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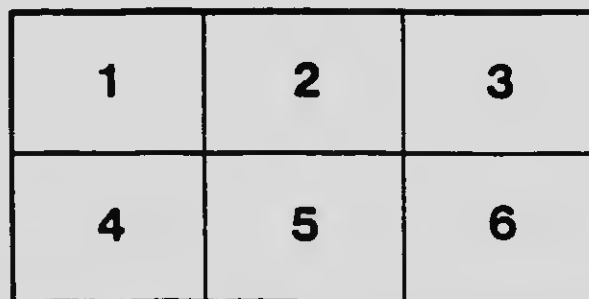
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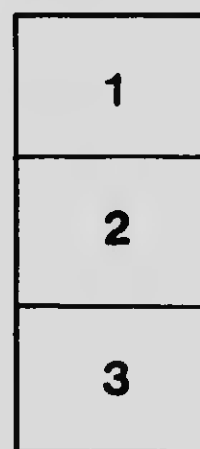
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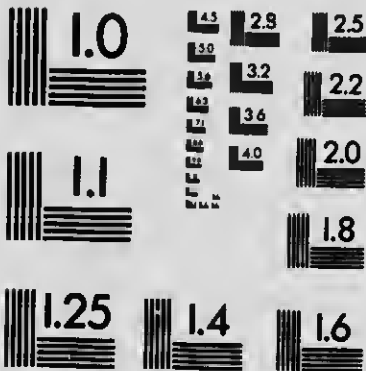
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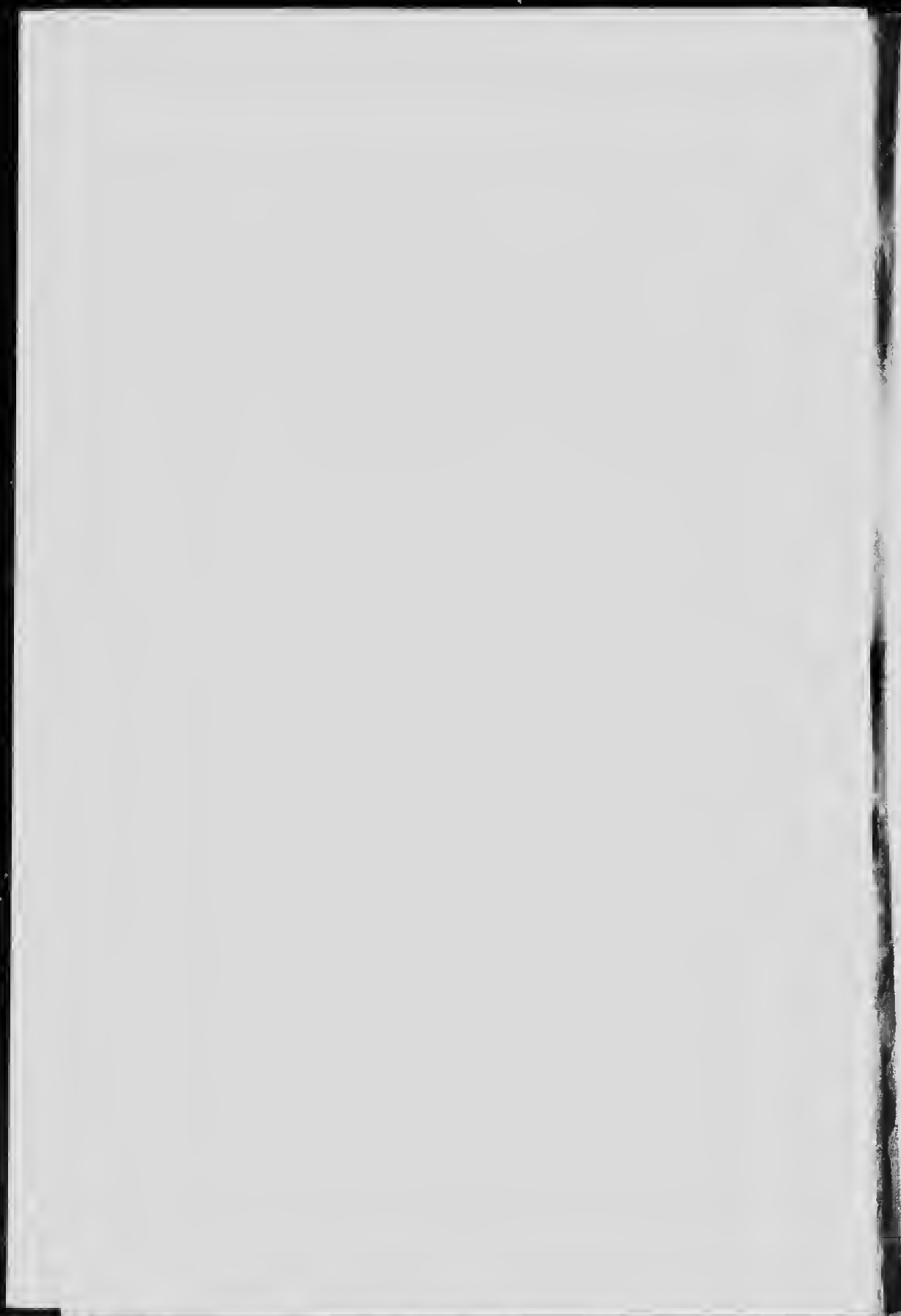


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THE JUDICATURE ACT OF ONTARIO

AND

THE CONSOLIDATED RULES OF PRACTICE AND PROCEDURE

OF THE

Supreme Court of Judicature FOR ONTARIO

*(As Revised and Consolidated by the Commissioners appointed under Statute 58 V. c. 13,
s. 42, and approved by the Lieutenant Governor in Council)*

AND THE RULES AMENDING THE SAME, WITH PRACTICAL NOTES

BY

GEORGE SMITH HOLMESTED,
*One of His Majesty's Counsel,
Senior Registrar of the High Court of Justice,*

AND

THOMAS LANGTON, M.A., LL.B.
One of His Majesty's Counsel.

THIRD EDITION.

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PREFACE.

In the present edition of the Judicature Act and Rules the Editors have attempted, though they feel with only partial success, to reduce the size of the volume. To attain this object, some matter printed in the last edition has been omitted. The principal omissions are the following:

(1) The Tables showing where the former Rules and Orders had been inserted in the Consolidated Rules. These are not of much practical importance to the present generation of practitioners.

(2) The Forms contained in the Appendix to the Consolidated Rules. All these have been inserted in appropriate places in the volume of forms and precedents recently published by the editors.

(3) The tariffs of costs and fees and disbursements. The publishers propose to include these in the copies hereafter issued of the Editors' Volume of Forms and Precedents, and, on application, to furnish them to those who already have the volume, as a supplement thereto.

(4) Many passages in the last edition of merely historical interest; such as notes explaining the legislative history of Rules.

It has been found necessary, however, to add a very considerable quantity of new matter.

If the book were to be strictly confined to matters of procedure its size might be further reduced, but this would, as the Editors believe, be at the cost of utility. In this, as in former editions, beside the cases dealing with practice, many others are collected dealing with the principles on which relief is granted,—which, in view of the scarcity of Canadian text books, will doubtless prove in the future, as it has in the past, a great convenience to the general practitioner.

Owing to the rapidity with which the work has been passed through the press, cases decided almost up to the date of publication will be found cited.

The Tables (pp. xiii to xx) showing the English Rules of 1883, and Rules in force in Nova Scotia, British Columbia and Manitoba, corresponding with the Ontario Rules, have, as in the last edition, been kindly prepared for the Editors by Mr. A. Bedford-Jones, Barrister-at-law.

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N.B.—Corresponding Rules are not necessarily identical, but deal with the same subject-matter.

The references in the case of the English, Nova Scotia and British Columbia Rules are to the marginal numbers.

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32	21	21	120	96	61	66	182	138	102-3	106	197 (2)
33	22	22	123	97	62	67	183	..	..	..	199
34	23	23	123	98	63	68	184 (1)	139	104	107	217
35	24	24	126	99	64	69	184 (2)	142	107	110	198
40	25	26	129	101	66	71	218	154	119	112	201
41	26	27	130	102	67	72	574	155	120	113	203 (1)a
42	27	28	143	103	68	73	575	156	121	114	203 (1)b
44	..	30	335	104	69	74	577-8	157	122	115	203 (1)c
45	29	31	132	105	70	75	577-8	158	123	116	203 (1)d
46	30	32	133	106	71	76	577, 579	159	124	117	203 (1)e
47	31	33	131	107	72	77	577	160	125	118	203 (1)f
48	32	34	145	108	73	78	582	161	126	119	203 (2)
49	33	35	146	109	74	79	583	162	127	120	203 (3)
50	34	36	cf 151	110	75	80	630	166	131	124	220
51	34	37	152-6	112	78	81	576, 578	168	133	126	194

COMPARATIVE TABLE—I.

English. 1883	Nova Scotia 1900	British Columbia 1890	Ontario 1897	English, 1883	Nova Scotia 1900	British Columbia 1890	Ontario 1897	English, 1883	Nova Scotia 1900	British Columbia 1890	Ontario 1897
169	134	127	204	262	225	218	426	378	320	306	469
170	135	128	209	263	226	219	427	380	322	307	487
171	136	129	210	267	228	221	405	381	323	309	376
172	137	130	211	269	230	223	840	382	324	310	646
173	138	131	212	276	234	223	256	383	325	311	674
174	139	132	213 1)	277	235	221	257	384	326	311	673
175	140	133	213 2)	277	236	225	258	387	329	315	680
176	141	134	214	277	237	226	cf. 250	388	330	316	667 (e)
177	142	135	215	277	238	227	262	388	331	316	663
178	143	136	215	277	238	227	262	388	331	316	648 (3)
179	143	136	215	277	238	227	262	388	331	316	372 1) 3
180	145	138	215	277	238	227	262	388	331	316	373
181	146	139	215	277	238	227	262	388	331	316	374, 365
182	147	140	215	277	238	227	262	388	331	316	375 (1)
183	148	141	215	277	238	227	262	388	331	316	375 (2)
184	149	142	215	277	238	227	262	388	331	316	372 (2)
185	150	143	215	277	238	227	262	388	331	316	372 (1)
186	151	144	215	277	238	227	262	388	331	316	cf. 15
187	152	145	215	277	238	227	262	388	331	316	35
188	153	146	215	277	238	227	262	388	331	316	cf. 45
189	154	147	215	277	238	227	262	388	331	316	529
190	155	148	215	277	238	227	262	388	331	316	550
191	156	149	215	277	238	227	262	388	331	316	531
192	157	150	215	277	238	227	262	388	331	316	532
193	158	151	215	277	238	227	262	388	331	316	530
194	159	152	215	277	238	227	262	388	331	316	433
195	160	153	215	277	238	227	262	388	331	316	538 (a)
196	161	154	215	277	238	227	262	388	331	316	538 (b)
197	162	155	215	277	238	227	262	388	331	316	538 (c)
198	163	156	215	277	238	227	262	388	331	316	538 (d)
199	164	157	215	277	238	227	262	388	331	316	538 (e)
200	165	158	215	277	238	227	262	388	331	316	538 (f)
201	166	159	215	277	238	227	262	388	331	316	538 (g)
202	167	160	215	277	238	227	262	388	331	316	538 (h)
203	168	161	215	277	238	227	262	388	331	316	538 (i)
204	169	162	215	277	238	227	262	388	331	316	538 (j)
205	170	163	215	277	238	227	262	388	331	316	538 (k)
206	171	164	215	277	238	227	262	388	331	316	538 (l)
207	172	165	215	277	238	227	262	388	331	316	538 (m)
208	173	166	215	277	238	227	262	388	331	316	538 (n)
209	174	167	215	277	238	227	262	388	331	316	538 (o)
210	175	168	215	277	238	227	262	388	331	316	538 (p)
211	176	169	215	277	238	227	262	388	331	316	538 (q)
212	177	170	215	277	238	227	262	388	331	316	538 (r)
213	178	171	215	277	238	227	262	388	331	316	538 (s)
214	179	172	215	277	238	227	262	388	331	316	538 (t)
215	180	173	215	277	238	227	262	388	331	316	538 (u)
216	181	174	215	277	238	227	262	388	331	316	538 (v)
217	182	175	215	277	238	227	262	388	331	316	538 (w)
218	183	176	215	277	238	227	262	388	331	316	538 (x)
219	184	177	215	277	238	227	262	388	331	316	538 (y)
220	185	178	215	277	238	227	262	388	331	316	538 (z)
221	186	179	215	277	238	227	262	388	331	316	538 (aa)
222	187	180	215	277	238	227	262	388	331	316	538 (ab)
223	188	181	215	277	238	227	262	388	331	316	538 (ac)
224	189	182	215	277	238	227	262	388	331	316	538 (ad)
225	190	183	215	277	238	227	262	388	331	316	538 (ae)
226	191	184	215	277	238	227	262	388	331	316	538 (af)
227	192	185	215	277	238	227	262	388	331	316	538 (ag)
228	193	186	215	277	238	227	262	388	331	316	538 (ah)
229	194	187	215	277	238	227	262	388	331	316	538 (ai)
230	195	188	215	277	238	227	262	388	331	316	538 (aj)
231	196	189	215	277	238	227	262	388	331	316	538 (ak)
232	197	190	215	277	238	227	262	388	331	316	538 (al)
233	198	191	215	277	238	227	262	388	331	316	538 (am)
234	199	192	215	277	238	227	262	388	331	316	538 (an)
235	200	193	215	277	238	227	262	388	331	316	538 (ao)
236	201	194	215	277	238	227	262	388	331	316	538 (ap)
237	202	195	215	277	238	227	262	388	331	316	538 (aq)
238	203	196	215	277	238	227	262	388	331	316	538 (ar)
239	204	197	215	277	238	227	262	388	331	316	538 (as)
240	205	198	215	277	238	227	262	388	331	316	538 (at)
241	206	199	215	277	238	227	262	388	331	316	538 (au)
242	207	200	215	277	238	227	262	388	331	316	538 (av)
243	208	201	215	277	238	227	262	388	331	316	538 (aw)
244	209	202	215	277	238	227	262	388	331	316	538 (ax)
245	210	203	215	277	238	227	262	388	331	316	538 (ay)
246	211	204	215	277	238	227	262	388	331	316	538 (az)
247	212	205	215	277	238	227	262	388	331	316	538 (ba)
248	213	206	215	277	238	227	262	388	331	316	538 (bb)
249	214	207	215	277	238	227	262	388	331	316	538 (bc)
250	215	208	215	277	238	227	262	388	331	316	538 (bd)
251	216	209	215	277	238	227	262	388	331	316	538 (be)
252	217	210	215	277	238	227	262	388	331	316	538 (bf)
253	218	211	215	277	238	227	262	388	331	316	538 (bg)
254	219	212	215	277	238	227	262	388	331	316	538 (bh)
255	220	213	215	277	238	227	262	388	331	316	538 (bi)
256	221	214	215	277	238	227	262	388	331	316	538 (bj)
257	222	215	215	277	238	227	262	388	331	316	538 (bk)
258	223	216	215	277	238	227	262	388	331	316	538 (bl)
259	224	217	215	277	238	227	262	388	331	316	538 (bm)
260	225	218	215	277	238	227	262	388	331	316	538 (bn)
261	226	219	215	277	238	227	262	388	331	316	538 (bo)

COMPARATIVE TABLE—I.

XV

English, 1883	Nova Scotia 1900	British Columbia 1890	Ontario 1897	English, 1883	Nova Scotia 1900	British Columbia 1890	Ontario 1897	English, 1883	Nova Scotia 1900	British Columbia 1890	Ontario 1897
499	406	380	460	612	535	488	905	680	640-3	531 6	716-743
500	407	381	cf. 485	617	536	491	1139	685	645	...	758
502	409	383	490-2	618	538	492	cf. 845	a)	647	537	755
511	418	392	480	...	...	...	cf. 856-7	696	618	538	355
512	419	393	480	...	...	...	...	697	619	539	357
520 a)	...	...	443	...	...	...	860	698	619	...	363
521	429	401	489, 490	620	541	495	854	699	650	...	368
522	430	402	cf. 320	621	542	496	855	700	651	541	348
523	431	403	518	622	543	497	911	701	652	542	360
527	435	408	516	623	544	498	913	704	655	545	361
528	436	409	516	624	545	499	914	706	656	546	1045 1
529	437	410	517 1)	625	546	500	916	707	657	517	1045 2)
530	438	411	cf. 525	626	547	501	920 1)	708	658	548	629 1)
531	439	412	296	627	548	502	920 2)	712	661	551	348
532	440	413	520	628	549	503	921	719	663	557	1081
533	441	414	521	630	551	505	1139	720	664	558	1082
535	443	416	523	...	559	...	1027	721	665	559	1083
536	444	417	522	...	560	...	1048	722	666	560	1080
537	445	418	522	...	561	...	1047	734	678	572	cf. 356
543	451	424	cf. 673	...	564	...	1031	745	...	...	42
551	459	432	cf. 783	...	565	...	1040	753	...	...	44
551 a)	...	...	cf. 782	...	566	...	1049	754	...	583	767 1) 2)
554	461	434	787	...	567	...	1067	755	...	581	767 5)
556	464	436	785	...	568	...	1068	756	689	...	777 1)
557	465	437	786	...	...	...	1071	...	760	...	...
559	467	438	609	...	570	...	1075	757	...	693 b)	771 1)
561	469	440	783 b)	...	571	...	1072	763	692 f)	590	42 cf. 367
562	470	441	783	...	574	...	1077	764	693	...	cf. 366
563	471	442	783 2)	...	576	...	1058	765	694	591	938
565	473	443	613	...	577	...	1058	766	695	592	cf. 944
566	474	444	614	...	595	...	1063	767	696	593	939
567	475	445	612	642	...	...	82	768	697	595	940
568	476	446	615	644	606	506	846	769	698	596	941
...	477	...	617	645	607	507	847	770	699	597	941
...	478	...	608	...	609	...	848	771	700	598	912
...	...	...	637	646	608	508	849	772	701	599	954
569	479	448	635	647	610	509	852	772 a)	701 a)	...	955
570	...	...	635 2)	648	611	510	852	774	702	601	943
571	480	449	629	648 a)	605 a)	104	222	781	704	603	94
574	484	452	631	648 b)	605 b)	29	144	789	709	611	cf. 155
575	485	453	632	648 c)	605 c)	39	223	794	710	613	cf. 657
...	489	...	643	648 d)	605 d)	...	224	802	717	619	662
580	491	457	638	648 e)	605 e)	59	...	806	721	623	670
581	492	458	837	648 f)	605 f)	60	226	809	724	626	701
582	493	459	839	648 g)	605 g)	...	227	811	725	628	704
583	494	460	846	648 h)	605 h)	465	228	812	726	629	705
584	495	461	cf. 852	648 i)	605 i)	...	229	813	727	630	706
585	496	462	853	648 k)	605 k)	...	230	814	728	631	707-8
586	497	463	836	648 l)	605 l)	40	231	815	729	632	709
587	498	464	841	656	...	511	435	817	731	634	710
590	501	467	866	657	612	512	1095	818	732	635	711
591	502	468	868	658	613	513	1097	819	733	636	713
592	503	469	867	659	614	514	1096	822	...	639	714
593	504	470	871	660	615	515	570	823	736	640	715
594	505	471	869	661	616	516	571	824	737	641	703
595	506	472	843	662	617	517	361	826	739	643	703
598	509	475	872	663	618	518	1098	830	...	647	cf. 689
599	510	476	875	664	619	519	1099	832	739 b)	619	769
600	511	477	863	666	621	521	717	836	...	...	634 2)
601	512	478	864	667	622	522	1094	850	742	655	1103
602	513	479	835 a)	669	624	523	436	851	743	656	1104
604	514	480	865	670	625	...	437	852	744	657	1105
605	519	481	642 1)	671	626	...	438	853	745	658	1106
608	517	484	862	...	627	524	759-766	854	746	659	1107
...	528	...	883	672-9	633	539	1013	855	747	660	1106
610	533	486	900, 902	...	...	...	1020	856	748	661	1109
611	534	487	910	...	...	...	...	857	749	662	1110

COMPARATIVE TABLE—I.

English, 1883	Nova Scotia 1900	British Columbia 1890	Ontario 1897	English, 1883	Nova Scotia 1900	British Columbia 1890	Ontario 1897	English, 1883	Nova Scotia 1900	British Columbia 1890	Ontario 1897
858	750	663	1111	963	818	739	345	(37)	..	..	1181
859	751	664	1108	964	..	740	351	(39)	..	..	1182
861	753	666	1112	965	..	741	352	(40)	..	..	1183
862	754	667	1114	966	819	742	346	(41)	(23)	790	774
863	755	668	1117	967	820	743	353	(42)	..	..	776
864 1)	756	669	1122	968	821	744	348	..	..	800	1178
864 3)	..	..	1116	..	..	745	347	..	..	802	1131
865	757	671	cf. 798	971	822	746	350	..	..	805	1135
866	758	672	799	972	823	747	349	..	..	806	1136
868	761	674	498, 817	976	827	751	314 (1)	..	848 (1)	808	1140
869	762	..	786	977	828	752	1130 (3)	1003	819	810	316
870	763	676	813	981	832	756	1201	1005	cf. 797	812	317
872	..	672	cf. 812	981 a)	..	..	1198 b)	1009	..	..	cf. 322-1
876	..	..	cf. 803	982	833	757	1205	1012	851	815	333
880	769	685	827	983	834	758	1178	1013	852	817	329
884	779	690	(J. A. s. 67 790 (1))	988	836	760	cf. 1138	1015	854	819	330
889	..	..	793-7	989	837	761	1165	1017	855	821	334
894	..	..	806	990	838	762	1166	1018	856	822	336
895	..	..	20-22	991	839	763	1159	1026	859	..	4
..	780	..	17	992	840	764	1160	1030	553-4	..	1021
..	..	..	12	993	..	765	1137	1031	555	..	1024
..	..	..	624-7	1002	848 (6)	771	1162	1032	556	..	1036
..	..	..	cf. 627	..	..	772	..	1033	557	..	1042
938	..	..	cf. 95	..	..	773	..	1034	558	..	1026
945	..	95, 96	cf. 95	..	..	774	..	1035	..	..	1043
..	..	732	116	..	..	775	..	1036	559	..	1028
..	..	733	98	..	..	776	..	1037	1863	950	310
948	..	..	354	..	..	777	..	..	1468	957	1022
950	..	692	9	..	..	778	..	..	..	951	311
953	..	693	10	..	..	779	..	1038	1864	..	3
955	..	..	114	..	..	780	..	1044	1490	..	557
961	816	737	342	..	..	781	..	..	870	997	1100
962	817	738	343	..	..	782	..	..	..	1001	481

COMPARATIVE TABLE-II.

SHEWING

MANITOBA RULES UNDER THE KING'S BENCH ACT, 1902, AND
THE CORRESPONDING ONTARIO CONSOLIDATED RULES
AND ENGLISH RULES OF 1883.

N.B.—Corresponding Rules are not necessarily identical, but deal with the same subject matter.

The references in the case of the English Rules are to the marginal numbers.

Manitoba	Ontario	English 1883	Manitoba	Ontario	English 1883	Manitoba	Ontario	English 1883	Manitoba	Ontario	English 1883
1	4	1026	49	665	..	85	718	..	121	747	..
2	6	43	50	666	..	86	719	..	122	748	..
3	654	..	51	667	..	87	720	..	123	749	..
4	3	1044	52	668	..	88	721	..	124	750	..
5	5	..	53	669	..	89	722	..	125	751	..
6	7	..	54	670	..	90	723	..	126	752	..
7	8	..	55	671	..	91	724	..	127	753	..
8	9, 10	950	56	672	..	92	725	..	128	754	..
9	11	..	57	673	383	93	726	..	129	755	..
10	12	..	58	674	382	94	727	..	130	756	..
11	123	..	59	675	..	95	728	..	131	757	..
12	18	..	60	676	..	96	729	680	132	758	..
13	22, 26	894	61	677	..	97	730	685a	133	50	267
14	35	cf. 406	62	678	..	98	731	..	134	405	..
15	35	..	63	679	..	99	732	..	135	407	..
16	28	..	64	680	384	100	733	..	136	416	..
17	2a	b) 1.	65	681	..	101	734	..	137	412	..
18	37	..	66	682	..	102	735	..	138	416	..
19	38	11	67	683	..	103	736	..	139	51	..
20	39	11	68	684	..	104	737	..	140	82	..
21	27	..	69	685	..	105	738	..	141	83	..
22	41	..	70	686	..	106	739	..	142	55	..
23	42	745	71	687	..	107	740	..	143	60	..
24	43	753	72	688	..	108	741	..	144	71	..
25	634	31	73	689	..	109	742	..	145	72	..
26	45	11	74	690	..	110	743	..	146	73	..
27	45	21	75	691	..	111	744	..	147	74	..
28	45	11	76	692	..	112	745	..	148	75	..
29	656	..	77	693	..	113	746	..	149	82	11
30	657	794	78	694	11	114	747	..	150	82	21
31	659	..	79	695	11	115	748	..	151	83	..
32	660	..	80	696	21	116	749	..	152	84	..
33	661	..	81	697	..	117	750	..	153	85	..
34	662	802	82	698	..	118	751	..	154	86	1002
35	663	..	83	699	..	119	752	..	155	87	25
36	664	..	84	700	680	120	753	..	156	90	..
37	..	..	..	..	681	..	..	..	157	..	..
38	..	..	..	..	682	..	..	..	158	..	..
39	..	..	..	..	683	..	..	..	159	..	..
40	..	..	..	..	684	..	..	..	160	..	..
41	..	..	..	..	685	..	..	..	161	..	..
42	..	..	..	..	686	..	..	..	162	..	..
43	..	..	..	..	687	..	..	..	..	..	..
44	..	..	..	..	688	..	..	..	..	..	..
45	..	..	..	..	689	..	..	..	..	..	..
46	..	..	..	..	690	..	..	..	..	..	..

Manitoba	Ontario	English 1883	Manitoba	Ontario	English 1883	Manitoba	Ontario	English 1883	Manitoba	Ontario	English 1883
164	94		230	203 2	161	311	276	218	379	337	968
165	98 99		240	203 3	162	312	277	219	380	318	1700
166	113		241	205		313	278	220			1712
168	114		242	206	133	314	279	221	381	349	971
170	117		243	206 8	134	315	280	222	382	350	
171	118		244	207, 208	135	316	281	223	383	351	965
172	120	1 & 3	245	209	170	317	282	216	384	352	967
174	121	23	246	209	170	318	283	252	385	353	948
176	123	33, 34	247	209	170	319	284	281	386	354	
177	126	38	248	210	171	320	285	284	387	439 1	
178	133	42	249	213	174	321	286	208	388	440	
179	134	648 6	250	216		322	287	252	389	441	
180	145	48	251	216	179	323	288	350	390	442	
181	145	48	252	217	179	324	289	351	391	443	
182	146	49	253	218		325	290	352	392	444	
183	150	62	254	219		326	291	353	393	445	
185	135	20	255	220	100	327	292	354	394	446	
186	147		256	221		328	293	355	395	447	
187	cf. 189	55	257	222	188	329	294	356	396	448	
188	151	50	258	223	190	330	295	357	397	449	
189	152	51	259	224	191	331	296	358	398	450	
190	153		260	225	192	332	297	359	399	451	
191	154		261	226	193	333	298	360	400	452	
192	155	189	262	227	194	334	299	361	401	453	
193	156		263	228	195	335	300	362	402	454	
194	157	52	264	229	196	336	301	363	403	455	
195	158		265	230		337	302	364	404	456	
196	223	648 c	266	231		338	303	365	405	457	
197	231 a		267	232		339	304	366	406	458	
198	189	55	268	233		340	305	367	407	459	
199	160		269	234		341	306	368	408	460	
200	161		270	235		342	307	369	409	461	
201	162	64	271	236		343	308	370	410	462	
202	162 60		272	237		344	309	371	411	463	
203	167		273	238		345	310	372	412	464	
204	168 10		274	239		346	311	373	413	465	
205	168 20		275	240		347	312	374	414	466	
206	18	401	276	241		348	313	375	415	467	
207	317		277	242		349	314	376	416	468	
208	178	92	278	243		350	315	377	417	469	
209	174	88	279	244		351	316	378	418	470	
210	180	95	280	245		352	317	379	419	471	
211	181		281	246		353	318	380	420	472	
212	182	96	282	247		354	319	381	421	473	
213	183	97	283	248		355	320	382	422	474	
214	184 1	98	284	249		356	321	383	423	475	
217	176		285	250	120	357	322	384	424	476	
218	185	123	286	251	121	358	323	385	425	477	
219	186	124	287	252	122	359	324	386	426	478	
220	187	125	288	253	123	360	325	387	427	479	
221	188	126	289	254	124	361	326	388	428	480	
222	189	127	290	255	125	362	327	389	429	481	
223	190	128	291	256	126	363	328	390	430	482	
224	191		292	257	127	364	329	391	431	483	
225	192	129	293	258	128	365	330	392	432	484	
226	193	130	294	259	129	366	331	393	433	485	
227	194	131	295	260	130	367	332	394	434	486	
228	195	132	296	261	131	368	333	395	435	487	
229	196	133	297	262	132	369	334	396	436	488	
230	197	134	298	263	133	370	335	397	437	489	
231	198	135	299	264	134	371	336	398	438	490	
232	199	136	300	265	135	372	337	399	439	491	
233	200	137	301	266	136	373	338	400	440	492	
234	201	138	302	267	137	374	339	401	441	493	
235	202	139	303	268	138	375	340	402	442	494	
236	203	140	304	269	139	376	341	403	443	495	
237	204	141	305	270	140	377	342	404	444	496	
238	205	142	306	271	141	378	343	405	445	497	

M. and O.	Ontario	English 1883	M. and O.	Ontario	English 1883	M. and O.	Ontario	English 1883	M. and O.	Ontario	English 1883
449	368		524	400	184	593	500	2	672	792	
451	946	381	525	401		593	500	101	682	797	754
452	372	389	526	402		594	507		683	799	832
453	373	390	527	403	185	595	507		684	774	1002
454	374	391	528	404		596	507		685	775	411
455	375	392	529	410	255	597	509		686	776	1002
456	372	393	530	420		601	570		687	776	142
457	478		531	421	256	602	604	1115	688	836	586
458	479		532	422	261	603	604	1116	689	836	617
459	480	511	533	423	261	604	605	1119	690	845	644
460	481		534	424	262	605	606	120	691	844	595
461	482		535	425	263	606	609	359	692	844	
462	483	483	536	426	267	607	610		693	844	582
463	484		537	427	287	608	611		694	844	583
464	485	484	538	428	290	609	611		695	844	583
465	486	485	539	429	292	610	612	567	696	844	583
466	487	486	540	430	290	611	613	563	697	844	583
467	488	487	541	431	290	612	613	563	698	844	583
468	489	488	542	432	290	613	614	563	699	844	583
469	490	489	543	433	290	614	615	563	700	844	583
470	491	490	544	434	290	615	616	563	701	844	583
471	492	491	545	435	290	616	617	563	702	844	583
472	493	492	546	436	290	617	618	563	703	844	583
473	494	493	547	437	290	618	619	563	704	844	583
474	495	494	548	438	290	619	620	563	705	844	583
475	496	495	549	439	290	620	621	563	706	844	583
476	497	496	550	440	290	621	622	563	707	844	583
477	498	497	551	441	290	622	623	563	708	844	583
478	499	498	552	442	290	623	624	563	709	844	583
479	500	499	553	443	290	624	625	563	710	844	583
480	501	500	554	444	290	625	626	563	711	844	583
481	502	501	555	445	290	626	627	563	712	844	583
482	503	502	556	446	290	627	628	563	713	844	583
483	504	503	557	447	290	628	629	563	714	844	583
484	505	504	558	448	290	629	630	563	715	844	583
485	506	505	559	449	290	630	631	563	716	844	583
486	507	506	560	450	290	631	632	563	717	844	583
487	508	507	561	451	290	632	633	563	718	844	583
488	509	508	562	452	290	633	634	563	719	844	583
489	510	509	563	453	290	634	635	563	720	844	583
490	511	510	564	454	290	635	636	563	721	844	583
491	512	511	565	455	290	636	637	563	722	844	583
492	513	512	566	456	290	637	638	563	723	844	583
493	514	513	567	457	290	638	639	563	724	844	583
494	515	514	568	458	290	639	640	563	725	844	583
495	516	515	569	459	290	640	641	563	726	844	583
496	517	516	570	460	290	641	642	563	727	844	583
497	518	517	571	461	290	642	643	563	728	844	583
498	519	518	572	462	290	643	644	563	729	844	583
499	520	519	573	463	290	644	645	563	730	844	583
500	521	520	574	464	290	645	646	563	731	844	583
501	522	521	575	465	290	646	647	563	732	844	583
502	523	522	576	466	290	647	648	563	733	844	583
503	524	523	577	467	290	648	649	563	734	844	583
504	525	524	578	468	290	649	650	563	735	844	583
505	526	525	579	469	290	650	651	563	736	844	583
506	527	526	580	470	290	651	652	563	737	844	583
507	528	527	581	471	290	652	653	563	738	844	583
508	529	528	582	472	290	653	654	563	739	844	583
509	530	529	583	473	290	654	655	563	740	844	583
510	531	530	584	474	290	655	656	563	741	844	583
511	532	531	585	475	290	656	657	563	742	844	583
512	533	532	586	476	290	657	658	563	743	844	583
513	534	533	587	477	290	658	659	563	744	844	583
514	535	534	588	478	290	659	660	563	745	844	583
515	536	535	589	479	290	660	661	563	746	844	583
516	537	536	590	480	290	661	662	563	747	844	583
517	538	537	591	481	290	662	663	563	748	844	583
518	539	538	592	482	290	663	664	563	749	844	583
519	540	539	593	483	290	664	665	563	750	844	583
520	541	540	594	484	290	665	666	563	751	844	583
521	542	541	595	485	290	666	667	563	752	844	583
522	543	542	596	486	290	667	668	563	753	844	583
523	544	543	597	487	290	668	669	563	754	844	583

COMPARATIVE TABLE--II.

Mantides	Datario	English 1883	Mantides	Datario	English 1883	Mantides	Datario	English 1883	Mantides	Datario	English 1883
752	905		808	915		899	1103	850	952	1160	992
753	906		809	916		900	1104	851	953	1161	(1002
754	906		807	917		901	1105	852			(27
755	907		808	918		902	1106	853	954	1163	(1002
756	835		809	919		903	1107	854			(1-28
757	138		810	920		904	1108	855	955	1164	(1002
759	911	622	814	1058		905	1109	856	956	1165	(21
762	913	(24	815	1059		906	1110	857	957	1167	989
763	914	624	816	1060		907	1111	858	958	1170	
764	915		817	1061		911	1108	859	959	1171	
765	916	625	819	1062		912	1112	861	960	1168	
766	920 (1)	626	820	1063		913	1113	862	961	1169	
767	920 (2)	627	811	1064		914	1114	863	962	1172	
770	921	628	842	1065		915	1117	865	963	1173	
772	947		841	1066		916	1118		964	1177	
776	911	766	861	1067		917	1119		965	1185	
777	945		862	1068		919	1120		966	1186	
778	946		863	1069		920	1121		967	1184	
779	949		864	1070		921	1122				(1002
780	950		865	1071		930	cf. 1104	cf. 851	968	1182	(34
781	953 (2)		866	1072		931	1130	976			(1002
782	953 (3)		867	1073		932	1131		969	1183	(40
783	703	824	868	1074		933	1132				
784	701	809	869	1075		934	1135		970	1190	
785	704	811	870	1076		935	1138	988	971	1192	
786	705	812	871	1077		936	1139		972	1193	
787	706	813	872	1078				cf. 1002	973	1195	
788	707	814	873	1079		937	cf. 1154	200	974	1194	
789	708	814	874	1081	719		1136		975	1196	
790	709	815	875	1083	721	939	1140		976	1197	
791	710	817	876	1084	722	940	1142		978	1199	
792	711	818	877	1085		941	1143		979	1198	293
793	712		878	1086		942	1144		980	1200	
794	713	819	879	1087		943	1145		981	1201	981
795	714	822	880	1088		944	1146		982	1202	
796	715	823	881	862	908	945	1147		983	1203	
797	956		882	863	909		1148		984	1205	982
798	957		883	864	910		1149		985	1207 (1)	
799	960		884	865	911		1150		986	1207 (2)	
800	961		885	866	912		1151	242	987	1208	
801	962		886	867	913		1152	(1002	988	1209 (1)	
802	963		887	868	914		1153	(19	989	1209 (4)	
803	964 (1) 2		888	869	915		1154	861 (1)	990	1178	
804	964 (1)		889	870	916		1155	991			

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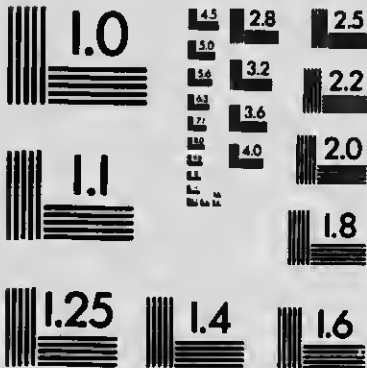
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ADDENDA ET CORRIGENDA. *Noted*

- ✓ Page 41—Line 8—After "by-law," instead of the remainder of the paragraph, substitute the following:—And it has been held under the Act, as amended by 4 Ed. vii. c. 11, that no appeal lies, by leave or otherwise, at the instance of a defendant, from an order of a Divisional Court respecting a conviction by a Police Magistrate under an Ontario statute: *Rex v. Pierce*, 5 O. W. R. 464.
- ✓ " 56—Line 4—*Pirany v. Dawson* is now reported 9 O. L. R. 248.
- ✓ " 57—Add at the end of the page:—Where a party has made numerous unsuccessful interlocutory applications, the costs of which he has not paid, he may be restrained from making any further such application without the leave of the Court: *Kinnaird v. Field*, 119 L. T. Jour. 85; and see *Grepe v. Loam*, 37 Ch. D. 168; 58 L. T. 1001.
- ✓ " 69—Line 11, from the foot of the page, add to the reference to *Brandts v. Dunlop*, "in appeal, 119 L. T. Jour. 338."
- ✓ " 98—In the 11th line from the foot of the page, after "1 Ch. 158," add:—*Re London P. H. Co., Campbell v. London P. H. Co.*, 1905, 1 Ch. 576.
- ✓ " 129—Add at the end of the third paragraph:—A judgment on an issue raised on a suggestion of further branches, after judgment in an action on a bond for a penalty: *Smart v. Dana*, 9 O. L. R. 427.
- ✓ " 137—At the foot of the page add:—The fact that the decision might be thought contravertible does not of itself make the case "exceptional" where the amount at stake is very small: *Clipsaw v. Orillia*, 9 O. L. R. 713.
- ✓ " 159—Line 7 from the end—instead of the reference to *Solmes v. Stratford*, read:—" *Solmes v. Stafford*, 16 P. R. 78, 264."
- ✓ " 292—Line 30—Add:—and *Burnett v. Gen. Accident Assoc. Corporation*, 6 O. W. R. 144.
- ✓ " 303—Line 17—After "130 L. T. 622," add "*Baxter v. Faulkner*, 6 O. W. R. 108."
- ✓ " 331—Between the third and fourth paragraphs, add:—A contract for re-insurance is not a contract for indemnity within the Rule: *Nelson v. Empress Assurance Co.*, 1905, 2 K. B. 281.
- ✓ " 329, 337, 779, 807. As to the decision in *Morrell v. Westmarchland*, see *Froeh v. Horie*, 1905, 2 K. B. 580.
- ✓ " 475—Line 2—Add:—See a statement that "there was contributory negligence on the part of the plaintiff," is a statement of law based on a state of facts not set out, and as such open to objection: *Kelly v. Martin*, 6 O. W. R. 141.

- ✓ Page 481—Add after the fifth paragraph—A mistake in the year of the statute relied on would not appear to be fatal, provided that it reasonably appears what statute is intended: see *Ruston v. King*, 93 L. T. 10.
- ✓ " 504—Line 28—After "28 Ch. D. 123," add "*Kelly v. Martin*, 6 O. W. R. 141."
- ✓ " 722—Line 15 *Toronto Industrial, &c., v. Houston*, is now reported 9 O. L. R. 527.
- ✓ " 734, 738—*Saskatchewan, &c., v. Leadby*, is now reported, 9 O. L. R. 556.
- ✓ " 831—At the end of the notes to *Rule 129*, add:—Where a plaintiff fails in a Court of first instance in an action for unliquidated damages, but on appeal obtains judgment for damages to be ascertained, the judgment does not, as a matter of course, take effect from the date of the trial, so as to entitle the plaintiff to interest from that date. Unless other order is made by the Court of Appeal, the date of its decision is the date from which the judgment takes effect: *Borthwick v. Elderslie, &c.* 1905, 2 K. B. 516.
- ✓ " 1061, 1378, 1395, and 1405—The decision in *Earle v. Burford*, 8 O. L. R. 174, has been affirmed: see 9 O. L. R. 603.
- ✓ " 1077—Line 30—For "*Amr Light v. Dueschel*, 18 C. L. J. 290," read, "*Amr Light v. Dueschel*, 18 C. L. T. 290."
- ✓ " 1083—After line 3, insert:—No appeal lies in an action to restrain infringement of a trade mark, where no particular sum is in controversy or involved: *Gillett v. Lumyden*, 119 L. T. Jour. 314.
- ✓ " 1106—At the end of line 31, add:—*Rex v. Russell*, 119 L. T. Jour. 308; *Rex v. Backhouse*, *Ib.* 390.
- ✓ " 1213—The fifth and sixth paragraphs should be reversed.
- ✓ " 1324—Add at the end of the third paragraph after the word "cases"—and there is no limitation as to the amount involved: see *Harbottle v. Roberts*, 92 L. T. 723.
- ✓ " 1347—After *Robinson v. Boyle*, 18 Ont. 387, in line 24, add:—*Green v. Stevenson*, 9 O. L. R. 671.
- ✓ " 1408—Line 21—The appeal from the decision in *Re Cohen & Cohen*, has now been reported 1906, 1 Ch. 137; 92 L. T. 782.

THE JUDICATURE ACT

REVISED STATUTES OF ONTARIO 1897

CHAPTER 51.

An Act respecting the Supreme Court of Judicature of Ontario.

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

TITLE.

Short title. **1.** This Act may be cited as "*The Judicature Act.*" 3s
V. c. 12. s. 1.

INTERPRETATION.

Interpre-
tation of
terms.

2. Where the words following occur in this Act and in the Rules made thereunder, they shall be construed in the manner hereinafter mentioned unless a contrary intention appears.

1. "Rules of Court" shall include forms.

2. "Cause" shall include any action, suit, or other original proceeding between a plaintiff and a defendant.

3. "Action" shall include suit, and shall mean a civil proceeding commenced by writ, or in such other manner as may be prescribed by Rules of Court.

An interpleader matter comes within the above definition of "action": see *Rule 6 (e)*.

"Action" may include a petition: see *Re Atkin's Estate*, 1 Ch. D. 82; *Finnay v. Hinde*, 4 Q. B. D. 102; *Re Dynevor & Duffryn Collieries*, W. N. 1878, 199; and in England includes proceedings by originating summons; *Re Fawcitt*, 30 Ch. D. 231; and, in Ontario, proceedings commenced by notice of motion under *Rules 938, 944, 950, 956*; or by petition under *Rule 962*.

4. "Matter" shall include every proceeding in the Court not in a cause.

5. "Plaintiff" shall include every person asking any relief (otherwise than by way of counterclaim as a defendant), against any other person by any form of proceeding, whether the same be taken by action, suit, petition, motion, summons, or otherwise.

6. "Petitioner" shall include every person making any application to the Court, either by petition, motion or summons, otherwise than as against any defendant.

7. "Defendant" shall include every person served with any writ of summons or process, or served with notice of or entitled to attend any proceeding.

"Defendant" does not include a third party served with notice under *Rule 209*: *Eden v. Weardale*, 28 Ch. D. 333, 339; but by an order made under *Rule 213* he may be placed in the same position as a defendant: *Eden v. Weardale*, 35 Ch. D. 287.

8. "Party" shall include every person served with notice **Sec 3.** of or attending any proceeding, although not named on the record.

9. "Pleading" shall include any petition or summons, and shall also include the statement in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any counter-claim of a defendant.

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

10. "Judgment" shall include decree and a decretal order.

11. "Order" shall include rule.

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

12. "Oath" shall include solemn affirmation and statutory declaration.

13. "Proper officer" shall, unless and until any Rule to the contrary is made, mean an officer to be ascertained as follows:—

(a) Where any duty to be discharged under this Act or under Rules of Court is a duty which has been discharged by any officer, such officer shall continue to be the proper officer to discharge the same, until otherwise provided by Rule. 58 V. c. 12, s. 2 (1—13a).

(b) Where any new duty is, under the Rules afore-said, to be discharged, the proper officer to discharge the same shall be such officer as may be named in the Rules, or in case no officer is so named, then such officer as may from time to time be directed to discharge the same by the President of the High Court. 59 V. c. 18, Sched. (1); 60 V. c. 3, s. 3.

It may be observed that all the foregoing definitions are, with perhaps the exception of numbers 3 and 13, merely inclusive, and not exhaustive.

CONSTITUTION OF THE SUPREME COURT OF JUDICATURE FOR ONTARIO.

3.—(1) The Supreme Court of Judicature for Ontario at present existing is hereby continued, and all commissions, rules, orders and regulations granted or made, in, by, or ^{Supreme Court of Judicature continued.}

THE JUDICATURE ACT.

4

Sec. 3.

respecting the former Court of Queen's Bench for Ontario, the Court of Chancery for Ontario, and the Court of Common Pleas for Ontario, or the Supreme Court of Judicature, the Court of Appeal, and the High Court of Justice, or the Judges or officers thereof now existing and in force shall remain in force until altered or rescinded or otherwise determined.

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

The Supreme Court does not sit as a Court unless it be to make General Rules and Orders: sec. 122, sub-s. 1, and it has been said that it might be more properly called the Supreme Council of Judicature. *Reg. v. Bunting*, 7 Ont. 118. The Judges of the Supreme Court are also to hold a Council once a year to consider the Procedure and Administration of the Law, and to report thereon: sec. 127. The Master in Ordinary, the Master in Chambers, and the Accountant of the Supreme Court, and Local Masters, and the Taxing Officers, are declared to be Officers of the Supreme Court and attached thereto: sec. 131 (2); by order in Council of 22nd May, 1880, the Masters are also made officers of the High Court. All the Judges, and their successors, are Judges of the Supreme Court, thus marking the uniformity which is aimed at in the administration of justice, and the abolition of all distinction between Courts administering Law, and Courts administering Equity. The Appeal Judges are made competent to do any work which ordinarily is discharged by the Judges of the High Court, and the Judges of the High Court are to act, when needed, in the Court of Appeal: secs. 4, 10.

All of the Judges of the Supreme Court of Judicature are required to reside in Toronto, or within five miles thereof: 60-61 Vict. c. 34 (D).

(2) The Supreme Court shall continue to consist of two permanent Divisions, to be called The High Court of Justice for Ontario, and The Court of Appeal for Ontario.

(3) The High Court of Justice for Ontario shall hereafter consist of four Divisions, to be called The King's Bench Division, The Chancery Division, The Common Pleas Division and The Exchequer Division of the High Court.

(4) The King's Bench Division shall during the reign of a Queen, be called The Queen's Bench Division, and during the reign of a King, The King's Bench Division.

The Divisions of the High Court are not themselves Courts, but together constitute the High Court which is thus divided for convenience in transacting business: *Reg. v. Bunting*, 7 Ont. 118. See also *Reg. v. Dudley*, 33 W. R. 348; *Serrao v. Nord*, 15 Q. B. D. 557-8.

(5) The persons hereafter appointed to fill the places of the Chief Justice of the [King's] Bench, the Chancellor of Ontario, the Chief Justice of the Common Pleas, and the

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Chief Justice of the Exchequer Division and their successors **Sec. 3.**
respectively, are to be appointed by the authority mentioned
in *The British North America Act*, and with the same re- **Imp. Act, 30**
spective titles as heretofore. **V. c. 3.**

By the B. N. A. Act, section 96, it is provided that "the Governor-General shall appoint the Judges of the Superior, District and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick."

(6) The persons to be appointed Judges of the High Court shall be Barristers-at-Law of at least ten years' standing at the bar of Ontario.

(7) Save as in this Act is otherwise expressly provided, all the Judges hereinbefore mentioned, and their successors, shall have in all respects equal power, authority and jurisdiction.

See in England by Jud. Act, 1873, sec. 5.

(8) The Chief Justice of the [King's] Bench shall be the President of the [King's] Bench Division, the Chancellor shall be the President of the Chancery Division, the Chief Justice of the Common Pleas shall be the President of the Common Pleas Division, and the Chief Justice of the Exchequer Division shall be the President of the Exchequer Division.

See Eng. Jud. Act, 1873, sec. 31.

(9) Besides the Chief Justice of the [King's] Bench, two Justices of the High Court shall be attached to the [King's] Bench Division; besides the Chancellor of Ontario, two Justices of the High Court shall be attached to the Chancery Division; besides the Chief Justice of the Common Pleas, two Justices of the High Court shall be attached to the Common Pleas Division; and besides the Chief Justice of the Exchequer Division, two Justices of the High Court shall be attached to the Exchequer Division.

(10) The President of the said High Court shall be that one of the Presidents of the King's Bench, Chancery, Common Pleas or Exchequer Divisions who, for the time being, is first in order of seniority; and in case of the absence or illness of the President of the High Court, any duty which he is required to perform under any statute or any Rule of Court may be performed by the President of any Division.

(11) Upon a vacancy happening among the Judges, the Judge appointed to fill the vacancy is (subject to the provisions of this Act, and to any Rules of Court which may be

Secs. 5-8. made pursuant thereto) to become and be a member of the same Division to which the Judge whose place has become vacant belonged.

(12) Nothing in this Act shall prevent, or shall be construed as intended to prevent the transfer of any Judge of any of the said Divisions from one to another of the said Divisions. 58 V. c. 12, s. 3; 2 Ed. vii. c. 12, s. 7; 3 Ed. vii. c. 8, s. 1.

(Section 4 was repealed by 3 Ed. vii. c. 8, s. 2.)

Judgment
of Judge
who resigns
after case
heard.

5. Where a Judge resigns his office, and any case which has been fully heard by such Judge, either alone or jointly with other Judges, stands for judgment, he may give judgment therein as if he were still a Judge of the Court; and any such judgment shall be of the same force and validity as if he were still such Judge, provided that such judgment of the Judge be delivered within six weeks after his resignation. 58 V. c. 12, s. 5.

Death of
Judge.

Where a Judge dies after the trial of an action, but before giving judgment, there is no power to direct that the action be set down for hearing before a Divisional Court on the evidence already taken, except by consent of parties, but the case must go to trial again: *Clarke v. Trask*, 1 O. L. R. 207. See s. 19 as to death of Judges of Appeal.

Existing
Court of
Appeal
continued.

6. The Court of Appeal for Ontario at present existing is continued under that name, and shall consist of a Chief Justice, to be called the Chief Justice of Ontario, and four other Judges to be called Justices of Appeal, and the Judges of the High Court shall be *ex officio* Judges of the Court of Appeal, so as to provide for the cases mentioned in sections 12, 13 and 14 of this Act. 58 V. c. 12, s. 6; 60 V. c. 13, s. 1.

Who may
be appoint-
ed to the
Court of
Appeal.

7. The Chief Justice of Ontario and the Justices of Appeal may be selected from the Judges for the time being, or the retired Judges of the High Court, or from such barristers as are eligible to be appointed Judges of that Court. 58 V. c. 12, s. 7.

See *supra*, s. 3 (6).

Precedence
of Judges.

8.—(1) The Chief Justice of Ontario shall have rank and precedence over all other Judges of the Courts in Ontario.

(2) The Justices of Appeal, the Chief Justice of the [King's] Bench, the Chancellor of Ontario, the Chief Justice of the Common Pleas, and the Chief Justice of the Exchequer Division, shall have rank and precedence among themselves according to their seniority of appointment to any of the said offices.

(3) The other Judges of the High Court shall have rank and precedence among themselves according to seniority of appointment to their respective offices. 58 V. c. 12, s. 8; 3 Ed. vii. c. 8, s. 3. secs. 9-11.

9. The Chief Justice of Ontario and the Justices of Appeal may, in addition to their duties as Judges of the Court of Appeal, preside over Courts of Assize and Nisi Prius, Oyer and Terminer and General Gaol Delivery, and hold sittings of the High Court of Justice, for the trial of civil causes, matters and issues, and criminal matters or proceedings; and every such Justice in the exercise of such duties shall have the same rights, powers and privileges as a Judge of the High Court presiding at such Court or Sittings. 58 V. c. 12, s. 9. The Justices of the Court of Appeal may hold Assizes, etc.

10. Upon the request of the Judge or Judges with or for whom he is requested to sit or act, it shall be lawful for any Judge of the Court of Appeal, or any retired Judge of the said Court, or of the High Court, who may consent so to do, to sit and act as a Judge of the said High Court, or to perform any other official or ministerial acts for or on behalf of any Judge absent from illness or any other cause, or in the place of any Judge whose office has become vacant, or as an additional Judge of any Division; and while so sitting and acting, any such Judge of the Court of Appeal or retired Judge shall have all the power and authority of a Judge of the said High Court. 58 V. c. 12, s. 10. Provision for absence or vacancy in office of a Judge.

See Eng. Jud. Act, 1873, sec. 51.

As to the authority of the Judges referred to, to hold Courts of Assize, etc., see sec. 188.

APPEALS.

11. — (1) Subject to sections 18 and 19.

Quorum of Court of Appeal.

(a) Appeals from decisions of a Divisional Court and appeals now required to be so heard and disposed of, shall be heard and disposed of by the full Court of five Judges.

(b) Other appeals may be heard and disposed of by not less than three Judges.

(2) Where an appeal comes before a Court of less than five Judges, the Court, instead of hearing such appeal, or giving judgment thereon, may direct the case to be heard or re-argued, as the case may be, before the full Court. 4 Ed. vii. c. 11, s. 1. Reargument before full Court.

Secs. 12, 13.

Divisional
Courts of
Court of
Appeal.

12.—(1) In case from pressure of business, or other cause, it shall at any time seem expedient to the Lieutenant-Governor in Council, or to the Judges of the Court of Appeal or to the Judges of the Supreme Court, or a majority of them (of which majority two Judges of the Court of Appeal, including the Chief Justice, unless absent on leave, shall form part), the Court of Appeal may sit in two Divisions either at the same time or at different times; and to enable two Divisional Courts of the Court of Appeal to be held, the Judges of the Supreme Court or the said majority of them, shall select from the Judges of the High Court as many of the Judges thereof as may be necessary to form, with the Justices of Appeal, two such Divisional Courts; and every Judge so chosen shall, while sitting in a Divisional Court of the Court of Appeal, have and may exercise all the powers and authority of a Justice of Appeal. Such selection shall be made on or before the Saturday before the commencement of the Long Vacation in each year, and if not then made such selection may be made at any time afterwards at a meeting duly called for the purpose, and any selection which shall be made may be varied or rescinded from time to time, and a new selection made as occasion may require.

(2) At least two of the Justices of the Court of Appeal shall sit in such Divisional Court. 60 V. c. 13, s. 4; 3 Ed. vii. c. 8, s. 5.

Quorum
may be
made up by
the Judges
of the High
Court.

13. In case of there being a vacancy in the Court of Appeal or in case from illness or some other cause, any of the Judges of the said Court are not present at some sitting of the Court, or in case any of the said Judges are under some legal disqualification to hear an appeal, the Judges of the High Court shall choose from amongst their number as many Judges as are necessary, to form a quorum; and the Judges so chosen and acting shall have authority to continue to hear appeals partly heard, and to give judgment in all appeals heard before them, notwithstanding that such vacancy may in the meantime have been filled up, or that the Judge who was absent may have resumed his duties. 58 V. c. 12, s. 13; 60 V. c. 13, s. 5.

One cause of disqualification is given in section 17. As to other causes; see *Boulton v. Church Society*, 15 Gr. 450; *Dimes v. Grand Junction*, 3 H. L. C. 759. "The law looks with such distrust upon an interested Judge that, whatever may be the amount of interest, the fact is enough to disqualify all his judicial acts"; per Field, J., *Ex p. Dale*, 43 L. T. 542; in case of necessity an interested Judge may sit for the purpose of enabling a quorum of the Court to give judgment; see *Boulton v. Church Society*, *supra*; and see further as to

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disqualification of Judge by reason of bias or interest: *Reg. v. Kemp*, **Secs. 14-19.**
 10 Ont. 143; *Reg. v. Eli*, *Ib.* 727; *Reg. v. Steele*, 26 Ont. 540; *Allin-*
son v. General Council, 1894, 1 Q. B. 759; 70 L. T. 471; *Reg. v.*
Huggins, 1895, 1 Q. B. 563; *Eckersley v. Merser Docks*, 1894, 2 Q. B.
 967; 71 L. T. 308; *Reg. v. Burton*, 77 L. T. 364.

14. In case of a Judge or Judges not having been chosen by the Judges of the Supreme Court, as mentioned herein-
 before in this Act, or in case of the Judge or Judges chosen
 not being available, the senior of the Presidents of the Divi-
 sions of the High Court shall sit in the Court of Appeal
 where one Judge only is needed from the High Court, the
 two senior Presidents where two are needed. Any other
 Judge of the High Court may sit in the place of one of the
 Presidents by arrangement between such other Judge and the
 President whose duty it is to sit as aforesaid. 58 V. c. 12, s.
 14; c. 13, s. 4; 59 V. c. 18, Sched. (2); 60 V. c. 13, s. 6.

Judges of
 High Court
 sitting in
 Court of
 Appeal.

15. Where a Judge of the High Court is selected or it
 becomes his duty, under this Act, to sit in the Court of Ap-
 peal, the business of the Court of Appeal shall thenceforward
 have precedence of all other judicial duty of such Judge.
 58 V. c. 12, s. 15; c. 13, s. 5.

Duty in
 Court of
 Appeal to
 have pre-
 cedence
 over other
 work of
 High Court
 Judge.

16. Judges of the High Court to whom at any time
 shall fall the duty of sitting in the Court of Appeal, or in
 a Divisional Court thereof, shall continue to be the Judges
 to perform such duty until a selection, or new selection (as
 the case may be), shall be made by a majority of the Judges
 of the Supreme Court. 58 V. c. 12, s. 16; c. 13, s. 7.

Judges se-
 lected to sit
 in Court of
 Appeal
 until other
 selection
 made.

17. No Judge against whose judgment an appeal is
 brought, or who took part in the trial of the cause or matter,
 or in the hearing of the Court below, shall sit or take part
 in the hearing of or adjudication upon the proceedings in
 the Court of Appeal. 59 V. c. 18, Sched. part of (3).

Judge ap-
 pealed
 from not
 to sit.

18. Where a Judge has heard a case in the Court of
 Appeal and is not present at the time of the judgment of
 the Court being delivered, his written judgment may be read
 by one of the other Judges of the Court and shall have the
 same effect as if he were present. 59 V. c. 18, Sched. part
 of (3).

Reading
 judgment
 of absent
 Judge.

19.—(1) In case after a cause or matter in the Court of
 Appeal, or a matter referred to the said Court under any
 Act, has been heard and stands for judgment, one of the
 Judges by whom the appeal was heard is transferred to the
 Supreme Court of Canada or resigns his office, or is absent

In certain
 cases judg-
 ment may
 be given
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 occurs.

Secs. 23-24. from illness or other cause, or dies, the remaining Judges, or in case there is a difference of opinion, a majority of them, may give judgment as if such Judge were still a Judge of the Court of Appeal, and were present and taking part in the said judgment. 59 V. c. 18, Sched. part of (3). 1 Ed. vii. c. 12, s. 8.

(2) This provision shall apply to cases which have been already heard, and are now standing for judgment in the said Court. 2 Ed. vii. c. 12, s. 8.

Presiding
Judge in
absence of
Chief Jus-
tice.

20 In the absence of the Chief Justice of Ontario, the Judge entitled to precedence over the other Judges present shall preside. 58 V. c. 12, s. 17.

Sittings of
Court of
Appeal.

21 The Court of Appeal shall, subject to the provisions of section 67 of this Act, hold its sittings at the City of Toronto at such times and for such periods as the acting Judges thereof for the time being, or a majority of them, may deem necessary or convenient for the speedy despatch of business. 58 V. c. 12, s. 18.

OATH OF JUSTICES.

Oath of
office.

22 The oath to be taken by the Judges to be hereafter appointed shall be the following:

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

58 V. c. 12, s. 19.

Adminis-
tration of
Oath.

23. The oath is to be administered to the Chief Justices and the Chancellor by the Lieutenant-Governor in Council, and to the Justices of the High Court, other than the Chief Justices, in presence of the President of the High Court; and to the Justices of the Court of Appeal in open Court by the Chief Justice of Ontario, unless the Lieutenant-Governor in any of such cases shall otherwise direct. 58 V. c. 12, s. 20.

In the case of the absence or illness of the President of the High Court: see s. 3 (10).

SEALS OF THE COURT OF APPEAL AND OF THE HIGH COURT.

Seals of
Court of
Appeal and
High Court.

24. The seals heretofore, from time to time, in use in and for the Court of Appeal and the High Court, shall be deemed to have been the proper seals of the said Courts respectively, and shall so continue until another seal is author-

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ized by the Lieutenant-Governor in Council for either of the **Sec. 28.** said Courts; and any seal so authorized may be afterwards changed by the Lieutenant-Governor in Council; and the seal from time to time so authorized shall be the seal of the Court for which it is authorized and by which its proceedings shall be certified and authenticated. 44 V. c. 5, s. 8; 59 V. c. 18, s. 9.

JURISDICTION OF HIGH COURT.

25 The High Court shall be a Superior Court of Record of original jurisdiction, and shall, subject as in this Act mentioned, possess all such powers and authorities, as by the law of England, are incident to a Superior Court of civil and criminal jurisdiction; and shall have, use and exercise all the rights, incidents and privileges of a Court of Record, and all other rights, incidents and privileges as fully to all intents and purposes as the same were on the 5th day of December, 1859, used, exercised and enjoyed by any of Her Majesty's Superior Courts of Common Law at Westminster in England, and may and shall hold plea in all and all manner of actions and causes as well criminal as civil, and may and shall proceed in such actions and causes by such process and course as are provided by law, and as shall tend with justice and despatch to determine the same; and may and shall hear and determine all issues of law, and may and shall also hear and (with or without a jury, as provided by law) determine all issues of fact that may be joined in any such action or cause, and judgment thereon give, and execution thereof award in as full and ample a manner as might, at the said date, be done in Her Majesty's Courts of Queen's Bench, Common Bench, or, in matters which regard the Queen's revenue (including the condemnation of contraband or smuggled goods), by the Court of Exchequer in England. 58 V. c. 12, s. 21.

Jurisdiction
of High
Court.

All that was done by the Jud. Act, 1881, was to give the High Court all the jurisdiction which the Court of Chancery or the Courts of Common Law had before. It conferred no new right to relief. An action to enforce a charge where the value of the subject matter was under £100 could not have been entertained by any of those Courts before the Jud. Act, and therefore cannot now be maintained *Westbury v. Meredith*, 30 Ch. D. 387; see *Gilbert v. Braithwaite*, ? Chy. Clk. 413; *Westbrooke v. Browett*, 17 Gr. 339; *Reynolds v. Cop*, 19 Gr. 627; *Harding v. Cardiff*, 29 Gr. 308; *Allen v. Lyon*, 5 Out. 615; *Shaw v. Freedy*, 8 C. L. J. 135. Where, however, an action is brought to recover an annuity, or other periodical payment, although the amount actually in arrear when the action is commenced be less than £10, it may nevertheless be entertained, inasmuch as such an

Effect of
Jud. Act,
1881.

Sec. 25. action is brought to recover not only the arrears but also the growing payments: see *Story's Eq. Plg.* (8th Ed.), s. 500; and where a substantial right is in question, the Court has jurisdiction, and will entertain the action, even though the pecuniary amount involved is trifling: see *Clarry v. G. T. Ry.*, 29 Ont. 18; *Clarke v. Creighton*, 14 P. R. 100.

Mandamus In England it has been held that the prerogative writ of mandamus is still only granted on application to the K. B. D.; *Glossop v. Heston Local Board*, 12 Ch. D. 115, 116, 122. In Ontario, however, it is different: see notes to section 58 (9).

Actions relating to land out of Ontario. The High Court has no jurisdiction to entertain an action against a defendant resident within its territorial jurisdiction for damages for trespass to land situate out of the territorial jurisdiction of the Court: *Companhia de Mocambique v. The British South Africa Co.*, 1893, A. C. 602; 69 L. T. 604; *Brereton v. C. P. Ry.*, 29 Ont. 57. See *The Black Point Syndicate Ltd. v. Eastern Concession, Ltd.*, 1898, 79 L. T. 658. Nor will it entertain an action against a defendant within its jurisdiction, to set aside an alleged fraudulent conveyance of land without the jurisdiction: *Burns v. Davidson*, 21 Ont. 547; nor for redemption: *Henderson v. Bank of Hamilton*, 20 Ont. App. 64; 23 S. C. R. 716; nor for a declaration that a deed of lands out of the jurisdiction is in reality a mortgage, and for redemption: *Gunn v. Harper*, 2 O. L. R. 611; nor to enforce a lien on lands out of the jurisdiction by a judgment for sale, or recovery of possession: *Great North Western Ry. v. Charlebois*, 1899, A. C. 114; 79 L. T. 37; but see *Duder v. Amsterdamsch*, *infra*; nor by a mortgagee for sale: *Strange v. Radford*, 15 Ont. 145; nor to determine the title: *Ross v. Ross*, 23 Ont. 43, of lands out of the jurisdiction. But it would seem that an action for foreclosure of the equity of redemption in land out of the jurisdiction may be entertained: *Paget v. Ede*, 18 Eq. 118; and see *Re Robertson R. v. R.*, 22 Gr. 449; *Bryson v. Huntington*, 25 Gr. 265.

Specific performance was decreed of a contract to exchange land in the United States for land in Ontario, the plaintiff being the owner of the land in U. S., and submitting to the jurisdiction of the Court of Ontario by suing in it: *Montgomery v. Ruppensburg*, 31 Ont. 433; and a receiver was appointed of the rents and profits of land out of the jurisdiction on which plaintiff claimed to have an equitable charge: *Duder v. Amsterdamsch*, 1902, 2 Ch. 132; 87 L. T. 22.

Where a plaintiff is entitled to sue a defendant within Ontario to set aside an agreement, the fact that there are lands included in the agreement which are out of the jurisdiction will not prevent the Court from exercising jurisdiction: see *Hackney v. Colonial Investment Co.*, 4 O. L. R. 571.

Foreign sovereign. The Court will not exercise jurisdiction against a defendant who is a foreign sovereign and refuses to submit to its jurisdiction: *Mighell v. Sultan of Johore*, 1894, 1 Q. B. 149; 70 L. T. 64; nor over a foreign ambassador: see *Musurus Bey v. Gadbau*, 1894, 2 Q. B. 352; 71 L. T. 51.

Criminal Jurisdiction.—By the B. N. A. Act, s. 91, s.s. 27. "The criminal law, except the constitution of Courts of criminal jurisdiction, but including the procedure in criminal matters," is within the exclusive legislative power of the Dominion Parliament; and by s. 93, s.s. 14, "the administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and criminal jurisdiction, and including

procedure in civil matters in the Courts," is within the legislative control of the Provincial Legislatures. This division of legislative powers in regard to criminal Courts for a short time occasioned some difficulty in determining the precise effect of the Judicature Act upon the criminal jurisdiction of the High Court and its various Divisions.

Now the High Court is a "Superior Court of Criminal jurisdiction" within the meaning of the Code, and the Court of Appeal for Ontario is the "Court of Appeal" under the Crim. Code: see section 3 (c) and (y) as amended by 63-4 V. c. 46 (D.).

What branch or composition of the High Court had power to enter motions to quash convictions was at one time doubtful: see H. & L. 2nd ed., p. 14. Now such motions are to be brought before a Divisional Court: *Rule 117* as amended by *Rule 1239*. Quashing convictions.

By section 533 of the Criminal Code, as amended by 63-4 V. c. 46 (D.), "the Supreme Court of Judicature" is in Ontario empowered to make rules for the regulation of the sittings of the Courts and the pleading, practice, and procedure, in the Court, including the subjects of *mandamus*, *certiorari*, *habeas corpus*, prohibition, *quo warranto*, and the stating of cases by Justices under sec. 900 of the Code. In pursuance of this power, *Rules 1238-1241* may have been passed.

The *Rule* of the High Court of 17th November, 1886, relating to security on motions to quash convictions, passed under the authority of 49 V. c. 49, s. 6 (D.), (see now Crim. Code, s. 892), and printed under the schedule of repealed *Rules*, is also still in force: *Reg. v. Robinet*, 16 P. R. 49, and has been made applicable to convictions under Provincial Statutes: see 1 Ed. vii. c. 13, ss. 3, 4.

Proceedings to collect a debt due to the Crown under an estreated recognizance of bail, taken in a criminal case, are civil and not criminal proceedings, and are regulated by R. S. O. c. 106; *Re Talbot's Bail*, 23 Out. 65; *Rastall v. Attorney-General*, 18 Gr. 138. Estreating bail.

26. The High Court shall also, subject as in this Act mentioned, have the like jurisdiction and powers as by the laws of England were on the 4th day of March, 1837, possessed by the Court of Chancery in England, in respect of the matters hereinafter enumerated, that is to say: Equitable jurisdiction.

1. In all cases of fraud and accident;
2. In all matters relating to trusts, executors and administrators, co-partnership and account, mortgages, awards, dower, infants, idiots, lunatics and their estates;
3. To stay waste;
4. To compel the specific performance of agreements;
5. To compel the discovery of concealed papers or evidence, or such as may be wrongfully withheld from the party claiming the benefit of the same;
6. To prevent multiplicity of suits;
7. To decree the issue of Letters Patent from the Crown to rightful claimants;

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

Fraud.

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

The law as laid down in *Peck v. Derry*, *supra*, as regards false statements made by the directors of joint stock companies in prospectuses issued by them, is very materially modified by statute: see R. S. O. cc. 216, 217, and see *Angus v. Clifford*, 1891, 2 Ch. 449.

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

As to the effect on costs, of unsuccessfully charging fraud: see notes to Rule 1130, "Discretion of Court or Judge."

Accident.

Accident.—By the term accident is intended not merely casualty, or the act of Providence, or what is technically called *vis major*, or irresistible force, but such unforeseen events, misfortunes, losses, acts, or omissions as are not the result of any negligence or misconduct of the party seeking relief in respect thereof: Story, s. 78. One of the most common instances in which relief is sought under this head is in the case of lost bonds, or other instruments under seal. In such a case relief is usually granted on the terms of the plaintiff giving a bond of indemnity to the defendants: *McDonald v. Hime*, 15 Gr. 72; but see *Macaulay v. Boyle*, 25 C. P. 339; and where a suit was brought to recover promissory notes alleged to be lost after

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maturity, and the defendant allowed the bill to go *pro confesso*, indemnity was dispensed with: *Abell v. Morrison*, 23 Gr. 109. A will lost or destroyed may be established on parol evidence of its contents, and proof of due execution: *Sugden v. St. Leonards*, 1 P. D. 154; *Carroll v. Carroll*, 34 C. L. J. 415; *Stewart v. Walker*, 6 O. L. R. 495. The jurisdiction of the Court also extends to giving relief in respect of instruments which have been destroyed: *Frontenac v. Briden*, 17 Gr. 645.

Under this head of jurisdiction the Court may also grant relief in the case of a defective execution of a power resulting from accident or mistake, or both, and also in regard to agreements to execute powers, which may generally be deemed a species of defective execution: see *Sugd. on Pow.* 549. But this relief is only granted to persons having some moral right, and where there are no opposing equities. Thus, such relief may be granted in favour of a purchaser: *Pothergill v. Pothergill*, 2 Freem. 256; under which term a mortgagee, or lessee, is included: *Barker v. Hill*, 2 Chy. R. 113; *Reid v. Shergold*, 10 Ves. 370; to a creditor: *Pollard v. Greenvil*, 1 Chy. Ca. 10; *Wilkes v. Holmes*, 9 Mod. 485; to a wife: *Cowp.* 267; *Clifford v. Burlington*, 2 Vern. 379; to a legitimate child: *Sarth v. Blanfrey*, Gilh. Eq. R. 166; *Sneed v. Sneed*, Amb. 64; and to a charity: *Innes v. Sayer*, 7 Ha. 377; 3 Mac. & G. 606; *Attorney-General v. Sibthorp*, 2 R. & M. 107; but not in favour of the donee of the power, nor a husband: *Watt v. Watt*, 3 Ves. 244; nor an illegitimate child: *Tudor v. Ineson*, 2 Ves. Sr. 582; nor a grandchild: *Watt v. Bullas*, 1 P. Wms. 60; nor of remote relations, or volunteers: *Smith v. Ashton*, 1 Freem. 308.

Under this head of jurisdiction, personal representatives who have by mistake overpaid creditors, or legatees, beyond the amount they are justly entitled to receive, may recover the overpayment: *Edwards v. Freeman*, 2 P. Wms. 447; *Hawkins v. Day*, Amb. 160; *Story* s. 90. See also *Uffner v. Lewis*, 5 O. L. R. 684; *Re Horne*, 1905, 1 Ch. 76.

But relief cannot be given from the consequences of a positive contract: thus, a lessee cannot get relief from payment of rent because of the destruction of the demised premises by accident: *Pym v. Blackburn*, 3 Ves. 34, 38; *Story*, s. 101; nor can relief be given on the ground of accident to a party whose own gross negligence or fault has caused the accident: *Ex p. Greenway*, 6 Ves. 812; nor can a lessee be relieved from a forfeiture for breach of a covenant not to assign or sub-let, because he has acted in forgetfulness of his covenant: *Borrow v. Isaacs*, 1891, 1 Q. B. 417; *Eastern Telegraph Co. v. Dent*, 1899, 1 Q. B. 835; 78 L. T. 713; 80 L. T. 459.

Mistake.—The cases in which contracts may be set aside for mistake are usually those in which, either there has been mutual mistake or ignorance in both parties affecting the essence of the contract, or a fact is known to one and unknown to the other, and there is some fraud or surprise upon the ignorant parties: see *Beauchamp v. Winn*, L. R. 6 H. L. 223, at p. 233; but although as a rule the mistake must be mutual in order to afford a ground for equitable relief, yet even a unilateral mistake which has been induced by the opposite party may be a ground for setting aside a contract: see *Hilding v. Sanderson*, 1897, 2 Ch. 524.

Trusts.—The jurisdiction in respect of trusts was formerly a part of the exclusive jurisdiction of the Court of Chancery. By the Statute of Frauds (29 Car. 2, c. 3; see now R. S. O. 1897, c. 338, s. 6), all declarations or creations of trust or confidences, of any

Sec. 26. lands, tenements or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trusts, or by his last will in writing; and by sec. 8, all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by his last will. Section 7 makes two exceptions from the statute: (1) trusts arising or resulting from any conveyance of lands or tenements, by implication, or construction of law; (2) trusts transferred or extinguished by act or operation of law. Trusts of chattels real must be evidenced by writing: *Forster v. Hale*, 3 Ves. 695; *Riddle v. Emerson*, 1 Vern. 108, but not trusts of chattels personal: *He Phadden v. Jenkins*, 1 Ph. 153; *Benbow v. Townsend*, 1 My. & K. 506.

A trust of land in a foreign country may be enforced by the High Court where the trustee is resident within its jurisdiction: *Smith v. Henderson*, 17 Gr. 6; *Rocheffoucauld v. Boustead*, 1897, 1 Ch. 196; and see *Re Robertson*, *Robertson v. Robertson*, 22 Gr. 449. See also *Ross v. Ross*, 23 Ont. 43, and other cases cited *supra*, p. 12.

The Court has jurisdiction under The Trustee Relief Act (R. S. O. 1897, c. 336, to appoint new trustees upon a summary application: see sec. 21 of the Act, and *Re Hellierell*, 21 Gr. 346; *Re Dillon*, 3 C. L. J. 126.

The Court is authorized to allow trustees under any deed, settlement or will, compensation for their services: R. S. O. c. 129, s. 40.

Executors
and admin-
istrators.

Executors and Administrators.—The jurisdiction of the Court over personal representatives authorizes it to entertain actions or proceedings to compel them to account for their administration: see *Rules 944, et seq.*, to fix the compensation to be paid them for their services: R. S. O. c. 129, s. 40; to control their management of the estate of their testator, or intestate, and if necessary to restrain them from exercising their office, and to appoint a receiver or other person to act in their stead: *Harrold v. Wallis*, 9 Gr. 443; *Re Moore*, *McAlpin v. Moore*, 21 Ch. D. 778; *Re Morphy*, before Boyd, C., 9 April, 1887; *Johnson v. McKenzie*, 20 Ont. 131; and an injunction may be granted at the instance of an executor against his co-executor, to restrain him from intermeddling with the estate before probate: *In re Moore*, *Ker v. Moore*, 13 P. D. 36; 58 L. T. 386; without appointing a receiver: *Bourn v. Phillips*, 1897, 1 Ch. 174; 75 L. T. 629.

An executor may now be removed on the same grounds as the Court may remove any other trustee: Jud. Act, s. 39. Before that enactment it was held that the High Court would not remove an executor from his office while anything remained to be done by him as executor, even though the will provided for his continuance as a trustee after his duties as executor had ceased, and he had acted as trustee by investing the trust fund: *Re Bush*, 19 Ont. 1, and see *Eaton v. Daines*, 96 L. T. Jour. 413.

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

Partnership.

Co-partnership.—The Court of Chancery formerly exercised a concurrent jurisdiction with the Courts of Common Law in partnership cases, but in all cases of difficulty and complexity the equity jurisdiction was resorted to. Under this head the Court has power to entertain actions for the specific performance of agreements to

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enter into partnership for a definite term: *Buxton v. Lister*, 3 Atk. 385; *England v. Curling*, 8 Beav. 129; but not where no specified time for the duration of the partnership has been named: *Hercy v. Birch*, 9 Ves. 357. It has also power to enforce the specific performance of articles of partnership: *Somerville v. McKay*, 16 Ves. 382; *England v. Curling*, 8 Beav. 129; *Miles v. Thomas*, 9 Sim. 606. 609; *Marshall v. Watson*, 25 Beav. 501; *Haggart v. Allan*, 4 Gr. 36; but not where damages would be an adequate compensation: *Street v. Rigby*, 6 Ves. 815; *British Empire Shipping Co. v. Somerset*, 3 K. & J. 433; nor where the partnership is in contravention of any public Act: *Collins v. Scindie*, 6 Gr. 282.

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It has also power to decree a dissolution of partnership: *Rawlins v. Wickham*, 1 Giff. 355; *Hue v. Richards*, 2 Beav. 305; *Newton v. Doron*, 1 Gr. 590; *O'Leone v. O'Leone*, 2 Gr. 125; and to appoint a receiver of the partnership assets: *Prentiss v. Brennan*, 2 Gr. 274; *Ib.* 322; *Rule 759*, note; and to decree the taking of the partnership accounts. The Court has also power to entertain an action to establish a partnership: *Bingham v. Smith*, 16 Gr. 373; and to decree an account up to the time of the commencement of the action, even where a dissolution is not asked: *Loscombe v. Russell*, 4 Sim. 8; *Southorne v. Weston*, 3 Ha. 387; and see *Lyon v. Tweedell*, 44 L. T. 485; 50 L. J. Chy. 571.

Account

Account.—In this respect the Court of Chancery formerly also exercised a concurrent jurisdiction with the Courts of Law, but owing to its superior machinery for compelling discovery, and taking accounts, it practically exercised an almost exclusive jurisdiction in all cases of any complication. Under this head of jurisdiction the Court entertains actions for an account brought by a principal against his agent: *McKenzie v. Johnson*, 4 Mod. 373; *Kerr v. Lafferty*, 7 Gr. 412; *Ridley v. Sexton*, 18 Gr. 580; 19 Gr. 146; *Arthurton v. Dalen*, 2 Gr. 1; *Wright v. Rankin*, 18 Gr. 625; *McLean v. Grant*, 20 Gr. 76; *Smith v. Henderson*, 17 Gr. 6; *Harrison v. Harrison*, 14 Gr. 586; *Landman v. Crooks*, 4 Gr. 353; but not necessarily by an agent against his principal: *Padwick v. Stanley*, 9 Ha. 627; *Smith v. Leveaux*, 2 D. J. & S. 1. An action for an account will lie where there are mutual accounts between the plaintiff and defendant, i.e., where each has received and paid on account of the other: *Phillips v. Phillips*, 9 Ha. 471; or by *cestui que trust* against his trustee; or by creditors, legatees, or next of kin against personal representatives; or by a client against his solicitor; or by partners against each other; or by a mortgagor against his mortgagee, or *vice versa*; or where the accounts are complicated; or where fraud is charged; or by any party having a statutory right to call another to account, e.g., by a municipal corporation against a registrar of deeds for an account of moneys received by him in excess of his salary, to which excess the corporation is entitled: *Re Ingersoll*, *Gray v. Ingersoll*, 16 Ont. 194.

See further as to proceedings in taking accounts: *Rule 667*, et seq., and notes.

Awards on references by consent out of Court.—The Court of Chancery had formerly a concurrent jurisdiction with Courts of Law in respect of awards. The Court has power to set aside awards: *Lawson v. Hutchinson*, 19 Gr. 84; *Edicard v. Gordon*, 12 Gr. 333; *Wemp v. Henderson*, 10 Gr. 54; *Jekyll v. Wade*, 8 Gr. 363; *Hickman v. Watson*, 8 Gr. 386; *Gillam v. Cleghorn*, 7 Gr. 82. But an award is not impeachable in Equity on the ground that it was

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erroneous in either law or fact, unless the error appeared on its face. The cases in which the Court of Chancery could interfere were those in which such an error so appeared; or where there had been corruption, fraud, or excess of jurisdiction; or where the arbitrators making the award admitted that they had made a mistake: *Re Grant v. Eastwood*, 22 Gr. 363; *Pardee v. Lloyd*, 26 Gr. 374; and see *La May v. McKee*, 16 Ont. App. 348; *Re Harvey & Parkdale*, 16 Ont. 372. The Court of Chancery could also enforce awards: *Armstrong v. Cayley*, 2 Chy. Ch. 128, 163; *Wilson v. Switzer*, 1 Chy. Ch. 44, and see *Bell v. Miller*, 9 Gr. 385; *Hodder v. Turvey*, 20 Gr. 63; where specific performance was decreed: *Darnley v. London, Chatham & Dover Ry. Co.*, L. R. 2 H. L. 43; *Blackett v. Bates*, L. R. 1 Chy. 117; *Nickels v. Hancock*, 7 D. M. & G. 300; *Norvall v. Canada Southern Ry. Co.*, 5 Ont. App. 13. Formerly it was customary in Chancery to make the award a rule of Court as a preliminary to proceeding to enforce it: *White v. Kerby*, 2 Chy. Ch. 452; *Wadsworth v. McDougall*, 5 Gr. 290; *Allan v. O'Neal*, 2 Chy. Ch. 452; but at law the practice was to make only the submission a rule of Court. Both practices are now superseded by R. S. O. c. 62, s. 3.

An award must now be moved against as provided by R. S. O. c. 62, s. 45; or where it has been agreed that there may be an appeal: see *ib.* s. 14.

Appeals from awards of compensation made under the Dominion Railway Act (3 Ed. vil., c. 58), are regulated by s. 168 of that Act; and see *Birely v. Toronto, H. & B. Ry.*, 25 Ont. App. 88.

Dower.

Dower.—The jurisdiction of the Court of Chancery was formerly concurrent with that of the Courts of Law in actions to enforce claims for dower: *Craig v. Templeton*, 8 Gr. 483; *Grieve v. Woodruff*, 1 Ont. App. 617. Damages for detention of dower cannot be recovered where the husband does not die seised, even though a demand of dower be made: *Morgan v. Morgan*, 15 Ont. 194.

The Court had jurisdiction to compel a widow to elect between the provision made for her by her deceased husband's will and her dower, wherever it was inconsistent with the testator's intention to be collected from his will, that she should enjoy both: *Lapp v. Lapp*, 10 Gr. 159; *Murphy v. Murphy*, 25 Gr. 81; *Ripley v. Ripley*, 28 Gr. 610; *Laidlaw v. Jackes*, 25 Gr. 293; 27 Gr. 101; *Patrick v. Shaver*, 21 Gr. 123; *Armstrong v. Armstrong*, 21 Gr. 351; *McGregor v. McGregor*, 20 Gr. 450; *Coleman v. Glanville*, 18 Gr. 42; *Lee v. McKim*, 18 Gr. 527; *Hutchinson v. Sargent*, 16 Gr. 78; *Melchman v. Grant*, 15 Gr. 65; *Kerr v. Leishman*, 8 Gr. 435; *Re Quimby*, 5 Ont. 738; *Dawson v. Fraser*, 18 Ont. 496; *Marriott v. McKay*, 22 Ont. 320; *Re Biggar*, 8 Ont. 372; *Rudd v. Harper*, 16 Ont. 422; *McNicol v. Lynch*, 24 Ont. 632; *Elliott v. Morris*, 27 Ont. 487; *Re Geo. Shunk Est.*, 31 Ont. 175; *Reynolds v. Palmer*, 32 Ont. 431; and where a dowress has made her election she may be restrained from afterwards prosecuting an action for dower: *Westcott v. Cockerline*, 13 Gr. 79.

Infants.

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

As regards the persons of infants, the Court of Chancery could make order for their custody, education, and maintenance, and

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appoint guardians of their persons: *Re Keith*, 7 P. R. 138; *MacNabb* Sec. 26. v. *McInnes*, 25 Gr. 144; *Re Irwin*, 16 Gr. 461; *Murphy v. Lamphier*, 12 Gr. 241; *Anon*, 6 Gr. 632. The Surrogate Courts had a concurrent jurisdiction with the Court of Chancery to appoint guardians of the persons and estates of infants: *Re Stannard*, 1 Chy. Ch. 13; *Re McQueen*, 23 Gr. 191.

As regards the custody of infants: see *Re Keith*, 7 P. R. 138; *Re Gillicie*, 3 Gr. 279; *Re Davis*, 3 Ch. Ch. 277; *Andrews v. Salt*, L. R. 8 Chy. 622; *Re Smart*, 12 P. R. 312, 435, S. C. sub. nom. *Smart v. Smart*, 1892, A. C. 425; 67 L. T. 510; and see R. S. O. c. 168, ss. 1, 2, 11, 14 in notes to sec. 58 (12), whereby important changes were made in the law relating to the custody and guardianship of infants.

Formerly there was a conflict between the Courts of Law and Equity as to whether a testamentary guardian could be interfered with: see *Re Andrews*, L. R. 8 Q. B. 153; *Andrews v. Salt*, L. R. 8 Chy. 622; but the power to remove testamentary guardians is now expressly given to the Court by statute: R. S. O. c. 168, s. 17; and see *Re X* 1899, 1 Ch. 526. Formerly it was not customary for the Court of Chancery to exercise jurisdiction in regard to an infant, unless the infant had some property in respect of which the jurisdiction could be invoked: *Wellesley v. Beaufort*, 2 Russ. 21; *Clayton v. Clarke*, 3 D. F. & J. 682; but the right of the Court to exercise jurisdiction is not considered to be limited to cases in which the property of the infant is involved: *Re Spence*, 2 Ph. 247; *Re Tynn*, 2 L. R. & S. 481; *Re Smart*, 12 P. R. 312, 435; see S. C. sub. nom. *Smart v. Smart*, 1892, A. C. 425; 67 L. T. 510; *Re McGrath*, 1892, 2 Ch. 246. Any suit relating to the estate or person of an infant and for his benefit has now the effect of making him, whether plaintiff or defendant, a ward of Court: *Gynn v. Gilbard*, 1 Dr. & S. 356; *Re Berte*, 9 H. L. C. 440; *Peadleton v. Macrory*, 2 Dick. 736.

The Court, upon an application for a *habeas corpus* by a father to obtain the custody of his children, cannot require the applicant to proceed by way of petition in order that the facts may be better inquired into: *Re Smart*, 12 P. R. 635.

The Court has power to order the sale of infants' estates when necessary to provide for their maintenance or education, or when by reason of any part of the property being exposed to dilapidation or depreciation from any other cause, the infant's interest requires it: R. S. O. c. 168, s. 3. The Court may also make provision out of an infant's estate for his maintenance and education: *Ashbough v. Ashbough*, 10 Gr. 430; R. S. O. c. 168, s. 7.

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

Marriage.—The Court has jurisdiction to declare a marriage void, but nothing short of the most clear and convincing testimony will justify the interposition of the Court: *Lawless v. Chamberlain*, 18 Ont. 296; *Burns v. Anderson*, before Proudfoot, J., 10th November, 1883; and see *Scott v. Sebright*, 12 P. D. 21; 57 L. T. 421; *Bartlett v. Rice*, 72 L. T. 122; *Clark v. Stier*, 73 L. T. 632.

Idiots and Lunatics.—The Court of Chancery formerly exercised an exclusive jurisdiction over the persons and estates of idiots and lunatics. This jurisdiction is now regulated, so far as regards obtaining declarations of lunacy and providing for the sale of lunatics' estates, and for their custody and maintenance and the payment of

Sec. 26. their debts, by R. S. O. c. 65. The Court has jurisdiction to authorize the committee of a lunatic to accept a devise made to him on condition: *Re Sefton*, 1898, 2 Ch. 378; 78 L. T. 705.

Staying
waste.

Staying Waste.—The jurisdiction of the Court of Chancery to stay waste was part of the concurrent jurisdiction of the Court which was exercised by means of injunction. The jurisdiction of Equity originally arose in England on account of the incompetency of the Courts of Law to give adequate relief. The jurisdiction of the Court of Chancery was originally confined to cases of what was by a somewhat misleading use of words called "equitable waste," meaning thereby acts which were deemed waste only in Courts of Equity, and for which no action would lie at law; and to cases where no waste had been actually committed, but was threatened; but by late statutes the jurisdiction was extended, and the Court was enabled to grant an injunction to restrain waste, notwithstanding that the party in possession claimed by an adverse legal title: R. S. O. 1877, c. 40, s. 39; *Wightman v. Fields*, 19 Gr. 559. This clause is now superseded by sec. 58 (9), *infra*; see R. S. O. 1887, p. 2687. Sec. 58 (2) in effect abolishes the distinction between legal and equitable waste, by taking away from a tenant for life without impeachment of waste, the legal right to commit equitable waste. See, however, *In re Cartwright*, *Avis v. Neuman*, 41 Ch. D. 532; *Dashwood v. Maguire*, 1891, 3 Ch. 306; *Meur v. Cobley*, 1892, 2 Ch. 253.

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

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

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

An injunction has been granted to restrain waste pending litigation as to the ownership of the property: *Christie v. Long*, 3 Gr. 420; *Robins v. Porter*, 2 U. C. L. J. 230; and an injunction has also been granted to restrain waste in favour of an unpaid vendor against a vendee and his assignee: *Lawrence v. Judge*, 2 Gr. 301; *Perrier v. Kerr*, 2 Gr. 668; *Mitchell v. McGaffey*, 6 Gr. 361; *Walsh v. Brown*, 4 U. C. L. J. 68; *McLean v. Burton*, 24 Gr. 134; *Summers v. Cook*, 28 Gr. 179. A tenant for life who is not entitled to hold without impeachment of waste, may be restrained from committing any waste in an action at the suit of the remainderman: *Cloie v. Cloie*, 4 Ont. 355; but see *Drake v. Wigle*, 22 C. P. 341; *Saunders v. Breckin*, 5 Ont. 603; *Munsie v. Lindsay*, 10 P. R. 173, and where the tenant for life holds his estate without impeachment of waste, if he is guilty of malicious, extravagant, or capricious waste, that was formerly called "equitable waste," and may be restrained at the suit of the reversioner or remainderman: *Garth v. Cotton*, 1 W. & T. L. C. Eq. 806; *Fane v. Barnard*, 2 Vern. 738; *Rolf v. Somerville*, 2 Eq. Ca. Abr. 759; *Morris v. Morris*, 15 Sim. 505; *Micklethwait v. Micklethwait*, 1 De G. & J. 519; *Turner v. Wright*, 2 D. F. & J. 234; *Talbot v. Hope-Scott*, 4 K. & J. 96; and see s. 58, s.s. 2 *infra*. He cannot be restrained from merely permissive waste; see *In re Cartwright*, *Avis v. Neuman*, 41 Ch. D. 532.

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

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

Where the plaintiff has slumbered on his rights: *Hughson v. Cook*, 20 Gr. 238; or the injury is trifling: *Bernard v. Gibson*, 21 Gr. 193, an injunction will be refused.

Specific Performance.—The jurisdiction of the Court of Chancery to decree specific performance of contracts was discretionary, but the exercise of this discretion was regulated by certain fixed rules and principles: *Lamare v. Dixon*, L. R. 3 H. L. 414. This branch of the jurisdiction of the High Court is also discretionary: *In re Scott*, 1895, 2 Ch. 603. Speaking generally, the Court of Chancery refused to decree specific performance of contracts or obligations except in those cases in which there was no adequate remedy at law for breach of the agreement, and in which the Court could superintend and enforce the execution of its decree: *Johnson v. Montreal & City of Ottawa Ry.*, 22 Gr. 290; neither would it enforce specific performance of mere voluntary agreements: *Re Lucan*, 45 Ch. D. 470. Agreements for the sale or leasing of land will be specifically enforced: *Dennison v. Kennedy*, 7 Gr. 342; *Simmons v. Campbell*, 17 Gr. 612; *Heater v. Pearce*, 1900, 1 Ch. D. 341 (an agreement for lease of an undivided moiety of mineral property), even when made by parol, if there have been acts of part performance: *Shannon v. Parsill*, 18 Gr. 8; *Butler v. Church*, 16 Gr. 295; *McDonald v. McKinnon*, 26 Gr. 12; but payment of the whole, or part, of the purchase money is not in itself of part performance sufficient to admit parol evidence of a contract for the sale of lands: *Johnson v. The Canada Co.*, 5 Gr. 558; the acts of part performance relied on must be such as cannot be referred to any other than the alleged contract: *Alderson v. Maddison*, 5 Ex. D. 293; 7 Q. B. D. 174; 8 App. Cas. 467; *Sexton v. Shell*, 3 U. C. L. J. 94. Letting the purchaser into possession is, ordinarily, a sufficient part performance: see *Crane v. Rapple*, 22 Ont. 549; this case was reversed in appeal on another point: see 20 Ont. App. 291. As to how far signing the deed, without delivery by the vendor, is part performance, or evidence to satisfy the Statute of Frauds: see *Gillately v. White*, 18 Gr. 1; *McClung v. McLaughlin*, 3 Ont. 593.

The purchaser under a contract for sale of land is not entitled to a decree for specific performance by the vendor, unless he has been prompt in the performance of the obligations devolving upon him, and always ready to carry out the contract on his part within a reasonable time, even though the time was not of its essence; and is not entitled where he has declared his inability to perform his share of the contract: *Wallace v. Heston*, 29 S. C. H. 171; *Levy v. Stogden*, 1895, 1 Ch. 5; 79 L. T. 364; but though a purchaser by laches may have debarred himself from the right to specific performance he may nevertheless be entitled to damages: *Cornwall v. Henson*, 1900, 2 Ch. 298; 82 L. T. 735; but in the case of land he is not entitled to damages for loss of his bargain, but only to the amount of the price paid: *Id.* and see *Confederation Life v. Labatt*, 27 Ont. App. per

Sec. 26.

Osler, J.A., at p. 320, whereas in the case of goods he may recover damages to the amount of their value and not merely the price paid: *Ib.*

Sometimes where the vendor is unable to convey all that he contracted to sell, he may be compelled to perform the contract so far as he is able, and the purchaser will be allowed an abatement in his purchase money, *e.g.*, where the purchaser was entitled to a conveyance free from the dower of the vendor's wife, and she refused to join in the conveyance, specific performance was decreed, but with an abatement: *Van Norman v. Beaupre*, 5 Gr. 590; *Loughead v. Stubbs*, 27 Gr. 387; and see *Jones v. Dale*, 16 Ont. 717; *Stammers v. O'Donohoe*, 28 Gr. 207; 8 Ont. App. 161; 11 S. C. R. 358. But where a partner agreed to sell partnership lands, but owing to his co-partner refusing to join in the sale, the vendor was only able to convey an undivided interest, the Court refused to decree specific performance in favour of the purchaser with an abatement: *Crain v. Kapple*, 20 Ont. App. 291; but where the plaintiff at the time he entered into a contract for the exchange of lands had no title to the lands he proposed to give in exchange, but the title, as the defendant knew, was in the plaintiff's wife, it was held that the defendant could not on that ground repudiate the contract, and the plaintiff having before action tendered a conveyance from his wife, specific performance was decreed: *St. Denis v. Higgins*, 24 Ont. 230.

A contract for the sale of land involving a breach of trust, will not be specifically enforced: *Deleca v. Gray*, 1902, 2 Ch. 606; 87 L. T. 423.

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

The sale and specific delivery of chattels may be enforced when damages would manifestly be an inadequate compensation. So also the specific delivery of heirlooms: *Pusey v. Pusey*, 1 W. & T. L. C. Eq. 961; *Somerset v. Cookson*, 1 W. & T. L. C. Eq. 962; of chattels of unique value: *Fells v. Reul*, 3 Ves. 70; *Falcke v. Gray*, 4 Drew 651; *Dowling v. Bettjemann*, 2 J. & H. 544; *Thorn v. Commissioners of Works*, 32 Beav. 490; *Elves v. Brigg Gas Co.*, 33 Ch. D. 562; 55 L. T. 831; may be enforced: but specific delivery of merchandise will not usually be decreed: *Buxton v. Lister*, 3 Atk. 384; *Fothergill v. Rowland*, 17 Eq. 141; but a contract relating to saw logs has been specifically enforced: *Farewell v. Wallbridge*, 6 Gr. 634; *Flint v. Corby*, 4 Gr. 45; *Stevenson v. Clark*, *Ib.* 541; *Fuller v. Richmond*, 2 Gr. 24; 4 Gr. 657.

An agreement for the allotment of shares in a company, if any shares remain available, may be specifically enforced: *Price v. Denbigh Ry. Co.*, 17 W. R. 572; *Ferguson v. Wilson*, 2 Chy. 77; *Canada Life Assur. Co. v. Peel Manufactory Co.*, 26 Gr. 477; agreements for the sale of shares in companies: *Duncuft v. Albrecht*, 12 Sim. 190; *Cheale v. Kenward*, 3 D. & J. 27; *Turner v. Hoy*, 32 L. T. 56; for the sale of patents: *Cogent v. Gibson*, 32 Beav. 557; or future inventions: *Printing Co. v. Sampson*, L. R. 19 Eq. 462; for the sale of good will with business premises, and fixtures: *Smith v. Peters*, 20 Eq. 511; *Mossop v. Mason*, 18 Gr. 453; 17 Gr. 360; 16 Gr. 302; or with plant and trade secret: *Bryson v. Whitehead*, 1 S. & S. 74; but not of good-will only: *Baxter v. Connolly*, 1 J. & W. 580. A con-

tract between several manufacturers not to sell goods manufactured by them below a stipulated price may be enforced: *The Ontario Salt Co. v. The Merchants Salt Co.*, 18 Gr. 540; nor also agreements not to trade within reasonable limits: see *Holcomb v. Nixon*, 5 Gr. 278, 373; but conditions as to the price at which goods are to be sold by retail cannot be enforced against any sub-purchaser: *Taddy v. Sternum*, 1904, 1 Ch. 354; 89 L. T. 628; *McGruther v. Pitcher*, 1904, 2 Ch. 300. Sec. 26.

A contract which on its face does not appear to have been intended to be a final and concluded agreement will not be specifically enforced: *Page v. Norfolk*, 70 L. T. 23, 781.

A covenant by a lessor to employ a porter for the general benefit of his lessees of flats, was held not to be one which the Court could specifically enforce: *Ryan v. The Mutual Tontine Westminster Chambers Co.*, 1893, 1 Ch. 119; 67 L. T. 820.

Specific performance of an agreement to refer to arbitration, will not be decreed, either directly or indirectly, by compelling the recalcitrant party to appoint an arbitrator: *Re Smith & Nohon*, 25 Q. B. D. 545; but see *R. S. O. c. 62, s. 6*; *Manchester Ship Canal v. Pearson*, 1900, 2 Q. B. 696; 83 L. T. 16.

As to specific performance of awards, and contracts relating to partnerships: see *supra*.

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

Sometimes where the Court cannot decree specific performance of a positive part of a contract, if the contract includes a separate negative contract, the latter may be enforced, e.g., an agreement by a singer to sing at a particular place cannot be enforced, nor an agreement by a writer to write for a particular publisher; but if the agreement also provides that the singer is not to sing elsewhere without the consent of the plaintiff, or that the writer will not write for any other publisher during the engagement, the negative agreement may be enforced: *Lumley v. Wagner*, 1 D. M. & G. 604; *Rolfe v. Rolfe*, 15 Sim. 88; *Stiff v. Cassell*, 2 Jur. N. S. 348; *Dayett v. Ryman*, 16 W. R. 302; *Brown v. Harper*, 68 L. T. 488; *Star Newspaper Co. v. O'Connor*, 94 L. T. Jour. 182; but such negative covenant must be reasonable: *Lermann v. Bartholomew*, 1898, 1 Ch. 671; 78 L. T. 646; and where there is no such negative covenant, an injunction will not be granted: *Whitwood v. Hurdman*, 1891, 2 Ch. 416; 64 L. T. 716; *Grimston v. Cuninghame*, 1894, 1 Q. B. 125.

Where the specific performance of a contract involves the working of a railway in all its minutiae for all time to come, specific performance will not be decreed, nor will the Court attempt to enforce it by mandamus or injunction: see *Kingston v. Kingston P. & E. Ry.*, 28 Ont. 229; *Bickford v. Chatham*, 16 S. C. R. 235.

The Court has refused to order specific performance of an agreement by an Electric Railway Company to run its cars on certain streets at certain hours, and with certain officers, as the Court could not oversee the carrying out of the judgment if granted: *Kingston v. Kingston P. & E. Electric Railway Co.*, 25 Ont. App. 462; see *Hamilton v. Hamilton Street Ry. Co.*, 8 O. L. R. 642.

In cases where County Courts have no jurisdiction to decree equitable relief, they cannot indirectly decree specific performance by treating an agreement for a lease as an actual lease: *Poster v. Reeves*,

Sec. 26. 1802, 2 Q. B. 257; 67 L. T. 537; and see *Whidden v. Jackson*, per Osler, J.A., 18 Ont. App. 442; but since the latter case the equitable jurisdiction of the County Courts has been restored in certain cases: see R. S. O. c. 55, s. 21.

Discovery.

Discovery.—This was formerly a part of the exclusive jurisdiction of the Court of Chancery, but, even before the Judicature Act, the Common Law Courts were empowered to compel discovery: see R. S. O. 1877, c. 50, ss. 150, et seq.; 41 Vict. c. 8, s. 9. Discovery is now an incidental part of the relief which may be obtained in every action. This may be obtained by a plaintiff against a defendant, and by a defendant against a plaintiff. The method of obtaining discovery is prescribed by *Rules 433-477*. Actions for discovery only, in aid of a foreign action, will not be entertained: *Dreyfus v. Peruvian Guano Co.*, 41 Ch. D. 151.

Multiplicity of suits.

Multiplicity of Suits.—The mode by which a multiplicity of suits in reference to the same matter, was avoided in the Court of Chancery, was by requiring all persons interested in the subject matter of the litigation to be made parties either as plaintiffs or defendants in one suit; but as this general rule sometimes operated inconveniently it was in certain classes of cases provided that some only of the persons interested need be made parties, and that those who were not made parties should be sufficiently represented by those who were made parties, and should be bound by the proceedings as if they had been themselves parties: (see *Rules 185-195*, 200, 201, 203, and notes), or else it was provided that the parties interested need not all be made original defendants, but might be added as defendants at a later stage of the proceedings (see *Rule 190*).

Patents.

Decreeing the Issue, or Cancellation of Patents.—The jurisdiction conferred on the High Court by this section to decree the issue or cancellation of patents is probably confined to patents issued by the Provincial Government. But under the R. S. C. c. 61, s. 34, the Court has also power to decree the cancellation of patents for invention issued by the Dominion Government; and may also entertain motions to restrain the infringement of such patents, and for damages therefor: *Id.* s. 30; *Hunter v. Carrick*, 28 Gr. 489; 10 Ont. App. 449; 11 S. C. R. 300; *Smith v. Goldie*, 7 Ont. App. 628. A prior patent to a person who is not the true inventor is no defence to an action by the true inventor under a subsequent patent: *Smith v. Goldie*, 9 S. C. R. 46. The Court of Chancery would formerly rescind a patent for land improperly granted by the Provincial Government, although the grant were voidable, or even void at law: *Martin v. Kennedy*, 2 Gr. 80. But it would not set aside a patent issued upon a deliberate view of all the circumstances, where there was no fraud or mistake: *Simpson v. Grant*, 5 Gr. 267; *Boulton v. Jeffrey*, 1 E. & A. 111; *Barnes v. Boomer*, 10 Gr. 532; *Kennedy v. Lawlor*, 14 Gr. 224; and see *Farmer v. Livingstone*, 8 S. C. R. 140; even though the patent issued contrary to a report of the Heir and Devisee Commissioners as to the party entitled: *McDiarmid v. McDiarmid*, 9 Gr. 144; nor if the plaintiff had no opportunity of bringing the material facts to the attention of the officers of the Crown before the patent issued, and neglected to do so: *Mahon v. McLean*, 13 Gr. 361. But a patent issued in error might be rescinded; e.g., where a patent issued to a third party after another party had contracted to purchase and had gone into possession of the land: *Martyn v. Kennedy*, 4 Gr. 61; *Attorney-General v. Hill*, 8 Gr. 532; or where it issued without

proper consideration by the officers of the Crown of all the facts: *see* 27. *Fricht v. Scheck*, 10 Gr. 254; or had issued to A., when an order in council had been passed for the grant of the land to B.: *Attorney-General v. Garbutt*, 3 Gr. 383; and *see Saugeen v. Church Society*, 8 Gr. 538.

The Attorney-General is a proper party to such actions whenever the person to whom the patent has issued would be entitled to compensation if the patent be rescinded: *ib.*; *Rice v. Attorney-General*, 16 Gr. 467; and *see McIntyre v. Attorney-General*, 14 Gr. 86; but if the case made by the plaintiff is one of fraud, and the patentee would not be entitled to any compensation on the patent being set aside, then the Attorney-General is not a necessary party: *Rice v. Attorney-General*, 16 Gr. 467; and *see Cosgrove v. Corbett*, 14 Gr. 617; *Lawrence v. Pomeroy*, 9 Gr. 474; but *see Attorney-General v. McNulty*, 8 Gr. 321; 11 Gr. 281, 381; *Westbrooke v. Attorney-General*, 11 Gr. 330; *Mitchmore v. Davis*, 14 Gr. 346, where the Attorney-General appears to have been a party though the patent was impeached for fraud.

The Court may be unable to grant relief where third parties have acquired a title under the impeached patent without notice of the defect: *Proctor v. Grant*, 9 Gr. 26, 224; but *see Stevens v. Cook*, 10 Gr. 119.

The Court by virtue of its jurisdiction to decree the issue of patents, would not, however, entertain a suit for the specific performance of an order in council for the grant of land: *Simpson v. Grant*, 5 Gr. 297.

Though there is jurisdiction before the issue of a patent to establish the right to the issue, the Court will not act, in the absence of any special ground for invoking the jurisdiction: *see Bull v. Frank*, 12 Gr. 80; *Brouse v. Cram*, 14 Gr. 677; but the Court may in a suitable case make a declaratory judgment as to the rights of the parties which will practically work the result of a partition if the Crown is willing to act upon the judgment: *Fride v. Rodger*, 27 Ont. 325.

27. The rules of decision in the said matters in the last preceding section mentioned shall, except where otherwise provided, be the same as governed the Court of Chancery in England, in like cases, on the 4th day of March, 1837. 58 V. c. 12, s. 23.

This section must be read in connection with the rest of the statute law of this Province; and wherever any Provincial statute modifies what was the law or rule of decision of the Court of Chancery in England in like cases on the 4th March, 1837, then the express provisions of the Provincial statutes must control the decision of the High Court rather than those rules which governed the Court of Chancery in England at the date above mentioned: *see Smith v. The Methodist Church*, 16 Ont. 199.

The jurisdiction of the Court of Chancery in England was to some extent regulated by Imperial Statutes, and by force of s. 27 these statutes became part of the law of Ontario. They are all now included in R. S. O. 1897, vol. iii.

Rule of decision in such cases.

Secs. 28-30. **28.** The High Court shall have the like jurisdiction and power as the Court of Chancery in England possessed on the 10th day of June, 1857, as a Court of Equity to administer justice in all cases in which there existed no adequate remedy at Law. 58 V. c. 12, s. 24.

Jurisdiction in cases where formerly no adequate remedy at Law.

This section confers upon the High Court all the powers of the English Court of Chancery on 10th June, 1857, whether derived from the Common Law, or statutory enactment: see *Re Hodges*, 1 Gr. at p. 289, *per* Esten, V.C. The general words of this section, however, are controlled by other express enactments of the Provincial Legislature. See sec. 27, notes *supra*.

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

Jurisdiction in matters of revenue.

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

This section in the Revised Statutes of 1877 (c. 40, s. 371), was taken from 28 Vict. c. 17, s. 2, and was confined in its terms to the Court of Chancery. The Courts of Law appear also to have had jurisdiction both legal and equitable in matters of revenue: see R. S. O. 1877, c. 39, s. 4; and see s. 25, *supra*. Prior to 28 Vict. c. 17, s. 2, it had been held that the Court of Chancery had no equitable jurisdiction in revenue cases: see *Norwich v. Attorney-General*, 2 E. & A. 541; *Miller v. Attorney-General*, 9 Gr. 558; and even after equitable jurisdiction in revenue cases had been conferred on the Court of Chancery, it was held that the Court had no jurisdiction to relieve against the forfeiture of a recognizance of bail in a criminal case, which had been estreated into a Court of Quarter Sessions: *Rastall v. Attorney-General*, 17 Gr. 1; 18 Gr. 138; but it was held that the Crown might proceed in Chancery for dues alleged to be fraudulently withheld, although there were no equitable circumstances connected with the demand: *Attorney-General v. Walker*, 25 Gr. 233.

Relief against forfeiture for breach of covenant to insure in certain cases. Imp. Act. 22-23 V. c. 35, s. 4.

30. The High Court shall have power to relieve against a forfeiture for breach of a covenant or condition in any lease to insure against loss or damage by fire, where no loss or damage by fire has happened, and the breach has, in the opinion of the Court, been committed through accident or mistake, or otherwise without fraud or gross negligence, and there is an insurance on foot at the time of the application to the Court in conformity with the covenant to insure, upon such terms as to the Court may seem fit. 58 V. c. 12, s. 26.

Under the general jurisdiction of the Court of Chancery now vested in the High Court independently of this section, it has power to

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relieve against forfeitures in cases other than those provided for in **sec. 30.** this section: see **sec. 57 (3), infra.** Wherever a penalty or a forfeiture is imposed to secure the performance of some act, or the enjoyment of some right or benefit, if the breach of the act, or the withholding of the right or benefit can be adequately compensated in money, relief from the penalty or forfeiture may be decreed: *e.g.*, where the payment of a larger sum is imposed in the event of failure to pay a stipulated sum by a given day, such larger sum is regarded as merely a security for legal interest during the time the money is in default: *Aylet v. Dodd*, 2 Atk. 239; *Sloman v. Walter*, 1 Bro. C. C. 418; *Sanders v. Pope*, 12 Ves. 282; *Davis v. West*, 12 Ves. 475. So where the performance of several acts is secured by a covenant to pay a sum, which as to some of the acts, would be too large, and as to others too small, a compensation for the injury, the sum is considered to be a penalty: see *Kemble v. Farreu*, 6 Blng. 141. But where the damages from the breach cannot be measured, then the sum agreed to be paid in default of performance, is held to be liquidated damages from which no relief can be granted: *Atkyns v. Kinnier*, 4 Ex. 76, 783; *Galsworthy v. Strutt*, 1 Ex. 659; *Law v. Redditch*, 1892, 1 Q. B. 127; 66 L. T. 76; *Elphinstone v. Monkland, etc.*, 11 App. Cas. 332. See also note to **sec. 57 (3)**, and *Townsend v. T. H. & B. Ry. Co.*, 28 Ont. 195, there mentioned.

Relief will be given against a forfeiture incurred by the omission of a mere money payment, *e.g.*, the payment of taxes under a covenant: *Buckley v. Beigle*, 8 Ont. 85; but see R. S. O. c. 170, s. 13 (7), as to non-payment of rent.

The general leaning of the Court was formerly against granting relief against forfeitures for breach of covenants to repair, in the absence of special circumstances: *Hill v. Barclay*, 16 Ves. 402; 18 Ves. 62; *Gregory v. Wilson*, 9 Ha. 683; *Nokes v. Gibbon*, 3 Drew. 681; *Croft v. Goldsmid*, 24 Beav. 312; *Burt v. Gray*, 1891, 2 Q. B. 98; but see *Bamford v. Creasy*, 3 Giff. 675; *Hughes v. Metropolitan Ry. Co.*, 2 App. Cas. 439; neither would the Court grant relief against a forfeiture for breach of a covenant by a lessee not to assign the term without leave: *Hill v. Barclay*, 18 Ves. at p. 63; *Barrow v. Isaacs*, 1891, 1 Q. B. 417; 68 L. T. 86; *Eastern Telegraph Co. v. Dent*, 1890, 1 Q. B. 835; 80 L. T. 459; but an equitable assignment is not a breach of such a covenant: *Geutle v. Faulkner*, 1900, 2 Q. B. 267; 82 L. T. 708. Prior to the 29 Vict. c. 28, s. 5, on which this section is founded, the Court of Chancery would not relieve against a forfeiture for breach of a covenant to insure: *Green v. Bridges*, 4 Sim. 96. Relief may be granted under this section in respect of a covenant contained in an instrument made before the passing of the 29 Vict. c. 28, as regards any subsequent breach: *Page v. Bennett*, 2 Giff. 117. See further as to cases in which the Court will, or will not, relieve against penalties and forfeitures: *Story's Eq. chap. 34.*

By **sec. 57 (3), infra**, a general power is given to the Court to relieve against all penalties and forfeitures. Whether the Court in the exercise of its discretion will relieve against forfeitures which a Court of Equity would not formerly relieve against, has not been determined: see *Barrow v. Isaacs*, 1891, 1 Q. B. 417, 430; 64 L. T. 686. It will not relieve against a forfeiture arising from a breach of covenant by a lessee not to assign without leave: see *Eastern Telegraph Co. v. Dent*, *supra*.

By R. S. O. c. 170, s. 13, special provision is made in reference to forfeitures under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease.

Secs. 31-34.

When relief
is granted,
same to be
recorded.
Imp. Act
22-23 V. c.
35, s. 8.

31. The Court, where relief is granted, shall direct a record of such relief having been granted to be made by indorsement on the lease or otherwise. 58 V. c. 12, s. 27.

The object of the indorsement required by this section is probably for the purpose of identifying the instrument, in respect of which the relief is granted, and to give notice to third persons dealing with the property, of the fact that relief has been granted by the Court. In the case of lauds this may also be effected by the registration of the judgment.

To what
leases
preceding
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Imp. Act,
22-23 V. c.
35, s. 9.

32. The preceding two sections shall be applicable in the case of leases for a term of years absolute, or determinable on a life or lives or otherwise, and also in the case of a lease for the life of the lessee or the life or lives of any other person or persons. 58 V. c. 12, s. 28.

Jurisdic-
tion in
partition.

Rev. Stat.
c. 124.

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

The effect of this section is to enable the Court in an ordinary suit to avail itself of the powers and authorities conferred upon it by *The Partition Act*, without resorting to the procedure laid down in that Act: see *Bennett v. Bennett*, 8 Gr. 446; *Cursey v. Cassey*, 15 Gr. 399; *Munro v. Munro*, 1b. 431; and see *Rules 956, 957*, and notes.

In *re Humes, Hodgins v. Andrews*, 19 P. R. 217, an order was made appointing a guardian for an absentee who had been long unheard of, and directing that he be served with an office copy of the judgment or order for partition, and notice for the absentee.

Jurisdic-
tion in
alimony.

34. 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

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restitution of conjugal rights; and alimony when granted **Sec. 34.** shall continue until further order of the Court. 58 V. c. 12, s. 30.

The jurisdiction by this section conferred on the High Court, is part of the jurisdiction formerly exercised in England by the Ecclesiastical Courts, as incident to proceedings for divorce or judicial separation.

Where proceedings are instituted against a defendant for alimony, if he is about to quit Ontario with intent to defraud his creditors generally, or the plaintiff in particular, he is liable to be arrested and held to bail: see R. S. O. c. 80, s. 2, *Rule 1022: Richardson v. Richardson*, 8 P. R. 274; *Needham v. Needham*, 29 Gr. 117; *Harn v. Harn*, 4 U. C. L. J. 261.

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

Pending the action, if the wife is in need of support, an order may be granted for payment of interim alimony: as to the mode of obtaining interim alimony: see Form 9 k (H. & L. Forms No. 64). *Rules* 370, 371, and notes.

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

Proof of grave misconduct short of adultery will not disentitle a wife to alimony: *Aldrich v. Aldrich*, 21 Ont. 447.

An agreement to live apart founded on valuable consideration will be a bar: *Atwood v. Atwood*, 15 P. R. 425.

Permanent alimony is granted where the husband has been guilty of desertion and cruelty: *Severn v. Severn*, 3 Gr. 431; see *Martin v. Martin*, 78 L. T. 568; or desertion, where coupled with other acts of cruelty, *ib.*; or cruelty alone: *Jackson v. Jackson*, 8 Gr. 499; but not as a rule where he has only been guilty of a solitary act of personal violence: *Rodman v. Rodman*, 20 Gr. 428. So also it may be granted for desertion and adultery: *Henderson v. Henderson*, 19 Gr. 464; *Martin v. Martin*, 78 L. T. 568; and perhaps for adultery alone: *Howey v. Howey*, 27 Gr. 57; *Aldrich v. Aldrich*, 21 Ont. 447; *Koch v. Koch*, 1899, P. 221; 81 L. T. 61; or for wrongfully accusing the wife of adultery: see *Ferris v. Ferris*, 7 Ont. 496.

A husband may be guilty of desertion though he and his wife have never cohabited: *De Laubaque v. De Laubaque*, 1898, 79 L. T. 708.

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

But where the wife leaves the husband without sufficient cause: *Edwards v. Edwards*, 20 Gr. 392; or refuses him his marital rights: *Synge v. Synge*, 1901, P. 317, she is not entitled to alimony; and it would seem that where the husband refuses to live with her by reason of her cruelty or adultery, she is not entitled to alimony: *Nelligan v. Nelligan*, *supra*. The condonation by a wife of acts of cruelty by

Sec. 35. her husband, is annulled by repetition of such acts: *Bavin v. Bavin*, 27 Ont. 571; *Copsey v. Copsey*, 1905, P. 94; 91 L. T. 363.

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

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

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

A judgment for alimony may be suspended on the application of the husband on proof of the wife's subsequent adultery: *Serren v. Serren*, 14 Gr. 150; but a husband who has deserted his wife, is not entitled as of right to have a judgment against him for alimony vacated on his afterwards offering to receive and maintain her: *Cronk v. Cronk*, 19 Gr. 283.

Judgment for alimony may be registered and thus bind lands.

35. An order or judgment for alimony may be registered in any Registry Office in Ontario, and the registration shall, so long as the order or judgment registered remains in force, bind the estate and interest of every description which the defendant has in any lands in the county or counties where the registration is made, and operate thereon in the same manner and with the same effect as the registration of a charge by the defendant of a life annuity on his lands. 58 V. c. 12, s. 31.

A judgment for alimony is registered by means of a certificate: see R. S. O. c. 136, s. 52; and *semble*, an order for payment of interim alimony may in like manner be registered.

The charge created by the registration of a judgment for alimony, binds all the lands of the defendant in the registration division in which the registration is made. The judgment itself does not contain any clause creating a lien, nor does it specify any lands to be bound: it can only be registered among the instruments having no local description: (see R. S. O. c. 136, s. 29). The simple fact of registration creates the charge. This charge may be enforced by a petition in the alimony action, where the defendant has made default in paying the alimony ordered to be paid. Upon such a petition the Court may order the land bound by the judgment, or such part thereof as may be deemed necessary, to be sold and the purchase money to be applied in payment of the arrears of alimony, and the alimony as it accrues. For form of order in such a case, see *Forrester v. Forrester*, D. B. 37, fo. 232; H. & L. Forms, No. 842.

The charge created by a registered judgment under this section is not affected by an assignment for the benefit of creditors subsequently made by the defendant, and the plaintiff is not obliged to rank *pari passu* with other creditors of the defendant under R. S. O. c. 124, s. 9; *Abraham v. Abraham*, 19 Ont. 256; 18 Ont. App. 436; nor

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is the charge affected by the plaintiff recovering judgment in another Court for instalments of alimony in arrear: *Lee v. Lee*, 27 Ont. 193. **Sec. 36.**

36. In every case in which the Court has authority to order the execution of a deed, conveyance, transfer or assignment of any property, real or personal, the Court may by order vest such real or personal estate in such person or persons, and in such manner, and for such estates, as would be done by any such deed, conveyance, assignment or transfer if executed; and thereupon the order shall have the same effect as if the legal or other estate or interest in the property had been actually conveyed, by deed or otherwise, for the same estate or interest, to the person in whom the same is so ordered to be vested, or in the case of a chose in action, as if such chose in action had been actually assigned to such last mentioned person. 58 V. c. 12, s. 32. Vesting order, effect of.

The power of the Court to grant a vesting order extends to every case where it has power to order the execution of a conveyance, transfer, or assignment, of any property, real or personal; but the Court cannot order the execution of any conveyance by any person who is not before the Court and amenable to its jurisdiction, and it can therefore only vest the interests of those who are before the Court and subject to its jurisdiction: *Re Hewish*, 17 Ont. 454. as to the report of which see *Ayerst v. McClean*, 10 C. L. T. 341. Only interests of parties before the Court can be vested.

Where lands are sold under the judgment or order of the Court, a conveyance by the person having the legal estate is all that is necessary to vest the title in the purchaser. It is not necessary that parties to the suit having purely equitable interests should also join in the conveyance: *Ross v. Steele*, 1 Chy. Ch. 94; *Moore v. Shinnors*, 1 Chy. Ch. 59; but persons having equitable interests who were not parties to the action would not formerly (unless represented sufficiently by persons who were parties) be bound by the judgment, and it was necessary for a purchaser, before taking either a conveyance or vesting order, to see that all persons having any interest, had been made parties, or were properly represented by persons who were parties, and were bound by the judgment; but see now s. 58 (11) *infra*.

By a vesting order, all the interest, legal and equitable, of the parties to the action, or any of them, may be vested in the person named in the order: *Re Robertson*, 22 Gr. 449; even though some of them be infants: *Donaldson v. Berry*, 2 Chy. Ch. 16. But where the legal estate was in the plaintiff, who became the purchaser himself at a sale under a decree, the Court refused to make a vesting order because it had no power to order him to convey to himself: *Bowen v. Fox*, 1 Chy. Ch. 387. In such cases the purchaser's title would be made out by the production of the judgment and the Master's report on sale duly confirmed (see *per MacLennan, Q.C., arguendo*, 22 Gr. 452); but this has been thought an unsatisfactory mode of proving that the equitable rights have been extinguished, and in some cases under similar circumstances vesting orders have been made, no objection thereto being raised by the parties. Effect of vesting order.

Vesting order when refused.

A vesting order will not be granted to a purchaser except on proof of payment of his purchase money, or on evidence entitling him to an order dispensing with its payment.

Sec. 37. The purchaser is entitled to a conveyance with ordinary covenants for title, and he cannot be compelled to accept a vesting order: see *Slater v. Fiskin*, 1 Chy. Ch. 1; but he may, if he chooses, take a vesting order instead.

Evidence.

In *Slater v. Fiskin*, *supra*, it was held that a purchaser, before taking a vesting order, was entitled to proof that the persons whose estates were sold were alive at the time of the sale; but in deducing title under a vesting order it has been held unnecessary to give this evidence because the order will be presumed to be rightly made until the contrary is shown: *Re Morse*, 8 P. R. 475; and see *Gunn v. Doble*, 15 Gr. 655; *Shaw v. Crawford*, 4 Ont. App. 371; *McLean v. Grant*, 20 Gr. 76.

Notice of motion for vesting order, to whom to be given.

Upon a sale of lands by the Court, notice to the vendor's solicitor of the application for a vesting order by the purchaser is sufficient, and notice to infants interested was held to be unnecessary: *Boulton v. Stegman*, 1 Chy. Ch. 199; but see *Thorne v. Chute*, 2 Chy. Ch. 221. So also a vesting order has been granted *ex parte* where a party to the action was ordered to convey, but could not be found after due diligence: *McNair v. Simpson*, 1 Chy. Ch. 299; and see *Laurason v. Buckley*, 3 Chy. Ch. 270, where the costs of the motion were ordered to be paid out of the purchase money. But where one of the plaintiffs had become the purchaser in a mortgage action, notice of a motion to dispense with payment into Court and for a vesting order was required to be given to the mortgagor who had appeared in the suit: *McMaster v. Kempshall*, 1 Chy. Ch. 329.

Purchaser taking v. o. waives objections to title, etc.

Where a purchaser takes a vesting order he usually waives all objection to the title, and if possession has not previously been delivered to him, he assumes the responsibility of obtaining possession: *Bull v. Harper*, 6 P. R. 36; and where a purchaser after the lapse of a year from obtaining a vesting order, applied to be allowed compensation in respect of certain taxes which the vendor should have paid, the application was refused: *Kincaid v. Kincaid*, 6 P. R. 93. But so long as the purchase money remains in Court, an application by a purchaser who has inadvertently taken a vesting order without first requiring incumbrances to be paid off, to have the incumbrances discharged out of the purchase money, will be granted: *Fleming v. McDougall*, 8 P. R. 200; *Turrill v. Turrill*, 7 P. R. 142.

Infants.

As regards infants, whose estates have been sold under the direction of the Court, the Court may order some person to execute the conveyance in the place of the infants: R. S. O. c. 168, s. 5; and the Master in Ordinary or a Local Master may, in like manner, be ordered to execute a deed for adult parties who have been committed to gaol for contempt in refusing to execute the same, after the expiration of two calendar months from their being committed or detained under such process: see R. S. O. 1897, c. 324, s. 18, and *supra*, s. 28; *Ledyard v. Campbell*, O. R. 26, fo. 719.

Trustee Acts.

Under the Trustee Relief Act, R. S. O. 1897, c. 336, ss. 5-19, the Court has also power to make vesting orders: and under secs. 14, and 15 (2), wherever the Court can under that Act make a vesting order, it may also appoint some person to execute a conveyance.

Jurisdiction of High Court in respect to settlement of

37. The High Court shall have the same jurisdiction as the Court of Chancery in England had on the eighteenth day of March, 1865, in regard to enabling infants, with the approbation of the Court, to make binding settlements of

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their real and personal estate on marriage; and in regard to ^{Sec. 37.} questions submitted for the opinion of the Court in the form of special cases on the part of such persons, as may by themselves, their committees or guardians, or otherwise, concur therein. 58 V. c. 12, s. 33 (1). ^{estates of infants, and special cases.}

Settlements.—The jurisdiction of the English Court of Chancery as to sanctioning marriage settlements by infants of their property, was on the 18th March, 1865, regulated by the Imp. Stat. 18 & 19 Vict. c. 43, now R. S. O. 1897, c. 340, ss. 15-18. The Act does not apply to males under twenty years nor females under seventeen years: see sec. 8. An application for the sanction of the Court to a settlement does not constitute the infant a ward of Court so as to necessitate the Court's inquiring into the propriety of the marriage: Seton, 5th ed., 1903. ^{Settlements by infants.}

This Act only enables the Court to remove the bar of infancy, but it does not enable an infant, even with the sanction of the Court, to do more than an adult could do: e.g., where an infant was a married woman and made a post-nuptial settlement with the sanction of the Court under the above-mentioned Act, but the settlement was one which would not have bound her if she had been an adult: it was held, notwithstanding it had received the sanction of the Court, to be invalid: *Buckmaster v. Buckmaster*, 35 Ch. D. 21; 56 L. T. 795; 13 App. Cas. 61; *Mills v. Fox*, 37 Ch. D. 153; *sed vide Buckland v. Buckland*, 1900, 2 Ch. 534. But the Act enables an infant with the sanction of the Court to make a valid post-nuptial settlement so far as an adult can make one: *Re Wall*, 50 L. T. 435.

In England applications for the sanction of the Court to a settlement by an infant are required to be supported by evidence to show, (1) The infant's age; (2) If there is any parent or guardian; (3) If none, what near relatives, and with whom, and under whose care the infant is; (4) Infant's parents' rank and position; (5) Infant's fortune and property; (6) The age, rank and position of the other party; (7) His property, fortune and income; (8) The fitness, and consent to act, of the trustees: Seton, 6th ed., 1902.

A post-nuptial settlement by a married woman while an infant, made under the sanction of the Court, was held valid against creditors: *Hemingway v. Braithwaite*, 61 L. T. 224; but see *Re Holland*, 85 L. T. 304.

A settlement made by an infant without the sanction of the Court was held binding on the settlor, he not having attempted to repudiate it until the lapse of four years after attaining his majority: *Edwards v. Carter*, 1893, A. C. 300; 69 L. T. 153; *sed vide Re Jones, Farrington v. Forrester*, 1893, 2 Ch. 461; a settlement made by a married woman while an infant may be ratified by her on coming of age, notwithstanding her coverture: *Re Hodson*, 1894, 2 Ch. 421.

Special Cases.—The jurisdiction of the English Court of Chancery in regard to special cases on the 18th March, 1865, was regulated by Imp. Stat. 13 & 14 Vict. c. 35. By that Act a special case may be stated without commencing an action, but that provision has not been retained in Ontario, and the only provisions of Imp. Stat. 13 & 14 Vict. c. 35, on this point, now in force in Ontario are to be found in R. S. O. 1897, c. 324, ss. 16 and 17. ^{Special cases.}

Sec. 38.

After action commenced a special case may be stated under *Rules* 372-375, but, as no provision is made for stating a special case otherwise than in an action, the above section 37 of the Jud. Act, must be taken to be modified so that the jurisdiction mentioned can now only be exercised as provided by the *Rules*.

Fictitious questions not entertained.

Fictitious questions will not be entertained, so as to give the Court jurisdiction in matters not cognizable under the Act: *Pryse v. Pryse*, 15 Eq. 86; and see *Key v. Key*, 4 D. M. & G. 73. All persons beneficially interested should be parties: *Entwistle v. Lannon*, 4 W. R. 450; and trustees must be parties to a case for construing the trust deed: *Vorley v. Richardson*, 8 D. M. & G. 120. Where some of the parties beneficially interested are out of the jurisdiction, but others having identical interests are before the Court, the presence of the absentees may in the discretion of the Court be dispensed with: *Re Brown*, 29 Beav. 401.

The case must be framed so that the rights of the parties can be determined, or the Court will decline to answer the questions submitted: *Bulkely v. Hope*, 4 W. R. 280. The Court will not act on inferences drawn by the parties, but necessary facts should be proved by affidavit: *Domville v. Lamb*, 9 Hn. 1v.

Amendment of case.

The case may be amended: see *Rule* 312; but where a material fact was omitted from the case, but was admitted by all parties at the hearing, prefacing the order with a recital to that effect was held to be sufficient: *Lane v. Debenham*, 11 Hn. 188; 17 Jur. 1005.

But an amendment after final judgment cannot be allowed: *Johnston v. Consumers' Gas Co.*, 17 P. R. 297; and see S. C. 23 Ont. App. 506; 78 L. T. 270.

Costs.

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

The Court may try the validity of wills.

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

The jurisdiction of the High Court, as regards wills affecting personalty, depends on this section; but as regards wills affecting realty the jurisdiction of the High Court would seem to depend not only on this section, but also on secs. 25 and 41, by which the jurisdiction of the former Superior Courts of Law is vested in the High Court.

Letters probate are, notwithstanding *The Devolution of Estates Act*, now R. S. O. c. 127, only *prima facie* evidence as far as realty is concerned of the testamentary capacity of the testator; and in an action asserting title under a will, the defendant may give evidence showing want of testamentary capacity: *Sproule v. Watson*, 23 Ont. App. 692.

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For cases in which wills have been contested on the ground of the ^{Sec. 22.} mental incapacity of the testator: see *Brown v. Bruce*, 10 U. C. Q. B. 35; *Meuzies v. White*, 9 Gr. 574; *Emes v. Emes*, 11 Gr. 325; *Martin v. Martin*, 15 Gr. 586; *Ingoldsby v. Ingoldsby*, 20 Gr. 131; *Wilson v. Wilson*, 22 Gr. 39; and for cases in which wills have been sought to be set aside as having been obtained by undue influence: see *Waterhouse v. Lee*, 10 Gr. 176; *Donaldson v. Donaldson*, 12 Gr. 431; *Wilson v. Wilson*, 22 Gr. 30; 24 Gr. 377; *Re White*, *Kersten v. Tane*, 22 Gr. 517; 24 Gr. 224; *Thompson v. Torrance*, 28 Gr. 253; 9 Ont. App. 1.

This section provides that the Court may pronounce wills void for fraud and undue influence or otherwise in the same manner and to the same extent as the Court has jurisdiction to try the validity of deeds and other instruments. The cases in which Courts of Equity are accustomed to set aside deeds and other instruments for fraud, where they are voidable and not merely void, are, firstly, where there is actual fraud in the party defendant in which the party plaintiff has not participated. Secondly, where there is a constructive fraud against public policy, and the party plaintiff has not participated therein. Thirdly, where there is a fraud against public policy, and the party plaintiff has participated therein, but public policy would be defeated by allowing it to stand. And lastly, where there is a constructive fraud by both parties, but they are not in *pari delicto*: Story, s. 695.

39.—(1) The High Court may remove an executor or administrator upon the same grounds as such Court may remove any other trustee, and may appoint some other proper person or persons to act in the place of the executor or administrator so removed. ^{Powers of High Court as to removal of executor or administrator.}

(2) The order may be made upon the application of any executor or administrator desiring to be relieved from the duties of the office, or of any executor or administrator complaining of the conduct of a co-executor or co-administrator, or of any person interested in the estate of the deceased.

(3) Subject to any Rules to be made under this Act the practice in force for the removal of any other trustee shall be applicable to proceedings to be taken in the High Court under this section.

(4) Where the executor or administrator removed is not a sole executor or administrator the Court need not, unless it sees fit, appoint any person to act in the room of the person removed, and if no such appointment is made the rights and estate of the executor or administrator removed shall pass to the remaining executor or administrator as if the person so removed had died.

(5) The executor of any person appointed an executor under this section shall not by virtue of such executorship be an executor of the estate of which his testator was appointed executor under this section, whether such person acted alone or was the last survivor of several executors. ^{Executor of an executor}

Sec. 40.Order for
removal.

(6) A certified copy of the order of removal shall be filed with the Surrogate Clerk and another copy with the Registrar of the Surrogate Court by which probate or administration was granted, and such officers shall, at or upon the entry of the grant in the registers in their respective offices, make in red ink a short note giving the date and effect of the order, and shall also make a reference thereto in the index of the register at the place where such grant is indexed. The date of the grant of the letters probate or the letters of administration shall be indorsed upon the copy of the order filed with the Surrogate Court. 59 V. c. 18, s. 4; 63 V. c. 17, s. 7.

The Court will not under this section act upon a summary petition, or otherwise, than in an action, remove a trustee or executor *in invitum*: *Re Davis*, 17 P. R. 187. See also note to sec. 28, p. 18.

Juris-
diction.**40.** The High Court shall also have jurisdiction—In matters
testamentary.
Rev. Stat. c. 59.

1. In matters testamentary as provided in sections 33 to 35 inclusive of *The Surrogate Courts Act*.

Appeals
against judg-
ment of com-
missioners
under Rev.
Stat. c. 33.

2. On any appeal from the judgment or decision of the Commissioners under *The Act to Prevent Trespasses to Public Lands*, as provided in the said Act.

Lunatics
and infants.
Rev. Stat.
cc. 65 and
168.

3. In respect of lunatics and infants and their property and estates, as provided by *The Act respecting Lunatics* and *The Act respecting Infants*.

Testamentary
guardians.
Rev. Stat. c. 168.

4. In respect of guardians and trustees, as provided by *The Act respecting Infants*.

Partition.
Rev. Stat.
c. 123.

5. In respect of partition and sale of real estate as provided in *The Partition Act*. 58 V. c. 12, s. 35.

Settled
estates.
Rev. Stat.
c. 71.

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

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

The High Court has also original jurisdiction to appoint an administrator *ad litem*: *Rule 195*; but it has no original jurisdiction to grant probate of a will, or letters of administration; and where a case is transferred to the High Court from the Surrogate Court, it is usually ultimately remitted to the Surrogate Court, to issue probate or administration, as the case may require: *Thompson v. Torrance*, 28 Gr. 253; see Decree in that case: D. B. 37, fo. 192: H. & L. Forms, No. 896.

Infants.—The jurisdiction by this section conferred on the High Court over infants is cumulative with that already conferred under section 26 (2) and s. 28. As to the general jurisdiction of the Court over infants: see Story's Eq., chap. 35.

Guardians and Trustees.—The same observation applies in regard to the jurisdiction over trustees: see *supra*, s. 26 (2) and s. 28.

Partition.—The like observation applies in regard to the jurisdiction in Partition: see sec. 28, *supra*, and Story's Eq., chap. 14, and see *supra*, s. 33. The jurisdiction under *The Partition Act* may be exercised in any ordinary action for partition; and it would seem that it is not essential that the procedure prescribed by that Act should be strictly pursued, in order to enable the Court to exercise any special powers conferred by that Act: see *Bennett v. Bennett*, 8 Gr. 446; *Casey v. Casey*, 15 Gr. 309.

Leases and Sales of Settled Estates.—R. S. O. c. 71, now regulates the jurisdiction of the Court as to Settled Estates. Rules contained in the original Act 58 Vict. c. 20, regulating matters of practice under the Act are now included in the *Con. Rules*: see *Rules* 973-990, and notes.

41. The High Court shall have, generally, all the jurisdiction which, prior to the 22nd day of August, 1881, was vested in, or capable of being exercised by, the Court of Queen's Bench, Court of Chancery, Court of Common Pleas, and Courts of Assize, Oyer and Terminer, and Gaol Delivery (whether created by Commission or otherwise) and the High Court shall be deemed to be and shall be a continuation of the said Courts respectively (subject to the provisions of this Act) under the said name of "The High Court of Justice for Ontario." 58 V. c. 12, s. 36.

As to criminal jurisdiction see note to sec. 25, *supra*.

42. The jurisdiction of the High Court shall include (subject to the exceptions hereinafter contained) the jurisdiction which at the commencement of this Act, was vested in or capable of being exercised by the Judges of the said Courts respectively, sitting in Court or Chambers, or elsewhere, when acting as Judges in pursuance of any statute or law: and all powers given to any such Court, or to any such Judges, by any statute: and also all ministerial powers, duties and authorities, incident to any and every part of the jurisdiction. 58 V. c. 12, s. 37.

See Eng. Jnd. Act of 1873, s. 16.

In the corresponding English section 16 the same Courts are mentioned as above, and several others: and the jurisdiction is said to be "transferred to" the High Court—an expression which is not used in this Act.

General jurisdiction.

Existing jurisdiction of Judges continued.

Secs. 43-45. Where a person fraudulantly personating a testator had forged mortgages of the testator's estate, and an action was brought to obtain a declaration that certain mortgages were void, and to have them delivered up, Kay, J., looking at this enactment said that he was not administering equity merely, and should therefore give the plaintiff his legal remedy as to the deeds, and direct them to be delivered up as well as declare them void: *Cooper v. Vesey*, 51 L. J., Chy. 149; see also *Manners v. Mew*, 29 Ch. D. 725.

Rights and
privileges
of Judges.

43. Every Judge of the High Court shall have, use and exercise all the rights, incidents and privileges of a Judge of a Court of Record and all other rights, incidents and privileges as fully to all intents and purposes as the same were, prior to the fifth day of December, 1859, used, exercised or enjoyed by any of the Judges of any of Her Majesty's Superior Courts of Common Law at Westminster. 58 V. c. 12, s. 38.

A Judge to
sit in
Chambers.

44. The Judges of the High Court shall, in rotation or otherwise, as they may agree among themselves, sit in Chambers or elsewhere, and there transact any such business as may be transacted by a single Judge out of Court, whether such business be in the Division of the High Court to which such Judge is attached, or in another Division, subject to the right of appeal as provided in this Act and the Rules from time to time in force. 58 V. c. 12, s. 39.

As to the business which may be transacted in Chambers: see *Rule 366*; as to the jurisdiction of the Master in Chambers, Local Judges, and Local Masters, in Chambers, and the various matters excluded from their jurisdiction: see *Rules 42-49*; and as to the jurisdiction of the Master in Ordinary in Chambers: see *Rule 608*.

The business before a single Judge in Court, other than trials, is regulated by sec. 65 of the Jud. Act and *Rules 98 to 112*.

Anyone
while acting
as Judge of
Assizes in
Toronto,
may act as
Judge in
Chambers.

45. Any person sitting or acting as Judge at any Assizes or sittings of the High Court for the trial of causes, matters, and issues, in the City of Toronto, may, while so sitting or acting as such Judge, or while the Assizes or sittings last, act as a Judge in Chambers in all matters as if he were a Judge of the High Court. 58 V. c. 12, s. 40.

This section applies to the acting Judge of Assize at the City of Toronto: a similar provision is made by the following section in regard to the acting Judge of Assize in any outer county.

The power to act in Chambers hereby conferred, may be exercised not only by a Judge of the Supreme Court, but by any retired Judge of the Supreme Court, Judge of a County Court, or King's Counsel, appointed to hold the Assizes under s. 85.

The jurisdiction in Chambers under this section would seem to extend to all actions, and not merely to those entered for trial: see sec. 46.

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Orders made by a Judge at the Assizes in actions set down for trial thereat should be signed by the officer who acts as registrar at such sittings: *Waghorn v. Hawkins*, 12 P. R. 145. The same rule probably applies to orders made in Chambers by the Judge of Assize. Secs. 46-48.

It is the duty of the officer signing the order to see that it is in proper form, and correctly embodies the order actually made by the Judge, and that the Court fees thereon are duly paid. It should be entered in the proper office: *Rule 635*.

The Court has power to make any interlocutory order which is reasonably asked for, as auxiliary to the administration of justice at the hearing: *Smith v. Peters*, L. R. 20 Eq. 511.

46. Any person acting as a Judge at any Assizes or sittings of the High Court for the trial of causes, matters and issues, may, in and for the county in which he is acting, and while the sittings of the said Court last, act as a Judge in Chambers in all matters entered for trial before him, as if he were a Judge of the High Court. Anyone sitting as Judge of Assize may during sittings act as Judge in Chambers. 58 V. c. 12, s. 41.

See note to sec. 45. It will be noticed that this section is not so wide in its terms as sec. 45, and the jurisdiction in Chambers hereby conferred on the Judge of Assize is not general, but limited to the "matters entered for trial before him."

There is nothing to prevent a Judge sitting at the Assizes from hearing a Chamber motion if he is disposed to treat the Court room as his Chambers: *Sarnia, etc. v. Perdue*, 11 P. R. 224.

47. The several jurisdictions vested in the said High Court, shall not be exercised except [in the name of] the said High Court as provided by this Act, save as otherwise in this Act provided. Jurisdiction to be exercised in name of High Court. 58 V. c. 12, s. 42.

In Eng. J. A. 1873, c. 22, was the word "by" instead of the words in brackets.

Orders made by a single Judge in Court, or in Chambers, are not drawn up as the order of the Judge making them, but of the High Court. All judgments and orders, whether made by a single Judge or by a Divisional Court, are to show the names of the Judge or Judges who pronounced the same: *Rule 623*. This is usually done by inserting the name or names of the Judge or Judges in the margin of the order under the title of the Court: see Forms 102, 103 (H. & L. Forms, Nos. 908, 910).

48. The jurisdiction of (a) the High Court of Justice and the Court of Appeal, respectively, shall be exercised (so far as regards procedure and practice) in the manner provided by this Act, or by Rules and Orders of Court now in force or to be made pursuant to this Act; and where no special provisions are contained in this Act or in any such Rules or Orders with reference thereto, it shall be exercised as nearly as may be in the same manner as prior to the 22nd day of August, 1881. Jurisdiction to be exercised according to Rules of Court. 58 V. c. 12, s. 43.

Sec. 49.

(a) Instead of the word "of," the English Act has the words "by this Act transferred to."

The concluding clause must probably be taken to be modified by *Rules 2 and 3*, which repeal the practice and procedure existing prior to 22nd Aug., 1881 (except in certain cases in which it is expressly continued in the *Con. Rules*), and provide that in the absence of any special provision the practice is to be regulated by analogy to the *Con. Rules*: see notes to those *Rules*, and to sec. 128.

As to the jurisdiction given to a Judge as a *persona designata*, and the mode of enforcing orders made by him in that capacity: see R. S. O. c. 76; 63 Vict. c. 17, s. 14.

JURISDICTION OF THE COURT OF APPEAL.

Juris-
diction of
Court of
Appeal.

49. The Court of Appeal shall continue to be a Superior Court of Record with appellate jurisdiction in civil and criminal cases and matters. 4 Ed. vii. c. 11, s. 2.

Civil Jurisdiction of the Court of Appeal.—The jurisdiction of the Court in civil cases is partly original and partly appellate. It is entirely of statutory origin, and is regulated by sections 50 and 72-77 *infra* of the Judicature Act, and the Acts referred to in those sections.

Where a *habeas corpus* is granted in a civil proceeding, *e.g.*, for obtaining the custody of a child, an appeal lies to a Divisional Court from an order of attachment for disobedience to the writ: see 74 (1); whether a further appeal to the Court of Appeal would lie from the order of the Divisional Court would depend upon secs. 50, 75 and 76, as in any other civil case: see *Reg. v. Barnardo*, 23 Q. B. D. 305; an appeal to the Court of Appeal lies from the order of a single Judge remanding a person to custody upon a return to a *habeas corpus* issued under R. S. O. c. 83: see R. S. O. c. 83, s. 6; *Re Harper*, 23 Ont. 63, and section 50 (2) clause (i) *infra*.

Criminal Jurisdiction of Court of Appeal.—This section does not enlarge the civil jurisdiction of the Court of Appeal, and of course cannot give it any criminal jurisdiction which it does not otherwise possess: see *Cox v. Hakes*, 15 App. Cas. per Lord Bramwell, p. 527. The criminal jurisdiction of the Court of Appeal now extends only to those cases in which it is conferred by Dominion legislation, and those in which an appeal is given by statute of the Province in respect of branches of laws within the power of the Province to enact: see *Reg. v. Eli*, 13 Ont. App. 526; R. S. O. c. 91; *Reg. v. Cushing*, 26 Ont. App. 248; and perhaps also to appeals from a Divisional Court of the High Court refusing a *habeas corpus*, or refusing to discharge a prisoner in a criminal proceeding upon a return to a *habeas corpus*: see 29 & 30 Vict. c. 45, s. 6 (which is to be found at p. 446 in the volume of the Statutes of Canada and the Provinces, not repealed, and yet not included in R. S. C. 1886; *Reg. v. Brown*, 6 Ont. App. 386; *Reg. v. Boucher*, 4 Ont. App. 191. In these cases it was held that there is no appeal under the latter statute to the Court of Appeal from a single Judge; but see *contra*, *Reg. v. St. Clair*, 27 Ont. App. 308, where R. S. O. c. 83, was assumed to be applicable. Where a *habeas corpus* is refused an appeal lies to the Court of Appeal and its judgment is final: see *Taylor v. Scott*, 30 Ont. 475. No appeal to the Court

of Appeal lies from an order of the High Court discharging a prisoner **Sec. 50.** on the return of a *habeas corpus* in a civil, and a *fortiori* in a criminal proceeding: see *Cox v. Hakes*, 15 App. Cas. 506 (and see *per Lord Halsbury, L.C.*, pp. 514 and 522).

In *Reg. v. Cushing*, 26 Ont. App. 248. It was held that no appeal lies to the Court of Appeal from an order of a Divisional Court quashing a conviction by a Police Magistrate for a breach of a municipal by-law. Whether under the recent enactments of 4 Ed. vii. c. 11 (see *infra*, section 67 (1) (c), and section 75), there would be an appeal in such case, and in the case of convictions generally, for offences against Ontario statutes, *quære?* It may be that the question of appeal in such case depends on whether the case falls within the terms of sec. 76: see *Re v. Mancion*, 8 O. L. R. 24. *See Addenda*

In the case of convictions under Dominion legislation there would seem to be no appeal to the Court of Appeal unless one is given by Dominion legislation.

For instances in which the Court of Appeal has exercised appellate jurisdiction in criminal cases arising from a breach of Provincial Statutes: see *Reg. v. Potter*, 20 Ont. App. 516; *Reg. v. Sloan*, 18 Ont. App. 482; *Reg. v. Hazen*, 20 Ont. App. 633; *Reg. v. Elborne*, 19 Ont. App. 439; *Reg. v. Hodge*, 7 Ont. App. 246, (where the cases arose under *The Liquor License Act*: R. S. O. c. 245. s. 3), and *Reg. v. Edwards*, 19 Ont. App. 706; *Reg. v. Wason*, 17 Ont. App. 221 (under R. S. O. c. 91, see s. 3). As to the legislative authority of a Provincial Legislature in regard to offences against Provincial Acts: see *Atty.-Gen. for Ontario v. Hamilton Street Railway Co.*, 1903, A. C. 524.

The "Court of Appeal" referred to in the Cr. Code, s. 742, is "the Court of Appeal for Ontario": see Cr. Code. s. 3 (c); as amended by 63-64 V. c. 46.

In civil and criminal cases, the jurisdiction of the Court of Appeal is appellate only: see *Brown v. Collins*, W. N. 1883, 155. It has original jurisdiction in election cases (s. 50) and in cases relating to constitutional or provincial questions referred under R. S. O. c. 84.

50.—(1) The Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment, order or decision, save as in this Act mentioned, of a Divisional Court of the High Court, subject to the provisions of this Act, and to such Rules and Orders of the Court for regulating the terms and conditions on which appeals shall be allowed, as are now in force or may be made pursuant to this Act. 4 Ed. vii. c. 11. s. 2, *part.*

(2) The Court of Appeal shall also have jurisdiction as provided by

- (a) *The Ontario Voters' Lists Act*,
- (b) *The Ontario Election Act*,
- (c) *The Ontario Controverted Elections Act*,
- (d) *The Registry Act*,

See R. S. O. c. 136, s. 110.

Jurisdiction
in appeals
from
Divisional
Court.

Additional
jurisdiction
under cer-
tain statutes
R. S. O. c. 7.
R. S. O. c. 9
R. S. O. c. 11.
R. S. O. c. 136.

Secs. 51-52.
R.S.O. c. 222.

(e) *The Joint Stock Companies Winding-up Act (Ontario).*

4 Ed. vii.
c. 23.

(f) *The Assessment Act,*

See 4 Ed. vii. c. 23, s. 75 (61); *Re Toronto Ry.*, 18 P. R. 489.

R.S.O. c. 245.

(g) *The Liquor License Act,*

R.S.O. c. 91.

(h) *An Act respecting appeals to the Court of Appeal on Prosecutions to enforce Penalties and punish Offences under Provincial Acts.*

R.S.O. c. 83.

(i) *An Act for more effectually securing the Liberty of the Subject,*

R.S.O. c. 153.

(j) *The Mechanics' and Wage Earners' Lien Act.*

55-6 V. c. 29
(D).

(k) *The Criminal Code, 1892, and amendments thereto.*

R.S.C. c. 129.

(l) *The Revised Statutes of Canada, Chapter 129 (The Winding-up Act), and amendments thereto.*

R.S.O. c. 250.

(m) *The Municipal Drainage Act,*

R.S.O. c. 24.

(n) *The Succession Duty Act, and*

(o) *Any other Act of the Parliament of Canada or of the Legislature of Ontario.*

Appeal from
Divisional
Court—
present
rights con-
tinued.

(3) For greater certainty it is hereby declared that notwithstanding the provisions of section 75 an appeal shall lie to the Court of Appeal from any judgment, order or decision of a Divisional Court in any of the cases mentioned in sub-section 2 in which such appeal now lies. 4 Ed. vii. c. 11, s. 2, *part*.

May quash
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51 The Court of Appeal shall have power to quash proceedings in cases brought before it, in which appeal does not lie, or where such proceedings are taken against good faith. 58 V. c. 12, s. 46.

Where a party had lodged an appeal contrary to an undertaking he had given not to appeal, it was held that the Master in Chambers had jurisdiction to enforce the undertaking by setting aside the proceedings in appeal; *Donovan v. Haldane*, 14 P. R. 106. *Semble*, in such a case the order should now be made in the Court of Appeal. See *Rule 799*, and see, 131, *infra*, and note to s. 54.

To make
whatever
order may
be required

52. The Court of Appeal shall have power to dismiss an appeal, or give any judgment and make any decree or order which ought to have been made, and to direct the issue of any process, or the taking of any proceedings in the Court below.

or to award restitution and payment of costs, or to make Sec. 52. such further or other order as the case may require. 58 V. c. 12, s. 47.

The Court may make such order as is justified by the law as then existing, though the effect be to vary a decision of the Court below, which was in accordance with the then existing law: *Quilter v. Mapleson*, 47 L. T. 561; *Re Gillespie and Toronto*, 19 Ont. App. 713.

While there is no rule of law or procedure which prevents the Supreme Court or any intermediate Court of Appeal from reversing the decision at the trial on the facts: *Dempster v. Lewis*, 1903; 33 S. C. R. 292; nevertheless the Supreme Court in its discretion has refused to reconsider concurrent findings of the Courts below on the facts; see *Matthews v. Bouchard*, 28 S. C. R. 580; *G. T. Ry. Co. v. Rainville*, 29 S. C. R. 201; and the rule generally followed by the Courts is not to review the findings of the Judge of first instance, where his decision depends upon the balance of testimony: *Hall v. Kennedy*, 8 Ont. App. 157; *Cook v. Patterson*, 10 Ont. App. 645. Review of questions of fact.

The appellate Court, however, is not deterred from reversing such a judgment merely by the consideration that the Judge of first instance had the advantage of seeing the demeanour of the witnesses and their manner of giving their evidence, unless the decision of the case rests upon the credibility of the witnesses, and the Judge in determining the credit to be given to them proceeded upon their demeanour: see *Day v. Brown*, 18 Gr. 681; *Morrison v. Robinson*, 10 Gr. 480; *Armstrong v. Gage*, 23 Gr. 1; *Ryon v. Ryan*, 5 S. C. R. 406; *The Picton*, 4 S. C. R. 648; *Little v. Brunker*, 28 Gr. 191; *The Glanibanta*, 1 P. D. 283; *Bigsby v. Dickinson*, 4 Ch. D. 24; *Symington v. Symington*, L. R. 2 Sc. App. 424; *Gray v. Turnbull*, *ib.* 53; *Redgrave v. Hurd*, 20 Ch. D. 22; *Trumpour v. Saylor*, 1 Ont. App. 104; *Taylor v. Taylor*, *ib.* 264; *Re Randolph*, *ib.* 331; *The Milanese*, 43 L. T. 107; *Bickford v. Hawkins*, 19 S. C. R. 362; *Warner v. Hurroy*, 16 S. C. R. 720; *N. British, etc., Co. v. Tourville*, 25 S. C. R. 177; *Coghlan v. Cumberland*, 1898, 1 Ch. 704; 78 L. T. 540; *Lefeunteum v. Beau-doin*, 28 S. C. R. 89.

Where the appellate Court has the same materials before it as the Court whose decision it is reviewing, the above considerations do not apply: *Redgrave v. Hurd*, 20 Ch. D. 23; *e.g.*, where evidence was taken by commission; *Malzard v. Hart*, 27 S. C. R. 510; and the Court will exercise its judgment on the evidence just as it would on a question of law. It will reverse the judgment if satisfied that it is wrong: *Berdan v. Greenwood*, 20 Ch. D. 769 n.; *Jones v. Hough*, 5 Ex. 11, 122; *Prentice v. Consolidated Bank*, 13 Ont. App. 69; otherwise it will affirm it: *Symington v. Symington*, *sup.*; *Hale v. Kennedy*, 8 Ont. App. 157. See also *Card v. Cooley*, 4 C. L. T. 248; *Berthier Election Case*, 9 S. C. R. 102; *Grasett v. Carter*, 10 S. C. R. 105.

Where the case does not so turn upon the credibility of the witnesses, but upon the proper inference to be drawn from all the evidence in the case, it is the duty of the Court to review the conclusion arrived at by the Court below upon the questions of fact: *Russell v. Lefrançois*, 8 S. C. R. 535; *Cameron v. Bickford*, 11 Ont. App. 52. Thus, where, without differing from the Judge as to the credibility of the witnesses, the appellate Court came to a different conclusion upon the evidence, documentary and written, the judgment was reversed: *Cameron v. Bickford*, 11 Ont. App. 52.

Sec. 53

Read v. Anderson, 13 Q. B. D. 781, where Brett, M.R., said that the Court of Appeal was not bound by the findings of fact by a Judge who tried the case without a jury, is not inconsistent with the above cases; see also *Sugden v. St. Leonards*, 1 P. D. 200.

In appeals to the Judicial Committee of the Privy Council, where there have been concurrent findings of fact by the Courts below, the question in appeal in the P. C. is not what conclusion the P. C. would have arrived at if the matter had come for the first time before them, but whether it has been established that the Courts below were clearly wrong: *Allen v. Quebec Warehouse Co.*, 12 App. Cas. 111.

The Supreme Court of Canada refused to interfere with a decision of the Court of Appeal in a matter of procedure, viz., whether a verdict of a jury was a general or a special verdict: *Toronto Railway Co. v. Balfour*, 32 S. C. R. 231.

The amount of damages awarded by the Judge at the trial will not be interfered with by an appellate Court unless clearly unsupported by evidence and unreasonable, or there is some error of fact, or law, or partiality, on the part of the Judge: *Coussette v. Dun*, 18 S. C. R. 222; *Montreal Gas Co. v. St. Laurent*, 26 S. C. R. 176; in *McGarr v. Prescott*, 4 O. L. R. 250, the damages were reduced from \$1500 to \$900.

The Court has power under this section, and sec. 53, to increase damages awarded to a respondent without a cross appeal by him: *Toronto Junction v. Christie*, 25 S. C. R. 551.

The Supreme Court refused to disturb a verdict attacked as being against the weight of evidence after it had been affirmed by the Court of Appeal: *Toronto Railway Co. v. Balfour*, *supra*.

Powers of
Court of
Appeal.

53. The powers of the Court of Appeal may be exercised, notwithstanding that the appeal is brought against part only of the judgment of the Court below; and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from, or complained of the judgment. 58 V. c. 12, s. 48.

One of two or more plaintiffs (*Beckett v. Attwood*, 18 Ch. D. 511), or counter-claiming defendants (*Hester v. Hester*, 71 L. T. Jour. 153), where the claim or counter-claim respectively is dismissed, may appeal, where the others refuse to join they being made respondents.

As to how far a party not appealing can obtain relief on an appeal by another party: see *Black v. Black*, 9 Gr. 413; 2 E. & A. 419; *Sampson v. McArthur*, 8 Gr. 84; *Topping v. Joseph*, 1 E. & A. 305, 322; *Kent v. Freehold, etc.*, L. R. 3 Chy. 493; *Vaughan v. Halliday*, L. R. 9 Chy. 561; *Gilbert v. Jarvis*, 16 Gr. 275, 279; *Saffron Waldron Benefit Co. v. Bayne*, 14 Ch. D. 406, 419; *Dilke v. Douglas*, 5 Ont. App. 43 (as to which see 1 O. L. R. p. 294); *Peterkin v. McFarlane*, 6 Ont. App. 254; *R. Gaborie*, 12 P. R. 252; *Esdaile v. Piquet*, 50 L. T. 804; 40 Ch. D. 520; *R. Rawlins*, 45 Ch. D. 299; *Toronto Junction v. Christie*, 25 S. C. R. 551; *Hackin v. Robidon*, 7 Gr. 215; *Hunter v. Hunter*, 24 W. R. 527; *Challoner v. Lobo*, 1 O. L. R. 292; *Atty.-Gen. v. Simpson*, 1901, 2 Ch. 671; 85 L. T. 325.

Leave to appeal may be given to a person interested, but not a party: *Re Markham*, 16 Ch. D. 1; *Re Securities, etc., Co.*, 1894, 2 Ch. 410; but only where his interest is such that he might have been made a party by service: *Crawcour v. Salter*, 30 W. R. 329; see also *Langtry v. Dumoulin*, 11 Ont. App. 544; *Wood v. Madras*, 23 Ch. D. 248; *Watson v. Cave*, 17 Ch. D. 19; *Re Claggett*, 30 W. R. 374; *Ex p. Tupper*, 12 Ch. D. 308; *Re Youngs, Doggett v. Revett*, 33 W. R. 880; 53 L. T. 682.

54. In any cause or matter pending before the Court of Appeal any direction incidental thereto, not involving the decision of the appeal, may be given by a single Judge of the Court of Appeal; and a single Judge of the Court of Appeal may at any time during vacation make any interim order to prevent prejudice to the claims of any parties pending an appeal, as he may think fit; but every such order made by a single Judge may be discharged or varied by the Court of Appeal or a Divisional Court thereof. 58 V. c. 12, s. 49.

Power of a single Judge in Court of Appeal.

Same as Eng. Jud. Act, 1873, s. 52.

A matter becomes pending before the Court of Appeal upon the service of notice of intention to appeal: *Rule 799*; see also *Sugden v. St. Leonards*, 1 P. D. 200.

A matter is ~~not~~ pending in the Court of Appeal after its decision has been certified under *Rule 818*; *Hargrove v. Royal Templars*, 2 O. L. R. 126; and a Judge of the Court of Appeal has no jurisdiction thereafter to stay proceedings pending a proposed appeal to the Supreme Court, either under s. 54 or 60-61 Viet. c. 34, s. 1 (D.) *Ib.*

On an appeal by a party committed for extradition it would seem that a single Judge of the Court of Appeal has no jurisdiction under this section to admit the applicant to bail: *Re Watts*, 3 O. L. R. 279.

Where pending an appeal from an order refusing an injunction to restrain erection of buildings, the buildings were completed before the appeal could be argued, it was said that an interim order should have been applied for under the corresponding section of the Eng. Act: *Johnstone v. Royal Courts*, W. N. 1883, 5.

In a matter of discretion an order made by a single Judge will not be interfered with by the Court: *Acill v. Tracellers' Ins. Co.*, 9 Ont. App. 54; *Platt v. G. T. Ry. Co.*, 12 P. R. 380.

55. For all the purposes of and incidental to the hearing and determination of any such appeal, and the amendment, execution, and enforcement of any judgment or order made on such appeal, and for the purpose of every other authority given to the Court of Appeal by this Act, the said Court of Appeal shall have all the power, authority and jurisdiction by this Act vested in the High Court. 58 V. c. 12, s. 50.

On an appeal Court of Appeal to have all powers of High Court.

This corresponds substantially with the second part of the English J. A. 1873, section 19.

This section only confers additional powers on the Court of Appeal without interfering with the practice under the *Rules*, so that

Secs. 56, 57. execution for costs, etc., awarded by the Court of Appeal is to be issued out of the Court appealed from: *Freed v. Orr*, 2 C. L. T. 90; see *Lowson v. Canada Farmers' Ins. Co.*, 8 Ont. App. 613; *Rule 818*; and *Cox v. Hakes*, 15 App. Cas. 520.

Jurisdic-
tion subject
to Rules, etc.

56. The jurisdiction and power of the Court of Appeal, in respect of the said matters and all others, shall be and are subject to the provisions of this Act, and to such Rules and Orders of Court for regulating the terms and conditions on which such appeals shall be allowed as are now in force or as may be made pursuant to this Act. 58 V. c. 12, s. 51.

Same in effect as Eng. J. A., 1873, s. 19, first part.

RULES OF LAW.

Law and
equity to
be concu-
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57. In every civil cause or matter commenced in the High Court of Justice, law and equity shall be administered by the High Court and the Court of Appeal respectively according to the rules following:

Equitable
relief.

1. If any plaintiff or petitioner claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument or contract, or against any right, title or claim whatsoever asserted by any defendant or respondent in such cause or matter, or to any relief founded upon a legal right which heretofore could only have been given by a Court of Equity, the said Courts respectively, and every Judge thereof, shall give to such plaintiff or petitioner such and the same relief as ought to have been given by the Court of Chancery in a suit or proceedings for the same or the like purposes properly instituted before the passing of *The Judicature Act, 1881*.

44 V. c. 12.

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

This and the next section deal with the old anomaly of different Courts, recognizing different rights and duties, applying different remedies to the same case, and in some cases even enforcing rules of law in conflict with one another. The removal of the conflict of law is provided for by sec. 58. The rest of the matter is dealt with in the present section, the provisions of which have been summarized thus:—

The plaintiff may assert an equitable claim in the High Court (sub-sec. 1); and may obtain an equitable remedy (*ibid.*); the defendant may raise any equitable answer or defence to any claim; that is to say, anything which would formerly have been good by way of answer if the suit had been brought in Chancery (sub-sec. 2), or would have afforded ground for an injunction if the action had been

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brought at law (sub-sec. 9); and he may assert, by way of counter-^{Sec. 57.} claim against the plaintiff, any claim, legal or equitable, which he might have raised by a cross suit at Law, or in Equity (sub-sec. 7); the defendant may also obtain relief relating to, or connected with, the original subject of the action, against other persons, whether already parties or not (*ibid.*). The Court is to recognize equitable rights incidentally appearing (sub-sec. 8); no cause is to be restrained by injunction; what would have been ground for injunction is to be raised by way of defence, or upon an application to stay proceedings (sub-sec. 9). Subject to these provisions, Common Law rights and duties are to be recognized (sub-sec. 11). Every Court is to apply all appropriate remedies, and dispose of all matters in controversy (sub-sec. 12). (*Wilson Jud. Act*, 7th ed., p. 15).

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

In *Adamson v. Adamson*, 7 Ont. App. 592, the opinion was expressed by Burton, J.A., that notwithstanding the Jud. Act, the owner of an equitable estate cannot proceed to recover possession of land against a trespasser in possession, but was bound to sue in the name of the person having the legal estate. This opinion did not form part of the judgment of the Court in the case, and was founded upon the view that before the Administration of Justice Act, 1873, ejectment would not lie in such a case, and that the latter Act only enabled the Court of Chancery to entertain suits for ejectment in the same way as the Courts of Common Law. The point, which did not there distinctly arise, as the proceedings were before the Jud. Act, has since been considered in *Heenan v. Heenan*, 3 C. L. T. 163; *Thorne v. Williams*, 13 Ont. 577, and *Gordon v. Armstrong*, 16 P. R. 432; see also *Jones v. McGrath*, 16 Ont. 617, where the opinion was expressed that since the Jud. Act, such an action may be maintained by the equitable owner in his own name; but the owner of the legal estate should also be made a party to the action: *Cope v. Crichton*, 30 Ont. 603; *Allen v. Woods*, 68 L. T. 143; *Saylor v. Cooper*, 2 Ont. 338; *Fairclough v. Marshall*, 4 Ex. D. 37; and *Goodrich v. Everglyn Coal Co.*, W. N. 1889, 152.

In an action of ejectment by the owner of the legal title, he was, on the counter-claim of the defendant setting up an equitable title, ordered to convey the legal estate to the defendant: *Trinidad Asphalt Co. v. Corput*, 1896, A. C. 587.

For definitions of "plaintiff," "petitioner," "defendant," see s. 2.

2. The High Court shall have jurisdiction to en-^{Jurisdiction as to validity of Provincial statute.}tertain an action at the instance of either the Attorney-General for the Dominion, or the Attorney-General of this Province, for a declaration as to the validity of any statute, or any provision in any statute of this Legislature.

THE JUDICATURE ACT.

though no further relief should be prayed or sought; and the action shall be deemed sufficiently constituted if the two officers aforesaid are parties thereto. A judgment in the action shall be appealable like other judgments of the said Court.

Under this sub-section or R. S. O. c. 84, cases have been submitted as to the validity of 53 V. c. 56, s. 18: *Re Local Option Act*, 18 Ont. App. 572; 24 S. C. R. 145, 170; 1896, A. C. 348; of 51 V. c. 5 (O.) (remitting of sentences): *Atty.-Gen. for Canada v. Atty.-Gen. for Ontario*, 20 Ont. App. 222; 19 Ont. App. 31; 23 S. C. R. 458; of R. S. O. 1897, c. 147, s. 11: *Re Assignments and Preferences Act*, 20 Ont. App. 480; 1894, A. C. 189; of R. S. O. c. 173, s. 6: *Re Queen's Counsel*, 23 Ont. App. 792; S. C. sub. nom. *Atty.-Gen. for Canada v. Atty.-Gen. of Ontario*, 1898, A. C. 247.

As to the questions which should be put under R. S. O. c. 84: see *Atty.-Gen. for Ontario v. Hamilton Street Ry. Co.*, 1903, A. C. 524.

See sec. 60, *infra*, which provides for the case of the validity of a Statute of Canada or of Ontario being questioned in an ordinary action.

The Supreme Court has no jurisdiction to entertain an appeal from the opinion of a Provincial Court upon a reference made by the Lieut.-Governor in Council under a Provincial Act, although the statute provides that such opinion shall be deemed a judgment of the Court: *Union Colliery Co. v. A.-G. of Brit. Columbia*, 27 S. C. R. 637.

Relief
against
penalties,
etc.

3. Subject to appeal as in other cases, the High Court shall have power to relieve against all penalties and forfeitures. (a) and in granting such relief to impose such terms as to costs, expenses, damages, compensation, and all other matters, as the Court thinks fit.

Taken from 49 V. c. 16, s. 38; 58 V. c. 12, s. 52 (3), which, however, had at (a) the words "and agreements for liquidated damages" struck out subsequently by 60 V. c. 15, Sched. (64).

See also secs. 30, 57 (8), to which this section is supplementary. Similar power was at the same time (see 49 V. c. 16, s. 38), conferred upon the County and Division Courts: see R. S. O. c. 55, s. 28, and c. 60, s. 75. It has not been determined whether there is power to relieve against a forfeiture which a Court of Equity would not formerly relieve against; *e.g.* for breach of a covenant not to assign or sublet without leave; but the Court has refused to give such relief. *Barrow v. Isaacs*, 1891, 1 Q. B. 417; 64 L. T. 686; *Eastern Tel. Co. v. Dent*, 1899, 1 Q. B. 835. A forfeiture for such a breach was not formerly relieved against in Equity: *Hill v. Barclay*, 18 Ves. 63, and the relief does not seem to be contemplated by R. S. O. c. 170, sec. 13, sub-sec. 6), passed in 1886 in the same Session in which the present section was enacted.

When the party seeking relief has himself by negligence or design participated in, or contributed to the forfeiture, query, is he entitled to relief: see *Lurray v. Oakshette*, 1897, 2 Q. B. 218.

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The Court would seem to have no jurisdiction under this section **sec. 57.** to relieve against the payment of liquidated damages for breach of contract: *Empire Loan & S. Co. v. McKee*, 5 O. L. R. 710; although it had under 58 V. c. 12, s. 52 (3) as originally framed: see *Townsend v. T. H. & B. Ry.*, 28 Ont. 196; and see *Clyde Engineer, etc., Co. v. Castuneda*, 91 L. T. 686.

4. No appointment, which after the 25th day of **March, 1886**, is made in exercise of a power to appoint any property, real or personal, among several objects, shall be adjudged to be invalid on the ground that any object of the power has been altogether excluded, and an appointment shall be valid and effectual notwithstanding that one or more of the objects shall not thereby or in default of appointment take a share or shares of the property which is subject to the power.

But nothing in this subsection shall prejudice or affect any provision in any deed, will or other instrument creating a power, which shall declare the amount or the share or shares from which no object of the power shall be excluded, or shall declare some one or more object or objects of the power who shall not be excluded.

Adopted from Imp. Act, 37 & 38 V. c. 37. See further provisions, R. S. O. c. 330, ss. 31 and 33.

As to the law before the Act, see *Bulfeel v. Plummer*, L. R. 6 Chy. 160. The Act applies only to an appointment made after 25th March, 1886, not to one made before, though only taking effect after that date: see *Moyman v. Moyman*, 1 L. R. Ir. 382.

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

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

Chancery Order 538 was held only to apply to cases where the plaintiff was entitled to relief consequent upon the declaration he asked, if he chose to claim it, but it was held not to apply to cases where the plaintiff was not entitled to claim any relief consequent upon the declaration: *Rooke v. Lord Kingsdown*, 2 K. & J. 753; *Clark v. Cook*, 23 Gr. 110; *Copswell v. Sugden*, 24 Gr. 474; *Brookes v. Conley*, 8 Ont. 549. Thus, a decree was pronounced declaring the true construction of a will, without directing administration, in a

Declaratory judgments and orders.

Declaratory judgment may now be granted in favour of a party who would not be entitled to relief.

Sec. 57

case where the plaintiff was entitled to the latter relief if he desired it: *Murphy v. Murphy*, 20 Gr. 575; and see *Canada Central Ry. Co. v. The Queen*, *ib.* 303. This section was passed to enable the Court to pronounce a declaratory decree whether consequent relief could be claimed or not. But notwithstanding the power thus conferred the jurisdiction will be exercised with great caution: *Austen v. Collins*, 54 L. T. 903. See also *Grand Junction W. W. v. Hampton Urban, etc., Co.*, 1898, 2 Ch. 331.

Semble, the Court has now jurisdiction under this section to make a declaration of the legitimacy of a plaintiff, and his right in remainder to a title and estates: *West v. Sackville*, 1903, 2 Ch. 378; 88 L. T. 514.

A declaratory judgment is a judicial act, and will not be made merely on admissions of counsel, or by consent: *Williams v. Powell*, W. N. 1894, 141.

A declaratory judgment may be pronounced even though the cause of action be one at Common Law: e.g., that defendant is a trespasser on land: *Harrison v. Rutland*, 1893, 1 Q. B. 142; 68 L. T. 37; that certain land is a highway: *Toronto v. Lorsch*, 24 Ont. 227; *Callerton v. Miller*, 26 Ont. 36; *Gooderham v. Toronto*, 19 Ont. App. 641; and the rights of parties in unpatented lands: *Pride v. Rodger*, 27 Ont. 320; and regulations of defendants have been declared to be not binding upon the plaintiff, without granting any consequential relief: *London Ass'n of Shipowners v. London and India Docks*, 1892, 3 Ch. 242. *De facto* marriages may also be declared invalid: see *supra*, p. 19.

A declaration was made that a lessor was not entitled to impose a particular condition attached by him to a license to assign, and that the lessee was entitled to assign without any further consent of the lessor: *Young v. Ashley Gardens Properties, Limited*, 1903, 2 Ch. 112; 88 L. T. 541.

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

Where a right of recovery was given by statute in a Court of summary jurisdiction, it was held that the High Court had no power to make a declaratory judgment that the plaintiff had such right: *Barracough v. Brown*, 1897, A. C. 615.

A declaration was refused as to the validity of a life policy during the life of the assured, even where the Society issuing the policy had refused to accept from the holder premiums upon the ground that the policy was void: *Honour v. Equitable Life, etc.*, 1900, 1 Ch. 852.

A declaration that a debtor was the beneficial owner of a claim against the Dominion Government, was refused, the plaintiff not being in a position to claim any consequential relief: *Stewart v. Guibord*, 6 O. L. R. 202.

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A declaration of right in respect of a matter which the Legislature had expressly assigned to the Surrogate Court Registrar was also refused: *Attorney-General v. Cameron*, 20 Ont. App. 103. Sec. 87.

A declaratory decree was refused under the former practice where it was sought for the purpose of protecting the plaintiff against a contingent claim by the defendant: *Jackson v. Turnley*, 1 Drew, 617; and see *Cogswell v. Sugden*, *supra*; and also where it was sought to affect future rights in events which had not happened: *Lungdale v. Briggs*, 8 D. M. & G. 391; *Dowling v. Dowling*, L. R. 1 Chy. 412; or persons entitled in reversion: *Guthrie v. Lawson*, 10 Ha. App. xv.; or not in case, *Bright v. Tyndall*, 4 Ch. D. 189; or to declare a purely legal question as against infants, even by consent: *Webb v. Byng*, 8 D. M. & G. 633; *De Windt v. De Windt*, L. R. 1 H. L. 87; or to declare a merely legal right: *Trustees of Birkenhead Docks v. Laird*, 1 D. M. & G. 732; *Bristow v. Whitmore*, 4 K. & J. 743; *Metropolitan Board of Works v. Sant*, L. R. 7 Eq. 197; *Jenner v. Jenner*, L. R. 1 Eq. 361; see also *Miller v. Robertson*, 35 S. C. R. 80; but see now *supra*. Other cases in which declaratory judgments have been refused.

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

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

County Courts.—This sub-section applies to County Courts in cases otherwise within the jurisdiction of a County Court: *Bradley v. Barber*, 30 Ont. 443, 449.

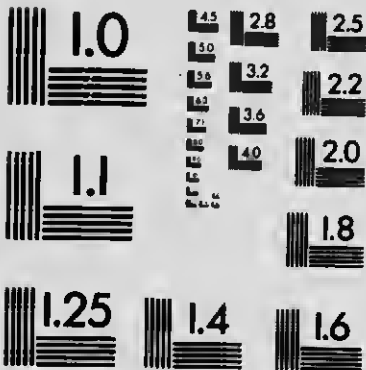
6. If any defendant claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument or contract, or against any right, title or claim asserted by any plaintiff or petitioner in such cause or matter, or alleges any ground of equitable defence to any claim of the plaintiff or petitioner in such cause or matter, the said Courts respectively, and every Judge thereof, shall give to every equitable estate, right or ground of relief so claimed, and to every equitable defence so alleged, such and the same effect, by way of defence against the claim of such plaintiff or petitioner, as the Court of Chancery ought to have given if the same or the like matters had been relied on by way of defence in any suit or proceedings instituted in that Court for the same or the like purposes before the passing of *The Ontario Judicature Act, 1881*. Equitable defences.

Identical with Eng. Ind. Act, 1873, s. 24, sub-sec. 2.



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Sec. 57.

See this section applied in *Mostyn v. W. Mostyn*, 1 C. P. D. 145; *Hughes v. Metropolitan, etc.*, *ib.* 120; *Eyre v. Hughes*, 2 Ch. D. 148; *Marshall v. Marshall*, 5 P. D. 19; *Emmerson v. Ind.*, 12 App. Cas. 300; *Cooper v. Vesey*, 20 Ch. D. 611. See also sub-sec. 8.

Relief which
may be
granted to
defendants.

7. The said Courts respectively, and every Judge thereof, shall also have power to grant to any defendant in respect of any equitable estate or right or other matter of equity, and also in respect of any legal estate, right or title claimed or asserted by him, all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleading, and as the said Courts respectively, or any Judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner; and also all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any rule of Court or any order of the Court, as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose; and every person served with any such notice shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claim as if he had been duly sued in the ordinary way by such defendant.

Identical with Eng. Jud. Act. 1873, s. 24 (3).

The Rules respecting set-off and counterclaims (*Rule 251. et seq.*), and third parties (*Rules 209-216*) were made in furtherance of the powers conferred by this sub-section. See notes to those Rules.

As to how far Rules have been made to regulate the exercise of the powers conferred by this section of granting relief between co-defendants: see *Treleavan v. Bray*, 45 L. J. Chy. 113; and notes to *Rule 209, et seq.*

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

In *Mudge v. Adams*, 50 L. J. Pro. 49; 17 C. L. J. 369, an action propounding the will of a married woman made after she had obtained a protection order, and become possessed of separate estate, the defendant set up that the protection order had been fraudulently

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obtained, and claimed by way of cross relief to have it set aside, *Sec. 57.* the will pronounced against, and administration granted to the defendant: and it was held to be within this section as asserting by counterclaim what might be asserted in a suit against the same plaintiff.

A defendant is not bound to make his cross claims in the same action, but may assert them by cross action. Thus where an action was brought against shippers and consignees for damages for detention at the port of lading, and for freight, and the defendants brought a cross action for a larger sum for damages for loss of cargo by the shipowners' negligence, and the writs were issued on the same day and statement of claim delivered first in the former action, a Master stayed proceedings in the second action with liberty to the plaintiffs in it to file a counterclaim in the first action; but it was held on appeal that though there was jurisdiction to make such an order, it should only be exercised where the points in issue are the same, and that in the case in question the right to bring a cross action should not be interfered with: *Adams v. Tuff*, 44 L. T. 420. See also the notes to sec. 57 (9) and *Rule 435*.

As to the effect of the concluding words of this section, see *Fowler v. Knoop* in note to *Rule 209*.

8. The said Courts respectively, and every Judge thereof, shall recognize and take notice of all equitable estates, titles and rights, and all equitable duties and liabilities appearing incidentally in the course of any cause or matter, in the same manner in which the Court of Chancery would have recognized and taken notice of the same in any suit or proceedings duly instituted therein before the passing of *The Ontario Judicature Act, 1881.* Courts to take notice of equitable rights and duties.

44 v. c. 5.

Identical with the Eng. J. A., 1873, section 24 (4).

In *Williams v. Snowden*, W. N. 1880, 124, a plaintiff in ejectment was ordered specifically to perform an agreement to lease the premises to defendant, which agreement, though not raised by defence, appeared incidentally in the cause. See *Mostyn v. W. Mostyn, etc.*, 1 C. P. D. 145; *Borrowes v. Delancy*, 24 L. R. Ir. 503, where it incidentally appeared that a party was entitled to have a deed rectified. See also *Furness v. Bond*, W. N. 1888, 78; *Scott v. Brown*, 1892, 2 Q. B. 724; *Annesley v. Annesley*, 31 L. R. Ir. 457; and cases in note to sub-sec. 6.

The doctrine of Equity whereby part performance furnishes a ground for enforcing a contract not enforceable at law by reason of s. 4 of the Statute of Frauds, is confined to suits as to the sale of interests in land, and has not been extended by the Jud. Act. The Jud. Act confers no new rights, but alters procedure only: *Britain v. Rossiter*, 11 Q. B. D. 123. See also *Gibbs v. Guild*, 9 Q. B. D. 67, and notes to sec. 58, sub-sec. 8.

Under this section relief was given against a forfeiture in an action to re-enter for breach of covenant for payment of taxes which the defendant paid before statement of claim delivered: *Buckley v. Beigle*, 8 Ont. 87.

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Notwithstanding this sub-section an equitable assignment is not equivalent to a legal assignment, and is not a breach of a covenant not to assign without leave: *Gentle v. Faulkner*, 1900, 2 Q. B. 207; 82 L. T. 708.

Section 57 (3) also now enables the Court to relieve against penalties and forfeitures.

Restraining proceedings.

9. No cause or proceeding at any time pending in the High Court of Justice or before the Court of Appeal shall be restrained by prohibition or injunction; but every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained, prior to *The Ontario Judicature Act, 1881*, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto:

Provided always, that nothing in this Act contained shall disable either of the said Courts from directing a stay of proceedings in any cause or matter pending before it, if it shall think fit; and any person, whether a party or not (a) to any such cause or matter, who would have been entitled, prior to *The Ontario Judicature Act, 1881*, to apply to any Court to restrain the prosecution thereof, or who may be entitled to enforce by attachment or otherwise, any judgment, decree, rule or order, contrary to which all or any part of the proceedings in such cause or matter may have been taken, shall be at liberty to apply to the said Courts respectively, by motion in a summary way, for a stay of proceedings in such cause or matter either generally, or so far as may be necessary for the purposes of justice; and the Court shall thereupon make such order as shall be just.

Identical with Eng. J. A., 1873, s. 24 (5).

The effect of this sub-section is that, in ordinary cases, whatever would formerly have been ground for an injunction restraining an action must now be raised in the action, either by way of defence, or upon an application to stay proceedings: *Garbutt v. Fawcus*, 1 Ch. D. 155.

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

An application to stay proceedings in an action must be made in **Sec. 27.** the action sought to be stayed, and not by commencing a new action for an injunction: *Garbutt v. Faucus*, 1 Ch. D. 155; *Re South of France Pottery Works Syndicate*, 37 L. T. 260; *Re People's Garden Company*, 1 Ch. D. 4; *Walker v. Banagher Distillery Company*, 1 Q. B. 129; *Wright v. Redgrave*, 11 Ch. D. 24; *White v. Harrow*, 50 W. R. 166. Two decisions to the contrary, *Kinchurch v. People's Garden Company*, 1 C. P. D. 45, and *Needham v. Rivers Protection Company*, 1 Ch. D. 253, are overruled. See also *Scarle v. Choate*, 25 Ch. D. 723; *Lane v. Capsey*, 1891, 3 Ch. 411, and the same rule applies where the proceedings sought to be stayed are being taken by an officer of the Court, e.g., a sheriff: *Wright v. Redgrave*, *supra*; or a receiver: *Scarle v. Choate*, and *Lane v. Capsey*, *supra*.

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

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

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

See also *Hedley v. Bates*, 13 Ch. D. 498; (explained *Sta v. Giles* 20 Ch. D. p. 196); *Re Artistic Colour Printing Co.*, 1 Ch. D. 502; *Crowle v. Russell*, 4 C. P. D. 186.

Stay to Enforce a Compromise.—Under this clause and **sec. 57 (12)**, the Court has power to enforce a compromise entered into pending an action, and (where no terms of the compromise go beyond what is in controversy in the action: *Rees v. Carruthers*, 17 P. R. 51), to stay the action on a summary application in that action: *Eden v. Naish*, 7 Ch. D. 781; *Scully v. Lord Dundonald*, 8 Ch. D. 658; *Re Gaudet Frères Steamship, etc., Co.*, 12 Ch. D. 882; *Baker v. Baker*, 55 L. T. 723; *Smythe v. Smythe*, 18 Q. B. D. 544, followed in *Farran v. Hunter* (before Ferguson, J., 25th Sept., 1888). See also *Davidson v. Merritton*, 18 P. R. 139. The former Chy. practice required a fresh suit to be brought for specific performance of the agreement for compromise, unless it related merely to the prosecution of the suit: *Pryer v. Gribble*, L. R. 10 Chy. 534, or unless where the compromise was entered into before answer, and was set up by the answer and specific performance prayed by way of cross-relief: *Small v. Union Perm. B. S.*, 6 P. R. 206.

A separate action to enforce a compromise may still be brought: *Hart v. Hart*, 18 Ch. D. 670; *Knoules v. Roberts*, 58 L. T. 259, and may sometimes be necessary: see *Gilbert v. Eudcan*, 9 Ch. D. 259, but ordinarily it will be proper to apply in the action for such order

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as may be necessary. Where the pronouncing of some judgment is necessary to give effect to the compromise, a motion for judgment should be made to the Court; the Master in Chambers would have no jurisdiction to make an order in such a case: *Pirung v. Dawson*, 4 O. W. R. 499; though possibly he would have jurisdiction where the order required is merely to stay or dismiss the action: see *Ib.*

The decisions as to staying proceedings upon summary application in case of a compromise are not necessarily applicable to a compromise arrived at pending a reference, as under *Rule 667* the Master may after the compromise proceed to report it: *Corry v. Lemoine*, 18 P. R. 482.

An agreement as to payments after judgment in a foreclosure action was enforced by the appointment of a new day: *McCollum v. Caston*, 1 O. L. R. 240.

Setting
aside a
compromise

It has been held that the compromise cannot be set aside on summary application, and that an action is necessary: *Emeris v. Woodward*, 43 Ch. D. 185; and see *Ainsworth v. Wilding*, 1896, 1 Ch. 673; 74 L. T. 193; 1897, 2 Ch. 584; 77 L. T. 57; *Gilbert v. Endean*, 9 Ch. D. 259; but, where necessary, an issue may be directed to determine as to whether a valid agreement of compromise has been arrived at, and a stay may be directed provisionally to be continued in the event of the compromise being valid: *Rees v. Carruthers*, 17 P. R. 51; and it has also been held that the validity of a compromise agreed to by an illiterate plaintiff without the knowledge or concurrence of his solicitor, may be inquired into, without bringing a new action to set it aside, if the compromise is pleaded in the action alleged to be compromised, and, where that is done, its validity may be tried in the action: *Johnston v. G. T. Ry. Co.*, 25 Ont. 64; 21 Ont. App. 408; *Haist v. G. T. Ry. Co.*, 22 Ont. App. 504; *Davidson v. Merrittton*, 18 P. R. 139.

Where the intended compromise fails but the plaintiff has obtained some advantage, he will be required to restore it, as a condition of being allowed to continue the action: *Henderson v. Underwriting Assoc.*, 65 L. T. 616, 732; *Guy v. Walker*, 8 Times, 314.

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

Staying
vexatious
proceedings

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

"A Court of competent jurisdiction has inherent power to prevent abuse of its process, by staying or dismissing, without proof, actions which it holds to be vexatious": per Lord Watson, *Haggard v. Pelicier*, 1892, A. C. 61.

The institution of such proceedings is an abuse of the process of the Court, and they may be stayed summarily upon motion: *Edmunds v. Attorney-General*, 26 W. R. 550; 38 L. T. 213; W. N. 1878, 64. See also *Tucker v. Collinson*, 34 W. R. 355; 54 L. T. 128, 263; or dismissed: *Metropolitan Bank v. Pooley*, 10 App. Cas. 210; *Ker v. Williams*, 79 L. T. Jour. 229; W. N. 1886, 16; *Willis v. Earl Beauchamp*, 11 P. D. 59; *Blair v. Corder*, 36 W. R. 64; *Grepe v. Loam*.

37 Ch. D. 168; *Lawrance v. Lord Norreys*, 30 Ch. D. 213; 15 App. Sec. 87. Cas. 210; 62 L. T. 706; *Warwick v. East*, W. N. 1889, 8; *Willis v. Earl Howe*, 1893, 2 Ch. 545; 69 L. T. 358; e.g., actions against a public officer for an act plainly in accordance with his duty: *Castro v. Murray*, L. R. 10 Ex. 213; *Chatterton v. Secretary of State for India*, 1895, 2 Q. B. 189; 72 L. T. 858; against a Judge for any act done in that capacity; *Cobbett v. Field*, W. N. 1877, 8; *Hind v. Brett*, W. N. 1883, 37; *Anderson v. Gorrie*, 1895, 1 Q. B. 668; *Haguard v. Pélissier Frères*, 1892, A. C. 61, an action against a member of Parliament for a mandamus to compel him to present a petition in Parliament: *Chaffers v. Goldsmid*, 1894, 1 Q. B. 186; where the point has already been decided against the plaintiff in another action: *Dawkins v. Saxe Weimar, etc.*, 1 Q. B. D. 499; *Edmunds v. Attorney-General*, *supra*; *Mortlock v. Mortlock*, 20 L. T. 773; *Horrocks v. Stubbs*, 74 L. T. 58; *Macdougall v. Knight*, 25 Q. B. D. 1; *Hall v. Paulet*, 66 L. T. 645; *Willis v. Howe*, 69 L. T. 358; *Kellaway v. Burp*, 66 L. T. 599; *Wallace v. Duff*, 94 L. T. Jour. 181; *Stephenson v. Garnet*, 1898, 1 Q. B. 677; 78 L. T. 371; *Whitworth v. Darbshire*, 68 L. T. 216; *Stephenson v. Garnett*, 1898, 1 Q. B. 677; where the plaintiff has no *locus standi*: *Robson v. Dodds*, L. R. 8 Eq. 302; *Vale v. Oppert*, 5 Ch. D. 969; or it is clear that the plaintiff has no cause of action: *Lawry v. Tuckett-Lawry*, 2 O. L. R. 162; or the case is clearly *res judicata*: *Birch v. Birch*, 1902, P. 130; 86 L. T. 334; *Boswell v. Coaks*, 86 L. T. 365 n; where the claim though stating a sufficient case is shown by admission of the plaintiff to be without foundation: *Jameson v. Laing*, 7 P. R. 404. The Court will not decide a doubtful point of law on an application to stay proceedings as frivolous: *Roberts v. Charing Cross & E. H. Ry.*, 87 L. T. 732; or dismiss an action which is brought in good faith to try a question of law: *Rea v. Thursby*, 90 L. T. 265. Where a right to sue, however slight, appears on the face of the proceedings, and is not displaced by any admission, the plaintiff will not be prevented from having his action disposed of in the regular way: *Bloxam v. Metropolitan, etc.*, L. R. 3 Chy. 337; *Seaton v. Grant*, L. R. 2 Chy. 459; *Ross v. Edwards*, 14 P. R. 523; 15 P. R. 150, but he may be directed to facilitate an early disposition of the action: *Jameson v. Laing, supra*, or may be required to give security for costs as a condition of being allowed to proceed: *Smith v. Clarkson*, 7 O. L. R. 460; 8 O. L. R. 131.

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

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

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

Actions against Justices of the Peace, brought contrary to the provisions of R. S. O. c. 88, may be stayed summarily: see s. 12 of that Act: *sed vide Webb v. Spears*, 15 P. R. 232. The omission to give notice of action where one is requisite is no ground for summarily staying an action: *Gurney v. Emmett*, 7 O. L. R. 604.

in addition

Sec. 57.

The power to stay proceedings as frivolous or vexatious will not ordinarily be exercised merely on the indorsement on the writ, and before statement of claim: *Ross v. Edwards*, 15 P. R. 180; *Fletcher v. Bethom*, 68 L. T. 438.

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

For a form of order staying proceedings where repeated frivolous applications have been made, see *Grepe v. Loam*, 37 Ch. D. 169; Seton, 5th ed., 344.

Staying
for non-
payment of
costs.

There was no rule of practice at Common Law by which a plaintiff ordered to pay costs in the course of an action, but not paying them, was liable to have his action stayed till they were paid: *Morton v. Palmer*, 9 Q. B. D. 89; but the Court had power in its inherent jurisdiction to direct a stay if that appeared to be equitable. The onus of showing the propriety of a stay was on the party asking for it. In Equity the onus was on the other party, and he was required to show that a stay would be inequitable. The Common Law rule is adopted in Ontario as the most convenient: *Stewart v. Sullivan*, 11 P. R. 529, followed in *Wright v. Wright*, 12 P. R. 42. See also, in addition to the cases there cited, *Re Wickham*, *Marony v. Taylor*, 35 Ch. D. 272; and if the action is vexatious, or has been vexatiously conducted by the plaintiff, the Court by virtue of its inherent jurisdiction may stay the proceedings for non-payment of costs: *Graham v. Sutton*, 1897, 2 Ch. 367; 77 L. T. 35.

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

Another
action
pending.

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

Cross
actions.

Cross Actions.—One of two cross actions between the same parties, arising out of the same matter may be stayed, and a consolidation in fact thus effected; and where such an application is made the action against the party on whom the burden of proof lies ought in general to be stayed, and the action brought by him ought to be allowed to proceed, the other party being at liberty to raise by defence, set-off or counter-claim, all questions intended to be raised by him in the action which is stayed: *Thompson v. Eastern Ry. Co.*, 9 Q. B. D. 320. See further the notes to sec. 57 (7), and Rule 435.

Staying
proceed-
ings where
an agree-
ment to
refer to ar-
bitration.

Staying Proceedings Where an Agreement to Refer to Arbitration.—Where the parties have agreed that no action shall be brought in respect of the matters in question, until the amount due shall have been ascertained by arbitration, an action brought in contravention of the agreement will be stayed: R. S. O. c. 62, s. 6; *Scott v. Avery*, 5 H. L. C. 811; *Belfield v. Bourne*, 69 L. T. 780; *Trainor v. Phoenix Fire Ass. Co.*, 65 L. T. 825; *Scott v. Mercantile Accident Co.*, 66 L. T. 811; and see notes to C. L. P. Act, s. 214. Maclellan's Ind. Act, 2nd ed., p. 90. An allegation of fraud by the plaintiff will not prevent the application of this rule: *Id.* But when the plaintiff is entitled to some relief (*e.g.*, an injunction or receiver)

which could not be attained by a reference to arbitration, such relief **Sec. 57.** may be granted, and the action stayed, except so far as is necessary to enable the plaintiff to obtain such relief: *Pini v. Roncoroni*, 1892, 1 Ch. 631; *Baker v. Yorkshire F. & L. Ass., etc., Co.*, 1892, 1 Q. B. 144; *Lyon v. Johnson*, 60 L. T. 223; 40 Ch. D. 579; *Chappell v. North*, 1891, 2 Q. B. 252; *Turnock v. Sartoris*, 62 L. T. 200.

An action was perpetually stayed where its subject was embraced in a reference to an official referee under the Vendors and Purchasers Act, R. S. O. c. 134: *City of Toronto v. Canadian Pacific Railway Co.*, 18 P. R. 374, 451.

Practice.—An application to stay must in general be on notice. Practice. "in a summary way" does not mean *ex parte* except in cases of emergency: see *Blewitt v. Dowling*, W. N. 1875, 202; *Kerens v. Mitchell*, W. N. 1876, 53, and notes to sec. 58 (9).

Seem, the Master in Chambers has no jurisdiction to stay an action on the ground that it is frivolous or vexatious: see *Kuapp v. Carley*, 40 Ch. J. 390.

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

10. If any action is brought in the High Court for any cause of action for which any suit or action has been brought and is pending between the same parties or their representatives in any place or country out of Ontario, the Court or any Judge thereof may make an order to stay all proceedings in the High Court until satisfactory proof is offered to the Court or Judge that the suit or action so brought in such other place or country out of Ontario is determined or discontinued.

Stay of proceedings if action for same cause is pending out of Ontario.

No corresponding clause in the Eng. Act.

The power to stay under this section is a discretionary one, and the English cases are authorities as to the exercise of discretion, though there is no similar statutory provision in England: *First Natchez Bank v. Coleman*, 2 O. L. R. 159.

The rule in England is, that where one of two actions for the same English cause is pending abroad, the Court has jurisdiction to stay, but the rule. party applying must make out a special case for relief; whereas where all the actions are in England, or *seem* in the King's Courts anywhere, the concurrent proceedings are *prima facie* vexatious: *McHenry v. Lewis*, 21 Ch. D. 202; 22 Ch. D. 397; *The Christiansburg*, 10 P. D. 141. The Court will not consider the double litigation vexatious where there are substantial reasons to induce the plaintiff to sue in both countries; as when he can get judgment in each action, but execution is more easily obtained in one than in the other: *Peruvian Guano Co. v. Bockwoldt*, 23 Ch. D. 225; *Hyman v. Helm*, 24 Ch. D. 531; *Direct U. S. Cable Co. v. Dom. Tel. Co.*, 8 Ont. App. 416; *Armstrong v. Armstrong*, 1892, P. 98.

7. Whether a Court having ample authority to decide the matter brought before it should await the expected adjudication of another tribunal having only similar authority is merely a question for the exercise of judicial discretion: *Phosphate Sewage Company v. Molleson*, 1 App. Cas. 780. See *Hounston v. M. of Sligo*, W. N. 1884, 20, reversed, p. 151.

There is a discretion to stay proceedings in the High Court for damages for a collision, in respect of which proceedings are being taken *in rem* in a Vice-Admiralty Court: *The Peshawar*, 48 L. T. 790; 8 P. D. 32.

Rule in
Ontario.

Under the above clause 10, proceedings were stayed in this Province, where the matter could more conveniently be disposed of in the foreign Court, by reason of the suit being there in a more advanced stage, and the parties being personally subject to the jurisdiction of the foreign Court, and the latter was the most convenient, in view of the evidence to be procured: *Howell v. Jewett*, 7 P. R. 69. A stay was also ordered pending an appeal in a foreign Court, terms as to diligence in prosecuting the appeal being imposed: *Huntington v. Attrib*, 12 P. R. 36.

Where a Bank was being wound up in Ontario under the Dominion Winding-up Act, an injunction was granted restraining proceedings in a Montreal Court against the Bank, and also proceedings against the liquidators for things done in their official capacity, and from attacking the validity of their appointment: *Baxter v. Central Bank*, 20 Ont. 214.

Where there are substantial reasons for double litigation the Court will not stay proceedings in an action in Ontario until after the determination of another action for the same cause pending in a foreign Court. Thus where a defendant resident in Ontario was sued there on a promissory note, the Court refused to stay proceedings until after the determination of attachment proceedings in a foreign Court, the only effect of which would be to make available towards payment of the note certain stock in a Company domiciled in a foreign country: *First Natchez Bank v. Coleman*, 2 O. L. R. 159.

As to staying an action in Ontario where the plaintiff's claim is being prosecuted in bankruptcy proceedings in England: see *Maritime Bank v. Stewart*, 13 P. R. 86, 262, 491.

Giving
effect to
legal claims.

11. Subject to the aforesaid provisions for giving effect to equitable rights and other matters of equity in manner aforesaid, and the other express provisions of this Act, the said Courts respectively, and every Judge thereof, shall recognize and give effect to all legal claims and demands, and all estates, rights, duties, obligations and liabilities existing by the Common Law or created by any statute, in the same manner as the same would have been recognized and given effect to prior to *The Ontario Judicature Act, 1881*, by any of the Courts then existing and whose jurisdiction is now vested in the High Court.

Same as Eng. J. A., 1873, s. 24 (6), except that the latter has the words "transferred to" instead of "vested in"; and after the words "Common Law" has the words "or by any custom."

12. The High Court of Justice and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act in every cause or matter pending before them respectively, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided. 58 V. c. 12, s. 52; 60 V. c. 15, Sched. A (64).

Same as Eng. J. A., 1873, s. 24 (7).

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

Modern procedure endeavours to work out the rights and liabilities of all parties, as far as possible, in the same action: *per* Boyd, C., in *Stilllicay v. Toronto*, 20 Ont. 98.

A cause or matter is pending within the meaning of this section so long as final judgment remains unsatisfied: *Salt v. Cooper*, 16 Ch. D. 544; *Smith v. Cowell*, 6 Q. B. D. 75; *Hart v. Hart*, 18 Ch. D. 670. See also *Re Clagett*, *Fordham v. Clagett*, 20 Ch. D. 637, where it was said that a "pending matter" in any Court of Justice is one in which some proceeding may still be taken. A foreclosure action is at an end after the granting of the final order: *Wills v. Luff*, 38 Ch. D. 200.

The meaning of this and the preceding sub-section is, that whenever a subject of controversy arises in an action which can conveniently be determined between the parties to the action, the Court should, if possible, determine it, so as to prevent further and needless litigation: *Re Tharp*, 3 P. D. 81; *McDougall v. Hall*, 13 Ont. 166; *Byrne v. Brown*, 22 Q. B. D. 666. The right of the parties is limited by the opinion of the Court as to the practical convenience of trying incongruous claims in the same action. See notes to *Rules* 373 and 374.

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

Sec. 58.

Rules of law
upon certain
points.

58. The law to be administered in Ontario, as to the matters next hereinafter mentioned, shall be as follows:

See Eng. J. A., 1873, s. 25; J. A., 1875, s. 10.

Statutes of
Limitation
not to ap-
ply to ex-
press trusts.

1. [Subject to the provisions of section 32 of *The Trustee Act*] no claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations. 58 V. c. 12, s. 53 (1); 59 V. c. 18, Sched. (4).

Rev. Stat.
c. 129.

Except the words in brackets introduced by 59 Viet. c. 18, this clause is the same as the English Jud. Act, 1873, sec. 25 (2).

See *Petre v. Petre*, 1 Drew, 333, and *Nugent v. Nugent*, 15 L. R. 1r. 321, for the difference in Equity between express and implied trusts. In the case of an express trust it was always the doctrine of Courts of Equity that no time as between the trustee and *cestui que trust* operates as a bar to the equitable right of the latter; and this subsection as originally enacted was only a statutory declaration of that doctrine: *Hurston v. Tenison*, 20 Ch. D. 100; see also *Thompson v. Eastwood*, 2 App. Cas. 215. As to what nevertheless amounts to laches and acquiescence which will be a bar to relief: see *Id.* and *Lewin on Trusts*, 6th Ed., 714, and *Fisher, Dig.* 1880, p. 2200. It is not necessary that the express trust be evidenced by writing to bring the case within this provision: *Cook v. Grant*, 32 C. P. 511, 521, and see *Copie v. Brodby*, 15 Ont. App. 159; *Wright v. Bell*, 18 Ont. App. 25.

Seuble, an implied or constructive trustee may set up the statute as a bar: *Re Davis, Evans v. Moore*, 1891, 3 Ch. 119. See also *In re Barker, Burton v. Campbell*, 1892, 2 Ch. 491, where the circumstances showed that there was no express trust; *Shaver v. Harkness* (before Boyd, C., Nov., 1891); but see *Cameron v. Campbell*, 7 Ont. App. 361.

Under R. S. O. c. 129, s. 32, the Statute of Limitations may be pleaded by trustees, except in the case of a claim founded upon fraud, or fraudulent breach of trust, to which the trustee was a party or privy, or where the action is to recover trust property retained or converted by the trustee: see *Stephens v. Beatty*, 27 Ont. 75; *North American Land Co. v. Watkins*, 1904, 2 Ch. 233. This Act is similar to the Imperial Statute, 51 & 52 Viet. c. 59, as to which see *Re Borden, Andrew v. Cooper*, 45 Ch. D. 444; *Moore v. Knight*, 1891, 1 Ch. 547; 63 L. T. 831; *Re Swain, S. v. Bringeman*, 1891, 3 Ch. 233; 65 L. T. 296; *Gardner v. Perry*, 6 O. L. R. 231; *In re Garney*; *Mason v. Mercer*, 1893, 1 Ch. 530; 68 L. T. 289; *Thorne v. Heard*, 1893, 3 Ch. 530; 1894, 1 Ch. 599; 1895, A. C. 495; *Went v. Campaign*, W. N. 1893, 66; 9 Times, 254; *Re Somerset, S. v. Ponnett*, 1894, 1 Ch. 231; 68 L. T. 613; 69 L. T. 744; *Jago v. Jago*, 68 L. T. 654; *Re Chapman*, 73 L. T. 958; *Re Wassell*, 1896, 1 Ch. 554; 74 L. T. 99; *How v. Winterton*, 1896, 2 Ch. 626; 75 L. T. 40; *Soar v. Ashwell*, 1901, 2 Q. B. 390; 69 L. T. 585; *In re Page*, 1893, 1 Ch. 304; *Re Harrison, Allen v. Cort*, W. N. 1892, 148; 37 Sol. J. 9; *Re Sharp*.

1892, 1 Ch. 161. Directors of a company were held to be trustees **Sec. 55.** within the Imp. Act: *Re Lands Allotment Co.*, 1891, 1 Ch. 510.

If fraud or non-discovery of fraud is to be relied on to take a case out of the Statute of Limitations, it must be the fraud of, or in some way imputable to, the person who invokes the aid of the Statute: *Thorne v. Heard*, 1895, A. C. 495; *Re Metallum*, 1901, 1 Ch. 143.

As to breaches of trust against liability for which a trustee may be relieved: see R. S. O. 1897, c. 129, s. 31; 62 V. c. 15; and *Wear v. Jackson*, 5 O. W. R. 281.

R. S. O. c. 133, s. 30, is as follows:—

"30. Where any land or rent is vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him to bring an action against the trustee or any person claiming through him, to recover such land or rent shall be deemed to have first accrued, according to the meaning of this Act, at and not before the time at which such land or rent has been conveyed to a purchaser for a valuable consideration, and then shall be deemed to have accrued only as against such purchaser, and any person claiming through him."

It has been said by Kay, J., *Bauer v. Berridge*, 18 Ch. D. 262, that that enactment is in effect extended to personality by the present sub-section, which is also repeated in c. 133, as sec. 30 (2).

See also *Patrick v. Simpson*, 24 Q. B. D. 128.

2. An estate for life without impeachment of waste ^{Equitable waste.} shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate.

Same as Eng. J. A. 1873, s. 25 (3).

Seem, this sub-section is retrospective: *Dibb v. Walker*, 1893, 2 Ch. 429.

For the difference between legal and equitable waste see the notes to *Garth v. Cotton*, 1 W. & T. Lend. Cas., 751 (5th Ed.); *Scogram v. Knight*, L. R. 2 Chy. 628. A tenant for life without impeachment of waste is not permitted to make an excessive use of his legal power as such, by cutting down ornamental trees, defacing the mansion-house, etc. See also Seton on Decrees (7th Ed.), 477, and s. 25, sub-sec. 3, *supra*, and notes p. 20, and *Patterson v. Central Canada, etc., Co.*, 20 Ont. 134; *Re Freeman*, 1898, 1 Ch. 28; *Zimmerman v. O'Reilly*, 14 Gr. 646; *Walker v. Friel*, 16 Gr. 105.

3. There shall not be any merger by operation of ^{Merger.} law only of any estate, the beneficial interest in which would not, prior to *The Ontario Judicature Act, 1881*, have been deemed merged or extinguished in Equity.

Same as Eng. J. A. 1873, s. 25 (4).

Sec. 56.

Merger is where a greater estate and a less coincide and meet in one and the same person in the same right without any intermediate estate; in which case the less is immediately annihilated or "merged" in the greater; as, if the fee comes to a tenant for years or life, the particular estates are merged in the fee; but, in Equity, if the merger which would take place at law would occasion prejudice to a party having a previous equitable interest in the estate, such interest is not deemed to be merged: see *Tyrwhitt v. Tyrwhitt*, 32 B. 249; *Finlayson v. Mills*, 11 Gr. 218; *MacLennan v. Gray*, 16 Ont. 326. As to the rule in Equity: see *Forbes v. Moffatt*, 18 Ves. 394; *Compton v. Ozenden*, 2 Ves. Jr. 264; *Swinfen v. Swinfen* (No. 3), 20 Bea 199; *The Liquidation Co. v. Willoughby*, 1896, 1 Ch. 726; 74 L. T. 228; 1898, A. C. 321; 77 L. T. 320; *Adams v. Angell*, 5 Ch. D. 634; *Re Price, Shackell v. Colnett*, 1891, 2 Ch. 135; *Re Radcliffe*, 1892, 1 Ch. 227; *Thorne v. Cann*, 1895, A. C. 11; Brett Leading Cases in Equity, 3rd Ed., 225.

By R. S. O. c. 121, ss. 8-9, a mortgagee may take a release of the equity of redemption without merging his debt as against any other mortgagee or person having a charge on the property. The cases on the construction of this enactment will be found in *The Ontario Digest*, 4347, *et seq.*

Where C., an administrator, granted an underlease for a term of years of land held by him as administrator, and shortly afterward the underlessee assigned the land to C. for the residue of the term, it was held that there was in Equity no merger of the term: *Chambers v. Hingham*, 10 Ch. D. 743; see also *Hyde v. Warden*, 3 Ex. D. 72, and where a tenant for life conveyed her estate to a tenant for life in remainder expectant on the grantor's death, subject to a charge in the grantor's favour, and the grantee predeceased the grantor, it was held that there was no intention to merge the two estates: *Shore v. Boycot*, 1892, 3 Ch. 110; and see *Re Barry Ry. Co.*, 76 L. T. 489.

Actions for
possession
of land by
mortgagors.

4. A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or sue or distrain for the recovery of such rents or profits, or to prevent or to recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arise upon a lease or other contract made by him jointly with any other person (a), and in that case he may sue or distrain jointly with such other person. 58 V. c. 12, s. 53 (4).

(a) Up to this point this sub-section corresponds with the Eng. J. A., 1873, s. 25 (5), what follows is not in the English sub-section.

As to the law before this enactment: see *Walsh v. Lonsdale*, 21 Ch. D. 9.

This section does not give a mortgagor in possession of land subject *Sec. 58.* to a lease created before the mortgage the right to re-enter for breach of covenants in the lease: *Matthews v. Usher*, 1900, 2 Q. B. 535. In this case the mortgagee was added as a co-plaintiff at the trial, but it was held that as the legal owner of the reversion was not a party when the writ issued, the action could not be maintained.

In cases under this sub-section the mortgagor may sometimes have to make the mortgagee a party; but "unless there is a probability that the relief for which the mortgagor sues will injuriously affect the interest of the mortgagee, the mortgagee ought not to be brought before the Court on a mere suggestion of a possibility that he may be prejudiced": *Fairclough v. Marshall*, 4 Ex. D. 37 and 49.

Where a tenant of the mortgagor, who has received notice from the mortgagee to pay the rent to him, remains in possession, that alone does not create any tenancy between him and the mortgagee: *Towers v. Jackson*, 1891, 2 Q. B. 484.

A mortgage having been assigned, the assignee served notice on the tenants to pay him rent. A judgment creditor of the mortgagor obtained an order on the tenants to pay. The rents due at the date of the assignment were not thereby assigned to the transferee, but were assigned to him by the mortgagee after the garnishee order. It was held that under this sub-section the rents attached were debts due to the mortgagor: *Puterson v. O'Reilly*, 10 L. R. Ir. 304.

The owner of the equity of redemption may maintain an action for trespass to the mortgaged property, and injury to the freehold, though after the trespass and before action he has parted with his equity: *Brookfield v. Brown*, 22 S. C. R. 398; and see *Gordon v. Armstrong*, 16 P. R. 432; but mortgagees out of possession cannot after their interest has ceased to exist maintain an action for trespass and injury committed while they held the title: *Ib.*

A mortgagor entitled to the equity of redemption in mortgaged patents, may sue to restrain infringement without making the mortgagee a party: *VanGelder, etc., v. Sowerby*, 44 Ch. D. 374.

Mortgagees were made co-plaintiffs with the mortgagor in *Goodrich v. Everglyn Coal Co.*, W. N. 1889, 152, an action on covenants in a lease made by both mortgagor and mortgagees to defendants.

As to when mortgagees are necessary parties: see *Saylor v. Cooper*, 2 Ont. 398; *Re Nickle v. Walkerton*, 11 Ont. 433, and *Platt v. G. T. Ry. Co.*, *Ib.* 246.

5. Any absolute assignment, made on or after the 31st day of December, 1897, by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action of which express notice in writing shall have been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this section had not been enacted) to pass and transfer the legal

Assignments of debts and choses in action.

Sec. 58.

right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same and the power to give a good discharge for the same without the concurrence of the assignor. 60 V. c. 15, s. 5.

This sub-section is taken from 60 Vict. c. 15, s. 5, whereby R. S. O. 1887, c. 122, ss. 7, 10, 11 and 12, were repealed, and the law of Ontario on this point assimilated with that of England under the Eng. Jud. Act, 1873. 36 & 37 Vict. c. 66, s. 25 (6).

For a discussion of the English cases bearing on this section: see 108 L. T. Jour. 436.

See also *Rule 203 (1), (g)*, which provides that an assignee of a chose in action may institute an action in respect thereof without making the assignor a party.

Scope of the Enactment.—This sub-section is not retrospective, in which respect it differs from the Eng. Act: see *Dibb v. Walker*, 1893, 2 Ch. 429. Assignments of choses in action made prior to 31st December, 1897, are probably still governed by R. S. O. 1887, c. 122: see R. S. O. c. 1, s. 8 (50).

The effect of the clause is to give the assignee of a chose in action a legal, where he formerly had a merely equitable, title. In other respects the enactment does not give new rights, but only affords a new mode of enforcing old rights: *Walker v. Bradford Bank*, 12 Q. B. D. 511, 515. It does not make anything an assignment which was not theretofore an assignment either at Law or in Equity: *Schroeder v. The Central Bank*, 24 W. R. 710; as, for instance, a claim, the assignment of which is against public policy, such as a bond to secure alimony payable to a married woman: *Reiffenstein v. Hooper*, 36 U. C. Q. B. 295; *Re Robinson*, 27 Ch. D. 160; and see *Watkins v. Watkins*, 74 L. T. 636. It only enables an action to be brought by the assignee in his own name where previously he would have sued in the assignor's name: *Torkington v. Magee*, 1902, 2 K. B. 427.

The enactment transfers the legal remedies as well as the legal rights of the assignor: thus the assignee of a judgment debt is enabled to garnish debts due to the judgment debtor: *Goodman v. Robinson*, 18 Q. B. D. 332. The assignee does not, however, acquire any greater right than his assignor had, and therefore the assignment of an agreement to advance money by way of loan does not create a debt, and confers no right on the assignee to compel the specific performance of the agreement, or to recover damages for its breach, unless some specific fund is bound by the agreement: *Western Waggon Co. v. West*, 1892, 1 Ch. 271; *South African Territories v. Wallington*, 1898, A. C. 309; 78 L. T. 426; *May v. Lane*, 43 W. R. 58, 193; 71 L. T. 869; *Roxburghe v. Cox*, 17 Ch. D. 520; *Webb v. Smith*, 30 Ch. D. 199.

A cheque is a mere order to pay and a revocable request, and does not purport to be an absolute assignment: *Schroeder v. The Central Bank*, *supra*. After a cheque has been marked good by the bank, however, the drawer is discharged and the bank becomes the principal debtor: *Boyd v. Nasmith*, 17 Ont. 40.

Quære, whether an assignment of an ascertained part of the debt is within this section. An assignment of an indefinite and unascertained

tained part is not, and therefore the assignee cannot sue in his own name: *Jones v. Humphreys*, 1902, 1 K. B. 10. Sec. 58.

"Debt or other Legal Chose in Action."—These words include "all rights, the assignment of which a Court of Law or Equity would before the Act have held to be lawful": *King v. Victoria Ins. Co.*, 1896, A. C. pp. 254, 256; see also *Colonial Bank v. Whinney*, 30 Ch. D., pp. 285, 286; 11 App. Cas. p. 438, as to what are "choses in action." See also Warren's Choses in Action, Bk. i., c. ii. The former Act, R. S. O. 1887, c. 116, s. 7, was confined to choses in action "arising out of contract": see *Blair v. Ascalatine*, 15 P. R. 211.

The enactment does not appear to extend to all choses in action, but only to debts or other legal choses in action. A claim for damages for a tort is a legal chose in action, but it appears to be doubtful whether it is within the section, not being *ejusdem generis* as a "debt"; and equitable choses in action do not appear to be within the section, but the former equitable right of the assignee to enforce such choses in action in his own name is not taken away, and continues. In *Dawson v. Great Northern Ry.*, 1904, 1 K. B. 277, reversed, 1905, 1 K. B. 260, it was held that a claim for compensation for damages done to land by a railway company is not in the nature of damages for a tort and is assignable within this section. In *King v. Victoria Ins. Co.*, 1896, A. C. 250, the Supreme Court of Queensland held that a claim for unliquidated damages arising out of a tort is a chose in action within the corresponding section of the Queensland Jud. Act, which is in the same terms as the English Act, but the Jud. Committee of the Privy Council, on appeal, while not dissenting from that construction of the Act, affirmed the judgment on other grounds. See article in 20 Law Quarterly Review, p. 113.

This subjects capable of assignment within this sub-section there-fore include debts due: *Comfort v. Betts*, 1891, 1 Q. B. 737; judgment debts: *Goodman v. Robinson*, 18 Q. B. D. 332; moneys due under a building contract: *Drew v. Josolyne*, 18 Q. B. D. 590; *Ex p. Moss*, 14 Q. B. D. 310; 52 L. T. 188; money accruing due but not yet due: *Brice v. Bannister*, 3 Q. B. D. 569; *Buck v. Robson*, *ib.* 686; *British Wagon Co. v. Lea*, 5 Q. B. D. 149, 154; *Walker v. Bradford*, 12 Q. B. D. 511, 516; *May v. Lane*, 43 W. R. 58, 193; 71 L. T. 869; *Ex p. Hall*, 10 Ch. D. 621; future book debts during a limited time: *Tailby v. Official Receiver*, 13 App. Cas. 523; moneys accruing due to the assignor as legatee under a will: *Re Coleman*, 39 Ch. D. 443; a beneficial interest under a policy of insurance: *Re Turcan*, 40 Ch. D. 5; a future balance at a banker's: *Walker v. Bradford*, 12 Q. B. D. 511; rent accruing: *Knill v. Proise*, 33 W. R. 163; or in trustees' hands: *Harding v. Harding*, 17 Q. B. D. 442; a solicitor's bill of costs: *Ingle v. McCutchan*, 12 Q. B. D. 518; *Ibberson v. Neck*, 2 Times, 427; a claim on a policy of insurance of goods before loss, even though the goods are not transferred to the assignee: *McPhillips v. London M. F. Ins. Co.*, 23 Ont. App. 524; a covenant to indemnify against liability under a covenant: *Re Perkins*, 1898, 2 Ch. 182; 78 L. T. 216, 666; a claim against a purchaser of an equity of redemption for indemnification against the mortgage debt: *British Canadian L. Co. v. Tear*, 23 Ont. 664; *Scarlett v. Nattress*, 23 Ont. App. 297; *Maloney v. Campbell*, 28 S. C. R. 228; *Small v. Thompson*, *ib.* 211; *Irring v. Boyd*, 15 Gr. 162; *Glenn v. Scott*, 18 C. L. T. 162; *McCaig v. Barber*, 23 S. C. R. 126 (in which it was held that the mortgagee had so dealt with the covenant assigned to him that he had disentitled

Sec. 58. himself to sue at that time upon it); an executory contract for the purchase of a reversionary interest, is assignable under this section as a "legal chose in action": *Torkington v. Magee*, 102, 2 K. B. 427, 431, 435; *sed vide S. C.* 1903, 1 K. B. 644; 88 L. T. 443. And an executory contract for the purchase of materials for the purposes of a trade is assignable, so as to enable the assignee to sue thereon in his own name: *Tolhurst v. Associated Portland Cement Works*, 1903, A. C. 414; but *quere* whether this sub-section covers a claim for unliquidated damages arising upon a tort; see *supra*; but see *King v. Victoria Ins. Co.*, *supra*; or an assignment of part of a debt: see *Jones v. Humphrey*, 1902, 1 K. B. 10.

Requisites
of assign-
ment with-
in the Act.

"Absolute Assignment."—A deed by which debts are assigned to a trustee to receive them and thereout pay himself a sum due from the assignor, and pay the surplus to the assignor, is an absolute assignment (not purporting to be by way of charge only): *Burlinson v. Hall*, 12 Q. B. D. 347; *Comfort v. Betts*, 1891, 1 Q. B. 737; so is an assignment made merely to enable the assignee to sue in his own name: *Wiesener v. Rackow*, 102 L. T. Jour. 577; so is a mortgage of debts due, in the ordinary form with proviso for redemption and reconveyance: *Tancred v. Delagoa Bay Ry.*, 23 Q. B. D. 239, in which *Nat. Provincial Bank of England v. Harle*, 6 Q. B. D. 626, was disapproved of and not followed; see also *Durham v. Robertson*, 1898, 1 Q. B. 765; 78 L. T. 438.

An assignment in these terms: "We hereby charge the sum of £1080, which will become due to us from J. R. on the completion of the above building, as security for the advances, and we hereby assign our interest in the above mentioned sum until the money, with interest added, be repaid to you," was held not to be an absolute assignment: *Durham v. Robertson*, *supra*. So an assignment though in general terms of the whole rights and interest of the assignor, where it appeared from the instrument of assignment that it was "as security for the repayment on demand" of a sum advanced and really an assignment only of sufficient to make the repayment, is not an absolute assignment within the section: *Mercantile Bank, etc. v. Evans*, 1899, 2 Q. B. 613; 81 L. T. 376.

But where the intention to be gathered from the whole instrument is not to assign merely so much of the debt or chose in action as will provide security, but to pass the whole interest of the assignor though subject to an equity of redemption, the assignment will be an absolute one within the section: *Hughes v. Pump House Hotel Co.*, 1902, 2 K. B. 190.

In order to entitle an assignee to sue in his own name the assignment must be explicit in its terms, and free from ambiguity: *McMillan v. Orillia E. L. Co.*, 6 O. L. R. 126.

Mode of Assignment.—"In Writing."—The sub-section only applies to an assignment in writing: *Re Sutton's Trusts*, 12 Ch. D. 175; a written order on trustees of a fund notified to them is a good assignment within the sub-section: *Harding v. Harding*, 17 Q. B. D. 442; so is a letter from a landlord to a tenant directing him to pay rent to another person till further order: *Knill v. Prouse*, 33 W. R. 163; but a direction by A. to pay a debt to B., without referring to a specific fund out of which the payment is to be made, is not an

assignment: *Percival v. Dunn*, 29 Ch. D. 132; see *Webb v. Smith*, 30 Ch. D. 192; *Western Waggon Co. v. West*, 1 Ch. 271; *Brandts & Co. v. Dunlop & Co.*, 1904, 1 K. B. 387; 90 L. T. 106; *Thomson v. Huggins*, 23 Ont. App. 191; and *Quick v. Colchester South*, 30 Ont. 645; *Greenway v. Atkinson*, W. N. 1881, 47; *Southwell v. Scottar*, 19 L. J. Q. B. 356; and a discussion in 78 L. T. Journ. 439.

Equitable Assignment.—Although, to bring a case within this sub-section, it is necessary that the assignment should be in writing, yet the statute does not invalidate parol assignments of choses in action: see *Trusts Corporation v. Rider*, 27 Ont. 593; 24 Ont. App. 157; *McMaster v. Canada Paper Co.*, 21 C. L. J. 16; and may take priority over a subsequent written assignment: *Heyd v. Müller*, 29 Ont. 735. Neither a writing nor any particular form of words is necessary to constitute an equitable assignment; an intention to pass the beneficial interest is all that is required: *Re McRae Estate*, 6 O. L. R. 238; but where there is only a parol assignment the action to recover the chase in action must be brought in the name of the assignor, or he must be joined as defendant if he refuses an offer of a proper indemnity to allow his name to be used as plaintiff: see *Turquand v. Fearon*, 4 Q. B. D. 280; 40 L. T. 141; *Trusts Corporation v. Rider*, 27 Ont. 593; 24 Ont. App. 157. The indorsement and delivery to a third party as a gift of a hanker's deposit receipt expressed on its face to be unassignable, was held to be a good equitable assignment: *Re Griffin*, 1899, 1 Ch. 408; 79 L. T. 442.

An assignment which may not come within this sub-section by reason of the absence of writing, notice or otherwise, may be enforceable as an equitable assignment or charge: see *Gorringe v. Irwell*, 34 Ch. D. 128; *Christie v. Tannan*, 1893, 2 Ch. 175, 181; *Webb v. Smith*, 30 Ch. D. 192; *Re Patrick*, 1891, 1 Ch. 82, 87.

A present appropriation by order of a particular fund not yet realized operates as an equitable assignment, and a promise or executory assignment to apply a fund in discharge of an obligation has the same effect in equity: *Heyd v. Müller*, 29 Ont. 735, and see *Quick v. Colchester South*, 30 Ont. 645; *Palmer v. Culverwell*, 85 L. T. 758; *Re McRae*, 6 O. L. R. 238.

A letter indicating an intention to make an equitable assignment of a fund written to the holder of the fund, is operative upon the posting of the letter: *Alexander v. Steinhardt Walker & Co.*, 1903, 2 K. B. 208; but a request by a creditor to his debtor to agree to pay his debt to a third party is not an assignment of the debt to such third party within the meaning of this sub-section: *Brandts v. Dunlop*, 1904, 1 K. B. 387; 90 L. T. 106. *In Appeal 119 47 Jan 330*

Notice in Writing.—The notice may be given after the death of the assignor: *Walker v. Bradford Bank*, 12 Q. B. D. 511; or of the assignee: *Bateman v. Hunt*, 1904, 2 K. B. 530; 91 L. T. 331. It is in some cases necessary, in order to make the assignment effectual as regards third person, e.g., in the case of book debts to bind the debtor: *Tailby v. Official Receiver*, 13 App. Cas. 534; but is not necessary as between the assignor and the assignee: *Newman v. Newman*, 28 Ch. D. 678; *Gorringe v. Irwell*, 34 Ch. D. 128.

The notice must be clear and unequivocal: *McMillan v. Orillia E. L. Co.*, 6 O. L. R. 126.

Sec. 58.

Notice of an assignment of funds, in the hands of a trustee, is necessary to be given to the trustees in order to preserve priority as against other chargees or assignees of the same fund.

Notice should be given to all of the trustees; where notice was given to one only of several trustees, and be died, a subsequent assignee of the fund without notice of the prior assignment, who first gave notice to the surviving trustees, was held entitled to priority: *Re Phillips*, 1903, 1 Ch. 183; 88 L. T. 9.

A subsequent assignee of a chose in action may, by being first to give notice of his assignment to the debtor, obtain priority over a prior assignment, of which he had no notice when he took his assignment: see *Marchant v. Morton*, *infra*.

An assignee of a reversionary fund who has given notice to the existing trustees is under no obligation to give any further notice, and is consequently entitled to priority over a subsequent assignee who has taken an assignment after the death of all the old trustees, and has given notice to the new trustees: *Re Wasdale, Brittin v. Purtridge*, 1899, 1 Ch. 163.

As to the effect of omitting to give notice, see *English and Scottish, etc., Investment Co. v. Brunton*, 1892, 2 Q. B. 1, 700; *West v. Williams*, 46 W. R. 362; *Re Phillips*, 1903, 1 Ch. 183, *Lloyd's Bank v. Pearson*, 1901, 1 Ch. 865; *McMillan v. Orillia E. L. Co.*, *supra*.

The omission to give notice in writing to the debtor will not enable an execution creditor of the debtor to acquire priority over the assignee: *Rennie v. Quebec Bank*, 1 O. L. R. 303; nor *semble*, a subsequent assignee for creditors; *In re Wallis*, 1902, 1 K. B. 719.

After notice of the assignment no valid agreement can be made between the debtor and the assignor to the prejudice of the assignee with reference to the chose in action assigned: *Quick v. Colchester*, 30 Ont. 645.

A debt due to a firm was assigned by one partner to defendant in writing, and subsequently, by the other partner to plaintiff by deed. The plaintiff gave notice of his assignment to the debtor before the defendant did, and it was held that there was a valid equitable assignment, and that the plaintiff having given notice first was entitled to priority: *Marchant v. Morton & Co.*, 1901, 2 K. B. 829; 85 L. T. 169; following *Ward v. Duncombe*, 1893, A. C. 369; 69 L. T. 129.

Where a debtor gives a negotiable cheque in payment of his debt before notice of its assignment, he is not bound to stop payment and take steps to get back the cheque on subsequently receiving notice, but before payment of the cheque. He may properly pay the assignor, who still holds the cheque: *Bence v. Sherman*, 1898, 2 Ch. 582; 78 L. T. 804.

Notice must be given to the person having legal dominion of the fund. A notice given by an assignee to the person who is himself the assignor is not an effectual notice to alter priorities: *Re Dallas*, 1904, 2 Ch. 385.

The doctrine of obtaining priority by notice does not apply between successive equitable sub-mortgagees of land: *Hopkins v. Hemsworth*, 1898, 2 Ch. 347.

Action by
assignee.

Action by Assignee.—Where an assignment within this sub-section is made and notice given, the legal right and legal remedies

are transferred, and the assignee may sue in his own name: see *Sec. 58.*
Read v. Brown, 22 Q. B. D. 132; and since the right is transferred to him he must probably so sue, as was necessary under the repealed Act, R. S. O. 1887, c. 122, s. 7; (see *Dawson v. Graham*, 41 U. C. Q. B. 532; *Ward v. Hughes*, 8 Ont. 138), where the assignee took the beneficial interest: *Wood v. McAlpine*, 1 Ont. App. 234.

Any equitable right remaining in the assignor may doubtless be enforced by him in the same way as in the case of any other equitable right.

Formerly under R. S. O. 1887, c. 122, the assignee in order to sue Former law alone must have taken the beneficial interest in the claim assigned: *Wood v. McAlpine*, 1 Ont. App. 234; *Scarlett v. Nattress*, 23 Ont. App. 297; and where the assignment was by way of security only, the assignor might sue in his own name: *Hostrawser v. Robinson*, 23 C. P. 350; *Dawson v. Graham*, 41 U. C. Q. B. 532; *Pritt v. Connecticut F. Ins.*, 23 Ont. App. 449; and see *McPhillips v. London M. F. Co.*, 23 Ont. App. 524; but under the present sub-section it is only necessary that there be an assignment in writing absolute in form. It may Present law be an assignment with a trust declared for the benefit of the assignor or others: *Burlinson v. Hall*, 12 Q. B. D. 347; *Comfort v. Betts*, 1891, 1 Q. B. 737; or with a proviso for redemption and reconveyance: *Tancred v. Delagoa Bay*, 23 Q. B. D. 239; or it may have been made to the assignee as agent of the assignor, and merely to enable the assignee to sue in his own name: *Wiesener v. Rackow*, 102 L. T. Jour. 577.

In *Lee v. Magrath*, 10 L. R. Ir. 45, 315, the payee of a promissory note not negotiable, and not then payable, indorsed it as follows: "I indorse the within promissory note for £100 to my sister L." and delivered it to L. There was no consideration for the indorsement and delivery, but it was found as a fact that the intention was to vest in L. the beneficial interest. The payee died before the note was due, and bequeathed to one of the makers all moneys he should die possessed of, and appointed the legatee executor. Express notice in writing of the indorsement was given to the maker after the payee's death and before action. It was held that as the appointment of the maker of the note, executor of the payee, extinguished the debt prior to service of notice of the indorsement, there had been no legal transfer of the debt to L. within this sub-section so as to enable her to bring an action thereon.

Where the assignment is not an "absolute assignment," but purports to be by way of charge, the assignor is a necessary party: see *Turquand v. Fearon*, 4 Q. B. D. 280; 40 L. T. 141; and may sue in his own name: *Walls v. Sault Ste. Marie Paper, etc., Co.*, 18 C. L. T. 117; 34 C. L. J. 196; see *Pritt v. Connecticut F. Ins. Co.*, 23 Ont. App. 449; *Western Waggon Co. v. West*, 1892, 1 Ch. 271. Where assignment not absolute

Where the plaintiff had only a partial assignment, the objection that the assignor should be made a party when taken at the hearing was cured by the assignor appearing by counsel and submitting to be added as a party plaintiff, and to be bound by the proceedings: *Yates v. Great Western Railway Company*, 24 Gr. 495; his consent in writing to be added as a plaintiff is now necessary: see *Rule 206* (3).

Where the assignee sued in his own name, and afterwards desired to amend by adding the assignor as a co-plaintiff, the amendment

Sec. 55. was refused, the Statute of Limitations having in the meantime run out as against the assignor: *Hudson v. Fernyhough*, 61 L. T. 722. *See Thompson v. Iquo, S.C., 12 Q.M.R.*

Equities.

Equities and Set-off Against Assignee.—It has been said that the Act does not affect the rule that the assignee of a chose in action takes subject to all equities; and the assignor can give no greater right in equity than he himself possesses: *West of England Banking Co. v. Batchelor*, W. N. 1882, 11; *Rosburghe v. Cox*, 17 Ch. D. 520; *Webb v. Smith*, 30 Ch. D. 199. That rule, however, does not apply to choses in action assignable at Common Law, and therefore does not apply to an assignee of a negotiable security: *Taylor v. Blakelock*, 32 Ch. D. 560; 55 L. T. 8.

Where a mortgagor gave his solicitor money to pay off a mortgage which he misapplied, but subsequently obtained a transfer of the mortgage to himself and then assigned it for value to a third party without notice, it was held the assignee could not hold the mortgage against the mortgagor as a subsisting security: *Turner v. Smith*, 1901, 1 Ch. 213; 83 L. T. 704.

A licensee of a patentee takes subject to an equitable assignment of which he has express notice: *New Lion Type Co. v. Spilsbury*, 1898, 2 Ch. 137, 484.

The fact that the debtor before notice of the assignment has given a negotiable instrument in payment of the debt, is a defence to any claim by the assignee: *Bence v. Shearman*, 1898, 2 Ch. 582, *supra*, p. 70.

Set-off of Debts.

It seems to be clear that the debtor may set off as against the assignee a debt which accrues prior to the time notice of the assignment is received by the debtor: see *Christie v. Taunton*, 1893, 2 Ch. 181; and payment to the assignor after the assignment but before the notice is good against the assignee: *Crawford v. Canada Life Ass. Co.*, 24 Ont. App. 643. It has also been held that the debtor cannot set off as against the assignee a debt which accrues subsequently to the notice, even though the debt arises out of a liability which existed at and previously to the notice: see *Christie v. Taunton*, 1893, 1 Ch. 181; unless it flows out of and is inseparably connected with the dealings and transactions which gave rise to the subject of assignment: *Id.*, and *Newfoundland v. Newfoundland Ry. Co.*, 13 App. Cas. 200, 213. See also *Quick v. Colchester S.*, 30 Ont. 645.

Of unliquidated damages.

In regard to unliquidated damages, some change seems to have been made by the repeal of R. S. O., 1887, c. 122, s. 11. Under the present enactment unliquidated damages, under a right of action, accrued before the notice, and also unliquidated damages under a right of action accruing after the notice, if flowing out of and inseparably connected with the dealings and transactions which gave rise to the subject of assignment, may be set off as against the assignee to the extent of his claim: *Newfoundland v. Newfoundland Ry. Co.*, 13 App. Cas. 213; but damages beyond the amount claimed by the assignee cannot be recovered from him.

Thus where the statement of claim alleged that the plaintiff sued as assignee by deed of a debt due from the defendant to the assignor on a building contract, and the defendant pleaded by way of set-off and counter-claim that he was entitled to damages for breaches of contract by the assignor to complete and deliver the buildings at the specified time, whereby the defendant lost the use of them,

it was held, on demurrer, that the defendant was not entitled to recover any damages against the plaintiff; but was entitled, by way of set-off or deduction from the plaintiff's claim, to the damages which he had sustained by the non-performance of the contract by the assignor: *Young v. Kitchin*, 3 Ex. D. 127; and see *Farquhar v. Toronto*, 26 Ont. 356. For cases under R. S. O., 1887, c. 122, s. 11: see *Exchange Bank v. Stinson*, 32 C. P. 158; *Seyfang v. Mann*, 27 Ont. 631; 25 Ont. App. 179.

A debt due by the assignee to the debtor in another capacity cannot be set off as against the assignee: *Nelson v. Roberts*, 69 L. T. 352.

Where an assignment is absolute in form, a subsequent assignee for value is not affected by an equity, of which he had no notice, between the original assignor and assignee: *Quebec Bank v. Taggart*, 27 Ont. 162.

6. In case of an assignment of a debt or other chose in action, if the debtor, trustee or other person liable in respect of the debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he thinks fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he thinks fit, pay the same into the High Court under and in conformity with the provisions of law for the relief of trustees.

Where several claimants under assignments of debts or choses in action.

This sub-section corresponds with the latter part of sub-section 6 of the English J. A., 1873, a. 25 (6).

The Eng. sec. 25 (6) has been held to be retrospective: *Dibb v. Walker*, 1893, 2 Ch. 429; and this sub-section not being restricted as is the preceding sub-section, would also probably be held to be retrospective and applicable to all assignments of debts or choses in action whenever made.

A broker to whom shares had been transferred for the purpose of sale may, where rival claims are set up to them by a third party, call on the latter and the transferor, to interplead: *Robinson v. Jenkins*, 24 Q. B. D. 167.

A debtor, against whom an action has been brought for a debt of which notice of assignment has been given, may call on the claimants to interplead in respect of part of the debt, and dispute the remainder: *Reading v. School Board for London*, 16 Q. B. D. 686. The application may be made in a pending action, or by a separate proceeding under this section: *ib.*, and *McElheran v. London Masonic, etc.*, 11 P. R. 181. On a separate application under this clause an action commenced against the debtor cannot be stayed: *Reading v. School Board, supra*, otherwise if a summary application is made in the action: *McElheran v. London Masonic, supra*.

The provisions of this sub-section were held to entitle an insurance company to pay insurance money into Court where it is claimed by different parties: *Re Bajns*, 24 Ont. 397.

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To entitle the debtor, trustee, etc., to interplead, sufficient notice of the assignment must be shown: see *Re New Hamburg, etc., Co.*, W. N., 1875, 239.

A banking company, having received notice in writing of conflicting claims to moneys placed with them on deposit, paid such moneys into Court under the Trustee Relief Acts after first deducting therefrom their costs of payment in. Upon petition by one of the claimants for payment out, it was held that the corresponding sub-section in the Eng. Act applied only to debts of which there had been an absolute assignment in writing, and that the banking company, not being trustees within the Trustee Relief Acts, were not entitled to pay the deposit moneys into Court thereunder; but it was also held that the petitioner must be taken to have submitted to the jurisdiction under the Trustee Relief Acts by petitioning the Court; and that the bank was entitled to taxed costs of paying in the money, and of the petition; *In re Sutton's Trusts*, 12 Ch. D. 115; see *In re Haycock's Policy*, 1 Ch. D. 611; but it is to be noticed that this sub-section, unlike the corresponding Eng. sub-sec., is not in terms confined to an absolute assignment in writing. The provisions of the Trustee Relief Acts are now to be found in R. S. O. c. 336.

Stipulations
not of the
essence of
contracts.
44 V. c. 5.

7. Stipulations in contracts, as to time or otherwise, which would not before the passing of *The Ontario Judicature Act, 1881*, have been deemed to be or to have become of the essence of such contracts in a Court of Equity, shall receive in all Courts the same construction and effect as they would, prior to the passing of said Act, have received in Equity.

Same as Eng. J. A., 1873, s. 25 (7).

Time is not of the essence of a contract in Equity except in cases of express stipulation: *Oakden v. Pike*, 34 L. J. Chy. 620; *Hatten v. Russell*, 38 Ch. D., p. 339, or by necessary implication: *Parkin v. Thorold*, 16 Beav. 59; see also *Patrick v. Mûner*, 2 C. P. D. 342; *Crossfield v. Gould*, 9 Ont. App. 218.

The stipulation cannot be made by giving a notice, where not originally part of the contract, unless there has been such delay as to entitle the party giving the notice to be relieved from his contract: *Green v. Sevin*, 13 Ch. D. 589.

As to the equitable construction of stipulations in contracts as to time: see further *Tilley v. Thomas*, L. R. 3 Chy. 61.

Satisfaction
of obligation
by perform-
ance in part.

8. Part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in satisfaction, or rendered in pursuance of an agreement for that purpose, though without any new consideration, shall be held to extinguish the obligation.

This clause changes the law as settled by the decision of the House of Lords in *Foakes v. Beer*, 9 App. Cas. 665. Since the old case of

Cumber v. Wane, 1 Str. 426, it had been held that a debtor being *Sec. 56* under a legal obligation to pay the whole of his creditor's demand an agreement upon payment of part to discharge the whole was *nudum pactum*, unless there was some new consideration. Many subsequent cases exemplified circumstances under which *Cumber v. Wane* might be distinguished, such as where some dispute existed as to the exact amount due, or the money was to be paid in advance, or there was the acceptance of some new consideration however slight, or a negotiable instrument was given for the smaller sum: 1 Smith, L. C., 10th ed., 325; *Bidder v. Bridges*, 37 Ch. D. 406. In *Foukes v. Beer*, the House of Lords was asked to overrule *Cumber v. Wane*, but held that legislation was requisite for that purpose, the doctrine of that case having been part of the law of England for 280 years.

In *Day v. McLea*, 22 Q. B. D. 610, the plaintiffs made a claim for damages for breach of contract; the defendant sent a cheque for a less sum, saying that it was in full of all demands; plaintiffs kept the cheque, stating that they did so on account, and brought an action for the balance of the claim. It was held that keeping the cheque was not as a matter of law conclusive that there was accord and satisfaction, and that it was a question of fact on what terms the cheque was kept; and see *Mason v. Johnston*, 20 Ont. App. 412.

But where money has been paid in pursuance of a compromise, the person to whom it is so paid cannot both keep it and repudiate the compromise; and where money had been thus paid to a plaintiff he was required to bring it into Court, as a condition of being allowed to proceed with the action: *Henderson v. Underwriting Assoc.*, 65 L. T. 616; affirmed *Id.*, 732; *Guy v. Walker*, 8 Times 314.

This clause was applied in *Bank of Commerce v. Jenkins*, 16 Ont. 215, where it was held that an agreement of composition, by which notes for 40c. on the dollar were to be given, was irrevocable, when entered into by a creditor, though other creditors had not given their assent.

9. A mandamus or an injunction may be granted or ^{Injunctions and receivers.} a receiver appointed by an interlocutory order of the Court, in all cases in which it shall appear to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally, or upon such terms and conditions as the Court shall think just; and if an injunction is asked, either before, or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained

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under any colour of title; and whether the estates claimed by both or by either of the parties are legal or equitable.

Identical with the English J. A., 1873, s. 25 (8).

Where an injunction or receiver is a substantial object of the action, the writ should be indorsed with a claim for that relief: *Colbourne v. Colbourne*, 1 Ch. D. 630, but may be had though not so claimed: *Norton v. Glover*, W. N., 1877, 203.

"Interlocutory order."

An "interlocutory order" means not merely an order between writ and final judgment, but an order other than final judgment whether before or after final judgment: *Smith v. Cowell*, 6 Q. B. 19, 76; *McLean v. Allen*, 14 P. R. 84; *Easton v. Nar Valley, etc.*, 8 Times 649. See also *Salt v. Cooper*, 16 Ch. D. 544, and *Agnew v. McDowell*, 14 L. R. 1r, 115, where, after a verdict, an injunction was granted against a continuance of the trespasses complained of in the action, no injunction having been granted at the trial. See also notes to sec. 73, and *Rule 702*.

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

Practice.

Motions under this section may be made in Court, except probably in the case of a mandamus, in regard to which provision is made for a summary application in Chambers: see *Re Brookfield, etc.*, 12 P. R. 485, and *Rules 1081, 1091-1093*.

Mandamus.

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

Prerogative mandamus.

Prerogative Mandamus.—The prerogative writ was one which did not issue as of strict right like the writs which the subject had the right to call for under the clause of Magna Charta, by which the Crown is bound not to refuse or delay justice or right, but issued at the discretion of the Crown, and the power to issue it was not delegated to the ordinary Judges between party and party, but the discretion of the Crown was exercised through that one of the Courts in which the Sovereign is supposed to be personally present: see 3 Bl. Com. 110, 132; 4 Mod. 340; *Reg. v. Cowle*, Burr. 855; Tapping 4; Shortt 223. For this reason it is still in England only granted on application to the K. B. D. being considered one of the flowers of the old Court of Queen's Bench, now belonging to the K. B. D.: *Glossop v. Heston Local Board*, 12 Ch. D. 115-116. The discretion which the Court possessed was not an arbitrary, but a judicial discretion: see *Reg. v. Wigan*, 1 App. Cas. 622; but was only exercised where there was no other effectual remedy: *Rex v. University of Cambridge*, 1 W. Bl. 552; *Re Borlow*, 30 L. J. Q. B. 271; *Rex v. Hall*, 3 A. & E. 497.

In Ontario the former Superior Courts of Law had concurrent jurisdiction in the matter; and the High Court has now the same jurisdiction that any of the Courts formerly existing had: see sec. 25 of the Act. *Re Stratford & Huron Railway and County of Perth*, 38 U. C. Q. B. 156, per Moss, J.A., and *Board of Education, Napanee v. Napanee*, 29 Gr. 395; *Re Paris Skating Rink Co.*, 6 Ch. D. 731; *Toronto Pub. Lib. Board v. Toronto*, 19 P. R. 329.

The prerogative mandamus is not interfered with by the above ^{Sec. 55.} sub-section, or by any other enactment.

It is not the appropriate remedy for the enforcement of rights arising out of contract: *Re London H. and B. Ry. and Tp. Wawanosh*, 30 U. C. Q. B. 93; *Re Hamilton and N. W. Ry. and Halton*, 30 U. C. Q. B. 93; *Grand Junction Ry. v. Peterboro'*, 8 S. C. R. 78; or other personal right in the applicant against the respondent: *Reg. v. Cammell*, 45 W. R. 330; *Kingston v. Kingston P. & C. E. Ry.*, 25 Ont. App. 462. If a mandamus be grantable in such a case it is the mandamus which may be claimed in an action under Rule 1081, or the above sec. 58 (9).

The prerogative mandamus is preserved for the extraordinary cases, where without it a party would be left without effectual remedy to compel the performance of some duty in which the applicant is interested, and to the performance of which he has a specific legal right: *Reg. v. Lewisham*, 1897, 1 Q. B. 498; 45 W. R. 346, but it is not granted where the applicant has another appropriate remedy: see cases *supra*, and *Pasmore v. Oswaldtwistle Urban D. Co.*, 1898, A. C. 397 (where a special Act provided the remedy for non-performance of the duty), *Bush v. Brocan*, 1 H. & C. 500; *Tp. of Moulton and Haldimand*, 12 Ont. App. 503; *Re Massey Mfg. Co.*, 11 Ont. 441; 13 Ont. App. 446; *Reg. v. Lambourne Ry.*, 22 Q. B. D. 463; *Reg. v. Registrar of Joint Stock Co's*, 21 Q. B. D. 131; *Re Whitaker & Mason*, 18 Ont. 63; *Re Marter v. Cravenhurst*, 18 Ont. 243; *Probley v. Oswaldtwistle*, 1897, 1 Q. B. 625; 76 L. T. 315; *Westacott v. Steuart*, 48 W. R. 379. See, however, Rule 1084. A petition of right has been considered to be other appropriate remedy: *Reg. v. Commissioners of Inland Revenue*, 12 Q. B. D. 461.

The prerogative mandamus cannot be granted against the Crown: *McQueen v. McQueen*, 16 S. C. R. 1; and see per Cockburn, C.J., *Queen v. The Lord Commissioner of the Treasury*, L. R. 7 Q. B. 388; though it may be granted against an officer of the Crown to compel the performance by him of a public duty: *Re Massey Mfg. Co.*, *supra*.

Formerly the existence of a remedy in Equity was not sufficient reason for refusing the writ, the Court only considered whether there was another specific remedy at Law: see *R. v. Stafford*, 3 T. R. 652; *Re Hamilton and N. W. Ry. v. Halton*, 30 U. C. Q. B. 93; and see *Re Stafford and Huron Ry. Co. and Perth*, 38 U. C. Q. B. 112, but, since the Ont. Jud. Act, the existence of any other remedy, legal or equitable, which the Court can apply will probably be sufficient reason for not interfering by way of the prerogative mandamus.

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

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

Examples.—A mandamus will not be granted (either in an action *Examples.* or otherwise) to interfere with a discretion vested in, and honestly

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Discretion.

exercised by, a local public authority: *Smith v. Chorley*, 1897, 1 Q. B. 532, 678; but has been granted where the discretion has been exercised on a mistaken view of the matters to which the discretion of the local authority extends: *Reg. v. St. Pancras*, 24 Q. B. D. 371; *Reg. v. Cotham*, 1898, 1 Q. B. 802; and to a Judge of an inferior Court who refused to hear a cause because he erroneously decided that he had no jurisdiction: *Reg. v. Judge of Southampton, C. C.*, 65 L. T. 320.

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

A mandamus will not be granted against a public body where, if issued, it would be unavailing, or where there is no necessity for the relief: *Re Gies v. Wellington*, 30 Ont. 610; nor where the performance of the duty sought to be enforced is impossible by reason of want of funds: *Re Bristol and Somerset Ry.*, 3 Q. B. D. 10; see *Atty.-Gen. v. Dorking*, 20 Ch. D. 345; nor against a railway company to compel it to reinstate and keep open its line which had fallen into disuse in consequence of subsidence: *Reg. v. Great Western Ry.*, 69 L. T. 443, 572; nor to compel a railway company to operate its railway: *Kingston v. Kingston E. Ry. Co.*, 28 Ont. 399; 25 Ont. App. 462.

A mandamus was granted to rehear an application for a license to sell liquor before justices who had improperly taken money for granting the application: *Reg. v. Bowman*, 1898, 1 Q. B. 663.

Statutory mandamus.

Statutory Mandamus.—The right to claim a mandamus in an action was first given by Imp. Act. 17 & 18, c. 125, s. 69, adopted here in 1850 (see R. S. O. 1877, c. 52, s. 4), and now embodied in Rule 1081.

Under Rule 1081.

The decisions under the Act from which Rule 1081 was taken (and for which see notes to Rule 1081 and the elaborate notes of Chief Justice Harrison in his edition of the C. L. P. Act, pp. 462, *et seq.*), somewhat limited its application, possibly by reason of some confusion of the new writ with the old prerogative writ (though a distinction between them is made in the Act: see R. S. O. 1877, c. 52, s. 10, where the right to issue the old writ is preserved), and it would seem that the intention of the above sec. 58 (9) of the Jud. Act was to enlarge the scope of the mandamus which was obtainable in an action.

Under the Jud. Act, sec. 58 (9).

This enactment goes further than the previous statutes, and than Rule 1081, and enacts that a mandamus may be granted "by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made."

The object of this clause was probably two-fold: (1) to enlarge the discretion of the Court in granting writs of mandamus, and (2) to enable the writ to be obtained on an interlocutory application, and not merely as part of the judgment in an action. The latter matter possibly did not require legislation in this Province, as the Act 35 Vict. c. 14, s. 1 (now Rule 1091), enabled parties to obtain a mandamus on motion in Chambers.

The mandamus referred to in this section is not the old prerogative mandamus, "but only a mandamus which may be granted to direct the performance of some act, of something to be done, which is the result of an action where an action will lie": *per* Brett, L.J., in *Glossop v. Heston, etc.*, 12 Ch. D. 122.

Semble, a mandamus grantable by action will not be granted to enforce private rights arising under an agreement: *Kingston v. Kingston P. & C. E. Electric Railway*, 25 Ont. App. 462.

Although the Court or a Judge has power to grant a mandamus on an interlocutory application, it will not be done unless the plaintiff clearly shows that he will suffer some injury by waiting for the result of the action: *In re Paris Skating Rink Co.*, 6 Ch. D. 731; *vidue Alkali Co. v. Sheffield and Midland Railways Co.'s Committee*, 37 L. T. 131.

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

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

Practice.—As to practice on motions for mandamus: see notes to practice. Rule 1091.

When a mandamus *nisi* is granted, as to the return thereto, and practice thereon, see Rule 1085 and notes.

A second application for a prerogative mandamus, after the first has been dismissed, will not be entertained: *Reg. v. Mayor of Bodmin*, 1892, 2 Q. B. 21; *Ex p. Thompson*, 6 Q. B. 721; *Reg. v. Pickles*, 12 L. J. Q. B. 401; unless the dismissal was owing to a technical insufficiency in the affidavits: *Re Guillot & Southwick, etc.*, 26 U. C. Q. B. 246; but see *Reg. v. Bodmin, supra*.

In England it has been held that the prerogative writ must be moved for by counsel, not by an applicant in person: *Reg. v. Mayor of Liverpool*, 7 Times, 592; *Ex p. Whyte*, 12 Times, 458; *Ex p. Wallace*, 1902, 2 K. B. 488; and see Rules 3, 768, 355 *note*.

Although on an application for a prerogative mandamus proof of a previous demand and refusal to do the act required must be given, this is not essential in actions for mandamus: *Young v. Erie & Huron Ry.*, 27 Ont. 530.

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

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

Injunctions.—By the transfer to the High Court of the former jurisdiction of the Common Law Courts (see J. A., sec. 25), it has power to grant injunctions, interlocutory or final, in any action to restrain the defendant from the repetition or continuance of any breach of contract, or wrongful act complained of in the action, or from the commission of any breach of contract, or injury of a like kind arising out of the same contract, or relating to the same property or right: such relief may be granted or refused upon such terms.

Sec. 58. as to its duration, keeping an account, or giving security or otherwise, as may seem just (see R. S. O. 1877, c. 52, s. 30). The High Court has, therefore, not only the jurisdiction formerly possessed by the Court of Chancery to grant injunctions, but also that formerly conferred on the Courts of Law by the above enactment.

Scope of
enactment
as to in-
junctions.

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

An injunction may be granted where "it shall appear to the Court to be just and convenient": *Thorley's Cattle Food Company v. Massam*, 6 Ch. D. 582; *Hinrichs v. Berndes*, W. N. 1878, 11; *Sarby v. Easterbrook*, 3 C. P. D. 339; *Re Cambrian Mining Co.*, 29 W. R. 881, and the words of the section rather enlarge than diminish the arm of the Court in respect of injunction: *per Fry, J.*, in *Thomas v. Williams*, 43 L. T. 94; 49 L. J. Chy. 605. But it is with regard to settled legal reasons or principles that the Court will decide what is just and convenient: *Beddow v. Beddow*, 9 Ch. D. 89; *Shaw v. E. of Jersey*, 4 C. P. D. 359; *Gaskin v. Balls*, 13 Ch. D. 324; *Fletcher v. Rogers*, 27 W. R. 97; *Aslatt v. Corporation of Southampton*, 16 Ch. D. 143; and this sub-section does not in the least alter the principles upon which the Court should act: *Day v. Brownrigg*, 10 Ch. D. 294, and does not give any new rights to parties who had previously no rights enforceable at Law or in Equity; but it enables the High Court, without being hampered by any old rules, to grant an injunction whenever it is just or convenient so to do, for the purpose of protecting or asserting the legal rights of the parties: *N. London Ry. Co. v. Great Northern Ry. Co.*, 11 Q. B. D. 30; 48 L. T. 696; *Bonner v. G. W. Ry.*, 24 Ch. D. 1; *Wood v. Lillies*, 61 L. J. Chy. 158; *Richardson v. Methley School Board*, 1893, 3 Ch. 510; *Kitts v. Moore*, 1895, 1 Q. B. 253. See also *Robinson v. Pickering*, 16 Ch. D. 660; and *Brett Ldg. Cas. in Modern Equity*, 324; and notes, *infra*, under "Receivers."

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

In *Cooper v. Whittingham*, 15 Ch. D. 507, Jessel, M.R., said that this section may be said to be a general supplement to all Acts of Parliament, and where a statute creates a penalty for doing an act, an injunction to restrain the act may be claimed as an ancillary remedy. As to this dictum, see *Hayward v. E. London W. W. Co.*, 28 Ch. D. 146; see also *Richardson v. Methley*, 1893, 3 Ch. 510.

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

No Court will issue an injunction where if the thing sought to be restrained is allowed to go on, no legal injury is done to any one: *per Brett, L.J.*: *N. London Ry. Co. v. G. N. Ry. Co.*, *supra*. Thus there is no right to restrain the removal of exigible goods where there is no subsisting judgment or order under which execution might be issued: see *Newton v. Newton*, 11 P. D. 11 (see after judgment *Newton v. Newton*, 1896, P. 36); *Carter v. Carter*, 1896, P. 35; *Burdett v. Fader*, 6 O. L. R. 532; 7 O. L. R. 72 (where the entry of judgment was stayed); nor the alienation by defendant of lands which would be liable to satisfy the judgment if the plaintiff should succeed

in the action: see *Hepburn v. Patton*, 28 Gr. 597; *Robinson v. Pickering*, 50 L. J. Chy. 527; *Merchants Bank v. Bell*, 29 Gr. 413; *Parkes v. St. George*, 10 Ont. App. 496, 542; nor the alienation of her separate property by a married woman pending an action against her to recover a debt: *Nat. Prov. Bank v. Thomas*, 24 W. R. 1013. An action will not lie for such purposes: *Chamberlain v. McDonald*, 14 Gr. 447.

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

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

In *London & Blackwell Ry. Co. v. Cross*, 55 L. J. Chy. 313, it was held that the enlarged powers as to injunctions given by this section did not enable the Court to restrain a person from proceeding for compensation under the Lands Clauses Act, though the claim be futile or vexatious, and made in the name of a third party without his authority. The Court acts in such case on the ground that its process is being abused.

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

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

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

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The performance of statutory duties imposed on a public body may be enforced by injunction. Thus an injunction was granted against a railway company to compel it to observe statutory provisions respecting the speed of trains, although there was no evidence of any damage by reason of their breach: *Attorney-General v. Landon & N. W. Ry.*, 1900, 1 Q. B. 78; and to restrain a road company from constructing its road otherwise than as authorized by statute: *Attorney-General v. Weston*, 4 Gr. 211; and an injunction was granted to restrain a municipal corporation from carrying on a business in excess of its statutory powers, and the discretion of the Attorney-General to institute such proceedings on the relation of rival traders cannot be interfered with by the Court: *Attorney-General v. London County Council*, 1901, 1 Ch. 781; 84 L. T. 245; but an injunction or mandamus to compel a street railway company to run its cars in accordance with its agreement with a city was refused: *Kingston v. Kingston P. & C. E. Ry.*, 25 Ont. App. 462; *Hamilton v. Hamilton St. Ry.*, 8 O. L. R. 642; and an injunction to compel a road company to keep its road in repair was also refused: *Attorney-General v. Weston*, 4 Gr. 211.

It was held that an action for an injunction may be commenced against a Local Board without the month's notice required by the Public Health Act, in all cases where, before the Judicature Act, a bill would have been sustained in Chancery for an injunction; and although damages are claimed by way of subsidiary relief: *Flower v. Law Lepton Local Board*, 5 Ch. D. 347; and when the action is *bona fide* brought for an injunction, damages may be awarded in lieu of the injunction, though no notice of action has been given: *Chapman v. Auckland*, 23 Q. B. D. 294.

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

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

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

An injunction is granted against a person not a party, only when he is agent of a party, or in cases where he is doing something which amounts to contempt of the Court or its process: *Re Gay & Gay v. Hancock*, 80 L. T. Jour. 392.

Hearing in camera.

In *Mellor v. Thompson*, 31 Ch. D. 55, an injunction motion was heard *in camera* on the ground that a public hearing would defeat the object of the action.

Delay.

Delay.—Delay is, in general, no bar to an injunction in aid of a legal right, unless the legal remedy is barred by the lapse of time: *Fullwood v. Fullwood*, 47 L. J. Ch. 459; but where buildings (which transgressed the provisions of restrictive covenants) had been allow-

ed to remain for five years without complaint, an injunction was **Sec. 58.** refused: *Gaskin v. Balls*, 13 Ch. D. 324.

Damages.—As to awarding damages in lieu of an injunction, see sec. 58 (10).

Mandatory Injunctions.—These may be granted as formerly: *Mandatory* see *Strelley v. Pearson*, 28 W. R. 752; *Mullins v. Howell*, 11 Ch. D. *injunctions.* 763; *Smith v. Smith*, L. R. 20 Eq. 504; *Gaskin v. Balls*, 13 Ch. D. 324; *Hermann Loog v. Bean*, 26 Ch. D. 306; but an injunction will not be granted where the proper remedy is a prerogative writ of mandamus: *Glossop v. Heston Loc. Board*, 12 Ch. D. 120; *Attorney-Gen. v. Dorking*, 20 Ch. D. 595.

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

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

The Court may interfere by mandatory injunction on an inter- *On an inter-* locutory application, but the right must be very clear indeed: *Toronto* *locutory* *Brewing and Malting Co. v. Blake*, 21 Ont. 175; *Bonner v. G. W. Ry.* *application.* *Co.*, 24 Ch. D. 10; *Hermann Loog v. Bean*, 26 Ch. D. 306.

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

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

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

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

Interlocutory Injunctions.—The office of an interlocutory in- *Interlocu-* junction is usually simply to retain matters *in statu quo* till the trial: *tory in-* *Erie & Niagara Ry. Co. v. C. W. R. Co.*, 21 Gr. 171; *Preston v. Luek,* *junctions.* 27 Ch. D. 497; and the Court will not determine legal rights on such an interlocutory application: *G. T. Ry. Co. v. Credit Valley R. Co.*,

Sec. 53. 26 Gr. 572. See also *Lybbe v. Harte*, W. N. 1883, 127; and *Attborough v. London, etc., Telephone Co.*, W. N. 1884, 2, where the Court declined to consider the questions involved till the hearing.

An application for an interlocutory injunction must be made promptly. Acquiescence or delay will generally be an answer to the motion before trial; but the applicant is not bound to move till the hearing, and delay till then is not such acquiescence as will disentitle him then to relief: *Davies v. Marshall*, 4 L. T. 105; *Rich v. Brantford*, 14 Gr. 83. See *Caldwell v. Galt*, 27 Ont. App. 162.

The motion is made in Court, not in Chambers: see above clause (9). The Master in Chambers and judicial officers having like powers have not jurisdiction: *Rule 42 (12)*. County Judges as Local Judges of the High Court have a limited jurisdiction under *Rules 46 and 47* in High Court cases. In the County Courts they have the same jurisdiction that High Court Judges have in the High Court: R. S. O. c. 55, s. 28.

The plaintiff must shew upon his own material a *prima facie* right to the injunction, otherwise it will not be granted, however much the balance of convenience may be in favour of granting it: *Société Anonyme, etc. v. Tilghman, etc.*, 25 Ch. D. 1. It will not be granted on the ground that no harm will be done thereby: *Strousberg v. Linklater*, 32 Sol. Jo. 751, and see per Cotton, L.J., in *Preston v. Luck*, 27 Ch. D. 506; *Challender v. Royle*, 36 Ch. D. 425.

Where the plaintiff is himself in fault an interlocutory injunction should not be granted: *Kirkhouston v. Airlie*, 1892, 2 Q. B. 278; 67 L. T. 229.

A deliberate violation of a covenant may be restrained though the injury may be trifling: *Cooke v. Gilbert*, 92 L. T. Jour. 312; 8 Times, 382.

Balance
of conven-
ience.

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

The Court on an interlocutory application for an injunction should consider the balance of convenience, and if on the one hand irreparable injury may be caused by withholding the injunction, while on the other hand any injury occasioned by the injunction may be sufficiently compensated by damages, the injunction should be granted: *Corporation of Cork v. Rooney*, 7 L. R. Ir. 191; see also *Atty-Gen. v. Dorking*, 20 Ch. D. 595; *Bonner v. G. W. Ry. Co.*, 24 Ch. D. 10; and *Masson v. Grand Junction Ry. Co.*, 26 Gr. note p. 289; *Grafton v. Watson*, 27 Ch. D. 43; 51 L. T. 141; *Walker v. Clarke*, 56 L. T. 111; 35 W. R. 245; *Hamilton, etc., Road Co. v. Raspberry*, 13 Ont. 466; *Newson v. Pender*, 27 Ch. D. 43.

When the plaintiff's legal right is not clear and serious loss and public inconvenience may necessarily result from granting an interlocutory injunction, and no irreparable loss would result from refusing it, it should not be granted: *Dwyre v. Ottawa*, 25 Ont. App. 121.

Where, in pursuance of a clause in articles of partnership, one partner had expelled a co-partner from the firm on the ground of his having been convicted of a crime, the Court refused an interlocutory injunction to restrain such expulsion, the fact of the conviction not being denied: *Carmichael v. Evans*, 1904, 1 Ch. 486; 90 L. T. 573.

The judicial committee of the Privy Council refused to interfere with an interlocutory injunction restraining trespass on mining lands, although the respondent did not appear: *Croudace v. Zobel*, 1899, A. C. 258. Sec. 68.

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

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

A plaintiff may serve notice of motion for an injunction without leave at any time after the issue of the writ: *Rule 361*; *Re Sceptre V. Co.*, 23 Sol. Jour. 230; or possibly by leave before, in cases of urgency: see *Thornloe v. Skoines*, L. R. 16 Eq. 126; but ordinarily an action should be pending. A case involving necessity for dispensing with the issue of the writ is not easily imaginable. It might, however, occur where immediate action is necessary after the offices of the Court are closed for the day. The mere preparation of the writ ready for issue is easily done in connection with the affidavits, which, in any case, must be prepared, and should properly speaking be entitled and sworn in a pending action: see *Chanvock v. Hertz*, 4 Times, 331; *Süder v. Lewin*, 33 Sol. Jour. 757; *Green v. Prior*, W. N. 1886, 50. The notice of motion may be served with the writ: *Capes v. Brewer*, 44 W. R. 40; *Rule 361*. When interlocutory motion may be made.

A defendant may move at any time after service of the writ and before judgment: *Sargant v. Read*, 1 Ch. D. 600; *Rule 361*; but see "*Injunction against plaintiff*," *infra*, p. 87.

In cases of urgency and necessity an application may be made before service of the writ, and *ex parte*, as for instance, where it was alleged that trustees were on the eve of bankruptcy, a receiver was appointed: *Re T's Estate*, 1 Ch. D. 276.

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

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

The plaintiff is entitled to move as soon as his legal right is invaded. Notice to the defendant before coming to the Court is not necessary: *Cooper v. Whittingham*, 15 Ch. D. 501; *Upmann v. Forster*, 24 Ch. D. 231; *Goodhart v. Hyett*, 25 Ch. D. 182; *United Telephone v. London Tel. Co.*, 26 Ch. D. 766; *Nicols v. Pitman*, 26 Ch. When plaintiff may commence action.

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D. 374; *Wittman v. Oppenheim*, 27 Ch. D. 200; and an offer to accede to the plaintiff's demands will not deprive the plaintiff of his right to move, or to costs, where the violation of his rights has been wilful: *Fennessy v. Day*, 55 L. T. 161; but if the violation is trifling and has been innocent and unintentional, costs may be refused the plaintiff: *American Tobacco Co. v. Quest*, 1892, 1 Ch. 630. Where, on service of the writ, defendant offered an undertaking and costs, an injunction was refused: *Jenkins v. Hope*, 1896, 1 Ch. 278; *Snuggs v. Seyd*, W. N. 1894, 95.

Ex parte injunctions.

"*Ex Parte*" Injunctions.—An injunction should not be granted *ex parte* except in cases of urgency, as where immediate damage is being done or apprehended: see *Anon*, per Lindley, J., W. N. 1876, 12; *Meluish v. Milton*, 24 W. R. 679; *Tozer v. Walford*, W. N. 1875, 250; *Blewitt v. Dowling*, *ib.*, 202; *Hennessey v. Rohmann*, 36 L. T. 51; W. N. 1877, 14, and *Taylor v. Eokersley*, 2 Ch. D. 302; *Re H's Estate*, 1 Ch. D. 276; *Hyde v. Warden*, 1 Ex. D. 309; cases of receivers. If the defendant has appeared, that fact should always be mentioned to the Judge on an *ex parte* motion for an injunction: *Harrison v. Cockercill*, 3 Mer. 1, and where it is not, the plaintiff may be made to pay in any event the costs of a motion to dissolve an injunction so granted: *The Mexican Co. v. Maldonado*, 88 L. T. Jour. 238, W. N. 1890, 8.

The affidavits on which an *ex parte* motion is made should disclose all facts and circumstances material for the Court to know, or the injunction will be dissolved on motion for that purpose, even though the party moving did not consider the omitted matter material: *McMaster v. Callaway*, 6 Gr. 577; *Ley v. McDonald*, 2 Gr. 398; *Hynes v. Fisher*, 4 Ont. 60; see notes to Rule 357.

Where an *ex parte* injunction is dissolved on the ground of concealment of material facts, the party who obtained it will, in general, be ordered to pay the costs of the motion forthwith: *Walton v. Henry*, 13 P. R. 390; an interim injunction obtained on the suppression of facts, may be dissolved on the motion to continue it, though there be no cross motion: *Boyce v. Gill*, 64 L. T. 824; and though the Court may see fit to grant another injunction in the same terms: *ib.*

Duration of interim injunction.

Duration of Interim Injunction.—Where an interim injunction is granted *ex parte*, it is usually limited to a few days only, and the party obtaining it, when serving it on the party enjoined, usually serves at the same time a notice of motion to continue it. If the Court on the hearing of this motion thinks fit to continue it, it is usually continued "until the trial or other final disposition of the action," and in that case the injunction continues in force until judgment is entered. An injunction granted until a certain day expires on that day unless continued; no motion to dissolve is necessary unless it is sought to get rid of the injunction in the meantime: *McCuaig v. Connee*, 19 P. R. 45. Where the judgment at the trial is directed not to be entered until a future time, an interim injunction until the trial, etc., remains in force until that time arrives: *Carroll v. Provincial Gas Co.*, 16 P. R. 578, and where a party by his counsel or solicitor gives an undertaking to refrain from doing an act, and a party has refrained from applying for an injunction in consequence, the undertaking will continue in force, and be enforced by the Court in the same manner as an injunction: *Haggert v. Brampton*, *ib.*, in note, p. 518; *Polini v. Gray*, 12 Ch. D. 438; *London & B. Ry. Co. v. Grand Junction C. Co.*, 1 Eng. Ry. Cas. 224; and see *Bolton v. London School Board*, 7 Ch. D. 766.

A plaintiff was held not entitled to have matters kept in *statu quo* ^{Sec. 59.} by an injunction after judgment, and until the case could be heard by the Court of Appeal, although the decisions in Courts of first instance were against the plaintiff, and therefore unless time was given to take the case to the Court of Appeal he would be without substantial relief: *Wyld v. McMaster*, 4 Ont. 717; *sed vide*, *King v. Duncan*, 9 P. R. 61; *Polini v. Groy*, 12 Ch. D. 438.

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

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

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

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

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

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

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

The right to an injunction to restrain trespassers formerly depended on whether the person sought to be restrained was in possession or not, and if in possession whether he was a mere trespasser or acted under colour of right: see Kerr on Injunctions 289, *Louder v. Bettle*, 33 L. J. Ch. 451; 10 Jur. N. S. 226; *Stanford v. Harlstone*, L. R. 9 Chy. 116. But the Canadian Legislature long ago dealt with this difficulty by enacting (20 Vict. c. 56, s. 4; Cons. Stat. U. C. c. 12, s. 27; R. S. O., 1877, c. 40, s. 39) that "the Court

Restrain-
ing trespassers.

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may grant an injunction to stay waste in a proper case notwithstanding that the party in possession claims by an adverse legal title." The enactment in the above clause 58 (9) is to the same effect.

In *Anon. W. N.*, 1876, c. 38, an *ex parte* application for an injunction restraining a man from trespassing with a horse and cart was refused, the Judge remarking that "injunctions are not ordinarily granted for mere trespass, unless serious injury is threatened to the property." On a fresh application being made in this case, after notice to the defendant, no order was made, on the defendant consenting that damages should be assessed up to the date of the trial: *Makin v. Barrow*, *Id.* 105.

An injunction to restrain interference with the enjoyment of an easement, which was not 20 years old, was refused, although it had been enjoyed for 19 years: *Governor of Bridewell v. Ward*, 68 L. T. 212.

Nuisances

Nuisances may be restrained by injunction: but where the act complained of as a nuisance is done in pursuance of a legal right conferred by statute, and to carry out a lawful object, and is temporary in its character, it is no nuisance in law, and no injunction can be granted to restrain it: *Harrison v. Southwick & Vauxhall Water Co.*, 1891, 2 Ch. 409; but a legal right may be exercised in an unreasonable way so as to become a nuisance: e.g., the ringing of church bells at unreasonable times, and may be restrained: *Soltau v. De Held*, 2 Sim. N. S. 133; 21 L. J. Chy. 153; the unreasonable playing of a band: *St. Margaret's Church v. Stephens*, 29 Ont. 185; or of street organs: *Lambton v. Mellish*, 1894; 3 Ch. 163. A public urinal is not necessarily a public nuisance: *Vernon v. St. James' Vestry* 16 Ch. D. 449; 44 L. T. 229; *Graham v. Newcastle*, 67 L. T. 260, 790; but it may be one which will be restrained by injunction: *Sellers v. Matlock Bath*, 14 Q. B. D. 928; 52 L. T. 762. A nuisance caused by the noise of washing dishes, and heat and smell from a cooking range, was restrained: *Sanders v. Grosvenor Mansions*, 1900, 2 Ch. 373; 82 L. T. 758; so also noise, vibration, and smell from steam engines: *Knight v. Isle of Wight, E. L. & P. Co.*, 90 L. T. 410; *Colwell v. St. Pancras*, 11 1 Ch. 707.

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

Recount of ballots.

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

The Crown or its servants discharging discretionary function

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

Foreign sovereign.

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

In the absence of any sufficient equity to justify it the Court will not restrain by injunction a plaintiff from proceeding in a foreign Court: *Hunt v. Hunt*, 1807, 2 Q. B. 34, as reversed in appeal, 77 L. T. 421. Mere hardship or inconvenience will not be sufficient reason: *Fletcher v. Rodgers*, 27 W. R. 97; but where a foreigner has appeared in an English Court, the Court has a discretion to restrain him from litigating the same subject matter in his own country: *Dawkins v. Simonetta*, 29 W. R. 228; see also *Re Boyse, Crofton v. C.*, 15 Ch. D. 591; and notes to sec. 57 (10) *supra*.

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Proceed-
ings in
foreign
Courts.

In *Ex parte McPhail*, 12 Ch. D. 632, Jessel, M.R., refused leave to serve a writ out of the jurisdiction, on the ground that the plaintiff could have an effectual remedy by application to the local Court. As to providing for an injunction where the writ is to be served out of the jurisdiction, see *Young v. Brassey*, 1 Ch. D. 277.

Property which is the subject of an action may be preserved under Rule 1006, by means of an injunction: *Strelley v. Pearson*, 43 L. T. 155.

Preserva-
tion of
property.

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

A threatened sale of a specific chattel, which, if carried out could have been compensated in damages, is not a proper case in which to grant an injunction restraining the sale: *Bradley v. Barber*, 30 Ont. 442.

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

In *Anon.*, W. N. 181: 1, a defendant was restrained from parting with a bill of exchange. See also *Anon.*, *Ibid.* 37.

An interim injunction was granted against a lunatic partner at the suit of a co-partner: *J. v. S.*, 1894, 3 Ch. 72; 70 L. T. 758. An injunction may be granted to restrain the interference with light to which plaintiff is entitled for the purpose of his business: *Lazarus v. Artistic Studio Co.*, 1897, 2 Ch. 214; 76 L. T. 457.

Injunctions have been granted restraining the committee of a club from acting improperly in expelling a member: *Fisher v. Keane*, 11 Ch. D. 353; *Labouchere v. Earl of Wharfedale*, 13 Ch. D. 346; see also *Dawkins v. Antrobus*, 17 Ch. D. 615; *Foster v. Harrison*, W. N. 1881, 171.

Restraining
action of
clubs.

An injunction was granted restraining a photographer from publishing a photograph of the plaintiff, whose portrait he had taken: *Pollard v. Photographic Co.*, 40 Ch. D. 345; restraining the publication of libels: *Thorley Cattle Food Co. v. Massam*, 14 Ch. D. 763; *Thomas v. Williams*, *Ib.* 864; *Saxby v. Easterbrook*, 3 C. P. D. 339; *Hayward v. Hayward*, 34 Ch. D. 198; or slanderous oral statements injuriously affecting the person: *Quirk v. Dudley*, 4 O. L. R. 532; or property or trade: *Hermann Loog v. Bean*, 26 Ch. D. 306; *Mellin v. White*, 1894, 3 Ch. 276; subsequently reversed on the facts; 1895, A. C. 154; or tending to injure a friendly society or a joint stock company: *Hill v. Hart Davies*, 31 W. R. 22; 47 L. T. 82; but the Court will not restrain a trader from publishing circulars to the effect that his goods are better than those of a rival trader: *Hubbuck v. Wilkinson*, 1890, 1 Q. B. 86; 70 L. T. 429.

Publication
of photo-
graphs.

Libel and
slander.

Sec. 88.

Though the jurisdiction in the case of such libels is clear, even on an interlocutory application, the Court only acts in a strong case, and in general not unless satisfied that the statements complained of are untrue: *Quartz Hill Gold Mining Co. v. Beall*, 20 Ch. D. 501; *Bonnard v. Perryman*, 1801, 2 Ch. 234; 65 L. T. 506; *Collard v. Marshall*, 1802, 1 Ch. 571; 98 L. T. 248; *Lea v. Gibbins*, 8 Times, 773; *Liverpool v. Smith*, 37 Ch. D. 170; nor where defendant swears he will be able to justify, and the Court is not satisfied that he may not be able to do so: *Bonnard v. Perryman*, 1801, 2 Ch. 234; *Monson v. Tussaud's, etc.*, 1804, 1 Q. B. 671; 70 L. T. 225; nor where there is no reason to apprehend such danger or injury to the plaintiff in person or property, as to make it right to grant an interlocutory injunction: *Salomons v. Knight*, 1891, 2 Ch. 294.

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

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

Publication of "Black list."

An interlocutory injunction was granted against a trades union, to restrain the publication *pendente lite*, of a black list of men employed by plaintiff: *Trollope v. London Building Trades Federation*, 72 L. T. 242.

Misappropriation of funds by public body.

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

Contravention of charter.

An interlocutory injunction was granted to prevent a corporate body from acting in contravention of a prohibition contained in its special Act: *Atty.-Gen. v. Metropolitan Electric Supply Co.*, 1905, 1 Ch. 24; and from proceeding to elect some one to fill the place of the plaintiff as a member, who was alleged to have forfeited his seat by absence: *Richardson v. Methley School Board*, 1898, 3 Ch. 510.

Interference in suit by nominal party.

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

Goodwill.

Canvassing for customers of a business, the good will of which has been sold by defendant to the plaintiff, may be restrained: *Trenn v. Hunt*, 1896, A. C. 7; 73 L. T. 514; and an injunction may be granted against a former partner to prevent him from using information acquired while a partner, to the prejudice of the good will in the business to which his former co-partner is entitled: *Jennings v. Jennings*, 77 L. T. 786.

Servants.

So also a servant may be restrained from utilizing copies of entries surreptitiously obtained from his master's books: *Robb v. Green*, 1895, 2 Q. B. 315; 73 L. T. 15.

Shorthand notes.

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

Landlord and tenant.

Where an injunction was applied for to restrain a landlord from exercising his legal rights of distress, until the determination of an action brought by the tenants against the landlord, to try his right to the rent, the injunction was granted for a fortnight, and continued only if the rent should in the meantime be paid into Court: *Shaw v. Earl of Jersey*, 4 C. P. D. 120, 359.

An injunction will not be granted at the suit of a landlord or reversioner to restrain a trespass or nuisance not of a permanent character, or not actually injuring the reversion: *Cooper v. Crabtree*, 47 L. T. 5; 51 L. J. Chy. 180.

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

An interlocutory injunction for the purpose of enforcing an agreement to lease premises for a single day was refused: *Glasco v. Woolgar*, 103 L. T. Jour. 172.

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

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

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

The enforcement by injunction of a negative stipulation in a covenant by defendant not to employ himself in any business other than the plaintiff's, was refused as being unreasonable, in *Ehrman v. Bartholomew*, 1898, 1 Ch. 671.

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

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

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

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

In patent cases.

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

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

An injunction against the infringement of a patent was refused where, though there had been an infringement, it had been discontinued several years before action, and there was no intention or probability of a renewal of the wrongful user: *Proctor v. Bayley*, 38 W. R. 100.

Trade marks

An injunction will be granted to restrain the exportation of goods under a trade mark likely to deceive a foreign though not a home purchaser: *Orr Ewing v. Johnston*, 13 Ch. D. 434, and also to restrain the infringement of a trade mark: *Cochrane v. Macnish*, 1896, A. C. 225; but where the action was brought against a retail dealer, who had not been guilty of any intentional infringement, and who at once yielded to the plaintiff's demand, no costs were awarded against the defendant: *American Tobacco Co. v. Guest*, 1892, 1 Ch. 630; so also the user of a name which has come to be known to the trade, as indicating goods made by the plaintiff, may be restrained by injunction: *Reddaway v. Banham*, 1896, A. C. 199; *Powell v. Birmingham Vinegar Co.*, 1896, 2 Ch. 54; 1897, A. C. 710; *Pinet v. Maison Pinet*, 77 L. T. 322; 1898, 1 Ch. 179; 77 L. T. 613; but see *Lever v. Beddingfield*, 80 L. T. 100.

The use of a name by a company so like that of another company as to be calculated to deceive the public may be restrained: *Manchester Brewery Co. v. N. Cheshire and Manchester Brewery Co.*, 1898, 1 Ch. 539; 1899, A. C. 83; 79 L. T. 645.

The use of a trade name calculated to lead the public to believe that the defendant's business was that of the plaintiff, was restrained: *Randall v. British & American Shoe Co.*, 1902, 2 Ch. 354.

Copyright.

The infringement of copyright may also be restrained by injunction: *Church v. Linton*, 25 Ont. 131; *Collis v. Cater*, 78 L. T. 613.

The Court will restrain an arbitrator from acting in any case in **Sec. 58.** which he is unfit or incompetent to act: *Malmesbury v. Budd*, 2 Ch. D. 89; *Beddow v. Beddow*, 9 Ch. D. 89; *Burford v. Chambers*, 25 Ch. D. 663; *Vineberg v. Guardian, etc., Co.*, 19 Ont. App. 293; but see *Jackson v. Barry Ry. Co.*, 1893, 1 Ch. 238; and will restrain arbitration proceedings where the instrument containing the agreement for reference is impeached: *Kitts v. Moore*, 1895, 1 Q. B. 253; 71 L. T. 676.

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

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

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

Undertaking as to Damages.—The usual undertaking as to damages should be inserted in all interlocutory injunction orders; *Graham v. Campbell*, 7 Ch. D. 491; *Corp. of Cork v. Rooney*, 7 L. R. 191; *Re Johnston, Ex p. Abrams*, 50 L. T. 184, even though the order is granted on notice: *Smith v. Day*, 21 Ch. D. 421; 48 L. T. 54; and there is no exception in this respect in favour of the Crown: *Secretary for War v. Chubb*, 43 L. T. 83; W. N. 1880; but see *Att'y-Gen. v. Albany Hotel Co.*, 1896, 2 Ch. 696; 75 L. T. 140, 195, where it was not required.

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

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

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

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

Where a married woman applies, her undertaking by her counsel is sufficient: *Re Prynn*, 53 L. T. 465; *Pike v. Cave*, 68 L. T. 659.

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

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

An order having been made restraining the defendant from proceeding with certain buildings, he appealed, offering an undertaking to abide by any order the Court might make at the hearing as to pulling down or altering any buildings erected by him; the Court of Appeal, being of opinion that the right to an interlocutory injunction was not established, discharged the order, taking from the defendant an undertaking in the terms of his offer, but held that, without any undertaking, the Court would have jurisdiction at the trial to order the pulling down of any buildings erected after the commencement of the action, or after notice had been given to the defendant that the plaintiff objected to the building: *Smith v. Day*, 13 Ch. 1. 651; and see *Greenwood v. Hornsey*, 53 L. T. 126, in which a similar undertaking was given on a motion for an interim injunction, where buildings were erected by the defendant *pendente lite* of the value of between \$35,000 and \$40,000, and were ordered to be pulled down, although plaintiff's damages were estimated at only \$3,000.

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

The undertaking as a general rule should extend to the damages incurred by any party to the suit, who may be damaged by the injunction wrongly granted, and should not be confined to the person actually enjoined: *Tucker v. New Brunswick Trading Co.*, 44 Ch. D. 249.

Where an order is made by consent embodying an undertaking by the defendant equivalent to an interlocutory injunction as asked by the plaintiff, there is in that case no implied undertaking as to damages by the plaintiff; if such an undertaking is required it must be made part of the consent: *Howard v. Press Printers*, 91 L. T. 718; 53 W. R. 98.

See further as to Undertakings as to Damages, 21 C. L. J. 44.

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

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

Enforce-
ment of the
undertaking

The granting of an inquiry as to damages consequent on the grant- **Sec. 58.**
 ing of an injunction is discretionary, and cannot be claimed *ex debito*
justitie. Where, therefore, no damage appeared to have been sus-
 tained apart from the detriment arising from litigation, and the
 Court at the trial thought the defendant's conduct had provoked the
 litigation, and even though the action was dismissed, the inquiry as
 to damages was refused: *Gault v. Murray*, 21 Ont. 458; see also
Mansell v. British Linen Co. Bank, 1892, 3 Ch. 159; and *Montreal*
St. Ry. Co. v. Ritchie, 16 S. C. R. 622; *Smith v. Day*, 21 Ch. D.
 421; *Ex p. Hall*, 23 Ch. D. 644; *Schlesinger v. Bedford*, W. N.
 1893, 57.

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

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

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

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

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

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

A person who is neither a party, nor a servant or agent of a party,
 but who with full knowledge of an injunction assisted defendant in

Sec. 55. disobeying it, may be committed not for breach of the injunction but for contempt of Court: *Seauard v. Paterson*, 1897, 1 Ch. 545; 76 L. T. 215; *Crooks v. Crooks*, 1 Gr. 66.

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

A breach of an injunction may be punished by committal for contempt, or by sequestration; but it is only where the disobedience has been wilful that punishment will be awarded: see *Fairclough v. Manchester Ship Canal*, 102 L. T. Jour. 292.

Where an injunction is granted against a party, his servants and agents, a servant continues bound by the injunction though he subsequently leaves his master's service, and may be committed for a breach of the injunction though not served with it: *Brown v. Sage*, 12 Gr. 1; *Gilchrist v. Carden*, 26 C. P. 1. So also new trustees are bound by an injunction granted against their predecessors in the trust, of which they have notice: *Avory v. Andrews*, 46 L. T. 279.

As to the term of imprisonment of persons in contempt for breach of an order of the Court: see *Re Davies*, 21 Q. B. D. 236; *Rule 561*.

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

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

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

Scope of the
enactment
as to re-
ceivers.

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

It has been a moot point whether this sub-section has enlarged the power of the Court to grant a receiver. In *Anglo-Italian Bank v. Davies*, 9 Ch. D., at p. 293, Cotton, L.J., said, "Under that (the present) sub-section the Court may and does grant receivers where it never could have done so before. Thus, for instance, it has the power to grant a receiver under that section where a plaintiff has himself the power of obtaining possession at law." See also *Tyrell v. Panton*, 1895, 1 Q. B. 202; *Tillet v. Nixon*, 49 L. T. 598; 25 Ch. D. 238; *The Amphill*, 5 P. D. 224, and *Gawthorpe v. Gawthorpe*, W. N., 1878, 91, where Jessel, M.R., considered that there was no limit to the power of the Court to grant a receiver on motion, except that it was only to be exercised where it appeared just and convenient. But in *Habershon v. Gill*, W. N., 1875, 231, Quain, J., on the other hand, indicated an opinion that the words "just and convenient"

were to be interpreted by the old practice. See also *Holmes v. Sec. 58. Millage*, 1893, 1 Q. B. 551, and *Harris v. Beauchamp*, 1894, 1 Q. B. 501; 70 L. T. 636; where the Court of Appeal (Lord Esher, M.R., Lopes and Davey, L.J.J.), were unanimous in holding that the Eng. Act has not given the Court power to grant a receiver by way of equitable execution in any case in which the Court of Chancery was formerly not able to do so; and that there is no right to an order merely because a receiver would be a more convenient mode of obtaining satisfaction of the judgment than execution in the usual way. This decision has been followed in *O'Donnell v. Faulkner*, 1 O. L. R. 21; *Re Asscin & Cleghorn*, 6 O. L. R. 170.

The former Common Law Courts had no power to appoint receivers.

In Chancery a receiver would not be appointed at the instance of a mortgagee having the legal estate, or other person able to obtain protection at law: *Berney v. Sewell*, 1 J. & W. 617; *Buxton v. Monkhouse*, G. Coop. 41; *Kelsey v. Kelsey*, L. R. 17 Eq. 495. But see now *Tillet v. Nixon*, 25 Ch. D. 238, and *Mason v. Westoby*, 32 Ch. D. 206, and note *supra*, as to the power of the Court now in all cases where it is "just and convenient."

If it appears to be just and convenient the power may be exercised where the plaintiff seeks to recover land by a legal title. The Court has to consider amongst other things the probability of the plaintiff's succeeding, length of defendant's possession, and whether he has any *prima facie* title, also the position of tenants, who, if the defendant is not of undoubted solvency and remains in the receipt of the rents, may have to pay twice if plaintiff succeeds: *John v. John*, 1898, 2 Ch. 573.

Thus in *Pense v. Fletcher*, 1 Ch. D. 273, where the plaintiff was mortgagee of property, as to some of which his title was legal and as to some equitable, Bacon, V.C., on an interlocutory application, appointed a receiver for the whole. In *Truman v. Redgrave*, 18 Ch. D. 547, a receiver was granted on application of a legal mortgagee who was prevented by the mortgagor from taking possession, and an injunction restraining the mortgagor from interfering with the management of the business and possession of the premises. (See the form of order in that case). So the Court has power now to appoint a receiver where the title to the property is uncertain and disputed: *Berry v. Keen*, 51 L. J. Chy. 912; and the defendant in possession: *Cook v. Andrews*, 1897, 1 Ch. 266; *Foxcell v. VanGrutten*, 1897, 1 Ch. 64; 75 L. T. 311, 368; *John v. John*, *supra*; but a case must be made to justify the appointment. Such cases as *Talbot v. Hope Scott*, 4 K. & J. 139, and *Dunn v. Ferrior*, L. R. 3 Chy. 719, are not now law: *Berry v. Keen*, *supra*.

But a mortgagee is not as of right entitled to a receiver under all ^{Mortgagees} circumstances, at the expense of the equity of redemption: *Re Prytherch*, *Prytherch v. Williams*, 42 Ch. D. 590; 38 W. R. 61, where it was considered not just and convenient to grant a receiver to a mortgagee in possession, who desired to give up possession.

An interim receiver of rents has been, however, refused to the plaintiff in an action of ejectment: *Powell v. Powell*, 73 L. T. Jour. 140, but granted in an action by a landlord against his tenant for recovery of land, under a proviso for re-entry: *Gwatkin v. Bird*, 52 L. J. Q. B. 263, and granted in *Real and Personal Advance Co. v.*

Sec. 55. *McCarthy*, 27 W. R. 706; 40 L. T. 878, an action of ejectment by a sub-mortgagee, where the property was wasting and insufficient, and the plaintiff's action had been stayed till another action by defendant against the plaintiff and others should be ready for trial.

Co-owners. In an action for partition, where one of the co-owners is in occupation, though not in exclusive occupation of the property, the Court has jurisdiction under this sub-section to appoint a receiver until the hearing: *Porter v. Loner*, 7 Ch. D. 358. So in an action to enforce specific performance of a parcel agreement to execute a bill of sale of personal chattels, upon an *ex parte* motion before appearance of defendant, there being evidence of immediate danger of the chattels in question being disposed of: *Taylor v. Eckersley*, 2 Ch. D. 302. Where in an administration action the defendant, the sole surviving executor and trustee of the testator, had been personally condemned in costs in an action to test the validity of the will, and an execution had been issued against him, and there had been a return of *nulla bona*, on the application of the present plaintiffs, who were executors of the deceased executor of the testator, who was also a creditor of the testator and a residuary legatee, a receiver of the proceeds of the sale of part of the testator's real estate, and of the rent of the other part, and of the outstanding personal estate was granted: *Gauthorpe v. Gauthorpe*, W. N., 1878, 91.

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

In an action for the dissolution and winding up of an insolvent partnership, an order was made for the sale of the assets by a receiver before trial; the assets being of such a character that their sale at once was desirable and other special circumstances existing: *McLaren v. Whiting*, 16 P. R. 532.

Debenture holders.

A receiver and manager of the property and undertaking of a limited company was granted to a debenture holder of the company, whose debenture was a charge on the property of the company, the security being in jeopardy through the insolvency of the company, even though the principal secured by the debenture was not immediately payable and default had not been made in payment of interest: *McMahon v. N. Kent Iron Works Co.*, 1891, 2 Ch. D. 148; *Edwards v. Standard Rolling Stock Syndicate*, 1893, 1 Ch. 574; *In re Victoria Steamboats*, 1897, 1 Ch. 158. See also *Hubbuck v. Helms*, 56 L. T. 232; and notes to Rule 759; but see *Marshall v. South Staffordshire T. Co.*, 1895, 2 Ch. 36, where it was held that the Court had no jurisdiction to do this unless the Act authorizing the mortgage conferred it. **In London Co 1905 1 Ch 576*

Other cases. A trustee appointed, upon his own undertaking in a suit, to act as receiver of the trust property, is not, under ordinary circumstances, in England, entitled to a salary as receiver: *Pilkington v. Baker*, *British Mutual Investment Co. v. Pilkington*, 24 W. R. 234. But in this Province trustees are entitled to compensation as such: R. S. O. c. 120, ss. 40, *et seq.*

An interpleader issue being ordered to try the right to goods seized in execution a receiver and manager of the property may be appointed under this section instead of a sale by the sheriff; *eg.*, where the property was in cab business, a going concern: *Howell v. Dawson*, 13 Q. B. D. 67.

A simple contract creditor of a joint stock company cannot obtain an interim order appointing a receiver of the assets of the company on the ground that the company is insolvent, or has made an assignment of its assets: *McCall v. Canada Farmers' Mut. Ins. Co.*, 18 C. L. J. 117, following *Mills v. Northern Ry. of Buenos Ayres Co.*, L. R. 5 Chy. 621.

An unpaid vendor of property of a company in voluntary liquidation, and unable from insolvency to carry on its works, was appointed without security or salary: *Boyle v. Betties Llantwit Colliery Company*, 2 Ch. D. 726.

In a creditor's action for administration against an executrix, a decree had been made and summons taken out for a receiver; but, pending the summons, the sole defendant died. The Court, on the application of the plaintiff, appointed an interim receiver, whose powers were to extend for ten days after the appointment of an administrator *de bonis non*, the plaintiff undertaking to use all possible speed in obtaining the appointment of such administrator, and to accept short notice of motion to discharge the receiver: *In re Parker, Cash v. Parker*, 12 Ch. D. 293.

Equitable Execution.—Receivers have since the Jud. Act often been appointed as a means of enforcing judgments and reaching property not capable of being seized under an execution, *eg.*, at the instance of the plaintiff who had recovered judgment, and sued out an *elegit* against the debtor whose only interest in land was an equity of redemption in fee, for the protection of the property until a decree could be obtained, under which the equity of redemption could be reached: see *Anglo-Italian Bank v. Davis*, 9 Ch. D. 275; *Re Watkins*, 13 Ch. D. 252; and *Re Pope*, 34 W. R. 693 (in Ontario the sheriff can sell an equity of redemption: see R. S. O. c. 77, s. 30), and it has been held that there is no need first to issue a *fi. fa.*; see *ib.* and *Stuart v. Grough*, 15 Ont. App. 309; but see *Thomas v. Cushing*, 30 Ont. 123, 388; and see *Re Harrison & Bottomley*, 1899, 1 Ch. 465; 80 L. T. 29, where it was held by the Court of Appeal that the appointment of a receiver by way of equitable execution does not create a charge on property which can be enforced by a sale.

In *Kincaid v. Kincaid*, 12 P. R. 462, this was called "one of the now usual and ordinary methods of execution," and it was held to be no answer to the motion that the judgment creditor could probably make the amount of his judgment by sale of other property under common law process, but in *Manchester, etc., v. Parkinson*, 22 Q. B. D. 173, it was held that in the absence of any legal impediment to obtaining execution of the judgment in the ordinary course of law by *fi. fa.*, or attachment of debts, and of any special circumstances showing it to be just or convenient, an appointment of a receiver should not be made. See also *I. v. K.*, W. N. 1884, 63; and *Hamilton v. Brogden*, 1891, W. N. 36; *Harrison v. Harrison*, 14 P. R. 436; *Harris v. Beauchamp*, 1894, 1 Q. B. 801; 70 L. T. 636. Street, J., in *Trust & Loan Co. v. Gorsline*, 12 P. R. 654, refused an order in a case where a garnishing order would afford a remedy. See also his judgment in *Miller v. Thompson*, 19 P. R. 224; and *O'Donnell v. Faulkner*, 1 O. L. R. 21.

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It may, therefore, not be considered to be settled that a receiver by way of equitable execution will only be appointed in respect of property which the execution creditor has a right to make available for the payment of his debt: *Holmes v. Millage*, 1893, 1 Q. B. 555; 68 L. T. 205; but which cannot be reached by execution in the ordinary way, or by garnishee proceedings: *Harris v. Beauchamp*, 1891, 1 Q. B. 801; *Morris v. Taylor*, 32 L. R. Ir. 14; and see *Cadogan v. Lyric Theatre*, 1894, 3 Ch. 338; *Re Asselin & Cleghorn*, 6 O. L. R. 170.

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

Seemle, in England a legal debtor's remainder in real estate is not a sufficient present interest to justify the appointment of a receiver with a view to realization: see *Re Harrison & Bottomley*, 1899, 1 Ch. 467. In Ontario there is the further reason against the appointment of a receiver in such case, that under R. S. O. 1897, c. 77, s. 33, the interest in remainder can be sold under an execution.

On the application the plaintiff is sometimes appointed the receiver: *Fuggle v. Bland*, 11 Q. B. D. 711. See also *Book v. Ruth*, 20 C. L. J. 183; *Heicitt v. Murray*, 52 L. T. 380; *McGarry v. White*, 16 L. R. Ir. 322; but a plaintiff cannot in this way get himself made a sort of general assignee of all his debtor's assets: *Re Asselin & Cleghorn*, *supra*.

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

Receiver
granted.

A receiver has been appointed to receive the life interest of a married woman in stock: *Bryant v. Bull*, 10 Ch. D. 153; the income of a defendant's reversionary interest under a will: *Fuggle v. Bland*, 11 Q. B. D. 711; of the debtor's share of his deceased wife's estate, of which he was administrator, and an injunction was granted to restrain him from dealing with his share: *Smith v. Egan*, 17 P. R. 330; a legacy to a debtor expectant upon the death of a tenant for life: *Macnicoll v. Parnell*, 35 W. R. 773; a judgment debtor's interest as one of the next of kin of an intestate to whose estate no administrator had been appointed: *Mullane v. Aberne*, 28 L. R. Ir. 105; and see *Re McNulty*, 31 L. R. Ir. 391; a judgment debtor's interest in subsisting life insurance policies and in a charge upon land: *Beamish v. Stephenson*, 18 L. R. Ir. 319; or in a fully paid up life insurance policy which he had assigned to the plaintiffs as security, reserving to himself the cash surrender value of the policy: *Canadian Mutual L. & I. Co. v. Nisbet*, 31 Ont. 562; moneys secured by mortgage held

by the debtor who was resident out of the Province: *Parent v. Lartie*, *Sec. 56*, 7 C. L. T. 195; an equitable reversionary interest in personalty (though it was said by Lindley, L.J., that he could not find that the Court of Chancery had ever done so): *Tyrrell v. Paintan*, 1893, 1 Q. B. 202; an equitable reversionary interest in freehold and leasehold property: *Re Jones, etc.*, W. N. 1895, 123; the rents and profits of defendant's lands (without prejudice to prior incumbrances), the possession of the lands being ordered to be delivered to the receiver: *Cadogan v. Lyric Theatre Co.*, 1894, 3 Ch. 338; see also *Hills v. Webber*, 17 Times, 513; the moneys receivable in respect of the debtor's interest in a ship and her freight (without prejudice to prior incumbrances): *Croshaw v. Lyndhurst Ship Co.*, 1897, 2 Ch. 154; and in other cases where proceedings for attachment of debts are not applicable: see *Westhead v. Riley*, 25 Ch. D. 413; *Book v. Ruth*, 20 C. L. J. 193; *Stewart v. Jones*, 19 P. R. 227; 1 O. L. R. 34.

The Court has no jurisdiction to appoint a receiver of the future earnings of a judgment debtor by way of equitable execution: nor in any other case where prior to the Jud. Act the Court of Chancery would not grant such relief: *Holmes v. Millage*, 1893, 1 Q. B. 551; *Harris v. Beauchamp*, 1894, 1 Q. B. 801; 70 L. T. 636.

A receiver will not be appointed by way of equitable execution of a judgment debtor's property generally: *Hamilton v. Brodgen*, No. 1, 1891, W. N. 14; *Harris v. Beauchamp*, *supra*; nor to receive all debts due to the judgment debtor: *Re Asselin & Cleghorn*, 6 O. L. R. 170; nor of a particular fund or interest after the death of the defendant in the action when the estate has become vested in his legal representative: *Re Shepherd*, 43 Ch. D. 131; nor of money payable in respect of insurance of chattels exempted under R. S. O. c. 77, s. 2: the money takes the place of the chattels, and is subject to the same protection: *Osler v. Muter*, 19 Ont. App. 94; nor of a debtor's interest in land vested in trustees on trust to permit the debtor and his wife and children to use it for a home: *Cameron v. Adams*, 25 Ont. 229; nor of a fund applicable for the benefit of the debtor in the discretion of trustees: *Re McInnes v. McGarr*, 30 Ont. 38; nor of a husband and wife's interest in furniture of which they were entitled to the use under a settlement: *Whitaker v. Cohen*, 69 L. T. 451; nor of the income of a married woman debtor, becoming due after the date of the judgment, as to which at that date she is restrained from anticipating, even as regards an instalment in arrear at the time of the application: *Hood Barrs v. Cathcart*, 1894, 2 Q. B. 559; 70 L. T. 862, 863; see notes to *Rule 199*; nor, in the case of a defendant a theatre company, to receive the money paid by the public for admission to the theatre: *Cadogan v. Lyric Theatre Co.*, 1894, 3 Ch. 338; nor of unliquidated damages the subject of a pending action: *Central Bank v. Ellis*, 27 Ont. 583; nor of shares of stock in a foreign company said to be owned by the debtor; nor of the interest of the debtor in a certain policy of insurance on the life of another assigned to the debtor: *Re Asselin & Cleghorn*, *supra*.

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

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A third person injuriously affected by the appointment of a receiver may move to rescind it: *McLean v. Allen*, 18 P. R. 255.

Practice.

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

A defendant in order to obtain the appointment of a receiver must file a counter-claim claiming that relief, where his right to such relief arises out of some matter independent of the plaintiff's case; and if such relief is required before he is in position to file a counter-claim a cross action must be commenced: *Carier v. Fey*, 1894, 2 Ch. 541; but where such right arises out of the plaintiff's case, a counter-claim does not appear to be necessary: *Sargant v. Read*, 1 Ch. D. 600.

A motion for a receiver is made in England to a Judge in Chambers as a rule: *Re Hartley, Nuttall v. Whittaker*, 66 L. T. 588; but in Ontario it is customary to apply to the Judge sitting in the weekly Court.

Except in cases of emergency the application should be on notice: see *Lucas v. Harris*, 18 Q. B. D. 134; *Re Potts*, 1893, 1 Q. B. 648; *Tilling v. Blythe*, 1899, 1 Q. B. 557. In cases of emergency a receiver will be appointed *ex parte* not only before appearance: *Taylor v. Eckersley*, 2 Ch. D. 302; but before service of writ: *Re H's Estate*, 1 Ch. D. 276; *Colbourne v. Colbourne*, 1 Ch. D. 600; *Hyde v. Warden*, 1 Ex. D. 309; *Evans v. Lloyd*, W. N. 1889, 171; and not only in cases of equitable execution (see *Minter v. Kent*, 11 Times, 197; 72 L. T. 186), where delay might mean loss of the property, but also in actions.

In cases of equitable execution the practice has grown up of applying *ex parte*, in cases of emergency, for an interim order for a limited time, and of applying within such time to continue and make permanent the appointment: see *Stark v. Ross*, 17 P. R. 237.

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

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

An interim receiver of a partnership may be ordered to sell the assets: *McLaren v. Whiting*, 16 P. R. 552.

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

A receiver is liable to account, and his sureties are responsible, for **Sec. 55.** all moneys coming to his hands in that capacity at any time: *Smart v. Flood*, 49 L. T. 467.

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

For the practice in the Master's Office on the appointment of receivers, and the security, if any, to be given by them: see *Rules* 756-766, and notes.

Effect and Enforcement of Order.—The appointment of a receiver (at any rate when not accompanied by a direction to any person to pay) creates no lien or charge on the property of which he is to be receiver, and is not equivalent to a seizure in execution: *Croshaw v. Lyndhurst Ship Co.*, 1897, 2 Ch. 154; but as to the extent to which it prevents the debtor from dealing with the fund prejudicially, and prevents other persons from obtaining priority in regard to it: see *Re Marquis of Anglesea & De Galve v. Gardner*, 1903, 2 Ch. D. 727.

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

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

As to the effect of an order for a receiver as against a trustee in bankruptcy: see *Levasseur v. Mason*, 1891, 2 Q. B. 73; *Re Potts*, 1893, 1 Q. B. 648; 68 L. T. 229; *Croshaw v. Lyndhurst*, 1897, 2 Ch. 154.

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

Property in possession of a receiver is not for all purposes in *custodia legis*: *Re Hoare*, 67 L. T. 45; but it is so, so far as to prevent the party ultimately found entitled, from claiming damages for its detention while in his possession: *The Peruvian Guano Co. v. Dreyfus*, 1892, A. C. 166.

A receiver of the debtor's share in an estate which could not be reached by execution in the usual way, after refusal of the debtor to allow the use of his name, was authorized, on giving security to him, to take proceedings in his name for the administration of the estate, and is necessary for the removal of the executor: *Mones v. McCallum*, 17 P. R. 398.

A person who is not a party to an action is not entitled to apply by motion for payment of money to him by a receiver appointed in the action, even though his claim is made in respect of a debt properly payable out of the funds in the receiver's hands: *Brocklebank v. East London Railway Company*, 12 Ch. D. 839; see *Neate v. Pink*, 15 Sim. 459; 3 Mac. & G. 476.

Sec. 55.

Court may
award
damages,
etc.

10. In all cases in which the Court has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, the Court, if it thinks fit, may award damages to the party injured either in addition to or in substitution for such injunction or specific performance, and such damages may be ascertained in such manner as the Court may direct, or the Court may grant such other relief as it may deem just.

Taken from R. S. O. 1877, c. 40, s. 40, which was taken from Lord Cairns' Act, 21 & 22 Vict. c. 27, s. 2 (6). This section does not enable the Court to grant damages in a case where before the Act damages were not recoverable, *e.g.*, in the case of an oral agreement not capable of specific performance in Equity, and in respect of which the defendant, in an action at Law for damages, might have successfully pleaded the Statute of Frauds: *Re Northumberland Avenue Hotel Co., Sully's Case*, 54 L. T. 76; 33 Ch. D. 16. See also *Lavery v. Pursell*, 30 Ch. D. 308.

The following is stated as a "good working rule," under this clause: "Damages may be given in substitution for an injunction in cases where there are found in combination the four following requirements, viz.: where injury to the plaintiff's legal rights is (1) small, (2) capable of being estimated in money, (3) can be adequately compensated by a small money payment, and (4) where the case is one in which it would be oppressive to the defendant to grant an injunction": per A. L. Smith, L.J., in *Shelfer v. City of London Electric, etc., Co.*, 1895, 1 Ch. 287; see S. C. *sub nom. Meux v. London, etc.*, 72 L. T. 34; and *Coeper v. Laidler*, 1903, 2 Ch. 337; 80 L. T. 409.

The Court has no jurisdiction under this sub-section to award damages where no wrongful act has been actually committed, but only threatened, by the person against whom the injunction is claimed: *Coeper v. Laidler*, *supra*; *Dreyfus v. Peruvian Guano Co.*, 43 Ch. D. 316; 62 L. T. 518; *Martin v. Price*, 1894, 1 Ch. 276; 70 L. T. 228; but see *Holland v. Worley*, 26 Ch. D. 578.

Substantial damages can only be given where there is a proper case for an injunction, and in lieu of it: *Proctor v. Bailey*, 42 Ch. D. 390; 38 W. R. 100; *General Accident Asscc. Co. v. Noel*, 1902, 1 K. B. 377; 86 L. T. 555; but nominal damages may be given in addition to an injunction: *Lyman v. Pulman*, 91 L. T. 132; 1904, W. N. 129.

Where the act sought to be restrained is a continuing actionable nuisance, although there is jurisdiction to award damages in lieu of an injunction, yet it is said it ought to be exercised under very exceptional circumstances: *Meux Brewing Co. v. London*, *supra*.

Where a plaintiff has established his right to a perpetual injunction, the Court has no power to oblige him to accept damages in lieu of an injunction: *Martin v. Price*, *supra*; *Krehl v. Burrell*, 1 Ch. D. 146; and *Greenwood v. Hornsey*, 33 Ch. D. 471, in which *Holland v. Worley*, 26 Ch. D. 378, was distinguished. See also *Allen v. Ayres*, W. N. 1894, 242.

Where the wrongful act has ceased before trial, the Court may ^{Sec. 56.} under this Act, in lieu of an injunction, which would be useless, assess at the trial the damages from the commencement of the wrongful act, including damages accrued since the writ: *Fritz v. Hobson*, 14 Ch. D. 542, 557.

Where the wrongful act has been discontinued before suit, without the plaintiff's knowledge, it was held that the Court had no jurisdiction under the above enactment to make a decree for damages: *Brockington v. Palmer*, 18 Gr. 488.

See also *White v. Boby*, 37 L. T. 652; *Kino v. Rudkin*, 6 Ch. D. 180; *National Provincial Plate Glass Ins. Co. v. Prudential Ass. Co.*, 6 Ch. D. 761; *Krehl v. Burrell*, 7 Ch. D. 551; *Fritz v. Hobson*, 14 Ch. D. 542; *Rock Portland Cement Co. v. Wilson*, 52 L. J. Chy. 217; *Sayers v. Collyer*, 28 Ch. D. 103, and *Serrao v. Noel*, 15 Q. B. D. 549; *Laurance v. Horton*, 38 W. R. 555; *Ryan v. Mutual, etc.*, 1893, 1 Ch. 116; *Elmore v. Pirrie*, 57 L. T. 333; *Tamplin v. Jones*, 15 Ch. D. 222.

11. An order of the Court under any statutory or other jurisdiction shall not, as against a purchaser, whether with or without notice, be invalidated on the ground of want of jurisdiction, or of want of any concurrence, consent, notice, or service.

Purchaser not affected by irregularities in orders of Court.

This provision was held not to operate to give a good title to a purchaser at a sale under an order of the Court, where the Court in making the order supposed that it was dealing with an interest belonging to a judgment debtor, though in fact it belonged to a person not a party to the proceedings and not bound by them: *Jones v. Barnett*, 1900, 1 Ch. 370; 80 L. T. 408.

See *Calvert v. Godfrey*, 6 Beav. 97; *Blean v. Blean*, 10 Ont. 693; *Re Hall Dare's Contract*, 21 Ch. D. 41; *Mostyn v. Mostyn*, 1893, 3 Ch. 376; 69 L. T. 741.

Semble, a purchaser showing the existence of irregularities in the proceedings cannot be compelled to rely on the indemnity of this sub-section: see *Life Interest Corp. v. Hand-in-Hand Socy.*, 1898, 2 Ch. 230; *Forsters v. Pegg*, 19 P. R. 254.

12. In questions relating to the custody and education of infants, the Rules of Equity shall prevail.

Same as English J A., 1873, s. 25 (10).

At Common Law the father of an infant (or his testamentary guardian, or guardian appointed by the Court; *Wellesley v. Beckett*, 2 R. & M. 639), had a *prima facie* right to the custody of the infant, even against the mother, unless the child was of an age to judge for himself, or there was an apprehension of cruelty from the father, or contamination in consequence of his immorality or gross profligacy. If the infant was of an age to elect for himself, the Court would merely interfere so far as to get it free from illegal restraint, without handing it over to anybody: *Rex v. Delaval*, 3 Burr. 1435. But, in the absence of any right of choice, the Court transferred the infant to the proper legal custody. The right to such an election was decided

Sec. 53. to depend upon age alone, and not on mental capacity: see *Reg. v. Clarke*, 7 E. & B. 186; and it was settled that no such choice could be made, at all events by a female infant, under the age of sixteen: see *Re Andrews*, L. R. 8 Q. B. 158.

Equity rule. The English Court of Chancery had original jurisdiction over the persons and property of infants, springing from the right of the Crown as *paterfamilias*, and had power to interfere with the Common Law rights of the father, in the interest of the infant, on the ground of the father's cruelty, immorality, etc. (as to the father's rights in such case, see further notes below, and *Swift v. Swift*, 6 N. R. 137; 34 L. J. Chy. 209, 394); or of his agreement, express or implied, to waive his rights (see Simpson on Infants, 136 *et seq.*). This jurisdiction was not often exercised except where the Court had the means of applying property for the use and maintenance of the infant (*Ib.*) The existence of the jurisdiction, however, was affirmed in *Re McGroth*, 1892, 2 Ch. 496; 1893, 1 Ch. 143.

Under
Judicature
Act.

Under the Judicature Act, the High Court has now jurisdiction with regard to the care and custody of infants; and, in the exercise of that jurisdiction, the rules of Equity are to prevail.

Where an infant is in the custody of some person who is required to deliver him up, the application may be made for a *habeas corpus ad subjiciendum*, and the Court on the return of the writ will determine to whom the future custody of the infant should be committed, but the application may also be made by petition entitled in the matter of the infant: *Re Smart*, 12 P. R. 312, 435, 625; 9 C. L. T. 200.

A wife who left her husband's home without reasonable cause, taking with her their only child, was ordered forthwith to deliver the child into the custody of the father, with liberty to either party to apply in Chambers as to access: *Constable v. Constable*, 34 W. R. 649; and see *Re Mothieu*, 29 Ont. 546.

A *habeas corpus* should not issue where the person, in whose custody the child had been, has parted with the custody of the child (except in the case of this being done to evade the process of the Court, and so is virtually a contempt): *Reg. v. Barnardo, Gossage's case*, 24 Q. B. D. 283; 1892, A. C. 326, *sub nom. Barnardo v. Ford*, overruling *Reg. v. Barnardo*, 23 Q. B. D. 305.

There is no power in the Court or a Judge to order the issue of a writ of *habeas corpus* directed to a person who at the date of the order is out of the jurisdiction: *Re v. Pinkney*, 1904, 2 K. B. 84.

Under
R.S.O. c. 165

The rights of the parents as to custody of their infant children have been modified by statute in Ontario. R. S. O. 1897, c. 168, contains the provisions now in force, as follows:

Court may
make order
as to cus-
tody and
right of
access to
infants.

1.—(1) The High Court or Surrogate Court, or any Judge of either Court, may, upon application of the mother of an infant (who may so apply without next friend) make such order as the Court or Judge sees fit regarding the custody of the infant, and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may afterwards alter, vary or discharge the order on the application of either parent, or, after the death of either parent, of any guardian under this Act, and in every case may make such order respecting the costs of the mother and the liability of the father for the same or otherwise as to costs as the Court or Judge may think just.

(2) The Court or Judge may also make order for the maintenance of the infant by payment by the father thereof, or by payment out of any estate to which the infant is entitled, of such sum or sums of money from time to time as according to the pecuniary circumstances of the father, or the value of the estate, the Court or Judge thinks just and reasonable. R. S. O. 1887, c. 137, s. 1. Sec. 58.
Order as to maintenance.

Taken from Imp. Act, 49-50 Vict. c. 27, s. 5.

2.—No order directing that the mother shall have the custody of or access to an infant shall be made by virtue of this Act, in favour of a mother, against whom adultery has been established by judgment in an action for criminal conversation at the suit of her husband against any person. R. S. O. 1887, c. 137, s. 2.

See Imp. Act, 49 & 50 Vict. c. 27, s. 7.

The Act mentions no age within which the mother may be given the custody of her children. In case application is made under the Act, the matter is left entirely open for the Judge to deal with the infants as may seem best for them: see *Re Witten*, 57 L. T. 336, W. N. 1887, 167; *Skinner v. Skinner*, 36 W. R. 912. But the *prima facie* right of a father to the custody of his children will not be interfered with merely because his wife, without any good cause, refuses to live with him: *Re Mathieu*, 29 Ont. 546.

R. S. O. 1897, c. 168, does not affect the right of a father to decide as to the religious education of his children: sec. 23, and see *Re Scanlan*, 40 Ch. D. 200; 36 W. R. 842.

A father has a legal right to control and direct the education and bringing up of his children until they attain the age of 21, even though they are wards of Court, and the Court will not interfere with him in the exercise of his paternal authority, except (1) where by his gross moral turpitude he forfeits his rights, or (2) where he has by his conduct abdicated his paternal authority, or (3) where he seeks to remove his children, being wards of Court, out of the jurisdiction, without the consent of the Court: *Re Agar Ellis*, 24 Ch. D. 317; *Re Mathieu*, 29 Ont. 546. *Prima facie*
rights of
the father.

Before the jurisdiction of the Court to deprive a father of the guardianship of his children can be called into action, the Court must be satisfied that he has so conducted himself, or placed himself in such a position as to render it not merely better for the children, but essential to their safety or welfare in some very serious and important respect, that the father's ordinary rights should be interfered with: see *Re W*—5 N. R. 363; *Smart v. Smart*, 1892, A. C. 425; 67 L. T. 510.

The affidavits of the mother and others, in answer to a rule for a *habeas corpus* by a father to remove his child (a boy of nine years) from the custody of the child's maternal grandfather, disclosing facts which shewed the applicant to be a person of intemperate and vicious life, and in the habit of using gross and disgusting language, as well as personal violence to his wife,—the Court declined to interfere, the present custody of the child being unobjectionable: *In re Goldsworthy*, 2 Q. B. D. 75. So the Court, in the interest of the children, declined to interfere where it was contended that there had been a gross breach of marital duty on the husband's part, he not desiring or intending that his wife should live with him, or if she insisted on doing so he declined to meet or speak to her except at meals, and when the interests of the children required: *Re Elderton*, 25 Ch. D. 220.

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See also *Re Ferguson*, 8 P. R. 556, where the father being imbecile the Court refused to take a child out of the custody of its grandfather and her brother-in-law.

The father, a medical officer in the army, who was under a covenant to allow his wife access to his children, was held entitled to take his children with him wherever his duties called him: *Hunt v. Hunt*, 28 Ch. D. 606.

The custody of children was given to a guardian appointed by the father to be brought up in the faith of the father, it not appearing to be for the benefit of the children to do otherwise: *Re Chulman Infants*, 25 Ont. 268.

Where a father had secreted two of his children, aged 8 and 11, from their mother, to prevent their being brought up in the Roman Catholic religion, he was on petition of the mother under R. S. O. c. 168, directed to disclose the whereabouts of the younger child, and access by the mother was provided for. No order was made as to the other child, who was nearly 12: *Re Keith*, 7 P. R. 138.

Interests of
the infants
considered.

The best interests of the children were considered on petitions under the former Act, and will be under the present Act: see *Re Ethel Davis*, 25 Ont. 579; *Re Young*, 29 Ont. 665; *Re Mathieu*, *supra*; and unless what is asked for is for the real benefit of the child the Court will not interfere: *Re X.*, 1899, 1 Ch. 526; 80 L. T. 311. In *Re Murdoch*, 9 P. R. 132, the Court refused under the circumstances to remove a child from its mother's custody, but allowed the father to have access: see also *Re Newton*, 1896, 1 Ch. 740. In *Re Scott*, 8 P. R. 58, a child was allowed to remain with a stranger, having been originally placed there by the mother, the father being dead, and the mother having married again and being in poor circumstances: see also *Re Dickson*, 12 P. R. 639; *Smart v. Smart*, 1892, A. C. 425; *Re McGrath*, 1892, 2 Ch. 496; 1893, 1 Ch. 143; *Witt v. Witt*, 1891, P. 163, 64 L. T. 121.

In *Reg. v. Gyngall*, 1893, 2 Q. B. 232, though the mother was the legal guardian of a child, and had not been guilty of any misconduct to disentitle her to its custody, the Court refused to give her the custody, being satisfied that that course was essential for the welfare of the child. The grounds generally upon which a parent's rights may be interfered with were discussed in that case.

In exercising its jurisdiction the conduct of the mother is taken into consideration by the Court: *Re Taylor*, 11 Sim. 178; *Re Bartlett*, 2 Collyer, 661; *Shilleto v. Collet*, 8 W. R. 683; *Re Winscom*, 2 H. & M. 541; *Re Shaw*, referred to in 11 Sim. 182-195; *Re Halliday*, 17 Jur. 56.

As to custody of infants where both parents have been guilty of adultery: see *In re A. & B.*, 1897, 1 Ch. 786, and where the father alone was guilty: *Re Young*, 29 Ont. 665.

Where the Court has made an order respecting the custody of an infant, and directed it to remain within the jurisdiction, it is a contempt of Court, punishable by attachment, to remove such infant out of the jurisdiction: *Farard v. Farard*, 75 L. T. 664.

The order may be made *ex parte* if the necessity of the case requires it: *Re Taylor*, 11 Sim. 178.

The Court has jurisdiction to summarily order the personal attendance before it of any persons who are supposed to be in a position to give information as to the place of concealment of wards of Court: *Rosenberg v. Lindo*, 48 L. T. 478. **Sec. 56.**

On a *habeas corpus* under R. S. O. c. 83, the Court may direct evidence to be taken *viva voce* to examine into the truth of the return: *Re Smart*, 12 P. R. 2.

As to the custody of illegitimate children: see *Re Holshed*, 5 P. R. 231; *Re Brandon*, 7 P. R. 347; *Re Smith*, 8 P. R. 23; *Reg. v. Bernardo, Jones' Case*, 1891, 1 Q. B. 194; 1891, A. C. 388; *Reg. v. Armstrong*, 1 P. R. 6; *Re v. New*, 20 Times, 583. Illegitimate children.

As to the support of illegitimate children: see R. S. O. c. 169.

Guardians.—R. S. O. c. 168, secs. 14 and 15, are as follows:—Guardians.

14.—(1) On the death of the father of an infant, the mother, if surviving, shall be the guardian of the infant, either alone, when no guardian has been appointed by the father, or jointly with any guardian appointed by the father. On death of father, mother to be guardian alone or jointly with others.

As to the right of a mother as guardian: see *Re X.*, 1899, 1 Ch. 526; 80 L. T. 311.

(2) Where no guardian has been appointed by the father, or if the guardian or guardians appointed by the father is, or are, dead, or refuses or refuse to act, the High Court or Surrogate Court, or any Judge of either Court, may from time to time appoint a guardian or guardians to act jointly with the mother, as such Court or Judge shall see fit. R. S. O. 1887, c. 137, s. 13.

15.—(1) The mother of an infant may, by deed or will, appoint any person or persons to be guardian or guardians of the infant after the death of herself and the father of the infant (if the infant be then unmarried), and where guardians are appointed by both parents they shall act jointly. Mother may appoint guardian in certain cases.

(2) The mother of an infant may, by deed or will, provisionally nominate some fit person or persons to act as guardian or guardians of the infant after her death jointly with the father of the infant, and the Court or a Judge, after her death, if it be shown to the satisfaction of the Court or a Judge that the father is for any reason unfitted to be the sole guardian of his children, may confirm the appointment of such guardian or guardians, who shall thereupon be empowered to act as aforesaid, or make such other order in respect of the guardianship as the Court or Judge shall think right. R. S. O. 1887, c. 137, s. 14.

This Act is in the same terms as Imp. Act, 49 & 50 Vict. c. 27.

The Court has jurisdiction to remove a guardian appointed by the mother, under sec. 15 (2), after the father's death, if that course is for the welfare of the infants: *Re McGrath*, 1892, 2 Ch. 496; 1893, 1 Ch. 143; and see *Re G.*, 1892, 1 Ch. 292, where an appointment by the mother was adopted by the Court though the guardian was not appointed to act jointly with the father.

As to the father's power to appoint a testamentary guardian: see R. S. O. c. 340, s. 2; and as to the powers of guardians so appointed: see *Ib.*, ss. 2, 3.

Religious Education.—As to the father's right to control the religious education of his children, recognized by the above Act (sec. education 23): see *Re Agar Ellis*, 10 Ch. D. 49, where the father was held not of infants.

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to have forfeited his right by promising his wife on their marriage that their children should be brought up of her religion: see also *Re Besant*, 11 Ch. D. 308; *Re Dickson*, 12 P. R. 659; *Re Scanlan*, 40 Ch. D. 200; 59 L. T. 599; *Re Chillman*, 25 Ont. 268; and *Re Nevin*, 1891, 2 Ch. 299.

The father's right to have his infant children educated in his religious faith may be lost if he allows them to be educated in another faith for such a time that it would, in the opinion of the Court, be contrary to the children's interests to alter their religious education. The welfare of the children is of paramount consideration: *Re Newton*, 1896, 1 Ch. 740; 73 L. T. 687.

The fact that the infant's mother and sole guardian has married a person of a religion different from that of the infant, was considered to be no ground for interfering with the guardianship of the mother, when no attempt was made by the step-father to interfere with the infant's religion: *Re X.*, 1899, 1 Ch. 526; 80 L. T. 311.

In *Condon v. Vollum*, 57 L. T. 154, a child was allowed to be brought up of its mother's religion, as it was maintained by her, and the father was indifferent and made opposition only for the sake of vexing the mother. It was also held that the father's living in adultery was not a relevant fact to the question of his right to control the religious education of his child.

A Protestant on his marriage with a Roman Catholic agreed that their children should be brought up as Roman Catholics, but a son should when old enough be permitted to change his religion. A boy was born, baptized and brought up a Roman Catholic. The father died intestate, only expressing a wish that his son should go to an English Protestant School. It was held that having regard to the indication of intention on the father's part, and the present and future benefit of the son, his mother ought to be appointed his guardian, and he be brought up as a Roman Catholic: *Re Clarke*, 21 Ch. D. 817; 31 W. R. 37; 47 L. T. 84; and where there was no father, mother or guardian, and therefore no one entitled to the custody, or to say that the child was to be brought up in any particular religion, and it appearing to the Court to be best for the interest of the child that she should be brought up as a Protestant, it was so directed, notwithstanding that she had been baptized in the Roman Catholic Church: *Re Nevin*, 1891, 2 Ch. 299; 65 L. T. 35. An ante-nuptial agreement that the child should be brought up as a Roman Catholic was held not binding on the father, who was a Protestant: (*ib.*); and see *Re McGrath*, *supra*.

Where a testator, a Protestant, appointed his sister to be guardian of his infant daughter, and four years after the sister became a Roman Catholic, it was held under the circumstances that it was for the benefit of the infant who had been brought up as a Protestant that the guardian should be removed: *F. v. F.*, 1902, 1 Ch. 688.

Where infants interested in real estate in England, whose father was dead, were living with their mother out of the jurisdiction, and she was one of their testamentary guardians, an order was made at the instance of their two other guardians declaring in what faith they should be educated: *Re Montagu*, 28 Ch. D. 82.

Cases of
conflict not
already
mentioned.

13. Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the Rules of Equity and

the Rules of Common Law with reference to the same matter, the Rules of Equity shall prevail.
58 V. c. 12, s. 53 (5-12).

Same as Eng. J. A. 1873, s. 25 (11). In *Re Terry & White*, 32 Ch. D. 14, it was denied by Lord Esher, M.R., that any such difference between the Rules of Law and Equity existed; and see *Pugh v. Heath*, 7 App. Cas. 237; *Kearsley v. Philips*, 10 Q. B. D. 41; *Lowe v. Dixon*, 10 Q. B. D. 455.

This sub-section relates to matters of substantive law, not mere practice: *Friendly v. Carter*, 9 P. R. 41; *Dalrymple v. Leslie*, 8 Q. B. D. 5; *La Grange v. McAndrew*, 4 Q. B. D. 210; *Harrison v. Rutland*, 1893, 1 Q. B. 142. As to matters of practice: see secs. 48 and 128, and Rules 2 and 3.

The following decisions illustrate this sub-section:—

Examples

The old learning on the subject of "conversion" at law is not imported into the Judicature Act: *Stimson v. Block*, 11 Ont. 96, 103.

Where the terms of a bill of sale are such as to bind after-acquired goods in Equity, the title of the claimant must now prevail as against the execution creditor, under this sub-section: *per Lush, J.*, W. N. 1875, 203; *per Archibald, J.*, W. N. 1876, 64.

The rule of Equity now prevails that letters of administration, when obtained, relate back to the death, and it is sufficient if a plaintiff suing as administrator qualifies before trial: *Trice v. Robinson*, 18 Ont. 433; *Doyle v. Diamond Flint Glass Co.*, 8 O. L. R. 499; *Dini v. Fauquier*, 8 O. L. R. 712.

Where assets have come into possession of the executor and are afterwards lost to the estate, the rule in all Courts now is, that the executor cannot be charged without some wilful default: *Job v. Job*, 6 Ch. D. 562; and see *Barber v. Mackrell*, 12 Ch. D. 534.

Since the Judicature Act there is only one Court, and the rules of Equity prevail in it; therefore a tenant in possession holding under an agreement for a lease (of which specific performance would be decreed: *Swain v. Ayres*, 21 Q. B. D. at p. 293) has no longer two estates, one a legal tenancy, from year to year and the other an equitable tenancy under the agreement. He holds as if a lease had been granted: *Walsh v. Lonsdale*, 21 Ch. D. 9; *Lowther v. Heaver*, 41 Ch. D. 264; *Re Maughan*, 14 Q. B. D. 956; *Allhusen v. Brooking*, 26 Ch. D. 559; *Pugh v. Heath*, 7 App. Cas. 237; *Crump v. Temple*, 7 Times, 120; *Magee v. Gilmour*, 17 Ont. App. 27; 18 S. C. R. 579; but this doctrine can only be applied in cases in the County Court in which the Court is competent to exercise equitable jurisdiction: see *Foster v. Reeves*, 1892, 2 Q. B. 255; 67 L. T. 537. The landlord has the same right of distress as if a lease had been executed, and he cannot distrain by virtue of a legal title if he cannot distrain under the agreement: *Walsh v. Lonsdale*, 21 Ch. D. 9; and see *Lowther v. Heaver*, 41 Ch. D. 248. So in actions to re-enter for breach of covenant in a lease the Court will dispose of questions in their equitable rather than their legal aspect in cases where under the former practice the Court of Chancery would have relieved against a forfeiture: *Buckley v. Beigle*, 8 Ont. 85.

Where the solicitor of a lessee fraudulently procured from him a memorandum of deposit of the lease as security for a loan by the

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solicitor, and upon the security of the lease and memorandum procured a loan from an innocent lender, it was held in an action by the lessee against the latter, for the delivery up of the lease, that this section did not apply to enable the defendant to say that he was a purchaser for value without notice, and retain the lease: *James v. Giles*, W. N. 1880, 170.

It has been held in England that where an executor or administrator, after the commencement of a creditor's action for administration and before judgment, has voluntarily paid any creditor in full, the rule in Equity and not at Law must prevail under this subsection, and he will be held to have made a good payment, and will be allowed it in his accounts, even though he may have had notice of the action before payment: *Re Radcliffe, European Soc. v. Radcliffe*, 7 Ch. D. 733; *Vibart v. Coles*, 24 Q. B. D. 364; *Re Wells*, 45 Ch. D. 569; but *quære* whether in Ont. this was the rule in Equity: see R. S. O. c. 129, s. 34.

The rule of Equity in the administration of partnership assets was applied in administering a fund in the sheriff's hands, and joint estate was applied to joint debts, and separate estate to separate debts, to the exclusion of any legal lien acquired by an execution creditor: see further, as to the application of this rule: *Re Ruby*, 24 Ont. App. 509. Equitable rules are, however, only applied where they would have been applied formerly by a Court of Equity: e.g., the plea of purchase without notice had no effect in a case under the concurrent jurisdiction of Equity where a plaintiff was pursuing a legal title for legal relief: *Manners v. Mew*, 29 Ch. D. 725, 734.

See also *Ryan v. Fish*, 4 Ont. 335; *Re Hodgson, Beckett v. Ramsdale*, 55 L. J. Chy. 241, and Trower on the Prevalence of Equity under the Jud. Act.

Rules of law
to apply to
all Courts

59. The several rules of law enacted and declared by this Act shall be in force and receive effect in all Courts whatsoever in Ontario, so far as the matters to which such rules relate shall be respectively cognizable by such Courts. 58 V. c. 12, s. 54.

Taken from Eng. J. A. 1873, s. 91.

The provision of *Rule 1130*, that in an action tried by jury the costs shall follow the event unless the Judge otherwise orders, was considered to be a rule of Law and not one of practice, and therefore under the corresponding English section was held to be applicable to the Passage Court of Liverpool: *King v. Haickworth*, 4 Q. B. D. 371. *Quære*, whether notwithstanding this decision it was not the intention of this section to apply in all Courts the Rules of Law only which are enacted by sec. 58; see *Building and Loan, etc., v. Heimrod*, 19 C. L. J. 256, and *Pryor v. City Offices*, 10 Q. B. D. 504; *Poyser v. Minors*, 7 Q. B. D. 329. The transfer of this section in the Revision of the Statutes of 1888 from the end of the Act to its present position immediately following sec. 58 seems to give some support to the latter view.

See also *Speers v. Daggers*, 1 Cah. & E. 503; *Fellows v. Owners, etc.*, 1893, 1 Q. B. 104; *Foster v. Reeves*, 1892, 2 Q. B. 255.

CONSTITUTIONAL QUESTIONS.

60.—(1) When in any action or other proceeding, the constitutional validity of any Act of the Parliament of Canada or of the Legislature of Ontario comes into question, the same shall not be adjudged to be invalid until after notice thereof has been served on the Minister of Justice and the Attorney-General of Ontario, or at their offices respectively.

Notice to be given to Minister of Justice and Attorney-General of Ontario before any Act is declared invalid.

(2) The notice in such case shall be entitled in the cause; shall state what the Act or section of an Act is which is in question, and the day on which the case or the said question is to be argued; and shall give such other particulars as are necessary to show the constitutional point proposed to be argued.

(3) The notice shall be served six days before the day of the argument unless a Judge authorizes a shorter notice.

(4) Upon every such question the said Minister of Justice and the said Attorney-General shall be entitled as of right to be heard, either in person or by counsel, notwithstanding that the Crown is not a party to the action or proceeding. 58 V. c. 12, s. 55.

See notes to sec. 57 (2).

SITTINGS OF COURT AND DISTRIBUTION OF BUSINESS.

61. The legal year shall not be divided into Terms so far as relates to the administration of justice; and there shall not (a) be terms applicable to any sitting or business of the High Court (b), or of any Commissioners to whom any jurisdiction may be assigned under this Act, or of any Commissioners of Assize (c); but in all (d) cases in which, under the law existing prior to the 22nd day of August, 1881, the terms into which the legal year was divided were used as a measure for determining the time at or within which any act was required to be done, the same may continue to be referred to for the same or the like purpose, unless and until provision is otherwise made by any lawful authority. 58 V. c. 12, s. 56.

Abolition of Terms.

With the exceptions mentioned below, this clause corresponds with Eng. J. A. 1873, s. 26, first part.

Secs. 62, 63. (a) The English section has the words "no longer," instead of the word "not."

(b) The English section has here the words "or the Court of Appeal"; the Court of Appeal in Ontario had no "Terms."

(c) The words "commissioners of assize" are not in the English Act.

As to commissions of Assize, etc., see note to sec. 188 of this Act.

(d) The English Act has the additional word "other" here.

Time of
former
Terms.

The former Common Law Terms were certain fixed periods in the year when the former Common Law Courts sat *in banc*; and certain business could only be transacted before the Court at those periods. There were four of these Terms, viz.: Hilary, Easter, Trinity and Michaelmas: R. S. O. 1877, c. 39, s. 11.

Terms survive as measures of time for the purpose of marking time: *e.g.*, formerly in the time for making a motion to set aside an award: *College of Christ's Hospital v. Martin*, 3 Q. B. D. 28; *Giles v. Morrice*, 4 Ont. 649; *Kean v. Edwards*, 12 P. R. 625; *Re Garson*, 16 P. R. 179; but now Terms will not be used in such case, provision having been made for the time for moving against an award by R. S. O. c. 62, s. 45.

Sittings of
Courts.

62.—(1) Subject to the Rules of Court, the High Court of Justice, and the Court of Appeal, and the Judges thereof respectively, or any such Commissioners as aforesaid, shall have power to sit and act, at any time and at any place, for the transaction of any part of the business of such Courts respectively, or of such Judges or Commissioners, or for the discharge of any duty which by any statute, or otherwise, is required to be discharged.

Where
Divisional
Sittings to
be held.

(2) Subject to the preceding proviso. the Divisional Sittings of the High Court shall be held at the city of Toronto. 58 V. c. 12, s. 57.

The sittings of Divisional Courts are regulated by Rule 116.

Vacations.

63. The Lieutenant-Governor in Council may from time to time, upon any report or recommendation of the council of Judges of the Supreme Court hereinafter mentioned, make, revoke or modify, orders regulating the vacations to be observed by the High Court of Justice and the Court of Appeal, and in the offices of the said Courts respectively; and any Order in Council made pursuant to this section shall, so long as it continues in force, be of the same effect as if it were contained in this Act; and Rules of Court may be made for carrying the same into effect in the same manner as if such Order in Council were part of this Act. 58 V. c. 12, s. 58.

As to vacations, see Rule 354.

64. Commissions of assize or any other commissions, ^{secs 64, 65.} either general or special, may be issued, by the proper authority, assigning to the persons to be therein named, the duty of trying and determining within any place or district specially fixed for that purpose by such commission, any causes or matters, or any questions or issues of fact or of law, or partly of fact and partly of law, in any cause or matter, depending in the said High Court; or the exercise of any civil or criminal jurisdiction capable of being exercised by the said High Court; and any commission so issued shall be of the same validity as if it were enacted by the body of this Act; and any Commissioner or Commissioners shall, when engaged in the exercise of any jurisdiction so assigned to him or them, be deemed to constitute a Court of the said High Court. 58 V. c. 12, s. 59.

The English J. A. 1873, s. 37, gave this authority expressly to His Majesty. In Canada it has been questioned whether the authority belongs under the B. N. A. Act to the Governor-General or the Lieutenant-Governor; the present section provides for the issuing "by the proper authority." A commission in its ordinary form both constitutes the Court and names the Judges, while under the B. N. A. Act the creation of Courts belongs to the Province, and the appointment of Superior Court Judges belongs to the Dominion: see *Regina v. Amer*, 42 U. C. Q. B. 391.

The English section limited the appointment to "any Judge or Judges of the High Court, or other persons usually named in commissions of assize." The Dominion Government is understood to maintain that a Provincial Legislature has no authority to limit the class of persons from which Judges are to be selected.

65.—(1) Every action and proceeding in the High Court and all business arising out of the same, except as hereinafter provided, shall, so far as is practicable and convenient, be heard, determined, and disposed of, before a single Judge (a). ^{Business to be disposed of by one Judge as far as practicable.}

(2) A Judge sitting elsewhere than in a Divisional Court, is to decide all questions coming properly before him, and is not to reserve any case, or any point in a case, for the consideration of a Divisional Court. ^{Judge not to reserve questions.}

(3) In all such cases any Judge sitting in Court shall be deemed to constitute a Court (b). 58 V. c. 12, s. 60. ^{Judge to constitute a Court.}

See Eng. J. A. 1873, s. 46; J. A. 1875, s. 22; and J. A. 1876, s. 17.

(a) This is the same in effect as the enactment in the Eng. J. A. 1876, s. 17; and is an extension of the authority, previously to Ont. J. A. 1881, possessed in Ontario by a Judge of the Common Law Courts under the Administration of Justice Act, 1874 (R. S. O. 1877, c. 50, s. 281).

The provisions of sec. 81 (2) constitute an exception to this subsection.

Secs. 66, 67. In *Benachor v. Colcy*, 52 L. J. Q. B. 308; 48 L. T. 583, it was held that notwithstanding the first clause of this section a Judge at *Nisi Prius* may leave any party to move a Divisional Court for judgment, and that the words "so far as is practicable and convenient" above, should be interpreted to authorize that course. This decision would not seem to be applicable in Ontario as the Imp. Act contains no clause similar to sub-sec. (2) above.

Where "a special case on the pleadings" had been referred to a Divisional Court in forgetfulness of the above sections, the application was turned into a motion and heard under *Rules* 600, 615 and 617; *Till v. Till*, 15 Ont. 133.

In *re Vivian*, Rose, J., directed an issue to be heard before a Divisional Court, and it was heard and disposed of by C. P. Divisional Court, 9th January, 1896: but see *Hood Barrs v. Oathcart*, 72 L. T. 184; W. N. 1895, 34.

A hearing *in camera* may be allowed in a proper case: see *Mellor v. Thompson*, 31 Ch. D. 53, an application to restrain a solicitor from disclosing communications made to him confidentially as such solicitor; and see 82 L. T. Jour. 297, and observations of Lord Fitzgerald in *Macdougall v. Knight*, 14 App. Cas. 206-7; also articles in 25 C. L. J. 597, and 88 L. T. Jour. 40, 123. Where a cause is heard *in camera* it is a contempt of Court to publish a report of the hearing: *Re Martindale*, 1894, 3 Ch. 193.

(b) The English J. A. 1873, s. 39, last part, is the same. See *Cooper v. Central Ont. Ry. Co.*, 4 Ont. 280.

The civil business of Divisional Courts is regulated by secs. 74 and 75, and *Rules* 117, 770, 777 and 778-797. As to their criminal jurisdiction see note to sec. 25.

As to the comparative authority of decisions of a single Judge sitting as the High Court and those of a Divisional Court, see *Toncred v. Delagou Bay, etc., Co.*, 23 Q. B. D. 242.

Business of
Divisional
Courts of
the High
Court.

66. All business which may from time to time be so ordered by Rules of Court shall be transacted and disposed of by the Divisional Courts of the High Court, which shall for that purpose exercise all or any part of the jurisdiction of the said High Court. 58 V. c. 12, s. 61.

See notes to *Rule* 117, and sec. 67.

Certain
matters to
be heard
before
Divisional
Court.

67.—(1) Subject to Rules of Court the following proceedings and matters shall be heard and determined by a Divisional Court of the High Court:—

- (a) Proceedings directed by any Statute to be taken before the High Court in which the decision of the Court is final;
- (b) Cases of *habeas corpus* in which the Judge directs that the writ be made returnable before a Divisional Court;

- (c) Motions to quash summary convictions or orders, ^{Sec. 62.} including convictions and orders made or purporting to be made under the authority of Imperial or Dominion legislation;
- (d) Applications for a new trial in the High Court when the action has been tried with a jury;
- (e) Stated cases under *The Ontario Summary Convictions Act* and amendments thereto, and under ^{Rev. Stat. c. 90.} Section 900 of the Criminal Code, 1892;
- (f) Other cases where all parties agree to the same being heard by a Divisional Court.

(2) Nothing in this section contained shall take away or limit the power of a single Judge to hear and determine any proceeding or matter which he has heretofore had power to hear and determine or shall require any interlocutory proceeding heretofore taken before a single Judge to be taken before a Divisional Court. 4 Ed. vii. c. 11, s. 2.

The Heir and Devisee business was transferred to Divisional Courts by 62 Vict. c. 11, s. 33.

Rule 117 as amended by Rule 1239, also contains the provisions of the above sub-section (1), except (d) and (e), and clause (e) is embodied in Rule 782.

A special case stated by arbitrators pursuant to R. S. O. 1897, c. 62, s. 41, must be argued before a Divisional Court under clause (a) and Rule 117. A single Judge in Court has not jurisdiction: *Re Geddes & Cochrane*, 2 O. L. R. 149.

The order on motion in the nature of an application for a mandamus under R. S. O. 1897, c. 88, s. 6, is not final; and, therefore, such a motion should be to a single Judge in Court: *Rex v. Meehan*, 3 O. L. R. 361.

A Divisional Court will not hear an appeal from an award under the Railway Act: *Re Montreal & Ottawa Railway & Ogilvie*, 18 P. R. 120; and see *Re Potter & Central Canada Railway*, 16 P. R. 16.

Semble, where parties agree, under clause (d), to the Divisional Court hearing a case, the order made on such hearing is not a consent order so as to necessitate leave to appeal therefrom: *Payne v. Caughell*, 24 Ont. App. 556.

68. The [King's] Bench, Chancery, Common Pleas and the Exchequer Divisions of the High Court shall not sit or give judgments as such Divisions; and there shall not be Divisional Courts of any of the said Divisions; but the Divisional Courts shall be Divisional Courts of the High Court, without reference to the said Divisions. 58 V. c. 12, s. 63; c. 13, s. 10; 59 V. c. 18, Sched. (5); 3 Ed. vii. c. 8, s. 6.

King's Bench, Chancery, Common Pleas and Exchequer Divisions not to sit as such.

secs. 69-70. The three Divisions of the High Court do not necessarily correspond with the Divisional Courts referred to in this section and elsewhere in the Act and Rules: see next three sections. The Divisional Courts are a distinct organization under the Jud. Act, and invested with special functions: *Reg. v. Beemer*, 15 Ont. 263. For the business assigned to Divisional Courts: see *Rules* 117, 770, 777 and 797, also *secs.* 67 and 73.

As to the constitution of Divisional Courts for criminal matters, see notes to *sec.* 25.

In s. 62 (2), *supra*, it may be noticed that the phraseology used is "Divisional Sittings of the High Court."

Sittings of
Divisional
Courts.

Proviso.

69. The Judges of the High Court or a majority of them, may from time to time, pass such Rules to regulate the sittings of the Divisional Court as may be found necessary for the due despatch of business; provided always that there shall be at least a monthly sitting of such Court except during vacation. 60 V. c. 15, Sched. A (65).

The sittings are at present ordinarily regulated by *Rule* 116, but further sittings are sometimes provided for, during the months in which circuit sittings are not being held.

Certain
Judges not
to be
assigned to
sittings of
Assize.

69. In arranging the sittings of Assize and for the trial of causes as well in the County of York as the other counties, the President of one of the Divisions and two other Judges shall be selected, to none of whom shall any of the said sittings be assigned, and it shall be the duty of the said President and Judges to hold the sittings of the Divisional Court during the time that they are left free from the sittings of Assize and for the trial of causes as aforesaid. 3 Ed. vii. c. 8, s. 7.

Under this section the sittings of the Divisional Court are no longer confined to two weeks in each month, as provided by *Rule* 116 (1), but are made continuous throughout each month.

As to whether a puisne Judge can sit in place of a President of a Division: see *infra*, sub-secs. (5), (6).

Divisional
Courts, how
composed.

70—(1) Every Divisional Court of the High Court shall be composed of three Judges. 58 V. c. 12, s. 66 (1); c. 13, s. 15, part; 59 V. c. 18, s. 10; as amended by 3 Ed. vii. c. 8, s. 8 (1).

As to how far the decisions of one Divisional Court are binding on another, see *sec.* 81 and notes.

No Judge
to hear
appeal from
his own
judgment.

(2) No Judge shall sit as a Judge on the hearing of an appeal from any judgment or order made by himself; but subject to this provision every Judge of the High Court shall be qualified and empowered to sit in any of such Divisional Courts. 58 V. c. 12, s. 66 (2); c. 13, s. 15, part.

Where a motion against the judgment of the C. J. was made before **Sec. 71.** a full Court of three Judges, but when judgment was delivered one of the puisne Judges was absent, being engaged in another Court, on a motion for leave to appeal, the judgment of the C. J. and the remaining puisne Judge was held to be invalid, and therefore there was no judgment which could be appealed against: *Cochran v. Boucher*, 19 C. L. J. 349; 3 C. L. T. 544; 8 Ont. App. 555. For the subsequent proceedings taken in consequence of this decision, see 3 C. L. T. 547, and 19 C. L. J. 402.

(3) The Judges of the High Court, or a majority of them, ^{Judges to arrange sittings.} may arrange in what order the Judges of the High Court shall hold the said sittings. 58 V. c. 12, s. 66 (3); c. 13, s. 16 (3).

(4) If no arrangement is made, or subject to any arrangement so made, the presiding Judge shall, wherever practicable, be a President of one of the Divisions of the High Court. 58 V. c. 12, s. 66 (4); c. 13, s. 16 (4); as amended by 3 Ed. vii. c. 8, s. 8 (2).

(5) In the absence of a President of a Division the senior Judge present shall preside. 58 V. c. 12, s. 66 (5).

(6) Nothing in this Act is to be construed as preventing any Judge from sitting in a Divisional Court in the absence of the Judge whose turn it may be to sit; and nothing in this Act is to be construed as making irregular any sitting or any proceeding thereat by reason of the Court not being constituted as hereinbefore mentioned, provided that the sitting is held by the proper number of Judges, not including the Judge from whose judgment or order an appeal is heard.

(7) Where a Judge has heard a case in a Divisional Court and is not present at the time of the judgment being delivered, his written judgment may be read by one of the other Judges of such Divisional Court, and shall have the same effect as if he were present. 58 V. c. 12, s. 66 (6-7); c. 13, s. 16 (6, 7).

71. All such arrangements as may be necessary or proper ^{Arrangements for transaction of business.} for the holding of any of the Courts, or the transaction of business, or assignment from time to time of Judges to hold such Courts, or to transact such business, shall be made by the Judges of the High Court or a majority of them. 58 V. c. 12, s. 67.

Sec. 72.

APPEALS.

A right of appeal must be given by express enactment. It does not exist in the nature of things: *Sandback v. N. Staffordshire Ry.*, 3 Q. B. D. 4.

The High Court has no jurisdiction to review its own judgments or orders in an action brought for that purpose, on the ground of error apparent on their face. The remedy is now by appeal: *Bright v. Sellar*, 1904, 1 K. B. 6.

Jurisdiction
of Court of
Appeal.

Before 1
Sept., 1904.

After 1
Sept., 1904.

By 4 Ed. vii., c. 11, the jurisdiction of the Court of Appeal has been changed. Before that Act, general appellate jurisdiction was given to the Court under Jud. Act, s. 50, from judgments or orders of the High Court, whether pronounced by a Divisional Court, or by a single Judge sitting in Court, but restrictions on appeals were imposed by other provisions in the Act and in the Rules. Now by the above section 50 (1), the general appellate jurisdiction of the Court is confined to appeals from Divisional Courts and by section 76a, it is empowered to entertain appeals from judgments, orders or decisions of a single Judge in Court, in certain cases only, and only upon consent or upon leave being granted.

Appeals
from orders
made in
jurisdiction
not judicial
but consult-
ative.

An appeal will not lie from a judgment which is not impeached, merely for the determination of an abstract point of law upon which an opinion is expressed by the Court below, but which is not necessary for the decision of the question between the parties: *Rex v. Lowe*, 1904, A. C. 412.

Quare, whether an appeal lies from an order where it expresses the opinion of the Court, not being a judicial decision, but merely consultative: *Re Arbitration, Knight & Tabernacle, B. S.*, 41 W. R. 35; 67 L. T. 403; or from a decision of the High Court on a question submitted to it under a special enactment enabling that course to be taken: *Ex p. County Council of Kent, etc.*, 39 W. R. 465.

In giving an opinion on a special case, the jurisdiction exercised by a Court is judicial, not consultative, so that its decision is a "judgment or order": *Overseers of Walsall v. L. & N. W. Ry. Co.*, 4 App. Cas. 30.

In *Harmon v. Park*, 29 W. R. 750; 17 C. L. J. 389, it was held that an appeal would lie to the Court of Appeal from a Divisional Court on a question as to whether a petition against a municipal election was properly instituted, as being an order of the High Court of Justice, though the Act, under which the petition was presented, provided that a decision upon the hearing of the petition should not be appealable. See also *Corporation of Peterboro' v. Wilsthorpe*, 12 Q. B. D. 1. See further the notes to sec. 76.

Summary of
4 Edw. vii.,
c. 11.

Summary of Enactments as to Appeals.—Formerly, subject to certain restrictions, an appeal was given to the Court of Appeal from every judgment, order or decision of the High Court, whether of a Divisional Court or of a Judge in Court: Jud. Act, ss. 50 and 76; and an appeal from a Judge in Court also lay to a Divisional Court: Jud. Act, s. 75.

Those enactments have been repealed by 4 Ed. vii., c. 11, s. 2, and new provisions on the subject have been made as follows:

(a) Divisional Courts have practically the same appellate jurisdiction as formerly: s. 74.

- (b) The general appellate jurisdiction of the Court of Appeal **Sec. 72.** lies in respect of judgments, orders or decisions of Divisional Courts only: s. 50 (1).

Appeals from a Divisional Court to the Court of Appeal are regulated by secs. 50, 76 and 77.

- (c) An appeal from a single Judge in Court lies in all cases to a Divisional Court, but only lies to the Court of Appeal by leave of that Court or a Judge thereof, and in cases where an appeal would lie from the decision of the Court of Appeal to the Supreme Court of Canada: s. 76a.

In other words, the judgment, order or decision must be the final judgment in the action or matter, within the meaning of the Acts relating to the Supreme Court, and must also involve a certain amount, or questions of a certain nature, as specified in the Supreme Court Acts. This has the effect of excluding appeals directly to the Court of Appeal from all decisions of a single Judge, which are interlocutory only, (e.g., a motion for an interim injunction), and also from all final judgments and orders not falling within the cases specified in 40-61 Vict. c. 34, s. 1 (d).

Under the new provisions an appeal to a Divisional Court does not of itself preclude a further appeal to the Court of Appeal by the same party, as was previously the case. Whether an appeal lies from a Divisional Court will depend, (1) on whether the Divisional Court was unanimous: sec. 76 (1), clause (a); or (2) on the nature of the questions involved: sec. 76 (1), clauses (b) to (h).

Appeals from a Single Judge.—The appellate forum in the case of the different kinds of judgments and orders which may be pronounced by a single Judge of the High Court, would seem to be as follows:—

- (i.) From the decision of a Judge in Chambers—
To a Divisional Court: *Rule 767.*
- (ii.) From the decision of a single Judge in Court not at the trial—and
- (iii.) From the decision of the Judge at the trial where the appeal does not involve a new trial only (though a motion for a new trial may be asked as an alternative)—
 - (a) To a Divisional Court: sec. 74 (1), or
 - (b) To the Court of Appeal by its leave, or by consent, if an appeal would lie in the case from the Court of Appeal to the Supreme Court of Canada: sec. 76a.
- (iv.) Motions for a new trial in cases tried with a jury—
 - (a) To a Divisional Court: sec. 67 (1) (d).
 - (b) To the Court of Appeal by consent or leave in cases within sec. 76a.

Appeals from a Divisional Court.—(1) An appeal to the Court of Appeal lies from the order of a Divisional Court in any of

Sec. 72. the cases enumerated in sec. 76 (1), whether the order of the Divisional Court was made—

- (a) On an appeal from a Judge in Chambers;
- (b) On an appeal from a Judge in Court, whether at the trial or otherwise;
- (c) On a motion for a new trial in a jury case, or
- (d) On an appeal from a Surrogate Court or a Surrogate Court Judge in the two cases mentioned in sec. 77.

(2) An appeal lies to the Court of Appeal from an order of a Divisional Court made under any of the Statutes mentioned in sec. 50 (2), as provided in those Acts, or wherever such appeal lay prior to 4 Ed. vii., c. 11: sec. 50 (3).

County Courts Appeals, Etc.—No appeal lies to the Court of Appeal from the order of a Divisional Court on an appeal from a County or District Court, or a Division Court, nor from an order made on a Surrogate Court appeal, except in certain cases specially mentioned in sec. 77: see secs. 75 and 77.

Appeal from Orders Obtained by Default.—There would not seem to be any difference, so far as the right to appeal is concerned, between an order obtained by default in appearing to oppose it, and any other order, but see *Re Morris, Ex p. Streeter*, 19 Ch. D. 216; *Walker v. Budden*, 5 Q. B. D. 267; *Allum v. Dickenson*, 30 W. R. 930.

Appeals
from discretionary
orders.

Discretionary Orders.—Where a judgment or order is appealable under this section, it remains appealable though made in the exercise of judicial discretion. In such case, however, the Court does not in general interfere (though it may disapprove), unless in a strong case, or when the discretion was exercised on a wrong principle: *Golding v. Wharton*, 1 Q. B. D. 374; *Watson v. Rodicell*, 3 Ch. D. 380; *Huggons v. Ticead*, 10 Ch. D. 359, cases respecting the striking out of pleadings; *Byrd v. Nunn*, 7 Ch. D. 286, 287; *Laird v. Briggs*, 16 Ch. D. 663, respecting allowance of amendments; *Swindell v. Birmingham Syndicate*, 3 Ch. D. 127; *Ormerod v. Todmorden*, 8 Q. B. D. 664, respecting the mode of trial; *Papayanni v. Coutpas*, W. N. 1880, 109; *Wallingford v. Mutual Soc.*, 5 App. Cas. 685, 709, as to allowing a defendant to defend on a motion under Rule 603. See also *Jarmain v. Chatterton*, 20 Ch. D. 493, and notes to sec. 72.

As to an appeal from an order granting or refusing leave to appeal: see notes to sec. 72.

Interpleader
issue.

Interpleader.—Formerly it was doubtful whether an appeal lay to the Court of Appeal from the decision upon the trial of an interpleader issue: *Whiting v. Hovey*, 12 Ont. App. 119, where the Court was divided in opinion: but now such a decision would seem to be appealable in the same way as any other decision given at a trial in Court: see Rules 6 (e) and 783, sec. 74 of the Jud. Act, and *Graham v. Temperance*, etc., 17 P. R. 271.

Habeas
corpus

Habeas Corpus.—There is no appeal to a Divisional Court from a decision of a Judge in Chambers on a *habeas corpus* application, under R. S. O. c. 83, s. 1. There is only an appeal to the Court of Appeal, as provided by sec. 6 of that Act: *Re Harper*, 23 Ont. 63.

Dominion Railway Act.—Under 3 Ed. vii. c. 58, s. 168 (D.), **Sec. 72.**
 an appeal lies by either party from an award of compensation exceeding \$600, either to the Court of Appeal or to the High Court of Justice, but if an appeal is taken to the latter tribunal, no further appeal lies by either party to the Court of Appeal: *Re Birchy and T. H. & B. Ry. Co.*, 25 Ont. App. 88.

Appeal by a Party in Contempt.—The rule is not universal that a party in contempt can take no steps in the action; he is entitled to take the necessary steps to defend himself: *Small v. American Federation of Musicians*, 5 O. L. R. 456, and may proceed with the action in the ordinary way.

The contempt is only a bar to his asking the Court for an indulgence: *Ferguson v. Elgin*, 15 P. R. 399. He may of course appeal from the order putting him in contempt: *McGregor v. McDonald*, 1 C. L. T. 20; and also from the order which he has disobeyed: *Ferguson v. Elgin*, *supra*; *McLeod v. Noble*, 24 Ont. App. 459.

The express provisions of sec. 47 of the Eng. Jud. Act of 1873, prevent an appeal "in any criminal cause or matter," and so prevent an appeal from an order punishing a stranger to an action for contempt of Court, where the contempt is of a criminal character, though not perhaps indictable, e.g., for publishing statements calculated to prejudice the fair trial of an action, such an order being a criminal cause or matter: *O'Shea v. O'Shea*, 15 P. D. 59; 62 L. T. 713; *Ellis v. The Queen*, 22 S. C. R. 7. In Ontario it seems doubtful whether an appeal lies in such a case: see Ont. J. A., sec. 191, though an appeal was entertained in *Reg. ex rel. Frelitz v. Howland*, 14 Ont. App. 184; 16 S. C. R. 197, where no objection to the jurisdiction appears to have been raised, (see the remarks in *Ellis v. The Queen*, 22 S. C. R. at p. 13); but an order adjudging a party to be in contempt for not obeying an order of the Court is an order in a civil proceeding, and an appeal from it lies in England: *Reg. v. Barnardo*, 23 Q. B. D. 305; *Re Freston*, 11 Q. B. D. 545; *Re Dudley*, 12 Q. B. D. 44; *Re Hardwick*, 12 Q. B. D. 148; *Re Johnson*, 20 Q. B. D. 68; *Re Wray*, 38 Ch. D. 138; and probably in Ontario an appeal will lie to a Divisional Court, or to the Court of Appeal, as the case may be, as in the case of any other judgment or order in a civil proceeding.

As to appealing from a refusal to commit for contempt, see *Jarman v. Chatterton*, 20 Ch. D. 493; *Ashworth v. Outram*, 5 Ch. D. 943; *Debenham v. Wardroper*, 48 L. T. 235; *Krehl v. Burrell*, W. N. 1883, 177; see also notes to Rule 855, and to sec. 72.

72. No order made by the High Court or any Judge thereof, by the consent of parties, or as to costs only which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court or Judge making such order. 58 V. c. 12, s. 68.

Identical with Eng. J. A. 1873, s. 49.

No exception is made of cases involving a question of law or principle, nor is any reference made to the discretion of the Judge being exercised: *per Lindley, M.R.*, in *Adlington v. Conyngham*, 1898, 2 Q. B. 492; but see *McCausland v. Quebec Fire Insurance Company*, 25 Ont. 330; *Bew v. Bew*, 1899, 2 Ch. 467; 81 L. T. 284; and *Civil*

Certain orders not subject to appeal.

Sec. 72. *Service Co-operative Soc. v. Gen. Steam Navigation Co.*, 1903, 2 K B. 756; see also notes to *Rule 1130*.

Consent
order.

Where a Divisional Court by consent of parties under s. 67 (f), hears a case, such judgment does not make the order pronounced on the application a consent order within this section: *Payne v. Caughell*, 24 Ont. App. 356.

A judgment in which some of the terms have been inserted at the suggestion of a party struggling for the best possible terms, in a decision adverse to him, cannot be regarded as a consent judgment: *Sweeney v. Sweeney*, 16 Ont. 92; so also the mere initialing of the minutes of an order, does not make the order a consent order; it merely amounts to an admission that the minutes correctly embody the order pronounced: *McMaster v. Radford*, 16 P. R. 20; and where a party accepts an alternative order offered by the Court, his acceptance does not make the order a consent order: *Aldam v. Brown*, 89 L. T. Jour. 116; 34 Sol. Jour. 525.

Where a party is offered an option as to the judgment to be pronounced, his acceptance of one of the alternatives offered does not make the judgment a consent judgment within this section: *Sun Life v. Elliott*, 31 S. C. R. 91.

There can be no appeal from an order appearing on its face to be made by consent unless by leave of the Court or Judge making it, even though the appeal is on the ground that no such consent was given: *Re Justin*, 18 P. R. 125.

A consent order made by the Master in Chambers or officer having the like jurisdiction would seem to be within this section: see *Re Solicitor*, 18 C. L. T. 224, 261.

Where an undertaking equivalent to an injunction asked by plaintiff was given, and the case was tried on the question of costs only, it was held that there was no appeal, both because the judgment was as to costs within this section, and, except so far as the costs were concerned, the judgment was by consent: *Hadida v. Fordham*, 10 Times, 129.

An interpleader matter tried summarily by consent by a Judge in Chambers under R. S. O. 1877, c. 54, s. 5, was formerly within this section: *Edd v. Winsor*, W. N. 1878, 88; *Turner v. Bridgett*, 9 Q. B. D. 55; *Lyon v. Morris*, 19 Q. B. D. 139; but now *Rule 1110*, which has superseded the above sec. 5, provides for an appeal.

Not only is there no appeal from a consent judgment, but there is no jurisdiction in the Judge who pronounced it to re-open the matter and re-hear it on the ground of mistake, and it can only be set aside by bringing a fresh action: *Ainsworth v. Wilding*, 1896, 1 Ch. 673; 74 L. T. 193; and see *Wilding v. Sanderson*, 1897, 2 Ch. 534; 77 L. T. 57. See also notes to *Rule 640*.

Appeals as
to costs.

Appeals as to Costs.—Where a defendant is ordered to pay costs of an action, but no further relief is given, an appeal from the judgment is not an appeal as to costs within the section: *Fleming v. Toronto*, 19 Ont. App. 318.

Where pending an appeal from an order refusing to quash a by-law, the by-law was repealed, the Supreme Court refused to entertain the appeal as it involved costs only: *Moir v. Huntington*, 19 S. C. R. 363.

Costs awarded to a third party under *Rule 214* are in the discretion of the Court, and within this section: *Russell v. Eddy*, 5 O. L. R. 379.

Where a Judge decided that a defendant had committed a breach of an injunction, and no committal being pressed for on the other side, simply ordered the defendant to pay the costs, it was held that the order was not one as to costs only in the discretion of the Court, within the meaning of this section, and that an appeal lay: *Witt v. Corcoran*, 2 Ch. D. 69; followed in *Stevens v. Metropolitan Ry.*, 29 Ch. D. 60. See also *Miller v. Macdonald*, 14 P. R. 499; *Re Evans*, 68 L. T. 271; *Ellam v. Martyn*, 79 L. T. 510. On the other hand, where a Judge, being asked to commit for contempt made an order, within his power but of a different kind, viz.: to deliver a deed within a certain time, and disposed of the costs: *Krehl v. Burrell*, W. N. 1883, 177, and in another instance refused to commit, and made the costs, costs in the cause: *Ashworth v. Outram*, 5 Ch. D. 943. It was held that no appeal lay. See also *Jarmain v. Chatterton*, 20 Ch. D. 493; *Re Wray*, 36 Ch. D. 138.

By *Rule 1130* the right which certain classes of persons, such as trustees, mortgagees, etc., had in Equity to costs out of a particular estate or fund, is preserved. Such costs are not in the discretion of the Court, and are therefore a proper subject of appeal, if no other restriction on the right of appeal applies. See notes to *Rule 1130*.

Where a settlement is set aside in an action by the settlor, the trustee has no claim to his costs as a matter of right, there being no contract in existence, and therefore where costs were given against him, it was held that, under this section, no appeal lay: *Dutton v. Thompson*, 23 Ch. D. 278.

So an order directing an executor to pay costs of an administration action, on the ground that he had caused the litigation by refusal to furnish accounts, is appealable, as he is entitled to costs unless the right is displaced by misconduct, and whether there was misconduct is the subject of appeal: *Re Pugh*, 57 L. T. 858.

An appeal lies from an order depriving a trustee of costs on the ground that he severed from his co-trustee in an action to administer the estate: *Re Isaac*, 1897, 1 Ch. 251.

There is a distinction between "costs" and "charges and expenses." Where a trustee defended an action unreasonably (though by the advice of counsel), and paid the costs of it, these were allowed in subsequent administration proceedings, and were held to be not costs in the administration proceedings but "charges and expenses," and therefore not costs in the discretion of the Judge. An appeal as to the allowance of these costs in the trustee's accounts was therefore held to lie, and the costs were disallowed: *Re Beddoe*, 1893, 1 Ch. 547; but an appeal from an order for payment of costs, charges and expenses will not lie as to the "costs" only, if the order is right as to charges and expenses: *Bew v. Bew*, *infra*.

The effect of this section is that a mortgagee may appeal from an order depriving him of costs out of the estate for misconduct (he-cause if there was no misconduct the costs are not in the discretion of the Court under *Rule 1130*); but a mortgagor cannot appeal from an order negating misconduct and allowing a mortgagee costs out of the estate (because misconduct if proved would bring the costs within the discretion of the Judge): *Charles v. Jones*, 33 Ch. D. 80; in that case it was held that even though the Judge does not exercise

Sec. 72.

his discretion, there would be no appeal, but *Bew v. Bew*, 1890, 2 Ch. 407; 81 L. T. 284, overrules *Charles v. Jones* in this respect, and decides that if a Judge has not exercised his discretion but has applied some rule which excluded his discretion, an appeal lies without leave; and see *The City of Manchester*, 1890, 5 P. D. 221; 42 L. T. 521.

An order directing an official receiver in bankruptcy to pay costs was held to be appealable without leave; but an order refusing him costs was considered to be discretionary, and therefore not appealable without leave: *Re Rayner Park Golf Club*, 1899, 1 Q. B. 961; and see *Re Silver Valley Mines*, 1892, 21 Ch. D. 381.

Where costs are improperly ordered to be paid out of an estate, such order is appealable without leave: *Crawford v. Bradley*, 18 P. R. 233; *Bew v. Bew*, *supra*.

Costs ordered to be paid by solicitor personally.

The Court has a discretion to order costs to be paid personally by a solicitor where there has been misconduct or negligence, but an appeal lies on the question whether there has, in fact, been misconduct or negligence: *Re Bradford*, 15 Q. B. D. 635, overruling 11 Q. B. D. 373; and see *Charles v. Jones*, *supra*.

Examples of costs in discretion of Court.

The following are instances of costs in the discretion of the Court and therefore within this section:—

Costs of an interpleader issue disposed of in Chambers: *Hartmont v. Foster*, 8 Q. B. D. 82; costs given over to a defendant against a third party: *Hornby v. Cardwell*, 8 Q. B. D. 329; costs refused to a third party: *Tomlinson v. Northern Ry.*, 11 P. R. 526; costs given or refused to a plaintiff on confessing a defence under Rule 295; *Perkins v. Bersford*, 47 L. T. 515; and costs of inspection of property under Rule 1096; *Mitchell v. Darley*, 10 Q. B. D. 457; and costs on dismissal of an action for want of prosecution: *Snelling v. Pulling*, 29 Ch. D. 85. See also notes to Rule 1130.

In a suit to settle the priorities between incumbrancers, B., one of the defendants, was ordered to pay the costs of the plaintiff and his co-defendant. B. appealed, and the decision being affirmed on the merits the Court refused to vary the order as to costs, as that would be practically allowing an appeal for costs: *Harpham v. Shacklock*, 19 Ch. D. 215; *Harris v. Aaron*, 4 Ch. D. 749.

Notwithstanding this section, an appeal from a decision as to costs will lie, without leave, if the Judge has not exercised his discretion, or has decided on grounds which were not open to him: *Civil Service Co-operative Soc. v. Gen. Steam Navigation Co.*, 1903, 2 K. B. 756; or if he has proceeded on an erroneous principle, and so has not exercised his discretion: see *per Lindley, L.J.*, in *Young v. Thomas*, 1892, 2 Ch. at p. 137; *McCausland v. Quebec F. Ins. Co.*, 25 Ont. 330.

Cases where appeals as to costs permitted.

The following are instances in which appeals involving questions of principle on the subject of costs have been permitted:

Where the question was the right of a claimant in interpleader proceedings to recover from the execution creditor the charges of the sheriff as costs: *Goodman v. Blake*, 19 Q. B. D. 77; where costs were directed to be first paid out of a fund, and then various incumbrancers in order of priority, and the fund, after payment of costs, was not sufficient to pay the first incumbrancer, who appealed: *Johnstone v. Cox*, 19 Ch. D. 17; where an order imposed, as a condition of a new trial, the payment within a certain time of the costs of the

first trial: *Metropolitan Asylum District v. Hill*, 5 App. Cas. 582; *sec. 72*, where at the trial of an action for the infringement of a copyright of a novel, it appeared that the defendant before trial discontinued the use of the title of the novel objected to, and therefore the only order made was that defendant pay the costs of the action: *Dicks v. Yates*, 18 Ch. D. 76; and where a defendant who had disclaimed was ordered to pay costs: *Wansley v. Smollwood*, 11 Ont. App. 439.

Where leave to appeal is given on questions of costs in the discretion of the Court, the Appellate Court ought to have the same regard to the discretion of the Judge as in other cases in which his discretion is subject to review, and it ought not to interfere unless there has been a manifest disregard of principle or misapprehension of facts: *per Baggallay, L.J.*, in *Re Gilbert, Gilbert v. Huddleston*, 28 Ch. D. 549; *Young v. Thomas*, 1892, 2 Ch. 134; *Huxley v. W. L. Extension, etc.*, 17 Q. B. D. 378; *Russell v. Russell*, 1892, P. 152.

As to the principle upon which the Appellate Court proceeds in appeals on matters of discretion, see notes *supra*, p. 122.

An appeal lies from the decision of a Judge as to the scale on which costs should be taxed, but the Court will not interfere unless he has proceeded upon a wrong principle, or made a manifest slip: *Re Terrell*, 22 Ch. D. 473. See also as to charges the allowance of which is in the discretion of the taxing officer: *McGannon v. Clark*, 9 P. R. 555. Other cases.

Leave to Appeal.—Leave to appeal will not be granted unless the appellant makes out a *prima facie* case for attacking all the grounds on which the judgment or order sought to be appealed from is based; wherever any one ground is sufficient to support the order or judgment leave will be refused: *Appleby v. Turner*, 19 P. R. 175; *Ray v. Port Arthur*, 7 O. L. R. 737. Leave to appeal generally.

Where the decision is final and conclusive, no appeal can be had from it, even by leave: *Van Laun v. Boring*, 1903, 2 K. B. 277; 89 L. T. 120.

Laches in making the application may be a ground for refusing it: *Ray v. Port Arthur, supra*.

Leave to appeal on a question of costs should be asked for when the judgment in question is given: *Moy v. Thompson*, W. N. 1882, 53. Leave to appeal as to costs.

Leave may be refused where the amount involved is small and the case involves matters of infrequent occurrence: *Ford v. Mason*, 15 P. R. 398. Leave to appeal will not be given after the time for appealing has elapsed merely on the ground of the law having been subsequently altered by statute, even though it be retroactive: *Eyre v. Wynn-MacKenzie*, 1896, 1 Ch. 135; 73 L. T. 571.

No appeal lies from an order granting or refusing leave to appeal: *Lane v. Esdaille*, 1891, A. C. 210; *Re Sarnia Oil Co.*, 15 P. R. 348; *Kay v. Briggs*, 22 Q. B. D. 343; *Ex p. Stevenson*, 1892, 1 Q. B. 609; *Re Central Bank*, 17 P. R. 395; *Farquharson v. Imperial Oil Co.*, 35 C. L. J. 230; 30 S. C. R. 188; but see in the case of a refusal of leave: *Moore v. Peachey*, 8 Times, 406. No appeal from order granting leave to appeal, etc.

Application for Leave to Appeal by Parson not a Party.—See note to sec 53, *supra*.

Sec. 73.

Appeals
from inter-
locutory
orders.

73. There shall be no appeal to a Divisional Court from any interlocutory order, whether made in Court or Chambers, in case prior to *The Ontario Judicature Act, 1881*, there would have been no relief from a like order by an application to a Superior Court; and there shall be no appeal to the Court of Appeal from any interlocutory order in case prior to *The Ontario Judicature Act, 1881*, there would have been no relief from a like order by an appeal to the Court of Appeal (a). Any doubt which may arise as to what orders or judgments are interlocutory, shall be determined by the Court of Appeal. 58 V. c. 12, s. 69.

(a) What follows is taken from the Eng. Jud. Act, 1875, s. 12. The former part of the section is not in the English Act. For the cases in which, before the Ont. Jud. Act, there was an appeal to the Court of Appeal: see R. S. O. 1877, c. 18, and *Whiting v. Hovey*, 12 Ont. App. 119.

Prior to the Judicature Act, 1881, appeals from orders made by a Judge in Court or in Chambers lay to the full Court: see Chy. Ord. 323; R. S. O. 1877, c. 39, s. 26; and 37 Vict. c. 7, ss. 17, 19, 20.

Interlocu-
tory judg-
ments or
orders.

An order or judgment is said to be *interlocutory* unless the decision, whichever way it might be given, would finally dispose of the action: e.g., a decision dismissing an action on a point of law raised on the pleadings was held to be interlocutory, because if the decision had been the other way it would not have disposed of the action: *Salaman v. Warner*, 1891, 1 Q. B. 734; but see *Bozson v. Altrincham*, 1903, 1 K. B. 547. In the earlier case of *Trowell v. Shenton*, 8 Ch. D. 318, an order overruling a demurrer was held not to be interlocutory.

See generally as to the distinction between final and interlocutory orders, *White v. Witt*, 5 Ch. D. 589, 591; *Pheysey v. Pheysey*, 12 Ch. D. 305, 307; *Whiting v. Hovey*, 12 Ont. App. 119; *Hateley v. Merchants Despatch Co.*, ib. 640, and notes to sec. 58 (9) *q*, 76.

The following have been held to be interlocutory orders: An order that a case be tried by jury: *Swindell v. Birmingham*, 3 Ch. D. 127; a rule absolute for a new trial: *Highton v. Treherne*, 48 L. J. Ex. 167; an order discharging a rule for a new trial: *Wilks v. Judge*, W. N. 1880, 98; a refusal to remit an award to an arbitrator: *Re Delagoa Bay Ry., etc.*, 37 W. R. 578; an order on the trial of an interpleader issue: *McAndrew v. Barker*, 7 Ch. D. 701; *McNair v. Audenshaw*, 1891, 2 Q. B. 502 (but see *Whiting v. Hovey*, *supra*); an order for final judgment under Rule 603: *Standard Discount Co. v. La Grange*, 3 C. P. D. 67; an order setting aside a demurrer as frivolous: *Kandick v. Morrison*, 2 S. C. R. 14; an order providing for defendant's costs, the action not being further proceeded with: *Re Lewis*, 31 Ch. D. 623; the judgment of a Div. Court affirming the judgment of a County Court in an interpleader issue: *Hughes v. Little*, 18 Q. B. D. 32, reversing 17 Q. B. D. 204; an order after final judgment in regard to a set-off of costs, payable under the judgment: *Blakey v. Latham*, 43 Ch. D. 23; an order striking out a statement of claim: *Jones v. Insale*, 64 L. T. 703; an order directing a review of taxation: *Ex p. Phillips*, 19 Q. B. D. 234; an order refusing a motion to set aside a judgment signed on default: see *O'Donoghue v. Bourne*, 27 S. C. R. 654; an order refusing application

to have issues tried by a jury: *Demers v. Bank of Montreal*, 27 S. C. Sec. 74. R. 107; and an order directing an issue in an interpleader matter: *Hunter v. Hunter*, 18 C. L. T. 114; an order striking out a statement of claim as disclosing no reasonable cause of action, and as being frivolous and vexatious: *Bright v. River Plate, etc., Co.*, 17 Times, 708; and an order for security for costs, and directing that it be not given within a limited time, dismissing the action: *Stewart v. Royds*, 118 L. T. 176.

The decision of the Court upon a special case stated by an arbitrator, who is thereupon to make his award, is an interlocutory order: *Collins v. Vestry of Paddington*, 5 Q. B. D. 368; but in *Shubbrook v. Tufnell*, 9 Q. B. D. 621, it was held that a decision upon a special case must be treated as a final order, unless the decision of the Court could not, in any event, necessitate the entering of final judgment.

The following have been held to be final:—A judgment for foreclosure, even before final order: *Smith v. Davies*, 55 L. J. Chy. 496, 54 L. T. 478; an order made on an application for the delivery and taxation of a bill of costs, whether granting or refusing it: *Re Reeves*, 1902, 1 Ch. 29; 85 L. T. 495. An order refusing a motion to set aside a judgment signed by default, for irregularity, though the order reserved to the defendant leave to apply again on the merits: *Voight v. Orth*, 5 O. L. R. 443. *Indep. An issue as to further the action after judgment*
Swat, Dec. 90 L. R. 437

Interlocutory Orders, When Appealable.—It must be observed that the effect of this section is negative. It does not authorize an appeal from any interlocutory order, but in effect declares that no appeal shall be had from any interlocutory order unless an appeal would have lain therefrom prior to the Jud. Act, 1881.

The section does not prevent an appeal to a Divisional Court from an order of a Judge in Chambers on appeal from a certificate of taxation: *Talbot v. Poole*, 15 P. R. 274; see *Rule 717*.

An order by a Judge in Court, directing the execution by defendants (mortgagees) of a conveyance or discharge directed by a previous judgment, was said not to be interlocutory. But if interlocutory it was held to be appealable to the Court of Appeal notwithstanding this sec.: *Bull v. N. British, etc., Co.*, 12 P. R. 284. Now the appeal would be to the Divisional Court: sec. 74 (1), unless section 76a applies.

Appeals to Divisional Courts.

74. Subject to sections 72 and 73 of this Act, an appeal shall lie to a Divisional Court of the High Court, in the following cases:—

- (1) From any judgment, order or decision (a) of a Judge of the High Court in Court, whether at the trial or otherwise;
- (2) From a County Court as provided in *The County Courts Act*;

L.A.—9

Appeals to a Divisional Court.

(a) Order of single Judge

Under Rev. Stat. c. 55.

Sec. 74.

Under Rev.
Stat. c. 69,
168.

(3) From a Surrogate Court or a Surrogate Judge, as provided in *The Surrogate Courts Act* and *The Act respecting Infants*;

Under Rev.
Stat. c. 69.

(4) From a Division Court as provided in *The Division Courts Act*;

Under Rev.
Stat. c. 109.

(5) From a District Court, as provided in *The Unorganized Territory Act*;

Under Rev.
Stat. c. 109.

(6) From a Judge or Stipendiary Magistrate, as provided in section 71 of *The Unorganized Territory Act*;

Under Rev.
Stat. c. 245.

(7) From a Judge of a County Court upon appeal from a conviction or order arising out of or under *The Liquor License Act*;

Under Rev.
Stat. c. 141.

(8) From a Judge of a County Court, as provided in *The Act respecting Water Privileges*;

Under Rev.
Stat. c. 142.

(9) From a Judge of a County Court, or a Stipendiary Magistrate, as provided in *The Act for Protecting the Public Interest in Rivers, Streams, and Creeks*.

Under Rev.
Stat. c. 153.

(10) Appeals which by *The Mechanics' and Wage Earners' Lien Act*, are to be heard and determined by a Divisional Court. 4 Ed. vii. c. 11, s. 2, *part*.

(a) The insertion of the word "decision," is the only change of any consequence made by 4 Ed. vii., c. 11, s. 2. Whether its insertion really makes any addition to the matters appealable under the former section 73 is doubtful. A decision probably always can, and generally at any rate, must be, embodied in a judgment or order: see *Rule 791*.

Appeals to
Divisional
Court.

This section does not contain an enumeration of all the matters in respect of which a Divisional Court has jurisdiction: when originally enacted by 58 Vict., c. 12, s. 71, and c. 13, s. 11, its main object was to transfer jurisdiction in appeal in certain matters from the Court of Appeal to a Divisional Court of the High Court. As to the jurisdiction of Divisional Courts: see also *Rules 117, 770, 777, 778-786*.

Judgments or Orders of a Single Judge at the Trial.—See as to these, *Rules 778-797*, and notes.

An appeal lies from an order at the trial directing a case to stand over to add parties: *Payne v. Caughell*, 24 Ont. App. 556.

Judgments or Orders of a Single Judge in Court, not at the Trial.—In this class of decisions an appeal lies to a Divisional Court in every case under clause (1) *supra*; but to the Court of

Appeal only in certain cases, and by consent or upon obtaining leave: *see* 74, *see* section 76a and *Rule* 772.

Orders of a Judge in Chambers.—Appeals in such cases are regulated by *Rule* 777.

An appeal does not lie to a Divisional Court from the order of a Judge under R. S. O. c. 164, s. 12, dispensing with the concurrence, for the purpose of barring dower, of the wife of an owner of land selling or mortgaging it free from dower: *Re Rush*, 10 C. L. T. 184; and *see* R. S. O. c. 76, s. 6.

County Court Appeals.—*See* notes to *Rules* 703-707.

Surrogate Court Appeals.—R. S. O. c. 50, s. 36, and *Rules* 57-59 of the Surrogate Court Rules, regulate such appeals.

Notice of appeal must be served within fifteen days as required by s. 36, and vacation is not excluded in the computation of the 15 days: *Re Eastman*, Div. Court, 17th Nov., 1898.

The service of a notice of appeal, and the deposit with the Registrar of the Surrogate Court, as security, of an unmarked check for \$100, payable to the order of the Registrar, but never cashed by him, was held not to be compliance with *Rule* 57 of the Surrogate Rules, and, therefore, the appeal, not having been lodged and brought within 15 days, as required by R. S. O. c. 50, s. 36, was quashed: *Re Wilson*, 17 P. R. 407.

An appeal lies to a Divisional Court from an order of a Surrogate Court Judge allowing compensation to an executor under R. S. O. 1897, c. 120, s. 43: *Re Alexander*, 31 Ont. 167.

An appeal under s. 36 of the Surrogate Court Act cannot be entertained unless lodged before any removal of the matter into the High Court under s. 34. Upon the making of an order for removal the matter becomes an action in the High Court, and the practice to be followed is the practice prescribed in a High Court proceeding: *Justin v. Goodison*, 18 P. R. 174.

On an appeal from an order of the Surrogate Court, security must be given and an affidavit of the value of the property affected filed, as required by *Rule* 57 of Surrogate *Rules* 1802 (notwithstanding *Con. Rule* 825). Unless this is done an appeal is not properly lodged, and may be quashed: *Re Nichol*, 1 O. L. R. 213.

A notice of appeal not specifying that it was to a Divisional Court, or any Court, and a bond reciting that the appellant desired to appeal to the Court of Appeal, were held not to be defects sufficient to have an appeal quashed: *Taylor v. Delancy*, 3 O. L. R. 380. Certain defects in Surrogate *Rule* 59 and forms are pointed out in this case.

As to the cases in which an appeal lies to the Court of Appeal from the decision of a Divisional Court on a Surrogate Court appeal: *see* section 77.

Division Court Appeals.—Under *The Division Courts Act*, R. S. O. c. 60, s. 154, an appeal does not lie to a Divisional Court until a new trial has been applied for: *Cole v. Halliday*, 33 C. L. J. 120; 17 C. L. T. 53.

The right of appeal from a Division Court is not lost because the Judge of the Division Court omits to take notes of the evidence: *see*

Sec. 78.

Sullivan v. Francis, 18 Ont. App. 121; *Wohlgemuth v. Coste*, 1890, 1 Q. B. 501; 80 L. T. 529. Where the evidence in such a case cannot be agreed on, or otherwise supplied, it may be necessary for the Divisional Court to remit the case to the Judge to take the evidence upon a new trial: *Davidson v. Head*, 18 C. L. T. 260; 34 C. L. J. 415.

The consent required by ss. 121 and 122 of the Division Courts Act, R. S. O. 1897, c. 60, to dispense with the evidence being taken down in writing in a case where the amount claimed exceeds \$100, must be in writing and filed: a verbal consent is not sufficient: *Davidson v. Head*, 18 C. L. T. 260; 34 C. L. J. 415.

The giving of notice of setting down for argument before the Divisional Court, with the grounds of appeal required by sec. 158 of the Division Courts Act, is a condition precedent to the right to appeal, and if not given the Divisional Court has no jurisdiction to deal with the appeal: *Bradley v. Wilson*, 8 O. L. R. 184.

The Divisional Court has no jurisdiction to extend the time for taking steps in a Division Court appeal; such a matter is for the Judge of the Court below: *Owen v. Sprung*, 28 Ont. 607.

A Division Court appeal is lodged as soon as a certified copy of the proceedings has been filed in the Central Office in proper time: the time for setting it down for argument and giving notice thereof, and other matters relating to the appeal, are in the discretion of the appellate Court, and that Court may allow an amendment and enlarge the time, etc.: see 4 Ed. vii., c. 12, s. 2.

Further opportunity was given to supply a notice of appeal, where it could be given within the proper time: *Smith v. Port Colborne, etc.*, 1 O. L. R. 195.

An appeal may be quashed where "the sum in dispute upon the appeal" does not exceed \$100, exclusive of costs: *Lambert v. Clarke*, 7 O. L. R. 130; see R. S. O. 1897, c. 60, s. 154 (1); and an appeal which has been duly lodged may be dismissed if not set down for the first Divisional Court commencing after the expiration of one month from the decision complained of: see *Heise v. Shanks*, 1 O. L. R. 48; and R. S. O. 1897, c. 60, s. 158 (1); but the time may be extended by the Divisional Court: see 4 Ed. vii., c. 12, s. 2.

The Water Privileges Act.—The costs of such appeals are in the discretion of the Divisional Court, and are not part of "the practice and proceedings upon the appeal," which are subject to regulation by the Judge to whom application for leave is made, under R. S. O. c. 141, s. 18: *Re Burnham*, 16 P. R. 390.

Dominion Railway Act.—See *Birdy v. T. H. & B. Ry.* in note preceding sec. 72, *supra*, p. 123.

No appeal from Divisional Court in Crown cases except at the instance of the Crown.

75. The judgment, order, or decision of a Divisional Court shall be final, and there shall be no further appeal therefrom, save only at the instance of the Crown, in a case in which the Crown is concerned, and save as provided in sections 50 and 76. 4 Ed. vii. c. 11, s. 2, *part*.

The side note to the section in the Act does not seem to be accurate. It would seem to be provided by the section, that as a rule when any appeal is taken to a Divisional Court, the decision is final except (a)

where an appeal is given by section 50, or 76; or (b) at the instance ^{Sec. 76.} of the Crown, in a case in which the Crown is concerned: see *Res v. Pierce*, 5 O. W. R. 405.

No appeal lies by leave or otherwise at the instance of a defendant from an order of a Divisional Court respecting a conviction by a Police Magistrate under an Ontario Statute: *Res v. Pierce, supra*.

As to an appeal to the Supreme Court direct, where a Divisional Court is the final appellate Court: see *Farquharson v. Imperial Oil Co.*, 30 S. C. R. 188.

Since, however, by section 76 (1), clause (h), *infra*, an appeal lies to the Court of Appeal in all cases in which a question is raised which would be the proper subject of an appeal to the Supreme Court of Canada, there would not seem to be now any cases in which an appeal can be taken to the Supreme Court direct from a judgment of a Divisional Court as the final appellate Court in the Province.

76.—(1) An appeal shall lie to the Court of Appeal from the judgment, order or decision of a Divisional Court of the High Court in the following cases, that is to say:

When appeal
to lie to
Court of
Appeal from
Divisional
Court.

- (a) Where the judgment, order or decision is pronounced in an action or proceeding in the High Court and the Divisional Court is not unanimous;

Absence of a unanimous decision would seem to be the only requisite to make a case appealable under this clause. It need not fulfil the conditions mentioned in the subsequent clauses.

- (b) Where the matter in controversy in the proposed appeal is of the sum or value of \$1,000, exclusive of costs, or involves indirectly or otherwise that sum or value;

Compare the somewhat similar clause in 60-61 V. c. 34, s. 1 (D.), relating to appeals to the Supreme Court of Canada, and see the cases decided under that enactment, *infra*, in notes preceding *Rule 831*.

- (c) Where the matter in controversy in the proposed appeal involves the validity of a copyright, trademark or patent;
- (d) Where the matter in controversy in the proposed appeal involves a question of the validity of an Act of the Parliament of Canada or of the Legislature of the Province of Ontario;
- (e) Where the judgment, order or decision involves a question of law or practice on which there have been conflicting decisions by Divisional Courts of the High Court and leave to appeal is obtained as herein provided;

Soc. 76.

- (f) Where the judgment, order or decision is in regard to a matter of practice or procedure, but affects the ultimate rights of the parties to the action to the extent of the said sum or value;

In the cases covered by this clause, the obtaining of leave to appeal does not seem to be a preliminary condition.

- (g) Where there are special reasons for treating the case as exceptional and allowing a further appeal and leave to appeal is obtained as herein provided;

- (h) Generally, but not so as to restrict an appeal in any of the foregoing cases, in all cases in which from time to time an appeal would lie from the judgment of the Court of Appeal to the Supreme Court of Canada.

Leave to
appeal, how
given.

- (2) Such leave to appeal may be given by a Divisional Court or a Judge of the High Court if a Divisional Court is not sitting or by the Court of Appeal or a Judge thereof if the Court of Appeal is not sitting. 4 Ed. vii. c. 11, s. 2.

Amount
involved.

On a defend-
ant's appeal.

On a plain-
tiff's appeal.

Clauses (b), (c), (d)—Matter in Controversy on Appeal.—

The test as to determining the matter in controversy on an appeal was defined in *Macfarlane v. Leclaire*, 15 Moo. P. C. C. 181. The judgment is to be looked at as it affects the interest of the party who is prejudiced by it. This test has been recognized as the correct one by the Jud. Committee of the Privy Council, which has accordingly determined that on an appeal by a defendant, the proper measure of value for determining the question of the right to appeal is the amount recovered in the action, not the amount claimed by the plaintiff in his pleadings: *Allan v. Pratt*, 13 App. Cas. 780; 59 L. T. 674; see also *Foster v. Emory*, 14 P. R. 1; and *Cossette v. Dun*, 18 S. C. R. 222; *Hunt v. Taplin*, 30 C. L. J. 459; 24 S. C. R. 36. Therefore where the plaintiff appeals to the Court of Appeal, if he has acquiesced in the judgment of the Court below, *semble* the amount of the judgment, and not the amount originally claimed by him, is the amount in question as regards the appeal. Thus, where the plaintiff claimed \$5,000, and recovered a judgment for \$200, from which he did not appeal, but it was subsequently reversed on the defendant's appeal and the action dismissed, for the purpose of an appeal by the plaintiff from this latter decision \$200 was held to be the amount in question: *Monette v. Lefebvre*, 16 S. C. R. 387.

Where the plaintiff's claim was for \$1,500, and a reference was directed to ascertain the amount due on certain specific principles, it was held that, on an appeal by the defendant, the amount in question "in the appeal" was more than \$1,000, although counsel for the plaintiff admitted that under the reference he could not establish a claim for more than \$1,000; *Frankel v. Grand Trunk Ry.*, 3 O. L. R. 703.

In *O'Donohoe v. Whitty*, 9 P. R. 361, bills of costs amounting to \$250.10 were, on taxation, reduced to \$187.10, and the client desired to appeal: the Court held, following *Macfarlane v. Leclaire*,

that the matter in controversy was whether the appellant was liable **Sec. 76.** to pay as much as \$187.10. The Divisional Court in that case subsequently granted leave to appeal, as the case involved the construction of clause 14 of the form appended to R. S. O. 1887, c. 107, a question of general interest, and affecting solicitors at large and other parties besides the parties to the litigation: *S. C.*, 10 C. L. J. 9.

Where the amount involved in an interpleader issue was under \$500 (the amount mentioned in the section then in force, R. S. O. 1887, c. 44, s. 67), but it was alleged that the decision of the Divisional Court, desired to be appealed from, affected the right to other property amounting to \$2,000, it was held that the decision in this matter was not conclusive as to the right to the other property, and therefore there was no sufficient ground for granting leave to appeal: *Buty v. Bryce*, 19 C. L. J. 9.

For the purpose of determining the amount involved, interest on the amount for which judgment has been given in the Court below cannot be taken into account: *Foster v. Emory*, *supra*.

Where bank shares are in question the market, and not the par value, determines the amount in question: *Muir v. Carter*, 16 S. C. R. 473.

In an action to set aside a fraudulent conveyance, the amount in dispute is the amount of the plaintiff's claim, and not the value of the property conveyed where it is of greater value than the plaintiff's claim: *Flatt v. Ferland*, 21 S. C. R. 32; *Lachance v. Société des Pêches, etc.*, 26 S. C. R. 200; and see *Jermyn v. Tru*, 28 S. C. R. 497.

Where the action is ejectment and for mesne profits, both the value of the estate and the mesne profits are to be taken into account in determining the amount at stake: *Mohideen v. Pitchay*, 1893, A. C. 193.

See also the decisions under 40-61 V. c. 34, which contain restrictions on appeals to the Supreme Court of Canada, *infra*, in the notes preceding *Rule 831*.

Leave to Appeal.—Leave to appeal is necessary in cases falling within clauses (c) or (g).

Where a Divisional Court has refused leave to appeal, the Court of Appeal has jurisdiction to grant it: see *Goodman v. Mosca*, 1900, W. N. 179; 83 L. T. 46; *Dorset v. Pethick*, 14 Times, 183.

Clause (c)—Conflicting Decisions by Divisional Courts.—Few cases of this kind can now arise since the enactment of s. 81 of the Judicature Act, and the existing provisions of the Rules, by which two Divisional Courts will rarely be sitting at the same time, so as to be in danger of deciding a point simultaneously and with conflicting results: *See cf. Krentziger v. Brox*, 32 Ont. 418; *McCormick v. Warnica*, 3 O. L. R. 427; *Bank of Toronto v. Keystone Fire Ins. Co.*, 18 P. R. 113; and *Skac v. Moss*, *Id.*, p. 119, note.

Clause (g)—Special Reasons for Treating a Case as Exceptional.—This clause is similar to former section 77 (4), clause (c), under which it was held, that on an application for leave it must appear that there is some reasonable ground for doubting the soundness of the judgment; and in addition, that special reasons exist for taking the case out of the general rule, which forbids a further appeal: *Re Reddock & Toronto*, 19 P. R. 217. *See addenda*

Sec. 76.

A sufficient special reason exists where the question is the status, jurisdiction and authority of a judicial officer: *McClure v. Brooke*, 4 O. L. R. 102.

Leave granted.

Leave was granted to appeal from an order of a Divisional Court affirming, but on different grounds, the judgment at the trial dismissing the action, where no lapse of time had occurred to prejudice the plaintiff's claim to the consideration of the Court, the injury in respect to which he sued being a serious one, and there being no authority upon the question of law decided by the Divisional Court: *Spence v. G. T. Ry. Co.*, 17 P. R. 172.

Leave was granted where an important question was raised as to the meaning of an obscurely phrased section of the Public Schools' Act: *Re School Trustees v. Cartwright*, 4 O. L. R. 278; and where two questions were raised, and the trial Judge had decided one only, and the Divisional Court the other only, against the appellant: *Kidd v. Harris*, 3 O. L. R. 277; and where a case has been disposed of on an originating notice in Chambers, instead of in Court in an action, as it ought to have been, and an appeal would have lain as of course if it had been disposed of in Court: *Re Sherlock*, 18 P. R. 6; see 28 Ont. 638.

Where leave to appeal on one point was given, the Court of Appeal confined the argument to that point: *Jones v. Bierstein*, 1900, 1 Q. B. 100.

Leave refused.

Leave was refused by a Judge of the Court of Appeal, where the Court appealed from had refused leave, and there appeared to be good ground for supporting the decision complained of, and none of the special circumstances, enumerated in the clauses then in force corresponding to clauses (b), (c), (e) and (f), existed, and there were no special reasons for treating the case as exceptional under clause (g): *G. N. W. Central Railway Co. v. Stevens*, 18 P. R. 392.

Leave was also refused where the question was the power of a Judge in Chambers to strike out a jury notice, a power which has never been doubted: *People's Loan Co. v. Stanley*, 4 O. L. R. 90, 377; and where the decision of the Divisional Court ought to be appealed from appeared to be in accordance with well established practice: *Walker v. Gurney-Tilden, etc., Co.*, 18 P. R. 471; also where two questions were raised, but plausible grounds of appeal were shown only on one of such grounds, while the other was sufficient alone to support the judgment attacked: *Appleby v. Turner*, 19 P. R. 175; also from an order staying proceedings in an action which appeared to have been unnecessarily brought: *Toronto v. Canadian Pacific Ry.*, 18 P. R. 451.

Procedure.

Procedure.—Where leave to appeal is necessary it should be applied for, if not when the judgment was given, at any rate within the time within which an appeal should be commenced: see *McCrae v. White*, 9 P. R. 288; *May v. Thompson*, W. N. 1882, 53, and *Rule 799*.

All parties should be represented on an application for special leave: *Dornes v. Somerville*, 56 L. T. 424.

In England it has been held by the Court of Appeal that a motion for leave to appeal from a Divisional Court should be made *ex parte*, and that if the Court desires to hear the other side notice will be directed to be given: *Dorset v. Pethick*, 14 Times, 183. In

Ontario the practice is to move on notice, or in the presence of counsel for the respondent, at the time when the decision complained of is given. **Sec. 76a.**

The Court of Appeal may award costs on such a motion, and execution may issue out of the High Court under *Rule 3*, by analogy to the proceedings under *Rule 818: People's Loan Co. v. Stanley*, 4 O. L. R. 247.

No appeal lies from an order granting or refusing leave to appeal: No appeal *Re Sarnia Oil Co.*, 15 P. R. 348; *Lane v. Esdaile*, 1891, A. C. 210; *Kay v. Briggs*, 22 Q. B. D. 343; *Ex p. Stevenson*, 1892, 1 Q. B. 609; *Farquharson v. Imperial Oil Co.*, 30 S. C. R. 188; and therefore leave to appeal from such an order will not be given: *Re Central Bank of Canada*, 17 P. R. 395; but see in the case of a refusal of leave: *Moore v. Peachey*, 8 Times, 406.

Leave to Appeal after Time Elapsed.—See cases under *Rule 353*.

76a. In any case in which an appeal would lie from the Court of Appeal to the Supreme Court of Canada, any party may by consent or by leave of the Court of Appeal, or a Judge thereof, appeal to the Court of Appeal from a judgment, order or decision of a Judge in Court at the trial or otherwise, or may apply for a new trial of the action. 4 Ed. vii. c. 11, s. 2, *part*.

Appeal to lie to Court of Appeal in cases which may be appealed to Supreme Court

The meaning of this section is, perhaps, not perfectly clear, but the intention would seem to be that the cases in which the section applies are those in which a further appeal would lie to the Supreme Court from the decision of the Court of Appeal whatever it may be.

Assuming this to be the meaning of the section, in order to determine what cases come within it regard must be had to the Statutes and Rules which govern appeals from the Court of Appeal to the Supreme Court. Consequently, the judgment, order or decision, must be final and not interlocutory merely, or otherwise within R. S. C., c. 135, s. 24; and must involve the amount or be of the nature specified in R. S. C., c. 135, s. 24, and 60-61 Vict., c. 34, s. 1 (D.). See *Canada Carriage Co. v. Lea*, 5 O. W. R. 86.

A judgment so appealable to the Court of Appeal may be one given at a trial with a jury: *Randall v. Ottawa Electric, etc.*, 8 O. L. R. 701.

"Or may apply for a new trial of the action."—The effect of these words is not very clear. If their meaning is not that a motion for a new trial *simpliciter* may be made to the Court of Appeal, but that the party may apply for a new trial in the ordinary way (viz., on motion to a Divisional Court: sec. 97 (1), (d), and *Rule 782*), the provision is unnecessary; an application for a new trial would, without the enactment, be a course open to the party if he did not wish to appeal, and he would also have another alternative not mentioned, viz., an appeal to a Divisional Court: sec. 74 (1). If, on the other hand, the words in question mean that a motion for a new trial may be made to the Court of Appeal, a strictly grammatical construction of the sentence would seem to involve the result that a motion for a

Secs. 75b-77 new trial may be made to the Court of Appeal without leave or consent. This would be grafting an exception on section 67 (1) (d), and the several enactments, taken together, would in effect provide that a motion for a new trial may be made in all cases to a Divisional Court, but in certain cases the party has the option of moving for a new trial in the Court of Appeal.

It is submitted that, notwithstanding the insertion of the word "may" in the last line, the section requires that in cases of the nature specified (viz., in which an appeal would lie from the Court of Appeal to the Supreme Court), an appeal may be taken or an application to the Court of Appeal for a new trial may be made, only by consent or by leave of the Court of Appeal or a Judge thereof. In all such cases an appeal may be had to a Divisional Court as of right: secs. 67 (1), (d), and 74 (1); and an appeal may, as a rule, be taken as of right from the decision of the Divisional Court: see sec. 76 (1), (b)—(d); the granting of leave, under sec. 76a, would therefore be likely in many cases to save the parties an intermediate appeal. That this consideration should prevail in cases of substantial importance would seem to be the view of Osler, J.A.: *Molson's Bank v. Stearns*, 5 O. W. R. 479; but it has been held that the fact that the nature of the case and the amount involved render it one in which an appeal would lie to the Supreme Court of Canada, is not alone a sufficient ground for granting leave to appeal to the Court of Appeal under sec. 76a, and that some reasonable ground must also be shown for departing from the usual course of an appeal to a Divisional Court: *Canada Carriage Co. v. Le*, 5 O. W. R. 801; *O'Leary v. Perkins*, 5 O. W. R. 257.

Appeal
books to be
printed

76b. Subject to Rules of Court, the appeal books shall be printed. 4 Ed. vii, c. 11, s. 2, *part*.

Rules of Court respecting the printing of appeal books have now been made: see *Rules* 802, 803, as amended by *Rule* 1265.

Security for
costs on
appeal.

76c. Subject to Rules of Court on appeals from a Divisional Court, or under the provisions of section 76a, security unless otherwise ordered by the Court of Appeal shall be given for the costs of the appeal. 4 Ed. vii, c. 11, s. 2, *part*.

See *Rule* 826.

No appeal
from Divi-
sional Court
decisions
on appeals
from
inferior
Courts, etc.

77 Nothing in section 76 contained shall be construed so as to permit an appeal to the Court of Appeal from the judgment, order or decision of a Divisional Court of the High Court upon an appeal to the Divisional Court in any of the cases mentioned in clauses 2 to 9, both inclusive, of section 74, except from a judgment, order or decision of a Divisional Court upon an appeal from a Surrogate Court or a Surrogate Judge in the following cases:

- (a) Matters of account or distribution where the amount in question is the sum or value of \$1,000, exclusive of costs.

- (b) Where a proceeding might have been removed into the High Court, under the provisions of section 34 of the *Surrogate Courts Act*, and then only if leave to appeal shall have been obtained as herein provided. 4 Ed. vii. c. 11, s. 2, *part*. Secs. 78-81.
Rev. Stat.
c. 50.

Limitation of Time for Appealing.

78. Subject to the provisions of this Act, all appeals from a judgment or order of the High Court shall be brought to hearing within one year [from the date thereof], or within such further time as the Court of Appeal or a Judge thereof may allow. 58 V. c. 12, s. 74. Time within which appeals from judgment must be brought to a hearing.

Instead of the words in brackets the section formerly (as R. S. O. 1887, c. 44, s. 73), had the words "after the giving of the judgment, decision, rule or order," under which language it was held that the year counted from the day on which the judgment, etc., was pronounced, not from the time when it was drawn up or entered: *Platt v. G. T. Ry. Co.*, 12 P. R. 380; see, however, *Robertson v. Wigle*, 15 S. C. R. 214. The effect of the present section is the same. A judgment or order must have a date, which must be the date of pronouncing the judgment or order: see *Rule 629*.

79 If the appeal is from an interlocutory order, then the appellant shall bring the same to a hearing within six months from the pronouncing of the same, or within such further time as the Court of Appeal or a Judge thereof may allow. 58 V. c. 12, s. 75. Time within which appeals from interlocutory orders must be brought to a hearing.

As to interlocutory orders, see note to sec. 73.

80. The time limited for appealing from a judgment or order, which does not become absolute upon the same being pronounced, shall be computed from the time when the same does become absolute. 58 V. c. 12, s. 76, *part*; 59 V. c. 18, Sched. (8). Time to be reckoned from the judgment or order becoming absolute.

Chy. O. 113-117, under which certain decrees and orders were not absolute are now abrogated: see *Rule 3*; but notwithstanding the abrogation of those orders there is nothing to prevent the Court from still pronouncing a judgment or order which shall not be absolute in the first instance.

EFFECT OF JUDICIAL DECISIONS.

81 —(1) The decision of a Divisional Court of the Court of Appeal on a question of law or practice shall, unless overruled or otherwise impugned by a higher Court, be binding on the Court of Appeal and all Divisional Courts thereof. Decision of Divisional Court of Court of Appeal to be binding.

Sec. 21. as well as on all other Courts and Judges, and shall not be departed from in subsequent cases without the concurrence of the Judges who gave the decision, unless and until so overruled or impugned.

Decision of
Court of
co-ordinate
authority to
be binding.

(2) It shall not be competent for the High Court or any Judge thereof in any case arising before such Court or Judge to disregard or depart from a prior known decision of any Court or Judge of co-ordinate authority on any question of law or practice without the concurrence of the Judges or Judge who gave the decision; but if a Court or Judge deems the decision previously given to be wrong and of sufficient importance to be considered in a higher Court, such Court or Judge may refer the question to such higher Court. 58 V. c. 12, s. 79; c. 13, s. 9.

This section only affects civil proceedings. As Courts of Appeal for criminal cases are now constituted (as to which see note to sec. 25), the decision of the Judges of one Court is not binding on the Judges of another Court of co-ordinate jurisdiction: *The Queen v. Hammond*, 20 Ont. 211.

A decision of the House of Lords upon a question of law is conclusively binding upon the House afterwards: *London Tramways Co. v. London County Council*, 1898, A. C. 375.

Sub-section
(1).

It would seem to have been decided in *Toronto v. Toronto Ry. Co.*, 4 O. W. R. 330, 335, that sub-section (1) interferes with the rule laid down in *Trimble v. Hull*, 5 App. Cas. 344 (see also *City Bank v. Barrow*, 5 App. Cas. 679), and adopted in *Hollender v. Foulkes*, 25 Ont. 61, that in the construction of a Colonial Act similar in its terms to an Imperial Act, the Colonial Courts should adopt as authoritative the construction placed upon the Imperial Act by the Court of Appeal in England in preference to prior decisions of the Colonial Courts of Appeal. The rule was not adopted in *Macdonald v. Macdonald*, 11 Ont. 187, and *McDonald v. Elliott*, 12 Ont. 98; see also *Woodruff v. McLennan*, 14 Ont. App. 256, and in *Toronto v. Toronto Ry. Co.*, *supra*, it has been held that a decision of the Court of Appeal is to be followed, notwithstanding that it is in conflict with English authorities, except decisions of the Judicial Committee of the Privy Council.

As to the effect of a decision where the Court of Appeal is equally divided: see *Clarkson v. Atty-General of Canada*, 16 Ont. App. 202; *Re Stanstead Election*, 20 N. C. R. 12.

Though the High Court may be the final Court of Appeal, it will defer to previously decided cases affirming the validity of a patent, and will follow the Court of Appeal in refusing to disturb a decision in the Exchequer Court: *Toronto Amer Light Co. v. Colling*, 31 Ont. 18.

Sub-section
(2).

Sub-section (2) is intended to prevent, and, now that two Divisional Courts do not ordinarily sit at the same time, will probably prevent, such a result as occurred in *Sterens v. Grout*, 16 P. R. 210, and *McDermott v. Grout*, 16 P. R. 215, where two Divisional Courts decided differently the same point in two actions which had been tried together. The decisions were in those cases given on the same day.

For a conflict still existing between decisions of Divisional Courts, see *McKelvey v. Chilman*, 5 O. L. R. 263, and cases referred to therein, and in the notes to *Rules 425*.

Before this enactment it was decided in *Pledge v. Carr*, 1895, 1 Ch. 51, and other cases that the decision of a Court of co-ordinate jurisdiction is to be followed, though this rule has not been uniformly observed and exceptions to it have been made; see *Heath v. Meyers*, 15 P. R. 388, more especially in cases where there is no further appeal.

Where after a succession of Ontario decisions the point involved becomes differently decided by Courts of first instance in England, the Ontario cases will, it would seem, be followed in preference to the English cases until a different decision is given by the English or the Provincial Court of Appeal: *Moore v. Bank of B. N. A.*, 15 Gr. 308, 319.

As to the comparative authority of decisions of a single Judge sitting as the High Court, and those of a Divisional Court, see *Tancred v. Delagoa Bay, etc.*, 23 Q. B. D. 242.

SITTINGS FOR TRIALS.

82.—(1) Subject to Rules of Court, as often in every year as the due despatch of business and the public convenience may require, there shall be sittings of the High Court at every County Town for the trial of causes, matters and issues, whether legal or equitable, in [all Divisions of] the High Court, which are to be heard and determined by a Judge without a jury, and also for the trial of causes, matters and issues [in all Divisions of] the High Court which are to be tried with a jury, and for the trial of criminal matters and proceedings; and in case such first mentioned sittings are appointed at any county town for the same time and before the same Judge as jury cases, separate lists shall be made of the jury and non-jury cases, and the jury cases shall be first disposed of, unless the Judge sees fit to direct otherwise. 55 V. c. 12, s. 80 (1). Sittings for trial of causes.

The words in brackets seem to be no longer necessary.

(2) The Judges of the High Court of Justice, or a majority (a) of them, shall appoint the days upon which such sittings shall be held. 58 V. c. 12, s. 80 (2), part; 59 V. c. 18, Sched. (4).

(a) Rule 113 provides that any four of the Judges of the High Court shall form a quorum having power to appoint the days upon which the Assizes and Sittings for trial shall be held. The provisions of Rule 113 would seem to prevail; see *supra*, 129.

Under this section the High Court holds Circuit Sittings similar to the former Sittings of Courts of Assize and Nisi Prius.

Commissions for holding Courts of Assize and Nisi Prius may still be issued; see R. S. O. c. 53.

Secs. 53-55. *Scoble*, that the Lieut.-Governor as well as the Governor-General has power to issue such commissions: *Reg. v. Abou*, 12 U. C. Q. B. 391.

See *Reg v. Bunting*, 7 Ont. 118.

As to the weekly sittings for business other than trials, see *Rules* 98-112.

Sittings in
each
County.

53.—(1) Subject to Rules of Court, not less than two of such sittings shall be held at the County Town of every County and Union of Counties in each year. 58 V. c. 12, s. 81 (1).

York

(2) In the County of York, there shall in every year be held at the County Town of such County not less than three of such sittings, and also a fourth such sittings, unless the same is not required for the administration of justice, but if the said Judges, on inquiry, ascertain that such fourth sittings for any year is not required for the administration of justice, it shall not be necessary to hold the same or to appoint a day for holding the same. 58 V. c. 12, s. 81 (3); 59 V. c. 18, Sched. (11).

Carleton,
Wentworth,
Middlesex.

(3) In the Counties of Carleton, Wentworth, and Middlesex, there shall, in every year, be held at the County Town of each of the said Counties not less than three of such sittings. 58 V. c. 12 s. 81 (4).

Additional
sittings.

(4) In addition to the regular sittings to be held under subsection 1 of this section, a third such sittings may be appointed if the Judges of the High Court, or a majority of them, shall see fit for the trial of civil causes, matters and issues and criminal matters and proceedings, or of civil causes, matters and issues only, to be held at the County Town of any County in the Province. 58 V. c. 12, s. 81 (5); 59 V. c. 18, Sched. (12).

Judges
may ap-
point sit-
tings in
any county
for issues
to be tried
without a
jury.

54. The Judges of the High Court may appoint sittings of the High Court in any County in the Province, as often and at such times as they see fit, for the trial of causes which are to be tried by a Judge without a jury. 58 V. c. 12, s. 82; 59 V. c. 18, Sched. (13).

Separate
sittings may
be held for
civil and
criminal
matters

55. The sittings of the High Court for the trial of civil causes, matters and issues in any County may, in the discretion of the Judges appointing the days therefor, or of the Judge who has been appointed to preside or is presiding

Thereat, be held separate and apart from the sittings for the ^{Secs. 86, 88.} trial of criminal matters and proceedings, either on the same day or on a different day. 58 V. c. 12, s. 83.

86. Such sittings may, at the discretion of the Court or of the Judge who is to hold the same, be held in the court house of the County Town in which the same are appointed to be held, or in such other place in the County Town as the Judge selects, and the Judge shall in all respects have the same authority as a Judge formerly had when sitting at *Nisi Prius* in regard to the use of the court house, gaol and other buildings or apartments set apart in the County for the administration of justice. 58 V. c. 12, s. 84.

87.—(1) Such sittings shall be presided over by one of the Judges of the Supreme Court, or in the absence of any such Judge by a retired Judge of the Supreme Court, or by a Judge of any County Court in Ontario, or by one of Her Majesty's Counsel learned in the law appointed for Upper Canada, or for the Province of Ontario, upon such Judge or Counsel being requested by a Judge of the Supreme Court to attend for that purpose. ^{Who may preside.}

(2) Such Judge or Counsel while holding the sittings shall possess, exercise and enjoy all the powers and authorities of a Judge of the High Court, and in civil proceedings may reserve the giving of his decision on questions raised at the trial, and such decision shall have the like force and effect as the decision of a Judge of the High Court. 58 V. c. 12, s. 85. ^{Powers of presiding Judge.}

See note to sec. 64.

88. Where the Judge whose duty it is to hold any sittings of the High Court for the trial of civil causes, matters and issues and for the trial of other matters and proceedings within the jurisdiction of the Provincial Legislature, does not arrive in time, or is not able to open such Court on the day appointed for that purpose, the sheriff of the County in which such Court should be held, or, in his absence, his deputy, may, after the hour of six of the clock in the afternoon of such day, adjourn by his proclamation, the Court which should have been opened on that day, to an hour on the following day to be by him named, and so from day to day until the Judge arrives to open such Court, or until such sheriff receives other direction from the Judge in that behalf. 58 V. c. 12, s. 86. ^{Course to be pursued by the sheriff if the Judge does not arrive on the day appointed for opening Court}

Secs. 90-92. The adjournment of Courts of Assize and Nisi Prius and of Oyer and Terminer and General Gaol Delivery is similarly provided for by R. S. O. c. 53, s. 6.

Sittings to commence at one o'clock in the afternoon.

89.—(1) No such sittings of the High Court for the trial of causes, matters and issues shall open earlier than one of the clock in the afternoon of the first day of the sittings, but this shall not prevent a non-jury trial from being begun before one of the clock with the consent of the parties. 58 V. e. 12, s. 87 (1).

Hours for sittings.

(2) No such sittings shall begin before nine o'clock in the forenoon, nor, except for special reasons, extend beyond seven o'clock in the evening, with at least a half-hour's intermission at or near noon. An irregularity under this section shall not render any trial or other proceeding void. 58 V. e. 12, s. 87 (2); c. 13, s. 19.

Entering non-jury actions for trial

90. All non-jury actions in any County may be entered for trial at any sittings of the High Court in such County, except in the County of York. 58 V. e. 12, s. 88; c. 13, s. 17.

General docket after sittings of High Court or Assizes.

91. At the sittings of the High Court or Assizes in any county town there shall be a general docket in addition to the docket of cases entered for trial, and such general docket may include all motions, petitions, proceedings and other matters which may be heard by a Judge in Court or in Chambers in any case where the solicitors consent, or where the matter in controversy arose in the County or where the party opposing or showing cause in the matter, or his solicitor, resides in the County. Such general docket shall be disposed of after the trial of causes. 58 V. e. 12, s. 89; c. 13, s. 18.

This section does not except the County of York, but in practice no such general docket is kept or necessary, as the matters for such a docket are disposed of in the Weekly Court and in Chambers at Toronto; see *Rules* 98-103.

TRIAL OF HIGH COURT CASES IN COUNTY COURTS, AND COUNTY COURT CASES BEFORE HIGH COURT.

Certain cases in High Court may be tried in the County Court of the county in which the cause is laid

92.—(1) All issues of fact and assessments of damages in the High Court relating to debt, covenant and contract, where the amount is liquidated, or ascertained by the signature of the defendant, may be tried and assessed in the County Court of the County where the trial is to take place.

if the plaintiff desires it, unless a Judge of the High Court sec. 92. otherwise orders, and upon such terms as the Judge deems meet.

The amount must be ascertained by the signature of defendant or liquidated in the same way: *McPherson v. McPherson*, 5 P. R. 240. A note made in the U. S. and payable in American currency is not so liquidated or ascertained: *Cushman v. Reid*, 20 C. P. 147; 5 P. R. 121. By sub-sec. (3), *infra*, the Court has a discretion to send an action for any debt for trial in a County Court, though the debt be not liquidated or ascertained by the signature of the defendant.

In the cases mentioned in sub-section 1 the plaintiff is *prima facie* entitled to a trial in the County Court of the county in which the place named as the place of trial is, but if he takes steps for this purpose the defendant may move to have the trial in the High Court.

(2) In such case the action shall be entered for trial, notice of trial shall be given, and the trial take place in the same way as in ordinary cases in such County Court.

No order is necessary.

(3) In any action in the High Court, in which the amount of the demand is ascertained by the signature of the defendant, and in any action for any debt in which a Judge of the said High Court is satisfied that the case may be properly tried in a County Court, any Judge of the High Court may order that such case shall be tried in the County Court of the County [the county town of which is named as the place of trial], and such action shall be tried there accordingly, and the record shall be made up as in other cases, and the order directing the case to be tried in the County Court shall be left with the clerk of the County Court on entering the action for trial, annexed to the record; and the trial shall take place in the same way as in ordinary cases in such County Court.

Certain cases in High Court may be tried at the County Court of the county in which the action is to be tried.

Proceedings in such case.

The words in brackets are new. Formerly the trial was required to be in the county in which the action was commenced, i.e., the county in which the writ was issued.

In the cases mentioned in sub-section 3 the plaintiff must first obtain an order for trial in a County Court.

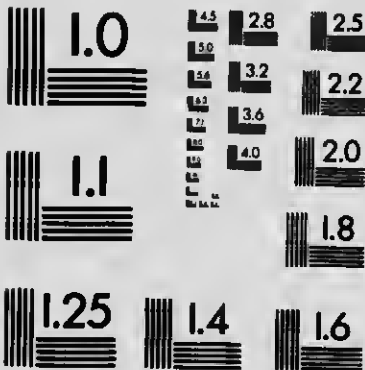
Seem, that the Judge of the County Court, at the trial of an action being tried under this section, would have power to allow an amendment by substituting a claim for unliquidated damages: see *Spencer v. Forster*, 1905, 1 K. B. 434.

Any appeal from the judgment given on the trial of a High Court action in the County Court, or motion for a new trial therein, must be made to a Divisional Court, or the Court of Appeal, as if the action had been tried in the High Court: see *Rule 562*, and *sec. 760*, and notes.



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secs. 93. 96.

By order
County
Court
cases may
be tried at
High Court
sittings.

93.—(1) By the order of a Judge of the High Court, made upon such terms as the Judge may consider just, the issues of fact and assessment of damages in any action pending in a County Court may be tried and assessed at the sittings of the High Court at any county town.

(2) In such cases the action shall be entered and the case tried as in ordinary cases. 58 V. c. 12, s. 91.

This does not enable issues of fact to be tried in the High Court, leaving issues of law on the same record to be determined in the County Court: *Pattypiece v. Mayville*, 21 C. P. 316.

The jurisdiction of the County Court is not enlarged by the trial of the case in the High Court. Where, therefore, the title to land came in question so that a County Court had no jurisdiction, a verdict was entered for defendant: *Wetherall v. Garlow*, 30 U. C. Q. B. 1. But *semble*, in such a case an order might now be made transferring the action to the High Court, and the trial would then proceed as if the action had been originally brought in the High Court: see R. S. O. c. 55, s. 32.

An issue under *The Partition Act* was ordered to be tried in the High Court where it had been tried in a County Court and the jury had disagreed: *Brown v. Neff*, 17 C. L. T. 81, following *Symonds v. Symonds*, 20 C. P. 271.

Powers of
County
Court
afterwards.

94. Where any such cause is referred by the presiding Judge at such sittings, the County Court in which the action is brought, and the Judge thereof, shall have the same power to enforce any award, report or certificate made on the reference, and to make rules and orders upon appeals therefrom and motions relating thereto, as if the order referring the case had been made by the County Judge. 58 V. c. 12, s. 92.

The reference here referred to, may be either to an arbitrator, or to a Master or Referee, and the section provides that the subsequent judicial proceedings shall be in the County Court.

Books for
Judge's
notes of
trial, etc.

95. The Clerks of the several County Courts shall provide books in which the Judges presiding at the sittings of the High Court, where cases brought in any County Court are tried or assessed under this Act, may enter their notes of such trials and assessments; and such books, immediately after the trials or assessments, shall be returned to the said Clerks and shall remain in their offices. 58 V. c. 12, s. 93.

Fees of
officers.

96. The jury fees and the fees and charges payable and pertaining to officers of the County Courts, upon all actions or proceedings brought in the County Courts and tried or assessed in the High Court, shall be chargeable and paid as if the same were being tried or assessed in the County

Courts; and no other fees shall be chargeable thereon, and the Clerk of a County Court shall be entitled to receive and take such part thereof as pertains to him, to his own use. 58 V. c. 12, s. 94. Sec. 97.

CERTIFICATES OF *Lis Pendens*.

97. The instituting of an action or the taking of a proceeding, in which action or proceeding any title or interest in land is brought in question, shall not be deemed notice of the action or proceeding to any person not being a party thereto, until in cases where the land is registered under *The Land Titles Act* a caution is registered under that Act, nor in other cases until a certificate, signed by the proper officer of the Court, has been registered in the Registry Office of the Registry Division in which the land is situate, which certificate may be in the following form:—

Action, etc., not notice unless certificate registered.

Rev. Stat. c. 135.

"I certify that in an action or proceeding in the High Court, between A. B., of and C. D., of some title or interest is called in question in the following land (*describing it.*)"

Form.

Dated at (*stating date and place.*)

But no certificate shall be required to be registered in any action or proceeding for foreclosure or sale upon a registered mortgage. 56 V. c. 21, s. 53. Proviso.

The registration of a *lis pendens* is notice to persons subsequently dealing with the lands which are the subject of the *lis*, and they take subject to the rights of the parties as ultimately declared in the action. It cannot avail to give a plaintiff priority over any prior unregistered instrument: *Clergue v. McKay*, 6 O. L. R. 51; 8 O. L. R. 84. *Lis pendens.*

As to the doctrine of *lis pendens*, see notes to *Rule 659*.

As to the effect of a *lis pendens*, see *Price v. Price*, 35 Ch. D. 297.

Where the plaintiff desires to register a certificate of *lis pendens*, the indorsement on the writ of summons should contain a short description of the property, sufficient to identify it for the purpose of registration: see note to Form No. 9 (H. & L. Forms No. 64). The officer who issues the writ will issue the certificate of *lis pendens*, in the manner provided in this section; and see *Rules 22 (h)*, and 35. Where a *lis pendens* is required the plaintiff should be more precise than in ordinary cases, and should by the indorsement define generally the grounds of his claim to an interest in the land: *Sheppard v. Kennedy*, 10 P. R. 242. A solicitor suing for his bill of costs of foreclosure proceedings and claiming a lien or charge on the property in question under *Rule 1129*, was held entitled to register a *lis pendens*: *O'Flynn v. Middleton*, 5 O. L. R. 621. Mode of registering.

Where the title to land is not in question in the action, e.g., in an alimony suit: *White v. White*, 6 P. R. 208; *Crandell v. Crandell*, 20 C. L. J. 329; 4 C. L. T. 500, it is improper to issue a *lis pendens*; and if this appears from the indorsement on the writ, the registration When not to be issued or registered.

Sec. 98.

may be vacated on motion before the Master in Chambers: *Sheppard v. Kennedy, supra*. If the suit ostensibly brings the title to land in question, but is an illusory suit brought in order to register a *lis pendens*, the action may be dismissed on an admission by the plaintiff, as to the real nature of the suit; but otherwise it must be disposed of in the regular way. If there is not such an admission, but the affidavits clearly shew the nature of the suit, the Master in Chambers may refer the matter to a Judge, and an order may be made by a Judge directing a speedy trial: see *Jamieson v. Laing*, 7 P. R. 404; *Sheppard v. Kennedy, supra*.

Vacating
lis pendens.

Where, however, the motion is to vacate the registration of the *lis pendens* because the remedy against the land is not appropriate to the cause of action which is pending, then the Master in Chambers may finally dispose of the matter without referring it to a Judge: *Sheppard v. Kennedy, supra*. Thus, a plaintiff may not register a *lis pendens* merely to prevent a defendant from alienating land which would be liable to satisfy the judgment if the plaintiff should succeed in the action. An action for that purpose will not lie, and the registration of a certificate of *lis pendens* may be vacated on motion: *Westloh v. Brown*, Referee in Chambers, 5th June, 1878; see *Newton v. Newton*, and *National Provincial Bank v. Thomas, supra*, p. 80, also *White v. White, supra*; *Hepburn v. Patton*, 26 Gr. 597; *Robinson v. Pickering*, 50 L. J. Chy. 527; *Green v. Temple*, 8 O. W. R. 15. A certificate of *lis pendens* issued before the action was actually begun was set aside: *St. Louis v. O'Callaghan*, 13 P. R. 322.

Where a certificate of *lis pendens* is registered, a defendant is entitled to appear *gratis* and anticipate the service upon him of actually issued process, so as to compel the plaintiff to proceed promptly: *McTaggart v. Toote*, 20 C. L. J. 175; *Poulton v. Lee*, 7 P. R. 415. Where an appearance is so entered *gratis*, the defendant should serve notice thereof on the plaintiff's solicitor: *Vigcon v. Northcote*, 12 C. L. T. 101.

Seem, an action will not lie for maliciously registering or maintaining the registration of a *lis pendens*: see *Conan v. Macanlay*, 5 B. C. R. 495.

Provision has now been made by secs. 98-100 of the Jud. Act for the discharge of a certificate of *lis pendens* where the plaintiff does not promptly proceed with his action. Before this enactment, where a *lis pendens* had been properly issued and registered, it could not be vacated pending the action: *Foster v. Moore*, 11 P. R. 447, a case of fraudulent conveyance.

The registration of a certificate of an order dismissing the action is a sufficient discharge of a *lis pendens*: *Tedford v. Tedford*, 7 C. L. T. 140; *Graham v. Chalmers*, 2 Chy. Cb. 53.

Mortgage
actions.

It may be observed that the concluding words of the section dispensing with the registration of a certificate of *lis pendens* in actions for foreclosure or sale, do not expressly provide that the institution of such actions shall be deemed notice thereof to any person not a party; nor does the clause extend to actions for redemption.

Order
vacating
lis pendens
upon non-
prosecution
of action.

98.—(1) Where a certificate of *lis pendens* has been registered, and the plaintiff, or other party at whose instance the certificate was issued, does not in good faith, prosecute the litigation, the Court or Judge may at any time during the litigation make an order vacating the certificate of *lis pendens*.
53 V. c. 33, s. 1.

(2) Where a certificate of *lis pendens* has been registered, and the plaintiff's claim is not solely to recover the land, or the estate or interest therein, but is to recover a sum of money or money's worth which is chargeable on or payable out of the land, or some estate or interest therein, or for which he claims that the land or such estate or interest therein ought to be subjected to payment, or where the plaintiff claims the land or some interest in land, and, in the alternative, damages or compensation in money or money's worth, the Court or a Judge may at any time during the litigation make an order vacating the certificate of *lis pendens* upon such terms as to giving security or otherwise as may be deemed just. 53 V. c. 33, s. 2.

Secs. 99, 100

Order where claim not limited to land.

These sections apply only where the *lis pendens* has been registered by an opposite party: *McGillivray v. Williams*, 4 O. L. R. 451. A party by whom or for whose benefit a *lis pendens* has been registered may obtain *ex parte* an order vacating it and may register the order at any time: *Id.*

The Master in Chambers or other officer having like jurisdiction may entertain the motion: see *Rules* 42, 366, (7). and notes.

(3) The Court or Judge may at any time annul the registration upon any other just ground. 53 V. c. 33, s. 3.

Upon other grounds.

(4) On application under this section, the Court or Judge may order any of the parties to the application to pay the costs of any of the other parties thereto: he may make any other order with respect to costs, as under all the circumstances may appear to him (a) just. 53 V. c. 33, s. 4.

Costs.

(a) *Quare*, if "him" is a misprint for "be."

99. The order for vacating or annulling a certificate of *lis pendens* shall be subject to appeal according to the practice of the High Court in like cases, and may be registered in the same manner as judgments and other orders affecting lands are registered, such registration to be on or after the fourteenth day from the date of the order, unless a Judge of the High Court reverses the order meanwhile, or postpones or forbids the registration. 53 V. c. 33, s. 5.

Appeal from order.

Registration of order.

An order refusing to vacate a certificate is not in terms appealable under this section, and has been held to be not appealable under *Rules* 767 or 777: *Hodge v. Hallamore*, 18 P. R. 447.

100. Where a certificate of *lis pendens* is vacated, any person may deal in respect to the land, as fully as if such *lis pendens* had not been registered, and it shall not be incumbent on any purchaser or mortgagee to enquire as to the

Effect of vacating *lis pendens*

secs. 101, 102. facts alleged in the suit, and the rights of such purchaser or mortgagee shall not be affected by his being aware that the allegations made in the suit were in fact made. 53 V. c. 33, s. 6.

ASSESSORS.

Assessors. **101**—(1) The High Court, or any Divisional Court or Judge before whom any cause or matter may be pending, or the Court of Appeal, may, in any cause or matter in which it thinks it expedient so to do, call in the aid of one or more assessors specially qualified, and try and hear such cause or matter wholly or partially with the assistance of such assessors.

Remuneration. (2) The remuneration, if any, to be paid to such assessors shall be determined by the Court. 58 V. c. 12, s. 105 (2, 3); 60 V. c. 16, Sched. D, part.

Assessors are not to take part in the judgment, the Judge alone is to adjudicate, and the litigants are entitled to his judgment. He cannot simply adopt the assessors' opinion as to the result of the evidence: *Wright v. Collier*, 19 Ont., at p. 298.

TRIAL, PROCEDURE AND PLACE OF TRIAL.

Practice in Ontario. In Ontario the practice as to having, or dispensing with, a jury is different from that which prevails in England, as to which see II. & L. Jud. Act, 2nd ed., p. 139.

(1) All actions which, under the practice existing at the time of the passing of the A. J. Act, 1873, could have been brought in the Court of Chancery only, must be tried by a Judge without a jury (unless a jury can be had on special application): see sec. 103, and a notice of jury given in such a case is irregular and will be struck out on motion: see *Gowantac's v. Mann*, 9 P. R. 270, an action for rectification of a lease: *Thurlow v. Beck*, 9 P. R. 268, an action to set aside a conveyance: see also *Usil v. Whelpton*, 45 L. T. 39; 20 W. R. 799.

(2) Certain actions against municipal corporations are to be tried without a jury: sec. 104.

(3) In all other actions (except those mentioned in sec. 102), the provisions of secs. 105 and 106 will apply; and either party, upon giving notice, has a *prima facie* right to a trial by jury, subject to the discretion vested in a Judge in Chambers, or the Judge at the trial, to direct otherwise: see notes to sec. 110, *infra*.

Certain actions for torts to be tried by a jury. **102.** In actions of libel, slander, criminal conversation, seduction, malicious arrest, malicious prosecution and false imprisonment, all questions which might prior to *The Administration of Justice Act, 1873*, have been tried by a jury.

shall be tried by a jury, unless the parties in person or by their solicitors or counsel, waive such trial. 58 V. c. 12, s. 109. Sec. 103.

In these cases it is not necessary to file and serve a jury notice: *Puterbaugh v. Gold Medal Mfg. Co.*, 3 O. L. R. 259, and the Court has no power to dispense with the jury, except by consent of both parties: see *Adair v. Wade*, 9 Ont. 15, but it is for the Judge to say if an alleged libel is reasonably capable of being interpreted as libellous, and, if it is not, there is no question for the jury, and the Judge may give judgment for the defendant: *McQuire v. Western Morning News*, 1903, 2 K. B. 100; *McDonald v. The Mail*, 2 O. L. R. 278.

An action for trade libel does not come within this section so as to be triable only by a jury, unless by consent: *Dickerson v. Radcliffe*, 17 P. R. 418.

103. Subject to Rules of Court, all causes, matters and issues, over the subject of which prior to *The Administration of Justice Act of 1873*, the Court of Chancery had exclusive jurisdiction, shall be tried without a jury, unless otherwise ordered. 58 V. c. 12, s. 110. Cases formerly within exclusive jurisdiction of Court of Chancery.

A change in the practice was made by this section in 1887. The words "prior to The Administration of Justice Act of 1873," were in the Revision of the Statutes, 1887, substituted for the words "at the time of the passing of this (the J. A. 1881) Act," in sec. 45, of 44 Vict. c. 5. The effect of this alteration was to add to the cases which must be tried without a jury those actions which by the A. J. Act, 1873, were made cognizable by a Court of Law as well as by the Court of Chancery, e.g., actions for purely money demands, though the right to recover was an equitable one, (see R. S. O. 1877, c. 49, s. 4), and actions where an injunction, or similar equitable relief is required, though otherwise cognizable by a Court of Law: see *Toronto & Hamilton Navigation Co. v. Silcox*, 12 P. R. 622, and R. S. O. 1877, c. 49, s. 8. The what actions prima facie to be tried without a jury.

In determining whether an action is one over the subject of which the Court of Chancery had exclusive jurisdiction, the test is not whether the plaintiff's end might have been substantially obtained by some proceeding cognizable in a Court of Law, but whether or not the specific relief asked for in the statement of claim is of a kind which on the 29th March, 1873, could only have been obtained in the Court of Chancery: see *Pattison v. Merchants' Bank*, 11 P. R. 72; *Masse v. Masse*, 11 P. R. 81, reversing S. C., 10 P. R. 574; *Herring v. Brooks*, 11 P. R. 15. If the cause of action is an equitable one, the circumstance that the issues or questions of fact to be tried are matters which juries are accustomed to consider, in actions differently framed, will not entitle a party to a trial by jury: *Farran v. Hunter*, 12 P. R. 324.

An action to enforce a charge and also for a personal judgment for the recovery of the sum charged was held to be not an action for relief, which prior to 29th March, 1873, could only have been obtained in the Court of Chancery: *Saunders v. Robertson*, 19 P. R. 172; so also an action to restrain a nuisance, and for damages: *Shantz v. Berlin*, 4 O. L. R. 730; see also, *St. Margaret's v. Stephens*, *infra*.

Sec. 104.**Examples.**

The following have been held to be cases which could have been only brought in Chancery: an action for the rectification of a lease: *Gowanlock v. Mann*, 9 P. R. 270; to set aside a conveyance: *Thurlow v. Beck*, 9 P. R. 268; to declare void the delivery of certain notes: *Pawson v. Merchants' Bank*, *sup.*; to establish a will: *Re Lewis*, 11 P. R. 107.

An action by ratepayers against members of a municipal council for misconduct causing loss to the municipality is an action against trustees, and formerly within the exclusive jurisdiction of Chancery: *Morrois v. Connor*, 11 P. R. 423; so also an action for an injunction, and to establish a will, and for an account: *McGill v. McDonell*, 14 P. R. 483; and an action for an injunction to abate a nuisance and for damages: *Lauder v. Didmon*, 16 P. R. 74; *St. Margaret's v. Stephens*, 33 C. L. J. 464; see 29 Ont. 185; *sed vide*, *Shantz v. Berlin*, *supra*.

An action for specific performance of a covenant to repair, or for damages, was held to be a Common Law action, as specific performance of such a covenant could not be decreed in Chancery: *Bingham v. Warner*, 10 P. R. 621; but generally where a party seeks equitable relief to which he is not entitled, the opposite party should, unless in a very clear case, move to strike out the pleading (see *Rules* 385-7), instead of attacking it indirectly by asking to have a jury: *Fraser v. Johnston*, 12 P. R. 113.

Jury
obtained
on special
motion.

Even in cases formerly within the exclusive jurisdiction of the Court of Chancery, a trial by jury may be had. *Prima facie* the trial is to be without a jury. It may, however, be "otherwise ordered" on special application. The power to order a jury existed under the Chancery Act (R. S. O. 1877, c. 40, s. 99). Applications under that section could only be made to the Court; the Master in Chambers had no jurisdiction: *Thurlow v. Beck*, 9 P. R. 268. It is presumed that under the present section the application may be made in the same way as an application under section 110, that is, to the Court or a Judge thereof, and should not be made to the Master in Chambers or a local Judge, as the discretion to be exercised on the motion is similar to that vested in the Judge at the trial under section 110; see, however, *Bennett v. Tregent*, 25 C. P. 443.

A jury was refused in *Re Lewis*, 11 P. R. 107, a suit to establish a will; and see *McGill v. McDonell*, 14 P. R. 483.

It was granted in an action by a mine owner against another mine owner for an account and for an injunction, in which a view was said to be necessary: *Jenkins v. Bushby*, 1891, 1 Ch. 484; 64 L. T. 213; and also in a partnership action in which allegations of fraud and misconduct were made against the defendant as grounds for a dissolution: *Ehrmann v. Ehrmann*, 72 L. T. 352, 548.

As to where there are both legal and equitable issues, see *Rule* 551 and notes.

Certain
actions
against
municipal-
ities to be
tried with-
out a jury
and venue
to be local.

104 All actions against municipal corporations for damages in respect of injuries sustained through non-repair of streets, roads or sidewalks, shall be tried by a Judge without a jury, and the trial shall take place in the County in which the road, street or sidewalk is situated. 59 V. c. 18, s. 5.

As to actions of the kind mentioned in this section, see *Con. Secs. 105, 106. Municipal Act* (3 Ed. vii. c. 19, s. 606).

In *Lennard v. Township of Bruce*, 19 C. L. T. 87, it was held that a bridge, part of the highway, was within the words "streets, roads or sidewalks," in this *Rule*.

An action against a municipal corporation for negligently leaving a stone roller on the highway whereby plaintiff's horses were frightened and thereby caused damage to the plaintiff is not in respect of non-repair of streets, and therefore is not within this section: *Clemens v. Berlin*, 7 O. L. R. 33; nor is an action in respect of injuries occasioned by the negligent use of a steam roller of the municipality, operated by a contracting company: *Kirk v. Toronto*, 7 O. L. R. 30.

An action based both on non-repair and obstruction is within the section, and on a motion to strike out a jury notice leave to amend by striking out the allegations as to non-repair was refused: *Read v. City of Toronto*, 4 O. W. R. 810.

Where an action was brought against a railway company and a city corporation to recover damages for injuries sustained by the plaintiffs by being upset upon a street in the city, owing to the heaping up of snow upon the side of the roadway, and the plaintiffs in their statement of claim alleged that the corporation had permitted this to be done, and had thereby allowed the street to be out of repair and dangerous for travel. It was held that the action must be treated as one for non-repair of a street within the meaning of this section, and a jury notice was therefore irregular and was struck out: *Barber v. Toronto Ry. Co.*, 17 P. R. 293.

An action based on negligent construction of a pavement, rendering it slippery and dangerous, is within the section: *Armour v. Peterborough*, 5 O. W. R. 630.

105. Subject to Rules of Court, all causes, matters and issues other than as aforesaid, and the assessment or inquiry of damages therein may, and (subject to the provisions of section 110) in the absence of such notice as in the next section mentioned, shall be heard, tried and assessed by a Judge without a jury. 58 V. c. 12, s. 111 (1).

One of the *Rules* to which this provision is subject is *Rule 550*, by which equitable issues are to be tried without a jury. See also *Rule 551*, providing for the case where there are both legal and equitable issues.

106. If any of the parties desires the issues of fact to be tried or damages to be assessed or inquired of by a jury, he shall [at any stage of the proceedings, but not later than the fourth day after the close of the pleadings, or in case notice of trial is served before that time, then within two days after service of notice of trial], or within such other time as may be ordered by the Court or a Judge, file and serve on the opposite party a notice in writing requiring that the issues should be tried, or the damages assessed by a jury, and a copy

Other issues to be tried and damage assessed by Judge alone unless jury notice given.

Unless jury notice given or Court or Judge otherwise directs.

**secs. 107,
108.**

of the notice shall be attached to the record or certified copy of the pleadings prepared for the Judge. 58 V. c. 12, s. 111 (2); 59 V. c. 18, Sched. (17).

The words in brackets were introduced by 50 Vict. c. 18, Sched. (17).

For the form of jury notice, see Form 64 (H. & L. Forms, No. 784).

Where a jury notice was served but by inadvertence not filed within the proper time, it was held that there was power to correct the slip by ordering the notice to stand good, and that such an order should be made where the case is a proper one to be tried by a jury: *Macrae v. News Printing Co.*, 16 P. R. 364.

No jury notice is necessary in actions of the class provided for by sec. 102: *Puterbaugh v. Gold Medal Co.*, 3 O. L. R. 250.

Effect of
notice re-
quiring a
jury.

107 —(1) Where any one of the parties has given such notice requiring a jury, the issues of fact shall (subject to the provisions of section 110) be tried and determined, or the damages assessed by the verdict of jurors duly sworn for the trial of such issues or for the assessment of such damages.

See sec. 108.

Parties
may waive
notice.

(2) The parties present at the trial may consent that the said notice requiring a jury shall be waived, and the case tried and damages assessed by the Judge, and may indorse a memorandum of such consent upon the record, and thereupon the Judge may try the issues or assess the damages without a jury. 58 V. c. 12, s. 112 (1, 2).

The memorandum, if omitted to be made at the time, may be made afterwards *nunc pro tunc*: *Wyeott v. Campbell*, 31 U. C. Q. B. 584.

Agreement
of ten
jurors in
verdict or
answers to
be suffi-
cient.

108 —(1) In all civil cases in the High Court of Justice or in a County Court, or in any matter or cause within the jurisdiction of the Provincial Legislature, where issues are tried or where damages are assessed by a jury, it shall be sufficient if ten of the jurors empanelled for the trial or assessment shall agree, instead of twelve; and in such case ten jurors may give the verdict, or answer the questions submitted to the jury by the Judge. 58 V. c. 12, s. 112 (3); c. 16, s. 1.

Effect of
verdict or
answers so
given.

(2) A verdict rendered or question answered under the provisions of this section shall have the same effect as the verdict or answer given by twelve jurors. 58 V. c. 12, s. 112 (4); c. 16, s. 3.

Special
juries.

(3) This section shall apply to special juries. 58 V. c. 12, s. 112 (5); c. 16, s. 4.

109. If at the trial of any action or issue or assessment of damages, a juror should die or become incapacitated by illness or any other cause from continuing to sit or act on the jury, or if it should be discovered that one of the jury sworn has an interest in the result of the suit, or is a relative of any of the parties thereto within the degree of first cousin, the presiding Judge may discharge such juror, and may in any such case direct that the trial or assessment shall proceed on such terms as he thinks fit with eleven jurors, and in such case ten jurors may give the verdict or answer the questions submitted to the jury by the Judge. 58 V. c. 12, s. 113.

Secs. 109,
110.

Death or
illness of
juror or
discovery
of interest
during
trial.

110. Notwithstanding anything in sections 106 and 107 contained, the Judge presiding at the trial may in his discretion direct that the action or issues shall be tried or the damages assessed by a jury; and upon application to the Court in which the trial is pending, or to a Judge thereof, by an order made before the trial, or by the direction of the Judge presiding at the trial, the issues may be tried and damages assessed without a jury. 58 V. c. 12, s. 114; 59 V. c. 18, Sched. (18).

Judge may
direct trial
by jury or
without
a jury.

It has been said that as a rule the question whether a jury notice ought to be struck out can be better disposed of by the Judge at the trial, when the real questions to be tried have been ascertained, than by a Judge in Chambers on the pleadings and affidavits (*per Osler, J.A., in Conmee v. C. P. R.*, 12 Ont. App. 760), and the Judge at the trial is considered to have absolute control over the manner in which the case shall be tried, and his discretion will not be interfered with by a Divisional Court: *Brown v. Wood*, 12 P. R. 198. See, however, *per Osler, J.A., in Reg. v. Grant*, 17 P. R. at p. 171.

In *Conmee v. C. P. R.* (*sup.*), though the Court of Appeal held that the plaintiff was entitled to a jury, at the trial a jury was dispensed with and the case referred to arbitrators. It has, therefore, sometimes been considered inexpedient to deal with the matter on motion before trial in view of the power of the Judge at the trial: see *Temperance Colonization Co. v. Evans*, 12 P. R. 48, 380; *McMahon v. Lovcry*, *ib.* 62. Cases, however, have arisen in which the Court has acted on motion. In *Bennett v. Tregent*, 25 C. P. 443, Mr. Dalton, Q.C., Clerk of the C. & P. sitting in Chambers, directed the trial to be without a jury in an action for a breach of warranty, and his power to do so was affirmed by the Court.

The Master in Chambers and officers having like jurisdiction can now, however, only strike out a jury notice for irregularity, *e.g.*, where not proper under sec. 103 (see notes to that section), or where delivered after the time allowed by section 106 for doing so: see *Rule 42*, clause 15. Before that *Rule* the Master in Chambers had the same jurisdiction as a Judge: see *Baldwin v. McGuire*, 15 P. R. 306; *Bristol, etc. v. Taylor*, 15 P. R. 310; *Lauder v. Didmon*, 16 P. R. 74.

Jurisdic-
tion of
Judge and
Judicial
officers.

Sec. 110.

The jurisdiction of a Judge in Chambers to strike out a jury notice has never been judicially doubted: *Peoples' Loan, etc., Co. v. Stanley*, 4 O. L. R. 90, 377; *Shantz v. Berlin*, 4 O. L. R. 730.

A Judge in Chambers, on motion before trial, has full discretion to direct as to the mode of trial: *Lauder v. Didmon*, 16 P. R. 74; and *semble*, where, before trial, the Court or a Judge has ordered that the action be tried without a jury, the Judge at the trial has no power (while the order stands unreversed) to say that the issues shall be tried by a jury: *Reg. v. Grant*, 17 P. R. at p. 171, *per* Osler, J.A. It had previously been said that the exercise by a Judge in Chambers of his power before trial may hamper the discretion of the trial Judge: *per* Street, J., in *Bristol, etc., v. Taylor*, 15 P. R. 310; and see *Bank of Toronto v. Keystone F. Ins. Co.*, 18 P. R. 113. While, therefore, there is no doubt as to the discretionary power of a Judge in Chambers before trial to strike out a jury notice, the practice is not to strike it out where the ground is merely that the action can be more conveniently dealt with without a jury, that being a matter which can better be left for the consideration of the Judge at the trial: *Harke v. O'Neil*, 18 P. R. 104; *Shantz v. Berlin, supra*. On the other hand it is said that it is desirable to have the question whether an action is to be tried with or without a jury determined at as early a stage as possible: *Lauder v. Didmon*, 16 P. R. 74; and the discretion of a Judge on this point will not be lightly interfered with: *Id.*; and see *Togood v. Hindmarsh*, 17 P. R. 446; and see *Mangan v. Metropolitan Electric Supply Co.*, 1891, 2 Ch. 551.

Local Judges.

A local Judge acting under Rule 47 has the same power as a Judge of the High Court in Chambers: *Fox v. Fox*, 17 P. R. 161; and in a case where it was almost certain that the Judge at the trial would dispense with the jury it was held that the discretion of the local Judge ought to have been exercised by striking out the jury notice.

It has been held that this section places the matter in the discretion of the Judge in much the same way as under the English Order 36, rr. 3-7, that is, the Judge must be satisfied that sufficient reasons exist to deprive the party claiming a jury of his *prima facie* right. The *onus* of establishing this is on the other side, if an application is made before trial, and if the case can be equally well tried by either mode, then, if either party desires it, the case should go to a jury: *Bank of B. N. A. v. Eddy*, 9 P. R. 470; see also *Clark v. Skipper*, 21 Ch. D. 134; *Moses v. Simpson*, 20 C. L. J. 230.

Where a trial is commenced with a jury, the Judge may, even after the evidence is taken, or during its progress, dispense with, and discharge the jury, and try the case himself: *Marks v. Windsor*, 17 Ont. 719; see also *Denmark v. McConaghy*, 26 C. P. 563; *Adair v. Wade*, 9 Ont. 15; but *semble*, where he refuses to try a case with a jury he should proceed to try it himself, and *semble*, he has no jurisdiction to strike out the jury notice and transfer the case to a non-jury sittings for trial: *Bank of Toronto v. Keystone Fire Insurance Co.*, 18 P. R. 113.

County Court cases.

In cases in County Courts an order made by the Judge before trial, as to trial of the action with, or without a jury, is not appealable under section 52 of the County Courts Act (R. S. O. c. 55): *McPherson v. Wilson*, 13 P. R. 339.

Examples.

In *Pickup v. Kincaid*, 11 P. R. 445, an action to recover fees for medical attendance, where nothing was in dispute but the amount, it was held to be a proper case to strike out a jury notice with a view to having an account directed at once.

Simple, mere complexity of facts would not, alone, be sufficient **Sec. 111.**
reason for dispensing with a jury, in a Common Law action: *Bank of*
B. N. A. v. Eddy, 9 P. R. 468. Examples

Under ordinary circumstances an action for infringement of a patent should not be tried by a jury: *Veradyn v. Guthrie*, 9 P. R. 267; and where there is an issue involving a scientific investigation, that may be a good reason for dispensing with a jury: *Siegn v. H. E. Ry. Co.*, 100 L. T. Jour, 3901.

It has been said that actions against physicians and surgeons for malpractice, should now, as a general rule, be tried without a jury: *Town v. Archer*, 4 O. L. R. 383; and an action on a fire policy in which the defendants set up fraud was tried without a jury: *Whyte v. British America Assurance Co.*, 38 C. L. J. 165.

Causes of action may in a proper case be severed, that some separate proper for a trial by jury may be so tried: see *Temperance Colonization Co. v. Evans*, and *McMahon v. Larven*, 12 P. R. 62; but such separate trial by jury should not be ordered where there is but one cause of action: *Farran v. Hunter*, 12 P. R. 324.

Rules 550, and 551, provide the mode of trial where equitable issues, or both legal and equitable issues, are raised: see notes to those Rules.

Where a case had been tried and the jury disagreed, a motion was made to dispense with a jury, as a jury would be likely to disagree again, but it was held that the case having been considered proper for a trial by jury, it should be so tried, subject to the directions of the Judge at the trial: *Bank of B. N. A. v. Eddy*, 3 C. L. T. 499; see 19 C. L. J. 158; but in *Adamson v. Adamson*, 12 P. R. 469, a second trial was directed to be without a jury, the case being one where there was no *prima facie* right to a jury.

In *McGinnighal v. G. T. R.*, 9 P. R. 269, after the jury disagreed, and a second trial had been had, but the verdict had been set aside as against evidence, an order was made for trial by a Judge.

Where at the trial both parties treated an issue as one which should be tried by the Judge, and not by the jury, and the plaintiffs obtained a rule nisi for a new trial on the ground that the Judge had decided the issue wrongly, they were not allowed to amend the rule so as to state that the Judge should have left the issue to the jury: *Australian, etc., v. Smith*, 14 App. Cas. 318.

As to the effect of withdrawing a juror, see *Thomas v. Kruter*, *Flying Post*, 18 Q. B. D. 582.

Verdict.

111. Upon a trial by a jury, it shall not be lawful for the jury to give a general verdict, where the Court or the presiding Judge otherwise directs, and it shall be the duty of the jury to give a special verdict if the Court or presiding Judge so directs; and the jury may give either a general or a special verdict, unless the Court or the presiding Judge otherwise directs; but this section shall not apply to actions of libel.

58 V. c. 12, s. 116.

Court may direct jury to give a special verdict except in actions for libel.

Sec. 112.

A "general verdict" is one whereby the jury find the issue in favour of one party or the other, generally, i.e., for plaintiff, or defendant, as the case may be; and where there are several issues, if some be found in favour of one side and some in favour of the other, this would still be a "general verdict": Co. Lit. 226; *Davies v. Loundes*, 1 Sc. N. R. 328; Chitty's Arch. Pr. (14th ed.) 655. A "special verdict," on the other hand, is one whereby the jury simply find the facts, leaving it to the Court on applying the law to the facts so found, to determine for which of the parties a judgment should be given: Co. Lit. 227 h., 228; Chitty's Arch. Pr. (14th ed.) 655.

Formerly a jury might in all cases give a general verdict: *Mapes v. Devises v. Clark*, 3 A. & E. 506; but this and the following section have restricted this right, and the jury may in certain cases be required to answer specific questions: sec. 112.

In certain cases the jury may be directed to answer questions, and on the answers the Judge shall enter verdict.

112. Upon a trial by jury, in any case except an action for libel, slander, criminal conversation, seduction, malicious arrest, malicious prosecution or false imprisonment, the Judge, instead of directing the jury to give either a general or a special verdict, may direct the jury to answer any questions of fact stated to them by the Judge for the purpose; and in such case the jury shall answer such questions, and shall not give any verdict; and, on the finding of the jury upon the questions which they answer, the Judge may direct judgment to be entered. 58 V. c. 12, s. 117.

See *Canada Central v. McLaren*, 8 Ont. App. 564; *St. Denis v. Barter*, 13 Ont. 41; *Gower v. Lusse*, 16 Ont. 88.

It is imperative upon the jury to answer the questions submitted to them, and they may not give a general verdict instead, unless the Judge in his discretion receives it: *Furlong v. Carroll*, 7 Ont. App. 145, but to enable the jury to give such general verdict instead of answering the questions, the Judge's charge must give them such instructions as to the law, that they can properly give a general verdict instead of merely answering the questions: *Reid v. Barnes*, 25 Ont. 223.

In the excepted cases mentioned, this section prevents a judgment from being entered upon answers to questions submitted to the jury: a general or special verdict may be given by the jury, either by directions of the Judge or of their own accord (except in an action for libel in which a general verdict must be given); and a finding, in answer to a question, of a certain amount of damages is not equivalent to a general verdict: *Gordon v. Denison*, 22 Ont. App. 315 (an action for false imprisonment). In an action (e.g., for malicious prosecution) where the question of the presence or absence of reasonable and probable cause is for the Judge to decide, this section cannot prevent his putting questions to the jury in order to obtain a finding as to the facts for his assistance in forming his opinion upon the question of reasonable and probable cause: *Ib.*, pp. 319, 320-1.

A Judge is not bound to submit questions in writing to the jury: *Lett v. St. Lawrence*, 1 Ont. 545. See also *Balfour v. Toronto Railway Co.*, 5 O. L. R. 735; 32 S. C. R. 231; where Armour, C.J.O.,

said that questions should be in writing, but Osler, J.A., said that **Sec. 113.** while it is convenient and no doubt the usual course that questions submitted to the jury should be in writing, the law does not so require; and his refusal to submit any particular question is not ground for a new trial: *Turner v. Burns*, 24 Ont. 28.

When the jury fail to answer questions, or their answers are conflicting, so that no judgment can be awarded for either party on their finding, or in case the Judge at the trial refuses to give judgment for either party, the action may, unless his decision is appealed from, be carried down for trial again, as upon a disagreement of the jury: see *Rules 780, 781.*

In *Spencer v. Alaska, etc.*, 35 S. C. R. 362, it was said by Nesbitt, J., that in an action founded upon negligence it is advisable that specific questions be submitted to the jury to enable them to state the special grounds on which they find negligence or no negligence.

INTEREST.

113. Interest shall be payable in all cases in which it is now payable by law [or in which it has been usual for a jury to allow it]. 58 V. c. 12, s. 118. Interest may be allowed as hitherto.

The words in brackets are not in the Imp. Act. 3 & 4 Vict. c. 42, s. 28, from which this section was taken. As to the words in brackets: see *McCullough v. Clemow*, 26 Ont. pp. 472, 475.

Interest is in practice more frequently allowed by our juries than English authority would seem to warrant: *Spence v. Hector*, 24 U. C. Q. B. 277; see also *Mennie v. Leitch*, 8 Ont. 397; *Snarr v. Badenach*, 10 Ont. 131; *Re Kirkpatrick*, 10 P. R. 4; *Michie v. Reynolds*, 24 U. C. Q. B. 303; *Montgomery v. Boucher*, 14 U. C. C. P. 45; *McCullough v. Clemow*, *supra*; *McCullough v. Newlove*, 27 Ont. 627; *City of Toronto v. Toronto Ry. Co.*, 7 O. L. R. 78.

As to the allowance of interest on a claim in the Master's office: see *Re Ross*, 29 Gr. 385; *Rule 667* and notes.

As to interest on mortgages: see *Rule 750*, and notes.

The Interest Act, 1897, 60 & 61 V. c. 8 (D.), being an Act passed on grounds of public policy for the benefit of borrowers, its application cannot be waived: *Dunn v. Malone*, 6 O. L. R. 484.

A referee on taking accounts has power to allow interest whenever a jury would be entitled to allow it: *Attorney-General v. Etna Insurance Co.*, 13 P. R. 459; and on amounts claimed for work and services agreed to be paid at a fixed rate, from the times when they became payable: *McCullough v. Newlove*, 27 Ont. 627.

Interest is not recoverable on the amount of a foreign judgment except as unliquidated damages: *Solmes v. Stafford*, 16 P. R. 78; **264** nor on an award; and such interest does not begin to run until notice of the award has been given to the person liable to pay: *Hupck v. Wilson*, 18 P. R. 44.

Interest is payable on money obtained and retained in fraud of the plaintiff, but not on money paid by mistake: *Johnson v. The King*, 1904, A. C. 817; 91 L. T. 234.

Sec. 114.

When
allowed
on debts
certain
and over-
due.

114—(1) On the trial of any issue, or any assessment of damages, upon any debt or sum certain, payable by virtue of a written instrument at a certain time, interest may be allowed to the plaintiff from the time when the debt or sum became payable.

See *Torcsley v. Wythes*, 16 U. C. Q. B. 139; *McCullough v. Clemon*, *supra*.

"Debt or Sum Certain, etc."—The Act requires that the contract shall ascertain the sum and the time: the certainty of both must appear from the contract. But still, if all the elements of certainty appear by the contract, and nothing more is required than an arithmetical computation to ascertain the exact sum or the exact time for payment, that will be sufficient: *Per Lindley, L.J.*, in *London, etc., S. E. Ry. Co.*, 1892, 1 Ch. 144; see also 1893, A. C. 429; and *McCullough v. Clemon*, 28 Ont. p. 473. But it is not sufficient that the debt or the time may be made certain by some process of calculation, or some act to be performed in the future: *Sinclair v. Preston*, 31 S. C. R. 408.

Where the amount recovered on a bond is damages not ascertainable until judgment, interest will not be allowed: see *Sinclair v. Preston*, 31 S. C. R. 408; *Beam v. Beatty*, 3 O. L. R. 345 (but this case was reversed on another point, 4 O. L. R. 554); but interest is payable as interest, and not as damages, under a bond having a condition or defeasance to make void the same on payment of a lesser sum at a day or place certain, even although no express mention of interest is made in the bond: *Re Dixon, Heynes v. Dixon*, 1899, 2 Ch. 561; 1900, 2 Ch. 561.

And where a railway company was bound by agreement to pay a certain sum to a municipal corporation by way of rental of its tracks, and disputes having arisen as to the construction of the agreement, the payment was delayed and no sum tendered; and the amount being subsequently ascertained in the action, it was held that the corporation was entitled to interest as damages from the time when it should have been paid: *Toronto v. Toronto Ry. Co.*, 7 O. L. R. 78. That was held to be when the plaintiffs first made a good title: see S. C., 1905, A. C. 33. Where lessees went into possession under an agreement for a lease, and there was delay by the lessors in making title, it was held that interest on rent in arrear did not begin to run until the lessors had made title: *Re Canadian Pacific R. W. v. Toronto*, 5 O. L. R. 717, in appeal, 1905, A. C. 33.

(2) If such debt or sum is payable otherwise than by virtue of a written instrument at a certain time, interest may be allowed from the time when a demand of payment is made in writing, informing the debtor that interest will be claimed from the date of the demand. 58 V. c. 12, s. 119.

These provisions are founded upon Imp. Act. 3 & 4 Wm. 4. c. 42, s. 28.

Interest
on claims,
when
allowed.

Interest cannot be allowed on merchants' accounts unless a demand of interest under this section is proved: *Juglia v. Wellington Hotel Co.*, 20 C. P. 387. But in *Michie v. Reynolds*, 24 U. C. Q. B. 303, 310, Draper, C.J., said: "It has been the practice for a very long

time to leave to the discretion of the jury to give interest where the payment of a just debt has been withheld, and we can find no good reason to depart from that practice"; and in *Spence v. Hector, Ib.* 277, 281, the same learned Judge remarked that "Interest is in practice much more frequently allowed by our juries than English authorities would seem to warrant."

When the debt or sum is payable by virtue of a written instrument at a certain time, no demand is necessary in order to entitle the payee to interest. A covenant to pay six months after the death of the covenantor is a covenant to pay at "a certain time": *Re Horner*, 1896, 2 Ch. 188; 74 L. T. 686; and interest is usually allowed, without demand made, on sums awarded to be paid at a particular time: *Townsend v. Wythes*, 16 U. C. Q. B. 139.

Where the indorsement on the writ claimed interest, *Boyd, C.*, was of opinion that that was a good demand of interest under the statute: *Irwin v. Victoria Harbour*, Jan. 22nd, 1894 (not reported); but the mere bringing of the action appears not to be a sufficient demand where there has been no specific demand of interest: *London, Chatham & Dover Ry. v. South Eastern Ry.*, 1893, A. C. 429; 69 L. T. 637.

It has been held in England that a printed notice at the head of an account that interest will be charged is not a sufficient demand within the statute: *Re Edwards*, 65 L. T. 453; but where interest had been regularly charged on sums overdue for three years and upwards, the fact that no objection was made by the debtor was held to be evidence of a promise to pay interest: *Re Anglesey*, 1901, 2 Ch. 548; 85 L. T. 179, overruling *Re Edwards, supra*, on this point.

Interest may be allowed upon a solicitor's bill, if a demand in writing is made for it: *Re McClive*, 9 P. R. 213.

Although interest cannot, in the cases provided for in this section, be allowed without a prior demand, it is still in the discretion of the Judge or jury to allow interest in such cases, even though a demand be proved.

Where money has been paid by mistake, interest on it will not be allowed in favour of the payer: *Barber v. Clark*, 20 Ont. 522; 18 Ont. App. 435; *Johnson v. The King*, 1904, A. C. 817; 91 L. T. 234, but where moneys of an estate were distributed under a judgment subsequently reversed for irregularity, the payees were ordered to refund with interest from the commencement of the proceedings to set aside the judgment: *Uffner v. Lewis, Boys' Home v. Lewis*, 5 O. L. R. 684.

Where an action was brought upon a written agreement, silent as to interest, to recover the amount of net profits of a business for a period ending 1st May, 1895, as ascertained in the manner provided for in the agreement, but not so ascertained till after the time fixed thereby, and it was adjudged at the trial that the ascertainment was void, and a reference was directed to a Master to take an account, it was held that interest was not recoverable, (1) under s. 113, as in a case in which it had been usual for a jury to allow it, because no debt existed which was payable till ascertained, either in the manner provided in the agreement, or by the account taken in the action; nor (2) under s. 114 (1), because, the mode of computation provided by the contract being departed from, there was no certainty as to the amount payable, nor time of payment: *McCullough v. Glenow*, 26 Ont. 467.

Secs. 115, 116. As regards the rule followed by Courts of Equity in the allowance of interest, Bacon, V.C., said, in *Spatali v. Constantinidi*, 20 W. R. 823, "I take the law of this Court to be perfectly clear and distinct, and to have prevailed for centuries, that upon the wrongful withholding of a debt, the party who wrongfully withholds it is liable to pay interest upon that debt. A jury might always have given it, I do not say it did, but it might always have given it at law. But without reference to what a jury might do, this Court has given it in numberless instances": see *Rodger v. Comptoir d'Escompte de Paris*, L. R. 3 P. C. 465; but it is said that as regards legal claims the Courts of Equity always followed the law: see *per Lindley, L.J., London, Chatham & Dover Ry. v. South Eastern Ry.*, 1892, 1 Ch. at p. 142. *Booth v. Leicester*, 3 My. & Cr. 459; 1 Keen. 247.

Rate. After judgment has been recovered for a sum of money, payable "with interest until paid," it is doubtful whether the rate reserved by the contract can be recovered after judgment: see *Hutton v. Federal Bank*, 9 P. R. 568. In *Rykert v. St. John*, 4 Ont. App. 213; 10 S. C. R. 278, it was held that the contract became merged in the judgment, and only the interest payable under the judgment could be recovered. But in *Popple v. Sylvester*, 22 Ch. D. 98; 47 L. T. 329, it was held that the difference between the rate payable by the contract, and the rate recovered on the judgment, for the period between the recovering of judgment and payment, might be recovered in a subsequent action; and see 19 C. L. J. 21; *Acc. Economic Life Assce. Co. v. Usborne*, 85 L. T. 587; but see *Ex p. Fewings*, 25 Ch. D. 338; 50 L. T. 109.

Right of the Crown. In England the Crown has a prerogative right to be paid in priority to other creditors: *In re West London Commercial Bank*, 38 Ch. D. 364; *Attorney-General v. Leonard*, 38 Ch. D. 622; *Rex v. Ward*, 2 Ex. 301 u.; *Maritime Bank v. The Queen*, 17 S. C. R. 657; but see *Clarkson v. Attorney-General*, 15 Ont. 632; 16 Ont. App. 202; and see R. S. O. c. 129, s. 34, which in effect repeals 9 Hen. viii. c. 18.

When by way of damages in certain actions.

115. In actions for conversion of goods or for trespass *de bonis asportatis*, the jury may give interest in the nature of damages over and above the value of the goods at the time of the conversion or seizure, and in actions on policies of insurance may give interest over and above the money recoverable thereon. 58 V. c. 12, s. 120.

After goods are placed in the custody of the law, as for instance, in the hands of a sheriff or receiver, the liability of the defendant for interest on the value of such goods ceases: *Peruvian Guano Co. v. Dreyfus*, 1892, A. C. 166.

Interest on judgments.

116. Unless it is otherwise ordered by the Court, a verdict or judgment shall bear interest from the time of the rendering of the verdict, or of giving the judgment, as the case may be, notwithstanding that the entry of judgment shall have been suspended by any proceedings in the action, whether in the Court in which the action is pending or in appeal. 58 V. c. 12, s. 121.

Interest does not run from the date of the verdict, where the judgment is expressly directed to be entered at a future day: *McLaren v. Canada Central Ry. Co.*, 10 P. R. 328; and where a verdict is entered, subject to an award, the amount of the award does not bear interest from the date of the verdict: *Hope v. Beatty*, 7 P. R. 39; and see *Woodruff v. Canada Guarantee Co.*, 8 P. R. 532.

Where the entry of judgment is stayed, the interest nevertheless runs from the date of the judgment: *Talbot v. Canadian C. C. Co.*, 33 C. L. J. 735; 17 C. L. T. 336; and see *Rule 629*.

Where the judgment declares a charge of money upon land without imposing any personal liability, it bears interest unless otherwise ordered: *Re Drax*, 1903, 1 Ch. 781; 88 L. T. 510; although the contrary was held in *Lynch v. Skerrett*, 5 Ir. Eq. 494.

An interlocutory order for payment of costs was held to be a judgment within Imp. Act, 1 & 2 Vict. c. 110, s. 28, and to carry interest on the costs from the date of the order: *Taylor v. Roe*, 1894, 1 Ch. 413; 70 L. T. 232; see also R. S. O. c. 80, s. 9.

The interest included in a judgment is a part of the claim for the purpose of determining the scale of costs applicable: *Malcolm v. Leys*, 15 P. R. 75; but not the interest which accrues on the verdict or judgment under this section: *Sproule v. Wilson*, 15 P. R. 349.

PLEADINGS IN ACTIONS ON FOREIGN JUDGMENTS.

Foreign judgments are those given by Courts whose jurisdiction does not extend to Ontario: *Macfarlane v. Derbyshire*, 8 U. C. Q. B. 12; a foreign judgment if not impeached or denied is *prima facie* evidence against the defendant: *Manning v. Thompson*, 17 C. P. 606; but it must be a judgment which finally and conclusively (subject only to appeal) settles the existence of the debt, so as to become *res judicata* between the parties: *Noarion v. Freeman*, 15 App. Cas. 1.

A foreign judgment constitutes a simple contract debt, so that the period of limitation in such case (6 years), for bringing an action upon it, applies: *North v. Fisher*, 6 Ont. 206; and is a liquidated demand which may be specially indorsed under *Rule 138*: *Solmes v. Stafford*, 16 P. R. 78.

The principle upon which a foreign judgment is enforced is that the judgment of a Court of competent jurisdiction over the defendant imposes an obligation upon the defendant to pay which the domestic Court is bound to enforce: *Fowler v. Vail*, 4 Ont. App. 270; *Castrique v. Imrie*, L. R. 4 E. & L. App. 414; *Godard v. Gray*, L. R. 6 Q. B. 139; *Re Trufort*, *Trafford v. Blane*, 57 L. T. 674; *Ritter v. Fairfield*, 32 Ont. 350; *Foycrick v. Hubbard*, 86 L. T. 829; *Swaizie v. Swaizie*, 31 Ont. 324.

No legislature, having merely territorial jurisdiction, can confer on Courts under its control, jurisdiction which any foreign Court ought to recognize, against absent foreigners who owe no allegiance or obedience to the power which so legislates. In all personal actions the Courts of the country where the defendant resides, not the Courts of the country where the cause of action arose, should be resorted to: *Sirdar Gurdyn Singh v. Rajah of Faridkote*, 1894, A. C. 670; see also note prefixed to *Rule 162*.

A judgment for a penalty payable to a foreign state, under a statute of such foreign state, does not create a debt enforceable in this Province; but where the penalty is payable by way of indemnity

Sec. 116. to a private citizen a foreign judgment for such penalty may be enforced in Ontario: *Huntington v. Attrill*, 20 Ont. App. 703; 1883, A. C. 150.

A foreign judgment is not a merger of the original cause of action, which may, notwithstanding such judgment, be sued on in Ontario: *Trevelyan v. Myers*, 26 Ont. 430; *Bugbee v. Clergue*, 27 Ont. 201, affirmed in S. C., sub nom. *Clergue v. Humphrey*, 31 S. C. R. 66; the foreign judgment creditor may sue either upon the judgment or upon the original cause of action: *Id.*

The tribunals constituted by Provincial authority cannot extend their powers so as to bind by their decisions persons, or their property, in other Provinces, unless such persons choose to attorn to their jurisdiction: but judgments of Provincial Courts are binding on persons resident in other Provinces when pronounced in actions or proceedings which they have themselves instituted: *Deacon v. Chadwick*, 1 O. L. R. 346.

A foreign judgment is *prima facie* evidence only that the foreign Court had jurisdiction over the subject matter, or the person of the defendant, and that the judgment was regularly obtained. It may be shown by way of defence that the judgment was not binding in the foreign country, for want of jurisdiction. The Court has jurisdiction over the person of the defendant when he is a subject of the country, even though not resident nor domiciled in it, and he is therefore bound by a judgment, though obtained in his absence, where recovered under the process of the country to which he owes allegiance as a subject, or temporary allegiance, by being when the suit was commenced, resident in the country, so as to have the benefit and protection of its laws. The absence of these circumstances will constitute a defence: see *Fowler v. Fail*; *Godard v. Gray* (sup.) *Schibsky v. Westenholz* L. R. 6 Q. B. 155; *Manbournet v. Wyse*, 1 Ir. C. L. 471; *McLean v. Shields*, 9 Ont. 699; *Solmes v. Stafford*, 16 P. R. 78; *Beatty v. Cromwell*, 9 P. R. 547; *Turnbull v. Walker*, 67 L. T. 767; 2 Smith L. C., 10th ed., 766.

If the foreign Court had jurisdiction as above (or if defendant submitted to its jurisdiction by appearing: *Voinet v. Barrett*, 34 W. R. 161; 1 Cab. & E. 554), the judgment is conclusive so as to prevent him from pleading any defence which might have been pleaded in the foreign country: *Fowler v. Fail*, and other cases, *supra*; *Paisley v. Broddy*, 11 P. R. 202; *Solmes v. Stafford*, 16 P. R. 78.

A judgment or decree pronounced by a foreign Court will be treated and acted on as final, notwithstanding any irregularity of procedure under the local law; provided the foreign Court had jurisdiction over the subject matter, and over the persons brought before it, and the proceedings do not offend against English views of substantial justice: *Pemberton v. Hughes*, 1891, 1 Ch. 781; but an action on a foreign judgment must fail if it be proved that the judgment was obtained without notice to the defendant, actual or constructive: *Bugbee v. Clergue*, 27 Ont. 96; 31 S. C. R. 66; but if a defendant in the foreign action does not prove that he had no notice of the proceedings and no opportunity of appearing in the foreign Court, the judgment, if *in rem*, may be conclusive on him: see *Fraser v. Carr*, 81 L. T. 541; 1902, A. C. 156; 85 L. T. 144.

By invoking and submitting to the jurisdiction of a foreign Court, a party may, in an action in Ontario on the judgment of the foreign Court, be precluded from setting up want of jurisdiction to it: *Swaikie v. Swaikie*, 31 Ont. 324.

Fraud in obtaining a foreign judgment is a defence: *Abouloff v. Secs.* 117. *Oppenheimer*, 10 Q. B. D. 295; *c.g.*, by means false evidence adduced 118a. in the foreign Court: *Hollender v. Foulkes*, 26 Ont. 61; *Anderson v. Nesbitt*, 1 O. W. R. 818; 2 O. W. R. 430; though the fraud is such that it cannot be proved without re-trying the questions adjudicated upon by the foreign Court: *Ib.* and *Vadala v. Lawes*, 25 Q. B. D. 310; 62 L. T. 701; 63 L. T. 128. It is also a defence that the judgment is contrary to natural justice, as in *Buchanan v. Rucker*, 1 Camp. 43; 9 East., 192; or the fact that it was obtained against defendant without notice (he being an alien), notwithstanding the judgment is valid in the foreign country: *Rousillon v. Rousillon*, 14 Ch. D. 351.

Where the defendant did not appear or submit to the jurisdiction of the foreign Court, and was not resident within the territorial jurisdiction when the foreign judgment was obtained, an action on such judgment (except when recovered in the Province of Quebec, as mentioned in s. 117, *post*), cannot be maintained in Ontario: see *Turnbull v. Walker*, 67 L. T. 767; and see *Schibsby v. Westminster*; *Sirdar Gurdial Singh v. Faridkote*, and other cases, *supra*.

117. In any action brought in Ontario on a judgment obtained in the Province of Quebec in an action in which the service of notice on the defendant or party sued has been personal, no defence that might have been set up to the original action shall be pleaded to that brought on the judgment. 58 V. c. 12, s. 122.

Suit upon judgment in Quebec, where service was personal.

118. In any action brought in Ontario on a judgment obtained in the Province of Quebec in an action in which personal service was not obtained and in which no defence was made, any defence that might have been set up to the original action may be made to the action on the judgment. 58 V. c. 12, s. 123.

Suit upon judgment in Quebec, where the service was not personal.

Quære, whether the personal service referred to in these sections means service in the Province of Quebec: *Court v. Scott*, 32 U. C. C. P. 148. In that case the action was upon a prom. note made in Toronto, payable in Montreal, so that the contract was performable, and the breach occurred in Quebec, bringing the defendant within 22 Vict. c. 5, s. 58, which, by the law of Quebec, gave the Quebec Court jurisdiction upon a personal service in Ontario.

As to the mode of proof of a Quebec judgment: see *Tilton v. McKay*, 24 U. C. C. P. 94.

118a. In any action brought in Ontario on a judgment obtained in Quebec, the costs incurred in obtaining the judgment shall not be recoverable without a Judge's order directing their allowance; and such order shall not be granted unless, in the opinion of the Judge, the costs were properly incurred, nor if it would have been a saving of expenses and costs to have first instituted proceedings in Ontario on the original claim. 3 Ed. viii., c. 8, s. 11.

Costs of actions on Quebec judgments

Secs. 119-
121.

COSTS.

Costs in
discretion
of Court.

119. Subject to Rules of Court, and to the express provisions of any statute, the costs of and incident to all proceedings in the Supreme Court of Judicature, shall be in the discretion of the Court or Judge, and the Court or Judge shall have full power to determine by whom and to what extent such costs are to be paid. 59 V. c. 18, s. 11.

See notes to Rule 1130, and see Rules 1238, 1241.

Habeas corpus proceedings are within this section: *Re Weatherall*, 1 O. L. R. 542; so also motions to quash convictions under Ontario statutes: *Re v. Mancion*, 8 O. L. R. 24.

The mere absence of any clause conferring jurisdiction on the Court to award costs under a particular statute is not an "express provision of any statute" so as to amount to an express prohibition by the Legislature, and to deprive the Court of its discretion as to costs conferred by this section: *Re Schmarr*, 1902, 1 Ch. 326.

This section authorizes the awarding of costs by the Court of Appeal on motions before it: *People's Loan, etc., v. Stanley*, 4 O. L. R. 247.

The ancient doctrine that in matters of Common Law the Crown neither pays nor receives costs, has not been altered in England: *Re v. Archbishop of Canterbury*, 1902, 2 K. B. 503; 86 L. T. 450; but various statutory provisions have in Ontario made a change in this respect, so that it has been said that the rule is practically superseded; see *Attorney-General v. Toronto General Trusts Corporation*, 5 O. L. R. 607, and Rule 239; but see *Johnson v. The King*, 1904, A. C. 817.

WITNESS FEES.

Fees of cer-
tain officers
producing
documents.

120. No public official or other witness subpoenaed 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. 58 V. c. 12, s. 127, part; 59 V. c. 18, Sched. (20).

See also Rule 1151.

REFERENCES TO MASTER IN ORDINARY.

When re-
ferences to
be to Mas-
ter in
Ordinary.

121.—(1) Unless the Master in Ordinary shall certify that by reason of press of business, or for other good reason, he is presently unable to proceed with any reference or trial, or unless the Judge or the Court which directs the reference or the trial is satisfied that the said Master in Ordinary is otherwise unable or ought not by reason of disqualification

or for any other good reason, to take or proceed with any reference or trial, the references which shall be made by the High Court or a Judge thereof at the trial or hearing in Toronto of any action, suit or proceedings begun and carried on in Toronto, and which might according to the practice of the Court be referred to the Master in Ordinary, shall be to the Master in Ordinary. This section shall apply to references made by order of the Court or a Judge under *The Arbitration Act*. Sec. 122.
Rev. Stat.
c. 62.

(2) Nothing in this section contained shall affect the powers of reference of the Court or Judge where a reference shall be made to an engineer or other skilled or expert person or to an Official Referee agreed upon by the parties. 60 V. c. 14. s. 8; 3 Ed. vii. c. 8, s. 12.

RULES OF COURT.

The result of sections 122 to 125 in the present Act is, that since the Act went into operation, the power of making *Rules* is as follows:

(1) *Rules* may be made by the Supreme Court of Judicature for Ontario for governing its several Divisions (sec. 122).

(2) Subject to any such *Rules* of the Supreme Court, the Judges of the Court of Appeal may make *Rules* for that Court, and the Judges of the High Court may make *Rules* for the High Court (secs. 123 and 124). The English Acts do not give any such power to the Judges of the High Court.

(3) The Lieutenant-Governor may authorize the three Chief Justices and the Chancellor to make *Rules*; and *Rules* so made are to have the same effect as if made by all the Judges of the Supreme Court; sec. 125.

As to the power to make *Rules* respecting criminal procedure: see Cr. Code, s. 533.

As to the virtue and effect of *Rules* of Court; and as to *Rules* which may not be considered *intra vires*: see *Williams v. Goose*, 1897, 1 Q. B. 471.

Rules of the Court are not to be construed as having a retroactive effect, so as to deprive any snitor of any vested right or interest he may have acquired at the time of their being passed: *Island v. Amaranth*, 16 P. R. 3; but where they merely affect procedure, they will be held to apply to all pending actions: *Ib.*; *Spence v. G. T. Ry.*, 17 P. R. 172; but see *McGillivray v. Lindsay*, 16 P. R. 11.

122.—(1) The Supreme Court may at any time, with the concurrence of a majority of the Judges thereof present at any meeting held for that purpose, alter and annul any *Rules* of Court for the time being in force, and may make any further or additional *Rules* of Court for carrying this Act Judges of
Supreme
Court may
make *Rules*.

Sec. 122. into effect, and in particular for all or any of the following matters, that is to say:

(a) For regulating the sittings of the High Court of Justice and the Court of Appeal, and of any Divisional or other Courts thereof respectively, and of the Judges of the said High Court sitting in Chambers;

(b) For regulating the pleading, practice, and procedure in the High Court of Justice and Court of Appeal;

See Eng. J. A., 1875, s. 17.

The Court of Appeal and the High Court have each additional Rule-making powers: see ss. 123 and 124.

(c) For the hearing of appeals from County Courts, or from a Judge of a County Court, from Provisional Judicial District Courts or from a Judge of any such Court, from Surrogate Courts, Stipendiary Magistrates, or Division Courts, by any two or more of the Judges of the Supreme Court, and for regulating the selection of the Judges of the Supreme Court, who shall hear such appeals, and for regulating all matters relating to the practice of such appeals;

There is no similar clause in the Eng. Acts.

See Rules 793-797.

To emp-
power Mas-
ter in
Chambers,
etc., to
make orders.

(d) For empowering the Master in Chambers, or any Referee sitting for him, or the Judges of the County Courts, other than the Judge of the County of York, or the Local Masters in respect of actions brought in their counties, to do any such thing, and to transact any such business, and to exercise any such authority and jurisdiction in respect of the same as by virtue of any statute or custom, or by the Rules of the High Court, are now or may be hereafter done, transacted or exercised by a Judge of the High Court sitting at Chambers, and as shall be specified in any such Rule, except in respect of matters relating to—

1. The liberty of the subject;
2. Appeals and applications in the nature of appeals.

3. Proceedings under *The Act respecting Lunatics*; Sec. 122. Rev. Stat. c. 68.
4. Applications for advice under *The Trustee Act*; Rev. Stat. c. 122.
5. Matters affecting the custody of children; and
6. Proceedings under section 37 of this Act.

See notes to Rule 42.

(e) Generally, for regulating any matters relating to the practice and procedure of the said Courts respectively, or to the duties of the officers thereof, or of the said Supreme Court, or to the costs of proceedings therein; (a) and every other matter deemed expedient for the better attaining the ends of justice, advancing the remedies of suitors, and carrying into effect the provisions of this Act and of all other Acts now or hereafter in force respecting the said Courts.

(a) What follows this is not taken from the English Acts, but from R. S. O. 1877, c. 49, s. 45 (7).

(f) Subject to the approval of the Lieutenant-Governor in Council, to make Rules from time to time regulating all fees payable in stamps.

See the *Tariff B.* *infra*; and as to power to impose fees, see *Institute of Patent Agents v. Lockwood*, 1894, A. C. 347.

(2) Where any provisions in respect of the practice or procedure of any Courts, the jurisdiction of which is vested by this Act in the High Court, are contained in any statute, Rules of Court may be made for modifying such provisions to any extent that may be deemed necessary for adapting the same to the High Court, unless, in the case of any Act hereafter passed, this power shall be expressly excluded.

To the same effect is Eng. J. A., 1875, s. 24.

See *Williams v. Goose*, 1897, 1 Q. B. 471.

The operation of this section is probably now very limited, as nearly all the statutory enactments regulating practice and procedure in any of the Courts existing prior to Ont. J. A., 1881, whose jurisdiction is now vested in the High Court were, at the time of the Revisions of the Statutes in 1887 and 1897, intended to be embodied in the Consolidated *Rules*. For an instance in which the *Rules* vary a statute, see note to sec. 128, *infra*.

(3) Any provisions relating to the payment, transfer or deposit into, or in, or out of any Court of any money or

Secs. 123-125.

property, or to the dealing therewith, shall, for the purposes of this section, be deemed to be provisions relating to practice and procedure.

Taken from Eng. J. A., 1875, s. 24.

(4) All Rules of Court made in pursuance of this section shall from and after they come into operation, regulate all matters to which they extend, until annulled or altered in pursuance of this section or section 125. 58 V. c. 12, s. 132; c. 13, s. 41.

Taken from Eng. J. A., 1876, s. 17.

Rule 8 requires that new *Rules* shall be published in the Ont. Gazette for 7 days before coming into force, unless the publication is expressly dispensed with.

Judges of Court of Appeal may make Rules.

123 Subject to any Rules of Court which may be made under the provisions of the preceding section, the Judges of the Court of Appeal, or a majority of them, may from time to time make such general Rules and Orders for fixing the costs to be allowed in respect of proceedings in the said Court, and for regulating the different proceedings in appeal, and generally for the effectual execution of this Act and the intention and object thereof in regard to the practice in appeals as to them may seem expedient; and may also from time to time alter and amend any of the existing Rules or any Rules made under the authority of this Act, and make other Rules instead thereof; and until such Rules are made, the present Rules and the existing practice and mode of proceeding in the Court shall continue in force. 58 V. c. 12, s. 133.

The *Rules* authorized to be made under this section, would appear to be merely *Rules* affecting the procedure, and costs to be allowed in the Court of Appeal.

Judges of High Court may make Rules.

124. The Judges of the High Court or any four of them, of whom two of the Presidents of the Divisions of the High Court shall be two, shall, as regards matters in the High Court, have power to make general rules from time to time for the regulation of the practice of the High Court. 58 V. c. 12, s. 134.

Lieut. Governor in Council may authorize certain Judges to make Rules.

125. The Lieutenant-Governor in Council may from time to time authorize the following persons, viz.: the Chief Justice of Ontario, the Chancellor, the Chief Justice of the [King's] Bench, the Chief Justice of the Common Pleas, and any one or more of the other Justices of the Supreme Court.

to make Rules of Court under this Act; every such appointment to continue for such time as shall be specified by Order in Council, and the Judges so appointed, or any three of them, may make such Rules, and the same shall have the same effect as if made by all the Judges of the Supreme Court, under section 122. 58 V. c. 12, s. 135.

Secs 126-128.

126. The Judges of the Supreme Court and of the High Court, respectively, shall have the same authority to make Rules of Court with respect to District Courts as they have with respect to the High Court and to County Courts, and the Judges authorized as mentioned in section 125 of this Act shall, with respect to District Courts, have the like authority. 58 V. c. 12, s. 136.

Authority to make Rules of Court for District Courts.

127. A Council of the Judges of the said Supreme Court, of which due notice shall be given to all the said Judges, shall assemble once at least in every year, on such day or days as shall be fixed by the Lieutenant-Governor, for the purpose of considering the operation of this Act and of the Rules of Court for the time being in force, and also the working of the several offices and the arrangements relative to the duties of the officers of the said Courts respectively, and of inquiring and examining into any defects which may appear to exist in the system of procedure or the administration of the law in the High Court of Justice or the Court of Appeal, or of any other Court, or by any other authority; and they shall report annually to the Lieutenant-Governor what (if any) amendments or alterations it would in their judgment be expedient to make in this Act, or otherwise relating to the administration of justice, and what other provision (if any) which cannot be carried into effect without legislative authority it would be expedient to make for the better administration of justice; an extraordinary council of the said Judges may also at any time be convened by the Lieutenant-Governor. 58 V. c. 12, s. 137.

Council of Judges to consider procedure and administration of justice.

See Imp. enactment J. A., 1873, s. 75.

128. Save as by this Act or by any Rules of Court otherwise provided, all forms and methods of procedure which, prior to the 22nd day of August, 1881, were in force in any of the Courts whose jurisdiction then became vested in the said High Court, under and by virtue of any law, general order or rule whatsoever, and which are not inconsistent with this Act or with any Rules of Court, may continue to be used and

Provision for saving of existing procedure where not inconsistent with this Act or Rules of Court.

Secs. 129-131. practised in the said High Court of Justice, in such and the like cases, and for such and the like purposes as nearly as may be, as those to which they would have been applicable prior to the said date in the respective Courts of which the jurisdiction became so vested. 58 V. c. 12, s. 138.

This section is taken substantially from Imp. Act of 1875, s. 21. See also secs. 48, 58 (13).

This section must be taken to have been greatly modified by *Rule 3*, which provides that as to all matters not provided for in the *Rules*, the practice is to be regulated by analogy thereto instead of, as in this section mentioned, by the practice prior to the Jud. Act, 1881.

Consolidated Rules of Practice prepared under 58 V. c. 12, 59 V. c. 18, confirmed.

129. The Consolidated Rules of Practice and Procedure of 1897, revised and consolidated under the authority of section 42 of *The Law Courts Act, 1895*, and of section 15 of *The Law Courts Act, 1896*, by the Commissioners appointed under the said section 42 and approved by the Lieutenant-Governor in Council, are hereby declared to be as valid as if contained in an Act of the Legislature; and nothing in the said Rules shall be open to any question as to the jurisdiction to make, approve and authorize the same under the said section or otherwise, but the same shall be subject to be varied or repealed from time to time by the same authority and in the same manner as other Rules of Court. 59 V. c. 18, s. 15.

OFFICERS AND OFFICES.

Registrar and Assistant Registrar of Court of Appeal.

130.—(1) The Lieutenant-Governor in Council may from time to time appoint a Registrar and an Assistant Registrar of the Court of Appeal.

(2) The said Registrar or Assistant Registrar shall not take for his own use or benefit, directly or indirectly, any fee or emolument, save the salary to which he is entitled by law; and all fees received by him on account of the said offices shall form part of the Consolidated Revenue Fund, and shall be payable in stamps, subject to *The Act respecting Law Stamps*.

Rev. Stat. c. 25.

(3) In the case of the absence or illness of the Registrar, or in case the office of Registrar is vacant, the Assistant Registrar shall perform all the duties of the Registrar. 5 Ed. VII. c. 13, s. 4.

Appointment of Masters, etc.

131.—(1) The Lieutenant-Governor may from time to time appoint a Master in Ordinary, a Master in Chancery, an Accountant of the Supreme Court and two or more Taxing Officers.

(2) Subject to orders of the Lieutenant-Governor in Council, the said officers and the Local Masters shall be officers of the Supreme Court and attached thereto. 58 V. c. 12, s. 140. Secs. 132-134.

By order of the Lieutenant-Governor in Council of 22nd May, 1889, the Master in Ordinary, and Local Masters, were constituted officers of the High Court.

132. The Lieutenant-Governor may from time to time appoint for the High Court: one Clerk of the Crown and Pleas; two Registrars; one Clerk of the Process; one Clerk of Records and Writs, and also such other clerks and officers as the business of the Court may, from time to time, require; and such officers and clerks shall, in addition to any of the duties usually performed by the like officers and clerks, perform such duties as may by Order in Council or Rules of the Supreme Court or the High Court be provided. 58 V. c. 12, s. 141, part; 59 V. c. 18, Sched. (22). Appointment of Clerk of Process, etc.
Duties

133 —(1) Subject to orders of the Lieutenant-Governor in Council, all officers attached to the various Divisions of the High Court shall remain and continue to be attached to the Division to which they are now respectively attached. Officers to remain attached to their several Divisions until changed.

Compare Eng., 1883, R. 890.

(2) Where a doubt exists as to the position under this Act of any existing officer attached to any Court or Judge affected by this Act, such doubt may be determined by Rule of Court.

(3) The Lieutenant-Governor in Council shall have the power and (subject to any Order in Council) the Judges of the said Supreme Court shall have power to change the official names of offices and officers, and to change and regulate the duties of the officers. 58 V. c. 12, s. 142.

See Eng. J. A., 1879, s. 24.

134 Subject to any Order in Council in that behalf, the business to be performed in the High Court and in the Court of Appeal respectively, or in any Divisional or other Court thereof, or in the Chambers of any Judge thereof, other than that performed by the Judges, shall be distributed among the several officers attached to the said Courts by the preceding section in such manner as may be directed by Rules of Court; and such officers shall perform such duties in relation to such business as may be directed by Rules of Court; and, subject to such Order in Council and Rules of Court, all such officers Distribution of business among officers.

Secs. 135-138.

respectively shall continue to perform the same duties, as nearly as may be, and in the same manner as if this Act had not been passed. 58 V. c. 12, s. 143.

See Eng. J. A., 1873, s. 77.

Oath of officers.

135.—(1) Every officer of the Court hereafter appointed shall, before he enters upon his duties, take and subscribe the following oath:—

Form.

"I, A. B., of—, do hereby solemnly swear that I will, according to the best of my skill, learning, ability and judgment, well and faithfully execute and fulfil the duties of the office of (*as the case may be*), without favour or affection, prejudice or partiality, to any person or persons whomsoever. So help me God."

Before whom taken.

(2) When not convenient to a person appointed to any office to attend at Toronto to take the oath of office, the oath may be taken before the Judge of the County Court of the County in which the officer resides, or before a Commissioner authorized to administer affidavits in such County, and the oath shall be certified by the Judge or Commissioner and filed amongst the records of the Court at Toronto. In all other cases the oath shall be administered to the officer by the Judge in open Court. 58 V. c. 12, s. 145.

Officers to give security.

136. The Clerk of the Crown and Pleas, the Clerk of the Process, the Registrars and Local Registrars of the High Court, and the Deputy Clerks of the Crown and Pleas, shall when required by the Lieutenant-Governor in Council, give security to [His] Majesty, in such sum and with so many sureties, and in such form as the Lieutenant-Governor in Council directs, conditioned respectively for the due performance of the duties of their respective offices. 58 V. c. 12, s. 146, part; 59 V. c. 18, Sched. (23); 63 V. c. 17, s. 8.

Consequences of neglecting to do so.

137. The neglect by any such officer to give such security shall render his appointment void; but the forfeiture of office shall not affect any act done by him during the time he actually continues to hold his appointment. 58 V. c. 12, s. 147, part; 59 V. c. 18, Sched. (24).

Who to approve of the sureties.

138. The Lieutenant-Governor shall in his discretion approve of the security and sureties so given by the Clerk of the Process, Clerk of the Crown and Pleas and Registrars; and the Judge of the County Court having first certified his approval in writing, of the security and sureties given by the Local Registrar or Deputy Clerk of the Crown for his County.

the Lieutenant-Governor shall in his discretion approve of the security and sureties so given by such Local Registrar or Deputy Clerk; and such securities, when executed and approved, shall be duly recorded in the manner provided by *The Act respecting Public Officers*, and shall then be deposited in the office of the Provincial Treasurer. 58 V. c. 12, s. 148, part; 59 V. c. 18, Sched. (25).

Secs. 139-142.

To be recorded and deposited as provided by Rev. Stat. c. 16.

139. The Clerk of the Crown and Pleas, the Registrars and the Clerk of the Process respectively, shall keep their offices in Osgoode Hall, in the City of Toronto. 58 V. c. 12, s. 149; 59 V. c. 18, Sched. (26).

Offices to be kept at Osgoode Hall.

140. The Clerk of the Process shall make to the Treasurer of the Province quarterly returns, verified by his affidavit, of all writs and process supplied by him to be issued by the said officers. 58 V. c. 12, s. 151, part; 59 V. c. 18, Sched. (27).

The Clerk of Process to make quarterly returns.

141.—(1) Subject as aforesaid, the Judges of the County Courts, the Master in Ordinary, the Master in Chambers, the Clerk of the Crown and Pleas, the Registrars of the High Court and the Local Masters shall be Official Referees for the trial of such questions as shall be directed to be tried by such Referees.

Official referees.

The Drainage Referee is not an Official Referee under this section unless specially so appointed, which has not been done: *McClure v. Brooke*, 5 O. L. R. 59.

(2) In case the business is found to require other or additional Official Referees, and the President of the High Court so certifies, the Lieutenant-Governor from time to time may appoint other additional Official Referees accordingly. 58 V. c. 12, s. 152 (1, 2), part; 59 V. c. 18, Sched. (28).

Additional referees may be appointed.

This section does not correspond with the provisions of the English Act as to official referees. The English Act appears to have contemplated an immediate appointment of a new set of officers as official referees, which has not been thought necessary for the present here, the authority of official referees being given to the County Court Judges, Masters in Chancery, Local Masters, and other officers specially named in this section, and the appointment of others being deferred until the President of the High Court certifies that others are necessary. Hitherto only one additional referee has been appointed, viz.: Mr. McLean, the Chief Clerk of the Master in Ordinary.

142. In the case of officers who are paid by salary, the fees on any reference or trial shall be paid in stamps, other referees shall be paid in money. 58 V. c. 12, s. 152 (3).

When fees to be paid in stamps.

**Secs. 143,
144.**

**Local
Masters.**

143.—(1) There shall be a Local Master in every county or union of counties other than the County of York, and every Local Master hereafter appointed shall reside in the county for which he is appointed.

See section 149, authorizing the High Court, with the concurrence of the Lieutenant-Governor in Council, to relieve present officers from the operation of this provision. No part of sections 143 to 151 is taken from the English Acts.

**In case of
vacancy.**

(2) When a vacancy occurs in the office of Local Master, the Judge of the County Court for the county shall be the Local Master until and unless another person is appointed Local Master. In such case if there are two County Judges, a Senior and Junior Judge, both Judges shall be Local Masters until and unless one of them or some other person is appointed sole Local Master.

More than one Master may now be appointed for a county or union of counties: see 62 Vict. (2), c. 11, s. 3, *infra*, p. 177.

Prior to that Act the contingency provided for in this sub-section was held to be the only case in which there could be two Local Masters in a county: see *Re Glen, Fleming v. Curry*, 27 Ont. App. 144.

Where a Master writes a letter to the government resigning his office, the appointment of some other person to the office is equivalent to an acceptance of the resignation: *Ib.*

**Deputy
Clerks of
the Crown.**

(3) Except in the County of York, the several Clerks of the County Courts shall be *ex officio* Deputy Clerks of the Crown and Pleas of the High Court for their respective Counties, unless the offices of Deputy Clerk of the Crown and Deputy Registrar are consolidated under sub-section 5.

**Ex-Deputy
Registrars.**

(4) Where a County Court Judge is the Local Master, the County Court Clerk shall be the Deputy Registrar.

**Local Reg-
istrars.**

(5) The offices of Deputy Clerk of the Crown and Deputy Registrar (not Local Master) shall be consolidated as vacancies occur in either: unless where the Presidents of the Divisions of the High Court or a majority recommend otherwise: when the said offices are held by the same person, he shall be styled Local Registrar of the High Court. 58 V. c. 12, s. 153 (1-5).

As to officers in Districts: see R. S. O. c. 109, ss. 16-18.

**Fees of De-
puty Clerks
of the
Crown.
Rev. Stat.
c. 62.**

144.—(1) Except as provided in sub-section 4 of section 30 of *The Arbitration Act*, where a reference is made to a Deputy Clerk of the Crown, or an examination is taken by him, he shall be entitled to take and receive to his own use the fees on such reference or examination.

(2) The Lieutenant-Governor in Council may commute Sec. 145.
the fees of a Local Master, or of a Local Master and Deputy Registrar, including his fees as an official referee, for a fixed annual sum, such sum not to exceed the average income Commutation of fees of Local Masters. derived from such fees for the preceding five years.

(3) The Lieutenant-Governor in Council may commute Commutation of fees of Deputy Clerks of the Crown.
the fees payable to a Deputy Clerk of the Crown on references and examinations and other matters for a fixed annual sum, such sum not to exceed the average income derived from such fees during the preceding five years. 58 V. c. 12, s. 153 (6-8).

(3a) The Lieutenant-Governor in Council may commute Commutation of County Crown Attorney's fees.
the fees payable to a County Crown Attorney in any County in which there is a City having a population of over 100,000 for a fixed annual sum, such sum not to exceed the average income derived from fees during the preceding five years. 63 V. c. 17, s. 9.

(4) Any annual sum fixed as provided in the preceding sub-sections shall continue until varied by Order in Council, but any order for payment of any such annual sum as aforesaid may be rescinded, and the amount may by Order in Council be increased or diminished, provided that in no case shall any Order in Council name a sum exceeding the average income or fees aforesaid (as the case may be) during the preceding five years. 58 V. c. 12, s. 153 (9); 63 V. c. 17, s. 10. Amount of Commutation may be changed.

145.—(1) The Local Masters, Local Registrars, and Deputy Clerks of the Crown, Deputy Registrars and other officers mentioned in this Act, shall be appointed by the Lieutenant-Governor, and every such officer heretofore or hereafter appointed shall hold office during the pleasure of the Lieutenant-Governor. 58 V. c. 12, s. 153 (10). Appointment of officers.

(2) The power of appointing Local Masters hereby conferred shall be deemed to include and to have always included power to appoint more than one Local Master in a county or union of counties, and any such appointments heretofore made and all acts done by persons so appointed are confirmed, subject to any right of appeal which may exist on grounds other than those relating to the validity of any such appointment; but this sub-section shall not affect any suit or action in respect of which judgment has been delivered and in which the Local masters, appointment of more than one in any county.

Secs. 146-148.

validity of the appointment of a Local Master has been directly called in question or has been passed upon in the judgment of the Court.

See *Re Glen, Fleming v. Curry*, 27 Ont. App. 144, *supra*.

When
County
Judge may
act for local
master.

(3) In case of the illness or absence of a Local Master or upon his request in writing to be filed with the Local Registrar, the Judge, or Junior Judge or Deputy Judge (if any) of the county, after approval by the Lieutenant-Governor in Council, may act as such Local Master, and while so acting shall have all the powers and may perform all the duties of such Local Master unless the Lieutenant-Governor in Council shall otherwise direct. 62 V. (2), c. 11, s. 3.

Office
hours of
judicial
officers.

146. Subject to Rules of Court as to office hours during vacations and in Toronto on Saturdays, the offices of the Local Registrars, Deputy Clerks of the Crown, and those of the Supreme Court, Court of Appeal, and the High Court of Justice for Ontario at Osgoode Hall, shall be kept open from 10 o'clock in the forenoon until 4 o'clock in the afternoon, except upon legal holidays or other special days appointed by an Act of the Legislature. 60 V. c. 3, s. 3; c. 14, s. 89.

"Subject to Rules of Court": see *Rules 9 and 10*.

Officers
paid by
salaries
not to take
fees for
their own
use.

147.—(1) Where a Local Master, or Deputy Registrar, or Deputy Clerk of the Crown, or other officer, is paid by a salary, he shall not, save as hereinbefore expressly provided, take for his own benefit, directly or indirectly, any fee or emolument, save the salary to which he is entitled; but the like sums and fees heretofore payable on proceedings in his office shall continue to be payable; and all such fees shall form part of the Consolidated Revenue Fund of this Province, and shall be payable in stamps, subject to the provisions of *The Act respecting Law Stamps*. 58 V. c. 12, s. 153 (11).

Rev. Stat.
c. 25.

Local off-
icers may
take fees
if not paid
by salary.

(2) The Local Masters and Deputy Registrars not paid by salary and the commissioners for taking affidavits may retain to their own use all the fees of office which they respectively receive not payable to the Crown, or belonging to any fee fund, and need not account to the Crown for any portion of such fees. 58 V. c. 12, s. 180 (2).

Local Mas-
ters not to
practise in
certain
cases.

148. No Local Master whose gross income from his office of Local Master or of Deputy Registrar and Local Master, is \$2,000 or upwards, shall, during the continuance of his appointment, directly or indirectly, practise in the profession of

the law as Counsel, or Solicitor, or as a Notary Public, or Con-
veyancer, or do any manner of conveyancing, or prepare any
papers or documents to be used in any Court of this Province,
under the penalty of forfeiture of office and the further
penalty of \$400, to be recovered by any person who sues for
the same by action in the High Court, and one-half of such
pecuniary penalty shall belong to the party suing, and the
other half to [His] Majesty for the use of the Province; and
nothing in this section shall prevent the Lieutenant-Governor
in Council, or the High Court, from requiring a Local Master
whose income does not amount to \$2,000, to abstain from
practising under the like penalties. 58 V. c. 12, s. 153 (12).

149. The High Court may, with the concurrence of the
Lieutenant-Governor, relieve any person now holding the
office of Local Master and Deputy Registrar, or any other
officer, from the operation of sub-section 1 of section 143, and
section 148, or of either of them. 58 V. c. 12, s. 153 (13).

High Court
may except
officers
from ss. 143
(1) and 148.

150.—(1) The Lieutenant-Governor in Council may
direct that sums not in any case exceeding \$600 nor less than
\$100 yearly shall be paid out of such moneys as may be voted
by the Legislature for the purpose, as and for the salaries of
the Deputy Clerks of the Crown respectively.

Salaries of
Deputy
Clerks of
the Crown.

(2) The preceding provision fixing the maximum at \$600
shall not apply to any case where the Deputy Clerk does not
hold the office of Registrar of the Surrogate Court. 58 V. c.
12, s. 181.

151.—(1) Every officer paid by fees, whether commuted
or not, shall on or before the 15th day of January in every
year, transmit to the Inspector of Legal Offices appointed
under section 165 of this Act, a just, true and faithful
account, verified upon oath, of the amount of fees paid or
payable to him in cash or in stamps, in respect of his office
during the preceding year, and also such particulars with
reference to the business of his office as the Inspector of Legal
Offices may require.

Returns of
fees.

(2) The Lieutenant-Governor or the member of the Gov-
ernment having charge of the matter may require the return
to state any particulars, or to be made in any form that may
be thought proper, and such return shall be made accordingly.
58 V. c. 12, s. 153 (14, 15).

Form of
returns.

Secs. 152-156.

Seals of Deputy Registrars and Deputy Clerks of the Crown.

152. In the office of every Local Registrar, Deputy Registrar and Deputy Clerk of the Crown such seal shall be used as the Lieutenant-Governor shall from time to time direct, which seal shall be impressed on every writ and other document issued out of or filed in such office; and all such writs and documents, and all exemplifications and copies thereof, purporting to be sealed with the seal of any such Local Registrar, Deputy Registrar, or Deputy Clerk of the Crown, shall in all parts of this Province be received in evidence without further proof thereof. 58 V. c. 12, s. 154.

See Eng. J. A., 1873, c. 61.

Owing to doubts as to whether the effect of this section was to make an additional fee of 50 cents, payable under R. S. O. 1877, c. 39, s. 53 (now sec. 183, *infra*), upon all filings, *Rule 1225* (now 1180) was passed to make such fee not payable except where the former practice required a seal to be impressed.

Marshal and Clerk of Assize for County of York.

153. The Lieutenant-Governor in Council may from time to time appoint a suitable person to be the Marshal and Clerk of Assize for the County of York, who shall hold office during pleasure. 58 V. c. 12, s. 155.

Remuneration of Marshals of Assize.

154. Every Marshal and Clerk of Assize, being a Deputy Clerk of the Crown, Deputy Registrar, or Local Registrar, or authorized to act as such, shall be entitled to be paid out of the Consolidated Revenue Fund the sum of \$4 for each day's attendance as such Marshal or Clerk of Assize at non-jury as well as at jury sittings. 58 V. c. 12, s. 156; 59 V. c. 18, Sched. (29); 1 Ed. vii. c. 12, s. 6.

Not to receive fees in criminal cases.

155. No charge whatever shall be made by any of the said Marshals or Clerks of Assize upon any criminal trial or proceeding in any Court at which they act as Marshals and Clerks of Assize respectively. 58 V. c. 12, s. 157.

Where Deputy Clerk's office to be kept.

156—(1) Each Deputy Clerk of the Crown and Pleas shall, if proper accommodation is afforded him, keep his office in the Court House of his county, and until he can obtain such accommodation he shall keep his office in some convenient place in the County Town.

Proviso.

(2) Provided, however, that the Deputy Clerk of the Crown and Pleas at Sandwich may keep an office in some convenient place in the Town of Windsor, in the County of Essex, subject to such arrangements as the County Council of the County of Essex may assent to, and subject also to the

approval thereof by the Lieutenant-Governor in Council. 58 *Sec. 137.*
V. c. 12, s. 158.

157.—(1) There shall be an Official Guardian *ad litem* Official Guardian
ad litem. of infants, who shall be appointed by the Lieutenant-Governor, and shall be a Barrister-at-Law and Solicitor of this Province, of not less than seven years' standing, and shall hold office during pleasure. 58 V. c. 12, s. 159 (1).

(2) The Official Guardian, besides acting as a Guardian *ad litem* Duties of
Guardian. of infants under Rules of Court and other orders, shall perform such other duties as the President of the High Court may from time to time direct. 58 V. c. 12, s. 159 (2); 59 V. c. 18, Sched. (30).

(3) The same costs as hitherto shall be paid to the Guardian by any party; and the same costs as hitherto shall be payable to the Guardian out of funds in Court; but all costs so to be paid to the Guardian by any party shall be by such Guardian paid forthwith into Court with the privity of the Accountant of the Supreme Court, and shall be placed to the credit of an account to be entitled "Account of Official Guardian *ad litem*"; and all costs payable to the Guardian out of any funds in Court, shall be transferred to the credit of the same account. Costs of
Guardian.

The costs of the Official Guardian *ad litem*, are taxed as between party and party, and not as between solicitor and client; but the taxing officer is accustomed to tax them on a liberal scale, so as to remunerate the Guardian for all reasonable expenses incurred by him.

(4) Where the estate is small, and, in view of the amount Costs
where es-
tate is small. at the credit of the said account, the amount or part of the amount payable out of the estate for the Guardian's costs does not appear to be required to pay the salary and disbursements of the Official Guardian, the Court may withhold payment out of such estate of the sum or any part of the sum due for the Guardian's costs in respect of such estate; and may distribute the estate as if such costs were not payable by or out of the same.

(5) There shall be paid to the said Guardian in respect Salary of
Guardian. of all business done a fixed salary of such sum per annum as, in view of the amount of business done or to be done by the Guardian, and the sum at the credit of the account, the said Judges think reasonable and the Lieutenant-Governor in Council approves; which salary shall be over and above all

Sec. 167. necessary disbursements; and the salary and disbursements shall be paid monthly or otherwise as shall be determined by Rule of Court, out of the fund at the credit of the said account of Official Guardian *ad litem*, and not otherwise.

Transfer of surplus of Guardian's account.

(6) The surplus appearing from time to time at the credit of the said account beyond what may be required to pay the charges on the said account, shall be transferred to the "Suitors' Fee Fund Account."

See note to sec. 164.

Costs of solicitor employed by Official Guardian.

(7) Where the Official Guardian has occasion to employ a solicitor in another county for the purpose of any proceeding in an action, such solicitor shall be entitled to receive from the Official Guardian in respect of the proceeding the same costs as if the solicitor so employed were solicitor and Guardian of the infant.

Return of costs.

(8) The Official Guardian *ad litem* shall once every six months file in the Accountant's office an affidavit, showing all costs recovered by him as Official Guardian *ad litem*, during the six months preceding the making of the affidavit, giving therein the several amounts received by him and the name or names of the actions and matters in which the same were respectively received by him, together with the date of receipt.

Transfer on appointment of new Guardian.

(9) When a new Official Guardian *ad litem* is appointed, he shall, *ipso facto*, become, and be by virtue of such appointment, Guardian *ad litem* to all infants, in the place and stead of his predecessor, with the same duties and powers; and the latter (his executors and administrators, as the case may be) shall forthwith deliver over to the new Official Guardian all letters, papers, documents and books in his possession or power as Official or other Guardian *ad litem* of infants; and the new Guardian shall forthwith communicate his appointment to whomsoever it may concern.

Guardian not to practise if Lieutenant-Governor in Council or Court so orders.

(10) The Lieutenant-Governor in Council, or the High Court, may order that the Official Guardian is not to practise as a Barrister or Solicitor, and in such case he shall not, during the continuance of his appointment and of such order, directly or indirectly, practise the profession of the law as Counsel or Solicitor, or as a Notary Public or Conveyancer, or do any manner of conveyancing, or prepare any papers or documents to be used in any Court of this Province, except in the discharge of his duties as Official Guardian, or of any other duties which may be assigned to him by the said High

Court or any Division or Judge thereof, as the case may be; Secs. 156, 159. and the said Official Guardian, in case of his offending in the matter aforesaid, shall be subject to a penalty of forfeiture of office, and the further penalty of \$400, to be recovered by any person who sues for the same by action in the High Court; and one-half of such pecuniary penalty shall belong to the party suing, and the other half to [His] Majesty for the use of the Province. 58 V. c. 12, s. 159 (3-10).

158 The Accountant shall on or before the 15th day of January in every year, transmit to the Lieutenant-Governor in Council a just, true and faithful statement, showing the state of the "Account of Official Guardian *ad litem*," upon the 31st day of the preceeding December. 58 V. c. 12, s. 160. Annual statement of Official Guardian's accounts.

159.—(1) Subject to any Rules of Court made under the provisions of sections 122 to 129 of this Act, the present Accountant and his successors appointed under section 131 of this Act, shall be the Accountant of the Supreme Court of Judicature for Ontario and shall be so designated. Accountant of Supreme Court.

(2) For the purposes of holding the mortgages, stocks, funds, securities, and all estate therein, and any interest in real and personal estate, effects or property, and of all moneys and effects mentioned and described in sections 162 and 163 of *The Judicature Act*, 1895, or in any Rule or Order of Court, the said Accountant shall be a corporation sole by the name of "The Accountant of the Supreme Court of Judicature for Ontario," and the said Accountant, as such corporation sole, shall have perpetual succession and may sue and be sued, may plead and be impleaded in any of [His] Majesty's Courts in this Province. 58 V. c. 12, s. 161. To be a corporation sole. 58 V. c. 12.

All moneys and securities for money vested in or held by the said Accountant or by the Official Guardian *ad litem*, or either of them, or by any one appointed to discharge the duties of either of the said officers, shall be deemed to be vested in them in trust for [His] Majesty. All such moneys and the proceeds of such securities shall nevertheless be paid out in accordance with any statute or with any rule, judgment, decree, or order of Court, or Order-in-Council, or otherwise as heretofore, or as may be provided or directed by any such statute, rule, judgment, decree, or order, or Order-in-Council. 62 V. (2) c. 11, s. 4. Moneys, etc., vested in Accountant, Guardian, etc., to be deemed to be held in trust for Crown.

This clause is to be deemed and held to have been in force since the coming into force of the Revised Statutes of Ontario, 1897: see 62 V. (2) c. 11, s. 4.

Secs. 160. Moneys in Court are not liable to assessment for municipal taxation: *Re Accountant*, 35 C. L. J. 75.

When there is no Accountant securities to be vested in officer appointed by Court.

160. In case of there being at any time no Accountant of the Supreme Court, all mortgages, stocks, funds, annuities and securities whatsoever theretofore standing in the name of any Accountant, or in his custody or power in respect of his office, together with all the interest and estate of the said Accountant in the lands and premises embraced in such mortgages or other securities, shall become and be, by force of this Act, vested in such other officer as the Supreme Court, by general rule, may, from time to time, direct, subject to the same trusts as they may then respectively be subject to, 58 V. c. 12, s. 164.

Money under control of Court, how to be paid or invested.

161. All moneys that become subject to the control and distribution of the High Court or Court of Appeal shall be paid in the name of the Accountant of the Supreme Court (or if there is no Accountant, in the name of such other officer as the Court by general rule may have directed) into the hands of such person or body corporate, or shall be invested in the name of the Accountant (or, if there is no Accountant, in the name of such other officer) in the public funds of the Dominion of Canada or of this Province, or in such other securities as the Court may from time to time direct. 58 V. c. 12, s. 165.

For the purpose of investing the moneys in Court, arrangements have been made by the Court with the Toronto General Trusts Corp. These arrangements are embodied in the former J. A. Rule 721, Con. Rule 191, and Rule of 23rd March, 1895. Subject to the next section, moneys in Court can only be invested in the manner provided for in those Rules, and the Court will not on the application of suitors authorize the investment of moneys in Court in any other way: see *Re Smith's Trusts*, 18 Ont. 327; *Re Harrison*, 18 P. R. 303.

Investment of Court funds in municipal debentures.

161a. The Supreme Court of Judicature for Ontario may, if it shall see fit, authorize the investment of any of the funds standing in Court in the purchase of any debentures issued by any municipality in Ontario, except incorporated villages, and in case any such investment shall be so made the debentures so purchased shall not thereafter be questioned and shall be deemed to be valid to all intents and purposes. 62 V. (2) c. 11, s. 5.

This section was added to the Act by 62 V. (2) c. 11, s. 5, repealing 61 V. c. 13, s. 1.

Expenses of Accountant's office.

162. The expenses of the Accountant's office, including all salaries, shall be the first charge on the income arising from the funds in Court. 58 V. c. 12, s. 166.

See Imp. Stat. 32 Geo. III, c. 42.

163. The surplus income arising from the funds in the High Court after payment of the expenses of the Accountant's office, and of such interest on the moneys of suitors as from time to time by Rules of Court or otherwise is directed to be paid, shall be transferred to the "Suitors' Fee Fund Account." 58 V. c. 12, s. 167.

Secs. 163.
165.

Surplus to
be paid to
Suitors'
Fee Fund.

164. "The Suitors' Fee Fund Account" shall continue to be kept and managed as may from time to time be directed by the Court, and any Divisional Court or any Judge of the Supreme Court of Judicature for Ontario may apply the same as may be necessary for the protection of infants and other persons not *sui juris* or *non compos mentis*, on whose behalf proceedings may be had in the Court, or may, by the Court, be ordered to be had in other Courts, and may also, from time to time, order to be paid, out of the money at the credit of the said account, any sum required to make good a default arising in respect of suitors' money or securities from any mistake, act or omission of any official of the Court. Such payment is to be without prejudice to any personal liability of the official or his sureties in respect of the mistake, act or omission. 58 V. c. 12, s. 168.

Suitors' Fee
Fund.

Certain
losses may
be charged
on Suitors'
Fee Fund.

The "Suitors' Fee Fund Account," which is an account formerly kept by the Court of Chancery, was first created by 20 Vict. c. 50, s. 20 (Con. Stat. U. C. c. 12, s. 73; R. S. O. 1877, c. 40, s. 104). It was constituted by a fee of ten cents on every bill, answer, and demurrer filed; and it was provided that the account should "be kept and managed as may from time to time be directed by the Court; and the sums at the credit of such account shall be applied by the Court as may be necessary for the protection of infants and other persons not *sui juris*, on whose behalf proceedings may be had in the Court, or may by the Court be ordered to be had in other Courts." This section of the Revised Statute was repealed by 41 Vict. c. 8, s. 5, "so far as it directed payment of any fee to the account." There was then, and is still, a considerable sum at the credit of the account; and this sum, with the additions that may be made to it under sections 157 (6) and 163, will continue to be applicable to the same purposes and the others mentioned in this section.

165. The Lieutenant-Governor may from time to time appoint one of the officers of the High Court, or some other competent person, to be called "The Inspector of Legal Offices," to inspect the offices of the Sheriffs, Local Masters, Deputy Registrars, Deputy Clerks of the Crown, Local Registrars of the High Court, Registrars of the Surrogate Courts, Clerks of the Peace and County Crown Attorneys and Clerks of the County Courts, in the respective Counties of the Province, and such other officers connected with the administration of justice as the Lieutenant-Governor in Council may from time to time direct. 58 V. c. 12, s. 169.

Inspector
of Legal
Offices.

Secs. 166-168.

Duties of Inspector.

166. The following shall be the duties of the Inspector:

1. To make a personal inspection of the said offices and of the books and Court papers belonging thereto respectively;

2. To see that proper books are provided, that they are in good order and condition; that the proper entries and records are made therein in a proper manner, at proper times and in a proper form and order, and that the Court papers and documents are properly classified and preserved;

3. To ascertain that the duties of the officers are duly and efficiently performed;

4. To see that proper costs and charges only are allowed or exacted;

5. To ascertain that proper security has been given by any officer required by law to give security;

6. To ascertain whether uniformity of practice prevails in the several offices of the High Court and in the County and Surrogate Courts;

7. To report upon all matters to the Lieutenant-Governor. 58 V. c. 12, s. 170.

Inquiries by Inspector.

167. When the Inspector has occasion to institute an inquiry into the conduct of any officer in relation to his official duties or acts, it shall be lawful for the said Inspector to require such officer, or any other person or persons, to give evidence on oath; and for this purpose the Inspector shall have the same power to summon such officers and other persons to attend as witnesses, to enforce their attendance and to compel them to produce books and documents and to give evidence, as any Court has in civil cases. 58 V. c. 12, s. 171.

Books, etc., to be produced for inspection.

168. The said several officers shall, as often as required by the Inspector, produce for examination and inspection all books and documents which are required to be kept by them, or which may hereafter be required to be kept by them; and shall report to the Inspector all such matters relating to any cause or proceeding as the Inspector shall require. 58 V. c. 12, s. 172.

[As to authority of Inspector to direct law stamps to be affixed to proceedings not properly stamped, see cap. 25, sec. 14.]

169. The stenographic writers heretofore appointed, or who shall hereafter be appointed by the Lieutenant-Governor to report trials at sittings of the High Court or of a County Court, shall be officers of the Court to which they are appointed, and shall hold office during the pleasure of the Lieutenant-Governor, and shall perform such other duties as may be assigned to them by Rule of Court, or order of the Lieutenant-Governor in Council.

Secs. 169-172.

Steno-
graphic
writers.

170. Every such reporter shall take the following oath before one of the Judges of the Court to which he is appointed, and the same shall be filed:

Reporter's
oath.

I (A. B.) do solemnly and sincerely promise and swear that I will faithfully report the evidence and proceedings at the trial in each case in which it may be my duty to act as shorthand reporter. So help me God.

58 V. c. 12, s. 114.

171—(1) To provide a fund to enable a reduction to be made to litigants for copies of evidence taken in shorthand at trials or on references, a fee of \$2 shall be paid in every civil case in the High Court of Justice entered for trial.

Fee for
copies of
evidence for
trial.

(2) The fee provided for by the next preceding subsection shall be paid in law stamps and not in money, and shall be payable and be paid when the case is entered for trial.

(3) Any moneys now standing at the credit of the Shorthand Reporters' Fund shall forthwith, after this section comes into force, be paid over to the Provincial Treasurer.

(4) This section shall come into force on the 1st day of September, next. 5 Ed. vii. c. 13, s. 5.

This section was by 5 Ed. vii. c. 13, s. 5, substituted for the former section 171, and came into force on Sept. 1st, 1895.

For the duties of the Registrar under this section: see *Rule 511*.

172.—(1) The Supreme Court may, from time to time, under the seal of the Court, appoint, and at discretion remove, special examiners for the purpose of taking evidence of parties and witnesses, and the examiners so appointed shall have all the powers formerly possessed by Masters Extraordinary and Examiners. 58 V. c. 12, s. 115.

Appoint-
ment of
special ex-
aminers.

Secs. 173-175

Number limited.

Fees for examinations

Salaries of officers at Osgoode Hall not to be taken as examination fees for his own use.

Rev. Stat. c. 25.

Examination may be taken in presence of examiner.

Examination not to be solicited.

Fees of examiners.

(2) There shall be but four special examiners at or in the City of Toronto, besides the officer or clerk at Osgoode Hall mentioned in sub-section 4. 60 V. c. 14, s. 56 (1).

(3) The Lieutenant-Governor in Council may make regulations fixing the fees and charges of and payments to stenographers and others entitled to take examinations for taking examinations for discovery or cross-examinations in the High Court and County Court, and for copies of such examinations or cross-examinations. 58 V. c. 12, s. 131 (2); c. 13, s. 10 (2).

(4) No officer or clerk at Osgoode Hall who is in receipt of a salary as such officer or clerk from the Province shall act as a special examiner for fee or reward; but the fees payable in respect of such examination or for copies or certificates thereof or connected therewith shall be payable in stamps, subject to the provisions of *The Act respecting Law Stamps*, and not otherwise, and no such officer or clerk whose salary is paid as aforesaid shall hereafter be eligible for appointment as a special examiner. In the event of a vacancy occurring in the said office of examiner there shall thereafter be but three special examiners in the said city besides such officer or clerk. 60 V. c. 14, s. 56 (2).

173. When an examination is taken by a stenographer or other person who is not an examiner, it shall be taken in all cases in the presence of the examiner. 60 V. c. 14, s. 60.

174. No special examiner shall solicit or make request from any suitor, solicitor, or other person, or offer inducements to have special examinations taken before him, nor shall any one do so on his behalf with his knowledge or assent, on pain of forfeiture of office. 60 V. c. 14, s. 57.

175. The Lieutenant-Governor in Council shall fix a schedule of fees to be charged and taken by special examiners, and may make rules and regulations in respect thereof; and no other fees or charges than those fixed by the said schedule shall be charged or taken. 60 V. c. 14, s. 58.

By Order in Council, 12th February, 1899, and 16th March, 1899, the Schedule of Fees fixed, is as follows:

The charge for taking depositions per hour in the High Court shall be \$1 per hour.

The charge for each copy ordered by each party to the suit represented by different solicitors shall be seven cents per folio—but in any case the first copy is to include the copy for the Court—and four cents per folio for each copy after the first; where no copy is ordered by either party, but a copy is required to be filed in Court or for the Judges, the charge shall be seven cents per folio, where one copy only is required to be made. In case more than one copy is required for the Court or the Judges, a charge of four cents per folio for each additional copy may be made. **Secs. 176-179.**

The charge for marking every exhibit in the High Court shall be 10 cents.

The charge for every attendance out of office, when within two miles, shall be \$1.50.

The charge for marking exhibits in the County Court shall be reduced from 20 cents to 5 cents for every exhibit, and that the other charges stand as in the present tariff.

A special Order-in-Council dated 22nd June, 1898, regulates the shorthand writer's fees in the District of Rainy River.

176. Where it appears to the Lieutenant-Governor in Council that the Local Registrar or Deputy Clerk of the Crown or Clerk of the County Court elsewhere than in Toronto, is infirm or ill, or is absent on leave, or is otherwise unable or unfit to act personally as special examiner, the Lieutenant-Governor in Council may appoint the shorthand writer for the County Court, or some other efficient person temporarily or otherwise to act as such special examiner, instead of the said Local Registrar, Deputy Clerk of the Crown, or Clerk of the County Court. 60 V. c. 14, s. 59. **Appoint-
ment of
special
examiners
pro tem.**

177. Any officer of the Supreme Court, the Court of Appeal or the High Court shall, for the purposes of any proceedings directed by the Court to be taken before him, have full power to administer oaths, to take affidavits, to receive affirmations and to examine parties and witnesses as the Court may direct. 58 V. c. 12, s. 176; 60 V. c. 15, Sched. A. (67). **Adminis-
tration of
oaths.**

178. Sheriffs, Deputy Sheriffs, Gaolers, Constables and other peace officers, shall aid, assist and obey the Court and the Judges thereof respectively in the exercise of the jurisdiction conferred by this Act, and otherwise, whenever by any general or other order of the Court or by order of a Judge thereof, required so to do. 58 V. c. 12, s. 177. **Sheriffs,
Gaolers,
etc., to be
officers of
the Court.**

179. All gaols in Ontario shall be prisons of the High Court. 58 V. c. 12, s. 178. **Gaols to be
prisons of
the Court.**

Secs. 180-183.

Salaries,
etc.

180.—(1) There shall be paid out of the Consolidated Revenue Fund of this Province as and for the salaries of officers of the said Courts, who are not paid by fees or otherwise, such sums as the Legislature may from time to time appropriate for such purpose.

(2) The salaries of all officers of the Court which are payable out of the Consolidated Revenue Fund shall be paid monthly, but the payment to be made in each case on the first day of payment which happens after the right thereto accrues, shall be a rateable proportion of a month's salary, according to the time then elapsed since the accrual of the right; and in case of a vacancy, the person who vacates the office, his executors or administrators, shall be entitled to a proportional part of his salary according to the time elapsed between the vacancy and the last payment. 58 V. c. 12, s. 179.

Certain
officers not
to take fees
for their
own use.

181. Unless specially authorized, neither the Master in Ordinary, the Clerk of the Crown and Pleas, the Master in Chambers, the Registrars, nor any of their deputies, nor the Process Clerk, nor the Clerk in Chambers, nor the Accountant, nor any of their clerks, shall take for his own benefit, directly or indirectly, any fee or emolument, save the salary to which he may be entitled by law; but the like sums and fees heretofore payable on proceedings in the offices of the said officers shall continue to be payable; and all such fees shall form part of the Consolidated Revenue Fund of the Province, and shall be payable in stamps, subject to the provisions of *The Act respecting Law Stamps*. 58 V. c. 12, s. 180 (1); 59 V. c. 18, Sched. (31).

Rev. Stat.
c. 25.

This section does not preclude an officer from claiming compensation from the Crown for any special and extraordinary services he may be called on by the government to perform, which could not have been legitimately expected or intended when he accepted office; see *The Queen v. Bradley*, 27 S. C. R. 657.

Fees on
writs and
process.

Rev. Stat.
c. 25.

182. The fees payable on all writs and process issued out of the Central Office at Toronto shall be payable in stamps, subject to the provisions of *The Act respecting Law Stamps*. 58 V. c. 12, s. 182, part; 59 V. c. 18, Sched. (32).

Fees on
certain
proceedings
in High
Court.

Rev. Stat.
c. 25.

183. In addition to all fees, otherwise authorized to be levied on proceedings in the High Court, the following fees shall be payable to the Crown in stamps, subject to the provisions of *The Act respecting Law Stamps*.

On every writ of summons, capias or subpoena, and on every other writ or other document of what nature and description soever, having the seal of the Court affixed thereto	\$0 50	Secs. 184, 185.
On every judgment entered	0 60	
On every certificate of action instituted, judgment or decretal order made	0 50	
On the setting down on the paper for argument of every special case, points reserved, special verdict or appeal case	0 30	
On every rule or order of Court issued	0 20	
On taxation of every bill of costs	0 20	

58 V. c. 12, s. 183; 3 Ed. vii. c. 8, s. 9.

The fees payable under this section have been included in the Tariff established by *Rule 1179*.

184. In addition to all fees otherwise authorized to be levied on proceedings in cases brought to the Court of Appeal from the High Court, the following fees shall be payable to the Crown in stamps, subject to the provisions of *The Act respecting Law Stamps*.

Fees on certain proceedings in Court of Appeal.
Rev. Stat. c. 25.

On every appeal entered	\$4 00
On every judgment, decree or order of the Court passed and entered	2 00

58 V. c. 12, s. 184.

The fees payable under this section have been included in the Tariff established by *Rule 1179*.

LOCAL JUDGES OF THE HIGH COURT.

185. Except in the County of York, the Judges of the several County Courts shall be Judges of the High Court for the purposes of their jurisdiction in actions in the High Court; and in the exercise of such jurisdiction may be styled "Local Judges of the High Court," and shall, in all causes and actions in the High Court, have, subject to the Rules of Court, power and authority to do and perform all such acts, and transact all such business in respect to matters and causes in and before the High Court as they are by Statute or Rules of Court in that behalf from time to time empowered to do and perform. 58 V. c. 12, s. 185 (1).

County Court Judges to be local Judges of High Court.

Compare Eng. (1883) R. 35.

See notes to *Rules 45-47*.

Notwithstanding anything in R. S. O. 1897, c. 109, s. 7, and this section 185, Judges of District Courts who are Local Judges of the High Court have no jurisdiction to deal with applications under *The Vendors and Purchasers Act*, R. S. O. 1897, c. 134, or under *The Land Titles Act*, c. 138; *Re Mitchell & The Pioneer Steam Navigation Co.*, 31 Ont. 542.

Sec. 186.

TRANSFERRING CAUSES FROM COUNTY OR DIVISION COURTS TO
HIGH COURT.

Transfer to
High Court
from
County and
Division
Courts.

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

Adopted from Eng. J. A. 1873, s. 90.

In the Ont. J. A. 1831, this section was preceded by a clause which, as subsequently amended, is now, in the Revised Statutes, transferred to the County and Division Courts Acts as c. 55, ss. 28 and 29, and c. 60, ss. 75 and 76; see *infra*.

Where a transfer is made under s. 186 the proceedings must thenceforward be regulated by the practice of the High Court: *Davies v. Williams*, 13 Ch. D. 550; and all applications must be made in that Court: see *Duke v. Davis*, 1893, 2 Q. B. 107, 260; 69 L. T. 342.

But actions transferred from a County Court are not for all purposes on the same footing as actions commenced in the High Court, and no appeal will lie in any such action to the Supreme Court: *Tucker v. Young*, 30 S. C. R. 185. Apart altogether from this section the Crown has a prerogative right to have causes in which it is concerned in inferior Courts removed to the High Court, even after judgment: see *Stanley v. Wild*, 1900, 1 Q. B. 256; but such prerogative right cannot be claimed on the part of a relator in the case of an information: *Attorney-General v. Wilson*, 83 L. T. 646; 1900, W. N. 263.

County Courts.—Section 28 of *The County Courts Act* (R. S. O. c. 55), is as follows:—

Relief which
may be
granted by
County
Courts.

28. Every County Court shall have legal and equitable jurisdiction, and shall, as regards all causes of action within its jurisdiction for the time being, have power to grant, and shall grant, in any [action or] proceeding in such Court such relief, redress or remedy, or combination of remedies, either absolute or conditional [including the power to grant vesting orders, and to relieve against penalties and forfeitures], and shall in every such action or proceeding give such and the like effect to every ground of defence or counter-claim, equitable or legal (subject to the provision next hereinafter contained) by and upon the same mode of procedure, and in as full and ample a manner as might and ought to be done in the like case by the High Court. 59 V. c. 19, s. 6; 60 V. c. 15, Sched. A (72).

Adopted from Eng. J. A. 1873, s. 89, which, however, had not the words in brackets. **Sec. 186.**

Under the corresponding section of the English Act, it was held that a County Court, in actions within its jurisdiction, has power to grant an injunction against a nuisance, and to enforce obedience by committal: *Martin v. Bannister*, 4 Q. B. D. 212, 491, and though the order is only interlocutory: *Richards v. Cullerne*, 7 Q. B. D. 623; 18 C. L. J. 364.

The operation of the above section 28, in conjunction with *Rule 1216* (by which the *Rules* and the practice and procedure of the High Court are to apply and extend to actions in the County Courts) has had the effect of overruling *Pryor v. City Offices*, 10 Q. B. D. 504, and conferring on the County Court and its Judges, in actions and proceedings within its jurisdiction, the same powers of granting relief and remedy as the High Court and its Judges have in High Court actions, and by the same procedure: *Bradley v. Barber*, 30 Ont. 443.

Section 29 of *The County Courts Act* (R. S. O. c. 57), is as follows:—

29. Where in a proceeding before a County Court any defence or counter-claim of the defendant involves matter beyond the jurisdiction of the Court, such defence or counter-claim shall not affect the competence or the duty of the Court to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff and the defence thereto, but no relief exceeding that which the Court has jurisdiction to administer shall be given to the defendant upon such counter-claim. R. S. O. 1887, c. 47, s. 22.

This was adopted from Eng. J. A. 1873, s. 90.

It has been held, under that section, that an inferior Court has jurisdiction to entertain a claim set up by way of counter-claim, although in respect of matters which arose beyond its local jurisdiction, but the power to grant relief in respect of such counter-claim is limited to the same amount as the plaintiff has claimed in the action: *Davis v. The Flagstaff Mining Co.*, 3 C. P. D. 228; see also *Ward v. Wyld*, 5 Ch. D. 779; *Wallace v. People's Life Ins. Co.*, 30 Ont. 438. The relief which a defendant can obtain against a third party brought in under *Rules 209, et seq.*, is similarly limited to protection against the plaintiff's demand: *Neuld v. Corkindale*, 4 Ont. 317.

A defendant who has succeeded on a counter-claim for an amount beyond the jurisdiction of the County Court is not estopped from bringing an action in the High Court on the same cause of action to recover what the County Court could not give him. The defendant in the High Court is estopped by the judgment in the County Court from denying the cause of action of the plaintiff in the High Court. The only question in the High Court is the amount of damages: *Webster v. Armstrong*, 54 L. J. Q. B. 236; 1 Cab. & E. 471.

Division Courts.—Sections 75 and 76 of *The Division Courts Act* (R. S. O. c. 60), are as follows:—

75. (1) Every Division Court shall as regards all causes of action within its jurisdiction for the time being, have power to grant and shall grant in any proceedings before such Court such relief, redress, or remedy, or combination of remedies, either abso-

Sec. 186.

lute or conditional [including the power to relieve against penalties and forfeitures], and shall in every such proceeding have such and the like effect to every ground of defence or counter-claim, equitable or legal (subject to the provision next hereinafter contained), in as full and ample a manner as might and ought to be done in the like case by the High Court. R. S. O. 1887, c. 51, s. 73; 61 V. c. 3, s. 3; c. 15, Sched. A (64).

(2) Nothing in this section shall confer or be deemed to have conferred on a Division Court jurisdiction to grant injunctions in cases otherwise within the competency of the Court; 61 V. c. 15, s. 1.

Adopted from Eng. Jud. Act, 1873, s. 89, except the words in brackets.

Duty of Court where defence or counter-claim involves matters beyond jurisdiction.

76. Where in any proceeding before a Division Court any defence or counter-claim of the defendant involves matter beyond the jurisdiction of the Court, such defence or counter-claim shall not affect the competence or the duty of the Court to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff and the defence thereto, but no relief exceeding that which the Court has jurisdiction to administer shall be given to the defendant upon any such counter-claim. R. S. O. 1887, c. 51, s. 74. [See also *cap. 51, sec. 186.*]

Adopted from the Eng. Jud. Act, 1873, s. 90.

As regards the Division Courts there has been some conflict of authority, but it may perhaps be fairly said to be now settled that these sections only enable Division Courts to exercise, so far as that can be done in pronouncing the judgment in the action, the legal and equitable jurisdiction conferred upon the High Court (see also sec. 59, and R. S. O. c. 55, s. 58), and do not purport to deal with details of practice, or apply to the Division Courts the Rules of Procedure made under the Jud. Act. See *Building & Loan Co. v. Heimrod*, 19 C. L. J. 254; 3 C. L. T. 361, and *Bank of Ottawa v. McLaughlin*, 8 Ont. App. 543, where Rule 797 (now 779), as to the effect of a non-suit, and *Fletcher v. Noble*, 9 P. R. 258, where the right to security for costs, were held not to fall within the purview of section 75. See also *Pryor v. City Offices Co.*, *supra*; *Speers v. Daggers*, 1 Can. & E. 503; and *Foster v. Reeves*, 1892, 2 Q. B. 255. On the other hand in *Connors v. Birmingham*, 20 C. L. J. 10, Rule 80 (now 603), was, by virtue of section 75, applied: (see now R. S. O. c. 60, s. 116). In *Auchberry v. McLean*, 19 C. L. J. 335, the right to counter-claim, which seems implied by the terms of the above sec. 76, was held to exist.

Where an equitable doctrine requires the special machinery of the High Court in order to work it out, it would, therefore, seem that the doctrine cannot be applied in the Division Courts.

By 61 V. c. 15, s. 1, it has been expressly enacted that the above sec. 75 (1) of *The Division Courts Act*, "shall not confer or be deemed to have conferred on a Division Court jurisdiction to grant injunctions in cases otherwise within the competency of the Court."

The provisions of the Judicature Act relating to garnishee process do not apply in Division Courts, the proceedings in such cases being specially provided for by *The Division Courts Act* (R. S. O. c. 60), ss. 179-205; *Re Clark v. McDonald*, 4 Ont. 310; nor the *Rules* as to service of partnership firms, *ib.*: see R. S. O. c. 60, s. 110.

The practice under *Rule 778*, as to moving to set aside a verdict **Sec. 187.** or judgment obtained by default of appearance by a party at the trial, is not applicable in Division Courts, being inconsistent with sec. 152 of *The Division Courts Act: Re Foley v. Moran*, 11 P. R. 316.

There has also been some difference of opinion as to how far the practice of the High Court may or should be introduced into Division Courts under sec. 312 of *The Division Courts Act* (R. S. O. s. 60).

That section is as follows:—

312. In any case not expressly provided for by this Act, or by existing Rules, or by Rules made under this Act, the County Judges may, in their discretion, adopt and apply the general principles of practice in the High Court, to actions and proceedings in the Division Courts; provided that nothing herein contained shall be held to authorize the taxation or allowance of costs to any officer of the Court other than those to be found in the tariff of fees as authorized and allowed by the Board of County Judges under the provisions of this or any other Act. R. S. O. 1887, c. 51, s. 304.

Under this section the right to security for costs has been held to be a principle of practice which may be applied by the Division Court Judges: *Fletcher v. Noble*, 9 P. R. 255, with all its consequences: *ib.*, 3 C. L. T. 360.

The power of adding defendants (see *Rule 206*) is not a principle of practice within the section: *Barber v. Bingham*, 20 C. L. J. 65; nor is service out of the jurisdiction a principle of practice, but a branch of a system of practice or a means of relief which the procedure in Division Courts does not admit of being applied: *Re Guy v. G. T. Ry. Co.*, 10 P. R. 372.

Quære, whether the third party Rules (209, *et seq.*), are applicable: *Re Merchants Bank v. Van Allen*, 10 P. R. 348.

The power to apply the High Court practice of examining parties before trials has been affirmed: *MacNee v. Ont. Bank*, 19 C. L. J. 252; 3 C. L. T. 360; and denied: *Re Willing v. Elliott*, 37 U. C. Q. B. 320; *Fletcher v. Noble*, 9 P. R. 258.

MacNee v. Ont. Bank (*supra*), is also in favour of the power to apply the Rules under the Jud. Act generally. See also *Murray v. Gillett*, 18 C. L. J. 78. The decision in *Building & Loan Co. v. Heinrod*, 19 C. L. J. 254; 3 C. L. T. 361, is the other way, and in that case the discretion, if it existed, to apply *Rule 779* was not exercised.

The provisions of *Rule 603* have been made applicable to Division Courts: see R. S. O. c. 60, s. 116.

MISCELLANEOUS.

187.—(1) Every Order in Council determining the commutation allowance or the salary of any Judge, Official Guardian or other officer under the authority of this Act, shall be laid before the House of Assembly forthwith, if the Legislature is in session at the date of the order, and if the Legislature is not then in session, the order shall be laid before the said House within the first seven days of the session next after the Order in Council is made.

Order in Council as to allowances and salaries subject to ratification by Legislative Assembly.

**Secs. 188,
189.**

Disap-
proval of
order by
Assembly.

(2) In case the Assembly at the said session, or if the session does not continue for three weeks after the said order is laid before the House, then at the ensuing session of the Legislature, disapproves by resolution of such Order in Council, either wholly, or so far as relates to any of the persons therein named, the Order in Council, so far as so disapproved of, shall have no effect from the time of such resolution being passed. 58 V. c. 12, s. 187.

Saving as
to Commis-
sions of
Assize, &c.

188. This Act shall not affect the issue of any Commissions of Assize, Nisi Prius, Oyer and Terminer, Gaol Delivery, or other Commission for the discharge of civil or criminal business on circuit or otherwise or the authority of a Judge or a retired Judge of any of the Superior Courts, or a Judge of a County Court, or one of [His] Majesty's Counsel learned in the law, to preside without any Commission at any Court of Assize, Oyer and Terminer, and General Gaol Delivery, or at a Court held under this Act in the exercise of the jurisdiction now belonging to the Courts of Assize, Oyer and Terminer, and General Gaol Delivery, or the authority of any Judge or retired Judge of a Superior or County Court, or Counsel learned in the law, to hold any sitting for the hearing of causes; and any such Judge or Counsel shall after the commencement of this Act have the same authority to preside as aforesaid, or to hold any sitting of the High Court for the hearing of causes in the High Court, which such Judge or Counsel has to preside at Court of Assize, Oyer and Terminer, and General Gaol Delivery, and any such Judge or Counsel when presiding as aforesaid, with or without a Commission, or when holding any sitting as aforesaid, shall be deemed to constitute a Court. 58 V. c. 12, s. 188.

See Eng. J. A. 1873, s. 93.

See R. S. O. (1877) c. 40, s. 27; c. 41, s. 6.

All books
in which
writs, judg-
ments, &c.,
are entered
to be open
to in-
spection.

189. Every person shall have access to and be entitled to inspect the several books of the High Court and of the County Courts, containing records or entries of the writs issued, judgments entered, and chattel mortgages and bills of sale filed; and no person desiring such access or inspection shall be required, as a condition to his right thereto, to furnish the names of the parties or the style of the causes or matters in respect of which such access or inspection is sought; and the Clerk of the Crown and Pleas, Registrars, Deputy Clerks of the Crown, Deputy and Local Registrars of the High Court

and all Clerks of the County Courts of the Province respectively, shall, upon demand or request, produce for inspection any writ of summons or copy thereof, and any judgment roll or chattel mortgage, or bill of sale so issued, entered or filed in their respective offices, or of which records or entries are, by law, required to be kept in such several books of the High Court and County Courts respectively. 58 V. c. 12, s. 189; 59 V. c. 18, Sched. (33). Secs. 190, 191.

190. The fees payable in respect of such inspection of books shall be twenty-five cents as for a general search, and ten cents for each writ of summons, judgment roll, chattel mortgage or bill of sale so inspected, and ten cents per folio shall also be payable for all extracts, whether made by the person who makes the search or by the officer. 58 V. c. 12, s. 190. Fees on inspection

191. Nothing in this Act shall affect the practice or procedure in criminal matters, or matters connected with Dominion controverted elections (a). 58 V. c. 12, s. 191; 59 V. c. 18, Sched. (35). This Act not to apply to criminal matters or Dominion elections.

See Eng. J. A. 1875, ss. 19, 21; Rules S. C. 1875, O. 62.

As to what are criminal proceedings: see *Scaman v. Burley*, 75 L. T. 311; *Southport v. Birkdale*, 76 L. T. 318; *O'Shea v. O'Shea*, 15 P. D. 59; *Ellis v. The Queen*, 22 S. C. R. 7; *Rex v. Bennett*, 4 O. L. R. 207.

In *Reg. v. Cushing*, 26 Ont. App. at p. 250, Osler, J.A., said: "The jurisdiction of the High Court to review convictions made under Provincial Acts, when brought before it on *certiorari*, to the same extent and in the same manner as summary convictions under a Dominion Act, seems not to be interfered with; see Judicature Act, sec. 25. The practice in that respect followed in the High Court as to both classes of convictions is the same: see *supra*, s. 67 (1) (c), and Rules 1238 and 1239.

The High Court is a continuation of the former Courts, and has the same jurisdiction in Dominion Controverted Election matters as the former Courts of Law and Equity had under the Dominion Controverted Elections Act of 1874: *Mitchell v. Cameron*, 8 S. C. R. 126, reversing S. C. 1 Ont. 433. See also *Re V. York*, 32 C. P. 458, and *Re Russell*, 1 Ont. 439, and note to sec. 3 (4).

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THE CONSOLIDATED RULES OF PRACTICE

OF THE

SUPREME COURT OF JUDICATURE FOR ONTARIO.

CHAPTER I.

INTERPRETATION, ETC.

1. These Rules shall take effect on the 1st day of September, 1897.

Date of
coming
into force
of Rules.

The expression "Rules of Court," when used in relation to any Court, mean Rules made by the authority having for the time being power to make Rules or Orders regulating the practice and procedure of such Court: R. S. O. c. 1, s. 8 (36); and the power of the said authority to make Rules of Court, as above defined, includes a power to make Rules of Court for the purpose of any Act directing or authorizing anything to be done by Rules of Court: *Ib.*, s. 8 (37).

These Rules were consolidated by a Commission appointed by the Lieutenant-Governor in Council under the authority of 58 Vict. c. 13, s. 42. By 59 Vict. c. 18, s. 15, the Commissioners were empowered to incorporate in such revision and consolidation any statutory provisions relating to practice and procedure, with such amendments, additions to such Rules of Practice and statutory provisions as they might seem expedient; and it was enacted by that session of the Legislature (see 129 of the Ind. Act: see *supra*, p. 172), that the Rules so prepared, on being approved by the Judges of the Supreme Court or the Lieutenant-Governor in Council, should have the force of an Act of the Legislature, and that nothing in the Rules should be open to any question as to jurisdiction to make, approve and authorize the same under the said 58 Vict. c. 13, s. 42, or otherwise, but the same are subject to be varied or repealed from time to time by the same authority and in the same manner as other Rules of Court.

Rules 2-6. It, therefore, does not appear to be possible to question the validity of any of these *Rules* on the ground that the Commissioners have exceeded their authority, as was done in *Williams v. Goose*, 1897, 1 Q. B. 471.

Former
practice
superseded.

2. All Rules and Orders heretofore passed are rescinded, save and except those mentioned in the Schedule hereto. All practice inconsistent with these Rules is superseded. Con. Rule 3, *part*.

Matters
unprovided
for.

3. As to all matters not provided for in these Rules, the practice, as far [as] may be, shall be regulated by analogy thereto. Con. Rule 3, *part*.

For cases in which this *Rule* has been applied: see *Wolff v. Ogilvy*, 12 P. R. 645; *Flett v. Way*, 14 P. R. at p. 315; *Ladies' Tailoring Ass'n v. Clarkson*, 27 C. L. J. 501; *Morse v. Lamb*, 15 P. R. 9, in note to Rule 263; *Smith v. Houston*, 15 P. R. 18, in note to Rule 337; *Re Murray*, 13 P. R. 367, in note to Rule 1005.

See also Jud. Act, sec. 128, and notes, *supra*, p. 171-2.

The word in brackets is not in the official edition of the *Rules*.

Criminal
matters not
affected.

4. Nothing in these Rules shall be construed as intended to affect the practice or procedure in criminal matters (*a*). Con. Rule 1.

See Eng. Jud. Act, 1890, a. 4; and R. S. O. c. 51, s. 191, and notes, *supra*, p. 197.

The former *Rule* had at (*a*) the words "or proceedings on the Crown or Revenue side of the Queen's Bench or Common Pleas Divisions." Such proceedings are now to be conducted in the same manner as proceedings in ordinary actions, subject to *Rules* 238 and 241.

A proceeding before Justices to recover a penalty against a municipal body for not supplying gas up to the proper standard was held to be a criminal proceeding: *Southport v. Birkdale*, 76 L. T. 318; and see other cases cited in note to s. 191, *supra*, p. 197.

Interpreta-
tion.

5. The provisions of *The Interpretation Act* and the interpretation clauses of *The Judicature Act, 1895*, shall apply to these Rules unless there is anything in the subject or context repugnant thereto. Con. Rule 4 *amended*.

See R. S. O. c. 1, s. 8; and Jud. Act, R. S. O. c. 51, s. 2.

Interpreta-
tion.

6. In these Rules unless there is something in the context indicating a different meaning.

"Judge."

(*a*) "Judge" shall mean a Judge of the Supreme Court, or a Judge [or officer] having the authority for the time being of a Judge of the High Court.

The words in brackets are new.

The definition of "Judge" in this *Rule* gives jurisdiction to the *Rules* 7, 8. Master in Chambers, or Local Judge or Master, under *Rules* 42, 45 and 49 (subject to the express limitation of their authority), to entertain applications which under these *Rules* are to be made to "the Court or a Judge," but not those which are required to be made to a "Judge of the High Court."

The interpretation clause in the Act, viz., sec. 2, applies to the *Rules*; see *Rule* 5.

For the reason for employing the expression "Court or a Judge" throughout the English *Rules*: see *Freason v. Loe*, 26 W. R. 138.

(b) "County Court" shall include District Court. ^{"County Court."}
Rules 23 June, 1894, 1281. Con. *Rule* 2.

(c) "Accountant" shall mean "The Accountant of the ^{"Accountant."} Supreme Court of Judicature for Ontario." Con. *Rule* 140.

(d) "Official Guardian" shall mean "The Official Guar- ^{"Official Guardian."} dian *ad litem*."

(e) "Action" as defined by section 2 of *The Judicature Act, 1895*, shall include garnishee proceedings under *Rules* 911 to 921 and proceedings for relief by interpleader under *Rules* 1102 to 1128. *New.* ^{"Action."}

The definition of "action" had previously been held not to include such proceedings: see *Hogaboom v. Gillies*, 16 P. R. 402, following *Hamlyn v. Betteley*, 6 Q. B. D. 63; *Coulson v. Speers*, 9 P. R. 491.

7. The division of these *Rules* into chapters, titles and headings, and the addition of marginal notes, is for convenience only, and shall not affect their construction. Con. ^{Division of Rules and marginal notes.}
Rule 5.

But for this *Rule* the construction of the *Rules* would be controlled by the title and headings: see *Inglis v. Robertson*, 1898, A. C. 616; 79 L. T. 224.

8. Every *Rule* hereafter made shall be construed as intended to come into force on the seventh day after the day of its publication in the *Ontario Gazette*, unless such prior publication is expressly dispensed with in or by the *Rule*. Con. ^{Promulgation of Rules.}
Rule 6.

Rules 9, 10

CHAPTER II.

OFFICERS AND OFFICES.

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| 1. OFFICE HOURS, ETC., 9-10. | 9. MASTER IN CHAMBERS, 42-44. |
| 2. BUSINESS IN OFFICES, 11-15. | 10. LOCAL JUDGES, 45-48. |
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| 4. CLERK OF THE PROCESS, 24. | 12. ACCOUNTANT'S OFFICE, 50-52. |
| 5. REGISTRARS' OFFICE, 25-31. | 13. TAXING OFFICERS, 83-86. |
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1. OFFICE HOURS.

Office hours to be observed in the offices of the Courts.

9. Except during Vacations and on holidays, the offices of the Supreme Court of Judicature, of the Court of Appeal, and of the High Court of Justice for Ontario, shall be kept open from 10 a.m. to 4 p.m., and in Toronto and Ottawa on Saturdays from 10 a.m. to 1 p.m. Con. Rule 7, amended. See 60 V. c. 14, s. 89. [As amended by Rule 1226 of 8th Oct., 1898.]

See also Jud. Act, sec. 146.

This Rule is merely directory, and for the guidance of the officials only. It does not forbid them to keep their offices open to a later hour than those mentioned if they think fit, or the business of the office requires it: *Muir v. McNeil, Re N. Bruce Election*, 27 C. L. J. 538; 11 C. L. T. 265. The hours will be according to standard time: R. S. O. c. 144, s. 1; see also *Lloyd v. Ward*, 13 P. R. 238.

A special examiner, though an official of the Court, has no office in connection with the Court which is required to be kept open or closed under this or any other Rule: *Hogaboom v. Cox*, 15 P. R. 23, 127; see also Rule 439 (3).

As to the office of the Taxing Officers: see *Cousineau v. City of London F. I. Co.*, 13 P. R. 36; and as to the office of Official Referees: see *Marples v. Roschbrugh*, 17 P. R. 104.

Office hours during vacation.

10. The offices of the Supreme Court, of the High Court of Justice and of the Court of Appeal, shall be kept open during the Long Vacation, and the Christmas Vacation, from 10 o'clock in the forenoon until 12 o'clock noon. Con. Rule 8. See 60 V. c. 14, s. 89.

During vacation the Registrars' offices are open only for the transaction of matters of an urgent nature, such as issuing injunction orders, but not as a general rule for the transaction of business requiring the attendance of the opposite party, such as the settlement of the minutes of orders or judgments not of an urgent nature: *Miller v. Spencer*, 13 P. R. 478; and see former Chy. O. 425.

Rules
11-13.

2. BUSINESS IN OFFICES.

11. Except as provided in Rules 991 to 1014, no business shall be transacted in any of the offices of the Courts, either in procuring or issuing process, or in entering judgments or taking any proceeding whatever in a cause, unless upon the personal attendance of the party on whose behalf such business is required to be transacted, or of the counsel or solicitor of such party, or the clerk or agent of the solicitor, or the clerk of the agent. Con. Rule 9.

Putting an appearance under the door of the office of a Deputy Clerk of the Crown during office hours, or handing it to him in the street, was held not to be a due entry of the appearance: *Gray v. Stacey*, 10 U. C. L. J. 245; and see *Frolick v. Huffman*, 1 C. L. Ch. 80; *Campbell v. Modden*, Dra. 2.

But the Court refused to set aside a *fi. fa.* issued at the officer's house before office hours: *Rolker v. Fuller*, 10 U. C. Q. B. 447; and see *Hall v. Hunter*, 5 O. S. 705; and an election petition, filed after office hours on the last day for filing, was held to be well filed: *Muir v. McNeill*, 27 C. L. J. 538.

Where a defendant's solicitor is present at the opening of the office to enter an appearance, or file a statement of defence, and the plaintiff's solicitor is present to sign judgment for default, the defendant's solicitor is entitled to precedence: see *Fralick v. Huffman*, 1 C. L. Ch. 80; and where the plaintiff's solicitor had begun to enter judgment for non-appearance, and before it was completed, the defendant's solicitor arrived to enter an appearance, it was held that the officer should stay the entry of judgment in order to admit the entry of the appearance: *Smith v. Logan*, 17 P. R. 219.

The offices of the Court should not be opened for business, on days on which they are appointed by statute, or Rule of Court, to be closed, and proceedings taken therein on such days are irregular: *Trust and Loan Co. v. Dickson*, 2 C. L. J. 166; *Mumford v. Hitchcock*, 9 Jur. N. S. 1200.

12. All officers shall be auxiliary to one another for promoting the correct, convenient, and speedy administration of business. Con. Rule 10.

Not in the English Rules.

13. In case of the absence or illness of any officer to whom any special duty is assigned, the duty may be performed by such other officer as may be designated for that purpose by the President of the High Court of Justice, or in his absence by the Senior Chief Justice. *New. See* Con. Rule 1300.

**Rules
14-16.**Office in
which
proceedings
commenced

14. Where the first document in a cause or matter is required to be filed in Toronto, the Central Office shall be deemed to be the office in which the cause or matter is commenced. In other cases the office of the Deputy Clerk of the Crown, Deputy or Local Registrar of the County in which such first document is required to be filed shall be deemed to be the office in which the cause or matter is commenced. *New. See Rules of 1 January, 1896, 1502.*

The first document to be filed in an action commenced by writ is a copy of the writ (*Rule 123*), together with a copy of order for leave to issue it (where leave is required), and these must be filed in the office out of which the writ is to issue.

Most proceedings commenced otherwise than by writ are motions commenced by petition, or notice of motion, to be prosecuted in the Weekly Court or in Chambers. The first document to be filed in such cases is the petition or notice of motion, or an affidavit in support of the motion.

In Toronto, if the proceeding is in the Weekly Court, the filing must be in the Registrar's Office (*Rule 102*); if in Chambers, the office of the Clerk in Chambers (*Rule 525*). All documents so filed subsequently reach the Central Office (*Rules 341, 525*); and the Central Office is to be deemed to be the office in which the cause or matter is commenced, so that subsequent ministerial proceedings must be taken there.

In other proceedings in Toronto not commenced by writ, the first document filed should be in the filing branch of the Central Office, viz., in the office of the Clerk of Records and Writs (*Rules 14, 22*).

In other counties in proceedings not commenced by writ the office of the Local Registrar, if any, is the office in which to file all documents which have to be filed. Where there is a Deputy Clerk of the Crown, his office is the proper office in which to file documents which commence proceedings to be prosecuted at the Weekly Sittings, if any. (*Rule 107*); and the first document to be filed in other cases (except in administration and partition proceedings) may be filed either in his office or that of the Deputy Registrar (*Rules 14, 35*).

In administration and partition proceedings the first document should be filed with the Deputy Registrar (*Rule 958*).

Where an issue is directed to be tried it is to be filed in the proper office in the county in which it is to be tried, and subsequent proceedings in the issue are to be carried on in that office: *Rule 377*.

Proceed-
ings to be
there
carried on.

15. All proceedings in a cause or matter shall be carried on in the office in which [the cause or matter is commenced]. *Con. Rule 279, amended.*

See Eng. (1888) R. 77.

3. THE CENTRAL OFFICE.Central
Office
continued.

16. The Central Office of the High Court of Justice heretofore established is hereby continued. *See Rules 1 Jan., 1896, 1392-1393.*

17. The Central Office shall be under the control and superintendence of such officer as may from time to time be designated or appointed for that purpose by Order in Council, and, until such officer is so designated or appointed, shall continue to be under the control and superintendence of "The Clerk of the Crown and Pleas." Rules of 1 Jan., 1896, 1394.

Rules
17-21.
Chief officer
of Central
Office.

18. The Clerk of Records and Writs shall be the Chief Clerk of the Central Office, and besides any special branch of the business of said office which may be assigned to him, may in all actions, matters and proceedings in the Central Office, sign all orders, writs, certificates and other documents requiring signature, and may affix the seal of the Court to such of the proceedings in the Central Office and such other documents as require the seal of the Court to be affixed thereto: Provided that the same may be signed and sealed by the Clerk of the Crown and Pleas. Rules of 1 Jan., 1896, 1395.

Clerk of
Records
and Writs.

19. The business to be performed in the Central Office shall, subject to Rules of Court, be distributed amongst the several officers of the Central Office as may be directed by Order in Council or by Rules of Court, or, subject to such Orders in Council and Rules of Court, by the officer having the control and superintendence of the said Central Office. Rule 1396.

Distribution
of business.

20. The business of the Central Office shall, for the convenient despatch of business, be divided amongst the following Branches, viz.:—

Branches
of Central
Office.

(a) The Writs of Summons Branch.

(b) The Filing and Record Branch.

(c) The Judgment Branch. Rules of 1 Jan., 1896, 1397.

21. The business of the Writs of Summons Branch shall comprise:—

Writs of
Summons
Branch.

(a) The issuing of writs for the commencement of actions in the County of York.

(b) Such other business as may be assigned thereto. Rules of 1 Jan., 1896, 1398.

The business of this Branch is performed under the immediate superintendence of the Clerk of Records and Writs.

Rule 22.Filing and
Record
Branch.

22. The business of the Filing and Record Branch shall comprise the following:—

(a) The receiving, filing and custody of all appearances, pleadings, petitions, reports, depositions, affidavits, bonds, and other papers and proceedings, and making entries thereof in the proper books.

(b) Amending pleadings.

(c) Entering notes of default in pleading and giving certificates thereof.

(d) The care and custody of all papers and proceedings in actions commenced in the Central Office, and of all documents required or ordered to be deposited for safe keeping or produced under any order of Court.

(e) Preparing and issuing all writs (other than writs of summons), commissions and orders obtainable on *præcipe*.

As to the orders obtainable on *præcipe*: see note to Rule 37.

(f) Certifying proceedings and making exemplifications of proceedings and of judgments or orders.

Certificates of officers as to proceedings in their offices are conclusive; and affidavits cannot be read to contradict them: *Beaven v. Burgess*, 10 Jur. 63; *Foley v. Griffith*, 2 Moll. 318.

(g) Examining and authenticating office copies of pleadings and other proceedings.

(h) Issuing certificates of *lis pendens*.

(i) Preparing and issuing certificates for registration.

(j) Receiving the return of commissions and attending on the opening of the same.

(k) The issuing of writs of execution or other process under judgments and orders.

(l) Receiving and filing articles of clerkship.

(m) Preparing receipts for summoning juries and transmitting them to the proper officers.

(n) The following business under *The Quieting Titles Act*:—

(1) The care and custody of all books kept under the Act for Quieting Titles and making the necessary entries therein.

- (2) Preparing and signing certificates of the filing of **Rule 23.** petitions under the said Act and issuing the same.
- (3) Transmitting such petitions to the proper Referee.
- (4) Entering and issuing certificates of title and conveyances granted under the said Act.

The petition, affidavits, and other evidence used upon Quelling Titles proceedings (except the original title deeds, which are usually returned to the petitioner or other person by whom they are produced), are retained by, and remain in the custody of, the Senior Registrar, but are not open to public inspection except by consent of the petitioner or his solicitor, or leave of the Court.

(o) All other business transacted in the office of the Clerk of Records and Writs, prior to the 1st day of January, 1896, not otherwise expressly provided for by these Rules, and all similar business transacted, prior to said date, in the offices of the Registrars of the Queen's Bench and Common Pleas Divisions. Rules of 1 Jan., 1896, 1399.

The business referred to in this *Rule* is also performed under the superintendence of the Clerk of Records and Writs.

23. The business of the Judgment Branch shall comprise :— Judgment
Branch.

(a) The signing of all judgments in actions commenced in the Central Office.

(b) The issuing of all such judgments and all orders pronounced in Toronto (other than orders in Chambers), and the entering of such thereof as by the Rules or practice are required to be entered.

(c) The custody of all judgment and order books of the former Courts of Queen's Bench and Common Pleas and the Court of Chancery, and all judgments and order books (other than Chambers order books in actual use) containing judgments and orders entered since the Judicature Act of 1881 came into force. Rule of 1 Jan., 1896, 1400. *amended.*

By the officers of the Judgment Branch judgments and orders are signed and entered after they have been settled by the proper Registrar, or other officer, pursuant to *Rules 26 (d), 28, 624, et seq.*

This department also has charge of records, exhibits, and other documents received by the Central Office from outer offices, and attends to their transmission to the proper local office.

Rules
24-26.

4. THE CLERK OF THE PROCESS.

Clerk of
the Process.

24. The Clerk of the Process shall, as heretofore, prepare and furnish to the officers requiring them, forms of writs to be issued by them, and shall perform such other duties as he may by Rule of Court or Order in Council, be directed to perform. Rule of 1 Jan., 1896, 1403.

5. REGISTRARS' OFFICE.

Registrars.

25. There shall be two Registrars of the High Court. The Registrar first appointed shall be deemed the Senior Registrar unless otherwise directed by Order in Council or Rule of Court. Rules 1 Jan., 1896, 1404.

Registrars'
office,
business in

26. The following business shall be transacted in the office of the Registrars :

(a) The business of the Crown Office, which shall comprise all criminal business and *quasi* criminal business and proceedings carried on in the offices of the Registrars of any Division of the High Court prior to the 1st day of January, 1896, and all business and proceedings on the Crown and Revenue side of the Queen's Bench and Common Pleas Divisions carried on in the offices of the Registrars of those Divisions prior to said date.

(b) The preparation of Cause Lists comprising the following, viz. :—

- (1) The setting down of actions for trial at Sittings of the High Court in the County of York and of motions, appeals and other matters for Sittings of Divisional Courts of the High Court.
- (2) The setting down of all motions, special cases and other matters required by the Rules to be set down for the Sittings of the Weekly Court at Toronto.
- (3) The attendance with records, exhibits and papers on the Court or Judges thereof, and the furnishing to the proper officer on his requisition, of all papers and exhibits necessary for the purposes of all motions, appeals, special cases and other matters.

- (4) The custody of the records, exhibits, affidavits and papers relating to the matters aforesaid until the conclusion of the same, when the same shall be transmitted to the Central Office to be dealt with under Rule 340. Rules
27-29.

(c) The custody of the roll of barristers and solicitors and all former rolls of barristers, attorneys and solicitors, and the producing thereof when necessary and the issuing of certificates in respect thereof.

(d) Subject to Rule 30 of these Rules, the settling of all judgments and orders made at any Sittings of the High Court in the County of York, for the trial of causes, matters and issues, or at any Sittings of a Divisional Court. Rules 1 Jan., 1896, 1405, amended by Rule 1230.

27. The control and superintendence of the business to be performed in the office of the Registrars shall be distributed amongst them as may be directed by Order in Council or by Rules of Court. Rules 1 Jan., 1896, 1406. Distribution
of business.

28. Subject to any such Orders in Council and to the provisions of Rule 30 of these Rules the duty of settling the judgments and orders referred to in clause (d) of Rule 26, and such other special judgments and orders as may be referred to him for that purpose, is assigned to the Senior Registrar; and the control and superintendence of the business referred to in clauses (a), (b) and (c) of Rule 26 is assigned to the Junior Registrar. Rules 1 Jan., 1896, 1407. Duties of
Registrars.

29. In addition to any duties specially required by the Rules to be performed by them, it shall be the duty of the Registrars: Further
duties.

(a) To attend the sittings of Divisional Courts in rotation as they may arrange, or, in default of arrangement, the said sittings shall ordinarily be attended by such one of the Registrars as may be designated for that purpose by any Order in Council or by Rules of Court, and, subject to any such Order in Council or Rules of Court, shall ordinarily be attended by the Junior Registrar.

(b) To attend, when required, and act as Registrar at any Sittings of the Court of Appeal or a Divisional Court thereof, or the Weekly Sittings of the High Court at Toronto, in case

**Rules
30-34.**

of the inability by absence, illness or other cause, of the Registrar of the Court of Appeal and the Clerk of the Weekly Court, respectively, to attend the same.

(c) To attend, when required, the Assizes or Sittings at Toronto for the trial of causes, matters and issues. Rules 1 Jan., 1896, 1408.

**Settlement
of judgments and
orders by
Registrar.**

30. The Registrar attending the Sittings of a Divisional Court or the Weekly Sittings of the High Court at Toronto, or any Sittings in the County of York, for the trial of causes, matters and issues, may settle all judgments pronounced at any such Sittings so attended by him, and settle and sign all orders pronounced at the Sittings of the Divisional Court or Weekly Sittings so attended by him; provided that at the instance of any party any of such judgments or orders may be settled by the Registrar to whom is specially assigned the duty of settling judgments and orders of the High Court. Rules 1 Jan., 1896, 1409.

**Cause
lists to be
transmitted
to proper
officers.**

31. The proper officer shall make out and transmit to the proper Registrar, Clerk of Assize, Clerk of the Weekly Court or other proper officer, a list of all actions and matters set down for trial at the Sittings of the High Court for trial of actions, causes and matters in the County of York, and of all motions, appeals, special cases and matters set down for argument in the Divisional Courts and the Weekly Court. Rules 1 Jan., 1896, 1426.

6. CLERK OF THE WEEKLY COURT.**Clerk of
the Weekly
Court.**

32. There shall be a Clerk of the Weekly Court at Toronto. Subject to any Order in Council, the present holder of that office shall continue to be such Clerk, and shall be designated "The Clerk of the Weekly Court." Rules 1 Jan., 1896, 1410.

**To attend
Weekly
Court.**

33. The Weekly Sittings of the High Court at Toronto shall ordinarily be attended by the Clerk of the Weekly Court. Rules 1 Jan., 1896, 1411, *part*.

**Settle
judgments
and orders.**

34. The officer attending such Sittings may settle and sign all orders and settle all judgments pronounced thereat. Rules 1 Jan., 1896, 1411, *part*.

7. LOCAL REGISTRARS.

Rules
35-36.

35. Deputy Clerks of the Crown, Deputy and Local Registrars shall perform the duties of their offices in the same manner and under the same regulations as the like duties are performed in the Central Office and in the Registrars' Office, and shall have all such powers and authorities in relation to causes, matters and proceedings commenced in their offices respectively as the Central Office and the officers thereof have in the case of causes, matters and proceedings commenced in the Central Office; and all Rules and practice in force respecting the Central Office and the Registrars' Office shall be applicable to the Deputy Clerks of the Crown, Deputy and Local Registrars in relation to such duties as they are required to perform; and the like sums and fees payable on proceedings in the Central Office and the Registrars' Office shall be payable to the Deputy Clerks of the Crown, Deputy and Local Registrars in relation to similar matters. Con. Rule 20. Rules of 1 Jan., 1896, 1413, 1414.

Local Masters and Deputy Registrars, under the former practice in Chancery, were not at liberty to practice by themselves in Chancery, nor were they even at liberty to practice in partnership with solicitors practising in Chancery, although they might not actually share in the emoluments arising from such business: *McLean v. Cross*, 3 Chy. Ch. 432. After the merging of the three Superior Courts in the High Court, it was doubtful whether a Master could practice at all, even though he confined his practice to the Queen's Bench and Common Pleas Divisions of the High Court, as under the new system he is just as much an officer of those Divisions as he is of the Chancery Division; but see *Rule 49*, from which it may be inferred that it is not the intention of *The Judicature Act* to deprive them of the right of practising; and see also sec. 148, *supra*.

Whether
Local Mas-
ters may
practice -
quere.

The fees now payable to Deputy Clerks of the Crown, Deputy and Local Registrars, are regulated by *Tariff B.*; see *Rule 1179*.

Officers paid by fees are entitled to receive all fees payable under the *Tariff*, in cash, but those fees payable under any statute not expressly requiring them to be paid in cash, must be paid in stamps.

A certificate of a Local Officer on a post card is no evidence; *semble*, where the fees are payable to such officer in stamps, it is a nullity for want of a proper stamp: *Johnson v. Loney*, 6 P. R. 70.

36. Every Deputy Clerk of the Crown, Deputy and Local Registrar, shall within 10 days after the 31st day of March, the 30th day of June, the 30th day of September and the 31st day of December in each year, transmit to the Central Office, at Toronto, a return signed by him in his official capacity according to Form No. 211 in the Appendix, of all

List of
judgments
entered
in outer
offices to be
forwarded
to the Cen-
tral Office,
Toronto.

Rule 37.

judgments which have been entered by him in the High Court of Justice during the three months ending on the above dates respectively; and from the said returns the proper officer in the Central Office shall prepare and from time to time keep up, a general index or list of such judgments, which shall be open to inspection by all persons interested, upon payment of the usual fee. A return shall be sent whether any judgments have been entered by such officer during said three months or not. Con. Rule 21, Rules of 1 Jan., 1896, 1415.

For the Form No. 211 referred to, see H. & L. Forms No. 1001.

**Orders on
præcipe.**

37. All orders heretofore issued on *præcipe* shall continue to be issued at any time from the office in which the cause, matter or proceeding is commenced. Con. Rule 25, Rules of 1 Jan., 1896, 1416.

These orders are all the orders which, according to the practice of the Court of Chancery, could be obtained on *præcipe* without an actual motion therefor, or which, at Common Law, were called "side bar rules," and were issued on the filing of a motion paper signed by Counsel. The most common orders of this kind were:—

1. Orders for security for costs, where the writ or other proceeding by which an action is commenced discloses on its face, that the plaintiff or person asking relief (see Jud. Act, s. 2), is resident out of the jurisdiction: *Rule 1100*.

2. Orders to produce, under *Rule 404*.

3. Orders for appointment of guardians of infants when necessary: see Chy. O. 610, but the power to issue orders of this kind seems now to be abrogated, owing to the omission of Chy. O. 610 from the *Rules*, since the consolidation of the *Rules* in 1888.

4. Orders to continue proceedings where the death or marriage of parties, or the transmission of interest *pendente lite*, renders it necessary for other persons to be made parties to the action: *Rule 396*.

5. Orders for sheriffs to return writs, or to bring in the body: see *Rules 885, 1045*.

6. Orders for leave to plaintiff or defendant, to change his solicitor, or solicitor and agent: *Rule 335*—or to prosecute, or defend, in person, instead of by a solicitor—or to enable one of several plaintiffs to appoint a solicitor for the purpose of making an application separate from his co-plaintiff—or to enable a solicitor of a plaintiff, or defendant, to change his agent.

7. Orders for delivery and taxation of solicitors' bills of costs, on the application of a client: or for the taxation alone of such bills on the application of the client within a month from the delivery thereof, or on the application of the solicitor at any time after such month: see *Rule 1184*.

For other orders issuable as of course, see Daniel's Pr., 5th ed. 2002-2012.

8. MARSHALS AND CLERKS OF ASSIZE.

Rules
30-40.

38—(1) The Deputy Clerks of the Crown and Local Registrars in the several Counties and Unions of Counties, except the County in which the City of Toronto is situated, shall *ex officio* be and act as Marshals and Clerks of Assize at the Circuit Sitzings of the High Court for the trial of causes, matters and issues, and of criminal matters or proceedings, and at any Courts of Assize and Nisi Prius, Oyer and Terminer, and General Gaol Delivery, appointed to be holden by commission in their respective Counties or Unions of Counties, and shall have all the powers and perform all the functions incident to the same as such Marshals and Clerks of Assize. Con. Rule 26.

(2) In counties where there are a Deputy Clerk of the Crown and a Deputy Registrar of the High Court of Justice, the records for trial at the jury sittings shall be entered with the Deputy Clerk of the Crown, and he shall act as Clerk of Assize at such jury sittings; and the records for trial at the non-jury sittings shall be entered with the Deputy Registrar, and he shall act as Clerk of Assize at such non-jury sittings. Rules of 29 December, 1894, 1391; Rules of 1 January, 1896, 1466.

See Jud. Act, s. 153-155.

39—(1) The said Deputy Clerks of the Crown and Local Registrars respectively shall, immediately after each sitting of such Courts, forward by post to Toronto, addressed to "The Registrars' Office, Osgoode Hall, Toronto," every recognizance, indictment, paper or proceeding in any criminal matter in their custody as such officers respectively, and also the usual and proper returns as such Marshals and Clerks of Assize. Con. Rule 27; Rules of 1 Jan., 1896, 1411.

(2) The Deputy Clerks of the Crown and the Local Registrars shall pay the postage on the transmission to Toronto of the indictments and other proceedings in criminal cases, and the same shall be repaid out of the Consolidated Revenue Fund. Con. Rule 27.

40—(1) The Marshal and Clerk of Assize for the County of York, shall perform the duties of Marshal and Clerk of Assize at the Sitzings of the High Court for the trial of causes, matters and issues and of criminal matters

Who to
officiate
as Clerks
of Assize.Clerks of
Assize.To make
return of
proceedings
and trans-
mit indict-
ments, etc.,
to the Reg-
istrars' office.And to pay
postage
thereon,
etc.Marshal
and Clerk
of Assize,
County
of York.

Rule 40. or proceedings, and at any Courts of Assize and Nisi Prius, Oyer and Terminer and General Gaol Delivery holden for the County of York, and shall be subject to all the provisions of these Rules, in reference to records, exhibits and other documents : and he shall also perform such other duties as he may from time to time be directed, by Rules of the Judges of the Supreme Court, or High Court, under sections 132, 134 and 135 of *The Judicature Act, 1895*, to perform : and subject to such Rules and for the performance of such duties he shall be attached to the Registrars' Office at Toronto : but it shall not be necessary for him to attend at the Registrars' Office for the setting down of actions for trial under Rule 26. Con. Rule 28 ; Rules of 1 Jan., 1896, 1418, *first part, amended*.

(2) The said Marshal and Clerk of Assize shall take and receive the same fees only as other Marshals and Clerks of Assize ; and such fees shall be by him accounted for, paid over and applied in the manner provided by law : and he shall not take for his own use or benefit, directly or indirectly, any fee or emolument save the salary to which he may be entitled by law.

(3) When the Circuit Sittings of the High Court at the County Town of the County of York for the trial of civil and criminal proceedings are held separately, or when any Court of Assize and Nisi Prius by Commission in the County of York is held separate and apart from any Court of Oyer and Terminer and General Gaol Delivery held by commission in the said county, and at the same time, one of the Registrars of the High Court shall personally or by Deputy, act as Clerk of the Sittings for criminal proceedings or of such Courts of Oyer and Terminer and General Gaol Delivery, only as long as such separate Sittings or such Courts are being held at the same time, and shall, while so acting, have all the powers and exercise all the functions that are by law had and exercised by Marshals and Clerks of Assize.

(4) The Marshal and Clerk of Assize for the County of York or Registrar sitting personally or by deputy shall forthwith, after the close of each Assize, or sittings of the Court, or earlier if required, return to the Central Office all records, together with all exhibits and other documents appertaining thereto. Con. Rule 28 ; Rules 24 March, 1894, and 23 June, 1891, 1226.

(5) In the absence of the Clerk of Assize one of the Registrars or such other officer as may be designated by the President of the High Court, shall act as Clerk of Assize at all non-jury Sittings for trial of actions in the County of York. Con. Rule 28 ; Rules of 1 Jan., 1896, 1418 (a), (b), (c), (d). Rules
41, 42.

41. In the event of any Marshal or Clerk of Assize or Registrar being absent or being prevented by illness or other cause from performing his duties as such Marshal or Clerk or Registrar, the presiding Judge at such Sittings or Courts may authorize some person to act as Marshal and Clerk of Assize, and the person so authorized to act shall receive the remuneration payable for the performance of the duties. Con. Rule 29. Absence of
Clerk of
Assize
provided
for.

9. MASTER IN CHAMBERS.

42. The Master in Chambers, in regard to all actions and matters brought [or proposed to be brought] in the High Court, including proceedings in the nature of a *quo warranto* under *The Municipal Act*, shall be, and hereby is, empowered and required to do all such things, transact all such business, and exercise all such authority and jurisdiction in respect to the same as are now done, transacted, or exercised by any Judge of the said Court sitting at Chambers, save and except in respect to the matters following: Master in
Chambers,
jurisdiction
of.

Matters
excepted.

The words in brackets, which are new, were introduced to meet the case of an application before an action is actually commenced, e.g., for leave to issue a writ for service out of the jurisdiction.

1. All matters relating to criminal proceedings, or the liberty of the subject ; Criminal
matters, etc.

2. Appeals and applications in the nature of appeals ; Appeals.

3. Extending the time for appealing to the Divisional Court, or the Court of Appeal, before or after the time limited for that purpose has expired ; Extending
time to
appeal.

4. Applications to arrest ; Arrest.

5. Proceedings as to Lunatics under The Revised Statutes of Ontario 1887, chapter 54, sections 5, 6, 7, 8, 9, 17 and 18, and section 168 of *The Judicature Act*, 1895 ; Lunacy.

These sections referred to are now R. S. O. 1897, c. 65, ss. 5-9, 17 and 18, and c. 51, s. 164.

6. Applications for advice under the Revised Statutes of Ontario, 1887, chapter 110, section 37 ; Applica-
tion by
trustees
for advice.

See now R. S. O. 1897, c. 129, s. 39.

- Rule 42.** 7. Applications as to the custody of infants under the Revised Statutes of Ontario, 1887, chapter 137, section 1; See now R. S. O. 1897, c. 123.
- Custody of infants.
- Settled estates. 8. Applications as to leases and sales of settled estates; to enable minors, with the approbation of the Court, to make binding settlements of their real and personal estate on marriage; and in regard to questions submitted for the opinion of the Court in the form of special cases on the part of such persons as may by themselves, their committees, or guardians, or otherwise, concur therein;
- Settlements by infants, etc.
- Special cases.
- Partition. 9. Proceedings as to Partition and sale of Real Estate, under the Revised Statutes, chapter 104. See now R. S. O. 1897, c. 123.
- Administration. 10. Opposed applications for judgment for Administration; See also Rule 947, and *Re Underhill*, 17 C. L. T. 9; 33 C. L. J. 40.
- Infants or their estates. 11. Opposed applications respecting the Guardianship of the person and property of Infants;
- Mandamus and injunction. 12. Applications for Prohibition, Mandamus or Injunction;
- Payment out of Court. 13. The payment of money out of Court, or dispensing with payment of money into Court, in administration and partition matters;
- Granting taxed costs in lieu of commission. 14. Making an order for taxed costs in lieu of commission under the provisions of Rule 1146.
- Striking out jury notice. 15. Striking out a jury notice except for irregularity;
- Other matters. 16. Any matter which by these Rules is expressly required to be done by a Judge of the High Court;
- In certain matters jurisdiction by consent. 17. And (unless by consent of the parties) the following proceedings and matters, that is to say:
- (a) The removal of causes from Inferior Courts, other than the removal of judgments for the purpose of having execution;
- (b) The making of orders for reference under *The Arbitration Act*;
- See R. S. O. 1897, c. 62, secs. 28, 29.
- (c) Reviewing taxation of costs.
- Review of taxation. (d) Staying proceedings after verdict, or on judgment after trial or hearing before a Judge. Rules 23 June, 1894, 1287.
- Staying proceedings.

This *Rule* appears to be intended to confer on the Master in Chambers all the jurisdiction of a Judge in Chambers at the time of this *Rule* coming into force, i.e., 1st September, 1897, except as to the matters above excepted; see *In re Donisthorpe*, 1897, 1 Q. B. 671; *Watson v. Dandy*, 18 C. L. T. 164. Any powers hereafter conferred by *Rule* or Statute will not by force of this *Rule* be exercisable by the Master in Chambers. The propriety of extending any such after conferred powers to the Master in Chambers, or Local Judges or officers, is thus reserved for consideration by the Judges.

Where a statute hereafter passed merely enlarges the power of a Judge in Chambers, in a case in which the Master in Chambers has previously exercised jurisdiction, it would seem that the Master in Chambers can exercise the additional powers conferred by the statute upon a Judge in Chambers; see *Collier v. Swayzie*, 8 P. R. 42.

Setting aside Fraudulent Conveyances.—The Master in Chambers has, therefore, now power to entertain applications to set aside fraudulent conveyances, etc., by judgment debtors, and for the sale of equitable interests under *Rules* 1015-1020, which the Referee in Chancery Chambers did not formerly possess; see *Queen v. Smith*, 7 P. R. 429; and *Wark v. Moulton*, 7 P. R. 144; but which was exercised by the Clerk of the Crown and Pleas in Chambers; see *Watts v. Hobson*, 7 P. R. 334.

Jurisdiction intended to be Reserved to Judges.—While the Master in Chambers may thus, speaking generally, exercise (except as to the matters excepted) the jurisdiction which a Judge in Chambers had on 1st September, 1897, yet this *Rule* is subject to some exceptions. It would not seem to enable the Master in Chambers to act in a matter in which a Judge in Chambers acts by virtue of any statute as a *persona designata* (e.g., under R. S. O. c. 164, ss. 12 and 13, in making orders dispensing with a wife's joining in a conveyance by her husband; *Re Nolan*, 6 P. R. 115); nor does it give the Master in Chambers powers which it has been the policy of the Court to retain in the hands of the Judges. Thus in *Hendricks v. Hendricks*, 13 P. R. 79, it was held that the mere consolidation of the *Rules* could not work a construction which was not in accordance with the policy upon which *Rule* 1146 (originally promulgated along with *Rule* 956 (4)) was framed. It would, therefore, seem to be still contrary to *Rule* 956, that the words "Judge in Chambers" therein should by the aid of *Rule* 42 be made to extend to the Master in Chambers, and by force of *Rules* 45 and 49 to Local Judges and Local Masters also; and it would seem that the Master in Chambers has still no power to grant judgments under *Rule* 956 for partition on summary application in Chambers, which was formerly excluded from the jurisdiction of the Referee in Chambers; *Re Arnott, Chatterton v. Chatterton*, 8 P. R. 39.

Applications to the summary jurisdiction of the Court against solicitors, are excluded from the jurisdiction of the Master in Chambers and like officers; *Re L. & M.*, 6 P. R. 21; *Re Bridgman*, 16 P. R. 322; *Re Ross*, *ib.* 482; but see *Re Carroll*, 2 Chy. Ch. 323; *Re Walker*, *ib.* 324; *Re Toms*, *ib.* 381; *Re Attorney*, 7 P. R. 174; also applications by parties claiming adversely to a receiver, or sequestrator; see *Brown v. Dollard*, 6 P. R. 113; also an application by a person claiming adversely to the heirs or next of kin in an administration suit to be made a party in the Master's office and for leave to establish his claim there; *Re Tobin, Tobin v. Tobin*, 7 P. R. 67; and an application for payment into Court by an executor or administrator of

Rule 42. money admitted by him to be in his hands: *Re Curry*, 8 P. R. 340; but see now *Rule* 616.

Other cases. The Master in Chambers has no jurisdiction on conflicting evidence to strike out pleas, raising questions of liability preliminary to an account and to order an account to be taken: *Ryan v. Fish*, 20 C. L. J. 114; nor to set aside a judgment of a creditor against an absconding debtor to enable another creditor to defend: *Wills v. Carroll*, 10 P. R. 142.

References to Masters.

References to Masters.—The right of the former Referee in Chambers to direct a reference to a Master was denied: *Brown v. Dollard*, 6 P. R. 113; this case was affirmed on re-hearing, however, on another ground, viz.: that the relief should have been sought under Chy. Ord. 398 *et seq.*; see also *Queen v. Smith*, 7 P. R. 429; and since *The Judicature Act* the right of the Master in Chambers to direct such a reference under the Dominion Winding-up Act has also been denied: *Re Queens City Refining Co.*, 10 P. R. 415; *Re Joseph Hall Manufacturing Co.*, 10 P. R. 485; and see *Fraser v. Buchanan*, 25 Ont., *per* Rose, J., at p. 5.

But whatever may be the case in regard to interlocutory orders, it would seem clear that when the Master in Chambers has jurisdiction to award a judgment, he has power, for the purpose of carrying out such judgment, to direct a reference to the Master: see *Rules* 616, 944, 946, 952, 953, and notes.

Quo Warranto applications.

Quo Warranto.—The jurisdiction of the Master in Chambers in *quo warranto* proceedings under the Municipal Act as now framed, affirmed in *Reg. ex rel. Felitz v. Howland*, 11 P. R. 264, but denied in *Reg. ex rel. Wilson v. Duncan*, *ib.* 379, has been finally confirmed by this *Rule*, *Reg. ex rel. McGuire v. Birkett*, 21 Ont. 162, and the enactment of the Municipal Act; see 3 Ed. vil. c. 19, s. 219 (2). He has also power to direct a reference to a County Judge to take evidence in such a matter under *The Municipal Act* (R. S. O. c. 223, see ss. 248 and 219); *Reg. v. McClay*, 13 P. R. 96. His decision respecting a municipal election was held to be not appealable, in *Reg. ex rel. McGuire v. Birkett*, 21 Ont. 162; but see now R. S. O. c. 223, s. 219 (3).

The jurisdiction of the Master in Chambers in Quo Warranto Proceedings is confined to those under the Municipal Act and does not extend to applications provided for by R. S. O. c. 324, ss. 31-5.

Jurisdiction to Dispose of Costs of an action where no Other Question Remains.—See note to *Rule* 1130.

Changing Venue in C. C. Actions.—The jurisdiction to entertain motions to change the venue in County Court actions was doubted: *Brigham v. McKenzie*, 10 P. R. 406; but is now settled by *Rule* 1219.

As to changing the venue where the Judge of the County Court is a defendant: see *Anon.*, 4 P. R. 310.

Appeals, etc.

Appeals.—An application impeaching the propriety of a filing, is not an appeal or in the nature of an appeal from the officer who filed the document, so as to exclude the jurisdiction of the Master in Chambers: *Watrous v. Farran*, 6 P. R. 31.

Where a reference in an action had been made to a County Court Judge, who died before entering upon it, an application to set aside (as having been issued without jurisdiction), an appointment to proceed with the reference, issued by the deceased's Judge's successor was held to be in the nature of an appeal: *Toronto v. Toronto Ry. Co.*, 5 O. W. R. 403. Rules 43, 44.

Staying Proceedings Pending Appeal.—The Rules do not seem to empower the Master in Chambers to make any order in regard to proceeding with a reference or issue of execution under a judgment pending an appeal: see Rule 42, clause 17 (d), and Rule 27. Clause 17 (d) of this Rule prevents the Master in Chambers from having jurisdiction, after a decision of the Court of Appeal in favour of the plaintiff, to order a stay of proceedings till such time as leave to appeal to the Supreme Court of Canada can be moved for, in a case requiring such leave; or to require the defendant to undertake to refund damages and costs in the event of the judgment proposed to be appealed from being reversed: *Tabb v. G. T. Ry. Co.*, 8 O. L. R. 514.

Liberty of the Subject.—Formerly the Referee in Chambers could entertain motions to commit for disobedience of an order to produce, but the Clerk of the C. & P. Q. B. had no jurisdiction in matters relating to the liberty of the subject. The latter restriction is continued under this Rule, and is held to prevent the Master in Chambers from entertaining motions to compel obedience to an order for production by committal: *Keefe v. Hard*, 18 C. L. J. 166. He has also no jurisdiction to order the discharge of a defendant held in custody under a *ca. sa.*: *Cochrane v. Lamou*, 11 P. R. 351.

Adjournment of Motions before Court or Judge.—An application made to an officer in Chambers, which he has no power to entertain, may be adjourned before a Judge: Rules 44, 367.

Long Vacation.—As to the officers empowered to hold Chambers during the Long Vacation, see Rule 115.

43. Any Official Referee, upon request of the Master in Chambers, or of a Judge of the High Court, may act as Master in Chambers, and while so doing shall have all the authority, jurisdiction and powers of the said Master. Con. Rule 31. Rules 18 Feb., 1892, 1272 amended. Master in Chambers, Official Referee may act as.

See Rule 690, making similar provision where an Official Referee sits for the Master in Ordinary; and see Jud. Act, s. 41.

44. The Master in Chambers, or such Referee, may refer any matter pending before him to a Judge of the High Court for decision, and the Judge may dispose of or refer back the same in whole or in part. Con. Rule 32. M. C. may refer to Judge.

A case may be brought before a Judge under this Rule upon a certificate of the officer that in his opinion the case is a proper one to be heard by a Judge; otherwise applications within the jurisdiction of any officer must be disposed of by him: *Hughes v. Rees*, 9 P. R. 56; see also *Hood-Burrs v. Cathcart*, 72 L. T. 184.

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45, 46.

Where a motion, made returnable before an officer in Chambers, is one in which a Master has not, but a Judge has, jurisdiction, *quære*, whether he can transfer it to the proper forum by analogy to the practice laid down in *Rules 307, 784*.

A Local Judge has not power to transfer a motion, which may properly be heard by him, to be heard by the Master in Chambers, though the latter officer would have had jurisdiction to hear the motion had it been made originally before him: *Mahoney v. Welsh*, 6 O. W. R. 18.

10. LOCAL JUDGES.

Local
Judge's jur-
isdiction in
Chambers.

45.—(1) The Judge of every County Court other than the County Court of York, shall in all actions brought, or proposed to be brought, in his county and in interpleader proceedings where the goods in respect of which interpleader is sought are situate in his county, have concurrent jurisdiction with, and the same power and authority, as the Master in Chambers at Toronto, except that the authority of such Judge shall not (except as provided by sec. 185 of *The Judicature Act, 1895*, or *Rules 47*, and 1127), extend to the payment of money out of Court or dispensing with the payment of money into Court in any action or matter, or to making an order for the sale of infants' estates. *Rules 29 Dec., 1894, 1386*.

Power to
refer to
Judge
of High
Court.

(2) Every Local Judge may refer any matter pending before him in Chambers to a Judge of the High Court for decision, and the Judge may dispose of or refer back the same in whole or in part. *Con. Rule 42*.

See notes to *Rules 42 and 44*.

The jurisdiction of a Local Judge in Chambers is made co-extensive with that of a Judge of the High Court in all cases within the provisions of *Rule 47 (a)*.

As to Chambers matters in the District of Rainy River, see R. S. O. c. 109, ss. 12, 13.

Local
Judge's jur-
isdiction as
to injunc-
tion.

46.—(1) A Local Judge of the High Court may, in cases of emergency, grant an interlocutory injunction under subsection 8 of section 53 of *The Judicature Act, 1895*, (c) in any action in the High Court brought in his county, on proof, to the satisfaction of the Judge, that the delay required for an application to the High Court is likely to involve a failure of justice: such injunction shall remain in force for a period not exceeding eight days as such Local Judge may direct, unless continued by the Local Judge under this Rule or *Rule 47*, or by the High Court: the injunction shall be by order to be signed, sealed and issued by the Deputy Clerk of

the Crown, Deputy or Local Registrar of such county, as ^{Rule 47.} the case may require, upon the direction or fiat of the Local Judge, and the injunction shall have the same force and effect and may be continued, varied, dissolved and otherwise dealt with by the High Court as if it had been originally granted by judgment or order of the Court. 52 V. c. 11, s. 1. See 58 V. c. 12, s. 185 (2).

(x) Now Jud. Act, sec. 58 (9).

(2) In any action in which a Local Judge of the High Court has granted an interlocutory injunction under the next preceding clause, and in which all parties interested consent thereto, the Local Judge may hear, determine and dispose of any motion to continue, vary, dissolve or otherwise deal with the injunction, including such terms and conditions as to costs and other like matters as the Local Judge sees fit. Rule 1419 of 1 Jan., 1896.

47.—(1) A Local Judge of the High Court shall in actions brought and proceedings taken in his county, possess ^{Local Judge's jurisdiction generally.} the like powers of a Judge in the High Court in Court or Chambers, for hearing, determining and disposing of the following proceedings and matters, that is to say:

- (a) Motions for judgment in undefended actions;
- (b) Motions for the appointment of receivers after judgment by way of equitable execution;
- (c) Application for leave to serve short notice of motion to be made before a Judge sitting in Court or in Chambers;
- (d) Motions for judgment and all other motions, matters and applications (except: (i) trials of actions; (ii) applications for taxed or increased costs under Rule 1146; and, (iii) motions for injunction other than those provided for by Rule 46) where all parties agree that the same shall be heard, determined or disposed of before such local Judge, or where the solicitors for all parties reside in his county.

See *Wendover v. Nicholson*, 5 O. W. R. 645, where the Local Judge was held to have no jurisdiction, the circumstances not being within clause (d) (iii).

Provided always that where an infant or lunatic or person of unsound mind is concerned in any such proceedings or matters, the powers conferred by this Rule shall not be exercised, in case of an infant without the consent of the Official

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48, 49.

Guardian, and in the case of a lunatic or person of unsound mind without the consent of his committee or guardian; and provided also the like consent shall be requisite in the case of applications for payment of money out of Court and for dispensing with the payment of money into Court, where an infant, lunatic, or person of unsound mind, is concerned.

(2) No order for the payment of money out of Court, or for dispensing with the payment of money into Court, shall be acted upon unless a Judge of the High Court has manifested his approval thereof in manner provided by Rule 414.

(3) The judgment or order of the Local Judge in any of the proceedings or matters in this Rule referred to shall be entered, signed, sealed and issued by the Deputy Clerk of the Crown, Deputy or Local Registrar of the County, as the case may require, and shall be and have the same force and effect and be enforceable in the same manner as a judgment or order of the High Court in the like case: Rule 1242 of 20th June, 1903.

Since this Rule a Local Judge has no power to hear a motion to continue an injunction until the trial, except by consent as provided by Rule 46 (2); see formerly *Dougall v. Hutton*, 19 C. L. T. 190; 35 C. L. J. 368.

Appeal.

48. Any person affected by a decision, judgment or order of a Local Judge under paragraph (2) of Rule 46 or clauses (a), (b) or (d) of Rule 47, may appeal therefrom to a Judge of the High Court in Court, and such appeal shall be brought within the time and upon the like notice and proceedings as in cases of appeals from orders and decisions of Local Judges in Chambers. 56 V. c. 11, s. 1; 57 V. c. 20, ss. 11 and 13. See Rule 1 Jan., 1896, 1419. As amended by Rule 1243.

See Rule 767.

11. LOCAL MASTERS.

Local
Masters,
jurisdic-
tion of in
Chambers.

49.—(1) Every Local Master who does not practise as a Barrister or Solicitor, and who has not taken out certificates to practise, shall, in addition to his other powers as Local Master, have, in all actions brought in his county and in interpleader proceedings, when the goods in respect of which the interpleader is sought are situated in his county, concurrent jurisdiction with, and the same power and auth-

ority as, the Master in Chambers, in all proceedings now ^{Rules} taken in Chambers at Toronto, except that the authority of ^{50. 61} such Local Master shall not extend to proceedings in the nature of a *quo warranto* under *The Municipal Act*, or to the payment of money out of Court, or dispensing with payment into Court, or to making an order for sale of infants' estates. Rules 23 June, 1894, 1291.

(2) Every Local Master may refer any matter pending before him in Chambers to a Judge of the High Court for his decision, and the Judge may dispose of or refer back the same in whole or in part. *New.*

See notes to Rule 42.

12. ACCOUNTANT'S OFFICE.

50. The Suitors' Accounts in the Court of Appeal and the High Court shall be in charge of "The Accountant of ^{Suitors} ^{Accounts.} the Supreme Court of Judicature for Ontario." Con. Rule 139.

The suitors' accounts in the Courts of Queen's Bench, Common Pleas, and Chancery, were, on the passing of *The Judicature Act*, consolidated and placed in charge of an officer called the Accountant of the Supreme Court: original Rule 475, 44 Vict. c. 5, s. 18; and by Rule 10, H. C. J., passed 25th August, 1881, all moneys and securities, etc., standing in the name of the Accountant of the Court of Chancery, or the Referee in Chambers, or any other officer named by the Court of Chancery, or in the name of the Clerk of the Crown and Pleas of the Court of Queen's Bench, or the Clerk of the Crown and Pleas of the Court of Common Pleas, on the 21st of August, 1881, were transferred to and vested in the Accountant of the Supreme Court as such Accountant, and by 48 Vict. c. 13, s. 19, all moneys and securities in the hands of the Registrar of the Court of Appeal were also transferred to, and vested in, the Accountant. See now 58 Vict. c. 12, ss. 162, 163.

The Accountant of the Supreme Court of Judicature for Ontario is constituted a corporation sole: see Jud. Act, s. 159 (2).

In case of the office being at any time vacant, provision is made for vesting all moneys and securities in some other officer to be named by Rule of Court: Jud. Act, s. 160.

Books.

51. The following books shall be kept by the Accountant:— ^{Books to} ^{be kept.}

1. A book of Directions to the Bank to receive money.
2. A Book of Cheques.
3. A Journal.
4. A General Ledger.

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5. A Stock Journal.
6. A Stock Ledger.
7. A Balance Book.
8. A Book of Investments.
9. A Bond Index.
10. A Deposit Index.
11. A Private Ledger. Con. Rule 141.

Directions
and
cheques.

52. The *Directions* and *Cheques* shall be in the form approved of by the President of the High Court, and shall be numbered consecutively. Con. Rule 142, amended.

Journal

53. The *Journal* shall show the several sums daily paid into and out of Court, and shall be so kept, that at the foot of the account for each month will appear the total amount paid into and out of Court during such month, and the amounts to the debit and credit of the said account shall be transferred each month to the Private Ledger. Con. Rule 143.

General
Ledger.

54. The *General Ledger* shall contain a separate account for every action or matter, in which there is money in Court: and also, "The Suitors' Fee Fund Account," and "The Suspense Account" for the High Court, and for the Court of Appeal, each of which accounts shall show correctly the state and condition thereof for the time being. Con. Rule 144.

To "The Suitors' Fee Fund Account" is to be transferred the surplus income arising from the funds in the High Court after payment of the expenses of the Accountant's office, and interest payable to suitors: see Jud. Act, s. 163. Out of the funds standing to the credit of this account any Divisional Court or Judge of the Supreme Court of Judicature may order such sums to be applied as may be necessary for the protection of infants and other persons not *sui juris*, on whose behalf proceedings may be had in the Court, or be directed to be taken in other Courts: and may also order any sum to be paid which is required to make good a default arising in respect of suitors' money or securities, from any mistake, act or omission of any official of the Court without prejudice to the liability of the official or his sureties: see Jud. Act, s. 164.

Form of
accounts.

55.—(1) In each of the suitors' accounts there shall be entered every sum of money paid into Court, and by whom, and under what authority: and also every sum paid out, to whom, and under what authority. Con. Rule 145, *part*.

Clause (2) of this Rule was repealed by Rule 1272. See Ont. Gaz., 31 Dec., 1904.

56.—(1) Each account opened in the Ledger shall from time to time until the same is closed, be credited with the interest allowed by the Court from time to time accruing in respect of such account; and a corresponding transfer of interest shall be made at the bank by cheque signed and countersigned as in other cases; and there shall also be entered in each account any statement or memorandum of any other matters material to be recorded for the information of the Court or its officers, or any of the parties. *Con. Rule 146; Rules 23 June, 1894, 1292.*

*Crediting
Bank
interest.*

(2) From and after the 1st day of October, 1898, interest shall not be credited in any action or matter in respect of moneys paid into Court: (1) With a defence; (2) as security for costs of an action or appeal; (3) as security for debt or costs, to stay execution; (4) as a deposit for sale in mortgage actions; (5) as a condition imposed by any injunction order; (6) as proceeds of sale in, or to abide the result of, interpleader proceedings; or (7) for any other merely temporary purpose unless or until after the same shall have been in Court for six months, and then only at the rate of 2 per cent. per annum, not compounded in any case; but the President, or in his absence the next senior Judge of the High Court, may, for special reasons, order that in any particular case, interest shall be allowed on such moneys at any higher rate not exceeding $3\frac{1}{2}$ per cent. per annum.

(3) From and after the 1st day of October, 1898, the interest to be credited on the Assurance Fund (a) shall be at the rate of $2\frac{1}{2}$ per cent. per annum, compounded as provided by Rule 57.

(4) The interest to be credited to suitors' accounts, on all moneys paid into Court after the said 1st October, 1898 (other than for the purposes above mentioned), shall until further or other order be at the rate of $3\frac{1}{2}$ per cent. per annum from the date, and as provided by Con. Rule 57. Rule 1225 of 29 June, 1898, *part.*

(5) From and after the first day of April, 1902, the interest to be paid on any suitor's account which has been heretofore allowed at four per cent. per annum, is to be three and one-half per cent. per annum, but this Rule is not to

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affect any payments of interest at four per cent. already made on such accounts. Rule 1236, 10th May, 1902.

(c) See *The Land Titles Act* (R. S. O. c. 138), s. 130.

The interest which accrues on funds in Court is apportioned among the parties beneficially interested in the funds; sums payable thereon for costs do not bear interest, but the interest which accrues on money applicable to the payment of the costs is, with the other interest, apportioned among the suitors in proportion to their respective interests in the principal money.

Where in an administration action costs are directed to be paid out of the estate, and a direction is made for the division of the fund after such payment among the parties beneficially entitled, in the absence of a special direction to that effect, the costs do not bear interest: *In re Marsden*; *Withington v. Neumann*, 40 Ch. D. 375; even though the payment of the costs has been delayed owing to there being no funds available: *Archer v. Scriven*, 12 P. R. 648.

Interest on
moneys in
Court.

87.—(1) Interest shall be credited upon moneys paid into Court only after the same have been in Court for fifteen days. Rule 21 Oct., 1893, 1273.

This has been the rule since 17th Oct., 1893, the date named in the above Rule 1273.

Compound
interest.

(2) Compound interest shall not be credited to any action or matter, or allowed or paid to any suitor in respect of any fund which has not been in Court for at least five years. Con. Rule 147.

Where compound interest is allowed the practice of the Accountant's office is to compound it half-yearly.

Balances
under \$10
standing
for 2 years
carried to
Suspense
Account.

88.—(1) Wherever the balance remaining to the credit of any action or matter to which an adult party is entitled does not exceed \$10, and two years elapse without the balance being claimed, the account in such action or matter shall be closed by the transfer of the balance to "The Suspense Account" of the High Court, or of the Court of Appeal, but such transfer shall not prejudice the claim of any suitor entitled to the balance to its payment. Con. Rule 148.

By the closing of the account, the amount transferred ceases to bear interest: see Rule 56.

(2) All balances which are or shall hereafter be standing to the credit of any action or matter which have not been, or which hereafter shall not be claimed, before the lapse of ten years from the time when the same became, or shall hereafter become payable out of Court, shall be transferred to the Suspense Account; and the account in such actions or

matters, in respect of all money so transferred, shall be closed, Rules 59-63. and no further interest shall thereafter be credited thereto in respect of the moneys so transferred; but such transfer is not to prejudice the claim of any person to the payment of any moneys so transferred. Interest shall not hereafter be credited to the Suspense Account in respect of moneys standing at its credit or authorized to be transferred thereto. Rule 1225 of 29th September, 1898. *part.*

59. In the *Stock Journal* and *Stock Ledger* shall be entered all transactions relating to Dominion stock held or purchased by the Court for suitors, other than such orders, reports and other particulars as to the said stock as are entered in the General Ledger. Stock Journal and Ledger. Con. Rule 149.

60. The *Balance Book* shall contain a statement to be entered therein quarterly of the balances at the credit of the various accounts in the three Ledgers at the date of such statement; such balances shall be made up to the 31st of March, 30th of June, 30th of September, and 31st of December of every year. Balance Book. Con. Rule 150.

61. In the *Book of Investments* shall be entered under the heading of the action or matter in which any mortgage or other security other than Dominion stock has been taken by the order of the Court, the date, and a concise statement of the material contents of the mortgage or other security, and of all subsequent orders and proceedings in relation thereto until the mortgage or other security is discharged. Book of Investments. Con. Rule 151.

62. In the *Bond Index* shall be entered under the heading of the action or matter in which the same is entitled, a memorandum of all bonds, or recognizances, filed or deposited with the Accountant, and also receipts for all bonds or recognizances delivered out pursuant to any order. Bond Index. Con. Rule 152.

63. In the *Deposit Index* shall be entered under the heading of the action or matter in which the same are ordered to be deposited, a memorandum of all securities for money, or other documents, books, papers, or other things which may at any time be ordered to be deposited with the Accountant for safe custody, and also receipts for all such Deposit Index.

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64-67.

documents, books, papers, or other things so deposited as may be delivered out pursuant to any order. Con. Rule 153.

Private
Ledger.

64. In the *Private Ledger*, which is not to be open to general inspection, shall be entered "The General Interest Account," "The Toronto General Trust Company Account," the "Bank Account," and "The Account of the Official Guardian *ad litem*," and such other accounts as the Accountant, with the approbation of the President of the High Court, may direct. Con. Rule 154, *amended*.

By direction of the President of the High Court, the Suspense Account was ordered to be transferred to the Private Ledger on 20 June, 1900.

Books to
be open to
inspection.

65. The other books kept under these Rules shall be open to inspection by any person interested in any account entered therein, or his solicitor or agent; and the Accountant shall give a certificate of the state of any account, or an extract therefrom, or of any entry in such books, at the desire of any person interested, or his solicitor or agent, and all such certificates shall be signed by the Accountant, or the Chief Clerk in the Accountant's office. Con. Rule 155.

Investments, etc.

Securities
to be taken
in name of
Accountant.

66. All mortgages and other securities taken under an order or judgment of the Court, and all bonds, and other instruments required by the practice of the Court for the purpose of security shall, unless otherwise ordered, be taken in the name of the Accountant, his successors and assigns, and shall be deposited in his office. Con. Rule 156, *amended*.

(2) Mortgages and other securities made to, or vested in the Accountant, in any action or matter, are to be held by him subject to the order of the Court or a Judge; but no duty or liability (save as custodian of the instrument) is by reason of such mortgage or other security being made, given to or vested in him, imposed on the Accountant in respect of such mortgage or security or any property thereby vested in the Accountant. Rule 1225, 29th September, 1898, *part*.

Audit of
Accounts.

67. An Auditor shall be appointed to the Supreme Court. It shall be the duty of the Auditor in each year to examine and verify the several account books and securities in the Accountant's office and to compare the balances

entered in the *Balance Book* with the balances entered in the *Rules* 68-70.
 Ledgers, and with the Bank account, and to certify such balances if found to be correct, and to make such further and other examination of the said books and securities as he may think necessary for the proper audit thereof, and to report forthwith, after making such examination, the result thereof to the President of the High Court, and from time to time to make such suggestions as may appear to be desirable for the efficient keeping of the accounts. Con. Rule 157, *amended*.

68. The Auditor's remuneration, which is hereby fixed at the sum of \$500 per annum, shall be payable in monthly instalments, for which cheques shall be issued payable out of the General Interest Account, upon the fiat of the President of the High Court. Rule 9 Feb., 1895, 1392. *amended*. Auditors' remuneration.

69. During the month of January in each year the Accountant shall present to the President of the High Court a statement of the amounts paid for salaries and expenses of the Accountant's office during the previous year, and the names of the persons to whom such amounts were respectively paid, and also an estimate of the salaries and expenses of his office for the current year, and such estimates shall be examined by the President, who shall be at liberty to make such variations therein as he may think necessary, and when approved of by him, a fiat shall be indorsed thereon or appended thereto which shall be signed by him authorizing the payment of the sums mentioned and cheques may issue accordingly. Con Rule 159, 160. *amended*. Salaries and expenses of office.

The expenses of the Accountant's office, including the salaries, are a first charge on the income arising from the funds in Court: Jud. Act, s. 162.

70. Where money, stock, or securities in Court are directed by an order to be paid or transferred to an unmarried woman, and she marries before payment of the money or transfer of such stock or securities, the Accountant may pay out the money or make or execute a transfer of the stock or securities, in favour of such woman, upon an affidavit of herself and her husband that no settlement or agreement for a settlement has been made or entered into before, upon or since their marriage; or in case any settlement or agreement for a settlement has been entered into, then upon an affidavit by the woman and her husband, identifying the settlement Stock, how transferred to a married woman

Rule 70.

or agreement for a settlement, and stating that no other settlement or agreement for a settlement has been made or entered into as aforesaid, and an affidavit of the solicitor of the woman and her husband that such solicitor has carefully perused such settlement or agreement for a settlement, and that according to the best of his judgment, such money, stock or securities are not, nor is any part thereof, subject to the trusts of the settlement or agreement for a settlement, or in any manner comprised therein or affected thereby. *Con. Rule 179, amended.*

Where a married woman had assigned her interest in a fund in Court, and both she and her husband refused to make an affidavit of no settlement to enable the assignee to obtain payment of the fund, the Court made an order for payment, on the affidavit of a third party who knew the facts and was able to swear that there was no settlement: *Timothy v. Crown*, 1900, W. N. 51; 82 L. T. 142; following *Rowland v. Oakley*, 14 Jar. N. S. 845.

Affidavit
when dis-
pensed with.

Where the fund was under £10, an affidavit was dispensed with: *Ucal v. Ucal*, L. R. 4 Eq. 115; *Guest v. Newman*, 78 L. T. Jour. 161; and where the husband was permanently resident out of the jurisdiction, the affidavit of the wife alone was accepted and acted on: *Wilkinson v. Schneider*, L. R. 9 Eq. 423; and in another case an affidavit by a solicitor disclosing facts, from which it appeared that it was unlikely that there was any settlement, was accepted as sufficient: *Hoodward v. Pratt*, L. R. 16 Eq. 127; and see *Timothy v. Crown*, *supra*.

Where the applicant for the money is an infant, it is probable that even since this *Rule* the money may be settled. It was formerly held that a female infant had no power to waive her equity to a settlement: *Shipway v. Ball*, 16 Ch. D. 376; 44 L. T. 49. If not settled, doubtless the money will be held for the infant in Court, till she becomes of age, as in the case of any other infant, to be then paid to her, or to her trustees, under any settlement as circumstances may require.

Ordinarily a married woman, if an infant, is not entitled to get money out of Court to which she is entitled, before attaining her majority; but when the infant is married and domiciled abroad, and by the law of such foreign country is entitled to give a valid receipt for moneys due to her, notwithstanding her infancy, a fund in Court may be ordered to be paid to her notwithstanding her infancy: *Kavanagh v. Lennon*, 16 P. R. 229. So also where a legacy is bequeathed to an infant and is expressly directed to be paid to her at a certain age before attaining majority, if such legacy is in Court, the Court will direct it to be paid in conformity with the will: *Re Denckin*, 72 L. T. 220.

Infants,
lunatics, etc.

Infants and Persons Non Compotes Mentis. — Money in Court belonging to an infant will not as a matter of right be paid out to the Surrogate Guardian of the infant: *Re Harrison*, 18 P. R. 204; nor to a foreign guardian or official custodian of a lunatic: *Re Thompson*, *Thompson v. Thompson*, 19 P. R. 304, though in either case such allowance for maintenance as may be shown to be proper and necessary for an infant or person of unsound mind may be allowed and paid to the guardian, etc., *ib.* See also *Re Chute's*

Settlement, 1899, 1 Ch. 712; *Thiery v. Chalmers, Guthrie & Co.*, 1899, **Rules** W. N. 235. **71, 72.**

Where an infant is found entitled to moneys in Court in an administration suit, or moneys of an infant or person of unsound mind are otherwise in Court: *Re Thompson*, 19 P. R. 304; the Court takes charge of the fund, and will not suffer it to go into the hands of a trustee for the infant: *Kingsmill v. Miller*, 15 Gr. 171; *Mitchell v. Richey*, 13 Gr. 445, and where it is in the hands of a personal representative it may be ordered to be paid into Court: *Re Humphries*, 18 P. R. 289; *Whitewood v. Whitewood*, 19 P. R. 183. But where a married woman died entitled to a fund in Court which she bequeathed to her executor to be invested and the income applied for maintenance of her children, the fund was ordered to be paid out to the executor: *Re McDougall*, 11 P. R. 494.

The Court has refused to pay money out of Court to the tutrix of an infant residing in Quebec, although by the law of that Province the tutrix is entitled to the possession of all of the infant's property, where the fund in question was insurance money to which the infant was entitled under R. S. O. c. 136: *In re Berryman*, 17 P. R. 573; but she may under s. 155, s.-s. 2, apply to be appointed trustee of the fund and obtain an order for payment on giving security. Money to which a lunatic was entitled was ordered to be paid to a foreign Court, of which she had been made a ward, and within whose jurisdiction she resided: *In re DeLinden*, 1897, 1 Ch. 453.

In *Re Knight*, 1898, 1 Ch. 257; 77 L. T. 773, the Court refused to transfer to the curator of the person and property of a lunatic (appointed according to the law of Jersey, where the lunatic resided), stock of the lunatic in England, without proof of the need of the property for the maintenance of the lunatic, or other sufficient reason. In *Re Brown*, 1895, 2 Ch. 666, stocks in England were transferred to a Master in Lunacy of a Colony appointed by the Courts of the Colony to manage the lunatic's property.

71. Where money, stock or securities in Court are to be paid out of Court or transferred to the legal personal representative (a) of any person, the same may, upon proof, to the satisfaction of the Accountant of the death of any of them (whether before, on, or after the day of the date of the order), be paid to the survivors or survivor of them. *See* Con. Rule 189.

Transfer of stock to representative of person entitled.

(a) An "s" seems wanting here in the *Rule*; but see *Rule 5*, and R. S. O. c. 1, s. 8 (24).

72. Where money, stock, or securities in Court are to be paid out or transferred to any person named in the order or judgment, or named, or to be named in any report, the same or any portion thereof for the time being remaining unpaid or untransferred, may, on proof, to the satisfaction of the Accountant of the death of such person (whether before, on, or after the date of the order or judgment), and that his legal

Money, etc. payable to representatives may be paid to survivor of them.

Rule 72. personal representatives are entitled thereto, be paid or transferred to such legal personal representatives or the survivors or survivor of them. *See* Con. Rule 181.

Where no letters of administration have been taken out to the estate of a person who has died entitled to money in Court, and the amount is so small as not to warrant the expense of procuring letters of administration, the Court may direct the money to be paid out on the undertaking of the solicitor for the applicant to see to its due administration; *Ross v. Ross*, 4 Chy. Ch. 27; *Callender v. Toppdale*, 3 W. R. 289; *King v. Isaacson*, 9 W. R. 369; *Hivings v. Hivings*, 2 H. & M. 32; *Re Cable*, 3 W. R. 84; but see *Re Cahel*, 3 W. R. 289; *Mulock v. Caithra*, 13 P. R. 473.

In *Frogley v. Phillips*, 1901, W. N. 243; 50 W. R. 184, it was held that where a person entitled to a fund in Court has died intestate, the Court will not allow the fund to be paid out to the person who is entitled to take out letters of administration, but has not done so, even although the fund is under £20, and it is there said that the Judges had agreed that letters of administration must be taken out in all cases.

Payment has been ordered to be made of moneys in Court to an official assignee in bankruptcy of a deceased person entitled to the same, without requiring him to take out letters of administration; *In re Layson*, 1890, 1 Ch. 175; 73 L. T. 571. And where persons claiming to be the next of kin of a person entitled to money in Court applied in 1897 for payment, on the ground that the person entitled had in 1889 escaped from a prison in the United States where he was serving a life sentence, and had never since been heard of, the application was granted, and the taking out of administration to the estate of the person originally entitled was dispensed with; *In re Dunn*, 23 C. L. J. 434; 17 C. L. T. 197.

An administrator is entitled to have money in Court, to which he is entitled as administrator, paid out to him, notwithstanding there may be infants who may be entitled to a share of it as next of kin; *In Parsons, Jones v. Kelland*, 14 P. R. 144; *Stewart v. Whitton*, *Ib.*, 147; *Hanrahan v. Hanrahan*, 19 Ont. 396. Where the money in Court was the property of a person domiciled out of the Province, on his death it would seem that the money would not ordinarily be ordered to be paid out except to a personal representative duly appointed by the Court of this Province; *Stewart v. Whitton*, *supra*. See R. S. O. c. 79, s. 78, as to the power to grant ancillary probate of letters of administration to personal representatives appointed in another Province or other parts of the British Empire.

Where money was paid into Court under The Trustee Relief Act, under the erroneous supposition that a deceased person, of whose estate the fund was part, had died intestate, on the subsequent discovery and proof of a will, it was ordered to be paid out to the executors named therein, on petition presented by them, on proof that certain legacies bequeathed to infants were properly secured; *Re Reid*, 1884, 1 Ch. 270; 74 L. T. 77.

Where money is standing in Court to the credit of two or more persons as joint tenants, an application for payment out of a share to one of the parties, on which an order is actually made prior to the death of the applicant, will not amount to a severance of the joint tenancy; *In re Wilks; Child v. Bulmer*, 1891, 3 Ch. 59.

Where a beneficiary named in a will had disappeared and there was no evidence that he had survived the testator, and a sufficient time had elapsed, the Court presumed him to be dead, and made an order for the trustees to distribute the fund on the basis of the beneficiary not having survived the testator: see *Re Benjamin*, 1902, 1 Ch. 223; 86 L. T. 387. Rules 73-77.

See Rules 73, 74, which limit the operation of this Rule.

73. No principal sum of money, nor any stocks, funds, shares or securities shall, under Rules 71 and 72, be paid, transferred or delivered out of Court to the legal personal representative of any person under any probate, or letters of administration, purported to be granted at any time subsequent to the expiration of six years from the day of the date of the order, or judgment, directing such payment, transfer or delivery. Principal money, etc., not to be paid to representative after 6 years. Con. Rule 182.

74. No interest or dividends shall, under Rule 72, be paid out of Court to the legal personal representatives of any person under any probate, or letters of administration, purported to be granted at any time subsequent to the expiration of 6 years after the day of the date of the order or judgment directing such payment, or after the last receipt of such interest or dividends under such order or judgment, whichever shall last happen. Interest in like manner not to be paid after 6 years. Con. Rule 183.

75. Where money is to be paid out to persons named or to be named in an order or report, and the money is thereby found to be due to them as partners, the cheque may be made payable to the firm. Payments to partners. Con. Rule 184.

76. Persons entitled to money in Court may have a sufficient amount of the unappropriated Dominion Stock standing in the name of the Accountant appropriated as an investment of such money, or of part thereof, at par value. Investment of funds in Court in Dom. Stock. Con. Rule 185.

See *Re Smith*, 18 Ont. 327.

77. If all parties interested consent in writing, the consent shall be filed with the Accountant, and he shall make the appropriation without an order being drawn up for the purpose, and shall enter the consent in the Stock Ledger under the heading of the cause or matter. Appropriation without order. Con. Rule 186, as amended by Rule 1273. See Ont. Gaz., 31 Dec., 1904.

**Rules
78-80.**Crediting
interest on
stock.

78. The interest on stock so appropriated or purchased, shall, each half year, be credited to the various accounts entitled thereto; and wherever interest is ordered to be paid from time to time to any person in respect of the moneys which have been so invested, he shall be entitled to receive a cheque therefor without further order. Con. Rule 188.

Official
Guardian's
duty as to
mortgages.

79.—(1) It shall be the duty of the Official Guardian to see that moneys payable on mortgages held by the Accountant, in which persons for whom the said Guardian has acted are interested, are promptly paid, and that the mortgaged premises are kept properly insured, and that the taxes thereon are duly paid.

Remuner-
ation of
Guardian.

(2) There shall be paid quarterly to the Official Guardian out of the surplus interest fund for services rendered by him under this Rule the sum of \$200 per annum; and in the event of the fund to the credit of the account of the Official Guardian exceeding the sum requisite to meet the other charges thereon, the moneys so to be paid out of the said surplus interest fund, shall be recouped out of the fund to the credit of the said account of the said Official Guardian. Con. Rule 190.

Discharge
of mort-
gages held
by Ac-
countant.

80. Any person entitled to the discharge of a mortgage, made to or vested in the Accountant or other officer, may leave with the Accountant the required discharge with a request that the same be executed. The Accountant shall thereupon certify as to the payment of the money secured by the mortgage, and the matter shall in such case be considered by the officers whose duty it is to sign and countersign cheques for payment of money out of Court, and if they find that the mortgage has been satisfied in full, and that the proposed discharge is in due form, they shall indorse upon such certificate and discharge a direction for the execution of the said discharge by the Accountant or other officer in whom the mortgage may be vested, and thereupon the Accountant or such other officer may execute such discharge and may on a receipt being given therefor, deliver up all deeds and documents relating to such mortgage in his hands and may assign any policy of insurance held by him as collateral security for such mortgage to the person entitled to such discharge, or as he may by writing direct. Rules of 1 Jan., 1896, 1423.

81. The arrangement as to the investment by the Toronto General Trusts Company (a) of the funds in Court is hereby continued subject to change by the Judges of the High Court. See Con. Rule 191; Rules 13 Sept. 1890, 1269; Rule 23 March, 1895, 1393.

Rules
81, 82.
Investment
of funds in
Court.

(a) Now the Toronto General Trusts Corporation.

The arrangement referred to was made under Con. Rule, 1888, 191. That Rule which is not abrogated (see Rule 2, and schedule therein, referred to); it has, however, been modified by other Rules (see 11, & L. Jud. Act, 2nd ed., p. 220, for Rule 1269 and Rule 1393) of 23rd March, 1895, which are also unrepealed, and by new arrangements made by the Judges of the High Court with the T. G. T. Corporation.

82.—(1) Any person claiming to be interested in, or to have a lien or charge upon, or an assignment of, any money, stock or securities in Court, or invested in the name of the Accountant or other officer of the Court, or any portion thereof, or claiming to have the same applied towards the satisfaction of any judgment or execution against the person to whose credit such moneys, stocks or securities stand, or for whose benefit the same are held by the said Accountant or other officer, may, upon an affidavit verifying his claim, apply to the Court or a Judge *ex parte*, for an order directing that such money, stock or securities shall not be paid out or dealt with except upon notice to him. *New.* See Con. Rule 192.

Stop orders
how and
when
obtained.

(2) The person obtaining any such order may be ordered to pay any costs, charges and expenses occasioned thereby to any person interested in the money, stock or securities to which such order relates. *New.* See Con. Rules 192, 193.

Costs of.

The power to grant stop orders was formerly part of the jurisdiction of the Court of Chancery, and now, under *The Judicature Act*, is vested in the High Court.

Jurisdiction
to grant stop
orders.

This Rule, therefore, applies to the moneys and investments in Court, in any action in the High Court, which are vested in the Accountant of the Supreme Court.

The object of the Rule is to define the cases in which a stop order may be granted, and prevent injustice being done by the granting of stop orders *ex parte*. The applicant for a stop order is always required to submit to be bound by the terms of this Rule as a condition of getting the stop order. See Form of order H. & L. Forms, No. 542.

No petition is necessary under this Rule; see also *Hack v. Postle*, 1894, 2 Ch. 454. An affidavit verifying the applicant's claim, i.e., showing his title, is all that is required; see *Wood v. Vincent*, 4 Beav. 419; *Quarman v. Williams*, 5 Beav. 133.

Rule 82.Object of
stop order.

The effect of a stop order is simply to prevent the payment out of money, or the transfer of securities in Court, to the person appearing on the books of the Accountant to be entitled thereto, without notice being first given to the person who obtains the stop order. Nothing is decided thereby as to the rights of the parties: *Lucas v. Peacock*, 11 Beav. 177. A stop order has no effect until delivered to the Accountant, but the payment out may be stayed for twenty-four hours, on lodging a caveat with that officer.

When
granted.

Stop orders may be granted against a fund in Court, on the application of an execution creditor of the party entitled to the fund: *Wilson v. McCarthy*, 7 P. R. 132; *Courtney v. Vincent*, 15 Beav. 480. A motion by a judgment creditor who had not obtained execution was refused: *Brooke v. Brooke*, before Ferguson, J., 28th May, 1884; but granted in *Steckle v. Byers*, 10 C. L. T. 41, and by Boyd, C., in *Tweed v. Larocque* (2nd June, 1890), where it was also held to be unnecessary to issue executions where the assets to be reached consisted of money in Court, and the costs of stop orders instead were allowed; see also *Stuart v. Grough*, 15 Ont. App. 309. A stop order may be obtained on a fund ordered to be paid into Court, though it has not been actually paid in: *Shaw v. Hudson*, 48 L. J. Ch. 689, but not against a fund which is neither in Court, nor ordered to be paid in: *Wellesley v. Mornington*, 11 W. R. 17.

Where a fund in Court has been assigned, but no stop order is lodged by the assignee with the Accountant, that officer is not liable if he pay the money out on a fraudulent application by the assignor: *Bath v. Bath*, 1801, 1 Ch. 460.

Payments made by the Accountant to a second assignee before notice of a prior assignment will not be disturbed: *Cottingham v. Cottingham*, 11 Ont. 244.

Application
to pay out.

Sometimes the stop order is followed by an application for payment to the party obtaining it: such a motion is of course made on notice to all parties interested in the fund: *Re Gilchrist, Bohn v. Fife*, 7 P. R. 430, including any other persons who have obtained stop orders against the fund: see *Hulkes v. Day*, 10 Sim. 41.

Where the party obtaining the stop order does not move for an order for payment to him of the fund, the opposite party may move for payment out notwithstanding the stop order, or may move to discharge the stop order: such motions must, of course, be made on notice to the person who has obtained the stop order.

An order for payment out to a party entitled was made notwithstanding a stop order had been lodged by a mortgagee of a person who had a contingent interest in the fund, but whose interest never actually vested, and without notice to the mortgagee: *Vernon v. Craft*, 58 L. T. 989; 30 W. R. 778. This, however, seems like adjudicating upon a man's rights in his absence, and is a precedent that will no doubt be very cautiously followed.

A mortgagee of a fund in Court is not entitled to have the whole fund paid out where it exceeds the amount due under his mortgage, but only sufficient to satisfy his debt: see *Re Bell*, 1896, 1 Ch. 1; 76 L. T. 391; *Hacken v. Western*, 1898, 1 Ch. 370.

Effect of
stop order
on priorities.

Priorities.—As between specific chargees on a fund, a subsequent chargee having at the time of his advance notice of the prior charge cannot obtain priority over it by first obtaining a stop order against the fund: *Livesey v. Harding*, 23 Beav. 141; *Richardson v. Ibbotson*.

4 D. J. & S. 122; *Swayne v. Swayne*, 11 Beav. 403; *Re Holmes*, 20 Rule 82. Ch. D. 786; but if he had no notice of the prior charge when making his own advances, he may gain priority over it by first obtaining a stop order, even though he do so after notice of the prior charge: *Ib.*, *Greening v. Beckford*, 5 Sim. 195; and see *Stephens v. Green*, *Green v. Knight*, 72 L. T. 83; and an assignee for value of a fund claiming under an assignor who had a legal title, and obtaining a stop order without actual notice of a prior equitable assignment, will be entitled to priority as against the prior equitable assignees: *Montepore v. Guedella*, 1903, 2 Ch. 26; 88 L. T. 496; but as between parties having no specific charge against the fund: e.g., execution creditors, he who first obtained a stop order formerly gained priority: *Thomas v. Cross*, 2 Dr. & S. 423; but now the fund will be distributed among all creditors ratably according to the principle of *The Creditors' Relief Act*, R. S. O. c. 78; *Dawson v. Moffatt*, 11 Ont. 484; 22 C. L. J. 31; and see *la re Bokstal*, 17 P. R. 201; but an execution creditor cannot by obtaining a stop order acquire priority over a prior charge, legal, or equitable: *Re Bell*, *Carter v. Stadden*, 34 L. T. 370; see also *Cottingham v. Cottingham*, 11 Ont. 294, nor against a creditor who has obtained the prior appointment of a receiver of the fund: *Re Anglessey*, 1903, 2 Ch. 727; 89 L. T. 584; although the appointment of a receiver creates no lien or charge upon the fund: see *supra*, p. 103.

Where a fund had been directed to be carried over to another account, and it was subsequently discovered that the person entitled to the fund was a debtor to the estate from which the fund was carried over, it was, nevertheless, held that specific chargees on the fund after it had been carried over were entitled in priority to the claims of the parties in the original suit: *Re Eyton*, *Bartlett v. Charles*, 45 Ch. D. 458; 63 L. T. 336.

Where a trust is being administered by the Court, the trustees cease to have any power over it, and a notice to them of an incumbrance will not give the party giving the notice priority over a prior incumbrancer who has not given notice: a stop order in such a case is the most effectual notice: *Pinnock v. Bailey*, 23 Ch. D. 487; 48 L. T. 811; *Mutual Life Assurance Company v. Langley*, 26 Ch. D. 686; 51 L. T. 284; *Mack v. Postle*, 1894, 2 Ch. 449; 71 L. T. 153; *Cottingham v. Cottingham*, 11 Ont. 294; but see *Stephens v. Green*, 1895, 21 Ch. 148, 72 L. T. 574.

The priority acquired by a stop order extends only to the charge in respect of which it was obtained: *MacLeod v. Buchannan*, 33 Beav. 234; 4 D. J. & S. 265.

To ascertain the effect of a stop order the Court may look not merely at the ordering part, but also at anything else appearing on the face of the order: *Mack v. Postle*, 1894, 2 Ch. 449.

The stop order cannot defeat the rights of third parties to the stop order fund, thus, the lien of a solicitor on the fund cannot be defeated by obtaining a stop order against his client, even under an assignment: *Hammer v. Couper*, 33 Beav. 431.

Costs of obtaining a stop order are not given as of course: *Grimaby v. Webster*, 8 W. R. 755; *Houle v. Roberts*, 12 Jur. 108; *Waddilove v. Toller*, 6 Ha. 497, the applicant may be ordered to pay the costs of a person unnecessarily notified: *Churchbrook v. Gillatt*, 6 Beav. 611.

Rules
83-87.

13. TAXING OFFICERS.

Taxing
Officers.

83. There shall be two or more Taxing Officers of the Supreme Court at Toronto. Con. Rule 194.

Local
Taxing
Officers.

84. Every Local Registrar, Local Master, Deputy Registrar and Deputy Clerk of the Crown, shall be a Local Taxing Officer. Con. Rule 195.

Powers
of local
Taxing
Officers.

85. Every Local Taxing Officer shall, subject to the provisions of Rules 1167 to 1171, inclusive, in actions begun or pending in his office, be entitled to tax all bills of costs, including counsel fees, subject only to appeal to a Judge of the High Court. This Rule shall not apply to cases in which infants are concerned, unless the Official Guardian is the guardian *ad litem* for the infants. Con. Rule 196.

In lunacy matters all costs should be revised by a Taxing Officer in Toronto: *Re Norris*, 5 O. L. R. 99.

Powers of
Taxing
Officers.

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 them. Con. Rule 197.

Substantially to the same effect as Eng. (1883) R. 27 (25).

Taxing officers have power to call evidence on taxations before them: *Williamson v. Town of Aylmer*, 12 P. R. 129.

Where the taxing officer refused to proceed until the plaintiff was produced for examination as to a retainer, and he was out of the jurisdiction, the taxing officer was directed to examine other witnesses, and if unable to decide as to the retainer, then to report to a Judge in Chambers: *Ib.*

Where solicitor and client contradict one another in affidavits, the taxing officer should allow oral evidence to be taken under this Rule: *Re Evans*, 35 W. R. 546.

There is no power to direct shorthand notes of evidence before him without the consent of the parties: *Re Hilleary v. Taylor*, 36 Ch. 11, 202; unless Rule 457 is applicable in such a case, which does not seem to have been contemplated, as that Rule deals with an examination authorized under other provisions.

14. BARRISTERS AND SOLICITORS.

Barristers'
Roll.

87. There shall be one Roll of Barristers-at-Law, and all persons admitted to the Bar of Ontario shall sign the same and take the prescribed oaths. See Con. Rule 200.

88. There shall be one Roll of Solicitors of the Supreme Court of Judicature for Ontario, and all persons admitted as solicitors shall sign the same upon taking the prescribed oaths. **Rules 88, 89.**
 Con. Rule 198. **Solicitors' Roll.**

89. In a case appearing to justify investigation, it shall be competent for the Court, in lieu thereof, to issue an order calling upon the solicitor to answer the matters appearing on affidavit or otherwise. **Striking solicitor off roll.**
 Con. Rule 201.

The Court of Appeal, as well as the High Court, has power to strike a solicitor off the rolls: R. S. O. c. 174, s. 3 (3): *Re Whitehead*, 28 Ch. D. 615.

The Solicitors Act, R. S. O. 1897, c. 174, does not deprive the Court of its inherent authority over solicitors as officers of the Court: *Re McBrady & O'Connor*, 19 P. R. 37.

Where the employment of a solicitor is so connected with his professional character as to afford the presumption that that character formed the ground of his employment by the client, the Court will exercise its summary jurisdiction over him: *Re McBrady & O'Connor*, *supra*.

The Law Society has a disciplinary jurisdiction over solicitors and barristers: see R. S. O. c. 172, s. 44: *Hunda v. Law Society*, 16 Ont. 625; 17 Ont. App. 41; and where, on complaint to the Law Society, the Society has acquitted the solicitor, any application to the Court to strike the solicitor or barrister off the rolls for such alleged misconduct cannot be made by a suitor in person, but must be made by counsel: see *Re Solicitor*, 1903, 2 K. B. 205; 89 L. T. 119.

Where in the course of a cause, evidence of fraudulent conduct on the part of a solicitor is brought to light, the Court may *sua sponte* direct proceedings to be taken against the offending solicitor: *Goodwin v. Gosnell*, 2 Coll. 457, 462; *Wheatley v. Bastow*, *Re Collins*, 7 D. M. & G. 261, 588; *Re Toms*, 3 Chy. Ch. 204, 215; *Re Currie*, 25 Gr. 338; *Re Solicitor*, 27 Gr. 77; *Thorndyke v. Hunt*, 5 Jur. N. S. 879, or upon the application of any party interested: *Cave v. Cave*, 43 L. T. 158.

Answering Affidavits.—This is usually a preliminary measure to see whether a motion to strike a solicitor off the rolls need be resorted to. **Answering affidavits**

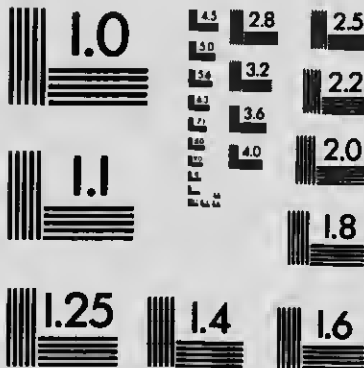
In *Burton v. Earl of Chesterfield*, 9 Jur. 373, it was said that the motion could not be made, calling on an attorney to answer the affidavits and at the same time to show cause why he should not be struck off the rolls; and in that case the rule was confined to calling on him to answer the affidavits. In a later case, however, the rule *nisi* was granted in the double form: *Re Blake*, 3 E. & E. 34; and see *Re Grueber*, 63 L. T. Jour. 637.

Where the motion is confined to calling on the solicitor to answer affidavits simply, and the Court is of opinion that his answer is insufficient, the practice at law has been to enlarge the motion to a future day, intimating to the solicitor that he may be further heard on that day, why he should not be struck off: *Re Wright*, 12 C. B. N. S. 705; *Re H.*, 31 L. T. 730.



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Rule 89.

In order to give the Court jurisdiction to entertain an application for a solicitor to answer matters contained in an affidavit, or to strike him off the rolls, it is not necessary that the misconduct of which he is accused should arise strictly between solicitor and client: *Re Aitken*, 4 B. & Ald. 47; *Re Attorney*, 39 U. C. Q. B. 171; *Re Knight*, 1 Bing. 91; *Re Blake*, 3 E. & E. 34; *Re Hill*, L. R. 3 Q. B. 743; *Re Chandler*, 22 Beav. 353; and see *Re Cutts*, 16 L. T. 715; *Re Keays*, 13 C. P. 282; *Re Solicitor*, 80 L. T. Jour. 103; *Re Strong*, 53 L. T. 694; 55 L. T. 3; 31 Ch. D. 273.

Striking off the Roll.

Striking off Roll.—A solicitor may be struck off the rolls for fraudulent conduct as a trustee: *Re Chandler, supra*, where the application was made by the *cestui que trust*; and see *Thorndyke v. Hunt, supra*; *Dolland v. Johnson*, 2 Jur. N. S. 633; or for fraudulently abusing the confidence of a client: *Re Martin*, 6 Beav. 337; *Re J. C. M. & J. M.*, 24 W. R. 111; or for obtaining a client's money to discharge alleged liabilities of the client which did not exist: *Re H.*, 31 L. T. 730; *Re Strong*, 31 Ch. D. 273; 55 L. T. 3; or for getting a false affidavit sworn, and without authority instructing counsel to consent to payment of money out of Court: *Wheatley v. Bastow*, 7 D. M. & G. 261, 558; or for falsely representing an injunction to have been granted: *Kimpton v. Eve*, 2 V. & B. 352; or for making an interlineation in an affidavit after it had been sworn: *Erskine v. Adcane*, 18 Sol. Jour. 573; 10 C. L. J. 209; or for committing perjury, *Seton* 652; or for revealing the secrets of a client: *Re Cutts*, 16 L. T. 715; *Cholmondeley v. Clinton*, 19 Ves. 261; or for persuading his client to give him money to be used for bribing a jury before whom the client was to be tried for a criminal offence: *R. Titus*, 5 Ont. 87; or where he has been convicted of crime and sentenced to imprisonment, as, e.g., for being a party to the use of premises as a disorderly house: *Re Solicitor*, 69 L. T. 148, 522, S. C., *sub nom Re Weare*, 1893, 2 Q. B. 439; or for misappropriating fees paid to him to be paid to counsel: *Re Lewis*, 95 L. T. Jour. 85; or borrowing large sums of money from a client, who has just attained his majority, without giving proper security: *Re Solicitor*, 1894, 1 Q. B. 254; 70 L. T. 27.

Non-payment of money.

Under R. S. O. c. 174, s. 29, a solicitor may be struck off the rolls for default of payment of money received by him as a solicitor: *Anon*, 12 C. L. J. 204; *Re Knowles*, 16 P. R. 408. Where considerable sums had got into the hands of a solicitor who made default in payment, but the client issued execution upon the order directing payment, it was held that he had treated the claim as a debt, and a subsequent motion to strike the solicitor off the rolls for non-payment was therefore refused: *Re Fletcher*, 28 Gr. 413; see also *Ex p. White Sewing Machine Co.*, 12 C. L. T. 256; but the English cases on which these decisions were based have been since overruled: *In re Grey*, 1892, 2 Q. B. 440. And where the client had sued the solicitor for the money and failed on the ground that his claim was barred by the Statute of Limitations, it was held that he could not afterwards resort to summary proceedings against the solicitor without any allegation of misconduct: *Sittingbourne & S. Ry. Co. v. Lawson*, 50 L. T. Jour. 448. The Court will not exercise its summary jurisdiction over a solicitor to compel repayment of a loan: *Re Bryant*, 50 L. T. 450; unless the loan has been fraudulently obtained by the solicitor from his client: see *Re Strong, supra*.

Where the application is to strike a solicitor off the roll for non-payment of money, it should be made in Court, and if the order is granted it may direct payment by the solicitor within a specified time, or in default that he be struck off. Upon default no further order is necessary, but the applicant must move, on notice to the solicitor, to have the roll brought into Court for the purpose of having the name struck off: *Re Bridgman*, 16 P. R. 232; *Re Advocates*, 18 C. L. T. 159; and see *Re W.*, 72 L. T. 679. On the roll being brought into Court, the officer of the Court will, in open Court, on the direction of the Court, strike the name off the roll. **Rule 89.**

The order to strike off the roll for non-payment of money, issues in respect both of the specific moneys ordered to be paid, and also the costs of the application: *In re Knowles*, 16 P. R. 408; and see *In re Solicitor*, 1895, 2 Ch. 66.

The Court will not on a summary application against a solicitor for payment of money alleged to be in his hands, make it a term of an order for the delivery and taxation of his bill that on non-payment of what shall be found due he be struck off the roll, where there appears to be a *bona fide* dispute as to whether there is anything in the solicitor's hands at all, such a provision being regarded as an unnecessary slur on the solicitor's professional character: *Re Ross*, 16 P. R. 482.

A summary application for payment of money will not be entertained against a solicitor, as against whom no professional misconduct can be alleged, even though he may be liable to an action: *Id.*

Repayment, pending a motion to strike off the rolls, of money fraudulently obtained, is no purgation of the offence: *Re H.*, 31 L. T. 730; nor is it, where the money was properly obtained, but misappropriated: *Re Solicitor*, 62 L. T. Jour. 446.

Where a solicitor is struck off the rolls for misappropriating the moneys of his client, the order directing him to be struck off may properly contain a reference to ascertain the amount for which he is liable and direct him to pay the amount so to be ascertained, and payment may be enforced against him even after he has been struck off: *Re Strong*, 31 Ch. D. 273; 55 L. T. 3.

Where the solicitors engaged in any action or matter in court represent conflicting interests, any undisclosed arrangement or practice between them whereby a share of profit, whether by way of agency or otherwise, is paid to any of them, for introducing the litigation, that is professional misconduct: *Re Four Solicitors*, 1901, 1 K. R. 187; 83 L. T. 484.

Where the application against a solicitor is made on the ground of fraud, the fraud must be clearly proved; the Court will not infer an equivocal action to have been fraudulent: *Re Stewart*, L. R. 2 P. C. 88; *Re S—*, 14 C. P. 323.

The Court refused to make an order on the production merely of a certificate that the solicitor had been struck off the roll of a Colonial Court: *Re Solicitor*, 1898, 1 Q. B. 331; 77 L. T. 661.

Suspension from Practice.—Instead of striking a solicitor off the roll for misconduct, the Court may, if it see fit, suspend him from practice for a specified period; thus, for antedating a marriage settlement in order to make it appear to have been executed before

Suspension.

Rule 89. marriage, a solicitor was suspended from practice for five years: *Re Parry*, 98 L. T. Jour. 404; and see *Erskine v. Adeane*, 18 Sol. Jour. 573; *Re Hill*, L. R. 3 Q. B. 543; *Re Blake*, 3 E. & E. 34; *Re Officer*, 95 L. T. Jour. 299; *Re Russell*, 95 L. T. Jour. 300; *Re Solicitor*, 1894, 1 Q. B. 274; 70 L. T. 27; *Re Solicitor*, 61 L. T. 842; *Re Lewis*, 95 L. T. Jour. 85, where the solicitor was suspended until restitution should be made to the client. In some cases, though the solicitor has been exonerated from fraud, he has nevertheless been ordered to pay the costs of proceedings against him, where the circumstances were such as to call for investigation: *Re Holland*, 95 L. T. Jour. 160.

Where a solicitor has been suspended for misappropriating the moneys of his clients, he will not necessarily be struck off the rolls on being subsequently convicted of embezzlement in reference to the same transaction: *Re Solicitor*, 61 L. T. 842.

Restoration to Roll.

Restoration to Roll.—A solicitor who has been struck off the roll, after conviction of a criminal offence, may be restored to the roll, if there are circumstances justifying it: *Re Brandreth*, 64 L. T. 739; and see *Re Poole*, L. R. 4 C. P. 350; *Ex p. Pyke*, 6 B. & S. 703; *Re Solicitor*, 19 C. L. J. 234.

Where a solicitor has been struck off the rolls for non-payment of money, it is a condition precedent to restoration that he shall have made full restitution, or made the best efforts in his power thereto, and shall satisfy the Court as to the propriety of his conduct in the meantime: *Re Poole*, L. R. 4 C. P. 350; *Ex parte Pyke*, 6 B. & S. 703. And the Law Society must be notified of any application to restore to the rolls, a solicitor who has been struck off for misconduct: *Re Solicitor*, 19 C. L. J. 234.

Appeal.

Appeal.—An order striking a solicitor off the rolls is not a criminal proceeding and is appealable: *Re Hardwick*, 49 L. T. 584.

Leave to appeal to Her Majesty in Council from an order striking a barrister off the roll of a Colonial Court was given, and the order was reversed by the Judicial Committee of the Privy Council, on the ground that the facts did not warrant the order: *In re Renner*, 1897, A. C. 218.

Restitution, etc., in case of negligence or other breach of duty.

Restitution, etc., on Summary Application.—Where negligence or other breach of duty is committed by a solicitor in a matter of which the Court has selsin, the Court can summarily order the solicitor, as its officer, to make good the loss actually occasioned thereby, but cannot mulct him in damages for his misconduct: *Marsh v. Joseph*, 1897, 1 Ch. 213.

A solicitor may on a summary application be compelled to make good moneys improperly obtained out of Court, through negligence on his part; thus, a solicitor who, at the request of a third person, applied as solicitor for a person entitled to money in Court for payment out of the money, and by reason of the fraud of the third person, and on forged affidavits, improperly obtained payment of the money, without ever having had any direct communication with the person for whom he acted; he was ordered on a summary application to refund the money so obtained: *Slater v. Slater*, 1897, 1 Ch. 222, note. And where it is brought to the attention of the Court that money has been improperly obtained out of Court by a solicitor, the Court may *sua sponte* direct proceedings to be taken to compel him to refund it: see *Re Central Bank*, per Burton, C.J., 24 Ont. App. at p. 473.

Where in the course of an action it appears that a solicitor for **Rules** one of the parties has in breach of trust got possession of a trust **90, 91.** fund, he may be directed to pay it into Court by order made on a summary application in the action, and in the matter of the solicitor: *Re Carroll*, 1902, 2 Ch. 175; 86 L. T. 862.

The Court may also, in exercise of its summary jurisdiction over Costs, order a solicitor to pay the costs of proceedings instituted by him without authority: *Nurse v. Durnford*, 13 Ch. D. 764; 41 L. T. 611; *Re Savage*, 15 Ch. D. 557, or where by his negligence a cause has been tried as undefended, which was intended to be defended, a new trial may be ordered, and the solicitor ordered to pay costs so occasioned, as between solicitor and client: *Re Reaiguay*, 3 Taunt. 484.

Where an action is carried on by a solicitor on an agreement to indemnify his client against costs, the solicitor is personally liable for the costs, if the action fail: *Cockle v. Whiting*, 1 K. & M. 43; *Re Jones*, L. R. 6 Chy. 497, and this liability may be summarily enforced: *Ib.*; and where a solicitor agreed to charge no "solicitor's fees," this was held to include fees as counsel, if the solicitor himself acted as counsel: *Re Solicitors*, 33 C. L. 115.

Undertaking of Solicitor—Enforcing.—A solicitor, being an officer of the Court, his undertaking, given in his professional capacity, whether in an action or not, will be enforced on a summary application to the Court: *Woodfin v. Wray*, 51 L. J. Chy. 427; 97 L. T. Jour. 41; *Sneyay v. Harland*, 1894, 1 Q. B. 707; *In re Coolgardie Gold Fields*, 1900, 1 Ch. 475; *D. v. A. & Co.*, 1900, 1 Ch. 484. Under-takings.

90. A book to be called "The Solicitors' and Agents' Book" shall be kept in the Central Office to be there inspected by any party. A solicitor or his clerk without fee: and every solicitor having an office or carrying on his business within the said city, shall cause to be entered in such book (in alphabetical order) his name and place of business or some other proper place within the city where he may be served with pleadings, notices, orders, warrants and other documents, proceedings and written communications; and as often as any such solicitor changes his place of business or the place where he may be so served as aforesaid, he shall cause to be made the like entry thereof in the said book. Solicitors' and agents' book. Rules 1 Jan., 1896, 1423. Toronto Solicitor.

The entries required to be made under this Rule are compulsory: *Essery v. G. T. Ry. Co.*, 13 P. R. 219.

For the consequences of not complying with this Rule, see Rule 329.

91. Every other practising solicitor shall cause to be entered in the said book (in alphabetical order) his name and place of business, and also in an opposite column the name of some solicitor having an office and carrying on business in the city of Toronto as his agent. Entry of Toronto Solicitors as agents. Rules 1 Jan., 1896, 1423.

**Rules
92-94.**

The entry of a Toronto agent by solicitors practising out of Toronto is compulsory: *Essery v. G. T. Ry. Co., supra.* See also *Rule 320.*

Solicitors' and agents' book in County Towns.

92. Every Deputy or Local Registrar shall keep in his office a book to be called "The Solicitors' and Agents' Book," in which each solicitor residing elsewhere than in the County Town, and not having an office there, may specify the name of an agent, being a solicitor of the Supreme Court, and having an office in such County Town, upon whom all pleadings, notices, orders, warrants, and other documents, proceedings and written communications in relation to business conducted in the office of the Local Master, Deputy Clerk of the Crown, Deputy or Local Registrar of such County may be served. Rules 1 Jan., 1896, 1423.

The entry of the name of an agent in the books required to be kept under this *Rule* is optional: *Essery v. G. T. Ry. Co., supra.* If the entry is made, services may be effected accordingly: see *Rule 320*; but service on an agent is not good service on the principal, unless the agent is booked as agent under this *Rule*: *Robinson v. Robinson*, 13 P. R. 51.

In England a town and a country firm, having certain partners in common, are treated as the same firm, and not as principals and agents: *Re Borough Com. & Bdg. Soc.*, 1894, 1 Ch. 289.

15. SHORTHAND REPORTERS.

Copies of evidence.

93. All copies of evidence required to be furnished by the official shorthand reporters shall be obtained and paid for through such officer as may from time to time by Rule of Court or Order in Council be named for the purpose. *New.*

Mr. Strange of the Registrar's office is now the person to whom applications for copies of the shorthand reporters' notes should be made.

See Ind. Act, ss. 169-171.

For the fees payable for copies of evidence, see notes to *Rule 792.*

16. EXPERTS.

Court may obtain service of experts.

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.*

Master cannot employ experts.

It is only the Court that is authorized to obtain the assistance of experts. A Master to whom a cause is referred, has no authority to employ experts for the purpose of assisting him to come to a conclusion on matters referred to him: *Re Robertson, Robertson v. Robert-*

son, 24 Gr. 555; *Mildmay v. Lord Methuen*, 1 Drew. 216; 16 Jur. Rule 94. 965; but see *contra*, *Re London & Birmingham Ry. Co.*, 6 W. R. 141; and see Rule 683, note.

Where, however, the Master had, at the instance of the plaintiff, and with the consent of the creditors, in an administration suit, employed an expert, and the parties received the benefit of his services without objection, the Court on appeal by the creditors refused to disallow the costs incurred: *Re Robertson, Robertson v. Robertson*, *supra*. Costs of expert may be allowed though incurred improperly.

This Rule gives a wide discretion to the Court as to the manner in which experts shall be employed; but apparently it does not give the Court power to direct experts to be employed for the purpose of giving evidence as witnesses; it appears merely to enable the Court to procure the assistance of experts for the purpose of getting their opinions, on the evidence adduced by the parties, or upon a view of the *locus in quo*: see *Enderwick v. Alden*, 88 L. T. Jour. 12.

In *Broder v. Saillard*, 25 W. R. 456, the Judge at the trial, appointed an independent surveyor to make a report, and at the adjourned hearing his report was handed to the Judge: the Judge thought that two points should be stated more fully, and he directed the surveyor to make an addition to his report, observing that he preferred not to allow the surveyor to be sworn as a witness, as he was acting in a quasi-judicial capacity.

Where there is contradictory evidence on a scientific question the Court is at liberty to employ an independent expert to give advice upon which the Court may form its judgment: *Badische Anilin, etc., v. Levinstein*, 24 Ch. D. 156. Cases in which expert appointed.

An expert has been employed to ascertain the effect of a dam on the water penned back: *Dickson v. Burnham*, 14 Gr. 601; 17 Gr. 265; *Hawkins v. Mahaffy*, 29 Gr. 326; and the amount of encroachment of alluvium on a sea shore: *Attorney-General v. Chambers*, 4 DeG. & J. 55, 58; and as to the effect of using steamboats on a canal: *Case v. Midland Ry. Co.*, 27 Beav. 247. As to the circumstances under which the Court will send an expert, to report in the case of a suit to abate a nuisance, see *Slavin v. North Bancepeth Coal Co.*, L. R. 9 Chy. 705; *Enderwick v. Alden*, *supra*.

Where a plaintiff proves himself entitled to an injunction against a nuisance, or other injury, the Court cannot, before pronouncing judgment, order an expert to be employed, for the purpose of ascertaining the best mode of removing the nuisance, etc., even though the injunction to which the plaintiff is entitled be a difficult one for the defendant to obey: *Attorney-General v. Colney Hatch Asylum*, L. R. 4 Chy. 146; and a general inquiry as to what ought to be done to preserve the plaintiff's light and air was refused: *Stokes v. City Office Co.*, 13 W. R. 537. But after judgment, the opinion of an expert may be taken, as to the time which ought to be allowed for carrying it into effect: *Attorney-General v. Merthyr Tydfil*, 5 W. R. 148. Court cannot refuse to grant relief against nuisance until inquiry made by expert as to how it may be best abated.

In the *Baltic Co. v. Simpson*, 24 W. R. 390, it was held that the Court ought not, under 15 & 16 Vict. c. 80, s. 42, or sec. 57 of the Jud. Act (now R. S. O. c. 62, s. 29), to make an order before trial, appointing a scientific person to report on a question of fact.

Where a matter is referred by the Court to an expert for report, a formal order of reference to him should be drawn up; but where an

Rule 94.

expert acted, and made his report, without this having been done, the Court acted on the report notwithstanding the objection: *Enderwick v. Alden*, 88 L. T. Jour. 12.

Appoint-
ment may
be *ex parte*.

Where an expert is employed, it is not absolutely necessary that the appointment should be made in the presence of the parties: *Re London & Birmingham Ry. Co.*, 6 W. R. 141.

Expert
cannot call
witnesses.

An expert cannot call witnesses: *Morris v. Llanelly Ry. Co.*, W. N. 1868, 46; and his report is not conclusive: *Ford v. Tynte*, 2 D. J. & S. 127; *Adamson v. Gill*, 16 W. R. 306.

Assessors.

Under the Jud. Act, s. 101, the Court may call in the aid of one or more assessors specially qualified, and may try or hear a cause or matter wholly, or partially, with the assistance of such assessors. Where experts are called in to act as assessors their powers are merely advisory, and the Court is not bound to adopt, or follow, the advice which they may offer. Assessors sit with the Judge and hear the evidence upon which their advice is required. It has not been usual for them to take any oath of office.

The Court cannot after the evidence has been taken in an action call in the aid of experts as assessors, and base its judgment on their opinion as to the result of conflicting testimony of a technical character: *Wright v. Collier*, 19 Ont. App. 298; not even though the assessors are so called in with the consent of the parties: *Ib.*

Reference
to experts
under R. S.
O. c. 62, ss.
28, 29.

Under *The Arbitration Act*, sec. 28, any question arising in any cause or matter may be referred to a Judge of a County Court, or an official referee, or to any referee agreed on by the parties, for inquiry and report, and in this way the assistance of experts may be obtained. And under sec. 29 a cause or matter may, in certain cases therein mentioned, be referred to a special referee (if the parties so agree) for trial.

No power it will be seen is given to the Court under sec. 28 or 29, to refer a cause to anybody but a Judge of a County Court, or an official referee, except by consent of the parties. Where, therefore, a reference is required under those sections to an expert, it would seem that the parties must agree on the referee to be named. It is possible, however, that this *Rule* may be held so to amplify the power of the Court as to enable it to refer causes for the purposes mentioned in sections 28 and 29, to special referees of its own nomination, independently of the consent of the parties.

Where a reference is directed to an expert for inquiry or report under sec. 28, or for trial under sec. 29, that is, of course, an exception to the rule laid down in *Morris v. Llanelly Ry. Co.*, *supra*, that he cannot call witnesses: see *Rules* 648, 650.

Where a question, or a cause or matter, is referred to a special referee under sec. 28 or 29, his report is appealable in the same way and within the same time as a Master's report: see *Rules* 654, 769.

Expert
evidence.

Where an expert is required to give evidence, his evidence should be given *viva voce*, as the Court as a general rule discourages the taking of such evidence by commission: *The Attorney-General v. Gooderham*, 10 P. R. 259.

It is provided by 2 Ed. vii., c. 15, that not more than three expert witnesses on each side shall be examined without leave, to be obtained before the examination of any of the three which may be called without leave, in any action, arbitration, or other proceeding.

In the case of proceedings within the jurisdiction of the Dominion **Rule 94**. Parliament, five may be called subject to the like provision: 2 Ed. vii., c. 9 (D.).

Where parties adduce *quasi* expert evidence, it is not open to the Court, upon a trial by jury, to withdraw the case from the jury, because, in the opinion of the Court, the witnesses are incompetent to give expert evidence, but the evidence must be submitted *quantum valent*; e.g., in an issue in which the mental capacity of a testator was in question, the evidence of witnesses who spoke to his mental capacity was held to be admissible, even though the witnesses were not, in the opinion of the Court, experts: *Regan v. Waters*, 10 Ont. App. 85. As to the weight to be attached to the conclusions of scientific witnesses, see *Goldamid v. Tunbridge Wells*, L. R. 1 Chy. 349.

Where the opinions of experts on foreign law are conflicting, the Court may examine for itself the text books and judicial decisions of the foreign country, in order to arrive at a satisfactory conclusion: *Rice v. Gunn*, 4 Ont. 579; *The Stettin*, 14 P. D. 142. The Court will not receive the opinions of experts as to the proper construction of a statute: e.g., the evidence of surveyors as to the correct mode of making a survey under a statute is inadmissible: *Stafford v. Bell*, 6 Ont. App. 273.

The costs incurred in order to qualify experts to give evidence are not taxable between party and party: see *Molannon v. Clarke*, 9 P. R. 555.

CHAPTER III.

SITTINGS OF THE COURTS.

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| 1. COURT OF APPEAL, 95, 96. | (iii) <i>Weekly Sittings, Ottawa and London, 104-112.</i> |
| 2. HIGH COURT, | (iv) <i>Sittings for trials, 113.</i> |
| (i) <i>Distribution of business, 97.</i> | (v) <i>Vacation Business, 114, 115.</i> |
| (ii) <i>Weekly Sittings, Toronto, 98-103.</i> | (vi) <i>Divisional Courts, 116-119.</i> |

1. COURT OF APPEAL.

[Rules 95 and 96 were repealed by Rule 1233.]

2. HIGH COURT.

(i) *Distribution of Duties amongst the Judges.*

Distribution
of work
amongst
Judges.

97. In case a Judge of the High Court assigned to any duty is unable to act, or in case some special work requires to be done by a Judge for which no appointment has been made, it shall be competent for any two of the Presidents of Divisions of the High Court, by writing, under their hands, to assign the particular work or duty to any Judge of the High Court. Rules of 1 Jan., 1896, 1427 (213 A.).

(ii) *Weekly Sittings at Toronto.*

Sittings of
Weekly
Court.

98. A Judge shall be at Osgoode Hall every week, except during vacations, for the purpose of disposing of all business, except trials, which may be transacted by a single Judge. All applications in respect to such business are to be made to him. Rules 29 Dec., 1893, 1276 (210).

The Judge sitting in the Weekly Court has no jurisdiction to entertain an appeal from an order of a Judge of the High Court made in a criminal proceeding: *Reg. v. Graham*, 29 Ont. 193.

Business.

99. The business of the weekly sittings shall be as follows: Tuesday and Friday, Chambers; Monday, Wednesday and Thursday, Court. Rule 1259 of 28th Nov., 1903.

Settling
down.

100 All Court business, except *ex parte* motions, shall be entered on a list for the proper day, and shall be disposed of in the order of entry, unless otherwise directed by the Judge. Rules 29 Dec., 1893, 1276 (212).

101. The proper officer shall make out and transmit to the Clerk of the Weekly Court a list of all business set down for argument in the Weekly Court. Rules of 1 Jan., 1896, 1426. Rules 101-104.
Cause list.

102. All papers relating to proceedings in the Weekly Court at Toronto shall be filed in the Registrars' office. Rules 1 Jan., 1896, 1501, amended. Filing papers in Registrars' office.

Affidavits before the Court on a motion and mentioned in the order made thereon, were held to be taxable, though filed in the office of the Clerk in Chambers instead of in the Registrars' office: *Sturgeon Falls P. Co. v. Sturgeon Falls*, 10 P. R. 286.

No. 8 of the Regulations of the High Court, passed on 17th Dec., 1904, to take effect from 31st Dec., 1904, is as follows:

(8) When a case is required to be set down for a Divisional Court, Weekly Court or Chambers, the officer shall require the party desiring the case to be set down to indorse on the notice of motion the name of the office in which the action or proceeding was commenced, and the officer shall not set down any case without such indorsement, unless otherwise ordered by the Court or a Judge.

103. All documents sent from local offices to Toronto for use in the Weekly Court shall be sent to The Central Office, and the necessary return postage or express charge shall be transmitted therewith. Rules 29 Sept., 1894, 1382; 1 Jan., 1896, 1425. Transmission of papers to Toronto.

(iii) Weekly sittings at Ottawa and London.

104.—(1) Subject to the Rules of Court, sittings of the High Court of Justice shall be held at Ottawa and London respectively at least once one day in each week, except during vacations; and all proceedings in any action or matter which may be heard and disposed of before a Judge in Court, or by a Judge in Chambers (not including such proceedings as may in the first instance be heard and disposed of by the Master in Chambers or Local Judge), may be heard and determined at such Weekly sittings in the cases following: Sittings of High Court at Ottawa and London.

Matters which may be heard at such sittings.

(a) Where the solicitors for all parties reside in the county in which the sittings are held;

(b) Or where such solicitors, who do not so reside, consent in writing under their hands to the proceeding being heard at such sittings;

Rules
105 106.

(c) Or where such solicitors as do not so reside or so consent as aforesaid shall have registered their names in the book to be kept as hereinafter provided ;

(d) Or where the solicitors for all parties are so resident or consent as aforesaid with the exception of the solicitor for the party on whose behalf and at whose instance the proceeding is being taken ;

(e) Or where the party making and entitled to make an *ex parte* motion sees fit to make it at said sittings ;

(f) Or where any Rules of Court made hereafter, or where any Court or Judge may direct any proceedings to be heard at such sittings. 58 V. c. 12, s. 95.

Rules as to
sittings at
Ottawa and
London.

(2) Upon the written request of a majority of the practising solicitors resident at Ottawa and London, or either of them, the Judges of the High Court may by Rule, passed as provided by section 134 (x) of *The Judicature Act, 1895*, substitute monthly or semi-monthly sittings in either or both of the said cities, as the case may be, in lieu of such Weekly Sittings. 58 V. c. 12, s. 96.

(x) See now Jud. Act, sec. 124.

"Proceedings," what
to include.

105. Proceedings under Rules 104 to 112 inclusive shall be deemed to include motions, petitions, special cases, appeals and other proceedings and matters generally which by the law and practice of the said Court may be heard and disposed of by a single Judge in Court as aforesaid. 58 V. c. 12, s. 101.

Practice.

106. The Rules relating to setting down and giving notice of motions and other matters before a Judge in Court, or in Chambers in Toronto, shall *mutatis mutandis* apply to proceedings under Rules 104 to 112. 58 V. c. 12, s. 104.

Duties of
Deputy
Clerks
and Local
Registrars.

107. The Deputy Clerk of the Crown or Local Registrar at Ottawa and London respectively, shall in regard to matters under Rules 104 to 112, perform the duties pertaining to the Registrars' office and Clerk of the Weekly Court or Clerk in Chambers at Osgoode Hall. 58 V. c. 12, s. 99.

Fees

108. Where proceedings are taken under the provisions of Rules 104 to 112, no greater fees shall be taxed as be-

tween party and party or between solicitor and client than ^{Rules} would have been taxable had such proceedings been carried ^{109-111.} on in accordance with the previously existing practice. 58 V. c. 12, s. 102.

109. To avoid the necessity of a Judge attending when there is no business, all proceedings to be brought on at any such Weekly Sittings shall be entered for that purpose with the Deputy Clerk of the Crown or Local Registrar on or previously to the day next but one before the day appointed for the sittings; and it shall be the duty of the Deputy Clerk or Local Registrar on the evening of the last day for making such entries to notify by mail or telegram the Senior Registrar of the High Court at Toronto, or another officer of the High Court named for the purpose from time to time by the Court, as to whether any and what business has been so entered, and the said Senior Registrar or other officer shall forthwith by note in writing inform the Judge appointed to attend at such sittings; and if no business has been so entered it shall not be necessary for any Judge to attend. 58 V. c. 12, s. 97.

110.—(1) Where the Judge whose duty it is to hold such sittings is not able to hold the same on the day appointed for that purpose, such sittings may be presided over by some other Judge of the High Court or by a Judge of any County Court in Ontario, or by one of [His] Majesty's Counsel learned in the law appointed for Upper Canada or for the Province of Ontario, upon such Judge of a County Court or Counsel being requested by a Judge of the High Court to attend for that purpose. ^{Where Judge unable to attend on the day fixed.}

(2) Such Judge or Counsel while holding the sittings shall possess all the powers and authorities of a Judge of the High Court. 58 V. c. 12, s. 103.

111. Solicitors desiring to be registered shall file with the Deputy Clerk of the Crown or Local Registrar at the place of such sittings a request to the effect following: ^{Form of declaration by solicitors desiring to be registered}

I (or in the case of a firm, we) hereby request the Deputy Clerk of the Crown (or Local Registrar) of the High Court at Ottawa (or London) to register my (or our) name as consenting to the hearing and disposal at the sittings of the High Court at Ottawa (or London as the case may be)

Rules 112, 113. of all proceedings in which I (*or we*) may be acting as solicitor (*or solicitors*) as provided by *The Judicature Act, 1895*, and Rules of Court. 58 V. c. 12, s. 98.

"Consent register."

112.—(1) A book to be called "The Carleton (*or Middlesex*) consent register" shall be kept by the Deputy Clerk of the Crown or Local Registrar at Ottawa and London respectively, wherein shall be recorded such requests as aforesaid and the names of the local agents (*if any*) of the solicitors filing the said request; and such solicitors so registered shall be deemed to have consented to the hearing at the said sittings of any proceeding that may lawfully be made thereat.

(2) The book shall be open to inspection by any solicitor or his clerk without fee or reward.

(3) A solicitor who files such request may at any time withdraw the same by giving to the same officer notice in writing to that effect as respects future actions. In respect of actions begun before such withdrawal the order of a Judge made on notice shall be necessary. The Deputy Clerk or Local Registrar, upon receiving such notice of withdrawal, or such order of a Judge, shall forthwith make an entry thereof in the said book.

(4) The Judge holding any such sittings shall take judicial notice of the said book and the entries therein. 58 V. c. 12, s. 100.

(iv) *Sittings for Trials.*

Appointment of.

113. The Judges of the High Court of Justice (four of whom (*x*) shall form a quorum for the transaction of business) shall appoint the days upon which the Assizes and sittings for trials shall be held. Con. Rule 213 : Rules 1 Jan., 1896, 1427 (213 B).

(*x*) Jud. Act, s. 82 (2), provides that the Judges of the High Court of Justice, or a majority of them, shall perform the above duty. The provisions of this *Rule* would seem to prevail: see sec. 129.

Sittings for trial of non-jury actions at Toronto are appointed from time to time as occasion may require, and are ordinarily held for about 10 consecutive weeks, between 1st February and 1st June, and about 10 consecutive weeks between 1st September and December, and separate sittings are appointed for the trial of criminal cases in the spring and autumn.

Two sittings, one for jury, and one for non-jury cases, between **Rules** January and June, and two similar sittings, between 1st September **114-116.** and about 20th December, are ordinarily appointed at each county town.

At Hamilton, Ottawa and London, there are also winter assizes: see s. 83 (3).

(v) *Vacation Business.*

114. One or more of the Judges of the High Court shall be selected at the commencement of each Long Vacation, for the hearing in Toronto during Long and Christmas Vacations of all such applications as may require to be promptly heard. *Con. Rule 214, amended.*

Vacation
Judges.

No provision is made for the attendance of the Court of Appeal, or Judges thereof, in vacation.

No business is heard by the vacation Judges, except such as requires "to be promptly heard" within the meaning of the above *Rule*. As to what is vacation business, see also *Re Wigan Junction Railway Co.*, L. R. 10 Chy. 541. No Judges except the vacation Judges, or those sitting for them, can dispose of business in vacation: *Per Lush and Lopes, JJ.*, 24th September, 1877. *Sed quare.*

115. All applications within the jurisdiction of the Master in Chambers which require to be immediately or promptly heard during Long Vacation shall be heard by one of the following officers, viz., the Master in Ordinary, the Master in Chambers, and the Registrars of the High Court, who shall arrange among themselves at the commencement of each Long Vacation on what days and for what period each shall act; and in the absence of such arrangement the duty shall devolve upon the said officers in rotation, beginning with the junior officer, in order of appointment, and they shall so sit in rotation at least one day in each week. *Rules 1 Jan., 1896, 1428.*

Chambers
during long
vacation

(vi) *Divisional Courts.*

116.—(1) Unless otherwise ordered, sittings of Divisional Courts shall commence on the first Monday of each month (except during the Long and Christmas Vacations); and shall continue to sit for two weeks (except on Saturdays and public holidays and on any days falling in any Vacation) unless the business before the Court is sooner disposed of.

Sittings of
Divisional
Courts.

Since the coming into force of sec. 69a, *supra*, p. 118, the sittings of the Divisional Court are continued from week to week in each month unless the business is sooner disposed of.

Rule 117.

(2) Where the first Monday in a month falls in any Vacation the Sittings shall commence on the first Monday after the expiration of such Vacation ; and where the first Monday in the month is a public holiday the Sittings shall commence on the first juridical day thereafter. Rules of 9 Jan. 1897, 1511.

Proceed-
ings to be
taken
before
Divisional
Courts.

117. In addition to the proceedings and matters elsewhere in these Rules or by Statute expressly provided for, the following proceedings and matters shall be heard and determined before the Divisional Courts ; but nothing herein contained shall take away or limit the power of a single Judge to hear and determine any such proceedings or matters in any case in which he has heretofore had power to do so (a), or require any interlocutory proceeding therein, heretofore taken before a single Judge, to be taken before a Divisional Court:

Cf. Eng. (1883) R. 884, and sec. 67 of the Jud. Act. *supra*.

Proceedings directed by any statute to be taken before the Court, and in which the decision of the Court is final (b).

Cases of Habeas Corpus, in which a Judge directs that a motion for the writ, or the writ be made returnable before a Divisional Court.

Other (c) cases where all parties agree that the same be heard before a Divisional Court.

Proceedings for or in relation to the quashing of convictions or orders. Con. Rule 219. Rules of 1 Jan., 1896, 1430, 1431, *as amended by* Rule 1239, 7th June, 1902.

See also secs. 66 and 67 of the Jud. Act.

(a) These matters, except so far as has since been otherwise provided by Statute or *Rule*, are the matters which were defined in R. S. O. (1877) c. 50, s. 281, which was as follows:

R. S. O.
(1877) c. 50,
s. 281.

281. All matters which according to the law or practice prevailing before the 24th day of March, 1874, had been heard in the Court of Queen's Bench or Common Pleas, before the full Court in Term or in the Practice Court, with the exception of motions for a new trial on account of some error on the part of the Judge before whom the trial was held, motions to enter or set aside a nonsuit, or any other matters being in the nature of an appeal from the decision, judgment or order, of a single Judge; or such matters as the Judges of the said Courts may by Rule or Order, appoint to be heard before the full Court, shall unless a Judge otherwise directs, be heard and disposed of in the first instance by a single Judge sitting under the 20th section of the Act respecting the Courts of Queen's Bench and Common Pleas. See 37 V. c. 7, ss. 17 and 20.

(b) For example, proceedings under the Overholding Tenants Act, *Rules* R. S. O. c. 171: *Re Scottish Ont. and Man. Land Co.*, 21 Ont. 676; 118, 119. or upon a special case stated by arbitrators under *The Arbitration Act* (R. S. O. c. 62): *Re Geddes & Cochrane*, 2 O. L. R. 145.

For the appellate business which may come before a Divisional Court, see the Jud. Act, s. 74. *supra*, p. 120.

(c) Instead of "other" the Eng. Rule has "special." Before the Jud. Act of 1893 (58 V. c. 12, s. 71), the words "other cases" did not include appeals from judgments or orders of a Judge sitting in the Weekly Court, no appeal then lying in such a case to the Divisional Court, and it was held that consent could not give jurisdiction: *Re Wilson and County of Elgin*, 16 P. R. 150. See, however, *Beatty v. O'Connor*, 5 Ont. 731, 737. The cases in which this clause applies are probably those which a single Judge might dispose of, but which from their importance or for other good reason the parties agree to bring before the Divisional Court in the first instance: see *Court v. Scott*, 32 U. C. C. P. 148; *Armstrong v. Provident Life*, 2 O. L. R. 771.

A Divisional Court has no jurisdiction in appeal from an order under R. S. O. c. 164, s. 12, dispensing with a wife's concurrence in a bar of her dower: *Re Rush*, 28 C. L. J. 127. The Judge under that provision acts not as a Judge in Chambers, but as a *persona designata* for the purposes of the Act: *Re McMillan & the Guelph Junction Ry. Co.*, 12 P. R. 294. As to appeals in such cases, see R. S. O. c. 76, s. 6, as amended by 63 Vict. c. 17, s. 14.

An appeal from an award under *The Railway Act*, 3 Ed. vii., c. 58, s. 168 (D.), should not be to a Divisional Court, but to a Judge in Court: *Re Potter & Central Counties Ry.*, 16 P. R. 16; *Re Montreal & Ottawa Ry. Co. and Ogilvie*, 18 P. R. 120.

A Divisional Court has no jurisdiction to entertain appeals from orders of a Judge in Chambers made under the *Dominion Winding-up Act* (R. S. C. c. 129): *Re Sarnia Oil Co.*, 15 P. R. 182; *Re Central Bank* (Divisional Court, 16 June, 1898): the appeal in such cases is to the Court of Appeal: R. S. C. c. 129, s. 74.

For the proceedings and matters elsewhere prescribed to be taken before Divisional Courts: see Jud. Act, ss. 67, 73-80, pp. 116, 128, and *Rules* 770, 777, 778, 797.

The jurisdiction of a Divisional Court is strictly limited by these provisions. It has, therefore, no power to hear an appeal from a Referee or Master: *Clarke v. Jamieson*, 9 C. L. T. 97; or from the Master in Chambers: *Ball v. Cathcart*, 16 Ont. 525; as these are provided for by *Rules* 767-772; and it has no jurisdiction to order a *mandamus* to a magistrate to entertain an information: *Rex v. Meehan*, 5 Can. Cr. C. 307; 3 O. L. R. 361; nor has it any original jurisdiction to quash a municipal by-law, except where sec. 67 (1) (f) applies: see formerly *Landry v. Ottawa*, 11 P. R. 442.

118. All business before a Divisional Court, except *ex Cause list*, *parte* motions, shall be set down in the Registrars' office upon payment of the proper fees. Rules of 1 Jan., 1896, 1426 and 1432, *amended*.

119 Six cases, in the order of priority, in the general *Peremptory list*, shall be set down in a peremptory list for argument, on each day excepting upon the last day of the sittings. Con. Rule 220, *amended*.

CHAPTER IV.

ACTIONS—COMMENCEMENT, PARTIES, APPEAR-
ANCE, ETC.

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1. FORM AND COMMENCEMENT OF ACTION.

(i) Writ of Summons.

All actions
commenced
by writ of
summons.

120. All actions shall be commenced by the issue of a writ of summons (a), which shall be prepared by the plaintiff (b), and shall contain the names of the parties and the characters in which they sue and are sued (c), and the office (d) in which and the time within which the defendant is to enter his appearance, and shall be indorsed with a short statement of the nature of the plaintiff's claim (e). Con. Rule 224. Rules of 1 Jan., 1896, 1433.

- (a) See Eng. (1883) R. 1.
 (b) See Eng. (1883) R. 3.
 (c) See Eng. (1883) R. 14.
 (d) See Eng. (1883) Rs. 25, 26.
 (e) See Eng. (1883) Rs. 11-13, 16-18.

Every writ must have the full title of the action, including the names of all the defendants and their addresses: *State Savings Bank v. Columbia Iron Works*, 6 O. L. R. 358; but need only be directed to the particular defendant or defendants intended to be served with it. Where different times have to be mentioned for different defendants to appear, the proper course is to issue concurrent writs: *Traill v. Porter*, 1 L. R. 1r. 60; see *Burt v. Bowen*, 8 Times, 28. Rule 120.
Actions generally.

The term "action" is defined by the Act (s. 2), to be a civil proceeding commenced by writ, or in such other manner as may be prescribed by Rules of Court. See also *Rule 6 (c)*. As to the effect of this definition, see *Darcy v. Whittaker*, 33 L. T. 778; 24 W. R. 244; and notes to sec. 2 and *Rule 6 (c)*.

There is to be no special form of writ for particular kinds of actions, such as proceedings by *capias*, and against absconding debtors, in dower, replevin, ejectment, etc. See also *Rules 142, 177, 1021, 1058, 1067*; all are to be commenced by writ of summons. As to the former practice, see *Holmsted & Langton, Jud. Act, 1st ed.*, p. 270; and *Bank of Hamilton v. Aitkin*, 20 Ont. App. 616.

Proceedings appear to have been instituted by a writ of *scire facias* in *Shaver v. Cotton*, 16 P. R. 278.

Con. Rule (1888) 224, on which the present *Rule 120* is based, expressly provided *inter alia* that all suits which were commenced by bill or information, shall be commenced by the issue of a writ of summons; but *scilicet*, "information" in that *Rule* only included "information in Chancery," and not an information in the nature of a *quo warranto*; see *Attorney-General v. Bergin*, 29 N. S. R. 135; but as to the procedure in *quo warranto*; see now R. S. O. 1897, c. 324, ss. 31-35.

An action may, by amendment of the writ and statement of claim, be turned into an action by the Attorney-General at the suit of a relator corresponding to an information under the old practice, the sanction of the Attorney-General being obtained: *Caldwell v. Pagham Harbour, etc., Co.*, 2 Ch. D. 221; *Wallasey v. Gracey*, 36 Ch. D. 599; see *Rule 312*. The title information is no longer to be used: *Attorney-General v. Shrewsbury Bridge*, 42 L. T. 79; W. N. 1880, 23; but the name of a relator is to be used where the action does not immediately concern the rights of the Crown; see *Brooks v. Terry*, 4 Times, 678. Where the rights of the Crown are immediately concerned, the action may be brought by the Attorney-General alone without a relator: *Atty.-Gen. v. Logan*, 1891, 2 Q. B. 107; but such an action can only be instituted by his sanction; see *Attorney-General v. Toronto Street Railway Co.*, 2 Chy. Ch. 165, and his *fiat* should be obtained and indorsed on the writ and a copy thereof. The copy should then be filed under *Rule 123*.

Where the action is to enforce a public right, *e.g.*, the proper management of a city park, it must be brought by the Attorney-General: *Hope v. Hamilton Park Commissioners*, 1 O. L. R. 477.

The address of the defendant is a necessary part of the writ. If omitted the writ may, in a proper case, be amended by inserting it; but where defendant lived out of Ontario, and no cause of action within *Rule 162* was shown, the writ was set aside: *State Savings Bank v. Columbia Iron Works*, 6 O. L. R. 358. See also notes to *Rules 127 and 128*. Address of defendant.

Rule 120.

Indorse-
ment of
claim.

Except so far as *Rule 244* applies, it is irregular to proceed by statement of claim upon a different cause of action from that mentioned in the writ: see *United Telephone Co. v. Tasker*, 59 L. T. 852, and notes to *Rules 242* and *244*.

In case a *mandamus*, or an injunction, or a receiver is claimed, the plaintiff ought to indorse his writ accordingly, though, if the necessity for such relief arises incidentally in the course of the action, the Court has power to give the relief even if a claim for it was not indorsed on the writ: see *Colebourne v. Colebourne*, 1 Ch. D. 690; *Norton v. Gover*, W. N. 1877, 206. A defective indorsement may be amended. A general power of amending proceedings is given by *Rule 312*.

In an action for administration, the writ should show that such is the nature of the action, by being entitled "in the matter of the estate of": *Re Jones, Eyre v. Cox*, 24 W. R. 317.

No very precise indorsement of the nature of the claim is required: see *Rule 137*.

A writ against A. O. & R. indorsed to have set aside a deed from A. to O., and a deed from O. to A., was held sufficient, and a motion by R. to have service on him set aside as shewing no cause of action against him was refused: *Gilmore v. Orford*, 11 P. R. 437.

Character
of parties.

Where a woman is made a defendant, she ought to be described in the writ as a spinster, married woman, or widow: *Tofield v. Roberts*, 96 L. T. Jour. 11; W. N. 1894, 74; *Re Poinons*, W. N. 1891, 139; where a plaintiff sues on behalf of a class it should so appear in the title of the action; a statement to that effect in the body of the statement of claim is not sufficient: *Re Tottenham*, 1896, 1 Ch. 628; 74 L. T. 376.

Action on
behalf of
a class.

In *Worraker v. Pryer*, 2 Ch. D. 109, it was held by Jessel, M.R., and in *Re Boyle*, 5 Ch. D. 540, by Bacon, V.C., and in *Adcock v. Peters*, W. N. 1876, 139; 2 Charl. N. C. (Court) 288, by Malins, V.C., that in an ordinary creditors' action for administration of the real and personal estate of a deceased debtor, the action must be by the plaintiff on behalf of himself and all the other creditors; and the writ must be indorsed accordingly. In the earlier case of *Cooper v. Blissett*, 1 Ch. D. 691, Hall, V.C., had taken a contrary view. In the later case of *Eyre v. Cox*, 24 W. R. 317, Jessel, M.R., said that when it appeared in the statement of claim that the plaintiff was suing on behalf of himself and other creditors, it was not necessary to amend the writ by the insertion of these words. See also *McNab v. Macdonnell*, 15 P. R. 14.

Where a judgment for administration is applied for under *Rule 944, et seq.*, it has not been the practice to require the style of the cause to shew that the action is on behalf of all the creditors, etc. See also *Re Blount*, 27 W. F. 865.

See notes to *Rule 200*, as to class suits.

Plaintiffs suing on behalf of a class, should specify the class as accurately as possible: *Marshall v. S. Staffordshire Tramways Co.*, 1895, 2 Ch. 36.

A statement of the representative capacity in which a plaintiff sues cannot be supplied from allegations in plaintiff's affidavits on a motion: *Hynes v. Fisher*, 4 Ont. 78; but may be shewn in the statement of claim if omitted in the writ: *McNab v. Macdonnell*, 15 P. R. 14.

The irregularity of omitting to indorse the character in which the Rules plaintiff sues, if a representative one, may be waived by appearance: *121-124.*

Where notice of action is necessary it may not be required where the principal relief sought is an injunction, and damages are only claimed as subsidiary thereto: see *Flower v. Low Leyton*, 5 Ch. D. 347.

121. The writ of summons may be issued in any county. *Writ may issue in any county.*
Con. Rule 230.

This Rule corresponds substantially with the Eng. (1883) R. 23, and with the former practice in this Province as respects transitory actions.

The writ in an action for recovery of land may under this Rule issue in High Court cases out of the proper office in any county without reference to the locality of the land, though the trial must, under Rule 529, be in the county where the land lies: *Canada Permanent, etc. v. Foley*, 9 P. R. 273. In County Court cases under R. S. O. c. 55, s. 23 (8), the action must be brought as well as tried in the county in which the land is: R. S. O. c. 55, s. 36.

An action for assignment of dower is an action for the recovery of land: *McCulloch v. McCulloch*, 4 C. L. T. 252.

122. Writs of summons in the county of York shall be issued out of the Central Office and in other counties by either the Deputy Clerk of the Crown or Deputy Registrar at the option of the plaintiff, or in counties where there is a Local Registrar by such Local Registrar. Rules of 1 Jan., 1896, 1435. *From what office.*

123. The proper officer shall, on receiving a copy of the writ so prepared, to be filed with him, issue the writ by signing and sealing the same with his seal of office. Rules of 1 Jan., 1896, 1434. Con. Rules 229, 234. *Issue of writs of summons.*

See Eng. (1883) R. 33.

The issue of the writ is not a judicial act and the Court will take cognizance of the fact that it was not issued till later in the day than the cause of action arose: *Clarke v. Bradlaugh*, 8 Q. B. D. 63.

A writ sealed but not signed was held valid: *Archibald v. Strathg.*, 18 S. C. R. 116.

124. The writ shall bear date on the day on which it is issued, and shall be tested in the name of the President of the High Court of Justice. See Rules 23 June, 1894, 1307. *Date and teste of writ.*

Corresponds substantially with the Eng. (1883) R. 10, which also provides that all other writs shall be similarly tested. The date of most other writs is provided for by Rules 478 and 867, and the teste

**Rules
125-127.**

by the Forms given in the App. Nos. 166-184. In Ontario, by section 3, sub-section 10, of *The Judicature Act*, the President of the High Court is "that one of the Presidents of the [King's] Bench, Chancery and Common Pleas Divisions, who, for the time being, is first in order of seniority."

A clerical error in the teste is of no importance: *Pleasants v. East Derham*, 47 L. T. 439; *Warron v. Stalker*, 47 L. T. 444. See also Rule 312.

Where the teste was "witness, . . . Lord High Chancellor," leaving out the name of the Lord Chancellor, the writ was held to be good: *McNay v. Alt*, 66 L. T. 832.

See Rule 312 as to irregularities in the teste of writs.

Absence from the Province of the Judge in whose name writs are tested, does not render it improper to teste writs in his name: *Brett v. Smith*, 1 P. R. 309.

A writ issued after the cause of action accrued, but on the same day is good. The issue of the writ is the act of the party and not of the Court, and the Court will in such case inquire as to the actual time, and not refer the act to the first moment of the day: *Clark v. Bradlaugh*, 7 Q. B. D. 151; 8 Q. B. D. 63; see *Lord Dorchester v. Petrie*, 3 Doug. 273.

Office from which issued to be noted in the margin.

125. The officer shall note in the margin of the writ under his hand from what office and in what county it is issued, and shall subscribe his name thereto. Con. Rule 228. Rule of 1 Jan., 1896, 1437.

Process Book.

Procedure Book.

Writ for service in Ontario.

126. The officer shall make an entry of and number every writ of summons issued by him in the Process Book, and in case of any further proceeding in the action, an entry thereof shall be made in the Procedure Book. Con. Rule 235.

127. Where the service is to be made in Ontario (whether upon the defendant personally or in any other manner), the writ shall be according to Form No. 1 in the Appendix. Con. Rule 231, amended.

See Eng. (1883) R. 5.

For Form No. 1, see H. & L. Forms, No. 35.

A writ in the form for service within the jurisdiction will not be set aside before service because the defendant is resident without the jurisdiction, for the plaintiff may wait until he comes within the jurisdiction to serve him: *The Helenslea*, 7 P. D. 57; 47 L. T. 446; and see *Snor v. Cole*, 7 P. R. 162; *Fry v. Moore*, 23 Q. B. D. 395, 397.

Where a writ for service on persons domiciled within, was served on them without the jurisdiction, leave was given to issue *nunc pro tunc* a concurrent writ for service out of the jurisdiction, and to amend the copies served in accordance therewith: *Metcalf v. Davis*, 6 P. R. 275.

Where a writ for service out of the jurisdiction is issued, and the defendant is abroad, the Judge may, if the circumstances warrant substitutional service, order a copy to be served within the jurisdiction: *Ford v. Shephard*, 34 W. R. 63; 53 L. T. 564. Where a writ is served substitutionally it should be in the form in which it would be required to be if personal service were being effected, i.e., if the defendant is within the jurisdiction, the writ must be one for service within the jurisdiction; and if the defendant is out of the jurisdiction, the writ, though served substitutionally within the jurisdiction, must nevertheless be in the form of one for service out of the jurisdiction: see *Worcester Banking Co. v. Firbanks*, 1894, 1 Q. B. 784; 1894, 70 L. T. 443; and notes to Rule 162.

The form contemplates the defendant's address being stated in the body of the writ, but an incorrect statement of his address will not invalidate the writ: *Smith v. Hammond*, 1896, 1 Q. B. 571; but its omission, coupled with the fact that no cause of action is shown against the defendant properly sueable in Ontario, may be a ground for setting the writ aside: *State Savings Bank v. Columbia Iron Works*, 6 O. L. R. 358.

In *The W. A. Scholten*, 36 W. R. 559, a writ was set aside for not containing the address of defendant as prescribed by the form of writ, but the decision seems to have proceeded upon the fact that the defendant was a foreign corporation, and if the address abroad had been inserted the writ could not have been issued without leave. But see *The Helenslea*, 7 P. D. 57; *Zuccato v. Young*, 38 W. R. 474. See also *Sedgwick v. Yedras Mining Co.*, 35 W. R. 780.

128. A writ for service out of Ontario shall be according to Form No. 2, and shall bear indorsement that such writ is for service out of Ontario. Where the defendant is not a British subject, and is not in British Dominions, notice of the writ, according to Form No. 3, shall be served in lieu of the writ. Con. Rule 232. See Rule 168.

Writ and notice for service out of jurisdiction.

See Eng. (1883) R. 7.

For Form No. 2, see H. & L. Forms, No. 36, and for Form No. 3, ib. No. 37.

The last clause is adopted from R. S. O. 1877, c. 50, s. 45, and is not in the English Rule. As to the form of affidavit of service: see *Bustros v. Bustros*, 14 Ch. D. 849, and H. & L. Forms, Nos. 70 et seq.

A writ not according to the form for service out of the jurisdiction may, if served out of the jurisdiction, be set aside: *Sedgwick v. Yedras*, 35 W. R. 780.

Where a writ for service on a foreigner out of the jurisdiction was served on him while within the jurisdiction on a temporary visit, a judgment signed by default of appearance was held to be regular: *Snare v. Cole*, 7 P. R. 162.

Where a foreigner is served out of the jurisdiction, with a writ, instead of a notice as prescribed by this Rule, the service is void: *Howitson v. Fabre*, 21 Q. B. D. 6.

See also notes to Rules 127 and 162.

Rules

129, 130.

Concurrent writs for service within or without the jurisdiction.

129 The plaintiff may at any time within twelve months after the issuing of the writ, issue concurrent writs, tested of the same day as the original writ, and marked "concurrent," and with the date of actual issue. Concurrent writs shall only be in force during the currency of the original writ. Con. Rule 236.

See Eng. (1883) R. 40.

The twelve months are calendar months: Rule 342.

By the terms of this Rule the concurrent writ can only be issued within the twelve months for which the original writ is current: see also *Smallpage v. Yonge*, 17 Q. B. D. 644; but under Rule 353 the Court or Judge may enlarge the time, and after the renewal of the original writ under Rule 132, may allow a concurrent writ to issue: *Smallpage v. Yonge*, *supra*, and *Re Jones*, *Eyre v. Cox*, 46 L. J. Ch. 316; W. N. 1877, 38.

Where different times are to be mentioned for different defendants to appear, the proper course is to issue concurrent writs: *Truitt v. Porter*, 1 L. R. Ir. 60; see *Hurt v. Borch*, 8 Times, 28; so that that course will be proper where several defendants out of the jurisdiction are given different times to appear, or where some defendants are within and others without the jurisdiction: see next Rule, and *Beddington v. Beddington*, 24 W. R. 248; 34 L. T. 386; 45 L. J. (P. D. & A.) 44.

Where it is sought to issue a concurrent writ for service out of the jurisdiction on a party alleged to be a necessary party to an action against a defendant resident within the jurisdiction [see Rule 162 (g)], the defendant within the jurisdiction should be first served; and an application should then be made for leave to issue a concurrent writ for service on the absent party: see Rules 162, 163, 164, and in support of the application it must be shown that the party sought to be served out of the jurisdiction is a necessary party: *Collins v. N. B. & M. Ins. Co.*, 1894, 3 Ch. 228; 71 L. T. 58. The omission to mark the copy served of a concurrent writ as "concurrent" is irregular: *ib.* See also notes to Rule 162 (g).

Concurrent writs.

130 A writ for service within Ontario may be issued and marked as a concurrent writ with one for service out of Ontario; and a writ for service out of Ontario may be issued and marked as concurrent with one for service within Ontario. Con. Rule 237.

See Eng. (1883) R. 41. Corresponds in substance with R. S. O. 1877, c. 50, s. 52; see *Beddington v. Beddington*, *supra*.

A concurrent writ may be issued after the original writ has been issued, and although there is only one defendant, and for service abroad although the original writ is for service within the jurisdiction: *Smallpage v. Yonge*, 17 Q. B. D. 644; cf. *Wilding v. Bean*, 1891, 1 Q. B. 100.

Where a defendant, whose domicile was within the jurisdiction, was served abroad with a writ in the form for service within the Province, on an application to set aside the service for irregularity, leave was granted to issue *nunc pro tunc*, a concurrent writ for service abroad.

and the copies served were directed to be amended to conform to **Rules**
the concurrent writ: *Metcalf v. Davis*, 6 P. R. 275.

131, 132.

As to substitutional service, within the jurisdiction, of writs
against defendants who are abroad: see notes to *Rules* 127 and 132.

Service on a defendant, within the jurisdiction, of a concurrent writ
issued for service on him out of the jurisdiction was, on motion to
set it aside, allowed to stand as good service: *Marshall v. McFarish*,
32 C. L. J. 190.

131. Where a writ has been lost, the Court or a Judge ^{Lost writ.}
may order a duplicate thereof to be issued. **Rules** 23 June,
1894, 1308.

See Eng. (1883) R. 47. Introduced in 1894 by *Rule* 1308 to meet
the difficulty presented in *Davies v. Garland*, 1 Q. B. D. 250, in which
it was held that only the original writ when produced could be
renewed. *Scoble*, a concurrent writ might be issued.

(ii) *Renewal of Writ.*

132.—(1) The writ shall be in force for twelve months ^{currency}
from the date thereof, including the day of such date; but, if ^{of writ.}
any defendant has not been served, the writ may at any time
before its expiration, by order of the Court or a Judge, be
renewed for twelve months, and so from time to time during
the currency of the renewed writ.

A local Judge has jurisdiction under this clause: *Gilmour v. Magee*,
14 P. R. 120.

An original writ of summons, notwithstanding the expiration of 12
months mentioned in this *Rule*, and even though not renewed, still
continues effectual for all purposes, except that of service, the limit
of time applying to service only: *Re Kerly, Son, & Verden*, 1901, 1
Ch. 467.

The twelve months is inclusive of the day of issue, or of the last
renewal, if any: *Laird v. King*, 19 P. R. 307; 1 O. L. R. 51.

(2) The writ shall be renewed by being marked by the ^{Evidence}
proper officer, with the date of the order and renewal, upon ^{of renewal.}
delivery to him of a copy of the order.

(3) The writ so renewed shall be available to prevent the
operation of any statute whereby the time for the commence-
ment of the action is limited and for all other purposes, from
the date of the original issue of the writ. See *Con. Rule* 238.

See Eng. (1883) R. 45, which provides for the renewal being mark-
ed with a seal.

This *Rule*, in 1881, introduced an important change. Theretofore
the writ if not served, might, as of right, during its currency, be
renewed for six months from the date of renewal, and so on from

Rule 132. time to time during the currency of the renewed writ; so as to keep the action alive without service, and thereby defeat the Statute of Limitations for an indefinite time; whereas under this Rule a writ can only be renewed by leave, and if reasonable efforts have been made to serve the defendant, or for other good reason. The application is made *ex parte*; see Chitty's Arch., 14th ed., 220.

The writ will expire at midnight preceding the anniversary of its issue; see *Fitch v. Walker*, 7 P. R. 8.

The order, besides providing for the renewal, should also provide that service of the writ may be made notwithstanding the lapse of a year; *Gilmour v. Magee*, 14 P. R. 120.

The twelve months are calendar months; *Rule 142*; and run from the date of the writ; *Re Jones, Eyre v. Cox*, 46 L. J. Chy. 313; W. N. 1877, 38; and vacation is included; see *Rule 152*, and *Mullin v. Bonjar*, 7 Ir. C. L. 475.

By *Rule 153* a Court or Judge may enlarge the time for any proceeding, and although the prescribed time has elapsed. In *Re Jones, Eyre v. Cox*, *supra*, Jessel, M.R., allowed a writ to be renewed after its period of currency had expired, the plaintiff not having been able to serve it; and see *Canadian Bank of Commerce v. Tennant*, 5 O. L. R. 524; see also *St. Louis v. O'Callaghan*, 13 P. R. 322, followed in *Gilmour v. Magee*, *supra*; *Cairns v. Airth*, 10 P. R. 100. The Judge exercises a discretion, however, where the time has expired, and where the Statute of Limitations had in the meantime run, the Queen's Bench Division refused to renew the writ; *Dogle v. Kaufman*, 3 Q. B. D. 7, affirmed in Appeal, 340; see also *Hewett v. Barr*, 1891, 1 Q. B. 18, where, however, it was said by Kay, L.J., that even in such a case there would, under exceptional circumstances, be a discretion to allow a renewal. Where the plaintiff has made every reasonable effort to serve the writ, or for some unavoidable reason the service has been prevented; see *Gilmour v. Magee*, *supra*; but where a writ is ordered to be renewed notwithstanding that the action has become barred by the Statute of Limitations, and the order is not appealed or moved against, it is too late on an appeal from the judgment in the action to raise the objection that the writ ought not to have been renewed; *Butler v. McMicken*, 32 Ont. 425.

In *Mair v. Cameron*, 18 P. R. 484, where orders had been made from time to time renewing the writ of summons, but the plaintiff knew, though he did not disclose that he knew, where the defendant could be served, and but for the renewals the Statute of Limitations had barred the plaintiff's claim, the orders were rescinded on defendant's application under *Rule 132*.

Where an order has been made *ex parte* under this Rule, it is open to the defendant to move against it within the time prescribed by *Rule 132*, and to show that no reasonable efforts were made to serve the writ, and that there was no good reason for making the order for renewal, even though the result of setting the order aside will be to make the Statute of Limitations a bar to the claim; *Holland v. Dominion Bank*, 15 P. R. 56; 22 S. C. R. 130; *Mair v. Cameron*, 18 P. R. 484; *sed vide Canadian Bank of Commerce v. Tennant*, 5 O. L. R. 524; and *Williams v. Harrison*, *infra*.

The Master in Chambers has jurisdiction to make an *ex parte* order made by a Local Judge for the renewal of a writ, if material evidence has, even unintentionally, not been brought to the attention of the Local Judge; *Williams v. Harrison*, 6 O. L. R. 687, and see *Langley v. Costigan*, 5 O. W. R. 147.

But such a motion, unless made within the time prescribed by **Rules 133, 134.** *Rule 358*, viz., within 4 days of its coming to the notice of the applicant, will be too late: *Cairns v. Airth*, 13 P. R. 100.

Where a defendant is entitled to immunity from suit, a writ of summons cannot properly be issued against him and kept renewed in the expectation that the immunity may cease: *Munro v. Gubbins*, 1894, 2 Q. B. 352.

Where the writ has expired before service, the copy and service of the writ may be set aside, but not the original writ: *Fitch v. Walker*, 7 P. R. 8.

Where a defendant has been served with an unrenewed writ after the expiration of twelve months from the date of its issue, he probably cannot treat it as a nullity, but should apply to set aside the service for irregularity: see *Rule 310*, and *Hemp v. Warren*, 11 M. & W. 163; 2 Dowl. N. S. 758.

133. The writ so marked shall be evidence of the re- **Evidence of renewal**
newal, and of the commencement of the action as of the date of the original issue of the writ. Con. Rule 239.

See Eng. (1883) R. 46, which corresponds in substance with the English C. L. P. Act, 1852, s. 13, and with R. S. O. 1877, c. 50, s. 28. See *Fisher v. Cox*, 16 L. T. 397.

(iii) Indorsement of Address.

134 —(1) Where a plaintiff sues by a solicitor, the writ of summons or notice in lieu thereof, shall be indorsed with the solicitor's name or firm and place of business, where pleadings, notices, orders, warrants and other documents, proceedings, and written communications may be served. **Address of plaintiff and of solicitor.**

(2) Where the solicitor issuing or filing a writ of summons is only agent of another solicitor, his name or firm and place of business, as well as the name or firm and place of business of the principal solicitor, shall be indorsed. Con. Rule 240.

Compare Eng. (1883) R. 19.

Where a petition was indorsed by agents only, it was held to be irregular and was set aside: *Re Scholes*, 34 W. R. 501; 54 L. T. 466; see also *Wray v. Kemp*, 26 Ch. D. 169.

It has been held in Ontario that, though not expressly provided in this *Rule*, the plaintiff's address, as well as the solicitor's address, must be indorsed, as the form of writ No. 1 in the Appendix (H. & L. Form No. 35), so provides, and that form is made imperative by *Rule 127*: *Chess Carley Co. v. Rodger*, 4 C. L. T. 500; see also *Rule 139*. A writ not so indorsed may be set aside as irregular: *Ib.*; *Sherwood v. Goldman*, 11 P. R. 433; see also *McCready v. Hennessy*, 9 P. R. 489.

The address of the plaintiff indorsed must be that of his residence: *McC v. Denbigh*, 27 Sol. Jour. 617; *Stoy v. Peck*, 24 Q. B. D. 748; 63 L. T. 46. The business address of a firm is sufficient: *ib.*; 59 L. J. Q. B. 311.

Rules

135, 136. Where the suit was on behalf of "the plaintiff and all others, the underwriters of a steamship *Id* at the time of loss in 1873," it was held that there was only one plaintiff, that his address alone need be given; the other persons mentioned were not plaintiffs: *Leathby, etc., v. McAndrew*, W. N. 1873, 259; 1 Charl. Ch. Ca. 58.

As to obtaining security for costs where an illusory address is given, see notes to *Rule 1198*. The suit is not irregular, though the address be illusory: *Pittsburgh C. & Co. v. Mara*, 102 L. T. 532.

Address of
plaintiff in
person.

135—(1) Where a plaintiff sues in person, there shall be indorsed upon the writ or notice in lieu thereof, his place of residence and occupation.

(2) If his place of residence is more than two miles from the office in which the proceedings are commenced there shall be indorsed also another proper place which shall not be more than two miles from such office, to be called his address for service, where pleadings, notices, orders, warrants and other documents, proceedings, and written communications not requiring personal service may be served.

(3) If the writ or notice is not so indorsed, or if such address or place is more than two miles from the office aforesaid, the opposite party shall be at liberty to proceed by posting up in such office all pleadings, notices, orders, warrants and other documents, proceedings and written communications requiring service. *Con. Rule 241*.

See Eng. (1883) R. 20.

The clause (3) is not in the English Rule, but corresponds with the practice of the Courts: *Arch. Practice* (13th ed.), p. 176.

No one but a solicitor or plaintiff in person may issue a writ. Where a person not a solicitor, but purporting to be next friend of a married woman, issued a writ, the writ and all subsequent proceedings were set aside: *Swann v. Swann*, 43 L. T. 530; 25 Sol. Jour. 134.

As to sufficiency of address, see *Smith v. Dobbin*, 3 Ex. D. 338.

As to what retainer of a solicitor authorizes him to issue a writ, see *Wray v. Kemp*, 26 Ch. D. 169.

Defendant's Address.—An incorrect statement of the defendant's address in the writ does not invalidate the writ: *Smith v. Hammond*, 1896, 1 Q. B. 571.

Indorsement
on other pro-
ceedings.

136 Indorsements similar to those mentioned in the two next preceding Rules shall also be made upon every writ issued and upon every document by which proceedings are commenced in cases where proceedings are commenced otherwise than by writ of summons. *Con. Rule 242*.

Rules
137, 138.

(iv.) *Indorsement of Claim.*

Indorsements under Rules 120, 139, are compulsory, as also are those under Rules 141, 142, in the cases therein provided for. Indorsements under Rules 138, 140, are optional.

137. The indorsement of claim may be to the effect of such of the Form[s] in Part II. in the Appendix as are applicable, or if none be applicable, then in such other concise form as the nature of the case may require; and it shall not be essential to set forth the precise ground of complaint, or the precise remedy or relief to which the plaintiff considers himself entitled. *Con. Rules 243 and 244.*

Form of indorsement.

Precise statement not essential.

See Eng. (1883) Rs. 12 and 13. The object of the indorsement is to identify the claim to which the action relates; one advantage of this being to facilitate a settlement without the action going further. In some cases the indorsement will take the place of a pleading: see Rules 245, 278, etc.

Though the plaintiff's precise ground of complaint, or the precise remedy or relief claimed, need not be set forth under this Rule, still a claim for an injunction or receiver should be indorsed where the obtaining of either is a substantial object of the action: see notes to Rule 120, and *Colchourne v. Colchourne*, there cited.

As to amendment of the indorsement on the writ: see notes to Rule 312.

An amendment of the indorsement by increasing the amount claimed was allowed after judgment: *The Dictator*, 1892, P. 64; 66 L. T. 863; and see *Wyatt v. Rosherville*, 2 Times, 282; *Modera v. Modera*, 10 Times, 69; *Wilder v. Crowe*, 10 C. P. 406, 412; *Robinson v. Hall*, 1 Ont. 266; *Smith v. Goldie*, 11 P. R. 24; *Rowland v. Bennett*, 12 P. R. 667; but when, without any such amendment, judgment was signed for damages assessed at a greater amount than was claimed, it was set aside: *Chattell v. Daily Mail*, 18 Times, 165.

Where a plaintiff seeks to enforce a claim against the separate estate of a married woman, the writ should be indorsed with a claim for that relief, though an amendment may be allowed where such indorsement has been omitted: see the remarks in *McNab v. Macdonnell*, 15 P. R. 17; referring to *Nesbitt v. Armstrong*, 14 P. R. 366; *Sweetland v. Neville*, 21 Ont. 412; see also other cases in notes to Rule 603.

Where a husband is sued as trustee of separate estate of his wife as well as in his personal capacity, the claim against him as such trustee should be made expressly in the indorsement: *Dixon v. Dougan*, 8 L. R. Ir. 211.

Lis Pendens.—As to the registration of a certificate of *lis pendens*: see sec. 97 of the Jud. Act, and notes, *supra*, p. 147.

(v.) *Special Indorsements.*

138—(1) The writ of summons may, at the option of the plaintiff, be specially indorsed with a statement of his claim, or of the remedy or relief to which he claims to be

special indorsements.

Rule 138. entitled, where the plaintiff seeks to recover a debt or liquidated demand in money (with or without interest, and whether the interest be payable by way of damages or otherwise), arising—

(a) Upon a contract, express or implied (as, for instance, on a bill of exchange, promissory note, cheque, or other simple contract debt); or,

(b) On a bond or contract under seal for payment of a liquidated sum; or

(c) On a statute where the amount sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or

(d) On a guaranty, whether under seal or not, where the claim against the principal is in respect of a debt or liquidated demand; or

(e) On a trust; and also

(f) In actions for the recovery of land (with or without a claim for rent or mesne profits); and

(g) In actions for the recovery of chattels.

(2) Such special indorsement shall be to the effect of such of the Forms in sec. 2 of Part II. in the Appendix as are applicable. *Con. Rule 245, amended.*

See Eng. (1883) R. 10; and see R. S. O. 1877, c. 50, s. 19, which latter section was not so wide in its operation as this *Rule*.

Clause (g) is not in the Eng. Rule, and was first introduced in the present *Rule*.

The use of this indorsement is optional; the chief advantage in using it is that it will entitle the plaintiff to final judgment in case of default of appearance, and even notwithstanding appearance, unless the defendant can satisfy a Judge that he has a defence, or ought to be allowed to defend; see *Rule 603*; and where the plaintiff's claim is properly the subject of a special indorsement under this *Rule* he may not be entitled to any extra costs occasioned by his omitting so to indorse his writ; see *Rule 1176*.

The difficulties in the previous *Rule* raised in the decided cases (see H. & L., 2nd ed., p. 253), have been removed by the amendments contained in *Rules 138, 573-580 and 603*; and a special indorsement is not now vitiated by the indorsement, in addition to claims of the kind mentioned in this *Rule*, of claims of a different character, and the appropriate judgment may be obtained under *Rules 575, et seq.*, or *Rule 603*, as to the claims properly the subject of a "special indorsement," and the action may be proceeded with as to any other claims indorsed.

Special Indorsement.—For forms of special indorsement, see *Rules 138*, Appendix No. 5 (H. & L. Forms No. 39). Such forms must be substantially followed to entitle plaintiff to judgment under *Rules 575* or 603, but a merely formal difference will not prejudice: *per* Archibald J., *Anon.*, W. N. 1876, 53. Special in-
dorsements
of money
demands.

As the object of the special indorsement is to give the defendant an opportunity of avoiding further proceedings by payment of the debt, as well as to entitle the plaintiff to a summary remedy, the indorsement must give sufficient particulars to enable the defendant to satisfy his mind as to whether he ought to pay, or resist: *Walker v. Hicks*, 3 Q. B. D. 8; and if it gives sufficiently specified particulars to bring to the mind of the defendant knowledge as to what the plaintiff's claim is, it is a good special indorsement: *Bickers v. Spight*, 22 Q. B. D. 7.

The indorsement may be sufficient though not so full as a statement of claim: see *Satchwell v. Clark*, 66 L. T. 641; but it must be sufficient to show a cause of action: see *Fruhauf v. Grosvenor*, 67 L. T. 350; 8 Times, 744.

It cannot be supplemented by affidavits: see notes to *Rule 603*.

In *Anon.*, W. N. 1875, p. 220, Lush, J., said that it could not be intended that a list of items, extending perhaps over three or four years, should be indorsed on the writ. In an action for the price of goods sold, the dates and amounts of consignments were held necessary: *Parpaite v. Dickinson*, 38 L. T. 178; 26 W. R. 479.

A claim for arrears of alimony, and alimony *pendente lite*, is not a claim for "a debt or liquidated demand in money" within this *Rule*: *Bailey v. Bailey*, 13 Q. B. D. 855. Neither is a claim for a sum in dispute and requiring assessment or valuation, as a claim by lessor against lessee for amount of dilapidation to premises leased: *Clarke v. Berger*, 36 W. R. 809; nor a claim for quarterly payments of an annuity secured by a bond for a penal sum, as breaches have to be assigned: *Tutcher v. Caralampi*, 21 Q. B. D. 414; nor is a claim on a bond conditioned for payment of a sum of money by instalments with interest in the meantime on the unpaid principal, where only some of the instalments are overdue: *Star Life, etc. v. Southgate*, 18 P. R. 151; nor a claim on a bond given as security for costs: *Appelby v. Turner*, 19 P. R. 145; but in an action on a common money bond, where only one breach can be assigned, and the penal sum is not for the performance of several covenants, a special indorsement can be framed, e.g., on a bond conditioned for the payment of a sum certain on a day certain: *Gerrard v. Cloes*, 1892, 2 Q. B. 11.

A claim for damages against an over-holding tenant for double the yearly value of the land, under R. S. O. c. 342, s. 20, is an unliquidated claim: *Magann v. Ferguson*, 29 Ont. 235.

A claim for unliquidated damages other than interest, whether arising out of contract or tort, even though the amount of damages be fixed and definite, cannot be specially indorsed: *Knight v. Abbott*, 19 Q. B. D. 11; nor a claim by an unpaid vendor to recover possession of the land sold, and also a money demand: *Spears v. Fleming*, 19 P. R. 127; nor a claim to recover alleged overpayments made under a contract, on the ground that it has not been carried out by the opposite party, where the amount of the overpayments has not been ascertained or settled between the parties: *McIntyre v. Muir*, 3 O. L. R. 230; nor a claim by a vendor for a balance of purchase money under a contract, on the ground that he had shown and was ready to show title.

Rule 138. and was willing to convey: *Leader v. Tod-Hentley*, 1891, W. N. 174; *Hood v. Martin*, 9 P. R. 313. Such a claim is not a liquidated demand, but only for damages: *Laird v. Pim*, 7 M. & W. 474.

A claim on a bond for a penal sum cannot be specially indorsed: *Star Life, etc. v. Southgate*, 18 P. R. 151; but a bond to secure payment of a sum as liquidated damages may be specially indorsed; thus a bond conditioned to obey an injunction restraining defendant from committing trespasses of various kinds was held to depend upon one event only, viz.: the breach of the injunction, and that the sum secured by it was a liquidated sum which might therefore be specially indorsed: *Strickland v. Williams*, 1899, 1 Q. B. 382.

A special indorsement within *Rule 138* may be framed upon a covenant for payment in a mortgage, where foreclosure or sale is not also claimed; but the particular covenant which makes the money payable (e.g., by default in payment of interest), must be sufficiently stated in the indorsement, also the agreement to pay interest, if interest is claimed, under the terms of the mortgage: *Munro v. Pike*, 15 P. R. 164. But where foreclosure or sale is also asked, the writ must be indorsed under *Rule 141*, and not under this *Rule*: *Canadian Bank of Commerce v. Bricker*, 1 C. L. T. 729; *Hill v. Sidebottom*, 47 L. T. 224.

In *Richardson v. Malloy*, before Falconbridge, J., on 5th Aug., 1898, an indorsement respecting a merchant's account with the addition of "And for interest thereon \$12," was held to be sufficient within this *Rule*, to enable the plaintiff to sign judgment for the interest, under *Rule 375*.

An action upon a foreign judgment is within the *Rule*: *Grant v. Easton*, 13 Q. B. D. 302; *Solmes v. Stafford*, 16 P. R. 78 (where the foreign judgment is one that can be sued on at all, i.e., where it is a final and conclusive judgment: *Re Henderson*, 37 Ch. D. 244; S. C. *sub nom.*; *Nouvion v. Freeman*, 15 App. Cas. 1; 62 L. T. 189, and see *Huntington v. Attrill*, 20 Ont. App. Appx. i; *Dohn v. Gillespie*, 33 C. L. J. 394).

A claim based on an implied covenant or equitable obligation to pay cannot be specially indorsed, or support an application under *Rule 603*: *Davidson v. Gurd*, 15 P. R. 31.

A place of trial should be named in a special indorsement as no statement of claim may be delivered; and when a place of trial is so named it cannot be changed by the plaintiff by naming a new one in a subsequent statement of claim: *Segsworth v. McKinnon*, 19 P. R. 178.

Interest

Interest.—Formerly interest could only be claimed by "special indorsement" where it was payable under a contract or by a statute: *Gold Ore Reduction Co. v. Parr*, 1892, 2 Q. B. 14; *Wilkes v. Wood*, 1892, 1 Q. B. 684; 66 L. T. 520; *Casselman v. Barrie*, 14 P. R. 507; *Hupck v. Wilson*, 18 P. R. 44; and if a contract was relied on, it must have appeared from the indorsement itself, and any defect in that respect could not be supplied by affidavit on a motion for summary judgment: *Gold Ore, etc. v. Parr*, *supra*; and see *Clarkson v. Dwan*, 17 P. R. 92; but now the first clause of the *Rule* is so framed as to enable a claim for interest, though payable only by way of damages, to be specially indorsed.

See also notes to *Rule 603*.

Interest on a foreign judgment is recoverable as unliquidated damages: *Hollender v. Foulkes*, 16 P. R. 175, 204; and *Solmes v. Stafford*, *ib.* 78, and formerly could not, but under the present *Rule* may be "specially indorsed." Under ss. 57 and 88 of *The Bills of Exchange Act, 1890*, interest accruing from the maturity of a bill or note, and the "expense of noting" or protesting: *London and Universal Bank v. Clancarty*, 1892, 1 Q. B. 689; *Laurence v. Willcocks*, *ib.* 696; *McVicar v. McLaughlin*, 16 P. R. 450; *Clarkson v. Dwan*, 17 P. R. 92; are recoverable as liquidated damages and may be specially indorsed, and expense of noting and protesting are sufficiently expressed by the words "bank charges": *Dando v. Boden*, 1893, 1 Q. B. 318.

Where more than the statutory rate of interest is claimed on a promissory note, the ground on which the claim is based should be specifically stated in the indorsement: see *Clarkson v. Dwan*, 17 P. R. 92.

Indorsements Insufficient.—The following indorsements have been held to be insufficient: Insufficient
indorse-
ments.

(1) "The plaintiff's claim is £399 9s. 7d., the defendant's share or contribution to the payment of certain bills of exchange and promissory notes in which he and the plaintiff were jointly liable, and which bills and notes have been taken up by the plaintiffs": *Walker v. Hicks*, 3 Q. B. D. 8.

(2) A claim on a dishonoured cheque, where the indorsement did not aver that notice of dishonour had been given to the drawer: *Fruhauf v. Grosvenor*, 8 Times, 744.

(3) "The plaintiff's claim is £399 9s. 7d., being seventy-five per cent. of the invoice price of goods supplied by the plaintiff to the defendant under an agreement" (giving its date and nature).

"The plaintiffs also claim to recover from the defendants the following bills of exchange, drawn by the plaintiffs and payable to the order of the defendants, being bills drawn for the price of goods supplied by the plaintiffs to the defendants as aforesaid." A list of bills was then set out in the indorsement, giving their dates and amounts: *Parpaite v. Dickinson*, 38 L. T. 178; 26 W. R. 479.

(4) The plaintiff's claim is for \$420.37, balance of work, etc., less credits as agreed upon. The plaintiff claims interest on \$420.37 until judgment: *Fitzsimmons v. Wilson*, 4 C. L. T. 91.

(5) The plaintiff's claim is for \$213.90, balance due for sawing wood by the plaintiff for the defendant: *Villeneuve v. Wait*, 12 P. R. 505.

(6) The plaintiff's claim is against the defendants as makers of a joint and several promissory note, dated 11th April, 1892, £36 6s. 0d. and payable by certain instalments in respect whereof default has been made: Particulars.—To balance of moneys owing upon the said promissory note £24 6s.: *Manchester & D. Bank v. Walton*, 68 L. T. 167; 5 R. 147.

(7) Where a plaintiff had brought an action for the foreclosure of a mortgage, and had obtained therein the appointment of a receiver, it was held that in a subsequent action on the covenant to recover interest payable under the same mortgage, the interest claimed was not a liquidated sum having regard to the order for the receipt of rents by the receiver, and therefore could not be "specially indorsed": *Poulett v. Hill*, 1893, 1 Ch. 277; 68 L. T. 476.

Rule 138. (8) "The plaintiff's claim is for the price of goods supplied. The following are the particulars:—\$621.06 for money payable by the defendant to the plaintiff for goods bargained and sold and delivered by the plaintiff to the defendant, and interest thereon from 25th July, 1882": *Lucas v. Ross*, 9 P. R. 251. No reasons are given for holding this to be insufficient, but the omission of the date of sale and the claim of interest would appear to have rendered it bad under the *Rule* as it then stood.

(9) A claim for \$404 for services rendered and money expended for the defendants, indicating the nature of the services and of the expenditure, but not the items, was held to be not a special indorsement: *Hoffman v. Crerar*, 18 P. R. 473; 19 P. R. 15.

Indorse-
ments held
sufficient.

Indorsements Sufficient.—The following indorsements have been held to be sufficient:—

(1) "The plaintiff's claim is £36 5s. for the balance of goods sold." *Anon*, W. N. 1875, 220; 1 Charl. Ch. Ca. 44. See, however, *Parpate v. Dickinson*, *supra*, as to effect of absence of dates.

(2) "The plaintiff's claim is £49 5s. 8d.; the following are the particulars:

	£	s.	d.
1879, Feb. 14 To goods	0	16	1
15 To goods	4	13	6
etc. etc. etc.			
May 21 Brit. Com.			
Bank draft returned	20	0	0
Notary charges on same	0	1	6
	£	99	0 8

	£	s.	d.
Cr. March 8 By Brit. Com.			
Bank draft	9	15	0
April 23 By Cash	10	0	0
April 29 By Brit. Com.	20	0	0
May 23 By Cash	10	0	0
	49	15	0
	£	49	5 8

and £2 15s. for costs": *Smith v. Wilson*, 4 C. P. D. 392; 5 C. P. D. 25.

(3) "The plaintiff's claim is for £116 0s. 10d., being the balance due to him from the defendant, for moneys paid at the said defendant's request, and on his behalf, for the purchase of certain stocks and shares, between the 3rd June, 1879, and the 31st August, 1879, an account of which has been rendered and exceeds three folios": *Ashton v. Hurwitz*, W. N. 1879, 194. The ground of the decision was that such an indorsement would have been sufficient under C. L. P. Act: see R. S. O. 1877, c. 50, s. 19, and the schedule where the form given states that an account previously delivered may be referred to by its date: see also *Bickers v. Speight*, 22 Q. B. D. 7.

(4) "The plaintiff's claim is £130 due him from the defendant, under an assignment, under the hand of one M. J., and dated July 14, 1888; particulars whereof are as follows: I do hereby authorize and request you to pay to Mr. E. Bickers, of, etc., the sum of £130 being the amount due or to become due from you to me, as appears

by an I. O. U. signed by you, and dated Feb. 4, 1885, and his receipt Rule 138, for the same shall be a good discharge": *Bickers v. Speight*, 22 Q. B. D. 7.

(5) "The plaintiffs claim \$2,000, being the amount of the defendants' overdrawn account with the plaintiffs' bank on the 18th September, 1882": *Imp. Bank v. Britton*, 9 P. R. 274. A similar indorsement omitting the date of the overdraft was held to be insufficient: *Ontario Bank v. Burk*, 10 P. R. 648.

(6) Claim for payment of a legacy of £2,750, "which has remained unpaid by reason of a breach of trust" with interest, the interest being payable under the will and not as damages: *Hamilton v. Brogden*, 60 L. J. Chy. 88.

(7) Claim for the amount due under a covenant in a mortgage in an action by an assignee without averring that the mortgagor had been notified of the assignment: *Satchwell v. Clark*, 66 L. T. 641; *S Times*, 592.

(8) "To 12 Debentures of Municipality of Morris, in the Province of Manitoba, which debentures are dated . . . and numbered . . . and were issued under a By-law passed . . . being By-law No. 5 of said municipality, which said By-law, and the coupons attached thereto, were legalized and confirmed by the Act of the Manitoba Legislature, 46 & 47 Vict. c. 70. The said debentures fall due respectively, Nos. 10, 11 and 12, on . . . To interest on debentures 10, 11 and 12 since their due date to the issue of this writ, at 6 per cent.": *London & Canadian L. & I. Co. v. Rural Mun. of Morris*, 11 C. L. T. 20.

(9) A claim by a surety for a debt and costs paid by him for the principal debtor: *Borland v. Curry*, 4 L. R. Ir. 273.

(10) A claim by a *cestui que trust* against his trustee for money payable under an express trust: *Wilson v. Dundas*, W. N. 1875, 222.

(11) An indorsement setting out an agreement by defendant to pay £210 to the plaintiff, if he would deliver to defendant's husband certain bills, was held to be good, notwithstanding that it contained no averment of performance by plaintiff of the conditions precedent: *Bradley v. Chamberlyn*, 1893, 1 Q. B. 439; 68 L. T. 413.

Actions to Recover Land.—The power to specially indorse a writ in an action for the recovery of land now extends to all actions of ejectment and is not now limited as it was by the former Con. Rule 245, to certain cases between landlord and tenant. In *Jarred v. Edwards*, 92 L. T. Jour. 8, it was held that the former Con. Rule applied (and *a fortiori* the present Rule applies) in the case of a tenancy at will. Special indorsement in actions to recover land.

The indorsement of a claim for possession of the mortgaged land in an action for foreclosure is not "a special indorsement" under Rule 138, so as to enable the plaintiff to apply for judgment under Rule 603: *Foresters v. Peggy*, 19 P. R. 80; nor *simile*, a claim by an unpaid vendor of land for possession: *Spears v. Fleming*, 19 P. R. 127.

But a claim by a mortgagee "to recover possession of" land (describing it) and "for an order that defendant do forthwith deliver up possession thereof" where that was the only claim, was held to be

Rule 139. a sufficient indorsement within *Rule 138*: *Central Trust Co. of N. Y. v. Algoma Steel Co.*, 6 O. L. R. 464.

Where in an action by a landlord for possession the copy of writ served omitted the length of the tenant's term, which was in the indorsement on the original writ. It was held on a motion under *Rule 603* for final judgment that sufficient information was given by the copy: *Hammer v. Clifton*, 1894, 1 Q. B. 238.

Amend-
ment.

Amendment of Indorsement.—The particulars of claim indorsed on the writ may, by leave, be amended, even though the writ has been served out of the jurisdiction, so long as no claim is introduced by amendment, which could not have been properly indorsed on the writ originally: *Holland v. Leslie*, 1894, 2 Q. B. 450; 71 L. T. 33; *Hogaboom v. MacCulloch*, 17 P. R. 377.

Where claims are added by amendment, the order allowing amendment may provide that the action as to such added claims shall be deemed to have been commenced only as from the date of the amendment: *Holland v. Leslie*, *supra*.

The place of trial named in the indorsement cannot be altered without leave in a subsequently delivered statement of claim: *Segsworth v. McKinnon*, 17 P. R. 178.

Indorse-
ment in
cases of
debt or
liquidated
demand.

139. Where the plaintiff's claim is for [or includes] a debt or liquidated demand, the indorsement, besides stating the nature of the claim, shall state the amount claimed in respect of such debt [or demand], and for costs, respectively, and shall further state that upon payment thereof within the time allowed for appearance, further proceedings will be stayed. Such statement may be according to Form No. 6. The defendant, notwithstanding that he makes such payment, may have the costs taxed, and if more than one-sixth be disallowed, the plaintiff's solicitor shall pay the costs of taxation. *Rule 1244*, amending *Rule 139*.

This is to the same effect as section 18 of the C. L. P. Act (R. S. O. 1877, c. 50), and Eng. (1883) R. 17, except the words in brackets, which are new (and as to which see note to *Rule 138*), and except that the latter names four days.

For Form No. 6, see H. & L. Forms, No. 50.

The indorsement must state clearly what is debt and what costs: *Truslove v. Whitechurch*, 8 Dowl. P. C. 837; and when interest is claimed the amount and the period from which it is claimed should be given: *Bardell v. Miller*, 7 C. B. 753.

The use of this indorsement, it will be observed, is obligatory. The effect of it is to entitle the defendant to settle the claim by payment within eight days: the plaintiff is not bound by it for any other purpose: *Jacquot v. Boura*, 5 M. & W. 155, 156.

Where the defendant paid the amount, but not within the four days, he was nevertheless held entitled to have the costs taxed under the last clause of this *Rule*, as the plaintiff, by accepting the amount indorsed, was considered to have waived payment within the four days: *Hoole v. Earnshaw*, 39 L. T. 400.

140. Where the plaintiff desires to have an account taken in the first instance, the writ of summons shall be indorsed with a claim for such account. Con. Rule 247.

See Eng. (1883) R. 18.

The former Con. Rule 247 had reference to cases of "ordinary account, as for instance in the case of a partnership, or executorship or ordinary trust account," and a claim against an executor for an account on the footing of wilful default, which is not an "ordinary account," did not fall within this Rule or Rule 645: *Re Bowen, Bennett v. Bowen*, 20 Ch. D. 538; but the present Rule makes no distinction between ordinary and other accounts. See also *Re Allan*, 9 P. R. 277, and *infra*, Rule 667 "Wilful neglect and default," and Rule 944; and *York v. Stowers*, W. N. 1883, 174.

Rules
140, 141.

Indorse-
ment of
claim for
account.

141 A claim for the foreclosure of a mortgage or for the sale or redemption of mortgaged property, or for immediate delivery of possession, or for immediate payment, shall be indorsed in accordance with the Forms in the Appendix, Part II. sec. VI., applicable thereto. Con. Rule 248. Rules of 1 Jan., 1896, 1438.

Foreclose-
ure, etc.

This Rule and the Forms referred to are not in the English Act.

The Forms are those numbered No. 9 (d), (e) and (f), in the Appendix, for which see H. & L. Forms, Nos. 57-59.

The indorsement should also state concisely the lands in question: *Canada Landed Credit Co. v. Callaghan*, Boyd, C., 26th October, 1881; see Forms.

This Rule having reference to the indorsement of a writ only, does not apply to a counter-claim on a mortgage, and orders for immediate payment and possession may be granted, though not asked for specifically by the counter-claim: *Klein v. Union Fire Insurance Co.*, 3 Ont. 250.

A separate action for possession should not be brought when other remedies against the mortgagor are claimed: *Hay v. McArthur*, 8 P. R. 321.

A writ indorsed with all the claims mentioned in this Rule is not specially indorsed under Rule 138 so as to entitle the plaintiff to move under Rule 603 for summary judgment for recovery of land: *Forsters v. Pegg*, 19 P. R. 80.

In an action for foreclosure, in which also possession is claimed, where the mortgage sought to be foreclosed was held void for illegal or immoral consideration, the plaintiff was held not entitled to recover possession: *Clark v. Hagar*, 22 S. C. R. 511.

Where a mortgage is being enforced by foreclosure against executors of the mortgagor, and an order for payment is asked against them, and they do not plead *plene administraverunt*, the additional costs of the latter claim only should be taxed against the executors personally: *Miles v. Brown*, 15 P. R. 375.

Formerly under Chy. O. 464, and former Con. Rule 341, after a final order for foreclosure or sale had been obtained in a mortgage action, an order for delivery of possession might have been obtained, even though the judgment did not include an order for possession:

Rules 142, 143. see Holmsted & Langton Jnd. Act, 1st ed., p. 383. Since the repeal of Con. Rule 341, it would seem, however, that that procedure may no longer be available, and possession may be only obtainable where claimed by the writ. See also *Wills v. Luff*, 38 Ch. D. 197, 200; but see Jnd. Act, sec. 57 (12).

Indorsement in action of dower.

142. Where the plaintiff in an action of dower claims damages for detention of her dower, the indorsement shall contain a statement that the plaintiff claims damages for the detention of her dower, from some day to be stated. Con. Rule 249.

Where the plaintiff's husband did not die seised of the land out of which dower is claimed, no damages for detention are recoverable: *Losce v. Armstrong*, 11 Gr. 517, even though a demand for dower may have been made by the plaintiff before action: *Morgan v. Morgan*, 15 Ont. 194. See further as to damages in actions for dower, *Wallace v. Moore*, 18 Gr. 560; *Ryan v. Fish*, 4 Ont. 335, and notes to Rule 177.

2. DISCLOSURE BY SOLICITORS AND PLAINTIFFS.

Demand on solicitor instituting proceedings.

143.—(1) The solicitor whose name is indorsed on any writ of summons, [notice, petition or document by which a cause or matter is commenced] shall, on demand in writing made by or on behalf of any defendant, [party or parties] who has been served therewith or has appeared thereto, declare forthwith in writing whether the cause or matter (a) has been commenced by him or with his authority or privity.

Whether commenced by his authority.

(2) If he answers in the affirmative, he shall also, in case the Court or a Judge so directs, disclose in writing within a time to be limited by the Court or Judge, the profession or occupation, and place of abode [giving name of street and house number where practicable] of the plaintiff, [or party on whose behalf he is acting.] on pain of being guilty of a contempt of Court.

(3) If the solicitor declares that the writ, [notice, petition or document] was not issued or served by him or with his authority or privity, all proceedings upon the same shall be stayed, and no further proceedings shall be taken thereupon without leave of the Court or a Judge. Con. Rule 250, amended.

See Eng. (1885) R. 42.

The words in brackets are new, and at (a) "cause or matter" has been substituted for "writ." These amendments extend the Rule so as to enable it to be ascertained in any "cause or matter," how-

commenced, whether it was commenced by the authority of the per-^{Rule 143.}
son in whose name it is commenced.

Where a solicitor continued to act for a Company after it had been dissolved, he was held to be not liable for acting under his original authority after it had been revoked, until he knew, or by the exercise of due diligence he might have known, of the dissolution: *Salton v. New Beeston Cycle Co.*, 1900, 1 Ch. 43. Where he had not exercised such due diligence he was ordered to pay the opposite party's costs between solicitor and client: *Id.*

Where a solicitor without authority prosecutes or defends an action, the proceedings are not necessarily void in all cases; e.g., an action prosecuted without authority binds the plaintiff, and his remedy is against the solicitor; he may, however, on getting notice of the proceedings, move to stay them: see *infra*, and *Chisholm v. Sheldon*, 1 Gr. 244. But where a defendant has not been served with process, and an unauthorized appearance is entered for him, the proceedings will be set aside on his applying promptly after he has notice of them: *Rossiter v. Westbrook*, 24 C. P. 91; *Massey v. Rapelje*, 5 C. P. 134; *Wright v. Hull*, 2 P. R. 26; *Re Gray*, 65 L. T. 743; and this rule applies in the case of partners, one of whom will not be bound by an appearance entered for him on the instructions of a co-partner, but without his authority: *Mason v. Cooper*, 15 P. R. 418; unless he be a dormant partner: see *Court v. Berlin*, *infra*; or unless the partner giving the retainer be the managing partner, in which case an appearance entered by authority of the managing partner for the other partners will be binding on them: *Tomlinson v. Broadbent*, 1896, 1 Q. B. 386; 74 L. T. 265; and the retainer of the solicitor will not be terminated by the retirement of a sleeping partner from the firm, of which the solicitor has no notice: see *Court v. Berlin*, 1897, 2 Q. B. 396.

By delay defendant may waive his rights: *Kerr v. Malpas*, 2 P. R. 135. In *McLean v. Grant*, 20 Gr. 76, the party was held to be bound by an unauthorized defence to a Chancery suit, though he does not appear to have been served with the bill. Where a defendant has been personally served with process, he is bound by an unauthorized appearance and defence, and the proceedings will not be set aside unless the plaintiff had notice: see *Rossiter v. Westbrook*, *supra*; *Moran v. Schermerhorn*, 2 P. R. 261; *Bayley v. Buckland*, 1 Ex. 1; Arch. Pr., 14th Ed., 107 (y); or unless the solicitor be insolvent: *Warely v. Poapst*, 7 C. C. L. J. 294. See note to Rule 145.

Where a solicitor has commenced an action in the name of a plaintiff without authority, the plaintiff may, on notice to the defendant and the solicitor, move that the action be dismissed, and that the solicitor pay the costs of the plaintiff as between solicitor and client, and the costs of the defendant as between party and party: *Newbiggin-by-the-Sea Gas Co. v. Armstrong*, 13 Ch. D. 310; *Nurse v. Burnford*, 13 Ch. D. 764; *Wray v. Kemp*, 26 Ch. D. 169; *Scribner v. Parcells*, 20 Ont. 354; *Geilinger v. Gibbs*, 1897, 1 Ch. 479; a defendant is also entitled to move to strike out the name of a plaintiff which has been used without authority: *Barrie v. Weymouth*, 15 P. R. 95; *Barrie Public School Board v. Barrie*, 19 P. R. 33. The fact that the action has been dismissed: *Morris v. Confederation Life*, 17 P. R. 24; *Scribner v. Parcells*, *supra*, or discontinued: *Gold Reefs of W. A. v. Dawson*, 1897, 1 Ch. 115, is no answer to the application.

Rule 144.

Dismissal
on defend-
ant's appli-
cation.

So where plaintiffs were joined without authority, their names were struck out, on the defendant's application, with costs payable by the other plaintiffs. The plaintiff's solicitors were not ordered to pay the costs personally, as they had acted *bona fide*. *Scoble*, that any plaintiff joined without his authority should be made a party to the motion by a defendant: *Barrie v. Weymouth*, 15 P. R. 95; but where a plaintiff was added as a party without his written consent as required by *Rule 206* (3), although a verbal consent to his being added had been given by his solicitor in his presence. It was held that he was entitled to have his name struck out, and the solicitor who had added him was ordered, notwithstanding he appeared to have acted *bona fide*, to pay the applicant's costs as between solicitor and client, and also the costs of the adverse party, which the applicant had been ordered to pay, together with all the costs of the application: *Fricker v. Van Stratten*, 1896, 2 Ch. 649; and see *Morris v. Confederation Life*, *supra*. A plaintiff residing out of the jurisdiction moving to set aside proceedings brought by a solicitor without his authority cannot be ordered to give security for costs on the solicitor's application: *Sample v. McLaughlin*, 17 P. R. 400.

The fact that a solicitor has acted as a solicitor for a trustee does not authorize the solicitor to enter an appearance for the trustee in an action in relation to the trust without any further retainer: *Re Gray*, 67 L. T. 743.

Where an order for security for costs has been obtained against a plaintiff for non-payment of the costs of a former action, in which his name had been used without his authority, he cannot apply to set aside the order on that ground, he must attack the root of the irregularity, and take proceedings to have his name struck out of the former action: *Lea v. Lang*, 17 P. R. 203, and see S. C., 18 P. R. 1.

Any former rule of practice that an action brought without the authority of the plaintiff can be dismissed, on application of the plaintiff, only on payment of costs, is not now in force. He may now leave the action stayed without payment of costs: *McKay v. Macfarlane*, 12 P. R. 149. In this case it was held that on an application of this kind after judgment, the action should not be dismissed, where it is brought for the benefit of a class: *sed quare*, see *Bank of Toronto v. Beaver, etc.*, 28 Gr. 87.

Where a solicitor acts as solicitor for a party without a direct retainer, and only upon the instructions of a third person, he may become personally liable for any loss arising to such party, in the proceedings, consequent on the fraud of the third person: *Slater v. Slater*, 1897, 1 Ch. 222, note.

Names and
addresses
of members
of firm suing
as partners.

144—(1) Where an action is brought by partners in the name of their firm, the plaintiffs or their solicitor, shall, on demand in writing by or on behalf of any defendant, declare forthwith in writing the names and places of residence of all the persons constituting the firm.

(2) If the plaintiffs or their solicitor fail to comply with such demand, all proceedings in the action may, upon an application for that purpose, be stayed upon such terms as the Court or a Judge may direct.

(3) Where the names of the partners are so declared, the ^{Rule 145.} action shall proceed in the same manner, and the same consequences in all respects shall follow, as if they had been named as the plaintiffs in the writ; but all proceedings shall, nevertheless, continue in the name of the firm. Con. Rule 251. See also Rule 222.

This Rule is the same as Eng. (1883) R. 43.

By Rule 222, any party to an action, in which partners either are or are sued in the name of their firm, may apply for a statement of the names of the persons who were at the time of the accruing of the cause of action co-partners in the firm, to be furnished in such manner, and verified on oath or otherwise, as may be directed.

By R. S. O. c. 152, s. 1, the names of the individual members composing a firm carrying on a trading, manufacturing or mining business, are required to be registered in the Registry Office for the county or registry division in which the business is carried on.

Where the names of partners are disclosed under Rule 144 (3), it does not seem to be necessary to verify the declaration by an affidavit; but if so verified, it has been held in England that the defendant is not liable to cross-examination on the affidavit, nor can the Court order the trial of an issue to determine who are the actual partners of a plaintiff firm; *Abrahams & Co. v. Dunlop*, 1905, 1 K. B. 46; 91 L. T. 11; but *quære*, whether in Ontario the defendant might not be cross-examined; see Rule 450.

3. SERVICE OF WRIT OF SUMMONS.

(a) Generally.

145. Service of a writ or other document by which a ^{Undertaking to accept service.} cause, matter, or proceeding may be commenced shall not be required where the defendant by his solicitor [accepts service and undertakes to appear]. Con. Rule 252.

The corresponding Eng. (1883) R. 48, has the words "undertakes in writing to accept service and enters an appearance." Instead of the words in brackets.

In order to take advantage of Rule 174 the solicitor's undertaking must be in writing, for that Rule provides that a solicitor not entering an appearance in pursuance of his written undertaking so to do, shall be liable to an attachment; see Rule 174; and he may also be ordered to pay all costs occasioned by his neglect; *Cook v. Broomhead*, 14 Ves. 133; and see *Courtney v. Stock*, 2 D. & W. 251; *Townley v. Jones*, 29 L. J. C. P. 299. The plaintiff may also proceed against defendant as upon default of appearance; he must take the risk, however, of the solicitor not having had authority to accept service; *Reissler v. Westbrook*, 24 C. P. 91; and it would therefore be proper to serve any subsequent proceedings upon the defendant personally. See note to Rule 143.

A solicitor's undertaking is binding and enforceable for six years from its date; *Re Kerby*, 83 L. T. 524, 699; 1900, W. N. 274.

Rule 146. As to the effect of a judgment obtained by the plaintiff in an action where the appearance of defendant was entered without his authority: see notes to *Rule 143, supra*, p. 277.

A sleeping partner may be bound by an appearance entered for the firm by the authority of the acting partner: see *Court v. Berlin*, 1897, 2 Q. B. 396; *Tomlinson v. Broadsmith*, 1896, 1 Q. B. 386.

Personal and substituted service.

146. Where service is required, the writ may be served in any County or District in Ontario, and the service thereof shall be personal; but if it appears to the Court or a Judge on affidavit that the plaintiff is unable to effect prompt personal service, the Court or Judge may order substituted or other service, by advertisement or otherwise. *Con. Rule 253, amended.*

See *Eag. (1883) R. 49.*

As to the old practice, see *H. & L. Jud. Act (1st ed.)*, p. 288.

As to service of corporation, see *Rules 159-161.*

Service of process must if possible be personal, or, in the case of a corporation, upon the duly constituted agent: the substitutional method is to be followed only when prompt personal service is shown to be unavailable: *Young v. Dominion Construction Co.*, 19 P. R. 139.

Personal service.

Personal service may be by delivering the process into the defendant's hand; or by seeing him and bringing the process to his notice: *Thomson v. Phency*, 1 Dowl. 441; and shewing him the original if he desires it: *Goggs v. Huntington*, 12 M. & W. 503; *Philpott v. Emmanuel*, 56 L. T. 858; *Hawthorn v. Harris*, 23 W. R. 214; within a reasonable time after service: *Thomas v. Pearce*, 2 B. & C. 761; *Petit v. Ambrose*, 6 M. & S. 274; a quarter of an hour was considered reasonable time in *Westley v. Jones*, 5 Moo. 162; or if he refuses to receive the copy, after being told its nature and being tendered it, then by placing it on his person: *Bell v. Vincent*, 7 D. & R. 233; or by throwing it down in his presence: 1 Dowl. 443. The copy must, however, be left with the defendant and not merely shewn to him: *Worley v. Glover*, 2 Str. 877, even though he refuses to take it: *Pigeon v. Bruce*, 8 Taunt. 410; *Erwin v. Powley*, 2 U. C. Q. B. 270. Handing a writ or notice of writ in an envelope, the defendant not being informed of the contents, and having no knowledge that an action has been or is about to be brought against him, is not good personal service: *Banque Russe, etc. v. Clark*, W. N. 1894, 203.

In *O'Sullivan v. Murphy*, 78 L. T. Jour. 213, placing the writ on the ground within 20 or 30 yards, and holding up the original, the defendant having run away to evade service, was held to be insufficient.

Where the person serving did not show the original, although requested to do so, service was set aside: *Philpott v. Emmanuel, supra*.

Appearance precludes all question as to the sufficiency of service: *Dart v. Citizens' Insurance Co.*, 11 P. R. 513; see *Boyle v. Sacker*, 39 Ch. D. 251, and notes to *Rule 169*.

If it is intended to object to the service, a motion to set it aside should be made before appearance: *Boyle v. Sacker, sup.*

Under the present Tariff A. (item 17) the costs of service of a writ by a person other than a sheriff are only taxable where the sheriff has made default: see *Rule 148*.

Service of the writ may be effected at any time of the day or night: *Updon v. Mackenzie*, 1 D. & R. 172; *Priddie v. Cooper*, 1 Bing. 66; *Rule 349* does not apply: *Murray v. Stephenson*, 19 Q. B. D. 60; but not on Sunday: *Mackreth v. Nicholson*, 19 Ves. 337; *Taylor v. Phillips*, 3 East, 155; R. S. O. c. 324, s. 3.

Where a person has been induced by fraud to come into the jurisdiction for the purpose of serving him, within it, with a writ, the service will be set aside as an abuse of the process of the Court; *sees*, if the invitation to come within the jurisdiction was *bona fide* for another purpose, even though it was also intended to take advantage of the opportunity to serve the person: *Watkins v. A. A. Land & Timber Co.*, 20 Times, 533.

Action to Recover Possession of Land.—In actions for recovery of land where it is in the actual possession of several persons, all ought to be named as defendants, and served with the writ, as judgment must follow the writ, and can be awarded only against the defendants; and only the defendants, and those claiming under them, can be ejected: see *Mint v. Johnston*, 133 L. T. 507. Persons in the position of servants, or the members of the family of a person in possession, need not be made parties or served with the writ. Persons not named as defendants, and claiming to be in possession, independently of the defendants, may appear: *Rules 180, et seq.*, and, even after judgment against the defendants, may obtain leave to defend: *Id.*

Action to
Recover
Land.

In an action by a landlord against his tenant, sub-tenants of the tenant, though in actual occupation, need not be made parties, and may be ejected under a judgment recovered against the tenant: *Spence of Toronto v. Fiske*, 29 Ont. 738; *Green v. Herring*, 1905, 1 K. E. 152.

Substitutional Service.—The present *Rule* gives a wide discretion to the Court. It allows substituted service to be ordered in whatever way the Court or a Judge may direct: *Whitley v. Honeywell*, 24 W. R. 871; if, from any cause, the plaintiff is unable to effect prompt personal service.

By send
plaintiff.

Substitutional service should not be ordered where service under *Rules 146, 150* or *160*, might be effected: *Young v. Dominion Construction Co.*, 19 P. R. 139 (where an order for substitutional service was set aside).

substituted
service of
writ.

A Statute authorizing Courts in the case of contracts made or to be performed within the jurisdiction, to decide whether they will, or will not, proceed in the absence of defendants, is *intra vires*, but whether a judgment obtained in such circumstances will be enforced by the Courts of another country is for those Courts to determine: *Ashbury v. Ellis*, 1893, A. C. 339.

As to substituted service where a defendant is out of the jurisdiction, see notes to *Rule 162*.

As to whether the *Rule* applies to the case of persons sued in the name of a firm, where no person having control or management of the business can be found, see notes to *Rule 229*.

Where defendant has an agent within the jurisdiction, substitutional service may be allowed on such agent, *o.g.*, a managing clerk in his place of business: *Armitage v. Fitzwilliam*, W. N. 1875, 238; general agents: *Jones v. Carhill*, 11 L. T. 506; special agents: *Hab-*

When sub-
stituted
service
allowed.

Rule 146. *hanse v. Courtney*, 12 Sim. 140; solicitors who had acted for defendant; *Hornby v. Holmes*, 4 Ha. 306; *Watt v. Barnett*, 3 Q. B. 11, 183, 363; *Tottenham v. Barry*, 12 Ch. D. 798; but see *The Pommerania*, 4 P. D. 195; and *Young v. Dominion Construction Co.*, *supra*.

Substituted
service.

Where the defendant, out of the jurisdiction, has expressly agreed to service being effected on him in a particular way, service effected in that way will be allowed as good service: *Montgomery v. Lichen*, *ibid.*, 1898, 1 Q. B. 487; but only in a case in which there is jurisdiction to allow service upon him out of the jurisdiction: see *Reid, Wagon Co. v. West*, 1896, 1 Q. B. 35, 37.

As was said in *Watt v. Barnett*, 3 Q. B. D. 367, substituted service may be properly ordered upon any persons with whom the Court is satisfied that the party is in communication. The Court has a right to consider that the copy of writ served will be sent on, and the service will be good, though the service is not in fact communicated.

In cases decided under the former Chancery practice the agent was required to be such in relation to the subject matter of the suit: *Allan v. Pyper*, 5 F. C. L. J. 118; *Cupples v. Yurston*, 2 Chy. Ch. 31; *Conniffe v. Taylor*, 2 Gr. 317; *Doremus v. Kennedy*, 2 Gr. 657; but under the present practice orders have been made though the person served has no connection with the subject of the suit, if only he is likely to communicate the fact of service to the defendant: see *Watt v. Barnett*, *supra*.

Where defendant's wife, or other relative or person, is shown to be, or to be likely to be, in communication with him, and is within the jurisdiction, service may be allowed on such person: *Dicker v. Chalk*, 11 W. R. 635; *Bank of Whitehaven v. Thompson*, W. L., 1877, 45; *Smacerville v. Joyce*, 1 Chy. Ch. 378; and even under the former Chancery practice such service has been allowed though the relative was not shown to be at the time in communication with defendant: *Cameron v. Baker*, 2 Chy. Ch. 281. Such service may be accompanied by advertising where the person upon whom substituted service is made, may not be able to communicate with defendant: *Bank of Whitehaven v. Thompson*, *Cameron v. Baker*, *supra*; *Conthoupe v. Curshaw*, 32 W. R. 33, or by mailing to an address at which defendant is shown to have recently been: *Cupples v. Yurston*, *supra*.

Where a bill had been filed for foreclosure, and the defendant the official assignee of the mortgagor absconded before service effected, service was allowed substitutionally upon one of the Inspectors of the estate: *London Canadian Loan & Agency Co. v. Thompson*, 8 P. R. 91.

When not
allowed.

Substituted service will not be ordered under this Rule unless it is shown that prompt personal service cannot be effected. The fact of a defendant being out of the jurisdiction is not alone a reason for dispensing with personal service. He must be evading service, or his whereabouts be unknown: *Robertson v. Mera*, 9 P. R. 540; see also *Adler v. Benjamin*, 1 Times, 308; *Young v. Dominion Construction Co.*, 19 P. P. 129; and see as to that case, *Taylor v. Taylor*, 6 Q. B. R. 356, 345. Where his residence can be ascertained by examination of relatives, that course will doubtless be proper as formerly in Chancery: see *McMurrich v. Hogan*, 1 Chy. Ch. 307; *McDonald v. McMillan*, 2 Chy. Ch. 1982.

In the case of actions brought in respect of a business carried on in Ontario, by a defendant out of the jurisdiction, a special provision is made by Rule 147.

After a service, not personal, has been effected, there is power to **Rule 146.** make an order allowing the plaintiff to proceed on the service made, but this power must be prudently exercised: *Adler v. Benjamin*, 1 Times, 308.

Substituted service will not be ordered under this *Rule*, of a writ which could not legally have been served personally—as a writ against a colonial government: *Stoman v. Governor of New Zealand*, 1 C. P. L. 563; or against a foreign sovereign: see *Mihell v. Sultan of Johore*, 1892, 1 Q. B. 149; 70 L. T. 64; or a foreign ambassador: see *Musurus Bey v. Gaddan*, 1894, 1 Q. B. 533; or of a writ for service within the jurisdiction, where the defendant is without the jurisdiction, and there is no evidence that he left the jurisdiction to avoid service: *Wilding v. Bean*, 1891, 1 Q. B. 100; or of a writ against a partnership firm, upon a partner resident out of the jurisdiction: *Worcester, etc., v. Firbank*, 1894, 1 Q. B. 784.

But where after issue of a writ for service within the jurisdiction the defendant, knowing of it, leaves the jurisdiction, though not for the purpose of evading service, substituted service of the writ may be authorized, and the plaintiff will not in such a case be required to issue a concurrent writ for service out of the jurisdiction: *Jay v. Budd*, 1898, 1 Q. B. 12; 77 L. T. 335; distinguishing *Wilding v. Bean*, *supra*.

See also *Fry v. Moore*, 23 Q. B. D. 395; *Field v. Barnett*, 56 L. J. Q. B. 89; *Hilliard v. Smyth*, 36 W. R. 7; and note preceding *Rule* 162.

The principle upon which substituted service is granted is that the service is likely to come to the knowledge of the party: *Hope v. Hope*, *supra*; *Furber v. King*, 29 W. R. 535; where therefore the defendant was shewn to have absconded from his residence and place of business, leave to serve him substitutionally, by leaving copies of the writ at those places, was refused, and service was allowed by advertising: *Wolverhampton & Staffordshire Banking Co. v. Bond*, 43 L. T. 72; 29 W. R. 599; see also *Coulbourn v. Carshaw*, 32 W. R. 33.

For observations on an order made for substitutional service, where there was not sufficient evidence that the service was likely to come to the knowledge of the defendant: see *Alexander v. Alexander*, 1 O. L. R. 639.

The Court will not set aside substitutional service if it appears, or ^{Setting} can fairly be inferred, that the defendant has notice of the proceed- ^{service aside} ings: *Taylor v. Taylor*, 6 O. L. R. 356, 545. Where, after instructions to a solicitor to accept service had been revoked, and the plaintiff's solicitor so informed, an order for substitutional service on the solicitor was obtained, it was held that the solicitor had no *locus standi* to move to set aside the order on the defendant's behalf: *Taylor v. Taylor*, *supra*; but a person served as the agent of defendant may move to set aside the service if he is not the agent: *Doremus v. Kennedy*, 2 Gr. 65; *The Pommerania*, 4 P. D. 195; cited in *Taylor v. Taylor*, *supra*.

The provision for substituted service has been held in England to apply to an originating summons as well as to a writ: *Re Pepper*. ^{Not confined to service of writs.} 32 W. R. 765; 50 L. T. 580; 53 L. J. Chy. 1054; though it has also been held by Denman, J., in *Chambers*, to relate only to service of writs of summons or notices thereof, and therefore substituted service of a notice of application for a writ of attachment was refused.

Rule 146. *Anon.*, W. N. 1876, 105; 2 Charl. Ch. Ca. 26. It is presumed, however, that notices under *Rule 209* (see last clause of that Rule) may be so served, and that, under the general jurisdiction which the Courts of this Province have heretofore had, they may order such service of all papers not required to be personally served: see *Rules 147, 167; McTaggart v. Merrill*, 7 P. R. 405, and *Rule 334* as to notices of motion and appointments. Substituted service has been allowed of proceedings to set aside fraudulent conveyances under R. S. O. 1877, c. 49, s. 10, now *Rules 1015, et seq.*; *Dobson v. Marshall*, 9 P. R. 1; and in England of a notice of motion: *Cook v. Dey*, W. N. 1876, 122; *Hamilton v. Davies*, W. N. 1880, 82; see Dan. Pr., 5th ed., 1142; an order for an interim injunction: *Young v. Brassey*, 1 Ch. D. 277; a summons to shew cause, where defendant was evading service: *Hunt v. Austin, Ex p. Mason*, 9 Q. B. D. 598; a notice of appeal: *Ex p. Warburg, Re Whalley*, 24 Ch. D. 364; 25 Ch. D. 336; and a notice of motion for an administration order under Chy. Gen. O. 638 (now *Rule 947*): *Re Allan*, 9 P. R. 77; see also *Re Morant*, W. N. 1879, 144; *Trubner v. Trubner*, 62 L. T. 186.

An order to proceed without service will not be made; substituted or equivalent service must be effected, if personal service, or acceptance of service cannot be obtained: W. N. 1875, p. 202; 1 Charl. Ch. Ca. 37.

Substitution
of notice for
service.

In *Cook v. Dey*, 2 Ch. D. 218, it was held by V. C. Hall, that the substitution of notice for service mentioned in the latter part of the original *Rule* was not intended to apply to ordinary cases of persons not able to be found, but who were within the jurisdiction. He, however, directed substituted service of the writ by advertising, and by leaving a copy at defendant's office and lodgings, which is plainly authorized by the *Rule* in its present shape. In *Leddell v. McDougall*, 22 Sol. Jour. 838, Manisty, J., held that the Court had power to make an order for substitution of notice for service within the jurisdiction. See also *Rule 273*.

In such cases the time for appearance runs from the time the order takes effect, that is, from the service of the writ at the place mentioned, or publication of the advertisement, whichever is the later: *Crane v. Jullion*, 2 Ch. D. 220; see also *Johnson v. Moffat*, W. N. 1875, 248; 1 Charl. Ch. Ca. 39.

A combination of different modes of effecting service where defendant's address is not known, or he cannot be found, may be ordered, depending upon the circumstances of the particular case.

When
service
set aside.

Where defendant gave his club as his address, and an order for substitutional service had been granted on an affidavit of a clerk that he had been to the defendant's residence but had been unable to effect personal service, and judgment by default was signed on the substituted service, the affidavit was considered misleading, and the order for substitutional service was set aside, though two years had elapsed since the signing of judgment: *Johnson v. Menzies*, 72 L. T. Jour. 348.

An order directing substitutional service upon solicitors of defendant in a former action was set aside, it being shown that the solicitors had ceased to act for defendant in such former action: *The Pommerania*, 4 P. D. 195. See also *Young v. Dominion Construction Co.*, 19 P. R. 139; and *Taylor v. Taylor*, 6 O. L. R. 356, 545.

Examples.—Where the defendant was supposed to be within the jurisdiction but had absconded or was evading service, service was allowed by leaving copies of writ with his wife or other relatives presumably in communication with him: *Bank of Whitehaven v. Thompson*, W. N. 1877, 45; *Atkins v. Atkins*, W. N. 1887, 92; at his last lodgings and place of business, and by advertising or mailing: *Cook v. Day*, 2 Ch. D. 218; *Capes v. Breicer*, 24 W. R. 40; by serving his managing clerk at his offices, and upon his solicitors: *Armitage v. Fitzwilliam*, W. N. 1875, 238; by serving tenants of lands in question in the action to whom the defendant had given notice to pay rents to him, and advertisement: *Crane v. Jullion*, 2 Ch. D. 220; *Coulbourn v. Carshaw*, 32 W. R. 33; by posting to defendant's last address: *Dymond v. Croft*, 3 Ch. D. 512; by leaving a copy of writ at defendant's only known place of residence, a club, and serving solicitors who refused to accept service, but had acted in other matters for defendant: *Rafael v. Ongley*, 34 L. T. 124; see *Anon.*, 1 Char. Ch. Cs. 38; *Hornby v. Holmes*, 4 Ha. 306; *Tottenham v. Barry*, 12 Ch. D. 797; by mailing to his address and advertising: *Hamilton v. Davies*, W. N. 1880, 82; by serving defendant's wife or other relative leaving copies at his residence and advertising: *Mullows v. Bannister*, W. N. 1882, 183; 31 W. R. 238; *Waters v. Waters*, 24 W. R. 190; *Coulbourn v. Carshaw*, 32 W. R. 33. Where defendant is out of the jurisdiction but his whereabouts is unknown, service may be allowed by advertising alone, if there is no agent within the jurisdiction or person likely to be in communication with defendant: *Hartley v. Dilke*, 35 L. T. 706; *Gordon v. Hanna*, 6 P. R. 266; *Whitley v. Honeywell*, 24 W. R. 871; *Rowley v. Southwell*, 61 L. T. 805; or by advertising and mailing to various addresses at which defendant has been heard of: *Stimson v. Stimson*, 6 Gr. 379.

Substituted service, when duly effected, is for all purposes equal Practice, valent to personal service: *Watt v. Barnett*, 3 Q. B. D. 363.

Where it is necessary to effect substitutional service on several defendants at the suit of the same plaintiff, and the application is based on the same facts, a single affidavit may be used setting out the necessary facts and entitled in all the actions: *Orkney v. Shanahan*, 8 L. R. Ir. 155.

Any objection to an order allowing any particular mode of service must be taken by motion to set aside the order and not by pleading the objection as a defence: *Preston v. Lamont*, 1 Ex. D. 363; and it should be made before the defendant has taken any other step in the action, otherwise he will be deemed to have waived his right to object: see *Fry v. Moore*, 23 Q. B. D. 395; *Western Nat. Bank v. Percz*, 1891, 1 Q. B. 304, and notes preceding Rule 162.

Costs of a motion for leave to effect substituted service are taxable Costs, in the cause: *Eager v. Buckley*, 8 L. R. Ir. 99.

147. Where service of a writ out of Ontario may be allowed under Rules 162 to 167, and the defendant, whether a British subject or not, is, or was at the time the cause of action arose, carrying on business within Ontario, the Court or a Judge may, if the cause of action arose in respect of such business, make an order allowing service upon any person having the control or management of the business; and such

Substitutional service on manager of a business in Ontario.

Rules 149-150. service shall be equivalent to personal service upon the defendant. *New.*

See *Rules* 159-161.

Indorsement of receipt of process, etc., non-service, re-delivery to plaintiff; costs of service.

148. Upon the delivery of a writ at the office of a Sheriff for service, he shall indorse thereon the time when it was so delivered; and in case the writ is not served within ten days after such delivery, the plaintiff shall be entitled to re-delivery of the same; and the Sheriff shall indorse thereon the time of the re-delivery; and the mileage and costs of service of the writ by any literate person afterwards, shall, in case the person served was at any time during such ten days within the County, be allowed in the taxation of costs, as if the service had been by the Sheriff. *Con. Rule 254.*

See *Carty v. London*, 13 P. R. 285, and Item 17 of *Tarif A.*

Failure of sheriff to re-deliver.

149. If the Sheriff, being applied to, neglects or refuses to re-deliver the writ, after the expiration of the ten days, the plaintiff may issue a duplicate writ on the *praecipe* already filed, and the costs of the writ not re-delivered may be recovered from the Sheriff. *Con. Rule 255.*

Indorsement of service.

150 —(1) The person serving a writ shall, within three days after the service, indorse on the writ the day of the month and week of the service thereof; otherwise the plaintiff shall not be at liberty, in case of non-appearance, to proceed by default [without the leave of a Judge, such leave to be obtained at the sole cost of the plaintiff].

(2) Every affidavit of service of such writ shall state the day on which such indorsement was made. *Con. Rule 256.*

See *Eng. (1883) R. 62.* which is expressly made to apply to substituted service.

The words in brackets are not in the *Eng. Rule*. In *Hastings v. Hurley*, 16 Ch. D. 734, and in *Sproat v. Peckett*, W. N. 1883, 76; 48 L. T. 755, and in *Shepherd v. Silcock*, W. N. 1886, 84, the time for making the indorsement was extended under *Rule 353*.

An order to amend the indorsement of service was granted where a wrong date was indorsed by mistake: *Hync v. Murphy*, 2 L. R. 1r. 35.

Judgment was allowed to be signed where the indorsement shewed the day of the month but not the day of the week: *Foat v. Basset*, W. N. 1888, 255.

Holidays are not included in the three days: *Rule 343*.

This *Rule* does not apply to cases of substituted service: *Dymond v. Croft*, 3 Ch. D. 512; *Cruse v. Kuttingwell*, W. N. 1875, 250; 1

Charl. Ch. Ca. 40; or where notice in lieu of a writ (see *Rule 165*), *Rules* is served: *Fish v. Chatterton*, W. N. 1882, 145; 31 W. R. 87; 47 L. 161, 162, T. 328; or where the writ is served by advertisement: *Davis v. Lound*, 78 L. T. Jour. 318; W. N. 1883, 54.

There is power under *Rule 310* to hold a service to be valid notwithstanding the want of strict compliance with this *Rule*: *Steers v. Rogers*, 7 Times, 183.

(b) *Married Women.*

151. A married woman shall be served in the same manner, and with the like effect, as if she were a *feme sole*. *Con.* *Rule 257.* Married Woman.

(c) *Infants.*

152.—(1) Where an infant is to be served in respect of his interest in an estate, whether beneficially or in a representative capacity, with a writ of summons, petition, notice of an application or other proceeding in the High Court, he shall be served by delivering to the Official Guardian a copy of the writ, petition, notice, or other proceeding required to be served. *New. See Con. Rule 258, first part.* Service on Infants.

(2) From the time of such service, the said Official Guardian shall be the guardian *ad litem* of the infant, unless and until the Court or a Judge otherwise orders; and it shall be the duty of the said Official Guardian, or of any other guardian appointed for such infant, forthwith to attend to the interests of the infant, and to take all such proceedings as may be necessary for the protection of such interests in the proceeding in which he is appointed guardian, and for that purpose to communicate with all proper persons and parties, including the father or guardian of the infant and the person with whom or under whose care the infant is. *See Con. Rule 258.*

(3) In case there is more than one infant for whom service is made on the Official Guardian, one copy only of the writ, petition, or notice or other proceeding need be served, but the name of each person on whose behalf the Official Guardian is served shall be stated on the copy served. *See Con. Rule 258.*

The practice under Eng. (1883) R. 51 is different.

The cases in which the Official Guardian is to act are those which formerly were dealt with in Chancery, viz., where an infant, whether within or without the Province is interested in an estate in question in the suit. The present *Rule* further expressly provides that

Rules
153-155.

whether the interest of the infant in the estate is beneficial or fiduciary, he is to be represented by the Official Guardian: see *Re Jackson, Massey v. Crookshanks*, 12 P. R. 475. In all other cases Rule 155 applies.

Where a plaintiff signs judgment against a defendant in ignorance that he is an infant, it is discretionary with the Court whether such judgment shall be set aside: *Furnival v. Brooke*, 49 L. T. 134; *Straughan v. Smith*, 19 Ont. 558; *Millson v. Small*, 25 Ont. 144.

Service on the Official Guardian of a notice under *The Quitting Titles Act* is good service upon infants who are required to be notified: *Re Murray*, 13 P. R. 367.

See also notes to Rules 155 and 197.

Service
on infant
personally
when
necessary.

153. Where the action against an infant defendant is for the recovery of lands, goods, or chattels of which he is personally in possession, service shall be made on the infant personally, and one copy of the writ shall also be mailed to, or delivered at the office of the Official Guardian, [who may enter an appearance for the infant, in the absence of other order or direction]. Con. Rule 259.

This Rule varies from Eng. (1883) R. 51.

The words in brackets were not in the former Con. Rule 259 referred to.

Personal service on an infant is made in the same manner as upon an adult: *Lan. Chy. Prac.* (5th ed.), 368, 376.

Where an infant is out of the jurisdiction the Court has the like power to order service substitutionally, or by publication, or otherwise, as in the case of an adult: *Duffy v. O'Connor*, 1 Chy. Ch. 393.

In an action for foreclosure, where possession is claimed, the writ of summons need not be served personally on the infant heirs of the mortgagor if they are not personally in possession: *Sparks v. Purdy*, 15 P. R. 1, 295.

See also notes to Rule 152.

Torts, etc.

154. Where the action is against an infant in respect of a personal tort or for the recovery of money only, the infant shall be served, as in the case of an adult defendant. Con. Rule 260.

See notes to Rules 152 and 197.

Guardian
other than
official
guardian.

155. Where an infant defendant is not represented by the Official Guardian, a guardian may be appointed for him by the Court or a Judge. Con. Rule 261.

The English practice is different: see *White v. DuVernay*, 1891, P. 291.

See note to Rule 152.

Under this *Rule* the defendant may himself before appearance make an application in Chambers to appoint a guardian *ad litem*, by whom he may appear and defend the action, or in case he does not, the plaintiff may, after the time for appearance has elapsed and defendant has not appeared by guardian, move on notice to the defendant for the appointment of a guardian *ad litem* for him, and if the defendant fails to nominate a guardian, the plaintiff may probably be allowed to do so; the consent of the person nominated, and an affidavit of his fitness, and that he has no adverse interest, should be filed; see *Hugh v. Brown*, 13 P. R. 17, and the proposed guardian should appear before the Judge with the infant; *Rule* 221.

Where a plaintiff knows that the defendant is a minor he should not proceed with his action until a guardian has been appointed, or his proceedings may be invalid; but in *Stoughton v. Smith*, 19 O.R. 568 (an action of tort), the appointment of a guardian was held not to be imperative, so that the want of one would not necessarily invalidate the proceedings after judgment, where the defendant was not quite of age, but his interests appeared to the Court to have been sufficiently protected, and the fact of his infancy was well known to his parents and solicitors, and no objection to the want of a guardian had been taken until the case was in the Divisional Court.

156. Subject to *Rule* 221, any person interested may apply to a Judge of the High Court for an order substituting another guardian for the Official Guardian. Con. *Rule* 262.

This *Rule* is in substantial accordance with Chancery Order 612.

In *Hodgins v. Hodgins* (Mr. Justice, March, 1882), the mother of infant defendants of tender years, who was also their guardian appointed by the Surrogate Court for the purpose of taking proceedings on their behalf for partition of the lands in question under *The Partition Act*, 1st, applied to have a guardian other than the Official Guardian appointed. There was no conflict of interest and the action involved a partition of lands inherited by the infants from their grandfather, but the Master in Chambers held that there was an sufficient reason for not using the power conferred by this *Rule*, and that the policy adopted by the *Rules* of appointing the Official Guardian was not to be departed from without some reason, apart from the wishes of those who naturally have the care of the infants' interests.

On an application at the instance of an infant of 18 who was considered capable of exercising a sound discretion in managing his own affairs, and applied with the approbation of his father, a guardian nominated by the infant was appointed under the above clause in the place of the Official Guardian; *McKenzie v. Dorfold*, 2 O. L. T. 176.

See also note to *Rule* 221.

The Court would appear to have inherent jurisdiction to substitute another guardian for a guardian appointed under *Rule* 155.

64 Lunatics and Persons of Unsound Mind.

157. [Subject to the provisions of section 55 of chapter 245 of The Revised Statutes of Ontario, 1887]. (a) where a lunatic, or person of unsound mind not so found by inquisi-

Rule 158 tion [or judicial declaration], is a defendant, service on the committee of the lunatic or on the person with whom the defendant of unsound mind resides, or under whose care he is, shall, unless otherwise ordered, be deemed good service, Con. Rule 263.

Same as Eng. (1883) R. 52, except the words in brackets. The R. S. O. 1897, c. 65, s. 8, authorizes the Court or a Judge to serve on a person a lunatic without an inquisition.

1897 N. W. R. S. O. c. 317, s. 55.

By R. S. O. c. 317, s. 53, the Inspector of Prisons and Public Charities is *ex officio* the committee of every lunatic who has no other committee, and is detained in any public asylum. Service on the Inspector is not, however, sufficient. R. S. O. c. 317, s. 55, referred to in this Rule, provides as follows:—

Process
being
against
persons
confin-
ed in pub-
lic Asyl-
ums.

55. In case any action or other proceeding is brought against a person confined as insane in a public asylum for the insane, it shall not be sufficient in order to bind the estate of such insane person, or to make the proceedings otherwise valid, to serve any writ, process, return or other document upon the Inspector of Prisons and Public Charities, although the Inspector is named therein as committee, but the same proceedings shall and may be taken for the appointment of some person or persons to protect the interests of the insane person aforesaid in the action or other proceeding, as would be requisite, if might be taken if the said Inspector was not the committee of the lunatic under this Act.

Where a lunatic had no committee, service was, in England, directed to be on the keeper of an asylum where the lunatic was lying: *Thorn v. Smith*, W. N. 1879, 81; 27 W. R. 617. It is the duty of the keeper of an asylum to allow the writ to be served: *Dunlop v. Harbington*, W. N. 1867, 17, unless the service might be injurious to the lunatic: *Re McIn*, 2 Chy. Ch. 420. Service on the manager of a lunatic defendant's business was held bad: *Forestreet Co. v. Murdoch*, 10 Q. B. D. 471.

Guardian
ad litem.

158. After service of the writ no further proceedings shall be taken against a defendant who is a lunatic and has no committee, or against a defendant of unsound mind not so found until a guardian *ad litem* is appointed, Con. Rule 264.

See notes to Rules 217, *et seq.*

Where the fact of lunacy is disputed, and the defendant has not been judicially found lunatic, an inquiry would probably be ordered on this point, on the application of the defendant, before appointing a guardian: see *Howell v. Lewis*, 67 L. T. 672, the case of a plaintiff.

Where proceedings are taken against a lunatic defendant without the due appointment of a guardian, in the manner prescribed by Rules 218, *et seq.*, they may be set aside as irregular: *Warnock v. Priour*, 12 P. R. 264.

(c) Partners.

[See Rules 223 and 231.]

Rule 159.

(f) Corporations.

159. Where a corporation is a party to a cause or matter; Service on corporations, how effected.

(a) A writ of summons or other document by which the cause or matter is commenced, and,

(b) In the absence of the appearance of the corporation by solicitor, all papers and proceedings in the cause or matter before the final judgment or order therein,

may be served on the Mayor, Warden, Reeve, President, or other head officer, or on the Township, Town, City or County Clerk, or on the Cashier, Treasurer or Secretary, Clerk or agent of such corporation, or of any branch or agency thereof in Ontario; and every person who, within Ontario, transacts or carries on any of the business of, or any business for any corporation whose chief place of business is without Ontario, shall, for the purpose of being served as aforesaid, be deemed the agent thereof. *Con. Rule 267.*

The Eng. (1883) R. 53, first clause, contains analogous provisions, being a consolidation of the repealed Rule of 1875, O. 9, r. 7, and the provisions of sec. 16 of the C. L. P. Act of 1872.

As to the residence of a corporation: see *Bank of Nova Scotia v. McKinnon*, 12 C. L. T. 178.

The Mother Superior of a convent is not the "head officer" within the corresponding English Rule upon whom to serve the writ in an action against an order whose governing body is in France: *Golding v. Order of La Sainte Union des Sœurs Cœurs*, 67 L. T. 606. Whether such a body is a corporation *quære, Ib.*

Rule 159 applies to a company incorporated by the Dominion. Such a company cannot in any Province be regarded as a foreign corporation: *Tytler v. C. P. R.*, 21 Ont. 654, 659; 26 Ont. App. 467. Dominion companies. As to such companies: see 2 Ed. vii. c. 15, s. 80 (D.).

Where the head office of such a corporation had been at Ottawa at the time of the issue of the writ, and, though it was said that the head office had been changed to Montreal, this was not clearly shown to be the case, an order for substitutional service of the corporation by advertising was upheld, there being at the time of service no place of business of the corporation in Ontario, nor any representative on whom service could be made: *Gold Run (Klondike) Mining Co. v. Canadian Gold Mining Co.*, 5 O. W. R. 411.

Foreign Corporations.—A foreign corporation is not subject to process simply because some person in its employ as clerk or agent can be found in Ontario: *per Moss, J.A., in Murphy v. Phoenix Bridge Co.*, 18 P. R. 502. A foreign corporation in order to be sued in Ontario must be carrying on business there in such a way as to render it subject to be deemed resident within Ontario, and in order to serve a writ upon it within Ontario some person must be served within Ontario who sufficiently represents it: if a clerk, he must be one transacting business or performing duties in Ontario on behalf of Foreign corporations

Rule 159.Foreign
corpora-
tions.

the corporation of such a nature that if transacted or performed by a clerk of a domestic corporation, would make him a proper person to be served: *Ib.*, per Moss, J.A., 502; or one who transacts or carries on in Ontario or controls or manages for the corporation some part of the business which it professes to do, and for which it was incorporated: per Osler, J.A., *Ib.*, p. 501.

It is sufficient to warrant service under this *Rule* that the corporation is actually carrying on business within the jurisdiction, though it be merely temporarily doing so: *Dudlop, &c., v. Actien-Gesellschaft*, 1892, 1 K. B. 312; 86 L. T. 472.

Where there is such an officer or agent as is in this *Rule* mentioned of a corporation whose chief place of business is without Ontario, service may be effected on such officer or agent, even in an action respecting a liability incurred by the corporation out of the Province: *Armstrong v. Lancashire*, 3 O. L. R. 395.

Service within the Province on the President of a foreign corporation was held bad where it was not shown that it transacted any business there: *Wilson v. Detroit & Milwaukee Ry. Co.*, 3 P. R. 37. Where a foreign Insurance Co. had a head office for the Province in Toronto, service on the local agent of the Co. at Ottawa was held good, notwithstanding the provisions of the Dom. Act, 40 Vict. c. 42, s. 9: *Wilson v. Etna Life Insurance Co.*, 8 P. R. 131; see now R. S. C. c. 124, s. 11; even though the company had transferred its business to another company, the authority of the agent remaining unrevoked: *Armstrong v. Lancashire*, *supra*.

For peculiar circumstances under which a corporation was held not to have had an agent in Ontario upon whom service might be effected: see *Murphy v. Phoenix Bridge Co.*, 18 P. R. 406, 495.

"Carrying on Business in Ontario."—See cases under *Rule 222*, + *Burnett, In Assist. Cap. 6 O.W.R. 144*

It has been decided under the English O. 63 of 1875, and s. 100 of the Ind. Act of 1873 [see s. 2 (7) of the Ont. Act, and R. S. O. c. 1, s. 8 (13)], that a foreign corporation, though it does not carry on business within the jurisdiction, may be sued there, in cases where an individual foreigner might be sued; see *Westman v. Aktiebolaget, etc.*, 1 Ex. D. 237; *Scott v. The Royal War Candle Co.*, 1 Q. B. D. 404; *Royal Mail Steam Packet Co. v. Braham*, 2 App. Cas. 381. Such a corporation might, under the old practice, have been sued in Ontario, and the mode of service in such a case was prescribed by Chy. O. 92, and R. S. O. 1877, c. 50, ss. 50 and 51. Since the Ind. Act a foreign defendant can only be sued where *Rules 162, et seq.*, apply.

A foreign corporation which carries on business within Ontario is capable of being treated for the purpose of service as a Provincial corporation resident within the Province: *Haggin v. Comptoir, etc.*, 23 Q. B. D. 519; 61 L. T. 748; approving of and following *Nesby v. Von Oppen*, L. R. 7 Q. B. 293; see also *Palmer v. Gould's Manufacturing Co.*, W. N. 1884, 63; per Lord St. Leonards in *The Carron Iron Co. v. MacLaren*, 5 H. L. C. at p. 459; *La Bourgeois*, 70 L. T. 310, 321; S. C. sub nom. *Compagnie-Generale v. Law*, 1889, A. C. 431; 80 L. T. 845; *Logan v. Bank of Scotland*, 1904, 2 K. B. 495.

A foreign corporation, all the directors and officers of which are abroad, but the majority of the shareholders of which are in England, and which has a London agent with a London office, but car-

ries on no principal or material part of its business in England, is **Rule 160**, not liable to be sued in an English Court: *Badcock v. Cumberland*, 1893, 1 Ch. 302; 41 W. R. 204; 68 L. T. 155.

Nor can a foreign corporation which advertises that inquiries may be made at the office of its agents within the jurisdiction, be served, by serving the managing clerk of such agents where the office is the agent's office, and the clerk is the agent's servant: *Re Princess Clementine*, 75 L. T. 335, but see *La Bourgogne, supra*.

Service under the Eng. (1883) R. 55 was held good on a foreign corporation which had an agency office in London: *Lhuissier & Co. v. Hong Kong & Shanghai Banking Co.*, 33 Ch. D. 445.

The word "clerk" in this *Rule* means a principal officer and not a mere subordinate clerk: *Walton v. Fairclough & Co.*, 10 M. & W. 438; *Hackforth v. Glasgow*, 1 L. R. 8 Ex. 151.

Where, by a statute, service of a writ might be effected by being left at, or sent by post to, the company's office, or given to the secretary, or if no secretary, to a director, and the company had no office, and the action was brought by the secretary, service on a director was held invalid: *Lancashire v. Dublin Metropolitan, etc., Railway*, 37 L. T. 32.

Service on the liquidator of a company is not good service on the company: see *Re Flowers*, 75 L. T. 306.

Service within the jurisdiction on a broker employed by a foreign corporation to obtain subscriptions to its stock, was held good service on the corporation: *Globe P. Co. v. Hilltop, G. M. Co.*, 33 C. L. J. 771.

A foreign corporation may contract that process, etc., may be served upon a person within the jurisdiction, and the appointment of such person is irrevocable until some other agent is appointed: *Tharion Sulphur, etc., Co. v. Société Industrielle, etc., des Métaux*, 38 W. R. 78; 60 L. T. 924; *Montgomery v. Liebenthal*, 1898, 1 Q. B. 407; but only in a case where the Court has jurisdiction to allow service of a writ out of the jurisdiction: *British Waggon Co. v. West*, 1890, 1 Q. B. 35, 37.

A colonial Government: *Sloman v. Governor of New Zealand*, 1 C. P. D. 563, and a foreign Government: *Strousberg v. Costa Rica*, 20 W. R. 125, have been held not to be corporations.

160. In the case of a railway, telegraph, or express corporation, service may be effected under the next preceding *Rule*, on the agent of such corporation at any branch or agency thereof, or on any station-master of the railway company, or on the telegraph operator, or express agent having charge of any telegraph or express office belonging to such corporation. See *Rule* 268.

See notes to *Rule* 159.

The Canadian Pacific Railway, whose head office is in Montreal, was served in Ontario under this *Rule* with a writ of summons in an action to recover damages for negligence in British Columbia, and the service was upheld: *Tytler v. Canadian Pacific Ry.*, 20 Ont. 654; 26 Ont. App. 467.

Services of papers on certain corporations.

Rule 161.

But an action against a railway company in Ontario, whose head office is in Quebec, for damages to lands in another Province, the title of the plaintiff to which is denied, cannot be maintained in Ontario: *Brereton v. Canadian Pacific Ry.*, 20 Ont. 57.

Service as
provided by
any special
statute,

161. Where, by any statute, provision is made for service in any other manner, service may be made accordingly. (Con. Rule 269.

Same as Eng. (1883) R. 55, last clause.

or by
letters
patent or
special Act.

A mode of serving companies incorporated by special Act, and by letters patent, was formerly provided, in the case of corporations created by Provincial authority by R. S. O. 1877, c. 149, s. 43, and c. 150, s. 60, but these sections have not been consolidated in the R. S. O. 1897. See R. S. C. c. 118, s. 42; c. 119, a. 62, as to companies incorporated by the authority of the Dominion Parliament; and *Id.* c. 124, ss. 13 and 16, as to insurance companies. See also *White v. Land and Water, etc., Co.*, W. N. 1883, 174, and *Harvey v. Harvey*, 9 Ont. App. 91.

The provisions of any such statutes must be strictly followed: *Wood v. Anderston*, 36 W. R. 918.

(ii) *Service Out of Ontario.*

Jurisdiction.

The right of the Court to order service of proceedings out of the jurisdiction, whether on British subjects or foreigners, is not an inherent right, but depends altogether on statute: see *In re Anglo-African S. Co.*, 32 Ch. D. 350; and see *Re Busfield*, 32 Ch. D. 123; *Re Maugham*, 22 W. R. 748. The jurisdiction of all Provincial Courts is *prima facie* only territorial, and, generally speaking, is exercisable only over persons and land and movables within the territorial limits within which this jurisdiction is to be exercised. "Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory, and it may be exercised over movables within the territory, and in questions of status and succession governed by domicile, it may exist as to persons domiciled, or who, when living, were domiciled within the territory"; see *Sirdar Gurdial Singh v. Faridkote*, 1894, A. C. 670. In the same case the Privy Council laid down (1) that no territorial Legislature can give jurisdiction, which any foreign Courts ought to recognize, against absent foreigners who owe no allegiance or obedience to the power which legislates; and (2) that in all personal actions the Courts of the country in which the defendant resides, not the Courts of the country where the action arose, ought to be resorted to. And it was also said that "in a personal action to which none of the above named causes of jurisdiction apply, a decree pronounced *in absentem* by a foreign Court, to the jurisdiction of which the defendant has not in any way subjected himself, is by international law an absolute nullity."

The present English Rules as regards suits against absent foreigners, which are followed by the Ontario Rules, are the result of diplomatic remonstrance in regard to the previous practice of the

English Courts, and they were passed "to bring that practice into Rule 162. accordance with well-settled rules of international law, or at all events, comity": see *per* Lord Coleridge, C.J., *Field v. Bennett*, 3 Times, 239; 56 L. J. Q. B. 89; and see *per* Huddleston, B., *Lendens v. Anderson*, 12 Q. B. D. p. 57; and *per* Field, J., *Hewitson v. Fabre*, 21 Q. B. D. p. 8; and *per* Chitty, J., *Re Busfield*, 32 Ch. D. 123.

Former Practice.—See H. & L., 2nd ed., 277.

Former practice.

Present Practice.—Under the English Rules it has been held that the provisions of the new Rules are exhaustive, and even though under any former practice process might be served out of the jurisdiction it will not now be allowed unless the case falls within these Rules: *Re Eager*, 22 Ch. D. 86; *Re Cliff*, 1895, 2 Ch. 21; and following this English practice the present Ontario Rules embrace all cases in which it is intended that the jurisdiction of the High Court shall, for the present, be exercised in the case of a defendant out of the jurisdiction.

Present practice.

There is, for instance, no power given by the Rules to give leave to serve a writ out of the jurisdiction in an action to enforce a charge against personal property in Ontario: *Kolchmann v. Meurice*, 1903, 1 K. B. 534; nor in an action for alimony: *Wheeler v. Wheeler*, 17 P. R. 45; and see *Allen v. Allen*, 15 P. R. 458, unless Rule 162 (c) applies. See *Bonbright v. Bonbright*, 1 O. L. R. 629; 2 O. L. R. 249; see also *Rasch v. Wulfert*, 1904, 1 K. B. 118, where it was held that there was no jurisdiction to authorize service out of the jurisdiction of a summons to enforce an award, under *The Arbitration Act*. Nor is there jurisdiction now to allow service out of Ontario of a statement of claim already filed. A motion must be made for leave to issue the writ of summons showing a case falling within some clause of this Rule: *Pennington v. Morley*, 3 O. L. R. 514, and see *Re Jones v. Bissonnette*, 3 O. L. R. 54.

Where, however, a foreign firm which cannot be sued within the jurisdiction brings an action, it thereby brings itself within the jurisdiction, and by a counter-claim the defendant can set up matters which could not be set up in an action against the foreign firm: *Griendtoven v. Hamlyn*, 8 Times, 231; but see *Imperial Japanese Govt. v. P. & O. Co.*, 1895, A. C. 644.

A foreign sovereign suing in the Courts of this country submits to the jurisdiction to the extent only that (1) he must give discovery, and (2) cross-proceedings in mitigation of the relief claimed by him can be taken against him: *S. African Rep., etc., v. La Compagnie, etc.*, 1898, 1 Ch. 190.

Motion for Leave to Issue and Serve Writ.—Leave to issue and serve the writ may, and generally should, be asked for on the same motion: *Young v. Brassey*, 24 W. R. 110; 1 Ch. D. 277; *Traill v. Porter*, 1 L. R. Ir. 60; *McIver v. Crown Point Mining Co.*, 19 P. R. 335; though separate motions may possibly sometimes be necessary: see *Stigand v. Stigand*, 19 Ch. D. 460.

Motion for leave to issue and serve.

The motion for leave should also be for the limiting of the time for defendant to appear, and the order giving leave should name the time: *Rule 164*; *Re Jones v. Bissonnette*, 3 O. L. R. 54.

The motion is made in Chambers: *Ib.*, before the Master in Chambers or other officer (except the Master in Ordinary) having like jurisdiction in Chambers: see *Rules 6, 42, 45, 49, 608*.

Rule 162. The evidence in support of the motion (usually an affidavit) is prescribed by *Rule 163*: see also *Scagrove v. Parks*, 1891, 1 Q. B. 551.

Affidavit. The affidavit or other evidence should show that *prima facie* the plaintiff has a good cause of action within the *Rules*: *Great Australian Mining Co. v. Martin*, 5 Ch. D. 1; *Société, etc., v. Dreyfus*, 37 Ch. D. 215; but the Court need not try the action to determine the existence of a cause of action. If there is *prima facie* evidence that is sufficient: *Badische Anilin, etc., v. Chemische Fabrik, etc.*, 88 L. T. 490; *Badische Anilin v. Thompson*, 88 L. T. 492a.

Although the affidavit need only establish a *prima facie* case, it should be "cautious": see *Hardingham v. Rowan*, 24 Sol. Jour. 309. An order, *ex parte*, allowing service out of the jurisdiction was discharged upon its being shown that the affidavit on which the order was obtained contained misstatements of fact, which had the effect of showing the plaintiffs to have good cause of action: *Republic of Peru v. Dreyfus*, 55 L. T. 802. The affidavit may be made by the solicitor or any one who has a knowledge of the facts. Identifying a copy of the statement of claim is not enough: the material allegations contained in it as to the contract, etc., must be sworn to: *Great Australian, etc., v. Martin, sup.*; *Perkins v. Mississippi, etc., Co.*, 10 P. R. 198; *Société, etc., v. Dreyfus*, 37 Ch. D. 215. It is not necessary to use the words "there is a cause of action" if the facts sworn to show it: *Fowler v. Barstow*, 30 W. R. 113; 20 Ch. D. 240.

The affidavit should be styled, "In the matter of an intended action between, etc.": *Young v. Brassy*, 1 Ch. D. 277; *Blake v. Lever*, 6 L. R. Ir. 476; *Re Jones v. Bissonnette, supra*.

The facts must be fairly disclosed, or the order may be rescinded: *Plaskitt v. Eddis*, 79 L. T. 136.

Where a defendant out of the jurisdiction was a proper party to an action against defendants within the jurisdiction, and on that ground alone was made a defendant, the order allowing service on him was made subject to an undertaking by the plaintiff to submit to a dismissal of the action against the defendant out of the jurisdiction if he failed as against those within: *Re Jones v. Bissonnette, supra*; and see *Barson v. German Union Ins. Co.*, 6 O. W. R. 21, in which the action was for that reason dismissed.

Service of proceedings other than writs of summons out of the jurisdiction.

Proceedings other than Writs of Summons.—What documents or proceedings other than writs of summons may be served out of the jurisdiction was originally left in some uncertainty: see 11. & L. Ind. Act, 2nd ed., p. 279, 280. Now, however, it has been provided by 3 Ed. vii., c. 8, s. 13, that the word "writ" in *Con. Rule 162*, shall be deemed to include any document by which a matter or proceeding is commenced.

As to proceedings under *The Settled Estates Act*: see *Rule 975*.

As to service of infants with proceedings under *The Quietting Titles Act*: see *Re Murray*, 10 C. L. T. 88.

In *Manitoba & N. W. v. Allan*, 1893, 3 Ch. 432, it was held that the Court had no power to give leave for service of a notice of motion with a writ, where the writ is to be served out of the jurisdiction. But see *Herscy v. Herscy*, W. N. 1894, 18, and *Rule 361*.

Counter-claim.

Leave to serve a counter-claim on a third person out of the jurisdiction was granted in *Re Luckie*, W. N. 1880, 12; and see *Grindal v. Haullyn*, 8 Times, 231; but refused in *Potters v. Miller*, 31

W. R. 358; but this case is probably overruled by *Dubout v. Mac- Rule 162.*
pherson, 23 Q. B. D. 340; and see *Rule 249.*

As to service of a third party notice out of the jurisdiction: see *Third party*
notes to Rule 200, p. 395. *notice.*

Discretion.—The Court is not bound to allow service in cases *Discretion.*
 within this *Rule*, but has a discretion on a consideration of the
 merits: *Société Generale de Paris v. Dreyfus*, 37 Ch. D. 215.

It has been held to be a matter for the discretion of the Judge or
 officer in Chambers whether he will give leave to issue a writ for ser-
 vice out of the jurisdiction to recover damages for breach of promise
 of marriage, where the affidavits on the motion do not show that the
 plaintiff is prepared to prove her case by corroborative evidence of
 the promise: *Franklyn v. Chaplin*, 17 Times, 84. See also *Cooper v.*
Knight, *Id.*, 290.

Motion to set Aside Service.—If the case is not one in which *Motion to*
 service should be allowed, the proper course is, not to raise the ques- *set aside*
 tion by statement of defence, but to move to set aside the service or *service.*
 to rescind the order allowing service, if an order has been made:
Preston v. Lamont, 1 Ex. D. 361; *Boyle v. Sacker*, 39 Ch. D. 249.

If defendant contends that the Court has not jurisdiction under the
Rule he may move in the ordinary way in Chambers to set aside the
 order for service, and the service, and any judgment signed by default
 of appearance. A motion to a Divisional Court was held to be
 improper: *Black v. Dawson*, 1895, 1 Q. B. 848.

Where an order giving leave to serve out of the jurisdiction had
 been made, a motion against it, on the ground of irregularity, made
 after the lapse of a year, was held to be too late: *Reynolds v. Cole-*
man, 36 Ch. D. 453.

Where defendant moves against the order or to set aside the ser-
 vice, affidavits are admissible to try the question whether a cause of
 action arose within the jurisdiction, or other circumstances exist
 which are necessary under *Rule 162* to give the Court jurisdiction,
 though not to try the merits of the case: *Fowler v. Barstow*, 20 Ch.
 D. 240; overruling on this point *Great Australian Gold Mining Co.*
v. Martin, 5 Ch. D. 1; see also *Thomas v. Hamilton*, 17 Q. B. D. 592;
Société, etc., v. Dreyfus, 37 Ch. D. 215.

Where a defendant was resident in Scotland or Ireland the omis-
 sion of any statement that he was a British subject was held immat-
 terial: *Fowler v. Barstow*, *supra*.

Where there has been a conflict of evidence as to whether the
 cause of action arose within or without the jurisdiction, orders have
 been made similar to that in *Diamond v. Sutton*, L. R. 1 Ex. 130, i.e.,
 the service to stand, plaintiff undertaking to be non-suited if no
 cause of action within the jurisdiction be shewn at the trial: see
O'Donoghue v. Wiley, 43 U. C. Q. B. 350; *Nottage v. Attkin*, 71 L. T.
 Jour. 326, 25 Sol. Jour. 834; see also *Fowler v. Barstow*, 20 Ch. D.
 240; *Shearman v. Findlay*, 32 W. R. 122; *Thomas v. Hamilton*, 17
 Q. B. D. 592, reversing the judgment of the Court below, reported in
 55 L. T. 219; and *Perkins v. Mississippi*, *supra*, where the practice
 was disapproved of; but it was again approved of in *Simpson v.*
Hall, 14 P. R. 310; see also *Bell v. Villeneuve*, 16 P. R. 413;
Franchot v. General Securities Co., 18 P. R. 291; *Re Jones v.*
Bissonnette, 3 O. L. R. 54; and *Burson v. German Union Ins. Co.*, 6
 O. W. R. 21.

Rule 162. In the case of such a conflict of evidence another practice has sometimes been adopted since *Rule 173* was passed, viz., to allow the defendant to enter a conditional appearance and raise on pleadings the want of jurisdiction, so that, where there would be great expense involved in the trial of all the merits, the preliminary question as to the jurisdiction may be tried separately: see *Canadian Radiator Co. v. Cuthbertson*, 9 O. L. R. 126.

Upon motion to set aside the service on the ground that the breach of contract did not occur within the jurisdiction the plaintiff was refused leave to amend by setting up another and distinct cause of action: *Parker v. Schiller*, 17 Times L. R. 299.

A notice of motion to set aside an order for service out of the jurisdiction operates as a stay of proceedings till the motion is disposed of, so that the time for appearance does not run in the meanwhile: *Confederation Life, etc., v. Moore*, 6 O. L. R. 603.

The Court will not try the case on a motion to set aside an order allowing service out of the jurisdiction: *Badische Anilin v. Chemische Fabrik*, 88 L. T. 490.

Effect of
appearance.

Effect of Appearance.—It is probable that an appearance by defendant in the usual way estops him from moving to set aside a writ and service as contrary to this *Rule*, notwithstanding *White v. MacGregor*, Mews Dig. 1882, 342. See also notes to *Rule 169*.

In *Sears v. Meyers*, and *Heath v. Meyers*, 15 P. R. 281, the C. P. D. so held; and see S. C. in appeal, 15 P. R. 456. The Ch. D. doubted this, and held that obtaining security for costs and opposing a motion for speedy judgment (without formally appearing) did not estop: see also *Manitoba & N. W. v. Allan*, 1893, 3 Ch. 432; *Dart v. Citizens*, 11 P. R. 513. In the Court of Appeal it was said by Osler, J.A., that defendant might perhaps have appeared under protest, but not having done so, and not having moved against the service, but having appeared simply and submitted to the jurisdiction, he was estopped from questioning the jurisdiction: *Sears v. Meyers*, 15 P. R. 456.

There is an express *Rule* in England (O. 12, r. 30), under which a motion to set aside the service of a writ may be made before appearance: see *Western v. Perez*, 1891, 1 Q. B. 304; but a conditional appearance may be entered: *Firth v. De las Rivas*, 1893, 1 Q. B. 768; 69 L. T. 383; or an ordinary appearance, unaccompanied by a protest, if defendant notifies plaintiff that he objects to the jurisdiction: *Mayer v. Claretic*, 7 Times, 40, without waiving the right to set aside the service.

In Ontario a conditional appearance may now be entered by leave of the Court or a Judge: *Rule 173*; and see *Burson v. German Union Ins. Co.*, 6 O. W. R. 22.

An objection to the jurisdiction of the Court, not based on the ground that *Rule 162* does not authorize service, but upon other grounds which might arise even though the Court has jurisdiction over the person of the defendant, is not necessarily waived by an ordinary appearance: *Willmott v. Macfarlane*, 16 C. L. T. 83; 32 C. L. J. 129.

Objection to an order for service was held to have been waived by appearing on a motion for injunction and arguing the merits: *Boyle v. Sacker*, 39 Ch. D. 249; by taking a summons for delivery of a statement of claim: *Fry v. Moore*, 23 Q. B. D. 398; and by applying for security for costs: *Lhonneux & Co. v. Hong Kong, etc., Corp.*

33 Ch. D. 446; proceeding to examine witnesses after objection to the jurisdiction overruled: *Guy v. G. T. Ry. Co.*, 10 P. R. 372. See also notes to *Rule 169*.

Substituted Service.—Under the Irish Rules it is held that a writ intended to be served substitutionally upon a person within the jurisdiction may be issued without leave though the defendant be resident out of the jurisdiction: *Levin v. Herberts*, 16 L. R. 1r. 340; but the contrary has been held in England: *Fry v. Moore*, 23 Q. B. D. 395, where it was said that holding otherwise would enable the Rule to be evaded, which requires leave to be obtained. Where a writ has been properly issued against a defendant out of the jurisdiction, an order for substituted service within the jurisdiction may be obtained: *Ford v. Shephard*, 53 L. T. 564; 34 W. R. 63; or by mailing to an address out of the jurisdiction: *Dillon v. Bornemann*, 3 Times, 3.

In Ontario an order for substituted service can only be obtained in case the subject matter of the action makes *Rule 162* applicable; and the time for appearance, etc., will be the same as if the defendant had been served out of the jurisdiction.

The person on whom service is authorized should be served with such form of writ or notice thereof as would be proper if the service were being personally effected upon the defendant himself, at the place where he is at the time of the substituted service.

There cannot be substituted service of an ordinary writ for service within the jurisdiction on a defendant who cannot be served with it by reason of his being out of the jurisdiction: *Société Industriale, etc., v. Companhia Portuguesa, etc.*, W. N. 1889, 32; *Fry v. Moore*, 23 Q. B. D. 399; *Hillyard v. Smyth*, 36 W. R. 7; see *Field v. Bennett*, 56 L. J. Q. B. 89; *Stewart v. Bank of England*, W. N. 1876, 263; *Wilding v. Bean*, 1891, 1 Q. B. 100; *Worcester, etc., v. Firbank, etc.*, 1894, 1 Q. B. 784, unless defendant is out of the jurisdiction to evade service: *Re Urquhart*, 24 Q. B. D. 723; see *Watt v. Barnett*, 3 Q. B. D. 186; or has left the jurisdiction after the issue of the writ without intending to evade service: *Jay v. Budd*, 1898, 1 Q. B. 12; 77 L. T. 335.

Foreign Corporations.—A foreign corporation is within the Rules and may be served abroad: *Scott v. Royal Wax Candle Association*, 1 Q. B. D. 404; *Westman v. Aktiebolaget, etc., Snickarefabrik*, 1 Ex. D. 237, but not a foreign sovereign or state: *Strousberg v. Costa Rica*, 29 W. R. 125; see also *Sedgwick v. Yedras Mining Co.*, 35 W. R. 780; *Mighell v. Sultan of Johore*, 1894, 1 Q. B. 149.

A corporation incorporated by the Dominion is not in any Province a corporation of foreign origin: *Tytler v. C. P. Ry.*, 29 Ont. 654; 26 Ont. App. 467.

Miscellaneous.—The power conferred by *Rule 162* of serving a writ or notice of a writ on a defendant out of the jurisdiction, who is neither a British subject nor in British dominions, does not affect 4 & 5 Anne, c. 16, s. 20 (see R. S. O. c. 324, s. 40), by which in certain specified actions where a defendant is beyond the seas when the cause of action arises, the plaintiff is not liberty to bring his action after the defendant's return, but within the period limited by 21 Jac. 1, c. 16 (see R. S. O. c. 324, ss. 38, 39): *Musurus Bey v. Gadban*, 1894, 2 Q. B. 352; 71 L. T. 51.

Rule 162. It would seem that a party out of the jurisdiction cannot, even by consent, give the Court jurisdiction in cases not within the provisions of *Rule 162*: see *The British Waggon Co. v. West*, 1896, 1 Q. B. 35, 37; 73 L. T. 498; but it was held that a party out of the jurisdiction may appoint a person within the jurisdiction to accept service for the purpose of being sued within the jurisdiction; *Tharion, etc., Co. v. Société, etc.*, 60 L. T. 924; 38 W. R. 78; *nud see per Lord Esher*, 1896, 1 Q. B. 37; *Montgomery v. Liebenthal*, 1898, 1 Q. B. 487; and that the jurisdiction of any Court may be excluded by agreement: *Hoerler v. Hanover, etc.*, 10 Times, 22.

Service of writ out of jurisdiction.

162.—(1) Service out of Ontario of a writ or notice of a writ may be allowed by the Court or a Judge wherever:—

This Rule is taken from Eng. (1883) R. 64.

The word "writ" in this Rule "shall be deemed to include any document by which a matter or proceeding is commenced, and service of any such document heretofore or hereafter made, if in other respects proper, shall be deemed good service as against the objection that such document was not included in the said Rule"; 3 Ed. vii. c. 8, s. 13.

The sub-sections of *Rule 162* are to be read disjunctively, and each of such sub-sections is complete in itself and independent of the others; *Tassell v. Hallen*, 1892, 1 Q. B. 321; *Livingstone v. Sibbald*, 15 P. R. 315; *Hadad v. Bruce*, 8 Times, 409.

(a) The whole subject-matter of the action is land situate within Ontario (with or without rents or profits):

Same as Eng. (1883) R. 64 (a).

The fact that the defendant is the owner of land within the jurisdiction, against which the plaintiff seeks to realize the amount of a judgment recovered against a defendant in a foreign Court, does not raise a cause of action within this or any other section of *Rule 162*; *Heath v. Meyers*, 15 P. R. 381, unless the case can be brought within clause (b) *infra*.

In *Conrad v. Alberta*, 17 C. L. T. 134, under the similar Ordinance of the N. W. Territories, s. 32 (1), it was held that an action by judgment creditors to declare defendants, resident in a foreign country, trustees for the judgment debtor of lands situated within the jurisdiction of the Court, and for a sale of the land to satisfy the judgment, is an action in which the whole subject-matter is land situate within the judicial district.

(b) Any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within Ontario is sought to be construed, rectified, set aside or enforced in the action:

Same as Eng. (1883) R. 64 (b).

An action for breach of covenant to repair, contained in a lease of premises situate within the jurisdiction was held to be within this clause: *Tassell v. Hallen*, 1892, 1 Q. B. 321; 66 L. T. 196; and *see Haye v. Sutherland*, 20 Q. B. D. 147; so also was an action by a

simple contract creditor on behalf of himself and other creditors to set aside an alleged fraudulent conveyance of lands in Ontario, made by the alleged debtor residing out of Ontario: *Livingstone v. Sibbald*, 15 P. R. 315. But an action for rent is held to be not within this clause, though the lands in respect of which it is payable are within the jurisdiction: *Agnew v. Usher*, 14 Q. B. D. 78; 51 L. T. 576, 752; but see *Tassell v. Hallen*, *supra*.

A statement in the nature of slander of title, made out of the jurisdiction, concerning property within the jurisdiction, has been held not to be an act or thing affecting such property within the meaning of this clause: *Casey v. Arnott*, 2 C. P. D. 24, where the *Rule* was held not to apply in a case in which the defendant in Ireland said that a ship in England was unseaworthy.

A slander, not actionable in itself without special damage, spoken out of the jurisdiction, but resulting in a special damage within the jurisdiction, was not within the original *Rule*: *Bree v. Marescanz*, 7 Q. B. D. 434; but may now fall within the case provided for by clause (c).

An action between foreigners on a foreign judgment to obtain equitable execution against lands of defendant in Ontario is not within this *Rule*: *Sears v. Meyers*, 15 P. R. 381; unless the case can be brought within clause (h) *infra*.

(c) Any relief is sought against any person domiciled or ordinarily resident within Ontario;

Same as Eng. (1883) R. 64 (c).

As to what amounts to domicile: see *Wanzer v. Woods*, 13 P. R. 511; *Allen v. Allen*, 15 P. R. 458; *Re Craignish*, 1892, 3 Ch. 180; *Bonbright v. Bonbright*, 1 O. L. R. 629; 2 O. L. R. 249.

If it is shewn that defendant is ordinarily resident within Ontario, it is not necessary to bring the case within any of the other clauses of this *Rule*: *Hudad v. Bruce*, 8 Times, 409; but notwithstanding this *Rule* the High Court has no jurisdiction to entertain an action for damages for trespass to land situated in a foreign country against a defendant resident within Ontario: *Companhia de Mocambique v. B. S. African Co.*, 1892, 2 Q. B. 358; 1893, 1 A. C. 602; *Brereton v. Canadian Pacific Ry.*, 29 Ont. 57; and see *Black Point v. Eastern Concessions*, 79 L. T. 658; or to set aside an alleged fraudulent conveyance of lands out of the jurisdiction: *Burns v. Davidson*, 21 Ont. 547, approved in *Purdom v. Pavey*, 26 S. C. R. 412; or to declare a conveyance of lands out of the jurisdiction, though absolute in form, to be by way of mortgage only, after an absolute conveyance by the grantee to other parties: *Gunn v. Harper*, 30 Ont. 650; or to redeem lands out of Ontario: *Henderson v. Bank of Hamilton*, 20 Ont. App. 646; 23 S. C. R. 716. As to the appointment of a receiver of lands out of the jurisdiction, see *Mercantile I. Co. v. River Plate*, 1892, 2 Ch. 303; *Kerr on Receivers*, p. 100; and see further as to the jurisdiction in respect of lands out of the jurisdiction, 94 L. T. 409, 30.

It has been held in England that an Admiralty writ *in personam* cannot be issued for service abroad in respect of a wrong done on the high seas. The phrase "within the jurisdiction," was construed to mean "within the territorial jurisdiction": *Re Smith*, 1 P. D. 309; *The Firar*, 2 P. D. 29; which does not extend beyond low water mark: *Harris v. Owners of the Franconia*, 2 C. P. D. 173; see *Reg. v. Keyn*, 2 Ex. D. 63.

Rule 142.

A company with a registered office in Scotland and branches in England, was held not to be domiciled or ordinarily resident in England: *Jones v. Scottish Accident Insurance Co.*, 17 Q. B. D. 421; *Watkins v. Scottish, etc., Co.*, 23 Q. B. D. 285; *sed vide In re Burland, Burland v. Broxburn Oil Co.*, 41 Ch. D. 542; *Tytler v. Canadian Pacific Ry.*, 20 Out. 654; 26 Ont. App. 467.

As to foreign corporations doing business within the jurisdiction, see *Palmer v. Goulds Mfg. Co.*, in note to clause (e).

An action to recover damages for negligence alleged to have been committed in British Columbia was held to be maintainable against the Canadian Pacific Railway in Ontario: *Tytler v. Canadian Pacific Ry.*, *supra*.

No action will lie for a wrong committed out of the jurisdiction, unless it was a wrong according to the law of the place where it was committed: *Corr v. Francis*, 1902, A. C. 176. Neither can a contract be enforced in Ontario, which would be void as against public policy if made in Ontario, notwithstanding it may be legal according to the law of the place where it was made: *Kaufman v. Gerson*, 1904, 1 K. B. 591.

A person who has acquired a domicile of choice in Ontario, and has not abandoned it, may be served out of Ontario with a writ claiming alimony: *Bonbright v. Bonbright*, 1 O. L. R. 249.

- (d) The action is for the administration of the personal estate of any deceased person, who at the time of his death was domiciled within Ontario, or for the execution (as to property situate within Ontario) of the trusts of a written instrument of which the person to be served is a trustee, which ought to be executed according to the law of Ontario;

Taken from Eng. (1883) R. 64 (d). Same as the clause previously in force.

It is a condition precedent to the proper service of a writ out of the jurisdiction under this clause that there be property within the jurisdiction, either when leave to serve the writ is applied for, or when service is effected, or at the latest when an application to set aside the service is made: *Winter v. Winter*, 1894, 1 Ch. 421; 69 L. T. 759. It is not sufficient that according to the terms of the trust it ought to be within the jurisdiction, if in fact it is not: *Ib.*

This clause it may be observed is limited to the "personal estate" of a deceased person: where the realty, within the jurisdiction, of a deceased person is also sought to be administered, the case would seem to come within clause (a), or sub-section (3).

- (c) The action is founded on [a judgment or on] a breach within Ontario of a contract wherever made, which is to be performed within Ontario [or on a tort committed therein]; (Rule 1246, 20 June, 1903).

Except the words in brackets, similar to first part of Eng. (1883) R. 54 (c): the Eng. Rule has instead of the words "is to be performed," the words "according to the terms thereof ought to be

performed." The words "a judgment or on" were introduced by **Rule 162**. **Rule 1240**.

Contract.—No difficulty can now arise such as used to arise under R. S. O. 1877 (c. 50, s. 49), as to the meaning of a "cause of action which arose in Ontario"; see *Gilderale v. McDougall*, 31 C. P. 104, 106. The breach within Ontario is the test of the application of the *Rule*, and it is, therefore, enough if any part of the contract in respect of which the breach is alleged, is to be performed within the jurisdiction: *Rein v. Stein*, 1892, 1 Q. B. 753; 60 L. T. 409.

It is not necessary that a contract should expressly state that it is to be performed within the jurisdiction. It is sufficient if this appear from the contract either expressly, or by necessary implication; surrounding circumstances: *Reynolds v. Coleman*, 36 Ch. D. 453; *Duval & Co. v. Gans*, 1904, 2 K. B. 685; 91 L. T. 308; but it must appear from the contract either expressly or by necessary implication: *Bell & Co. v. Antwerp Line*, 1891, 1 Q. B. 103; 64 L. T. 276; see also *The Elder*, 1893, 1 P. 119; 69 L. T. 622. If by the contract, as an express or implied term, payment is to be made in Ontario, an action based on a breach of that term will lie within this clause: *Anger v. Vasmier*, 18 Times, 596; *Atkinson v. Plimpton*, 6 O. L. R. 566; *Duval v. Gans*, *supra*, and see *Phillips v. Malone*, 3 O. L. R. 47, 492; but *quære*, whether under the Ontario *Rule 162* (c), in construing the contract, the rule of law must be applied that the debtor must seek out his creditor to pay him, unless the application of that rule is inconsistent with the terms of the contract, construing it in the light of the facts which existed when it was made: *Blackley v. Elite Costume Co.*, 9 O. L. R. nt p. 387. See also cases *infra*, under "Examples."

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Where the contract was not in writing, and would only be within this *Rule* if, by it, payment was to be made in Ontario, and this was disputed, leave to issue the writ was held to be proper; but the defendant was given leave to enter a conditional appearance, so as to enable the question of jurisdiction to be raised in the action: *Canadian Radiator Co. v. Cuthbertson*, 9 O. L. R. 126.

Where no place of payment is named in a policy of insurance, it must be assumed that payment is to be made at the head office of the company, and that fact may determine the question of the *lex loci contractus*: *Burson v. German Union Ins. Co.*, 6 O. W. R. 21.

Where part of a contract only is to be performed within the jurisdiction, and a foreign defendant is sued for breach of the contract, the order giving leave for service out of the jurisdiction should expressly limit the relief to be given against such defendant to relief in respect of the breach within the jurisdiction: *Manitoba & N. W. Co. v. Allan*, 1893, 3 Ch. 432; 69 L. T. 558; see also *Indigo Co. v. Ogilvy*, 1891, 2 Ch. D. 31, and *Lovell v. Coles*, 3 O. L. R. 291.

The plaintiff may be directed so to restrict his statement of claim without prejudice to his bringing an action elsewhere for breaches committed without the jurisdiction: *Lovell v. Coles*, *supra*.

A contract which may be performed either within or without the jurisdiction is not within this *Rule*: *Bell & Co. v. Antwerp, etc., Line*, 1891, 1 Q. B. 103; *Comber v. Leyland*, 1898, A. C. 524; 79 L. T. 180; see also *The Elder*, 1893, 1 P. 119; 69 L. T. 622; *Thompson v. Palmer*, 1893, 2 Q. B. 80; 69 L. T. 366.

Where a contract of hiring is made within Ontario, and the work thereunder is to be done there, the remuneration is payable there: *Bell v. Villeneuve*, 16 P. R. 413.

Rule 162.

Where a servant employed within the jurisdiction was dismissed by a letter written and posted by his employer out of the jurisdiction, leave to serve a writ for wrongful dismissal was refused, there being no breach of the contract within the jurisdiction: *Holland v. Bennett*, 1902, 1 K. B. 867; 81 L. T. 485.

As to breach of a promise to marry in Ontario, see *Cooper v. Knight*, 17 Times, 200.

Tort.—A transfer of goods effected in Ontario as a fraudulent preference, the goods being afterwards removed to Quebec, is a "tort committed within the jurisdiction" within this Rule: *Clarkson v. Dupré*, 10 P. R. 521.

The publication within Ontario of a libel written without, entitles the plaintiff to sue in Ontario: *Shearman v. Finlay*, 32 W. R. 122.

The making of a fraudulent conveyance of land out of the jurisdiction, would not appear to be a tort for which the plaintiff could sue under this Rule, even though the deed were actually executed within the jurisdiction: see *Burns v. Davidson*, 21 Ont. 547.

Criminal proceedings begun in Quebec, under which the plaintiff was arrested in Ontario and taken to Montreal, where he was discharged, were held to constitute one entire tort, founded upon transactions in Quebec, so that leave to issue a writ of summons for malicious prosecution was not allowed: *Olinvy v. Beauchemin*, 16 P. R. 508.

A foreigner out of the jurisdiction cannot be sued in Ontario for a tort committed out of the jurisdiction: *Badische Anilin, etc., v. Johnson*, 76 L. T. 434. (See S. C. 1896, 1 Ch. 25, where leave was given for the service, a *prima facie* case having been made out: see also *Rourke v. Wiedebach*, 1 O. L. R. 581.)

It is open to question how far a judgment recovered against a defendant sued under this clause would be binding on the defendant in a foreign country: see *Sirdar Gurdyal Singh v. Faridkot*, 1891, A. C. 70.

Tort committed abroad.

To entitle a plaintiff to sue in Ontario for a tort committed abroad, the act complained of must be wrongful according to the law of England, and must not have been justifiable according to the law of the place where it was committed: *Phillips v. Eyre*, L. R. 6 Q. B. 1; *Machado v. Fontes*, 1897, 2 Q. B. 231. See also *Carr v. Francis, etc.*, 1902, A. C. 176. In such an action the defendant can only be sued in Ontario if he can be served therein; leave to serve out of the jurisdiction cannot be given under clause (c): see *Rourke v. Wiedebach*, 1 O. L. R. p. 583.

Examples.—The following are further examples of the application or non-application of this clause:

Service allowed.

Service was allowed.—Where the plaintiff complained of an agreement made in England as infringing his rights under an agreement made in India, because the action was in respect of a breach within the jurisdiction, of a contract made abroad: *Harris v. Fleming*, 13 Ch. D. 208; where a contract made in England by a defendant resident in Ireland, to pay for a rink constructed in Dublin, was broken by non-payment to the plaintiff in England: *Green v. Brown*, 34 L. T. 760. See *Atkinson v. Plimpton*, 6 O. L. R. 566.

Where goods were furnished by an English firm to defendants in Man, and no place for payment was named, it was presumed that it

was to be in England and the breach therefore took place there: *Rule 162. Robey v. Snarfell Mining Co.*, 20 Q. B. D. 152.

So where according to the course of business in similar transactions ^{Service allowed.} payment was to be made in England: *Rein v. Stein*, 1892, 1 Q. B. 753; *Fry v. Raggio*, 40 W. R. 120; but where money is payable under a contract, and no place for payment is stated, the case is not brought within the *Rule* by the fact that the person to whom the money is payable resides within the jurisdiction: *Bell v. Antwerp*, etc., 1891, 1 Q. B. 103; *Banque Nationale v. S. A. Trading Co.*, 12 C. L. T. 20; *Phillips v. Malone*, 3 O. L. R. 47, 492; see, however, *Thompson v. Palmer*, 1893, 2 Q. B. 80.

Where goods were to be shipped in British Columbia and delivered freight paid at Toronto, and payment was to be made in Toronto, an action in Ontario for the amount paid by plaintiff for freight and for damages for breach of contract, the goods not being up to sample, was held to be within the *Rule*: *Fisher v. Cassidy*, 14 P. R. 577; and in such a case an action will also lie in Ontario for the price: *Atkinson v. Plimpton*, 6 O. L. R. 566; *Ducal v. Gana*, 1904, 2 K. B. 685; so also where a firm in Montreal delivered an order to the plaintiffs' traveller in Montreal, which was accepted by letter of plaintiffs, posted in Toronto, under which goods were to be delivered f. o. b. in Toronto: *Blackley v. Elite Co.*, 9 O. L. R. 382.

Where defendant, a commercial traveller, under a contract for selling and taking orders for goods over a route through British Columbia and Ontario, resigned his position by letter from British Columbia, before the expiry upon performance of the contract in Ontario, the plaintiffs after waiting until the expiration of the time by which the entire contract was to be performed, moved for leave to issue a writ for damages for non-performance of the entire contract, and leave was given to issue a writ confined to breaches of the contract within Ontario, but reserving to the plaintiffs the right to bring action for breaches out of Ontario: *Lovell v. Coles*, 3 O. L. R. 291.

As to the principles applicable where a plaintiff sues for an account, upon a contract to pay in a foreign currency: see *Manners v. Pearson*, 1898, 1 Ch. 581; 78 L. T. 432. The payments due must be ordered to be paid in Canadian currency, and must be converted into such currency at the rate of exchange current at the time of the ascertainment of the amount due: *Id.*

An action to foreclose a mortgage on a policy of insurance against a subsequent incumbrancer was held not to come within this subsection: *Deutsche Nat. Bank v. Paul*, 1898, 1 Ch. 283; 78 L. T. 35.

Service was not allowed.—Where the writ was indorsed with a ^{Service not allowed.} claim to restrain a ship-owner from dealing with a ship in port at Cardiff contrary to a charter party entered into in Scotland between a plaintiff and defendant who both resided in Scotland: *Ex parte McPhail*, 12 Ch. D. 632; where the claim was by a *cestui que trust* resident in England for administration of trusts of Scotch property by Scotch trustees: *Crosswell v. Parker*, 11 Ch. D. 601; where mortgagees of a ship and her freight, in an action against second mortgagees, discovered that some freight had previously to the suit been collected by brokers in Antwerp, who claimed to retain the money against a debt due to them by the second mortgagees, the plaintiffs obtained leave to serve the brokers, but the order was on motion set

Rule 162. aside, the Court holding that the right to the freight was claimed by virtue of a right as mortgagees to take possession of the ship and its earnings, and not by way of enforcement of the contract: *Mc-Stephens v. Carnegie*, 28 W. R. 385; 42 L. T. 300.

Where by the contract, defendants, a steamship company, were exempted from liability for damage for loss arising beyond their line of steamships, and there was a breach alleged within Ontario, but beyond the said line of steamships, in not delivering the subject of the contract, it was held that as no damage would result from the breach, though the case was technically within this *Rule*, discretion, if any existed, should be exercised in refusing to allow the service: *Perkins v. Mississippi*, 10 P. R. 108.

Where an offer to purchase goods was made by letter from London (Ont.), and accepted by letter posted at Quebec, and delivery was to be on the cars at Quebec, it was held that the contract was to be performed in Quebec: *Empire Oil Co. v. Vollerand*, 17 P. R. 27; and see *Phillips v. Molone*, 3 O. L. R. 47, 492.

Service was not allowed in an action for wrongful dismissal where the appointment was in Glasgow, and the letter of dismissal was posted there. The defendant was a Scotch coal merchant, who verbally appointed the plaintiff commission agent in Ireland. The posting of the letter was held to be the act of dismissal: *Hamilton v. Barr*, 18 L. R. 1r. 297; *Offord v. Bresse*, 16 P. R. 332; but see *Bell v. Villeneuve*, 16 P. R. 413; *Holland v. Bennett*, 1902, 1 K. R. 847; 81 L. T. 485.

It was held in *Moritz v. Stephon*, 36 W. R. 779; 58 L. T. 850, that an action to enforce a charge obtained by a judgment creditor under a statutory provision (1 & 2 V. c. 110, s. 14), (see R. S. O. c. 324, ss. 21, 22), in that behalf, does not fall within this clause, nor any other clause of this *Rule*, and that therefore service of a writ in such an action out of the jurisdiction is not authorized: *Kolchmann v. Maurice*, 1903, 1 K. B. 534; and see *Re Lo Compognie, etc.*, 1891, 3 Ch. 451, where, although leave to serve was refused, the Court nevertheless held that the party required to be served, might be notified, without order, that proceedings affecting his interests were pending, leaving him to appear and submit to the jurisdiction if so advised, and the Court if satisfied that a notice so served was sufficient will act upon the notice: *Re Cliff*, 1895, 2 Ch., p. 28.

A foreigner resident in the Province, or a foreign corporation having a place of business in the Province, may be served without any leave though the contract was made and breach thereof occurred out of the jurisdiction: see *Palmer v. Gould's Manufacturing Co.*, W. N. 1884, 63; and notes to *Rules* 159-161.

- (f) An injunction is sought as to anything done or to be done within Ontario, or any nuisance within Ontario is sought to be prevented or removed, whether damages are or are not claimed in respect thereof: or (x)

The same as Eng. (1883) R. 64 (f).

(x) As to the effect of this disjunctive "or": see *Tussell v. Hallen*, 40 W. R. 221; 1892, 1 Q. B. 231.

In *Tosler v. Hawkins*, 15 Q. B. D. 680, it was held under the Rule 162, corresponding English Rule that the Court might allow service out of the jurisdiction of a writ claiming an injunction to restrain the defendant from sending libels to the plaintiff, resident within the jurisdiction, where the defendant does not state on affidavit that he never comes within the jurisdiction.

But it would seem that the Court has no jurisdiction to grant an injunction restraining a person resident abroad from infringing a Canadian patent of invention: see *Badische Anilin, etc. v. Johnson*, 1881, 1 Ch. 25; 70 L. T. 434; and see *Sirdar Gurdial Singh v. Faridkote*, 1894, A. C. 670; but the Court may entertain an action for an injunction against a defendant resident out of the jurisdiction to restrain an infringement of a patent within the jurisdiction: *Badische Anilin v. Chemische Fabrik*, 88 L. T. 410.

A claim to an injunction to restrain defendant from parting with his assets in a case not otherwise within the Rule does not give jurisdiction by virtue of above clause (f): *Sears v. Meyers*, 15 P. R. 381.

An injunction to restrain executors out of the jurisdiction from suing within the jurisdiction to recover part of the estate, is an injunction "as to anything to be done within Ontario": *Re De Pennu, De Pennu v. Christie*, 1891, 2 Ch. 63.

A claim for an injunction which does not appear to be *bona fide*, but merely to bring the case within this Rule, will not be sufficient: *De Bernales v. N. Y. Herald*, 68 L. T. 638; 1893, 2 Q. B. 97 (n).

Seemingly, leave cannot be given for service of a notice of motion for an injunction out of Ontario, with the writ: *Mautoba, etc. v. Allan*, 1883, 3 Ch. 432; but see Rule 361.

See also *Lisbon, etc., v. Heddle*, 52 L. T. 796; *Speckhart v. Campbell*, W. N. 1884, 24.

And as to the effect of a judgment recovered under this Rule, see *Sirdar Gurdial, etc., v. Faridkote*, 1894, A. C. 670.

Unless the injunction can properly be asked against the party out of the jurisdiction he cannot be sued under this clause: *Postlethwaite v. McWhinney*, 6 O. L. R. 412.

(g) A person out of Ontario is a necessary or proper party to an action properly brought against another person duly served within Ontario. Rules 23 June, 1894. 1309.

The same as Eng. (1883) R. 64 (g).

This clause applies to a foreigner resident out of the jurisdiction: *Firth v. De las Rivas*, 1893, 1 Q. B. 768; 42 W. R. 100; 60 L. T. 283, 686; *Duder v. Amsterdamsch*, 1902, 2 Ch. 138; *The "Duc D'Aumale"*, 1903, P. 18; 87 L. T. 674; and whether the action be founded on contract or tort: *Croft v. King*, 1893, 1 Q. B. 419; but ought only to be applied to an action of tort in extreme cases: *Williams v. Cartwright*, 43 W. R. 145, per Lord Esher; but see *Duc D'Aumale*, *supra*.

Where a person out of the jurisdiction is made a defendant to an action under clause (g), the application for leave to serve him should not be made until the defendant within the jurisdiction has been

Rule 162. served: *Postlethwaite v. McWhinney*, 6 O. L. R. 412; and see *Firth v. De las Rivas*, 95 L. T. Jour. 297; *Yorkshire Tannery Co. v. Eglinton*, 54 L. J. Chy. 81; 33 W. R. 162; *Collins v. N. B. & M. r. Inacc. Co.*, 1894, 3 Ch. 228. See, however, *Livingstone v. Sibbald*, 15 P. R. 315; *Tassell v. Hallen*, 1892, 1 Q. B. 321.

On the application it should be shewn that the party within the jurisdiction has been served, and that against him substantial relief is claimed: *Yorkshire Tannery Co. v. Eglinton*, 54 L. J. Chy. 81; 33 W. R. 162; *Collins v. North British, etc., Inacc. Co.*, 71 L. T. 58; 1894, 3 Ch. 228. Failure to so proceed (viz., first to serve the defendant who is within the jurisdiction, and then to apply for leave to serve the defendant who is out of the jurisdiction, with a concurrent writ), is not an irregularity merely which can be condoned: *Postlethwaite v. McWhinney*, 6 O. L. R. 412.

In order to make the Rule apply, the plaintiff must have an apparent cause of action against the person served within Ontario, or an alternative claim either against the person within or the person without Ontario, though it cannot be ascertained till the trial which of the two is liable: *Witted v. Galbraith*, 1893, 1 Q. B. 431, 577; 68 L. T. 421; and the relief sought against the person within and the person without the jurisdiction must be connected: *Collins v. North British, etc., supra*. The Rule cannot be evaded by making persons against whom there is no cause of action, parties only in order to obtain leave to serve the persons out of the jurisdiction whom it is really desired to sue: *Ib.*; and see *Simpson v. Hall*, 14 P. R. 310.

The plaintiff cannot by making a person within the jurisdiction a defendant, when he ought properly to have made him a co-plaintiff, thereby acquire a right to add a party out of the jurisdiction as a necessary party under clause (g): *Deutsche N. Bank v. Paul*, 1898, 1 Ch. 283; 78 L. T. 35; and where the party out of the jurisdiction is made a defendant solely on the ground that he is a proper party to the action against a co-defendant within the jurisdiction, the plaintiff may be required to undertake as a condition of being allowed to serve the defendant out of the jurisdiction, that if he fails against the defendant within the jurisdiction, he will submit to a dismissal of the action as against the defendant out of the jurisdiction: *Re Jones v. Bissonnette*, 3 O. L. R. 54.

Clause (g) has no application to a third party notice for contribution unless, *semble*, there were at least two joint contributors, one of whom is within the jurisdiction: *McCrane v. Gyles*, 1902, 1 Ch. 287; 86 L. T. 1.

In an action to set aside an agreement between a Quebec and Ontario loan company, transferring the assets of the Quebec company to the Ontario company, and for the distribution of the proceeds of the assets, service was allowed on the Quebec company and its liquidator as necessary parties to the action brought against the Ontario company under clause (g): *McKay v. Colonial Investment, etc., Co.*, 4 O. L. R. 571.

In the absence of special circumstances no term ought to be imposed that the plaintiff is not to sign judgment without leave of the Court or a Judge: *Firth v. De las Rivas, supra*.

In an action for salvage against owners of a vessel within the jurisdiction, leave was given to serve the owner of the cargo out of the jurisdiction: *The Elton*, 1891, P. 265.

An order was made where the alleged cause of action was a conspiracy by three defendants, one of whom resided out of the jurisdiction; but the plaintiff was required to undertake to submit to a writ out of Ontario. *Rule 162.*
Simpson v. Hall, 14 P. R. 310.

In an action against defendants in London, for breach of warranty of authority, their principals out of the jurisdiction having repudiated a contract abroad as made without authority, it was held that the foreign principals were proper parties, and service on them was allowed abroad: *Massey v. Heynes*, 21 Q. B. D. 330; and see *Bennetts v. Mee*, 1896, 2 Q. B. 464; 75 L. T. 145.

In an action by debenture holders of a foreign corporation against trustees of the debentures residing within the jurisdiction, the validity of the debentures being in dispute, it was held that the corporation was a necessary party, and service on it abroad was allowed under this clause: *Bustree v. The G. N. Ry.*, 195 L. T. Jour. 104.

See also *The Steamship Shamrock, Limited, v. Thompson*, 52 L. T. 552; *Lisbon, etc., v. Heddle*, 16, 796; *Livingstone v. Sibbald*, 15 P. R. 315; *Dudge v. Amsterdamse, etc.*, 1902, 2 Ch. 132, *supra*, pp. 307, 308.

Where the land in question was out of the jurisdiction, but some of the parties within, liberty was granted to serve a defendant out of the jurisdiction: *Jenny v. Mackintosh*, 33 Ch. D. 595; *Dickson v. Lane*, 1885, 2 Ch. 62; 72 L. T. 680; but specific performance of a contract for the exchange of lands out of Ontario for lands in Ontario, was decreed in favour of the plaintiff, who was the owner of the lands out of Ontario: *Montgomerie v. Rappensbury*, 31 Ont. 433; but see *Burns v. Davidson*, 21 Ont. 547; *Pardon v. Percy*, 26 S. C. R. 112; *Henderson v. Bank of Hamilton*, 23 S. C. R. 716; 20 Ont. App. 646; *Gunn v. Harper*, 30 Ont. 650; 2 O. L. R. 611.

In *Harvey v. Dougherty*, 56 L. T. 322, an action for breach of trust was brought against the executors of a testator dying in England, two of whom were in Ireland and one in England. The action was to compel them to replace assets invested in Ireland; service on the defendants resident in Ireland was allowed; see also *Re Lane*, 55 L. T. 149.

To an action against the personal representatives of a deceased trustee for breach of trust, the solicitors for the trustee, who resided out of the jurisdiction, and had made the investment which had resulted in a loss, were held not to be necessary parties: *Plaskitt v. Eddis*, 79 L. T. 136.

In *Lightowler v. Lightowler*, W. N. 1884, 8, an order was made where the party out of the jurisdiction was a partner of the defendant already served, and the action was for specific performance of an agreement to convey the partnership property.

Whether a third party notice can be served under this clause, *quære*; see *Speller v. Bristol*, 13 Q. B. D. 96.

The order granting leave to serve the persons out of the jurisdiction, may be for the issue of a writ to be concurrent with the writ served on the other defendants within the jurisdiction: *Bart v. Buren*, 8 Times, 28.

- (h) Service may also be allowed where the action is for any other matter and it appears to the satisfaction of the Court or a Judge that the plaintiff has a good cause of action against the defendant upon a

Rule 162.

contract or judgment, [or in respect of a claim for alimony] and that the defendant has assets in Ontario of the value of \$200 at least, which may be rendered liable for the satisfaction of the judgment, in case the plaintiff should recover judgment in the action; but in such case if the defendant does not appear, the Court or a Judge shall give directions from time to time as to the manner and conditions of proceeding in the action, and shall require the plaintiff, before obtaining judgment, to prove his claim, before a Judge or jury, or in such manner as may seem proper. 58 V. c. 12, s. 124. Rules 1 Jan., 1896, 1439. 5 Ed. vii. c. 13, s. 22.

"Contract or Judgment."—The words "where the action is for any other matter" in the first line, would appear to extend the class of cases in which service of a writ out of the jurisdiction may be allowed to all other cases not within any of those enumerated in the preceding clauses, but the subsequent words shew that the operation of the *Rule* is limited to cases where the plaintiff is suing upon a contract or judgment, or for alimony, and it is shewn that the defendant has assets in Ontario of the value of at least \$200, which may be considered liable to satisfy the plaintiff's claim if judgment is recovered.

The right to alimony is not based on "contract," and, before the amendment of this clause by 5 Ed. vii. c. 13, s. 22, by inserting the words in brackets, an action for alimony could be brought against a defendant residing out of the jurisdiction only under clause 1c1, upon a judgment recovered out of the jurisdiction: *Wholter v. Wholter*, 17 P. R. 15; or under clause 1c1 *supra*.

Amendment of Writ.—The indorsement of a claim on a writ served out of the jurisdiction may be ordered to be amended after service, without requiring re-service, but not so as to add any claim which could not under this *Rule* be indorsed on a writ for service out of the jurisdiction: *Holland v. Leslie*, 1894, 2 Q. B. 450; followed *Hogaboom v. MacCulloch*, 17 P. R. 377.

Where plaintiff and defendant were both residing out of Ontario, and neither of them was a British subject, and the plaintiff's right, if any, to sue depended upon the above clause (*th*), and defendant, pleading that there was no jurisdiction, a summary judgment under *Rule* 603 was refused, in view of the provision in clause (*th*), requiring that the plaintiff prove his claim "before a Judge or jury, etc.," and the case was allowed to go to trial in the regular way: *Campbell v. Randall*, 17 P. R. 243.

Proceeding
in winding
up of
companies.

(2) Service out of Ontario of any order or notice in the winding-up of a Company, may be allowed by the Court or a Judge:

See also R. S. C. c. 129; 52 Vict. c. 32, s. 11 (D.).

Service of
petitions or
notices of
motion out of
jurisdiction.

(3) Service out of Ontario of a petition or notice of motion in an action or matter relating to the administration of the estate of a deceased person or to the execution of a

trust, or, praying for an order dealing with any funds in ^{Rule 163.} Court and in interpleader proceedings, may be allowed by the Court or a Judge. Rules 23 June, 1894, 1309 (7).

As to the time for the hearing of the petition or notice of motion: see *Rule 164*.

An originating notice of motion under *Rules 933 or 944*, would seem to be within this *Rule*; but it may be open to question whether a notice of motion for partition under *Rule 956* would be so. Such notices will, however, be within other clauses of *Rule 162*: see *Rules 3, 162 (1a)*, and 3 Ed. vii. c. 8, s. 13, in the note to 162 (1).

Seem, leave cannot be given to serve a notice of motion for an injunction out of the jurisdiction with the writ: *Manitoba, etc.*, v. *Allan*, 1893, 3 Ch. 432: but see *Rule 361*.

See also notes *supra*, p. 295.

Service of proceedings under *The Settled Estates Act* are provided for by *Rule 975*.

Notice of a summary application for an interpleader order by an insurance company was allowed to be served out of the jurisdiction under this *Rule*: *Re Confederation Life Ass. Co. & Cordingley*, 19 P. R. 89.

(4) Where, under *Rule 203 or 659* or otherwise under the practice of the Court, it is necessary or proper to serve persons, not already parties to an action, with an office copy of any judgment or order, or notice to prove claims thereunder, service of the same out of Ontario may be allowed by the Court or a Judge. Rules of 1 Jan., 1896, 1440.

The order allowing service of a copy of a judgment under this *Rule* must also prescribe the time within which the party served may move against the judgment: see *Rule 164 (3), (4)*.

163. Every application for leave to serve or give notice of any proceeding out of Ontario shall be supported by affidavit or other evidence stating that in the belief of the deponent the applicant has a right to the relief claimed, and showing in what place or country the person to be served is or probably may be found, and whether he is a British subject or not, and the grounds upon which the application is made, and that the case is a proper one for service out of Ontario under these Rules. Rules 23 June, 1894, 1309 (3).

The affidavit must shew that the plaintiff has a *prima facie* case: *Collins v. North British & M. Ins. Co.*, 1894, 3 Ch. 228; 71 L. T. 58. And a material mistake in the affidavit, though unintentional, will be a ground for rescinding the order: *Republic of Peru v. Dryfus*, 55 L. T. 802.

It may be difficult for a conscientious plaintiff to comply literally with this *Rule*, as the relief can only be claimed by the writ and statement of claim, and the affidavit is required to be made before the

Service of
office copy
of judgment
out of juris-
diction.

Application
to be sup-
ported by
evidence.

Rules writ is issued, and therefore before the relief can be claimed: see a form of affidavit, H. & L. Forms, No. 84.

164, 165.

Order to fix time for appearance to writ.

164.—(1) An order allowing service of a writ or notice of a writ out of Ontario shall limit the time for entering appearance.

Order to fix time for hearing motion where no appearance to be entered.

(2) An order allowing service out of Ontario of a petition or notice of motion shall limit a time when the petition or motion is to be heard.

(3) An order allowing service out of Ontario of an office copy of a judgment or order or notice to prove claims thereunder shall limit a time for moving to add to, vary or set aside the judgment or order.

(4) In regulating in an order for service out of Ontario, the time for entering an appearance to a writ, or for hearing of a motion or petition, or for moving to add to, vary or set aside any judgment or order to be served out of the jurisdiction, regard shall be had to the place where service is to be effected. *See* Rules 23 June, 1894. 1309 (4). (5). (7): Rules 1 Jan., 1896. 1440.

Compare Eng. (1883) R. 68.

See notes to Rule 168.

The order allowing service, besides regulating the time for appearance, should also authorize the service of the statement of claim, if any (see Rule 166), at the same time, and limit a time for the delivery of the statement of defence, which should be not earlier than eight days from the last day for appearance: *Melver v. Crown Point Mining Co.*, 19 P. R. 335. See *Lovell v. Taylor*, 5 O. W. R. 525.

Notice in lieu of writ.

165.—(1) Where the defendant is to be served out of Ontario, and is neither a British subject nor in British dominions, notice of the writ and not the writ itself shall be served. Such notice shall be served personally, or as the Court or Judge may direct. Rules 23 June, 1894. 1309 (6).

Compare Eng. (1883) R. 69.

Service of notice in lieu of writ.

(2) Notice in lieu of a writ shall be served in the same manner as writs are served. Con. Rule 272.

Compare Eng. (1883) R. 70; and see notes, p. 280.

Notice in lieu of writ.

Service of a writ may be made on a British subject abroad, or upon a foreigner within the jurisdiction: *Fowler v. Barstowe*, 20 Ch. D. 246; but service of process abroad upon a defendant not a British subject might involve unpleasant questions of jurisdiction. Where, therefore, a defendant to be served out of the jurisdiction is a

foreigner, or a foreign corporation, notice of the writ, and not the Rules writ itself, is to be served: *Beddington v. Beddington*, 1 P. D. 426; *Westman v. Aktiebolaget, etc.*, 1 Ex. D. 237; the Court having jurisdiction to so order service: *James v. Despott*, 14 L. R. Ir. 71. If the defendant is a British subject residing abroad, the writ itself should be served on him: *Great Australian, etc., Co. v. Martin*, 5 Ch. D. 1. and so if the defendant is the British wife of a foreigner: see *Bacon v. Turner*, 34 L. T. 647; *Re Howard*, 10 Ch. D. 550; but see R. S. C. c. 113, s. 22; *Piggott* on service out of the jurisdiction, 100. Where the writ was served instead of notice thereof, it was held, under the similar practice before the Judicature Act, that this was an irregularity which could not be cured by amendment, and the service was accordingly set aside: *Henderson v. Hall*, 8 P. R. 353; and in *Hewitson v. Fabre*, 21 Q. B. D. 6, such service was held to be a nullity, unless made good by appearance to it without objection.

A respondent to a petition or a notice of motion which can be served out of Ontario may properly be served with the petition or notice of motion itself, and not merely with notice of it. It is only in the case of a writ (or formerly a summons) which commands the attendance of the party served, that service of the document itself is only proper upon a subject who owes obedience to the Courts of the Sovereign.

A foreigner who cannot be served personally out of the jurisdiction may by order be served substitutionally: see *Field v. Bennett*, 56 L. J. Q. B. 89; but only in a case in which there is jurisdiction to allow service of a writ, or notice thereof, upon him personally: *Id.*; *Worcester, etc., v. Firkbank*, 1894, 1 Q. B. 784; 70 L. T. 443; see also note to Rule 146.

166. Where a defendant is to be served out of Ontario, with a writ of summons or notice in lieu thereof, the statement of claim shall be served therewith unless the writ is specially indorsed under Rules 138, 139 or 141. Rules 23 June, 1894, 1311. See Rule 128.

The statement of claim referred to in this Rule means the pleading so called, and not any indorsement, however full, upon the writ, of the nature of the claim: *Summers v. Summers*, Mr. Dalton, 6th February, 1882; but it will be observed that under the present Rule it is no longer necessary to serve a statement of claim out of Ontario with the writ, where the writ is specially indorsed under Rules 138, 139 or 141.

167. Where a party to an action or matter is absent from Ontario or cannot be found therein to be served, the Court or a Judge may authorize proceedings to be taken against him according to the practice of the Court in the case of a defendant whose residence is unknown, or in any other manner that may be directed, if the Court or a Judge deems such mode of proceeding conducive to the ends of justice; and service so effected shall be equivalent to personal service upon the party. Con. Rule 273.

Other modes of proceeding against absent defendant.

Rule 168. The Act (R. S. O. 1877, c. 40, s. 94), from which this *Rule* was originally taken, was held to apply to cases where defendants are very numerous or where they reside out of the jurisdiction at a very great distance, or where the residence is not known at all, or where from any other cause it would be difficult or expensive to effect a service: *Pearson v. Campbell*, 2 Chy. Ch. 25. Advertising has been dispensed with where it would be useless, and service allowed by mailing to the address of defendant's brother resident in the Province, though not in any way an agent of defendant: *Cooper v. Lane*, 1 Chy. Ch. 323; see also *Dobson v. Marshall*, 9 P. R. 1.

As to the constitutionality of such a provision as that contained in this *Rule*: see *Ashbury v. Ellis*, 1893, A. C. 339.

Mere absence from Ontario unaccompanied by any difficulty in effecting personal service, is no ground for resorting to substituted service under this *Rule*: *Young v. Dominion Construction Co.*, 19 P. R. 139; but a solicitor on whom service has been ordered to be effected, has no *locus standi* to move to set aside the service, even though before service his authority to act for the defendant had been revoked: *Taylor v. Taylor*, 6 O. L. R. 356; though it would be proper for him to notify the opposite party and also the Court of the fact of his want of authority.

APPEARANCE, ETC.

(i) General Rules.

Time for
appearance.

168.—(1) Where a defendant is served within Ontario, elsewhere than in the Districts of Algoma, Manitoulin, Nipissing, Rainy River or Thunder Bay, he shall appear within ten days, including the day of service.

(2) If served within the said Districts, unless otherwise ordered under Rule 353, he shall appear within twenty days after the service, including the day of service. *Rules* 23 June, 1894, 1310, *amended*; 60 V. c. 19, s. 20.

This *Rule* supersedes the previous statutory provisions; as to which, see 47 Vict. c. 14, s. 7 (O.); and *Kendell v. Ernst*, 30 C. L. J. 402.

It is made clear by this *Rule* that the period limited for appearance is to be inclusive of the day of service: see *Cornish v. Manning*, 18 C. L. J. 76, 143; 2 C. L. T. 105, and Con. Rule 233 of 1888.

Under the terms of a special order limiting the time for appearance to "10 days from the service of the writ," *Rule* 344 (1) was held to apply, and the period to be computed "exclusively of the first day and inclusively of the last day": *Bank of B. N. A. v. Hughes*, 16 P. R. 61.

In case of service by advertising, the advertisement should specify the time for appearance and the time allowed should date from the last publication unless otherwise ordered: *Crane v. Jullion*, 2 Ch. D. 220.

Service out of Ontario.—Where service is to be effected on a defendant resident out of Ontario, the order which allows service to be effected must name the time for appearance, (see *Rule* 164), which

will be regulated in the discretion of the Court or Judge making the order, according to the distance of the place where service is to be effected, or (in case of substitutional service), according to the distance of the place where defendant is: see *Rule 164*, and *Sparks v. Purdy*, 15 P. R. 1. See the form of order, No. 108, in the Appendix (H. & L. Forms, No. 85).

On application in Chambers the periods fixed by the former Rules 275 and 276 were frequently shortened under *Rule 353*, according to the facilities of communication with the place where the defendant was shewn to be residing. Two weeks was ordinarily limited by the Master in Chambers where the defendant resided in Montreal, and three weeks where defendant resided in some place in the United States not far from the border of Ontario. Similar periods will now probably be fixed in orders giving leave to serve defendants resident in such places.

Where a writ has been issued for service within the jurisdiction, and a defendant out of the jurisdiction is added as a party, the writ should also be amended so as to conform to Form No. 2 (H. & L. Forms, No. 36), or a concurrent writ according to Form No. 2 should be issued: see *Dickson v. Law*, 1895, 2 Ch. 62; 72 L. T. 680; *Burt v. Boucen*, 8 Times, 28; *Manitoba, etc., Co. v. Allan*, 1893, 3 Ch. 434.

169. A defendant shall appear by filing with the proper officer a memorandum in writing, according to Form No. 27, stating, if the defendant appears by solicitor, the name and place of business of such solicitor, or, if the defendant appears in person, stating that he so defends in person, giving his address and naming a place to be called his address for service, which shall not be more than two miles from the office from which the writ of summons was issued. See Con. Rules 277, 282, 284, 286.

(Compare Eng. (1883) Rs. 77, 80, 81, 83.

An appearance entered by two solicitors for one defendant is not a nullity, but is irregular: see *Williams v. Williams*, 10 M. & W. 178; *Walton v. Thompson*, L. R. 6 Eq. 7. If sued in a wrong name defendant should appear by the right one, stating that he was sued by the wrong one: *Lomax v. Kilpin*, 4 D. & L. 295; *Hobson v. Wadsworth*, 8 Bowl. P. C. 601; (see *Zuccato v. Young*, 38 W. R. 474, where a motion by a defendant wrongly named and described to set aside the writ as irregular was refused), otherwise the plaintiff may proceed against him by the wrong name: *Clark v. Baker*, 13 East, 273; *Williams v. Bryant*, 5 M. & W. 447.

Where a party who appears in person subsequently appoints a solicitor, the practice in Ireland is to enter the solicitor's name on the record by side bar rule for that purpose before any proceeding is taken by such solicitor: *Johnston v. Coleman*, 8 L. R. Ir. 148. Under these Rules a notice to the opposite party is all that is necessary, but it might be well also to file a copy of such notice: see *Rule 336*.

An appearance entered without an address is not a nullity, and therefore judgment cannot be signed disregarding it. It must first be set aside as irregular: *Gordon v. Roudlen*, 34 C. L. J. 135 (Brit. Col.).

Rule 170. Where at an address for service given by a defendant in person, no one was found but a housekeeper who refused to receive documents, service of a summons for judgment under *Rule 603* by putting it into the letter box was held not sufficient: *Jimincy v. Owen*, 28 Sol. Jour. 163.

The former Con. Rule 278 was as follows:

"278. If two or more defendants in the same action appear by the same solicitor and at the same time, the names of all the defendants so appearing shall be inserted in one memorandum. J. A. *Pub* 50."

This has been omitted in the present consolidation as being unnecessary. The course indicated by it will, however, of course, be taken, otherwise the additional costs will doubtless be disallowed.

Where several defendants represent one interest (e.g., trustee and cestui que trust, mortgagee and mortgagor, partners, etc.), they should appear by the same solicitor, and if they do not, will be allowed only one set of costs: *Morgan & Wurtzburg*, 124; see also *Barrett v. Campbell*, 7 P. R. 150; but where a trustee has really a separate interest, as where he claims that a co-trustee is liable, he may reserve a separate set of costs: *Webb v. Webb*, 16 Sim. 55.

Waiver of
irregularity
by appear-
ance.

An ordinary appearance usually operates as a waiver of an irregularity in the proceedings taken against the defendant: see *Gulton v. Radcliff*, L. R. 9 C. P. 189; *Preston v. Lamont*, 1 Ex. D. 362; *Diamond v. Sutton*, L. R. 1 Ex. 131; *Boyle v. Sacker*, 39 Ch. D. 249; *Re Merchants Bank v. VanAllen*, 10 P. R., per Osier, J.A., at p. 37; *Manitoba v. Allan*, 1893, 3 Ch. 432; *Dart v. Citizens Ins. Co.*, 11 P. R. 513. See, however, *Beuecke v. Frost*, 1 Q. B. L. 421; *Moore v. Gamgee*, 38 W. R. 669; *Western National Bank of N. Y. v. Perz*, 1891, 1 Q. B. 304; see also note, *supra*, p. 298.

An appearance to the original writ stands as a good appearance to the writ though subsequently amended: *Hammer v. Clifton*, 10 R. 55.

Appearance Gratis.—A defendant need not necessarily wait till he is served, before entering an appearance, and where he is prejudicially affected by the issue of the writ, he may appear gratis, so as to compel the plaintiff to proceed promptly: see *McTaggart v. Tooth*, etc., in notes to sec. 97 of the Act, *supra*, p. 147 (where a certificate of *lis pendens* had been issued). Where appearance is so entered notice should be given to the plaintiff's solicitor: *Vigeon v. Northcott*, 12 C. L. T. 101.

Where no
address or
improper
address
given.

170. If the memorandum does not contain the address of the solicitor or the defendant (as the case may be) it shall not be filed; and if such address is illusory or fictitious, the appearance may be set aside by the Court or a Judge; and thereafter, unless otherwise ordered, the plaintiff may proceed as if the defendant had not appeared. Con. Rule 285.

See Eng. (1883) R. 82.

Where a defendant gives an address for service at which he is not to be found, and there is no person authorized to take in or forward documents, such address is illusory, and the appearance will be set aside: *A. v. B.*, W. N. 1883, 174; W. N. 1884, 241; *Edell v. Carr*

(probably S. C.), 51 L. T. 621; 33 W. R. 208; *E. v. C.*, 54 L. J. Chy. Rules 308. Rule 171-174.

171. If a defendant does not require the plaintiff to deliver a statement of claim he shall so state in his memorandum of appearance, and in that case shall serve a copy thereof on the plaintiff. Con. Rule 286. Where statement of claim not required.

See Eng. (1883) R. 225.

Where a defendant dispenses with a statement of claim under this Rule, and delivers a defence, the indorsement on the writ becomes for the purposes of pleading the statement of claim, which may be amended without leave under Rule 300; but it was held irregular after defence to deliver a statement of claim, as if none had been delivered; *Confederation Life Ass. Co. v. Moore*, 6 O. L. R. 648. *Sed quare*, might not the statement of claim in that case have been allowed as an amended statement of claim within Rule 300.

172. Upon a Memorandum of Appearance being filed, the officer shall forthwith note the same in the Procedure Book. Con. Rule 287. Entry of memor. andum.

See Eng. (1883) R. 83.

An appearance filed without the proper stamp affixed is a nullity: *Bank of Montreal v. Harrison*, 4 P. R. 331.

173. A conditional appearance may be entered by leave of the Court or a Judge. *New.* Conditional appearance.

Where a defendant wishes to contend that he is not properly subject to the jurisdiction of the Court, he should obtain leave under this Rule to enter a conditional appearance: see *Howland v. Insurance Co.*, 16 P. R. 514; *Campau v. Randall*, 17 P. R. at p. 244; as an unconditional appearance will be deemed a waiver of the right to take the objection: *Scars v. Meyers*, 15 P. R. 381, 456; *Western National Bank v. Perez*, 1891, 1 Q. B. 304, 313; but an unconditional appearance, though a waiver of the right to object to the jurisdiction of the Court over the person of the defendant, would seem not to be a waiver of the defendant's right to object to the jurisdiction of the Court over the subject matter of the action: see *Wilmott v. McFarlane*, 22 C. L. J. 129.

174. A solicitor not entering an appearance for a defendant in pursuance of his written undertaking so to do, shall be liable to an attachment. Con. Rule 283. Solicitor's undertaking.

This is the same as Eng. (1883) R. 88; and also as the Ontario Rule 3 of T. T. 1856.

The plaintiff may also proceed, as on default of appearance. Rule 145 provides that service of writ or other document by which a cause, matter or proceeding may be commenced, shall not be required where the defendant by his solicitor accepts service, and undertakes to appear.

Rule 175. Where a solicitor accepted service, but did not in terms undertake to appear, a motion to attach him was refused: *The Anna & Bertha*, 61 L. T. 332.

An undertaking to "enter an appearance in due course" is unconditional, and must be performed forthwith. A solicitor's undertaking is binding even after the lapse of 12 months from issue of the writ, and under this *Rule* it may at the instance of the plaintiff be enforced by attachment at any time within six years from its date: *Re Kirby, Son, & Verden*, 1801, 1 Ch. 407; 83 L. T. 524.

An application to attach should be entitled not in the action but in the matter of the solicitor: *Id.*

If a solicitor enter an appearance without authority, it may be discharged with costs, to be paid by him: *Re Lloyd*, 12 Ch. D. 443. See also cases in the note to *Rule* 143, p. 277; and *Re Gray, Gray v. Cole*, 65 L. T. 743.

Proceedings by attachment to compel an appearance to be entered, may perhaps be usefully adopted where it is desired to obtain from defendant a waiver of some irregularity: see *Carwick v. Young*, Jac. 524, or to prevent a relitigation of the matter in an action on the judgment in another country. The plaintiff should request the defendant's solicitor to enter the appearance before moving to attach: *Jacobs v. Magnay*, 7 Jur. 326.

See also as to the enforcement of an undertaking by a solicitor given out of Court, *Woodfin v. Wray*, 51 L. J. Chy. 427; and see *Sirry v. Harland*, 1884, 1 Q. B. 707.

When appearance may be entered and when notice is to be given.

175. A defendant may appear at any time before judgment. If he appears after the time limited for appearance he shall, [forthwith give notice thereof, and he shall] not, unless the Court or a Judge otherwise orders, be entitled to any further time for delivering his defence, or for any other purpose, than if he had appeared according to the writ; and if the defendant appears after the time appointed and omits to give such notice, the plaintiff may proceed as in case of non-appearance. *Con. Rule* 281, *amended*.

Compare Eng. (1883) R. 92. The words in brackets are not in the Eng. R., nor is the last clause, which was taken from R. S. O. 1877, c. 50, s. 60 (The C. L. P. Act).

"Forthwith" means "as soon as practically possible, admitting of such reasonable time as may be required for the performance, having regard to the circumstances": *Leake on Contracts* (2nd ed.), 728; see also *Hyde v. Watts*, 12 M. & W. 254; *Morton v. B. of Montreal*, 18 C. L. T. 157.

For the time limited for appearance, see note to *Rule* 168.

A form of notice of appearance will be found in App. Form No. 45 (H. & L. Forms, No. 1061).

An appearance entered or tendered while the plaintiff is signing judgment is in time: *Harris v. Andrews*, 3 C. C. L. J. 31; and the judgment is not complete until the stamps are affixed: *Smith v. Logan*, 17 P. R. 219. See also note to *Rule* 11, p. 203.

If an appearance has been entered, but the plaintiff nevertheless proceeds as if none had been entered, the proceedings are not null, but merely irregular, and the irregularity may be waived: see *Alsager v. Crisp*, 9 Dowl. 353; *Strauge v. Freeman*, 5 Dowl. 407; *Maple v. Woodgate*, 1 B. & C. 79; but, under this Rule, where notice of an appearance, entered after the proper time was not given, judgment signed disregarding the appearance was upheld: *Smith v. Dobbin*, 3 Ex. D. 338; see also *Hunter v. Wilcockson*, 9 P. R. 305; and the knowledge of the fact that an appearance has been entered does not constitute such notice as the Rule requires: *Hudson's Bay Co. v. Hamilton*, 13 P. R. 481.

In an action for recovery of land, an appearance by the original defendant, after the landlord had intervened and appeared, so as to join with the landlord in a statement of defence, was held regular: *Gioring v. Cameron*, 10 P. R. 498.

Although an appearance may, under this Rule, be entered at any time before judgment, yet the defendant may be precluded from putting in a defence after the proper time, by the plaintiff's noting the pleadings closed under Rule 263.

(ii) Appearance disputing amount only.

176.—(1) A defendant appearing to a writ, in actions other than upon a mortgage or for the recovery of land, may, in his appearance, or, by notice served within four days thereafter, state that he disputes only the amount claimed; and he need not file any further defence, and the plaintiff may proceed to take an account of the amount due to him before the officer with whom the judgment is to be entered, on four clear days' notice, and judgment may be signed for the whole amount due as in default of a defence. Rules of 1 Jan., 1896, 1443.

Limitation of defence to question of amount only.

(2) The notice may be according to Form No. 46. Con. Rule 299.

For Form No. 46, see H. & L. Forms, No. 112.

A similar notice was provided for by Chy. Gen. Order 436, in mortgage suits, and entitled the defendant to four days' notice of the taking of the plaintiff's account. The extension of the practice by the Jud. Act, 1881, Rule 68, to other suits was new.

The present Rule, following the amendments of Rule 1443 referred to, makes it clear that the Rule is not intended to apply to actions upon a mortgage, which are specially provided for by Rule 596. Upon the appearance, disputing the amount only, being filed, the record is complete. No statement of claim is necessary or proper. Express provision is by this Rule made for the proceedings which may thereupon be taken by the plaintiff to take the account and obtain judgment. Formerly a motion for judgment was necessary: see *Peel v. White*, 11 P. R. 177; *Mahoney v. Horkins*, 14 P. R. 117.

A defendant cannot limit his appearance to part of the plaintiff's claim, and offer to submit to another part of it: *Padgett v. Padgett*, 38 C. L. J. 207; except in the case of an action to recover land, as to which, see Rule 184.

Rule 177. **Statute of Limitations.**—If the defendant wishes to set up the Statute of Limitations as a bar to the suit, he should set it up by a defence. He can not avail himself of the Statute for that purpose by filing a notice under this Rule: see *Cattanach v. Frquhart*, 5 P. R. 28, explained, 1 Ont. App. 410, and notes to Rule 271.

As to how far the Statute may be taken advantage of in taking the account under this Rule, see *Wright v. Morgan*, 1 Ont. App. 613, and note to Rule 506.

(iii) *Dower.*

Defendant
may file
appear-
ance and
acknow-
ledge
tenancy.

R. S. O.
1887, c. 54.

177.—(1) A defendant in an action for dower, may, with his appearance, file an acknowledgment that he is tenant of the freehold of the land named in the writ, together with his consent that the plaintiff may have judgment for her dower therein and may take the proceedings authorized by *The Dower Procedure Act* to have the same assigned to her, unless the parties otherwise agree, and he shall forthwith serve the plaintiff or her solicitor with a copy of such appearance, acknowledgment and consent, together with an affidavit of the day of the filing of the same; and upon such consent the plaintiff may enter judgment of seisin, and may obtain a writ of assignment of dower, but shall not be entitled to tax or recover the costs of the action or judgment against the defendant.

Judgment
of seisin
and writ of
assignment
thereon.

(2) Where the plaintiff claims arrears of dower or damages for detention of dower, neither the entry of a judgment of seisin nor the taking of proceedings for the assignment of her dower thereunder shall prevent her from proceeding with the action for the recovery of such arrears or damages. Con. Rule 290.

The Dower Procedure Act is now R. S. O. c. 67.

Clause (2) was introduced in Con. Rules 1888, to meet the decisions of *Linfot v. Duncombe*, 21 C. P. 484, and *Cameron v. Christie*, 7 P. R. 184, which decided that judgment of seisin is conclusive, and when signed the defendant cannot be proceeded against for damages: see also *Harvey v. Pearall*, 31 C. P. 239. Those cases are therefore no longer to be followed.

It was held in *Ryan v. Fish*, 4 Ont. 337, that a dowress may recover damages as well for *incure* profits as for detention against all persons, and in all cases where they were recoverable before Aug. 10th, 1850. By R. S. O. 1877, c. 55, sec. 45, the procedure before that date was made applicable to all cases not provided for by the Act. This sec. 45 was omitted from R. S. O. 1887, as "effete," because the procedure in an action for dower is under the Jud. Act to be the same as in other actions for recovery of land. No doubt the right to damages has not been affected by the change in the mode of procedure to obtain them: but see *Giles v. Morrow*, 1 Ont. 527. Costs are not given unless a demand for dower was made: *Lance v. Armstrong*, 11 Gr. 517.

A widow is not entitled to damages for detention of dower till Rules after demand; *Ryan v. Fish*, 4 Ont. 355; *Mason v. Atwood*, 17 Ont. 176-180. 101; nor to either arrears of dower or damages for detention unless her husband died seised; *Loose v. Atwood*, 11 Gr. 377; *McLean v. Morgan*, 15 Ont. 104; even though *Loose v. Atwood* and *Morgan v. Morgan*, *supra*.

As to whether damages are to be computed against the value of the freehold from the death of the husband or the day of demand, *quære*; see *Ryan v. Fish*, *supra*.

The mere fact that at the death of, or detention by the husband, his lands were of no rentable value, is not alone sufficient to disentitle the widow to damages if the land has been subsequently made rentable by reason of improvements or otherwise, either by the heir or the vendee; in such case a portion of the rent is attributable to the land; *Wallace v. Moore*, 18 Gr. 590.

For form of writ of assignment of dower, see Form No. 183 in the Appendix (H. & L. Forms No. 1084).

178. Where the defendant has filed and served an acknowledgment and consent under the preceding Rule, and the plaintiff does not within 3 months thereafter sue out and cause to be executed a writ of assignment of dower, the defendant may, by leave of the Court or a Judge, sue out such writ; and the writ shall be, as nearly as may be, in the same form as a writ sued out by the plaintiff, and the like proceedings shall be had thereon. Con. Rule 291.

See Form No. 183.

179. In an action for dower the landlord or other person under whom a tenant in possession, who is not also tenant of the freehold, holds or entered into possession, may, if he has not been served with the writ, without leave, appear and defend, by filing with his appearance an affidavit that he is tenant of the freehold, and is advised and believes that there is good ground for disputing the plaintiff's claim to dower. Con. Rule 292.

Case wherein defendant may sue out execution, if plaintiff does not.

Landlord may be substituted as defendant.

(iv) Recovery of Land.

180. Any person not named as a defendant in a writ for the recovery of land, may, without leave, appear and defend, by filing with his appearance an affidavit stating that he is in possession either by himself or his tenant (a) (as the case may be), and if the possession is by his tenant, that the defendant named in the writ is his tenant. The affidavit may be according to Form No. 18. Con. Rule 293.

Appearance without leave by person not named as a defendant.

To (a) this Rule corresponds with Eng. (1883) R. 95.

For Form No. 18; see H. & L. Forms, No. 115.

Rules**181-183.**

The intention would appear to be that in simple cases in which leave would have been given under the former practice as of course, and an affidavit in the form given can be made by the defendant, no leave need be applied for. Under s. 10 of the Ejectment Act (R. S. O. 1877, c. 51) it was often a question whether a person could be said to be in possession by himself or his tenant within the meaning of that section; for example a mortgagee out of possession in an action against his mortgagor: *McDermott v. Keeling*, 7 T. C. L. J. 150; see also *Morris v. Smythe*, 2 U. C. L. J. 212. In such cases it will be necessary to apply for leave under *Rule* 181.

Even where judgment has been signed against the defendant named in the writ, any other person claiming to be in possession independently of him, may obtain leave to defend the action: see *Rule* 181. and *Minet v. Johnson*, 63 L. T. 507.

In ejectment by a landlord against his tenant, the sub-tenants of the lessee are not necessary parties; and under a judgment recovered against the plaintiff's lessee, the defendant's sub-tenants may be ejected: *Synod v. Faken*, 20 Ont. 738. See also *Geen v. Herring*, 1905, 1 K. B. 152.

Appearance
by leave in
action for
land.

181. [Where such affidavit is not filed,] any person not named as a defendant in a writ of summons for the recovery of land, may, by leave of the Court or Judge, appear and defend, on filing an affidavit shewing that he is in possession of the land, either by himself or his tenant. Con. Rule 294.

Except the words in brackets, the *Rule* is the same as Eng. (1883) R. 25.

For cases under the old practice, see Harrison's C. L. P. Act, 518. See also notes to the preceding *Rule*.

The Court will not on the application consider nice questions as to the right of possession: see *Croft v. Lumley*, 4 E. & B. 611, and *Thompson v. Tompkinson*, 11 Ex. 442. In *Longbourne v. Fisher*, W. N. 1878, 28; 47 L. J. Ch. 379, an equitable tenant for life was given leave to defend an action of ejectment in the place of her trustees, using their names and indemnifying them; and see note to *Rule* 180. See also *Leader v. Hayes*, 54 L. T. 204.

Form of
appearance
by landlord

182. Any person appearing to defend an action for the recovery of land as landlord, in respect of property whereof he is in possession [in person or] by his tenant, shall state in his appearance that he appears as landlord. Con. Rule 295.

Same as R. S. O. 1877, c. 51, s. 12. The English (1883) R. 96, has the word "only" instead of the words in brackets.

Notice of
appearance
by person
not named
as a defend-
ant in writ.

183. Where a person not named as defendant in a writ for the recovery of land enters an appearance according to the foregoing Rules, the appearance shall be entitled in the action against the parties named in the writ as defendants; and the person so entering an appearance shall forthwith give notice thereof, and shall in all subsequent proceedings be named as a party defendant (a); and if such person appears

and omits to give notice the plaintiff may proceed as in case ^{Rules} 184, 185. of non-appearance. Con. Rule 296.

(a) The preceding part of the *Rule* corresponds with Eng. (1883) R. 97: what follows has been taken from R. S. O. 1877, c. 50, s. 60.

A form of notice of appearance will be found in the App. Form No. 45 (H. & L. Forms, No. 106).

The notice should of course be given to the plaintiff if he sues in person, otherwise to his solicitor.

184.—(1) Any person appearing to a writ for the recovery of land may limit his defence to a part only of the land, describing the part with reasonable certainty in his appearance, or in a notice to be served within four days after appearance. ^{Limited appearance in action for land.} Con. Rule 297. ^{Notice.}

(2) The notice may be according to Form No. 47. ^{Form of notice.} Con. Rule 298.

Compare Eng. (1883) Rs. 98 and 99.

For Form No. 47, see H. & L. Forms, No. 113.

This *Rule* has been held to be applicable in an action of dower: *Cunningham v. Pearce*, Mr. Dalton, 21st Sept., 1881; see also *McCulloch v. McCulloch*, 4 C. L. T. 252. Better particulars may be obtained where there is a want of "reasonable certainty": *Watson v. Breuer*, 4 P. R. 202.

The notice should be served upon the plaintiff if he sues in person, otherwise upon his solicitor.

An appearance without limitation therein, or by notice served within four days after appearance, will of course be an appearance to defend for the whole land, as was expressly provided in the former *Rule* 297.

This *Rule* does not enable a defendant in actions other than for recovery of possession of land, to limit his appearance to part of the plaintiff's claim: *Padget v. Padget*, 38 C. L. J. 207.

5. PARTIES.

(i) Generally.

185. All persons may be joined in an action as plaintiffs in whom any right to relief [in respect of or arising out of the same transaction or occurrence, or series of transactions or occurrences.] is alleged to exist, whether jointly, severally, or in the alternative, [where if such persons brought separate actions any common question of law or fact would arise; but, if, upon the application of a defendant, it appears that such joinder may embarrass or delay the trial of the action, the Court or a Judge may order separate trials, or make such

^{who may be joined as plaintiffs.}

Rule 185.

other order as may be expedient]; and without any amendment, judgment may be given for such one or more of the plaintiffs as may be found entitled to relief, for such relief as he or they may be entitled to. [But the defendant, though unsuccessful, shall be entitled to his costs occasioned by joining any person who is not found entitled to relief unless the Court or a Judge, in disposing of the costs, otherwise orders.]. *New.* See Con. Rule 300.

The former Rule 300, followed Eng. (1883) R. 123; and did not contain the clauses in brackets, which are new, following substantially the Eng. Rule of 26th Oct., 1896. (See W. N. 1896, p. 291; *Storey Ann. P.* 1905, p. 148).

The last clause in brackets is also contained in Rule 1131.

For the changes in regard to parties introduced by the Judicature Act, and for the decisions down to the time of the passing of the above Rule in 1897, see Holmsted & Langton *Jud. Act*, 2nd ed., pp. 304, *et seq.*

Practice
under
former
Rules and
decisions.

Speaking generally the Jud. Act provided that all parties may be joined whose presence before the Court is necessary to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action. On the question, however, how far separate causes of action by several plaintiffs or against several defendants might be investigated in one action, the cases do not present a consistent and uniform course of decision. A change of view began about 1893, and culminated in the decision of the House of Lords in *Smurthwaite v. Hannay*, 1894, A. C. 494, where it was held that several shippers, or several consignees of different shipments, of goods shipped on board the same ship, for carriage from and to the same places, could not join as plaintiffs in one action, against the ship-owners to recover damages for short delivery; because the causes of action were separate and distinct, and could not under the *Rule*, as it formerly stood, be joined in one action; see also *Peninsular and Oriental S. N. Co. v. Taunse Kijima*, 1895, A. C. 161.

The numerous cases in which the decision of the House of Lords was subsequently applied led to the passing in England of the *Rule* of 1896, above mentioned, and in Ontario of the above *Rule* 185.

Under present
Rule
185.

Under the new *Rule* probably all of the cases which follow *Smurthwaite v. Hannay*, 1894, A. C. 494, would now be differently decided. Even under the former Rules it was held that separate actions by husband and wife for damages caused by the same wrongful act ought not to be brought, but that they should join in one action; *Noyes v. Young*, 16 F. R. 254; but see *Himbs v. Vancouver*, 76 L. T. 109.

The power to order separate trials contained in *Rule* 185 is in accordance with the decision in *Hannay v. Smurthwaite*, in the C. A., 1895, 2 Q. B. 412.

"**Series of Transactions.**"—The allegation, that the defendants have been actuated by the same motive in each of a number of similar transactions between them and distinct plaintiffs, is sufficient to constitute the transactions a "series" within the meaning of this *Rule*; *Mason v. G. T. Ry. Co.*, 8 O. L. R. 28.

Eight different contracts of insurance, made by six different persons with the same insurance company, were held not to constitute a series of transactions within the *Rule*: *Housinger v. Mut. Reserve*, 5 O. W. R. 528. **Rule 185.**

Joinder of Plaintiffs.—Two or more holders of debentures may join as plaintiffs in an action against directors of a company for damages for alleged misrepresentations in the prospectus of the company: *Dringbier v. Wood*, 1890, 1 Ch. 393; 70 L. T. 548.

So also two plaintiffs whose names had been wrongfully used in publications of the defendant were held entitled to join in an action to restrain such user: *Oxford v. Gill*, 1890, 1 Ch. 55; 70 L. T. 338. So also two plaintiffs, a married man and an unmarried woman, against whom charges of criminal intimacy had been made by the defendant, on three different occasions, were held entitled to sue in one action in respect of the three charges, there being publication as to all, and the three occasions being a series with a common question of fact: *Agar v. Excott*, 8 O. L. R. 177; but the male plaintiff was held not entitled to join in the action a claim for libel contained in a letter to the female plaintiff, except by way of aggravation of damages: *Ib.*; and several plaintiffs claiming to have been damaged by several defendants combining and conspiring together as officials of different trades unions, to prevent the plaintiffs doing acts they were legally entitled to do, were held entitled to join in one action, and the defendants were also held to be properly sued together: *Walters v. Green*, 1899, 2 Ch. 696.

Where two or more fruit-growers brought an action claiming to enforce certain preferential rights in Covent Garden Market, it was held that the plaintiffs, as representing a class who had an interest in common, could maintain the action; the Attorney-General was directed to be added as a defendant to represent the rest of the public; *sed quare*, if that was necessary: *Ellis v. Duke of Bedford*, 1899, 1 Ch. 494; 1901, A. C. 1; 83 L. T. 486.

Mortgagees asking to have a lease set aside as having been made by the mortgagor after the mortgage, and an assignee for the benefit of creditors asking to have the lease set aside as being voluntary and void as against creditors, were held not entitled to join as plaintiffs: *Bank of Hamilton v. Anderson*, 7 O. L. R. 613; 8 O. L. R. 153.

The new *Rule* does not permit claims for seduction and breach of promise of marriage to be joined in one action: *Dixon v. Tracey*, 17 C. L. T. 381.

A plaintiff claiming on his own behalf damages against directors of a company, in respect of his having been induced by fraud of defendants to purchase shares, was held not entitled under the new *Rule* to make, in the same action, that claim, and also a claim on behalf of himself and all shareholders to a declaration that a declaration of a dividend on shares, when there were no profits, was *ultra vires* and illegal, and for judgment for repayment of the dividend: *Stroud v. Lawson*, 1898, 2 Q. B. 44; 78 L. T. 720.

One of two joint promisees can maintain an action on a contract making the other joint promisee a co-defendant, if after tender of an indemnity against costs he refuses to be joined as a co-plaintiff: *Callen v. Knowles*, 1898, 2 Q. B. 380.

So also one of several joint covenantees may sue alone to restrain a breach of the covenant, where the other covenantees have ceased to be interested in the covenant; but, *scilicet*, they should be joined as defendants: see *Parrell v. Dean*, 31 Ont. 515.

Rule 185. One of several joint owners of a patent may sue for a recovery of profits due for the use of the patent without joining the other owners: *Sheehan v. G. E. Ry. Co.*, 16 Ch. D. 59.

One of several mortgagees may bring a foreclosure action, making his co mortgagees defendants, if they will not join as plaintiffs: *Luke v. South Kensington Hotel Co.*, 11 Ch. D. 121.

One of several owners of a reversion may sue for injury to the reversion without joining his co-tenants: *Roberts v. Holland*, 1893, 1 Q. B. 685.

As to the mode of objecting to a misjoinder or non-joinder of plaintiffs, see *Rule 206*.

Where two or more plaintiffs sue for a joint claim, the defendant may set up a separate counter-claim against each plaintiff: *Manchester, etc., Ry. v. Brooks*, 2 Ex. D. 243.

The proper person to sue directors of a limited company for acts done by them *ultra vires*, is the company itself; but if the company will not allow its name to be used, a shareholder on behalf of himself and other shareholders may sue, making the company a defendant: per Jessel, M.R., in *Russell v. Wakefield, etc.*, L. R. 20 Eq. 474; *Atwood v. Merryweather*, L. R. 5 Eq. 464 n.

Where the action is brought to enforce a public right, the Attorney-General should be plaintiff: *Deranport v. Tozer*, 1903, 1 Ch. 759 (an action to enforce a municipal building by-law). Some only of the public cannot maintain such an action unless they have a special and private interest in the subject matter of the action: *Hop v. Hamilton Park*, 1 O. L. R. 477; *Liverpool v. Chorley*, 1872, 2 D. M. & G. 852.

A company in liquidation retains its corporate powers, and suits to recover debts or property of the company should be brought by the liquidator in the company's name: *Keat v. Communauté des Sœurs de Charité*, 1903, A. C. 220; where, however, the liquidator is suing as representative of the creditors or contributories, he should sue in his own name: *Id.*

An objection that one of several plaintiffs has no title to maintain the action, should be taken by defence under *Rule 285*: *Harvey v. Ross*, 3 O. L. R. 354.

A sovereign of a foreign state is not obliged to sue in his own name to enforce contracts made on his behalf by his ministers, by such ministers or their successors in office, though not expressly named in the contract, may sue for the enforcement thereof: *Yezquiedo v. Clydebank E. Co.*, 1902, A. C. 524; 87 L. T. 329.

Costs. Where two plaintiffs joined in an action and one was successful and the other unsuccessful, the successful plaintiff was held to be chargeable with the costs of joining the unsuccessful plaintiff: *W. Horwood & Co. and Isaacs & Co. v. Grey*, 10 Q. B. D. 13; 52 L. J. Q. B. 16, but in *Viscount Gort v. Rowney*, 17 Q. B. D. 625, where costs had been ordered "to abide the event," it was held that the unsuccessful plaintiff only was liable for the costs occasioned by his being joined in the action.

Where some plaintiffs were successful but some were absent from the trial from illness and gave no evidence, the latter were ordered to pay defendants the costs occasioned by their being joined as plaintiffs without prejudice to their bringing a fresh action: *Landon v. S.*, 41 Ch. D. 318.

186. All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative; and, without any amendment, judgment may be given against one or more of the defendants, according to their respective liabilities. Con. Rule 301.

Rule 186.

Who may be joined as defendants.

(Compare Eng. (1883) R. 126.

This Rule must be read with Rule 206: *Edwards v. Lowther*, 24 W. R. 434.

Rules 187 and 188 seem to be applications of the principle of the present Rule.

Joinder of Defendants.—Under the present practice in considering the propriety of the joinder of defendants, the nature of the action and the relief asked must be considered. If that relief is of an equitable nature all parties must be before the Court whose presence is necessary to give the plaintiff, if successful, the full measure of his rights, assuming that the action is not multifarious. On the other hand the plaintiff cannot join two independent claims merely because they happen to relate to the same subject matter, there being no connection otherwise between the parties: *Ludlow v. Forsythe*, 7 Q. L. R. 188.

Ordinarily the right to sue, and the liability to be sued attaches only to individuals, corporations or firms, and as a general rule all persons interested in the subject matter of an action should be made parties either as plaintiffs or defendants, but there are many cases in which the parties interested are so numerous that if it were necessary to make them all parties the difficulty in suing them and carrying on the suit would be insuperable. The rules as to parties to suits in equity were not the same as those which governed Courts of Common Law, and were long since adapted to meet the difficulties presented by a multiplicity of persons interested in the subject matter of litigation. Some of such persons were allowed to sue and be sued on behalf of themselves and all others having the same interests. This was avowedly done to prevent a failure of justice: see *per* Lord Lindley: *Tuff Vale Ry. Co. v. Amalgamated Society of Railway Servants*, 1901, A. C. 426; 85 L. T. 147. Suits so constituted were technically called class suits, and provision is made by Rule 200 for the continuance of the former equity practice as to parties in such cases.

This Rule was formerly analogous to Rule 185 as to plaintiffs; and the two Rules received a similar construction; but no amendments corresponding to those indicated by brackets in Rule 185 have been made in this Rule, so that even assuming that the amendments to Rule 185 have the effect of overriding the decision in *Smurthwaite v. Hannay*, 1894, A. C. 494; 71 L. T. 157, as to plaintiffs, it may still be open to doubt whether the former decisions based upon that case, as regards the joinder of defendants, are not still binding authorities: see *Gincer v. Couldridge*, 1898, 1 Q. B. 318.

Defendants severally sued on several causes of action.

Following *Hannay v. Smurthwaite*, it was held by the House of Lords that a plaintiff could not join several defendants in an action to abate several separate nuisances, though occasioned by similar but separate acts: *Sadler v. G. W. Ry.*, 1896, A. C. 450; 74 L. T. 561. And it has been held that several defendants, sued under R. S. O. c. 245, s. 122, for wrongfully supplying liquor to a person at

Rule 186. different times, could not be joined as defendants in the same action *Crane v. Hunt*, 26 Ont. 641.

Torts —
Separate
causes of
action
against dif-
ferent per-
sons.

Where several defendants are sued, a claim for damages in respect of a tort alleged against some of them cannot be combined with a claim for damages in respect of a separate tort alleged against all: *Gower v. Condrige*, 1898, 1 Q. B. 348 (explained in *Frankenburg v. Great Horsham Carriage Co.*, 1900, 1 Q. B. 504; see also *Thompson v. London County Council*, 1899, 1 Q. B. 840); claims against two or more defendants in respect of separate torts cannot be joined in the same action: *Appleton v. Fuller*, 6 O. L. R. 683; *Hinds v. Barric*, 6 O. L. R. 656; even though the damage complained of may be the same as against each defendant; *Thompson v. London County Council*, 1899, 1 Q. B. 840; and generally speaking, a plaintiff cannot claim on separate causes of action against different persons in one action, if the real causes of action that exist against them are separate; *Quigley v. Waterloo*, 1 O. L. R. 606; *Hinds v. Barric*, 6 O. L. R. 656; but there may be such unity in the matters complained of as between all parties as to justify the joining of defendants who are not all interested in the same way, or in the same inquiries: *Ernst v. Jaffray*, 1 O. L. R. 614.

Causes of action for a similar slander spoken at different times by each defendant, but arising out of the same matter, cannot be joined in the same action; and a cause of action for conspiracy between the defendants wrongfully to dismiss the plaintiff cannot properly be joined with either of the causes of action for slander: *Pope v. Hurtray*, 17 Times L. R. 717; 85 L. T. 203; but persons who conspire illegally to watch and beset a place with a view to persuade workmen not to work, or to cease work for a person, may be sued jointly in the same action: *Walters v. Green*, 1899, 2 Ch. 696. (There the right to the relief claimed arose out of the same series of transactions, and there was a common question of fact as well as law, whether all the acts complained of were done in pursuance of a combination so as to render the defendants jointly liable.) Even if it were not established that all the defendants had committed the acts complained of, judgment might be recovered against some or one of them: *Id.*

In an action against two joint tort-fensors for conversion, a claim may be joined against one of them for money had and received, if it arise out of the same transaction: *Rice v. Reed*, 1900, 1 Q. B. 54, so also an action may be maintained against a company and its directors and the executors of a deceased director, for cancellation of plaintiff's shares and damages, on the ground of misrepresentations in the prospectus of the company: *Frankenburg v. Great Horsham Carriage Company*, 1900, 1 Q. B. 504.

Alternative
claims

In an action by the assignee of a debt, the plaintiff was allowed to add the assignor and claim alternative relief against him, in the event of being unable to recover against the debtor: *Langdon v. Life Society*, 3 O. L. R. 247. But the later cases seem to establish that this Rule is confined to cases in which the alternative relief asked by a statement of claim against one defendant is consistent with that asked against another; and entirely separate and distinct causes of action, founded upon different rights, cannot be joined in the same action: *Quigley v. Waterloo*, 1 O. L. R. 606; *Chandler v. Grand Trunk Ry.*, 5 O. L. R. 589; *Andrews v. Forsyth*, 7 O. L. R. 188, but see *Honduras Ry. Co. v. Tucker*, 2 Ex. D. 301; *Child v. Staddon*, 5 Ch. D. 657; *Philips v. Philips*, 4 Q. B. D. 134.

If the defendant can show that there is inconvenience or additional expense in trying both the claims at the same time, or that the disposition of one will render the trial of the other unnecessary, he may apply under *Rule 237* for the trial of one issue before the other is approached: *Bagot v. Easton*, 7 Ch. D. 1; or he may apply to compel a plaintiff to elect against which defendant he will proceed: *Andriess v. Foraythe*, 1 O. L. R. 188.

If alternative cases are alleged, the facts ought not to be mixed up, but should be stated so as to shew on what facts each alternative of the relief sought is founded: *Davy v. Garrett*, 7 Ch. D. 489.

Where the claim of the plaintiff is in the alternative against one or the other of two defendants, if the plaintiff take final judgment against one of the defendants, that is a bar to the further prosecution of his action against the other defendant: *Morrell v. Westmoreland*, 1883, 1 K. B. 64; 87 L. T. 635; 1904, A. C. 11; 89 L. T. 702; and see *Cross v. Mathers*, 117 L. T. Jour. 220.

Where the plaintiff succeeds against one defendant, but not against another: the costs of the successful defendant must be borne by the plaintiff, and not by the unsuccessful defendant, unless the Court orders otherwise: see *Child v. Stenning*, 7 Ch. D. 413; 11 Ch. D. 82, and *Bingham v. Alexander*, cited *Charley's Judicature Act*, 3rd ed. 475. See also *Rule 1131*.

If a plaintiff brings separate actions against a number of persons whom he might have joined as defendants in one action, he may have to pay the defendants' extra costs: *Gueret v. Young*, W. N. 1883, 216.

In *Warch v. Mihelli*, W. N. 1891, 86; 64 L. T. 560, it was said that a man cannot be both plaintiff and defendant, and therefore where the plaintiff was also made a defendant in another capacity his name was struck out as a defendant.

It is not proper to make individual corporators defendants for the sole purpose of making them pay costs: *Atty.-Gen. v. Vestry of Bermundsey*, 23 Ch. D. 60. See also *Matthias v. Yetts*, 46 L. T. 497; *Barnes v. Addy*, L. R. 9 Chy. 244, 25; 256; *Burstall v. Bopfus*, 26 Ch. D. 35; *Amos v. Herne Bay*, 80 L. T. Jour. 356, for what was formerly known in Chy. as the *Rule of the three A's*, and for observations on the practice of making attorneys, agents and arbitrators parties to suits, alleging against the principal defendants fraud in which the co-defendants are not implicated.

As to adding a party for discovery only, see *Symonds v. City Bank*, 79 L. T. Jour. 175, and *Rule 191*.

A sovereign of an independent foreign state, though within the jurisdiction of the Court, is not liable to a civil action unless he chooses to submit to the jurisdiction: *Mihelli v. Sultan of Johore*, 1894, 1 Q. B. 149; 70 L. T. 64; neither is a foreign ambassador: *Muxuru Bey v. Galhau*, 1894, 1 Q. B. 533. As to the extent to which a foreign sovereign by suing submits to the jurisdiction, see *S. African Republic v. Compagnie Franco Belge*, 1898, 1 Ch. 190, in the note, *supra*, p. 235.

In *Hyad v. Bowman*, 9 P. R. 12, the plaintiff sued in respect of the flooding of land by a milldam. The G. W. Ry. had turned the waters of the stream into another channel, which was not deep enough to carry off all the water, even though the defendant's dam were removed, so that complete relief could not be given, even though the plaintiff were successful against the defendant. The plaintiff was

Rule 187. therefore allowed under this *Rule* and *Rule 208* to add the G. W. Ry. Co. as defendants.

In *Heatley v. Newton*, 51 L. J. Chy. 225, an action by a purchaser for rescission of a contract of sale and costs, auctioneers were made co-defendants with the vendors, the plaintiff alleging that they and the vendors had joined in a fraud whereby the plaintiff was induced to pay too high a price. It was held that the auctioneers were rightly joined and could not claim to be dismissed merely on payment of the deposit into Court, and costs to the date of the order.

In an action to recover the value of goods (an engine and boiler), a person who had notified the plaintiff not to remove the goods, which had not been paid for, and the property in which had not passed, was made a defendant in the action: *Polson v. DeGroot*, 12 Ont. 279.

An action against four independent saw-mill owners, from whose mills sawdust and refuse matter were carried down the River Ottawa and lodged upon and in front of the plaintiff's land, was held to have been properly brought against all four owners as defendants: *Ratti v. Booth*, 10 P. R. 649.

Where a restrictive covenant in a lease is omitted in a sub-lease, both lessee and sub-lessee are properly made defendants in an action for breach of the covenant: *Tritton v. Bankart*, 35 W. R. 474; 161 T. 306; 56 L. J. Chy. 623.

In an action by a creditor to recover a debt, persons to whom the debtor had made an alleged fraudulent conveyance of his property, which the plaintiff claimed to have set aside, were held to be properly joined as defendants: *Hutton v. McKellar*, 13 P. R. 81.

In an action by a simple contract creditor claiming merely to set aside a conveyance as fraudulent against creditors, the debtor and grantor is a necessary party as well as the grantee: *Gibbons v. Davill*, 12 P. R. 478.

See also *Rule 192* and notes.

Where defendant not interested in all the relief prayed.

187. It shall not be necessary that every defendant to an action shall be interested as to all the relief thereby prayed for, or as to every cause of action included therein; but the Court or a Judge may make such order as may appear just, to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in the action in which he may have no interest. Con. Rule 302.

Same as Eng. (1883) R. 127.

See *Cur v. Barker*, 3 Ch. D. 359, where this *Rule* was considered and given a liberal construction. The judgment of V.-C. Bacon, which was affirmed on appeal, contains the following passages: "I take it that it was the intention of the Legislature, when any question of any sort, or any set of questions, arose, to endeavour by one hearing and one decree to dispose of all matters in litigation between all the parties who were interested in the subject of the litigation. The Act of Parliament, at the same time that it has enabled any person stating a claim to bring before the Court all persons interested in that claim, and to include in the claim every question that

belong to it, or arise out of it, has, at the same time, carefully provided that no one shall be prejudiced by the fact of his being joined. The Rules are distinct on the subject." **Rule 188.**

It was held that notwithstanding this Rule separate tortfeasors could not be joined as defendants in the same action: *Sadler v. Great Western Ry.*, 1890, A. C. 450; 74 L. T. 561; *Gower v. Couldridge*, 1898, 1 Q. B. 348; *Thompson v. Lardon*, 1890, 1 Q. B. 840; 80 L. T. 512; *Pope v. Hawtrey*, 85 L. T. 263; *Quigley v. Waterloo*, 1 O. L. R. 606; *Walter v. Green*, 1899, 2 Ch. 606, 81 L. T. 151; but see *Evans v. Jaffray*, 1 O. L. R. 614.

See notes to Rule 186.

188 The plaintiff may join as parties to the same action all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange and promissory notes. Con. Rule 303.

All or any parties liable on one contract may be joined.

Same as Eng. (1883) R. 128.

By R. S. O. 1877, c. 50, s. 134, it was provided that all the parties to a bill or note might be joined in one action; but by sec. 135 the non-joinder of any joint drawer, maker, indorser, or acceptor might be pleaded in abatement.

By the present Rule it is optional with the plaintiff in actions on bills and notes, as well as in actions on any other contract, to proceed against any one or more of the parties jointly or severally liable: see *Re Arcedeckne*, *Atkins v. Arcedeckne*, 24 Ch. D. 709; *Hurray v. Gillett*, 18 C. L. J. 78; but one of such parties if sued alone is entitled to have his co-contractors joined, wherever under the old practice a plea in abatement might have been pleaded: *Pilley v. Robinson*, 20 Q. B. D. 155, as explained in *Wilson v. Balcarres*, 1893, 1 Q. B. 422; *S. C. sub nom. Wilson v. Killick*, 68 L. T. 169. Where, however, the joint contractor is a foreigner residing out of the jurisdiction the defendant cannot insist on his being joined: *Id.*; see also *Rubb v. Hurray*, 13 P. R. 397. The Court will ordinarily stay the plaintiff's proceedings until the co-contractor is added, when the latter is within the jurisdiction, but where he has been added as defendant, and after reasonable efforts, the plaintiff is unable to serve him with process, the action will be allowed to proceed against the other parties: *Robinson v. Girard*, 1894, 2 Q. B. 695; 71 L. T. 70.

As to the rule that judgment recovered against one of two joint contractors or tortfeasors is a bar to an action against the other: see *Hammond v. Schofield*, 1891, 1 Q. B. 453; *Toronto Dental Mfg. Co. v. McLaren*, 14 P. R. 89; *Kelly v. Hammond*, 2 Times, 804; *Went v. James*, 68 L. T. 515; and note to Rules 222 and 223.

Under Chy. Gen. Order 62, a plaintiff might select one or more of several persons liable. Under the corresponding English Con. Order (A. R. 21), it was held in *Smith v. Horsfall*, 24 Beav. 331, that if the plaintiff chose to sue all or some of them, and the suit became defective or abated by reason of a transmission of the interest of one of them, he could not afterwards proceed against the other. This gloss on the Order was described as highly technical: *Grey v. Leavis*, L. R. 8 Chy. 1037, 1052, and will not be imported by analogy into the present Rule: *Lloyd v. Dimmack*, 7 Ch. D. 398. In the latter case two of five defendants became bankrupt, and it was held that the action might proceed against the other three without bringing the

Rules trustees of the bankrupts before the Court. For other restrictions upon the application of Chy. G. O. 62, see *Lewin*, 8th ed., 807. See also *Wilson v. Rhodes*, 8 Ch. D. 777.

189. A surety for the payment of a mortgage debt may be made a party to the action for the sale of the mortgaged property. Con. Rule 304.

Surety may be joined with mortgagor, relief obtained against both.

Liability of assignee of mortgagor.

Of assignor of a mortgage on covenant for its payment.

Under this *Rule* an assignee of the mortgagor who had covenanted with the mortgagor to pay the mortgage debt, could not formerly have been ordered to pay the mortgagee, to whom he was under no legal liability: *Turnbull v. Symmonds*, 11 Gr. 315; *Clarkson v. Scott*, 25 Gr. 373; and see other cases in notes to *Rule* 378. And where the original mortgagee had assigned the mortgage to the plaintiff and covenanted for payment, it was held that he was not a surety within the meaning of this *Rule*, but that the contract amounted merely to a guaranty, to enforce which, a separate action must be brought. *Clarke v. Best*, 8 Gr. 7. But it would seem that in such cases the appropriate relief as between the plaintiff and defendants, and between the defendants *inter se*, may now be granted in the same action. See *Rule* 215, and *Campbell v. Robinson*, 27 Gr. 634; *Chamberlain v. Norris*, 28 Gr. 404.

Principal, when a necessary party.

Where the surety had given a mortgage on his own property, the principal debtor was formerly a necessary party to an action for foreclosure, or sale thereof: *Scidler v. Sheppard*, 12 Gr. 453.

A surety cannot be required to pay the amount of a judgment which it has been agreed shall stand as security for the deficiency on a mortgage, until the security has been realized and the deficiency ascertained: *Tetter v. St. John*, 10 Gr. 85.

Liability of surety for deficiency.

Where a surety is not joined in an action against his principal, he may be released from liability for interest accruing subsequent to the judgment against his principal, on the ground that the right of action against the principal is merged in the judgment: *Faber v. Latham*, 77 L. T. 108.

Parties interested in equity of redemption may be allowed to be added or dispensed with.

190 —(1) Where one or more of the persons interested in the equity of redemption are already defendants and it is made to appear to the Court or a Judge either upon motion for that purpose, or at the trial or other disposition of the action, that by reason of their number or otherwise, it is expedient to permit the action to proceed without the presence of the other persons interested in the equity of redemption, the Court or a Judge may make directions accordingly, and may order such other persons to be made parties in the Master's office after judgment.

(2) Where after judgment it appears that persons are interested in the equity of redemption besides those who are already parties, the Court or a Judge may order such persons or any of them to be made parties in the Master's office upon such terms as may seem just. See Con. Rule 306.

Based upon Chy. O. 438 with amendments. This *Rule* and *Rules* 203 (3), 659 and 746, constitute an exception to the general rule of

practice, that after judgment at the trial parties cannot be added: **Rule 190.** *see Durham v. Robertson*, 1898, 1 Q. B. 763, per Chitty, L.J., at p. 774; and *see Johnston v. Consumers' Gas Co.*, 17 P. R. 207.

The words "persons interested in the equity of redemption" in this Rule are intended to apply to persons interested in the ultimate equity of redemption, i.e., the mortgagor or any one standing in his place. As a general rule, all parties interested in the ultimate equity of redemption in mortgaged property, ought to be made original defendants in an action to enforce the mortgage, by sale, or foreclosure: *Peters v. Holland*, 8 Gr. 238; *Buckley v. Wilson*, 8 Gr. 500; but not *incumbrancers*, or execution creditors, who are always added in the Master's office: *see Rule 740.*

This Rule makes an exception to the general rule, and enables the Court or a Judge to direct that parties interested in the ultimate equity of redemption, may be made parties in the Master's office.

Under the former Con. Rule 300 it was not clear whether before judgment the other persons could by order be directed to be added in the Master's office. It was in Chancery done either upon motion for judgment: *Jones v. Bank of E. C.*, 12 Gr. 429; *Faulk v. Harper*, 2 Ont. 405; or upon motion in Chambers afterwards: *see cases infra.* This Rule contemplates either an interlocutory order, or an order embodied in the judgment. Such a direction, however, cannot be inserted in a judgment obtained *ex parte*.

Clause (2) is new, but only states what might previously have been done.

Upon any such motion to add parties in the Master's office the parties already before the Court are entitled to notice, but not those intended to be added: *Pomeroy v. Canniff*, 1 Chy. Ch. 351; *Harrison v. Greer*, 2 Chy. Ch. 440; *Runkle v. Moore*, 1 Chy. Ch. 59; but *see Chumley v. Harrison*, 1 Chy. Ch. 380, where the order was granted *ex parte*. But after a final order of foreclosure, or sale, the application is in general too late: *see Orford v. Bayley*, 1 Chy. Ch. 272; *Street v. Dolan*, 3 Chy. Ch. 227. And where the plaintiff had not acted with reasonable diligence in framing his suit, the order was refused: *Portman v. Paul*, 10 Gr. 458.

Where an order of this kind has been obtained in Chambers after judgment, the defendant so added should be served with a copy of the order adding him, and also with an office copy of the judgment which, by analogy to the procedure laid down in Rule 203 (31), should be indorsed with a notice according to Form No. 74. Any motion to set aside or vary the order or judgment should be made to the Court upon petition: *Tice v. Myers*, 3 C. L. J. 102.

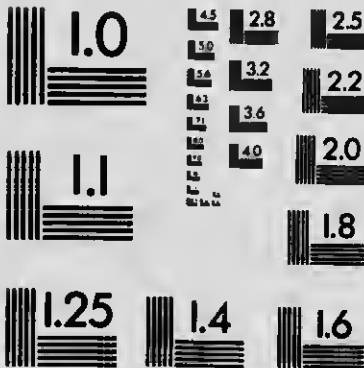
Wherever the party added claims by title paramount to the plaintiff's, he may move to discharge the order adding him as a party: *Houghton v. Shortis*, 3 Chy. Ch. 69; but *see note to Rule 747.*

Occasionally it happens that the plaintiff is unable to determine which of the defendants is entitled to the equity of redemption, or there may be a conflict between defendants on this point *inter se*. The Court will not however determine such questions *ex parte*, even against defendants who have not appeared, but will pronounce the usual judgment directing all the defendants to redeem, leaving them to settle their rights *inter se* by a separate proceeding: *Robinson v. Dobson*, 11 Gr. 357, and *see Ramsay v. Thompson*, 8 Gr. 372; or may direct the Master to inquire as to the point: *Copley v. Hudson*, 13



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Rule 190. Gr. 433. But latterly any such reference if ordered has been directed as a separate reference from the general reference in the cause, and so as the plaintiff may not be put to expense, or delay, thereby: see decree in *Johnson v. Neezer*, D. B. 27, fo. 150.

Wife of Mortgagor.—Whether the wife of the mortgagor who joined in the mortgage to bar her dower should be a party to an action for foreclosure or sale has been several times considered. Prior to R. S. O. 1887, c. 133, ss. 5-8 (see now R. S. O. c. 164, secs. 7-9), it was held that she was neither a proper nor a necessary party: see *Moffatt v. Thomson*, 3 Gr. 111; *Davidson v. Boyes*, 6 P. R. 27. After that Act she was held to be a proper party: *Building & Loan v. Carswell*, 8 P. R. 73; *Ayerst v. McClean*, 14 P. R. 15. In *Cassner v. Haight*, 6 Ont. 451, she was held, by Proudfoot, J., to be not a necessary party, but the contrary view was taken by Rose, J., in *Blong v. Fitzgerald*, 15 P. R. 467, where on her application she was added as a defendant, the opinion being intimated that she was a necessary party in order to bind her by the proceedings. The weight of authority appears to be rather in favour of the view that she is a proper, but not a necessary party. The safer practice is to add her as a party, though strictly speaking a married woman having a mere inchoate right of dower in the equity of redemption has no present right to redeem.

Husband of Mortgagor.—In view of what is said by Osler, J.A., in *Moore v. Jackson*, 19 Ont. App. at p. 396, and see *Wallace v. Lea*, 28 S. C. R. 595; it would seem safer to add the husband of a married woman mortgagor as a defendant in an action for foreclosure or sale, notwithstanding the estate mortgaged may have been her separate estate.

Infant Heirs of Intestate Mortgagor.—Though the record may be complete as a matter of title, since *The Devolution of Estates Act*, by making the administrator of the mortgagor sole defendant (see *Plenderleith v. Smith*, 5 O. W. R. 753), yet as a matter of procedure the infant heirs are proper parties, and as such should be made defendants to the writ, unless some good reason exists for omitting them: *Keen v. Codd*, 14 P. R. 182. See notes to *Rules 193-195*.

Devisees of a mortgagor were ordered to be added: *Watts v. Lanc*, 84 L. T. 144.

Railway Co.—A railway company which has expropriated part of the mortgaged property and obtained an award fixing the compensation is a proper party to a foreclosure action when the award has not been taken up, and the compensation has not been paid: *Scottish Investment Co. v. Prittie*, 20 Ont. App. 398.

Prior Mortgagees.—Con. Rule 305 of 1888 has not been inserted in the present Consolidation, as the practice which it stated is now too well established to require stating in a Rule. That Rule was as follows:

Where relief is sought subject to prior mortgage, prior mortgagee an unnecessary party.

"305. Where the plaintiff prays a sale or foreclosure, subject to a prior mortgage, the prior mortgagee is not to be made a party either originally or in the Master's office, except under special circumstances to be alleged in the statement of claim. Chy. O. 440."

This Rule was, and the practice which it stated will still be, confined to cases where the plaintiff claims relief subject to the prior

mortgage; where he seeks to redeem, or in any way to bring in question the right of the prior mortgagee, the latter must, of course, be made a defendant by writ. Rule 190.

Formerly Chy. O. 439 provided that where a bill was filed by a subsequent incumbrancer seeking relief against a prior mortgagee, such mortgagee must be made a party previous to the hearing of the cause; but that Order was in 1888 omitted from the *Rules* as being no longer necessary. The practice it prescribed, however, is still in force.

An action for redemption by a subsequent, against a prior mortgagee, will not lie, unless the prior mortgage, and that of the plaintiff, are both overdue: *Parsons v. Bank of Montreal*, 15 Gr. 411; *Long v. Long*, 16 Gr. 239. The owner of the equity of redemption is a necessary party to such an action: *Id.* Subsequent incumbrancer, action for redemption by.

A bill, by a subsequent incumbrancer, against a prior mortgagee, claiming the right of redemption, but not offering to redeem him, was not demurrable: *Pearson v. Campbell*, 2 Chy. Ch. 12 (but see *Rogers v. Lewis*, 11 Gr. 257); and it would probably now be held that a statement of claim, omitting an offer to redeem, would not be open to objection under the present practice: see *National Bank v. United Hand in Hand Co.*, 4 App. Cas., at p. 400.

A subsequent incumbrancer, bringing an action against a prior mortgagee, is not entitled to a sale: *McDougall v. Campbell*, 6 S. C. R. 502; unless the prior incumbrancer consents, or does not object, to a sale: *Grange v. Barber*, 2 Chy. Ch. 189; he is only entitled to judgment for redemption, and in default of redemption he is foreclosed: see Rule 391, or the action is dismissed, as against both mortgagee and mortgagor with costs: *Hallett v. Furze*, 54 L. T. 12, which is equivalent to a foreclosure of the plaintiff: *Cornwall v. Henriod*, 12 Gr. 338; *Inman v. Wearing*, 3 De G. & Sm. 734; except in the case of an equitable mortgage by deposit: *Marshall v. Shrewsbury*, L. R. 10 Chy. 250, unless in the latter case the defendant on obtaining the dismissal, obtains also an order for the absolute conveyance of the property, as he probably might do under the present system of procedure: see Jud. Act, s. 57 (12). Not entitled to a sale.

In an action by a subsequent incumbrancer, to redeem, he may also impeach transactions by the prior mortgagee in reference to the mortgaged estate: *McLaren v. Fraser*, 15 Gr. 239.

Although a prior mortgagee can, ordinarily, only be made a party to an action by a subsequent incumbrancer, for the purpose of redeeming him, yet where the prior security is created by a deed absolute in form, a subsequent incumbrancer is at liberty to bring him before the Court for the purpose of showing his interest to be redeemable, without offering to redeem him: *Moore v. Hobson*, 14 Gr. 703; and see *Rogers v. Lewis*, 12 Gr. 257. To such an action the execution creditors of the alleged mortgagee are necessary parties: *Glass v. Freckleton*, 10 Gr. 470; and see *Darling v. Wilson*, 16 Gr. 255, 257. Prior mortgagee, when he may be made a defendant.

Where a prior incumbrancer is made a party to an action by a subsequent incumbrancer, and a judgment for sale is obtained by consent, or without objection on the part of the prior incumbrancer, the proceeds of the sale must be distributed in payment of the claims of the incumbrancers according to their priorities, and in such a case the plaintiff is not entitled to any priority in respect of his costs, even though the fund prove insufficient: *Grange v. Barber*, 2 Chy. Ch. 189. Subsequent incumbrancer obtaining sale has no priority for costs.

Rules**191, 192.**

Assignee of equity of redemption, when entitled to attack prior mortgage for fraud.

Where the equity of redemption was valueless, and an assignment thereof was made merely for the purpose of enabling the assignee to impeach a prior mortgage on the ground of fraud for the benefit of the assignor, the assignment was held to savour of champerty, and no relief was granted to the assignee, even though he asked in the alternative for redemption: *Muchall v. Banks*, 10 Gr. 25; and see *Little v. Hawkins*, 19 Gr. 267; *Wigle v. Settrington*, *Ib.*, 512; *Bell v. Walker*, 20 Gr. 558; *Hilton v. Woods*, L. R. 4 Eq. 432. But where the assignee takes beneficially, and the assignment is not made merely to enable him to sue in respect of the alleged fraud, it would seem that he may maintain the action: *Swear v. Lawson*, 15 Ch. D. 424; *Dickinson v. Burrell*, L. R. 1 Eq. 337.

Relief against other incumbrancers.

A subsequent incumbrancer may, in the same action, obtain relief against the mortgagor, and incumbrancers subsequent to himself—consequent on his redeeming the prior mortgage: *Rogers v. Lewis*, 12 Gr. 257; *McLaren v. Fraser*, 15 Gr. 230; and see *Rule 753*.

Prior mortgagee owning eq. of red., account for rents by.

A prior mortgagee in possession, who is also the owner of the equity of redemption, is only bound to account to a subsequent incumbrancer for rents and profits, on the footing of a mortgagee in possession, until his mortgage is paid off; any subsequent receipts he is entitled to retain without account as owner: *Steinhoff v. Brown*, 11 Gr. 114.

Officers of corporations not to be made defendants merely for discovery.

191. Where an action is brought against a corporation aggregate, an officer of the corporation shall not be made a defendant for discovery only. Con. Rule 307.

Officers may be parties when charged with wrongful acts.

This *Rule* applies to cases where the officers are made parties for "discovery only," but where the plaintiff charges the officers of a corporation with collusion and conspiracy to deprive plaintiff of his rights, or damages are claimed against them for wrongful acts, such officers may be properly made defendants notwithstanding this *Rule*: *Cuthbert v. The Commercial Travellers' Association*, 24 Gr. 731; *Cline v. The Mountairvine Cheese Factory*, 20 Gr. 227; *Betts v. Neilson*, L. R. 3 Ch. 420; L. R. 5 H. L. 1.

As to discovery by corporations, see *Rules 433a, 468*.

Several defendants in cases of doubt.

192. Where the plaintiff is in doubt as to the person from whom he is entitled to redress he may join two or more defendants, in order that the question as to which, if any, of them is liable and to what extent, may be determined as between all parties. Con. Rule 308.

Substantially the same as Eng. (1883) R. 129.

This *Rule* is applicable to actions which have been already commenced, as well as to those in which the plaintiff is in doubt at the commencement of action: *per Cockburn, C.J.*, in *Honduras, etc., v. Tucker*, 2 Ex. D. 395. In that case the plaintiffs claimed against L. specific performance of a contract alleged to have been made by T., the authorized agent of L.; they afterwards alleged that L. denied that T. was his authorized agent, and were therefore in doubt as to who was liable, and they obtained leave to add T. as defendant, claiming that if he was not the authorized agent of L. he was liable as principal. See also *Bennett v. McIlraith*, 1890, 2 Q. B. 464, followed in *Fate v. Natural Gas Co.*, 18 P. R. 82, but it is doubtful

whether these cases would now be followed: see *Quigley v. Waterloo*, **Rule 193**, 1 O. L. R. 606; *Chandler v. Grand Trunk Ry.*, 3 O. L. R. 589; *Andriens v. Forsythe*, 7 O. L. R. 188; and it would seem that the *Rule* would now be held only to apply to the case of the plaintiff having a single claim, and being in doubt as to which of two or more defendants is liable to satisfy it.

If the doubt arises after an action has been commenced as to whether the defendant sued is the party liable, other parties may be added under *Rule 206* (2): *Tate v. Natural Gas Co.*, *supra*.

This *Rule* was applied in *Harvey v. G. T. Ry. Co. & G. W. Ry. Co.*, 9 P. R. 80, affirmed on appeal 7 Ont. App. 715, where injury was done to goods carried by two railway companies, but the plaintiff was not able to ascertain which line of railway the goods were on at the time of the injury. The plaintiff was held entitled to join both companies as defendants; and see *Witted v. Galbraith*, 1893, 1 Q. B. 431. But this *Rule* does not authorize the recovery of judgment against two or more parties separately liable, and where damages were assessed against two defendants under such circumstances, the Court directed judgment to be entered against one defendant only, on the plaintiff agreeing to abandon judgment as to the other defendant: *Crauc v. Hunt*, 26 Ont. 641.

In an action brought against an Irish railway company claiming damages for breach of contract in not carrying pigs from a station in Ireland to Liverpool, and for trover and conversion of the pigs; the company having stated in answers to interrogatories, that some of the pigs were sold by the L. & N. W. Ry. Co., on whose line part of the journey had to be performed, but without communication with the defendants, leave was given to add the L. & N. W. Ry. Co. as defendants: *Creaton v. Midland, G. W. Ry. Co.*, 10 L. R. Ir. 74.

Where a plaintiff sues two defendants as alternatively liable, if he recovers final judgment against one of them, he cannot prosecute the action any further against the other defendant, and against him the action must be dismissed: *Morel v. Westmoreland*, 1894, A. C. 1. *see also*

As to the person by whom the costs of a successful defendant are to be borne: see notes to *Rules 186* and *1131*.

193. Trustees, executors, and administrators may sue and be sued on behalf of, or as representing, the property or estate of which they are trustees or representatives, without joining any of the persons beneficially interested, and shall represent them; but the Court or a Judge may, at any time, order any of them to be made parties in addition to, or in lieu of, the previous parties. *Con. Rule 309.*

Substantially the same as Eng. (1883) R. 130, and an extension of *Cby. O. 61*.

The effect of *Rule 193* is that in litigation with strangers, trustees and executors represent their *cestuis que trustent*: *Re Cooper*, *Cooper v. Vesey*, 20 Ch. D. 611; *Bulley v. Bulley*, 8 Ch. D. 489; *Brooke v. McLean*, 5 Ont. 209; thus in a suit for redemption a trustee of the equity of redemption has been held to sufficiently represent the trust estate: *Mills v. Jennings*, 13 Ch. D. 639; 6 App. Cas. 638; *sub nom.*

Rule 193. *Jennings v. Jordan*; see *Day v. Radcliffe*, 24 W. R. 844; so trustees of real estate, in a partition suit under *The Partition Act*: *Starr v. Gage*, 8 Ch. D. 451; *Simpson v. Deeny*, 10 Ch. D. 28; *Goodrick v. Marsh*, W. N. 1878, 188; In *Re Cooper*, 20 Ch. D. 611, one of four trustees under a will was a beneficiary and son of the testator and bore the same name. He, personating the testator, mortgaged the trust estate, and employed the mortgage money for his own use. After his death the remaining trustees brought an action against the mortgagees and beneficiaries to have the mortgage declared void. It was held that the plaintiffs represented the beneficiaries, and that the latter were improperly made parties, and an order directing the mortgagees to pay their costs was therefore reversed on appeal.

But where the trustee was bankrupt: *Francis v. Harrison*, 43 Ch. D. 183; and even where not bankrupt: *Griffith v. Pound*, 45 Ch. D. 553; *Warell v. Mitchell*, 64 L. T. 500, it has been held that he does not sufficiently represent his c. q. t. as defendant in an action of foreclosure unless he is also personal representative of the mortgagor: *S. C.* 65 L. T. 851; *Re Booth & Kettlewell*, 67 L. T. 551.

Where the action is brought by a *cestui que trust* in respect of an alleged breach of trust, the trust estate must be represented, e.g., where the trustees have died, and none been appointed in their stead, the personal representative of the last surviving trustee must be before the Court, or new trustees must be appointed and made parties to the action, because a *cestui que trust* has no legal title to the trust estate, and it is always necessary that the party having the legal title to the property in question shall be a party to the litigation: *Re Jordan*, 1904, 1 Ch. 260.

Where the subject of a settlement was an equitable chose in action, and the legal estate was not in the trustees of the settlement, but in the trustees under a prior will who were charged with mis-application of the fund, the *cestui que trust* was held entitled to institute the suit: *Pigot v. Stewart*, W. N. 1875, 69.

Notwithstanding this *Rule* where the interests of the *cestui que trust* are in conflict with those of the trustee, they should all be made parties: see *Meldrum v. Scorer*, 56 L. T. 471.

A *cestui que trust* may probably also still be properly joined where the chief object of the suit is to affect the right of the *cestui que trust*: *Liddell v. Deacon*, 20 Gr. 72; *Day v. Radcliffe*, 24 W. R. 844; or the trustee has an adverse interest: *Payne v. Parker*, L. R. 1 Ch. 327; or there is a question of fraud: *Read v. Prest*, 1 K. & J. 183.

Where the action is against a personal representative to recover a debt due by the deceased, if the defendant does not plead and prove *plene administravit*, he is liable to be personally ordered to pay the costs of the action; but when the action is brought for foreclosure as well as to enforce a covenant for the payment of the mortgage debt, only so much of the costs as relate to the claim on the covenant should be ordered to be paid by an executor or administrator personally: *Miles v. Brown*, 15 P. R. 375.

In an action for foreclosure, although since *The Devolution of Estates Act* (R. S. O. c. 127), the record may as a matter of title be complete with the general administrator as sole defendant, yet as a matter of procedure the infant children of the deceased intestate mortgagor are proper parties, and should, as a rule, be made parties, unless good reason exists for omitting them: *Keen v. Codd*, 14 P. R. 182, and in *Watts v. Lane*, 84 L. T. 144, a devisee beneficially in-

interested in the equity of redemption was required to be added as a defendant. But where the mortgagor had devised his lands to his executors, the latter were held to be the only necessary defendants to an action for foreclosure, even though the widow and children of the deceased mortgagor were in actual possession of the mortgaged premises; *Emerson v. Humphreys*, 15 P. R. 84; and see *Re Booth v. Kettlewell*, 67 L. T. 551. **Rule 193.**

In an action respecting the realty of a deceased person, where the personal representatives neglect to register a caution under R. S. O. c. 127, s. 13, the parties beneficially entitled to such realty as heirs or devisees, sufficiently represent it after the lapse of 3 years: see *Ramus v. Dow*, 15 P. R. 219; and 2 Ed. vil. c. 17, s. 3.

In an action to establish a will, the executors do not sufficiently represent the next of kin, nor does one of the next of kin sufficiently represent the rest: all should be made parties; *Cornell v. Smith*, 14 P. R. 273; *O'Sullivan v. Phelan*, 14 P. R. 278; *Gunn v. Carson*, 11 C. L. T. 47; and see *Clifton v. Crawford*, 18 P. R. 316.

Where a party was only agent and not trustee, the principal was required to be made a party: *Wright v. Mills* (No. 2), 63 L. T. 186.

Where persons are joined with trustees as defendants on the ground that they have become constructive trustees, all are equally liable: there is no primary or secondary liability as between them: *Coeper v. Stincham*, 68 L. T. 18.

The question of the beneficiaries being parties, or not, is now entirely in the discretion of the Court: see *Jennings v. Jordan*, 6 App. Cas. 698; 45 L. T. 593. It has been laid down that in the exercise of this discretion, wherever the suit is to set aside the trust, or is adverse to the rights of the beneficiaries, the Court should require one or more of the beneficiaries to be made parties: *Read v. Prest*, 1 K. & J. 183; *Baker v. Trainor*, 15 Gr. 252; *Payne v. Parker*, L. R. 1 Ch. 327; and see *Thomas v. Torrance*, 1 Ch. Ch. 46, and *Clarke v. Cook*, 23 Gr. 110; *Liddell v. Deacon*, 20 Gr. 72.

It would seem that, notwithstanding the general terms of *Rule 193*, it is only where the trustee has the like absolute control over the trust estate which an executor has over personality, that he can, in general, be said to sufficiently represent his *cestui que trust*: *Cox v. Burnard*, 5 Harc. 233. As to the extent to which the personal representative prior to *The Devolution of Estates Act* represented those interested in the realty: see *Eccles v. Lowry*, 23 Gr. 167. Under *The Devolution of Estates Act* (R. S. O. c. 127), ss. 3, 4, the personal representative may, if his letters of administration extend to the realty, as fully represent those interested in the realty as he does those interested in the personality: see *Malone v. Malone*, 17 Ont. 101; see, however, *Kee v. Codd*, 14 P. R. 182; *Watts v. Lane*, 84 L. T. 144; and *Ramus v. Dow*, *supra*. Where, however, the beneficiaries are infants or persons not *sui juris*, they are usually required to be added as defendants.

In a suit for administration, by a plaintiff claiming as a beneficiary under a will, but whose title was doubtful, one of the *cestuis que trust* was required to be added as a party before the hearing, in order to have an opportunity to argue the question of the plaintiff's title: *Day v. Radcliffe*, 24 W. R. 844.

In a suit to execute the trusts of a will, where the trustee had only a power of sale on the death of tenants for life who were still living, the parties interested in remainder were ordered to be added: *Cox* ^{Cases where c. y. t required to be added.}

Rule 194. *v. Barnard*, 5 Hare, 253; where the plaintiff claimed under an assignment, the validity of which was denied by the trustee, who set up that the heir of the assignor was entitled to the trust estate, the heir was required to be added: *Miller v. Ostrander*, 12 Gr. 349.

In a suit for foreclosure, where a trustee was defendant and was bankrupt, the *cestui que trustent* were added: *Francis v. Harrison*, 43 Ch. D. 183.

Cases where *c. q. t.* not required to be added.

Effect of representation of *c. q. t.* by trustee.

For cases where the *cestui que trust* was not required to be added under the former practice, see H. & L., 2nd ed., pp. 320-321.

Effect of Representation.—Where the action is brought by, or against, a trustee without adding the *cestui que trustent* as parties, if the question in issue has been fairly tried, all parties represented by the trustee would, generally speaking, seem to be concluded by the judgment, but not otherwise: *Eccles v. Lowry*, 23 Gr. 167. Thus a decree made after replication filed, dismissing a bill brought by an official assignee, was, in the absence of fraud, conclusive against the creditors of the estate of which he was assignee: *Morrison v. Robinson*, 19 Gr. 480, and see *Jardine v. Wood*, 19 Gr. 617.

Where, however, a suit by trustees had failed for want of evidence, it was held that a subsequent suit might be maintained for the same purpose by the *cestui que trust* on the discovery of new evidence: *Pierce v. Brady*, 2 Jur. N. S. 772. See, however, *Commissioners, etc., of London v. Gollally*, 3 Ch. D. 610; 24 W. R. 1059; *Morrison v. Robinson*, 19 Gr. 480.

Actual knowledge of, and acquiescence in, the proceedings, and acceptance of the benefit thereof, may preclude a person interested from afterwards disputing their validity, even though he were not sufficiently represented in such proceedings; see *In re Lart*, 1896, 2 Ch. 788.

If a deceased person has no personal representative, proceedings may go on or the Court may appoint a representative.

194. Where in any action or other proceeding it appears that a deceased person who was interested in the matters in question has no personal representative, the Court or a Judge may either proceed in the absence of any person representing his estate, or may appoint some person to represent the estate for all the purposes of the action or other proceeding, on such notice as may seem proper, [notwithstanding that the estate in question may have a substantial interest in the matters, or that there may be active duties to be performed by the person so appointed, or that he may represent interests adverse to the plaintiff, or that there may be embraced in the matter an administration of the estate whereof representation is sought]; and the order so made and any orders consequent thereon, shall bind the estate of such deceased person in the same manner as if a duly appointed personal representative of such person had been a party to the action or proceeding, [and had appeared therein]. Con. Rule 319.

The foundation of this Rule is Chy. Gen. Ord. 56. The clauses in brackets are additions made by R. S. O. 1877, c. 49, s. 9, to the provisions of that Order, which was substantially the same as the present Eng. (1883) R. 168.

A person appointed to represent an estate under this Rule is not entitled to the assets of the deceased, or to administer the same; his authority is purely representative, and upon the subsequent grant of general administration to another his authority, even as a representative of the deceased's estate, is entirely superseded: see *McLean v. Allen*, 18 P. R. 255. **Rule 194.**

It was held that an appointment should not be made where an administrator *ad litem* appointed by the Probate Court would not suffice, and that an administrator *ad litem* did not sufficiently represent the estate where a general administration of the estate is necessary: *Dowdencell v. Dowdencell*, 9 Ch. D. 294; see also *in. Fr.* 5th ed., 181; 6th ed., 208. *Morgan Chy. Orders*, 201; *Webster v. British Empire Co.*, 15 Ch. D. 169; *Curtis v. Caledonia, etc., Ins. Co.*, 19 Ch. D. 534.

The words in brackets in this Rule were intended to meet the various cases decided under Chy. O. 56 (see *Morgan, Chy. Orders, supra*), and the Rule as now framed may have rendered some of those cases obsolete; see, however, *Fairfield v. Ross*, 4 O. L. R. 534. As to the constitutionality of such provisions: see *Ashburn v. Ellis*, 1893, A. C. 339.

This Rule has still a comparatively limited scope, as the representation which may be ordered under it is only of a deceased person "who was interested in the matters in question." A person the administration of whose estate is the subject of the action, is not a deceased person "interested in the matters in question," within the meaning of the Rule. He must in his lifetime have been interested in the matters in question: *Hughes v. Hughes*, 6 Ont. App. 373; *Fairfield v. Ross*, 4 O. L. R. 534; *sed vide, Webster v. The British Empire Ins. Co.*, 15 Ch. D. 169. The legal personal representative of deceased must in such case be a party to properly constitute the action: see *ib.* and *Rossell v. Morris*, L. R. 17 Eq. 20; *Outram v. Wyckoff*, 6 P. R. 150; *Leonard v. Clydesdale*, 6 P. R. 142; *Toronto Savings Bank v. Canada Life Ass. Co.*, 13 Gr. 171; unless, there being an executor *de son tort*, Rule 196 applies; but a judgment against an executor *de son tort* would not bind the deceased person's estate: see *Mohamidu v. Pitcher*, 1894, A. C. 437; 71 L. T. 99; except so far as is provided by Rule 196.

The Rule enables the Court to take one of two courses, either (1) to proceed without a representative of the estate of a deceased person who may have been interested in the matters in question; or, (2) to appoint some person to represent such deceased person's estate for the purposes of the action.

Where the Court makes an order adopting either of these courses, the estate in question is bound and concluded by the proceedings as though it had been represented in the litigation by a duly appointed legal personal representative.

In order to bind the estate, however, an order under this Rule must be made: it is not enough that the Court should proceed to adjudicate on the matters before it in the absence of a representative of the estate: *Re Richerson*, 1893, 3 Ch. 146; 3 R. 643; and see *Mohamidu v. Pitcher*, 1894, A. C. 437; 71 L. T. 99.

Originally the Chy. O. only applied to the representation of the personal estate, and wherever it was necessary that the real estate of a deceased person should be represented in any action or proceeding, the Court had no power, before *The Devolution of Estates Act*, under this Rule to proceed in the absence of the real representative, or to

No authority to appoint any one to represent realty.

Rule 194 appoint any person to represent such estate, so as to bind it by the proceedings. But in the case of the estates of persons dying after the 1st of July, 1880, the personal representative is also the representative of the realty, unless his powers are expressly limited to the personal estate, or have expired as to realty by reason of his omitting to register a caveat: *Ramus v. Dow*, 15 P. R. 219; R. S. O. 1897, c. 127, ss. 4, 13; and see *Re Williams & McKinnon*, 14 P. R. 338; *id. v. ib.*, R. S. O. 1897, c. 50, s. 61.

Further provisions are made by *Rules 201-203* to enable actions to be prosecuted in the absence of persons who, according to the ordinary practice, should be joined as parties.

Application
under Rule
194, how
made.

The application under the *Rule* is usually made by *ex parte* motion in Chambers, but the order may be made at the trial of the action: *Menden v. Guidalla*, 10 W. R. 485; *Hewitson v. Todhunter*, 22 L. J. Chy. 76; *Re Peppitt*, 4 Ch. D. 230; or on a motion for judgment: *Gairdner v. Gairdner*, 1 Ont. 184, and see *Curtius v. Caledonian Fire and Life Ins. Co.*, 19 Ch. D. 534; or at a subsequent stage of the action where the party whose estate is to be represented, dies after the trial: *McCarthy v. Arbuckle*, 31 C. P. 48. Before the order is made notice is sometimes required to be given to the person, if any, who would be entitled to letters of administration: *Curtius v. Caledonian Fire and Life Ins. Co.*, *supra*.

Discretion
of Court.

The Court has a wide discretion either to appoint a representative, or to order that the action may proceed without any representation if it considers the estate in question sufficiently protected: see *Joint Discount Co. v. Brown*, L. R. 8 Eq. 380; *Tarratt v. Lloyd*, 2 Jur. N. S. 371; *Hewitson v. Todhunter*, 22 L. J. Chy. 76.

Cases when
representa-
tive dis-
pens-
ed
with.

Representation of the estate has been dispensed with, where the deceased person was in the same interest as the plaintiff: *Car v. Taylor*, 22 L. J. Chy. 910; or where other persons of the same class were before the Court: *Threy v. Newman*, 17 Jur. 153; and a representative of the estate of one of two executors who had died insolvent, and to which representation could not be obtained was also dispensed with: *Moore v. Morris*, L. R. 13 Eq. 139; *Band v. Randle*, 2 W. R. 331; *Rogers v. Jones*, 1 Sm. & G. 17; and where the deceased person's interest was very small: *Montgomery v. Douglas*, 14 Gr. 268; and where his estate was insolvent and his next of kin refused to take out letters of administration, and the estate appeared to have no substantial interest in the fund sought to be recovered by the plaintiff, representation was dispensed with: *Curtius v. Caledonian Fire and Life Ins. Co.*, 19 Ch. D. 534; *Webster v. The British Empire Ins. Co.*, 15 Ch. D. 103; and even where the deceased party was sole plaintiff and tenant for life, and an arrear of income remained due to him, an administration suit instituted by him was, on the application of the defendants, revived without any representative of the original plaintiff, whose executor had died without proving his will, but without prejudice to the right of the personal representative of the original plaintiff to intervene: *Hayward v. Pile*, L. R. 7 Chy. 634, but see *Bank of Montreal v. Wallace*, 1 Chy. Ch. 261.

Where a deceased person had by an instrument *inter vivos* made over his property to the defendant, who became bound to pay his grandchildren \$400 each after the death of the settlor, the Court dispensed with a personal representative of the settlor, in a suit by one of the grandchildren to enforce payment of the \$400: *Mulholland v. Merriam*, 19 Gr. 288; S. C., 20 Gr. 152.

Where an estate had been administered, and pending the suit for **Rule 194.** administration, the personal representative died, and all that remained to be done was for the Master to make his report, and it appeared that the estate was insolvent, an order was made appointing the solicitor of the deceased administratrix to represent the estate: *Re Tobin, Cook v. Tobin*, 6 P. R. 40; and see *Sherwood v. Freeland*, 6 Gr. 305; *Toronto Savings Bank v. Canada Life Assur. Co.*, 13 Gr. 171.

The Rule has been held to apply though the deceased person was ^{Cases} never a party to the action: *Hebster v. British Empire Ins. Co.*, 15 ^{where Rule} Ch. D. 160; but see *Hughes v. Hughes*, 6 Ont. App. 373, and to an ^{applies.} action for administration where the estate is small: *Re Colton, Fisher v. Colton*, 8 P. R. 542, and to actions for the construction of wills: *Gairdner v. Gairdner*, 1 Ont. 180; see also *Mendes v. Guadalla*, 10 W. R. 487, where an order was made at the trial; and *McCarthy v. Arkhuckle*, 31 C. P. 48, where a defendant died after the trial. It also applies to proceedings on a special case: *Sicallow v. Binns*, 17 Jur. 20; and to proceedings by petition: *Re Ranking*, L. R. 6 Eq. 601-5; *Ex parte Cramer*, 9 Hare, App. xlvii.; and see *Magnay v. Davidson*, 16, lxxxii., but is generally applicable only where from any cause there is difficulty in obtaining representation of the estate: *Loag v. Stone*, Kay App. xii.; *Davies v. Boulcott*, 1 Dr. & Sm. 23; *Bliss v. Putnam*, 20 Beav. 20.

In an action to enforce a lien for an annuity charged upon real estate, it is not necessary to make the personal representative of a deceased person who was liable for its payment a party, unless an account of the personal estate of the deceased is asked: *Paine v. Chapman*, 7 Gr. 179, and see *Burns v. Canada Co.*, 7 Gr. 387.

In an action for a general account against a surviving trustee or executor it is not, in the absence of special circumstances, necessary that the representatives of a deceased trustee or executor should be made parties where no relief is sought as against the deceased's estate. The defendant may have such representatives added under *Rules 206 or 207* if the circumstances render it advisable: *Re Harrison*, 1891, 2 Ch. 349.

In an action to make several defendants liable for a breach of trust, where one died before decree having made a will appointing executors who had not proved the will (the liability of the surviving defendants being the same as that of the deceased defendant), the Court made an order allowing the suit to proceed in the absence of a personal representative, reserving leave to the executors to intervene, if so advised when they had proved the will: *Heberman Joint Stock Co. v. Fotherill*, 13 L. R. 1r. 335.

An administrator *ad litem* does not, under R. S. O. c. 129, s. 11, sufficiently represent the estate of a person sued for a tort who dies *pendente lite*: *Hunter v. Boyd*, 3 O. L. R. 183.

Where a mortgagor died pending a foreclosure action, it was held that a final order could not properly be made so as to bind the mortgagor's estate against a person appointed to represent his estate under this Rule: *Aylward v. Leicis*, 1891, 2 Ch. 81; 64 L. T. 250.

See *Wingrove v. Thompson*, 11 Ch. D. 419, cited in note to Rule 403.

A person cannot be appointed to represent an estate under this Rule without his consent: *Prince of Wales Co. v. Palmer*, 25 Beav. 405; *Hill v. Bonney*, 26 Beav. 372. The proper person to be appointed ^{Consent of person appointed necessary.}

Rule 194. pointed is the person who would be appointed administrator *ad litem*. *Dean of Ely v. Gayford*, 10 Beav. 581; where the deceased had left a will which was disputed, the person named as executor therein was appointed; *Hele v. Lord Berkeley*, 15 Beav. 344.

Judgment
against per-
sonal repre-
sentative
how far
binding on
real repre-
sentative

Although a judgment in a suit to which the personal representative was a party was conclusive as regards the personal estate and those beneficially interested therein, whether as legatees or next of kin; it was formerly only *prima facie* evidence of liability of the estate as against those interested in the realty, whether as devisees, or heirs-at-law, and the latter were at liberty to rebut it; *Eccles v. Lowry*, 23 Gr. 107; *Lovell v. Gibson*, 19 Gr. 280; *Willis v. Willis*, 19 Gr. 573; *Horvey v. Wilde*, L. R. 14 Eq. 438; *Steel v. Linberger*, 78 Penn. St. Rep. 308; *Story v. Fry*, 1 Y. & C. C. C. 603, and see *Anderson v. Paine*, 14 Gr. 110; and it is therefore only to this extent that an order under the Rule will bind those interested in the real estate, except in cases coming under *The Devolution of Estates Act* (R. S. O. 1897, c. 127), s. 4, in which the personal representative also represents the realty. But even before *The Devolution of Estates Act* the lands of a deceased person could be sold under execution against his personal representative, without making the persons interested in the realty parties; R. S. O. 1877, c. 66, ss. 35, 36, 40; and the persons interested in the realty were *prima facie* bound by the sale; *McEvoy v. Chant*, 21 Gr. 515. But where the claim for which the judgment was recovered was one that was not properly enforceable against the realty, the execution might be stayed in an action by heirs-at-law; *Anderson v. Paine*, 14 Gr. 110; and if a sale took place it might be successfully impeached by the heirs-at-law; *Freed v. Orr*, 6 Ont. App. 600; *Mohamidu v. Pitcher*, 1894, A. C. 437; 71 L. T. 99. Where the judgment against the personal representative was successfully impeached on the ground of fraud and collusion, the beneficiaries were entitled to set up the Statute of Limitations against the claim of the creditor which the personal representative had omitted or neglected to plead; *Jardine v. Wood*, 19 Gr. 617.

The Master in Chambers has power to entertain applications under this Rule for the appointment of a person to represent the estate of a deceased party; *Colliver v. Surpuzie*, 8 P. R. 42.

Rule does
not super-
sede juris-
diction of
Surrogate
Courts.

This Rule does not authorize the High Court to grant letters probate of wills, or letters of administration. It merely enables the Court to proceed with an action so as to bind the personal estate of a deceased person even though no letters probate, or letters of administration, have been granted by the Surrogate Court. In the absence of some such power the Court would have no jurisdiction to bind the estate of a deceased person unless some duly appointed personal representative were before the Court; even an executor who had applied for, but not actually obtained probate, would not represent the deceased's estate so as to bind it by a judgment recovered against him; *Mohamidu v. Pitcher*, *supra*. The representative authorized to be appointed by this Rule is not an administrator, but merely represents the estate for the purpose of the action in which the order is made, and he is not entitled to act as an administrator of the estate except so far only as it is necessary for him to do so for the purposes of the action in which he is so appointed. It has not been usual to require any security to be given by a person appointed under this Rule to represent an estate; and he has no authority to receive any moneys belonging to the estate he is appointed to represent, except according to the express order of the Court in that behalf. The

Court has, under the original Chy. O., refused to appoint a person **Rule 195** to receive a sum of money payable out of Court to a deceased person: *Randall v. McMahon*, 1 Drew. 225; *Williams v. Allen*, 32 Beav. 450; and has refused to order payment to a person who has been appointed in the suit to represent the estate: *Dyam v. Sutton*, 19 Beav. 646.

An administrator *ad litem*, however, may be appointed by the Surrogate Court: R. S. O. 1807, c. 59 s. 59, and see s. 59, and a judgment against him binds the general administrator: *Davis v. Chanter*, 2 Ph. 545; *Croft v. Waterton*, 3 Sim. 651; *Ellice v. Goodson*, 2 Coll. 4; *Williams v. Allen*, 32 Beav. 450; *Woodhouse v. Woodhouse*, L. R. 8 Eq. 514; *Collins v. Hesse*, 12 W. R. 505; and by the following **Rule** the High Court has also power in certain cases to appoint an administrator *ad litem*: **Rule 195**.

195. Where probate of the will of a deceased person, or letters of administration to his estate, have not been granted, and representation of such estate is required in any action or proceeding in the High Court, the Court may appoint some person administrator *ad litem*. See Con. Rule 311. Rules of 1st Jan., 1896, 1441.

Appoint-
ment of ad-
mini-stra-
tor to repre-
sent estate
in proceed-
ings in High
Court.

The former Con. Rule 311 was different, and provided for the appointment either of an administrator *ad litem*, or a general administrator, and for the payment to the Crown and the proper Surrogate Court of the same fees as if the appointment had been by that Court, and for the same notification of the order to the Surrogate Clerk as would be given by a Surrogate Court. These provisions and difficulties occasioned by the question of security, and other matters have led to the repeal of the former **Rule**, and the substitution for it of the above **Rule 195**.

Where an administrator *ad litem* has been improperly appointed under this **Rule**, a general administrator on being subsequently appointed was held entitled to apply to set aside the order: *McLean v. Allen*, 18 P. R. 255.

Under this **Rule** an administrator *ad litem* only, can be appointed. He will have no power or duties other than those of representing the estate in the action, and of obeying and carrying into execution any orders of the Court, giving directions or imposing duties upon him. Security will rarely if ever be necessary to be given by him, though, doubtless, the Court or a Judge may order it to be given where necessary. A judgment against an administrator *ad litem*, will as effectually bind the estate as if a general administrator were a party: but in any action which involves general inquiries as to next of kin or general inquiries as to assets and creditors, an administrator *ad litem* should not be appointed as he would not sufficiently represent the estate; a general administrator would in such case be necessary: *Dowdeswell v. Dowdeswell*, 9 Ch. D. 294; and see *Rodger v. Moran*, 28 Ont. L. R. 283; and *McLean v. Allen*, 18 P. R. 255.

The intention of the **Rule** doubtless is to provide for necessities arising in the progress of an action, where representation of an estate is required in an action and there has not been carelessness or negligence on the part of the party who may require the appointment to be made; the fact that a claim is likely to be barred by the Statute

Rule 195. of Limitations is not a ground for applying under this *Rule*: *Meir v. Wilson*, 13 P. R. 33; *Ford v. Lauded Banking Co.*, 13 P. R. 210; and it is not applicable where a person commences action without right or title, and asks to be made a competent plaintiff by being appointed administrator *ad litem*: *Fairfield v. Ross*, 4 O. L. R. 534; *sed vide*, p. 111, as to the effect of letters of administration granted after the commencement of an action.

Under the former *Rule* an application by a mortgagee seeking to foreclose his mortgage to appoint an administrator to the estate of the mortgagor was granted: *MacLaren v. Rivett*, 7 C. L. T. 202; *Re Chambliss & Canada Life Ass. Co.*, 12 P. R. 649; *Cameron v. Phillips*, 13 P. R. 78. *In re Chambliss & Canada Life Ass. Co.*, *supra*, the appointment was made before action commenced, and this course was also held to be proper in *Re Williams & McKinnon*, 14 P. R. 338. Probably under similar circumstances an administrator *ad litem* may be appointed under the present *Rule*.

This *Rule* seems to authorize the appointment of an administrator only in the case where no probate of the will of a deceased person, or letters of administration to his estate, have been granted. It does not appear to authorize such appointment where probate or administration has been granted, but the executor or administrator has died or has become incapable of acting.

This *Rule* may, since *The Devolution of Estates Act* (R. S. O. 1897, c. 127), be applied where a deceased person has left only land: *Re Williams & McKinnon*, 14 P. R. 338.

As a person cannot, without his consent, be appointed under *Rule* 194 to represent an estate (see *Prince of Wales Co. v. Palmer*, *supra*, p. 343, it seems a *fortiori* that a person cannot under this *Rule* be appointed administrator *ad litem*, without his consent.

The order appointing an administrator *ad litem* should as nearly as possible follow the form of a grant of administration made in a like case by the Surrogate Court, and should contain all the particulars necessary to be entered in the books of the Surrogate Clerk under the Surrogate Rule 48. For form of order see App. Form 119, II. & L. Forms. No. 456, and *Cameron v. Phillips*, 13 P. R. 141; *Howell's Surrogate Court Pr.*, pp. 841, 266; *Davis v. Chaater*, 2 L. 549; and a copy of the order should be forwarded to the Surrogate Clerk at Osgoode Hall: see *Surrogate Act*, ss. 44-51. As to the effect of the grant, see *Faulkner v. Daniel*, 3 Ha. 208; *McLean v. Allen*, 18 P. R. 275; for form of foreclosure against an administrator *ad litem*: see *Peal v. Gott*, W. N. 1885, 46.

The authority of an administrator *ad litem* in a probate action terminates on the pronouncing of a judgment in favour of a will; a grant of probate is not necessary to put an end to his powers: *Wickland v. Bird*, 1894, P. 262; 71 L. T. 267.

An administrator *ad litem* in an administration action has no power to commence another action in respect of the lands of the deceased, and a *fortiori* where the lands have vested in the heirs of the deceased through no caution having been filed: *Rodger v. Moraa*, 28 Ont. 275; and it may be open to question whether an administrator *ad litem* has any power to register a caveat under R. S. O. c. 127, s. 13.

A general administrator *pendente lite*, appointed by the Surrogate Court in a probate action, may be served without first obtaining the

leave of the Court: *In re Toleman*, 1897, 1 Ch. 866; but an administrator *ad litem* appointed under this Rule, being merely appointed for the purpose of the particular action, could not be sued as administrator in any other action. Rules 196, 197.

The Court declined to act under the Rule in favour of a plaintiff, sole heir and next of kin of a deceased person, suing to set aside a transfer of chattel property made by the deceased: *Fairfield v. Ross*, 4 O. L. R. 534.

196. Where an order for general administration is not asked or required, or where it is shewn that an executor *de son tort* has taken possession of the bulk of the personal assets belonging to the estate of a deceased person, he may on the application of any one interested in the estate of the deceased, without the appointment of any personal representative, be required to account for any assets of the estate which have come to his hands; and where a case is made for the appointment by the High Court of a receiver of the estate of a deceased person who has no personal representative, the estate may be administered under the direction of the Court without the appointment of any person other than the receiver to represent the estate. Con. Rule 312. Order for account against executor *de son tort*.

Prior to the statute from which this Rule is taken (48 V. c. 13, s. 12), it was impossible to obtain a decree for the general administration of the estate of a deceased person, without having a duly appointed personal representative before the Court, either as plaintiff or defendant; because the personal representative was the only person who had a legal title to the personal estate: see Rule 194, note.

Where the Court acts under this Rule and grants an order for the general administration of a deceased person's estate, without requiring a duly appointed personal representative to be made a party, it will itself assume the duties of a personal representative, and will not suffer the assets to be paid over to next of kin, legatees, or devisees, without making due inquiry as to the debts of the deceased, and providing for their payment out of the assets.

197. An infant may sue by his next friend (a); and may defend by his guardian appointed for that purpose, [or by the Official Guardian as the case may be]. Con. Rule 313. Infants.

The original J. A. Rule 96 had at (a) the words "in the manner practised in the Court of Chancery," following Eng. R. 1875, O. 16, r. 8 (1883, R. 138). The words in brackets are not in the Eng. Rules, which, as respects infants, correspond otherwise with the above.

See also Rules 152, 153, 155 and 156.

Infants as Plaintiffs.—By the practice of the Court of Chancery, every suit or application: *Cox v. Wright*, 9 Jur. N. S. 981, on behalf of an infant must be by next friend, who properly will be the father if he is not adverse in interest: *Woolf v. Pemberton*, 6 Ch. D. 19; but who need not be a relation: *Cross v. Cross*, 8 Beav. 455; nor a solvent person: *Re McConnell*, 3 Chy. Ch. 423; *Woran v.* Next friend of infant.

Rule 197. *Kellogg*, 10 C. L. T. 184; and therefore need not give security for costs: *Fellows v. Barrett*, 1 Keen, 119; but see *Sloan v. Fellows*, 18 Q. B. D. 585; but may not be a married woman: *Thynne v. St. Maur*, 34 Ch. D. 465; nor a defendant: *Anon.*, 11 Jur. 258; *Payne v. Little*, 13 Beav. 114; *Re Burgess*, 25 Ch. D. 24, unless merely a formal defendant: *Taylor v. Taylor*, 16 L. J. N. C. 66.

In *Nalder v. Hawkins*, 2 M. & K. 248, it was said that the Court always expected next friends to be substantial persons, and that they should be relations, connections or friends of the family, not mere volunteers; see also *Foster v. Cautley*, 10 Ha. App. 24, and *Woolf v. Pemberton*, *sup.*; but see cases *supra* and *infra*.

The primary object of requiring the infant to sue by next friend is not, however, that defendants shall have security for costs, but that there may be some one before the Court to answer for the propriety of the action, and through whom the Court may compel the obedience of its orders. Thus even where the natural guardian and next friend is not a resident of Ontario, infants having a *bona fide* cause of action are privileged suitors, and the same rule as to security for costs should not be applied as in the case of adults: *Roberts v. Coughlin*, 18 P. R. 94; *Scott v. Niagara, etc., Co.*, 15 P. R. 400. In the latter case the infant and the next friend were within Ontario, but that would not, however, seem to affect the question: see *Roberts v. Coughlin*, *supra*, and *Rule 1198 (b)*.

Circumstances connecting a next friend too closely with parties adverse in interest may render him an improper person, and liable to be removed, though nothing is alleged against his character, circumstances or conduct: *Re Burgess, Burgess v. Bottomley*, 25 Ch. D. 243. The consent of the next friend should be obtained before using his name, though the infant's consent is unnecessary: *Worthan v. Pemberton*, 9 Jur. 291.

As to obtaining and filing the written authority of the next friend for the use of his name in the proceedings, see *Rule 198*.

If no next friend is named a motion may be made to dismiss the action, with costs to be paid by the solicitor: *Flight v. Bolland*, 4 Russ. 298; *Dau. Pr.*, 6th ed., 105.

Where a suit was prosecuted by an infant without a next friend, an application made by him more than twelve months after he became of age to set aside the proceedings was refused: *Milson v. Smith*, 25 Ont. 144.

If an action is brought in the name of an infant by a married woman as next friend, the course is, to apply to have her removed, and to stay proceedings until a proper next friend is appointed: *Martin v. Martin*, 15 P. R. 177.

Where an infant plaintiff and his next friend both reside out of the jurisdiction, the defendant may move to have the action stayed until either security for costs is given or a next friend within the jurisdiction is appointed: *McBain v. Waterloo, &c.*, 8 O. L. R. 620.

Notwithstanding that generally anyone may sue as next friend of an infant, the Court will, on the application of the defendant, or of any person acting as next friend of the infant for the purpose of the application: *Guy v. Guy*, 2 Beav. 460, institute an inquiry as to whether the suit is for the benefit of the infant, and if the result shows that the proceedings are not for the benefit of the infant, the suit may be stayed: *Anderson v. Yates*, 5 DeG. & S. 202, or dis-

Consent
of next
friend.

If no next
friend
named.

Inquiry
whether
suit for
benefit of
infant.

missed with costs, to be paid by the next friend: *Fox v. Suickerrop*, Rule 197. 1 Beav. 583; *Golda v. Kerr*, W. N. 1884, 46; and see *Re Elsom*, *Thomas v. Elsom*, W. N. 1877, 177; *Mill v. Mill*, 20 C. L. J. 252.

In general a next friend is as to costs in the same position as any Costs, other litigant, and receives or pays costs personally as between him- liability self and defendant: *Smith v. Mason*, 17 P. R. 444; unless otherwise of next friend for. ordered: *Caley v. Caley*, 25 W. R. 528.

As to whether a next friend is entitled to solicitor and client costs, see *Damant v. Hennell*, 33 Ch. D. 224.

The costs of an unsuccessful action by infants by their next friend claiming a share of a testator's estate, by the alleged forfeiture of the share by the legatee thereof after the testator's death, were ordered to be paid by the next friend, and not out of the testator's estate, without prejudice to the claim of the next friend to be indemnified out of the shares of the infants when they should come into possession: *Smith v. Mason*, 17 P. R. 444.

The next friend of an infant was indemnified against the costs of an appeal to the Supreme Court out of the infant's estate, where the appeal was advised by more than one counsel, and the Court of Appeal was not unanimous: *Cottingham v. Cottingham*, 11 P. R. 13.

When the next friend of an infant dies pending the action, a new Death of next friend may be appointed on an *ex parte* motion: *Daly v. Daly*, 9 next friend. L. R. Ir. 383; Dan. Forms, 34.

In an action on behalf of an infant by a next friend acting with the father's authority, the father died and the mother, the testamentary guardian, was held entitled to be substituted as next friend, though no charge of improper conduct had been made against the actual next friend: *Hutchinson v. Norwood*, 31 Ch. D. 237.

The next friend should not take any step in the cause in the name Authority of the infant after he attains twenty-one, for the infant may abandon ceases on the suit: *Brown v. Weatherhead*, 4 Ha. 122. If the infant adopts infant's the proceedings after he becomes of age, he becomes liable for all the 21. costs of the suit.

A next friend who refuses to appeal may be removed: *Depuy v. Removal of next friend Welsford*, W. N. 1880, 121.

The next friend of an infant plaintiff may obtain leave to withdraw upon such terms as the circumstances of the case and the welfare of the infant may require, and subject amongst other things to liability to the opposite party for costs theretofore incurred in case the Court should so order: *Taylor v. Wood*, 14 P. R. 449. Where a next friend desires to withdraw, the defendant may move to stay proceedings until a new next friend is named, though the normal practice is for the next friend to move: *Ib.* A solicitor should not continue an action in the name of a next friend who has notified him of his desire to withdraw: *Ib.* *Scoble*, if a next friend cannot be found to prosecute an action for an infant, the Court in a proper case may appoint the Official Guardian to act as next friend: *Ib.*

A compromise cannot be forced upon infants if it is of no benefit Compro- to them, even though agreed to by their counsel: *Rhodes v. Swithin- mise. bank*, 22 Q. B. D. 577; or if it is contrary to the opinion of their legal adviser: *Re Birchall*, *Wilson v. Birchall*, 16 Ch. D. 41; 44 L. T. 113. A compromise of an action brought by a next friend of an infant is invalid unless approved of by the Court: *Mattei v. Lantini*, 78 L. T. 682.

Rules

198, 199. Infants as Defendants.—Defendants when known to be infants of an estate in which the infant is interested (see *Rule 152*), or for recovery of lands, goods or chattels of which he is personally in possession (see *Rule 153*), will be the Official Guardian. In other cases (see *Rules 154, 155*), a guardian should be appointed, but the appointment of a guardian is not imperative, so that the want of one will not necessarily invalidate the proceedings after judgment, where the interests of the infant appear to have been sufficiently protected: see *Furnival v. Brooke*, 40 L. T. 134; *Straughan v. Smith*, 19 Ont. 558.

Consent of
next friend
or relator
to be filed.

198. Unless otherwise ordered, before the name of any person is used, in a cause or matter, as next friend of an infant or other party or as relator, such person shall sign a written authority to the solicitor for that purpose, and the authority shall be filed in the office in which the cause or matter is commenced. *New.*

Married
Women.

199.—(1) A married woman may sue for alimony without a next friend.

R. S. O.
1897, c. 162.

(2) In cases not provided for by *The Married Women's Property Act*, a married woman may sue by her next friend. *Con. Rule 314.*

Not the same as the Eng. (1883) R. 138.

In suits for alimony a wife could always formerly sue alone; and might compromise the suit and deal with it just as any other plaintiff can: *Vardon v. Vardon*, 6 Ont. 719.

For the practice as to a married woman's suing and being sued under the various Married Woman's Acts prior to 1897, see *Holmsted & Langton Jud. Act*, 2nd ed., pp. 331-338.

By 60 Vict. c. 22 (following imp. Stat. 56 & 57 Vict. c. 631, an important change was made in reference to the contracts of married women made after 13th April, 1897. By that Act (now R. S. O. 1897, c. 163, s. 4), it is provided as follows:—

Contracts
of married
women to
bind all
their
separate
estate.

4.—(1) Every contract entered into by a married woman on or after the 13th day of April, 1897, otherwise than as an agent:

(a) Shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract, and it shall not be necessary in any proceeding to prove that she had any separate property at the time when such contract was entered into, or subsequently;

(b) Shall bind all separate property which she may at the time or thereafter possess or be entitled to; and

(c) Shall also be enforceable by process of law against all property which she may thereafter while discoverer possess or be entitled to.

Except
where re-
straint on
anticipation
exists, 55-57
V. (Imp.) c.
63, s. 1.

(2) Nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which she is restrained from anticipating. 60 Vict. c. 22, s. 1.

Section 15 of R. S. O. 1897, c. 163, is as follows:—

Rule 199.

15. Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same remedies for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any proceeding under this section it shall be sufficient to allege such property to be her property; and in any proceeding under this section a husband and wife shall be competent to give evidence against each other. R. S. O. 1887, c. 132, s. 14.

Remedies of married woman for protection and security of separate property.

This last section seems to apply to all married women, whether married before or after 1st July, 1884, to enable them to sue or be sued alone, whether in respect of a cause of action arising before or after that date: *James v. Barraud*, 49 L. T. 300; 31 W. R. 786 (an action for trespass committed before the Act, brought in her own name); *Gloucester, etc., v. Phillips*, 12 Q. B. D. 533; (an action of contract); *Weldon v. Winslow*, 13 Q. B. D. 784; *Weldon v. De-Bathe*, 14 Q. B. D. 330; *Love v. Fox*, 15 Q. B. D. 667 (actions for torts).

A husband may bring an action against his wife for money lent and for money paid at her request after marriage; *Butler v. Butler*, 14 Q. B. D. 831; affirmed in appeal, 16 Q. B. D. 374; see *McGregor v. McGregor*, 20 Q. B. D. 529; and a wife may sue her husband to recover possession of her real estate: *Till v. Till*, 15 Ont. 133.

As to contracts made since 13th April, 1897, by a married woman, it is no longer necessary to allege or prove the existence of separate property, either at the date of the contract or subsequently; see R. S. O. c. 163, s. 3, *supra*, and *Gibson v. Le Temps*, 8 O. L. R. 707.

The Act, in enlarging the capacity of a married woman to take property, as her separate property, has changed the former rule in respect to a gift to a husband, his wife and a third party, so that now the husband and wife do not take one moiety, and the third party the other moiety, but each takes one-third: *Re March*, 24 Ch. 11, 222; *Re Dixon*, 42 Ch. D. 306; *Re Wilson & Incandescent Light Co.*, 20 Ont. 397; *Thornley v. Thornley*, 1893, 2 Ch. 229; 68 L. T. 139; but see *Re Jupp*, 39 Ch. D. 148; 59 L. T. 123, and 11 C. L. T. 97, 153, 157; 13 C. L. T. 177.

The separate estate of a married woman is liable for her funeral expenses: *Re Gibbons*, 31 Ont. 252.

Where a wife is sued on a contract made before marriage (whether before or after 13th April, 1897), there is no need to shew the possession of separate estate at the time of entering into the contract or at the time of judgment: *Downe v. Fletcher*, 21 Q. B. D. 11; more fully reported, 59 L. T. 180. Judgment in such case will not be restricted to property not subject to any restraint on anticipation, as in *Scott v. Morley*, *infra*; *Robinson v. Lynes*, 1894, 2 Q. B. D. 577; see also *Downe v. Fletcher*, 59 L. T. 181, *per* Lord Coleridge; and *Axford v. Reid*, 22 Q. B. D. 548, (decided under the English M. W. Act of 1870, and as to which, see *Birmingham v. Haywood*, 1904, 1 K. B. 35; 89 L. T. 656); *Re Teasdale v. Brady*, 18 P. R. 104; but even, though the judgment be in a personal form, it would seem that R. S. O. c. 163, ss. 4, (2), 16, 21, will still have the effect of protecting property from execution which the defendant is restrained from anticipating, unless the restraint is imposed by the married woman herself: *Birmingham v. Lane*, 1904, 1 K. B. 35; 89 L. T. 656.

In an action on a contract made before marriage.

Rule 199. Enforcement of Judgment Against a Married Woman.—

Before 13th
April, 1897.

In the case of a contract entered into before 13th April, 1897, both separate property at the date of the contract, and all separate property thereafter acquired, will be liable to satisfy any judgment recovered: see R. S. O. c. 163, s. 3 (4).

After 13th
April, 1897.

In the case of a contract entered into by a married woman on or after 13th April, 1897, otherwise than as an agent, all separate property which she may at the time or thereafter possess or be entitled to is bound, and the contract is also enforceable by process of law against all property which she may thereafter while discoverer possess or be entitled to: *Id.*, sec. 4 (1 b. c.), provided it has not been subject to a restraint against anticipation: sec. 4 (2).

Form of
judgment
under pre-
sent Act.

The form of judgment against a married woman was settled in *Scott v. Morley*, 20 Q. B. D. 132, but that form was settled prior to the statute of 1897; and now where the action is brought to recover a debt contracted on or after 13 April, 1897, it is suggested that the form should now be as follows: "It is adjudged that the plaintiff recover against the defendant \$, and costs to be taxed, such sum and costs to be payable out of the defendant's property, as hereinafter mentioned, and not otherwise; and it is ordered that execution hereon be limited to the separate property of the said defendant not subject to any restriction against anticipation (unless by reason of s. 21 of *The Married Woman's Property Act*, such property shall be liable to execution notwithstanding such restriction), and to any property which the said defendant may at any time hereafter while discoverer be possessed of or entitled to, and not theretofore subject to any restriction against anticipation as aforesaid": see *Brown v. Dumbleby*, 1904, 1 K. B. 28; 89 L. T. 424; *Doull v. Doelle*, 5 O. W. R. 414. The forms Nos. 883, 884, in H. & L. Forms, should be amended in accordance with the above.

See also *Quebec Bank v. Radford*, 10 P. R. 619; *Turnbull v. Forman*, 15 Q. B. D. 234; *Kinnear v. Blue*, 10 P. R. 465; *Camrose v. Rutherford*, *Id.* 620.

Where the married woman after the contract has become a widow, such verbal alterations should be made in the form of judgment as are necessary to adapt the form to that state of facts: see *Softlaw v. Welch*, 1899, 2 Q. B. 419; 81 L. T. 64.

The judgment has been said not to subject the married woman to a "personal" liability, but only to a "proprietary" liability: per Bowen, L.J., in *Scott v. Morley*, 20 Q. B. D. at p. 128; and see *In re Hewitt*, 1895, 1 Q. B. 328; 72 L. T. 60; but in *Holtby v. Hodgson*, 24 Q. B. D. 105, it was said that this was only a short and compeadious way of saying that the judgment must be executed against her property, not her person: see also *Van Wart v. Burlaud*, 17 C. L. T. 68, and *McLeod v. Emigh*, 12 P. R. 45, doubted in *Re Tensdale v. Brady*, 18 P. 104. The judgment is, in other words, a personal judgment though it can only be enforced against her property: *Peltan v. Harrison*, 1891, 2 Q. B. 422; 65 L. T. 845.

Where a married woman administratrix was ordered to pay into Court money admitted to be in her hands and to belong to the estate of the intestate, it was held that in the absence of any evidence that she had committed a *devastavit*, the order should be in the ordinary form, and should not be restricted to payment out of her separate estate; and if she failed to comply with the order the Court had juris-

diction to make an order for attachment against her; but, *semble*, if Rule 199. the object of the order be to make her make good a loss occasioned by her *deceit*, the order should be as in *Scott v. Morley; Re Turnbull*, *Turnbull v. Nicholas*, 1900, 1 Ch. 180, subject to modification as above where the liability has arisen after 13 April, 1897.

An order for arrest should not be made under R. S. O. 1897, c. 80, s. 1, in the case of a married woman against whom a judgment in the form settled in *Scott v. Morley*, has been recovered: *Doull v. Doelle*, 4 O. W. R. 525.

As to how far a married woman is subject to the provisions of *The Division Courts Act* (R. S. O. c. 60, s. 247), relating to judgment summonses, see *McLeod v. Emigh*, *supra*; *Aylesford v. G. W. R.*, 1892, 2 Q. B. 626; *Re Teasdale v. Brady*, 18 P. R. 104; *sed vide*, 116 L. T. Jour. 467-70.

With regard to all her property, other than that settled to her separate use with a restraint on anticipation, a judgment operates against a married woman just as it would against an unmarried woman: *Holtby v. Hodgson*, *supra*, at p. 107; *Hood-Barrs v. Heriot*, 1897, A. C. 177; see also *Cox v. Bennett*, 1891, 1 Ch. 617; but it does not even after her husband's death bind her personally to pay the debt, as if she were a *feme sole* at the time of its recovery: *Pelton v. Harrison*, 1891, 2 Q. B. 422; *In re Hewett*, 1895, 1 Q. B. 324.

The law remains as before 1887, that separate property which is subject to a restraint on anticipation, is not separate property upon which a judgment can operate (unless such restraint exists under any settlement of her own property made by herself): *Bursill v. Tanner*, 13 Q. B. D. 691; *Myles v. Burton*, 14 L. R. Ir. 258; *Scott v. Morley*, 20 Q. B. D. 120; *Beckett v. Tasker*, 19 Q. B. D. 7; see also *Pike v. Fitzgibbon*, 17 Ch. D. 454; *Smith v. Lucas*, 18 Ch. D. 531; *Re Hedgeley*, 34 Ch. D. 385; *Re Dixon*, 35 Ch. D. 4; *Smith v. Whitlock*, 34 W. R. 414; *Roberts v. Watkins*, 46 L. J. Q. B. 552; *Re Glanville*, 31 Ch. D. 532; *Re Andrews*, 30 Ch. D. 159; even after the removal, by the death of the husband, of the restraint on anticipation: *Pelton v. Harrison*, 1891, 2 Q. B. 422; *Softlaw v. Welch*, 1899, 2 Q. B. 419; 81 L. T. 64; *Barnott v. Howard*, 1900, 2 Q. B. 784; *Brown v. Donnelly*, 1904, 1 K. B. 28; 89 L. T. 424; in the case of a judgment on a contract entered into before marriage: see cases *supra*; and *Birmingham v. Lane*, 89 L. T. 656; and the judgment cannot be enforced by any kind of process (receiver, sequestration, or otherwise), against income of property subject to a restraint on anticipation, accruing due after the date of the judgment: *Hood-Barrs v. Cathcart*, 1894, 2 Q. B. 559; *Loftus v. Heriot*, 1895, 2 Q. B. 212; 73 L. T. 167; *Hood-Barrs v. Heriot*, 1897, A. C. 177; *Whiteley v. Edwards*, 1896, 2 Q. B. 48; 74 L. T. 720; *Colyer v. Isaacs*, 77 L. T. 198; *Bolitho v. Gidley*, 1905, A. C. 98; 92 L. T. 369. Thus income, which is subject to a restraint on anticipation, accrued before the date of the judgment, but not paid over to the married woman (but not income accrued after the judgment) can be reached by the appointment of a receiver: *Loftus v. Heriot*, *supra*; *Hood-Barrs v. Heriot*, 1897, A. C. 177.

A plaintiff cannot by postponing the entry of his judgment make available income not accrued due before the time when he became entitled to enter judgment: *Colyer v. Isaacs*, 77 L. T. 198.

Judgment against a widow on a contract entered into by her during coverture must be according to the form settled in *Scott v.*

Rule 199. *Morley*, and not in the ordinary form as though she were a *fence sale*; *Softlaw v. Welch*, 1899, 2 Q. B. 429; but it may be enforced against property acquired after the death of her husband: *Doull v. Doelle*, 5 O. W. R. 238, provided it was not during coverture subject to a restraint against anticipation, which during coverture would have exempted it from liability: *Brown v. Dimpleby*, *supra*.

The restraint on anticipation though suspended on a married woman becoming discover: *In re Wheeler's Settlement*, 1899, 2 Ch. 717; revives on her subsequent re-marriage: *Stroud v. Edwards*, 77 L. T. 280.

The execution by a married woman of a general power of appointment by will makes the property appointed liable to meet her debts: see sec. 8 of R. S. O. c. 163: *Re Inn*, 1894, 1 Ch. 549; 70 L. T. 273. This was not the case before the Act of 1887, and the section does not apply in the case of a contract entered into before that Act: *Re Roper*, 59 L. T. 203.

A writ of sequestration against the "estate and effects" was held to be in proper form, but it is only operate on separate property, not subject to any restraint on anticipation: *Hyde v. Hyde*, 59 L. T. 529; 36 W. R. 708; *Hood-Barra v. Cathcart*, *etc.*, *supra*.

Execution.

The property liable may be reached in execution in the usual way, as in the case of any other judgment debtor: *Barker v. Westover*, 5 Ont. 121-2; *Larson v. Laidlaw*, *supra*; and see *Perks v. Mylra*, W. N. 1884, 64; *Peuce v. Waller*, 24 Ch. D. 405; and a direction in a judgment that an inquiry be made as to separate estate exigible, does not authorize the examination of any person other than the debtor or other person examinable under *Rules 900-910*: *Hood-Barra v. Heriot*, *Ex p. Blyth*, 1896, 2 Q. B. 338.

Actions of tort.

Actions for Torts.—In actions in this Province against a married woman for a tort committed by her during coverture, it was held under the Act of 1872 that the husband was not a proper party, but the wife was to be sued alone, and that her liability was not dependent upon her possession of separate estate: *Amer v. Rogers*, 31 C. P. 197; *Barker v. Westover*, *supra*; but see *Lee v. Hopkins*, 20 Ont. 666. This seems to be in accordance with the opinions expressed by Hagarty, C.J., in *Stone v. Knapp*, 20 C. P. 609, Spragge, C., in *McFarlane v. Murphy*, 21 Gr. 80; and Wilson, J., in *Wagner v. Jefferson*, 37 Q. B. 577, 578. The husband is, however, liable for his wife's torts committed before or after marriage to the extent of all property whatsoever belonging to his wife, which he shall have acquired and become entitled to, from or through his wife, after deducting any payments made by him and any sums for which judgment may have been *bona fide* recovered against him in any legal proceeding in respect of any of his wife's ante-nuptial debts, contracts or torts, or post-nuptial torts: R. S. O. c. 163, s. 17. Under the present Act the husband and wife may be sued jointly, or the wife may be sued alone, for torts committed by her after marriage: *Seroka v. Kattenburg*, 17 Q. B. 14, 177; see *Scott v. Morley*, 20 Q. B. D. at p. 125; *Bahin v. Hughes*, 31 Ch. D. 390; *Earle v. Kingscote*, 1900, 2 Ch. 585, followed in *Travis v. Hales*, 6 O. L. R. 514, approving of *Lee v. Hopkins*, 20 Ont. 666, and overruling *Amer v. Rogers*, 31 C. P. 195.

Where the action is against both husband and wife, they cannot put in inconsistent defences. The defence of the husband is to be considered the one on the record: *Beaumont v. Kaye*, 1904, 1 K. B. 292, 90 L. T. 51, though what was regarded as an inconsistent defence in that case might probably not be so regarded under the Ontario *Rules*.

In actions by a married woman for a tort suffered by her, un-**Rule 199**, connected with her separate estate, her husband was, even after the Act of 1872, required to be a party plaintiff: see *Imier v. Rogers*, 31 C. P. 190; but under the present Act it would seem that the wife may sue alone: *Weldon v. Winslow*, 13 Q. B. D. 784; *Spahr v. Bean*, 18 Ont. 70.

A married woman in sole occupation of a house bought by her out of her own earnings may sue alone, without her husband, in an action for trespass: *Weldon v. De Buthe*, 14 Q. B. D. 339.

There cannot be many cases which are not provided for by *The Next friend Married Woman's Property Act*, and in which, therefore, under clause (2) of the present *Rule*, a married woman may sue by next friend. The Act 1880, 3 (2) renders a married woman capable of suing and liable to be sued "in all respects as if she were a *feme sole*;" but that section seems to assume that the action shall be one in which she is beneficially interested, and it, therefore, may be that in cases in which she sues as a trustee, a next friend may still be necessary.

It is also left in doubt whether in cases where a next friend may be necessary the practice formerly existing in Chancery applies, such as for instance the rule that the next friend must be a solvent person: see *Re Thompson*, *Stevens v. Thompson*, 38 Ch. D. 317.

Where a next friend is necessary, his written authority to the solicitor must be filed: see *Rule 398*.

The following summary of the principal decisions under the former practice may still be useful:—

The defendant may raise the question of want of next friend by motion to stay proceedings till a next friend is appointed: *McPherson v. McCabe*, 1 Chy. Ch. 250; *Pruyn v. Soby*, 7 P. R. 44; *Abouloff v. Oppenheimer*, 47 L. T. 702; 52 L. J. Q. B. 309; and formerly by demurrer: *Jessop v. McLean*, 15 Gr. 489; *Blackburn v. McKinlay*, 3 Chy. Ch. 67; but a demurrer would not now be a proper course: see *Young v. Robertson*, 2 Ont. 434, and notes to *Rules 259-261*.

Objection for want of next friend, how taken.

The question whether a next friend was necessary was not allowed to be raised upon a motion to limit the time for the appointment of a new next friend. The original order was required to be first rescinded: *Olustrad v. Rutherford*, 7 P. R. 140, and see *Shelley v. Goring*, 8 P. R. 36; *Webster v. Leys*, 10 P. R. 86; 5 Ont. 599; and *Re Thompson*, *Stevens v. Thompson*, 38 Ch. D. 317.

The objection was one which formerly might be waived by conduct, as it stands on the same footing as the right to security for costs: *Mallory v. Mallory*, 7 P. R. 446; but see now *Martano v. Mann*, 14 Ch. D. 419, where it was held that since the Judicature Acts the Court has a judicial discretion to direct security for costs to be given at any time, and that the old rule as to waiver by step taken is abrogated: see also notes to *Rules 1198, et seq.*

If the next friend is not appointed in a reasonable time, a motion may be made to limit the time therefor, or, in default, that the action be dismissed: *McPherson v. McCabe*, *supra*. The time limited is the same as upon an application to limit the time for furnishing security for costs; as to which see *Rule 1202*, and *Grant v. Winchester*, 6 P. R. 56.

A defendant cannot act as next friend of a married woman plaintiff: *Payne v. Little*, 13 Beav. 114; *Bennett v. Sprague*, 4 C. L. J. 45; see *Lewis v. Nobbs*, 8 Ch. D. 591; except perhaps a merely formal

Rule 200. defendant: *Taylor v. Taylor*, 10 L. J. N. C. 464. The next friend must be a person of substance, as he is liable for the costs: *Hood v. Whitmore*, 2 K. & J. 458; *Rann v. Lawless*, 1 Chy. Ch. 333; *Pan Winkle v. Chaplin*, 2 Chy. Ch. 98; *Re Thompson, Stevens v. Thompson*, 38 Ch. D. 317. If not solvent an order may be made, on motion of defendant, to stay proceedings till a new next friend be appointed or security for costs given: *Stord v. Colox*, 3 Chy. Ch. 421. Where such an order had been made and, not being complied with, the action was dismissed with costs, a second action by another next friend was stayed till the costs of the first were paid: *Re Payne, Randle v. Payne*, 23 Ch. D. 288.

A next friend of a married woman plaintiff must be authorized to act as such, otherwise the action may be dismissed on the application of the defendant. Where a next friend's authority was disputed by defendant, and not deposed to by the next friend, the action was dismissed with costs, payable by the next friend: *Schjott v. Schjott*, 19 Ch. D. 344; see also *Cook v. Fryer*, 4 Beav. 16. A written authority to the solicitor must now be filed: *Rule 398*. A writ issued by a next friend without employing a solicitor was set aside with all the proceedings: *Swann v. Swann*, 43 L. T. 530.

The next friend may be changed by the married woman on notice to the defendant: *Eastman v. Eastman*, 2 Chy. Ch. 183; *Harvey v. Boomer*, 3 Chy. Ch. 11.

Where parties are numerous.

200. In an action where there are numerous parties having the same interest, one or more of such parties may sue or be sued, or may be authorized by the Court to defend, on behalf of, or for the benefit of, all parties so interested. *Con. Rule 315.*

This is the same as Eng. (1883) R. 131, and corresponds with what had long been the practice of the Court of Chancery: see *Dan. Ch. Pr.*, 5th ed. 207, *et seq.*, 1088; *Thomson v. Victoria Mutual Company*, 29 Gr. 56.

The object of this *Rule* is to avoid the expense and inconvenience of bringing before the Court a numerous body of persons all having the same interest: *Ward v. Benson*, 3 O. L. R. 199; and to prevent a denial of justice: see observations of Lord Macnaghten: *Taff Vale Ry. v. Amalgamated Society, etc.*, 1901, A. C. 426; 85 L. T. 147.

The *Rule* does not authorize the making of an order on the plaintiff's application for the appointment of a solicitor to defend for a number of persons in the same interest who are already defendants to the action: *Ib.*

A plaintiff suing under this *Rule* must indorse his writ accordingly: see *Rule 120*, and *Hynes v. Fisher*, 4 Ont. 78; and the class should be specified as accurately as possible: *Marshall v. S. Staffordshire Tramways Co.*, 1895, 2 Ch. 36.

Plaintiffs.—A plaintiff can only sue under this *Rule* where he has the same interest as all the members of the class he claims to represent: see *Parkinson v. Wainwright*, 72 L. T. 495; *Johnston v. Consumers' Gas Co.*, 23 Ont. App. 566; *Herman v. Wilson*, 32 Ont. 60; and where a person suing on behalf of himself and others is disentitled to sue on his own behalf, he cannot do so on behalf of the others interested: *Dillon v. Raleigh*, 13 Ont. App. 53.

In *De Hurt v. Stevenson*, 1 Q. B. 11, 313. It was held that one part—Rule 200.
owner of a ship might sue under this *Rule* on behalf of himself and
his co-owners for freight. So also one underwriter on behalf of all:
Leathley v. McAndrew, W. N. 1875, 259; 1 Charl. Ch. Ca. 48; one of
 a number of co-owners of a patent: *Sheehan v. G. E. Ry.*, 10 Ch. D.
 539; or bondholders: *Frazer v. Cooper, Hall & Co.*, 21 Ch. D. 718, or
 policy holders in an insurance company: *Thomson v. Victoria Mutual*
Company, 20 Gr. 56; or shareholders of a company: *International*
Wracking Company v. Murphy, 12 P. R. 423; see also *Bergmann v.*
McMillan, W. N. 1881, 39; *Ellis v. Bedford*, 1899, 1 Ch. 4; 1901,
 A. C. 1; 80 L. T. 332; 83 L. T. 680.

Where a plaintiff described himself as suing on behalf of himself
 and all other debenture holders of the defendant company, "and its
 predecessors in title," the fact being that the plaintiff was the debenture
 holder of a company which had been dissolved, and which had
 transferred its business to the defendant company, it was held that
 the description of those on whose behalf the plaintiff sued was too
vague, and that he should describe himself as suing on behalf of all
 other debenture holders of the (naming the Company): "now dis-
 solved": *Marshall v. South Staffordshire T. Co.*, 1897, 2 Ch. 30.

An action cannot be brought by a plaintiff on behalf of himself and
 other persons to recover damages for conspiracy, or any other tort:
Curry v. Clapp, 33 C. L. J. 771; and see *Temperton v. Russell*, 1893,
 1 Q. B. 435.

A plaintiff in a class suit under this *Rule* cannot be compelled to
 disclose the names and addresses of the persons on whose behalf he
 sues: *Leathley v. McAndrew*, W. N. 1875, 259.

In *Strond v. Lawson*, 1898, 2 Q. B. 44; 78 L. T. 729, it was held
 that notwithstanding *Rule 185*, a claim cannot be joined by a plain-
 tiff individually with one by him on behalf of a class.

Defendants.—To bind the absent parties, an order must be made
 under this *Rule* authorizing one or more persons to defend on behalf
 of all persons interested: *Re Rickerson*, 1893, 3 Ch. 146; 3 R. 643;
Fairfield v. London, W. N. 1895, 64; *Saragossa, etc., v. Collingham*,
 etc., 1904, A. C. 159; and an order may be made against the will of
 the persons so authorized to defend: *Wood v. McCarthy*, 1893, 1 Q.
 B. 775; 62 L. T. 431.

It should be shown that the parties having the same interest are
 numerous before a party can be authorized to defend on "behalf of
 all": *Wilson v. Church*, 9 Ch. D. 552.

The officers of an unincorporated benevolent society may be sued, to
 compel them to make a levy for the plaintiff's benefit on the members
 of the society in accordance with its rules, and an order may be made
 under this *Rule* authorizing them to represent both themselves and
 the other members of the society: *Wood v. McCarthy*, *supra*.

Apart altogether from this *Rule* the executive officers of an unin-
 corporated club may be sued personally for contracts entered into
 by them on behalf of the club: see *Aikins v. Dominion Live Stock*
Ass., 17 P. R. 303.

In *Andrews v. Salmon*, W. N. 1888, 102 (see also *Ib.* 176), defen-
 dants were authorized to defend on behalf of all the members of the
committee of a club.

Rule 200.

There is jurisdiction under this *Rule* to make an order that some of the officers of a voluntary unincorporated association may be sued, as representing themselves and all other members of the association, to restrain torts by the members of the association, or to recover damages for torts committed by the association or its servants or agents, but in order to lay against the property of the association it may be necessary that the persons or trustees in whom such property is vested should also be made parties to the action; *Metallic Roofing Co. v. Local Union, etc.*, 5 O. L. R. 424; 9 O. L. R. 171; (*) and *Tuff Vale Ry. v. Amalgamated Society of Engineers*, 1901, A. C. 420; 53 L. T. 147; and *Wallace v. Railroad Telegraphers*, 5 O. W. R. 788, but such a society (not being registered anywhere by its name so as to constitute it a quasi corporation, such as was sued in the *Tuff Vale* case) cannot be sued in its own name; see *Kington v. Salvator Army*, 7 O. L. R. 681; *Metallic Roofing Co. v. Local Union*, 5 O. L. R. 424; 5 O. W. R. 95; *Small v. American Society of Association Musicians*, 5 O. L. R. 450; *Sellers v. Dutton*, 7 O. L. R. 616; *Wood v. Lovetham*, 4 O. W. R. 502; *Logan v. Hurlburt*, 23 Ont. App. 628; but after a trade union had appeared and pleaded in an apparently corporate capacity, it was held to be too late at the trial to raise the objection that it was not in fact incorporated or liable to be sued. Such an objection must be specially pleaded; *Krug Furniture Company v. Berlin Union of Amalgamated Workers*, 5 O. L. R. 601.

Where the plaintiff sought an injunction against a musical protective association to restrain them from making a member of that body break a contract with the plaintiff, and made the president and six other officers or leading members of the association defendants as representing the association, an order was granted directing that the defendants might be sued and authorized to defend on behalf of all the members of the association; *Small v. Hyttenrauch*, 6 O. L. R. 588.

This *Rule* was acted on in a case where certain charitable bequests in a will, if held invalid, would go to the next of kin, and four of the next of kin besides the widow of the testator, and the Attorney-General, as representing the charities, had been served, and it appeared that there were a large number of next of kin, many of whom were unknown, and service upon others would be difficult and expensive. An order was made declaring that the next of kin were sufficiently represented by those before the Court; *Gillies v. McConochie*, 18 C. L. J. 179; see S. C., 3 Ont. 203.

The *Rule* applies only to persons who have or claim some proprietary right, which they are asserting or defending. It was therefore held not to authorize a plaintiff to sue in tort several presidents of defendant trades unions and societies as representing not only themselves, but all the members of their respective societies; *Tennerton v. Russell*, 1903, 1 Q. B. 435; 4 R. 302.

* On a subsequent application to enforce the judgment in this case by attachment of money in a Bank at the credit of an account headed "Amalgamated Sheet Metal Workers' Union, No. 39" (said to be the defendants, the Local Union), payable out on cheques signed by three officers of the Local Union, it was held that the members of the Union, other than those who had been made defendants to represent all members, though bound by the judgment, were not parties to the action; and that the money in the Bank not being the property of the representative defendants, was not exigible under a judgment against them; see 5 O. W. R. 700; 6 O. W. R. 11 and 283. But see *per Meroloth*, C.L., as to whether property of the Local Union might have been exigible under a judgment differently framed.

Where an action is brought to establish a will, unless so ordered, Rule 200 one of the heirs or next of kin does not sufficiently represent the others. As a general rule all should be made parties; *Cornell v. Smith*, 11 P. R. 275; *O'Sullivan v. Phelan*, 11 P. R. 278; *Gunn v. Carson*, 11 C. L. T. 47; and see *Clifton v. Crawford*, 18 P. R. 310.

It will be observed that where an application is necessary to obtain the authority of the Court to defend on behalf, or for the benefit, of all parties similarly interested, the motion cannot be made in Chambers, but must be in Court.

Effect of Representation of a Class.—In suits by one on behalf of all others of a particular class the other members of the class, if fairly represented, are bound by the judgment; *Commissioners of Sewers v. Gellatly*, 3 Ch. D. 610; *Leathley v. McAndrew*, W. N. 1874, 38; 2 Chanc. Ch. Ch. 24; *Burt v. British Nation Life Assurance Association*, 4 De G. & J. 158, 174; *Barker v. Waters*, 8 Beav. 97.

But an order authorizing a person to represent a class only binds those whose interests are identical with the rest of the class; persons belonging to the class, but having other interests, may however be bound by acquiescence; if any member of a class having notice of the proceedings conceives that his interests are not properly represented, he may apply to be made a defendant; see *Rule 200*; *Young v. Hollaway*, 1884, P. 87; 72 L. T. 118; but if he lies by he may be bound by the judgment; see *Re Lart*, 1896, 2 Ch. 788; 75 L. T. 175.

The same rule holds good where one of the class, on behalf of which the plaintiff claims to sue, objects to the proceedings; he may on applying, be made a party defendant; *Wilson v. Church*, 8 Ch. D. 552; *Fraser v. Cooper*, 21 Ch. D. 718; and that is the proper course if he is really not represented by the plaintiff. He cannot otherwise appeal from an order obtained by the plaintiff; *Watson v. Gape*, 17 Ch. D. 19; unless perhaps in a case where a person has already been made a defendant in the same interest as the applicant, and appointed under this *Rule* to represent that interest; see *Fraser v. Cooper, etc.*, 21 Ch. D. 718.

A person fairly represented will not be allowed to attend the proceedings unless he may be joined as a party; *Conybeare v. Lewis*, 48 L. T. 526.

But where the object of the action was to fix the parties represented with liability, a party so represented on being brought in in the Master's office, on appeal from the Master's certificate, succeeded practically in reversing the judgment so far as he was concerned, although he did not in terms appeal therefrom; *Wise v. Perpetual Trustee Co.*, 1903, A. C. 139; 87 L. T. 569.

Persons authorized by the Court to defend an action on behalf of others having the same interest, have no power to consent on behalf of such others to judgment; the proper course, in case there is no defence, is for the representative to submit the rights of such other person to the judgment of the Court, and the judgment should be so drawn up; *Rees v. Richmond*, 62 L. T. 427.

Where suit is brought by a plaintiff on behalf of himself and other persons of the same class, he continues dominus litis, until judgment, and the other persons interested are bound to see that it is prosecuted to judgment or it may be dismissed for want of prosecution or compromised; *Smith v. Doyle*, 4 Ont. App. 477. After a judgment for the plaintiff in a class suit, any person of the same class as the plaintiff may intervene and apply to prosecute the action if the plaintiff declines to do so; *Canadian Bank of Commerce v.*

Rule 201. *Tinning*, 20 C. L. J. 614; and after judgment in such suit a certificate of lis pendens will not be vacated on the plaintiff's consent: *Arnbury v. Thornton*, 6 P. R. 190; *In re Alpha Co.*, 1903, 1 Ch. 203.

Where the judgment is not in favour of the plaintiff, the same considerations do not apply, and another member of the class is not entitled to be substituted for the plaintiff in order to appeal from the judgment: *Macdonald v. Toronto*, 18 P. R. 17.

Where several ratepayers, in fact, combined in taking proceedings to quash a by-law and put forward one of their number to actually take the proceedings, and he was afterwards corruptly induced to countermand the notice of motion to quash given by him, it was held that the others might, on application, be allowed to continue the proceedings in his name upon indemnifying him as to costs: *Re Ritz v. New Hamburg*, 4 O. L. R. 639.

Persons appointed to represent a class.

201.—(1) Where the right of an heir-at-law or of the next of kin, or of a class, [or of an unborn person,] depends upon the construction of an instrument, and it is not known or is difficult to ascertain who is such heir-at-law or next of kin or class, and the Court deems it convenient to have the question determined before the heir-at-law, next of kin or class in question is ascertained, [or before the birth of any person who may be born.] the Court may appoint some person to represent the heir-at-law, next of kin or class, [or unborn person,] and the judgment of the Court shall be binding upon the person or class [or unborn person] so represented. Con. Rule 316. Rules 23rd June, 1894, 1312.

(2) The Court, in other cases, where necessary in furtherance of justice, may at any time appoint some person to represent, for the purposes of any action or proceeding, the interest of any person who may be not ascertained or who may be unborn. *New*.

The extension of clause (1) of this *Rule*, by the words in brackets, to the case of an unborn person, follows *Rule 1312* of 23rd June, 1894. In other respects the clause is substantially the same as Eng. (1883) R. 154.

Clause (2) is new, and makes the *Rule* applicable in cases other than where the right of the heir, etc., depends upon the construction of an instrument, for example, in an action for foreclosure, where the estate of a deceased mortgagor is vested in unascertained persons.

The *Rule* is thus wider than the English *Rule*, under which the Court has no power to appoint a person to represent a class of which there is no member in existence, e.g., unborn children: *Re Whiting's Settlement*, 1905, 1 Ch. 96.

As to the constitutionality of such an enactment, see *Ashbury v. Ellis*, 1893, A. C. 339.

To enable the Court to act under this *Rule*, an order must be made under *Rule* 201. obtained: see *Re Richerson*, 1893, 3 Ch. 146; 3 R. 643.

As to when the rights of unascertained persons may be determined, and as to their representation by trustees: see *Cardigan v. Curzon-Howe*, 1901, 2 Ch. 479; *Re Whiting's Settlement*, 1905, 1 Ch. 96.

It will be observed that an application under this *Rule* cannot be made in Chambers but must be made in Court.

Examples.—Where upon the construction of a will, questions had arisen as to what classes of representatives of the testator were entitled, and great difficulty was foreseen in attempting to find the heir, who in the result might be held not entitled, an order was made under this *Rule* appointing persons to represent the various classes of persons, some or one of which might be held to be entitled, before the questions of construction came on to be decided: *Re Poppitt's Estate*, *Chester v. Phillips*, 4 Ch. D. 230.

In *Re Hake*, *Pownall v. Pryor*, W. N. 1895, 116, plaintiffs, the legal representatives of the last surviving executor or trustee under a will, were appointed to represent the next of kin for the purposes of the determination, on the construction of a will, whether, in the events which had occurred, the residuary estate was undisposed of.

Persons interested in an estate, the subject of an administration action to which they have not been made parties, and whose rights or interests may be affected by an order directing accounts and inquiries, are not bound by proceedings under that order, at any rate where they ought to be served, unless they are served with notice of the order, or an order has been made appointing a member of their class to represent them: *May v. Newton*, 34 Ch. D. 347.

In *Re Rees*, *Rees v. George*, 49 L. J., Chy. 568, persons who had not been parties, but had been served with notice of decree, were directed to be served with notice of hearing on further consideration, where an order was asked against them personally: see *quare*, whether relief can in any case be properly granted against persons who are not parties: see *Hooper v. Harrison*, and other cases cited in notes to *Rule* 659.

In *Re Pringle*, 17 Ch. D. 821, an action by legatees for construction of a will, the defendants the executors, two of the next of kin, were at the hearing authorized to represent the absent next of kin.

In *Cook v. Fearn*, 27 W. R. 212, representation of an unascertained class, viz., the next of kin of the plaintiff, was dispensed with.

See also *Lovesy v. Smith*, 15 Ch. D. 635; *Hobbs v. Reid*, W. N. 1876, 95; and *Beale v. Ruston*, W. N. 1878, 179; *Moore v. Sinkin*, 53 L. T. 815.

An order appointing a person to represent a class, such as next of kin, is not binding on one of the next of kin who has a distinct and independent interest in another capacity: *Re Lart*, 1896, 2 Ch. 788; 57 L. T. 175.

A person not a party to the action nor technically bound by the judgment, but who was fully cognizant of the proceedings, and stood by and took the benefit of a decision on the construction of a will under which a particular fund was distributed, was held to be estopped by his conduct from re-opening any of the questions covered by the decision by means of a fresh action, relating to another fund under the same will: *Id.*

Rule 202.

Court may proceed though some of the parties interested are not before it.

202. Where questions arise between parties, who are some only of those interested in the property in question, or where the property is comprised with other property in the same instrument, or is the property of an intestate, the Court may adjudicate on the questions arising between such parties without making the other persons interested in the property respecting which the question arises, or interested under the instrument, parties, and without requiring the whole trusts and purposes of the instrument, or the whole estate of the intestate, to be executed or administered under the direction of the Court, and without taking the accounts of the trustees or other accounting parties, or ascertaining the particulars or amount of the property in question or of the whole estate or assets. Con. Rule 319.

Based upon and substantially the same as Chy. O. 57.

This Rule is confined to cases where some special reason exists for not bringing all proper parties before the Court; *Gunn v. Corson*, 11 C. L. T. 47, and as a general rule where an action is brought to establish a will, all heirs or next of kin should be made parties; *Cornell v. Smith*, 14 P. R. 275; *O'Sullivan v. Phelan*, *Ib.*, 278, note.

The Court may under this Rule execute one or more of several specific trusts embraced in an instrument without making all the persons interested in the other trusts embraced therein parties; *Parnell v. Hingston*, 3 Sm. & G. 337. But some of the parties interested on both sides of the question involved must be before the Court; *Swallow v. Binns*, 9 Hare App. xlvii. The Court has refused to permit a plaintiff at the hearing to strike out the names of defendants whom he had improperly omitted to serve with a subpoena to hear judgment, and proceed in their absence although such parties had merely a nominal interest; *Lauhara v. Pirie*, 2 Jur. N. S. 1201, and see *Quaint v. Smolker*, 6 P. R. 288; but where at the hearing it was discovered that an order *pro confesso* against certain defendants had been vacated by a subsequent amendment, the Court pronounced a decree saving the rights of such defendants; *Waddle v. McGinty*, 15 15 Gr. 261. A decree for foreclosure could not be made under this Rule as against some only of the parties interested in the equity of redemption; *Caldick v. Cook*, 32 Beav. 70. But where the parties interested in the equity of redemption are numerous, the Court may, under Rule 190, award judgment and direct that parties so interested be made parties in the Master's Office, but such order can only be made when one or more parties interested in the equity of redemption are already parties to the action.

This Rule applies to applications made under *The Trustee Relief Act* (see R. S. O. 1897, c. 3361), and some out of several parties entitled to the equity of redemption were held entitled to apply under that Act for a reconveyance; *Re Sharpley's Trusts*, 1 W. R. 271. The Rule also applies to parties to special cases; *Swallow v. Binns*, 9 Hare App. xlvii.; *Re Brown*, 20 Beav. 401.

In *Collingham v. Sloper*, 1901, 1 Ch. 769, the Court held that it had no jurisdiction to limit a time within which unascertained bondholders must come in or be excluded from the benefit of a compromise. As to whether represented parties are bound by a compromise order, see S. C., 1904, A. C. 159, and Eng. Rule 131 A.

When the Court proceeds under this *Rule* in the absence of any **Rule 203**, parties interested, the absent parties are not bound by the proceedings: *Doody v. Higgins*, 9 Hare App. xxxii., unless an order has been made for their representation by some person who is a party to the proceedings: *Re Richerson*, 1893, 3 Ch. 146.

203—(1) An objection for want of parties shall not lie in any of the following cases:

(a) A residuary legatee, or next of kin, may have a judgment for the administration of the personal estate of a deceased person without serving the other residuary legatees or next of kin.

Cases where one of a class may sue without joining others.

Residuary legatee, etc.

(b) A legatee interested in a legacy charged upon real estate; or a person interested in the proceeds of real estate directed to be sold, may have a judgment for the administration of the estate of a deceased person, without serving any other legatee or person interested in the proceeds.

Legatee whose legacy is charged on realty.

(c) A residuary devisee, or heir, may have the like judgment, without serving any other residuary devisee, or heir.

Residuary devisee or heir.

(d) One *cestui que trust*, under an instrument, may have a judgment for the execution of the trusts of the instrument, without serving the other *cestuis que trustent*.

One of several c. q. t.

(e) In actions for the protection of property pending litigation, and in cases in the nature of waste, one person may move on behalf of himself, and of all persons having the same interest.

In actions for protection of property.

(f) An executor, administrator, or trustee, may obtain a judgment against any one legatee, next of kin or *cestui que trust*, for the administration of the estate or the execution of the trusts.

Administration against one c. q. t.

(g) An assignee of a chose in action may institute an action in respect thereof without making the assignor a party. Con. Rule 320.

Assignee of chose in action may sue without joining assignor.

The English (1883) Rs. 155-160, are to the same effect as clauses (a, f).

The object of this *Rule* is to save unnecessary expense, and where unnecessary parties are joined in the action, the Court will refuse to charge the estate with extra costs thereby occasioned: *Rodgers v. Rodgers*, 33 Gr. 457; *Bradley v. Wilson*, *Ib.* 645, and it would seem that the plaintiff may be ordered to pay such costs.

Persons interested in an estate the subject of administration proceedings to which they have not been made parties, and whose rights

Rule 203. may be affected, are not bound by the proceedings unless they are served with notice of the judgment; see clause 3 of this *Rule*; or an order has been made appointing a member of their class to represent them: see *Rule 201*: *May v. Newton*, 34 Ch. D. 347.

Persons
not made
parties,
must be
served with
judgment.

Although in the several cases mentioned in this *Rule* the action may be commenced and judgment obtained without making all persons interested parties to the action, yet the persons who but for this *Rule*, would be necessary parties to the proceedings must under clause (3), be served with a copy of the judgment, unless the Court, or Master, dispense with the service, and it is not until "after such service," that they are bound by the proceedings. Whether persons upon whom service of judgment is dispensed with, are bound by the proceedings as if they had been actually served, is not stated in the *Rule*, and it is possible that they would not be so bound: see *Duddy v. Higgins*, 9 Hare App. xxxii.

Persons
from whom
an account
is sought
should be
made parties

Notwithstanding this *Rule*, all persons from whom an account is sought, must be made parties in the first instance: *Latch v. Latch*, L. R. 10 Ch. 464; *Walker v. Seligmann*, L. R. 12 Eq. 152; *Rolph v. U. C. Building Society*, 11 Gr. 275, 278-9; *Hopper v. Harrison*, 28 Gr. 22; *Re Parkes*, 66 L. T. 151; and the judgment cannot be varied under clause (3), *post*, at the instance of persons served with the judgment so as to direct the taking of accounts for which no foundation is laid in the pleadings: *Foster v. Foster*, L. R. 3 Ch. 330, at all events not without giving the party from whom an account is sought an opportunity to adduce evidence to show that the account should not be ordered: a. 1 persons served with the judgment have no greater right to call the original defendants to account, than they would have if such persons had been originally made co-defendants in the action; thus in an action by a remainderman for an account, it was held that a tenant for life served with the judgment could not claim an account of the income: *Whitney v. Smith*, L. R. 4 Ch. 513.

All persons in the same interest with the plaintiff, necessary to be made parties, except perhaps infants, should be made co-plaintiffs: where they are made defendants in consequence of their refusal to join as plaintiffs, they will be refused their costs; *Ling v. Smith*, 25 Gr. 246.

Action by
residuary
legatee.

Sub-clause (a).—Where the action is brought by one of several residuary legatees, the plaintiff sufficiently represents all the residuary legatees, and the others are not entitled as of course to appear in the Master's Office, by a separate solicitor, and if they do, they may be refused their costs: to entitle them to costs some sufficient reason should be stated in the Master's report, for their being represented by a separate solicitor: *Gorham v. Gorham*, 17 Gr. 386.

The legal personal representative is ordinarily a necessary party to an action for general administration, and it is necessary to allege that the person named as the legal personal representative has proved the will or obtained letters of administration, as the case may be: *Penny v. Watts*, 2 Ph. 149; *Re Marshall*, *Fowler v. Marshall*, 1 Ch. Ch. 29; *Kelly v. Ardell*, 11 Gr. 579; *Simons v. Millman*, 2 Sim. 241; *Lowry v. Fulton*, 9 Sim. 104; *Zimmerman v. O'Reilly*, 14 Gr. 646; *Groves v. Lane*, 16 Jur. 1061; *Cooke v. Gittings*, 21 Beav. 497; *Beardmore v. Gregory*, 2 H. & M. 491; *Cary v. Hills*, L. R. 15 Eq. 79; *Dowdswell v. D.*, 9 Ch. D. 204; *Roswell v. Morris*, L. R. 17 Eq. 20; but see *Rule 196*. But probate, or administration, obtained by the alleged personal representative *pendente lite* before

the trial of the action, will be sufficient to bind the estate: *Bateman* Rule 203. v. *Margerison*, 6 Hare, 496; *Trice v. Robinson*, 16 Ont. 433; *Doyle v. Diamond Flint Glass Co.*, 8 O. L. R. 493; and *semble*, will relate back to the commencement of the action so as to bar the running of the Statute of Limitations: *Dini v. Fauquier*, 8 O. L. R. 712 (casting doubt upon if not overruling *Chard v. Rae*, 18 Ont. 374); and this was held even though the objection was taken by defendant in his answer: *Edinburgh Life Assurance Co. v. Allen*, 19 Gr. 593; and see *Stump v. Bradley*, 15 Gr. 30; *McDonald v. McDonald*, 14 Gr. 133 (where probate was not obtained until after judgment); but where the executor had applied for and had obtained an order for the grant of probate, but had never actually obtained probate, after his death, a judgment recovered against him as executor was held not to bind the estate: *Mohanidu v. Pitchey*, 1894, A. C. 437; 71 L. T. 99. Judgment for the general administration of a deceased person's estate may now be granted against an executor *de son tort* without a legal personal representative being a party. Rule 196; formerly it was otherwise: *Rowell v. Morris*, L. R. 17 Eq. 30; *Outram v. Wyckhoff*, 6 P. R. 150; *Re Kirkpatrick*, 10 P. R. 4; but see *Re Lovett*, 3 Ch. D. 198. Judgment for administration, however, cannot be granted against one of several executors who have proved, even though the absent executor be out of the jurisdiction: *Re Freckova, F. v. Carroll*, 6 P. R. 183; *Latch v. Latch*, L. R. 10 Ch. 464. All the executors who have proved, and all who have acted, even though they have not proved, are necessary parties: *Lickers v. Bell*, 4 D. J. & S. 274; *Hamp v. Robinson*, 3 D. J. & S. 97; *Latch v. Latch*, *supra*; but an executor who has renounced, or who has neither proved nor acted, need not be made a party: *Forsyth v. Drake*, 1 Gr. 223; *Willie v. Walker*, 1 Vern. 30 (4) 2; *Stinson v. Stinson*, 2 Gr. 508. Where the plaintiff brought a suit for administration against one of three executors and trustees, alleging in the bill that the others had never acted, and the bill having been served by publication, on a hearing *pro confesso* the Court refused to make a decree in the absence of the other two executors and trustees as parties, or of proof of the facts alleged, accounting for their not being made parties: *Lane v. Young*, 17 Gr. 104. The renunciation of an executor under R. S. O. c. 59, s. 65, is peremptory and cannot be recalled on the death of the acting executor: *Allen v. Parke*, 17 C. P. 105; and after renunciation he cannot execute a power of sale given to him, *qua* executor: *Travers v. Gustin*, 24 Gr. 106; and see *Re Oclaronde*, 19 Gr. 119. As to the acts which will render an executor liable, notwithstanding his renunciation of probate, see *Lannatto v. Mitchell*, 13 Gr. 665.

The representative of a deceased executor who fully accounted to the surviving executor, need not be made a party: *Webster v. Lens*, 28 Gr. 471; and in an action for a general account against surviving trustees, the representatives of a deceased trustee were held not to be necessary parties to the writ, but they may be added at any time under Rule 206 if necessary: *Re Harrison*, 64 L. T. 442.

An executor proving the will, after judgment has been obtained, against another executor who has previously proved, might formerly have been added as a party by a supplemental order: *Guthrie v. Walrond*, 22 W. R. 723; and it would seem he might under the present practice be brought before the Court under an order to continue proceedings: see Rules 395, 396. A general decree for administration was granted in a creditor's suit against an administrator *ad litem*, it being alleged in the bill that there was no personal estate, and the parties interested in the realty having allowed the bill to be

Personal representative a necessary party to action for administration.

Rule 203. taken *pro confesso* against them: *Dey v. Dey*, 2 Gr. 149, but see remarks of Spragge, C., in *Garrow v. McDonald*, 20 Gr. 130.

Action for protection of estate until probate.

An action for protecting the estate until probate cannot be joined with an action for administration; formerly a bill so framed was demurrable for want of parties: *Rawlings v. Lambert*, 1 J. & H. 458; *Overington v. Ward*, 34 Beav. 175; and see *Tempest v. Camoys*, 35 Beav. 201; and *Cole v. Glover*, 16 Gr. 392; but now any objection to an action on the ground of the absence of necessary parties, can not under *The Judicature Act* be taken by demurrer; the question must be raised on motion to add the necessary parties; *Werderman v. Société Générale d'Electricité*, 45 L. T. 514, 18 C. L. J. 18; 19 Ch. D. 246; *Young v. Robertson*, 2 Ont. 439; *Carter v. Clarkson*, 15 P. R. 379, and see *Rule 206*.

Removal of assets may be restrained.

The removal of the assets out of the jurisdiction will be restrained by injunction even though the deceased's domicile was out of the Province: *Shaver v. Gray*, 18 Gr. 419.

Real representatives, when necessary parties.

Where the action relates to the realty as well as the personality, unless the executor is also trustee, or devisee, of the realty, or of some part of it: *Stewart v. Hunter*, 14 Gr. 132, or entitled thereto under *The Devolution of Estates Act*, (R. S. O. 1397, c. 127), s. 4, it is necessary to join the heir, or if the lands be devised, then the devisee, or one or more of the devisees: *Calvert*, 151, 153; *Rule 191 infra*. But execution against the lands of a deceased person might, prior to *The Devolution of Estates Act*, be issued upon a judgment against his personal representative, although those interested in the realty were not parties to the action: R. S. O., c. 77, s. 35, and see *McEvoy v. Clune*, 21 Gr. 515.

No action for administration lies by legatee, or next of kin, within a year of death.

No action can be brought by a legatee, or next of kin, against a personal representative before a year has elapsed from the death of the testator, or intestate: R. S. O., c. 335, s. 4; *Slater v. Slater*, 3 Chy. Ch. 1; *Fivian v. Westbrooke*, 19 Gr. 401; but see *Wallis v. Wallis*, 9 Ir. Chy. 511; *Prosser v. Mossop*, 29 W. R. 439. But an action for the protection of the estate simply, may be brought by a legatee, or next of kin, against an executor *de son tort* before the lapse of the year: *Beardmore v. Gregory*, 2 H. & M. 491; but not for administration as well: *Rawlings v. Lambert*, 1 J. & H. 458; *Overington v. Ward*, 34 Beav. 175. Formerly the High Court had no power to appoint an executor, in place of executors who had become incompetent to act through bodily infirmity, that could only be done by the Surrogate Court; nor would the High Court appoint a trustee in place of such executors: *Corriyal v. Henry*, 2 Gr. 310; but in *Re Moore*, 21 Ch. D. 778, under *The Trustee Relief Act*, a trustee was appointed to discharge the duties of an executrix who retired; and see *Re Morphy*, before Boyd, C., 9th April, 1887; and it would seem that *Rule 195* does not extend the power of the High Court in this respect: see *Re Bush*, 19 Ont. 1; *Rule 195*, note. But where an executor had become insolvent, a receiver was appointed: *Harrold v. Wallis*, 9 Gr. 443; and see *Meacham v. Draper*, 2 Gr. 316; and now jurisdiction to remove executors and appoint others in their stead has been conferred on the High Court: see *Jud. Act*, s. 39.

Formerly High Court could not appoint trustee in place of executor.

When personal representative has distributed estate after

Where the personal representative has duly advertised for creditors under R. S. O., c. 129, s. 38, and has distributed the estate, that is an answer to a subsequent action against him for administration, by a legatee: see *Newton v. Sherry*, 1 C. P. D. 246; or by a creditor: *Clegg v. Rowland*, L. R. 3 Eq. 368; or by an alleged cestui que trust of the deceased: *Re Bracken*, 43 Ch. 1, 1; 61 L. T. 531;

even though he have retained money in his hands to answer legacies, **Rule 203.** because from the time he sets apart moneys to answer legacies, he ceases to hold them as executor, and becomes then a trustee thereof for the legatees: *Id.*; *Cameron v. Campbell* 27 Gr. 307; *Ballard v. Marsden*, 42 L. T. 763; *Galbraith v. Duncombe*, 28 Gr. 27; but see *Noble v. Brett*, 24 Beav. 499. But if he has notice of a creditor's claim, he is not discharged because it was not sent in: *Wood v. Wood*, *Markwell's Case*, 21 W. R. 135; *Re Land Credit Co. of Ireland*, W. N. 1872, 210; and if the advertisement is insufficient he is not protected: *Wood v. Weightman*, L. R. 13 Eq. 434.

Where also there had been an accounting in the Surrogate Court by the personal representative, and no objection made for eight years, the right to a further account in the High Court of Justice was held to be barred: *Bell v. Landon*, 18 C. L. J. 178.

Personal representatives distributing an estate without advertising under the Statute (R. S. C. c. 129, s. 381), or without the authority of the Court remain liable to a creditor, though they had no notice of his claim: *Knatchbull v. Fearnhead*, 3 My. & Cr. 126; *Noble v. Brett*, 24 Beav. 499; *Jeffreys v. Jeffreys*, 19 W. R. 464; and also to legatees; and where the executor has distributed under a mistaken construction of the will he is liable to the parties injured: *Hildard v. Fulford*, 4 Ch. D. 389; *Boulton v. Peard*, 3 D. M. & G. 608; *Doyle v. Blake*, 2 Sch. & L. 243; but he would have a right to recoup himself out of any further payments due to those who had been overpaid: *Dibbs v. Goren*, 11 Beav. 483; and would also seem entitled to call on them to refund the money overpaid them, but not any interest thereon: *Jervis v. Wolferstan*, L. R. 18 Eq. 18; *Boys' Home v. Lewis*, 3 O. L. R. 208.

Publication of the advertisement in the Ontario Gazette is not necessary: *Re Cameron*, 15 P. R. 272.

An infant executor or administrator is not liable to account for assets received by him whilst a minor: *Nash v. McKay*, 15 Gr. 247; *Hindmarsh v. Southgate*, 3 Russ. 324; *Merchants' Bank v. Monteith*, 10 P. R. 334; 20 C. L. J. 377. But a judgment for an account against a trustee who has received moneys while an infant ought to be general in its terms and not confined merely to his receipts after he comes of age: *In Re Garnes*, 31 Ch. D. 147.

Payment of a legacy in full, is *prima facie* an admission of assets to pay all legacies in full, but it is open to explanation: *Coleman v. Whitehead*, 3 Gr. 227. Where an executor in a residuary account stated that he retained £500 to meet outstanding legacies he was held to be precluded from afterwards showing that the statement was a mistake: *Brewster v. Pryor*, 55 L. T. 771.

Administration has been refused, where the estate was sworn by the executors not to have exceeded \$50: *Foster v. Foster*, 19 Gr. 463; but see *Re Falconer*, 1 Chy. Ch. 273; and where the plaintiff's claim as legatee only amounted to \$28, notwithstanding it was alleged that there were other legacies for a considerable sum remaining unpaid, administration was refused, though the suit was unopposed: *Reynolds v. Coppin*, 19 Gr. 427. Administration has also been refused where the applicant was a partnership creditor of the deceased whose separate estate proved to be insufficient to pay his separate creditors: *Re Barnard, Edwards v. Barnard*, 32 Ch. D. 447; 55 L. T. 40.

Rule 203.

Rule applies to application in Chambers for administration.

This Rule applies to applications for administration on summary applications in Chambers, under Rules 944 to 953; but it is to be noted that clause (a) of this Rule is confined to actions by a residuary legatee, or next of kin, and clause (b) is confined to actions by a legatee interested in a legacy charged upon real estate, and therefore neither of these clauses extends to actions by specific legatees, or pecuniary legatees whose legacies are not charged on real estate.

Sub-clause (d).—A new trustee may be appointed in an action by one of several *cestuis que trustent*: *Jones v. James*, 9 Hare, 12 Eq. lxxx.

A suit by one of two *cestuis que trustent* to recover an annuity charged upon land devised to the defendant, was held maintainable without making another *cestui que trust* interested in another annuity charged on the same land, a party: *Ree v. Engleback*, L. R. 12 Eq. 225.

But parties who claim adversely to the trust could not formerly be made parties to a suit for the execution of the trust: *Attorney-General v. Lyon Corporation*, 3 De G. J. & S. 637, where it is said that *Talbot v. Earl of Radnor*, 3 My. & K. 252, to the contrary had been constantly disapproved of and never followed; but see now Rules 186, 187.

Persons from whom account required, trust notwithstanding be parties.

All persons from whom an account is required must be made original parties to the action: see note, p. 364; thus a *cestui que trust* who has been party to a breach of trust, is a proper party: *Jones v. Bennett*, 6 D. M. & G. 609; and a stranger or a creditor who has joined in the breach of trust may be joined: *Lund v. Blanshard*, 4 Hare, 9; *Bank of Toronto v. Beaver & Toronto Mutual Fire Insurance Co.*, 26 Gr. 102; *Consett v. Bell*, 1 Y. & C. C. C. 509; *Stainton v. The Carron Co.*, 18 Beav. 146. But if a trustee commits a breach of trust, the person participating is not a necessary party to an action for the general administration of the trust estate: *Tiffany v. Thompson*, 9 Gr. 244.

Where a suit was brought by a remainderman for an account against trustees, the tenants for life who were served with the decree, were held not entitled to call the trustee to account as to the income: *Whitney v. Smith*, L. R. 4 Chy. 513.

Execution of trust in foreign country.

The Court will decree the execution of a trust of lands in a foreign country when the trustee is resident within the jurisdiction: *Smith v. Henderson*, 17 Gr. 6; and see *Re Robertson R. v. R.*, 22 Gr. 449; but see *Burns v. Davidson*, 21 Ont. 547; 94 L. T. Jour. 30; *Mercantile Inv. Co. v. River Plate Co.*, 1892, 2 Ch. 303; *Gunn v. Harper*, 30 Ont. 650.

Sale by trustee restrained in suit by one of several c. q. t.

Sub-clause (e).—Where property was offered for sale by a trustee under depreciatory conditions of sale as to title, the sale was restrained in a suit instituted by one of several *cestuis que trustent*: *Dance v. Goldingham*, L. R. 8 Chy. 902; but see R. S. O. c. 129, s. 29.

Where the action is necessary and proper, and has resulted in benefit to the co-owners, they may be compelled to bear their proportion of the expense of the action, according to the advantage they are shown respectively to have derived from the proceedings: *Stage v. Mutholland*, 16 Gr. 145.

One tenant in common is entitled to maintain an action for in-**Rule 203.**
 jury to the reversion without joining his co-tenants. The only ques-
 tion would be whether non-joinder of the co-tenants is a reason for
 staying proceedings till they are joined: *Roberts v. Holland*, 1893,
 1 Q. B. 665.

Sub-clause (f).—Where an action for administration is brought in action
 by the personal representative, some special circumstances requiring for admini-
 stration the intervention of the Court must be shown: *Cole v. Glover*, 16 by personal
 Gr. 392; *Barry v. Barry*, 19 Gr. 458; *Grant v. Grant*, 10 P. R. 211; represen-
 tative, 18 C. L. J. 99. It seems that he has no right to institute an action
 merely to obtain an indemnity by passing his accounts: *White v. special*
Cummins, 3 Gr. 602; *Cole v. Glover*, 16 Gr. 392. As to whether a stance
 deficiency of assets to pay debts in full is alone a sufficient reason, must be
 seems doubtful: *Suetnam v. Suetnam*, 6 P. R. 149; *Re Ette*, 6 P. R. shewn,
 159; *Re Shipman*, *Wallace v. Shipman*, 24 Gr. 177; *Marsh v. Marsh*,
 7 P. R. 129; *Re Jack*, *Jack v. Jack*, 13 C. L. J. 358; *Re Bromley*
 (Blake, V.C., 28th Jan., 1878); and see further, *Rule 950*. Where
 there were leaseholds it was held that the executor was entitled
 to bring an action in order to obtain indemnity against liability on
 the covenants in the lease. *Re Bosworth*, *Howard v. Easton*, 45 L. T.
 136; *Dodson v. Sammel*, 1 Dr. & Sm. 575; 4 L. T. 44; but see
 R. S. O. 1897, c. 129, s. 36. The absence of a legatee beyond the
 jurisdiction, whom the executors are unable to discover, was held
 to be a sufficient ground for the executors coming to the Court: *Re*
Wade, *Dec v. Wade*, 18 Gr. 485.

Where the action is unnecessarily brought by the personal repre- He may be
 sentative, he may be ordered to pay costs, or may be refused his ordered to
 costs: see cases cited *Rule 953*. pay costs.

An executor may begin an action before obtaining probate, but he Executor
 must obtain probate before the trial: *Newte v. Metropolitan Railway may begin*
Co., 1 F. & Sm. 583; *Trice v. Robinson*, 16 Ont. 433; or before a suit before
 defence is filed that he is not executor: *Simons v. Milman*, 2 Sm. probate,
 241; but see *Edinburgh Life Insurance Co. v. Allen*, 19 Gr. 593; and
 the same rule applies to administrators: *Humphreys v. Humphreys*,
 3 P. Wms. 350; see also *supra* p. 364-5.

Where an executor, before probate, brought an action to recover
 an asset of the estate, which the defendant had refused to deliver
 up until probate should be obtained, the action was stayed as being
 frivolous and vexatious: *Tarn v. Commercial Banking Company*, 12
 Q. B. D. 294; 50 L. T. 365; and an executor intermeddling with the
 estate before probate may be restrained from so doing, and a receiver
 may be appointed at the suit of a co-executor: *In re Moore*, 13 P. D.
 36; 58 L. T. 386.

An executor cannot under this *Rule* bring an action against one
 of two co-executors who have proved, without making the other a
 party: *Latch v. Latch*, L. R. 10 Chy. 464. Executor
 suing one
 of several
 co-executors.

An action may be brought by a trustee against his co-trustee to
 recover and secure the trust fund, without joining any of the *ces-*
tuis que trustent as parties: *Horsley v. Fawcett*, 11 Beav. 565; *Bay- But c. q. t.*
nard v. Wooley, 20 Beav. 583; *May v. Selby*, 1 Y. & C. C. C. 235; need not
Peak v. Ledger, 4 De G. & S. 137; *Franco v. Franco*, 3 Ves. 75; and be joined.
 an action may also be brought by the trustee against one *cetui que*
trust to recover the trust fund, without making the other *cetuis que*
trustent parties: *Bridget v. Hames*, 1 Coll. 72.

Rule 208.

Action by
personal
representa-
tives to
enforce
claim
against
realty.

An executor who advanced money to pay the price of certain land held by his testator as lessee with a right of purchase, was held entitled to enforce his claim against the land, for the advances so made, the personal estate being exhausted: *Lanvin v. Jermy*, 9 Gr. 100.

A personal representative who is a creditor of the estate may where the personality is exhausted, obtain judgment against a devisee for administration of the realty devised. To such an action the heir-at-law was a proper party; but where the devisee made no objection in his answer to his not being joined, and the plaintiff alleged by his bill that there were no lands descended, a decree was made in the absence of the heir, for the administration of the realty: *Tiffany v. Tiffany*, 8 Gr. 158; but see now *The Devolution of Estates Act* (R. S. O. 1897, c. 127), s. 4.

Sub-clause (g).—As to assignments of choses in action, and as to when an assignee can sue in his own name, see notes to the Jud. Act, sec. 58 (5), *supra*, p. 65.

In such
cases Court
may require
persons to
be joined as
parties.

(2) The Court may require any other person to be made a party, and may give the conduct of the action to such party as it deems proper; and may make such order as it deems just for placing the defendant on the record on the same footing in regard to costs as other persons having a common interest with him in the matter in question. Con. Rule 321.

See Chy. O. 50.

Where proceedings are necessary against persons who have had dealings with the testator whose estate is being administered, the executor has a right to the conduct of the cause unless his conduct has been proved: *Longbourn v. Fisher*, 40 L. T. 124.

Where trustees were accounting parties they were not given the conduct of proceedings: *Allen v. Norris*, W. N. 1884, 118.

Conduct of a sale was given to the party most interested in getting a good price, in *Woolley v. Colman*, 30 W. R. 769; and *Davis v. Wright*, 32 Ch. D. 221.

Where the conduct of an administration action is given to a creditor he is entitled to costs as between solicitor and client: *Re Richardson*, *Richardson v. Richardson*, 14 Ch. D. 611; 43 L. T. 279.

As a general rule where two actions for administration have been commenced the conduct will be given to the plaintiff in the first, even though a judgment may have been first obtained in the second. This rule is not however inflexible. There may be special circumstances which the Court will take into account, such as the object of the first plaintiff in commencing his action, the amount of his interest and the nature of his claim: *Re Scire*, *Mellor v. Scire*, 21 Ch. D. 647; *Townsend v. Townsend*, 23 Ch. D. 100; *Re McRae*, *Forster v. Davis*, 25 Ch. D. 16; or the fact of one of the applicants being an accounting party: *Re Curry*, *Curry v. Curry*, 17 P. R. 60. See also *Perrin v. Perrin*, 3 Chy. Ch. 452, and *Re Draggan*, 8 P. R. 330, and notes to Rule 949.

Where the conduct of the cause was refused to a party, and he appealed, it was held that all parties were interested and should be served with notice: *Septon v. Quillam*, 71 L. T. Jour. 264.

(3) The persons who, but for this Rule, would have been necessary parties, shall be served with an office-copy of the judgment (unless the Court, or Master, dispenses with such service) indorsed with a notice according to Form No. 74, and after such service they shall be bound by the proceedings in the same manner as if they had been originally made parties; and upon notice to the plaintiff they may attend the proceedings under the judgment. Any person so served may apply to the Court to add to, vary, or set aside the judgment within fourteen days from the date of such service. Con. Rule 322.

Rule 203.

Persons who would be necessary parties except for Rule 203 must be served with judgment.

See Chy. Orders 60 and 507.

The Eng. (1883) R. 162, makes the service of such persons necessary only if directed by the Court or a Judge: see *May v. Venton*, in note, *supra*, p. 347.

For Form No. 74, see 11. & L. Forms, No. 929.

Office Copy to be Served.—An office copy of the judgment must be served. As to the making and certifying of office copies of judgments, see Rule 323.

Office copy to be served.

Who is to be Served.—All parties, who, but for clause (1) of Rule 203, would have been necessary parties to the action, who have not been made parties by writ, must be served with the judgment, unless service is dispensed with. Infants and persons of unsound mind not so found who are interested must be served: *Clarke v. Clarke*, 20 L. T. O. S. 88. In such manner as the Master or officer before whom the reference is being prosecuted directs: Rule 220. Before proceedings can be validly carried on against an infant or a person of unsound mind not so found, a guardian *ad litem* must be appointed for such person. Service of the office copy of the judgment on the Official Guardian *ad litem* seems of itself sufficient to constitute him guardian *ad litem* for the infant parties requiring to be served under clause (3) of Rule 203: Rule 219; see also Rule 3; and notes to Rule 219. The procedure to obtain the appointment of a guardian *ad litem* for persons of unsound mind by order is not prescribed by these Rules: see Rule 220, and notes. Where a guardian *ad litem* is appointed by order, he must be served with the order appointing him guardian, and with the office copy of the judgment. The Official Guardian is usually appointed guardian *ad litem*.

All persons who but for Rule 203 (1) would have been necessary parties to action, must be served.

Infants.

Lunatics.

Where parties who should be served are not served, and no proper order is made dispensing with service on them, they will not be bound by the proceedings, and they may be opened up on their application, and moneys distributed to their prejudice may be ordered to be refunded with interest: *Uffner v. Lewis*, 27 Ont. App. 242; 8. C. 3 O. L. R. 208; 5 O. L. R. 684. But if a party who should have been served, lie by after notice of the proceedings, and take no step until after the estate is distributed, he may be precluded by inches from thereafter disputing the validity of the proceedings: *Mohan v. Broughton*, 1900, P. 56; 82 L. T. 20.

Service out of the jurisdiction may be directed: Rule 162 (4), and Rule 167; see *Chambers v. Laurie*, 10 Ha. App. xxvii.; *Strong v. Moore*, 22 L. J. Chy. 917; or substituted service: Dan. Pr., 6th ed. 929; *Re Hynes, Hodgins v. Andrews*, 19 P. R. 217.

Service out of Ontario.

Substituted service.

Rule 203.

Parties
who are
served, are
bound by
proceedings.

Effect of Service.—The person served is not liable to account, nor can a motion for an injunction be made against him: *Walker v. Seligmann*, L. R. 12 Eq. 152; *Hopper v. Harrison*, 28 Gr. 22; *Rolph v. T. C. Building Society*, 11 Gr. 275, 278-9; *Re Parkes*, 68 L. T. 151; see, however, *In re Rees*, 15 Ch. D. 490; *Re Rolfe*, 70 L. T. 624. Neither can he require the defendant to account any further than if he had been himself an original defendant in the action: *Whitney v. Smith*, L. R. 4 Chy. 513. A party served, however, may impeach in the Master's Office an instrument set up in answer to his claim as a legatee, on the ground of fraud: *Dadling v. Dadling*, *Rossa's claim*, 15 C. L. J. 112.

Whether the party served attend the proceedings or not, he is bound by the proceedings. Unless he gives notice to the plaintiff of his intention to attend the proceedings under the judgment he is not entitled to service of notice of the proceedings: in the Master's office: *English v. English*, 12 Gr. 441.

Persons who have been improperly served may move to set aside the service: *Re Symons*, 54 L. T. 501.

Parties
served may
on notice
to plaintiff
attend the
proceedings.

Attending Proceedings.—A person served is entitled, on giving notice to the plaintiff, to attend the proceedings. A party so attending, although entitled to notice of the future proceedings in the action, does not thereby become a party to the action: *English v. English*, 12 Gr. 441; *Walker v. Seligmann*, L. R. 12 Eq. 152; but see *Re Rees*, 15 Ch. D. 490.

Costs where
attending
unnecessary.

Under *Rule 205* the Master has power, among other things, to give special directions as to the parties who are to attend on the several accounts and inquiries: and see also *Rule 204*. A person served under *Rule 203* (3), and attending the proceedings without special leave, may be ordered to pay all the extra costs occasioned by his so attending, if it appear that his attendance was unnecessary: *Sharp v. Lush*, 10 Ch. D. 463; and see *Daubney v. Luke*, L. R. 1 Eq. 495; *Re Marshall*, W. N. 1879, 12.

Persons
not attend-
ing pro-
ceedings not
entitled to
notice.

Persons served with the judgment, and not attending the proceedings, are not entitled to service of the warrant to settle the report: *Green v. Measures*, W. N. 1866, 122; nor of the notice of hearing on further directions: *Lee v. Sturrock*, W. N. 1876, 226. If any relief is intended to be asked against them they are entitled to notice, even though they have not attended the proceedings before the Master: *Re Rees*, 15 Ch. D. 490; *Re Rolfe*, *supra*.

Parties
served may
move
against
judgment.

Motion to Vary Judgment.—The motion to vary, or set aside the judgment, must be made on notice to the plaintiff. The motion is to be made before a Judge in Court. Two clear days' notice of the motion must be given: see *Rule 348*; and it must be set down at least the day before the day named for hearing the motion: see *Rule 364*.

On the motion to vary the judgment by any person served with a copy, the Court will not direct the taking of accounts for which no foundation was laid in the pleadings or proceedings in the action, except perhaps on the terms of allowing the party from whom such account is sought, an opportunity to adduce evidence, to shew why it should not be granted: *Foster v. Foster*, L. R. 3 Chy. 330; and see *Murgatroyd v. Caldwell*, 10 L. T. 410. Additional accounts and inquiries have been directed after the report, at the instance of a party subsequently served with the decree: *Rees v. Rees*, W. N. 1871, 52.

Under the former practice in Chancery, any person served with the Rule 203 decree might rehear the cause: *Elison v. Thomas*, 1 D. J. & S. 18.

A person improperly made a party under this Rule is not limited to moving against the order, but may appeal from the Master's report: *Coican v. Allen*, 21 Ont. App. 457; 20 S. C. R. 292; *McLaughlin v. Stewart*, 1 O. L. R. 205.

Where the question intended to be raised does not appear on the pleadings or previous proceedings in the action, it may be necessary to present a petition in the nature of a bill of review under the former Chancery practice. No petition for leave to file this petition is necessary: *Kidd v. Cheyne*, 18 Jur. 348; *Duggan v. McKay*, 1 Chy. Ch. 380; and see Rule 642.

It would seem that a purchaser under a judgment pronounced in an action constituted under Rule 203, is bound to see that it has been served on all necessary parties, so as to bind them by the proceedings, in the same way that a purchaser is bound to see that all necessary parties are made parties to any other action in which a sale is directed by the Court. *Prima facie*, only the persons who are actually named as parties to the record are bound; Rule 203 (3) forms an exception to this rule: see *Reeve v. Reeve*, W. N. 1871, 52, and *Russell v. Romanes*, 3 Ont. App. 635.

A purchaser, however, is not bound to inquire into the regularity of the proceedings antecedent to the judgment: *Gunn v. Doble*, 15 Gr. 655; *Shaw v. Crawford*, 4 Ont. App. 371; *Collins v. Denison*, 2 Chy. Ch. 465, and see Jud. Act, s. 58 (11); but a purchaser pending proceedings whose rights are made expressly subject to a termination of proceedings in a regular way is in a different position: *Foresters v. Pepp*, 13 P. R. 254.

Dispensing with Service.—The Master, to whom an action is referred, as well as the Court, has under this Rule power to dispense with the service of a copy of the judgment: *Re Hynes, Hodgins v. Andrews*, 19 P. R. 217. Formerly, where the Master dispensed with service he was required to state the reasons therefor in his report: see Chy. O. 587; but that provision has not been embodied in these Rules.

An advertisement may be published for persons who cannot be found to be served, as a condition of dispensing with service on them: see Rule 670.

Service on some of the next of kin, who were resident out of the jurisdiction, was dispensed with: *English v. English*, 12 Gr. 441. An application to the Court to dispense with service may be made *ex parte*: *Ib.*

Absence from the jurisdiction is not of itself sufficient reason for dispensing with service: *Chalmers v. Laurie*, 10 Hare. App. xxvii.; *Mayberry v. Brooking*, 7 D. M. & G. 673; *Strong v. Moore*, 22 L. J. Chy. 917.

Whether parties on whom service of the judgment is dispensed with, either by the Court, or Master, are nevertheless bound by the proceedings, is nowhere stated: it would seem that they are in the same position as parties in whose absence judgment is pronounced under Rule 202, and that they are not bound: see *Doody v. Higgins*, 9 Hare. App. xxxii.; *May v. Newton*, 34 Ch. D. 347; unless by acquiescence: see *Re Lort*, 1896, 2 Ch. 788; 75 L. T. 177; and see

Rules *Bunnett v. Foster*, 7 Beav. 540; *Saragossa & M. Ry. v. Collingham*,
204, 205. 1904, A. C. 159; and Eng. Rule 131 A.

Persons not having an interest at the date of the judgment cannot be brought before the Court under this *Rule*: *Colyer v. Colyer*, 11 W. R. 355; but see *Rule* 659.

As to the effect of omitting to serve, or dispense with service: see *Uffner v. Lewis*, *supra*, p. 371.

**Parties to
adminis-
tration pro-
ceedings**

204. In administration proceedings no person other than the executor or administrator shall, unless by leave, be entitled to appear either in Court or in Chambers, or in a Master's office, on the claim of any person against the estate of the deceased in respect of any debt or liability. The Court, Judge or Master, as the case may be, may direct any person to appear, either in addition to or in the place of the executor or administrator, upon such terms as to costs or otherwise as may seem proper. *Con. Rule* 334.

Compare Eng. (1883) R. 169, which is in substance the same.

Mere liberty to attend proceedings does not necessarily entitle the party to costs of attendance. The order should so provide if it is the intention that costs should be allowed: *Day v. Beatty*, 21 Ch. D. 830.

Only one party, generally speaking the executor or administrator, should in general attend to oppose a contested claim in an administration action: *Re Smith v. Watts*, 52 L. J. Chy. 209.

**Objection to
nonjoinder
at hearing,
judgment
saving
rights of
absentees.**

205. Where a defendant, at the trial or on motion for judgment, takes objection for want of parties, the Court, if it thinks fit, may pronounce a judgment saving the rights of all persons not parties. *Con. Rule* 323.

Taken from Chy. O. 65.

The Court may now in every action deal with the matters in controversy, so far as regards the rights and interests of the parties actually before it: *Rule* 206.

When the Court acts under this *Rule* the absent parties will not, as a general rule, be bound by the judgment pronounced, unless after knowledge thereof, they accept any benefit thereunder, or otherwise acquiesce therein: see *Re Lart*, 1896, 2 Ch. 788; 75 L. T. 175; but the Court instead of pronouncing a judgment saving the rights of an absent party, may make an order adding him as a defendant, and adjourn the hearing or trial to enable him to be served: see *Clifton v. Crawford*, 18 P. R. 316.

The Court will only act under *Rule* 205, where justice can be done to all parties notwithstanding the defective constitution of the action: *Lambert v. Hutchinson*, 1 Beav. 277, 286.

**Cases in
which *Rule*
acted on.**

Where in a suit to set aside an alleged fraudulent conveyance by a debtor, it appeared at the hearing that a note *pro confesso* entered against one of the defendants, the original debtor, had been waived by a subsequent amendment of the bill, the Court dismissed the bill

as against that defendant, on the application of the plaintiff, without **Rule 206**, the dismissal being equivalent to a dismissal on the merits, and made a decree, saving the rights of that defendant: *Waddle v. McGinty*, 15 Gr. 261.

A decree was made under Chy. O. 65, from which this *Rule* is taken, in the absence of the assignee of a bankrupt: *Maybery v. Brooking*, 7 D. M. & G. 673; of a mortgagee: *Feltham v. Clark*, 1 De G. & Sm. 307; of a person entitled in a remote contingency: *Daubuz v. Peel*, 1 Coop. temp. Cott. 365; of the heir-at-law of the last surviving trustee, and of the personal representative of a testator: *Faulkner v. Daniel*, 3 Hare, 199.

An objection for want of parties should be taken as soon as possible, and not postponed until the trial, or motion for judgment: *for want of parties must be taken promptly.* *Luke v. South Kensington*, 11 Ch. D. 121; *Sheehan v. Great Eastern Ry. Co.*, 16 Ch. D. 59; 29 W. R. 69; the objection should be taken by motion, and not merely raised by statement of defence: *Id.*, and see notes to *Rules 202, 206*; and see *Vallance v. Birmingham*, 24 W. R. 454; *Roberts v. Evans*, 7 Ch. D. 830; 26 W. R. 280, where no costs of pleadings were allowed to plaintiff from the time the objection was taken.

206.—(1) An action shall not be defeated by reason of the misjoinder of parties, and the Court may deal with the matter in controversy so far as regards the rights and interests of the parties before it.

(2) The Court or a Judge may, at any stage of the proceedings, either upon or without the application of either party, and upon such terms as may appear to the Court or Judge to be just, order that the name of a plaintiff or defendant improperly joined, be struck out, and that any person who ought to have been joined, or whose presence is necessary in order to enable the Court effectually and completely to adjudicate upon the questions involved in the action, be added as plaintiff or defendant.

See *Long v. Crossley*, 13 Ch. D. 391.

(3) No person shall be added or substituted as a plaintiff (a), or as the next friend of a plaintiff, without his own consent in writing thereto to be filed.

The words "in writing" were not in the original *Rule*.

At (a), the former Con. Rule 324 had "suing without a next friend." The meaning is doubtless the same, as it is not to be supposed that where the consent of a next friend is obtained, the consent of the plaintiff, of whom he is next friend, is also to be obtained.

It seems to be assumed that in some cases a person may be added as a plaintiff without his consent: *Murray v. Wurtch*, 19 P. R. 288; *sed quare*, if that is correct, having regard to the explicit terms of this *Rule*.

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(4) Parties who are so added [or substituted] as defendants shall be served with a writ of summons or notice in manner hereinafter mentioned, or in such other manner as may be ordered, and the proceedings as against them shall be deemed to have begun only at the time of service. Con. Rule 324.

Clauses 1-4 are the same as Eng. (1883) R. 133, except the words in brackets.

As to the words "only at the time of service," (in the Eng. R. "only on the service of summons or notice.") see *The Bowesfield*, 51 L. T. 128; *St. Louis v. O'Callaghan*, 13 P. R. 322.

How
application
is to be
made.

(5) An application to add, or strike out, or substitute a plaintiff or defendant may be made to the Court or a Judge, at any time before trial, by motion, or at the trial in a summary manner. Con. Rule 325.

Clause (5) is the same as Eng. (1883) R. 134.

The first clause is an extension of the Chy. O. 53, which provided that no suit should be dismissed by reason of the misjoinder of persons as plaintiffs.

The Court of Chancery formerly under Chy. O. 65, exercised a similar power of dealing with the questions raised in a suit, wherever justice could be done to all parties notwithstanding misjoinder or nonjoinder: see *Lambert v. Hutchinson*, 1 Beav. 277, 286. Where necessary, the decree expressly saved the rights of absent parties.

From the provisions for adding parties contained in the sub-clauses of this Rule, it would appear that "misjoinder" includes "nonjoinder." As to substituting a plaintiff when an action has been commenced in the name of a wrong party: see Rule 313.

Persons who might have been made parties under Rule 185, may be added under this Rule: *Liddiard v. Toronto Railway Co.*, 5 O. L. R. 371 (where, in an action for damages for injuries to the plaintiff occasioned by negligence of defendants, liberty was given to join as a plaintiff the plaintiff's infant son who was also injured, making him to sue by his father as next friend).

Misjoinder, though it cannot defeat an action, may affect the costs: *Roberts v. Evans*, 7 Ch. D. 830.

Striking
out and
adding
parties.

Misjoinder and non-joinder of parties ceased after the Ind. Act to be grounds of demurrer: see *Blake & Co. v. Moore*, 8 L. R. Ir. 95; *Werderman v. Société Générale, etc.*, 19 Ch. D. 246; *Hunter v. Young*, 4 Ex. D. 256; *Young v. Robertson*, 2 Ont. 434; *Seane v. Duckett*, 3 Ont. 370; *Carter v. Clarkson*, 15 P. R. 379. The defendant's course is to apply under the present Rule to add, or strike out, parties, or require the plaintiff to do so; and the defendant should raise any objection of this kind that he may have, at the earliest possible moment: *Sheehan v. Great Eastern Ry. Co.*, 16 Ch. D. 59, where the objection was not allowed though taken by the defence; see also *Ruston v. Tobin*, W. N. 1880, 19; *Roberts v. Evans*, 7 Ch. D. 830; *Seane v. Duckett*, 3 Ont. 370. Where the defendant's contention is that additional parties are necessary to enable the action to proceed

at all. It would seem, however, that it is sufficient for him to take **Rule 206**, the objection by his defence, leaving the plaintiff to apply to add parties if so desired: see *Nobel's Explosives Co. v. Jones*, 28 W. R. 653; 42 L. T. 734; 49 L. J. Chy. 726; *Lydall v. Martinson*, 5 Ch. D. 780; see also *Cornell v. Smith*, 14 P. R. 275, an action to establish a will.

If the plaintiff cannot proceed without the addition of parties, the action should not be dismissed (see the first clause of this *Rule*), but the parties deemed necessary should be directed to be added by him: *VanGelder v. Sowerby Bridge, etc., Soc.*, 44 Ch. D. 374. If in such a case the trial has to stand over, the question as to how the costs thrown away should be borne will doubtless depend upon which party was in default in not applying to have the parties added.

It was held to be too late to raise objection for the first time in the Supreme Court, that the legal representatives of the person injured were not made parties, where a policy was sued on by the person in whose favour it was made: *Venner v. Sun Life*, 17 S. C. R. 394.

Where the plaintiffs are not persons entitled to bring the action, so that the objection is one of substance, and not merely that other parties should be joined, formerly a demurrer was proper, and now, probably, that objection may be raised under *Rule 259*: see *McCleughan v. Grey*, 4 Ont. 329.

Clause (1) provides a cure for misjoinder and non-joinder, by Time of striking out or adding parties. Applications under it may be made application by either party, or the Court may act *mero motu*: *Kino v. Rudkin*, 5 Ch. D. 160. The power given is very extensive, and may be exercised at any stage of the proceedings, before trial on motion, and at the trial: *Kino v. Rudkin*, 6 Ch. D. 160, in a summary way: *Rule 206* (5). An order was made after delivery of a statement of claim: *Anon.*, 2 Charl. Ch. Ca. 25; but was refused as being asked for at an unreasonably late stage where the case had come on for trial and had been adjourned: *Williams v. Andrews*, W. N. 1875, 237; 1 Charl. Ch. Ca. 60. It cannot be made after the trial or after final judgment: *Durham v. Robertson*, 1898, 1 Q. B. 765, per Chitty, J., at p. 974; *Attorney-General v. Corporation of Birmingham*, 15 Ch. D. 423. In that case new parties had succeeded to the rights and liabilities of the defendants, and it was held on appeal, that the pleadings could not be amended to introduce these parties after final judgment, and that when it becomes necessary to enforce such a judgment against persons who had acquired a title after it was made, an action must be brought for that purpose; and after final judgment dismissing an action it was held to be too late to add a party as plaintiff, in order to remedy an objection of want of proper parties: *Johnston v. Consumers' Gas Co.*, 17 P. R. 297. Where the judgment is not drawn up, however, and can therefore be recalled, the plaintiff may be allowed to amend and add parties: *Keith v. Butcher*, 25 Ch. D. 750.

An application to add as a defendant a person who ought to be, but has not been joined, ought to be granted or refused upon the same principles on which a plea in abatement for the non-joinder of such person would have succeeded or failed: *per* Lord Cairns in *Kendall v. Hamilton*, 4 App. Cas. 516.

Applications to add or strike out.—An application to add or strike out parties should be made promptly: *Sheehan v. Great Eastern Ry. Co.*, 16 Ch. D. 59; *Williams v. Andrews*, W. N. 1875, 237;

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1 Charl. Ch. Ca. 60; *Fallance v. Birmingham, etc.*, 2 Ch. D. 369. It may be after delivery of statement of claim: *Anon.*, 2 Charl. Ch. Ca. 25; or at the trial, even during examination of witnesses: *Ruston v. Tobin*, W. N. 1880, 19; *Kino v. Rudkin*, 6 Ch. D. 160; *House Property Co. v. H. P. Horsenail Co.*, 29 Ch. D. 190; *Gandy v. Gandy*, 30 Ch. D. 57; though it may under the circumstances be then too late: *Nobel's Explosives Co. v. Jones*, 28 W. R. 653; or in some cases after judgment if the party to be added does not object: see *Re Mason, Turner v. Mason*, W. N. 1883, 134, 147; *sed quære*, see *Heard v. Borgwardt*, W. N. 1883, 173 and 194, and *Hurst v. Hurst*, 21 Ch. D. 278, 289; *Johnston v. Consumers' Gas Co.*, *supra*.

The order, whether for adding, striking out, or substituting parties, is in the discretion of the Judge; and after trial it was held too late to add new plaintiffs and make a new case: *New Westminster Brewing Co. v. Hannah*, 24 W. R. 899.

A Divisional Court in ordering a new trial may properly add as a party a person against whom relief is then for the first time claimed in the alternative: *Casson v. Consolidated Plate Glass Co.*, 25 Ont. App. 63.

A voluntary association of individuals forming an unincorporated society cannot be sued in the name of the association, and if so sued, may move to strike out its name as a party defendant: *Metallic Roofing Co. v. Local Union*, 5 O. L. R. 424. As to the proper way of suing such an association, see *Rule 200* and notes.

Where it becomes necessary to enforce a judgment against persons who acquired title after it was made, an action must be brought: *Attorney-General v. Corporation of Birmingham*, 15 Ch. D. 423; but see *Young v. Huber*, 29 Gr. 49; and see *Morgan v. Day*, Dan. Pr. 5th ed., 463, note (c), and *Campbell v. Holyland*, 7 Ch. D. 166.

The application is made in Chambers: see *Wilson v. Church*, 9 Ch. D. 552; and on notice: *Tildesley v. Harper*, 3 Ch. D. 277; *Re Calbeck, Hall v. Calbeck*, 36 W. R. 259; but an order *nisi* has under peculiar circumstances been made *ex parte*, to become absolute unless moved against within a time named in the order: *Re Worthley*, 4 Ch. D. 180; *Wilson v. Church*, *supra*.

A motion on behalf of some of several plaintiffs, when all should join, will not be entertained: *Re Wright*, 1895, 2 Ch. 747.

In *Roberts v. Holland*, 1893, 1 Q. B. 665, the objection that the plaintiff could not sue alone was raised as a point of law on the pleadings.

Appeal.—An appeal lies from an order of the Judge at the trial directing the case to stand over to add parties: *Payne v. Caughell*, 24 Ont. App. 556; and see *Monro v. Toronto Railway Co.*, 4 O. L. R. 36; 5 O. L. R. 483.

Striking
out parties.

Striking out Parties.—Under the former practice, if a party was improperly joined, the defendant might demur if the impropriety appeared on the face of the proceedings; otherwise it was necessary to defend, and proceed to a hearing of the cause. The present *Rule* enables the Court to strike out a party improperly joined, before expense is incurred.

An objection that a person joined with others as plaintiff has no title to maintain the action is a matter of substance which should

be raised on the pleadings under *Rule 259*, and not by motion to *Rule 204*.
strike out parties under *Rules 206* and *185*: *Morang v. Rose*, 3 O. L.
R. 354.

Where an action is brought without proper authority, the action may be stayed in the case of a sole plaintiff; or in case there be several plaintiffs, some of whom have not authorized it, the names of such plaintiffs may be ordered to be struck out. The application may be made by the defendant or by the parties whose names have been used without authority: *Barrie v. Weaymouth*, 15 P. R. 95; *Barrie v. Barrie*, 19 P. R. 33. If the application is made by the defendant the parties whose names are to be struck out are necessary parties to the motion: see *infra*, p. 383.

If a defendant is improperly joined, he should apply to have his name struck out, at the earliest possible moment; but a defendant was struck out on his own application, though he had delivered a statement of defence upon which issue had been joined, and delay only influenced the decision as to the costs: *Lallance v. Birmingham & Midland Land, etc., Corporation*, 2 Ch. D. 369.

Where two defendants are sued in the same action, in respect of separate torts, or other distinct and separate causes of action, either may apply to compel the plaintiff to elect against which of them he will proceed, and the name of the other will be struck out: *Sadler v. G. W. Ry. Co.*, 1896, A. C. 450; 74 L. T. 561; *Andrews v. Forsythe*, 7 O. L. R. 188; *Chandler v. Grand Trunk Ry.*, 5 O. L. R. 389.

Where defendants did not move under this *Rule* to be struck out, but took part in the defence, they were held jointly liable with other defendants to the costs of the action: *Twinbarrow v. Braid*, W. N. 1878, 169.

The Court will not virtually try the cause, however, on such an application. Where, therefore, a plaintiff, a builder, sued for work and labour done, and made two persons defendants who occupied the position of lessee and lessor, alleging that there was a doubt which was liable to him, Lush, J., on the application of the lessor, refused to strike him out on his statement that the lessee was liable to do all repairs: *Anon.* W. N. 1875, 203; 1 Charl. Ch. Ca. 59. Under an order striking out a defendant and giving the plaintiff leave to amend, he may not amend by striking out another defendant, even though that defendant's interest was determined: *Wymer v. Dodds*, 11 Ch. D. 436; *Elwen v. Vaughan*, W. N. 1879, 69. A defendant sought to be struck out is entitled to notice, that he may be heard as to the question of his costs: *Wymer v. Dodds*, *supra*.

A defendant in ejectment, a tenant, whose landlord had obtained leave to defend, and whose lease had expired pending the suit, was not allowed to have his name struck out, as the plaintiff's security would thus be diminished: *Johnston v. Oliver*, 9 P. R. 353.

On grounds apart from any question of personal responsibility, defendants on their own application may not be allowed to be struck out: see *Heatly v. Newton*, 19 Ch. D. 336.

Where there is a misjoinder of plaintiffs, a defendant may apply to stay proceedings until the plaintiffs elect which of them shall proceed, and the names of the others will then be struck out. On such an application the Court has no power to impose terms on

Rule 206. defendants as regards any defence under the Statute of Limitations which they may have against the plaintiffs whose names are struck out, or to enable the latter to issue new writs *nunc pro tunc*: *Huthnance v. Raleigh*, 17 P. R. 458.

Plaintiffs
joined
without
their
authority.

Where persons are joined as plaintiffs without their authority, the defendant may move to strike out their names as plaintiffs: *Barrie v. Weaymouth*, 15 P. R. 95; or the party improperly joined as plaintiff may move to have his name struck out of the proceedings, and the formal discontinuance of the action is no bar to the motion: *Gold Reefs v. Dawson*, 1897, 1 Ch. 115; 75 L. T. 575.

Adding
parties.

Adding Parties.—This Rule is to be read in connection with Rules 185, 186, and 313: *Edwards v. Louther*, 24 W. R. 434; and any person who might have been joined originally under the latter Rules may be added under this Rule: see *Liddiard v. Toronto Ry.* 5 O. L. R. 371; *Smith v. Haseltine*, W. N. 1875, 250; 1 Charl. Ch. Ca. 56; *Long v. Crossley*, 13 Ch. D. 388, subject to the restrictions hereafter referred to, and to the power of the Judge in his discretion to refuse to interfere if injustice is likely to be done in any way by the addition: see *Edwards v. Louther*, 34 L. T. 257.

The words "who ought to have been joined," in this Rule mean "ought, in order to do complete justice, to have been joined," and, as a general rule, "all parties against whom remedy or relief is sought should, if possible, be joined in the same action": per Archibald, J., in *Edwards v. Louther*, 45 L. J. C. P. 419. There, an action was brought against a publisher of a newspaper for libel, and after issue joined the proprietor of the newspaper was added as a defendant on the plaintiff's application.

Where a plaintiff assigned his interest to a third person, who obtained an order giving him liberty to prosecute the suit in the name of the original plaintiff, it was held on the application of the defendant, that the assignee was bound to amend the title of the action, so as to shew that he was the real plaintiff, and to set forth the assignment, by amendment or otherwise. In the statement of claim: *Seear v. Lawson*, 16 Ch. D. 121.

But the Courts do not interpret the Rules as empowering them to add parties at the instance of a defendant to the same extent as upon the plaintiff's application.

In an action to restrain defendants from using certain premises as a smallpox hospital, application was made under this Rule by the plaintiff, to join another person with his consent who was an inhabitant of the same neighbourhood, on the ground that since the action was commenced the plaintiff had given up his business and was going abroad. An order was refused, on the ground that the cause of action was injury to the plaintiff's own property only, and it was not necessary, to enable the Court effectually to dispose of all questions in the action, that anyone be added: *Dalton v. St. Mary Abbots*, 47 L. T. 349.

Where the plaintiffs were lessees of eleven houses for a long term, one being sub-let, they, together with the sub-tenant, brought an action to restrain a nuisance, etc., subsequently the sub-tenant declined to go on. The other ten houses having been let in the meantime, two of the other sub-tenants were on application added as co-plaintiffs with their consent: *House Property & L. Co. v. H. P. Horsnail Co.*, 29 Ch. D. 190.

Persons were added as defendants who appeared to be the persons really liable to plaintiffs, and were conducting the defence for the defendants sued: *Adams v. Watson Manufg. Co.*, 15 Ont. 218; and 16 Ont. 2, where the decision was affirmed as to the terms of payment of costs imposed as a condition precedent to amending.

In *Hathaway v. Doig*, 6 Ont. App. 264, where the plaintiff in an action to restrain a nuisance appeared to have no interest, his wife being the owner of the property injured, an application to substitute the wife with her consent as plaintiff was refused, it being held that the suit was not merely not properly constituted, but had no proper existence at all, and another person who had a right should not be substituted for a person who had no right to institute proceedings: see also *Nor Westminster Brewery Co. v. Hannah*, 24 W. R. 899; *Walcott v. Lyons*, 29 Ch. D. 584, where an action was brought by a life tenant against trustees for improper investment; the defence made was that the life tenant had acquiesced; a motion to add the tenant in remainder, who had not acquiesced, as co-plaintiff was refused; but see *Rule 313*.

Adding Plaintiffs.—The addition of a plaintiff is subject to the provision of clause (3) of this *Rule*, that the addition shall be by his consent in writing; (see *vide*, *Murray v. Wartle*, *supra*, p. 359), but if he consents, the addition may be made against the wish of the other plaintiffs, if necessary, as where the right of action has passed from the original plaintiff: *Emden v. Cotte*, 17 Ch. D. 100; 29 W. R. 600.

Where a party brought an action in his own name instead of in the name of the person in whom the legal title of the property to be recovered was vested, an amendment was allowed adding such party: *McGuin v. Fretts*, 7 C. L. T. 159; *Walcott v. Lyons*, 29 Ch. D. 584; and see *Ayscough v. Bullar*, 41 Ch. D. 341.

But in a later case it was held that if the plaintiff by whom the action was commenced had no cause of action, the adding as a co-plaintiff at the trial a person who had the right of action, would not cure the defect, and the action must fail; see *Matthews v. Usher*, 1900, 2 Q. B. 535; see, however, *Rule 313* and notes; and *Kent v. Communauté des Sœurs de Charité*, 1903, A. C. 220.

In *De Hart v. Stevenson*, 1 Q. B. D. 213, one of the several co-owners of a ship, sued for freight dues; the defendant applied to add the other co-owners as plaintiffs confessedly in order to obtain the benefit of their liability for costs. The application was refused, on the ground that it was not shown that the presence of the others was necessary in order to completely adjudicate upon and settle the questions arising in the action; see also *Harry v. Davey*, 2 Ch. D. 721, and *Walcott v. Lyon*, *supra*.

In *Long v. Crossley*, 13 Ch. D. 388, an action was brought by a tenant for life for specific performance of an agreement, signed by her "for myself and those entitled after me," to accept a lease of a coal mine. After notice of trial the plaintiff died, and the persons entitled in remainder, of whom the plaintiff's executor was one, wishing to adopt the suit, were at their request added as plaintiffs at the trial. The question whether the action would nevertheless fail was not considered by the Court. Fry, J., said, "I think that at present I have nothing to do with that. The object of the provision was, not that a party's case should be framed so as to succeed, but that it can be adjudicated on by the Court, whether in his favour or against him."

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In *Cormack v. Grofrian*, W. N. 1876, 22, the action was by a ship-owner against consignees of the cargo for demurrage, and a counter-claim was put in for damage to the cargo. Leave was refused to the plaintiff to add as co-plaintiffs the other owners (perhaps because they did not consent), though it was admitted to be hard that the plaintiff should have to meet the counter-claim alone if others were liable as much as he.

In *Beck v. Dear*, W. N. 1876, 40; 2 Charl. Ch. Ca. 25, the addition of a plaintiff was refused where the object was to bring a counter-claim against him. See also *Bank of Commerce v. Bank of B. N. America*, 10 P. R. 158; *Norris v. Beazley*, 2 C. P. D. 80.

See also *Secar v. Lawson*, 16 Ch. D. 121, *supra*, where a plaintiff was in effect added on a defendant's application.

In *Emden v. Carter*, 17 Ch. D. 163, a trustee of a bankrupt plaintiff was added as a plaintiff, and the conduct of the action given to him on his own application, he alleging that the interest in the action had passed from the plaintiff to him. A similar order was made in *Bied v. Matthews*, 46 L. T. 512; see also *Woodward v. Shields*, 32 C. P. 282, and notes to *Rule 396*.

In *Saylor v. Cooper*, 2 Ont. 308, where the equitable owner of land sued in respect of a right of way of necessity implied by a grant of land, he was permitted to make the owner of the legal estate a co-plaintiff by amendment at the hearing; and see *Lynce v. Snaith*, 1800, 1 Q. B. 486; 80 L. T. 122.

An amendment by adding a plaintiff ought not to be allowed so as to prejudice the defendant's right to set up the Statute of Limitations as against the added party; see *Hudson v. Fernyhough*, 61 L. T. 722; affirmed by C. A.; see 88 L. T. Jour. 253.

Neither this *Rule* nor *Rule 207* provides for the issue or service of an amended writ where a plaintiff is added. As to when an amended writ should be served, see notes to *Rule 312*.

Consent of
person
added as
plaintiff.

Consent of Person added as Plaintiff.—The consent referred to in clause (3) must be proved; *Turquand v. Fearon*, 27 W. R. 326; *Mason v. Harris*, *ib.*, 700; under the original *Rule* it need not have been in writing. It was sufficient if the solicitor for the existing plaintiff stated that he was authorized to consent on behalf of the new plaintiff, the solicitor taking the ordinary responsibility of using a plaintiff's name; *Cor v. James*, 19 Ch. D. 55. The practice now requires the consent to be in writing and filed. It must be given personally by the party to be added; the consent in writing of his solicitor, though given with his knowledge, and in his presence, is not in compliance with the *Rule*, and is insufficient; *Fricker v. Van Grutten*, 1890, 2 Ch. 649; 75 L. T. 117. The objection that there is no consent of a plaintiff sought to be added may be taken by the defendant; *Turquand v. Fearon*, *supra*; see also *Jackson v. Kruger*, 51 L. J. Q. B. 446; 52 L. T. 962; *Tryon v. National Prov.*, 16 Q. B. D. 678.

The case of trustee and *cestui que trust* is no exception to this provision: the trustee's consent will be required in order to make him a co-plaintiff on the application of his *cestui que trust*; *Besley v. Besley*, 37 Ch. D. 648; so also where an assignee for the benefit of creditors was sought to be added as a plaintiff in an action by a creditor to set aside a fraudulent conveyance; *Bank of London v. Wallace*, 13 P. R. 176; and persons alleged by the defendants to be beneficially interested in the subject matter of the action, named on

the defendant's application be added as plaintiffs without their consent **Rule 206**, sent in writing: *Major v. MacKenzie*, 17 P. R. 18.

In *Duckett v. Gover*, 6 Ch. D. 82, a company was made, by mistake of law, a defendant instead of a plaintiff; and time was given to obtain the consent of the company to be joined as co-plaintiffs: see also *Mason v. Harris*, 11 Ch. D. 97, and *Pender v. Lushington*, 6 Ch. D. 70. Where a resolution of a company had been passed that the company's name should not be used in an action brought by a shareholder for himself, and also in the name of the company, against directors alleging misapplication of the funds, the company's name was struck out as plaintiff, and leave was given to amend the writ by adding the company as defendants: *Silber Light Co. v. Silber*, 12 Ch. D. 717. In *MacDougall v. Gardiner*, 1 Ch. D. 13, 22, it was said that every litigation on a company's behalf should be in the name of the company if the company really desires it. See also *McHenry v. Lewis*, 25 So. Jour. 777. Where there is a fraud committed by persons who can command a majority of votes, the majority may sue and the company need not be plaintiff: see *Aticool v. Merryweather*, L. R. 5 Eq. 464; *Menier v. Hooper*, L. R. D Chy. 350; *Mason v. Harris*, 11 Ch. D. 107; and see *Spokes v. Grovenor, etc., Hotel Co.*, 1897, 2 Q. B. 124; 76 L. T. 679, per Chitty, L.J.

Jessel, M.R., in *Duckett v. Gover*, 25 W. R. 554, said: "An application to strike out the name of a person added as plaintiff without his consent can only be made by the person so added"; but where proceedings were instituted without the authority of a company, they were set aside at the instance of defendants: see *Cape Breton Co. v. Fenn*, W. N. 1881, 23; and see *Barrie v. Weymouth*, 15 P. R. 95; *Barrie Public School Board v. Barrie*, 19 P. R. 31.

The authority given by a married woman to a next friend to sue for her is not a document which can be filed: *Rodgers v. Horn*, 26 W. R. 432.

But a next friend's authority to the solicitor to use his name as next friend must be filed in the office in which the proceedings are commenced: see *Rule 198*.

As to adding a person as plaintiff without his consent under *Rule 396*, see notes to that *Rule* and *Murray v. Wurtel*, 19 P. R. 288.

Adding Defendants.—On the plaintiff's application, as a rule all persons may, on proper terms, be added, against whom the plaintiff desires to proceed, and whom he might have made defendants originally. Adding defendants on plaintiff's application.

A person whom plaintiff was entitled to join originally under *Rule 192*, as a defendant, was added upon proper terms on the plaintiff's application after he had obtained discovery: *Tate v. Natural Gas Co.*, 18 P. R. 82.

A plaintiff the assignee of a book debt, in an action against the debtor, was allowed to add the assignor, and make an alternative claim against him in the event of the debtor succeeding in his defence: *Langley v. Law Society of U. C.*, 3 O. L. R. 245.

Whether a defendant will be added or not upon a defendant's application, depends upon whether the adjudication upon and settling of the questions arising in the action requires the presence of the person proposed to be added: *Harry v. Darcy*, 2 Ch. D. 721. In general a defendant will not be added against the plaintiff's will, unless in the language of clause (a) his presence is necessary to enable On defendant's application.

Rule 206. the Court to effectually and completely settle all matters in question, and unless the parties will be prejudiced by his non-joinder: *Leduc v. Ward*, 54 L. T. 214; *McCheane v. Gyles*, No. 2, 1902, 1 Ch. 911, 80 L. T. 217. In *Norris v. Beasley*, 2 C. P. D. 80, a defendant sought to add a person as a defendant. The person sought to be added consented, and the object of the application was to enable such person to set up a counter-claim against the plaintiff, (and see *Montgomery v. Foy, Morgan & Co.*, 1895, 2 Q. B. 321). The plaintiff objected, and it was held that this Rule should not be made use of in a manner harassing to plaintiffs, by forcing them to include in their action persons against whom they do not seek to proceed, unless a strong case is made out, showing that in the particular case justice cannot be done without the person being brought in. Denman, J., there said, "We ought not to act upon it (the Rule) by adding a defendant without the consent of the plaintiff, except in cases where it is clearly made out that it is necessary to do so."

See also *Draye v. Hartopp*, 28 Ch. D. 414, (where one executor brought an action for foreclosure without joining either as plaintiff or defendant his co-executor who had absconded to avoid prosecution for fraud), and *Toronto & Hamilton Navigation Co. v. Silcox*, 12 P. R. 622, *supra*, and *Sanders v. Peck*, 50 L. T. 630; 32 W. R. 492; *Peterson v. Fredericks*, 15 P. R. 361.

The addition of a defendant contemplated by this Rule, is not of a person against whom the original defendant may have a remedy over: *Hewett v. Heise*, 11 P. R. 47; or for contribution or indemnity: see *Re Harrison*, 1891, 2 Ch. 349 (as to which see Rule 200), *Peterson v. Fredericks*, 15 P. R. 361; *McCheane v. Gyles*, No. 2, 1902, 1 Ch. 911; nor of a person claimed by a defendant to be liable to the plaintiff instead of himself: *Lercaley v. Harrison*, W. N. 1876, 39; 2 Charl. Ch. Ca. 26; *Lovell v. Holland*, W. N. 1876, 53; 2 Charl. Ch. Ca. 26; *Thompson v. London County Council*, 1899, 1 Q. B. 840; 80 L. T. 512. In such case the defendant can defend himself without the presence of the other party; and if the plaintiff does not proceed against the other party, the defendant is not injured. But the Rule has been held to apply where some only of several joint contractors are sued: *Robb v. Murray*, 13 P. R. 397.

In actions against newspapers for libel, however, provision is made whereby a defendant may apply to add as a co-defendant, and claim relief over against, any person by whom the alleged libel was communicated in writing to the original defendant, except where the communication was anonymous, or known to be untrue: see R. S. O. c. 68, s. 17.

Adding joint
contractors
as defend-
ants.

As a general rule where an action is brought against one only of several joint contractors, he is entitled to have his co-contractors joined as defendants, and is not limited to serving them with a third party notice under Rule 200; *Pilley v. Robinson*, 20 Q. B. D. 157; as explained in *Wilson v. Balcarres*, 1893, 1 Q. B. 422; S. C. *sub nom.* *Wilson v. Kulick*, 68 L. T. 169, 312, that is, where under the old practice a plea in abatement might have been pleaded: see also *Scarf v. Jardine*, 7 App. Cas. 364; *Robb v. Murray*, 13 P. R. 397; but not necessarily where the joint contractor resides out of the jurisdiction: *Wilson v. Balcarres*, *supra*; or being within the jurisdiction cannot be found after reasonable inquiry: *Robinson v. Geis*, 1894, 2 Q. B. 685; 71 L. T. 70; or is insolvent: *Güldersleeve v. Balfour*, 15 P. R. 293, nor where the party sued is on the face of the contract the sole contractor, though other persons are behind jointly interested: *Toronto & Hamilton Nav. Co. v. Silcox*, 12 P. R. 622; see also *Eyre v. Moring*, W. N. 1884, 58.

As to adding members of a club in an action against the club, and **Rule 206.** the right of those added to apply to have co-contractors added, see *Aikins v. Dom, Live Stock, etc.*, 17 P. R. 303.

A defendant who is desirous of raising the objection that some one jointly liable with him has not been joined as a defendant, may make a motion under this *Rule* to add the persons jointly liable: *Gibbshere v. Balfour*, 15 P. R. 283, or may apply in Chambers to have the action stayed, shewing that the person alleged to be jointly liable with him, is within the jurisdiction: *McArthur v. Hood*, 1 Ch. & E. 550; and see *Begg v. Ellison*, 14 P. R. 384; *Robinson v. Gusch*, *supra*.

On such an application it need not be admitted by the plaintiff, or by the person sought to be added, that he is jointly liable with defendant. If the defendant shows some ground for so saying, he is entitled to have the person added on any proper terms as to costs: *Fardell, etc., Co. v. Basset*, 15 Times, 204.

By analogy to the old practice where a plea in abatement for non-joinder of co-contractors was pleaded, a defendant now moving to stay proceedings until co-contractors are added should shew by affidavit the names and residences of the persons whom he seeks to have added, and he is subject to the same liability as to costs, in case persons are added who turn out not to be liable: *Aikins v. Dom, Live Stock, etc.*, 17 P. R. 303.

In *Byrne v. Brown*, 22 Q. B. D. 657, lessors sued the son of the lessee who was entitled to the term, subject to a sub-lease to D., for damages for breach of covenant caused by dilapidations made by D. Under the terms of the sub-lease to D. (who was brought in under a third party notice) it was doubtful whether he was liable to indemnify the defendant, or only the executors of the deceased lessee. On defendant's application, the plaintiffs not objecting, the executors were added as defendants to enable them to get indemnity from D., and D. was held not entitled to object, though the case might be different if plaintiffs objected.

In *Day v. Radcliffe*, 24 W. R. 844, an administration suit, where the plaintiff's title as a beneficiary under a will was doubtful, and the trustee under the will was the only defendant, the beneficiary interested in disputing the plaintiff's claim was added; and where an executor was sued for a legacy, a third person to whom he had paid it was ordered to be added as a co-defendant on the defendant's objection: *Clifton v. Crawford*, 18 P. R. 316.

In *Ashley v. Taylor*, 10 Ch. D. 768, a defendant died, and the cause of action alleged in the claim did not survive. Upon the plaintiff's motion, alleging further facts which shewed a cause of action which did survive, the administrator of the deceased defendant was added. See also *Rule 396*.

In *Head v. Bowman*, 9 P. R. 12, the plaintiff sued for damages caused by the flooding of his lands by defendant's mill dam. The G. W. Ry. Co. had turned the waters of the stream into another channel, which was not deep enough to carry off all the water if the defendant's dam were removed, so that plaintiff could not obtain complete relief by succeeding against the defendant. Liberty was therefore given to add the Ry. Co.

Defendants might under the former Chancery practice, be added after the judgment, for the purpose of a motion for injunction to

Rule 200. preserve the subject of the suit: *Young v. Huber*, 29 Gr. 49; *see sub. Attorney-General v. Corporation of Birmingham*, 15 Ch. D. 423.

In *Dis v. G. W. Ry. Co.*, 34 W. R. 712; W. N. 1880, 130; 54 L. T. 810; 55 L. J. Chy. 707, the defendant company covenanted separately with the plaintiff and two other covenantees by one indenture. The plaintiff sued for specific performance of the covenant without joining the separate covenantees. They were added on the application of the company; but *see McChane v. Gyles*, No. 2, 1802, 1 Ch. 911, *supra*, p. 384.

An officer of a corporation cannot be added merely for the purpose of discovery: *Wilson v. Church*, 9 Ch. D. 552. See notes to *Rules* 191 and 186.

In *Gibson v. Nelson*, 2 O. L. R. 500; 35 S. C. R. 181, a person who had acquired an interest after the commencement of a foreclosure action was on his own application added as a party, and in *Kino v. Rudkin*, 6 Ch. D. 160, a person to whom the defendant had assigned *pendente lite* was added at the trial at his own request. Where plaintiff had assigned his interest before suit it was doubted whether it was proper to allow the assignee to be added as plaintiff: *Foster v. Ward*, 9 L. R. 1r. 447.

In *Molloy v. Kilby*, 29 W. R. 127, it was held that persons, not parties, made defendants to a counterclaim and wishing to interrogate the plaintiff, should apply under this *Rule* to be made defendants to the original action.

In *Hewitt v. Heise*, 11 P. R. 47, it was held that the facts did not show a case for adding a defendant, but rather for service of a notice under *Rule* 200, claiming indemnity.

Adding a
defendant
at his own
instance.

Cases have arisen in which a third party has applied for leave to come in as a defendant. For such a case no express provision is made. In *Mills v. Griffith*, 45 L. J. Q. B. 771, an action of ejectment was brought by a lessor against a lessee who had incurred a forfeiture; on motion of a mortgagee of the lessee to be added as a defendant, the Court refused to make an order, holding that the questions involved in the action were wholly on the covenant between the lessee and lessor. In *Wilson v. Church*, 9 Ch. D. 552, a representative action, a bond-holder who had a substantial interest and disputed the plaintiff's contention, was, on his own application, added as a defendant. See also *Watson v. Case*, 17 Ch. D. 19, and *Kino v. Rudkin*, 6 Ch. D. 160; *Debeature Co. v. De Murieta Co.*, 8 Times, 493.

In *Kitching v. Hicks*, 9 P. R. 518, an action against an assignee for the benefit of creditors, claiming a lien on goods taken by the assignee, certain creditors claiming that they had a substantial interest in the subject of the action were, on their own application, added as defendants.

A third party who would be commercially and incidentally, but not legally and directly injured by a judgment being obtained against the defendant in an action, is not entitled on the ground of such prospective injury to be made a party to the action; therefore, in an action to restrain the user of a machine alleged to be an infringement of the plaintiff's patent, the maker of the alleged infringement was not allowed, on his own application, to be added as a defendant: *Moser v. Marsden*, 1802, 1 Ch. 487; 66 L. T. 570.

In *Varasseur v. Krupp*, 27 W. R. 176, a foreign sovereign (the Mikado), applied and was added as a defendant in order to enable him to apply to dissolve an injunction.

In *Farris v. Farris*, 9 P. R. 441, an action was brought by a **Rule 207.** father to recover arrears under an annuity deed against his son who had absconded. The son's wife had barred her dower by the annuity deed, and had brought a suit against her husband for alimony. She now applied to be let in to defend this action, on the ground that it was collusively brought to defeat her suit for alimony, and defraud her of dower. She was let in to dispute the amount claimed.

Where defendants are added as parties after the commencement of an action, the action as to them is deemed to be commenced only from the date they are added: *Rule 206* (4); and see *St. Louis v. O'Callaghan*, 13 P. R. 322; *Huthnance v. Raleigh*, 17 P. R. 458; i.e., from the time when they are served with the amended writ: see *Gooderham v. Moore*, 31 Ont. 86, and *Rule 206* (4).

Costs.—Where persons who are not necessary, but are proper parties, are added as defendants, upon an objection made by an original defendant, the Court may in its discretion refuse to award costs to such added parties: *Merry v. Porrett*, 1898, 1 Ch. 306; 78 L. T. 146; 46 W. R. 487; or may order the defendant, at whose instance they were added, to pay them, where it is ultimately found that they should not have been added: *Mikins v. Dom. Live Stock, &c.*, 17 P. R. 305.

207. Where a defendant is added [or substituted], unless otherwise ordered, the plaintiff shall issue an amended writ of summons, and serve the new defendant with such writ, or notice in lieu thereof, in the same manner as an original defendant is served. *Con. Rule 326.*

Original J. A. Rule 105 was identical with Eng. R. 1875, O. 16, r. 15. The words in brackets which were not in the original *Rule* are taken from Eng. (1883) R. 135, which is to the same effect as the present *Rule*. Where the person added is out of the jurisdiction, the writ if originally issued for service within the jurisdiction, should before service be amended according to the form for service out of the jurisdiction: *Keate v. Phillips*, W. N. 1878, 186; or a concurrent writ should be issued.

The directions for service of the writ on new defendants do not meet the case of consolidated actions: *Re Wortley, Culley v. Wortley*, 4 Ch. D. 180, where the defendants were added to the consolidated action without service of any writ being required.

Service of the writ of summons on a company, added for conformity as defendants, was dispensed with under this *Rule*, where the defendants already before the Court were directors and principal shareholders of the company, and were being sued in respect of money in their hands and found (as against them) to belong to the company: *Es v. Miller*, 24 Ont. 268.

When the sole plaintiff died after delivery of statement of claim, his executors took out the common order to revive, copies of the writ, order to revive, and order adding a defendant were directed to be served on the added defendant: *Austen v. Bird*, W. N. 1881, 129; 17 C. L. J. 365.

As against defendants added by amendment, the action will be deemed to be commenced from the time when they are served with the amended writ: *Rule 206*; and see *Gooderham v. Moore*, and other cases in note to *Rule 206*, p. 387.

Rules 208, 209. Neither this *Rule* nor *Rule* 206 provides for the issue or service of an amended writ where a plaintiff is added. As to when an amended writ should be served: see notes to *Rule* 312.

Amended statement of claim.

208 If a statement of claim has been delivered previously to such defendant being added, the same shall, unless otherwise ordered by the Court or Judge, be amended in such manner as the making of the new defendant a party may render desirable; and a copy of the amended statement of claim shall be delivered to the new defendant with the writ or notice. *Con. Rule* 327.

Same as the Eng. R. 1875, O. 16, r. 16. It is omitted from Eng. Rules 1883.

(ii) *Third Party Procedure.*

Third party notice, where contribution or indemnity claimed.

209. Where a defendant claims to be entitled to contribution, or indemnity from or any other relief over against (a) any person not a party to the action, he may by leave of the Court or a Judge issue a notice (hereinafter called the third party notice) which shall be sealed in the same manner as the writ of summons, and shall state the nature and grounds of the claim and be according to Form No. 49. A copy of the notice shall be filed in the office in which the action was commenced, and a copy, together with a copy of the statement of claim, or, if there be no statement of claim, of the writ, shall be served by the defendant within the time limited for the delivery of his defence, and according to the Rules relating to the service of writs of summons. Rules of 23rd June, 1894, 1313, (328). *amended.*

Third parties.

(a) Provision for the case of "other relief over" is not contained in Eng. (1883) R. 170. In other respects this *Rule*, though not in identical terms with, is to the same effect as, the Ont. Rules of 23rd June, 1894 (1313), which followed the Eng. Rule of 1883.

For Form No. 49, see H. & L. Forms, No. 478.

The *Rules* relating to third party procedure provide machinery for giving effect to sec. 57 (7) of the Act, *supra*, p. 55.

The third party procedure as provided by the *Rules*, applies only to actions commenced by writ, not to summary proceedings such as an originating summons in England: *Re Wilson, Atty-Gen. v. Woodall*, 45 Ch. D. 266; 63 L. T. 100; nor to proceedings commenced in Ontario under *Rules* 938 to 943, or 944-957.

Scope of the Rules.

Scope of the Rules.—By *Rules* 186 and 187, plaintiffs are given the fullest liberty to join as defendants all persons against whom, jointly, severally, or in the alternative, they may jointly, severally, or in the alternative claim relief. By sec. 57 (7) of the Act, in furtherance of one of the main objects of the Legislature, namely, to have the claims of all persons interested in the subject of the

litigation disposed of in the same action, a further and entirely new **Rule 209.** jurisdiction was conferred upon the Court. By that section a defendant to an action may obtain (1) *against a plaintiff*—any relief that might be granted in an independent suit by the same defendant against the same plaintiff; (2) *against (a) a co-defendant, or (b) any other person*—any relief relating to, or in connection with, the original subject of litigation which might be granted in an independent suit by such defendant against such co-defendant or other person.

The mode in which a defendant may obtain the relief above mentioned against a plaintiff is by counterclaim, and is treated of hereafter: *Rules 251, et seq.*

By a counterclaim, to a certain extent, complete relief may be obtained against a co-defendant, or a third person not originally a party: *Rules 251-253*; but no counterclaim can be set up which does not seek relief against a plaintiff: see notes to *Rule 251*.

The *Rules* as at present framed however, do not provide means to give a defendant the full benefit of the remaining provisions of sec. 57 (7) of the Act. The third party procedure provided by them prescribes the procedure, so far as has at present been thought expedient, for giving a defendant (whether so in an action or a counterclaim: see *Leri v. Anglo-Continental, &c.*, 1902, 2 K. B. 481; 86 L. J. 857), relief against a co-defendant, or any other person, as contemplated by section 57 (7) of the Act.

The *Rules* which have been made since the introduction of the former Judicature Act in 1881, shew a gradual reduction of the scope of *Rules* third party procedure: see H. & L. Jud. Act. 2nd ed., p. 371.

In June, 1894, the former *Rules* on the subject of third parties were repealed and the English *Rules* (1883) R. 170, *et seq.*, were adopted, by which the third party procedure was confined to cases of *contribution* and *indemnity* only: see H. & L. Jud. Act. 2nd ed., 371.

The present *Rules* follow in the main the Ontario *Rules* of 1894, ^{Present} and the Eng. *Rules* of 1883, but extend third party procedure to ^{*Rules.*} cases of claims for "other relief over" in addition to contribution and indemnity. They in effect provide that:

(1) Third party procedure is confined to claims for (a) contribution from, (b) indemnity from, and (c) *other relief over against* a third party.

(2) Contribution, indemnity, or other relief over, may be enforced against a co-defendant as well as a person not originally a party.

(3) Final judgment may be given between a defendant and a third party, or between a defendant and a co-defendant in the same proceedings, without the bringing of a subsequent action.

(4) The third party procedure applies not only to the parties to the action, but also to parties to a counterclaim, who may also avail themselves of it: see *Leri v. Anglo-Continental, supra*.

Contribution.—The right to contribution is an equitable right ^{Contribution} arising where two or more persons are subject to a common liability other than for a fraud or other wilful tort: see *Johnson v. Wild*, 44 Ch. D. 146.

Except in cases of liability for fraud or other wilful tort, the right exists between trustees: *Butler v. Butler*, 14 Ch. D. 329; *Re Fyton*, 45 Ch. D. 458; quasi trustees, such as directors: *Ramskill v.*

Rule 209. *Edwards*, 31 Ch. D. 100; co-trustees: *Lever v. Pearce*, W. N. 1888 105; co-partners or co-adventurers in partnership: *McLaren v. Marks*, 10 P. R. 451; *Loive v. Dixon*, 16 Q. B. D. 455; co-sureties: *Moorhouse v. Kidd*, 28 Ont. 35; affirmed in C. A., 18 C. L. T. 235; 34 C. L. J. 381.

There is no right to contribution between *tortfeasors*, knowingly committing the wrong: *Atty-General v. Wilson*, Cr. & Ph. 1; *Argard v. Bromley*, 1 V. & B. 117; *Power v. Hocky*, 19 W. R. 916; *Merryweather v. Nison*, 8 T. R. 186; and per Lord Herschell, *Palmer v. Wick*, 1894, A. C. 318; see also *The Englishman*, 43 W. R. 670; Pollock on Torts (5th ed.), 191; but a trustee committing a breach of trust, at the request, or instigation, or with the consent in writing, of his *cestui que trust*, is in some cases entitled to be indemnified out of the share in the trust estate of such *cestui que trust*; see R. S. O. c. 129, s. 30.

An assignee of a lessee as to part of the land leased who had paid the whole of the rent due by the lessee, was held not entitled to contribution from the assignee of the lessee of the remaining part of the land, there being an independent and not a common liability: *Johnson v. Wild*, *supra*; but *semble*, in such a case relief over might properly be claimed under this Rule.

Where a surviving executor is sued for an account, and he seeks contribution against the representatives of the deceased executor, he cannot insist on the plaintiff making such representatives defendants, but he may proceed against them as third parties under this Rule: *Re Harrison*, 1891, 2 Ch. 349; 64 L. T. 442.

As to contribution between co-defendants, see notes to Rule 215.

Indemnity. **Indemnity.**—Indemnity arises where the defendant sued by the plaintiff, though liable to the plaintiff, may have a right to indemnity over against a third party whom the plaintiff could not sue.

The right to indemnity within the English Rules must be one arising out of a contract for indemnity *as such*, expressed, or implied: *Speller v. Bristol Steam Navigation Co.*, 13 Q. B. D. 96, where it was held that a warranty of seaworthiness of a vessel hired was no such contract for indemnity against a claim for damages for the injury of plaintiff's goods in the vessel by reason of its not being seaworthy. So in an action for trespass by cutting timber, defendants justifying their acts under an agreement with third parties from whom the defendants purchased the timber, would not seem to be entitled to bring in the third parties and claim indemnity, under the English Rule, the damages not being necessarily the same, and *semble*, there would not be a case for relief over within the Ontario Rule; see *Parent v. Cook*, 2 O. L. R. 712; 3 O. L. R. 350. See also *The Jacob Christensen*, 1895, P. 281, and *Payne v. Caughell*, 17 P. R. 39.

Cases where there is no such contract, but merely a right to damages against the third party if the plaintiff succeeds in recovering from defendant, are not within the English Rules: *Birmingham Land Co. v. L. & N. W. Railway Co.*, 34 Ch. D. 261; *Pontifer v. Foord*, 12 Q. B. D. 152; *Payne v. Caughell*, 17 P. R. 39; and see *Wilson v. Boulter*, 18 P. R. 107; *Windsor, &c., v. Highland Park*, 19 P. R. 130; *Miller v. Sarnia Gas Co.*, 2 O. L. R. 546; but may sometimes be cases of "other relief over" within the Ontario Rule 209.

Cases of an express contract for indemnity will present no difficulty; but an express contract may be met by a defence that the claim is not within the contract: see *Page v. Midland*, 95 L. T. Jour. 252, following *Hunt v. White*, 37 L. J. Ch. 326. Rule 209
Express contract.

In *Hall v. Sim*, 10 Times, 463, in an action against the committee of a club, they were held entitled to bring in some of the members, under a rule of the club which provided that the committee of the club was to be indemnified by the members.

A covenant by the assignee of a lease to indemnify the assignor against liability on the covenants in the lease was enforced by third party proceedings: *Gooch v. Clutterbuck*, 1890, 2 Q. B. 148; 81 L. T. 9. *Resonance not indemnity under rule Nelson v. Simpson 1905 2 K.B. 261*

An implied right of indemnity may arise in the case of principal and agent: see *Langley v. Law Society of U. C.*, 3 O. L. R. 245; *Birmingham v. London & N. W. Railway*, 34 Ch. D., at p. 277; of acts done at request: *ib.*; and *Carshore v. N. E. Railway Co.*, 23 (Ch. D.) 344; of identical contracts (e.g., for supply of goods with a warranty), where the second contract (with a similar warranty), is entered into with knowledge of the first: see *Birmingham v. London*, 34 Ch. D. p. 277; also *Jacobs v. Brown*, W. N. 1884, 23; *Hart v. Brown*, 28 Sol. Jour. 577; *Steel v. Dixon*, W. N. 1880, 113; 42 L. T. 765; 28 W. R. 796; also between trustees and their *cestui que trust* concurring in a breach of trust: *Sawyer v. Sawyer*, 28 Ch. D. 595; *Re Holt*, 1897, 2 Ch. 525; R. S. O. c. 129, s. 30; *Re Salmon, Priest v. Uppleby*, 42 Ch. D. 351. (In the last case, however, there seems to have been an express contract for indemnity). There is no right of indemnity on the part of a passive trustee for a breach of trust by the acting trustee, except under special circumstances, as where the acting trustee is solicitor for the trust, or has derived personal benefit from the breach of trust: *Bahin v. Hughes*, 31 Ch. D. 390; *Blyth v. Fladgate*, 1891, 1 Ch. 337; all are equally liable to the c. q. t.: *Concper v. Stoneham*, 68 L. T. 18. Implied contract.

Where an action was brought against a surviving trustee for recovery of a trust fund, lost by misapplication thereof by a deceased trustee, a solicitor, it was held that the partners of the deceased solicitor could not be brought in as third parties on a claim of defendant to be indemnified by them, the right of the defendant to recover from the surviving partners a sum equal to the lost trust fund being an independent right not depending on the liability of the defendant: *Wynne v. Tempest*, 1897, 1 Ch. 110; see also *Campbell v. Farley*, 18 P. R. 97.

As to claims against third persons for indemnity against liability for damages arising out of negligence of the third persons as contractors, see *McCann v. Toronto*, 28 Ont. 650.

The right to indemnity may have arisen either before, or after, the commencement of the action: *Edison v. Holland*, 33 Ch. D. 497; see also *Edison v. Jablockhoff*, 35 W. R. 178.

As to the difference between a guaranty and a contract of indemnity, see *Guild v. Conrad*, 1894, 2 Q. B. 885; 71 L. T. 140; *Beattie v. Dinnick*, 27 Ont. 285.

Other Relief Over.—This is a new class of case provided for in Ont.; but not under Eng. (1883) R. 170. It arises under the over-words in brackets which are restored from J. A. Rule 108 (repealed by the Rules of 23 June, 1894).

Rule 206.

The amendment introduced by the present *Rule* does not restore the whole of the practice as it was under the original J. A. Rules 107, 108, following Eng. Rules of 1875, O. 16, r. 17. That part of the original J. A. Rule enabling a "common question in the action to be determined which under the original J. A. Rules presented the greatest difficulties, (see *Holmsted & Langton, Jud. Act, 1st ed., 1890, p. 364*), remains repealed.

The object of the present *Rules* is probably to extend the third party procedure to cases where if a defendant is held to be liable to the plaintiff he has a right of action (to recover the amount for which he may be liable to the plaintiff: see *Miller v. Sarnia Gas Co., 2 O. L. R. 546*), against another person whether by way of contribution or indemnity, or as damages under an independent contract, or otherwise; and relief against a third party can probably now be obtained in Ontario in cases in which it could not be obtained under the Eng. Rules, or the former Ont. Rules which follow them: see for example *Constantine v. Warden, 44 W. R. 162; 73 L. T. 450; 12 Times, 33*, where a defendant who became liable in consequence of a failure to unload a ship pursuant to a charter party, was held not entitled to claim over against a third party, a purchaser of the cargo from the defendant under an agreement by which he was liable to the defendant for "any loss, demurrage or expenses arising therefrom"; and see *The Jacob Christensen, 1895, P. 281*. But the scope of the *Rules* in cases of "relief over" cannot yet be said to be at all well defined. A tendency to restrict the scope is rather indicated in *Miller v. Sarnia Gas Co., 2 O. L. R. 546*, where it was said that the third party procedure is only applicable where a defendant, if liable to the plaintiff, is entitled to recover against the third party the very damages which the plaintiff seeks to recover against him. It would seem that an independent right, which may be enforced before defendant is damaged, and whether he is damaged or not, is not a right to either indemnity or relief over: see *Wynne v. Tempest, 1897, 1 Ch. 119; 75 L. T. 624; supra, p. 391; Campbell v. Farley, 18 P. R. 97; see also Birmingham v. L. & N. W. Ry. Co., 34 Ch. D. 261; Moore v. Death, 16 P. R. 296*.

One object of the *Rules* is to prevent the same question, common as between the plaintiff and defendant, and the defendant and the third party, from being tried on different occasions and in different forums: *Wilson v. Boulter, 18 P. R. 107*; but where damages, if recoverable by defendants, would be assessed upon a different principle from those of the plaintiff, there is no such identical question and no case for relief over: *Ib.*; see also *Parent v. Cook, 2 O. L. R. 712; 3 O. L. R. 350; Pontifex v. Foord, 12 Q. B. D. 152; Catton v. Bennett, 26 Ch. D. 161*.

In an action for conversion of goods, the defendant may bring in the party who sold him the goods as a third party against whom he is entitled to relief over: *Confederation Life Association v. Labatt, (No. 2), 18 P. R. 266*.

Where the plaintiff claimed a balance due to him for hire of a race track, and the defendants alleged an agreement by a Ferry Company to pay \$15 per day to defendants while the races were being carried on, it was held that defendants had no right to contribution or indemnity, or any relief over against the Ferry Company, in respect to the plaintiff's claim for rent: *Windsor Fair Grounds v. Highland Park Club, 19 P. R. 130*.

In an action by an employee in a factory for damages for injuries **Rule 209.** occasioned by alleged negligence, in that a retort by which the injury was caused was defective and without a safety valve, a third party notice given by defendant to the manufacturers of the retort was set aside, the retort appearing to have been manufactured under a written contract containing no warranty, and providing that the defendants were to put in their own fittings, including the safety valve: *Wilson v. Boulter*, 18 P. R. 107.

The *Rules* do not, and even the original *Rule* did not enable a defendant to bring in a third party in an action for specific performance by a vendor so as to have it determined between plaintiff and defendant, whether the third party has a title to the whole or part of the land: *Begg v. Ellison*, 14 P. R. 384.

Other Cases.—in certain special cases by statute, relief over other cases, against a third party may be obtained by a defendant. By R. S. O. c. 68, s. 17, in actions for libel against newspapers, the defendant may have added as a co-defendant and claim relief over against him, any person by whom the alleged libel was communicated in writing, Libel, but not where the communication was anonymous or known to be untrue. By the Municipal Act, R. S. O. c. 223, s. 600, a municipal corporation sued for damages sustained by reason of any obstruction, excavation or opening in or on a highway or bridge, made, left or maintained by any person or corporation, may have such other person or corporation added as a defendant or third party: see also *Erdmon v. Walkerton*, 15 P. R. 12; *Stillwoy v. Toronto*, 20 Ont. 98; *Homewood v. Hamilton*, 1 O. L. R. 266. Obstruction, etc., of highways.

Third Party Procedure—General Principles.—If a third party is a necessary party to the action as regards the plaintiff, the defendant ought to have him added as a defendant and not as a third party under this *Rule*: see *Pilley v. Robinson*, 20 Q. B. D. 155, and other cases in notes to *Rule 200*; and see *Bank of Commerce v. Bank of B. N. A.*, 20 C. L. J. 136; 4 C. L. T. 200.

Leave to serve a notice was refused where defendant claimed indemnity from three persons jointly, viz.: a plaintiff, a defendant and a third person: *Re Gilson*, 1894, 2 Ch. 92.

Whether the claim which the defendant has against the third party, need not be identical or co-extensive with the plaintiff's claim against the defendant himself, *quære*: see *Sironasco Co. v. Duncan*, 45 L. J. Q. B. 640; 1 Q. B. D. 649, and *Miller v. Sarnia*, 2 O. L. R. 546.

"The object of the Act was not only to prevent the same question being litigated twice, but to obviate the scandal which sometimes arose by the same question being differently decided by different juries": *Benecke v. Frost*, 1 Q. B. D. 422, *per* Blackburn, L.J.; see also *Re Collie*, 2 Ch. D. 51.

A right to indemnity arising after action brought, entitles a defendant to notify a third party: *Edison & Swan Co. v. Holland*, 33 Ch. D. 497.

The third parties can only be joined before trial: *Lockie v. Tenant*, 5 Ont. 52, and will not be allowed to be brought in, if the plaintiff will be prejudiced: *Bowser v. Hartley*, 1 Q. B. D. 652; *Wye Valley Ry. Co. v. Howes*, 16 Ch. D. 489; see also *Sironasco, etc., v. Duncan*, 1 Q. B. D. 648-9, and *Rule 216*; *Hutchinson v. Colorado*

Rule 209. *United Mining Co.*, W. N. 1884, 40; *Mead v. Etobicoke*, 13 P. R. 341.

Married woman as third party.

A married woman may be brought in as a third party if a separate action might be brought against her: *Gloucestershire Banking Co. v. Philipps*, 12 Q. B. D. 533; *Jones v. Elderton*, W. N. 1884, 39.

Third party notice by a plaintiff counter-claimed against.

Where a defendant in an action counterclaims against a plaintiff, the plaintiff may serve a third party notice on a person against whom he claims contribution or indemnity in respect of the counter-claim: *Levi v. Anglo Continental, etc.*, 1902, 2 K. B. 481.

See notes to Rule 210, *et seq.*

Counter-claim by third party.

A third party cannot counterclaim against the plaintiff: *Eden v. Weardale*, 28 Ch. D. 333; but it would seem that he may against the defendant who brings him in: *ib.* 338; 54 L. J. Chy. 384; *Borough v. James*, W. N. 1884, 32.

A third party is not a person served with notice of proceedings within the definition of "defendant" in sec. 2 of the Act: but by an order giving directions under Rule 213, he may be placed in the same position as a defendant: *Eden v. Weardale*, 28 Ch. D. 338; 35 Ch. D. 287.

Replevin.

The Rules relating to third party procedure apply in an action of replevin: *Bradley v. Clarke*, 19 C. L. J. 80; 9 P. R. 410.

Counter-claim not proper to raise claim for relief against co-defendants.

Where a defendant makes a claim against a co-defendant for indemnity or other relief, his proper course is to proceed under Rules 209 and 215, and not by counterclaim: *Furness v. Booth*, 4 Ch. D. 586. The contrary ruling of V.-C. Hall in *Shepherd v. Beane*, 2 Ch. D. 223 (an earlier case), has not been followed, and was subsequently disapproved of by the same Judge in *Harris v. Gamble*, 6 Ch. D. 748. The defendant might formerly raise a question against a co-defendant by a pleading which also stated a defence against a plaintiff; but such pleading is not a counterclaim, and should not be so entitled: *Furness v. Booth*, *supra*. It would seem, however, that this cannot now be done; if a defendant claims relief over against a co-defendant he must now proceed under Rule 215.

Fourth, etc. parties.

In *Walker v. Balfour*, 25 W. R. 511, it was held that a third party brought in under Rule 209, was not entitled under that Rule to have any other person against whom he has a claim, added; but in *Fowler v. Knoop*, 36 L. T. 219; W. N. 1877, 68, the third party against whom indemnity was claimed, was allowed under the concluding words of section 57, sub-section 7, of the Act to bring in a fourth party, from whom he claimed indemnity upon the same grounds upon which it was claimed from him. Perhaps the point cannot yet be considered as settled: see *Yorkshire Waggon Co. v. Newport, etc.*, 5 Q. B. D. 268; *Witham v. Vane*, W. N. 1880, 108.

Practice.—The mode of procedure is provided by Rules 209, *et seq.* A defendant is to obtain leave to serve, and is then to serve a notice on the third party: Rule 209. The latter must enter an appearance if he intends to contest the plaintiff's claim as against the defendant who served the notice, or such defendant's claim to indemnity, contribution, or relief over. If he does not appear he is bound by the decision both as to the plaintiff's claim against the defendant, and the defendant's claim for indemnity contribution, or relief over: Rule 210. If he appears, before anything further can be done in respect of the claim to contribution, etc., directions must be obtained as to the extent to which, and the mode in which, the claim is to be determined: Rule 213.

Motion for Leave to serve Third Party Notice.—Leave must be obtained to issue the notice for service on a person not already a party, but leave is not necessary to serve a co-defendant with a third party notice under *Rule 215*; see notes to that *Rule*. An application for leave may be made *ex parte* unless the Judge or officer applied to considers notice to be necessary. This is the practice of the Q. B. D. in England: *Ann. Pract.* 1905, p. 195. If notice of motion is given it should be served on the plaintiff, but not on the third party: *Wye Valley v. Hawes*, 16 Ch. D. 489; *Edison v. Holland*, 33 Ch. D. 497; and see *Rules 355-357, 348*.

The application should be made as soon as the statement of claim is delivered, and before the time for putting in a defence has expired, inasmuch as the notice, if allowed, must be served on the third party within the time for delivering the defence: *Rule 209*; but see *Re Gilson*, 1894, 2 Ch. 92.

A notice which was too late, having been served after the pleadings were closed, and the action entered for trial, was under the circumstances not allowed to be made good by the granting of an extension of time, and was set aside on the application of the third party: *Parent v. Cook*, 2 O. L. R. 709; 3 O. L. R. 350.

Even under the former Rules such an application would not be entertained after the close of the pleadings: see *Lockie v. Tennant*, 5 Ont. 52; *Birmingham, etc., v. L. & N. W. Ry.*, 56 L. T. 702; *Associated H. Co. v. Whichcord*, 8 Ch. D. 457; and it would seem to be doubtful whether after judgment there is jurisdiction, on an appeal, to add a third party by amendment: see *Edison v. Holland*, 41 Ch. D. 28; or to allow a defendant to claim relief against a co-defendant: *Boulthbee v. Cochrane*, 17 P. R. 9.

Evidence in Support of Application.—The motion should be on affidavit shewing the state of the action, the nature of the plaintiff's claim, and the circumstances under which the right to indemnity, contribution, or relief over, is claimed. The defendant must make out a *prima facie* case; it is not sufficient merely to state that he claims contribution, etc., etc.: *Birmingham v. L. & N. W. Ry.*, *supra*; but the Court in giving leave to issue a notice, does not decide that the claim is a valid one, but merely that a *prima facie* case has been made for the relief claimed by the defendant against the third party: *Carshore v. N. E. Railway Co.*, 29 Ch. D. 344; *Edison v. Holland*, 33 Ch. D. 497; *Beynon v. Godden*, 4 Ex. D. 247.

Service of Notice.—The notice to the third party is to be served according to the *Rules* relating to the service of writs of summons: *Rule 209*. Such notice may therefore be served out of the jurisdiction under *Rule 162*; but only where, if it were a writ, it would be capable of being so served; and in determining whether the notice could be so served, if it were a writ the Court will not have regard to the plaintiff's claim, but will only consider the defendant's claim actually made in the notice: *McCheane v. Gyles*, 50 W. R. 376; 1902, 1 Ch. 287; 86 L. T. 1; see notes to *Rule 162*, and *Swansea Shipping Co. v. Duncan*, 1 Q. B. D. 644; *Dubout v. Macpherson*, 23 Q. B. D. 340. In such case the time for appearance (eight days) mentioned in *Rule 210* will not be sufficient; and in *Swansea, etc., v. Duncan*, *supra*, this was used as an argument that the enactments as to notice to third parties were not intended to apply to persons out of the jurisdiction. The answer given by the Master of the Rolls

Service of notice out of jurisdiction.

Rule 210. to this objection was, that the order giving leave to serve the notice out of the jurisdiction is to name such a time for appearance as the necessity of the case as to time and place requires: see *Rule 164*, and the *Rule* allowing eight days only must be taken to be modified accordingly.

Third party,
appearance.

Default of
appearance
of.

Leave to
appear when
necessary.

310. If a person not a party to the action, who is served as mentioned in *Rule 209* (hereinafter called the third party) desires to dispute the plaintiff's claim in the action as against the defendant on whose behalf the notice has been given, or his own liability to the defendant, he shall enter an appearance in the action within eight days from the service of the notice, and in default of his so doing, he shall be deemed to admit the validity of the judgment obtained (whether by consent or otherwise) against such defendant, and his own liability to contribute or indemnify, or as may be, to the extent claimed in the third party notice. Provided always that a person so served and failing to appear, may apply to the Court or a Judge for leave to appear, and such leave may be given upon such terms, if any, as may seem just. Rules 23rd June, 1894. 1313 (329.)

Substantially the same as Eng. (1883) R. 171, except that it is co-extensive with *Rule 209*, and so applies to cases of "other relief over" as well as of contribution and indemnity.

The notice Form No. 49, in the Appendix to the Rules, should in cases of "other relief over" be slightly modified in its last paragraph. Instead of the words "your own liability to contribute or indemnify," there should be stated appropriately the liability to which it is claimed that the third party is subject. See H. & L. Forms No. 478.

As to the time for entering appearance in the case of a third party out of the jurisdiction, see note to *Rule 209*, "Service of notice."

Appearance
by third
party served
under *Rule*
209.

Appearance indicates a desire "to dispute the plaintiff's claim in the action, as against the defendant, on whose behalf the notice has been given, or his own liability to the defendant." When a motion is afterwards made under *Rule 213* for directions, the third party will state whether he admits his own liability to the defendant, and whether he wishes to dispute the plaintiff's claim, and the extent to which he will be allowed to take part in the action will be defined accordingly.

Where the third party appears, nothing more can be done in regard to the claim for contribution, etc., without an application under *Rule 213* for directions as to subsequent proceedings: see notes to that *Rule*.

By non-appearance the third party is taken to admit the validity of any judgment obtained against the defendant who brought him in, and his own liability to the extent of the claim made against him by the third party notice. As to judgment against him in such case, see *Rules 211, 212*.

Motion to Set Aside Notice.—The third party may move to set aside the notice served upon him: *Bencke v. Front*, 1 Q. B. D. 429; *Bower v. Hartley*, 1b. 652; *Harwell v. London Gen. Omnibus Co.*, 2 Ex. D. 305; and *semble*, he generally should take that course and not wait until a motion for directions is made under Rule 213: see *Holden v. G. T. R.*, 2 O. L. R. 421, where it was said that the third party should appeal from the order allowing him to be served. Probably the proper test is whether the applicant is prepared to rely solely on the affidavits and papers on which the order was made, if he is, then he should appeal, if, on the other hand, it is necessary for him to adduce further evidence on the motion, then the application should be to set aside the order.

Rule 211.

Motion to set aside notice.

In England a conditional appearance may be entered by a third party who intends to move to set aside a notice served on him: see Eng. (1883) R. 100; *Pleasants v. E. Derham*, 47 L. T. 439; *Nelson v. Pastorino*, 49 L. T. 544; but in Ontario a conditional appearance cannot be entered except by leave of the Court or a Judge: Rule 173; and it has now been decided in Ontario, that the third party should not appear as a preliminary to moving to set aside the notice: *Windsor v. Highland Park*, 19 P. R. 130.

Appearance whether necessary.

Notice of an application to set aside the notice must of course be given to the defendant who served the notice, and may also properly be given to the plaintiff, who is interested in seeing that no question is introduced into the litigation which may prejudice him: see *Bower v. Hartley*, 1 Q. B. D. 652; *Wyo Valley Ry. Co. v. Hawes*, 16 Ch. D. 489; Rule 333.

Notice to plaintiff.

If the defendant who gave the notice cannot, from the nature of the case, become entitled to any remedy or relief over against the third party, the service will be set aside: *Horwell v. London General Omnibus Co.*, 2 Ex. D. 365; as where it was made to appear that the contract under which indemnity was claimed did not apply to the state of facts appearing in the pleadings between the plaintiff and defendant: *Ferguson v. Toronto*, 14 P. R. 358. See also *Rice v. Alliance, etc.*, 12 L. R. Ir. 172; *Johnson v. Wild*, 44 Ch. D. 146; *Birmingham, etc. v. L. & N. W. Ry.*, 34 Ch. D. 261; *Hammond v. Bussey*, 20 Q. B. D. 97; *Pontifex v. Foord*, 12 Q. B. D. 152; *Cotton v. Bennett*, 26 Ch. D. 161; *Moore v. Death*, 16 P. R. 296.

Order.

211. Where the third party makes default in entering an appearance, the defendant giving the notice, in case he suffers judgment by default, shall be entitled at any time, after satisfaction of the judgment against himself, or before such satisfaction, by leave of the Court or a Judge, to enter judgment against the third party to the extent of the contribution, indemnity [or relief over] claimed in the third party notice; but the Court or Judge may set aside or vary such judgment upon such terms as may seem just. Rules 23rd June, 1894, 1313 (330).

Third party judgment against, how obtained.

Substantially the same as Eng. (1883) R. 172, except the words in brackets.

Judgment by default may be signed without order by defendant against a third party who has failed to appear, upon proof of satisfaction of the judgment against himself and proof of the third party's default.

Rules Judgment for costs can probably not be signed against the third party without an order under *Rule 214*.

For proof of default in entering of appearance, see *Rule 374*. Judgment can only be signed by leave before satisfaction, by defendant, of the judgment against himself. Proper terms can then be imposed. A reasonable term may sometimes be that the amount payable by the third party be paid into Court: see *Cunningham v. Lyster*, 13 Gr. 575; *Boyd v. Johnston*, 20 Ont. 404; *Mewburn v. Mackelcan*, 10 Ont. App. 729.

This *Rule* will probably not affect the decisions in which it was held that a person entitled to indemnity might obtain judgment before he has actually paid anything to the person to whom he is liable: see *English and Scottish Trust Co. v. Flatau*, 38 W. R. 938; *Underhay v. Read*, 1b., 75; *Ottendennen v. Grant*, 10 P. R. 593; *Cunningham v. Lyster*, *supra*; *Boyd v. Johnston*, *supra*; *Mewburn v. Mackelcan*, *supra*, and *Federal Bank v. Harrison*, 10 P. R. 271.

Third party judgment against, how obtained

212. Where a third party makes default in entering an appearance, if the action is tried and results in favour of the plaintiff, the Judge who tries the action may, at or after the trial, direct such judgment as the nature of the case may require to be entered for the defendant, giving the notice against the third party; but execution thereon shall not be issued without leave of the Judge, until after satisfaction by such defendant of the judgment against him. And if the action is finally decided in the plaintiff's favour, otherwise than by trial, the Court or a Judge may, on motion, direct such judgment as the nature of the case may require, to be entered for the defendant giving the notice, against the third party, at any time, after satisfaction by the defendant of the amount recovered by the plaintiff against him. Rules 23rd June, 1894, 1313 (331).

In substance the same as Eng. (1883) R. 173. See notes to *Rule 211*.

In cases coming within the principle of *Cunningham v. Lyster*, *Boyd v. Johnston*, and *Mewburn v. Mackelcan*, *supra*, execution will probably be allowed to issue before payment by the defendant, for the purpose of compelling the third party to pay the amount for which he is found liable into Court: but see *Sutherland v. Webster*, 21 Ont. App. 228.

Defendant notifying third party may apply for directions.

213.—(1) Where the third party appears pursuant to the third party notice, the defendant giving the notice may apply for directions, and the Court or a Judge, if satisfied that there is a question proper to be tried as to liability of the third party, in whole or in part, may order the question of such liability, as between the third party and the defendant giving the notice, to be tried in such manner at or after the trial of the action, as may seem proper; and, if not so satisfied, may direct such judgment as the nature of

the case may require, to be entered in favour of the defend- **Rule 213.**
ant giving the notice against the third party.

(2) The Court or a Judge upon the application may, if **Order to be made on such application.**
it shall appear desirable to do so, give the third party liberty to defend the action, upon such terms as may be just, or to appear at the trial and take such part therein as may seem proper, and generally may order such proceedings to be taken, documents to be delivered, or amendments to be made, and give such directions as may appear proper for having the question most conveniently determined, and as to the mode and extent in or to which the third party shall be bound or made liable by the judgment in the action. Rules 23 June, 1894, 1313 (332 and a).

Substantially the same as Eng. (1883) Rs. 174 and 175.

"Court or Judge," these words confer jurisdiction on the Master in Chambers and Local Judges: see Rule 6.

Application for Directions.—After appearance by a third party or co-defendant against whom relief is claimed (*Pontifex v. Foord*, 12 Q. B. D. 152), before the trial can be had of any issue raised against him, the directions of the Court or Judge must be obtained under this Rule as to the extent to which the third party is to take part in the action, and how the question between the defendant and the third party or co-defendant is to be determined: *Piller v. Roberts*, 21 Ch. D. 198; *Flower v. Todd*, W. N. 1884, 47; *Burke v. Pittman*, 12 P. R. 662; *Tritton v. Bankart*, 35 W. R. 474. Without an order under this Rule the Court at the trial will not entertain the question raised by the third party notice: *Ib.*, and the third party is not entitled to take any part in the trial and is not entitled to costs: *Gibb v. Camden*, 10 P. R. 316. **Directions as to procedure**

This application may sometimes be the first opportunity the plaintiff has of considering how the introduction of the third party will affect him, and notice of the motion must of course be given to him: see *Bower v. Martley*, 1 Q. B. D. 652; *Wye Valley, etc., v. Haynes*, 16 Ch. D. 489; *Swansea, etc., v. Duncan*, 1 Q. B. D. 648-9; *Finlay v. Scott*, W. N. 1884, 8.

In general the motion will be made, as the Rule provides, by the party giving the notice; but an application seems to have been made by the third party in *Piller v. Roberts*, 21 Ch. D. 198.

The words "at or after the trial of the action," have been construed as meaning that any question between the plaintiff and the defendant should be tried at the trial between the plaintiff and the defendant, or that directions should then be given as to further proceedings: *Caster v. Chapman*, W. N. 1884, 31. It was there said that it was not intended that an action should go to trial between defendant and third party after the question between the plaintiff and defendant had been determined. The intention of the Rules is that a third party is, if he desires it, to have an opportunity to contest the plaintiff's claim, as well as his liability to the defendant who brings him in; and therefore directions must be obtained at a stage when it is possible that there may still be a trial between plaintiff **Time for trial of question against the third party.**

Rule 212. and defendant. After judgment has been obtained against the defendant, a Judge cannot give directions as to the trial of the question of the liability of the third party, who has been brought in; *Rich v. Barrett*, 28 Sol. Jour. 513, and this seems to be still the rule.

For the decisions under the former Rules: see II. & L. Jud. Act, 2nd ed., p. 381.

Effect of
settlement
of action
before trial.

Where after a third party had been brought in and directions were given as to trial, the action was settled as between the plaintiff and defendant, it was held that the defendant could not proceed to trial against the third party, and the claim of defendant against the third party was dismissed with costs, without prejudice to the defendant's bringing an action against him: *Wheeler v. Cornwall*, 4 O. L. R. 120.

Effect of
going to
trial without
directions.

If the case proceeds to trial, between the original parties, without obtaining directions under this Rule as to a third party who has appeared, *semble*, the third party proceedings thereby become abortive, and no subsequent order can be made giving the defendant any relief against such third party, but he would have to proceed against him by a separate action.

Order on
motion for
directions.

The Court or Judge may give such directions as may be proper for having the question in which the third party is interested determined, subject always to the condition that the plaintiff must not be prejudiced or unreasonably delayed; see *Rule 216*, and *Carshore v. N. E. Ry. Co.*, 29 Ch. D. 346; or looking at the circumstances, and notwithstanding that the third party may not have moved to discharge the service of the notice upon him, the Court or Judge may determine that it is not a proper case for citing a third party, or that the giving of any directions will prejudice or delay the plaintiff and may therefore refuse to give any: *Schneider v. Batt*, 44 L. T. 142; 8 Q. B. D. 101; *Pontifer v. Foord*, 12 Q. B. D. 152; see *Burser v. Hurlley*, 1 Q. B. D. 652; *Associated Home Co. v. Whitchord*, 8 Ch. D. 457; in which case the third party must be considered as dismissed from the action: *Schneider v. Batt*, 8 Q. B. D. 701; 45 L. T. 370; 50 L. J. Q. B. 525; 30 W. R. 420; 18 C. L. J. 56; see *Barter v. France*, 1895, 1 Q. B. 591; or may dismiss the third party from the action without any motion for that purpose by the third party: *Scripture v. Keilly*, 14 P. R. 249.

Where an application for directions involves a preliminary question, as to whether there is a right to indemnity, etc., about which there is great doubt, that doubt may sometimes be a sufficient ground for refusing to give directions as to such cases; see *Barter v. France*, 1895, 1 Q. B. 455, 591; 72 L. T. 183; and see where the claim set up is really and properly the subject of a counter-claim: *Moore v. Deeth*, 16 P. R. 296; but see *Holden v. G. T. R.*, *infra*.

Upon the application for directions, none will be given for the trial of the question between the defendant and the third party, unless the Judge or officer is satisfied that there is a proper question to be tried. If satisfied that the case is one for contribution, indemnity, or other relief over, but that there is no disputed question to be tried, he may give judgment against the third party: *Gloucestershire, etc., v. Phillips*, 12 Q. B. D. 536; and see cases cited under *Rule 616*; or if the case is not a proper one for the application of the third party procedure, he may make no order for trial.

Directions were given where it was desirable that the question of the defendant's liability to the plaintiff should be established in such

a way as to be binding on the third parties, although all matters in **Rule 213**. dispute between the defendant and the third parties would not be determined in the action; and the questions between the defendant and the third party were ordered to be tried after the trial of the action: *Holden v. G. T. R.*, 2 O. L. R. 421, and see *Christie v. Toronto*, 15 P. R. 415.

Where a co-defendant is served with a notice claiming relief under **Rule 215**, it has been held that he cannot properly move to set it aside, because there is no order giving leave to issue it to be appealed from: *Baxter v. France*, 1895, 1 Q. B. p. 458; *Holden v. G. T. Ry. Co.*, 2 O. L. R. p. 423; and that on the motion for directions under this **Rule** the question of the propriety of serving the notice may be raised: *Id.*

Refusal of Motion.—Where the motion for directions under this **Rule** is refused, that is equivalent to a dismissal of the third party refused from the proceedings: *Baxter v. France*, *supra*; *Schneider v. Butt*, 8 Q. B. D. 701; 45 L. T. 370; and see *Scripture v. Reilly*, 14 P. R. 249.

Application Granted.—Where the application is rightly made, the Directions third party, on the return of the motion, should decide whether or not he admits his liability to the defendant, and whether or not he desires to dispute the plaintiff's claim against the defendant. If he admits that, in the event of the plaintiff's succeeding, he is liable to the defendant, he may be allowed to defend, or to actively assist in resisting the plaintiff's claim, if he so desires: *Pearson v. Lane*, W. N. 1875, 248; *Coles v. Civil Service*, 26 Ch. D. 520.

If the third party does not admit his liability, that question may be ordered to be determined at the trial under **Rule 213**: *Flower v. Todd*, W. N. 1884, 47; 28 Sol. Jour. 301; see also *Callender v. Wallingford*, 53 L. J. Q. B. 509; *Blare v. Ashby*, 42 Ch. D. 682; or after the trial: *Holden v. G. T. R.*, *supra*; and if he desires so to do, he may be allowed to put in a defence to the plaintiff's claim, and take such part in the proceedings as seems right under the circumstances of the case: *Coles v. Civil Service*, *supra*; see form of order in that case, and in *Seton on Decrees*, 5th Ed., p. 23, also *Barton v. L. & N. W. Ry. Co.*, 38 Ch. D. 144; *Byrne v. Brown*, 22 Q. B. D. 657; 60 L. T. 651; *Christie v. Toronto*, 15 P. R. 415.

If the pleadings are closed as regards the plaintiff and defendant at the time the application for directions is made, that fact should be mentioned to the Court, so that special directions as to pleading and notice of trial may be given. Where this was not done, and the action had been previously set down for trial, and notice of trial given by the plaintiff, an order made on the application for directions allowing a third party to defend, and for the trial of the issue between the defendant and the third party at the trial, and the delivery of the defence by the third party, were held to have the effect of re-opening the pleadings, making it necessary for the plaintiff to make up a new record, including the defence of the third party, to enter the case again, and to give notice of trial to the defendant and to the third party: *Confederation Life, etc., v. Labatt*, 18 P. R. 238.

Examples of Directions.—In an action by the holders of a bill, Examples. indemnity as to part was claimed by the acceptors from the drawer, on the ground that the consideration had in part failed; the drawer

Rule 213. denied failure of consideration; an order was made substituting the drawer for the plaintiff, and allowing him to sue on the bill, upon the acceptor's undertaking to pay the amount not in dispute, and the drawer's paying to the plaintiff the balance in dispute: *National Provincial Bank of England v. Bradley Bridge, etc., Co.*, W. N. 1876, 63; 2 Charl. Ch. Ca. 30.

A. contracted to sell goods to B. with a warranty, and himself bought the goods from C. stipulating for a similar warranty. B. sued A. for breach of warranty. It was held that C. was properly brought in, and directions were given for trial of the liability of C. to indemnify A.: *Hart v. Brown*, 28 Sol. Jour. 577.

Third parties admitting their liability to indemnify were substituted as defendants with the plaintiff's consent: *Commissioners of Waterford v. Veale*, W. N. 1876, 23, but not where plaintiff objected: *Mearns v. Thomas*, W. N. 1875, 203; see also *Norris v. Beasley*, 2 C. P. D. 80; *Dawes v. Thornton*, W. N. 1876, 74; *Seligman v. Mansfield*, W. N. 1875, 240; *Barton v. London & N. W. Ry. Co.*, 38 Ch. D. 144; *Byrne v. Brown*, 22 Q. B. D. 657; 37 W. R. 592; 60 L. T. 651.

The third party may probably obtain leave under this Rule to counter-claim against the defendant, or at any rate the fact of his having a valid counter-claim will prevent judgment from being given against him: *Borough v. James*, W. N. 1884, 32; but a third party will not be allowed to counter-claim against the plaintiff: *Eden v. Weardale, etc.*, 28 Ch. D. 333.

If the defendant does not effectually defend the action, and the third party has not liberty to defend, further application may be made by him for directions: *Barton v. L. & N. W. Ry. Co.*, *supra*; and see *Blore v. Ashby*, 42 Ch. D. 682.

Costs

Costs.—The costs of the proceedings will in general be reserved till the trial: *Bencke v. Frost*, 1 Q. B. D. 422, but *quære* whether the order giving directions should not make some reference to the costs of the proceedings: *Tomlinson v. Northern Ry.*, 11 P. R. 526; see also *Gibb v. Camden*, 16 P. R. 316.

Where the motion for directions is refused, it would seem that the costs of the third party or defendant against whom relief is claimed should be provided for: see *Rule 214*.

A third party who is given liberty to contest the plaintiff's claim against the defendant should not, without necessity, defend separately from the defendant, where his case and that of the defendant are identical, as against the plaintiff. If he does so, he may be refused costs, even though the plaintiff fails: *Williams v. Buchanan*, 7 Times. 226.

Where the third party on being served with notice, pays the plaintiff's claim, he is liable to the defendant for his costs of defence as between solicitor and client, and for his costs of claim between party and party: *King v. Federal Life Ins. Co.*, 17 P. R. 65.

Effect of Directions.—A third party permitted to defend, or to take part in defending the action, does not become a defendant for all purposes: *Eden v. Weardale*, 33 Ch. D. 287; but see sec. 57 (7), last sentence; though if he is really the person who is fighting the plaintiff he may be added as a defendant: *Edison, etc., v. Holland*, 41 Ch. D. 33.

A third party defending the action along with the defendant is not **Rule 214** confined to the defences which are open to the defendant: *Callender v. Watlingford*, 32 W. R. 491; but see *Bell v. Van Delszen*, W. N. 1883, 208, where, defendant admitting the plaintiff's claim, the third party was not allowed to dispute it. In such case the third party would not seem to be bound by the judgment against defendant in proceedings between the defendant and the third party.

Where a third party has liberty to appear at the trial he may cross-examine the plaintiff's witnesses on the question of the liability of the defendant to the plaintiff: *Re Salmon*, 42 Ch. D. 362; and may call witnesses: *Barton v. L. N. & W. Ry. Co.*, 38 Ch. D. 144.

As to the giving of the directions opening the pleadings, see *Confederation Life v. Labatt*, *supra*, p. 401.

Discovery as between Parties to the Action and a Third Party.—For the purpose of any proceedings directed between defendant and third party, discovery may be obtained: see *Rule 465*, and notes, and *Bates v. Burchell*, W. N. 1884, 108.

Rule 465, however, only provides for discovery as between the third party and the defendant bringing him in. No express *Rule* provides for discovery as between the third party and the plaintiff, but where the third party appears and is permitted to defend the action, he would, as regards the plaintiff, then seem to be a defendant, and *Rules 439* and *464* would seem to be applicable: or where the third party is only given leave to take a limited part in resisting the claim of the plaintiff, an order, upon a special application in Chambers for that purpose, or upon the motion for directions under *Rule 213*, may be made in favour of the third party for discovery by the plaintiff: *Eden v. Weardale* (No. 3), 35 Ch. D. 287. In like manner the plaintiff may obtain discovery from the third party: see *McAllister v. Bishop of Rochester*, 5 C. P. D. 194; *Eden v. Weardale* (No. 2), 34 Ch. D. 223; *Bradley v. Clarke*, 9 P. R. 410; *Piller v. Roberts*, 21 Ch. D. 201; *Hornby v. Cardwell*, 8 Q. B. D. 329.

214. The Court or Judge may decide all questions of Costs, costs, as between the third party and the other parties to the action, and may order any one or more to pay the costs of any other, or others, or give such directions as to costs as the justice of the case may require. Rules 23 June, 1894, 1313. (332b.)

Same as former *Rule 1313* (332 b), and Eng. (1883) R. 176.

Where a third party appears and obtains leave to defend, his costs are in the discretion of the Judge at the trial, and may be ordered to be paid by the plaintiff: *Witham v. Fane*, 28 W. R. 812; W. N. 1880, 108; 1881, 79; 44 L. T. 718; *Fulton v. Brown*, 18 P. R. 137; *Russell v. Eddy*, 5 O. L. R. 379; or by defendant: *Dawson v. Shepherd*, 49 L. J. Q. B. 529; W. N. 1880, 110; *Living v. Toronto*, 18 C. L. T. 237; 34 C. L. J. 417; or to be borne by himself: *Williams v. S. E. Ry. Co.*, 26 W. R. 352; *Re Salmon*, 42 Ch. D. 359; *Williams v. Buchanan*, 7 Times, 226; *Toulinson v. Northern Ry.*, 11 P. R. 419, 526; *Wallbridge v. Gaujat*, 13 P. R. 463; or he may be ordered to pay the plaintiff's costs directly: *Piller v. Roberts*, 21 Ch. D. 198; *Edison v. Holland*, 41 Ch. D. 28; or defendant's costs: *Bates v. Burchell*, W. N. 1884, 108; *Morgan v. Hardy*.

Rule 215. 17 Q. B. D. 782; *Jablochkoff v. McMurdo*, W. N. 1884, 91; and costs payable by defendant to the plaintiff may be given to defendant against the third party: *Hornby v. Cardwell*, 8 Q. B. D. 329; *Morgan v. Hardy*, *supra*; see also *Beynon v. Godden*, 4 Ex. D. 246; *Blore v. Ashby*, 42 Ch. D. 682.

Where defendants were sued for insurance moneys which they had paid to deceased's executors, taking from them a bond of indemnity, and the executors being brought in as third parties paid the plaintiff's claim and costs, the defendants were held entitled against the third party to the costs of their defence between solicitor and client, and costs of their claim against the third party between party and party: *King v. Federal Life Ins. Co.*, 17 P. R. 65.

Where no directions were made giving a third party leave to take part in the action, and he voluntarily appeared at the trial and asked to be made, and was made, a defendant, it was held that the defendant who gave the notice could not be ordered to pay his costs: *Gibb v. Camden*, 16 P. R. 316.

Claims to contribution in indemnity, etc., against a co-defendant.

215. Where a defendant claims to be entitled to contribution or indemnity from, or relief over against, any other defendant, a notice may be issued and the same procedure shall be adopted as if such last mentioned defendant were a third party [except that a copy of the statement of claim or writ need not be served with the third party notice, and service may be effected upon the solicitor in the action, if any, of the defendant sought to be made liable as a third party.] Rules 23 June, 1894, 1313, (332c) amended.

See former *Rule* 1313 (332 c), and Eng. (1883) R. 177, which latter only covers cases where contribution or indemnity is claimed. The words in brackets are new. The present *Rule* makes it clear that relief in the cases contemplated by *Rule* 209 may now be given between co-defendants, as well as between a defendant and a third party, and by the same general mode of procedure, this was formerly doubtful: see H. & L. Jud. Act, 2nd ed., p. 385.

No leave to issue the notice need be obtained: *Baxter v. France*, 1895, 1 Q. B. 455, 458; *Holden v. G. T. Ry.*, 2 O. L. R. p. 423; see also *Towse v. Loveridge*, 25 Ch. D. 76. It is perhaps doubtful whether a defendant who has already appeared in the action should enter a second appearance to the notice, but that course was taken in *Baxter v. France*, *supra*, and is, it is submitted, the proper course under this *Rule*. The notice (Form 49 in the App., see H. & L. Forms, No. 478), served on the co-defendant will direct him to appear if he disputes the claim made by the notice, and failure to appear will, it would seem, subject him to the consequences stated in *Rule* 210 and in the notice.

Motion for directions.

When an application is made under *Rule* 213, for directions as to the proceedings upon such claim, the defendant against whom relief is claimed may object to the claim being entertained: see *Schneider v. Batt*, 8 Q. B. D. 705; *Wye Valley Ry. Co. v. Hawes*, 16 Ch. D. 489; *Baxter v. France*, 1895, 1 Q. B. 455; and it has also been held that this is the proper course to be pursued where a co-defendant served contends that the claim is not one to which *Rules* 209 and 215 apply, or objects to the question between himself and his co-defendant being tried. It is not proper (unlike in this respect the

case of a notice served on a person not a party to the action) to **Rule 216**. move to set aside the notice: *Baxter v. France*, *supra*; but see *Towse v. Lovelidge*, 25 Ch. D. 76.

A claim by a defendant against a co-defendant for indemnity will not be tried without an order under *Rule 213* providing for the determination of the claim raised: *Burke v. Pittman*, 12 P. R. 662; *Flower v. Todd*, W. N. 1884, 47; *Tritton v. Bankart*, and other cases, *supra*, p. 399.

The procuring by a defendant of the pleadings of a co-defendant who claims contribution, etc., from him does not operate as a notice to the former: *Steel v. Dixon*, 28 W. R. 796; 42 L. T. 765.

In *Walker v. Dickson*, 14 P. R. 343, where the defendant claimed indemnity against a co-defendant, the question was directed to be tried at the same time and place as the plaintiff's claim, notwithstanding that the time for pleading to the claim for relief over had not expired, and that it was at the date of the order too late to give the usual ten days' notice of trial to the third party.

As to whether a defendant who is entitled to indemnity from a co-defendant is entitled to judgment before he has actually paid anything in discharge of his liability to the plaintiff, see *Rules 211, 212*, and notes.

Security for Costs.—As to security for costs by a defendant security for from a co-defendant making a claim against him, see *Molsons Bank costs*, *v. Sawyer*, 19 P. R. 316.

216. A plaintiff is not to be [prejudiced or] unnecessarily delayed by reason of questions between the defendant and the third party in which he is not concerned: and the Court or Judge shall give such directions, on terms or otherwise, as may be necessary to prevent such delay of the plaintiff, where it can be done without injustice to the defendants. Plaintiff not to be delayed by questions between defendants.
Con. Rule 333.

The words in brackets are new in this *Rule*. They appear to have been taken from the last clause of the former *Rule 1313* (332 c). see note to *Rule 215*. The object of the present *Rule* is to prevent the plaintiff from being delayed by questions between the defendant and a third party, whether such third party is a stranger or a co-defendant. The former *Rule* referred only to questions "between defendants," probably, however, including as defendants third parties when brought in.

There is no express *Rule* like this under the English Practice, but the decisions of the Courts are to the same effect: see *Bower v. Hurley*, 1 Q. B. D. 652; *Wye Valley Ry. Co. v. Hawes*, 16 Ch. D. 489; *Barton v. London & N. W. Ry. Co.*, 38 Ch. D. 144; *Byrne v. Brown*, 22 Q. B. D. 657; 60 L. T. 651; *Hutchison v. Colorado*, W. N. 1884, 40; and see note to *Rule 215* as to the former practice in Chancery.

Rule 217.

(iii) *Guardians.*Insane
persons.

217. Where a lunatic or a person of unsound mind (not so found by inquisition or judicial declaration) might before the passing of *The Ontario Judicature Act 1881*, have sued or have been sued, he may as heretofore sue by his committee or next friend, and may defend by his committee or guardian. Con. Rule 335.

The words "or judicial declaration" are not in the English Rules; in other respects this is to the same effect as Eng. (1883) R. 139.

The practice adopted by this Rule is that of the Court of Chancery.

As plaintiffs. Lunatics—As Plaintiffs.—A lunatic so found by inquisition (or judicial declaration under R. S. O. c. 65, s. 8), and having a committee, must sue by him. If he has no committee, or if the committee has an interest in the subject matter of the action adverse to the lunatic, the suit in certain cases may be brought by the Attorney-General: *Atty.-Gen. v. Panther*, 2 Dick. 748, but is usually by next friend: *Light v. Light*, 25 Beav. 248; *Porter v. Porter*, 37 Ch. D. 420; who may be any person who chooses to act, just as in the case of an infant: *Skinner v. White*, 19 C. L. J. 115; and need not be a solvent person: *Sharp v. Sharp*, 2 Chy. Ch. 244; *Crummey v. Kingston*, 3 C. L. T. 311.

As in the case of an infant the next friend may not be a married woman. If an action is so framed the defendant may move to remove her, and stay the action till a proper next friend is named: *Martin v. Martin*, 15 P. R. 177.

A committee before instituting a suit on behalf of a lunatic or his estate must obtain the sanction of the Court: Dan. Prac. 5th ed., 82; 6th ed., 118.

If an action is brought in the name of a person, who was at the time in a state of mental incapacity, without either a committee or next friend, the defendant may move to dismiss the action, but not if the plaintiff becomes imbecile after commencing an action in the ordinary way: Dan. Pr., 5th ed., 81, 83; 6th ed., 118; *Wartnaby v. Wartnaby*, Jac. 377; *Blake v. Smith*, You. 594.

Where an action has been commenced in the name of a person of unsound mind by next friend, an inquiry may be directed at the instance of the person alleged to be of unsound mind as to his competency: *Powell v. Lewis*, 40 W. R. 88; 65 L. T. 672.

An action which can be shown to be not beneficial to a lunatic plaintiff will be stayed on application, as in the case of an infant: *Waterhouse v. Woranop*, 59 L. T. 140.

Where an action is brought by a next friend on behalf of a person alleged to be of unsound mind, but who is really of sound mind, the action will on his application, shewing by affidavit his sanity and ability to manage his own affairs, be ordered to be dismissed with costs against the next friend: *Palmer v. Walesby*, L. R. 3 Chy. 732; and the defendant may make a similar application: *Skinner v. White*, 19 C. L. J. 115; and see *Barrie v. Weymouth*, 15 P. R. 95; and vide *Quantz v. Smeltzer*, 6 P. R. 126.

The application must be to a Judge in Chambers, since if the affidavit is contradicted or doubtful, an inquisition in lunacy might be directed and the Master in Chambers has no jurisdiction to entertain such a question: *Skinner v. White, supra*.

If a plaintiff is found a lunatic, and a committee appointed after the commencement of an action, an order should be obtained for the committee to carry on the proceedings: *Green v. Pratt*, 41 L. T. 30, and see *Beall v. Smith*, L. R. 9 Chy. 85, where the effect of the appointment of a committee was said to paralyze a preceding action by a next friend. If during the action the committee dies or is removed, and a new committee is appointed, a similar order should be obtained. If the plaintiff's solicitor neglects to obtain an order in either of such cases, to carry on the proceedings, the defendant may, before judgment, move to dismiss the action, unless the order is obtained within a limited time; after judgment the defendant may obtain the order himself. See *Dan. Forms*, 3rd ed., 55.

The Court has no jurisdiction over the property of a person of unsound mind, except to protect it, so that where more is desired the proper course is to apply for the appointment of a committee to prosecute the suit: *Skinner v. White, supra*; see *Jones v. Lloyd*, L. R. 18 Eq. 265; *Beall v. Smith*, L. R. 9 Chy. 85.

As to the effect of a person of unsound mind being declared a lunatic after an action commenced by next friend, see *Beall v. Smith, supra*.

By R. S. O. c. 317, s. 53, the Inspector of Prisons and Public Charities is *ex officio* committee of lunatics detained in any public asylum, and having no other committee. But the High Court may appoint a committee of any such lunatic, and upon its so doing, so long as the committee appointed by the High Court exercises such office, the Inspector ceases to be the committee.

Lunatics—As Defendants.—A lunatic defends by the committee of his estate, if he has one. If he has none, or the defendant has an adverse interest, or the lunatic has not been so found by inquisition or judicial declaration, he defends by guardian *ad litem* under this Rule: see also *Howlett v. Wilbraham*, 5 Mad. 423; *Worth v. McKenzie*, 13 M. & G. 363.

The committee of a lunatic's estate is a necessary party defendant with the lunatic in an action relating to that estate, and may defend without obtaining leave: *Dan. Pr.*, 5th ed., 82.

As to the mode in which a lunatic defendant in an action is to be served: see *Rule 157*, and *Wolff v. Ogilvy*, 12 P. R. 645.

After service under *Rule 157*, no further proceedings are to be taken against a lunatic who has no committee, until a guardian *ad litem* is appointed: *Rule 158*. If the friends of a lunatic desire to defend for him, they should cause an appearance to be entered for him: see *Rule 218 (2)*, and then apply in Chambers: *Crawford v. Crawford*, 9 P. R. 178, to have a guardian *ad litem* appointed, see *Rule 221*. Any fit person who has no adverse interest may be such guardian: *Dan. Pr.*, 5th ed., 160, but in general the Official Guardian will be appointed: *Rule 218 (3)*.

If no application is made on the lunatic's part the plaintiff may, after the time for appearance has expired, apply for the appointment of a guardian by motion on notice: in which case the Official Guardian will be appointed, unless he be already acting as solicitor

Rule 218. for the plaintiff, or for some other parties having an interest in the subject matter of the action adverse to the lunatic, or unless the friends of the lunatic ask for the appointment of some other person, in which case some other proper person may be appointed: see *Rule 218 (3)*, though some good reason is now required for appointing some one other than the Official Guardian: see *Rule 218*, and notes.

Where proceedings are carried on without the due appointment of a guardian to a lunatic defendant, they are not merely irregular but void: see *Warnock v. Prieur*, 12 P. R. 264.

The defence of a lunatic or person of unsound mind should be expressed to be by his committee or guardian: Arch. Pr., 13th ed., 1048.

Where a person of sound mind not so found has to be made a party in the Master's office after judgment, or to be served with notice of motion for an administration order, a guardian *ad litem* must be appointed "in like manner as before judgment," that is to say by analogy to the practice (see *Rule 3*) in an action before judgment: see *Rule 218*, and *Wolff v. Ogilvy*, 12 P. R. 645. The procedure will therefore be by special motion in Chambers; in the latter case before the application for the administration order is made: *Wolff v. Ogilvy*, *supra*; *Burvy v. Brazil*, 1 Chy. Ch. 237.

Service of persons of unsound mind with an office copy of a judgment, pursuant to *Rule 203 (3)* or otherwise, is effected as the officer before whom the reference is pending directs: *Rule 220*.

A guardian *ad litem* to a defendant, who became of unsound mind after judgment, was appointed at the instance of a co-defendant who wished to obtain indemnity from the insane defendant: *Re Dawson*, *Johnston v. Hill*, 41 Ch. D. 415.

No appearance by persons of unsound mind.

218.—(1) Where no appearance has been entered to a writ of summons for a defendant who is a person of unsound mind not so found by inquisition or judicial declaration, the plaintiff may apply to the Court or a Judge for an order that a guardian of such defendant be appointed, by whom he may appear and defend.

(2) No such order shall be made unless it appears that the writ was duly served, and that notice of the application was, after the expiration of the time allowed for appearance, and at least six clear days before the day in the notice named for hearing the application, served upon, or left at the dwelling-house of, the person with whom the defendant resides, or under whose care he is at the time of serving such notice.

(3) The Official Guardian shall be so appointed, unless it is otherwise directed. Con. Rule 356; Rules 23 June, 1894, 1314.

Eng. (1883) R. 101 does not speak of an Official Guardian, and includes the case of an infant which is here provided for by *Rule 152*.

This *Rule* is based upon the English Chancery Order 7, Rule 3, as *Rule 219* to which, see H. & L. Jud. Act, 2nd ed., p. 390, and Morgan's Chy. Orders, 4th ed., p. 400; Seton, 4th ed., 706.

It would seem that Sunday is reckoned in computing the six clear days: see *Brewster v. Thorpe*, 11 Jur. 6, see also *Rules* 343, 344, 348.

It will be seen, from the terms of *Rule 158*, that the practice in Ontario is the same as under the Eng. Rule of 1883, and that even though an appearance should be entered for a lunatic, if he has no committee or guardian *ad litem*, the plaintiff cannot proceed until a guardian *ad litem* is appointed. It is apprehended that the intention of the *Rules* is, that application may be made on behalf of a lunatic for the appointment of a committee or guardian *ad litem* by whom he may appear and defend; but that if no such appointment is made, the plaintiff may under this *Rule* apply to have a guardian appointed.

By R. S. O. c. 317, s. 53, the Inspector of Prisons and Public Charities is *ex officio* committee of lunatics detained in any public asylum who have no other committee, but, in the case of a defendant for whom the Inspector is thus committee, service of a writ or other paper on the Inspector is not sufficient, but service must be made and a guardian appointed as if there were no committee: *Ib.*, sec. 55; see also notes to *Rule 217*.

Applications under this *Rule* should be made to the Master or other officer having jurisdiction in Chambers, not to a Judge: *Crawford v. Crawford*, 9 P. R. 178. If the lunatic defendant has been found to be of unsound mind by inquisition, or judicial declaration, the *Rule* does not apply, and he should defend by his committee; but where he has not been so found lunatic the *Rule* applies, and it should be shewn, on the application to appoint a guardian, that the defendant has not been found lunatic by inquisition or judicial declaration: *Crawford v. Birdsall*, 1 Chy. Cham. 70; and facts must also be shewn upon which the Court may judge for itself that the person is of unsound mind: *McIntyre v. Kingsley*, 1 Chy. Ch. 281. The Official Guardian is to be appointed, unless a case is made for appointing another proper person: see *Rule 218*. It will have to be shewn that such other person has no conflicting interest: see *Rule 221*, and *James v. Robertson*, 1 Chy. Ch. 197. Service of notice of the application is necessary though the person to be served is out of the jurisdiction: *O'Brien v. Maitland*, 10 W. R. 275.

An appointment of a guardian without notice served as directed by this *Rule* was held to be void, and not to be a mere irregularity, and to be a defect not capable of being waived by the fact that the Official Guardian who was appointed, acted as such, and made all the inquiries usual in such cases in the interests of the lunatic: *Warlock v. Priour*, 12 P. R. 264.

219. Where an infant, or a person of unsound mind not so found by inquisition or judicial declaration, is served with an office copy of a judgment or order, or is made a party after judgment, a guardian *ad litem* shall be appointed for him in like manner as before judgment. Con. *Rule 337*.

Based upon Chy. Orders 522, 525.

Infants.—The appointment of guardians *ad litem* to infants before judgment, is now governed by *Rules 152, 155, 156*. Under those

Appointment of guardian *ad litem* to infants or lunatics added after judgment.

Rule 220. *Rules* service of the writ on the Official Guardian *ad litem*, *ipso facto* constitutes him the guardian of the infant on whose behalf he is served, where the infant is served in respect of his interest in an estate, but not in actions for personal torts, or for the mere recovery of money: see Rule 154. Where an infant is required to be served with an office copy of judgment it is ordinarily in that class of cases in which service of a writ on the Official Guardian is sufficient service on the infant if an original defendant, and by analogy to Rule 152 (see Rule 3). In such cases, service of the office copy of the judgment on the Official Guardian would be sufficient service on the infant, and the Official Guardian would thereby become *ipso facto* his guardian *ad litem*. Where there are several infant defendants to be served, by analogy to Rule 152, only one copy of the judgment need be served on the Official Guardian.

Lunatics.—This Rule refers to persons of unsound mind not so found by an inquisition or order of the Court. The appointment of guardians *ad litem* to such persons before judgment is regulated by Rules 218, 221. Where the person is found lunatic by inquisition or order, it is not necessary to appoint a guardian *ad litem* for him, his committee having power to act for him.

The appointment is made on an application in Chambers, notice of which motion may be served along with the office copy of the judgment—or afterwards, but no further proceedings affecting the person of unsound mind can properly be taken until a guardian *ad litem* has been appointed for him: *Wolff v. Ogilvy*, 12 P. R. 645. Where the Master before whom the reference is pending, has also jurisdiction in Chambers, it would seem that he would have power to entertain such applications: see Rules 49, 698.

Where a person has been judicially declared a lunatic, service is effected on his committee, who should be made a co-defendant: *Sm. Pr.*, 7th ed., p. 311, and it would seem not to be necessary in such a case to appoint a guardian *ad litem*: *Ib.*, but where the lunatic has no committee within the jurisdiction, it has been held proper to serve the Official Guardian *ad litem* on behalf of such lunatic: see *Re Hagar*, 12 P. R. 645, *sed quare*; see *Warneck v. Priour*, *supra*, and in case of lunatics detained in any public asylum, see R. S. O. c. 317, *supra*, p. 409.

Service of
infant or
lunatic with
judgment,
how
effected.

220. Where a person required to be served with an office-copy of a judgment or order is an infant, or a person of unsound mind not so found by inquisition or judicial declaration, service is to be effected in such manner as the officer before whom the reference is being prosecuted directs. Con. Rule 338.

Based upon Chy. O. 523.

Infants,

Service of Office Copy of Judgment.—**Infants.**—For the reasons given in the note to the preceding Rule, service on the Official Guardian of an office copy of a judgment required to be served on an infant, is sufficient service on the infant, and the Official Guardian thereby *ipso facto* becomes his guardian *ad litem*: see Rule 3, and *Re Murray*, 13 P. R. 367.

A guardian *ad litem* must be appointed for an infant whether he is made a party in his own right, or in a representative capacity.

e.g., as executor or trustee, or the proceedings will be void as against Rule 221. such infant: *Re Jackson, Massey v. Crookshanks*, 12 P. R. 475, and see *supra*, p. 410.

Lunatics so Found.—Where a person who has been judicially declared a lunatic is required to be served with a judgment, the office copy should be directed to be served on his committee, who should be also made a co-defendant; the service should also be made on the lunatic as well, unless it is shewn that for any reason it is dangerous to serve him personally: *Re Miller*, 1 Chy. Ch. 215. See note to Rule 219, *sed vide*, *Re Hagar*, 12 P. R. 645.

Lunatics Not so Found.—Where the person required to be served is of unsound mind, but has not been judicially declared to be a lunatic, the direction of the Master before whom the reference is pending should be obtained under this Rule as to the mode in which he is to be served. By analogy to Rule 157 (see Rule 3) it would appear that the person with whom, or under whose care he is, should be directed to be served; and, unless it is shewn that service on the person of unsound mind would be attended with danger, it would seem that he should be directed to be personally served as well: see *Re Miller*, 1 Chy. Ch. 215; *Re Newman*, 2 Chy. Ch. 390; *Re Mein*, 2 Chy. Ch. 420. No proceedings can be validly taken against a person of unsound mind who has no committee until a guardian *ad litem* has been appointed: Rule 264: *Warnock v. Prieur*, 12 P. R. 264.

It is therefore necessary not only to obtain the Master's direction for service of the office copy of judgment on the person of unsound mind under this Rule, but it is also necessary to obtain an order appointing a guardian *ad litem* to such person. This is to be done by order to be obtained in Chambers on motion, supported by affidavits. By analogy to Rule 218 it would seem that the notice of the motion should be served in the manner mentioned in that Rule, and that it must be a six clear days' notice instead of the ordinary two clear days' notice.

Where the Inspector of Prisons and Public Charities is *ex officio* committee of the lunatic (see R. S. O. c. 317, s. 53), it is nevertheless necessary in proceedings against the lunatic that a guardian should be appointed of such lunatic: R. S. O. c. 317, s. 55.

Where a defendant in an action becomes of unsound mind after judgment, a guardian *ad litem* must be appointed for him before proceedings can be validly continued against him: *Wolff v. Ogilvy*, 12 P. R. 645. This must be done by order, upon motion, and cannot be effected by merely serving the Official Guardian on his behalf: *Id.*; *sed vide*, *Re Hagar*, 12 P. R. 645, where it was held that this might be done where the defendant had been judicially declared insane, *sed quare*: see *Warnock v. Prieur*, *supra*.

221. A person desirous of appointing a guardian for himself other than the Official Guardian to defend an action or matter, may go before a Judge or Master with the proposed guardian. He must satisfy the Judge or Master by affidavit that the proposed guardian is a fit person, and has no adverse interest: and the Judge or Master may examine the proposed guardian, or the person making the affidavit, *viva voce*, or re-

Person desiring to have a guardian *ad litem* appointed to himself, may attend Judge with proposed guardian.

Rule 222.

Evidence
required on
application.

quire further evidence to be adduced until he is satisfied of the propriety of the appointment. Con. Rule 339.

Based on Chy. O. 526.

This Rule would appear to apply to all cases of disability where the appointment of a guardian is necessary.

Official
guardian
to be
appointed.

The Official Guardian *ad litem* is now, by the direction of the Court, appointed in all cases, unless some special reason exists for the appointment of some other person.

Proceedings
set aside
where
guardian
ad litem
irregularly
appointed.

Where a guardian was irregularly appointed upon insufficient notice to the infant, the appointment was set aside on the application of the infant after decree: *Hamilton v. Hamilton*, 2 Chy. Ch. 160; and see *Re Jackson, Massey v. Crookshanks*, 12 P. R. 475.

(iv) *Actions by and against Partnership Firms.*

The following Rules 222-231, form a code, and must in construing them be read together: per Lord Esher in *Worcester, etc., Banking Co. v. Firbank*, 1894, 1 Q. B. 787-8, adopting the view of Fry, L.J., in *Heinemann v. Hale*, 1891, 2 Q. B. 90.

Rules 222-231 supply a mode of suing all the partners, by suing them in the name of the firm. They may still be sued individually if the plaintiff so desires. In such case, if he does not sue all the partners, those sued may be entitled to have the others added as defendants: see note to Rule 206, p. 384; and a judgment obtained against some only of the partners will be a bar to an action for the debt against the others not sued: see note to Rule 228, p. 424.

Partnership
firms, how
may sue and
be sued.

222. Any two or more persons (whether British subjects or not and whether residing within or without Ontario) claiming or being liable as partners, and carrying on business within Ontario, may sue or be sued in the name of the firm of which such persons were co-partners at the time of the accruing of the cause of action; and any person may in such case apply to the Court or a Judge for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, co-partners in the firm, to be verified on oath or otherwise as may be directed. Con. Rule 317 amended. (Eng. O. 48a, r. 1.) [See also Rule 144.]

Follows in substance Eng. R. 1891, O. 48a, r. 1, which was the same as Eng. 1885, O. 16, r. 14, with the addition of the words "and carrying on business within the jurisdiction" ("within Ontario" in the above Rule).

The words in brackets are not in the English Rule, and have been inserted to make clear what seems also to be established by decision to be the meaning of the Eng. Rule: see *Grant v. Anderson*, 1892, 1 Q. B. 108; *Worcester City Banking Co. v. Firbank & Co.*, 1894, 1 Q. B. 784; *Shepherd v. Hirsch & Co.*, 45 Ch. D. 231.

The application for names and addresses is not to be "by summons as provided in Eng. R., but by motion (in Chambers as a rule)

on notice in the usual way. The words "Court or a Judge" confer **Rule 222**. Jurisdiction of the Master in Chambers and like officers in Chambers: see **Rule 6**.

The Ind. Act, 1881, **Rule 100** (now the above **Rule**), first authorized the suing of partners, and empowered partners to sue or be sued, in the firm name. Formerly all the partners must have been named individually as parties, and if sued were required to be jointly sued as their liability is joint: see *Kendall v. Hamilton*, 4 App. Cas. 504. Now the action may be brought against the firm without first ascertaining who the partners are.

If a firm is sued as such service may be effected either upon any one or more of the partners, or, at the principal place of business of the partnership, upon any person having the control or management of the business. The partners are to appear individually in their own names, but all subsequent proceedings go on in the name of the firm: **Rule 225**.

After judgment against the firm, execution may issue as provided in **Rule 228**.

Disclosure of Names and Addresses.—If partners are suing ^{Disclosure} in the name of the firm they must, on the demand of the defendant, by partners, disclose the names of the partners: **Rule 144**; and whether suing or being sued, they may be ordered by the Court or a Judge, on the application of any party to the action, to make such disclosure: **Rule 222**.

The names of the partners composing firms for trading, manufacturing or mining purposes in Ontario, are also required to be registered in the registry office of the registry division in which they carry on business: R. S. O. c. 152, s. 1.

A plaintiff in a class suit cannot under this **Rule** be compelled to disclose the names and addresses of the persons on whose behalf he sues: *Leathley v. McAndrew*, W. N. 1875, 250.

A form of notice of motion for a statement of the partners under this **Rule** is given in the App. No. 58, and a form of order in No. 113. (See H. & L. Forms, Nos. 103, 403 and 404.)

The order for the statement cannot be enforced by attachment under **Rule 473**; *Pike v. Keene*, 24 W. R. 322; 35 L. T. 341.

See also notes to **Rule 144**.

Scope of the Rules.—The Rules in effect merely furnish a convenient way of proceeding by or against the individuals who constitute a firm, by enabling them to sue, or be sued in the name which they have adopted for business purposes. Their creditors are enabled to reach in the first instance the property of the firm, but also under certain circumstances (see **Rule 228**) the property of the individuals; see *Re Frances Hondford*, 1899, 1 Q. B. 566. ^{What are firms within the Rule.}

A proprietary club would appear to be a partnership in which the proprietors are the partners, and may be sued in the club name: *Firmin v. International Club*, 5 Times, 612, 694. As to a member's club, see *Overton v. Hewett*, 3 Times, 656; *The Granville Club*, 28 Sol. Jour. 513; *Stansfeld v. Ridout*, 5 Times, 656.

As to whether trades unions can be so sued, see *Taff Vale Ry. v. Amalgamated Society of Railway Servants*, 1901, A. C. 426; 85 L. T. 147; and other cases noted under **Rule 200**.

Rule 222. The *Rule* only covers the case of two or more persons trading as a firm. It does not authorize a single person carrying on business in the name of a firm to sue in the firm name: see *Lang v. Thompson*, 10 P. R. 516; *St. Gobain v. Hoyermann*, 1893, 2 Q. B. D. 901; *Russell v. Cambefort*, 23 Q. B. D. 520. He may be sued in the name or style under which he carries on business, under *Rule 231*, but must sue in his own name.

See, also, as to the general scope of *Rules 222-231*, an article in the *Law Quarterly Magazine* for 1890, p. 53.

Infant. **Infant Partner.**—This *Rule* applies though one of the partners is an infant: *Harris v. Beauchamp*, 1893, 2 Q. B. 534; see *Re Beauchamp*, 1894, 1 Q. B. 1; but the judgment should be expressed to be either against the firm "other than A. B., an infant," or possibly against the other partners by name: *Id.*; and *Lovell v. Beauchamp*, 1894, A. C. 607; see pp. 612, 613; but see *Rule 225*.

Carrying on business. **"Carrying on Business Within Ontario."**—Under the present *Rules* the test of the power to sue a firm by its firm name is whether or not it "carries on business within Ontario": per Lord Davey in *Worcester City, etc., Banking Co. v. Firbank*, 1894, 1 Q. B. p. 710, so that the *Rule* has no application to actions by or against a foreign firm not carrying on business within Ontario, the members of which are domiciled and resident out of Ontario, even though a partner be temporarily within and served within Ontario: *Agar v. Kauffman*, 30 Sol. Jour. 181; *Grant v. Anderson*, 1892, 1 Q. B. 108; but it applies to a firm carrying on business within Ontario though it be a foreign or a British or a colonial firm, the members of which are resident out of Ontario: *Worcester, etc., Banking Co. v. Firbank, etc., Co.*, 1894, 1 Q. B. 784.

As to the difference between "carrying on business" and "transacting business," see *Nelson v. Lenz*, 9 O. L. R. 50, 52, and *Rule 159*.

A place of business held in the name of the firm in charge of a partner or employee would seem to be necessary to bring the firm within the meaning of this *Rule*. Regular visits to Ontario to purchase goods to be sent to the firm is not "carrying on business" within the *Rule*: see *Singleton v. Roberts*, 10 R. 223; 76 L. T. 687; *Worcester City Banking Co. v. Firbank*, 1894, 1 Q. B. 784; *sed quare* whether a place of business is necessary except to effect substitutional service on a manager provided for by *Rule 223*.

A partner may perhaps be considered as carrying on business of the firm at his regular office though the name of the firm does not appear there: see *Heinemann v. Hole*, 1891, 2 Q. B. 83, where some such circumstances existed, but the former *Rules* were held not to apply.

A foreign corporation having agencies within the jurisdiction and conducting a trade therein by means of steamships was held to be "carrying on business" within the jurisdiction: *La Bourgogne*, 1899, A. C. 431; 79 L. T. 310, 331. So a foreign corporation having "a stand" at the Crystal Palace for exhibition of their manufactures at a "cycle show," and for explaining their cycles, taking orders, and pressing the sale of their goods: *Dunlop Pneumatic Tire Co. v. Action Gesellschaft, etc.*, 1902, 1 K. B. 342. See also *Nelson v. Lenz*, 5 O. W. R. 21.

The mere employment of an agent within the jurisdiction to solicit orders, but not to make contracts, is not "carrying on business"

within Ontario" within the meaning of the *Rules*, notwithstanding *Rule 223*, that the name of the firm is entered on the door of the agent's office: *Grant v. Anderson*, 1892, 1 Q. B. 198. See also *Railton v. Goodwin*, 33 Ch. D. 604.

See also notes to *Rule 223*.

Foreign Firm as Plaintiff. If not "carrying on business within Ontario," a foreign firm cannot sue by its firm name. An action may, of course, as formerly, be brought by all the partners in their individual names, and in such an action a counter-claim may be made against the firm even though an action respecting the subject of the counter-claim could not have been brought within Ontario against the plaintiffs: *Orendtoven v. Hamlyn & Co.*, 8 Times, 231.

Foreign Firms as Defendants.—The individual members of a foreign firm may still it is presumed be sued jointly in any case within *Rule 162*; but unless carrying on business within Ontario the firm cannot be sued in the firm name (even by leave under *Rule 162*: *Dobson v. Festi*, 1891, 2 Q. B. 92), where the members of the firm (or any of them: *Indigo Co. v. Ogilvy*, 1891, 2 Ch. 31) reside abroad: see *per Lord Davey* in *Worcester, etc., Banking Co. v. Firbank*, 1894, 1 Q. B. 780; and see *Western, etc., v. Perez*, 1891, 1 Q. B. 304, under the former *Rules*.

Where a foreign firm carries on business within Ontario, that circumstance makes it under the *Rules* subject to the jurisdiction of the Court, apparently, whatever the cause of action may be. It will not be necessary to bring the case within *Rule 162*, or to obtain leave to issue the writ against the firm: *Rule 223*; *Worcester, etc., Banking Co. v. Firbank*, 1894, 1 Q. B. 784.

The writ when issued however must be served according to some one of the modes prescribed by *Rule 223*, otherwise the service will not be sufficient to bind the firm and support a judgment against it, which is the only form of judgment obtainable in such an action: see *Rules 225, 227, 228*. Substitutional service in modes not prescribed by *Rule 223* cannot be ordered: *Worcester, etc., Banking Co. v. Firbank*, 1894, 1 Q. B. 788.

From the reference to the time of the accruing of the cause of action in this *Rule*, and from the last clause of *Rule 223*, it would seem that a firm dissolved before action may nevertheless sue or be sued in the firm name, but in the case of defendants, if the dissolution was known to the plaintiff at the time of the issue of the writ all of the partners within the jurisdiction sought to be made liable must be individually served: see *Rule 223*; *Fisher v. Linton*, 28 Ont. 322.

223. Where persons are sued as partners in the name of the firm under *Rule 222* the writ shall be served either upon any one or more of the partners, or at the principal place within Ontario of the business of the partnership, upon any person having the control or management of the partnership business there; and subject to these *Rules* such service shall be deemed good service upon the firm whether any of the members thereof are without Ontario or not, and leave to issue a writ against them shall not be necessary: but in the case of a

Rule 223. partnership which has been dissolved to the knowledge of the plaintiff before action, the writ of summons shall be served upon every person within Ontario sought to be made liable. *Con. Rules 265 and 317 amended. (Eng. O. 48a, r. 3.)*

The Eng. O. 48a, r. 3, is to the same effect.

The service provided for by this *Rule* is of a writ issued against a firm by its firm name under *Rule 222*, i.e., of a firm "carrying on business within Ontario."

Foreign firms.

Foreign Firm.—This *Rule* applies to foreign firms carrying on business within the jurisdiction—but not to foreign firms not so carrying on business. Foreign firms not carrying on business within the jurisdiction must be sued in the names of the partners, each of whom must be served: see formerly *H. & L. Jud. Act*, 2nd ed., 397; and *Russell v. Cambefort*, 22 Q. B. D. 526; *Western v. Perez*, 1891, 1 Q. B. 304; *Nutter & Co. Messageries Maritimes*, 54 L. J. Q. B. 527; and *Lysaght v. Clark*, 1891, 1 Q. B. 552.

Firm dissolved before action.

Firms Dissolved Before Action.—Notwithstanding the dissolution of a firm, it may still be sued in the firm name: *In re Wenham*, 1900, 2 Q. B. 698.

But the concluding clause of the *Rule* seems practically to render it useless to sue partners in the firm name if the firm has been dissolved: for notwithstanding that a firm existing at the date of the accrual of the cause of action may be sued in the firm name, although it has been dissolved before action, yet every individual member of the firm, resident in Ontario, and sought to be made liable, must also be personally served with the writ; and in such a case partners resident out of Ontario are not personally bound by service on those within Ontario, and cannot be made individually liable unless they are individually made parties and served under *Rule 162*; see *Rule 228. Wigram v. Cox*, 1894, 1 Q. B. 792; 70 L. T. 656; *Shepherd v. Hirsch*, 45 Ch. D. 231, and "Service on a partner," *infra*.

When a partner dies before action brought against the firm, a judgment against the firm can only be enforced against the surviving partners, and the partnership assets: *Ellis v. Wadson*, 1899, 1 Q. B. p. 718; 80 L. T. 508; and the same result will follow where a partner dies between the service of the writ and the trial of the action and judgment: *Ib.*, pp. 718-19.

Where a partnership, unregistered, existed between A., B. and C., under the style A. & Co., and A. absconded, and three days later C. made a secret assignment of his interest in the business to B., and two days thereafter, before the announcement was made public, C. was served with a writ in an action against the firm by its firm name, of which proceedings B. was aware, it was held that the service was good: *Bank of Hamilton v. Blakeslee*, 9 P. R. 130.

Mode of service of firms.

Service.—The service provided for is of a writ issued against a firm by its firm name under *Rule 222*, i.e., of a firm "carrying on business within Ontario."

In the case of an action against a foreign firm as a firm, or against a firm, some members of which do not reside within Ontario, service must be effected as in this *Rule* mentioned, and in the case of a firm, none of whose members reside within Ontario, no other mode of substitutional service than upon the manager as mentioned in this

Rule is authorized: *Worcester, etc., Banking Co. v. Firbank*, 1894, 1 **Rule 223**. Q. B. 788; 70 L. T. 443.

It does not seem to be clear whether a partner within Ontario may be served for the firm under this Rule, by serving him, not personally, but substitutionally: see *Skillico v. Child*, W. N. 1883, 208; *Croyden v. Jackson*, 3 Times, 650; *Worcester, etc. v. Firbank*, 1894, at pp. 792 and 790, 1 Q. B.; and 70 L. T. p. 445. Where a partner is only substitutionally served, it is doubtful whether execution could issue against him, without leave, if he does not appear in the action: see *Jackson v. Litchfield*, in note to Rule 228.

Service on a Partner.—A service within Ontario only is what (on a partner in Ontario) is contemplated: see last clause of Rule 228. Service on a partner temporarily within Ontario will probably suffice: see *Pollczfen v. Sibson*, 16 Q. B. D. 792; *Shepherd v. Hirsch*, 45 Ch. D. 231. These cases are probably again authorities on this point though decided under the repealed Rules and overruled in *Western, etc., v. Perez*, 1891, 1 Q. B. 304, for reasons not applicable under the new Rules.

The words used in this Rule are "be served on one or more of the partners," without any express qualification that the partners served are to be within the jurisdiction, but as under the old Rules it was held that words equally unqualified must be confined to persons within the jurisdiction of the Court, the same rule of construction will probably be applied to this Rule: see *Russell v. Cambefort*, 23 Q. B. D. 526; *St. Gobain, etc., v. Hoyermann's Agency*, 1893, 2 Q. B. 102; Rule 228.

Furthermore service out of Ontario is regulated by Rule 162: see notes to that Rule, and by the terms of Rule 223, leave to issue a writ is not necessary as against the members of the firm who are out of Ontario, which may point to a service not requiring to be scrutinized under Rule 162, by reason of the service being within Ontario: see also the last clause of Rule 228.

In a case within Rule 162 an order may be made for service of any individual partner so as to reach assets of his in Ontario under Rule 228, (see last clause of that Rule); but such service will probably only bind the partner served: see *Russell v. Cambefort*, and other cases *supra*; and it would seem that such an order can only be made against partners individually defendants: see Rule 228 (2), and *Dobson v. Festi*, 1891, 2 Q. B. 92; and *quære* whether any order binding upon the firm can be made other than for service of all the partners: *Id.* If all partners are to be served out of the jurisdiction, no object is gained by suing the firm by its name rather than the partners individually: see *per* Lindley, L.J., in *Western, etc., v. Perez*, 1891, 1 Q. B., at p. 314.

If the person served as a partner is not a partner, the service may be set aside with costs on the application of the firm: *Nelson v. Pastorino*, 49 L. T. 564.

Service on Manager.—Service otherwise than on a partner, (on a manager of a partnership business at its principal place of business in Ontario.) must be made upon some person having the control or management of the partnership business at its principal place of business in Ontario. The Eng Rule adds "at the time of such service" and that must be the meaning of this Rule.

The substitutional service on a manager, thus authorized, is good service upon which to obtain judgment and execution against the firm.

Rules 224, 225. As to what constitutes "having the control or management of the partnership business," see *Baillie v. Goodwin*, 33 Ch. D. 604; *Hennemann v. Hale*, 1891, 2 Q. B. 83; *Grant v. Anderson*, 1892, 1 Q. B. 108; *Worcester, etc., v. Firbank*, 1894, 1 Q. B. 784, in notes to *Rule 222*. Service on a receiver or manager appointed by the Court of the business of a firm in litigation will not bind the firm: *Re Flowers*, 1897, 1 Q. B. 14. Where a manager is served, notice in writing that he is served as manager must be given: *Rule 224*.

As to when execution may be issued against partners individually, see *Rule 228*.

Notice of capacity in which a person is served.

224. Where a writ is issued against a firm and is served as directed by *Rule 223*, every person upon whom it is served shall be informed by notice in writing given at the time of service whether he is served as a partner or as a person having the control or management of the partnership business, or in both characters. In default of such notice the person served shall be deemed to be served as a partner. *New.* (Eng. O. 48a, r. 4.)

Same as Eng. (1883) O. 48a, r. 4.

The notice is required apparently for the purpose of enabling the person served to know whether it is intended to charge him as a partner under *Rule 228*, and to enable him to dispute that he is a partner. If he is only manager and not a partner he need not appear where the notice informs him that he is served only as having control or management of the business: *Rule 226*.

Form of notice.

For a form of notice, see H. & L. Forms, No. 74.

If served as a partner the delivery of a notice to that effect is not necessary; the *Rule* provides that in default of notice the person served is to be deemed to be served as a partner.

Where the notice is that he is served as a partner, or where no notice is given, and the person is therefore deemed to be served as a partner, he may, and probably if not a partner should, appear under protest denying that he is a partner: *Rule 227*. If he does not appear under protest, or otherwise, it may be that execution may be issued against him under *Rule 228* (c). Probably a motion may be made by the firm, at any rate, to set aside service effected upon a person as a partner where he is not a partner: *Nelson v. Pastorino*, 49 L. T. 564.

It may not always be possible to ascertain before service the name of the person in charge of the business, and the notice though required to be delivered at the time of service need not be directed to any one, and need not contain anything but the notification of the capacity in which the person is being at the time served with the writ.

Where no such notice is given and the person served is not a partner the service is defective and may be set aside on the application of the firm: *Gibson v. Le Temps*, 6 O. L. R. 690; but not after judgment has been obtained after appearance by the firm: *Id.*

Appearance of partners

225. Persons sued as partners in the name of the firm shall appear individually in their own names, but all subse-

quent proceedings (a) shall continue in the name of the firm. **Rule 225.**
Con. Rule 222. (Eng. O. 48a, r. 5.)

Same as Eng. (1891) O. 48a, r. 5.

(a) These words should be confined to "subsequent proceedings" by the plaintiff: *Langman v. Hudson*, 14 P. R. 215; in that case it was held that a defence and counter-claim by the defendant, individually, is regular, at any rate in an action against a firm after its dissolution; but see *Ellis v. Wadeson*, *infra*.

Appearance.—No appearance is to be entered for the firm. Part-Appearance, persons, whether served personally or not, must appear individually within the time limited for appearance computed from the time of a valid service of the firm under *Rule 223*; and the appearance of a partner is an appearance on behalf of the firm so as to found proceedings against the firm under *Rule 223*: *Lysaght v. Clark*, 1891, 1 Q. B. 556. Probably an appearance under protest under *Rule 227* will not be sufficient for that purpose.

Seemle, an appearance not under protest is an admission that the person appearing is a partner; see *Davies v. André*, 24 Q. B. D. 508; 63 L.T. 151; *Zuccato v. Young*, 38 W. R. 474, under the former practice.

Seemle, also, that a person claiming to be a partner may, after a service of the firm under *Rule 223*, appear, notwithstanding that his claim to be a partner is disputed: see *Robinson v. Ward & Son*, 36 Sol. Joar. 415.

As to the effect of partners severing in their defence and not raising the same defences, see *Cropper v. Smith*, 26 Ch. D. 700; 51 L. T. 733; and *Smith v. Cropper*, 10 App. Cas. 249.

Each partner appearing is entitled to put in a defence for the firm: *Taylor v. Collier*, 30 W. R. 701; *Ellis v. Wadeson*, 1899, 1 Q. B. p. 517; 80 L. T. 508, though they should endeavour by agreement to put in but one statement of defence: *Ellis v. Wadeson*, *supra*; but it is only a defence for the firm that a partner can put in; he is not entitled to put in a personal defence: *Ellis v. Wadeson*, *supra*; and the defence must be in the name of the firm, even though pending the action the firm is dissolved by the death of one of the partners, and the defence is delivered by the surviving partner: *Ib.*; but see *Langman v. Hudson*, *supra*.

After appearance by any partner the plaintiff cannot sign judgment against the firm until the defence of every partner appearing is disposed of: *Adm v. Townsend*, 14 Q. B. 103; *Jackson v. Litchfield*, 8 Q. B. D. 474; *Manster v. Cox*, 10 App. Cas. 680.

Time for Appearance.—The time for appearance, where the writ is served on the manager, and also on a partner personally, runs from the date of the last of such services; see *Allen v. Borkley*, 25 Q. B. 10, 543.

Solicitor's Authority to Enter Appearance.—Where a partner has not been served but an appearance is entered for him by the instructions of a co-partner, who has been served on behalf of the firm, such appearance if unauthorized will be set aside on the prompt application of the partner in whose name it was entered: *Mason v. Cooper*, 15 P. R. 418; but ordinarily instructions from a managing partner to defend the action for the price of goods supplied to the firm in the ordinary course of business is good authority to a solicitor to enter an appearance for all the partners: *Tomlinson v. Broadsmith*, 1896, 1 Q. B. 380; *Court v. Berlin*, 46 W. R. 57; 1897, 2 Q. B. 396.

Rules 226, 227. Where one partner is an infant, and appears by a guardian *ad litem*, the appearance is proper: *Harris v. Beauchamp*, 1893, 2 Q. B. 534; 60 L. T. 373; but as to the form of the judgment, see note to *Rule 227*.

No appearance except by partners.

226. Where a writ is served under *Rule 223* upon a person having the control or management of the partnership business an appearance by him shall not be necessary unless he is a member of the firm. *New.* (Eng. O. 48a, r. 6.)

Same as Eng. (1891) 48a, r. 6.

An appearance by a person describing himself as manager should be refused by the officer unless it is under protest pursuant to *Rule 227*.

Appearance under protest of person served as partner.

227. A person served as a partner under *Rule 223* may enter an appearance under protest, denying that he is a partner, but such appearance shall not preclude the plaintiff from otherwise serving the firm and obtaining judgment against the firm in default of appearance if no partner has entered an appearance in the ordinary form. *New.* (Eng. O. 48a, r. 7.)

Same as in Eng. (1891) 48a, r. 7.

Form.—For a form of appearance under protest, see H. & L. Forms No. 107.

Contesting Denial of Partnership.—If the plaintiff insists that the person served is a partner, he may if it would seem, move in Chambers to strike out the appearance, shewing that the person so appearing is a partner; upon such a motion probably an issue may be directed to determine the question; see *Worcester Banking Co. v. Trotter*, 3 Times, 709; and *Davis v. Harris*, 10 Q. B. D. 433 (cases of an issue directed under *Rule 228*). This course will probably be expedient where there is no other means of serving the firm pursuant to *Rule 223*.

Re-service of Firm.—The plaintiff may leave for decision in the action (probably under *Rule 228* (2), when execution is sought) the question whether the person served is a partner, and may serve the writ in some other way pursuant to *Rule 223*, so as to bind the firm.

Judgment.—If one of several partners does not appear, judgment cannot be entered against him individually. Judgment if recovered must follow the writ and be against the firm: *Jackson v. Litchfield*, 8 Q. B. D. 474; *Adam v. Townsend*, 14 Q. B. D. 103; (see the discussion of this case in 17 L. J. 324); *Firmin v. International Club*, 5 Times, 612. But where one of the partners is an infant, the judgment given against the firm should expressly except the infant: *Harris v. Beauchamp*, 1893, 2 Q. B. 534, 60 L. J. 373; *Re Beauchamp*, 1891, 1 Q. B. 1; *S. C. sub nom Lovell v. Beauchamp*, 1894, A. C. 607.

Execution may be issued under *Rule 228* against individual partners.

Where an action was brought against a firm, and one of the partners individually, and the partner only appeared, but separate defences were afterwards delivered by the partner and the firm, it was held that the defence of the firm could not be struck out; *Taylor v. Collier & Co.*, 30 W. R. 701; W. N. 1882, 83; 51 L. J. Chy. 853. The firm is sued though appearance must be by the partners individually, and as regards any claim against the firm, the defence to be filed must be for the firm and in the firm's name; *Ellis v. Hadenon*, 1899, 1 Q. B. 714, 720.

In *Munster v. Railton*, 10 Q. B. D. 475, 11 Q. B. D. 435 (affirmed in the House of Lords, 10 App. Cas. 680) an action was brought against a firm, "R. & Co."; R. appeared individually and the plaintiff then delivered a statement of claim against "R. sued as R. & Co." and obtained judgment. Afterwards discovering that C. was a member of the firm of "R. & Co." plaintiff was not allowed to amend his judgment to make it conform to the writ and he a judgment against the firm, as he had chosen to sue R. individually.

Where a partner is served after a service on a manager or other person under Rule 223, judgment by default of appearance cannot be signed until the requisite time has expired after the second service; *Alden v. Beckley*, 25 Q. B. D. 543.

228.—(1) Where a judgment or order is obtained against a firm, execution may issue

Execution
of judgment
against a
firm.

- (a) Against any property of the partnership within Ontario;
- (b) Against any person who has appeared in his own name under Rule 225 or Rule 226, or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner;
- (c) Against any person who has been individually served as a partner with the writ of summons and has failed to appear.

(2) If the party who has obtained the judgment or order claims to be entitled to issue execution against any other person as being a member of the firm, he may apply for leave so to do; and the Court or a Judge may give such leave if the liability be not disputed, or if disputed may order that the liability be determined in any manner in which any issue or question in an action may be determined. Except as against any property of the partnership, a judgment against a firm shall not render liable, release or otherwise affect any member thereof who was out of Ontario when the writ was issued, and who has not appeared to the writ unless he has been made a party under Rules 162 to 167, or has been served within Ontario after the writ was issued. Con. Rule 876, amended. (Eng. O. 48a, r. 8.)

Same as Eng. (1891) O. 48a, r. 8.

Rule 223. This *Rule* provides the mode of realizing a judgment against a firm. Where a partner has been made a party individually, any judgment awarded against him may of course be enforced against him in the ordinary way.

Execution of judgment against a firm and the partners. Where the writ is issued against partners, not individually, but in the name of the firm, service of the writ on one or more will be sufficient: *Rule 223*; but the judgment must follow the writ and be against the firm: *Rule 225*. Therefore, if no appearance is entered judgment cannot be entered against any of the individual partners, even though they may have been served with the writ. Execution may, however, under this *Rule*, be issued, without leave, in the cases mentioned, against individual partners, upon the judgment against the firm: *Jackson v. Litchfield*, 8 Q. B. D. 474.

Infant partner. Where one of the partners is an infant, under a judgment against the firm, execution may be issued against the firm so as to bind all the partnership assets, and the assets of the adult partners, but the infant partner is not personally bound by the judgment, and execution cannot issue against him individually although he may have been personally served with the writ: *Harris v. Beauchamp*, 1893, 2 Q. B. 534; and the firm cannot under such a judgment be put into bankruptcy: *Re Beauchamp*, 1894, 1 Q. B. 1.

Any appropriate form of execution may be issued to reach the property liable under this *Rule*, and it is presumed that where the property can only be reached by a receiver or other proceedings by way of equitable execution (see *Rule 853*), the necessary order may be made.

Married woman. Where a married woman is a partner, execution as against her individually can only be against her separate estate as in the case of a judgment against her individually: see *Re Frances Handford*, 1891, 1 Q. B. 506; *Gibson v. Le Temps*, 8 O. L. R. 707, and *supra*, p. 352.

Action on judgment. The plaintiff is not confined to his remedy against the individuals by execution under this *Rule*, but may bring fresh actions against the partners individually upon the judgment obtained against the firm: *Clark v. Cullen*, 9 Q. B. D. 355, and a judgment against a firm is no bar to an action against the partners individually on a promissory note given as a collateral security for the same debt: *Banque Provinciale v. Arnoldi*, 2 O. L. R. 624.

Exigible property. Under an execution against an individual partner the sheriff cannot sell the interest of the partner in the partnership assets. He can seize the partnership goods and sell the execution debtor's share, whatever may be the difficulties that arise thereafter; and the Judicature Act has made no difference in this respect: *Harrison v. Harrison*, 14 P. R. 436; but it is only the partner's interest in the tangible property of the partnership that can thus be sold: *Reaume v. Quebec Bank*, 1 O. L. R. 303; 3 O. L. R. 541; the partner's interest in the goodwill or book-debts or anything else which cannot be seized by the sheriff cannot be reached in that way: *Helmore v. Smith*, 35 Ch. 19, 436.

Clause 1 (c). Clause 1 (c)—Person Individually Served as Partner Failing to Appear.—The service contemplated is such service as is provided for by *Rule 223*; and "individually" would appear to mean "personally": *Jackson v. Litchfield*, 8 Q. B. D. 478; 46 L. T. 519.

A person so served, if he is served otherwise than as a partner, *Rule 228*, must be so notified, and if no notice is given he is deemed to be served as a partner (*Rule 224*) and must govern himself accordingly. If where so served, or deemed to be served, as a partner, he fails to appear, it would seem that he may be proceeded against under this *Rule* (clause c). Under the present *Rules* the doubt referred to in *Davis v. André*, 24 Q. B. D. 598, as to whether a person was served as a partner or only as manager, will not arise.

Execution by Leave.—This clause (2), only applies where Clause (1) there is in truth a partnership, which is bound by the judgment, in consequence of service upon one of its members, or its manager: see *Standard Bank v. Frind*, 15 P. R. 438. It does not apply where the plaintiff seeks to obtain, on a judgment against a firm, execution against a person not actually a partner whom he has not served as a partner with the writ, but whom he claims to treat as a partner by estoppel: see per Osler, J.A., in *Ray v. Isbister*, 22 Ont. App. 16.

Where the action is between a firm and one or more of its members, or between firms having one or more members in common, execution cannot issue at all without leave: see *Rule 230*.

A judgment against a firm is not conclusive of the liability of a person who has neither admitted on the pleadings that he is, nor has been adjudged to be a partner, nor has been served with the writ. Execution in such case will not be allowed to issue without a trial of the liability under the last clause of the *Rule*: *Ex parte Young*, 19 Ch. D. 124; 18 C. L. J. 119.

The Master in Chambers cannot under *Rule 616*, determine that a person was a partner without directing the trial of an issue if desired: *Standard Bank v. Frind*, 14 P. R. 355, overruling *Tennant v. Mauhard*, 12 P. R. 619.

An issue in which the question was whether the person alleged to Form of be a partner "was or had held himself out as a partner in the de-issue. fendant firm" was held to have been rightly ordered: *Davis v. Hyman & Co.*, 1903, 1 K. B. 854; 88 L. T. 284.

The issue will only be as to the question of the partners in the firm against which judgment has been recovered: the validity of the judgment will not be allowed to be put in issue by a person who disputes his liability as a partner: *Gibson v. Le Temps*, 6 O. L. R. 690.

A statutory declaration of partnership registered under R. S. O. c. 152 is incontrovertible: *S. C.*, 8 O. L. R. 707.

The execution is not limited to partners carrying on business at the date of the writ, but it is a question of fact in each case whether the persons against whom it is desired to issue execution are partners in the firm against which the judgment has been obtained (subject to *Rule 223*, last clause, and, in the case of partners out of Ontario, to *Rule 228* (2), last clause): see *Davis v. Morris*, 10 Q. B. 11, 436.

Where an individual has entered an appearance in an action against a firm, there must be a novation to render him liable for a debt contracted before he was a member, the fact that the individual had undertaken to indemnify the firm is not enough: *Cripps v. Toppin*, 1 Can. & El. 13. See *Searf v. Jardine*, 7 App. Cas. 345.

Rule 228. Joint Contractors.—A judgment obtained against some joint contractors is a bar to an action for the debt against others not so. *King v. Hoare*, 13 M. & W. 494, and partners are such joint contractors; *Kendall v. Hamilton*, 4 App. Cas. 504. See *Re Holyoake*, *Beckett v. Ramsdale*, 31 Ch. D. 177; 34 W. R. 127; 35 L. J. Chy. 241; *Cumbeport v. Chapman*, 10 Q. B. D. 220. In *Hoare v. Niblett*, 1891, 1 Q. B. 781, it was held that the fact that one of the joint contractors was a married woman contracting in respect of her separate property, made no difference in the application of the rule; but the rule does not apply in the case where the judgment against one joint contractor is on a contract by him alone for payment of the joint debt, such as a cheque given by him alone; *Weggs Press v. Evans*, 1894, 2 Q. B. 101; 1895, 1 Q. B. 108, overruling *Cumbeport v. Chapman*, *supra*.

Action
against
joint con-
tractors.

So also a judgment against one of two tortfeasors is a bar to an action against the other, but an interim injunction followed by a compromise whereby the action is stayed against him is not a bar to an action against the other; *Kelly v. Hammond*, 2 Times, 804; nor is a judgment against one of two joint debtors under Rule 587, or Rules 603 and 604, a bar to the action as against the other joint debtor who has obtained leave to defend; *Ducher Watch Case Manfg. Co. v. Haggart*, 26 Ont. App. 265; 30 S. C. R. 373; *Wells v. James*, 68 L. T. 515; but where two joint contractors were sued, and judgment was entered, by consent, against one, it was held that the plaintiff could not subsequently bring on the action for trial, and obtain judgment against the other; *McLeod v. Power*, 1898, 1 Ch. 235; 70 L. T. 67. A defendant who relies on the recovery of judgment against another joint contractor as a defence should plead it; *ib.*

The release of one of two joint debtors under a joint, or joint and several obligation operates as a release of his co-debtors; *Hoffman v. Crerar*, 18 P. R. 473; 19 P. R. 15; *Bogart v. Anderson*, 8 O. L. R. 261, and this rule of law applies as much to a judgment debt as to any other obligation; *Re E. W. A., a Debtor*, 1901, 2 K. B. 642. Where judgments were signed by default of appearance against some defendants, joint contractors, but judgments by default were not warranted by the practice, and the action was proceeded with to trial against other defendants only, it was held that, by proceeding against such other defendants without taking any warranted proceedings against the defendant who failed to appear, the plaintiff must be considered as having abandoned his action against him; *Hoffman v. Crerar*, 18 P. R. 473; 19 P. R. 15; and a compromise having been made with some of the defendants who did not appear in respect of a debt for which judgment had been obtained against others of the defendants, further proceedings on the judgment were stayed; *ib.*; but see *Edwards v. Hood-Barrs*, 1905, 1 Ch. 20; 91 L. T. 766.

Where a judgment has been recovered against one of two joint contractors in ignorance of the liability of the other of them, and without joining him as a party in the action; *Hammond v. Schofield*, 1891, 1 Q. B. 454, or against an agent in ignorance of his having acted as agent for an undisclosed principal; *Toronto Dental Mfg. Co. v. McLaren*, 14 P. R. 89, the judgment will not be vacated on the application of the plaintiff in order to enable him to join the other joint debtor, or undisclosed principal, as a defendant, even on the consent of the defendant against whom the judgment has been entered; *Hammond v. Schofield*, *supra*.

The above rules of law would, however, seem to be modified by Rule 228, so far as those members of a partnership are concerned

who are out of the jurisdiction. The effect of proceeding under *Rule 222, et seq.*, would seem to be that all members of the partnership are sued, though by their firm name, and subject to certain restrictions as to execution: see *Heinemann v. Hale*, 1891, 2 Q. B. at p. 91, et seq.; *Lindley, L.J.*, in *Western, etc., v. Perez*, 1891, 1 Q. B. 304.

229. Debts owing from a firm carrying on business within the jurisdiction may be attached under Rule 911, although one or more members of the firm may be resident out of Ontario, provided that any person having the control or management of the partnership business or any member of the firm within Ontario is served with the attaching order. Appearance by a member pursuant to the order shall be sufficient appearance by the firm. *New.* (Eng. O. 48a, r. 9.)

Attachment of debts owing from a firm.

Same as the Eng. Rule, O. 48a, r. 9.

The right to attach debts is confined to cases where the debtor is within Ontario, and where under *Rule 162*, leave might be given by the debtor to serve a writ of summons on the garnishee out of the jurisdiction: see *Rule 911*; *Parker v. Odette*, 16 P. R. 69; *Boswell v. Piper*, 17 P. R. 257. The present *Rule* therefore is an enlargement of the right to attach debts due by firms given by *Rule 911*, to cases where some of the garnishees are out of Ontario, upon proof that their firm carries on business within the jurisdiction.

The appearance referred to in this *Rule* is merely the appearance by a member of the firm by solicitor or counsel, upon the motion to pay over, and not the formal entry of an appearance as provided for by *Rules 169, 225*.

230. Rules 222 to 229 shall apply to actions between a firm and one or more of the members, and to actions between firms having one or more members in common, if the firm or firms carry on business within Ontario, but execution shall not issue in such actions without leave of the Court or a Judge, and on an application for leave, all such accounts and inquiries may be ordered and directions given as may seem just. *New.* (Eng. O. 48a, r. 10.)

Application of Rules to actions between co-partners.

Same as the Eng. Rule, (O. 48a, r. 10).

Although *Rule 228* is made applicable to the class of actions mentioned in this *Rule*, yet the subsequent words of the *Rule* show that in no case coming within this *Rule* is execution to issue without leave.

231.—(1) Any person (whether a British subject or not, and whether residing within or without Ontario), carrying on business within Ontario in a name or style other than his own name, may be sued in such name or style.

Party carrying on a business under a name not his own, how to be sued.

(2) Leave shall not be necessary to issue the writ of summons in such case.

Rule 331.

(3) The writ may be served upon the person so carrying on the business if he be within Ontario, or at the place of business within Ontario, (or if there are several such places, at the place within the county in which the cause of action arose), upon any person having the control or management of the business there; and such service shall be equivalent to personal service on the person so sued.

(4) The person upon whom the writ is served shall be informed by notice in writing, given at the time of service, whether he is so served as the person carrying on the business or as a person having the control or management of the business or in both characters. In default of such notice he shall be deemed to be served as the person carrying on the business.

(5) Any party may apply to the Court or a Judge for a statement of the name and address of the person who is, and of the person who, at the time of the accruing of the cause of action, was, carrying on business in such name or style, to be furnished in such manner and verified on oath or otherwise, as may be directed.

(6) The person so sued shall appear in his own name, but all subsequent proceedings shall continue in the said name or style.

(7) A person served as the person carrying on the business may enter an appearance under protest denying that he is the person so carrying on the business; but such appearance shall not preclude the plaintiff from otherwise serving the person sued or from obtaining judgment in default of appearance in the ordinary form by the person so sued.

(8) Where a writ is served under clause 3 of this Rule on a person having the control or management of, but not carrying on, the business, an appearance by him shall not be necessary.

(9) Any judgment or order in the action may be enforced by execution against

(a) The property of the person so sued, used or employed in or in connection with the business;

(b) The property within Ontario of the person so sued if he has appeared in the action, or has been adjudged to be the person carrying on the business, or has been personally served with the writ within Ontario and has failed to appear.

(10) If the person so sued has not appeared or has not been personally served, or has not been adjudged to be the person carrying on the business, the plaintiff may apply for leave to issue execution against the person within Ontario whom the plaintiff alleges to be the person carrying on the business, and the Court or a Judge may give such leave if the liability be not disputed, or if disputed, may order that the liability of such person be determined in any manner in which any issue or question in an action may be determined. *New.* (See *Con. Rules* 266, 271, 280, 318 and *Eng. O.* 48 a, r. 11.) Rule 231.

See the corresponding *Eng.* (1891) *O.* 48a, r. 11.

The present *Rule* is an adaptation of the procedure provided in the case of a partnership firm. It only authorizes an action against a person in his trade name in connection with the business carried on under that name: *Molter v. Burns*, 1895, 2 Ch. 630; 73 L. T. 39.

The *Rule* by its express terms applies to a person not a British subject residing out of the jurisdiction, but carrying on business within the jurisdiction in a name or style other than his own name. To such a case the *Eng. R.* has been held not to apply: *St. Gobain Co. v. Hoyermann's Agency*, 1895, 2 Q. B. 96; 69 L. T. 329; 4 R. 441; see also *De Bernales v. N. Y. Herald*, 68 L. T. 658; 1893, 2 Q. B. 96 (n).

A business carried on under such names as "Mndame Louise" or "Waukenbast," and not being the title of a corporation, will therefore be within the present *Rule*; so also will probably a business carried on under such circumstances as existed in *Standard Bank v. Frind*, 15 P. R. 438; *St. Gobain v. Hoyermann, supra*. In *De Bernales v. New York Herald*, 1893, 2 Q. B. 96; 68 L. T. 658, it was held that "The New York Herald" was not a firm name, and that it was the name of the thing sold and not the name under which the proprietor trades. The *Rule* probably does not affect that decision. The *Rule* would also seem not to include the case of an ecclesiastical order, some of whose members reside within Ontario, as in *Golding v. La Sainte Union, etc.*, 67 L. T. 605; 4 R. 93.

This *Rule* does not apply where the person so carrying on business has become a lunatic; *Rule* 157, in such case applies: *Fore Street Warehouse Co. v. Durrant & Co.*, 10 Q. B. D. 471.

It will be noticed that a person carrying on business in the manner described, may be sued in the name or style adopted by him in his business, but he cannot sue in that name; he must sue in his own name: see *Mason v. Mogridge*, 8 Times, 805; but where a plaintiff named "J. W. Lang," carried on business alone as "J. W. Lang & Co.," and sued by that name it was held that he was suing in his own name, as "and Co." was surplusage and might be struck out: *Lang v. Thompson*, 16 P. R. 516.

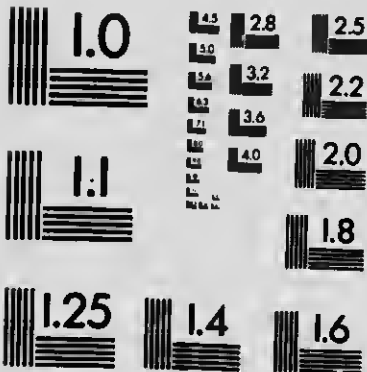
As to what is meant by "carrying on business," see notes to *Rule* 222.

Service of Writ.—The *Rule* (clause (3)) prescribes the method of service of a person sued under any name or style other than his own name. (1) The writ may be served in Ontario upon the person sued, or (2) it may be served upon any person having the control or management of the business in Ontario of the person sued. Where



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Rule 232. the latter mode of service is adopted the person served must be notified in writing that he is served as being the person having the control or management of the business; clause (4). Where the person sued is resident abroad, it would seem that if he is to be personally served with the writ or notice of the writ, the provisions of *Rules 165, 166*, would have to be observed; but not the provisions of *Rules 162-164*; see *Rule 231*, clause (2); and in such a case it would seem that the time for appearance should be more than the ordinary 10 days allowed in the case of service within the jurisdiction, and application should be made for an order regulating the time for appearance in such a case.

Appearance.—Appearance must be entered by the person sued in his individual name; see clause (6), and *Taylor v. Collier*, 30 W. R. 701. A person served merely as having the control or management of the business need not appear; clause (8).

An appearance under protest by a person served, (see clause 7) denying that he is the person carrying on the business, will of course be entered by him in his own name.

See clause (5) as to the means of ascertaining the person who at the time of the accruing of the cause of action, was the person carrying on the business.

See also notes to *Rules 226-228*.

Judgment.—Judgment must follow the writ and be against the defendant by the name or style by which he is described in the style of the action.

Execution.—Execution may be enforced against the property employed in the business, wherever there has been a valid service under clause (3), i.e., either upon the person carrying on the business (within Ontario), or at the place of business within Ontario upon some person having the control or management of the business there. To enforce the execution against other property as being that of the owner of the business, it would seem that there must either be proof, or what amounts to an admission, that the owner of the property is the owner of the business, or proof that the owner of the property has had an opportunity of disputing that he is the owner of the business; he therefore (1) must have been adjudged to be the owner of the business; or (2) must have appeared in his own name (not under protest), and so have admitted the fact, or (3) must have been personally served and failed to appear.

Where judgment has been obtained by default on a service not on the owner personally, an application under clause (10) will be necessary where it is desired to reach property not used or employed in or in connection with the business; see also *Standard Bank v. Frind*, 15 P. R. 438, under the former *Rules*.

6. JOINDER OF CAUSES OF ACTION.

What causes
of action
may be
joined.

232. Subject to the following Rules, the plaintiff may unite, in the same action, several causes of action. *Con. Rule 340*.

Substantially identical with the first clause of Eng. (1883) R. 188.

Multifariousness, or the uniting of separate and distinct subjects in one suit, was formerly a ground for demurrer; but is now no objection of itself: see *Cox v. Barker*, 3 Ch. D. 359; and the right to join several causes of action is not limited to cases where they are between the same parties, nor (save as provided in these Rules) in the same right.

The present Rule is an extension of s. 84 of the C. L. P. Act, and it is apprehended that the words "cause of action" must receive the same construction as they received under the above section of the C. L. P. Act: see *Bustros v. White*, 1 Q. B. D. 423. The Rule must, therefore, as put by an able commentator on the English Judicature Act, be taken to include, not only different legal relations arising out of the same transaction, but also separate and independent transactions: *Wilson's Jud. Act*, 7th ed., 189.

Where there is but one plaintiff and one defendant, then the plaintiff may, apparently, without any restriction, join in an action any number of separate and distinct causes of action, but subject to separate trials being directed of issues which cannot, without prejudice to either of the parties, be tried at the same time: see Rule 237. Where, however, there are two or more plaintiffs or defendants, then different considerations arise, and the plaintiff's right to join separate and distinct causes of action is subject to important limitations. Though it is not necessary that every defendant in an action shall be interested as to all the relief claimed by the plaintiff or as to every cause of action included therein, (Rule 187) yet it is not competent for a plaintiff or plaintiffs to join in the same action several defendants against whom wholly separate and distinct causes of action are alleged.

The provisions of this Rule are therefore subject to Rule 186, respecting the joinder of parties defendant.

In *Honduras Ry. Co. v. Tucker*, 2 Ex. D. 301, there was one subject matter, a contract made and broken. The plaintiffs claimed relief against L. who made it, if T. was authorized to make it as agent of L., but if not so authorized then against T. as principal. Both were held to be rightly made defendants. Examples.

In *Bagot v. Easton*, 7 Ch. D. 1, separate alternative causes of action were held to have been properly joined against the same defendant.

In *Dessilla v. Schunck, etc.*, W. N. 1880, 96, it was held that separate causes of action against separate defendants might be joined with joint and several causes of action, where all related to the same subject matter.

A plaintiff cannot join an individual claim with one by him on behalf of a class, unless they arise out of the same transaction: *Stroud v. Lawson*, 1898, 2 Q. B. 44; 78 L. T. 729.

A cause of action against promoters and directors of a company, for a fraud and conspiracy in pursuance of which they had carried out certain purchases, loans, etc., and a cause of action against directors alone for, in regard to the first cause of action, having been guilty of a breach of duty as directors, were held to be properly joined: *Keut, etc., v. Martin*, 16 Times, 486.

A claim by plaintiffs who were mortgagees to set aside a lease by the mortgagor, joined with a claim by a co-plaintiff, who was assignee for the creditors of the mortgagor, for the avoidance of the lease, as having been made voluntarily and with intent to defraud creditors,

Rules 233, 234. were held to be improperly joined: *Bank of Hamilton v. Anderson*, 7 O. L. R. 613; 3 O. L. R. 153.

A claim by two plaintiffs, a married man and an unmarried woman, in respect of charges of criminal intimacy made on three different occasions by the defendant, was held to be proper, there being publication as to all, and the three occasions being a series with a common question of fact: *Agar v. Escott*, 8 O. L. R. 177.

Lord Selborne, in *Burstall v. Beyfus*, 26 Ch. D. 39, said: "To bring into one claim distinct causes of action against different persons neither having anything to do with the other (and only historically connected) is not contemplated by Order 18, s. 1 (*Rule 232*)."

The liberty given by the present *Rule* is, however, subject to the limitations contained in the following *Rules*, and to the discretion of the Court (see *Rule 237*) to interfere in order to prevent issues being raised which embarrass a fair trial of the action.

Action to Recover Land.—The former *Con. Rules 341* and *1315* did not allow the joining without leave in an action to recover land, any other claims except claims in respect of mesne profits or arrears of rent, or double value in respect of the premises claimed, or any part thereof, and damages for breach of any contract under which the same or any part thereof were held, or for any wrong or injury to the premises claimed, or for specific performance, or for an injunction or receiver in respect of the same lands, or the rents and profits thereof. Those *Rules* are repealed, and there is now nothing to prevent any cause of action from being joined with one for the recovery of land: but the Court has power to prevent the joining in one action of claims which are incongruous and inconvenient to try together: *Rule 237*.

Claims by
assignee in
insolvency.

233. A claim by an assignee in insolvency [or for the benefit of creditors], shall not, unless by leave of the Court or a Judge, be joined with any claim by him in any other capacity. *Con. Rule 342*.

Same as Eng. (1883) R. 190, except that for "an assignee in insolvency or for the benefit of creditors," the English *Rule* has "a Trustee in Bankruptcy."

The words in brackets are new in the present *Rule*.

The general rule as to joinder of causes of action being now made without the proviso contained in C. L. P. Act, s. 84, that they be in the same rights, it became necessary to specify cases in which causes of action accruing in different capacities shall not be joined. This is one of the cases: see also *Rule 235*.

Claims by
or against
husband
and wife.

234. A claim by or against husband and wife may be joined with claims by or against either of them separately. *Con. Rule 343*.

Same as Eng. (1883) R. 191.

By the Common Law Procedure Act (R. S. O. 1877, c. 50, s. 86), a husband might add claims in his own right in an action brought by him and his wife, for a cause of action accruing personally to the wife in respect of which they were necessarily co-plaintiffs: see *Harrison*, C. L. P. Act, 87.

235. A claim by or against an executor or administrator may be joined with a claim by or against him personally, provided the last mentioned claim is alleged to have arisen with reference to the estate represented by him in the action. Rules 235-237.
Claims by or against executor.
Con. Rule 344.

Same as Eng. (1883) R. 192.

"Alleged," i.e., in the writ or pleadings: *Davis v. Saintsbury*, 1 Times, 538.

In an action against executors founded on an alleged promise of a testator to leave a sum of money to the plaintiff by his will, it was held that the plaintiff could not join a claim against the executors personally for fraudulently influencing the testator to omit such bequest: *Whitworth v. Darbishire*, 41 W. R. 317; 68 L. T. 216; 5 R. 198.

Scmble, that as regards claims by an executor, this Rule refers to a case where the plaintiff's personal claim is in respect of the assets of the testator *qua* assets; the claim as executor and the claim personally are to be with reference to the same estate: *Johnson v. Johnson*, 47 L. J. Chy. 552.

The Rule it seems does not apply to a counter-claim, so as to enable the defendant to set up by way of counter-claim, claims against the plaintiff personally and as executor, where he is only suing in a distinct personal character: *Macdonald v. Carington*, 4 C. P. D. 28.

236. A claim by plaintiffs jointly may be joined with a claim by them or any of them separately against the same defendant. Joint and several claims.
Con. Rule 345

Same as the Eng. (1883) R. 193.

237. If several causes of action joined in the same action are such as cannot be conveniently disposed of in one action, the Court or a Judge may order any of them to be excluded, or may direct the issues respecting the separate causes of action to be tried separately, and may direct the statement of claim, or, if no statement of claim has been delivered, the copy of the writ and the indorsement of claim thereon to be amended accordingly. Order for separate issues.
Con. Rule 346.

See Eng. (1883) Rs. 188, 194, 195, 196.

In *Re Worssam, Hemery v. Worssam*, 51 L. J. Ch. 669, the Court declined to entertain an action to set aside a transaction, and in the same proceedings inquire whether to do so was for the benefit of infants or unborn persons.

The provisions of the Rules for preventing any of the parties from being prejudiced are two:

(1) A claim which emharrasses a fair trial of the action may be struck out: Rules 237, 298. This was done in a case where a claim was made for inconsistent alternative relief by different plaintiffs: *Smith v. Richardson*, 4 C. P. D. 112, where the vendor of goods and the indorsees of a bill given by the purchaser to the vendor for the price, jointly sued the purchaser, the vendor, to recover the price, and the other plaintiffs to recover upon the dishonoured bill.

Rules**238, 239.**

Where the plaintiff's claim was for infringement of 23 different patents, this was considered embarrassing to the defendants, and the action was confined to a limited number: *Saccharin, etc., v. Wild*, 1903, 1 Ch. 410; *Saccharin, etc., v. White*, 1903, W. N. 120; 88 L. J. 850.

Separate trials.

(2) The Court may direct the different causes of action to be tried separately under this Rule: see *Bagot v. Easton*, 7 Ch. D. 1; *Child v. Stenning*, 5 Ch. D. 695, and *Day v. Radcliffe*, 24 W. R. 84; *Barker v. Cox*, 3 Ch. D. 359; *Hannay v. Smurthwaite*, 1893, 2 Q. B. 412; 1894, A. C. 494. This course might formerly have been directed under R. S. O. 1877, c. 50, s. 85; see *Fitzsimmons v. McIntyre*, 5 P. R. 119. In *Rodger v. Nowon Co.*, 19 P. R. 327, it was held to be proper where the two causes of action were wrongful dismissal and slander.

Compare similar power given in Rule 254, in regard to counter-claims, and see *Hall v. Old Talargoch Lead Mining Co.*, 45 L. J. Chy. 775; 34 L. T. 901; *Re Woodfine*, 38 L. T. 753; *Dessilla v. Schunck, etc.*, W. N. 1880, 96; *Cox v. Barker*, 3 Ch. D. 372.

7. CROWN ACTIONS.

Forms and procedure in Crown actions.

238. The procedure and forms which are from time to time in force for the prosecution of rights, claims or demands, or for the recovery of the possession of any lands, deeds or personal property between subject and subject, shall be used in the like cases for the prosecution of rights, claims or demands which [His] Majesty may have against any person, or for the recovery of the possession of any lands, deeds or personal property whereto [His] Majesty claims to be entitled, but the right of reply shall be always allowed to the Attorney-General, and to any [King's] Counsel having written authority from him for that purpose. Con. Rule 364.

Taken from R. S. O. 1877, c. 58, ss. 6, 8.

The Court may on the application of the Crown strike out a jury notice in a Crown action: *Reg. v. Grant*, 17 P. R. 165.

The Crown has the same right of discovery as a subject has in an ordinary action: see *Atty.-Gen. v. Newcastle*, 1897, 2 Q. B. 384, but is not bound to give discovery: *Id.* See note, p. 608.

As to the right of reply, see a similar provision in the Crim. Code, 1892, s. 661, and *Rea v. Martin*, 9 O. L. R. 218.

Costs in revenue cases.

239. In case in any action, information, or other proceeding before any Court or tribunal in Ontario, by or on behalf of the Crown, against any person in respect of any lands, or of any goods or chattels belonging or accruing to the Crown, or standing or being in the name of [His] Majesty, or in respect of any sum of money due and owing to [His] Majesty by virtue of any vote of the Legislature for the

service of the Crown, or by virtue of any statute relating to the public revenue, or in any manner whatsoever, judgment is given for the Crown, [His] Majesty's Attorney-General may recover costs, subject to the same rules as though such proceedings had been between subject and subject. Con. Rule 365. Rules
240, 241.

Taken from R. S. O. 1877, c. 58, s. 9.

See note to Jud. Act, s. 119.

240. If in any information, action, or other proceeding, judgment is given against the Crown, the defendant shall be entitled to costs, subject to the same rules as though such proceeding had been had between subject and subject. Con. Rule 366. Defendant
may recover
costs in
revenue
cases.

Taken from R. S. O. 1877, c. 58, s. 10.

In *Atty. Gen. v. Williamson*, 60 L. T. 930, the Atty-Gen. notified the defendant that the information would not be further prosecuted, and it was held that there was no power to dismiss it for want of prosecution, or to award costs to the defendant as the cause was not determined. *Quare*, in Ontario.

241. Notwithstanding the want of enrolment, writs of summons to repeal letters patent, grants or other matter of record under the Great Seal, shall be issued in the same cases and under the same restrictions, as nearly as may be. as writs of *scire facias* were on the 5th day of December, 1859, issuable from the Court of Chancery in England; and all the proceedings thereafter shall be the same as the proceedings in an ordinary action; but before the issue of any such writ, the person making application for the same shall, in addition to the fiat of the Attorney-General, file in the Court from which the writ is to be issued, an exemplification under the Great Seal of the Province of the letters patent, grant or other matter of record with respect to which the said writ is to be issued. Con. Rule 367. High Court
may issue
writs of
summons
in the same
cases as *scire
facias*, formerly
issued.

Taken from R. S. O. 1877, c. 58, ss. 11, 12.

As to the jurisdiction of the Court in regard to the cancellation of letters patent, see J. A., s. 26 (7), (8), and note p. 24.

CHAPTER V.

PLEADINGS.

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| 1. STATEMENT OF CLAIM, 242-245. | 5. CLOSE OF PLEADINGS, 262, 263. |
| 2. DEFENCE AND COUNTER-CLAIM, 246-255. | 6. GENERAL RULES OF PLEADING, 264-288. |
| 3. REPLY AND SUBSEQUENT PLEADINGS, 256-258. | 7. PLEADING MATTERS ARISING PENDING ACTION, 289-295. |
| 4. RAISING QUESTIONS OF LAW IN PLEADINGS, 259-261. | 8. STRIKING OUT, AMENDING PLEADINGS, ETC., 300-308. |

1. STATEMENT OF CLAIM.

Statement
of claim.

242. The plaintiff shall state the nature of his claim and the relief sought in a pleading to be called the Statement of Claim. Con. Rule 368.

Statement
of claim,
when
necessary.

A statement of claim is necessary where the defendant has not dispensed with it at the time of appearance; see Appendix, Form 27 (H. & L. Forms, No. 105), and *Rule 243*, and even where no appearance is entered, if the case is one in which the plaintiff can only obtain judgment by motion for judgment: see *Minton v. Metcalfe*, 46 L. J. Chy. 584; *Hunter v. Wilcockson*, 9 P. R. 305, except where *Rule 176* applies.

No statement of claim is necessary where (1) the defendant does not require one; see *Rule 171*, and notes; or (2) the Court dispenses with it; *Chorlton v. Dickie*, 13 Ch. D. 160; or (3) the defendant has not appeared, and the final judgment can be obtained by default of appearance; see *Rules 575-578*, and 596, or (4) a defendant has not been allowed to defend under *Rule 603*.

If the defendant dispenses with the delivery of a statement of claim, the writ of summons, a copy of which has been already filed (*Rule 123*), becomes the only pleading necessary; and it stands as and for a statement of claim, and becomes amendable as a statement of claim would be under *Rule 300*: *Confederation Life v. Moore*, 6 O. L. R. 648. Where a statement of claim is necessary, if the writ has been specially indorsed, the plaintiff may deliver notice, under *Rule 245*, that his claim is that which appears by the indorsement upon the writ. Where such notice will not suffice, the statement of claim will be framed in accordance with the Form No. 10 given in the Appendix (H. & L. Forms, No. 123).

The plaintiff may deliver a statement, even though the defendant has stated in his appearance that he does not require one; *Rule 245 (b)*; subject to the power of the Court, or the taxing officer (*Rule 1154*), with regard to costs occasioned thereby, if the delivery be unnecessary or improper.

Form of Statement of Claim.—A statement of claim should **Rule 243.** follow the writ as to the names of the parties and the character in which they are sued or suing. The plaintiff will not be strictly **Form.** confined to the particulars of his cause of action indorsed on the writ: see *Rule 244* and notes.

The plaintiff need not ask relief against all the defendants named in the writ, but may claim against some only, if he abandons proceedings against the rest, but not otherwise: *Arch. Prac.*, 13th ed., 215.

In a statement of claim the mention of the date of the issue of the writ of summons, as shewn in *Form 10*, is essential. Where it was omitted, leave to amend was given on a motion to set aside the statement of claim: *Scott v. Creighton*, 9 P. R. 252.

As to printing the statement of claim, see *Rule 265*. As to the causes of action which may be joined, see *Rule 232*. As to the form in which material facts should be set out, see *Rule 268*.

The facts in support of each separate cause of action should be separately stated as far as may be: *Rule 274*. Under the English *Rules* it has been said that, in general, a defence should not be anticipated and answered: *Hall v. Eve*, 4 Ch. D. 341; *Clarke v. Callow*, 46 L. J. Q. B. 53. The relief desired must be asked for: *Rule 273*.

The place where the plaintiff proposes to try the action is to be mentioned in the statement of claim; and (subject to exceptions mentioned in *Rule 529*), the plaintiff has a *prima facie* right to have the trial at any place he names: *Rule 529*; unless otherwise ordered: see notes to *Rule 529*.

As to what variations from the indorsement on the writ may be made in the statement of claim, see *Rule 244*.

Attention should be given to the matters mentioned in *Rule 266* to be marked on the pleading. For the time for delivery, see *Rules 243* and *349*; and as to the mode of delivery, see *Rule 329*. A copy should be filed as well as served: *Rule 267*.

243 The delivery of the statement of claim shall be regulated as follows:—

Time within which to be delivered.

(a) If the defendant does not state that he does not require the delivery of a statement of claim, the plaintiff shall, unless otherwise ordered by the Court or a Judge, deliver it within three months from the entering of appearance;

(b) The plaintiff may, if he thinks fit, deliver a statement of claim, with the writ, or notice in lieu of writ, or at any time afterwards, either before or after appearance, and although the defendant may have appeared and stated that he does not require the delivery of a statement of claim: but in no case where a defendant has appeared shall a statement be delivered more than 3 months after the appearance has been entered, unless otherwise ordered by the Court or a Judge. *Con. Rule 369.*

Rule 243. Clause (a)—The Eng. (1883) R. 225 is different, as was also the corresponding Eng. Rule of 1873.

Clause (b)—Substantially the same as Eng. (1883) R. 225 d.

The defendant is, in his memorandum of appearance, to state whether or not he requires the delivery of a statement of claim: see *Rule 171* and *Appendix Form, No. 27* (H. & L. Forms, No. 105).

Where the defendant states that he does not require a statement of claim, and delivers a defence, the plaintiff is not, thereafter, at liberty to deliver a statement of claim. The writ in that case becomes in effect the statement of claim, and if not sufficient may be amended like an ordinary statement of claim: see *Rule 300*; *Confederation Life v. Moore*, 6 O. L. R. 648.

As to delivery of defence where no statement of claim is required by defendant: see *Rule 247*.

If the plaintiff delivers a statement of claim though not required to, the defendant must deliver a defence, but the plaintiff may be disallowed the costs of the statement of claim if it was unnecessary: see *Rule 1154*.

A guardian *ad litem* of an infant, and a married woman, may waive delivery of a statement of claim: see *Knatchbull v. Foebe*, W. N. 1876, 2; *Pryer v. Wiseman*, W. N. 1876, 3.

The three months are calendar months: *Rule 342*; and in computing them vacation is not reckoned: *Rule 352*. For the mode of delivery, see *Rules 266* and *329*.

Extension
of time,

Extending Time for Delivery.—As to extension of time, see *Higginbottom v. Aynsley*, 3 Ch. D. 288.

An order extending the time will not be made *ex parte*: *Wight v. Harris*, 9 P. R. 276.

A statement of claim filed after the time for doing so has expired without leave, has been held under the Irish Act to be not irregular, unless the defendant has served a notice of motion to dismiss: *O'Connell v. O'Connell* and *Sampson v. O'Donnell*, 6 L. R. Ir. 470, 471; but in Ontario it has been decided that a statement so filed is irregular, and may be struck out on motion in Chambers unless circumstances are shewn justifying an extension of time: *Clarke v. McEwing*, 9 P. R. 281; see clause (b) and *Anon.*, 25 Sol. Jour. 511. It cannot be treated as a nullity: *Gill v. Woodfin*, 25 Ch. D. 707; see also *Graves v. Terry*, in notes to *Rules 246, 256*.

On a motion to strike out as irregular a statement of claim delivered after the proper time an order may be made allowing it to stand, and any proper terms may be imposed as a condition of its being validated: *Toronto v. Ramsden*, 5 O. W. R. 381, 413.

An application to enlarge the time will, in general, be by motion in Chambers. Or the time may be enlarged by consent: *Rule 347*. The consent should be in writing, and no order is then necessary: *Ambrose v. Evelyn*, 11 Ch. D. 759.

Where, by mistake of a clerk of the plaintiff's solicitor, the statement of claim was served too late by two days, further time was given. The Court thought it immaterial that plaintiff had delayed bringing the action till shortly before the Statute of Limitations would have barred the claim: *Canadian Oil Works v. Hoy*, 38 L. T.

540; W. N. 1878, 107; but the Court has refused to renew a writ of *Rule 244* summons after the time for effecting the renewal has expired, where the claim, in the absence of such renewal, would be barred by the Statute of Limitations: *Doyle v. Kaufman*, 3 Q. B. D. 7, 340; *Hewitt v. Barr*, 1801, 1 Q. B. 98.

Where a statement of claim was delivered after the time limited by an order, and an order afterwards was made extending the time for delivery on payment of \$20 costs, and the costs were paid, but no new statement delivered, it was held, that though the delivery was irregular, it was waived by retaining the copy served and the costs: *Pierce v. Palmer*, 12 P. R. 275.

Where an order is made giving a further limited time to file a pleading, and providing that, in default, judgment may be signed, a judgment signed without serving a copy of the order is regular: see *Farden v. Richter*, 23 Q. B. D. 124.

After nine years' delay in proceeding to deliver a statement of claim in an action by solicitors on a bill of costs, the delay being owing to the fact that defendant was unable to pay, the plaintiffs were allowed to deliver a statement of claim, on terms of not charging interest, and a set-off of the costs of the motion, and the plaintiffs submitting to a taxation of the bill sued on: *Finkle v. Lutz*, 14 P. R. 446.

Where further time for a month "peremptory" was given, this was held to mean that the pleading must be delivered within the specified time, unless the order itself be expressly altered by any subsequent order: *Falck v. Azheim*, 38 W. R. 196.

See also notes to *Rules 246, 256, 432*.

Shortening Time.—Where plaintiff has obtained an injunction, or registered a *lis pendens*, or for other reasons justice so requires, the plaintiff may be ordered under *Rule 353* to file a statement of claim before the three months above mentioned: see *Armstrong v. Toronto & R. E. St. Ry.*, 15 P. R. 449; *Hall v. Forteye*, 9 C. L. T. 231; *Jamieson v. Loing*, 7 P. R. 404; *Sheppa v. Kennedy*, 10 P. R. 242.

The plaintiff becomes in such case "bound to deliver a statement of claim" (see *Rule 432*) within such shortened time, but the order should not provide that on default the action be dismissed: such an order is under *Rule 432* only to be made "after the expiration of such time": *Armstrong v. Toronto, etc., supra*.

244. Wherever a statement of claim is delivered, the plaintiff may therein alter, modify or extend his claim without any amendment of the indorsement of the writ. *New.*

Claim beyond indorsement.

Same as *Eug. (1883) R. 228*, and passed in affirmance of *Large v. Large*, W. N. 1877, 198. See also *Smith v. Richardson*, 4 C. P. D. 112; *Johnson v. Palmer*, *Id.* 258; *Eyre v. Cor*, 24 W. R. 317; *Wilmott v. Frechold*, 51 L. T. 551.

The construction placed upon the corresponding Eng. Rule has been that it applies only where a statement of claim is actually delivered, not where it is constructively delivered, under Eng. (1883) R. 206 (see *Con. Rule 330*), in case of non-appearance, by filing with the proper officer.

Rule 245.

It is presumed therefore that a similar view will be taken where, in Ontario, a defendant has not appeared, and a statement of claim has to be served under *Rule 330* by posting up a copy in the proper office, so that if a defendant does not appear the plaintiff cannot in his statement of claim enlarge his claim as indorsed on the writ: *Law v. Philby* (2), 35 W. R. 450; *Gee v. Bell*, 35 Ch. D. 191; see also *Ford v. Brown*, 20 L. R. 1r. 185; *Stone v. Smith*, 35 Ch. D. 188.

Probably this *Rule* only expresses what was formerly decided, viz., that the plaintiff will not be strictly confined to the particulars mentioned in the writ: see before the Jud. Act, *Sweden v. Sarsden*, 4 P. R. 276; *Huggins v. Guilph Barrel Co.*, 8 P. R. 170; and after the Jud. Act in *Johnson v. Palmer*, 4 C. P. D. 258; *Large v. Larp*, W. N. 1877, 108; *Lainchberry v. Dunn*, 9 C. L. T. 412.

An absolutely distinct and different cause of action from any mentioned in the indorsement on the writ may not be set up in the statement of claim: *United Telephone Co. v. Tasker*, 50 L. T. 852; *Cave v. Creche*, 68 L. T. 254; 41 W. R. 350; W. N. 1893, 42; 3 L. 401; *Kerr v. Williams*, W. N. 1886, 16; 30 Sol. J. 238; nor a claim arising *pendente lite*: *McLean v. McLean*, 17 P. R. 440.

The added claim must have some direct relation to the original claim, but, being so related, the claim may be substantially different from that indorsed on the writ, thus, where the claim on the writ was for specific performance, a statement of claim for cancellation of the agreement and recovery of possession of the land in question was held to be a legitimate extension: *Gibson v. Hieb*, 1 O. L. R. 247; and see *Alexander v. Alexander*, 1 O. L. R. 630; so a claim that is supplementary to the original claim will be proper, as where the writ was by a mortgagee against a mortgagor, indorsed for an injunction to restrain waste, and the statement of claim claimed also possession of the land by reason of default in the mortgage: *Smith v. Martin*, 18 P. R. 227.

An objection that the statement of the claim goes beyond the writ should be taken promptly; if not made till the trial, it is too late: *Bugbee v. Clergue*, 27 Ont. App. 90, 717; *Gibson v. Hieb*, *supra*.

Notice in
lieu of
statement
of claim.

245.—(1) Where the writ is specially indorsed and the defendant has not dispensed with a statement of claim, it shall be sufficient for the plaintiff to deliver as his statement of claim a notice to the effect that his claim is that which appears by the indorsement upon the writ, unless the Court or a Judge orders him to deliver a further statement.

(2) Such notice may be according to Form No. 48.

(3) Where the plaintiff is ordered to deliver such further statement it shall be delivered within such time as by the order is directed; and if no time is so limited then within the time prescribed by *Rule 243*. *Con. Rule 370*; *Rules 23 June, 1894, 1317*.

Substantially the same as Eng. R. 1875, O. 21, r. 4, Eng. (1883) R. 225 (a), is different. It makes a specially indorsed writ always

serve as the statement of claim, and provides that no further statement of claim shall be delivered: *Rule 245.*

For Form No. 48, see H. & L. Forms, No. 24.

A "specially indorsed" writ would seem to be one indorsed with- in the meaning of *Rule 138*: See notes to that *Rule*.

A writ specially indorsed, and a notice given under this *Rule*, were in the earlier decisions on the Act, held together to constitute a pleading which might be demurred to; *Robertson v. How* *et al.*, 3 C. P. 1, 280; but it was subsequently decided that a demurrer was not proper, and that the defendant's course was to apply under the present *Rule* for delivery of a further statement of claim: *Faucus v. Charlton*, 11 Q. B. 1, 516. Demurrers are now abolished: see *Rules 259, et seq.*

The plaintiff ought to indorse his writ for money claims, in such a way that a notice may be given under this *Rule*, and with the view that the indorsement may furnish all necessary information to the defendant in regard to the claim: see *Booth*, W. N. 1875, 202, per Lush, J. Where the indorsement is not sufficiently explicit, particulars may be ordered, and further time to put in a defence given, if necessary: see *Cotton v. Houseman*, W. N. 1876, 22; 2 Charl. Ch. Ch. 30; but the proper form of application in such case would seem to be for a further statement of claim: *Schomberg v. Zucbelli*, W. N. 1876, 106; 1 Charl. Ch. Ch. 36. Particulars of lump sums, for which credit was given, were ordered in *Godden v. Corsten*, 5 C. P. D. 17.

For further information with regard to particulars, see notes to *Rules 138, 209.*

In an action for money alleged to have been obtained by fraudulent misrepresentation, the nature of the misrepresentation, and the particulars of the sums sued for being set out in the indorsement of the writ, it was held that notice in lieu of a statement of claim was sufficient, and a motion to compel the delivery of a better statement of claim was refused: *Young v. Beattie*, 16 L. R. Ir. 192.

2. DEFENCE AND COUNTER-CLAIM.

The defendant may waive the delivery to him of a statement of claim: *Rule 171*. If none is then delivered he must deliver his statement of defence within 8 days from appearance: *Rule 247*. For the time for delivering a statement of defence, see *Rule 246*.

The facts relating to the defence must be stated in the same manner as is provided in respect to other pleadings: *Rules 268, et seq.* If the defendant has no facts to set up he may simply "take issue" or deny the statement of claim. Such a pleading will prevent an implied admission and put the plaintiff to the proof of his claim: *Rule 272*; *Hare v. Cartkrope*, 11 P. R. 355; *Malcolm v. Race*, 16 P. R. 330; and see *Irvine v. Turner*, *ib.* 349. All facts not in the statement of claim on which the defendant means to rely should be set out: *Rule 271*. Where distinct grounds of defence are relied on, founded on separate and distinct facts, such facts should be stated separately and distinctly: *Rule 274*. Though a defendant is not taken to have admitted what he does not deny (see *Rule 272*), he should nevertheless make all proper admissions: *Rule 269*; otherwise he may have to bear the costs rendered necessary by the failure to

Rule 246. admit: *Rule 1149*. The character in which the plaintiff sues (*Rule 280*), the incorporation of a corporate party (*Rule 281*), and the legality or sufficiency of a contract in point of law, if intended to be disputed, must be expressly traversed (*Rule 282*). In an action for the recovery of land the defendant need only state that he is in possession, unless he has some equitable ground to set up: *Rule 285*.

There may be a plea to the jurisdiction: see *Rule 162*, *Dart v. Citizens Ins Co.*, 11 P. R. 513.

Inconsistent pleas may still be used where applicable: *Re Morgan, Owen v. Morgan*, 35 Ch. D. 492; e.g., in an action for money, a denial of the loan, and plea that, if lent, it has been repaid or release given: *Barnicott v. Hann*, W. N. 1876, 24; 2 Charl. Ch. Ca. 39. A defence amounting to pleas of not guilty, and justification, may be properly pleaded: *Restell v. Steward*, W. N. 1875, 231; 1 Charl. Ch. Ca. 87. The offering of an apology, payment into Court, and a justification may be pleaded together in an action for libel: *Hawkesley v. Bradshaw*, 5 Q. B. D. 302. This was not formerly allowed; see *Doyle v. Owen Sound Printing Co.*, 8 P. R. 69. But where payment into Court was pleaded together with a justification, in a libel action, and it was not clear from the pleading in respect of which particular part of the cause of action the payment was made, the defence was struck out as embarrassing: *Fleming v. Dollar*, 23 Q. B. D. 388; and see *Rule 421*.

As a general rule, the defendants may deny the plaintiff's cause of action, and plead payment into Court in respect to the whole or any part of them: *Rules 419, 420*; *Berdan v. Greenwood*, 3 Ex. D. 251, in which the decision in *Spury v. Hall*, 2 Q. B. D. 615, was questioned. A defendant may plead "not guilty by Statute" where that defence is applicable: *Rule 283*; also grounds of defence arising after action brought, but before delivery of defence: *Rules 289, et seq.*; but pleading in abatement is abolished: *Rule 283*.

The Rules following in relation to counter-claims are made in order to give effect to the Jud. Act, s. 57 (7), *supra*.

As to counter-claims, see note to *Rule 251*.

Frivolous, vexatious, or scandalous defeaces, or defences tending to prejudice, embarrass, or delay the fair trial of the action, may be struck out on motion in Chambers: see *Rule 298* and notes.

When
defence
must be
delivered.

246. Where a statement of claim is delivered to a defendant he shall deliver his defence or counter-claim within 8 days from the delivery of the statement of claim, or from the time limited for appearance, whichever shall be last, unless such time is extended by the Court or a Judge. Con. Rule 371, Rules 23 June, 1894, 1318.

Same as the Eng. (1883) R. 239, except that the Eng. R. has 10 days. The eight days will be counted from the last day for appearance, where a statement of claim has been delivered with the writ, or before appearance: see *Rule 243 (b)*, and not from the actual entry of appearance where it has been entered before the time for appearing has expired: *McCulloch v. Hamilton*, 32 C. L. J. 364; *Lovell v. Taylor*, 5 O. W. R. 525, 527. Vacation is not reckoned in the eight days: *Rule 352*.

A "defence" and a "counter-claim" cannot be delivered separately. **Rule 247.** but must be included in one pleading: see Form 13 (H. & L. Forms No. 127), and *Halloway v. York*, 25 W. R. 627; also *Bagot v. Easton*, 11 Ch. D. 392. It would seem, however, that a "reply" to the statement of defence, and a "defence" to the counter-claim may, where necessary, be delivered separately: see notes to *Rule 250*.

The time may be extended by consent (*Rule 347*), which to avoid question should be in writing: *Ambroise v. Evelyn*, 11 Ch. L. 759. No order is then necessary: but if a consent cannot be obtained, the Court is liberal in granting further time. The motion for further time is made in Chambers on notice: *Wigle v. Harris*, 9 P. R. 276.

If a defence is not put in, the pleadings may be noted as closed, after which no defence may be received or filed without an order (*Rule 263*), or, it is presumed, a consent (*Rule 347*). Where proceedings are not taken to note the pleadings as closed, a defence put in without leave, after the proper time but before judgment, cannot be treated as a nullity: *Gill v. Woodfin*, 25 Ch. D. 707; see also *Harding v. Lyons*, 13 L. R. Ir. 302; *Gibbings v. Strong*, 26 Ch. D. 66; and notes to Rules 243, 256, and 263.

An action should not now be set down on motion for judgment by default of pleading until the pleadings are noted as closed: see notes to *Rule 263*, but if a defence be filed after such noting: *Jackson v. Gardiner*, 19 P. R. 137; or even after the action has been set down on motion for judgment the defence though irregular cannot be treated as a nullity and ignored: See *Gill v. Woodfin*, and other cases *supra*, and notes to *Rule 263*.

A defence delivered after the time, and after a motion for leave to deliver it had been refused, was set aside with costs: *Meehan v. Meehan*, 14 L. R. Ir. 301.

A defence delivered after the time, and upon the day when the case was to be heard on a motion for judgment, was held to be irregular and ordered to be struck out, unless the defendant paid the costs of setting down the action on motion for judgment, within a limited time: *Snider v. Snider*, 11 P. R. 34.

Where an order is made giving a further limited time for filing defence, and providing that in default judgment may be signed, a judgment signed after default is regular, though no copy of the order is served: *Farden v. Richter*, 23 Q. B. D. 124.

A counter-claim has been allowed to be filed after issue joined: *Erans v. Gann*, W. N. 1875, 199; but it may be too late after the case is entered for trial: *Ware v. Gwynne*, W. N. 1875, 240.

See also notes to *Rules 243, 256*.

247. A defendant who has appeared and stated that he does not require the delivery of a statement of claim and to whom a statement of claim is not delivered, may deliver a defence or counter-claim at any time within 8 days after his appearance, unless such time is extended by the Court or a Judge. Con. Rule 372, Rules 23 June, 1894, 1319.

Where no statement of claim.

Except as to time, the same as the Eng. R. 1875, O. 22, r. 2. The Eng. (1883) R. 240, is different.

Rule 248. "After his appearance." Not "after the time limited for appearance," as in *Rule 246*.

"And to whom a statement of claim is not delivered."—Notwithstanding that the defendant by his appearance states that he does not require the delivery of a statement of claim, the plaintiff may deliver one: *Rule 243 (b)*; but this can only be done before the defendant, treating the writ as a statement of claim, delivers a defence to it: *Confederation Life v. Moore*, 6 O. L. R. 648; the defendant has, under *Rule 247*, 8 days from his appearance within which to deliver such a defence. If before such a defence is delivered the plaintiff delivers a statement of claim, the defence must be delivered to, and within the 8 days from the delivery of, the statement of claim: *Rule 246*.

In *Harrison v. Surrey Masonic Hall Co., and Grimshaw, etc., v. McDowell*, 66 L. T. Jour. 277 (cited in Chitty Forms, p. 116), it was held that where the defendant dispenses with the delivery of a statement of claim, he must deliver his defence within eight days from his appearance, otherwise judgment may be signed under *Rule 587*. These cases overruled *Hooper v. Giles*, W. N. 1876, 10; 1 Chanc. Ch. Ca. 68, (see note to *Rule 587*).

Where
counter-
claim affects
third person

248 Where a defendant sets up a counter-claim which raises questions between himself and the plaintiff and (a) any other person, he shall [entitle it as a statement of claim], setting forth the names of all the persons who, if such counter-claim were to be enforced by cross-action, would be defendants to such cross-action, and shall deliver his counter-claim to such of them as are parties to the action within the period within which he is required to deliver it to the plaintiff. Con. Rule 376.

For the form of the title required by this *Rule*, see App. Form 13 (H. & L. Forms, No. 127).

(a) For the word "and" the former Con. R. 376 had, and the Eng. (1883) R. 244 has, "along with."

The Eng. R. 244 reads, "questions between himself and the plaintiff along with any other person," and this does not authorize a counter-claim by defendant raising "questions between himself along with any other person and the plaintiff," so that where the defendant and a third party had a joint cause of action against the plaintiff, even though arising out of the same circumstances that gave rise to the plaintiff's cause of action, a counter-claim by the defendant against the plaintiff, making also the third party a defendant to it, was struck out: *Pender v. Taddei*, 1898, 1 Q. B. 708. Under the present *Rule 248*, such a counter-claim would also seem to be unauthorized. The variation in the language of the *Rule* would not seem to change its meaning in this respect. The intention would seem to be that relief by counter-claim is confined to defendant and that a third party (not being a defendant in the action) cannot be thus directly or indirectly introduced into an action so as to enable him to claim relief against the plaintiff. Thus, a claim by the defendant on behalf of himself and other parties, which as regards an action would be within *Rule 203*, cannot be set up by counter-claim: *Hume v. Hume*, 38 C. L. J. 204.

Where defendant in an action on a note shewed that the note had been transferred to the plaintiffs to secure a debt due to them by the payee, one T. N., which debt had been satisfied since the commencement of the action, and the defendant swore that he had a good defence on the merits against T. N., it was held that this Rule had no application, but that the plaintiffs admitting these facts were entitled to their costs under Rule 295, and the cause of action having devolved upon T. N., he was entitled to continue it by taking out an order under Rule 396: *Oshawu Cabinet Co. v. Note*, 18 C. L. J. 60. Rules 249, 250.

A third person made n defendant to a counter-claim is not entitled to enter an appearance until he has been served with the counter-claim: and if he appears without having been so served, the appearance may be discharged on motion by the plaintiff in the counter-claim: *Fraser v. Cooper*, 23 Ch. D. 685.

Where, in an action for the price of iron, the defendant set up a counter-claim for a deduction, which he had been obliged to allow a purchaser, owing to the inferiority of the quality of iron, it was held unnecessary to add the purchaser's name to the title of the action: see *Anon.*, 60 L. T. Jour. 66; 1 Charl. Ch. Ca. 85 per Lush, J., who said Order 22, r. 5 (corresponding to the present Rule), does not apply to such a case: see also *Williams v. Wright*, W. N. 1875, 232.

249. Where any such person as in the last preceding Rule mentioned is not a party to the action, he shall be summoned to appear by being served with a copy of the counter-claim, and such service shall be regulated by the rules with respect to the service of a writ of summons, and every counter-claim so served shall be indorsed according to Form No. 50. Con. Rule 377. Service of counter-claim on third party.

Same as the Eng. (1883) R. 245.

For the rules in respect to service of writs of summons, see Rules 145, *et seq.*, and 162.

A third person, not n party to the action, when made a defendant to a counter-claim, is not entitled to appear gratis to the counter-claim: *Fraser v. Cooper*, 23 Ch. D. 685.

250. Any person, including the plaintiff, named as a party to a counter-claim, shall within 8 days after service thereof on him, deliver a defence thereto as if it were a statement of claim. Con. Rules 379, 380; Rules 23rd June, 1894, 1321. a Defence by third party.

The original J. A. Rule had "reply" instead of "defence" following the Eng. R. 1875, O. 22, r. 8; (1883) R. 247.

The repealed Rule 378 required the third person to appear as if he had been served with a writ of summons, and the repealed Rule 379 required him to deliver his defence (if any) to the counter-claim within 8 days. No appearance is now required. The delivery of a defence is all that is necessary.

Rule 250.

How far a counter-claim may be pleaded to a counter-claim.

A plaintiff made a defendant by counter-claim may counter-claim against the plaintiff by counter-claim, in respect of a cause of action accruing subsequent to the issue of the writ; *Toke v. Andrews*, 8 Q. B. D. 428; or in respect of a breach of the contract alleged in the counter-claim: *Renton v. Neville*, 1900, 2 Q. B. 181; 82 L. T. 446; but not in respect of independent matters arising before action: *James v. Page*, 85 L. T. Jour. 157, such matters can only be set up by amendment of the statement of claim; see *Rule 288*; and a third party made a defendant by counter-claim is limited to a defence and is not entitled to counter-claim against the defendant who brought him in: *Street v. Gover*, 2 Q. B. D. 498; *General Electric Co. v. Victoria Electric Co.*, 16 P. R. 476, 329; *Alcoy Ry. Co. v. Greenhill*, 1896, 1 Ch. 19; 73 L. T. 452; but see *Green v. Thornton*, 9 C. L. T. 139, where a pleading, though called a counter-claim, was allowed as being in substance a defence: *General Electric, etc., v. Victoria Electric, etc.*, *supra*, per Meredith, J., at p. 481, and per Street, J., *ib.*, at p. 534; see also *Eden v. Weardale*, 28 Ch. D. at p. 338.

Plaintiff's pleading to a counter-claim.

By this *Rule* a plaintiff has 8 days to deliver a "defence" to the counter-claim. By *Rule 256* the plaintiff has 21 days to "reply" to the statement of defence. The defendant combines his defence to the action and his cross-claim (by counter-claim) in one pleading. It would not seem that merely because there is a counter-claim (to which the plaintiff must deliver a defence in 8 days) he loses the right to reply to the statement of defence within 21 days: *Irwin v. Turner*, 16 P. R. 349. That time was originally fixed to give plaintiff time to obtain production and discovery, and to amend his statement of claim, if so advised, instead of delivering a reply: see *Rule 300*.

The defence to the counterclaim was in *Irwin v. Brown*, 12 P. R. 639, held to be technically his "reply" in the action, but that case was not followed in *Irwin v. Turner*, *supra*. Doubtless the plaintiff may still if he chooses combine in one pleading his "reply" to the statement of defence and his "defence" to the counter-claim, but such a pleading must under this *Rule* be delivered within 8 days.

The Eng. Rules are different. Under them the plaintiff has the 21 days mentioned in *Rule 256* within which to reply to the counter-claim: *Rumley v. Winn*, 22 Q. B. D. 265.

In case of default being made by plaintiff in delivery of a defence, the defendant cannot sign judgment for default of pleading, but must move for judgment under *Rule 593*; see that *Rule* and *Jones v. Macaulay*, 1891, 1 Q. B. 221. Such a judgment may be obtained even after the plaintiff's action has been dismissed for want of prosecution: *Roberts v. Booth*, 1893, 1 Q. B. 52; 3 R. 151; see also *Higgins v. Scott*, 21 Q. B. D. 10. See notes to *Rule 251*.

A pleading in answer to a counter-claim which denies the allegations of the counter-claim, puts the counter-claiming defendant to proof of his counter-claim, and submits that it should be dismissed, is a "defence" to the counter-claim, and not a joinder of issue in the action: *Irwin v. Turner*, 16 P. R. 349.

Subsequent pleading by the counter-claiming defendant.

Whether "plaintiff" in *Rule 256* includes a plaintiff by counter-claim, or whether, by virtue of *Rule 3*, *Rule 256* applies by analogy. It would seem that a counter-claiming defendant has 21 days from the delivery of the defence to the counter-claim within which to reply to such defence, and therefore the pleadings in such an action cannot be closed until the expiry of that time or until the delivery of a reply: *Irwin v. Turner*, 16 P. R. 349.

251. A defendant may (x) set up by way of counter-claim, Rule 251.
 against the claim of the plaintiff, any right or claim whether
 the same sounds in damages or not. Con. Rule 373, *first part.* Set-off and
counter-
claim.

See also notes before Rule 246.

This is a *Rule* made in furtherance of sec. 57 (7) of the Act.

"Defendants" in this *Rule* would seem not to include a third party made a defendant to a counter-claim: see notes to Rule 250.

Part of the benefit given by section 57 (7) of the Ind. Act has been discussed under Rule 209. In addition to the class of cases there mentioned, the defendant by the above sub-section enabled (subject to the discretion of the Court) to set up in an action brought against him, any claims whatever which he may have against the plaintiff, and under certain restrictions claims against the plaintiff and other persons: see *Naylor v. Farrer*, 26 W. R. 809; *Besant v. Wood*, 12 Ch. D. 605; *Gray v. Webb*, 21 Ch. D. 802; *Fried v. Gallo-way*, 4 C. L. T. 191.

(x) The original *Rule* following Eng. R. 1875. O. 19, r. 3 (1883). R. 199, had here the words "set-off or."

The effect of the original *Rule* seems to have been to enlarge the right of set-off, so as to make it extend to claims sounding in damages.

The alteration in the present *Rule* was made in consequence of what was said in *Chamberlin v. Chamberlin*, 11 P. R. 501, where it was held that what was really a set-off, was pleadable as a defence, and could be set up as a defence, if it arose before the commencement of the action, and that pleading it in the form of a counter-claim made no difference. A counter-claim may set up any matter properly pleadable in a cross-action, though arising after the commencement of the action: *Id.*, and Rule 289; and consequently a set-off, if arising after action, may, under the present *Rule*, and in fact can only, be set up by way of counter-claim.

A counter-claim properly so-called is therefore a claim by defendant for relief, which he cannot obtain by defence in the action: *Girardot v. Welton*, 19 P. R. 162, 201. By it a defendant may set up any cross-claim whether sounding in damages or not, subject however to Rule 254.

What was before the Judicature Act a set-off, and pleadable as a defence, is still so pleadable, and should be so pleaded and not as a counter-claim; and if the set-off exceeds the claim, the excess may be recovered without counter-claim for the same: *Girardot v. Welton*, *supra*; R. S. O. c. 324, s. 7.

If a claim for liquidated damages is pleaded by defendant by way of counter-claim, the plaintiff may set up matters arising subsequent to action brought: *McNamara v. Skain*, 23 Ont. 103; *accus* if the claim is pleaded by way of set-off; and see *Toke v. Andrews*, 8 Q. B. D. 428.

Other cases recognize that a set-off and counter-claim are quite distinct: see *Cutler v. Morse*, 12 P. R. 594; *Taggart v. Marcus*, 36 W. R. 469; *Winterfield v. Bradnum*, 3 Q. B. D. 326; *Stumore v. Campbell*, 1892. 1 Q. B. 314, 316; and cases *infra*, p. 450; and on the subject of costs, see the notes to Rules 1130, 1132.

Rule 251.

Former
practice as
to set-off.

Set-off.—It will be seen that a most important change was made by the Jud. Act in the previously existing law relating to set-off, and cross-demands.

Set-off, like counter-claim, was created by statute. Prior to the statutes of set-off, 2 Geo. 2. c. 22, s. 13, and 8 Geo. 2. c. 24, ss. 4, 5—see now R. S. O. c. 324, ss. 5-7—where there were cross-demands unconnected with each other, the parties were put to their cross-actions. R. S. O. c. 324, ss. 5, 6, enabled "mutual debts" to be set-off against one another (see *Rees v. Watts*, 11 Ex. 410), though the mutual debts are of a different nature, that is, a bond debt can be set off against a simple contract debt.

In Equity, set-off has been allowed in many cases not within the Statutes of set-off; see Story's Eq. Jur. ss. 14, 38, *et seq.*; *Lundy v. McCulla*, 11 Gr. 308; *Mucbeth v. Smart*, 13 Gr. 332. The Statutes of set-off applied only where the set-off was of a legal debt, and excluded equitable debts and unliquidated damages.

The Judicature Act abolished the distinction between legal and equitable debts; and the present *Rule* expressly authorizes the setting up of unliquidated demands as an answer to either liquidated or unliquidated demands, not merely by way of set-off, but so as to enable the defendant to obtain judgment in his favour for any balance, or for such other relief as he may be entitled to, on the merits of the case: see note to *Rule* 253, and *Staples v. Young*, and *Horrocks v. Ribby*, there referred to. The effect of *The Judicature Act* would seem to be to abolish any distinction in effect between set-off and cross-demands so far as the right to recover is concerned, though any cross-demand which could not formerly be pleaded as a set-off must now be pleaded by way of counter-claim.

A distinction has, however, been recognized which is still of importance in reference to the disposition of the costs where a counter-claim is set up, not by way of a defence against the plaintiff's cause of action. Mr. Pitt Lewis, in his work on County Court Practice, quoted with approval by Cockburn, C.J., in *Stooke v. Taylor*, 5 Q. B. D. 577, says:—"A set-off would seem to be of a different nature from a defence (*qu. counter-claim*) inasmuch as a set-off appears to shew a debt balancing the debt claimed by the plaintiff, and thus leaving nothing due to him; while a counter-claim, it would seem, consists of a cross-claim, not necessarily extinguishing or destroying the plaintiff's demand. In other words a set-off appears to consist of a defence to the original claim of the plaintiff; a counter-claim is the assertion of a separate and independent demand, which does not answer or destroy the original claim of the plaintiff. The right to rely on a set-off has long existed. The right to set up a counter-claim was first given by the Judicature Acts." See also *Gathercole v. Smith*, 7 Q. B. D. 626; *Pellas v. Neptune Marine Ass. Co.*, 5 C. P. D. 34; and notes to *Rule* 1130.

Under the
Jud. Act.

The terms of the present *Rule* are wide enough to allow a defendant to set up any cross-demand, whether connected with the plaintiff's claim or not, and whether it sounds in damages or not; but the *Rule* must be read in connection with *Rules* 254, 298, providing for the exclusion of counter-claims, and the compulsory amendment of pleadings, in the discretion of the Court: *Gray v. Webb*, 21 Ch. D. 802.

The *Rule* is only one of procedure, designed to prevent the necessity of bringing a cross-action where a cross-demand can conveniently be tried in the original action. It does not give rights as

against third parties, or confer rights of set-off between the parties **Rule 251.** which did not exist before. Thus claims against a company held by a director and *bona fide* for value assigned to a third person, were held not subject to be set-off against damages payable under an order, afterwards obtained by the liquidator of the company against the director: *Re Milan Tramways Co., Ex p. Theys*, 22 Ch. D. 122; affirmed in appeal, 25 Ch. D. 387; see *Mercer Steel, etc., Co. v. Naylor*, 9 Q. B. D. 648; 9 App. Cas. 434. In an action for calls by the liquidator of a company, a claim by a shareholder against the company was not allowed to be set up: *Re Whitehouse*, 9 Ch. D. 595. A set-off claimed against arrears of pension, against which, by statute, no set-off was permissible, was disallowed: *Guthrie v. Smith*, 7 Q. B. D. 626.

In an action by a trustee for a debt due to him as such trustee, or as agent for another person, the defendant may set up as a defence to the extent of the claim that the *cestui que trust* is indebted to him in a greater sum for unliquidated damages: *Banks v. Jarvis*, 1883, 1 K. B. 549; 88 L. T. 20. In that case the defence was set up in the form of a counter-claim, but *quære*, whether it should not have been set up as an equitable defence, as it might have been under the old practice: *Ib.*

The right of set-off only applies to mutual debts, viz., debts due and owing to and by the same parties; therefore a defendant cannot set-off a debt due by the plaintiff to him and another person in equal shares: *Boatcar v. Paterson*, 6 Q. B. D. 540; see also *Federal Bank v. Harrison*, 10 P. R. 271; 20 C. L. J. 194. Debt set-off must be mutual.

In an action by a receiver of a landlord's estate for rent due the landlord the defendant set up a set-off of money due by the landlord; it was held that the action by the receiver being in the interest of incumbrancers on the lands, the set-off could not be relied on: *Mullarkey v. O'Donohue*, 16 L. R. Ir. 365. So a receiver of an estate was held not entitled to set-off against a debt due by him as executor, a debt due to him as receiver, notwithstanding that both claims arose in respect of the same estate: *Nelson v. Roberts*, 69 L. T. 352.

Where a set-off is claimed or pleaded in defence to an action for debt, the debt sued on is not thereby extinguished to the extent of the debt sought to be set off, but two separate and distinct debts remain until judgment: *Re Hiram Maxim Lamp Co.*, 1902, 1 Ch. 70.

Counter-claim.—The mode in which a defendant proceeds to obtain the cross-relief contemplated by the *Rule* is by counter-claim, which has been defined as "a pleading where a defendant claims some remedy or relief either against the plaintiff alone, or against the plaintiff together with some other person or persons, whether already parties to the action or not"; see Haynes' Chy. Pr. 77, and *per Blackburn, J.*, in *Treleaven v. Bray*, 45 L. J. Chy. 115. Counter-claim.

A defendant is not bound to make his cross-claims by counter-claim, but may assert them by cross-action: *Adamson v. Tuff*, 44 L. T. 420; see note to sec. 57 (7) of the Act, *supra*, p. 53; *Neale v. Clarke*, 4 Ex. D. 295; and a counter-claim can only be maintained where a cross-action might be brought: *Birmingham Estates v. Smith*, 13 Ch. D. 508.

But where an action and cross-action have been brought there is power, in a proper case, to stay one, and compel the plaintiff in it to proceed by way of counter-claim in the other action: see *Irvine v. Speery*, 11 P. R. 229; *Connice v. C. Pl. Ry.*, *Ib.* 149.

Rule 251.

The Courts should give a liberal interpretation to these *Rules*, which were no doubt passed with the intention of settling in one litigation all questions arising out of the subject matter of the dispute: *per* Brett, L.J., in *Turner v. Hednesford Gas Co.*, 3 Ex. D. 151.

Plaintiff
must be
party.

It is of the essence of a counter-claim that it claims relief against the plaintiff, either alone, or in conjunction with some other person. There can be no counterclaim against a co-defendant alone: *Cope v. Crichton*, 18 P. R. 462; *Warner v. Twining*, 24 W. R. 536; *McLay v. Sharp*, W. N. 1877, 216; *Benecke v. Craddock*, W. N. 1881, 54;—*Sheppard v. Beane*, 2 Ch. D. 223, is not to be considered an authority: see *Harris v. Gamble*, 6 Ch. D. 748; *Furness v. Booth*, 4 Ch. D. 586. So there can be no counter-claim against a third party, unless a claim is made against plaintiff along with such third party: *Dear v. Swarder*, 4 Ch. D. 476; *Romann v. Brodrecht*, 9 P. R. 2; *Barber v. Blaiberg*, 19 Ch. D. 473; and *Rule 248*. Relief against co-defendants and third parties alone can only be obtained under the third party procedure: see *Rules 209 et seq.*

A counter-claim irregularly filed, not including a claim against a plaintiff, may be struck out on motion: *Cope v. Crichton*, 18 P. R. 462.

The relator in an action in the nature of an information at the suit of the Attorney-General is not a plaintiff, and a counter-claim cannot be filed against him: *Atty.-Gen. Ex rel. Russell v. Vaughan Road Co.*, 14 P. R. 516.

A counter-claim may be set up by the Crown in a petition of right: *Thomas v. The Queen*, W. N. 1875, 218; 1 Cbarl. Ch. Ca. 71.

Where by a statute a particular mode of procedure is provided for obtaining a particular relief, that mode must be pursued and procedure by a counter-claim will be improper: *Pinto v. Badman*, 7 Times, 317.

Against
plaintiff
alone.

Counter-claim against Plaintiff Alone.—Where a counter-claim is brought against a plaintiff alone, it is not necessary that the claim of the defendant should be connected with the plaintiff's original cause of action; it may relate to any matter which might be the subject of an independent action: *Stooke v. Taylor*, 5 Q. B. 19, 576; and *Quin v. Hession*, 40 L. T. 70, where it was held that the words, "relating to or connected with the original subject of the cause or matter," in sec. 57, sub-sec. 7, of the Act, only qualify that portion of the section with which they are in immediate connection, viz.: a counter-claim which seeks relief against a third party as well as the plaintiff: see also *Beddall v. Maitland*, 17 Ch. D. 174; *Gray v. Webb*, 21 Ch. D. 802. But the defendant can not set up by way of counter-claim against the claim of a plaintiff, suing only in his individual capacity, claims against him personally, and also as executor: *Macdonald v. Carington*, 4 C. P. D. 28; and see *Rule 235*.

The plaintiff may answer the defendant's counter-claim by a counter-claim: see *Kenton Gibbs v. Neville*, 1900, 2 Q. B. 181; 82 L. T. 446; *Toke v. Andrews*, *infra*; which may be in respect of a cause of action arising after the issue of the writ, but arising out of the same transaction as the counter-claim: *Toke v. Andrews*, 8 Q. B. D. 428; but not if the ground of claim is independent and arose before the issue of the writ: see *Rule 288*, and *James v. Page*, 85 L. T. Jour. 157. In such latter case the new claim may be raised by amendment of the statement of claim: *Ib.*

A counter-claim against a foreign plaintiff may be for a cause of *Rule 251*. action for which the defendant could not obtain leave to serve a writ of summons out of the jurisdiction: *Griendtoven v. Hamlyn*, 8 Times, 231; but *semble*, not in the case of a plaintiff a foreign sovereign, as *semble* a foreign sovereign only submits to the jurisdiction as to matters arising out of the claim: *S. African Republic v. Compagnie Franco Belge*, 1897, 2 Ch. at p. 490; 77 L. T. 555; *S. African Republic v. Transvaal Northern Ry.*, 67 L. J. Chy. 92.

There may be separate counter-claims against two plaintiffs severally, though they sue jointly: *Manchester S. & L. Co. v. Brooks*, 2 Ex. D. 243.

Counter-claim against Plaintiff and Others. — Where a counter-claim is made against the plaintiff and another person it is subject to certain restrictions. Against the plaintiff and others.

(1) The relief sought to be obtained against him must relate specifically to, or be connected with, the subject matter of the action: *Padwick v. Scott*, 2 Ch. D. 736; see *Harris v. Gamble*, 6 Ch. D. 748; *Quin v. Hession*, and *Barber v. Blidberg*, *supra*.

(2) The counter-claim must, as before mentioned, claim relief against the plaintiff along with such other person: *Rule 248*; *Trelovey v. Bray*, 45 L. J. Chy. 113; 1 Ch. D. 176; *Dear v. Swooner*, and *Harris v. Gamble*, *supra*; *Turner v. Hednesford Gas Co.*, 3 Ks. D. 145.

Where the defendant and a third person have a joint cause of action against the plaintiff, even though arising out of the same circumstances that give rise to the plaintiff's cause of action, the defendant cannot set up his cause of action by counter-claim making the third person a defendant to it: *Pender v. Taddoe*, 1898, 1 Q. B. 798. Where relief is not claimed against the third party along with the plaintiff, the proceedings must be under *Rule 209*: *Central African Trading Co. v. Grove*, 40 L. T. 540; 48 L. J. Ex. 510. It is not enough that the counter-claim be in form, if it be not in substance, for relief against the third person along with the plaintiff; thus where the matter of the counter-claim may be set up against the plaintiff as a defence without the third party, and the plaintiff is not interested in what is claimed from the third party, the counter-claim is improper: *Romann v. Brodrecht*, 9 P. R. 2; *Torrance v. Livingstone*, 10 P. R. 29.

Furthermore, it has been held, perhaps under the terms of original *Rule 167* (now 250), that a third party cannot counter-claim against the defendant who brought him in: *Street v. Gover*, 2 Q. B. D. 498; *Alcoy v. Greenhill*, 1896, 1 Ch. 19; 73 L. T. 452; and such a pleading may be struck out on a summary application: *General Electric Co. v. Victoria Electric Light Co.*, 16 P. R. 476, 529, which distinguished *Green v. Thornton*, 9 C. L. T. 139, where a third party, made with the plaintiff a defendant to a counter-claim, was allowed to amend a reply to the defendant's counter-claim, by asserting another counter-claim against the defendant, but this was said to have been allowed because, although called a counter-claim, it was in substance a defence: see 16 P. R. 481, 584; see *Rule 250*, and notes. In *Evans v. Buck*, 4 Ch. D. 432, it was held that a person cannot be brought in, as a defendant to a counter-claim, against whom relief is claimed in one of two inconsistent alternatives: see note to *Rule 126*.

Rule 251.

The counter-claim need not be for the same cause of action against all the defendants to it: *Central African, etc., Co. v. Grove*, 27 W. R. 931; 40 L. T. 540; *Turner v. Hednesford*, 3 Ex. D. 145.

A defendant is not entitled to set up in his counter-claim a hypothetical case for relief against a third party: *Sackville v. Pacey*, 18 C. L. J. 14.

A defendant may not serve a third party out of the jurisdiction with a counter-claim: *Potters v. Miller*, 31 W. R. 858. See, however, *Re Luckie*, W. N. 1880, 12; and notes to *Rule 162*.

Where a defendant counter-claims against the plaintiff as liable alone, the plaintiff cannot have added another person who, he alleges, is also liable as to a part of the counter-claim: *Eyre v. Moreing*, W. N. 1884, 58.

Counter-claim only where separate action would lie.

Counter-claim only where a Separate Action would lie.—

In any case, a counter-claim can only be set up where an action might be brought: *Birmingham Estates v. Smith*, 13 Ch. D. 506, 508.

A counter-claim has therefore been disallowed where it set up a debt alleged to have been incurred by the plaintiff when an infant, and not ratified under Lord Tenterden's Act: *Rawley v. Rawley*, 1 Q. B. D. 460. So in an action by an administrator for the balance of an intestate's banking account, a debt due from the intestate on a note which became due after his death was not allowed to be set up, because an administration order had been before action obtained, of which the defendants had notice; and under 23 & 24 Vict. c. 38, s. 14, equity would restrain the defendant from proceeding on the note, leaving him to prove for it in the administration proceedings: *Newell v. National Provincial Bank of England*, 1 C. P. D. 496; 1 Charl. Ch. Co. 82; see also *Monteith v. Walsh*, 10 P. R. 162. So also, where the claim set up in the counter-claim had been extinguished by the obtaining of a judgment in another Division, which judgment the defendant was not at liberty to enforce without leave, it was disallowed: *Birmingham Co. Estates v. Smith*, 13 Ch. D. 506; see also *Beddall v. Maitland*, 17 Ch. D. 174, where a counter-claim for damages for forcible entry under the Statute of Richard II. failed, because that Act gave no civil remedy. So also, where a counter-claim was by a surety against the plaintiff and third parties (the debtors) to require the plaintiff to first proceed against the debtors (they being able to pay), and for indemnity from the debtors, it was disallowed: *Federal Bank v. Harrison*, 10 P. R. 271.

See also *Re Milan Tramways Co., Ex parte Theys*, 22 Ch. D. 122, affirmed in appeal 25 Ch. D. 587; followed in *Re Gillespie*, 54 L. J. Q. B. 342; *Gathercole v. Smith*, 7 Q. B. D. 626; *Beatty v. Mair*, 10 L. R. 1r. 208.

Injunction by counter-claim.

As to when a counter-claim is necessary to enable a defendant to obtain an injunction or a receiver against the plaintiff, see notes to sec. 58 (9) *supra*, p. 87.

Counter-claim When Regarded as a Separate Action.—

Whether a counter-claim is to be considered merely as a defence, or as something like a separate action, has been much discussed. It is not an action: *Irwin v. Brown*, 12 P. R. 639; but see *Irwin v. Turner*, 16 P. R. 349, though by the terms of the *Rule 252* it has the same effect as a statement of claim in a cross-action, to enable judgment to be given on both claim and counter-claim; see *Lumsden v. Winter*, 8 Q. B. D. 650, and it was early viewed as in the nature

of an independent action in dealing with the question of the costs of *Rule 281*. It; see *Stooke v. Taylor*, 5 Q. B. D. 577; *Baines v. Brindley*, 6 Q. B. D. 685, and notes *supra*, p. 446, and to *Rule 1130*; *Haring v. Pearson*, 32 W. R. 420; 35 L. T. 633; and now in England it has practically been decided that though not a cross-action everything done in respect of the proceedings upon it must be treated as if it were; *McGowan v. Middleton*, 11 Q. B. D. 469; *Sykes v. Sacerdoti*, 15 Q. B. D. 425; *Amon v. Bobett*, 22 Q. B. D. 548; *Neck v. Taylor*, 1893, 1 Q. B. 560. This result is partly based upon the amended language of Eng. (1883) R. 100, which says that a counter-claim "shall have the same effect as a cross-action, etc." The corresponding Ont. *Rule 252* reads, "shall have the same effect as a statement of claim in a cross-action, etc."; but other amendments of the Ontario *Rules* are in the direction of regarding proceedings on the counter-claim as independent of those in the action; see notes to *Rules 250, 252, 255, 263, 583, 1130*. See also *Dominion Burglary Guarantee Co. v. Wood*, 3 O. L. R. 305.

In *Stumore v. Campbell*, 1892, 1 Q. B. 314, it was held that the judgments of plaintiff and defendant on claim and counter-claim respectively, constitute two independent debts either of which may be garnished, notwithstanding that the other party's judgment may be for a larger sum. It would of course be otherwise where an order is made to set off one against the other.

A counter-claim has also been viewed as a cross-action for other purposes. For instance, in *Beddall v. Maitland*, 17 Ch. D. 174, it was held by Fry, J., that a counter-claim is an independent action, and relief may be given upon it in respect of a cause of action that arose after the issue of the writ in the original action; and this view seems now established in England by decisions; see *McGowan v. Middleton*, 11 Q. B. D. 469; see also *Chamberlia v. Chamberlia*, 11 P. R. 501, and all doubt is removed in Ont. by *Rule 289*.

In *Ellis v. Munson*, W. N. 1876, 253; 35 L. T. 585, the Court of Appeal had previously held that such a counter-claim should, under Order 16 of Eng. R. 1875, state that it was founded on facts which have arisen since the action was brought; and in 1877, in *Original Hartlepool Collieries Co. v. Gubb*, 5 Ch. D. 713, Jessel, M.R., had expressed the opinion that damages claimed by counter-claim must be limited to the date when the writ issued.

In accordance with the principle of *Beddall v. Maitland*, it has further been now decided (and the decision was confirmed in England by an express *Rule* (Eng. (1883) R. 249), that the discontinuance of an action by the plaintiff does not put an end to the counter-claim; *McGowan v. Middleton*, 11 Q. B. D. 464, overruling *L'asscur v. Krupp*, 15 Ch. D. 474; *The Queen v. Judge of City of London Court*, 1891, 2 Q. B. 71; that a counter-claim may be revived on the death of the defendant, independently of the revivor of the action by the plaintiff; *Andrew v. Pitken*, 30 W. R. 701; 46 L. T. 689; and that a plaintiff may in reply to a counter-claim set up a counter-claim against defendant; *Toke v. Andrews*, 8 Q. B. D. 428; *Reaton v. Neville*, 1900, 2 Q. B. 181; 82 L. T. 446; see also 19 C. L. J. 162.

Where the plaintiff's claim was dismissed for default in compliance with an order, the defendant was allowed to proceed with his counter-claim by motion for judgment as by default of pleading thereto by the plaintiff; *Higgins v. Scott*, 21 Q. B. D. 10, in note to *Rule 593*; *Roberts v. Booth*, 1893, 1 Ch. 52; 67 L. T. 646; these cases in England have the support of the express *Rule* of 1883 R. 249 (not

Rule 281. adopted in Ontario), providing that where the defendant sets up a counter-claim, and the plaintiff's action becomes stayed, discontinued or dismissed, the counter-claim may nevertheless be proceeded with, but it is probable that in Ontario the decision would be the same without an express Rule. See also *Hildt v. Foy*, 9 Times, 31, 83; *Jones v. Macaulay*, 1891, 1 Q. B. 221. But where the counter-claim is one which the defendant could only set up by reason of the plaintiff, a foreigner, having come within the jurisdiction and sued the defendant, if the plaintiff moves to discontinue his action the defendant is in the position of a plaintiff *quoad* the counter-claim, and will not be permitted to continue it as a term of the plaintiff, being allowed to discontinue: *Dominion Burglary Guarantee Co. v. Wood*, 3 O. L. R. 305.

Where a claim can properly be the subject of a set-off, it should be set up as a defence, and not by way of counter-claim, and if set up by counter-claim, even though it is allowed, the defendant will not be entitled to any more costs than if it had been pleaded simply as a defence: *Girardot v. Welton*, 19 P. R. 162, 201.

In respect to security for costs also, a defendant who sets up a counter-claim becomes to some extent in the position of a plaintiff in a cross-action: *Winterfield v. Bradnum*, 3 Q. B. D. 324; and, when out of the jurisdiction, was in one case ordered to give security for costs: *The J. Fisher*, 2 P. D. 115; but a defendant will not be ordered to give security where his counter-claim is in respect of the same subject-matter as the plaintiff's claim: *Mapleton v. Masbi*, 5 Q. B. D. 144; see also *Shepherd v. Hayball*, 13 Gr. 681; or is in effect a defence: *Neck v. Taylor*, 1893, 1 Q. B. 560; and where he admits the plaintiff's claim, and sets up a counter-claim founded on a distinct claim, he cannot demand security for costs from plaintiff if out of the jurisdiction: *quare*, however, where he sets up a counter-claim for an amount greater than the plaintiff's claim: see *Winterfield v. Bradnum*, *supra*; see also notes to Rule 1201.

Other Incidents of a Counter-claim.—An order, however, will not be made upon the counter-claim until the original claim is dealt with: *Aitkin v. Dunbar*, 46 L. J. Chy. 489; but whether issues raised by the claim and counter-claim shall be tried together is a matter of convenience: *Re Woodfine, Thompson v. Woodfine*, 38 L. T. 753; 47 L. J. Chy. 832.

It is not necessary that the amount claimed by the defendant should be equal to the claim of the plaintiff: *Mostyn v. West Mostyn Co.*, 1 C. P. D. 145.

Evidence. Where the issues of fact in the claim and counter-claim were identical, it was held that the plaintiff was not entitled to adduce in reply to the counter-claim fresh evidence which would have been material to the original case: *Green v. Scrin*, 13 Ch. D. 589; see also, as to the evidence where claim and counter-claim are tried together, *Re Woodfine, Thompson v. Woodfine*, 38 L. T. 753.

Co-defendants to a counter-claim cannot examine one another for discovery: *Molloy v. Kilby*, 15 Ch. D. 162.

Irregular
counter-
claim

Striking Out Counter-claim. — Where a so-called counter-claim is irregular by not claiming relief against the plaintiff: *Cope v. Crichton*, 18 P. R. 462; or is otherwise not authorized by the Rules: *General Electric Co. v. Victoria Electric Light Co.*, 16 P. R. 476, 529, it may be struck out on motion, notwithstanding that the party

moving to strike it out has pleaded to it and the case has come on **Rule 251**, for trial: *Cope v. Crichton*, *supra*. See also *Barber v. Hühberg*, 10 Ch. D. 473.

In order to prevent the abuse of the extensive powers of counter-claim given to defendants, the Court has a discretion under **Rule 251** to consider whether the counter-claim should be proceeded with or struck out, leaving the defendant to make it the subject of an independent action. Counter-claims in convenient to be tried.

There is jurisdiction to stay proceedings in a cross-action and allow the claim to be set up by counter-claim in another action, yet it should only be done when the points at issue are the same: *Adams v. Tuff*, 44 L. T. 420; see *Irwin v. Sperry*, 11 P. R. 220; *Connice v. C. P. Ry.*, 11 P. R. 140.

Where the Court was of opinion that a counter-claim was not *bona fide* scandalous *file*, and it contained scandalous charges, it was struck out: *Lee v. Ashwin*, 1 Times, 291; see **Rule 208**. counter-claim.

Form of Counter-claim.—A counter-claim and statement of defence must be included in the same pleading, and the same rules apply in many respects to a counter-claim as to a statement of claim: see *Holburn v. York*, 25 W. R. 627, and Form 13 (H. & L. Forms, No. 1271). form.

A counter-claim is subject to the same rules as a claim in respect to the causes of action which may be joined: see *Compton v. Preston*, 21 Ch. D. 138; *Hunter v. Stark*, 17 P. R. 47.

By the express terms of the *Rules*, the relief prayed for by way of counter-claim must be specifically stated: **Rule 273**; and the facts supporting each cause of action are, as far as may be, to be kept distinct: **Rule 274**; but a counter-claim under the Ontario Act and *Rules* is not governed by as strict regulations as in England. Eng. **Rule 243**, provides, that "where any defendant seeks to rely upon any facts as supporting a right of set-off or counter-claim, he shall, in his statement of defence, specifically state that he does so by way of set-off or counter-claim." Under that Rule a defendant is not allowed, in England, to mix the facts supporting his counter-claim, indiscriminately with those constituting his defence. Where a pleading was headed "statement of defence and counter-claim," and set forth in thirteen paragraphs facts on which the defendant relied for his defence without making any reference to counter-claims, and concluded in the fourteenth paragraph with a claim by way of counter-claim for damages, it was held by Fry, J., to be not a proper counter-claim, and was dismissed: *Croice v. Barnicot*, 6 Ch. D. 753; see also *Hillman v. Mayhew*, 24 W. R. 485; but the same Judge afterwards qualified his decision in another case, and held that it is not necessary that a set-off or counter-claim should have a separate heading, or be separated by a marked line from the defence, or that paragraphs containing the facts relied on should be separately numbered: *Lees v. Patterson*, 26 W. R. 399; 7 Ch. D. 806.

The necessity for strict compliance with the above mentioned Eng. (1883) **Rule 243**, may have been partly due to the principle of the English system in regard to admissions (see note to **Rule 272**), and to the Eng. (1883) **R. 213**, which requires the plaintiff to deal specifically in his reply with each allegation in the counter-claim of which he does not admit the truth.

Rule 252.

The result under the English Act is, therefore, that though the statement of defence and counter-claim may be combined in the same document, they are quite distinct pleadings. The paragraphs of the document may be numbered consecutively; and the counter-claim need not be separated from the defence by any marked line or separate heading; but it is necessary that all the facts which the defendant relies upon by way of counter-claim should appear in that part of the document which in fact constitutes the counter-claim; and it is not enough if the facts be found scattered through the defence and counter-claim. If the facts relied on by way of defence are also relied upon to support the counter-claim, they may be incorporated in the counter-claim by reference to the paragraph in which they are set forth in the defence: *Birmingham Estates Co. v. Smith*, 13 Cb. D. 503.

The result under the Ontario Act would seem to be, that it is not necessary, by separate numbering of paragraphs, headings, or otherwise, to distinguish the defence from the counter-claim. It will be sufficient if the facts on which the defendant relies, whether by way of defence or counter-claim, are concisely stated and without proximity, (*Rule 268*) keeping, as far as may be, separate and distinct, the facts relating to several and distinct causes of action relied on by way of counter-claim: see *Rule 274*. A prayer for the counter-relief desired should be added: *Rule 273*. Then, by analogy to the decisions in *Watson v. Hawkins*, 24 W. R. 884, if the facts stated show either a defence, or a right to any relief prayed for by way of counter-claim, the defendant will be entitled to the benefit of such defence or to such relief: see also *Newell v. National P. Bank*, 1 C. P. D. 501. If relief, by way of counter-claim, whether general or otherwise, is not asked, it will be taken that it is not wanted: *Holloway v. York*, 25 W. R. 627.

A form of counter-claim is given in the App. Form No. 13 (H. & L. Forms, No. 127).

Defence to Counter-claim. — The defence to a counter-claim must be delivered within eight days after the service of the counter-claim: *Rule 250*.

Besides delivering a defence the plaintiff in the action may set up a counter-claim arising out of the same transaction as the defendant's counter-claim: *Renton v. Neville*, 1900, 2 Q. B. 181; 82 L. T. 448; to which the same rules would apparently apply as to the original counter-claim. But the right to deliver a counter-claim to a counter-claim is confined to the plaintiff in the action, and does not extend to any co-defendant or third person who is made defendant to a defendant's counter-claim.

The plaintiff in the action would also seem entitled to resort to the third party procedure in regard to any claim set up against him by counter-claim, and obtain leave to serve a third party against whom he claims indemnity, contribution, or relief over, in respect of the counter-claim: *Leri v. Anglo-Continental*, 1902, 2 K. B. 481; 86 L. T. 857.

Judgment
where
counter-
claim set up.

252. A counter-claim shall have the same effect as [a statement of claim in] a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and the counter-claim. Con. Rule 373. *last part.*

Same as Eng. R. 1875, O. 19, r. 3, except that that Rule commenced. "Such set-off or counter-claim shall, etc." The Eng. (1883) R. 199, is the same as the Rule of 1875 except that it omits the words above in brackets, as to the effect of which omission, see note *supra*, p. 451, and *McGowan v. Middleton*, 11 Q. B. D. 464.

See notes to Rule 251.

253 Where a counter-claim is established against the plaintiff's claim, the Court may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case. Con. Rule 375.

Judgment
for balance
of counter-
claim.

Substantially the same as the Eng. (1883) R. 250.

"**Balance in Favour of the Defendant.**"—These words mean the balance upon the hearing of the action: *Rolfe v. Maclaren*, 3 Ch. D. 106. Judgment upon the counter-claim may give the defendant complete relief as in an independent action, by ordering payment of any balance found in his favour: *Staples v. Young*, 2 Ex. D. 324; or by awarding to him such other relief as he may be entitled to; and the judgment may provide that the amount recovered on the counter-claim for damages and costs shall, notwithstanding any claim of lien on the part of the defendant's solicitors, be set off *pro tanto* against the sum awarded to the plaintiff for a debt and costs: *Blumenstiel v. Edwards*, 5 O. W. R. 796. In *Horrocks v. Rigby*, 26 W. R. 714, a defendant, who had purchased the entirety of a leasehold, resisted a claim against him for a specific performance of a contract for sale of a moiety of the leasehold; he was also mortgagee, and in the latter capacity, as alternative relief by way of counter-claim, he called upon the plaintiff to redeem him, and it was held that he was so entitled, with costs as of a foreclosure suit.

As to costs, where a balance is found in favour of the defendant, and in other cases of claims and counter-claims tried together, see *Staples v. Young*, *supra*; *Blake v. Appleyard*, 3 Ex. D. 195; *Potter v. Chambers*, 4 C. P. D. 69 and 457; *Chatfield v. Sedgewick*, *ib.*, p. 459; *Baines v. Bromley*, 6 Q. B. D. 197, 691, and notes to Rule 1130.

Where the plaintiff claimed £49 12s. and defendant admitted the claim and counter-claimed for £75, and judgment was given for the plaintiff on his claim and for defendant for £40 on his counter-claim, it was ordered that the plaintiff should have costs of his claim, and the defendant costs of his counter-claim, which was interpreted to mean that the plaintiff should have costs up to the delivery of the defence, and the defendant his costs after that time: *Bowker v. Kesteren*, 47 L. T. 545.

Judgment will usually be entered for the balance: see *Shrapnel v. Laing*, 20 Q. B. D. 338; *Griffiths v. Patterson*, 22 L. R. Ir. 656; but the judgment may be for the plaintiff upon the claim, and for defendant upon the counter-claim: *ib.* The form in which the judgment is entered does not affect the mode of taxing the costs, which will depend upon whether the counter-claim could or could not be pleaded as a set-off: see *Shrapnel v. Laing*, *supra*, and other cases in note to Rule 1130; it probably would affect the right of a third person to garnish either debt separately, as to which see *Stumore v. Campbell*, 1892, 1 Q. B. 314.

Rule 254. As to the effect of a solicitor's lien upon the right to a set-off, see notes to *Rule 1165*.

A charging order in favour of a solicitor under *Rule 1129* will be limited to the balance actually recovered: *Westcott v. Bevan*, 1891, 1 Q. B. 774.

This *Rule* is confined to claims set up by counter-claim, but a defendant is only entitled to a judgment for a balance in his favour in case of a set-off: see R. S. O. c. 324, s. 7.

Striking out
counter-
claim.

254. Where a defendant sets up a counter-claim, if the plaintiff, or any other person named in manner hereinafter mentioned (a) as party to such counter-claim, contends that the claim thereby raised ought not to be disposed of by way of counter-claim, but in an independent action, he may, at any time [before trial,] apply to the Court or a Judge for an order that such counter-claim be excluded; and such order may be made as may seem just. Con. Rule 374; Rules 23rd June, 1894, 1320.

The Eng. (1883) R. 248, is substantially the same, except that it has "before reply" instead of the words "before trial," in brackets above.

(a) The reference is really to *Rule 248*. The words "hereinafter mentioned" come from Rules 23 June, 1894 (1320), which substituted them for "aforesaid," correcting an oversight in the Con. Rules, 1888, due to the placing of Con. Rule 374 before Con. Rule 376. A similar oversight has occurred in the present consolidation, in which the former *Rule 376* (now *Rule 248*) has been placed before Con. Rule 374 (now *Rule 254*), without changing the words "hereinafter mentioned."

Excluding Counter-claims.—For the principles upon which the Court acts in excluding counter-claims, see *Naylor v. Farrer*, *infra*. *Padwick v. Scott*, 2 Ch. D. 736; *Dear v. Swoorder*, 4 Ch. D. 476; *Harris v. Gamble*, 6 Ch. D. 748; *Birmingham Estates v. Smith*, 13 Ch. D. 506; *Rotherham v. Priest*, 28 W. R. 277; also the examples *infra*.

An application under this *Rule* may, in England, be made in Court: see *Dear v. Swoorder*, 4 Ch. D. 476; *Huggons v. Tweed*, 10 Ch. D. 359; but, as a general thing, should be made in Chambers: see *Naylor v. Farrer*, 26 W. R. 809; and *Coe's Prac. in Cham.* 78. In Ontario it may, and usually should, be made before the Master in Chambers or other officer having like jurisdiction: see *Rule 6 (a)*. It is to be made before trial. In *Lynch v. Macdonald*, 37 Ch. D. 227, it was said that it was too late to apply after reply (the period fixed by the Eng. Rule), but doubtless also at the trial the Judge has power to deal with the pleadings and the action as he may deem proper: see *Barber v. Blalberg*, 19 Ch. D. 473.

The decision of a Judge under this *Rule*, if appealed from, will rarely be interfered with: *Huggons v. Tweed*, 10 Ch. D. 359.

In *Naylor v. Farrer*, Jessel, M.R., said that, in his opinion, under the English Rule, a defendant might set up any number of cross-claims. There was no limit laid down in that *Rule* either to their

number or nature; but it was left to the discretion of the Court or a Rule 254. Judge to limit them, otherwise fifty causes of action of the most diverse nature might be joined together and set up, and witnesses of all kinds called in support of each. How would it be possible for the Court to try all those in one action? There must also be some limit to the character of the claim set up. Suppose, for instance, an action for account brought by a surviving partner against the widow, who was also the executrix of the other, to which the widow set up a counter-claim for damages for breach of promise of marriage, could that be said to be a counter-claim which could be conveniently disposed of in the pending action? It was impossible. The Judge must exercise the discretion given to him by the Rule in allowing or rejecting a counter-claim.

In *Bartholomew v. Rawlings*, W. N. 1876, 56; 2 Charl. Ch. Ca. 32, Archibald, J., said: "There is no doubt whatever that a defendant is entitled to set up any counter-claim that is not so incongruous as to be incapable of being conveniently tried with the original claim." The question of the convenience of trial depends greatly upon whether the subject of the counter-claim is germane to the subject of the action. But though a counter-claim be not in relation to matters foreign to the subject of the action, still the fact that it will necessitate a long account, and thus unduly delay the action, may furnish grounds for excluding it: *Gray v. Webb*, 21 Ch. D. 802. See also *Delobel-Filipo v. Varty*, 1893, 1 Q. B. 663; *Hawkins v. Myhra*, 3 Times, 91.

In *Canadian Securities Co. v. Prentice*, 9 P. R. 329, Cameron, J., said: "I have assumed that allowing or disallowing a counter-claim, where third parties are to be brought in, is matter of discretion, not of course to be exercised arbitrarily, but upon consideration of all the circumstances, including rights involved in the counter-claim, and the question of delay, and convenience of trial. In jury cases there can be no question that much difficulty may arise by the mixing up of different claims—if I may use the term "mixing" in such connection—and cross or counter-claims in the same action; and unless the clear legal rights of the defendant for his protection against the plaintiff's action would seem to require it, counter-claims ought not to be favoured."

A counter-claim for damages arising out of the same subject matter or contract as the plaintiff is proceeding upon, is therefore in general, proper. So also a counter-claim in the nature of a cross-demand, pecuniary or otherwise, unconnected with the subject matter of the plaintiff's claim, provided there is no inconvenience in having a trial of both in the same action.

A counter-claim, like any other pleading, may be struck out for scandal, or if it tend to prejudice or embarrass the fair trial of the action: Rule 298; or if it be frivolous or vexatious: Rule 261. See also *Lee v. Ashwin*, 1 Times, 291.

See *Monteith v. Walsh*, 10 P. R. 162, in note to Rule 944.

Counter-claims Allowed.—Examples.—The following are examples of counter-claims allowed to be set up as raising questions which can conveniently be tried with the plaintiff's claim in the action:

Action by a stock-broker for price of shares. Counter-claim for fraudulent misrepresentations as to the values of the shares: *Anon.*, 1 Charl. Ch. Ca. 73; *Evans v. Gann*, W. N. 1875, 199; 1 Charl. Ch. Ca. 70; see also *Lee v. McMahon*, 2 Ont. 654.

Rule 254.

Counter-claims allowed.

Action for price of iron. Counter-claim for inferiority of iron. *Anon.*, 1 Charl. Ch. Ca. 73; or non-delivery of part; *Midland Ry. Co. v. Ontario Rolling Mills*, 2 Ont. 1.

Action for price of coals. Counter-claim for non-delivery of part of the coals: *Norton v. Merriman*, W. N. 1875, 219; 1 Charl. Ch. Ca. 80; see *Fulton v. U. C. Furniture Co.*, 32 C. P. 422; 20 C. L. J. 11.

Action for negligent construction of ship. Counter-claim for extras due beyond the contract price: *Trinacria v. Richardson*, W. N. 1875, 219; 1 Charl. Ch. Ca. 74.

Action by builder. Counter-claim for breach of covenant in building contract: *Trevana v. Watts*, W. N. 1875, 250; 1 Charl. Ch. Ca. 79.

Action by lessor for rent. Counter-claim for an alleged debt and damages for non-performance of lessor's agreement: *Atwood v. Miller*, W. N. 1876, 11; 1 Charl. Ch. Ca. 82; see *Atkinson v. Ellison*, W. N. 1875, 199; 1 Charl. Ch. Ca. 69.

Action of ejectment for non-payment of rent. Counter-claim for rectification of lease so as to state terms by which no rent would be due: *Carcio v. Christopher*, 10 L. R. Ir. 38.

Action of ejectment by heir against widow. Counter-claim for dower: *Glass v. Glass*, 9 P. R. 14.

Action for recovery of land and mesne profits. Counter-claim for damages for illegal distress against p. intiff and his bailiff: *Duckstader v. Phipps*, 9 P. R. 204.

Action for specific performance. Counter-claim for damages and rectification of agreement and specific performance of the agreement as rectified: *Durlop Tire Co. v. Ryckman*, 5 O. L. R. 249.

A counter-claim was allowed claiming against an assignee a set-off of damages due from the assignor: *Young v. Kitchin*, 3 Ex. D. 127; *Exchange Bank v. Stinson*, 32 C. P. 158; see *Pellas v. Neptune Marine Ass. Co.*, 5 C. P. D. 34.

Where A. sued B. on a bill and B. defended by alleging that A. was really trustee for C. who owed B. money; B. was allowed to bring in C. and claim set-off: *Macdonald v. Bode*, W. N. 1876, 23; but this case was disapproved of in *Tagart v. Marcus*, 36 W. R. 469; see *infra*, p. 440.

Action to establish a will. Counter-claim propounding two earlier wills, under which defendant claimed in the event of the last in date being invalid: *Appleman v. Appleman*, 12 P. R. 138.

Action by an executor for detention of the goods of his testator. Counter-claim for funeral expenses paid by the defendant, and a debt due to him from the testator before his death: *Watkin v. Newcomen*, 1 Cal. & El. 113.

Action for the recovery of land. Counter-claim for damages in respect of a trespass by the plaintiff on the lands in question, and for an assault: *Goring v. Cameron*, 10 P. R. 496.

Action by lessor for ejectment and forfeiture of lease. Counter-claim for relief from the forfeiture: *Wardens of Cholmeley's School v. Sewell*, 1893, 2 Q. B. 254; 69 L. T. 118.

Action for money lent. Counter-claim for money paid by defendant, and for work done by him for the plaintiff and another (without joining the other person): *Eyre v. Moreing*, W. N. 1884, 58.

Action by executors to charge a married woman's estate with a **Rule 254.** debt to their testator. Counter-claim by her and her husband, also a defendant, for money belonging to the wife, not part of her separate estate, and for chattels in the possession of the testator at his death, and alleged to be the property of the husband: *Hodson v. Mochi*, 8 Ch. D. 569.

Action by *caveat* against a surviving trustee to make good purchase money of testator's share of a partnership business, allowed to remain outstanding. Counter-claim to be indemnified by all *caveats* *quo trustent* including the plaintiffs, as the retention of the money by the surviving partner was by their consent: *Re Holmes*, *Wright v. Weatherhead*, W. N. 1883, 110.

Action propounding will of defendant's wife, who had obtained a protection order. Counter-claim to set aside the protection order as fraudulent, pronounce against the will, and for letters of administration: *Mudge v. Adams*, 50 L. J. Pro. 49; 17 C. L. J. 369.

A mortgagor was allowed to set up, in a foreclosure suit, a claim to open signed accounts: *Eyre v. Hughes*, 2 Ch. D. 148.

Action by a trustee in bankruptcy for unpaid price of a chattel purchased from the bankrupt. Counter-claim for fraudulent representation made by the bankrupt on the sale: *Jack v. Kipping*, 9 Q. B. D. 113.

Action to enforce an agreement by injunction. Counter-claim for damages for breach of agreement by plaintiff: *Dunlop v. Ryckman*, 5 O. L. R. 249.

M. and C. are partners with B. in London and Honduras: the two firms are separate. Actions by M. and C. against the London firm as agents of the Honduras firm for an account. B. had a decree in Honduras for the taking of partnership accounts there, and the London firm asked by counter-claim for the accounts of the Honduras firm to be taken: *Mutrie v. Binney*, 35 Ch. D. 614; 36 W. R. 131.

A County Court judgment was allowed to be set off against a **Set-off.** judgment of a Superior Court: *Sandys v. Louis*, W. N. 1875, 249; 1 Charl. Ch. Ca. 81.

Counter-claims Disallowed—Examples:—Counter-claims will not be allowed to be set up which cannot be the subject of an action; **Counter-** see *Rawley v. Rawley*, and other cases, p. 450, or which raise ques- **claims not** tions not capable of being conveniently tried in the action. **allowed.**

The following are examples of counter-claims held not capable of being conveniently tried in the action:

Action of assault and battery. Counter-claim for seduction of the defendant's daughter: *Cappeleus v. Brown*, W. N. 1875, 231; 1 Charl. Ch. Ca. 77.

Action for assault. A counter-claim for breach of agreement to repair a house was struck out, though an endeavour was made to connect the causes of action by showing that the parties were talking about the state of the house at the time of the assault: *Lee v. Colyer*, W. N. 1876, 8; 1 Charl. Ch. Ca. 86.

Action for libel consisting in the circulation of a letter by defendant among the shareholders of a colliery company. The plaintiff was one of the directors in the company, who were charged in the letter

Rule 254. with conspiracy and fraud. Counter-claim for damages for loss sustained in respect of shares bought on false representations. *Lindley, J.*, said: "This is one of those cases where it would be very difficult to keep the jury from mixing up the two claims." The counter-claim was therefore struck out without prejudice to any action defendant might bring, and the plaintiff was put on terms not to issue execution on any judgment he might obtain without leave of the Court or a Judge: *Nicholson v. Jackson*, W. N. 1876, 38; 2 Charl. Ch. Ca. 37.

Action for slander. Counter-claim for assault which was also pleaded in mitigation of damages for the slander: *Greer v. Hunter*, 11 C. L. T. 281.

Action for the specific performance by S. of an agreement for purchase by him of certain patent rights. H. & N., who were made co-defendants as claiming some interest in the subject-matter of the contract, alleged that the plaintiff had agreed to sell to them, and not to S., and that they had afterwards agreed to sell to S. By counter-claim H. & N. asked for specific performance by the plaintiff of his agreement with them, and by S. of his subsequent agreement with them. The counter-claim was excluded: *McLay v. Sharp*, W. N. 1877, 216.

Action for specific performance. Counter-claim for conspiracy against the plaintiff and others all but one resident out of Ontario: *Dunlop v. Ryckman*, 5 O. L. R. 249.

Action against trustees of a settlement for breach of trust. Counter-claim against the husband of a plaintiff (also a plaintiff) for £45, due on a bill of exchange: *Fendall v. O'Connell*, 32 L. T. 538.

Action for protection of a trust fund. Counter-claim for libel: *S. African Republic v. Compagnie Franco-Belge*, 1897, 2 Ch. 487; followed in *Dunlop v. Ryckman*, 5 O. L. R. 249.

Action against an indorser on a promissory note. Defence, that it was to be paid out of a certain agency in which the defendant and the maker of the note were engaged, and that the plaintiff by libel and slander of the defendant had prevented that business from going on. Counter-claim for damages for the libel and slander: *Central Bank v. Osborne*, 12 P. R. 160.

Action for foreclosure. Counter-claim for damages by reason of false and depreciative statements in regard to the value of the mortgaged premises: *Odell v. Bennett*, 13 P. R. 10; see also *Lynch v. Macdonald*, 37 Ch. D. 227.

Action to recover land for non-payment of rent. Counter-claim not connected with plaintiff's demand, in the absence of special circumstances disallowed: *Hildidge v. O'Farrell*, 8 L. R. Ir. 158.

Action by A. against B. for trover of goods which C. assigned by bill of sale to A., and which B. had seized. Counter-claim by B. alleging a bill of sale from C. to him and claiming relief against C. upon it. So far as claim against C. was concerned, it was held not sufficiently connected with the original cause of action: *Barber v. Blaiberg*, 19 Ch. D. 473.

Action by liquidator for calls against a newspaper proprietor. Counter-claim for price of advertisements and damages: *Government Security Invest. Co. v. Demfrey*, 50 L. J. Q. B. 199.

Action for damages for negligence. Counter-claim for libel: *McLean v. Hamilton Street Ry. Co.*, 11 P. R. 193.

Action by a trustee in bankruptcy of L. & Co. Counter-claim not against the firm but against L. only: *Baker v. Gent*, 9 Times. 159.

Action on promissory note. Counter-claim that plaintiff had conspired with third persons, added as defendants by counter-claim, to keep certain moneys instead of applying them on the note, and praying that the new defendants might be ordered to account therefor: *General Electric Co. v. Victoria E. L. Co.*, 16 P. R. 529. **Rule 255.**

Action of trover and for goods sold and delivered. Defendant was not allowed to set-off a claim against a third party, though such third party was the principal of the plaintiff: *Taggart v. Marcus*, 36 W. R. 469.

Action for specific performance by vendor against purchaser. Counter-claim for a comparatively small amount of money owing, as the result of an account, by plaintiff to defendant, and which the latter claimed to set-off against the purchase money. Counter-claim excluded as irrelevant to original claim, and because it would be inexpedient to try the two claims together, and would unduly delay the action to investigate the account: *Gray v. Webb*, 21 Ch. D. 802. **Cases of set-off.**

Separate Trial of Counter-claim.—Where a counter-claim is not excluded, it is still a question of convenience and in the discretion of the Court, whether the action and counter-claim should be tried together or separately: *Re Woodfine, Thompson v. Woodfine*, 47 L. J. Chy. 832; 38 L. T. 753.

255. Where a defendant does not dispute the plaintiff's claim and sets up no defence thereto, but sets up a counter-claim, the Court or a Judge may stay proceedings respecting the plaintiff's claim until the counter-claim is disposed of upon such terms as may seem just. *New.* **Stay of proceedings on undisputed claim pending disputed counter-claim.**

This *Rule* is new, and was introduced to prevent the obvious injustice of permitting the plaintiff to sign judgment and enforce payment from a defendant, though in the end the latter might establish a counter-claim entitling him to a balance upon the claim and counter-claim taken together.

3. REPLY AND SUBSEQUENT PLEADINGS.

Under the Ontario Rules of pleading the plaintiff may either reply, or amend his statement of claim; which course he shall pursue depends on circumstances. If he desire to strengthen his case made in the statement of claim, either by setting up new facts, or correcting mistakes therein, he should amend. If on the other hand he wishes merely to set up an answer to facts alleged by the defence, without in any way altering his statement of claim, or merely takes issue on the defence, then he should reply.

A reply must not set up new claims; or refer to an independent document as containing facts on which the pleader relies, without properly setting out such document as part of the reply; and, like other pleadings, it must not state evidence, argument, or conclusions of law: see *Rule 268*, and *Williamson v. L. & N. W. Ry. Co.*, 12 Ch. D. 790, and *Collambell v. Flight*, W. N. 1877, 125.

A reply is to be delivered within three weeks after the last of the defences: *Rule 256*.

Rule 256. As to reply and a defence to a counter-claim, see *Rules* 250 and 290.

As to the further defence to a counter-claim founded on matter arising after the defence, see *Rule* 292.

If the plaintiff amends, the defendant has further time to plead to the amended pleading: see *Rule* 302.

Delivery of
reply.

256. A plaintiff shall deliver his reply, if any, within 3 weeks after the defence or the last of the defences has been delivered, unless the time is extended by the Court or a Judge. *Con. Rule* 381.

Same as Eng. (1883) R. 276.

The last of the defences means the last defence of all the defences: see *Collett v. Preston*, 3 Mnc. & G. 432; *Arnold v. Arnold*, 9 Beav. 206; *Bertolacci v. Johnstone*, 2 Hn. 633; Chy. O. 152; and *Jimbroise v. Evelyn*, 11 Ch. D., nt p. 762.

Vacations are not reckoned in computing the time: *Rule* 352. As to extending the time, see notes to *Rules* 243, 246 and 353.

Delivery after Time.—Under the English practice a reply delivered after three weeks and without an extension of time is irregular, and may be set aside, the pleadings having become closed, (see *Rule* 262): *Webb v. Kerr*, 14 L. R. Ir. 294; and where a reply was delivered *without leave* after the time, and before notice of motion for judgment, it was held to have the effect of preventing notice of motion for judgment from being given under the English Rules, on admission of the defence by default of reply: *Graves v. Terry*, 9 Q. B. D. 170; see also notes to *Rules* 243, 246.

In Ontario, however, it has been held that the delivery of a reply after the three weeks does not in itself entitle the opposite party to move to set it aside, and even if strictly the right to move exists, the pleading should not in general be set aside, but the time should be extended: *Wright v. Wright*, 13 P. R. 268, see also notes to *Rules* 243, 246.

Where the time to deliver reply would have expired on 25th July, but was extended to 22nd August, and afterwards to 19th September, and on 26th September, no reply having been filed, the defendant took proceedings (warranted by the English, though not by the Ontario Rules), to obtain judgment as on admissions by reason of the default, and on the same day the plaintiff, by leave, served notice for leave to deliver a reply, leave was refused by the Judge of first instance on the ground of unexplained delay, but was granted, on payment of costs, by the Court of Appeal: *Eaton v. Storer*, 22 Ch. D. 91.

Leave to deliver a reply after the regular time for doing so had expired was granted, though the reply only sought to put in issue what was already in issue by the defence, the object of filing it being to enable the plaintiff to file a jury notice, the case being one in which a jury notice would be proper; and so it would be left to the discretion of the Judge at the trial to decide whether the trial should be with or without a jury: *Qua v. Canadian Order of Woodmen*, 5 O. L. R. 51.

Close of Pleadings by Reply.—The pleadings are not closed **Rules** until a reply has been delivered, or the time for delivering one has expired, and until then a defendant cannot give notice of trial: see **257, 258.** *Robinson v. Caldwell*, 1891, 1 Q. B. 519; 68 L. T. 218; 5 R. 320.

Form of Reply.—See II. & L. Forms, Nos. 126, 128. The reply must not raise a new ground of claim not made by the writ or statement of claim: *Rule* 288; *Williamson v. L. & N. W. Ry. Co.*, 12 Ch. D. 787; *Kingston v. Corker*, 29 L. R. Ir. 304; and must not contradict the statement of claim: *Breslaue v. Barwick*, 36 L. T. 52; *Collett v. Dickinson*, 26 W. R. 403; *Hancock v. De Nicville*, W. N. 1875, 230; but it may either traverse the allegations made in the defence, or confess and avoid them, or both: *Hall v. Eve*, 4 Ch. D. 341; 40 L. J. Chy. 145; 35 L. T. 926; 25 W. R. 177. In an action of ejectment where the defendant set up a claim as assignee of a mortgage, the plaintiff was held entitled to reply that the alleged assignment was made without consideration, and that the assignor was a lunatic at the time of the assignment to defendant's knowledge: *Smith v. Smith*, 2 Q. B. 410.

Defence to Counter-claim and Reply Thereto. — *Quære*, whether the word "plaintiff" in this *Rule* includes a plaintiff by counter-claim: *semble*, it does: see *Irvine v. Turner*, 16 P. R. 349; *Rule* 250 and notes; but see *Jud. Act*, s. 2 (5).

257. No pleading subsequent to reply other than a joinder of issue shall be pleaded without leave of the Court or a Judge, and then upon such terms as the Court or Judge thinks fit. *Con. Rule* 382. Leave for subsequent pleadings.

Same as Eng. (1883), R. 277.

Pleadings cannot go beyond reply without leave, except that the defendant may join issue if he chooses. That, however, would not seem to be necessary, as the pleadings are deemed to be closed without joinder of issue, at the expiration of the time within which the delivery of subsequent pleadings is necessary: *Rules* 258 and 262. If the plaintiff replies specially, it may be necessary for a defendant either to amend his statement of defence or to rejoin, so as to set up some new feature in the case, in the nature perhaps of a confession and avoidance, or something destroying the effect of the reply: see *Williamson v. L. & N. W. Ry. Co.*, 12 Ch. D. 792-3; but this cannot now be done in any case without leave: *Rules* 304 and 257.

In *Norris v. Beazley*, 35 L. T. 845, leave to rejoin was refused, the proposed rejoinder being regarded as unnecessary, and only amounting to a statement of matters contained in the statement of defence in a more detailed way.

In *Evans v. Gann*, W. N. 1875, 199, leave was granted to plead a counter-claim after issue joined.

As to pleading grounds of defence to a counter-claim arising after delivery of defence thereto, see *Rule* 292.

258. Subject to *Rule* 257, every pleading subsequent to reply shall be delivered within 4 days after the delivery of Time for delivery

Rule 259. the previous pleading, unless the time is extended by the Court or a Judge. Con. Rule 383.

Same as Eng. (1883) R. 278.

An extension by consent will doubtless be sufficient: see *Rule 303*.

4. RAISING QUESTIONS OF LAW IN PLEADINGS.

Questions
of law, how
to be
determined.

259. A party shall not be at liberty to demur, but shall be entitled to raise by his pleading any point of law, and the point so raised shall be disposed of by the Judge who tries the cause at or after the trial, provided that by consent of the parties, or by order of a Judge of the High Court on the application of either party, the same may be set down for hearing and disposed of at any time before the trial. Con. Rules 384, 385; Rules 23rd June, 1894, 1322, amended.

Same as Eng. (1883) Rs. 285, 286.

Scope of Rule.—Though by this *Rule* demurrers are abolished, the object of this and the succeeding *Rules* is to preserve a procedure for determining substantial questions of law as expeditiously as by the former demurrer, while rendering it no longer possible to raise objections which would lead to nothing but an amendment: see *Burstall v. Beyfus*, 26 Ch. D. 35; *Brophy v. Royal Victoria, etc.*, Co., 2 O. L. R. 651.

A motion to strike out the name of one of several plaintiffs, on the ground that he has no title to maintain the action, should not be made under *Rule 185*, but the objection should be raised under this *Rule*: *Morang v. Rose*, 3 O. L. R. 354.

Three methods of proceeding are provided by *Rules 259-261* (see *Burstall v. Beyfus*, 26 Ch. D. at p. 38, and *Hubback v. Wilkinson*, 1899, 1 Q. B. 91), namely:—

(1) By raising on the pleadings a question of law, so that the parties may have it quickly decided: *Rule 259*.

(2) By raising on a pleading (see *Lever v. Land Securities*, 70 L. T. 323), the question whether it discloses any reasonable cause of action or answer. If it does not the Court or Judge may order the pleading to be struck out, not necessarily disposing of the action: *Rule 261*, first part.

(3) In a case where an action, or defence, is shewn by the pleading, or by undisputed facts, to be frivolous and vexatious, then the Court or Judge can dismiss the action or order it to be stayed, or judgment to be entered, as may seem just: *Rule 261*, last part.

A fourth mode of procedure for disposing of a preliminary question of law, which may dispose of the action without going to trial, is provided by *Rule 373*, and this course may be pursued where the preliminary question is not raised by the pleadings, but it can be shewn nevertheless to be necessarily involved in the action and to be convenient to have decided *in limine*: see notes to *Rule 373* and *Magnus v. Nat. Bank of Scotland*, 58 L. T. 617; 37 W. R. 602, *ante*.

Horton v. White, 61 L. T. 683; 38 W. R. 201. Ordinarily pleadings are only required to state the material facts: *Rule 268*. Questions of law may arise on the facts alleged. Under this *Rule*, however, it will be proper to raise and state a point of law in a pleading.

A point of law will always be based upon a certain state of facts, which must be assumed or proved to be true before the point of law can be disposed of. The facts in the opposite pleading may be expressly admitted, and *Rule 616* may then apply; or (as formerly by a demurrer) a pleading may allege that the pleading of the opposite party discloses no cause of action or defence, and a point of law within this *Rule* will thus be raised: *Solaman v. Warner*, 1891, 1 Q. B. 734; *Thioden v. Tindall*, 7 Times, 581; and the facts in the pleading will in such case be taken to be admitted: *Hollender v. Foulkes*, 26 Ont. 61.

The facts raising the point of law were, in *O'Brien v. Tysen*, 28 Ch. D. 372, assumed to be true, though denied by the pleading of the opposite party, where the case was set down by consent under this *Rule* for argument: see also *Shafte v. Rolckow*, 34 Ch. D. 725. The facts were verified by affidavit in *Re Braeken*, 43 Ch. D. 3, where the case was set down pursuant to an order. Probably on motion to set down a point of law raised under this *Rule* for argument, an investigation on affidavit or otherwise may take place to ascertain whether, notwithstanding the pleadings, there is any real dispute as to the facts necessary for the determination of the point of law: see *Blaydes v. Selby*, 35 Sol. Jour. 528, where admissions of fact were made.

Procedure.—The question of law raised will be determined at the trial, unless, by consent, or by order, under the latter part of the *Rule*, the case is set down for argument at the Weekly Court.

Motion to set down for Argument.—The motion to set the matter down for argument must be made before a Judge in Chambers: see *Rule 6 (a)*, *Rule 42 (16)*, and *Bank of Montreal v. Morrison*, 3 O. W. R. 303; *Smith v. Smith*, 5 O. W. R. 518, 673.

An order may be made where the decision of the point of law will materially affect and have an important bearing upon the action, and probably cause a saving of expense: *London, Chatham & Dover Ry. v. S. E. Ry.*, 53 L. T. 109; *Chatenay v. Brazilion, etc.*, 1891, 1 Q. B. 70; and see *Leyman v. Latimer*, 3 Ex. D. 352; 26 W. R. 305; 37 L. T. 819; but probably not, unless the action, or a distinct cause of action, or some considerable question in the action, can be disposed of (see *Rule 260*) or where the question of law may not arise if the issues of fact are tried: *Parr v. London, Edinburgh & Glasgow Assoc. Co.*, 8 Times, 88; particularly where evidence may be lost by delaying the trial of the issues of fact: *Scott v. Mercantile, etc., Ins. Co.*, 8 Times, 431 (see 66 L. T. 811); and see *Re Palmer*, 22 Ch. D. 88; *Owners, etc., of Muori King v. Hughes*, 73 L. T. 141, in note to *Rule 531*.

Party to Begin.—The party entitled to begin is the party who raised the point of law in his pleading: *Richards v. Butcher*, 62 L. T. 867; *Stevens v. Choron*, 1901, 1 Ch. 894.

Stay of Trial pending Appeal on question of Law.—The trial of the issues of fact will not in general be stayed pending an

Rule 259. appeal respecting questions of law: *Re Palmer*, 22 Ch. D. 88; and see *Arnold v. Toronto Ry. Co.*, 10 P. R. 394; *Hockley v. G. T. Ry. Co.*, 7 O. L. R. 186.

Examples.—On a motion to strike out a pleading as bad in law, the Court will not look at the pleading with the same strictness as upon a demurrer under the former practice: *Bank of Hamilton v. George*, 16 P. R. 418.

Under this *Rule* an objection in the nature of the former general demurrer for want of equity was entertained: see *Salaman v. Warner*, 1891, 1 Q. B. 734; *Thioden v. Tindall*, 65 L. T. 343; *Cobb v. G. W. Ry.*, 37 Sol. Jour. 190; also a question of law depending on the construction of a will: *Re Ball*, 30 Ch. D. 508 (though that case was brought on under *Rule 261*); *Chatenay v. Brazilina, et al.*, 891, 1 Q. B. 79; or any other instrument such as a debenture: *Page v. International*, 68 L. T. 435; the effect of a disentailing deed: *Millbank v. Vane*, 1893, 3 Ch. 79; the validity of an admitted instrument imposing a fetter on a mortgagor's right of redemption: *Salt v. Northampton*, 45 Ch. D. 194; 1892, A. C. 8; in an action of libel whether statements by solicitors in objections to taxation while acting as solicitors were absolutely privileged: *Pedley v. Morris*, 65 L. T. 523; 10 W. R. 42; a question of estoppel: *Priestman v. Thomas*, 9 P. D. 210; of *res judicata*: *Caird v. Moss*, 33 Ch. D. 22; *Boswell v. Coaks*, 6 R. 167; a question preliminary to the right to sue, e.g., a defence that an action would lie only after adjustment of insurance by arbitration: *Viney v. Bignold*, 20 Q. B. D. 172; whether a corporation can maintain an action for libel: *Mayor of Manchester v. Williams*, 1891, 1 Q. B. 94; whether the Atty.-Gen. or Local Board could sue for a nuisance: *Atty.-Gen. v. Logan*, 1891, 2 Q. B. 100; whether an action of tort survived to an executor suing: *Oakey v. Dalton*, 35 Ch. D. 700; whether plaintiffs who had assigned their business to defendants in trust for creditors had a right to sue for an account: *Cooke v. Smith*, 45 Ch. D. 38; whether the purchaser, from the proprietors of a trade mark, of goods having that mark, could sue alleged infringers of the trade mark: *Richards v. Butcher*, 62 L. T. 867; whether a Statute of Limitations applied to bar the plaintiff's claim: *Parker v. London County Council*, 1904, 2 K. B. 501; whether the Court has jurisdiction: *Compagnie de Mocabique v. British S. A. Co.*, 1892, 2 Q. B. 358; 1893, A. C. 602; a question under the Statute of Frauds: *Stokell v. Niven*, 61 L. T. 18; whether notice of action was necessary: *McCarthy v. Vespra*, 16 P. R. 416. A statement of claim setting up a cause of action, in respect of which a notice of action is necessary, but omitting to allege that notice of action was given, cannot be struck out on that ground: *Coumce v. Weidmann*, 16 P. R. 239.

A pleading which sets up matter which has been held by an unreversed decision of the Court of Appeal to be bad in law, will be struck out, though the pleader disputes the correctness of the decision: *McCarthy v. Vespra*, 16 P. R. 416; *Lavery v. Tuckett-Lavery*, 2 O. L. R. 162.

The question whether an action would lie without an allegation of special damage for falsely and maliciously and without reasonable or probable cause presenting a bankruptcy petition was held not to be one to be determined on application to strike out a statement of claim as disclosing no reasonable cause of action: *Wyatt v. Palmer*, 1896, 2 Q. B. 196. Nor the question whether one of several plaintiffs was entitled to maintain the action: see *Morung v. Rose*, *supra*, p. 464.

260. If, in the opinion of the Court the decision of such point of law substantially disposes of the whole action, or of any distinct cause of action, ground of defence, set-off, counter-claim or reply therein, the Court may dismiss the action or make such other order as may seem just. Con. Rule 386; Rules 23rd June, 1894, 1322, amended.

Rules
260, 261.
Judgment
thereon.

Same as Eng. (1883) R. 287.

Leave to amend may be given in a proper case: *Richards v. Butcher*, 62 L. T. 867, on such terms as to costs as may be just: *Preston v. Fulwood*, 34 W. R. 200.

Where an action is dismissed because the statement of claim shews no cause of action, a fresh action may be brought: see *Jones v. Lucile*, 64 L. T. 763; 39 W. R. 629.

261. A Judge of the High Court may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just. Con. Rule 387; Rules 23rd June, 1894, 1322.

Pleading
may be
struck out.

Same as Eng. (1883) R. 288, except that the Eng. Rule authorizes "the Court or a Judge" to act. The power by the Ontario Rule is given to "a Judge of the High Court." The object of the alteration is to exclude the jurisdiction of the Master in Chambers, and of officers having the like jurisdiction: see *Rule 6 (a)*; *Knapp v. Carley*, 7 O. L. R. 409.

Scope of Rule.—Two cases are provided for by this Rule:

Two cases
provided for.

(1) Where a pleading discloses no reasonable cause of action or defence.

In such case a claim or defence may be struck out, not necessarily disposing of the action, as leave may be given to amend; or the action may be dismissed or judgment given for the plaintiff or defendant.

(2) Where an action is shewn by the pleadings to be frivolous or vexatious.

This appears to apply to the case of a plaintiff's action appearing by the pleadings to be frivolous or vexatious, and in such case the action may be stayed or dismissed, or judgment may be given for defendant.

This Rule does not seem to apply where only part of a pleading is scandalous, defective, or embarrassing. Rules 296-298, then apply.

A description of the cases in which this Rule is applicable has been expressed in various ways. In *Attys Gen. v. L. & N. W. Ry. Co.*, 1892, 3 Ch. 274; 27 L. J. N. C. 126, and *Parsons v. Burton*, W. N. 1881, 215; it was said that the Rule was not intended to take the place of a demurrer, but only to get rid of frivolous actions; but see *Habbuck v. Wilkinson*, 1899, 1 Q. B. 86.

Rule 261.

In *Darlow v. Scrutton*, 29 Sol. Jour. 131, Chitty, J., said, that the word "reasonable" is merely redundant, and the question is whether there is any question to be tried. In *Burstall v. Boyfus*, 26 Ch. D. 35, and *Dadswell v. Jacob*, 34 Ch. D. 278; 55 L. T. 751, 857; Cotton, L.J., thought that the Rule applied where a pleading is demurrable, but that the same strictness is not to be used in looking at the statements in the pleadings, as formerly on demurrer; see also *Bank of Hamilton v. George*, 16 P. R. 418; Landley, L. J., in *Dadswell v. Jacob*, at p. 284, said that a pleading which discloses no reasonable cause of action "is demurrable at once, and it is something more, it is perfectly frivolous," and that is the thing which is struck at by the Rule.

It has also been held that the Rule applies where a pleading is obviously bad: *Brophy v. Royal Victoria Life, etc., Co.*, 2 O. L. R. 651; see *Lawry v. Tuckett-Lavery*, *infra*; but does not apply where an arguable question of law is involved: see *Rodger v. Noxon Co.*, 19 P. R. 327; nor where a lengthy argument and citation of numerous authorities is necessary to shew that the plaintiff should not succeed: *Ib.*, 655; *Anderson v. Gorrie*, 36 Sol. Jour. 256; *Boaler v. Holder*, 54 L. T. 298; *Mutrie v. Binney*, 35 Ch. D. 614; see also *Re Bathygaun*, 32 W. R. 379; *Shafte v. Bolekoe*, 34 Ch. D. 725; and *Grosvenor v. White*, 61 L. T. 663; 38 W. R. 201; but only in a very clear case: *Christy v. Ion Specialty Co.*, 18 C. L. T. 85; 34 C. L. J. 163, as where on the face of the statement of claim the action is obviously unsustainable: *Atty.-Gen. v. L. & N. W. Ry. Co.*, 1892, 3 Ch. 274; 27 L. J. N. C. 126; as for example, being in respect of a question decided by the Court of Appeal adversely to the plaintiff's alleged cause of action: *Lawry v. Tuckett-Lavery*, 2 O. L. R. 162; or a defence is frivolous and vexatious: *Salomons v. Knight*, 8 Times, 472; *Reichel v. McGrath*, 14 App. Cas. 665; *Remington v. Scoles*, 1897, 2 Ch. 1; 76 L. T. 667; *Mackellar v. Hornsey*, 49 W. R. 301.

It is not convenient to act under the Rule where, assuming a defence to be true and to be no answer in law, the defendant may have another defence: *Grosvenor v. White*, 38 W. R. 201; 61 L. T. 663.

Again in *Kellaway v. Bury*, 66 L. T. 602; 8 Times, 434, Lindley, L.J., said, "It is not enough that the statement of claim should be demurrable, it is essential that the Court should see that the plaintiff has no case at all either on his statement of claim, or on such affidavits as he may file with a view to amendment.

Apart from this Rule the Court has jurisdiction to stay proceedings wherever necessary for the purposes of justice: see *Jud. Act*, s. 57 (9), and notes, *supra*, p. 56; and it has moreover inherent jurisdiction to prevent an abuse of its process.

(1) No Reasonable Cause of Action or Defence.—In ascertaining whether there is a reasonable cause of action or answer, the Court does not try the action on the pleadings, but merely looks to see if a reasonable case is set up: *Louis v. Guardians of Marylebone*, 4 Times, 442. The pleading complained of will not be looked upon with the same strictness as it used to be upon a demurrer; a party is not to be lightly deprived of a ground of substantial defence by the summary process of a judgment under this Rule: *Bank of Hamilton v. George*, 16 P. R. 418; *Dadswell v. Jacobs*, 34 Ch. D. 278. A defence to a *sci. fa.* action which might have been pleaded as a defence to the original action was struck out: *Shaver v. Cotton*, 16 P. R. 278; but the Court refused to strike out clauses of a statement of claim because notice of action was not alleged to have

been given though notice appeared to be necessary: *Coumce v. Weidman*, 16 P. R. 239; also where a statement of claim set up an agreement required by the Statute of Frauds to be in writing, but not stating it to be in writing: *Fraser v. Pape*, 91 L. T. 340. **Rule 261.**

The principles formerly applicable to demurrers will, however, to some extent be applied. As a general rule the pleading alone will be looked at: *Boaler v. Holder*, 54 L. T. 299; *Sulomons v. Knight*, 8 Times 473; *Willer v. Beauchamp*, 11 P. D. 59; *Reichel v. McGrath*, 14 App. Cas. 667; *Peru v. Peruvian Guano Co.*, 36 Ch. D. 489; and perhaps the particulars if any: see *Davey v. Bentinck*, 1893, 1 Q. B. 188; but the admissions of the defendant may also be considered: *Remington v. Scoles*, 1897, 2 Ch. 1; 76 L. T. 667; it is not enough to refer to a document in the pleadings and read the document on the motion: the part relied on must be set out in the pleading: *New Chile v. Lee*, 4 Times, 444; *Howard v. Hill*, W. N. 1887, 193.

Where therefore a material fact is not pleaded, without which no cause of action or defence is disclosed, the pleading might formerly have been demurred to; now, objection in law may be taken to it under Rule 259; see *Griffiths v. London and St. Katharine Docks*, 12 Q. B. D. 493; 13 Q. B. D. 259, (*sed vide Coumce v. Weidman, supra*); or a motion to strike out may be made under Rule 261, in a plain case, and perhaps also in a case where the possibility of amendment is doubted, so as to compel the party whose pleading is defective to shew by affidavit whether he can amend it.

A statement of claim was struck out where the Court was satisfied that the plaintiff could not succeed at the hearing: *South Hetton Coal Co. v. Haswell S. & E. Co.*, 1898, 1 Ch. 463; 78 L. T. 8; *Hodson v. Pare*, 1899, 1 Q. B. 455.

Liberty to Amend.—The Court will give leave to amend in a proper case rather than give judgment in ignorance of facts which it ought to know before rights are decided: *Steeds v. Steeds*, 22 Q. B. D. 37; *Griffiths v. London & St. Katharine Docks, supra*; *Richards v. Butcher*, 62 L. T. 867; on such terms as to costs as may be just: *Preston v. Fullwood*, 34 W. R. 200.

Application.—An application to strike out a pleading should be made promptly. It may be made immediately after the delivery of the pleading, and before pleading in answer to it: *Atty.-Gen. v. L. & N. W. Ry. Co.*, 1892, 3 Ch. 274, or perhaps after the close of the pleadings: see *Tucker v. Collinson*, 34 W. R. 354; at any rate before the case is set down for trial: *Cross v. Howe*, 62 L. J. Ch. 342.

(2) Frivolous and Vexatious Actions.—Under the second branch of the Rule the action must be obviously frivolous or vexatious; see *per Lindley, L.J.*, in *Atty.-Gen. v. L. & N. W. Ry. Co.*, 1892, 3 Ch. 277. An action appearing from the pleadings to be of that description comes within this Rule: see *Willis v. Beauchamp*, 11 P. D. 59; *Reichel v. McGrath*, 14 App. Cas. 667; but, apart from the Rule altogether, the Court has inherent jurisdiction to prevent abuse of its process, and to dismiss an action which can on motion be shewn to be frivolous or vexatious; see *Metropolitan Bank v. Pooley*, 10 App. Cas. 210; *Kellaway v. Bury*, 96 L. T. 603; *Brophy v. Victoria L. I. Co.*, 2 O. L. R. 651; *Lawry v. Tuckett-Lawry*, 2 O. L. R. 162; *Ker v. Williams*, 29 Sol. Jour. 687; and notes to sec. 57 (9) of the Ind. Act. *supra*, p. 56.

Rule 262.

This Rule only applies after a statement of claim is delivered: but the application need not be made until after the close of the pleadings, when the Court may look at the whole case upon the pleadings: *Tucker v. Collinson*, 34 W. R. 354. A motion before delivery of statement of claim may, however, be made by way of application for the exercise of the inherent jurisdiction of the Court: *Ker v. Williams*, 29 Sol. Jour. 681.

Jurisdiction under this Rule will only be exercised with caution: *Magrath v. Reichel*, 57 L. T. 850; 14 App. Cas. 667, and a doubtful question of law will not be decided: *Roberts v. Charing Cross Ry.*, 1903, W. N. 13; 87 L. T. 732; nor will an action be dismissed brought *bona fide* to try a question of law: *Lea v. Thursby*, 59 L. T. 744; 90 L. T. 265. The improbability of the facts alleged is not material. However improbable, their truth will be assumed: see *Laurance v. Norreys*, 39 Ch. D. 236; *Langdale v. Knill*, 6 Times, 236; *Johnston v. Johnston*, 33 W. R. 239; but if nevertheless the Court is satisfied that the action is frivolous or vexatious: *Kellaway v. Bury*, 66 L. T. 603; 8 Times, 433, as for example, being plainly based upon some ground which, if proved, as it is assumed it will be, would not in law entitle plaintiff to judgment: *Johnston v. Johnston*, 33 W. R. 239; *Re Batthyany*, 32 W. R. 379; *Rep. of Peru v. Peruvian Guano Co.*, 36 Ch. D. 489; *Williams v. Earl Beauchamp*, 11 P. D. 60; *Weldon v. Maples*, 20 Q. B. D. 331; *Willis v. Howe*, 1893, 2 Ch. 545; 2 R. 427; or being a case where a plea of *res judicata* if raised must succeed: *Macdougall v. Knight*, 25 Q. B. D. 1, see also *Reichel v. Magrath*, 14 App. Cas. 667; *Rio Tinto v. Société des Métaux*, 6 Times, 478; *Stephenson v. Garnett*, 1898, 1 Q. B. 677. So where an action was brought against an official liquidator personally, in respect of property vested in him officially, so that no action was maintainable, except against him officially, and by leave of the Court: *Graham v. Edge*, 4 Times, 442; an action for libel against a solicitor respecting statements made by him in an affidavit made in the action on an interlocutory motion: *Gompas v. White*, 6 Times, 20; see also *Lilley v. Roney*, 61 L. J. Q. B. 727; *Lawrence v. Newberry*, 7 Times, 588; *Salomons v. Knight*, 8 Times, 472; *Guy v. Walker*, 8 Times, 314.

This Rule would seem to contemplate that the frivolous or vexatious nature of the action or defence should appear from the pleadings: see also *Atty-Gen. v. L. & N. W. Ry.*, 1892, 3 Ch. 278; but in *Rep. of Peru v. Peruvian Guano Co.*, 36 Ch. D. 489; affidavits, and in *Remington v. Scoles*, 1897, 2 Ch. 1; 76 L. T. 667, the defendant's admissions under oath in another Court, were admitted: see also cases, *supra*, p. 56. Probably affidavits may always be used, as the application may be considered to be made to the Court both under this Rule and under its inherent jurisdiction: *Fletcher v. Bethom*, 41 W. R. 621; *Chaffers v. Goldsmid*, 1894, 1 Q. B. 190; and see *Boswell v. Coaks*, 6 R. 167.

A defendant may move notwithstanding that the action is brought by an infant: *Anon.*, 29 Sol. Jour. 638.

5. CLOSE OF PLEADINGS.

When
pleadings
closed.

262. As soon as either party has joined issue upon any pleading of the opposite party simply, without adding any further or other pleading thereto, [or as soon as the time for

amending the pleadings under these Rules or under any **Rule 262.** order, or for delivering a reply or subsequent pleading, has expired,] the pleadings as between such parties shall be deemed to be closed [without any joinder of issue being pleaded by any or either party.] **Con. Rule 392. Rules 23rd June, 1894, 1323.**

The clauses in brackets are not in Eng. (1883) R. 280, which is in other respects the same.

Under this *Rule*, in an action in which there is no counter-claim, it is not necessary to deliver any pleading to the defence: see *Rule* 256, 300: *Lockington v. King*, 7 C. L. T. 47; *Robinson v. Caldwell*, 1893, 1 Q. R. 519; 5 R. 320; and the pleadings become closed when the plaintiff has delivered a joinder of issue, or where, without joinder, three weeks have elapsed from the delivery of the defence: *Schneider v. Proctor*, 9 P. R. 11. Where there is no counter-claim.

Where there is no counter-claim and a reply has been delivered, the pleadings become closed without the delivery of any other pleading or of a joinder of issue upon the expiration of four days from the delivery of the reply: *Qua v. Canadian Order of Woodmen*, 5 O. L. R. 51; and see *Weller v. Proctor*, 10 P. R. 323; and *Piper v. Benjamin*, 17 P. R. 267.

A joinder of issue may, however, properly be delivered either to a defence, or a reply, and sometimes materially saves expense and delay: see *Robinson v. Caldwell* and *Qua v. Can. Order of Woodmen*, *supra*.

By the delivery by the plaintiff of a simple joinder of issue upon the statement of defence and counter-claim, the pleadings are closed, and notice of trial may be given: *Hare v. Cawthrope*, 11 P. R. 353; *Malcolm v. Race*, 16 P. R. 330; but a pleading which denies the allegations in a counter-claim, puts the counter-claiming defendant to the proof thereof, and submits that the counter-claim should be dismissed, is not a joinder of issue, but a defence, to which the counter-claiming defendant has 3 weeks to reply, so that the pleadings are not closed until he replies, or joins issue, or the 3 weeks expire: *Irwin v. Turner*, 16 P. R. 349.

A reply joining issue on the statement of defence, and further alleging that the facts set forth in the defence are no answer to the claim, is a joinder of issue only, within *Rule 262*, and closes the pleadings: *Gibson v. Nelson*, 19 P. R. 265.

In *Webb v. Kerr*, 14 L. R. Ir. 294, it was held that when the pleadings were closed by expiry of time under this *Rule*, neither party could re-open them without the leave of the Court; but see *contra Wright v. Wright*, 13 P. R. 268, where the delivery of a reply after the time had expired was held to be not necessarily open to objection. A reply was allowed to be delivered after time, to enable the plaintiff to give a jury notice, the case being one *prima facie* proper to be tried by jury: *Qua v. Canadian Order of Woodmen*, *supra*.

Where a pleading is amended under an order giving leave to amend, or the time limited by the order for making the amendment has expired, the pleadings are in the same position as to their being closed

Rule 263. as they were when the order was made: *Thompson v. Howson*, 16 P. R. 378.

Where a plaintiff issued a writ against several defendants, but only served one, and proceeded against him to the close of the pleadings, it was held that he must be assumed to have abandoned as to the others, and the pleadings in the action were closed, and notice of trial could be regularly given: *Vaudusen v. Johnson*, 3 C. L. T. 505.

Where there is a counter-claim.

Where there is a counter-claim the delivery of a pleading by the plaintiff which is more than a joinder of issue, and constitutes a reply to the defence proper, and a defence to the counter-claim, will not close the pleadings, as the counter-claiming defendant has further time to reply: *Irwin v. Turner*, *supra*. See also *Garner v. Tunc*, 12 P. R. 280, decided under the former Con. Rule 425, repealed by Rule 1327 of 23 June, 1894 (see note to Rule 304).

Where a third party has been made a defendant to a counter-claim, the action is not at issue till the counter-claim has been struck out, or the third party has pleaded, or become in default: *Canadian Securities Co. v. Prentiss*, 2 C. L. T. 90.

A counter-claim must be a defence, and therefore a joinder of issue on the defence, not mentioning the counter-claim, closes the pleadings, and notice of trial thereafter is therefore regular: *Macara v. Snow*, 12 P. R. 616.

See also notes to Rules 433, 530.

Note may be entered of default.

263. Where any party makes default in delivering a statement of defence, or subsequent pleading, including pleadings in counter-claims, within the time limited therefor, in cases where interlocutory or final judgment cannot be signed, the opposite party may, at any time before the pleading is filed, upon proof of the default, by *praecepe* to the officer with whom the pleadings are filed, require him to note that the pleadings in the action are closed as to the party in default: and thereupon the officer shall enter such note in the pleadings book accordingly, and thereafter no pleading by the party in default shall be received or filed without the order of a Judge. Con. Rule 393. Rules 23rd June, 1894, 1324, *amended*.

There is no similar English Rule.

Where interlocutory judgment cannot be signed, and an assessment of damages is necessary, or a motion for judgment, after the delivery of a statement of claim to which no defence is filed, the pleadings must be first closed by the entry of a note under this Rule before the case is set down for assessment of damages, or on motion for judgment: *Alexander v. Alexander*, 1 O. L. R. 639.

In *Lloyd v. Ward*, 13 P. R. 238, Saturday being the last day to deliver a defence, the plaintiff caused a note under this Rule to be entered at 2.25 p.m., conceiving that no defence could be validly delivered on that day, none having been served by 2 o'clock; but it was held that under Rule 267, filing was part of the delivery, and

the defendant had under former Rule 7, up to 3 o'clock to file the Rules defence, whether it had been delivered or not. The offices now close at 1 p.m. on Saturday: see Rule 5. 264, 265.

An action should not be set down on motion for judgment by default of pleading until the pleadings are noted as closed: see Rule 593; directions to officers in note to Rule 539, and *Alexander v. Alexander*, 1 O. L. R. 639. A defence filed after the pleadings have been so noted as closed is irregular, but is not a nullity, and if filed before notice of motion for judgment is given entitles the defendant to notice of the motion: *Jackson v. Gardiner*, 19 P. R. 137.

If a defence be delivered after service of a notice of motion for judgment, it should be brought to the attention of the Court by the plaintiff, if he is aware of it: or the defendant may do so, and the Court will exercise its discretion under all the circumstances: *Gibbings v. Strong*, 26 Ch. D. 66; *Montagu v. Land Corporation*, 56 L. T. 730; or the defendant may move to stay the motion for judgment, and for leave to deliver the defence: *Potts v. Deane*, 11 L. R. Ir. 396. See also *Wilson v. Noble*, 11 L. R. Ir. 546.

See also notes to Rule 246.

See also notes to Rules 246 and 262.

6. GENERAL RULES OF PLEADING.

264. The following Rules of pleading substituted for those used in the Court of Chancery and in the Courts of Common Law, prior to *The Ontario Judicature Act, 1881*, shall continue to be used. Con. Rule 394. Old rules abolished.

Same as Eng. (1883) R. 197.

For the definition of "pleading," see sec. 2 (9) of the Act.

The former system of pleading at Common Law required the parties to set forth the legal result of the facts, and not the facts themselves. Under *The Judicature Act* the facts must be stated, and the Court decides what is the legal result: *Hammer v. Flight*, 35 L. T. 127. The new system is thus to a great extent similar to that of the former Court of Chancery, and the forms of Chancery pleadings, except in some points noticed hereafter (notes to Rule 268), will in general serve as guides: *Heap v. Marris*, 2 Q. B. D. 630.

265.—(1) Every [writ,] pleading [or other document,] may be printed or written, in whole or in part, but not 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 23rd June, 1894, 1325. Copies of pleadings.

See Eng. (1883) R. 205, and Chy. O. 66 and 403.

The words in brackets, introduced in 1894, make it clear that copies of writs are covered by this Rule, affirming the decision in *Sparks v. Purdy*, 15 P. R. 1, so that no more than 4 copies can be taxed.

Rules**266-263.**

The provisions of this *Rule* cover all copies of the writ, pleading or other documents required during the litigation, including the copy for brief: *Sparks v. Purdy, supra*.

Printing pleadings.

(2) If more than three copies, exclusive of the draft, are required, the party may have the writ or pleadings 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 23rd June, 1894, 1325.

This is the same as the Chy. Gen. Ord. 404. The Eng. (1883) R. 205. is not similar.

See notes to clause (1) of this *Rule*.

How pleadings delivered should be marked.

266. Every pleading shall be delivered, and shall be marked on the face with the date of filing, and with the title of the action, the description of the pleading, and the name and place of business of the solicitor and agent (if any) of the party filing the same, or the name and address of the party filing the same if he does not act by a solicitor. Con. Rule 397.

Substantially the same as the Eng. (1883) R. 207, except that under the latter pleadings are to be delivered only, and need not be filed. Filing is necessary in Ont. under *Rule* 267.

Delivery includes filing and service.

267. Delivering a pleading shall include filing and service. Con. Rule 398.

The English practice does not require pleadings to be filed.

See *Lloyd v. Ward*, in note to *Rule* 263.

Form of pleadings.

268. Pleadings shall contain a concise statement of the material facts upon which the party pleading relies, but not the evidence by which they are to be proved; dates, sums and numbers shall be expressed in figures: the signature of counsel shall not be necessary. Con. Rule 399.

The somewhat similar Eng. (1883) R. 200, provides for the signing of pleadings, and that a pleading "shall contain, and contain only, a statement in a summary form of the material facts, etc." The pleadings in England since this *Rule* are now like a special indorsement on a writ which indeed always serves as a statement of claim: see O. 20, r. 1. The English pleadings and decisions thereon, and as to particulars, cannot now be safe guides in Ontario.

Facts to be stated.

The system of pleading introduced by the Jud. Act, 1881, requires not the legal result of the facts, but the facts themselves, to be stated: see note to *Rule* 264. A statement of claim therefore which merely alleged that a good and valid *donatio mortis causa* had been made to the plaintiff, without stating the facts which constituted it,

was formerly held to be demurrable: *Re Parton, Townsend v. Parton*, Rule 268. 30 W. R. 287; 45 L. T. 735. ~~see Addenda~~

Subsequent Rules modify slightly the original Rule requiring the facts only to be stated: see Rule 259, by which the contentions in point of law may be stated, and 271, under which the contentions of the party must be raised so as to prevent surprise. In complying with these Rules it may not always be proper to state only facts.

In an action for defamation, the plaintiff must set out as formerly Libel. the words of the alleged libel: see notes to Rule 275. and *Robinson v. Sugarman*, 17 P. R. 419; *Hay v. Bingham*, 5 O. L. R. 224; and the defendant must set out all the facts showing defences, e.g., justification or privilege: *Bell v. Lawes*, 51 L. J. Q. B. 359; or intended to be relied on in mitigation of damages, such as the plaintiff's general bad character: *Scott v. Sampson*, 8 Q. B. D. 491; see notes to Rule 488; or that the alleged libel (where in a newspaper article) was published in good faith and in the usual course of business: *Beaton v. Intelligencer*, etc., 22 Ont. App. 97; or that the words were spoken on a privileged occasion: *Vansycle v. Parish*, 1 O. L. R. 13; so in an action for libel, where the defendant pleads fair comment on matters of public interest, he must set out the facts upon which it is alleged that the article complained of was a fair comment, or allege the truth thereof: *Crow's Nest Pass Coal Co. v. Bell*, 4 O. L. R. 600.

In an action of slander it is not sufficient to allege that the defendant falsely and maliciously spoke and published the defamatory words complained of. The time and place, and the persons to whom, or in whose presence, they were spoken must be stated with reasonable certainty: *Thornton v. Capstock*, 19 C. L. J. 254; the statement that the words were spoken and published to certain named persons, "and to others at present unknown to the plaintiff," was held sufficient: *Townsend v. O'Keefe*, 18 P. R. 147; an allegation that during a period of 5 months the defendant spoke and published various slanders to certain named persons, and to others not known to the plaintiff, was held bad, and struck out because it did not shew which of the persons were present when the different statements were made, nor at which times and places they were present: *Ib.*

A statement of claim in an action for defamation for words charging the plaintiff with an offence under R. S. C. c. 168, ss. 26, or 58, need not aver special damage, but it is otherwise when the offence charged is a violation of ss. 27, or 59: *Routley v. Harris*, 18 Ont. 405.

A counter-claim for slander, referring to charges set out in the statement of defence, on an occasion *prima facie* privileged, and alleging that they were falsely and maliciously spoken, was held to be a good pleading, though it omitted to shew in what respect the plaintiff had exceeded the privilege: *Hopewell v. Kennedy*, 9 O. L. R. 43.

A defence of purchaser for value without notice may be relied on at the hearing, though not expressly pleaded, if it be a just inference from the facts admitted, on the pleadings, or subsequently by agreement of the parties: *Taylor v. Blacklock*, 34 W. R. 175. Purchaser for value.

The pleadings in dower are governed by the same rules as those power, in other actions. The right of dower is a legal conclusion from certain facts, and those facts should be stated in the pleading: *Lauder v. Carrier*, 10 P. R. 612.

A plaintiff who claimed to be entitled to a right of way over a other cases, road, and an injunction against the obstruction of the road, was required to state in his pleading the way and the route and limitations

Rule 268. of the road over which he claimed the right. A general statement that there was a road over a certain farm connecting two other farms, and that the plaintiff and his tenants were entitled to a right of way over it, was held to be embarrassing: *Harris v. Jenkins*, 22 Ch. D. 481; see also *Spedding v. Fitzpatrick*, 38 Ch. D. 410. So a plaintiff claiming an easement must set out the facts on which he relies as entitling him, by grant, prescription or otherwise: *Farwell v. Houghton*, 12 L. R. Ir. 14.

Where the pleadings alleged that "the company has otherwise acknowledged the insolvency," it was held that as a matter of pleading, the manner of acknowledgment should have been stated: *Re British American Loan, etc., Co.*, 4 C. L. T. 248.

In a foreclosure action where the mortgagee applies for judgment, on default of appearance, not only for foreclosure but also for a personal order for payment, the statement of claim ought, shortly, to contain an express statement of the covenant or other contract upon which the order is claimed: *Law v. Philby*, 56 L. T. 230; 35 W. R. 401.

What are
"material
facts."

Stating the Material Facts.—The "material facts" are those which the party must prove to be fully and completely successful: *Prince v. Toronto Ry. Co.*, 5 O. W. R. 88. Facts may be "material," though they are not merely facts which must be proved in order to establish the cause of action; if they are facts which if proved would affect the damages, they are properly pleadable in a statement of claim: *Millington v. Loring*, 6 Q. B. D. 190; (explained, *Prince v. Toronto Ry. Co.*, *supra*); *Lumb v. Beaumont*, 49 L. T. 772; *Glossop v. Spindler*, 29 Sol. Jour. 556; *Whitney v. Moignard*, 24 Q. B. D. 630; so facts in mitigation of damages in an action for malicious arrest: *Pursley v. Bennett*, 11 P. R. 64; and in an action for slander: *Vansycle v. Parish*, 1 O. L. R. 13. The Eng. Rules of 1883 (R. 237), provide that no defence as to damages shall be necessary; and, therefore, such a defence is not allowed to be pleaded: *Wood v. Earl of Durham*, 37 W. R. 222; *sed vide*, *Whitney v. Moignard*, 24 Q. B. D. 630. There is no similar provision in Ontario.

In an action for malicious prosecution, a part of the statement of claim, setting out the observations of the Judge, before whom the plaintiff was tried on a criminal charge, was struck out, but a part, stating damage from publication of such charge, was allowed to stand: *Morrow v. Cheyne*, 12 P. R. 487.

In an action for damages for false representations inducing the plaintiffs to supply the defendant with goods and money, it is sufficient to aver that the goods and money were supplied on the faith of statements, oral and written (specifying them), falsely and fraudulently made, leaving the details of goods, etc., to be given by particulars subsequently if required: *Arthur v. Runnians*, 18 P. R. 205.

A plea to an action on a contract, that it was entered into for immoral or illegal consideration, must set out the particular facts relied on as establishing such consideration: *Clark v. Hagar*, 22 S. C. R. 510.

Though each paragraph should as nearly as possible contain a separate allegation, it need not contain a separate cause of action or defence: *Union, etc., v. Lyman*, 46 U. C. Q. B. 453. The facts must be stated concisely, without any rhetoric: *per* Mellish, L.J., in *Watson v. Rodwell*, 45 L. J. Chy. 744; 3 Ch. D. 380; but if a plead-

ing states only material facts, it will not be struck out merely be- **Rule 265.**
 cause the facts are stated at too great a length: *Heap v. Marria*,
 2 Q. B. D. 630; unless the pleading is so prolix as to embarrass:
Dary v. Garrett, 7 Ch. D. at p. 488; *Marsh v. Pontefract, etc.*, W.
 N. 1876, 7. Prolixity may consist in (1) necessary facts being stated
 at undue length; or (2) statements of unnecessary facts: *per*
Baggallay, L.J., in *Dary v. Garrett*, 38 L. T. 77. It is improper to
 state argument, or inferences and conclusions of law: *Dary v.*
Garrett, supra; *per Mellish, L.J.*, in *Watson v. Rodwell, supra*;
Hammer v. Flight, 35 L. T. 127; *Williamson v. L. & N. W. Ry. Co.*,
 12 Ch. D. 787; or matters of law except under *Rules 250-261*:
Stokes v. Grant, 4 C. P. D. 25; or "charges" such as were sometimes
 introduced in Equity pleadings, and were merely statements of the Admissions
 pleader's view of the equity: *Watson v. Rodwell, supra*; or evidence, and other
 evidence.
per *Evelyn v. Evelyn*, W. N. 1880, 62; see also *Blake v. Abdon*
Life Ins. Co., 35 L. T. 260; 45 L. J. C. P. 663; *Jones v. Turner*,
 W. N. 1875, 239; *Williamson v. L. & N. W. Ry. Co., supra*; *Prince*
v. Toronto Ry. Co., 5 O. W. R. 88; or evidence in the shape of ad-
 missions: *Askew v. N. E. Ry. Co.*, W. N. 1875, 238. Documents relied
 on as admissions are nothing but evidence: *Dary v. Garrett*, 7 Ch. D.
 473.

A plaintiff is entitled to have the defences set out in such a man-
 ner as will enable him upon reading them to form a fairly correct
 judgment as to their scope and meaning, and as to what is intended
 to be relied upon under them. Paragraphs should be arranged so as
 to group separate defences: *Dryden v. Smith*, (2) 17 P. R. 505. **Arrangement of
 allegations
 and causes
 of action
 and defence.**

The Court has a discretion to strike out statements which are
 open to any of these objections: *Rule 208*. There are many cases
 in which facts and evidence are so mixed up as to be almost indis-
 tinguishable: *per Archibald, J.*, in *Smith v. West*, W. N. 1876, 55;
 2 Charl. Ch. Ca. 41.

The plaintiff in an action to recover land, must set out all the
 material facts upon which his title is founded: see note to *Rule 285*.

The plaintiff need not state under what particular form of action
 he is proceeding; nor in what legal relation he claims to stand to the
 defendant: *Metropolitan Ry. Co. v. Defries*, 36 L. T. 150, 494;
Hammer v. Flight, 24 W. R. 346.

What is material, is a statement of the facts and of the relief
 claimed; and the facts need not be distributed so as to show which
 of them support each claim to relief. So long as they show that the
 plaintiff is entitled to any one kind of relief claimed, or, where there
 is a claim for general relief, to any relief at all, the paragraph con-
 taining them will not be objectionable: *Watson v. Hawkins*, 21 W. R.
 884.

Where the old forms of Common Law pleadings will serve as
 models, they may still be followed. Where a defendant had received
 a sum of money for the plaintiff, it was considered that the statement
 of that fact was all that could be required; and an application for
 the amendment of the statement of claim by setting forth the cir-
 cumstances under which the money was received, was dismissed:
Bartlett v. Roche, W. N. 1876, 54. **mer
 amon
 w Forms.**

Defences, however, of "never indebted" and "set-off," in the old
 forms, have been struck out as violating the present *Rule*: *Davis v.*
McCoy, Mr. Dalton, 11th April, 1882. See *Copley v. Jackson*, W. N.
 1884, 39.

Rule 269. The pleading of the "common counts" is not admissible: *Spradley v. Ferrier*, 20 C. L. J. 284.

The plea of "not guilty," without statutory authority to plead it, is not admissible: *Peterborough v. Midland Ry. Co.*, 12 P. R. 127.

Conditions precedent.

It has been held by some Judges in England that the old general allegation of the performance of conditions precedent is improper, not being an allegation of facts: see 72 L. T. Jour. 343; but see *Home Life Association v. Randall*, 30 S. C. R. 97; where it was held that the performance of conditions precedent to the right of action must still be alleged and proved by the plaintiff.

The English Rules of 1883 now contain an express Rule on the subject (Rule 210); see also *Bradley v. Chamberlyn*, 1893, 1 Q. R. 439.

Quare, whether hypothetical defences can be pleaded: *Smith v. Farr*, 14 Ont. 729.

Unconventional forms of pleadings.

An appearance with these words added, "the defendant admits only \$103, but otherwise disputes the plaintiff's claim in this action," was held to be in effect a statement of defence: *Voight, etc., Co. v. Orth*, 5 O. L. R. 443.

Signature of Counsel.—The provision that signature of counsel is not to be necessary, does not mean that it is improper and ought to be struck out: *Bernard v. Harwick*, W. N. 1876, 134. In *Duchatt v. Jones*, W. N. 1876, 17; 33 L. T. 777, counsel's signature was said to be desirable; and in case of a petition by trustees for advice, necessary: *Re Boulton's Trusts*, W. N. 1882, 62; 30 W. R. 596; 51 L. J. Chy. 493; but this practice is not followed in Ontario.

Admission of statements of opponent.

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.

This Rule corresponds in principle with the former practice in Chancery. The Eng. (1883) R. 371, is permissive only, and authorizes, but does not require (as this Rule does) a party to the action to give notice, by his own statement or otherwise, that he admits the truth of the whole or part of his adversary's statement.

In *Lee v. Button*, 12 Ch. D. 383, Malins, V.C., said that a defendant ought not to deny the plain and acknowledged facts, which it is neither to his interest, nor in his power to disprove.

As to the construction of admissions not made by reference to paragraphs of the opposite party's pleading, see *Dovey v. Irwin*, 4 Ont. 8; see also notes to Rule 216.

Where all the material allegations in the plaintiff's claim were admitted, he was not allowed to go into evidence: *The Hardwick*, 9 P. D. 32.

As to costs where proper admissions are not made, see Rule 1119.

As to withdrawing admissions made otherwise than in pleadings, see *East v. O'Connor*, 19 P. R. 301, *infra*, in notes to Rule 616.

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.

Rules
270, 271.
Manner of
making
admissions.

Not in the English Rules. See notes to Rule 272.

See Rule 269, which requires each party to admit such of the material allegations contained in the pleading of the opposite party as are true.

271. Each party in any pleading shall raise [all matters which show the action or counter-claim not to be maintainable, or that the transaction is either void or voidable in point of law,] and all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the [preceding] pleadings, as for instance, fraud, Statute of Limitations, release, [payment, performance, facts showing illegality either by statute or Common Law, or Statute of Frauds]. Con. Rule 402, amended.

Pleadings
to raise all
grounds of
defence or
reply.

Same as Eng. (1883) R. 211. The former Con. Rule 402, followed Eng. R. 1875, O. 10, r. 18, which was less full and specific. It did not contain the passages in brackets.

In *Byrd v. Nunn*, 5 Ch. D. 781, where a statement of defence denied the making of an agreement alleged, and proceeded to say that the person by whom it was alleged to have been made was of unsound mind, it was held that the only issue was the unsoundness of mind of the alleged contractor. In *Collette v. Goode*, 7 Ch. D. 842, the defendant alleged that a song was not duly registered by reason of the time of registration not being entered: he was not allowed to prove that the registration was void by reason of the name of the publishers not being truly stated. Both the above cases, however, depended to a great extent, upon the English Rules as to admissions, which have not been adopted in Ontario: see note to Rule 272.

Plea to the Jurisdiction of the Court.—In a proper case the Court will allow an objection of ouster of jurisdiction to be raised at the trial though not previously raised by the pleadings: *Crossfield v. Manchester Ship Canal Co.*, 1904, 2 Ch. 123.

Notice of Action.—Want of notice of action must be pleaded: *Verrill v. McAulay*, 5 Ont. 313; *McKay v. Cummings*, 6 Ont. 400; and see *Connee v. Weidman*, 16 P. R. 239.

Notice of Dishonour.—In an action on a dishonoured cheque, notice of dishonour to the drawer should be averred: *Fruhauf v. Groutenor*, 67 L. T. 350; 61 L. J. Q. B. 717; 8 Times, 744.

Rule 271. Libel—Justification—Privilege.—In an action for libel, justification, or privilege, must be specially pleaded: *Holt v. Luce*, 51 L. J. Q. B. 350, and see notes to *Rule 268*.

Fraud.—As to the mode of pleading fraud; see notes to *Rule 276*.

Statute of Limitations.—Prior to this *Rule* there was a difference in the mode of setting up a Statute of Limitation, which merely barred the remedy, and one which extinguished the title. As to the former the defendant was bound to plead it, but as to the latter, if it appeared by the plaintiff's claim that his title was extinguished under the Statute, the objection might have been taken by demurrer: see 11. & L., 2nd ed., p. 458. Now it would seem that in all cases the Statute must be pleaded. In the cases in which formerly a demurrer was proper, a motion may probably now be made under *Rules 259-261*.

Where the Statute is pleaded the particular section or sections relied on should be specified, or the defendant may be required to give further particulars: *Dodge v. Smith*, 1 O. L. R. 46.

Statute of Frauds.—The effect of this *Rule* and of *Rule 282* is to require the defendant who wishes to rely on the Statute of Frauds, in an action between the parties to a contract, to plead the Statute specifically; but where the plaintiff has to show a title good *in omnibus* (as in an action for conversion of goods) the defendant may without specially pleading the Statute of Frauds set up that the plaintiff's title is based upon a contract which is void under that Statute: *Kent v. Ellis*, 31 S. C. R. 110.

Formerly "at law, if the contract was denied, it was a matter of evidence whether the contract was one which could be sued upon, or whether the remedy was barred by the Statute; but in Equity, if the defendant intended to rely upon the Statute of Frauds or any other special statute, he was compelled to make a special averment of his intention": *per Mellish, L.J.*, in *Clarke v. Collow*, 46 L. J. Q. B. 54; see also *Morgan v. Worthington*, 38 L. T. 443.

Formerly in Equity the statute might have been relied on by demurrer where the facts, which made the statute apply, appeared on the face of the bill: *Wood v. Midgeley*, 2 Sm. & G. 115; *Agnew on Statute of Frauds*, 404; and might have been relied on as a defence, though not pleaded in the answer: *Wilde v. Wilde*, 20 Gr. 521; *sed vide Butler v. Church*, 18 Gr. 190; but in *Clarke v. Collow*, *supra*, the plaintiff by anticipation of the defence of the statute alleged facts to show that the contract though verbal was a binding one under the Statute, and the defendants traversed these facts merely, not setting up the Statute. It was held that defendant was not entitled to rely on the Statute.

The facts which make the Statute apply should be stated, and the particular provisions relied upon should be pointed to. It is not sufficient to merely make a general statement of reliance on the Statute: *Pullen v. Snellus*, 40 L. T. 303. But see *James v. Smith*, 1891, 1 Ch. 384, where it was held that it is not necessary to plead any particular section of the Statute of Frauds, but the defendant having pleaded sec. 4 was not allowed to amend, or avail himself of sec. 7 (see S. C. in Appeal, 65 L. T. 544, and *Dodge v. Smith*, 1 O. L. R. 46).

Though it has not been proper since the Judicature Act to raise Rule 272, the defence of the Statute of Frauds by demurrer; *Culling v. King*, 5 Ch. D. 660; *Morgan v. Worthington*, 38 L. T. 413; *Towle v. Topham*, 37 L. T. 308; *Duckins v. Lord Parkyn*, 4 App. Cas. 71; *Shardlow v. Cotterill*, W. N. 1881, 2; *Futcher v. Futcher*, 20 W. R. 881, and see *Johnson v. Bonhote*, 2 Ch. D. 208, a question under the Statute may probably now be raised under the procedure adopted in lieu of demurrers (see *Rules* 230-231) where the facts which make the Statute apply appear upon the pleading of the opposite party.

Where the Statute is not pleaded, it cannot now be relied on as a defence; see *Olliv v. Fisher*, 34 Ch. D. 367.

See also *Rule* 282 and notes.

Illegality.—See *Pearson v. Carpenter*, 35 S. C. R. 380.

Other Statutes.—As to pleading statutes relied on other than the pleading Statute of Limitations, and the Statute of Frauds, see 83 L. T. Jour. order 93; *Cahoun v. Collins*, 35 Ch. D. 373 (registration necessary under statutes, the Bill of Sales Act); *Hugieard v. Lely*, 56 L. T. 418 (registration under the Copyright Act); from which it would appear to be well to mention any statute relied on in the pleading. In order to prevent the imputation of an attempt to surprise. The pleadings in the above cases were held insufficient, but amendments were allowed; see also *McKay v. Canonnings*, 6 Ont. 400. As to *The Chattel Mortgage Act*, see *Williams v. Leonard*, 16 P. R. 511; 17 P. R. 73; and as to *The Registry Act* (R. S. O. c. 136), see *R. v. L. Assur. v. Paine*, 27 Ont. at p. 476, and as to *The Master and Servant Act*, (R. S. O. c. 157), see *Neil v. Park*, 10 P. R. 476. *Statute 2 of 1881 was added Routh - May 93 L.T. 10*

Where a plaintiff at the trial is allowed to amend by setting up a new case, the defendant is *ex debito justitiae* entitled to amend by setting up a defence thereto, and may in such defence set up the Statute of Frauds as to the new case, though not previously pleaded; *Ebbsley v. Harrison*, 17 P. R. 425; *Bramming v. Odhams*, 75 L. T. 622; and wherever the plaintiff is allowed by amendment to set up a new claim, the Court may, and ordinarily will, impose the term, that the defendant shall be in the same position in regard to such new claim under the Statute of Limitations, as if the action, as to such claim, had been commenced at the date of the amendment; *Hogaboon v. MacCallach*, 17 P. R. 377.

Res judicata.—Estoppel by *res judicata* cannot be relied upon unless specially pleaded; *Cooper v. Molsons Bank*, 26 S. C. R. 611; *Huntoun v. Sligo*, 20 Ch. D. 448; *Edevala v. Cohen*, 43 Ch. D. 187.

Performance.—As to the averment of performance of conditions precedent, see note to *Rule* 208.

272. Save as otherwise provided, the silence of a pleading as to any allegation made in the previous pleading of the opposite party shall not be construed as an admission of the truth of such allegation. Con. Rule 403.

See Eng. (1883) R. 209, which is different.

This *Rule* introduces the practice of the Court of Chancery as to admissions; Chy. O. 123; see also *Rule* 269. It was a principle of

Rule 273. Common Law pleading that each party was to be taken to admit those allegations in the pleadings of the opposite party which he did not deny, and that is the present English practice.

"Save as otherwise provided." The exceptions referred to in these words are those which require the pleading to specifically deny the right of the party to claim in a representative capacity; or the alleged constitution of a partnership firm: *Rule 290*; or the incorporation of a corporate party: *Rule 281*; or the legality of a contract; or its sufficiency in point of law: *Rule 282*.

Where a material fact therefore is alleged in a pleading, and the pleading of the opposite party is silent in respect thereto, the fact must be considered in issue: *Waterloo Mutual, etc., v. Robinson*, 4 Ont. 295; *Seabrook v. Young*, 7 C. L. T. 152; *King v. Bailen*, 31 S. C. R. 342.

Where a pleading, however, does not maintain silence, but contains an answer to allegations in opposite pleadings which has no sense if not read as admitting certain statements, those statements must be taken as admitted: *Richardson v. Jenkins*, 10 P. R. 292.

The present *Rule* is not applicable where under *Rule 250* a point of law is raised on the pleadings. Thus where a replication raised a question of law to the effect that certain paragraphs of the statement of the defence raised no defence to the action, it was held that this *Rule* did not apply, and that the statements referred to were thereby admitted for the purposes of the argument of the question of law: *Hollender v. Foulkes*, 26 Ont. at p. 65.

The English Rules under the Judicature Acts, in regard to admissions, differ from the above: see Eng. (1883) Rules 209, 213, 216, 218, the effect of which is that, so far as regards statements of claim and defence and counter-claim, and as regards parties who are not infants or lunatics, the want of a specific denial of a fact will operate as an admission, and will entitle the party, whose pleading is thus admitted, to move for judgment; and thus upon a technical construction of the pleadings final judgment may be obtained: see *Thorpe v. Holdsworth*, 3 Ch. D. 637, and *Rutter v. Tregent*, 12 Ch. D. 758; and the merits might sometimes not be reached: see *Tildesley v. Harper*, 7 Ch. D. 403; reversed, however, in appeal, 10 Ch. D. 393; *Lumsden v. Winter*, 8 Q. B. D. 650; *Caroli v. Hurst*, W. N. 1883, 115; *Thorn-ton v. Church*, 10 L. R. Ir. 378; *Williamson v. London, etc.*, 27 W. R. 724; *Elliott v. Harris*, 17 L. R. Ir. 351.

By *Rule 269* (which is founded upon Chancery G. O. 124) each party is to admit such allegations in the pleadings of the opposite party as are true; and if he does not do so, *Rule 1149* gives the Court or Judge power to make a proper order with respect to any extra costs occasioned by the failure to admit.

Relief
claimed to
be stated
specifically.

273. Every statement of claim shall state specifically the relief which the plaintiff claims, either simply or in the alternative, and may also ask for general relief. And the same rule shall apply to any counter-claim made, or relief claimed by the defendant, in his statement of defence. If the plaintiff's claim be for discovery only, the statement of claim shall shew it. Con. Rule 404.

Same as the Eng. R. 1875, O. 19, r. 8. The *Rule* of 1883, **R. Rule 274**, 230, is different, providing that general or other relief need not be prayed for, and may always be given.

A claimant is not entitled to any relief unless it is specifically prayed for, or can be given under a prayer for general relief; and if general relief is not asked for, it will be considered that the party does not want it: *Holloway v. York*, 25 W. R. 627; *Cargill v. Bower*, 10 Ch. D. 508. Where general relief is claimed, a pleading will not be open to objection, if the facts stated in it show that the plaintiff is entitled to any relief: *Watson v. Hawkins*, 24 W. R. 884, unless the relief be foreign to the scope of the claim: *Gaughan v. Sharpe*, 6 Ont. App. 417; *Gunn v. Trust & Loan Co.*, 2 Ont. 393. It is sufficient to set out in the statement of claim facts which entitle to relief, and pray for any relief that the facts warrant: *Phelps v. White*, 7 L. R. Ir. 160. Under a prayer for general relief the Court will grant the appropriate relief which the facts warrant, although unable to grant the specific relief claimed: see *Slater v. The Canada Central Ry. Co.*, 25 Gr. 363.

Facts, arising after action brought, entitling the plaintiffs to further relief, in respect of the subject matter of the litigation, beyond what they were entitled to at its commencement, have been allowed to be set up by amendment: *Yorkshire Waggon Co. v. Cornwall Minerals Co.*, 73 L. T. Jour. 120.

In an action for an injunction, under the usual prayer for general relief, damages are included under sec. 58 (10) of the Jud. Act (Lord Cairns' Act): *Serrao v. Noct*, 15 Q. B. D. 549.

As to the efficiency of a prayer for general relief, see *Cook v. Martyn*, 2 Atk. 3, and the observations thereon in *Byrne v. Freer*, 2 Moll. 166.

It does not follow, because a plaintiff has asked for reformation of a document, that a defendant is entitled to claim the same relief though he has not asked for it: *Wolfe v. Hughes*, 1 Ont. 322; 18 C. L. J. 177. See as to asking two inconsistent kinds of relief, *Evans v. Davis*, 27 W. R. 285, referred to in note to *Rule* 298, and *Breslau v. Barwick*, 24 W. R. 902.

274. Where the plaintiff seeks relief in respect of several distinct claims or causes of complaint founded upon separate and distinct [facts,] they shall be stated, as far as may be, separately and distinctly. And the same rule shall apply where the defendant relies upon several distinct grounds of defence or counter-claim, founded upon separate and distinct facts. Con. Rule 405.

Same as the Eng. (1883) R. 231, except that in the latter, "grounds" is used instead of "facts," the word used in the Eng. R. 1875, O. 19, r. 9, from which the Ont. *Rule* was taken.

Rules 186 and 232 enable the plaintiff to unite in the same statement of claim several causes of action. The present *Rule* requires such a statement of claim to keep the facts supporting one cause of action, as far as may be, together, and distinct from the facts supporting another cause of action. It is not necessary, however, to distribute the various facts so as to show which are intended to support any particular prayer for relief: *Watson v. Hawkins*, 24 W. R. 884. The same rule applies to a counter-claim.

Distinct
claims or
defences.

Rules
275, 276.Effect of
document
may be
stated.

275. Where the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof unless the precise words of the document or any part thereof are material. Con Rule 406.

Same as the Eng. (1883) R. 217.

This does not dispense with the necessity for setting forth the precise defamatory words in an action of libel or slander: *Harris v. Warre*, 4 C. P. D. 125; *Bradlaugh v. The Queen*, 3 Q. B. D. 497; *Darbyshire v. Leigh*, 1896, 1 Q. B. 554; 74 L. T. 241; *Hay v. Ringham*, 5 O. L. R. 224; see also *Davy v. Garrett*, 7 Ch. D. 473.

Where *res judicata* in an Irish Court was alleged, a brief statement of the Irish judgment was held sufficient: *Houstoun v. Shoo*, 29 Ch. D. 448.

It is sufficient to state the effect or substance of the limitations in a will, without setting out the precise words used in the will: *Darbyshire v. Leigh*, 1896, 1 Q. B. 554; 74 L. T. 241.

Allegation
of malice,
etc.

276. Where it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact, without setting out the circumstances from which the same is to be inferred. Con. Rule 407.

Same as the Eng. (1883) R. 218.

Where an act is lawful in itself, so that no cause of action arises from the doing of it, the fact that it was done maliciously or from a bad motive does not make one: *Chaffers v. Goldsmid*, 1894, 1 Q. B. 186; *Allen v. Flood*, 1898, A. C. 1; and no use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper or even malicious: *Mayor, etc., of Bradford v. Pickles*, 1895, A. C. 587; see also *Davy v. Garrett*, 7 Ch. D. 489; *Riddell v. Strathmore*, 3 Times, 329.

A statement by a trader that his own goods are superior to those of another trader, even if untrue and the cause of loss, gives no cause of action; and the allegation of malice does not convert a statement *prima facie* lawful into one *prima facie* unlawful: *Hubbuck v. Wilkinson*, 1899, 1 Q. B. 86.

Fraud.

Fraud.—Fraud should be distinctly charged as fraud: *Davy v. Garrett*, 7 Ch. D. at p. 489; and if "fraudulently," or words of similar import are omitted, there must be allegations of fact which necessarily and *per se* amount to fraud: *Byrne v. Muzio*, 8 L. R. 12, 396, and see Rule 271; and the facts constituting the fraud should be stated, or no evidence in support will be received: *Re Rica Gold Washing Co.*, 11 Ch. D. 36, 43, 47; *Redgrave v. Hurd*, 25 Sol. Jour. 372; *Arkerwright v. Newbold, & Co.*, 338; *Symonds v. City Bank, W. N.*, 1886, 19; 80 L. T. Jour. 245; see *Smith v. Chadwick*, 9 App. Cas. 187; *Cargill v. Bower*, 10 Ch. D. 592; but where facts and circumstances are set out from which an inference of fraudulent intent, etc., may be inferred, the inference may be drawn: see *Herring v. Bishop's schim*, W. N. 1876, 77; *Johnson v. Barnes*, W. N. 1883, 32; but see

Davy v. Garrett, supra. See *Kattenbach v. Lewis*, 30 W. R. 356; Rule 276. 45 L. T. 666, for allegations which were considered to amount to a charge of fraud.

A general allegation of fraud, however strong the words used, where there was no statement of the circumstances relied on as constituting the alleged fraud, was held not to amount to an averment of fraud, of which any Court ought to take notice: *Wallingford v. Mutual Society*, 5 App. Cas. 685, 697, 701. In that case, however, the allegation in question was contained in an affidavit filed by the defendant upon a motion to obtain judgment on a specially indorsed writ. The construction of this Rule was not in question.

Fraudulent concealment of fraud, which within *Gibb v. Guild*, 9 Q. B. D. 53, may be relied on as ground of equitable relief against the running of the Statute of Limitations, being a question of fact, must be averred as such in the pleadings: *Barber v. Houston*, 14 L. R. Ir. 273.

In *Herring v. Bischoffsheim*, W. N. 1876, 77, the statement of claim alleged the purchase of bonds through fraudulent misrepresentations in the prospectus of the company, and, on a motion to strike out parts of the statement of claim as prolix, it was held sufficient to allege generally that the prospectus, which was set out, was fraudulent to the knowledge of the defendants, without specifying the particulars, and without going into either the motive which led to the issue of the prospectus, or the particulars of the fraudulent scheme of which the prospectus formed a part.

As to obtaining more specific allegations of, or particulars of fraud charged, see notes to Rules 268 and 299.

Malice.—It will be sufficient under this Rule, in an action for malicious prosecution, to allege that the proceedings were taken without reasonable or probable cause, without setting forth the circumstances from which the same would be inferred: *Aderis v. Thrigley*, W. N. 1876, 56; 2 Charl. Ch. Ca. 43.

In an action for malicious prosecution the plaintiff should allege the absence of reasonable cause, and the presence of malice, as the burden of proof thereof rests on him: *Abrath v. N. E. Ry. Co.*, 11 Q. B. D. 440; 11 App. Cas. 247; 55 L. T. 63; *Hicks v. Faulkner*, 8 Q. B. D. 167; see *Malcolm v. Perth Mut., etc.*, 29 Ont. 717; *St. Denis v. Shoultz*, 25 Ont. App. 131; in an action for false imprisonment, neither allegation nor proof of malice is necessary, and the burden of shewing reasonable cause is on the defendant: *Hicks v. Faulkner, supra*.

For an action against a corporation for malicious prosecution, see *Corford v. Carlton Bank*, 1899, 1 Q. B. 392; 1900, 1 Q. B. 22; and for a malicious libel, see *Citizens Life Assce. Co. v. Brown*, 1904, A. C. 423.

Negligence.—A statement of claim was held sufficient, which alleged that while the plaintiff was using an hotel, of which the defendant was a proprietor, as a guest for reward to the defendant, by the negligence of defendant the ceiling of the room, in which the plaintiff then was, fell upon and injured him: *Sandys v. Florence*, 47 L. J. C. P. 598. Negligence averred generally, was held sufficient in *Quillinan v. Canada Southern Ry.*, 6 Ont. 567.

Rules**277, 278.**Condition
of mind.

Condition of Mind.—Where knowledge or ignorance is material, it should be alleged, *eg.*, of untruthfulness of statements in particulars of sale: *Redgrave v. Hurd*, 20 Ch. D. 1; of unsafe condition of the defendant's premises, in an action by a servant for injuries through their unsafe condition: *Griffiths v. London & St. Katharine Dock Co.*, 13 Q. B. D. 259; of want of knowledge on the servant's part: *Ib.*; threats and intention to commit a trespass: *Stuana v. Vestry of St. Giles*, 20 Ch. D. 195.

Purchase
for value
without
notice

Purchaser for Value without Notice.—This claim, or defence, should generally be made specifically: *Atty-Gen. v. Biphosphated, etc., Co.*, 11 Ch. D. 327; but may sometimes be inferred from facts alleged: *Taylor v. Blakelock*, 32 Ch. D. 564. See R. S. O. c. 119, s. 36, as to proof of payment of purchase money.

Allegation
of notice.

277 Where it is material to allege notice to a person of any fact, matter or thing, it shall be sufficient to allege such notice as a fact unless the form or precise terms of the notice (a) is or are material. Con. Rule 408.

Same as the Eng. R. 1875. O. 19, r. 26; that of 1883, R. 219, has at (a) the words "or the circumstances from which the same is to be inferred."

Implied
contract.

278. Where a contract or relation between persons does not arise from an express agreement, but is to be implied from a series of letters or conversations, or otherwise from a number of circumstances, it shall be sufficient to allege the contract or relation as a fact (a); and if the person so pleading desires to rely in the alternative upon more contracts or relations than one, as to be implied from such circumstances, he may state the same in the alternative. Con. Rule 409.

To the same effect as the Eng. (1883) R. 220, which has, however, at (a) the following words, formerly in Con. Rule 409, but now struck out as unnecessary: "and to refer generally to such letters, conversations or circumstances, without setting them out in detail."

Where a Court has to find a contract in a correspondence, and not in one note or memorandum formally signed, the whole of what has passed between the parties must be taken into consideration: *Hussey v. Horne Payne*, 4 App. Cas. 311; *N. W. Transportation Co. v. McKenzie*, 25 S. C. R. 38.

An agreement is not strictly speaking a fact; it is an inference of law from facts. The material facts should therefore be stated: *Rule 268*. If there is an "express agreement" in writing, that fact should be stated, and the effect of the document set forth: *Rule 275*. If the agreement is to be gathered from a series of letters, conversations or circumstances, the present *Rule* applies: *Turquand v. Fearon*, 40 L. T. 543; see also *Smyth v. Levinge*, 38 L. T. 579; *Noad v. Murrott*, 40 L. T. 100. There should not be a bare statement that "it was agreed," however, "as a general rule it is not sufficient to state merely that there was an agreement * * * the party pleading * * * must give such particulars as will enable his opponent to meet the case set up": per Thesiger, L.J., in *Turquand*

v. Fearon, 40 L. T. at p. 545. In other words the party must make a general reference to the letters, conversations, or circumstances. Rules
279-282.

Where an agreement to have any effect in law must be in writing, it is sufficient to allege that there was an agreement without alleging that it was in writing; that it was in writing is matter for evidence at the trial: *Pasco v. Richards*, 50 L. J. Chy. 340; and it lies upon the party setting up the agreement to prove one sufficient in law at the trial: *Privett v. Hay*, Mr. Dalton, 4th March, 1884. See also *Fraser v. Pape*, 91 L. T. 340, *supra*, p. 469.

279. Neither party need in any pleading allege any matter of fact which the law presumes in his favour, or as to which the burden of proof lies upon the other side, unless the same has first been specifically denied. Facts
presumed
need not
be stated.

[*E.g.*—Consideration for a bill of exchange where the plaintiff sues only on the bill, and not for the consideration as a substantive ground of claim]. Con. Rule 410.

Same as the Eng. (1883). R. 221.

280. If either party wishes to deny the right of any other party to claim as executor, or as trustee, or as assignee in insolvency, or in any representative or other alleged capacity, or the alleged constitution of any partnership, he shall deny the same specifically. [or the same will be taken to be admitted]. Con. Rule 411. Denial of
represent-
ative
capacity.

The Eng. (1883) R. 238, does not contain the words in brackets, otherwise the Rules are the same.

See notes to Rule 272.

The rule was the same at Law under Reg. Gen. T. T. 1856, No. 5, as to assignees in insolvency, executors and administrators, and persons authorized by any Act of Parliament to sue, or be sued, as nominal parties: see *Jones v. Brown*, 1 Bing. N. C. 484, and Harr. C. L. P. Act, 712.

281 Unless the incorporation of a corporate party is specifically denied, it shall not be necessary to prove it. Con. Rule 412. Incorporation.

The Rule would seem to apply to plaintiffs suing, or defendants sued, in an alleged corporate capacity, though they be not, in fact, incorporated: see *Krug Furniture Co. v. Berlin Union, etc.*, 5 O. L. P. 463. See Rule 231.

282. Where a contract is alleged, a denial of the contract shall be construed only as a denial of the making of the contract in fact, and not of its legality or its sufficiency in law, whether with reference to the Statute of Frauds or otherwise. Con. Rule 413. Denial
of contract
only denial
of the
making.

Rules Same as the Eng. R. 1875, O. 19, r. 23. The Eng. (1883) R. 216;
283, 284. is a little more explicit.

A plea of *non est factum* pleaded to a declaration filed before *The Judicature Act*, in an action on a policy of insurance, was held to be not embarrassing; as under this *Rule* it must be treated as a denial of the making of the contract of insurance in fact: *Burnett v. Union Mut. F. Ins. Co.*, 32 C. P. 134.

In an action of ejectment by an assignee of a lessee against the assignors, the statement of claim alleged an assignment by deed to defendants to the plaintiffs. The defendants denied "that they had assigned or made over the premises" to the plaintiff. This was held under the corresponding Irish Rule to put in issue the execution of the assignment only, and not its invalidity as contrary to a covenant against alienation in the lease: *Hayes v. Corcoran*, 8 L. R. Ir. 75.

Where a plaintiff sets up a written contract in a case within the Statute of Frauds, it is not necessary for the defendant to plead the statute as a defence, and evidence of a parol contract in such a case is not admissible without an amendment of the pleadings; and if such amendment is allowed the defendant should, if he desires it, be allowed to set up the Statute: *Brunning v. Odhams*, 75 L. T. 602; *Elmsley v. Harrison*, 17 P. R. 425.

No plea in
 abatement.

283. A plea or defence in abatement shall not be pleaded.
 Con. Rule 414.

Same as the Eng. (1883) R. 253.

A plea in abatement was one which showed some ground for abating or quashing the writ, or the writ and declaration. Such pleas were generally based on the non-joinder of parties, or the personal competency of the parties to sue, or be sued. An instance of an ineffectual attempt to raise what amounted to a plea in abatement, will be found in *Preston v. Lamont*, 1 Ex. D. 361.

Though the form of objecting by means of a plea in abatement to the non-joinder of a defendant, who ought to be included in the action, is abolished, yet an application to have such person included as a defendant ought to be granted or refused upon the same principles on which a plea in abatement would have succeeded or failed: *per Lord Cairns* in *Kendal v. Hamilton*, 4 App. Cas. 516.

A defence stating that the plaintiff is a married woman and her husband is a necessary party is in reality an informal plea in abatement and is no defence: *Abouloff v. Oppenheimer*, 30 W. R. 429.

No new
 assignment.

284. A new assignment shall not be used, but everything which was formerly alleged by way of new assignment shall be introduced by amendment of the statement of claim (a).
 Con. Rule 415.

Same as the Eng. R. 1875 O. 19, r. 14. The Eng. (1883) R. 281 adds at (a) the words "or by way of reply."

Sometimes, owing to the generality of a declaration, the defendant was not sufficiently guided by it to the real cause of complaint, and was therefore led to apply his plea to a different matter from that which the plaintiff had in view; for example, a plaintiff might have been twice assaulted by defendant; one of these assaults may have

been justifiable, as having been committed in self-defence, while the other might be without excuse. Supposing the plaintiff to sue in respect of the latter, the declaration from its general terms would not necessarily inform the defendant that it was the second assault, and the defendant might plead to the first *non assault demesne*. The plaintiff then had no course but by new assignment to declare that he brought his action, not for the first, but for the second assault: see Stephen on Pleading, 187. Such an occurrence is not easily conceived under the present system, where the facts are stated, and not the legal result of facts only. Should it happen, however, the statement of claim may be amended. This Rule is not to be construed as rendering an amendment of the statement of claim necessary in other cases than those in which a new assignment would have been necessary under the old system of pleading at Law. In other cases, if new matter is raised by defendant, the plaintiff may either amend, or may reply by traverse, or confession or avoidance, or both: see *Hall v. Eve*, 4 Ch. D. 341; and *Earp v. Henderson*, 3 Ch. D. 254.

See also Rule 288.

285. A defendant in an action for the recovery of land who is in possession by himself or his tenant need not plead his title, unless his defence depends on an equitable estate or right, or he claims relief upon any equitable ground against any right or title asserted by the plaintiff: but except in the cases hereinbefore mentioned, it shall be sufficient to state by way of defence that he is so in possession, and he may rely upon any ground of defence which he can prove. Con. Rule 416.

Same as Eng. (1883) R. 254, except that the latter provides that by so pleading he shall be taken to deny the allegations in the statement of claim: see *Danford v. McNulty*, and note *infra*.

This Rule only applies to a defendant. In an action for recovery of land the statement of claim is as much subject to the foregoing Rules as in any other action, and the plaintiff must therefore set forth the material facts upon which he relies to prove his title. The effect of a deed is not a fact, and a statement of claim which merely alleged that by virtue of certain deeds, etc., plaintiff was entitled to possession of land, and did not state the purport of the deeds or set out the plaintiff's pedigree, or show the devolution of title by which the land in question became vested in the plaintiff, was therefore held embarrassing: *Philipps v. Philipps*, 4 Q. B. D. 127; 39 L. T. 329 and 556; *Davis v. James*, 26 Ch. D. 778; *Jones v. Curling*, 13 Q. B. D. 273. So also a statement of claim which simply alleged that the plaintiff had been wrongfully dispossessed of the land by the defendant was set aside for not stating the facts which shewed the plaintiff's interest in the land: *O'Connor v. O'Hara*, 8 L. R. Ir. 249; see also *Lyell v. Kennedy*, 20 Ch. D. 491; 8 App. Cas. 217; *Cromwell v. Scaill*, 1 Times, 474.

A statement of claim stating that "by virtue of a certain settlement, the plaintiff is entitled" without setting out or stating the effect of the limitations in the settlement is insufficient: *Riddell v. Strathmore*, 31 Sol. Jour. 183.

A statement that the plaintiff, or any person through whom he claims, was on such a day seised in fee simple in possession, would

Rule 286. seem to be sufficient statement of a plaintiff's title: see the Form in Wilson's Jud. Act, 7th ed., 572; and *Smith v. Cairns* (before Chief Justice Gtlt, 8th April, 1880). In *Beatty v. Leacy*, 16 L. R. Ir. 132, a general allegation of the plaintiff's derivative title was held sufficient.

In several cases under the Irish Jud. Act a defence, in actions of ejectment for non-payment of rent, has been set aside as embarrassing, where it, in effect, merely denied that defendant was tenant, without alleging anything as to the defendant's title, or saying that he was in possession: see *Hidige v. O'Farrell*, 8 L. R. Ir. 158; *Barnes v. Barnes*, 8 L. R. Ir. 165; *Rowley v. Laffan*, 10 L. R. Ir. 11.

Where the plaintiff's case depended on the heirship of A., and that fact was stated simply, without showing how A. became heir, the pleading was held sufficient: *Evelyn v. Evelyn*, 42 L. T. 248; 28 W. R. 531.

But in *Palmer v. Palmer*, 1892, 1 Q. B. 319, a defendant was held entitled to particulars shewing the links of relationship on which plaintiff relied as constituting him "heir": see also *Blackledge v. Anderton*, W. N. 1893, 112.

An action for the assignment of dower is an action for recovery of land: *McCulloch v. McCulloch*, 4 C. L. T. 252; *McLean v. McLean*, 17 P. R. 440.

In an action for dower, the facts showing the right of dower (which is a legal conclusion from the facts) must be stated: *Lauder v. Carrier*, 10 P. R. 612.

Equitable title.

Equitable Estate or Right.—The defendant relying on an equitable title must, in his statement of defence, allege the nature of the deeds and documents on which he relies; and it is not sufficient to allege that by virtue of divers *meane* acts and *meane* assurances, all the estates and interests of the plaintiff's predecessor in title are now vested in the defendant: *Sutcliffe v. James*, 40 L. T. 875; 27 W. R. 750. A defendant who pleads merely that he is in possession, was always at liberty to question the plaintiff's title even under the English system of pleading, by which what is not denied is taken to be admitted: *Danford v. McAnulty*, 6 Q. B. D. 645, affirmed in 11 L. 8 App. Cas. 456; and this is now expressly provided in the English Rule of 1883, 254; *a fortiori* under the Ontario system, where mere non-admission puts the plaintiff to proof.

See *Attorney-General v. Midland Ry. Co.*, 3 Ont. 511, and *Adamson v. Adamson*, 17 Ont. 425; *Allan v. Woods*, 68 L. T. 143.

Plea of not guilty by statute.

286. Nothing in these Rules contained shall affect the right of a defendant to plead not guilty by statute. A defence of not guilty by statute shall have the same effect as heretofore (a). Con. Rule 417, amended.

The Eng. (1883) R. 208 adds at (a), "but if the defendant so plead he shall not plead any other defence to the same cause of action without the leave of the Court or a Judge." A similar clause in the former Ont. Con. Rule 417 has been omitted in the present consolidation of the Rules, so that a defendant may now plead any defence in addition to "not guilty by statute."

Formerly the Court did not in general with this plea allow other Rule 287. pleas: *Neale v. McKenzie*, 2 Dowl. P. C. 702; *Fisher v. Thames Junction Ry. Co.*, 5 Dowl. P. C. 773; *O'Brien v. Clement*, 15 M. & W. 435; *Legge v. Boyd*, 1 M. & G. 808; *O'Donohue v. Maguire*, 1 P. R. 131; *Dale v. Coon*, 2 P. R. 100.

There are numerous statutes authorizing this defence of "not guilty by statute" to be pleaded: e.g., It may be pleaded under R. S. O. c. 88, s. 15, by Justices of the Peace and other public officers: *Dale v. Coon*, 2 P. R. 100; *Aldrich v. Humphrey*, 18 C. L. T. 172; 34 C. L. J. 385; under R. S. O. c. 207, s. 42, by a railway company under Provincial control; or under 3 Ed. vii. c. 58, s. 242 (D.) by a railway under Dominion control, in an action against it for indemnity for damage or injury sustained by reason of the railway; but see *Reist v. Grand Trunk Ry. Co.*, 15 U. C. Q. B. 355; *Pear v. Buffalo & Lake Huron Ry. Co.*, 17 U. C. Q. B. 282; under R. S. O. c. 318, s. 90, by the defendant in any action brought for anything done in pursuance of that Act, which relates to private lunatic asylums: see *Bullen & Leake Proc. of Pleadings*, 5th ed., 930; and under R. S. C. c. 41 (Militia Act), s. 114, by any officer or person sued for anything done in violation of that Act.

The statute must be formally pleaded to enable the defendant to avail himself of any defence under it: *McKay v. Cummings*, 6 Ont. 400.

An informal pleading of the statute has been allowed to be amended so as to be pleaded in the form of the general issue: *Grant v. Culbard*, 19 Ont. 20; and see *Bond v. Coumec*, 16 Ont. App. 419.

A railway company cannot be required to give particulars of the defence of "not guilty by statute": *Taylor v. G. T. Ry.*, 2 O. L. R. 148, overruling *Jennings v. G. T. Ry. Co.*, 11 P. R. 300, in which particulars were ordered where the plaintiff was not aware of the defence intended to be set up.

"Not guilty by statute" cannot be pleaded to an action for specific performance of a contract: *Peterborough v. Midland Ry. Co.*, 12 P. R. 127; *Scottish Ont., etc., Co. v. Toronto*, 24 Ont. App. 208; and see *Brown v. Blackwell*, 35 U. C. Q. B. 239.

The plea of "not guilty by statute" puts in issue not only the defence which the statute gives, but also all the defences which were admissible under the general issue at Common Law: *Ross v. Clifton*, 11 A. & E. 631.

Contributory negligence may be set up under this plea: *Dunn v. Michigan Central*, 17 Ont. App. 481.

An equitable defence is not admissible under this plea: *Brown v. Blackwell*, 35 U. C. Q. B. 239.

A plea of the general issue by statute was not demurrable, though no statute is applicable: *Cairns v. Water Commissioners of Ottawa*, 25 U. C. C. P. 551.

In an action in the County Court a plea of "not guilty by statute" does not necessarily raise any question as to the title of land, so as to exclude the jurisdiction of the Court: *Bell v. Grand Trunk Ry. Co.*, 16 C. P. 252.

287. Where a defendant pleads not guilty by statute, he shall insert in the margin of the paragraph containing the plea the words "By Statute," with the year of the reign in which the Act of Parliament upon which he relies was passed.

Plea of "not guilty by statute" to contain reference to statute relied on.

Rule 288. and the chapter and section of the Act, otherwise the plea shall be taken not to have been pleaded by virtue of an Act of Parliament. Con. Rule 418.

Taken from Rules of Pleading, T. T. 1856, 21.

The provisions of this *Rule* must be strictly followed: *Bond v. Connee*, 15 Ont. 716; 18 Ont. App. 398; *Heming v. Woodgatt*, 32 C. L. J. 120. Both the statute by which the plea is allowed and that containing the matter relied on by way of defence must be mentioned in the margin: *VanNatter v. Buffalo & Lake Huron Ry. Co.*, 27 U. C. Q. B. 581; *Belch v. Arnott*, 9 C. P. 68; *Doan v. Michigan Central Ry.*, 18 Ont. 482; and see *Grant v. Culbard*, 19 Ont. 20, where an amendment was allowed; but where evidence is given under the pleas as pleaded, without objection at the trial, it is too late afterwards to object to the sufficiency of the plea: *Doan v. Michigan Central Ry.*, 17 Ont. App. 481.

If the defendant omits to follow the requirements of this *Rule*, he cannot give special matter in evidence to bring himself within the terms of an Act of Parliament which allows a plea of "not guilty": *Coy v. Lord Forester*, 8 M. & W. 312; *Joy v. McKinn*, 1 U. C. Q. B. 13. An amendment may sometimes be allowed to supply the omission, even after verdict: *Edwards v. Hodges*, 15 C. B. 477; *Van Natter v. Buffalo & Lake Huron Ry. Co.*, 27 U. C. Q. B. 581. But where a defendant pleaded "not guilty," intending to justify under a statute, but the *Nisi Prius* record had not the words "by statute" in the margin, the Judge at *Nisi Prius* refused to allow an amendment by the addition of those words, as it was not shown that they were in the margin of the defendant's plea: *Forman v. Davies*, 1 Car. & M. 127. The parties may so act at the trial, and subsequently as to be precluded from raising the objection of the omission to name a particular statute in the margin of the plea: *Burridge v. Nicholls*, 6 H. & N. 383.

The words "according to statute" instead of "by statute" written in the margin, are sufficient: *Robertson v. Cooley*, 7 U. C. Q. B. 305.

Inconsistent pleadings.

288. A pleading (a) shall not except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same. Con. Rule 419.

This is the same as the Eng. (1883) R. 212, except that at (a) are the words "not being a petition or summons," and the former practice was substantially the same.

A second pleading may add a fact to, but must not contradict, the first: *per Brett, L.J.*, in *Breslaue v. Barwick*, 36 L. T. 52; 24 W. R. 901; nor raise a fresh cause of action: *Collambell v. Flight*, W. N. 1877, 125. See also *Williamson v. L. & N. W. Ry. Co.*, 12 Ch. D. 787; *Duckworth v. McClelland*, 2 L. R. Ir. 527; *Kingston v. Corker*, 29 L. R. Ir. 364. Where a reply violates this *Rule* the Judge at the trial may refuse to try the action: *Hurd v. Bostwick*, 16 P. R. 121.

In an action for goods sold, the defence was coverture; plaintiff replied, that he was not aware that defendant was a married woman, and thought she was a widow, and that she obtained credit by repre-

setting herself to be entitled to an annuity under a separation deed; **Rule 289.** and it was held that the reply did not raise a claim inconsistent with the previous pleading; *Collet v. Dickenson*, W. N. 1878, 52.

See also **Rule 284.**

In the following cases pleadings have been held not to be objectionable:

Action for infringement of patent, by alteration of goods supplied by plaintiffs—Defence that under an agreement with the plaintiffs the alterations were authorized — Reply denying this and asking rectification of the agreement on the ground of mistake if it did so authorize; *McLaughlin v. Lake Erie & Detroit River R. R. Co.*, 2 O. L. R. 151.

Action for possession — Defence a mortgage made by plaintiff's father and assigned to defendant—Reply that there was no consideration for the assignment, and that the assignor was of unsound mind to the knowledge of defendant; *Smith v. Smith*, 2 O. L. R. 419.

1. PLEADING MATTERS ARISING PENDING THE ACTION.

289. Any ground of defence [or counter-claim] which has arisen after action, but before the defendant has delivered his statement of defence (a), may be pleaded either alone or with other grounds of defence. **Con. Rule 434.**

Same as the first part of Eng. (1883) R. 282, except that in the latter at (a) the words "and before the time limited for his doing so has expired" are inserted, and the Eng. Rules have not the words in brackets. Reg. Gen. T. T., 1876, No. 22, was to the same effect: see also R. S. O. 1877, c. 50, ss. 106 and 107, and Harr. C. L. P. Act, pp. 115 and 731. The result is, that under this **Rule** the defendant may in his defence set up any ground of defence or counter-claim which he has at the time of delivering the defence, no matter when such ground arose; and not merely grounds of defence which arose before the time limited for delivering the defence.

Whether a ground of counter-claim arising after action brought can be set up was the subject of conflicting decisions in England: see *Boddall v. Maitland*, *Tuke v. Andrews*, and other cases cited in notes to **Rule 251**, p. 448. The words "or counter-claim" have been inserted in this **Rule** to remove any doubt. See also *Chamberlain v. Chamberlain*, 11 P. R. 501, and notes to **Rules 251** and 291.

Where the claim sued for had been attached by garnishee proceedings instituted before action, any payment made by the defendant *pendente lite* in pursuance of such proceedings constitutes a defence arising after action, and does not relate back to the attaching order: *Pickard v. Tims*, 19 P. R. 109.

A plaintiff cannot, except by way of defence to a counter-claim (**Rule 290**), set up matters arising *pendente lite* as a ground of claim; *McLean v. McLean*, 17 P. R. 440.

As to raising new matter after judgment, see **Rule 642** and notes.

Rules
290, 291.

Before
delivery
of defence
to counter-
claim.

290. If, after a counter-claim has been delivered, a ground of defence arises to anything alleged therein by the defendant, it may be pleaded by the plaintiff thereto, [or be introduced by amendment into the statement of claim, within three weeks after the counter-claim or the last of the counter-claims has been delivered, unless the time is extended by the Court or a Judge]. Con. Rule 435.

See Eng. R. 1875, O. 20, r. 12; O. 24, r. 1; (1883) R. 282, *last part*. The words in brackets are not in the Eng. Rules.

The original J. A. Rule 152 was similar to the Eng. Rules of 1875, except that the latter confined plaintiff to a reply, nothing being said about amending the statement of claim. The original J. A. Rule and the English Rules authorized the plaintiff to take the course provided for "after a statement of defence has been delivered." The present Rule is confined to cases where a counter-claim has been delivered so that if no counter-claim, but only a defence is delivered and facts exist, having arisen after action, which constitute a reply to the defence, the plaintiff may not be entitled to proceed under this Rule, but may be obliged to have recourse to an application under Rule 254.

A plaintiff may, in his reply to a counter-claim of defendant, counter-claim in respect of a cause of action accruing after the issue of the writ, or arising at the same time and out of the same transaction as the counter-claim of defendant: *Toke v. Indreus*, 8 Q. B. D. 428; *Renton v. Neville*, 1900, 2 Q. B. 181; 82 L. T. 446.

But where a claim which might have been pleaded by way of counter-claim is pleaded as a set-off, the plaintiff may not reply matters arising subsequent to action brought: *McNamara v. Skua*, 23 Ont. 103. See also notes to Rule 251.

After
delivery of
defence.

291. Where a ground of defence [or counter-claim] arises after the delivery of the statement of defence (a) [or counter-claim], the defendant may within 8 days after such ground of defence [or counter-claim] has arisen, deliver a further defence or counter-claim setting forth the same, [or introduce the same by amendment into his statement of defence or counter-claim]. Con. Rule 436.

Same as that part of the Eng. (1883) R. 283, which relates to a defendant; except that the English Rule has not the words in brackets, and has at (a) the words, "or after the time limited for his doing so has expired," and provides that the additional defence is to be raised only "by leave of the Court or a Judge." Leave will be unnecessary under this Rule if an affidavit is filed under Rule 293.

A counter-claim and set-off were, under the Eng. Rules corresponding to the original Ont. Rules, held to constitute a ground of defence within this Rule: *Wood v. Goodwin*, W. N. 1884, 17, and this will no doubt be so now under this Rule and Rule 251; see *contra*, *Chamberlain v. Chamberlain*, 11 P. R. 501, under the original Rules.

In computing the eight days, Vacation is not reckoned: Rule 352, and the time may be enlarged: Rule 353; and see *Re Jones, Eyre v. Coe*, 25 W. R. 303.

By pleading such a plea at law under the former practice, a defendant abandoned all his former pleas: *Barker v. Palmer*, 1 Salk. 178; but this is not so under the present Act, though *semble*, other defences fall to the ground if the plaintiff confesses the new plea: see *Foster v. Gampel*, 1 Q. B. D. 600. Rules 292-295.

292. Where a ground of defence to any counter-claim arises after the expiration of three weeks from the time of delivering the counter-claim or the last of the counter-claims, the plaintiff, within 8 days after such ground of defence has arisen, may deliver a further pleading setting forth the same, [or may introduce such new ground of defence into his statement of claim by amendment]. *Con. Rule 437.* After delivery of reply.

This *Rule* is substantially the same as the Eng. (1883) R. 283, in the case of a plaintiff, except that the Eng. *Rule* has not the words in brackets, and that the leave of the Court or a Judge is required. The same liberty is here given to a plaintiff after the time for delivering a reply has expired as is, by the preceding *Rule*, given to a defendant after the delivery of his defence.

Where the new ground is introduced by amendment an affidavit is required: see *Rule 293.*

293. The amendment may be made without order, on filing a *præcipe* and an affidavit that the matter of amendment arose within 8 days next before the making of such amendment. *Con. Rule 438.* Amendment on præcipe.

The affidavit here required is similar to that formerly required in obtaining leave to plead a plea *puis darrein continuance*, under R. S. C. 1877, c. 50, s. 107. Where, instead of amending, the plaintiff files a further pleading under *Rule 292*, the affidavit referred to in this *Rule* is not required.

294. In cases not provided for by Rules 289 to 293, the leave to amend the statement of claim or defence or counter-claim, or to deliver a further defence or counter-claim, or reply, may be obtained on application to the Court or a Judge on notice supported by affidavit. *Con. Rule 439.* Amendment by leave.

Not in Eng. Rules. See Eng. (1883) Rs. 313, 314.

This *Rule* will apply, for instance, where a further defence or reply has not been delivered under *Rules 291* and *292*, within the eight days mentioned. See also *Rule 353*, and *Re Jones, Eyre v. Cox*, 25 W. R. 303. The affidavit should set forth the new grounds of defence or reply, and explain any delay: *Haynes' Ch. Pract.* 88.

295. Where any defendant, in his statement of defence [or counter-claim,] whether by way of amendment or otherwise, alleges any ground of defence [or counter-claim] which has arisen after the commencement of the action, the plaintiff may deliver a confession of such defence (a), (which Plaintiff may deliver confession of defence

Rule 295

confession may be according to Form No. 54), and he may thereupon sign judgment for his costs up to the time of the pleading of such defence (a) unless the Court or a Judge shall, either before or after the delivery of such confession, otherwise order. Con. Rule 440.

This is substantially the same as the Eng. R. 1875, O. 20, r. 3, and (1883) R. 284. Rules 22 and 23 of Reg. Gen. T. T. 1856, were to the same effect, but were not applicable where a plea raising such a defence was pleaded by one or more only, of several defendants.

(a) "Defence" here includes "counter-claim," which is of course a defence.

Payment of money into Court is not a "defence" within the meaning of this Rule: *Callander v. Hawkins*, 2 C. P. D. 592.

Under the Rules of T. T. 1856, though a defendant pleaded with such a plea other defences arising before action, the plaintiff as nevertheless entitled to confess the plea and have his costs, the other pleas falling to the ground. And the present Rules seem to have the same effect: *Foster v. Gamgee*, 1 Q. B. D. 666. There is no difference in this respect between a plea of bankruptcy and any other plea: *Foster v. Gamgee*, *supra*. A plea that defendant was an adjudicated bankrupt, upon an act of bankruptcy which occurred after the service of the writ, was held to be "a ground of defence" which has arisen after the commencement of the action, and the plaintiff was held entitled to confess it and sign judgment for his costs under this Rule: *Champion v. Formby*, 7 Ch. D. 373.

Such a confession is a determination of the matters in litigation, and precludes a second action for the same cause: *Newington v. Lepp*, L. R. 5 C. P. 607; 6 C. P. 180.

For form of confession, see App. Form No. 54; (H. & L. Forms, No. 559); and of judgment for costs, No. 150, (H. & L. Forms, No. 518).

This Rule applies to a counter-claim in the nature of a pecuniary set-off, arising after action brought: *Ellis v. Munson*, 36 L. T. 585; *Wood v. Goodwin*, W. N. 1884, 17, and to counter-claims generally: see notes to Rules 251 and 291, and *Beddall v. Maitland*, 17 Ch. D. 174.

Where a Judge refused to deprive the plaintiff of the costs, under the last clause of this Rule, it was held that they were costs left within the discretion of the Judge within section 49 of the English Judicature Act (corresponding to sec. 72 of the Ont. Act), and that, therefore, there could be no appeal from the decision except by leave: *Perkins v. Beresford*, 47 L. T. 515; and see *Hopkins v. Tickers*, 3 Times, 610.

Defendants delivered a further defence of matter arising since former defence. Plaintiff delivered a confession of this defence and signed judgment for costs. The defendants asserting that the plea was sufficiently raised by the former defence, which was not intended to be waived, and consenting to withdraw the further defence, the judgment for costs was set aside under this Rule: *Bridgman, etc. v. Barbado, etc.*, 38 Ch. D. 378.

This Rule was held not to apply, where the defence also set up matters of defence, which had occurred before the commencement of the action: *Harrison v. Marquis of Abergavenny*, 57 L. T. 360.

and where an action had been brought by a judgment creditor against a judgment debtor and another, to set aside a conveyance as fraudulent, and after pleading of several defences the judgment debtor obtained leave to amend by adding as a defence, without abandoning his other defences, that the plaintiff's claim had become extinguished by reason of a set-off ordered in another action, it was held that this was a case in which the plaintiff should not be allowed to confess the new defence, and sign judgment for costs: *Patterson v. Smith*, 14 P. R. 558.

As to discontinuance of the action by the plaintiff in other cases, see *Rule 430*.

8. STRIKING OUT, AMENDING PLEADINGS, ETC.

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.*

Court may order scandalous matter to be expunged.

Taken from Cby. O. 69.

Scandal.—This *Rule* enables the Court at the hearing of an action *sua sponte* to order scandalous matter in any pleading, petition or affidavit to be taken off the files or expunged. Under *Rules 297, 298*, a motion may be made for the like purpose at any time before the bearing.

As to scandalous matter in the statement of claim or defence, see also *Rule 298*.

Nothing can be scandalous which is relevant: *per Cotton, L.J.*, Application in *Fisher v. Owen*, 8 Ch. D. 653; *Jones v. Huntingdon*, 3 Chy. Ch. 117; *B—— v. W——*, 31 Beav. 342; *Millington v. Loring*, 6 Q. B. D. 190; and the test is whether the matter alleged to be scandalous would be admissible in evidence to show the truth of any allegation which is material with reference to the relief prayed: *Christie v. Christie*, L. R. 8 Chy. 499; *Cashin v. Craddock*, 3 Ch. D. 376. The Court has power to strike out scandalous matter from an affidavit, or to order the person who has filed it to pay the costs of it, on the application of any person, even a stranger to the action, or *mero motu*. It is not necessary that the applicant should be the injured person: *Cracknell v. Janson*, 11 Ch. D. 1; *Middlemas v. Wilson*, L. R. 10 Chy. 230; *Sadtler v. Smith*, 7 P. R. 400; 15 C. L. J. 52; *Goddard v. Parr*, 24 L. J. Chy. 783.

Where proceedings are ordered to be taken off the files it is said to be the proper practice to destroy them: *Hill v. Hart-Davis*, 26 Chy. D. 471; *sed quare*, is not the proper practice to seal them up? Otherwise should they be destroyed, and the order be subsequently reversed, they could not be restored to the files. See also *Rule 315*.

The Court has jurisdiction to order in any proceeding, scandalous matter to be struck out: thus, scandalous statements in a bill

Rules of costs were ordered to be struck out; *Re Miller & Miller*, 51 L. T. 297, 298. 853; 33 W. R. 210; W. N. 1884, 234; *Erskine v. Gartshore*, 18 Ves. 114.

As to the power of the Court to strike out scandalous matter, see *Bright v. Marner*, W. N. 1878, 211; *Cracknall v. Janson*, 11 Ch. D. 1; and as to scandalous matter in affidavits, *Warner v. Mosses*, W. N. 1881, 69; *Kenrick v. Kenrick*, 12 W. R. 335; *Sadler v. Smith*, 7 P. R. 409; *Blake v. Albion*, 24 W. R. 677.

Costs of motion.

The costs of the motion are as between solicitor and client: *Ex parte Thorp*, 1 Ves. 394; *Ex parte Porter*, 2 M. & Ay. 220; *Ex parte Simpson*, 15 Ves. 476, and both the party and his solicitor concerned are liable to pay costs of an application: *Id.*; *Rattray v. George*, 16 Ves. 232, and see *Bishop v. Willis*, 5 Beav. 83; *Anon.* 4 P. R. 242. As to the disallowance of the costs of unnecessary matter in pleadings and affidavits, see *Rule* 1154.

Prolivity.—Although there is no *Rule* specially giving the Court power to take pleadings or affidavits off the files for prolixity, it has nevertheless an inherent power to do so: *Hill v. Hart-Davis*, 26 Ch. D. 470; and pleadings may also be ordered to be struck out for prolixity; *Marsh v. Pontefract*, W. N. 1876, 7; 1 Charl. Ch. Ca. 66; *Davy v. Garrett*, 7 Ch. D. 473; or amended by striking out the prolix matter: *Brock v. Tew*, 18 P. R. 30.

Impertinence.—The Court has also jurisdiction to order pleadings, petitions, or affidavits, containing matter which is impertinent, i.e., irrelevant, to be taken off the files, or amended by striking out the offending matter.

Motion may be made at any time before hearing.

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.

Scandal in pleading.

Taken from Chy. O. 70.

As to scandalous matter in statements of claim or defence, see *Rule* 298.

As to disallowance of costs of unnecessary matter contained in pleadings and affidavits, see *Rule* 1154.

Master has no power to strike out interrogatories for impertinence.

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

For form of notice of motion, see H. & L. Forms. Nos. 412, 413.

Amendment with leave.

298. The Court or a Judge may at any stage of the proceedings order to be struck out or amended any matter in the pleadings respectively, which may be scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action. Con. Rule 423.

Same as Eng. *Rule* 1875, O. 27, r. 1. Eng. (1883) R. 309, is different in language.

Scandal.

As to striking out scandalous matter, see *Rule* 296 and notes.

Rules 296, 297, enable the Court at the hearing of the action, or **Rule 298**, on a motion made before the hearing, to strike out scandalous matter in any pleading, petition, or affidavit. This Rule enables the Court to strike out any scandalous matter in any "pleading" at any stage of the proceeding. A petition is a pleading: see J. A. s. 2 (9).

Striking out a Pleading as Improper or Embarrassing, on the Application of the Opposite Party.—Apart from the Rules, the Court has inherent jurisdiction to strike out a defence as frivolous, vexatious, and an abuse of the procedure, e.g., where it attempts to re-try, in another form, a question already decided against the defendant: *Reichel v. McGrath*, 14 App. Cas. 665; see also Rule 261.

As a rule the only grounds for striking out pleadings are that they are either (1) embarrassing, (2) scandalous, or (3) tending to prejudice or delay: *Ryan v. Fish*, 10 P. R. 187, 192; but in *Chamberlain v. Chamberlain*, 11 P. R. 501, it was held that a defence which was wholly inapplicable, might be struck out, though neither scandalous, nor tending to prejudice, embarrass, or delay; and see *Glass v. Grant*, 12 P. R. 480; so also a pleading tendering no issue, and containing unnecessary matter: *Brock v. Tev*, 18 P. R. 30; a defence alleging want of notice of action, where defendants were not entitled to notice of action: *McCarthy v. Vespra*, 16 P. R. 416. Pleadings will not necessarily be struck out because they are inconsistent: *Re Morgan*, 35 Ch. D. 492; but where the plaintiff asked for an injunction and damages, and recovery of possession, it was held that such claims were inconsistent and embarrassing, and the plaintiff, though granted an injunction, was refused costs: *Evans v. Davis*, 27 W. R. 285.

An embarrassing pleading has been defined as one in which matter is pleaded which the party is not entitled to make use of: *Heugh v. Chamberlain*, 25 W. R. 742; W. N. 1877, 128; *Stratford v. Gordon*, 14 P. R. 407; e.g., in an action to enforce a contract for the sale of a patent without warranty, a defence putting in issue the validity of the patent: *Liardet v. Hammond Electric Light*, 31 W. R. 710; W. N. 1888, 96; allegations respecting matters compromised in a former suit, and which therefore could not be re-litigated: *Knowles v. Roberts*, 38 Ch. D. 263; *Reichel v. McGrath*, *supra*.

A pleading not drawn according to the Rules respecting pleadings is embarrassing: see notes to Rules 268 and 264, *et seq.*

As a general rule a pleading should not be set aside on summary application unless plainly frivolous, or indefensible. Formerly the party was left to demur, and even though the pleading appeared to be demurrable, that was not a sufficient reason for striking it out: *Glass v. Grant*, 12 P. R. 480; *Stratford v. Gordon*, 14 P. R. 407; *Dale v. Byrne*, 15 P. R. 4; now, however, that demurrers are abolished, it would seem to be proper to move under Rule 261, in cases where that Rule is applicable.

A motion to strike out a reply on the ground of its being a departure from the statement of claim was refused: *McLaughlin v. Lake*, 2 O. L. R. 151; and see *Brophy v. Royal Victoria L. I. Co.*, 2 O. L. R. 651.

Where allegations are properly pleadable under Rule 268, the Court has no power to strike out the paragraph containing them, unless scandalous, or tending to prejudice, embarrass or delay, within the meaning of the present Rule: *Millington v. Loring*, 6 Q. B. D. 190.

Rule 298.

The whole of a pleading may be struck out: a statement of claim: *Cashin v. Cradock*, 3 Ch. D. 376; *Ker v. Williams*, W. N. 1886, 16; a defence: *Preston v. Lumont*, 1 Ex. D. 361; or a reply: *Williamson v. L. & N. W. Ry. Co.*, 12 Ch. D. 787. See also *Golding v. Wharton Saltworks Co.*, 1 Q. B. D. 374; W. N. 1876, 40; 2 Charl. Ch. Ca. 40, and *Harris v. Gamble*, 3 Ch. D. 748; *Atty-Gen. v. L. & N. W. Ry. Co.*, 1892, 3 Ch. 274; 2 R. 84.

Striking out the whole of a pleading.

In *Finch v. The Guardians of York Union*, 35 L. T. 360, a motion to strike out the whole statement of defence was held to be misconceived, as the defence was not so frivolous as to justify its being set aside. In *Weir v. Barnett*, W. N. 1875, 258; 1 Charl. Ch. Ca. 94, a defendant applied to compel the plaintiff to amend, in an action for false representations in regard to debentures, stated to have been made in a letter and prospectus, and Huddleston, B., refused to order an amendment of the claim, so as to shew which of the false representations were in the letter, and which in the prospectus.

Striking out parts of pleadings.

The power to strike out is not exercised so as to enable one party to dictate to the other how he should plead: *Rolfe v. MacLaren*, 3 Ch. D. 106, 108; but portions of pleadings have been struck out which are not in accordance with Rule 268: e.g., where they contained irrelevant allegations of fraud, to the effect that in transactions other than the one in question the defendants had been guilty of fraud: *Blake v. Albion, etc.*, 35 L. T. 269; *Menhinick v. Turner*, W. N. 1876, 55; 2 Charl. Ch. Ca. 42; immaterial facts set out with prolixity: *Davy v. Garrett*, 7 Ch. D. 473; *Brock v. Tew*, 18 P. R. 30; admissions, *Askew v. N. E. Ry. Co.*, W. N. 1875, 238; 1 Charl. Ch. Ca. 90; *Davy v. Garrett, supra*; evidence: *Jones v. Turner*, W. N. 1875, 239; 1 Charl. Ch. Ca. 91; *Cole v. Can. Pacific Ry. Co.*, 19 P. R. 104; *Gloster v. Toronto Electric Light Co.*, 4 O. W. R. 522; *Prince v. Toronto Ry. Co.*, 5 O. W. R. 88; scandalous statements which were immaterial: *Duncan v. Vereker*, W. N. 1876, 64; 2 Charl. Ch. Ca. 44; see *Cracknall v. Janson*, 11 Ch. D. 1; *Sadler v. Smith*, 7 P. R. 409; *Christie v. Christie*, L. R. 8 Chy. 499; *Wood v. Earl Durham*, 21 Q. B. D. 501; and notes to Rule 296; but nothing is scandalous that is relevant to the merits: see *Fisher v. Owen*, 8 Ch. D. 653, and other cases in note to Rule 296; *Whitney v. Moignard*, 24 Q. B. D. 630; Dan. Prac., 5th ed., 290. General statements of title may be struck out: *Philipps v. Philipps*, 4 Q. B. D. 127; *Riddell v. Strathmore*, 31 Sol. Jour. 183; Rule 285; allegations so prolix as to be obscure: *Marsh v. Pontefract*, W. N. 1876, 6; 1 Charl. Ch. Ca. 66; see also *Hill v. Hart-Davis*, 26 Ch. D. 470; and unnecessary details though not amounting to statements of evidence: *Alderis v. Thrigley*, W. N. 1876, 58; 2 Charl. Ch. Ca. 43; paragraphs pleaded to a hypothetical case which might never arise, and could only arise on an amended claim: *Fulford v. Wallace*, 1 O. L. R. 278.

Paragraphs in a statement of claim tendering an immaterial issue: e.g., in a claim for damages caused by a defect in a machine, an allegation in the statement of claim that defendants were insured against such accidents was struck out as being immaterial, and embarrassing: *Flynn v. Industrial Exhibition, etc.*, 6 O. L. R. 635; see also *Prince v. Toronto Ry. Co.*, 5 O. W. R. 88; and *Hay v. Bingham*, 5 O. L. R. 224; or in a statement of defence which raised no issue, or only one that is immaterial: *Webb v. Hamilton Cataract Power Co.*, 7 O. L. R. 607.

In an action for seduction, a paragraph of the statement of claim alleged that the defendant administered noxious drugs to the plaintiff's daughter. It was held that the paragraph could not be struck

out as disclosing a felony for which the defendant ought to have been prosecuted, inasmuch as the plaintiff was not the person upon whom the felonious act was committed, and had no duty to prosecute: *Appleby v. Franklin*, 17 Q. B. D. 93; but see *Vincent v. Sprague*, 3 U. C. Q. B. 283; *Brown v. Dalby*, 7 U. C. Q. B. 160; *Walsh v. Nattrass*, 19 C. P. 453; *Williams v. Robinson*, 20 C. P. 255.

A plea denying liability is not embarrassing by being joined with a plea of tender before action, and payment into Court: *Davis v. National Insurance Co. of Ireland*, 16 P. R. 116.

Where a statement of claim for libel set out the whole article complained of, the Court refused to strike out any part of it as embarrassing: *Hay v. Bingham*, 5 O. L. R. 224; but where a plaintiff set up a breach of 23 different patents he was ordered to limit his claim to any three of them: *Saccharin Co. v. Wild*, 1903, 1 Ch. 410; 88 L. T. 101.

In an action for slander, where there was a denial of the speaking of the words alleged, a paragraph of the defence, admitting the speaking of other words (setting out the defendant's version of what he had said), and saying that they were true, was struck out as embarrassing: *Rassam v. Budge*, 1893, 1 Q. B. 571; 5 R. 336; 68 L. T. 717; *Fulford v. Wallace*, 1 O. L. R. 278.

A defence separating a libel, and justifying as to part, without leaving it clear what part was justified, was struck out as embarrassing: *Fleming v. Dollar*, 23 Q. B. D. 388; so also a defence setting up that an alleged libel was fair comment, without setting out the facts on which it was alleged to be a fair comment: *Crow's Nest Coal Co. v. Bell*, 4 O. L. R. 600.

Reasons pleaded to shew why an act, said to be *ultra vires*, was not *ultra vires*, were held not to be irrelevant or embarrassing, and a matter alleged as a reason should not be struck out because it is a bad reason: *Tomkinson v. S. E. Ry. Co.*, 57 L. T. 358.

A defence in a *sci. fa.* action, which might have been pleaded as a defence to the original action, was struck out: *Shaver v. Cotton*, 16 P. R. 278.

Where a defendant pleaded that a sum paid by him into Court as security for costs, was a satisfaction of the plaintiff's claim, the defence was struck out: *Mendels v. Gibson*, 7 O. L. R. 611.

Allegations in the statement of claim may be struck out where they have been abandoned by the reply: *Brooking v. Maudsley*, 55 L. T. 343.

For cases where several plaintiffs and defendants are joined, and causes of action alleged which can not be set up in one action: see notes to Rules 185 and 186.

In an action to restrain a breach of contract in restraint of trade, it was held to be embarrassing to claim both an injunction and liquidated damages, but, the point not having been taken until the hearing, it was held that the plaintiff should elect: *Grant v. Harrison*, 69 L. T. 307.

Where a pleading is defective in not containing all the allegations necessary to shew a case for relief, or a defence, the pleading may, for that reason, be embarrassing, and, where the defects can be supplied, it will in general be proper to move to strike out the pleading or paragraph, thus, where in a claim by a simple contract creditor he omits to state that he sues on behalf of all creditors to set aside a conveyance as fraudulent against creditors, the objection should be raised by motion under this Rule, and not under Rule 259; see *Scime*

Allegations which have been abandoned. Parties or causes of action improperly joined.

Embarrassing by being defective.

Rule 298. *v. Duckett*, 3 Ont. 370. So where a claim for ejectment alleged that prior to 1874 defendant was tenant and had paid rent, but since 1874 had not paid rent. It was held to be embarrassing as not showing any subsisting tenancy: *Molloy v. Lewers*, 12 L. R. Ir. 39; see also *Rowley v. Laffan*, 10 L. R. Ir. 9.

When should be struck out. Where pleadings are such as should be struck out, they ought to be struck out by the Judge, and not be left to be dealt with as a question of costs: *Watson v. Rodwell*, 3 Ch. D. 380.

Amendment when allowed. Ordinarily, instead of altogether striking out a pleading, or part of a pleading, the party whose pleading is defective will be given an opportunity to amend: *Moorkhouse v. Colville*, W. N. 1876, 12; 1 Charl. Ch. Ca. 95; *Anon.*, W. N. 1876, 24; 2 Charl. Ch. Ca. 39.

Where a pleading is obscure, instead of striking it out, it may be ordered to be amended so as to make it clear to the opposite party: *Dryden v. Smith*, 17 P. R. 505; *Johnson v. Stafford*, 33 C. L. J. 433; and see *Rule 299*. So with an allegation improperly made as a distinct cause of action, but which might be properly pleaded as an aggravation of damages: *Agar v. Escott*, 8 O. L. R. 177.

An amendment which will injuriously alter the rights which the parties would have if there were no amendment will not be allowed: *Weldon v. Neil*, 19 Q. B. D. 394; *Hudson v. Fernyhough*, 61 L. J. 722; e.g., an amendment for the purpose of setting up a claim, which since the issue of the writ has been barred by the Statute of Limitations: *Weldon v. Neil*, *supra*; *Lancaster v. Moss*, 15 Times, 476.

Striking out amendments. Matters improperly introduced by amendment may be struck out, e.g., an amendment adding claims for assault and false imprisonment, which would be barred by the Statute of Limitations if made by a new writ, was struck out: *Weldon v. Neil*, *supra*.

In *Restell v. Steward*, W. N. 1875, 249, paragraphs improperly introduced into a statement of defence by amendment were struck out: see *Rule 301*.

Frivolous or vexatious. As to striking out a pleading as shewing no reasonable cause of action, or answer, or as being frivolous, or vexatious, see *Rule 261*.

English authorities not always applicable in Ontario. In view of the difference between the English and Ontario systems as to admissions (see *Rule 272*), caution will be necessary in applying the English authorities on the subject of striking out embarrassing pleadings. The English Rules require a party to deal specifically with the allegations in the previous pleading, and to deny such allegations as he is not prepared to admit; but where, as under the Ontario system, a party is not so bound to make denials, he might not, in framing his pleading, be embarrassed by an improper pleading, though he might be prejudiced if irrelevant statements of fact in such a pleading were allowed to go before a jury.

Appeals. The striking out of pleadings is in the discretion of the Judge; and, as a general rule, an appeal from his order will not be entertained, unless a question of principle is involved: see *Golding v. Wharton Saltworks Co.*, 1 Q. B. D. 374; *Watson v. Rodwell*, 3 Ch. D. 380; *Ruston v. Tobin*, 10 Ch. D. 558, 565; *Re Martin*, *Hunt v. Chambers*, 20 Ch. D. 365. Such an appeal was entertained in *Daru v. Garrett*, 7 Ch. D. 473; *Knowles v. Roberts*, 38 Ch. D. 263; see also *Laird v. Briggs*, 19 Ch. D. 22; *Peterkin v. McFarlane*, 4 Ont. App. 25.

On this subject, see also notes to sec. 72, *supra*, p. 122.

299. A further and better statement of the nature of the **Rule 299.** claim or defence, or further and better particulars of any ^{Particulars may be ordered.} matter stated in any pleading, notice or written proceeding requiring particulars, may in all cases be ordered upon such terms, as to costs or otherwise, as may seem just. Rules 23rd June, 1894, 1326.

Same as Eng. (1883) R. 203.

See *Dryden v. Smith*, (2) 17 P. R. 505, in note to *Rule 268*, *supra*, p. 477.

Until this *Rule* the practice in Ontario as to ordering particulars ^{Particulars} depended upon the inherent jurisdiction of the Court to prevent ^{of pleadings.} injustice, no *Rules* on the subject having been adopted: *Queen Victoria Park, etc., v. Howard*, 13 P. R. 14. This *Rule* has, however, made no substantial change in the practice. The principle upon which particulars were ordered in Ontario, even before this *Rule*, has been the same as in England, viz.: to prevent surprise and embarrassment at the trial, and to lessen expense of evidence: *Mason v. Vancamp*, 14 P. R. 296; *Spedding v. Fitzpatrick*, 38 Ch. D. 410.

"As a general rule applications for particulars are to be made before the applicant has pleaded over. Particulars are ordered with reference to pleading, and are distinguished from examination for discovery, which is to get at the knowledge of the adverse litigant. . . . Particulars are ordered primarily with a view to have the prior pleading made sufficiently distinct to enable the applicant to frame his answer thereto properly." *per Boyd, C.: Smith v. Boyd*, 17 P. R. 463 at p. 467.

Demanding Particulars.—Before applying for particulars a written demand for the particulars desired should, in general, be made, so as to confine any subsequent motion to such particulars as are refused.

Where a party complies with a demand for particulars of his pleading, he will be restricted at the trial to the particulars given without any order for that purpose: *Young v. E. & H. Ry. Co.*, 17 P. R. 4.

Particulars given in compliance with a written demand or an order, should be given in writing; an oral statement of them will not be sufficient: *Ryan v. Donovan*, 16 C. L. T. 71 (N. W. T.).

Application for Particulars.—The applicant should prove the previous demand, if any, and the non-compliance with it, and should shew by affidavit the need for particulars: *Roberts v. Owen*, 6 Times, 172; *Sachs v. Spielman*, 37 Ch. D. 303-305, unless it is clear from the pleading that particulars of general allegations there made must be necessary, in which case a motion to strike out the pleading as embarrassing, or to compel its amendment by setting out particulars, will often be proper.

In *Kohfreitsch v. McIntyre*, 19 C. L. J. 116; 3 C. L. T. 173; it was held by Mr. Dalton, in Chambers, that, in a case where formerly a party would have been entitled to particulars of a pleading, the proper course will in general be to move to compel an amendment of the pleading so as to state the particulars required. In that case the defence was that a note sued on had been obtained by fraud (as ^{When amendment of pleading proper instead of particulars.}

Rule 299. to pleading which, see *Rule 271*), and the defence was ordered to be amended so as to state the circumstances of the fraud: see *Wallingford v. Mutual Soc.*, 5 App. Cas. 685; *Schomberg v. Zoebelli*, W. N. 1876, 108; 2 Chari. Ch. Ca. 36. Particulars have sometimes been ordered: see *Boston v. Bradshaw*, 8 L. R. 1r. 30; *Appleman v. Appleman*, 12 P. R. 138. A like order would seem to be proper where justification is pleaded in general terms in an action for libel: see *Corcoran v. Robb*, 8 P. R. 49; or an action for wrongful dismissal: see *Saunders v. Jones*, 7 Ch. D. 435, 448; *Crabbe v. Hickson*, 14 P. R. 42; or in such a case as *Palmer v. Palmer*, 1892, 1 Q. B. 319, where a statement of claim alleged merely that plaintiff was entitled to possession of land as heir-at-law of B., who died seised in fee and in possession, and the plaintiff was ordered to give particulars of the relationship relied on as constituting him the heir.

There may, however, be cases in which a general allegation may be allowed in the pleading to avoid prolixity, leaving the opposite party to apply for particulars if necessary: see *The Cory*, 7 P. D. 129, where a statement of claim, claiming damages for delivery of cargo in a damaged condition, alleged that the damage was occasioned by the defective condition of the vessel, or by the negligence or breach of duty of the defendants; see also *Appleman v. Appleman*, 12 P. R. 138.

Time for Application.—As particulars are most frequently desired for the purpose of framing a pleading in answer, the application should be made before the applicant pleads over: *Smith v. Boyd*, 17 P. R. 463, 467; by a defendant before delivering a defence: see *Augustinus v. Nerinckx*, 16 Ch. D. 7; *Blackie v. Osmaston*, 28 Ch. D. 123; and by a plaintiff before delivering his reply, or amending his statement of claim. Putting in a defence is not necessarily a waiver of the right to particulars: *Sachs v. Spielman*, 37 Ch. D. 295; 58 L. T. 102; *Watson v. North Metropolitan Co.*, 3 Times, 273; but in general, in the absence of special circumstances, particulars will not be ordered after the close of the pleadings: *Smith v. Boyd*, 17 P. R. 463; see *S. C.*, 18 P. R. 296; and *Gourand v. Fitzgerald*, 37 W. R. 55, 263. Particulars can not at that stage be required for the purpose of pleading, and they will only be granted for the purposes of the trial, upon affidavit shewing that they are necessary: *Bank of Toronto v. Ins. Co. of N. A.*, 18 P. R. 27.

Where defendant applied before defence for particulars of transactions impeached, the circumstances of which were within his own knowledge, and not that of the plaintiff, the application was ordered to stand over until the defence was put in: *Sachs v. Spielman*, *supra*; see *Re Morgan*, 35 Ch. D. 500.

Discovery
before par-
ticulars
ordered.

Particulars may not be ordered until discovery is given by the party asking for the particulars.

There is no hard and fast rule as to the class of cases in which particulars will be ordered to be delivered before discovery, or discovery to be given before particulars. The Court will look at the circumstances of each case: *Waynes Merthyr Co. v. Radford*, 1896, 1 Ch. 29.

Where the details of the facts pleaded lie in the knowledge of the party asking particulars, particulars should not be ordered before discovery is given by the party asking the particulars: *Sims v. Slater*, 10 C. L. T. 227; *Millar v. Harper*, 38 Ch. D. 110; *Sachs v. Spielman*, *supra*; *Whyte v. Ahrens*, 26 Ch. D. 717; *Leitch v. Abbott*, 31 Ch. D. 374; *Mazim & Co. v. Nordenfeldt*, 1893, 3 Ch. 122; *Edclinton*

* *Kelly v. Martin*
6 O.W.R., 141.

v. Russell, 57 L. T. 927; *Waynes Merthyr Co. v. Radford*, 1806, 1 Ruls 299. Ch. 29; but see *Zierenberg v. Labouchere*, 1803, 2 Q. B. 183, an action for libel.

In some cases all the particulars required may be obtained by examination for discovery: see *Saunders v. Jones*, 7 Ch. D. 435; explained in *Benbow v. Low*, 10 Ch. D. 97; *Frost v. Brooke*, 32 L. T. 312; *Hill v. Waters*, L. R. 9 C. P. 688; *Blatchford v. Green*, 14 P. R. 424; *Hall v. Bryce*, 6 Times, 344.

Where by examination for discovery the defendant had obtained the information which would be given by particulars, particulars were refused: *Gould v. Beattie*, 11 P. R. 320.

Where a pleading sets up that a deed is fraudulent and void under 13 Eliz. c. 5, (R. S. O. c. 334), particulars of the fraud should be obtained by examination for discovery: see *Pitfield v. Guest*, (Nov. Scot.), 18 C. L. T. 144.

Particulars—General Principles.—Particulars will be ordered giving information to prevent the opposite party from being taken by surprise at the trial, and to save unnecessary expense: *Spedding v. Fitzpatrick*, 38 Ch. D. 410; *Turnock v. Sartoris*, 33 Sol. Jur. 58; *Alexport v. Paynter*, 34 Ch. D. 93; *Crompton v. Anglo-American, etc.*, 35 Ch. D. 283; *Thompson v. Birkley*, 31 W. R. 230; but not such as will oblige a party to disclose the evidence upon which he relies: *Queen Victoria Park Commissioners v. Howard*, 13 P. R. 14; (where defendants pleading that certain lands were Ordnance Lands were not ordered to give particulars of facts and means by which, and the time at which, the lands so became Ordnance Lands, it not appearing that the defendants had any special means of information not open to the plaintiffs): see also *Temperton v. Russell*, 9 Times, 319; *Cove v. Torre*, 54 L. T. 518, 519; *Salisbury v. Nugent*, 9 P. D. 1. The drawing of the line between evidence, and particulars of facts to prevent surprise, is often difficult: *Briton Medical v. Britannia*, 59 L. T. 888; *Molsons Bank v. Hall*, 5 O. W. R. 625.

A defendant may be ordered to give particulars of documents referred to in his pleadings, though he has in an affidavit on production of documents effectually claimed for those documents the privilege of non-production: *Milbank v. Milbank*, 1900, 1 Ch. 376.

A party is entitled to have the opposite party's case presented in an intelligible form: *Harbord v. Monk*, 38 L. T. 411; *Dryden v. Smith*, 17 P. R. 505; and if the charges are not sufficiently explicit, particulars may be ordered: see *Anon.*, W. N. 1875, 202, 220; or an amendment of the claim may be applied for: *Schomberg v. Zocbelli*, W. N. 1876, 106; 2 Charl. Ch. Ca. 36.

Particulars compel a litigant to state the details of what he pleads, whether he himself knows the facts or not; discovery compels him to state what he knows: see *Turnock v. Sartoris*, 33 Sol. Jour. 58.

In determining what particulars may be demanded, the decisions under the English practice of delivering interrogatories may be usefully referred to. These shew that a party cannot be compelled to disclose the details of his evidence as contradistinguished from the facts: *Eode v. Jacobs*, 3 Ex. D. 335; explained in *Atty-Gen. v. Gas-kill*, 30 W. R. 558; *Bidder v. Bridges*, 29 Ch. D. 29; *Benbow v. Low*, 16 Ch. D. 93; *Re Leigh, Rowcliffe v. Leigh*, 6 Ch. D. 256; *Sheppard v. Lord Lonsdale*, 5 C. P. D. 47; 42 L. T. 172; *Commissioners of Sewers v. Glassey*, L. R. 15 Eq. 302; *Lister v. Thompson*, 7 Times, 107; or matters which do not pertain to the questions to be raised

Rule 299. at the trial, though they may be relevant if a judgment is obtained: *Parker v. Wells*, 18 Ch. D. 477; but the material facts upon which the issues in the case will be raised must be disclosed: *Ashby v. Taylor*, 38 L. T. 44, such as, in an action for dissolution of a partnership in the practice of surgeons, occasions when the defendant conducted himself in such a way as to make it impossible for the plaintiff to practice with him: *Lyon v. Tweddell*, 13 Ch. D. 375; and, in an action for wrongful dismissal, instances of misconduct relied on to justify the dismissal: *Saunders v. Jones*, 7 Ch. D. 435; *Crabbe v. Hickson*, 14 P. R. 42.

Where by his statement of claim, the plaintiff sued as trustee for A. B. "and others," upon motion by defendant he was ordered to amend his statement of claim by striking out the words "and others," or else to give particulars to defendant of such "others" within one week: *Johnson v. Stafford*, 33 C. L. J. 433.

Where the plaintiff claims not an account merely but a definite sum, he must state what his case is in detail, either in the pleadings or by way of particulars: *Blackie v. Osmaston*, 28 Ch. D. 119.

Where a claim was for a liquidated sum under an agreement for services rendered, and money disbursed, particulars of services and disbursements were ordered: *Gunn v. Tucker*, 7 Times, 280; see also *Sedgwick v. Yedras*, 4 Times, 17; *Hall v. Symons*, 92 L. T. Jour. 337.

See also notes to Rule 138.

As to particulars of damages, see *Turnock v. Sartoris*, 33 Sol. Jour. 58; *Blatchford v. Green*, 14 P. R. 424.

As to particulars of payment into Court, see *Rowe v. Kelly*, 59 L. T. 139; *James v. Rudnor*, 6 Times, 240.

Where particulars of money claims can be indorsed or stated in the claim they ought to be so: see *per* Lush, J., *Anon.*, W. N. 1875, 202; 1 Charl. Ch. Ca. 35. If, therefore, sufficient particulars are not given, the costs of an application to obtain them should be borne by the plaintiff.

Examples—Particulars not Ordered.—Particulars will not be ordered where the ordering of them will embarrass the party from whom they are asked, and the want of them will not take the party asking them by surprise, as where knowledge of the circumstances of the case lies with the party asking particulars: see *Roberts v. Owen*, 6 Times, 172; *Lister v. Thompson*, 7 Times, 107; *Temperton v. Russell*, 9 Times, 319; *Scottish, etc., v. Toronto*, (Boyd, C., 20th Dec., 1897), or where they are immaterial, as, for example, in an action to recover certain charges, where the defence was that they were unreasonable and excessive, particulars of the items objected to were refused as the plaintiff would at the trial have to prove that they were reasonable: *James v. Radnor*, 6 Times, 240; see also *Cave v. Torre*, 54 L. T. 515; *Gibbons v. Norman*, 2 Times, 676; or where by them it is sought to have evidence of the facts disclosed, and not the facts themselves: see cases, *supra*.

Where defendant pleaded that a deed was made for the purpose and with the intent to defraud, hinder and delay the creditors of the grantor, etc., and that the deed was void under 13 Eliz., c. 5. (R. S. O. c. 324), particulars of the fraud were refused: *Pitfield v. Gucat*, 18 C. L. T. 144 (Nov. Scot.).

Where the plaintiff's claim was not a merely legal demand for an Rule 299. ascertained sum, but an equitable claim, which if successful would only lead to an account being taken, and particulars were not necessary to enable defendant to frame his defence, the plaintiff was not ordered to furnish them: *Augustinus v. Norinoka*, 16 Ch. D. 16.

Where a plaintiff was suing for an account by an administrator, an order requiring him to give particulars of the property of which he required an account was held to be erroneous and was discharged: *Carr v. Anderson*, 112 L. T. Jour. 214. Particulars of defence under a plea of "not guilty by statute" cannot be ordered: *Taylor v. Grand Trunk Ry.*, 2 O. L. R. 148.

Particulars Ordered.—Of payments which the defendants, who were mortgagees in a redemption action, admitted having received, and in respect to which they counter-claimed: *Kemp v. Goldberg*, 36 Ch. D. 505; of a sum for which credit was given by the claim. In order to enable defendant to frame his set-off or counter-claim: *Godden v. Corsten*, 5 C. P. D. 17; W. N. 1879, 190; of negligence and damages, in an action for damages for injuries caused by negligent driving: *O'Meara v. Stone*, W. N. 1884, 72; 28 Sol. Jour. 359; of general allegations of trust, and breaches thereof: *Re Austice*, 33 W. R. 557; 52 L. T. 572; of errors in progress certificates, though these were the result of information derived from documents prepared for the litigation which were privileged: *C. P. R. v. Conner*, 11 P. R. 297; of items alleged to be false entries, and of the nature of the objection to each: *Newport v. Paynter*, 34 Ch. D. 88; of false and fraudulent misrepresentations: *Seligman v. Young*, W. N. 1884, 93; 28 Sol. Jour. 411; in an action for infringement of a trade mark, of "divers persona" alleged to have been deceived: *Humphries v. Taylor*, 39 Ch. D. 603; of items of a claim in respect of which the defendant pays money into Court, but only if the trial will be facilitated and neither party embarrassed: *Orient Steam Nav. Co. v. Ocean Marine Ins. Co.*, 34 W. R. 442. This case was decided under Rule 203, of Eng. Rules of 1883, providing expressly for a demand of particulars and order therefor, if not given on demand, which is the practice pursued in Ontario without special Rule.

In an action for goods sold and delivered, a counter-claim for damages for inferior quality was set up. Particulars of the damages claimed were ordered: *Anon.*, W. N. 1875, 220; see also notes to Rules 138 and 245.

Defendants claiming a road to be a highway by dedication were ordered, if they relied on any specific acts of dedication or declarations of intention to dedicate, whether alone or jointly with user, to give the nature and dates of the acts or declarations, and the names of the persons by whom they were done or made: *Spedding v. Fitzpatrick*, 38 Ch. D. 410.

In suits for alimony, the former Chancery practice required that the various acts of violence or adultery relied on, should be set forth specifically in the bill, that the defendant might have notice of them, otherwise no evidence of such acts could be given: *Rodman v. Alimony*, *Rodman*, 20 Gr. 428, 440, 441. This is in accordance with the present Rules of pleading; see *Brook v. Brook*, 35 W. R. 351; 57 L. T. 425; in *Rosenstadt v. Rosenstadt*, 9 P. R. 311, an order was made for delivery of particulars of acts relied on, within one month, and confining the plaintiff's evidence to such acts; and though in that case it was considered convenient to order particulars, the decision shews clearly enough that the plaintiff's statement of claim was not properly framed to enable her to go into evidence. Particulars were

Rule 299. ordered of names of servants in whose presence abusive language was alleged to have been used to plaintiff: *Bishop v. Bishop*, 1901, P. 325; 85 L. T. 173.

Wrongful dismissal. In an action for wrongful dismissal, the plaintiff is entitled to a list of the specific acts which defendant is aware of, and on which he proposes to rely as justifying dismissal, and if further facts are afterwards discovered, particulars of them should also be furnished before trial: *Crabbe v. Hickson*, 14 P. R. 42; *Saunders v. Jones*, 7 Ch. D. 435; *Scott v. Mewbery*, 3 O. L. R. 252.

Malicious prosecution. In an action for malicious prosecution defendant was not ordered to give particulars of what he relied on in support of an allegation of reasonable and probable cause, in the absence of any necessity for giving any such particulars being shown by plaintiffs: *Roberts v. Owen*, 6 Times, 172.

Grounds of belief. Where directors, sued for misrepresentations in a prospectus, set up that they had reasonable grounds to believe such representations to be true, particulars of such grounds of belief were ordered to be delivered: *Odman v. Oppert*, 1901, 2 K. B. 576; 87 L. T. 828.

False imprisonment. In an action for false imprisonment as a lunatic, reasonable and probable cause as a defence was held to be an immaterial allegation, and particulars of it were refused: *Cave v. Torre*, 54 L. T. 87, 515.

Seduction. In an action for seduction defendant was held not entitled to particulars of times and places, unless he made affidavit denying the seduction, so as to shew that he did not know the nature of the charges brought against him, which otherwise would be deemed to be matters within his own knowledge: *Thompson v. Birkley*, 31 W. R. 230; 47 L. T. 700; *Knight v. Engle*, 61 L. T. 780; *Hollister v. Annable*, 14 P. R. 11; *Mason v. VanCamp*, *ib.*, 296; and see *Turner v. Kyle*, 2 C. L. T. 311. Where such an affidavit is made, particulars may be ordered before defence: *A. v. B.*, 7 O. L. R. 73.

Criminal conversation. In an action for crim. con., defendant is entitled to particulars of times and places, where he makes affidavit denying the alleged acts and stating that he is ignorant of the charge, and that the application is made *bona fide*: *Keenan v. Pringle*, 28 L. R. Ir. 135; but not without such an affidavit, especially after an examination for discovery: *Murray v. Brown*, 16 P. R. 125.

Undue influence. The practice in the Probate Division in England is not to order particulars of undue influence charged: *Lord Salisbury v. Nugent*, 9 P. D. 23; or of allegations of a testator's unsoundness of mind: *Hankinson v. Barningham*, 53 L. J. Pro. 16.

Testator's mental capacity. In an action for libel against a newspaper, the statement of claim must be confined to the statement specified in the notice required by R. S. O. c. 68, s. 6 (2), to be given before action: *Obernier v. Robertson*, 14 P. R. 552.

Libel and slander. Where the charge made against the plaintiff is general, the defendant who pleads justification must set out the facts on which he relies in support of his justification, and if he do not, particulars will be ordered: *Zierenberg v. Labouchere*, 1893, 2 Q. B. 183; *Bristol v. German P. & P. Co.*, 33 C. L. J. 462.

Where a review of a book stated that the plaintiff by his own confession was a barefaced liar, and the defence was justification, the plaintiff was held entitled to particulars of the passages relied on: *Devereux v. Clarke & Co.*, 1891, 2 Q. B. 582; and see *Poster v. Perryman*, 8 Times, 115.

In an action for libel in a newspaper published in which the defence is that the said was an accurate report of certain public proceedings and for comment thereon, particulars by interrogation were denied in *Hennessy v. Wright* (No. 2), 36 W. R. 879; 24 Q. B. 1, 115, and where the action is against the proprietor of a newspaper who admits the publication of the libel, and pleads an apology, the plaintiff is not entitled to interrogate the defendant as to the name of the writer, unless the identity of the writer is a fact in issue, as in the issue raised in the case; *Gibson v. Evans*, 23 Q. B. 1, 384; *Hann v. Burrows*, 12 Times, 521; nor to have production of the original manuscript of the libel: *Hope v. Brash*, 1897, 2 Q. B. 188.

Particulars were ordered of a defence of justification in a libel suit, where it was not clear whether the defence was that what was charged against plaintiff was true, or was truly reported: *Hennessy v. Wright* (No. 1), *Id.* 878; 57 L. J. Q. B. 594. In *Wills v. Carman*, 17 Ont. 223, a defendant not pleading justification, but saying that the alleged libel was a fair comment on matters of public interest, was held entitled to shew what the facts were, as to the matters commented upon, in order to shew that the comments upon them were fair; but this does not mean that a defendant can give evidence to shew that the alleged libel is true without pleading justification: *Brown v. Meyer*, 20 Ont. App. 509; *Manitoba, etc., v. Martin*, 21 S. C. R. 518.

In an action for slander, particulars may be ordered of the persons to whom the slanderous words were spoken, or if such persons are unknown, or the words were spoken to the plaintiff, then the name of any person who was present and heard, or might have heard the words spoken: *Thornton v. Capstock*, 9 P. R. 535; which, it has been held in *Gould v. Beattie*, 11 P. R. 329 (see also *Patterson v. Dunn*, 14 P. R. 40), is in Ontario, to be followed in preference to the contrary views expressed in *Bradbury v. Cooper*, 12 Q. B. 11, 94, and *Roselle v. Buchanan*, 16 Q. B. D. 656; but see *Mellillan v. Colicell*, 7 C. L. T. 141; but it has been held, even in England, that those decisions are not to be extended to occasions of publication of an alleged libel: *Gourand v. Fitzgerald*, 37 W. R. 55. Particulars as to the names of persons alleged to have been passing by, when the slanderous words were used, and particulars as to the alleged damages, have been refused: *Wingard v. Cox*, W. N. 1876, 106, 2 Charl. Ch. Ca. 33; see also *Colonial Insurance Corporation v. Prosser*, W. N. 1876, 55; 2 Charl. Ch. Ca. 35; *Restell v. Steward*, W. N. 1875, 231; 1 Charl. Ch. Ca. 87; more especially where the persons are persons whose names the plaintiff does not know: *Dawson v. Rogan*, 10 C. L. T. 300.

Where the plaintiff alleged slander spoken to S. C. "and others," particulars as to "others," were refused, where, before motion, the plaintiff gave all the information in his power as to what he knew of the other persons present, and the defendant did not swear that he could not plead without further particulars: *Winnett v. Applebe*, 16 P. R. 57.

In an action for slander imputing a specific charge, which is justified, no particulars are necessary: *Cuming v. Green*, 7 Times, 408; see *Foster v. Perryman*, 8 Times, 115.

But a defendant is entitled to the fullest particulars the plaintiff can furnish as to places where, times when, and persons to whom alleged defamatory words were uttered; and also of the names of persons who have ceased to do business with plaintiff, in consequence

Rule 299. of the alleged slander, and also particulars of the slanderous statements, alleged as showing express malice, or in aggravation of damages: *Muller v. Gorth*, 17 P. R. 129; and see *Robinson v. Sugarman*, 17 P. R. 419.

Slander of title. In an action for slander of title, particulars were refused as to persons who would have given more than was realized at the sale in respect of which damages were claimed: *Catton v. Gleason*, 14 P. R. 222; but in an action for libel, particulars were ordered of the facts on which the plaintiff's claim for damages for loss of trade was based: *Blachford v. Green*, 14 P. R. 424.

Ejectment. Particulars were ordered of the links of relationship, whereby plaintiff sought to establish his title as heir, in an action for the recovery of land: *Palmer v. Palmer*, 1892, 1 Q. B. 319; also of the section of the Real Property Limitation Act on which defendant relied: *Dodge v. Smith*, 1 O. L. R. 46.

Insurance cases. As to the extent to which a defendant setting up a defence of misrepresentation in procuring insurance, arson, and improper statement of loss, may be ordered to give particulars, see *Katrine L. Co. v. Liverpool & L. Ins. Co.*, 17 P. R. 318.

Patent cases. Particulars of objections to a patent must be given: see *Cropper v. Smith*, 51 L. T. 729; see form of order in *Ehrlich v. Ihlee*, 56 L. T. 819.

The general law applicable to discovery governs actions for infringement of patents. Full disclosure of the lines of attack must be made, but no such individualizing of the persons who are alleged to be prior users as would enable the plaintiff to fix upon the defendant's witnesses: *Smith v. Greay*, 4 C. L. T. 589; 21 C. L. J. 58; 11 P. R. 169.

In *Mosley v. Victoria Rubber Co.*, 55 L. T. 482, particulars of infringements of two patents were delivered. The defendant answered the plaintiff's interrogatories, whereupon he discontinued as to one patent. The defendants then required the plaintiff to distinguish between the infringements complained of, referring him to their answers and interrogatories and interrogating him as to which of the processes, which they described, infringed the patent relied on by him. It was held that the plaintiff was not obliged to particularize the infringements: see also *Birch v. Mather*, 31 W. R. 362; 22 Ch. D. 629; *Anglo-American Brush Co. v. Crompton*, 34 Ch. D. 152; 35 Ch. D. 283, under Imp. Act 46 & 47 Vict. c. 57, s. 29.

Particulars were ordered of respects in which the defendants denied that the plaintiffs' patent was for any new invention, etc. (as alleged), and dates and occasions when, and also names of persons by whom prior user was had: *Smith v. Greay*, 11 P. R. 169; see also *Holliday v. Heppenstall*, 41 Ch. D. 109; *Union Electrical, etc., Co. v. Electrical Storage Co.*, 38 Ch. D. 325; *Bray v. Farrar*, 57 L. T. 866.

An application by the defendant to amend his particulars of objections to a patent, on the ground that, pending the trial, the defendant had discovered new facts showing want of novelty, was refused, it not being shown that he could not with reasonable diligence have discovered the new facts sooner: *Moss v. Malings*, 33 Ch. D. 603.

All defects in the specifications of a patent on which the defendant intends to rely at the trial must be specified in the particulars of objection: *Anglo-American Brush Light Co. v. Crompton*, 34 Ch. D. 152; 35 Ch. D. 283.

In an action for infringement of a duly registered copyright, **Rule 300.** particulars were ordered shewing the date of registration of the copyright, and the parts of defendant's book which infringed it: *Liddell v. Copp Clark Co.*, 19 P. R. 332.

Effect of Order for Particulars.—Where particulars are delivered pursuant to a demand or an order, the party delivering the same will be restricted at the trial to the particulars so delivered without any order for that purpose: *Young v. Erie & H. Ry. Co.*, 17 P. R. 4.

It may be made a term of an order for the delivery of particulars, that in default of delivery by a plaintiff his action be dismissed, and in case of a defendant, that his defence be struck out: see *Davey v. Bentinck*, 1893, 1 Q. B. 185; 67 L. T. 742; or it may provide for the exclusion of evidence if no particulars, or insufficient particulars, are given: *Noxon v. Patterson*, 16 P. R. 40, and if by the terms of the order the latter is the penalty imposed on a defendant for default, a further order will not be made limiting a time for delivery of particulars, and on default striking out the defence: *Bell v. Morrison*, 5 O. W. R. 226; nor should the order for particulars direct the excision of the pleading, on default, if it is good *per se*: *Noxon v. Patterson*, *supra*.

Where an order was made for particulars of certain paragraphs of defence, and in default the paragraphs to be struck out, it was held that the officer with whom the pleadings were filed could strike out the paragraphs without further order upon default being shown by affidavit: *Hamilton Road Co. v. Platt*, 10 P. R. 581.

An order striking out particulars complained of as too general was refused, it being held that if too general the admission of evidence thereunder was in the discretion of the Judge at the trial: *Citizens Insurance v. Campbell*, 10 P. R. 129.

As to the giving of particulars by parties in a representative capacity: see *Higgins v. Weekes*, 5 Times. 238.

300. A plaintiff may, without leave, amend his statement of claim whether indorsed on the writ or not, once, either before the statement of defence has been delivered, or after it has been delivered, and before the expiration of the time limited for reply, and before replying. **Rule 1247.** 20th June, 1903, repealing Con. Rule 300.

Amendment by plaintiff without leave.

Differs from the Eng. (1883) R. 310.

This *Rule* applies to a statement of claim which has been served out of the jurisdiction, where the defendant has appeared, and where it is amended it will not be necessary to re-serve the writ: *Holland v. Leslie*, 1894, 2 Q. B. 346; the amended pleading must, of course, be delivered to a defendant who has appeared, as provided by *Rule 380*; *sed quare*, where the defendant has not appeared: see *Rule 573*, and *Re Hartley*, 1891, 2 Ch. 121, and notes to *Rule 312*, *infra*, p. 526. Where an amended writ is served a second appearance is not necessary, the first appearance stands as an appearance to the amended writ: *Paxton v. Baird*, 1893, 1 Q. B. 139.

Where leave to amend is necessary, and defendant is out of the jurisdiction, the plaintiff must shew that the claim as proposed to be

Rule 300. amended is one for which he would have been entitled to have to issue a writ for service out of Ontario under *Rule 162*: *Holland v. Leslie, supra*; *Hogaboom v. MacCulloch*, 17 P. R. 377. It would seem, therefore, that any amendment made under this *Rule* without leave must be of the like character, otherwise the defendant may apply under *Rule 301* to have it disallowed.

In *Malcolm v. Itace*, 16 P. R. 331, it was held that a defendant who simply files a joinder of issue to the statement of claim, thereby closes the pleadings; and *semble*, in such a case a plaintiff would be precluded from amending under this *Rule*.

Chancery
Practice.

The former Chancery practice warranted the addition, under an order of course to amend, of a plaintiff: *Dunn v. McLean*, 6 P. R. 97, or defendant: *Attorney-General v. Nethercoat*, 2 M. & Cr. 601; but not the striking out of a defendant, or of a plaintiff, if any of defendants had answered: *Dunn v. McLean, supra*. As, however, this *Rule* relates to the amendment of a pleading only, and as an action is not now commenced by a pleading but by a writ, it would seem that no alteration in the frame of the action as to parties can be made by amendment under this *Rule*. It is to be observed also that *Rules 207* and *208* point to the service of added defendants with a writ. *Rule 206, et seq.*, (and perhaps *Rule 312*) would seem to apply where an amendment in respect to the parties is desired.

It has been held under the similar provisions of the Irish Judicature Act, that a plaintiff amending without leave may not add a fresh cause of action not covered by the indorsement of the writ, and that such an amendment is liable to be moved against under *Rule 301*: *Moore v. Atwill*, 8 L. R. Ir. 245. Such an amendment may affect the costs of prior pleadings, and on a motion under *Rule 301* such costs may be provided for, but under the English practice, and now in Ontario (see *Rule 244*), it is not the rule that the statement of claim must be no wider than the claim indorsed on the writ: see *Johnson v. Palmer*, 4 C. P. D. 258; and *Bourke v. Alexandra Hotel Co.*, W. N. 1877, 30 (except when a defendant has not appeared, and a statement of claim has to be delivered, in order to found a motion for judgment): *Gee v. Bell*, 35 Ch. D. 160; 56 L. T. 305; and see *Gibson v. Hieb*, 1 O. L. R. 247, where defendant, by appearance, waived objection; and there seems to be no reason why the plaintiffs should not, except as to parties, make under this *Rule* as large amendments as by the former Chancery practice might have been made under an order of course: as to which see *McGillivray v. McCoukcy*, 6 P. R. 56. The provisions of *Rule 301* will enable the defendant to obtain the imposition of any terms that may be just.

Extension
of claim
by amend-
ment.

Where the writ claimed damages for wrongful dismissal and slander, but the statement of claim was confined to the former cause of action only, an amendment made under this *Rule* setting up the second cause of action was held to be proper: *Rodger v. Noxon*, 19 P. R. 327.

Where a plaintiff has obtained discovery, he cannot thereafter by amendment add a claim which, if it had been originally made, would have disentitled him to discovery, e.g., a claim for penalties: *Rose v. Croden*, 3 O. L. R. 383.

Amend-
ment as to
place of
trial.

The plaintiff may not change the place of trial by amendment under this *Rule*: *Bull v. N. British*, 10 P. R. 622; and it has also been held in England that he may not, by amendment under this *Rule*, supply an omission to name the place of trial in his statement of claim: *Locke v. White*, 33 Ch. D. 308. But this may not be so in Ontario, for it would not be known where the place of trial was to

be; while in England the effect of omitting to name any place is that the action is to be tried at the Middlesex Sittings. Such an amendment in England, therefore, would amount to changing the place of trial without order, but would not have that effect here. See also *Powell v. Cobb*, 52 L. T. 183.

Where the plaintiff amends after a statement of defence has been put in, the defendant may amend his statement of defence under Rule 302; or put in a new defence, or may proceed with his original defence: *Boddy v. Wall*, 7 Ch. D. 164 (not following *Durling v. Lawrence*, 46 L. J. Chy. 808; W. N. 1877, 182). Where the plaintiff amends by striking out claims to which certain paragraphs of the defence make an answer, so that they are no longer necessary, it would seem that defendant need not amend by striking them out: *Christy v. Ion Specialty Co.*, 18 C. L. T. 85; 34 C. L. J. 163. As to costs in such a case, see note to Rule 301. If he neither amends nor puts in a new defence, it is presumed that the original defence will stand as a defence to the amended statement of claim.

After an order which extended the time for delivery of the defence until after particulars of claim should be delivered, an amended statement of claim delivered without leave was held to be irregular: *Anthony v. Blain*, 5 O. L. R. 48. And see *Confederation Life v. Moore*, 6 O. L. R. 648.

Where after judgment a defect in the pleadings is required to be amended, ordinarily the judgment will have to be vacated: *Hilgrees v. Craicford*, 12 P. R. 658; *Clark v. Cooper*, 15 P. R. 54; after a final judgment in favour of defendant, an amendment by adding a party plaintiff so as to reconstitute the suit was refused: see *Johnston v. Consumers' Gas Co.*, 17 P. R. 297; 1898, A. C. 447; and Rules 312 and 640, and notes.

301. Where a pleading has been amended under Rule 300, the opposite party may, within eight days after the delivery to him of the amended pleading, apply to the Court or a Judge to disallow the amendment, or any part thereof as may seem just. Rules 23rd June, 1894, 1328.

Varies from Eng. (1883) R. 312, so as to apply only in the case of an amendment by the plaintiff under Rule 300.

The giving of security for costs has been imposed as a term where a new case was raised by the amendment: *Northampton Coal, Iron & Waggon Co. v. Midland Waggon Co.*, 7 Ch. D. 500. See also *Bourne v. Coulter*, 50 L. T. 321; 53 L. J. Chy. 690.

Where the plaintiff issued a writ indorsed for the recovery of land, claiming as reversioner and under a surrender of a lease; and the defence was that the lease was in effect a mortgage, and the surrender was obtained by fraud, an amendment by the plaintiff asking, in the alternative, foreclosure of the land as mortgagee, was disallowed on motion under this Rule: *Mellhargen v. McGinnis*, 9 P. R. 157.

Where a plaintiff strikes out allegations so as to make the answer of defendant useless, the defendant may apply under this Rule for the costs unnecessarily incurred: see *McGillivray v. McCracken*, 6 P. R. 54; *Clarkson v. White*, 4 Ont. 663; *Strickland v. Strickland*, 3 Beav. 242; *Marar v. Drn*, 2 S. & S. 113; *Mounsey v. Burnham*, 1

Rules Ha. 22; Dan. Pr., 5th ed., 351-2; *Bourne v. Coulter*, 50 L. T. 321;
302-304. 53 L. J. Chy. 609; *Sidebottom v. Hooton Park Club*, 18 Times, 153.
 See also *Weldon v. Neal*, 19 Q. B. D. 394, in note to *Rule 298*.

Pleading or
 amend-
 ment by the
 other party
 after amend-
 ment.

302. Where a plaintiff has amended his statement of claim under Rule 300, the opposite party shall plead thereto or amend his pleading within the time he then has to plead, or within eight days from the delivery of the amendment, which ever shall last expire, and in case the opposite party has pleaded before the delivery of the amendment and does not plead again or amend within the time above mentioned, he shall be deemed to rely on his original pleading in answer to such amendment. Rule 1248, amending Con. Rule 302.

The Eng. (1883) R. 313 is similar.

For the reason for the latter provision, see *Boddy v. Wall*, 7 Ch. D. 164; *Powell v. Jewsbury*, 9 Ch. D. 34.

This *Rule* has been held not to apply where amendments are made under an order: *Thompson v. Howson*, 16 P. R. 378.

Amend-
 ment by
 consent.

303. Either party may amend his pleadings at any time without order on filing the written consent of the opposite party or his solicitor. Con. Rule 428.

Applica-
 tion for
 leave to
 amend.

304. In other cases application for leave to amend may be made to the Court or a Judge, or to the Judge at the trial, and such amendment may be allowed upon such terms as to costs or otherwise, as may seem just. Con. Rule 429. Rules 23rd June, 1894, 1327.

The Eng. (1883) R. 314 is to the same effect.

The English Rule seems to be intended to provide the mode in which an application under *Rule 298* is to be made. The object of the present *Rule* is probably the same, and to authorize an application for leave to amend when the time for doing so without leave under the preceding *Rules* has expired, or in cases not within them, e.g., the case of the amendment of a counter-claim after a defence to it has been delivered. The latter case was met by the former Con. Rule 425, which provided for an amendment of a counter-claim within a specified time (as is still the English practice under Eng. (1883) R. 311). The effect was that until that time had expired the pleadings were not closed: *Garner v. Tunc*, 12 P. R. 280; and the trial of the action was thereby delayed. The former Rule 425 was therefore repealed, and a special application required by Rule 1327 of 23rd June, 1894, which, with Rule 429, is consolidated in the present *Rule 304*.

A counter-claiming defendant must therefore now make special application if he desires to amend his counter-claim unless the opposite party consents: *Rule 303*.

Amendment of Pleadings by Leave.—General Principles. Rule 304.

—Amendments which justice requires are to be allowed: see *Rule 312* and notes; but it is to be justice to both parties; therefore the allowance of amendments to pleadings is subject to limitations to meet the requirements of justice, and so that the whole nature of the action may not be changed by amendment: *Blankhorn v. Penrose*, 20 W. R. 237; 43 L. T. 668; *Raleigh v. Goschen*, 1898, 1 Ch. 73; 77 L. T. 429; *Rose v. Croden*, *supra*, p. 489; and subject also to whether justice will be advanced, having regard to the nature of the proposed amendment: *McIlhargey v. McGinnis*, 9 P. R. 157; *Caughill v. Clark*, 9 P. R. 471; 3 Ont. 269; *Hendricks v. Montagu*, 17 Ch. D. 642; *Weldon v. Neal*, 19 Q. B. D. 394; and to the time when the application is made: see *Cropper v. Smith*, 26 Ch. D. 700; 10 App. Cas. 249, and other cases, *infra*.

An action may, by amendment of the writ and statement of claim, be turned into an action by the Attorney-General at the suit of a relator without prejudice to a pending motion in the action; the necessary sanction of the Attorney-General being obtained: *Caldwell v. Payham Harbour, etc.*, 2 Ch. D. 221; see *Mounsey v. Earl of Londsdale*, L. R. 6 Chy. 141.

An action against a Minister of the Crown will not be allowed to be amended, so as to make it an action also against the defendant as a private individual: *Raleigh v. Goschen*, 1898, 1 Ch. 73; 77 L. T. 429; and see *Smith v. Boyd*, 18 P. R. 76, 296.

In *Cargill v. Bower*, 4 Ch. D. 78, a defendant who had put in a joint defence with another was allowed to amend by raising defences separately from his co-defendant, and an affidavit showing the nature of the new defence sought to be raised, or its materiality, was not required: see also *Long v. Crossley*, 13 Ch. D. 391; and *Chesterfield v. Black*, 25 W. R. 409. From subsequent cases, however, it is clear that, provided the position of the cause is such that the granting leave to amend will not work injustice to the opposite party, the materiality of the amendment is a matter for consideration on the motion, and it would seem that the Court or Judge has power to consider the amendment and refuse to allow an amendment which is immaterial, or does not appear to be true, or capable of being substantiated: see *McIlhargey v. McGinnis*, in note to *Rule 301*, or which would set up an unmeritorious defence, where the time for raising it without leave has expired: see *Caughill v. Clark*, 9 P. R. 471; 3 Ont. 269; *Oates v. Foresters*, 4 Ont. 535; *Machado v. Fontes*, 45 W. R. 565; 1897, 2 Q. B. 231; *Holland v. Leslie*, 1894, 2 Q. B. 348.

Where an amendment of a matter of account as stated in the pleadings would be allowed before judgment, a similar amendment in respect of accounts filed should be allowed in the Master's Office: *Court v. Holland*, 4 Ont. 688.

Stage of Proceedings.—Application should be made at as early a stage as possible. Delay will be a circumstance to be considered in forming an opinion as to the justice of allowing an amendment: *Clark v. Wray*, 34 Ch. D. 68. The Rules apply and confer power to allow an amendment so long as anything remains to be done in the case: *The Duke of Buccleuch*, 1892, P. 212.

It is not necessarily too late after reply or issue joined: *Chesterfield v. Black*, 25 W. R. 409; after the cause is entered for trial: *Roe v. Davies*, 2 Ch. D. 729; at the trial: *Budding v. Murdoch*, 1 Ch. D. 42; *King v. Corke*, *ib.* 57; *Long v. Crossley*, 13 Ch. D. 388;

Rule 304. *Dallinger v. St. Albans*, 41 L. T. 406; *Green v. Sevin*, *ib.*, 580, 505; *Nobel's Explosives Co. v. Jones*, 17 Ch. D. 721, 724; *Laird v. Briggs*, 19 Ch. D. 22; *Russell v. Canada Life Ass. Co.*, 32 C. P. 256; *Blackburn v. Penrose*, 29 W. R. 237; *Nottage v. Jackson*, 11 Q. B. D. 627; *Riding v. Hawkins*, 14 P. D. 56; or after a new trial has been ordered (in which last case the action is in the same position as if it was at issue and had not been tried): *Hunter v. Boyd*, 6 O. L. R. 639. (In such cases the opposite party may sometimes obtain costs incurred in respect to the old pleadings: see *Dan. Prac.*, 5th ed., 351-52; or, if a plaintiff, he may have the opportunity given him to consider whether he will discontinue: see *Edison Telephone Co. v. India Rubber Co.*, 17 Ch. D. 137). An amendment may also be allowed after interlocutory judgment, but before assessment of damages: *The Duke of Buccleuch*, *supra*; after verdict, but before judgment: *Stilliray v. Toronto*, 20 Ont. 98; *Noad v. Murrow*, 40 L. T. 100; or an application for a new trial: *Ecklin v. Little*, 34 Sol. Jour. 543; but an application after final judgment is too late, except upon the terms of vacating the judgment: *Wilgress v. Crauford*, 12 P. R. 658; *Clarke v. Cooper*, 15 P. R. 54. See also *Johnston v. Canadian Gas Co.*, 17 P. R. 297; *Durham v. Robertson*, 1898, 1 Q. B. 771; and see notes to Rule 312, p. 527.

At the trial where all the evidence that could throw light on the case has been given, it is a mere matter of form to adapt the pleadings to the matters proved: *Cough v. Bench*, 6 Ont. 690; in order to determine the real matter intended to be tried: *Smith v. Bond*, 18 P. R. 76 (but see 18 P. R. 296); *Stilliray v. Toronto*, 20 Ont. 98; see also *The Dictator*, 1892, P. 65; *Wyatt v. Rosherville*, 2 Times, 282, and *Modera v. M.*, 10 Times, 69, where a greater sum having been awarded than was claimed amendments accordingly were made in the writ and pleadings. But where an amendment of the pleadings is allowed at the trial, the amendment should be made as provided by Rule 314. Judgment ought not to be entered until the amendment has been made.

Leave to amend should as a rule be asked before argument of the case as it stands has failed: *Cropper v. Smith*, 26 Ch. D. 700; *James v. Smith*, 1891, 1 Ch. 384; *Brown v. Dunn*, 6 R. 67; *Sales v. L. Erie, etc., Ry. Co.*, 17 P. R. 224.

Motion before Trial.—The expression "Court or a Judge" gives jurisdiction to the Master in Chambers or other officer having like jurisdiction: see notes to Rules 6 and 42.

The application should be made in Chambers, before trial as a general thing: *Marriott v. Marriott*, 26 W. R. 416. It should be made ordinarily to the Master in Chambers or like officer, upon notice, and the amendments should be specified, or their nature stated, either in the notice of motion or in the affidavits in support of it: see *Lawrence v. Norreys*, 39 Ch. D. 218. The condition in which the action stands should also be shewn.

When
allowed

Amendments allowed.—In *Tildesley v. Harper*, 10 Ch. D. at p. 340; Bramwell, L.J., said his practice in Chambers had been to give leave to amend, unless satisfied that the party applying was acting *mala fide*, or that by his blunder he had done some injury to his opponent which could not be compensated for by costs or otherwise; followed in *Re Truport*, *Trafford v. Blane*, 34 W. R. 56; 53 L. T. 498; *Kurtz v. Spence*, 36 Ch. D. 770, 773; *Clavapete v. Commercial Union*, 32 W. R. 151, 262. See also *Cropper v. Smith*, 26

Ch. D. 711; *Shickle v. Lawrence*, 2 Times, 776; *Steward v. Metro-* Rule 304.
politan, etc., 10 Q. B. D. 180; *Johnston v. Consumers' Gas Co.*, 17
 P. R. 297 (see S. C. in P. C., 1898, A. C. 447; 78 L. T. 2701. For Amend-
 the similar rule in cases where an extension of time is applied for. ^{ment} allowed.
 see notes to Rule 790.

The Court of Appeal in *Tildesley v. Harper* applied, in respect of an amendment at the trial, the same principles as if the application had been made before trial on motion: see *Green v. Sevin*, 13 Ch. D. 589, 595.

Where, by a slip in pleading, the legality of a will intended to be impeached was admitted, leave to amend was granted: *Smith v. Smith*, 5 Ont. 690, 698.

Leave to amend will generally be granted where there has been a slip in pleading, but not, in general, so as to raise a fresh cause of action: *Clarke v. Yorke*, 31 W. R. 62; 47 L. T. 381; see *Budding v. Murdoch*, 1 Ch. D. 42; *Raleigh v. Goschen*, 1898, 1 Ch. 73; 77 L. T. 429.

Leave to amend may be granted, though the proposed amendments set up a case not raised by the claim, and may require an adjournment to obtain fresh evidence: *Budding v. Murdoch*, 1 Ch. D. 42; see, however, the remarks as to the headnote to that case, *Re St. Nazaire Co.*, 12 Ch. D. at p. 92; *Betts v. Doughty*, 5 P. D. 26. And leave will in general be granted, on proper terms, so as to enable the real question between the parties to be tried: *Laird v. Briggs*, 10 Ch. D. 22; *Kurtz v. Spence*, 36 Ch. D. 770, 773; but see *Smith v. Boyd*, 18 P. R. 76, 296. See also notes to Rule 312.

Under this Rule, and Rule 312, a plaintiff was allowed to amend his statement of claim in an action on a building contract by increasing the amount claimed for extras, and to amend his reply by changing acceptance into non-acceptance of money paid into Court, the Court being satisfied that the plaintiff had made a mistake, and, on finding it out, had moved with reasonable promptness to correct it, and that no real prejudice was done to the defendant: *Chevier v. Ross*, 3 O. L. R. 219.

Where leave is necessary and the defendant is out of the jurisdiction, the plaintiff must shew that the amended claim is in respect of a cause of action which would have entitled him, had it been preferred in the first instance, to leave to issue the writ for service out of the jurisdiction: *Holland v. Leslie*, 1894, 2 Q. B. 334; *Hogaboom v. McAlloch*, 17 P. R. 377.

A defendant was allowed to amend his defence by setting up the Statute of Limitations as an additional defence: *Patterson v. Central Canada L. & S. Co.*, 17 P. R. 470; and see *Williams v. Leonard*, 16 P. R. 544; 17 P. R. 73; and *Hogaboom v. McAlloch*, 17 P. R. 377.

As to setting up the Statute of Frauds, see *Elmsley v. Harrison*, 17 P. R. 425, 525.

Amendments Refused.—The Court has, however, a discretion as to the amendment: see *Ishley v. Taylor*, 10 Ch. D. 772; *Oates v. Forsters*, 4 Ont. 535; and leave was refused at the hearing, where no reason appeared why the bill was not amended when the answer came in: *Offord v. Offord*, 1 Charl. Cn. (Court) 102; see *Louthier v. Heaver*, 37 W. R. 55; 50 L. T. 631; and where the effect of allowing an amendment would be to compel the plaintiff to re-assign, and

Rule 304.Amend-
ments
refused.

adduce new evidence: *Edevain v. Cohen*, 41 Ch. D. 563; 43 Ch. D. 187; or where the added claim would take away a defence, such as of the Statute of Limitations, which had accrued, and would change the substantial rights of the parties: *Hudson v. Fernyough*, 61 L. T. 722.

Leave was refused, where the Judge thought the amendment would merely enable the defendants to raise, to the plaintiff's title to sue, a technical objection which was not raised on the pleadings (as required by *Rule 271*), and which the defendant never intended to raise, till he adroitly sought to avail himself of it at the hearing: *Collette v. Goode*, 7 Ch. D. 842; see also *Caughill v. Clark*, 11 P. R. 471; *Oates v. Forsters*, 4 Ont. 335. So also where the proposed amendments were irrelevant: *Lever v. Goodwin*, W. N. 1887, 107; *Wood v. Durham*, 21 Q. B. D. 501; *Marshall v. Laughon*, W. N. 1889, 222; or inconsistent and useless: *Central Queensland, etc. v. Gallop*, 8 Times, 225; or where the effect would be to raise a new question which would involve an estate in further intricacies, and might more conveniently be raised in a separate action: *R. v. Blight v. Hartnoll*, 42 L. T. 531; or to convert a claim based on a subsisting lease into one based on an eviction: *Newby v. Shaggs*, 31 Ch. D. 39; see also *Clarke v. Wray*, 31 Ch. D. 68; *Cropper v. Barnicot*, 6 Ch. D. 753; *Mellhargey v. McGinnis*, in note to *R. v. 301*; *Blackmore v. Edwards*, W. N. 1879, 175; 24 Sol. Jour. 17; and where the plaintiff had elected to claim in a manner inconsistent with the proposed amendment: *Cargill v. Bowser*, 10 Ch. D. 522; *Hipgrave v. Case*, 28 Ch. D. 356; *Lowther v. Heaver*, 41 Ch. D. 218; 59 L. T. 630; where a new defence would be raised, after failure of the defence on the record: *Sales v. L. Eric, etc., Ry. Co.*, 17 P. R. 224; *Cropper v. Smith*, 26 Ch. D. 700; *Light v. Hawley*, 29 Ont. 25; and where the effect would be to raise a new issue merely to determine how the costs of the action should be borne: *Webber v. Wedgwood*, W. N. 1883, 8; or to raise a charge of fraud when the case has been launched independently of fraud: *Hendricks v. Montagu*, 17 Ch. D. 642; *Bentley v. Black*, 9 Times, 580; *Symonds v. City R.*, 34 W. R. 364; *Lever v. Goodwin*, *supra* (but see *Riding v. Hawley*, 14 P. D. 561; or *vice versa*; *Dunbar v. Meek*, 32 C. P. 195; or to raise a defence under a section of the Statute of Frauds which had not been pleaded: *James v. Smith*, 1891, 1 Ch. 384; or to require the addition of parties, and raise a new case: *Nobel's Explosives Co. v. Jones*, 17 Ch. D. 721; *Edevain v. Cohen*, *supra*; *Raligh v. Goshen*, 77 L. T. 429; 46 W. R. 92; and were made too late, as where the trial was approaching and the amendment would have the effect of delaying the trial: *Tottenham Local Board v. Lea Conservancy Board*, 80 L. T. Jour. 244; *James v. Smith*, *supra*; *Clark v. Wynn*, 31 Ch. D. 68.

Where a claim was for specific performance, or damages for breach of an agreement, and the plaintiff, pending the action, re-sold the subject of the contract, notifying the defendant of his intention to do so, but went to trial without amending his claim, it was held that, as he had disabled himself from enforcing specific performance, the action must be dismissed. Leave to amend at that stage by striking out the specific performance claim was not considered proper: *Hipgrave v. Case*, 28 Ch. D. 356. See also *Cropper v. Smith*, 26 Ch. D. 700; 10 App. Cas. 249.

In an action for personal injuries, the defendants denied the charge of negligence. After more than six months they proposed to amend by alleging a contract that would transfer the liability to a local body. An action against such local body was required by statute.

to be brought within six months from the accrual of the cause of **Rule 305**. action. Leave to amend was accordingly refused, as the plaintiff would be irretrievably injured, and could not be restored to the same position as before the defendant's mistake in pleading: *Steward v. Metropolitan Tramways Co.*, 1 Q. B. D. 550. See also *Re Gaulard*, 57 L. J. Chy. 200.

Though the Court will not allow an amendment for the purpose of setting up an unmeritorious claim or defence, yet the defence of the Statute of Limitations is not considered unmeritorious: *Patterson v. Central Canada Loan Co.*, 17 P. R. 470. See also note to *Rule 375*.

Terms—"As may be Just."—The terms on which an amendment is allowed are in the discretion of the Court or Judge, according to what the justice of the particular case requires: *Woolley v. Broad*, 1892, 2 Q. B. 317. The opposite party must not be allowed to be prejudiced: *Kurtz v. Spence*, 36 Ch. D. 774; and will be given all proper opportunity of meeting new matter: see *Budding v. Murdoch*, 1 Ch. D. 42, and other cases *supra*, in which application was made at the trial, or, if a plaintiff, he may have an opportunity given him to consider whether he will discontinue: see *Edison Telephone Co. v. India Rubber Co.*, 17 Ch. D. 137.

Where a plaintiff is allowed to amend at the trial by setting up a new case, the defendant is *ex debito justitiæ* entitled to put in a defence thereto: *Elmsley v. Harrison*, 17 P. R. 425, 525, where the Statute of Frauds was allowed to be set up.

The time to amend or deliver a new pleading will vary with each case. Fourteen days was allowed in *Planet Building Society v. Part*, W. N. 1878, 204; a week in *Chesterfield v. Black*, 25 W. R. 409; a month in *Williamson v. L. & V. W. Railway Co.*, 12 Ch. D. 787. Where no time is limited by the order, *Rule 305* applies.

Costs.—Costs are in the discretion of the Court or Judge: *Rule 1130*; and are generally awarded so that the opposite party shall not have to bear the expense, either of the motion to amend, if any, or of proceedings rendered unnecessary, such as costs of trial: *Chesterfield v. Black*, 25 W. R. 409; *Cargill v. Rower*, 4 Ch. D. 78; *King v. Corker*, 1 Ch. D. 57; *Long v. Crossley*, 13 Ch. D. 392; *Kurtz v. Spence*, 36 Ch. D. 770; *Re Gaulard*, 57 L. J. Chy. 200; or of pleadings, etc., rendered useless: *Dan. Pr.*, 5th ed., 351-2; the costs may sometimes be reserved to be disposed of when the merits are tried: *Roe v. Davies*, 2 Ch. D. 729; and *Nobel's Explosives Co. v. Jones*, 17 Ch. D. 721, in which the costs given to the plaintiffs by the Judge at the trial appear to have included costs of amendments, which apparently were necessary in consequence of disclosures made by defendant's clerk.

305. If a party who has obtained leave to amend does not amend within the time limited by the order, or if no time is limited, within 14 days from the date of the order, the order shall, on the expiration of the time limited, or of the 14 days, as the case may be, become *ipso facto* void, unless the time is extended by the Court or a Judge. *Con. Rule 430.*

Same as the Eng. (1883). R. 315, and as Chy. G. O. 83; see *Morgan Chy. Orders*, 4th ed., 415-17; *Dan. Prac.*, 5th ed., 346.

**Rules
306-308.**How alter-
ations to
be made.

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 amendment 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 re-print or fresh copy of the pleadings as amended. Con. Rule 431.

Substantially the same as the Eng. (1883) R. 310.

The number of words mentioned in the Eng. R., viz.: 144, make two folios according to the English mode of computation by which a folio is 72 words.

In *John v. Lloyd*, L. R. 1 Chy. 64, it was held that, though amendments to a bill did not in any place exceed two folios, the Clerk of Records and Writs had discretion to refuse to file the bill without a reprint, if the amendments were numerous and complicated.

Marking of
amended
pleadings.

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 of
under order dated day of ."

Same as Eng. (1883) R. 317.

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

These directions apply to the copy filed, but an omission to similarly mark the copy of the amended pleading, delivered under *Rule 308*, is unimportant: *Hammer v. Clifton*, 1894, 1 Q. B. 238; 10 R. 55.

Delivery of
amended
pleadings.

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

Same as the Eng. (1883) R. 318.

This would seem only to apply to amendments made before trial. Where amendments are made at the trial under *Rule 314*, it is not usual, or necessary, to deliver the amended pleading.

CHAPTER VI.

MISCELLANEOUS PROCEEDINGS IN AN ACTION.

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1. EFFECT OF NON-COMPLIANCE AND ERRORS.

309. A proceeding shall not be defeated by any formal ^{Formal} objection. ^{objections,} Con. Rule 441.

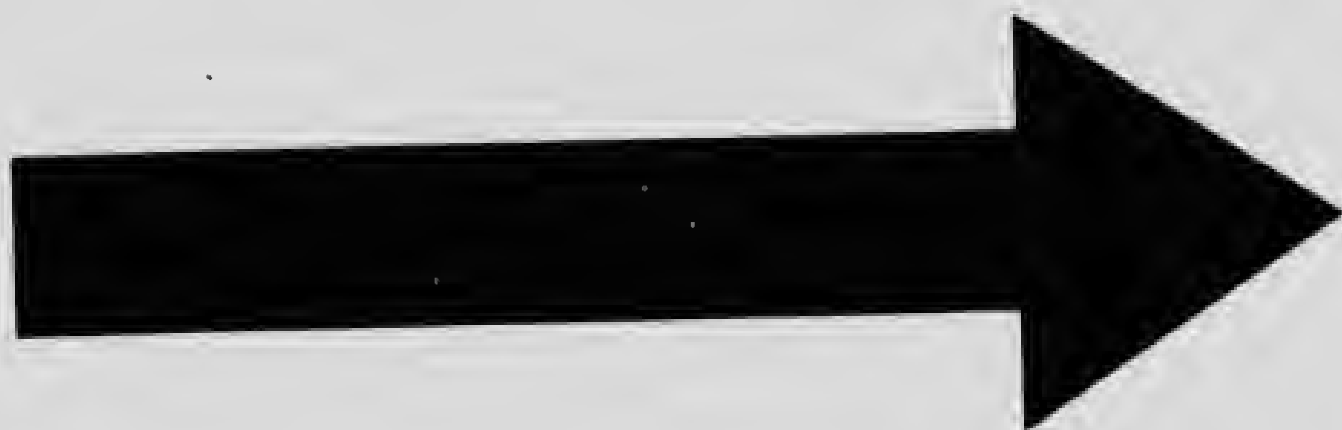
Taken from R. S. O. 1877, c. 49, s. 7.

310. Unless the Court or a Judge so directs, non-compliance with the Rules shall not render the writ or any act or proceeding void, but the same may be set aside, either wholly or in part, as irregular, or amended, or otherwise dealt with, as to the Court or Judge may seem just. Con. Rule 442.

To the same effect as Eng. (1883) R. 1037.

"**Otherwise Dealt With.**"—For the manner in which these words were applied or construed by Kay, J., see *Reynolds v. Coleman*, 36 Ch. D. 458.

Proceedings not Curable.—Service of a writ of summons instead of a notice, on a foreigner abroad (see *Rule 165*) is a nullity: *Hevittson v. Fabre*, 21 Q. B. D. 6; and service of a writ without shewing the original when demanded: *Phillipson v. Emanuel*, 56 L.



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Rule 310.

Proceed-
ings not
curable.

T. 858. and service on a wrong person, whether void or only irregularities, have been held to be not remediable. The service will be set aside: *Ib.*; *Nelson v. Pastorino*, 49 L. T. 564.

As to the difference between an irregularity and a nullity: see further *Hoffman v. Crerar*, 18 P. R. 473; 19 P. R. 15.

"If unwarranted by any enactment or Rule it (the joinder in one action of several plaintiffs having different causes of action) is in my opinion more than an irregularity": per Lord Herschell, in *Smurthwaite v. Hannay*, 1894, A. C. 501.

A writ purporting to be issued out of the District Court of Thunder Bay and Rainy River, after the district of Rainy River had been created a separate provisional judicial district, was held to be a nullity and not curable by amendment: *Hevigill v. Chadwick*, 18 P. R. 359.

A judgment purporting to be signed under Rule 575, but not properly so, the writ not having been specially indorsed, is a nullity: *Hoffman v. Crerar*, 18 P. R. 473; 19 P. R. 15; *Appleby v. Turner*, 19 P. R. 145, 175.

A judgment irregularly signed is not a matter which can be remedied under this Rule: *Anlaby v. Pretorius*, 20 Q. B. D. 764; the defendant has a right to have it set aside: *Ib.*; *Voight B. Co. v. Orth*, 5 O. L. R. 443.

Defects in proceedings taken under an Act of Parliament cannot be overlooked: see *Lawsen v. Can. Farmers, etc.*, 9 P. R. 309; *Re Ostrom and Sidney*, 15 Ont. App. 372; *Smith v. Baker*, 2 H. & M. 500.

See also *Ferrand v. Mayor of Bradford*, 8 D. M. & G. 93.

Proceed-
ings curable

Irregularities Curable.—Where short notice of motion had been irregularly given, but the opposite party had not been injured by the irregularity, the Court exercised its discretion under this Rule, disregarded the irregularity, and heard the motion: *Dawson v. Beeson*, 22 Ch. D. 504; see also *Williams v. De Boinville*, 17 Q. B. D. 180; *Re Coulton*, 34 Ch. D. 22. In *Re McRae*, 25 Ch. D. 19, it was held that objection to a short notice of an appeal was waived by appearing upon it.

An irregularity may be condoned, in the discretion of the Court, even on a motion for attachment: *Petty v. Daniel*, 34 Ch. D. 172; *Litchfield v. Jones*, 25 Ch. D. 64; see *Re Pilcher*, *Pilcher v. Hindes*, 11 Ch. D. 905; *Re Evans*, 1893, 1 Ch. 252; 68 L. T. 271. It was said in *Taylor v. Roe*, 68 L. T. 213, that the Court will not condone a direct non-compliance with the Rules upon an application affecting the liberty of the subject: but see *Rendell v. Grundy*, 1895, 1 Q. B. 16, 21.

The following irregularities have not been allowed to prevail to defeat a proceeding: The non-service of affidavits with notice of motion to set aside an award: *Re Wyggeston Hospital v. Stevenson*, 33 W. R. 551; or with a notice of motion for attachment (see Eng. (1883) R. 699); *Rendall v. Grundy*, *supra*; or with an application under *The Overholding Tenants Act*: *Re Dewar & Dumas*, 8 O. L. R. 141; the service of a writ out of the jurisdiction without the indorsement given in the N. B. (Form 2), and issued upon an order granted without an affidavit being filed under Rule 163; *Dickson v. Law*, 1895, 2 Ch. 62; service of a writ omitting the address of plaintiff's solicitor: *Hoerter v. Hanover Casutchow, etc.*, 10 Times, 22.

103; date of service not indorsed under *Rule* 150; *Steers v. Rogers*, *Rule* 311. *Times*, 183; *Foat v. Bassett*, W. N. 1888, 255; service of petition instead of summons: *Re Bethlehem and Bridewell Hospitals*, 30 C. D. 541; *Re Stafford's Charity*, 57 L. T. 846.

See *Taylor v. Delaney*, 3 O. L. R. 380, *supra*, p. 131.

Waiver.—Irregularities may be waived by appearance: *Re McCrac*, 25 Ch. D. 19; see also notes to *Rule* 169; but not necessarily where the liberty of the subject is affected: *Mander v. Falcke*, 1891, 3 Ch. 488; *Taylor v. Roe*, 68 L. T. 213; *Rendell v. Grundy*, 1895, 1 Q. B. 16, 21; nor where the appearance is merely to take the objection to the regularity of the proceedings. see *Mander v. Falcke*, 1891, 3 Ch. 488; *Firth v. De las Rivas*, 1893, 1 Q. B. 768; 60 L. T. 383.

See also notes to *Rules* 311, and 362.

A nullity cannot be waived by any act of the party against whom it has been taken, nor by lapse of time: *Hoffman v. Cregar*, 18 P. R. 473, 19 P. R. 15; *Appleby v. Turner*, 19 P. R. 145, 175.

311. An application to set aside process or proceedings for irregularity shall be made within a reasonable time, and shall not be allowed if the party applying has taken a fresh step after knowledge of the irregularity. Con. Rule 443.

Irregularity, motion to set aside proceedings to be made promptly.

The same in effect as Eng. (1883) R. 1038.

If an objection can be waived, it amounts to an irregularity, if not, it is a nullity: *Bank of Upper Canada v. Van Voorish*, 4 U. C. L. J. 232. The tendency of the cases is to consider defects as irregularities, rather than nullities: *Herr v. Douglas*, 4 P. R. 102. A stranger cannot set aside proceedings for irregularity: *Perrin v. Bores*, 5 U. C. L. J. 138; *Balfour v. Ellison*, 8 U. C. L. J. 330; *McKenzie v. Harris*, 10 U. C. L. J. 213; *Nicholls v. Nicholls*, 3 P. R. 201; see, however, *Bonistiel v. McMaster*, 6 O. S. 32; unless they are, in effect, fraudulent: *McDonald v. Boice*, 12 Gr. 48; and see *Martin v. Boulanger*, 8 App. Cas. 296. See also notes to *Rule* 310.

The notice of motion must specify the irregularity: *Rule* 362.

A writ joining causes of action which under former *Rule* 341 (now abrogated), could not be joined without leave, was held to be an irregularity, and appearance to such a writ was a "fresh step," within this *Rule*; and a defendant who appeared, instead of applying to strike out the irregularity, could not insist upon it: *Mulkern v. Doerks*, 51 L. T. 429; 53 L. J. Q. B. 526; *Re Derbon*, 36 W. R. 667; see, however, *Hunt v. Worsfold*, 1896, 2 Ch. 224; 74 L. T. 456, where North. J., refused to follow *Mulkern v. Doerks*, *supra*, considering it to have been overruled by *Smurthwaite v. Hannay*, 1894, A. C. 494; 71 L. T. 457.

See also *Fry v. Moore*, 23 Q. B. D. 375, and *Boyle v. Sacker*, 39 Ch. D. 249, in notes to *Rule* 162, p. 298; and *Tozier v. Hawkins*, 15 Q. B. D. 650.

An order setting aside proceedings must be served promptly, or it will be deemed to have been abandoned: *Molsons Bank v. Dillabaugh*, 13 P. R. 313.

Rule 312.

But where a Divisional Court sets aside the judgment at the trial, and orders a new trial, delay in issuing the order cannot be set up as a waiver by either party: *Kelly v. Wade*, 14 P. R. 66. There is a distinction in this respect between interlocutory orders, and judgments or orders going to the merits of the action: *Id.*; see also *Re Leshe*, 23 Ont. 143.

Where, on the return of a motion, an enlargement is granted for the purpose of remedying an objection to the regularity of the proceedings, and the motion is afterwards heard and disposed of on the merits, the objection to the regularity of the proceedings is not open on appeal: *Rendell v. Grundy*, 1895, 1 Q. B. 16.

2. AMENDMENTS.

Amendment of defects or errors.

312. The Court or a Judge may at any time amend any defect or error in any proceedings; and all such amendments may be made as are necessary for [the advancement of justice,] determining the real matter in dispute, [and best calculated to secure the giving of judgment according to the very right and justice of the case]. Con. Rule 444.

The words in brackets are not in the Eng. (1883) R. 309, and are taken substantially from R. S. O. 1877, c. 49, ss. 7, 8; *ib.* c. 50, s. 270, which were the enactments of *The Administration of Justice Act*, 1873, (36 Vict. c. 8, s. 50).

The first clause of this *Rule* differs from the Eng. R. of 1883.

This *Rule* is in regard to amendment of defects and errors generally, and is supplemental to *Rule* 208, respecting amendment of pleadings, and *Rule* 640, respecting clerical errors and slips.

Under *The Administration of Justice Act*, 1873 (36 Vict. c. 8), it was held that if the Court comes to the conclusion that an amendment is "necessary for the advancement of justice, the prevention and redress of fraud, the determination of the rights and interests of the respective parties, and of the real question in controversy between them, and best calculated to secure the giving of judgment according to the very right and justice of the case," the granting or refusing of the amendment ceases practically to be a matter of discretion: *Peterkin v. McFarlane*, 4 Ont. App. 45; *Gilleland v. Wadsworth*, 1 Ont. App. 82.

The Court is required by this *Rule* to allow any amendment which is "necessary for the determining the real matter in dispute," provided also it is for the "advancement of justice," in which is included justice to the opposite party.

In *Cropper v. Smith*, 26 Ch. D. at p. 710, Bowen, L. J., said:—"I know of no kind of error or mistake which, if not fraudulent or intended to over-reach, the Court ought not to correct, if it can be done without injustice to the other party. . . . Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such an amendment as a matter of favour or of grace. . . . It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to the decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done

without injustice, as anything else in the case is a matter of right. **Rule 312.**
 . . . The question seems to me to be this, can you by the imposition of any terms place the other side in as good a position for the purpose of having the question of right determined as they were in at the time when the mistake of judgment was committed? It does not seem to me material to consider whether the mistake of judgment was accidental or not, if not intended to over-reach." The other L.J.J. do not seem to have agreed with these observations so far as they include a mistake of judgment, and they refused leave to amend on the ground that the party had deliberately chosen a course inconsistent with that afterwards sought to be taken by amendment; but see *Ecklin v. Little*, 34 Sol. Jour. 516; see also *Kartv. v. Spencer*, 34 Ch. D. 774; *Collette v. Goode*, 7 Ch. D. at p. 847; *Laird v. Briggs*, 19 Ch. D. 22, 29.

In Ontario it has been held that an amendment may be allowed under this *Rule* at any stage of the proceedings before final judgment, wherever any prejudice it may occasion to the opposite party can be compensated by costs: *Williams v. Leonard*, 16 P. R. 544; 17 P. R. 72.

Under this *Rule*, a plaintiff who had by his pleading accepted money paid into Court by the defendant, was allowed to amend by withdrawing the acceptance and substituting a refusal to accept; and where he had claimed too little, he was allowed to increase his claim by amendment: *Chevalier v. Ross*, 3 O. L. R. 219.

Amendment of Writs of Summons:—

Amendment of writ.

An order to amend has been held to be necessary, even though the writ has been served: *per* Lush. J., *Anon.*, 60 L. T. Jour. 32; 1 Chnrl. 34; and this decision has been followed by Mr. Dalton in *Waters*; see *Globe*, 6th Oct., 1881, and Form 112 (H. & L. Forms, 10. 467); see *contra* under the former practice, *Worthington v. Boulton*, 6 P. R. 98.

When a statement of claim has been delivered, containing an extension of the claim made by the writ, an amendment of the indorsement on the writ seems to be unnecessary: *Large v. Large*, W. N. 1877, 98; *Johnson v. Palmer*, 4 C. P. D. 262; and now *Rule 244*. See under the previous practice, *Conybeare v. Lewis*, W. N. 1881, 31; 44 L. T. 242; 29 W. R. 391; *Re Jones*, *Eyre v. Cox*, 24 W. R. 317.

An action may, by amendment of the writ and statement of claim, be turned into an information without prejudice to a pending motion in the action, the necessary sanction of the Attorney-General being obtained: *Caldwell v. Pagham Harbour Reclamation Company*, 2 Ch. D. 221.

An amendment of the indorsement on the writ by increasing the amount claimed was allowed after verdict: *The Dictator*, 1892, P. 64; 66 L. T. 863; and see *Wyatt v. Rosherville*, 2 Times, 282; *Chattell v. Daily Mail*, 18 Times, 165; and other cases in notes to *Rule 304*, p. 516.

A writ of summons served out of Ontario may like any other writ be amended, but, it would seem, not so as to introduce any claim in respect of which service out of Ontario would not be allowed under *Rule 162*; see *Holland v. Leslie*, 1894, 2 Q. B. 346.

Rule 312.

Where a writ has been amended, the amended writ must be served. If the writ had been served and the time for appearance had elapsed, and the defendant has not appeared, it would seem that the service may be in the manner mentioned in *Rule 330*, at least in a case where no new claim, but only an amplification of the original one, is made: *Re Hartley*, 1891, 2 Ch. 121; 64 L. T. 786; *Jamaica Ry. Co. v. Colonial Bank*, 1905, 1 Ch. 677. There is no hard and fast rule that an amended writ must be served personally on a defendant who has not appeared: *Ib.*; or the writ may be served in the same way as the original was served: *The Cassiopeia*, 4 P. D. 188 (where a new claim was introduced); *Guess v. Perry*, 12 P. R. 460 (where a claim for damages was struck out by amendment); see also *Bryans v. Hughes*, 14 L. R. Ir. 62. The Court in its discretion may direct personal service, if the amendment has been a substantial one, and there might be danger of injustice if the absent defendant were not notified personally: *Jamaica Ry. v. Col. Bank*, *supra*. If the defendant has appeared it would seem to be sufficient to serve his solicitor with the amended writ; but see *Rules 146 and 329*.

Where a statement of claim has been delivered and it is amended it will not in general be necessary to amend and re-serve the writ. It will be sufficient to serve the amended pleading: see *Rules 300 and 306*, and notes.

Irregularities in a writ of summons may be amended either on motion by the plaintiff, or leave to amend may be granted where the defendant moves to set aside the writ. The following irregularities have been allowed to be amended:—A writ signed by a Process Clerk issued after the appointment of his successor: *Stevenson v. Williams*, 7 P. R. 358; a writ issued without the signature of the proper officer: *Labadie v. Darling*, 7 P. R. 355; a writ tested in the name of a retired Chief Justice after the appointment of his successor had been gazetted, but before he had taken the oath: *Nelson v. Roy*, 3 P. R. 226; a writ tested in the name of a Lord Chancellor after his resignation and the appointment of his successor: *Pleasants v. East Dereham, etc.*, 47 L. T. 439; a mistake in the date in the *teste* as "eighty—" for "eighty-two": *Wesson v. Stalker*, 48 L. T. 444. But the absence from the Province of the Judge in whose name writs are tested does not render it improper to *teste* a writ in his name: *Brett v. Smith*, 1 P. R. 309.

An amendment was not allowed where it would defeat the Statute of Limitations: *Hudson v. Fernyhough*, 61 L. T. 722; S. C. 88 L. T. Jour. 253, in appeal; but see *Challinor v. Roder*, *infra*.

The plaintiff will have to pay the costs of an amendment of the writ.

Amendments of Pleadings.—See notes to *Rule 304*.

Amendments Respecting the Parties are treated of in *Rules 206, 304, 312 and 313*.

Amendments which require the addition of parties as well as the restatement of allegations in pleadings are made by the combined action of *Rule 206*, and *Rule 312*, or *298*: *Ashley v. Taylor*, 10 Ch. D. 772; *Secar v. Lawson*, 16 Ch. D. 121.

Misnomer.

Where a person was intended to be sued as an executor, but by mistake was misnamed in the writ, an amendment was allowed substituting the true name of the defendant intended to be sued, notwithstanding that in the meantime the Statute of Limitations would, but for such amendment, have been a defence to the action against such party: *Challinor v. Roder*, 1 Times, 527.

Amendment after Judgment.—The writ of summons and subsequent proceedings may, in a proper case, be amended after judgment to correct some defect or error: *Clarke v. Cooper*, 15 P. R. 54; see *Wilgoss v. Crawford*, *Id.* 638; but the judgment in such case must be vacated and proceedings taken afresh from the point at which the defect occurred; 15 P. R. 54; and see formerly *Barrett v. Gardner*, 1 Chy. Ch. 344; *Laurason v. Buckley*, 2 Chy. Ch. 334; *Park of Montreal v. Power*, 2 Chy. Ch. 47; and any such amendment will probably be only of defects and errors, not of pleadings or as to parties necessitating re litigation: see *Durham v. Robertson*, 1898, 1 Q. B. 774. Thus where the judgment was in favour of the defendant, an amendment reconstituting the suit by adding the Attorney-General, and turning the action into an information and action, was refused: *Johnston v. Consumers' Gas Co.*, 17 P. R. 297; and see *Durham v. Robertson*, *supra*.

An amendment made affecting a person not a party, was, at his instance, rescinded: *Glass v. Cameron*, 9 Ont. 712.

Amendment of Slips, etc.—See as to the correction of slips, omissions, or clerical errors, generally, *Rule* 640; and as to clerical errors in reports and certificates of Masters, notes to *Rule* 702.

A notice of motion which did not shew any interest in the relator as required by R. S. O. c. 223, s. 221, was held amendable: *Reg. ex rel., Percy v. Worth*, 23 Ont. 688.

Where judgment had been pronounced for sale of property as described in a claim, but afterwards it was discovered to have been mis-described, the claim was by consent of all parties amended, and the judgment post-dated, so as to appear to have been made after the amendment: *Winkley v. Winkley*, 44 L. T. 572; 29 W. R. 628. In general, however, an order ought not to bear a fictitious date: *Ashley v. Taylor*, 10 Ch. D. 773.

A notice of motion in a *quo warranto* proceeding in which there was a discrepancy between the day of the week and the day of the month mentioned as that on which it was returnable, was amended in accordance with a notice subsequently given stating the day on which the motion would be brought on: *Rex ex rel. Roberts v. Ponsford*, 3 O. L. R. 410.

313. Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the Court or a Judge, if satisfied that it has been so commenced through a *bona fide* mistake and that it is necessary for the determination of the real matter in dispute so to do, may, [subject to clause (3) of *Rule* 206], order any other person to be substituted or added as plaintiff, upon such terms as may seem just. *Con. Rule* 445.

Same as the Eng. (1883) R. 124, except the words in brackets.

Actions have been inadvertently brought by the wrong person, as by *cestui que trust*, instead of trustee; by mortgagor, instead of mortgagee. The same mistake has been made where it was matter of real difficulty to say which of the two persons ought to sue, as in the

Substitution and addition of plaintiffs.

Rule 313. case of contracts made by agents, as to which it is sometimes a question of much nicety to determine who ought to sue. Previous to *The Administration of Justice Act, 1873*, in Ontario, and until the Judicature Acts in England, though the Common Law Courts had the largest powers of adding parties, or amending mis-descriptions of parties, they had no power to substitute one plaintiff for another, such as this *Rule* confers: see *De Gendie v. Bogardus*, L. R. 7 C. P. 409.

Substitution
and addition
of plaintiff.

Where an action has through a *bonâ fide* mistake been commenced in the name of the wrong person as plaintiff the fact that the original plaintiff has no cause of action, does not take away the jurisdiction of the Court to order the substitution of another person as plaintiff: *Hughes v. Pump House Hotel Co.* (No. 2), 1902, 2 K. B. 485; 87 L. T. 359.

An application under this *Rule* can only be made by a plaintiff: *Clares v. Hilliard*, 4 Ch. D. 413; and is restricted to cases where a *bonâ fide* mistake has occurred, which has been discovered after action brought: as where a new partner was brought into a firm before the dealing in question: but it is not intended to confer upon the Judge unlimited discretion to re-model the proceedings: *per* Mellor, J., in *Turquand v. Fearon*, 4 Q. B. D. at p. 282. In *Smith v. Heslitt*, W. N. 1875, 250; 1 Chanc. Ch. Ca. 56, Huddleston, B., said: "You have to satisfy me of two things: 1st, that there has been a *bonâ fide* mistake in the issue of the writ; and 2d, that it is a necessary change." See also *Clares v. Hilliard*, 4 Ch. D. 413.

In an action by assignees of insolvents, the Judge at the trial held that the claim sued for did not pass, under the circumstances, to the assignees. The defendants having been given time during the sittings to ascertain whether they had any defence to a suit by the insolvents, the latter were added under this *Rule* as plaintiffs, and judgment was given in their favour, but without costs: *Woodward v. Shields*, 32 C. P. 282; but see *Durham v. Robertson*, 1898, 1 Q. B. 774. See also *Emden v. Carte*, 17 Ch. D. 169.

In an action to restrain the violation of a covenant, and for damages, the plaintiff was advised, after action commenced, that there was something in her title which might act as a personal bar to her obtaining relief. An amendment by making another person a co-plaintiff who was also entitled to the benefit of the same covenant was allowed, the real question being the effect of the covenant: *Ayscough v. Bullar*, 41 Ch. D. 341. Where a new plaintiff is thus added, the action, as regards him, is to be deemed to have been commenced, only from the date of his being added: *Id.* See also *Walcott v. Lyons*, 29 Ch. D. 584.

After judgment finding defendants liable for a collision, the substitution of the owner of the cargo as plaintiff instead of the then plaintiff, his agent, was allowed so as to enable the owner's damages to be assessed. It was held that judgment finding the liability and leaving the damages to be assessed was not final, and therefore there was a power to act under this *Rule*: *The Duke of Buccleuch*, 1892, P. 201. The addition of a plaintiff was refused where the effect would be to constitute a new action which the plaintiff in the action commenced could not maintain: *Tinning v. Bingham*, 16 P. R. 110; *Johnston v. Consumers' Gas Co.*, 17 P. R. 297; *Durham v. Robertson*, *supra*; *Hathaway v. Duig*, 6 Ont. App. 264. So where the plaintiff in misconception of his rights had sued the defendants in their official capacity as servants of the Crown, he was not allowed to amend by suing them as private individuals: *Ratcliff v. Gascher*, 1898, 1 Ch. 73; 77 L. T. 429.

An addition of a plaintiff ought not to be allowed where it would prejudice defendant's right to set up the Statute of Limitations as against the added party: see *Hudson v. Fernyough*, 61 L. T. 722; 88 L. T. Jour. 253. Rules 314-316.

For other cases in which the *Rule* had been acted upon, see *Val de Travers Asphalt Co. (Limited) v. London Tramway Co. (Limited)*, 48 L. J. C. P. 312; 40 L. T. 133; W. N. 1879, 46, and *Mercantile River Plate Co. v. Isaac*, W. N. 1876, 104; 2 Charl. Ch. Ca. 23; *Blackburn Union v. Brooks*, 26 W. R. 57; *Cupples v. Strahan*, 20 L. R. Ir. 120; *Long v. Crossley*, 13 Ch. D. 388; *Carswell v. Hyland*, 3 Times. 708; *Lynce v. Suarh*, 1899, 1 Q. B. 489; 80 L. T. 122.

The *bona fide* mistake, which must be shown, may be one of law: *Duckett v. Gover*, 6 Ch. D. 82; *Mason v. Harris*, 11 Ch. D. 97.

Terms and Costs.—See *Ayscough v. Bullar*, 41 Ch. D. 341.

This *Rule* is expressly made subject to clause (3) of *Rule 206*, so that a plaintiff will not be added or substituted unless he consents: *Turquand v. Fearon*, 4 Q. B. D. 280, though the terms may otherwise be "such as may seem just": *Tryon v. National Prov. Ins.*, 16 Q. B. D. 678; and see *Rule 206*; nor under this *Rule* unless the original plaintiff consents: *Emden v. Carte*, 17 Ch. D. 169.

An order will not be made on an *ex parte* application: *Tildesley v. Harper*, 3 Ch. D. 277.

Where the present *Rule* is not applicable, plaintiffs may nevertheless sometimes be added under *Rule 206*; see notes to that *Rule*, and *Emden v. Carte*, and *Smith v. Haseltine*, W. N. 1875, 250.

314. Where an amendment is directed or allowed at the trial, it shall not be necessary to issue an order therefor. The amendment, unless otherwise directed, shall be at once made on the record. Amendment at trial. Con. Rule 446. Rules of 1 Jan., 1896, 1445.

Where a plaintiff is allowed to amend at the trial by setting up a new case, the defendant is *ex debito justitiæ*, also entitled to put in a defence thereto: *Elmsley v. Harrison*, 17 P. R. 325.

315. Where an amendment of any record of the Court or document filed, other than a pleading, is directed, no physical alteration of the record or document shall be made, but a note shall be made in the margin or other convenient place, of the amendment directed. *New.* No physical alteration of records.

This *Rule* adopts the practice laid down in *Fox v. Bearblock*, 45 L. T. 469; 46 L. T. 145.

3. PAPER, NOTICES AND WRITTEN PROCEEDINGS

GENERALLY.

316. Unless otherwise directed by the Court or a Judge, no notice required by these Rules or the practice of the Court shall be given orally. Notices to be written or printed. Con. Rule 447, amended.

A verbal notice to produce is insufficient: *Provincial Ins. Co. v. Shaw*, 19 P. C. Q. B. 537.

Rules
317-320.

Regulations as to
printing
proceed-
ings.

317. Proceedings, if printed, shall be printed with pica type leaded, on good paper, of foolscap size. Con. Rule 448.

The Eng. (1883) R. 1005, is more particular in its directions.

See Chy. G. O. 66, and *Cossey v. Ducklow*, 2 Chy. Ch. 227, where service of a bill not printed, etc., in conformity with the Gen. Orders was set aside.

Paragraphs.

318. Every petition, issue, special case, affidavit and other proceeding of a like nature, shall be divided into numbered paragraphs, and shall state concisely such matters and facts as may be necessary to truly inform the Court. Con. Rule 449.

**Width and
length of
paper, etc.**

319. All rolls and records shall be upon parchment or paper of such width and length as shall be prescribed by the officer having the control and superintendence of the Central Office by written notice, to be put up in some conspicuous place in the Central Office and in the several local offices, and no officer shall be bound to receive any roll or record not made up in conformity to such notice, and such rolls and records shall not exceed, when folded, 14 inches in length and 4 inches in breadth, written upon at least a sheet of paper and folded accordingly. Con. Rule 450. Rules of 1 Jan., 1896, 1446.

See as to printing pleadings, *Rule 265*; as to mode of printing, *Rule 317*.

The Clerk of the Crown and Pleas pursuant to this *Rule* has prescribed that all Judgments and Records, written or printed (either by typewriter or otherwise) shall be of the length and width of a half sheet of foolscap paper, and shall be folded in half, lengthwise; and it is recommended that all records for trial shall be enclosed or covered by a full sheet of foolscap, or other covering of the same size.

**Short style
of cause.**

320. In all proceedings in a cause or matter, except pleadings, petitions in the nature of pleadings, judgments and decretal orders, the following short style of cause shall be sufficient:

“*Between John Smith and others,—Plaintiffs,*
and
Richard Roe and others.—Defendants.”

(2) In case of proceedings which it has been the practice to entitle more shortly thus: "*Smith v. Roe*," such practice shall continue. *Cor.* Rule 451. Rules
321, 322

Taken from *Chy. O.* 597.

In all pleadings, petitions in the nature of pleadings, judgments, and decretal orders, the full style of the action or matter is to be set out; in other proceedings, including affidavits, interlocutory orders, notices of trial, to produce, to admit, notices of motion, and of appeal, the shortened style first given in the *Rule* may be used.

The shorter title, *e.g.*, *Smith v. Roe*, is usually confined to appointments for settling minutes of judgments or orders, Master's warrants, notices of taxation, or other notices and appointments not already mentioned, which are required to be taken out or served in the progress of a cause. There is, however, no authority for styling affidavits in this way.

Where an action is dismissed as against one of several defendants, it would seem that it is not irregular thereafter to leave that defendant's name out of the title of the action; see *Prince Albert v. Strange*, 2 D. C. & Sm. at p. 709.

321. A folio shall be one hundred words. *Con. Rule* A folio is
100 words.
452.

4. COPIES OF PAPERS.

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. Service of
office copies
of affidavits
and other
proceedings
disposed
with in cer-
tain cases.

An "office copy" of a document is a copy authenticated by the proper officer, usually the one in whose custody the original record of the proceedings is deposited. Under *Rule* 323, office copies of judgments and orders are to be certified by the officer in whose office the same are entered. Office copies of other proceedings should be certified by the officer in whose office they are filed. Office copies of judgments are expressly required to be served in certain cases; see *Rules* 203 and 659; and where according to the former practice an office copy of a decree, or order, was required to be served, in like cases an office copy of the judgment, or order, would seem to be necessary under the present practice, except where a different practice is expressly provided.

Under the former Chancery practice, the first proceeding in the cause served upon a defendant was usually required to be an office copy; *e.g.*, bills, or decrees, or orders served on parties added in the Master's office, and orders of revivor. But under the present practice, it would seem sufficient to serve a plain copy of an order, adding parties upon a change of interest, instead of an office copy as formerly; see *Rule* 397.

As to what is "a true copy," see *Walker v. Nibbs*, 18 Gr. 213; *Sharp v. McHenry*, 38 Ch. D. 427.

Rules**323-325.**

Habeas Corpus.—A writ of *habeas corpus ad subjungendum* can only be properly served by delivering the original writ to the person to whom it is addressed; *Reg. v. Koor*, 71 L. T. 558. It must be signed by the Judge who grants it, and notice must also be served giving the person to whom the writ is addressed, notice of the consequences of failure to obey it; *Re Hulbeck*, 30 C. L. J. 751. S. 15 C. L. T. 9.

Orders.—Where an order directs the doing of an act within a limited time, the order should be served on the person required to obey it before the limited time has expired, and in time to give him a reasonable opportunity to comply with its terms. Where an order was not so served a motion to commit for disobedience was refused; *Berry v. Donovan*, 21 Ont. App. 14. Where the limited time expires without service, it will be necessary to apply for an order limiting a further time, before the order can be enforced.

Office
copies.

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, 1417, amended.

This Rule makes a change. The former Rule 454, taken from Chy. O. 547, enabled Deputy Clerks of the Crown, Deputy and Local Registrars, at the place where a reference is being presented, as well as the proper officer where the judgment or order is entered, to authenticate copies.

An office copy is made by comparing it with the original or with the entry thereof in the judgment book, marking it "examined," (appending the signature of the officer), and stamping it with the seal of the Court or of the officer who certifies it.

Copies of
documents
to be
demanded
in writing.

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.

Taken from Chy. O. 548.

Pleadings are required to be served on the opposite party without a demand; Rule 461.

An irregularity in the indorsement of a pleading was formerly waived by demanding a copy of it, and was ordered to be amended without costs; *Bennett v. O'Meara*, 2 Chy. Ch. 167.

Where
copy of
document
demanded,
it is to be
furnished
within 48
hours.

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.

Taken from Chy. O. 549.

This Rule is imperative, and the Court will enforce compliance **Rules** with it: *Totten v. MacIntyre*, 2 Chy. Ch. 80; *Barrow v. Houghton*, 2 Chy. Ch. 180. Formerly the costs of furnishing copies were part of the costs of the cause, or application, and payment of the costs of the copies could not be required as a condition of furnishing them. Whether the Rules are intended to make any change in this respect is not very clear: see *Rule 326*.

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 Eng. (1883) R. 1002, r. 18, gives fourpence per folio; with that exception, the two Rules are the same in substance.

In practice, the costs of furnishing copies of affidavits on a motion have been regarded as part of the costs of the motion; and it has not been usual to demand payment for copies so demanded as a condition of furnishing them.

But a solicitor desiring copies of documents produced for inspection by the opposite party, was held to be entitled to make the copies himself, without first giving the opposite solicitor an opportunity to make them: *Ormerod v. St. George's Iron Works*, 1865, 1 Ch. 505, 118 L. T. Jour. 432.

Statute, that copies of documents may by leave of the Court be taken by photography: *Lewis v. Laidlaw*, 1895, 2 Q. B. 191; 63 L. T. 353.

5. SERVICE OF PAPERS.

327. Unless otherwise provided by Statute or Rule of Court, pleadings and notices required to be served in any action, whether in the Supreme Court of Judicature or County Courts, may be served in any part of Ontario. Con. Rule 459.

Taken from R. S. O. 1877, c. 50, s. 59.

328. Admissions and acceptances of the service of an order, notice of motion or other paper, upon the opposite solicitor, need not be verified by affidavit. Con. Rule 460.

Taken from Chy. O. 48.

See Rules 145, 574, as to acceptance of service of writs of summons.

Rule 329.

Under *Rule 574*, acceptances of service of writs of summons, and undertakings to appear, are required to be verified by affidavit in order to be used for signing a judgment by default; but all other acceptances and admissions of service may under this *Rule* be received and acted on, without verification.

Agent
when to be
served.

329. All writs, pleadings, notices, orders, appointments, warrants, and other documents, and written communications, which do not require personal service upon the party to be affected thereby, shall be served upon his solicitor when residing in Toronto, or if his solicitor does not reside in Toronto, then either upon his solicitor, or, if such solicitor does not reside in the county where such proceedings are conducted, or resides in some part of such county other than the county town, and has not an office in the county town, then upon the agent, if any, named in the "Solicitors' and Agents' Book," provided for by *Rule 92*, or upon the Toronto agent of such solicitor named in the "Solicitors' and Agents' Book," provided for by *Rule 90*, unless the Court, or a Judge, or a Master, before whom any such proceeding is had, shall give any direction as to the solicitor upon whom any such notice, appointment, warrant, or other document or written communication is to be served. Where any solicitor has not caused such entry to be made in either of the "Solicitors' and Agents' Books," provided for by *Rules 90 and 92*, then the posting up of a copy of any such notice, appointment, warrant, or other document, or written communication, for such solicitor in the office in which the proceedings are being conducted, is to be deemed sufficient service, unless the Court, or Judge, or Master, as the case may be, directs otherwise. *Con. Rule 461. Rules of 1 Jan., 1896, 1448.*

Taken from *Chy. O. 42, 43; R. S. O. 1877, c. 50, s. 57; Rules T. T. 1856, 136, 137; 58 Vict. c. 13, s. 36.*

By *Rule 90*, it is imperative upon every solicitor to appoint an agent in Toronto, and have his name entered as such agent in the book kept at Osgoode Hall; but under *Rule 92* it is entirely at the solicitor's option to have, or not have, a booked agent in any county town. If a solicitor does enter an agent's name in the books kept in a county town, then service can be effected on such solicitor, but if he does not, then service can be effected only by serving the solicitor himself, or his Toronto agent. Service can only be effected by posting up copies, when there is no entry of an agent in the books at either place: *Essex v. G. T. Ry. Co., 13 P. R. 221.*

Service of papers on a solicitor as agent for another solicitor is not good, unless the solicitor served is the booked agent of the other, even though he has acted as agent in the same suit: *Robinson v. Robinson, 13 P. R. 51.*

This Rule only applies to the service of documents, which do not **Rule 330**. require personal service: see **Rule 146**.

A solicitor cannot, as agent for one principal, serve himself as agent for another principal: *Horseman v. Coulson*, 6 P. R. 263; *Ontario Bank v. Fisher*, 4 P. R. 22.

Service on the clerk of a solicitor elsewhere than at the office of the solicitor, is good only from the time it reaches the solicitor: *Hermann v. Mandarin, etc.*, 18 P. R. 34.

Where parties have solicitors, papers and documents must in the absence of special arrangement be served by the party's solicitor: *Yeatman v. Snow*, 28 W. R. 574, and served either upon the solicitors, or their agents under this Rule: *Omnium Securities v. Ellis*, 18 C. L. J. 143; 2 C. L. T. 216; see *Kettlewell v. Watson*, 52 L. J. Chy. 818, where a notice served by a new solicitor before an order changing the solicitor had been obtained was held good, no one being misled.

Special arrangement is sometimes made between solicitors for service of papers upon one another through the post office, and in such case a question may arise as to whether service is to count from the date of mailing, or the date of receipt. This will be determined, according to the agreement, if any, between them, or if there be no special agreement on this point the date of receipt will be the date of service as it is the general practice to admit service as of the day of receipt: *McDonough v. Alison*, 9 P. R. 4.

Until an order has been made and served, changing the solicitor of any party to an action, or authorizing such party to sue, or defend, in person, service on the solicitor originally named is sufficient, even though such solicitor have ceased to act for such party: see *Rule 335*; *Davidson v. Leslie*, 9 Beav. 104; *Wright v. King*, 9 Beav. 161; and see *Newton v. Thompson*, 16 Jur. 1008; *De la Pole v. Dick*, 29 Ch. D. 351; 52 L. T. 457; *Muir v. Guimanc*, 9 O. L. R. 324; but not after the proceedings for which the solicitor had originally authority to act have come to an end, so that in law his authority has ceased: *Reg. v. JJ. of Oxfordshire*, 1893, 2 Q. B. 149; 69 L. T. 368; *James v. Ricknell*, 20 Q. B. D. 164; *Re Grey, Grange v. Coles*, 65 L. T. 743. Where a solicitor has absconded, a notice of motion left at his unoccupied place of business was held properly served: *Newton v. Thompson*, 22 L. J. Chy. 10; and see *Re Templeman*, 20 Beav. 574; *Re Wiscicold*, 16 Beav. 357; *Re Catlin*, 18 Beav. 508; *Re Dufaur*, 16 Beav. 1; *Re Thompson*, 20 Beav. 545; *Wilson v. Emmett*, 19 Beav. 232; *Ex parte Belton*, 25 Beav. 368; *Re Walton*, 4 K. & J. 78.

For the proceedings on the death of a solicitor to compel the appointment of another, see *Dean v. Lethbridge*, 26 Beav. 397.

330. Where a party sues or defends in person and no address for service of such party is written or printed pursuant to the directions of Rules 134, 135 and 136, or where a party has ceased to have a solicitor, [or where a defendant served with a writ of summons or notice in lieu thereof, has not appeared thereto], all writs, notices, orders, appointments, warrants and other documents, proceedings and written communications, not requiring personal service upon the party to be affected thereby, shall

Service, where solicitor neglects to enter name of agent.

Rule 330.

Service by
posting up
in office,
when
allowable.

unless the Court otherwise directs, be deemed to be sufficiently served upon the party, by posting up a copy in the office in which the proceedings are being conducted. But if an address for service is written or printed as afore-said, then all such writs, notices, orders, warrants and other documents, proceedings and written communications, shall be deemed sufficiently served upon such party if left for him at such address for service. Rules 23 June, 1894, 1330.

Based upon Chy. O. 45, and original J. A. Rule 131, which was inadvertently omitted from the Con. Rules 1888, but is in effect re-introduced by the passage in brackets. The corresponding Eng. Rule of 1883, is R. 1015.

Defendant who has not Appeared.—A defendant who does not appear is not entitled to notice of further proceedings, unless specially so provided by any Rule, or by any special order of the Court or a Judge: see Rule 573, and notes. In the cases where it is by Rule or order so provided that such a defendant is to be served with notice, or in any case where the plaintiff desires to serve such a defendant, service may be effected by posting up under this Rule, unless personal service is made necessary by any Rule or order; but proof of service of the writ of summons must be first filed: *Appleby v. Turner*, 19 P. R. 145; Rule 574.

A notice of motion for judgment is a document which may be delivered by posting under this Rule: *Dynand v. Croft*, 3 Ch. D. 512; *Morton v. Miller*, *ib.* 516; *Parsons v. Harris*, 6 Ch. D. 604; *Burritt v. Murdock*, 9 P. R. 191; *Williams v. Cardwell*, 25 W. R. 646, nor following *Cook v. Day*, W. N. 1876, 122; so a notice of assessment of damages under Rule 337; *O'Connor v. Hogan*, 10 L. R. 41, 262; a writ of summons after amendment; *Re Hartley*, 1891, 2 Ch. 121; 14 L. T. 786; an order to continue proceedings under Rule 394; *Jackson v. Kilham*, W. N. 1891, 171; a notice of motion for an attachment; *Re Morris*, 44 Ch. 14, 151; *Re Evans*, 1893, 1 Ch. 272; but *semble*, only where personal service cannot be effected; *Re Bassett*, 1894, 3 Ch. 179, because proceedings whereby the liberty of the person is intended to be affected; *e.g.*, proceedings upon which to found an application for an attachment, are usually required to be personally served on the party, even though he have appeared, or sued, by a solicitor. Applications to commit for non-production of documents are, however, an exception to this rule; see Rule 474.

The Rule applies where a person not originally a party is made a defendant to a counter-claim and fails to appear: *Verney v. Thomas*, 58 L. T. 20.

The omission of a defendant's address, or address for service when necessary, in an appearance by a defendant in person, is expressly provided for by Rule 170.

Where several parties are served with a document under this Rule, a copy must be posted up for each. The posting of one copy only of a statement of claim and notice of motion for judgment for two defendants was held not to be service on either: *Hauke v. Ward*, 17 P. R. 520.

The *Rule* only applies to proceedings before judgment, proceedings *Rules* after judgment requiring to be served on a non-appearing defendant **331, 332.** cannot be served in the manner described by this *Rule*. Thus a notice of motion for a receiver by way of equitable execution cannot be served in the manner mentioned in this *Rule*, but must be served personally or, by leave, substitutionally: *Tilling v. Blythe*, 1899. 1 Q. B. 557.

As to service of proceedings in the Master's Office, upon a non-appearing defendant, see *Rule* 658.

331. Where at the time of attendance to serve any paper or document, the office of the solicitor for the party upon whom the service is sought to be made is closed or no one is in attendance therein for receiving papers or documents served, service of the paper or document may be effected by mailing the same, at any time during the same day, addressed to the solicitor, at his office, by registered letter, postage prepaid, and the service shall be deemed to have been effected at the time of the attendance for that purpose at the office of the solicitor. *New.*

This *Rule* was passed to meet the case of *Raphael v. Davis* (before Mr. Cartwright, M.C., 15th January, 1897).

It is presumed that service may be effected in the manner mentioned in this *Rule*, after an attendance to serve after 2 p.m. on Saturday, or after 4 p.m. on other days, but, as the service will only count as of the next day, it will be better to serve at the office on the next day: see *Rule* 349.

332. In any action by a mortgagee or other person having a charge on real property, for foreclosure or sale, and to which action any judgment creditor of the mortgagor, or of the person liable to the charge, is a defendant, personal service on such defendant shall not be necessary, and it shall be sufficient to serve his solicitor in the action in which the judgment has been recovered, with the process of the Court, whether the same be an office copy of the judgment or decretal order, or any other order or notice which by order of Court may be directed, and whether the same be issued by the Court or by any officer thereof. *Con. Rule* 465.

Taken from R. S. O. 1877, c. 40, s. 92.

It is a matter of some doubt how far a solicitor's retainer continues after judgment has been recovered: see 79 L. T. Jour. 208; *De la Pole v. Dick*, 20 Ch. D. 351; 52 L. T. 457; *James v. Ricknell*, 20 Q. B. D. 164; 58 L. T. 278; and *Reg. v. J.J. of Oxfordshire*, 1893. 2 Q. B. 149.

The question has recently received consideration in *Millar v. Kennedy*, 5 O. L. R. 412, 418, where it was held that the retainer

Service where solicitor's office closed or no one in.

Service of proceedings for foreclosure or sale may be on solicitor in certain cases.

Rules

333, 334.

of a solicitor to bring or defend an action does not terminate on the giving of a judgment so long as anything remains to be done by the solicitor for the client's protection, *e.g.*, taxation of the opposite party's costs, and preparing any bill of his client's costs to be set off under the judgment.

Whether the retainer continues or not, this *Rule* makes the service of the solicitor sufficient service on the client for whom he acted.

Original
order need
not be
shown
except in
cases of at-
tachment.

333 It shall not be necessary to the regular service of any [writ], order, [or other original document], that the original shall be shown, unless sight thereof is demanded, except in cases of arrest or attachment. *Con. Rule 466, amended.*

Taken from Rules T. T. 1856, 134.

The former *Con. Rule 466* was confined to the service of an order.

Unless it is demanded, it is not necessary that the original order to examine a judgment debtor should be shown to him when serving him with a copy of it, in order to found an application for a *ca. m.*, in the event of his disobeying it: *Imperial Bank v. Dickey*, 8 P. R. 246.

It is not a ground for setting aside an execution that the order on which it issued had not been previously served: *Cranston v. Blair*, 15 P. R. 167; and see *Hopton v. Robertson*, 23 Q. B. D. 126.

As to service of orders, and of a writ of *habeas corpus*, see also note to *Rule 322*.

See also notes to *Rule 310*.

Service of
notice of
motion
may be
dispensed
with. Or
substituted
service
ordered.

334 Where it appears, upon the hearing of any matter, that by reason of absence, or for any other sufficient cause, the service of notice of the application or of the appointment, cannot be made, or ought to be dispensed with, such service may be dispensed with, or any substituted service, or notice, by advertisement, or otherwise, may be ordered. *Con. Rule 467.*

Taken from Chy. O. 199.

Where the notice of motion required to be served is the first proceeding, or personal service is necessary on a party who has appeared but cannot be found, then this *Rule* would seem to apply and to authorize the allowance of substitutional service, or dispensing with service altogether. For cases in which applications of this kind have been made, see *supra*, pp. 281, 299.

Where it was not shewn that defendant could not be served, the Court refused under this *Rule* to dispense with service of notice of motion for judgment for default of defence: *Dominion Bank v. Dobbidge*, 12 P. R. 655. The fact that defendant had been personally served with the writ, and had not appeared, was held not to be "sufficient cause" within this *Rule*: *Ib.* In the circumstances of that case it would now be sufficient to serve by posting under *Rule 330*: see *Burritt v. Murdock*, 9 P. R. 191; but no service at all would seem to be necessary in view of *Rule 573*. The course would be to set down the case on motion for judgment under *Rule 533*.

See *Re Buckhouse v. Bright*, 13 P. R. 117.

If an order for substituted service of a notice of motion to **com- Rule 335.**
mit can be made at all, it should not be made except in a case where
no doubt exists as to the notice coming to the knowledge of the
person against whom the motion is to be made: *Re Chatham v.*
Campbell 12 P. R. 686.

By analogy to this *Rule* (see *Rule 3*) service of a warrant and all
subsequent proceedings in the Master's Office upon certain absent
defendants was dispensed with, other defendants in the same interest
being represented: *Smith v. Houston*, 15 P. R. 18; but it would
seem that a Master, *qua* Master, has no jurisdiction under the *Rule*
to order substitutional service of proceedings in his Office; though
possibly the Master in Ordinary may so order under his jur-
isdiction in Chambers under *Rule 698*: see *Re Hyman; Hodgins v.*
Andrews, 19 P. R. 217.

335. A party suing or defending by a solicitor shall ^{Change of}
not be at liberty to change his solicitor in any action or ^{solicitor.}
matter without an order, which may be obtained on *præcipe*;
and until such order is obtained and served, the former
solicitor shall be considered the solicitor of the party. Con.
Rule 463, amended.

Taken from Chy. O. 49, and *Rule T. T.* 1856, 4.

The former Con. *Rule 463* provided that in addition to service
on the opposite party notice of the order should be given to the
officer with whom the pleadings are filed. Such notice is not re-
quired by the present *Rule*.

Order to Change Solicitor.—An order to change the solicitor is ^{Order to}
necessary, not only where the client desires to discharge his solicitor ^{change}
in an action, but also where the solicitor discharges himself: see ^{solicitor}
Griffiths v. Griffiths, 2 Hare, 587; 7 Jur. 573. But no order is neces- ^{when}
sary to enable the client to appoint a new solicitor, in place of one ^{necessary.}
deceased: *Whalley v. Whalley*, 22 L. J. Chy. 632; *Alchin v. Buffalo*
& L. H. Ry. Co., 2 Chy. Ch. 45. In the latter case, however, notice
should be given of the appointment of the new solicitor to the
opposite party: *Rule 335*; *Hunt v. Finckburg*, 22 Q. B. D. 259;
Braith. Pr., 564, 565; *Bank of Montreal v. Harrison*, 4 P. R. 331.

Until an order to change the solicitor is obtained and served, ser-
vice on the solicitor on the record or his agent, is good, even though
the former has ceased to act, and though a new one has been ap-
pointed: *Davidson v. Lestic*, 9 Beav. 104; *Wright v. King*, *ib.*, 161;
Brown v. Bugar, 2 Chy. Ch. 446; *De la Pole v. Dick*, 29 Ch. D.
351; 52 L. T. 357; but see *Reg. v. JJ. of Oxfordshire*, in note to
Rule 329.

Under the former practice at law, the attorney could not be ^{Payment of}
changed by the client, unless his costs were first paid: *Witt v. Ames*, ^{costs not}
11 W. R. 751; but in Chancery the rule was otherwise: *Meyers v.* ^{a condition}
Robertson, 1 Gr. 439. This is one of those matters in which the ^{precedent.}
rules of Equity and the rules of the Common Law differed, and
therefore under the Jud. Act, s. 58, s.-s. 13, the rule of Equity is
now to prevail, and orders to change solicitor will now be granted
without any provision as to the payment of costs: *Grant v. Holland*,
3 C. P. D. 180.

Rule 335. Where there is a joint retainer, an order to change the solicitor on the application of some or one of the clients only, is irregular: *Re Norwich and Norfolk Building Society*, 22 W. R. 856; *Wedderburn v. Wedderburn*, 17 Beav. 158.

Material facts must be disclosed. All material facts must be disclosed on the application for an order of course, or an *ex parte* order, otherwise it will be irregular and may be set aside: e.g., the existence of a special retainer for a term of years unexpired: *Richards v. Scarborough Market Co.*, 17 Beav. 83; or the fact of the solicitor being mortgagee of the client's share in the fund in question: *Jenkins v. Bryant*, 3 Drew. 70. Where, however, a solicitor in applying for an order to change a solicitor, relying on his client's statement that she was unmarried, so represented her, which statement turned out to be untrue, the Court, though setting aside the order, refused to direct the solicitor to pay the costs, emphatically declaring that the Court never had "made a man pay costs for believing the word of a woman": *Thomas v. Tinslayson*, 19 W. R. 255.

Where special circumstances are disclosed in the *præcipe* for an order of course, the officer may refuse to issue the order, and may require a special application to be made.

Setting aside order. After an order of course to change the solicitor has been issued, if the latter objects to the order, he should not apply on *præcipe* for an order to re-appoint himself, but should move on petition to set aside the order: *Topping v. Searson*, 2 H. & M. 205.

Solicitor dying. Where the solicitor dies and his client neglects to name a new solicitor, he may be served with notice of motion to appoint a new solicitor: see *Danl's Forms*, 3rd ed., No. 2129; *Braith, Pr.* 264; *Gillson v. Ingo*, 2 Phil. 402; *Smith Pr.*, 7th ed., 126.

Application by one of several plaintiffs. Where one of several plaintiffs desires to make an application in the action separately from his co-plaintiffs, he must obtain an order of course, giving him leave to appoint a solicitor for that express purpose: *Danl. Pr.*, 5th ed., 1724.

Party acting in person desiring to appoint a solicitor. Where a party sues or defends by a solicitor, and afterwards desires to sue or defend in person, an order giving him leave to do so must be obtained: *Danl. Pr.*, 5th ed., 1724. But when a party sues or defends in person and afterwards appoints a solicitor, no order is necessary. *Ib.* 1725, and see *Rule 330*; but notice should be given to the opposite party.

Proceedings taken by a new solicitor without an order, when one is necessary, or by a suitor in person when he has a solicitor on the record, are irregular and will be set aside: *Rathburn v. Hughes*, 3 Ch. Ch. 160; *Yeatman v. Snow*, 42 L. T. 502; *Arch. Pr.*, 13th ed., p. 110; 12th ed., p. 9.

If a solicitor retained in an ordinary Common Law action refuses, pending the action, to continue to act without some reasonable cause, and upon reasonable notice he has no right of action for his costs: *Underwood v. Lewis*, 1894, 2 Q. B. 306; but the rule appears to be otherwise in actions for equitable relief, in which the proceedings might be of a very long and complicated character, and be divided into several stages: *Ib.*, and *In re Hall*, 9 Ch. D. 538.

Where a defendant, in consideration of an indemnity against costs, has agreed that his defence shall be conducted by a co-defendant, to whose solicitor he gives a retainer, he will be restrained from afterwards withdrawing the retainer or interfering with the prosecution of an appeal: *Montforts v. Marsden*, 1895, 1 Ch. 11.

An order to change solicitor is *prima facie* a discharge of the Rule 335. former solicitor by the client: *Webster v. Le Hunt*, 9 W. R. 804. But it is not a discharge of the solicitor by the client, where it is taken out in consequence of the prior refusal of the solicitor to act; and a solicitor will be considered to have discharged himself, on the bankruptcy of himself, or the firm of which he is a partner: *Re Moss*, L. R. 2 Eq. 345; or by being arrested or detained in custody: *Re Williams*, 3 D. F. & J. 104; 28 Benv. 465; *Scott v. Fleming*, 9 Jur. 1085; but not merely by being in embarrassed circumstances: *Re Smith*, 9 W. R. 396. So also a firm of solicitors will be deemed to have discharged the client, where the firm is dissolved; and no arrangement can be made by the solicitors for the transfer of the client's business to one of their number without his consent amounting to a new retainer: *Cholmondeley v. Clinton*, 19 Ves. 261; *Griffiths v. Griffiths*, 2 Hare, 587; *Slater v. Stoddard*, 6 P. R. 200; *Alchin v. Buffalo & L. H. Ry. Co.*, 2 Chy. Ch. 45.

Where any new party is brought into an action by order to continue proceedings, by reason of the death of, or transfer of interest in, any of the parties, such new party is not obliged to employ the solicitor by whom the deceased person, or transferor, was represented, but he may, without order, employ a new solicitor, but notice of such new solicitor being so employed must be given to the officer with whom the pleadings are filed, and also to the opposite party: *Haul. Pr.*, 5th ed., 1725; *Simmonds v. Great Eastern Ry. Co.*, L. R. 3 Chy. 797; but the assignee of the plaintiff in a creditor's suit cannot appoint a new solicitor except on special application: *Topping v. Seamon*, 2 H. & M. 205.

Although a solicitor may for sufficient cause, by notice to his client, terminate the connection between them, the Court will not make an order for that purpose on the *ex parte* application of the solicitor: *Bricker v. Ansell*, 1 Chy. Ch. 367.

Where the solicitor is changed by the client, the original solicitor is still entitled to a lien on any fund afterwards recovered in the cause, and is entitled to be paid his costs, next after the costs of the solicitor by whom the suit is concluded: *Clark v. Eccles*, 3 Chy. Ch. 324; *Re Wadsworth*, *Rhodes v. Sudgen*, 34 Ch. D. 155; *Re Knight v. Gardiner*, L. T. 646; and the solicitor, if any, next in order, is entitled to a lien next in priority, and so on in inverse order to the solicitor first appointed: *Ib.*; but the first solicitor may be entitled to be paid first out of a fund created by his exertions, *e.g.*, by his having obtained an order for its payment into Court before his discharge: *Ford v. Mason*, 15 P. R. 392.

When a solicitor is retained by the acting partner of a firm as solicitor for the firm in an action, the retirement of a dormant partner from the firm, without notice to the solicitor, pending the action, will not relieve the retiring partner from liability to the solicitor for his costs subsequently incurred: *Court v. Berlin*, 1897, 2 Q. B. 396; 77 L. T. 293.

Where a solicitor is discharged by the dissolution of a firm of which he is a member, he is not at liberty to act for the opposite party: *Cholmondeley v. Clinton*, 19 Ves. 261; but when he is discharged by his client he cannot be restrained from acting for the opposite party, nor the latter from employing him: *Little v. Kingswood & Parkfield Colliery Co.*, 20 Ch. D. 733; 47 L. T. 323; 52 L. J. Chy. 66; but the solicitor may be restrained by injunction from divulging the secrets of his former client to the opposite party, either in the same transaction, or in any other flowing thereout, or connected therewith:

Rule 335. *Ib.*; and see *Davies v. Clough*, 8 Sim. 262, 267; *Griessell v. Peto*, 4 Blug. 1; *Johnson v. Marriott*, 2 Cr. & M. 183.

An agreement between solicitors acting for different parties, to share profit costs in consideration of being introduced into the litigation, was held to be misconduct: *Re Four Solicitors*, 1901, 1 K. B. 187.

How far the solicitor's retainer continues after judgment is recovered in the action in which he is retained to sue or defend, seems doubtful: see 79 L. T. Jour. 208; *Miller v. Kanady*, *supra*. In note to Rule 332. Service of notice of appeal from the judgment made on the respondent's solicitor on the record, was held good: *De la Puh v. Dick*, 29 Ch. D. 351; 52 L. T. 457; but a retainer of a solicitor to collect a debt was held not to authorize him after judgment recovered, to enter upon interpleader proceedings without further instructions: *James v. Ricknell*, 20 Q. B. D. 164; 58 L. T. 278. See also *Reg. v. JJ. of Oxfordshire*, 1893, 2 Q. B. 149.

Where an order had been made dismissing an action for failure to give security for costs, the retainer of the defendant's solicitor was held to continue, so as to enable the plaintiff to serve him as the solicitor on the record with proceedings by way of appeal from, or under Rule 358, to rescind, the order: *Muir v. Guinane*, 9 O. L. R. 324.

Lien on
books and
papers.

Lien of Solicitor on Books and Papers.—A solicitor has a lien on the books and papers of his client, which have come to him in the course of business in his professional capacity. This lien, however, is a mere right to retain the documents until his costs are paid, and cannot be actively enforced: *Bozon v. Bolland*, 4 My. & Cr. 354. In the absence of any agreement to the contrary, the lien is general, and attaches for all costs due from the client, and is not confined to the costs incurred in the particular business in which the documents came into the solicitor's hands: *Re Faithful*, L. R. 6 Eq. 325; *Bozon v. Bolland*, *supra*; *Richards v. Platel*, Cr. & Ph. 82; *Worrall v. Johnson*, 2 Jac. & W. 214; *Ex parte Sterling*, 16 Ves. 277; *Friswell v. King*, 15 Sim. 191; *Colmer v. Ede*, 19 W. R. 313; *Le Messanger*, 3 Ch. D. 317. While it exists the client is not entitled to inspect or take copies of papers subject to the lien: *Re Biggs*, 102 L. T. Jour. 364.

A solicitor is entitled to a lien on a deceased client's books and papers for moneys due by the client's executor, or administrator, in his individual capacity: see *Re Foster*, 116 L. T. Jour. 388.

The solicitor cannot acquire any greater right of detainer, than the client had himself, and the lien is therefore subject to the rights and equities of those claiming by title paramount to that of the client: *Francis v. Francis*, 5 D. M. & G. 108; *Stedman v. Webb*, 4 My. & Cr. 346; *Clutton v. Pardon*, T. & R. 304; *Moleworth v. Rabbits*, 2 J. & Lat. 358; *Polly v. Wathen*, 1 D. M. & G. 16; 7 Ha. 351; *Biunden v. Desart*, 2 Dr. & W. 405; *Bell v. Taylor*, 8 Sim. 216; *Baker v. Henderson*, 4 Sim. 27; *Warburton v. Edge*, 9 Sim. 508; *Re Mosely*, 15 W. R. 975; *Young v. English*, 7 Beav. 10; *Stennett v. Arup*, 2 Chy. Ch. 218; *Re Union Cement and Brick Co.*, *Ex parte Pullbrook*, L. R. 4 Chy. 627; and where the client would be bound to produce the documents in evidence on the demand of third parties, the solicitor cannot refuse to produce them on the ground of his lien: *Hope v. Liddell*, 7 D. M. & G. 331; 20 Beav. 438; *Fowler v. Fowler*, 44 L. T. 799; 50 L. J. Ch. 686; *Re Lawrence, Barker v. Austin*, 1894 1 Ch. 556; 70 L. T. 91; *Re Llewellyn*, 1891, 3 Ch. 145;

65 L. T. 240; *Smith v. Pontypidd, & R. V. T. Co.*, 96 L. T. Jour. **Rule 335**.
83; *Re Hawkes*, 1898, 2 Ch. 1; 78 L. T. 336.

But third parties whose rights are acquired under the client subsequent to the creation of the lien, have no greater rights than the client himself had at the time they acquired title: *Gill v. Gumble*, 13 Gr. 169; 2 Chy. Ch. 135. The solicitor, however, cannot claim a lien against such third parties, for costs incurred by him subsequently to their acquiring their rights: *Blunden v. Desart*, 2 Dr. & W. 405.

A solicitor cannot acquire a lien on the documents of a joint stock company which by statute, or the articles of association, are required to be kept in the office of the company: *Re The Anglo-Maltese Co.*, 52 L. T. 841; but he may acquire a lien on the books and documents of a company which are not so required to be kept in the office of the company, *ib.*, but not for business which was *ultra vires* of the company: *Re Howard & Dollman*, 1 H. & M. 433.

A solicitor who is employed by a mortgagor and mortgagee to prepare a mortgage, after completion of the mortgage holds the title deeds for the mortgagor, and cannot as against him claim any lien thereon for a debt due by the mortgagor: *Ex parte Quinn*, 49 L. T. 811.

A solicitor is not entitled to a lien on his client's papers, for the costs of proceedings instituted against the solicitor on behalf of the client: *Re Hanbury*, 75 L. T. 449.

Seemle, an agent of a solicitor is entitled to a lien on the documents which come to his hands in the course of his agency, for the costs of the proceedings to which the documents relate both as against his principal and the latter's client: see *Re Jones*, W. N. 1905, 57; 118 L. T. Jour. 478 (Joyce, J.).

The lien is superseded by the solicitor's taking security for his costs: *Correll v. Shapson*, 16 Ves. 275; *Re Taylor*, 1891, 1 Ch. 590; see *Brownlow v. Keatinge*, 2 Ir. Eq. 243; *Kennin v. Macdonald*, 22 Ont. 484; *Bissell v. Bradford, & P. T. Co.*, 94 L. T. Jour. 285; *Re Douglas*, 1898, 1 Ch. 199; 77 L. T. 552; but only to the extent of the security: *Watson v. Lyon*, 7 D. M. & G. 288; and ceases altogether on payment, and the solicitor cannot then retain documents on the ground that a third party claims an interest in them: *Re Emma Mine, Ex parte Turner*, 24 W. R. 54. The lien may also be lost by the solicitor's assigning his bill of costs to a third party: *Reesor v. Ella*, 7 P. R. 371; and also by parting with possession of the documents; but where on the dissolution of a firm of solicitors, one of the partners took possession of documents on which the firm had a lien, without the permission or consent of his late partners, it was held that the lien of the firm was not thereby lost: *Re Carter, Carter v. Carter*, 53 L. T. 630.

Where a firm is changed by the introduction of a new partner, there is no lien on papers delivered to the new firm, for costs due the old firm: *Re Forshaw*, 16 Sim. 121.

Toronto agents, as against their principals, have a general lien for their agency bills on papers placed in their hands by their principals; and the lien is not lost even though the relationship of principal and agent is dissolved by the agent: *Re Attorney*, 7 P. R. 311; *Re A. B. & C.*, 14 C. L. J. 142; *Re Cross*, 4 Chy. Ch. 11.

There is an important difference in the right of lien, of a solicitor in an action who discharges himself, and one who is discharged by his client.

Rule 335.

Difference
between
right of lien
of solicitor
who is dis-
charged,
and one who
discharges
himself.

Where the solicitor discharges himself, he is bound to deliver up the papers in the action to the new solicitor, upon the latter undertaking to hold them subject to his lien for what, if anything, shall be found due on taxation of his bill; and to proceed with the cause with due diligence, and to re-deliver the papers within ten days after he shall cease to have occasion for them, if the lien be not sooner satisfied: *Volgrave v. Mantey*, T. & R. 400; *Healop v. Metcalf*, 3 My. & Cr. 183; *Wilson v. Emmet*, 10 Beav. 213; *Cauc v. Mactia*, 2 Beav. 584; *Robins v. Goldingham*, L. R. 13 Eq. 440; *Ley v. Brown*, 1 Chy. Ch. 170; *Merrewether v. McIlhish*, 13 Ves. 101; *Mayne v. Hawkey*, 3 Sw. 93; *Webster v. Le Hunt*, 9 W. R. 804; *Conacher v. Poputon*, 1 Sw. 1. The solicitor cannot in such a case require the client to undertake to proceed to a taxation of his bills: *Mole v. Hudie*, 1 S. & S. 282. And if he refuses to deliver up the papers to the new solicitor, on his undertaking as above mentioned, he may be ordered to pay the costs of an application to compel him to do so: *Robins v. Goldingham*, *supra*. A solicitor who declines to proceed with an action until his costs are paid, in effect discharges himself: *Id.*, and see *Re Lewis*, 72 L. T. Jour. 387; but see *Underwood v. Lewis*, and *In re Hall*, *supra*, p. 540. And so the dissolution of the firm of solicitors engaged by the client, or the arrest or detention in custody, or bankruptcy of the solicitor, works a discharge of the client by the solicitor: *vide supra*. But where the client dies, or his interest is transferred by assignment or otherwise, and an order is made to continue the proceedings in the name of some new party who names a new solicitor, in such cases the solicitor is deemed to be discharged by the client: see *Re Moss*, L. R. 2 Eq. 345.

Discharge
by client.

Where the solicitor is discharged by the client he cannot generally be ordered to deliver up the papers, until his lien has been satisfied: *Re Faithful*, L. R. 6 Eq. 325; *Griffiths v. Griffiths*, 2 Hare. 587; *Bozon v. Bolland*, 4 My. & Cr. 354, unless it appears that there is strong ground for believing that there is nothing due the solicitor: *Re Breao & Whitting*, 33 Beav. 439. Nor is the solicitor in such a case bound even to produce the papers for the purpose of the cause, until his bill is paid: *Lord v. Woratcighton*, Jac. 580; *Redfern v. Sowerby*, 1 Sw. 84; *Robins v. Goldingham*, L. R. 13 Eq. 440; but see *Simmonds v. G. E. Ry. Co.*, L. R. 3 Chy. 797; *Clifford v. Turrill*, 2 D. & S. 1; *Webster v. Le Hunt*, 9 W. R. 804; *Re Leah*, 6 Jur. N. S. 387; nor permit his client to inspect or take copies of the documents: *Re Biggs*, 102 L. T. Jour. 364, but see *Lockett v. Carey*, 10 Jur. N. S. 144. But where the discharged solicitor neglects to deliver his bill of costs within the proper time, he may be ordered to deliver up the papers subject to his lien thereon: *Cooper v. Hewson*, 2 Y. & C. C. C. 515; and, where the papers are urgently needed, he may be ordered to deliver them up on the amount claimed for costs being paid into Court, together with a sum to meet the costs of taxation: *Re Galsland*, 31 Ch. D. 296; 53 L. T. 921; *Re South Essex Investment Co.*, 46 L. T. 280.

Where the action is one for administration in which the rights of third parties are concerned, the solicitor, though discharged by his client, may be compelled to deliver up the papers necessary for the prosecution of the action on the usual terms: *Re Boughton*, *Boughton v. Boughton*, 48 L. T. 413; *Belaney v. Ffrench*, L. R. 8 Chy. 918; 29 L. T. 706; and it is immaterial that the papers came to the hands of the solicitor before the action was commenced: *Re Hawkes*, 1898, 2 Ch. 1; 78 L. T. 336; and so also in a partition action: *Boaden v. Hensby*, 1892, 1 Ch. 101; 65 L. T. 744. (see *Re Hawke*, *supra*, at p. 11); *Pullistee v. Medd*, 33 C. L. J. 465; and see *Re Capital Fidec Insurance Assn.*, 24 Ch. D. 408; 49 L. T. 697.

Hutchinson v. Norwood, 54 L. T. 842. But costs incurred by an administrator in administration proceedings are a charge upon the estate, and upon his death, the administrator *de bonis non* takes the estate subject to the charge, and cannot compel the delivery up of papers in the hands of the solicitor until his costs are paid; *Re Watson*, 50 L. T. 205.

A lien on books and papers may continue in respect of a bill barred by the Statute of Limitations; see *Curwin v. Milburn*, 42 L. T. 278; *Re Carter*, *Carter v. Carter*, 53 L. T. 630; and under an order for taxation containing a submission on the part of the client to pay what is found due on taxation, payment of statute-barred costs will be enforced; *Re Margetts*, 1896, 2 Ch. 263.

A solicitor is bound to deliver up documents on which he has a lien on tender of the amount of his claim, though not in settlement; *Re Hanbury*, 75 L. T. 449.

As to the principles and extent of a solicitor's lien, generally, and the remedies against a solicitor to enforce production or delivery notwithstanding his lien, see *Re Hawke*, 1898, 2 Ch. 1, 15; 78 L. T. 336.

Lien on Fund.—A solicitor has not only a general lien on his client's papers for all costs due to him, but he has also a particular lien for the costs of proceedings to recover a fund, upon the fund recovered, or ordered to be paid; *Lann v. Church*, 4 Mad 391; and if the fund actually reaches the solicitor's hand he is only entitled to retain it until his costs of the action in which the fund is recovered are paid; he has not a general lien thereon for all costs; *Mackenzie v. Macintosh*, 64 L. T. 318, 706; and his lien attaches upon the sum to which his client becomes entitled, in priority to the claims of other parties to whom his client is personally ordered to pay costs; *Wright v. Bell*, 24 S. C. R. 656; and the taxing officer, or Master, unless specially authorized so to do, has no power to set off costs payable to a party out of a fund in Court against costs payable by such party personally to other parties in the action, so as to deprive his solicitor of his lien on the fund; *Ib.*; *Davidson v. Douglas*, 15 Gr. 354; *Hull v. Laver*, 1 Hare. 571; and his lien only extends to what is due to him in his character of a solicitor; *Re Galland*, 31 Ch. D. 206; 53 L. T. 921.

Where the compromise of an action is sanctioned by the Court on behalf of infant parties, and a fund is directed to be paid to them, without reserving the rights of their solicitor, the latter is not thereby deprived of his common law lien for costs on the fund so recovered or preserved through his instrumentality; *Re Wright's Trusts*, 1901 1 Ch. 317; 83 L. T. 515.

The solicitor's lien on the amount payable under a verdict is entitled to priority over the claim of a creditor of his client who has obtained an attaching order; *Bernski v. Tourangeau*, 18 P. R. 263.

The solicitor may give notice to the opposite party not to pay the money until his costs are satisfied; *Cowell v. Simpson*, 16 Ves. 275; and see *Simpson v. Prothero*, 5 W. R. 814; notice to his solicitor is sufficient; *Sandridge v. Ireland*, 14 P. R. 29. And this lien is not lost by the discharge of the solicitor by the client, or by the act of God, pending the suit; thus where the plaintiff assigned his interest in the suit, and the assignee named a new solicitor, the first solicitor was held entitled to a lien on the fund ultimately recovered.

Rule 235.

and to payment of his costs thereout, next after those of the solicitor by whom the suit was concluded: *Clark v. Eccles*, 3 Chy. Ch. 324; and see *Kellett v. Kelly*, 3 Ir. Eq. R. 34; *Boson v. Holland*, 4 My. & Cr. 354; *Cormack v. Beisly*, 3 D. & J. 157; *Re Wadsworth, Rhodes v. Sugden*, 34 Ch. D. 155; 55 L. T. 500. But after the fund has been paid to the client, with the solicitor's acquiescence, or without notice by the payer of the solicitor's claim, his lien is gone, and he must look to his client alone for payment of his costs; see 86 L. T. Jour. 440.

If payment be made to the client, notwithstanding notice given by the solicitor not to pay till his costs are satisfied, the solicitor, to the extent of his lien, is entitled to recover the amount paid against the party paying: *Ross v. Buxton*, 42 Ch. D. 190.

Solicitor
refusing
to act.
Comprom-
mise.

Where the solicitor declines to act he has no lien upon a fund in Court: *Cresswell v. Byron*, 14 Ves. 271.

Where a compromise has been made, the plaintiff's solicitor may be entitled to money payable under it to his client as the fruits of litigation: see *Walker v. Gurney*, 18 P. R. 274, 471; *Re Wright's Trusts*, 1901, 1 Ch. 317.

Lien may
be actively
enforced.

The lien on a fund may be actively enforced: *Boson v. Holland*, 4 My. & Cr. 354. The solicitor may obtain a stop order: *Hobson v. Shearwood*, 8 Beav. 486; or an order for payment of his costs out of any money in Court payable to his client, or applicable to the payment of the costs: *Wardell v. Trenouth*, 8 P. R. 142; or a charge for his costs on a fund recovered or preserved through his instrumentality: see *Rule 1129*. But a solicitor can have no higher claim against a fund by virtue of his lien than that of his client; and if the client would not be entitled to payment of his costs out of the fund neither will his solicitor; although it may have been recovered by means of proceedings taken by him: *Francis v. Francis*, 5 D. M. & G. 108; *Re Harrold, Wilde v. Walford*, 51 L. T. 441.

Where several solicitors in succession have acted, the general rule is that the solicitor who concludes the action to a successful termination is entitled to be paid first, and so, in inverse order, up to the solicitor first employed: *Ford v. Mason*, 15 P. R. 302; *Re Knight, Knight v. Cardiner*, 1892, 2 Ch. 368; 66 L. T. 646; see also *Clark v. Eccles*, 3 Chy. Ch. 324; but the first solicitor may be entitled to be paid first out of a fund created by his exertions, e.g., by his having obtained an order for its payment into Court before his discharge: *Ford v. Mason*, *supra*.

Client can-
not defeat
lien.

The client cannot assign a fund in Court so as to defeat his solicitor's lien, even to a purchaser for value, without express notice: *Haynes v. Cooper*, 33 L. J. Chy. 488; *Yemen v. Johnston*, 11 P. R. 231. Neither can the client release the adverse party from the payment of costs ordered to be paid, so as to defeat his solicitor's lien: *Ex parte Bryant*, 1 Mad. 49. But the lien may be defeated by a bona fide compromise by the parties to the action: *The Hope*, 8 P. D. 144; 49 L. T. 158; *Bellamy v. Connolly*, 15 P. R. 87; *Brunston v. Allard*, 1859, 2 El. & El. 19; *Walker v. Gurney*, *supra*; but a collusive compromise will not have that effect: *Beames Costs*, 312, 313; *Langle v. Fetterly*, 5 U. C. Q. B. 628; *Griggs v. Meyers*, 6 U. C. Q. B. 532; *Connors v. Squires*, 2 P. R. 149; and see *Plant v. Stone*, 9 U. C. Q. B. 458; *Ex parte Morrison*, L. R. 4 Q. B. 153; *Ex parte Games*, 3 H. & C. 294; *Brown v. Conant*, 2 P. R. 208; *Smith v. Thompson*, 5 P. R. 166; *Morgan v. Holland*, 7 P. R. 74; *Barrett v.*

Barrett, 42 Ch. D. 100; 18 C. L. J. 50; *Hall v. Griffith*, 5 Onl. 478; **Rule 335**.
Friedrich v. Friedrich, 10 P. R. 308, 549; *Ross v. Buxton*, 60 L. T. 620; *Re Margetson*, 1897, 2 Ch. 314; 76 L. T. 805.

But collusion must be shewn, or the act complained of must have been done after notice from the solicitor complaining: *Saunders v. Ireland*, 14 P. R. 29; see *Re Elliott v. McGuire*, 27 C. L. J. 23.

Where a compromise is effected for the purpose of depriving a plaintiff's solicitor of his costs, he may be authorized to carry on the action for the purpose of realizing them out of the defendant: *Dunthorne v. Bunbury*, 24 L. R. 1r. 6; but unless collusion to deprive the solicitor of his costs is clearly shewn, the defendant will not be ordered to pay the plaintiff's solicitor's costs: *Bellamy v. Connolly*, 15 P. R. 87. But where, in a suit for foreclosure, the plaintiff and defendant compromised the suit, the plaintiff paying the defendant \$200 in consideration of his releasing his equity of redemption, the defendant's solicitor was held to have no lien on the \$200; *Brownson v. Tully, re Fairbairn*, 3 Chy. Ch. 71.

An agent of a solicitor has a lien on a fund recovered: *Re Ryan*, 11 P. R. 127, and payment by the client to the agent in order to obtain his papers, is a good payment as against the principal solicitor: *Re Cross*, 4 Chy. Ch. 11; but the lien of the agent is no greater than that of the principal solicitor, and if the latter has no claim upon the fund as against his client, the agent may be compelled to pay it over upon a summary application on behalf of the client: *Re Edwards*, 45 L. T. 578. Where the fund was in Court an order was made for payment to the agent of the amount of his lien thereon: *Re Ryan*, 11 P. R. 127.

Where money is standing to the separate account of a party to a cause, he may apply for payment out by a new solicitor, without an order changing the solicitor: *Waddilove v. Taylor*, 17 L. J. Chy. 384. But where the new solicitor delivers the cheque to the client before the lien of the former solicitor was satisfied, he was ordered to pay him the amount of his lien: *McPhatter v. Blue*, 15 C. L. J. 162.

A lien may continue though the claim on the bill of costs may be barred by the Statute of Limitations: *Curcio v. Milburn*, 42 Ch. D. 424; 62 L. T. 278.

Effect of Lien on Right of Set-off between Parties.—See **Effect of** further, notes to **Rule 1165**. No set-off of damages or costs between the parties is to be allowed to the prejudice of the solicitor's lien for costs in the particular action in which the set-off is sought; but costs of interlocutory proceedings in the same action may be set-off: see **Rule 1165** note. But that **Rule** is held to apply only to the set-off of damages and costs in separate actions: see notes to **Rule 1165**; where that is sought, the set-off is not to be allowed to the prejudice of the solicitor's lien: *Webb v. McArthur*, 4 Chy. Ch. 63; *Edwards v. Hope*, 14 Q. B. D. 922; 53 L. T. 63; *Cuthbert v. Commercial Travellers Assoc.*, 7 P. R. 255; and see *Ross v. McLan*, 7 P. R. 97; *Wardell v. Trenouth*, 8 P. R. 142; *Barker v. Hemming*, 5 Q. B. 14, 60; *Re Harrold, Wilde v. Walford*, 48 L. T. 352; 51 L. T. 441; but see *Wilson v. Seitzer*, 1 Chy. Ch. 75, 160. But a set-off of damages and costs payable in the same action, will ordinarily be allowed without regard to the solicitor's lien: *Pringle v. Gloag*, 10 Ch. D. 676; 40 L. T. 512; *Cameron v. Campbell*, 12 F. C. Q. R. 159; *Young v. Hobson*, 8 P. R. 253; *Brigham v. Smith*, 17 Gr. 512; and the set-off of a claim and counter-claim arising out of the same transactions cannot be defeated by the claim of a solicitor to a lien: *Brown v. Nelson*, 11 P. R. 121 (per Osler, J.A.); *Westcott v. Brown*, 1891, 1

Rules 336, 337. Q. B. 774; 65 L. T. 263; but see *Flett v. Way*, 14 P. R. 312 (where the plaintiff being awarded costs against one defendant, and being ordered to pay the costs of other defendants, all the defendants being represented by the same solicitor, a set-off to the prejudice of the lien of the plaintiff's solicitor, was refused), and *Canadian Pacific R. v. Grant*, 11 P. R. 208 (where the claim and counter-claim were regarded as separate actions); and notes to *Rule 1165*.

Where a special lien was given by one of the parties to his solicitor, the right of set-off to the extent of the special lien thus created was held to be defeated: *Ross v. McLay*, 7 P. R. 97.

Lien on Estate Recovered.—Until the passing of *Rule 1129*, a solicitor in Ontario could not become entitled to any lien on an estate recovered through his instrumentality: *Shaw v. Neale*, 6 H. L. C. 581; *Tremear v. Lawrence*, 20 Ont. 137; but see *Morgan v. Holland*, 7 P. R. 74. Since *Rule 1129*, however, a charge may be declared and enforced: see notes to that *Rule*.

Where party has acted in person and notice given by solicitor that he is authorized to act, subsequent proceedings to be served on solicitor.

336. Where a plaintiff has issued a writ, or a defendant has appeared, in person, and either party by a solicitor gives notice in writing to the opposite party, or the solicitor or agent of such party, of the solicitor being authorized to act as solicitor for the party on whose behalf the notice is given, all pleadings, notices, orders and other proceedings, which according to the practice of the Court are to be delivered to, or served upon, the party on whose behalf such notice is given, shall thereafter be delivered to, or served upon such solicitor. Con. Rule 464.

Taken from Rule T. T. 1856, 139.

Notwithstanding this *Rule*, notice of motion to attach a defendant must usually be served personally, unless some sufficient reason is shown for dispensing with personal service: *Mann v. Perry*, 50 L. J. Chy. 251; followed by *Prondfoot, J.*, in *Smith v. Harrin*, September 29th, 1884; and see *Nelson v. Worsum*, W. N. 1890, 216; *Re Dancer*, W. N. 1895, 127. But notice of motion to commit for non-production of documents, or for not bringing accounts into a Master's office, may be served on the solicitor: see *Rules 474, 475*.

7. TRANSMISSION OF PAPERS.

On receiving notice local officers to transmit record, etc., to Toronto.

337. Every Deputy Clerk of the Crown, Deputy or Local Registrar, shall at the request of any party and upon receiving a *præcipe* for the purpose and payment of the necessary postage or express charges, transmit to the Central Office, Toronto, the record in any action together with all exhibits put in at the trial. Con. Rule 168; Rules 1 Jan., 1896, 1449, amended.

Altered from R. S. O. 1877, c. 50, s. 279.

The following are clauses of Regulations of the Judges, promulgated **Rule 338**, on 17th Dec., 1904:—

6. When the Judge at a trial reserves judgment in any case, elsewhere than at Toronto, the Clerk of the Court shall forthwith forward the Record and Exhibits to the Central Office.

7. All Local Officers of the Court when sending papers or Exhibits to the Central Office shall indorse on the wrapper enclosing such papers or Exhibits, the short style of cause, the title of the Officer sending them, and the purpose for which they are sent.—*e.g.*, "*Jones v. Smith*. From Local Registrar at Brantford, for Appeal to Divisional Court." or "For Mr. Justice Magee"—*or as may be*.

338. Where pleadings or other documents filed with an officer of the Court, are required by or for use before any other officer, the officer with whom the pleadings or other documents are filed, shall, upon the production of a request signed by the officer requiring the pleadings or other documents, that the same are required for some proceedings before him, transmit the pleadings or other documents upon payment of the postage or express charges required for their transmission and return. **Con. Rule 469.**

Based upon Chy. O. 542, 544.

This *Rule* is general in its terms, and appears to apply to all documents, whether filed with an officer in the action, in which their production is required, or in some other action.

Formerly where the documents in some other cause were required to be produced, an order was considered necessary. Where a party in his affidavit on production referred to documents produced by him and in the custody of a Deputy Registrar in another suit, an order was made *ex parte* for their production: *Gainer v. Doyle*, 2 Chy. Ch. 279; but see *Hamelyn v. White*, 6 P. R. 143. On a motion to produce documents in another cause at the trial, it was necessary to show that the original documents were required, and that the production of office copies would not be sufficient: *Chudwick v. Thompson*, 2 Chy. Ch. 389; *Jarvis v. White*, 8 Ves. 313; *Attorney-General v. Ray*, 6 Beav. 335; *Anon.*, 13 Beav. 420; and see *Gaynor v. Salt*, 24 U. C. Q. B. 180; and ordinarily an application for the order was required to be on notice: *Lamb v. Danby*, 9 W. R. 765. But under this *Rule* it is not necessary to obtain any order.

Where documents filed in the office of a Registrar of the H. C. J. or Clerk of the County Court, Registrar of Deeds, Registrar of the Surrogate Court, or Clerk of the Peace, are produced in evidence under a subpoena, the original documents are not to be left with the Court, but copies, if necessary, are to be put in: R. S. O. c. 73, s. 48; except where the genuineness of the document produced is in question: *Id.*, sec. 49.

By regulation of the Court dated 16th February, 1905, directions are given to the officers of the Court that subject to *Rule 338*, original documents on file or of record are not to be taken away from the Court by any officer under a subpoena unless authorized by a Judge's order: see note to *Rule 479*.

Transmission of documents from one officer to another.

Production of documents in other causes may be ordered.

Proof required that production of originals is necessary.

Rules

339-342. As to the way in which papers are to be transmitted to the Central Office by local officers, see note to *Rule 337*.

**Documents
how
transmitted**

339. Documents shall be transmitted by post or express, and not otherwise, and with the documents shall be transmitted the necessary postage or express charges for the return of the same, unless they are to be delivered by one officer to another in the same town, when they shall be transmitted by delivering the same to the officer requiring them, or his clerk. *Con. Rule 470.*

Taken from Chy. O. 543, 544: *Rule T. T. 1856, 148.*

**Documents
to be
returned.**

340. As soon as the purpose for which any such documents are required is completed, the officer to whom they have been sent shall re-transmit them to the office from which they were sent. *Con. Rule 471.*

Taken from Chy. O. 545.

**Papers
used in
Weekly
Courts.**

341 On the conclusion of any motion or proceeding before the Weekly Court holden at Ottawa and London, all papers in relation thereto shall be transmitted by the officer having the charge thereof to the proper office, where the proceedings in the action or matter were commenced, to be deposited with the other papers in the action or matter. *Rules 1 Jan., 1896, 1412. as amended by Rule 1231. 11th Feb., 1900.*

See note to *Rule 337*.

8. TIME.**Months
shall mean
calendar
months.**

342. Where by these Rules, or by any judgment or order, time for doing any act or taking any proceeding is limited by months, not expressed to be lunar months, such time shall be computed by calendar months. *Con. Rule 472.*

Identical with the Eng. R. 1875, O. 57, r. 1. That of 1883, R. 961, is a little more full, providing for the same construction of the word "month" in any document which is part of any legal procedure under the Rules.

Where a month's notice of passing a by-law was required, notice given on 28th March for 28th April was held insufficient: *Re Laplante v. Peterborough*, 3 Ont. 634; *Re Ostrom & Sidney*, 15 Ont. App. 372.

By R. S. O. c. 1, s. 8 (15), "month," and "year," in Ontario statutes, mean calendar month, and year, and this provision also applies to the *Rules*: *Rule 5*. In contracts and legal documents

where nothing to the contrary is expressed, and in matters not affected **Rule 343.** by this *Rule* and the above statutory provision, "month" means a lunar month: *Hutton v. Brown*, 29 W. R. 928. There is no general exception making it mean a calendar month in commercial documents: *Bruner v. Moore*, 1904, 1 Ch. 305.

By R. S. O. c. 144, s. 2, standard time is adopted as regards any time mentioned in any Act of the Ontario Legislature, by-law, *Rule* of Court, deed, or legal instrument, unless otherwise stated. As regards that part of the Province which lies east of the meridian, 87° west longitude, standard time is reckoned as 5 hours behind Greenwich time; and as regards that part of the Province lying west of the said meridian, standard time is reckoned as 6 hours behind Greenwich time.

343. Where a period of less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceeding, [holidays, as defined by *The Interpretation Act*], shall not be reckoned in the computation of such period. *Con. Rule 473.* Period of less than 6 days.

The words in brackets do not correspond with the Eng. (1883) R. 902. Holidays are defined by the *Interpretation Act* (R. S. O. c. 1, s. 8, s.-s. 16), as amended by 2 Edw. vii. c. 12, s. 1, as follows:—

"16. The word "holiday" shall include Sundays, New Year's Day, Good Friday, Easter Monday, Christmas Day, the birthday, or the day fixed by proclamation for the celebration of the birthday of the reigning Sovereign, Victoria Day, Dominion Day, Labour Day, and any day appointed by proclamation of the Governor-General or the Lieutenant-Governor as a public holiday or for a General Fast or Thanksgiving."

This *Rule* does not apply to Division Courts: *Re McKay v. Talbot*, 3 O. L. R. 258.

The only day on which no judicial act can be done is Sunday. Other statutory holidays are not *dies non juridici* in that sense: *Foster v. Toronto Railway Co.*, 31 Ont. 1.

This *Rule* applies to the period for entering cases under *Rule 538* (d): *Parr v. Lough*, 3 C. L. T. 312; to short notice of trial under *Rule 538* (b): *O'Donnell v. O'Donnell*, 10 P. R. 264; and to the computation of the 48 hours' notice of the examination of a party required to be given under *Rule 446*: *Lovelace v. Harrington*, 10 P. R. 157.

Where the limited period is *not less* than six days, holidays are counted: *Ex parte Viney*, 4 Ch. D. 794; *Cornish v. Manning*, 18 C. L. J. 143, except when the last day is a holiday, when, by *Rule 345*, it is not to be reckoned: *Taylor v. Jones*, 45 L. J. C. P. 110.

As to how far the Court regards a fraction of a day, see *Broderick v. Broatch*, 12 P. R. 561; *Clarke v. Bradlough*, 8 Q. B. D. 63; 46 L. T. 49.

Where a statute limits a time for making an application, serving notice of motion within the prescribed time is sufficient, and it is not absolutely necessary that the application should be brought on to be heard within that time: *Re Sweetman & Gasfield*, 13 P. R. 203; *Re Shaw & St. Thomas*, 18 P. R. 454; *Re Gallon v. Central Queensland Co.*, 25 Q. B. D. 230; 62 L. T. 834.

Rules
344, 345.

Days how
computed.

344. (1) Where a number of days not expressed to be clear days, is prescribed by the Rules or practice of the Court, the same shall be reckoned exclusively of the first day, and inclusively of the last day. Con. Rule 474.

Even in a statute where the time within which an act is to be done is to run from a certain date, or event, the day of the date, or event, must be excluded in the computation of the time: *Goldsmiths Co. v. W. Metropolitan Ry. Co.*, 1904, 1 K. B. 1.

Clear days.

(2) Where the days are expressed to be clear days, or where the term "at least" is added, both days shall be excluded. Con. Rule 475.

Clause (1) is the same as English Rule No. 174, of Hilary Term, 1853, and is to the same effect as Eng. (1883) Rule 972. Clause (2) is taken from App. O, 60; and there is no corresponding Eng. Rule.

When the expression "clear days" is not used, days are "clear" when expressed to be "at least" a certain number of days; see clause (2); and *Reg. v. Shropshire Justices*, 3 A. & E. 173; *Fisher Digest*, p. 8323; *Wickster v. Leys*, 3 C. L. T. 504; *Rumohr v. Maier*, 18 C. L. J. 444, 19 C. L. J. 10; 3 C. L. T. 31.

The Rule applies to the construction of orders made in actions limiting the time for doing any act: *Bank of B. N. A. v. Hughes*, 30 C. L. J. 138.

Where last
day is
Sunday.

345. Where the time for doing any act or taking any proceeding expires on a Sunday, or other day on which the offices are closed (a), the act or proceeding, so far as regards the time of doing or taking the same may be duly done or taken, on the next juridical day. Con. Rule 476. Rules of 1 Jan., 1896, 1450.

More general than Eng. (1883) R. 963, by omitting at (a) the following words: "and by reason thereof such act or proceeding cannot be done or taken on that day."

This Rule does not apply to extend the time for registration of a chattel mortgage under the statute, R. S. O. c. 148: *McLean v. Pinkerton*, 7 Ont. App. 490; nor to extend the time fixed by a Statute of Limitations, and therefore, in an action on a promissory note, where the limit of time under such a statute expired on Sunday, and the writ was not issued till Monday, the bar of the statute was held to apply: *Morris v. Richards*, 45 L. T. 210; see also *Flower v. Bright*, 2 J. & H. 598.

But it is considered by the officers of the High Court at Toronto that where the 3 years within which a writ of execution is to be renewed under Rule 872 expires on a Sunday, the writ may be renewed on the following day, as the limit of 3 years is one imposed by the Rules (Rule 872), and not by a statute.

When the time for appealing from Chambers expires on a holiday, the motion may be made the next day: *Taylor v. Jones*, 45 L. J. C. P. 110.

As to a notice of motion given for a *dies non*, see Rules 316 and 348.

346. The day on which an order that [a party] do give security for costs is served, and the time until and including the day on which the security is [allowed], shall not be reckoned in the computation of time allowed for [taking any proceeding in the action]. Con. Rule 477, amended.

Rules
346-348.
Computation of period of stay of proceedings.

Based on Chy. O. 400.

The words in brackets represent amendments to Rule 477, which only dealt with security given by a plaintiff, did not exclude the time up to allowance of the security, and applied only to the time for defendant to appear or deliver defence.

Eng. (1883) R. 966, still only excludes the time up to the day on which security is given.

Where the plaintiff has paid money into Court as security for costs, and has given notice of payment in, the defendant is entitled to at least one day to ascertain if such payment in has really been made and to file his defence, before the plaintiff can note the pleadings as closed, or take further proceedings: *The Northern Elevator Co. v. The North-West Transportation Co.*, 6 O. L. R. 23.

347. The time for delivering, amending or filing any pleading, answer or other document may be enlarged by consent, without application to the Court or a Judge. Con. Rule 478, as amended by Rule 1234, 28 Nov., 1903.

Enlargement of time by consent.

348. Unless the Court or a Judge gives leave to the contrary, there shall be at least 2 clear days between the service of a notice of motion or petition and the day for hearing; and in the computation of such 2 clear days, Sundays, and days on which the offices are closed, shall not be reckoned. Con. Rule 479.

Two clear days' notice.

The first sentence is the same as Eng. (1883) R. 700. The remainder is taken from Chy. O. 264.

"At least," see Rule 344.

For the days on which the offices are closed, see Rules 9 and 10.

Motions for judgment are held to be within this Rule: *Parsons v. Harris*, 6 Ch. D. 694; *Pearce v. Spickett*, W. N. 1876, 109; *Martins v. Birney*, 10 P. R. 368, and note to Rule 600.

A notice of motion need not state under what Rule the party proposes to move: *Re Barker's Estate*, 10 Ch. D. 165-6.

Where a motion is made by leave of the Court or a Judge, the notice should so state, otherwise it is irregular: *Hill v. Rimell*, 8 Sim. 632. The Court should also be informed of the fact on the return of the motion; but the Court has a discretion to disregard the irregularity: *Dawson v. Beeson*, 22 Ch. D. 504. Under Rule 310 affidavits were allowed to be read, though not served until after the notice of motion: *Re Wiggleson Hospital*, 78 L. T. Jour. 282. So, where, without leave, a motion is made returnable on a day on which

Rule 348. the Court does not sit: *Armstrong v. Cayley*, 13 Gr. 358; or in vacation: *Maulin v. Rogers*, 34 W. R. 502; 55 L. T. 121; 55 L. J. Q. B. 377; or the notice is too short: *Daubney v. Shuttleworth*, 1 Ex. D. 53; *Drykin v. Coleman*, 25 W. R. 294, it is irregular; but the Court may disregard the irregularity: see *Williams v. De Boinville*, 17 Q. B. D. 180; *Forrest v. Davies*, 26 W. R. 534, and *Re Coulton*, 34 Ch. D. 22.

Objection to a notice of appeal, as being short, was considered waived by appenring on the appeal: *Re McKee, Forster v. Davies*, 25 Ch. D. 19; and by obtaining an enlargement of a motion, and demanding affidavits: *Re Farlinger & Morrisburg*, 9 C. L. T. 109.

But appearance on a motion to commit, in order to take an objection that the service is irregular, is not a waiver of the irregularity: *Mander v. Falcke*, 1891, 3 Ch. 488; 65 L. T. 454.

Where notice of motion has not been given in sufficient time owing to a *bona fide* mistake, the Court may, in its discretion, allow the party in default to show the reason of the mistake by affidavit, and allow the motion to be made on a later day: *Smith v. Smackmen Ins. Co.*, 32 W. R. 184.

As to the case of a motion against a defendant who has failed to appear in the action, see note to *Rule 330*.

Costs.

Where the party who has given notice of motion fails to appear, the party served and appearing is entitled to an order for his costs: *Berry v. Exchange Trading Co.*, 1 Q. B. D. 77; *Reg. v. Armstrong*, 13 P. R. 306; *Denison v. Devlin*, 11 Gr. 84; in the case of motions to a Divisional Court (*Rule 790*); and of appeals to the Court of Appeal (*Rule 821*), special provision for such an event is made. Costs of affidavits prepared, but not filed at the date of the abandonment, were allowed in *Harrison v. Leutner*, 16 Ch. D. 559.

If the notice of motion is invalid, the party served not being bound to appear, is not entitled to costs if he does appear: *Daubney v. Shuttleworth*, 1 Ex. D. 53. In *Re Coulton, Hamling v. Elliott*, 34 Ch. D. 22, it was held that notice for a day not in the sittings is not bad, perhaps because the parties appeared on the motion; and see *Fisken v. Smith*, 3 Chy. Ch. 74.

In *Williams v. De Boinville*, 17 Q. B. D. 180, notice for a day not in the sittings was amended by inserting the proper day, the case apparently having been entered by the Clerk in the list of opposed motions for the first day of the sittings. The notice was held bad, but the amendment was allowed, the amount in question being large. In *Maulin v. Rogers*, *supra*, the Court thought it best for the parties not to permit an amendment, the amount being small; see 34 W. R. 702.

As to when costs will be given, where the Court decides that it has no jurisdiction, see *Cote v. Halliday*, 33 C. L. J. 159; *Brown v. Shaw*, 1 Ex. D. 425; *Great Northern Co. v. Inett*, 2 Q. B. D. 284; *Powley v. Whitehead*, 16 C. C. Q. B. 589.

As to the costs of a person who appears, though unnecessarily served, and merely to ask costs, and if one who appears *quia timet* an order would be made against him, see *Lucas v. Fraser*, 9 P. R. 319.

Affidavit of service.

Under *The Judicature Act*, where an order is made in default of appearance on a motion, the former practice is still in force, and it is still necessary to produce an affidavit of service to the Registrar

before the rising of the Court: it is not sufficient if it be produced **Rules** in time to draw up the order: *Seear v. Webb* 25 Ch. D. 84; *Jones v.* 348a, 349. *Bartholomew*, W. N. 1883, 205; *Re Rosier*, 40 L. T. 442.

Formal parties may, with a notice of motion, or petition, be Tender of tendered \$5 for costs, and if they appear unnecessarily they will get \$5 costs to no more costs: **Rule 1153**; *Re Sutton*, 46 L. T. 740; where several formal respondents appear by the same solicitor, the tender of one sum of \$5 is sufficient: *Re Mitchell*, 17 Ch. D. 515; 45 L. T. 60.

348a. Unless the Court or a Judge gives leave to the contrary, there shall be at least six (6) clear days, computed as Six clear days notice of motion for declaration of lunacy mentioned in **Rule 348**, between the service of a notice of an application for a declaration of lunacy and the day for hearing. **Rule 1261** of 28th Nov., 1903.

The 6 days must be clear days, and Sundays and days on which the offices are closed are not to be reckoned: see **Rule 348**.

349. Service of pleadings, notices, orders, and other proceedings, shall, unless otherwise ordered, be effected Time for service of pleadings, etc. on Saturday before 2 o'clock in the afternoon, and on other days before the hour of four o'clock in the afternoon. Service effected after four o'clock on any week day except Saturday, shall be deemed to have been effected on the following day. Service effected after two o'clock on Saturday shall be deemed to have been effected on the following Monday. **Con. Rule 480.**

The original **J. A. Rule 459** was identical with the English Rule, and named six o'clock as the last hour for service, instead of four o'clock.

Where service was admitted by a solicitor a few minutes after the hour *per incuriam*, and was repudiated by him as soon as he discovered the nature of the paper served upon him, it was held not to bind: *McTavish v. Simpson*, 7 P. R. 145; *Wright v. Way*, 8 P. R. 328.

Service of a paper effected within proper hours but by leaving the paper in the office of the solicitor, after he and his clerks had left for the day, is good service only from the time when the paper comes to the knowledge of the solicitor: *Davis v. Hubbard*, 20 C. L. J. 32; following *McCallum v. Prov. Ins. Co.*, 6 P. R. 101; but proceedings may also be taken under **Rule 331** so as to have the service count from the time of attendance to serve.

A specially indorsed writ is not a pleading within this **Rule**, and may be served at any hour of the day: *Murray v. Stephenson*, 9 Q. B. D. 60; see also *Veale v. Automatic Boiler, etc., Co.*, 18 Q. B. D. 631; see also in the case of a notice of motion to quash a by-law, *Re Davis & York*, 10 C. L. T. 8.

See *Lland v. Ward*, in note to **Rule 263**.

Rules This *Rule* was held not to apply to appeals from a Surrogate
350-352. Court: and vacation is not excluded from the 15 days allowed by
 R. S. O. c. 50, s. 36, for bringing such appeals: *Re Eastman*, Divisional Court, 17th November, 1898.

Half an
 hour's
 attendance
 on a summons,
 or
 appointment
 is
 sufficient.

350. An attendance on a motion in Chambers, or on an appointment before a Master, Registrar, or other officer, for half an hour next immediately following the return thereof, shall be deemed a sufficient attendance. Con. Rule 481.

Taken from Rule T. T. 1856, 124.

Pleading in
 vacation.

351. Pleadings shall not be amended or delivered in the Long Vacation, [except by consent or] unless directed by the Court or a Judge. Con. Rule 483.

The words in brackets are not in Eng. (1883) R. 964.

In the former Common Law Courts no pleadings could be delivered during the Long vacation: R. S. O. 1877, c. 50, s. 95. Under this *Rule* it can be done by order, or by consent, but not otherwise, so as to be regular.

A pleading may be delivered without consent or order in the Christmas vacation: *Thompson v. Howson*, 16 P. R. 378; but the opposite party cannot, without order, be compelled to deliver a pleading in answer during Christmas vacation: see *Id.* and *Rule* 352.

Vacation
 time of,
 when not
 to be
 reckoned.

352. Unless otherwise directed by the Court or a Judge, the time of the Long Vacation, or the Christmas Vacation, shall not be reckoned in the computation of the times appointed or allowed by these Rules for filing, amending, or delivering any pleading, or in the times allowed for the following purposes:

- (a) Appeals to a Judge in Chambers;
- (b) Reports becoming absolute;
- (c) Moving to discharge an order under Rules 398 to 402;
- (d) Moving to add to, vary, or set aside a judgment by a party served therewith;
- (e) Doing an act or taking a proceeding in appealing to the Court of Appeal, or to a Divisional Court, except in County Court appeals. Rules 23 June, 1894, 1331. Rules of 1 Jan., 1896, 1451.

Based on Chy. O. 408, and App. O. 57.

As to the proceedings which may or may not be taken during **Rule 353**, vacation, see further *Rule 3* and notes.

The Christmas vacation was under Chy. O. 408 not to be reckoned in the computation of the time allowed for taking certain steps: see *Blake v. Building & Loan Association*, 10 P. R. 153; under the former Con. Rule 484 it was not excluded, but the present *Rule* now expressly provides that it is to be excluded.

As to delivery of pleadings in vacation, see *Rule 351*.

A notice of trial given in vacation is regular: *Thompson v. Houston*, 16 P. R. 378.

Appeals to a Judge in Chambers.—Although the time of the Christmas or Long vacation is not to be included in the time limited for appealing to a Judge in Chambers, yet when any judgment, order or decision so appealable is made or given in vacation, any party affected may appeal therefrom, if he pleases, during vacation to the vacation Judge: *Rule 767* (6).

Masters' Reports.—In order to confirm a Master's report, it must be filed as directed in *Rule 693*, fourteen days; see *Rule 769*, reports. No part of this period must fall in vacation. As to the procedure in appeals from a Master's report, see notes to *Rules 769-772*, when confirmed.

Drainage Appeals.—The *Rules* apply as far as possible to appeals from reports of the Drainage Referee under R. S. O. c. 226, and Christmas Vacation is excluded in the computation of the time limited by s. 110, for appealing: *Re Raleigh and Harwich*, 18 P. R. 73.

Moving to Discharge Order Under Rules 398-402.—Where an order of revivor was formerly issued, the practice is now to issue an order to continue the proceedings. Fourteen days from service are allowed for moving against an order to continue proceedings: *Rule 398*. discharge orders to continue proceedings; Time for.

Moving to add to, or vary, or set aside a Judgment.—This *Rule* applies to motions to add to, or vary, judgments, by parties served therewith, by direction of the Master, whether on being added as parties to an action under *Rules 659* or *746*, or merely for the purpose of binding them by, and enabling them to attend the proceedings in the action under *Rule 203*. The time allowed for moving against a judgment by any party so served is fourteen days from the day of service: see *Rules 203* (3), 661, 747. Motions to add to, or vary, judgments.

Appeals to the Court of Appeal.—The time of the vacations is not to be reckoned, under clause (c), in any time fixed by statute (as well as in any time fixed by *Rule*), for "doing an act or taking a proceeding" in appealing (except in County Court appeals): *Hespeler v. Campbell*, 14 P. R. 18; *Re Elliott, Elliott v. Russell*, before MacLennan, J.A., 30 Sept., 1890. Appeals to C. A.

353. The Court or a Judge may enlarge or abridge the time appointed by these *Rules*, or any *Rule* relating to time, or fixed by any order (a), for doing any act or taking any proceeding, upon such terms as may seem just: Enlarge-ment or abridge-ment of time.

Rule 363. and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed. Con. Rule 485; Rules 23 June, 1894, 1332.

The Eng. (1883) R. 967, has it (a) "enlarging time": It is otherwise the same.

An application under this *Rule* should be on notice to the parties affected if they have appeared.

A motion to extend the time for making a motion may be made at the same time as a motion which is objected to as out of time: *Bradshaw v. Warlow*, 32 Ch. D. 403.

Scope of
Rule.

Scope of Rule.—The *Rule* only applies where a limited time is fixed for something to be done, and not where the *Rules* direct some act to be done before another: *Re Pitcher*, 11 Ch. D. 905.

The Court cannot, under this *Rule*, extend the time for renewing a writ where in the absence of such renewal the claim would be barred by the Statute of Limitations: *Doyle v. Kaufman*, 3 Q. B. D. 340; and see *Magee v. Hastings*, 28 L. R. Ir. 288; but the time for issuing a concurrent writ may be extended, the original having been kept renewed so that it could be acted upon within the jurisdiction: *Smallpage v. Yonge*, 55 L. T. 44, distinguishing *Doyle v. Kaufman*. See also note to *Rule 238*; *St. Louis v. O'Callaghan*, 13 P. R. 322.

An extension of the time limited by *Rule 1044* for delivery of a statement of claim may be extended, though the liberty of the subject is involved: *Winch v. Traviass*, 18 P. R. 102.

There is no power to extend (*McLean v. Pinkerton*, Ont. App. 495; *Re Oliver and Scott*, 43 Ch. D. 310; 61 L. T. 552; *McCarroll v. Metropolitan Life Ins. Co.*, 35 C. L. J. 421), or to shorten (*Re Sweetman & Gosfield*, 13 P. R. 293), the time fixed by a statute, and not by the *Rules*. The time for moving against an award was extended in *Re Oliver & Scott*, *supra*, because the time for moving was fixed by Rules passed by lawful authority altering the statute, 9 & 10 W. 3, c. 15, s. 2. See also *Flower v. Bright*, 2 J. & H. 590.

The time allowed by *Rule 424* for taking money out of Court, which has been paid in with a defence, cannot be extended under this *Rule* after the plaintiff has proceeded to trial: *Magnum v. Ferguson*, 18 P. R. 201.

This *Rule* does not empower the Court to allow an application as to costs, which by *Rule 1130*, if made to a Judge, must be made at the trial, to be made at any later period: *Baker v. Oakes*, 2 Q. B. D. 171; but see *Fritz v. Hobson*, 14 Ch. D. 542.

Extending
time for
appealing.

Extending Time for Appealing.—In appeals to the Court of Appeal the application for an extension of time must, under *Rule 799*, be to the Court of Appeal, or a Judge thereof. It was at one time held that in giving leave, or extending time, there was a difference between applications before, and after, judgment. In the former case, leave was readily granted, unless the opposite party was injured in some respect, for which payment of costs could not compensate him; but in the latter case after the action had been once tried

and judgment given, the party in whose favour the judgment is, was held to have a vested right in it of which he is not to be deprived, except under special circumstances; see *Collins v. Vestry of Paddington*, 5 Q. B. D. 308; *Miller v. Brown*, 9 P. R. 342; *Shupe v. Shupe*, 4 C. L. T. 129; *Craig v. Phillips*, 7 Ch. D. 210; *McAndrew v. Backer*, 7 Ch. D. 701; see *Re Ambrose Lake Tin and Copper Co., Taylor's Case*, 8 Ch. D. 643; *Re Sceptre Licensed Victuallers Fire Insurance Co., Ex parte Hore*, W. N. 1879, 6; but these cases have been gradually departed from, and it is now held that no such distinction exists, but that each case depends upon its own circumstances, and discretion is to be exercised, accordingly, in either case, so as to do what justice may require in the particular case; *Cusack v. L. & N. W. Railway*, 1891, 1 Q. B. 347; *Abell v. Morrison*, 14 P. R. 210; see also *Re Gabourie, Casey v. Gabourie*, 12 P. R. 252; *Re Clayton Mills Manufg. Co.*, 37 Ch. D. 28; *Edsall v. Pappas*, 40 Ch. D. 520; *Ross v. Robertson*, 7 O. L. R. 404; *Rap v. Port Arthur*, 7 O. L. R. 737, and notes to Rule 799.

No precise rules can be laid down as to what constitute circumstances sufficient to call for the exercise of the discretion of the Court; see *Carter v. Stubbs*, 6 Q. B. D. 116; *Re Manchester Economic B. S.*, 24 Ch. D. 488; *Wilby v. Standard, etc.*, 10 P. R. 34. Even in the case of the time for taking a step being allowed to expire by mistake, there is no hard and fast rule that an extension will not be given unless there has been conduct on the part of the opposite party conducing to the mistake; *Illingworth v. Melbourne*, 18 Times, 775.

As a general rule after delay and expiry of the regular time, there must be shewn a *bond fide* intention to appeal held while the right to appeal existed, and a suspension of further proceedings by reason of some special circumstances; *Smith v. Hunt*, 5 O. L. R. 97. The applicant must also shew *prima facie* error in the judgment; *Union Bank v. Rideau Lumber Co.*, 19 P. R. 106; *Ross v. Robertson*, *Rap v. Port Arthur*, *supra*, and see notes to Rule 799.

Where there has been delay on both sides, but an appeal is ready, though too late to be set down in due course, consent should ordinarily be given to its being entered; see *McLaughlin v. Mayhew*, 5 O. L. R. 114.

Thus, though, generally speaking, an extension will be granted where justice requires it: *Re Gabourie, Casey v. Gabourie*, 12 P. R. 252; and cases *supra*; two particular lines of cases have been noticed in which leave may be given, 1st, where there is unavoidable accident, where a party is unable to bring on his appeal; and 2nd, where some equity is raised on behalf of the appellant from the conduct of the other side: *Langtry v. Dismoulin*, 4 C. L. T. 351; *Re Mansel, Rhodes v. Jenkins*, 7 Ch. D. 711; *Re Blyth & Young*, 13 Ch. D. 416. Mistake on the appellant's part with which the respondent has nothing to do may be a ground, and it is not essential to shew misconduct by the respondent. (though there are expressions in the cases to the contrary); see *Re Mansel, Rhodes v. Jenkins, supra*; *McAndrew v. Barker*, 7 Ch. D. 701; *Curtis v. Sheffield*, 21 Ch. D. 5; *Rumohr v. Marx*, 19 C. L. J. 10; *Bertram v. Barringham*, 7 Ch. D. 24; but there must be an equity shewn in the applicant's favour either from conduct of the other party, or from something else recognized as a ground of equity: *Re New Callao, etc.*, 22 Ch. D. 484; *Re Manchester Economic B. S.*, 24 Ch. D. 488; *Peckett v. Short*, 32 W. R. 123; *Wilby v. Standard, etc.*, 10 P. R. 34; *Lewis v. Talbot Road Co.*, 19 P. R. 15; *Sieveright v. Leys*, 9 P. R. 200; *Langdon v. Robertson*,

Rule 363. 12 P. R. 139; *Re Gabourie*, 12 P. R. 252; *Esdaile v. Payne*, 40 Ch. D. 520; *McNair v. Andenshaw Paint Co.*, [1891], 2 Q. B. 502; and the onus of shewing such equity is on the applicant: *Shupe v. Shupe*, 4 C. L. T. 129.

In *Dayer v. Robertson*, 9 P. R. 78, time for appealing from an Official Referee in Chambers under Rule 767, was extended where the time had expired through a misapprehension of the practice: see *Croft v. Samuel*, 2 C. P. D. 21; and in *H'ery v. The World*, 17 P. R. 543, where, though a sittings of the Court had been lost, substantial steps towards bringing on the appeal had been taken, and security had been given for a large part of the debt and costs.

Extension
granted

An extension was granted where the applicants had been, without their default, in ignorance of the order appealed from, and applied as soon as they heard of it: *Re Padstone, Total Loss, etc.*, [1881], W. N. 1882, 1; 51 L. J. Chy. 344; where notice of appeal was withdrawn by mistake, and immediately renewed: *Re Labrone, etc.*, *Tanaka's Case*, 8 Ch. D. 643; where the delay was attributable to the Court: *McCrae v. White*, 9 P. R. 288; under peculiar special circumstances: *Re Lake Superior Native Copper Co.*, 11 P. R. 36; where some of the parties affected by the judgment lived at a great distance, and out of the jurisdiction: *Re Jacques*, 30 W. R. 394; but not where due diligence in communicating with them was not shown: *Miller v. Broten*, 9 P. R. 542; and where the order appealed from, viz., for the winding up of a company, was founded upon a void resolution of which the appellant had obtained the order, was not aware, and therefore had not disclosed to the Court: *Re Manchester Economic B. S.*, *supra*; where the case was important, and the facts were conflicting decisions below: *Powell v. Peck*, 12 P. R. 34; where leave was necessary, and had not been applied for, but proceedings to appeal had been taken in proper time, and a fairly arguable point of law was presented: *Langdon v. Robertson*, 12 P. R. 139, approving of the rule expressed in *Sieveright v. Leys*, 9 P. R. 200; and see *Re Gabourie*, 12 P. R. 252, and *Foley v. Canada P. L. & S. Co.*, 18 C. L. J. 444.

Leave was granted where the proposed appeal was from an order refusing to set aside a judgment obtained by default in an action for recovery of land, where the omission to file defence was due to a mere slip of the solicitor, the application for relief being made promptly, and the action having been directed to be brought, on the staying, by a previous action, of proceedings under a power of sale in a mortgage, presumably because the plaintiff's right to exercise the power was not clear: *Bourne v. O'Donohoe*, 17 P. R. 274.

Extension
refused.

An extension was refused where the object of the appeal was to fix executors with interest on money which they had invested, and on which a loss had occurred: *Coates v. McGlashan*, 2 Chy. Ch. 218; where the delay was owing to the applicant's ignorance of the practice: *Wilby v. Standard, etc.*, 10 P. R. 34; or to the party having inexcusably proceeded under the old and repealed practice: *Broten v. Dorset*, 34 W. R. 776; *Re Crosley*, 34 Ch. D. 664; or to the inadvertence of his solicitor: *Winnett v. Renuick*, 6 P. R. 233; (but see *Walton v. Jarvis*, 18 U. C. Q. B. 620; *Weldon v. De Bath*, 3 Times, 445); or the misconstruction of a Rule: *International Financial Society v. City of Moscow Gas Co.*, 7 Ch. D. 241. A contrary subsequent decision by a Court of Appeal does not form a special circumstance: *Craig v. Phillips*, 7 Ch. D. 249; *Allan v. McTavish*, 3 C. L. T. 196; see *contra*, *Re Normantown*, 50 L. J. Chy. 223; nor does the fact of a statute having been passed altering the law, even though it be retrospective: *Eyre v. Wynn MacKenzie* (No. 2), 1896, 1 Ch. 135; 73 L. T. 571.

See also *Baddie v. Sutherland*, 20 C. L. J. 146; 4 C. L. T. 205; *Rule 353*. and *Hamilton Prov. Loan Co. v. Dumble*, 20 C. L. J. 147; 4 C. L. T. 205.

In *Curtis v. Sheffield*, 21 Ch. D. 1. (see also 20 Ch. D. 308), leave to appeal from a decree 45 years old, which declared future rights, was asked by a person who applied promptly after the happening of the event which entitled him to a fund if the decree should be reversed. Leave was refused, the fact that future rights were declared being held to be no sufficient reason for giving leave in a case where all parties, who could in any event be interested, were before the Court when the declaration was made.

The order extending the time granting leave to appeal should provide for the contingency of the appeal being abandoned; and where the costs of the motion are not provided for in the appellate Court, the Court in which the order extending the time was made is the proper tribunal to correct the omission: *Hilson v. Carter*, 1883, A. C. 638.

See also an article on the subject, 28 C. L. J. 99.

Unless otherwise expressly provided, there is no appeal from an order refusing leave to appeal: *Ex p. Stevenson*, 1892, 1 Q. B. 600; *Lane v. Esdaile*, 1891, A. C. 210; see, however, *Moore v. Peachey*, 8 Times, 406; nor from an order granting leave: *Re Central Bank*, 17 P. R. 395; *Re Sarnia Oil Co.*, 15 P. R. 347; *Kay v. Briggs*, 22 Q. B. D. 343; or extending time for appealing: *Moore v. Peachey*, 8 Times, 406.

Other Cases.—In *Wilkins v. Helford*, 35 L. T. 622, Bacon, V.C., refused to extend time for delivering a counter-claim. It had not been delivered, through the gross neglect of the defendant's solicitor, and the application was made six months after a decree had been obtained, but immediately after the defendant discovered his solicitor's neglect.

In *Hastings v. Hurley*, 16 Ch. D. 734, the time for indorsement of the date of service under *Rule 150* was extended.

Where, within four days from a decision of a Master in Chambers, an appeal summons was taken out, and made returnable at a date after the expiration of the four days, but on the first day when a Judge would sit at Chambers, it was held that the time might be enlarged under this *Rule*: *Gibbons v. London Financial Association*, 4 C. P. D. 263.

By a Master's order an action was ordered to be dismissed, unless notice of trial should be given by a certain day. Through mistake of a solicitor's clerk, notice of trial was not so delivered. A Judge in his discretion refused to extend the time, and the Court of Appeal refused to interfere: *Gilder v. Morrison*, 30 W. R. 815.

Under this *Rule* the Court may order a plaintiff to deliver his statement of claim within a shorter time than that allowed by *Rule 243*; but such an order should not direct a dismissal of the action in case of default; in case of default a substantive application for dismissal may be made under *Rule 432*, which expressly provides that an application for dismissal is not to be made till after the expiration of the time within which the plaintiff is bound to deliver his statement of claim: *Armstrong v. Toronto & Richmond Hill Ry. Co.*, 15 P. R. 449.

Rule 353.

Where a third party notice was served too late, the Court in the circumstances refused to extend the time: *Parent v. Cook*, 2 O. L. R. 709; 3 O. L. R. 350.

Where an order was made under *Rule 432*, dismissing an action for want of prosecution, unless a statement of claim should be delivered within a week, and no statement was delivered in the week so limited, it was held that the action was at an end, and that there was no jurisdiction to make an order subsequently extending the time for delivery of the statement of claim: *Whistler v. Hancock*, 3 Q. B. 10, 83; and see *Dunn v. McLean*, 6 P. R. 156; *Hollender v. Ffoulkes*, 16 P. R. 225; *The Crown Corundum & Mica Co. v. Logan*, 3 O. L. R. 434.

An order was made on the 6th of May dismissing an action for want of prosecution if the statement of claim was not delivered within fourteen days, and on the 19th of May, the plaintiff took out a summons returnable the next day, the last of the fourteen days, for further time to deliver the statement of claim. The summons was, on the 20th, adjourned, by the consent of the parties in writing indorsed thereon, till the 21st, and on the 21st a Master made an order giving seven days more for delivery of the statement of claim. The Court rescinded the order on the ground that there was no jurisdiction to make it, the action being at an end on the 20th of May: *King v. Davenport*, 4 Q. B. D. 402.

On the 25th of March a Master made an order dismissing an action for want of prosecution, unless an affidavit in answer to interrogatories was filed on the 31st. The affidavit was not filed on that day; but on the day following a summons was taken out for further time to answer the interrogatories; it was held that it was still competent to the Court or a Judge to enlarge the time for moving to set aside or vary the order of the 25th of March: *Burke v. Rowan*, 4 C. P. D. 226.

The Court of Appeal has decided that a Judge has jurisdiction under this *Rule* to enlarge the time for appealing against an order dismissing the action for want of prosecution, even after the order has taken effect, and the action has therefore become dismissed; and that he has also jurisdiction, when he has so enlarged the time for appealing, to vary or amend the order dismissing the action, and in the exercise of such jurisdiction his discretion is not limited by fixed or arbitrary rules: *Carter v. Stubbs*, 6 Q. B. D. 116; see also *Welch v. Buhl*, 3 Q. B. D. 80, 253, and note to *Rule 432*.

In the above cases, *Whistler v. Hancock* is recognized as correctly decided. In that case there was no jurisdiction to make the order asked, because the motion was to take some step in the cause, and was not directed to modifying the order for dismissal. There had been no order or application within the week to set aside or vary the order of dismissal, or to enlarge the time for appealing against the order of dismissal, and that order existing and having taken effect, the cause was dead.

The last five above-mentioned English cases were considered and approved in *Hollender v. Ffoulkes*, 16 P. R. 225; and in *Newcombe v. McLuhan*, 11 P. R. 461, were not considered to stand in the way of a motion to vacate a judgment (signed on default of delivery of a statement of claim on a day previously fixed by order for its delivery), and to extend the time for delivering statement of claim: see also *Bank of Minnesota v. Page*, 14 Ont. App. 347; *The Crown Corundum Co. v. Logan*, 3 O. L. R. 434, and *Muir v. Guinam*, 6 O. W. R. 64.

Where an order for taxation of costs between solicitor and client ^{Rules} limited a time within which it was to be acted on, and provided that ^{354, 355.} in default it was to be of no effect: it was nevertheless held that the time for acting under the order might be extended: *Re McIntosh*, 1903, 2 Ch. 394; 88 L. T. 820.

354. The Vacations of the High Court and the Court of Appeal, shall be: ^{Time for vacations in the High Court of Justice, and Court of Appeal.}

(a) The Long Vacation to consist of the months of July and August.

(b) The Christmas Vacation to consist of the period from the 24th day of December to the 6th day of the following January, both days inclusive. Con. Rule 486.

Unless under any *Rule* (such as 9, 351, 352 or 439), proceedings are prohibited during vacation they may lawfully be taken, e.g., taxation: *Consinean v. City of London F. Ins. Co.*, 13 P. R. 36; proceedings before an Official Referee: *Marples v. Rosebrugh*, 17 P. R. 104; service of notice of trial: *Thompson v. Howson*, 16 P. R. 378. See notes to *Rule* 9.

By sec. 63 of the Jud. Act, power is given to the Lieutenant-Governor in Council to revoke or modify *Rules* relating to Vacations.

9. MOTIONS AND OTHER APPLICATIONS.

(i) Generally.

355. Where an application is authorized to be made ^{Application to Court or Judge to be by motion.} to the Court or a Judge in an action or proceeding, such application shall be made by motion. Con. Rule 525.

By the Eng. (1883) R. 696, it is only to a Divisional Court, or to a Judge sitting in Court, that the application is by motion. When made to a Judge in Chambers, a summons, or rule, or order, to show cause, continues in England to be the course.

A notice of motion for attachment stating that the Court would be moved at the *Royal Courts of Justice* was held sufficient: *Petty v. Daniel*, 34 Ch. D. 172.

Where a motion has been made and refused, it cannot be renewed as a general thing without leave: *Regina v. Richardson*, 13 P. R. 303; *Reg v. Mayor of Bodmin*, 8 Times, 553; but see *Payne v. Newberry*, 13 P. R. 392, where the motion when first made was held to be technically irregular: formerly a motion for a *habeas corpus* was an exception; but see now *Re Hall*, 8 Ont. App. 135; but where an interlocutory motion is refused on a ground which is subsequently removed by an amendment of the proceedings, a second motion for the same purpose may be made, and the doctrine of *res judicata* will not apply: see *Bombey & Son v. Playfair*, 1897, 1 Q. B. 368; 75 L. T. 676.

The Court may, under *Rule* 334 or 357, dispense with service of a notice of motion.

Rule 356. | *Rule 1240 provides that Rule 355 shall not extend or apply to proceedings for, or in relation to, the quashing of convictions or orders.*

In most cases where a suitor is prosecuting proceedings in person he is entitled to be heard in person in support of, or opposition to, any motion in the course of such proceedings; there are, however, some motions which the Court will not entertain unless made by counsel; e.g., a motion for a prerogative mandamus: *Ex p. Wallace*, 1902, 2 K. B. 488, where *Re Lewis*, 1884, 14 Q. B. D. 474, was held to be no authority for a contrary practice; so also in the case of complaints against a barrister, or solicitor, for alleged misconduct: see *Re Solicitor*, 1903, 1 K. B. 877; and *Re Solicitor*, 1903, 2 K. B. 205, where the complaint had been investigated by a committee of the Law Society, and the solicitor acquitted.

No rule or order nisi.

356. No summons, rule or order to shew cause shall be granted in any cause [or matter]; but when any person other than the applicant is entitled to be heard on a motion, he shall be served with a notice thereof. Con. Rule 526.

The Eng. R. 1875, O. 53, r. 2, had not the words "or matter," and instead of the last clause, like original J. A. Rule 405, concluded as follows: "except in the cases in which an application for such rule or order is expressly authorized by these Rules." The Eng. (1883) R. 697, is different. For want of the omitted words "or matter," there was a difference in England between rules or orders made in actions and those made in "matters."

Rule 1240 provides that the above Rule 356 shall not extend or apply to proceedings for, or in relation to, the quashing of convictions or orders.

An order calling upon a solicitor to answer affidavits under *Rule 89* appears to be an exception to this *Rule*.

As to motions to set aside awards, see *Rule 363*.

This *Rule* forbids the granting of a rule to shew cause where an application is made in the County Court against the judgment of a County Court Judge who tried the case without a jury: *Williams v. Crow*, 10 Ont. App. 301.

In *Re City of Toronto, Leader Lane Arbitration*, 13 P. R. 106, it was held that a motion, on which, before the *Rules*, no one but the applicant was entitled to be heard, may, under this *Rule*, be made *ex parte*.

The rights of an applicant cannot be prejudiced by anything done after the notice of motion has been served, but his rights are to be determined as they existed at the date of its service: see *Preston v. Tunbridge Wells*, 1903, 2 Ch. 323; 88 L. T. 53.

Motions to quash By-laws.—A motion to quash a municipal by-law should be made to a Judge in the Weekly Court, and from his decision either granting or refusing the motion, an appeal lies to the Divisional Court: see *Jud. Act*, s. 74 (1) as amended.

Under *The Municipal Act*, 3 Ed. vii, c. 19, s. 378, a notice of motion to quash a by-law must be served 7 clear days before the day on which the motion is to be made: s. 378 (2). See formerly, H. & L. *Jud. Act*, 2nd ed., p. 539.

The Court has no power under *Rule 353* to shorten this period *Rule 357* of 7 clear days, as it is fixed by the Statute, and the powers given by *Rule 353* only extend to periods of time fixed by the *Rules: Re Sweetman & Gosfield*, 13 P. R. 293. By analogy to the case of a writ of summons it would seem that *Rule 349*, providing for the hours for effecting certain services does not apply to the service of the notice of motion, it being the first proceeding in the matter.

Where an applicant collusively discontinues his application to quash a municipal by-law, other parties interested may be authorized to intervene and continue the proceedings in the applicant's name on giving him proper indemnity as to costs: *Re Ritz & New Hamburg*, 4 O. L. R. 639.

Evidence on Motions.—See *Rules 489, et seq.*

Affidavits to be read in support of a notice of motion must be filed before the notice is served: *Rule 524*. Affidavits in answer to a motion must be filed before they can be read, but not necessarily filed the day before, as was formerly the practice in Chancery.

Where a party obtained an enlargement, on terms, to file affidavits, but did not comply with the terms, he was not allowed to read the affidavits: *Campbell v. Martin*, 11 P. R. 509.

A party to a motion may read in support of his own case, the affidavits filed by his opponent: *Re Margetson*, 1897, 2 Ch. 314: 76 L. T. 803.

As to proof of service where the opposite party does not appear, see *Sugar v. Webb*, 25 Ch. D. 84, and note to *Rule 524*.

Renewal of Motion after Dismissal.—See note to *Rule 353*.

Motion by Person not a Party.—A notice of motion, other than a notice which originates proceedings, can ordinarily only be given by a party: *Re Knight*, 32 Sol. Jour. 166; but see the special provisions of *Rules 358* and *920*. An application by a person not a party should ordinarily be made by petition.

Length of Notice.—See notes to *Rules 348* and *310*.

357. If satisfied that the delay caused by proceeding by notice of motion might entail serious mischief, the Court or a Judge may make any order *ex parte*, upon such terms as may seem just. Con. Rule 527.

Notice of motion.

When orders *ex parte* can be made.

(Compare Eng. (1883) R. 698.

As to what motions are *ex parte*, see Dan. Pr. 5th ed., 1441, 1909.

Where the opposite party though not served with a notice of motion nevertheless appears upon the motion, he is entitled to be heard, and the motion should not, in that case, be entertained *ex parte: McLeod v. Noble*, 24 Ont. App. 439.

No order of any moment should be made *ex parte* except in a case of emergency: *Thomas v. Storey*, 11 P. R. 417. An *ex parte* order is always taken at the peril of the party, and is liable to be moved against, if improperly made, or if material facts are suppressed on the hearing of it: *Sturgeon v. Hooker*, 1 De G. & S. 484; *Re Gedye*, 15 Beav. 254; *Cartwright v. Hinds*, 3 Ont. 384; *Hynes v. Fisher*, 4

Rule 358.

Ont. 60; *Rep. of Peru v. Dreyfus*, 55 L. T. 802; *Schmitt v. Foulke*, W. N. 1893, 64; *Re McCarthy, Pepler & Co.*, 15 P. R. 261; *Re Collyer, etc., Co.*, 81 L. T. 110.

A party moving *ex parte* must make a frank disclosure of all material facts; his omission to do so may entitle the opposite party to have any order made on his application set aside with costs: see *Collins v. North British*, 1894, 3 Ch. 228; *Republic of Peru v. Dreyfus*, 55 L. T. 802; *In re Burland*, 41 Ch. D. 542; *Atkinson v. Plimpton*, 6 O. L. R. 566; *Mair v. Cameron*, 18 P. R. 484.

Motions for leave to appeal from a report: *Hamilton v. Tweed*, 9 P. R. 448; to stay execution: *Grand Trunk Ry. Co. v. Ont. & Quebec Ry. Co.*, 9 P. R. 420; to dismiss an abandoned appeal: *Ormerod v. Bleasdale*, 54 L. T. 343; or under Rule 425; *Hoocy v. Gilbert*, 12 P. R. 114, 118, should not be made *ex parte*.

A motion for leave to effect substituted service of a notice of motion is *ex parte*: *Hamilton v. Davies*, W. N. 1880, 82.

An *ex parte* order for the examination of a witness dangerously ill was upheld as being in accordance with the former Chancery practice: *Baker v. Jackson*, 10 P. R. 624.

Where the party moving does not appear, the motion is called an abandoned motion. As to costs in such case, see notes to Rule 348.

As to moving against *ex parte* orders, see Rule 358 and notes.

Service of Ex Parte Orders.—*Ex parte* orders should be served as soon as possible: *Church v. Marsh*, 2 Ha. 652; Dan. Pr., 5th ed., 1436. An order made on a motion on which a party affected appeared, does not necessarily require to be served on such party: *Farden v. Richter*, 23 Q. B. D. 124; see also *Hopton v. Robertson*, 23 Q. B. D. 126 (n); and *Cranston v. Blair*, 15 P. R. 167; except orders setting aside proceedings which, though made on notice, must be served promptly, or they will be deemed to have been abandoned: *Molsons Bank v. Dillabough*, 13 P. R. 312; but see *Kelly v. Wade*, 11 P. R. 66; and orders sought to be enforced by attachment must also be served.

Costs.—Ordinary costs should not be awarded on an *ex parte* motion: *McLean v. Allen*, 14 P. R. 84.

Ex parte
orders may
be moved
against.

358. A party affected by an *ex parte* order, [or any party who has failed to appear on an application through accident, or mistake, or insufficient notice of the application], may move to rescind or vary the order before the Judge or officer who made the same, or any Judge or officer having jurisdiction, within four days from the time when the order comes to his notice, or within such further time as the Court or a Judge may allow, and whether the order has been acted upon by the party issuing it or not. Con. Rule 536. Rules of 1 Jan., 1896, 1454.

This Rule was passed in 1888 to meet the objections and difficulties raised in *Ryan v. Canada Southern Ry. Co.*, 10 P. R. 535; *McNabb v. Oppenheimer*, 11 P. R. 214, and *Taylor v. Sisters of Charity*, *ib.* 496; see *Hughes v. Field*, 9 P. R. 127.

See also *Boyle v. Sacker*, 39 Ch. D. 249.

The passage in brackets is the amendment made by former *Rule* ~~358~~ *Rule* 1474. It expresses the decision in *Flett v. Way*, 14 P. R. 123, on the point.

All *ex parte* orders are *periculo petentis*: *Re McCarthy, Pepler & Co.*, 15 P. R. 261. See also notes to *Rule* 357.

In *Reid v. Trimmer*, 9 C. L. T. 391, it was held that where an order was made after an enlargement had been refused, and the opposing party had no material in answer to the motion, the order was not an *ex parte* one, and a motion against it should be by way of appeal.

This *Rule* does not apply to *ex parte* orders for arrest in respect to which special provision is made by *Rule* 1047: *Jury v. Jury*, 16 P. R. 375.

An application to rescind an *ex parte* order made by a Local Judge was entertained by the Master in Chambers: *Williams v. Harrison*, 40 C. L. J. 80.

"Party affected."—Where a garnishee does not, pursuant to *Rule* 920, bring to the notice of the Court the claim of a third party, such third party is a "party affected," within this *Rule*: *Parker v. McHearn*, 16 P. R. 555; 17 P. R. 84.

An execution creditor, prejudiced by an amendment of a judgment and writs of execution issued in an action to which he was not a party, may, on application, have the order rescinded; but *quære*, whether this *Rule* applies to limit the time for making the application to rescind: see *Glass v. Cameron*, 9 Ont. 712; it must at any rate be made promptly: *In re Deakin*, 1900, 2 Q. B. 889.

The general administrator of a deceased defendant was held to be a party affected by an *ex parte* order appointing a judgment creditor to be receiver of defendant's interest in an estate and another person to be administrator *ad litem*, although the grant of general administration was subsequent: *McLean v. Allen*, 18 P. R. 255.

"Party Failing to Appear through Accident, Mistake, etc."—See *Flett v. Way*, 14 P. R. 122; *Cousins v. Cronk*, 17 P. R. 348.

Procedure on Motion.—On an application under this *Rule* a Judge or the Master in Chambers has power to reconsider a matter which has been brought before him *ex parte*, and to receive additional evidence both for and against the order impeached: *Flett v. Way*, 14 P. R. 123; and an *ex parte* order so brought up for reconsideration will not stand or fall upon the sufficiency of the affidavits on which it was made: *Cairns v. Airth*, 16 P. R. 100.

The motion to rescind or vary may be supported or opposed by matter not before the Judge or officer when the order was made. The motion is not an appeal, but is a substantive motion, and the question is not alone whether the order should have been made, but whether, having been made, it should, in view of any change in the state of affairs or position of the parties, be rescinded: *Hawland v. Dominion Bank*, 15 P. R. 63; *Cairns v. Airth*, and *Cousins v. Cronk*, *supra*; *Allison v. Breen*, 19 P. R. 119, 143.

But the right of the party supporting the order to go into further evidence, will not prevent the order from being set aside if it should appear that there was not a fair disclosure of all material facts at the time the order was obtained.

Rules**359-361.**

Orders made from time to time *ex parte*, renewing a writ of summons (thus preventing the application of the Statute of Limitations) were rescinded, where the plaintiff knew, but did not disclose, that he knew where the defendant could be served: *Hair v. Cameron*, 18 P. R. 484. But an application to rescind an order renewing a writ of summons was refused where it appeared that nothing had been withheld from the officer who made the order, and that he had been satisfied with the efforts shown to have been made to effect service, though it appeared that the defendant had not changed his address, and that it might have been ascertained from a directory: *Canadian Bank of Commerce v. Tennant*, 3 O. L. R. 524.

Where costs were awarded against a non-appearing defendant by a Divisional Court, under the impression that he was represented on an appeal, a subsequent application by such defendant to vary the order of the Divisional Court, by striking out the order for payment of costs, was entertained and allowed: *Cousins v. Cronk*, 17 P. R. 348.

Costs of the application may be refused though it is successful: *Jackson v. Gardiner*, 19 P. R. 137.

When
guardian to
be notified.

359. Where an infant is concerned, no order dispensing with payment of money into Court is to be made without notice to his guardian *ad litem*. Con. Rule 528.

All proper
parties not
served.

360. If on the hearing of a motion or other application, it appears that any person to whom notice has not been given ought to have had notice, the Court or Judge may either dismiss the motion or application, or adjourn the hearing thereof in order that notice may be given, upon such terms as may seem just. Con. Rule 529.

Same as Eng. (1883) R. 701.

Service
with writ
or before
time for ap-
pearance.

361. The plaintiff may [without leave], serve a notice of motion for an injunction, and may, by leave of the Court or a Judge to be obtained *ex parte*, serve any [other] notice of motion upon any defendant with the writ, or at any time after service of the writ and before the time limited for appearance of such defendant; [and any notice of motion may be served on the plaintiff by any other party at any time after service of the writ upon such other party]. Con. Rules 533 and 1134 and Rules 23 June, 1894, 1368.

Eng. (1883) R. 704. has not the words in brackets.

The last clause in brackets is from former Con. Rule 1134 (similar to Eng. (1883) R. 662), which, however, provided that notice of motion by a defendant may be served at any time after *appearance* by the defendant.

The above Rule 361 makes a distinction between notices of motion for an injunction, and other notices of motion, authorizing the former to be served before appearance, without leave, but requiring

leave for such service in the case of other notices of motion. The **Rule 362**. English Rule requires previous leave, in all cases in which notice is served before the time limited for appearance, but the corresponding Irish Rule was held in *French v. Colles*, 17 L. R. Ir. 238. not to apply to injunction motions.

Where an affidavit was sworn before the issue of the writ, an injunction was granted *ex parte* on the undertaking of counsel to have the affidavit re-sworn and filed: *Green v. Prior*, W. N. 1886, 50.

Under the Eng. (1883) R. 704, it was intimated that leave to serve notice of motion with the writ could not be given where the defendant was out of the jurisdiction until an appearance had been entered: *Manitoba & N. W. Land Co. Corporation v. Allan*, 1893, 3 Ch. 432; *sed quare* in Ont., and see *Hersey v. Young*, W. N. 1894, 18. where leave was given, without prejudice to what might arise thereafter.

Where leave is given, that fact should be stated in the notice of motion: *Dawson v. Beeson*, 22 Ch. D. 504; and see notes to *Rule 210*. An objection that leave to serve short notice should not have been given cannot be successfully urged as a preliminary objection: *Mander v. Falcke*, 1891, 3 Ch. 408; 65 L. T. 454.

362. A notice of motion to set aside a proceeding for irregularity must specify clearly the irregularity complained of and the several objections intended to be insisted on. *Con. Rule 534*.

Taken from Chy. O. 277. and Rules T. T. 1856, 107.

This *Rule* is to the same effect as Eng. (1883) R. 1039. and is in accordance with the former Chy. Practice: see *Poole v. Poole*, 2 Chy. Ch. 379; *Donnelly v. Jones*, 4 Chy. Ch. 48; *O'Reilly v. Moore*, 1 C. L. T. 565.

It may be sufficient if the notice refers to grounds of irregularity appearing in the affidavits. Where an irregularity complained of was not thus specified, the motion was dismissed, though the irregularity was proved: *Dominion S. & I. Co. v. Kilroy*, 12 P. R. 19; see also *Blain v. Blain*, 9 P. R. 269; and *Petty v. Daniel*, 34 Ch. D. 172; *Wright v. Wright*, 13 P. R. 268; and *Vansickle v. Boyd*, 14 P. R. 469. in the note to *Rule 516*, where an irregularity in an affidavit was held to be waived, objection not having been taken as required by this *Rule*.

A party moving against an irregularity must himself be regular, and is not entitled to any indulgence: *Scott v. Burnham*, 3 Chy. Ch. 399; *Waterous v. Farran*, 6 P. R. 31; *Poole v. Poole*, 2 Chy. Ch. 379; *Donnelly v. Jones*, 4 Chy. Ch. 48; he must move promptly: *Müller v. Müller*, 9 C. L. J. 132; and before taking a fresh step in the action: *Manning v. Birely*, 2 C. L. J. 331; *Larkin v. Armstrong*, 1 Chy. Ch. 31; *Mulkern v. Doerks*, 51 L. T. 429; *Fry v. Moore*, 23 Q. B. D. 395; or making any demand respecting the alleged irregular proceedings which would put the opposite party to expense: *Carpenter v. Hamilton*, 2 Chy. Ch. 282; *Bennett v. O'Meara*, 2 Chy. Ch. 167; *Re Farlinger and Morrisburg*, 9 C. L. T. 109; or he may be held to have waived the irregularity: but see *Hunt v. Worsfield*, 1896, 2 Ch. 224; 74 L. T. 456. where North, J., refused to follow *Mulkern v. Doerks*.

Rules

363-366. Proceedings that are merely irregular are valid until set aside, but a nullity has no effect whatever: *Fuller v. McLean*, 8 P. R. 549. See also notes to *Rule 310*.

An amendment of the notice of motion for the purpose of setting up an irregularity, will not be allowed after the time for remedying the irregularity has elapsed: see *Dunlop v. Actien-Gesellschaft, &c.*, 1902, 1 K. B. 342.

Motion
against
award.

363. Every notice of motion by way of appeal from or to set aside an award shall specify the grounds intended to be insisted on. Con. Rule 535.

See Rule of T. T. 1856, 535.

Setting
down
motions.

364. Motions and other matters to be heard in Court, except *ex parte* applications, shall be set down for argument in the Registrar's office, on *principe*, at latest on the day before the day of argument, unless the Court otherwise orders. A list of the cases so set down shall be posted up in a convenient place not later than the day before the day for which the same are so set down, and a copy shall be furnished to the Registrar or other officer who is to attend the sittings of the Court. Con. Rule 537, 541. Rules 23 June, 1894, 1338. Rules of 1 Jan., 1896, 1455.

Special case,
setting
down.

365. A special case shall be set down to be heard, and notice thereof given to the opposite party six clear days before the day on which it is to be heard; and a copy of the special case shall be left, at the time of the setting down, for the use of the Judge. Rules 23 June, 1894, 1341; Rules of 1 Jan., 1896, 1456.

See Eng. (1883) R. 391.

(ii) *Applications at Chambers.*

The matters which may be disposed of in Chambers are too numerous to specify in detail. Some of them are enumerated in the notes to *Rule 366*. Those applications which may be entertained by the Master in Chambers, and Local Judges and Masters, are specified in *Rules 42, 45, and 49*.

A Judge has jurisdiction to make any order which can be made in Chambers, when sitting in his private room: *Hartmont v. Foster*, 8 Q. B. D. 82.

Business to
be trans-
acted in
Chambers.

366. The following applications shall be disposed of in Chambers:

1. For the sale of the estates of infants, under chapter 137 the Revised Statutes of Ontario, 1887.

Now chapter 168.

2. As to the guardianship, maintenance, and advancement *Rule 366* of infants;
3. For the administration of estates upon motion, without action;
4. Relating to the conduct of actions or matters;
5. As to matters connected with the management of property;
6. For the payment into Court of moneys by a party desiring to make such payment;
7. To vacate certificates of *lis pendens* under 53 Victoria, c. 33.

Now R. S. O. c. 51, ss. 97-100.

8. Such other matters as the Court thinks may be more conveniently disposed of in Chambers than in Court. Con. Rule 542.

Additional Cases to which Jurisdiction in Chambers extends:—The jurisdiction in Chambers extends to other matters, in addition to the business enumerated in *Rule 366*, e.g.:—

1. Summary applications to set aside fraudulent conveyances by execution debtors: *Rule 1015*; or for sale of equitable interests of execution debtors in lands: *Rule 1016*. Applications of this kind could formerly only be made to a Judge: *Queen v. Smith*, 7 P. R. 429; but now the Master in Chambers, Local Judges, and Local Masters, appear to have jurisdiction. Formerly, in such cases the application was made for an order nisi: *Wark v. Moulton*, 7 P. R. 144, but now the proper mode of procedure is to serve a notice of motion: *Rules 356, 348*. Substituted service of the notice on an absconding execution debtor may be allowed: *Dobson v. Marshall*, 9 P. R. 1. The debtor may be ordered to pay the costs of an application for sale: *Watts v. Hobson*, 7 P. R. 334.
2. Motions for judgment in ordinary mortgage actions, for sale, or foreclosure, or for redemption, where infants are concerned; see *Rule 595*. The Master in Chambers, Official Referees when sitting for him, and Local Judges, and in the cases mentioned in *Rule 49* the Local Masters, have jurisdiction to entertain such applications.
3. Motions for judgment by adult parties, in partition proceedings, under *Rules 956, 957*; motions of this kind cannot be entertained by the Master in Chambers: *Re Arnott, Chatterton v. Chatterton*, 8 P. R. 39; but are in certain cases within the jurisdiction of the Local Masters, but not of the County Court Judges (except under *Rule 47*), unless they be also Local Masters: see *Rule 47*, which in effect limits the jurisdiction of the County Court Judges, who are not Masters, to that exercised by the Master in Chambers.

4. Motions for judgment on summary applications for administration, may also be made in certain cases, if unopposed, to Local Masters, under *Rule 947*, and also to the Master in Chambers, and

Rule 366. County Judges who are not Local Masters: *Rules 42, 45, 141*, but if opposed, their jurisdiction is excluded under *Rules 42 and 147 (2)*.

As to procedure on motions for administration, see *Rule 144, et seq.*, and notes.

For judgment under *Rule 603*.

5. Motions for judgment after appearance to a specially endorsed writ, under *Rule 603*; and motions for judgment under *Rule 616*, see notes to those *Rules*.

To convey free from dower.

6. Applications to enable the owner of land to convey free from the dower of his wife, under R. S. O. c. 104, ss. 9, 10, and 11; *Re Eagles*, 7 P. R. 241; *Re Campbell*, 25 Gr. 187, 480; but it seems probable that applications of this kind can only be entertained by a Judge as a *persona designata*.

To appoint or dispense with appointment of representative of estate.

7. Applications to appoint, or to dispense with the appointment of, a person to represent the estate of a deceased person under *Rule 194*; but not to appoint an administrator *ad litem* under *Rule 195*. The Master in Chambers, Official Referee sitting for him, and County Court Judges, and Local Masters when acting under *Rule 49*, have jurisdiction to entertain such applications under *Rule 194*; *Colless v. Sicayic*, 8 P. R. 42.

Habeas corpus.

8. Applications for writs of *habeas corpus* in a civil or criminal proceeding may be made to a Judge in Chambers: 29-30 V. c. 45; R. S. O. 1897, c. 83; *Re Paton*, 4 Gr. 147. As to whether a Judge can in Chambers rescind his own order for a writ of *habeas corpus*, or quash the writ itself on the ground that it issued improvidently, see *Re Ross*, 3 P. R. 301. The Master in Chambers, and Local Masters, cannot entertain applications of this kind: *Rules 42, 49*; nor Local Judges, unless *Rule 47* applies: see *Rules 45, 47*.

A person confined or restrained of his liberty is limited to one writ of *habeas corpus* to be granted by any Judge of the High Court returnable before himself or another Judge in Chambers, or before a Divisional Court, with a right of appeal to the Court of Appeal from the judgment given on the return of the writ. The judgment of the Court of Appeal is final, and, where no such appeal is taken, the order which might have been appealed against becomes final, and no other writ of *habeas corpus* can issue in the matter; and such order is a good answer to an action in which the same question is raised: *Taylor v. Scott*, 30 Ont. 475. This was a civil proceeding, but the decision would seem also to be applicable where a *habeas corpus* is required in a criminal matter, because in Ontario an appeal lies to the Court of Appeal from a refusal to release: see 29-30 V. c. 45, s. 6; R. S. O. 1897, c. 83, and *Cox v. Hakes*, 15 App. Cas. 596.

For declaration of lunacy.

9. Applications to declare a person a lunatic under R. S. O. c. 65, s. 8; *Re Paton*, 1 Chy. Ch. 192; *Re Fleming*, 13 C. L. J. 197; *Re Kelly*, 6 P. R. 220, or for a commission *de lunatico*: *Re Stuart*, 4 Gr. 44.

Applications of this kind can only be made before a Judge: see *Rule 42 (5)*; but where an order has been made declaring the lunacy, the Master in Chambers has jurisdiction to entertain applications respecting the property of the lunatic, under R. S. O. c. 65, s. 11, *et seq.*

The supposed lunatic is entitled to notice of the application: *Re Miller*, 1 Chy. Ch. 215, unless the Court, on proper evidence of its being dangerous, or useless, to serve him, dispenses with service: *Re Newman*, 2 Chy. Ch. 390; *Re Mein*, *Ib.*, 420.

The custody of the lunatic need not be interfered with, unless it is **Rule 366.** shown that, in the interest of the lunatic, it should be: *Re Clark*, 14 P. R. 370. Where the custody of the lunatic was the only object of a motion for a declaration of lunacy, and it was not thought proper to alter the existing custody, a declaration was refused, though there was no doubt about the lunacy: *Ib.*

A husband of a married woman lunatic has no absolute right to be appointed the committee of her person either solely or jointly: *Re Duen*, 1892, 3 Ch. 38.

The rights of creditors against the property of a lunatic will not be interfered with by the Court until an order has been made shewing that the Court has taken control of the lunatic's estate: *Re Clarke*, 1898, 1 Ch. 336; *Re Brown, Llewellyn v. Brown*, 1900, 1 Ch. 480. After the estate has so become subject to the control of the Court, it cannot be seized under an execution; but the execution creditor is entitled upon application to be paid out of it, subject to the maintenance of the lunatic, but not of the lunatic's wife: *Re Winkle*, 1894, 2 Ch. 519. The maintenance of the lunatic is a first claim both on the capital and income of his estate under the control of the Court: *Re Plenderleith*, 1893, 3 Ch. 332; but, subject to this, the Court will not restrain a creditor from exercising his legal rights: *Dilischheim v. London & Westminster Bank*, 1900, 2 Ch. 15.

Applications in Chambers to whom to be made:—

Applications proper to be made in Chambers, but which are excluded from the jurisdiction of the Master in Chambers, Official Referees, Local Masters, and County Court Judges, acting under **Rule 45**, may be made before a Judge of the High Court in Chambers, and under **Rule 47** to a County Court Judge. A Judge sits in Chambers on Tuesday and Friday, at Toronto, in each week (except in vacation, when special arrangements are made). See **Rule 99**.

When Master in Chambers has no jurisdiction, matters may be brought before a Judge.

Applications which can be made in Chambers should be made there, and not in Court: *Moffatt v. Roddle*, 4 Gr. 44; *Anon.*, *Ib.*, 61; or the costs may be refused: *Moracy v. Courtney*, 10 Gr. 72; or allowed only as of a motion in Chambers: *King v. Connor*, 10 Gr. 364.

As to the adjournment of motions from Chambers to Court, and *vice versa*, see **Rule 367**.

The Master in Chambers, County Court Judges, or Local Masters, may refer matters proper for the decision of a Judge of the High Court to a Judge of the High Court: see **Rules 44** and **45 (2)**.

Matters coming before any officer of the Court having jurisdiction in Chambers, should not be referred to a Judge because the parties desire it, but only when the officer can certify that it is a proper case to be heard before a Judge; and matters improperly referred to a Judge will not be entertained: *Hughes v. Rees*, 9 P. R. 86.

Matters not to be unnecessarily brought before a Judge.

Sale of Infants' Estates.—As to the mode of proceeding for sale of infants' estates, see R. S. O. c. 168, ss. 3, 4, and **Rule 962**, *et seq.*, and notes.

Guardianship, and Maintenance, etc., of Infants.—As to the mode of proceeding for appointment of guardians, see **Rule 964**.

Guardianship of infants.

Opposed applications respecting the guardianship of the person, or property, of infants, are excluded from the jurisdiction of the Master

Rule 367. In Chambers: see *Rule 42* (10), and also from that of the Local Judges: *Rule 45*; and Local Masters: *Rule 49*. The authority of the High Court is not excluded by R. S. O. c. 108, ss. 11-33; *Re Standard*, 1 Chy. Ch. 15.

Applications respecting the custody of infants under R. S. O. c. 108, s. 1, may be made to a Judge in Chambers: see *Re Deen*, 3 Chy. Ch. 277; *Re Keith*, 7 P. R. 138; *Re Eves*, 15 Gr. 580; *Re Murdoch*, 9 P. R. 132; *Re Smith*, 8 P. R. 23; *Re Scott*, *Ib.*, 58; *Re Ferguson*, *Ib.*, 550; but not to the Master in Chambers: see *Rule 42* (11); nor (subject to *Rule 47*) to the Local Judges: *Rule 45*, nor to the Local Masters: *Rule 49*.

Winding-up order. **Winding-up Order.**—An order for winding-up a company upon a petition under the Winding-up Act (R. S. C. c. 120), may be made by a Judge in Chambers. *The Toronto Brass Company*, 18 P. R. 248.

Injunctions, and Receivers.—See notes to Jud. Act, sec. 58 (9).

Appeals. Appeals from the Master in Chambers, Local Masters, County Court Judges, or Official Referees, when exercising the jurisdiction of the Master in Chambers: *Rule 767*; and also appeals from the taxation of costs: *Rule 774*, may now be brought before a Judge in Chambers.

Motions to commit. **Motions to Commit.**—Motions to commit for contempt, by reason of disobedience of an order in Chambers, or a *præcipe* order, may be made in Chambers, but where the disobedience is of a Court order, the motions should be made in Court: *Verral v. Hardy*, 4 L. T. 310, following *Klein v. Union Fire Ins. Co.*, 3 C. L. T. 601.

And so also it should be made in Court, where the object is to commit a stranger to the action for contempt in interfering with the due course of justice: *Southwick v. Hare*, 15 P. R. 331. Such a matter is to be dealt with as a criminal matter, not affected by the practice and procedure under the *Con. Rules*: *Ib.*; and see *Seward v. Paterson*, 1897, 1 Ch. 545; 76 L. T. 215; and notes to the Jud. Act, sec. 58, pp. 95, 96.

Matters may be adjourned from Court to Chambers, and vice versa. **367.** The Court may adjourn for consideration in Chambers any motion or matter brought before it [which should have been brought on in Chambers or] which, though properly brought on in Court, may, in the opinion of the Court, be disposed of more conveniently in Chambers; and any motion or matter brought on in Chambers may similarly be adjourned into Court from Chambers by the Judge or officer before whom the same is brought on; and any such adjournment shall be subject to such order as to costs or otherwise as may seem just. *Con. Rule 548, amended.*

Taken from Chy. O. 203. The words in brackets are new, and extend the original Rule to all motions which are not brought before the proper tribunal. *Quære*, whether a Judge in Chambers can refer matters properly before him to a Divisional Court: see *Hood-Barron v. Cathcart*, 72 L. T. 184; and see Jud. Act, s. 65 (2).

368. A Judge sitting in Chambers may exercise the ^{Rules} same power and jurisdiction, in respect of the business ^{368 370.} brought before him, as is exercised by the Court; all orders made by a Judge in Chambers shall have the force and effect of orders of the Court; and all or any of the powers, authorities, and jurisdictions, given to a Master by any Act now in force, or by any Rule of Court, may be exercised by a Judge in Chambers. Con. Rules 549 and 547.

Taken from Chy. O. 200, 210.

For the general powers conferred on Masters by these Rules, see Rules 659-669.

As regards the conducting of sales, settling conveyances, and investigating titles, see Rules 716-742.

As regards the appointment of receivers and committees of lunatics, and passing their accounts, see Rules 759-766; and as regards actions for foreclosure, sale, and redemption, see Rules 744-758.

Accounts are now rarely taken in Chambers, except in infancy matters: a reference to the Master being usually directed.

As regards proceedings to commit for non-production, etc., see Rule 454 and notes.

369. Unless otherwise directed by the Judge presiding in Chambers, *ex parte* and unopposed motions shall be heard before contested motions and appeals. *New.*

10. INTERIM ALIMONY.

370. (1) In an alimony action, the defendant may, at any time before the statement of defence is due, give notice in writing that he submits to pay the interim alimony, and costs, as demanded by the plaintiff in the indorsement on the writ: and in that case no order shall be taken out until there has been a default in payment; and in case of default, affidavits being filed verifying the indorsement and notice and the default, an order for payment of the sum demanded shall be issued on *procipe*. Con. Rule 738.

(2) The defendant may give notice in writing that he submits to pay a less sum as he may deem proper and may name the sum.

(3) When a notice has been so served and the plaintiff accepts the amount therein mentioned as sufficient, the defendant shall pay thereafter the sum so offered as interim alimony, and no order for interim alimony shall be made until there has been default in payment.

Rule 371. (4) Where a notice has been so served, the plaintiff's interim disbursements may be taxed without order.

(5) Where the plaintiff does not accept the amount offered and upon motion for interim alimony it is found that the sum so offered is reasonable, and the defendant pays to the plaintiff the sum so offered, no order for interim alimony shall be made until there has been default in payment. Rules of 1st Jan., 1896, 1477.

When the order is authorized to be issued on *præcipe*, the officer in whose office the action was commenced may issue it: *Rule 37.*

See notes to *Rule 371.*

Interim
alimony.

371. An application for interim alimony shall not be made until the time for delivering the defence has expired. *Con. Rule 530.*

Taken from *Chy. O. 480.*

Interim Alimony.—For form of indorsement, on the writ, of a claim for interim alimony: see Form 9 (*k*) (H. & L. Forms, No. 64). If the indorsement is omitted, an application for interim alimony may be made, but in such case it will only run from the date of the order; and no costs of the motion will be allowed: *Peterson v. Peterson*, 6 P. R. 150.

For provisions for fixing the amount so as to avoid a motion, see *Rule 370.*

The application may be made at any time after the statement of defence has been filed: *Gorman v. Gorman*, before Prondfoot, V.C., 20th September, 1875; or after the time for delivering it has expired: *Peck v. Peck*, 9 P. R. 290; unless the defendant has given notice under *Rule 370*, and has not made default in payment of an amount accepted by the plaintiff as sufficient.

The allowance of alimony *pendente lite* depends on the marital relationship between the parties existing *de facto*, and the Court exercises a discretion in granting or withholding alimony *pendente lite*, which is regulated by the circumstances of each case: *Walker v. Walker*, 10 P. R. 633; *Atwood v. Atwood*, 15 P. R. 425; 16 P. R. 50.

Interim
alimony,
when
allowed.

It is allowed, when necessary, for the maintenance of the plaintiff: *Soules v. Soules*, 3 Gr. 113; *Thompson v. Thompson*, L. R. 1 P. & D. 553, but not as of course: the relative incomes of the husband and wife may be considered and discretion exercised in the whole circumstances of the case, and it may be refused if the plaintiff is shewn not to be in need of support: *Bradley v. Bradley*, 3 Chy. Ch. 329; *Smith v. Smith*, 6 P. R. 51; *Knapp v. Knapp*, 12 P. R. 105; *Falvey v. Falvey*, 2 O. W. R. 476, 832; and see *Allen v. Allen*, 1894, P. 134; and *Lovell v. Lovell*, 5 O. W. R. 401, 640; or if it is not shewn that the defendant has means to comply with an order if made: *Pherrill v. Pherrill*, 6 O. L. R. 642.

Alimony was refused where it was shewn that plaintiff and defendant had executed a separation deed, and the wife had bound herself not to sue for alimony: *Atwood v. Atwood*, 15 P. R. 425; and in appeal, 16 P. R. 50, where the Divisional Court of the Ch. Div. was equally divided; but where a similar separation deed was disputed by the plaintiff, interim alimony was ordered, following *Henderson v. Henderson*, 19 Gr. 464; *Lafrance v. Lafrance*, 18 P. R. 62.

On an application for interim alimony, cross-examination of the plaintiff on her affidavit in support of the motion was allowed, but limited to the question as to her own means: *Cook v. Cook*, 23 C. L. J. 95; 12 C. L. T. 73.

Interim alimony is payable from the date of the service of the writ, if there has been no delay in making the application: *Howe v. Howe*, 3 Chy. Ch. 494; *Thompson v. Thompson*, 9 P. R. 526; 19 C. L. J. 252; and the claim for interim alimony is indorsed on the writ: *Peterson v. Peterson*, 6 P. R. 150; in other cases from the date of the order. Where the plaintiff was living in the defendant's house and brought the action for alimony on the ground of alleged desertion, without alleging cruelty, and the husband by his defence and affidavit offered to resume co-habitation, interim alimony was refused: *Snider v. Snider*, 11 P. R. 140; but where it was proved that the plaintiff, though living in the defendant's homestead, was in need, it was allowed: *Lalonde v. Lalonde*, 11 P. R. 143.

On a motion for interim alimony, it is sufficient if a *de facto* marriage he proved: *Taylor v. Taylor*, 1 Chy. Ch. 234; *Foden v. Foden*, 1894, P. 307; 71 L. T. 279; its validity cannot be inquired into: *Bradley v. Bradley*, *supra*; *Nolan v. Nolan*, 1 Chy. Ch. 368; *Carr v. Carr*, 2 Chy. Ch. 71; *Walker v. Walker*, 10 P. R. 363; no can any question affecting the merits of the action; thus, alleged adultery by plaintiff cannot be raised on such an application: *Campbell v. Campbell*, 6 P. R. 128; nor the question whether the plaintiff is justified in leaving the defendant: *Wilson v. Wilson*, *Id.*, 129; *Keith v. Keith*, 7 P. R. 41; *Lovell v. Lovell*, 5 O. W. R. 401, 640.

The plaintiff is usually required to undertake to proceed to a trial of the action at the next sittings; but where the defendant neglected to pay the alimony, and the plaintiff was left without means of taking the case to trial, the undertaking was extended: *Bowdlaugh v. Bowdlaugh*, 6 P. R. 200; and where the cause had been entered for trial, it was ordered to stand over, until a sum sufficient to pay plaintiff's witnesses was paid by defendant: *Haffey v. Haffey*, 7 P. R. 137.

It would seem that the plaintiff's solicitor has no lien for his costs on moneys paid to him for interim alimony: *Cross v. Cross*, 43 L. T. 533; and see *Re Robinson*, 77 L. T. Jour. 237; *Lectt v. Lectt*, 40 L. T. 788.

Where interim alimony had not been applied for, the Court refused to order the permanent alimony to run from a date prior to the decree: *Soules v. Soules*, 3 Gr. 113. But where the husband had agreed to a separation, and to pay the plaintiff an allowance, the Court awarded permanent alimony at the rate agreed to be paid by defendant, and directed payment from the date of the writ, though no application had been made for interim alimony: *Mallory v. Mallory*, before Boyd, C., at Cobourg, 2nd April, 1883; and permanent alimony has been granted from the service of the writ, where no

Evidence required on motion for interim alimony.

Plaintiff must undertake to proceed to trial at next sittings.

Where interim alimony not applied for, permanent alimony ordered only from date of service of writ. Exception to rule.

Rule 371. application for interim alimony was made, and judgment was obtained on motion in default of defence (the notice of motion for judgment, stating that it would be so asked): *Hagarty v. Hagarty*, before Boyd, C., 11th February, 1885.

An order cannot be made in Chambers, even on consent, for payment of permanent alimony, as that is equivalent to a judgment in the action: see *Craig v. Craig*, 1 Chy. Ch. 41; but probably judgment might now be pronounced in Chambers in such a case under *Rule 416*.

Motion to set aside order.

Where, after an order for interim alimony, the wife returned to her husband's house, and resided there for some time, but was afterwards compelled to leave, by reason of cruelty, a motion to set aside the order for interim alimony, on the ground of condonation, was refused: *Marvell v. Marvell*, 1 Chy. Ch. 27.

The payment of interim alimony has been stayed until the plaintiff produced on oath, books and papers which she had taken from her husband, and which deprived him of the means of paying it: *Old v. Old*, 9 P. R. 552.

Amount to be allowed for interim alimony.

Amount to be Allowed.—There is no fixed rule as to the amount to be allowed for interim alimony. In England, the rule is usually to allow about one-fifth of the annual income of the husband, but it is in the discretion of the Court, and may vary according to the circumstances of the case. But in this Province a percentage on the income is not always the measure for the allowance, and the value of the defendant's labour may also be taken into account: *McCulloch v. McCulloch*, 10 Gr. 320. The allowance is usually less than would be allowed as permanent alimony, the wife being *pendente lite* to live in retirement and seclusion: *Coote Eccl. Pl. 338*; *Rees v. Rees*, 3 Phill. 389; *Hawkes v. Hawkes*, 1 Hagg. 526; *Good v. Otway*, 2 Phill. 108. As to the effect of *The Married Women's Property Act*, on the right to alimony, see *Wilson v. Wilson*, 2 Hagg. 204; *Milne v. Milne*, L. R. 2 P. & M. 202; 23 L. T. 877; *Magurn v. Magurn*, 10 P. R. 570.

Where the defendant had agreed to pay the plaintiff an allowance for her separate maintenance, and subsequently a suit was brought for alimony, and for specific performance of the agreement, and the plaintiff obtained an order for interim alimony, and subsequently a decree for specific performance, it was held that the plaintiff was bound to credit the sums received as interim alimony, on account of the sums payable under the agreement: *Marvell v. Marvell*, 7 P. R. 43.

Where a plaintiff in an alimony suit improperly registered a *lis pendens* the certificate was vacated, and the costs of the motion were ordered to be deducted from the interim alimony: *Crandell v. Crandell*, 20 C. L. J. 329. See *White v. White*, 6 P. R. 208, and notes to *Rule 137*.

Costs *de die in diem*.

Costs.—In addition to interim alimony, the plaintiff is also entitled to an order for payment *de die in diem* of the cash disbursements, properly made by her solicitor: *Rule 1144*.

These disbursements do not include fees to agents for solicitor's services, but fees to counsel, except where the solicitor or his partner is the counsel, may be included: see notes to *Rule 1144*. But where an order for interim alimony was granted (the defendant not appearing on the motion), for the amount indorsed on the bill, and the

defendant subsequently moved to reduce the amount as excessive, a **Rule 372.** reference was granted, on payment of full costs of the application: *Hooper v. Hooper*, 3 Chy. Ch. 114.

Where, before trial, an alimony suit is compromised by the parties, the plaintiff returning to co-habitation with the defendant, the solicitor of the plaintiff is not entitled to his costs from the defendant as between solicitor and client, but only to cash disbursements: *Ringrove v. Ringrove*, 10 P. R. 299, 596, overruling *Leonard v. Leonard*, 10 P. R. 450; *Moore v. Moore*, 10 P. R. 284; and see *Thompson v. Thompson*, 57 L. T. 374; but see *Rule 1130*; *Ferris v. Ferris*, 7 Ont. 496; *Re Friedburg*, 10 P. D. 112.

Registration of Order. — An order for payment of interim alimony and disbursements may be registered: see the Jud. Act, sec. 101, order. 35, *supra*, p. 30; *Miller v. Miller*, 8 C. L. T. 120.

11. SPECIAL CASES.

372.—(1) The parties may after the writ of summons has been issued in any action, or in any pending matter not commenced by writ, or in any proceeding incidental to an action, concur in stating the questions of law arising in the action, matter or proceeding in the form of a special case for the opinion of the Court: Parties may concur in stating special case.

(2) The parties to a special case may agree in writing, that, on the judgment of the Court being given in the affirmative or negative of the question or questions of law raised (a), certain specific relief may be awarded, and the Court may award judgment for such relief accordingly, with or without costs as the parties may agree.

(3) Upon the argument of the case the whole contents of the documents referred to therein may be read, and the Court may draw from the facts and documents any inference, whether of fact or law, as at a trial. *Con. Rules 554, 558. amended.*

Compare Eng. (1883) R. 389.

Clause (2) is not the Eng. Rule. What follows (a) is an amendment of the former *Con. Rule 554*, which there had language, from which it seemed that only an award of the payment of money was contemplated by the *Rule*. The amendment provides that any specific relief contemplated by the special case may be awarded.

The *Rule* provides not only for the stating of a special case in an action commenced by writ of summons, but also in any pending matter not commenced by writ, or in any proceeding incidental to an action.—Where the case is stated in a proceeding not commenced by writ, R. S. O. c. 324, s. 16, protects persons acting under any judgment made on the special case, in like manner as if the judgment

Rule 372. had been pronounced in an action commenced by writ. A special case, on its being filed, may be registered as a *lis pendens*, whether stated in an action commenced by writ or not: *Ibid.*, s. 17.

The *Rule* does not appear to contemplate that proceedings may be commenced by filing a special case; but that the stating of a special case shall be ancillary to an action, or some other proceeding already commenced.

By consent it would seem that a special case may be brought on for the opinion of a Divisional Court: see *Rule 117*.

Stating Case.—The case is to be stated concisely and in numbered paragraphs: *Rule 318*; *Bulkeley v. Hope*, 8 D. M. & G. 36; and must be signed by the parties or their solicitors, and filed by the plaintiff: *Rule 374*.

As to stating special cases where infants, or other persons not *ad jura*, are interested, see *Jud. Act*, s. 37, and notes, *supra*, p. 32, and *Rule 375*.

The *Rules* authorize the stating of a special case before statement of claim: *Metropolitan Board of Works v. New River Co.*, 1 Q. B. D. 727; 2 Q. B. D. 67.

Where pleadings are delivered and are admitted to state the facts, the case may come on as a motion for judgment under *Rules 600* and *615*; see *Till v. Till*, 15 Ont. 133.

A special case must be upon a real state of facts, not a hypothetical one: *Republic of Bolivia v. Bolivian Navigation Co.*, 24 W. R. 361; *Bright v. Tisdall*, 4 Ch. D. 189; *Pryse v. Pryse*, 1 L. R. 15 (K. 86); *Swilk v. Gibson*, 25 L. T. 559; 20 W. R. 88; *Savage v. Tynes*, 20 W. R. 817; *Bardwell v. Sheffield Water Works Co.*, L. R. 11 (K. 517); and where stated in an action, only such questions of law can properly be raised as must necessarily arise in the action; *Republic of Bolivia v. National Bolivian Navigation Co.*, 24 W. R. 361. The Court should not be asked, upon a case stated without pleadings, to answer questions which could not be raised upon proper pleadings: *Taylor v. Campbell, Postmaster-General*, 33 U. C. Q. B. 264. The Court will not entertain a case in an action in which the Court has no jurisdiction: *Attorney-General v. Cameron*, 26 Ont. App. 103.

Examples.

The following are examples of special cases under *The Judicature Act*:—*Lysaght v. Edwards*, 2 Ch. D. 499 (a question arising in an action for specific performance); *Gen. Finiace Co. v. Liberator, B. N.*, 10 Ch. D. 15 (a question of title, in an action for recovery of land); *Wilson v. Dundas*, W. N. 1875, 232 (a question as to the liability of a garnishee); *Marshall v. Aiglewood*, W. N. 1881, 3 (a question as to the construction of the power of appointment in a will); *Ashburg v. Watson*, 51 L. T. 766 (a question under the Companies Act); *Rosker v. Rosker*, 26 Ch. D. 801; 51 L. T. 785 (a question as to the validity of a condition annexed to a devise in fact).

A defence in the nature of a demurrer may be set up to a special case: *Johnston v. Consumers' Gas Co.*, 23 Ont. App. 566.

Amending special case.

Except by consent, a special case, after having been finally agreed to, cannot be reopened: *Hamilton v. Staley*, 28 Sol. Jour. 478, and see *Johnston v. Consumers' Gas Co.*, 23 Ont. App. 566. Affidavits cannot be received to alter or modify a special case stated by consent. The only relief open to the party complaining that a case has been mis-stated, is to apply to amend or vacate it, and *quære* whether it can be amended after judgment except by consent: *Coastal v. City of London F. Ins. Co.*, 15 Ont. 229; *Johnston v. Consumers' Gas Co.*, 17 P. R. 297.

semble, in case of error, the Court may at the hearing order a **Rule 372** special case to be amended: *The Immacolata Concezione*, 9 P. D. 37; and a special case was amended by leave, at the hearing, by adding a party in existence before the case was filed, but accidentally omitted, and the case, as amended, was ordered to be set down against the added defendant: *Barnaby v. Tassell*, L. R. 11 Eq. 363. Where new parties come into existence after a special case is set down they should be made parties to the proceeding: *Palmer v. Flower*, 18 W. R. 887; *Atty. v. Etough*, L. R. 13 Eq. 462; *Savage v. Snell*, L. R. 11 Eq. 264. See *Peter v. Peter*, W. N. 1884, 45, 60; 32 W. R. 409, and 515, in note to *Rule 396*.

Amendment after judgment on a special case was refused in *Re Taylor*, *Tomlin v. Underhay*, 22 Ch. D. 495; *Johnston v. Consumers' Gas Co.*, 17 P. R. 297. But where a special case is stated in an action, and a decision given upon it, under a mistake of fact, the Court is not bound by the decision, unless it has been adopted by subsequent orders, but may disregard it and direct the action to go on to trial: *Re Taylor*, *supra*, and *East v. O'Connor*, 19 P. R. 301.

Setting Down and Notice.—The case must be set down, and notice given 6 clear days before the day for argument: *Rule 365*.

A copy for the use of the Judge is to be left with the officer who sets it down: *Rule 365*. Where the case is to be heard before a Divisional Court, a copy for each Judge will be necessary.

As to leave necessary to set the case down, in the case of persons under disability, see *Rule 375*.

Upon the argument of a special case stated in replevin, the plaintiff has the right to begin: *Figar v. Dudman*, 24 L. T. 734.

Judgment.—The Court is not bound to answer every question the parties may think fit to put: *Viscount Barrington v. Liddell*, 2 DeG. M. & G. 480, 506; *Seton* 34. It will not in general declare future rights: *Savage v. Thers*, 20 W. R. 817; *Lady Langdale v. Briggs*, 8 DeG. M. & G. 426, 427, 428; *Earl of Tyrone v. Waterford*, 6 Jur. N. S. 587; *Greenwood v. Sutherland*, 10 Ha. App. 12; *Gurlick v. Larron*, *Id.*, 15; but has occasionally done so: *Bogg v. Midland*, L. R. 4 Eq. 310; *Byam v. Byam*, 19 Beav. 58; nor will the Court make any order where the facts stated do not enable it to determine the rights of the parties: *Bulkeley v. Hope*, 8 DeG. M. & G. 36.

In a special case stated in an action only such questions will be answered as must necessarily arise in the action: *Toronto v. Toronto Ry. Co.*, 9 O. L. R. 333.

A very special order having, by consent, been made for the purpose of obtaining the judgment of the Court under *Eng. R.* 1875, Q. 40, r. 8 (corresponding to *Rule 614*), the Master of the Rolls discharged the order, as the effect of it would be to make the Judge an arbitrator between the parties, who would thus, contrary to their intention, be deprived of the right of appeal: *Republic of Bolivia v. National Bolivian Navigation Co.*, W. N. 1876, 77; 24 W. R. 361.

Where the answers to the special case dispose of the action, the proper course is, to take the decision as a judgment making declarations to the same effect; and the answers ought to be followed by the words: "and the Court doth declare accordingly." In such a

Rule 373. case the Registrar was directed to draw up the judgment as answering the special case, on motion for judgment: *Harrison v. Cornwall Minerals Railway Co.*, 16 Ch. D. 60.

Appeal.—An appeal lies from the judgment on a special case: *Re Taylor's Estate*, 22 Ch. D. 495; see *Allan v. Dickinson*, 9 Q. B. D. 632, and Jud. Act, s. 76.

Where a special case is calculated to raise for decision questions of fact only, the proceedings are *extra cursum curiæ*; the judgment is in the nature of an arbitrator's award, and an appeal cannot be entertained, if objected to, (except, perhaps, where it could be had from the award of an arbitrator): *Burgess v. Morton*, 1861, A. C. 136; 73 L. T. 713.

Preliminary question of law.

373. If it appears from the pleadings or otherwise, that there is in an action or matter a question of law which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, or before any reference is directed, the Court or a Judge of the High Court may make an order accordingly (a); and may, if necessary, direct the mode in which such question shall be raised; and may stay such further proceedings as the decision of such question of law may render unnecessary. Con. Rule 555.

(Compare Eng. (1883) R. 390, 394.)

After (a) the language is different from that of former Con. Rule 555, which read, "may direct such question of law to be raised either by a special case or in such other manner as the Court or Judge may deem expedient." The new Rule seems to be wider than the former one. It leaves the mode of raising the question quite at large, and in the discretion of the Court or Judge. A special case is one mode which may be directed.

Rule 372 enables the parties to state a case by consent; the present Rule enables a Judge to require a question of law to be stated by special case or otherwise, without reference to consent, and to direct that question to be decided before the issues of fact are decided: *Metropolitan Board v. New River Co.*, 1 Q. B. D. 727; affirmed 2 Q. B. D. 67.

Rule 531 enables a Judge to direct the trial of one or more questions of fact before others, and by analogy to that Rule the Court will, at the trial of an action involving questions both of law and of fact, decide the question of law first, if it appears that the decision of such question may render it unnecessary to try the question of fact: *Poolen v. Driver*, 5 Ch. D. 460.

This Rule is not limited to cases in which the point of law is raised by the pleadings. The Court may look at the circumstances whether brought to its knowledge by pleadings, affidavit, or otherwise: *Metropolitan Board v. New River Co.*, 1 Q. B. D. 727; affirmed 2 Q. B. D. 67. Hence, an order may be made after writ, and before statement of claim: *Ib.* The Court of Appeal will not interfere with the discretion of the Court below in such a matter, except in a very strong case: *Ib.*

After appearance the plaintiffs, on an affidavit (uncontradicted by **Rules** the defendant), that the sole question between the parties was, **374, 375.** whether the defendants were bound to supply water by meter for road use, obtained an order under the above *Rule*, and it was held that the order was rightly made. The writ of summons was indorsed, "the plaintiffs claim damages from the defendants for refusing to supply them with water by meter, under sec. 4A of the New River Act, 1852": *Id.*

The Court directed a special case to be set down for hearing on the application of an executrix, the first tenant for life and the trustees being defendants, the persons interested in remainder, who were absent in New Zealand, being omitted as parties: *Bagley v. Miles*, 21 L. T. 784.

See also cases referred to under *Rule 531*.

Where defendants contended that, assuming questions of fact to be found against them, they were as a matter of law liable for a small sum, which they would pay into Court rather than go to the expense of evidence, an order was made under this *Rule* for determination of the questions of law first: *Tattersall v. National Steamship Co.*, W. N. 1884, 32.

On the other hand in *Scott v. Mercantile Accident Insurance Co.*, 8 Times, 431, an order for trial of a point of law first was refused, where issues of fact might be found at the trial which would render the question of law immaterial: see also *Grosvenor v. White*, 38 W. R. 201.

In *Preston v. Fulwood*, 2 Times, 60, a question of law, which could not clearly be separated from the other questions in the action, was directed to be tried first at the trial upon admissions or evidence.

374. A special case shall be signed by the parties or their solicitors, and shall be filed by the plaintiff. *Con. Rule 556.* ^{Preparing case.}

See Eng. (1883) R. 391.

Signature by counsel is not necessary: *Hare v. Hare*, W. N. 1876, 44.

375. (1) A special case to which a married woman is a party otherwise than in respect of her separate property, or of any separate right of action by or against her, or to which an infant, or person of unsound mind not so found by inquisition or judicial declaration, is a party, shall not be set down for argument without leave of a Judge of the High Court, the application for which must be supported by sufficient evidence that the statements contained in such special case, so far as the same affect the interest of such married woman, infant, or person of unsound mind, are true. *Con. Rule 557.* ^{Persons under disability.}

(2) Where such leave has been given, the order, or an office copy thereof, shall be produced when the special case is set down. Rules 23 June, 1894, 1341.

Substantially the same as the Eng. (1883) Rs. 392, 393.

Rules

The statement of counsel that the statements were true was considered sufficient evidence, in *Ehces v. Ehces*, 20 W. R. 480.

See also sec. 37 of the Act and notes thereto.

12. ISSUES.

**Settlement
of issues.**

376. Where it appears to a Judge of the High Court that the pleadings do not sufficiently define the issues of fact, he may direct the parties to prepare issues, and such issues shall, if the parties differ, be settled by the Judge. Con. Rule 420.

To the same effect as Eng. (1883) R. 380.

Issues were directed to be framed under this *Rule* for trying preliminary questions, under *Rule* 472, in *Wood v. Anglo-Italian Banking Co., Limited*, 34 L. T. 255.

**Issue to
be filed.**

377. Where an issue is directed to be tried it shall, as soon as settled, be filed with the proper officer of the county in which it is directed to be tried, and thereafter, unless otherwise ordered, the proceedings in the issue shall be carried on in the same manner as the proceedings in an action commenced in such county. Con. Rule 280. Rule of 1 Jan., 1896, 1442.

The "proper officer" will be the officer who issues writs for the commencement of actions in the county, if there is only one such officer (see *Rule* 122), but if there are two such officers (see *Rule* 122), the proper officer would seem to be that one of them with whom the affidavit or document commencing the proceedings was filed (see *Rule* 14), if it was filed in that county, otherwise that one of them who is to attend at the trial under *Rule* 38 (2). In Toronto the proper place for filing the issue will be the Central Office: see also *Rules* 14 and 15.

The officer to issue a *præcipe* order for production under *Rule* 134, and to enter the judgment under *Rule* 655, will be the "proper officer," as defined by the present *Rule* 377.

13. MORTGAGE ACTIONS.

**When
demand of
payment or
notice of
intention to
exercise
power of
sale given,
other pro-
ceedings not
to be taken
without
order.**

By R. S. O. c. 121, s. 31, it is provided that where, pursuant to any condition or proviso in a mortgage, a demand or notice has been given requiring payment or declaring an intention to proceed to exercise the power of sale contained in the mortgage, no further proceeding shall be taken, and no action shall be brought to enforce the mortgage until after the lapse of the time at or after which, according to the demand or notice, payment is to be made, or the power of sale is to be exercised or proceeded under, except by leave of a Judge of the High Court or a Judge of a County Court.

Where after an action to enforce payment under the covenant in a mortgage had been commenced, the plaintiff served notice of intention to exercise the power of sale unless payment of the mortgage moneys was made within 30 days, this notice, though subsequently abandoned by notice to that effect, was held to have the effect

of giving the defendant 30 days during which no further proceedings **Rule 378.**
 in the action could be taken without leave: *Lyon v. Roperon*, 17 P.
 R. 510.

The publication of an advertisement for sale is a "proceeding" within the above Act: *Smith v. Brown*, 20 Ont. 105. See also *Neil v. Almond*, 29 Ont. 63; *In re Woodall*, 8 O. L. R. 288; and 6 Ed. vii. c. 13, s. 10.

The Act does not apply where the power of sale is exercisable without any notice: *Canada Permanent v. Tector*, 19 Ont. 156.

A mortgagee who has given the mortgagor notice to pay off the principal money and interest, is not at liberty to withdraw it without the consent of the mortgagor. *Santley v. Wilde*, 47 W. R. 297.

Where a mortgagee, on default of payment of an instalment of interest, brings a foreclosure action and claims payment of the amount secured by the mortgage, any party to the action, by the original writ, or added in the Master's office, or by subsequent order, is entitled to hold the plaintiff to his election and to pay his claim; but this right must be taken advantage of in the foreclosure action, and does not entitle to the benefit of a person, not a party to the action, who ignores the foreclosure proceedings, and brings a redemption action after making an independent tender to the mortgagee: *Gibson v. Nelson*, 2 O. L. R. 500.

After a foreclosure action has been commenced it is improper for the plaintiff to bring a second action for a subsequently accruing instalment of principal or interest so long as the first action is pending: see *Poulett v. Hill*, 68 L. T. 476; 1893, 1 Ch. 277.

378. A mortgagee may claim foreclosure of the equity of redemption or a sale of the mortgaged premises, and in either case the payment of the mortgage debt by any party personally liable therefor. *New.* (See Con. Rule 347).

Mortgagee may have sale or foreclosure and also personal remedy.

See Chy. O. 426.

The relief mentioned in *Rule 378*, may be claimed by indorsement under the writ. A mortgagee, however, is only entitled to an order for the payment of any deficiency after a sale, where there is an express or implied contract by the defendant, with the plaintiff, by covenant, or otherwise, to pay the mortgage debt. If there be no such contract the mortgagee is entitled to no personal remedy against the defendant: see *Christie v. Docker*, 10 U. C. L. J. 161; *Turbull v. Symmonds*, 6 Gr. 617; *Forbes v. Adamson*, 1 Cley. Ch. 117; *Clarkson v. Scott*, 25 Gr. 373; *Norris v. Meadows*, 28 Gr. 334; 7 Ont. App. 237; *Pierce v. Cawran*, *Id.* 356; *Mathers v. Hilliwell*, 10 Gr. 175; *Aldous v. Hicks*, 21 Ont. 95; *Frontenac v. Hyslop*, *Id.* 577; *Re Errington*, 1894, 1 Q. B. 11; *Re Jones*, 1893, 2 Ch. 461; where, however, the mortgage deed contains no express covenant to pay, the law will imply a contract by the mortgagor to pay: see *Sutton v. Sutton*, 22 Ch. D. 511; 48 L. T. 97; *Barnes v. Glendon*, 79 L. T. 94; provided there be evidence that the mortgage was made to secure a debt or loan: *Hall v. Morley*, 8 U. C. Q. B. 584; *Pearman v. Hyland*, 22 U. C. Q. B. 202; *Jackson v. Yeomans*, 19 C. P. 394; 28 U. C. Q. B. 307; 39 U. C. Q. B. 280. The mere acknowledgment of the receipt of the mortgage money, is not sufficient to raise any presumption of a loan, or an implied promise of repayment: *London Loan Co. v. Smyth*, 32 C. P. 530.

Liability, when implied.

Rule 378.

A covenant for payment is implied by persons who convey, and are expressed to convey, as beneficial owners in a conveyance by way of mortgage: *R. S. O. c. 121, s. 5.*

A mortgagor may by his covenant restrict his liability as to amount, or as to the terms on which it may be enforced: *Wilson v. Fleming, 24 Ont. 388.*

Order for
immediate
payment,
when made.

Where there is a covenant for the payment of the mortgage debt, judgment may now be obtained, if claimed by the writ, for the full amount due with costs, for which execution may issue at once, without waiting for a sale of the mortgaged property.

A mortgagee should seek all the remedies he is entitled to, in one action, and if after commencing an action for foreclosure, and while it is pending, he brings another action on the covenant, the proceedings in such second action will be stayed: *Williams v. Hunt, 187, 1 K. B. 512; 92 L. T. 193.*

Where a reference to the Master to inquire as to incumbrances is necessary, and relief is also sought on the covenant, the judge usually refers it to the Master to take the account, and directs payment of the amount which he finds due, forthwith after the making of his report: see *H. & L. Forms, No. 865*, and *North of Scotland v. Beard, 19 C. L. J. 252*, though Form 173 in the App. to the *Cons. Rules* contemplates a computation by the officer entering the judgment, of the amount for which the plaintiff is entitled to a personal order. A judgment in the latter form will only provide for the immediate payment of the costs up to the date of the judgment, and will not entitle the plaintiff to a personal order for payment of the costs of the reference; these will be simply added to the mortgage debt and be payable as part of the price of redemption, although no execution can issue therefor.

Although the claim of a mortgagee against his mortgagor personally may be barred by the Statute of Limitations, the mortgagee may, nevertheless, be entitled to proceed for the foreclosure of the equity of redemption, or for the sale of the mortgaged property: *Barrow v. Glendon, 1899, 1 Q. B. 887; 80 L. T. 606* (a mortgage of land); *London & Midland Bank v. Mitchell, 1899, 2 Ch. 161; 81 L. T. 263* (a mortgage of chattels).

Covenant of
mortgagor
not enforce-
able against
his assigns.

The burden of a covenant to pay mortgage money does not run with the mortgaged lands. Though the purchaser of an equity of redemption covenants with the mortgagor to pay the mortgage money, there is no privity of contract between him and the mortgagee, or any implied obligation thereby created which will enable the mortgagee to sue the purchaser: *Re Frontenac Loan & Investment Society v. Hyslop, 21 Ont. 577; Canada Landed and Nat. Investment Co. v. Skater, 22 Ont. App. 377*; and the mortgagee cannot by way of equitable execution against the mortgagor obtain an order for a receiver to enforce payment by the purchaser upon his covenant with the mortgagor: *Palmer v. McKnight, 31 Ont. 306*; and where a deceased mortgagor's estate is insolvent, the mortgagee cannot compel his personal representative to seek indemnity from a purchaser of the equity of redemption: *Higgins v. Trust Corporation, 30 Ont. 684*; neither has the mortgagee any direct remedy against such purchaser on his contract with the mortgagor, in the absence of an assignment of the contract: *Palmer v. McKnight, supra*; but the legal or equitable obligation of the purchaser to pay off the mortgage may be assigned by the vendor to the mortgagee, who may then sue the purchaser for the mortgage moneys: *Campbell v. Morrison, 24 Ont. App. 224.*

The relations which exist among mortgagee, mortgagor and assignee, who has agreed to pay the mortgage moneys, are not those which exist among creditor, surety and principal debtor: *Forster v. Ivey*, 32 Ont. 175. Rule 378.

A mortgagor who has assigned his equity of redemption on the terms that the assignee is to pay off the mortgage cannot, as between himself and the mortgagee, claim to stand in the position of a surety: *Abbott v. Hicks*, 21 Ont. 95.

So long as the covenant to pay endures, the mortgagor, notwithstanding he has assigned his equity of redemption, is liable to pay when sued by the mortgagee; his equitable right is upon payment to get the land back, and to have unimpaired his remedies against his assignee; and if those rights can be exercised by him at the time he is sued, it is immaterial that, at some previous time, there was such dealing between his assignee and the mortgagee as would then have interfered with such rights: *Forster v. Ivey*, 32 Ont. 175. The mortgagor is therefore liable on his covenant notwithstanding a previous extension of time granted by the mortgagee to the purchaser, if, when the liability is enforced, the right of the mortgagee to redeem is not affected: *Ibid.*, 2 O. L. R. 480; but a mortgagee, who has notice that the mortgagor is entitled to indemnity from his assignee, cannot deal with the latter to the prejudice of the mortgagor, without discharging him from liability: *Mathers v. Hellmell*, 10 Gr. 172; *Mattiberg v. Taylor*, 22 Ont. 312.

Where the action is against the personal representative of a deceased mortgagor, and the plaintiff claims relief on the covenant for payment made by the deceased mortgagor, on default of defence the defendant should only be ordered to pay personally the additional costs occasioned by that claim: *Hibbs v. Brown*, 15 P. R. 375.

Where there is a surety for the payment of the mortgage debt, in default of payment thereof by the mortgagor, it is always desirable to join the surety as a defendant in any action by the mortgagee to enforce the security (see *Rule 180*), because, as soon as judgment is recovered against the principal, the right of action on the covenant is merged in the judgment, and subsequent accruing interest may not be otherwise recoverable against the surety: *Faber v. Latham*, 77 L. T. 168.

A surety against whom a judgment has been recovered, which by agreement is to stand as security for the payment of the deficiency, is entitled to have the security realized before he can be called on to pay anything: *Tetter v. St. John*, 10 Gr. 85. An assignee of the equity of redemption who covenants with the mortgagee to pay off the mortgage debt, becomes a principal debtor, and if time be given him by the mortgagee, the mortgagor may be discharged: *Mathers v. Hellmell*, 10 Gr. 172.

Where a mortgagee on assigning a mortgage had covenanted that the mortgagor would pay the mortgage moneys, a release of part of the mortgaged lands, on payment of part of the debt, without the consent of the covenantor, was held to have discharged him, whether the amount paid was the full value of the lands released or not: *Farmers' Loan & S. Co. v. Patchett*, 6 O. L. R. 255.

A mortgagee is now usually entitled to a sale, or foreclosure, at his option: *Harris v. Harrison*, 1 Gr. 449. But a subsequent mortgagee cannot, as plaintiff, have a sale against a prior mortgagee without the latter's consent: *McDonnell v. Campbell*, 6 S. C. R. 502; although

Mortgagee
entitled to
sale or
foreclosure.

Rule 378. he may as a defendant, under *Rule 382*. Where infants are concerned, and the mortgagee claims foreclosure, the judgment usually directs a sale, or foreclosure, as the Master may find most beneficial for the infants.

Mortgagee of chattels, right of, to foreclosure. A mortgagee of chattels: *Cook v. Flood*, 5 Gr. 463; a municipal corporation: *Oxford v. Bailey*, 12 Gr. 276; and a chartered bank: *Bank of Upper Canada v. Scott*, 6 Gr. 451; are each entitled to foreclosure. But a mere pledgee of chattels is said to be only entitled to a sale: *Carter v. Hake*, 4 Ch. D. 605.

Mortgagee by deposit when not entitled to a sale. A mortgagee of lands by deposit is said not to be entitled to a sale, but only to a foreclosure: *Pryce v. Burp*, L. R. 10 Eq. 153; *James v. James*, *ib.* 154; *Backhouse v. Charlton*, 8 Ch. D. 414; but where the deposit is accompanied by an agreement to execute a legal mortgage, the mortgagee is entitled to either sale, or foreclosure: *York Union Banking Co. v. Artley*, 11 Ch. D. 208; although an equitable mortgagee by deposit cannot insist on a sale, yet if a subsequent incumbrancer, or the mortgagor himself, desires a sale, it may be granted as in any other case: *Kerr v. Berke*, 12 Gr. 204.

Crown cannot be foreclosed. The Crown cannot be foreclosed: the only judgment that can be awarded where the equity of redemption is in the Crown, is one authorizing the mortgagee in default of payment to take possession until the Crown shall think proper to redeem: *Recre v. Attorney-General*, 2 Atk. 223; *Dunn v. Attorney-General*, 10 Gr. 482; or until the debt shall be satisfied: *Hodge v. Attorney-General*, 3 Y. & C. 342; or, if the Crown consent, or do not object, a sale may be ordered: *Seton*, 4th ed., 1041; *Perseott v. Tyder*, 1 Jur. 479; 2 Jur. 870; *Rogers v. Maule*, 1 Y. & C. C. 4; *Hancock v. Attorney-General*, 12 W. R. 563; *Burlett v. Ross*, L. R. 12 Eq. 395.

Mortgagee of railway entitled to sale, or foreclosure. A mortgagee of a railway is entitled to enforce payment of his mortgage, by either sale, or foreclosure of the railway as a going concern: *Toronto General Trusts Corp. v. Central Ont. Ry.*, 6 O. L. R. 1; 8 O. L. R. 342; and see 3 Ed. vil. c. 58, s. 210. He is also entitled to have a receiver, or manager, of the undertaking appointed: *Galt v. Erie and Niagara Ry. Co.*, 14 Gr. 439; *Peto v. Welland Ry. Co.*, 9 Gr. 455; *Furness v. Catherham Ry. Co.*, 25 Beav. 614. A vendor of a right of way to a railway company is entitled to enforce a lien for unpaid purchase money, by sale, or possession of the contract: *Walker v. Ware H. & B. Ry. Co.*, L. R. 1 Eq. 195; *Metcalf v. London, Chatham & Dover Ry. Co.*, 12 Jur. N. S. 775; but see *The Bishop of Winchester v. Mid-Hants Ry. Co.*, L. R. 5 Eq. 17; *Pell v. Northampton & B. J. Ry. Co.*, L. R. 2 Chy. 100, where the lien was enforced by the appointment of a receiver. And see notes to *Roh* 754.

As to foreclosure in a debenture holder's action, see *Re Continental Oxygen Co.*, 1897, 1 Ch. 511; re *Wolverhampton, etc., Brewery Co.*, 1899, W. N. 229; and *Wallace v. Evershed*, 1899, 1 Ch. 891.

Right to sale, or foreclosure when lost by sale of part of property. The right of a mortgagee to either a sale, or foreclosure, may be lost by his having sold, or parted with, part of the mortgaged property, without the concurrence of a person to whom the equity of redemption in the remainder has been conveyed. But this rule does not apply where the sale has been made under a power contained in the mortgage, or where the mortgage is of chattels which the mortgagee has a right to sell without any express power. But it applies to a sale under a decree in a suit to which the owner of the unsold portion was no party: *Gowland v. Garbutt*, 13 Gr. 578, and see *Crawford v. Anson* *ib.* 579; *Unwin v. Hauss*, 22 Gr. 279.

Where the mortgaged lands are out of the jurisdiction, although **Rule 379**, the Court may grant judgment for foreclosure; *Paget v. Ede*, 1 L. R. 18 Eq. 118; it will not grant a judgment for sale; *Steuage v. Radford*, 15 Ont. 145; nor for redemption, even in a case where the right to redeem exists according to our law; nor other decree, even though *in personam*, respecting foreign lands which can have no specific operation without the intervention of a foreign Court; *Henderson v. Bank of Hamilton*, 23 Ont. 327; 20 Ont. App. 616; 23 S. C. R. 716; *Gunn v. Harper*, 2 O. L. R. 611; but see *Mackay v. The Colonial Investment & L. Co.*, 38 C. L. J. 723; 4 O. L. R. 574.

In *Trey v. Manitoba & N. W. Ry.*, 31 C. L. J. 321, a judgment for sale of a mortgaged railway, part of which extended beyond the limits of Manitoba, was granted by the Manitoba Court.

Where the writ, or statement of claim, does not claim any personal relief remedy against the defendant, the judgment is erroneous. If it should contain any personal order for payment of the mortgage debt, directed at such a defect was amended after the lapse of four years; not claimed *Cockburn v. Hullock*, 12 Gr. 138.

Where the judgment directs foreclosure, on default in payment, where a final order may be made in Chambers, directing a sale in lieu of foreclosure, without appealing from the judgment; *Lowlett v. Cliff*, 2 Sm. & G. 278; *Fisk v. Carmyle*, D. B. 4, fo. 151; D. B. 5 fo. 211; *Thompson v. Badgley*, O. B. 25; but usually the sale will not be ordered until after the mortgagor has had the usual time to redeem; *Trust and Loan Co. v. Republica*, 2 Chy. Ch. 41; where the application is made by a defendant he will be required to deposit \$80 to meet the expense of the sale, and this deposit will not be dispensed with, although the security be ample; *Thompson v. Macaulay*, 3 Chy. Ch. 111. But if the plaintiff prefer it, the defendant may be required to conduct the sale in lieu of making the deposit. Formerly the Court would not, after a decree for sale, direct a foreclosure without rehearing the cause; *McClellan v. Jacob*, 9 Gr. 50; except where the sale had been attempted, and proved abortive; *Goodall v. Burrows*, 7 Gr. 440; *Odell v. Doty*, 1 Chy. Ch. 207; *Girdlestone v. Gunn*, *Id.* 212. In such a case, an order for foreclosure is granted in Chambers on motion. The mortgagor was usually allowed three months further time to redeem; *Id.*; but the time has been held to be subject to the discretion of the Court in view of all the circumstances of the case; *Scarlett v. Birney*, 15 P. R. 281. In *Goodall v. Burrows*, *supra*; and *Henry v. Kerr*, 10 C. L. T. 60, only one month was allowed, and perhaps that will now always be the time fixed, by analogy to **Rule 393**.

After a judgment of foreclosure, an order for sale may be obtained by a subsequent incumbrancer, under **Rule 382**.

A plaintiff who has been declared a trustee with a lien for advances is not entitled to foreclosure after an abortive sale, but may be allowed by the Court to become the purchaser of the land; *Hutton v. Justin*, 2 O. L. R. 713.

A derivative or sub-mortgagee may foreclose his derivative mortgage without making the original mortgagor or his assigns a party; *Silverthorn v. Glazbrook*, 30 Ont. 408. (N.B.—The head note of this case is incorrect.)

379. (1) The Court may direct a sale of the property, instead of a foreclosure of the equity of redemption, on such terms as may seem just; and without previously determining

sale may be ordered instead of foreclosure.

Rule 380

the priorities of incumbrancers, or giving the usual or any time to redeem. Con. Rule 348.

Taken from Chy. O. 428.

(2) This Rule shall apply although judgment of foreclosure may have been entered. *New.*

Ordinary
time for re-
demption,
when
shortened.

Some special ground must be shown in order to deprive the mortgagor of the ordinary six months' time to redeem: *Rigby v. Fisher*, 4 Gr. 198; *Swift v. Minter*, 27 Gr. 217; *Newman v. Selfe*, 33 B. & F. 522; and even where an application for sale was made in a foreclosure suit, by subsequent incumbrancers, after the time allowed them for redemption had expired, it was held that the mortgagor was entitled to an opportunity to redeem, before a final order for sale could be made: *Trust and Loan Co. v. Reynolds*, 2 Chy. Ch. 41.

Defendants
when
entitled to
a sale in
foreclosure
action.

Where the writ claims foreclosure, the defendant is entitled to have the judgment drawn up for sale, on paying into Court \$80; and where a judgment has been entered for foreclosure, a subsequent incumbrancer may also, on being made a party, at any time before the report is settled, on making a like payment, obtain on *procipe* an order for sale in lieu of foreclosure: see Rule 382. The \$80 is intended as security for the costs of the sale: see Rule 381 and notes.

On the Court being satisfied by evidence that the value of the mortgaged property was not sufficient to pay the amount due to the plaintiff, and that it was for the benefit of infant defendants, an account was dispensed with, and a judgment for immediate foreclosure was granted on the consent of the infant's solicitor: *Wolcott, Hampton & Staffordshire Banking Co. v. George*, 24 Ch. D. 707.

Judgment
for imme-
diate sale,
how
awarded.

A judgment for an immediate sale, without appointing any day for redemption, can only be granted on motion for judgment: it cannot be awarded on *procipe*. The motion may be made in Chambers, where infants are concerned: see Rule 395; *Copley v. Collett*, 2 Chy. Ch. 431; but in other cases the motion must be to the Court. An immediate sale has been granted on the consent of the mortgagor, and without the consent of the subsequent incumbrancers: *Township of Hamilton v. Stephenson*, 27 Gr. 198; but Blake, V.C., repeatedly refused to make such a decree without the consent of the subsequent incumbrancers, on the ground that the equity of redemption might be worthless, and the mortgagor might have ready no interest in the mortgaged property.

Where a decree for sale was pronounced in Court, the Referee in Chambers refused to entertain a motion for a final order for sale, before the time for redemption had expired: *Buell v. Fisher*, 6 P. R. 51.

Plaintiff
cannot
abandon
judgment
and exercise
power.

Where a judgment for sale, or foreclosure, has been pronounced it is not competent for the mortgagee to abandon the judgment, and proceed to sell under a power of sale in his mortgage: *Stevens v. Theatres*, 1903, 1 Ch. 877; 88 L. T. 458.

Where sale
is asked by
the mort-
gagor or in-
cumbrancer,
deposit to
be made.

380. Where a request for a sale is made by a subsequent incumbrancer or by the mortgagor, or by any person claiming under them respectively, the party making the request is to deposit in Court the sum of \$80 for the purpose of covering

expenses unless otherwise ordered by the Court or a Judge. Rule 381.
Con. Rule 349.

Chy. O. 429, from which this *Rule* is adapted, required the deposit of "a reasonable sum." The usual amount required was \$80, but on special application before the sale, it was sometimes increased: *London & C. L. & A. Co. v. Morrison*, 7 P. R. 450; 15 C. L. J. 57. But an application after the sale had taken place to increase the deposit would not be entertained, even though the sale had failed to realize the amount of the plaintiff's claim: *London & C. L. & A. Co. v. Palford*, 7 P. R. 432; 15 C. L. J. 55.

By the form of indorsement on the writ in mortgage actions, the amount of the deposit to be made by a defendant served with the writ, in order to secure a sale, is \$80: see Form 9 (c), (H. & L. Forms, No. 58). When the sale is applied for by an original defendant to the action, an application to increase the amount of the deposit cannot be entertained, even though the costs of the sale will exceed \$80: *Cruso v. Close*, 8 P. R. 33; and it would seem that the same rule will apply to subsequent incumbrancers obtaining a sale under this *Rule*; but the plaintiff may notify the defendant desiring the sale, to take the conduct of it: see Rule 383.

The deposit will not be dispensed with, even though the security cannot be ample: *Thompson v. Macanlay*, 3 Chy. Ch. 111; or the applicant dispensed with: *Machell v. Campbell*, 5 U. C. L. J. 117; and a defendant cannot claim a sale against the consent of the mortgagee without making the deposit: *Taylor v. Walker*, 8 Gr. 506; except in the case of infant defendants, who are entitled to a sale, without the usual deposit: *Bank of Upper Canada v. Scott*, 6 Gr. 471; *Laurason v. Fitzgerald*, 9 Gr. 371; but see *Western Canada Loan & S. Co. v. Dunn*, 9 P. R. 587. Where the sale is abortive, the deposit is applicable to the payment of the plaintiff's costs thereof: *Correllis v. Patman*, L. R. 4 Eq. 156; and where the deposit was paid in by the mortgagor, and the sale realized enough to pay the claim of the plaintiff, but not all the subsequent incumbrances, the mortgagor was held not to be entitled to get back the deposit, but it was directed to be applied in payment of the claim of a subsequent incumbrancer: *Gzowski v. Beaty*, 8 P. R. 146.

This and the following *Rules* will not, even where infants are concerned, be extended to an action by a mortgagee for possession merely: *Western Can., etc., v. Dunn*, 19 C. L. J. 211.

381. Where a defendant by writ in an action for foreclosure desires a sale, but does not otherwise desire to defend the action, he shall, within the time allowed for appearance, file a memorandum, entitled in the action, to the following effect:

"I desire a sale of the mortgaged premises instead of foreclosure."

And he shall attach thereto a certificate of the Accountant to the effect that he has deposited in Court to the credit of the action, the sum of \$80 to meet the expenses of the sale.
Rule of 1 Jan., 1896. 1441. amended.

Defendant
desiring sale
without
defending.

Rules

382, 383.

Incumbrancer made a party to a foreclosure suit, in the M. O., may apply for a sale.

382. An incumbrancer made a party in the Master's office, and desiring a sale of the mortgaged premises, shall make the necessary deposit therefor before the Master's report is settled, whereupon an order may be issued on *præcipe* directing a sale of the mortgaged premises instead of a foreclosure, and thereupon the Master shall compute subsequent interest, and appoint a time and place for payment; and all subsequent proceedings shall be had and taken as if the judgment had been in the first instance for sale. Con. Rule 350.

The powers conferred by Chy. Order 456, from which this *Rule* is taken, were not extended under the former practice to the Deputy Registrars. The present *Rule* and *Rule* 37 together enable the officer out of whose office the writ was issued to issue the *præcipe* order.

Præcipe for sale, form of.

The *præcipe* should show on whose behalf the application is made, and should also state that the applicant is an incumbrancer, made a party in the Master's office, who has proved a claim; and that the Master's report has not been settled; and should be accompanied by the certificate of the Accountant of the payment into Court of the requisite deposit of \$80.

Application to increase deposit.

An application, after the sale has taken place, to increase the amount of the deposit is too late: *London & Canadian Loan & Agency Co. v. Palford*, 7 P. R. 432. Such an application should be made before the order for sale has been acted on: *London & Canadian Loan & Agency Co. v. Morrison*, 7 P. R. 450.

If the plaintiff deems the deposit inadequate he may require the incumbrancer obtaining the order for sale to conduct the sale: see *Rule* 383.

Deposit, how applied.

Where the sale realizes sufficient to pay the plaintiff's claim, but not the claims of subsequent incumbrancers, the deposit will be ordered to be applied on account of the claims of the latter, according to their priorities: *Gzowski v. Beatty*, 8 P. R. 146. And where the sale proved abortive, except as to one parcel, which did not realize sufficient to pay the plaintiff's claim, the deposit was applied on account of plaintiff's costs of sale: *Corsellis v. Patman*, L. R. 4 Eq. 156. Where the sale realizes sufficient to pay the claims prior to the incumbrancer who paid in the deposit to secure a sale, the latter is entitled to obtain an order to refund it.

Although a mortgagee by deposit is not entitled to a sale: see *Rule* 378, note; yet a subsequent legal mortgagee made a party to the suit by the equitable mortgagee, is entitled to apply for a sale under this *Rule*: *Kerr v. Beebe*, 12 Gr. 204.

Plaintiff may require defendant asking sale to conduct it.

383. If before or upon the deposit being made, the plaintiff prefers that the sale be conducted by the defendant desiring the sale, he may so elect; and he shall thereupon notify the defendant of such election. The notice may be according to Form No. 76. Con. Rule 351.

Plaintiff may have reserved bid fixed.

Where the defendant claims a sale contrary to the wish of the plaintiff, the latter may protect himself against the mortgaged property being sold for less than his claim by getting a reserved bid

fixed, and in the event of the sale proving abortive, he may obtain Rules a final order for foreclosure: see note to Rule 378. **384, 385.**

As to when the plaintiff may apply to increase the deposit, see note to Rule 380.

384. Upon the plaintiff's filing in the office in which the proceedings were commenced a note of such election, and proof of service of such notice, the defendant making the deposit shall be entitled to a return thereof. *Con. Rule 352.*

Taken from Chy. O. 431.

Before the money can be obtained proof will have to be given to the Accountant of the due filing of the notice of election. The production of an office copy, with a certificate of its being filed, would seem to be the proper proof.

385. In default of payment according to the report in a foreclosure or redemption action, a final order of foreclosure may be granted against the party making default on an *ex parte* application. *Con. Rule 353.*

Taken from Chy. O. 451.

Judgments in mortgage actions in the usual form, are to be read as if this Rule was incorporated therein: see Rule 619. By the terms of this Rule it is confined to foreclosure and redemption actions, but it was always the practice under the Chy. Order 451, which was in similar terms, where the judgment was for sale in default of redemption, in like manner to obtain a final order for sale; and see Rules 387, and 754.

A final order is, generally speaking, necessary in all cases where a judgment directs anything to be done, upon the default of a party in doing a given act by a future day: the final order being the judicial determination that the default has in fact taken place.

Application for Final Order.—The application may be made to the Master in Chambers, or to any local officer having like jurisdiction. *Application for, how made.*

In order to obtain a final order for default of redemption in a mortgage action, it is necessary to produce an office copy of the judgment, an office copy of the report, if any, the affidavit of the party to be redeemed of non-payment, and non-receipt of rents, and negating his being in possession; *Scott v. McDonnell*, 1 Chy. Ch. 193; *Burford v. Lyimburner*, *Id.* 275; *Pross v. Coke*, L. R. 6 Chy. 645, or, in case any sum has been paid since the account was taken, and before the day appointed for redemption, showing that notice has been given pursuant to Rule 387, or, in case the party is in possession, showing no receipts, beyond those for which credit has been given in the account. For forms of affidavits, see H. & L. Forms, Nos. 598-600.

There must also be produced a certificate of the cashier, or other Certificate like officer: *Campbell v. Garrett*, 1 Chy. Ch. 255, of the bank, where the money is appointed to be paid, of non-payment of the money, on the date of the judgment, or since, duly verified by affidavit: see H. & L. Forms, Nos. 596, 597.

Rule 385.

Affidavit of non-payment, by whom to be made.

Affidavit of Non-payment.—Where there are several parties entitled to the money directed to be paid, the affidavit of non-payment should be made by all; *Annis v. Wilson*, 1 Chy. Ch. 217; *Kinnaird v. Yorke*, 60 L. T. 380; but where one of the parties is out of the jurisdiction, his affidavit may be dispensed with; *Lunn v. Kirkpatrick*, 2 Gr. 823; *Counter v. Wylde*, 1 Gr. 538; and see *Frith v. Cooke*, 5 L. T. 798, where the affidavit of the plaintiff's solicitor was accepted; *Kinnaird v. Yorke*, *supra*; where a sole plaintiff resides out of the jurisdiction, the affidavit of his agent will be accepted, and in such case the affidavit should show where the custody of the mortgage has been; *Rac v. Shaw*, 1 Chy. Ch. 209; and where, in such a case, the affidavit is made by the solicitor of the plaintiff, it should show that the plaintiff has no other agent within the jurisdiction authorized to receive the money; *Taylor v. Cathbert*, 1 Chy. Ch. 240; but see *Moody v. Tyrrell*, 6 P. R. 513; *Gillen v. Roman Catholic Episcopal Corporation*, 7 Ont. 146; *McHullen v. Polp*, 12 Ont. 702; 13 Ont. 209. An agent should state that he is authorized to receive the money; *Powers v. Merriman*, 1 Chy. Ch. 227; but it is not, however, necessary to produce the agent's authority; *Rudolph v. Duffy*, 1 Chy. Ch. 302; and where the party to receive the money is a corporation aggregate, the affidavit of an officer of the company must show that he is the proper officer to receive the mortgage money; *Western Assurance Co. v. Capree*, 1 Chy. Ch. 227.

When to be made.

The affidavit of non-payment must be made after the day appointed for redemption; *Bloug v. Kennedy*, 2 Chy. Ch. 453.

Notice of motion when necessary.

When Notice Necessary.—The motion for a final order is usually *ex parte*; *Henderson v. Cowan*, 1 Chy. Ch. 297; *Rule 385*. But where two years had elapsed since the default, before the motion was made, notice was required to be served; *Kirkhoffer v. Stafford*, 2 Chy. Ch. 52; *Ardagh v. Orchard*, 2 C. L. J. 303; and where it appeared by the report, that the defendant had not received notice of the proceedings in the Master's office, in a case in which he was entitled to notice, notice of the motion was required to be served; *McCormick v. McCormick*, 6 P. R. 208; and where the account has been changed even after the day appointed for redemption, notice should be served; *Portman v. Smith*, 2 C. L. J. 167; *Foresters v. Pegg*, 19 P. R. 254.

Final order when refused, where account changed.

On What Grounds Final Order Refused.—The order may be refused where the account is changed by the receipt of money before the day fixed for redemption; *Prees v. Coke*, L. R. 6 Chy. 345; *Garlick v. Jackson*, 4 Beav. 154.

Where the mortgagee is in occupation, or receipt of rents, he should be charged with rents up to the day fixed for redemption, or a new account must be taken and a new day appointed for payment; *Pipe v. Shafer*, 1 Chy. Ch. 251; and it was held that this must be done even where the plaintiff swore he was in occupation merely as a caretaker; *Cummer v. Tomlinson*, 1 Chy. Ch. 235; or where a receiver had been appointed; *Jenner-Fust v. Needham*, 31 Ch. D. 500; 54 L. T. 420, affirmed by C. A. 32 Ch. D. 582; *Piat v. Nicholson*, 80 L. T. Jour. 374; but see *Rule 750*, note; *Hoare v. Stephens*, 32 Ch. D. 194; 54 L. T. 230; *Holt v. Beagle*, 55 L. T. 502; *Ingham v. Sutherland*, 63 L. T. 614.

But the plaintiff's going into possession and receiving rents, after the day appointed for payment, does not affect his right to a final order; *Portman v. Smith*, 2 C. L. J. 167; *Greenshield v. Blackwood*, 1 Chy. Ch. 60; *Constable v. Horick*, 5 Jur. N. S. 331; *National Perm. B. S. v. Raper*, 65 L. T. 668.

Where before the day appointed for payment, the office of the **Rule 385** bank, at which the money is made payable, is closed, a new day must be appointed: *King v. Connor*, 1 Chy. Ch. 274. So where a ^{Refused} Sunday was appointed for payment, the final order was refused: ^{where bank closed.} *Holcomb v. Leach*, 3 Gr. 449.

Where it appeared that the decree was erroneous, a final order was ^{Or} refused: *Commercial Bank v. Graham*, 4 Gr. 419; and see *Mitchell* ^{Judgment erroneous.} *v. Strathy*, 28 Gr. 80.

Where a sole mortgagee, or one of several joint mortgagees, dies ^{Death of} before the day appointed for payment, unless the judgment provides ^{mortgagee,} in the latter case for payment to the survivors, a new account must ^{effect of,} be taken, and a new day appointed: *Blackburn v. Caine*, 22 Beav. 614; *Kingsford v. Poile*, 8 W. R. 110.

Where the Crown is entitled to the equity of redemption, a final ^{Crown can-} order of foreclosure cannot be obtained, but merely an order author- ^{not be} izing the mortgagee to take possession until the Crown may see fit ^{foreclosed.} to redeem: *Dunn v. Attorney-General*, 10 Gr. 482, or the security be satisfied: *Hodge v. Attorney-General*, 3 Y. & C. 342; *Seton*, 1044. A sale may be ordered where the Crown is interested: *Bartlett v. Rees*, L. R. 12 Eq. 396.

The final order may be refused where an extension of time for redemption is asked, and reasonable grounds therefor are shown; and the same relief may be granted in a redemption action, where the judgment provides for the dismissal of the action in default of payment, so long as the final order of dismissal has not been granted: *Collinson v. Jeffery*, 1896, 1 Ch. 644; 74 L. T. 78.

Effect of Final Order.—The final order for foreclosure, so long ^{Effect of} as it remains in force, is an absolute bar to the parties foreclosed ^{final order.} from claiming the right to redeem. But it is no bar to the mortgagee, as long as he is in a position to restore the mortgaged property, from ^{A bar to re-} seeking to enforce payment of the mortgage debt: *Lockhart v. Hardy*, ^{demption.} 9 Beav. 349; *Munsen v. Hauss*, 22 Gr. 279. But if, after a final order for foreclosure, he takes proceedings to enforce payment of the debt, that *ipso facto* operates as an opening of the foreclosure, and entitles the mortgagor to a reconveyance on payment of the money: ^{Unless} *Palmer v. Heudric*, 27 Beav. 349; 28 Beav. 341. If, however, the ^{mortgagee} mortgagee, by his own act, unauthorized by the mortgagor, has made ^{enforces} it impossible to restore the mortgaged property, proceedings to en- ^{payment of} ^{mortgage} ^{debt.} force payment of the debt will be stayed on the application of the mortgagor: *Ib.*; *The British and Canadian Loan & Investment Co. v. Williams*, 15 Ont. 366; and see *Re Thuresson*, 3 O. L. R. 271.

A final order of foreclosure obtained against an assignee of the equity of redemption for the benefit of creditors, is no estoppel to a subsequent action by him on behalf of the creditors of the mortgagor, under R. S. O. c. 147, s. 9 (2), to set aside the mortgage for fraud, where no such issue was raised in the action for foreclosure: *Glass v. Grant*, 16 Ont. 233.

Opening of Foreclosure at the Instance of the Mortgagor. ^{Opening} —Even after a final order has been obtained, the mortgagor may ^{foreclosure} apply to set aside the order, and to be let in to redeem; and this ^{at the} relief was granted even as against a purchaser from the mortgagee ^{instance} after the final order of foreclosure: *Campbell v. Holyland*, 7 Ch. D. ^{mortgagor.} 166; 26 W. R. 160; *Johnston v. Johnston*, 9 P. R. 259; *Foresters v. Pegg*, 19 P. R. 274; and a purchaser who has purchased pending foreclosure proceedings, and whose rights are expressly subject to the

Rule 385.

Not opened
as against
purchaser
from mort-
gagee except
where fraud
shewn.

When rights
of third
party do not
intervene,
it may be
opened.

Evidence
required.

Mortgagor
redeeming
after mesne
incum-
brancers
have been
foreclosed.

Purchaser
of equity
of re-
demption.

Terms
on which
foreclosure
opened.

termination of the proceedings by a final order in favour of the mortgagor, stands in a different position from one who comes in for the first time after the final order has been made, and is much more readily made subject to the discretion of the Court to open the foreclosure. But it has been said that this relief can only be granted where the final order has been obtained by actual, positive fraud, or under circumstances of oppression: *Patch v. Ward*, L. R. 3 Ch. 203, 212; and in *Trinity College v. Hill*, 2 Ont. 348; 18 C. L. J. 387, the relief was refused as against a purchaser from the mortgagor after the final order, there being no such circumstances; but this case was subsequently reversed in appeal on the ground of irregularity in the proceedings; the sale having taken place under a decree nisi, which had not been made absolute before the final order was obtained: S. C., 10 Ont. App. 99. When the rights of third parties do not intervene, and the plaintiff can be replaced in the same position he occupied before the default, and recompensed for any damages he may have suffered, and there is a reasonable prospect of payment shewn, the foreclosure may be opened, and the time for payment extended: *Waddell v. McColl*, 2 Chy. Ch. 62; but some reasonable excuse must be shewn for not redeeming at the time appointed, and the fact that the property is of much greater value than the amount due should be established: *Johnson v. Ashbridge*, 2 Chy. Ch. 251. The fact that the property has increased in value, is not alone a sufficient ground for opening the foreclosure: *Miles v. Cameron*, 9 P. R. 502; 19 C. L. J. 235; 3 C. L. T. 361. In *Platt v. Ashbridge*, 12 Gr. 105, the foreclosure was opened after a lapse of eighteen months, the mortgagor being illiterate, and having no solicitor, and not understanding the proceedings, and the property appearing to be worth three times the amount of the incumbrance.

The Court refused to open a foreclosure merely because a receiver, by mistake, neglected to account for all the rents he had received before the final order was granted: *Ingham v. Sutherland*, 153 L. T. 614.

Where, after a final order of foreclosure against subsequent incumbrancers, the mortgagor redeems; that has the effect of opening the foreclosure as against the subsequent incumbrancers: *Read v. Smith*, 14 Gr. 250; S. C., 16 Gr. 52; *Box v. Bridgman*, 6 P. R. 234; *Utter v. Lord Vaux*, 2 K. & J. 650; 6 D. M. & G. 638; and see *Ledbrook v. Passman*, 59 L. T. 306; *Re Howard*, 29 L. R. Ir. 266. In *Hillbird v. Campbell*, 7 Gr. 96, a final order of foreclosure was set aside at the instance of a purchaser of the equity of redemption *pendente lite*, but without notice of it, but in *Robson v. Argue*, 25 Gr. 497, such relief was refused.

Terms on which Foreclosure Opened at the Instance of the Mortgagor.—The terms on which a foreclosure is opened are in the discretion of the Court. Where the security is not ample, the mortgagor may be required to pay the interest and costs by an early day, and six months may be allowed for the payment of the principal: *Fisher on Mortgages*, 5th ed., 926; *Robbins on Mortgages*, 1047. But where the security is ample, the costs of the action, and of the application, may be ordered to be paid forthwith, and the time extended for payment of the principal and interest, the defendant being charged with interest on the gross amount of the principal and interest, for the period of the extension: see *Trinity College v. Hill*, 8 Ont. 286; 20 C. L. J. 359, 385; *Holford v. Yate*, 1 K. & J. 677; *Whitfield v. Roberts*, 7 Jur. N. S. 1268; *Thornhill v. Manning*, 1 Sim. N. S. 451; and see *Howard v. Macara*, 1 Chy. Ch. 27, and other cases cited in note to Rule 750.

Opening Foreclosure at the Instance of a Subsequent Rule 386.
Incumbrancers:—See *Scottish American Investment Co. v. Brewer*, 2 O. L. R. 369, where the circumstances were, such that the mortgagor might have successfully applied, and the incumbrancers, his creditors, even though they had not proved their claim, were held entitled to the same relief as the mortgagor.

Opening of the Foreclosure by the Mortgagee.—So long as the mortgagee is in a position to restore the mortgaged property, he may at any time open the foreclosure by enforcing payment of the debt. But if, after he has obtained a final order, he has parted with the mortgage estate, or any part of it, (otherwise than under power of sale; see *Pegg v. Hobson*, *infra*), so that he is not in a position to re-convey, he will be restrained from recovering the debt: *Lockhart v. Hardy*, 9 Beav. 340; *Gowland v. Garbutt*, 13 Gr. 383; *Burnham v. Galt*, 16 Gr. 417; *Chotfield v. Cunningham*, 23 Ont. 153; but see *Bald v. Thompson*, 10 Gr. 177; but the making of a mortgage by the mortgagee on the mortgaged estate, will not prevent him from opening the foreclosure by suing for the mortgage debt, if at the time of his bringing the action, he has paid off the mortgage, and is in a position to re-convey: *Hansen v. Hauss*, 22 Gr. 279.

Where the mortgagee had incapacitated himself from restoring the mortgaged property intact, he will be disabled from enforcing payment: *Re Thursson*, 2 O. L. R. 271; but this principle does not apply where the property is not intact merely owing to the removal or destruction of a building on it, unless, *scilicet*, the building is of such a character that compensation in money (which the mortgagor is, in such an event, entitled to) would not be an adequate indemnity: *Mendels v. Gibson*, 9 O. L. R. 44; and where the property was not intact by reason of the mortgagee having granted a right of way across part of it, he was given an opportunity to remove this difficulty: *Re Thursson*, *supra*.

A mortgagee who has exercised his power of sale, where there is a personal liability to pay the mortgage debt, is entitled to sue for the deficiency: the fact that the mortgagee has acquired the land since the sale, is no objection to his right to recover: *Pegg v. Hobson*, 14 Ont. 272. In the absence of any objection to the sale under the power, the acquisition of the estate by the mortgagee would not give the mortgagor any new right of redemption.

386. If the purchase money is insufficient to pay what has been found due to the plaintiff for principal, interest, and costs, subsequent interest, and subsequent costs in an action for sale, the plaintiff (where the mortgagor or person liable to pay the debt is a defendant, and such relief is claimed) shall be entitled, on an *ex parte* application to the Court or a Judge, to an order for the payment of the deficiency. Con. Rule 354.

Taken from Chy. O. 455.

Where a personal order for payment is claimed by indorsement on the writ, that relief may now be awarded by the judgment in the first instance, without waiting for the ascertainment of the deficiency: *on principle*, see Forms 153, 154 (H. & L. Forms, Nos. 864, 865).

Rule 387.

Enforcing
judgment
on coven-
ant after
foreclosure.

Where the judgment is for foreclosure, accompanied by a personal remedy for payment of the mortgage debt, if the mortgagee, after obtaining a final order of foreclosure, enforces the judgment for payment, by issuing execution, or otherwise, he thereby opens the foreclosure. If he has in such a case, parted with the mortgaged property after obtaining the final order, (otherwise than under a power of sale), any further proceedings to enforce the payment of the debt will be restrained on motion: see *Rule 385*, note.

Order for
payment of
deficiency,
only granted
when there
is a personal
liability.

The order for payment of deficiency can only be granted where there is a personal liability to pay. See cases cited in note to *Rule 378*.

A mortgagee, who has exercised his power of sale, is entitled to sue for any deficiency which may remain due after deducting the proceeds of the sale, and the fact that the mortgagee has again acquired the land is no objection to his right to recover: *Pegg v. Hobson*, 14 Ont. 272.

Where a mortgagor, who has parted with his equity of redemption, is sued on his covenant to pay the mortgage debt, he is entitled, as against the assignee of the equity of redemption, to a lien on the mortgaged land, if still in the hands of the mortgagee, subject to redemption, for any sum so paid, if the assignee of the equity of redemption has agreed to assume the mortgage: *Hamilton Provident L. & L. Co. v. Smith*, 17 Ont. 1.

Where
account
changed
after being
ascertained,
new account
may be
taken.

387. (1) Where the state of the account ascertained by a judgment, order or report, is changed by payment of money, receipt of rents and profits, occupation rent or otherwise, before the final order for foreclosure or sale is obtained, the plaintiff or other party to whom the mortgage money is payable may (either before or after the day appointed for payment) apply *ex parte* to the Court or a Judge to fix, by reference to a Master or otherwise, the amount to be paid in lieu of the amount previously ascertained, or (where the day appointed for payment has not arrived) may give notice to the party by whom the money is payable that he gives him credit for a sum certain to be named in the notice, and that he claims that there remains due in respect of such mortgage money a sum certain to be also named in the notice. See *Con. Rules 357, 355*.

Or notice
of credit
given.

New day.

(2) Where the application is made after the day appointed for payment, and in other cases if the Court or Judge so directs, a new day for payment shall be appointed. *New.*

Final order
may be
granted if
notice of
credit given,
or party may
have new ac-
count taken.

(3) Where notice of credit has been given, if the sums named therein appear proper to be allowed and paid, the final order may be granted without further notice: but the party to whom the notice of credit is given may apply to the Court or a Judge to fix, by reference to a Master or otherwise, the

amounts proper to be allowed and paid instead of the amounts **Rule 358.** mentioned in the notice. See Con. Rules 356, 358.

This *Rule* states what was in effect the practice under former Con. Rules 355 to 358. Those Rules were taken from Chy. O. 457-460.

A notice of credit must be given before the day for payment. Notice of arrival: see also *Knottinger v. Barber*, 1 Chy. Ch. 258. Notice of credit must be served credit of payments, or rents, which have been received after the day fixed for redemption, need not be given: see *Rule 385*, note. Such of payment. payments do not affect the plaintiff's right to a final order, unless indeed they amount to a total extinguishment of the debt: *National Perm. Mutl. B. B. Socy. v. Raper*, 65 L. T. 668.

A new day was appointed where accounts had been altered by a new arrangement between the plaintiff and defendant as to payments: *McCullum v. Caston*, 1 O. L. R. 240.

The procedure prescribed by this *Rule* must be followed, and it is not enough to entitle a plaintiff to a final order, after the account has been changed, to state on affidavit that the outgoings have exceeded the receipts since the date of the report: *Forsters v. Pegg*, 19 P. R. 254.

When notice has been given under this *Rule*, or the payment on account has been made after the day fixed for redemption, the final order may be obtained notwithstanding the alteration in the state of the account, without appointing any new day: *Ib.*

388. In an action for foreclosure or sale, or for recovery of possession of any mortgaged property for default in payment of interest, or of an instalment of the principal, the defendant may, before judgment, move to dismiss the action upon paying into Court the amount then due for principal, interest and costs. Con. Rule 359.

Taken from Chy. O. 461, and R. S. O. 1877, c. 51, s. 71.

This *Rule* applies before judgment. After judgment *Rule 389* applies.

The *Rule* in terms is confined to actions for foreclosure, or sale, and for recovery of possession of mortgaged property for default in payment of principal or interest; but it has been held that a mortgagee bringing an action for redemption is within the equity of this *Rule*: *Moore v. Mcveritt*, 6 Gr. 550; *Dornyn v. Fralick*, 21 Gr. 194; see *contra*, *Tylce v. Hinton*, 3 Ont. App. 53; but a plaintiff in an action for redemption claiming the benefit of this *Rule* is not entitled to six months for payment of the instalment in default: *Dornyn v. Fralick*, *supra*. The *Rule* is held not to apply where the mortgagee is seeking to enforce a power of sale: *Robertson v. Hetherington*, 8 C. L. T. 141; nor where he is suing solely on the covenant for payment, even though the principal has become due by virtue of an acceleration clause in the mortgage: *Wilson v. Campbell*, 15 P. R. 254.

Formerly when the principal money due under a mortgage was not paid off at the date at which it was covenanted to be paid, the mortgagee was entitled to six months' notice of payment, or six months' interest: *Latslow v. Davis*, Blake, V.C., 7th June, 1877; and see *Re Houston*, 2 Ont. 84; *Trust & Loan Co. v. Kirk*, 8 P. R. 263; *Archbold v. Building & Loan Association*, 15 Ont. 237; *Smith v. Smith*, 1891, 3 Ch. 550; 65 L. T. 234; notice was not necessary

Action may be dismissed before judgment in payment of arrears and costs.

Rule 388 applies to actions for redemption

Mortgagee bringing action cannot claim six months' notice, or six months' interest.

Rule 388.

where the six months' interest was paid: *Johnson v. Evans*, 61 L. T. 18; but a mortgagee bringing an action for sale, or foreclosure, or taking steps to enforce payment, could not insist on getting six months' notice of payment, or in default thereof, six months' interest: *Letts v. Hutchins*, L. R. 13 Eq. 170; *Re Alcock*, *Prescott v. Phipps*, 23 Ch. D. 372; 49 L. T. 240; *Bovill v. Endle*, 1891, 1 Ch. 648; nor could a mortgagee who entered into possession; *Bovill v. Endle*, *supra*; or who proved his claim in a partition action: *Re Houston*, 2 Ont. 84; and see *In re Moss*, 31 Ch. D. 90; 54 L. T. 49; nor an equitable mortgagee by deposit of title deeds: *Fitzgerald's Trustee v. Millersh*, 1892, 1 Ch. 385; 66 L. T. 178. This right to six months' notice, or six months' interest, does not exist in the case of a mortgage made after 1st July, 1888, unless there is an express stipulation therein to that effect: see R. S. O. c. 121, s. 17; see R. S. C. c. 127, s. 7.

Although, after action for foreclosure brought, a mortgagor may, at any time before judgment, tender the amount due with interest to the date of tender, and the plaintiff is bound to accept it, yet after judgment, it has been held, in England, that a defendant cannot waive the six months allowed for redemption without the consent of the plaintiff: *Hill v. Rowlands*, 1897, 2 Ch. 361, *int quare*, how far the statutes above referred to would enable a defendant to do so in Ontario.

In default of payment of instalment whole amount secured becomes due

Upon default in payment of any instalment of principal, or interest, the mortgagee has a right, without any express stipulation to that effect, to call in the whole amount secured by the mortgage: *Cameron v. McKee*, 3 Gr. 311; but this right may be qualified by the express stipulation of the parties, as, for instance, where there was an express proviso that in default of payment of any instalment of interest for six months, the whole principal money should become payable, it was held that a suit for foreclosure would not lie until the lapse of the six months: *Parker v. The Vine Growers' Association*, 23 Gr. 179. Where there was a proviso accelerating payment of principal and interest in the event of the mortgagor mortgaging, or otherwise incumbering the property, or suffering it to become liable to sale for taxes, it was held that a voluntary assignment in insolvency was not within the proviso: *McKay v. McFarlane*, 19 Gr. 347. Under a clause accelerating payment of mortgage money in the event of default, a mortgagee, who neglects to call in the mortgage money pursuant to the proviso, cannot in a redemption action treat the sums, of which the payment is accelerated, as overdue, and claim interest thereon: *McLaren v. Miller*, 20 Gr. 637.

Proviso accelerating payment, how construed.

How far Court can relieve from express proviso for accelerating payment in event of default, *quære*.

It was held by Spragge, C., that even though there be an express stipulation in the mortgage, that in default of payment of any instalment the whole mortgage money shall become payable, the mortgagor may, nevertheless, after default, claim the benefit of this Rule: *General v. Burn*, 7 P. R. 381; and see *Knappe v. Cameron*, 6 Gr. 550; but in *Tulee v. Hinton*, 3 Ont. App. 53, Moss, C.J.A., expressed a doubt whether the Court had any power to relieve against such a stipulation, either under this Rule, or under its inherent jurisdiction to relieve against penalties, and forfeitures; and see *General Credit & Discount Co. v. Glegg*, 48 L. T. 182. It cannot, therefore, be said to be clear that the Rule applies to cases where there is an express proviso accelerating the payment of the mortgage debt in the event of default.

Where a defendant moves to stay proceedings under this Rule, he may obtain the stay, on payment of the interest calculated up to the last gale day, and is not obliged to pay it, up to the time of making

Interest to be paid up to last gale day

the application: *Stratton v. Murney*, 6 Gr. 378; but, if the defendant desires to pay off the whole amount of the mortgage debt, the mortgagee cannot refuse to accept it: *Cruso v. Bond*, 9 P. R. 111; 1 Ont. 384 (overruling *Green v. Adams*, 2 Chy. Ch. 134); *Ex p. Wickens*, 1898, 1 Q. B. 543; 78 L. T. 213; *Re Ellis*, 1898, 2 Q. B. 79; 78 L. T. 733; although in a redemption suit he might not be bound to accept more than the instalments in arrear; see *Gibson v. Nelson*, 2 O. L. R. 500. Rules 389, 390. *Not do*

An application may be made, after judgment has been obtained, to stay proceedings on payment of the arrears; see *Rule 389*.

The making of a motion to stay proceedings on payment of principal and interest is not equivalent to a tender: *Kincaid v. Todd*, 42 Ch. D. 610.

389. In an action for the purpose and under the circumstances specified in *Rule 388*, the defendant may move to stay the proceedings in the action, after judgment, but before sale or final foreclosure, or recovery of possession of the mortgaged property, upon paying into Court the amount then due for principal, interest and costs. Con. *Rule 360*. After judgment proceedings may be stayed on payment of arrears and costs.

Taken from Chy. O. 462

See notes to *Rule 388*.

This and the preceding *Rule* in terms extend only to cases of foreclosure, or sale, or recovery of possession of the mortgaged premises; the relief provided for by them, therefore, cannot be given in an action on the covenant though it be for the whole of the mortgage money due under an acceleration clause: *Wilson v. Campbell*, 17 P. R. 254.

This *Rule* does not apply where, after judgment, the parties agree to an extension of the time for payment by instalments. In the event of the mortgagor making default he has no right on payment of instalments in arrear under the agreement, to have the proceedings stayed; see *Keen v. Biscoe*, 8 Ch. D. 201; *McCollum v. Costan*, 1 O. L. R. 240.

After payment has been made, under this *Rule*, of the instalments in arrear, it is irregular for the plaintiff to take any further proceedings in the action, until another instalment falls due: *Carroll v. Hopkins*, 4 Gr. 431; and see *Rule 390*.

390. Where an application is made to stay the proceedings under *Rule 389*, the judgment may afterward be enforced, by order of the Court, upon subsequent default in the payment of a further instalment of the principal, or of the interest. Con. *Rule 361*. On subsequent default judgment may be enforced.

Taken from Chy. O. 463.

Where, after a judgment of foreclosure, the proceedings are stayed under *Rule 389*, on a subsequent default being made, on the plaintiff's application to enforce the judgment, and the defendant asking for a further stay on payment of the arrears, an order may be made directing payment of the whole sum in six months, and in default of order.

Rules foreclosure, with liberty to the defendant to pay the arrears forth-
391, 392. with, and in that event staying the proceedings: *Strachan v. Deelin*,
 1 Ch. Ch. 8.

**Order on
 default.**

391. In a redemption action, on default of payment being made according to the report, the defendant shall be entitled, on an *ex parte* application to the Court or a Judge, to a final order of foreclosure against the plaintiff, or to an order dismissing the action with costs to be paid by the plaintiff to the defendant, forthwith after taxation thereof. Con. Rule 362.

See *Rules* 385, 392, and notes.

As to the evidence of non-payment: see *Docksey v. Elac*, 64 L. T. 256.

The Court may in a proper case extend the time for redemption at any time before a final order of dismissal, or foreclosure: *Collinson v. Jeffery*, 1896, 1 Ch. 644; 74 L. T. 78.

**Directions
 where
 plaintiff in
 redemption
 suit is
 foreclosed.**

392. In a redemption action where the plaintiff is declared foreclosed, directions may be given either by the final order foreclosing the plaintiff, or by subsequent orders, that all necessary inquiries be made, accounts taken and proceedings had for redemption or foreclosure, or redemption or sale, as against any subsequent incumbrancers, or for the adjustment of the relative rights and liabilities of the original defendants as among themselves, and such order shall have the same force and effect as a judgment obtained by the original defendant. Con. Rule 363.

The provisions of this *Rule* seem to be based on Chy. O. 466.

**Dismissal
 of action
 for re-
 demption
 operates as a
 foreclosure.**

The dismissal of an action for redemption by a mortgagor usually operates as a foreclosure: and where a bill did not pray redemption, but a decree for redemption was granted, it would seem a subsequent dismissal operated as a foreclosure: *Cornwall v. Henriod*, 12 Gr. 338; but this is not the case where the mortgage is by deposit of title deeds, because in such a case a judgment of foreclosure would provide for the execution of a legal mortgage, but the mere dismissal of an action to redeem cannot have that effect, though it may preclude the mortgagor from bringing another action to redeem: *Macshull v. Shrewsbury*, L. R. 10 Ch. 250; it would seem, however, that the defendant, on obtaining the dismissal, may also obtain an order for the absolute conveyance of the property: see note *supra*, p. 355.

**Subsequent
 proceedings.**

Where an action for redemption is brought by a second mortgagee and he is foreclosed, the mortgagor, as well as the first mortgagee, has a right to have a day appointed for the redemption of the first mortgage by the mortgagor: *McKinnon v. Anderson*, 18 Gr. 684. The defendant who is sought to be redeemed, need not, unless he pleases, proceed under this *Rule*, and he cannot be deprived of costs of any subsequent action for foreclosure, or redemption, for not having done so: *Id.*

Where a second mortgagee is entitled to redeem a prior mortgage and to foreclose the debt on the default of redemption, the action may be dismissed as against both the prior mortgagee, and the mortgagor, with costs: *Hobbs v. Barry*, 31 Ch. D. 312; 54 L. T. 12. Rules 393, 394.

393. In mortgage actions where it becomes necessary to fix a date for redemption after the lapse of the first period of six months, the further time allowed shall be one month. Redemption after six months.
 Rules 23 June, 1894. 1316.

Before this *Rule* the practice was to allow each person, or set of persons, successively entitled to redeem, three months from the taking of the subsequent accounts respectively. Incumbrancers having a specific lien by mortgage were successively allowed each a separate day in order of their priorities, but since *The Creditors' Relief Act* (11. 8. O. c. 78), execution creditors have been together given one day for redemption, their order of priority confidently being that of the first execution creditor: see note to *Rule* 750.

The terms of this *Rule* are probably wide enough to be applicable to the time to be given to a mortgagor, where foreclosure is ordered after an abortive sale: see note to *Rule* 378.

14. TRANSMISSION OF INTEREST *pendente lite*.

394. An action shall not become abated by reason of the marriage, death, or bankruptcy of any of the parties, if the cause of action survives or continues, and shall not become defective by the assignment, creation, or devolution of any estate or title *pendente lite*. And whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment, but judgment may in such case be entered notwithstanding the death. *Con. Rule* 620. Action not to abate by reason of marriage, etc., or death between verdict and judgment.

Same as Eng. (1883) R. 178, except that the Eng. Rule is made to apply to "a cause or matter" instead of "an action" only.

The former Eng. R. of 1875, O. 50, r. 1, which was like this *Rule* in applying only to an "action," was held to apply to a petition, *Re Atkins*, 1 Ch. D. 82; *Re Dwyer*, W. N. 1878, 199; but not to a charging order: *Finney v. Hinde*, 4 Q. B. D. 102. See the definition of "action" in sec. 2 of the Jud. Act, and *Rule* 610.

Where after argument before the Court, and before the delivering of judgment, a party dies, it would seem that no order to continue proceedings is necessary to enable the Court to give judgment; but the party in whose favour the judgment is, or his personal representative, if he be dead, is entitled to have judgment pronounced and entered as of the date on which the argument took place: *Ecroyd v. Gaultard*, 1897, 2 Ch. 554, and see 2 Williams' *Saund.*, part II., pages 720, 721; *Evans v. Rees*, 12 A. & E. 175; *Miles v. Bough*, 3 B. & L. 107; *Miles v. Williams*, 9 Q. B. 47; *Cumber v. Wane*, 1 Str. 126; *Collinson v. Lister*, 20 Beav. 355; *Freeman v. Traub*, 12 C.

Rule 394. B. 406; *Moor v. Roberts*, 3 C. B. N. S. 844; *Belsham v. Percival*, 8 Ha. 157; and see *Couture v. Bouchard*, 21 S. C. R. 281.

Where in ignorance of the death of the plaintiff, after the argument, a certificate of the Court of Appeal was issued dated as of the day of pronouncing judgment, the certificate was, on the *ex parte* application of defendant, amended so as to bear date as of the day of the argument and was ordered to be entered as of that date: *Gunn v. Harper*, 3 O. L. R. 633.

A special direction should be got from the Court to date and enter the judgment when delivered as of the date of the argument, otherwise it has to bear date as of the day it is pronounced (see *Rule 629*), which will make it apparently defective on its face. In *Huntington v. Attrill*, before the Judicial Committee of the Privy Council, 5th Aug., 1892, where the respondent died after argument of an appeal, but before judgment, the Committee directed the action to be revived before the Order in Council embodying the judgment was issued, and an order of revivor was made by the Committee accordingly [see *rel. D. W. Saunders*, of counsel for appellants]. An action for tort cannot be revived in the name of an assignee who obtains an assignment of the claim before judgment, though after a verdict: *Blair v. Ascheltine*, 15 P. R. 211.

Or before
judgment
issued.

Where a party dies after judgment, but before it has been drawn up and entered, the judgment must be drawn up and issued before the order to continue proceedings is issued: see *Beamish v. Ponerton*, 1 Ch. Ch. 32; *Galbraith v. Armstrong*, 1b., 33.

Where before the confirmation of the Master's report appointing a committee of a lunatic and propounding a scheme for maintenance, the lunatic died, notwithstanding his death, an order was made, the executors of the deceased consenting, for the confirmation of the Master's report, the discharge of the committee, and the surrender of his bond: *Re Garner*, 1 O. L. R. 405.

If the death or change of interest takes place before the writ is served, the action cannot be revived or continued: *Watson v. Hunt*, 1 Ch. Ch. 295; and see *Foster v. Ward*, 9 L. R. Ir. 447.

The *Rule* applies where both parties die pending an action: *Sellars v. Goole*, 30 L. R. Ir. 298.

For the practice where a party dies pending an appeal: see note to *Rule 396*, p. 612.

Rule does
not affect
the law as to
the survival
of causes of
action.

There is nothing in the *Rules* on this subject to alter the existing law as to what causes of action do, and what do not, survive; thus where the cause of action, or the interest of the party is terminated by death, etc., the action is at an end: *Tiepeross v. Grant*, 4 C. P. D. 40; *Kirk v. Todd*, 21 Ch. D. 484; *Ashley v. Taylor*, 10 Ch. D. 738; 27 W. R. 228; *Barker v. Evans*, 15 Q. B. D. 565; 53 L. T. 801. See notes to *Rule 396*. Nor is there anything to preserve to any person a right of action, which, by the ordinary rules of law, has passed from him. Thus, on the bankruptcy of a plaintiff, where the right of action is one which passes to the trustee, the action cannot be carried on by the bankrupt, but only by the trustee: *Jackson v. North-Eastern Ry. Co.*, 5 Ch. D. 844; *Ward v. Saunders*, 10 Q. B. D. 114; see also *Emden v. Carter*, 17 Ch. D. 169; *Selig v. Lion*, 1891, 1 Q. B. 513. If, in such a case, there are two trustees, and one refuses to go on, the other may do so, and make his co-trustee a defendant: *Jackson v. North-Eastern Ry. Co.*, *supra*.

Upon the death, before judgment, of the sole beneficiary on whose behalf an action is brought under *The Fatal Accidents' Act* (R. S. O. 1897, c. 166) the action comes to an end. It cannot be continued for the benefit of the beneficiary's estate, nor can a new action be brought by the beneficiary's personal representative: *McHugh v. G. T. Railway*, 2 O. L. R. 600. **Rule 394.**

The present *Rule* applies to enable the action to be proceeded with in case of marriage, death, or bankruptcy, without further order or notice, only where the cause of action survives to, or continues in, some person who is before the Court: *Eldridge v. Burgess*, 7 Ch. D. 411; see *Allechin v. Buffalo, etc.*, 2 Chy. Ch. 45. Thus where five defendants were jointly and severally liable, two of whom became bankrupt, Fry, J., offered to allow the trial to stand, that the other three might serve notice on the trustees of the bankrupts if they wished to do so; as they declined, the suit was held not to be defective and the trial was ordered to proceed: *Lloyd v. Dimmack*, 7 Ch. D. 398; see also *Walker v. Blackmore*, W. N. 1876, 112. When act on may proceed without order.

Where partners have recovered a judgment, and one of them dies, the action survives, so that the surviving partner may issue execution: *Davies v. Andrews*, 28 Sol. Jour. 411; W. N. 1884, 94.

In an action for damages for misrepresentations against several defendants, one defendant died after issue joined. It was held that the action could be proceeded with against the survivors: *Beatty v. Nelson*, 9 Ont. 385.

Where, however, the cause of action does not survive to, or continue in, some person who is before the Court: *Re Shepherd*, 43 Ch. D. 136; 62 L. T. 337; *Norburn v. Norburn*, 1894, 1 Q. B. 448; 70 L. T. 511; e.g., where a sole plaintiff or defendant dies or becomes bankrupt, the action abates or becomes defective: *Eldridge v. Burgess*, 7 Ch. D. 411; *Jackson v. N. E. Ry. Co.*, 5 Ch. D. 844; *Barter v. Dubouz*, 7 Q. B. D. 413; *Emden v. Carter*, 17 Ch. D. 169; *Chorlton v. Dickie*, 13 Ch. D. 160; *Wardle v. Saunders*, 10 Q. B. D. 114, and an order to continue it must be obtained under the subsequent *Rules*, by the proper parties: *Walker v. Blackmore*, *supra*; *Stanhope v. Stanhope*, 11 P. D. 106; see *Rules* 395, 396. When order necessary.

Where an action becomes defective by the death of a necessary party, or the dissolution of a corporation which is a necessary party, it is the duty of the solicitor who has acted for such party to notify the opposite party of the defect; and he may make himself personally liable to be ordered to pay costs lost in consequence of the proceedings being carried on after such defect has arisen, if he continues to act as solicitor, or fails to notify the opposite party of the defect: *Sutton v. New Beeston Co.*, 1900, 1 Ch. 43; 81 L. T. 457.

On the bankruptcy of plaintiff, the defendant, wishing to have the action dismissed for want of prosecution, was required to give notice to the trustee: *Wright v. Swindon Ry. Co.*, 4 Ch. D. 164; see also *Re Atkins*, 1 Ch. D. 82; *Cameron v. Eager*, 5 P. R. 117.

In an action by the indorser of a bill of exchange against the drawer who had become bankrupt, and suffered judgment by default, the trustee applied for leave to defend, complaining that judgment had been snapped. Quain, J., said, "It is only a question of terms. I will order the judgment to be set aside on payment of costs, and that the trustee be at liberty to defend in the name of the debtor"; *Goldard v. Poole*, W. N. 1875, 230; 1 Chanc. Ch. Cas. 126.

Rule 395.Assign-
ment *pen-
dente lite*.

395. In case of an assignment, creation or devolution of any estate or title *pendente lite*, the action may be continued by or against the person to or upon whom such estate or title has come or devolved. Con. Rule 621.

Identical with the Eng. (1883) R. 180.

An order under *Rule 396* is necessary to obtain the benefit of this *Rule*.

Where an action is carried on by a plaintiff after he has parted with his interest, it must be dismissed; *Roper v. Hopkins*, 20 Dan. 580; the action can only be properly carried on by the transferee first obtaining an order under this *Rule* making himself plaintiff.

Incum-
brancers
pendente lite.

Incumbrancers, or purchasers, becoming such after writ sued out, and a *lis pendens* registered, will be bound by the judgment, and need not be made parties whether the plaintiff have notice of them or not; Dan. Pr., 5th ed., 242; 6th ed., 290, 296; *Robson v. Argue*, 25 Gr. 407; see *Wallbridge v. Martin*, 2 Ch. Ch. 275; *Secar v. Lawson*, 15 Ch. D. 426; 16 Ch. D. 121; *Pooley's Trustees v. Whetham*, 28 Ch. 19, 38; *Kiao v. Rudkin*, 6 Ch. D. 160. But in cases where there has been a change in ownership of the legal estate, and a conveyance is required, it may be necessary to add parties; Dan. Pr. 243; and notes to *Rule 659*.

And a person who, after the institution of a foreclosure action, acquires an interest in, or a claim against, the mortgaged premises, may, on his own application, be added as a party defendant; *Gibson v. Nelson*, 2 O. L. R. 500.

Additional parties may be, in such cases, added by the plaintiff by a *præcipe* order; *Matthews v. Meacs*, 21 Gr. 99; see *Low v. Watson*, 1 Sm. & Giff. 123; but not parties who acquired their interest before action; *McKearie v. McDonaell*, 15 Gr. 442.

Assignment
of subject of
action.

Whether an agreement respecting the assignment of the subject of an action made with persons not parties, *pendente lite*, renders the action defective, depends upon the nature of the agreement, and whether, according to its legal effect, the Court can give the relief claimed without the addition of the other persons; *Scott v. Broadbent*, 9 C. L. T. 181.

Assignment
for the
benefit of
creditors.

An assignment under R. S. O. c. 147, for the benefit of creditors, has not the effect of transferring to the assignee an existing cause of action, to which the assignor was entitled, to set aside a transaction as being in fraud of creditors; *Gage v. Douglas*, 14 P. R. 126.

Quære, whether an assignment of a verdict in an action for tort, before judgment, if made as provided by Jud. Act, s. 58 (5), will now entitle the assignee to obtain an order to carry on proceedings in his own name. See under sec. 58 (5) of the Jud. Act, as it was before the amendment by 10 V. c. 15, s. 5, *Blair v. Axelstien*, 15 P. R. 211, and notes to sec. 58 (5), *supra*, p. 67 and 20 Law Quarterly Rev., 16, 113.

Rule 200 has been also applied to add parties, for example, in *Kiao v. Rudkin*, 6 Ch. D. 160, to add a person at his own request to whom an assignment *pendente lite* had been made by defendant; and in *Secar v. Lawson*, 16 Ch. D. 121, on defendant's motion to add a person to whom the plaintiff had assigned his interest. In such a case as the last, the action may be stayed till security is given, or the suit continued in the name of the assignee; *Secar v. Idavis*, 7 P. R. 147; see also *Ashby v. Taylor*, 10 Ch. D. 768.

Where an assignee for creditors had made a compromise of an **Rule 396.** action commenced by him, and was subsequently removed, and a new assignee appointed in his place, it was held that such new assignee might obtain an order making himself plaintiff in the action, and continue it in his own name, leaving the defendant to move to stay it, or plead the compromise in bar; and that this course was preferable to directing an issue as to the validity of the compromise: *Davidson v. Merrittton*, 18 P. R. 139.

This *Rule* in terms applies only to devolutions or assignments ^{Assignment} *pendente lite*, and it has been held not to apply to assignments or devo- ^{after judg-} lutions of interest after final judgment: *Atty.-Gen. v. Birmingham*, 15 Ch. D. 423; where the action is at an end: *Arnison v. Smith*, 40 Ch. D. 570; but see *Phillips v. Fox*, 8 P. R. 51; but in a foreclosure action, where a party had assigned his interest after judgment, the assignee was made a party, after order for foreclosure absolute: *Campbell v. Holyland*, 7 Ch. D. 165; and see *Brigham v. Smith*, 2 Chy. Ch. 257; *Foresters v. Pegg*, 19 P. R. 254; where the assignment takes place *pendente lite* the order must be obtained before judgment: *Abell v. Parr*, 9 P. R. 564, where it was held that persons to whom defendants had assigned *pendente lite*, could not be added after judgment and declared bound by it, where they claimed to be entitled independently of the assignment; and see *Arnison v. Smith*, *supra*.

An order adding a trustee in bankruptcy under this *Rule* as a defendant for discovery only, was set aside as improper: *Symonds v. City Bank*, 79 L. T. Jour. 175.

Where a trustee in bankruptcy, suing as such, is removed, and a new trustee appointed, the latter must obtain an order to continue ^{grounds for setting} the action: *Poolcy's Trustee v. Whetham*, 28 Ch. D. 38. ^{aside order.}

Where a person issuing an order to continue proceedings is barred by the Statute of Limitations, the order will be set aside on motion: *Jay v. Johnstone*, 1893, 1 Q. B. 25.

Where a person claiming to be assignee of the plaintiff, obtains an order under this *Rule*, the original plaintiff, if he disputes the assignment, may move to set the order aside: *Fisken v. Ince*, 8 P. R. 147.

As to persons interested in the subject matter of the litigation ^{Persons} who come into being after the commencement of an action, see *Peter v. Thomas Peter*, 26 Ch. D. 181; *Re Gould*, 51 L. T. 417; and see ^{coming into} *being pen-* *pendente lite*, *Rules* 201 (2), 396.

396. Where by reason of marriage, death or bankruptcy, ^{Order to} or any other event occurring after the commencement of an ^{add parties} action and causing a change or transmission of interest or ^{on change} liability, or by reason of any person interested coming into ^{of interest,} existence after the commencement of the action, it becomes ^{how ob-} necessary or desirable that any person not already a party ^{tained.} should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties and such new party, may be obtained on *praeripe*, (a) upon an allegation of such change, or transmission of interest or liability or of such person interested having come into existence. Con. Rule 622.

Rule 396. (a) The Eng. (1883) R. 181, has the words "*ex parte*," instead of the words "*on præcipe*"; it is otherwise the same.

"Necessary or Desirable."—It has been said that it may in rare cases be "necessary and desirable" under this Rule, to add or substitute a person as plaintiff, *without his consent as required by Rule 206 (3)*, on the application of the opposite party, but he should not be exposed without further action on his part, or adoption by him of the position into which he is forced, to liability for damages or costs: *Murray v. Wartle*, 19 P. R. 286.

But it may be open to doubt whether in any case a person can properly be added as a plaintiff without his consent; and it is submitted that the proper procedure, where the transferee of a plaintiff *pendente lite* neglects to take out an order under this Rule authorizing him to continue the proceedings, is for the defendant to move to limit a time for the transferee to take out such order, or in default that the action be dismissed, or that all proceedings be stayed: see *Rule 403*; *Daniel Fr.*, 5th ed., 717; *Cameron v. Eager*, 4 P. R. 117; *Watson v. Watson*, 6 P. R. 229; *Chorick v. Dimes*, 3 Beav. 290; *Wright v. Swindon*, 4 Ch. D. 164; *Motion v. King*, 2 O. W. R. 73.

Rule applies only if cause of action survives.

This Rule applies where the cause of action survives or continues to some person not already a party. Where the cause of action has not survive, the action cannot be continued under this Rule: see cases in note to Rule 391, and *Love v. Watson*, 1 Sm. & Gill. 123; *Dendy v. Dendy*, 5 W. R. 221; *Greenhough v. Rumney*, 5 W. R. 453; *Williams v. Williams*, 9 W. R. 296.

and to assignments, etc. before judgment.

The Rule only applies to devolutions of interest taking place before final judgment: *Atty.-Gen. v. Birmingham*, 15 Ch. D. 423; unless after the final judgment, it is necessary to take any proceedings in the action (other than execution, which is provided for by *Rule 864*), e.g., where the plaintiff dies after final judgment by default, and defendant wishes to apply to set aside the judgment and to be let in to defend: *Chambers v. Kitchen*, 16 P. R. 219; 17 P. R. 3; see also *Arnison v. Smith*, 40 Ch. D. 579; *Brigham v. Smith*, 2 Chy. Ch. 25; *Campbell v. Holyland*, 7 Ch. D. 166; *Norburn v. Norburn*, 1894, 1 Q. B. 448; 70 L. T. 411.

When actions survive.

All actions survive which do not fall within the maxim, "*actio personalis moritur cum persona*," as modified by statute: see *Tynges v. Grant*, 4 C. P. D. 40. That maxim has no application to any breaches of covenant, except those which constitute a mere personal wrong, and, with that exception, all rights of action for breaches of contract pass to the executors: *Formby v. Barker*, 1903, 2 Ch. 539, *per* Vaughan Williams, L.J., at p. 550.

The rule of the Common Law as to the survival of causes of action was summed up in the maxim *actio personalis moritur cum persona*. This was first modified by 4 Ed. iii. c. 7, and in 1886, this maxim was to a large extent abrogated. The statute then passed with some slight amendment, is now R. S. O. 1897, c. 129, ss. 10, 11 and 12, and when the Imperial statutes in force in Ontario were revised the statute was deemed to have superseded 3 Ed. iii. c. 7, which was accordingly repealed: see 2 Ed. viii. c. 1, Sch.

Under R. S. O. c. 129, "all torts or injuries to the person or to the real or personal estate of the deceased, except in cases of libel and slander," survive to the personal representatives of the deceased who have the same rights and remedies in respect thereof as the deceased could have had, and the damages recovered form part of

his estate: and in like manner the personal representatives of a Rule 396. deceased person are liable for torts committed by the deceased to any other person "in respect of his person, or of his real or personal property," except libel or slander: but actions by or against the personal representatives in respect of any such torts must be commenced within a year of the death of the person by or against whose representatives the action is brought: And an order to continue an action already commenced must be obtained within that period in cases where the action survives only by virtue of the provisions of R. S. O. c. 129.

This statute is to some extent founded on the Imp. Stat. 3 & 4 Wm. iv. c. 42, s. 2, but goes very much beyond the provisions of that Act, which limits the survival of actions in respect of torts, to those committed by, or against, the deceased, within six calendar months prior to his decease. Many causes of action, therefore, which would not survive under the English Act, would survive under the Ontario Statute.

Notwithstanding R. S. O. c. 129, s. 10, the benefit of an action under *The Fatal Accidents Act* (R. S. O. 1897, c. 166), to which the beneficiaries named therein are entitled, does not survive in favour of their representatives: *McHugh v. Grand Trunk Ry.*, 2 O. L. R. 600.

Under the statute, a right of action for seduction now survives against the seducer's personal representative: *Lince v. Faircloth*, 14 P. R. 273; before the Act, see *Edy v. Stewart*, 10 Ont. 591; and if an action for any tort, which survives, has been commenced by the deceased, it may be continued by his representatives: *Mason v. Peterborough*, 20 Ont. App. 683.

Prior to R. S. O. 1897, c. 129, ss. 10, 11, under 4 Ed. iii. c. 7, certain personal actions survived: e.g., actions of tort where the injury had been done to the estate of the deceased: *Tyngcross v. Grant*, 4 C. P. D. 40; *Hatchard v. Mege*, 18 Q. B. D. 771 (a case of slander of title); *James v. Simce*, 43 Ch. D. 607; 62 L. T. 497; *Jenks v. Clifden*, 1897, 1 Ch. 694; 76 L. T. 382 (a case of obstruction of light); or where the deceased's estate had benefited by the tort: *Hambly v. Trott*, 1 Cowp. 374; *Ashley v. Taylor*, 10 Ch. D. 768; *Oakey v. Dalton*, 35 Ch. D. 700; 57 L. T. 18; but where the deceased wrongdoer had merely derived a negative benefit by his tort, by saving himself an expense which he would otherwise have been put to, the right of action did not survive under 4 Ed. iii. c. 7, against his personal representatives either at law: *Phillips v. Homfray*, 24 Ch. D. 439; 49 L. T. 5; or in equity: see *Hamilton Provident & L. Socy. v. Cornell*, 4 Ont. 623; and see *Re Duncan*, 1899, 1 Ch. 387; 80 L. T. 322.

It has been laid down that the maxim *actio personalis moritur cum persona* "never extended to personal actions founded upon any obligation, contract debt, covenant, or any other duty to be performed, for there the action survived": 1 Wms. Saund. p. 240, and that the maxim did not extend to actions for tort arising out of breach of contract: see *Davis v. Hood*, 88 L. T. 19, (a case of negligence by a solicitor); but an action for breach of promise of marriage, though in form an action for breach of contract, is within the maxim and was not maintainable against the representatives of the deceased promisor: *Fislay v. Chirney*, 20 Q. B. D. 494; 58 L. T. 664; *Chamberlain v. Wilson*, 2 M. & S. 468; but under R. S. O. c. 129, such a cause of action would now seem to survive.

Rule 396. Cases of tort arising from breach of contract, which were an exception to the Common Law rule, probably still survive in Ontario as at Common Law, and are not subject to the limitations of R. S. O. c. 129, as to bringing an action therefor.

Practice.

Practice.—An order to add parties under this *Rule* is an order on *præcipe*: *Oshawa Cabinet Co. v. Note*, 18 C. L. J. 30; application in Court is not necessary: *Crane v. Loftus*, 24 W. R. 93; *Roffey v. Müller*, *Id.* 103; *Dyer v. Painter*, W. N. 1881, 105.

A form of the order is given in the App. Form 97; H. & L. Forms No. 485. It continues proceedings in the plight and condition in which they were at the transmission of interest: see also *Chadton v. Dickie*, 13 Ch. D. 160.

Title of cause after revivor.

After an order under this *Rule*, the practice is, as formerly, that in the subsequent proceedings the title of the revived action shall be added to the original style: *Miller v. Huddleston*, W. N. 1881, 171; *Secar v. Lawson*, 16 Ch. D. 121.

Who may obtain order

Who may Apply.—Where an action becomes defective, by the death or transmission of interest of any of the parties, whether before or after judgment, the plaintiff, or in the case of the death of a sole plaintiff, then his representatives; or in the case of the death of one of several plaintiffs, then the surviving plaintiff, or in the case of an assignment or transmission of the plaintiff's interest *inter vivos*, then his assignee, are the proper parties to apply for an order to continue the action; because the carriage of the action rests with them. If the plaintiff, or his representative, or a surviving plaintiff, or assignee, does not take out an order to continue the proceedings in due course, it is open to the opposite party to move to limit a time for him to do so, and, in default of his so doing, either to dismiss the action for want of prosecution, or, if after judgment, to stay all farther proceedings; see *supra*, p. 608; for there does not appear to be any authority enabling a defendant to take out such an order, except in a case where he is entitled to assume the carriage of the action as plaintiff; or where he seeks to continue the action for the purpose of recovering costs: *Rule* 404.

Where a sole plaintiff in an administration action died, an order to continue the action was granted to a person who had been served with notice of the judgment, and had obtained liberty to attend the proceedings, he being held to be in the same position as a party to the action: *Burstell v. Fearon*, 24 Ch. D. 126. The personal representative of the plaintiff might obtain an order to continue the proceedings: *Dyer v. Painter*, W. N. 1881, 105. But a person who has not obtained such liberty to attend proceeding cannot obtain an order under this *Rule*, as he is not a party: *Delaney v. Delaney*, 27 Sol. Jour. 418. *See quære*, whether in either case such a person becomes party to the proceedings: see notes to *Rule* 293, p. 372. It has been held that in a case of transmission of interest of a party served with notice of judgment, an order under this *Rule* is not proper; and that the successor should be served with notice of the judgment: *Re Wicks*, W. N. 1888, 9.

Where two of several plaintiffs having separate causes of action died before trial, but, in ignorance of their death, the trial proceeded and the action was dismissed, an application by the executors of the deceased plaintiffs to continue the action was refused: *Arnison v. Smith*, 40 Ch. D. 507; and see *Salton v. New Beeston Co.*, *supra*, p. 605.

An executor continuing an action becomes, as formerly, when he obtained an order of revivor under the old practice, liable for costs. *Baynton v. Baynton*, 5 Ch. D. 250; 4 App. Cas. 733. So does an official liquidator continuing an action commenced by the company. *Re London Drapery Stores*, 1898, 2 Ch. 684. Rule 396
Liability for costs

An order of revivor is in force from its service, and notice of trial served within 14 days after such service, for a day after the expiration of the 14 days, was held good: *New York Piano Co. v. Stevenson*, 10 P. R. 270.

Where on the death of the sole defendant after notice of trial, persons in whom his interest vested were added as defendants, it was held that new notice of trial to them was necessary: *Johnston v. English*, 55 L. T. 55; 35 W. R. 29; W. N. 1886, 131.

On the death of an accounting party the Court may, on an *ex parte* motion, order the action to continue between continuing parties and the executor of deceased, notwithstanding that the executor is resident out of the jurisdiction: *Jamieson v. Marshall*, 46 L. T. 480; and see *Rule* 102 (4), 401, and *Rule* 3; but see *Morrice v. Smart*, 73 L. T. Jour. 338.

If an action becomes defective by the birth, since its commencement, of an infant who is a necessary party thereto, and proceedings, since its birth, have been taken in the action, the common order under this *Rule* will not render such proceedings binding on the infant. A special form of order to meet this case will be found in *Seton*, 4th ed., 1527, Form 3, 5th ed., 102, and *Peter v. Peter*, 26 Ch. D. 181. See also *Re Gould*, 51 L. T. 417.

Where a party becomes a lunatic pending action, as to continuance of the action by his committee, see *Re Green*, 41 L. T. 30; 48 L. J. Chy. 1881.

After the death of a judgment debtor, an order for a receiver of his estate cannot be made without representation of the deceased's estate: *Re Shepherd*, 43 Ch. D. 131; *Norburn v. Norburn*, 1894, 1 Q. B. 448; 70 L. T. 411.

In *Wallis v. Smith*, 16 L. T. 473; 51 L. J. Chy. 577, a judgment creditor who had obtained an order attaching a judgment debt, was held entitled to be added under this *Rule* as co-plaintiff with his debtor, in the action in which the debtor had obtained the judgment, and to have notice of all proceedings taken in that suit to recover the debt. This decision proceeded to a great extent upon the terms of Eng. Ord. 50, R. 2 (1883, R. 159), which applied to the case of the devolution of estate by operation of law, and has not been adopted in the Ontario Act, or *Rules*; but see *Rule* 3.

This *Rule* is not inapplicable to the case where there is a transmission of interest by reason of a subsequent incumbrancer having redeemed the plaintiff in a foreclosure suit. In such case, a new account may probably be taken under *Rule* 753 without order.

Where the plaintiff died after judgment, and the defendant desired to move to set aside the judgment, an order obtained by the defendant to continue the proceedings in the name of the executor of the deceased plaintiff, was upheld: *Chambers v. Kitchin*, 16 P. R. 219; 17 P. R. 3; and *quere*, see *Rule* 403; *Faraham v. Mallward*, 1895, 2 Ch. 730; *Watson v. Watson*, 6 P. R. 229; *Cameron v. Eager*, 6 P. R. 117; *Chowick v. Dixon*, 3 Rev. 204. The only case in which a defendant would seem entitled to obtain such an order after

Rule 394. Judgment is where he has an interest in enforcing the judgment. In such a case, if he obtains the order, he should make himself plaintiff and the representatives of the deceased plaintiff defendants. See *Burstell v. Foulon*, 24 Ch. D. 126; but see Danl. Pr., 6th ed., 289.

Appeal.

Where an appeal to the Court of Appeal becomes defective by death, transmission of interest, or other cause, proceedings to continue the appeal by or against the proper parties should be taken under this Rule, and in the Court of first instance: *Grasett v. Carter*, 6 Ont. 384. The appeal is a step in the cause or matter. *Re* 798, and the present Rule being applicable, the express provision of the same effect made by R. S. O. 1877, c. 138, s. 40, was omitted as unnecessary in the Revision of the Statutes and Rules in 1888. See also *Ranson v. Patten*, 17 Ch. D. 767; *Re Knight, Knight v. Gower*, 84 L. T. Jour. 205; 32 Sol. Jour. 160.

Costs of Order.—The costs of an order to continue proceedings are recoverable as part of the costs of the cause: *Girardot v. Webster*, 10 P. R. 201.

The costs of an order under this Rule were allowed in *Mitchell v. Barrett*, 3 C. L. T. 265.

Delay.—There is no time limited for reviving. If, therefore, a defendant does not move under Rule 403, *prima facie*, an order to continue is regular. *Ardagh v. York*, 17 P. R. 194. It would seem, however, that there is not an unlimited right to revive proceedings, and if undue delay takes place in obtaining the order it may be set aside: see *Lemercier v. Macaulay*, 20 Ont. App. 421; *Jay v. Johnston*, 1 Q. B. 25; see also *Curtis v. Sheffield*, 20 Ch. D. 338; 21 Ch. D. 1; *Mickelthwait v. Vachonour*, W. N. 1893, 61; *Fussell v. Donding*, 27 Ch. D. 237; *Re Leslie*, 23 Ont. 143; and where there is undue delay in taking out the order to continue the proceedings, the defendant may move to limit the time for so doing, and if default to dismiss, or stay the action: see *supra*, p. 408, and Rule 401.

Dismissal of Action on Failure to Revive.—See Rule 403 and note.

Actions Against Partnership, Firms.—Where a partner dies between service of the writ of summons and judgment, the action may continue without an order, but judgment can only be enforced against his surviving partners, and the partnership assets: *Ellis v. Wadson*, 1899, 1 Q. B. 714, 719.

Counter-claims, petitions, etc.

Counter-claims, etc.—A counter-claim may be revived, in the same way as an original action, by the representatives of the deceased counter-claiming defendant: *Andrew v. Aitkin*, 21 Ch. D. 175; see also *Lumsden v. Winter*, 8 Q. B. D. 650.

As to the case of consolidated actions: see *Re Wortley*, 4 Ch. D. 180.

The Rules on this subject apply to petitions as well as actions: *Re Atkins*, 1 Ch. D. 82; *Re Dwyer*, W. N. 1878, 199.

Execution.

Execution.—Where, after judgment, it is merely desired to issue execution, and rights or liabilities have become changed by death or otherwise, the person seeking to issue execution may proceed under Rule 501; but where it is sought to appoint a receiver by way of equitable execution, the representatives of the deceased debtor must be brought before the Court, by order to continue proceedings and

this Rule, before the motion for a receiver can be entertained: *Re Rule 397*.
Shepherd, 43 Ch. D. 131; *Norburn v. Norburn*, 1894, 1 Q. B. 448
 70 L. T. 411.

Where the solicitor of a deceased plaintiff issued execution without reviving, it was held that a motion might be made by defendant to set it aside without first reviving the action: *Chambers v. Kitchen*, 16 P. 210; 17 P. R. 3.

Where it becomes necessary to enforce a judgment against persons who have subsequently acquired a title, an action must be brought for the purpose: *Atty.-Gen. v. Cor. of Birmingham*, 15 Ch. D. 423.

Examples.—Where the plaintiff died within fourteen days from Examples.
 trial, the Court made an order, on the application of his executors, continuing proceedings, the executors undertaking to apply forthwith for probate, and to produce the same at the trial of the action if obtained: *Hughes v. West*, 13 L. R. 1r. 224.

Two sons were under their father's will appointed trustees on attaining twenty-one, and an administration action was commenced on the elder attaining that age, in which the infant son was a plaintiff, and the other a defendant as trustee. Upon the infant attaining twenty-one and becoming a trustee and thus changing his interest and liability, an order was made *ex parte* making the infant son a co-defendant: *Re Gould, Gould v. Gould*, 51 L. T. 417; W. N. 1881, 183.

In an action on a promissory note, where the defendant became bankrupt, it was held that the trustee should not be added, as the judgment would not be for recovery, but would only amount to a declaration of a right to prove, which ought to be made in the bankruptcy proceedings: *Butler v. Deben*, 7 Q. B. D. 413.

Where a petitioner had died after an order directing inquiries, it was ordered that the petition be carried on by the executors: *Re Ullin's Estate*, 1 Ch. D. 82. See note to sec. 2 of the Act.

Costs.—The person by, or against whom, the action is continued, Costs.
 becomes liable to be ordered to pay the whole costs, both those incurred before, as well as those incurred after, the order: *Beggs v. Beanton*, 9 Ch. D. 250; 4 App. Cas. 733; *Watson v. Holliday*, 20 Ch. D. 780; *Vint v. Hudspeth*, 30 Ch. D. 24; *Bornemann v. Wilson*, 28 Ch. D. 73; *School Board, etc. v. Wall*, 35 Sol. Jour. 527; *Re London Drapery Stores*, 1898, 2 Ch. 684.

Where the action on the death of one of several plaintiffs survives to the others, they are liable for the whole costs to the defendant, without regard to the estate of the deceased: *Asplen v. Seddon*, W. N. 1877, 207.

397. An order so obtained shall, unless the Court or a Judge otherwise directs, be served upon the continuing parties, or their solicitors, and upon the new party, and the order shall from the time of such service, subject nevertheless to the next five following Rules, be binding on the person served therewith. Con. Rule 623.

The Eng. 1883, R. 182 names two instead of five following Rules, those two being the Rules corresponding with 398 and 400 *infra*; the other three here following Rules are not taken from the English Rules.

Rules**398-400.**

The English Rule has the following additional words at the end of the Rule: "and every person served therewith who is not already a party to the cause or matter shall be bound to enter an appearance thereto within the same time and in the same manner as if he had been served with a writ of summons." The Ontario Rules do not require an appearance to be entered by the person served.

Applica-
tion to dis-
charge
order.

398. A person served with such order who is under no disability, or under no disability other than coverture, or who being under any disability other than coverture, has a guardian *ad litem*, may apply to the Court or a Judge to discharge or vary the order at any time within 14 days from the service thereof. Con. Rule 624.

Same as the Eng. 11883 R. 181, except that the time there limited is 12 days.

This Rule is very similar in its terms to Chy. O. 239, under which it was held to be not sufficient to give notice of the motion to discharge within the time allowed, but the motion had to be made returnable within that time; *Harris v. Myers*, 16 Gr. 117; *Jackson v. Gardiner*, 2 Chy. Ch. 387; 15 Gr. 425; *Mellroy v. Hawk*, 3 Chy. Ch. 44; see *Per v. Wallis*, 2 C. P. D. 15. The time may be extended, see *Smith v. Ginn*, 2 Chy. Ch. 230, and Rule 353. The motion was formerly made to the Court and set down for the proper day, but *quære* whether it may not under the present Rule be made in Chambers.

A notice of trial served before the 14 days had expired, for a trial commencing after the 14 days was held good, no motion against the order having been made; *New York Paving Co. v. Stevenson*, 10 P. R. 273.

Previous delay in the prosecution of the action is no ground for discharging the order, the defendant not having moved to dismiss; *Adolph v. York*, 17 P. R. 184; but if the Statute of Limitations has barred the claim, the order may be discharged; see *Lemercure v. Macdonald*; and *Jay v. Johnston*, in note to Rule 396.

Indorse-
ment on
order.

399. Upon every copy of such order served there shall be indorsed a memorandum according to Form 51. Con. Rule 625.

No form is given in the Eng. Rule.

For Form 51, see H. & L. Forms, No. 456.

Applica-
tion to dis-
charge order
by persons
under dis-
ability.

400. A person served with such order, who is under any disability other than coverture, and has not a guardian *ad litem*, may apply to the Court or a Judge to discharge or vary the order, at any time within 14 days from the appointment of a guardian *ad litem*, and until such period of 14 days has expired the order shall have no force or effect as against him. Con. Rule 626.

Same as the Eng. 11883 R. 184. See Rules 401, 402.

As to the grounds for discharging an order, see *Dan. Pr.*, 6th ed., **Rules 301; Rule 308 and note; Hurstall v. Pearson, 24 Ch. D. 128; *Jay v. Johnston*, 1893, 1 Q. B. 25. **401-403.****

401. [The time allowed to a party served out of Ontario to apply to discharge the order shall be that limited by the order allowing the service to be effected. Rule of 25 June, 1898.]

Applies
then to dis-
charge order
then served
out of
Ontario.

Not taken from any English Rule.

The Rule of 25th June, 1898, repeals *Rule 401* and substitutes the above Rule. See *Ont. Gazette*, 23 July, 1898, p. 743.

402. Where service by publication is ordered, the Court or Judge shall appoint a time for applying to discharge the order. Con. Rule 628.

Applies
then to case
of order
allowing
service by
publica-
tion.

Not taken from any Eng. Rule.

403. Where an action would but for these Rules have abated by reason of death, and proceedings may be continued under these Rules, the defendant or person against whom the action may be so continued, may apply on notice to compel the plaintiff or person entitled to proceed with the action, to proceed according to the provisions of these Rules within such time as the Court or a Judge may order, or in default for an order dismissing the action or for payment of the costs thereof or for such order as may seem just. Con. Rule 629.

Right of
defendant
in action
to which
may be so
continued.

Taken from R. S. O. 1877, c. 50, ss. 241, 242; c. 38, s. 10.

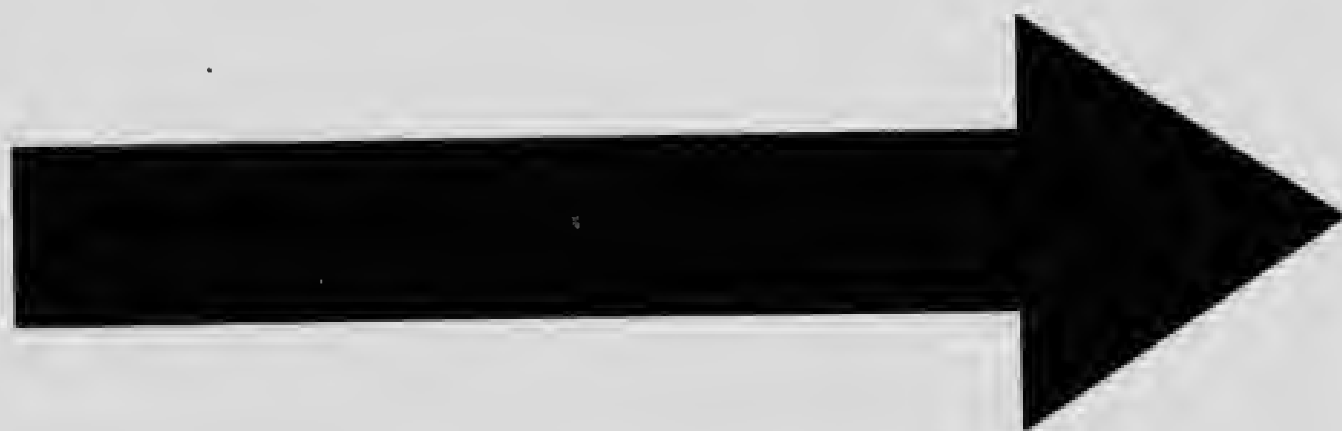
See Eng. (1884) R. 187, and *Duke v. Davis*, 1891, 2 Q. B. 290.

The procedure pointed out by this *Rule* appears to be the proper course for a defendant or his representative to take, and not (as was suggested in *Murray v. Wutch*, 19 P. R. 288), himself to issue an order to continue proceedings; unless he is entitled to assume the position of plaintiff and take the carriage of the action; see *supra*, *Rule 300*, and note; or is seeking to recover costs; see *Rule 404*.

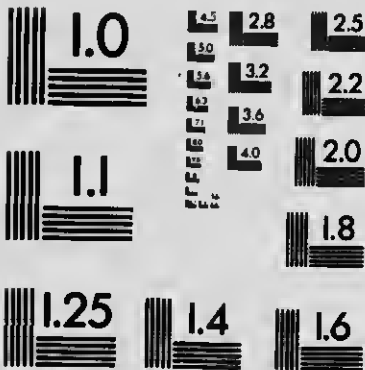
In *Wignanc v. Thompson*, 11 Ch. D. 419, the Court acting under 15 & 16 Vict. c. 56, s. 44 (see *Rule 1944*), appointed a person to represent the estate of a deceased plaintiff, who died insolvent and intestate, so that the defendant might have somebody against whom to move to have the action dismissed for want of prosecution.

See *Oshawa Cabinet Co. v. Note*, in note to *Rule 248*.

Under the former Chancery Practice if the representatives of a deceased sole plaintiff did not revive when served with an order limiting a time for doing so, the action was dismissed *without costs*; *Pugh v. Pitt*, 3 W. R. 100; *Hill v. Gaud*, 9 W. R. 68. Under *Rule 403* an order may be made for payment of costs. If the defendant moving intends to press for a dismissal with costs his proper course would seem to be to include a claim to that effect in his notice of motion to compel the plaintiff to revive.



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Rules

404-406. Where a sole plaintiff died after judgment, and defendant desired to move to set aside the judgment, see *Chambers v. Küchen*, 16 P. R. 219; 17 P. R. 3.

Costs.

404. Where a judgment or order has been made for payment of costs and the action or matter would, but for these Rules, have abated, any person interested under the judgment or order may continue the proceedings and thereupon enforce the judgment or order. Con. Rule 630.

Taken from R. S. O. 1877, c. 40, s. 102. Formerly in Equity a suit could not be revived for costs payable by the deceased party personally, unless the costs had been taxed before the abatement of the suit, or unless in addition to the costs a duty was decreed which remained unexecuted: Sm. Pr., 6th ed., 728.

Sequible, where a defendant, under this Rule, seeks to continue proceedings for the purpose of recovering costs due by a deceased plaintiff, he should make himself plaintiff, and the representatives of the deceased plaintiff defendants, by the order to continue the proceedings; he cannot properly bring the latter into the action as plaintiffs, because that would be imposing on them a personal liability for past costs: see note to Rule 396.

In *Gunn v. Harper*, 3 O. L. R. 693, where the plaintiff died after argument of an appeal, but before the giving of judgment; on the appeal being dismissed with costs, it was held that the defendants were entitled to the appointment of an administrator *ad litem* to represent the plaintiff's estate, in order that the costs of the action and of the appeal might be recovered, the deceased plaintiff having no assets in the Province, but having given a bond, securing the costs of the appeal.

15. PAYMENT INTO AND OUT OF COURT, GENERALLY.

Mode of payment into Court.

405. Subject to Rule 429, money required to be paid into Court shall be paid into the Canadian Bank of Commerce at Toronto, or in some branch of said bank, or into any chartered Bank being its agent in this Province, and in no other way. Rules 23 June, 1894, 1294. Con. Rules 164, 165.

The Accountant is the only proper person to receive payment into Court: *Leroux v. Lanthier*, 2 C. L. T. 481; except in the cases provided for by Rule 429.

Where payment into Court was ordered, payment to the solicitor of the party entitled to the money was held not to be a ground for dispensing with its payment into Court: *Blackburn v. Sheriff*, 1 Chy. Ch. 208.

Directions to pay in.

406. (1) The person paying money into Court shall obtain from the Accountant, Local Registrar, Deputy Registrar, or Deputy Clerk of the Crown, a direction to the Bank to receive the money. Con. Rule 166.

(2) When money is required to be paid into Court to the credit of the Assurance Fund, established under the Land Titles Act, the direction to receive the money, if the same is payable into a bank in Toronto, shall be obtained from the Master of Titles, and if payable into a bank outside of Toronto the direction shall be obtained from the proper Local Master of Titles. Rule 1254.

Rules
407-410.

407. (1) The person applying for the direction shall leave a *praecipe* therefor according to Form No. 42, or Form 43, and the judgment or order under which the money is payable, together with a copy thereof and of the report where necessary, which is to be on good paper of foolscap size folded together lengthwise, and is to be verified by an officer in the Accountant's office, and to be retained by the Accountant. In case the direction is obtained elsewhere than in Toronto, these papers with the necessary postage for their re-transmission are to be sent to the Accountant.

Papers
necessary to
obtain
direction.

(2) The copy so verified shall be marked with a number corresponding with that of the account, and shall be bound and kept for reference in a book to be called the "Order Book." Rule 1274. See Ont. Gaz., 31 Dec. 1904.

For Forms 42 and 43, see H. & L. Forms, Nos. 390, 391.

408. Where the direction is issued elsewhere than in Toronto, the officer issuing the same shall, on the same day, transmit to the Accountant by post the *praecipe* for such direction together with the papers left on the application therefor. Con. Rule 168; Rules 23 June, 1894, 1296.

outside
towns.

409. The person paying money into Court elsewhere than in Toronto shall be entitled to credit therefor as of the date on which the same was deposited in the bank. Con. Rule 169.

Date of
crediting
money.

410. The bank, on receiving money to the credit of any cause or matter, shall give a receipt therefor in duplicate; and one copy shall be delivered to the party making the deposit, and the other shall be posted or delivered the same day to the Accountant. Con. Rule 170.

Receipt to
be given in
duplicate
by Bank.

Rules
411-413.

Dates of
birth of
infants in
orders.

Payment
out of
Court.

411. An order for payment of money into Court on behalf of, or as the property of, an infant shall, unless otherwise directed, state the date of the birth of the infant. *New.*

See Rule 418.

412. Money shall be paid out of Court upon the cheque of the Accountant, countersigned by the Registrar of the Court of Appeal, or in the case of his absence, the Junior Registrar of the High Court of Justice, this Rule to take effect forthwith without being published in *The Gazette*, Rule 1229.

The Committee of Judges charged with the supervision of the financial affairs of the Court has given the following directions (dated 18th Sept., 1890), to the officers of the Court:—

1. As a general rule all orders affecting money in Court, ought to be entitled in the cause or matter to the credit of which the said money is standing in Court where there is any such cause or matter; and in cases where money has been, by mistake, paid into Court to the credit of some non-existing cause or matter, the order correcting the mistake should be entitled in the cause or matter to the credit of which the money was intended to be paid into Court, and should rectify the mistake; and—

2. All orders affecting the moneys in Court of infants or other persons under disability, ought to be made on the application of such persons, by their guardians, next friends, or committees, as the case may be; or, if made on the application of any other person, it should appear by the order that the person under disability whose money is sought to be affected, had due notice of, and, if so, was properly represented on the application.

Vacation.

413. Cheques shall not be issued during the Long Vacation unless the *præcipe* therefor is lodged in the Accountant's office on or before the 20th day of July, unless otherwise ordered by a Judge. Rule 1251 of 28 Nov., 1903.

Approval
by a Judge.

414. (1) Where an order for payment of money out of Court is made otherwise than by a Judge of the Supreme Court sitting either in Court or in Chambers, the Accountant before acting thereon shall apply to a Judge of the High Court for his approval, which he may manifest by signing his initials to the order with or without any other words; and, before approving, the High Court Judge, if he sees occasion, may call for any of the papers in the cause, or if necessary require the solicitor who obtained the order, or his agent, to attend before him to give any explanation or information he may think necessary. Rules 1 Jan., 1896, 1422.

(2) An order dispensing with the payment of money into Court unless it is made by a Judge of the Supreme Court shall not be acted on unless or until a Judge of the High Court has manifested his approval thereof in manner provided by sub-section 1. Rule 1349 of 23 June, 1903.

Rules
415, 416.

415. Every cheque shall be initialed by the Chief Clerk in the Accountant's office before the same is presented for the signature of the Accountant or other officer. Con. Rule 175.

Cheques to
be initialed
by Chief
Clerk.

416. The person entitled to a cheque shall produce and leave with the Accountant the orders and reports entitling such person to the money, and shall file a *proteipce* according to Form No. 43. Con. Rule 176. Rules 24 March and June, 1894, 1301.

On applica-
tion for
payment
out, orders
and reports
to be
produced

For Form 43, see H. & L. Forms, No. 391.

Moneys in Court are considered to be in *custodia legis*: see *Alistair v. Goetner*, 31 Ont. 495; and if improperly paid out may, on a summary application, be ordered to be refunded: *Id.* Where the mistake has not been induced by any fraud or improper dealing by the payee or his solicitor or agent, interest will not be charged: *Id.*; but where he obtains an order for payment without any colour of right, he may be ordered to refund the amount with interest at the rate allowed by the Court: see *Hogbourne v. Receiver-General*, 28 S. C. R. 192.

Where one member of a firm or partners was cognizant of a fraudulent application to the Court, whereby money was improperly paid out to a party not entitled, it was held that each member of the firm was liable to refund it, including those who were ignorant of the fraud: *Brydges v. Braffill*, 12 Sim. 389; and see *Atkinson v. Mackintosh*, L. R. 2 Eq. 570; *St. Aubyn v. Smart*, L. R. 3 Chy. 646; *Dun-Donald v. Mastecaana*, L. R. 7 Eq. 594; *Plummer v. Geogogan*, L. R. 18 Eq. 621; *Cleather v. Tivendale*, 24 Ch. D. 731; 40 L. T. 633; 28 Ch. D. 340; 52 L. T. 330; *Rhodes v. Moules*, 1895, 1 Ch. 236; 71 L. T. 599; *Marsh v. Joseph*, 1897, 1 Ch. 213; 74 L. T. 412; 75 L. T. 558; *Thompson v. Robinson*, 15 Ont. 662; 16 Ont. App. 175; *Bath v. Bath*, 1904, 1 Ch. 460; 84 L. T. 107; but see *Re McCaughey & Walsh*, 3 Ont. 425.

Liability of
solicitor, for
improperly
receiving
money to
be paid out
on Court.

Where a solicitor allowed his name to be used in an application for payment by a third person, who by forged affidavits and powers of attorney succeeded in getting the fund into his hands, out of which he paid the solicitor a portion, and absconded with the balance, the solicitor was held liable for the whole fund, both what he actually received and what he did not, though ignorant of the fraud: *Slater v. Shore*, 1897, 1 Ch. 222, note; 78 L. T. 149; and see *Re Spence*, 21 L. T. 808; and *Marsh v. Joseph*, *supra*.

Where money is improperly ordered to be paid out of Court to parties not entitled, without fraud, but through the negligence of a solicitor, he is liable to the parties injured thereby for the consequences: *Re Douglass*, 60 L. T. 491; 41 Ch. D. 178.

Rules**417, 418.**Refunding
of money
paid out by
mistake.

Where money has been ordered to be paid out of Court upon a mistake of facts: *Fisken v. Wride*, 13 Gr. 419, or to persons having no title: *Hogaboom v. Receiver-General*, 28 S. C. R. 192; it will upon summary application be ordered to be refunded, and the Statutes of Limitations do not apply in such a case: *Allstadt v. Gortner*, 31 Ont. 495; and where a solicitor was directed to refund money which he had obtained out of Court, under an order which was subsequently rescinded, he was held to be liable to attachment for contempt in disobeying the order: *Pritchard v. Pritchard*, 18 Ont. 173.

Where an order for payment out of money in Court has been made inadvertently in error, the Court has inherent jurisdiction on the fact being brought to its notice, to rescind such order, and to order repayment into Court of the money so paid out: *Hogaboom v. Receiver-General*, *supra*; see *per Gwynne, J.*, 28 S. C. R., at p. 205; and see *per Burton, C.J.*, in *Re Central Bank*, 24 Ont. App. at p. 473; affirmed in Sup. Ct., 28 S. C. R. 192.

Where a sum of money was paid out of Court under an erroneous order, and was subsequently recovered, but without interest, it was held that a proportion of the amount recovered should, as between the tenant for life and remainderman, be treated as income: *Re Cleveland Estate*, 1895, 2 Cb. 542.

Where money paid into Court with a defence, which was misleading in its terms, was *bona fide* taken out of Court by the solicitor, and, with his client's consent, applied partly in payment of his costs, and the residue paid to the client, it was held that the solicitor was not personally liable to refund it: *Davys v. Richardson*, 21 Q. B. D. 202.

Consent of
purchaser
to payment
out.

Purchase money is not paid out except either on proof being given to the Accountant of the purchaser having received a conveyance or vesting order, or upon the production of the written consent of the purchaser, or his solicitor: *Rule 743*; and see *Daniel Pr.*, 6th ed., 1100.

A party declared by a foreign Court to be a prodigal, and for whom a council has been appointed, cannot be prevented by such council from obtaining money in Court to which he is entitled: *Re Schot*, 1902, 1 Cb. 488.

Orders dis-
pensing with
payment
into Court.

417. Orders dispensing with payment of money into Court, or certified copies thereof, shall be left with the Accountant forthwith after entry thereof. *Rules 23 June, 1894, 1302.*

Dates of
birth of
infants to be
stated in
reports and
orders.

418. Unless otherwise directed by the Court or a Judge, money shall not be paid out of Court to a party or person named as an infant in the proceedings in the cause or matter, nor to any person on behalf of an infant, unless the date of the birth of such infant is stated in the Master's report, or the order for payment into Court as required by *Rules 411 and 696. New.*

See *Rules 411 and 696.*

Ordinarily, money of an infant will not be ordered to be paid out **Rule 419.** to the infant personally until he has attained his majority, but when a female infant was married and domiciled in a foreign country, and was 19 years of age, and by the law of the foreign country a female infant on marriage was entitled to receive moneys due to her, an order was made for payment to her of a fund in Court to which she was entitled, notwithstanding her infancy: *Karanagh v. Lennon*, 16 P. R. 229.

Applications for payment out of the money of an infant for support or maintenance should be made in the name of the infant, and not of the guardian to whom the money is to be paid: see note to **Rule 412.**

16. PAYMENT INTO COURT WITH A PLEADING, IN SATISFACTION.

419. A defendant may, either before (a) or at the time of delivering his defence, or afterwards by leave of the Court or a Judge, pay into Court a sum of money in satisfaction of the cause or a part of the cause of action, or one or more of the causes of action for which the plaintiff sues, and the money when so paid in shall remain in Court subject to further order, unless the plaintiff elects to take it out as provided in **Rule 423.** **Con. Rule 632.**

When defendant may pay in.

For the practice before this **Rule** was passed: see *Wheeler v. United Telephone Co.*, 13 Q. B. D. 603; *Rogers v. Loos*, 11 P. R. 118; *Bell v. Fraser*, 12 Ont. App. 1.

(a) See *Lomer v. Waters*, 1898, 2 Q. B. 326.

This **Rule** is in many respects different from the English practice under Eng. (1883) Rs. 255-265:

(Comparison of practice in Eng. and Ont.)

(1) It is not confined to any particular kind of action. It therefore will at any rate apply in any "action to recover a debt or damages," which was the language of the original J. A. **Rule 215** (as also of the present Eng. **Rule 255**), which extended the right theretofore existing at Law: see MacLennan Jnd. Act, 2nd ed., 349. The former **Rule** was held not to apply in an action where an account was claimed: *Nichols v. Evans*, 22 Ch. D. 611; this **Rule** is not confined to any particular class of actions, but whether it applies to a claim which is not for recovery of money has not been decided. The English **Rule** has been held not to apply so as (1) to compel a plaintiff who accepts money paid in "in respect of the causes of action complained of," to accept it in satisfaction, not only of damages incurred, but also of his claim to establish his right to an injunction; or (2) to enable a plaintiff who accepts the money paid in, to do so not only as a satisfaction of his own claim but also as in effect discharging him from liability on a counter-claim by the defendant, who has paid the money in: *Cootte v. Ford*, 1899, 2 Ch. 93; 80 L. T. 697.

(2) It enables the defendant to deny the plaintiff's causes of action, and, at the same time, pay into Court: see **Rule 420**; *Berdan v. Greenwood*, 3 Ex. D. 251; *Hawkeley v. Bradshaw*, 5 Q. B. D. 22, 302; *Harper v. Davis*, 19 Q. B. D. 170; even in actions for libel or slander: *Hawkeley v. Bradshaw*, *supra*, which are expressly excepted

Rule 419. by the Eng. Rule; or to plead tender before action; *Davis v. National Ass. Co.*, 16 P. R. 116. *Quare*, whether this is so in all cases, such as actions to try a right, or to establish a character which is assailed, or where fraud is charged; *Berdan v. Greenwood*, *supra*.

The principle is, that the Court ought not "to preclude defendants in actions from saying and doing that which, as practical men, before the action they might reasonably say and do, viz., say that they entirely deny a person's right to sue them, yet pay, or offer to pay, a sum of money as the price of peace, and for the prevention of further litigation"; *Berdan v. Greenwood*, 3 Ex. D. 259. In *Spurr v. Hall*, 2 Q. B. D. 615, an action for nuisance, the defendant was not allowed to plead payment into Court together with a denial of the right of action; but the subsequent cases make the propriety of that decision at least doubtful, and under this *Rule* the defendant's right so to do seems plain. See also *Potter v. Home and Colonial Insurance Co.*, cited 2 Q. B. D. 622.

(3) The payment into Court is not to be an admission of liability; *Rule 420*. Under the Eng. Rule payment in satisfaction is an admission of liability of the cause of action in respect of which the money is paid into Court; but with his defence a defendant may (except in action for libel or slander; *Fleming v. Dollar*, 23 Q. B. D. 388) pay in money, and deny liability; *Wheeler v. United Telephone Co.*, 13 Q. B. D. 507. See *Henrich v. Davies*, 1893, 1 Q. B. 367, 68 L. T. 220, where money was paid in generally, without specifying the cause of action. Under this *Rule* there is no exception of actions for libel or slander.

(4) Payment may be made in satisfaction of part of a cause of action, or of any one or more of several causes of action as well as of the whole action.

(5) The plaintiff may not take the money out, unless he accepts it in satisfaction of the cause of action in respect to which it was paid in; *Rule 423*.

Practice in
Ct.

The result will be that notwithstanding any defence denying liability, the acceptance will satisfy the cause of action, and the costs, except as to costs, will come to an end, if the payment is in satisfaction of the whole cause of action; see *Re Earl of Stamford*, 33 W. R. 909, where plaintiff, after taking the money proceeded with the action, and was required to stop proceedings, or pay the money in again; see also *Kane v. Mitchell*, 13 P. R. 118.

Formerly the payment enabled the plaintiff to take the money out, not accepting it in full, and proceed with the action; and he might keep the money in the end, though his action failed; see Maclellan *Ind. Act*, 2nd ed., 37a. The money will, under the present *Rule*, remain in Court as the defendant's money, if not accepted by the plaintiff in satisfaction, to be dealt with by the Court in the judgment, or by other order in the action; see *Maple v. Earl of Shrewsbury*, 19 Q. B. D. 463; 35 W. R. 819. It will not be paid out on motion by the plaintiff, he not accepting it in full; *Kane v. Mitchell*, *supra*; and if the plaintiff fail to recover judgment for as much as the amount paid in, the defendant will be entitled to the surplus; *Veale v. Reid*, 117 L. T. Jour. 202.

It would seem also that it should be treated, while in Court, as the defendant's money, where it is paid in with a denial of liability, and plaintiff does not accept it, but proceeds to trial and recovers less; *Gillmour v. Cowan*, cited in *Davis v. National Ass.*, 16 P. R. 119.

Gray v. Bartholemew, 1895, 1 Q. B. 209; 71 L. T. 867 (Islanders), and **Rule 419** see under the dissimilar English Rules, *Dunn v. Decon*, 70 L. T. 223; 1895, 1 Q. B. 211 (n), (lbel).

Where the plaintiff did not elect to take the money out within the time limited by **Rule 424**, and judgment was given in favour of the defendant upon the cause of action in respect of which the money was paid in, but the judgment did not dispose of the money in Court, it was held that it remained in Court subject to the final order of the Court after the determination of the action, and must be disposed of in accordance with such determination. Plaintiff was held to be not entitled, after such judgment, to an order extending the time limited by **Rule 424** by an order *nunc pro tunc* under **Rule 453**; *Mugger v. Ferguson*, 18 P. R. 201.

Even where liability is not denied the money must remain to be dealt with by the Court, if plaintiff does not elect to take it out under **Rules 423** and **424**; and, by reason of the plaintiff's not accepting at the proper time, the defendant may afterwards contend that the amount payable by him is less than the amount paid into Court; *Jackson v. Woods*, 17 P. R. 549; see *Veale v. Reid*, *supra*.

Where the money is not accepted in full, and the plaintiff does not succeed in obtaining more, it would seem that the defendant has established a defence to the whole action, entitling him to the general costs of it: see *Wheeler v. United Telephone Co.*, 13 Q. B. D. 597; *Gentard v. Carr*, 13 Q. B. D. 598 n; *Wood v. Leatham*, 61 L. J. Q. B. 215; *James v. Whitaker*, 57 L. T. 219; and *Kane v. Mitchell*, *supra*; but he may nevertheless be liable to pay the costs of issues on which he fails: *Hubbark v. British N. Borneo Co.*, 1901, 2 K. B. 473.

But see *Buckton v. Higgs*, 4 Ex. D. 174; *Gretton v. Mees*, 7 Ch. Costs. 1, 839; *Best v. Osborn*, 12 Times, 419, where the plaintiff was given costs up to the time of payment into Court, and defendant costs subsequent thereto. The Judge at the trial doubtless has a discretion under **Rule 1130** to give defendant the whole costs of the action: see also *Trickes v. For*, 91 L. T. Jour. 30. In *Small v. Lyon*, 10 P. R. 222, where judgment was given for defendant with costs, it was held that the Taxing Officer had no alternative but to tax the defendant all his costs.

Where two defendants are entitled to put in separate defences, and one has paid money into Court exceeding the amount ultimately recovered in the action, the other defendant cannot avail himself of the payment into Court by his co-defendant as a satisfaction of the cause of action against himself, and, on failure of his defence, plaintiff is entitled to have judgment entered against him for costs: *Penny v. Wimbledon Urban District*, 1892, 2 Q. B. 72.

Where an order for summary judgment under **Rule 603** is refused, and defendant is allowed to defend, on payment of money into Court as part security for the plaintiff's claim, the defendant cannot set up in his pleading that such payment into Court is in satisfaction of the plaintiff's claim: *Mendels v. Gibson*, 7 O. L. R. 411.

In an action against a husband and wife for a tort of the wife (n lbel) it was held that the husband and wife could not put in inconsistent defences, and therefore the husband paying money into Court, the wife could not plead denying liability: *Beaumont v. Kane*, 1901, 1 K. B. 292; but that was because in England a payment into Court is an admission of liability, which is not the case under Ont. Rules; see **Rule 421**.

Payment by
by one of
two defend-
ants.

Rules. Where a defendant in an action of libel or slander pays money into Court by way of amends with his defence under R. S. O. c. 68, s. 7, he cannot in the event of his failing in his defence under s. 6 of the Act, treat the payment as made under *Rule 419*; *Orlop v. Wilkes*, 1808, 2 Q. B. 56.

As to payment into Court in actions for libel, see R. S. O. c. 68, s. 7; and in actions against Justices: R. S. O. c. 88, s. 17; and in proceedings between landlord and tenant: R. S. O. c. 170, s. 25. As to payment in by a third party, see *Rates v. Burchell*, W. N. 1886, 108.

As to the effect of payment into Court on the question of costs, see notes to *Rule 1252*.

Payment
not to be an
admission.

420. Payment of money into Court shall not be deemed an admission of the cause of action in respect of which it is paid. Con. Rule 632.

The Eng. (1883) R. 255 provides that the defendant by payment into Court shall be taken to admit the claim or cause of action in respect of which the payment is made, unless he denies liability, in which case *Rule 260*, which is somewhat similar to the Ont. *Rules* 419, 423, and 424, applies. See *Cooke v. Ford*, 1890, 2 Ch. 363 in note to *Rule 419*, p. 621.

To be
signed in
defence.

421. Payment into Court shall be pleaded, and in the pleading the cause of action or part thereof, in respect of which the payment is made, shall be specified. Con. Rule 634.

Taken from Eng. (1883) R. 254.

A payment into Court in satisfaction of the whole or part of the plaintiff's claim may be made before, or after, the delivery of a defence: see *Rules* 419, 422.

In the case of a payment in before defence, if a defence is subsequently delivered, the payment in must be set up in the defence. Where the payment in is made after the delivery of the defence, the order granting leave should provide for the delivery of a supplementary defence, in order to set up the payment in as required by this *Rule*.

Where there are several causes of action or different heads of claim, money should not be paid in generally, without specifying the amounts applicable to the different causes of action or heads of the claim, where it can be done; otherwise particulars may be ordered. Thus, where plaintiff claimed (1) *mesne profits*, and (2) damages for dilapidation and non-repair of premises leased, the defendant paying in generally was ordered to give particulars apportioning the money paid in to the different heads of claim; *Rare v. Kelly*, 59 L. T. 139; W. N. 1888, 141. The Eng. Rule 263, corresponding to *Rule* 260 respecting particulars, was referred to.

In *Parvire v. Eidl*, 49 L. J. C. P. 481; 13 L. T. 427 (discussed in *Rare v. Kelly*), where plaintiff claimed for distinct services as defendant's architect, viz.: in preparing plans, acting as arbitrator, and making surveys, it was held that payment into Court generally was sufficient in point of pleading, but the question whether particulars should be ordered was not passed upon: see *Bank of London v. Guarantee Co.*, 12 P. R. 490; *Ocean Marine SS. Co. v. Ocean Marine Insurance Co.*, 2 Times 125.

422. A defendant paying money into Court before delivering his defence shall serve upon the plaintiff a notice stating that he has paid in the money, and specifying the claim or cause of action in respect of which the payment has been made. The notice may be according to Form No. 52. Con. Rule 634.

Rules
422-424.

Or by
notice.

Taken from Eng. (1883) R. 258.

For Form No. 52, see H. & L. Forms, No. 397.

A defence delivered subsequently and simply denying liability was held not embarrassing: *Anon.*, 31 Sol. Jour., 136, 139; but under Rule 420, the payment must be pleaded.

Where a motion for judgment is pending when the payment is made, the defendant is liable for the costs thereof: *Re Lomer v. Waters*, 1898, 2 Q. B. 526; 79 L. T. 81.

423 —(1) A plaintiff taking the money out of Court shall make it in satisfaction of the very cause of action, or part thereof, in respect of which it was paid in, and shall upon applying therefor file and serve a memorandum according to Form No. 53, which shall be equivalent to a satisfaction piece. Con. Rule 635.

How
plaintiff
may take
money out
of Court.

(2) In order to obtain the money out of Court the plaintiff shall file the said memorandum with the proper officer in the office where the pleadings in the action are filed, and where the pleadings are filed elsewhere than in Toronto the officer shall transmit to the Accountant the pleadings and memorandum with return postage. The pleadings and memorandum shall be returned by the Accountant to the officer from whom they were received. *New.*

The memorandum referred to in this Rule should be entered of record: see Rule 644.

For Form No. 53, see H. & L. Forms, No. 398.

424. The plaintiff shall make his election to take the money out of Court within four days after the day on which he receives notice of payment in, if the payment is made before defence, and if the money is paid in with the defence, he shall elect, either before replying or before the expiration of the time for replying, whichever first happens. Con. Rule 636.

Election.

Where the plaintiff does not elect, within the time provided by this Rule, to accept the money, the defendant may contend that it is

Rule 425. more than the plaintiff is entitled to recover; see *Denison v. Woods*, n. note to Rule 419.

A plaintiff, who by mistake had accepted money paid in with a defence, was allowed to withdraw his acceptance: *Chevalier v. Ross*, 3 O. L. R. 219; and see *Emery v. Webster*, 9 Ex. 249, *infra*, Rule 425, p. 627-8. If the plaintiff elects not to accept the money paid in, and falls at the trial to recover judgment for as much as was paid in, the defendant paying it in is entitled to the surplus: *Veale v. Reid*, 117 L. T. Jour. 292; *Gillmor v. Cowan*, cited in *Dura v. National Ass. Co.*, 10 P. R. p. 119; *Maguire v. Ferguson*, 18 P. R. 201. The money in Court is subject to the order of the Court, and must be dealt with as the rights of the parties ultimately appear: *Id.*; Rule 419.

Taxing
costs.

425. When the plaintiff takes out money in satisfaction of all the causes of action he may tax his costs of the action and sign judgment therefor, unless the defendant pays them within forty-eight hours after taxation. Con. Rule 637.

Instead of "all causes of action" the former Con. Rule 637 had "the entire cause of action."

The alteration is to make it clear that the satisfaction is to be such as to end the action; see *Moon v. Dickinson*, *infra*, and *Barnes v. Jefferson*, 11 Times, 435. Under the former Con. Law Practice, where payment into Court was pleaded as to part only, the plaintiff could not proceed at once to tax costs as to that cause of action: *Cauty v. Gyll*, 5 Sc. N. R. 819.

Whether this Rule gives the plaintiff an absolute right to the costs according to the scale of the Court in which the action is brought, irrespective of the amount brought into Court and accepted in satisfaction of the claim, and without any set-off of costs by the defendant, is the subject of a conflict of opinion: in the affirmative, see *Babeock v. Standish*, 19 P. R. 195, (a decision of a Divisional Court), followed by Britton, J., in *McKelvey v. Chilman*, 5 O. L. R. 263; and in the negative, see *Chick v. Toronto Electric Light Co.*, 12 P. R. 58, (Rose, J., not referred to in *Babeock v. Standish*; and see Rule 1133; and *Soloman v. Mulliner*, 1901, 1 K. B. 76.

The weight of authority appears to be against the view that the costs ought to be taxed in accordance with the provisions of Rule 1133, where the money accepted in satisfaction might have been recovered in an inferior Court.

Where money is paid into Court in satisfaction of one of several claims, with a denial of liability, and the plaintiff proceeds with the action, but ultimately accepts the money paid in in satisfaction of all claims sued for, he is entitled to the costs of the claim in respect of which the money was paid into Court up to the time of payment, but must pay the defendant's costs of all other claims, and of all subsequent proceedings after payment in: *Smith v. Northbach*, 1902, 1 Ch. 197; and where in a case the plaintiff proceeds to trial and succeeds on some issues he is entitled to the costs of those issues though the amount recovered be less than the amount paid in: *Wagstaffe v. Bentley*, 1902, 1 K. B. 124; 85 L. T. 744; and see *Ridout v. Green*, 87 L. T. 679.

In an action for an injunction to restrain a nuisance, and for damages, the defendants denied liability and paid money into Court in

satisfaction of the claim for damages. The plaintiff accepting the Rule 425 money in satisfaction of the claim for damages, was held not entitled to tax his costs, as the entire cause of action was not satisfied: *Moore v. Dickinson*, 38 W. R. 278; 63 L. T. 371; *Cootte v. Ford*, 1890, 2 Ch. 93; 80 L. T. 667.

The Eng. (1883) R. 261 provides for costs in a similar way, but adds "unless the Court or a Judge shall otherwise order."

It has been held that though only sixpence is paid into Court the plaintiff, if he takes it in satisfaction, is entitled to his costs: *Mes. Sheffrey v. Lanagan*, 20 L. R. Ir. 528; and if he accepts the money within the time allowed, he cannot be made liable for defendant's costs incurred between the dates of payment in and acceptance: *Lomer v. Waters*, 1898, 2 Q. B. 326.

See *Suckling v. Gibbs*, in note to Rule 430, p. 623.

If the plaintiff does not accept the money in satisfaction, he may become liable to pay the whole costs: see *Bank of London v. Guarantee Co.*, 12 P. R. 499.

The costs may be taxed under this Rule without any judgment or order unless it becomes necessary to enforce payment, in which case the plaintiff may sign judgment after the expiration of 48 hours from the granting of the certificate of taxation.

But if the plaintiff accepts the money in full satisfaction of his claim, he will be treated as having discontinued the action as to the causes to which the money does not relate (though he should properly give notice of withdrawal of them), and may tax his costs of so much of the action as relates to the causes for which the money is paid: *Melleraith v. Green*, 14 Q. B. D. 766; 52 L. T. 81; but it would seem that defendant would be entitled to the costs of the causes abandoned by plaintiff, as upon a discontinuance: *Smith v. North-leach, etc.*, 1902, 1 Ch. 197.

The plaintiff is not entitled to costs under this Rule where the money is paid in with a plea of tender and the plaintiff accepts it; but he must pay the defendant's costs: see *Griffiths v. Ystradgynolun*, 24 Q. B. D. 307; *American Aristotype Co. v. Eakins*, 7 O. L. R. 127.

If the plaintiff does not elect within the time given by Rule 424, probably his right to do so, and to tax costs, is gone: see *Spencer v. Watts*, 23 Q. B. D. 350; 67 L. T. 711. It was, however, held under original J. A. Rule 218, which gave the plaintiff 4 days after receipt of notice of payment within which to accept the money in satisfaction, that he might still apply under Rule 1130 for costs: *Grevco v. Fleming*, 4 Q. B. D. 226; see also *Broadhurst v. Willey*, W. N. 1876, 21; but *quære*, whether that will be so under the present Rules, by which the plaintiff has no right to the money by the mere payment of it into Court, but only in the event of his making an election under Rule 424; and see *Babcock v. Standish*, 19 P. R. 195.

For form of judgment for costs, see App. Form 151 (H. & L. Forms, No. 819).

If the plaintiff recovers less than the amount paid in, the defendant is entitled to the excess: *Gillmor v. Cowan*, cited in *Davis v. National Ass.*, 10 P. R. 119; and where the plaintiff recovered only 20c. more than had been paid in in satisfaction, he was held entitled to full costs: *Henderson v. Bank of Hamilton*, 25 Ont. 641.

Where the plaintiff's solicitor, by mistake, accepted money paid in, and signed judgment for costs, the judgment, on application of the

Rules

426-428. plaintiff, was set aside, upon payment of costs, and the plaintiff was allowed to proceed with his action: *Emery v. Webster*, 9 Ex. 242; *Chevalier v. Ross*, 3 O. L. R. 219.

Consolidated actions.

426. Where money is paid into Court in two or more actions which are consolidated, [and the plaintiff proceeds to the trial of one, and fails.] the money paid in and the costs in all the actions shall be dealt with in the same manner as in the action tried. Con. Rule 638, *amended*.

Same as Eng. (1883) R. 262, except the words in brackets, which are now.

When plaintiff may pay in.

427. A plaintiff may, in answer to a counter-claim, pay money into Court in satisfaction thereof, subject to the like conditions as to costs and otherwise as upon payment into Court by a defendant. Con. Rule 639.

Same as Eng. (1883) R. 263; and see *Hutchinson v. Barber*, 7 L. T. 624.

Tender.

428. With a defence setting up a tender before action the sum of money alleged to have been tendered shall be brought into Court. Con. Rule 640.

Same as Eng. (1883) R. 257.

This Rule is similar to the former Common Law practice: see *Chapman v. Hicks*, 2 C. & M. 631, where it was held that if the sum tendered was not paid in, the plaintiff might sign judgment for the sum as to which tender was pleaded.

A defence may be set up denying liability as well as pleading tender: *Davis v. National Assur. Co.*, 16 P. R. 116.

The Rule would seem to apply in a foreclosure suit, as well as in any other kind of action: see *Kinnaird v. Trollope*, 42 Ch. D. 610.

Payment into Court with a plea of tender before action is not an admission of the right of the plaintiff to bring the action: *American Aristotype Co. v. Eukins*, 7 O. L. R. 127.

As to tender and payment into Court in actions against Justices, see R. S. O. c. 88, s. 17.

Where a defence sets up a tender, it is not essential that the tender should be alleged to have been made before action, if the fact may be inferred from the other statements of the defence: *Griffiths v. Ystradgynaf*, 24 Q. B. D. 397.

The plaintiff cannot take the money out in satisfaction, and pay his costs as of course; the plea of tender raises an issue, which remains unsettled on the record, and in respect of it the defendants are entitled to go to trial: *Id.* If the plaintiff elects to take the money, he must take it in full of his claim, and the defendant thereupon becomes entitled to his costs: *American Aristotype Co. v. Eukins*, 7 O. L. R. 127.

Where under 3 Edw. vii. c. 19. ss. 469, 470, a municipal corporation ^{Rules} tenders amends or compensation for damages to the plaintiff or his ^{429, 430.} solicitor. It is expressly provided that, where the action is proceeded with, if no greater amount is recovered, the defendants shall be awarded costs of suit, to be set off against any amount awarded to the plaintiff.

In an action for wrongful dismissal where the defendant tendered one month's salary, pleading that the plaintiff was only entitled to that, or in the alternative to three months', and salary for three months was paid into Court, and the plaintiff was found entitled to one month's salary, it was held that, the action being for unliquidated damages, the *Rule* did not apply (see now, however, *Rule 419*), and defendant was entitled to a return of part of the money: *Dacys v. Richardson*, 20 Q. B. D. 722; but could not recover it from the plaintiff's solicitor, who had *bonâ fide* taken out the money and paid it over to the plaintiff: *S. C.* in appeal, 21 Q. B. D. 202.

Tender to a solicitor of a cheque, is not a good legal tender: *Blumberg v. Life Interests Corp.*, 1897, 1 Ch. 171; 1898, 1 Ch. 27.

429. Money paid into Court with a defence at L'Original, ^{Payment with defence in certain towns} Bracebridge or Gore Bay, may, until a branch or agency of the Canadian Bank of Commerce is established at those places, be paid to the proper officer of the Court, who, for receiving the same, may exact a sum not exceeding one per cent. on the sum so paid in, and shall sign a receipt for the amount in the margin of the pleading, for signing which receipt he shall be entitled to twenty cents, and the sum so paid in may be paid out to the plaintiff, or to his solicitor upon a written authority from the plaintiff. *Con. Rule 171; Rules 23 June, 1894, 1297.*

(2) The officer receiving such money shall forthwith pay the same into Court as mentioned in *Rule 405. New.*

The fee payable to the officer under clause (1) of this *Rule* probably includes the amount necessary for stamp on payment in by the officer under clause (2).

17. DISCONTINUANCE.

430.—(1) [Subject to any special statutory provisions,] ^{Discontinuance.} 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.

Rule 430. 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, (x) order the action to be discontinued, or any part of the alleged cause of complaint to be withdrawn. Con. Rule 641.

Substantially the same as the first three clauses of the Eng. (1883) Rs. 290 and 292, except the words in brackets, which are not in the Eng. Rules.

(x) Some such words as "as may be just," seem necessary to be supplied here: see *Armstrong v. Armstrong*, 9 O. L. R. 19, 20. The words "as may seem fit" were in Rule 641, from which this Rule is derived.

"Subject to any Special Statutory Provisions."—The reference is to such provisions as those contained in R. S. O. c. 86, ss. 17, 21.

The last clause in brackets in clause (1) is new: see *Fox v. Hamilton Prov.*, 9 C. L. T. 197.

In clause (2) the passage in brackets was introduced to make clear the procedure which was not quite plain under the original J. A. Rule: see *Bolton v. Bolton*, 3 Ch. D. 276.

For form of judgment, see App. Form 152 (H. & L. Forms, No. 820).

Scope of
present
Rule.

Scope of Present Rule.—The present Rule besides allowing the plaintiff, as formerly, to discontinue the whole action, authorizes the withdrawal of a part of his cause of complaint, or a discontinuance of the action against one or more of several defendants; formerly, at Law, the discontinuance could only be of the whole action: *Benton v. Polkinghorne*, 16 M. & W. 8. In Equity a partial discontinuance could be effected by amendment.

The power to withdraw part is, however, only where the part is severable from the rest of the claim: *Bank of London v. Guarantee Co.*, 12 P. R. 499.

It was formerly held that a plaintiff could not serve notice of **Rule 430**, discontinuance against one of several defendants; and that his proper course was to obtain an order for leave to discontinue against such defendant: *Fox v. Hamilton Prov. & L. Soc.*, 9 C. L. T. 197. The last sentence of clause (1) of **Rule 430**, makes a change in this respect.

Where a co-defendant, as against whom interlocutory judgment had been signed, is sued jointly for a libel, he is entitled to notice of the motion, and an order obtained without notice to him is irregular: *Jennings v. Scripps*, Divl. Court (14 Nov., 1903).

The words "before taking any other proceeding in the action" mean "before taking any proceeding with an intention of continuing the action," and do not include a step such as taking money out of Court, or bringing in money in satisfaction of a counter-claim: *Spicer v. Watts*, 23 Q. B. D. 350; and see *Musman v. Boret*, 40 W. R. 352; 66 L. T. 171.

The plaintiff cannot serve notice under this **Rule** on an infant until a guardian is appointed, and so escape the costs of the action: *Ruth v. Taylor*, 79 L. T. Jour. 211.

On a motion to set aside a discontinuance as irregular, leave was granted to discontinue on proper terms on a cross-motion of the plaintiff: *Spiller v. Coghlan*, 20 L. R. Ir. 32.

An action ought to be disposed of against all the parties to it. If, therefore, the defendant has become an unnecessary party owing to circumstances arising subsequent to the issue of the writ, the action should be dismissed, or discontinued, as against him: *McLaughlin v. Stewart*, 1 O. L. R. 295.

After judgment for the benefit of the plaintiff and other members of a class for which he sues, an action cannot ordinarily be dismissed even by consent of parties: see *Arndery v. Thornton*, 6 P. R. 190; but even in such an action the plaintiff remains *dominus litis* after judgment, and where there are no other unsatisfied members of the class, he may, on his own claim being satisfied, consent to an order staying all further proceedings: *Re Alpha Co., Ward v. Alpha Co.*, 1903, 1 Ch. 203; 87 L. T. 646.

At any Time, etc.—The **Rule** permits a discontinuance before appearance: *Moore v. S. Counties, etc., Bank*, W. N. 1889, 156; but see in the case of an infant, *Ruth v. Taylor, supra*. It does not permit the plaintiff to discontinue his action after it has been entered for trial: *Matthews v. Antrobus*, 49 L. J. Chy. 80; and he has no right to demand to be non-suited at the trial. If he wishes to discontinue his action, at that stage, leave must be obtained under clause (4), or **Rule 543**; see *Fox v. The Star*, 1898, 1 Q. B. 636; 78 L. T. 311; 1900, A. C. 19; 81 L. T. 562.

The discontinuance is only of right, either before defence put in, or, if defence is put in, before taking any step, other than an interlocutory application.

If the statement of defence sets up matters arising after the issue of the writ, the truth of which the plaintiff cannot deny, and which afford a good answer in law, the plaintiff's proper course will be, not to discontinue, but to enter a confession of the defence under **Rule 295**.

Form.—The form of discontinuance will be found in the Appendix Form No. 56 (H. & L. Forms, No. 561). Form of notice.

Rule 430. Under the English Rule (which does not contain the words as to the notice being filed and served), it was held that a written notice by the plaintiff's solicitor as follows: "We are instructed to proceed no further in the action," was a sufficient notice: *The Pommerania*, 4 P. D. 195; but a letter saying "We shall discontinue this action, and take out of Court the amount paid in, and tax our costs. We will send formal notice to-morrow," is not a notice of discontinuance within the Eng. R. and a fortiori not within this Rule: *Moon v. Dickinson*, 38 W. R. 278; 63 L. T. 371; see also *Brooking v. Mandalay*, 55 L.T. 343.

It is not necessary for the plaintiff to ascertain the amount of defendant's costs and pay them in order to make the notice of discontinuance effectual: *Barry v. Hartley*, 15 P. R. 376.

Effect of
discontin-
uance.

Effect of Discontinuance.—The Rule is express (clause 3), that by a discontinuance there is no *res judicata*; see also *The Kronprinz*, 12 App. Cas. 256, (where the same action was revived); *United Telephone Co. v. Tasker*, 59 L. T. 852.

A discontinuance filed by a plaintiff has been held not to have the effect of discontinuing a counter-claim set up in the action: *Mellorau v. Middleton*, 11 Q. B. D. 464, (overruling *Favasseur v. Krupp*, 15 Ch. D. 474); but a counter-claim which the defendant could only assert by virtue of the plaintiff's submitting to the jurisdiction and suing the defendant, will be put an end to by the plaintiff's discontinuance: *Dominion Burglary Guarantee Co. v. Wood*, 3 O. L. R. 365; and a discontinuance in a vendor's action for specific performance puts an end to defendant's right, if any, to move for judgment for specific performance on admissions: *Lye v. McConnell*, 5 O. W. R. 326.

An appeal by the plaintiff will be thereby discontinued: *Combeare v. Lewis*, 13 Ch. D. 469. Where, however, a plaintiff, who had given an undertaking as to damages, discontinued his action, it was held that the Court would nevertheless direct a reference as to damages: *Newcomen v. Coulson*, 7 Ch. D. 764.

The discontinuance of the action is no bar to a motion by a plaintiff, whose name has been used without authority, to have his name strack out of the proceedings; and to compel the solicitor acting without authority to pay the costs: *Gold Reefs of W. Australia v. Dawson*, 1897, 1 Ch. 115.

Costs.

Costs.—The defendant has an absolute right to all costs of the action, and they are not in the discretion of the Judge under Rule 1130; see *The St. Olaf*, 2 P. D. 113; *The J. H. Henkes*, 12 P. D. 106. The costs will include costs made costs in the cause on an application on which the plaintiff succeeded: *The St. Olaf*, *supra*.

Leave to discontinue is only granted on payment of the costs: *The J. H. Henkes*, 12 P. D. 106.

The defendant is entitled to costs though the plaintiff discontinues before appearance: *Moore v. N. Counties, etc., Bank*, W. N. 1889, 156.

Costs of work in preparing, briefing, or otherwise relating to affidavits, etc., properly and not prematurely done, down to the time of discontinuance, are taxable: *Harrison v. Leutner*, 16 Ch. D. 559.

It was formerly held that as this Rule only applies to an "action" it could not be made use of in an interpleader issue: *Hogaboom v. Gillies*, 16 P. R. 402. See now Rule 6 (c).

A reasonable time will be given to defendant within which to apply Rule 430. for an appointment to tax his costs, before an appointment will be granted to the plaintiff to tax interlocutory costs to which he may be entitled: *Barry v. Hartley*, 15 P. R. 376.

Where a plaintiff gives notice of discontinuance, and the defendant's costs are taxed, judgment must be signed therefor, in case of non-payment, before execution to enforce payment can be issued: see clause (2). The English practice is different: see *Bolton v. Bolton*, 3 Ch. D. 276.

An order of a Master which stayed an action on payment of costs, was varied by substituting the word "discontinued" for "stayed," to prevent the possibility of the action being again proceeded with: *Anon.*, W. N. 1876, 40; 2 Charl. C. Ca. 38.

Where, on a motion under the Eng. Rule corresponding to Rule 603, the defendant was ordered to pay money into Court as to part of the claim, and was given leave to defend as to the remainder, and the plaintiff afterwards discontinued, the costs were held to be not governed by this Rule, but were in the discretion of the Court under Rule 1130, and plaintiff was given costs up to the time of payment into Court: *Suckling v. Gabb*, 36 W. R. 175.

The rule whereby the plaintiff in a creditor's administration action is precluded from discontinuing his action after judgment does not apply to a debenture holder's action, the reason being that in a creditor's action the Court, by directing in the judgment that the estate shall be applied in due course of administration, takes upon itself the duty of administering the assets, whereas no such direction is contained in the usual judgment in a debenture holder's action: *Re Alpha Co.*, 1903, 1 Ch. 203; and see *Re Rit. & New Hamburg*, 4 O. L. R. 639, *supra*, p. 344.

Discontinuance by Leave.—In a test action, the plaintiff asked for a postponement of the trial, or that an order for discontinuance might be made; the Court held that it could not regard the rights of the plaintiffs in the other actions, but must act as if the plaintiff had not appeared at the trial, and dismissed the action: *Robinson v. Chadwick*, 7 Ch. D. 878.

Where a case had been referred to arbitration, and the arbitrator found in favour of defendant as to all but a small part, leave to discontinue was refused: *Stahlschmidt v. Walford*, 4 Q. B. D. 217; see also *Mattheus v. Antrobus*, 40 L. J. Chy. 80.

On a motion for leave to discontinue, the Court has no jurisdiction to give the plaintiff any costs where the defence, if undisputed, or if it were established, would disentitle the plaintiff to maintain the action: *Lambton v. Parkinson*, 35 W. R. 545; see also *Dicks v. Yates*, 18 Ch. D. 76.

It has been held that, on the application of a plaintiff admitting the defence, a Judge, under this Rule, has jurisdiction to order a stay of all proceedings, and to dispose of the costs: *Musman v. Borst*, 66 L. T. 171; 40 W. R. 352; *Armstrong v. Armstrong*, 9 O. L. R. 14.

Where the action is against two defendants jointly, each defendant is entitled to notice of a motion to discontinue against either of them even though interlocutory judgment may have been signed against one of them: *Jennings v. Cripps* (Divisional Court, 14 Nov., 1904).

Rules
431, 432.
With-
drawal of
defence.

431. A defendant may, with the leave of the Court or a Judge (x), withdraw his defence or counter-claim, or any part thereof, upon such terms as may seem just. Con. Rule 642.

Same in effect as Eng. (1883) R. 290, last clause.

(x) Here the former Con. Rule 642 had "but not otherwise." The omission does not alter the effect of the Rule.

One of the defendants, in an action for the recovery of land, was allowed to withdraw his defence after the action had been in the paper for trial, but had been postponed till another action relating to the same property should be ready for trial, upon the terms of giving to the plaintiffs all the relief to which they could be entitled at the trial, and paying the costs occasioned by the defence, and the costs of a summons for leave to withdraw: *Real & Personal Advance Co. v. McCarthy*, 14 Ch. D. 188. The costs only which were occasioned exclusively by the defence were allowed: *Ib.*

A defence put in fraudulently, and without authority, was allowed to be withdrawn: *Williams v. Preston*, 20 Ch. D. 672.

As to withdrawal of defence of infants, see *Fitzwater v. Waterhouse*, 52 L. J. Chy. 83; *Gardner v. Tapling*, 33 W. R. 473.

18. DISMISSAL OF ACTION FOR WANT OF PROSECUTION.

On failure
to deliver
statement
of claim.

432. If the plaintiff, being bound to deliver a statement of claim, does not deliver the same within the time allowed for that purpose, the defendant may, at the expiration of such time, apply to the Court or a Judge to dismiss the action with costs, for want of prosecution; and on the hearing of such application the Court or a Judge may order the action to be dismissed accordingly, or may make such other order as may seem just. Con. Rule 646.

Same as the Eng. (1883). R. 294.

Rule 243 regulates the time within which the plaintiff is bound to deliver his statement of claim, viz., three months after appearance, unless the defendant has dispensed with its delivery, as he may do under Rule 171. The time by the English Rule is six weeks.

"The expiration of such time": see *Armstrong v. Toronto, etc.*, *Ry.*, 15 P. R. 449, in note to Rules 243 and 353.

The application to dismiss for want of prosecution is made in Chambers. The application may be supported by an affidavit that a statement of claim has not been dispensed with, and has not been delivered, and a certificate of the officer in whose office the action is, that an appearance has been entered by the applicant, with the date of entry.

Where the plaintiff made default in delivering his claim, and had become bankrupt, it was held that notice of motion to dismiss under this Rule must be served upon the trustee in bankruptcy: *Wright v. Swindon Ry. Co.*, 4 Ch. D. 164. In *Higginbottom v. Appaley*, 3 Ch. D. 288, on a motion to dismiss under this Rule, Hall, V.C., gave a

week's time to take further proceedings, observing that each case **Rule 432** must depend upon its own merits. The plaintiff was ordered to pay the costs of the motion. Probably the plaintiff will in general be given a short further time upon payment of costs.

Some only of the defendants cannot have the action dismissed, if, for sufficient reasons, proceedings against other defendants have been delayed, and the applicant ought probably to apply to the plaintiff's solicitor for information as to the state of the cause against the other defendants: *Foley v. Lee*, 12 P. R. 371; see *Ambrose v. Evelyn*, 11 Ch. D. 759.

A defendant can only have the action dismissed as against himself: *Ward v. Ward*, 11 Beav. 159.

It has been said that, if a plaintiff desires to avoid the cost of the hearing of the motion, he should tender to the defendant the costs of the notice, and give the usual undertaking to go on: *Evelyn v. Evelyn*, 13 Ch. D. 138; *Ferguson v. Lee*, 26 W. R. 138; but this is not the practice in Ontario, even where the motion to dismiss is merely for a default under this **Rule**; see note to **Rule 433**. The filing of a statement of claim is no answer to a motion to dismiss: *Napanee Tamworth, etc., Ry. Co. v. McDonnell*, 10 P. R. 525. The filing would be irregular without leave: see **Rule 243**.

Where, before statement of claim, an action was stayed until the plaintiff should give security for costs, and the time for delivery of a statement of claim expired without security having been given, it was held that the stay did not prevent the action from being dismissed under this **Rule**: *La Grange v. McAndrew*, 4 Q. B. D. 210.

A plaintiff was allowed to file a statement of claim after nine years' delay, it being shewn that the delay was owing to the defendant being financially worthless: *Finkle v. Lutz*, 14 P. R. 446.

Where the plaintiff set up a compromise, as a ground for not proceeding, and the defendant disputed it, the question of settlement was ordered to be tried: *Rees v. Carruthers*, 17 P. R. 51.

Where, after the time for delivering a statement of claim had elapsed, an order had been made dismissing an action unless a statement of claim should be delivered within a week, and this was not done, it was held that the action was at an end, the order having neither been complied with, nor appealed against, and an order could not afterwards be made extending the time for delivering the statement: *Whistler v. Hancock*, 3 Q. B. D. 83; see also *King v. Davenport*, 4 Q. B. D. 402; and *Hollender v. Foulkes*, 16 P. R. 225. But if an order to dismiss is made, further time may be given for appealing against that order: *Burke v. Rooney*, 4 C. P. D. 226; *Carter v. Stubbs*, 6 Q. B. D. 116; or if the time has not expired, so that the action is not gone, there is jurisdiction to vary or rescind the order for dismissal on proper grounds: *Wolpely v. Buhl*, 3 Q. B. D. 80, 253; *Carter v. Stubbs*, *supra*. In *Newcombe v. McLuhan*, 11 P. R. 461, the above cases were considered, and it was held that after the action stood dismissed for failure to file a statement of claim by the time named, and judgment was signed dismissing the action, an order could be made under **Rule 353** to vacate the judgment, and further extend the time for delivering the statement of claim. See also notes to **Rule 353**, and *Bank of Minnesota v. Page*, 14 Ont. App. 347.

Where an order is made dismissing an action unless a statement of claim be delivered within a time named, it has been the practice

Rule 432. In Ontario to obtain a further order *ex parte* dismissing the action, showing that the previous order has not been complied with: see *Burns v. Chisholm*, 2 Chy. Ch. 88; but doubt has been cast upon the propriety, or at any rate the necessity, of that course: *Hollender v. Foulkes*, 16 P. R. 225.

It would seem that an order dismissing an action does not take effect until it is drawn up and served; and that the action under the English practice is not dead until that is done: *Metcalf v. British Tea Association*, 46 L. T. 31; but see *Script Phonography v. Gregg*, 59 L. J. Ch. 406.

As to the effect of a peremptory order requiring plaintiff to proceed within a named time, see *Huddcraft v. Larned*, 27 Sol. Jour. 296; *Falck v. Arthelun*, 24 Q. B. D. 174; *Cox v. Holman*, 25 L. J. N. C. 115.

Where an order was made dismissing an action in the event of the plaintiff not complying with an undertaking, it was held that on default the order was absolute, and no further order was necessary: *Crown Corundum Co. v. Logan*, 3 O. L. R. 434 (but the Divisional Court, though affirming the order, declined to deal with that point); *ib.*, and it would probably in such a case be safe to obtain a final order.

The plaintiff sued the indorser of a bill of exchange. The debt was afterwards paid by the acceptor, and the indorser applied to dismiss the action for want of prosecution. Lindley, J., said, "I shall certainly not let the action go on simply to determine who is to pay the costs. All further proceedings in the action to be stayed, the defendant to pay the costs of the writ"; *Anon.*, W. N. 1873, 37; see also *Elliott v. Gardner*, 8 P. R. 409; *Wallace v. Ford*, 1 Chy. Ch. 282.

Though no motion to dismiss is made, the plaintiff cannot regularly proceed without leave: see note to *Rule 243*; but the former practice requiring a Term's notice to be given, where a year has elapsed without a proceeding having been taken, is not continued under *The Judicature Act*: *Beaver v. Boardman*, 9 P. R. 239. For a similar restriction upon moving for judgment: see *Rule 612*.

In England a formal judgment for defendant's costs is signed upon the order for dismissal: Chitty Forms, 189; but in this Province the costs may be recovered under the Judge's order: see *Rule 825 (a)*.

Effect of Dismissal.—The dismissal of an action for want of prosecution is not necessarily a bar to a subsequent action in respect of the same matter: *Re Orrell Colliery & Firebrick Co.*, 12 Ch. D. 681; *Byrne v. Freere*, 2 Moll. 180; *Roberts v. Lucas*, 11 P. R. 3; though made on consent, unless the order is made upon a compromise of the cause of action: *Magnus v. National Bank of Scotland*, 36 W. R. 603; 58 L. T. 617; but the plaintiff is liable to be called on for security for costs in the second action, if the costs of the first are not paid: see *Rule 1198*.

The Court may examine the pleadings, evidence and proceedings at the trial of a former action, and the reports of the reasons given for the judgment, to ascertain what was decided. The dismissal of an action, on the ground that it was prematurely brought, is no bar to another action when time has removed the objection: *Barber v. McCuaig* (2), 31 Ont. 593.

See *Sutton v. Huggins*, W. N. 1875, 235.

433. Except in the cases provided for by Rule 434, if the pleadings are closed six weeks before the commencement of any sittings of the High Court for which the plaintiff might give notice of trial, and he does not give notice of trial therefor, [or if the plaintiff has given notice of trial but does not proceed to trial pursuant to such notice], the action may be dismissed for want of prosecution. Rules 23 June, 1894. 1348.

Rule 433

no failure
to give
notice of
trial.

Not the same as Eng. (1883) R. 36. This is somewhat analogous to the mode of proceeding under section 216 of the C. L. P. Act (R. S. O. 1877, c. 50), but simpler, and corresponds substantially with the former Chancery practice.

The exception referring to Rule 434 is made because this Rule cannot be applied in the case of default in going to trial at the Toronto non-jury sittings: Rule 434 applies in that case.

The words in brackets were inserted by Rule 1348. Prior thereto, where the plaintiff gave notice of trial but neglected to enter the action, the action could not be dismissed; the defendant's remedy was to enter the action himself under Rule 538 (c): *McDougald v. Thomson*, 13 P. R. 256; *Simpson v. Murray*, 13 P. R. 418.

The six weeks is not a time limited for "doing any act" within Rule 353. It, therefore, cannot be abridged under that Rule, and the lapse of this period is an absolute condition precedent to the right of the defendant to give notice of trial: *Saunders v. Pawley*, 14 Q. B. D. 234.

There is a continuing duty on the plaintiff's part to give notice of trial until the case is tried: hence, although he has given a notice, but the trial, for some reason, is postponed, the defendant may move to dismiss under this Rule if the plaintiff makes default in giving notice of trial for any subsequent Assizes: *Chapman v. Smith*, 32 C. P. 555; *Hibernian Bank v. Hughes*, 10 L. R. 1r. 15.

Where a case is made a *remand*, a further notice of trial must be *Remand* given under Rule 544, except in non-jury actions to be tried in Toronto. A case was held to be a *remand* where, by verbal order at the trial, it was "postponed till the Autumn Assizes": *Donovan v. Boulton*, 10 P. R. 52.

Where a new trial has been ordered, and the plaintiff does not give notice of trial pursuant to this Rule, a motion in Chambers to dismiss is the course for defendant to pursue; the Court which ordered the new trial has no jurisdiction in the matter: *Roberts v. French*, 14 R. 210; 72 L. T. 147; 43 W. R. 258.

Where a case is to be tried without a jury, and two Spring or Autumn Sittings are appointed at the place of trial, one for jury, and the other for non-jury cases, the plaintiff may give notice of trial for either Sittings, but is not in default under this Rule by reason of his not giving notice of trial for the earlier Sittings, if it is not the non-jury Sittings: *Leyburn v. Kuoke*; *Leyburn v. Herbert*, 17 P. R. 410.

Where one of several defendants in an action has delivered his defence, and the time for the plaintiff to deliver his reply to such defence has expired, but the plaintiff has, without the knowledge of

Rule 433. that defendant, agreed in writing with the other defendants to extend the time for delivering their defences, that defendant cannot move to dismiss the action as against him for want of prosecution, the pleadings not yet being "closed"; and it was said that a defendant's proper course is to write to the plaintiff's solicitor, and inquire how the action stands as regards the other defendants: *Ambrose v. Evelyn*, 11 Ch. D. 759.

On a motion to dismiss, or that the plaintiff give security for costs, an order was made for the plaintiff to give security for costs, and staying proceedings in the meantime: *Wilmott v. Frechold, etc.*, 23 Sol. Jour. 385; 33 W. R. 554; 52 L. T. 743; and the order was upheld in the special circumstances of that case, but it is not a form of motion which can ordinarily be made.

Motions to
dismiss.

On motion to dismiss, some excuse must be given for the default, the sufficiency of which will depend upon the circumstances of each case. Chy. Gen. Order 276 was held to be applicable to such motions: *Bucke v. Murray*, 9 P. R. 495; and though that Order is not expressly continued in the *Rules* the practice originated under it and acted upon under the original *Rules* will probably be held to apply. That Gen. Order was as follows:

Chy. Order
276.

"276. Where a defendant is entitled to give notice to dismiss, it is not to be sufficient answer to the motion for the plaintiff, after being served with the notice, to take out and serve an order for amending the bill or to file a replication, or undertake to speed the cause; but it shall be necessary for the plaintiff to shew that he has prosecuted the suit with diligence, or that under all the circumstances the bill should not be dismissed."

Though an undertaking to speed the cause is therefore not a sufficient answer to a motion to dismiss for want of prosecution (though it is otherwise in England: *Evelyn v. Evelyn*, 13 Ch. D. 138; *Frasen v. Loc*, 26 W. R. 138), it is still discretionary with the Judge to say whether, under all the circumstances, the action should be dismissed: *Bucke v. Murray, supra*. See also *Napance, Tameorth, etc., Ry. v. McDonnell*, 10 P. R. 525; *Carter v. Barker*, 11 P. R. 1.

The former decisions under the Chancery practice will therefore probably serve as authorities as to what is a sufficient excuse: see cases in Robinson & Joseph's Digest, pp. 2922, *et seq.*; *Finnegan v. Keenan*, 7 P. R. 385; and as to what amounts to waiver of objection to the delay: *Cotton v. Rodgers*, 7 P. R. 423; see also *Miles v. Roe*, 20 C. L. J. 113; 10 P. R. 218.

Where an action was ordered to be dismissed unless notice of trial was given by a specified time, and by mistake of the solicitor's clerk notice was not given, a Judge refused to extend the time, and the Divisional Court refused to interfere: *Gilder v. Morrison*, 30 W. R. 815.

Where the action was brought on a ground for which no action lay, the plaintiff being in default under this *Rule*, indulgence was refused and the action dismissed: *Clarke v. Creighton*, 13 P. R. 113.

An order that the action be dismissed unless notice of trial be given, and action entered for trial within a certain time, was made in *Sierier v. Spearman*, 74 L. T. 132.

In cases where equitable relief is granted upon a condition which the plaintiff fails to comply with, the action may be dismissed, even after judgment: *Hapex v. Elmley*, 30 C. L. J. 574.

434. In actions in the county of York, to be tried without a jury, if the plaintiff does not set down the action for trial within six weeks after the pleadings are closed, and proceed to trial as provided in Rule 542, the action may be dismissed for want of prosecution. *New.*

Rules
434, 435.

In non-jury
cases, York

See notes to Rule 433.

Default must be made both in setting down, and proceeding to trial under Rule 542, before a motion to dismiss can be made: *Toronto Type Foundry Co. v. Tuckett*, 17 P. R. 538.

19. CONSOLIDATION OF ACTIONS.

435. Actions may be consolidated by order of the Court or a Judge in the manner in use in the Superior Courts of Common Law, prior to *The Ontario Judicature Act, 1881*. Con. Rule 652; Rules of 1 January, 1896, 1462.

Consolidation
of
actions.

See Eng. (1883), R. 656.

Consolidation of actions may take place in several ways, and the term is used in different senses.

(1) Actions by same Plaintiff against same Defendant.—If a plaintiff brings two actions against the same defendant, for matters which might properly be combined in one action, and the double proceeding is shewn to be vexatious, a Court of Law, in the exercise of its ordinary power to prevent any abuse of its own process, might consolidate the actions; that is to say, stay proceedings absolutely in one action, and require the plaintiff to include the whole of his claims in the other; and this has been done with costs against the plaintiff: see *Cecil v. Briggs*, 2 T. R. 639; *Anon.*, 1 Chitty's Rep. 709 (n); *Beardsall v. Cheetham*, E. B. & E. 243; 2 Chitty's Archbold, p. 1085 13th ed., *et seq.*; Dan. Pr., 6th ed., 1888; Dan. Forms, 3rd ed., 816; Seton, 5th ed., 700; and may be done under this Rule upon the application of either party: *Martin v. Martin*, 1897, 1 Q. B. 420; 76 L. T. 44.

Several
actions by
the same
plaintiff
against
same
defendant.

Where an action is commenced that covers the same ground as one already existing, together with some further relief, it will be stayed as to the first part: *Morton v. Quick*, 26 W. R. 441; and see *Hamilton v. Hamilton Street Ry. Co.*, 5 O. W. R. 151.

An application to consolidate two actions by the same plaintiff, one for malicious prosecution and the other for salary as a manager, was dismissed by Quain, J., with costs: 1 Chari. Ch. Ca. 127; 60 L. T. Jour. 86.

Where plaintiffs brought an action for the same cause of action as was set up by them in a counter-claim in an action in another Division, it was held that though the case was not strictly within this Rule because the plaintiffs had not brought two actions, yet there is inherent jurisdiction in the Court to prevent undue use of its process, and the plaintiffs' action was stayed till their counter-claim should be disposed of: *Taylor v. Bradford*, 9 P. R. 350.

Where the plaintiffs in a prior pending action, claimed \$200,000, balance due upon a construction contract, and in another action, begun some time afterwards, claimed \$3,000 for goods sold and delivered,

Rule 435. and the cause of action arose before the commencement of the first action, it was held that the two claims should have been made in one action, and it was a proper exercise of discretion to refuse judgment, and leave the question till the determination of the first action, in which a large set-off was claimed, since, in the result of both actions, nothing might be due to the plaintiffs: *Connec v. C. P. R.*, No. 2, 11 P. R. 222.

Several
actions
by same
plaintiff
against
different
defendants

(2) Actions by same Plaintiff against different Defendants.—But the term consolidation is more frequently used in a different sense. Where actions are brought by the same plaintiff against different defendants, but the questions in dispute in all are substantially the same, the Court, if the defendants apply, will stay proceedings in all the actions except one, until that one action has been determined, upon the terms that the various defendants agree to be bound by the event of the action which proceeds. This practice has been applied to the case of actions against several underwriters upon policies of insurance: *Hollingsworth v. Broderick*, 4 A. & E. 646 (see the form of order in that case, Chitty Forms, 9th ed., p. 788); actions against guarantors of separate parts of a debt by separate instruments: *Sharp v. Lethbridge*, 1 M. & G. 37; or against joint and several obligors of a bond conditioned for the good behaviour of another person: *Anderson v. Towgood*, 1 Q. B. 245; *Essex v. Wright*, 13 P. R. 474; or against principal and sureties on a reprieve bond: *Bartlett v. Bartlett*, 4 Scott, N. B. 779; or against the several members liable upon a mutual insurance policy: *Lewis v. Barker*, 4 C. B. N. S. 330; to several actions against different defendants for trespass in refusing to pay tolls, where the main issue, as to the right to tolls, was common to all the actions: *Vaughan Road Co. v. Fisher*, 14 P. R. 340; and to several actions in respect to the publishing of the same libel in different newspapers: *Colledge v. Pike*, 36 L. T. 124; in which last case the plaintiff was given liberty, if dissatisfied with the verdict, to select another action for trial.

In *Eddison v. Dalziel*, 9 Times, 334, three such actions for libel by the same plaintiff were consolidated, though two defendants pleaded justification, and the third an apology, and payment into Court. So, where a number of actions against different defendants may be reduced to classes, those of each class raising the same questions, the Court may allow one action of each class to proceed, and stay the rest: *Spers v. Pickersgill*, 27 L. J. Ex. 5.

This course of staying all but one of several actions, will only be allowed where the questions in dispute are substantially the same. Where questions, raised by defendants of fraud and misrepresentation would necessarily be different, and depend on different evidence, a stay was refused: *Niagara Grape Co. v. Nelles*, 13 P. R. 179, 278, and see *Williams v. Raleigh*, 14 P. R. 50.

Libel under
R. S. C. C.
68, s. 14.

Under R. S. C. C. 68, s. 11, actions for the same libel may be consolidated so that they shall be tried together. If the plaintiff recovers damages, the same are to be assessed in one sum, and apportioned by the jury against the different defendants: *Ibid.* 5 (2). See Imp. Act. 51-2 Vict. c. 64.

Such a motion to consolidate should not be made until statements of claim have been delivered from which it may be seen whether the actions are for the same libel: *Crosley v. Ferguson*, 33 C. L. J. 461; but it has been made before the delivery of the defences: *Stone v. Press Assoc.*, 497, 2 Q. B. 159; 77 L. T. 41.

The order, when made on the application of the defendant, does not require the plaintiff's consent: *Hollingsworth v. Brodrick*, 4 A. & E. 516. It binds the defendants in the actions which are stayed to abide the event of the one which proceeds; but it has been held not to bind the plaintiff to do so; and that, if the result of the first action is against him, he may proceed with another: *Dople v. Anderson*, 1 A. & E. 125; *Dople v. Douglas*, 4 B. & Ad. 514. But see *Amos v. Chadwick*, 9 Ch. D. 450; and *Bennett v. Lord Burg.*, 5 C. P. D. 330. A consolidation order may be obtained at any time after each action has become a *lis pendens*, i. e., when the writ has been served: *The Helenslea*, 30 W. R. 616; see *Hollingsworth v. Brodrick*, *supra*; *Ray v. Sherwood*, 1 Curt. 173, 193; 1 Moo. P. C. 353; but in the case of several actions for the same ill, see *Crossley v. Ferguson*, *supra*.

The Court may re-open the consolidation order, and allow a second action to be defended, notwithstanding that the plaintiff has succeeded in the first action. But it will require a very strong case to induce it to do so. Probably a case must be shown at least as strong as would be required to procure a new trial; see *Foster v. Alcock*, 3 Bing. N. C. 896; *Cohen v. Bullock*, 5 Taunt. 175.

Re-opening consolidation.

(3) **Actions by Several Plaintiffs against the same Defendant.**—Although consolidation, properly so called, is obtained at the instance of several defendants, where several defendants are sued by the same plaintiffs, a somewhat analogous proceeding has been adopted in the converse case, of several plaintiffs bringing several actions against the same defendant, to recover similar relief in reference to the same transactions. Mallus, V.C., at the instance of the plaintiffs, enlarged the time for taking any further steps in all the actions but one, until that one should be tried; *Amos v. Chadwick*, 4 Ch. D. 830; and his judgment was affirmed on appeal; 9 Ch. D. 450; see also *Hodson v. Richardson*, 3 Hurr. 1478. A like course was taken in *Bennett v. Lord Burg.*, 5 C. P. D. 330, where thirty-eight actions had been brought, and, on the plaintiff's application, the proceedings in thirty-seven were stayed until the trial of the thirty-eighth as a test action, though it was said that the incidents would or might vary in each case, and there would be differences of proof in each, but the gist of the charge was the same in all. See also *Fulmer v. Hulse*, 5 O. W. R. 589, 591, 572.

Where the issues in several actions are not the same, there cannot be a consolidation of them. Where, therefore, several actions had been brought against a municipal corporation for damages arising from the negligent construction of drains; consolidation was refused, as each plaintiff would have to prove that the negligence resulted in injury to his own particular land; *Williams v. Rutley*, 14 P. R. 50; and it was doubted whether a common defendant could obtain a consolidation order against the will of the several plaintiffs; *Id.*; but where husband and wife brought separate actions against the same defendant for damages arising out of the same act of alleged negligence, they were ordered to be consolidated; *Napex v. Young*, 16 P. R. 254.

Where an action is ordered to be tried and the others are directed to abide the result, the judgment in the test action will not bind the parties in the other actions, unless the action has been tried out on its merits, upon evidence; *Amos v. Chadwick*, 9 Ch. D. 450. Where, therefore, the plaintiffs in the test action, when it came on for trial, declined to proceed, and judgment was then given for defendants, it was held that, notwithstanding the Rule corresponding to Ord. Rule

Rule 435. 779, the Judge had jurisdiction to substitute another of the actions as a test action: *Ib.* In the absence of agreement, the plaintiff, in an action thus constituted a test action, has no right to be indemnified against costs by the other plaintiffs: *Ib.*

Where, on a test action coming on for trial, the plaintiff was not prepared to proceed, and applied for a postponement, to which, under the circumstances so far as his own interest was concerned, he was not entitled; it was held that the Court could not regard the rights of the plaintiffs in the other actions, and must dismiss the action with costs: *Robinson v. Chudwick*, 7 Ch. D. 578. See notes to *Rules* 450, and 546.

A judgment on the merits in the test action will not preclude an appeal in any of the other actions, unless there is an agreement that the decision in one is to be final in all: *Coutts v. Dodds*, 16 P. R. 273.

Cross
actions.

(4) Cross Actions.—A fourth kind of consolidation is where there are cross actions between the same parties, arising out of the same matter, and the Court stays one, directing the plaintiff in it to bring forward his case by way of defence, set-off or counter-claim in the other action. In such case the party on whom the onus of proof lies is given the conduct of the proceedings, by being directed to proceed with his action: *Thomson v. S. E. Ry. Co.*, 9 Q. B. D. 320; see also *The Never Despair*, 9 P. D. 34; *Girvin v. Burke*, 13 P. R. 216.

An action for breach of an agreement and fraud in the Ex. D., and a cross action for specific performance in the Ch. D., were ordered to be consolidated in the latter action: *Holmes v. Hervey*, 25 W. R. 80.

Where the plaintiff brought an action for an account in one Division, and the defendant brought an action for a balance due on such accounts in another, the latter action was stayed on the defendant's application: *Betholl v. United Stock Ex.*, W. N. 1886, 10.

Separate Actions between Different Parties.—In *Smith v. Whichcord*, 24 W. R. 400; separate actions between different parties relating to the same subject were consolidated; but in *Ryan v. Cameron*, 16 P. R. 235, an application to consolidate was refused.

Though consolidation is refused, a trial of the actions at the same time may sometimes be had, where that course will be convenient, and a saving of expense: *Ib.*

Conduct
of consoli-
dated
action.

Conduct of Consolidated Actions.—Where two actions commenced on the same day were consolidated, and a difference of opinion arose between the plaintiffs as to the conduct of the action, the plaintiffs who took the first steps towards severance were made defendants, and the conduct of the cause was given to the other plaintiffs, though their claim was the smaller in amount: *Holden v. Silkstone & Dods-worth Coal & Iron Co.*, 30 W. R. 98.

There is no fixed rule that the action last begun is to be stayed: *Thomson v. S. E. Ry. Co.*, 30 W. R. 537; 46 L. T. 513; *Miller v. Confederation Life, etc.*, 11 P. R. 211; *Seton*, 706.

The plaintiff in the first action will not be given the conduct if his action is defective: *Re McRae*, 25 Ch. D. 16.

In determining who is to have the conduct of a consolidation of two cross actions, the main *indicia* to be regarded are, which action was first begun, upon whom does the chief burden of proof lie, and which action is the more comprehensive in its scope: *Girvin v. Burke*, 13 P. R. 216. **Rule 436.**

As to the conduct of several administration actions after their consolidation: see notes to *Rules* 203, 948, 951.

In Master's Office.—The Master in Ordinary has no jurisdiction to consolidate actions in which judgments are entered, and under which separate references are pending in his office: *Boswell v. Grant*, 11 P. R. 376.

Practice.—The application is to be made usually in Chambers: see *Smith v. Whichcord*, 24 W. R. 900; *Chitty's Arch.*, 13th ed., 1087; but occasion for consolidation may arise in Court, e.g., on motion for an injunction.

"Court or Judge." These words confer jurisdiction on the Master in Chambers, or other officer having like jurisdiction: see *Rule* 6 (a).

An application to consolidate several actions for libel, against different newspapers, was granted before the delivery of defences: *Stone v. Press Assoc.*, 1897, 2 Q. B. 159; 77 L. T. 41; but *semble*, it should not be made until statements of claim are delivered: see *Crossley v. Ferguson*, and other cases, *supra*, p. 640.

Place of Trial.—Where cross-actions with different places of trial named are consolidated, the place of trial will be ordered as the balance of convenience requires: *Gonce v. Leitch*, 11 P. R. 255.

20. COMPOUNDING PENAL ACTIONS.

436. Leave to compound a penal action may be given, but in cases where part of the penalty goes to the Crown notice shall first be given to the proper officer. Con. Rule 643. See R. S. O. c. 90. Leave to compound penal actions.

Taken from Rule T. T., 1856, 95.

By 18 Eliz., c. 5, s. 3 (now R. S. O. 1897, c. 324, s. 29), no penal action by a common informer can be compromised without the leave of the Court.

The words "proper officer," in this *Rule*, do not refer to an officer of the Court, but to the proper officer of the Crown, viz.: the Attorney-General.

Where the Crown is concerned, the consent of the Attorney-General must be procured: *Howard v. Sowerby*, 1 Taunt. 103. Leave is not necessary in actions by the party aggrieved: *Kirkham v. Wheeley*, 1 Salk. 30. It is entirely in the discretion of the Court to grant it, or not: *Maughan v. Walker*, 5 T. R. 98; *Sheldon v. Mumford*, 5 Taunt. 268. Where the sum offered is so small as to indicate collusion, leave will be refused: *Wood v. Cassin*, 2 W. Bl. 1157. Leave will not be granted until after the statement of defence: *Rex v. Collier*, 2 Dowl. 481; and see *Rex v. Crisp*, 1 B. & Al. 282.

Leave was given to compromise a penal action brought under 32 Hen. viii., c. 8, for buying pretended titles, on paying the Crown's share into Court: *May v. t. v. Pettrick*, 5 O. S. 77.

Rules

437, 438. A promise founded on the compromise of a penal action without the leave of the Court is void: *Hart v. Meyers*, 7 U. C. Q. B. 416 and see *Bell v. Riddell*, 10 Ont. App. 544.

Where
action by
informer
will lie.

An action for a penalty imposed by a statute cannot be brought by a common informer, unless the statute imposing the penalty so provides, either expressly, or by implication: *Bradlaugh v. Clarke*, 8 A. C. Cas. 637; 48 L. T. 681; 52 L. J. Q. B. 505.

Where the statute does not authorize an action by a common informer, the penalty can only be recovered in a proceeding at the instance of the Crown: *Ib.*; but see *Shrigley v. Taylor*, 4 Ont. 396.

An action to recover a penalty cannot be brought by an infant or his next friend; it must be brought by the informer in person, or by his solicitor: *Garrett v. Roberts*, 10 Ont. App. 650.

The Court refused to set aside a judgment of *non pros.* regularly signed, in a penal action: *McChaugue v. McLeod*, 8 U. C. L. J. 233; 3 P. R. 33.

Remission
of penalties.

The Court or a Judge, and the Lieutenant-Governor in Council, have now power to remit penalties imposed by any Act of the Province of Ontario, either wholly, or in part: see R. S. O. c. 108, ss. 1, 3. They have, however, no power to remit costs incurred up to the time of the remission: *Ib.*, s. 4.

Order for
compounding
fine.

437. The order for compounding shall express therein that the defendant thereby undertakes to pay the sum for which the Court has given him leave to compound such action. Con. Rule 644.

Taken from Rule T. T. 1856, 96.

The payment of such sum might formerly be enforced by attachment: *Regina v. Clifton*, 5 T. R. 257; but see now R. S. O. c. 80, ss. 5, 7.

Queen's
proportion
of composition.

438. Where leave is given to compound, the proportion of the Crown of the composition shall, unless otherwise ordered, be paid into the Accountant's Office, for the use of [His] Majesty. Con. Rule 645.

Taken from Rule T. T. 1856, 97.

See *Brown v. Bailey*, 4 Burr. 1929. Presumably the money should be paid into the Accountant's office in the same manner as other moneys are paid into Court: see *Rules* 107, *et seq.* By the order authorizing the action to be compounded, or by some subsequent order, provision should be made for payment out of the money to the Provincial Treasurer, or other public officer entitled to receive the same.

CHAPTER VII.

DISCOVERY.

1. EXAMINATION FOR DISCOVERY, 439-462.
2. PRODUCTION AND INSPECTION OF DOCUMENTS, 463-474.
3. MISCELLANEOUS, 475-477.

1. EXAMINATION FOR DISCOVERY.

An action for discovery may still be brought, where necessary, but it can rarely now be necessary. Its aid in an action in Ontario will not be necessary, as discovery may under the *Rules* be obtained in such action; an action for discovery in aid of proceedings in a foreign Court will not lie: *Dreyfus v. Peruvian, etc.*, 41 Ch. D. 151.

The following are instances of actions for discovery: *Maswath v. Starkie*, W. N. 1876, 8; *Reiner v. Salisbury*, 2 Ch. D. 378; *Orr v. Diaper*, 4 Ch. D. 92. In an action by the Attorney-General at the suit of a relator, the Crown, represented by the Attorney-General, has the same right of discovery as a subject has in an ordinary action: *Atty.-Gen. v. Newcastle*, 1897, 2 Q. B. 384; but the Crown is not bound to give discovery: *Id.* See note to *Rules* 238 and 929.

In general, discovery is obtained by interlocutory proceedings, as ancillary to the main object of an action, but an action for discovery may, in a proper case, still be brought: *Orr v. Diaper*, 4 Ch. D. 92; *Anderson v. Bank of British Columbia*, 2 Ch. D. 644. For the grounds of objection to such an action: see Maddock's Chy. Pr., 3rd ed., 268.

The methods prescribed by the *Rules* for obtaining discovery are: ^{Discovery} ^{General} ^{Rules.} Firstly, by examination of the adverse party, and, in the case of corporation, of their officers or servants: *Rules* 439-461; Secondly, by the production under oath for inspection of the documents in the possession of the adverse party: *Rules* 463-477; Thirdly, in actions to recover damages for personal injury, by an examination by a duly qualified medical practitioner of the injured person: *Rule* 462; and Fourthly, by the inspection by the party and his witnesses of any real or personal property, the inspection of which may be material to the proper determination of the question in dispute: *Rule* 571.

The *Judicature Act* has made no alteration in the right of the parties to discovery by examination: see *Atty.-Gen. v. Gaskill*, 20 Ch. D. 719; also *Hunnings v. Williamson*, 10 Q. B. D. 459; see also *Jones v. Jones*, 22 Q. B. D. 425; *Martin v. Treacher*, 16 Q. B. D. 507; *Malcolm v. Race*, 16 P. R. 330; *Whitely v. Barley*, 56 L. J. Q. B. 312; *Derbyshire v. Mayor of Derby*, 1896, 2 Q. B. 53, 297; 74 L. T. 747; 77 L. T. 107; *Johnston v. London and Paris Exchange*, 6 O. L. R. 49.

Therefore there is no right to examine a defendant for discovery in an action touching an alleged champertous agreement: *Wellbourne v. discovery.* ^{Where no right to}

Rule 439a. *C. P. Ry. Co.*, 16 P. R. 343; nor in an action for criminal conversation with the plaintiff's wife: *Mulholland v. Misener*, 17 P. R. 132; *Taylor v. Neil*, *Id.* 134; *Fleury v. Campbell*, 18 P. R. 110; (though an examination was allowed on a claim for damages for alienation of the affections and loss of the society of the wife in *Taylor v. Neil*, *supra*); but see *Lellis v. Lambert*, 24 Ont. App. p. 664, and *Fleury v. Campbell*, *supra*; nor in an action against a tenant for double value under R. S. O. c. 342, s. 20: *Hobbs v. Hudson*, 25 Q. B. D. 232; 62 L. T. 764; 63 L. T. 215; nor in an action based on a forfeiture or an alleged forfeiture: *Mazborough v. Whitcomb*, *etc.*, 1897, 2 Q. B. 111; 76 L. T. 765, overruling *Seaward v. Dennington*, 44 W. R. 696; nor in an action under the *Imp. Trade Mark Act*, 1883 (46 & 47 Vict. c. 57), s. 58, which imposes the forfeiture of a sum not exceeding £50, to the registered proprietor for each offence, to be recovered as a simple contract debt: *Saunders v. Wiel*, 1892, 2 Q. B. 18, 321; or generally in an action for penalties: *Huntings v. Williamson*, and other cases, *supra*; *Rose v. Croden*, 3 O. L. R. 384; nor in an action for double tolls under R. S. O. c. 194, s. 44, which is an action for penalties: *Pickrel, etc., Co. v. Moore*, 17 P. R. 287; see also *Pickrel R. Imp. Co. v. C. Beck, & Co.*, 5 O. W. R. 184; but in an action to recover a penalty for violation of *The Alien Labour Act*, 60-61 V. c. 11 (*D.*), *The Canada Evidence Act*, 56 V. c. 31, s. 2, was held (*Rose, J.*, dissenting), to authorize examination for discovery: *Reg. v. Fox*, 18 P. R. 343. Neither can discovery be had in an action to recover damages, on the ground that the defendant had been guilty of maintenance: *Hopkins v. Smith*, 1 O. L. R. 659. See also *Johnston v. London & Paris Exchange* in note to *Rule 463*.

But an action for the amount payable under the Copyright Act, 1842, for each representation of a copyright musical publication was held not to be an action for penalties (such amounts being fixed by way of compensation to the plaintiff), and therefore discovery was allowed: *Adams v. Batley*, 18 Q. B. D. 625. Discovery may also be had in an action for an injunction, though the defendant may incur a liability for a penalty, in the event of disobedience of the injunction: *The Derbyshire County Council v. Derby*, 1896, A. C. 315; 74 L. T. 747.

Examination for discovery.

439. A party to an action or issue, whether plaintiff or defendant, may, without order, be orally examined before the trial touching the matters in question by any party adverse in interest, and may be compelled to attend and testify in the same manner, upon the same terms and subject to the same rules of examination [of] a witness except as hereinafter provided. Rule 1250 of 20 June, 1903.

The word "of" in brackets should probably be read "as": see next *Rule*.

Where discovery from a corporation is sought.

439a. (1) In the case of a corporation any officer or servant of such corporation may, without order, be orally examined before the trial touching the matters in question by any party adverse in interest to the corporation, and may be compelled to attend and testify in the same manner and upon the

same terms and subject to the same rules of examination as **Rule 439a**.
a witness except as hereinafter provided; but such examination shall not be used as evidence at the trial.

(2) After the examination of an officer or servant of a corporation a party shall not be at liberty to examine any other officer or servant without an order of the Court or a Judge.
Rule 1250 of 20 June, 1903.

Based upon Chy. O. 138, and R. S. O. 1877, c. 50, s. 150.

Since **Rule 439a** a past officer (formerly examinable), cannot be examined: *Cantin v. The News*, 8 O. L. R. 531, and besides an "officer" (alone, formerly examinable), a "servant" may now be examined: see formerly *Morrison v. G. T. Ry. Co.*, 5 O. L. R. 38.

The former authorities (see *Holmsted and Langton Jud. Act*, 2nd ed., pp. 611, *et seq.*), upon the question as to whether a person is an officer and so examinable, or is merely a servant, would not seem to be any longer of moment.

Scope of Rule.—The right to examine under this *Rule* is subject to the exception above mentioned, of actions in which there is no right to discovery: see note to preceding *Rule 439*.

An action for recovery of land is not one of the exceptions. The defendant in such an action is liable to be examined by the plaintiff for discovery: *Lucell v. Kennedy*, 8 App. Cas. 217; 48 L. T. 585; reversing S. C., 20 Ch. D. 484; 46 L. T. 752; and see under the dissimilar Eng. Rule, *Phillips v. Phillips*, 40 L. T. 821; and the fact that a defendant pleads that he is a "purchaser for value without notice" affords no ground for resisting discovery: *Ind v. Emmerson*, 56 L. T. 778; although this was formerly a good plea to a bill for discovery. An examination for discovery may be had in an action for breach of promise of marriage: *McLaughlin v. Carroll*, 4 C. L. T. 498; and see R. S. O. c. 73, s. 6; and in an interpleader issue: *Canada Perm. B. S. v. Forest*, 6 P. R. 254; and see *White v. Watts*, 31 L. J. C. P. 381, and *Rule 463*, note.

"Action or Issue."—A petition authorized under the Rules would appear to be an "action": see *Jud. Act*, s. 2, and *Re Credit Co.*, 11 Ch. D. 256; *Re Haddon's Patent*, 51 L. T. 190; also interpleader proceedings: *Rule 6 (c)*.

"Before the Trial."—These words do not prevent the examination of a party after a trial which proves abortive, by reason of disagreement of the jury, and before a second trial, if the party has not already been examined. Such a trial is not a trial within the meaning of this *Rule*: *Clarke v. Rutherford*, 1 O. L. R. 275.

Parties Adverse in Interest.—Under the Eng. (1882) R. 343, Who may providing for the examination of the "opposite party or parties," it has been held that a party added by the defendant in a counter-claim, is not an opposite party as regards the plaintiff: *Wolloy v. Kilby*, 15 Ch. D. 162; but see *Bradley v. Clark*, 9 P. R. 410; 19 C. L. J. 194. But a third party, who has been noticed by the defendant under *Rule 204*, and has appeared and obtained leave to defend, is entitled to examine the plaintiff in the same manner as an original defendant: *McIlkster v. Bishop of Rochester*, 5 C. P. D. 194; *Eden*

Rule 439a. *v. Weardale Iron Co.*, 34 Ch. D. 223; and the plaintiff is entitled to examine him: *Bradley v. Clark*, 9 P. R. 410; 19 C. L. J. 193.

An official liquidator, as an officer of the Court, cannot be called upon to make discovery, unless he is representatively in the position of an adverse litigant to the party requiring discovery: *Henderson v. Blain*, 14 P. R. 308; *Re Barnes's Banking Co.*, L. R. 2 Chy. 350; *Re Contract Corporation*, L. R. 7 Chy. 207; *Re Mutual Soc.*, 22 Ch. D. 714; *Re Alexandra Palace Co.*, 16 Ch. D. 58.

A defendant who has not appeared, and to whom a statement of claim has not been delivered, is examinable by the plaintiff: *Bulst v. Currie*, 33 C. L. J. 622; 17 C. L. T. 335; but he is not entitled to examine the plaintiff: see *Ashley v. Brenton*, 13 P. R. 98.

If the issues between co-defendants are material to the case of the plaintiff, or to the character of the relief he seeks, he may examine a defendant upon them, though there is no issue between that defendant and himself: *Alexander v. Diamond*, 9 P. R. 274. A defendant whose interest is identical with that of the plaintiff is a party adverse in point of interest to his co-defendant, and may be examined by such co-defendant; and where the plaintiff's solicitor is present at such examination the depositions may be read against the plaintiff: *Moore v. Boyd*, 8 P. R. 413. A disclaiming defendant charged with complicity in a fraud was held to be properly questioned as to the fraud: *McFarland v. McFarland*, 9 P. R. 73.

A necessary party to an action may be examined for discovery, though no relief is asked against him: *Spokes v. The Grosvenor & W. E. R. T. Hotel*, 1897, 2 Q. B. 124; 76 L. T. 679.

Infants.—As a general rule an infant suing by next friend may in the absence of special incapacity, be examined for discovery before trial in the same way as an adult: *Arnold v. Playter*, 14 P. R. 399; distinguishing *Mayor v. Collins*, 24 Q. B. D. 361; approved in *Flett v. Coulter*, 4 O. L. R. 714; see also *Curtis v. Mundy*, 1892, 2 Q. B. 178.

An order for the examination of an infant for discovery should not give the examiner discretion to determine the capacity of the infant. The proper mode of raising the question as to the infant's capacity is by motion to set aside the appointment, or if there is not time for that, then upon a motion to commit for non-attendance, so that the question may be considered by the Court itself: *Flett v. Coulter*, 4 O. L. R. 714.

Officers, etc., of Corporations.—Under the present Ont. *Rule 439*, one present officer, or servant, of a company party may be examined without special order. If on his examination it turns out that he does not possess the necessary information, leave to examine others may be applied for; and it is altogether within the discretion of the Court whether another officer, or servant, should be examined: see clause (2); *Dawson v. London St. Rn.*, 18 P. R. 223.

It is reasonable and convenient that the corporation should suggest for examination the officer or servant best qualified to give the desired information, who should prepare himself for obtaining knowledge of all relevant facts: *Clarkson v. Bank of Hamilton*, 9 O. L. R. 317.

Where the plaintiff sued "The Tanners' Association," a syndicate, not incorporated, made up of a number of trading partnerships and incorporated companies, and one of the companies appeared and defended in its own name, "sued as the Tanners' Association," it was held that the agent of the syndicate could not be examined as

an officer of the Association, because it was not a corporation, nor of **Rule 439a**, the Company defending, because he was not its officer: *Ahrens v. Tanners' Association*, 6 O. L. R. 63.

An auditor may, or may not, be an officer of a company. *Prima facie* he is not: *Re Western Cos., etc., Co.*, 45 W. R. 418.

The Medical Health Officer of a municipality has been held not to be an officer examinable: *Coleman v. Toronto*, 15 P. R. 27, 125; *Forsyth v. Cuniff*, 20 Ont. 478 (except when the corporation is being sued in respect of anything done by such officer: *Coleman v. Toronto*, *supra*; *Odell v. Ottawa*, 12 P. R. 446); nor surveyors usually employed by a municipality, but not formally appointed officers thereof: *Meek v. Yarmouth*, 9 C. L. T. 373.

In the case of a society which consisted of a head office, called the "Head Camp," and a number of local branches, called "subordinate camps," the clerk of a subordinate camp was held to be an officer of the society and examinable: *Headhead v. Woodmen of the World*, 9 O. L. R. 321.

Under the former practice an order was made to examine an architect of defendants in an action for price of work and materials in erecting a building, where defendants themselves could give no information: *Smith v. Clarke*, 12 P. R. 217; and a local agent of an insurance company who procured the application for the insurance in question in the action: *Hartnell v. Canada Mutual Aid Co.*, 12 P. R. 401; *Garing v. London Mutual Fire Ins. Co.*, 10 P. R. 642.

An officer of a company called as a witness at the first trial of an action may, pending a second trial, be examined under this **Rule**: see *Leitch v. Grand Trunk Ry. Co.*, 12 P. R. 571.

An objection that the person sought to be examined is not an officer, should be taken at the outset when it is sought to examine him, and cannot be taken on taxation only: *Township of Logan v. Kirk*, 14 P. R. 130.

Where a corporation tenders one of its officers who is a solicitor, to make discovery on its behalf, the privilege of a solicitor cannot be claimed, *scilicet*, where the opposite party selects such person for examination: *Siransan v. Quirk*, 5 C. P. D. 106; *Salford v. Leroy*, 24 Q. B. D. 695.

As to the time for making the examination: see **Rule 424**.

An order for the examination of an officer residing in a foreign country of a foreign corporation which had assumed to the jurisdiction, was refused in *Perrin v. Algoma*, 8 O. L. R. 634.

How Attendance Procured.—See **Rules 443**, to 447.

Ordinarily an appointment is obtained from the Examiner: **Rule 443**, and a copy served with a subpoena; and the party must be paid proper witness fees: *McMurray v. G. T. Ry.*, 3 Chy. Ch. 130; *Fardon v. Fardon*, 7 P. R. 439. A subpoena dated prior to the time when the party issuing it was entitled to examine the party served therewith, is irregular: *McMurray v. G. T. Ry.* *supra*. The solicitor of the party to be examined should also be served with a copy of the examiner's appointment: *Faucher v. Boulton*, 12 Gr. 437.

The solicitor of the party to be examined is entitled to forty-eight hours' notice of the examination: **Rule 446**, but the party himself, where he has a solicitor, is only entitled to reasonable notice according to circumstances: *Wilson v. Cairn*, 19 C. L. J. 140; 3 C. L. T.

Attendance for examination how obtained

Rule 439a. 216; *Bolkow v. Foster*, 7 P. R. 388; see *Re N. Wheel Ermouth Mining Co.*, 31 Beav. 628; and *Lanackey v. Can. Pacific Ry. Co.*, 4 C. L. T. 93; but where a party who has no solicitor is required to attend, he should have forty-eight hours' notice: *Watson v. Ham*, 1 Chy. Ch. 293.

Where the party to be examined is a resident out of the jurisdiction, see *infra*, and *Rule 477*.

Where a party is subpoenaed, with others, for examination at the same hour, he is bound to wait until he can be examined, and if he depart before examination he may be ordered to attend again at his own expense: *Campbell v. Scott*, 5 O. L. R. 233. Where a party attends voluntarily for examination and submits to be sworn, he cannot refuse to answer proper questions because he has not been subpoenaed: *Cooke v. Wilson*, 3 O. L. R. 299.

Service may also be effected, as provided by *Rule 447*, on the solicitor of the party to be examined: see that *Rule*.

Service on the solicitor of a corporation is not sufficient service on the officer sought to be examined; and an order will not be made for substitutional service upon an officer of a litigant corporation, of the subpoena and appointment: *Mills v. Mercer Co.*, 15 P. R. 274.

Abandonment of order.

A party taking out an order to examine and failing to appear on an appointment thereunder, loses the benefit of the order, and must obtain a new one: *Ferguson v. Elliott*, 7 P. R. 7. When an examination is adjourned *sine die*, re-service of an appointment and payment of conduct money is necessary in order to compel attendance: *Whitchead v. Harte* (Mr. Dalton, 22nd June, 1882), *Globe*.

Adjournment of examination.

So where an examination is adjourned for further production of documents disclosed on the examination, the party to be examined is entitled to further witness fees for attendance on a subsequent day: *Chamberlain v. Thicotte*, 11 C. L. T. 53; and he is compellable to re-attend upon being paid his proper fees, although he has signed the depositions, and does not consent to the adjournment: *Re Metropolitan Brush Co.*, 51 L. T. 816; 54 L. J. Chy. 253.

Parties out of Ontario.

Party Out of Ontario.—Where a party to be examined is resident out of Ontario, even though temporarily within Ontario, he can only be examined pursuant to a special order made under *Rule 477*: *Connolly v. Dowd*, 18 P. R. 38; *Cox v. Prior*, 18 P. R. 492; he cannot be compelled to attend by being served under *Rules 439* and *443*, or *447*, without such an order: *Id.* The former cases of *Bolkow v. Foster*, 7 P. R. 388; *Smith v. Greay*, 11 P. R. 345; *Comstock v. Harris*, 12 P. R. 17; *Parker v. Meridon*, 7 C. L. T. 112; are now inapplicable owing to changes in the *Rules*.

Where a party resides in Quebec a subpoena requiring his attendance for examination in Ontario might formerly be ordered to issue under *Con. Stat. Can.*, c. 79, s. 4: *Moffat v. Prentice*, 6 P. R. 33; *Bank of British North America v. Eddy*, 19 C. L. J. 192; and see *Morell v. Morrison*, 6 P. R. 219; but such an order was not granted *ex parte*: *Moffat v. Prentice*, *supra*; and see *Dowalt v. Hughitt*, 7 P. R. 323. Where considered necessary, an order for a subpoena may probably still be made, or contained in an order made under *Rule 477*, or a commission may be directed: see *Stratford v. G. W. Ry. Co.*, 6 P. R. 91.

Ordinarily, it is probable that it will be sufficient if the order directs attendance, upon service of a copy of the order and of the appointment of the Examiner upon the solicitor of the party: see *Rule 477*.

The party may doubtless, as formerly, when a subpoena was granted, be compelled to attend at such place as in the opinion of the Court is most convenient, and not necessarily the nearest to his place of abode: *Smith v. Babcock*, 9 P. R. 97; *Bank of B. N. A. v. Eddy*, 9 P. R. 396. **Rule 439a.**

A Special Examiner must, by the order, be appointed to take the examination, or a commission may be issued: *Banque Franco-Egyptienne v. Lutscher*, W. N. 1879, 183; 41 L. T. 468; 28 W. R. 133; see also *Nadin v. Bassett*, 25 Ch. D. 21; but there is no authority to proceed without an order, and by subpoena only: see *Bank of B. N. A. v. Eddy*, 9 P. R. p. 390; *Connolly v. Dowd*, 18 P. R. 38.

Where such an order has been made, attendance will be compelled in such manner as may be directed by the order. If a commission is issued, attendance may be compelled as in the case of a commission for examination of a witness.

See also *Rule 477*, and notes.

Vacation.—Before the passing of clause (3) of *Rule 439* (now *Rule 439 b*), it was held that a party was bound to attend for examination in vacation: *Hogaboam v. Cox*, 15 P. R. 23, 127, and notes to *Rule 9*. **Examination in vacation.**

Where a motion for an injunction is pending in vacation the Master in Chambers has no jurisdiction to authorize an examination of witnesses in support of the motion to be taken in vacation, the motion and all pertaining to it being within the jurisdiction of the Court: *Saskatchewan L. & H. Co. v. Leadley*, (before Meredith, C.J., C. P., 11th September, 1903), but *semble*, the Master in Chambers would have jurisdiction to order an examination for discovery in vacation.

Place of Examination.—The Examination must usually be had before a Local Registrar, Local Master, or Deputy Clerk of the Crown, or Special Examiner, in the county where the party to be examined resides: *Rule 443*; but for special reasons, to be shown on an application in Chambers, he may be ordered to attend elsewhere: *Rule 444*; *Gallagher v. Gairdner*, 2 Chy. Ch. 480; *McDermid v. McDermid*, 1b, 371; *Campbell v. Tucker*, 7 P. R. 135; *Kahn v. Redford*, 3 Chy. Ch. 55; and note as to this case *Cooper's Digest*, 1873, p. 111. **Place of examination.**

The Examination.—The Examiner's office is not a public Court, and he has a discretion which may be reviewed by the Court, as to the admission or exclusion of persons who desire to be present at an examination: *Re Western of Canada O. L. & W. Co.*, 6 Ch. D. 166; *Merchants Bank v. Ketchum*, 16 P. R. 356; *Wright v. Wilkin*, 6 W. R. 643; see also *Re Cambrian Co.*, 51 L. J. Chy. 221; *Re Grey's Brewery Co.*, 25 Ch. D. 400. The Examiner in his discretion may exclude the clerk of the counsel conducting the examination, if his presence is objected to, and even the examinant's own solicitor if his presence interferes, in the Examiner's opinion, with the due taking of the examination: *Hands v. F. C. Furniture Co.*, 12 P. R. 292. **Examiner's office not a public Court.**

A defendant, who had allowed judgment to go by default, was held entitled to be represented by counsel on the examination of his bookkeeper for discovery at the instance of a co-defendant under *Rule 481*: *Dominion Bank v. Bell*, 13 P. R. 471.

Where several parties attend for examination, the Examiner may exclude those in the same interest, while the others are under examination: *Culbreth v. Bligny*, 10 P. R. 555; *Sircwright v. Sirc-* **Exclusion of parties.**

Rule 440. *wright*, 8 P. R. 81; *Sadlier v. Smith*, 14 C. L. J. 30; but one of them should be permitted to remain for the purpose of instructing counsel subject to his being first examined; *Sivewright v. Sivewright*, 8 P. R. 81; and the Examiner has a discretion as to the order of their examination, where several are in attendance for examination; *Stuart v. Balkis*, 32 W. R. 676; 53 L. J. Chy. 791.

A refusal to comply with the Examiner's ruling is a contempt of Court; *Sadlier v. Smith*, 14 C. L. J. 30.

Producing of documents on examination.

The party examined may be required to produce books and papers. *Rules* 448, 452, but books in constant use need not be produced until it is decided that they are necessary, when the Examiner may adjourn the examination until they are produced; *Comstock v. Hecris*, 12 P. R. 17.

Ordinarily, any question as to whether documents are subject to production on the examination should be raised before the Examiner; *Alexander v. Trondah*, 18 P. R. 20; but in a proper case, such as a subpoena for the production of an enormous number of papers, amounting to an abuse of the process of the Court, a motion may be made to set aside the subpoena; *Steele v. Saroy*, W. N. 1891, 195; 35 *Sed. Jour.* 92; 8 *Times*, 94.

Disclosure on examination.

As to the scope of the examination, see notes to *Rule* 455.

The issuing of a *subpoena duces tecum* as a substitute for an order for production is not to be encouraged; *per Boyd, C.*, *Larrop v. Wolfe*, 10 P. R. 488; 20 C. L. J. 410.

If documents are produced, the examining party is entitled to have them marked as exhibits; *Hanks v. U. C. Furniture Co.*, 12 P. R. 292.

If the examination is unnecessary, or vexatious, or of unnecessary length, the party taking it may have to pay, or at all events be disallowed, the costs of it; *Dobson v. Dobson*, 7 P. R. 256; *Ernos v. Jaffray*, 3 C. L. R. 327; and see *Rule* 443b.

An examination for discovery in support of a defence which is bad in law will not be allowed; *Rogers v. Lambert*, 21 Q. B. D. 573; 62 L. T. 694.

Fees.

Where the examination is taken before a Local Registrar, or other officer paid by salary, the fees are payable in stamps; *Denmark v. McConaghy*, 8 P. R. 436; *Ind. Act*, s. 147 (1); but Deputy Clerks are entitled to fees in money for their own use, for such examinations; *Ibid.*, s. 144 (1).

Disclosure on Examination.—Privilege, etc.—As to what must be disclosed, privilege, etc.; see notes to *Rule* 455.

On Reference to an Official Referee.—As to Discovery on proceedings before a Referee, see note to *Rule* 448.

Examinations in long vacation.

439b. An examination shall not take place during the long vacation without an order of the Court or a Judge. *Rule* 1250 of 20 June, 1903.

Party benefited

440. A person for whose immediate benefit an action is prosecuted or defended shall be regarded as a party for the purpose of examination. *Con. Rule* 488.

Taken from Chy. Order E23, which applied also to production of **Rule 440**. documents, as to which see now *Rule 466*. There appears to be no similar English Rule.

A person to be examined, etc., must be directly interested; *Heazler v. Toronto & Ottawa, Globe*, 1st October, 1881. An order was made, where it appeared, on affidavit, that the plaintiff was agent for his wife as to part of the subject matter of the suit; *Rowson v. Sutherland, Globe*, 19th September, 1881.

In *Johnson v. McIntosh*, 3 C. L. T. 313, J. L. was trustee for the E. estate for twenty years when the plaintiff was appointed in his place. The action involved the consideration of matters during the trusteeship of J. L., and as to which the plaintiff was ignorant, and the E. estate was indebted to J. L., so that if the plaintiffs succeeded J. L. would be benefited. An order was made under this *Rule* for examination of J. L.

In an action by creditors of a firm to establish the liability of defendant as a partner, the assignee of the firm for the benefit of creditors, though having no direct beneficial interest in the result, was regarded as a *quasi* plaintiff, and the defendant was held entitled to production from him, and to examine him for the purposes of production; *Frithingham v. Ishister*, 14 P. R. 112.

See also *Brudby v. Clarke*, in note to *Rule 465*.

An order under this *Rule* for the examination of the plaintiff's daughter, in an action of seduction, was refused, but under special circumstances was granted under the former *Con. Rule 543* (now 185); *Turner v. Kylo*, 18 C. L. J. 402; 2 C. L. T. 598; see also *Hollister v. Innakke*, 14 P. R. 11; *Baxter v. Campbell*, 9 C. L. T. 5; but see now as to the scope of that *Rule*, notes to *Rule 485*.

Where, in an action for infringement of a patent, the defendant set up that he had acquired the right to use the invention from C. & Co., but it did not appear that C. & Co. had done anything in reference to the action before or after it was brought, it was held that C. & Co. were not persons for whose benefit the action was defendable; *Maffatt v. Leonard*, 8 O. L. R. 519.

The examination of a debtor, who had effected insurance and assigned the policy for the benefit of his creditors, was ordered, in an action by one creditor and the trustee for the benefit of other creditors; *Macdonald v. Norwich Union; Clarkson v. F. Ins. Assn.*, 10 P. R. 162; so also of a debtor, in an action against his assignee for the benefit of creditors, to establish the right of the plaintiff to rank upon the insolvent estate; *Garland v. Clarkson*, 9 O. L. R. 281.

See *Minkler v. M. McMillan*, 10 P. R. 506, where proof of the interest of the party sought to be examined was unsatisfactory, but the order was made with the qualification that it was only to be used for the purpose of discovery.

In *Leach v. Dodds* (Mr. Dalton, 8th May, 1881), the action was to establish an alleged will, suspected by the defendant to have been a forgery of the plaintiff's husband, who was not a party; the plaintiff having been examined had no knowledge of it, but the circumstances under which it had come into his hands were suspicious, and an order was made, under this *Rule*, on defendant's application, for examination of the plaintiff's husband for discovery as a person for whose benefit the action was brought.

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Rules
441, 442.

Assignor
of chose
in action,
examin-
able for
discovery.

441. Where an action is brought by an assignee of a chose in action, the assignor may without order be examined for discovery. Rules 23 June, 1894, 1334.

An officer of a corporation, the assignors of a chose in action, can not under this Rule or otherwise be examined for discovery: *Bank of Toronto v. Quebec F. Ins. Co.*, 15 P. R. 41.

Time when
examin-
ation may
be held.

442. The examination on the part of a plaintiff may take place at any time after the statement of defence of the party to be examined has been delivered or after the time for delivering the same has expired; and the examination on the part of a defendant may take place at any time after such defendant has delivered his statement of defence; and the examination of a party to an issue, at any time after the issue has been filed. Con. Rule 489.

Based on Chy. O. 140.

Party may
be exam-
ined as a
witness.

A party may be examined as a witness in support of a motion although the time for examining him under this Rule may not have arrived: *McClennaghan v. Buchanan*, 7 Gr. 92.

Time for
examin-
ation by
plaintiff.

Under this Rule it will be noticed that the right of the plaintiff to examine only arises after the statement of defence, or after the time for delivering the same has expired; see *Davis v. Wickson*, 9 P. R. 219. He is not obliged to wait until all of several defendants have filed their statements of defence.

But where a plaintiff is ordered to give particulars of his statement of claim, he has, by special order, been allowed to have discovery by examination of the defendant, and production of documents, before delivering such particulars, where the Court thought it just: *Hapner Co. v. Radford*, 1896, 1 Ch. 29; 73 L. T. 624; but not as to matters which ought to be within the plaintiff's own knowledge: *Zierenberg v. Labouchere*, 1893, 2 Q. B. 183; 69 L. T. 172.

A plaintiff may examine a defendant who has made default in delivering a defence; see *Bacon v. Campbell*, 6 P. R. 275; and *Dominion Bank v. Bell*, 13 P. R. 471; or has not appeared: *Bulst v. Currie*, 33 C. L. J. 622; 17 C. L. T. 335; and see *Spoken v. The Grosvenor & W. E. R. T. Hotel*, 1897, 2 Q. B. 124; 76 L. T. 679.

Time for
examin-
ation by
defendant

The right of a defendant to examine the plaintiff under this Rule only arises after he has filed his statement of defence; a defendant, therefore, who suffers the time for delivering a defence to elapse without delivering one, has no right to examine the plaintiff for discovery: *Ashley v. Brenton*, 13 P. R. 98.

Co-defend-
ants need
not be
notified of
examin-
ation of
plaintiff.

A defendant is entitled to examine the plaintiff as soon as his own statement of defence is filed; he is not obliged to wait until those of his co-defendants, if any, are filed: *Fowler v. Boulton*, 12 Gr. 437. He need not notify his co-defendants of the examination: *Ib.*

The examination may be had, though the case has been entered for trial: *Clarke v. Hawke*, 1 Chy. Ch. 349.

Second Examination for Discovery:—

Rule 443.

The examination under this *Rule* may be had as of course within the time prescribed, but it is possible that there is inherent jurisdiction to order, where justice so requires, an examination of a party for discovery at an earlier period, or after an examination under this *Rule* has taken place; see *Waynes Co. v. Radford*, *supra*, and *Thomson v. Gye*, 13 P. R. 273. There does not now, however, seem to be any express *Rule* on the subject, unless it be *Rule* 444, and that seems merely to deal with the case of an examination required to be held before an examiner other than one of the regular officers, or out of the county, where the examination could otherwise be had without order. It has been held under the former practice that a second examination of the same party will not be allowed except under the most special circumstances; *Thorburn v. Brown*, 8 P. R. 114; see also *Campbell v. Scott*, 14 P. R. 203; and upon a special motion made on notice: *Laird v. Stanley*, 6 P. R. 322. But assuming that there is authority to make an order for examination for discovery at an earlier period than that mentioned in this *Rule*, it ought not to be made except under special circumstances; *Thomson v. Gye*, 13 P. R. 273, and such an order if obtained *ex parte* would be irregular; *Hooley v. Gilbert*, 12 P. R. 114.

Where the pleadings have been amended raising matters not before suggested, after examination for discovery, an order may, in a proper case, be made for further examinations limited to the matter raised by the amendment; *Standard Trading Co. v. Seybold*, 7 O. L. R. 39.

443. Where a party is entitled to examine another party [or person] he may procure an appointment therefor from the Local Registrar, Local Master, Deputy Clerk of the Crown, or a special examiner, in the County where the party [or person] to be examined resides, and such party [or person], upon being served with a copy of the appointment and a subpoena, and upon payment of the proper fees, shall attend thereon and submit to examination. Con. Rule 490.

Subpoena
and appointment.

The words in brackets are new, and include an officer or servant examinable under *Rule* 433.

"Where the party or person to be examined resides": see *Machan v. James Bay Ry. Co.*, 5 O. W. R. 440.

The fact that a witness could only speak Welsh, was held not to be a reason for having the examination before some person other than the Court Examiner, as he can have an interpreter; *Marquess of Bute v. James*, 33 Ch. D. 157.

For special reasons, the examination may be specially ordered to be taken before some other person, and elsewhere than provided by this *Rule*; *Rule* 444; *Gallagher v. Guirner*, 2 Chy. Ch. 480; *McDonaid v. McDermid*, *Id.*, 372; *Campbell v. Tucker*, 7 P. R. 135; *Kahn v. Redford*, 3 Chy. Ch. 55; *Coop. Dig.*, 1873, p. 111; and see *Standard Trading Co. v. Seybold*, 7 O. L. R. 39.

The solicitor of the party to be examined is entitled to 48 hours' notice: *Rule* 446.

Where a motion is made to compel attendance of a party who has not attended, or has attended and refused to be sworn, it must be

Rules**444-446.**

proved that he was duly served with a copy of the appointment and subpoena, and was paid proper fees; *Melchett v. Bruce*, 12 P. R. 602. *Scamblé*, that the Examiner's certificate on these points would not be sufficient: *Id.*

Attendance and submitting to be sworn precludes objection that no subpoena had been served: *Cooke v. Wilson*, 3 O. L. R. 290.

An order for substitutional service of the appointment and subpoena for the examination of a person not a party to the action can not be made: *Mills v. The Mercer Co.*, 15 P. R. 276.

A party or person is entitled to be served a reasonable time, but not necessarily 48 hours, before the time appointed: *Re North Wheel Co., Co.*, 31 Beav. 628; 8 Jur. N. S. 1168; *Bolkow v. Foster*, 7 P. R. 388; *Wilson v. Cowan*, 19 C. L. J. 140; 3 C. L. T. 216; *Egoshke v. C. P. Ry. Co.*, 4 C. L. T. 93; unless he has no solicitor, in which case he is entitled to 48 hours' notice: *Watson v. Hunt*, 1 Chy. 19, 203.

Where the defendant's solicitor was served under *Rule 446*, but defendant himself was not, but the appointment was twice enlarged, and defendant was served for the enlarged date, and the solicitor notified of the enlargement, the defendant, not attending, was held to be in default: *Reid v. Walters*, 19 P. R. 310.

Where a party resident out of Ontario comes temporarily within Ontario, his attendance for examination for discovery can only be obtained by order under *Rule 477*: *Cog v. Prior*, 18 P. R. 492.

See also notes to *Rule 492*.

Order to
examine.

444. Upon application to the Court or a Judge an order may be made for the examination of any party or person liable to be examined as aforesaid before any other person or in any other County than those before mentioned. Con. Rule 492.

See notes to *Rule 412*.

An order for the examination of an officer residing in a foreign country of a foreign corporation which had attained to the jurisdiction was refused, in *Perrins v. Algoma*, 8 O. L. R. 634.

445. In High Court cases an examination for discovery on which fees may be payable otherwise than in law stamps, shall not be taken before the Judge of the County Court, or Local Judge of the High Court, or Local Master, being also a Judge of the County Court, by whom the order or appointment for such reference or examination has been made. Con. Rule 1192, *part*.

Service of
appointment
on
solicitor.

446. The party examining shall serve a copy of the appointment upon the solicitor of the party to be examined, if he has a solicitor in the cause, at least forty-eight hours before the examination. Con. Rule 491.

Sundays and other holidays are excluded in the computation of Rules the 48 hours: see *Rules* 343, and 344 (2), and *Lovell v. Harrington*, 10 P. R. 157. Service on Saturday at 9.30 p.m. for Tuesday at 2 p.m. is insufficient: *Senn v. Hewett*, 8 P. R. 70. Where the person to be examined is not a party, he must be personally served; the Court will not, in such a case, authorize substitutional service: *Mills v. The Mercer Co.*, 15 P. R. 276. 447-449.

447.—(1) In lieu of personal service of a subpoena 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. Service on solicitor for client

(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 subpoena, as in the preceding Rules provided, in case the party desiring the examination so chooses. Rules of 1 Jan., 1896, 1452.

This Rule only applies in the case of the examination of a party who has a solicitor. It cannot be employed for service of an officer of a corporate party.

448. The party or person to be examined shall, if so required by notice, produce on the examination all books, papers and documents which he would be bound to produce at the trial under a subpoena duces tecum. Con. Rule 493. Production of papers.

The proper mode of compelling production on an examination for discovery, where the witness neglects or refuses to produce, is for the Examiner to direct what documents are to be produced and to adjourn the examination. Process by subpoena duces tecum to get production of particular documents is not to be encouraged by treating non-production thereunder, for discovery, as contempt: *Lovely v. Wolfe*, 10 P. R. 488; but see *Alexander v. Irondale, etc.*, 18 P. R. 20. See note to Rule 452.

See *Russell v. Macdonald*, 12 P. R. 458.

449. Anyone so examined, may be further examined on his own behalf, or on behalf of the body corporate of which he is [or has been] an officer, in relation to any matter respecting which he has been examined in chief; and when one of several plaintiffs or defendants has been examined, any other Parties and others may be examined on their own behalf.

Rules
450-452.

plaintiff or defendant united in interest may be examined on his own behalf or on behalf of those united with him in interest, to the same extent as the party examined. Con. Rule 494.

The words in brackets are now of no effect. They are a relic of the practice abolished by *Rule 439a*.

When explanatory examination to take place.

450 Such explanatory examination shall, unless by leave of the Court or a Judge, be proceeded with immediately after the examination in chief, and not at any future period. Con. Rule 495, *amended*.

The explanatory examination may be proceeded with, notwithstanding that the counsel for the opposite party has withdrawn: *Connolly v. Murrell*, 14 P. R. 187.

Mode of conducting examination.

451. Any one examined orally under these Rules shall be subject to cross-examination and re-examination; and the examination, cross-examination and re-examination shall be conducted as nearly as may be as at a trial. Con. Rule 496.

Taken from R. S. O. 1877, c. 50, s. 161.

A party admitting the possession of document may be ordered to produce there.

452. Anyone (a) who admits, upon his examination, that he has in his custody or power any deed, paper, writing, or document relating to the matters in question in the cause, not privileged or protected from production, shall produce the same for the inspection of the party examining him upon the order of the Court or a Judge, or upon the direction of the officer before whom he is examined, and for that purpose a reasonable time is to be allowed. Con. Rule 497.

Taken from Chy. O. 147.

(a) The words in Con. Rule 497 were "a party to the action."

Where Master may order production.

The power of the Master, or Special Examiner, to order production of documents under *Rule 452*, is therefore not, as formerly, confined to cases where *parties to the action* admit the possession of such documents. Where the admission is made by an officer of a corporation, the Master, and Examiner, has now power to make the order, and an application in Chambers is not necessary: see *Rule 464*. In the case of an officer of a corporation it would seem that an order for production of documents can only be made of such as he admits are in his custody or power, and not of any which are in the custody or power of some other officer. Production may be obtained under an order of course, as provided by *Rule 464*. The provisions of *Rule 452* are intended to meet the case of any one examinable under *Rules 430-441*, who on his examination admits that he has material documents which he has not produced; the examination may be adjourned for the purpose of enabling the examinant to comply with the Master's, or Examiner's, order for production: *Comstock v. Harris*, 12 P. R. 17.

A person examined under *Rule 485* may also be ordered by the Rules Examiner to produce documents by virtue of this *Rule*: *Orpen v. Kerr*, 11 P. R. 128. **453, 454.**

The question as to the liability of any person being examined to produce any documents referred to in a *subpoena duces tecum* should ordinarily, be raised before the Examiner, and not by motion to set aside the subpoena: *Alexander v. Irondale, etc., Ry.*, 18 P. R. 20; or by motion to commit for contempt in disobeying the subpoena: see note to *Rule 488*; *Stickle v. Surry*, W. N. 1891, 197, is only to be followed in exceptional cases: *Alexander v. Irondale, supra*.

453. The direction of the officer shall be subject to appeal; and he shall upon request certify under his hand the question raised and the direction made thereon. Con. Rule 498. Master's and Examiner's order for production appealable.

Taken from Chy. O. 148.

There is no *Rule* specially regulating appeals from Special Examiners, but the convenient mode of appeal would be by analogy to *Rule 767*.

As to documents privileged from production, see notes to *Rule 467*.

454 Anyone refusing or neglecting to attend at the time and place appointed for his examination, or refusing to be sworn or to answer any lawful question put to him by the examiner or by any party entitled so to do, or his counsel, solicitor or solicitor's clerk, shall be deemed guilty of a contempt of Court and proceedings may be forthwith had by attachment. He shall also be liable, if a plaintiff, to have his action dismissed; and if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended; and the party examining may apply to the Court or a Judge for an order to that effect, and an order may be made accordingly. Con. Rules 499, 518. Penalty on witness refusing to attend or answer, etc.

Based on R. S. O. 1877, c. 50, s. 162; Chy. O. 144.

This *Rule* is confined to three classes of cases (1) refusal or neglect to attend for examination, (2) refusal to be sworn, (3) refusal to answer lawful questions, and it renders a wilfully disobedient defendant liable to have his defence struck out: *Haigh v. Haigh*, 31 Ch. D. 478; and a disobedient plaintiff to have his action dismissed: *Republic of Liberia v. Imperial Bank*, L. R. 9 Chy. 509; S. C. as *Republic of Liberia v. Royal*, 1 App. Cas. 439; *Dunn v. McLean*, 6 P. R. 156; *Dauvillier v. Myers*, W. N. 1883, 78.

By *Rule 473* a party failing to comply with an order for production, or inspection of documents, is liable to similar penalties.

This *Rule* does not apply to cases of disobedience of a notice to produce for inspection under *Rule 469*; see *MERCHANTS BANK v. PIERSON*, 8 P. R. 123; an order under *Rule 471* must first be obtained.

Rule 454.

The party or person must have been regularly subpoenaed; *Murray v. G. T. Ry. Co.*, 3 Chy. Ch. 130, and paid his witness fees; *Belknap v. Foster*, 7 P. R. 388, or no order can be made against him; *McLean v. Bruce*, 12 P. R. 602.

A party subpoenaed for examination and paid his conduct money, having been excluded while others were being examined, is bound to wait for examination and is not justified in leaving without communicating with the examiner; *Campbell v. Scott*, 5 O. L. R. 231.

A motion to strike out the defence, or to dismiss the action, is the proper course, where default has been made by an officer of a company or corporation in attending for examination. The remedy is to commit the defaulting officer; *Badgerow v. G. T. Ry. Co.*, 13 P. R. 132; *Central Press Association v. American Press Association*, 13 P. R. 353.

Commitment
for con-
tempt.

Motion to Commit for Contempt.—It has been held that proceedings to attach must be taken before the Court, and not before a Judge in Chambers; *Merchants Bank v. Pierson*, 8 P. R. 423; but this decision does not seem in practice to have been adhered to in cases under this Rule. (In other cases of contempt, see *Southwick v. Hare*, 15 P. R. 331.) The motion is made to a Judge in Chambers in a case of non-compliance with a *præcipe* order, or an order in Chambers; and an application to the Court is necessary in case of breach of an order of the Court; see *Klein v. Union Ins. Co.*, 3 O. L. T. 501, and note to Rule 306.

The Master in Chambers cannot entertain applications to commit for non-production; *Rule 42*; *Keele v. Ward*, 9 P. R. 220; 18 O. L. J. 129; 2 C. L. T. 260; neither can a Local Judge under *Rule 47*; or a Local Master; *Rule 49*; but *semble*, a Local Judge may do so when acting under *Rule 47*.

It is not necessary to serve, with a notice of motion to commit, copies of the affidavit upon which it is based; *Hannum v. McKee*, 18 P. R. 185.

The defaulting party is entitled to notice of motion to strike out the defence, or to dismiss the action, and the defaulting party or person to notice of motion to commit; *Rule 855*; and it would seem that a notice to commit should be personally served; *Manu v. Perry*, 44 L. T. 248; 50 L. J. Chy. 251; *Weir v. Matheson*, 1 Chy. Ch. 244; *Nelson v. Worssam*, W. N. 1890, 216; *Mander v. Faich*, 1891, 3 Ch. 488; 64 L. T. 791; except where every reasonable effort to effect personal service has failed, in which case an order for substituted service may be made; *Ib.*, and S. C. 65 L. T. 454; and see *Rule 474*, in the case of default in production pursuant to an order to produce and in certain other cases. Two days' notice would seem to be sufficient in all cases; *Rule 348*.

Where an order was made for examination in Ontario of a defendant who resided out of Ontario, but was temporarily in Ontario attending the House of Commons, of which he was a member, it was held that the order could not be enforced by attachment against the defendant while the House was in session, but it might be enforced under *Rule 454* by striking out his defence; *Cox v. Prior*, 18 P. R. 492.

In *Re Evans*, 1893, 1 Ch. 272; 68 L. T. 271, the Court refused to set aside an order for attachment founded on a notice of motion which had not been personally served, holding that the irregularity may be condoned if the Court sees fit; but in *Taylor v. Roe*, 3 R. 259; 68 L. T. 223, Kekewich, J., held that an irregularity will not be condoned on motions affecting the liberty of the subject, where the opposite party appears and takes the objection.

A person committed for default in attending to be examined is not **Rule 454.** entitled to a *habeas corpus*; *Re Anderson v. Vanstone*, 16 P. R. 243.

See further as to motions to attach, notes to *Rules* 854, 855.

As to motions to commit for unsatisfactory answers, see *Smith v. Grey*, 4 C. L. T. 589.

An objection to answer incriminating questions should be taken by the witness, but the privilege may be claimed on a motion to commit, though not claimed before the Examiner; *Hall v. Gowanlock*, 12 P. R. 104. The penal provisions of R. S. O. c. 334, ss. 2, 4, do not afford any ground for refusing to answer questions put regarding a fraudulent transaction; *Dunsford v. Carlisle*, 10 P. R. 441.

Dismissal of Action or Striking out of Defence.—In general another opportunity to obey will be given on terms, but where the action is unmeritorious the plaintiff may be refused this indulgence and the action may be dismissed; *Deahm v. Gough*, 13 P. R. 344.

Where the plaintiffs were husband and wife, and the wife complied with an order for production, but the husband absconded without complying, Hall, V.C., refused to dismiss the action; *Hartley v. Owen*, W. N. 1870, 193; 34 L. T. 752.

For other cases in which the power has been exercised, see *Egan v. Hughes*, 25 W. R. 528; and *Rep. of Liberia v. Rep.*, 1 App. Cas. 139. In the last case it was held that where any step ought to be taken in a cause which, in the judgment of the Court, was necessary to facilitate the decision of the cause, and default had been made, the former Court of Chancery had power, if the party in default was the plaintiff, to dismiss the bill; see also *Fraser v. Burrows*, 2 Q. B. 15, 624.

Compliance was held excused by illness; *Lord Cardwell v. Tomlinson*, 33 W. R. 814; 52 L. T. 746.

Other Remedies.—On a motion to commit for non-production of books, etc., pursuant to a subpoena *duces tecum* on an examination for discovery, it was held that the proper course was to get the examiner to direct what should be produced, and to adjourn the examination for procuring the documents; *Lavery v. Walje*, 10 P. R. 488; *Constock v. Harris*, 12 P. R. 17.

Where the defendant did not appear, nor deliver any statement of defence, after being served with a statement of claim, and a summons for him to attend to be examined touching the matters in question (delivering up to plaintiff of books and documents in his possession) was likewise disregarded, it was held, that, notwithstanding that he was a party to the action, he must be considered as being summoned as a witness, and must be dealt with accordingly, and that his disobedience was not disobedience of an order of Court. An order was therefore made under Eng. Rule of 1883, No. 495 (not adopted in Ontario), for his attendance for examination at his own expense, for disobedience of which an attachment might issue; *Powell v. Brett*, 55 L. T. 728.

The question whether or not the person or party alleged to be in default is really so may be tested by moving to compel him to attend again at his own expense, and submit to examination, or in default that the action be dismissed, or defence struck out. Where such an order has been obtained and disobeyed, the motion to dismiss, or strike out defence, may perhaps be made *ex parte*; *Dunn v. McLean*, 6 P. R. 156; but see *Hallender v. Foulkes*, 16 P. R. 225.

Rule 455.

Upon failure of a plaintiff to attend for examination, the action may be stayed for a definite time, to enable him to attend, but not indefinitely: *Comstock v. Harris*, 12 P. R. 17.

A party who has been ordered to attend for further examination, after a refusal to answer questions, is in contempt if he does not so attend, but that is not a bar to his appealing from the order: *McGregor v. McDonald*, 11 P. R. 518.

Restoring
action dis-
missed for
non-pro-
duction.

Restoring Action, etc.—Where an action has been dismissed it will not be restored, unless, perhaps, where the claim would otherwise be barred by the dismissal, *e.g.*, by the Statute of Limitations: *Dunn v. McLenn*, 6 P. R. 156; and see *Hodgson v. Paxton*, 2 Chy. Ch. 398; *Bank of Montreal v. Wilson*, 2 Chy. Ch. 117; *Dary v. Dary*, 2 Chy. Ch. 26; nor where the defence has been struck out, and judgment signed, will the judgment be set aside: *Huigh v. Huigh*, 31 Ch. D. 478.

Miscellaneous.—It is not imperative on the Court to act under this Rule: *Kennedy v. Lyell*, W. N. 1882, 137. It was said in one case that the Rule is a penal one, and only to be acted on in the last resort: *Laish, J.*, in *Twyeross v. Grant*, W. N. 1875, 201, 229; 1 Charl. Ch. Ch. 115; see *Fisher v. Hughes*, 25 W. R. 528; *Pike v. Keene*, 24 W. R. 322; 35 L. T. 341.

Objection
to questions

455. If any one under examination objects to any question put to him, the question and the (a) objection of the witness thereto shall be taken down by the Examiner and transmitted by him to the office of the Court where the pleadings are filed, to be there filed; and the validity of such objection shall be decided by the Court or a Judge; and the costs of and occasioned by such objection shall be in the discretion of the Court or Judge. Con. Rule 500.

Compare Eng. (1883) R. 496, which is to the same effect.

The former Con. Rule 500 had at (a) the words "demurrer or," following in that respect R. S. O. 1877, c. 50, s. 163. Any former practice by which a demurrer by the witness was authorized, (see *Dan. Pr.*, 6th ed., 659), is now abolished.

Scope of
examina-
tion.

Disclosure on Examination.—A party has the right to examine for discovery, not only for the purpose of obtaining information from the opposite party as to material facts which are not within his own knowledge, and are within the knowledge of the opposite party, but also for the purpose of obtaining from the opposite party admissions which will make it unnecessary for him to enter into evidence of the facts admitted: *Atty.-Gen. v. Gaskill*, 20 Ch. D. 519; *Heller v. Ellis*, W. N. 1884, 9; see *Cotter v. McPherson*, 12 P. R. 630; *Humphries v. Taylor Drug Co.*, 33 Ch. D. 693; *Macdonald v. Sheppard Pub. Co.*, 19 P. R. 282.

The examination must not extend to matters wholly irrelevant to the pleadings: *Bentley v. Murphy*, 2 O. L. R. 665; *Cole v. Canadian Pacific Ry.*, 19 P. R. 164; and it will be as far as possible, confined to matters relevant to what is raised by the pleadings: *Atty.-Gen. v. N. Metropolitan Tramways*, 1892, 3 Ch. 70; 67 L. T. 283; *Dickson v. Covert*, 2 Chy. Ch. 242; *Nicholl v. Elliott*, 3 Gr. 536; *Proctor v.*

Grant, 9 Gr. 31; though a fair amount of latitude must be allowed: **Rule 455**. *Mack v. Dobie*, 14 P. R. 465, and matters germane to what is strictly raised by the pleadings may be inquired into in view of the right to amend, information for which purpose is one of the objects of examination for discovery: see *McGillivray v. McConkey*, 6 P. R. 56. Relevancy to the mere allegations in the pleadings may not be sufficient to justify a particular line of discovery, if parts of the pleadings are not relevant to the action: *Bentley v. Murphy*, 2 O. L. R. 665.

Discovery is relevant or material, not only if it is directed to the facts directly in issue, but also if it is directed to the damages: *Blumenstiel v. Edwards*, 5 O. W. R. 341.

Examination for discovery in support of a defence which was bad in law, was not allowed in *Rogers v. Lunbert*, 24 Q. B. 11, 573; 62 L. T. 1394.

It is improper to examine generally as upon a cross-examination of a witness: see *Kennedy v. Dodson*, 1895, 1 Ch. 334.

The plaintiff is entitled to discovery of what will help him to prove any issue to be determined at the trial; but where discovery is sought in aid of something which is not part of what the plaintiff must prove at the trial, but is merely consequential to it, the right is not absolute, but discretionary, until the plaintiff has established his fundamental right at the trial: see *per Street, J.*, in *Graham v. I. v. Temperance, &c.*, 16 P. R. at p. 533; but where the plaintiff sued on an agreement, which defendant denied, but also set up that if established it had been performed, the defendant was required to answer questions directed to the alleged breach of the agreement, without the agreement itself having been first established: *Sheppard v. Harkins*, 8 O. L. R. 622.

Questions which only go to impeach the credit of the party examined are not admissible: *Mack v. Dobie*, 14 P. R. 465.

Where a party's right to an account depends on his establishing a fiduciary relationship which is denied, the opposite party may refuse to make discovery of matters of account until the question of relationship has been judicially determined: *Bedell v. Ryckman*, 5 O. L. R. 670; and a defendant may refuse to answer questions as to facts, which would become material only in the event of the plaintiff establishing his right to recover damages: *Evans v. Jaffray*, 3 O. L. R. 327.

A defendant pleading privilege was allowed to be examined as to his reasons for believing in the truth, and as to the means taken by him to ascertain the truth, of the alleged slander in respect of which the action was brought: *Ellitt v. Garrett*, 1902, 1 K. B. 170; 86 L. T. 441; but see *Cargill v. Daily Mail*, 90 L. T. 307.

A plaintiff was held entitled to examine a married woman as to the estate possessed by her at the time of the contract, that being, as the law then stood, a matter which the plaintiff must prove: *Kennedy v. Bowers*, 11 C. L. T. 281; *Smith v. Berg*, 36 L. T. 471; and see *Bursill v. Tanner*, 16 Q. B. D. 1.

An executor pleading *plene administravit* was held bound to disclose particulars of the real and personal estate: *St. George v. St. George*, 19 L. R. 1r. 225.

Disclosure by Officers of a Corporation.—The person examined, whether a party or officer of the company, is bound to seek the necessary information which is in his own possession, or in possession of the servants or agents of the company, in order to give the dis-

Rule 455. discovery to which the party examining is entitled: *Harris v. Toronto Electric Light Co.*, 18 P. R. 285; *Clarkson v. Bank of Hamilton*, 9 O. L. R. 317; but it would seem that he is not bound to answer as to his own knowledge, not acquired in the course of his employment by the company, or to make inquiries of the other officers or agents as to their knowledge not acquired in the same way, but acquired accidentally, or in some other capacity than as such officers or agents: *Wylsbach Incandescent, etc., v. New Sunlight Incandescent, etc.*, 1900, 2 Ch. 1; 83 L. T. 58; see also *Sydney Cheese & Butter Factory Association v. Brooker*, 19 P. R. 152, where a special agreement was set up by the defendant binding him not to divulge the matters, disclosure of which was sought.

Action to
recover
land.

There is no distinction, as regards the right to discovery, between actions for recovery of land, and other actions; and a plaintiff is therefore entitled to discovery as to all matters relevant to his own, and not exclusively to the defendant's case; *Lyell v. Kennedy*, 8 App. Cas. 217; *Daniel v. Ford*, W. N. 1883, 27, 32. This is not a new right, however; the right to discovery is unaffected by *The Judicature Act, 1875*, and *Humming v. Williamson*, 10 Q. B. D. 459, 462.

Defamation.

In an action for libel of the plaintiffs in the way of their trade, where no special damage is alleged, but only general diminution of profits, discovery as to the amount of diminution, and how it was made out, was held to be relevant; *Blutcher v. Green*, 14 P. R. 424.

In an action against a newspaper for libel, a defendant cannot be required to disclose the source of his information; *Parnell v. Walter*, 24 Q. B. D. 441; 62 L. T. 75; *Blane v. Burrows*, 12 Times, 521; and see *Ridgway v. Smith*, 4 Times, 275; *Hope v. Brash*, 1897, 2 Q. B. 188; nor can a well established newspaper, sued for libel, be required to disclose the number of its circulation; *Whittaker v. Scarborough Post*, 1896, 2 Q. B. 148; 74 L. T. 753, overruling *Parnell v. Walter*, *supra*, on that point. Questions as to the inquiries made as to the truth of the matters complained of before publishing them are proper; *White v. Credit Reform, &c.*, 1905, 1 K. B. 653; but not the names of persons to whom the publication had been shown: *Id.*

In an action for slander the defendant may be asked whether he spoke the words complained of, "or words to that effect," and in whose presence he spoke them; *Dalglish v. Lowther*, 1899, 2 Q. B. 500; 81 L. T. 161; and what information he had and what inquiries he made as to the truth of the words; *Saunderson v. Von Rudeck*, 119 L. T. Jour, 331.

Patent
cases.

In an action for infringement of a patent, the plaintiff was held to be bound to answer questions as to matters which tended to show that the patent was not a good one, having become forfeited; *Parramore v. Boston Manufacturing Co.*, 4 O. L. R. 627.

In an action for infringement of patent where defendants were ordered to account for profits, it was held that they must disclose the names and addresses of their customers; *Saccharin Corporation v. Chemicals and Drugs Co.*, 1900, 2 Ch. 556.

As to the extent to which plaintiff may examine defendant for discovery in an action for infringement of a patent, where the defendant claims to use a secret process, see *Ashworth v. Roberts*, 45 Ch. D. 623.

Disclosure
of evidence
and names
of witnesses.

As to objections to answer questions tending to disclose evidence, see *Eade v. Jacobs*, 3 Ex. D. 335; *Atty.-Gen. v. Gaskill*, 20 Ch. D. 539; *Benbow v. Low*, 18 Ch. D. 93; *Bray on Discovery*, 445; *Coyne v. Coyne*, 19 P. R. 97.

A party, on examination for discovery, need not disclose the names **Rule 455.** of his witnesses; see *McCalla v. Jones*, 4 Times, 12; *Marriott v. Chamberlain*, 17 Q. B. D. 154; 54 L. T. 714; nor the evidence he intends to give; *Cople v. Cople*, 19 P. R. 37; though he cannot object to disclose a material fact only for the reason that names of witnesses will thereby necessarily be disclosed; *Ib.*; *Johns v. James*, 13 Ch. D. 370; *Humphries & Co. v. The Taylor Drug, etc., Co.*, 39 Ch. D. 483; *Birch v. Mather*, 22 Ch. D. 629; *Hall v. Luardet*, W. N. 1883, 175; *Marshall v. Metropolitan*, 7 Times, 49; *Williamson v. Merrill*, 4 O. W. R. 528; and see 5 O. W. R. 64; *Sungster v. Vickerhead*, 5 O. W. R. 438, 495; or their reputation injured; *Macdonald v. Sheppard Pub. Co.*, 19 P. R. 282.

Where a solicitor's objection to questions is overruled by the Examiner, he cannot put an end to the examination by withdrawing, and the examination if proceeded with will be regular, and will not be struck out, though taken after he has withdrawn; *Connolly v. Murrell*, 14 P. R. 187, 270.

Privilege on Examination.—The general rules as to privilege in evidence apply in examinations for discovery, and in the production and inspection of documents; see notes to *Rules* 175, and 467.

The plaintiff is entitled to examine in order to ascertain what title the defendant is setting up against him. This does not come within the ground of privilege; *Copley v. Sandcroft*, 33 W. R. 577.

A husband or wife may under R. S. O. c. 73, s. 8, refuse to disclose communications made by one to the other of them during marriage; *Connolly v. Murrell*, 14 P. R. 187, 270; but each must disclose communications made by a third person to either of them; *Williamson v. Merrill*, 5 O. W. R. 64.

As to objections to answers as tending to criminate, see note to *Rule* 455.

As to objections on the ground of disclosing the names of witnesses, see *supra*.

Where interrogatories, under the English practice, were administered to the guardian *ad litem* of a lunatic defendant, it was held that he need not answer them, as he was not a party, and not called upon to make admissions against defendant's interest; *Jugan v. Little*, W. N. 1883, 121.

Where knowledge, which might have been obtained by inquiry, is contained in reports which are privileged, the information so obtained is privileged; *London, Tilbury & Southend Ry. Co. v. Kirk*, 51 L. T. 599.

As to the circumstances under which police officers can be compelled to disclose the source of information under which they have done an act for which the action is brought, see *Humphrey v. Archibald*, 21 Ont. 553; 29 Ont. App. 267.

Criminating Questions.—A person under examination for discovery may object to answer questions tending to criminate such person, or the husband, or wife, of such person; *Fisher v. Owen*, 8 Ch. D. 647; *Alhosen v. Labouchere*, 3 Q. B. D. 654; *Malister v. Hucness*, 70 L. T. 375; *Mitchell v. Little*, 10 P. R. 265; *Jones v. Gallon*, 9 P. R. 296. The objection must be made on oath; *Webb v. East*, 5 Ex. D. 23; *Power v. Ellis*, 6 S. C. R. 2; *Redfern v. Redfern*, 35 W. R. 212; *D'Erny v. World*, 17 P. R. 387; but if not claimed before the Examiner the privilege, it seems, may still be claimed on a motion to

Answers
tending to
criminate.

Rule 456. commit: *Hall v. Gouranlock*, 12 P. R. 204. It is sufficient if the person swears that the answer to the question 'might' tend to criminate him: *Lamb v. Munster*, 10 Q. B. D. 110; but see 1 Ed. vil. c. 36 (D.). That another person may be exposed to an action, is not a ground for refusing to answer: *Tetley v. Easton*, 25 L. J. C. P. 293; but an officer of a corporation may claim the privilege on the ground that the corporation may be exposed to a criminal prosecution: *D'Irry v. World*, 17 P. R. 387.

See also R. S. O. c. 43, s. 5, and the notes to *Rule 467, infra*, p. 670.

The protection is against answering not only a question that has a direct tendency to criminate the person or corporation, but also one that forms a step towards doing so; the person, however, or in the case of a corporation, an officer, must pledge his oath to his belief that such would, or might, be the effect of the answer; and to entitle him to the privilege of silence, the Court must see from the circumstances of the case, and the nature of the evidence which the witness is called to give, that his belief is likely to be well founded: *D'Irry v. World*, 17 P. R. 387.

Where in an action on promissory notes defendants pleaded that plaintiff and others had conspired to harass defendants, and lessen trade competition, contrary to 52 V. c. 41 (D.), s. 1 (e), and had procured holders of notes to transfer them to the plaintiff, who was suing as trustee, plaintiff was held not entitled to refuse to answer as to the names of his *custis que trustee*, on the ground that the answer would tend to criminate him: *Hills v. Mercer*, 15 P. R. 276.

As to actions for breach of promise of marriage and proceedings in consequence of adultery, see R. S. O. c. 53, ss. 6, and 7, and notes preceding *Rule 439, supra*, pp. 608-9.

It was at first thought that answers given under such circumstances are not, under *The Canada Evidence Act*, 1893, 56 V. c. 31 (D.), admissible against the person examined, in any criminal proceedings, except a prosecution for perjury in giving such evidence, and the old rule exonerating a party from giving such evidence was therefore thought to be in effect abrogated; see *Weiser v. Heintzman*, 15 P. R. 258; but on appeal (S. C., 15 P. R. 407), it was held that the Dominion Act had not altered the practice in civil proceedings; but see 1 Ed. vil. c. 36 (D.), and see *The Queen v. Fox*, 18 P. R. 346; *sed quare*, as to this case.

In an action to recover damages for maintenance (which is an indictable offence), as no discovery could be had which would not involve the defendant in matters leading up to the offence, no examination for discovery can take place at all: *Hopkins v. Smith*, 1 O. L. R. 659.

Depositions how to be taken down.

456.—(1) Subject to Rules 457 and 458, the depositions on an oral examination as aforesaid shall be taken down in writing by the examiner in the form of a narrative, expressed in the first person; and when completed shall be read over to the person examined, and shall be signed by him in the presence of the parties, or such of them as may think fit to attend.

Signing depositions.

(2) Where any one examined refuses or is unable to sign the depositions, then the examiner shall sign the same.

(3) The examiner may upon every examination state any special matter to the Court if he thinks fit. He may in his discretion take down any particular question or answer, and he shall upon request note upon the depositions any question objected to and his ruling thereon. *Con.* Rule 501.

Rules
457-459.

Taking
down
questions.

Clauses (1) and (2) of this *Rule* merely apply where the examination is taken in long hand; where it is taken in short hand, see *Rules* 457, 458.

457. Where an examination (a) before or otherwise than at the trial, if the examining party desires to have such examination taken in shorthand, he shall, unless otherwise ordered by the Court or a Judge, be entitled to have it so taken at the place of examination [by the examiner or by a shorthand writer approved and duly sworn by him]. *Rules* 23 June, 1894, 1335.

Examina-
tion may
be taken in
shorthand.

The words in brackets were new in the *Rule*, 335 of 1894. For the previous practice, see *Bradt v. Bradt*, 13 P. R. 271.

(a) The words "is had or taken," or some equivalent words, seem wanting here.

458.—(1) Where in shorthand, the examination may be taken down by question and answer; and unless otherwise ordered it shall not be necessary for the depositions to be read over to, or signed by, the person examined, unless the Judge so directs where the examination is taken before a Judge, or in other cases unless any of the parties so desires.

Examina-
tions, how
to be
taken in
shorthand.

(2) A copy of the depositions so taken, certified by the person taking the same as correct, and if such person be not the examiner, also signed by the examiner, shall for all purposes have the same effect as the original depositions in ordinary cases. *Rules* 23 June, 1894, 1336.

Certified
copy to
have effect
of original
depo-
sitions.

Where an error has been made by the shorthand-writer in transcribing his notes the Court may allow the transcript to be taken off the files for correction: see *The Knutsford*, 1891, 1 P. 219; 64 L. T. 352.

459. The depositions taken by the examiner shall, at the request of any party interested and upon payment of his fees, be returned to and kept in the office of the Court in which the proceedings are carried on; and office copies of such depositions may be given out, and the examinations and depositions certified under the hand of the Judge or other

Deposi-
tions to be
returned
to Court.

Rules
460, 461.

Office
copies.

officer or person taking the same, or a copy thereof certified under the hand of the proper officer, shall, without proof of the signature, be received and read in evidence, saving all just exceptions. Con. Rule 504.

Taken from R. S. O. 1877, c. 50, s. 165.

"Saving all just exceptions."—This *Rule* does not make the depositions of a party, or of an officer of a corporation, admissible in evidence, otherwise than as provided in *Rule* 461.

Examiners
may make
a special
report to
the Court.

460. The person taking an examination may, and if need be shall, make a special report to the Court in which proceedings are pending, touching such examination and the conduct or absence of any person; and the Court may institute such proceedings and make such order upon such report as justice may require, and as may be instituted and made in any case of contempt of the Court. Con. Rule 505.

Taken from R. S. O. 1877, c. 50, s. 166.

Depositions,
how
may be
evidence.

461.—(1) Any party may, at the trial of an action or issue, use in evidence any part of the examination of the opposite party; but the Judge may look at the whole of the examination, and if he is of opinion that any other part is so connected with the part to be so used that the last mentioned part ought not to be used without such other part, he may direct such other part to be put in evidence. Con. Rule 506.

Compare Eng. (1883) R. 306, which is in substance the same.

In the Court of Chancery of this Province, and in the Common Law Courts of both England and Ontario, a party could use no part of the examination of his opponent without using the whole. The consequence was that one of the great uses of an examination of a party, *viz.*, the saving of expense by proving, by admission, the facts not really in dispute, was prevented, as such admissions in the examination often stood side by side with other statements which the examining party could not safely make part of his case.

Two additional clauses (2) and (3) of this *Rule*, added in the Consolidation of 1897, provided that the depositions of an officer of a corporation taken for discovery might, subject to specified restrictions, be used as evidence. These provisions were not found to be generally acceptable or just, and they have therefore been abolished by the repeal of the clauses (2) and (3) by Con. *Rule* 1254, of 20 June, 1907.

The *Rule* only authorizes the examination for discovery to be used as evidence where it is that of "the opposite party." It does not authorize the use of the examination of any other person who is not a party, as evidence at the trial; *e.g.*, the evidence of an assignor of a chose in action taken under *Rule* 441 will not be usable against the assignee, nor will the examination of a person for whose benefit "an action is brought or defended, taken under *Rule* 440, be usable against

the actual parties to the action. In such cases the examination is **Rule 462.** confined to the purposes of discovery simply, and if the evidence is required at the trial, the person must be called and examined in the same way as any other witness.

See *Lyle v. Kennedy*, 50 L. T. at p. 734, in which under the corresponding English Rule it was said that when an admission is read, everything ought to be read which is fairly connected with that admission.

Where the plaintiff, without objection, put in the defendant's depositions and referred to certain parts, and the Judge in charging the jury referred to other parts, it was held that he could properly do so, as the whole depositions had been put in evidence: *Dougall v. Stapleton*, 12 Ont. 206.

Where the examination of a witness has been taken by a stenographer it is admissible in evidence, even though incomplete, and though in consequence of the death of the witness he could not be cross-examined: *Randall v. Atkinson*, 30 Ont. 242, 620; *semble*, the same rule would apply to an examination for discovery.

462. In any action brought to recover damages or other compensation for or in respect of bodily injury sustained by any person, the Court or a Judge or any person who by consent of parties, or otherwise, has power to fix the amount of such damages or compensation, may order that the person in respect of whose injury damages or compensation is sought shall submit to be examined by a duly qualified medical practitioner who is not a witness on either side, and may make such order respecting such examination and the costs thereof as he may think fit. The medical practitioner named in such order shall be selected by the Court or Judge making the order, and may afterwards be a witness on the trial unless the Judge before whom the action is tried otherwise directs. Rules of 1st Jan., 1896, 1453.

Medical examination in action in respect of bodily injury.

Taken from 54 V. r. 11 (O.).

Formerly, the examination of the person of a litigant could not be ordered for the purpose of discovery: *Reilly v. City of London*, 14 P. R. 171.

This Rule does not authorize the putting of questions by the medical practitioner to the person examined, who therefore refuse to answer questions, but must allow him to be physically examined: *Chase v. Coleman*, 16 P. R. 406, 54.

An examination under this Rule, before trial and verdict for plaintiff, for the purpose of shewing that the plaintiff had recovered his health, and that the verdict was excessive, was refused, it being held that examination under the Rule is only intended for discovery before trial: *Fraser v. London Street Ry. Co.*, 18 P. R. 370.

Rule 463.

2. PRODUCTION AND INSPECTION OF DOCUMENTS.

Discovery
before and
after close
of pleadings.

463. The Court or a Judge at any time pending any action or proceeding, may order the production by any party thereto, upon oath, of such of the documents in his possession or power relating to any matter in question in such action or proceeding, as the Court or Judge thinks right; and the Court may deal with such documents, when produced, in such manner as appears just. Con. Rule 507.

The same as the Eng. (1883) R. 356. It enables the Court or Judge to order production at any time during the pendency of the action or proceeding. The next Rule 464, enables either party, after the defence is delivered, or, when the application is on behalf of a plaintiff, after the time for delivering the defence has expired, to obtain an order of course for this purpose upon *principle*.

The right to discovery of documents is not enlarged by *The Judicature Act*, and where a bill of discovery would not formerly lie, discovery of documents cannot now be had, e.g., in an action to recover statutory penalties: see *Hanning v. Williamson*, and other cases in the note preceding Rule 439.

Where, in any such case, an order has been issued, the defendant is not bound to file an affidavit, and claim privilege, but may have the order set aside: *Johnston v. London & Paris Exchange*, 6 O. L. R. 49.

The present Rule will only be applicable, where the ordinary procedure for obtaining production under Rule 464 will not meet the justice of the case.

Evidence will not be entered into on a motion under this Rule, but the Court will form its conclusions upon the pleadings, if any, or upon any proceedings already taken: *Downing v. Falmouth*, 37 Ch. D. 234.

As a general rule, production should not be ordered in favour of a party before he pleads, unless the Court or Judge is satisfied that discovery of documents is necessary to enable him to frame his pleading: *Arthur v. Rumbians*, 18 P. R. 207.

Under the present Rule production by defendant was ordered, before defence, where the plaintiff had been awarded an injunction restraining the sale of chattels, and had been put on terms to go down to trial at such a time that it was probable that the case would be tried before production could be obtained in the ordinary way: *Coots v. Coots*, 3 C. L. T. 314. So production of a document was ordered to enable defendant to frame his defence: *Henderson v. Underwriting & Agency Association*, 1891, 1 Q. B. 557; so also before statement of claim, to enable it to be framed: *Machon v. Barber, etc.*, 13 P. R. 500. So, under a similar Irish Rule, where discovery was required by defendants to ascertain what damages the plaintiff had sustained, with a view to payment of money into Court: *McGuire v. McBurnid*, 10 L. R. Ir. 373. See also *Jourdain v. Palmer*, L. R. 1 Ex. 192; *Re Satchell*, 50 L. J. Chy. 574; 29 W. R. 732; 17 C. L. J. 357; *White v. Threns*, 25 Ch. D. 717.

Documents taken out of the plaintiff's possession by the defendant, **Rule 464**, on leaving the plaintiff's employment, and to recover which the action was brought, were, on an interlocutory application, ordered to be delivered up to the plaintiff: *Whitcham v. Moss*, 73 L. T. 57.

"**Documents.**"—Under this term "photographs" are included: *Fox v. Steeman*, 17 P. R. 492.

Copies.—The right of inspection includes the right to have or take copies; see *Pratt v. Pratt*, 30 W. R. 837; 47 L. T. 249; *Matter v. Eastern*, 38 Ch. D. 92; and the Court has jurisdiction to order that the opposite party be at liberty to take copies by means of photographs of the documents, proper safeguards being adopted to secure the preservation of the originals from injury or loss: *Lewis v. Loundsbrough*, 1893, 2 Q. B. 191; 69 L. T. 353.

464. Any party may, after the defence is delivered, or a plaintiff may, after the time for delivering the defence has expired, (a) and any party to an issue may, after the issue has been filed, obtain an order of course upon *præcipe*, directing the adverse party within 10 days after the service thereof, to make discovery on oath of the documents which are or have been in his possession or power, relating to any matters in question in the action; and to produce and deposit the same with the proper officer for the usual purposes, and such party shall make discovery and produce and deposit the documents accordingly, without further notice. Con. Rule 568.

Order for production of documents.

Rule 464 varies from the Eng. (1883) R. 374, and from the practice under the Common Law Procedure Act, but agrees substantially with the practice in Chancery under Chy. O. 134. The English Rule is not limited as this **Rule** is, with respect to the time of obtaining the order; and the English decisions thereon, such as *Union Bank of London v. Mauby*, 13 Ch. D. 239, etc., will therefore not apply here. Nor does the English Rule permit the order to be obtained on *præcipe*, but requires an application, though not necessarily on affidavit, which, however, the Judge may require, if he sees fit: *Johnson v. Smith*, 36 L. T. 741.

The order for production can only be properly issued under this **Rule**, where the party issuing it is entitled to discovery. If the action is of such a nature as disentitles the plaintiff to such relief, the order is irregular, and will be set aside: *Johnston v. London & Paris Exchange*, 4 O. L. R. 49, (an action to recover penalties).

On a special application, production may be obtained under **Rule 463** from "any party" and at any stage; see notes to that **Rule**.

In a petition of right, the Crown is entitled to discovery of documents from the suppliant: *Tomlin v. The Queen*, 4 Ex. D. 252; and in an action by the Crown, the Crown has the same right of discovery against the defendant as one subject has against another: *Att.-Gen. v. Newcastle*, 1897, 2 Q. B. 384; 77 L. T. 293. The defendant has not the same right against the Crown, though as a rule the Crown gives full discovery, unless the public interest requires that this should not be done: *Id.*

Rule 464. Time for Production.—The words at (a) mean that as each defendant puts in his defence, or the time for doing so expires, that defendant becomes liable to give, and entitled to obtain, production.

Issue.—Where production is required upon an issue, the officer with whom the issue is filed is the officer to issue the order: see *Rule 377*.

From whom
production
may be
compelled.

"Adverse Party."—The Eng. (1883) R. 343, not adopted by the Ontario Act, provides for the examination of the "opposite party or parties" by interrogatories; and it has been held that a person whom defendant, by his counter-claim, had made a defendant, was not "an opposite party" as between him and the plaintiff, so as to entitle him to examine the plaintiff under that Rule: *Molloy v. Kilby*, 15 Ch. D. 162; but see *The Alcop & Gandia Ry. v. Greenhill*, 74 L. T. 345; and there is no jurisdiction under the English Rules to make an order for discovery, except as between opposite parties: *Brown v. Watkins*, 16 Q. B. D. 125; see *Shaw v. Smith*, 18 Q. B. D. 193; third parties may become in the position of defendants and thus be within the Rule: *Eden v. Weardale*, 35 Ch. D. 287. The Ontario *Rule 464* entitles any party to production from "the adverse party"; and *Rule 439* enables a party to examine for discovery "any party adverse in interest," and it is probable that production may be obtained under this Rule from any party who might so be examined: see notes to *Rule 439, supra*; and *Hamilton v. Nott*, L. R. 16 Eq. 112; *Kennedy v. Wakefield*, 39 L. J. Chy. 827; 22 L. T. 645; 18 W. R. 884; and *Brigham v. Bronson*, 3 C. L. T. 311, where a defendant obtained production from a co-defendant adverse in interest.

A defendant, who is a necessary party to the action, is liable to make discovery to the plaintiff, though no relief is asked against him: *Spokes v. The Grosvenor & W. E. Ry. T. Hotel*, 1897, 2 Q. B. 124; 76 L. T. 679.

Under an order obtained by one defendant, other defendants cannot compel production: *Scymour v. Longworth*, 3 Chy. Ch. 112.

Third Party.—As to compelling production by, and against, a third party, see *Rule 465* and notes.

By whom
affidavit to
be made.

Affidavit.—Under an order for production by the plaintiff, the plaintiff on the record is the person to make the affidavit, and an affidavit from some beneficial plaintiff is not a compliance with the order: *Wilson v. Ruffalovich*, 7 Q. B. D. 553.

Infant and
lunatic
plaintiffs.

Where a plaintiff of unsound mind sues by a next friend, the defendant is entitled to an affidavit of documents made by the next friend, or by some one acquainted with the facts: *Traviss v. Bell*, 8 P. R. 550; and in the case of an infant, see *Arnold v. Playter*, 14 P. R. 390; *Flett v. Coulter*, 4 O. L. R. 714. In England, *Higginson v. Hall*, 10 Ch. D. 235, to the same effect was disapproved of in *Dyke v. Stephens*, 30 Ch. D. 189; see also *Mayor v. Collins*, 24 Q. B. D. 361. A motion by the defendant was granted, that the next friend of an infant plaintiff might be ordered to make an affidavit in reference to documents in his possession in *Crouce v. Bank of Ireland*, 5 Ir. R. Eq. 578; but see *Ingram v. Little*, 11 Q. B. D. 251; *Re Corsellis, Lawton v. Ellice*, 48 L. T. 425; W. N. 1883, 60; 52 L. J. Chy. 399; *Dyke v. Stephens*, 30 Ch. D. 189; *Redfern v. Redfern*, 1891, P. 139; and *Curtis v. Mundy*, 1892, 2 Q. B. 178; *Scott v. Consolidated Bank*, W. N. 1893, 57; 94 L. T. Jour. 508; decided under

the English Rule of 1875, O. 31, r. 12 (1883, R. 354), not adopted **Rule 464** here, but which provides that any 'party' may apply to a Judge for an order directing any other 'party' to the action to make discovery on oath of the documents which are or have been in his possession, etc., relating to any matter in question in the action.

Where it is sought to remove a next friend of an infant, he cannot be compelled to give discovery under this *Rule* for that purpose: *Re Corsellis, Lawton v. Elwes*, 31 W. R. 414. (For the conclusion of that matter see 50 L. T. 703).

The next friend of a married woman is not bound to make the affidavit: *Brown v. Capron*, 6 P. R. 203; Dan. Pr., 5th ed., 1682.

In an action by a husband and wife, the wife suing in respect of her separate property and without a next friend, they must make affidavits as to what documents they, and each of them, have, an affidavit as to what they have jointly not being sufficient: *Fendall v. O'Connell*, 29 Ch. D. 899.

In other cases, where a plaintiff cannot make an affidavit, some proper person must do so for the plaintiff, and proceedings will be stayed meanwhile: *Republic of Liberia v. Royce*, 1 App. Cas. 139; see *Pringle v. U. S. America*, L. R. 2 Eq. 659; *U. S. America v. Wagner*, L. R. 2 Chy. 582; *Princess of Wales v. Earl of Liverpool*, 1 Sw. 114; see also notes to *Rules* 463, 468. But it has been held that proceedings could not be stayed by a defendant, in an action on a marine policy, until the plaintiff had obtained an affidavit of documents from his assignor, who was not a party to the suit, nor under the plaintiff's control, within the jurisdiction: *Fraser v. Burrows*, 2 Q. B. D. 624; but see *Willis v. Baddeley*, 1892, 2 Q. B. 324; 67 L. T. 60 206.

As to production of documents by an official liquidator, see *Re Mutual Society*, 22 Ch. D. 714. official liquidators.

See *Rule 467* as to the form of the affidavit to be made in pursuance of the order to produce. Affidavit.

As to what documents a party is bound to produce, see notes to *Rule 467*.

An affidavit must be made, though the party has no documents to produce. It should not be made before the order to produce is issued: *Kennedy v. Royal Ins. Co.*, 3 Chy. Ch. 489; see *Dobson v. Dobson*, 7 P. R. 258; and it should not in such case refer to schedules containing no documents: see *Rogers v. Crookshank*, 4 C. L. J. 45. Affidavit where no documents produced.

"Possession or Power."—The party's solicitor, who has in his books and papers entries relating to the party's affairs, cannot be compelled to produce them, nor can the party be required to get and produce copies: *O'Shea v. Wood*, 1891, P. 237 (reversed, on another point, in appeal, *Ib.*, 286).

Documents admitted by a defendant, sued as administratrix, to be in her hands individually, but not in her representative capacity, were order to be produced: *Fox v. Sleeman*, 17 P. R. 492.

"The Usual Purposes" mentioned in this *Rule* include the inspection, and taking of copies by the opposite party: but where documents were mentioned as being in the hands of a third person, who refused to give them up until paid certain charges, it was held that the Usual purposes.

Rule 465. opposite party must content himself with inspecting them, and taking copies, unless he would agree to indemnify his opponent against the costs of obtaining the documents: *Hagaboom v. Cox*, 15 P. R. 23.

Deposit of documents. Documents produced may be ordered to be deposited, ordinarily, in the office in which the proceedings are being taken, (and the form of order (Form 96) issued directs them to be deposited with the affidavit on production), but not in the case of books in daily use: *Macdonnell v. McKay*, 2 Chy. Ch. 141; though inspection of these must be allowed at reasonable times: *Hamelyn v. Whyte*, 6 P. R. 143. In practice it is not the custom to deposit the documents, unless specially required by the opposite party; and upon an undertaking being given to allow inspection, when required, of books in constant use, the deposit of them may be dispensed with: *Re Ross*, 5 Ont. App. 82. Where necessary, any convenient place for inspection may be named by special order: see *Hamelyn v. Whyte*, *supra*; *Gabbett v. Cavendish*, 3 Sw. 267 (n), in the case of books in daily use; *Prestney v. Colchester*, 24 Ch. D. 376, old records and books: *Wagner v. Mason*, 6 P. R. 188, documents in which other persons were interested.

Production before Referees or Masters.

Probably, orders on *præcipe* to produce under this *Rule*, as under Chy. O. 134, are for the purposes of a trial only, and can not be used for the purposes of a reference, but the Master to whom the reference is directed may be applied to for a direction for production: *Hulderbroom v. McDonald*, 8 P. R. 389. See also *Shelley v. Hussey*, 8 P. R. 250.

See further as to production before Masters, and Referees, notes to *Rules* 669 and 648; and *Cochrane v. Morrison*, 10 P. R. 606.

In an action on a marine policy, an order that the plaintiffs and all other persons interested produce the ship's papers in accordance with the practice in that behalf before *The Judicature Act*, was held not superseded by it, and therefore proper: *China Trans-Pacific S. S. Co. v. Commercial Union*, 8 Q. B. D. 142.

As to restoring to parties documents left for inspection in the office of a Master, see *Darling v. Darling*, 10 P. R. 1.

Postponement of Discovery pending Decision on Point of Law.—Under *Rule* 259 the Court may order any point of law which is raised to be argued, and may postpone inspection of documents until such point has been determined: *DeCarteret v. Land Security Co.*, 42 W. R. 104; 70 L. T. 323; 7 R. 16.

Position of a third party served by a defendant.

465. A party or person who has been served by a defendant with a third party notice and has entered an appearance, shall, for all purposes of and incident to the production of documents and examination, be, as between him and the defendant serving the third party notice, in the same situation as a defendant, and the defendant serving him shall, for the same purposes, be in the same situation as a plaintiff: the time for taking out an order for production or for examination shall be after the party or person so served has entered a defence, or where the application is on behalf of the defendant so serving such third party notice, the time shall be

after the time for delivering a defence has expired. *Con. Rules*
Rule 509; Rules 29th Dec., 1894, 1387, amended. *466, 467.*

The object of this *Rule* is to place a third party who has been served by a defendant, and has appeared, in the same situation as a defendant, for the purposes of *Rule 464*, as between him and the defendant who served him. There is no corresponding *Rule* in England. A third party so served, and appearing, is not on that ground entitled to an order for production as against the plaintiff under this *Rule*. But if directions are obtained under *Rule 213*, allowing him to defend as against the plaintiff, he is then in the same situation, with respect to the plaintiff, as any other defendant, and may obtain discovery from, and be compelled to give it to, the plaintiff: *McAllister v. The Bishop of Rochester*, 5 C. P. D. 194; *Eden v. Wear-Jale*, 34 Ch. D. 223; see also *Bradley v. Clarke*, 9 P. R. 410, where, though there was no direct issue between the plaintiff and a third party, yet as the latter had all the rights of a defendant, and virtually took his place, the plaintiff was allowed to examine him under *Rule 440*.

Scmble, a third party, made a defendant by counter-claim, may not be entitled to an order of course for production against the original plaintiff, but on special application he may obtain an order, where the circumstances warrant it: see *The Aleoy & Gandia Ry. v. Greenhill*, 74 L. T. 345.

466. A person for whose immediate benefit an action is prosecuted or defended is to be regarded as a party for the purpose of production of documents. *Con. Rule 510.*

Person benefited a party for certain purposes

This *Rule* and *Rule 440* are in *pari materia*: *Garland v. Clarkson*, 9 O. L. R. 281.

See notes to *Rule 440*, and *Bradley v. Clarke*, in note to *Rule 465*.

The Court may stay proceedings in an action brought for the benefit of a person, not a party, until discovery of documents shall have been made by such person: *Willis v. Baddeley*, 1892, 2 Q. B. 324; 67 L. T. 60, 206.

By *Rule 441* where an action is brought by an assignee of a chose in action, the assignor is examinable for discovery, but there is no *Rule* requiring the assignor to make an affidavit of documents.

467. The affidavit to be made by a party against whom an order for production has been made, shall specify which, if any, of the documents therein mentioned he objects to produce, and may be according to Form No. 19. *Con. Rule 513.*

Affidavit on production, form of.

Corresponds with Eng. (1883) R. 355.

For Form No. 19, see H. & L. Forms, No. 504.

Discovery and Production of Documents Generally.—What Courts of Equity have always compelled the production of documents, must be. The Common Law Courts did so to a very limited extent, but the practice was extended by statute: R. S. O. 1877, c. 54, ss. 169, 170; 41 Vict. c. 8, s. 9. And now under *The Judicature Act*, the right is

Rule 467. regulated by the rules previously existing in the Court of Chancery: *Anderson v. Bank of British Columbia*, 2 Ch. D. 644, 658; and the Common Law rules are entirely at an end: Cotton, L.J., in *Eade v. Jacobs*, 3 Ex. D. 337, explained in *Bidder v. Bridges*, 20 Ch. D. 29, in which it was decided that the defendant has no larger right to discovery than the plaintiff. Production is a matter of right (subject to any right of privilege or protection), and is not a matter in the discretion of the Court: *Bustros v. White*, 1 Q. B. D. 423; *Atherley v. Harvey*, 36 L. T. 551; except where sought under *Rule 463*, when the Court would appear to have a discretion as to the documents to be produced.

What must
be produced

A plea of purchase for value without notice was formerly available as a bar in Chancery, in a suit for discovery in aid of proceedings at law, but was not available against either discovery, or relief, in cases in which the Court of Chancery had concurrent jurisdiction. Sec. 57 (6) of the Act, therefore, does not protect defendants who set up such a defence from giving discovery, as the High Court does not now exercise the former auxiliary jurisdiction of the Court of Chancery, but has complete jurisdiction over the whole action: *Emmerson v. Ind*, 12 App. Cas. 300; 56 L. T. 778.

All material
documents
unless some
ground of
privilege
made out.

Every material document (see *Bowie v. Graham*, 7 Q. B. D. at p. 411), must be produced, unless it is shewn to be privileged; though where the materiality depends upon the determination of a question in dispute, and the discovery sought is calculated to cause considerable trouble, or to prove oppressive and vexatious to the party from whom it is sought, the Court may act upon *Rule 472*, and postpone the discovery until the question has been determined: *Wood v. Anglo-Italian Bank*, 34 L. T. 255; *Evans v. Jaffray*, 3 O. L. R. 327. See also notes to *Rule 472*.

It is the duty of a party, who, after filing an affidavit, discovers a document of which his opponent has a right to have production, but which is not disclosed in the schedule, to inform his opponent of the discovery, either by a supplementary affidavit (the proper course), or at least by notice: *Mitchell v. Darley Main Colliery Co.*, 1 Cab. & Ell. 215.

The general law applicable to discovery governs in patent cases. The defendant must disclose the particular lines of attack on the plaintiff's patent which are contemplated, but need not so individualize persons alleged to be prior users, as to enable the plaintiff to know the defendant's witnesses: *Smith v. Greig*, 10 P. R. 482.

Everything which will throw light upon the case: *Hutchinson v. Glover*, 1 Q. B. D. 138; or which may help the case: *Dinn v. Brandon*, 79 L. T. Jour. 196; *Cameron v. Cameron*, 10 P. R. 522; *Compagnie Financière, etc., v. Peruvian Guano Co.*, 11 Q. B. D. at p. 63, is *prima facie* subject to production and inspection.

Letters written, though not mailed, must be produced; the mere fact that they were not forwarded is no ground of exemption: *Cameron v. Cameron*, 10 P. R. 522.

Photographs are "documents": *Fox v. Sleeman*, 17 P. R. 492.

Discovery of documents clearly immaterial to the question at the trial will not be compelled before trial: see note, p. 682.

Materiality.

As a rule only those documents material to the issue to be tried can be required to be produced; documents which may be material on a reference, if the relief claimed is granted, are not "material" before trial: see *Diakerson v. Radcliffe*, 17 P. R. 586; and notes *infra*, p. 682.

The Court, however, does not in general distinguish nicely between **Rule 467**, the materiality of the discovery to the matter to be tried at the hearing, and by way of consequential relief; still if the discovery is such as might be used to the prejudice of the party, irrespective of the suit, the Court will look narrowly to the question, whether there is reasonable prospect of its being of material service at the hearing: *Carver v. Pinto Leite*, L. R. 7 Chy. 90; *Heugh v. Garrett*, 44 L. J. Chy. 305; 32 L. T. 45; *Republic of Costa Rica v. Erlanger*, L. R. 19 Eq. 33; *Graham, q. t. v. Temperance & G. L. A. Co.*, 16 P. R. 536; and where the plaintiff's right to judgment was conceded, discovery was ordered before decree as to matters which would be referred to a Master: *McDonald v. McArthur*, 7 C. L. T. 28, following *Elmer v. Creasy*, L. R. 9 Chy. 69.

Where, in an action for libel, defendant has pleaded justification, and has pleaded or delivered particulars in support of the plea, the issues to be tried are limited to the particulars, and discovery is also limited to those matters: *Yorkshire Provident, etc., v. Gilbert & Rivington*, 1895, 2 Q. B. 148. Where publication is admitted and an apology and payment into Court pleaded, production of the original MS. of the libellous contribution was not ordered: *Hope v. Brash*, 1897, 2 Q. B. 188; see also *Parnell v. Walter*, 24 Q. B. D. 441; *Blanc v. Burrows*, 12 Times, 521, where in an action against a newspaper for libel, the editor was responsible for the publication, it was held not relevant to inquire from whom he got his information, or the means taken to test its truth; see also note to *Rule 455, supra*, p. 664.

Where a question, in an action on an insurance policy, was whether the plaintiff's answer to the question, whether he had been subject to asthma, was material under 55 Vict. c. 39, s. 33 (2), (R. S. O. c. 203, s. 144 (2)), which provides that no untrue statement shall vitiate the contract unless material, it was held that the materiality was a question for the jury, and defendants were ordered to produce all other applications and medical examinations in which the answer as to asthma had been in the affirmative, with a view to the plaintiff's showing that in such cases the company had treated the answer as immaterial: *Ferguson v. Provident Institution*, 15 P. R. 366.

A defendant is entitled to inspect documents evidencing the contract sued on, though he does not admit their genuineness: *Benjamin v. Sauter*, 6 Ir. R. C. L. 16; and documents bearing upon the amount of damage though there is no question of liability to be tried, but assessment of damages only: *Pape v. Lister*, L. R. 6 Q. B. 242.

After judgment for the plaintiff in an action for the infringement of a patent, he is entitled to inspection of defendant's books, and to an account, although an appeal may be pending from the judgment: *Sarby v. Easterbrook*, L. R. 7 Ex. 207.

Discovery of the documents must be given, though the party may not be bound to produce them for inspection: *Rumbold v. Fortcath*, 3 K. & J. 44; *Lazarus v. Mozley*, 5 Jur. N. S. 1119; *Manby v. Bevicke*, 8 D. M. & G. 476; *Kain v. Farrer*, W. N. 1877, 266; *New British Investment Co. v. Pead*, 3 C. P. D. 196; and see *Owen v. Wynn*, 9 Ch. D. 29; *Re Pickering*, 25 Ch. D. 247.

The party making an affidavit on production must, if necessary, seek the necessary information from his present or former agents: *Earl of Glengall v. Feazer*, 2 Hare, 99; *McIntosh v. G. W. Railway*, 4 DeG. & S. 544; *Anderson v. Bank of British Columbia*, 2 Ch. D. 644; see *Rashotham v. Shropshire, etc.*, 24 Ch. D. 110; *Southwark v. Quick*, 2 Q. B. D. 321; *Bolelow v. Fisher*, 10 Q. B. D. 161; see

Information to be sought by party producing.

Rule 467. also *Harris v. Toronto Electric Light Co.*, 18 P. R. 285; *Foakes v. Webb*, 28 Ch. D. 287. In an action on a policy of marine insurance, the defendants obtained an order that the action should be stayed until the plaintiffs satisfied the Court that they had done all in their power to obtain production of the ship's papers: *West of England Bunk v. Canton Co.*, 2 Ex. D. 472; but where the person in whose control the documents were, was not within the jurisdiction, and it was difficult if not impossible to obtain the discovery, the Court refused to stay proceedings: *Fraser v. Burrows*, 2 Q. B. D. 624; and where executors were sued for trust funds alleged to have been received by their testator, it was held that they were not bound to make inquiry of the testator's bankers to enable them to say whether or not the fund had been paid to the bankers at a period 20 years prior to the testator's death, and that inquiry into transactions of so remote a date was no part of their duty: *Millett v. Smith*, 1895, 2 Ch. 111.

Difficulty
in obtaining
production.

Mere difficulty or inconvenience in giving discovery, is no reason for not giving it. Thus a railway company were required to give discovery of the contents of books in the possession of themselves or their agents extending over a series of years, to shew the receipt of goods specifically delivered to them for carriage: *Hall v. L. & N. W. Ry. Co.*, 35 L. T. 848. See also *Mertens v. Haigh*, 11 W. R. 792.

Documents
not in
party's
possession.

If documents not in the possession of a party are required to be produced, or information respecting them given, the party is entitled to be indemnified against the cost of obtaining the documents, or the information: *Hamelyn v. White*, 6 P. R. 143; *Bethell v. Casson*, 12 W. R. 200; *Hogaboom v. Cox*, 15 P. R. 23.

Secondary
evidence.

Though documents are privileged from production, the opposite party may nevertheless give secondary evidence of them: *Calcraft v. Guest*, 1898, 1 Q. B. 759; 78 L. T. 283.

Copies.

A party who has a right to have documents produced for his inspection has also a right to take copies of them: *Pratt v. Pratt*, 30 W. R. 837; 51 L. J. Chy. 838; 47 L. T. 240; W. N. 1882, 117; and such copies may, under proper safeguards, be allowed to be taken by photography: *Lewis v. Lamesborough*, 1893, 2 Q. B. 191.

As to obtaining copies, see *Rules 324-326*.

Privileged
documents.

Privilege and Protection from Production:

The general rules as to privilege in evidence, are applicable in regard to protection from discovery: *Wulcer v. E. Indian Co.*, 2 Jur. N. S. 407; *Clegg v. Edmonson*, 22 Beav. 125. See *Greenough v. Gaskell*, 1 M. & K. 100.

The following are some of the principal classes of cases in which documents need not be produced:

On ground
of public
policy.

1. State Documents and the Like, the Production of which is not in the Public Interest, and is against Public Policy:

—*Kain v. Farrer*, W. N. 1877, 293; 37 L. T. 469; *H. M. S. Bellocophon*, 31 L. T. 756; 23 W. R. 248; 44 L. J. Adm. 5; *Hennessey v. Wright*, 21 Q. B. D. 509; *Wright v. Mills*, 62 L. T. 558; *Ford v. Blest*, 6 Times, 295. But it must be stated in the affidavit how these are privileged: *Kain v. Farrer*, *supra*; and in such case it is for the head of the department, having the custody of such documents, not for the Judge, to determine whether the production will be injurious to the public service; *Bradley v. McIntosh*, 5 Ont. 227; *Hennessey v. Wright*, 21 Q. B. D. 509; *Hughes v. Vargus*, 9 R. 661; 9 Times, 551; see *Re Joseph Hargreaves, Limited*, 1900, 1 Ch. 347.

As to privilege by reason of a disclosure being injurious to the administration of justice: see *Humphrey v. Archibald*, 21 Ont. 353; 20 Ont. App. 267.

2. Documents the Production of which would Tend to Involve the Party in a Criminal Charge, or to Subject Him to a Penalty.—*Webb v. East*, 5 Ex. D. 23; *Fisher v. Owen*, 8 Ch. D. 645; *Allhusen v. Labouchere*, 3 Q. B. D. 654; *Hill v. Campbell*, L. R. 10 C. P. 222; *Boyle v. Wiseman*, 10 Ex. 647. see *Waters v. Earl of Shaftesbury*, 14 W. R. 250; *Pickard v. Moore*, 17 P. R. 287; or forfeiture: *Maxborough v. Whitwood*, 1897, 2 Q. B. 111; *Atty.-Gen. v. Toronto Junction Recreation Club*, 7 O. L. R. 248; but the objection must be made upon oath: *Webb v. East*, *supra*, *Brookley v. Graham*, 11 P. R. 451; *Powder v. Ellis*, 6 S. C. R. 1; and must be made in an affidavit pursuant to an order for production, the objection is no ground for refusing an order: *Spokes v. Grosvenor*, 1897, 2 Q. B. 124; 76 L. T. 677; and the penalty and forfeiture clauses of the 13 Eliz. c. 5, and 27 Eliz. c. 4, (see now R. S. O. c. 334, ss. 2, 6), cannot be used to prevent production by parties to deeds which it is sought to impeach under those statutes: *Bunn v. Bunn*, 4 DeG. J. & S. 316; see *Society of Apothecaries v. Nottingham*, W. N. 1875, 259.

An action for pound breach, claiming treble damages, is a penal action, and the plaintiff is not entitled to an affidavit of documents: *Jones v. Jones*, 22 Q. B. D. 425; *Hobbs v. Hudson*, 25 Q. B. D. 232; but where the action is for a sum imposed by statute by way of compensation, the plaintiff is entitled to an affidavit: *Adams v. Batley*, 18 Q. B. D. 625; and see *Saunders v. Wiel*, 1892, 2 Q. B. 321.

The mere fact that a party disobeying the order of the Court granting the plaintiff the relief claimed would be liable to a penalty, is no ground for refusing discovery: *Re Derbyshire v. Derby*, 1896, 2 Q. B. 297; 1897, A. C. 550; 74 L. T. 747; 77 L. T. 107.

See also note to Rule 455, p. 665.

Generally, when fraud is charged, no privilege can be claimed for documents relating to the alleged fraud: *Ferner v. Williams*, 11 Jur. N. S. 902; *Phillips v. Holmer*, 25 W. R. 578; *Charlton v. Coombes*, 4 Giff 372; *Mornington v. Mornington*, 2 J. & H. 697; *Williams v. Quebrada Ry.*, 1895, 2 Ch. 751; 73 L. T. 397; *Smith v. Hunt*, 1 O. L. R. 334; but see *Griffin v. Fackes*, 17 P. R. 540; *Bullivant v. A.-G. Victoria*, 1901, A. C. 196.

3. Documents Relating Exclusively to the Party's Own Title, or Case, or to the Evidence by Which it is to be Established.—*Owen v. Wynn*, 9 Ch. D. 29; *Dow v. Eley*, 2 H. & M. 725; *Inglby v. Shafto*, 33 Beav. 31; *Commissioner of Stamps v. Glaspe*, L. R. 15 Eq. 302; *Storey v. Coles*, 4 Chy. Ch. 9; *Green v. Amey*, 2 Chy. Ch. 138. In such case his opponent is not entitled to his deeds, etc., in order to "pick holes" in them: *Owen v. Wynn*, 9 Ch. D. 29; but it must appear that they do not relate also to the title of the opposite party: *Clegg v. Edmondson*, 22 Beav. 125; *Lind v. Isle of Wight Ferry Company*, 8 W. R. 540; *Bishop of Winchester v. Bowker*, 29 Beav. 479; *Felkin v. Lord Herbert*, 9 W. R. 756; *Bolton v. Corporation of Liverpool*, 1 Myl. & K. 88; *Jenkyn v. Bushby*, 14 W. R. 531; *Southwark & Vauxhall Water Company v. Quick*, 3 Q. B. D. 315, and it must appear on oath positively, and not on information and belief only, that the documents are exclusively matter of evidence in support of, and not impeaching, the party's own case, and do not support that of the opposite party: *Diamond Match Co. v. Hanchesbury Lumber Co.*, 1 O. L. R. 577.

Rule 467.

It was held by the Court of Appeal in *Budden v. Wilkinson*, 1893, 2 Q. B. 432, that this rule is not confined to documents relating to the title to land, overruling *Macleay v. Jones*, 66 L. T. 653; and see *Frankenstein v. Garins H. C. C. Co.*, 1897, 2 Q. B. 62; 76 L. T. 747.

The denial of the making of, or an allegation that, a document relating exclusively to the opposite party's own case, is forged, gives no right to call for its production; *Griffin v. Fawkes*, 17 P. R. 540.

Letters between co-defendants were held not capable of being put in evidence, and therefore, as not supporting the defendant's case, are not privileged; *Hep v. De la Hep*, W. N. 1886, 101.

Interrogatories seeking discovery in support of a substantive case set up by the defendant were required to be answered by the plaintiff; *Ridder v. Bridges*, 20 Ch. D. 29; but a party is not entitled to discovery of the manner in which, and the evidence by which, his opponent intends to establish exclusively his case; *Id.*

Production cannot be refused merely on the ground that if the plaintiff's claim is unfounded, he has no interest in the documents; *Greedy v. Housley*, 2 K. & J. 288.

Production was ordered when, from the circumstances of the case as stated, the Court thought that the cases of the plaintiff and defendant were so interwoven that nothing could relate to the one without relating to the other; *Hamilton v. Street*, 1 Gr. 327.

For what was held a sufficient description of the documents, and entitling them to protection on this ground, see *Bewicke v. Graham*, 7 Q. B. D. 400; *Roberts v. Oppenheim*, 26 Ch. D. 724; *Budden v. Wilkinson*, 1893, 2 Q. B. 432; *Milbank v. Milbank*, 1900, 1 Ch. 376; 82 L. T. 63; *Diamond Match Co. v. Hawkesbury Lumber Co.*, 1 O. L. R. 577.

In *Budden v. Wilkinson*, *supra*, it was held that the omission of a statement that the documents did not contain anything impeaching the case or title of the plaintiff was immaterial.

The following statements have been held to sufficiently disclose some ground of privilege: "The said documents relate solely to the case of the defendants, and not to the case of the plaintiff, nor do they tend to support it, and they do not to the best of our knowledge, information and belief, contain anything impeaching the case of the said defendants, wherefore, we object to produce the same and say they are privileged from production"; *Bewicke v. Graham*, 7 Q. B. D. 400; see a discussion of that case, 16 L. J. 263; see also *Roberts v. Oppenheim*, 26 Ch. D. 724; and *Bulman v. Dixon*, 49 L. T. 736.

Moniments
of party's
title.

4. (Properly speaking only a branch of the third head.) **A Party's Moniments of Title, which he Swears Relate Solely to his Own Case and do not Contain Anything (in the case of a Plaintiff) Impeaching his Case, or (in the case of Either a Plaintiff or Defendant), Supporting, or Material to, the Case of the Opposite Party:**—*11th Gen. v. Newenham upon Teme*, 1893, 2 Q. B. 478; *Minet v. Morgan*, L. R. 8 Chy. 301; *Morris v. Edwards*, 23 Q. B. D. 287; 15 App. Cas. 309; *Horton v. Roth*, 26 L. J. Ex. 267; *New British Invest. Co. v. Ford*, 3 C. P. 11, 190; *Frankenstein v. Garins Co.*, 1897, 2 Q. B. 62; *Griffin v. Fawkes*, 17 P. R. 540; but not documents which tend to support the title of the opposite party; *Lpell v. Kennedy*, 8 App. Cas. 217, 223, 224; see

Small v. Eccles, 3 P. R. 180; *Egremont Burial Board v. Egremont* Rule 467; *Iron Ore Co.*, 14 Ch. D. 158; *Webster v. Wherrell*, 15 Ch. D. 120. It was held in the last case, that it was sufficient to swear to the best of the deponent's knowledge, information and belief. The contrary has been held in *Manby v. Benicke*, 8 D. M. & G. 476.

It is insufficient to swear generally that the documents are privileged. The affidavit must state the facts upon which the objection is grounded: *Gardner v. Irvin*, 4 Ex. D. 49; see also *Webb v. East*, 5 Ex. D. 23; *Clergue v. McKay*, 3 O. L. R. 478.

An affidavit to protect maps is more readily accepted than in the case of deeds: *March v. Bailey*, 78 L. T. Jour. 263; see also article on production of documents of title in 78 L. T. Jour. 278.

In an action for the recovery of land, and delivery of deeds relating thereto, in the defendant's possession, the defence of purchaser for valuable consideration without notice does not enable the defendant to resist discovery of such deeds and documents: *Emmerson v. Ind.*, 55 L. T. 422; 34 W. R. 778, but only if he sets that defence up simply (in which case the discovery would not be material to the issue to be tried), not if he also disputes, or does not admit, the plaintiff's title: *Id.*; 33 Ch. D. 323; 12 App. Cas. 300.

The defendants, before putting in their statement of defence, moved for the production by the plaintiffs of the conveyance under which they held their land, in order to ascertain whether it contained a reservation of minerals, the defendants alleging that, if it did not, they would submit to a decree of ouster. It was held that the land having been conveyed to the plaintiffs in fee simple, they were *prima facie* entitled to the land down to the centre of the earth, and unless the defendants could show that the plaintiffs were not so entitled, the latter could not be compelled to produce their title deeds: *Egremont Burial Co. v. Egremont Iron Ore Co.*, 14 Ch. D. 158; see *Webster v. Wherrell*, 15 Ch. D. 120.

The following is a form of statement of objection on this ground, Form. in the affidavit on production:

"I object to produce the documents set forth in the second part of the first schedule, on the ground that they are the muniments of my title to the . . . and do not to the best of my knowledge, information and belief, contain anything [in the case of a plaintiff, tending to impeach my case or] material to the case of the . . . and tending to support it."

In the case of the defendant it is not necessary that the affidavit should state that the document does not contain anything tending to impeach his own case: *Attorney-General v. Newcastle-on-Tyne*, 1899, 2 Q. B. 478; *Johnson v. Whitaker*, 90 L. T. 535.

5. (Also properly speaking a branch of the third class above mentioned.) **Title Deeds of Land of Which a Party Defendant is in Possession, in an Action to Recover Possession of the Land by an Adverse Title:**—*Phillips v. Phillips*, 4 Q. B. D. 127; 27 W. R. 939; but the defendant must make an affidavit disclosing what they are: *Rumbold v. Fortreath*, (No. 1), 3 K. & J. 44; *New British Co. v. Peed*, 3 C. P. D. 196; *Wrentmore v. Hagley*, 40 L. T. 741; see *Owen v. Wynn*, 9 Ch. D. 29; *Lyall v. Kennedy*, 8 App. Cas. 217; *Daniel v. Ford*, W. N. 1883, 52. This rule depends on the circumstance that where claims to the same land in fee simple are made by two different persons, they must be based on inconsistent titles: it cannot therefore be applied to a case where the title of the

Title deeds of defendant in possession.

Rule 467. Plaintiff and defendant are not absolutely adverse, but may to some extent be proved by the same evidence; *Ponsonby v. Hartley*, W. N. 1881, 13; 74 L. T. Jour. 208; affirmed an appeal though on a different ground, W. N. 1883, 44. In that case the right to possession was not disputed, but the right to minerals was claimed, and the plaintiff relied on a reservation of them, and the plaintiff was allowed to inspect the title deeds, to see if they supported his case.

Form of
stating ob-
jection.

The following is a form of statement of objection on this ground:—

"I object to produce the documents, etc., on the ground that they relate to the evidence of my right to the possession of the subject matter of this action to which the plaintiff (or defendant) claims an independent title."

Mortgagees'
deeds.

6. Mortgage Deeds are privileged until the mortgage is paid what is due; *Chichester v. Donagall*, L. R. 5 Chy. 497; *Patch v. Ward*, L. R. 1 Eq. 426; *Jones v. Jones*, Kay, App. vi.; *Bridgewater v. Dellington*, 12 W. R. 40; *Harvard v. Robinson*, 4 Drew. at p. 525; *Weeks v. Stourton*, 13 W. R. 489; *Freeman v. Butler*, 33 Beav. 289; *Smith v. Barnes*, L. R. 1 Eq. 65; *Aaron*, 2 Charl. Ch. Ca. 61; W. N. 1876, 23; *Fisher on Mortgages*, 4th ed., 302; unless the right to redeem is denied; *Patch v. Ward*, and *Jones v. Jones*, *supra*; *Bell v. Chamberlen*, 3 Chy. Ch. 429; and where the proceedings are being taken by the mortgagee upon the mortgage deed, inspection of it may be ordered, as of any other document sued on; *Emmens v. Moldeswain*, 8 P. R. 320.

Irrelevant
to the
question at
the trial.

7. Documents Having no Bearing on the Question to be Tried.—These need not be produced before trial; *Merchants Bank v. Tisdale*, 6 P. R. 51; *Bryce v. McIntyre*, 7 P. R. 134; *Parker v. Wells*, 18 Ch. D. 477; *Parnell v. Walter*, 24 Q. B. D. 441; 62 L. T. 75; 38 W. R. 270; *Whittaker v. Scarborough Post*, 1890, 2 Q. B. 148; 74 L. T. 753; *Evans v. Jeffery*, 3 O. L. R. 327; such as papers relating to details of a trust account until the right to account has been established; *Feenecsey v. Clark*, 37 Ch. D. 181; *McGregor v. McDonagh*, 11 P. R. 386; *Hurst v. Barber*, 12 P. R. 467; *Bedell v. Ryckman*, 5 O. L. R. 670; but see *Sydney Chose, &c., Co. v. Brover*, 19 P. R. 152; or relating to sales in an action for infringement of trade-mark until the right to damages is established; *Waters v. Earl of Shaftesbury*, 1 W. R. 259, and see *Graham v. Temperance & G. L. I. Co.*, 16 P. R. 536; *Rule 472*. The Court does not distinguish too nicely, however, between documents relating to the question at the hearing and consequential relief (see note p. 677), especially in cases where further inquiries consequent on the establishment of the plaintiff's right may not be directed at the trial, but judgment at the trial may be given as to the matters depending upon the right; *Re Morgan, Owen v. Morgan*, 39 Ch. D. 316; *Sheppard Publishing Co. v. Harkins*, 8 O. L. R. 632.

The rule is thus expressed in *Graham v. Temperance, etc.*, 16 P. R. 536, *per Street, J.*, "Wherever discovery is sought in aid of an issue which must be determined at the hearing, the plaintiff is entitled to it to help him prove the issue; but where it is sought in aid of something which does not form part of what he must prove at the hearing, but is merely consequential to it, the right is not absolute, but discretionary, until the plaintiff has established his fundamental right at the hearing." See also *Sheppard Publishing Co. v. Harkins*, *supra*.

The plaintiff sued the defendant, who had acted as his stock-broker, for an account and damages, making general allegations of fraud, and then interrogated with a view to establish the fraud. The defendant

refused to answer on the ground that the plaintiff was not entitled **Rule 467.** to the information till after decree. It was held that the plaintiff was entitled to the discovery to establish his alleged charges of fraud at the trial: *Leitch v. Abbott*, 31 Ch. D. 374.

A party's case for the purposes of discovery consists of everything which it is reasonable to suppose will directly, or indirectly, enable him either to advance his own case, or damage, or repel, his adversary's: *Compagnie Financière du Pacifique v. Peruvian Guano Co.*, 11 Q. B. D. 55; *English v. Tottie*, 1 Q. B. D. 141; *Hatchinson v. Glover*, 1 Q. B. D. 138; *Western of Can. Oil Co. v. Walker*, 6 P. R. 191; *Lawlor v. Murchison*, 3 Gr. 533; *Ferguson v. Provincial Provident Institution*, 15 P. R. 390; and the test of materiality is to assume the party's pleading to be true: *Grosvenor v. Mouslop*, 2 K. & J. 288; *White v. Alrcna*, 32 W. R. 311, affirmed in appeal, 26 Ch. D. 717, where it was held that the party was entitled to discovery before giving particulars of fraud under Eng. 1883, R. 262 (see also *Leitch v. Abbott*, 31 Ch. D. 374; *Miller v. Harper*, 38 Ch. D. 110; *Harbord v. Monk*, 6 Ch. D. 616); but a document relating exclusively to the case of the party making discovery is not material: see *Wigram on Discovery*, 15, 261; *Bray on Discovery*, 481; *Mint v. Morgan*, 1 R. 8 Chy. 361; *Atty-Gen. v. Emerson*, 10 Q. B. D. 191; 52 L. J. Q. B. 67, and *per Brett, L.J.*, 74; *Pelle on Discovery*, 42.

Irrelevant documents, if disclosed, need not be produced for inspection: *Wilson v. Thornbury*, L. R. 12 Eq. 517; *Central News (Limited) v. Eastern Tel. Co.*, 28 Sol. Jour., 300; 33 L. J. Q. B. 236.

Where there was a *bond fide* contest as to the right to sell a certain drug alleged to be the subject of a patent of the plaintiff's, it was held that the defendants should not, before trial of the question of right, be compelled to afford discovery of the details and particulars of their buying and selling, so as to disclose their own and their customers' private business transactions: *Dickerson v. Radcliffe*, 17 P. R. 586.

In an action for libel, where a defendant has delivered particulars libel of a defence of justification, he is not entitled to discovery of documents relating to matters not covered by such particulars: *The Yorkshire P. L. Ass. Co. v. Gilbert*, 1895, 2 Q. B. 148; 72 L. T. 445.

In an action against a newspaper for libel, the plaintiff is not entitled to the production of the original MS. containing the alleged libel: *Hope v. Brash*, 1897, 2 Ch. 188; 76 L. T. 823; nor to discovery of the name of the writer, nor of the price paid for the MS., nor of the means taken by defendant to test its truth: *Parnell v. Walter*, 24 Q. B. D. 441; nor (where there is no question as to the defendant's solvency) to discovery of the circulation of the newspaper containing the libel: *Whittaker v. Scarborough Post*, 1896, 2 Q. B. 148; 74 L. T. 753. See also notes *qq.* 634 and 677.

In *Star Kidney Pad Co. v. Greenwood*, 3 Ont. 280, an action on Trade secrets. a promissory note given for kidney pads, one defence was that the pads were useless, and possessed no healing properties. Discovery of the recipe or ingredients was refused, the plaintiff resisting the discovery, on the grounds that no representation was made as to the ingredients, which constituted a trade secret, and the disclosure of the same would damage the plaintiff's business. See also *Badische Anilin, etc. v. Lohmstein*, 24 Ch. D. 176; *Howe v. McKernan*, 30 Beav. 574; *Ishworth v. Roberts*, 45 Ch. D. 623; but it is in the discretion of the Court to order inspection of documents which might disclose a trade secret: *Mistorski v. Mandichura*, 6 Times, 267.

Rule 467.Books of
account.

Where books of account are produced which contain entries not relating to the matters in question in the action, the party producing them is entitled to seal, or cover up, during inspection by the opposite party, all parts not affecting or relating to the matters in question, but an affidavit should be made showing that the parts sealed, or covered up, do not in any way relate to, or affect, the matters in question: see *Graham v. Sutton*, 1897, 1 Ch. 761; 76 L. T. 369; and *Sydney Cheese, etc., Co. v. Brauer*, 19 P. R. 152.

Where a defendant in an action for infringement of a patent is required to produce his books for the purpose of a reference as to profits made by him, he cannot refuse to disclose the names of his customers to whom he has sold goods infringing the plaintiff's patent: *Saccharin Corp. v. Chemical & Drugs Co.*, 1900, 2 Ch. 556; 83 L. T. 206.

Documents
held in a
different
character.

8. Documents held by a Party in a Different Character from that in which he is Sued:—*Pindar v. Smith*, 6 Madd. 38; *Haguer v. Mason*, 6 P. R. 187.

Where a defendant claimed that he held documents only as solicitor for a co-defendant also a party, but who had not been called on for particulars, it was held that he should not have been called on to produce these documents without the co-defendant being called on to show cause: *McGregor v. McDonald*, 11 P. R. 386.

Documents
in which a
third person
is interested

9. Documents in which a Third Person, not a Party to the Action, is Interested—are not for that reason alone protected from production: *Kettlewell v. Barstow*, L. R. 7 Chy. 680; *Hutchinson v. Glover*, 1 Q. B. D. 138; but when such documents are in the joint legal (not corporal) see *Reid v. Langlois*, 1 Mac. & G. 627; and *B. A. Ins. Co. v. Wilkinson*, 6 P. R. 268, possession of the third person, and the party from whom production is sought, the latter cannot be required to produce them: see cases *supra*, *Murray v. Walter*, Cr. & Ph. 114; *Kearsley v. Phillips*, 10 Q. B. D. 36, 465 (where all the cases are reviewed), unless there is no interest which can be affected by their production other than the interest of the parties to the action: *London & Yorkshire Bank v. Cooper*, 15 Q. B. D. 7 and 473. Production will not be required from a party having the sole legal possession, if a third person who is not a party and who has the beneficial interest objects, unless the suit is of such a nature that the Court can say that the party having the legal custody sufficiently represents in the suit the other person interested: *Fraser v. Home Ins. Co.*, 6 P. R. 47; but where production will not be ordered, the party must give all the information in his power respecting the documents in his affidavit, and also on any examination: *Fraser v. Home Ins. Co.*, *supra*; *Nicholl v. Elliott*, 3 Gr. 545; *Clinch v. Financial Corporation*, L. R. 2 Eq. 251; *Upse v. Foster*, L. R. 13 Eq. 602; *Hadley v. McDougal*, L. R. 7 Chy. 312; *Evans v. Jaffray*, 3 O. L. R. 327.

Possession by a party's agent, is of course the possession of the party: *Murray v. Walter*, Cr. & Ph. 114.

A defendant sued as administratrix was held bound to produce material documents admitted to be in her possession, but which she claimed to be entitled to individually, and not in her representative capacity: *Fax v. Sleeman*, 17 P. R. 492; but a personal representative cannot be compelled to produce documents containing entries relating to the affairs of the deceased, when such documents are the private property of the solicitor who acted for the deceased in his lifetime: *O'Shea v. Wood*, 1891, P. 286; 65 L. T. 30.

As to documents in the joint custody of husband and wife: see *Rule 467*.
Findall v. O'Connell, 29 Ch. D. 899.

A solicitor cannot set up a lien acquired in the cause against the right of other parties to production; and the fact that a lien which may be set up exists, is not a sufficient reason for not ordering production, as the party may be able to free the documents from the lien: *Fale v. Oppert*, L. R. 10 Ch. 340; *Rodick v. Gandell*, 12 Beav. 325; 1 De G. M. & G. 763; *Leicis v. Powell*, 1897, 1 Ch. 678; 76 L. T. 282; *Pratt v. Pratt*, W. N. 1882, 117; but see *Bainbridge v. Blair*, 1 Jur. 256.

A lien of a solicitor on papers does not confer any greater right to refuse production of the documents subject thereto than his client would have; where therefore the client would have to produce the documents, an order may be made requiring the solicitor to produce them subject to his lien, in an action to which the client is a party, if production is necessary in order to do justice to parties other than the client: *Re Hawkes*, 1898, 2 Ch. 1; 46 W. R. 445.

The Court refused to compel defendants to produce documents which were in their possession solely as directors of a company to which the documents belonged: *Williams v. Ingram*, 16 Times, 451.

Production was not ordered in an action of trespass against a defendant, who was committee of a lunatic, of documents relating to the lunatic's estate, the documents not being in the custody of the party, but in the custody of the Court having jurisdiction in lunacy: *Curran v. Little*, 11 Q. B. D. 370.

The following is a form of statement of objection in the affidavit on Form this ground:

"I object to produce the documents, etc., . . . on the ground of their being in my possession or power jointly with A. B. [stating the nature of the joint possession]."

For a description held not sufficient to protect on the ground of joint interest, see *Fraser v. Home Ins. Co.*, 6 P. R. 45.

10. Documents which are Privileged, as being Communications Passing between the Party and his Confidential Professional Adviser, or Agents:—

Of this kind are all communications between a party and his solicitor or other legal adviser, whether made *ante* or *post litem motam*. It is enough if they are communications of a confidential character: *Smith v. Daniell*, L. R. 18 Eq. 649; *Original Harthpool Collieries Co. v. Moon*, 30 L. T. 585; (not an open communication: *Foakes v. Webb*, 28 Ch. D. 287; *Raeburn v. Preston*, 30 Ch. D. 116); made by, or to, the legal adviser in a professional character: *Mint v. Morgan*, L. R. 8 Ch. 367; *Corporation of Hastings v. Ivall, & Co.*, 1017; *Macfarlane v. Rolt*, L. R. 14 Eq. 580; *Hamelyn v. Whyte*, 6 P. R. 143; *Hoffman v. Crecar*, 17 P. R. 404; *Mostyn v. West Mostyn*, 34 L. T. 531; *Wilson v. Northampton*, L. R. 14 Eq. 477; *Endie v. Addison*, 47 L. T. 543; *Mayor, & Co., of Bristol v. Cox*, 26 Ch. D. 678; *Proctor v. Smiles*, 55 L. J. Q. B. 527; *Lowden v. Blakey*, 23 Q. B. D. 332; *Bullivant v. A.-G. Victoria*, 1901, A. C. 196; see *Lynch v. Kennedy*, 9 App. Cas. 81; including communications with a former solicitor: *Thomas v. Sec. of State for India*, 18 W. R. 312; *Marriott v. Anchor, & Co.*, 3 Giff. 304; *Wilson v. Brunsell*, 2 Ch. Ch. 147; and the predecessors in title of the party: *Mint v. Morgan*, and *Mostyn v. W. Mostyn*, *supra*.

Communications between solicitor and client

Rule 467.

The privilege may be claimed in respect to communications to a solicitor, who besides being the solicitor of a corporation, is also an officer of the corporation, and examinable as such: *Salford v. Lever*, 24 Q. B. D. 695.

It was held insufficient to state that the documents were privileged, as communications between deponent and her solicitor. It is necessary to state that they are professional communications of a confidential character: *O'Shea v. Wood*, 1891, P. 237, 286; *Clergue v. McKay*, 3 O. L. R. 478; *Ainsworth v. Widding*, 1900, 2 Ch. 315.

Communications by a clerk of the defendant company to the company, containing references to advice given by the company's solicitor, whom the clerk had consulted, are privileged, being held to be the same as if written by the solicitors: *Boughton v. Citizens Insurance Co.*, 11 P. R. 110.

Where a document is privileged, the production of it as an exhibit to a witness in another action is not a waiver of the privilege for all purposes, even as to a person entitled to inspection of the deposition in which it was referred to: *Goldstone v. Williams*, 1890, 1 Ch. 47; 79 L. T. 373.

The privilege is not lost by the death of the client: *Bullivant v. Attorney-General of Victoria*, 1901, A. C. 196.

Extent
of this
ground of
privilege.

The privilege extends to a person who, unknown to the client, had ceased to practise as a solicitor when the communications were made: *Calley v. Richards*, 19 Beav. 401; see also L. R. 18 Eq. 654; and to communications with reference to actual or impending litigation coming from any third person employed by the solicitor, or at his instance, such as his town agent: *Cutt v. Tourle*, 23 L. T. 485; 19 W. R. 56, or clerk, accountant, or other skilled person: see *Lawrence v. Campbell*, 4 Dr. 485; *Steel v. Stewart*, 1 Ph. 471; *Churton v. Preuen*, 2 Dr. & S. 390; *Hooper v. Gumm*, 10 W. R. 644; or in any other way procured by the solicitor, or by the client or his agent, at the instance of the solicitor: *Bustros v. Whyte*, 1 Q. B. D. 423; *Anderson v. Bank of British Columbia*, 2 Ch. D. 644; *Taylor v. Batten*, 4 Q. B. D. 85; and to documents prepared with a *bona fide* intention of being laid before a solicitor in a contemplated action: *Southwick v. Quick*, 3 Q. B. D. 315; *Wheeler v. Le Marchant*, 17 Ch. D. 675; (see that case explained and upheld in *Calcraft v. Guest*, 1898, 1 Q. B. 759); *Kennedy v. Lyell*, 23 Ch. D. 387; see 9 App. Cas. 81; *Macdonald v. Norwich Union, etc.*, 10 P. R. 501; *Lowden v. Blakey*, 23 Q. B. D. 332; even though they answer the purpose of giving information to other people as well: *Hunter v. G. T. Ry. Co.*, 16 P. R. 385; letters from a third person in answer to inquiries by a party's solicitor with a view to anticipated litigation: *McCorquodale v. Bell*, 1 C. P. D. 471; *Anderson v. Bank of British Columbia*, 2 Ch. D. 644; or in answer to similar inquiries of the party himself at the suggestion of his solicitor: *Donahue v. Johnston*, 14 P. R. 476; or in reasonable contemplation of litigation: *Collins v. London General Omnibus Co.*, 5 R. 353; 68 L. T. 831; anonymous letters to solicitors about the case: *Young v. Holloway*, 12 P. D. 167; documents material to the party's case procured by his solicitors of their own motion for the purposes of the action: *The Palermo*, 9 P. D. 6; *Guelph C. Co. v. Whitehead*, 9 P. R. 509, (and indicating also names of witnesses: *Elwesley v. Miller*, 5 O. W. R. 651, 717); documents relating only to the conduct of the suit: *Lugilby v. Shafter*, 33 Beav. 31; *Gundee v. Stansfield*, 4 DeG. & J. 1; *Turner v. Burkenshaw*, 11 W. R. 851; papers relating to a former action and privileged therein: *Bullock v. Corp.*, 3 Q. B. D. 350; *Bacon v. Bacon*, W. N. 1876, 96;

Nordon v. Defries, 8 Q. B. D. 508; *Branford v. Branford*, 4 P. D. 72; *Rule 467*.
Pearce v. Foster, 15 Q. B. D. 114; *Canadian Pacific Ry. v. Commr.*,
 11 P. R. 297; *Calcraft v. Guest*, 1898, 1 Q. B. 759; 78 L. T. 283; but
 not otherwise; *Hutchinson v. Glover*, 1 Q. B. D. 138; *Re Worswick*,
 38 Ch. D. 370; a doctor's report of an examination at the instance of
 a party's solicitor: *Friend v. London, Chatham and Dover Ry. Co.* 2
 Ex. D. 437; and reports of surveyors as to the condition of a cargo,
 made solely for the use of one of the parties or for the opinion of his
 legal adviser: *The Theodore Korner*, 3 P. D. 162; see *Cozy v. Lon-*
don, Brighton, etc., Ry. Co., L. R. 5 C. P. 146; and a report of an
 accident made in similar circumstances: *Collins v. London General*
Omnibus Co., 68 L. T. 831; 3 R. 355; *Hunter v. G. T. Ry. Co.*, 16 P.
 R. 385.

All statements made at joint consultations between parties and
 their respective solicitors or counsel, even though made by one party
 to the solicitor or counsel of the other are privileged; so also is a
 statement made by one party to the solicitor of the other at an
 interview between them alone, held at the request of the other party:
Rochevoucauld v. Boustead, W. N. 1896, 74; 74 L. T. 783; 65 L. J.
 Ch. 794.

In a probate action an order for production of documents, the
 private property of plaintiff's solicitor, containing entries by the
 solicitor as to the deceased's affairs, was refused: *O'Shea v. Wood*,
 1891, P. 237, 286.

Although copies of documents, which are *publici juris*, are them-
 selves, unprivileged, a collection of entries in public records, and
 registers, and of photographs of tombstones, and houses, will be pro-
 tected from production, when it has been made or directed by the
 solicitors of a party for his defence, and is the result of the pro-
 fessional knowledge, skill and research of those solicitors: *Lynch v.*
Kennedy, 27 Ch. D. 1; 53 L. J. Chy. 937.

Transcript of shorthand notes of proceedings in open Court are
 not privileged: *Re Worswick*, *Robson v. Worswick*, 38 Ch. D. 370;
Leary v. Halifax Banking Co., 1893, 1 Ch. 686; 68 L. T. 158; and
 see *North Australia Co. v. Goldborough*, 1893, 2 Ch. 381; *Goldstone*
v. Williams, Deacon & Co., 1899, 1 Ch. 47; 79 L. T. 383.

The giving of an extract or copy of an opinion of counsel pro-
 cured by the solicitor for his client, on the subject matter of a suit,
 to the solicitor on the other side, does not prevent the opinion from
 being privileged: *Carey v. Cuthbert*, 6 L. R. Ir. Eq. 599; but as to
 making use of the copy so given, see *Calcraft v. Guest*, 1898, 1 Q.
 B. 759.

Protection cannot be claimed on this ground for communications made
 to a solicitor, but not in his character of solicitor: *Greenough v. Gaskill*,
 1 M. & K. 98; *Rudd v. Frank*, 9 C. L. T. 387; *Thomas v. Rawlings*,
 27 Beav. 140; as where he was not simply advising as solicitor, but
 negotiating actively much of the transaction impeached in the action:
Pearson v. Merchants Bank, 11 P. R. 21; and see *Bullivant v. Attorney-
 General*, 1901, A. C. 190; or was plaintiff's patent or other agent, as well
 as his solicitor; and the communication was in the former capacity:
Moseley v. Victoria Rubber Co., 55 L. T. 482; *Clergue v. McKay*,
 1901, 3 O. L. R. 63; nor for letters to a party's solicitor, not induced
 by inquiries: *McCorquodale v. Bell*, *supra*; nor for documents not
 obtained by direction of the party's solicitor, but by way of precau-
 tion and by possibility to be laid before him for the purpose of defence
 to an action, if any should be brought: *Cook v. N. Metropolitan Tramway
 Co.*, 6 Times, 22; and see *Rau-*

Communi-
 cations not
 in profes-
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 character.

Rule 467. *stone v. Preston*, 30 Ch. D. 116; nor for statements made voluntarily, or at the party's request for his own information, by his unprofessional agents: *Bustros v. White*; *Anderson v. Bank of British Columbia*, *supra*; though made in confidence, and so marked: *Hopkinson v. Lord Burghley*, L. R. 2 Chy. 447; see *Wiman v. Bradstreet*, 2 Chy. Ch. 77; nor where fraud is charged: see *infra*.

Where documents are produced in such cases an undertaking may be required from the opposite party not to use the documents for any collateral purpose: *Hopkinson v. Lord Burghley*, *supra*; *Richardson v. Hastings*, 7 Beav. 354.

Notes on a bill of costs of proceedings in Chambers recorded by the solicitor are not privileged: *Ainsworth v. Widding*, 1900, 2 Ch. 315, following *Greenough v. Gaskell*, 1 M. & K. at pp. 102-104; and *Re Worswick*, 38 Ch. D. at page 373.

of collateral
information.

Protection also cannot be claimed for information derived from collateral sources, and not directly from the client: *Marsh v. Keith*, 1 Dr. & Sm. 342; *Ford v. Tennant*, 32 Beav. 162; *Deaborough v. Rawlins*, 3 M. & Cr. 515; *Re Land Credit Society*, 15 W. R. 703; nor for mere collateral facts, such as the client's residence, unless communicated confidentially; e.g., as his client's hiding place: *Heath v. Crealock*, L. R. 15 Eq. 257; *Re Arnott, Ex parte, Chief Official Receiver*, 37 W. R. 223; 60 L. T. 109; or address: see *Bursill v. Tanner*, 55 L. J. Q. B. 53; (see also the distinction between confidential communications, and those of facts patent to the senses: *Kennedy v. Lyell*, 48 L. T. 455; 23 Ch. D. 387); nor for documents passing between the party's solicitor and third persons to enable the solicitor to advise his client, unless they were for the purpose of obtaining information, evidence, or legal advice with reference to litigation existing or contemplated between the parties to the action: *Wheeler v. Le Marchant*, 17 Ch. D. 675; (see that case explained and upheld in *Calcraft v. Guest*, 1898, 1 Q. B. 759); *Pavitt v. Metropolitan Tramways Co.*, W. N. 1883, 100; *Original Hartlepool Collieries Co. v. Moon*, 30 L. T. 193, 585; *Betts v. G. T. Ry.*, 12 P. R. 86, 634; *Comtee v. C. P. Ry. Co.*, 9 C. L. T. 36; *Leacroft v. Halifax Jt. Stk. Banking Co.*, 1893, 1 Ch. 686; *N. Australia, etc., Co. v. Goldborough*, 1893, 2 Ch. 381; (see *Westinghouse v. Midland, etc.*, 48 L. T. 98, 462, as to what constitutes *lis mota*); nor for professional opinions given partly for the benefit of the party requiring production: *Reynolds v. Godlee*, 4 K. & J. 88; *Talbot v. Marshfield*, 13 W. R. 885; *Wynne v. Humberston*, 27 Beav. 421; nor in respect of communications passing between a solicitor and his client, who was the predecessor in title of the plaintiff and defendant, in respect to property in dispute: *Platt v. Buck*, 4 O. L. R. 421.

Between
solicitor
and a third
person.

Professional communications are excepted from protection in partnership actions and actions between beneficiaries and trustees, where such communications had been obtained for the sake of, and paid for out of, the partnership or trust estate: *Gauraud v. Edison Goods Bell Tel. Co.*, 59 L. T. 813; 57 L. J. Chy. 498.

No privilege can be claimed by a trustee as against his *cotui qui trust* for letters passing between the trustee and the solicitor, relating to the trust before action brought: *Re Mason, Mason v. Cattley*, 22 Ch. D. 609; *Talbot v. Marshfield*, *supra*; *Re Postlethwaite, Postlethwaite v. Rickman*, 35 Ch. D. 722.

Fraud.

Where fraud is charged, communications between solicitor and client as to the subject matter of an alleged fraud are not privileged in an action: *Williams v. Quebrada Ry. Co.*, 1895, 2 Ch. 751; 73 L. T. 397; *Smith v. Hunt*, 1 O. L. R. 331; *Mornington v. Mornington*,

2 J. & H. 697; *Charlton v. Coombes*, 4 Giff. 372, 382; *Reynell v. Rule* 467. *Sprye*, 10 Beav. 51; 11 Beav. 618; see also as to the effect of a charge of fraud, *Re Postlethwaite*, 35 Ch. D. 722; *Reg. v. Cox*, 14 Q. B. D. 153; *Reg. v. Bullivant*, 1900, 2 Q. B. 163; 82 L. T. 493, subsequently reversed in the House of Lords, because in that case no fraud was charged; see 1901, A. C. 196.

The privilege where it exists only prevents the production of the document, or the disclosure by the solicitor of its contents; secondary evidence of its contents may be given: *Calcraft v. Guest*, 1898, 1 Q. B. 759.

Form of Claim of Privileged Communications.—It is not enough Form. to state that the documents were privileged as communications between the deponent and his solicitor. It is necessary to state that the professional communications are of a confidential character: *O'Shea v. Wood*, 1891, P. 286; *Clergue v. McKay*, 3 O. L. R. 478; and, in the case of a correspondence in respect of which privilege is claimed, it must be set forth in the affidavit on production, without any ambiguity, in order that there may be no doubt as to its being privileged. That letters were "in reference to the matters which are now in question in this action," was held to be too indefinite a description: *Clergue v. McKay*, 3 O. L. R. 478.

The following are forms of statement of objection to produce communications between solicitor and client on the ground of privilege:

"I object to produce the documents set forth in the second part of the said first schedule, on the ground that they are communications passing between me (or A. B., acting on my behalf), and my solicitor, with reference to matters which are now in question in this cause; and that the same are confidential communications between solicitor and client."

Or, "are communications written at the instance, and for the use, of my solicitor for the purpose of the proceedings in this action, and of giving advice to me with reference to the same."

Or, "are communications between A. B. and myself, for the purpose of being laid before my solicitor for obtaining his advice, and with a view to this litigation."

Or, "are communications written and sent by A. B. for the confidential and private information of my solicitor, with a view to the institution of legal proceedings against . . ."

"I object to produce the documents set forth in the second part of the first schedule, on the ground that being communications between solicitor and client they are privileged": *Hamelyn v. White*, 6 P. R. 143; followed, though with doubt, in *Hoffman v. Crerar*, 17 P. R. 404; see also *Macfarlane v. Rolt*, L. R. 14 Eq. 580.

11. Communications with an Unprofessional Agent in Communication with unprofessional agent anticipation of litigation, and with a view to the prosecution of, or defence to, a claim to the matter in dispute, were held to be privileged in *Ross v. Gibbs*, L. R. 8 Eq. 522; *Connave v. C. P. Ry. Co.*, 11 P. R. 297; the later cases, however, seem to show that such communications are not privileged, even where made during, and for the express purpose of litigation; see *Bustros v. White*, 1 Q. B. D. 423; *Anderson v. Bank of British Columbia*, 2 Ch. D. 644, 658; *Shute v. Tucker*, 14 Ch. D. 824; *Martin v. Butchard*, 36 L. T. 732; see also *Reid v. Langlois*, 1 Mac. & G. 638; *Hamilton v. Nott*, L. R. 16 Eq. 112.

Rule 467. See also *Armstrong v. Toronto Street Railway Co.*, 15 P. R. 208, where, in an action for damages for personal injuries received in a tramway accident, a report made to defendants by the conductor of the car was held not privileged as a whole, while the portion of the report containing the names of eye-witnesses was held to be protected.

Instances of communications not privileged.

Further Examples of Non-privileged Communications.—

The following are further instances of communications not privileged:—Copies of letters between defendants and third persons procured for the purpose of defence by the solicitors of the defendants from such third persons, the defendants not having kept copies of the correspondence: *Chadwick v. Bowman*, 16 Q. B. D. 561.

A transcript of shorthand notes of evidence in an action instituted by a party, with a view to ulterior proceedings not then contemplated, and for the purpose of submitting the same to counsel in such ulterior proceedings if taken: *Rainstone v. Preston*, 30 Ch. D. 1; *Cook v. N. Metropolitan Tramway Co.*, 6 Times, 22.

Opinions of Engineers, etc.

Opinions of engineers as to the validity of a patent, obtained with a view to being forearmed, in case litigation should arise: *Toronto Gravel Road Co. v. Taylor*, 6 P. R. 227; reports made to an insurance company by their medical officer, and by friends of the assured, to whom the company was referred, as to his health and habits: *Mahony v. National Widow's Life Ass. Fund*, L. R. 6 C. P. 252; reports of persons employed to survey a tug, for the purposes of an action for damages for improperly constructing the tug: *Martin v. Butchard*, 36 L. T. 732; correspondence between a vendor and a vendee relative to the subject matter of the action by a subvendee but which could not be said to be confidential communications with a view to litigation: *English v. Tottie*, 1 Q. B. D. 141; letters from a party's unprofessional agent to defendant, relative to the subject matter of an action, not sent in order to be laid before the party's solicitor: *Anderson v. Bank of British Columbia*, 2 Ch. D. 644; an agreement of compromise between the defendant and a third person relative to the subject matter of an action: *Hutchinson v. Glover*, 1 Q. B. D. 138; *Richards v. Morgan*, 4 B. & S. 641; papers obtained from experts, by arbitrators for their guidance: *Pousford v. Scaime*, 1 J. & H. 433; statements made to a reporter in the employment of the proprietor of a newspaper: *Davis v. Shepatone*, 55 L. T. 1.

Bankers' Books.

Banker's books are not privileged from production, whether the bank be a party, or whether by a subpoena *duces tecum* production is sought from the bank as a witness: *Hannum v. McRae*, 18 P. R. 185. Customers' accounts are not privileged at Common Law, nor under our Banking Acts: *Id.*

Correspondence after suit.

Correspondence between co-defendants after suit, is not as a general rule privileged: *Hamilton v. Nott*, L. R. 16 Eq. 112; see also *Sankey v. Alexander*, 8 L. R. Ir. 241; *Hey v. De la Hay*, W. N. 1886, 101.

Where a diary that would not have been protected from production has been lost, extracts made from it since the commencement, and for the purposes of the litigation, are not protected: *Land Corporation of Canada v. Pulcston*, W. N. 1884, 1; see *The Paterno*, 9 P. D. 6.

Form of affidavit claiming protection from production.

Form of Affidavit.—The Forms 19 and 20, given in the Appendix (H. & L. Forms, Nos. 504, 505), should be followed. "The statutory form is the right form, and is intended to be the common form. The affidavit of documents is intended now to be exhaustive, and the form given in the Act is so"; *per Lindley, J.*, W. N. 1876, 39.

For form of affidavit where two plaintiffs have different interests, *Rule 467*.
see *Fendall v. O'Connell*, 52 L. T. 553, in note to *Rule 464*.

The affidavit must give such description of the documents which the party objects to produce as will sufficiently identify them: *Taylor v. Batten*, 4 Q. B. D. 85; *Bewicke v. Graham*, 7 Q. B. D. 400; *Taylor v. Oliver*, 45 L. J. Chy. 774; *Mayor of Bristol v. Cox*, 26 Ch. D. 678. A list may be given setting them out in the same way as the documents which the party does not object to produce: see *Hamelyn v. Whyte*, 6 P. R. 143; *Hoffman v. Czerar*, 17 P. R. 404; *Fraser v. Home Ins. Co.*, 6 P. R. 45.

It is obvious that a minute specification of the documents in the affidavit might often defeat the claim of privilege.

The following descriptions have therefore been held sufficient: "A correspondence between the plaintiff and his predecessors in title on the one hand, and their respective solicitors from time to time on the other": *Minet v. Morgan*, L. R. 8 Chy. 361. "Certain documents, letters and correspondence which have passed between my legal advisers and myself, and certain instructions to, and opinions of counsel, which are numbered 50-76 inclusive and are tied up in a bundle marked with the letter A and initialed by me": *Taylor v. Batten*, *supra*; *Morris v. Edwards*, 15 App. Cas. 309; *Budden v. Wilkinson*, 1893, 2 Q. B. 432; 69 L. T. 427. "Bundles of letters" is not a sufficient description of correspondence: *Hamilton v. Nott*, L. R. 16 Eq. 112; but letters may be so described with sufficient description to identify them: *Walker v. Poole*, 51 L. J. Chy. 840. Too prolix and voluminous an affidavit may be ordered to be taken off the files: *Ib.*, W. N. 1882, 136; or the party filing it may be ordered to pay the costs of it: *Hill v. Hart-Davis*, 26 Ch. D. 470.

It is not sufficient to mention bundles containing a large number of documents, among which the deponent thinks one or two may be material; an affidavit so framed may be ordered to be taken off the files: *Bolton v. Natal Land & Col. Co.*, 83 L. T. Jour. 203; W. N. 1887, 143.

Reference generally to letters, etc., as filed in Court on certain specified applications, was held sufficient, without scheduling the particulars: *Lyon v. McKay*, 10 P. R. 557.

The affidavit must also (see clause 3) assign a reason for objecting to produce the documents, and verify the facts upon which the claim to protection is based: *Bromley v. Graham*, 11 P. R. 451; *Gardner v. Irvin*, 4 Ex. D. 49; *Weble v. East*, 5 Ex. D. 108; *Roberts v. Oppenheim*, 26 Ch. D. 724. It has been held sufficient to swear to the best of the defendant's knowledge and belief: *Minet v. Morgan*, *supra*, but see *Manby v. Berwick*, 8 DeG. M. & G. 476. It is insufficient to swear generally that the documents are privileged: *Gardner v. Irvin*, 4 Ex. D. 49.

Where an affidavit of documents had been filed, setting out the number and the dates, but not the parties, to title deeds, it was held that as the deeds were privileged, the Court would not order the names of the parties to the deeds to be set out: *Taylor v. Oliver*, 45 L. J. Chy. 774; 34 L. T. 902.

Where one document only was mentioned as "a certain document," and possession of others was negatived, the statements (1) "I object to produce the said document; (2) the naming or production of the said document might tend to criminate me, or would tend to bring a criminal prosecution against me for a crime of which I am in fact innocent, but for which I might be criminally prosecuted," were held

Rule 467. to be sufficient to "specify" the document within *Rule 467*, and to state a claim of privilege, though no information was given as to the date, nature, or contents, of the document: *Vausickh v. Leon*, 17 P. R. 335.

Portions of books produced, containing entries not relevant to the matters in question, may be allowed to be sealed up: *Re Pickering*, 25 Ch. D. 247; *Hugh v. Garrett*, W. N. 1874, 229; 1875, 26; *Jones v. Adames*, 57 L. T. 843; 58 L. T. 601; or where books are in use the portions not relevant need not be actually sealed up, but may be temporarily covered up during inspection, and, where required, any necessary affidavit may be ordered to be made so as to protect the opposite party by oath against the possibility of a relevant portion being covered up: *Graham v. Sutton*, 1897, 1 Ch. 761; 76 L. T. 324.

As to the conclusiveness of the affidavit, see *infra*.

Further
and better
affidavit.

Motion for better Affidavit. — Where a claim to protection from production is not sufficiently made out by the affidavit on production, or where, by admissions of the party who made the affidavit, it is made out that other documents than those produced are in the possession or power of the party, the course is to require a further and better affidavit to be made. If on the motion it appears that the claim to protection is not authorized, or sufficiently made out, or that there are such other documents, an order will be made directing the filing of a better affidavit making the further production which may be proper.

It is irregular to go into the merits of the action on a motion for a better affidavit: *Morris v. Edwards*, 23 Q. B. D. 287; *Hoffman v. Czerar*, 17 P. R. 404.

A second application for a better affidavit on production is improper where no objection is made on the first application to the non-production of the documents in question, the second motion not being made upon any material which did not exist at the time of the first motion: *Boughton v. Citizens Insurance Co.*, 11 P. R. 110.

Affidavit
in proper
form
conclusive.

Affidavit on Production, when Conclusive. — Where the documents are properly identified and described, and the ground of protection sufficiently stated, if it is a valid ground, the affidavit is *prima facie* conclusive as to the relevancy of documents, and privilege claimed: *Bewicke v. Graham*, 7 Q. B. D. 400; *Welsh Steam, etc., Co. v. Gaskell*, 36 L. T. 352; *Bulman v. Young*, 31 W. R. 766; 49 L. T. 735; and it cannot be contradicted by counter affidavits: *Jones v. Monte Video Gas Co.*, 5 Q. B. D. 556; *Lyon v. McKay*, 10 P. R. 757; see also *Hall v. Truman Hanbury Co.*, 29 Ch. D. 307; *Nicholl v. Wheeler*, 17 Q. B. D. 101; *McGregor v. McDonald*, 12 P. R. 81; *Morris v. Edwards*, 23 Q. B. D. 287; 15 App. Cas. 309; *Hoffman v. Czerar*, 17 P. R. 404; but the Master or Judge may see from the nature of the case, that the party has misconceived the effect of the documents, and may therefore disregard, or refuse to act upon his affidavit: *Attorney-General v. Emerson*, 10 Q. B. D. 19; *Ponsonby v. Hartley*, W. N. 1883, 13, 44; *Lyell v. Kennedy*, 31 W. R. 618; *Fraser v. Home Ins. Co.*, 6 P. R. 45; *Re Pickering*, 25 Ch. D. 247; *Morley v. Canada Atlantic Ry. Co.*, 11 P. R. 39; *Frankenstein v. Gavins, H. C. C. Co.*, 1897, 2 Q. B. 62 (but see *Leslie v. Cave*, 35 W. R. 515; 56 L. T. 332, where it was held that one document being shown not to be privileged as claimed, by relating only to the party's own case, another document is not on that ground to be ordered to be inspected); or if from the affidavit itself: *Jones v. Monte Video Gas Co.*, *supra*; *Wagstaffe v. Anderson*, 39 L. T. 332; (where the words

"never have had" were omitted), or from the documents referred to, **Rule 467**, or an admission in the pleading of the party: *Hastings v. Hall*, L. R. 8 Ch. 1017; *Imp. Land Co. of Morseilles v. Masterman*, 22 W. R. 68; 20 L. T. 559; *Jones v. Monte Video Gas Co.*, *supra*; *Smedley v. B. America Ass. Co.*, 18 P. R. 92; or other documents affording reasonable suspicion that the affidavit is not sufficient: see *Lyell v. Kennedy*, 27 Ch. D. 1 (such as evidence given at a former trial of the case: *Moxley v. Canada Atlantic Ry. Co.*, 11 P. R. 39), or in his examination in the cause: see *Dobson v. Dobson*, 7 P. R. 256; or the admission of his solicitor: *Campbell v. McArthur*, 7 P. R. 46; or of any officer of a company: *Pawson v. Merchants Bank*, 11 P. R. 18, the Master or Judge is of opinion that the affidavit is insufficient a further affidavit may be ordered. See also *Ross v. Dublin United Tramways Co.*, 8 L. R. Ir. 213; *Compagnie Financière v. Pecurian Ginno Co.*, 11 Q. B. 11, 55; *Central News (Limited) v. Eastern Telegraph Co.*, 28 Sol. Jour. 380; *Robinson v. Budgett*, W. N. 1884, 94; 28 Sol. Jour. 411; *Parnell v. Wood*, 1892, P. 137; but when the affidavit is positive that all the relevant documents have been set out in the schedule to the affidavit, a further affidavit will not be ordered: *Hull v. Brewer*, 17 C. L. T. (Occ. N.) 132.

Cross-Examination on Affidavit.—In England cross-examina-
tion upon the affidavit was not allowed in Chancery, nor is it under
the Jud. Act: see *Manby v. Berricke*, 8 DeG. M. & G. 470; *Hall v. Geo.*
Truman, 20 Ch. D. 313; *Nicholls v. Wheeler*, 17 Q. B. D. 101; it was
allowed under the Chancery practice in Ontario: see *Dobson v.*
Dobson, 7 P. R. 256; but in *Frith v. Ryan*, 10 P. R. 235, it was held
that the Chy. practice was not continued under the Jud. Act; Con.
Rule 512 was therefore passed in 1888 to continue the Chancery
practice, but it was rescinded in September, 1894, by *Rule 1337* to
prevent a double examination of a party, one upon the affidavit, and
another for discovery. The prohibition is continued in *Rule 490*. It
would, however, seem that now, upon the usual examination for dis-
covery, examination may take place in respect to the correctness of
the affidavit of the party on production of documents just as in re-
gard to any other relevant matters: see *Lavery v. Wolfe*, 10 P. R.
488; *Dobson v. Dobson*, 7 P. R. 256; *Dryden v. Smith*, 17 P. R. at
pp. 504, 505; and admissions so obtained impeaching the correctness
of the affidavit may, it would seem, be used as the foundation of a
motion for a better affidavit; and see *Smedley v. B. Am. Assur. Co.*,
18 P. R. 92. It is not permissible, however, to the opposite party to
obtain a cross-examination of the deponent, by the indirect means of
examining him as a witness under *Rule 491*, for the purpose of using
his evidence upon a motion for a better affidavit on production:
Dryden v. Smith, 17 P. R. 500; nor on an examination for discovery
to cross-examine on the affidavit on production of documents:
Standard v. Seybold, Divl. Ct., 6 Oct., 1902; and see 39 C. L. J. 772.

Inspection by a Judge of Documents claimed to be Privileged.—It seems, in England, to have been a not uncommon
practice, on applications respecting discovery, to shew the documents
upon which a question of privilege arises to the Judge; and where
by consent, the documents are so shewn to the Judge, and his decision
thereupon taken, no appeal lies from his order: *Bustros v. White*, 1
Q. B. D. 427; see also *Macdonald v. Norwich Union*, 10 P. R. 505;
but whether this course is right was doubted: see *Re Holloray*, 12 P.
D. 167, 169; it is now, however, authorized by an express English
Rule, O. 31, r. 19 a (2). Under the Ontario practice this course
would not seem to be authorized.

Rules 468, 469. **Inspection by the Party.**—As soon as documents are produced, the opposite party, at whose instance the production is ordered, is entitled to inspect them: see *Rule 404*; but where there is some preliminary question of law or fact to be determined, on special application, the right of inspection may be postponed until after the determination of such question: see *Rules 250, 472; De Carteret v. Land Security Co.*, 70 L. T. 323; 42 W. R. 104; 7 R. 16.

Costs. **Costs.**—As to the costs of several successive affidavits on production by the same party, see *Baldwin v. Quinn*, 16 P. R. 248, where only the first affidavit, and the extra folios of subsequent affidavits, were allowed.

Affidavit on production by a corporation.

468. Where the party required to produce documents is a corporation the affidavit shall be made by one of its officers, and may be according to Form No. 20. Con. Rule 511, amended.

There is no similar English Rule, but the *Rule* is in conformity with what was the practice in Chancery: see *Dan. Prac.*, 5th ed., p. 1677, and cases there cited.

A form of affidavit by an officer is given in the Appendix, No. 20 (H. & L. Forms, No. 505). This affidavit must be made by the proper officer of the company, in compliance with an order in the usual form.

Where a bill was filed by a Republican government, the defendant, having put in a sufficient answer, was held entitled to the usual affidavit of documents, to be made by one or more of the Ministers, or officers, of the government: *Republic of Liberia v. Imperial Bank*, L. R. 16 Eq. 179.

It was held unreasonable to require a defendant company to answer interrogatories through a former director who was interested in the plaintiff company, the Court intimating at the same time, that such person might be made a defendant, and discovery thus obtained: *Manchester Val de Traversa Paving Co. v. Slagg*, W. N. 1882, 127.

Notice to produce documents referred to in pleadings or affidavit.

469.—(1) A party shall be entitled to obtain the production, for inspection, of any documents referred to in the pleadings or affidavits of the opposite party, by giving a notice (according to Form No. 60) to the solicitor of such opposite party, and shall be entitled to take copies of such documents when so produced for inspection.

(2) Any party not producing any document in compliance with such notice, shall not afterwards be at liberty to use the documents in evidence, in the cause, matter or proceeding, unless he satisfies the Court or Judge, as the case may be, that he had some sufficient cause for not complying with the notice (*a*). See Con. Rules 514, 515.

Clause (1) is a slightly abbreviated form of former Con. Rule 514, and clause (2) of Con. Rule 515, which two Rules corresponded sub-

stantially with Eng. (1883) R. 357, and 358, except that the Eng. Rule 400. Rule 357 has at (a) the words following, which seem to be implied in the present Rule 400: "In which case the Court or Judge may allow the same to be put in evidence on such terms as to costs and otherwise as the Court or Judge shall think fit."

See notes to Rules 404, and 407.

In *Webster v. Whehall*, 15 Ch. D. 121, remarks were made by Denman, J., to the effect that "sufficient cause" for not complying with a notice by defendant under this Rule would be, that the defence had not yet been delivered. This dictum was not approved in *Quilter v. Heatty*, 23 Ch. D. 42, where it was held that a defendant was, *prima facie*, entitled at once to inspect a document referred to in the pleadings, and the burden of shewing cause is on the party from whom inspection is demanded: also that the Rule applies not only between the plaintiff and a defendant, but also between co-defendants. There Lindley, L.J., said: "There is a material distinction between ordinary discovery, and discovery of documents referred to in the pleadings or affidavits." And Jessel, M.R., said: "The defendant may say, 'Your case depends partly on a set of documents which you have set out incorrectly. I wish to see them. It may be that I have made admissions which will put me out of Court. I wish to see the documents to know whether I have made such admissions, and it is important for me to see them before I put in my defence.' It is reason enough why the defendant should be allowed to see them that the plaintiff has made them part of his statement of claim;" and see *Diamond Match Co. v. Hawkesbury L. Co.*, 1 O. L. R. 577.

Where a document is referred to in an affidavit, of which a copy is served to be read in answer to a motion, the opposite party is entitled to call for the production of the document, even though the affidavit is not filed: *Re Fenner*, 1897, 1 Q. B. 667; 76 L. T. 376.

The documents need not be particularly identified, or referred to; but if more compendiously described by general words, they fall within this Rule, and inspection may be ordered: *Smith v. Harris*, 48 L. T. 860. A letter referred to in particulars of plaintiff's claim is a document within the Rule: *Cass v. Fitzgerald*, W. N. 1884, 18.

The reference in a pleading, etc., to a document in respect of which privilege might otherwise be claimed does not render it liable to inspection under this Rule, but if production is refused it cannot be used in evidence: *Roberts v. Oppenheim*, 26 Ch. D. 724; see also *Mayor of Bristol v. Cox*, 26 Ch. D. 678; *Leslie v. Carr*, 30 Sol. Jour. 76, and *Green v. Auen*, 2 Chy. Ch. 138.

Inspection of a foreign judgment was refused, in an action on a judgment brought under the old procedure: *Matthias v. Deleacho*, 1 Charl. Ca. (Court) 123. Inspection of a mortgage deed was refused to a defendant, who wished to find from it the amount in order to redeem, the plaintiff undertaking to give in a week a statement of principal, interest, and amount of costs, and of the particulars of all other subsequent incumbrances: *Anon.*, 2 Charl. Ch. Ca. 61; W. N. 1876, 23; but see *contra Emmens v. Middlemiss*, 8 P. R. 320. In *Lake v. Pooley*, W. N. 1876, 54, an action for breach of covenant in a lease, the defendant had made an assignment of one undivided moiety of leasehold property, consisting of land, brewery and fixtures: the plaintiff having applied for an order for inspection of documents, and the defendant having objected that the documents related solely to his own title, Archibald, J., made the order, because it was a case of an undivided moiety, the interest in which could only be realized by the usufruct of the whole property.

Rule 470. As to inspection of a company's books by a shareholder, see *Re Credit Co.*, 11 Ch. D. 250.

Form of Notice.—The form of notice need only be in language substantially according to Form 60 (H. & L. Forms, No. 527); *Rule* 1221, but the procedure must be according to *Rule* 463 in order to entitle to inspection of the documents; a notice to inspect on the following morning, was held to be not authorized, and did not confer any right to inspect: *Re Credit Co.*, 11 Ch. D. 250.

Notice to Produce at the Trial.—The form of the usual notice to produce documents at the trial is No. 62 in the Appendix (H. & L. Forms, No. 580).

As to the effect of not giving a proper notice to produce at the trial, see *Sugg v. Bray*, 51 L. T. 194; 54 L. J. Chy. 132; where parol evidence was not allowed to be given of a document in respect of which a proper notice to produce had not been given.

Copies.—In a proper case the Court may authorize a party to make photographs of the documents produced by the opposite party, due precautions being taken to provide for the safety of the documents: *Lewis v. Loundesborough*, 1893, 2 Q. B. 101; 69 L. T. 353.

Exhibits.—Irrespective of any question as to discovery, property, or privilege, if a document is made an exhibit to an affidavit, any person who has the right to inspect and take copies of the affidavit has a similar right as to the exhibit: *Re Hönchcliffe*, 1895, 1 Ch. 117.

Privilege.—The same rules that govern the right to production of documents, are generally applicable where inspection is sought: see *Clegg v. Edmondson*, 22 Beav. 125, and notes to *Rule* 464; and so (except in the case of exhibits), there is no right to inspection of documents as to which there is no right to discovery: *Central News (Limited) v. Eastern Tel. Co.*, 28 Sol. Jour. 390; see 53 L. J. Q. B. 236; but where a document is referred to in a party's pleading it is subject to production by him: *Quilter v. Heutley*, 23 Ch. D. 49, 50; *Diamond Match Co. v. Hunkesbury Lumber Co.*, 1 O. L. R. 577.

Notice to
inspect.

470. The party to whom such notice is given, shall within two days from the receipt thereof, deliver to the party giving the same, a notice (according to Form No. 61), stating a time within three days from the delivery thereof, at which the documents may be inspected at the office of his solicitor, and stating which, if any, of the documents he objects to produce, and on what ground. See Con. Rule 516.

Compare Eng. (1883) R. 359.

The former Con. Rule contained (following in that respect the Eng. R. 359) special provision making the notice applicable to documents mentioned in an affidavit on production, and the Eng. R. has a special provision relating to the inspection of bankers' books, and books of account, etc., in constant use at their usual place of custody. The present Con. Rules 463 and 470, only apply in the case of documents mentioned in pleadings, or affidavits other than affidavits on production.

The course to obtain inspection of documents produced under an affidavit on production will be found in the notes to *Rule* 464, p. 674.

For Form No. 61 of Appendix, see H. & L. Forms, No. 528.

471. If the party served with such notice to give notice to give such inspection, or to give such inspection, the party desiring to give such inspection, may apply to a Judge of the High Court for an order or may apply to the Master in Chambers. See Con. Rule 517.

This Rule is substituted for former Con. Rules 517, 518. These Rules, following Eng. (1883) R. 360, applied to documents referred to in an affidavit on production, as well as to those referred to in other affidavits and in pleadings, and also made provisions respecting motions to inspect generally. The present Rules 460-471 only provide machinery for obtaining speedy inspection of documents referred to in pleadings, or affidavits being used on motions or proceedings: see notes to Rules 470, and 467.

Judge of the High Court.—The Master in Chambers, Local Judges acting under Rule 45, and Local Masters under Rule 49, will not have jurisdiction to entertain the motion: see Rule 6 (a).

Motion for Inspection.—Where an application is made under this Rule, the Court may order inspection of the document indicated in the affidavit, notwithstanding that the other party may have made an affidavit on production omitting to disclose this document, and concluding with the usual general averment as to having no other documents: *Wiedeman v. Wulpole*, 24 Q. B. D. 537; but see S. C., in appeal, *ib.* 626.

Inspection may be ordered at any convenient place: see *Prestney v. Colchester*, 48 L. T. 353; W. N. 1883, 114, and note *supra*, p. 674.

In an action for breach of promise, judgment went by default, and the question of damages was referred to the Master. The plaintiff claimed a right to inspect and take copies of his letters to the defendant, as being material to the question of damages. It was held that the matter was one for the discretionary jurisdiction of the Court or a Judge, and inspection was refused on the ground that it would increase the costs. The Court of Appeal declined to review the decision: *Ladd v. Waltham*, 32 W. R. 1000.

A party has the right to inspect documents the common property of both parties: *Brace v. Liell*, 16 Q. B. D. 229.

472. If the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the Court or a Judge, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the action, or that for any other reason it is desirable that any issue or question in dispute should be determined before deciding upon the right to the discovery or inspection, may order that such issue or question be determined first, and reserve the question as to the discovery or inspection. Con. Rule 519.

Same as Eng. (1883) R. 362.

The right to the discovery or inspection of documents may depend, for example, on a disputed allegation of partnership: *Lyon v. Tweedell*.

When inspection objected to.

Rule 472.

Inspection
of docu-
ments.

13 Ch. D. 375; or on whether an alteration in a will, upon which the rights of the parties depend, was validly made: *Hurst v. Barber*, 12 P. R. 467; or on the validity of a patent: *Dickerson v. Radcliffe*, 17 P. R. 586; or whether the defendant was acting as a trustee: *Bedell v. Ryckman*, 5 O. L. R. 670; and, in such case, the Court, or a Judge, may order that question to be determined first, reserving the question as to discovery or inspection.

A plaintiff partner is entitled to inspect the partnership books by his agent, where there is no reasonable objection to the agent so appointed, and the agent undertakes not to use any information so obtained except for the purpose of confidentially advising his principal: *Bevan v. Webb*, 1901, 2 Ch. 50.

In an action for an account of profits made by the defendants as the plaintiffs' agents, the defendants denying the agency, the Court declined, until after that question should be tried, to order production of the invoices of goods sold by third persons to the defendants, and re-sold by the defendants to the plaintiffs, the defendants having sworn that those invoices had nothing to do with the point at issue, and that the disclosure would be injurious to the defendants if the plaintiffs failed: *Vermineck v. Edwards*, 29 W. R. 180.

It was held under this Rule, that where a question on examination is substantially answered, a further answer ought not to be required when discovery would be oppressive: *McGregor v. McDonald*, 11 P. R. 386.

In *Re Leigh, Rowcliffe v. Leigh*, 6 Ch. D. 256, where an executrix disputed a horse dealer's account, and the dispute was whether or not certain horses were sold on commission, the Court refused to order the horse dealer to disclose the prices, as being immaterial until it had been decided that the horses were sold on commission. The question of liability must be one which is severable from the question of damages: see *Elkin v. Clarke*, 21 W. R. 447.

In a suit by an alleged next of kin to an intestate, against the solicitor to the Treasury, to whom administration had been granted, it was held that the defendant was not bound to make an affidavit of documents relating to the estate, until a *prima facie* case had been made by the plaintiff that he was next of kin: *Lane v. Gray*, L. R. 16 Eq. 552.

A person who had acted as the foreman of a manufacturer's business, filed a bill against the manufacturer, alleging that the plaintiff was to have a weekly salary, and one-sixth of the profits of the business, and praying an account, and payment of one-sixth of the profits of the business to him accordingly. The defendant by his answer admitted a right to a weekly salary, and to one-twelfth of the profits of the business, coupled, however, with an agreement on the part of the plaintiff, that the latter should take the statements of the defendant as to the profits to be true, and should not ask for an account or question the business transactions, or be entitled to examine or investigate the business books; it was held that he was not compellable to produce them before the hearing, their production not being relevant to the issue whether or not the plaintiff was entitled to a decree for an account: *Turney v. Bayley*, 4 DeG. J. & S. 332.

See also *Parker v. Wells*, 18 Ch. D. 447; *Wood v. Italian Bank*, 34 L. T. 255; and other cases in notes to Rule 467, p. 643; also *Johns v. James*, 13 Ch. D. 370; *English v. Tottie*, 1 Q. B. D. 141; *De Carteret v. Land Security Co.*, 70 L. T. 323; 42 W. R. 104; 7 R. 16.

473. If a party fails to comply with any order for production or inspection of documents, he shall be liable to attachment. He shall also be liable, if a plaintiff, to have his action dismissed, and if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended; and the party who obtained the order for production or inspection may apply to the Court or a Judge for an order to that effect, and an order may be made accordingly. Con. Rules 520, 648.

Rules
473, 474.

Conse-
quences of
disobeying
an order for
discovery.

Taken from Chy. O. 144, and 41 V. c. 8, s. 9.

Compare Eng. (1883) R. 363, which is to the same effect, except that it also refers to answering interrogatories.

See Rule 454, and notes.

This provision does not seem to apply in case of disobedience of a notice to produce given under Rule 448: see *Merchants Bank v. Pier-son*, 8 P. R. 123.

An order for production need not now be indorsed with the warning to the party, sometimes employed under the former Chancery Practice: *Thomas v. Palin*, 21 Ch. D. 360; *Wallace v. Graham*, 11 L. R. Ir. 360.

It is otherwise in England under Eng. (1883) R. 573, even in case of an order for production which may be served on the solicitor: see *Hampden v. Wallis*, 26 Ch. D. 746.

An order for production or inspection need not be personally served in order to make a party disobeying it liable to attachment: it is sufficient to serve it on his solicitor: Rule 475.

474. Where the application for such last mentioned order is made by reason of default in production of books and papers in the Master's office, or pursuant to an order to produce, or in carrying in accounts, service of the notice of motion upon the solicitor of the party required to obey the same, is to be sufficient service. Con. Rule 521.

Service of
notice on
solicitor,
when
sufficient.

Taken from Chy. O. 296.

The application referred to in this Rule is one for an order absolute to commit for non-production of documents in the Master's office, or pursuant to an order to produce, or for not bringing in accounts. Service of a notice of motion to commit is generally required to be personal: see *supra*, pp. 622, 623; *Mann v. Perry*, 50 L. J. Chy. 251; *Re Dance*, W. N. 1895, 127; and see Gilbert's Chy. Pr. 198-9, but this Rule makes an exception to the general rule, in the cases mentioned: *Re Harnden*, *Harnden v. Harnden*, 11 P. R. 35; 21 C. L. J. 238.

Motion to
commit;
service of
notice of
motion.

Formerly, the notice of motion to commit for breach of an order of course was required to be a clear four days' notice: *Gray v. Hatch*, 2 Chy. Ch. 12; and see *Exchange Bank v. Newell*, 19 C. L. J. 253; but two clear days' notice seems now sufficient: Rule 348.

Motions to commit for breach of any order of course, or order made by a Judge in Chambers, or judicial officer, may be made in Chambers, but motions to commit for breach of any judgment or order made in Court should be made to a Judge in Court: see *Southwick*.

Rule 475. *v. Hare*, 15 P. R. 239, 331; *Roberts v. Donovan*, 21 Ont. 535; *Berry v. Donovan*, 21 Ont. App. 14; and notes to *Rule 454*.

A motion to commit, when made in Chambers, must be made before a Judge; the Master in Chambers, or Local Master, has no jurisdiction to entertain it: *Keefe v. Ward*, 18 C. L. J. 166; see *Rules 42* (11, 49); but a Local Judge would appear to have jurisdiction where *Rule 47 (a)* applies. See also notes to *Rule 454*.

Default;
how es-
tablished.

On motions to commit for non-production, or for not bringing accounts into the Master's office, the Master is to determine whether the party has been sufficiently notified. The Master's certificate of default is the only evidence of default which is necessary, or can be used: *Parson v. Dryden*, 6 P. R. 83; *Wilson v. Wilson*, 7 P. R. 57; but on motions to commit for non-production in the proper office under *Rule 467*, it is necessary to prove the due service of the order, and also to produce the certificate of the proper officer that it has not been complied with: *Id.*

It is not necessary to serve with the notice of motion copies of the affidavits intended to be used in support of it: *Hannum v. McRae*, 18 P. R. 185.

The certificate of default should bear the latest possible date: *Somerville v. Joyce*, 1 Chy. Ch. 202. Such a certificate may be read, though no notice of reading it be given: *Mullock v. Plunkett*, 1 Chy. Ch. 381. See notes to *Rule 855*.

Where the order has been complied with, after notice of motion served, the motion will be refused, but the applicant will be entitled to his costs: *Mullock v. Plunkett*, *supra*; *Berrie v. Moore*, 1 Chy. Ch. 107.

Discharge
from cus-
tody, on
subsequent
obedience.

And even after committal for not bringing in accounts, the party is entitled to be discharged on production of the Master's certificate that the accounts have been brought in, and the sufficiency of the accounts will not be inquired into on the application for discharge, nor will the payment of costs be made a condition precedent of the discharge: *Clark v. Clark*, 3 Chy. Ch. 67. Where a party obstinately refuses obedience, see *Rule 861*.

Sufficiency
of compli-
ance; how
determined.

Where the party has complied with the order, but it is contended that his compliance is insufficient, the question of sufficiency must be determined, in cases pending in the Master's office, by the Master upon a warrant to bring in a better affidavit, or accounts, as the case may be: *Merkley v. Casselman*, 1 Chy. Ch. 202; and see *Wilson v. Wilson*, 7 P. R. 57.

But where there is an alleged insufficient compliance with an order issued from the Central Office, or by a Deputy Clerk of the Crown, or Deputy or Local Registrar, the question of sufficiency must be determined on motion in Chambers to compel the party to bring in a better affidavit, or in default that he be committed: *Ross v. Robertson*, 2 Chy. Ch. 66.

3. MISCELLANEOUS.

Service of
order on
solicitor,
when
sufficient.

475. Service of an order for production or inspection on the solicitor of a party shall be sufficient service to found an application for an attachment for disobedience to the order. But the party against whom the application is made may shew in answer that he has had no notice or knowledge of the order. Con. *Rule 522*.

To the same effect as Eng. (1883) R. 364, except that the latter includes an order for interrogatories. Chy. O. 136, was to the same effect. **Rules 476, 477.**

This *Rule* was held to apply where, after judgment in an action for specific performance, an order was obtained requiring defendant within four days to produce the abstract and all deeds and writings, etc., for the inspection of the plaintiff, and this order was served on the defendant's solicitor: *Joy v. Hudley*, 22 Ch. D. 571.

476. A solicitor upon whom an order against any party for production or inspection is served under Rule 475, who neglects without reasonable excuse to give notice thereof to his client shall be liable to an attachment. Con. Rule 523.

To the same effect as Eng. (1883) R. 367.

477. The preceding Rules as to preliminary examination of parties for discovery, and as to production and inspection of documents, shall, so far as practicable, apply to parties residing out of Ontario, and in such cases the Court or Judge may, on application on notice to the opposite party, order the examination of the parties to be taken at such place and in such manner as may seem just and convenient, and service of the order for examination, production or inspection, and of all other papers necessary to obtain the benefit of the provisions of the said Rules, shall be sufficient if made on the solicitor of the party, in the same manner as other papers in the action are served on the solicitor; unless the Court or Judge makes other order to the contrary; and if there is no such solicitor, or he cannot for any reason be served, the Court or Judge may order the service in any other manner to be mentioned in the order in that behalf. Con. Rule 524.

See notes to Rule 439, et seq. p. 670.

This *Rule* is in terms restricted to the examination of the parties. It does not extend to the examination of officers of corporations: *Perrins v. Albion Tube Works (Limited)*, 8 O. L. R. 634; but it applies to the case of a party temporarily absent: *Mayleau v. James' Bay Ry. Co.*, 5 O. W. R. 440, 495; and an order may be made for the examination of such a party at the place abroad where he may happen to be: *Id.*, 495.

Where a defendant resides out of Ontario, and is only in it for a temporary purpose, his attendance to be examined for discovery can only be obtained under this *Rule*, and not by appointment under Rule 445: *Cox v. Prior*, 18 P. R. 492. An order may, where convenient, be made for the examination in Ontario where the party happens to be, and such an order was made where the defendant resided in British Columbia and was temporarily in Ontario attending the House of Commons, of which he was a member: *Id.*

The Court, or Judge, may take judicial notice of the geographical situation of places where examinations can be held with reference to the residence of the party to be examined, in order to fix a place which may be just and convenient: *Lick v. Rogers*, 1 D. L. R. 37. A local Judge of the county where the solicitors for both parties reside, has jurisdiction to make an order under this *Rule*: *Id.*

CHAPTER VIII.

EVIDENCE.

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|--|--------------------------|
| 1. SUBPOENAS, 478-482. | 4. COMMISSIONS, 499-515. |
| 2. EVIDENCE AT TRIALS AND RE-
FERENCE, 483-488. | 5. AFFIDAVITS, 516-526. |
| 3. EVIDENCE ON MOTIONS, 489-498. | 6. ADMISSIONS, 527, 528. |

1. SUBPOENAS, ETC.

Subpoena

478. A writ of subpoena shall bear date upon the day when the same [is] issued. Con. Rule 559.

Taken from R. S. O. 1877, c. 62, s. 15.

Where a person required as a witness is undergoing imprisonment for a crime in the Province, it is necessary to move for an order to the governor of the prison to produce the prisoner in Court at the trial; see form of order, Seton, 5th ed., 89. Such an order, however, will not be issued when the time for trial is uncertain, until the case is on the paper for trial; *Jenks v. Ditton*, 76 L. T. 591, and see *Rule 495*.

Subpoena
to produce
original
record not
to issue
without
order.

479. A subpoena for the production of an original record, or of an original memorial from any registry office, shall not be issued, unless the order of the Court or a Judge is produced to and filed with the officer issuing the same; and the writ shall conform to the description of the document in the order. Con. Rule 560.

Taken from Rule T. T. 1856, 31.

The application for the order may be made to the Master in Chambers, or other officer exercising the like jurisdiction in Chambers. The application should be supported by an affidavit showing the necessity for producing the original, and that the production of a certified copy will not be sufficient.

The *Rule* applies to records of the Court, and memorials in the offices of Registrars of Deeds; an assignment of a squatter's right filed in the Crown Lands Department was held not to be a record within the meaning of the *Rule*; *McGuire v. Sneath*, 2 U. C. L. J. 184.

Original papers filed in Court should not be sent away to be used in evidence at a trial, unless it is shown that the production of the originals is essential; and the party applying to have them transmitted has some right in them, or the interests of public justice require their transmission. *Quinn v. Scott* 21 F. C. Q. B. 180; and *see also* *Scott v. The Queen*, 14 Fed. Rep. 190; directions are given

to officers of the Court that, "subject to *Rule 335*, in case originals **Rule 479.** are required instead of examined or certified copies of affidavits, papers, and documents on file or of record in the Court, such originals shall not be taken away from the Court by any officer under a subpoena, unless authorized so to do by a Judge's order in that behalf."

Where original documents are produced in evidence under a subpoena by any public officer, the originals are not to be left in Court, but copies thereof, or of so much as may be necessary, certified by the officer, are to be put in: see R. S. O. c. 73, s. 48; except where the genuineness of the document produced is in question: *Ib.*, sec. 49.

In an action for malicious arrest, the production of an examined copy of the affidavit on which the arrest was made, and shown to have been used in the cause, is sufficient *prima facie* proof of such affidavit, and that it was made by the defendant: *Spafford v. Buchanan*, 3 O. S. 391; *Wilson v. Thorpe*, 18 U. C. Q. B. 443. But in an action for malicious prosecution, the production of the original indictment indorsed "no bill" is not sufficient proof of its termination; a record must be drawn up, and an examined copy produced: *Hewitt v. Cane*, 26 Ont. 133; *Reg. v. Ivy*, 24 C. P. 78; *McCaun v. Preneveau*, 10 Ont. 573; and see *Gunn v. Cox*, 3 S.C. R. 296; *Henry v. Little*, 11 U. C. Q. B. 296; *Aston v. Wright*, 13 P. R. 14; but see *O'Hara v. Dougherty*, 25 Ont. 347. A conviction returned to the Sessions and filed by the Clerk of the Peace becomes a record, and may be proved by a certified copy: *Graham v. McArthur*, 25 U. C. Q. B. 478.

So also the books, indictments and records of the Court of General Sessions of the Peace, in the hands of the Clerk of the Peace are public documents, and any person affected by them is entitled to a copy of a record of acquittal without the fiat of the Attorney-General: *Ree v. Scully*, 2 O. L. R. 315; 4 O. L. R. 394; R. S. O. c. 324, s. 11.

Any public document filed in a public office of the government may be proved by a certified copy: *McLean v. McDowell*, 1 U. C. Q. B. 73; R. S. O. c. 73, ss. 26, 28, but see *Langtry v. Dumoulin*, 7 Ont. 499. As to proof of orders of the Lieutenant-Governor in Council, see R. S. O. c. 73, s. 23, and orders of the Governor-General in Council, *Ib.*, s. 22; registered instruments may be proved by certified copies: R. S. O. c. 73, ss. 45-49. Certified copies of registered memorials are sufficient evidence of such memorials: *Lynch v. O'Hara*, 6 C. P. 259; but a memorial is not always sufficient proof of the deed to which it relates: *Gough v. McBride*, 10 C. P. 166; *Ausley v. Broo*, 14 C. P. 371; for the cases in which the memorial proves the deed, see R. S. O. c. 134, ss. 2 (2), and 3; *Re Higgins*, 17 Gr. 303.

As to proof of wills, see R. S. O. c. 73, ss. 41-44; where the probate wills is admissible as evidence under this statute, it is evidence of the testator's death, as well as of the will: *Davis v. Van Norman*, 30 U. C. Q. B. 437.

A Crown patent must be proved by the production of the original. Patents or an exemplification thereof: *Reid v. Banks*, 10 C. P. 202; *McCollum v. Darw*, 8 U. C. Q. B. 159; a certified copy is not sufficient: *Prince v. McLean*, 17 U. C. Q. B. 463. Under *The Quieting Titles Act*, certified copies of patents are, however, received.

As to municipal by-laws, see 3 Ed. vii. c. 19, s. 323; *Robinson v. By-laws* *Category*, 1905, 1 K. B. 521.

Rules

480-482.

Any number of names may be included in one subpoena.

480. Any number of names may be included in one subpoena, and no more than one subpoena 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. Con. Rule 561.

Taken from Rule T. T. 1856. 163.

Although several names are included in one subpoena, it is not necessary that the copies served should contain the names of any other witness than the one on whom the copy is served.

Calling opposite party.

481. Wherever a party desires to call the opposite party as a witness at the hearing or trial, he shall either subpoena such party, or, in case such party is within the jurisdiction, give him or his solicitor at least eight days' notice of the intention to examine him as a witness in the cause, paying at the same time the amount proper for conduct money; and if such party does not attend on such notice or subpoena, such non-attendance shall be taken as an admission *pro confesso* against him in any such action, unless otherwise ordered by the Court or Judge in which or before whom such examination is pending, and a general finding or judgment may be had against the party thereon, or the plaintiff may be nonsuited, or the proceedings in the action may be postponed by the Court or Judge, on such terms as the Court or Judge sees fit to impose. Con. Rule 562; Rules of 1 Jan., 1896, 1458.

Taken from R. S. O. 1877, c. 62, s. 18.

"At least 8 days" means 8 clear days: *Rule 344 (2)*; Sundays will probably be included; see *Rule 343*.

It is to be observed that this *Rule* does not say that the notice is to be given eight clear days before the commencement of the sittings. It, perhaps, therefore, may be sufficient if eight clear days elapse before the case comes on; but see *Sierichs v. Woodcock*, 13 P. R. 250; *Girvan v. Molens*, 12 C. L. T. 357.

It was held that the statute from which this *Rule* is taken only applied to a party resident within the jurisdiction, and that where a litigant was residing abroad the opposite party could not compel him to attend as a witness on notice, but must take his evidence by commission. *Patchin v. Parris*, 10 F. C. Q. B. 630; *Tyre v. Wilkes*, 18 F. C. Q. B. 46; *Sefton v. Lundy*, 4 Chy. Ch. 33. The effect of these cases is now expressed in the *Rule*.

The provision for payment of witness fees was introduced in 1890 to express what was already the construction of the *Rule*; see *Haw v. Lasher*, 24 F. C. Q. B. 357.

Bench warrants

482.—(1) Upon proof, to the satisfaction of the Judge presiding at the sittings of any Court, of the service of a

subpoena upon any witness who fails to attend or to remain **Rule 483.** in attendance in accordance with the requirements of the subpoena, and that a sufficient sum for his fees as a witness had been duly paid or tendered to him, and that the presence of such witness is material to the ends of justice, the said Judge may, by his warrant, directed to any sheriff or other officer of the Court, or to any constable, cause such witness to be apprehended, and forthwith brought before him or any other Judge who may thereafter preside at such sittings, to give evidence, and in order to secure his presence as a witness, such witness may be taken on such warrant before the presiding Judge and detained in the custody of the person to whom the warrant is directed, or otherwise, as the presiding Judge may order, until his presence, as such witness, is required, or, in the discretion of the said Judge, he may be released on a recognizance (with or without sureties) conditioned for his appearance to give evidence.

(2) The warrant may be according to Form No. 93, and may be executed in any part of Ontario. Con. Rule 363.

Taken from 44 V. c. 5, ss. 83, 84.

For Form No. 93, see H. & L. Forms, No. 708.

3. EVIDENCE AT TRIALS AND ON REFERENCES.

483. In the absence of an agreement between the parties, and subject to these Rules, the witnesses at the trial ^{Evidence on trial to be first made.} of an action or at an assessment of damages shall be examined *viva voce* and in open Court, but the Court or a Judge of the High Court may at any time, for sufficient reason, order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the trial, on such conditions as may seem just, or that any witness whose attendance ought for some sufficient cause to be dispensed with, be examined before an examiner; but where the other party *bond fide* desires the production of a witness for cross-examination, and such witness can be produced, an order shall not be made authorizing his evidence to be given by affidavit. Con. Rules 364, 367.

The Eng. (1883) R. 483, provides for the examining by interrogatories, or otherwise, of a witness whose attendance is dispensed with. The Rules are otherwise the same. The use of affidavits at a trial

Rule 483. was not permissible in the Common Law Courts; but in Chancery exhibits might formerly be proved at the hearing in that way.

Evidence at trials, etc.

The present *Rule 483* consolidates former Con. Rules 564, and 567. In its language the new *Rule* follows former Con. Rule 564, which seems to have been considered to be wide enough to include what was provided by former Con. Rule 567. The latter Rule was taken from Chy. O. 176, and there were under that Chy. O. many decisions as to the matters which might, and might not, be proved by affidavit; see Dan. Pr., 5th ed., 777, 1236; *Devey v. Thornton*, 9 Hu. 233; *Fowler v. Reynal*, 15 Jur. 1019; *Delevante v. Child*, 6 Jur. N. S. 118; *Rush v. Watkins*, 14 Beav. 33; *Hoghton v. Hoghton*, 15 Beav. 278; *Bear v. Smith*, 5 D. & S. 92; *Fallock v. Dillon*, 2 W. R. 507; *Bateman v. Margerison*, 2 W. R. 607; *Howard v. Chaffers*, 11 W. R. 585; *Evans v. Lewis*, 2 L. T. 559; *Fleming v. East*, Kay, App. lit.; *Macdonald v. Antelme*, W. N. 1884, 72.

Affidavits as to trustees' conduct, between judgment and further directions, may be read by the original plaintiff on the question of costs; but not affidavits as to their conduct before judgment; but it would seem that persons added as defendants in the Master's office, or who are served with the judgment under *Rule 265* (3), may read affidavits as to the trustees' conduct before, or after judgment, on the question of costs: *Re Revill*, 55 L. T. 542.

In an administration action, the Court may, under this *Rule*, if it thinks fit, receive fresh affidavit evidence on further consideration: *May v. Newton*, 34 Ch. D. 347; see, however, *Howey v. Raaf*, 6 P. R. 89, as to the usual material which may be used on further directions.

Certain facts are expressly authenticated to be proved by affidavits: e.g., service of notice to produce documents; see *Rule 487*; the absence from Ontario of a witness or party whose evidence has been taken by commission; see *Rule 512*.

The Court has no power on a motion for judgment by default of pleading to receive evidence by affidavit to prove the allegations of the statement of claim against infants, or parties *non compotes mentis*, or in any other case, except where *Rule 416* is applicable; see *Ellis v. Robbins*, 50 L. T. 512; 17 C. L. J. 342; and *Re Fitzwater*, 52 L. J. Chy. 83.

The Judge should, in every case of fairly contested or disputed facts coming on to be tried, take the evidence orally unless some good reason to the contrary is shown: *Atty.-Gen. v. Metropolitan District Ry. Co.*, 5 Ex. D. 218; see also *Nagle-Gillman v. Christopher*, 4 Ch. D. 173; *Blackburn v. Brooks*, 7 Ch. D. 68; *Warner v. Monack*, 16 Ch. D. 101.

In the absence of agreement, evidence must be taken *viva voce* at the trial, and affidavits used on a motion cannot be used at the hearing; *Perkins v. Slater*, 45 L. J. Chy. 224; but where an interlocutory motion had been ordered to stand over till the hearing, and a deponent had died in the meantime, the Court allowed his affidavit to be read at a trial, with evidence *viva voce*, although the deponent had not been cross-examined: *Elias v. Griffith*, 46 L. J. Chy. 806.

Where none of the parties cited had appeared in an action to prove a will in solemn form, Hannen, P., refused to allow the execution and attestation of the will to be proved by affidavit: *Cook v. Tindleson*, 24 W. R. 871. In *Gornall v. Mason*, 12 P. D. 142, an action for revocation of probate, an affidavit made by the witness eight years previously to obtain probate was allowed to be read as evidence in support of the will.

In *Druitt v. Druitt*, 58 L. T. 684, an affidavit used as a method in the cause, made by a witness who was unable to attend at the trial, was allowed to be put in as evidence. This was not allowed in *Blackburn Union v. Brooks*, 7 Ch. D. 68, where cross-examination of the witness was desired. **Rules 484, 485.**

The depositions of a defendant taken on his own behalf in shorthand upon a reference, were held to be admissible in evidence, notwithstanding that he had died before the examination was concluded and before cross-examination: *Rawlall v. Atkinson*, 30 Q. B. 212, 620.

The Judge, at any period in a case, may allow further evidence to be called by either party for his own satisfaction, though it be doubtful whether it would be admissible, on the request of either party, as of right: *Bald v. Dawson*, 20 W. R. 192.

At the trial the Judge may call and examine a witness not called by the parties: the right of the parties to cross-examine such a witness is in the discretion of the Judge, who should as a rule allow cross-examination by any party adversely affected by the answers of the witness, but not a general cross-examination: *Coulson v. Duxborough*, 1894, 2 Q. B. 316; 50 L. T. 617.

As to proof of registered instruments, see *Barber v. McKay*, 17 Ont. 592.

484. All witnesses in any matter pending before a Master, or Referee, shall give their testimony *viva voce*, before the Master or Referee, unless it is otherwise ordered by the Master or Referee, or by the Court or a Judge, on special grounds, or unless with the consent of the parties. **Con. Rule 565.** Exhibits before a Master or Referee

Taken from R. S. O. 1877, c. 40, s. 100.

A subpoena may properly be issued to compel the attendance of a witness before a Master: *Hummel v. McRae*, 17 P. R. 567; 18 P. R. 185.

485.—(1) The Court or a Judge may, in any cause or matter where it appears necessary for the purpose of justice, make an order for the examination upon oath before an officer of the Court, or any other person and at any place, of any person, and may order any deposition so taken to be filed in the Court, and may empower any party to the cause or matter to give such deposition in evidence therein, on such terms as may seem just. **Con. Rule 566.** Depositions

(2) Such examination shall, unless otherwise ordered, be conducted in accordance with the practice upon examinations for discovery in so far as the same is applicable. **Rules 23 June, 1894, 1344.**

The first clause is the same as Eng. (1883) R. 487.

Rule 485

Construc-
tion of Rule.

Scope of Rule.—This *Rule* applies only where there is pending litigation between contesting parties: *Re Hewitt*, 15 Q. B. D. 159, 161; and for the taking of evidence for the purposes of the trial, or upon a hearing upon a reference: *Beaton v. Globe*, 16 P. R. at pp. 285, 286; and for that purpose may be applied wherever a case of justice is made out: see *Warner v. Mosses*, 16 Ch. D. 100; *Nadin v. Bassett*, 25 Ch. D. 21. It cannot be used merely for the purpose of obtaining discovery: *Beaton v. Globe*, *supra*, and see *infra*.

It is not necessary to apply under this *Rule* for an order to examine witnesses on a reference after judgment; the former practice of subpoenaing without leave is not abolished: *Raymond v. Tapson*, 22 Ch. D. 430; *Hannum v. McRae*, 17 P. R. 507; 18 P. R. 185.

Order for
examina-
tion of a
witness
in lieu of a
commission.

In Lieu of a Commission.—In consequence of the provision of original J. A. Rule 289, requiring consent to enable the evidence under a commission to be taken *viva voce*, and of original J. A. Rule 290, staying the trial until the return of a commission, the examination of witnesses out of the jurisdiction orally, or without a stay, used sometimes to be ordered under this *Rule*. Though those reasons no longer exist, this *Rule* may still be invoked if necessary to obtain the evidence of a witness for use at the trial, without the issue of a commission, whether the witness be without, or within the jurisdiction, wherever it may be necessary and just: see notes to *Rules* 489, *et seq.*; see also *Croft v. Middleton*, 9 Ha. App. xviii.; *London Bank of Mexico v. Hart*, L. R. 6 Eq. 467; (where a form of order is given); *Banque Franco-Egyptienne v. Lutschner*, 41 L. T. 108; 28 W. R. 133.

Examination abroad under this *Rule* will be ordered upon the same principles and under the same circumstances as a commission would be ordered, as to which see *Rule* 489, and notes, and *Delap v. Charbon*, 15 P. R. 142.

There is a difference between a party seeking to have his own examination abroad and a mere witness. In both cases it is a matter of judicial discretion, but the discretion will be exercised in a stricter manner in the case of a party: *Cock v. Allcock*, 2 Q. B. D. 178, 181.

An order for examination of a plaintiff, otherwise than before the Court and jury, was considered not proper, where the issue was forgery of the plaintiff's name, or a personation of the plaintiff: *Thomas v. Storey*, 11 P. R. 417.

In applying under this *Rule* to examine witnesses before trial, it is not sufficient to shew that the examination will materially benefit the applicant, some special reason must be given why the witness should be examined, out of the regular course, and not at the trial for the first time: *Hendrie v. Neelon*, 19 C. L. J. 18; 2 C. L. T. 599.

Examina-
tion de
bene esse.

Examination de bene esse.—Under this *Rule* orders may be made for examination of a witness *de bene esse*, for use at the trial, or on a reference in the Master's office: *Re Dunsford*, 9 P. R. 172.

Examination of a witness *de bene esse* is allowed where there is danger of losing testimony from death, or absence, at the time of the trial. An order will therefore be made where a necessary witness is going abroad, or is from illness, age, or other infirmity, likely to be unable to attend the trial: *Warner v. Mosses*, 16 Ch. D. 100; and generally speaking wherever justice requires it, though, as a rule, only where the evidence is to be used for some definite judicial proceeding pending: *Whitehead v. Buffalo & L. R. Ry.*, 5 V. C. L. J. 232, where an order was made in contemplation of a reference to a Master not yet directed.

If the ground is that the witness is over 70 years, or dangerously ill, or going immediately abroad, the application may be made *ex parte*: Dan. Pr., 5th ed., 817; 6th ed., 655; *Oliver v. Dickey*, 2 Chy. Ch. 87; *Crippen v. Ogilvey*, Ib., 304; *Bidder v. Bridges*, 26 Ch. D. 1; *Baker v. Jackson*, 10 P. R. 624; *Crammond v. Thompson*, 11 Times, 572; but the Court in its discretion refused to apply this rule to the extraordinary case of thirty witnesses over 70 years, in *Bidder v. Bridges*, *supra*.

In other cases notice should be served: see *Anderson v. Anderson*, 1 Chy. Ch. 291; *Spears v. Waddell*, 7 P. R. 290; *Hoey v. Gilbert*, 12 P. R. 114.

If the only ground is that the witness is the only witness as to some fact this should be clearly shewn: *Hope v. Hope*, 3 Beav. 317; *Jamieson v. Jones*, 3 Chy. Ch. 98; but the order may provide that the examination is not to be used at the trial unless the attendance of the witness cannot be procured: *Elliott v. C. P. Ry. Co.*, 12 P. R. 593.

That the witness is going abroad is a sufficient ground. He need not be going permanently, or be the only witness: *Spears v. Waddell*, 7 P. R. 290; and where witnesses residing out of Ontario come within the jurisdiction, and are about to return, an order for their examination here before their departure may be made: *Delup v. Charlebois*, 15 P. R. 142.

Such orders are discretionary, and if witnesses have been examined, will not be reversed unless plainly erroneous: *Ib.*; and see *Beaton v. The Globe*, 16 P. R. 281.

As to what must be shown at the trial before the deposition when taken can be used as evidence, see Dan. Pr., 6th ed., 654-7; 7th ed., 558-9, and *Rule 486*.

For form of order for examination *de bene esse*, see Seton, 5th ed., 89; and see *Burton v. Staffordshire Ry. Co.*, 35 W. R. 536; 56 L. T. 601; *Solicitor of the Treasury v. White*, 55 L. J. Pro. 79; W. N. 1886, 144.

Any party to the action, whose interest may be affected by the examination of witnesses under this *Rule*, is entitled to have counsel present on such examination to protect his interests: *Dominion Bank v. Bell*, 13 P. R. 471.

Where evidence had been taken in shorthand of a party on his own behalf, and he had died before the examination was concluded, and before he could be cross-examined, the evidence was held to be admissible: *Randall v. Atkinson*, 30 Ont. 242, 620.

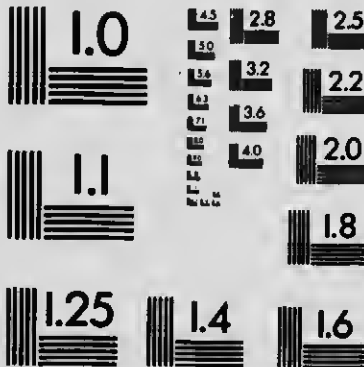
Costs.—In *Carty v. London*, 10 C. L. T. 3, the costs of an examination were allowed though the evidence was rejected at the trial as inadmissible; so also in *Roudot v. Monetary Times*, 18 P. R. 141, where it became unnecessary to use the depositions, in consequence of admissions made in evidence by the opposite party.

Cases in which Rule not Applicable.—By a series of decisions prior to 1894, this *Rule* was applied to authorize examinations for the purpose of discovery not only of parties, before the time for doing so in the ordinary course: *Ficken v. Chamberlain*, 9 P. R. 283; *Boulton v. Blaker*, 11 P. R. 106; *Tate v. Globe*, 11 P. R. 253; *Hallis v. Newton*, 7 C. L. T. 138; *Orpen v. Kerr*, 11 P. R. 128; *Thomson v. Gue*, 13 P. R. 273; *Campbell v. Scott*, 11 P. R. 203; *Bruton v.* Examination cannot be had for discovery.



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Rule 436. *Globe*, 15 P. R. 473; but also of persons not parties: *Turner v. Kyle*, 18 C. L. J. 402; *Hendrie v. Neelon*, 2 C. L. T. 490; *McNally v. McDonald*, 9 C. L. T. 54; *Boulton v. Blake*, 11 P. R. 196; *Murray v. Warner*, 11 P. R. 440; *Gordon v. Phillips*, *ib.* 540; *Carnegie v. Cox*, *ib.* 311; *Smith v. Clarke*, 12 P. R. 217; *McMaster v. Mason*, 12 P. R. 278; *Brown v. Pears*, 12 P. R. 396; see also *Carnegie v. Federal Bank*, 10 P. R. 69; *Rosenheim v. Silliman*, 11 P. R. 7; *Hooy v. Gilbert*, 12 P. R. 114; *Henderson v. Blain*, 14 P. R. 308. All the decisions countenancing such examinations were disapproved of and overruled by the Court of Appeal, in *Beaton v. Globe Printing Co.*, 16 P. R. 281, in which it was held that this Rule does not apply to examinations for discovery. Ordinarily, such examinations must be had in the manner and at the times provided by Rules 439-477. There may be inherent jurisdiction in the Court or a Judge to make a special order for examination for discovery before the time for obtaining it in the ordinary way arrives, but there seems to be no express Rule on the subject: see note to Rule 442.

The Rule was formerly held to apply to the examination of a witness on a pending motion who has not made an affidavit: *Mouughan v. Dobbin*, 18 C. L. J. 180; 2 C. L. T. 260; and a witness from whom it is desired to obtain information, in order to serve a defendant with the writ: *Seager v. Barber*, 27 Aug., 1881, Mr. Dalton.

It would seem that either this Rule, or Rule 491, may be applied where it is desired to examine a witness upon a pending *ex parte* motion: see *McMillan v. Wausborough*, 10 P. R. 377, and notes to Rule 491.

Arbitration.—*Scumble* an arbitration pending before an arbitrator named under *The Municipal Act*, 3 Ed. vii. c. 19, s. 448, is not a "matter" within this Rule: *Re Macpherson and Toronto*, 16 P. R. 230.

Using Depositions in Another Action.—The Court has no power to make an order authorizing the use in a future action of evidence taken in a pending action: *Erdman v. Walkerton*, 14 P. R. 467.

The depositions of a deceased person taken as a witness in a former suit were allowed to be read, the parties being in effect the same, the adverse party having had the opportunity to cross-examine, and the two actions substantially involving the same questions: *Erdman v. Walkerton*, 22 Ont. 693; 20 Ont. App. 444; 23 S. C. R. 252.

As to using depositions taken in the same action, see *Monro v. Toronto Ry. Co.*, 9 O. L. R. 299.

Copies of depositions certified by person taking the same admissible in evidence.

486. Where an examination of a party or witness has been taken before a Judge of the High Court, or of a County Court, or before another officer or person appointed to take the same, copies of such examinations and depositions certified under the hand of the Judge, officer or other person taking the same shall, without proof of his signature, be received and read in evidence, saving all just exceptions. Con. Rule 574.

Taken from 42 Viet. c. 15, s. 3.

487. Service of a notice to produce may be proved by an affidavit of the solicitor in the cause, or his clerk. Con. Rule 575. Rules
487-489.
Evidence
of service
of notice
to produce.

A simplified form of R. S. O. 1847, c. 50, s. 173, under which it was held that an affidavit was not admissible unless made in the manner mentioned in the section, *Patterson v. Morrison*, 17 U. C. Q. B. 130.

488. In actions for libel or slander, in which the defendant does not by his defence assert the truth of the statement complained of, he shall not be entitled on the trial to give evidence in chief, with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without the leave of the Judge, unless seven days at least before the trial he furnishes particulars in writing to the plaintiff of the matters as to which he intends to give evidence. Con. Rule 573. Libel or
slander,
particulars
of evidence
in mitiga-
tion.

Same as Eng. (1883) R. 461.

No demand for these particulars is necessary. They must be furnished as a condition precedent to giving of evidence of the matters mentioned.

Notwithstanding this *Rule* the facts relied on in mitigation of damages in an action for libel or slander must be set out in the defence: *Beaton v. Intelligencer P. Co.*, 22 Ont. App. 97; *Vanayele v. Parish*, 1 O. L. R. 13; *McKenzie v. McLaughlin*, 38 C. L. J. 131; but see *Fulford v. Wallace*, 1 O. L. R. 278.

Where the defence does assert the truth of the statement complained of, it has been held that evidence as to the plaintiff's character with a view to mitigation of damages, is not admissible unless the facts relied on are pleaded: *Scott v. Sampson*, 8 Q. B. D. 491, so that the effect of the *Rule* and this decision is that whether the truth of the alleged libel or slander be pleaded or not, the evidence referred to in this *Rule* cannot be given, unless the particulars are furnished as therein mentioned.

3. EVIDENCE ON MOTIONS.

489. Evidence upon a motion or petition may be given by affidavit. Con. Rule 576. Evidence
on motion
or petition.

An applicant who has failed to make out his case on his own affidavits, may read the affidavits of his opponent if they supply what is lacking: *Re Margetson*, 1897, 2 Ch. 314; 76 L. T. 805, and see notes to *Rule* 524.

It was held that a Judge could not, on an interlocutory motion, properly decide the matter in controversy by a personal inspection of the subject matter in dispute, in lieu of taking evidence orally, or by affidavit: *London General Omnibus Co. v. Lavell*, 1901, 1 Ch. 137; 83 L. T. 453. See notes to *Rule* 572.

Rule 490. It has been held in England, that affidavits in reply may bring forward additional evidence in support of the original case, and are not restricted by this Rule, to the points raised by the defendant's evidence: *Peacock v. Harper*, 7 Ch. D. 648; see also *Adair v. Young*, W. N. 1879, 8; *Roe v. Davies*, 2 Ch. D. 731; but see *Re Ferris & Eyre*, 18 Ont. 397, and *Gilbert v. Comedy Opera Co.*, *infra*.

Affidavits filed by a plaintiff in reply will not, upon an interlocutory motion, be ordered to be taken off the files, upon an allegation by the defendant that they are not confined to matters strictly in reply, though at the argument, if it should turn out to be so, the Court will not regard them, or may give leave to the defendant to answer them: *Gilbert v. Comedy Opera Company*, 29 W. R. 169; 43 L. T. 665.

Cross-examination on affidavit.

490. A person who has made an affidavit to be used in any action or proceeding, other than on production of documents, may be cross-examined thereon. Rules 23 June, 1894. 1345.

Based upon Chy. O. 268.

As to the excepted case of an affidavit on production, see note to Rule 467, p. 693. A party cannot be cross-examined on an affidavit on production in support of a motion for a better affidavit on production: *Dryden v. Smith*, 17 P. R. 500.

The affidavit of justification of a surety in an appeal bond filed, was held to be an affidavit used in a proceeding within Chy. O. 268: *Hughes v. Hughes*, 17 C. L. J. 110; 1 C. L. T. 189.

When the proceeding for which the affidavit has been filed has been disposed of, the right of cross-examination is gone: *Catholic Printing Co. v. Wiman*, 11 W. R. 399; *Felan v. McGill*, 3 Chy. Ch. 56; *Clendinning v. Tarcoe*, 7 P. R. 61.

Deponents making affidavits in reply, are liable to cross-examination: *Re Foster*, 6 P. R. 95; 9 C. L. J. 313.

As to the extent to which the affiant may be cross-examined, see *Wilson v. Fleming*, 19 P. R. 203.

The opposite party may cross-examine witnesses who have made affidavits though they are not read: *Re Ottaway*, W. N. 1882, 9; 30 W. R. 282; *Re Quartz Hill, etc., Co.*, 21 Ch. D. 642; but see *Massam v. Thorley's Food Co.*, W. N. 1879, 181.

A party cannot withdraw an affidavit which he has given notice of reading, so as to avoid a cross-examination of the deponent: *Clarke v. Law*, 2 K. & J. 28; *Pike v. Dickinson*, 21 W. R. 862; W. N. 1873, 178; *Re Quartz Mining Co.*, 47 L. T. 644; 21 Ch. D. 642. The party cross-examined cannot insist on the passage in his affidavit being read, or shown, to him, before he answers: *Gwynne v. Watney*, 31 L. T. O. S. 231.

Cross-examination on affidavits filed in answer to a motion not properly made may be refused: *Canadian Bank of Commerce v. Bricker*, 1 C. L. T. 729.

As to the mode of compelling attendance for cross-examination, see Rule 492.

The right to re-examine necessarily follows upon cross-examination: *Rex v. Noel*, 6 O. L. R. 385; even as to matter elicited during cross-examination, which is inadmissible or volunteered, unless the cross-examiner submits to such matter being expunged.

This *Rule* does not apply where an affidavit has been made in pro-^{Rules}ceeding before a Master; in such case the cross-examination, if any, ^{491, 492.} must be by the direction of the Master, and before him; *Plenderleith v. Parsons*, 6 O. W. R. 145; or as he may direct: see *Rule* 168.

491. A party to any action or proceeding may require the attendance of a witness to be examined, before any officer having jurisdiction in the County where the witness resides, for the purpose of using his evidence upon any motion, petition, or other proceeding before the Court, or any Judge or judicial officer in Chambers. Con. *Rule* 578.

Based upon Chy. O. 266.

A motion must be pending to enable a party to proceed under this *Motion Rule*: *Traders' Bank v. Kean*, 13 P. R. 60. Depositions taken when must be no motion or other proceeding is pending, are irregular and cannot pending. be read: *Stovel v. Cole*, 3 Chy. Ch. 362.

An *ex parte* motion is a "motion . . . before the Court" within the *Rule*: *Dunlop v. Dunlop*, 9 O. L. R. 372.

Where the evidence of a person who refuses to make an affidavit subpoena, is sought in support of an *ex parte* motion, the motion must be date of. mentioned, and an adjournment obtained for the purpose of procuring the desired evidence under this *Rule*; or else an order for the examination of the witness must be obtained under *Rule* 485.

A subpoena for the examination of a witness, dated prior to the time at which the party issuing the same was entitled to examine the witness, was held . . . irregular: *McMurray v. Grand Trunk Ry. Co.*, 3 Chy. Ch. 130.

A party as well as a stranger may be examined as a witness under this *Rule*, and the consequence of default in attendance is to put him in contempt: *Clark v. Campbell*, 15 P. R. 338; and where the evidence of the party in default is required in support of a motion to set aside, or vary, an order obtained by such party, the operation of such order may in the meantime be suspended: *Ib.*

Evidence may be taken under this *Rule* in support of a motion for a new trial: *Rushton v. G. T. Ry. Co.*, 6 O. L. R. 425.

The *Rule* does not apply to criminal proceedings, e.g., motions to quash convictions: *Reg. v. Haywood*, 32 C. L. J. 30; or to a summary proceeding under R. S. O. 1897, c. 147, s. 8 (1), to remove an assignee, which is not a proceeding in an action: *Re Wilson*, 6 O. L. R. 564.

The witness, though not a party to the action, may move to set aside the subpoena and appointment served on him: *Dunlop v. Dunlop*, 5 O. W. R. 258, 305; and see *London & Globe v. Kaufman*, 48 W. R. 458; 1899, W. N. 240.

492. The person to be examined under Rules 490 and 491 may be required to attend in the same manner as, and his examination shall be subject to the same rules as apply to the examination of, a party for discovery. Con. Rules 578 (a); Rules 23 June, 1894, 1345.

Rule 493. The subpoena must be served personally, otherwise an attachment for non-attendance cannot be obtained: *Barber v. Adams*, 16 P. R. 156.

Witness
fees to be
paid.

As to the mode of service of the person to be examined in order to compel his attendance, see *Rule 443* and notes.

A witness, whether a party, or a stranger to the cause, who is required to attend for examination, is entitled to be paid ordinary witness fees, and may refuse to attend, or, if attending, may refuse to be sworn, until paid: *Rules 443, 492*; *Brocas v. Lloyd*, 23 Beav. 129; *Wiltshire v. Marshall*, W. N. 1866, 80; *Davey v. Durrant*, 24 Beav. 493; and see *Robins v. Carson*, 2 Chy. Ch. 343; *Bolkow v. Foster*, 7 P. R. 388; *Smith v. Greay*, 11 P. R. 345.

Examina-
tion of
party out
of juris-
diction.

Where the witness, or party, required to be examined in support of a motion is out of the jurisdiction, an order for a commission may be obtained as soon as the notice of motion is served: *Farrell v. Cruickshank*, 1 Chy. Ch. 12; or if a resident in Quebec a subpoena may be ordered to issue under C. S. C. c. 70, s. 4 (see R. S. O. p. 876); *Hoffatt v. Prentice*, 6 P. R. 33; *McKerchie v. Montgomery*, 1 Chy. Ch. 225.

Default of
witness,
how
punished.

Default of Witness.—The certificate of default should show that the witness had been duly subpoenaed; a statement in the certificate, that evidence of the service had been produced, is insufficient: *Waddle v. McGinty*, 2 Chy. Ch. 442; and see *Sutherland v. Rogers*, *Ib.* 191; and *Barber v. Adams*, *supra*.

A witness failing to attend is liable to be committed for default. A witness who attends, but refuses to answer proper questions, may, on motion, be ordered to attend again and submit to answer the questions at his own expense, or in default be committed: see *Hannum v. McKee*, *per Moss*, J.A., 18 P. R. at p. 200.

A motion to commit a witness for refusing to answer questions is a civil process, and not a criminal proceeding. The privilege of Parliament may therefore be claimed by the witness: *Re Armstrong*, 1892, 1 Q. B. 327.

A motion to commit must be made before a Judge: *Keefe v. Ward*, 18 C. L. J. 166; 2 C. L. T. 260.

A witness attending for examination, is not bound to wait more than half an hour, unless notified that his examination is to be proceeded with: *Perks v. Stottart*, 1 N. R. 563; but see *Campbell v. Scott*, *supra*, p. 660.

See *Clark v. Campbell*, in note to *Rule 491*.

Production
of docu-
ments on
viva voce ex-
aminations.

493. For the purposes of a motion, the Court or Judge may, upon such terms as may seem just, order documents to be produced and witnesses to appear and be examined *viva voce* before such Court or Judge, or before a Judge of any County Court, or before any other person and at any place. Con. Rules 579, 580.

Production can only be ordered for the purposes of a pending motion, and the Court has no power under this *Rule* to order a person, not a party to the action, to produce documents in his possession merely for the purpose of enabling a party to the action to in-

spect the same before trial: see *Straker v. Reynolds*, 22 Q. B. D. Rules 262; 60 L. T. 107; *Central News Co. v. Eastern News Telegraph Co.*, 494-497. 53 L. J. Q. B. 236; *Elder v. Carter*, 25 Q. B. D. 194.

A person called on to produce documents under this Rule is entitled to take the same objection to produce them as he would on being served with a subpoena duces tecum: *Re Smith*, 1891, 1 Ch. 323; 64 L. T. 253.

A witness who objects to produce a document is not entitled to be heard by counsel: *Doc d. Rowcliffe v. Egremont*, 2 Moo. & Rob. 386; *Carson v. Davidge*, 34 C. L. J. 429.

Where a number of documents are produced by a witness who is not a party, the proper course is to obtain an adjournment to ascertain which of them are material. They should not be put in *en bloc*, and the witness questioned as to them *seriatim*: *Re Martin Sands*, 71 L. T. 56, 594.

494. Such examination shall, unless otherwise ordered, be conducted in accordance with the practice upon examinations for discovery, as far as the same is applicable. *New.*

The examination referred to in this Rule would appear to be that authorized by Rule 493. As to examinations for discovery, see note to Rule 439, *supra*, pp. 647-652.

495. The Court or a Judge may order the sheriff, gaoler, or other officer having the custody of any prisoner, to produce him for any examination authorized by these Rules. *How prisoners may be brought to give evidence.* Con. Rule 582.

Taken from R. S. O. 1877, c. 50, s. 178.
See note to Rule 478.

496. Wherever a party wishes to produce to the Court or a Judge, the writ, or any pleading or other proceeding filed in any office of the Court, he may demand and on payment of the lawful fees receive from the officer in whose custody the writ, pleading or other proceeding is, a copy of the same certified by the officer to be a true copy of the original, and such copy shall be admissible in evidence to the same extent as the original would be admissible. Con. Rule 583. *Certified copies of proceedings may be obtained from the office where filed.*

Seem this Rule does not apply to criminal proceedings or records: see *Hewitt v. Canc.* 26 Ont. 133; but see R. S. O. c. 324, s. 11; *Rea v. Scully*, 4 O. L. R. 394.

The transmission of the original documents is provided for in certain cases, by Rules 337-341, *supra*.

497. Where money is directed to be paid into a Bank, the certificate of the cashier, manager, agent, or like Bank officer of the Bank, at the place where the money is made pay- *Default in payment, how to be proved.*

Rule 498. able; of default in making such payment, shall be sufficient evidence of such default. Con. Rule 584.

Taken from Chy. O. 257.

Certificate
of non-
payment,
how to be
signed.

The certificate should be signed by the cashier, manager, or agent, or like officer. The certificate of an accountant in the bank is not sufficient: *Campbell v. Garrett*, 1 Chy. Ch. 255. A certificate of default, according to the present practice, should state that the money was not paid on the date of the taking of the account or since; see formerly: *Farrell v. Stokes*, 1 Chy. Ch. 201. The certificate does not prove itself, but must be verified by an affidavit.

The affidavit of the plaintiff of non-payment is usually required on the motion for a final order for sale or foreclosure, in addition to the certificate of the bank: see *Rule 385* note.

Power
given to
receive
further
evidence
in all
appeals,
etc.

498.—(1) In all appeals, either to the Court of Appeal or to the High Court or a Judge, or hearings in the nature of appeals, and on all motions to set aside a verdict or finding of a jury, and to set aside or vary a judgment, the Court or Judge appealed to shall have all the powers and duties as to amendment and otherwise of the Court, Judge or officer appealed from, and full discretionary power to receive further evidence upon questions of fact; such evidence to be either by oral examination before the Court or Judge appealed to, or as may be directed.

See Murray v. C.C.R.
7 AR 268

Semble, that this *Rule* does not apply to newly discovered evidence after the trial: *Bank of B. N. A. v. Western Assurance Co.*, 11 P. R. 434. It is confined to cases where the evidence is sought to be introduced for the purposes of the appeal: *Ducker Watch Case Mfg. Co. v. Taggart*, 19 P. R. 233; but the Court may entertain an application to admit new evidence on, and for the purposes of, a County Court appeal, notwithstanding R. S. O. 1897, c. 55, s. 51 (3); and this although the time for applying for a new trial has expired: *Butler v. Mellicken*, 32 Ont. 422.

New evidence was admitted, in *Leach v. G. T. Ry.*, 13 P. R. 467; *Burfoot v. DuMoulin*, 21 Ont. 583; *Dean v. Ont. Cotton Mills*, 14 Ont. 119; *Dolen v. Metropolitan L. A. Co.*, 26 Ont. 67; *Warren v. Van Norman*, 29 Ont. 84, 508; see also notes to *Rule 549*.

(2) Such further evidence may be given without special leave (a) as to matters which have occurred after the date of the judgment or order or decision from which the appeal is brought.

(a) The former Con. Rule 585 had here "upon interlocutory applications or in any case." The effect of the omission of these words is that interlocutory appeals will stand in the same position as other appeals, and further evidence will only be admitted by leave, except as to the matters mentioned in this clause.

It would seem that a special motion for leave is not necessary, except in the cases mentioned in clause (3). In other cases leave

may be obtained on the argument of the appeal. It will in general **Rule 499.** be advisable however to notify the opposite party of the intention to ask leave to give the further evidence.

See *Sanders v. Sanders*, 45 L. T. 637; 51 L. J. Chy. 276; 18 C. L. J. 236; *Re Compton, Norton v. Compton*, 27 Ch. D. 302; *Robinson v. Bradshaw*, 32 W. R. 95; *Leach v. G. T. Ry., supra*; *Wood v. Reesor*, 22 Ont. App. 57.

(3) Upon appeals from a judgment order or decision given upon the merits at the trial or hearing of any cause or matter, such further evidence (save as aforesaid) shall be admitted on special grounds only, and not without the special leave of the Court. Con. Rule 585.

Taken from 41 Vict. c. 8, s. 7; R. S. O. 1877, c. 38, s. 22.

See also notes to *Rule 767*, and *Re Rouse*, 59 L. T. 887.

The Supreme Court of Canada does not allow fresh evidence to be used on an appeal: *Montreal v. Hogan*, 31 S. C. R. 1.

For remarks as to the caution to be observed in giving leave to adduce further evidence in appellate Courts, see *Merchants Bank v. Lucas*, 12 P. R. 526; *Arison v. Smith*, 41 Ch. D. 98; and *Shoe Machinery Co. v. Cutlan*, 1896, 1 Ch. 108; and the remarks of Cotton, L.J., against allowing fresh evidence to meet defects in the case seen after trial; *Re Leonard & Ellis Trade Mark*, 26 Ch. D. 289. Where evidence is allowed to be adduced, the opposite party has the right to cross-examine thereon: *Spencer v. Ancoats F. R. Co.*, 84 L. T. Jour. 440.

Leave to adduce further evidence on an appeal, with a view to the reduction of damages or a new trial, was refused, where the Court appealed from had reduced the damages if the plaintiff would consent (which he had done), but the defendants were still dissatisfied: *Fraser v. London Street Ry. Co.*, 18 P. R. 370; but *semble*, where the Court finds the damages excessive it must order a new trial, it cannot reduce the damages except by consent of both parties: *Watt v. Watt*, 1905, A. C. 115.

Where an assignment of a policy was lost, but it was doubtful whether sufficient evidence of the loss had been given to warrant the admission of secondary evidence, at the trial, further evidence by affidavit was allowed by the Divisional Court to be given on a motion against the judgment: *Dolen v. Metropolitan Life Ins. Co.*, 26 Ont. 67; and see *Warren v. Van Norman*, 29 Ont. 508.

Pending an appeal to the Supreme Court the appellant applied for leave to give evidence that a copy of a document put in as an exhibit was not a true copy, but it not appearing that such evidence would necessarily affect the judgment of the Court, the application was refused: *Deuber Watch Co. v. McTaggart*, 19 P. R. 233; and see *Buck v. Birch*, 1902, P. 130.

4. COMMISSIONS.

499.—(1) Where the testimony of a person who is residing without the limits of Ontario is required, the Court or a Judge may order the issue of a commission for the examination of such person. Con. Rules 586, 588.

Persons
out of
Ontario.

Rule 499.

(2) Where the commission appears to be necessary in proceedings before a Master, [or Referee] it may be issued on the order of the Master [or Referee]. Con. Rule 590.

The words in brackets are new, embodying the decision in *Brooks v. Georgian Bay, etc., Co.*, 16 P. R. 511.

The Rules consolidated in this *Rule* were taken from R. S. O. 1877, c. 62, ss. 10, 21.

Those *Rules* provided separately for the cases of "an opposite party resident out of Ontario," and "any aged or infirm persons resident within Ontario, or of any person who is about to withdraw therefrom, or who is residing without the limits thereof."

The present *Rule* provides for the issue of a commission only in the case of a "person who is residing without the limits of Ontario," which will include any party, as well as a stranger to the action.

In the case of the examination *de bene esse* of aged or infirm persons resident within Ontario, or of persons about to withdraw therefrom, *Rule* 485 will now be applicable. Under it an order will be all that is necessary, without the issue of any commission.

The former Con. Rule 586 provided that the commission should be issued "in case the Court or Judge is satisfied that such commission is applied for in good faith and not for purposes of delay." These words have doubtless been omitted as unnecessary and the Court or Judge will still require to be satisfied, as formerly, of the propriety of granting the order: see *Berdan v. Greenwood*, 20 Ch. D. 764 n; 46 L. T. 524; *Re Boyse, Ib.*; *Langen v. Tate*, 24 Ch. D. 528.

Discretion.

Discretion of Court as to Granting Commissions to take Evidence.—There is no hard and fast rule as to granting or refusing a foreign commission. It is not granted as of course: *Price v. Bailey*, 6 P. R. 256; *Virian v. Mitchell*, 13 C. L. J. 198; *Berdan v. Greenwood*; *Re Boyse*, *Crofton v. Crofton*, *supra*; *Coch v. Allcock*, 21 Q. B. D. 1, 178 (overruling *Kemp v. Tennant*, 2 Times, 3041). It is a matter of judicial discretion: *Mills v. Mills*, 12 P. R. 473; *Coch v. Allcock*, 21 Q. B. D. 1, 178; see also *Re Imperial Land Co. of Marselles*, W. N. 1877, 236; 37 L. T. 588; *Kidd v. Perry*, 14 P. R. 364; an order was refused where it would cause delay, and the applicant had been dilatory in trying to obtain it: *Stewart v. Gladstone*, 7 Ch. D. 394; *Temperance Colonization Socy. v. Evans*, 7 C. L. T. 46. So, where the Court was not satisfied on the materials adduced, that the evidence was material: *Langen v. Tate*, 24 Ch. D. 522; *Smith v. Greay*, 10 P. R. 531; *Morrow v. McDougald*, 10 P. R. 129; *Toronto Industrial Exhibition etc., v. Houston*, 5 O. W. R. 303; and where there was another action pending in the foreign country for the same cause: *Mair v. Anderson*, 11 U. C. Q. B. 160; and it was refused in a case where the evidence sought, though material, would be only corroborative: *Ehrmann v. Ehrmann*, 1896, 2 Ch. 611.

In *Grant v. Banque Franco-Egyptienne*, referred to in 27 W. R. p. 226, Brett, L.J., said: "I apprehend that the granting of a commission is a matter of discretion, and that the grounds upon which a commission is granted or refused is always a matter of comparison, namely, whether it is more convenient that the commission should go, than that witnesses should be examined before the tribunal here, and the exercise of that discretion depends upon the circumstances of each particular case." See the remarks of the same Judge in *Coch v. Allcock*, 21 Q. B. D. 181; see also *Robins v. The Empire*, 14 P. R. 488.

The order may be reconsidered on appeal where circumstances ^{Rule 499} render it just to do so: *Emanuel v. Soltykoff*, 8 Times, 331, but the discretion of the Court or Judge will not readily be interfered with: *Butterfield v. Financial News*, 5 Times, 279; *Hunt v. Roberts*, 9 Times, 92.

In *Re Boyse, Crofton v. Crofton*, 20 Ch. D. 760, it was held that upon an application for a commission to take evidence abroad, the Court ought to be satisfied that the application is made *bona fide*. Where the Court thought the witness should be subjected to a strict cross-examination on part of a claim in which he was interested, and the French practice was to have the examination take place through the Judge only, a commission was refused: see also *Berdan v. Greenwood*, 40 L. T. 524; 20 Ch. D. 764 (note), where the case turned on the fact that the person to be examined was the plaintiff himself, and the Court was not satisfied that he could not attend so as to be cross-examined *virâ voce*, but on the contrary, was keeping out of the way: see *Langen v. Tate*, 21 Ch. D. 522; *Spiller v. Paris Skating Rink Co.*, W. N. 1878, 228; 27 W. R. 225; *Grant v. Banque Franco-Egyptienne*, *supra*; *Kidd v. Perry*, 11 P. R. 361, and *Thomas v. Storey*, and *Lawsen v. Vacuum Brake Co.*, 27 Ch. D. 137, as explained in *Coch v. Allcock*, 21 Q. B. D. 1, 178.

In the absence of special circumstances making it desirable that the plaintiff should face the Court or jury in person, there is no reason why his evidence should not be taken by commission where he is residing abroad: *Armour v. Walker*, 25 Ch. D. 673; *Banque Franco-Egyptienne v. Lutschner*, 28 W. R. 133; 41 L. T. 468; W. N. 1879, 183; *Coch v. Allcock*, 21 Q. B. D. 1, 178; see *Price v. Bailey*, 6 P. R. 256.

Where, however, the person to be examined abroad is the party ^{Commission} himself who asks for the commission, the Court will be more circumspect as to making an order than in the case of an ordinary ^{for examination of the party moving} witness: *Mills v. Mills*, 12 P. R. 173; *Light v. Anticosti*, 58 L. T. 25; *Price v. Bailey*, 6 P. R. 256; *Kidd v. Perry*, *supra*.

A plaintiff's application to take his own evidence by commission in an action for libel, was refused, it being considered that the plaintiff's evidence ought to be given before the jury, the main question being one of damages depending upon the plaintiff's testimony: *Kley v. Wakley*, 9 Times, 571.

There is however a difference between the case of a foreign plaintiff and a foreign defendant asking to be examined on commission in his own country, the Court will not regard a defendant's case with the same strictness as the case of a plaintiff who has chosen his own forum: *Ross v. Woodford*, 1894, 1 Ch. 38; 70 L. T. 22; *Hortmont v. Daly*, 12 Times, 170; *Emanuel v. Soltykoff*, 8 Times, 331. *Prima facie* a defendant resident abroad is entitled to the commission: *New v. Burns*, 43 W. R. 182; 71 L. T. 681; 11 Times, 53, but a defendant's application was refused where the matters in question were complicated accounts arising out of transactions between plaintiff and defendant, when both were residing in Ontario, and the expense of executing a commission would exceed the costs of a defendant's coming from England, and his only reason for not coming was engagements in England, and want of time and money: *Porter v. Boulton*, 15 P. R. 318.

The plaintiff, where there was a counter-claim, was viewed as a defendant so far as the counter-claim was concerned, and a commission to take his evidence on the counter-claim was granted: *Levi v. Edwards*, 5 O. W. R. 83.

Rule 499. A commission to examine as a witness a person who has absconded from the Province, will not be refused on the ground that he is alleged not to be a credible witness, and that his cross-examination in open Court is desired: *Nordheimer v. McKillop*, 10 P. R. 216. The proper course in order to impeach his veracity is to call witnesses at the trial for that purpose: *Id.*

Evidence of
a witness
whose
credibility
is impeached

The fact that the witness was a co-defendant with the party applying was considered no obstacle to the granting of a commission: *Wilson v. McDonald*, 13 P. R. 6.

Expert
evidence

In *The M. Mosham*, 1 P. D. 115, a commission to take evidence in Spain as to the law of Spain, was refused, as it was not shown that competent Spanish advocates could not attend the trial without difficulty, and in the opinion of the Judge it would, under the circumstances, be more satisfactory to have the witnesses examined in Court. See also *Russell v. G. W. R. Co.*, 3 U. C. L. J. 116, and *Atty.-Gen. v. Gooderham*, 10 P. R. 259, where the object was merely to obtain scientific, or expert testimony: but see *The Edison Co. v. Hough*, 98 L. T. Jour. 374.

When
motion to
be made.

Motion.—A motion for a commission is usually to be made after issue joined: *Smith v. Greay*, 10 P. R. 531; but it is not essential that the action be technically at issue. The motion may be made whenever it can be shown that some issue is raised on the pleadings which must be tried in the action: *Smith v. Greay*, 11 P. R. 38.

The form of order is given in the App. No. 120, and the form of a commission, No. 94. See II. & L. Forms, Nos. 737, and 739.

Evidence
thereon.

Evidence on Motion.—In case of an application for a commission, before issue joined, the nature of the evidence expected from the witness must be shewn, that the Court may see whether it is likely to be material and necessary: *Morrow v. McDougald*, 16 P. R. 129, explaining *Smith v. Greay*, 10 P. R. 531.

The affidavit on which the application is based, even after issue joined, should state that the witnesses proposed to be examined are material and necessary: *Kidd v. Perry*, 14 P. R. 364. An affidavit of the plaintiff stating that the witnesses to be examined were necessary for the plaintiff on the trial, and that he was advised and verily believed that he could not safely proceed to trial without their evidence, was held to be *prima facie* sufficient: *Robins v. Empire Printing Co.*, 14 P. R. 488.

The personal affidavit of the party applying may not be essential in support of the motion for a commission, but cogent reasons must be given, by some one who can speak with knowledge, why an applicant who seeks to have his own evidence taken in that way cannot attend in person: *Kidd v. Perry*, 14 P. R. 364.

Under the English practice it is a recognized though not an absolutely rigid rule, to give in the affidavit the name of at least one of the witnesses proposed to be examined, and the excuse for not doing so, that the witness might be spirited away, was held untenable: *Howard v. Dulun & Co.*, 11 Times, 451.

Where defendants contended that the evidence expected from the witnesses was unnecessary by reason of implied admissions in the pleadings, it was held that it was for the defendants to make the evidence unquestionably unnecessary either by amending their pleadings so as to expressly make the admission, or by undertaking to do so at the trial: *Robins v. Empire*, *supra*.

In *Ehrmann v. Ehrmann*, 1890, 2 Ch. 411, it was said that a commission or letters of request for the examination of a witness abroad ought not to be issued, unless the evidence which it is proposed to obtain is evidence directly material to an issue in the cause, and not merely evidence which may be incidentally useful in corroboration of other evidence.

Where the application is to examine a witness who is travelling, it should be shown that he will remain at the place to which the commission is directed, a sufficient time to allow of its due execution: *Singer v. Williams Manufacturing Co.*, 8 P. R. 181.

Order.—A commission issues only pursuant to the order. Where, therefore, an order provided for examination of one witness M., *voir dire*, and others upon interrogatories, it was held that the commission could not issue to examine M. only, without amending the order: *Smith v. Babcock*, 8 P. R. 175.

An objection to a witness affirming instead of taking an oath, on a commission, ought to be taken at the time of his appearing before the commissioner: *Rickards v. Hough*, 30 W. R. 670; 51 L. J. Q. B. 391.

In the discretion of the Court or Judge, terms may be imposed on granting an order for a commission, e.g., that the plaintiff give security for defendant's costs of the execution of the commission, and undertake to speed the proceedings and not delay the trial: *Rokins v. Engrave*, 14 P. R. 188; *Coleman v. Bank of Montreal*, 16 P. R. 150; *Sheppard v. Dalby*, 80 L. T. Jour. 29; 30 Sol. Jour. 16; that no greater costs be taxable than if the witness had been subpoenaed within the jurisdiction: *Watt v. Mackay*, 5 O. W. R. 463, 170; or that the expense of the commission be borne by the applicant, and that the examination be upon interrogatories: *Toronto Industrial, etc., v. Houston*, 5 O. W. R. 349.

Terms as to reading the depositions at the trial were imposed, where the plaintiff applied to examine himself by commission: *Nadin v. Bassett*, 25 Ch. D. 21.

Commissions may provide for the examination of unnamed persons at a particular place: *Nadin v. Bassett*, 25 Ch. D. 21; *Arnoux v. Walker*, 25 Ch. D. 676.

Books and documents produced in an action may be sent out of the jurisdiction, for the purpose of examining witnesses on a foreign commission; but documents produced in another action which is *sub judice* will not be sent away: *Clarke v. Union (Chabot's Case)*, 10 P. R. 413; *Chaplin v. Puttick*, in note to *Rule 1000*.

An order may be made that the subject matter of the action shall be sent out of the jurisdiction for the purpose of identification by the witnesses: *Chaplin v. Puttick*, 1898, 2 Q. B. 160; 78 L. T. 410; not approving of *Leader v. Smythe*, 8 Times, 612, in which the Court refused to order a brooch to be sent abroad for identification.

Where a witness previously examined by commission stated that he had further evidence to give, to explain or correct his former evidence, a re-examination was allowed under a new commission. The witness in such a case should be considered the witness of the party applying to re-examine him: *Rogers v. Munning*, 8 P. R. 2.

Letters Rogatory.—In aid of a commission, where the assistance of a foreign Court is necessary in order to compel the attendance of

Rule 500. a party for examination for discovery, or of a witness before the commissioner, letters rogatory may be ordered to issue: see R. S. C. c. 140; and *Re Kirchoffer v. Imperial Loan & Investment Co.*, 7 O. L. R. 295; and see Imp. Stat. 48 & 49 Vict. c. 74; in Doan. Stat. 1896; *Ex p. Smith*, 2 Cart. 330; *Re Wetherell*, 3 Cart. 315; R. S. O. c. 73, s. 52. Orders of this kind however are not granted unless absolutely necessary for the purposes of justice: *Ehrmann v. Ehrmann*, 1896, 2 Ch. 611; 75 L. T. 37.

As to taking evidence in Ontario for use in a foreign Court. see *Re Wetherell*, 4 Ont. 713, and statutes above referred to.

Interrogatories.—The applicant frames his interrogatories at the risk of the evidence taken being rejected in whole or in part: the Master in Chambers cannot consider or interfere with them on motion for that purpose: *Toronto Industrial, etc., v. Houston*, 5 O. W. R. 493. *9 O. L. R. 517*

Return of Commission.—Where the time for the return of a commission was extended to a certain day, and on that day the witnesses were examined, it was held, that, having been executed within the time, the necessary delay occasioned by its transmission did not render it irregular: *Darling v. Darling*, 9 P. R. 560.

See *Darling v. Darling*, 8 P. R. 391, for irregularities which were held not to invalidate the proceedings under a commission.

Opening Commission.—See Rule 515.

Commissions on a Reference.—Clause (2) of Rule 499, is an extension of Chy. O. 221

The Master, or Referee, may direct witnesses to be examined before any other Master, or Examiner, of the Court, without the consent of the parties: *Re Casey*, *Biddell v. Casey*, 1 Chy. Ch. 198.

The Master, or Referee cannot grant an order for a commission *ex parte*. *McLennan v. Helps*, 3 Chy. Ch. 193; except where the reference is *ex parte*.

Where an application is made to the Master, or Referee, for a commission to cross-examine a plaintiff resident abroad, on an affidavit filed by him in support of his account, the Master, or Referee, cannot properly refuse it, so long as the plaintiff relies on the affidavit in support of his claim: *Townend v. Hunter*, 3 C. L. T. 310.

An order of a Master, or Referee, for a commission should, *mutatis mutandis*, follow, as nearly as may be, the form of order as given in the Appendix. See Form No. 120, H. & L. Forms, No. 737.

Costs.—As to the costs of commission, see *Dominion, etc., v. Stinson*, 9 P. R. 177; *Rondot v. Monetary Times*, 18 P. R. 141, in note to Rule 1175.

Refusal
to attend.

500. If a party for whose examination a commission has so issued under Rule 499, refuses to attend before the Commissioner, a verdict or judgment may pass against him or he may be non-suited. Con. Rule 587.

Taken from R. S. O. 1877, c. 62, s. 20.

Rule 499 enables a commission to be issued by either party to take the evidence of himself or of the opposite party, or of a stranger: **Rules 501-503.**
Rule 500 is applicable where a party whose evidence is desired by his opponent does not attend for examination.

501. The notice of a motion for a commission to take evidence shall state the name and address of the commissioner proposed by the applicant; and if the opposite party desires to name a commissioner, he shall, on the return of the motion, give notice to the applicant of the name and address of such commissioner; and the order may direct the issue of the commission directed to the persons so named, or to such person as may seem proper. *Con. Rules 591, 592.* Notice of motion.

502. Unless otherwise directed by the order, the examination of witnesses shall be upon oral questions, and notice of the execution of the commission shall be given to the opposite party, if, before the expiry of the time limited for mailing the commission or within such time as may be provided by the order, he gives the name and the address of a person resident within two miles of the place where the commission is to be executed, on whom such notice may be served. *Con. Rules 593, 596.* Particulars to be stated in order.

Under original *J. A. Rule 289*, there was no jurisdiction to order the examination to be wholly oral unless all parties consented. That Rule was amended so as to enable the order to provide whatever might be proper on the subject. Under the present *Rule*, *prima facie*, the examination is to be wholly oral, but the order may still provide otherwise as may be just; see under the old practice, *Watson v. McDonald*, 8 P. R. 354; *Taylor* Ev. 451.

503. Where the examination is to take place upon written interrogatories, the interrogatories in chief shall be delivered to the opposite party (unless otherwise ordered) at least 8 days before the issue of the commission; and the cross-interrogatories shall be delivered to the opposite party (unless otherwise ordered) within 4 days after the receipt of the interrogatories in chief; and in default of cross-interrogatories being so delivered, the opposite party may send the commission without cross-interrogatories. *Con. Rule 595.* Examination on written interrogatories.

The rules of evidence as to leading questions at a trial cannot be strictly applied to interrogatories administered under a foreign commission in the Master's office: *Lockwood v. Bew*, 10 P. R. 655.

It is not proper to apply to strike out interrogatories for impertinence, the proper course is for the witness to demur to the impertinent questions: *Williams v. Carby*, 8 P. R. 83; see *Lockwood v. Bew*, 10 P. R. 655, and *Sirahy v. Dorey*, 55 L. J. Chy. 621.

Rules
504-510.

Notice of
execution
of com-
mission.

504. Where notice of the execution of the commission is required to be served, 48 hours' notice shall be sufficient; such notice shall be in writing, stating the time and place of the intended examination, and shall be addressed to the person named for that purpose before the expiry of the time limited for mailing the commission or as provided in the order; and service upon him, or upon a grown up person, at the address given shall be sufficient. If the name or address given proves to be illusory or fictitious, or if the party so notified fails to attend, pursuant to the notice, the commission may be executed *ex parte*. Con. Rules 589, 596, 597. Rules 29 Dec., 1894. 1388.

Oath of
witness.

505. The witnesses shall be examined on oath, affirmation, or otherwise in accordance with their religion, by or before the commissioner. Con. Rule 599.

Mode of ex-
amination.

506. The oral questions and answers shall be reduced into writing and returned with the commission. Con. Rule 594.

Interpreter

507. Where a witness does not understand the English language the commission shall be executed with the aid of an interpreter nominated by the commission, and sworn by or before him to interpret truly the questions to be put to the witness, and his answers thereto, and the examination shall be taken in English. See Con. Rule 600.

Copies as
evidence.

508. If a witness produces a book, document, letter, paper or writing, and refuses for good cause, to be stated in his deposition, to part with the original, then a copy or extract, certified by the commissioners to be a true and correct copy or extract, shall be annexed to the deposition of the witness. Con. Rule 598.

Deposi-
tions may
be taken in
shorthand.

509. The depositions may be taken in shorthand if so provided by the order or the parties so agree. (*New.*)

By com-
missioner
or sworn
shorthand
writer.

510. If the examination is to be taken in shorthand, the commissioner may take the same in shorthand or employ a shorthand writer, to be duly sworn. Rules 23 June, 1894. 1346, *part*.

511.—(1) Unless the examination is taken in shorthand, the depositions shall be subscribed by the witness and by the commissioner.

Rules
511-513.

Depositions, how
to be
signed.

(2) Where taken in shorthand it shall not be necessary that the depositions be read over or signed by the person examined unless any of the parties so desire.

(3) A copy of the depositions if taken in shorthand by the commissioner and certified by him, or, if taken in shorthand by a shorthand writer employed for the purpose as aforesaid, certified by him and signed by the commissioner, shall for all purposes have the same effect as original depositions. Con. Rule 601. Rules 23 June, 1894. 1346.

Where only one of two commissioners signed the return, this was held not to vitiate it: *Milville Mutual, etc., v. Driscoll*, 11 S. C. R. 183.

512. The interrogatories, cross-interrogatories, and depositions and any documents and certified copies thereof or extracts therefrom, referred to therein, shall be sent to the proper officer, on or before such day as may be ordered in that behalf, enclosed in a cover under the seal of the commissioner; and the same or office copies thereof may be given in evidence by and on behalf of the parties respectively, saving all just exceptions, without any other proof of the absence from Ontario of the witness therein named than an affidavit of the solicitor or agent of the party as to his belief of such absence. Con. Rule 602.

Return of
commis-
sion and
use thereof
as evidence.

513.—(1) Where, upon the application for a commission to take evidence, the opposite party desires to join in the commission and examine witnesses on his own behalf thereunder, or names a commissioner, each party shall pay the costs of the commission consequent upon the examination of his witnesses and the appointment of his commissioner, without prejudice to the question by whom such costs are ultimately to be borne. Con. Rule 603. *part.*

Parties
joining in
commis-
sion to
share costs.

(2) If for any reason the commissioner named by either party refuses to act upon receiving 48 hours' notice in writing from the other commissioner so to do, the commission may be executed by the commissioner giving such notice. Con. Rule 603. *part.*

When com-
missioner
of one
party may
act alone.

Rules
514-516.

Order for
commis-
sion to be
read as in-
cluding
above
particulars.

Opening
commis-
sion.

514. Every order for a commission shall be read as if it contained the above particulars, and shall not set forth the same, but may contain any variations therefrom, and any other directions, which the Court or Judge sees fit to make. Con. Rule 604.

515. A commission when returned shall be opened at the trial or before trial at the instance of any party (without order) by the officer to whom it is returned, on two clear days' notice to the parties interested. *New.*

The Court in permitting a foreign commission to be opened before the trial, will not impose restrictions as to the use to be made of the knowledge of the evidence which would be acquired by the solicitors by such opening: *Smith v. Greey*, 11 P. R. 238.

D. AFFIDAVITS.

Form of
affidavits.

516. An affidavit shall be drawn up in the first person, stating the name of the deponent in full, and his description and true place of abode, and shall be signed by him. Con. Rule 605.

Taken partly from Cby. O. 258; Rules T. T. 1856, 109.

See Eng. (1883) Rs. 527, 528.

Style of
cause in
affidavits.

An affidavit should be entitled in the cause or matter in which it is to be used. The shortened style of "A. B. and others, plaintiffs, and C. D. and others, defendants," may be used: *Rule 320*; *Dickey v. Heron*, 2 Chy. Cb. 490; but not "*Brown v. Jones*."

The Court may receive an affidavit, notwithstanding formal defects in it: R. S. O. c. 73, s. 39.

Erroneously
entitled,
may be
re-sworn.

Affidavits erroneously entitled have been allowed to be taken off the files, and re-sworn without a fresh stamp: *Pearson v. Wilcox*, 10 Ha. App. xxxv.; *Hawes v. Bamford*, 9 Sim. 653.

Affidavits
by parties
to the
cause.

In affidavits made by parties to the cause it was sufficient in Equity to describe the deponent as the above-mentioned plaintiff, or defendant, without specifying any residence, or other addition: *Crockett v. Bickton*, 2 Madd. 446; *Rogers v. Crookshank*, 4 C. L. J. 45. And the same rule prevailed at Common Law: *Poole v. Pembrey*, 1 Dowl. P. C. 693; *Brooks v. Farlar*, 5 Dowl. P. C. 361; *Lyman v. Brethron*, 2 C. L. Ch. 108; *Ewing v. Lockhart*, 3 U. C. Q. B. 248. But affidavits in which the plaintiff in a divorce proceeding gave no address, or an illusory one, were rejected by the Court, and the case was disposed of on the defendant's affidavits: *Hyde v. Hyde*, 59 L. T. 523. An affidavit as to the fitness of a proposed trustee in which the deponent was described as a "gentleman," was held insufficient: as the position in life or occupation of the deponent is in such case material in order to give effect to the affidavit: *Re Ord*, 24 Ch. D. 271; *Re Horwood*, 55 L. T. 373; but in other circumstances such a description is not necessarily insufficient so as to prevent the affidavit from being filed or used: *Re Dodsworth*, *Spence v. Dodsworth*, 1891, 1 Ch. 657; 64 L. T. 282.

An affidavit by a person who was a stockbroker was held not to state his description and true place of abode, by describing him as a "stock exchange stock broker": *Re Levy, Levin v. Levin*, 60 L. T. 317; 37 W. R. 398.

The Court has sometimes received affidavits sworn abroad, although drawn in the third person: *Re Husband*, 12 L. T. 303; and see *Dryden v. Frost*, 8 Sim. 380; and not entitled in the cause: *Salvidge v. Tutton*, 20 L. T. 300; *Blaney v. Blaney*, 113 L. T. Jour. 265. And an affidavit without the signature of the deponent was received: *Re Howard*, L. R. 9 C. P. 347; but see *contra, Anderson v. Stather*, 9 Jur. 1085.

Where the initial only of the deponent's second Christian name was given, the affidavit was held to be regular: *De Forrest v. Bunnell*, 15 L. C. Q. B. 370.

An affidavit to obtain an order to arrest which began "I, Albertu Jane Boyd, the above named plaintiff," her name being Alberta Jane Vansickle, and was signed Berta Jane Vansickle, was held to be not a nullity, but an irregularity merely, which under the circumstances was waived: *Vansickle v. Boyd*, 14 P. R. 469.

An affidavit omitting the words "make oath" will be rejected: *Allen v. Taylor*, 10 Ex. 52; *Phillips v. Prentice*, 2 Ha. 542; *Re Newton*, 2 D. F. & J. 3.

Affidavits may be sworn in Ontario before commissioners appointed under R. S. O. c. 74, or before a notary public of Ontario: see R. S. O. c. 175, ss. 3, 5. As to affirmations, see R. S. O. c. 73, s. 15.

The notary need not affix his seal to the affidavit: R. S. O. c. 175, s. 8, which overrules the decision in *Boyd v. Spriggins*, 17 P. R. 331.

Affidavits sworn out of Ontario may be sworn before any of the persons enumerated in R. S. O. c. 73, s. 37. Affidavits sworn before any other person than those mentioned in that statute cannot be read: *McErcan v. Boulton*, 3 Chy. Ch. 63.

Affidavits sworn before the solicitor, or partner, or managing clerk, or agent, of the party in whose behalf the affidavit is filed, cannot be read: *Dunn v. McLean*, 9 C. L. J. 212; 6 P. R. 95; *Duke of Northumberland v. Todd*, 7 Ch. D. 777; and see *Rule 522*. But this rule does not apply to the partner of a counsel engaged in the cause, but not otherwise connected therewith: *Wilde v. Crow*, 10 C. P. 406; nor to affidavits to obtain an order for arrest: *Rule 522*.

A commissioner ought not to take affidavits not made in any cause, nor authorized by statute to be taken by him. Such oaths are voluntary: *Jackson v. Kassel*, 26 U. C. Q. B. 341; *Mellroy v. Hall*, 25 U. C. Q. B. 303; and see R. S. C. c. 141.

The officer taking the affidavit should add after his signature the name of his office. The words "A Commissioner, etc." or "A Commissioner," or "A Comr." have been held sufficient: *Henderson v. Harper*, 2 U. C. Q. B. 97; *Brown v. Parr*, 2 U. C. Q. B. 98; *Murphy v. Boulton*, 3 U. C. Q. B. 177; *Pawson v. Hall*, 1 P. R. 294; *Brett v. Smith*, ib., 309; *Canada Perm. L. & S. Co. v. Todd*, 22 Ont. App. 515. But the signature alone has been held insufficient: *Babcock v. Bedford*, 8 C. P. 527. "Sworn before, etc." omitting "me," was held sufficient: *Martin v. McCharles*, 25 U. C. Q. B. 279; and see *De Forrest v. Bunnell*, 15 U. C. Q. B. 370; and *Eddowes v. Argentina L. & M. A. Co.*, 62 L. T. 514; 38 W. R. 629.

As to the mode of administering oaths, see per Kay, J., in *Bourke v. Davis*, 88 L. T. Jour. 103.

Rule 517.

The addition of a deponent is only descriptive and not an allegation of fact: *Hood v. Cronkite*, 4 P. R. 279. The usual form of oath, "you swear that the contents of this affidavit are true," however, would seem to pledge the deponent to the truth of the addition, as well as of the matters formally deposed to.

Fisher v. Green.

In drawing affidavits, the following observations of Wilson, J., in *Fisher v. Green*, 2 C. L. J. 16, may be useful to the student: "I regret to find, in several instances lately, that superlative words are used in stating facts in affidavits. There can be no stronger expression of the very truth than that it is stated on oath. If less certainty is intended, the statement should be qualified. The terms to which I object are, '*I most positively swear*,' etc. I can only show my disapproval of such language, by refusing to allow costs to be taxed for affidavits drawn in this style, when costs are in my discretion. In one of the affidavits before me I observe the expression, that the statement made by another person in another affidavit was '*false*.' I suppose the affidavit was drawn by a young man of little experience, for the one had detailed a transaction in one light, and the other had stated the same transaction in another light, but the term '*false*,' as applied by one to the other, could in no way verify the statement of him who used the offensive expression."—and see *Davidson v. Grange*, 5 P. R. 258.

Superlative and needlessly offensive expressions not to be used in affidavits.

A solicitor introducing impertinent and irrelevant matter into his affidavit may be ordered to pay the costs of the application in which it is used: *Anon.*, 4 P. R. 242; and see *Corby v. Robbin*, 5 U. C. L. J. 225.

Where affidavits were badly written, scarcely legible, and difficult to decipher, the Court refused all costs connected with their preparation, although costs of the suit were given: *Burnham v. Garvey*, 27 Gr. 80.

Affidavits made by two or more deponents.

517.—(1) In an affidavit made by two or more deponents the names of the persons making the affidavit shall be inserted in the jurat, but if the affidavit of all the deponents is taken at one time by the same officer, it shall be sufficient to state that it was sworn by both (or all) of the "above-named" deponents. Con. Rule 606.

Same as Eng. (1883) R. 529.

Jurat.

(2) The jurat may be according to Form No. 16. Con. Rule 607.

Taken from Chy. O. 258.

An affidavit which omitted "before me" was (under Eng. O. 38, R. 14, which enables the Court to accept affidavits notwithstanding defects in form, see R. S. O. c. 73, s. 39), received, where from what appeared in the affidavit, such as signature of the Consul and his initials affixed to alterations, the reasonable inference was that the affidavit was sworn before him: *Eddowes v. Argentine, etc., Co.*, 62 L. T. 514; 38 W. R. 629, and other cases in note to Rule 516.

See note to Rule 516.

For Form 16, see H. & L. Forms, No. 744.

518. Affidavits shall be confined to the statement of ^{Rules} facts within the knowledge of the deponent, but on inter- ^{518, 519.} locutory motions, statements as to his belief, with the grounds ^{affidavits} thereof, may be admitted. ^{how framed.} Con. Rule 609.

To the same effect as Eng. (1883) R. 523.

Under Chy. O. 259, each statement in an affidavit to be used as evidence on any proceeding before the Court was required to show the deponent's means of knowledge. This provision is, however, not embodied in these *Rules*.

Under this *Rule* the grounds of statements made on "belief" are required to be stated, but not the means of knowledge for positive allegations: see *Bidder v. Bridges*, 26 Ch. D. 1; *Quartz, etc., v. Brull*, 29 Ch. D. 501; *Edwards v. Davis*, W. N. 1888, 59.

An affidavit on information and belief founded on statements made to the deponent by an informant who declined to repeat them on affidavit, unless subpoenaed, was not admitted on an interlocutory motion in a case where the informant might have been but was not, subpoenaed, and no irremediable injury could result from the exclusion of the evidence: *Re Anthony*; *Doig v. Anthony*, 1899, 2 Ch. 59; 80 L. T. 188.

Affidavits on information and belief which fail to disclose the grounds thereof, are not evidence, whether on an interlocutory or a final application, and need not be answered: see 104 L. T. Jour. 285; and *Re J. L. Young Manufacturing Co.*, 1900, 2 Ch. 753; 83 L. T. 418; and in England a solicitor may be refused costs of such affidavits: *Id.*

An affidavit in which the deponent stated that he was credibly informed and believed certain facts, without stating the name of his informant, or the ground of his belief, was held not to comply with this *Rule*, and was insufficient proof of the facts deposed to: *Gilbert v. Stiles*, 13 P. R. 121.

Evidence on information and belief, though generally admissible on interlocutory applications, is not admissible on a proceeding which, though interlocutory in form, finally decides the rights of parties; and the party against whom it is adduced, is not bound to contradict it; but if, in the Court below, he deals with the evidence as admissible, he may be precluded from objecting to it before the Court of Appeal: *Gilbert v. Endran*, 9 Ch. D. 259.

Costs of setting out the contents of written documents were disallowed, in *Hirst v. Procter*, W. N. 1882, 12.

Affidavits may be ordered to be taken off the files, if scandalous or irrelevant: *Sudler v. Smith*, 7 P. R. 409; 15 C. L. J. 52; *Osmaston v. Association of Land Financiers*, W. N. 1878, 101; *Kernick v. Kernick*, 12 W. R. 335; *Goldard v. Parr*, 3 W. R. 633; or the scandalous matter may be expunged: *Warner v. Mosses*, W. N. 1881, 69; *Re Fitch*, 2 Chy. Ch. 288; and see *Rule 290*, and note.

Costs of scandalous affidavits will be disallowed: *Vanstaden v. Vanstaden*, 10 P. R. 428.

519. In an action or proceeding to which a corporation is a party, any affidavit required by these Rules to be made by a party may be made by any officer, servant, or agent of ^{affidavits} ^{by officers} ^{for cor-} ^{poration}

**Rules
520-522.**

the corporation having knowledge of the facts required to be deposed to, and he shall state therein that he has such knowledge. Con. Rule 610.

**Alterations in
affidavits.**

520. An affidavit having in the jurat or body thereof any interlineation, alteration, or erasure shall not be used without leave (a) unless the interlineation, alteration or erasure is authenticated by the initials of the officer taking the affidavit. Con. Rule 611. Rules 23 June, 1894, 1347.

See Chy. O. 131; Rule T. T. 1856, 111.

Compare Eng. (1883) R. 532.

(a) The former Rules 611 and 1347 provided expressly that the leave is to be that of "the Court or a Judge or officer before whom the affidavit is to be used." The present Rule by implication has the same meaning.

A line drawn through words though leaving them legible is an erasure: *Williams v. Clough*, 1 A. & E. 376.

Where an interlineation was uninitialed by the Commissioner, it was held that under this Rule the affidavit could not be read, but leave was given to refile it properly sworn: *Boyd v. McNutt*, 9 P. R. 493; see *Re Cloake*, 65 L. T. 455; 61 L. J. Chy. 69.

No alteration can properly be made in an affidavit after it has been sworn: see W. N. 1882, Part 2, 81.

**Affidavits
by illiterate
persons.**

521. Where an affidavit is sworn by a person who appears to be illiterate, the officer shall certify in the jurat that the affidavit was read in his presence to the deponent, who seemed perfectly to understand it, and signed it in his presence: otherwise such affidavit shall not be used without leave. Con. Rule 612.

See Rule T. T. 1856, 113.

Identical with the Eng. 1883, R. 533.

For the form of jurat under this Rule, see Form 16, H. & L. Forms, No. 744.

Where an affidavit of an illiterate person did not appear to have been read over in the presence of the Commissioner, it was taken off the files: *Blenkharn v. Longstaffe*, 52 L. T. 681; 54 L. J. Chy. 516.

**No affidavit
to be sworn
before
solicitor of
party.**

522. An affidavit sworn before the solicitor of the party on whose behalf it is made, or before the clerk, or partner of such solicitor, shall not be used; but this Rule shall not extend to an affidavit to obtain an order for arrest. Con. Rule 613.

Taken from Rule T. T. 1856, 114.

See Eng. (1883) Rs. 536, 537.

See notes to Rule 516.

Query, whether the *Rule* prevents the agent of the solicitor from *Rules* taking an affidavit: *Re Lennox Provincial Election*, 4 O. L. R. 523, 524, 541.

This *Rule* only applies to affidavits made in actions or proceedings in Court: *Canada Perm. L. & S. Co. v. Told*, 22 Ont. App. 515.

The corresponding Eng. *Rule* was held to apply to the affidavit of execution of a bill of sale under the Bills of Sale Act, 1882: *Baker v. Ambrose*, 1886, 2 Q. B. 372; and see *Archibald v. Hubley*, 18 S. C. R. 116; but the reasons for the decision would not seem to apply in Ontario.

523. Affidavits and other papers required to be filed shall be filed before being used. Con. Rule 614. Stamps on affidavits.

See Chy. O. 260.

Compare Eng. (1883) R. 535.

It is the imperative duty of the solicitor of any party to proceedings to cause to be filed every affidavit sworn and used by such party in the course of the proceedings: *Taylor v. Gates*, 72 L. T. 436.

Former Cou. Rule 608 required a note to be appended to, or indorsed on, every affidavit, to shew the party on whose behalf it was filed. This is no longer necessary, the former *Rule* 608 having been abrogated.

The proper office for filing affidavits is (subject to *Rules* 102, 106, 525), the office in which the proceeding was commenced: *Rules* 14, 15.

Where the affidavit is the commencement of the proceeding it may, in counties other than the County of York, be filed with any officer in the county who is authorized to issue writs of summons, and his office thereby becomes the proper office for filing all subsequent papers: *Rules* 14, 15, 341.

In the County of York, papers for motions in Court are to be filed in the Registrars' office: *Rule* 102; and for motions in Chambers are to be filed with the Clerk in Chambers: *Rule* 525; papers so filed are ultimately transmitted to the Central Office: *Rules* 341, 525.

As to affidavits to be used before the Weekly Court at Ottawa, and London, see *Rule* 107.

524. Affidavits upon which a notice of motion, or petition is founded, shall be filed before the service of the notice of motion or petition. Con. Rule 616. Affidavits in chief, when to be filed.

Taken from Chy. Order 261, which also provided that affidavits in answer must be filed not later than the day before that appointed for the hearing of the motion, or petition. This provision, however, is not embodied in these *Rules*, and no time whatever is prescribed for filing affidavits in answer, or reply.

The affidavits and papers intended to be used in support of a motion, must be mentioned in the notice of motion: *Farish v. Martyn*, 1 Gr. 300; and when the motion is intended to be supported by affidavits filed previous to the date of the notice of motion, the date of the filing of such affidavits should be stated in the notice: *Fraser* Affidavits in support to be mentioned in notice of motion.

Rules
525-527.

v. Fraser, 13 Gr. 181; *McMartin v. Dartnell*, 2 Chy. Ch. 322; *MacKenzie v. Carter*, 12 P. R. 544; documents referred to in the affidavits filed in support of a motion may be read without special reference to them in the notice: *Johnson v. Ashbridge*, 2 Chy. Ch. 251. If a party gives notice of reading an affidavit in support of a motion, but declines to read it, the opposite party may, nevertheless, do so: *Clark v. Law*, 2 K. & J. 28; *County v. Houlditch*, 14 Sim. 75, and may cross-examine the deponent though the party filing it offers to withdraw it: *Pike v. Robinson*, W. N. 1873, 178. So a respondent's affidavits may be read in support of a motion, though no case is made out by the applicant's own affidavits: *Re Margetson & Jones*, 1897, 2 Ch. 314; 70 L. T. 805.

Affidavits of service must be filed at latest before the rising of the Court on the day on which the application is made: *Mitova v. Stuart*, 8 Sim. 34; but see *contra*, *Necar v. Webb*, 25 Ch. D. 81; 40 L. T. 94, where it was held that they were filed in time, if filed at any time before the order was drawn up; but see *Re Rosier*, *Jones v. Bartholomew*, 40 L. T. 442.

See also notes to *Rule 480*.

Affidavits,
where filed.

525. Affidavits to be used on a motion in Chambers at Toronto shall be filed with the Clerk in Chambers, who shall transmit them to the Central Office when the motion is disposed of. Rules of 1 Jan., 1896, 1460.

Exhibits.

526. Where properly marked exhibits are referred to in an affidavit filed, and are not annexed thereto, such exhibits need not be filed, and shall be handed out on the disposal of the motion unless otherwise ordered. Rules of 1 Jan., 1896, 1461.

Exhibits to an affidavit are part of the affidavit, and inspection thereof cannot be withheld from the person against whom the affidavit is to be used: *Re Hinchcliffe*, 1895, 1 Ch. 117; 71 L. T. 532.

G. ADMISSIONS.

Notice to
admit doc-
uments.

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.

To the same effect as the first clause of Eng. (1883) R. 372, and R. 373.

For Form No. 36, see H. & L. Forms No. 687.

This *Rule* extends to all documents which a party proposes to adduce in evidence, and not merely those in his custody or control: *Rutter v. Chapman*, 8 M. & W. 388.

Among the "just exceptions" are the admissibility of the documents as evidence: *Phillips v. Harris*, Car. & M. 492, and their legal effect: *Hills v. London Gas Light Co.*, 1 F. & F. 346; but not an

objection to their reception on the ground of interlineation: *Freeman Rule 528*.
v. *Steggall*, 14 Q. B. 202.

Admissions between defendants cannot be used as evidence against the plaintiff: *Dodds v. Tuke*, 25 Ch. D. 617.

A notice to admit must be given a reasonable time before trial: *Tynn v. Billingsley*, 3 Dowl. 810; *Uary v. Cumberland*, 1 P. R. 140, and holds good upon a subsequent trial: Day, C. L. P. Act, 3rd ed., 103; *Wilson v. Baird*, 19 C. P. 98.

A notice to admit may be given, in respect of a document not in the possession or under the control of the party: *Rutler v. Chapman*, 8 M. & W. 388; *Conger v. McKeehan*, 1 C. L. Cham. 220; or a foreign judgment: *Smith v. Bird*, 3 Dowl. 641; or documents, the validity of which is directly in issue: *Spencer v. Burrough*, 9 M. & W. 425.

For notices which may be given to enable secondary evidence to be given of wills, registered instruments, telegraphic messages, letters, etc., see R. S. O. c. 73, ss. 41, to 51.

Sec. 63 of R. S. O. c. 136, does not enable a party to use as evidence a certified copy of a registered probate: *Barber v. McKay*, 17 Ont. 562; 19 Ont. 50.

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.

Admissions sufficiently signed by solicitor.

Not similar to the Eng. R. 1875, O. 32, r. 4, which was the same as The C. L. P. Act (R. S. O. 1877, c. 50), sec. 173. The Eng. (1883) R. 374, 377, extend to admissions of facts, and require an affidavit of the solicitor or his clerk as to the signature to the admissions. The Chancery Practice in Ontario was to dispense with an affidavit, and the present *Rule* adopts that practice.

The mere fact that documents are admitted in admissions signed by the solicitor, will not make them evidence unless put in at the trial: *Watson v. Rodwell*, 11 Ch. D. 150; and the admission of a copy does not entitle the plaintiff to put in the copy, without first accounting for the original: *Sharpe v. Lamb*, 11 A. & E. 805. The admission when made is conclusive: *Langley v. E. of Oxford*, 1 M. & W. 508.

CHAPTER IX.

TRIAL.

1. GENERAL RULES, 520-560.

3. VEXATIOUS DEFENCES IN ACTIONS TO RECOVER LAND, 567-569.

2. HIGH COURT CASES IN COUNTY COURTS, 561-563.

4. INSPECTION OF PROPERTY AND VIEWS BY JURIES, 570-572.

1. GENERAL RULES.

Place of trial.

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

(a) The plaintiff shall, in his statement of claim, name the county town at which he proposes that the action shall be tried.

(b) Where the cause of action arose and the parties reside in the same county the place so to be named shall be the county town of that county.

This clause applies to County Court cases, and the venue may be changed and the action transferred to the Court of the County in which the cause of action arose and the parties reside; *Leach v. Bruce*, 9 O. L. R. 380; *Cornell v. Irwin*, 2 O. W. R. 466, and see Rule 1219.

"Cause of Action."—Means the whole cause of action. Where part of the cause of action arises in the county in which the parties reside, and part in another county, the Rule does not apply, and the question of venue must be determined by the consideration of convenience; *Conner v. Dempster*, 6 O. L. R. 354.

"Parties Reside."—The residence of the plaintiff at the time of the delivery of his statement of claim, and not at the time of the issue of the writ, is the time referred to in this clause; *Edsall v. Wray*, 19 P. R. 245.

This clause will govern a case in which the cause of action has arisen in a county in which all the parties to it, other than those who are out of the jurisdiction, reside; *Saskatchewan Land, etc., Co. v. Leadley*, 5 O. W. R. 449. The county town of that county should therefore be named in the statement of claim as the place of trial. *Id.*

(c) Where the action is for, or includes a claim for, the recovery of land, the place to be so named shall be the county town of the county in which the land is situate.

90 L.R. 556

(d) The action shall be tried at the place so named unless **Rule 629** otherwise ordered by the Court or a Judge upon the application of either party.

(2) Any such order of the Court or a Judge shall be subject to appeal in the same manner as other orders of the Court or a Judge. See 58 V. c. 12, s. 115. Rules of 1 Jan., 1896, 1463.

The Eng. (1883) R. 425 is different.

The Ont. J. A. Rule 254 and Con. Rule 653 of 1888 began: "There shall be no local venue for the trial of any actions (except an action of ejectment)." "Local venue" having thus been abolished those words are not continued in the present *Rule*. Under the Eng. R. similar to the former Con. Rule 653, it was held that no new jurisdiction was conferred, and that therefore actions for damages for trespass to lands out of the jurisdiction could not be maintained: *British S. African v. Companhia Mocambique*, 1893, A. C. 602; and see *Bretton v. Canadian Pacific Ry. Co.*, 20 Ont. L.R. 107.

An action to cancel a lease of a mining location, and to recover possession of the location, and to restrain the defendant from entering thereon, was held not to be an "action of ejectment" within the former Con. Rule: *Kendell v. Ernst*, 16 P. R. 167.

"Subject to any special Statutory Provisions." — The exception is new, and preserves the provisions under particular statutes by which certain kinds of action are directed to be tried in some particular place. Previously it was held that the effect of the Jud. Act and original J. A. Rule 254 was to abolish all local venues as well those made so by any Provincial Statute, or by Common Law, except in actions of ejectment: *Legacy v. Pitcher*, 10 Ont. 620; but venues fixed by Dominion Acts were not considered to be affected: see *Goldsmith v. Walton*, 9 P. R. 10; *Aitchison v. Mann*, *ib.*, 253, 473.

The exception contained in the present *Rule* operates in favour of local venues created by Dominion Acts, and Provincial Acts contained in the Revised Statutes, 1897, or Provincial Acts passed subsequently thereto; but see 60 V. c. 3, s. 9. See also *Buckley v. Hull Docks*, 1893, 2 Q. B. 93; 69 L. T. 347; *Howard v. Herrington*, 20 Ont. App. 175.

The following are instances of actions governed by Dominion Statutes which fix the venue:—actions for infringements of patents under R. S. C. c. 61, s. 30; see *Goldsmith v. Walton*, 9 P. R. 10; *Aitchison v. Mann*, *ib.*, 253, 473; actions under *The Customs Act* (R. S. C. c. 32), s. 147; actions for anything done in the administration of the criminal law: see R. S. C. c. 151, s. 24; c. 185, s. 1.

The following are instances of actions governed by Provincial Statutes fixing the venue:—actions against Justices of the Peace for not returning convictions: R. S. O. c. 93, s. 4; or against Justices of the Peace, or other public officers, for anything done in performance of their duty: R. S. O. c. 88, s. 15, see also s. 16; actions of replevin under R. S. O. c. 66, s. 7; *Howard v. Herrington*, 20 Ont. App. 175; actions against newspapers for libel: R. S. O. c. 68, s. 11; actions by a person confined as a lunatic, R. S. O. c. 318, s. 89; actions against the Inspector of Prisons and Public Charities, and others, under R. S. O. c. 321, s. 28.

Rule 529.County
Court cases.

Under *The County Court Act* (R. S. O. c. 55), s. 36, actions for recovery of, or for trespass or injury to, land, brought under sec. 23 (8), are to be brought and tried in the county where the land is; partnership actions under sec. 23 (9) in the county where the partnership had or has its principal place of business; and actions by legatees under sec. 23 (10) in the county where letters probate or of administration have issued, or where the decedent resided at the time of his death, unless by consent of the parties, or unless the place of trial is changed.

Where no special statutory provision as to the place of trial applies, this *Rule* prescribes a particular place: (1) In actions for or including a claim for recovery of land: clause (c). (2) In actions where the cause of action arose and the parties reside in the same county: clause (b). In other cases the plaintiff makes choice of such place as he thinks fit, though it must not be vexatiously chosen.

It is the duty of the plaintiff's solicitor to conform to clause (b), and name the place of trial as there indicated. If it be not the most convenient place for the trial, the plaintiff may apply to change it to a more convenient place: *Brown v. Hazell*, 2 O. W. R. 784.

Actions for
recovery of
land.

In actions for recovery of land the trial must *prima facie* take place in the county where the land lies, but the writ may issue from the proper office in any county: *Canada Permanent L. & S. Co. v. Foley*, 9 P. R. 273; so also an action for assignment of dower, which is an action for the recovery of land: *McCulloch v. McCulloch*, 1 C. L. T. 252.

An action by a mortgagee for foreclosure, payment, and possession, is not an action for recovery of land within this *Rule*, and the venue therefore need not be in the county where the lands lie: *Scymour v. De Marsh*, 11 P. R. 472; and see *Kendall v. Ernst*, 16 P. R. 197.

Contract as
to place of
trial.

Place of Trial Fixed by Contract.—The parties may agree that in case of litigation the action is to be carried on, or tried in a Court having jurisdiction in a particular locality; see *The Niagara Co. v. Cox*, 6 O. L. R. 637; or that the trial shall be at a particular place: *Dulmage v. White*, 4 O. L. R. 121; and the Court will give effect to such a condition: *Ib.*

In the case of contracts for conditional sales of chattels, the right to contract as to the place of trial of any actions arising out of the contract of sale is restricted by 3 Ed. vii. c. 13, s. 1. Where that Act is not complied with, any term contained in the contract as to place of trial is void, and the place of trial may be changed as in any other case: *Goodison, &c., v. Wood*, 5 O. W. R. 717. As to the mode of compliance with the Act, see *Ib.*, and S. C. in appeal, 6 O. W. R. 19.

Former
practice.

Changing Place of Trial.—In Chancery no actions were local, all were transitory. At Common Law some actions were local, and some transitory. In a local action the venue had to be laid in the county in which the cause of action arose, though the trial might be ordered to take place elsewhere. In a transitory action the plaintiff might lay his venue where he pleased, subject to the power of the Court or a Judge to order it to be changed. The practice as to changing the venue was, that either party might apply for an order for that purpose. The plaintiff, if the application was his, had to show reasonable ground for the change, and if the application was the defendant's, the defendant had to show distinctly a preponderance of convenience in favour of trying where he proposed, instead of where the venue was laid: *Church v. Barnett*, L. R. 6 C. P. 196.

Now, the Court or a Judge may change the place of trial on **Rule 529.** motion for that purpose [clause (d)], in all cases not governed by special statute, including actions for recovery of land: see *C. P. Rg.* *Change of place of trial* v. *Manion*, 11 P. R. 247, and including actions within clause (b).

Under the present *Rule*, on a motion to change the place of trial, while the matter is largely in the discretion of the Court, or Judge, and one question is where can the action most conveniently be tried (see *Givvy v. Siddall*, 12 P. R. 557; *Taylor v. Grant*, 9 C. L. T. 140), it is now settled by two decisions of Divisional Courts that the discretion is to be exercised subject to two restrictions, viz.:—

(1) The plaintiff, where clause (b) does not apply, has a right to select the place of trial, a right which is not lightly to be interfered with, where the place has not been vexatiously chosen; and

(2) The onus is upon the applicant to show that the preponderance of convenience is against the place named in the statement of claim: *Standard Drain Pipe Co. v. Fort William*, 16 P. R. 404; *Halliday v. Stanley*, *Id.*, 433; see also *Noad v. Noad*, 6 P. R. 48; *Plum v. Norwinton*, W. N. 1876, 105; *Wood v. Kay*, W. N. 1879, 206; *Schwader v. Myers*, 34 W. R. 261; *Greco v. Bennett*, 32 W. R. 848; 50 L. T. 706; *Bridout v. Duncan*, 7 Times, 514; *Waltan v. Widmann*, 10 P. R. 228; *Russ v. C. P. Ry. Co.*, 12 P. R. 220; *Nicholson v. Linton*, *Id.*, 221; *Madigan v. Ferland*, 17 P. R. 124. This was in effect the practice in Chancery formerly: *Noad v. Noad*, 6 P. R. 48; *Bridout v. Duncan*, 7 Times, 514; and has now been held by the C. A. to be the settled practice: *Campbell v. Doherty*, 18 P. R. 243.

There has not been unanimity amongst the Judges in this Province as to the weight to be given to the place where the cause of action arose, in determining the place which is most convenient. This had formerly little weight in Chancery: *Noad v. Noad*, *supra*; but was an important element at Common Law: *Harper v. Smith*, 6 P. R. 9; *Gilmour v. Strickland*, 6 P. R. 274; *Phippen v. McKeel*, 7 P. R. 377. The reported cases, and the opinions of the majority of the Judges, are in favour of adopting the former Chancery practice, and of determining the convenience by a consideration of the expense, and the witnesses' facilities of travelling: see cases *supra*, and *Daris v. Murray*, 9 P. R. 222; *Robertson v. Dugan*, 3 C. L. T. 236; *Waltan v. Widmann*, 10 P. R. 228; *Slater v. Purvis*, 10 P. R. 604; *Russ v. C. P. Ry. Co.*, *Nicholson v. Linton*, *supra*; *Taylor v. Grant*, 9 C. L. T. 140; *Odell v. Mulholland*, 14 P. R. 180; *Berlin Pinn Co. v. Trautisch*, 15 P. R. 68; *Brethour v. Braake*, 15 P. R. 205.

"The facts in each case must be considered, but it is a safe general rule that the venue will not be changed unless the defendant shows that some serious injury and injustice to his cause will arise by trying it where the plaintiff proposes to have it tried": *per* Boyd, C., in *Daris v. Parthe*, 15 P. R. 314.

The fact that a view by the jury might be necessary is a circumstance to be considered: *Odell v. Mulholland*, 14 P. R. 180; see also *Jenkins v. Rushby*, 1891, 1 Ch. 481; see 1891, 2 Ch. 551.

The Court, or Judge, will not enter into an inquiry as to the personal inconvenience of witnesses: *Standard, etc., v. Fort William*, 16 P. R. 404; and it is impossible, as a general rule, to enter into the investigation whether one class of witnesses will be more injured than another, by absence from home: *Noad v. Noad*, and *Daris v. Murray*, *supra*; *Berlin Pinn Co. v. Trautisch*, 15 P. R. 68; except in the case of a public officer: *Fiskin v. Smith*, 2 Chy. Ch. 49; *Fogg v. Fogg*, 12 P. R. 249.

Rule 529.

Change of
place of
trial.

As to witnesses who are out of the jurisdiction, the place of trial may be of comparatively little importance: *Saskatchewan Land, etc., Co., v. Leadley*, 5 O. W. R. 449, 9 O.R. 551.

The preponderance of convenience to be shewn by the defendant must be considerable. A change will not be made on account of a trifling difference in expense: see *Peer v. N. W. Transportation Co.*, 14 P. R. 381; *Stewart v. Johnstone*, 4 U. C. L. J. 21; *Mooney v. Mooney*, 6 P. R. 267; and *Walton v. Wideman*, and other cases *supra*, even though the cause of action arose at the place to which the change is asked to be made: *McDonald v. Dawson*, 8 O. L. R. 72; *Campbell v. Doherty*, *supra*; especially if the plaintiff undertakes to pay the difference in expense: see *Brigham v. McKenzie*, 10 P. R. 406.

An undertaking by defendant to pay the difference in expense to the plaintiff if the place of trial is changed is not a ground for making a change: *McDonald v. Dawson*, *supra*.

But difference of expense is of more importance in an alimony action, as the defendant has to bear in any event all the disbursements: *Fogg v. Fogg*, 12 P. R. 249.

Where the parties reside in the county in which the cause of action arose and the venue is laid, a very strong case will have to be made out to obtain a change: see *Pollard v. Wright*, 16 P. R. 505; *Servos v. Servos*, 11 P. R. 135.

The fact that a change will delay the trial considerably is a circumstance to be considered: *Servos v. Servos*, *supra*.

A direction to the parties to disclose the names and evidence of the witnesses, in order to consider whether the witnesses are material, is not proper: *Arpin v. Guinane*, 12 P. R. 364.

Where the plaintiffs resided at Montreal, and the defendants' officers at Picton, and the plaintiffs had some witnesses resident at Toronto, the place of trial was changed from Ottawa to Toronto: *Cooper v. Central Ontario Ry. Co.*, 4 Ont. 280.

Where owing to conflicting affidavits it is impossible to decide which would be the most convenient place of trial, the Court may decline to interfere, leaving it to the trial Judge to apportion the costs as may be proper if it shall appear that the wrong place has been selected: *McArthur v. Michigan Central*, 15 P. R. 77, as explained in *Brethour v. Brooke*, 15 P. R. 205; and see *Roberts v. Jones*, 1894, 2 Q. B. 194.

Delay in applying may, apart from all other considerations, be sufficient to justify the dismissal of a motion to change the venue; as where the action is just about to be tried, and application might sooner have been made: *Philips v. Beall*, 26 Ch. D. 621; 32 W. R. 667.

The affidavits on such motions should be made by the parties themselves, and not by their solicitors: *Hood v. Konkrite*, 4 P. R. 270; *Baker v. Waldon*, 2 O. W. R. p. 434; *Leach v. Bruce*, 9 O. L. R. 380.

An application is not necessarily premature because issue is not joined, if the issues can be determined from the pleadings: *Powell v. Cobb*, 29 Ch. D. 488-9.

Seemingly, this Rule does not give a Judge a right to interfere with the procedure in the action (e.g., to change the venue of his own motion), except at the instance of a party: *Bull v. North British, etc.*

Co., 11 P. R. 83. Such motions should not be made at the Assizes; **Rule 529**, it is too late then to consider the balance of convenience, as the parties have to be prepared for trial: *Sornia Agricultural Implement Co. v. P. & Co.*, 11 P. R. 224.

The plaintiff having named a place of trial in the special indorsement on a writ, cannot name a new one in the statement of claim; *Negsworth v. McKinnon*, 19 P. R. 178; nor having named one in his statement of claim, can he change his mind and name a new one by amendment of the statement of claim under *Rule 300*; *Bull v. North British, etc., Co.*, 10 P. R. 622. As to whether the omission to name a place of trial in the statement of claim can be supplied by amendment, see note to *Rule 300*, p. 512.

The place of trial may be changed in actions to recover land, as well as in other cases: clause (d), see *C. P. Ry. Co. v. Manion*, 11 P. R. 247.

In the cases mentioned in clauses (b) and (c) of the *Rule*, viz., actions where the cause of action arose, and the parties reside in the same county, and actions for recovery of land, the plaintiff is obliged to name a particular place, whether the most convenient or not. In such case the plaintiff may nevertheless move, like the defendant, to have the place changed; the onus will be upon the applicant of shewing a preponderance of convenience in favour of the change proposed.

In the cases where the plaintiff has the right of selection, he cannot have the place selected by him changed, if the defendant objects, except upon shewing some cogent reason. If the place chosen by him is manifestly an improper one, he may be ordered to pay the costs of the motion to change: *Martin v. Ross*, 6 P. R. 264. If, however, the plaintiff is obliged by *Rule 529*, clause (b), or (c), to name a place which is not the most convenient, he cannot be said to have named an improper place, and where he applies for a change, the circumstance that he has named a place should not weigh against him. The plaintiff may probably, however, as formerly, obtain a change to hasten the trial, where he is in danger of losing his debt, particularly if by some unforeseen circumstance he has been prevented from going to trial at the place originally named by him: see *Lucas v. Taylor*, 4 P. R. 99; *Mercer v. Vogt*, 3 P. R. 94; *Jones v. Jones*, 3 Ch. Ch. 58; *McDonnell v. Pror. Ins. Co.*, 5 U. C. L. J. 186 (where the Judge appointed to take the Assizes refused to try the case, being interested in the defendant company).

On other extraordinary grounds the place of trial may be changed. For instance, the existence of circumstances which may render it impossible to have a fair trial, such as political excitement: *Roche v. Patrick*, 5 P. R. 210; the interests of the locality being involved: *Municipal Council of Ontario v. Chamberland*, 3 U. C. L. J. 11; or its prejudices or sympathies enlisted on one side so as to render a fair trial impossible: *McDonagh v. Pror. Ins. Co.*, 2 U. C. L. J. 104; *Blackburn v. Cameron*, 5 P. R. 341; see also *Davis v. Macray*, 9 P. R. 229; *Shafte v. Bolekour*, 35 W. R. 686; 57 L. T. 17; *Crossham v. Leach*, 32 L. T. 665; *Shroder v. Myers*, 34 W. R. 261; *Queen v. Appley*, 13 C. L. T. 375; *Upper v. Beavan*, 14 P. R. 294. But the mere fact that one of the parties is personally widely known or popular in any county, is not a reason for having the trial elsewhere: *Lockelle v. Andrew*, 2 O. W. R. 608; *Brown v. Hazell*, *ib.* 504.

Quere, whether the pendency of other similar suits, and the fact that a large number of persons are interested in the county in the matters involved, and that in the opinion of a number of residents a

Rule 529. fair trial cannot be had, will be sufficient; see *Mell v. Leadley*, 1461 v. *Kirk*, 2 C. L. T. 555, 557; see also *Moor v. Boyd*, 3 P. R. 374; *Unger v. Brennan*, 14 P. R. 291. See also where the Sheriff is a party; *Braunen v. Jarvis*, 8 P. R. 321; or the County Judge, *Good*, 4 P. R. 310.

The place of trial was changed in a collision suit in the Master's Court, on the sole ground that the local Judge would be in a better position to try the case from his practical or easily obtained knowledge of the locality in which the collision occurred; *The Waverley Belle*, 2 C. L. T. 360.

Criminal Cases.—As to change of venue in a criminal case under the Criminal Code, s. 651, see *Reg. v. Pontua*, 18 P. R. 210, 429.

Appeals.—The discretion of the Court or Judge, exercised in a motion to change the place of trial, is an appealable discretion; *Philips v. Beall*, 26 Ch. D. 621; 32 W. R. 665; and though a Judge in Chambers may, perhaps, freely review the decision of a subordinate judicial officer in Chambers, the discretion of a Judge in Chambers, unless a clearly mistaken view has been taken by him, will not be interfered with by a Divisional Court, even though the Court think the discretion might have been exercised differently; see *Morrell v. C.J.*, in *Standard, etc.*, v. *Fort William*, 16 P. R. at p. 406-7, citing *The Assyria*, 4 Times, 634; see also *Bengoa v. Lurda*, 6 T. S. 146; *Sulby v. Lye*, 12 Times 191.

An order in Chambers affirmed by a Judge and the Divisional Court will not be interfered with, though the Court of Appeal should not be satisfied that there is a preponderance of convenience in trying the case at the place named in the order; *Pear v. N. W. Transportation Co.*, 14 P. R. 381.

Changing
place of
reference.

Changing Place of Reference under a Judgment. A reference to a Master is *prima facie* to the Master at the place where the proceedings were instituted; *Maceira v. Gygane*, 3 Gr. 310; *McNah v. McInnis*, 4 Chy. Ch. 53; but the place is subject to be changed, upon motion, applying the same principles as in the case of the place of trial; see *Jackson v. Harriman*, 9 C. L. J. 29; *McNah v. McInnis*, *supra*. The policy of *The Judicature Act* in decentralizing business introduces a further element, and, as far as possible, local matters are to be sent to the local Masters; a reference was therefore changed and sent to the Master of the county in which a partnership business in question was carried on; *Litkea v. Wilson*, 9 P. R. 75.

A reference was also changed where it became necessary to add as a party the Master before whom the matter was pending; *Webster v. Thompson*, 1 Chy. Ch. 360; and where the Master's illness obliged him from attending to business; *Re Kirkpatrick*, 18 C. L. J. 121; 2 C. L. T. 204.

In administration matters, however, the reference should *prima facie* be to the place where the person whose estate is to be administered resided; *Rule 547* is in such matters applicable, not *Maceira v. Gygane*, 3 Gr. 310; *Thompson v. Fairbairn*, 10 P. R. 533. See also notes preceding *Rule 654*.

Cross Actions.—Where cross actions, with different places of trial named, are consolidated, the place of trial will be ordered as the balance of convenience requires; *Good v. Leitch*, 13 P. R. 257.

530. After the close of the pleadings either party may give notice of trial. Can. Rule 654. Rule 530.
Notice of
trial.

The Eng. (1883) Rs. 435, and 436, permit the plaintiff to give notice of trial with his reply though it does not close the pleadings: *Asquith v. Molincaux*, 49 L. J. Q. B. 800; but he may not enter the case till the pleadings are closed: *Metropolitan Toner Circle Ry. v. Metropolitan Ry. Co.*, 5 Ex. D. 123; and they do not permit the defendant to give notice of trial, until the plaintiff has failed to do so for six weeks after the close of the pleadings, or such extended time as the Court or Judge may allow. The Ontario Rule, *supra*, is in accordance with the former Chancery practice under Chy. O. 161.

Close of Pleadings.—See notes to Rules 262, and 433.

As to when the pleadings are closed, see *Hare v. Carthage*, 11 P. R. 374; *McLachlan v. Ruse*, 16 P. R. 330; and notes to Rule 262, 263. Notice of trial given before the pleadings are closed, within the meaning of Rule 262, as against all the defendants, is irregular: *Long v. Long*, 7 O. L. R. 536; *Schneider v. Proctor*, 9 P. R. 11; *Robinson v. Caldwell*, 1893, 1 Q. B. 519; 68 L. T. 218; and a defendant against whom the pleadings are closed may take the objection, and have the notice of trial set aside, though the other defendants are content to accept it: *Long v. Long*, *supra*.

Where an overdue defence was filed on the last day for giving notice of trial, and a joinder of issue and jury notice were filed on the same day, but after the filing of the defence, the service of notice of trial with the joinder of issue and jury notice on the same day, but before the filing of the defence, was held to be regular: *Broderick v. Brantch*, 12 P. R. 561; but service of notice of trial and jury notice before the filing or delivery of defence on the last day, defendant being in no default, is irregular: *Mellroy v. Mellroy*, 14 P. R. 264; followed in *Hermann v. Mandarin, etc., Co.*, 18 P. R. 34, in preference to *Broderick v. Brantch*, *supra*, and the issuing of an order to produce at the time defence was delivered was held not to waive irregularity in the notice of trial: *Id.*

Where no reply is delivered the plaintiff cannot give notice of trial until the lapse of 21 days from the delivery of the defence: *Robinson v. Caldwell*, *supra*. Where the reply is something more than a joinder of issue, the notice of trial cannot be given until after the expiration of 4 days (see Rule 258), and a notice served on the 4th day after 11 p.m. is premature: *Piper v. Benjamin*, 17 P. R. 267.

Where after notice of trial has been given, a third party notice is given and directions made thereon allowing the third party to put in a defence, and directing the issues between the defendant and third party to be tried at the trial of the action, that has the effect of reopening the pleadings, and they are not re-closed until after the expiration of the time for delivering a reply to the third party's defence; and a new record must then be prepared including the third party proceedings, and the case must be again entered for trial, and a new notice of trial given to the defendant, and third party: *Confederation Life v. Lohatt*, 18 P. R. 238.

Notice of trial given prematurely is a voidable proceeding, and where a motion to set aside such a notice was adjourned till the trial, and was dismissed by the Judge at the trial, who proceeded with the trial in the absence of the defendant, it was held that a motion by way of appeal against the decision of the Judge on the motion, and

Rule 530. also to set aside the judgment, might properly be made to the Divisional Court: *Campau v. Randall*, 17 P. R. 525; *Qnu v. Canadian Order of Woodmen*, 5 O. L. R. 51.

Assessment of Damages.—Where a plaintiff indorsed his writ for a liquidated demand, and signed interlocutory judgment for default of appearance, and thereafter filed a statement of claim varying the claim for relief asked by the writ, and, without closing the pleadings on the statement of claim, set the cause down for assessment of damages on the relief claimed by the statement of claim, it was held that the proceedings were irregular and the assessment of damages could not be made: *Alexander v. Alexander*, 1 O. L. R. 639.

Notice of Trial.—Forms of the notice are given in the App. Forms Nos. 65, 66, (H. & L. Forms, Nos. 789, and 790), see *Rules* 538, 542.

Where notice of trial did not state the place where the trial was to take place, a motion to set aside the notice was refused, in the absence of an affidavit stating that the party moving was thereby misled: *O'Brien v. Wells*, 20 C. L. J. 369. See also *Walker v. Torrey*, 7 P. R. 340; *Bank of Montreal v. Cameron*, 7 P. R. 188.

The notice may be given, in non-jury cases, for either the jury, or non-jury, sittings, at the place named for trial; see *Rule* 538 (c), except in Toronto cases, as to which see *Rule* 542.

"Either Party."—Any one of the parties plaintiffs, or defendants, may give notice of trial: *Tinning v. G. T. Ry.*, 11 P. R. 38; and if one of several defendants does so he should serve his co-defendants as well as the plaintiff: *McLean v. Thompson*, 9 P. R. 553. If some of the defendants have not appeared, and it is necessary, or desired, to give them notice of motion for judgment, such notice should be for the same time and place as the notice of trial: *McGill v. McDonnell*, 14 P. R. 483; but see now *Rules* 573, 586.

Where the plaintiff served an insufficient notice of trial on defendants, and third parties, and it was set aside on defendant's motion, it was held that it was the plaintiff's and not the defendant's duty to notify the third parties that the trial could not proceed on the notice, and third parties appearing at the trial were held entitled to costs of the day from plaintiff: *Knight v. Ridgetown*, 14 P. R. 81.

Where the defendant exercises the power conferred by this *Rule*, and gives a regular notice for the sittings next approaching, the plaintiff cannot interfere with defendant's right, by giving notice for more distant sittings: *Shaw v. Crasford*, 13 P. R. 219; *McGill v. McDonnell*, 14 P. R. 483; see also *Hogaboom v. Lunt*, 14 P. R. 480.

Failure to give Notice of Trial.—The plaintiff (in actions other than non-jury actions in the County of York) is liable to have his action dismissed for want of prosecution if he fails to give notice of trial, where the pleadings have been closed six weeks before the commencement of any sittings for which he might give notice: *Rule* 433.

As to non-jury actions in the County of York, see *Rule* 434.

Where a case is to be tried without a jury, the plaintiff (notwithstanding *Rule* 538 c) will not be in default under *Rule* 433, by reason of his not giving notice for a sittings for which he might have given notice, if it is not the non-jury sittings: *Leyburn v. Knake*, 17 P. R. 419.

531. Subject to the provisions of *The Judicature Act*, **Rule 531.**
 1895, and of these Rules, the Court or a Judge may order that different questions of fact be tried by different modes, or that one or more questions of fact be tried before the others, and may appoint the place or places for trial. Con.
 Rule 655.

Trial of
 different
 questions
 in different
 modes.

Same substantially as the Eng. (1883) R. 432.

Rule 373 enables the Court to direct a preliminary point of law, to be decided, which may prevent the necessity for trial of issues of fact.

Rule 259 contains provision of a similar kind for enabling a point of law to be raised in the pleadings and to be decided at the same time as issues of fact, or at a different time.

The present *Rule* enables the Court to direct one or more issues of fact, which may decide the case, to be tried before the others: see *Sims v. New Brunswick, etc., Co.*, 5 Times, 148; but it is to be read in connection with sec. 57 (12) of the Act, which provides that multiplicity of proceedings is to be avoided: *Village of Fort Erie v. Fort Erie Ferry Co.*, 13 P. R. 444.

An order for the trial of a point of law first, was made in *Corporation of Preston v. Fulwood*, 80 L. T. Jour. 41. See also *Irvine v. Sperry*, 11 P. R. 229; *Smith v. Hargrove*, 16 Q. B. D. 183; *Temperance Colonization Society v. Evans*, 12 P. R. 48, 380; *Elmore v. Pirrie*, 57 L. T. 333; *London C. & D. v. St. E. Ry.*, 53 L. T. 109. See also *Graham v. Temperance, etc., Ass'n Co. of N. A.*, 16 P. R. 526, in note to *Rule 467*.

Where a preliminary point of law is ordered to be tried first, the trial of the issues of fact will not take place until after the final determination of the preliminary point: *Owners, etc., Maori King v. Hughes*, 73 L. T. 141. See, however, notes to *Rule 259*.

A separation of the issues may be made at the trial, and one issue may be left to the jury and another disposed of by the Judge: *Haist v. G. T. Ry.*, 22 Ont. App. 504; *Johnson v. G. T. R.*, 25 Ont. 64; 21 Ont. App. 408; and his discretion will not be interfered with on appeal, unless he acted on a mistaken view of the law: *Ib.*, and see *Re Martin, Hunt v. Chambers*, 20 Ch. D. 365.

In *The Emma Silver Mining Co. v. Grant*, 11 Ch. D. 918, Jessel, M.R., said (p. 930), that a "case is to be brought within this *Rule* ought to be one of simple issues. I do not think it is convenient to travel through a long record, and to get a number of complicated issues, and except them, so to say, from the pleadings." He explained in what cases the *Rule* had theretofore been acted upon. All had been cases in which the application was by the defendant.

In the subsequent case of *Piercy v. Young*, 15 Ch. D. 474, the learned Judge stated that the *Rule* was intended to be applied in exceptional cases only; that the object of the Judicature Act was to try all disputes together, and that, it was considered, was a beneficial object. "Separate trials of separate issues are nearly as expensive as separate actions, and ought certainly not to be encouraged, and they should only be granted on special grounds." It was there held that a defendant in a partnership action, who had set up by counterclaim, an agreement by the plaintiff for sale of his interest in the partnership to the defendant, at a stated price, was not entitled to have this issue tried before the plaintiff's issues in the action.

Rules

532, 533. Where discovery of accounts and dealings is sought, but the plaintiff's right to the account is disputed, a preliminary trial of that question may be ordered: *Guthrie v. Tompkinson and Co., Ld., etc.*, 16 P. R. 536.

In *Tasmanian Railway Company v. Clark*, W. N. 1870, 106; 27 W. R. 677, the Court refused leave to try the liability of a surety, before that of the principal; and the Court of Appeal declined to interfere with their discretion.

Where a reference would be ordered by the Judge as to a question of account, it is proper that the question of liability should be tried separately from the question to be so referred: *Liverpool, Brazil, etc., Navigation v. London & St. Katherine, etc., Co.*, W. N. 1875, 203; 1 Ch. Ch. 121.

In *Milnesich v. Lloyds*, W. N. 1875, 200, an action for libel, an application by the defendant to have the question of libel tried before the question of damages was refused by Lush J., who said: "I do not think that I could in this case separate the question of damages from the question of fact without injury to the plaintiff." In *Deat v. Sovereign Life Assurance Co.*, 27 W. R. 379; W. N. 1870, 33, the validity of a life policy being the matter in dispute, an application by the plaintiff that the issue, whether the deceased was a man of temperate, or intemperate, habits, should be tried first, was refused by V.-C. Bacon, who said that "this particular issue could not be severed from the rest of the case as to admit of its being heard separately by a jury."

Where the plaintiff, who had been injured in a railway accident, signed a receipt for a sum of money paid to him in full satisfaction of all claims, but, having subsequently become totally blind, he brought an action for damages, the question of law whether, owing to his conduct, the action was not maintainable, was directed to be tried first by a Judge alone before the trial of the issues of fact: *Ellen v. Great Northern Ry. Co.*, 49 W. R. 396.

The Rule applies not merely to questions of fact, but to mixed questions of law and fact: *Tasmanian Ry. Co. v. Clark, supra*; *Simson v. New Brunswick, etc., Co.*, 5 Times 148.

See also *Tattersall v. National Steamship Co.*, in note to Rule 373, and *Paolyn v. Driver*, 5 Ch. D. 478.

Trial by jury

532. The trial of questions or issues of fact by a jury shall be held before one Judge, unless otherwise ordered. Con. Rule 656.

Substantially the same as Eng. (1883) R. 432.

See sec. 65 of the Jud. Act. For trials at bar, see Rules 533-536.

As to the cases in which a jury may be had, see notes to sec. 102 of *supra* of the Act.

Trials at the bar on the part of suitors

533. A party may [within thirty days] after issue joined, apply to the Divisional Court for a trial at bar, and the Court may, in its discretion, upon hearing the parties, grant or refuse the same. Con. Rule 657. R. S. O. 1857, c. 39, s. 33.

* Taken from R. S. O. 1877, c. 39, s. 33, except the words in bracket. **Rules**
 els. Under the former Rule the time was "the Divisional Court **634-638.**
 sittings next after issue joined."

Semble, notice of the application is necessary: *Anderson v. Gurrin*,
 10 Times, 383.

Presumably a trial at bar must take place before a Court of three
 Judges; possibly, by implication from this *Rule*, a Divisional Court,
 but it may be observed that in the matters assigned to Divisional
 Courts, by ss. 67, 74, trials at bar are not specifically mentioned.

534. Where the Crown is actually or immediately inter-^{in the}
 ested, a trial at bar may be had as of right, upon, and shall ^{part of the}
 be regulated and governed by, the same principles as in simi-^{Crown.}
 lar cases in England. Con. Rule 658.

Taken from R. S. O. 1877, c. 39, s. 34.

See *Dixon v. Farrer*, 18 Q. B. D. 43; *Ross v. Ross*, 2 State Trials,
 N. S. 271; *Anderson v. Gurrin*, 10 Times, 383; *Reg. v. Jackson*, 75
 L. T. 77.

535. Where a trial at bar is directed, the President of ^{When trial}
 the High Court may appoint the day for the trial. Con. ^{to be had.}
 Rule 659.

Taken from R. S. O. 1877, c. 39, s. 35. For the practice in trials
 at bar, see 101 L. T. Jour. 199; *Corner's Crown P.*, p. 278, *et seq.*

536. Notice of a trial at bar shall be given to one of the ^{Notice of}
 Registrars of the Court before giving notice of trial to the ^{trial at bar.}
 party. Con. Rule 662; Rules of 1 Jan., 1896, 1464.

Taken from Rule T. T. 1876, 37.

537. Where interlocutory judgment has been signed ^{Notice of}
 against any defendant by default of appearance or pleading, ^{trial to be}
 notice of assessment of damages shall be given to such de- ^{given}
 fendant, and unless otherwise ordered, shall not require to ^{where}
 be personally served. *New.* ^{interlocu-}
^{tory}
^{judgment}
^{signed.}

See notes to *Rule 573*.

The notice may be served by posting up as mentioned in *Rule 330*.

538. Except in the cases provided for by Rule 542,

(a) Notice of trial shall be given before entering an action
 for trial, and may be according to Form No. 65. Con. Rule
 660.

Compare Eng. 1883, R. 437.

For Form No. 65, see H. & L. Forms No. 789.

Except
 under
Rule 542.

Rule 539.

10 days' notice.
Short notice 5 days.

(b) Ten days' notice of trial shall be given, and shall be sufficient in all cases, unless otherwise ordered by the Court or a Judge. Short notice of trial shall be 5 days' notice. Con. Rule 661.

Compare Eng. (1883) R. 438.

It was held under the C. L. P. Act, that the commission day of the assizes might be included in computing the days for notice of trial; *Morell v. Wilmot*, 20 C. P. 378; and the computation of the ten days will be so made under Rule 344. See *Harper v. Morn*, 3 C. L. T. 309.

A defendant cannot (unless he be asking an indulgence) be required to accept less than ten days' notice of trial; *Laskier v. Tekewin*, 67 L. T. 121; but where a special order is being made as to going down to trial, there is jurisdiction to give special directions as to notice of trial; *Barter v. Holdsworth*, 1899, 1 Q. B. 266; 79 L. T. 434; 15 Times 84, where an order was made providing for ten days' notice of trial expiring on the day on which the trial was to take place.

Entry for trial.

(c) After notice of trial is given, either party may enter the action for trial. If both parties enter the action for trial at the same sitting, it shall be tried in the order of the plaintiff's entry. Con. Rules, 663, 667.

Time of entry for trial.

(d) Actions shall be entered for trial not later than the third day next before the first day of the sittings; but the Judge at the trial may permit any action to be entered after the time above limited. Con. Rule 665.

Non-jury actions

(e) An action which is to be tried without a jury, may be entered for trial at any sittings appointed for the place named for the trial of such action. Con. Rule 666.

See *Grant v. Middleton*, 10 P. R. 585.

This Rule does not apply to non-jury actions to be tried at Toronto; Rule 542 applies to such cases.

Notice of trial was amended *nunc pro tunc* where given for trial at Belleville, naming the day fixed for the Assizes at Picton, the Belleville Assizes being over, and the party served not having been misled; *Walker v. Terry*, 7 P. R. 340; so where "September" was inserted instead of "October," as the mistake could not mislead; *Bank of Montreal v. Cameron*, 7 P. R. 188; see also *O'Brien v. Wells*, 20 C. L. J. 369; and *McBride v. Carroll*, 14 P. R. 70.

Where, after notice of trial given by plaintiff, the defendant obtained an order postponing the trial on payment of costs, this was held to be a conditional order not staying the plaintiff's proceedings, and one which the defendant was at liberty to abandon without being liable to pay other than the costs of the application; *Allen v. Mathers*, 9 P. R. 477.

As to both parties giving notice of trial, see notes to Rule 539.

The ten days are computed in the usual way, exclusively of the first day and inclusively of the last, under Rule 344.

A defendant is entitled to the full ten days' notice, and there is **Rule 538**, no power to compel him to take less, unless he has consented to take short notice, or unless short notice can be imposed as a term of granting an indulgence to the defendant: *Hamilton Prov. & L. Soc. v. McKim*, 13 P. R. 125; *Whitney v. Stark*, *ib.*, 129. See also *Laakier v. Tekirian*, 67 L. T. 121; *Qua v. Woodmen of the World*, 5 O. L. R. 51; but where a special order as to trial is being made it may provide for a notice of trial shorter than the usual 10 days: see *Barter v. Holdacorth*, 1890, 1 Q. B. 266; 70 L. T. 434.

Where, by arrangement, papers were served by mail, notice of trial posted in time, but received one day short of the ten, was set aside: *McDonough v. Alison*, 9 P. R. 4. But, except by consent, service cannot be effected by mailing; a notice sent by mistake to defendants' solicitors, the envelope of the letter being addressed to them instead of to the plaintiffs' solicitors' agents for service, and returned by mail on seeing that the letter was not intended for them, was held not to be good service: *Newsome v. Mutual Life Insurance Co.*, 3 O. L. R. 253.

On motion to set aside a notice of trial served a few minutes late, service having been admitted, but immediately afterwards repudiated, it was held that unless service of a good notice was negatived, the notice should not be set aside: *Wright v. May*, 8 O. R. 218.

Actions to be tried by jury must be entered not later than six clear days next before the first day of the sittings: 2 Ed. vii, c. 14, s. 3 (3).

provides that no notice of trial shall be countermanded, except by consent, or leave of the Court, or a Judge. This Rule has not been adopted in the Ontario Rules. By the former Common Law practice countermand was permitted, but not by the Chancery practice. Since *The Indicture Act*, notice of trial cannot be countermanded, by either party: *Friendly v. Carter*, 9 P. R. 43.

Remanet.—In the case of a *remanet*, no notice of trial was formerly necessary: *Donovan v. Boulthce*, 10 P. R. 52; but must now be given under **Rule 544**, except in the case of non-jury actions at Toronto. A case postponed by order at the trial, on defendants' application, is a *remanet*: *Donovan v. Boulthce*, *supra*.

Entry of Action for Trial.—The present Rule abolished both the former Com. Law and Chy. practice (see R. S. O. 1877, c. 59, s. 248, and Chy. Order 163), and requires the entry to be made not later than the third day next before the first day of the sittings, unless with the Judge's permission. It may be made on any earlier day, after notice of trial is given: clauses (a), and (d).

Sunday is, under **Rule 343**, to be excluded in computing "the third day": *Parr v. Lough*, 3 C. L. T. 312.

The entry is made on *præcipe* (H. & L. Forms, No. 281) in the proper office, in Toronto in the Registrars' office, *Rules* 21 (b), 40, 541, and 542, and in other places the Local Registrar, or, where there

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Short notice 5 days.

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entered for trial at any sittings appointed for the place named for the trial of such action. Con. Rule 666.

See *Grant v. Middleton*, 10 P. R. 585.

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Where, by arrangement, papers were served by mail, notice of trial posted in time, but received one day short of the ten, was set aside: *McDonough v. Allison*, 9 P. R. 4. But, except by consent, service cannot be effected by mailing; a notice sent by mistake to defendants' solicitors, the envelope of the letter being addressed to them instead of to the plaintiffs' solicitors' agents for service, and returned by mail on seeing that the letter was not intended for them, was held not to be good service: *Newsome v. Mutual Life Insurance Co.*, 3 O. L. R. 253.

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Where notice of trial is set aside on the application of one of several defendants, the plaintiff should notify the others that it has been set aside, or he may have to pay their costs of the day: *Knight v. Ridgeway*, 14 P. R. 81.

Where, after notice of trial has been served, the pleadings are re-opened and new issues are to be tried, the notice of trials falls, and a new record must be prepared, and a new notice of trial given: see *Confederation Life v. Labatt*, 18 P. R. 238.

Countermand of Notice not Allowed.—Eng. (1883) R. 443 provides that no notice of trial shall be countermanded, except by consent, or leave of the Court, or a Judge. This Rule has not been adopted in the Ontario Rules. By the former Common Law practice countermand was permitted, but not by the Chancery practice. Since *The Judicature Act*, notice of trial cannot be countermanded, by either party: *Friendly v. Carter*, 9 P. R. 41.

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Sunday is, under **Rule 343**, to be excluded in computing "the third day": *Parr v. Lough*, 3 C. L. T. 312.

The entry is made on *præcipe* (H. & L. Forms, No. 381) to the proper officer, in Toronto in the Registrars' office, **Rules 23 (b)**, 40, 541, and 542, and in other places the Local Registrar, or, where there

Rule 539. is to Local Registrar, the Deputy Clerk of the Crown in jury cases, and to Deputy Registrar in non-jury cases; *Rule 38 (2)*.

The effect of clauses (c) and (d) of this *Rule* is to supersede the former Common Law practice, by which the defendant could obtain a side-bar rule for costs of the day where the plaintiff gave notice of trial but did not enter the case. The defendant can enter the action, or if the plaintiff fails to do so, the defendant may apply to the Judge under clause (d). No officer has now power to issue a rule for costs, and the Master in Chambers has no jurisdiction to entertain an application for them; *Hopkins v. Smith*, 9 P. R. 287, see *Tonstey v. Hepper*, 57 L. T. 481, under the English practice.

Action not entered.

Where, after the plaintiff has given notice of trial, neither party enters the case, the defendant may, under *Rule 433*, move to dismiss the action for want of prosecution; see also *Crick v. Heckett*, 27 Ch. D. 374; *Sierier v. Spearman*, 70 L. T. 132 (decided upon the terms of Rules 433, and 440, of the Eng. Rules of 1883).

Record.

539. The party entering an action for trial shall, at the time of entry (or, in the cases to which *Rule 542* applies, at or before the time when the notice of trial is to be filed), deliver to the proper officer one copy of the whole of the pleadings in the action for the use of the Judge at the trial, and such copy shall be certified as a true copy by the officer having charge of the pleadings filed, and shall be called the Record. *Con. Rule 664. Rules of 1 Jan., 1896, 1405, amended.*

Comp. Eng. (1883) R. 454.

The following regulation has been made by the President, and Chief Justices, of the High Court of Justice, dated October 28th, 1891:—

"Whereas, it is necessary for the due administration of justice, and avoidance of delays and unnecessary expense, that records entered for trial should show the state of the action against all the defendants, including those who have not appeared, or as against whom the pleadings have been noted closed, or any interlocutory, or final, judgment has been signed;

Therefore, from and after the first day of January next (1900), all officers passing records are hereby directed, and required, to see that they contain, in addition to a certified copy of the pleading, a note or memorandum stating the state of the action as against every defendant or defendants who has, or have, put in no defence, or as against whom the action has been discontinued.

No extra charge is to be made for such note or memorandum.

All officers and clerks when entering causes for trial, or for hearing on motion for judgment, are required to see that the same are in a proper state for trial, or hearing, and are not otherwise to enter the same; and for that purpose may require either the production of the record, or a certificate of the state of the action, when the necessary information cannot be obtained from their own books of office."

Where the record is lost a new one may be made up: see *White v. Hutchinson*, Tay. 307; if the pleadings are opened after the record has been entered for trial a new record must be made up and entered: see *Confederation Life v. Lubatt*, 18 P. R. 238, *supra*, p. 741. Rules
540-542.

540. The party entering an action for trial shall indorse on the copy of the record, whether the matter for trial is an assessment of damages, or an undefended issue, or a defended issue; and the officer with whom the action is entered shall make two lists, and enter each action in one of the said lists, in the order in which the actions are entered for trial with him; and in the first list he shall enter all the assessments and undefended issues, and in the second list all defended issues. *Con. Rule 669.* Separate
lists of
defended
and
undefended
issues.

Taken from R. S. O. 1877, c. 50, s. 249.

541. In actions entered for trial at Toronto the Registrar to whom is assigned the superintendence of the business of setting down such actions shall receive and account for the fees payable under The Jurors' Act or otherwise, on entering the action for trial, whether the same are payable in money or stamps. *New.* Fees on
entering
for trial.

For the fees payable, see *Tariff B*, item 37.

542—(1) Actions to be tried at Toronto without a jury, may be set down for trial by either party immediately after the close of the pleadings. Setting
down and
notice of
trial in
non-jury
cases, York.

(2) Notice of trial (which may be according to Form No. 66) shall be given, by the party setting down the action for trial, within 2 days thereafter, and he shall within 4 days after so setting down the action, file the notice of trial and proof of the service thereof, with the officer by whom the action was set down.

For Form 66, see *H. & L. Forms*, No. 790.

(3) Where default is made in filing the notice of trial as aforesaid, any party who has been served therewith may within 4 days after such default, file in like manner the notice of trial served on him and proof of the service thereof.

(4) Where a notice of trial is filed, as aforesaid, the action shall be placed by the proper officer upon the list of cases

Rules 543, 544. for trial upon the expiration of three weeks from the date of the setting down.

(5) If more parties than one have caused the action to be placed on the list of cases for trial, it shall be tried in the order of the first entry. *New.*

Where the pleadings are re-opened after service of a notice of trial, see *Confederation Life v. Labatt*, 18 P. R. 238, *supra*, p. 741.

Withdrawal
of record
by consent.

543. An action may be withdrawn from trial by either party, upon producing a consent in writing, signed by the other, but not otherwise except by order. *Con. Rule 610.*

Same as Eng. (1883) R. 291, which was framed to obviate the necessity of applying to the sitting Judge for leave.

As to discontinuance of the action after it has been entered for trial, see notes to *Rule 430.*

At Common Law, a plaintiff who had entered a cause for trial might withdraw the record at any time before the jury were sworn. This was often a hardship, where the defendant was ready with his witnesses and counsel. Under the present clause, leave is necessary for the withdrawal of a record, unless all parties consent, and in *Learmouth v. Croll*, 1 Charl. Ca. (Court) 100, Huddleston, B., refused an application to postpone the trial fixed for a few days thereafter, though counsel for the plaintiff was not sufficiently instructed in the case; and he referred the plaintiff to the Judge who was to sit on the day appointed for trial, for leave to withdraw the record.

Any order made at the trial for withdrawal or postponement, and requiring to be issued, should be signed by the officer who acts as Registrar at the trial: *Waghorn v. Hawkins*, 12 P. R. 145.

Orders at the trial for amendment of pleadings do not require to be issued: the amendment is made on the record: *Rule 314*, and orders respecting postponements, not containing any special terms, may not require to be issued.

For the effect of withdrawal of a juror, see *Thomas v. Exeter Flying Post*, 18 Q. B. D. 822.

Actions
not tried.

544. Actions not tried or disposed of after being once entered for trial shall remain for trial, and shall not, except in the case of actions entered for trial without a jury at Toronto, be heard at any subsequent sittings, unless and until a fresh notice of trial is given. *Rule of 15 December, 1888, amended.*

The object of the present *Rule* is to make it necessary (except in non-jury actions in the County of York) to give a new notice of trial whenever a case becomes a *remnant*: see "*Remnant*" in note to *Rule 538.*

For the previous practice, see 11, & L. Jud. Act, 2nd ed., p. 707.

The effect of the *Rule* seems to be, that actions not reached at **Rules** the Assizes may not be entered for trial at the non-jury sittings (and **545, 546.** *vice versa*) without consent or leave: see *Ward v. Jackson*, 12 P. R. 225, and that, if withdrawn, a further fee for entering at another sittings must be paid.

It has been held that where a Judge has no time to try a case, owing to his having to go to another circuit town, though he may make the case a *remand*, he should not direct it to be tried at another place: *Fairbairn v. Household*, 73 L. T. 513. This case seems to have turned on the circumstance that the Judge had not power to change the venue, which power he would have in Ont.; see secs. 45 and 46, of the Act, *supra*, pp. 38, 39.

545. If, when an action is called on for trial, the plaintiff appears, and the defendant does not, the plaintiff may prove his claim as far as the burden of proof lies upon him. **Non-ap-**
Con. Rule 672. **pearance of**
defendant.

Same as Eng. (1883) R. 455.

Before the Jud. Act, 1881, in actions of ejectment, if the defendant did not appear at the trial, the plaintiff was entitled to a verdict without any proof: R. S. O. c. 51, s. 32. Now, ejectment suits are on the same footing in that respect as other suits: see *Guillet v. Clark*, referred to and discussed in 72 L. T. Jour. 398.

In the cases dealt with by this *Rule*, it has been held in England that the plaintiff need not prove service of the notice of trial: *Chorlton v. Dickie*, 13 Ch. D. 160; *Dacres v. Footc*, W. N. 1890, 70; 88 L. T. Jour. 397; *Baird v. E. R., etc., Racecourse*, W. N. 1891, 144. See, however, *The Avenir*, 9 P. D. 84. This is in accordance with the former practice at Law. There had been a previous decision by Fry, J., the other way: *Cockshott v. London General Cab Co.*, 26 W. R. 31; W. N. 1877, 214. See note to next *Rule*. But, in the absence of any decision to the contrary, it would seem proper that, where judgment has been pronounced in the absence of a defendant, the officer with whom the judgment is entered should require due proof of service of notice of trial, or of motion for judgment, to be filed with him before entering the judgment, unless the proof has been given at the trial: see *Glasgow v. Glasgow*, 9 Ont., 511 (n).

The plaintiff's proof of his claim is of course limited to the allegations of his statement of claim: *Barker v. Farloag*, 1891, 2 Ch. 179, and he is entitled to the relief claimed, and such other relief as is consistent therewith: see *Stone v. Smith*, 37 Ch. D. 188; *Kingdon v. Wick*, 37 Ch. D. 141.

If the defendant has a counter-claim and does not appear at the trial, the plaintiff is entitled to have judgment on his claim on proving it, and to have the counter-claim dismissed with costs: *Lundey v. Beokes*, 41 Ch. D. 323.

546. If, when an action is called on for trial, the defendant appears, and the plaintiff does not, the defendant, **Non-ap-**
 if he has no counter-claim, shall be entitled to judgment dis- **pearance**
of plaintiff.

Rule 547. missing the action, but if he has a counter-claim he may prove such claim as far as the burden of proof lies upon him. Con. Rule 613.

Same as the Eng. (1883) R. 456.

In such case the defendant is entitled to judgment dismissing the action with costs; *Facrell v. Wale*, 30 L. T. 95, and cases *infra*, without going into evidence though the *onus* of proof may be on him; *Armauer v. Bate*, 1891, 2 Q. B. 233; 65 L. T. 437; it has been held in England that the defendant need not prove the service of notice of trial on him; *James v. Crow*, 7 Ch. D. 410; and *Re Paterson, Skipper v. Skipper*, 32 W. R. 83; 40 L. T. 553; following *Ex parte Lucas*, 7 Ch. D. 160; not following *Cockle v. Japer*, 7 Ch. D. 56, and see note to Rule 545. But where notice of trial had been given by the plaintiff, and he filed a liquidation petition, under which a trustee had been appointed, and no one appeared at the trial for the plaintiff or trustee, proof of service of notice on the trustee was held to be necessary; *Eldridge v. Burgess*, 7 Ch. D. 411.

On application a judgment dismissing an action may be set aside, and the action restored to the list, upon proper terms; see *Rickes v. Williams*, 24 W. R. 700; *Breed v. Jackson*, 10 Times, 142, and notes to Rules 630 and 778. As to restoring cases struck out on account of the absence of counsel, see *Harey v. Rango*, 12 Jur. 445; and as to costs so occasioned, *Gadsdon v. Hall*, 7 Cl. & Fin. 549.

A judgment dismissing the action under this Rule is equivalent to a judgment on the merits, and is a bar to another action for the same cause; *Armauer v. Bate*, 1891, 2 Q. B. 233.

The practice in England, where the plaintiff does not appear, is not to swear the jury, and any costs which the defendant may incur, by having the jury sworn in such case, the defendant may not be entitled to get taxed; *Lane v. Ecc*, W. N. 1876, 86.

Where a test action came on for trial, and the plaintiff was not prepared to proceed and applied for a postponement, to which order the circumstances, so far as his own interest was concerned, he was not entitled, it was held that the Court could not regard the rights of the plaintiffs in the other actions, and must dismiss the action with costs; *Robinson v. Chadwick*, 7 Ch. D. 878. See note *supra*, p. 612.

Exclusion
of witnesses.

547. The Judge at the trial shall, at the request of either party, order a witness to be excluded from the Court until he is called to give evidence, and also, if the Judge deems it expedient, a party intending to give evidence; or he may require such party to be examined before the other witnesses on his behalf. Any such witness or party who does not conform to such order shall be liable to be punished as to the Judge may seem just, and the Judge may, in his discretion, exclude the testimony of any witness or party who does not conform to such order. Con. Rule 674.

Taken from R. S. O. 1877, c. 50, s. 260, but redrawn so as better to carry out the intention of that section.

See *Sievwright v. Sievwright*, S P. R. 81. and note *supra*, p. 615. Rule 548.

A plaintiff calling defendant as a witness is not entitled as of right to re-examine in the nature of cross-examination. The Judge has a discretion to refuse to allow such cross-examination: *Price v. Manning*, 42 Ch. D. 372; 61 L. T. 537.

A party calling a witness is not thereby debarred from calling another witness to contradict him: *Stanley Piano Co. v. Thomson*, 32 Ont. 341.

In England, parties as well as witnesses may be excluded from Court during the examination of other witnesses: *Outram v. Outram*, W. N. 1877, 75, but a witness will not be excluded during the reading of affidavit evidence: *Penniman v. Hill*, 24 W. R. 245. See also W. N. 1876, 297. In Ontario the exclusion of parties is in the discretion of the Judge under this Rule.

A hearing *in camera* may be allowed in a proper case: *Mellor v. Thompson*, 31 Ch. D. 55, and 25 C. L. J. 597; 82 L. T. Jour. 297; 88 L. T. Jour. 40; and per Lord Fitzgerald, in *Macdougall v. Knight*, 14 App. Cas. 206-7.

548.—(1) At the trial, the addresses to the jury shall be regulated as follows:—

Addresses
of Counsel
at trial.

(a) At the conclusion of the case of the party who begins, if the opposite party states his intention to be not to adduce evidence, and he has not adduced evidence, the party who begins shall have the right to address the jury a second time at the close of his case for the purpose of summing up the evidence, and the opposite party shall have the right to reply.

(b) If the opposite party does not state his intention to be not to adduce evidence, or if he has adduced evidence, he shall have the right to open his case, and (after the conclusion of such opening), to adduce such evidence as he thinks fit, and where all the evidence is concluded, to sum up the evidence, and the party who begins shall have the right to reply.

(2) Where a defendant claims a remedy over against a co-defendant, he shall have the right to address the jury after the co-defendant.

(3) Where a party is represented by counsel, the right conferred by this Rule shall be exercised by his counsel. *New.* See Con. Rule 675.

Compare Eng. (1883) R. 460.

This Rule is a statement in slightly altered form, for clearness' sake, of the effect of the former Con. Rule 675, which was taken from R. S. O. 1877, c. 50, s. 261.

Rule 548.

See also Crim. Code, 1892, sec. 661, and *Reg. v. Gardner*, 1890, 1 Q. B. 170.

The right of defendant's counsel to sum up the evidence, is not a Common Law right, and cannot be insisted on in a Court (e.g., a County Court in England), where it is not customary; see *Dymock v. Watkins*, 10 Q. B. D. 451.

Custom in England has established a distribution of the work on opening, examining of witnesses, and summing up, among the counsel engaged, which is not followed in Ontario; see *Kino v. Rudkin*, 6 C. B. D. 100; *Metzler v. Wood*, 26 W. R. 125.

In Ontario usually the course of proceeding at a trial is as follows. The counsel having the right to begin opens the case by an address to the Court and jury, in which he states the facts of the case and the nature of the issue to be tried, and the evidence by which he proposes to prove his case. He then produces the evidence. If at the conclusion of his case, the opposite party desires to produce evidence, he is entitled to address the Court and jury, stating the nature of his case and the evidence he proposes to produce in support of it; this right, however, is not generally exercised, but without any preliminary address, he adduces his evidence. Evidence in reply may be then adduced by the party who began, and at the conclusion of the evidence, the counsel who did not begin addresses the Court and jury on the whole case, and the counsel who began then replies. If, however, the party who did not begin adduces no evidence, then the counsel who began addresses the Court and jury on the whole case at the conclusion of the evidence, and the opposite party replies. In trials before a jury, therefore, there are usually but three addresses, viz.: the opening speech before any evidence is adduced, and the two addresses at the conclusion of the evidence. Where defendants are represented by different counsel, each defendant is entitled to be heard by his own counsel.

Where a trial takes place before a Judge without a jury, the opening speech is frequently dispensed with, the reading of the pleadings being considered a sufficient statement of the case.

The right to begin is not altered by this Rule. The party upon whom the burthen of proof lies is the party entitled to begin; *Harr. C. L. P. Act*, 2nd ed., 291. Generally the burthen of proof lies on the party who asserts the affirmative on the record, i.e., the affirmative in substance, and not merely in form. If there is a presumption of law in favour of the pleading of either party the *onus probandi* is cast upon his adversary, though he may thereby be called on to prove a negative. Where there are conflicting presumptions, the *onus probandi* lies on the party having in his favour the weaker presumption of the two. But where the case of a party rests on the proof of some particular fact, of the truth or falsehood of which, he must from its very nature be peculiarly cognizant, the *onus* of proving the fact lies on him, even though there be a presumption of law in favour of his pleading; and where the plaintiff sues for damages and it is necessary for the plaintiff to show the amount of damages sustained, he is entitled to begin, even though the affirmative of the issue be on the defendant, but if the affirmative of the issue is on the defendant, and plaintiff's counsel will not undertake to offer proof of substantial damage, the defendant is entitled to begin; *Id.*, 292, 293; *Best on Right to Begin*, 3, 5, 12, 21, 23.

An incorrect ruling as to the right to begin is no ground for a new trial unless the ruling "did clear and manifest wrong"; *Harr. C. L. P. Act*, 2nd ed., 293.

The right to begin is important, as it also involves, as we have seen, in some measure the right to reply. The right of reply, as far as the Attorney-General is concerned when appearing for the Crown, or any counsel appearing for the Crown having written authority from the Attorney-General for that purpose, is unaffected by this Rule, as he has always the right to reply, no matter who may have begun: see *Rule 238*.

As to the reason for giving the right of reply, see per Lord Esher, in *Fletcher v. L. & N. W. Ry. Co.*, 1892, 1 Q. B. 122.

The effect of clause (2) is to confirm the decision in *Stillman v. Toronto*, 20 Ont. 98, as to the time when counsel for a third party defending the action shall address the jury. The object is to give the plaintiff a reply against both the original defendant, and the third party.

As to when a third party, who has obtained liberty to contest the plaintiff's claim, is entitled to be heard on an appeal by the plaintiff from a judgment dismissing the action, see *Ewing v. Toronto*, 18 P. R. 137.

549. Where, through accident or mistake or other cause, a party omits or fails to prove some fact material to his case, the Judge may proceed with the trial, subject to such fact being afterwards proved at such time and subject to such terms and conditions as to costs and otherwise, as the Judge shall direct; and if the case is being tried by a jury, the Judge may direct the jury to find a verdict as if such fact had been proved, and the verdict shall take effect on such fact being afterward proved as directed; and if not so proved, judgment shall be entered for the opposite party unless the Judge otherwise directs. This Rule shall not apply to an action for libel. Con. Rule 676.

Evidence omitted by accident or mistake, how supplied.

No corresponding Eng. R.

This Rule merely enables a party to supply proof of some fact omitted before the trial is concluded, the verdict of the jury, if any, being taken on the assumption that it will be proved before judgment is given.

As to the power of a Judge or a Divisional Court, or the Court of Appeal, to receive new evidence on an appeal, see *Rule 498* and notes.

As to obtaining a new trial on the ground of the discovery of fresh evidence, see notes to *Rule 785*.

As to motions to reverse or vary judgments on discovery of new matter, etc., see *Rule 642* and notes.

The abstaining by a party from proof, under an idea that his adversary had no real intention of putting him to such proof, and being thereby taken by surprise, is no ground for a new trial: *Andrews v. Stuart*, 1 C. L. T. 724. See also *Henth v. Pugh*, 6 Q. B. 13, 357.

Rule 550.

At the close of defendant's case plaintiff was not allowed to call a defendant whom he had expected to be called on his own behalf, the plaintiff's counsel admitting that he had not been misled by any misrepresentation, that this defendant would be called on his own behalf: *Barker v. Furlong*, 1891, 2 Ch. 172.

Where a party is taken by surprise by a point made against him at the hearing, the Judge may, if he thinks right, at any stage of the trial allow him to produce rebutting evidence; and if such permission is refused, the appellate Court will, in a proper case, permit the fresh evidence to be adduced on the appeal: *Bigsby v. Dickinson*, 4 Ch. D. 24, and *Rules* 498, 585.

In a suit for an injunction to restrain a nuisance caused by a chemical manufacturer, the plaintiff's counsel applied at the close of his speech for liberty to adduce evidence to explain (as the plaintiff's witnesses had had no opportunity of doing) certain evidence of the defendant's witnesses as to various vapours arising from a material (asphalt) stated to be used in the manufacture of varnish used by the plaintiff, and to show that the word asphalt had a double meaning; it was held that the evidence should be admitted: *Bigsby v. Dickinson*, *supra*.

* A Judge may, at any period in a case, allow further evidence to be called, for his own satisfaction, by either party, even though it is doubtful whether the party is entitled to put in such evidence at all: *Budd v. Davison*, 29 W. R. 192.

The Court on argument of a motion by the plaintiff for a retrial, allowed the plaintiff to give in evidence the proclamation bearing into force the Ontario Factory Act: *Dean v. Ontario Cotton Mills Co.*, 14 Ont. 119; and see *Burford v. DuMoulin*, 21 Ont. 584; so in *Cooke v. McMillan*, 5 O. W. R. 507, an affidavit proving the dates of the deaths of two persons was allowed to be filed on an appeal, formal proof not having been given at the trial, though the dates were made known to the Judge.

In an action for false arrest and malicious prosecution, arising out of a false information laid by defendant, a certified copy of the information being objected to, leave was given to put in afterwards the original, and an exemplification of the judgment of acquittal: *Hamilton v. Broatch*, 17 Ont. 679.

**Trial of
equitable
issues.**

550. Where equitable issues are raised by the pleadings, they shall be heard and tried, and the damages, if any, incidental thereto, assessed by the Judge without the intervention of a jury; but he may order such issues to be tried or damages assessed by a jury. *Con. Rule 677, amended.*

Taken from R. S. O. 1877, c. 50, s. 257.

Where equitable issues alone are raised, a jury is not of right, but of grace, under this *Rule*; see *Adamson v. Adamson*, 12 P. R. 160. In such cases a jury notice would be irregular, and might be struck out.

Where both legal and equitable issues are raised, it was held under the former *Con. Rule 677* (at a time when separate non-jury sittings were held by the Judges of the Chancery Division), that there was no right to a jury, and a jury notice if given was irregular and might be struck out: *Baldwin v. McGivie*, 15 P. R. 305; *Adamson v. Adamson*, *supra*; but when the Judges of the Chancery Division (under *Rule*

1277 (at 4th January, 1894), held both jury and non-jury sittings, **Rules 551, 552.** it was decided that a jury notice could not be regarded as irregular: *Tooood v. Hindmarsh*, 17 P. R. 446; see also *Bristol, etc., v. Taylor*, 15 P. R. 310; *Fox v. Fox*, 17 P. R. 161. It has now been made clear by **Rule 551** (which amends the former Con. Rule 678) that a jury notice may be given, and, if given, the action must be entered at the jury sittings, when the legal issues will be tried by a jury (unless the Judge otherwise directs under the Jud. Act, sec. 110), but the equitable issues must be tried without a jury, pursuant to **Rule 550**, unless the Judge otherwise directs.

Where there are both legal and equitable issues, it is within the power of the Judge to direct the equitable as well as the legal issues to be tried by the jury: *Rae v. McDonald*, 13 Ont. 364; see also *Wright v. Sun Mutual*, 20 C. P. 236.

It would now seem not to be in the power of a Judge in Chambers, or the Master in Chambers, or other like judicial officer, before trial, to make an order for the trial of equitable issues by a jury. The former Con. Rule 677 provided that the Court or a Judge upon application for the purpose might so order, but the present **Rule** is different, and the alteration seems to have the effect of leaving the mode of trial entirely in the discretion of the Judge at the trial.

As to striking out a jury notice, and the discretion of the Judge at the trial, see further sec. 110 of the Act and notes.

R. S. O. 1877, c. 50, s. 257, was formerly held to apply to an action of ejectment where equitable issues were raised: *Bryan v. Mitchell*, 5 P. R. 302. Under the Jud. Act and **Rules** the rule will of course be the same in an action for recovery of land as in other actions.

551. Where both legal and equitable issues are raised, Where both legal and equitable issues. and notice for a jury has been given, or the action is one to which section 109 of *The Judicature Act, 1895 (a)*, applies, the action or proceeding shall (unless the Court or a Judge otherwise orders, in cases to which said section 109 does not apply) be entered for trial at the proper jury sittings, and (subject to **Rule 550** and sections 111 (b) and 114 (c) of the said Act), such issues shall be tried at the same time, unless the Judge presiding at the trial otherwise directs. Con. Rule 678, *amended*.

Taken from R. S. O. 1877, c. 50, s. 258.

See notes to **Rule 550**.

(a) Now R. S. O. c. 51, s. 102. (b) Now ss. 105 and 106. (c) Now s. 110.

552. Damages in respect of any continuing cause of Assessment of damages action shall be assessed down to the time of the assessment. Con. Rule 680.

Taken from Eng. (1883) R. 482.

See *Fritz v. Hobson*, 14 Ch. D. 542.

Rule 553. A continuing cause of action is a cause of action arising from repetition or continuance of acts or omissions similar to those in respect of which the action is brought; for example, pollution of a stream: *Hole v. Chard Union*, 1894, 1 Ch. 203; 7 R. 84; 70 L. T. 52; see also *Ratté v. Booth*, 10 P. R. 619; 14 Ont. App. 419; 17 A. C. 188; obstruction to light: *Jenks v. Clifden*, 1897, 1 Ch. 601; 76 L. T. 382.

This Rule is merely declaratory of what was the practice in Equity prior to the Judicature Act: *Stalker v. Dunwich*, 15 Ont. 342; *Lacour v. Burns*, 24 Ont. 28; *Hole v. Chard Union*, *supra*.

Where damage is caused to land, causing subsidence, there is a fresh cause of action on every fresh subsidence, and the recovery of damages for one subsidence is no bar to another action for damages occasioned by a subsequent subsidence: *Darby Main Colliery Co. v. Mitchell*, 11 App. Cas. 127; 54 L. T. 82; *Crambie v. Wallend*, 1891, 1 Q. B. 503.

Adjournment of trial.

553. The Judge may postpone or adjourn the trial. Con. Rule 681.

The Eng. (1883) R. 458 (which is like the former Con. Rule 681), is fuller, providing expressly that the adjournment may be granted if "expedient for the interests of justice," and may be on terms. These provisions are implied in the present Rule. Where the hearing of an action was adjourned to allow the plaintiffs to add parties, the plaintiffs were ordered to pay all the costs incurred by the action having been in the paper for hearing, and not merely a fixed sum for costs of the day: *Lydall v. Martinson*, 7 Ch. D. 780; *Smith v. Bond*, 18 P. R. 76, and see 18 P. R. 296.

Where a plaintiff seeks relief in respect of matters not covered by his statement of claim, an amendment is necessary, which, in general, will only be granted on the terms of adjourning the trial to give the defendant time to consider the fresh claim, and the plaintiff paying all costs thrown away, including the costs of the day: *Cobb v. Stringer*, 100 L. T. Jour. 181; *Karunaratne v. Ferdinandus*, 1902, A. C. 405.

The trial of an action to recover damages for personal injuries was ordered to be postponed at the instance of the defendants, on the ground that sufficient time had not elapsed to enable the damages to be properly estimated: *Speers v. Great Western Ry.*, 6 P. R. 170.

Motions to postpone the trial may, of course, be made before the trial, and should be so made, where practicable, in Chambers, before expense in preparing for trial is incurred.

For terms imposed where defendant obtained an order for postponement on payment of costs, and then notified plaintiff's solicitor that defendant would not pay the costs and that the trial must go on, upon which plaintiff applied to postpone, see *Allen v. Mathers*, 13 C. L. J. 79.

The Master in Chambers, on a motion to postpone the trial, has under this Rule, power to impose terms, *e.g.*, giving security for the amount sued for: *Bank of Hamilton v. Stark*, 13 P. R. 13.

The costs of postponing a trial, on account of the absence of a material witness, will be costs in the cause, where diligent efforts have been made to secure attendance: *Brown v. Porter*, 11 P. R. 250;

but where the application is not made promptly, the applicant may **Rule 554.**
be ordered to pay the costs of the application and adjournment: *Mc-*
William v. McDonald, 22 Gr. 362.

As to costs of the day on a postponement of the trial, see *Out-*
water v. Mullett, 13 P. R. 509.

See *Faichurn v. Household, etc.*, 53 L. T. 513, in note to *Rule 544.*

554. The Judge may, at or after the trial, direct that judgment be entered, or may adjourn the case for further consideration. Con. Rule 682.

Judge may
direct entry
of judg-
ment; or
reserve
judgment.

Substantially the same as Eng. (1881) R. 401.

See notes to sec. 67 of the Act, and *Rule 610.*

The Judge at the trial cannot against the will of the plaintiff's counsel, non-suit the plaintiff on the opening address, without hear-
ing the evidence; *Fletcher v. L. & V. W. Ry.*, 1892, 1 Q. B. 122; but
where there is some evidence adduced by the plaintiff, but it is not
of such a nature as would warrant the jury in finding a verdict in his
favour, the Judge may direct a non-suit; *Hiddle v. National F. &*
H. Ins. Co., 1896, A. C. 372; 74 L. T. 291.

Where at the trial it appears, at the close of a plaintiff's case, that
there is no evidence against one of the defendants, it is within the
discretion of the Judge whether he will then direct a verdict in such
defendant's favour, or wait till the whole evidence in the cause closes;
Parrell v. Great Western Railway Company, 34 L. T. 129; see 1 Q.
B. D. 636.

In such a case, the action being for negligence, one of the de-
fendants called witnesses, the effect of whose evidence was to throw
the blame on his co-defendant, and they were cross-examined by the
latter's counsel, a verdict being found against this defendant and in
favour of the other; it was held that these circumstances did not
entitle the unsuccessful defendant to object to the verdict; *Id.*

Where there are several distinct issues to be tried, the Judge may,
without the consent of the parties, accept the verdict of the jury
upon those issues on which they agree, and discharge them upon the
others, leaving the parties, if they think fit, to take down the un-
decided issues to a new trial; and the Court will give judgment on the
decided issues, and has power to send down the undecided issues
to a new trial; *Marsh v. Isaacs*, 45 L. J. C. P. 505.

Where a Judge, after trying a case without a jury, reserves judg-
ment and dies without having given it, the case must go down to
trial again; *Clarke v. Trask*, 1 O. L. R. 207.

Where the jury, in answer to questions, gave answers which were disagree
not consistent with one another, they were sent back for reconsideration of
ation of the inconsistent answers; *Peuchen v. Imp. Bank*, 20 Ont.
325.

This *Rule* repealed in effect R. S. O. 1877, c. 51, s. 34, under which
judgment in ejectment, unless the Judge at the trial otherwise dir-
ected, could not be entered before the 5th day of the term follow-
ing. Under the present *Rules* judgment in actions to recover land,
as in all others (see *Rule 630*), may be entered at once unless the
Judge otherwise directs; see *Rudd v. Frank*, 17 Ont. 558.

Rule 554

After a judgment by consent has been passed and entered, it can not afterwards be varied on the ground of mistake, except for reasons sufficient to set aside an agreement: *Attorney-General v. Tatham*, 7 Ch. D. 388; such a judgment creates an estoppel between the parties: *Re South American Co.*, 1895, 1 Ch. 37; 71 L. T. 594. As to appeals in such cases, see s. 72 of the Act and notes.

Where the Judge does not at the trial direct judgment to be entered, this *Rule* enables him, as formerly under R. S. O. 1877, s. 50, s. 292, to indorse on the record at any time subsequent thereto a direction for judgment, upon which judgment may be entered as though the indorsement had been made at the trial; or he may, after the facts have been found by the jury, or by the Judge at or after the trial, indorse the finding, and leave the parties to move for judgment before him.

Where, at a trial by jury, a motion for a non-suit is made at the close of the plaintiff's case, and again at the close of the whole evidence, and the Judge adopts the course of taking a verdict, and of considering the motion afterwards, he may, if he considers that there was no evidence to go to the jury, dismiss the action: *Macdonald v. Mail Printing Co.*, 32 Ont. 163; 2 O. L. 11, 278; no power to direct judgment to be entered for defendant on the ground that there was no evidence to go to the jury, was assumed in *De v. Felix*, 4 Ex. D. 33; see also *Rocke v. McKerrow*, 24 Q. B. 41, 463; 62 L. T. 556; though there the Judge on consideration could not say that there was no evidence to go to the jury. See also s. 65 of the Act, and *Dunn v. Simpinis*, 48 L. T. 543, and *Hanilton v. Johnson*, 5 Q. B. D. 263; but where the jury have found for the plaintiff and there is evidence to support the finding, it cannot be disregarded, and a judgment contrary to it cannot be entered: *Kelly v. Davidson*, 32 Ont. 8; 27 Ont. App. 487; *Perkins v. Dauphin*, 37 L. T. 535; *Conn. Mutual v. Moore*, 6 App. Cas. 644; *McDonald v. Mail Printing Co.*, *supra*; *Burns v. Clark*, 37 C. L. J. 32, a case the finding is on an immaterial issue, and the Judge is of opinion that, on the undisputed facts, the defendant is entitled to judgment: *Hargrove v. Dominion Council of Templars*, 2 O. L. R. 79, 80.

Where the jury answers questions purely in favour of each party, so that no judgment can be entered for either party, the Judge may decline to enter any judgment, and the case then stands as upon a disagreement of the jury, and may be brought on again for trial as if the findings did not exist: *Rule 781*. If either party thinks that the findings justify a judgment in his favour, his course will be to move for judgment upon them at or after the trial; if the Judge declines to enter any judgment the motion will be dismissed, and an appeal may be had from the decision or order on the motion for judgment: see notes to *Rule 781*.

Under the corresponding Eng. R. judgment was in *Peters v. Perry*, 10 Times, 266, entered for the defendant, where the jury had disagreed. By the express terms of *Rule 780*, if the jury disagree and find no verdict, the Judge at or after the trial may dismiss the action; and see *Bank of B. N. A. v. Eddy*, Patterson, J.A., November, 1883. In that case the action was upon promissory notes; the defence relied on was the insolvency of the defendant, and his discharge under a deed of composition and discharge duly confirmed. In reply the plaintiffs attacked the discharge on the grounds of fraud and fraudulent preference. Objections were taken to the validity of the discharge upon facts which were undisputed, and as to certain other matters of fact which were disputed, evidence was gone into, to show that the discharge had been obtained by fraudulent prefer-

ence of a creditor, and by giving to that creditor a valuable security. **Rule 556.** At the trial the defendant objected that there was no evidence to go to the jury. Without deciding whether there was, or was not evidence, the question was left to the jury by the Judge, and this and all other questions were reserved for discussion on motion for judgment. The jury disagreed and therefore left the question unanswered. Nevertheless, both parties moved for judgment, the plaintiffs contending that on the undisputed facts, objections fatal to the discharge were established; the defendant contending that the discharge was good as against such objections, and that there was no evidence proper to go to the jury on the issue of fraud, or fraudulent preference. Both motions were refused though apparently considered proper in point of form, the Judge being of the opinion that the issue as to the validity of the discharge could not properly have been withdrawn from the jury, and that the undisputed facts were not, without the matters left to the jury for consideration, sufficient to decide the question as to the validity of the discharge.

As to the effect of the withdrawal of a juror, see *Thomas v. Exeter*, etc., *Con.* 18 Q. B. D. 822.

Unanimity of the jury is no longer necessary, the verdict of 10 out of 12 is sufficient; *R. S. O. c. 51, s. 108 (1)*. If any juror is discovered to have an interest in the result, or to be a relative of any of the parties, he may be discharged and the trial may proceed before the remaining 11, of whom the verdict of 10 is sufficient; *Id.*, s. 109.

The judgment of the Court should not go beyond the relief claimed by the pleadings. In *Karunaratne v. Ferdinandus*, 1902, A. C. 405, the Judicial Committee of the Privy Council annuadverted on the Court below having awarded relief not covered by the issues raised on the pleadings. There the question raised on the pleadings was whether a will was good or bad *in toto*, and the judgment found it was good as to personality.

Staying Entry of Judgment, or Execution.—Unless the Judge at the trial stays the entry of the judgment, it may be entered forthwith; see *Rule 630*.

An application to stay the entry of judgment, or the issue of execution, is best made at the trial when all the facts are known to the Judge. If not made till later it may be necessary to show on affidavit circumstances making a stay just; see *Tuck v. Southern Counties, etc., Bank*, 61 L. T. 159.

Where a stay of execution has been refused by the Judge at the trial, an application to the Court must be supported by special circumstances, and allegations that the verdict or judgment was against the weight of evidence, or that there was no evidence to support the verdict or judgment, or that there was misdirection, are not special circumstances; *Monk v. Bartram*, 1891, 1 Q. B. 346.

As to stay of execution and other proceedings in the action in the event of an appeal to the Court of Appeal, or a Divisional Court, see *Rules 827, 829*.

555. Exhibits put in at the trial shall be numbered, and marked according to *Form No. 208*. *Con. Rule 683. Rules of 1 January, 1896, 1468.*

Exhibits at trial, how to be marked

Taken from *Chy. O.* 177.

For *Form No. 208*, see *H. & L. Forms, No. 793*.

Rules
556-559.

List of
exhibits.

556. The officer attending the trial shall, at the conclusion thereof, make a list of the exhibits put in, stating the number thereof and giving a description of each exhibit, and stating by whom the same were respectively put in. The exhibits of each party shall be classified separately in such list. Such list may be according to Form No. 209. *New.*

For Form No. 209, see H. & L. Forms, No. 794.

Exhibits.

557. Where exhibits are put in at the trial they shall remain in Court until judgment is given and during any stay of proceedings, and thereafter shall be delivered out, without order, to the parties respectively, upon the application of either party upon notice to the other side, unless a motion is made to the Divisional Court or an appeal is taken to the Court of Appeal, in which case the exhibits shall, unless otherwise ordered, be retained until such motion or appeal is disposed of. Rules of 1 Jan., 1896, 1470.

Chy. O. 179 modified.

A regulation of the Judges passed on 17th December, 1904, provides as follows:

"6. When the Judge at a trial reserves judgment in any case, elsewhere than at Toronto, the Clerk of the Court shall forthwith forward the record and exhibits to the Central Office.

"7. All local officers of the Court when sending papers or exhibits to the Central Office shall indorse on the wrapper enclosing such papers or exhibits, the short style of cause, the title of the officer sending them, and the purpose for which they are sent.—*e.g.*, '*James v. Smith*. From Local Registrar at Brantford, for Appeal to Divisional Court' or 'For Mr. Justice Magee'—*or as may be.*"

By whom
entries of
findings to
be made.

558. The officer attending the trial shall enter all such findings of fact as the Judge may at the trial direct to be entered, and the directions, if any, of the Judge as to judgment, in a book to be kept for the purpose, and the findings shall also be indorsed on the Record. Con. Rule 687.

See Eng. (1883) R. 465.

The practice under the English Rule is substantially the same as that which this *Rule* provides, except that the certificate is not required to be indorsed on the copy of the pleadings.

As to the effect of a judgment pronounced but not signed, see note to *Rule* 629.

Certificate
of Judge
or officer.

559. The indorsement or a certificate of the said officer according to Form 207, shall be sufficient authority to the proper officer to sign judgment accordingly. Con. Rule 688.

The Eng. (1883) R. 465, is the same in substance.

For Form 207, see H. & L. Forms No. 795.

560. Except in cases provided for by clause (4) of Rule 40 after judgment has been delivered, or verdict entered, the record and exhibits and the list thereof shall be retained by, or forwarded to, the officer whose duty it is to settle the judgment, and the parties shall be at liberty to inspect the same: after judgment has been settled the record and exhibits and list thereof shall be retained by, or forwarded to, the officer whose duty it is to enter the judgment, and shall be retained by him, subject, however, to the provisions of Rules 337 and 557. Rules 1 Jan., 1896, 1471.

Rules
560-562.

Record,
etc., to be
retained
in Court.

In the County of York records and exhibits are forwarded by the Clerk of Assize to the Central Office, from which when required before the Registrar settling the judgment, they can be obtained on his requisition: see Rules 40 (4), 338. The judgment, when settled, is entered in the office where the action was commenced: Rule 628.

In other counties, where judgment is given at the trial, the record and exhibits are retained by the officer who attends as Registrar at the trial, if he is the officer in whose office the proceedings were commenced, as in that case he is the proper officer to enter judgment: Rule 628; or when the judgment is settled by him (Rule 628), they are forwarded by him to the officer in whose office the proceedings were commenced, and where the judgment is to be entered: Rule 628.

Other
counties.

Where judgment is reserved at the trial, the record and exhibits must be forwarded to the Central Office: see Regulation of 17th December, 1904, in note to Rule 557; and after judgment is given should be transmitted to the officer who is to settle the judgment.

When the record and exhibits are required on a motion before the Divisional Court, they may be forwarded to the Central Office, under Rule 337.

2. TRIAL OF HIGH COURT CASES IN COUNTY COURT AND Vice Versa.

561. In any of the cases in sections 90 and 91 of *The Judicature Act, 1895*, (a) the notice of trial or assessment of damages shall state that the cause will be tried, or the damages assessed at the Sittings of the High Court or County Court, according to the fact. Con. Rule 690.

Notice of
trial, etc.,
in such
cases.

Taken from R. S. O. 1877, c. 49, s. 33.

(a) Now secs. 92 and 93 of the Jud. Act, R. S. O. 1897, c. 51.

562. A motion to be made, in respect to the trial, judgment, verdict or assessment of damages in a High Court case tried or assessed at the Sittings of any County Court, shall be made in the High Court or the Court of Appeal, according to the alternative right given in other cases. Con. Rule 693.

Motions
against
verdict in
High Court
cases tried
in County
Courts.

Taken from R. S. O. 1877, c. 49, s. 36.

Rules

563-565.

Motion
against
verdict, etc.,
in County
Court cases
tried at
High Court
Sittings.

563. A motion in respect to the trial, judgment, verdict or assessment of damages in any County Court case tried at a Sittings of the High Court, shall unless otherwise ordered, be made at the sittings of the Divisional Court at which a motion would be required to be made if the action were in a High Court, and according to the practice of the High Court; and any order made in that Court shall be final and shall not be subject to appeal. Con. Rule 694. Rules of 1 Jan., 1896, 1473.

Taken from R. S. O. 1877, c. 49, s. 37.

See *Edmunds v. Hoey*, 35 U. C. Q. B. 495.

In a County Court case directed to be tried in the High Court, the case is only in the High Court for trial. For other purposes, it remains in the County Court, so that a motion to set aside notice of trial must be made in the County Court; *Clark v. Clifford*, 7 P. D. 329. So also motions to postpone the trial are to be made in the County Court; this was expressly provided by former Rule 694, now omitted as unnecessary.

Powers of
Judge as to
County
Court cases
tried before
him.

564. In any action in a County Court entered for trial at any Sittings of the High Court, the Judge presiding at the Sittings shall have the same powers as to amendment of the pleadings and proceedings, putting off the trial, reference, making the cause a *remanet*, and otherwise dealing with the cause and proceedings therein, as if the action had been commenced in the High Court. Con. Rule 695.

Taken from R. S. O. 1877, c. 49, s. 38.

The Judge of a County Court may allow amendments in High Court cases coming on before him for trial; *King v. Glassford*, 11 C. P. 490; *semble*, including an amendment setting up a claim for unliquidated damages; *Spencer v. Forster*, 1905, 1 K. B. 434.

When Judge
marks re-
cord as a
remanet,
etc., it may
be tried at
subsequent
sitting or
Assizes

565. Wherever the Judge indorses on the record in any such action the word "*Remanet*," and adds any words to the effect following: "*And the within cause may be entered and tried at any County Court, or sittings of the High Court.*" such cause may without payment of any further fee for entering the case be entered at any subsequent Sittings of the County Court, or Sittings of the High Court, for which notice of trial may be given, and the case may be tried and disposed of in the same way as any other case entered at such Sittings. Con. Rule 696.

Taken from R. S. O. 1877, c. 49, s. 39.

566. On the application of any party, the County Court Clerk shall at the cost of the party, forward to the Central Office, a certified copy of the evidence, and the record and exhibits. Con. Rule 697. Rules 1 Jan., 1896, 1474.

Rules
566-568.

Certified
copy of
notes of
cases.

3. VENATIONOUS DEFENCES IN ACTIONS TO RECOVER LAND.

567. It being desirable, in actions to recover land brought against persons who are merely intruders, not to prevent plaintiffs from recovering land to which they have just claim on account of some want of technical form in their title, or some imperfection not affecting the merits of the case, and of which mere strangers to the title, having no claim or colour of legal claim to the possession, should not be permitted to take advantage; the plaintiff or his solicitor may serve a notice upon the defendant or his solicitor in words or to the effect following:

Vexatious
defence
without
merits.

"Take notice that I claim the premises for which this action is brought as the *bona fide* purchaser thereof, from A. B. (or as the case may be), and that you will be required to show upon the trial of this cause what legal right you have to the possession of the premises."

(Con. Rule 698.

Taken from R. S. O. 1877, c. 51, s. 26.

See *Doc d. Lyons v. Crawford*, 6 O. S. 344; *Armstrong v. Little*, 20 U. C. Q. B. 425; *Davis v. Van Norman*, 30 U. C. Q. B. 437; *Thompson v. Hall*, 31 U. C. Q. B. 367; *Booth v. Girdwood*, 32 U. C. Q. B. 23; *Thompson v. Bennett*, 22 C. P. 393; *Barnier v. Barnier*, 24 O. S. 280.

568. If, upon the trial, the evidence of title given by the plaintiff satisfies the Court (and the jury, if the case is tried by jury) that he is entitled in justice to be regarded as the proprietor of the land or is entitled to the immediate possession thereof for any term of years, but that he cannot show a perfect title by reason of some want of form in, or to the defective registration of some instrument produced, or from any cause not within the power of the plaintiff to remedy by using due diligence, the Court, or the jury under the direction of the Court, may find a verdict for the plaintiff, unless the defendant or his counsel upon being required by the other party so to do, give such evidence of title as shows that he is the person entitled, or

Formal
defects in
plaintiff's
title.

Rules
569-571.

that he *bonâ fide* claims to be the person entitled to the land, by reason of the defect in the title of the plaintiff, or that he holds, or *bonâ fide* claims to hold, under the person so entitled. Con. Rule 699.

Taken from R. S. O. 1877, c. 51, s. 27.

Verdict to
be indorsed
as rendered
under Rules

569. Where a verdict or judgment is rendered or given under the authority of Rule 568, it shall be indorsed as rendered or given under Rules 568 and 569, and it shall be stated in the judgment to have been so given, and in any action thereafter brought for *mesne* profits, such judgment shall not be evidence to entitle the plaintiff to recover. Con. Rule 700.

Taken from R. S. O. 1877, c. 51, s. 28.

4. INSPECTION OF PROPERTY AND VIEWS BY JURIES.

Judge may
inspect.

570. The Judge, by whom any cause or matter is tried with or without a jury, or before whom any cause or matter is brought by way of appeal, may inspect any property or thing concerning which any question arises therein. Con. Rule 701.

Where a Judge takes a view of premises or property in dispute, *semble*, he should do so in presence of the parties, so as to avoid any mistake as to the property viewed being that in dispute.

Inspection
of real or
personal
property
by jury,
parties or
witnesses.

571. A party in a cause or matter may apply to the Court or a Judge for an order for the inspection by the jury or by himself or by his witnesses, of any real or personal property, the inspection of which may be material to the proper determination of the question in dispute, and the Court or a Judge may make such order upon such terms as to costs and otherwise, as the Court or Judge may think fit. Con. Rule 702. Rules of 1 Jan., 1896, 1475.

Taken from R. S. O. 1877, c. 50, s. 168. See Eng. R. (1883) 671.

Rule 571 is confined to cases in which the property of which inspection is sought is in the possession, custody or control of the party against whom the order is desired: *Hills v. Union Loan, etc., Co.*, 10 P. R. 1.

This *Rule* is intended apparently to apply to inspection for the purposes of a trial; further provision is made by *Rule 1096* for obtaining inspection in other cases.

A Judge on the trial of an action of deceit can take a view of the property, or matter, in litigation, in lieu of taking the evidence of witnesses, *e.g.*, on a question of colourable imitation: *London*

General Omnibus Co. v. Lavell, 1901, 1 Ch. 135; 83 L. T. 453; but **Rule 572**. In an action to restrain the passing off of goods of the defendant as those of the plaintiff, it is said that the Judge looking at the exhibits before him, and also paying due attention to the evidence adduced, must not surrender his own independent judgment to any witness: per Lord Macnaghten, *Payton v. Saelling*, 1901, A. C. 311; and see *Civil Service v. Dun*, 1879, 13 Ch. D. 512; *North Cheshire & M. B. Co. v. Manchester B. Co.*, 1899, A. C. 83; *Hecla F. Co. v. Walker*, 14 App. Cas. 555; *Houldsworth v. McCrea*, 1867, L. R. 2 H. L. 380; *Bonnie v. Swan*, 1903, 1 Ch. 211. *Sed quare*, if there is any distinction between the two classes of action, and whether the function of the Judge is not the same in both, viz., to determine whether, in view of a comparison, there is any evidence.

Liberty was given under the similar Irish Rule to inspect a ship lying in harbour on which it was alleged that certain timber, part of the subject matter of the action, had been placed by defendant for removal: *Morris v. Howell*, 22 L. R. Ir. 77.

Under Eng. (1883) R. 654, property has been ordered to be sent out of the jurisdiction for inspection by witnesses who are to be examined by commission: see notes to *Rule 499, supra*, p. 721.

There is no power to order the Sheriff of one county to bring a jury of that county to view lands in question in another county: *Stoke v. Robinson*, 6 Times, 31.

572. Upon any application for a view by a jury, there shall be an affidavit stating the place at which the view is to be made, and the distance thereof from the Sheriff's office. Unless the Court or Judge otherwise orders, the party obtaining the order for the view shall deposit with the Sheriff the sum of \$25 in case of a common jury, and \$34 in case of a special jury if such distance does not exceed 5 miles; and \$31 in case of a common jury, and \$43 in case of a special jury, if the distance be above 5 miles; and if such sum shall be more than sufficient to pay the expenses of the view, the surplus shall forthwith be returned to the party who obtained the view, or his solicitor, and if such sum shall not be sufficient to pay such expenses, the deficiency shall forthwith be paid by such party or his solicitor to the Sheriff. Con. Rule 703.

Party requiring view to deposit with Sheriff sum to pay expenses.

Taken from Rule T. T. 1856, 39.

Rules
573, 574.

CHAPTER X.

JUDGMENTS AND ORDERS—MOTIONS FOR JUDGMENT, ETC.

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|--|--|
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1. DEFAULT OF APPEARANCE.

(i) *Generally*.

Effect of not appearing

573. Except where otherwise provided by these Rules or where otherwise ordered by the Court or a Judge, a defendant who fails to appear shall not be entitled to notice of any subsequent proceedings in the action. *New.*

A similar provision is made in the case of a defendant not delivering a statement of defence, and against whom the pleadings are noted as closed: see *Rule 584*.

As to notice of assessment of damages, see *Rule 537*.

As to re-service of amended writ on a defendant who has not appeared, see notes p. 526.

Where a reference is directed, notice is to be given of the first proceeding before the Master to every party affected, unless expressly dispensed with by the Master: see *Rule 658*.

Proceedings in default of appearance.

574. Where a defendant fails to appear, the plaintiff before taking proceedings upon default of appearance shall file an affidavit of service of the writ or the notice in lieu thereof. [for the undertaking of the defendant's solicitor

accepting service and agreeing to enter an appearance, **Rule 575.** with an affidavit verifying the undertaking filed], as the case may be. **Con. Rule 704.**

This *Rule* corresponds with the Eng. (1883) R. 102, except that the clause in brackets is not in the latter. *Rule 145* provides for a solicitor's acceptance of service, and undertaking to appear. *Rule 645* prescribes the procedure in case of default of appearance to a writ indorsed under *Rule 140*, with a claim for an account; and see *Rule 575*, as to specially indorsed writs.

A defendant who had not appeared is nevertheless entitled to notice of an application to appoint a receiver by way of equitable execution: *Tilling v. Blythe*, 1899, 1 Q. B. 557; 80 L. T. 44; and so also of an application to discontinue against a co-defendant sued as a joint tortfeasor: *Jennings v. Scripps* (Div'l Court, 14th Nov., 1904). But notice of filing a report need not be served on a defendant who has not appeared, or taken any part in the reference: *Toronto General Trusts Corp. v. Craig*, 2 O. L. R. 238.

The substitution of notice in lieu of service of the writ, is authorized in cases where the Court sees fit to allow that mode of service, whenever the plaintiff is unable to effect prompt personal service: *Rule 146*.

Notice of the writ, and not the writ itself, is required to be served where the defendant is served out of the jurisdiction and is not a British subject: see *Rule 165*.

Where a notice was served in lieu of a writ, an affidavit stating that defendant had been served with "a notice in writing, a true copy of which is hereto annexed," was held sufficient: *Bustros v. Bustros*, 14 Ch. D. 849. In cases, however, to which *Rule 150* applies, the affidavit of service should state the day on which the indorsement of the time of service was made.

The writ should be annexed to the affidavit of service in accordance with the former practice: *The Eppos*, 32 W. R. 154; 49 L. T. 604.

This *Rule* must be complied with, and an affidavit of service of the writ filed, before a statement of claim can be served on default of appearance: *Appleby v. Turner*, 19 P. R. 145, 175, and see *Lovell v. Taylor*, 5 O. W. R. 525.

As this *Rule* requires an affidavit it has been held that the Court will not accept a certificate, though British consuls; in the country to which the defendant belonged, had instructions not to administer oaths to subjects of that country: *Ford v. Miescke*, 16 Q. B. D. 57.

575. Where the writ is specially indorsed for a debt or liquidated demand in money under *Rule 138*, and any defendant fails to appear, the plaintiff, notwithstanding that the writ may be indorsed with any other claim, may, as against such defendant, sign final judgment for any sum not exceeding the amount for which the writ is so specially indorsed, together with interest as claimed to the date of the judgment, and for his costs, without prejudice to his right to proceed with the action against any

Where writ is specially indorsed for a debt or liquidated demand.

Rule 575. other defendants, and as to any other claims indorsed. See Con. Rules 705, 706, 711.

See Eng. (1883) R. 103, which, however, does not admit of a judgment being signed where there is any other claim indorsed on the writ besides the special indorsement.

Under the *Rules*, claims properly the subject of a special indorsement may be combined with others which are not, and, in default of appearance, final judgment may be signed for the former, and the action may be proceeded with as to the other claims.

The present *Rules* therefore override a number of decisions settling the former practice: see *Hollender v. Foulkes*, 16 P. R. 175; *Salmes v. Stafford*, *ib.*, 264; *McVicar v. McLaughlin*, *ib.*, 450, and cases there referred to. The Rule was applied in *Huyck v. Wilson*, 18 P. R. 44.

"Specially Indorsed."—See notes to *Rules* 138 and 603.

Where judgment is signed purporting to be under this *Rule*, but the writ is not specially indorsed, the judgment is a nullity: *Hoffman v. Crecer*, 18 P. R. 473, 19 P. R. 15; *Appleby v. Turner*, 19 P. R. 145, 175; *Star Life v. Southgate*, 18 P. R. 151.

Where
several
defendants.

Where there are several defendants jointly liable, some of whom appear, and some of whom do not, judgment may be signed under this *Rule* against the latter without prejudice to the plaintiff's claim against the others: and see *Montgomery v. Ferris*, 20 L. R. Ir. 282; *Rice v. Dillon*, 28 L. R. Ir. 376; and *Dueber Watch Case Mfg. Co. v. Taggart*, *infra*, p. 781. But if the plaintiff sues and recovers judgment against one of two joint debtors, without making up other a party, the latter is discharged: *Hammond v. Schofield*, 1891, 1 Q. B. 453; *Toronto Dental Mfg. Co. v. McLaren*, 14 P. R. 89; such a judgment will not be vacated on the plaintiff's application in order to join the co-debtor, even with the defendant's consent: *Hammond v. Schofield*, *supra*, and see *Hoffman v. Crecer*, 18 P. R. 473; 19 P. R. 15.

See also note to *Rule* 228, p. 424, and to *Rule* 605, p. 807.

If a plaintiff alleges a joint liability against two defendants and signs judgment against one, and at the trial only proves a sole liability against the other defendant, he cannot recover against him: so also where defendants are sued as alternatively liable, if the plaintiff enters final judgment against one of them, he cannot thereafter proceed against the other: *Morrell v. Westmoreland*, 1903, 1 K. B. 64; 1904, A. C. 11; 89 L. T. 702 (a case of husband and wife); *Cross v. McHeus*, 117 L. T. Jour. 220 (a case of principal and agent).

But where a judgment entered against a person erroneously assumed to be liable, was void under a statute, and was set aside by consent, it was held to be no bar to a subsequent action against other persons liable for the debt: *Keating v. Graham*, 26 Ont. 361.

In an action on a promissory note, the plaintiff may sign judgment on default of appearance to a specially indorsed writ, without production of the note: *Oliver v. Fryer*, 7 P. R. 325.

Where an action is commenced in a local office, a judgment by default should be entered in the local office: *Chamberlain v. Armstrong*, 18 C. L. J. 99, and see *Rules* 15, and 628.

Where the copy of writ served was not an accurate copy, the date being 1880 instead of 1882, this was held not to be a fatal error, and a motion to set aside a judgment signed was refused: *Wesson v. Stalker*, 47 L. T. 444.

in addition

Judgment can only be signed for the amount due at the time the writ was issued, not for claims which had not then matured: *Park v. Patton*, 3 C. L. T. 264; but see *Hughes v. Justin*, *infra*.

In an action for foreclosure, and on the covenant for payment, judgment was signed on a claim on the covenant under this Rule: *Bisect v. Jones*, 32 Ch. D. 635; but the practice in Ontario is not to sign a separate judgment on the covenant, but to sign one judgment which awards relief on the covenant, and also provides for redemption or sale, or foreclosure.

Judgment may be signed by default of appearance against a married woman, when the writ is specially indorsed, and, in the case of contracts entered into before 13th April, 1897, the special indorsement should allege that she had, when she made the contract, and still has, separate estate: *Nesbitt v. Armstrong*, 14 P. R. 366; and see *Felley v. Griffith*, 36 W. R. 96; 37 L. T. 873; but that allegation is not necessary in the case of contracts made after 13th April, 1897; see R. S. O. c. 163, ss. 3 and 4, and notes to Rule 199, p. 336.

Forms of judgment will be found in the App. Nos. 139 and 140; H. & L. Forms, Nos. 802, 803.

Where the judgment is against a married woman it must follow the usual form in such cases, see notes to Rule 199, *supra*, p. 352.

Execution.—Execution may in all cases be issued forthwith, unless otherwise ordered: see Rule 843. This was not the case under original J. A. Rule 72, and R. S. O. 1877, c. 50, s. 64. *Cornish v. Janning*, 18 C. L. J. 143; 2 C. L. T. 105, and *Macdonald v. Crombie*, 2 Ont. 241, decided under the former practice, are no longer applicable.

Setting aside Judgment by Default.—See also Rule 633.

Under R. S. O. 1877, c. 50, s. 64, it was provided that an application to set aside a judgment must be based upon affidavits "accounting for the non-appearance, and disclosing a defence upon the merits." Under the present Rules the matter is left at large to the discretion of the Court or Judge; but, no doubt, in practice, the non-appearance will have to be explained, and a defence shown. The terms commonly imposed have been the payment by the defendant of the costs of the application, pleading without delay, and sometimes bringing money into Court; see *Harrison C. L. P. Act* (R. S. O. 1877, c. 50, s. 64; Arch. Pr., 13th ed., 790, and 800; and *Smith v. Dobbin*, 3 Ex. D. 349. In *Hillyard v. Swan*, 12 P. R. 223, the judgment and execution were directed to stand as security. See also *Ontario Bank v. Burk*, 10 P. R. 561, 565.

Setting
aside
judgment.

Where the defendant paid the claim sued on, after the writ issued, a judgment subsequently entered for non-appearance, for the amount of the claim and costs, was set aside as irregular: *Hughes v. Justin*, 1894, 1 Q. B. 667; 70 L. T. 365.

Substituted service, when regularly effected, is, for all purposes, equivalent to personal service, and, even though it has in reality never come to the knowledge of the defendant, he will not be let in to defend as of right: *Watt v. Barnett*, 3 Q. B. D. 183, 303. Lapse of time is no bar to an application to set aside a judgment obtained by default, where no irreparable mischief will be done to the plaintiff, and the injury caused by the delay may be compensated for by payment of costs: *Atwood v. Chichester*, 3 Q. B. D. 722; see also *Barrie v. Ballenden*, W. N. 1882, 12; 46 L. T. 797, and notes to Rules 1224, and 778; but, especially after delay in moving, a judgment regularly signed, will only be set aside on proper terms; see *McVicar v. McLaughlin*, 16 P. R. 454.

Rule 575.

Where an appearance was duly filed, but the appearance was mislaid by the officer and not entered in his book, and in consequence a judgment for default was signed, the judgment was set aside as irregular: *Moore v. Simmons*, 1 C. L. J. 183; and see *Bank of Montreal v. Harrison*, 4 P. R. 331.

The application will not be granted to give the defendant the advantage of a technical defence: *Forbes v. Middleton*, 2 Str. 1242.

The following have been considered meritorious defences. The Statute of Limitations: *Maddocks v. Holmes*, 1 B. & P. 228; *McIntyre v. The Canada Co.*, 18 Gr. 307; *Scaton v. Fenwick*, 7 P. R. 146; Usury: *Trust & Loan Company of Canada v. Boulton*, 18 Gr. 234; Infancy: *Delafield v. Tanner*, 5 Taunt. 856; *Cavallier v. Michael*, 17 L. T. 290; that the claim is not one that can be specially indorsed: *Rogers v. Hunt*, 10 Ex. 474; want of jurisdiction: *Hamplyn v. White*, 6 P. R. 129. As to want of stamps: see *Caughill v. Clark*, 9 P. R. 471.

A judgment signed for default was set aside after the lapse of two years, on the ground that the covenant sued on, which was contained in a mortgage settled by an officer of the Court, was inserted *per incuriam*: *Brown v. Grady*, 31 Ont. 73.

Where writ for a debt or liquidated demand but not specially indorsed.

576. Where the writ is not specially indorsed, but as indorsed includes a claim for a debt or liquidated demand, and any defendant fails to appear, a statement of claim including such claim need not be delivered to such defendant, but the plaintiff may file an affidavit of service of the writ or notice in lieu thereof, and file and serve a statement of the particulars of the claim stated in the indorsement upon the writ, and may, after the expiration of 8 days, sign final judgment against such defendant for the amount, not exceeding the amount indorsed upon the writ, and for his costs, without prejudice to his right to proceed with the action against any other defendants, and as to any other claims indorsed. See Con. Rule 707.

The former Rule 707 was the same as Eng. Rule, 1875, O. 13, r. 5, but this Rule is modified so as to make it conform to the other Rules, which enable other claims than those specified in Rule 138 to be indorsed on a specially indorsed writ. This Rule is evidently only intended to enable the plaintiff to obtain judgment, in the manner provided for such part of his claim as might under Rule 138 be specially indorsed.

Where, however, the indorsement on the writ includes claims not the subject of special indorsement under Rule 138, a statement of claim as to such claims must be delivered.

A claim for a specified sum for work, labour and attendance as a medical man, has been held to be a liquidated demand and capable of being made the subject of a special indorsement, or, though the writ be not specially indorsed, to entitle the plaintiff to obtain final judgment under the present Rule: *Kilgurriff v. McFarlane*, 8 L. R. Ir. 354.

Forms of judgment will be found in the App. Nos. 139, 140; H. & Rules L. Forms, Nos. 802, 803. As to married women defendants, see note 577, 578. (c) Rule 575, p. 771.

It is provided by Rule 1134 that the plaintiff is not to be entitled to the costs of the statement of particulars of his claim, unless the taxing officer is satisfied that there was good reason for not specially indorsing the writ, so as to render unnecessary the filing and serving such statement.

577. Where the writ is specially indorsed with a claim for the recovery of chattels under Rule 138, and any defendant fails to appear, the plaintiff, notwithstanding that the writ may be indorsed with any other claim, may, as against such defendant, sign final judgment for the recovery of the chattels and his costs, without prejudice to his right to proceed with the action against any other defendant and as to any other claims indorsed. *New.*

Where specially indorsed for recovery of chattels.

This is a new provision introduced in consequence of the addition of claims for the recovery of chattels to those which may now be specially indorsed; see Rule 138 (g).

It may be a question how far a plaintiff would be entitled to issue execution for the recovery of chattels in the joint possession of several defendants, some of whom appear, and some of whom do not, until he has recovered judgment against all. See Rules 584, 3.

578. Where the writ is not specially indorsed but as indorsed includes a claim for the detention of goods and pecuniary damages, or either of them, and any defendant fails to appear, a statement of claim including any such claim, need not be delivered to such defendant, but interlocutory judgment may be signed against such defendant, without prejudice to the right of the plaintiff to proceed against any other defendants, and as to any other claims indorsed; and the value of the goods and the damages, or either of them, as the case may be, in respect of the causes of action stated in the indorsement on the writ, may, unless otherwise ordered by the Court or a Judge, be assessed, as against such defendant, at a sittings of the High Court, and either before or at the same time as the trial of the action, or issue therein, against the other defendants, if any, or at the County Court of the county in which the action is brought. See Con. Rules 708, 709.

Where claim is not specially indorsed.

This Rule in effect embodies the provisions of Eng. (1883) Rs. 105, and 106, except that under the Eng. Rules interlocutory judgment cannot be signed for the value of the goods or damages, where the writ is indorsed for other claims, such as for example an injunction:

Rule 579.

see *Part v. Griffiths*, 28 Sol. Jour. 339; the same was the case under former Con. Rule 708; *McCallum v. McCallum*, 11 P. R. 16.

Under the present *Rule* the plaintiff may sign interlocutory judgment, and proceed with the action as to the claim for an injunction and to assess damages.

Interlocutory judgment may be entered immediately upon default of appearance; and the indorsement on the writ will govern the inquiry as to damages without any pleading.

The old learning on the subject of "conversion" need not be reported into the system introduced by *The Judicature Act*, which provides for redress in case the plaintiff's goods are wrongfully detained, or in case he is wrongfully deprived of them; *Stacey v. Block*, 11 Ont. 103.

A form of interlocutory judgment will be found in the Appendix Form No. 145, (H. & L. Forms, No. 810), and of judgment in default of appearance after assessment of damages, No. 147 (H. & L. Forms, No. 811).

A claim indorsed "for damages for slander" is for pecuniary damages within this *Rule*, there being nothing to show that the action is brought under section 5 of the Act respecting Libel and Slander, R. S. O. 1897, c. 68; *Stanley v. Litt*, 19 P. R. 161; but whether the *Rule* would apply to an action for libel or slander brought under that section, *quære*; *Id.*

It would seem that, under this *Rule*, where the action is brought for the specific recovery of chattels, the plaintiff may, upon default of appearance, have judgment for the delivery of the chattels, and may then enforce that judgment under *Rule* 572; *Leary v. Church*, 10 W. N. 1875, 249; *per* Quain, J., at Chambers.

Where a final, instead of an interlocutory, judgment was set aside, and was therefore set aside, it was held under the former practice, that the plaintiff was not forthwith entitled to take out and file the order, and sign an interlocutory judgment. The final judgment was held to be not set aside without an entry on the roll, and the defendant without laches could not be deprived of the carriage of the order; *Caranagh v. Hastings Mutual*, 7 P. R. 111.

Where the plaintiff claims equitable relief, e.g., specific performance of a contract, an interlocutory judgment cannot be signed in default of appearance; *Stuart v. McVicar*, 18 P. R. 250. In such cases, in default of appearance a statement of claim must be filed, and in default of defence a motion for judgment should be made; *Id.*

Mode of Assessment of Damages.—See the last clause of the *Rule*, and *Rule* 579.

An inquiry was directed before a Master on affidavit evidence in *Maddonald v. Antelme*, W. N. 1884, 72; and it would seem that, under *Rule* 579, the Court or a Judge might so order.

Assessment
of damages.

579. The Court or a Judge may order that instead of a trial or assessment the value of the goods and amount of damages, or either of them, shall be ascertained in any way which the Court or Judge may direct. Con. Rule 710.

See note to *Rule* 578, "Mode of Assessment of Damages."

580. Notwithstanding anything in the Rules contained, the provisions of the Act of the Parliament of Great Britain passed in the Session held in the eighth and ninth year of the reign of King William the Third, entitled *An Act for the better preventing frivolous and vexatious suits*, as to the assignment or suggestion of breaches, and as to judgment, shall continue in force in Ontario. Con. Rule 712.

Provisions
of the
Imperial
Act 9 & 10
W. III. c.
11, to
remain
in force.

Taken from R. S. O. 1877, c. 50, s. 151

The 8th section of 8 & 9 Wm. III. c. 11 (now R. S. O. 1897, c. 324, s. 4), provides that in actions in any Court upon a bond for non-performance of any covenants or agreement in any indenture, deed or writing, the plaintiff may assign as many breaches as he thinks fit, and damages may be assessed upon any of such breaches that may be proved to have been broken, and judgment may be entered and execution issued; that execution may be stayed upon payment of the amounts; that the judgment shall stand as security to the plaintiff and his personal representatives for further breaches; that the plaintiff, upon the happening of further breaches, may apply for leave to issue execution on the judgment against the defendant, his heirs, executors, etc., and may summon him or them to shew cause why execution should not be awarded upon the judgment, upon which the Court shall make such order as may be just, and so *toties quoties*.

This statute was held to be confined to actions of debt, as in covenant and assumpsit there was no penalty that could stand as continuing security for future breaches: 1 Williams' Saunders, 58, b. c. & d; *Lance v. Peers*, 4 Burr. 2225. A bond conditioned for payment of a sum certain is not within the statute: *Murray v. Lord Stair*, 2 B. & C. 40; nor is a bail bond: *Moody v. Pheasant*, 2 B. & P. 446; *McAumey v. Reilly*, 13 U. C. Q. B. 197; nor a bond conditioned not to trespass: *Strickland v. Williams*, 1890, 1 Q. B. 382; 80 L. T. 4, the penalty in such a case being liquidated damages. A replevin bond was not formerly: *Bletcher v. Burn*, 24 U. C. Q. B. 259, but now is, (*Rule 1073*) within the statute; and an appeal bond is within the statute: *Appleby v. Turner*, 19 P. R. 145, 175.

In all respects, other than the matters mentioned in this *Rule*, the practice and proceedings in an action on a bond which is subject to 8 & 9 Wm. III. c. 11, are the same as in an ordinary action: *Star Life, etc. v. Southgate*, 18 P. R. 151; *Appleby v. Turner*, 19 P. R. 145, 175. Where the action is brought on a bond, which is within the statute of 8 & 9 Wm. III. c. 11, the indorsement of the writ should claim the full amount of the penalty, and allege the breach or breaches, and claim execution for the amount due in respect thereof. In the event of default of appearance a statement of claim appears to be necessary, which should set out the condition and specify the breaches, and in default of defence, judgment, it would seem, must be obtained under *Rule 593* (not under *Rule 589*): *Star Life v. Southgate, supra*, and will be for the full amount of the penalty, but should conclude with an allegation of the condition, and of the alleged breach, and a direction to assess the damages in respect thereof in such way as may be thought proper under *Rules 578, 579*; *Id*. When the action comes on for assessment of damages, the damages in respect of the breaches for which execution is to be issued will be assessed:

Rules
581-583.

1b. Upon the damages being assessed, the judgment should be entered reciting the assessment and directing execution to issue for the amount thereof and costs.

For forms of judgment, see H. & L. Forms, Nos. 844-847.

(ii) *Dower.*

Action for
dower.
Judgment
of seisin.
Execution.
Costs.

581.—(1) Where a defendant fails to appear in an action for dower, the plaintiff may sign judgment of seisin forthwith, and sue out a writ of assignment of dower, but she shall not, unless otherwise ordered by the Court or a Judge, be entitled to costs.

On motion for judgment on the pleadings where detention and demand were denied, and defendants alleged that they always had been and were ready to assign dower, judgment of seisin was granted, but no damages (or, apparently, costs): *Malone v. Malone*, 17 Ont. 101.

(2) Where the plaintiff claims arrears of dower or damages for detention of her dower, neither the entry of a judgment of seisin nor the taking of proceedings for the assignment of her dower thereunder, shall prevent her from proceeding with the action for the recovery of such arrears or damages. Con. Rule 713.

See notes to Rule 177.

(iii) *Recovery of Land.*

Action for
land.

582. Where an action is for or includes a claim for the recovery of land, other than for dower, and any defendant fails to appear, or if an appearance is entered but the defence is limited to part only, the plaintiff, notwithstanding that the writ may be indorsed with any other claim, may sign judgment against such defendant, for possession of the land, or of the part thereof to which the defence does not apply. Con. Rule 714.

This corresponds with the Eng. R. (1883) R. 108, and is in substance the same as the former practice. A form of judgment which may be adapted to meet such cases will be found in the Appendix, No. 140, (H. & L. Forms, No. 803).

This judgment does not carry costs, without an affidavit being filed to the effect mentioned in Rule 585, or an order obtained under Rule 585.

Assessment
of damages
in action
for land.

583. Where an action is for or includes a claim for the recovery of land, other than dower, and any defendant fails to appear, and the writ is indorsed with a claim for

mesne profits, arrears of rent, or double value in respect of the premises claimed or any part of them, or damages for breach of contract, or wrong or injury to the premises claimed, the plaintiff may sign judgment against such defendant for possession as in Rule 582 mentioned; and may proceed as mentioned in the Rules 575 or 578 as the case may require as to the other claims. Con. Rule 715.

Rules
584-586.

Corresponding with Eng. (1883) R. 100. The former practice confined this right to the suit of a landlord against a tenant.

A form of judgment which may be adapted to meet such cases will be found in the Appendix, Form No. 142 (H. & L. Forms, No. 805).

Actions to recover dower are specially provided for by Rule 581.

584. Where judgment is not signed against all the defendants a writ of possession shall not be issued, unless directed by the judgment against the defendants who appear or by the order of the Court or a Judge. *New.*

Execution not to issue until judgment given as to all defendants.

This *Rule*, although in general terms, appears to be intended to be limited to actions for the recovery of land: see Form No. 174 (H. & L. Forms, No. 1081), a similar provision seems necessary in actions for the recovery of chattels in the joint possession of several defendants.

585. Where any defendant fails to appear in an action for recovery of land, other than dower, the plaintiff may sign judgment for his costs as well as for possession of the land, on filing an affidavit showing that such defendant was at the time of the issue of the writ in actual adverse possession of the land, or instead of such affidavit an order of the Court or a Judge allowing him to sign judgment as well for his costs as for possession of the land. Con. Rule 716.

Costs where adverse possession.

2. DEFAULT OF PLEADING.

586. Except where otherwise provided in these Rules or where otherwise ordered by the Court or a Judge, a defendant who fails to deliver a statement of defence and against whom the pleadings have been noted as closed, shall be deemed to admit all the statements of fact set forth in the statement of claim (or in the indorsement on the writ, where the defendant has stated in his appearance that he does not require the delivery of a statement of claim) and shall not be entitled to notice of any subsequent proceedings in the action. *New.*

Effect of default.

Rule 586.

This *Rule* in effect introduces the former Chancery practice, which entitled a plaintiff to have his bill of complaint heard *pro confesso* as against a defendant who put in no defence.

Under this *Rule* service of notice of motion for judgment on a defendant who puts in no defence will no longer be necessary. Notice of any assessment of damages must, however, be given: *Rule 537*. In the case of a sole defendant, if judgment cannot be entered, as of course, or a motion made therefor in Chambers under *Rule 595*, a motion for judgment must be made to a Judge in the Weekly Court: see *Rule 606*; the motion must be brought on within a year from the time when the right to move accrued, otherwise leave to move is necessary: see *Rule 612*; where there are other defendants who defend, the motion for judgment against a defendant who does not defend may be made at the trial of the action, or upon motion for judgment against such other defendants: see *Rule 593*. Where the relief sought against a defendant in default, is separable and distinct from that claimed against other defendants who defend, the motion for judgment against the party in default may properly be made without waiting until the action is ready for trial, or motion for judgment, as against the other defendants. But such a course would not be proper where the relief claimed against the party in default is bound up with that against the other parties who defend, as for example in an action to set aside an alleged fraudulent conveyance by a debtor, a motion for judgment against the debtor who made no defence would be premature, if made before the action was also ripe for hearing as against his grantee, otherwise two inconsistent judgments might be pronounced in the same action, one against the debtor declaring the conveyance impeached to be fraudulent, and another against his grantee in effect declaring it to be valid.

The difficulty in some cases about making a final order at a hearing of the action as against some defendants only, and in the absence of others, is also referred to in *Cooke v. Gilbert*, 40 W. R. 682; W. N. 1892, 111; *MacMillan v. Australasian, etc.*, 176 L. T. 182.

As to noting pleadings closed for default of defence: see *Rule 263*. Notwithstanding that a defendant allows the pleadings to be noted as closed, the action may nevertheless be dismissed as to him, if on the trial of the action against a co-defendant the plaintiff fails to establish his case, whenever the cause of action against the two defendants is inseparable: see *McDermott v. McDermott*, 3 Chy. Ch. 38; and *Tucker v. Gayer*, before MacMahon, J., 29 April, 1898; *Challoner v. Lobo*, 1 O. L. R. 292.

Where a defendant, with his appearance, filed a notice to the following effect: "The defendant admits only \$103, but otherwise disputes the plaintiff's claim in this action," this was held to be in effect a defence, and a judgment signed for default of defence was held to be void: *Voight v. Orth*, 5 O. L. R. 443.

Where a defence has been filed but mislaid by the officer and not entered in his procedure book, a judgment signed for default of defence is irregular: see *Moore v. Simmons*, 1 C. L. J. 183; *Bank of Montreal v. Harrison*, 4 P. R. 331; and where a defence is filed by defendant after the pleadings are noted as closed under *Rule 263*, though it is irregular, it is not a nullity, and the defendant should be notified of any motion for judgment: *Jackson v. Gardiner*, 19 P. R. 137.

Where after a defendant has appeared it becomes unnecessary to continue the action against him, the action should be either formally

discontinued: see *Rule 430*; or the action should be formally dismissed against him, and it is irregular to proceed with the action without taking that course: see *McLaughlin v. Stewart*, 1 O. L. R. 295. **Rule 587.**

As to the right of a defendant in default, to notice of proceedings upon a reference to a Master, see *Rule 658*; or for the appointment of a receiver by way of equitable execution, *Tilling v. Blythe*, 1899, 1 Q. B. 557; 80 L. T. 44.

587. Where the plaintiff's claim is for or includes a claim for a debt or liquidated demand, and any defendant does not, within the time allowed for that purpose, deliver a defence, the plaintiff may, at the expiration of such time, sign final judgment against such defendant for the debt or liquidated demand claimed, with interest and costs, without prejudice to his right to proceed against any other defendant and as to any other claims. Con. Rules 719, 720, 723.

Judgment on defendant's default in claim for debt.

The original *Rule 719* was identical with the Eng. R. (1883 R. 295), and in accordance with the C. L. P. Act (R. S. O. 1877, c. 50), s. 150.

The present *Rule* varies from the Eng. Rule inasmuch as it applies to cases where the plaintiff is suing for other claims besides a debt or liquidated demand, the Eng. Rule being confined to cases where a debt, or liquidated demand, alone is the subject of the action.

Under this *Rule* the plaintiff may obtain a final judgment for default of defence for a liquidated demand, and may continue the action against the same defendant for any other claim, and against co-defendants, if any, who have defended. So that it will be possible for a plaintiff to recover several final judgments in the same action for different parts of the relief claimed.

Judgment can be properly signed under this *Rule* only in respect of claims which can be and are specially indorsed on the writ of summons: *Star Life v. Southgate*, 18 P. R. 151.

Where the plaintiff's claim is in the alternative against either one of two defendants, judgment cannot be signed against both, and the signing of judgment against one is an indication of election not to proceed against the other: *Morcl v. Westmoreland*, 1904, A. C. 11, 14. *See also* *Adkins*.

A defendant to whom a statement of claim is delivered must deliver his defence or counter-claim "within eight days from the delivery of the statement of claim, or from the time limited for appearance, which ever shall be last, unless such time is extended by the Court or a Judge": *Rule 246*.

As to the case where a defendant dispenses with the delivery of a statement of claim, and none is delivered to him, see note to *Rule 247*.

As to the effect of delivering a defence after the time for doing so has elapsed, see notes to *Rule 246*.

It is held in England that in an action on a replevin bond, if the plaintiff, instead of claiming damages, claims the amount for which the bond was given, and becomes entitled to judgment by default.

Rule 587. his proper course is to enter final judgment under this *Rule*, and not interlocutory judgment under *Rule* 589: *Dix v. Groom*, 5 Ex. 1, 91. and see *Rule* 1073.

In an action for replevin, where damages are claimed as well as recovery of the chattels, *Rule* 1079 provides that "Where the plaintiff is entitled to sign judgment by default, he may sign final judgment for five dollars and costs, but shall not be entitled to recover a larger sum, except upon an assessment before a Judge or jury, or upon filing the written consent of the defendant or his solicitor, and an affidavit verifying the signature to such consent."

Where a defence has been struck out, e.g., for disobedience to an order for discovery, judgment may be signed under this *Rule*; see *Fisher v. Hughes*, 25 W. R. 528.

An informal defence cannot be treated as a nullity: see *Voight v. Orth*, *supra*, p. 778.

Formerly if the defendant did not appear the plaintiff could not enlarge, in the statement of claim, his claim indorsed on the writ: *Law v. Philby*, 35 W. R. 450; 56 L. T. 522; *Gee v. Bell*, 35 Ch. D. 160; *Stone v. Smith*, 35 Ch. D. 188; but he may do so now under *Rule* 244: see that *Rule* and notes; but where a material addition is thus made by the statement of claim, it would seem proper to require the defendant to be served therewith.

Where the plaintiff claimed interest at seven per cent., showing no ground for more than six, it was held to be the duty of the officer signing judgment to allow only six per cent.: *Bank of Hamilton v. Harvey*, 11 P. R. 145.

Where a defendant dispenses with a statement of claim, and does not, within 8 days after appearance, deliver a defence under *Rule* 247, judgment may be signed against him as in other cases where there is default of defence: *Grimshaw, etc., v. McDowell*, 66 L. T. Jour. 277. See *Harrison v. Surrey Masonic Hall Company*, cited in Chitty's Forms 116.

Counter-claim.—Although a counter-claim is regarded for some purposes as a separate action, yet in the event of a plaintiff's not putting in a defence to it, judgment cannot, even where the counter-claim is for a liquidated demand, be entered under this *Rule*, but the defendant will have to move for judgment: *Jones v. Macaulay*, 1891, 1 Q. B. 221; 64 L. T. 621; and see *Rule* 593.

Where Several Defendants.—In *Rihel v. Livingstone*, 4 C. L. T. 135, an action on a promissory note against K. & L., two joint makers, final judgment was signed under this *Rule* against L., and costs of the action up to judgment taxed. The plaintiff afterwards at the trial recovered judgment against K., and in taxing costs against K. the Taxing Officer held that by taxing the general costs against L., the plaintiff had waived the right to recover these costs from K. To remedy this an order was made in Chambers *ex parte* setting aside the judgment as to costs against L., upon shewing that he was worthless and that no steps had been taken to enforce the judgment against him.

In *Wilkinson v. Garrett*, 7 C. L. T. 22, judgment was obtained against defendants at different stages; against defendant R. by default of appearance, and afterwards against G. who had defended. The whole costs were ordered to be taxed against G., including the

costs of judgment against R.; costs up to and including judgment Rules against R. to be also taxed against him, and, if recovered from either, 586, 589. to be credited on the judgment against both.

Joint Debtors.—A judgment recovered under this *Rule* against one or more partners or joint debtors does not prevent the plaintiff from proceeding in the same action to judgment against the other defendants: *Dueber Watch Case Mfg. Co. v. Taggart*, 28 Ont. App. 295; 30 S. C. R. 373; and other cases, *supra*, pp. 424 and 770.

See also *Jenkins v. Davies*, 1 Cb. D. 696.

588. Where the plaintiff's claim is for or includes a claim for the recovery of chattels and any defendant does not within the time allowed for that purpose deliver a defence, the plaintiff may at the expiration of such time sign final judgment for the recovery of the chattels without prejudice to his right to proceed against any other defendants or as to any other claims. *New.*

Or in claim for recovery of chattels.

This *Rule* is new, and was introduced in consequence of claims for the recovery of chattels being now included among the claims which may be specially indorsed: see *Rule* 138.

No provision is made similar to that in *Rule* 584, as to the right to issue execution where the goods are in the joint possession of several defendants, some of whom defend: see, however, *Rule* 3.

589. Where the plaintiff's claim is for or includes a claim for detention of goods and pecuniary damages, or either of them, and any defendant makes default as mentioned in *Rule* 587, the plaintiff may sign interlocutory judgment against such defendant, without prejudice to the right of the plaintiff to proceed with the action against any other defendant and as to any other claims; and the value of the goods, and the damages, or either of them, as the case may be, shall be assessed or ascertained as provided by *Rules* 578 and 579. *Con. Rules* 721, 722.

Interlocutory judgment on default in claim for damages.

The provision of this *Rule*, by which it applies where there are other claims besides those for detention of goods or damages, is new. In other respects it is substantially the same as the Eng. (1883) Rs. 297, 298, except that the latter provided for a writ of inquiry issuing to assess the value of the goods.

Where the claim sued for is pecuniary damages, but is not properly the subject of a special indorsement, interlocutory judgment for default of defence should be signed under this *Rule*, and not under *Rule* 587; and the damages must then be assessed before final judgment can be ordered.

Where the plaintiff's claim is for equitable relief, and damages are also claimed, interlocutory judgment cannot be properly signed under this *Rule*, but the action, in default of defence, must be set down to be heard on motion for judgment on the statement of claim: *Stuart v. McVicar*, 18 P. R. 250.

Rules

590, 591. In *Ivory v. Cruickshank*, W. N. 1875, 249, the action was for rent, and for the return of certain chattels: the defendant had failed to appear: it was held that the plaintiff was entitled to have judgment for the rent, and for the return of the goods.

See *Dix v. Groom*, in note to Rule 587.

In the case of an action on a bond which is subject to 8 & 9 Wm. III., c. 11, see notes to Rule 580.

Default by
defendant
in action
for land.

590. Where an action is for or includes a claim for the recovery of land, if any defendant makes default as mentioned in Rule 587, the plaintiff may sign judgment against such defendant for possession of the land, and his costs. Con. Rule 724.

Substantially the same as Eng. (1883) R. 300.

A judgment for recovery of land (unlike the former judgment in ejectment) has the same finality as any other judgment: see *Bull v. Cathcart*, 16 Ont. 525; *Cochrane v. Hamilton Prov.*, 15 Ont. 128.

Where
claim for
land and
damages.

591. Where the plaintiff with a claim for the recovery of land also claims mesne profits, arrears of rent, or double value in respect of the premises claimed, or any part of them, or damages for breach of contract, or wrong or injury to the premises claimed, if any defendant makes default as mentioned in Rule 587, the plaintiff may sign judgment against such defendant for possession and costs as in Rule 590 mentioned, and may proceed as mentioned in Rules 587 to 589 as to the other claims. Con. Rule 725.

Substantially the same as Eng. (1883) R. 301.

The judgment where it is for a liquidated sum for arrears of rent, may, it would seem, be final in the first instance, and not interlocutory as under Rule 589.

Where mesne profits were claimed on a specially indorsed writ in an action for the recovery of land, on a motion for judgment under Rule 603 the mesne profits were ordered to be calculated up to the date when the plaintiff should recover possession: *Southport Tramways Co. v. Gandy*, 1897, 2 Q. B. 65; but whether judgment could be entered as of course for mesne profits accruing subsequent to the date of the judgment seems doubtful, although there appears to be authority for saying that whenever a judgment is authorized to be entered without motion, it may properly embody all such provisions as would be included in the judgment if pronounced by the Court on a hearing *pro confesso*: see *Kirkpatrick v. Howell*, 22 Gr. 94. A judgment for mesne profits up to the date of recovery of possession would seem to necessitate its being framed so as to direct a reference to ascertain the amount, inasmuch as the amount to be recovered could not be ascertained until the writ of possession to be issued under the judgment should be executed.

592. Where a judgment is not entered against all the defendants a writ of possession shall not be issued unless directed by the judgment against the defendants who defend, or by the order of the Court or a Judge. *New.*

Rules
592, 593.
Execution
not to issue
till
judgment
against all
defendants

This *Rule*, although new, seems nevertheless merely to be declaratory of what was formerly the practice.

It applies obviously to actions for the recovery of land, and prevents a plaintiff from issuing execution to recover possession of the land in question against some defendants, so long as there are others on the record, as against whom he is not entitled to judgment, without first obtaining leave; which leave will ordinarily not be granted, so long as the plaintiff's right to possession is in dispute.

593.—(1) In all cases other than those provided for in Rules 587 to 592, if any defendant in the action or by counter-claim makes default in delivering a defence in the action or to the counter-claim, as the case may be, the plaintiff in the action or by counter-claim may, after causing the pleadings to be noted as closed as to the party in default, move for judgment as against such defendant either before or at the time judgment is applied for against the other defendants, and such judgment shall be given, upon the statement of claim or counter-claim respectively, as the Court may consider the plaintiff in the action or by counter-claim respectively to be entitled to. *Con. Rules 727, 728. Rules 23 June, 1894, 1350. amended.*

other
actions.

(2) Where a judgment is obtained under this *Rule* against any defendant after a judgment has been signed against such defendant under any of the preceding Rules, the costs of the signing of one judgment only shall be taxed unless otherwise ordered. *New.*

The first clause of this *Rule* contains the provisions contained in the former Rules 727, 728, and in addition provides explicitly for obtaining judgment on a counter-claim to which no defence is delivered. The construction placed upon Eng. Rules (1883) 304, 305 (on which the former Rules 727, 728, were based), was that the term plaintiff in the Rules included a plaintiff by counter-claim; *Jones v. Macaulay*, 1891, 1 Q. B. 221.

Before a case is set down on motion for judgment under this *Rule* the officer with whom cases are set down is required to see that all preliminary proceedings are regular, so that the action is in a condition to be set down as asked; see note to *Rule 609*, p. 765.

Defendants who have filed no defence are not entitled to notice of motion for judgment, unless the Court or Judge otherwise orders it, see *Rule 586*.

Where the plaintiff by his statement of claim has materially varied his claim as indorsed on the writ, it would seem to be proper that,

Rule 593. unless the defendant has been served with the statement of claim, he should be notified of the motion; and as only the statement of claim will be before the Court on a motion for judgment, it should be the duty of the plaintiff to inform the Court of such variation; it being a well understood rule that on all *ex parte* applications the utmost candour must be observed.

On a motion for judgment in default of defence, a plaintiff will be confined to the relief asked by his statement of claim; thus, where by his statement of claim the plaintiff asked for specific performance and ancillary relief, but not for any declaration of lien, upon motion for judgment as in default of defence, it was held that the plaintiff could not have a declaration of lien: *Tacon v. National Standard Land Co.*, 50 L. T. 165; nor a rescission of the contract: *Stone v. Smith*, 35 Ch. D. 188; 56 L. J. Ch. 871.

Where by the statement of claim, in an action for specific performance, the plaintiff craved leave to refer to the agreement, and the property did not appear except by reference to the agreement, it was held that the allegations were insufficient, as nothing beyond the statement of claim could be looked at: *Smith v. Buchan*, 36 W. R. 631; 58 L. T. 710; *Faithfull v. Woodley*, 43 Ch. D. 287.

If a statement of claim against a married woman on a contract, made before 13th April, 1897, does not allege the possession of separate estate, no judgment can be given: *Tetley v. Griffith*, 36 W. R. 96; 57 L. T. 673; see notes to *Rule 190*.

Where plaintiff's claim was dismissed by interlocutory order, defendant was held to be entitled to proceed under this *Rule* for judgment on his counter-claim: *Higgins v. Scott*, 21 Q. B. D. 10; *Roberts v. Booth*, 1893, 1 Ch. 52.

Where no defence is put in to a counter-claim, it is only by motion that judgment can be obtained, even though the counter-claim be in respect of a debt or liquidated demand: *Jones v. Macaulay*, 1891, 1 Q. B. 221; 64 L. T. 621.

Where a part of the plaintiff's claim is for a debt or liquidated demand, and the balance is an unliquidated demand, and a motion for judgment is made, under *Rule 593*, in default of defence, the Court may, in its discretion, refer the action to one of its officers to take an account of the amount due, and is not obliged to give final judgment for the amount of the liquidated demand: *Charles v. Shepherd*, 1892, 2 Q. B. 622; or the Court may on proof of the claim by affidavit, give final judgment for the amount claimed, without a reference: *Roberts v. Booth*, *supra*. In Ontario, however, it is open to a plaintiff to sign judgment under *Rule 587* in default of defence for that part of the claim which is a debt or liquidated demand: see *Rule 587*.

Where a defence is struck out for non-compliance with *Rules* as to examination, or with an order to produce, under *Rules 454, 473*, the defendant is in default under this *Rule*: *Fisher v. Hughes*, 25 W. R. 528.

Proof by affidavit of the allegations contained in the statement of claim is unnecessary: see *Rule 586*; and see *Williams v. Brisco*, 29 W. R. 713; 17 C. L. J. 478; *Ripley v. Sawyer*, 31 Ch. D. 434; *Jones v. Harris*, 55 L. T. 884; *Wilmott v. Young*, 44 L. T. 331; *Montague v. The Land Corporation of England*, 58 L. T. 730; *De Jongh v. Newman*, 56 L. T. 180; *Webster v. Vincent*, 77 L. T. 167; *Bagley v. Searle*, 35 W. R. 404; 56 L. T. 306; and *Gray v. Roberts*.

32 Sol. Jour. 322. But under the corresponding Irish Rule, it has been held that where the plaintiff's title depends on documents, he must produce and prove them; *Crisford v. Dodd*, 15 L. R. Ir. 83; but see *Smith v. Buchan*, and *Faithfull v. Woodley*, *supra*, p. 784.

Seem, it would be open to a defendant in default of defence to appear on the motion, and contend that the statement of claim was bad in law: see *Greig v. Green*, 6 Gr. 240; *Seane v. Hartrick*, 7 Gr. 161.

As to judgment in an action on a bond which is subject to R. S. O. 1897, c. 324, s. 4, see notes to *Rule 580*.

The *Rule* was applied in *Re Smith, Bridson v. Smith*, W. N. 1876, 103, where one defendant made default, and the others admitted the plaintiff's claim by their defence.

In *National Provincial Bank v. Evans*, 51 L. J. Chy. 97; 30 W. R. 177, the defaulting defendant was an infant, and the action was set down under Eng. R. 1875, O. 19, r. 17 (not adopted in Ontario), for trial as against him, and on motion for judgment against other defendants. The practice in Ontario is, without express provision, the same. See also *Re Fitzwater*, 52 L. J. Chy. 83; *Gardner v. Tapling*, 33 W. R. 473.

Where a defence is put in before a motion under this *Rule* is made, see notes to *Rules 243, 246, and 256*.

Under the English Rules a motion cannot be made against one of several defendants alone unless the cause of action be severable, and it would seem that this *Rule* must be understood to be subject to that limitation: see *Verney v. Thomas*, 36 W. R. 398; 58 L. T. 20; *Mac-Millan v. Australian Territories*, 76 L. T. 182, and note to *Rule 586*.

In a case where several persons joined as plaintiffs to restrain the infringement of rights of pasture to which they were severally entitled, the defendant counter-claimed against the plaintiffs and seven third parties, to restrain the erection of fences on the land in question, judgment by default of appearance against the seven third parties was refused before trial, because, assuming them to have been properly made parties, the cause of action against them was not severable from that against the plaintiffs: *Verney v. Thomas*, 36 W. R. 398; 58 L. T. 20.

Under the former Chancery Practice, where a bill was filed against a patentee, and his vendee, impeaching the patent, and the vendee allowed the bill to be taken *pro confesso*, the plaintiff falling to establish his case against the patentee who defended, the bill was dismissed as against both defendants, though without costs as to the vendee: *McDermott v. McDermott*, 3 Chy. Ch. 38; and see *Tucker v. Gayer*, referred to in note to *Rule 586*.

Costs.—Upon the motion for judgment the costs are, subject to *Rule 1120*, in the discretion of the Court: *Young v. Thomas*, 1892, 2 Ch. 134; 60 L. T. 575.

Clause (2) of the above *Rule* provides for the case of judgment having been signed by default as to some claims, a motion for judgment being necessary as to others. The costs of signing a judgment by default in such case will probably not be allowed unless the urgency of the case justifies the plaintiff in not delaying until a motion for judgment can be made.

Rules
594, 595.

In case of
issues be-
tween par-
ties other
than plain-
tiff and
defendant.

594. Where issues arise other than between plaintiff and defendant, if any party to any such issue makes default in delivering any pleading, the Court may, on motion of the opposite party, give such judgment, as upon the pleadings may seem just. Con. Rule 729.

See Eng. (1883) R. 307.

The Eng. Rule enables the plaintiff in a counter-claim to obtain judgment against any defendant thereto who makes default: *Street v. Crump*, 25 Ch. D. 68; see, in Ontario, *Rule 593*.

3. JUDGMENT ON PRECISE IN MORTGAGE ACTIONS.

Judgment
for re-
demption,
foreclosure
or sale,
where in-
fants are
defendants
may be
made in
Chambers.

595. In an ordinary action for redemption, foreclosure or sale where the defendants, or some of the defendants, are infants and no defence is set up, the action shall not be set down to be heard in Court; but after the statements of defence are filed, or after the time for filing the same has expired, the plaintiff, upon filing affidavits of the due execution of the mortgage, and of such other facts and circumstances as entitle him to judgment, may move for judgment in Chambers, upon notice to the guardian *ad litem* of the infants and the other defendants' solicitor, if any. Con. Rule 717.

Taken from Chy. O. 434, 645, 646.

This Rule enables judgment to be pronounced in Chambers, as against infants and adult defendants who are *sui juris*, but where any of the adult defendants is a lunatic or person of unsound mind not so found, it is necessary that the motion for judgment should be made in Court: *Warnock v. Prieur*, 12 P. R. 264.

When anything beyond the ordinary relief is required, as for example an injunction, it would seem that the motion for judgment should be made in Court: see *King v. Freeman*, 1 Chy. Ch. 350.

In judgments for foreclosure against infants, a day to shew cause must still be inserted: *Mellor v. Porter*, 25 Ch. D. 158; *Gray v. Bell*, 46 L. T. 521; *London & C. L. & A. Co. v. Everitt*, 8 P. R. 489; *Muir v. Kerr*, 2 Gr. 223; and the final order must also reserve a day to shew cause. The formal words usually inserted in Ontario are "and this judgment [or order] is to be binding upon [name of infants] unless being served with a copy thereof on attaining the age of twenty-one years, they do, within six months after such service, shew unto this Court good cause to the contrary": see Seton, 5th ed., 827.

When un-
necessary.

No day to shew cause is reserved in judgments for sale; nor in judgments against infant trustees of real estate: *Foster v. Parker*, 8 Ch. D. 223, and see *Wolverhampton v. George*, 24 Ch. D. 707. Thus, in a redemption suit against an infant for redemption of land conveyed to the infant's ancestor by deed absolute in form, it was held that no day to shew cause should be reserved in the decree directing a re-conveyance: *Lake v. McIntosh*, 7 Gr. 532. As to defences open to an infant shewing cause: see Seton, 5th ed., 828, 830.

Where a decree for foreclosure was made against the ancestor, who died before a final order was obtained, it was unnecessary to reserve a day to shew cause in favour of infant heirs of the mortgagor, as to whom the proceedings were revived: *Sutherland v. Dickson*, 2 Chy. Ch. 25; *Younge v. Cocker*, 76 L. T. Jour. 247; and infant parties under such circumstances could not set up a defence which their ancestor had not set up, unless he had been prevented, by fraud, or mistake, from pleading it: *Burke v. Pyne*, 2 Chy. Ch. 193; but now under such circumstances the estate of the mortgagor descends to his personal representative: R. S. O. c. 127, s. 4.

Formerly where infants were defendants in an action for foreclosure before judgment, the Court would direct a reference to the Master, as of course, to inquire whether a sale, or foreclosure, would be the more beneficial for the infants, and direct a sale, or foreclosure, accordingly, or it would determine the question, on the motion for judgment, if affidavits were produced or the Guardian *ad litem* consented to dispense with the reference on that point: *Dudley v. Berczy*, 13 Gr. 141; but see *Graham v. Davis*, 2 Chy. Ch. 24; and if a sale was directed on the application of infant defendants, no deposit was required from the infants: *Bank of Upper Canada v. Scott*, 6 Gr. 451; *Laurason v. Fitzgerald*, 9 Gr. 371; but see *Western Canada Loan Co. v. Dunn*, 9 P. R. 587. Whether a personal representative of a deceased mortgagor would be entitled to this relief, where infants are beneficially interested in the equity of redemption, has not been thus far determined.

Where the judgment directs an inquiry whether a sale or foreclosure would be more beneficial to infant defendants, if the Master omits to report on that point, no final order can be granted: *Edwards v. Burling*, 2 Chy. Ch. 48.

596.—(1) Where the writ has been indorsed, as provided by Rule 141, and the defendant fails to appear, or by his statement of defence admits the execution of the mortgage and other facts, if any, entitling the plaintiff to a judgment, or where the defendant disclaims any interest in the mortgaged premises, or where no statement of defence is delivered, [or where notice is filed and served disputing the amount of the plaintiff's claim only, or where in his appearance the defendant states that he disputes the amount of the plaintiff's claim only], the plaintiff may sign judgment, in which may be included, where claimed, any relief for which a claim may be indorsed upon the writ under Rule 141.

Judgment, when to be granted on *precipue*.

(2) The reference in such cases, when required, shall be to the Master in Ordinary, or a Local Master.

(3) Where the indorsement on the writ claims foreclosure, and the defendant files a notice requiring a sale and a certificate of the deposit of the sum of \$80 as required

Rule 296. by Rule 381, the judgment shall be for sale, together with such other relief, if any, as the plaintiff is entitled to, upon the indorsement.

(4) Where in the defendant's appearance or otherwise a notice disputing the amount of the plaintiff's claim only is filed, the defendant filing the same shall be entitled to four days' notice of the taking of the account. Where no reference as to incumbrances is desired, such account may be taken by the officer signing judgment; and where a reference as to incumbrances is desired, then by the Master to whom the action is referred. The finding of the officer taking the account as to the amount due on signing judgment shall be subject to appeal to a Judge in Chambers in the manner prescribed by Rule 767, and such officer shall have power to direct a stay of proceedings until the time for appealing has expired.

(5) Where a reference as to incumbrances is directed, in a case where a notice disputing the amount of the plaintiff's claim has been filed, the judgment shall direct that the defendant filing such notice shall have four days' notice of the taking of the account.

(6) A judgment may be signed under this Rule, whether the defendant has been served personally or otherwise; but where the writ has not been personally served, the claim of the plaintiff shall be duly verified by affidavit, which shall be filed with the officer taking the account. Con. Rule 726. Rules 23rd June, 1894. 1349. Rules 1 Jan., 1896, 1476.

Founded on Chy. O. 435, 646, 648.

This Rule as now framed (see the words in brackets and clauses 4 and 5) removes the difficulties which occasioned the decisions in *Mahony v. Horkins*, 14 P. R. 117, and *Rice v. Kinghorn*, 17 P. R. 1; and substantially restores the former Chancery practice, as to which see *Trust & Loan v. McCarthy*, 19 C. L. J. 188; 3 C. L. T. 266; *Peel v. White*, 11 P. R. 177.

A motion for judgment was held to be necessary, where costs of proceeding under the power of sale and moneys expended for repairs were claimed; *Hannaford v. Neeley*, 9 C. L. T. 48; or immediate foreclosure; *Gibson v. McCrimmon*, 9 C. L. T. 40.

It will be seen that this Rule covers five classes of cases.

(a) Where defendant does not appear;

(b) Where the defendant by his defence admits the mortgage and other facts entitling the plaintiff to judgment;

(c) Where the defendant disclaims any interest in the premises: *see* *supra* *Chapter* *Rule* 696.

(d) Where no defence is filed:

(e) Or where only a notice disputing the amount claimed is filed:

It is not necessary that all the defendants should be in the same position, in order to entitle the plaintiff to judgment under this *Rule*, it is sufficient if they all come within one or other of the two classes of cases above mentioned: and the judgment should be entered against all of the defendants and not against some only: *see* *McLaughlin v. Stewart*, 1 O. L. R. 295.

Where the writ is issued from a local office, the judgment should be entered in that local office: *Chamberlain v. Armstrong*, 9 P. R. 212; and *see* *Rules* 15, 128.

Where any of the defendants are infants, or lunatics, or persons of unsound mind not so found, judgment cannot be obtained under this *Rule*, but in the case of infants it may be obtained on motion in Chambers: *see* *Rule* 545, and in the case of lunatics, etc., a motion in Court is necessary: *Warrack v. Prieur*, 12 P. R. 264.

For forms of judgment, *see* *Appendix*, *Forms* Nos. 153, 154, 155. These forms require modification according to the nature of the relief claimed in the writ. *See* *H. & L. Forms*, Nos. 864, 865, and 875.

Where the writ has not been sufficiently indorsed with a statement of the relief claimed, according to the form prescribed by *Rule* 141, it would seem that the officer may properly refuse to enter judgment on *præcipe*: *Pherill v. Forbes*, 8 P. R. 408.

In a foreclosure action, where the mortgagee applies for judgment in default of appearance, or defence, not only for foreclosure, but also for a personal order for payment, the indorsement on the writ, or the statement of claim, ought to contain an express statement of the covenant upon which the order is claimed: *Law v. Philby*, 56 L. T. 230; 35 W. R. 401; and *see* *Form* No. 9 (c), (*H. & L. Forms*, Nos. 57, 58).

As to the form of judgment, when immediate payment under the covenant for payment is desired, as well as the usual judgment for foreclosure, *see* notes to *Rule* 378, *supra*, p. 586.

Under *Chy. O. 435*, on which this *Rule* is mainly founded, it was *præcipe* held that the Registrar was bound to issue on *præcipe* the decree ^{judgment} which the Court would itself make upon a hearing of the cause ^{form of} *pro confesso*: *Kirkpatrick v. Howell*, 22 Gr. 94; *Buell v. Towns*, *Ib.*, 95; but extraordinary relief cannot be granted by judgment on *præcipe*; thus, an immediate sale, or foreclosure, without appointing a day for redemption, cannot be granted, even though the relief be claimed by the writ, or statement of claim: *Patey v. Flint*, 48 L. J. ^{Extraor-} ^{dinary} ^{relief not} *Chy.* 636. To obtain such relief, a motion for judgment in Court ^{granted,} under *Rule* 600 is necessary. On such a motion, however, special grounds for immediate foreclosure, or other special relief, must be shewn though the defendant has not appeared, otherwise only the usual judgment will be given: *Meredith v. McCabe*, 19th January, 1881, *Boyd, C.*; *see also* *North of Scotland, etc., v. Beard*, 9 P. R. 546.

Formerly, where no appearance had been entered the plaintiff could not, unless he served the statement of claim on the defendant, enlarge by it the scope of the claim indorsed on the writ: and on motion for judgment according to the terms of relief claimed in the state-

Rule 596. ment of claim, in default of appearance, the usual foreclosure judgment only was given when that was the only relief claimed by the writ, notwithstanding that by the statement of claim additional relief was claimed: *Law v. Philby*, 58 L. T. 522; 35 W. R. 450; see also *Gice v. Bell*, 35 Ch. D. 160; but see now *Rule 244*, and note to *Rule 593*.

Interlocutory injunction cannot be continued by

Where the defendant is a married woman, and the writ is indorsed with a claim for execution against her separate estate, where the action is founded on a contract made before 13th April, 1897, the indorsement should allege that she had when she made the contract sued on, and still has, separate estate, and when the writ is properly indorsed judgment may be signed under this *Rule*: *Nesbitt v. Armstrong*, 14 P. R. 366; R. S. O. c. 163, s. 3 (3). This allegation is not necessary in the case of contracts made by a married woman since 13th April, 1897: see R. S. O. c. 163, s. 4.

Where the plaintiff had obtained an interlocutory injunction, it was held that it could not be continued by a *præcipe* decree: *King v. Freeman*, 1 Chy. Ch. 350, the power to issue decrees on *præcipe* being confined to simple cases, where the ordinary decree for foreclosure, or sale, with order for payment and delivery of possession, was all that was required. Thus, where the defendant answered admitting the mortgage, but denying an alleged agreement to pay an increased rate of interest, and set up a tender, and claimed costs, it was held that a decree could not be granted on *præcipe*. Nor could a decree issued on *præcipe* in such a case be amended in Chambers, by inserting a direction to the Master to inquire as to the alleged tender: *Ross v. Vader*, 3 Chy. Ch. 236.

Reference as to Incumbrances.—The plaintiff must determine for himself whether he takes a judgment with a reference to the Master as to incumbrancers. If he takes a reference, unnecessarily, he will not be entitled to the costs of it: *Hamilton v. Howard*, 4 Gr. 581; *Purdy v. Parks*, 9 P. R. 424. If he omits to take a reference where one is necessary, his proceedings will be defective: see *Willgress v. Crauford*, 12 P. R. 658.

Where a plaintiff had taken judgment without a reference, and after the mortgagor was foreclosed, discovered there was an incumbrancer, on an interlocutory application the judgment was amended by directing the usual reference as to incumbrancers: *Willgress v. Crauford*, 12 P. R. 658.

Varying Præcipe Judgment.—A decree pronounced *pro confesso* or on *præcipe*, might be varied, or set aside, on motion in Chambers, without rehearing the cause: see *Kline v. Kline*, 3 Chy. Ch. 79; *Nelles v. Vandyke*, 17 Gr. 14; and the same rule applies to judgments on *præcipe* under this *Rule*: *Trust & Loan Co. v. McCarthy*, 19 C. L. J. 188; 3 C. L. T. 266.

Statute of Limitations.—It has been decided that a defendant filing a disputing note in a mortgage suit may on the taking of the accounts shew that the Statute of Limitations applies so as to prevent the recovery of more than six years' arrears of interest: *Wright v. Morgan*, 1 Ont. App. 613, overruling the decision reported, 24 Gr. 457. But the statute must be pleaded if the defendant wishes to set it up as a bar to the suit: *Cattanach v. Urquhart*, 6 P. R. 28, explained, 1 Ont. App. 616; see also notes to *Rule 402*.

Discovery.—It was held also under the former Chancery practice that a disputing note was not an answer, and therefore Gen. Order 134 (see Rule 464) allowing a defendant after answer to obtain on *præcipe* an order for production, did not apply: *Richardson v. Beaupré*, 2 Chy. Ch. 34. Rules 597-599.

4. CONFESSION OF ACTION OR JUDGMENT.

597.—(1) In actions for the recovery of land a defendant may, at any stage of the action, confess the action, in whole or in part, by giving notice to that effect according to Form 55, whereupon judgment may be signed for possession accordingly, as to such defendant, with the costs occasioned by his being made a defendant, and as against the other defendants, if any, the action may proceed in the usual way. *New.* See Con. Rules 730-732. Defendants may confess action to recover land as to the whole or part of the property.

(2) Where the confession is not by all the defendants a writ of possession shall not be issued unless directed by the judgment against the defendants who have not confessed, or by order of the Court or a Judge. *New.*

598. Final judgment upon a *cognovit actionem* or warrant of attorney to confess judgment given or executed before the signing out of any process, may be entered, and where the amount does not exceed \$600 the judgment may be entered in any County Court, unless some particular office or some particular County Court for that purpose is expressly stated in the *cognovit* or warrant. Con. Rule 733 amended. As to judgment on *cognovits*.

With the exception that the amount named was formerly \$400, the differences between this and the former Rule 733 are merely verbal.

599. Leave to enter judgment upon any *cognovit* or warrant of attorney more than one and less than ten years old, shall be obtained by order of a Judge, made *ex parte*, and if ten years old or more, by motion upon notice. Con. Rule 734. Leave to enter judgment on *cognovit*, when to be obtained.

Taken from Rule T. T. 1856, 27.

See note to Rule 601; and see Rules 348, 355-360.

A motion under this Rule would seem to be properly made in Chambers: *Handley v. Roberts*, 17 Jur. 440. Leave to enter judgment was granted where the witness to the *cognovit* had left the Province: *King v. Robins*, Tay. 299; *Chal v. Latham*, 1 U. C. Q. B. 412; and also in a case where the *cognovit* was seven years old, upon affidavit of the plaintiff, that the whole amount was still due, and that having received a letter from the defendant he believed him to

Rules be still alive, though the affidavit failed to state that the defendant
600, 601. either wrote or signed the letter: *Oliphant v. McGinn*, 4 U. C. Q. B. 170; but it was refused where the *cognovit* was fifteen years old, and it appeared that the plaintiff had once accepted property from the defendant, and discharged the action, though the property proved unproductive: *Grant v. McIntosh*, 4 O. S. 184.

Confes-
 sions and
cognovits
 to be
 registered.

600. No confession of judgment or *cognovit actionem* shall be valid or effectual to support any judgment or writ of execution, unless within one month after the same has been given, the same, or a sworn copy thereof, is filed of record in the proper office of the Court in the county in which the person giving such confession of judgment or *cognovit actionem* resides; and a book shall be kept in every such office, to be called the Cognovit Book, in which shall be entered the names of the plaintiff and defendant in every such confession or *cognovit*, the amount of the true debt or arrangement secured thereby, the time when judgment may be entered and execution issued thereon, and the day when such confession or *cognovit*, or copy thereof, is filed in the said office; and such book shall be open to inspection by any person during office hours, on the payment of a fee of 20 cents. Con. Rule 735.

Taken from R. S. O. 1877, c. 50, s. 297.

When judgment has been signed on the *cognovit* before the time limited by this Rule for filing it has elapsed, it need not be filed, or entered in the *cognovit* book, as required by this Rule: *Commercial Bank v. Fletcher*, 8 C. P. 181; *Armour v. Carruthers*, 2 P. R. 217; *McLean v. Stuart*, 2 P. R. 367.

Immaterial discrepancies between the copy filed and the original, do not invalidate the *cognovit*: *Irwin v. Ham*, 9 U. C. L. J. 80; and see *Sharp v. McHenry*, 38 Ch. D. 427.

Cognovit to
 be executed
 in presence
 of solicitor

601. No warrant of attorney to confess judgment in any action, or *cognovit actionem*, given by any person, shall be of any force, unless there is present some solicitor on behalf of such person expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant or *cognovit*, before the same is executed, which solicitor shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be solicitor for the person executing the same, and state that he subscribes as such solicitor, and in the affidavit of execution, the attendance of such solicitor, and the fact of his being a subscribing witness, shall be plainly stated, which affidavit and the warrant of attorney or *cognovit*, shall be filed at the time of entering judgment thereon. Con. Rule 736 amended.

Taken from *Rule T. T. 1856, 26.*

Rule 601

The differences between this and the former *Rule 736* are merely verbal.

A partner cannot give a *cognovit* so as to bind his firm without special authority: *Holme v. Allan*, Tay. 148; *Huff v. Cameron*, 1 P. R. 255; *Joyce v. Murray*, M. T. 6 Vict.; but when there is evidence of assent on the part of the other partners, the *cognovit* will bind the firm: *Brown v. Cinqmars*, 2 P. R. 205.

One of several executors cannot, without express authority, give a *cognovit* binding his co-executor; and a judgment entered on such a confession will be set aside as to all: *Commercial Bank v. Woodroffe*, 21 U. C. Q. B. 602; and see *Astbury v. Astbury*, 1898, 2 Ch. 111.

A *relicta verificatione* was not within the Rule of T. T. 1856, 26, and did not require to be verified by affidavit: *Eakins v. Fraser*, 6 P. R. 297.

A *cognovit* may be executed by the solicitor of the party giving it. *Richmond v. Proctor*, 3 U. C. L. J. 202.

An uncertificated solicitor may attest: *Holgate v. Slight*, 2 L. M. & P. 662; but not a solicitor's clerk: *Barnes v. Ward*, 14 M. & W. 42; *Paul v. Cleaver*, 2 Taunt. 360, nor a person not actually a solicitor, though believed to be one: *Wallace v. Brockley*, 5 Dowl. 695; but where the defendant wrongfully misrepresented a person to be a solicitor, the Court refused to set aside the judgment: *Cox v. Cannon*, 6 Dowl. P. C. 625; *Joyce v. Booth*, 1 B. & P. 97; the plaintiff's solicitor cannot properly act for the defendant: *Mason v. Kiddle*, 5 M. & W. 513; *Rice v. Linstead*, 7 Dowl. P. C. 153; *Ducrant v. Burton*, 9 Dowl. P. C. 1015; even though the latter consent: *Hutson v. Hutson*, 7 T. R. 7; *Pryor v. Suaine*, 2 D. & L. 37; *Jarl v. Dieker*, 5 D. & L. 1; *Mason v. Kiddle*, 8 Dowl. P. C. 205; *Cooper v. Grant*, 2 L. J. C. P. 197; *Hirst v. Hannah*, 17 Q. B. 383. The solicitor must, in general, attend at the request of the defendant: *Gripper v. Bristow*, 6 M. & W. 807; *Rice v. Linstead*, 7 Dowl. P. C. 153, but the adoption by the defendant of a solicitor present, not being the plaintiff's solicitor, no matter how procured, is sufficient: *Taylor v. Nicholls*, 6 M. & W. 91; *Walton v. Chandler*, 2 D. & L. 802; *Oliver v. Woodroffe*, 4 M. & W. 650; *Case v. Benson*, 3 U. C. L. J. 132; *Levinson v. Sper*, 2 L. M. & P. 557; and see *Meriden v. Lee*, 2 Ont. 451.

It is not necessary that the *cognovit* should be read over to the defendant: it is sufficient if its nature and effect be explained to him: *Oliver v. Woodroffe*, 4 M. & W. 650; but the neglect of a solicitor chosen by the defendant to explain the instrument, will not vitiate it: *Haigh v. Frost*, 5 Dowl. P. C. 743; *Case v. Benson*, 3 U. C. L. J. 132, unless there be fraud or collusion: *Taylor v. Nicholls*, 6 M. & W. 91; and see *Gorrie v. Beard*, 5 U. C. Q. B. 624.

It is advisable to state in the attestation clause that the requirements of the Rule have been complied with, but the attestation has been held sufficient, though omitting to state that the solicitor was appointed by the defendant: *Oliver v. Woodroffe*, 4 M. & W. 650, or was named by him, or attended at his request: *Gay v. Hall*, 5 Dowl. & L. 422, and did not declare him to subscribe as defendant's solicitor: *Knight v. Hasty*, 12 L. J. Q. B. 297; *Hall v. Kershaw*, 5 D. & L. 419; *Phillips v. Gibbs*, 16 M. & W. 208; but see *Reed v. Poppleton*, 5 Q. B. 181; *Hilbert v. Barton*, 2 Dowl. N. S. 434. The

Rules 602, 603. following form of attestation has been held sufficient: "Signed by the above named A. B. in my presence, and I declare myself to be solicitor for the said A. B., and I subscribe my name as such his solicitor": see *Gay v. Hall*, 18 L. J. Q. B. 12; *Ledyard v. Thompson*, 11 M. & W. 40. The provision respecting attestation is for the benefit of the defendant; a third party cannot object to a judgment on the ground that the *cognovit* on which it is entered was not formally executed: *Chipp v. Harris*, 5 M. & W. 430; *Cox v. Edwards*, 2 Dowl. N. S. 55; nor to the want of an affidavit of execution: *Potter v. Pickle*, 2 P. R. 391.

Cognovit may be given though no process issued.

A *cognovit* may be given in an action though no process has issued: *Walton v. Hayward*, 2 O. S. 408; *Rule 598*.

The practice of taking *cognovits* is not now very often resorted to since R. S. O. c. 147, s. 1, which avoids judgments recovered on *cognovits* given by insolvents, for the purpose of giving a preference, or to defeat or delay creditors; see *Meriden v. Lee*, 2 Ont. 451; *Martin v. McAlpine*, 8 Ont. App. 675. The same result, however, is arrived at, by a defendant appearing and delivering a defence and then consenting to an immediate judgment: *Turner v. Lucas*, 1 Ont. 623, affirmed in appeal, 10th September, 1884.

Leave to enter judgment may be obtained

The application for leave to enter judgment would seem to be properly made in Chambers: *Handley v. Roberts*, 17 Jur. 440. The motion can now be made to the Master in Chambers, or other officer having like jurisdiction. It is irregular to enter judgment without leave, when leave is necessary: *Jones v. Jones*, 1 D. & R. 558. When the *cognovit* is ten years old, notice to defendant of the motion cannot be dispensed with: *Nicholas v. Merit*, 9 Dowl. P. C. 101; *Fletcher v. Everard*, 13 L. J. Q. B. 44; but see *Croft v. Lord Egmont*, 8 Dowl. P. C. 95; *Wortham v. Tuck*, 9 Dowl. P. C. 335.

Defeasance to which any instrument is subject to be written on same paper

602. The person who prepares any *cognovit* or warrant of attorney to confess judgment, which is to be subject to any defeasance, shall cause such defeasance to be written on the same paper or parchment on which the *cognovit* or warrant is written, or cause a memorandum in writing to be made on such *cognovit* or warrant containing the substance or effect of such defeasance. Con. Rule 137.

Taken from Rule T. T. 1856, 28.

Omission of solicitor to comply with Rule 602, effect of.

The omission of a solicitor to comply with *Rule 602* does not invalidate the instrument, but subjects the solicitor to punishment, on application to the Court: see *Shaw v. Evans*, 14 East, 576; *Partridge v. Fraser*, 7 Taunt. 307; *Sansom v. Goode*, 2 B. & Al. 568; *Barber v. Barber*, 3 Taunt. 465; *Burdick v. Potter*, 1 Dowl. N. S. 134.

3. MOTION FOR JUDGMENT.

(i) On Summary Application.

Leave to sign final judgment.

603—(1) Where the defendant appears to a writ specially endorsed, under Rule 138, (a) and the plaintiff is not entitled to a judgment or order under the preceding

Rules], he may, on an affidavit made by himself, [(b) or by Rule 603. any other person who can swear positively to the debt or cause of action], verifying the cause of action and stating that in his belief there is no defence, move before the Court or Judge for final judgment for the claim so indorsed, with interest, if any, and costs. (c) A copy of the affidavit shall accompany the notice of motion. The Court or Judge, unless satisfied by affidavit or otherwise, (d) that the defendant has a good defence to the action on the merits, or has disclosed such facts as may be deemed sufficient to entitle him to defend the action, may award judgment. Con. Rule 739.

(2) Such motion may be made in respect of a cause of action specially indorsed under Rule 138, though the writ may also be indorsed with any other claim, and such order may be made in respect of the cause of action so specially indorsed as might be made if no other claim were indorsed on the writ of summons. *New.*

(3) On any such motion any amendment of the writ which might be ordered on a substantive motion may be directed, and judgment may be awarded in accordance with the writ as amended. *New.*

Comp. Eng. (1883) Rs. 115, 116.

(a) These words in brackets are not in the English Rule. (b) The words in brackets here are not in the English Rule. (c) The English Rule 116 provides for this, and that the application is to be by summons. The Rules are otherwise to the same effect, except as regards the provisions of sub-sections (2) and (3), which are new and peculiar to Ontario, and very much extend the operation of the former part of the *Rule*, and supersede many cases decided under the *Rule* before the introduction of these sub-sections.

The *Rule* as revised has made a slight change in the procedure. Formerly the motion authorized was for an order to sign judgment; under that procedure it was necessary first to obtain an order, and then sign a judgment thereunder. Under the present *Rule* the motion is to be one for judgment, and where the judgment is granted it will be drawn up and issued in Chambers and will have then to be entered in the proper office as in the case of other judgments.

(c) As to this provision: see *Litchfield v. Jones*, 25 Ch. D. 64.

(d) By reason of the words "or otherwise," it was held that the reasoning in *Bank of Montreal v. Cameron*, 2 Q. B. 10, 536, did not apply, and that therefore a plaintiff may apply for judgment under this *Rule* where the defendant is a corporation: *Shelford v. Louth & Co.*, 11 R. G. 4 Ex. D. 317.

Rule 603.

When Rule
applies.

It has been said that the power given by this *Rule* is intended to be exercised where it is shewn from an acknowledgment by the defendant of the debt, or from other circumstances, that the defence is only for time: *Lloyd's Banking Co. v. Ogle*, 1 Ex. D. 262; *Thompson v. Marshall*, 28 W. R. 220; see also *Munro v. Orr*, 17 P. R. 53; and again, when there can be no reasonable doubt that the plaintiff is entitled to judgment, and when, therefore, it is inexpedient to allow defendant to defend for the mere purpose of delay: *Jones v. Stone*, 1894, A. C. 124; see also *Bank of Minnesota v. Page*, 14 Ont. App. 347; *Stephenson v. Dallas*, 13 P. R. 450.

Formerly where the nature of the claim involved the taking of accounts between the parties, the *Rule* was not applicable: *Wallingford v. Mutual Society*, 5 App. Cas. 685; but see now *Rule* 607.

The right to direct a reference to take accounts is now expressly given by *Rule* 607, but even before that *Rule*, in the case of an action on a solicitor's bill, where it was clear that something was due to the plaintiff, the usual order for taxation was made, combined with a judgment under this *Rule* for payment of the amount which, as the result of the taxation should be payable: *Smith v. Edwards*, 22 Q. B. D. 10.

Where writ
specially
indorsed
under Rule
138.

An application under this *Rule* can only be made where the writ has been specially indorsed under *Rule* 138, i.e., where the claim is in respect of the causes of action therein specified, or any one or more of them; see *Rule* 138. Where, therefore, the claim was upon a covenant in a chattel mortgage given as a continuing security for future advances, and the writ was indorsed for the amount mentioned in the mortgage, and not for the various advances, and the Master in Chambers had directed judgment to be signed for a sum less than \$2,500, which upon affidavits and the depositions of defendant, appeared to him to be due, it was held on appeal that the plaintiff's claim was not a debt, or liquidated demand: *Barber v. Russell*, 9 P. R. 432, 442.

Where equitable relief was claimed in addition to a liquidated demand, that was formerly a bar to a motion under this *Rule*; see *McCollum v. McCollum*, 11 P. R. 16; *Yeatman v. Snow*, 42 L. T. 502, and, unless the claims are distinct and properly severable, it may still be a reason for refusing an application under this *Rule* in such cases.

The addition of any claim in the writ which was not capable of being specially indorsed under *Rule* 138 formerly vitiated the whole indorsement, even as regarded claims which were properly the subject of a "special indorsement," and prevented any motion for judgment under this *Rule*, even in respect of the demand which might, if it had stood alone, have been specially indorsed: *Wicks v. Wood*, 1892, 1 Q. B. 684; *Sheba Gold Mining Co. v. Truittshere*, and *Roby v. Master*, 1892, 1 Q. B. 674; *Casselman v. Barrie*, 14 P. R. 507; *Selmes v. Stafford*, 16 P. R. 78, 204; *Hollender v. Eftulkes*, 16 P. R. 177; *Clarkson v. Dean*, 17 P. R. 206. But all of these cases are in effect overruled by the change made in the framing of the present revised *Rule* 602.

A writ may now be "specially indorsed" for claims coming within *Rule* 138, and other claims may also be added in the indorsement, and judgment may now be obtained as to the claims specially indorsed under *Rule* 138, and the action may be proceeded with thereafter as to any other claims.

A judgment may be obtained against one or more of several part-^{Rule 603.}ners or other joint debtors without preventing the plaintiff from proceeding in the same action to judgment in the ordinary way against the other defendants: *Ducher Watch Case Mfg. Co. v. Taggart*, 26 Ont. App. 295; see also *supra*, p. 424, and *infra*, pp. 781 and 807.

As to a claim for recovery of land with other claims, see *Spears v. Fleming*, 19 P. R. 127.

For instances of indorsements sufficient and insufficient under *Rule 138*, see notes to that *Rule*.

In actions where the writ is indorsed, not under *Rule 138*, but under *Rule 141*, for foreclosure, and immediate payment of the amount due under a covenant in a mortgage, this *Rule* was formerly held not to apply: *Canadian Bank of Commerce v. Bricker*, 1 C. L. T. 729; *Hill v. Sidebottom*, 47 L. T. 224; *Imbert-Terry v. Carver*, 34 Ch. D. 500; *Clarke v. Berger*, 36 W. R. 809; and it does not apply to a claim for immediate possession under *Rule 141*: *Foresters v. Pegg*, 19 P. R. 80.

Where plaintiff was entitled to costs payable by defendant, between solicitor and client, he was held not entitled to the costs of a motion made under this *Rule* and refused because the indorsement on the writ was not a good special indorsement: *Baldwin v. Quinn*, 16 P. R. 248.

In order to entitle a plaintiff to judgment under this *Rule* the indorsement on the writ must be complete in itself, and shew a cause of action, which is properly the subject of a special indorsement under *Rule 138*. A defect in the indorsement cannot be supplemented by the affidavits on the motion: *Davidson v. Gurd*, 15 P. R. 31; *Fruhauf v. Grosvenor*, 67 L. T. 350; *Munro v. Pike*, 15 P. R. 164; unless an amendment can be made under clause (3) of the *Rule*; see, however, *Nesbitt v. Armstrong*, 14 P. R. 366.

But, in an action to recover land, where the writ was indorsed to recover £80 for mesne profits, explanation was allowed to be given by the affidavit that the £80 was claimed as double value for 6 months in consequence of a refusal to deliver up possession, and an order was made for judgment: *Southport v. Gandy*, 45 W. R. 681.

A formal error in the indorsement of the writ, such as the misplacing of a date, is no answer to an application under this *Rule*: *Anon.*, W. N. 1876, 53; 2 Charl. Ch. Ca. 20. Neither is a mistake in the teste in the copy of the writ served: *Wesson v. Stalker*, 47 L. T. 444, where the year was given in the copy as "eighty" instead of "eighty two"; see also *Re Johnson*, 25 Ch. D. 112.

In Ontario, since 47 V. c. 19 (now R. S. O. c. 163), it has been held that the *Rule* may be applied, and judgment entered in a plain case against a married woman, with execution against her separate estate not subject to restraint on anticipation: *Nesbitt v. Armstrong*, 14 P. R. 366; *Kinnear v. Blue*, 10 P. R. 465; *Quebec Bank v. Radford*, 10 P. R. 619; *Cameron v. Rutherford*, 10 P. R. 620; see *contra*, *Cameron v. Heigh*, 14 P. R. 56; and the later English cases seem to have established the same right in England: see *Bursill v. Tauner*, 13 Q. B. D. 491, and other cases referred to in the notes to *Rule 139*.

In an action against a married woman on a contract made prior to Married 15th April, 1897 (see R. S. O. c. 163, s. 41, the plaintiff must show ^{woman} that the married woman was capable of contracting, by shewing the

Rule 603. possession of separate estate at the date of the contract: see notes to *Rule 199*, p. 350, and *Canadian Bank of Commerce v. Woodcock*, 13 P. R. 242. Where this did not appear by the writ, but was shown by the affidavits on the motion, an amendment of the writ was allowed: *Nesbitt v. Armstrong*, 14 P. R. 396; and see *Sicetland v. Neville*, 21 Ont. 412; but an amendment to uphold a summary judgment was not, before the present *Rule* (see clause 3), encouraged: *Davidson v. Gurd*, and other cases *supra*.

In actions founded on contracts made by a married woman since 13th April, 1897, it is no longer necessary to allege or prove the possession of separate estate at the date of the contract: see R. S. O. c. 103, s. 4.

For the form of judgment against a married woman: see notes to *Rule 199*, p. 352.

Indians.

Judgment may be obtained against an Indian, as, since the repeal of C. S. C. c. 9, an Indian may sue and be sued, though by the Indian Act of 1880, s. 77 (d), the judgment will not bind any property of the Indian except that described in sec. 75: *Bybee, etc.*, *Salt*, 11 P. R. 112.

Actions to recover land.

As to actions to recover land, to which the present *Rule* has now been made applicable, see notes to *Rule 138, supra*, p. 273.

Judgment cannot be given under this *Rule* in an action for possession of land where the right to possession is disputed for some *bona fide* reason: see *Jours v. Stoue*, 1894, A. C. 124; 70 L. T. 174.

In an action for the recovery of land where other questions are raised by counter-claim, judgment for the recovery of the land should not be granted, where the Judge at the trial might be thereby hampered in dealing with the other questions: *Spears v. Fleming*, 14 P. R. 127.

Where the action is for recovery of land and mesne profits, and the plaintiff obtains judgment under this *Rule*, the mesne profits may be ordered to be calculated up to the date of the plaintiff's obtaining possession so as to avoid the necessity of bringing another action: *Southport Tramways Co. v. Gandy*, 1897, 2 Q. B. 96.

The effect of the J. A. Rules is to abolish the non-finality which a judgment in ejectment formerly had. A former judgment on the same question will now sustain a defence of *res judicata*: *Bull v. Cathcart*, 16 Ont. 525; *Cochrane v. Hamilton Prov. L. S.*, 15 Ont. 128.

Security for costs.

Where the plaintiff is liable to give security for costs, and an order for that purpose has been obtained, but the plaintiff has a case for setting it aside, it was held under the original Rules that he might move *uno facto*, and upon the same materials, to vacate the order for security, and to sign judgment: *Anglo-American Casings Co. v. Reaction*, 10 P. R. 394. This course cannot be taken now; but it is open to a plaintiff, under *Rule 120* (1), to pay \$50 into Court as a partial compliance with the order for security, and proceed with the motion for judgment: *Payne v. Neiberry*, 13 P. R. 354.

The Master in Chambers, and the Local Judges under Rules 42, 47, and 49, have jurisdiction to entertain applications under the present *Rule*.

No time is limited within which an application may be made, and Rule 603. it has therefore been held to be regular after statement of claim delivered: *Hope v. Neill*, 12th Sept., 1881 (Mr. Dalton); and see *Hannay v. Flight*, 30 L. T. 279. It is held in Ireland under a similar Rule that, after issue joined on a statement of defence, a plaintiff cannot resort to this summary procedure, as he has adopted the defendant's mode of procedure: *Hac v. Lalor*, 12 L. R. Ir. 43; also that where the plaintiff, after appearance, takes any deliberate step to have the action tried by a jury by serving a statement of claim, he cannot move under this Rule: *Stewartstown Loan Co. v. Dalp*, 12 L. R. Ir. 418.

In Ontario the rule is that motions after a statement of claim is delivered, are not to be encouraged, though in cases of necessity, allowable: *Woodruff v. McLennan*, 11 P. R. 22; but see *McLardy v. Slatcum*, 24 Q. B. D. 394.

If the time for delivering a defence is running pending the motion, the Judge or Master will by his order give further time if necessary: *Hobson v. Monk*, W. N. 1884, 8.

Under the practice in Ireland where a motion was refused, because second affidavit was filed at the time of service of the summons, the motion Court refused to entertain a renewal of the motion: *Trench v. Mulcahy*, 8 L. R. Ir. 146; but in England the dismissal of the motion on the ground of a technical defect in the writ, has been held to be no bar to a fresh application on fresh materials after the defect has been cured: *Wagstaff v. Jacobowitz*, W. N. 1884, 17; *Domkey & Son v. Playfair*, 1897, 1 Q. B. 398; 75 L. T. 676; and the doctrine of *res judicata* has no application to such renewal of the motion: *Id.* A dismissal for not complying with the provisions of Rule 1281 (1), is no bar to a subsequent motion when the provisions of that Rule have been complied with: *Payne v. Nicholls*, 13 P. R. 392.

For a form of affidavit, see H. & L. Forms, No. 419.

The plaintiff's affidavit should not only verify the cause of action, but also pledge the deponent's belief that there is no answer to the plaintiff's demand: *Kirby v. Musson*, 6 L. R. Ir. 445. An affidavit of plaintiff which stated that he was "advised and believed defendant had no defence on the merits to the action" was held sufficient: *Manning v. Moriarty*, 12 L. R. Ir. 372.

An affidavit by the plaintiff's solicitor not stating his means of knowledge is not sufficient: *Edwards v. Davis*, W. N. 1888, 59.

The affidavit in support of the application must verify the claim as indorsed: if it fails to do so, or shows that the real claim of the plaintiff is different from that indorsed, the motion for judgment cannot succeed: *Clarkson v. Dwan*, 17 P. R. 92, 206; unless an amendment be allowed under Rule 603 (3), *supra*.

In *Fell v. Williams*, 3 C. L. T. 358, it was held that the plaintiff's case must appear to a demonstration, and where the defendant set up matter which might possibly afford a defence, the Court refused to criticize or enter into the probabilities of the defence; see also *Thompson v. Marshall*, 28 W. R. 220, and *Lowden v. Martin*, 12 P. R. 496.

Where the action is brought on a cheque, the fact that notice of dishonour was given to the drawer must appear in the indorsement on the writ: *Feuhauf v. Grosvenor*, 67 L. T. 350; but an affidavit not specifically stating the fact, but stating in general terms that the

Rule 603. defendant was justly and truly indebted to the plaintiff, was held to be sufficient verification of the claim in the absence of an affidavit of merits from defendant: *May v. Chidley*, 1894, 1 Q. B. 451.

"The defendant is indebted to the plaintiff in the sum of £24 10s. Od. as *per* particulars specially indorsed on the writ of summons," was held to be a sufficient verification of the special indorsement to entitle the plaintiff to judgment: *Murphy v. Nolan*, 18 L. R. 1r. 468.

The defendant is *ex debito justitiæ* entitled to cross-examine the plaintiff on his affidavit: *Kingsley v. Dunn*, 13 P. R. 300.

Opposition
to the
motion.

The application may be adjourned, if necessary, for better particulars of the plaintiff's claim: *Aston v. Hurwitz*, W. N. 1879, 104.

The affidavit in answer to the motion should ordinarily be made by the defendant himself, where he is a person who can make an affidavit: *Huirhead v. Direct U. S. Cable Co.*, 27 W. R. 708; *Shelford v. Louth, etc., Ry. Co.*, 4 Ex. D. 317; and if a corporation, the affidavit in answer must be made by its proper officer disclosing the defence of the defendant corporation: *Id.* The affidavit will not be insufficient merely because it contains only *hearsay* evidence: *Harri-son v. Bottenheim*, 26 W. R. 362.

That defendant was served in New York, and had not time to instruct his solicitors, was considered sufficient reason for refusing an order: *Anon.*, 60 L. T. Jour. 213; 2 Charl. Ch. Ca. 18.

Affidavit
on defen-
dant's part.

In answer to the motion a simple affidavit of merits is not sufficient: the affidavit must disclose a good defence, i.e., shew its nature, and give some reason for thinking that it exists in fact: *Collins v. Hickok*, 11 Ont. App. 620; *Pascal v. Stone*, 9th Sept., 1881 (Mr. Dalton); *Bank of Toronto v. Kelly*, 17 P. R. 250; see also *Anon.*, 1 Charl. Ch. Ca. 48; W. N. 1875, 249, 250. In the words of Lord Blackburn in *Wallingford v. Mutual Soc.*, 5 App. Cas. 704: "It is not enough for defendant to swear 'I say I owe the man nothing.' Doubtless if it were true that you owed the man nothing, as you swear, that would be a good defence; but that is not enough. You must satisfy the Judge that there is reasonable ground for saying so. So again if you swear there was a fraud, that will not do. It is difficult to define it, but you must give such an extent of definite facts pointing to the fraud as to satisfy the Judge that there are facts which make it reasonable that you should be allowed to raise that defence. And in like manner as to illegality, and every other defence that might be mentioned." A mere statement that he has a good defence is not sufficient: *per* Quain, J., *Anon.*, 1 Charl. Ch. Cas. 48; W. N. 1875, 249, 250.

In *London & Canadian, etc., v. Morris*, 11 C. L. T. 20, a defence alleging that an Act legalizing debentures, and relied on by the plaintiff, was obtained by fraud, was held to be no defence.

Where the action was on a foreign judgment, and the defendant set up that it was obtained by fraud, but the only fraud alleged was the perjury of a witness, and it was not shewn that the plaintiff was in any way party to any fraud, or knew that the evidence was false, leave to sign judgment was granted: *Dohn v. Gillespie*, 33 C. L. J. 394.

Leave was granted to sign judgment against a firm on a specially indorsed writ, notwithstanding that one of the partners was shown to be an infant: *Harris v. Beauchamp*, 1883, 2 Q. B. 534; 130 L. T. 373; but in such a case the judgment should not be against the

firm generally, but "against the firm other than the infant" see *Rule 603*.
Lowell v. Beauchamp, 1804, A. C. 607.

A judgment obtained against a partner under this *Rule* cannot be pleaded in bar to the action by any other partner who obtains leave to defend: *Weall v. James*, 68 L. T. 515; and see note to *Rule 228*, p. 424.

In an action against a limited company incorporated under R. S. O. c. 199, for goods sold and delivered, the company set up that their indebtedness when the goods were purchased exceeded the limit prescribed by ss. 11, 40 of that Act, and that the directors of the company were personally liable—and a motion for judgment against the company under this *Rule* was dismissed: *Canadian General Elec. Co. v. Tagana Water Co.*, 6 O. L. R. 641.

On such a motion the only question to be determined is whether the Judge is satisfied that there is a good defence on the merits: per Jessel, M.R., *Ex p. Marshall*, 5 Ch. D. 877.

What must be shown to entitle the defendant to defend has been variously expressed: see H. & L. Jud. Act, 2nd ed., pp. 750-7 *et seq.* What defendant must show

The various decisions are probably summarized in the judgments in the House of Lords in *Jacob v. Booth's Distillery*, 1901, 50 W. R. 41; 85 L. T. 262, and *Canadian Gen. Electric v. Tagana Water & Light Co.*, 6 O. L. R. 641, in which it was held that the merits of the case are not to be tried (though they must of course to some extent appear and be discussed), and a defence is not to be shut out where on the disclosed facts a triable issue arises; and the plaintiff is to be awarded judgment only where it appears that, assuming all the facts set up by the defendant to be true, they nevertheless do not amount to a defence in law: see also *Nisbet v. Hill*, 5 O. W. R. 155; *Wells v. Allcott*, 1904, 2 K. B. 842.

A question of law in dispute may perhaps be decided on the motion, but where it is a question of foreign law it was held to be impossible to decide this upon affidavits: *Western Nat. Bank of N. Y. v. Perez*, 6 Times, 396.

The fact that there is a valid counter-claim is not necessarily sufficient, as the admission of a counter-claim is not of right but in the discretion of the Judge: *Anglo-Italian Bank v. Wells*, W. N. 1877, 263; 1878, 10; 38 L. T. 197; *Fowler v. Lee*, W. N. 1876, 86; *Rotherham v. Priest*, 49 L. J. C. P. 104; *Anon.*, 1 Charl. Ch. Ca. 45; *Bank of Ottawa v. Johnston*, 9 C. L. T. 251.

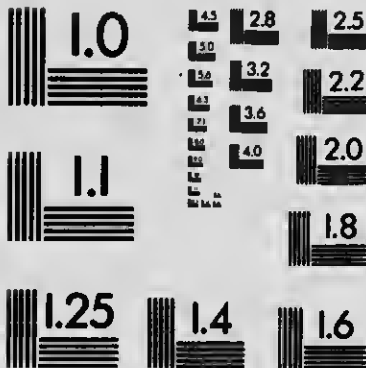
Where a counter-claim is, however, proper, the defendant will generally be allowed to set it up: *Anon.*, 60 L. T. Jour. 85; 1 Charl. Ch. Ca. 45; *Morin v. Calcock*, 26 Oct., 1881 (Mr. Dalton in Chambers); and, if sufficiently connected with the same transaction as that which is the subject of the plaintiff's claim, the counter-claim may be sufficient to entitle the defendant to defend, even where set up as a defence to a liquidated claim, as on a bill of exchange: per L. J. Thesiger in *Anglo-Italian Bank v. Wells*, 38 L. T. 197. So where the defendant has a valid set-off greater than the plaintiff's claim: *Groom v. Rathbone*, 41 L. T. 591; and see *Bayne v. Parson*, 6 Q. B. D. 540; *Government Co. v. Thompson*, 50 L. J. Q. B. 199.

In *Shepherd v. Wilkinson*, 6 Times, 13, judgment was granted for an amount admitted to be due to plaintiff, but execution was stayed till after the trial of the counter-claim: similar orders have been made in Ontario. See also *Rule 255*.



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Rule 603.

Claim for
indemnity
not a
defence.

Affidavit
in reply

A claim for indemnity against a third party will not suffice: *Thorne v. Steel*, W. N. 1878, 215; *German Bank v. Schmidt*, W. N. 1876, 10; 1 Charl. Ch. Ca. 53; nor a promise to give time without consideration: *Woolston v. Baines*, W. N. 1876, 74; 2 Charl. Ch. Ca. 21.

The Judge may, in his discretion, allow the plaintiff to file affidavits in reply to the defendant's affidavit: *Davis v. Spence*, 1 C. P. D. 719; this case was disapproved of in *North Central Waggon Co. v. The N. Wales Waggon Co.*, 39 L. T. 628, but has been followed in *Girvin v. Grepe*, 13 Ch. D. 174. The filing of an affidavit in reply, under this Rule, is however not a matter of right: *Rotherham v. Priest*, 49 L. J. C. P. 104; W. N. 1879, 190.

The orders which may be made upon the application are:—

Final
judgment.

(1) Final Judgment.—This order ought not to be made save where the case is free from doubt: *Ray v. Barker*, 48 L. J. Ex. 569; 4 Ex. D. 279; *Thompson v. Marshall*, 28 W. R. 220; *Bank of Minnesota v. Page*, 14 Ont. App. 347; *Stephenson v. Dallas*, 13 P. R. 450; *Jones v. Stone*, 1894, A. C. 124; *Munro v. Orr*, 17 P. R. 53. It will be made if defendant does not appear, or files no affidavit; W. N. 1876, 12; or only an affidavit stating that there is a good defence, without stating what it is: *Wallingford v. Mutual Society*, 5 App. Cas. 704; though an opportunity of filing a better affidavit may be given: *Pascal v. Stone*, p. 800, *supra*; or if no fairly arguable defence be shewn: *Anglo-Italian Bank v. Wells*, 38 L. T. 197; *Thorne v. Steel*, W. N. 1878, 215; *Anon.*, W. N. 1876, 23; 2 Charl. Ch. Ca. 18; *East Assam, etc.*, v. *Roche*, W. N. 1875, 238; 1 Charl. Ch. Ca. 46; *Bank of Toronto v. Keilty*, 17 P. R. 250; *Jacobs v. Booth's Distillery*, 50 W. R. 49; 85 L. T. 262; *Jones v. Mason*, 18 P. R. 442; *Imp. Bank v. Tuckett*, 6 O. W. R. 121, 161. Judgment was ordered to be signed where the only defence was that the defendant had commenced proceedings in bankruptcy: *Anon.*, W. N. 1875, 220; W. N. 1876, 23; *Clifford v. Budds*, W. N. 1884, 40. So where in an action against two defendants, one admitted the debt and let judgment go by default, and the other only deposed that he was willing to pay his share, and that his co-defendant was acting in collusion with the plaintiff: *East Assam Company v. Roche*, W. N. 1875, 238.

Execution was stayed to enable defendant to appeal, in *Anglo-Italian Bank v. Wells*, 38 L. T. 197. An order directing payment by a day named, otherwise judgment to be signed, need not be served before signing judgment on default of payment: *Hopton v. Robertson*, 23 Q. B. D. 126; W. N. 1884, 77; 28 Sol. Jour. 375; and see *Cranston v. Blair*, 15 P. R. 167.

Where the action was on an untaxed bill of costs delivered within a year, the order made was for taxation and judgment for the amount certified: *Larkin & Co. v. McInerney*, 16 L. R. Ir. 240; see also *Smith v. Edwards*, 22 Q. B. D. 10.

Judgment was ordered to be signed where it was stated that the defendant was at sea on his way to join his regiment, and that he had been served with the writ the day before leaving England: *Anon.*, W. N. 1875, 260; 1 Charl. Ch. Ca. 49.

Leave to
defend
uncondi-
tionally.

(2) Leave to Defend Unconditionally. This will be the order where the affidavit shews what the defence is, and the Court is of opinion that a triable issue arises: *Jacobs v. Booth Distillery*, 50 W. R. 49; 85 L. T. 262; *Canadian Gen. Electric v. Tagana, etc.*, 6 O. L. R. 641; *Remond's v. Mesquita*, 1 Q. B. D. 116. Where the defendant

was a surety, and had not acknowledged his indebtedness, and there **Rule 603.** was nothing to shew that the defence was merely for delay, he was held entitled to put the plaintiff to proof of his claim, and was admitted to defend: *Lloyd's Banking Co. v. Ogle*, 1 Ex. D. 262.

So also where a set-off was shewn exceeding the plaintiff's claim: *Groom v. Rathbone*, 41 L. T. 591; *Connec v. C. P. R.*, No. 2, 11 P. R. 222, but see *Branchite's Case*, 40 L. T. 632, where the action was on a covenant for payment in a mortgage, and defendant swore that the mortgage was signed on the express understanding that he was not to be personally liable, and there were circumstances to corroborate this statement: *Munro v. Orr*, 17 P. R. 53. Where in an action on a promissory note the defendant swears to facts affecting the note with fraud, he is entitled to defend unconditionally, as the onus of proof is on the plaintiff that he is a *bonâ fide* holder for value: *Fuller v. Alexander*, 47 L. T. 443; 52 L. J. Q. B. 103; *Millard v. Baddeley*, W. N. 1884, 96; 28 Sol. Jour. 412, 427; 76 L. T. Jour. 408; *Farmer v. Ellis*, 2 O. L. R. 544. In the case, however, of a note not alleged to have been obtained by fraud, but only to have been made for the accommodation of another, the presumption of value is not removed, and the onus is on the defendant; leave to defend in such a case was refused, except on the terms of paying money into Court: *Merchants Nat. Bank v. Ontario Coal Co.*, 16 P. R. 87.

Where the action was on a note, and defendants swore that it was given on conditions which had not been fulfilled by the payees, and the defendants also swore that they were informed and believed (without indicating the source of information), that the plaintiffs (who were indorsees) were suing for the benefit of the payees and were not holders for value, or took the note after maturity, and the plaintiffs denied that they had any notice of any condition, it was held that no valid defence was shewn: *Jones v. Mason*, 18 P. R. 442, distinguishing *Munro v. Orr*, 17 P. R. 53, and following *Bank of Toronto v. Kelly*, 17 P. R. 250.

A defendant setting up that the note sued on was made without consideration, and that the plaintiff was suing on behalf of the payee who had notice, was allowed to defend unconditionally: *Farmers' Bank v. Sargent*, 17 P. R. 67; also where the defendant set up that the note sued on was void under *The Bills of Exchange Act*, s. 30 (4), because to the knowledge of the plaintiff, it was given for a patent right, which fact did not appear on its face as the Act requires: *Darcy v. Sadler*, 1 O. L. R. 626.

Indorsers who denied receipt of notice of dishonour, although the protest was produced, were held entitled to have the matter tried: *Ontario Bank v. Burk*, 10 P. R. 561; see also *Hughson v. Gordon*, 10 P. R. 565.

Leave to defend unconditionally will be granted where a *bonâ fide* defence is set up, even though novel in its character: *Jones v. Stone*, 1894, A. C. 124, wherever there is a *bonâ fide* contest on a question which is a fair subject for litigation: *Wilkes v. Kennedy*, 16 P. R. 204; *Munro v. Orr*, 17 P. R. 53; *Dueber v. Taggart*, Ch. D. Ont. 23 Dec., 1895; *Clark v. Lee*, 5 O. W. R. 631; *Rill v. Eden*, Ib. 620, 719; *McGavin v. Campbell*, 6 O. W. R. 94; *Imp. Bank v. Tuckett*, 6 O. W. R. 161.

So also where the only defence set up is to the jurisdiction of the Court under *Rule 162* (1), (4), having regard to the special nature of that jurisdiction: *Campbell v. Randall*, 17 P. R. 242.

Rule 603. In an action on a covenant in a mortgage where there is a *bond fide* dispute as to the amount due, leave to defend will be given: *Lynde v. Waithman*, 1895, 2 Q. B. 180; but *quere*, in such a case in Ontario whether a reference might not be directed under *Rule 607*.

Where a plaintiff, pending an action on a covenant in a mortgage, without the leave of the Court, gives notice of sale under a power of sale contained in the mortgage, that, *ipse facto*, operates as an extension of the time for payment, and the plaintiff cannot without the defendant's consent, withdraw the notice or move for judgment under this *Rule* until the time for payment under the notice has expired: *Lyon v. Rycerson*, 17 P. R. 516.

In *Anon.*, 60 L. T. Jour. 176; 1 Charl. Ch. Ca. 52, on an appeal from a Master who had ordered money into Court, a fresh affidavit not used before the Master being read, leave to defend unconditionally was given.

On terms.

(3) Leave to Defend on Payment of Money into Court within a Reasonable Time, or on Other Terms.—Where it was not clear that there was a defence, but the defendant shewed such a state of facts as led to the inference that at the trial he might be able to establish a good defence, leave was given to defend on payment of the amount claimed into Court: *Ray v. Barker*, 4 Ex. D. 279; *sed vide*, *Leslie v. Poulton*, 15 P. R. 332; *Merchants National Bank v. Ontario Coal Co.*, 16 P. R. 87 (where the defence urged was not founded on any known facts, but was merely a suggestion of what might be disclosed if the case went to trial); see also *Dunnct v. Harris*, 14 P. R. 437, where the defence set up was negatived by the plaintiff's affidavits.

In *Anon.*, 60 L. T. Jour. 85; 1 Charl. Ch. Ca. 45, Quain, J., gave leave to defend where a proper counter-claim was the defence, but confined the defence to the counter-claim: but see *Shepherd v. Wilkinson*, 6 Times, 13.

Where the defendant shews what his defence is, and his reasons for thinking it substantial, and it appears to be fairly in dispute, he ought not to be ordered to bring money into Court: *Runnacles v. Mesquita*, 1 Q. B. D. 416; *Dobie v. Lemon*, 12 P. R. 64; even though the plaintiff's case appears to be supported by documents: *Ward v. Plumley*, 6 Times, 198; *Boices v. Caustic Soda, etc.*; *Ford v. Harvey*, 9 Times, 328; and it would seem from the later cases that, as a general rule, whenever the Court is of opinion that the defendant should be allowed to defend at all, no terms should be imposed: *Munro v. Orr*, 17 P. R. 53; *Ducher v. Taggart*, Ch. D. Ont. 23 Dec., 1895.

Where in a claim for payment of sums of money, the defence set up is a denial and contradiction of the accounts on which the claim is founded, it is erroneous to make an order under this *Rule* refusing leave to defend, except upon the condition of the defendant paying into Court a definite sum within a certain time, and that, unless he does so, judgment shall be signed against him. This is especially the case where the plaintiffs are mortgagees, and have been in possession as mortgagees: *Wallingford v. Mutual Society*, 5 App. Cas. 685.

In *Roberts v. Guest*, W. N. 1876, 10; 1 Charl. Ch. Ca. 53, judgment was ordered to be signed, unless the defendant paid the money into Court, where the defence was a counter-claim for costs in a suit in Chancery, in which an order for costs had not been obtained. See also *German Bank v. Schmidt*, W. N. 1876, 10, and as to the amount to be paid, *Oriental Bank v. Fitzgerald*, W. N. 1880, 119.

Where the defence to an action by the holder of a bill of exchange⁴ Rule 603. was sworn to be that the acceptance was obtained by fraud, to which the plaintiff replied that he took the bill for value without notice of any fraud, it was held reasonable to give defendant leave to defend upon payment into Court of the amount of the bill: *Brooks v. Aylmer*, 73 L. T. Jour. 80.

In an action by a company on a call, a clerk of the company swore that notice of allotment was duly posted to the defendant, but though the defendant swore that the letter was never received, it was held that this constituted no defence: see *Houshold Fire Insurance Company v. Grant*, 4 Ex. D. 216; but it was held that the defendant was entitled to cross examine the clerk who swore to the posting, and leave was therefore given to defend on payment into Court: *Carta Para Gold Mining Company v. Fastnedg*, 30 W. R. 80.

Where a *prima facie* case was made out on notes signed by a married woman in the course of a business carried on by her, and the Judge not being satisfied that there was ground for a defence that the business was her husband's, and that she only acted as his agent, and the defendant declining to pay money into Court, leave to sign judgment was granted: *Nelson v. Thorner*, 11 Ont. App. 616.

A defendant is not entitled as of right to defend upon paying money into Court, without an affidavit of merits: *Crump v. Curendish*, 5 Ex. D. 211.

The money paid in, is paid in as security to abide the event, and therefore where the plaintiff succeeds he is entitled to have the money paid out to him: *Bird v. Barstow*, 1892, 1 Q. B. 94; and his right is not affected by the subsequent insolvency of the defendant: *Re Ford*, 1900, 2 Q. B. 211; and a defendant who has paid money into Court has been held entitled to have it paid out to him if successful in the action, notwithstanding that a notice of payment has been given: *Yorkshire Banking Co. v. Beaton*, 4 C. P. D. 100, but see in Ont. *Rule 798*, and notes to *Rule 827*.

(4) Judgment for Part, and Leave to Defend as to the Residue Unconditionally.—Where the defendant's affidavit admits⁵ Judgment for part. part of the claim to be due, and discloses a defence upon the merits as to the residue, there is no power to grant leave to defend as to part of the claim only, on condition of payment of the amount as to which there is no defence. The plaintiff is entitled to have judgment for the amount admitted; the defendant being at liberty to defend as to the residue: *Dennis v. Seymour*, 4 Ex. D. 80, and see *Rule 604*.

Where a good defence is not shewn to the whole of the plaintiff's claim, judgment may be obtained under this *Rule* for so much of the claim as is not answered: see *Rule 604*; *Anon.*, W. N. 1876, 53; 2 Charl. Ch. Ca. 22; *Hammer v. Flight*, 35 L. T. 127; W. N. 1876, 54; 2 Charl. Ch. Ca. 23. (On appeal, however, in the last case, 36 L. T. 279, it was considered that the facts set out in the pleadings did not support the claim in respect of which the plaintiff sought to sign judgment, and the order was therefore refused. See also *Dennis v. Seymour*, 1 Ex. D. 80.)

It has been held in England that where leave is given to defend upon giving security to the satisfaction of a Master in Chambers, there is no appeal from the decision of the Master in regard to the sufficiency of the security tendered: *Hoare & Co. v. Morshead*, 1903, 2 K. B. 359; 89 L. T. 225; but in Ontario probably the Master's decision is not necessarily final merely because the subject of it, or some matter decided forming part of it, is more or less in his discretion.

Rule 604.Effect of
dismissal
of motion.

(5) Dismissal of the Motion. — The simple dismissal of the plaintiff's motion will be equivalent to leave to defend: *Margate Pier, etc., Co. v. Perry*, W. N. 1876, 52; 2 Charl. Ch. Ca. 19; and where the motion is dismissed the plaintiff must proceed with the action in the usual way, by delivering a statement of claim, or notice under *Rule 245*.

Amend-
ment.

Formerly where at the time of the motion the indorsement on the writ was defective, the motion was refused, and the defect could not be cured by amendment pending the motion: *Gurney v. Small*, 1891, 2 Q. L. 584; 65 L. T. 754; but after the amendment of the indorsement a new motion for leave to sign judgment might be made: *Paxton v. Baird*, 1893, 1 Q. B. 139; 67 L. T. 623; *Satchwell v. Clark*, 66 L. T. 641; *Clarkson v. Dwan*, 17 P. R. 92, 206; but see *Nesbitt v. Armstrong*, 14 P. R. 366, and *Casselman v. Barrie*, 14 P. R. 507; *Roberts v. Plant*, 1895, 1 Q. B. 597.

Under *Rule 603* (3) a substantive motion to amend is not necessary, but in a proper case, an amendment may be granted on the motion for leave to sign judgment; but it is to be presumed that an amendment under that clause will not be granted, if a defendant will be unfairly prejudiced thereby.

Where a motion under *Rule 603* is dismissed, there is no jurisdiction to treat the application as a motion for judgment under *Rule 616*: *Solmes v. Stafford*, 16 P. R. 264.

Forms of
judgment,
orders, etc.

For form of judgment, see App. Form 159 (H. & L. Forms, No. 424).

For forms of orders under this *Rule*: see App. Forms, 109, 110, 111 (H. & L. Forms, Nos. 421, 422, 423). For forms of judgment after order and default in complying with the conditions imposed, see App. Forms Nos. 148, 149 (H. & L. Forms, Nos. 816, 817).

Appeal.

An appeal lies to a Judge in Chambers, and from him to a Divisional Court, from an order granted by a judicial officer or local Judge under *Rule 603*, notwithstanding that it is interlocutory: see Ind. Act, sec. 73, and *Bank of Toronto v. Kellty*, 17 P. R. 250; but where leave to defend has been given, an appeal against the discretion thus exercised will hardly ever be entertained: *Papayanni v. Coutpas*, W. N. 1880, 109.

Where the costs of a motion under this *Rule* are disposed of by an order made on the motion, the mode of disposing of them is not reviewable by the Judge at the trial: *Koszen v. Rose*, 76 L. T. 145; 45 W. R. 337.

Defence as
to part.

604. Where the defence applies only to a part of the plaintiff's claim, or any part of his claim is admitted to be due, the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to, or as is admitted to be due, subject to such terms, if any, as to suspending execution, or the payment of any amount levied or any part thereof into Court by the sheriff, the taxation of costs, or otherwise as to the Court or Judge may seem just, and the defendant may be allowed to defend as to the residue of the plaintiff's claim, or the Court or Judge may direct a

reference in regard thereto in the cases provided for by Rule ^{Rules} 606 608.
607. Con. Rule 741.

See the Eng. (1883) R. 118. See the Rule applied in *Hammer v. Flight*, 24 W. R. 346; 36 L. T. 279.

See notes to Rule 603.

605. Judgment may be awarded and execution issued against any defendant without prejudice to the plaintiff's right to proceed against any other defendant. Con. Rule 742 amended. ^{Judgment not to prejudice proceeding against other defendants.}

Cf. Eng. R. (1883) 119 (O. 14, s. 5), which, though not in the same words, is to the same effect.

This Rule does not apply where the right of action can only be in the alternative against one or other of two defendants. In such case judgment signed against one defendant is conclusive evidence of election not to proceed against the other: *Morel, etc. v. Westmoreland*, 1904, A. C. 11, 14. ~~see French v. Harris 1908 2 K. B. 580~~

See note to Rule 603.

Where one of two partners submits to judgment, and the other obtains leave to defend, the latter cannot set up the judgment so recovered against his partner as a bar to the recovery of judgment against himself: *Weatt v. James*, 68 L. T. 54, 515; see also *Ducher Watch Case Manufg. Co. v. Taggart*, 26 Ont. App. 295. *Secus*, if the judgment is obtained by consent: *McLeod v. Power*, 79 L. T. 67.

606. On any such motion, an order may be made giving the defendant leave to defend unconditionally, or subject to such terms as to time and mode of trial, giving security, or other conditions, as may seem just. Con. Rule 743, amended. ^{Leave to defend may be absolute or conditional.}

Compare Eng. (1883) R. 120.

See notes to Rule 603.

607. Where on any motion under Rule 603 it appears that the defence disclosed is substantially only as to the amount recoverable, the Court or Judge may pronounce a judgment or order directing a reference to a Master or Official Referee, and may either pronounce such judgment as may be proper, to take effect on the confirmation of the report, or may reserve further directions and questions of costs for the consideration of the Court or a Judge after the report is made. *New*. ^{Reference, when may be ordered.}

No corresponding English Rule.

608.—(1) At any time after the writ has issued the plaintiff may, by leave of the Court or a Judge, serve notice of motion for judgment. Such leave may be given *ex parte* ^{Motion for judgment by leave after service of writ}

Rule 608. and subject to such directions, as to the service of the notice of motion and filing of the affidavits and otherwise, as may seem just, and may be indorsed upon the notice of motion or embodied in an order, if an order is deemed necessary.

Chy. G. O. 271 was to the same effect. There is no corresponding English Rule.

The Master, or a Judge in Chambers, may grant leave under this clause to make the motion, but under the next clause the motion itself must be made in Court; *Morrison v. Taylor*, 46 U. C. Q. B. 492. The report of *Lucas v. Fraser*, 9 P. R. 319, is erroneous; the motion was before Osler, J., in Court.

Where an order was erroneously made in Chambers instead of in Court, it was held that advantage of the irregularity must be taken by a summary motion to set aside the judgment, and that its invalidity could not be set up in an action founded upon it; *Martin v. Evans*, 6 Ont. 238; in this case the Judge of a County Court pronounced the judgment in question in a County Court action, and the judicial personality was the same in Court and Chambers.

(2) Upon hearing the motion the Court may grant the application on such terms and conditions as may be thought proper, or may refuse the same; or instead of either granting or refusing the same, may give such directions for the examination of either parties or witnesses, or for the making of further inquiries, or with respect to the further prosecution of the suit, as the circumstances of the case may require, and upon such terms as to costs as the Court thinks right. Con. Rule 744. Rules of 1st Jan., 1896, 1478.

The Chy. O. 272 was to the same effect.

In *Federal Bank v. Hope*, 4 Ont. 200, the Court refused to decide on a motion under this Rule whether a defence set up was a valid one, it not being clearly bad.

An execution issued upon a judgment obtained under this Rule is, of course, subject to the provisions of *The Creditors' Relief Act*.

The plaintiff must make out as clear a case for judgment as on a motion under Rule 603; *Leslie v. Poulton*, 35 P. R. 332; *Copeland Breering Co. v. Brooks*, 35 C. L. J. 419; and in addition special circumstances necessitating a hearing out of the ordinary course must be shown; *Francis v. Francis*, 9 P. R. 209; *Leslie v. Poulton*, *supra*; that some injury or injustice is likely to happen to him if he is not awarded immediate relief; *Greene v. Wright*, 12 P. L. 426. Something beyond the plaintiff's desire to get a speedy judgment is necessary; *Kinloch v. Morton*, 9 P. R. 38; *Lucas v. Fraser*, 9 P. R. 319; *Leslie v. Poulton*, *supra*.

Judgment will not be granted where a substantial defence is indicated in the affidavits for the defendant; *Molson Bank v. Cooper*, 16 P. R. 195.

Where the affidavits filed for and against the motion were conflicting, the action was ordered to be entered for trial; *Francis v.*

Francis, 9 P. R. 209; *Greene v. Wright*, 12 P. R. 426; and even Rule 609 though the Court is unable to say that a clear legal defence is shewn, yet if, on the facts presented, it is of opinion that there is a question to be tried, the motion will not be granted; *Leslie v. Boulton*, *supra*. The fact that the sheriff had sold the goods of the defendant in another action, and that the plaintiff desired to obtain a share in the distribution of the proceeds under *The Creditors' Relief Act*, was held not to be of itself a sufficient reason for granting judgment under this Rule; *Molsons Bank v. Cooper*, 16 P. R. 195. In *Lake of the Woods Milling Co. v. Apps*, 17 P. R. 96, the motion was refused though unopposed, and the defendant was sworn to have fraudulently assigned his property: *see vide Kinloch v. Morton*, *supra*.

(ii.) *Motion for Judgment Generally.*

609. Unless it is otherwise provided, the judgment of the Court may be obtained by motion for judgment. *How judgment obtained* *Con.* Rule 748.

See Eng. (1883) R. 559.

The "Court" in this Rule means the "High Court of Justice," *Wellbar v. Conger*, 12 P. R. 354; usually the motion will be made before a single Judge: *see sec. 65 of the Act, and Davenport v. Ward*, 47 L. J. 348.

Rules 575 et seq. provide for the plaintiff's signing final judgment by default of appearance, and *Rules 587 et seq.* for the like judgment upon default of pleading without any motion.

Rules 595, 596. provide for a judgment in default of appearance, or defence, or where the plaintiff's case is admitted in cases of foreclosure, sale, or redemption.

Rules 558 and 559 provide for judgment on a trial, without a motion for judgment afterwards.

Rules 597, 598, 599. provide for judgments on cognitions.

Rule 603 provides for obtaining judgment in Chambers on specially indorsed writs.

Rule 608 provides for the recovery of judgments on special motions, by leave, at any time after the writ has issued.

Rule 631 provides for a like judgment where, under the Act or these Rules, or otherwise, it is provided that judgment may be entered or signed upon the filing of an affidavit, or production of a document.

Rules 944, 950, 956. provide for obtaining judgments in Chambers for administration or partition.

Rules 938 et seq. provide for obtaining an adjudication in a summary way upon matters such as are enumerated in *Rule 938*.

Motions for judgment may be necessary in other cases to obtain the proper relief in case of defendant's default in appearing or pleading: *see Rule 593; e.g.*, where a claim is indorsed for specific performance or other equitable relief, in which case if defendant does not appear the plaintiff must deliver a statement of claim, and cannot sign any judgment, or move for judgment by reason of the default in appearance: *Stuart v. McEwen*, 18 P. R. 250; or where

Rule 610. the Judge at the trial of the action has not ordered a judgment to be entered: see *Rule 554*, and *Wellbinks v. Conger*, 12 P. R. 354; or different issues or questions have been determined in different ways, and at different times, where a motion for judgment on the result may thus become necessary: see *Rules 504, 613*: see also *Rules 602, 645*.

As to motions for judgment by default of defence to a counter-claim: see *Rule 303*.

Before setting a case down on motion for judgment, the plaintiff must in general have delivered a statement of claim, or the notice authorized in lieu thereof: see *Minton v. Metcalf*, 46 L. J. Chy. 384; W. N. 1877, 142; and *Rule 369*; *Hunter v. Wilcockson*, 9 P. R. 305, and notes to *Rule 212*, p. 431.

Two clear days' notice under *Rule 348* is sufficient: *Martens v. Birney*, 10 P. R. 328; see *Roupell v. Parsons*, W. N. 1876, 61.

By direction of the Judges, the officer with whom cases are set down is required to see that all preliminary proceedings are regular, before setting a cause down. Solicitors will therefore require, in settling down cases for judgment for default of defence (1) to file with the officer with whom the case is set down the writ of summons, affidavit of service of writ, and statement of claim, affidavit of non-appearance or no defence, and the order authorizing the service of the writ, when that is necessary under *Rule 162*; (2) a certificate of state of cause, where the action is pending in an outer county.

No motion for judgment is necessary in an action in the High Court, after a trial or assessment in a County Court: *Scutt v. Freeman*, 2 Q. B. D. 177.

It seems that in England, as a matter of form, further directions cannot be reserved; but the same object is accomplished by declaring that the further consideration of the action is adjourned: *Bennett v. Moore*, 1 Ch. D. 692; *Gilbert v. Smith*, 2 Ch. D. 686; *Brassington v. Cussons*, 24 W. R. 881. This difficulty would seem not to exist in practice here.

No judgment on true pleadings merely.

610. A party shall not be entitled to judgment at the trial or on motion on the ground of his pleading being true, if the facts proved are not sufficient in point of law to entitle him to judgment. Con. Rule 749.

Taken from 44 Vict. c. 5, s. 44. There is no corresponding Eng. Rule.

Gray v. Stait, 11 Q. B. D. 668, illustrates this *Rule*. That was an action for wrongful distress by seizure of goods off the premises, after the expiration of the tenancy, and the tenant had given up possession. The defence set up was proved, viz.: that they had been fraudulently removed to prevent distress for rent; but nevertheless judgment was directed to be entered for the plaintiff for 1s.

In *McGee v. Kane*, 14 Ont. 220, this *Rule* was held not to be applicable. In that case the statement of claim had been held to be sufficient upon a demurrer, and the plaintiff having at the trial proved the material allegations in it, it was held that an objection that the facts proved were not sufficient in law to entitle the plaintiff to

judgment, could not be entertained, and that the decision on the de- **Rules**
 murrer should be followed at the trial. See also *Weir v. Mathieson*, 611-613.
 11 Gr. 390.

611. In case the title of the plaintiff in an action to recover land, as alleged in the writ, existed at the time of service thereof, but had expired before the trial, the plaintiff shall, unless otherwise ordered, be entitled to judgment that he was entitled at the time of service, and to his costs. Con. Rule 750.

Taken from R. S. O. 1877, c. 51, s. 31. There is no corresponding Eng. Rule.

In England a writ of possession will be allowed to issue although the plaintiff's estate terminated after action commenced, and before trial, unless it will be unjust and futile to issue the writ, and it is for the defendant to shew affirmatively that such will be the result of issuing the writ; *Knight v. Clark*, 15 Q. B. D. 234; but where a judgment is in the terms provided in this Rule it would seem that a writ of possession could not be issued thereon.

612. Except by leave of the Court or a Judge, an action shall not be set down on motion for judgment after the expiration of one year from the time when the party seeking to set down the same first became entitled so to do. Con. Rule 752.

See Eng. (1883) R. 507, which is to the same effect.

613. Where issues or questions of fact are ordered to be tried or determined in any manner, [and there is no direction for the entry of judgment] the plaintiff may set down the action on motion for judgment as soon as such issues or questions have been determined. If he does not so set it down, and give notice thereof to the other parties, within 14 days after his right so to do has arisen, then after the expiration of such 14 days, any defendant may set down the action on motion for judgment, and give notice thereof to the other parties. Con. Rule 753.

The words in brackets are not in the Eng. (1883) R. 505, and it names 10 days instead of 14, otherwise it is to the same effect. The introduction of the words in brackets appears to make no difference in the construction of the above Rule; they are implied, though not expressed in the English Rule.

This Rule has been held to apply where a reference had been ordered to the Master to inquire whether a partition alleged in the pleadings was binding upon the parties thereto. The Master found in the affirmative. A motion for judgment under this Rule was held to be proper, and judgment was directed to be entered according to the report; *Consolidated Bank v. Wallbridge*, 18 C. L. J. 205. See also *Larkin v. Lloyd*, 64 L. T. 507.

Rules
614, 615.

After trial
of some
only of the
issues
of fact.

614. Where issues have been ordered to be tried, or issues or questions of fact to be determined, in any manner, and some only of such issues or questions of fact have been tried or determined, any party who considers that the result of such trial or determination renders the trial or determination of the others of them unnecessary, or renders it desirable that the trial or determination thereof should be postponed, may apply to the Court or a Judge for leave to set down the action on motion for judgment, without waiting for such trial or determination. And the Court or Judge may, if satisfied of the expediency thereof, give such leave, upon such terms, if any, as appear just, and may give any directions which may appear desirable as to postponing the trial of the other questions of fact. Con. Rule 751.

Identical with the Eng. (1883) R. 500.

Where an order was taken, by the consent of the parties, to determine certain issues of fact in a manner which the Judge afterwards held to be beyond the powers of the Court, Jessel, M.R., refused to proceed with the trial, on the ground that any decision founded upon this consent order would not be binding upon the parties: *Republic of Bolivia v. National Bol. Sur. Co.*, 24 W. R. 301.

On motion
for judg-
ment or
new trial
final
judgment
may be
given by
Court.

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615. Upon a motion for judgment, or for a new trial, the Court may, (a) if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly; or may, if it is of opinion that it has not sufficient materials before it to enable it to give judgment, direct the motion to stand over for further consideration, and direct such issues or questions to be tried or determined, and such accounts and inquiries to be taken and made as it may think fit. Con. Rule 755.

Identical with Eng. R. 1875, O. 40, r. 10. The Eng. (1883) R. 508 introduced at (a), "draw all inferences of fact not inconsistent with the finding of the jury." Under this language in the Eng. R. it was held that when the Court is satisfied that the verdict is against the weight of evidence, and considers that all the facts are before it, it may enter judgment accordingly instead of ordering a new trial: *Miller v. Foytwin*, 17 Q. B. D. 603; 12 App. Cas. 746; *Attcock v. Hall*, 1891, 1 Q. B. 444; *Bryant v. N. M. Tramways Co.*, 6 Times, 306.

Similar power (including, as in the Eng. Rule, power to draw inferences of fact not inconsistent with the finding of the jury) is conferred upon the Court of Appeal by Rule 817.

The motion for judgment referred to probably means, not the ordinary motion to the Judge who tried the cause, for judgment after the findings upon the facts, but such a motion as is contemplated by

100 L.R. 243 (1889)
100 L.R. 243, 719

Rule 708, where a judgment has already been directed to be entered. *Rule 615* and a Divisional Court is moved for a new trial, or to enter another judgment; but see *Bobbett v. S. E. Ry. Co.*, 9 Q. B. D. 430.

Where the case is one proper for the decision of a jury, the powers conferred on the Court by this *Rule* may not affect the decision in *Moore v. Connecticut Mutual*, 6 App. Cas. 614, that a Court has power to enter a verdict in accordance with what they deem to be the true construction of the findings, coupled with other facts, either admitted, or so clearly proved, that there could be no controversy about them, but have no power to enter a verdict in direct opposition to the finding of the jury upon a material issue, upon which there was evidence to go to the jury; see also *Perkins v. Dangerfield*, 51 L. T. 757, W. N. 1879, 172; *Jones v. Hough*, 5 Ex. D. 122; and *Mollisich v. Lloyd*, 40 L. J. C. P. 491; W. N. 1877, 30; *Scovell v. B. C. Towing Co.*, 20 C. L. J. 170; 1 C. L. T. 844; 9 S. C. R. 527; *Macdonald v. Mail Pub. Co.*, 32 Ont. 155.

This *Rule*, however, seems to confer upon a Divisional Court the power to enter a verdict not in accordance with the finding of the jury, where the Court considers that the most convenient course is not to send the case for the opinion of another jury, but to enter a judgment in accordance with their own views, upon the whole case, if they consider that they have the proper materials before them upon which to decide; see *Hamilton v. Johnson*, 5 Q. B. D. 263, 266; *Lancey v. Burke*, 10 Ont. 428; *James v. Clement*, 13 Ont. 115; *Palmer v. Miller*, 11, 576; *Campbell v. Cole*, 7 Ont. 127; *St. Denis v. Buxter*, 15 Ont. App. 387; *Sabbald v. Grand Trunk Ry.*, 18 Ont. App. at p. 197 (see, however, per Burton, J.A., at p. 207); *Clayton v. Patterson*, 32 Ont. 435; *Jackson v. Grand Trunk Ry.*, 2 O. L. R. 680; 32 S. C. R. 245; or to finally determine all questions in dispute though the jury may not have found upon them all; *Scovell v. British Columbia Towing Co.*, *supra*.

Where, therefore, the case is one in which no additional facts remain to be proved, and in which, upon the facts proved, no jury would be justified in finding a verdict adverse to the party in whose favour the Court thinks that judgment should be given, the Court has before it all the materials necessary for finally determining the questions in dispute, and will act under this *Rule*; *Yorkshire Banking Company v. Beaton*, 5 C. P. D. 109, 127; *Bobbett v. S. E. Ry. Co.*, 9 Q. B. D. 430; *Stewart v. Rounds*, 7 Ont. App. 515, 519; *McCaull v. Wilkins*, 13 Ont. App. 438; *Sheppard Pub. Co. v. Press Publishing Co.*, 5 O. W. R. 775; and this was done where the parties did not object, in a case where the Court was of opinion that the Judge at the trial had improperly usurped the functions of the jury on a question of fact which should have been left to them; *Peacey v. Lansdowne*, 62 L. T. 316; and see *Watt v. Watt*, 1935, A. C. 115; 118 L. T. Jour. 524, as to the Court usurping the functions of the jury unless both parties consent.

But where some of the findings of the jury are set aside, but others are left undisturbed, this *Rule* does not empower the Court to direct a judgment to be entered upon its own view of the facts, where such view is irreconcilable with the unquestioned findings of the jury; *Ogilvie v. West Australian M. & L. Corp.*, 1896, A. C. 257; 74 L. T. 201.

The power must be most sparingly and cautiously exercised (per Wilson, C.J., in *Stewart v. Rounds*, *supra*); and *Clayton v. Patterson*, 32 Ont. 435; and will not be exercised where there is evidence which ought properly to go to a jury; *Brewster v. Durand*, W. N.

Rule 616. 1880, 27; or where, if a new trial were ordered, further evidence might be adduced: *Clark v. Molyneux*, 3 Q. B. D. 237, 245; see *Baker v. G. T. Ry. Co.*, 11 Ont. App. 72; *Hardman v. Putnam*, 18 S. C. R. 714.

In *Milissich v. Lloyds*, 46 L. J. C. P. 404; W. N. 1877, 36, an action for libel, the Court held that whether the report of a trial in question was a fair one or not, was a question for the jury, which the Court would not withdraw from them under this Rule; but in *McGuire v. Western Morning News*, 1903, 2 K. B. 100; 88 L. T. 737; which was an action for libel contained in a criticism of a play, the Court held that if the alleged libel only amounted to fair comment it was the duty of the Judge at the trial to withdraw the case from the jury.

If the appellate Court finds that the damages awarded by a jury are excessive, it must grant a new trial. it has no power unless both parties consent, to reduce the damages to a sum which it thinks proper: *Watt v. Watt*, *supra*.

Where there was a conflict of evidence, and the Judge who tried the cause without a jury, attributed greater weight to the evidence of some witnesses than others, but, in the opinion of the Court, took a wrong view of the law, the Court refused to give judgment on the evidence, and sent the case for a new trial: *Canada Landed Credit Co. v. Thompson*, 8 Ont. App. 696.

See also for applications of this Rule: *Mercier v. Williams*, 9 Q. B. D. 337, 10 App. Cas. 1, where judgment was entered for defendant upon a motion for a new trial in an interpleader issue: *Daun v. Simmings*, 40 L. T. 556; 41 L. T. 783; 28 W. R. 129; W. N. 1879, 178, where a non-suit was entered, after a verdict for plaintiff, and though the rule only asked for a new trial, the Court being of opinion that there was really no evidence in support of the findings: also *Batty v. Clever*, 71 L. T. Jour. 43; and *Waddell v. Blockley*, 10 Ch. D. 416; *Eastland v. Burehell*, 3 Q. B. D. 432; 38 L. T. 563; *Rosenberger v. Grand Trunk Ry. Co.*, 32 C. P. 349, 365; 8 Ont. App. 482; 9 S. C. R. 311; *Standard Bank v. Dunham*, 14 Ont. 67; *Heath v. Pugh*, 6 Q. B. D. 355.

The Court declined to act under this Rule in *Garland v. Thompson*, 9 Ont. 376; see also *Hislop v. McGillivray*, 7 C. L. T. 37.

The Rule is applicable on a motion for a new trial to a County Court in term: *Donaldson v. Wherry*, 29 Ont. 552; but the contrary has been held in England: *Pryor v. City Offices Co.*, 10 Q. B. D. 504; see notes, *supra*, pp. 192-195.

The Rule was held to enable the Divisional Court to pronounce the proper judgment on the findings of the jury in a case where the Judge who tried the action considered the findings insufficient to warrant a judgment for either party: *Stevens v. Grout*, 16 P. R. 210; but where judgment cannot be obtained in that way, see Rule 781.

Summary
relief on
motion upon
admissions
in pleadings,
etc.

616.—(1) A party may, at any stage of an action, apply to the Court or a Judge for such order as he may, upon any admissions of fact in the pleadings, [(a) or in the examination of any other party] be entitled to; [(b) and it shall not be necessary to wait] for the determination of any other question between the parties (c); [(d) or he may so apply

where the only evidence consists of documents and such affidavits as are necessary to prove their execution or identity without the necessity of any cross-examination; or he may so apply where infants are concerned, and evidence is necessary so far only as they are concerned, for the purpose of proving facts which are not disputed. Rule 616.

(2) The foregoing Rules shall not apply to such applications, and any such application may be made by motion as soon as the right of the party applying to the relief claimed has appeared from the pleadings.

No corresponding clause in the Eng. (1883) R. 376.

(3) The Court or a Judge may, on such application, give such relief, subject to such terms, if any, as such Court or Judge may think fit. Con. Rule 156.

See Chy. O. 270, and Eng. (1883) R. 376.

(a) The words here in brackets are not in the Eng. (1883) R. 376, which here has "or otherwise," and those words were held to include admissions contained in an affidavit filed on a previous interlocutory application made in an action in which no pleadings had been delivered, and the writ not specially indorsed: *Landerghau v. Feast*, 34 W. R. 469, 691; 54 L. T. 369. This was reversed on appeal: 55 L. T. 42; 55 L. J. Chy. 505; on the ground that the admission was not definite enough, and it was held that there must be a clear admission in the action in which the admission is made. The English Rule has also been held to include verbal admissions alleged to have been made before action and not denied by the defendant: *Re Beeny, Ffrench v. Sproston*, 1894, 1 Ch. 490; 70 L. T. 160. Under this Rule the admission on which the motion is founded must be in the pleadings or examination of the party, but even the English Rule has been held not to authorize the Court to order money to be paid into Court upon an interlocutory application, except upon a clear admission that the party required to pay has it in hand: *Neville v. Mattheuman*, 1894, 3 Ch. 345; an admission that the party is responsible therefor is not enough: *Nutter v. Holland*, 1894, 3 Ch. 408; *Crompton v. E. Union Bank*, 1895, 2 Ch. 711; 73 L. T. 181; but see *Re Benson*, 1899, 1 Ch. 39; 79 L. T. 590.

(b) Instead of the words in brackets here, the English Rule has the words "without waiting."

(c) Where the claim of the plaintiff against the defendants is severable, and one defendant does not appear, or does not deliver a defence, and another delivers a defence on which the plaintiff's right to relief is admitted, the plaintiff may proceed against the latter under this Rule, and against the former by default: *Re Smith's Estate, Bridson v. Smith*, 24 W. R. 392; *Parsons v. Harris*, 6 Ch. D. 654; see, however, *Warner v. Davies*, 79 L. T. Jour. 136. See also *Jenkins v. Davies*, 1 Ch. D. 636, where a statement of defence, purporting to be the defence of a husband and wife, raised no defence as regarded the husband, and the plaintiff was held entitled under the English rules of pleading (though it would be otherwise here under

Rule 616. *Rule 403* to judgment against the husband as admitting the plaintiff's claim, without waiting for the determination of the case against the wife. Where the plaintiff's claim against several defendants is not severable, the action should be brought to a trial or hearing against all of them at the same time: see notes to *Rule 586, supra*, p. 778.

(d) The words here in brackets are not in the English Rule and are taken from the Chy. O. 270.

Scope of Rule.—The object of this *Rule* is to enable a plaintiff or defendant to get rid of so much of the action as there is no controversy respecting. If the whole issue is not in controversy, either party may be entitled to move on the admission of the other: *Thorpe v. Holdsworth*, 3 Ch. D. at p. 640.

There cannot be an admission under this *Rule* until pleadings, i.e., both claim and defence (*Jurmer v. Davis*, 23 Sol. Jour. 462), have been delivered: *McLeod v. Seasmith*, 12 P. R. 606; and the indorsement on a writ was held to be not a pleading within the *Rule*: *Wallis v. Jackson*, 23 Ch. D. 204, followed by *Boyd, C.*, in *Fell v. Williams*, though not mentioned in the report: 3 C. L. T. 358; see also *Gillott v. Ker*, 24 W. R. 428; and the reference to pleadings in clause (1) of the *Rule*; and *Landergan v. Feast, supra*.

Where admissions were made not in pleadings or in any document filed, but in a statement of facts agreed to by both parties, the plaintiff was held to be at liberty to abandon the admissions without any motion to be relieved from them, and to proceed with the action by statement of claim in the usual way, countermanding a notice of motion given by him for judgment on the statement of facts: *East v. O'Connor*, 19 P. R. 301.

A defendant admitting that she held in her hands funds of an infant, but claiming a discretionary trust therein, which was held not to be the fact, was ordered to bring the fund into Court: *Whitewood v. Whitewood*, 19 P. R. 183.

As to allowing an admission to be withdrawn, see *Hollis v. Burton*, 1892, 3 Ch. 226.

The *Rule* is applicable at any stage of the action, after pleadings: *McLeod v. Seasmith, supra*, and therefore it was held that the plaintiff was entitled to judgment on an admission under this *Rule*, though he had delivered a reply, and the action was set down for trial: *Brown v. Pearson*, 21 Ch. D. 716; and the *Rule* may be acted on at the trial: *Tildesley v. Harper*, 7 Ch. D. 403. After a judgment obtained without pleadings, the *Rule* was held to be applicable on a motion under *Rule 228* for leave to issue execution against a person who had been served as a partner under a judgment against the firm, the necessary admissions appearing in an examination of the person upon an affidavit made by him on the motion: *Tennant v. Manhard*, 12 P. R. 619; but there is no power under this *Rule* to determine summarily the liability of an alleged partner who was not served with the writ, and who disputes his liability: *Standard Bank v. Frind*, 14 P. R. 355; and see S. C. in appeal, 15 P. R. 438.

The entering of a dispute note under *Rule 176*, limiting the defence to a part of the sum claimed and admitting the remainder, was held to be an admission under this *Rule*: *Crawford v. Gemmell*, 7 C. L. T. 117, but see now *Rule 176*.

It is in the discretion of the Judge whether to give relief on the *Rule 616*, motion or not, and the Court of Appeal will not review his discretion: *Mellor v. Sidebottom*, 5 Ch. D. 342.

On a plaintiff's motion for judgment where all the facts are before the Court, and the conclusion is against the plaintiff, the action, and not merely the motion, may be dismissed: *Hill v. Hill*, 2 O. L. R. 289, 541; 3 O. L. R. 202.

The Court acting under this *Rule* has decided, on the pleadings, the question whether the facts set up by the defence constituted a legal defence: *Ontario Bank v. Young*, 2 O. L. R. 761, but it has since been held that the *Rule* does not apply to the case of the alleged insufficiency in law of the statements of fact pleaded in the defence: and that in such case the procedure provided by *Rules 259*, or *261* should be followed: *Edwards v. Cole*, 8 O. L. R. 140.

A defendant may move upon an admission entitling him to the "relief" of having the action dismissed: *Pascoe v. Richards*, 50 L. J. Chy. 337; 44 L. T. 87; *The Naples*, 35 W. R. 59; *Coyle v. Coyle*, 19 P. R. 97; *Hermann v. Wilson*, 32 Ont. 60.

The provisions of this *Rule*, which are not contained in the English *Rule*, are taken from the former Chancery practice regulating hearings on motion for decree (see Chy. O. 270), and on bill and answer.

Both those methods of hearing a case were formerly employed in cases involving the consideration of important questions of law. Suits for the construction of wills are familiar examples: see for instance *Fuller v. Macklen*, 25 Gr. 455; *Robson v. Argue*, 25 Gr. 467; *Patton v. Hickson*, 25 Gr. 102; *Clarkson v. Scott*, 25 Gr. 373. In such cases this *Rule* is no doubt applicable, and the motion will be properly made in Court: *Rogers v. Wilson*, 12 Ont. 322. In simpler cases similar to those in which the English *Rule* was intended to apply, the application may be made in Chambers: see *Gough v. Heatley*, W. N. 1884, 14; 32 W. R. 385; 49 L. T. 772; *Cook v. Heynes*, *ib.* 75; *London, etc., v. Digby*, 36 W. R. 497; 58 L. T. 724; 57 L. J. Chy. 505; *Allen v. Oakley*, 2 L. T. 724. Applications under this *Rule* have frequently been entertained by the Master in Chambers: see *Trust and Loan Co. v. Hill*, 9 P. R. 8; *Cook v. Lemieux*, 10 P. R. 577; *Taylor v. Cook*, 11 P. R. 60; *Henebery v. Turner*, 2 Ont. 284; and see *Ladies Tailoring Assoc. v. Clarkson*, 27 C. L. J. 501.

All the plaintiffs on the record must join in, or be parties to, the motion under this *Rule*: *Re Wright, Kirke v. North*, 1895, 2 Ch. 747; 73 L. T. 396.

Even in England an application may be made where the judgment asked for is in the nature of a final judgment and not merely interlocutory: *Gilbert v. Smith*, 2 Ch. D. 686; *Jenkins v. Davies*, 1 Ch. D. 696; *Re Barker's Estate*, 10 Ch. D. 162, 165; but it has been held that the party moving must have a clear case, and if he claims a right which does not exist at law, the fact that it is not denied in the other party's pleadings will not entitle him to judgment: *Chilton v. London*, 7 Ch. D. 735; see *Rule 610*.

Formerly in Chancery on a motion for decree the examination of a defendant might be read, with his answer, against him: *Proctor v. Grant*, 9 Gr. 31; *Mathers v. Short*, 14 Gr. 255; see also *Powell v. Lea*, 20 Gr. 621; and *Rogers v. Wilson*, 12 P. R. 322, 545; and

Rule 616. on a motion for judgment under this *Rule* the defendant's examination for discovery may be read: *Coyle v. Coyle*, 19 P. R. 97. Affidavits proving exhibits might formerly be read on motion for decree under Chy. O. 270, or on a hearing on bill and answer: see *Killaly v. Graham*, 2 Gr. 281; *Chalk v. Raine*, 13 Jnr. 381. But *quære* how far this is the case now: *Cook v. Lemieux*, 10 P. R. 577. It may be found that upon the documents which may be referred to the questions raised in the action cannot satisfactorily be disposed of, in which case the action may be directed to be brought on for trial in the usual way: *Gardner v. Brown* (before Galt, C.J., 28th October, 1889).

Counter-claim as an answer to a motion.

Where the plaintiff's claim is admitted, but the defendant set up a counter-claim for damages for a larger amount, the plaintiff is not necessarily entitled to judgment upon the admission of his claim. The proceeding upon the plaintiff's claim may be stayed on proper terms pending the disposition of the counter-claim: *Rule 255*. *Semble*, if the counter-claim is apparently frivolous or unsubstantial, the plaintiff would be entitled to have the amount of his claim brought into Court to await the result: *Mercy Steamship Co. v. Shuttleworth*, 10 Q. B. D. 468; affirmed on appeal, 11 Q. B. D. 531. A judgment for the plaintiff was made, where the counter-claim was in fact an independent claim for damages as to the quality of other goods than those for the price of which the plaintiff was suing; but execution was directed to be stayed till after the trial, if the defendant should pay the amount of the judgment into Court: *Showell v. Bouillon*, W. N. 1883, 50; 31 W. R. 550; 48 L. T. 613; 52 L. J. Q. B. 284; *Sheppard v. Wilkinson*, 6 Times, 13; *Court v. Sheen*, 7 Times, 556.

In an action on a foreign judgment where the only defence was a denial of the judgment, it was held that the plaintiff was not entitled to judgment, under this *Rule*, upon the pleadings and an exemplification of the judgment, as it was necessary for the plaintiff to give evidence to connect the defendant with it, and support its genuineness, the defendant having put the judgment distinctly in issue: *Henberg v. Turner*, 2 Out. 284.

In reply the plaintiff admitted that a collision was not due to default of the defendant, or those on board, and submitted to a decree that it was due to inevitable accident. On motion by the defendant on the admission, the action was dismissed with costs: *The Naples*, 35 W. R. 59.

In an action by the payee against the maker of a note the defendant, on examination, said that the note had been made and delivered to a trading company for a purpose other than that for which the company had deposited it with the plaintiffs, but did not allege notice to the plaintiff. Judgment for the plaintiff was granted: *Ontario Bank v. Young*, 2 O. L. R. 761.

Where the plaintiff's case is not conclusively made out, the motion will be refused: *Cook v. Lemieux*, 10 P. R. 577, where it was held that much care must be taken in cases under this *Rule* not to take away the right of trial on *voir dire* evidence: see also *Gardner v. Brown*, *supra*, and *Barnum v. Henry*, 9 O. L. R. 319.

The whole of an admission in a pleading must be looked at, and the sense, and not merely the grammatical construction or the form thereof, is to be regarded as the criterion of the extent and scope of the admission: *Dorey v. Irwin*, 4 Out. 8; and it must be clear and distinct: *Landergan v. Frost*, 34 W. R. 694; 55 L. T. 42.

In an action for infringement of a patent, the defendant admitted **Rule 616** the infringement in ten instances, but denied any other infringement. On a motion for judgment on the pleadings the plaintiff was held bound to take the denial as well as the admissions, and was entitled to an inquiry as to damages limited to the ten instances admitted: *United Telephone Co. v. Donohoe*, 31 Ch. D. 399.

An admission by defence must be taken just as it is pleaded: *Demarest v. Midland*, 10 P. R. 640. Thus in an action on a policy of insurance for £1,000, a defence that on an apportionment of the loss under a certain condition in the policy, the defendants were liable for £62 only, was set up. The plaintiffs were not allowed to have judgment for this, and proceed for more; the defendants' contention being that the admission was, that £62 was due as the result of an entire defence shewing that no more was due: *Andrews v. Patriot Assurance Co.*, 18 L. R. Ir. 115.

The statement of one partner on his examination (in a suit against the firm), as to transactions which occurred during the partnership, binds all the partners, unless they seek by examination of some of themselves to contradict or qualify the statements of the partner whose evidence they object to: *Taylor v. Cook & Co.*, 11 P. R. 60.

In a foreclosure action, the statement of defence craved leave to refer to deeds mentioned in the statement of claim, and, save as by such deeds when produced should appear, the defence did not admit that they were to the effect mentioned in the statement of claim. Upon motion for judgment under this **Rule**, the deeds being produced, it was held that there was a sufficient admission of the execution of the deeds, as they appeared to be of the dates, and made between the parties, mentioned in the statement of claim: *Barnard v. Wicland*, W. N. 1882, 103; 30 W. R. 947.

Judgment for possession was given against a mortgagor who admitted the mortgage and default simply: *Trust & Loan Co. v. Hill*, 9 P. R. 8; so where he admitted that his mortgage was in default and plaintiff was mortgagee, merely saying, in addition, that some one else was in possession: *Padgett v. Binns*, W. N. 1884, 10; see also *Croft v. Collingwood*, *ib.*, 33.

In *Coddington v. Jacksonville, Pensacola and Mobile Railway Co.*, 39 L. T. 12, the plaintiff claimed a charge upon certain bonds of a foreign state which were deposited in the bank to the credit of the cause. The defendants, in their answer, admitted the plaintiff's title, and an order was made, before the hearing, for the sale of the bonds as perishable goods within the meaning of **Rule 1007**.

Under this **Rule** in a partition action, an inquiry was directed as to the persons interested in the property: *Gilbert v. Smith*, 2 Ch. D. 686; an order for sale was made: *Burnell v. Burnell*, 11 Ch. D. 213; an order was made for taking the accounts of partnership dealings: *Turgand v. Wilson*, 1 Ch. D. 85; the agent of the trustees of a will was ordered to deliver up all securities relating to the testator's estate, and to account for all sums received on behalf of the estate: *Rumsey v. Reade*, 1 Ch. D. 643; and an order was made for a dissolution of a partnership: *Thorp v. Holdsworth*, 3 Ch. D. 637; see also *Reynolds v. Moore*, 1 Ch. D. 632; *Martin v. Gale*, 4 Ch. D. 428. Probably also the common application for payment into Court by an accounting party of a sum admitted to be in his hands may now, at any time before judgment, be made in Chambers under this **Rule**, though formerly made in Court: *Re Curry*, 8 P. R. 340. As to what is a sufficient admission for this purpose, see *Re Curry*, *supra*; *Re*

Rule 617.

Babcock, 8 Gr. 409; *Collins v. Orme*, 3 Chy. Ch. 70; *London Syndicate v. Lord*, 8 Ch. D. 84; *Fremman v. Cox*, *ib.*, 148; *Symonds v. Jenkins*, 34 L. T. 277; *Re Becup*, *French v. Sproston*, 1894, 1 Ch. 499; *Hollis v. Burton*, 1892, 3 Ch. 229; *Nutter v. Holland* 1894, 3 Ch. 408; *Crompton & F. Union Bank v. Burton*, 1895, 2 Ch. 711; 73 L. T. 181; *Neville v. Matthewman*, 1894, 3 Ch. 345; *Re Benson*, 1899, 1 Ch. 39; 79 L. T. 390.

• Admissions in letters written by a trustee before, and after, action brought, that he has received trust funds, and the recital of that fact in the settlement, the execution of which by the trustee has been proved, are under the English Rule sufficient admissions to support an order for payment into Court, although there is no formal admission in the pleadings: *Hampden v. Wallis*, 27 Ch. D. 251; see also *Porrett v. White*, 31 Ch. D. 52; *sed quare*, if they would be sufficient under this Rule, which requires the admission to be in the pleadings or examination of the party.

The Court can, on an interlocutory application, when it has before it the parties to an account, look at all the facts of the case, and use its discretion as to disallowing charges to which the party making them is clearly not entitled, and may order payment into Court of the sum which it thus decides to be plainly due to the other party: *Wanklyn v. Wilson*, 35 Ch. D. 180.

A foreclosure decree was refused where the defence did not admit the mortgage deed: *Davies v. Smith*, 29 Sol. Jour. 115, [or *Smith v. Davies*, 29 Sol. Jour. 132]; see W. N. 1884, 242; 52 L. T. 10.

Where a solicitor put in a fraudulent defence for his client, without the knowledge of the client, making admissions on which judgment was obtained against the client, the judgment was set aside and the client allowed to withdraw the defence and put in a fresh one: *Williams v. Preston*, 20 Ch. D. 672.

Practice on Motion.—Notice of motion need only be served upon the defendant who makes the admission, at any rate where the cause of action is severable: *Macmillan v. Australasian*, 76 L. T. 182.

It seems that in England, as a matter of form, further directions cannot be reserved; but the same object is accomplished by declaring that the further consideration of the action is adjourned: *Bennett v. Moore*, 1 Ch. D. 692; *Gilbert v. Smith*, 2 Ch. D. 686; *Brassington v. Cussons*, 24 W. R. 881. No difficulty of that kind would seem to arise here (see Rule 618), and where the motion is made in Chambers the motion on further directions should also be made in Chambers: *McGillicuddy v. McCarthy*, 7 C. L. T. 165.

Where the plaintiff makes no case the action, and not merely the motion, should be dismissed: *Hill v. Hill*, 2 O. L. R. 541; 3 O. L. R. 202; *Herman v. Wilson*, 32 Ont. 60.

Pending application turned into motion for judgment, or hearing of cause.

617. Where it is made to appear on the hearing of any application that it will be conducive to the ends of justice to permit it, the Court may direct the application to be turned into a motion for judgment, or a hearing of the cause or matter; and may make such order as to the time and manner of giving the evidence in the cause or matter, and with respect to the further prosecution thereof, as the circumstances of

the case may require; and upon the hearing it shall be discretionary with the Court to either pronounce a judgment or make such order as may seem just. *Con. Rule 757.*

Same in effect as *Chy. O. 614.* There is no corresponding English Rule.

The Court may direct a motion for an interim receiver or injunction to be turned into a motion for judgment where it is satisfied that there is no other question to be tried; and the consent of parties is not necessary: *Merritt v. Nissen*, Divl. Court, 12 Dec., 1900; *King v. Toronto*, per Britton, J., 29 Dec., 1902.

See this Rule applied in *Byrne v. Box*, 2 C. L. T. 47; but in *Selmer v. Stafford*, 16 P. R. 264 (reversing S. C., 16 P. R. 78), it was held by the Court of Appeal that this Rule could not be applied to turn an appeal from the Master in Chambers refusing a motion under Rule 603, into a motion for judgment under this Rule.

618. Where further directions have been reserved until after the making of a report, if the party having the conduct of the action does not set the same down by way of motion for judgment on further directions, and serve notice thereof within 14 days after the confirmation of the report, any other party affected by the report may set the same down, and serve notice of the motion. *Con. Rule 758.*

If cause not set down on F. D. within 14 days after confirmation of report, any party interested may set down and give notice.

Taken from *Chy. O. 419.*

Evidence taken in the Master's office cannot be read on a hearing on further directions: *Gould v. Burritt*, 11 Gr. 234; *Curling v. Austin*, 2 Dr. & Sm. 120; *McMill v. Courtier*, 17 Gr. 271. But on the question of costs reserved, the Court will look at an order made on appeal from the report, and also at the pleadings, and other orders made in the cause: *Downey v. Roof*, 6 P. R. 89.

The Court may, on a hearing of the cause on further directions, refuse to act upon a report, although it be confirmed, if it appears to be improper, or unsatisfactory: *Taylor v. Craven*, 10 Gr. 488; *Baldwin v. Crawford*, 1 Gr. 202; *Harrison v. McSheehan*, 80 L. T. Jour. 79; and it may also refuse to carry out the original judgment pronounced in the action, if it appears to have been improvidently granted: see *Commercial Bank v. Graham*, 4 Gr. 419; *Mitchell v. Strathg.*, 28 Gr. 80. Where the original judgment is defective, the Court may as far as possible supply the defects: *Robertson v. Meyers*, 1 Gr. 560.

Court on F. D. may refuse to act on report, or to carry out an erroneous judgment.

A judgment pronounced by a single Judge on a hearing on further directions, was formerly not appealable to a Divisional Court: *Wansley v. Smallwood*, 10 P. R. 233; *Re Wilson*, 16 P. R. 150; but now an appeal lies under the Jud. Act. sec. 74 (1).

6. FORM OF JUDGMENTS AND ORDERS, ETC.

619. Judgments for foreclosure or sale of mortgaged property where a reference is required, shall after the proper recital: hitherto in use, direct, in general terms, that all necessary inquiries be made, accounts taken, costs taxed, and

General form of judgment for foreclosure or sale.

Rule 619. proceedings had for redemption or foreclosure, (or for redemption or sale as the case may be) and that for these purposes the cause is referred to (naming the Master); and a judgment so expressed shall be read and construed as if the same set forth the particulars contained in Rules 744 to 755 and Rule 385. Con. Rule 776.

Taken from Chy. O. 441.

A declaration that plaintiff is entitled to a charge is a proper preface to a judgment on mortgage debentures: *Parkinson v. Wainwright*, 43 W. R. 429, but not after a windlag-up order has been made, unless with the consent of the liquidator: *Warwick v. Thurlow*, *Ib.*, 493.

Judgments under Judicature Act for foreclosure or sale, effect of.

Judgments for foreclosure, or sale, since *The Judicature Act* have been authorized to be drawn in a similar form to that prescribed by Chy. Ord. 441, from which this *Rule* is taken: see App. Forms, Nos. 153, 154, (H. & L. Forms, Nos. 864 and 865). The Rules prior to 1888 did not expressly state that judgments so worded were to have the effect which Chy. O. 441 stated they should have, but in *McDougall v. Lindsay*, 10 P. R. 248, it was held that such was the effect of judgments so drawn.

In special cases.

Where the circumstances of the case are special, a judgment in the ordinary form prescribed by this *Rule* would not be appropriate. Thus, where a tender was pleaded, a special inquiry was directed on this point, and further directions and costs were reserved: *Peters v. Allen*, 19 Gr. 98. So also where the defendant pleaded payment in full, costs were reserved: *Gooderham v. DeGrassi*, 2 Gr. 137. In such cases, this must still be done, or the judgment must provide for the dismissal of the action in case the Master shall find in the defendant's favour. So also, where the defendants were rival claimants to the equity of redemption, special directions were inserted in the decree: *Ramsay v. Thomson*, 8 Gr. 372.

Day to shew cause.

When infants are defendants, a judgment of foreclosure must also, ordinarily, reserve a day to shew cause: see notes to *Rule 595*.

Reference to take account, when unnecessary.

It is for the plaintiff himself to determine whether or not a reference is required. This will depend upon whether or not there are any subsequent incumbrances: of this he must satisfy himself by getting the proper certificates from the proper officers: see *Rule 745*. Where there are no subsequent incumbrancers, the account should be taken on entering the judgment: if the plaintiff takes a reference to the Master unnecessarily, he cannot recover the extra costs so occasioned: *Hamilton v. Howard*, 4 Gr. 581; *Purdy v. Parks*, 9 P. R. 424.

Where the plaintiff took a judgment without a reference, and, after obtaining a final order of foreclosure, discovered that there were subsequent incumbrances, the Court refused to make a supplemental judgment directing the usual accounts and inquiries against the incumbrancers, but amended the judgment by inserting the usual reference as to incumbrancers, which had the effect of nullifying the previous proceedings: *Wilgress v. Crawford*, 12 P. R. 658; and so also where after a final order, it was discovered that a parcel of land had by mistake been omitted from the indorsement on the writ of summons, an amendment was granted but only on the terms of vacating the judgment and final order: *Clarke v. Cooper*, 15 P. R. 54.

The reference, if directed, should be made to a Master in the county where the writ issued: *Macara v. Gwynne*, 3 Gr. 310. But the reference may afterwards be changed on motion, for sufficient cause: see notes to *Rule 529*, p. 740.

A judgment to enforce an equitable mortgage of shares by deposit, should be in substantially the same form as a judgment to enforce an equitable mortgage by depositing title deeds: *Harrold v. Plenty*, 85 L. T. 43.

620. Judgments and orders shall be divided into convenient paragraphs, and such paragraphs are to be numbered consecutively: and where accounts are directed to be taken, or inquiries to be made, the direction in that behalf may be according to Form No. 157. *Con. Rule 117.*

For Form No. 157, see H. & L. Forms, No. 839.

Actions against Executors and Administrators.—*Pleading.* Pleading. —In an action against a personal representative for a debt of the deceased, if the defendant has not administered the estate and has no defence, he should not allow judgment to go against him if the estate is not solvent, but should ask by counter-claim for judgment for administration and for payment of the debt in due course of administration. Judgment in that form is the proper judgment in all actions in the High Court (and in the County Court, where it has jurisdiction to order administration under R. S. O. c. 55, s. 23, clause 131, against executors, etc., when there is a recovery of money, and assets are not admitted: see *McKibbin v. Feegan*, 21 Ont. App. 95.

If he has duly administered he should plead *plene administravit* or *plene administravit prater*, viz.: "That he has fully administered all the estate and effects of A. B., the deceased, which have come to the hands of the defendant as executor (or administrator) to be administered [except, etc.], and the defendant had not at the commencement of this action, nor has he since, any estate or effects of A. B. in the hands of the defendant as executor (or administrator), [except as aforesaid]." And *scilicet*, a personal representative may plead *plene administravit*, where he has paid his own debt out of the assets, without notice of any other claims, if that has exhausted the assets: see *Re Fludger*, 1898, 2 Ch. 562; 79 L. T. 298.

If the executor thus pleads *plene administravit*, he cannot, if he establishes his defence, be made personally liable; but if he does not so plead, he is taken to admit assets, and may become personally liable for the claim and the costs, if they cannot be levied on property of deceased.

If the defendant does not so plead, or if he pleads and fails to establish his defence, or disputes the right to recover, or pleads any defence which is false to his knowledge, such as a denial that he is executor, etc., and the plaintiff succeeds, the plaintiff is entitled to judgment for costs *de bonis et terris testatoris, si, etc., et si non de propriis*: *Huyck v. Proctor*, 10 P. R. 25; *Lince v. Faircloth*, 11 P. R. 253; *Miles v. Brown*, 15 P. R. 375; but *scilicet*, not for the debt, *de propriis*: see *Wms. Exors.*, 9th ed., 1859-60.

If the defendant proves his plea of *plene administravit* he will usually be given the general costs of the cause, as having succeeded on a plea in bar, although other issues may be found against him:

Rules see *McKibbin v. Feegan*, 21 Ont. App. at p. 94. To prove his plea
621, 622. he must probably shew due notice to creditors and distribution of the estate thus far come to his hands pursuant to R. S. O. c. 129, s. 38, or in administration proceedings in Court.

If the plaintiff takes issue on a plea of *plene administravit*, and proves some assets unadministered, he may obtain judgment to the extent of the assets proved, and of future assets *quando acciderint* for the residue, if any, of his debt: 2 Wms. Exors., 9th ed., 1800, and in such a case the defendant may be ordered personally to pay the costs: 2 Wms. Exors., 9th ed., 1859. Where a judgment has been recovered in this form against a personal representative, it would seem that it would be open to the plaintiff, where the facts justified that course, to present a petition under *Rule 612*, alleging a *devastavit* by defendant and praying judgment against him personally to the extent thereof, so far as necessary to satisfy the judgment.

Judgment
if plaintiff
admits
plea of
*plene ad-
ministravit*

The plaintiff upon the plea of *plene administravit* being pleaded, may apply for judgment (for his debt and costs) of future assets *quando, etc.*: 2 Wms. Exors., 9th ed., 1862; Chitty's Forms, 12th ed., 540. He may do this at once, or after having obtained discovery: see Chitty's Forms, 12th ed., 290, 291.

Such a judgment may, after assets have come to the hands of the executor, and demand has been made upon him for payment, be enforced by applying under *Rule 804* for leave to issue execution, or by action upon the judgment: 2 Wms. Exors., 9th ed., 1863.

Before *The Judicature Act* if a plaintiff took issue on a plea of *plene administravit* and failed, he was not entitled to judgment of assets *quando, etc.*; but this is no longer the case, and such judgment may be awarded if desired, even though the plea be established: *McKibbin v. Feegan*, *supra*.

Sums to
be stated
in dollars
and cents.

621. In all judgments and orders, sums shall be stated in dollars and cents. Con. Rule 778.

Taken from Chy. O. 441.

The Court has no jurisdiction to award payment in anything but Canadian currency: *Manners v. Pearson*, 1898, 1 Ch. 581; 78 L. T. 432; and in taking the account of money payable under a contract in a foreign currency, conversion into Canadian currency is to be made at the rate of exchange current at the time when the amount is ascertained: *Ib.*

Liberty
to apply,
need not be
reserved.

622. It shall not be necessary in any judgment or order to reserve liberty to apply, but any party may apply to the Court from time to time as he may be advised. Con. Rule 771.

Taken from Chy. O. 186.

It is said that all orders of the Court carry with them in *gremio* liberty to apply to the Court, *per Fry, J., Fritz v. Hobson*, 14 Ch. D. 542; 42 L. T. 225; see also *Re Roper, Taylor v. Ward*, 39 W. R. 101, and *Hew v. Winterton*, 91 L. T. 763, 765. But this liberty was held in England not to be implied in orders of a final nature: *Penrice v. Williams*, 23 Ch. D. 353; 48 L. T. 808; nor, in favour of defendant.

in an order dismissing an action, except for the purpose of enforcing Rules the terms of the order: *Huntley v. Link*, 26 Sol. Jour. 59. **623, 624**

Where costs of an interlocutory motion were reserved "until the hearing or other final disposition of the cause," and an order was subsequently made allowing a demurrer to the plaintiff's bill for want of equity, but the costs of the interlocutory motion were not then asked for, it was held that a subsequent application might be made to the Court to amend the order by directing the allowance of the costs reserved: *St. Michael's College v. Merrick*, 26 Gr. 216; 18 C. L. J. 130; *Viney v. Chaplin*, 3 De G. & J. 281; *Fritz v. Hobson*, 14 Ch. D. 542; *Blakey v. Hall*, 56 L. T. 400; and see *Gosnell v. Bishop*, 38 Ch. D. 385; *Hoe v. Winterton*, 91 L. T. 763, 765.

Liberty to apply is said only to extend to applications for further relief consequent on the order or judgment pronounced, and not to an application for additional relief which is not consequential on that already given: see *Poisson v. Robertson*, 86 L. T. 392.

623. Every judgment or order shall shew on its face the day of the week and month on which it was given or made, and (except judgments signed by default or upon an order for leave to sign judgment and orders of course) shall shew the name or names of the Judge or Judges who gave or made the same. Con. Rule 179. Form of judgments and orders.

The date of a judgment or order is the date of pronouncing it; from that date it takes effect: *Rule 629.*

Judgments and orders should be dated on the day on which they are finally made, and should not be ante-dated, nor contain recitals of affidavits sworn after the date of the order: *Ashley v. Taylor*, 10 Ch. D. 768; nor upon an application by a defendant against the plaintiff, should the order be drawn up stating that a co-defendant appeared who in fact did appear, but who had not been served with the notice: *Evelyn v. Evelyn*, 28 W. R. 531.

Where an order is expressed to last until a particular day "or until further order," the words "further order" mean an order made on an earlier day than the day specified: *Bolton v. London School Board*, 7 Ch. D. 766.

As to the manner in which the name of the Judge or officer is to be stated in the margin of judgments or orders, see Appendix, Forms Nos. 102 (Divisional Court), 103 (Single Judge), 104 (Order in Chambers), (H. & L. Forms, Nos. 910, 908 and 902).

7. SETTLEMENT OF JUDGMENTS AND ORDERS.

624. Judgments in cases tried at Toronto shall be settled by the Registrar to whom is assigned the duty of settling judgments. Rules 23 June, 1894, 1351; Rules of 1 Jan., 1896, 1479. By Registrar.

The Registrar here referred to is the Senior Registrar of the High Court: see *Rule 28.*

Rule 624. When a judgment is pronounced, or an order made, by the Court, a note is taken by the Registrar or other officer attending the Court for the purpose, and a similar note is indorsed by counsel on their briefs; and from these notes the draft or minute of the judgment, or order, is prepared.

Judgments pronounced on circuit, are, when necessary, to be settled by the Deputy Registrar, Deputy Clerk, or Local Registrar, or by the Senior Registrar; see *Rule 625*.

This *Rule* only refers to judgments pronounced after a trial at Toronto; judgments pronounced on motions in the Weekly Court are settled by the Clerk of that Court, or other officer acting as Clerk thereof; see *Rule 34*.

The party on whose motion a judgment or order is made, if he obtains any relief or benefit thereby, is *prima facie* entitled to the carriage of it.

Appoint-
ment to
settle.

The party desiring to enter a judgment, or issue an order, the minutes of which require to be first settled, usually in practice prepares a draft, and attends the Registrar, or other officer authorized to settle the minutes of the judgment or order, for an appointment to settle it. The Registrar or other officer will, however, if required, himself prepare the draft of the judgment or order, and when it is ready will issue the appointment to settle it, if he deems one necessary; see *Rule 626*.

On the return of the appointment, the parties notified attend and make any objections they may have to the draft, which are disposed of by the Registrar, or the officer settling the minutes, who then marks the draft settled, and adds his initials. The minutes having been settled, the judgment, or order, is then engrossed, and having been compared with the draft and passed, it is then signed by the Registrar, or other officer, who has settled the minutes, for entry.

Appoint-
ment to
pass

Where the Registrar or other officer thinks it necessary, he may give an appointment to pass; e.g., when any blanks have been left in the draft; or the terms of the order, or judgment, are complicated, and there is any danger of error in transcribing the draft. The passing of the judgment, or order, is merely the act of comparing the engrossment with the draft and seeing that it agrees with it, and signing and marking it for entry.

Registrar
may make
alterations.

The Registrar or other officer in settling any judgment or order, may introduce such alterations as from his experience he believes the Court will sanction; and these alterations are binding on the parties; see *Davenport v. Stafford*, 8 Beav. 503; *Hargrave v. Hargrave*, 3 Mac. & G. 318; Seton, 5th ed., 164; *McKindney v. Armstrong*, 11 P. R. 200. It is also his duty to bring to the attention of the Judge any defects he may find to exist in the proceedings. Thus, when, after judgment pronounced, it appeared before the Registrar that one of the defendants had not been duly served with process, on his bringing the point to the attention of the Judge the judgment was ordered not to be drawn up; *Re Howard*, 10 Ch. D. 550.

Where the Registrar finds that the judgment or order has been pronounced without due notice to a non-appearing party, entitled to notice, before drawing up the order or judgment he should obtain the direction of the Court; see *Tilling v. Blythe*, 100 L. T. Jour. 367; 1899, 1 Q. B. 557.

Where questions of difficulty arise, the Registrar may require the matter to be mentioned to the Court.

Motion to vary Minutes.—After the draft or minutes have been settled by the Registrar, or other officer, but not before, any party dissatisfied may move to vary the minutes; and the Registrar, or other officer, should be previously informed of the application; *Prince v. Howard*, 14 Beav. 208; *Hood v. Cooper*, 24 Beav. 373; *Tennant v. Trenchard*, L. R. 4 Chy. 517, 545; *British Dynamite Co. v. Krebs*, 25 W. R. 840; and such application may be made at any time before the judgment, or order, is passed and entered; 1 Turn. & Ven. 319; Daal. Pr. 875; Seton, 5th ed. 164. The notice of motion should be served on all parties interested, and state the alteration desired.

Varying minutes.

The Court may refuse to permit any question to be argued on a motion to vary the minutes, except what was the actual order made, and whether the intention of the Court has been correctly expressed; *South Wales Min. Co. v. Davies*, 31 Sol. Jour. 110; unless both parties consent to an addition being made, or when it cannot be ascertained what order was pronounced; in which cases the Court may allow the case to be re-argued; see Seton, 5th ed. 165; *Hendrie v. Beatty*, 20 Gr. 423. The Court has, however, on a motion to vary minutes, varied the decree; *Johnson v. School Trustees*, 23 Gr. 204; and until a judgment has been actually entered a Judge may recall, or alter the judgment; *Gilgore v. Gbagore*, 9 Ont. 511, note; *Canadian L. & E. Co. v. Dymart, Ib.*; *Re Suffield & Watts*, 20 Q. B. D. at p. 987; *Re Adam Eyton*, 36 Ch. D. 200, and other cases in notes to Rule 640.

As the Registrar or other officer settling minutes has no jurisdiction to stay the entry of an order or judgment indefinitely, any motion to vary the minutes should be made promptly, after the settlement of the minutes; it should be made returnable at the next sittings of the Court at which the order or judgment was pronounced. Such motions are usually heard before the Judge by whom the order or judgment in question was made, and if he be not then sitting, the motion will usually be adjourned to be heard by him.

Costs of motion.

Any variation made on a motion to vary the minutes is embodied in the draft, and except where the costs of the motion are ordered to be paid, no further order need be drawn up by any party.

If there is fair ground for the application, and there has been no improper opposition, the costs are usually made costs in the cause, and the judgment, or order, may be post-dated so as to include the costs of the day; see Seton, 5th ed. 165.

Where an order has been made in Chambers, it cannot be drawn up as a Court order, even though the case be one which might have properly been argued in Court, unless both the parties and the Court consent; *Re Henning*, 11 P. R. 272.

Where the minutes have been settled by a Local Officer they may be varied either on application to the Senior Registrar, or on motion to "the Judge," presumably the Judge who pronounced the judgment; Rule 625.

Where, after judgment was pronounced, a mistake was discovered in the statement of claim, on a subsequent application to amend the statement of claim, the judgment was directed to be post-dated as of a day subsequent to the amendment; *Winkley v. Winkley*, 44 L. P. 572.

Under the former practice, if the suit abated after decree pronounced, or between hearing and judgment, the decree might be passed and entered notwithstanding the abatement of the suit; Seton, 5th ed. 165; *Braynish v. Pomeroy*, 1 Chy. Ch. 32.

Abaten ent.

Rule 624.

A party not producing his briefs when required, was ordered to do so within a limited time, and in default the order was to be drawn up without them: *Yeatman v. Read*, 14 W. R. 123.

A solicitor who has been discharged by his client before the passing and entry of an order, will not be allowed to withhold papers on which he claims to have a lien, so as to prevent the drawing up, or entry of the order: *Simmonds v. G. E. Ry. Co.*, L. R. 3 Ch. 797; *Clifford v. Turrill*, 2 D. & S. 1.

An appointment to settle minutes, served one day and returnable the next, was sufficient under the former practice: *Re Christmas*, 19 Beav. 519. No time is prescribed by the Rules within which a judgment or order is to be bespoken, and issued; under the former practice a time was limited by Chy. Orders 10, 11: see Holmsted's Rules & Orders, 8; and after the lapse of the prescribed time the judgment or order was not to be issued without leave; but this practice was not very strictly followed. After the lapse of four years, notice of the application to issue an order was required to be given to all parties: *Re Forrester*, *Messmer v. Forrester*, 1 Chy. Ch. 29.

Entry of Judgments and Orders.—Before an order requiring entry can be enforced by attachment for disobedience, it must be entered, and such entry should have been made before the expiry of the time limited by the order for doing the act thereby ordered to be done: *Ballard v. Tomlinson*, 48 L. T. 515.

Proceedings under a judgment, or order, requiring entry, before it has been entered, are irregular and voidable: *Tolson v. Jervis*, 8 Beav. 366; *Drummond v. Anderson*, 3 Gr. 150; although in the case of injunctions and restraining orders, parties are bound by notice of the restraining order, however received, from the time when it is pronounced: see Seton, 5th ed., 456.

Time for entry.

By English Gen. Ord. of 4th December, 1691, all orders pronounced in Michaelmas or Hilary Terms, or the vacations following, were to be entered before the first day of the ensuing Michaelmas Term; and all orders pronounced in Easter or Trinity Terms, or the following vacations, were to be entered before the first day of the ensuing Term. This order is considered to be still in force in England: see Seton, 1547. Whether it is binding here seems doubtful: *Rule 3*; see, however, *Jud. Act*, ss. 27, 61.

Entry *nunc pro tunc*.

Orders may be made to enter judgments, or orders, *nunc pro tunc*: *Donne v. Lewis*, 11 Ves. 601; *Laurence v. Richmond*, 1 J. & W. 241; *Re Jones*, *Bullis v. Jones*, 91 L. T. Jour. 127; 39 W. R. 619. But where a defendant would be prejudiced by such an order it will be refused: *Drummond v. Anderson*, 3 Gr. 150.

Varying judgment.

A judgment, though by consent, is a solemn judgment of the Court, and cannot be altered by consent of the parties without the sanction of the Court: *The Belcairn*, 34 W. R. 55; *Blake v. Harvey*, 29 Ch. D. 827; 53 L. T. 541.

After a judgment, or order, has been passed, and entered, it can, as a general rule, only be varied on appeal: see *Pepper v. Pepper*, W. N. 1868, 104; *Re Robinson*, W. N. 1873, 28; *Andrews v. Bohannon*, W. N. 1869, 80; *Teil v. Barlow*, 3 D. J. & S. 426; *Mason v. Seney*, 2 Chy. Ch. 30; *Moffatt v. Hyde*, 6 U. C. L. J. 94; *Simmers v. Erb*, 21 Gr. 289; *Fawkes v. Swauzie*, 31 Ont. 256; but where the applicant has neglected to move to vary the minutes in the usual

way, the amendment will only be granted on payment by the applicant of all costs: *Re Swire, Mellor v. Swire*, 30 Ch. D. 239; 53 L. T. 625, 626. 205. In cases of clerical mistakes, or errors, arising from any accidental slip or omission, a judgment or order may be corrected on motion, without appeal: *Rule 640*. So also a judgment may be amended on motion where it has been obtained by default: see *Kline v. Kline*, 3 Chy. Ch. 79; or on *præcipe*: *Nelles v. Vandyke*, 17 Gr. 14. After the judgment or order has actually issued, such mistakes cannot properly be corrected, as of course, by the officer who has drawn up the judgment or order: it can only be done on motion: see *Re Beard*, 60 L. T. 259.

An appeal is not proper from the decision of the Judge on a motion to vary the minutes of his judgment or order. The appeal must be from the judgment or order in its entered form: *James v. Jones*, 67 L. T. 584.

625.—(1) Judgments in cases tried elsewhere than at Toronto, shall be settled by the Deputy Clerk of the Crown, Deputy or Local Registrar, at the place of trial, unless any party affected applies to the Registrar to whom is assigned the duty of settling judgments, to settle the same, or to reconsider the settlement of the same by the local officer. Rules 23 June, 1894, 1352; Rules 29th Dec., 1894, 1389; Rules of 1 January, 1896, 1480.

(2) When settled the minutes may be varied by the Judge on the application of either party. (*Ib.*).

As to varying minutes, see notes to *Rule 624*.

In County Court cases there is no appeal to the High Court from an order dismissing a motion to vary the minutes of a judgment or order: *Taggart v. Bennett*, 6 O. L. R. 71.

626. Notice of settling minutes, or passing a judgment or order, shall not be given unless by direction of the officer by whom the judgment or order is to be settled, nor until the proposed minutes of the judgment or order have been prepared by, or delivered to the officer by whom the same are to be settled; the notice shall be by an appointment signed by him, a copy whereof shall be served. The proposed minutes shall remain in his office for inspection until settled or passed, and any party may take a copy thereof. Con. Rule 762.

The Registrar, or other officer, may dispense with notice of settling or passing if he thinks fit: but except where the order or judgment is simple, notice is usually required to be given; the minutes must be first prepared, and left with the Registrar, or other officer (see *Rule 625*), and an appointment obtained from him: see *Rule 624*, note.

An appointment served one day for the next is sufficient: *R. Christmas*, 19 Beav. 519.

By local officers.

Appointments to settle minutes or pass orders how to be issued.

Rules
627-629.

Procedure
where party
makes
default

627. Where a notice is given to settle minutes, or to pass a judgment or order, and the party served attends thereon, but the party giving the notice does not attend or is not prepared to proceed, the officer settling the judgment or order may proceed *ex parte* to settle the minutes or pass the judgment or order, or may in his discretion order the party giving the notice to pay to the other party the costs of his attendance; or if a party served asks for delay, the officer may grant the delay on such terms as he thinks reasonable as to payment of costs or otherwise. Con. Rule 763.

Taken from Chy. O. 13.

Where either party does not attend, it would seem that the officer is not justified in proceeding *ex parte* until the lapse of half an hour from the time appointed: Rule 350.

8. SIGNING AND ENTRY OF JUDGMENTS AND ORDERS.

Office where
judgments
to be signed.

628. Every judgment and order pronounced by the Court or entered by default shall be signed by or under the direction of the officer in whose office the action was commenced. Con. Rule 764; Rules of 1 Jan., 1896, 1401, 1481.

Date of
judgments
and orders.

629.—(1) Every judgment and order pronounced by the Court or a Judge shall be dated as of the day on which such judgment or order is pronounced, and shall take effect from that date, unless otherwise directed; and every judgment shall also bear upon its face the date upon which it is signed.

(2) Every judgment by default shall be dated on the day on which it is signed. Con. Rules 33 and 765.

See Eng. R. 1875, O. 41, r. 2. The Eng. (1883) R. 571, introduces a provision for ante-dating or post-dating a judgment by leave.

It has been held by a Divisional Court in an unreported case, that where a judgment is handed to the Registrar and not delivered in open Court, it is not to be deemed to be pronounced or delivered until the parties are notified of it; and see *Fourkes v. Swayzie*, 31 Ont. 261; *Wallace v. Bath*, 7 O. L. R. 742; but the well settled practice of the Court is, in such cases, to date the judgment or order as of the date on which the decision was handed to the Registrar, notice of its delivery being usually placed on the notice board of the Court on the same day; and see *Atty.-Gen. v. Dunlop*, 36 C. L. J. 607.

See Rule 869, and *Winkley v. Winkley*, 44 L. T. 572.

The day of the week and month are required to be shown in the date of a judgment or order: Rule 623.

The signing of the judgment referred to in this Rule is the marking of it as entered, with the date of entry, and the name of the officer in

whose office it is entered, and not merely the signing of it by the Rules officer who settles it, where he is not the officer with whom it is entered. 630, 631.

A plaintiff who has obtained an order giving him leave to sign judgment, but has not actually signed judgment, is not a judgment creditor: *Re Gurney*, 1896, 2 Ch. 864; but where a judgment has been actually pronounced it becomes an effective judgment from that time, so that it may be attached, though the judgment is not formally entered: *Holtby v. Hodgson*, 24 Q. B. D. 103; *Davidson v. Taylor*, 14 P. R. 78; and see *Moody v. Canadian Bank of Commerce, Ltd.*, 258. The formal signature is only the record that it has been pronounced: *Kelly v. Wade*, 14 P. R. 66.

Where a judgment pronounced in 1880 gave plaintiff an order for an account if he desired it, the judgment not having been issued, 12 years afterwards, leave to issue it was refused, in view of the altered position of the parties and other circumstances: *Eaton v. Dorland*, 15 P. R. 138; and see *Re Leslie*, 23 Ont. 143; and *Finkle v. Lutz*, 14 P. R. 446.

This Rule was held not to apply when the judgment itself regulates the entry: *McLaren v. Canada Central*, 10 P. R. 328, where the judgment was, "I direct judgment to be entered after the 5th day of Hilary Sittings for \$100,000"; but see *Talbot v. Canadian Coloured Cotton Co.*, 17 C. L. T. 336.

Where a judgment is varied by a Divisional Court the judgment should be entered as of the date on which the Divisional Court pronounced judgment: *Beckett v. G. T. Ry. Co.*, 12 P. R. 377.

Orders in Chambers should be dated on the day on which they are finally made: *Ashley v. Taylor*, 27 W. R. 228; so also the finding of a Master: *Wallace v. Bath*, 7 O. L. R. 542.

Where a party dies after argument and while the cause is standing for judgment, the direction of the Court should be obtained to date and enter the judgment when delivered, as of the date of the argument, otherwise it would appear to be defective on its face: see Rule 294, and notes.

Where an application is made and refused, and on appeal the order is reversed and the application granted, the order made on the appeal relates back to the date of the order reversed so far as any intervening proceedings are concerned: *In re Donisthorpe & The Manchester S. & L. Ry. Co.*, 1897, 1 Q. B. 671; the litigant is not to be prejudiced by the delay, or the mistake, of the Court.

See also - as to effect of appeal -

630. In all cases the judgment pronounced by the Court may be signed forthwith, unless otherwise ordered. Con. Rule 767. Immediate judgment.

631. Where judgment may be signed upon the filing of any affidavit or production of any document, the officer shall examine the affidavit or document produced, and if the same be regular and contain all that is by law required, he shall enter judgment accordingly. Con. Rule 768. Entry on affidavit, etc.

The Eng. (1883) R. 575 is to the same effect.

Rules
632-635.

Entry on
order or
certificate.

632. Where judgment may be signed pursuant to any order or certificate, or return to any writ, the production of such order or certificate, or of such return, shall be a sufficient authority to the officer to sign judgment accordingly. Con. Rule 769; Rules of 1 Jan., 1896, 1482.

The Eug. (1883) R. 573 is to the same effect.

Form of
order.

633. An order shall be marked with the name of the Judge or officer by whom it is made. Con. Rule 543.

The name of the Judge or officer pronouncing the judgment or order is according to the Forms to be placed at the commencement of the judgment or order in the left hand margin. This is usual, although the Judge or officer pronouncing the judgment or order also signs it. Where an officer pronounces the judgment or order, his name of office appears to be sufficient: e.g., "The Master in Chambers"; see the Forms 124, *et seq.*; H. & L. Forms, Nos. 902, *et seq.* See notes to Rule 412 as to orders relating to money in Court.

Signing of
Court
orders.

634.—(1) Every order pronounced by the Court shall be signed by the Registrar, Local Registrar, Deputy Registrar, Deputy Clerk of the Crown, or the Clerk of the Weekly Court attending the Court at which the same is pronounced, provided that the Judge pronouncing such order may himself sign the same. Rules 23 June, 1894, 1353.

Orders in
Judge's
Chambers.

(2) Orders made by a Judge of the High Court in Chambers in Toronto shall be signed by the Clerk in Chambers (or in his absence by the Assistant Clerk), but the Judge pronouncing such order may himself sign the same. Con. Rules 544, 1265. Rules 23 June 1894, 1342.

By officers
in Cham-
bers.

(3) Orders made by an officer sitting in Chambers shall be signed by him. *New.*

The signing of orders in accordance with the requirements of the *Rules* is sometimes most important, and especially where the liberty of the subject is concerned; thus, where the former *Rule* required all orders to be signed by the Clerk, the signature of a Judge alone to an order for arrest was held insufficient, and the order was held to be a nullity: *St. Croix v. McLachlin*, 13 P. R. 438.

An order of a Local Judge sitting in Chambers must be signed by the Local Judge, not by the Local Registrar: see clause (3) and *Lorrell v. Taylor*, 5 O. W. R. 525.

Entry of
judgments
and orders

635.—(1) Every judgment, whether pronounced in Court or Chambers, or entered by default, and every order pronounced in Court, shall be entered at full length in a book to be kept for that purpose by the officer issuing the same. Rules 23 June, 1894, 1354.

(2) Judgment in causes and matters commenced in the ^{Rule 635.} Central Office, and all orders made in Court in Toronto, shall be entered in the Central Office. Orders made in Chambers in Toronto shall be entered in Chambers as heretofore. See Con. Rule 20, and Rules 1 Jan., 1896, 1400.

(3) All such judgments, and subject to the preceding clause, all such orders, as require to be entered in a cause or matter commenced in a local office, shall be entered in the office in which the cause or matter was commenced. See Con. Rule 20, and Rules 1 Jan., 1896, 1400.

The date of entry, and the book, and folio, in which the entry is made, must be stated in the margin of the order, or judgment, issued: *Rule 637.*

Place of Entry.—All orders made in Court, or in Chambers, in Toronto, requiring entry, are to be entered in Toronto. Orders made elsewhere, *e.g.*, on circuit, or at the Weekly Courts at London, or Ottawa, or in Chambers, should, under this *Rule*, sub-sec. (3), be entered at the place where the action or matter was commenced.

Except in the case of judgments in an issue (as to which see *Rule 377*), all judgments no matter where pronounced, are to be entered in the office where the proceedings were commenced: see clause (3), *Rule 15*; *e.g.*, where the proceedings have been commenced elsewhere than in Toronto, the judgment must be entered in the office of the Local Registrar, Deputy Registrar, or Deputy Clerk of the Crown in whose office the proceedings were commenced; and where the judgment is pronounced in a proceeding not commenced by writ, then the office of the Deputy Clerk of the Crown, or Deputy, or Local Registrar, in which the first document is required to be filed, is to be deemed the office in which the cause or matter is commenced: see *Rule 14*.

Execution may be issued under sec. 85 of the Winding-up Act, (R. S. C. c. 120), upon the order of a Court of another Province, upon the mere production to the proper officer of the High Court of a properly certified copy of the order: but entry of the order must be made in the proper judgment or order book of the High Court: *Re Dominion Cold Storage Co., Lowrey's Case*, 18 P. R. 68.

Where an order, which had not been entered, was lost, it was directed to be redrawn: *Ex parte Dean of St. Paul's*, 18 W. R. 724. No proceedings can properly be taken upon a judgment or order required to be entered, until it has been entered: see *Ballard v. Tomlinson*, 48 L. T. 515. But where an administration judgment had been issued before being entered, and was subsequently entered after proceedings had been taken under it, such proceedings were upheld: *Re Morphy, Morphy v. Niven*, 51 P. R. 321; but where a plaintiff in a redemption action obtained judgment, but neglected to issue it for twelve years, he was held to have disentitled himself by the delay, to issue or prosecute it: *Eaton v. Dorland*, 15 P. R. 138; and see *Re Leslie*, 23 Ont. 143; but see *Finkle v. Lutz*, 14 P. R. 446.

Rules
636-638.

Orders
required to
be entered
in full and
otherwise.

636. Orders of course, *ex parte* orders, and orders made in Chambers, shall not be entered in full, except:

Orders declaring persons Lunatics;

“ for the Sale of Infants' Estates;

“ for Payment of Money into or out of Court, or out of an estate or fund;

“ for Foreclosure or Sale;

“ for continuing proceedings upon death or transmission of interest;

“ for the confirmation of the report of a Master or Referee;

Vesting Orders;

and such other orders as may from time to time be directed to be entered. Con. Rules 546, 773, 774, *amended*.

This *Rule* is strictly confined to orders, and does not include judgments. All judgments pronounced in Chambers are covered by *Rule* 635 (1), and must be entered in full. They must be entered not in Chambers, but in the office for entering judgments.

The orders enumerated in this *Rule* are, in Toronto, entered by the Entering Clerk in Chambers.

The practice in Toronto heretofore has been to make a brief note of the purport of all orders not requiring entry in full, and this practice seems to be continued by *Rule* 635. It is desirable that a similar practice should be observed in the local offices, but there appears to be no express *Rule* requiring it to be done.

By the words, “orders for foreclosure or sale,” final orders are meant.

See notes to *Rule* 412.

Entering.

637. The Entering Clerk shall note in the margin of the judgment or order book the day of entering a judgment or order, and shall at the foot of the judgment or order note the same date, and the book in which the entry has been made and the pages of such book. Con. *Rule* 775.

The absence of such a note of entry on the face of the order is irregular: see *Lovell v. Taylor*, 5 O. W. R. 525.

9. ORDERS OBTAINED ON A CONDITION.

Orders obtained on condition deemed to be abandoned so far as benefit.

638. Where a judgment or order is obtained upon a condition, and the condition is not complied with, the judgment or order shall be deemed to have been waived or abandoned as far as the same is beneficial to the person obtaining the same,

and any person interested in the matter on the breach or non-performance of the condition, may either take such proceedings as the judgment or order in such a case may warrant, or such proceedings as might have been taken if the judgment or order had not been made. Con. Rules 770, 794.

Rule 638.
 Trial to
 party
 obtaining
 unless
 condition
 performed

Taken from Chy. O. 196; compare Eng. (1883) R. 580.

Under former *Rule* 794, where a new trial was granted to a party on condition of payment of costs or other condition, an application was properly made, on default in performance of the condition, for an order defining the rights of the opposite party: see *Carroll v. Booth*, 11 C. L. T. 84. Under the present *Rule* no such order will be necessary.

Even before this *Rule* where an order was made granting a new trial on payment into Court of \$500 within a limited time, and in default dismissing the motion with costs, it was held that no further order was necessary: *Stor, v. McKay*, before Div'l Court, Chy. D., 6 Sept., 1888.

Where a plaintiff gave notice of trial for 2nd October, and on 22nd September the defendant obtained an order postponing the trial on payment of costs, it was held to be a conditional order not staying plaintiff's proceedings, and one which the defendant was at liberty to abandon without paying any costs except those of the application: *Allen v. Mathers*, 9 P. R. 477; *Pugh v. Kern*, 5 M. & W. 104; *Brega v. Hodgson*, 4 P. R. 47; *Horton v. Westminster Commissioners*, 7 Ex. 911.

Where a plaintiff in an action of tort recovered a verdict, and on motion of the defendant a new trial was granted in June, 1889, and the plaintiff died in the Spring of 1890, it was held on an application in December, 1890, by the defendant, to issue the order, that the delay afforded no evidence of an intention to abandon it: *Kelly v. Wade*, 14 P. R. 66.

Where a new trial is granted on payment of costs, it is the duty of the party obtaining the indulgence to get the costs taxed and paid, so as to enable the case to be tried at the next opportunity: *Johnson v. Sparrow*, 1 U. C. Q. B. 306; *Grantham v. Powell*, 1 P. R. 256; but see *Van Every v. Drake*, 3 P. R. 84; *Stacey v. McIntyre*, 5 P. R. 205; *Pacaud v. McEwan*, 6 P. R. 20; *Lyman v. Snarr*, 3 P. R. 86; but where the solicitor of the party to pay the costs promptly applied to the solicitor of the opposite party begging to know what the costs were that he might pay them, of which communication no notice was taken, a rule subsequently obtained *ex parte* discharging the rule for a new trial, and the judgment entered thereon, were set aside without costs: *Doc d. Arnold v. Auldjo*, 6 U. C. Q. B. 21. The party to receive costs cannot insist on their being taxed: *Stock v. Shewan*, 18 C. P. 185. Where the costs were tendered, but refused because there was not sufficient time to give proper notice of trial for the next Assizes, which, however, the defendant offered to waive, it was held that the plaintiff was not entitled to have the rule for a new trial rescinded: *Rabidon v. Harkin*, 2 P. R. 129; and see *Thompson v. Sewell*, 4 O. S. 16. The costs must be paid before notice of trial can properly be given: *Stock v. Shewan*, 18 C. P. 185.

Where an order for a new trial is not taken out, the original judgment stands, and proceedings to enforce it, before the order for the new trial has been issued, will not be stayed: *Kelly v. Wade*, 14 P. R. 13; and see *S. C. Ib.* 66.

Rule 639.

10. SETTING ASIDE JUDGMENTS OBTAINED BY DEFAULT.

Judgment
by default
may be set
aside on
terms

639. Any judgment by default may be set aside by the Court or a Judge, upon such terms as to costs or otherwise as the Court or Judge may think fit. Con. Rule 796.

Same in effect as the Eng. (1883) R. 308.

Notwithstanding this *Rule*, an action to set aside a judgment by default on the ground of fraud, will lie: *Wyatt v. Palmer*, 1899, 2 Q. B. 100; 80 L. T. 639.

A judgment for default of appearance, or defence, signed after an appearance or defence has been filed, but which has been mislaid by the officer and not entered in his procedure book, is irregular: *Moore v. Simons*, 1 C. L. J. 183; *Bank of Montreal v. Harrison*, 4 P. R. 381.

Where a judgment has been obtained irregularly, the party against whom it has been obtained is entitled *ex debito justitiæ* to have it set aside: *Lalaby v. Pretorius*, 20 Q. B. D. 764; *Voight v. Orth*, 5 O. L. R. 443. The Court has only power to impose terms as a condition of giving him costs: *Id.* This *Rule* applies, rather in cases where a regular judgment is sought to be set aside as an indulgence.

To set aside a regular judgment, an affidavit of merits will be necessary: *Farden v. Richter*, 23 Q. B. D. 124; but where merits are shewn, it is only a question of proper terms: see *Wright v. Mills*, 40 L. T. 887; *Moore v. Kennedy*, 18 C. L. T. 204 (Man.); and though the judgment be set aside, the Court may refuse costs of the application: *Jackson v. Gardiner*, 19 P. R. 137.

A judgment obtained by default in compliance with the terms on which leave was given, under *Rule* 603, given to defend, is a judgment by default within this *Rule*: *Budman's case*, *Re Portuguese, etc.*, *Mines*, 62 L. T. 180.

Mere delay is not in itself a reason for refusing to set aside a judgment by default. Some irreparable injury must be shewn to result to the plaintiff: see *Attwood v. Chichester*, 3 Q. B. D. 722; *Watt v. Barnett*, 3 Q. B. D. 183, 303, and notes to *Rule* 575; but lapse of time, and acquiescence, may be an answer to the motion: *McLean v. Smith*, 10 P. R. 145.

Where a judgment obtained on default of appearance at the trial was set aside, the defaulting party was ordered to pay the costs of the day, and of the application to set it aside and to restore the case to the list: *Cockle v. Joyce*, 26 W. R. 59.

A plaintiff not being ready to proceed with the trial of his action when it came on unexpectedly, applied for a postponement, and upon his being refused let judgment go by default: a Divisional Court refused to set aside the judgment; but the Court of Appeal, upon fresh evidence offering a reasonable explanation of the plaintiff's un-readiness, set aside the judgment, and ordered the action to be restored to the list on his paying the costs of the day, including all costs thrown away, and the costs of the applications both to the Divisional Court, and to the Court of Appeal: *King v. Sandeman*, 38 L. T. 461; 26 W. R. 539; see also *Williams v. Brisco*, 26 W. R. 713, (where a judgment was set aside and leave given to defend upon payment of all costs of the action subsequent to the delivery of the

statement of claim); and *Ryan v. Fish*, 5 P. R. 458, (where judgment of seisin signed in an action of dower, under a misapprehension of plaintiff's solicitor as to its effect, was vacated). **Rules 639, 640.**

A judgment by default, in an action against a lessee for recovery of land on a forfeiture, was set aside under this *Rule* on the application of equitable mortgagees, although not parties to the action: *Jacques v. Harrison*, 12 Q. B. P. 136; but on appeal it was held that the order was technically wrong, as the applicants ought to have obtained the leave of the defendant to move in his name, or to have applied for leave to defend on terms of indemnifying defendant, and the order made was amended so as to allow the mortgagees to defend in defendant's name: 8 C. 12 Q. B. D. 165. The *Rule* is designed to enable judgments by default to be set aside by those who have, or who can acquire a *locus standi*, and does not give a *locus standi* to those who have none: *Id.*

Where the action had been improperly brought against the defendant, and the plaintiff was aware of the impropriety, and had suffered no irreparable mischief, it was held that the lapse of time was no bar to the application to set aside judgment by default: *King v. Sandeman*, *supra*.

Where the defence had been struck out for wilful refusal to produce, and judgment by default obtained, the Court refused to set it aside on any terms: *Haigh v. Tuigh*, 31 Ch. D. 478; and see *Dunn v. Melton*, 6 P. R. 156.

The Court will not set aside a final judgment regularly signed by default, unless the defendant shows at least some *prima facie* ground of defence such as would be necessary on a motion for judgment under *Rule* 603. The Court will not on such an application try the defence; but the defendant may be cross-examined on his affidavit, and his alleged defence may be shown by documents under his own hand, not explained or answered, to be non-existent: *Bourne v. O'Donoghue*, 17 P. R. 522.

A stranger to the proceedings cannot apply to set aside a judgment on the ground of irregularity: *Balfour v. Ellison*, 8 L. C. L. J. 330; *Tait v. Harrison*, 17 Gr. 458; but where it has been obtained by fraud to the prejudice of a stranger it may be successfully attacked by him: *Id.*; but *semble*, in such a case an action should be brought.

An appeal does not lie to the Supreme Court from a judgment of the Court of Appeal granting or refusing a motion to set aside a judgment obtained by default: *O'Donoghue v. Bourne*, 27 S. C. R. 654.

See also notes to *Rules* 575 and 778.

11. VARIATION OF JUDGMENTS AND ORDERS.

(1) Before being Drawn up and Entered.

A Judge can always reconsider his decision until the judgment or order is drawn up: *Re St. Nazaire Co.*, 12 Ch. D. p. 91; *Miller's* *creation by the Judge*; *Case*, 3 Ch. D. 661; *Atty-Gen. v. Tomlin*, 7 Ch. D. 388; *Canada Land, etc., Co. v. Dpsact*, 5 Ont. 511; *Glasgow v. Glasgow*, *Id.*; *Re Safeld and Watts*, 20 Q. B. D. at p. 697; *Re Adam Epton*, 35 Ch. D. 290; *Re Cwara Bank*, 44 Ch. D. 634; 62 L. T. 823; *Keith v. Butcher*, 25 Ch. D. 759. So also can a Divisional Court: see *Cameron v. Walker*, 19 Ont. 217.

Rule 640. After an order made declaring that children took *per stirpes*, it was discovered that this was contrary to authorities, and by arrangement the matter was mentioned to the Court again, and an order altering the order so as to declare that they took *per capita* was made: *Re Blackwell, Bridgman v. Blackwell*, W. N. 1886, 97; *sed vide Preston Banking Co. v. Allsup*, 1895, 1 Ch. 144.

As to motions to vary the minutes of judgments and orders, see note to *Rule 624*.

(2) After having been Drawn up and Entered.

A judgment or order, when passed and entered, can only be amended as provided by the *Rules of Court*: *Blake v. Harvey*, 29 Ch. D. 827; *Re Beard*, 69 L. T. 259. It is irregular for the officer who issued it to take upon himself to vary it, even though it be defective or erroneous: *Ib.*; *Succelland v. Turkish Cigarette Co.*, 47 W. R. 511; 80 L. T. 472.

After a judgment has been passed and entered, even where taken by consent and under a mistake, the Court cannot set it aside otherwise than in a fresh action brought for the purpose, unless:

(1) There has been a clerical mistake or error arising from an accidental slip or omission within *Rule 640*, or,

(2) The judgment does not, as drawn up, correctly state what the Court actually decided or intended to decide, in either of which cases, an application may be made by a motion in the action to correct the error: *Ainsworth v. Wilding*, 1896, 1 Ch. 673.

Semble, different considerations apply to interlocutory orders: *Ib.*

Even if a judgment has not been passed or entered, the Court will not always interfere, *e.g.*, where from the nature of the ground on which the application is based, conflicting evidence would have to be gone into: *Ib.*

Clerical Mistakes.—See notes to *Rule 640*.

Varying judgment to carry out intention of the Court.

Judgment not Correctly Stating the Decision of the Court.—In *Laurie v. Lees*, 7 App. Cas. at p. 34, Lord Pearce said: "I cannot doubt that under the original powers of the Court, quite independent of any order that is made under the Judicature Act, every Court has the power to vary its own orders which are drawn up mechanically in the registry, or in the office of the Court, to vary them in such a way as to carry out its own meaning, and, where language has been used which is doubtful, to make it plain"; see also *Balfour v. Drummond*, 4 Man. 467; *Tucker v. New Brunswick Trading Co.*, 44 Ch. D. 249; *Shipwright v. Clements*, 38 W. R. 746; 63 L. T. 160; *Rattray v. Young*, Cassels Sup. Ct. Dig. 692; *McMaster v. Radford*, 16 P. R. 20; *Sherk v. Evans*, 22 Out. App. 242; *Hilson v. Carter*, 1893, A. C. 638. Thus an alteration may be made so as to make the record truly contain what was adjudged: *Re Swire, Mellor v. Swire*, 30 Ch. D. 239, but where the defect is known before the order is passed and entered, the proper course is to move to vary the minutes, and if this course is not pursued the applicant may have to pay costs: *S. C.*, 53 L. T. 205.

Where the Court intended to give costs, and the judgment as drawn up merely provided for their payment out of a sum of money, which, the Court was informed, was in Court, the judgment was amended so as to direct payment of the costs forthwith after taxation, it appearing that the money was not in Court: *Letourneau v. Carbonneau*, 35 S. C. R. 791.

Other Cases.—Where a Judge has given an erroneous judgment, *Rule 640*. he has no jurisdiction to alter or amend the judgment or order which correctly embodies the judgment actually given, even although he has been induced to make it under a misrepresentation, or mistake of fact: *Preston Banking Co. v. Allsup*, 1895, 1 Ch. 144; except at the instance of a party who did not appear when the order or judgment was made: see *Rule 358*; 71 L. T. 708. Such mistakes can, where the party complaining was represented, only be corrected by appeal. Where a judgment, before being drawn up, had been appealed from by one defendant, and varied, it was held that the Judge had no power to entertain a motion to vary his decision as to the defendant who did not appeal, on the question of costs, even though the judgment or order had not been drawn up: *Port Elgin School Board v. Elgin*, 17 P. R. 58; *sed vide, Re Blackwell, Bridgman v. Blackwell, supra*, and *Re St. Nazaire*, and other cases, *supra*; but a supplemental order may be made: *Scowby v. Scowby*, 1897, 1 Ch. 741.

Where, however, an order is made in the absence of a party, the Court has jurisdiction to reconsider its judgment or order, even after entry, and, if proper, to rescind or vary it: see *Rule 358*; *Cassius v. Crank*, 17 P. R. 348; and where the application to vary a judgment or order is based on the discovery of new matter, see *Rule 642* and notes.

A judgment entered on *præcipe* cannot be amended on application. Amendment in Chambers, by inserting therein any special direction which could not properly be included in a judgment issued on *præcipe*: *Ross v. Fuder*, 3 Chy. Ch. 236.

Liberty to apply is implied in judgments and orders: *Rule 622*; *Liberty to Fritz v. Hobson*, 14 Ch. D. 542, 561, but, *semble*, not where they are final: *Pearce v. Williams*, 23 Ch. D. 353; but see *Rule 622*. It is not implied in favour of a defendant against whom the action has been dismissed, except for the purpose of enforcing the terms of the order: *Hantley v. Luck*, 26 Sol. Jour. 59.

An order made without jurisdiction, if not appealed against, must stand: *West v. Dawson*, 27 W. R. 697; and a *de facto* judgment, which has not been set aside, cannot be objected to, as having been rendered *ultra vires*, in an action of trespass for acts done under it: see *Beuce v. Canadian Bank of Commerce*, before Osler, J., 26th September, 1882; *Forrester v. Thrasher*, 9 P. R. 383; 2 Ont. 38; but it was held that a party could not be committed for disregarding an order made without jurisdiction: *McLeod v. Noble*, 28 Ont. 528.

A consent judgment on a contract *ultra vires* of a company, where the question of *ultra vires* is not raised either in the pleadings or on the facts stated, is of no greater value than the contract which it is founded: *G. N. W. Central Ry. Co. v. Charlebois*, 1891, A. C. 114.

Judgment obtained by Fraud.—Where a judgment has been obtained by fraud, the Court has jurisdiction, in a subsequent action brought for the purpose, to set aside the judgment: *Cole v. Langford*, 1898, 2 Q. B. 36; *Wyatt v. Palmer*, 1899, 2 Q. B. 106; 80 L. T. 639; but it will not be set aside on the ground alone that it was obtained by perjury: *Baxter v. Wadsworth*, 67 L. J. Q. B. 301.

Variation of Consent Judgments and Orders.—Where an order has been made by consent, the consent given without mistake is binding, and cannot be withdrawn, even before the order is drawn up: *Harvey v. Croydon*, 26 Ch. D. 249; overruling *S. C. W. N.*

Rule 640. 1881, 222; *Elsas v. Williams*, 52 L. T. 39; *Re Wylt Devon, &c.*, *Miles*, 38 Ch. D. 51, 55; *Holt v. Joss*, 3 Ch. D. 177; and *Rogers v. Horn*, 20 W. R. 232. In which, as reported, it was held that the consent might be withdrawn before the order was passed and entered, and see *Williams v. Meakins*, Crump & Evans Chy. Pr. 522; *Robert v. Donoran*, 16 P. R. 450; but where counsel, being authorized by his client to agree to terms of an order, by mistake agrees to other terms, the client may withdraw the consent before the order is drawn up; *Lewis v. Lewis*, 45 Ch. D. 281; 63 L. T. 84. In *Moore v. Peachey*, 66 L. T. 398, a garnishee order made by mutual mistake of the judgment creditor, and garnishee was set aside, and money paid under it, was ordered to be repaid.

An interlocutory order consented to by mistake may be discharged, though the mistake was on one side only; *Mullins v. Howell*, 11 Ch. D. 703; and see *Gilbert v. Eudeau*, 9 Ch. D. 259; but not because one of the parties finds it less beneficial than he expected; *Constance v. London F. Ins. Co.*, 12 P. R. 512; *Powell v. Smith*, L. R. 14 Eq. 85; *Midland v. Johnston*, 6 H. L. C. 811.

After a judgment by consent has been passed and entered, it cannot be afterwards amended, except for reasons sufficient to set aside an agreement on the ground of mistake; *Attorney-General v. Toulton*, 7 Ch. D. 388; *Davis v. Davis*, 13 Ch. D. 861; and it would seem that it can not even then be set aside on motion, but that an action must be brought for that purpose; see *The Huddersfield Banking Co. v. Lister*, 1895, 2 Ch. 273; 72 L. T. 761; 12 R. 331; *Hidding v. Sanderson*, 1897, 2 Ch. p. 538. Thus where parties had consented to a judgment establishing a will, which afterwards turned out to be a forgery, it was held that they were not estopped from shewing the forgery, and setting aside the compromise judgment on that ground, in an action brought for that purpose; *Priestman v. Thomas*, 9 P. D. 210; 51 L. T. 843. In *Hickman v. Bercus*, 1895, 2 Ch. 638; 73 L. T. 323; where a consent order had not been drawn up, it was rescinded on motion, on proof that there had been a mistake in giving the consent; and see *Lewis v. Lewis*, 45 Ch. D. 281; 63 L. T. 84.

Where the Master had proceeded on an alleged consent of counsel, of which he had made no entry in his book, and of which the terms were disputed, the report was referred back, although the Master's recollection agreed with that of one of the parties; *Beaudry v. Gallien*, 5 O. L. R. 75.

A consent judgment or order may be amended by striking out terms not consented to; *Merchants Bank v. Grant*, 3 Chy. Ch. 64.

The silence by a party in regard to a material fact which the party knowing it was not under obligation to disclose, is not a ground for a rescission of an agreement, or a compromise of an action; *Turner v. Green*, 1895, 2 Ch. 205; 43 W. R. 537; 72 L. T. 763.

A defendant gave an undertaking at the hearing to make certain payments to the plaintiff; the order was drawn up two or three weeks later, and the undertaking was embodied in it; the undertaking was given under a misapprehension of fact; but application to discharge the defendant from the undertaking was refused, on the ground that the facts were ascertainable by the defendant, and that the application was under these circumstances too late; *Attorney-General v. Toulton*, 7 Ch. D. 388.

A consent to a perpetual injunction was not allowed to be withdrawn, merely because the defendant afterwards discovered that he had a defence; *Elsas v. Williams*, 52 L. T. 39; 54 L. J. Chy. 336.

Where the Judge at the trial ruled adversely to the defendant, but **Rule 640**, in compliance with the request of his counsel modified his ruling, it was held that the judgment was not by consent, and defendant was not precluded from moving against it: *Sweeney v. Sweeney*, 16 Ont. 92.

An order arranged by consent between the parties, and not the result of an adjudication by the Court, should show on its face that it is by consent: *Michel v. Mutch*, 34 W. R. 251; 54 L. T. 45; 55 L. J. Chy. 485.

Disobedience to a consent order good on its face, cannot be justified by shewing grounds, which if urged against the making of the order, might have prevented it from being made: *Ribblé, etc. v. Crasston, etc.*, 45 W. R. 318.

No appeal can be had from a consent judgment, or order, except by leave, see Ind. Act, s. 72.

The solicitor, on the record, or his agent acting for him, has a **Compromise** general authority to compromise an action on behalf of his client, provided he acts *bonâ fide* and reasonably, and not in defiance of his direct and positive instructions, and, whether the compromise is made by the solicitor or his agent, the client will be bound, although there is no privity between him and the agent: *Re Noren*, 1903, 1 Ch. 812. See also *Hackett v. Bibb*, 12 P. R. 482; but a solicitor has no implied authority before action to compromise a claim: *Macaulay v. Polley*, 1897, 2 Q. B. 122; *Duffy v. Hanson*, 16 L. T. 332.

Counsel has full authority to compromise an action at the trial: *Mattheys v. Munster*, 20 Q. B. D. 141; but see *Watt v. Clark*, 12 P. R. 379; and see 98 L. T. Jour. 489; but a compromise in intended pursuance of terms consented to by the client, but by misapprehension or intentionally not strictly following them, is not binding on the client: *Lucia v. Lewis*, 45 Ch. D. 281; 63 L. T. 84; *Benart v. Edwards*, 19 P. R. 9; *Stokis v. Latham*, 4 Times, 305; *Veak v. Lennox, infra*; and where, acting on general instructions to compromise, counsel consents under a misapprehension, such as where intending to concede one thing he inadvertently concedes another, or where counsel are not *ad idem*, the compromise is not binding, and the Court will set it aside: *Hickman v. Bercus*, 1897, 2 Ch. 638; 73 L. T. 323.

As to the right to repudiate a verbal arrangement of compromise made at the trial before it is recorded as a verdict or judgment, see *Brown v. Blackwell*, 26 C. P. 43.

Upon the question of the authority of counsel to compromise, the Court will take the statement of the counsel from his place at the bar without oath: see *Hickman v. Bercus, supra*; and *Widding v. Samlerson*, 1897, 2 Ch. 734.

An action by an infant by his next friend cannot validly be compromised by the infant or his counsel, without the sanction of the Court: *Mattei v. Vatro*, 105 L. T. Jour. 202.

As to the enforcement of a compromise by motion, for judgment or otherwise, in the action, see *Pirang v. Dawson*, 9 O. L. R. 248, and notes *supra*, p. 55.

A counsel has not authority to refer an action against the wishes of his client, or upon terms different from those which his client has authorized. Where a limitation has been placed by a client on the authority of his counsel with regard to the reference of

Rule 640. the action, though it is not communicated to the other side, and if his counsel agrees to a reference in disregard of that limitation, the agreement to refer is not binding on the client, whether it results in an interlocutory or a final order: *Neale v. Lennor*, 1902, A. C. 465; 87 L. T. 341.

A consent order creates an estoppel between the parties: *Re South American Co.*, 71 L. T. 334; unless procured by fraud: *Priestman v. Thomas*, 9 P. D. 210; 51 L. T. 843.

Correction
of mistakes
in judgments and
orders.

640. Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court or a Judge on motion. Con. Rule 780.

Based upon Chy. O. 335.

The same in effect as Eng. (1883) R. 319, and substantially the same as Eng. Chy. O. 23, r. 21, as to which see *Morgan Chy. Acts and Orders*, 4th ed., 493; *Seton*, 4th ed., 1547-8.

Lapse of time is not necessarily a bar to the making of amendments under this Rule, where the rights of other parties acquired under the judgment or order will not be improperly affected; thus an action was brought to enforce a covenant, in an assignment of lease, against carrying on a business, and the decree contained an injunction perpetually restraining the defendant from carrying on the business; after the lapse of 19 years it was amended by restricting the injunction "to the remainder of the term of the lease," which had previously expired: *Shipwright v. Clements*, 38 W. R. 746; 63 L. T. 160; and where a decree made in 1853, declared a party entitled to a charge on land for £500 and interest until paid, and it appeared in 1892 that the claim in question arose out of a bond in a penal sum of £1,000, the decree was amended so as to limit the charge for principal and interest to a sum not exceeding the amount of the penalty: *Hatton v. Harris*, 1892, A. C. 547; 67 L. T. 722; see also *McMaster v. Radford*, 16 P. R. 20; *Milson v. Carter*, 1893, A. C. 638.

What kind
of errors
corrected.

Under Chy. O. 335, a direction necessarily consequent upon the judgment, but omitted from the decree drawn up, might be supplied, such as a direction (now unnecessary, see Rule 734), to settle a conveyance: *Moffatt v. Hyde*, 6 U. C. L. J. 94; *Trcvclyan v. Charter*, 9 Beav. 140; or a reference as to title, in a decree for specific performance: *Hughes v. Jones*, 26 Beav. 24; and an error in an order arising from an error in the chief clerk's certificate which had escaped the notice of all parties: *Eckersley v. Eckersley*, W. N. 1884, 133; an error in a taxing officer's certificate by reason of disbursements (fees paid to a referee) by mistake not having been carried in for taxation: *Chesnum v. Gordon*, 1901, 1 Q. B. 694; 84 L. T. 137; a foreclosure judgment in the form without a reference as to incumbrancers, it having been discovered that there was an incumbrancer: *Wilgoss v. Crawford*, 12 P. R. 658; *Clarke v. Cooper*, 15 P. R. 54; or other mistake or slip: *Turner v. Hodgson*, 9 Beav. 265; *Askew v. Puddle*, 14 Sim. 301; and see *Eadie v. McEwen*, 14 Gr. 404; see also *Ex parte Straight*, 16 W. R. 661; *Andrews v. Bohannon*, W. N. 1869, 80; *Jeffreys v. Smith*, 11 W. R. 479; *Re Glauville's Trusts*, W. N. 1878, 21; *Warman v. Zeal*, W. N. 1871, 241; *Re Tiel*, 11 W. R. 351; but not any term which could only have been introduced by

express direction of the Court, which was not given: *Bird v. Heath*, Rule 640, 6 Ha. 236; *Whitehead v. North*, Cr. & Ph. 78; nor any substantial addition except by consent: *Willis v. Parkinson*, 3 Sw. 233; but see Rule 641.

The application must, as a general rule, be on notice: *Radenhurst v. Reynolds*, 11 Gr. 521.

An error was corrected under this Rule, not because it did not correctly carry out the intention of the Court at the time, but because the parties were mistaken as to the fact upon which the judgment as it stood was founded: *Barker v. Purvis*, 31 Sol. Jour. 155; 56 L. T. 131; but see *Re Leonard*, 107 L. T. Jour. 409; so an order awarding costs against a defendant who had not appeared, the Court thinking he was represented, was amended by striking out such award of costs: *Cousins v. Cronk*, 17 P. R. 348; a clause giving special directions as to scale of costs was inserted in *Doswell v. Norton*, 18 Times. 728. But in *Kluick v. Ontario Loan & L. Co.*, before the Divisional Court, Ch. D., 28 June, 1889, it was considered that a Judge had no power to amend his judgment after it had been formally issued, even on the ground of mistake (except to make it carry out the intention of the Court when it was made), and an order made under such circumstances was vacated, and a new order to the like effect was made by the Divisional Court. See also *Glasier v. Rolis*, 62 L. T. 395; *Preston Banking Co. v. Allsop*, 1897, 1 Ch. 141; *McMaster v. Radford*, 16 P. R. 20; *Ainsworth v. Wilding*, 1896, 1 Ch. 673; *Port Elgin, etc., v. Eby*, 17 P. R. 78. See also notes preceding Rule 640.

A motion to amend a decree in which the pleadings and evidence, or anything beyond the judgment pronounced, and the decree, is required to be looked at, must be made in Court: *Lapp v. Lapp*, 3 Chy. Ch. 234; 4 Chy. Ch. 3.

In *Livingstone v. Wood*, 29 Gr. 157, a decree directing an account was amended, by striking out a declaration that the plaintiff was entitled to certain credits which had not formed a substantive part of the judgment, so as to make the decree conform to the actual judgment, and enable the credits to be further investigated in the Master's office.

On motion under the corresponding English Rule, an order made under the Settled Estates Act was varied, so as to dispense with consents of tenants for life to leasing powers granted: *Re Riley's Trust*, 30 W. R. 78.

Where an order had been made on the petition of several persons, two of whom had not authorized it, the Court, under this Rule, amended the order by striking out the names of these two as petitioners, and treating them as not having been served with the petition: *Re Savage*, 15 Ch. D. 557.

Where the costs of a motion for an interim injunction having been reserved till the trial of the action, the plaintiff's counsel omitted to ask for them at the trial, and they were not provided for, it was held that the omission might be supplied under this Rule: *Fritz v. Hobson*, 14 Ch. D. 542, 561. So, where the Judge inadvertently omitted to make any order as to the costs of the action: *Hardy v. Pickard*, 12 P. R. 428; and see Rule 641.

But where the decree did not direct the payment of costs "forthwith," and it did not appear that such a direction was intended by the judgment, an application to amend was refused: *Wilson v. Robertson*, 3 Chy. Ch. 100.

Rules

641, 642. See, for amendment of orders so as to provide for costs omitted by mistake, *Blakey v. Hall*, 56 L. J. Chy. 568; 56 L. T. 400; *Viney v. Chaplin*, 3 De G. & F. 282; *St. Michael's College v. Merrick*, 26 Gr. 216.

Where a judgment, order, report or certificate is varied, it is not the correct practice to make any actual physical alteration in the document: *Rule 315*; see *For v. Bearblock*, 45 L. T. 469; 46 L. T. 145.

Amendment as to matters on which there was no adjudication.

641. Where a judgment or order requires amendment in any other particular on which the Court did not adjudicate, the same may be amended by the Court on motion. Con. Rule 781.

Based on Chy. O. 336.

Where the application was made after the time within which the cause could have been reheard without leave, it was held that the applicant need not apply for leave to move, but must, nevertheless, make out such a case as would be necessary, in order to obtain leave to rehear after the time had elapsed. *O'Donoghue v. Hembroff*, 19 Gr. 95. And see *Fritz v. Hobson*, and *Hurdy v. Pickard*; *Blakey v. Hall*, and other cases cited in note to preceding Rule.

Application by petition to impeach judgments, etc.

642.—(1) A party entitled to the reversal or variation of a judgment or order, upon the ground of matter arising subsequent to the making thereof, or subsequently discovered, or to impeach a judgment or order on the ground of fraud, or to suspend the operation of a judgment or order, or to carry a judgment or order into operation, shall proceed by petition in the cause, praying the relief which is sought, and stating the grounds upon which it is claimed. Con. Rule 782.

Petition to be verified and served on all parties interested.

(2) The petition shall be verified by affidavit, and served upon the solicitors of all parties interested; and in case a party has no solicitor, then upon the party. Con. Rule 783.

Hearing of petition.

(3) Upon the hearing of the petition, the Court may either make a final order, or direct the petition to stand over, with liberty to the parties interested in sustaining the judgment or order to file a special answer to the same; and may make such order as to evidence and the hearing of the petition, as may seem just. Con. Rule 785.

(4) Where the reversal or variation of a judgment or order is sought upon new matter, such proof as would have been requisite upon a motion to file a bill of review shall be supplied. *Con. Rule 786.*

Rule 642.

Evidence required when reversal sought on new matter.

Based upon Chy. O. 330. There is no similar Eng. Rule.

Formerly a person presenting a petition under Chy. O. 330, from which this *Rule* is taken, in a case where formerly a bill of review, or a bill in the nature of a bill of review, should have been filed, was required to give security for costs: *Sadler v. Dogle*, before Proudfoot, V.C., 19 and 26 Nov., 1877, and see *Beames' Orders*, pp. 314, 366, and see Ont. Order in Chy. 12th July, 1844, lxxix; but see Chy. O. 1; but it would seem that no such security is now required to be given unless expressly ordered.

An order made for the payment out of Court of money in a winding up proceeding, was rescinded on the application of the Receiver General who had received no notice of the motion for the order, though having an inchoate interest in the fund: *Re Central Bank*, 24 Ont. App. 470; 28 S. C. R. 192.

Leave to file a petition under this *Rule* is not necessary in any case. *Duggan v. McKay*, 1 Chy. Ch. 380.

For cases in which petitions have been presented under Chy. O. 330, see *Bank of Upper Canada v. Wallace*, 16 Gr. 280; *Bronse v. Stagger*, 16 Gr. 1; *Dumble v. Cobourg & P. Ry. Co.*, 20 Gr. 121; *Mason v. Seney*, 12 Gr. 143; *Colonial Trusts v. Cameron*, 21 Gr. 70; *Hobson v. Wrie*, 14 Gr. 604; 15 Gr. 565.

As to vacating a judgment on the application of the party in whose favour it is, where a third party might be affected thereby, see *Toronto Dental, etc., Co. v. McLaren*, 14 P. R. 89; and as to vacating a judgment or order at the request of the plaintiff in order to enable him to amend his proceedings, see *Clarke v. Cooper*, 15 P. R. 54; *Wilgress v. Crawford*, 12 P. R. 658.

Seem, the *Rule* is not imperative, and where consequential relief is sought, which could not be granted upon petition in the original action, a new action may be brought: *Leeming v. Armitage*, 18 P. R. 486; see also *Wyatt v. Palmer*, 1899, 2 Q. B. 106; 80 L. T. 639.

Petitions to Impeach a Judgment on the Ground of Fraud.

—A bill of this kind was, prior to Chy. O. 330, proper, where a decree had been obtained by fraud. Where the decree, however, had also been affirmed by the House of Lords, it would seem to have been necessary that application should be first made to the House of Lords for directions: *Shedden v. Patrick*, 1 Macq. H. L. C. 535, and see *Tomney v. White*, 4 H. L. C. 313.

Petitions to impeach judgments on ground of fraud.

In England, where no such practice as that prescribed by this *Rule* is in force, it is held by analogy to the former practice, that in order to set aside a judgment obtained by fraud, a new action must now be brought: *Floer v. Lloyd*, 6 Ch. D. 297; *Priestman v. Thomas*, 9 P. D. 219; 51 L. T. 843; *Cole v. Langford*, 1898, 2 Q. B. 36; *Wyatt v. Palmer*, 1899, 2 Q. B. 106; 80 L. T. 639.

Petitions to Suspend the Operation of a Judgment.—Bills of this kind were formerly necessary whenever it was sought to stay the execution of a decree: e.g., where an appeal was pending from the decree. But relief of this kind has, since Chy. O. 330, been

Petitions to suspend operation of a judgment.

Rule 642. granted on motion in Chambers, without even a petition: *Campbell v. Edwards*, 6 P. R. 159; *Walker v. Niles*, 3 Chy. Ch. 418. In such cases security was generally required to be given: *Id.* The staying of proceedings pending an appeal is discretionary. In a case where the Court refused to stay proceedings pending an appeal from an order allowing a demurrer, it directed that an answer filed should not prejudice the appeal: *McMurray v. Grand Trunk Ry.*, 3 Chy. Ch. 125.

An order obtained by the suppression of material facts may be set aside on motion: *Merchants Bank v. Sussler*, 4 O. L. R. 524.

Petitions to carry judgment into operation.

Petitions to Carry a Judgment into Operation.—Bills of this kind were sometimes necessary where the parties neglected to proceed upon the decree, and their rights under it had become embarrassed by subsequent events, and it was necessary to have them settled by the decree of the Court. See *Mitford Pleadings*, 3rd ed., 75.

Petitions of review.

Petitions of Review.—Prior to Chy. O. 350, where a party sought to impeach a decree, either for error in law appearing in the body of the decree, without further examination of matters of fact, or in respect of some new matters arising after the decree; or on new evidence discovered after decree made, which could not possibly have been used when the decree was pronounced; in such cases, where the decree had been enrolled, a bill of review was filed, and where it had not been enrolled, a bill in the nature of a bill of review was the proper proceeding: see *Dumble v. Cobourg, etc.*, 23 Gr. 121.

When bill filed on ground of error, error must be apparent on face of decree.

Where the bill was filed on the ground of error, it was necessary to specifically assign the error complained of, and it must have been an error of law, apparent on the face of the decree, and not a mere error of judgment: *Green v. Jenkins*, 6 Jur. N. S. 515, *e.g.*; it could not be assigned for error that any matter had been decreed contrary to the proofs: *Mellish v. Williams*, 1 Vern. 166; and see *Rule 642 (4)*.

For cases since *The Judicature Act*, see *Synod v. De Blaquiere*, 10 P. R. 11; *Bank of B. N. A. v. Western Ins. Co.*, 11 P. R. 434; *Boswell v. Coaks*, 6 R. 107; and see *Wilkins v. Wilkins*, 100 L. T. Jour. 418.

Seem, a petition of review will not now be entertained in any case in which the petitioner could have appealed from the judgment or order in question: *Bright v. Sellar*, 1904, 1 K. B. 6; 89 L. T. 137.

An application under the present *Rule* is a proceeding in the cause, and is properly made in Court to the Judge who pronounced the judgment or order sought to be varied, *etc.*: *Armour v. Merchants Bank*, 17 P. R. 108; *Bank of British North America v. Western Assurance Co.*, 11 P. R. 434; *Synod v. De Blaquiere*, 10 P. R. 11; but where new evidence is discovered within the time limited for moving before a Divisional Court, under *Rules 787, 788*, a motion for a new trial on that ground may be made to the Divisional Court.

A new trial was refused where the fresh evidence was only in corroboration: *Howarth v. McTugan*, 23 Ont. 396; *Trumble v. Horton*, 22 Ont. App. 51.

A respondent may file affidavits in answer without the leave of the Court: *Robson v. Wride*, 14 Gr. 606; 15 Gr. 565.

On applications to open up proceedings, by way of review, on the **Rule 643.** ground of newly discovered evidence, the party applying must shew (1) that the evidence is such that if it had been brought forward at the proper time, it might probably have changed the result; (2) that at the time he might have so used it, neither he nor his agent had knowledge of it; (3) that it could not, with reasonable diligence, have been discovered in time to have been so used; and (4) the applicant must have used reasonable diligence after the discovery of the new evidence: *Hosking v. Terry*, 8 Jur. N. S. 977; *Mason v. Senev*, 12 Gr. 143; *Dumble v. Cobourg and Peterboro' Ry. Co.*, 29 Gr. 121; *Colonial Trusts v. Cameron*, 21 Gr. 70; see also *Caradice v. Currie*, 19 Gr. 108; *Waters v. Shade*, 2 Gr. 218; *Murray v. Canada Central Railway Co.*, 7 Ont. App. 646; *Synod v. De Blaquiere*, 10 P. R. 11; *Bank of B. N. A. v. Western Ass. Co.* 11 P. R. 434; *Boswell v. Coaks*, 6 R. 167.

12. ENTRY OF SATISFACTION.

643. In order to acknowledge satisfaction of a judgment, it shall be requisite only to produce a satisfaction piece Satisfaction of judgments, entry of. according to Form 210, and such satisfaction piece shall be signed by the party acknowledging the same or his personal representative, and his signature shall be witnessed by some practising solicitor expressly named by him, and attending at his request to inform him of the nature and effect of such satisfaction piece before the same is signed; the solicitor shall declare himself in the attestation thereto to be the solicitor for the person so signing the same, and state that he is witness as such solicitor (provided that the Court or a Judge may make an order dispensing with such signature under special circumstances); and in cases where the satisfaction piece is signed by the personal representative of a party deceased, his representative character shall be proved by the production of the probate of the will, or of the letters of administration, to the officer in custody of the judgment. Con. Rule 187.

Taken from Rule T. T. 1856, 64.

For App. Form No. 210, see H. & L. Forms, No. 900.

The plaintiff's signature may be dispensed with, and his solicitor in the cause may be authorized to acknowledge satisfaction, upon proof that the solicitor is authorized by the plaintiff to arrange the claim, and that the delay in obtaining the plaintiff's signature would be prejudicial: *Rudall v. Hard*, 3 U. C. L. J. 14; *Pawson v. Wrightman*, 2 U. C. L. J. 184; so also where the amount of the judgment is small and the plaintiff resides out of the jurisdiction: *Bank of Montreal v. Cronk*, 3 U. C. L. J. 32; or where the plaintiff resides abroad and has given his solicitor written authority to acknowledge satisfaction for him: *Darling v. Wright*, 3 U. C. L. J. 50. When a satisfaction piece is executed before an attorney of another Province, a

Rule 644. certificate of his due admission must be produced, and his signature duly verified: *Moss v. Dugly*, 3 U. C. L. J. 74; signature before a practising attorney of a foreign country is a sufficient compliance with this Rule: *Abernethy v. Beddome*, 6 P. R. 162.

An order to enter up satisfaction will not be granted where it is not clear that the judgment has been satisfied: *Lewine v. Savage*, 3 U. C. L. J. 89.

After the judgment has been satisfied, the plaintiff's solicitor cannot be compelled by defendant to procure a satisfaction piece to be executed by his client; but the solicitor may be ordered to disclose his client's place of residence, so that the defendant may tender a satisfaction piece for execution, and if the plaintiff refuses to sign it he may be ordered to do so: *Carr v. Coulter*, 2 P. R. 226.

The arrest of one of several defendants on a *ca. sa.* and his subsequent discharge with the consent of the plaintiff, operates as a satisfaction of the judgment, as to him, even though the plaintiff at the time of the discharge expressly stipulated that his other remedies on the judgment were not to be impaired: *Hamilton v. Holcomb*, 7 U. C. L. J. 40; but it was held not to be a satisfaction as to other parties liable in priority to the party discharged: *S. C.* 11 C. P. 33; 12 C. P. 38; 2 E. & A. 239, and see *Rule 1056*. Where a vendor after recovering judgment for his purchase money, subsequently cancels the contract of sale, that operates as a satisfaction of the judgment: *Cameron v. Bradbury*, 9 Gr. 67.

Satisfaction piece, where to be entered.

644. The satisfaction piece shall be entered in the office in which the judgment is entered. Con. Rule 188.

Taken from Rule T. T. 1856, 65.

CHAPTER XI.

ACCOUNTS AND INQUIRIES.

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| 1. APPLICATIONS FOR ACCOUNT, 645-646. | (ii) <i>Inquiries for Creditors</i> , 701, 702. |
| 2. REFERENCES TO REFEREES, 647-653. | (iii) <i>Administration</i> , 703-715. |
| 3. PROCEEDINGS ON REFERENCES TO MASTERS AND REFEREES, 654-758. | (iv) <i>Sales</i> , 716-743. |
| (i) <i>General Rules</i> , 654-700. | (v) <i>Foreclosure, Sale and Redemption</i> , 744-758. |
| | (vi) <i>Receivers, Committees, etc.</i> , 759-766. |

1. APPLICATIONS FOR ACCOUNT.

645. In default of appearance to a writ indorsed under Rule 140, and after appearance [in a case in which the preceding Rules do not entitle the plaintiff to a judgment or order otherwise] the plaintiff may apply for, and unless the defendant, by affidavit or otherwise, satisfies the Court or a Judge that there is some preliminary question to be tried, shall be entitled to a judgment or order for the taking of the account claimed, by a reference to any officer to whom the reference might be ordered at a trial, with all directions formerly usual in the Court of Chancery in similar cases. Con. Rule 745.

To the same effect as the Eng. (1883) R. 121, except that the words in brackets are new. The order or judgment for an account under this *Rule* can only be obtained on motion.

Rule 140 provides for the indorsement of a claim for an account where the plaintiff desires to have an account taken in the first instance. The present *Rule* provides for two cases; first, default of appearance, in which case the order will be made as of right; secondly, appearance, in which case the order is to be made unless the defendant shows that there is some question which ought to be tried first.

The writ should be indorsed under *Rule* 140, or the claim as indorsed should involve an account; *Re Gylton*, 20 Ch. D. 834, and notes *infra*.

Before taking proceedings under this *Rule* in default of appearance the plaintiff must file an affidavit of service of the writ of summons, or the notice in lieu thereof; see *Rule* 574.

The *Rule* applies not merely where the plaintiff claims an account from defendant, but also where the plaintiff will himself be the accounting party; *Molony v. Molony*, 21 L. R. Ir. 91.

Rule 646. Under the corresponding English Rule, where the account claimed is an executorship or administration account, the order made is the same as the usual administration decree formerly made in Chancery: see *Bell v. Lowe*, W. N. 1875, 229; 1 Charl. Ch. Ca. 56; and *Pratt v. Brown*, cited in *Dau. Forms*, 3rd ed., 206. Under such a judgment, the account may, in Ontario, be taken on the footing of wilful neglect and default: see notes to *Rule 944*; and it would seem that the account might be so taken when ordered under this *Rule*.

In Ontario it is not customary to make orders for an account under this *Rule*, in mortgage actions, a special procedure being provided to meet such cases: see *Rules 595-6*.

Administration accounts are also usually taken under other special *Rules*: see *Rules 944, 946, 947, 955*, and *Forms 156 and 157, (11. & L. Forms, Nos. 838 and 839)*. Where, however, complete administration of the estate of a deceased person, or of a trust or the winding-up of a partnership, is not desired, but only an account, this *Rule* may probably be usefully applied: see *Leybourne Popham v. Spencer-Brown*, 9 *Times*, 309.

A form of indorsement claiming an account in administration actions is given in the Appendix, No. 9 (*a* and *b*). (11. & L. Forms, Nos. 54 and 55).

The provisions of the *Rules 454, 473*, for enforcing orders for discovery or inspection of documents, are not applicable to the order for accounts under this *Rule*: *Pike v. Keene*, 35 *L. T.* 341; 24 *W. R.* 322.

This *Rule* is not intended to enable parties upon a summary application to obtain what is equivalent to a judgment, but merely to take accounts upon which the Court can on a subsequent hearing, pronounce the appropriate judgment: *Clover v. Wilts, etc.*, W. N. 1884, 110; see also *Borthwick v. Ransford*, 28 *Ch. D.* 79; 54 *L. J. Ch.* 569.

If the right to an account depends upon a preliminary question which is in dispute, that question must first be decided in some manner authorized by the *Rules*, and an account will not be granted unless it may properly be ordered under *Rule 646*; see *Re Gibson*, 29 *Ch. D.* 834 (disputed question of breach of trust); *Batthyany v. Walford*, 36 *Ch. D.* 276 (plaintiff's claim as a creditor disputed); *Dyott v. Neville*, W. N. 1887, 35.

Forms.

A form of a notice of motion will be found in 11. & L. Forms, No. 404. Two days' notice of motion is all that is necessary, *Rule 348*. It would seem that the motion may be made in Court or in Chambers: see *Ladies' Tailoring Assoc. v. Clarkson*, 27 *C. L. J.* 501. If made in Court it must be set down to be heard at the sittings of the Weekly Court.

It would seem that a statement of claim should, in general, be delivered before a motion is made under this *Rule*. In *Re Huckwell, David v. Dalton*, W. N. 1879, 86, an administration action, the motion was directed to stand over until a statement of claim was delivered. See also *Green v. Colby*, 24 *W. R.* 246.

Reference
at any
stage.

646. The Court or a Judge may, at any stage of the proceedings in a cause or matter, direct any necessary inquiries or accounts to be made or taken, notwithstanding that some special or further relief is sought, or some issue is to be

tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner. *Con. Rule 551.* Rules
646, 647.

Identical with the Eng. (1883) R. 381.

A reference under this *Rule* may be to a Master, or other proper officer, or to an Official Referee, under sec. 28 of *The Arbitration Act* (R. S. O. c. 62). See notes prefixed to *Rule 647*.

An inquiry was directed in *West London Dairy Soc. v. Abbott*, 29 W. R. 581; 44 L. T. 376, as to a question of fact, leaving questions of law for subsequent determination; and in *Turquand v. Wilson*, 1 Ch. D. 85, for taking of accounts of a partnership which by his defence defendant had admitted.

An order may sometimes be made under the combined authority of this *Rule* and *Rule 617*. See notes to that *Rule* and *Turquand v. Wilson*, *supra*; see also *Re Barker's Estate*, 10 Ch. D. 165-6; *Rolfe v. MacLaren*, 3 Ch. D. 106; *Rumsey v. Reade*, 1 Ch. D. 643.

It was considered that under this *Rule* it is not proper that the issue in the action should be referred to be tried on the reference; but only accounts subsidiary to the rights of the parties should be directed to be taken; *Garnham v. Skipper*, 29 Ch. D. 566; see also *Macdonald v. Piper*, 10 P. R. 586.

Where an action was brought to obtain a declaration of plaintiff's rights in certain mortgaged property, and to restrain a sale by the mortgagees, and the plaintiff obtained judgment declaring his rights, but the Court refused to restrain the sale, it was held that a supplementary order to take the mortgagees' account, tax costs and ascertain the surplus in their hands after the sale was properly made under this *Rule*; *Meyers v. Hamilton Provident, etc.*, 15 P. R. 39.

The motion may be made either in Court or Chambers; see *Ladies' Tailoring Assoc. v. Clarkson*, 27 C. L. J. 501.

2. REFERENCES TO REFEREES.

Rule 647 provides that, except by consent, the Court will not refer to arbitration, so that all references of matters not disposed of by the Judge at the trial are referred either to a Master (see *Rules 654-706*), or to an Official Referee under R. S. O. c. 62, ss. 28-36.

See notes to *Rule 647*.

References to Referees under The Arbitration Act.

The following are the provisions of *The Arbitration Act* (R. S. O. c. 62) referred to:—

References under Order of Court.

References for Inquiry and Report.

28. Subject to Rules of Court and to any right to have particular cases tried by a jury (a), the Court or a Judge may refer for any question arising in any cause or matter for inquiry and report to a Judge of the County Court or to any Official Referee or to a special referee agreed upon by the parties. 60 V. c. 16, s. 28. Reference
for inquiry
and report.

Rule 647. Substantially the same as the former s. 102 of R. S. O. 1887, c. 41, and as sec. 13 of the Imp. Arbitration Act, 1889 (52 & 53 V. c. 49, s. 13).

(a) For such cases see Jud. Act (R. S. O. c. 51), ss. 102, 103 and notes, *supra*, p. 150.

"Court or a Judge."—The Master in Chambers, Local Judge, and Local Masters have no jurisdiction to make an order under this section: *Union Loan Co. v. Boomer*, 10 P. R. 430; *Bank of Commerce v. Jennings*, 7 C. L. T. 170, except by consent: see *Rules 42, 45, 49*, and except where a Local Judge has jurisdiction under *Rule 47*.

As to who are Official Referees, see section 141, *supra*, p. 175.

See also *Rule 646*, which provides further for references to take accounts or make inquiries at any stage of proceedings.

As to the employment of experts, see *Rule 64*.

Except by consent, the Court has no power to order a reference under above sec. 28 to any person other than an Official Referee, or the Judge of a County Court: *Feinster v. Raleigh*, 14 P. R. 429.

Scope of section.

"Inquiry and Report."—In view of other provisions of the Act, these words probably have a slightly different signification in this section from that given to them in the English Act. The inquiry intended is just such a judicial inquiry as a Master would make in the case, to ascertain, as the delegate of the Court, the rights of the parties in regard to the questions referred, and the report is to be similar to that of a Master and is to have the same effect given to it when filed: see sec. 31, *infra*, and notes.

Under Ont. Act.

What may be referred.

"Any Question Arising."—Under this section all that can be referred is a question or questions in the action, and must be a question or questions which must necessarily be decided in the action, not such as it may prove unnecessary to decide: *Heed v. Ward*, 40 Ch. D. 555. The whole action, facts and law, cannot be referred: *Longman v. East*, 3 C. P. D. 142; *Braginton v. Yates*, W. N. 1880, 150; *Lunoy v. Essery*, 10 P. R. 285; *Re Queen City Refining Co.*, 10 P. R. 415; nor the whole of the issues in an action: *Clarry v. B. N. Ass. Co.*, 12 P. R. 357. The whole action may be referred for trial by an official referee under s. 29 of *The Arbitration Act, infra*.

A question of liability, upon which the right to an account depends, should be tried in the usual way: *Ward v. Hall*, W. N. 1880, 120, *per* Cotton, L.J.; *Clow v. Harper*, 3 Ex. D. 198; *Feinster v. Raleigh*, 14 P. R. 429; more especially if it be a proper question for a jury: *Young v. Prittie*, Globe, 19th April, 1882. Where a question is directly raised by the pleadings, and is distinctly presented to the Court for its decision, and evidence has been taken upon it, it should not be referred, but should be disposed of by the Court: *International Bridge Co. v. Canada Southern Ry. Co.*, 7 Ont. App. 266; *Smith v. Armitage*, 24 Ch. D. 727.

Amount of damages.

The question of the amount of damages, as a question in the action, may be referred, in the discretion of the trial Judge, but the exercise of his discretion is subject to review: *Ratté v. Booth*, 10 P. R. 187. The onus of shewing that the discretion was wrongly exercised is on the party objecting: *Ib.*; and generally speaking a reference as to

damages ought only to be ordered in cases where the inquiry involves **Rule 647**. questions of detail which it would be wasting the time of the Court to investigate: *Wallis v. Sapers*, 34 Sol. Jour. 545, per Bowen, L.J.

A form of order of reference under this section is given in the ^{Form of} App. No. 122 (H. & L. Forms, No. 904). It should express on its ^{order.} face whether it is an order under this section for inquiry and report, or under sec. 29 for trial: *Cumming v. Low*, 2 Ont. 505; and see *White v. Peto*, W. N. 1886, 165; *Wentlock v. River Dee Co.*, 19 Q. B. D. 155.

Further directions need not be expressly reserved, but a motion for judgment upon the report may be made after it has become confirmed, which is in effect the former motion for decree on further directions.

Procedure before Referee.—This section contemplates an inquiry by examination of witnesses and not by the Referee's personal observation only: *Baroness Wentlock v. River Dee Co.*, 19 Q. B. D. 155.

The practice and procedure generally before a Referee is the same as before a Master: see *Rule 650*, also Rules 648-653, 483, and 654-706.

Rule 651 provides for the submission by the Referee, in his report, of questions for the decision of the Court.

As to discovery before the Referee: see note to *Rule 648*.

Report.—The report is subject to the same rules, and should be drawn in the same form, as the report of a Master, as to which, see notes to *Rule 687*.

The Master, if he sufficiently follows the directions of the judgment, is not obliged to give his reasons for, or to enter into detailed explanations of his report: *Booth v. Rattle*, 21 S. C. R. 637; and see *Dunkirk, etc. v. Lever*, 9 Ch. D. 20, under the English practice. Evidence should not be stated: *Longman v. East*, 3 C. P. D. 149; *Sovereign v. Sovereign*, 15 Gr. 559.

It is presumed that a Referee may, like a Master, report specially any circumstances which he deems necessary for the information of the Court, and that he should do so as to any matter affecting costs: see *Hayes v. Hayes*, 29 Gr. 90.

When the conduct of an arbitrator would invalidate his report the like conduct on the part of a referee would be fatal to his report: see *Cumee v. Canadian Pacific Ry. Co.*, 16 Ont. 639.

The Referee should himself draw his report and settle it in the presence of both parties: *Kuarr v. Bricker*, 16 P. R. 363, where it was held to be improper for the referee to delegate the drawing of the report to the solicitor for the successful party.

As to filing the report, see sec. 31, *infra*, and *Rule 653*.

Judgment on Report.—A report under this section, under *Rules 653* and *709*, and sec. 31, *infra*, becomes absolute at the expiration of 14 days from the filing unless duly appealed from, or erroneous on its face. Judgment cannot be signed upon it, however, without a motion for judgment, which is similar to the former motion for decree on further directions, and the Referee cannot direct judgment to be entered upon his report: see *Rule 648* (1). The Eng. practice is different under Eng. (1883) R. 471: see *Clark v. Sammenschein*, 25 Q. B. D. 226, 464.

Rule 647. Two clear days' notice of a motion for judgment was formerly, and is still, sufficient; *Re Brook*, 45 L. T. 172; 29 W. R. 801; 17 C. L. J. 301, and *Rule 348*.

Appeal from Report.—See R. S. O. c. 62, secs. 33, 34, *infra*, and *Rules 760-772, 692* and notes.

Costs.—As to the costs of references and appeals: see *McCallough v. Clemon*, 26 Ont. 467.

References for Trial under R. S. O. 1897, c. 62, s. 29.

Power to
refer in
certain
cases.

29. In any cause or matter,

- (a) If all the parties interested who are not under disability consent; or,
- (b) If the cause or matter requires any prolonged examination of documents or any scientific or local investigation which cannot in the opinion of the Court or a Judge conveniently be made before a jury or conducted by the Court or Judge directly; or,
- (c) If the question in dispute consists wholly or in part of matters of account,

Imp. Act,
52-53 V. c.
49, s. 14.

the Court or a Judge may at any time order the whole cause or matter or any question or issue of fact arising therein [or question of account] to be tried either before [a Judge of a County Court or before] a special referee agreed on by the parties, or before an Official Referee. 60 V. c. 16, s. 29.

The words in brackets are not in Imp. Act, 52 & 53 V. c. 49, s. 14, and the latter has at the end "or officer of the Court." In other respects the sections are substantially the same.

"Court or a Judge."—The Master in Chambers, Local Judge, and Local Masters, have no jurisdiction to order a reference under this section: *White v. Beecher*, 10 P. R. 531; *Union Loan v. Bomer*, 10 P. R. 630; *Bank of Commerce v. Jennings*, 7 C. L. T. 170; except by consent: see *Rules 42, 45, 49*; and except where a Local Judge has jurisdiction under *Rule 47*.

But where the Master in Chambers made an order of reference to a Judge of a District Court, and a report was made and judgment subsequently pronounced thereon by a Judge of the High Court, a Divisional Court refused to entertain the question whether the Master in Chambers had jurisdiction to make the order, there being no appeal therefrom: *Fraser v. Buchanan*, 25 Ont. 1.

Special Referee.—A reference to a special Referee under the last clause of R. S. O. c. 62, s. 29, is only ordered on consent: see *London & Lancashire F. Ins. Co. v. British American Ass. Co.*, 52 L. T. 385; 54 L. J. Q. B. 302, where the extra costs of a trial before an Official Referee instead of a special Referee, to whose appointment defendants refused to consent, were reserved.

As to Official Referees: see Jud. Act, section 141.

What may
be referred.

Under above sec. 29, the Court, or a Judge at Nisi Prius, or at a circuit sitting of the High Court: *Hoch v. Boor*, W. N. 1880, 93; 43 L. T. 425; 49 L. J. Q. B. 665, may send, where the parties have con-

ented, the whole action (though this was not formerly authorized, *Rule 647*, see *Longman v. East*, 3 C. P. D. 142; *Brigstock v. Yates*, W. N. 1880, 150; *Clarry v. B. N. Ass. Co.*, 12 P. R. 357), or any question of issue of fact, or question of account, to an Official Referee for trial. Where an order is made without consent, the Court can only send such questions as are brought within the terms of clauses (b) and (c), that is, any issue requiring prolonged examination of documents or accounts, etc., which in the opinion of the Judge cannot conveniently be made before a jury or conducted by the Court or Judge directly; *Longman v. East*, *Hoch v. Boor*, *supra*; or where the question in dispute consists wholly, or in part, of matters of account. But if a case is once brought within clauses (b) and (c), or either of them, the Court may refer not only the questions of account, but the whole cause or matter (see last clause of sec. 201; or all issues of fact in the cause; *Ward v. Pilley*, 5 Q. B. D. 427, 431; *Miller v. Pilling*, 9 Q. B. D. 738; *Knight v. Coates*, 19 Q. B. D. 206; though the question in dispute does not consist entirely of matters of account; *Martin v. Fife*, 31 W. R. 840; 40 L. T. 107; *Goodwin v. Budden*, 42 L. T. 536; as where issues of fact were so mixed up with matters of account, that they could not practically be discovered; *Longman v. East*, 3 C. P. D. 142; *Ward v. Hall*, W. N. 1880, 69). It is probable, however, that where there is a substantial question of liability upon which the taking of accounts depends, to be determined, it will first be determined in the ordinary way; *Clove v. Harper*, 3 Ex. D. 198; *Ward v. Hall*, W. N. 1880, 69; *Ward v. Ward*, 10 L. D. 555; and other cases under R. S. O. c. 62, s. 28, *supra*, p. 852.

"Prolonged" means prolonged if had before a jury, not if had before a skilled accountant; *Ward v. Pilley*, 5 Q. B. D. 428; and the documents are such as it would be necessary to inquire into, in order to leave the question properly to the jury, not such as require examination to determine a question of legal right; *Ormeau v. Todmorden*, 8 Q. B. D. 644, 677. Reading a lot of letters is not a prolonged examination of documents; *Green's Trustee v. Barrett*, W. N. 1875, 204.

The expression "question of account," will receive a large construction; *Re Leigh*, 3 Ch. D. 292; and any question of account which might have been compulsorily referred under the C. L. P. Act (see R. S. O. 1877, c. 50, ss. 189 and 195), may be compulsorily referred under this section; *Ward v. Pilley*, 5 Q. B. D. 427.

In a case involving a critical knowledge of pictures, the Court of Appeal refused to send the case for trial before a special Referee against defendant's will, as the fortune and character of the defendant were involved, and he was entitled to have the matters of fraud charged tried in a public Court; *Leigh v. Brooks*, 5 Ch. D. 592. But even where there are questions of fraud there is no inherent right to a trial by jury, and in such a case if the issues involve a prolonged examination of documents or accounts they may be compulsorily referred; *Hoch v. Boor*, W. N. 1880, 93; 43 L. T. 425; *Sacker v. Ragazine & Co.*, 44 L. T. 308; but see *Russell v. He v.*, 65 L. T. 752.

A question of damages consisting of various items in an action for injuries caused to a vessel by defendant's negligence; *Liverpool & Co. v. London Navigation*, W. N. 1875, 203; damages from obstructing a river by casting in sawdust and rubbish; *Ratté v. Booth*, 16 P. R. 187; issues of fact in a patent case requiring "scientific investigation"; *Saxby v. Gloucester Wagon Co.*, W. N. 1880, 28; and

Rule 647. damages in an action for specific performance: *Stafford v. Coxon*, W. N. 1877, 138, were ordered to be assessed by a Referee.

An order made under this section by a Judge in his discretion is appealable: *Ormerod v. Todmorden, etc.*, 8 Q. B. D. 604; *Hoch v. Boor*, W. N. 1880, 93; 43 L. T. 425; *Ratté v. Booth*, 16 P. R. 185. But as a rule the Court of Appeal is disinclined to interfere with the exercise of a discretion: *Sarby v. Gloucester Waggon Co.*, W. N. 1880, 28.

Order. A form of order is given in the App. No. 123 (H. & L. Forms, No. 905). It should, as intimated in *Longman v. East*, 3 C. P. D. 163, point out that it is an order under this section for issues to be tried, and should state whether all the issues are to be tried, or, if only certain issues, it should state by some sufficient description what those issues are: *Cumming v. Low*, 2 Ont. 505.

Powers and remuneration of referees, and R.S.O., c. 62.

Powers of Referees under R. S. O. c. 62.

30.—(1) In all cases of reference to or trial by an Official or special Referee under an order of the Court or a Judge in any cause or matter, the Official or special Referee shall be deemed to be an officer of the Court, and shall have such authority, and shall conduct the reference in such manner as may be prescribed by Rules of Court, and subject thereto as the Court or a Judge may direct.

(2) The remuneration to be paid to any special Referee to whom any matter is referred under order of the Court or a Judge may be determined by the Court or a Judge.

(3) The remuneration, fees, charges and disbursements, payable to an Official Referee, and, in the absence of any special direction, to any special Referee, shall be the same as are payable to a Local Master.

Where the Referee apportions the fees payable to him between the plaintiff and defendant according to the time occupied by each on the reference, and the plaintiff pays his proportion, the Referee cannot refuse to issue to the plaintiff the report until the fees payable by defendant are paid: *Brooks v. Georgian Bay, etc., Co.*, 17 P. R. 34.

(4) In case of a reference by the Judge at the trial of any action to a County Judge or to the Registrar or Deputy Registrar, Deputy Clerk of the Crown, Local Master or other officer of the Court, paid wholly or partly by salary, of any matter which it would be competent for such Judge to himself try at the said trial, no fees, either in stamps or otherwise, shall be charged by such Referee in such reference. This sub-section does not apply to references made in pursuance of the ordinary practice of the Court of Chancery before *The Ontario Judicature Act, 1881*. 60 V. c. 16, s. 30.

See also *Rule 155*.

Procedure before Referee.—For the procedure before the Referee, see *Rules 648, et seq.*

Where a Referee refused to postpone the trial of a matter referred to him, it was held that an appeal from that decision might be made to a Judge in Chambers: see *Richard v. Talbot*, 38 W. R. 478. In Ontario, the course would seem to be to take out a certificate of the Referee of his decision, and appeal from it to the Court, as in the case of a Master.

Rule 651 provides for the submission of questions to the Court by *Rule 647*, the Referee before the conclusion of the trial before him, or by his report.

A Referee has the same power to allow interest as a jury has: *Attorney-General v. Etna Insurance Co.*, 13 P. R. 459; and see Jud. Act, secs. 113 to 116, and notes.

Report.—The report of a Referee under this section should state his conclusions upon the issues referred, and he is not bound to give reasons for his findings: *Miller v. Pilling*, 9 Q. B. D. 736; see also *Longman v. East*, 3 C. P. D. 155; *Fawcett v. Winters*, 12 P. R. 232. Under *Rule 652* the Court has power to obtain any explanation or reasons as to the principles upon which the Referee has rested his conclusions: *Ib.*

For an example of scientific or local investigation by a Referee, see *Broder v. Saillard*, 2 Ch. D. 692.

The Referee should himself draw his report and settle it in the presence of both parties: *Knarr v. Bricker*, 16 P. R. 363; he should not delegate the drawing of the report to the solicitor for the successful party: *Ib.*

See also notes to *Rule 687*.

Effect of Report of Referee.

31. The report of an Official or special Referee under the three next preceding sections may be filed by any party forthwith after the same shall have been made, and upon notice of the filing thereof having been given to the other parties, it shall from the time of service of such notice have the effect of and be subject to all the incidents of a report of a Master as regards confirmation, appealing therefrom, motions thereupon and otherwise. 60 V. c. 16, s. 31.

See also *Rules 653, 693, 769* and *771*.

The report should be filed in the office in which the proceedings were commenced: see *Rules 693, 14* and *15*.

As to appeals from reports, see sec. 33, *infra*.

Evidence to be Transmitted.

32. The evidence of witnesses examined upon a reference under any order of reference, together with the exhibits therein referred to, shall forthwith, after the making of the report, be transmitted by the Referee to the proper officer of the Court. 60 V. c. 16, s. 32. See *Con. Rules 14* and *15*.

The proper officer will be the officer in whose office the proceedings were commenced: see *Rules 14* and *15*; and if that office is the Central Office, the proper officer will be an officer of the Filing and Record Branch: *Rule 22*.

Appeals from Reports.

33. The appeal from the report may be heard and decided by a Judge sitting in Court, and the practice to be observed upon such appeal and any further appeal to the Court of Appeal shall in other respects be the practice observed on an appeal from the report of a Master. 60 V. c. 16, s. 33.

The mode of questioning a report, whether made under sec. 28 or sec. 29, is now by appeal from it in the same manner as in the case of a report of a Master, as to which see *Rules 769, et seq.*

Rule 647. Further appeals are regulated by *Rule 772*, and secs. 74 (1) and 76 (1) of the Jud. Act.

Where a Referee held that there was a want of reasonable and probable cause for the defendant's proceeding criminally against the plaintiff, and it was objected that this was a finding of law and not of fact, it was held to be equivalent to a verdict for plaintiff rendered by a jury under instructions from the Judge as to what would be reasonable and probable cause: *Fawcett v. Winters*, 12 P. R. 232.

Time for
appealing.

34. An appeal from a report shall not be made after the expiration of 14 days from the filing thereof, and the giving notice of such filing to the opposite party, unless under special circumstances the Court or a Judge shall allow an appeal after the 14 days. 60 V. c. 16, s. 34.

See notes to *Rule 770*.

As to appeals in respect to costs, see *Rule 1130* (4), and notes.

Costs.—As to the costs of references and appeals, see *Rule 648*: *McCullough v. Clemon*, 26 Ont. 467.

Where an action was referred to a Referee for trial, and he gave the defendant the costs of the action and award, this was held to include the costs of the reference: *Patton v. West of Eng., etc.*, 1894, 2 Q. B. 159.

Where an action is referred under s. 29, the Referee may find by whom the costs should be paid, but payment of them can only be enforced under a judgment or order of the Court directing payment of them. The judgment or order of reference may contain such a direction: see Form 123. (H. & L. Forms, No. 905.)

Judgment.—An Official Referee has no power to order judgment to be entered: *Longman v. East*, 3 C. P. D. 142. The report must be brought before the Court on motion for judgment, when the Court will give judgment as formerly in Chancery upon the report of a Master: *Longman v. East*, *supra*; *Deacon v. Dolby*, W. N. 1883, 25; *Miller v. Pilling*, 9 Q. B. D. 736; *Monro v. Rendall*, W. N. 1878, 41; *Walker v. Bunkell*, 22 Ch. D. 722. The motion is made to a single Judge sitting in Court: see *Cumming v. Low*, *supra*. See also notes to R. S. O. c. 62, s. 28, *supra*, p. 853.

Defects appearing on the face of the report such as that the report is imperfect, or in excess of jurisdiction, may be urged in opposing a motion for judgment: *Cooke v. Newcastle*, 10 Q. B. D. 336.

Court to
have same
powers as
on consent
references

35. The Court or a Judge shall, as to references under order of the Court or a Judge, have all the powers which are by this Act conferred on the Court or a Judge as to references by consent out of Court. 60 V. c. 16, s. 35.

Same as Imp. Act, 52-3 V. c. 49, s. 16.

For the powers referred to, see R. S. O. c. 62, ss. 3-17, 40-51.

Court of
Appeal to
have power
of High
Court.

36. The Court of Appeal shall have all the powers conferred by this Act on the Court or a Judge thereof under the provisions relating to references under order of the Court. 60 V. c. 16, s. 36.

Same as Imp. Act, 52-3 V. c. 49, s. 17.

647. [Except by consent] an order for a reference to arbitration shall not be made. Con. Rule 550. Rules
647, 648.
Arbitration

The words in brackets are new in this Rule, but they only express the decision in *Macdonell v. Baird*, 13 P. R. 331. under the former Con. Rule 550.

648. (1) Where a reference is made to a Referee under *The Arbitration Act*, he shall have all the powers of a Master, and shall, in addition, unless otherwise ordered, have in the conduct of the reference all the powers of a Judge of the High Court when presiding at a trial, except the powers of directing judgment to be entered and committing any person to prison, or enforcing an order by attachment or otherwise. Con. Rules 37, 38, 552. Provisions
of refer-
ence to
official or
other
referee.

Under this section a Referee has, in the absence of any restriction in the order of reference, the same discretion as to costs as a Judge under Rule 1130, and no appeal from his disposition of the costs will lie without his leave: see Jud. Act. s. 72; *Minister v. Apperty*, 1902, 1 K. B. 643.

(2) Neither the plaintiff nor the defendant shall bring or prosecute any action against the Referee, or against each other, of or concerning the matters referred to the Referee. Con. Rule 552 (b).

(3) In the event of the Referee declining to act, or dying before he has made his report, the parties, or if they cannot agree, a Judge of the High Court may, upon application of either party, appoint a new Referee. Con. Rule 552 (c).

This clause enables only a Judge of the High Court to appoint a new Referee. The Master in Chambers has therefore no jurisdiction in the matter: see Rule 42.

(4) The Referee shall make his report concerning the matters referred to him: and if either party by affected delay or otherwise wilfully prevents the Referee from making his report, he shall pay such costs to the other party as to the Court or a Judge may seem just. Con. Rule 552 (1) and (b).

(5) An order of reference to a Referee made under *The Arbitration Act*, or Rule 646, shall be read as if it contained the provisions of this Rule, but may contain any variation therefrom or addition thereto. Rules 23 June, 1894, 1343.

Rule 649. As far as this *Rule* confers on a Referee the powers of a Master it follows the former Con. Rule 35. The remainder of clause (1) and clauses (2), (3) and (4), are taken from Form 11. 32 in the schedule appended to Eng. R. Sup. C., April, 1880, which was the form of order for trial by a Referee, corresponding to a reference under sec. 29, *supra*, of *The Arbitration Act* (R. S. O. c. 62).

The English form of order in Rs. (1883) Appx. K. No. 24, sets out *in extenso* the directions, (2), (3), (4), contained in this *Rule*.

The present *Rule* renders unnecessary and improper the specification of those directions in orders in Ontario.

With clause (1) compare Eng. (1883) R. 474 and 475. Eng. Rule 474 confers power on the Referee to direct judgment to be entered, and gives authority with respect to discovery and production: see *Serle v. Fardell*, 44 Ch. D. 299; *Clark v. Sonnenschein*, 25 Q. B. 19, 226; *Hayward v. Mut. Reserve*, 1891, 2 Q. B. 236. The Ont. Rule 648 expressly denies the power to direct judgment to be entered, and no express provision is made in regard to discovery.

Discovery. There was formerly doubt as to whether a Referee had power to issue a direction for production like a Master, or whether an order on *præcipe* might be obtained: see *Hilderbroom v. McDonald*, 8 P. R. 289.

Now, however, it would seem to be the intention of the Ont. Rules that the practice before a Referee is to be as nearly as possible the same as before a Master. If the order of reference is made after discovery and production have been obtained in the action in the ordinary way under Rules 439, and 464, that may suffice, but if further discovery or production is required for the purpose of the reference, it would seem to be obtainable by a direction of the Referee: see Rules 650, 654, 669, and *Brooks v. Georgian Bay, etc.*, 16 P. R. 511; *Garland v. Clarkson*, 9 O. L. R. 281.

Where a reference is made for trial, the referee has power to direct such discovery as might be obtained in an action before trial, including discovery, under Rules 440 and 466, from a person for whose immediate benefit the action was brought or defended: *Garland v. Clarkson*, 9 O. L. R. 281.

Hearing. The Referee, whether the reference is for report (R. S. O. c. 62, s. 28); or trial (*Id.*, c. 29), has power, subject to the control of the Court, to fix a peremptory appointment for the hearing, and, on default of either party, to proceed in his absence: *Wentlock v. River Dee Co.*, 32 W. R. 220; 49 L. T. 617.

Costs. Where an action is referred to a Referee for trial under sec. 29 of *The Arbitration Act*, he would seem to have power under clause (1) of Rule 648 to dispose of the costs of the action, including those of the reference: see *Patten v. W. of England, etc.*, 1894, 2 Q. B. 159, and note *supra*, p. 858; but payment thereof can only be enforced under a judgment or order directing payment.

**Trial
before
referee.**

649. The Referee may, subject to the order of the Court or a Judge, proceed with the reference at, or adjourn it to, any place which he may deem convenient, and have any inspection or view which he may deem expedient for the better disposal of the matters referred to him. Con. Rule 34.

See Eng. (1883) R. 472.

In the former Rule 34 there was a direction to the Referee to sit *Rules de die in diem*, but this has now been omitted as unnecessary: see 650-653. Rule 664.

650. The practice and procedure on the reference to a Referee, including the procuring of the attendance of witnesses, shall be the same, as nearly as may be, as the practice and procedure in the Master's office. Con. Rule 35.

This Rule would seem to govern the practice and procedure on a reference, whether under section 28, or 29, of *The Arbitration Act*: see *supra*, and *Rules 654, et seq.* The English practice is different: see Eng. (1883) R. 473; *Re Taylor, Turpin v. Pain*, 44 Ch. D. 128; and notes to Rule 654.

As to costs of proceedings before a Referee and appeals in respect to costs, see Rule 1130, and notes.

651. The Referee may, by his report or by interim certificate, submit any question arising in the reference for the decision of the Court; and upon any motion in respect to the report or such certificate the Court may adjudicate in respect to the question so submitted. See Con. Rule 39.

See Eng. (1883) R. 476; R. S. O. (1877) c. 50, s. 211.

652. The Court may require explanations or reasons from the Referee, and remit the cause or matter, or any part thereof for further consideration, to the same or any other Referee; or upon an appeal from the Referee's report or certificate the Court may decide the question referred to the Referee on the evidence taken before him, either with or without additional evidence as the Court may direct. Con. Rule 40.

See Eng. (1883) R. 476.

This Rule supplements sec. 41 of *The Arbitration Act*. That section simply enabled an arbitrator to state his award as to the whole or any part thereof, in the form of a special case for the opinion of the Court; and the Court could only deal with the case as stated. Under this Rule the Court may require of the Referee explanations or reasons, or send the matter back for re-trial or re-consideration, and to another Referee if it thinks fit; or upon an appeal from the report may itself decide the question on the same evidence, or with additional evidence.

This Rule does not apply to the case of an arbitration ordered by the Court upon consent, where the arbitrator is selected and agreed on by the parties: *Kennedy v. Beal*, 29 Ont. 599.

653. The report of a Referee may be filed by any party forthwith after the same has been made, in the same manner as the report of a Master, and, upon notice of the filing hav-

Rule 653. ing been given, shall from the time of service of such notice have the effect of, and be subject to all the incidents of a report of a Master as regards confirmation, appealing therefrom, motions thereupon, and otherwise. Rules 23 June, 1894, 1288. See 60 V. c. 16, s. 31.

See also R. S. O. c. 62, s. 31, *supra*, and notes prefixed to Rule 647.

3. PROCEEDINGS ON REFERENCES TO MASTERS AND REFEREES.

Masters
are officers
of Supreme
Court.

The Master in Ordinary, and Local Masters, are all officers of the Supreme Court; J. A. s. 131, and, as such, actions may be referred to them. They are also by Order in Council of May 22d. 1889, made Masters of the High Court, and Court of Appeal.

The Judges of the County Courts, the Master in Ordinary, Master in Chambers, the Clerk of the Crown and Pleas, the Registrars, and the Local Masters, are also *ex officio* Official Referees: s. 141, *supra*, p. 175.

Place of
reference.

Under the former practice in Chancery the plaintiff was *prima facie* entitled to have a reference, when necessary, directed to the Master at the place where the bill was filed: *Macara v. Gwynne*, 3 Gr. 310; *Watson v. Henderson*, 2 Chy. Ch. 370; and the defendant might for good cause apply to change the reference: *McNab v. McLunis*, 4 Chy. Ch. 53; but now in administration actions, it has been held that the reference should be *prima facie* to the Master in the county where the deceased resided: *Thompson v. Fairbairn*, 10 P. R. 523; and see *Armstrong v. Armstrong*, 18 P. R. 55.

Prima facie
plaintiff
entitled
to have
reference
where writ
issued.

Subject to this exception, the old rule, it is presumed, will still be followed, and a plaintiff will have the right *prima facie* to have the reference, if any, directed to the Master in the county where the writ issued. Formerly when it was sought to change the reference on the score of expense, the difference of expense must have been considerable; and if on the ground of convenience, a clearly preponderating convenience in favour of the proposed change must have been established; and the fact that a defendant was a man in extensive business, or a trustee, was not a sufficient ground for changing the reference: *McNab v. McLunis*, *supra*; *Jackson v. Harriman*, 9 C. L. J. 29.

Reference
may be
changed;
on what
grounds.

Since *The Judicature Act* it has been held that the policy of that Act is to decentralize business, and to send local matters to the Local Masters, and the fact that a partnership business had been carried on in the county to which it was proposed to change the reference to take the partnership accounts, and that a delay of two months would be incurred by retaining the reference at the place directed by the judgment, was held sufficient ground to warrant the change: *Athen v. Wilson*, 9 P. R. 75.

When Mas-
ter has
been pro-
fessionally
concerned.

Where the Master has been professionally concerned for any of the litigants, in reference to the same or any other matter, that is a sufficient ground for changing the reference: *Bigelow v. Bigelow*, 6 P. R. 124; *Boyd v. Simpson*, before Spragge, C., 19th June, 1878. (See Reg. Lib.)

But where the reference was directed to a Master, who had, prior to the appointment, been counsel for one of the litigants, neither

party objecting, and the Master certifying that he acted in the reference at the pressing request of both parties, the Court held that the party against whom the Master reported could not raise that objection on appeal from the report, having taken the chance of the Master's finding in his favour: *Cotter v. Cotter*, 21 Gr. 159. Rules 654-656.

Where in the course of a suit it became necessary to add as a party the Master to whom the cause was referred, the reference was changed on an *ex parte* application by the plaintiff, in *Weldon v. Templeton*, 1 Chy. Ch. 360. Usually, however, any application to change the reference should be on notice: *McConnell v. McConnell*, 3 Chy. Ch. 122. Where necessary to add Master as a party.

The following Rules 654-666 regulate the practice in the Master's offices, and apply to all actions which are referred to a Master, or to a Referee. Application to be made on notice.

In England it has been held that an Official Referee is not bound on a reference to him to take accounts, to pursue the strict method followed on a reference to a Chief Clerk, who occupied there a position similar to that of the Master in Ordinary and Local Masters: *Re Taylor, Turpin v. Pain*, 44 Ch. D. 128. It would appear from this Rule and Rule 650, however, that a reference to an Official Referee is intended to be conducted in the same manner as references to Masters.

(i) *General Rules.*

654. In Rules 656 to 766 inclusive, the word "Master" shall include Local Master and Official or other Referee, as well as the Master in Ordinary of the Supreme Court. Con. Rule 43. Interpretation.

The powers conferred by the Rules on Masters may be exercised by a Judge in Chambers: Rule 368.

655.—(1) In High Court cases a reference on which fees are payable otherwise than in law stamps, shall not be taken before the Judge of the County Court, or Local Judge of the High Court, or Local Master being also a Judge of the County Court, by whom the order for such reference has been made. Certain references or examinations not to be before officer ordering same.

(2) This Rule shall not apply to references in administration and partition matters and in mortgage actions. Con. Rule 1192, *part*.

656. Instead of a reference, the Court may dispose of all matters itself without a reference, and may direct the proceedings to be taken in Court, or in Chambers. Con. Rule 44. Court may dispose of matters without reference.

Taken from Chy. O. 540.

This Rule is usually acted upon only in simple cases, to save the expense of a reference to a Master. The most usual instance of its

Rule 657. application being where the account necessary to be taken involves a mere computation. In such a case the Judge usually directs the Registrar to ascertain the amount, and it is then inserted in the judgment, or order, as the finding of the Court.

Occasionally, however, the accounts in an administration suit have been taken under this *Rule*.

The proceedings referred to in this *Rule* are matters properly referrible to a Master, not the adjudication of the action.

Order to
be carried
into M. O.
within
14 days.

657. Every judgment or order of reference shall be brought into the proper office for prosecution, within 14 days after the judgment or order is signed or issued, or after the same should have been signed or issued, by the party having the carriage of the same; otherwise any other party to the cause or matter, or any party having an interest in the reference, may assume the carriage of the judgment or order. Con. Rule 45.

Taken from Chy. O. 211.

The "proper office for prosecution" is that of the Master, or Referee, to whom the reference is directed. Usually the original, or a copy, of the judgment or order of reference, is required to be left with the Master.

Under these *Rules*, no time appears to be prescribed within which an order, or judgment, directing a reference, is to be drawn up and entered.

According to the former practice, it would appear that the party having the conduct of an order, or a judgment, directing a reference, was entitled to at least 21 days from the time the order, or judgment, was pronounced, or finally disposed of, by the Court, within which to issue the order, or judgment, and carry it into the Master's office; but whether he is entitled to the same time, or any longer or shorter period, under the present practice is not clear, and the *Rules* seem to furnish no analogy.

Conduct of
reference,
who
entitled to.

Duty of
solicitor
having
conduct.

The rule which regulates the question, as to who shall have the carriage of an order, or judgment, directing a reference to a Master, is a technical one, and in the majority of cases, the solicitors alone are interested. The solicitor of the party having the conduct of the judgment is entitled to prosecute all those proceedings which relate to the general inquiries, and the other parties only prosecute those which relate exclusively to themselves, or such as it would be inconsistent for the party having the carriage of the order or judgment to do. Thus, if the plaintiff has the conduct, his solicitor bespeaks and procures to be inserted all advertisements, whether for creditors, or for next of kin, or for the sale of property: he prepares the abstract, and answers the requisitions; and if the purchaser requires a reference as to title, he attends upon it. He furnishes, where directed, for the purpose of answering the general inquiries and taking the general account, copies, abstracts, or extracts of, or from accounts, deeds or other documents, and pedigrees, etc., relating to proceedings of a general character, and not belonging to particular parties to prosecute. Smith's Pr., 7th ed., 725. See also notes to *Rule* 203 (2).

Where the party having the carriage of a judgment or order, directing a reference, is guilty of delay in carrying it into the Master's office within the meaning of this *Rule*, any other party to the action, or any party having an interest in the reference, may assume the carriage of the judgment, or order, which, where necessary, would include the right to draw up the minutes and procure them to be settled, and to have the order or judgment passed and entered. No order seems necessary to entitle him to do this; but see *Re Shaw*, 14 Gr. 524, where a special application was made for the conduct of the reference, after the order issued, in pursuance of leave reserved. Where the judgment, or order, has been drawn up and entered, but has not been carried into the Master's office within the prescribed time, an office-copy of the judgment, or order, may be obtained and carried into the Master's office by any other party interested. Persons who are not parties to the action, but who are interested in the reference, e.g., creditors, next of kin, heirs, etc., are entitled under this *Rule* to assume the carriage of the order, or judgment, where the prescribed time has elapsed: see *Re Shaw*, 14 Gr. 524.

May be changed for delay.

When a plaintiff neglects for twenty years to prosecute a judgment directing a reference to take accounts in a redemption action, he may be deemed to have lost his right to prosecute the reference, and his proceedings may be stayed: see *Re Leslie*, 23 Ont. 143.

Or proceedings stayed.

Where a judgment or order has been carried into the Master's office, in the event of delay arising on the part of the party having the carriage of it, the Master may transfer the conduct of the reference to any other person interested: see *Rule* 663.

Party interested may assume carriage, when.

658. Unless otherwise directed by the Master, notice of the first proceeding before him in an action shall be given to every party affected by or interested in the inquiry, though any such party may not have appeared or pleaded in the action. *New.*

Notice to parties in Master's office.

This *Rule*, though new, merely gives the force of a *Rule* to what had been previously the practice in the Master's office.

Under the present practice, provision is made for hearing the action *pro confesso* for default of appearance or defence: see *Rules* 573, 586; and judgment may be awarded against a defendant on default of appearance, or on default of defence, and the future proceedings may be carried on against him *ex parte*, "except where otherwise provided by these *Rules*, or where otherwise ordered by the Court or a Judge." One of the cases "otherwise provided" is specified in this *Rule*. A defendant, if interested in, or affected by the inquiry, is, therefore, under this *Rule*, entitled to notice of proceedings upon a reference unless the Master sees fit to dispense with it.

Service on a defendant who has not appeared may, unless the Court otherwise directs, be effected by posting up a copy of the document required to be served "in the office where the proceedings are being conducted": *Rule* 334. Where a defendant who has not appeared, appears to have some substantial interest in the proceedings on the reference, the Master would probably direct personal service.

Rule 659.

Where service is effected by posting a copy, it would seem that it should be posted in the office in which the proceedings were commenced: see *Rules 15, and 830.*

Where a defendant who has made no defence, has no interest in, and is not affected by the reference, service on him may properly be dispensed with.

Master
may add
parties in
his office.

659. Where, in proceedings before the Master, it appears to him that a person not already a party ought to be made a party, and ought to attend, or be enabled to attend the proceedings before him, he may direct an office copy of the judgment or order to be served upon such person; and upon due service thereof, such person shall be treated and named as a party to the action, and shall be bound by the judgment or order in the same manner as if he had been originally made a party. *Con. Rule 46.*

Taken from *Chy. O. 244.*

It is most important that all proper parties should be added. Persons interested, who are not added, or served with the judgment under *Rule 203*, are not bound by the proceedings, and may intervene and compel the refunding of moneys distributed in their absence to the prejudice of their rights: see *Uffner v. Lewis*, 27 A. R. 275; 3 O. L. R. 208; with interest, S. C. 5 O. L. R. 684.

Master may
dispense
with service
of judgment

The Master has power to dispense with the service of the judgment on parties required to be served therewith under *Rule 203*; but he would seem to have no power to dispense with service on parties who ought to be added as parties under the provisions of this *Rule*.

As to substituted service of an office copy of the judgment or order and as to dispensing with service: see *Re Hynes, Hodgins v. Andrews*, 19 P. R. 217.

Persons served with a copy of a judgment under *Rule 203*, are not thereby made parties to the action: see notes to that *Rule*; but persons required to be served under this *Rule* are made parties to the action.

Adding
parties.

Where persons are required to be added as parties, the Master usually issues an order making them parties, and directing them to be served with the judgment, or order, of reference, indorsed as required by *Rule 660.*

Persons
acquiring
interests
*pendente
lite* need
not be
added.

Persons who acquire equitable interests in the subject matter of litigation *pendente lite* need not be added as parties, but are nevertheless bound, and concluded, by the proceedings; thus, a person recovering a judgment, and execution, against a mortgagor: *Wallbridge v. Martin*, 2 Chy. Ch. 275; or obtaining a mortgage, or other incumbrance from him: *Rohson v. Argue*, 25 Gr. 407; pending an action for foreclosure, or sale, by a prior mortgagee, need not be made a party. But where a person acquires the legal estate *pendente lite* it may sometimes be necessary to make him a party for the purpose of obtaining a conveyance. A person, who after the institution of a foreclosure action acquired an interest, was on his own application added as a party in *Gibson v. Nelson*, 2 O. L. R. 500; 35 S. C. R. 181. A purchaser *pendente lite* may be added as a

defendant in the Master's office under this Rule: *Lindsay v. Bank of Montreal*, 13 Gr. 66; but see *Abell v. Parr*, 9 P. R. 564. But where after registration of a certificate of *lis pendens* a statement of claim was amended by claiming further and other relief than that originally sought, it was held that persons acquiring interests before such amendment, though after the registration of the *lis*, were not bound by notice of such further relief: *Priee v. Priee*, 35 Ch. D. 297; but see 7 C. L. T. 205, and *Bennett on Lis pendens*, c. 1. The doctrine of *lis pendens* does not affect third persons acquiring title *pendente lite* under tax sales: *Ib.*, c. 5, s. 80; nor bond file assignees of negotiable paper: *Ib.*, ss. 80, 87; nor persons acquiring title under Acts authorizing expropriation: *Ib.*, s. 89; nor persons claiming under prior unregistered deeds: *Clergue v. McKay*, 6 O. L. R. 51; 8 O. L. R. 84; and it has no application to personal property other than chattel interests in land: *Wigram v. Buckley*, 1894, 3 Ch. 483; 71 L. T. 287.

A purchaser from the plaintiff in a foreclosure action, in anticipation of a final order being granted, acquires no greater rights than his vendor, and where the final order was erroneously granted the fact of the sale was held to furnish no obstacle to its being set aside on the application of the mortgagor: *Foresters v. Pegg*, 19 P. R. 54; and such a sale *pendente lite* was held not to be shippable as a sale under the power of sale in the mortgage: *Ib.*

Persons having a paramount title to the plaintiff, cannot be made parties in the Master's office, if they object: *Montgomery v. Shortis*, 3 Chy. Ch. 69. Thus, in a suit by an execution creditor, to set aside a fraudulent conveyance of the equity of redemption by the execution debtor, an order adding a prior mortgagee for the purpose of redeeming him, was discharged. When that is required he should be made an original party to the action: *Craeford v. Meldrum*, 19 Gr. 163. But where a decree had been made to take partnership accounts, in the absence of one of the partners alleged to be insolvent, and out of the jurisdiction, it was held that he was properly made a party in the Master's office on his returning to the jurisdiction pending the reference: *Paterson v. Holland*, 7 Gr. 563; and as to parties interested in the equity of redemption, see Rule 190.

The action is only deemed to be commenced as against parties added in the Master's office from the date of the order adding them: *Inson v. Gardiner*, 11 Gr. 23; and see *Dumble v. Larush*, 27 Gr. 187; *Sterling v. Campbell*, 1 Chy. Ch. 147. Where it is made to appear to the Master that all liability on the part of a party added, is barred by the Statute of Limitations, he may discharge the order adding him as a party: *Kline v. Kline*, 3 Chy. Ch. 161.

No direct relief can be had against parties added in the Master's office, and they cannot be required to account: *Hooper v. Harrison*, 28 Gr. 22; *Rolph v. Upper Canada Building Society*, 11 Gr. 275, 278; *Walker v. Seligmann*, L. R. 12 Eq. 152; *Re Parkes, Simpson v. Parkes*, 66 L. T. 151. And it would seem they cannot themselves get any relief against co-defendants beyond what is claimed by the plaintiff: see *Whitney v. Smith*, L. R. 4 Chy. 513; they are simply bound by and entitled to the benefit of the proceedings.

A party filling two capacities, if made a party to a suit distinctly in one capacity only, may not be bound as to his rights in the other capacity: e.g., a person added as a defendant in his character of a judgment creditor, was held not to be bound in his character of a mortgagee: *Crooks v. Watkins*, 8 Gr. 340; but see *Beardsley v. Bourdieu*, 1899, 1 Q. B. 746; 80 L. T. 51.

Rules
660-662.

Office
copy of
judgment
to be served
on parties
added in
M. O.

660. The office copy of a judgment or order directed to be served under Rule 659 shall be indorsed with a notice according to Form No. 75. Con. Rule 47.

Taken from Chy. O. 245.

For Form No. 75, see H. & L. Forms No. 931.

Parties
added in
M. O. may
move
against
judgment

661. A person served with an office copy of a judgment or order under Rule 659, may apply to the Court at any time within 14 days from the date of such service, to discharge, add to, vary, or set aside the same. Con. Rule 18.

Taken from Chy. O. 240, and see Chy. O. 445.

Applica-
tion when
to be heard.

Under Chy. Orders 240, 445, the application was required to be brought on to be heard within the fourteen days; see *Holmsted's Rules and Orders*, p. 245. But the application might, in the discretion of the Court, be entertained after that time; *Stewart v. Huels*, 2 Chy. Ch. 295. The practice under this Rule now appears to be the same.

Both vacations are excluded from the fourteen days; *Rule 352 (b)*.

Party added
claiming
priority to
plaintiff

Where a party is added who claims by title paramount to the plaintiff, he should move to discharge the order; *Montgomery v. Shortis*, 3 Chy. Ch. 130; *Crawford v. Meldrum*, 19 Gr. 165; *McFoss v. Tiffin*, 13 Ont. App. 1. But an encumbrancer claiming priority to the plaintiff, but whom the Master finds to be subsequent, may also appeal from the report on the question of priority; *McDonald v. Rodger*, 9 Gr. 75.

Master may
discharge
order, when.

The Master may himself discharge the order adding a party who subsequently appears to be an unnecessary party; *Kline v. Kline*, 3 Chy. Ch. 161.

A party improperly added as a party in the Master's office is not limited to the time mentioned in this Rule within which to object that he should not have been made a party; he may take the objection on an appeal from the report, or upon the hearing on further directions, if any, if sufficient appears on the Master's report to enable the Court to deal with the question; *Cowan v. Allen*, 26 S. C. R. 292; *McLaughlin v. Stewart*, 1 O. L. R. 295.

Master may
classify and
appoint
solicitors to
represent
different
classes.

662. Where, at any time during the reference, it appears to the Master, with respect to the whole or any portion of the proceedings, that the interests of the parties can be classified, he may require the parties constituting each or any class, to be represented by the same solicitor; and where the parties constituting such class cannot agree upon the solicitor to represent them, the Master may nominate a solicitor for the purpose of the proceedings before him. Con. Rule 19.

Taken from Chy. O. 218.

Where the Master appoints a solicitor to act for a class, all the individuals composing that class are bound by the acts of the solicitor so appointed, and cannot repudiate them, unless they appoint a separate solicitor: *Re McCounell*, 3 Chy. Ch. 423.

A solicitor so appointed is entitled to act for the class, not only in the Master's office, but also in proceedings arising out of, or connected with, the proceedings in the Master's office: *Id.* But where a solicitor was *ex parte* appointed to represent creditors it was held that he could not recover his costs against creditors who had not proved their claims and who had no notice of his appointment: *Monteith v. Merchants Bank*, 12 P. R. 288; 23 C. L. J. 415.

As to the appointment of a solicitor to represent creditors generally: see *Re Drury Nickel Co.*, 16 P. R. 525; where orders of that kind were not favourably regarded.

The Master should not appoint a separate solicitor for parties who are sufficiently represented by the plaintiff; and where *prima facie* the plaintiff represents the class (see *Rule 213*), if the Master appoints a separate solicitor he should state the reason for so doing in his report: *Gorham v. Gorham*, 17 Gr. 386.

After the appointment of a solicitor to act for a class, the separate costs of any member of that class subsequently incurred will not ordinarily be allowed against the estate under administration: *Re Alna Insurance Company*, 17 Gr. 160.

As to the liability for costs of any member of a class refusing to be represented by the solicitor nominated by the Master, and insisting on being represented by a different solicitor, see *Rule 1148*.

663. Where a party prosecuting a reference, does not proceed with due diligence, the Master may, upon the application of any other person interested, either as a party to the suit, or as one who has come in and established his claim under the judgment or order, commit to him the prosecution of the reference. Con. Rule 50.

Taken from Chy. O. 212.

The Master in his discretion may entertain an application to change the conduct of the reference *ex parte*: *Stephenson v. Nicolls*, 14 Gr. 144; but ordinarily the application should be made on notice: 1 Sm. Pr., 2nd ed. 312; and see *Sims v. Ridge*, 3 Mer. 458; *Edwards v. Ireland*, 5 Mad. 31.

An appeal lies from the order of the Master changing the conduct of the reference: *Stephenson v. Nicolls*, 14 Gr. at pp. 147, 149, and in *Wyatt v. Sadler*, 5 Sm. 459, the Court on a substantive motion changed the conduct of the reference, after the Master had refused an application for that purpose. But the application must in the first instance be made to the Master: *Miller v. McNaughton*, 1 Chy. Ch. 296.

Where there has been great delay in prosecuting a judgment in a creditor's suit, a creditor may apply to have the conduct of the cause, though it has become defective by the death of the defendant: *Cook v. Bolton*, 5 Russ. 282; and see *Re Shaw*, 14 Gr. 524; *Patterson v. Scott*, 4 Gr. 145.

Rules**664, 665.**

Party
conducting
reference
entitled to
inspect
papers.

Plaintiff
may apply
to amend
order of
reference,
though
conduct
taken him.

Reference
to be
proceeded
with on
day fixed
and *de*
die in diem.

Master may
proceed in
vacation.

Warrant to
consider
proceedings
on return.

A party to whom the conduct of the reference is committed is entitled to inspect and take copies of briefs and documents in the possession of the party, or his solicitor, from whom the carriage of the reference has been taken: *Bennett v. Baxter*, 10 Sim. 417; and see *Heslop v. Metcalf*, 8 Sim. 622, and notes to *Rule 335, supra*, p. 544.

An order taking the conduct of the reference from the plaintiff, does not preclude him from applying to amend a clerical error in the judgment, or order, under *Rule 640*; *Whitehead v. North*, Cr. & Ph. 78. This *Rule* only enables the Master to transfer the conduct of proceedings in his office.

Where there is undue delay in prosecuting a reference the Court may stay the proceedings: see *Re Heslic*, 23 Ont. 143.

664. Unless the Master otherwise directs, a reference shall be proceeded with at the day and time fixed; and so *de die in diem*, without interruption, and without a fresh warrant; and when an adjournment is ordered, the Master shall note in his book the time and reason thereof. Con. *Rule 52*.

Taken from Chy. O. 213, 214.

The Master may proceed with a reference in vacation, and make his report: *Marples v. Roscbrugh*, 17 P. R. 104.

"It is the bounden duty of the Masters to observe these *Orders* to the letter, wherever it is not absolutely impracticable to follow them literally," *per Spragge, C.*; *Falls v. Powell*, 20 Gr. at p. 468.

The proceedings on the reference should be from time to time recorded in the Master's book referred to in this *Rule*; see *Rule 681*. All consents or undertakings should be duly entered therein, and signed by the parties to prevent misunderstandings: see *Rule 681*; *Beaudry v. Gallien*, 5 O. L. R. 73.

665. Upon the return of a warrant to consider, or upon the bringing in of the reference where the warrant is dispensed with, the Master shall fix a time at which to proceed with the reference and shall give any special directions he thinks fit as to:—

(a) The parties who are to attend on the several accounts and inquires;

(b) The time at which, or within which, each proceeding is to be taken;

(c) The mode in which any accounts referred to him are to be taken or vouched;

(d) The evidence to be adduced in support thereof;

(e) The manner in which each of the accounts and inquiries ^{Rule 666.} is to be prosecuted;

And such directions may be afterwards varied or added to, as may be found necessary. Con. Rule 55.

Where a judgment is manifestly erroneous, the Master may pro-Where perly refuse to proceed upon it until it has been corrected: *Sucainson* judgment *v. Bartley*, 18 C. L. J. 15; and see *Commercial Bank v. Graham*, 4 erroneous, Master Gr. 419; *Mitchell v. Strathy*, 28 Gr. 80; *Adamson v. Adamson*, *Ib.*, at p. 224; but the mistake must be very obvious to warrant the Master to proceed on it. at may refuse to proceed on it.

Formerly a warrant to consider a judgment, or order, only required Warrant to one day's service: see *Sutherland v. Rogers*, 2 Chy. Ch. at p. 192; consider. other warrants required two clear days' service: *Ib.*; except warrants to settle report, which required four days' service: see *Rule 687*, note. The present *Rules* make no express provision as to Master's warrants.

The warrant must be underwritten so as to explain clearly what proceedings are to be taken under it: *Denison v. Denison*, 3 Chy. Ch. 349.

In any cause, or matter, for the administration of the estate of a who to deceased person, no person, other than the personal representative, appear on is, except by the leave of the Master, entitled to appear on the creditors' claim of any person not a party to the cause, against the estate of claims against the deceased, in respect of any debt or liability. The Master may estate. direct any person to appear, either in addition to, or in the place of, the personal representative, upon such terms as to costs and otherwise as may seem proper: see *Rule 204*.

As to mode of taking and verifying accounts generally: see *Rules 674-679, 683*; and as to taking accounts of creditors' claims against the estate of a deceased person: see *Rules 703-715*.

The ruling of the Master is not conclusive, and the Court may on appeal give a party leave to attend proceedings whom the Master has excluded: *Davis v. Combermere*, 9 Jur. 76. But it would seem that any objection to the Master's ruling should be brought up by way of appeal, and not as a substantive motion.

666. To enable the Master to exercise all or any of the No state- ment in powers conferred upon him by, or to take the accounts and pleadings, or evidence make the inquiries referred to in, the following Rules. it at trial necessary to shall not be necessary that any of the matters therein enable Master to mentioned shall have been stated in the pleadings, or that exercise his powers the evidence thereof shall have been given before the judgment or order of reference, or that the judgment or order shall contain any specific direction in respect thereof. Con. Rule 56.

Taken from Chy. O. 219. See *Sculthorpe v. Burn*, 12 Gr. 427.

This *Rule* enables the Master to take an account with rests, and to charge the accounting party for rents, and profits, which might have been received, but for wilful neglect and default, and to set an occupation rent in any case referred to him: although there be

Rule 667. nothing in the pleadings: *McLennan v. Heward*, 9 Gr. at pp. 178, and 187; and though no evidence may have been given as to any such matters at the trial.

It was formerly held that under a common administration order obtained on motion without bill, by any person but the personal representative himself, there could be no inquiry as to wilful neglect, or default: *Harrison v. McGlashan*, 7 Gr. 332. But where the order was obtained by the personal representative himself, such an inquiry might be made: *Ledgerwood v. Ledgerwood*, 7 Gr. 584.

Inquiry as to neglect and default etc., can now be made without special direction.

The case of *Carpenter v. Wood*, 10 Gr. 354, though not referring to *Harrison v. McGlashan*, is said in effect to have overruled it; and the practice was stated by Boyd, C., to be now settled that under Chy. Orders 219, 220 (*Rules* 666, 667), the inquiry as to wilful neglect and default, may be made in all cases under the common administration order: *Ke Allan*, 9 P. R. 277.

If the Master refuses to exercise the power to take the accounts in the manner mentioned in *Rule* 667, his ruling will be appealable; but it has been said to be more proper to bring the question up on further directions: see *Stewart v. Leys*, 1 Ont. 375.

Where the judgment gives further relief than claimed by the pleadings, it has been held that the judgment is not to be construed by reference to the pleadings if it is unambiguous: *Smith v. Gohdie*, 11 P. R. 24.

Powers of Master to take accounts with rests

667. Under a judgment or order of reference, the Master shall have power:

To inquire as to wilful neglect and default.

To set occupation rent.
To allow for improvements.

To make just allowances.

To report special circumstances, and to inquire as to all matters relating to accounts.

(a) To take the accounts with rests or otherwise;

(b) To take account of rents and profits received or which, but for wilful neglect or default, might have been received;

(c) To set occupation rent;

(d) To take into account necessary repairs, and lasting improvements, and costs and other expenses properly incurred otherwise, or claimed to be so;

(e) To make all just allowances;

(f) To report special circumstances;

(g) And generally, in taking the accounts, to inquire, adjudge, and report as to all matters relating thereto, as fully as if the same had been specifically referred. *Con. Rule* 57.

Taken from Chy. O. 220.

Interest.—The Master has power to allow interest against an accounting party, though not expressly directed so to do by the judgment or order under which the account is taken: *Earle v. Barland*, 5 O. L. R. 327; and it is immaterial that the accounting party is merely a co-constructive trustee: *Id.* Interest is not chargeable, however, as a matter of course against an accounting party: *Phillips v.*

Homfray, 44 Ch. D. 694; 39 W. R. 45; 62 L. T. 897; *London, Chat-Rule 667*.
ham & D. Ry. Co. v. South Eastern Ry. Co., 1893, A. C. 420; and
 see the Act, ss. 113-116 and notes, *supra*, p. 159.

Taking the Account with rests:—

Taking an account with "rests" means, either that the accounting party is charged with compound interest on the amount found due from him; or that the surplus income remaining after satisfying the interest due to him, is applied at certain periods in reduction of the principal. The amalgamation of principal and interest, or the application of income to pay off the principal, may take place yearly, half-yearly; or at other times more or less frequently, and these periods are termed "rests." In *Robinson v. Cumming*, 2 Atk. 410, Lord Hardwicke said rests were only ordered in accounts of realty, and not of personalty, but this is no longer the rule. When the Master declines to take an account with rests, if it is intended to appeal from his decision, he should be required to report the facts, so as to enable the Court to judge of the propriety of his decision: *Sievwright v. Lays*, 1 Ont. 375; but it has been said that the preferable method is to bring the question up on further directions: *Ib.*, *sed quare*.

Rests, as against Executors and Trustees.—In taking accounts against an executor, or trustee, he is to be charged "with what he ought to have made, with what he actually did make, or with what he must be presumed to have made": *per Esten, V.C., Smith v. Roe*, 11 Gr. 312. The principle on which the Court proceeds in charging an executor, or trustee, with interest, is that of restoring to the *cestui que trust* his own, and of fairly compensating him for loss directly attributable to the neglect, or breach of duty, by the trustee; and on the other hand, that of withdrawing from the trustee any advantage he has appropriated by abusing his position: *per Moss, C.J., Inglis v. Beatty*, 2 Ont. App. at p. 490. It is not that of punishment to the executor, or trustee: *Attorney-General v. Alford*, 4 D. M. & G. 843; *Burdick v. Garrick*, L. R. 5 Chy. 233; *Vyse v. Foster*, L. R. 8 Chy. 309; L. R. 7 H. L. 318. Compound interest may in some cases be a convenient mode of making this compensation, but in other cases it may be oppressive, and sound more as punishment than compensation, and therefore in such cases it ought not to be charged: see *Fidler v. O'Hara*, 14 Gr. 223.

In England the amount of interest with which an executor, or trustee is charged, depends on the circumstances: (1) When he is guilty of mere neglect, and gets no personal benefit, he is charged with simple interest at 4 per cent.: *Forbes v. Ross*, 2 Cox, 116; *Rocke v. Harte*, 11 Ves. 58; *Robinson v. Robinson*, 1 D. M. & G. 247; *Tebbs v. Carpenter*, 1 Mad. 290; *Mousley v. Carr*, 4 Beav. 49; *Attorney-General v. Alford*, 4 D. M. & G. 843; or 3 per cent. compounded: *In re Barclay*, 1899, 1 Ch. 674; or with the interest he should have received with half-yearly rests: *Gilroy v. Stephen*, 45 L. T. 761. (2) Where he is guilty of a positive breach of trust, or has employed trust money for his own benefit, he is charged with 5 per cent.: or, at the option of the beneficiary, with the profit actually made: *Jones v. Foxall*, 15 Beav. 388. The neglect to comply with a specific direction for investment, has been held to be such a positive breach of trust: *Crackelt v. Bethune*, 1 J. & W. 586; *Berwick v. Murray*, 7 D. M. & G. 519; *Mosley v. Ward*, 11 Ves. 581; and where the trust directed accumulation, the accounts have been taken with rests: *Raphael v. Rochm.*, 11 Ves. 92; *Knott v. Cotter*, 16 Beav. 77; *Jones v. Foxall*, 15 Beav. 388; *Re Barclay*, 1899, 1 Ch. 674; and

Rule 667. where a breach of trust, and the employment of the trust fund for his own benefit, in trade, or speculation, concur, whether there be any direction for accumulation or investment or not, the trustee is charged with 5 per cent., sometimes with: *Burdick v. Garrick*, L. R. 5 Chy. 233; and sometimes without rests, or in the option of the beneficiary with the profits actually realized from the fund: *Flocton v. Bunning*, L. R. 8 Chy. 323; *Saltmarsh v. Barrett*, 31 Beav. 349; *Docker v. Somes*, 2 My. & K. 655; *Heathcote v. Hulme*, 1 J. & W. 122; *Sutton v. Sharpe*, 1 Russ. 146; *Robinson v. Robinson*, 1 D. M. & G. 247; *Re Davis*, 1902, 1 Ch. 314; 86 L. T. 523. In *Walker v. Woodward*, 1 Russ. 107, annual rests were ordered, but this was said to have been obtained by surprise: see *Attorney-General v. Solly*, 2 Sim. 518. In *Jones v. Fozall*, 15 Beav. 388; *Williams v. Powell*, 15 Beav. 461; *Heighington v. Grant*, 1 Ph. 600; rests were ordered. In *Docker v. Somes*, 2 My. & K. 655; *Palmer v. Mitchell*, 2 My. & K. 672; *Macdonald v. Richardson*, 1 Giff. 81; accounts of profits arising from employment of trust funds in trade were ordered; and see *Crawshay v. Collins*, 15 Ves. 218; 1 J. & W. 267; 2 Russ. 325; *Witlett v. Blunford*, 1 Ha. 233; *Wedderburn v. Wedderburn*, 22 Beav. 84. Where a trustee raised money on the security of the trust estate in conjunction with his own property, he is bound to account to his *cestui que trust* for a proportionate part of the money so raised: *Roche-foucauld v. Boustead*, 1898, 1 Ch. 550. The paying in money to the general account of a firm of solicitors, of which the trustee was a partner, was held not to be a using of the money in his own business, so as to render him liable for compound interest: *Burdick v. Garrick*, L. R. 5 Chy. 233. Where an infant is interested, an inquiry will be directed whether it is for his advantage to take interest, or profits: *Burden v. Burden*, cited in *Heathcote v. Hulme*, 1 J. & W. 134-5. No special direction seems to be necessary to authorize the Master to make that inquiry in Ontario.

Where, however, trustees have improperly dealt with a trust fund but have invested it in such a way as to yield much larger profits than could have been obtained had it been dealt with strictly according to the trust, the *cestui que trust* are not at liberty to take the benefit of the investments and at the same time hold the trustees liable as for breach of duty; if they reprobate the transaction, they must account for the extraordinary profits they have received: see *Smith v. Nelson*, 92 L. T. 313.

Rule in
Ontario as
to rate of
interest.

In this Province prior to the repeal of the usury laws, the rule was to charge interest at the rate of 6 per cent., and where according to the English cases a higher rate of interest than 4 per cent. would be charged, to take the account with half-yearly rests: see *Landman v. Crooks*, 4 Gr. 353; *Small v. Eccles*, 12 Gr. at p. 40. Since the abolition of the usury laws, an accounting party chargeable according to the English cases with more than 4 per cent., may now be charged, either with a higher rate of interest than the legal rate, according to the value of money, as was done in *Wightman v. Hellwell*, 13 Gr. 330 (where an executor was charged with 8 per cent. simple interest); or it would seem he may be charged with compound interest at the legal rate: *Wiard v. Gable*, 8 Gr. 458; *Erskine v. Campbell*, 1 Gr. 570; or even at a higher rate if the money has been used in trade: *Wightman v. Hellwell*, 13 Gr. at p. 343; *Small v. Eccles*, 12 Gr. 40, or, at the option of the *cestui que trust*, with the actual profits realized. Prior to 63 & 64 Vict. c. 29 (D.) which reduced the legal rate of interest to 5 per cent., a trustee who had kept no accounts, and made no attempt to keep the trust moneys separate

from her own, was charged with interest at 6 per cent. on the Rule 667. yearly balances in her hands: *Zimmerman v. Wilcox*, 35 C. L. J. 688.

But where the trustee, or executor, has neglected to pay over sums Interest on in his hands to the parties entitled, he is chargeable with interest at sums the legal rate on such sums, no matter what the amount, from the neglected to time the payment ought to have been made: *McLennan v. Howard*, 9 over, Gr. at p. 190.

Where from the circumstances of the estate the executors are not justified in making permanent investments, they will be charged only with the interest actually received while the money is on deposit: see *Re McIntyre, McIntyre v. London, &c.*, 7 O. L. R. 548.

In *re Honsberger v. Kratz*, 10 Ont. 521; 21 C. L. J. 400, Boyd, C., laid down the rule on which executors and trustees should be charged with interest, as follows:—(1) An executor or trustee who negligently retains funds in his hands which he should have paid over, or made productive for the estate, is to be charged with simple interest thereon at 6 per cent. (2) An executor or trustee who in violation of his trust has used the money for his own purposes (though not in trade or speculation), is to be charged at such rate as is the then current value of money. (3) An executor or trustee who makes a gain out of the trust by embarking the money in speculation or trading adventures, is to be charged either with the profits or compound interest. Since this rule was laid down the legal rate of interest has been reduced to five per cent.: 63 & 64 Vict. c. 29 (1.); and in the last case not more than 5 per cent. would now be chargeable except in case of liabilities existing at or prior to 7th July, 1900, to which the old rate of 6 per cent. would apply. Where under the third case mentioned a trustee is charged with profits, it is not the course of the Court to charge him also with interest on such profits: *Silkstone & H. M. Co. v. Eddy*, 1900, 1 Ch. 167.

Where the executor, or trustee, retains trust money in his hands, Where re- under a *bonâ fide*, though mistaken, belief that it is his own, he may tained un- be exonerated altogether from payment of interest: *Brucere v. Pem- der bonâ bertson*, 12 Ves. 386; *Davenport v. Stafford*, 14 Beav. 319; or he may fide belief be ordered to pay simple interest: *Inglis v. Beatty*, 2 Ont. App. 453; ship. and where there has been great delay on the part of the *cestui que trust* in making claim to the trust fund: *Broune v. Cross*, 14 Beav. Neglect of 145, provided such delay can be said to amount to acquiescence: c. q. t. to The Life Assurance Co. v. Siddal, 3 De G. F. & J. 72; *Blain v. demand Terryberry*, 12 Gr. 221, the trustee or executor may be relieved from payment. Neglect of paying interest thereon: but see *Boys' Home v. Lewis*, 4 Ont. 18. trustee to invest.

A direction to invest a trust fund for infants, is not properly executed by the deposit of the money in a savings bank at 3½ per cent. interest, even though made with the consent of the statutory guardian of the infant c. q. t.; and the trustees are liable for interest at the legal rate: *Spratt v. Wilson*, 19 Ont. 28.

An executor who paid over money under what proved to be a mistaken construction of his testator's will, was held nevertheless bound to pay interest thereon to the parties properly entitled; but not to a person who had acquiesced in the misapplication of the fund: *In re Hulkes, Powell v. Hulkes*, 33 Ch. D. 552; 55 L. T. 209; and see *In re Deane, Bridger v. Deane*, 42 Ch. D. 9.

A trust to invest in "public securities," is violated by investing in municipal debentures: *Ewart v. Gordon*, 13 Gr. 40; but as to debentures in which trustees may invest, see R. S. O. c. 130; and a direction to carry on a business will not justify an executor in embarking more capital in it: *Smith v. Smith*, 13 Gr. 81.

Rule 687.

Executors
lending
money to
themselves.

Where trustees, or executors, lend money to themselves at a lower rate than could have been obtained by investing it according to the trust, they will be chargeable with the higher rate, but not with rests: *Smith v. Roc*, 11 Gr. 311, at p. 315; and see *Forbes v. Ross*, 2 Cox. 116.

In cases of simple neglect to invest, the Master is not justified in charging interest against the trustee until the balance amounts to a sum sufficient for an ordinary investment. \$400 was considered a reasonable sum for this purpose: *McLennan v. Heward*, 9 Gr. 178; and see *Re Jones*, 49 L. T. 91; *Re McIntyre*, *supra*, p. 875.

Or not in-
vesting as
directed.

But where a trustee is authorized to invest in either of two specified modes, and by mistake invests in neither, the measure of his liability is the loss arising from his not having invested in the less beneficial of the authorized modes. Thus where a trustee was authorized to invest in Government securities, or mortgages, and he invested in bank stocks, which proved a loss: he was charged with what would have been obtained had the investment been made in Government securities, although a larger rate of interest could have been obtained on mortgages: *Paterson v. Lailey*, 18 Gr. 13; and see *Cameron v. Bethune*, 15 Gr. 486; and see *Re Gabouric*, 13 Ont. 635.

Nor is an executor, or trustee, liable for neglect in not calling in investments made by the testator, in order to invest at a higher rate of interest, although authorized so to do: *Smith v. Roc*, 11 Gr. 311. Where a trust company was appointed executor of an estate and took over certain securities of the estate, and without giving any security or covenant, paid interest at a lesser rate than that received from the securities, to the beneficiaries, on the ground that they had "guaranteed" the payment of interest on the fund, it was held that the transaction could not be supported and that the company was accountable for the interest actually received: *Hiddings v. De Villiers*, 12 App. Cas. 107, 624; 57 L. T. 886.

An administratrix who allowed the moneys of the estate in her hands to be used by her husband, was charged with simple interest at the legal rate: it not being shewn that the money had been used in trade, or that any larger sum had been realized: *Fidler v. O'Hara*, 14 Gr. 223; and see *Zimmerman v. Wilcox*, 35 C. L. J. 688. Where a trustee mixes the trust fund with his own money in his bank account he cannot attribute investments made out of the common fund, to his private account, until he has fully restored the trust fund, and his *c. q. t.* is entitled to the benefit of all such investments: *In re Oatway*, 1903, 2 Ch. 356.

No interest
on sums
charged to
executor,
he has not
actually
received.

Where an executor, or trustee, has properly deposited the trust fund for safe keeping, or not unreasonably kept it in his hands unemployed, he may be relieved from payment of interest, except such as he has actually received; but if he has not kept it apart from his own moneys, or has used it, he will be liable for interest on it: *Beaton v. Boomer*, 2 Chy. Ch. 89; *Re McIntyre*, *supra*, p. 875.

An executor, or trustee, charged with principal sums which have never come to his hands, but which have been lost by his neglect, is not always chargeable with interest thereon as well: *Vanston v. Thompson*, 10 Gr. 542; *Re Shaw*, 15 Gr. 626; *Re Crowter*, *Crowter v. Hinsmann*, 10 Ont. 159; unless his neglect or default amounts to acquiescence in the spoliation of the estate: *Sovereign v. Sovereign*, 15 Gr. 559; *Cudney v. Cudney*, 21 Gr. 153; *Archer v. Severn*, 13 Ont. 316.

The commencement of a suit does not stop interest running: *Mc-Rule 667*.
Lennan v. Heward, 9 Gr. 178; *McMillan v. McMillan*, 21 Gr. 369;
 but see *Blogg v. Johnston*, L. R. 2 Chy. 225.

As against executors, interest should not ordinarily be charged,
 until after the lapse of a year from the testator's death.

Where a trustee or executor has made advances to the trust estate,
 he may be allowed simple interest on the balances of principal due to
 him from year to year, but not compound interest: *Finch v. Prescott*,
 L. R. 17 Eq. 554.

Principal and Agent.—An agent who had used moneys of his prin-Principal
 cipal, with his consent, was only charged simple interest: *McLennan and agent*.
v. Heward, 9 Gr. 178; and where the state of accounts could not be
 ascertained until they had been taken by the Court, interest on the
 balance was charged only from the date of the Master's certificate:
Turner v. Burkinshaw, L. R. 2 Chy. 488; and see *Blogg v. Johnston*
Ib., 225.

Where the principal was found indebted to the agent, interest on the
 balance was allowed from the filing of the declaration in the action
 by the agent to recover the amount: *Ridley v. Sexton*, 19 Gr. 146.

Legatees.—Interest on legacies runs from the end of a year from Legatees.
 the death of the testator, in the absence of any express direction in
 the will to the contrary: see *Smith v. Seaton*, 17 Gr. 397; even
 though the income of the whole estate be bequeathed to another for
 life: *Toomey v. Tracey*, 4 Ont. 708; and see *Re Olive, Olive v.*
Westerman, 50 L. T. 355; but this rule does not apply to sums ap-
 pointed by will, under a power; as to such sums, interest runs from
 the death of the testator: *Dodds v. Graham*, 20 Gr. 258. But no
 interest can usually be recovered on arrears of annuities, bequeathed
 by will: *Goldsmith v. Goldsmith*, 17 Gr. 213; *Crone v. Crone*, 27
 Gr. 425; and see *Snarr v. Badenach*, 10 Ont. 131; 21 C. L. J. 401;
 nor on annuities granted to secure a loan, as against land on which
 the annuity is charged, even though judgment may have been recovered
 therefor: *Beamish v. Farwer*, Ir. R. 1 Eq. 466; and see *Ashburner*
v. Maguire, 2 W. & T. L. Cas. 317.

Legacies by persons *in loco parentis* to infant legatees, where there
 is no other provision for maintenance of the legatees, will bear in-
 terest from the death of the testator: *In re McIntyre*, 9 O. L. R. 408.

Where a legacy is vested in trustees upon an express trust, more
 than six years' arrears of interest are recoverable: *Loring v. Loring*,
 12 Gr. 374.

Where, by mistake, a legatee has been paid by an executor before
 his legacy was due, he cannot be required to give credit as against
 subsequently accruing instalments of his legacy, for interest on the
 payments made before they were due: *Barber v. Clark*, 20 Ont. 522;
 18 A. R. 435.

A legatee receiving more than his share may be ordered to refund,
 with interest: *Davidson v. Bowmer*, 17 Gr. 509; *Uffner v. Lewis*, 5 O.
 L. R. 684; but see *Re Horne*, 1905, 1 Ch. 76, where a trustee, who
 was himself a beneficiary, having in a distribution paid himself too
 little, his executors were held not entitled to compel other benefi-
 ciaries to refund, nor to impond accruing income to make an
 equalization.

Rule 667. Where there is a deficiency of assets to meet an annuity given by a testator or other person, the annuitant is entitled to have his annuity valued, and the value paid to him, where there is no gift over of the corpus of the fund after the death of the annuitant: *In re Sinclair*, 1897, 1 Ch. 921.

Creditors.—As to creditors overpaid their proportion of the assets and ordered to refund, see *Chamberlen v. Clarke*, 1 Ont. 135; 9 Ont. App. 273; *Uffner v. Lewis*, 3 O. L. R. 208; *sed vide*, S. C., 5 O. L. R. 684.

Policies of insurance. **Policies of Insurance.**—Interest does not begin to run until the party claiming is in position to give a full discharge: *Toronto Savings Bank v. Canada Life*, 14 Gr. 300; and see *Matthew v. Northern Ass. Co.*, 9 Ch. D. 80.

Partnership accounts. **Partnership Accounts.**—In the absence of any agreement to the contrary, advances of capital made by a partner do not bear interest: *Hill v. King*, 9 Jur. N. S. 527; 3 D. J. & S. 418; *Cooke v. Benbow*, 3 De G. J. & S. 1; *Sterens v. Cook*, 5 Jur. N. S. 1415; but see *Millar v. Craig*, 6 Beav. 433. This applies not only to the original capital put in, but also to subsequent advances made by a partner on capital account: *Jardine v. Hope*, 19 Gr. 76.

No interest allowed on capital. Neither is interest chargeable on capital agreed to be advanced by a partner, but not advanced by him: *Wilson v. McCarthy*, 13 C. L. J. 303; *Rishton v. Grissell*, L. R. 5 Eq. 326.

As to temporary loans.—quere. As to advances in the way of temporary loans there seems to be no settled rule. In *Cook v. Benbow*, *supra*, Turner, L.J., thought interest should not be allowed; and see *De Hertel v. Supple*, 14 Gr. 421. But in *Ex parte Chippendale*, 4 D. M. & G. 36, Knight Bruce, L.J., was of the contrary opinion; and see *Re German Mining Co.*, 17 Jur. 745, 747; *Pim v. Harris*, 10 L. R. Ir. Eq. 442.

Interest allowed on sums in the hands of a partner, or not accounted for. Interest is chargeable on sums in the hands of a partner, and not accounted for: *Hutcheson v. Smith*, 5 Ir. Eq. 117; or improperly applied: *Evans v. Coventry*, 8 D. M. & G. 835. But a partner in possession of partnership property is not obliged to account on the footing of wilful default: *Rowe v. Wood*, 2 J. & W. 556; *Davidson v. Thirkell*, 3 Gr. 330, at pp. 347-8.

No interest on capital withdrawn, or profits. Interest is not chargeable on withdrawal of capital, unless fraudulent or improper: *Cooke v. Benbow*, *supra*; *Meymott v. Meymott*, 31 Beav. 445; nor on withdrawn profits: *Dinham v. Bradford*, L. R. 5 Chy. 519.

Interest payable on capital where stopped by dissolution. Where capital carries interest during the continuance of a partnership, it does not do so after a dissolution: *Watney v. Wells*, L. R. 2 Chy. 250; *Rhodes v. Rhodes*, John. 653; although the business is carried on for the purposes of a sale: *Watney v. Wells*, *supra*; unless where the capital is treated as a debt: *Wood v. Scoles*, L. R. 1 Chy. 369; *Barfield v. Loughborough*, L. R. 8 Chy. 1; or in the case of a sleeping partner: *Parsons v. Hayward*, 4 D. F. & J. 414.

Interest when it runs. After the Master's report, simple interest at the legal rate runs on the amount found due: *Bonville v. Bonville*, 35 Beav. 129; *Brereton v. Yorke*, 46 L. T. 289.

Losses how borne. Losses resulting from investments of partnerships moneys, are to be borne by the partners, in the same proportions as they are entitled to share in the profits of the partnership business: *Storm v. Cumberland*, 18 Gr. 245.

Mortgagees in Possession.—Where a mortgagee in possession, has in **Rule 667**, that character received rents and profits, or is chargeable with an occupation rent, in excess of the interest due, the Master may strike a balance periodically, and apply the surplus to the reduction of the principal; this is called taking the account with rests: *Thornycroft v. Crockett*, 2 H. L. C. 239; *Wilson v. Cluer*, 3 Beav. 136; *Schofield v. Ingham*, 1 C. P. Co. 477; *Thompson v. Hudson*, L. R. 10 Eq. 407; and see *Fisher on Mortgages*, 5th ed., sec. 1793, *et seq.* And where a mortgagee, after having been paid in full, has continued in possession, he may be charged with compound interest on his receipts: *Wilson v. Metcalfe*, 1 Russ. 530; *Lloyd v. Jones*, 12 Sim. 490; *Ashworth v. Lord*, 36 Ch. D. 545; 58 L. T. 18.

In *Coldwell v. Hall*, 9 Gr. 110, VanKoughnet, C., stated it to be the settled practice of the Court, "that when a mortgagee enters, his money being in arrear, he is not liable to account for the rents received by or chargeable against him, with rests, until he is paid off in full." And see *Wilson v. Cluer*, 3 Beav. 136; *Wilson v. Metcalfe*, 1 Russ. 530; *Paul v. Johnson*, 12 Gr. at p. 482; *Davis v. May*, 19 Ves. 384; *Finch v. Broico*, 3 Beav. 70; *Latter v. Dashwood*, 6 Sim. 462. But if he enters when nothing is in arrear, it seems the account may be taken with rests from the beginning of the possession: *Nelson v. Booth*, 3 D. & J. 119.

But the mere fact of nothing being due when possession is taken, is not conclusive as to the right to have the account taken with rests; every attendant circumstance must be regarded: *Horlock v. Smith*, 1 Coll. 287. Thus a mortgagee who has taken possession of leaseholds to prevent a forfeiture is not liable so to account, though nothing was in arrear when he entered: *Patch v. Wild*, 30 Beav. 90; and see *Gordon v. Eakins*, 16 Gr. 363.

If a mortgagee holds bills, or notes, for arrears when he enters, he is nevertheless not liable to account with rests, if they are dishonoured: *Dobson v. Land*, 4 D. & S. 575.

Rests may be made when a mortgagee in possession sets up an unfounded claim to the equity of redemption, or resists the mortgagor's right to redeem; or when overpaid, has denied that his mortgage was satisfied: *Incorporated Society v. Richards*, 2 Dr. & W. 258; *Crippen v. Ogilvie*, 15 Gr. 569; *Montgomery v. Colland*, 14 Sim. 79.

Where the mortgagee is in occupation and is charged with an occupation rent more than sufficient to pay the interest, the account may be taken with rests, if the mortgage debt was not in arrear when he entered, subject to the qualifications above mentioned, from the time he entered, or, if then in arrear, then from the time he was paid in full: *Wilson v. Metcalfe*, 1 Russ. 530; *Binnington v. Harwood*, T. & R. 477; *Coldwell v. Hall*, 9 Gr. 110; where the account is taken with rests, it would seem that the proper time for making the rests is at the time of each payment of rent, whenever the payment exceeds the interest then in arrear.

The mere fact that a mortgagee resides with the owner of the equity of redemption on the mortgaged property, does not render him liable to account as a mortgagee in actual occupation: *Paul v. Johnson*, 12 Gr. 474.

A person entering as a *bonâ fide* purchaser from a mortgagee is not liable to account as a mortgagee in possession, in the event of his purchase being held invalid: *Parkinson v. Haubury*, L. R. 2 H. L. 1; *Carroll v. Robertson*, 15 Gr. 173. But a mortgagee who entered

Rule 667. claiming to have purchased the equity of redemption, but who was held to be still redeemable, was ordered to account with rests: *Atcheson v. Coombs*, 6 Gr. 643; this point is not noticed in the report, but see the decree, D. B. 4, fo. 570; but see *Parkinson v. Hanbury*, *supra*.

The mere giving of notice by a mortgagee to his mortgagor's tenant to pay his rent to the mortgagee, does not, unless the tenant attorns and pays his rent to the mortgagee, create any tenancy between the tenant and the mortgagee; the mere fact that he continues in possession after the notice is not enough: *Towerson v. Jackson*, 1891, 2 Q. B. 484; 65 L. T. 332.

A mortgagee who has sold under a power of sale and retains the surplus in his hands is liable to pay interest on it to the party entitled, (unless there are circumstances which render it unjust, but mere non-claim even for four years is not such a circumstance: *Elcy v. Read*, 76 L. T. 39; *Charles v. Jones*, 35 Ch. D. 544; 56 L. R. 848.

No special direction now necessary

Prior to Chy. O. 220 (*Rule 667*), the account could not be taken against a mortgagee with rests, without an express direction in the decree to that effect: *Webber v. Hunt*, 1 Mad. 13. Under *Rules 666, 667*, no express direction in the judgment is necessary; but the Master of course cannot properly take the account with rests in cases where it would not under the former practice have been ordered by the Court.

Statute of Limitations

Statute of Limitations.—A mortgagee in occupation is liable to account for more than six years' occupation rent prior to the commencement of the action; the Statute of Limitations is no bar: *Coldwell v. Hall*, 9 Gr. 110; S. C., 7 U. C. L. J. 42; 8 U. C. L. J. 93.

Statute of Limitations, how far a bar to recovery of interest.

As against the person of the debtor, arrears of interest, or rent, payable under a covenant (except a covenant in a mortgage made on or after 1st July, 1894), accruing, or acknowledged in writing, or by part payment, to be due, at any time within twenty years of the commencement of the action, have been held recoverable, even though such interest, or rent, be charged upon, or payable out of land: R. S. O. c. 72, ss. 1, 9; *Allan v. McTavish*, 2 Ont. App. 278; and see *Boice v. O'Loane*, 3 Ont. App. 167; *McMahon v. Spencer*, 13 Ont. App. 439; but see *contra*, *Sutton v. Sutton*, 22 Ch. D. 511; 48 L. T. 95; *Fearnside v. Flint*, *ib.*, 154; 22 Ch. D. 579, where it was held that the remedy on a collateral bond was barred, after the lapse of the time for bringing an action in respect of the land mortgaged by the principal security; and see *Lewin v. Wilson*, 9 S. C. R. 677; *Re Powers*, 30 Ch. D. 291; *Kirkland v. Peatfield*, 1903, 1 K. B. 756. In *Macdonald v. Macdonald*, 11 Ont. 187, Proudfoot, J., refused to follow *Sutton v. Sutton*, *supra*, on the ground that he was bound by the contrary decision of the Court of Appeal in *Allan v. McTavish*, *supra*; and in *McDonald v. Elliott*, 12 Ont. 98; 22 C. L. J. 220; but see *Trimble v. Hill*, 5 App. Cas. 342, and *per Osler, J.A.*, 13 Ont. App. 434; and *per Burton, J.A.*, 14 Ont. App. 256.

In the case of mortgages made on or after 1st July, 1894, the period will be 10 years: R. S. O. c. 72, s. 1 (1, h).

Although no more than six years' arrears of interest accrued prior to action can be recovered in an action for foreclosure or sale, the rule is different in redemption actions; in such actions if the mortgagor is personally liable on a covenant or otherwise for payment of the debt, he will not be allowed to redeem except on payment of

all arrears for which he is liable: *Dingle v. Coppin*, 1891, 1 Ch. 729; Rule 667, 79 L. T. 603; but where he is not personally liable for payment of the mortgage debt, only six years arrears are recoverable: *McMicking v. Gibbons*, 24 Ont. App. 586.

As against land, no arrears of rent, or interest, in respect of any sum of money charged upon, or payable out of, any land, or rent, or in respect of any legacy charged upon land, can be recovered but within six years after the same shall have respectively become due, or next after any acknowledgment of the same, in writing, has been given to the person entitled thereto or his agent, signed by the person by whom the same was payable, or his agent: R. S. O. c. 133, s. 17; but a bond given by third parties as sureties for a mortgage debt was held not to be barred under R. S. O. c. 133, s. 17: see *Re Poirers*, 30 Ch. D. 291; 53 L. T. 647. But where any prior mortgagee, or other incumbrancer, has been in possession of any land, or in receipt of the profits thereof, within one year next before an action is brought by any person entitled to a subsequent mortgage, or other incumbrance, on the same land, the person entitled to the subsequent mortgage, or incumbrance, may recover in such action the arrears of interest which have become due during the whole time that such prior mortgagee, or incumbrancer, was in possession, or receipt, as aforesaid, although such time may have exceeded the time of six years: see R. S. O. c. 133, s. 18.

An acknowledgment by one of two executors against the will of the other, is not sufficient in England to bind the land: see *Astbury v. Astbury*, 1898, 2 Ch. 111; but see R. S. O. c. 127, s. 4.

Payments.—Where a covenant for payment of a debt is given by a principal and surety, payments by the principal on account of the debt, which will prevent the Statute of Limitations from running in his favour, will also prevent the Statute from running in favour of the surety, though he be no party to the payments: *In re Frisby*, 43 Ch. D. 106; but see *Paxton v. Smith*, 18 Ont. 178.

And payments made by a vendor of the equity of redemption in pursuance of an agreement with his vendee, will prevent the Statute from running in favour of the vendee, though he be no party to the payments: *Trust & Loan Co. v. Stevenson*, 20 Ont. App. 66.

Partnership Accounts.—In England it has been held that the Statute of Limitations cannot be set up as a bar to an action for an account so long as a partnership continues: *Retjean v. Retjean*, 1895, 2 Ch. 471; 73 L. T. 2; *The Poogola*, 73 L. T. 512; but in Canada it has been held by the Supreme Court that the statute may be set up as between partners, or at all events that long delay may be evidence of acquiescence: *Tooth v. Kittredge*, 24 S. C. R. 287. Where the partnership has expired or been dissolved more than six years before action, the Statute of Limitations may be pleaded as a bar to the taking of partnership accounts: *Nages v. Crawley*, 10 Ch. D. 31; and see *Storm v. Cumberland*, 18 Gr. 245; *Carroll v. Eccles*, 17 Gr. 529; this latter decision, however, would seem to be qualified by *Wright v. Morgan*, *infra*, but see Rule 271.

Where a Master is directed to take an account, he should allow whatever interest is proper to be allowed up to the date of his report, as on the hearing on further directions, interest will not be allowed on the amount found due anterior to the date of the report: *Phillips v. Hoofrey*, 44 Ch. D. 694; 53 W. R. 191; 62 L. T. 897.

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Where the Statute of Limitations is intended to be relied on as a bar to the whole claim, it should be specially pleaded: *Rule 271*; but it would seem that it may be set up in the Master's office as a bar to part of the claim, without having been pleaded: *Wright v. Morgan*, 1 Ont. App. 613; *Cuttonach v. Urquhart*, 6 P. R. 28; where no claim for interest is made by the pleadings and there is no covenant, six years' arrears only are recoverable: *Wilby v. Ledgard*, 10 P. R. 182; 20 C. L. J. 142.

Wilful neglect and default; English rule regarding.

Wilful Neglect and Default.—Under the present English practice, the accounts cannot be taken on the footing of wilful default without a special direction in the judgment, or order, or reference; and where wilful default is not pleaded, no order can be made on the footing of wilful default, either at the trial, or at any subsequent time; but where wilful default has been alleged and a case made for it in the pleadings, an account may be directed on the footing of wilful default, either at the hearing or trial of the action, or at any subsequent stage: *Re Symons, Lake v. Tonkin*, 47 L. T. 484; *Barber v. Mackrell*, 12 Ch. D. 534; 41 L. T. 23, 201, where affidavits raising a case of fraud, were treated as pleadings; and see *Joh v. Joh*, 6 Ch. D. 562; *Mayer v. Murray*, 8 Ch. D. 424; *Re Bowen, Bennett v. Bowen*, 47 L. T. 114; 20 Ch. D. 538; *Re Lancelay*, 1899 1 Ch. 674.

Ontario rule.

In Ontario no statement in the pleadings is necessary, in order to authorize the Master to take accounts in any proper case, on the footing of wilful default: see *Rule 666*. Mortgagees in possession were always liable, as of course, to account on the footing of wilful neglect and default, and the effect of *Rules 666, 667*, is to place trustees, executors, and others, liable for wilful default, upon the same footing in this respect as mortgagees in possession. Clause 2 of *Rule 667*, applies in terms only to accounts of realty, but it has been held that under clause (g), the Master may inquire as to wilful neglect and default, in all cases referred to him without any special direction so to do: *Carpenter v. Wood*, 10 Gr. 354. Wherever wilful neglect and default is charged against an accounting party, the Master is to determine whether or not he is liable to account on that footing, and, if so, the amount that is due; he should not report the facts as "special circumstances": *Walmesley v. Bull*, 3 Chy. Ch. 344; and in his report he should distinguish between sums actually received, and those charged by reason of wilful default, in order to enable the Court to deal with the question of costs: *Moodie v. Lesto*, 12 Gr. 537.

Executors and trustees, when liable for wilful neglect and default.

Executors and Trustees.—The Master may make the inquiry, though no case of wilful neglect or default is averred in the pleadings, or proved at the trial: *Carpenter v. Wood*, 10 Gr. 354, and see *Rule 666*. Formerly it was thought that the inquiry could not be made under the common administration order obtained in Chambers: *Harrison v. McGlashan*, 7 Gr. 531; except when obtained by the personal representative himself: *Ledgerwood v. Ledgerwood*, *ib.*, 584; but the practice is now settled that the inquiry may be made in every case, per Boyd, C., *Re Allan, Pocock v. Allan*, 9 P. R. 277; *Sullivan v. Hartp*, 9 P. R. 500.

Executors are not liable for loss of interest arising from their delay in taking out probate: the remedy of any person likely to suffer loss from any such delay is to cite the executor in the Surrogate Court: *Re Stevens*, 1897, 1 Ch. 422; 76 L. T. 18; 1898, 1 Ch. 162; 77 L. T. 508.

An executor improperly delaying to sell lands which, by the will are saleable for the payment of debts, in order to benefit himself, is liable to account for rents and profits: *Emes v. Emes*, 11 Gr. 325; and executors without authority intermeddling with, and assuming the management of, the realty, are liable to account as if duly empowered to act as trustees: *Chisholm v. Barnard*, 10 Gr. 479; but in such a case they are not entitled to any compensation for so doing: *Dugg v. Dugg*, 25 Gr. 542; see now R. S. O. c. 127, s. 4. Rule 667

But it is the duty of the Court in all cases where executors, or trustees, are concerned, to administer equity in such a manner that honest and respectable men shall not be deterred from accepting the office, and if there is a doubt, where men have acted honestly and *bono fide* in discharge of their duty, although they have made mistakes, the doubt should be determined in favour of the executor, or trustee: *Re Owens*, 47 L. T. 51; *In re Spright*, 22 Ch. D. 727; 18 L. T. 279; 9 App. Ca. 1; 50 L. T. 330. and trustees, liable to the benefit of doubt.

Where a person becomes beneficially entitled to a trust fund, which, prior to his interest vesting in possession, he has actively assented to being applied otherwise than according to the terms of the trust, neither he nor his representatives have any right to sue for the breach of trust: *Erons v. Bengoo*, 37 Ch. D. 329; 58 L. T. 700.

Where a testator expressed the fullest confidence in one of the trustees named in his will, and directed the other trustees to be guided by his views as to sale, disposal, and reinvestment, of his American securities, and declared that his trustees should not be responsible for any loss occasioned thereby, it was held that the co-trustees were not answerable to legatees for loss occasioned by unauthorized investments of their moneys, made by the trustee: *Burritt v. Burritt*, 29 Gr. 321. But as regards creditors it seems they might not be discharged: *Doyle v. Blake*, 2 Sch. & L. 239.

A trustee is liable for not taking proper steps to get the trust fund into his hands: *Re Brogden, Billing v. Brogden*, 38 Ch. D. 546; 59 L. T. 659; but see *Tudball v. Medlicott*, 59 L. T. 370; *Zimmerman v. Wilcox*, 35 C. L. J. 688.

While the Court will not require from executors, and trustees, any greater care than a prudent man ordinarily bestows on the management of his own property, yet it will require them to give full explanations of all their dealings, and of the causes why outstanding assets were not collected, or property of the estate has disappeared; and a trustee, or executor, who cannot account for the one or the other, will be chargeable with them: *Chisholm v. Barnard*, 10 Gr. 481; *Zimmerman v. Wilcox*, *supra*; a trustee is not liable for losses arising through the default of agents to whom he may have properly confided the management of the trust: *Re Speight*, 22 Ch. D. 727; and see *Re Brier*, 26 Ch. D. 238; even though the trustee is remunerated for his services: *Johnson v. Palmer*, 1893, 1 Ch. 71; nor for the default of a co-trustee who has been *bono fide* allowed to convert registered bonds into bonds payable to bearer for the purpose of facilitating a sale thereof, and who has taken advantage of the fact by converting the bonds to his own use: *Re Gasquoin*, 1894, 1 Ch. 410; 69 L. T. 822; 70 L. T. 196; nor for the money of the estate obtained by a co-trustee by fraud, to which he is no party: *Re McLatchie, Preston v. Loeble*, 30 Ont. 179; nor for losses arising from mere errors of judgment: *Re Chapman*, 1896, 2 Ch. 763; 75 L. T. 196; but he is for the loss occasioned by employing improper agents:

Rule 667. *Ery v. Tapson*, 28 Ch. D. 208; 51 L. T. 326; for negligently allowing the money of the estate to remain in the hands of proper agents; *McCarter v. McCarter*, 7 Ont. 243; *Cann v. Cann*, 51 L. T. 770; *Re Mitchell*, 52 L. T. 178; *Deicar v. Brooke*, 52 L. T. 489; for losses occasioned by neglecting to supervise the actions of agents, *Loic v. Gemley*, 18 S. C. R. 685; but not for moneys misappropriated by a co-executor: *Re Crowter*, 10 Ont. 159; *Preston v. Leslie*, *supra*; unless he has knowingly allowed them to remain in his co-executor's hands uninvested without making any effort to secure the fund from loss.

Executors have a fair discretion in taking or delaying legal proceedings against a debtor, and a delay in suing, even though causing a loss of the debt, is not necessarily such negligence as subjects them to any liability: *Re Owens*, 47 L. T. 61. In the absence of special circumstances, an executor is only liable for his own individual receipts, and not for those of his co-executors: *Re Crowter*, 10 Ont. 159; but he is liable for the receipts of any agent jointly employed by himself and his co-executor: *Harrison v. Patterson*, 11 Gr. 105.

Losses on
investments

There is no fixed rule as to the relative proportion which losses made by trustees ought to bear to the value of the property. As a general rule more than two-thirds the value should not be advanced; but a trustee who, in the honest exercise of his discretion, lends a little more than two-thirds, is not liable in the event of the security proving insufficient: *Re Godfrey*, 23 Ch. D. 483; 48 L. T. 853; and see *Re Pearson*, 51 L. T. 692. Where trust funds are lost through improper investments, the trustees are all equally liable, and as a general rule one trustee who has merely passively assented to the breach of trust has no right to be indemnified by his co-trustee who has acted honestly in making an improper investment: *Babin Hughes*, 31 Ch. D. 390; 54 L. T. 188; *Bacon v. Camphausen*, 58 L. T. 511; but see *Re Partington*, 57 L. T. 654.

Depositing money in a bank at interest may be a breach of trust: see *Perpetual Executors v. Swan*, 1898, A. C. 763.

As to the amount with which a trustee is chargeable where the trust fund is lost through investment in proper but insufficient securities: see R. S. O. c. 130, s. 9.

Where a trustee who is also a beneficiary has consented to an improper investment, he cannot call upon his co-trustee to bear any portion of the loss which he, as a beneficiary, thereby sustains: *Chillingworth v. Chambers*, 73 L. T. 208.

To accept a valuation made on behalf of the borrower is improper: *Walcott v. Lyons*, 54 L. T. 780; and see *Re Somerset, Somerset Poulet*, 68 L. T. 613; 69 L. T. 744; 42 W. R. 145, where the solicitors for the mortgagees acted also for the mortgagor; as is also neglecting to obtain a formal valuation: *Re Olive*, 34 Ch. D. 70; 55 L. T. 83; *Re Stuart*, 1897, 2 Ch. 583; and see *Re Partington*, *supra*, where trustees were held liable for neglecting to give proper instructions to the valuers; and see *Leopard v. Whiteley*, 12 App. Cas. 727, 58 L. T. 93.

Executors cannot be charged with losses arising from their having carried out the express directions of their testator: *Re Hart*, 63 L. T. 645; and where they have so carried on a business of the deceased pursuant to the directions in his will, or even without such directions, but with the consent of his creditors, they are entitled to be deputed from the estate against any loss, and creditors, who claim

have been thus contracted, are entitled to stand in the executors' place against the testator's estate: *Dowse v. Gorton*, 1891, 190; 64 L. T. 809; *Re Brooke*, 71 L. T. 398; but they are not, without express authority, justified in embarking more capital in such business: *Smith v. Smith*, 13 Gr. 81.

Trustees investing trust money on insufficient security in breach of trust, are not entitled to an option of taking the security, and the order for realizing the security need not contain any such option: *Re Salmon*, 42 Ch. D. 351; 62 L. T. 270, although, of course, if they pay up what is due to the trust they are entitled to the benefit of the securities unrealized: see also *Head v. Gould*, 1898, 2 Ch. 250; 78 L. T. 739.

Where a sale by a trustee to himself is set aside as a breach of trust, he is liable to account for rents and profits received by him, but is not chargeable with interest thereon: *Silkstone & H. M. Co. v. Edey*, 1900, 1 Ch. 167.

The rule in *Clapton's Case*, 1 Mer. 572, applies as between two *cestui que trustent*, where money has been paid into the private bank account of the trustee: see *Re Stanning*, 1895, 2 Ch. 433; 73 L. T. 207.

Mortgagees.—A mortgagee in possession is bound to account, as of course, for what he has, or but for his wilful default might, or ought to have received: *Chaplin v. Young*, 33 Beav. 330; *Parkinson v. Hanbury*, L. R. 2 H. L. 1; *Hughes v. Williams*, 12 Ves. 493; *Kennington v. Bouverie*, 7 D. M. & G. 134; *Quarrel v. Beckford*, 1 Mad. 274. But he is not liable for more than he has actually received, unless it is clearly proved that he knew a greater rent might and could have been obtained, and that he refused or neglected to obtain it: *McCrann v. Cronk*, 21 Gr. 60; *Coldwell v. Hall*, 9 Gr. 110, 114; *Metcalfe v. Campion*, 1 Moll. 238; *Hughes v. Williams*, 12 Ves. 493; *Brandon v. Brandon*, 10 W. R. 287; *Cocks v. Gray*, 1 Giff. 77.

A mortgagee not in possession is not chargeable with rent which a tenant of the mortgagor had promised to pay him, but did not receive: *Waddell v. McColl*, 14 Gr. 211.

A mortgagee in possession who lets the mortgaged premises subject to a proviso that the lessee shall buy goods from him, is bound to account for the rent that could have been obtained for the premises without such a restriction as to trade, but he is not bound to account for the profits so made: *White v. City of London Brewery Company*, 39 Ch. D. 559; 60 L. T. 19; affirmed, 42 Ch. D. 237; 61 L. T. 741.

Where a mortgagee takes possession at a rent agreed on between him and the mortgagor, he is only liable to account to the mortgagor on the footing of the agreement, but such agreement is not binding on any subsequent incumbrancer, and as to him the Master may charge the mortgagee with a fair occupation rent, though it exceeds the amount agreed to by the mortgagor: *Court v. Holland*, 29 Gr. 10, and see *Gilmour v. Roe*, 21 Gr. 284; *Gregg v. Arrott, Ll. & Co.*, temp. Sugd. 246.

But where a mortgagor agreed with a mortgagee in possession that the rents and profits should be applied in payment of the mortgagor's indebtedness for goods purchased from the mortgagee, it was held that a subsequent incumbrancer had no right to insist that the rents and profits should be applied in reduction of the mortgage debt: *Mitchell v. Saylor*, 1 O. L. R. 458.

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Where a mortgagee directly or indirectly becomes the purchaser at a sale made by himself under a power of sale in his mortgage, the sale may be set aside, and he may be required to account as a mortgagee in possession: *Farrar v. Farrar, Limited*, 40 Ch. D. 395; 60 L. T. 121; *Martinson v. Claris*, 21 Ch. D. 857; 46 L. T. 882; *Hudson v. Deans*, 1893, 2 Ch. 647; 89 L. T. 92.

A *bona fide* sale by a mortgagee under a power to one of several mortgagors, without notifying the others of the intended sale, cannot be impeached by the latter: *Kennedy v. Trafford*, 1897, A. C. 180; 76 L. T. 427; and a *bona fide* sale to his own solicitor was upheld: *Autt v. Easton*, 1899, 1 Ch. 873; 1900, 1 Ch. 29; 80 L. T. 352; 81 L. T. 530.

Where a sale of part of the land has been made under a power of sale in the mortgage, the expenses of sale are to be deducted from the gross proceeds of sale, and the balance only to be brought into the account; and, without special direction, the mortgagor is not entitled to have a rest made in the account of rents and profits at the date of each sale: *Ainsworth v. Hilding*, 1905, 1 Ch. 435; 118 L. T. Jour. 293.

A mortgagee who concurs in a sale by a mortgagor, and permits the surplus of the purchase money to be paid to the mortgagor to the prejudice of the subsequent incumbrancers, is liable therefor to the latter: *West London Commercial Bank v. Reliance Permanent Building Society*, 20 Ch. D. 954; 53 L. T. 442.

A puisne mortgagee who has cut timber on mortgaged property is liable to account to the prior mortgagee for the proceeds, where the mortgaged land proves an insufficient security: *McLeod v. Avey*, 16 Ont. 365.

Vendor,
after time
fixed for
completing,
is liable to
purchaser
for rents
and profits.

Vendor and Purchaser.—After the time fixed for completion of the contract, the vendor is liable for rents and profits, but usually only for those actually received: *Howell v. Howell*, 2 My. & Cr. 486, unless he allows the rent to fall in arrear, when he will be held accountable for the arrears. *Acland v. Gausford*, 2 Mad. 28; *Watson v. Clapham*, 1 J. & W. 36; formerly a special case must have been made at the hearing to entitle a purchaser to have the account taken on the footing of wilful default: *Sherwin v. Shakespear*, 5 D. M. & G. 517, 532; *Phillips v. Sylvester*, L. R. 8 Chy. 173. But this is no longer necessary in Ontario: see *supra*, p. 882. Where no time was named in the contract for delivery of possession, the purchaser was held entitled to the rents from the date of the contract: *Brady v. Keenan*, 6 P. R. 262; and see *Dudley v. Berczy*, 2 Chy. Ch. 364, as to the liability of a vendor in possession.

Interest on
purchase
money.

No more than six years' arrears of interest on purchase money can be recovered from a purchaser as a charge on the land, whether he has been in possession or not: *Avey v. Mitchell*, 21 Gr. 512; *Gunn v. Trust & L. Co.*, before Boyd, C., 19th January, 1882; but in some cases where more than six years' arrears was recoverable against the estate of a deceased person, the excess beyond six years was allowed to avoid circuity of action: *Carroll v. Robertson*, 15 Gr. 173; *Taylor v. Hargrave*, 19 Gr. 271; *Raiceen v. Bradburn*, 22 Gr. 96; *Waver v. Vandusee*, 27 Gr. 181.

Builder
liable for
neglect and
default.

Principal and Agent.—A builder at Common Law was liable to account for what he might have made of the lands, but for his wilful default: *Seton*, 770; *Whitaker v. Horn*, Willes 268; Co. Lit. 172 a; and

an agent acting under a power of attorney is liable so to account, *Rule 687*, though the power be defective: *Bradburn v. Shantly*, 7 Gr. 560. But a solicitor who paid off a mortgage for a client, and entered into the receipt of rents, was not held to be liable on the footing of wilful default, his possession being that of his client: *Ward v. Carttar*, L. R. 1 Eq. 23.

Persons not Liable to Account for Wilful Default:—

Partners in possession of partnership property are not liable to Partners- account on the footing of wilful default: *Davidson v. Thirkell*, 3 Gr. 330, at p. 348; *Rowe v. Wood*, 2 J. & W. 556; but one partner may have a demand against another for compensation for negligence or fraud: *Bury v. Allen*, 1 Coll. 584; *Douglas v. Stewart*, 13 Gr. 337.

Tenants in Common who have received more than their share, *Tenants in common* though liable to account for the excess: *Lorimer v. Lorimer*, 5 Mad. 333; *Turner v. Morgan*, 8 Ves. 145, are not answerable for wilful default: *Wheeler v. Horne*, Willes, 208.

Tenants for Life.—A tenant for life may cut down timber in the Tenant's proper course of husbandry, in order to bring the proper proportion for life of land into cultivation, and perhaps destroy such timber, but he cannot cut down timber even for that purpose and sell it for his own benefit: *Drake v. Wigle*, 22 C. P. 341; *Saunders v. Breakie*, 5 Ont. 603; but he may sell it in order to buy with the proceeds more suitable timber for making necessary repairs to buildings on the premises: *Hiron v. Revely*, 9 O. L. R. 6.

He is not liable for permissive waste: *Patterson v. Central Canada Lumber Co.*, 29 Ont. 134; nor for repairs: *In re Freeman*, 1898, 1 Ch. 28; and a legatee for life of leasehold premises is not liable on the covenants in the lease: *Re Tomlinson*, 1898, 1 Ch. 232.

Purchaser for Value evicted by a person having a better title, of Purchaser's which he is fixed with constructive notice, is not liable to account for value on the footing of wilful default: *Hewell v. Hewell*, 2 My. & Cr. 478.

Persons who have obtained Possession by Fraud, are not liable to Persons in account on the footing of wilful default: *Murray v. Palmer*, 2 Sch. possession by fraud & L. 474; *Trevdyan v. Charter*, 9 Beav. 140; 4 L. J. N. S. 209; 11 C. & F. 74.

Occupation Rent.—A person liable to account for rents and occupation profits may, generally, if he has been himself in actual occupation of rent, then the property in question, be charged with a fair rent for the time he chargeable, has so occupied—which account of rent is liable to be taken with rests, wherever rests would be charged if rents and profits had been received; but see *Silkstone & H. M. Co. v. Eley*, 1900, 1 Ch. 167.

Vendors.—A vendor who continues in occupation after the time As against vendors, fixed for completion may be charged with an occupation rent: *Leggott v. Metropolitan Ry. Co.*, L. R. 5 Ch. 716; *Dorr v. Hargrave*, 10 Ves. 565; but not in cases where the purchaser could, and ought to have taken possession: *Larkin v. Cape*, 2 Ross. 170; nor where—the purchaser making default in payment—the vendor continues to carry on his business: *Leggott v. Metropolitan Ry. Co.*, *supra*.

Purchasers.—Where a conveyance is set aside, an occupation rent purchaser's may be charged against a purchaser who has been in occupation: *Rhodes v. Spith*, L. R. 13 Eq. 427; *Nelson v. Clarkson*, 2 Ha. 163; but see *Parkinson v. Hinchburn*, L. R. 2 H. L. 1.

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Mortgagee,
liability of,
for
occupation
rent.

Mortgagees.—A mortgagee may be charged with an occupation rent if it be proved that he has actually occupied the mortgaged premises: *Trulock v. Robey*, 15 Sim. 265. Any agreement as to the amount of the rent made between mortgagor and mortgagee, though binding between them, is not binding on others interested in the equity of redemption who are not parties to it: *Court v. Holland*, 29 Gr. 19; *Gregg v. Ariatt*, L.R. 4 G. temp. Sugd. 246. And where rent is paid in advance to a prior mortgagee, and applied, with the consent of the mortgagor, in discharge of other liabilities than the mortgage debt, a subsequent assignee of the equity of redemption is entitled to have all rents accruing subsequent to the assignment applied in reduction of the prior mortgage, notwithstanding the payment and application in advance: *Gilmour v. Roe*, 21 Gr. 284. A mortgagee who continues in occupation after payment in full, is chargeable with interest on the occupation rent, with rests: *Wilson v. Metcalfe*, 1 Russ. 537; *Quarrel v. Beckford*, 1 Mad. 269; *Lloyd v. Jones*, 12 Sim. 491; *Ashworth v. Lord*, 36 Ch. 11, 545; 58 L. T. 18.

May set off
arrears
of interest.

A mortgagee in occupation is entitled to set off, against the occupation rent, with which he is charged, the arrears of interest, so far as they were recoverable against the land at the time the rent accrued: i.e., for six years prior to its accruing: *Wilton v. Bernard*, 2 Gr. 358; *Harrison v. Jones*, 10 Gr. 39. A prior mortgagee is not bound to account to a subsequent mortgagee on the footing of a mortgagee in possession, merely because there is an attornment clause in the prior mortgage, if he has not actually taken possession: *Western District Bank, Limited, v. Turner*, 45 L. T. 433; *Stanley v. Grundy*, 22 Ch. D. 458; 48 L. T. 106.

Tenants in
common,
how far
liable for
occupation
rent.

Tenants in common.—A tenant in common who has been in exclusive occupation, cannot be charged with an occupation rent, if he has not ousted his cotenant: *Rice v. Grogan*, 20 Gr. 221; *Re Kirkpatrick, Stevenson v. Kirkpatrick*, 10 F. R. 4; except where his cotenant is an infant: *Courcier v. Courcier*, 26 Gr. 307. But he cannot recover for substantial repairs and improvements: *Rice v. Grogan*, *supra*; nor even for incumbrances paid off by him, unless he also submits to account for an occupation rent: *Tweedale v. Sanderson*, 33 Illy. 534; *Rivet v. Desautels*, 12 C. L. J. 202. But a tenant in common who has been in exclusive occupation, and has ousted his cotenant, is liable to account for an occupation rent: *Pascoe v. Stann*, 27 Illy. 508.

Heir at
law.

Heirs.—Prior to *The Devolution of Estates Act* (R. S. O. c. 127), an heir-at-law was liable to account to a dowress for an occupation rent: *Rumford v. Bamford*, 7 H. 266.

Lease.

Devisees.—Under the law as it existed prior to *The Devolution of Estates Act* (R. S. O. c. 127), ss. 1, 2, devisees in possession of land devised, charged with a rent, were bound to account to the lessors, but not to the heirs, who had no right to the land: *Allen v. Allen*, 11, 48 H. 606; 62 L. T. 533.

Trustees.

Trustees.—Trustees of a mortgage, or of a trust, or of a will, or of a fund, are liable to account to the cestui que trust, or to the legatee, or to the beneficiary, for an occupation rent: *Re G. H. G. v. G. H. G.*, 11 L. C. 878; *Law v. Law*, 7 Gr. 278; *Zetser v. Zetser*, 37 L. T. 1, 1888.

Mortgage of land.—No account is required by a mortgagee of land, who has been in occupation, and who has paid the interest on the mortgage, for an occupation rent, if he has not ousted the mortgagor: *Yates v. Yates*, 5

Ont. 617; *Munsie v. Lindsay*, 10 P. R. 173. Where occupation rent **Rule 667**. is charged in respect of property which has been improved by the occupant, according to the value as increased by the improvements, interest should be allowed on the outlay for the improvements; *Munsie v. Lindsay*, 11 Ont. 520.

Improvements:—

Persons in Possession of Lands under void Deeds, making lasting improvements, by which the value of the estate has been enhanced, may, within certain limits, be allowed for such improvements; *Jordin v. South Eastern Railway Co.*, 2 Sm. & G. at p. 73; *Quarrel v. Beckford*, 14 Ves. at p. 179; and whether in, as actual, or constructive, trustees: *Williamson v. Seeber*, 3 Y. & C. Ex. 717; *Quedor v. Lewis*, 1 Y. & C. Ex. 427; *Bridge v. Brown*, 2 Y. & C. C. C. 191; *Beris v. Boulton*, 7 Gr. 39; or as solicitors: *Robinson v. Ridley*, 6 Mad. 2; or agents: *Trevclan v. White*, 1 Bear. 588; or as mortgagees believing themselves absolutely entitled: *Neeson v. Clarkson*, 2 Ha. 176; S. C. 4 Ha. 37; or as a *bonâ fide* purchaser under the void deed: *Ashton v. Innis*, 26 Gr. 42; *Churcher v. Bates*, 42 U. C. Q. B. 566; *Pegley v. Woods*, 14 Gr. 47; *Gummerson v. Banting*, 18 Gr. 516; and the claim for such improvements may be actively enforced, and allowed, whether the party claiming them be plaintiff or defendant: *Id.*; but see *Le Brazill*, 11 Gr. at p. 250; and even though the party claiming adversely be an infant: *Beris v. Boulton*, *supra*; and see *Biehn v. Biehn*, 18 Gr. 497; *Wood v. Wood*, 16 Gr. 471.

But when possession had been taken in pursuance of an immoral agreement which was void, it was held that there could be no lien for improvements: *Maan v. Clarke*, 30 C. P. 417.

Wrongdoers.—A mere wrongdoer, entering without colour of right, is not usually allowed for improvements made by him; *Townstey v. Ayl*, 10 Gr. 72; *Scott v. Hunter*, 14 Gr. 376, nor persons entering with actual notice of a paramount title: *Wyoming v. Bell*, 24 Gr. 564; *Smith v. Gibson*, 25 C. P. 248; *Kilborn v. Workman*, 9 Gr. 255; *Grissett v. Carter*, before Boyd, C., 2nd Sept. 1884.

But it would seem that mere legal fraud will not deprive a party of the right to improvements: *McLaren v. Fraser*, 17 Gr. at p. 520; and see *Nevills v. Nevills*, 6 Gr. 121, 130; and the owner standing by and not objecting, may preclude himself from getting back his estate, except on the terms of paying for improvements: *Davis v. Sander*, 1 Gr. 134.

Improvements made under Mistake of Title—Lasting improvements made under a *bonâ fide* mistake of title may now be allowed, and the person making them and his assigns are entitled to a lien on the land therefor: R. S. C. c. 179, s. 30; *Fawcett v. Burton*, 27 Gr. 445; *McGregor v. McGregor*, *Id.*, 470; *McCarthy v. Atchekle*, 29 C. P. 529; *Farick v. Smith*, 54 P. C. Q. B. 389; *Stam v. Chapman*, 21 Gr. 540; *Munsie v. Lindsay*, 10 P. R. 173; 19 C. L. J. 186; *Plunk v. Stenderoff*, 2 Ont. 614. But improvements made with actual knowledge of the paramount title will not be allowed under that Act: *Wyoming v. Bell*, 24 Gr. 564; *Smith v. Gibson*, 25 C. P. 248; *The Commissioners of Q. T. Park v. Colt*, 22 Ont. App. 1; and see *Kilborn v. Workman*, 9 Gr. 225. Improvements made after action commenced cannot be allowed: *O'Grada v. McCaffrey*, 2 Ont. 309; *Bright v. Campbell*, 53 L. T. 428.

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By mortgagee.

Improvements made under mistake of title by a person in as mortgagee, but believing himself to be absolute owner, are allowed more liberally than improvements made by a mortgagee knowing that he is a mortgagee: *Carroll v. Robertson*, 15 Gr. 173.

By mortgagor.

Improvements made by a purchaser from a mortgagor under the erroneous belief that the mortgage had been discharged, cannot be claimed as against the mortgagee: *Beuty v. Shaw*, 14 Ont. App. 604.

By husband.

A husband is not entitled to be paid by his wife for improvements made by him on her lands while in his occupation: *Till v. Till*, 15 Ont. 133.

A mortgagee of a person making lasting improvements under mistake of title is an "assign," and as such entitled to the extent of his mortgage, to the benefit of the lien for such improvements: *McKibbin v. Williams*, 24 Ont. App. 122.

Tenants in common.

Tenants in Common are entitled to contribution from their co-tenants for the costs of repairs made to prevent the property from going to ruin: Co. Lit., 200 b.; *Fitzherbert*, N. B., 127; but not for ordinary repairs: *Leigh v. Dickeson*, 12 Q. B. D. 104; 50 L. T. 124; *Re Jones, Farrington v. Forrester*, 1883, 2 Ch. 461; *Curry v. Curry*, 25 Ont. App. at p. 277; unless they submit to be charged with rents and profits: *Id.*

The right of a tenant in common in partition proceedings to be paid for improvements is restricted to such as are made by him after the tenancy has commenced in fact: *Lasby v. Creighton*, 21 Ont. 255.

Where land held in common is sold under a paramount mortgage, money expended by one of the tenants in common in permanent improvements will be allowed to him in distributing the surplus: *Re Cook's Mortgage*, 74 L. T. 652.

Tenants for life.

Tenants for Life are not entitled to charge for repairs as against the inheritance, however substantial or lasting: *Lewin*, 9th ed., 642; *Re Smith*, 4 Ont. 518; *sed vide, Conway v. Fruton*, 40 Ch. D. 512, nor are they chargeable with repairs: *In re Freeman*, 1898 1 Ch. 28; nor liable to account for permissive waste: *Patterson v. Central Canada Loan Co.*, 29 Ont. 134.

Tenants at will, improvements by.

Tenants at Will.—Improvements made by a tenant at will cannot be allowed: *Foster v. Emmerson*, 5 Gr. 135; but improvements made on wild land by a son, to whom his father had promised to give it by way of advancement, which he failed to do, were allowed as against the co-heirs of the father: *Biehn v. Biehn*, *supra*; *Howe v. Ferguson*, see 18 Gr. 108; but see *Foster v. Emmerson*, *supra*.

Trustees are entitled to be allowed for improvements on trust estate.

Trustees.—Substantial and lasting improvements, and repairs, made by a trustee on the trust property, are usually allowed to him: *Barnes v. Boulton*, 7 Gr. 39; *Hill v. Hill*, 3 H. L. C. 828; *Smith v. Remondet*, 13 Gr. at p. 35; *Ex parte Hughes*, 6 Ves. 624; *Ex parte James*, 8 Ves. 1352; *Campbell v. Walker*, 5 Ves. 482; *Dunlop v. Dunlop*, 1 De G. & J. 535; *King v. Anderson*, 8 Ir. R. Eq. 625, 636. Repairs are allowed, even in the case of actual fraud: *Baugh v. Prior*, 1 G. Wils. 320; and in one case improvements also: *Oliver v. Court*, 8 Price, 172; but see *contra, Kenney v. Browne*, 3 Rids. 518; *Stratton v. Murphy*, 1 Ir. R. Eq. 361.

Receivers.

Receivers.—A receiver has been allowed for improvements made, without the previous sanction of the Court: *Timpest v. Ord*, 2 Mer. 55.

Committee of Lunatic.—A committee has been allowed for improve- **Rule 667.**
ments made, without previous sanction: *Re Shaw*, 15 Gr. 618; *Re* Committee.
Churchill, 3 Jur. 719.

Personal Representative.—An unauthorized expenditure by an execu- Personal
trix in improving the realty, was allowed, so far as the value of the represent-
estate had been enhanced, and those interested had benefited by it; ative.
Harley v. Matthews, 14 Gr. 551. But where an administratrix had
occupied and improved the realty, in a suit by her for administration,
such improvements were disallowed as against infant heirs: but she
was not charged with any increase of rental in consequence of such
improvements. *Re Brazil*, 11 Gr. 253.

Purchaser.—A purchaser failing to complete his purchase is not Purchaser.
entitled to be allowed for improvements: *Re Yaggie*, 1 Chy. Ch. 52.

Mortgagee.—The ordinary rule is, that a mortgagee will not be Mortgagee.
allowed for improvements further than is proper to keep the premises
in necessary repair. But if buildings are incomplete or ruinous, he
may complete or pull them down, and rebuild, and the rebuilding
or repairing, may be done in an improved manner, and more sub-
stantially than before, so that the work be done providently, and that
no new or expensive buildings be erected for purposes different from
those for which the former buildings were used; for the property
when restored ought to be of the same nature as when the mortgagee
received it: *Fisher, Mortg.*, 5th ed., s. 1781. And while the mort-
gagee in possession is not allowed to charge for lasting improvements
which are not requisite for the purpose of keeping the property in
necessary repair, he is not, on the other hand, chargeable with the
increased rents and profits which are directly traceable to such im-
provements made by him: see *Jones on Mortgages*, s. 1127.

Mortgagees in possession are entitled to be allowed for necessary Mortgagees
repairs, as just allowances. Under *Rules 666, 667*, no special direc- entitled to
tion in the judgment is necessary to enable the Master, in a proper be allowed
case, to allow substantial improvements. for neces-
sary repairs.

A mortgagee in possession cannot charge the mortgaged property But only
with improvements that are not necessary for its preservation: such as are
Harrison v. Jones, 10 Gr. 321, unless with the consent of the parties necessary
entitled to the equity of redemption: *Kirby v. Kirby*, 5 Gr. 587, for preser-
And improvements made even with the mortgagor's sanction must not vation of
be such as to improve him out of his property: *Sandon v. Hooper*, 6 property.
Beav. 246; *Fisher, Mortg.*, s. 1781. But a mortgagee is not bound to
give the mortgagor notice before making any reasonable permanent
improvement: *Shepherd v. Jones*, 47 L. T. 604; 21 Ch. D. 463.

Where a mortgagee is charged with rents, or improved rents,
arising from his improvements, he should either be allowed for such
improvements: *Constable v. Guest*, 6 Gr. 540; or he should not be
charged with the rent, or improved rent, arising therefrom: *McGregor*
Metropar, 5 Ont. 617; 19 C. L. J. 78; *Munsie v. Lindsay*, 10 P.
173; *Bright v. Campbell*, 53 L. T. 428; and see *Curry v. Curry*,
17 P. R. 379; 25 Ont. App. 267.

The Master is not necessarily bound to allow the actual cost of
improvements, but should limit the allowance to the benefit which the
property has derived therefrom: *Paul v. Johnson*, 12 Gr. at p. 479.

Rule 667

Improvements by purchaser when sale invalid, allowed.

Secure if he have knowledge of defect

Mortgagee submitting to redemption entitled to all improvements

What improvements allowed

Covenant to pay for improvements in rectorial lease invalid

Costs and expenses recoverable by mortgagees.

A person who had *bona fide* purchased under a power of sale, even mortgage, notwithstanding the sale was held invalid, was allowed improvements made by him as far as they enhanced the value of the property, and was not restricted to such improvements as a mortgagee in possession would have been entitled to make, knowing himself to be a mortgagee: *Carroll v. Robertson*, 15 Gr. 173; and see *McLaren v. Fraser*, 17 Gr. 567; *Davey v. Durant*, 1 De G. & J. 534. But where a purchaser from a mortgagee, who had obtained a decree for foreclosure, which was defective owing to there being outstanding claims, which were not foreclosed, entered, and made improvements, having notice of the outstanding title, such improvements were disallowed as against the unforced parties: *Russell v. Romanes*, 11 Ont. App. 637; and see *Romanes v. Herms*, 22 Gr. 403.

But where the mortgagor released his equity of redemption, and two months afterwards the mortgagee agreed to reconvey, upon being repaid principal and interest, and all costs of improvements made by him, on a bill to redeem, the mortgagee was held entitled to recover for all permanent improvements, although the estate might not have been increased in value to an amount equal to the sum expended: *Byrtherton v. Hetherington*, 23 Gr. 187.

What Improvements Allowed.—The clearing of land for farming purposes is a permanent improvement under *The Doer*, 1st: H. S. O. c. 67, s. 9 (21): *Robinet v. Pickering*, 44 F. C. Q. B. 337.

After suit commenced, the only improvements which can ordinarily be allowed, are such as are made to save the premises from deterioration: *Hawn v. Cashion*, 20 Gr. 518; and see *O'Grady v. McAffrey*, 2 Ont. 309.

Trustees with power to invest in the purchase of real estate, may be allowed for erecting a new building where an increased income can be obtained thereby: *Re Henderson*, 23 Gr. 47.

A rector cannot make a lease with a covenant to pay for improvements, which will be binding on his successor: *Kirkpatrick v. Lyster*, 13 Gr. 323; 16 Gr. 17; unless there be some statutory provision empowering him so to do.

Costs, and other Expenses:—

Mortgagees.—A mortgagee is entitled to charge against the estate the costs of defending the title to the mortgaged estate, for the benefit of all parties interested in the equity of redemption; and also the costs of proceedings taken to perfect his security, e.g., the costs of an equitable mortgagee of investigating the title for the purpose of preparing a legal mortgage, and the costs of preparing such legal mortgage are recoverable: *National Provl. Bank v. Games*, 53 L. T. 955; 54 L. T. 626; 31 Ch. D. 582; also the costs of an action brought against a surety of the mortgagor: *Suchs v. Ashby*, 88 L. T. 230; also, costs of a suit to redeem, brought by a subsequent incumbrancer, and dismissed: *McKinnon v. Anderson*, 17 Gr. 636; 18 Gr. 684; but not the costs of defending his own title to the mortgage, unless those interested in the equity of redemption had concurred in, or assisted, the litigation: *Parker v. Watkins*, John, 133; nor yet the costs of an unsuccessful litigation undertaken by him without the concurrence of the mortgagor: *Wells v. The Trust and Loan Co.*, 9 Ont. 170.

Where a mortgagee is a solicitor and takes legal proceedings to recover the mortgage debt, he is not, upon redemption,

entitled to charge the mortgagor with his profit costs: *Re Wallis*, 23 Rule 667. Q. B. D. 176; 62 L. T. 674; but only his costs out of pocket. *Stone v. Lucknow*, 1801, 2 Ch. 363; 61 L. T. 29; and see *Ficht v. Hopkins*, 14 Ch. D. 524; 62 L. T. 102; but where the proceedings are taken by his partner, the latter may recover the proportion of such profit costs to which he is entitled: *Re Doody, Pisker v. Doody*, 1893, 1 Ch. 129; *Re Rollit*, 105 L. T. Jour. 180; and see *Eyre v. Wynn-Mack*, 120, 1894, 1 Ch. 218; but a solicitor mortgagee cannot recover profit costs against the mortgagor, because he also acts as solicitor for his mortgagee who is not a solicitor. *Re Doody, Hibbert v. Lloyd*, 1893, 1 Ch. 129; 67 L. T. 650.

It has been held that a solicitor mortgagee, who is a trustee, is not entitled to profit costs of suits brought by him in respect of the mortgaged property: *Schubert v. Colton*, 29 L. T. O. S. 337; 3 J. & N. S. 630; 5 W. R. 741; but see *contra*, *Re Donohoe*, 27 Ch. D. 544; 51 L. T. 622.

A covenant to pay profit costs to a solicitor mortgagee is void in equity as an attempt to clog the right of redemption: see *Eyre v. Wynn-Mack*, *supra*.

In *Re Griffith*, 50 L. T. 314, it was said by Cotton, L.J., that in a foreclosure action "the mortgagor must pay all the costs of the mortgagee, including those payable by the latter to his solicitor."

The mortgagee may also be allowed the expenses of sales, and of costs of recovering the purchase money. *Fisher, Mortg.*, 5th ed., sec. 1785, and *supra*. Also the costs of an alternative sale, where it has fallen through without default of the mortgagee. *Lacey v. Lacy*, 31 Ch. 10, 42; 70 L. T. 121.

But he is not entitled to a commission on a sale in addition to the costs, even though he has stipulated for it: *Eyre v. Hughes*, 2 Ch. 10, 118; *Broad v. Selpe*, 10 Jur. N. S. 885.

Where a mortgagee had made a sale of part of the land, but before it was completely carried out found another purchaser at the better price, a payment to the assignee of the rights of the first purchaser, to obtain a release from him, was allowed in the mortgage account: *Lacey v. Toronto General Trusts Corp.*, 8 O. L. R. 522.

A mortgagee is also entitled to the expenses of taking and holding possession of a ship, advertising it for sale, and insurances: *Wakes v. Sauran*, 7 Ch. D. 188.

Where the mortgage so provides, a mortgagee may recover a commission for renewing notes held as collateral to the mortgage, but not unless the notes are actually renewed, even though the mortgagor has had all the time he would have had, had they been renewed. *Bucknell v. Vickery*, 64 L. T. 701; also bonuses and commissions agreed to at the time of the advance, where the security is of a speculative character: *Guthrie v. Munro*, 29 Ont. 375.

He is not entitled to charge for personal trouble in collecting rents: *Cannot Bouthon v. Backhouse*, 1 Vern. 316; *Lamouette v. French*, 10 Ves. 495; *Godfrey v. Watson*, 3 Atk. 518; *Leath v. Terrell*, 1 M. & K. 277; not even if he has stipulated for it with the mortgagor. *French v. Bayne*, 2 Atk. 120; *Barnett v. Harby*, L. R. 2 Eq. 780; *Church v. Gubbins*, 1 Ves. 271. But the mortgagee is entitled to an allowance for an agent, or bailiff, collecting rents where the property is of such a character that a prudent owner, whose time was of value, would appoint an agent. *Lacey v. Ingram*, 16 Ch. D. 59.

Rule 667.

Insurance,
when re-
coverable.

Insurance.—Sums paid for insurance by a mortgagee cannot, in the absence of a special contract, be charged against the mortgaged estate: *Bellamy v. Brickenden*, 2 J. & H. 137; *Brook v. Stone*, 13 W. R. 401; *Dobson v. Laod*, 8 Ill. 216; *Russell v. Robertson*, 1 Ch. Ch. 72; 6 L. C. L. J. 143; but see *Scholfeld v. Lockwood*, 11 W. R. 555. But in the case of a trustee, such payments may be allowed, without any express stipulation to that effect in the instrument creating the trust: *Heron v. Moffatt*, 22 Gr. 370.

Where a subsequent account is directed to be taken, sums properly paid for insurance since the last account, may be allowed under the head of just allowances, without any express direction: *Bethune v. Calcutt*, 3 Gr. 648.

Prior incum-
brances.

Prior Incumbrances.—A mortgagee paying off prior incumbrances, is entitled to recover the amount paid, and interest on the principal, at the rate in his own mortgage, and on the interest and costs, at the legal rate: *McMaster v. Hector*, 8 C. L. J. 284; and see *Tector v. St. John*, 10 Gr. 85. But a tenant in common in sole possession paying off incumbrances, is not entitled to be allowed therefor, unless he submits to account for an occupation rent: *Rivet v. Desouddi*, 12 C. L. J. 203.

Trustees
entitled
as against
e.g. l. to
expenses of
baillifs, etc.

Trustees and Personal Representatives.—Trustees are entitled to recover, as against the beneficiaries, the expense of baillifs, surveyors, and accountants, where necessarily employed, and also the necessary legal expenses of carrying the trust into effect: *Wilkinson v. Wilkinson*, 2 S. & S. 237; *McNamara v. Jones*, 2 Dick. 587; *Henderson v. McIver*, 3 Mad. 275.

Trustees are also entitled to be allowed the costs paid to the representatives of a deceased trustee properly incurred by the latter in reference to the trust; also the costs incurred by them, on being appointed to the trust, of examining into the state of the trust property, the validity of the power under which they were appointed, and the costs paid of the donee of the power in making the appointment: *Hareco v. Olivee*, 57 L. T. 239; as to what expenses come under the head of "testamentary expenses"; see *Re Cleaver*, 1900, 2 Ch. 182; *Re Treasure*, 1900, 2 Ch. 648.

So also a trustee is entitled to have his costs out of the trust estate even though by reason of subsequent events the trust becomes invalid: *In Re Holden*, 20 Q. B. D. 43.

Solicitor
trustee
when
entitled
to charge
for pro-
fessional
services

Formerly a trustee, acting as solicitor for himself in any action was only entitled to costs and expenses out of pocket, properly incurred: *Moore v. Froud*, 3 My. & Cr. 45, 50; *Robinson v. Pett*, 2 W. & T. Lend. Ch. Eq. 214; *Re Corsellis*, 33 Ch. D. 160; 34 Ch. D. 675; 55 L. T. 167; unless there were a special power to charge for professional services: *Re Sherwood*, 3 Beav. 338; *Maere v. Froud*, *supra*; *Re Wyche*, 11 Beav. 200; but even then, no charge could be allowed for doing professionally, anything that he would have been bound to do himself, if not a solicitor: *Harbin v. Darbin*, 28 Beav. 325; *Re Chapple*, 27 Ch. D. 584; 51 L. T. 748; and what he could not charge for professionally himself, he could not recover for, if done by a partner though not a trustee: *Christophers v. Hite*, 10 Beav. 523; *Collins v. Carey*, 2 Beav. 128; but the partner might recover any part of such costs to which he was entitled for his own benefit: *Clack v. Carlow*, 7 Jur. N. S. 441; 9 W. R. 568; but where a solicitor trustee was one of several trustees, and acted for them, he might recover profit costs against the trust estate. The rule on this point was laid down in

Craddock v. Piper, 1 Mac. & G. 604; 17 Sim. 41, viz., that where a **Rule 667.** solicitor (or his firm) appears in a suit on behalf of himself and a co-trustee, and the expense has not thereby been increased, then the solicitor (or his firm, as the case may be), is entitled to the usual full ^{Rule in Craddock v. Piper.} costs: see *Re Doody*, 1883, 1 Ch. at p. 138; *In re Barber, Burgess v. Fincome*, 34 Ch. D. 77; 55 L. T. 882; *Re Thorpe*, 1891, 2 Ch. 300; 64 L. T. 654; but this rule was held not to extend to professional services rendered by a solicitor trustee to the trust estate out of Court: *Re Williams*, 4 O. L. R. 501. Though the rule so laid down has been frequently regretted and its propriety questioned, and it was held that it should not be extended, it was nevertheless established: *Re Corsellis*, 34 Ch. D. 675; 55 L. T. 107; *Re Doody*, *supra*; *Re Mimico Saver Pipe Co.*, 20 Ont. 289; see also *Re McNab*, 19 C. L. T. 74; and its principle applied to counsel fees, where the solicitor trustee was also counsel in the case: *Strachan v. Rutton*, 15 P. R. 109; but see *Lawlin*, 9th ed., 300; *Manson v. Baillie*, 2 Macq. St. See also *Re Roberts*, 43 Ch. D. 52, and a collection of the authorities in 20 C. L. J. 218. The profit costs of professional services which could not be recovered against the *c. q. t.*, or out of the trust estate, might be recoverable by the trustee against a third party: *Colonial Trust Co. v. Cameron*, 21 Gr. 548; *Meighen v. Buell*, 25 Gr. 604; *Re Donaldson*, 27 Ch. D. 544; 51 L. T. 622; but see *Re Corsellis*, *Lawton v. Elwes*, 33 Ch. D. 160; 34 Ch. D. 675; 55 L. T. 107; and 82 L. T. Jour. 280; 23 C. L. J. 146.

It must be remembered, however, that the English cases on this point are all founded on the principle that according to English law a trustee is not to be allowed to make any profit out of the trust, and is entitled to no compensation for his services; see per Lord Hatherley in *Clack v. Carlton*, 7 Jur. N. S. 441, although in *Meighen v. Buell*, 24 Gr. 508, Spragg, C., was of opinion that one important consideration in disallowing such costs is the removal of the temptation to unnecessary litigation. How far the English cases on the right of solicitor trustees to costs should be followed, seems open to some question, having regard to the difference in the law of Ont. as to a trustee's right to compensation for his services; see R. S. O. c. 129, s. 40; *Re Leckie*, 36 C. L. J. 136.

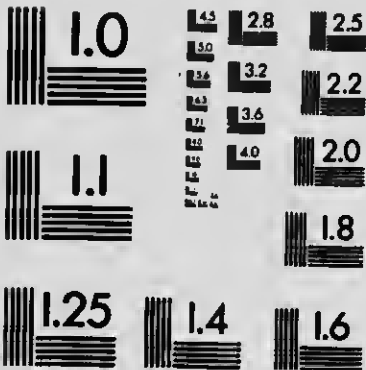
The rule which denied a professional trustee the right to charge ^{1 Ed. vii., c. 7, s. 27.} for professional services rendered to the trust estate, has moreover ^{c. 7, s. 27.} now been materially modified by 3 Ed. vii., c. 7, s. 27, whereby it is provided that: "Where a barrister or solicitor is trustee or an executor or administrator, and has rendered professional services to the estate, regard may be had in making the said allowance (*i.e.*, the allowance of compensation for services) to such circumstances, and such allowance shall be increased by such amount as the Court, Judge, Master or Referee may consider to be fair and reasonable in respect of such professional services; provided that nothing in this section shall affect pending litigation." This section is an addition to s. 43, but the words in italics would seem to indicate that it is intended also to extend the provisions of s. 40.

The rule laid down in *Craddock v. Piper* as to trustees, has been ^{solicitor} held not to extend to solicitor mortgagees; *Re Doody*, *Hibbert v. Lloyd*, 1893, 1 Ch. 129; 68 L. T. 128, and a solicitor mortgagee is not entitled as against the mortgagor to profit costs of a redemption action, or other proceedings, in which he appears in person; but only to costs out of pocket: *Stoue v. Lickorish*, 1891, 2 Ch. 363; 64 L. T. 79; *Re Wallis*, 25 Q. B. D. 156; 62 L. T. 654; nor is he entitled to costs for acting as agent for the mortgagor in collecting



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Rule 687. the rents of the mortgaged property: *Eyre v. Wynn-Mackenzie*, 1894, 1 Ch. 218; 69 L. T. 823; though where the business is done by a firm, of which the solicitor mortgagee is a partner, the other members of the firm are entitled to recover their proportion of the costs: *Re Doody, Hibbert v. Lloyd*, *supra*; and if by arrangement with the mortgagee solicitor they are entitled to all costs, *semble*, they may recover them in full: *Re Kolbit*, 96 L. T. Jour. 199.

Where costs had been taxed and allowed to the solicitors of an executor in an administration action, it was held that the Court had no jurisdiction, on an interlocutory application in that action, to compel the executor to account for and refund a share of the profit costs, to which, under a secret arrangement with the solicitors, he was entitled; but that a new action would have to be brought to compel him to account therefor: *Re Thorpe*, 1891, 2 Ch. 360; 64 L. T. 554.

Even though a will empowers a trustee to charge for his professional services, still, in the absence of express power to do so, trustees or executors cannot settle the amount payable out of the estate for such services to one of themselves, so as to bind the *cestui que trust* and preclude him from the right to have such costs taxed if he desires it: *Re Fish*, 1893, 2 Ch. 413; 69 L. T. 233.

Where an executor and trustee is authorized by will to charge the estate for his professional services as solicitor, that right is in the nature of a legacy, and cannot be asserted in competition with creditors: *Re White*, 1898, 1 Ch. 297; 2 Ch. 217; 77 L. T. 793; 78 L. T. 770; *sed vide* R. S. O. c. 129, s. 40; *Harrison v. Patterson*, 11 Gr. 105, 113.

Retaining fee and costs paid by trustee, how far recoverable.

A retaining fee paid by trustees to their solicitor in an administration suit, may be allowed under certain circumstances: see *Chisholm v. Barnard*, 10 Gr. 479; and see *Hayes v. Hayes*, 29 Gr. 90; but they are not entitled to any allowance for gratuitous services of an agent: *Chisholm v. Barnard*, 10 Gr. 479.

Costs paid by an executor, administrator, or trustee, to his solicitor, in respect of business of the trust estate, may be allowed, but the Master should examine the bill, and without strictly taxing it, should moderate it, by deducting such charges, if any, as are improper: *McCargor v. McKinnon*, 17 Gr. 525; *Hayes v. Hayes*, 26 Gr. 90; and where the costs have been paid out of the trust estate, and *bona fide* received by the solicitor without notice of any breach of trust on his client's part, he cannot be made to refund the costs so received to the estate, even though it should turn out that the trustee has disentitled himself to get the costs out of the estate: *Re Blundell, Blundell v. Blundell*, 58 L. T. 933; and see *Brinsden v. Williams*, 1894, 3 Ch. 325; 71 L. T. 77.

A personal representative is not liable to pay costs incurred by a beneficiary in reference to the estate, and for its protection, before the grant of probate, or letters of administration: *Re Watson*, 19 Q. B. D. 234; 57 L. T. 215.

Trustees' expenses are a lien on trust estate.

Trustees' expenses are a lien upon the trust estate, and have priority to the costs of suit: *Marison v. Marison*, 7 D. M. & G. 214; 2 S. & G. 504; *Gaunt v. Taylor*, 2 Ha. 413; *Hughes v. Rees*, 10 P. R. 301; unless the payments are not strictly authorized, and the estate is insufficient: *Robison v. Killeen*, 30 Beav. 520; or they have misconducted themselves: *Rose v. Sharrod*, 41 W. R. 356.

A personal representative is entitled to be recompensed out of the estate any costs he may be put to, or incur, without impropriety or fraud, in connection with the estate; and he is entitled to set-off, against the claims of next of kin or other beneficiaries, costs of an unsuccessful litigation, which they have been ordered to pay him: *Re Jones*, 1897, 2 Ch. 190; 76 L. T. 454.

Just Allowances.—Several of the matters which may be allowed under the head of "just allowances" have already been discussed in the preceding notes to this Rule.

Allowances to Executors, and Trustees.—Compensation for care, pains, and trouble, may be allowed by the Master to trustees under any deed, settlement, or will; or to any other trustee, however the trust is created; and to executors, and administrators; and to any guardian appointed by any Court; or to any testamentary guardian: R. S. O. c. 129, ss. 40-42; *Re Commissioners of Cobourg*, 22 Gr. 377; *Re Toronto Harbour Commissioners*, 28 Gr. 195. The Act is retrospective: *Thompson v. Freeman*, 15 Gr. 384; *McMillan v. McMillan*, 21 Gr. 309; *Zimmerman v. Wilcox*, 35 C. L. J. 688. The Surrogate Judge has also power to allow compensation to trustees under wills, and to executors, and administrators: R. S. O. c. 129, s. 43; and he may now allow compensation to professional trustees for services rendered by them to the trust estate as barristers and solicitors: see 3 Ed. vii., c. 7, s. 27. But where an action is pending in the High Court for the administration of an estate, it is improper for the Surrogate Judge to interfere by ordering the allowance of compensation to the executors, or trustees: *McLennan v. Heward*, 9 Gr. 279; *Cameron v. Bethune*, 15 Gr. 486. And the Master is bound to exercise his own discretion as to the compensation to be allowed, regardless of any order of a Surrogate Judge made under such circumstances: *Biggar v. Dickson*, 15 Gr. 233.

A person acquiring lands under circumstances which constitute him a constructive trustee thereof for another, is entitled to be recompensed his purchase money, and the lasting improvements made by him to the amount which the value of the property has been thereby enhanced: *Rowley v. Gunnever*, 1897, 2 Ch. 503; 77 L. T. 302.

A trustee does not lose his right to compensation, where part of the trust fund has been lost under circumstances for which he is not responsible, as, for instance, where the loss was occasioned by the fraud of a properly selected agent to whom he had entrusted it: *Jobson v. Palmer*, 1893, 1 Ch. 71; 67 L. T. 797.

A trustee of municipal debentures issued in aid of a railway, who holds them in trust, to be handed to the company in a certain event, is entitled to compensation, and has a lien on the debentures therefor: *Re Tilsonburgh, L. Erie & P. Ry. Co.*, 24 Ont. App. 378.

No fixed rule can be laid down as to the amount of compensation proper to be allowed, as it must necessarily depend on the circumstances of each case: see *Robinson v. Pett*, 2 W. & T. L. C. Eq. 214. Usually the amount is fixed by a percentage on the amount of money passing through the hands of the trustee, or executor. In some cases five per cent. has been allowed: *Bald v. Thompson*, 17 Gr. 154; *McLennan v. Heward*, 9 Gr. 178; *Chisholm v. Barnard*, 10 Gr. 479; *Re Batt, Wright v. White*, 9 P. R. 447; *Re Fleming*, 11

Rule 667.

Usually a percentage on receipts and payments.

But a lump sum may be allowed.

A sliding scale suggested.

Allowance of percentage on investments and reinvestments disapproved.

Legacies given to executors as compensation.

Do not abate.

Bear interest.

P. R. 272, 426; *Archer v. Severn*, 13 Ont. 316; *Re McIntyre, McIntyre v. London, &c., Trust Co.*, 7 O. L. R. 548. But this may in some cases be more, and in some less, than an adequate compensation. In *Torrance v. Chewett*, 12 Gr. 407, four per cent. was allowed; and in *McMillan v. McMillan*, 21 Gr. 381, two and a-half per cent. was allowed. The Master may, instead of a percentage, allow a lump sum, but only on proper evidence as to the services rendered: *Stinson v. Stinson*, 8 P. R. 560; *Denison v. Denison*, 17 Gr. 306. In fixing compensation, it has been suggested that it would be proper to adopt a sliding scale, similar in principle to that on which the poundage of Sheriffs is fixed; see observations of Spragge, V.C., in *Thompson v. Freeman*, 15 Gr. at p. 387. In that case, the estate amounted to nearly \$300,000, and five per cent. on the amounts disbursed, which included investments, and reinvestments, made in the course of fifteen years, was considered excessive; and on appeal, the allowance was reduced to five per cent. on investments of sums of \$600, and three per cent. on investments over that amount.

But in a later case it was considered vicious in principle, to allow any commission on investments, or reinvestments, on the ground that it offered an inducement to trustees to be constantly, and unnecessarily, calling in and charging the investments: *Re Berkeley's Trusts*, 8 P. R. 193; followed in *Re Williams*, 4 O. L. R. 501. No commission should be allowed for merely receiving the trust estate until it has also been duly accounted for: *Ib.*, *Re McIntyre, McIntyre v. London & Western Trust Co.*, 7 O. L. R. 548.

Where trust property consisting of land was exchanged, with the consent of the *cuius que trust*, for stock in a land company, from which nothing had been realized by way of income, and both land and stock were said to be valueless, a percentage on the nominal value of the stock was held to be an improper way of fixing the trustees' compensation; and a lump sum to cover their care and trouble was allowed instead: *Re Prittie*, 13 P. R. 19.

A legacy given to a person appointed executor is *prima facie* intended as a compensation, and if the legatee renounce, he is not entitled to the legacy: Williams on Executors (9th ed.), 1147; *Re Appleton, Barber v. Tebbitt*, 52 L. T. 906; and the fact that legacies are left to other executors of unequal amount is not sufficient to destroy the presumption: *Ib.*

Where a legacy is given to executors or trustees without any stipulation that it is to be a compensation for their trouble, they are not precluded from claiming a further sum under the statute, if the legacy is inadequate: *Denison v. Denison*, 17 Gr. 306; *Huddingh v. De Villiers*, 12 App. Cas. 107, 624; *Re Fish*, 1893, 2 Ch. 413; 69 L. T. 233; *Freeborn v. Vandusen*, 15 P. R. 264; and so also in the case of a devise: *McClenaghan v. Perkins*, 5 O. L. R. 129; but where it is expressly stated to be in lieu of compensation, it would seem that no further compensation can be allowed under the statute: see R. S. O. c. 129, s. 44; *Williams v. Roy*, 9 Ont. 534; 21 C. L. J. 236; *Keenedy v. Pingle*, 27 Gr. 305. Such a legacy precludes any presumption that the executor is entitled beneficially to the undisposed of residue: *Loreless v. Clarke*, 24 Gr. 14; but see *Boys' Home v. Lewis*, 4 Ont. 18. Such a legacy in the event of a deficiency of assets, does not abate with other legacies, even though it exceeds what the executor would be entitled to under the statute: *Anderson v. Dougall*, 15 Gr. 405; and such legacies bear interest at the expiration of a year from the testator's death: *Anderson v. Dougall, per Strong, v.*

C., on appeal from report, 8th and 14th Dec., 1870; but see *Re White*, Rule 667, 1898, 1 Ch. 297; 2 Ch. 217; 77 L. T. 703; 78 L. T. 770.

Where the executor is also a residuary legatee, he is entitled to commission on the receipt, but not on the payment of the share of the residue to which he is beneficially entitled: *Boys' Home v. Lewis*, 19 C. L. J. 139; *Re Fleming*, 11 P. R. 272, 426.

Where, on appeal from the Master, the Court increased the allowance for compensation, the Court of Appeal refused to interfere: *McDonald v. Davidson*, 6 Ont. App. 320.

Where the amount of a trustee's compensation is fixed by the trust deed, the Master cannot reduce the amount: *Heron v. Moffatt*, 7 P. R. 438; nor can he increase it: R. S. O. c. 129, s. 44.

When trust fixes compensation Master cannot allow less.

Executors are entitled to some compensation for moneys received by them *pendente lite* but not so much in other cases: *Re Housberger*, 10 Ont. 521; *Thompson v. Fann*, 11 P. R. 333.

Misconduct in the management of the estate may, but does not necessarily, disentitle an executor, or trustee, to compensation for what he has properly done: see *Kennedy v. Pringle*, 27 Gr. 305; *Sieversright v. Leys*, 1 Ont. 375; *Gould v. Burritt*, 11 Gr. 523; *City Bank v. Maulson*, 3 Chy. Ch. 334; *Hoover v. Wilson*, 24 Ont. App. 421; *McClenaghan v. Perkins*, 5 O. L. R. 129; *Zimmerman v. Wilcor*, 25 C. L. J. 688. But commission cannot be allowed on moneys which were not actually received, but charged against the executor, or trustee, on the ground of wilful default: *Bald v. Thompson*, 17 Gr. 154; and an allowance cannot be made to an executor, for unauthorized receipts of rents, and profits, of the real estate: *Dagg v. Dagg*, 25 Gr. 542.

Misconduct, how far it disentitles executor to compensation.

Nor is the fact that a balance is found against an executor, part of which is occasioned by the allowance of a surcharge, alone sufficient to disentitle him to compensation: *Sieversright v. Leys*, 1 Ont. 375; *McCardle v. Moore*, 2 Ont. 229. An executor, not being a trustee of the realty, is not entitled to receive the rents thereof, and if he do, he is a mere intermeddler, and not entitled to any compensation in respect of such rents: *Dagg v. Dagg*, 25 Gr. 542; and see *Re Brazil*, *Barry v. Brazil*, 11 Gr. 255. Since *The Devolution of Estates Act*, however, the rights of personal representatives in regard to the real estate are materially changed.

Where a suit was brought by an executor unnecessarily, the Court refused to allow him any commission: *Graham v. Robson*, 17 Gr. 318. But where executors had acted improperly, the Court, although allowing them compensation, refused them their costs of suit: *Kennedy v. Pringle*, 27 Gr. 305. The omission to keep a regular set of books is not alone a sufficient ground for refusing trustees compensation: *Life Association of Scotland v. Walker*, 24 Gr. 293.

When one executor incurs greater responsibility than another a larger proportion of the compensation will be allotted to him: *Re Fleming*, 11 P. R. 272.

An allowance to trustees, or executors, for compensation is prior to the claims of creditors: *Harrison v. Patterson*, 11 Gr. 105, at p. 113; (but see *contra*, *Re White*, 1898, 1 Ch. 297; 2 Ch. 217; 77 L. T. 703; 78 L. T. 770); or of *cestui que trust*: *The Life Association of Scotland v. Walker*, 24 Gr. 293; and a trustee may retain it from time to time, out of moneys received, and is not bound to wait until the expiration of his trust: *Heron v. Moffatt*, *supra*.

Executors' compensation is prior to claims of creditors.

Rule 667.**Expenses.**

A trustee who properly employs an agent to collect rents is entitled to an allowance for his own care and responsibility in addition to the sum paid to the agent (in this case the trustee was allowed two and one-half per cent.): *Re Prittie*, 13 P. R. 19.

Where a testator's estate was worth \$200,000, an expenditure of \$3,000 for a burial plot and monument was allowed: *Archer v. Severa*, 13 Ont. 316.

Trustees entitled to credit *pro tanto* for defective securities;

Trustees who have invested the trust fund, at the instance of one of their number, in a defective security, are nevertheless entitled to credit for the value of such security: *Larkin v. Armstrong*, 9 Gr. 300; and see R. S. O. c. 130, s. 9.

And for sums paid for maintenance

An allowance may be made to executors, for sums paid for the maintenance and education of infant *cestuis que trustent* out of the capital of the fund to which they are entitled, where the income thereof is insufficient: *Stewart v. Fletcher*, 16 Gr. 235.

Where compensation is allowed to a personal representative or trustee, it should be credited at the end of each year: *Hoover v. Wilson*, 33 C. L. J. 458.

Claims not referred cannot be allowed.

Claims not Referred to Master, cannot be allowed.—The authority to make "just allowances" does not authorize the Master to allow claims which are not referred to him by the judgment to take an account of, however reasonable they may appear to be. The Master may, however, report such a claim as "a special circumstance," and on the hearing on further directions, or otherwise, an application may be made to the Court for its allowance: *Fielder v. O'Hara*, 2 Chy. Ch. 255; *Kellar v. Taché*, 1 Chy. Ch. 788; *Stewart v. Fletcher*, *supra*.

Special Circumstances:—

Special circumstances, Master may report

Notwithstanding this Rule the Master may refuse to report as special circumstances, facts which would be immaterial on a hearing on further directions, or which would lend to evidence in relation to matters not necessary to the inquiry directed by the judgment: *Benton v. Ammond*, 19 Gr. 172. But he may, at the request of any party, report specially as to any matters which he may deem proper for the information of the Court: *Roschatch v. Parry*, 27 Gr. at p. 120; and he ought to report any matter bearing on the question of costs: *Simpson v. Horne*, 28 Gr. at p. 7; *Hayes v. Hayes*, 29 Gr. 181. And the Master may, at the request of a party, report specially as to matters not particularly referred to him, but which form the subject of charges of fraud in the pleadings: *Ib.*

In a mortgage suit the Master may report specially, as to the existence of a claim of the wife of a mortgagor to dower in the surplus: *Bore v. Wert*, 13 C. L. J. 326; 7 P. R. 252.

The Master should not report circumstances, showing an accounting party to have been guilty of wilful neglect, and default, as a "special circumstance," but he should himself determine whether or not the party is so liable, and if so, find the amount due on that footing: *Wulmsley v. Bull*, 2 Chy. Ch. 344.

Claims which are not referred to the Master to take an account of, cannot be allowed by the Master, but may be reported as "special circumstances": see *Fielder v. O'Hara*, *etc.*, *supra*.

Where money has been received by a trustee during his minority the Master should report the amount so received, notwithstanding the infancy: *Re Gurnes*, *Gurnes v. Applin*, 31 Ch. D. 147; 54 L. L. 141.

General Powers of Master:—

Rule 667.

Rule 667 (y) provides that, generally, in taking the accounts, the Master is to inquire, adjudge, and report as to all matters relating thereto, as fully as if the same had been specially referred to him.

General powers of Masters to inquire as to all matters relating to accounts

The general powers here given, enable the Master to inquire as to, and to take the accounts on the footing of, wilful default in accounts of personalty, as well as of realty, and he is not limited to the matters of inquiry specially enumerated in this Rule: *Carpenter v. Wood*, 10 Gr. 354. But the Master cannot inquire into the validity of the instrument upon which the plaintiff's judgment was obtained: *Bickford v. Grand Junction Ry. Co.*, 1 S. C. R. 696, see p. 725 *et seq.*; not even at the instance of parties added in his office: *McDougall v. Lindsay Paper Mills Co.*, 10 P. R. 247; 20 C. L. J. 133; and see *Re Munsie*, 20 C. L. J. 112; *Wiley v. Ledyard*, 10 P. R. 182; 20 C. L. J. 142; nor, when the judgment awards larger relief than was claimed by the pleadings, can the Master restrict the inquiry as to damages or otherwise, to the relief claimed by the pleadings: *Smith v. Leeson*, 11 P. R. 24; neither can he extend the inquiry under a general reference "to take accounts" to matters beyond the scope of the pleadings: *Rowland v. Burwell*, 12 P. R. 607; *Bennicourt v. Le Gendre*, 1900, A. C. 173. But the mere fact that a plaintiff claiming to be a creditor has obtained a judgment directing the taking of accounts, reserving further directions, was held not to preclude the defendants from taking the objection that the plaintiff is not in fact a creditor, and consequently has no *locus standi*, and from insisting, on the hearing on further directions, that his action should on that ground, be dismissed: *Bank of Toronto v. Beaver Mutual*, 28 Gr. 87; and see *Barton v. Barton*, 3 K. & J. 512, 514; *Houseman v. Houseman*, 1 Ch. D. 335.

But it will be seen that it is only matters relating to the accounts which are referred to him to take, as to which he has these general powers; he cannot allow claims altogether outside of the accounts he is directed to take, and not necessarily connected therewith. Such claims, though they cannot be allowed by the Master, may, however, be reported by him as "special circumstances," and the Court, in its discretion, may on further directions, or on special application for that purpose, allow them: *Fielder v. O'Hara*, 2 Chy. Ch. 255; and see *Wiley v. Ledyard*, *supra*.

Under these general powers, in an administration suit where a creditor made a claim by virtue of a partnership with the testator, it was held that the partnership accounts might be taken in order to establish the claim: *Kline v. Kline*, 3 Chy. Ch. 137; and the Master may inquire as to a stated account set up in the defence, though no evidence was given of it at the hearing: *Edinboro' Life Association v. Allen*, 23 Gr. 230; *Holgate v. Shutt*, 28 Ch. D. 111; but *scilicet*, not as to usury, as affecting the amount recoverable on a security: see *Penn v. Lockwood*, 1 Gr. 547.

The Master cannot under these general powers set off costs so as to interfere with the lien of a solicitor on a fund: *Bell v. Wright*, 24 S. C. R. 656.

Where a settlement is come to between the parties, pending a reference, if it is disputed, the Master, under his general powers, may inquire as to its terms and report thereon: *Corry v. Leuaine*, 18 P. R. 482.

Rules

668, 669.

Master
may order
witnesses
to be
examined.

Foreign
commission

Master
may cause
parties to
be exam-
ined, and
may order
production
of docu-
ments.

Witnesses
in M. O.

668. Witnesses may, by direction of the Master, be examined before a special Examiner. Con. Rule 58.

Taken from Chy. O. 221.

The Master may direct witnesses to be examined before any other Master, or Examiner, of the Court, without the consent of the parties: *Re Casey, Biddell v. Casey*, 1 Chy. Ch. 198.

The Master may also grant an order for a commission to issue to take evidence out of the jurisdiction: see *Rule 499* (2).

The Master cannot grant an order for a commission *ex parte*, *McLennan v. Helps*, 3 Chy. Ch. 193; except where the reference is *ex parte*.

As to when a commission may be granted, see notes to *Rule 499*.

As to proceedings under a commission, see *Rules 503-515*.

Where an application is made to the Master for a commission to cross-examine a plaintiff resident abroad, on an affidavit filed by him in support of his account, the Master cannot properly refuse it, so long as the plaintiff relies on the affidavit in support of his claim: *Townend v. Hunter*, 3 C. L. T. 310.

The Master's order for a commission should follow, as nearly as may be, the form of order given in the *Rules*: see Form No. 120. (H. & L. Forms No. 757).

As to cross-examination on an affidavit in the Master's Office, see note to *Rule 499*, *supra*, p. 713.

669. The Master may cause parties to be examined, and to produce books, papers and writings, as he thinks fit, and may determine what books, papers and writings are to be produced, and when and how long they are to be left in his office; or in case he does not deem it necessary that such books and papers or writings should be left or deposited in his office, he may give directions for the inspection thereof by the parties requiring the same, at such time and in such manner as he deems expedient. Con. Rule 59.

Taken from Chy. O. 222.

All officers of the Court have power to administer oaths and to examine witnesses for the purposes of proceedings before them: see *Jud. Act*, sec. 177.

Any party to a reference pending before a Master is entitled to require the evidence to be given orally, and may object to affidavits being received: see *Rule 484*, and see *per Mowat, V.C., Brady v. Walls*, 17 Gr. at p. 702.

Witnesses.—A subpoena may issue, as of course, to secure the attendance of witnesses before a Master: *Hannum v. McRae*, 17 P. R. 567; 18 P. R. 185.

Any party to an action is now eligible as a witness in his own behalf: see *R. S. O. c. 73*, ss. 2-11.

In an action by, or against, heirs, or personal representatives, or assignees, of a deceased person: *Ib.*, s. 10; or by or against a lunatic, or an inmate of a lunatic asylum: *Ib.*, s. 11, the evidence of any opposite, or interested party, must be corroborated. As to the nature of the corroboration required, see *Sugden v. Lord St. Leonards*, 3 P. D. 154, 179; *McDonald v. McKinnon*, 26 Gr. 12; *Stodhart v. Stodhart*, 30 C. C. Q. B. 203; *McKay v. McKay*, 31 C. P. 1; *Adamson v. Adamson*, 28 Gr. 228; *Brown v. Capron*, 24 Gr. 31; *Re Robbins*, 23 Gr. 162; *Halleron v. Moon*, 28 Gr. 319; *Re Ross*, 29 Gr. 385; 18 C. L. J. 11; *Re Laws, Laws v. Laws*, 28 Gr. 382; *Parker v. Parker*, 32 C. P. 113; *Birdsell v. Johnson*, 24 Gr. 202; *Findley v. Pedan*, 26 C. P. 481; *Rose v. Hickey*, 3 Ont. App. 309; *Re Marryn*, 29 Gr. 443; 9 Ont. App. 363; *Burn v. Burn*, 20 C. L. J. 148; *Re Curry*, 32 Ont. 159; *Thompson v. Coulter*, 34 S. C. R. 261; *Davis v. Walker*, 5 O. L. R. 173; *Wilson v. Howe*, 5 O. L. R. 323. In England there is no such statute, nor any absolute rule as to corroboration in such a case: *Re Griffin*, 1899, 1 Ch. 408; 79 L. T. 442.

The whole case need not be proved by independent testimony: *Radford v. Macdonald*, 18 Ont. App. 167. It is sufficient if evidence of the interested party is strengthened by evidence which appreciably helps the judicial mind to believe one or more of the material facts deposed to: *Ib.*; and see *Green v. McLeod*, 23 Ont. App. 676; *Secor v. Gray*, 3 O. L. R. 34; *Wilson v. Howe*, *supra*. And where a wife made a claim against her husband's estate for moneys advanced to pay premiums on a policy on his life, and it was shewn that the money was paid by a third party out of moneys of the wife in his hands, in which payment the wife reluctantly acquiesced, and that the policy was entirely in the husband's control and disposition, it was held that corroborative evidence of a contract to repay the money was not necessary: *Elliott v. Bussell*, 19 Ont. 413.

The testimony of one interested witness cannot be accepted as corroboration of another interested witness's testimony: *Taylor v. Regis*, 26 Ont. 483.

No corroboration is necessary as to matters occurring after the death of a deceased person affecting his estate: *McCloughan v. Perkins*, 5 O. L. R. 129.

A witness may be cross-examined in the Master's office on the whole case. The Master cannot properly confine the cross-examination to the evidence given in chief. But in some cases, it may be proper to exercise his discretion, as to the party to pay the fees of the examination: *Crandell v. Moon*, 6 U. C. L. J. 143.

Where a party is examined as a witness on his own behalf and dies before he can be cross-examined, his evidence is nevertheless admissible: *Randall v. Atkinson*, 30 Ont. 242, 620.

The Master should not allow a witness who has been examined, to be recalled in order to supplement his testimony, except in cases where the Court itself would allow him to be re-examined: see *Patterson v. Scott*, 1 Gr. 582.

Depositions in Another Action, or Books of Account, how far Evidence.—As to how far evidence taken in another action, and books of account of third parties are receivable in evidence in the Master's office, see *Court v. Holland*, S. P. R. 219.

Rule 670.Production
of docu-
ments

Production of Books and Papers.—When books are in constant use, and the party required to produce them offers to allow them to be inspected in his counting house, the Master should not require them to be left in his office, in the absence of any special ground for so doing: *Re Ross*, 8 P. R. 86; 5 Ont. App. 82; but the usual affidavit on production must be filed, though the deposit of the books in the Master's office be dispensed with: *Ib.*; *Darling v. Darling*, 10 C. L. J. 329.

In taking accounts in an action for infringement of a patent, the defendant is bound to disclose the names of customers to whom he has sold the goods infringing the patent: *Saccharin Corporation v. Chemical & Drugs Co.*, 1900, 2 Ch. 556, 83 L. T. 206.

Remedy for
default in
production.

Default.—Where default has been made in the production of documents, or the attendance of a witness to be examined, an application may be made to commit for contempt. The application should be made to a Judge, and not to the Master in Chambers, or to any County Court Judge, or Local Master: *Keefe v. Ward*, 18 C. L. J. 166; 2 C. L. T. 264. For form of certificate of default: see H. & L. Forms, Nos. 1029, 1045; *Sutherland v. Rogers*, 2 Chy. Ch. 191.

Master
may adver-
tise for
creditors,
heirs or
next of
kin, etc.

670. The Master may cause advertisements for creditors, and if he thinks it necessary, for heirs or next of kin, or other unascertained persons, and the representatives of such as are dead, to be published as the circumstances of the case require; and in such advertisements he shall appoint a time within which such persons are to come in and prove their claims, and within which time, unless they so come in, they are to be excluded from the benefit of the judgment or order. Con. Rule 60.

Taken from Chy. O. 223.

Time to be
limited for
coming inAdverts. for
creditors
where
dispensed
with.

The Master may dispense with an advertisement for creditors in an administration action, where the personal representative had, before action, duly advertised under H. S. O. c. 129, s. 38: *Cuthbert v. Wharmby*, W. N. 1869, 12; but he should state in his report that he has done so, and the reason for so doing. But mere lapse of time, even of twenty years, from the death of the deceased person whose estate is being administered, is not sufficient to warrant the Master in dispensing with an advertisement for creditors, and the Court has referred causes back to the Master to advertise for creditors, where the Master has omitted to do so, merely in consequence of the lapse of time.

There is no rule of practice rendering it necessary in every case for the sufficiency of publication of notices to creditors, under Imp. Act 22 & 23 Vict. c. 34, s. 29, to have an advertisement in the *Times* or other London daily papers in addition to the *Gazette*: *Re Bracken*, 38 W. R. 48; 61 L. T. 531; and it is not necessary that an advertisement in Ontario should be published in the *Ontario Gazette*: *Re Cameron*, 15 P. R. 272.

Forms of
advertisements.

See further as to advertisement for creditors of a deceased person, *Rule 701*, and for form of advertisements for creditors in an administration action, see Form 79 (H. & L. Forms, No. 936), and for heirs or next of kin, see H. & L. Forms, No. 960.

A month at least should be allowed for creditors to file claims, *Rule 671* three weeks was considered too short a time: see *Wood v. Weightman*, L. R. 13 Eq. 434.

Time for sending in claims

Where the action has been constituted as provided by *Rule 203* (1), heirs, and other persons interested, whose presence as original parties is dispensed with by that *Rule*, are nevertheless to be served with a copy of the judgment, as provided by *Rule 203* (3), unless the Master dispenses with service. If they are neither served, nor service on them dispensed with, they are not bound by the accounts or proceedings: *L. J. v. Lewis*, 25 Out. App. 242. Where any of such persons cannot be found to be served with the judgment, the Master may require an advertisement to be published as a condition of dispensing with service on them. But there seems to be no provision authorizing substitutional service of a judgment under *Rule 203* (3). Service out of the jurisdiction may be authorized: see *Rules 162* (1) 163. It is doubtful whether persons on whom service of a judgment is dispensed with, would be bound by the proceedings: see *L. J. v. Lewis*, *supra*, and *supra*, p. 371.

Persons to be served with copy of judgment.

671. The Master shall proceed on the claims brought in before him pursuant to such advertisement, without further notice, and may examine witnesses in relation thereto at the time appointed in the advertisement, or thereafter as he sees fit. *Con. Rule 61.*

Master to proceed on claim brought in.

Taken from Chy. O. 224.

In actions for the administration of a deceased person's estate, the mode of proving claims of creditors is regulated by *Rule 701 et seq.*

Mode of proving claims of creditors.

In other actions the creditor, or claimant, is required to file his claim with an affidavit verifying it. If the claim be disputed, the claimant may be required, at the instance of a opposing party, to establish his claim by oral evidence. Where the claim is evidenced by some written document, the production of the document and proof of its due execution, if disputed, and the claimant's affidavit of the amount due, is usually a sufficient *prima facie* case, and the onus then rests with the party opposing the claim to adduce evidence: see *Court v. Holland*, 8 P. R. 213; and see *Rule 750* and notes. A claimant may be cross-examined on his affidavit: *Court v. Pomeroy*, 3 Sin. & G. 369; 3 Jur. N. S. 38; 26 L. J. Ch. 353; and see *Rule 400*.

Parties residing out of the jurisdiction coming into the Master's office to prove claims, cannot be ordered to give security for costs: *Palmer v. Lovett*, 14 P. R. 415, overruling *Re Ross, Urquhart v. Toronto General Trusts Co.*, 10 P. R. 425; but in the event of their failing to substantiate their claims they may be ordered to pay costs occasioned thereby: see *Rule 1137*.

In actions for the administration of a deceased person's estate, no party other than the personal representative, unless by leave of the Master, can appear on the claim of any person, against the estate of the deceased in respect of a debt or liability. But the Master may direct any person to appear, in addition to, or in place of, the personal representative, upon such terms as to costs or otherwise as may seem proper: see *Rule 204*; and see *Rules 662, 665, 1147, 1148*.

Parties entitled to attend on proof of claims

Rule 672.

In creditors' actions plaintiff must prove claim, and any creditor may dispute any other creditor's claim.

In a creditor's action, the plaintiff must prove his claim in the Master's office, even though he may have proved it at the trial, and any creditor may dispute the claim of any other creditor: *Field v. Titman*, 1 Sim. N. S. 218; *Orcus v. Dickinson*, Cr. & Ph. 48, subject to Rule 204; and the Master has power to adjudicate upon all questions arising between creditors *inter se*: *Merchants Bank v. Monteith*, 11 P. R. 458. The mere fact that a plaintiff claiming to be a creditor has obtained a judgment directing the taking of accounts and making of inquiries, does not preclude the defendants upon such reference from taking the objection that the plaintiff is not a creditor, and has consequently no *locus standi*, and from insisting, on the hearing on further directions, that his action should on that ground be dismissed: *Bank of Toronto v. Beaver Mutual*, 28 Gr. 87; see *Barton v. Barton*, 3 K. & J. 512, 517; *Houseman v. Houseman*, 1 Ch. D. 535.

Creditors coming in after time has expired.

Creditors who have omitted to file their claims within the time limited, may be allowed to come in and prove their claims, before report, by leave of the Master; and after report, on application in Chambers, so long as the fund remains in Court: *Lashley v. Hogg*, 11 Ves. 602; *Angell v. Haddon*, 1 Mad. 520; *Re Metcalfe*, W. N. 1870, 1045; *Cotton v. Vansittart*, 9 C. L. J. 312; *Andrews v. Maulson*, 1 Chy. Ch. 316; the statement in the advertisement that in default of coming in and proving their claims within the time limited, the creditors will be barred, is merely in *terrorem* and not conclusive: *Harrison v. Kirk*, 1804, A. C. 1; 80 L. T. 506. But a creditor coming in after a dividend has been paid, is only entitled to prove against the residue of the fund for a similar proportion of his debt; he is not permitted to disturb any prior dividend: *Gillespie v. Alexander*, 3 Russ. 130; *Greig v. Somerville*, 1 R. & M. 338; *Todd v. Studholme*, 3 K. & J. 324.

Creditor objecting to form of decree might rehear.

A creditor proving a claim, and objecting to the form of the decree, could, under the former practice, only obtain relief by rehearing the cause: *Mutholland v. Hamilton*, 12 Gr. 413; *Willis v. Willis*, 20 Gr. 306. And a petition of a creditor to vary a decree was refused with costs: *Mutholland v. Hamilton*, *supra*.

Creditor, appeal by.

A creditor whose claim is disallowed, may appeal at once on a certificate of disallowance, without waiting for a general report: *Re Clagett*, *Fordham v. Clagett*, 20 Ch. D. 657; 46 L. T. 70.

Interest.—As to the allowance of interest on claims in the Master's office, see *Re Ross*, 20 Gr. 385, and notes to ss. 113-116 of the Jud. Act.

A Referee has power to allow interest on the amount of a loss by fire referred to, or ascertained by him: *Atty.-Gen. v. Etna Ins. Co.*, 13 P. R. 450.

As to interest on mortgages, see notes to Rules 607, 750.

Master's power as to settlement of conveyances.

672. Under every judgment or order whereby the delivery of deeds or execution of conveyances is directed, the Master shall give directions as to delivery of such deeds, settle conveyances where the parties differ, and give directions as to the parties to the conveyances, and as to the execution thereof. Con. Rule 62.

Taken from Chy. O. 226.

Under every judgment, or order, directing a sale, the Master to **Rules** whom the action is referred, may, without any special directions, **673, 674.** settle all necessary conveyances in case the parties differ, or in case there be any parties interested in the sale who are under any disability except coverture: see *Rule 731*; and see further as to sales: *Rules 718-742*. Under this *Rule* the Master has power to deal with questions arising on the conveyance as to the payment off of incumbrances: and when a party applied to the Court instead of to the Master, no other costs were given: *Stammers v. O'Nohoc*, 29 Gr. 64.

A covenant on the part of an ant for payment is not a proper covenant to be inserted in a mortgage: *Brown v. Grady*, 31 Ont. 73.

673. Where an account is to be taken, the accounting party, unless the Master otherwise directs, shall bring in the same in debit and credit form, verified by affidavit. The items on each side of the account shall be numbered consecutively, and the account shall be referred to by the affidavits as an exhibit, and shall not be annexed thereto. Con. Rule 63.

Taken from Chy. O. 227.

When a personal representative of a deceased person is required to account in respect of the dealings of the deceased, he is bound to make up the accounts of such dealings, from the books in his possession: *Strathy v. Crooks*, 5 Gr. 162.

A party may be estopped by acquiescence from moving to set aside accounts brought in, in an improper form: *Wade v. Rice*, C. P. Co. 428.

The deponent may be cross-examined on an affidavit verifying accounts. A party who is to be cross-examined on an affidavit verifying accounts, is entitled to detailed notice of the points in respect to which he is to be examined: *Re Lord, Lord v. Lord*, L. R. 2 Eq. 605. A notice that all the items but one are objected to, is insufficient: *McArthur v. Dudgeon*, L. R. 15 Eq. 102; and see *Rule 680 infra*. Such cross-examination may take place before the account is vouched: *Meacham v. Cooper*, L. R. 16 Eq. 102.

The affidavit under this *Rule* and the production of the vouchers, is *prima facie* sufficient to warrant the Master in passing the accounts, and where voluminous accounts had been passed under this *Rule*, the pointing out of one or two items as *prima facie* objectionable, was held insufficient to warrant the re-opening of the account: *In re Curry*, 17 P. R. 379; affirmed, 25 Ont. App. 267.

674. The Master may direct that in taking accounts, the books of account, in which the accounts required to be taken have been kept or any of them, be taken as *prima facie* evidence of the truth of the matters therein contained. Con. Rule 64.

Taken from Chy. O. 228.

Rules**675-677.**

Sums of £5 and under allowed without voucher.

Vouchers to be produced.

Books of account when admissible.

No state of facts, etc., to be brought in.

Copies, abstracts, etc., to be supplied as Master directs.

Parties bound by Master's direction without warrant.

The Chy. O. 228 was adapted from Imp. Stat. 15 & 16 Vict. c. 86. s. 54. Every sum of £8 and under, is allowed without a voucher, upon the oath of the accounting party; see *Everard v. Warren*, 2 Ch. Ca. 249; but his oath must be positive, and not on belief only: *Robinson v. Cumming*, 2 Atk. 410; and it would seem that the aggregate of such items should not exceed \$400 in amount: Bennett's M. O. 86. Greater latitude in proving other items is also allowed when the account is of long standing; *Id.* Receipts, or other vouchers, must be produced, but when they are lost, or accidentally destroyed, secondary evidence will be let in: *Id.*; and it is to such cases, or when, for any other reason, it is impossible to vouch the account in any other way, that this Rule is intended to apply: *Lodge v. Prichard*, 3 D. M. & G. 906; and see *Ewart v. Williams*, 7 D. M. & G. 67. In partnership cases, however, the books of account of the firm are admissible by virtue of the general law, without any special direction: *Gething v. Keighley*, 9 Ch. D. 547, 551. Books of trustees of a will were allowed to be taken as *prima facie* evidence for a period of 21 years, as against a *cestui que trust* who had access to them, but had not actually inspected them: *Banks v. Cartwright*, 15 W. R. 417; and see *Steight v. Lawson*, 3 K. & J. 202; *Ogden v. Battams*, 1 Jur. N. S. 791; *Hardwick v. Wright*, 15 W. R. 953.

675. No state of facts, charges or discharges shall be brought into the Master's office; and where original deeds or documents can be brought in, no copies are to be made without special direction. Con. Rule 65.

Taken from Chy. O. 229. See Bennett's M. O. p. 84.

676. Where directed, copies, abstracts of, or extracts from accounts, deeds, or other documents and pedigree, and concise statements shall be supplied; and where so directed, copies shall be delivered as the Master may direct. Con. Rule 66.

Taken from Chy. O. 230.

The party having the conduct of the reference, is usually required to furnish copies, abstracts, etc., which relate to the general inquiries, and the other parties only such as relate exclusively to themselves; see note to Rule 657.

677. A party directed by the Master to bring in an account, or do any other act, shall be held bound to do the same in pursuance of the direction of the Master, without any warrant or written direction being served for that purpose. Con. Rule 67.

Taken from Chy. O. 231.

This Rule of course implies that the party directed to do the act, or his solicitor, has actual notice of the direction, otherwise a warrant must be taken out and served.

678. Before proceeding to the hearing and determining of a reference, the Master may appoint a day in the meantime for the purpose of entering into the accounts and inquiries, with a view to ascertaining what is admitted and what is contested between the parties. Con. Rule 68.

Rules
678-681.

Warrant to appoint a day to ascertain what is admitted and what is contested

Taken from Chy. O. 232.

Admissions before the Master should be entered in his book (see Rule 681), and subscribed by the parties or their solicitors; *Foster v. Allison*, 11 P. R. 233; 21 C. L. J. 418. Admissions made by a solicitor without the authority of his client have been allowed to be withdrawn on the terms of the items admitted being taken to be *prima facie* correct, and the onus being cast on the party withdrawing the admission, of showing that they are wrong; *McBean v. McBean*, 11 P. R. 429; 22 C. L. J. 348.

679. Where the Master has appointed a day for the purposes mentioned in Rule 678, he may grant to the party bringing in accounts a warrant to proceed on the same, for the purposes aforesaid; such warrant to be underwritten as follows: "On leaving the accounts of, etc., and take notice that you are required to admit the same or such parts thereof as you can properly admit." Con. Rule 69.

When day not previously appointed warrant may issue to ascertain what admitted.

Taken from Chy. O. 233.

As to the costs occasioned by any party improperly refusing to admit facts: see Rule 1149; *McIntyre v. Canada Co.*, 18 Gr. 370.

680. A party seeking to charge an accounting party beyond what he has in his account admitted to have received, shall give notice thereof to the accounting party, stating as far as he is able, the amount sought to be charged, and the particulars thereof in a short and succinct manner. Con. Rule 70.

Party seeking to charge accounting party must give notice of particulars.

Taken from Chy. O. 237.

An accounting party who is intended to be cross-examined on his affidavit verifying his accounts, is entitled to notice of the items on which he is to be cross-examined; *Re Lord, Lord v. Lord*, L. R. 2 Eq. 605; *Wormsley v. Sturt*, 22 Beav. 398; *Re Curry*, 17 P. R. 379; items he is 25 Ont. App. 267; and it is not sufficient to inform him that all the items except one are objected to, but the notice must specify the points on which the cross-examination is to proceed; *McArthur v. Dudgeon*, L. R. 15 Eq. 102; and see *Glover v. Ellison*, 20 W. R. 408; and unless he has been thus duly notified he may refuse to be sworn; *McArthur v. Dudgeon*, *supra*; see Eng. Chy. O. 30, of 16th October, 1852.

681. The Master shall keep in his office a book, to be called the "Master's Book," in which, upon the bringing in of a judgment or order of reference, he shall enter the

Master's Book, how to be kept.

Rules
682-684.

style of the cause, the name of the solicitor prosecuting the reference, the date of the judgment or order being brought in, and the proceedings then taken; and he shall also enter therein, from time to time, the proceedings taken before him, and the directions which he gives in relation to the prosecution of the reference, or otherwise. Con. Rule 71.

In the book referred to in this *Rule* any admissions which are made during the proceedings before the Master, should be entered and signed by the parties or their solicitors making the same: *Beaudry v. Gallien*, 5 O. L. R. 73; and see *Rule* 677. note.

Master
to certify
proceeding
in his office.

682. Upon the application of any person, the Master shall certify, as shortly as he conveniently can, the several proceedings had in his office in any cause or matter, and the dates thereof. Con. Rule 72.

Taken from Chy. O. 239.

After a Master has made his report, he should not certify as to any matters before him in the course of the inquiry upon which he has made his report, unless required by the Court so to do: *Rosebath v. Parry*, 27 Gr. 193; and see *Rule* 687, and notes.

For forms of certificates, see H. & L. Forms, Nos. 1028, 1029. As to appealing from a certificate, see *Rules* 769-772.

Master
to devise
simplest
and speed-
iest method
of prosecut-
ing
references.

683. In giving directions, and in regulating the manner of proceeding before him, the Master shall devise and adopt the simplest, most speedy, and least expensive method of prosecuting the reference and with that view, shall dispense with any proceedings ordinarily taken, but which he conceives to be unnecessary and shorten the periods for taking any proceedings, or substitute a different course of proceedings for that ordinarily taken. Con. Rule 73.

Taken from Chy. O. 240.

The Master is not authorized under this *Rule* to employ the services of experts: *Re Robertson, Robertson v. Robertson*, 24 Gr. 555. But he may appoint experts to examine into matters referred to him so as to enable them to give evidence before him, on which to act; and the costs of persons so appointed are taxable between party and party: *McKay v. Ketcher*, 12 P. R. 256.

The Master should allow amendments of accounts, when such amendments would be allowed before judgment: *Court v. Holland*, 4 Ont. 688.

Appoint-
ments for
several
days may
be included
in one
warrant.

684. Where the Master directs parties not in attendance before him to be notified to attend at some future day, for different purposes at different future days, it shall not be necessary to issue separate warrants, but the parties shall

be notified by one appointment, signed by the Master, of the proceedings to be taken, and of the times by him appointed for the taking of the same. Con. Rule 74.

Taken from Chy. O. 241.

The words "warrant" and "appointment," though apparently used in this and the two following *Rules* as distinct things, appear nevertheless to be in effect convertible terms: see Bennett's M. O., p. 6 *et seq.*, and see form of warrant; Bennett's M. O. App. 1; H. & L. Forms, Nos. 957, 958.

685. Where parties are notified by appointment from the Master, of proceedings to be taken before him, no warrants shall be issued as to such parties, in relation to the same proceedings. Con. Rule 75.

Taken from Chy. O. 242.

686. Parties making default upon such appointments, shall be subject to the same consequences as if warrants had been served upon them. Con. Rule 76.

Taken from Chy. O. 243.

687. As soon as the hearing of any matter pending before the Master is completed, he shall so inform the parties to the reference then in attendance, and make a note to that effect in his book; and after such entry no further evidence shall be received, or proceedings had, without the special permission of the Master; and the Master may proceed to prepare his report or certificate without further warrant, except the warrant to settle which shall be served on the parties as the Master directs. Con. Rule 77.

Taken from Chy. O. 247.

The Master should not make any *ex parte* communications to any of the parties as to his decision, and he should draw his report himself; and not delegate it to the solicitor of any of the parties, and all parties interested should have equal facilities for knowing the result and being present at the settlement of the report: *Knare v. Bricker*, 16 P. R. 363.

There is no difference between a report and a certificate of a Master, "though we apply the term 'report' to the more lengthened productions of a Master, and the term 'certificate' to his shorter statements. It is, I think, clear that all his reports are certificates, and all his certificates are reports." *per Shadwell, V.C., Chennel v. Martin*, 4 Sim. 344; *In re Mulphy*, 17 P. R. 247.

Parties served with the judgment under *Rule* 203, who do not give notice to the plaintiff that they desire to attend the proceedings, need not be served with a warrant to settle the report: *Green v. Measures*, W. N. 1866, 122; *Lee v. Sturrock*, W. N. 1876, 226.

Rules
685-687.

Parties notified by Master not to be served with warrant.

Parties notified, liable for default as if served with warrant.

Master to notify parties when hearing concluded, and to note it in his book.

Thereafter no evidence to be given, except by leave.

Masters report and certificate.

Rule 687. It would seem that a warrant to settle a report formerly required four days' service: see Bennett's M. O. 20; Beames' Ord. in Chy. 259.

A report or certificate should not, in a contested matter, be made *ex parte*, when intended to be used as evidence against the opposite party: see *Re Ryan v. Simonton*, 13 P. R. 299; *sed vide, Jones v. MacDonald*, 14 P. R. 109.

Application to open reference. When the Master has closed the reference, an application to let in further evidence may be made to him at any time before the report is signed: *Re Ritchie, Sewery v. Ritchie*, 23 Gr. 66. After report, the application can only be made to the Court: *O'Donohoe v. Hembroff*, 9 C. L. J. 312; or a Judge: see note to *Rule 769*. But to warrant such application being granted, the applicant must in general make such a case as would entitle him to a new trial: *Waddell v. Smyth*, 3 Chy. Ch. 412; and see *Patterson v. Scott*, 1 Gr. 582; *Saunders v. Saunders*, 45 L. T. 628; *Carradice v. Currie*, 10 Gr. 108; *Mason v. Seney*, 12 Gr. 143; *Hosking v. Terry*, 8 Jur. N. S. 977.

Master not functus officio till he has fully reported. A Master is not *functus officio* until he has made his report on all the matters referred to him: *Rae v. Geddes*, 3 Chy. Ch. 404; but after he has made his report he should not certify as to any matters before him in the course of the inquiry upon which he has made his report, unless required by the Court so to do: *Rosebatch v. Parry*, 27 Gr. 193; the same rule applies to taxing officers: *Langtry v. Dumoulin*, 10 P. R. 444.

Masters' Reports are either General, Special, or Separate.

General report. A *General Report* is that which comprises the conclusion which the Master has come to, upon all the matters referred to him by the judgment, or order under which he has proceeded.

Separate report. A *Separate Report* is that which embraces one or more separate matters of the reference, and the conclusion the Master has come to thereon; and is limited thereto, apart from the other matters referred. A report on sale is a familiar illustration of a *separate report*.

Where an order directed a taxation of the plaintiff's costs including therein the remuneration of receivers and managers appointed in the action, and to certify the balance after setting off certain costs of the defence, it was held to be improper for the Master to make a separate report of the plaintiff's costs alone: *Re Silkstone Co. v. Edey*, 1901, 2 Ch. 652.

Special report. A *Special Report*, is a report of special circumstances found by the Master, as a guide to the Court for some further direction upon the facts so reported.

Special reports on matters which the Master has power himself to adjudicate upon, and dispose of, are not to be made, unless specially directed by the judgment, or order, of reference: see Bennett's M. O. 18, 19; *Walmsley v. Bull*, 2 Chy. Ch. 344, and other cases, *infra*.

Report, what it should state. A report should not be dated before the costs included therein have been revised, when revision is necessary: *Waddell v. McColl*, 14 Gr. 211.

A report, like a judgment, should state results only, and should not set forth the evidence, arguments, or reasons, on which the conclusions are arrived at: *Sovereign v. Sovereign*, 15 Gr. 559; *Booth v. Ratté*, 21 S. C. R. 657; *Rule 689*.

Where the Master is specially directed to state his reasons, they should be stated briefly: *McLargar v. McKinnon*, 15 Gr. 361. All unnecessary prolixity in reports is to be avoided: S. C. 17 Gr. 525.

The report should not go beyond the order, or judgment, of reference, or the Court will not respect it: see *Beames' Orders*, 23; and see *Clouster v. McLean*, 10 Gr. 576; and see *Imperial Trusts Co. v. N. Y. Security Co.*, 5 O. W. R. 641. And matters should not be reported specially, or as special circumstances, which the Master has himself power to adjudicate upon: *e.g.*; whether or not an accounting party is chargeable on the footing of wilful default, etc.; *Walmsley v. Bull*, 2 Chy. Ch. 344; whether a particular debt is, or is not, an asset of an estate being administered; *Clouster v. McLean*, 10 Gr. at p. 578.

Rule 688.
Should not go beyond order of reference.
Nor report specially unnecessarily.

A Master's report was set aside where he had exceeded his authority by reporting on matters not referred to him *Doult v. McHicth*, 14 S. C. R. 739.

But the Master should state in his report such matters as may be necessary for the information of the Court on further directions, or to enable it to dispose of the question of costs: *e.g.*, the priorities of creditors: *Lavin v. O'Neill*, 13 Gr. 170; and of the legatees: *Clouster v. McLean*, 10 Gr. 576, should be stated; and where a separate solicitor is appointed to represent a class which is *prima facie* sufficiently represented by the plaintiff, or some other party to the action, the reason for the appointment should be stated: *Gorham v. Gorham*, 17 Gr. 386; and where an advertisement for creditors has been dispensed with, the fact and the reason for it should be stated in the report: see *Rule* 670 note. Where the Master dispensed with service of judgment on parties required to be served therewith by *Rule* 203 (3) he was formerly required to state his reasons therefor, in his report: see Chy. O. 387, *Holmsted's Rules and Orders*, 349, but that provision is not embodied in these *Rules*, although it would seem to be a practice which should still be followed.

But should report matters necessary to dispose of costs.

Sums charged against an accounting party, on the footing of wilful default should be distinguished in the report from sums actually received: *Moodie v. Leslie*, 12 Gr. 537.

The Master should not make a final report in an action until he is in a position to deal with all the matters referred to him: *e.g.*, it is improper to make a final report in an action to wind up a partnership, finding a balance due from one partner to another, until all the assets are realized: *Smith v. Crooks*, 3 Gr. 321. But when the Master is not able to make a final report, he may, when necessary, make a separate report as to certain of the matters referred to him, and which he is able to report on.

Final report, when to be made.

Death or Removal of Master.—Where a Master dies or becomes incapacitated pending the reference, an order may be obtained referring the cause to another Master with power to adopt the proceedings already taken: *Anon.*, 4 Jur. 858.

Death, etc. of Master.

For forms of reports on sales see Form 86 (*H. & L. Forms*, No. 1013); and of reports in administration actions, Form 84 (*H. & L. Forms*, No. 1042).

688. Parties shall raise before the Master, in respect of any matters presented in his office, for his decision, all points which may afterwards be raised upon appeal. *Con. Rule* 18.

Points intended to be raised on appeal to be taken before Master.

Rules

689-692. Taken from Chy. O. 248, which went on to provide that in case an appeal was allowed on any ground not distinctly taken before the Master, the Court might order the appellant to pay the costs of the appeal; but this provision has not been embodied in these *Rules*. Under the Chy. O. 248, it would seem that the Court might, in its discretion, entertain appeals on grounds not distinctly taken before the Master, but in such cases might order the appellant, even if successful, to pay the costs of the appeal.

Or Court
may refuse
to entertain
the appeal.

Although the Court might formerly allow an appeal on a ground not taken before the Master, it might refuse so to do. Thus, the Court refused to allow the Statute of Limitations to be raised on appeal, it not having been raised before the Master: *Brigham v. Smith*, 18 Gr. 224; and see *Clouster v. McLean*, 10 Gr. 576.

In order to avoid any question as to whether or not any point intended to be raised on appeal, has been taken before the Master, it is safer to deliver the objection in writing, or to have it noted in the Master's book; but this is not absolutely necessary: see *Rule 692*.

See further as to appeals from reports, *Rule 692* and notes.

Accounts,
charges,
affidavits,
etc., not to
be set out
in report.

689. In the Master's report no part of any account, affidavit, deposition, examination or pleading used in the Master's office, shall be stated or recited, but the same may be referred to by date or otherwise. Con. *Rule 79*.

Taken from Chy. O. 249.

As to form of reports, see note to *Rule 687*.

Schedule to
be attached
as to
moneys in
Court, or
payable
into Court.

690. Reports affecting money in Court, or to be paid into Court, shall set forth, in figures, in a schedule, a brief summary of the sums found by the report, and paid or payable into or out of Court, and the funds or shares to which the sums of money are respectively chargeable. Con. *Rule 80*.

Taken from Chy. O. 250.

An omission to observe this *Rule* may prevent the report from being acted on in the Accountant's office.

Report to
be issued
to party
prosecuting
reference, or
if he decline
it, then to
any other
party.

691. As soon as the Master's report or certificate is prepared, it shall be delivered out to the party prosecuting the reference, or in case he declines to take the same, then, in the discretion of the Master, to any other party applying therefor; and a common attendance shall be allowed to the party taking the same. Con. *Rule 81*.

Taken from Chy. O. 251.

Without
previous
exceptions
before
Master.

692. No written objections or exceptions need be taken before the Master previously to an appeal. Con. *Rule 82*.

Taken from Chy. O. 253.

Appeal, when Necessary.—Ordinarily, where the objection to the report is not manifest on its face, an appeal must be brought, unless the report be a nullity, *Fuller v. McLean*, 8 P. R. 549; *Queen v. Smith*, 7 P. R. 429; *Brown v. Dollard*, 6 P. R. 113; where the report goes beyond the judgment, or order of reference, the report as to such matters will "not be respected" by the Court: Beames' Ord., 23, and therefore no appeal as to such matters would seem necessary; an incumbrancer claiming priority to the plaintiff, who is made a party as a subsequent incumbrancer, may either move to set aside the order making him a party (which appears to be the preferable practice), or appeal from the report on the question of priority: *McDonald v. Rodger*, 9 Gr. 75, and see *Montgomery v. Shortis*, 3 Ch. Ch. 69.

Rules
693, 694.
Appeal
when
necessary

Mere clerical errors in a report may be corrected, even after confirmation, without appeal, by order in Chambers: see *Rule 769* note; and where the Master who has made the report has also jurisdiction in Chambers, it would appear to be competent for him to make the order: but he has no jurisdiction to make any material alteration or amendment of the report, not being a clerical error: that can only be properly done on appeal: see *Sked v. Holland*, 9 C. L. T. 50.

For the purpose of appeal, a Master's certificate stands on the same footing as a report: *Re Molphy*, 17 P. R. 247.

For the procedure on appeals from a Master's report: see *Rules 769-772*.

693.—(1) Pending a reference to a Master all affidavits, papers and documents relating thereto required to be filed shall be filed with the Master, but every report or certificate of a Master shall be filed in the office in which the proceedings were commenced.

Reports
where to
be filed.

(2) Any report or certificate filed in any office other than the Central Office may, at the request of any party to the proceedings, be forwarded to the Central Office. Con. Rule 84. Rules of 1 Jan., 1896, 1420; amended.

Under the former Con. Rule 84, reports of Local Masters were required to be filed in their own offices: under the present *Rule* all reports are required to be filed in the office where the proceedings were commenced: see *Rules 14*, and *15*, and notes.

694.—(1) Any party affected by a report or certificate may file the same, or a duplicate thereof, and the filing of a duplicate shall have the same effect as the filing of the report or certificate. Con. Rule 83.

Any party
may file
report, or
duplicate.

Taken from Chy. O. 254.

(2) Notice of the filing shall be given forthwith thereafter by the party filing the report. *New*.

Rule 695.

Report must be filed before appeal, and before it can be enforced.

The report, or certificate, of a Master or a Taxing Officer, must be filed before an appeal can be had therefrom: *Hayes v. Hayes*, 8 P. R. 546; *Langtry v. Dumoulin*, 10 P. R. 444; or before any process can issue thereon: *Jellett v. Anderson*, 8 P. R. 387. And where it appoints a time for the payment of money it should be filed before the day for payment: *Mills v. Dixon*, 2 Chy. Ch. 53; and be confirmed, where the report is one requiring confirmation: *Mountain v. Porter*, 1 Chy. Ch. 207.

As to delay in filing a duplicate report by a party intending to appeal, see *Caisse v. Burnham*, 6 P. R. 201.

Formerly a party could not by neglecting to file a report, extend the time for bringing on the appeal to be heard beyond a calendar month from its date: see former Con. Rule 849; but see now *Rules* 769, 771.

Notice of filing need not be served on defendants who have not appeared: *Toronto General Trusts Corp. v. Craig*, 2 O. L. R. 238.

Payment of money into bank, how to be directed in report.

695.—(1) Where the Master is directed to appoint money to be paid at some time and place, he shall appoint the same to be paid into some bank to the joint credit of the party to whom the same is made payable, and the Accountant; the party to whom the same is made payable may name the bank into which he desires the same to be paid. Con. Rule 85.

Taken from Chy. O. 255.

Party may pay money to the sole credit of the party entitled thereto or to the joint credit of such party and the Accountant.

(2) Where money is paid into a bank, in pursuance of such appointment, the party paying may pay the same either to the credit of the party to whom the same is made payable, or to the joint credit of the party and the Accountant; and if the same be paid to the sole credit of the party, such party shall be entitled to receive the same without order. Con. Rule 86.

Taken from Chy. O. 256.

Object of Rule.

This Rule does not relate to the payment of money into Court (as to that, see *Rule 405 et seq.*), but it is intended to provide for the payment of money in cases where the payee is required to do some act, as a condition of his receiving the money; e.g., in specific performance actions, where the vendor is required to execute a conveyance, or in mortgage actions, where the mortgagee, or incumbrancers, are required to release and discharge their incumbrances, etc.

How paid out.

Money paid into a bank under this Rule, is paid out on a joint cheque of the officer of the Court and of the party to whose credit it is paid in. The cheque will be signed by the officer either upon an order, obtained for that purpose, being produced, or without order, upon filing the written consent of the solicitor of the party paying the money in, and production of the judgment or order, and Master's report showing the person entitled to receive the same.

If the money be paid in to the sole credit of the party entitled, **Rules**
under **Rule 695** (2) he may draw it out at his pleasure. **696-697.**

Where the party paying money in, refuses to consent to its pay- order for
ment out to the party entitled, the latter may move in Chambers for when
an order to the officer to sign the cheque: *Bernard v. Alley*, 2 Chy. necessary.
Ch. 91; *Weeks v. Stourton*, 11 Jar. N. S. 278. Although the refusal
to consent appears to have been without reason, the applicant in
Bernard v. Alley was refused his costs. The application must be
made on notice: *Totten v. McIntyre*, 2 Chy. Ch. 462.

A report appointing the payment of money, should be filed before Report
the day named for the payment: *Mills v. Dixon*, 2 Chy. Ch. 53; and should be
confirmed, where the report is one requiring confirmation: *Mountain* day ap-
v. Porter, 1 Chy. Ch. 207. pointed for
payment

If the bank closes its office on or before the day named for pay-
ment, and default be made, an application must be made in Chambers
to appoint a new day and to name another bank, and the order must
be served: *King v. Connor*, 1 Chy. Ch. 274.

696. Where, by a report, any money in Court is found Master to
to belong to infants, the Master shall require proper evid- report age
ence of the age of the infants to be given before him, and of infant
shall in his report state the date of birth and age at the time benefi-
of his report of each of such infants, or shall certify specially caries
his reason for not so doing. Rules 23 June, 1894, 1290.

697. In administration suits, reports shall, as far as pos- Reports in
sible, be according to Form No. 84. Con. Rule 87. adminis-
tration
suits.

Taken from Chy. O. 389.

For Form 84, see H. & L. Forms No. 1042.

The Master should not, in an administration action, attach to his
report a copy of the will of the testator whose estate is administered:
McCargar v. McKinnon, 15 Gr. 361.

698.—(1) The Master in Ordinary shall have the same Master in
power, authority, and jurisdiction, as the Master in Cham- Ordinary,
bers, in respect of all causes and matters referred to him, jurisdic-
or which may arise in his office. Con. Rule 88, first part. tion of, in
Chambers

(2) Where he acts under this Rule the fees payable in
stamps shall, in respect of such business, be the same as
are payable for the like business to the Master in Chambers.
Rules 29 Sept., 1894, 1381.

699. Any Official Referee, upon the request of the Mas- official
ter in Ordinary, or of a Judge of the High Court, may Referee
sit for the Master; and while sitting for him shall have all may sit for
the authority and power of such Master, but shall not be Master and
entitled to any fees. Con. Rule 88 (b). have like
powers

**Rules
700-702.**

Practice as
to appeal-
ing from
or acting
on report
of an
Official
Referee.

It will be observed that this *Rule* only applies where the Official Referee is sitting "for the Master," it does not apply to cases where a reference is made to an Official Referee direct; in the latter cases he has, however, certain powers of the Master in Ordinary under *Rule* 654. A report of an Official Referee, whether made upon a reference to him direct, or when sitting for the Master, is to be appealed from, or confirmed, in the same manner as a Local Master's report: *Rules* 700, 771.

The concluding words of this *Rule* are probably only intended to prevent the Official Referee from collecting fees for his own use, but not to disentitle him to charge the usual fees in law stamps.

Trans-
mission of
papers at
close of
reference.

700. On the conclusion of proceedings before a Master he shall annex together all the papers in the action or matter before him and transmit the same to the office in which the proceedings were commenced, to be deposited with the other papers in the action or matter. *Rules* of 1 Jan., 1896, 1402. See also *Rule* 958.

(ii) *Inquiries for Creditors.*

Advertise-
ment for
creditors,
form of.

701. Every advertisement for creditors issued pursuant to a judgment or order, shall direct every creditor, by a time to be thereby limited, to send to such other party as the Master or other officer before whom the inquiry is, directs, or to his solicitor, to be named and described in the advertisement, the name and address of the creditor, and the full particulars of his claim, and a statement of his account, and the nature of the security (if any) held by him; and such advertisement shall be according to Form No. 79, and, at the time of directing such advertisement, a time shall be fixed for adjudicating on the claims. *Con. Rule* 976.

Where the Master finds that there has been a proper advertisement for creditors, under R. S. O. c. 129, s. 38, he may dispense with any further advertisement without any special direction so to do: *Cuthbert v. Wharmby*, W. N. 1869, 12; *Seton*, 5th ed., 1189, 1216; and see *Re Bracken*, *Doughty v. Townson*, 60 L. T. 628; S. C., affirmed 88 L. T. Jour. 6. It is not necessary that the advertisement should have been published in the *Ontario Gazette*; *Re Cameron*, 15 P. R. 272; and see *Re Bracken*, 61 L. T. 531; 38 W. R. 48.

For Form 79, see H. & L. Forms No. 936.

702. Where, in a cause or matter, an inquiry as to creditors is directed, the Master or other officer shall proceed according to or by analogy to the procedure provided by *Rules* 703 to 715. *New.*

(iii) Administration.

703. In taking accounts under a judgment or order in administration proceedings, interest shall be computed on the deceased's debts from the date of the judgment or order, and on legacies from the end of one year after the deceased's death, unless any other time of payment is directed by the will. *Con. Rule 975.*

Taken from Chy. O. 474. Under that Order, and the former *Con. Rule 975* the Master was specifically directed, in taking an account of a deceased's personal estate under an order of reference, to inquire and state to the Court what, if any of the deceased's personal estate is outstanding or undisposed of; the omission of that direction from this *Rule* is probably not intended to alter the practice, and such inquiry should still be made.

This and the following Rules 704-715, apply to proceedings before Referees as well as before Masters: see *Rule 654.*

The Master ought not to proceed *ex parte*, even though the defendant did not appear on the motion for administration: *Jackson v. Mattheys*, 12 Gr. 47.

Before proceeding to take the accounts, the Master should require the necessary evidence to be brought before him, to show who are the parties, if any, who ought to be served with an office copy of the judgment as prescribed by *Rule 203 (3)*. The Master should direct on whom the judgment is to be served, and he may also dispense with service, on any parties, as he may think fit: *Ib.*; but see *Rule 658.*

Service may be dispensed with on parties whose apparent interest is small, and where there is difficulty in effecting service, and other parties in the same interest are already represented, or directed to be served with the judgment: mere difficulty in effecting service would not alone be sufficient ground for dispensing with service.

Persons who are served with an office copy of a judgment under *Rule 203 (3)* do not thereby become parties to the action, they merely acquire a right to attend the proceedings on giving notice of their desire to do so to the plaintiff's solicitor, but they are bound by the proceedings as though they were actually parties to the action: *English v. English*, 12 Gr. 441; and see *supra*, p. 372; and where they do not attend the proceedings in the Master's office, they are not entitled to notice.

Persons so served may give notice to the plaintiff of their desire to attend the proceedings, and are then entitled to be served with the appointments in the Master's office, and with notice of the motion for distribution: but where a person served with the judgment does not notify the plaintiff of his desire to attend the proceedings, he is not entitled to notice of the proceedings in the Master's office, nor of the motion for distribution: see *Rule 203 (3)* note.

Persons so attending, however, are not, as of course, entitled to the costs of so doing out of the estate, and unless the Court is satisfied that there was some good reason for their so attending they will be left to bear their own costs in any event; and may be ordered to pay the extra costs occasioned by their unnecessary attendance: see *Rule 1148.*

Rule 704. Persons served under *Rule 203 (3)* cannot be required to account: see *supra*, p. 372.

Master
may add
parties

Where the Master finds that any persons not coming within *Rule 203 (3)*, ought to be made parties, and enabled to attend the proceedings, he may add them as parties under *Rule 630*. Persons added under that *Rule* become parties to the action, as if they had been originally made parties to the writ, and thereafter their names are added as defendants in the title of the action.

Interest to
be allowed
on debts.

Judgment
for admin-
istration
operates as
a judgment
in favour
of all
creditors

Rate of
interest
payable.
Interest on
legacies.

The direction contained in this *Rule*, as to the allowance of interest on debts, applies to debts not bearing interest, prior to the date of the judgment. The judgment for administration, operates as a judgment for all the creditors of the estate for the amount of their respective debts, and consequently from that date they bear interest; but where a creditor is entitled to interest from any prior date, by virtue of any statute, or any contract, expressed or implied, the Master may allow such interest. But where a sum is payable at a certain day, with interest, there is no implied contract to pay interest at the same rate after default; and even where the same rate has been paid for many years after default, there is no implied contract to continue doing so: *Re Roberts, Goodchap v. Roberts*, 14 Ch. D. 49; 42 L. T. 693; *Cook v. Fowler*, L. R. 7 H. L. 27; *Dalby v. Humphrey*, 37 L. C. Q. B. 514; *Simonton v. Graham*, 9 P. R. 495. As to what is a sufficient demand of interest within the Jud. Act, s. 114 (2), *supra*, p. 100; see *Ginke v. Rose*, 32 L. T. 608.

General legacies payable out of personality bear interest from the expiration of a year from the testator's death, unless the testator was the legatee's debtor, or being a parent or standing in *loco parentis* to the legatee has made no provision for the maintenance of the legatee who is an infant; interest on legacies charged on land, bear interest from the testator's death: *Ashburner v. Macguire*, 2 White & Tudor's L. C. (7th ed.), 852; but where the legacy is payable out of the proceeds of the sale of land, the interest does not run until a year from the death: *Tanner v. Buck*, 18 L. R. Eq. 301; but where the sale was postponed by the testator till after the death of a tenant for life, and the rents were directed to be applied as if the sale had taken place, a legacy payable out of the proceeds, was held to bear interest from the death of the tenant for life: *Re Waters, Waters v. Borer*, 42 Ch. D. 517; 61 L. T. 431. Where, for the convenience of the estate, the payment of a legacy is postponed by the testator, the legacy bears interest nevertheless from a year from the testator's death: *Re Olive, Olive v. Westerman*, 50 L. T. 355; as to interest on a legacy to an infant executor, see *Re Gardner, Long v. Gardner*, 67 L. T. 552; and see further as to interest on legacies, *Re Judkin*, 25 Ch. D. 743; 50 L. T. 200.

For form of report in administration proceedings, see App. Form 84 H. & L. Forms No. 1042.

Affidavit
of creditor
dispensed
with unless
required.

704. A creditor need not make an affidavit, or attend in support of his claim (except to produce his security, if any), unless he is served with a notice requiring him to do so as hereinafter provided. Con. Rule 977.

No person, except the personal representative, is entitled (except **Rule 705**, by leave of the Master) to appear on the claim of any person not a party to the cause, against the estate of the deceased, in respect of any debt or liability. But the Master may direct any other party to appear on the cause to appear, either in addition to, or in place of, the personal representative, upon such terms as to costs or otherwise as he shall think fit: see **Rule 204**.

Creditors merely sending in their claims pursuant to advertisement, ought not to be allowed any costs of so doing; but where they are required to go into formal proof thereof, the Master may fix a sum for costs, or allow taxed costs of proving the claim: see **Rule 1137**.

A notice to a creditor requiring him to make an affidavit in support of his claim, may be transmitted by post, pre-paid, addressed to him or his solicitor: see **Rule 715**.

When a creditor's claim is disputed, he may be required to produce corroborative evidence thereof: see R. S. O. c. 73, s. 10; and see cases in notes to **Rules 939** and **941**.

A judgment obtained without fraud or collusion is conclusive evidence in suits between creditors in relation to the property of the debtor, of the indebtedness of the latter and of the amount of such indebtedness: *Candee v. Lord*, 2 Com. N. Y. Rep. 260; *Martin v. Boulanger*, 8 App. Cas. 298; 49 L. T. 62; and see *Boycerman v. Phillips*, 15 Ont. App. 679; *Re Hague, Traders Bank v. Murray*, 13 Ont. 727.

Where the solicitor of a plaintiff in an administration action, had purchased, after judgment and pending an inquiry thereunder as to debts, two claims against the estate for less than the sum due, it was held that the officer to whom the action was referred had no jurisdiction to certify that the solicitor was a trustee for the creditors for any surplus he might receive over and above what he had paid for the claims: *Re Tillet, Field v. Lydell*, 32 Ch. D. 639; 54 L. T. 991; and it was also held that such a contention could not be raised at the hearing on further directions, except by consent of the solicitor.

In the administration in Ontario of the estate of a person domiciled abroad, foreign creditors are entitled to dividends *pari passu* with Ontario creditors: *Milne v. Moore*, 24 Ont. 456.

As regards the estates of persons dying after 13th April, 1897, claims for three months' salary or wages are entitled to priority of payment over ordinary creditors: see R. S. O. c. 156, s. 6.

705. Every creditor shall produce before the Master the security (if any) held by him, at the time appointed for adjudicating on the claims: and every creditor, if required by notice in writing, to be given by the executor or administrator of the deceased, or by such other person as the Master directs, according to Form No. 80, shall produce all other deeds and documents necessary to substantiate his claim before the Master, at the time specified. Con. Rule 978.

The notice to produce documents in support of his claim, may be transmitted to the creditor, by post, addressed to him or his solicitor, if any: see **Rule 715**.

Rules**706-710.**

Where the estate being administered is insolvent, the creditor must value his securities, and can only rank for the difference. The personal representative, on the authority of the other creditors, is entitled to take over the securities on payment, after realization of the securities, of 10 per cent. advance on their specified value: or the creditor may assign his security to the personal representative and rank as an unsecured creditor for the full amount of his claim: see R. S. O. c. 132.

In case of a deficiency of assets all creditors claims not specifically secured are paid *pari passu*; those specially secured have only priority in respect of the property held in security: see R. S. O. c. 129, s. 34; and this would seem now to be the rule as to voluntary debts: see *Re Whitaker*, 1900. 2 Ch. 677; 83 L. T. 342, 449.

Otherwise
not to be
allowed
costs.

706. Where a creditor neglects or refuses to comply with Rule 705, he shall not be allowed any costs of proving his claim, unless the Master otherwise directs. Con. Rule 979.

Creditors'
claims to be
examined.

707. The executor or administrator, or such other person as the Master directs, shall examine the claims sent in pursuant to the advertisement, and ascertain, as far as he is able, to which of such claims the estate is justly liable. Con. Rule 980.

Affidavit
to be made
by persons
examining
creditors'
claims.

When to
be filed.

Form of.

708. The executor or administrator, or one of the executors or administrators, or such other person either alone or jointly with his solicitor, or other competent person, or otherwise, as the Master directs, shall, seven clear days before the day appointed for adjudication, file an affidavit, which may be according to Form No. 21, verifying a list of the claims, the particulars of which have been sent in pursuant to the advertisement, and stating to which of such claims, or parts thereof, respectively, the estate of the deceased is, in the opinion of the deponent, justly liable, and his belief that such claims or parts thereof respectively, are justly due, and proper to be allowed, and the reasons for such belief. Con. Rule 981.

For Form 21, see H. & L. Forms No. 949.

Time for
making
affidavit
may be
postponed.

709. Where the Master so directs, the making of the affidavit referred to in Rule 708, may be postponed till after the day appointed for adjudication, and shall then be subject to such directions as the Master may give. Con. Rule 982.

Adjudica-
tion on
claims by
Master.

710. At the time appointed for adjudicating upon the claims, or at any adjournment thereof, the Master may allow any of the claims, or any part thereof respectively, without

proof by the creditors, and may direct such investigation of **Rule 711.**
all or any of the claims not allowed, and require such further
particulars, information, or evidence relating thereto, as he ^{Further evidence may be required.} thinks fit, and may require any creditor to attend and prove
his claim, or any part thereof; and the adjudication on such
claims as are not then allowed shall be adjourned to a time
to be then fixed. Con. Rule 983.

Taken from Chy. O. 482.

The Master, has no power under this *Rule* to employ experts to ^{Master can not employ experts.} assist him in coming to a conclusion on the claims of persons claiming
to be creditors: *Re Robertson, Robertson v. Robertson*, 24 Gr. 555.

Subject to the provisions of R. S. O. c. 132, referred to in the notes ^{Mortgagee's claim.} to *Rule 705*, a mortgagee is entitled to prove against the general
estate, and hold his security for any amount the general estate is in-
sufficient to pay: *Re Stewart, Stewart v. Stewart*, 10 Gr. 169. Where
on a deficiency of assets, some creditors are paid more than their pro-
portion, they may, on the petition of a creditor who has not been paid
his proportion, be ordered to refund the excess: *Chamberlen v. Clarke*,
1 Ont. 135; 9 Ont. App. 273; but where the personal representative
has made the payment after due notice as provided by R. S. O. c.
129, s. 38, he is protected from liability, and has no right to recover
the overpayment: *Leitch v. Molson's Bank*, 27 Ont. 621.

Where the Master requires a creditor to attend and prove his claim,
the notice so to do may be transmitted to him or his solicitor by
post, unless the Master otherwise directs: see *Rule 715*.

Notice of proceedings in the Master's office should be given to the
parties, though they have not appeared on the motion for the admin-
istration order: *Re Pattison, Jackson v. Matthews*, 12 Gr. 47, and see
Rule 658.

711. Notice shall be given by the executor or adminis- ^{Notice to be sent creditors.} trator, or such other person as the Master directs:

(a) To every creditor whose claim, or any part thereof, ^{Where claim allowed without proof.} has been allowed without proof by the creditor, of the allow-
ance, and the notice may be according to Form No. 81:

(b) And to every such creditor as the Master directs to ^{Where proof of claim is required.} attend and prove his claim, or such part thereof as is not
allowed, by a time to be named in the notice (which may be
according to Form No. 82) not less than seven clear days
after the service of the notice, and to attend at a time to be
therein named, being the time to which the adjudication
thereon has been adjourned; and in case any creditor does not
comply with the notice, his claim, or such part thereof as
aforesaid, shall be dis-allowed, unless the Master thinks fit to
give further time. Con. Rule 984.

Taken from Chy. O. 483.

Rules

712-715. The notice may be transmitted by post, prepaid, to the creditor or his solicitor, unless the Master otherwise directs: see *Rule 715*.

For Forms S1 and S2, see H. & L. Forms Nos. 953, 954.

Creditors
may send
in particu-
lars of
claim.

712. A creditor who has not before sent in particulars of his claim pursuant to the advertisement, may do so seven clear days previous to any day to which the adjudication is adjourned. Con. Rule 985.

Taken from Chy. O. 485.

After expiry
of time
limited by
advertis-
ment for
filing claims

713. After the time fixed by the advertisement a claim shall not be received (except as before provided in case of an adjournment), unless the Master thinks fit to give special leave upon application, and then upon such terms and conditions as to costs and otherwise as the Master directs. Con. Rule 986.

Taken from Chy. O. 485.

An application of a creditor to prove after the time has elapsed is usually granted: but on the terms of not disturbing any division of assets which has actually been made: *Re Metcalfe, Hicks v. May*, 13 Ch. D. 236; 42 L. T. 383; 49 L. J. Ch. 192; *Re McMurdy, Penfield v. McMurdy*, 1902, 2 Ch. 684; *Harrison v. Kirk*, 1904, A. C. 1; 89 L. T. 566.

Creditors
to be
notified
when their
claims are
payable out
of Court.

714. Where an order is made for payment of money out of Court to creditors, the person whose duty it is to prosecute the order shall send each creditor, or his solicitor (if any), a notice that the cheques may be obtained from the Accountant: and the notice may be according to Form No. 83, and such person shall, when required, produce any papers necessary to enable the creditors to receive their cheques. Con. Rule 987.

Taken from Chy. O. 486.

Creditors who have proved claims, but who are not parties to the action, are not entitled to notice of a hearing on further directions, nor of an application for distribution: *Lavin v. O'Neill*, 13 Gr. 179.

Creditors who have received more than their share, may be ordered to refund, on the application of a creditor who has not received his proper proportion: *Chamberlen v. Clarke*, 1 Ont. 135; 9 Ont. App. 273; but the right may be barred by the Statute of Limitations, if not prosecuted within six years from the date of the overpayment: *Blake v. Gale* 31 Ch. D. 196; or may be lost by acquiescence: S. C. 55 L. T. 234.

For Form 83, see H. & L. Forms No. 956.

Notice, how
to be sent
to creditors.

715. Every notice by Rules 703 to 714, required to be given shall, unless the Master otherwise directs, be deemed to be sufficiently given and served if transmitted by post.

prepaid, to the creditor to be served, according to the address given by the creditor in the claim sent in by him pursuant to the advertisement, or, in case the creditor has employed a solicitor, to such solicitor, according to the address given by him. Con. Rule 988. Rules 716-718.

(iv) Sales.

716. Where a sale is ordered, the Master may cause the property, or a competent part thereof, to be sold either by public auction, private contract, or tender, or part by one mode and part by another, as he may think best for the interest of all parties. Con. Rule 89. General provisions where a sale is ordered.

This and the following Rules 716-743, apply to sales by Official Referees, as well as by Masters: see Rule 654.

717. Where the trusts of any will or settlement are being administered and a sale is ordered of any property vested in the trustees of such will or settlement upon trust for sale or with power of sale by the trustees, the conduct of the sale shall be given to the trustees, unless otherwise ordered. Con. Rule 90. Conduct of sale under trusts of will or settlement.

Identical with Eng. R., March, 1879, r. 7, formerly the plaintiff would have had the conduct: *Re Marshall*, W. N. 1879, 12.

Under this Rule the conduct of the sale was given to a defendant in an action by one trustee, who was also tenant for life, against the three other trustees: *Re Gardner, Gardner v. Beaumont*, 48 L. J. Chy. 644.

718. Where a sale is to take place under a judgment or order of the Court, the original judgment or order shall be used, unless the Master requires a copy. Con. Rule 91. Copy of order directing sale, is not to be brought into M. O. unless required by the Master.

Taken from Chy. O. 374.

Conduct of the Sale.—The party having the carriage of the order, or judgment, directing a sale, is the party usually entitled to the conduct of the sale. Conduct of sale. Who entitled to.

The mere extent of the interest of any party in the property, or the possession by him of title deeds, does not give any right to conduct the sale. Usually the plaintiff having the carriage of the judgment, or order, will also have the conduct of the sale: *Dale v. Hamilton*, 10 Ha. App. vii. But where it is for the benefit of all parties, the conduct of the sale may be given to a defendant: *Hewitt v. Nansom*, 7 W. R. 5; *Dixon v. Pinner*, 7 Ha. 331; or where all parties to the action wish to bid, it may be given to an independent solicitor: *Ramsay v. McDonald*, 8 P. R. 283.

Rules**719, 720.**Trustees
entitled to
in certain
cases.Duty of
solicitor
conducting
sale.

But "where the trusts of any will, or settlement, are being administered, and a sale is ordered of any property vested in the trustees of such will, or settlement, upon trust for sale, or with power of sale by such trustees, the conduct of such sale shall be given to such trustees, unless the Judge shall otherwise direct": *Rule 717.*

It is the duty of the solicitor of the party having the conduct of the sale, to prepare the advertisement, to procure its settlement by the Master, and to see to its publication, pursuant to the Master's direction, to make the necessary arrangements with the auctioneer, to attend the sale, to see that the contracts are duly signed by the purchasers, to prepare the necessary affidavits proving the sale, and procure the report on sale to be settled and filed, to deliver abstracts, answers to requisitions, and objections, and to attend any reference as to the title; to attend the settlement of the conveyances, and procure their execution by all necessary parties to the action; and to enforce, if necessary, by motion the due performance by the purchasers of their contracts. He is usually styled "the vendors' solicitor," and as such he acts for the purpose of the sale, and as regards the purchaser, for all the parties to the action who are interested in the land directed to be sold: *Dalby v. Pullen*, 1 R. & M. 204; *Street v. Hallett*, 6 P. R. 312; but his own client must bear any loss occasioned by such solicitor's malfeasance, such as the misappropriation of the purchase money: *Mulkins v. Clarke*, 11 P. R. 350.

Duty of
parties.

Every party to the action is bound to facilitate the sale: *Knott v. Cottee*, 27 Beav. 33. Interference by other parties, with the party having the conduct of the sale, may be restrained by injunction: *Dean v. Wilson*, 10 Ch. D. 136.

The party having the conduct of the sale, is not at liberty to bid, unless leave to do so is granted specially: see *Rule 725.*

Abortive
sale.

Where a sale has proved abortive for want of bidders, the property may be advertised and put up again for sale without further order: *Sherwood v. Campbell*, 1 Chy. Ch. 299.

Appoint-
ment to
settle adver-
tisement.

719. An appointment or warrant in respect of the sale shall be obtained from the Master, and served upon all necessary parties. Con. Rule 92.

Taken from Chy. O. 375.

Draft
advertis-
ment to be
brought in,
but no par-
ticulars or
conditions.

720. At the time appointed thereby, the party having the conduct of the sale shall bring into the Master's office, a draft advertisement, but no particulars or conditions of the sale, or draft or copy thereof. Con. Rule 93.

It will be seen from the next *Rule*, that any particulars in which the proposed conditions of sale differ from the standing conditions, are to be set out in the advertisement. This *Rule*, therefore, renders, it unnecessary to bring in any particulars and conditions of sale, apart from those necessarily required to be embodied in the advertisement.

721. The advertisement shall contain the following particulars:—

- (a) The short style of cause;
- (b) That the sale is in pursuance of a judgment or order of the Court;
- (c) The time and place of sale;
- (d) A short and true description of the property to be sold;
- (e) The manner in which the property is to be sold, whether in one lot or several, and if in several, in how many, and what lots;
- (f) What proportion of the purchase money is to be paid down by way of deposit, and at what time or times, and whether the residue of such purchase money is to be paid with, or without interest;
- (g) Any particulars, in which the proposed conditions of sale differ from the standing conditions.

Rule 721.

Advertisements of sale to contain, style of cause, Recital of order.

Time and place of sale

Description of property.

Manner of sale.

Terms of payment of purchase money.

Any special conditions.

Taken from Chy. O. 377.

Advertisements of sale should be framed as concisely as possible, and all matter which conveys no necessary information to intending purchasers should be excluded. The introduction of "puffing" is to be avoided: *Baxter v. Finlay*, 1 Chy. Ch. 230; *Buchan v. Wilkes*, *Id.*, 231. The advertisement should set out the improvements: *Heward v. Ridout*, 1 Chy. Ch. 244; and the existence of a favourable lease, if any: *McAlpine v. Young*, 2 Chy. Ch. 171. But any omissions of this kind, must, as a general rule, be objected to at the time of settling the advertisement, or before the sale has taken place: *Creswick v. Thompson*, 6 P. R. 32. But, where a material fact was omitted from the advertisement, e.g., that a lease was subject to a ground rent, the purchaser was discharged from his purchase: *Jones v. Rimmer*, 14 Ch. D. 588; 43 L. T. 111; 49 L. J. Ch. 775.

Misdescription in the advertisement, where it amounts to a material misrepresentation, is also a ground for compensation to the purchaser: *Stammers v. O'Donoghue*, 28 Gr. 207; even after conveyance: *Bull v. Harper*, 6 P. R. 36; or may entitle the purchaser, at his option, to be relieved from his purchase: *Mathias v. Yetts*, 46 L. T. 497; *Redgrave v. Hurd*, 20 Ch. D. 1; 45 L. T. 485; 51 L. J. Ch. 113; but he is not entitled to compensation if he bought with knowledge of the facts: *Re Edwards & Daniel*, 62 L. T. 445; and see *post*, pp. 944, et seq.

Where a misstatement in the advertisement has been verbally corrected at the sale by the auctioneer, but such correction was not heard by the purchaser, the latter is not entitled to compensation, though *semble*, the vendor might not be entitled to enforce the contract specifically: *Re Hare & O'More*, 1901, 1 Ch. 93; 83 L. T. 672.

Rule 721. Where leaseholds subject to onerous covenants are offered for sale, such covenants should be disclosed to the purchaser; and an acceptance of the title in ignorance of such covenants will not be binding on the purchaser: *Re Haddicke & Lipski*, 1901, 2 Ch. 666; 85 L. T. 402; *Molyneux v. Hawtrey*, 1903, 2 K. B. 487; 89 L. T. 350.

Special conditions of sale not to be resorted to without cause.

Special Conditions.—Unnecessarily stringent conditions of sale ought not to be sanctioned by the Master: thus where the title, or the proof of it, was involved in no difficulty, a condition of sale that "The vendor is not to be bound to give any evidence of title, or any title deeds, or copies thereof, other than such as are in his possession, or prove any abstract," was condemned by the Court: *McDonald v. Gordon*, 2 Chy. Ch. 125; and see *Dance v. Goldingham*, L. R. 8 Chy. 402; *Dunn v. Flood*, 25 Ch. D. 629; 49 L. T. 670; 28 Ch. D. 586; 52 L. T. 689; *Re Rayner*, 53 L. T. 495. Trustees were restrained from selling without a reserved bid: *Downey v. Dennis*, 14 Ont. 219.

In sales by the Court, if a good title can be made, the parties are not at liberty to relieve themselves by special conditions from the obligation to make such a title, and the Court will not provide by conditions for imaginary defects, *per Mowat v. C.*, *McDonald v. Gordon*, 2 Chy. Ch. 126; *Piers v. Piers*, Sau. & Sc. 414. "It is the uniform practice of a Court of Equity, not to set up for sale a title knowing it to be bad": *Bennett v. Wheeler*, 1 Ir. Eq. 16; *Lahey v. Bell*, 6 Ir. Eq. 122; *Sugden v. & P.*, 14th ed., 100, and see *Hume v. Bentley*, 5 De G. & S. 527.

Where a contract stated that the land was sold "subject to the conditions of the Incorporated Law Society" it was held that the conditions for the time being of the Incorporated Law Society were incorporated into the contract and it was not open to the objection that it did not sufficiently comply with the Statute of Frauds: *Pickles v. Sutcliffe*, 114 L. T. J. 172; and the same rule would doubtless apply to the incorporation of the standing conditions of the Court referred to in *Rule 723*.

Condition requiring purchaser to assume as true, what is false, is bad.

A condition of sale is bad, as misleading, if it requires the purchaser to assume as true what the vendor knows to be false; or if it states that the state of the title is not accurately known, when in fact it is known to the vendor: see *Nash v. Wooderson*, 78 L. T. Jour. 59. And a purchaser purchasing at a sale by the Court under such conditions, is entitled to have a good title made, notwithstanding the conditions; but where the conditions on the face of them purport to give only a good holding title, that is all the purchaser, even though relieved from the conditions, can insist on: *Re Banister, Broad v. Munton*, 12 Ch. D. 131.

Effect of special conditions as to title.

And where a sale was had, under a condition that precluded the purchaser from objecting to the title prior to the document chosen as the root of the title, but the purchaser inquired into the prior title and refused to complete, on the ground that the prior title was bad, the Court, being of opinion that the objection was well founded, refused to enforce the sale against the purchaser, and discharged him from his purchase: *Elsie v. Elsie*, L. R. 13 Eq. 196; *Williams v. Wood*, 16 W. R. 1005; *Bennett v. Wheeler*, 1 Ir. Eq. 16; *Hume v. Bentley*, 5 De G. & S. 527; and see *Dunn v. Flood*, *supra*; but see *Re National Provincial Bank v. Marsh*, 71 L. T. 629.

Where a sale was had under a condition that no objection or requisition should be made by the purchaser by reason of the non-acknowledgment of a deed dated 18th December, 1841, by a married woman, who was a party to it, and it turned out that the deed in question was the conveyance to the vendor, and that the married woman had one-fifth interest in the estate, and that the vendor, though in possession, had not acquired a title under the Statute of Limitations, the Court refused to enforce the contract against the purchasers: *Re Cumming to Goldbolt*, 78 L. T. Jour. 31.

Where a sale was had upon condition that in case the vendor should be unable or unwilling to remove or comply with any objection or requisition made by the purchaser, he might rescind the sale, and the purchaser delivered requisitions which the vendor answered, but the purchaser considered the answer insufficient, and the vendor then gave notice that he rescinded the contract, it was held that the purchaser could not by subsequently waiving his objections prevent the rescission from taking effect: *Danck v. Wood*, 51 L. T. 109. Where there was such a condition, and it appeared that the purchasers objected to a prior contract for sale appearing on the registry, and they offered to give time for the removal of their objection, if the vendor would give an indemnity against the prior contract, and they threatened action if this was not accepted, the vendor, in good faith rescinding, was held entitled to do so: *Woolcott v. Peggic*, 15 App. Cas. 42; see also *Re 163rd Starr Bowkett Building Society v. Siburn*, 61 L. T. 346; but such a power to rescind can not be exercised except in good faith: *Smith v. Wallace*, 1895, 1 Ch. 385.

Under a condition of sale giving the vendor right to rescind in the event of his being unable or unwilling to answer any requisition or objection to the title, there is a difference between the case of a vendor selling having no title, and selling a defective title; in the former case he cannot avail himself of the condition: *Bowman v. Hyland*, 8 Ch. D. 588; *Re Jackson & Haden*, 53 W. R. 426; while in the latter case he can: *Re Deighton*, 1898, 1 Ch. 458; 78 L. T. 430.

The expense of procuring title deeds not in the vendor's possession, to which the purchaser is entitled, must be borne by the vendor in the absence of any condition to the contrary, and *semble*, a condition that the vendor shall not be bound to produce them for verification of the abstract is not a sufficient condition to the contrary: *Re Duthy & Jesson*, 1898, 1 Ch. 419.

The standing conditions of sale are those referred to in *Rule 723*.

Where an advertisement is not settled in proper form, it may on motion in Chambers be referred back to the Master to be re-settled, and if necessary to appoint a new day for the sale: *Heward v. Ridout*, 1 Chy. Ch. 244; such an application if in the nature of an appeal from the Master would seem to be beyond the jurisdiction of the Master in Chambers, and to be proper to be made to a Judge.

Where the conditions limit a time for making objections to the title, and provide that objections not made within the time shall be deemed to be waived, such conditions will be strictly binding on the purchaser, except in the case of an objection shewing that the vendor has no title: *Armstrong v. Nason*, 25 S. C. R. 263.

Rule 722.

Master on return of warrant, to settle advertisement to appoint auctioneer and fix time and place of sale, etc.

722. At the time named in the appointment or warrant, the Master shall settle the advertisement, fix the time and place of sale, name an auctioneer, where one is to be employed, and make every other necessary arrangement preparatory to the sale, so that nothing may remain to be done but to insert the advertisement; and all the before mentioned matters shall be done upon the return of the appointment or warrant where it is practicable, and no adjournment shall take place unless it is unavoidable. Con. Rule 95.

Taken from Chy. O. 378.

Formerly sale must be by auction, unless otherwise ordered, but now Master may direct sale by tender, etc.

Formerly all sales directed by the Court of Chancery had to be by auction, unless the order, or decree, expressly authorized a sale in some other way. Even after an abortive attempt to sell by auction, a sale in any other way could not be had except by express order; *Berry v. Gibbons*, L. R. 15 Eq. 150. Now, where a sale is ordered, the Master may cause the property, or a competent part thereof, to be sold either by public auction, private contract, or tender, or part by one mode, and part by another, as he may think best for the interest of all parties; and he may fix an upset price, or reserved bidding, but such price or bidding, must be so fixed at the meeting held by him for the settling of the advertisement, and making the other arrangements preparatory to the sale, and must be notified in the conditions of sale: *Rule 725*. The Master is not justified in accepting a tender from the person having the conduct of the sale; *Ramsay v. McDonald*, 8 P. R. 283.

Sales by auction, highest bidder, right of.

Limited right of vendor to bid cannot be exceeded.

Where land is offered for sale by auction, unless in the particulars or conditions of sale it is stated that the land will be sold subject to a reserved price, or a right of the seller to bid, the sale is to be deemed, and taken, to be without reserve; and upon any sale without reserve, it is unlawful for the seller, or a puffer, to bid, or for the auctioneer knowingly to take any bidding from a seller, or puffer; see R. S. O. c. 119, ss. 22, 23; *Heron v. Moffatt*, 22 Gr. at pp. 375-6; *Johnston v. Boyes*, 1899, 2 Ch. 73; 80 L. T. 488. Upon a sale without reserve it is not open to the vendor to refuse a bid, however small; *O'Connor v. Woodward*, 6 P. R. 223; *McAlpine v. Young*, 2 Chy. Ch. 171; and the vendor is liable to the highest bidder for breach of contract if he refuses to accept his bid; *Johnston v. Boyes*, *supra*; and see 117 L. T. Jour. 455; *Fenwick v. Macdonald*, 41 Sc. L. R. 688; *Rainbow v. Hawkins*, 1904, 2 K. B. 322; 91 L. T. 149. The offer of property subject to a reserved bidding, does not involve also a right for the seller to bid, or to employ a puffer; thus, where a sale was advertised under a decree subject to a reserved bid, but no right on the part of the seller to bid was reserved, but a puffer was employed whose bids did not exceed the reserved bid, the sale was on the application of the purchaser set aside; *Gilliat v. Gilliat*, 18 W. R. 203; L. R. 9 Eq. 60, and if a limited right to bid be reserved, and the limit be exceeded, the sale is voidable; *Parfitt v. Jepson*, 46 L. J. C. P. 529.

Mortgage actions, mortgagor's duty as to advertisement.

Under a judgment for sale in a mortgage action it is the mortgagor's duty to see to the parcelling out of the land directed to be sold, and, if he considers too much is offered for sale, he should urge the objection at the time of settling the advertisement, and it should be stated in the advertisement that so soon as sufficient has

been realized by the sale to pay off the plaintiff's and other claims. **Rule 723.** the remaining lots, if any, will be withdrawn, if that course is intended to be pursued: *Beatty v. Radenkurst*, 3 Chy. Ch. 344.

Properties widely apart should not be included in one parcel; thus shops in a village, and a farm three-quarters of a mile away, were held to have been improperly included in one parcel: *Aldrich v. Canada Permanent L. & S. Co.*, 24 Ont. App. 193.

Where the Master enlarged the time appointed for sending in tenders, it was held that he had a right to do so, and that the highest tender in at the time originally appointed was not necessarily to be accepted; notwithstanding it was advertised that the sale would be then "peremptorily closed": *Re Atyer, etc.*, 21 Ont. 440.

Where property is offered for sale subject to incumbrances, they must be accurately described; and where the agreement for sale stated that the land was to be subject to a "mortgage incumbrance of \$750, bearing interest at the rate of 7 per cent. per annum," and it turned out that the mortgage was for \$3,000, with interest at 10 per cent. per annum, payable half-yearly, to be reduced if punctually paid to 7 per cent., with an agreement to release the land, which was the subject of the contract, on payment of \$750; it was held that the agreement did not convey an accurate statement as to the nature of the incumbrance, and that the purchaser was entitled to be relieved from the contract: *Re Booth & McLean*, 21 Ont. 452.

The Master, or his clerk, may conduct the sale if no auctioneer is employed: see **Rule 727**. No license for the Master, or his clerk, to act as auctioneer under R. S. O. c. 223, s. 583 (2), is necessary: *Regina v. Chapman*, 1 Ont. 582.

723. The standing condition of sale shall be those set forth in Form No. 85. **Cont. Rule 96.**

Taken from Chy. O. 379.

For Form 85 see H. & L. Forms No. 1005.

Any conditions varying from, or in addition to, the standing conditions must be stated at length in the advertisement: **Rule 721.**

Where the owner of the equity of redemption is dead, and his heirs are out of the jurisdiction, or unknown, a sale may be directed in an action against a subsequent mortgagee, and the Provincial Attorney-General as representing the deceased mortgagor, but the circumstances under which the sale is directed, must be stated in the particulars of sale: *Smith v. Good*, 14 Gr. 444.

As to special conditions, see note to **Rule 721.**

Even without the standing condition for a re-sale in case of default by the purchaser, and payment by him of any deficiency, the law implies such a contract: *Re Hornibrook*, 12 P. R. 591.

The fact that the standing conditions are incorporated into the contract by reference does not render the contract open to the objection that it does not comply with the Statute of Frauds: see *Pickles v. Sutcliffe*, 114 L. T. J. 127.

Where, as the standing condition provides, the deposit is payable to the vendor's solicitor; if he makes away with it, it cannot be recovered from the auctioneer: *Brown v. Furbrother*, 59 L. T. 822; but the client of the solicitor is responsible to the other parties interested, to make good the loss: *Mulkins v. Clarke*, 11 P. R. 350.

Rules
724, 725.

Master
may fix
upset price
or reserved
bidding.

Reserved
bid, how
fixed.

How com-
municated
to auc-
tioneer.

All parties
may bid
except
party havin-
g conduct of
sale, trust-
ees, etc.

Leave to
bid not
granted
to party
having
conduct
of sale.

Nor to
executor,
receiver,
guardian
ad litem, nor
trustee.

724 The Master may, without further order, fix an upset price, or reserved bidding, but this shall be done at the time the advertisement is settled and shall be notified in the conditions of sale. Con. Rule 97.

Taken from Chy. O. 380, and original J. A. Rule 331.

In order to enable the Master to fix a reserved bid, an affidavit made by some competent surveyor must be filed. See H. & L. Forms, No. 1003.

According to the English practice affidavits for the purpose of enabling the Judge to fix reserved biddings are to state the value of the property by reference to an exhibit, so that the value may not be disclosed by the affidavit when filed: Eng. (1883) II. 683.

The amount of the reserved bid should not be stated in the conditions of sale, but merely the fact that the sale is to be subject to a reserved bid.

Where the Master omitted on the setting of the advertisement to fix a reserved bid, on motion in Chambers, leave to fix a reserved bid, and re-advertise was granted: *Fraser v. Bens*, 1 Chy. Ch. 71.

Where the sale takes place elsewhere than before the Master, a note of the amount of the reserved bid under a sealed cover is to be delivered to the auctioneer, or person selling the estate, with instructions not to open it until the biddings are closed, and not to make the amount of it known even then.

A bona fide purchaser cannot be prejudiced by any mistake made in fixing the reserved bid: *Re Jelly*, 3 O. L. R. 72.

725. All parties may bid, without taking out an order for the purpose, except the party having the conduct of the sale, and except any trustees, agents, and other persons in a fiduciary position; and where any parties are to be at liberty to bid, it shall be notified in the conditions of sale. Con. Rule 98.

Taken from Chy. O. 381.

Leave to bid will not usually be granted to the party having the conduct of the sale: *Phillips v. Conger*, 1 O. S. 583; *Domville v. Barrington*, 2 Y. & C. 723; *Sidney v. Ranger*, 12 Sim. 118, nor to his servants, or agents: see *Martinson v. Clowes*, 21 Ch. D. 857; 46 L. T. 882; 51 L. J. Ch. 594; except upon the terms of transferring the conduct of the sale to an independent solicitor, if none of the other parties will take it: *Ramsay v. McDonald*, 8 P. R. 283. Leave to bid has also been refused to an executor, in an administration action: *Geldard v. Randall*, D. Jur. 1085; to a receiver: *Alven v. Bond*, 1 Flan. & K. 196; to a guardian ad litem: see Seton, 5th ed., 297; *Crawford v. Boyd*, 4 P. R. 278. Leave will not, in general, be given to trustees to bid, unless all the cestuis quo trustent who are sui juris consent, and no other purchaser at an adequate price can be found: *Tennant v. Treachard*, L. R. 4 Chy. 537, 547; *Farmer v. Dean*, 32 Beav. 327; and see *Ricker v. Ricker*, 27 Gr. 516; 7 Ont. App. 28; 18 C. L. J. 274; 2 C. L. T. 399, and a trustee who has obtained leave to bid, is not exonerated from his duty of protecting the in-

trust of his *cestui que trust*; *Ib.*, but see *Bonwell v. Cooks*, 48 L. T. Rules 929; 51 L. T. 242; 55 L. T. 32; 23 Ch. D. 302; 27 Ch. D. 424; 11 App. Cas. 232. Where a trustee, who was also entitled to a lien on the trust estate for advances, had failed to realize the trust estate by sale at auction, or by tender, he was himself permitted to become the purchaser; *Hutton v. Justin*, 2 O. L. R. 713. Although a vendor cannot himself become the purchaser unless he has obtained special leave to bid, yet it would seem that there is no objection to a Joint Stock Company in which he is a shareholder becoming the purchaser; see *Furray v. Furrars*, 40 Ch. D. 395; 59 L. T. 619. But where a trustee for sale or the vendor, has a secret understanding not amounting to a contract, that the purchaser will resell the property to him, the sale will be set aside though no actual fraudulent intent be proved; *Re Pottlethwaite*, 59 L. T. 58; but this case was reversed on appeal owing to the great lapse of time; 60 L. T. 514.

Leave for parties, not otherwise entitled, to bid, is sometimes obtained in the order, or judgment, directing the sale, but an order for that purpose is usually obtained in Chambers on notice to the other parties interested. The Master formerly had no power to grant such leave; *Re Laycock, McGillivray v. Johnson*, 8 P. R. 545, but may now do so in the exercise of his jurisdiction in Chambers under Rule 685.

Where a party not authorized to bid, has bid without leave and becomes the purchaser, the sale will not necessarily be set aside, but the property may, on the application of the other parties interested, be ordered to be put up for sale again at the expense of the party so bidding, and if no more can be realized he may be held to his purchase; *Wilson v. Greenwood*, 10 Sim. 101; *Sidney v. Ranger*, 12 Sim. 118; *Crawford v. Boyd*, 6 P. R. 278; and see *Martinson v. Claves*, 52 L. T. 703.

726. The advertisement shall be inserted by the party conducting the sale, at such times and in such manner as the Master appoints. Con. Rule 99.

Taken from Chy. O. 382.

Where a sale is postponed, a note of such adjournment published at the foot of the original advertisement will suffice, without incurring the expense of an entirely fresh advertisement; *Thompson v. Milliken*, 15 Gr. 197.

Sales are not to be postponed except in extreme cases. Where, pending the time appointed in a mortgage suit for redemption, the mortgagor made an assignment in insolvency, and the plaintiff proceeded with the suit without adding the assignee; a motion by the latter to stay the sale on the ground that he had no notice of settling the advertisement was refused; *Hoskins v. Johnston*, 6 P. R. 257.

727. The Master or his Clerk shall conduct the sale where no auctioneer is employed. Con. Rule 100.

Taken from Chy. O. 383.

An auctioneer selling land is not required to be licensed under the R. S. O. c. 223, s. 582 (2); *Reid v. Chapman*, 1 Ont. 582; but an assignee for the benefit of creditors cannot act as auctioneer at a sale of goods without a license; *Reg. v. Robson*, 22 Ont. 467.

Rules

728, 729.

Biddings.

728. Biddings need not be in writing, but a written agreement shall be signed by the purchaser at the time of sale. Can. Rule 101.

Sale with-
out reserve.

Where the sale is to be without reserve, the vendor is not at liberty to refuse any bid, however small: *O'Connor v. Woodhead*, 13 P. R. 231; *McAlpine v. Young*, 2 Chy. Ch. 85, 171; *Johnston v. Hopes*, 1809, 1 Ch. 73; 80 L. T. 483; nor can the vendor, or a puffer, bid, unless the right to bid is expressly reserved in the conditions of sale. And where the right to bid is limited to one or more bids, the vendor may not exceed it. And where the sale is subject to a reserved bid, a puffer cannot also be employed: see *Rule 722*; but where a stranger, at the instance of the mortgagor, made a fictitious bid at a sale of the mortgaged property under a judgment of the Court, it was held that a purchaser could not avoid the sale on the ground that he had been thereby induced to bid more than he otherwise would: *Union Bank v. Munster*, 37 Ch. D. 51; 57 L. T. 877.

Vendor, or
puffer may
not bid.

Where the sale is without reserve, but the vendor, after a bid has been made, withdraws the property from sale, the highest bidder may, nevertheless, apply to be declared the purchaser: *McAlpine v. Young*, *supra*. It would seem that such an application should be made in the first place to the Master to report on the sale, and if he refuses to report the highest bidder the purchaser, an appeal would lie from him to the Court in the ordinary way: see *Rule 771*. In *McAlpine v. Young*, the application appears to have been made in Chambers in the first instance.

Accept-
ance of an
invalid bid.

Where the auctioneer has accepted the bid of a vendor, or puffer, who had no right to bid, and declared him the purchaser, it would seem that the highest bidder lawfully bidding, would be entitled to set aside the sale, and have himself declared the purchaser.

Contract.

The agreement to be signed by the purchaser should identify the property purchased, by reference to the particulars and conditions of sale, and should in other respects be a sufficient agreement to satisfy the requirements of the Statute of Frauds; but it is possible that a contract upon a sale by the Court might be enforced though these formalities had not been complied with: see *Daniel's Pr.*, 6th ed., 1104.

Contract,
how to be
signed.

The purchaser should sign his name, and his address and quality should also be stated. If his signature is not plain, or initials are used, it is desirable that a note of his full name should be written at the foot. Where any person purchases as agent for another, it should be so expressed in the signature, otherwise he will be treated as the purchaser, unless an affidavit showing the fact to be otherwise, is produced on the settlement of the report on sale: see *Dani. Pr.*, 6th ed., 1083.

The auctioneer has authority to sign the contract for the purchaser, but he must sign it at the time of the sale, he cannot do so afterwards, nor can he delegate the authority to sign for the purchaser to his clerk, or any other person: *Bell v. Balls*, 70 L. T. 254.

Deposit at
sale, how
to be paid.

729. The deposit shall be paid to the vendor, if present, or if not, to his solicitor, at the time of sale, and shall forthwith be paid by him into Court, in the name of the purchaser. Can. Rule 102 *amended*.

Taken from Chy. O. 387.

If the solicitor for the vendor neglects to pay the deposit into Court, he may be compelled to do so by order, on application of the purchaser: *Crooks v. Glenn*, 1 Ch. Ch. 354. And where he neglected to pay in the deposit, and in consequence of his not having done so the judgment was not in the hands of the Accountant, so that the purchaser could not obtain a direction to pay in the balance of his purchase money, the solicitor was ordered to pay the interest which would have accrued on the whole purchase money. If the money had been duly paid into Court: *Smith v. Dunn*, 3 C. L. T. 217.

Where the deposit was paid by the auctioneer to one of a firm of solicitors having the conduct of the sale, who misappropriated it, the other members of the firm were held liable for it: *Riggs v. Bree*, 45 L. T. 648; 46 L. T. 8; and see *Thompson v. Robinson*, 15 Ont. 662; 16 Ont. App. 175. The auctioneer is not bound to accept a cheque for the deposit: *Johnston v. Boyce*, 1890, 2 Ch. 73; 81 L. E. 488.

The client of the solicitor making default is responsible to the other parties to the action for his misfeasance: *Mutkus v. Clarke*, 11 P. R. 350; but an auctioneer who pays the deposit to the solicitor pursuant to the conditions of sale is discharged from liability: *Brown v. Fairbrother*, 59 L. T. 822. Where at a sale out of Court by a mortgagee he had accepted a cheque for the deposit which proved bad, and the sale fell through in consequence of the purchaser turning out to be worthless, it was held that the mortgagee was nevertheless entitled to add the costs of the auction sale to his debt: *Farrer v. Lacey*, 31 Ch. D. 42; 50 L. T. 121; 53 L. T. 515.

Where the sale is not completed through the default of the purchaser, he forfeits his deposit to the vendor: *Rosenberg v. Cooke*, 8 Q. B. D. 162; *Whelan v. Couch*, 20 Gr. 74; *Smith v. Butler*, 1900, 1 Q. B. 604; 82 L. T. 281; *Tilt v. Knapp*, 9 P. R. 314; *Re Hornbrook*, 12 P. R. 591; and all other payments made on account of purchase money: *Gibbons v. Cozens*, 20 Ont. 356; but see *Cornwall v. Hanson*, 1899, 2 Ch. 710; 81 L. T. 113; 1900, 2 Ch. 298; 82 L. T. 735; even though there be no stipulation to that effect: *Ex parte Burrell*, *Re Parnell*, L. R. 10 Ch. 512; *Dunn v. Fere*, 19 W. R. 151; and see *Hove v. Smith*, 50 L. T. 573; *Cotton v. Bennett*, 26 Ch. 1, 161; 51 L. T. 70; and even though specific performance is refused: *Scott v. Alvarez*, 1895, 2 Ch. 603; 73 L. T. 43. And this is so, even where the contract is invalid, and could not be legally enforced: *Thomas v. Brown*, 35 L. T. 247; but see *Casson v. Roberts*, 31 Heav. 613; or where there is a defect in the vendor's title, which the purchaser is precluded, by the conditions, from objecting to: *Rosenberg v. Cooke*, *supra*; nor can it be recovered though the purchaser shows that the title is bad, where he has bought subject to a condition which precludes him from objecting to the title: *Scott v. Alvarez*, *supra*; and where a good holding title is shewn, but not one which the Court would force on a purchaser, if the purchaser refuses to complete, he cannot under such circumstances recover the deposit: *Re Turner & Thomas*, 88 L. T. Jour. 81.

The deposit is only recoverable where there is a breach of contract by the vendor: *Ib.*, and see *Corrall v. Cattell*, 4 M. & W. 734.

A deposit, which has been forfeited for default of the purchaser, cannot be recovered back on the ground that upon a re-sale of the property a fatal defect in the title was discovered: *Super v. Arnold*, 35 Ch. D. 384; 14 App. Cas. 420.

Rules

730, 731. But where a sale has been improperly conducted and the purchaser has notice that such is the case, he may refuse to carry out the purchase and recover his deposit: *Locking v. Halstead*, 16 Ont. 32.

Costs of paying in purchase money.

Though the vendor's solicitor is entitled to his costs of receiving the deposit on sale, and paying it into Court, out of the fund, he must look to the purchasers for his costs of receiving, and paying into Court any other instalments of the purchase money, which it is their duty to pay into Court: *Re Robertson*, 24 Gr. 555.

In England the auctioneer, or solicitor, appointed to receive the deposit, is required to give security duly to account therefor; Danl. Pr., 6th ed., 1089. But this has not been customary in Ontario.

In sales out of Court, a vendor's solicitor, who has received a deposit of the purchase money, and applied it on account of his costs due by his client, cannot be made to refund it at the suit of the purchaser: *Ellis v. Goulton*, 1893, 1 Q. B. 350.

Affidavit of auctioneer, or certificate of Master of result of sale.

730. After the sale is concluded, the auctioneer, where one is employed, shall make an affidavit according to Form No. 22; and where no auctioneer is employed, the Master or his Clerk shall certify to the like effect the result of the sale. Con. Rule 103.

Taken from Chy. O. 386.

For form of affidavit of auctioneer, see H. & L. Forms, No. 1010.

Report on sale, form of.

731. The report on sale shall be according to Form No. 86. Con. Rule 104.

Taken from Chy. O. 387.

For Form No. 86, see H. & L. Forms, No. 1013.

The solicitor having the conduct of the sale usually takes the necessary steps to procure the report on sale; but it would seem that a purchaser may himself take out the report on sale, and get it confirmed where he is the sole purchaser: *Crooks v. Glenn*, 1 Chy. Ch. 354; or *semble*, he may take a separate report as to his own purchase where he is not the sole purchaser.

Opposing sale before Master.

The confirmation of a sale may be opposed before the Master, and the sale disallowed, on grounds which would justify a motion to set it aside: *Beatty v. Radenhurst*, 3 Chy. Ch. 344; *Rodgers v. Rodgers*, 13 Gr. 143.

Opposing sale in Chambers.

A motion to confirm a sale will not be entertained in Chambers, where an irregularity has occurred, unless the sale has been approved of by the Master: *Thomas v. McGee*, 2 Chy. Ch. 456; and see *Copley v. Colbart, Jr.*, 455. Where the Master's directions have not been observed, the party having the conduct of the sale will have to shew, at his own expense, that no person interested has been injured by the non-observance of the direction, otherwise the Master will not confirm the sale: *Royal Canadian Bank v. Dennis*, 4 Chy. Ch. 68.

Where a party bidding and becoming the purchaser had no right to bid.

Where a person not having authority to bid, has improperly bid and been declared at the auction to be the purchaser, the Master should not declare the sale void, but should report the sale, stating the facts as to the improper bid; and it is then open to the other parties to move to have the property again put up for sale, at the expense of

the party so bidding improperly, and holding him to his purchase if Rule 732, no higher price is realized; *Crawford v. Boyd*, 6 P. R. 278, note p. 280; or the purchaser may, on notice to all parties interested, move to confirm the sale to him. When the person so bidding has also had the conduct of the sale, the sale will not as a general rule be confirmed, if any party objects.

Until confirmation of the report on sale, the property is at the risk of the vendor, and in the event of fire, the loss occasioned thereby must fall on him; *Stephenson v. Bain*, 8 P. R. 166, 278; S. C., 16 C. L. J. 15, 115; but as to sales out of Court; see *Rayner v. Preston*, 43 L. T. 18; S. C., in Appeal, 44 L. T. 787; 18 Ch. D. 1; *Gill v. Canada Fire and Marine Insurance Co.*, 1 Ont. 341; *Castellain v. Preston*, 8 Q. B. D. 614; 46 L. T. 569; 19 C. L. J. 143; 49 L. T. 29; *Keefer v. Phoenix Ins. Co.*, 26 Ont. App. 277.

Even when the sale has proved abortive for want of bidders, the report needs confirmation before it can be acted on; *Robert v. Caughell*, 6 O. L. R. 381.

732. Objection to the sale shall be by motion to the Court or a Judge to set aside the same; and notice of the motion shall be served upon the purchaser, and on the other parties. The biddings shall [be] opened only on special grounds, whether the application is made before or after the report is confirmed. Con. Rule 105.

Taken from Chy. O. 388.

The motion to set aside the sale, or open the biddings, must generally be made before the confirmation of the report, but see *Ricker v. Ricker*, 27 Gr. 576, and S. C., in appeal, 7 Ont. App. 282. Formerly, a mere offer to give an increased price was sufficient ground for opening the biddings but this is no longer the case; *Roberts v. Durie*, 1 Chy. Ch. 211; now, special grounds affecting the validity of the sale, must be established; *Creswick v. Thompson*, 6 P. R. 52; and the fact that the purchaser is one of the parties to the suit makes no difference in the rule; *Mitchell v. Mitchell*, 6 P. R. 232; and it applies to sales by tender, or private contract; *Re Barthett, Newman v. Hook*, 44 L. T. 17. Great delay, is an answer to such an application, unless misconduct is shown on the part of the purchaser; *Crooks v. Crooks*, 2 Chy. Ch. 29. The fact that property was suffered to be knocked down at an under-value to a son of the testator, under the belief that he was bidding for himself, when in fact he had been employed by a third person to bid for him, was held sufficient to warrant a re-sale; *Rodgers v. Rodgers*, 13 Gr. 143; and see *Re Follis, Kilbourn v. Coulter*, 6 P. R. 160; and where a vendor has a secret understanding with the purchaser of the property that the purchaser is to resell it to the vendor, the sale will be set aside though no fraudulent intent be proved; see *Re Postlethwaite, Postlethwaite v. Rickman*, 50 L. T. 58; but this decision was subsequently reversed on appeal owing to the great lapse of time; S. C., 60 L. T. 514.

But the fact that a defendant was prevented from bidding, by promises made by the purchaser to give him the benefit of the purchase, is no ground for opening the biddings, such fact, if established, would constitute the purchaser a trustee, and the trust must be established by action; *Brock v. Saul*, 2 Chy. Ch. 145.

Rule 733.

Purchaser
by next
friend of
party having
conduct.

Mere irreg-
ularity not
sufficient
ground to
set aside
sale.

Misstate-
ments in
advertis-
ements may
be.

After con-
firmation
of report,
purchaser
may pay his
purchase
money into
Court.

Where the next friend of a plaintiff who had the conduct of the sale, had bid without authority, a re-sale was ordered, the next friend being held to his purchase in case a greater price could not be obtained, and he was ordered to pay the costs: *Crawford v. Boyd*, 1 P. R. 278; and see *Ramsay v. McDonald*, 8 P. R. 283.

The existence of mere irregularities in the proceedings prior to the sale, does not affect the validity of the sale as against a *bond fide* purchaser: *Dickey v. Heron*, 1 Ch. Ch. 149; *Gunn v. Doble*, 15 Gr. 655; *Skate v. Crawford*, 4 Ont. App. 371; *McLean v. Grant*, 20 Gr. 76; *Collins v. Demson*, 2 Ch. Ch. 465; but see *Foresters v. Pegg*, 19 P. R. 274; and the biddings will not be opened to his prejudice on the ground of mistake in fixing the amount of the reserved bid: *Re Jelly*, 3 O. L. R. 72.

Where a sale took place after an order had been made staying it, but of which the auctioneer, and the purchaser, had no notice, the Court refused, after confirmation of the report, to set aside the sale: *Frechold Building Society v. Choate*, 3 Ch. Ch. 444.

But where through a mis-statement in the advertisement, the property was knocked down at an under-value, and less than the purchaser himself would have otherwise given, a re-sale was ordered: *Jones v. Clarke*, 1 Gr. 368. But it would seem that if the purchaser without any misrepresentation, or undue concealment, by the vendor, gets a less benefit from his purchase than he expected, that would be no ground for relieving him from his contract: *James v. Freeland*, 5 Gr. 302; *Commercial Bank v. McConnell*, 7 Gr. 323. Where the property offered for sale was described as held under a lease, when in fact it was held under an under-lease, that was held to be such a mis-description as entitled the purchaser to a rescission of the contract: see *Broom v. Phillips*, 74 L. T. 459; so a misrepresentation that the property was subject to no restrictive covenants, where there were in fact such covenants, was held to entitle the purchaser to avoid the sale: *Wanton v. Coppard*, 1899, 1 Ch. 92; 79 L. T. 467. Misrepresentations in the advertisement as to facts visible to the eye, amounting to mere exaggeration, do not warrant a release of the purchaser from his contract: *Crooks v. Davis*, 6 Gr. 317; but see *Stammers v. O'Donoghue*, 28 Gr. 207; 8 Ont. App. 161; 11 S. C. R. 358; *Gale v. Hubert*, 6 Gr. 312; and see *Rule 733*, notes.

Where land was stated in the advertisement to be in the occupation of a tenant at a yearly tenancy, but before the sale the tenant had written intimating his intention of giving up the land, but the letter being written before the proper time for giving such notice the vendor had answered, "you will of course send me a formal notice at the right time," and after the sale the tenant gave the formal notice: it was held that the non-disclosure of the previous correspondence did not entitle the purchaser to rescind: *Davenport v. Charley*, 54 L. T. 372.

A purchaser will not be relieved from his purchase because, by his own mistake, he had been declared to be the buyer of a different lot from that which he intended to buy: *VooPrangh v. Everidge*, 1902, 2 Ch. 296.

733. At any time after the confirmation of the report the purchaser may pay his purchase money and interest, if any, or the balance thereof, into Court without further order, upon notice to the party having the conduct of the sale; and when he is entitled to be let into possession he

may, if possession is wrongfully withheld from him, proceed ^{Rule 733.} at his own expense to obtain an order against the party in possession for the delivery thereof to him, or may call upon the vendor to cause possession to be delivered to him. Con. Rule 106.

Taken from Chy. O. 389.

Payment of Purchase Money.—Where the purchaser makes default in paying his purchase money into Court pursuant to the conditions of sale, the vendor may move to compel him to pay in the amount overdue, and in default of payment, for a re-sale of the property. ^{Default in payment of purchase money, effect of.}

The deposit paid at the sale, is to be paid into Court: see *Rule 729*, ^{Deposit at sale to be paid into Court.}

When the plaintiff's solicitor makes default in paying in the deposit, the other parties interested in the purchase money will not suffer thereby, but the plaintiff's share will be charged with the amount of the defalcation: *Mulkins v. Clarke*, 22 C. L. J. 267; 11 P. R. 350.

Where, by the conditions of sale, the purchase money is payable into Court, payment to the solicitor of the party entitled to it, is not a good payment, and is therefore no ground for dispensing with payment of it into Court: *Blackburn v. Sheriff*, 1 Chy. Ch. 208: except upon the production of the written consent of all parties beneficially interested duly verified; but where the deposit is payable to the vendor, payment to his solicitor as his agent is sufficient: *Ellis v. Goulton*, 1893, 1 Q. B. 350. Where the vendor's solicitor receives purchase money, which the purchasers are bound to pay into Court, the expense of payment in, must be borne by the purchasers, the estate, or fund, is not chargeable with such costs: *Re Robertson*, 24 Gr. 555. ^{Payment of purchase money to solicitor when not a discharge.}

But the purchaser will not be compelled to pay in his purchase money unless he has accepted the title: *Crooks v. Street*, 1 Chy. Ch. 35; *Street v. Hallett*, 6 P. R. 312; *McDermid v. McDermid*, 8 P. R. 28; 15 C. L. J. 136; *Ellwood v. Pierce*, 7 P. R. 427; or, has waived the right to investigate the title, by delay: *Ontario Bank v. Surr*, 6 P. R. 216; or by taking possession: *Patterson v. Robb*, 6 P. R. 114; and see *Crooks v. Glenn*, 8 Gr. 239; *O'Keefe v. Taylor*, 2 Gr. 305. ^{Payment of purchase money not compelled until title accepted.}

But possession may be taken in accordance with the contract, under circumstances not amounting to a waiver, or acceptance of title: see *Mitchell v. Irvine*, 13 Gr. 537; *Darby v. Greenless*, 11 Gr. 351; *Wardell v. Trenouth*, 24 Gr. 465. Merely obtaining the keys of a building for the purpose of viewing the premises, is not a taking possession: *People's Loan Co. v. Bacon*, 27 Gr. 294.

If the purchaser makes default a re-sale may be ordered and the defaulting purchaser may be ordered to pay any deficiency: *Re Hornibrook*, 12 P. R. 591; *Noble v. Edwards*, 5 Ch. D. 378. In the event of a re-sale being ordered by reason of the default of the purchaser, in the absence of any condition to the contrary, under the standing conditions of sale, Form 85, his deposit and all other payments on account are forfeited and cannot be recovered by him, even though the property should realize a larger price on the re-sale: *Titt v. Knapp*, 9 P. R. 314; 2 C. L. T. 597; *Ex parte Barrett*, L. R. 10 Chy. 512; *Thomas v. Brown*, 35 L. T. 237; *Rosenberg v. Cook*, 8 Q. B. D. 162; and see *Whelan v. Couch*, 26 Gr. 74; *Collins v. Stinson*, 10 Q. B. D. 142; 48 L. T. 828; but see *Casson v. Roberts*, 31 Beav. ^{Deposit forfeited, when.}

Rule 733. 613; and a purchaser who has forfeited his deposit by default, is not entitled to recover it, in the event of the title proving bad on a subsequent re-sale of the property: *Soper v. Arnold*, 35 Ch. D. 384; 56 L. T. 330; 37 Ch. D. 96; 57 L. T. 747; 14 App. Cas. 429; 61 L. T. 702.

Costs of re-sale and deficiency, how borne. The costs of the re-sale, and also any deficiency on the subsequent sale, are also usually ordered to be borne by the defaulting purchaser: *Re Hornibrook*, 12 P. R. 591; but where the land sold at an advance, and the profit was more than sufficient to cover the costs of the re-sale, the defaulting purchaser was relieved from the payment of the latter costs: *Tilt v. Knapp*, *supra*; *Ontario Bank v. Sier*, 6 P. R. 277.

Interest on purchase money, from what time payable.

Interest on Purchase Money. — Rents and Profits. — The liability of the purchaser for interest, depends on the terms of the contract of sale: *Re Dingman & Hall*, 17 Ont. App. 398. In the absence of any special stipulation in the contract, it would seem that the liability to pay interest commences on the day fixed by the contract for completion of the contract, from which time the purchaser also becomes entitled to possession, and to all rents and profits, subsequently accruing: *Esdaile v. Stephenson*, 1 S. & S. 122; *People's Loan Co. v. Bacon*, 27 Gr. at p. 301; *Fauzant v. Burke*, 38 U. C. Q. B. 104; but see *Harrison v. Joseph*, 8 P. R. 293. But where the contract provided for payment of the purchase money by instalments, but was silent as to the time when possession should be given, the purchaser was held entitled to the rents and profits, from the date of the contract: *Brady v. Keenan*, 6 P. R. 262. A purchaser is entitled to a proper proportion of all rents paid to the vendor in advance: *Liscombe v. Gross*, 6 P. R. 271; and where rents are received by a vendor pending the completion of the contract, he is not entitled as against the purchaser to appropriate such payments to rents in arrear prior to the contract: *Pleas v. Samuel*, 1904, 1 Ch. 464; 90 L. T. 533.

A purchaser cannot be compelled to pay interest during delay under a condition that "the purchaser in default" shall pay interest, where the delay is due to the vendor: *Jones v. Gardner*, 1902, 1 Ch. 191.

Where the contract provides for payment of interest in the event of any delay in completion not attributable to the vendor, the purchaser cannot relieve himself from liability to pay interest by depositing the money in a bank on notice to the vendor: *Re Riley & Streetfield*, 34 Ch. D. 386; 56 L. T. 48; *Re Dingman & Hall*, *supra*; but where delay arises attributable to the vendor, the purchaser may relieve himself from the payment of interest beyond what the money earns, by depositing it in a bank on notice to the vendor; but the deposit must be made to a separate and not to his general account: *Sterenson v. Davis*, 21 Ont. 442; 19 Ont. App. 591, this case was varied by the Supreme Court, but not on this point: 23 S. C. R. 629.

A delay, caused by the vendors having made a *bonâ fide* mistake as to the origin of their title, was held not to be caused by wilful delay on their part, the real cause of the delay being the purchaser's inability to find his purchase money: *Mayor of London v. Tubbs*, 1894, 2 Ch. 524; 70 L. T. 719; so also delay occasioned by the time occupied in remedying a defect in the title, which was not, and could not be, known to the vendor at the time of entering into the contract: *Re Woods & Lewis*, 1898, 1 Ch. 431; 78 L. T. 250, 665; 1898, 2 Ch. 277.

But a vendor has been held to be guilty of wilful delay, where, Rule 733. knowing the facts, he has named too short a time for the completion of the contract: *Re Helling & Merton*, 1893, 3 Ch. 269; 68 L. T. 749; 69 L. T. 266; or from a mistaken construction of the contract, has improperly refused to deliver an abstract of title: *Re Pelly*, 81 L. T. 45.

A stipulation for payment of interest, notwithstanding any delay in the completion of the contract, does not entitle a vendor to interest during delays in completion created by himself, or through an ineffectual attempt to rescind the contract, the purchaser being out of possession, and the rents not being equal to the interest: *Hayes v. Elmsley*, 21 Ont. 562; 19 Ont. App. 291 (this case was subsequently reversed by the Supreme Court, 23 S. C. R. 623, but not on this point); *Re Young & Harston*, 31 Ch. D. at p. 174; see also *Stevenson v. Davis*, 21 Ont. 642, *supra*.

Where a contract provided that the vendor should be entitled to the rents and profits up to completion, and part of the property consisted of a quarry, which was under lease, it was held that the vendor was entitled to the rent payable under the lease, and that it could not be treated as purchase money for part of the corpus of the property: *Leppington v. Freeman*, 66 L. T. 357.

The liability of the purchaser to pay interest, may, in the absence of express stipulation as to the payment of interest: *Re Thompson, Biggar v. Dickson*, 2 Chy. Ch. 196, be qualified by delay on the part of the vendor, either in making title, or giving possession. In such a case interest will not begin to run until the purchaser could safely have taken possession, and a difficulty respecting the conveyance, may justify his not taking possession: *Rae v. Geddes*, 3 Chy. Ch. 404; *Re McLean & Walter*, 19 Ont. 161; *Re Helling*, 1893, 3 Ch. 269; 68 L. T. 749; 69 L. T. 266; and see *Re Wilson's & Steven's Contract*, 1894, 3 Ch. 546; 71 L. T. 388. Where there are several parcels included in the purchase, possession cannot be safely taken of any until the title is made to all: *Laird v. Paton*, 7 Ont. 137; 20 C. L. J. 385; so also the liability of a purchaser for the payment of interest may be qualified by the delay of the vendor in delivering the conveyance: *Stevenson v. Davis*, 21 Ont. 642, judgment of Armour, C.J., which was affirmed by the Supreme Court, 23 S. C. R. 629; and even where the purchaser has entered into possession he may be entitled to compensation for the damages he sustains in keeping his purchase money idle, owing to the delay of the vendor in delivering the conveyance: *Ib.* The measure of such damages, is the excess of interest payable on the purchase money, over and above the net rental of the property in the condition it was in when the purchaser entered into possession: *Ib.* Where the property is unproductive, the purchaser may, where the completion of the contract is delayed by the vendor, be exonerated from payment of interest; where it is productive, but the rents and profits, are less than the interest, the vendor may be allowed to retain the rents, etc., and the purchaser may be relieved from paying interest; and where the rents exceed the interest, the purchaser may, notwithstanding the delay, be ordered to pay interest from the date fixed for completion, taking the rents and profits: *Bank of Montreal v. Fox*, 6 P. R. 217; *The People's Loan Co. v. Bacon*, 27 Gr. 294; unless the delay is attributable to the vendor: *Hayes v. Elmsley*, 21 Ont. 562; 23 S. C. R. 623.

Growing crops on the land at the time of sale pass to the purchaser, unless expressly excepted in the conditions of sale: *McDowell v. Phippen*, 1 Ont. 143; *Manson v. Manson*, 10 P. R. 155.

Rule 733. 20 C. L. J. 33; and he is entitled to compensation if they are removed before he gets possession: *Id.*

A mortgagor after default cannot give a chattel mortgage on his growing crops so as to defeat the right of his mortgagee thereto: *Bloomfield v. Hellyer*, 22 Out. App. 232; and even before conveyance a purchaser may apply to the Court to restrain parties bound by the sale from exercising even a legal right to his prejudice as purchaser: *Re Powers*, 63 L. T. 626.

Rescission of contract.

Where the purchaser pays his purchase money, and is let into possession, but upon a reference it is found that a good title cannot be made, and the contract is rescinded, the purchaser is bound to re-deliver possession on being repaid his purchase money, and if he insists on interest on the purchase money, he must submit to account for the rents and profits: *Simmers v. Erb*, 21 Gr. 289; and see *Turley v. Evans*, 13 C. P. 214.

Interest on purchase money.

Where a purchaser is let into possession, pending an investigation of title, he is bound to pay interest, although the possession extend beyond six years: see *Birch v. Joy*, 3 H. L. C. 565, where the purchaser was in possession forty years before the completion, and the agreement provided that interest should not run until the completion of the contract, see also *Toft v. Stevenson*, 5 D. M. & G. 735; but it would seem that no more than six years arrears can be recovered as against the land: *Airey v. Mitchell*, 21 Gr. 510, overruling on this point, *Great Western Ry. Co. v. Jones*, 13 Gr. 353; but where the purchaser dies, and no intervening incumbrance exists, in order to prevent elusivity of action, the full amount may be recovered even against the land: *Airey v. Mitchell*, *supra*; *Howerton v. Bradburn*, 22 Gr. 96.

Mortgage parol evidence admitted to show terms of.

Where the contract provided for giving a mortgage to secure part of the purchase money, but omitted to state that the mortgage was to bear interest, parol evidence to show that that was the real understanding of the parties was admitted: *Gould v. Hamilton*, 5 Gr. 192.

Delivery of possession to purchaser, effect of.

Delivery of Possession.—Where the conditions of sale provide that possession may be taken by the purchaser without waiving his right to investigate the title, he may take possession without waiving his right: *Bolton v. School Board*, 7 Ch. D. 766; but in the absence of any such condition, if a purchaser at a sale under a judgment, enters into possession without the sanction of the Court, and exercises acts of ownership by making repairs and improvements, he may be held to have accepted the title: Danl. Pr., 6th ed., 1093; *Wattars v. Hesslein*, 20 S. C. R. 171; and at any rate may be ordered to pay his purchase money into Court, notwithstanding his objecting to the title: *Patterson v. Robb*, 6 P. R. 114; but where, after a purchaser had taken possession, the vendor's solicitor delivered an abstract of title and answered requisitions, it was held that the vendor had waived the right to treat the taking of possession as an acceptance of title: *Aldred v. Aldred*, 6 P. R. 183; and see *Gordon v. Harnden*, 18 Gr. 231. Where, under the conditions of sale, a purchaser is entitled to possession, the letting him into the receipt of the rents and profits, is not a sufficient delivery of possession: *The People's Loan Co. v. Bacon*, 27 Gr. 294.

Summary application for possession.

A summary application for delivery of possession under this Rule can only be made against parties to the action, or strangers who have obtained possession *pendente lite*: *Bank of Montreal v. Wallace*, 13 Gr. 184; *Trust & Loan Co. v. Start*, 6 P. R. 90; where a stranger is in possession who has not obtained possession *pendente lite* an action must be brought.

Where the purchaser accepts a conveyance or vesting order, knowing that a stranger to the suit is in adverse possession, he cannot afterwards claim compensation for delay in recovering possession. *Purchaser accepting conveyance, effect of.* *Bull v. Harper*, 6 P. R. 26; *Jolliffe v. Baker*, 48 L. T. 966; 11 Q. B. D. 255; unless possession is withheld contrary to the express stipulation of the contract: *Barber v. Barber*, 11 P. R. 137; 21 C. L. J. 418.

Adverse Possession.—Notice to the purchaser that a person other than the vendor is in possession is notice to the purchaser of the possessor's rights, but not necessarily of his lessor's or other person's through whom he claims; and notice that the rents of the property are received by an estate agent is not notice of the rights of the person for whom he receives them, nor does it put the purchaser on inquiry: *Hunt v. Luck*, 1902, 1 Ch. 428.

Incumbrances.—A purchaser before accepting a conveyance, or vesting order, or consenting to the payment out of his purchase money, should see that all incumbrances are paid off, which the vendors are bound to discharge. After conveyance, or vesting order, his right to have incumbrances discharged out of his purchase money is gone, and he must rely on his covenant if any: *Bull v. Harper*, 6 P. R. 26; 8 C., before Spragge, C., February 1, 1873; *Re Buck, Peck v. Buck*, 6 P. R. 98; *Kincaid v. Kincaid*, 6 P. R. 93; *Jolliffe v. Baker*, 11 Q. B. D. 255; 48 L. T. 966; unless perhaps, where he was ignorant of such incumbrances when he accepted the conveyance: see *Re Turner & Skelton*, 13 Ch. D. 139; *Henning v. McDougall*, 8 P. R. 200; but see 68 L. T. Jour. 387; *Robson v. Robson*, 10 P. R. 324; or unless title at all has been conveyed, as where the land had been sold for taxes: *Turrill v. Turrill*, 7 P. R. 142; and see *Jones v. Clifford*, 3 Ch. D. 779. But a conveyance by the vendor to a third party, even though made at the purchaser's request, will not prevent the latter, after the conveyance, from claiming to have incumbrances discharged, to which the covenants in the deed may not extend, but which, under the contract of sale, the vendor was bound to pay off: *McLennan v. Chequiu*, 37 C. C. Q. B. 301. *Acceptance of conveyance, effect of.*

Ground rent and other outgoings, accruing whilst the purchaser is kept out of possession through the default of the vendor, are held to be payable by the latter: *People's Loan Co. v. Bacon*, 27 Gr. 294; and see *Fisken v. Wride*, 11 Gr. 248; *sed quere*, if this is so, where the purchaser, on the completion of the contract, receives the rents and profits, for the period during which such outgoings accrued. Where the contract is not completed at the appointed time owing to the default of the purchaser, subsequent outgoings paid by the vendor are chargeable to the purchaser: *Barst v. Tagg*, 1900, 1 Ch. 231, and this, notwithstanding that, under the contract, the vendor is entitled to the rents and profits up to the time of completion in lieu of interest: *Ib.* *Outgoings, how payable.*

A purchaser is entitled to have instruments registered against the title creating an apparently adverse claim, removed by the vendor even though they be registered by persons having no apparent title: *Keefer v. McKay*, 10 P. R. 345. *Purchaser entitled to registered title.*

A vendor, however, cannot be required to procure the discharge of a mortgage in fee made by a person, since deceased, who had only a life estate: *Re Ponton & Swanston*, 16 Ont. 602.

Where a vendor contracts to sell only such right or interest (if any) as he has, he is nevertheless bound to convey such right or interest free from any existing incumbrances created by himself: *Gould v. Birmingham, Dudley & District Bank*, 58 L. T. 599.

Rule 733.

Taxes by
whom pay-
able.

Taxes.—The vendor is bound to pay a proportionate part of all taxes accruing up to the time fixed for the completion of the contract, even though not actually imposed at the time: *Bank of Montreal v. Fox*, 6 P. R. 217; *People's Loan Co. v. Bacon*, 27 Gr. 294; *Re Alger & Sarvia Oil Co.*, 23 Ont. at p. 591; 19 Ont. App. 446; unless the by-law imposing the taxes, expressly provides that they shall not form a charge on the land until a day after that when the title is made out: *Harrison v. Joseph*, 8 P. R. 293.

Where the purchaser pays taxes accrued before the time he is let into possession, he is entitled to be refunded out of his purchase money: *Youner v. Alcombrack*, 13 C. L. J. 226.

As to taxes imposed for local improvements: see *The Con. Municipal Act* (3 Ed. vii. c. 19, s. 681); R. S. O. c. 170, s. 17; 1 Ed. vii. c. 12, s. 27; *Graydon v. Hamill*, 20 Ont. 199; *Armstrong v. Auger*, 21 Ont. 98.

Compensa-
tion, when
allowed to
purchaser.

Compensation.—Although a vendor is allowed great latitude in the statements or exaggerations, he may make, as to the general qualities, and capabilities, of land he is about to offer for sale, still he will not be permitted to make misstatements, and misrepresentations, as to matters of fact, which would naturally have the effect of inducing parties resident at a distance to bid for the property. Therefore, where an advertisement of sale described the property as being "a farm of eighty-four and a half acres, twenty acres cleared and fenced," on the faith of which the plaintiff purchased, when, in fact, there was not any clearing or fencing, compensation for the misrepresentation was allowed: *Stammers v. O'Donohoe*, 28 Gr. 207; 8 Ont. App. 161; 11 S. C. R. 358; and see *Re Murray & Kerr*, 43 Ont. 414; but see *Osborne v. Farmers & M. B. Socy*, 5 Gr. 326.

Mis-repre-
sentation
in adver-
tisements.

Evidence
of misrep-
resentation.

Where a material misrepresentation has been made by the vendor, it is not necessary for the purchaser to prove that the representation was known by the vendors to be false, or was made recklessly; and in the absence of evidence to the contrary, the purchaser will be presumed to have bought on the faith of such representation: *Redgrave v. Hurd*, 45 L. T. 485; 20 Ch. D. 1; *Jones v. Rimmer*, 43 L. T. 111; see, however, *Jolliffe v. Baker*, 11 Q. B. 19, 255; 48 L. T. 966; *Smith v. Land & House Property Co.*, 49 L. T. 532; 51 L. T. 718; but where it is shewn that the purchaser bought with knowledge that the statement was untrue, compensation will be refused: *Carmichael v. Ferris*, 8 P. R. 289; and see *Curran v. Little*, 8 Gr. 250; but see *Lett v. Randall*, 49 L. T. 71. So also where the purchaser is a party to the action, and has been party to settling the conditions of sale, he cannot, it would seem, be entitled to compensation for any misrepresentation therein: see *Hopcraft v. Hopcraft*, 76 L. T. 391. As to the effect of a verbal correction by the auctioneer of misstatements in the advertisement, but not heard by the purchaser: see *In re Hare & O'More*, 1901, 1 Ch. 93; 83 L. T. 672, and see 110 L. T. Jour. 419.

But the fact that the purchaser was in actual occupation of the property before the sale, does not disentitle him to compensation for a deficiency in the area represented by the particulars to be sold: *Re Aspinall & Powell*, 60 L. T. 595.

Compensa-
tion for de-
lay in mak-
ing title.

The purchaser may be entitled to compensation for delay in making out the title: *Audley v. Boren*, 3 Chy. Ch. 81; or in completing the contract: *Jones v. Gardiner*, 1902, 1 Ch. 191; 86 L. T. 74; if there is any bad faith on the part of the vendor: *Rouse v. Gordon*, 36 Ch. D. 619; or want of reasonable diligence in completing, and not merely

delay due to conveyancing difficulties: *Jones v. Gardiner, supra*; or **Rule 733**, for delay in delivering possession: *Thomas v. Burton*, L. R. 8 Eq. 120; *Manson v. Manson*, 10 P. R. 155; 20 C. L. J. 33; *Royal Bristol Co. v. Bonash*, 35 Ch. D. 390; or for delay in delivering the conveyance: *Hayes v. Elmsley*, 21 Ont. 562; *Stevenson v. Davis, Ib.*, 642, judgment of Armour, C.J., afterwards affirmed 23 S. C. R. 629, by the Supreme Court; or for destruction of the property by fire before the confirmation of the sale: see *Stephenson v. Bain*, S. P. R. 258; but see *Rapier v. Preston*, 14 Ch. D. 297; 43 L. T. 18; 18 Ch. D. 1; 44 L. T. 787; 50 L. J. Ch. 472. So also, for the existence of a public sewer on the premises sold in which other persons have rights of user: *Re Breuer & Hankin*, 80 L. T. 127. So, also, for deficiency of land; thus, where 300 acres "more or less," was advertised, and the land only contained 244 acres, compensation was awarded: *Wardell v. Trenouth*, 24 Gr. 465; *Whittemore v. Whittemore*, L. R. 8 Eq. 603; and see *Canada Permanent L. & S. Co. v. Young*, 18 Gr. 566; *Re Fawcett & Holmes*, 61 L. T. 105. But a vendor who sells a parcel of land at so much per acre, which turns out to contain a greater number of acres than represented in the advertisement, is not, after conveyance, entitled to payment for the excess: *Cottingham v. Cottingham*, 5 Ont. 704; 11 Ont. App. 624; and see *Sea v. McLean*, 23 C. L. J. 352; 14 S. C. R. 652.

The right of a purchaser to compensation for deficiency in quantity may be excluded by the conditions of sale: *Re Terry & White*, 32 Ch. D. 14; 51 L. T. 353. Where, however, the purchaser, by the conditions of sale, is deprived of the right to compensation for deficiency, and such deficiency is material, specific performance of the contract would not be decreed at the suit of the vendor except on the terms of his making compensation for the deficiency: *Ib.*

A purchaser may also be entitled to compensation for failure to make title to part of the property sold, although he may be precluded by the conditions of sale, from objecting to carry out the sale on that ground: *English v. Murray*, 49 L. T. 35, and see *Re Jackson & Haden*, 53 W. R. 428.

A purchaser is also entitled to compensation for dilapidations committed by parties in possession, after sale, and before completion: *Fiske v. Wride*, 11 Gr. 245; *Thomas v. Burton, supra*; and he is entitled to compensation for the removal of growing crops: *Manson v. Manson*, 10 P. R. 155; 20 C. L. J. 33; *Royal Bristol Socy. v. Bonash*, 35 Ch. D. 390; 59 L. T. 179; or for removal of the soil; and the acceptance of a conveyance in ignorance of the damage done, will not estop him from claiming compensation: *Clarke v. Rawns*, 1891, 2 Q. B. 456; 65 L. T. 657; *Phillips v. Sylvestor*, L. R. 8 Ch. 173; 27 L. T. 840. Where a vendor is liable for all "outgoings" up to the time fixed for completion, he must bear the expense of the removal of dangerous buildings on the property ordered to be removed under statutory powers in that behalf before, though not actually removed till after completion: *Tubbs v. Wynne*, 1897, 1 Q. B. 74.

Compensation may also be awarded for the suppression of material facts; thus, where the property offered for sale was a mill site, and the vendor had previously sold the right to take water for the purpose of floating logs, which fact was not communicated to the purchaser, it was held that this was a subject for compensation: *Wardell v. Trenouth*, 24 Gr. 465; or the contract may be rescinded: see *Heywood v. Mallon*, 49 L. T. 658. Notwithstanding a condition of sale that misdescription should not avoid the sale, it was held that

Rule 73a. Describing the vendor's title as a lease, whereas it was an underlease, entitled the purchaser to rescind the contract: *Re Begfus & Masters*, 39 Ch. D. 110; 59 L. T. 740.

Defects which come within the terms of any covenants are not to be excluded from their operation, on the ground that they appear on the face of the conveyance, or are otherwise known to the purchaser: *Page v. Midland Ry. Co.*, 1894, 1 Ch. 11, overruling *Hunt v. White*, 37 L. J. Ch. 326; 16 W. R. 478.

Conditions as to title. A vendor can only insist on specific performance of the contract with compensation for misrepresentations in the advertisement pursuant to a condition in that behalf, where the misrepresentation is comparatively trifling, but not where it is substantial: *Jacob v. Kerell*, 1900, 2 Ch. 538.

After conveyance, right to compensation for defects in title is gone. After conveyance, or vesting order, the purchaser's right to compensation for defects in title to which his covenants, if any, do not extend, is usually gone: *Greswolde v. Barneby*, 83 L. T. 708; *Allen v. Richardson*, 13 Ch. D. 524; *Manson v. Thacker*, 7 Ch. D. 620; *Egleston v. Hove*, 3 Ont. App. 560; *Re Back, Peck v. Back*, 6 P. R. 98; *Kincaid v. Kincaid*, 6 P. R. 93; *Follis v. Porter*, 11 Gr. 442; *McCall v. Enithorne*, 10 Gr. 324; *Jolliffe v. Baker*, 11 Q. B. D. 255; 48 L. T. 960; *Besley v. Besley*, 9 Ch. D. 103; *Clayson v. Leach*, 61 L. T. 60; but where there is an express condition for compensation, see *Bos v. Halsam*, L. R. 2 Ex. 72; *Re Turner & Skelton*, 13 Ch. D. 130; 44 L. T. 638; *Palmer v. Johnson*, 12 Q. B. D. 32; 13 Q. B. D. 351; 51 L. T. 211; and where the conveyance has been made to a third party: see *McLennan v. Chequin*, 37 U. C. Q. B. 301; and *Clarke v. Ramuz*, 1891, 2 Q. B. 456; 65 L. T. 637.

Exception where misstatements in advertisements. But misstatements in the advertisement of a sale by the Court, or suppression of material facts, may form the ground for compensation even after conveyance, so long as the fund remains in Court: *Cann v. Cann*, 3 Sim. 447; *Bull v. Harper*, 6 P. R. 36; *Turrill v. Turrill*, 7 P. R. 142; and see *Horner v. Williams, Jo. & Co.*, 274; *Re Perriam*, *Perriam v. Perriam*, 49 L. T. 710, and see *Palmer v. Johnson*, 13 Q. B. D. 351; or the sale, may, after, or before, conveyance, be set aside: *Nash v. Wooderson*, 52 L. T. 49; *Brewer v. Brown*, 78 L. T. Jour. 79; and so also stipulations in the advertisement for the delivery of possession, if not carried out, may be the subject of compensation even after a vesting order has been taken, so long as the purchase money remains in Court: *Barber v. Barber*, 11 P. R. 137; and where a purchaser has by mistake or inadvertence taken a vesting order before an incumbrance has been discharged which he is entitled to have discharged, so long as the purchase money remains under the control of the Court, it may be ordered to be applied in discharge of the incumbrance: *Fleming v. McDougall*, 8 P. R. 200.

Specific performance, when not enforced. The Court will not enforce specific performance of a contract, with compensation for misdescription, where the sale was made by a vendor in a fiduciary capacity, and any *cestui que trust* would have a right to complain of the sale, if so enforced, as a breach of trust: *Osborne v. Farmers & M. B. Socy.*, 5 Gr. 326; *Mortlock v. Buller*, 10 Ves. 292; *Goodwin v. Fielding*, 4 Da G. M. & G. 104; *Sneizely v. Thorn*, 1 Jur. N. S. 125; *Dunn v. Flood*, 28 Ch. D. 586; 49 L. T. 670; *Re Douglas*, 1902, 2 Ch. 296; and see *Jacob v. Rowell*, 1902, 2 Ch. 850; and it is immaterial whether the trustees are plaintiffs or defendants: *Ib.*; and *vide Sea v. McLean*, 23 C. L. J. 352; 14 S. C. R. 632; nor will the Court enforce the contract when the title is doubtful: see *Re Hollis Hospital*, 1899, 2 Ch. 540; *Williams v. Scott*, 1900, A. C. 499, 82 L. T. 727.

Insurance Pending Completion.—Where a vendor insures the property sold, pending completion, for the benefit of himself and his assigns, the insurance will enure to the benefit of the purchaser, for whom the vendor will be trustee for the balance, if any, of the insurance money which remains after satisfying the amount due to the vendor for purchase money: *Keefer v. Phoenix*, 29 Ont. 391; 26 Ont. App. 277; 31 S. C. R. 144. Rule 733.

Rescission of Contract.—The misrepresentation of material facts may entitle the purchaser to have the contract rescinded: *Gule v. Hubert*, 6 Gr. 312; *Redgrave v. Hard*, 20 Ch. D. 1; *Broom v. Phillips*, 74 L. T. 459; *Moorhouse v. Hewish*, 22 Ont. App. 172; and the giving of time to a vendor to make good a representation, on the faith of which the purchaser bought, does not prevent the purchaser from claiming a rescission if at the end of that time it is not made good: *Tibbatts v. Boulter*, 73 L. T. 534. Misrepresentation, ground for rescission.

The fact that a tenant of the premises sold, was, unknown both to the vendor and purchaser at the time of sale, keeping a disorderly house on the premises, was held to be no ground for rescission at the instance of the purchaser, nor any bar to the vendor's obtaining specific performance of the contract: *Hope v. Wallace*, 1899, 1 Ch. 879; 1900, 1 Ch. 257; 80 L. T. 355.

In the absence of fraud by the vendor, or other special circumstances, where the contract is rescinded by reason of the vendor's failure to make title, the purchaser cannot recover for improvements made while he is in possession under the contract: *Rankin v. Sterling*, 3 O. L. R. 646; *Dart. V. & P.* (6th ed.), 1085; nor is he ordinarily entitled to damages for loss of his bargain, unless the contract falls through in consequence of the failure of the vendor to do his best to complete it: *Ib.*, and see *Day v. Lighton*, 1890, 2 Ch. 320; 81 L. T. 306. He is entitled to his costs of investigating and endeavouring to clear up the title: *Dart. V. & P.* 6th ed., 1085. As to the costs recoverable by the purchaser where the vendor rescinds pursuant to a condition: see *Isaacs v. Towell*, 1898, 2 Ch. 285. Purchaser not entitled to improvements on rescission.

As to special conditions enabling the vendor to rescind, see notes to *Rule 721*.

Where the vendor has the right to rescind, he may exercise it, notwithstanding the issue of a writ by the purchaser for specific performance: *Isaacs v. Towell*, 78 L. T. 619.

Reference as to Title.—The inclination of the Court is in favour of giving the purchaser a reference as to title, if he desires it. And it is only when the evidence is clear that the purchaser intended to waive, and has actually waived, his right of examining the title, that a reference will be denied: *Mitchell v. Irwin*, 13 Gr. at p. 543; and see *Jackson v. Jessup*, 6 Gr. 157. Reference as to title, when ordered.

On an application by the vendor to compel the purchaser to pay his purchase money into Court, a reference as to title may be ordered, if the purchaser has neither accepted, nor waived his right to examine the title: *Crooks v. Street*, 1 Chy. Ch. 95; *Street v. Hallett*, 6 P. R. 312; *McDermid v. McDermid*, 8 P. R. 28; 15 C. L. J. 136; *Ellwood v. Pierce*, 7 P. R. 427.

Where a reference as to title is directed in general terms it must be understood that the reference is to inquire whether a good title can be made, having regard to the contract: *Upperton v. Nickolson*, L. R. 10 Eq. 228; L. R. 6 Chy. 436.

Rule 734.

Waiver of
right to
reference,
what con-
stitutes.

Waiver.—The right to a reference may be waived by buying in either demanding an abstract, or making any objection to the title; *Ontario Bank v. Surr*, 6 P. R. 216; and see *Rae v. Geddes*, 18 Gr. 217; or by taking possession; *Denson v. Fuller*, 10 Gr. 408; *Commercial Bank v. McConnell*, 7 Gr. 323; *Wallace v. Hoshida*, 20 S. C. R. 171; *Patterson v. Robb*, 6 P. R. 111; *O'Connor v. Boyd*, 22 Ont. App. 407; but see *Wardell v. Trenouth*, 24 Gr. 405; *Daly v. Greenleaf*, 11 Gr. 351; *Matchett v. Irons*, 13 Gr. 337; *Cole v. v. Glens*, 8 Gr. 239; *Morin v. Wilkinson*, 2 Gr. 157; *O'Keefe v. Taylor*, 11 Gr. 305; *Jackson v. Jessup*, 6 Gr. 156. But if after possession taken, the vendor proceeds with the investigation of title, and answers requisitions, the taking of possession will be no waiver; *Boroughs v. Oakley*, 3 Sw. 159; *Alldred v. Alldred*, 6 P. R. 18; *Gordon v. Harnden*, 18 Gr. 231.

Circum-
stances
from which
a waiver
may be
inferred.

The right of a purchaser to investigate the title may be also waived by his accepting a conveyance, or vesting order; *Bull v. Harper*, 6 P. R. 161. So also writing a letter apologizing for non-payment of the purchase money, although making no reference to the title; or negotiating a release of dower from a person interested in the estate; or the giving of a mortgage to secure the purchase money, are circumstances from which an acceptance of title may be inferred; *Donald v. Garrett*, 8 Gr. 200; but see *Jackson v. Jessup*, 6 Gr. 156. But though the purchaser by taking possession and dealing with the property may waive his right to compel the vendor to make out a good title, he may yet be relieved from payment of his purchase money before completion, on showing that the vendor has no title at all; *Denson v. Fuller*, 10 Gr. 408.

Possession
taken with
knowledge
of incurable
defects;
effect of.

In applying the doctrine of waiver, a distinction is to be observed between the case of a contract, providing that a good title shall be shewn, and that possession may be taken before completion, and the case of a purchaser taking possession before completion without any express stipulation in that behalf. There is also a broad distinction between a purchaser going into, or remaining in, possession, and making structural alterations, knowing of the existence of an incurable objection; and one entering with knowledge of objections which are curable. In the former case he may, although entitled to have the title otherwise made out, be held to have waived the particular incurable objection; *Re Gleng & Miller*, 23 Ch. D. 320; 48 L. T. 620; but where the title was by possession, and the purchaser after obtaining the evidence of possession as being insufficient, continued in possession and made improvements, it was held not to be a waiver of his right to have a good title made out; *Rankin v. Sterling*, 3 D. L. R. 646.

Settlement
of con-
veyance.

734. The Master shall settle all necessary conveyances for the purpose of carrying out the sale in case the parties differ, or in case there are any persons under any disability (other than coverture) interested in such sale. Con. Rule 107.

Taken from J. A. Rule 331.

See Rule 672.

Conveyance.—In all sales by the Court, the Master to whom the action is referred, may, under this Rule, settle the conveyance in case the parties differ, or there be any parties not *ad iure* interested.

the purchaser is entitled to a conveyance with bar of dower by the wife; if she refuses to bar dower, the purchaser is entitled to an abatement, or to rescind the contract: *Kendrick v. Sherman*, 4 Gr. 578; *VanNorman v. Beaupre*, 5 Gr. 549; or to have a portion of the purchase money, sufficient to answer the dower, set apart until the wife's death, and the interest thereon paid to the vendor during his wife's life: see *Skinner v. Ainsworth*, 24 Gr. 148, and *Loughhead v.*

Rule 734. *Stubbs*, 27 Gr. 387; but the wife of a mortgagee cannot be compelled to join in a conveyance to a purchaser: *Simpson v. Simpson*, 1 Chy. Ch. 265, except where the mortgagee's title has become absolute by the foreclosure of the equity of redemption, and even then only when the mortgagee has the legal estate: see R. S. O. c. 164, s. 2. As to the mode of computing dower in an equity of redemption where the dower has not been assigned, but the widow has been in possession of the land, see *Re Percy*, 11 Ont. 374.

Purchaser may take vesting order in lieu of conveyance.

The purchaser is entitled to a conveyance with ordinary covenants; and for the principle for determining what are "usual covenants," see *Re Lander & Badgley*, 1892, 3 Ch. 41; 67 L. T. 521; Davidson on Conveyancing, vol. 5, pt. ii., pp. 51-54; 3 Bythw. 122; *Re Can Pac. Ry. v. Toronto*, 4 O. L. R. 134; 27 Ont. App. 54; 5 O. L. R. 717; 1905, A. C. 33; but he may, if he chooses, take a vesting order; but a purchaser cannot be compelled to take a vesting order instead of a conveyance: *Laplante v. Scamen*, 8 Ont. App. 557. Wherever the Court has authority to order the execution of a conveyance, it may make a vesting order: see Jud. Act, s. 36, *supra*, p. 31. The vesting order is granted in Chambers on production of the report on sale duly confirmed, and proof that the purchase money has been duly paid, or secured, according to the report. Where the purchase money is to be paid into Court, its payment must be proved by the production of the certificate of the Accountant or his Chief Clerk. The vendor's solicitor is entitled to notice of the application: *Boulton v. Stegman*, 1 Chy. Ch. 199; and where infants are interested, the guardian *ad litem* is usually notified also: *Thorne v. Chute*, 2 Chy. Ch. 221; but see *Boulton v. Stegman*, *supra*. Where the owner of the legal estate became the purchaser, a vesting order was refused: *Bowen v. For*, 1 Chy. Ch. 387; and see Jud. Act, s. 36, and notes, *supra*, pp. 31, 32.

Application for, how made.

Costs of vesting order.

Where, in consequence of the absence of one of the vendors from the jurisdiction, the execution of the conveyance prepared, and tendered by the purchaser, could not be procured, and a vesting order was then obtained, the purchaser was held entitled to the extra costs so occasioned: *Re McMorris*, 3 Chy. Ch. 430; and see *Laurason v. Buckley*, 3 Chy. Ch. 270.

Tender of conveyance.

The purchaser sufficiently tenders the conveyance for execution under the standing conditions of sale, by delivering the same to the vendor's solicitor: *Weiss v. Crafts*, 6 P. R. 151.

Even before conveyance a purchaser may apply to the Court to restrain any party bound by the sale from exercising even a legal right to his prejudice as purchaser: *Re Powers*, 63 L. T. 626.

Completion of Sale.—On the completion of the sale the purchaser is entitled to the delivery of all title deeds relating to the property purchased, unless otherwise provided by the conditions of sale; or unless the vendor is entitled to retain them as mortgagee; and the expense of procuring such of the title deeds as are not in the vendor's possession must be borne by the vendor in the absence of any conditions of sale to the contrary, and *semble*, a condition that the vendor shall not be bound to produce them for the verification of the abstract is not such a condition to the contrary: *Re Duthy & Jesson*, 1898, 1 Ch. 419.

The purchaser is also entitled to require the vendor to deliver to him possession of the premises: see *Rule 733* and notes p. 942.

785. After the report is confirmed, the vendor shall, ^{Rule 735.} forthwith upon demand, deliver an abstract of title to the purchaser; and if the purchaser does not serve objections within 7 days, he shall be deemed to have accepted the abstract as sufficient. If objections are served, the vendor shall answer them within 14 days, and if the purchaser is still dissatisfied, and the parties cannot agree, either party may obtain from the Master a warrant to consider the abstract. ^{Delivery of abstract. If no objection served abstract to be deemed sufficient. Objections to abstract: how disposed of.} Con. Rule 108.

Taken from Chy. O. 390.

This and the six following *Rules* apply to all cases where a reference as to title is made to a Master or Official Referee, as well as to sales by the Court: *Rule 742.* But where a sale is made out of Court, subject to certain conditions as to the delivery of objections to title within a specified time, and before action objections are delivered, the purchaser on an action for specific performance being subsequently brought, cannot, in the Master's office, deliver any further objections: *Imperial Bank v. Metcalfe*, 11 Ont. 467; except by leave of the Court; the Master has no power to grant such leave: *Clarke v. Langley*, 10 P. R. 208.

In sales by the Court, the solicitor of the party conducting the sale, is considered the vendor's solicitor, and it is from him the abstract must be demanded, and it is his duty to prepare, and deliver it. ^{Abstract, delivery of.}

The vendor is only required to deliver an abstract on demand. ^{Demand of abstract.} The demand should be in writing: see R. S. C. c. 164, s. 91. Wilful falsification of pedigree, or concealment of deeds, renders a vendor criminally liable: *Ib.*, and also civilly liable in damages: R. S. O. c. 119, s. 39.

Where after reasonable notice a vendor refuses to deliver a proper abstract of title, the purchaser is entitled to rescind the contract and claim a return of his deposit. Fourteen days has been held to be a reasonable time to limit for its delivery in the case of a sale out of Court: *Compton v. Bagley*, 65 L. T. 706.

The purchaser may, if he pleases, investigate the title, without making the demand. And where he made no demand of an abstract, and made no objection to the title, for twenty-three months, he was held to have waived his right to object to the title: *Ontario Bank v. Surr*, 6 P. R. 276; and see *Rac v. Goldes*, 18 Gr. 217. ^{Neglect of purchaser to demand, effect of.}

Where a purchaser neglects to demand an abstract of title, but brings a suit for specific performance in which the usual reference as to title is directed, and an inquiry when the title was first shewn: although the Master found the title was first shewn in his office, yet as no demand of abstract had been made previous to the suit, the purchaser was ordered to pay the costs of it: *London & Canadian L. & A. Co. v. Graham*, 12 P. R. 651.

Where the vendor neglects, on demand, to deliver an abstract, the purchaser may move to compel him to do so. Or it would seem if the delay is unreasonable, he may apply to be discharged: see *Walton v. Armstrong*, 11 Gr. 379. The purchaser is entitled to a solicitor's abstract, and not merely a registrar's abstract, unless there be an express condition of sale to the contrary. ^{Neglect of vendor to deliver abstract.}

Rule 736. Although the taking of possession by the purchaser, may amount to a waiver of title, yet if the vendor afterwards delivers an abstract, or proceeds with the investigation of the title, he cannot set up the waiver: *Aldwell v. Aldwell*, 6 P. R. 183; *Gordon v. Harnden*, 18 Gr. 231.

Abstract, nature of. An abstract may be defined to be a brief statement of all material deeds, and facts, necessary to be proved in order to establish a good title in a vendor. For form of a solicitor's abstract, see H. & L. Forms, No. 1015.

Where all matters essential to a good title are manifest in the abstract, and the vendor is able and willing to verify it, a good title is *shewn*; and a good title is *made* when the abstract is verified: *Granger v. Latham*, 14 Gr. 209, and other cases cited on p. 953.

Where a material document was omitted from the abstract, but its contents sufficiently appeared by a document which was abstracted, the omission was held to be no objection to the abstract: *In re Ebsworth & Tidy*, 42 Ch. D. 23.

Objection to abstract, how made. After the receipt of the abstract, the purchaser may deliver objections to the abstract: e.g., that assuming the chain of title therein set out to be proved, it does not shew a good, or any title, in the vendors; or that the effect of any instrument is not sufficiently abstracted. This class of objections is confined to the sufficiency of the abstract *per se*. The objections should be specific, and point out clearly the alleged defect.

Determination of. As to the determination of questions thus raised, see *Rule 737, infra*; *McManus v. Little*, 3 Ch. Ch. 263. After the abstract has been made perfect, or accepted as sufficient, the next step is its verification, and any defects in the proofs form the subject of objections to, or requisitions on, the title, as provided by *Rules 739-741*.

Objections to title, delivery of. The purchaser should not deliver objections, and requisitions, on title, until all objections to the abstract are disposed of, or he will be held to have waived all objections to the abstract: *McManus v. Little*, 3 Ch. Ch. 263.

For form of objections to the abstract, see H. & L. Forms, No. 1017.

Master to determine question as to sufficiency of abstract. **736.** The Master shall determine all questions upon the abstract and the sufficiency thereof; and, if desired by the purchaser, may require the vendor to make the same as perfect as he can, and if the vendor neglects or refuses to do so, may permit the purchaser to supply defects therein, at the vendor's expense. *Con. Rule 109.*

Taken from Chy. O. 391.

Objections to abstract may be referred to Master. Where the objections to the abstract are not removed within fourteen days after service of the objections, it is not necessary to obtain any order of reference, in order to obtain the Master's decision; but the vendor, or purchaser, may carry the abstract and objections into the Master's office, and obtain a warrant to consider the abstract.

Vendor may supply defects in abstract. If the Master holds the abstract to be insufficient, and the vendor neglects or refuses to supply the defects, the purchaser may be permitted to do so. This, of course, will not always be in the power of a purchaser; but where deeds are registered, the purchaser may

frequently obtain the necessary information to perfect the abstract from the Registry office. Rules 737, 738.

A condition of sale that "the examination of title is to be at the expense of the purchaser, who is to call for only those deeds and papers in my possession and under my control," does not relieve the vendor from delivering an abstract of title, even though such an abstract be not among the papers in his possession or control: *Re Boustead & Warwick*, 12 Ont. 488.

The vendor is usually bound to verify the abstract, by the production of all documents abstracted, or by proper secondary evidence, where the non-production of the originals is sufficiently accounted for; and by producing affidavits of all facts necessary to be proved in order to make out title: see *Rule 739*; *Re Halifax Coml. Banking Co. & Wood*, 79 L. T. 183; 1898, W. N. 174 (16).

A good title is not shewn until it is both exhibited by the abstract, and the vendor is able and willing to verify it: *Granger v. Latham*, 14 Gr. 200; *Parr v. Lovegrove*, 4 Drew. 176; 6 Jur. N. S. 600; but see *Laird v. Paton*, 7 Ont. 137; 20 C. L. J. 385; *London & Canadian L. & A. Co. v. Graham*, 12 P. R. 651; *Graham v. Stephens*, 27 Gr. 434.

The omission from the abstract of a document whose contents sufficiently appeared by a document abstracted, was held to be no objection to the abstract: *Re Ebsworth & Tidy*, 42 Ch. D. 23.

737. The Master shall not make a report on the abstract, but shall mark the objections as allowed or disallowed, and when he finds the abstract perfect, or as perfect as the vendor can make it, he shall certify to that effect thereon: and such certificate shall be final without filing, unless appealed from in the same manner as from a Master's report. *Con. Rule 110.*

Taken from Chy. O. 392.

Where the Master made a report on the title, instead of marking the objections "allowed," or "disallowed," the Court refused to entertain an appeal from his report, but referred the matter back to the Master, to be dealt with as provided by this *Rule*: *Cockenour v. Bullock*, 12 Gr. 73.

As to the time for appealing from a Master's report, see *Rules 769-772*.

738. After an abstract is confirmed, or is accepted by the purchaser as sufficient, no objection to the abstract shall be allowed. *Con. Rule 111.*

Taken from Chy. O. 393.

The abstract is accepted as sufficient, if the purchaser does not serve any objection within seven days after its delivery: *Rule 735*. It is confirmed, if the Master disallow the objections, and no appeal is had from his finding within the time limited by *Rules 769-772*.

Rule 739.Verifica-
tion of
abstract.Notice to
deliver
objections
and requi-
sitions.

739. After acceptance or confirmation of the abstract, the verification shall be proceeded with, and the vendor shall with all diligence afford the purchaser all the means of verification in his power, in the manner, and according to the practice usual with conveyancers; and after having done so, he may serve a notice on the purchaser to make objections or requisitions, if any, within 7 days, or that otherwise he will be deemed to have accepted the title. *Con. Rule 112.*

Taken from Chy. O. 394.

Verifica-
tion of
abstract.Title
deeds, how
proved.

Verification of Abstract.—The practice of conveyancers is for the vendor's solicitor to give notice of a time and place (usually his own office), where the abstract will be verified. Sometimes the deeds, and evidences of title, are sent to the purchaser's solicitor. So far as the title deeds are concerned, the abstract is verified by the production of the originals, or such of them as are in the vendor's possession, and by producing certified copies of the deeds, or registered memorials where the originals are not in the vendor's possession. Sometimes, however, notarial copies are furnished, e.g., where a deed covering other lands is in the hands of some third party. In verifying the abstract the production of the title deeds is sufficient proof of their due execution, unless evidence is adduced casting doubt on their authenticity: see *Coventry*, 41. As to how far registered memorials are evidence, and as to how far recitals in deeds are evidence of the facts recited, see *R. S. O. c. 134, ss. 2, 3*; *Sanders v. Malaburg*, 1 Ont. 178; 18 C. L. J. 206; *Allan v. McTavish*, 28 Gr. 539; *Reg. v. Guthrie*, 41 U. C. Q. B. 148; *Canada Permanent Loan & Savings Co. v. Ross*, 7 P. R. 79; *Re Halifax Coml. Banking Co. & Wood*, 1898, W. N. 174 (161); 79 L. T. 183; for cases before the Statute, see *Wishart v. Cook*, 15 Gr. 237; *Gough v. McBride*, 10 C. P. 166; *Re Higgins*, 19 Gr. 303; S. C., 4 Chy. Ch. 128; *Russell v. Fraser*, 15 C. P. 375.

Where the vendor relies on a possessory title, the possession must be proved by affidavits, and the purchaser is entitled to cross-examine the deponents: *Re Boustead & Warwick*, 12 Ont. 488; *McIntosh v. Rogers*, 12 P. R. 389; *sed vide* as to costs, *Dame v. Slater*, 21 Ont. 375.

The evidence in such a case must not only establish possession for the required period, but should also negative the existence of any fact mentioned in the Statute which would prevent, or stop, its running: *Chapman v. Bunbury*, 31 C. L. J. 103; 15 C. L. T. 57.

Other
facts, how
proved.

Facts necessary to be proved in order to make out the title, e.g., death, intestacy, heirship, etc., are required to be proved by affidavit; but statutory declarations of such facts, taken on a former devolution of the title, are usually accepted as evidence, and need not be corroborated by affidavits made in the action. By *R. S. O. c. 134, s. 2*, recitals and descriptions of facts, matters, and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations twenty years old at the date of the contract, shall, unless and except so far as they are proved to be inaccurate, be taken to be sufficient proof of such facts, matters and descriptions; and see *Re Ponton & Swanston*, 16 Ont. 609; *Re Marsh & Granville*, 24 Ch. D. 11; 48 L. T. 947.

Where the title is a registered title, all instruments in the chain of title must be registered, and any unregistered deeds in the chain of title, must be registered at the expense of the vendor: *Kitchen v. Murray*, 18 C. P. 69; *Brady v. Walla*, 17 Gr. 699; *Fahner v. Ran*, 1 Chy. Ch. 246; *Sweetnam v. Sweetnam*, 6 P. R. 83; *Laird v. Paton*, 1 Ont. 137; 20 C. L. J. 385. Where a registered deed appears on the abstract it is not sufficient verification of the abstract to produce a deed apparently between the same parties as the registered deed, but bearing no certificate of registration, without in some way establishing the identity of the deed produced with that registered: *McIntosh v. Rogers*, 12 P. R. 389. Deeds must be registered at vendor's expense.

In the absence of any express condition of sale to the contrary, the vendor is bound to furnish, at his own expense, to the purchaser, copies of all instruments relating to the title which are not of record: *Re Charles*, 4 Chy. Ch. 19. He is also bound to furnish copies of all deeds registered by memorial, but it was held not of deeds registered in full: *Id.*; but see *Harrison v. Joseph*, 8 P. R. 233; but in a later case it was held by Street, J., that the vendor is bound to produce and deliver to the purchaser certified copies of all deeds, of which he cannot produce the originals, whether registered in full or not: *McIntosh v. Rogers*, 12 P. R. 389; and see *Bohier & Ontario Invt. Assoc.*, 16 Ont. 259. Copies when to be furnished by vendor.

The ordinary liability of a vendor to produce all necessary evidence to make out a good title, and to deliver on completion the original deeds, or copies of such as are not in his possession, may be qualified by special conditions of sale. Where special conditions are imposed, they have to be set out in full in the advertisement: see *Rule 721*. Special conditions of this kind should not be unnecessarily stringent, as they are calculated to damp the sale. Thus where the proof of title was involved in no difficulty a condition of sale that "the vendor is not to be bound to give any evidence of title, or any title deeds or copies thereof, other than such as are in his possession, or prove any abstract," was held to be very objectionable, and one that should not be sanctioned by the Master, even by consent: *McDonald v. Gordon*, 2 Chy. Ch. 125. Liability of vendor to furnish qualified by conditions.

But it seems that even such a condition would not exempt a vendor from otherwise showing a good title: *Canada Permanent Building Society v. Wallis*, 8 Gr. 368; *McIntosh v. Rogers*, 12 P. R. 389; 14 Ont. 117; *Secus*, where the vendor purports to sell only such title as he has, but even then, if it can be shewn by the purchaser that the vendor has no title at all, the contract will not be specifically enforced against the purchaser: *Leslie v. Preston*, 1 Gr. 434; *Jones v. Clifford*, 3 Ch. D. 779; *Darlington v. Hamilton*, Kay, 550; but see *Hume v. Pocock*, L. R. 1 Cby. 379; *Hume v. Bentley*, 5 De G. & S. 520; even where a vendor advertises to sell only such title as he has, he is bound to convey that title free from any subsisting incumbrance: *Goold v. Birmingham, Dudley & District Bank*, 58 L. T. 560. The Court will not knowingly pass off a bad title, by the aid of special, or misleading conditions: *Else v. Else*, L. R. 13 Eq. 196; *Seton*, 5th ed., 204, 1854. Vendor may be bound, notwithstanding such conditions, to prove title.

The vendor is bound to procure the discharge of Crown bonds affecting the land: *Re Charles*, 4 Chy. Ch. 19. Crown bonds of the Province of Ontario, are no longer a charge on land of the obligor, unless registered against it: R. S. O. c. 113; *Re Franklin*, 8 P. R. 470; nor are Crown bonds of the Dominion: 51 Vict. c. 23 (D.). The vendor is also bound to remove certificates of *lia pendens* registered against the land: *Bohier & Ont. Invt. Assoc.*, 16 Ont. 259. Crown bonds not pass off a bad title knowingly.

Rule 740.

Taxes and
incum-
brances.

The vendor is not bound to give evidence, negativing the existence of arrears of taxes, or other incumbrances: *Thompson v. Milliken*, 10 Gr. 359. As to punishment for concealing incumbrances, or falsifying pedigree, etc., after written demand of abstract: see R. S. C. c. 164, s. 91. But he is bound to have removed from the register or otherwise nullified, any registered instrument, appearing to create an adverse interest in the land, even though such instruments purport to be made by parties having no apparent title: *Keefe v. McKean*, 10 P. R. 345.

Deeds by
T. & L. Co.
& Canada
Co.

As to execution of deeds, by the Trust & Loan Co., see 25 Vict. c. 72; *Trust & Loan Co. v. Monk*, 14 Gr. 385; by The Canada Company: *Woodhill v. Sullivan*, 14 C. P. 265; *Fell v. South*, 24 C. C. Q. B. 196.

Covenants
by Canada
Co.

The Canada Company is not exempted from giving ordinary covenants for title: see *Scarlett v. Canada Co.*, 1 Cby. Ch. 90.

Notice to
deliver
objections,
service of.

As soon as the vendor's solicitor considers that the verification of the abstract is complete, he should serve notice on the purchaser to deliver objections, and requisitions.

The Master has no jurisdiction to permit further objections to be delivered after the time limited by this Rule, but the Court on special application for that purpose may permit further objections to be delivered: *Clarke v. Langley*, 10 P. R. 208. And where under the conditions of sale, the time for putting in objections has expired before the reference to the Master takes place, no further objections can be delivered in the Master's office: *Imperial Bank v. Metcalfe*, 11 Ont. 467.

Objections,
and requis-
itions to
whom to be
delivered.

740. Upon being served with such notice, the purchaser, if dissatisfied, shall serve his objections or requisitions within the time thereby limited; and the like course shall be followed upon such objections or requisitions as is prescribed by Rules 735, 736, and 737, in relation to the abstract. Con. Rule 113.

Taken from Cby. O. 395.

Requisi-
tions on
title.

Requisitions on and Objections to Title.—If the purchaser is dissatisfied with the proofs of title adduced by the vendor, he must deliver his objections and requisitions within seven days after receipt of notice so to do, or he will be deemed to have accepted the title: Rule 739. For form of objections to and requisitions on title: see H. & L. Forms, No. 1025. As to the construction of conditions for the delivery of objections to title in the case of sales out of Court: see *Nason v. Armstrong*, 22 Ont. 542; 21 Ont. App. 183; 25 S. C. R. 263.

Objections
to title.

Stipulations as to time for delivery of objections to title do not prevent objection, even after the stipulated time, to an entire want of title: *Id.*

The existence of an easement undisclosed by the particulars was held a valid objection, although the property was offered "subject to any existing public and private rights of way, and other rights and easements of whatever nature": *Heywood v. Mallatcu*, 49 L. T. 678; and a condition providing that the purchaser was deemed to have purchased with knowledge of the qualities and condition of the

properly purchased was held not to apply to an underground culvert: *Re Pickett & Smith*, 1902, 2 Ch. 258; 87 L. T. 180. The existence of registered deeds by parties apparently having no title is a valid objection: *McKay v. Keefer*, 10 P. R. 345; the fact that the sale was by trustees under unnecessarily depreciative conditions is also a valid objection: *Re Rayner*, 53 L. T. 495.

The existence of a public road across the land was held a valid objection to the title, although a resolution of the Municipal Council to close it had been passed: *Kronsbien v. Gaye*, 10 Gr. 552; so also the existence of a right of way: *Ashburner v. Sewell*, 1891, 3 Ch. 405; 65 L. T. 524; or a sewer: *Re Brewer & Hawkin*, 80 L. T. 127; or underground culvert: *Re Pickett & Smith*, *supra*. So also is an outstanding claim to dower: *Gannoe v. Gannoe*, 5 Gr. 133. So also is the lunacy of a previous owner of the land: *Francis v. St. Germain*, 6 Gr. 630. So also is the fact that the vendor, an attorney, claimed through a will prepared by himself: *Grove v. Bastard*, 2 Phil. 621. So also is the fact that the title came through a will, whereby the testator purported only to devise a moiety: *Stapylton v. Scott*, 16 Ves. 273; and where the validity of the vendor's title depended on the fact of his having purchased without notice: *Freer v. Hesse*, 4 D. M. & G. 495; but a supposed equity in a person who died upwards of fifty years ago, where the possession since that time had been in another, and the vendor had a good legal title, was held no objection: *Dewitt v. Thomas*, 10 Gr. 21; *McIntosh v. Rogers*, 12 P. R. 389; *Imperial Bank v. Metcalfe*, 11 Ont. 467; *Re Shortt & Howard*, before Boyd, C., 21st March, 1888.

Where trusts affecting the title are accidentally disclosed to the purchaser, he may require the production of the trust deed: *McClellan & Abrahams*, 1899, 2 Ch. 340; and where a title is traced through a trustee for sale who has himself become the purchaser the burden is on the vendor of shewing by clear affirmative evidence, that the trustee and c. q. t. were at arm's length, and that the latter had full information of all material facts, and adopted what was done. In the absence of such evidence the Court would not compel an unwilling purchaser to complete: *Williams v. Scott*, 1900, A. C. 499; 82 L. T. 727.

And where litigation is threatened in respect of the property, specific performance would not be enforced until, at all events, it is reasonably clear that the claim in respect of which it is threatened is without foundation: see *George v. Thomas*, 90 L. T. 505.

Inquiry should always be made as to the possession. If a stranger is in possession, the purchaser should insist on his being ejected by the vendor. Under *The Registry Act*, R. S. O. c. 136, s. 98, it would seem that possession is no longer constructive notice of the title of the person in possession as against a party claiming under a registered title: *Bell v. Walker*, 20 Gr. 569; *Grey v. Ball*, 23 Gr. 390; *Sherbourne v. Jeffs*, 15 Gr. 574; *Building & Loan Ass. v. Pops*, 27 Ont. 470; nor of the title of the person through whom the person in possession claims: see *Hunt v. Luck*, 1901, 1 Ch. 45; 83 L. T. 449; 86 L. T. 68; not even though there be actual notice of the possession: *Ib.*; *Cooley v. Smith*, 40 U. C. Q. B. 543; *Roe v. Braden*, 24 Gr. 589; but where the person in possession is tenant under a lease for a term not exceeding seven years, his interest is protected though his lease is not registered: R. S. O. c. 136, s. 39; *Latch v. Bright*, 16 Gr. 653. As to the effect of possession in cases to which *The Registry Act* does not apply: see *Attorney-General v. McNulty*, 11 Gr. 281, 581; *Gray v. Coucher*, 15 Gr. 419; and as to what may amount to actual notice sufficient to take a case out of the protection of *The Registry Act*, see *Rose v. Peterkin*, 13 S. C. R. 677.

Rule 741.

Purchaser need not inquire as to regularity of proceedings. But must see that all necessary parties are bound, etc.

In investigating the title, the purchaser at a sale by the Court, is not bound to inquire into the regularity of the proceedings in the action; if the judgment appears to be regular on its face, he will be protected: *Shaw v. Crawford*, 4 Ont. App. 371; *Gunn v. Doble*, 15 Gr. 655; *McLean v. Grant*, 20 Gr. 78; but see *Forsters v. Pegg*, 19 P. R. 254. He must, however, ascertain that all proper necessary parties are bound by the judgment: *Lechmere v. Brasier*, 2 J. & W. 287; *Calvert v. Godfrey*, 6 Beav. 97; *Bennett v. Hamill*, 2 Sch. & Lef. 577; and that the sale was in accordance with the judgment: *Colclough v. Sterum*, 3 Bli. 181; *Talbott v. Minnett*, 6 Ir. Eq. 81. An order of the Court is not invalidated as against a *bona fide* purchaser under it on the ground of want of jurisdiction, or of want of any concurrence, consent, notice, or service: see Ind. Act, s. 58 (11); but *semble*, a purchaser having notice of the irregularity in the proceedings cannot be compelled to rely on the statutory indemnity: see *Life Interests Corp. v. Hand-in-Hand*, 1898, 2 Ch. 230.

Requisitions, how adjudicated on.

Where the requisitions and objections, or any of them, are not answered, either party may carry in the objections, or such of them as are not answered, before the Master, as provided by Rule 735, and get his decision thereon.

Matters of conveyance, what are.

Where it is found that the vendor has sold land which he cannot convey himself, the purchaser may rescind; he is not bound to wait and see if the vendor can procure a conveyance by a third party. *Re Cooke*, 78 L. T. 106, 108.

There are some objections which are not strictly objections to the title, but are considered "matters of conveyance." Thus, the existence of outstanding incumbrances, or satisfied mortgages—where the vendor is entitled to require the party appearing entitled thereto, to join in the conveyance to the purchaser, or to release or discharge his incumbrance,—are not objections to the title. But where the vendor is unable to procure such conveyance, or release, such incumbrances then constitute an objection to the title: see *Re Great Northern Ry. Co. v. Sanderson*, 25 Ch. D. 788; 50 L. T. 87; *McLean v. Walker*, 19 Ont. 161. See also Fry, Sp. Perf., 2nd ed., sec. 1357 *et seq.*, and *Martin v. McGee*, 19 Ont. 705, and 18 Ont. App. 384; *Re Deighton & Hurris*, 1898, 1 Ch. 458; 46 W. R. 341.

Where a sale is made subject to a condition that the vendor may rescind the contract in case the purchaser should take any objection, or make any requisition which the vendor should be unable or unwilling to answer or comply with, such right must be fairly exercised, and a vendor will not be allowed to temporise with the purchaser whilst endeavoring to effect a sale to some one else: *Smith v. Wallace*, 1895, 1 Ch. 385; 71 L. T. 814.

Ordinarily a purchaser is entitled to a conveyance of the legal estate, but when the vendor was able to convey a good equitable title, an objection that the legal estate was outstanding, delivered after the time limited for delivery of objections had expired, the objection was held to be too late: *Pryce-Jones v. Williams*, 1902, 2 Ch. 517; 87 L. T. 230.

On refusal of vendor to verify abstract, Master may authorize purchaser to do so.

741. In case of the refusal or neglect of the vendor to verify the abstract to the best of his ability, or to furnish any necessary proof or documents in his power, the Master may authorize the purchaser to do so at the vendor's expense. Con. Rule 114.

Taken from Chy. O. 396.

Costs of Reference as to Title.—In sales by the Court, the purchaser is entitled to his costs of the reference, where the title proves good, on grounds not appearing on the abstract: *Fielder v. Higginson*, 3 V. & B. 142; and will not be ordered to pay the vendor's costs, though the title is proved according to the abstract: *Flower v. Hartop*, 8 Beav. 200; *Holland v. King*, 1 W. R. 80; *Dart, V. & P.* 1210; unless the objections are frivolous and vexatious: *Thorpe v. Freer*, 4 Mad. 406; *Peers v. Snayd*, 17 Beav. 151 *Seton*, 5th ed., 1875; *Platt v. Blizzard*, 29 Gr. 48; *Hurd v. Robertson*, 7 Gr. 42; *Laird v. Paton*, 7 Ont. 137. A special application is necessary for an order for such costs: *Flower v. Hartop*, *supra*.

Though the title be a possessory one, and be first proved in the M. O., a purchaser may be ordered to pay the costs of the reference where he has acted unreasonably; see *Dame v. Slater*, 21 Ont. 375.

A purchaser will be ordered to pay the costs of an unsuccessful application to be relieved from his purchase: *Osborne v. Osborne*, 18 W. R. 421.

Where a good title cannot be made, the purchaser is entitled to a lien on the land sold, for the deposit and costs: *Hurd v. Robertson*, 7 Gr. 142; and where the vendor rescinds under a condition enabling him to do so, the purchaser is entitled to his costs: see *Isaacs v. Lowell*, 1898, 2 Ch. 285.

742. The foregoing Rules 735 to 741 inclusive, shall apply to all cases of reference to the Master as to title, as well as to sales by the Court. Con. Rule 115.

Taken from Chy. O. 397.

743. Purchase money shall not be paid out of Court except upon consent of the purchaser or his solicitor, or upon proof being made to the Accountant that the purchaser has received a conveyance or vesting order in respect of the property for which the money in question was paid into Court. *New.* See Con. Rule 974, last part.

This although a new Rule really embodies what has always been the practice in the Accountant's office.

(v) Foreclosure, Sale and Redemption.

744. Upon a reference under a judgment for foreclosure or sale or redemption of mortgaged property, the Master shall inquire into and state, whether any person, and who, other than the plaintiff, has any lien, charge, or incumbrance upon the land and premises embraced in the mortgage security of the plaintiff, subsequent thereto. Con. Rule 124.

Taken from Chy. O. 442.

This Rule in its terms applies only to the case of mortgages of lands, but a similar procedure is followed upon a judgment for the sale, or foreclosure of chattels.

Rule 745.

Master to
inquire as
to incum-
brances
subsequent
to plaintiff.

The inquiry is confined to subsequent incumbrancers; persons against whom relief is sought, who are entitled to the ultimate equity of redemption, or whose claims, if any, are *primâ facie* prior to the plaintiff's must be made parties to the writ: *Glass v. Freckleton*, 10 Gr. 470; *Lally v. Longhurst*, 12 P. R. 510; and see *White v. Beasley*, 2 Gr. 662; and as to the wife of the mortgagor: see *Blony v. Fitzgerald*, 15 P. R. 467; and see 30 C. L. J. 113. Where, however, the plaintiff has sought to attack in the Master's office, the priority of an incumbrancer who is *primâ facie* entitled to priority over him, he has been allowed to vacate his judgment and to add the incumbrancer as an original defendant to the writ, and proceed *de novo* as against him: *Lally v. Longhurst*, *supra*. Where the mortgagor was the only defendant, and a decree, by consent, for immediate foreclosure was taken against him, a reference as to incumbrances was refused: *Taylor v. Ward*, 13 Gr. 590; but it seems doubtful whether the rule laid down in that case would be followed under the present practice. Where there are no incumbrances, the plaintiff should not take a judgment with a reference as to incumbrances: see *Rule 619*, and notes.

The incumbrancers are ascertained by the production of the certificates mentioned in the following Rule.

Plaintiff
to bring
into M. O.
Sheriff's
and Regis-
trar's cer-
tificates.

745. The plaintiff shall bring into the Master's Office certificates of the Registrar and Sheriff of the County wherein the property lies, setting forth all the incumbrances which affect the property in the writ or pleadings mentioned, and such other evidence as he may be advised. Con. Rule 125.

Taken from Chy. O. 443.

The certificates should be brought down to, at least, the day subsequent to the issue of the writ in the action.

Parties
acquiring
title *pend-
ente lite*
need not
be added.

It is not necessary to add as parties, those who acquire title *pendente lite*: *Robson v. Argue*, 25 Gr. 407; *Walbridge v. Martin*, 2 Chy. Ch. 275; *Bellamy v. Sabine*, 1 D. & J. 566, 578, 580, 584, 3 Jur. N. S. 943; *Tyler v. Thomas*, 25 Beav. 47; an order adding parties who had acquired interests *pendente lite* was set aside: *Mell v. Parr*, 9 P. R. 561; but see *Lindsay v. Bank of Montreal*, 13 Gr. 86. A party acquiring an interest in the subject matter of an action may be added as a defendant on his own application: *Gibson v. Nelson*, 2 O. L. R. 500. As to the doctrine of *lis pendens*, see *supra*, pp. 606 and 866.

Sheriff's
certificate,
form of.

Sheriff's Certificate.—Where the mortgage is of freehold lands, the certificate of the Sheriff must relate to executions against lands, but where the property mortgaged is leasehold, or chattels, it should relate to executions against goods: *Sparrow v. Champagne*, 5 C. L. 334. The certificates are usually confined to executions against the mortgagor, or other owner of the equity of redemption. But when the practice of registration of judgments was in force, it was held to be necessary to make the judgment creditors of the mortgagee parties also: *Sanderson v. Juez*, 7 Gr. 383; but in a later case it was held that a creditor of the mortgagee who had obtained an order attaching the mortgage debt, but not an order to pay over, was not an incumbrancer, and ought not to be made a party: *Crashie v. Evans*, 26 Gr. 283. The Sheriff's certificate should be so worded as to include writs which have been withdrawn for renewal, this may be

done by making the certificate cover any writs which have been in the Sheriff's hands within thirty days preceding its date: see form of such a certificate, H. & L. Forms, No. 1437.

The withdrawal of a writ for renewal is not an abandonment of its priority, but on being returned to the Sheriff renewed, it retains the same position it held prior to its withdrawal for renewal: *Reice v. Jarvis*, 13 C. P. 495; *Hair v. Munroe*, 23 U. C. Q. B. 139. The day of the teste of a *f. fa.* is inclusive, so that a writ issued on the 15th day of a month expires on the 14th day of the same month in the last year of its currency: *Bank of Montreal v. Taylor*, 15 C. P. 107. A writ withdrawn for renewal, and not returned for fifteen days thereafter, when a year from the teste had expired, was held, nevertheless, to be re-delivered in sufficient time: *Meneilly v. McKenzie*, 3 E. & A. 290; but a writ not returned to the Sheriff until six months after its renewal—owing to mistake—was held to have lost its priority: *Re Hime & Ledley*, 13 P. R. 1; as to the currency and renewal of writs of *f. fa.*, see Rule 872. A direction by the execution creditor to the Sheriff to stay proceedings, is tantamount to a withdrawal of the writ, and any subsequent execution then in the Sheriff's hands, or thereafter, and during the stay, coming to his hands, will take priority: *Trust & Loan Co. v. Cuthbert*, 13 Gr. 412. Under *The Creditors' Relief Act*, R. S. O. c. 78, the question of priority between execution creditors is to a large extent done away with: see s. 3.

Registrar's Certificate.—The Registrar's certificate is usually confined to registrations on the particular parcel of land included in the plaintiff's mortgage. But it is well to bear in mind, that judgments for money registered against a defendant, bind all his lands situate within the county, or counties, in which the registration is made, without any local description: see A. A. s. 35, *supra*, p. 30.

Where the mortgaged property consists of chattels, the certificate of the Clerk of the proper County Court should be produced, as to subsequent mortgages.

It is to the interest of the plaintiff to take care that all persons, having any claim as subsequent incumbrancers, are made parties; as the omission to make them parties at the proper time, may lead to difficulty in carrying out any subsequent sale which may be had in the action; and possibly render another action necessary.

746. The Master shall direct all such persons as appear to have any lien, charge or incumbrance upon the property in question, subsequent to the mortgage in question, to be made parties to the action, and to be served with a notice according to Form No. 77. Con. Rule 126.

Taken from Cby. O. 444.

For Form No. 77, see H. & L. Forms, No. 985.

Where it is doubtful whether persons, appearing to have claims, have any valid right, the question should not be determined against them in their absence, but they should be added as parties, and an opportunity given them to maintain their claims: *Canada Landed Credit Co. v. McAllister*, 21 Gr. 593. Persons whose claims, if any, would be prior to the plaintiff's should be made parties to the writ.

Rule 746. If any relief is claimed against them, and not added in the Master's office: *Glass v. Freckleton*, 10 Gr. 470; *Lally v. Longhurst*, 12 P. R. 510; and see *Rule 744*. Persons having mechanics' liens subsequent to the plaintiff, should be added under this *Rule*, and not made parties by the writ: *Jackson v. Hammond*, 8 P. R. 157. Under the former *Mechanics' Lien Act* an execution creditor whose writ was placed in the Sheriff's hands subsequent to the registration of a mechanic's lien, but prior to the institution of an action to enforce it, was a subsequent incumbrancer, and might be made a party to the action to enforce the lien in the Master's office, notwithstanding the 90 days limited by R. S. O. 1887, c. 126, s. 23, had expired: *Cole v. Hall*, 12 P. R. 584, affirmed by C. A., 13 P. R. 100; but under the present *Mechanics' Lien Act* (R. S. O. c. 173), it would seem that such an execution creditor should be made an original party. A creditor of a mortgagee who has obtained an attaching order against the mortgage debt, but who has not obtained an order to pay over, is not an incumbrancer within the meaning of the *Rule*: *Crosbie v. Fenn*, 20 Gr. 283; neither is a simple contract creditor of the mortgagor, nor has he any right of redemption: *Archel v. Allenby*, 17 Ont. 275; and where a tenant in common mortgages his share, his co-tenants have no equity to redeem that share: *Id.*

Where a subsequent mortgagee is dead his real representatives should not be made parties, it is only necessary to add his personal representatives: *Whitla v. Halliday*, 4 D. & W. 267; *Taylor v. Stead*, 1 Ch. Ch. 74; *Grimshaw v. Parks*, 6 U. C. L. J. 142; *Lapierre v. Humphries*, 11 Gr. 209; R. S. O. c. 121, s. 11; *Dick v. Douglas*, 20 Gr. 99; *Robinson v. Myers*, 9 Gr. 572; and see now R. S. O. c. 127, ss. 3, 4. And where a mortgage is taken in the name of one partner to secure a partnership debt, it is not necessary to add the real, or personal, representatives of a deceased partner in an action by the surviving partner to enforce the security: *Stephens v. Simpson*, 12 Gr. 493.

To an action for sale or foreclosure by a mortgagee of a limited company, whose mortgage covers specific property, debenture holders, secured by a subsequent mortgage constituting a floating security on all the property and undertaking of the company, are proper parties, and even though their debentures are not due, they should be added under *Rule 746*: *Wallace v. Evershed*, 1899, 1 Ch. 891; 80 L. T. 523.

Subsequent incumbrancers should not be made defendants by writ, even in an action to enforce an annuity: *Nelson v. Cochrane*, 13 P. R. 76.

Where a person is entitled to rights in two different capacities, if he be made a party to an action distinctly as regards his right in one capacity, he may not be bound as to his rights in the other capacity: e.g., a person made a defendant as a judgment creditor, was held not to be bound in his character of mortgagee: *Crooks v. Watkins*, 8 Gr. 340.

Where an execution creditor is made a party in the Master's office as a subsequent incumbrancer, service of the notice (Form 77) upon his solicitor in the action in which the execution was recovered is sufficient: see *Rule 332*. Where it is brought to the notice of the Master that there are parties having subsequent unregistered claims against the lands, they should be made parties in his office: *Canadian Bank of Commerce v. Forbes*, 10 P. R. 442.

A mortgagor's tenant for years is entitled to redeem, if the mortgagee refuse to concur in the lease: *Tarn v. Turner*, 39 Ch. D. 466; 58 L. T. 558; and should be added as a party: and see *Anderson v.*

Stevenson, 15 Ont. 563; but the tenant is not a subsequent incumbrancer, and cannot be added in the Master's office as such; *McLaughlin v. Stewart*, 1 O. L. R. 295; but see *Rule 196*.

Persons added as parties under this *Rule* become parties from the date of the notice (Form No. 77) not merely from the date of its service; *Sterling v. Campbell*, 1 Chy. Ch. 147.

747. Any party served with a notice under *Rule 746* may apply to the Court at any time within 14 days from the date of the service, to discharge, add to, vary, or set aside the judgment or order making him a party. *Con. Rule 127.*

Taken from Chy. O. 445.

Where a party added by the Master, claims to be prior to the plaintiff, he should move to discharge the Master's order; *McDougall v. Lindsay Paper Mills Co.*, 10 P. R. 247; 20 C. L. J. 133.

In *Montgomery v. Shortis*, 3 Chy. Ch. 60, the motion to discharge an order adding a party, appears to have been entertained in Chambers; and in *McDonald v. Rodgers*, 9 Gr. 75, the question was raised on an appeal from the Master's report; and in *Kline v. Kline*, 3 Chy. Ch. 161, an application was made to the Master himself, to discharge his order adding a party under *Rule 650*, on grounds disclosed subsequent to the making of the order.

Where the party added, desires to move to vary, or set aside the judgment, the motion must be made to the Court at its weekly sittings, and the motion must be returnable within the fourteen days from service of the notice on the party moving; *Muller v. Brown*, before Prondfoot, V.C., 23rd November, 1880; *Wright v. Wright*, before Blake, V.C., 29th March, 1881; and see *Mellroy v. Hawke*, 3 Chy. Ch. 66; *Harris v. Meyers*, 16 Gr. 117; *Jackson v. Gardner*, 2 Chy. Ch. 385.

Where the fourteen days is suffered to elapse, before the motion is made returnable to discharge the order, or to vary, or set aside, the judgment, the party added must first obtain leave to move, before he can move to vary, or set aside, the judgment, or set aside the order making him as a party; *Roe v. Stoddard*, 15 Gr. 137; *Mellroy v. Hawke*, 3 Chy. Ch. 66. This leave, in a proper case, may be obtained on motion in Chambers, but where the applicant failed to show a *prima facie* case, leave was refused; *Boe v. Bridgman*, 6 P. R. 234.

A subsequent incumbrancer is not entitled to have the judgment varied so as to require the plaintiff to bring before the Court parties for the purposes of effectuating relief to which the incumbrancer is entitled; his remedy is to redeem, and then to proceed on his own account to obtain such relief; *Rutherford v. Rutherford*, 17 P. R. 229.

748. The Master, before he proceeds to hear and determine, shall require an appointment according to Form No. 78, to be served upon all persons made parties before the judgment or order. *Con. Rule 128.*

Taken from Chy. Ord. 416.

For Form No. 78, see H. & L. Forms, No. 184.

Rule 749.

Defendant who has not appeared entitled to notice of proceedings in M.O.

Under the former practice in Chancery, it was held that notwithstanding a bill might have been taken *pro confesso* against a defendant he was, nevertheless, entitled under certain circumstances, to notice of proceedings in the Master's office: *Robinson v. Whitcomb*, 20 Gr. 415; *McCormick v. McCormick*, 6 P. R. 208; *Buchanan v. Tiffany*, 1 Gr. 98; *Walsh v. Bourke*, 1b. 105; *Hawkins v. Jarvis*, 1b. 257; 1 E. & A. 216; *Strachan v. Murney*, 6 Gr. 284; but see *Perrin v. Davis*, 3 Gr. 161. In mortgage cases it was customary to notify not only subsequent incumbrancers who were parties to the bill as required by this *Rule*, but also the mortgagor, whenever the plaintiff proved any other claim in addition to that alleged in his bill, or where subsequent incumbrancers were added, even though the bill had been taken *pro confesso*: see *McCormick v. McCormick*, *supra*; but see *Baby v. Woodbridge*, 5 U. C. L. J. 67. But a defendant cannot, in the Master's office, rely on any defence which, if sustained, would have the effect of determining that the Court had made a nugatory order or judgment: *McDougall v. Lindsay Paper Mills Co.*, 10 P. R. 247; *Wiley v. Ledyard*, 1b. 182.

Under the new practice there is now an equivalent proceeding to an order or note *pro confesso* (see *Rules* 263, 573, 586); and a *Rule* expressly providing that defendants who do not defend, "except where otherwise provided by these *Rules* . . . shall not be entitled to notice of any subsequent proceedings in the action." This *Rule* contains such a provision for notice to such defendants. By *Rule* 330 non-appearing defendants may be served by posting up the document required to be served "in the office where the proceedings are being conducted."

Parties not attending, who have been duly served to be foreclosed.

749. Where a person who has been duly served with a notice under *Rule* 746 or with an appointment under *Rule* 748, neglects to attend at the time appointed, the Master shall treat such non-attendance as a disclaimer by the person so making default; and any claim of such person shall be thereby foreclosed, unless otherwise ordered upon application duly made for that purpose. Con. *Rule* 129.

Taken from Chy. O. 447.

Application to incumbrancer to be let in to prove after foreclosure.

Notwithstanding that a subsequent incumbrancer has been foreclosed under this *Rule*, he may in some cases obtain leave to prove his claim. Applications for leave to be let in after the time has expired must be obtained from the Master, if no report has been made, and where the report has issued, then upon motion in Chambers. After a Master has made his* general report, he is then *functus officio*, and there would therefore be no jurisdiction in the Master in Ordinary to entertain such an application under *Rule* 698 (1); but a Local Master having a general jurisdiction in Chambers under *Rule* 49 would appear to be entitled to entertain such an application. In *Becher v. Webb*, 7 P. R. 445, relief was given on the terms of postponing the applicant to a subsequent incumbrancer, who had duly proved his claim; and see *Catell v. Simons*, 8 Beav. 243; *Hull v. Falconer*, 11 Jur. N. S. 151; *Cameron v. Wolfe Island Ry. Co.*, 6

Terms on which motion granted.

* In *The Queen City Refining Co.*, before the Master in Ordinary, 7th May, 1885, the learned Master was of opinion that he was not *functus* until his report was filed.

P. R. 91; but in *Ross v. Stevenson*, 7 P. R. 126; *Sterling v. Camp*, Rule 750. bell, 1 Chy. Ch. 147, relief was granted, without postponing the applicant.

Where an incumbrancer had proved his claim on one mortgage, he was afterwards let in after report, on payment of costs, to prove a claim on another mortgage with a view to consolidating them: *Ross v. Stevenson, supra*.

Where a person added as a subsequent incumbrancer, appears and disclaims, he is not entitled to costs: *Hatt v. Park*, 6 Gr. 553; *Lewin v. Jones*, 51 L. T. 59. incumbrancer disclaiming costs.

750. When all parties have been duly served, the Master shall take an account of what is due to the plaintiff, and to the other incumbrancers (if any), for principal money and interest, and tax their costs, and settle their priorities, and appoint a time and place, or times and places, for payment according to the practice of the Court. Con. Rule 130. Master to take accounts of plaintiff and incumbrancers.

(a) Where moneys are by any judgment, order or report directed to be paid for the purpose of redemption or any like purpose, the same may be directed to be paid into Court.

(b) Moneys so paid into Court shall be paid out together with any interest accrued thereon, to the party for whom the same was by the judgment, order or report directed to be paid into Court, without order upon production to the Accountant of the consent of the party by whom the money was paid into Court, duly verified, or of his solicitor, but otherwise as the Court or Judge may order. Rule 1263, 18 June, 1904.

The first paragraph is taken from Chy. O. 448.

The second paragraph is new, and provides for payment into Court in lieu of payment into a bank, as has been heretofore the practice. It is not compulsory but will probably be generally adopted as being a simple and cheaper method. The consent of the party must be verified by affidavit, the consent of his solicitor needs no verification.

Proof of Service.—It is the duty of the Master, before proceeding to take the accounts, to require due proof to be adduced of service of the necessary proceedings on all parties not attending before him who are entitled to notice. All subsequent incumbrancers are entitled to attend the taking of the account, and it would seem also necessary that the defendants named in the writ should also be notified, even though they have not appeared: see note to Rule 748. Proof of service of notice.

Taking Account.—The production of the mortgage and affidavit of the incumbrancer proving his claim is *prima facie* sufficient proof of the claim, and under Rule 751 the affidavit of an assignee is *prima facie* sufficient: *Court v. Holland*, 8 P. R. 213; *Elliott v. Hunter*, 24 Gr. 430; *Pollock v. Perry*, 5 Gr. 591; *Hancock v. Moulson*, 10 Gr. Taking accounts, prima facie proof, what is.

Rule 750.
Affidavit of
claimant.

483; *Warren v. Taylor*, 9 Gr. 59; he need not go into evidence to prove that the amount is unpaid: *Markle v. Ross*, 13 P. R. 135; where the bill was *pro confesso*, the mortgagee was bound to state the amount actually advanced: *Stetling v. Raley*, 9 Gr. 343; and in every case it is competent for the parties, if the mortgage has not been made for the purpose apparent on the face of it, to shew in the Master's office, the real purpose for which it was executed: *Id.*; *Penn v. Lockwood*, 1 Gr. 547; *Brownlee v. Cunningham*, 13 Gr. 586; *Morrison v. Robinson*, 19 Gr. 480; or for which it is held as security: *Inglis v. Gilchrist*, 10 Gr. 301; *McIntyre v. Thompson*, 6 Ont. 710; 19 C. L. J. 393. But to reduce the amount below the amount apparently secured, the evidence must be clear: *Fraser v. Loeie*, 10 Gr. 207.

Where the claim is brought in, in the name of the Accountant of the Court, his certificate of the amount appearing due by his books, and that he has not been in possession, is sufficient *prima facie* evidence of his claim: *Holmsted v. Vanderbogart*, 19 C. L. J. 97; this was a decision of the Chancellor and Proudfoot, J., on the matter being submitted to them.

Where a mortgagor had received only a part of the mortgage money, but gave a receipt for the full amount, and the mortgagee thereupon, and before any payment had fallen due under the mortgage, assigned it to a third person who took it *bona fide* without notice that the full amount has not been advanced, it was held that the mortgagor could not, as against the assignee, dispute that the mortgage was security for the amount it purported to secure, and for which he had given the receipt: *Bickerton v. Walker*, 31 Ch. D. 151; 53 L. T. 731. But the usual rule is that an assignee of a mortgage takes it subject to the actual state of accounts between the mortgagee and mortgagor, and cannot, even when the mortgage contains a formal receipt for the whole amount purported to be secured thereby, recover more than has been actually advanced: *Manley v. London Loan Co.*, 23 Ont. App. 139; 26 S. C. R. 443.

An assignee, moreover, is not entitled to enforce a covenant which his assignor could not have enforced, thus, where a trustee by mistake executed a mortgage containing a covenant for payment personally of the mortgage debt, there being no consideration therefor, it was held that the assignee, though a purchaser for value without notice, could not enforce it: *Patterson v. McLean*, 21 Ont. 221.

Collateral
advantages
stipulated
for by
mortgagee.

Collateral advantages stipulated for by a mortgagee over and above his principal and interest, e.g., a bonus, cannot be recovered: *James v. Kerr*, 40 Ch. D. 449; 60 L. T. 212; *Bradley v. Carritt*, 1903, A. C. 253; 88 L. T. 633, overruling *Sautley v. Wilde*, 1899, 2 Ch. 474; 80 L. T. 154; 81 L. T. 393; see *Rice v. Noakes*, 1900, 1 Ch. 213; 2 Ch. 445; 1902, A. C. 24; 81 L. T. 482; 86 L. T. 62; nor costs not connected with the loan transaction: *Field v. Hopkins*, 62 L. T. 102.

And where a mortgagee stipulates for a life insurance as collateral security for the loan, and for the premiums being paid by or charged against the mortgagor, the representatives of the mortgagor are entitled to have the insurance applied to the payment of the debt, and are entitled to any surplus, notwithstanding any stipulation in the mortgage to the contrary: *Salt v. Northampton*, 1892, A. C. 1; 76 L. T. 765. A stipulation that the mortgagor should buy goods from the mortgagee was upheld: *Biggs v. Hoddinott*, 1898, 2 Ch. 307; 79 L. T. 201; but such a stipulation (if valid) is only enforceable during the currency of the mortgage; see *Rice v. Noakes*, *supra*; but since *Bradley v. Carritt*, *supra*, the authority of *Biggs v. Hoddinott* would seem to be doubtful.

An option to the mortgagee to purchase the mortgaged property, given at the time the mortgage was made, was held to be a clog on the equity of redemption which could not be enforced: *Jarrah Timber Co. v. Samuel*, 1902, 2 Ch. 479; 87 L. T. 44; 88 L. J. 106.

But a subsequent agreement giving the mortgagee a collateral advantage may be valid: *Lisle v. Reeve*, 1902, 1 Ch. 53; 1902, A. C. 481; 85 L. T. 464; 87 L. T. 308.

Where the secretary of a building society had given the society a mortgage to secure a loan payable by instalments "and other moneys becoming due from the mortgagor to the society," it was held that the mortgagees could not hold the mortgage as security for moneys embezzled from them by the mortgagor after he had assigned the equity of redemption, as against the assignee: *Bailes v. Sunderland, Eq. Industrial Society*, 55 L. T. 808.

A mortgagee in possession by an agent may be compelled to give a detailed account of the receipts by the agent; an account merely of the lump sums received from the agent is insufficient: *Noyes v. Potlock*, 30 Ch. D. 336; 53 L. T. 430.

A derivative mortgagee is bound to account to his mortgagor for all profits made by him: thus where a derivative mortgagee by representing himself to be the mortgagee obtained an assignment of the equity of redemption which he subsequently resold at a profit, he was held bound to account for the profit so made: *Wilkins v. McLean*, 10 Ont. 58; 13 Ont. App. 467; 14 S. C. R. 22.

Where a mortgagee had sold under his power of sale, but owing to a defect in the advertisement had been compelled to allow the purchaser compensation, it was held that he was chargeable, as against the mortgagor, with any loss occasioned by the misdescription: *Tomlin v. Luce*, 41 Ch. D. 573, in appeal, 43 Ch. D. 191.

Where the mortgage provided that the total amount to be recovered by the mortgagee "under these presents" should not exceed £900, payments made by the mortgagee for rent and insurance, while in possession, were held to be recoverable, though the aggregate amount of the claim exceeded £900: *White v. City of London Brewery Co.*, 42 Ch. D. 237; but where an incumbrancer proved a claim on a bond in a penal sum of £1,000, conditioned for the payment of £500, it was held that he could not, as against a subsequent incumbrancer, recover any large sum against the land than the amount of the penalty, and the decree made in 1853 was amended in 1891 by limiting the principal and interest recoverable thereunder to the amount of the penalty: *Hatton v. Harris*, 1892, A. C. 547; 67 L. T. 722.

The plaintiff or defendant may rely in the Master's office, on a stated account set up in the pleadings, although no evidence was given of it at the trial: *Edinburgh Life Assurance Co. v. Allen*, 23 Gr. 238; and see *Ingila v. Gilchrist*, 10 Gr. 301; *Neil v. Neil*, 15 Gr. 110; *Holgate v. Shutt*, 28 Ch. D. 111.

The Master, in taking the account under the usual judgment in a mortgage action for sale or foreclosure, cannot go into any question affecting the validity of the plaintiff's security: *McDonnell v. Lindsay Paper Mills Co.*, 10 Pr. R. 247; 20 C. L. J. 123, 253; *Wiley v. Leppard*, 10 P. R. 182; *Bickford v. Grand Junction Ry. Co.*, 1 S. C. R. 696, and see *Re Munster*, 10 P. R. 98; 20 C. L. J. 112; but a subsequent incumbrancer is not bound by an agreement made after the date of such incumbrancer's charge, between the plaintiff and the mortgagor, as to the amount due to plaintiff, and may dispute it without moving against the judgment: *Rutherford v. Rutherford*, 17 P. R. 228.

Rule 750.

Taking
account
when
equity of
redemption
divided.

Consolida-
tion of
mortgages.

As to the proper method of taking the account, where the mortgagor has sold the equity of redemption in part of the mortgaged lands, and has agreed to indemnify the grantee against the mortgage: see *Parkins v. Vanderlip*, 11 Gr. 488.

Consolidation of Mortgages.—Subject *inter alia* to the exceptions hereafter mentioned, a mortgagee has a right, in actions for redemption, or foreclosure, to consolidate all mortgages held by him, and made by the same mortgagor, so as to prevent the mortgagor or subsequent incumbrancers from redeeming one or more without redeeming all: *Watts v. Symes*, 1 D. M. & G. 240; *Selby v. Pomfret*, 1 J. & H. 336; 3 De G. F. & J. 595; *Johnston v. Reid*, 29 Gr. 296; even though they were originally made in favour of different mortgagees: *Pledge v. Carr*, 1895, 1 Ch. 51; S. C., *sub nom.*, *Pledge v. White*, 1896, A. C. 187; 74 L. T. 323, and though the securities are of different natures, or the mortgagee is a legal mortgagee in one security and a derivative mortgagee in another: *Silverthorn v. Glazebrook*, 30 Ont. 408. A subsequent incumbrancer added in the Master's office has the same right: *Merritt v. Stephenson*, 7 Gr. 22; *Ross v. Stevenson*, 7 P. R. 126. But the right to consolidate cannot be enforced against a subsequent registered purchaser or incumbrancer without actual notice: *Brower v. Canada Permanent Building Society*, 24 G. 509; *Johnston v. Reid*, 29 Gr. 296; *Smith v. Smith*, 18 Ont. 205; *Miller v. Brown*, 3 Ont. 210. Nor can it be enforced, where prior to the creation of the second mortgage, the mortgagor had assigned, or mortgaged, his equity of redemption in the first mortgage, as against such assignee or mortgagee: *Jennings v. Jordan*, 6 App. Cas. 698; 45 L. T. 593; *Harter v. Coleman*, 19 Ch. D. 630; 46 L. T. 154; and see *Baker v. Gray*, 1 Ch. D. 491; nor where, though the second mortgage was created before the assignment of the equity of redemption, it does not become united in the same hand with the first until after the assignment of the equity of redemption in the first mortgage: *Minter v. Carr*, 1894, 2 Ch. 321; 71 L. T. 526; nor where one of the mortgaged estates has ceased to exist, *e.g.*, where it was a leasehold, or life estate: *Re Raggett, ex parte Williams*, 44 L. T. 4; 50 L. J. Chy. 187; nor can a mortgage of realty be consolidated with a mortgage of chattels so as to throw the debt secured by the realty, on the chattels: *Chesworth v. Hunt*, 5 C. P. D. 266; 42 L. T. 774; 49 L. J. C. P. 507; nor can it be allowed in favour of the plaintiff in an action for foreclosure, where one of the mortgages is not in default: *Cummins v. Fletcher*, 42 L. T. 859; 49 L. J. Chy. 117, 593; *The Scottish-American L. Co. v. Tennant*, 19 Ont. 263. Nor can a mortgage held by a sole mortgagee be consolidated with one held by him jointly with a third person: *Riley v. Hall*, 79 L. T. 244. The right to consolidate, except by express agreement, is now abolished in England by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41) s. 17.

Consolidation is only allowed as a condition of granting the owner of the equity of redemption equitable relief, on the principle that "he who seeks equity must do equity," but it cannot be imposed as a condition of granting such relief in respect of a legal claim on his part: *Re Union Assoc. Co.*, 23 Ont. 627, *per* Ferguson, J.

As to whether a mortgagee is entitled to consolidate mortgages as against surety: see *Nicholas v. Ridley*, 1894, 1 Ch. 192.

Where the right to consolidate mortgages on different properties has once been exercised, it is defeated by any subsequent transfer of the equity of redemption in the different properties to other parties, and the right to consolidate arises, notwithstanding that the mort-

gages which it is sought to consolidate, were not united in title with **Rule 750.** the mortgage sought to be redeemed until after the assignment of the equity of redemption in the latter mortgage to the person seeking to redeem: *Pledge v. Carr*, 1895, 1 Ch. 51; 71 L. T. 598; 8. C. sub nom., *Pledge v. White*, 1896, A. C. 187; 74 L. T. 323.

Where an intending purchaser of the equity of redemption inquires of the mortgagee the amount due on a prior mortgage, and also states the purpose for which the inquiry is made, and the mortgagee neglects to notify him of the claim to consolidate the security with another, the mortgagee is deprived of the right of consolidation as against such person: *Dominion Savings & Investment Company v. Kittridge*, 23 Gr. 631. So also the assignee of two mortgages cannot consolidate them if his assignor was precluded from so doing: *Bird v. Wenn*, 33 Ch. D. 215.

See further as to the consolidation of mortgages, 101 L. T. 200.

Tacking.—Tacking a subsequent to a prior incumbrance, so as to tack out an intervening registered incumbrance, can no longer be done so as to defeat the provisions of *The Registry Act*: R. S. O. c. 136, s. 98; and to this extent tacking is abolished, but there are still some instances in which claims not secured by the mortgage may be tacked thereto as a condition of redemption.

The mortgagee cannot tack to his mortgage debt a simple contract debt due from the mortgagor: *Ferguson v. Frontenac*, 21 Gr. 188; *Canadian Bank of Commerce v. Forbes*, 10 P. R. 442; but he may as against his representatives, in case of his death; and he may tack all prior charges or incumbrances paid off by him: *Trust & Loan Co. v. Cuthbert*, 14 Gr. 410; *Tetter v. St. John*, 10 Gr. 85; *Wells v. The Trust & Loan Co.*, 9 Ont. 170; 20 C. L. J. 407; and he is entitled to claim as against subsequent incumbrancers, or the mortgagor, the full amount due thereon, no matter how advantageous the terms on which he may have acquired them: *Watkins v. Mcellar*, 7 Gr. 586; *Dobson v. Land*, 8 Ha. 216.

The mortgagee is also entitled to tack to his mortgage debt, any costs occasioned by part of the mortgaged estate being expropriated under any statute: *Rees v. The Metropolitan Board of Works*, 14 Ch. D. 372; 42 L. T. 685; 49 L. J. Ch. 620; and also any costs incurred in protecting, or endeavouring to realize, his security: *Wilkes v. Senior*, 7 Ch. D. 188; and see *Rule 657*, note p. 892; and the costs of an abortive sale: *Farrer v. Lacey*, 31 Ch. D. 42; 50 L. T. 121; but not the costs of unsuccessful proceedings undertaken without the concurrence of the mortgagor: *Wells v. The Trust & Loan Co.*, supra; nor costs of proceedings for sale which he has taken but abandoned: *Middleton v. Scott*, 3 O. L. R. 26.

Merger.—Where an incumbrancer obtains a release of the equity of redemption, a question whether his incumbrance is merged arises. This is a question of intention, and where it is obviously not for his benefit, the Court will not presume any such intention: *Hart v. McQuesten*, 22 Gr. 133; *North of Scotland Mortgage Company v. German*, 31 C. P. 349; *Elliot v. Jayne*, 11 Gr. 412; *Weaver v. Vandusen*, 27 Gr. 477; *Macdonald v. Bullivant*, 10 Ont. App. 582; and see *Adams v. Angell*, 5 Ch. 634; *Bell v. Sunderland Building Society*, 24 Ch. D. 618; 49 L. T. 535; *Re Pride, Schackell v. Cotnett*, 1891, 2 Ch. 135; 64 L. T. 768; *Thorne v. Cann*, 1895, A. C. 11; *Liquidation Estates Co. v. Willoughby*, 1896, 1 Ch. 726; 74 L. T. 228; 1898, A. C. 321; 78 L. T. 329.

Rule 750.

Improve-
ments—
What
allowed
mortgagee
in pos-
session.

Improvements.—Where a sale of the mortgaged property under execution is set aside the vendee is entitled to improvements: *Shaw v. Tims*, 19 Gr. 496; and also when a sale is made by the mortgagee who claims to be the absolute owner, as purchaser at a sale under the power which proves invalid: *McLaren v. Fraser*, 17 Gr. 567; *Carroll v. Robertson*, 15 Gr. 173. The expense of erecting a carding mill was disallowed: *Kerby v. Kerby*, 5 Gr. 587. Expenses of planting and tending fruit, and ornamental trees, suitable for carrying out improvements commenced by the mortgagor were allowed, but not their value at the time of redemption: *Paul v. Johnson*, 12 Gr. 474. Where the mortgagee is charged with rents arising from improvements made by him, he should be allowed the expenses of such improvements to a corresponding amount: *Constable v. Guent*, 6 Gr. 510 and see further as to allowances to mortgagees in possession, notes to Rule 667, *supra*, pp. 891, 892.

Interest,
arrears of,
how far re-
coverable
against
mortgaged
land.

Interest.—Interest on moneys secured by mortgages made after 1st July, 1880, is subject to the provisions of R. S. O. c. 127, ss. 3-8.

Interest begins to run only from the time the money is actually advanced: *Edmonds v. Hamilton P. & L. Soc.*, 19 Ont. 677; 18 Ont. App. 347.

The general rule is that a mortgagee suing for sale or foreclosure cannot recover arrears of interest for more than six years prior to the commencement of the action: see R. S. O. c. 133, s. 17; and the same rule applies in an action by a subsequent mortgagee for redemption: *McMicking v. Gibbons*, 24 Ont. App. 586, overruling on that point *Delaney v. C. P. R.*, 21 Ont. 11. See also *Colquhoun v. Murray*, 26 Ont. App. 204.

Where the action is either for foreclosure or redemption, and is between the mortgagee and the mortgagor, or the representative of a deceased mortgagor, who has covenanted for payment, and no subsequent incumbrancer intervenes, the mortgagee may tack all the interest recoverable on the covenant: *Carroll v. Robertson*, 15 Gr. 173; *Howeren v. Bradburn*, 22 Gr. 96; *Macdonald v. Macdonald*, 11 Ont. 187; see however *McMicking v. Gibbons*, *supra*; but where there is no covenant, even in such a case, no more than six years' arrears can be recovered: *Taylor v. Hargrave*, 19 Gr. 271; and see *Airey v. Mitchell*, 21 Gr. 510; *Howeren v. Bradburn*, 22 Gr. 96; *Weaver v. Vandusen*, 27 Gr. at p. 481; *Barnes v. Glenton*, 1898, 2 Q. B. 223; 1899, 1 Q. B. 885; 80 L. T. 606, (under the English Act, the language is different, not being, like R. S. O. c. 133, s. 23, confined to actions to recover "out of any land"); see also *Dingle v. Coppin*, 1898, 79 L. T. 189, 1 Ch. 726; but the limitation of six years' arrears of interest has no application where the mortgaged property is personal estate: *Mellersh v. Brown*, 45 Ch. D. 225; 63 L. T. 189; unless it is included in the same mortgage with realty so as to form one security: *Charter v. Watson*, 1899, 1 Ch. 175; 79 L. T. 440. See also *London & Midland Bank v. Mitchell*, 1899, 2 Ch. 161; nor does it apply as against a subsequent mortgagee, as regards interest accruing due to him while a prior mortgagee is in possession: see R. S. O. c. 127, s. 18.

When a mortgagee sells under a power of sale he may retain out of the proceeds, the arrears of interest though they exceed six years: *Edmonds v. Waugh*, L. R. 1 Eq. 418; *Ford v. Allen*, 15 Gr. 565; *In re Marshfield*, *Marshfield v. Hutchings*, 34 Ch. D. 721; 56 L. T. 694. See also *Dingle v. Coppin*, *supra*.

Interest is not ordinarily allowed on the costs of the action, but Rule 750. it may be allowed on costs which have been expressly ordered to be added to the plaintiff's security, from the date of taxation: *Eardley v. Knight*, 41 Ch. D. 537.

Rate of Interest.—Since the repeal of the usury laws, the Court will not refuse to enforce any contract, which parties, competent to contract, may make for the payment of interest, provided it is understood: *Teeter v. St. John*, 10 Gr. 85; R. S. C. c. 127, s. 1. But the rate of interest chargeable by corporations or companies or associations of persons, not being a bank, is restricted in certain cases to six per cent. or eight per cent.: see R. S. C. c. 127, ss. 9-11.

Where a mortgage stipulated that up to a certain day the interest to be charged should be eight per cent., and if the principal were not then paid twelve per cent., it was held that the mortgagee was entitled to recover the twelve per cent. on default: *Waddell v. McColl*, 14 Gr. 211.

Where a mortgage is made payable without interest, or no interest is reserved, interest may nevertheless be recovered at the legal rate from the time of default: *McDonell v. West*, 14 Gr. 492; *Reid v. Wilson*, 9 P. R. 165; 18 C. L. J. 58. Compound interest may now, subject to the provisions of R. S. C. c. 127, ss. 10, 11, be stipulated for and recovered: *Clarkson v. Henderson*, 14 Ch. D. 348; 43 L. T. 29; *Henderson v. Dickson*, 9 Gr. 379; or an increased rate in case of default: *Downey v. Parnell*, 2 Ont. 82; 18 C. L. J. 241; but a mortgagee is *prima facie* only entitled to simple interest, and where an account charging compound interest was assented to by the mortgagor in ignorance of his rights it was re-opened: *Daniell v. Sinclair*, L. R. 6, H. L. 381; 44 L. T. 257; and a bargain for an exorbitant rate of interest will not be enforced if it is shewn not to have been understood by the mortgagor: *Teeter v. St. John*, 10 Gr. 85.

Where the incumbrancer has redeemed a prior incumbrance, he is entitled to recover interest on the aggregate amount of principal, interest, and costs, so paid; on the principal, at the rate reserved in his own mortgage, and on the interest and costs, at the legal rate: *McMaster v. Hector*, 8 C. L. J. 284; and he has a lien on the land therefor as against subsequent incumbrancers: *Trust & Loan Company v. Cuthbert*, 14 Gr. 410; *Teeter v. St. John*, 10 Gr. 85. But where a solicitor purchases securities at his client's request, simple interest on the amount paid, is all that is chargeable, and not the rate reserved by the securities purchased, unless otherwise agreed: *Macleod v. Jones*, 50 L. T. 358.

The rate of interest reserved by the mortgage, is not necessarily payable after default, unless the mortgage expressly so provides: *Cook v. Fowler*, L. R. 7 H. L. 27; *Dalby v. Humphrey*, 37 U. C. Q. B. 514; *Jackson v. Harris*, 78 L. T. Jour. 130; and a covenant to pay interest on instalments in default does not necessarily mean that interest is to be paid on interest in default: *Goldstyon v. Tatterman*, 17 Q. B. D. 80; 18 Q. B. D. 1; 55 L. T. 866. But such rate was allowed after default, by way of damages, where it was not expressly shewn by evidence to be excessive: *Simonton v. Graham*, 8 P. R. 495; and see *Mellersh v. Brown*, 45 Ch. D. 225; 63 L. T. 189; but in another case, where no evidence was given by the mortgagees as to the rate of interest after default, only the legal rate was allowed: *Archbold v. Building & Loan Assoc.*, 15 Ont. 237; but see S. C., 16 Ont. App. 1. A covenant to pay interest at a higher rate than the legal rate "until mortgage money paid" does not entitle the covenantor to such higher rate after the time fixed for payment has expired: *Purell*

Rule 750. *v. Peck*, 12 Ont. 492; 23 C. L. J. 93; 15 Ont. App. 138; *Peoples Loan & D. Co. v. Grant*, 18 S. C. R. 202, but a covenant to pay a specified rate of interest as well before as after maturity until the principal is fully paid, entitles the covenantee to recover the specified rate after maturity until the principal is fully paid: *Middleton v. Scott*, 4 O. L. R. 459. A covenant to pay interest on all instalments in arrear, does not cover principal becoming due under an acceleration clause: *Biggs v. Freehold*, 26 Ont. App. 232; 31 S. C. R. 136. In computing the amount to be paid for redemption in the case of a mortgage the payment of which had been accelerated by default in the payment of an instalment, the Court allowed the mortgage rate for the six months allowed for redemption though it exceeded the legal rate: *Muttibury v. Stephens*, 6 C. L. T. 588; 23 C. L. J. 12; and see *Mellersh v. Brown*, *supra*.

Where an instrument provided for payment of interest at a given rate, until the principal money should be paid, it was held that the rate contracted for could not be recovered after judgment had been obtained on the instrument; but only interest at the legal rate on the amount of the judgment: *St. John v. Rykert*, 4 Ont. App. 213; *Grant v. People's Loan*, 17 Ont. App. 85; 18 S. C. R. 262; *Arbutnot v. Bunsell*, 62 L. T. 234; *Freehold Loan Co. v. McLean*, 8 Man. R. 116; *Manitoba & N. W. L. Co. v. Barker*, *ib.* 296; *Ex p. Feringa*, 25 Ch. D. 338; 50 L. T. 100; but see *contra*, *Popple v. Sylvester*, 22 Ch. D. 98; 45 L. T. 329; and see 19 C. L. J. 21; *Re Atkinson*, before Boyd, C., 4th May, 1883; and it would seem to be settled that the mortgagee cannot be redeemed by a subsequent incumbrancer except on payment of the interest secured by the mortgage, notwithstanding that the mortgagor may have recovered a judgment on the covenant for interest in arrear: *Economic Life Assce. Co. v. Usborne*, 1902, A. C. 147; 85 L. T. 589.

Where a mortgagor in ignorance of his rights, has paid interest at a higher rate than he could have been legally required to pay, he cannot recover the over-payments from the mortgagee, nor have them set off against moneys subsequently accruing due on the mortgage: *Stewart v. Ferguson*, 31 Ont. 112; but money paid by a mortgagor under a mistake of facts is recoverable: *McDermott v. Hickling*, 38 C. L. J. 85.

Interest in advance.

Where the interest is payable in advance, the mortgagee is nevertheless not entitled to have interest allowed for a period subsequent to that appointed for redemption: *Trust & Loan Co. v. Kirk*, 8 P. R. 203.

Tender
Prima facie
it stops
interest.

Tender.—Where a tender is relied on, it should be set up by statement of defence. Where such a defence is pleaded, it is sometimes specially referred to the Master to inquire as to the tender, or whether the amount tendered was sufficient: *Kuapp v. Bower*, 17 Gr. 695. *Prima facie* a tender stops interest; but if the mortgagee shows that the money was subsequently used by the mortgagor, and a profit made, subsequent interest is nevertheless chargeable: *ib.*; and see *Pearce v. Morris*, L. R. 5 Chy. at p. 231.

A tender is not equivalent to payment, and if refused, the mortgagor's remedy is an action for redemption; detainee for his title deeds will not lie: *Bank of N. S. W. v. O'Connor*, 14 App. Cas. 273.

A tender under protest is good, and a mortgagor is entitled to an inquiry whether the amount tendered was sufficient: *Peers v. Allen*, 19 Gr. 98; *Greenwood v. Sutcliffe*, 1892, 1 Ch. 1; 65 L. T. 797; and although a mortgagee is usually entitled to the costs of a redemption

action, yet where it has been occasioned by his refusal to accept the Rule 760. amount due, he may be ordered to pay the costs of the action up to judgment: *Squire v. Purdoo*, 66 L. T. 243. Tender by a cheque to a solicitor of a mortgagee is not a legal tender, though not objected to on that ground: *Blumberg v. Life Interest R. I. Corp.*, 1897, 1 Ch. 171; 1898, 1 Ch. 27; and see *Middleton v. Scott*, 4 O. L. R. 459.

Parol Agreements Affecting Mortgage.—A written agreement for value by a mortgagor to pay additional interest, is enforceable against mortgagor, though not under seal: *Brown v. Deacon*, 12 Gr. 198; and see *Alliance Bank v. Brown*, 10 Jur. N. S. 1121. But a verbal agreement to that effect will not bind the lands, as against a subsequent purchaser of the equity of redemption: *Totton v. Watson*, 17 Gr. 233; or even as against a devisee, or heir-at-law, of the mortgagor: *Re Houston, Houston v. Houston*, 2 Ont. 81.

An agreement for extra interest between a derivative mortgagee and the mortgagor cures to the benefit of the original mortgagee: *Gratwicke v. Anderson*, 15 Gr. 189.

Where, after the mortgage debt was partly paid off, the mortgagor re-borrowed the money and returned the receipts given for his previous payments, it was held that he was estopped from disputing that the amount so re-advanced was still secured by the mortgage: *Inglish v. Gilchrist*, 10 Gr. 301.

Statute of Limitations.—Under a dispute note, the Statute may be set up as a bar to the recovery of more than six years' arrears of interest; but where it is relied on as a defence to the whole claim, a statement of defence must be filed: *Wright v. Morgan*, 1 Ont. App. 613; *Cattanach v. Urquhart*, 6 P. R. 28.

Although ten years is now a bar to the recovery of money charged on land, as against the land: R. S. O. c. 133, s. 4; yet it was held that the right of action on the covenant was not barred until the lapse of twenty years under R. S. O. 1887, c. 60, ss. 1, 6; *Allan v. McTavish*, 2 Ont. App. 278; *Macdonald v. McDonald*, 11 Ont. 187; *McDonald v. Elliott*, 12 Ont. 98; but see *contra*, *Sutton v. Sutton*, 22 Ch. D. 511; 48 L. T. 95; *Fearnside v. Flint*, 22 Ch. D. 579; 48 L. T. 154. As to mortgages made on or after 1st July, 1891, the ten years' limitation applies to actions on the covenant: see R. S. O. c. 72, s. 1 (b). (h). As to the application of the Statute of Limitations as regards interest: see *supra*, p. 970.

Where there is an acceleration clause in case of default in payment of an instalment, the statute begins to run as to the principal and interest from the date of default: *McFadden v. Brandon*, 6 O. L. R. 247.

The Statute is no bar to an account for more than six years' rent, as against a mortgagee in possession: *Coldwell v. Hall*, 9 Gr. 110; affirmed in appeal, 7 U. C. L. J. 42; 8 U. C. L. J. 93.

Where a prior mortgagee, or other incumbrancer, has been in possession of any land, or in the receipt of the profits thereof, within one year next before an action is brought by any person entitled to a subsequent mortgage, or other incumbrance on the same land, the person entitled to the subsequent mortgage, or incumbrance, may recover in such action the arrears of interest which have become due during the whole time that such prior mortgagee, or incumbrancer, was in possession, or receipt, as aforesaid, although such time may have exceeded the term of six years: see R. S. O. c. 133, s. 18.

Rule 760. Although the remedy against the person of the debtor for the debt may be barred, an action for the foreclosure of the mortgaged property may lie: see *London & Midland Bank v. Mitchell*, 1899, 2 Ch. 161; 81 L. T. 263; *Barnes v. Glenton*, 1899, 1 Q. B. 885; 80 L. T. 606.

An action for foreclosure, or sale, is an action to recover land, and the commencement of an action for foreclosure or sale by a mortgagee out of possession stops the running of the statute: *Harlock v. Ashberry*, 19 Ch. D. 539; 46 L. T. 356; *Pugh v. Heath*, 7 App. Cas. 235; 16 L. T. 321; *Fletcher v. Rodden*, 1 Ont. 155; but see *Barwick v. Barwick*, 21 Gr. 39; and an action for redemption is also an action to recover land: per Strong, J., *Faulds v. Harper*, 11 S. C. R. 639.

Tenant in common entitled to redeem whole estate.

Where some of several tenants in common, are barred by the Statute of Limitations, and others of them are not; the latter are entitled to redeem the whole mortgaged estate, and not merely an aliquot part: *Faulds v. Harper*, 2 Ont. 405; 9 Ont. App. 537; 11 S. C. R. 639; see also *Martin v. Miles*, 5 Ont. 404.

Payments to take a case out of the Statute of Limitations must be made by the mortgagor or his duly authorized agent; payments made on his behalf without his authority will not prevent the Statute from running: *Acubould v. Smith*, 29 Ch. D. 882; 33 L. T. 137; or else by some person to whom the right of redemption is expressly reserved by the mortgage even though he is no party to it; see *Levin v. Wilson*, 11 App. Cas. 639; or by some person liable to pay the mortgage debt, and payment by such person will prevent the Statute from running in favour of his grantee, who is in possession, and no party to the payment: *Trust & Loan Co. v. Sterenson*, 20 Ont. App. 56; and see *Dobb v. Walker*, 1893, 2 Ch. 429; 68 L. T. 614. Payment by one of several executors, against the will of the others, was held not to bind the land: *Astbury v. Astbury*, 1898, 2 Ch. 111; but see R. S. O. c. 127, s. 4.

Payment by a receiver appointed by a mortgagee, will be as effectual as a payment by the mortgagor, to prevent the running of the Statute of Limitations: *Re Hale, Lilley v. Foad*, 1899, 2 Ch. 107; 69 L. T. 468.

Payments.

Payments.—Payment to one of several executors, is a good payment on account of a mortgage held by two of them as executors: *Ewart v. Dryden*, 13 Gr. 50; but payment to one of several trustees, who held a mortgage, is not good as to the other trustees: *Ewart v. Snyder*, 13 Gr. 55.

When mortgagee liable for moneys not received.

Where a mortgagor requested his mortgagee to release a part of the mortgaged property on payment of £100, and he released it on payment of £50 only, he was held liable for the difference: *Ball v. Jarvis*, 19 Gr. 568. But where a mortgagee refused to accept £100 offered as the price of part of the mortgaged property, which was expropriated, and upon an arbitration only £30 was awarded, the mortgagee was held not to be liable for the difference: *Gunn v. McDonald*, 11 Gr. 140.

Appropriation of Payments:

Appropriation of payments.

Payments made on account are to be appropriated (1) as the debtor directs at the time of payment, or (2) Where there is no direction by the debtor, as the creditor directs, or (3) Where neither makes any direction, the law will apply it to the older debt, or as may be just: *Wilson v. Rykert*, 14 Ont. 188; and see *Louther v. Heuser*, 41 Ch. D. 248.

A payment unappropriated by a debtor may be appropriated by the creditor at any time before judgment; and an appropriation by the creditor in the witness box at the trial was held to be valid: *Seymour v. Pickett*, 1906, 1 K. B. 715; 92 L. T. 519.

A mortgagee in possession, and in receipt of rents and profits, may sell under the power of sale, if the mortgage be in default, even though the rents are sufficient to keep down the interest; as in the absence of any agreement there is no appropriation of payments until the taking of the account: *Cockburn v. Edwards*, 18 Ch. D. 449; 45 L. T. 500; 51 L. J. Ch. 46; and see *Haddock v. Jobbery*, 19 Ch. D. 539.

Where a mortgagee sells under a power of sale, he is bound to apply the proceeds, first, in payment of interest and costs, and then either to pay the balance to the mortgagor, or apply it in reduction of purchase principal: *Thompson v. Hudson*, L. R. 10 Eq. 497; but see *Acworth v. Widding*, 1905, 1 Ch. 435; *Wright v. Gill*, *ib.* 241. He may sell on time, but he must give credit for the amount secured by the mortgage of the purchaser as cash, and even if he gets the consent of the mortgagor to a sale on credit, he is not at liberty to convert the mortgage taken to secure that part of the purchase money for which credit is given into cash, and charge the mortgagor with the discount and expenses, without a distinct bargain to that effect: *Heatly v. O'Connor*, 5 Ont. 731; any surplus in his hands should be either paid over to the party entitled, or if there be no hand to receive it, it should be either paid into Court under the Trustee Relief Act, or set apart so as to be fruitful for the benefit of the party entitled. If the mortgagee neglects to do either of these things, he will be chargeable with interest on the money so long as it remains in his hands: *Charles v. Jones*, 35 Ch. D. 544; 50 L. T. 848; *Read v. Eley*, 1900, W. N. 57; 88 L. T. 369. A mortgagee who concurs in a sale by his mortgagor is responsible for the due application of the purchase money: *West London Commercial Bank v. Reliance Permanent Building Society*, 29 Ch. D. 954; 53 L. T. 442.

If money is not expressly appropriated by the party paying it, the party receiving it may appropriate it, even upon a claim which he cannot enforce by suit; but an appropriation cannot be made by the creditor after action brought, on bringing in his account: *Fraser v. Loeie*, 10 Gr. 207; *Hagerman v. Smith*, Tay. 123; *Armour v. Carruthers*, 4 U. C. L. J. 210; *Fuller v. Parnall*, 8 C. L. 1. 86; and where a mortgagee held as security for a partnership debt the mortgage of one partner and the note of the other, it was held that he could not, as against an assignee of the equity of redemption, appropriate all payments on account of the note, but that he was bound to apply one-half of the sums paid out of the partnership assets, on account of the mortgage: *Moore v. Riddell*, 11 Gr. 69.

In taking the account, payments on account, should (if not otherwise appropriated by the debtor or creditor at the time of payment) be applied first, in payment of overdue interest and costs, and then of overdue principal, and where there are several items, the appropriation should be made in discharge of those earliest in date: *McGregor v. Gaulin*, 4 U. C. Q. B. 378; *Cummings v. Usher*, 1 P. R. 15; *Ross v. Porrault*, 13 Gr. 206; *Clayton's Case*, *Devaynes v. Noble*, 1 Mer. 530, 604; *Wilson v. Rykert*, 14 Ont. 188; but this rule is not an invariable rule of law. It cannot be applied to two transactions of the same date merely because one precedes the other on the paper on which they are recorded: *Cory v. S. S. Mecca*, 1897, A. C. 286; and where an accounting party (a solicitor) had in his accounts appropriated payments to principal, instead of the overdue interest, he was

Rule 750. held bound by the appropriation: *Taylor v. Magrath*, 10 Ont. 669. Where the creditor claims to have appropriated a payment, the onus lies on him of showing affirmatively that no appropriation was made by the debtor; *Lowther v. Heaver*, 41 Ch. D. 248. Where, for convenience, two separate accounts are kept by the creditor with his debtor in respect of one of which there is a credit, and the other a debit for which the creditor holds securities; the amount of the credit of the one account is properly applicable to the reduction of the balance to the debit of the other account: *Mutton v. Peat*, 1900, 2 Ch. 79.

Appropriation of payments, where mortgage given to secure a floating balance

A mortgage given to secure a floating balance, however, is not discharged by payments made on account, so long as the dealing between the parties continue, and any balance remains due in respect thereof, even though the payments exceed in amount the debt due when the mortgage was given, or the amount of the debt mentioned in the mortgage: *Cameron v. Kerr*, 3 Ont. App. 30; *Russell v. Davey*, 7 Gr. 13; *The City Discount Company v. Mellon*, L. R. 9 C. P. 692; *Fenton v. Blackisford*, L. R. 5 P. C. 167; *Griffiths v. Crocker*, 18 Ont. App. 370; but see *Re Brown*, 2 Gr. 111, 590; *Buchanan v. Kerby*, 5 Gr. 332.

An appropriation by the creditor cannot prevent the debtor from pleading the Statute of Limitations, but where the debtor pays a sum in respect of an account which includes a statute-barred item, that will amount to an acknowledgment. After a creditor has once made an appropriation, he cannot after action brought make another appropriation of the same payment: *Re Friend*, 1897, 2 Ch. 421; 77 L. T. 50.

Where a mortgagee in possession has, by an agreement with his mortgagor, applied the rents and profits on a collateral indebtedness for goods sold by him to the mortgagor, a subsequent incumbrance whose rights accrue after the arrangement is executed, is not entitled to have such rents applied on the mortgage debt: *Mitcheil v. Saylor*, O. L. 14, 458.

Insurance money, how applicable.

Insurance Money.—Where the mortgage contains no provision for the application of insurance money, payable under a policy effected by the mortgagor, or by the mortgagee under some covenant or provision in the mortgage in that behalf, the mortgagee is not bound to apply it in reduction of his debt before the time appointed for payment, or on the interest to accrue thereon, until it is actually due. In such a case, where the mortgagee declines to apply the money on his debt, or interest, the mortgagor is entitled to have the moneys laid out in rebuilding and restoring the premises to the *status quo*; but if the mortgagee retains the money he must apply it on account: *Austin v. Storr*, 10 Gr. 306. Under R. S. O. c. 121, s. 4 (2), the mortgagee cannot without the mortgagor's consent apply the insurance money in payment of moneys not yet due: *Corham v. Kingston*, 11 Ont. 432; *Edmonds v. Hamilton P. & L. Socy.*, 19 Ont. 677; 18 Ont. App. 347; and he is not bound to apply it in payment of arrears, but may hold it in reserve as collateral security while any portion of the mortgage money is unpaid; and, though he applies part of the insurance money in payment of overdue principal, he is not bound to apply the balance in discharge of overdue interest: *Edmonds v. Hamilton*, *supra*; but if he elects to hold the insurance money in reserve, he is accountable for all profit made out of the money while so held, and he should not let it lie idle, but ought, if possible, to concur with the mortgagor on some profitable way of laying it out: see *per Maclellan*, J.A., 18 Ont. App. 367.

In mortgages executed before March 18, 1881, after default, there is a statutory power, under which the mortgagee may recover premiums paid, with interest, the proceeds being by the mortgage; R. S. O. c. 121, s. 18. Where the mortgagee insures, though there be no covenant, to the benefit of a loss, the mortgagee may have the insurance money paid out in reimbursement; *Imperial Stat., 14 Geo. 3, c. 78, s. 83; Stinson v. French, 11 Gr. 404; Johnson (sed quib.) Carr v. Fire Insurance Association, 14 Gr. 487*; the Imperial Statute is now repealed as to this Province by *O. A. S. c. 26, s. 154 (O.)*; but see now R. S. O. c. 121, s. 4.

A mortgagee insuring out of his own funds, is not bound to give the mortgagor credit for the money received in the event of a loss; *Mortgagee insuring* *Russell v. Robertson, 1 Chy. Ch. 72*. Nor is he entitled to charge him with the premiums, unless the insurance is effected under R. S. O. c. 121, s. 18, *supra*; *McIntosh v. Ontario Bank, 20 Gr. 24*. But whether a mortgagee can recover both the insurance money, and also the mortgage debt seems doubtful; see *Castellum v. Preston, 8 Q. B. 19, 613; 46 L. T. 568; 19 C. L. J. 143; Kerfer v. Phoenix, 26 Ont. App. 277*; as to the right of a second mortgagee to recover on an insurance effected by him, when there is also an insurance on the same property effected by a prior mortgagee, see *Westminster v. Glasgow, 12 App. Cas. 690; 50 L. T. 611*.

Where a mortgagee holds several mortgages on different properties made by the same mortgagor, and receives insurance money in respect of one of such properties sufficient to satisfy the mortgage thereon, and the mortgagor has assigned his equity of redemption on that parcel to a third party, the third party is entitled to recover the surplus of the insurance moneys, and his right thereto cannot be defeated by consolidation of the mortgages; *Re Union Assurance Co., 25 Ont. 627*.

Mortgagees to whom a policy of insurance effected by the mortgagors is made payable as their interest may appear, may sue thereon in their own names and enforce payment to the extent of their interest, but if there is no mortgage or subrogation clause in the policy, the mortgagee stands in no better position than the mortgagor, and any defence against him will be a defence against the mortgagee; *Agricultural L. & S. Co. v. Liverpool L. & G. Ins. Co., 3 O. L. R. 127*. A renewal of a policy is a new contract, and though the original policy may have been voidable for non-disclosure of a prior insurance, yet, if, when the renewal is effected, there is no such prior insurance, the insurers cannot avoid the renewal on the ground of the existence of the prior insurance where the policy was originally issued; *Id.*

Where the mortgagor had insured in pursuance of a covenant, loss, if any, being payable to the mortgagee, and the buildings were burnt by the mortgagor, and the insurance money paid to the mortgagee, who assigned the mortgage to the insurance company; it was held, that inasmuch as the mortgagor could not have recovered on the policy, the insurance company were not bound to give credit on the mortgage debt for the amount of the insurance money, as against a puisne incumbrancer; *Westmacott v. Huntley, 22 Gr. 382; Livingston v. The Western Assurance Company, 14 Gr. 461; S. C. 16 Gr. 9*; and see *Klein v. Union Fire Insurance Company, 3 Ont. 234; Reddick v. The Saugeen Mutual Insurance Company, 14 Ont. 506; 15 Ont. App. 363; Secus*, if the mortgagor had not been debarred from recovering; *Id. v. North British & Commercial Insurance Company, 14 Ont.*

Rule 750. 322, 15 Ont. App. 421, 18 S. C. R. 697; *Howes v. Dominion Insurance Company*, 2 Ont. 89 (this case was reversed on appeal: see 19 C. L. J. 348, but not on the point for which it is here cited); *Austin v. Story*, 10 Gr. 308; and see *Provincial Insurance Company v. Reesor*, 21 Gr. 206; *Burton v. Gore District M. F. I. Co.*, 12 Gr. 156; affirmed in appeal, January 21st, 1875; see R. & J. Dig. 1819, and *per* Prondfoot, V.C., 22 Gr. 384; *Green v. Hewer*, 21 C. P. 531; and even though the mortgagor could not himself have recovered on the policy by reason of breach of its conditions, yet, if it is unconditional in favour of the mortgagee, the insurance company is bound to give the mortgagor credit for the insurance moneys on the mortgage, if on payment of the loss it takes an assignment thereof from the mortgagee: *Bull v. N. B. & Coml. Ins. Co.*, *supra*; *McKay v. Norwich Union Ins. Co.*, 27 Ont. 251.

A boiler and other machinery were held as between mortgagor and mortgagees to be included under the word "building," as they were treated by the parties a part of the freehold and passed as such, and the mortgagor was held entitled to the benefit of the insurance thereon as on part of the building: *Carr v. The Fire Insurance Association*, 14 Ont. 487.

Rent
chargeable
against
mortgagee.

Rents.—A mortgagee in possession may be charged with rents actually received, or which, but for wilful neglect and default, he might have received; or he may be charged with an occupation rent when he has been in actual occupation, using and enjoying the mortgaged property in the place of a tenant; in the latter case, he is charged with a fair rental, such as a tenant might be expected to give, unless it is shewn that he actually made a larger profit: *Truback v. R. ley*, 15 Sim. 265; S. C., 2 Phil. 395; *Coldwell v. Hall*, 9 Gr. 110.

A mortgagee is accountable not merely for his actual receipts whilst in possession, but also for whatever is received by those to whom he transfers possession under an arrangement inoperative to transfer title, and in derogation of the rights of the mortgagor: *National Bank of Australasia v. United Bank in Hand Band of Hope*, 4 App. Cas. 391.

A mortgagee in possession, but not in actual occupation, will not be held liable for any greater rent than he actually received, unless it is clearly established, in evidence, that he knew a greater rent might and could have been obtained, and that he refused, or neglected, to obtain the same: *Merriman v. Crouk*, 21 Gr. 60; *Waddell v. McColl*, 14 Gr. 211; *Penn v. Lockwood*, 1 Gr. 547.

Mortgagee
in possession
by arrangement
with
mortgagor,
how far
liable to
subsequent
incumbrancer.

A mortgagee receiving rents or going into occupation by consent of the mortgagor, must account as a mortgagee in possession to a subsequent incumbrancer, or purchaser of the equity of redemption, although the mortgagor has directed the rent to be applied in payment of another debt due by him to the mortgagee: *Gilmour v. Roe*, 21 Gr. 284; *Court v. Holland*, 29 Gr. 19; unless such arrangement was made and executed before the right of the subsequent incumbrancer accrued: *Mitchell v. Saylor*, 1 O. L. R. 458; and where a mortgagee, pursuant to a power, enters into possession and manages the mortgaged estate without default, at a loss, he is entitled to be recouped the loss as against a *puisne* incumbrancer, not only out of the rents, but also out of any surplus proceeds arising from the sale of the property: *Bumpus v. King*, 13 Ch. D. 279; 55 L. T. 190. But when a mortgagee suffers the mortgagor to resume possession he ceases to be liable to account for rents: *Rice v. George*, 19 Gr. 174. Where the mortgage provides for payment of five per cent. interest, reducible if periodically paid, to four-and-a-half per cent., a mortgagee, on going

into possession, after default, is not bound to accept the lower rate: *Rule 750. Union Bank v. Ingram*, 16 Ch. D. 53 (overruling *Stains v. Banks*, 9 Jur. N. S. 1049); *Bright v. Campbell*, 41 Ch. D. 388. A mortgagee in possession is entitled to be allowed a commission reasonably paid for collecting the rents: *Union Bank v. Ingram, supra*; but see *Eyre v. Hughes*, 2 Ch. D. 148.

A mortgagee, in possession, should not be charged with rests on rests, rents received by him, until he has been paid in full, when his money where was in arrear when he entered: *Coldwell v. Hall*, 9 Gr. 110; affirmed in appeal, 7 U. C. L. J. 42; 8 U. C. L. J. 93; but by setting up a title adverse to the mortgagor's right of redemption, he may lose the immunity of an ordinary mortgagee: *National Bank of Australasia v. United Hand in Hand Band of Hope*, 4 App. Cas. 391.

Notwithstanding the Statute of Limitations, a mortgagee in possession may be compelled to account to the mortgagor for more than six years' rent: *Coldwell v. Hall, supra*; although if the mortgagee has been overpaid, the Statute would doubtless be a bar to the mortgagor's recovering payment of more than six years' arrears.

Where the mortgagee is in occupation, he should be charged with an occupation rent up to the day appointed for payment: *Pipe v. Shafer*, 1 Chy. Ch. 251.

The mere existence of an attornment clause in a mortgage, does not make the mortgagee liable to account to a subsequent incumbrancer, as a mortgagee in possession: *Stanley v. Grundy*, 48 L. T. 100; but see *Re Stockton Iron Company*, 10 Ch. D. 335; 40 L. T. 19; *Ex parte Jackson*, 14 Ch. D. 725; 43 L. T. 272; *Ex parte Pinnett*, 16 Ch. D. 224; 41 L. T. 224; *Ex parte Harrison*, 18 Ch. D. 127; 45 L. T. 230; nor yet the fact that he has given notice to the tenant of the mortgagor to attorn, unless the tenant has, in fact, attorned, his mere continuance in possession after the notice is not sufficient: *Anderson v. Jackson*, 1891, 2 Q. B. 484; 65 L. T. 332.

Estoppel.—A mortgagee may be estopped as against a person inquiring of him the amount due on his mortgage, with a view to purchasing the equity of redemption, from claiming more than the amount then claimed: *Dominion Savings & Investment Co. v. Kattridge*, 23 Gr. 631. But if such representations are made to a person not known to be intending to purchase, or deal in respect of the equity of redemption, they are not binding on the mortgagee, although actually acted upon: *Moffatt v. Bank of Upper Canada*, 3 Gr. 374.

The mortgagor may, by his conduct, be also estopped from setting up payments on account of the mortgage: *Inglis v. Gilchrist*, 10 Gr. 301.

Vendor's Lien.—Void Mortgage for Purchase Money.—Where a mortgage was given by an infant for purchase money, and the infant on coming of age adopted the purchase, but repudiated the mortgage; an assignee of the mortgage was held nevertheless entitled to a lien for the purchase money: *Glover v. Whithead*, 7 Gr. 591.

Where land is conveyed in consideration of maintenance, the vendor has a lien for the consideration: *Paice v. Chapman*, 6 Gr. 338; 7 Gr. 179.

Mortgage payable in Foreign Currency.—Where the mortgage debt is payable in lawful money of the United States, the mortgagee is entitled, at his option, to claim the amount in the current foreign currency.

Rule 750. money of that country, or its equivalent in Canadian currency, at the time of default made in payment: *Morrell v. Ward*, 10 Gr. 231; *Crawford v. Beard*, 14 C. P. 87; and see *Munners v. Pearson*, 1898, 1 Ch. 581; 78 L. T. 432.

Priorities,
as to exe-
cutions.

Priorities.—Formerly the priorities were determined in the case of executions by the date of the delivery of the writs to the sheriff for execution, and for this purpose a fraction of a day was regarded. *Beckman v. Jarvis*, 3 U. C. Q. B. 280; *Converse v. Michie*, 16 U. C. P. 167. But now under *The Creditors' Relief Act*, (R. S. O. c. 78), all execution creditors whose writs are in the sheriff's hands to be executed are entitled to rank *pari passu*; *Harvey v. McNeil*, 12 P. R. 302; 24 C. L. J. 122. But an execution creditor directing the sheriff to stay execution, may now, as formerly, thereby lose his priority as against any subsequent execution then in, or thereafter coming into, the sheriff's hands, before the stay is removed: *Ross v. Hamilton*, E. T. 3 Viet.; *Foster v. Smith*, 13 U. C. Q. B. 243; *Re Ross*, 3 P. R. 394; *Bank of Montreal v. Munro*, 23 U. C. Q. B. 414; *Kerr v. Kinsey*, 15 C. P. 531; *Trust & Loan Co. v. Cuthbert*, 13 Gr. 412. But the sheriff, after being stayed, may make a second seizure during the currency of the writ: *Gates v. Smith*, 13 C. P. 572.

Stay of
execution,
effect of.

Priority of
mortgagees

Mortgagees for value are usually entitled to priority, according to the date of registration of their mortgages; and the omission of the Registrar to index a registered instrument will not deprive it of its priority: *Laurie v. Ruthburn*, 38 U. C. Q. B. 255; *Green v. Panton*, 8 Ont. 471.

Voluntary
mortgagees

Voluntary mortgagees, and mortgagees with actual notice of a prior unregistered instrument, however, are not within the protection of *The Registry Act* (R. S. O. c. 136, s. 87); and see *Geary v. Toft*, 43 L. T. 100; *Kettlewell v. Watson*, 46 L. T. 83; 51 L. J. Chy. 281; *Clarke v. Palmer*, 48 L. T. 877; and a person making voluntary payments on a registered mortgage cannot thereby acquire the position of a prior incumbrancer in respect of such payments as against persons having charges or incumbrances on the mortgaged property at the time of such payments, subsequent to the mortgage, even though the person making the payment subsequently obtains an assignment of the mortgage: *McMillan v. McMillan*, 23 Ont. 371; and where an assignee of a term subject to a mortgage, in pursuance of an option in that behalf contained in the lease, purchases the fee, the mortgage becomes a charge on the fee, and the purchaser of the fee has no prior lien, even for his purchase money, as against the mortgagee: *Building & L. Assn. v. McKeazie*, 24 Ont. App. 700.

Payments
by guaran-
tor, lien for

A mortgagee who has assigned the mortgage, and covenanted for its payment, is entitled to a lien as against the mortgagor for all payments so made: *Fleming v. Pabner*, 12 Gr. 226.

Execution
creditors,
purchasers
at sheriff's
sale.

An execution creditor cannot get priority over a prior unregistered deed: *Russell v. Russell*, 28 Gr. 419; nor over a prior unregistered equity: *Hamilton P. L. Socy. v. Gilbert*, 6 Ont. 434; *Bevan v. McLean*, 18 Ont. 533; *Re Trusts Corporation v. Bachner*, 26 Ont. 191; *Parke v. Riley*, 3 E. & A. 215; *Re Lewis & Thorpe*, 14 Ont. 133; but it would seem that a purchaser at a sheriff's sale may: *Van Wagner v. Findlay*, 14 Gr. 53.

A mortgagor who becomes also an execution creditor cannot acquire priority as such over his own mortgage, and where the mortgaged property is sold the proceeds are applicable to the mortgage, and only the surplus, if any, which remains will be applicable to his execution: see *Dixon v. Steel*, 1901, 2 Ch. 602.

Where it is necessary, for the purpose of settling the priority of Rule 750. incumbrancers, to inquire whether a person who has been sued, was, or was not, an absconding debtor within the meaning of the Act, the Master may do so, although the party sued may have taken no proceedings to set aside the attachment: *Montreal Bank v. Baker*, 3 Gr. 94, 268; but see *Martin v. Bonlauger*, 8 App. Cas. 205; 49 L. T. 62. An attachment only binds lands from the date of the seizure under it, and an execution delivered to the sheriff, before seizure made under the attachment, is entitled to priority over it: *Robinson v. Bergin*, 10 P. R. 127.

Where a creditor who had obtained security by an assignment from a debtor, his debtor of his chattels and other assets, by way of mortgage, was when notified by a subsequent execution creditor of his claim, and informed by conduct to that he would be held answerable for his dealing with the assets assigned, but negligently allowed the debtor to use, and deal with other creditors' them, so that they were lost; it was held that the first creditor was thereby postponed to the second as regards other property liable for the payment of their debts: *Huntingdon v. Van Brocklin*, 8 Gr. 421.

For the purpose of determining priorities between two deeds executed on the same day, the Master may inquire which was in fact the first executed, and may have regard to the internal evidence of the deeds themselves, for the purpose of ascertaining the intention of the parties upon the question of priority: *Gartside v. Silkstone*, D. C. d. 1. Co., 21 Ch. D. 762; 47 L. T. 76.

Where a judgment has been pronounced on the construction of an instrument declaring, A. to be entitled in priority to B., such judgment is a bar to any subsequent action by B. for the rectification of the instrument so as to give him priority; the proper course in such a case is for B. to procure a stay in the first action until his suit for rectification can be determined: *Caird v. Moss*, 33 Ch. D. 22; 55 L. T. 453.

Disputes between Incumbrancers.—Where there is a dispute between two persons, as to which of them is entitled to an incumbrance, the Master may determine the question himself, or, where he do so, would be likely unduly to delay the plaintiff and other parties not interested in the question, he may report the incumbrance, and its priority as regards other incumbrances, and the dispute between the claimants, so that the Court may give proper directions for determining the question: *McDonald v. Wright*, 12 Gr. 572.

Place of Payment.—The Master, in appointing the place, and manner of payment, must proceed under Rule 695. Place of payment.

Persons to Redeem, and Day for Redemption.—The Master is to appoint a day for redemption. He should be careful to see that the day appointed is not a Sunday, or a bank holiday, otherwise a new day will have to be appointed, before a final order can be obtained: *Holcomb v. Leach*, 3 Gr. 449. The omission of the Master to appoint a day for redemption may be remedied by order in Chambers: *King v. Connor*, 10 Gr. 364.

Where the judgment is for sale, one day is appointed six calendar months from the making of the report, for the mortgagor to redeem the plaintiff, and all subsequent incumbrancers who have proved claims; in default of payment a final order for sale is made: see directed Rules 385, 751; but see *Jones v. Harris*, 55 L. T. 884, where only three months were allowed for redemption. Where the judgment is for

Rule 750.

foreclosure, the subsequent incumbrancers are ordinarily entitled to successive rights of redemption in the order in which they acquired their charges: six calendar months being given to the first in priority, and one calendar month (*Rule 393*) to each of the others in succession. *Seton*, 5th ed., 1645; *Webster v. Patterson*, W. N. 1884, 20. But the Court may specially direct that one day only be given to all the defendants to redeem the plaintiff, without prejudice to their priorities *inter se*: *Bartlett v. Rees*, L. R. 12 Eq. 395; *The General Credit & D. Co. v. Glegg*, 22 Ch. D. 549; 48 L. T. 182; *Smith v. Olding*, 25 Ch. D. 462; 50 L. T. 357; *Lewis v. Aberdare & P. Co.*, 59 L. T. 451; *Western Canada L. & S. Co. v. Heimrod*, 28 C. L. J. 185. In *Mutual Life Assurance Co. v. Langley*, 26 Ch. D. 680; 51 L. T. 284, Pearson, J., said that as a general rule where there are several defendants, but one day should be given; and see *Platt v. Mendel*, 27 Ch. D. 246; 51 L. T. 424; where the practice of giving successive days for redemption, where there are subsequent incumbrancers, was declared to be anomalous; and see *Davis v. Manby*, 78 L. T. Jour. 318; *Doble v. Manley*, 28 Ch. D. 664; *Tufnell v. Nicholls*, 50 L. T. 152. A puisne incumbrancer, and all persons claiming under him are entitled to have one day for redemption: *Loveday v. Chapman*, 32 L. T. 680; *Beeson v. Lock*, L. R. 4 Eq. 537; and so are execution creditors, where there are no intermediate incumbrances: *Bates v. Hillcutt*, 16 Beav. 139; *Stead v. Banks*, 5 D. & S. 560; *Ardugh v. Wilson*, 1 Chy. Ch. 380; *Seton*, 5th ed., 1645; but see *Carroll v. Hopkins*, 4 Gr. 431.

As to the mode in which the direction for redemption is given, where one of the subsequent incumbrancers is an acquitance: see *Smithett v. Hesketh*, 44 Ch. D. 161; 62 L. T. 802.

After a judgment or report appointing a day for redemption, the plaintiff cannot be required to accept payment of the redemption money before the day named for payment with interest only to that date: *Hill v. Backlands*, 1897, 2 Ch. 361; 77 L. T. 34; but see R. S. O. c. 121, s. 17; R. S. C. c. 127, s. 7.

A party making default in redemption at the time appointed, may be foreclosed: *Rule 385*, and new accounts may, from time to time, be taken without further order: *Rule 753*. When all the subsequent incumbrancers have been foreclosed, one calendar month (*Rule 393*) is given to the mortgagor to redeem, and, on default, he may be foreclosed. An incumbrancer redeeming, may proceed to foreclose the subsequent incumbrancers and the mortgagor, as if he were the original plaintiff in the action. A subsequent incumbrancer redeeming out of his order of priority may add the amount paid to his own claim as against all incumbrancers subsequent to himself, but not as against any that are prior; as against the latter he may claim to be redeemed in respect of any claim he has paid which had priority over the latter's claim. But, inasmuch as a prior incumbrancer on redeeming a subsequent incumbrancer, in respect of a prior claim paid off by the latter, would be entitled to add the amount so paid to his own debt, and to be redeemed by the latter, it will generally be found inexpedient to claim the right to be redeemed, and the incumbrancer next in priority to the plaintiff should be appointed to be redeemed as to his claim, without first requiring him to redeem a subsequent incumbrancer in respect of any prior claim paid by the latter. Where the mortgagor redeems after puisne incumbrancers have been foreclosed, he thereby opens the foreclosure as to them: see *Bag v. Bridgman*, 6 P. R. 234; *Otter v. Lord Cairn*, 2 K. & J. 650; 6 De G. M. & G. 428; *Read v. South*, 14 Gr. 250; 16 Gr. 52; *Bell v. Sunderland Building Society*, 4 Ch. D. 618; 49 L. T. 555; and see *Leithrook v. Passman*, 59 L. T. 306.

subsequent
incumbrancer re-
deeming
out of his
order

Where portions of an estate under mortgage are conveyed away by Rule 750, the mortgagor, one day should be given to all the persons interested in the equity of redemption to redeem: *Hill v. Forsyth*, 7 Gr. 461; so also where there is any dispute between co-defendants as to their priorities, one day may be given to all to redeem without prejudice to where their rights inter se: *General Credit & D. Co. v. Glegg*, 22 Ch. D. 549; 48 L. T. 182; *Smith v. Olding*, 25 Ch. D. 462; 50 L. T. 357; *Leach v. Aberdare & P. Co.*, 50 L. T. 451; but where there is a stipulation in the mortgage that in case of sales by the mortgagor, the mortgagee shall, on payment of a certain portion of the purchase money, release the part sold, each purchaser is entitled to redeem his own part on payment of the stipulated portion of the money, and the Master should, in such a case, appoint one day for each of the several persons so entitled, to redeem his respective portion accordingly: *Davis v. White*, 16 Gr. 312.

As to the rights of purchasers of different portions of the mortgaged estate *inter se*, see *Barker v. Eccles*, 17 Gr. 277; *Jones v. Peck*, 18 Gr. 671; *Pierce v. Canavan*, 28 Gr. 356; 7 Ont. App. 187; *Buckler v. Bowman*, 12 Gr. 457; *Norris v. Meadows*, 28 Gr. 334; 10 Ont. App. 237; *Clark v. Bogart*, 27 Gr. 450; *Fraser v. Nagle*, 16 Ont. 241.

Where a mortgage comprised both real and personal estate, on the death of the mortgagor it was held that his personal representative was entitled to redeem both properties, but that the reconveyance to him should reserve the right or equity of redemption of any other person or persons: *Hall v. Howard*, 32 Ch. D. 420; 54 L. T. 810; but see now R. S. O. c. 127, ss. 3-10.

Where several persons are interested in the equity of redemption, any one of them seeking to redeem is entitled to, and as a rule must, redeem the whole mortgaged property and not merely a proportionate part, but the conveyance to one of several persons entitled to the equity of redemption should be made subject to the right of redemption of such other persons: *Pearce v. Moccis*, L. R. 5 Chy. 227; 22 L. T. 190; *Faulds v. Harper*, 11 S. C. R. 639. But under special circumstances one of several joint mortgagors was permitted to redeem his proportionate part of the mortgaged estate on payment of a proportionate part of the mortgage debt: *Readdy v. Pendergast*, 56 L. T. 790; and see *Smith v. Huot*, 2 O. L. R. 134; 4 O. L. R. 673, where third parties having acquired under a power of sale a legal title to an undivided three-fourths of the mortgaged property, the mortgagor was held only entitled to redeem the remaining undivided one-fourth, and to get compensation for the three-fourths from the mortgagee.

Where the day appointed for redemption is uncertain a new day must be appointed: *Scott v. McKeown*, 1 Chy. Ch. 186.

Pending the time allowed for redemption it is not competent for the mortgagee to sell the mortgaged property under a power of sale: *Stevens v. Theatres, Ltd.*, 1903, 1 Ch. 857; 88 L. T. 458. (In this case leave to appeal was given: 117 L. T. J. 199.)

Master's Report.—The Master's report should bear date the day it is signed, and not before: *Maddell v. McCall*, 14 Gr. 211. It must be confirmed before the day appointed for redemption, or a final order will be refused: *Mountain v. Potter*, 1 Chy. Ch. 207; *Mills v. Dixon*, 21 Chy. Ch. 53. In the latter case a month's further time to redeem was allowed; and see Rule 393, and *Two Trustees v. N. Y. Sec. Co.*, 5 O. W. R. 641.

Rule 760. As to confirming report, see *Rules* 692, 769, and notes. The omission to appoint a day for redemption may be remedied by application in Chambers; *King v. Connor*, 10 Gr. 364.

Correcting mistake in.

Where the Master had omitted to allow the plaintiff two items of interest, an order was made to correct the mistake, after a final order for sale, without appointing any new day for payment; *Benson v. Graham*, 9 C. C. L. J. 82; and see *Morley v. Matthews*, 12 Gr. 453; but the Master cannot, of his own motion, in a subsequent report, correct a mistake in a prior report; *Crooks v. Street*, 1 Chy. Ch. 78; and see further *Rule* 692, note p. 915.

Extension of time for payment, when granted,

Extending Time for Payment.—Application to extend the time for payment should be made in Chambers; *Anon.*, 4 Gr. 61; where the defendant showed that he had sold for £300, and the mortgage debt was only £250, and that he expected to receive payment in full in two or three months, the time was extended; *Ford v. Steeples*, 1 O. S. 282. So also where the mortgage was for purchase money, and the vendor had neglected to pay off a prior mortgage, pursuant to his covenant, and it appeared that the existence of the first mortgage prevented the defendant from raising money to pay off the second, the time was extended; *G. v. L.*, 2 Chy. Ch. 33. So also six months' further time was given, where the defendant was prevented from raising the money by reason of an improper advertisement published by the plaintiff's solicitors; *Gilmour v. Meyers*, 2 Chy. Ch. 171. So also where it was shewn that the value of the property would be enhanced in the meantime, by the construction of a railway; *Cameron v. Cameron*, 2 Chy. Ch. 375; and where a reasonable prospect of payment at the extended time was shewn, the time was extended; *Cahoon v. Durie*, 2 Chy. Ch. 394; *Street v. O'Reilly*, 2 Chy. Ch. 270; but an affidavit of the solicitor, that he believed his clients had exerted themselves, and were endeavouring to raise the money, and that the property was worth much more than the debt, was held insufficient; *Anon.*, 4 Gr. 61.

Application after day appointed has elapsed.

Where the application is made after the day fixed for redemption, the applicant is usually required to pay interest for the extended time, on the whole amount found due for principal and interest; *Street v. O'Reilly*; *Cahoon v. Durie*; *Cameron v. Cameron*, *supra*; and the payment of the whole costs, or at all events the costs of the application, is also usually made a condition precedent; *Id.*; and see *Holford v. Tate*, 1 K. & J. 677; *Whitfield v. Roberts*, 7 Jur. N. S. 1268; *Canada Permanent L. & S. Co. v. Donaldson*, 30 C. L. J. 68; and where the mortgagee swore that he had been compelled, in consequence of the mortgagor's default, to contract a loan to meet his liabilities, at a higher rate of interest than that reserved by the mortgage; on extending the time, the mortgagor was required to pay such a sum as would cover the excess of interest payable by the mortgagee; *Howard v. Macara*, 1 Chy. Ch. 27. It is probable however, that where the application is made before a final order has been obtained the application will be more readily granted, and on less stringent terms, than where it is made after the final order has issued; *Patch v. Hard*, L. R. 3 Chy. 212.

Terms imposed.

Time may be extended on the same grounds in a redemption action; where the application is not made until after a final order dismissing the action, that order must be first vacated; see *Collinson v. Jeffery*, 1896, 1 Ch. 644; 76 L. T. 78.

See further as to applications to open foreclosure, and extend the time for payment, *Rule* 685, note.

751. On any proceeding for foreclosure by, or for redemption against an assignee of a mortgagee the statement of the mortgage account, under the oath of such assignee, shall be sufficient *prima facie* evidence of the state of such account, and an affidavit or oath shall not be required from the mortgagee or any intermediate assignee, denying any payment to such mortgagee or intermediate assignee, unless the mortgagor or his assignee, or the party proceeding to redeem, denies by oath or affidavit the correctness of such statement of account. R. S. O. 1887, c. 102, s. 11.

Rules
751-753.
In proceedings for foreclosure, etc., state of mortgage account may be proved *prima facie* by statement on oath of assignee of mortgagor.

See *Court v. Holland*, 8 P. R. 213.

752. The Master's report shall state the names of all persons who have been made parties in his office, and who have been served with the notice or appointment hereinbefore provided for, and the names of such as have made default, and shall set forth the amount of the claims, and priorities of such as have attended, and these latter shall be certified as the only incumbrancers upon the property. Con. Rule 131.

Master's report, contents.

Taken from Chy. O. 441.

For forms of reports in mortgage cases, see H. & L. Forms Nos. 1030-1040.

753. Subsequent accounts shall, from time to time, be taken, subsequent costs taxed, and necessary proceedings had, for redemption by, or foreclosure of, the other parties entitled to redeem the mortgaged premises, as if specific directions for all these purposes had been contained in the judgment. Con. Rule 132.

Subsequent accounts to be taken by Master.

Taken from Chy. O. 452.

If the mortgagor, or owner of the equity of redemption, or any incumbrancer, redeems any prior charge which was his own debt, or which, by contract, express or implied, he was bound to discharge, he cannot keep such charge alive as against a *subsequent* incumbrancer, effect of whose incumbrance he is also expressly, or impliedly, bound to discharge: *Blake v. Beaty*, 5 Gr. 359.

Mortgagor paying off incumbrance, cannot keep it alive as against a subsequent incumbrancer.

In taking the subsequent account the Master may allow a sum paid for insurance since the last account, under a provision in the mortgage: *Bethune v. Cabott*, 3 Gr. 648.

In England, it is the practice on taking the subsequent account, to allow interest on the gross amount of principal, interest and costs, found due by the last report: *Ellon v. Curtis*, 19 Ch. D. 49; 45 L. T. 435; and see *Jacob v. Earl of Suffolk*, Wms. 27; but in Ontario, it has not been customary to allow interest upon interest in respect of

Interest on subsequent amount.

Rules an incumbrancer's own proper debt, unless the mortgage expressly
754, 755. provides therefor. But where a subsequent incumbrancer pays off a
 prior incumbrance, he is entitled to interest on the aggregate amount
 paid by him for principal, interest and costs; the interest on the prin-
 cipal being computed at the rate reserved in his own security, but on
 the interest and costs, at the legal rate only; *McMaster v. Hector*, 8
 C. L. J. 284.

Although ordinarily a mortgagee's own costs do not bear interest,
 yet if they have been expressly ordered to be added to his debt, they
 bear interest at the same rate as the principal money from the date
 of taxation: *Eardley v. Knight*, 41 Ch. D. 537.

Sale—pro-
 ceedings &c.

754. If the judgment directs a sale instead of fore-
 closure on default in payment, then on default being made,
 and an order for sale obtained, the property shall be sold,
 with the approbation of the Master, who shall settle the con-
 veyance to the purchaser in case the parties differ about
 the same; and the purchaser shall pay his purchase money
 into Court, to the credit of the action, subject to further
 order. Con. Rule 133.

Taken from Chy. O. 453.

Master
 may sell
 by tender,
 private
 contract
 etc.

By *Rules* 710, 724, 734, where a sale is ordered, the Master may
 cause the property, or a competent part thereof, to be sold, either by
 public auction, private contract, or tender; or part by one mode, and
 part by another, as he may think best for the interests of all parties;
 and he may fix an upset price, or reserved bidding, but such price, or
 bidding, must be so fixed at the meeting held by him for the purpose
 of settling the advertisement, and making the other arrangements
 preparatory to the sale, and must be notified in the conditions of sale.
 The Master is to settle all necessary conveyances for the purpose of
 carrying out the sale, in case the parties differ; or in case there shall
 be any persons under any disability (other than coverture) interested
 in such sale.

Settle all
 convey-
 ances.

Before a sale can take place, a final order must be obtained: see
Rule 385, note.

Whole
 should not
 be sold
 where part
 sufficient.

It is the Master's duty not to sell the whole, where it is clear that
 a sale of part would suffice for the payment of the incumbrances.
 Where the mortgagor thinks more land is offered for sale than is
 necessary, he should object at the settlement of the advertisement.
 It is too late to take the objection after the sale: *Beatty v. Rother-
 hurst*, 3 Chy. Ch. 344.

Purchase
 money,
 applied
 thereon.

755. The purchase money, when so paid, shall be ap-
 plied in payment of what has been found due to the plain-
 tiff and the other incumbrancers (if any), according to
 their priorities, together with subsequent interest, and sub-
 sequent costs. Con. Rule 134.

Taken from Chy. O. 454.

Even after a sale a dowress was allowed to come in and prove her
 claim: *Hyle v. Barton*, 8 P. R. 205.

This Rule makes no provision for the disposition of the residue, ^{Rules} 756, 757. after payment of the claims of the plaintiff, and other incumbrances. A motion may be made by the mortgagor, before a Judge in Chambers, for payment of the residue. Since 11th March, 1879, a wife barring dower in a mortgage, does so only for the purpose of the mortgage, and is consequently dowerable out of any surplus after satisfying the mortgage debt. It will therefore be necessary wherever this right exists, that the wife should be notified, and provision made for her protection, in any order directing payment out of the surplus: R. S. O. c. 164, s. 7; *Martindale v. Clarkson*, 6 Ont. App. 1; but it would seem that the wife of a mortgagor who has joined in the mortgage should now be made a party by writ: *Blong v. Fitzgerald*, 15 P. R. 167; *ad quere*, whether, even now, a woman having a mere inchoate right to dower in mortgaged lands has any present right of redemption.

The *Creditors' Relief Act* (R. S. O. c. 78), applies to executions against lands which have been sold in a mortgage action; and the surplus after payment of specific incumbrances is distributable, rateably among the execution creditors: *Harvey v. McNeil*, 12 P. R. 302; 24 C. L. J. 122.

756. Upon a reference under a judgment for redemption, the Master shall, without any special direction, take an account of what is due to the defendant for principal money and interest, and his costs shall be taxed, and a time and place for payment appointed according to the practice of the Court. Con. Rule 135.

Taken from J. A. Rule (1881) 332.

Six months is usually allowed for redemption by the plaintiff in a redemption action, as in the case of a defendant in a foreclosure action; see *Rule 750*, note. But it would seem that if the mortgagee were to insist on exercising his power of sale *instantly*, a mortgagor could not by commencing a redemption action, where the right to redeem is not in dispute, procure an extension of time for redemption, nor even stay the sale pending the action, except on the terms of bringing the money sworn to be due by the mortgagee for principal, interest and costs, into Court, to abide the taking of the account. But where the right of redemption is in dispute, a sale may be restrained until the trial or hearing of the cause without bringing the amount claimed into Court: *Rhodes v. Buckland*, 16 Beav. 212, 219; and the general rule requiring the payment of the money into Court may be modified, having regard to the special circumstances of the case: see *Hickson v. Darlow*, 23 Ch. D. 690; *Macleod v. Jones*, 24 Ch. D. 289.

In the event of a plaintiff in a redemption action failing to redeem at the time appointed he may be foreclosed: *Rule 391*.

757. Where the judgment is for redemption or foreclosure, or redemption or sale, such proceedings are in such case to be taken upon bid, and with the same effect as in an action for foreclosure or sale, and in such case the last incumbrance shall be treated as the owner of the equity of redemption. Con. Rule 136.

Taken from J. A. Rule (1881) 335.

Rule 758. In an action for redemption the plaintiff is not entitled to a sale in default of redemption, and it is only where the mortgagee expressly consents, that a judgment in a redemption action can be so framed.

Usually the only alternative of redemption is foreclosure, or dismissal of the action, which is equivalent to a foreclosure. The plaintiff may be foreclosed; see *Rule 301*; and under this *Rule* the mortgagee may bring in any subsequent incumbrancers and foreclose them. But when the mortgagee brings in the subsequent incumbrancers it would seem that they would have the ordinary right of defendants in a foreclosure action and be entitled to claim a sale on the usual terms, because the action then ceases to be a redemption action, and becomes one for foreclosure; see *Rule 382*.

A mortgagor, or any person liable to pay, is entitled to redeem any mortgage made after the 1st July, 1880, after it has run five years, even though the time limited by the mortgage itself for redemption has not expired: *R. S. C. c. 127, s. 7*; *Re Parker*, 30 C. L. J. 140; but this provision does not extend to mortgages or debentures secured on real estate given by any joint stock company or corporation; 73 Vict. c. 34, s. 1 (D.); and after the time for redemption has been fixed by any judgment, order, or report, the right of a mortgagor to stop interest by redeeming at an earlier period than that named would seem to be doubtful; see *Hill v. Rorlands*, 1897, 2 Ch. 361; 77 L. T. 34.

Where a mortgagee takes proceedings to enforce his security, he cannot refuse to accept payment of the whole amount of principal and interest, even though part of it has not matured; but when his proceedings are confined to protecting his security, he cannot, so far as the Statute above mentioned applies, be compelled to accept payment of moneys not yet accrued due; the right to accelerate payment for default being his, and not that of the mortgagor; see *Ex p. Ellis*, 1898, 2 Q. B. 79; 78 L. T. 733; *Ex p. Wickens*, 1898, 1 Q. B. 542; *Wickens v. Shuckburgh*, 78 L. T. 213.

A reversioner or remainderman is not entitled to redeem a mortgage of the particular estate, without the mortgagee's consent, before the reversion or remainder has come into possession; *Prout v. Cock*, 1896, 2 Ch. 808.

Assignment
of property,
and delivery
of documents.

Rev. Stat.,
1887, c. 162,
(now *R. S.*
C. c. 121).

758. Subject to the provisions of section two of *The Act respecting Mortgages of Real Estate*, in an action for foreclosure or sale, upon payment by the defendant, or, in an action for redemption, upon payment by the plaintiff, of the amount found due, the plaintiff or defendant shall, unless the judgment otherwise directs, assign and convey the mortgaged property in question to the defendant, (or plaintiff as the case may be), making the payment, or to whom he may appoint, free and clear of all incumbrances done by him, and deliver up all deeds and writings in his custody or power relating thereto, upon oath; and in case of a corporation the affidavit shall be made by the officer thereof having the custody of such deeds and writings. *Con. Rule 137*.

Taken from J. A. Rule (1881) 336.

The Act referred to in this *Rule* is R. S. O. c. 121, under which a **Rule 768** entitled to redeem instead of taking a discharge, or reconveyance, may require the mortgage debt, and mortgaged property to be transferred by the mortgagee to any third person: see s. 2.

A judgment creditor is bound to assign his judgment to the party Judgment creditor, redeeming it: *Bank of British North America v. Moore*, 8 Gr. 461.

Where both the mortgagor, and a subsequent incumbrancer, pay Who pays the money due to the plaintiff into the bank, the subsequent incumbrancer has the right to a conveyance in preference to a mortgagor, conveyance and as between two incumbrancers, the one who is prior is entitled to the conveyance: see *Trean v. Smith*, 20 Ch. D. 724.

Where there are other persons interested in the equity of redemption, besides the person redeeming, the mortgagee should convey to Redemption, besides the person redeeming, the mortgagee should convey to the party redeeming, subject to the equities of such other persons: of several interested persons: see *Peace v. Morris*, L. R. 5 Chy. 227; and see *Boyd v. Petrie*, L. R. 10 Chy. 182; L. R. 7 Chy. 392; and see further as to form of conveyance, *Hutley v. Hurton*, L. R. 3 Chy. 365.

Where a mortgagor who has assigned his equity of redemption Redemption, taking a covenant of indemnity from his assignee, is compelled to pay the mortgage debt, he is entitled to a reconveyance subject to the equities of persons other than himself in the property: *Armour v. Dellope*, 30 Ch. D. 434; 50 L. T. 433; *Queen's Coll. v. Clutton*, 25 Ont. 282; *Stark v. Reid*, 20 Ont. 257; and he is entitled to a charge on the land for the amount so paid as against his assignee: *Hamilton Pyrdt, L. & I. Co. v. Smith*, 17 Ont. 1. As to the terms of a conveyance to a tenant for life who redeems: see *Hiderson v. Elvey*, 20 Ch. D. 567. Where a mortgage is paid off, the mortgagee is bound to reconvey the mortgaged property so that it will revert in the mortgagors; if he reconvey to one of several mortgagors, he will be liable at the suit of the other mortgagors for any loss they may sustain by his so doing: *Magnus v. Queensland National Bank*, 36 Ch. D. 25; 57 L. T. 136; affirmed by C. A.: 57 Ch. D. 164; 58 L. T. 218.

A subsequent incumbrancer redeeming a prior mortgage is bound to take over all collateral securities of which he has notice, in the hands of the mortgagee, or is liable to subsequent incumbrancers for the value thereof: *Glover v. Southern L. & S. Co.*, 1 O. L. R. 59. If a mortgagee has put it out of his power to reconvey the whole of the mortgage security, he may be compelled to make compensation for the part he is unable to reconvey: *Smith v. Hunt*, 2 O. L. R. 131; 4 O. L. R. 653.

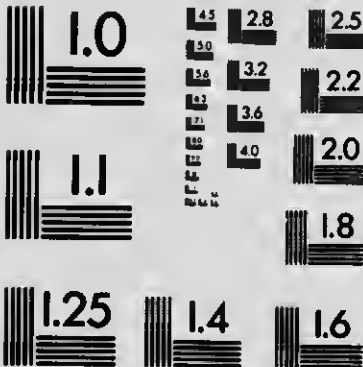
A mortgagor redeeming is entitled to a reconveyance, or vesting order, and is not obliged to accept a certificate of discharge of the mortgage: *Ellis v. Ellis*, 1 Chy. Ch. 257; *McLennan v. McLean*, 27 Gr. 54.

In order to get the money out of the bank, it is necessary to produce to the officer required to sign the cheque, the consent of the party paying it in, duly verified, or that of his solicitor, if any. If this consent cannot be procured, an order must be obtained in Chambers, on notice to such party, and the costs of such motion will not be ordered to be paid by the latter: *Bernard v. Hep*, 2 Chy. Ch. 91; *Meeks v. Stourton*, 11 Jur. N. S. 278. There should also be produced to him a certificate from the bank that the money has been paid in, and the judgment and report, if any, under which it was paid in. The party paying in the money, is entitled to receive his conveyance and deeds, and to be let into possession, before the money is paid out.



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Rule 759.

Lost mortgage, indemnity required.

Where the mortgagee has lost the mortgage deed, he is bound at his own expense to furnish the mortgagor, or any incumbrancer redeeming him, with proof of the loss, and with an indemnity against any demand of third persons: *McDonald v. Hime*, 15 Gr. 72; and see *Caldwell v. Matthews*, 62 L. T. 799.

(vi.) *Receivers, Committees, etc.*

Warrant for appointment of receiver, to name receiver and sureties.

759. The party prosecuting an order for a receiver shall obtain an appointment or a warrant from the Master, and serve the same on all the necessary parties, naming in the copy thereof served the proposed receiver and his sureties. Con. Rule 116.

Taken from Chy. O. 278.

Receivers, how appointed.

The appointment of receivers may now be made in any case in which it appears to the Court to be just or convenient: see Jud. Act, sec. 58 (9), *supra*, pp. 75 and 96.

Duty of Receiver.

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

Claim for, to be indorsed on writ.

Where the appointment of a receiver is a substantial part of the relief sought by a plaintiff, he should indorse a claim to that effect on his writ: *Colebourne v. Colebourne*, 1 Ch. D. 691.

Appointment operates as injunction.

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

As to whether interim Receiver superseded by judgment, *quære?*

It has been said that an interim receiver is superseded by the judgment subsequently given in the action, unless he is expressly continued by it: *Kerr on Receivers*, 2nd ed., 186; *Reeves v. Acryll*, 10 W. R. 335; *Taylor's Orders*, 3rd ed., 274; *Gibson v. Montfort*, 1 Ves. Sr. 485; but the authorities cited do not appear to bear out the proposition: see *Seton*, 5th ed., 658. The question would appear to depend on the terms of the order appointing the receiver: if appointed "until the trial," then it would seem clear, that unless continued by the judgment pronounced at the trial, he would be superseded by it; but if appointed generally without any limitation as to time, or "until the Court make order to the contrary," then it would seem that he would not necessarily be superseded by the judgment subsequently pronounced, even though not expressly continued by it: *Davies v. Vale of Evesham Preserves*, 73 L. T. 159.

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

Receiver, when Appointed:—

Rule 75a.

Infants.—A receiver will be appointed of an infant's estate in a proper case, as where the father is of bad character or insolvent, and where there is danger of loss; *Kiffin v. Kiffin*, cited 1 P. W. 704; *Ex parte Mountfort*, 15 Ves. 449 n.; *Re Cormicks*, 2 Ir. Eq. 264, or there is no testamentary guardian, or one who declines to act: *Hicks v. Hicks*, 3 Ark. 273; *Bridges v. Hales*, Mos. 111; or the guardian is misconducting himself; *Beaufort v. Berty*, 1 P. W. 704, and see *Dillon v. Lord Mountcashel*, 4 Bro. P. C. 306.

Lunatics.—A receiver will be appointed over a lunatic's estate, where no person will act as committee, or where the committee is infirm, or the management of the estate onerous: *Kerr on Receivers*, 78.

Executors and Trustees.—The Court will in a proper case appoint a receiver to act in place of an executor, or trustee, but it will not do so on slight grounds. Where fraud is charged a receiver will be appointed: *Leeson v. Amzie*, 2 O. S. 40, and see *Menham v. Draper*, 2 Gr. 316; or in case of misconduct or improper management, or where there is danger of loss of the trust property: *Middleton v. Dodswell*, 13 Ves. 266; *H. v. H.*, 1 Ch. D. 276; *Colebourne v. Colebourne*, 1b., 690; or the executor or trustee is wasting the assets: *Keene v. Riley*, 3 Mer. 436; *Re Wells*, *Molony v. Brooke*, 45 Ch. D. 549; 63 L. T. 521; or that being a sole executor, or trustee, he is insolvent: *Harrold v. Wallis*, 9 Gr. 443; *Re Johnson*, L. R. 1 Ch. 325; *Gauthorpe v. Gauthorpe*, W. N. 1878, 91; although mere poverty is no ground for the appointment: *Anon.*, 12 Ves. 4; but if coupled with bad character it may be: *Everett v. Prythorpe*, 12 Sim. 368; or if being a female, she has married a man in necessitous circumstances, the *residus que trustent* being infants: *Dillon v. Lord Mountcashel*, 4 Bro. P. C. 306. A receiver may also be granted before probate, or administration, to prevent waste or spoliation, and to provide for the collection of assets pending litigation as to the right of administration: *Atkinson v. Henshaw*, 2 V. & B. 85; *Ball v. Oliver*, 1b., 96; *Jones v. Godrich*, 4 Jur. 98; *Wood v. Hitchings*, 2 Beav. 289; 4 Jur. 558; *King v. King*, 6 Ves. 172; *Re Moore*, *Acr v. Moore*, 13 P. D. 36; 58 L. T. 386; but see *Knight v. Duplessis*, 1 Ves. S. 324; but to warrant the appointment there must in general be shown to be litigation pending, or threatened, in the Surrogate Court: *Jones v. Jones*, 3 Mer. 174; *Jones v. Frost*, 3 Mad. 1; Jac. 466; *Marr v. Littlewood*, 2 My. & Cr. 458; *Parkin v. Seddons*, L. R. 16 Eq. 36; or that there is some difficulty in obtaining administration: *Overington v. Ward*, 34 Beav. 175. Pending litigation respecting the grant of probate or administration, the Surrogate Court has power to grant administration *pendente lite*: R. S. O. c. 59, s. 56.

Mortgagee.—Formerly a receiver would not be granted at the instance of a mortgagee entitled to the legal estate: *Berney v. Sewell*, 1 J. & W. 648; except under special circumstances: see *Kerr on Receivers*, 29-30, 34; nor against a prior mortgagee in possession at the instance of a subsequent incumbrancer, so long as anything remained due on the prior mortgage; and the Court would only act on the prior mortgagee's own admission that he had been paid off, or his refusal to accept what was due to him: *Berney v. Sewell*, 1 J. & W. 647; *Miles v. Moore*, 15 Beav. 180; but where the prior mortgagee in possession had himself acquired the equity of redemption, and it appeared that he had received rents and profits more than sufficient to pay off his mortgage, a receiver might be granted:

Rule 759 *Steinhoff v. Brown*, 11 Gr. 114. And now a receiver may be appointed at the instance of a mortgagee of the legal estate, if it seems to the Court to be just or convenient so to do: *Pease v. Fletcher*, 1 Ch. D. 273; but see *North London Railway Co. v. Great Northern Railway Co.*, 48 L. T. 695; and see *In re Prytherch, P. v. Williams*, 42 Ch. D. 590. Where the mortgagor is in possession, and a receiver is appointed at the instance of the mortgagee, the usual direction for the tenants to attorn is not sufficient to compel the mortgagor to pay a rent to the receiver; but he will from the date of the demand of rent by the receiver be compelled to pay an occupation rent if he continues to retain possession: *Yorkshire Banking Co. v. Mallon*, 35 Ch. D. 125; 56 L. T. 399; *Re Burchnull, Walker v. Burchnull*, 96 L. T. Jour. 130; see Jud. Act, s. 58 (9), and notes, *supra*, pp. 75 and 96.

When on application of equitable mortgagee.

An equitable mortgagee may, after default, have a receiver appointed against a mortgagor in possession "without prejudice" to the rights of any prior mortgagee: *Aikins v. Blain*, 13 Gr. 646; *Kerr on Receivers*, 35. The Court will not try, on an interlocutory motion, the question whether a prior mortgagee in possession has been paid off, when he himself distinctly swears that there is something due; but his affidavit as to the amount due is required to be specific; if vague, or his accounts are so negligently kept that he cannot speak positively, a receiver may be appointed: *Rowe v. Wood*, 2 J. & W. 558; *Hiles v. Moore*, 15 Beav. 180; *Codrington v. Parker*, 16 Ves. 433.

A mortgagee cannot have a manager appointed to manage a business carried on on the mortgaged property, where the business itself has not been mortgaged: *Whitley v. Challis*, 1892, 1 Ch. 64; 65 L. T. 838.

Interim Receiver, when granted on application of creditors.

Creditors.—An injunction to restrain a debtor from alienating his property *pendente lite*, cannot in general be obtained by a simple contract creditor suing to recover his debt, where the debtor is in *case*; nor under such circumstances could a receiver be granted: *National Provincial Bank of England v. Thomas*, 24 W. R. 1013; *Queen v. Homan*, 4 H. L. C. 1036; *Robinson v. Pickering*, 50 L. J. Chy. 527; *Hepburn v. Patton*, 26 Gr. 597; not even though the debtor be a public company: *McCall v. Canada Farmers' Mutual Insurance Co.*, 18 C. L. J. 117; *Mills v. Northern Railway of Buenos Ayres Co.*, L. R. 5 Chy. 621; nor though the creditor be an unpaid vendor, and the company admit their liability: *Latimer v. Aylesbury & Bedford Railway Co.*, 9 Ch. D. 385.

But when the debtor is dead, a receiver may be obtained by a simple contract creditor against the personal representative, or devisee, wasting the assets of the deceased: see *Acen v. Riley*, 3 Mer. 436; and of the realty where it appears that the personal estate is insufficient: *Tones v. Pugh*, 8 Ves. 71; *Chalk v. Raine*, 13 Jur. 981; *Kerr on Receivers*, 40. Since *The Devolution of Estates Act* (R. S. O. c. 127), the realty and personalty of a deceased person constitute a common fund for the payment of his debts, and it would seem to be no longer necessary to establish that the personalty is insufficient as a condition of obtaining a receiver of the realty.

After judgment, Receiver may be appointed.

A creditor who has obtained judgment may apply for a receiver by way of equitable execution, as against property of the debtor, which could not be reached by a writ of execution: *Anglo-Italian Bank v. Davies*, 9 Ch. D. 275; *Smith v. Hurst*, 1 Coll. 705; 10 Ha. 48; *Wells v. Kilpin*, L. R. 18 Eq. 298; *Tillett v. Pearson*, 43 L. J. Chy. 93; *Fuggle v. Bland*, 11 Q. B. D. 711; *Westhead v. Riley*, 49 L. T. 776; 25 Ch. D. 413; *Perks v. Mydred*, 76 L. T. Jour. 336;

Kincaid v. Reed, 21 C. L. J. 144; *Kincaid v. Kincaid*, 12 P. R. Rule 759, 462; *Book v. Ruth*, 20 C. L. J. 193; *Smith v. Egan*, 17 P. R. 330. Formerly, in such cases, it was necessary, before applying for a receiver, to sue out a writ of execution; but it would seem now that if the property cannot be reached by the writ, such a preliminary is not necessary; *Ex parte Evans*, 13 Ch. D. 250; but see *supra*, p. 281. Where the fund can be reached by an attaching order, a receiver will not be appointed; *Miller v. Thompson*, 19 P. R. 291.

Where the application is made on behalf of an execution creditor, whether the receiver should be appointed for the benefit of the plaintiff alone, or for all creditors of the debtor by analogy to the provisions of *The Creditors' Relief Act* (R. S. O. c. 781, *quarrel*? see note *supra*, p. 100). The application may be made in the action in which the judgment has been recovered, if in the High Court, and it is not proper to institute another action for the purpose of obtaining a receiver; *ib.*; *Smith v. Cowell*, 6 Q. B. D. 73; *Salt v. Cooper*, 16 Ch. D. 544.

Where the execution debtor had a mere right of use of chattel property for life under a settlement, a receiver of such property was refused; *Whitaker v. Cohen*, 69 L. T. 451.

An interim receiver cannot, in general, be granted in favour of a creditor against a debtor company; *McCall v. Canadian Farmers' Mutual Insurance Co.*, 18 C. L. J. 117, but after judgment has been obtained, an execution creditor, or a mortgagee, of a railway company, may obtain the appointment of a receiver and manager of the undertaking; *Galt v. Erie & Niagara Railway Co.*, 14 Gr. 499; *Peto v. Willand Railway Co.*, 9 Gr. 455, affirmed on rehearing, 16th February, 1864; *Brantford v. Grand River Navigation Co.*, 8 Gr. 240; *Gardiner v. London C. & D. Ry.*, 1 L. R. 2 Chy. 201; Eng. Ry. Act, s. 4. *In re K. & O. Ry.*, 1901, 2 Ch. 8; *Toronto General Trussing Corp. v. Cent. Ontario Ry.*, 6 O. L. R. 1; and see *Brown v. Midland Railway Co.*, 3 Gr. 225 (where the plaintiff claimed a mechanic's lien); and as to other public companies, see *Marshall v. South Staffordshire Tramways Co.*, 1895, 2 Ch. 36; *Kerr on Receivers*, 46-7, 50. Where a railway company had been ordered to be wound up, and an unpaid vendor brought a suit to enforce his lien for purchase money, it was held that he was entitled to an injunction restraining the company from using the land until payment of the purchase money; *Althood v. Merryheat & Darlington Ry. Co.*, 33 Ch. D. 571; and see *Williams v. Aylesbury & Buckingham Ry. Co.*, 28 L. T. 547; but see *contra*, *Lincoln Paper Mills Co. v. St. Catharines N. C. Ry. Co.*, 19 Ont. 103, and see note to Rule 378, *supra*, p. 588.

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

Rule 759.

Appoint-
ment not
to prejudice
prior
mortgagees.

Where a receiver is appointed at the instance of a judgment creditor, it is without prejudice to the claims of prior mortgagees, if any: *Legg v. Matheson*, 2 Ch. 71; *Widd v. Mid-Hants Railway Co.*, 16 W. R. 409; *Potts v. Warwick & B. C. Co.*, Kay, 145.

A judgment creditor at whose instance a receiver is appointed is not a "secured creditor" within the English Bankruptcy Act: *Potts*, 1893, 1 Q. B. 648; 68 L. T. 229; *sed vide, Lyrasson v. Munn*, 1891, 2 Q. B. 73; 61 L. T. 761.

Receiver,
when ap-
pointed in
partnership
cases.

Partners.—The Court in granting a receiver of partnership property, thereby takes the affairs of the partnership out of the hands of all the partners, and entrusts them to a receiver or manager of its own appointment; and while an injunction only restrains one or more of the partners from doing what may be complained of, the appointment of a receiver excludes all alike from taking part in the management of the concern: *Hall v. Hall*, 3 Mc. & G. 86. It therefore, does not follow that the Court will grant a receiver *pendente lite*, in every case where it would grant an injunction.

Not ap-
pointed
pendente
lite of ;
concern.

Where a dissolution is neither sought nor is absolutely necessary, a receiver *pendente lite* will not in general be granted of a "going concern": *Goodman v. Whitcomb*, 1 J. & W. 589; *Roberts v. Eberhardt*, Kay, 148; *Hall v. Hall*, *supra*; unless there is danger of the business being destroyed, or the assets misapplied in the meantime, or unless one partner is misconducting himself; e.g., by colluding with debtors of the firm: *Estwick v. Conningsby*, 1 Vern. 118; or carrying on a separate trade with the partnership property: *Hatting v. Glover*, 18 Ves. 281; or is wrongfully excluding the plaintiff from the management: *Wilson v. Greenwood*, 1 Sw. 481; *Goodman v. Whitcomb*, 1 J. & W. 592; *Roe v. Wood*, 2 J. & W. 558; *Cass v. Harris*, T. & R. 525; *Prentiss v. Brennan*, 1 Gr. 371; *Bulfin v. Blakely*, 6 Gr. 575; *Steele v. Grossmith*, 19 Gr. 141; or where some of the partners are insolvent: *Collins v. Barker*, 1893, 1 Ch. 578.

Exception
to rule.

Where a partnership is alleged on one side and denied on the other, usually a receiver is not appointed until that question has been determined: *Penceck v. Penceck*, 16 Ves. 49; *Chapman v. Bouch*, 1 J. & W. 594 n; *Fairbairn v. Pearson*, 2 Mac. & G. 144.

A receiver of a partnership may, in a proper case, be ordered by interlocutory order to sell assets: *McLaren v. Whiting*, 16 P. R. 552.

Where a partner is appointed receiver and manager without salary, he is entitled to be paid out of the assets for premiums paid to a guarantee company for becoming surety for him: *Harris v. Kemp*, 1891, 2 Ch. 89; 76 L. T. 458.

Receiver,
when ap-
pointed as
against re-
tenant in
common.

Tenants in Common.—A receiver has been appointed in a partition action *pendente lite*, although there has been no exclusion by any of the co-owners: *Porter v. Lopes*, 7 Ch. D. 358. Formerly a case of destructive waste, or gross exclusion, was necessary to be made to warrant the appointment of a receiver in such a case; *Kerr v. Receivers*, 79; but see *Gaskin v. Butts*, 13 Ch. D. 313, *per Theobald, L.J.*, and *North London Ry. Co. v. Great Northern Ry. Co.*, 11 Q. B. D. 30; 18 L. T. 695, where it was held that the jurisdiction to grant injunctions, has not been extended by *The Indemnity Act*; see *Phelps v. Jones*, 76 L. T. Jour. 373.

Or between
vendor and
purchaser.

Vendor and Purchaser.—In actions for specific performance, a receiver may be appointed, in a proper case, by the Court: *Kerr v. Jones*, 3 Mer. 418; *Hull v. Jenkins*, 2 V. & R. 125; *McLeod v.*

Philips, 2 Jur. 962; and see *Taylor v. Eckerstep*, 2 Ch. D. 392; 3 Rule 759. Ch. D. 740, a case of chattels; or in actions to set aside conveyances as obtained by fraud; *Stillwell v. Wilkins*, Jac. 282; *Hugonia v. Buschey*, 13 Ves. 107; 2 White & Tind. Lg. Cases, 547.

Legal Title.—Formerly the Court would not, except under special Receiver, circumstances, or in cases covered by R. S. O. (1877) c. 40, s. 49, when appointed a receiver against a person in possession of lands claiming under a legal title; but since *The Judicature Act*, it has been held that the jurisdiction is extended, and that a receiver may be appointed against a person claiming a legal title, wherever the Court may think it "just or convenient"; *Real and Personal Advance Co. v. McCarty*, 27 W. R. 706; but see *North London Ry. Co. v. Great Northern Ry. Co.*, 11 Q. B. D. 30; 48 L. T. 655; *Phillips v. Jones*, 6 L. T. Jour. 373.

Application for Appointment.—The application for the appointment of a receiver must in the first instance be made in Court, upon motion for that purpose where the appointment is required to be made *pendente lite*, or else at the trial, or on motion for judgment in the action; but after a receiver has been appointed, applications to fill vacancies subsequently occurring in the office may be made in Chambers; *Grete v. Bug*, 9 Ma. App. 4, but the order for a receiver has been granted in Chambers, by consent; *Blackborough v. Ravenhill*, 16 Jur. 1085; and see 22 Sol. Jour. 914.

Under Rule 341, a defendant may, before judgment, apply for an interim injunction and receiver. He may do so, notwithstanding that the plaintiff has already served notice of motion for the like purpose. In such case, one order will be made on the two motions, but the conduct of it will, in general, be given to the plaintiff; *Sargant v. Reed*, 1 Ch. D. 600.

If the receiver is named by the Court, "on his giving security," no other person can be named in the warrant, and if the person named in the order fails to give the security, a further order will be necessary to enable the Master to appoint some one else.

A receiver when appointed is an officer of the Court, and stands in the position of trustee to all who are interested in the estate or fund. In making the appointment, the Master should endeavour to select a person acceptable to all parties, as well as otherwise fit and competent for the duties he will be called on to perform; *Simpson v. Latham & Prescott Ry. Co.*, 1 Chy. Ch. 391; and see *Brant v. Wilbushby*, 17 Gr. 627.

A receiver should in general be wholly disinterested, unless he carries otherwise consent, or the Court is of opinion that the appointment of one of the parties would be beneficial to the estate; *Cuquant v. Read*, 1 Ch. D. 600. Where a party to the action is appointed it is only on his undertaking to act without salary; *Re Wilson v. Greenwood*, 1 Sw. 471, 484; *Blackney v. Dufant*, 15 Beav. 441; *Kerr on Receivers*, 95. Where a receiver is appointed of trust property, the *cestui que trust* is entitled to have the superintendence of the trustee, as a check upon the receiver; the trustee should not therefore be himself appointed, except under special circumstances; *Kerr*, 95, 86; and where a receiver is appointed of the property of any person not *sui juris*, the guardian or committee of such person, should not be appointed for the same reason, nor yet any person connected with him, or the solicitor in the action; *Re Lloyd*, 12 Ch. D. 447; nor a Master of the Court; *Ex parte Fletcher*, 6 Ves. 127.

Rules**760-762.**

Parties not eligible.

Security.

A party to the action cannot propose himself as receiver unless leave to do so be embodied in the order: *Davis v. Duke of Marlborough*, 2 Sw. 118.

The giving of security for the due performance of his duty by a receiver will not be dispensed with where infants or other persons not *sui juris* are interested: *Tyler v. Tyler*, 17 Beav. 584; nor where all the parties are *sui juris* and consent, if it is referred to the Master to appoint the receiver: *Hanners v. Furse*, 11 Beav. 30; but it may be, if the parties themselves nominate the receiver: *Ib.*

Where a person is appointed receiver without salary, he is entitled to be paid out of property in question the premiums paid by him to a guarantee company for becoming his surety: *Harris v. Sheep*, 18 Q. 2 Ch. 80; 76 L. T. 458.

On return of warrant, bond to be brought in.

760. At the time appointed, the party prosecuting the order shall bring into the Master's office the bond proposed as security. Con. Rule 115.

The bond here referred to, is intended to be brought in as a draft, and should not be executed until it has been approved by the Master, see *Rule 762*, otherwise its re-execution may be necessary.

Bond, how to be given.

The bond must now be made to the "Accountant of the Supreme Court of Judicature for Ontario, his successors and assigns" *Rule 66*; Jud. Act, s. 150 (2), see *supra*, p. 183.

Where a guarantee company has been approved by the Lieutenant Governor in Council, its bond may be accepted as security: R. S. O. c. 220, s. 3; and see *Carpenter v. Solicitor to the Treasury*, 46 L. T. 821; R. S. O. c. 16, s. 24. The solicitor of any of the parties is not eligible as a surety: *Re Gibson*, 13 P. R. 359.

Party desiring to propose another person as receiver, to give notice.

761. Any other party desirous of proposing another person as receiver, shall serve notice of his intention so to do upon the other parties, naming in the notice the person proposed by him as receiver, and his sureties, and shall bring into the Master's office the bond proposed by him as security. Con. Rule 118.

See Chy. O. 280.

Master to appoint receiver and settle and approve security.

762. At the time named in the appointment or warrant the Master shall consider the appointment of the receiver, and determine respecting the same; and settle and approve of the proposed security. Con. Rule 119.

See Chy. O. 281.

Evidence to be produced on settling security.

In order to enable the Master to settle the security to be given, affidavits must be filed proving the amount of property likely to come to the receiver's hands. The amount of the security required will vary according to the circumstances; usually security will be required to be given by the receiver and at least two sureties in double the amount of the probable annual rents of realty, and double the probable amount of personal estate, likely to come to his hands.

When a receiver has passed his final accounts, and paid his balances as directed by the Court, an application may be made to discharge the bond; all parties interested are entitled to notice of the application: *Brown v. Perry*, 1 Chy. Ch. 253. As to the liability of the sureties, see *Re Graham*, 1895, 1 Ch. 66; 71 L. T. 623.

763. The Master shall approve of and appoint the receiver, by signing a written appointment according to Form No. 87, which shall be signed without any warrant or attendance for that purpose. Con. Rule 120.

See Chy. O. 282.

For Form No. 87, see H. & L. Forms, No. 1991.

Committees of lunatics, and guardians of the person and estate of infants, are to be appointed in the same manner as receivers: *Rule 765.*

764. After the execution and filing of the securities settled and approved by the Master, the appointment is to be filed by the party who has procured the person named by him as receiver to be appointed, and it may be moved against within seven days by any party interested. Con. Rule 121.

See Chy. O. 283.

A receiver appointed "upon his giving security," is not effectually constituted receiver as against third parties until he has given the security: *Edwards v. Edwards*, 1 Ch. D. 454; 2 Ch. D. 291; but if no security he required, he is legally clothed with the character of receiver from the date of his appointment: *Taylor v. Eckersley*, 2 Ch. D. 392; 5 Ch. D. 749. Where a receiver is required to give additional security his omission to do so may be a ground for removing him from office, but he cannot be proceeded against for contempt of Court for not doing so. *Re Dominion Provid. B. & E. Assoc.*, 24 Ont. 416.

Interference by third parties with the property in question, before the appointment is completed, is not a contempt of Court: *Taylor v. Eckersley*, *supra*; and see *Fox v. Nipissing Ry. Co.*, 29 Gr. 11.

After the appointment of the receiver is complete, any interference with the property committed to his charge and in his possession, either by parties to the action, or third parties having notice of his appointment, is a contempt of Court, unless the leave of the Court has been first obtained: *Angel v. Smith*, 9 Ves. 335; *Russell v. East Anglian Ry. Co.*, 3 Mac. & G. 104; *Ames v. Birkenhead Docks*, 20 Beav. 353; even though such interference be by persons claiming by title paramount to that of the parties to the action in which the receiver is appointed: *Ib.*; *Evelyn v. Lewis*, 3 H. & A. 475; *Hawkins v. Guthercole*, 1 Drew. 17; *Randfield v. Randfield*, 1 Dr. & Sm. 314; *Whitcomb v. Shropshire Ry. Co.*, 95 L. T. Jour. 272; and the Court will not permit any one, without its sanction, to intercept or prevent payment, or delivery to the receiver, of any money or property which he has been appointed to receive: *Ames v. Birkenhead Docks*, 20 Beav. 353; but where goods in the possession of a receiver were sold for taxes, and neither the bailiff, nor purchaser, had notice of the receiver's rights, the Court refused to hold the sale void: *Gibson v. Lovell*, 18 Gr. 197. As to payments which a receiver of a going concern may properly make, see *Gooderham v. Toronto & Nipissing Ry. Co.*, 8 Ont. App. 685.

Rule 764.

Leave was given to abate an obstruction to a right of way, existing on land in the possession of a receiver; *Lane v. Capsey*, 1891, 3 C. L. 111; 65 L. T. 375.

It has been held that the effect of a receivership order obtained by an execution creditor is to vest in the party obtaining the same a right to the property in question, as from the date of the order, which cannot be divested by proceedings in bankruptcy subsequently taken against the debtor; *Lecrassey v. Mason*, 1891, 2 Q. B. 73; 64 L. T. 761; but, notwithstanding, it has been held that he is not a "secured creditor" within *The Bankruptcy Act*; *Re Potts*, 1893, 1 Q. B. 648; 68 L. T. 229; and see *Croshaw v. Lyndhurst*, 1897, 2 Q. B. 154; 76 L. T. 533, where it was held by Stirling, J., that a receiver's order, under which the receiver is required to pay the moneys received into Court subject to further order, gave the execution creditor no charge on the property. See also *McLean v. Allen*, 18 P. R. at p. 259.

Property in the hands of a receiver is *in custodia legis* in so far that none of the parties to the action can recover damages for its detention while in his custody; *The Peruvian Guano Co. v. Decatur*, 1892, A. C. 160; but not in the same way as it would be if in possession of a sequestrator, or sheriff; *Re Hoare, H. v. Owen*, 1892, 3 C. L. 94; 67 L. T. 45.

Receiver
to obtain
leave to
sue, or
defend, or
distrain.

Where it is necessary for the receiver to bring, or defend, an action, or take other legal proceedings, to recover, or maintain, his right to property committed to him, he should first obtain the sanction of the Court; *Thomas v. Torrance*, 1 Ch. Ch. 9. He cannot sue in his own name, but he must get the leave of the Court to bring the action in the name of the party in whom the legal cause of action is vested; *McGuin v. Fretts*, 13 Ont. 699; *Stuart v. Grough*, 14 Ont. 275.

The Court may refuse to authorize the receiver to sue where the party having the legal title is ready and willing to do so; *McLean v. Allen*, 14 P. R. 291.

Where a receiver is appointed by way of equitable execution, he may be authorized to sue in the name of the debtor for the purpose of recovering assets to satisfy the execution, on first giving the debtor a proper indemnity against costs; *Morris v. McCollum*, 17 P. R. 308.

The receiver should not himself initiate proceedings, but he should apply to the party having the conduct of the cause to take any proceedings that may be necessary; *Third National Bank v. Queen City Refining Co.*, 20 C. L. J. 151. After attornment by a tenant to the receiver, the receiver may distrain in his own name; before attornment, leave must be obtained to distrain in the name of the person having the legal estate; *Kerr*, 142, 143. The application for leave to sue, defend, or distrain, may be made in Chambers; *Thomas v. Torrance*, 1 Ch. Ch. 9; notice to the tenants is not necessary; *Palmer v. Dryden*, 6 P. R. 127.

A receiver cannot be empowered by the Court to do things which the parties to the action could not themselves legally do, *e.g.*, in a partnership he cannot be empowered to agree to a compromise against the will of one of the partners; *Niemann v. Niemann*, 43 Ch. D. 198; 62 L. T. 339.

Proceed-
ings
against,
restrained.

Proceedings instituted against a receiver for acts done by him in the execution of his office, will be restrained; *Simpson v. Hutchison*, 7 Gr. 398; and see *Searle v. Choat*, 25 Ch. D. 723; 50 L. T. 470; *Re West Lancashire Ry. Co.*, 63 L. T. 56. After his discharge a receiver will not be restrained from soliciting customers, unless he was appointed on the terms that he would not do so after he ceased to be receiver; *Re Irish, Irish v. Irish*, 40 Ch. D. 49; 60 L. T. 224.

Accounts of Receiver.—See Rule 766.

Rules
765-766.

Liability of Receiver.—A receiver or manager entering into contracts will make himself personally liable, unless the contract expressly provides otherwise: *Burt v. Bull*, 1805, 1 Q. B. 276; 71 L. T. 810; or the credit is clearly given to the firm or business of which the receiver is manager: *Isaacs v. Utnerp*, 74 L. T. 320; and where a receiver is appointed by trustees for debenture holders in pursuance of a power in the trust deed, the trustees are not liable on the contracts of the receiver as undisclosed principals: *Gaskell v. Godling*, 1896, 1 Q. B. 669; 77 L. T. 311; 1897, A. C. 575, in which case the deed provided that the receiver when appointed should be the agent of the company who alone should be liable for his acts or defaults.

A receiver is bound to conform to the orders of the Court, and is responsible for any loss resulting from his not doing so: thus, where a receiver was ordered to pay money to the plaintiffs, and he paid it to their solicitor who misappropriated it, the receiver was held liable to make good the loss: *Ind. Cooper & Co. v. Kidd*, 71 L. T. 263.

A receiver is liable to attachment for disobeying the order of the Court as to the payment of moneys which came to his hands as receiver; but *scilicet* a specific order for payment should be first obtained and served on him: *Parkes v. Griffin*, 18 P. R. 48.

765. Committees of the persons and estates of lunatics, idiots, and persons of unsound mind, and guardians, excepting guardians *ad litem*, shall be appointed, as nearly as practicable, in the same manner as receivers, as nearly as circumstances will permit. Con. Rule 12³.

Taken from Chy. O. 537.

The husband of a married woman who is declared a lunatic, has no absolute right to be appointed her committee: *Re Davy*, 1892, 3 Ch. 38; 67 L. T. 180.

766. In the judgment or order directing the appointment of a receiver, committee of the person and estate of a lunatic, idiot, or person of unsound mind, or a guardian other than a guardian *ad litem*, in the absence of any provision therefor, (a) the Master shall fix the time or times in each year when the person appointed is to pass his accounts and pay his balances into Court; and in default of compliance with such direction, the person appointed, on the passing of his accounts, be disallowed any salary or compensation for his services, and may be charged with interest upon his balances. Con. Rule 12³.

Taken from Chy. O. 588.

(a) The words "in the absence of any provision therefor," were probably intended to be at the beginning of the Rule.

Where a receiver, who was appointed without a salary, performed divers extraordinary services in connection with his office which were not contemplated when he was appointed, he was allowed a reasonable compensation for such extraordinary services: *Harris v. Ship*, 76 L. T. 670.

A receiver appointed without salary, is entitled to be allowed in his accounts for premiums paid for the purpose of furnishing security: S. C., 1897, 2 Ch. 80; 76 L. T. 432.

Committees of lunatics to be appointed in same manner as receivers.

Master to appoint time for receivers, and cause committees to pass accounts where not fixed by Court.

Rule 767.

CHAPTER XII.

APPEALS.

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| 1. APPEALS FROM OFFICERS IN CHAMBERS, 707, 708.
2. APPEALS FROM MASTERS AND REFEREES, 709-712.
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1. APPEALS FROM OFFICERS IN CHAMBERS.

Appeal from officers in Chambers.

767—(1 A person affected by a judgment, order or decision of the Master in Ordinary made or given under his jurisdiction in Chambers, or of the Master in Chambers, a Local Judge, or a Local Master, or other officer in Chambers, may appeal therefrom to a Judge of the High Court in Chambers.

(2) The appeal may be made notwithstanding that the order or decision was in respect of a proceeding or matter as to which the officer had jurisdiction only by consent:

(3) The appeal shall be by motion, on notice served within four days and returnable within ten days after the decision complained of, or within such further time as may be allowed by a Judge of the High Court or by the officer whose decision is complained of:

(4) The Deputy Clerk of the Crown, Deputy or Local Registrar shall, on *præcipe*, transmit to the Central Office all documents filed in his office required on the appeal;

(5) The appeal shall not be a stay of proceedings unless ^{Rule 767.} ordered by a Judge of the High Court or by the officer whose decision is complained of. Con. Rule 816, amended by Rules of 1 Jan., 1896, 1490; 58 V. c. 12, s. 71 and 59 V. c. 18, s. 3.

(6) Where the judgment, order, or decision is made or given in vacation, a person affected thereby may, subject to the provisions of Rule 114, appeal therefrom during vacation to the Vacation Judge, or may appeal after vacation in the same manner and within the same time as if the judgment, order, or decision had been made on the next day after vacation. *New.*

See former Rule 846, and compare Eng. (1883) R. 410.

This *Rule* only relates to orders made in Chambers. It does not cover or include Masters' reports, or certificates, as to which, see *Rule 769.*

This *Rule* governs appeals from the Master in Ordinary when acting in Chambers, under *Rule 128*; and from the Master in Chambers, and the Local Judges, and Local Masters, when acting under *Rules 42, 45 and 49*; *Lowson v. Canada Farmers, etc.*, 9 P. R. 188, or *Rule 956*; *Stroud Sun Oil Co.*, 7 O. L. R. 204; 8 O. L. R. 748.

As to appeals from a Local Judge when acting under *Rule 47*, see *Rule 48.*

Appeals from a Judge in Chambers to a Divisional Court are governed by *Rule 777.*

Appeals from orders made by the Judge of the District Court of Thunder Bay and Rainy River, in Chambers, may be brought as if the action were in the High Court, wherever the cause of action is beyond the jurisdiction of a County Court; see R. S. O. c. 100, s. 15 (O.), and consequently appeals in such cases must be brought in the manner prescribed by this *Rule*.

In High Court actions, appeals from the Stipendiary Magistrate of Rainy River may be brought within double the time allowed by this *Rule*; see R. S. O. c. 100, s. 13 (3).

Where a Judge or judicial officer decides a matter as a *persona designata*, there appears to be no right of appeal under this *Rule*; *Houie v. Morhead*, 1903, 2 K. B. 353; *Re King*, 18 P. R. 365, save as provided by R. S. O. c. 76, s. 6; as amended by 63 Vict. c. 17, s. 14.

There is no power to vary or discharge an order except in the manner provided by the Act, or *Rules* *e.g.* by way of appeal or by motion under *Rule 355*, or 642; see *Att.-Gen. v. Llewellyn*, 58 L. T. 367; and *Re Adam Epton, Limited*, 35 Ch. D., at p. 301; *Hood-Barrs v. Cathart*, 72 L. T. 184, and notes preceding *Rule 640*; or by an action; see *Ainsworth v. Wilding*, 1896 1 Ch. 673.

An appeal cannot be had direct to a Divisional Court from the Master, Local Judge, or other officer acting in Chambers. *Ball v. Catheurt*, 16 Ont. 525.

Any person affected by an order may appeal, and therefore an appeal lies from an *ex parte* order by a person affected thereby; *Wigle v. Harris*, 9 P. R. 276; *G. T. Ry. Co. v. Ont. & Que. Ry. Co.*

Rule 767. 9 P. R. 420; but an application to set aside an order, made *ex parte*, and without knowledge of the facts, is not an appeal, and not within this Rule: *Hughes v. Field*, 1 C. L. T. 702; and see *Re Central Bank*, 24 Ont. App. 470; and Rule 358.

A consent order of an officer in Chambers is within sec. 72 of the Jud. Act, and no appeal lies from it without leave: *Re Solicitor*, 18 C. L. T. 224, 261.

Discretionary orders.

The Master's discretion is open to review on an appeal under this Rule: *Christie v. Conway*, 9 P. R. 529; *Abell v. Morrison*, 14 P. R. 210; but to be interfered with, it must be shewn to be clearly wrong: *Adamson v. Adamson*, 12 P. R. 471; *Odell v. Mulholland*, 14 P. R. 180.

Time for appealing.

The time for appealing runs from the pronouncing of the order, and not from the day upon which it was issued: *Miller v. Stillwood*, 21 C. L. J. 98, following *Dayer v. Robertson*, 9 P. R. 78. The contrary was at one time decided in *McNeil v. McGregor*, 3 C. L. T. 300; see *Heally v. Newton*, 19 Ch. D. 326; *Gibb v. Murphy*, 2 Chy. Ch. 132; see also *Lowson v. Canada Farmers, etc.*, 9 P. R. 185.

Where the time expires on a Sunday or holiday, Rule 345 applies; see that Rule and *Taylor v. Jones*, 45 L. J. C. P. 110.

An appeal from a decision of a Master refusing to rescind a former order was held tantamount to an appeal from the first order, and dismissed as too late under this Rule: *Jamieson v. Prince Albert Colonization Co.*, 11 P. R. 115.

The notice of motion by way of appeal must be served within four days, and be made returnable within the ten days; see *Hell v. N. Staffordshire Ry. Co.*, 5 Q. B. D. 205.

Extending time for appealing

Orders extending the time should not be made *ex parte*: *Hamilton v. Tice*, 9 P. R. 448, and cannot be made by the Master in Chambers in the case of an appeal from an officer other than himself: *Re Davies & York*, 10 C. L. T. 186.

It has been held that leave to serve short notice of appeal should not be obtained from the Master in Chambers; he has no power to shorten the time on a motion not returnable before himself: *Duncan v. Boulton*, 3 C. L. T. 501; and see 1 C. L. T. 614, 645.

Where an order was made on Friday, so that two clear days' notice of appeal could not be given for the next Chamber day (Monday), application was made *ex parte* within four days, for leave to bring on the appeal on the following Thursday, but leave was given instead for the following Monday, and no order was taken out, extending the time. It was held not an application for an extension of time, and an objection that the appeal could not be heard as eight days from the decision (the time named under the original Rule), had expired, was overruled: *Standard Bank v. Wittis*, 10 P. R. 159. Owing to the longer time allowed by the present Rule (*viz.*, 10 days) the difficulty is not now likely to arise.

The time was extended where there was the intention to appeal, but by misapprehension of the new practice, the time was allowed to pass: *Dayer v. Robertson*, 9 P. R. 78; also where it was supposed that Christmas vacation did not count in computing the time: *Stewart v. Leys*, 9 P. R. 200. But in *Snowdon v. Huntington*, 12 P. R. 1, notice of appeal given Dec. 24 for Jan. 10, the first day after vacation when a Judge sat in Chambers, was held not good notice. The notice should have been given for a day within the eight (now ten) days, and then an extension of the time for bringing on the

appeal should have been applied for, on an *ex parte* application *Rule 767*, as of course: see also *Wallingford v. Mutual Soc.*, 5 App. Cas. 685; and *Blaylock v. McFarlane*, 15 C. L. J. 137; *Lewis v. Tulbot St.*, etc., 10 P. R. 15; *Lowson v. Canada Farmers, etc.*, 9 P. R. 185; *Carter v. Stabbs*, 6 Q. B. D. 116; *Gibbons v. London Financial Association*, 4 C. P. D. 263. But as to orders made in vacation, see now *Rule 767*, clause (6).

An application to enlarge the time should in general be made within the ten days: *Stirling v. DuBarry*, 5 Q. B. D. 67.

Neglect to set down an appeal through forgetfulness of the appellant's solicitors' clerk, has been held not sufficient reason for extending the time for appealing from an order refusing to dismiss an action for want of prosecution: *Dunnard v. McLeod*, 8 P. R. 343.

Where, on an application in Chambers, a party omitted to take an objection to the jurisdiction to make the order applied for in Chambers, he was held not entitled to raise the objection afterward on motion to discharge the order: *Horton v. Bosson*, 1899, W. N. 23, 38.

A right to appeal may be waived by acting upon the order appealed from: *International Wrecking Co. v. Lobb*, 12 P. R. 207; *Videau v. Westover*, 18 C. L. T. 83; 29 Ont. 1, *Boulton v. Boulton*, 5 O. W. R. 177; or otherwise recognizing it, e.g., by obtaining an extension of time for complying with it: *Pierce v. Palmer*, 12 P. R. 308, where a motion by defendant to set aside a judgment for irregularity was refused, but defendant was let in to defend on terms, and he was held to have waived the right to appeal from the refusal to set aside the judgment by obtaining an extension of the time for compliance with the terms. See also *Re Smart*, 12 P. R. at p. 638; *Boyle v. Sacker*, 39 Ch. D. 249; and *Phillips v. Belleville*, *infra*.

But mere payment of money as directed by a judgment: *Phillips v. Belleville*, 6 O. W. R. 129; and the mere compliance with the terms of an order by the party to whom an indulgence or relief is granted on terms: *Anthony v. Blain*, 5 O. L. R. 48; do not operate as a waiver of the right to appeal from the judgment or order; and see *Duffy v. Donoran*, 14 P. R. 159.

Under the English Indicture Act an appeal is in all cases a rehearing, and fresh facts may be gone into: *Anon.*, per Lush, J., 60 L. T. Jour. 67; 1 Charl. Ch. Ca. 128. "Every appeal is now a rehearing, and therefore fresh affidavits may be used on all appeals from a Master to a Judge in Chambers": per Quain, J., *Anon.*, W. N. 1875, 250; 1 Charl. Ch. Ca. 129. "This ruling has been held by other Judges and confirmed by the Court" (Coe's Practice in the Judge's Chambers, p. 6). This would not seem to be the case in Ontario. Fresh evidence may be given by leave only under *Rule 498*; see *Taylor v. Sisters, etc., of Ottawa*, 11 P. R. 496. In *Re Neath Harbour, etc., Works*, 20 Sol. Jour. 26, it was said that each case must in this respect depend upon its own circumstances; fresh evidence was there allowed, also in *Robinson v. Bradshaw*, 32 W. R. 95.

In *Re Munns v. Longden*, 32 W. R. 675; 50 L. T. 356, it was held that the Court will not receive further evidence on a motion to discharge an order made in Chambers, where the motion has been fully argued and disposed of; see also notes to *Rule 498*.

Where it is intended to apply for leave to use fresh affidavits on documentary evidence, notice should be given to the opposite party that such relief will be applied for on the hearing of the appeal:

Fresh evidence on appeals.

Rules *Hastie v. Hastie*, 1 Ch. D. 562; see *Bigby v. Dickinson*, 4 Ch. D. 24; 768, 769, and *Dicks v. Brooks*, 13 Ch. D. 654.

Costs of affidavits in answer to fresh affidavits were refused where the fresh affidavits were not allowed to be read: *Mitchell v. Condy*, W. N. 1881, 83.

Appeals
not to be
set down.

768. Appeals in Chambers shall be heard as motions without being set down and shall be argued by Counsel or Solicitor. Rules 13 June, 1890, 1266. Rules of 1 Jan., 1896, 1457.

2. APPEALS FROM MASTERS AND REFEREES.

Interpreta-
tion of
"report or
certificate."

768a. The words "report or certificate" in Rules 769 and 771 shall include every order made by the Master in Ordinary, a Local Master, or an Official Referee, except an order made under the authority of Rule 767. Rule 1264, 20 June, 1904.

This Rule would not seem to apply to orders made by Masters under Rule 650; see Rules 660, 661.

Report
when
absolute.

769. Every report or certificate of a Master shall be filed and shall become absolute at the expiration of fourteen days from the date of serving of notice of filing the same unless notice of appeal is served within that time. Con. Rule 848, amended.

Taken from Chy. O. 252.

The filing is a prerequisite to the report or certificate's becoming absolute: *Re Sup. Legion of Select Knights of Canada*, 29 Ont. 708.

This Rule applies both to appeals, and cross-appeals from reports: *Stewart v. Ferguson*, 19 P. R. 21; notice of appeal given by one party, does not prevent the report becoming absolute as against another party: *Id.*

As to appeals from Masters under the Dominion Winding up Act, see 52 Vict. c. 32, s. 20, (D.); *Re Central Bank*, 30 Ont. 320; *Re Farmers' Loan & S. Co.*, 30 Ont. 337; formerly appeals from the Master in Ordinary under this Act, lay to a Divisional Court, but since the change effected by 3 Ed. vii. c. 8, s. 10, and Rule 1264, the appeal in such cases would appear now to lie to a Judge in Court as in other cases of appeals from reports.

Reports and certificates.—As to the reports and certificates which are the subjects of appeal, see notes to Rule 687, *supra*, p. 941. By Rule 768a orders (with certain exceptions) are also included under the words "report" or "certificate."

This Rule applies to the report or certificate of a Referee; see *Freeborn v. Vandusen*, 15 P. R. 261; *Colchester v. Valod*, 24 S. C. R.

and R. S. O. c. 62, ss. 31, 33 and Rule 653. It is also considered to apply to all reports including those of Commissioners to measure dower under R. S. O. c. 67, s. 9. **Rule 769.**

This and the two following Rules apply only to appeals from reports, and certificates. Where Local Masters are exercising jurisdiction in Chambers, under Rule 49, appeals from their decisions are regulated by Rule 767.

Where a reference was directed by consent to a Local Registrar with all the powers of a Master, it was held that his report was appealable in the same manner as a Master's report: *Kennedy v. Haddon*, 19 Ont. 210.

The certificate of a Taxing officer of the result of a taxation between solicitor and client is a report, and only appealable in the manner pointed out in Rules 769, 771: see Rule 773.

As to appeals under the Act for simplifying procedure for enforcing Mechanics' Liens, see R. S. O. c. 153, s. 39: that section, it will be observed, seems only to provide for appeals from the judgment in the action; no provision is made by the Act for appeals from interlocutory orders or reports in such actions.

Reports which require Confirmation.—All reports and certificates, which are the subject of appeal, are, as a general rule, required to be confirmed before they can be acted on: *Scott v. Liversay*, 2 Sim. & S. 300; or any application can be made to the Court founded thereon: *Hayes v. Hayes*, 8 P. R. 546; *Nichols v. McDonald*, 6 Gr. 394; *Green v. Ingham*, 58 L. T. 486. Thus a report on sale, where the sale proved abortive, requires confirmation before it can be acted on: *Robert v. Coughell*, 6 O. L. R. 381. There are, however, some reports, and certificates, which may be acted upon without confirmation on their being filed: see *Re Yaggie*, 1 Chy. Ch. 108. Reports which require confirmation, may be confirmed by special order before the expiration of the time limited for appealing therefrom, upon consent of all parties interested. An order confirming a report may be made by the Master in Chambers.

Reports which do not require to be Confirmed.—All reports, or certificates, of mere calculation: *Lewis v. Tulbot St. Road Co.*, 10 P. R. 15; *Bocck v. Bocck*, 16 P. R. 213; and of matters of opinion, which do not require any further order from the Court to give effect to, or to sanction them—except reports on sales—do not require confirmation. Under this head are included certificates of compliance, or non-compliance, with any order of the Master, or of the Court (but not certificates of insufficient compliance; e.g. that accounts filed are insufficient in substance and form: *Foster v. Morden*, 9 P. R. 70); certificates of scandal, or impertinence, in pleadings, or affidavits, referred to the Master; reports appointing trustees; and appointments of receivers, committees, or guardians, under Rule 763; but see *Finkle v. Date*, 7 P. R. 413; *Foster v. Morden*, *supra*; reports on passing the accounts of receivers, or committees; reports computing subsequent interest, or of apportionment of a fund on principles and in proportions, declared by the Court; reports approving of conveyances; and other certificates and reports of a like description: see Smith's Pr., 2nd ed., Vol. 11., 357-8.

No Appeal after Confirmation without Leave.—After a report requiring confirmation has been confirmed, no appeal from it will be entertained without leave first given, on special application: *Thomson v. Luke*, 10 Gr. 281.

Rule 769. After the cause or matter has been heard on further directions, the Court has no power to permit an appeal from the report in which the order or judgment on further directions is founded; *as Dingman v. Hall*, 13 P. R. 232; 17 Ont. App. 398. The judgment or order on further directions must be first vacated.

Effect of confirmation.

Effect of Confirmation.—After confirmation, the parties are concluded by the report; yet the Court in its discretion may refuse to act upon it, and may refer the cause back to the Master, or require additional information to be furnished; *Taylor v. Craven*, 10 Gr. 488; *Baldwin v. Crawford*, 1 Gr. 202; *Harrison v. McSheehan*, 80 L. J. Jour. 79.

Clerical errors may be corrected notwithstanding.

Notwithstanding confirmation, clerical errors, and accidental slips, in a report may be corrected at any time upon motion in Chambers, without appeal; *Merley v. Matthews*, 12 Gr. 453; *Krag v. Coonan*, 10 Gr. 364; *Watson v. Moore*, 1 Chy. Cl. 266; and where the error was apparent on the face of the report, the application was granted *ex parte*; *White v. Cartney*, 1 Chy. Cl. 11. But although the error be apparent, it does not follow that the proper correction is apparent, and the motion therefore is usually required to be on notice or consent; *Shannon v. Ottawa*, 2 Chy. Cl. 12. Mistakes in a report, however, cannot be corrected by the Master *mero motu*, on any subsequent reference in the matter; *Crooks v. Street*, 1 Chy. Cl. 78; but on a reference back upon an appeal, when the Court enunciates a principle, which is applicable to other parties, and other points, that those expressly concerned in the appeal, it is the duty of the Master so to apply that principle in all cases to which it is applicable, in making his new report, even though it involve the readjustment of an account not appealed from; *Denison v. Denison*, 17 Gr. 306; and see *Gilbert v. Jarvis*, 20 Gr. 478.

Report stands confirmed as to matters not appealed.

Even though an appeal be laid, the report will stand confirmed as to matters not objected to by the appeal, and when the decision of the appeal does not affect; *Denison v. Denison*, 17 Gr. 308; *Ross v. Perrault*, 13 Gr. 206. And when the report is referred back, an appeal will not lie from the further report, as to matters disposed of by the first report, and not objected to on the first appeal; *Ross v. Perrault*, *supra*, or affected thereby; *Denison v. Denison*, 17 Gr. 308.

Waiver of objection that appeal is late.

Where notice of appeal is delivered, without leave, after a report is confirmed, the delivery of notice of cross-appeal is a waiver of the objection; *Larkin v. Armstrong*, 1 Chy. Cl. 31.

Report not to be dated before costs assessed.

The report should not be dated before the costs have been assessed, where revision is necessary; *Waddell v. McColl*, 14 Gr. 211. A party who, being entitled to notice, have had no notice, is entitled; *Fuller v. McLean*, 8 P. R. 529.

Confirmation of report.

Confirmation of Report.—A report requiring confirmation now becomes absolute at the expiration of fourteen days from the date of service of notice of filing, unless in the meantime notice of appeal is served; *Rule 769*. An application to extend the time for appealing from a report, even before confirmation, must be made on notice; *as Hamilton v. Treed*, 9 P. R. 418; as also an application for leave to appeal after the time has expired; *Peterborough v. Irton*, before Proffoot, J., Nov. 11th, 1883.

Special order confirming report, when made.

Where it is desired to confirm a report before the expiration of 14 days, a special application in Chambers may be made for that purpose, but such applications are granted only where all parties are

itled to appeal consent: *Patterson v. Gilbert*, 12 P. R. 652, and at Rule 769, is considered undesirable that an officer should make an order confirming his own report: *Id.*

Filing Report.—A report before it can be acted on must be filed, filing and notice of filing must be given by the party filing it to the opposite party: *Rule 634*; and a report does not become absolute until notice of filing has been given (when necessary), and fourteen days have elapsed: *In re Supreme Legion S. K. of C.*, 29 Ont. 708; but service of such notice on defendants who have not appeared in the action is unnecessary: *Toronto General Trusts Corp. v. Craig*, 2 O. L. R. 238. So also a report must be filed before an appeal will lie: *Hanes v. Hanes*, 8 P. R. 546. If it appoints a day for payment of money, it should be filed before the day for payment: *Mills v. Baron*, 2 Chy. Ch. 53, and confirmed, if it is a report requiring confirmation: *Mountain v. Porter*, 1 Chy. Ch. 207. No proceedings can properly be taken on a report until filed, either by the issue of process or otherwise: *Hennes' Ord.* 233; *Jellitt v. Badoescu*, 8 P. R. 387; even though the report or certificate be one not requiring confirmation: *Id.*; but such reports can be set aside immediately on filing; it is not necessary to wait fourteen days: *Re Yeggin*, 7 U. C. L. J. 293; 1 Chy. Ch. 168.

All reports are to be filed in the office where the proceedings were commenced: *Rule 633*; and see *Rule 14*.

Leave to Appeal after Confirmation.—After a report is confirmed, leave to appeal from it may be granted on motion in Chambers after confirmation. The application must be made on notice, or consent: *Coxon v. McDaniel*, 1 Chy. Ch. 23; *Cade v. Newhall*, 1 Chy. Ch. 200; *Peterborough v. Irton*, before Proudfoot, J., 11th November, 1883; all parties are entitled to notice even though they be in the same interest as the party seeking to appeal: *Larkin v. Armstrong*, 1 Chy. Ch. 31. Where leave has been granted *ex parte*, the objection to the order may be taken on the appeal coming on for argument: *Peterborough v. Irton*, *supra*. On such application it is necessary to account for the delay, and to show a *prima facie* ground of appeal: *Dickson v. Arverp*, 3 Chy. Ch. 222; *Wong v. Wood*, 13 U. C. L. J. 326; *Carrie v. Brinkham*, 6 P. R. 201; *Dudley v. Beyer*, 3 Chy. Ch. 81; *Chad v. Hiners*, 3 Chy. Ch. 320. It is not absolutely necessary that the grounds of the proposed appeal should be stated in the notice of motion for leave to appeal: *Romanes v. Hines*, 1 Chy. Ch. 363; but reasonable, and probable, grounds of appeal, must be shown by the applicant: *Id.*, and a mere statement of the proposed grounds of appeal in the notice of motion will not suffice: *De Blaquiere v. Armstrong*, 3 U. C. L. J. 363; but costs unnecessarily incurred in making out a case on the merits were disallowed: *Nash v. Glover*, 6 P. R. 267.

The Master in Chambers has jurisdiction to entertain the application: *Russell v. Beuchen*, 3 Chy. Ch. 488; *Sunderlight v. Lugs*, 3 P. R. 200.

Leave to appeal was refused with costs, where it appeared that the object of the appeal, was to fix executors with interest upon a sum which they had invested, and upon which a loss had been incurred: *Charles v. McElashan*, 2 Chy. Ch. 218; so also where the matter had been heard on further directions, and an order pronounced founded on the report: *Re Diagon and Hall*, 13 P. R. 232.

But leave was granted where time was allowed to elapse through the mistake of the solicitor in supposing that his clients would be secured to the benefit of the appeal of their co-defendants: *Re*

What necessary to account for the delay, and to show a *prima facie* ground of appeal.

Master in Chambers has jurisdiction to entertain the application.

Rule 769. *Gabourie, Casey v. Gabourie*, 12 P. R. 252; and see *Steuwright v. Leys*, 9 P. R. 200; but see *Blackstock v. McFarlane*, 15 C. L. J. 137.
See also notes to *Rule 353*.

Time for
appeal.

Time for Appealing.—An appeal from any report, ruling, or other determination, of any Master, other than the Master in Ordinary, must now be brought on for argument, before a Judge in Court, within one month from the date of the notice of filing of such report or certificate: *Rule 769*,—or within such further time as a Judge may think proper; the vacations are excluded from the computation of the month; *Rule 352*. An appeal from a ruling of a Master, must be brought within the same time as is allowed for appealing from a report; *Mitchell v. Mitchell*, 22 Gr. 23; formerly it had to be brought within one month from the date of the ruling, irrespective of the date of the certificate of such ruling; *Macdonald v. Gray*, 12 P. R. 431; but *quære* if that is now the case, though it is obvious that it may be inconvenient in practice if it is not.

In *Markle v. Ross*, 13 P. R. 135, it was held under the then Consolidated Rules that there could be no appeal to a Judge in Chambers from a ruling of a Master because the provision of Chy. O. 642 had not been included in the Consolidated Rules; and that an appeal only lay from a report, by which was possibly meant a general report. It is, however, to be observed that unless a new meaning is to be given to the words "report" and "certificate" from that which they possessed under the former practice, there is nothing in the present Consolidated Rules which prevents an appeal from a Master's ruling, as in the case of an appeal from a report, because, as we have already seen, a certificate of a Master is a report; see *Rule 687*, note; and a Master's certificate of his ruling is therefore a "separate report," and as such it would seem to be appealable in the same way as any other report. See also *Re Crothers*, 15 P. R. 92; and *Re Molphy*, 17 P. R. 247.

Scumble, that where it is not shewn that a report has been filed, or that notice thereof has been served, an objection that an appeal therefrom is not in time cannot prevail; *Re McLellan & Chinguacousy*, 18 P. R. 216.

Notice of
appeal and
setting
down for
argument.

Notice of Appeal and Setting Down for Argument.—Seven clear days notice of the appeal, stating the grounds of appeal, must be given to the opposite party; *Rule 771*; *Hoyes v. Hoyes*, 8 P. R. 546; and such notice must be returnable within one calendar month from the date of service of notice of filing the report or certificate; *Rule 771 (1)*; and the appeal must be set down for argument at latest the day before that on which the notice is returnable; *Id.*

Such appeals from Local Masters are to be heard on Monday, Wednesday or Thursday; see *Rule 98*.

Appeals from a Master's certificate of taxation are an exception to the usual rule, and must be brought before a Judge in Chambers; see *Rules 774-6*.

Where an appeal was set down for a *dies non*, but was placed in the Clerk in the paper for the next regular sitting of the Court, it was held not to be irregularly set down; *McCue v. Pontas*, 11 P. R. 328.

Report must
be first filed.

Before notice of an appeal is given the report must be filed, and notice of filing served on the opposite party; *Rule 694*; and see *Hoyes v. Hoyes*, 8 P. R. 546.

The notice of appeal should set out *verbatim* the grounds upon which the appeal is brought, and should include all the grounds of objection intended to be urged: *Rules* 770, 771; objections cannot be raised on an appeal from a further report, made in pursuance of an order to the Master to review his report, which might have been taken, but were not, on the appeal from the original report: *Ross v. Perrault*, 13 Gr. 206.

Who Entitled to Appeal.—Any person having a substantial interest in the question involved in an appeal, is entitled to appeal; but persons having no interest in the subject of appeal, cannot appeal, even though the report be erroneous: *Thompson v. Luke*, 10 Gr. 281; *McCargar v. McKinnon*, 17 Gr. 525; neither will an appeal lie from a Master's ruling, or direction, by a party who has complied with it, even though it be to escape commitment for disobedience: *Mitchell v. Mitchell*, 22 Gr. at p. 24; neither will an appeal lie, where the amount involved is of trifling amount, *e.g.*, where not more than \$10 was in question, an appeal was dismissed: *McQueen v. McQueen*, 2 Ch. Ch. 344.

An appeal may also be brought, before the Master has made his report, from his ruling as to the admissibility of evidence: *McDonald v. Wright*, 12 Gr. 552; or upon his finding as to the principle upon which an account should be taken: see *Court v. Holland*, 20 Gr. 19; or by a creditor from the Master's ruling, disallowing his claim: *Wood v. Brett*, 9 Gr. 452; and he need not wait for a general report, but may at once obtain a certificate of disallowance and appeal therefrom: *Re Clagett, Fordham v. Clagett*, 20 Ch. D. 637; 46 L. T. 70.

Where a cause had been referred to a Master as an arbitrator, by a consent decree, which provided that "either party should be at liberty to appeal against the award in the same manner and to the same extent that a report may be appealed from," it was held nevertheless, that an appeal from the award could not be entertained: *Burns v. Chamberlin*, 25 Gr. 148; and see *Lemay v. McIsaac*, 16 Ont. App. 348; but see R. S. O. c. 62, s. 14. Where the order directing the reference was made without jurisdiction, the Court refused to entertain any appeal from a report made thereunder: *Queen v. Smith*, 7 P. R. 429; *Brown v. Dollard*, 6 P. R. 113.

Hearing of Appeal.—Appeals from the Master's ruling as to the regularity of proceedings in his office, in point of form, will not be readily allowed, even though the Court be of opinion that he might have properly taken an opposite view: *Sculthorpe v. Burn*, 12 Gr. 427.

On matters of fact decided by the Master who has had the witnesses before him, the Judge will differ from the Master with great hesitation, and only when it is manifest that he has fallen into error: *Coldwell v. Hall*, 9 Gr. at p. 115; and the Judge will not in general interfere with the decision of the Master as to the weight of evidence, nor as to the relative creditability of witnesses whose evidence has been taken before him, *vide* *cor.*: *Dag v. Brown*, 18 Gr. 681; *Haddell v. Smyth*, 3 Ch. Ch. 412; but see *McArthur v. Prittie*, 20 Gr. 500; *Coghlan v. Cumberland*, 1898, 1 Ch. 704. But if it can be shown that there is not only a balance of direct testimony, but also corroborative circumstances pointing strongly against the Master's conclusion, the Judge on appeal may review the evidence, and reverse his finding on a question of fact: *Chard v. Meyers*, 19 Gr. 358; *Armstrong v. Gage*, 25 Gr. 1; *Morrison v. Robinson*, 19 Gr. 480.

Rule 769. Where the Master determines the question without seeing the witnesses, the Judge will, in such a case, be less trammelled by the Master's finding, and will dispose of the question upon his own judgment as to the weight of evidence; *Fauccett v. Barnett*, 27 Gr. 114.

Grounds of appeal to be recited in order.

Order on Appeal.—The order on appeal should always recite and state in substance the grounds of the appeal which have been allowed. (See *Downey v. Roof*, 6 P. R. 89, as modified by the directions of the Court, given to the Registrars 6th October, 1893), and where a reference back is ordered as to any ground of appeal, that ground is to be set forth in the order; *Id.*

Variation of report.

Where the report is varied, it is not proper to make any actual alteration in the original; *Rule* 315; *Fox v. Bearblock*, 45 L. T. 460; 17 Ch. D. 420; 46 L. T. 145; nor where the alteration is simple, need it be referred back to the Master to alter; *Tetter v. St. John*, 10 Gr. 85, the order on the appeal specifying the alteration made being sufficient; *Id.*

Where the report is referred back, and it is not intended that further evidence should be received, the order must contain a direction to that effect; *Morley v. Matthews*, 12 Gr. 453; 3 C. L. 3. 21.

Evidence back, further evidence on, when receivable.

Reference Back.—Where a report is referred back, the Master is at liberty, as of course, to receive further evidence, unless the Judge otherwise orders, or the reference back is expressed to be for a purpose on which further evidence could not be material; *Morley v. Matthews*, 12 Gr. 453; see also *Imp. Trusts Co. v. New York Security Co.*, 5 O. W. R. 641. Where the reference back is to ascertain a particular fact, the Master cannot open other matters in his report not objected to on appeal; *Williams v. Haun*, 10 Gr. 553. Nor on a reference back can the Master entertain a claim not previously made before him, unless specially ordered so to do; *Romance v. Hems*, 22 Gr. 493.

Matters not objected to on first appeal.

When on an appeal from a Master's report a reference back to review the report is ordered, the appellant cannot appeal from the further report as to matters disposed of by the first report, and not objected to on the first appeal; *Ross v. Perrault*, 13 Gr. 206.

Costs of appeal from reports, how awarded.

Costs of Appeals from Masters' Reports. — When some grounds of appeal are allowed with costs, and others disallowed with costs, the appellant is entitled to all the costs of the appeal that are exclusively applicable to the objections allowed, and to a proportionate share of those costs common to all the objections, according to the number of really distinct grounds of appeal on which he succeeds; and the same rule applies to the costs of a respondent; *Bank of Montreal v. Ryan*, 13 Gr. 204; *Trinity College v. Hill*, 8 Ont. 286. Sometimes, instead of giving costs to each party of so much of the appeal as to which he succeeds, the general costs of the appeal are awarded to one of the parties, subject to the deduction of a proportionate part of the gross amount, in respect of the partial success of the other party. Thus, where there were four distinct grounds of appeal embraced in eleven objections, of which objections only two were allowed, the Court gave the general costs of the appeal to the respondent, deducting therefrom one-fourth in respect of the partial success of the appellant; *Ferguson v. Frontenac*, 21 Gr. 188.

General rule is that costs follow the event.

In the disposition of the costs of appeals from Master's reports, the Judges will probably continue to follow the rules of the Court of Chancery. The general rule is, that the costs should follow the event of the appeal; *Downey v. Roof*, 6 P. R. 89; *Huntington v. Van*

Brocklin, 8 Gr. 421; and the word "even" is to be understood distributively: *Bank of Montreal v. Ryan*, 13 Gr. 204. But where the appeal fails on the principal point involved, and succeeds only as to a comparatively insignificant one, the whole costs of the appeal may be given to the respondent: *Brownlee v. Cunningham*, 13 Gr. 586. And where the Court is of opinion that the finding of the Master was a fit subject for discussion under the circumstances, although the appeal be dismissed, costs may be refused: *Secord v. Terryberry*, 14 Gr. 172, and costs have also been refused of a successful appeal, where the report was defective, and the solicitors appeared to have been negligent: *Clonster v. McLean*, 10 Gr. 556.

Where an appeal was dismissed on a ground raised for the first time on the appeal, and not adjudicated upon by the Master, the Court refused costs: *Howard v. Wolfenden*, 14 Gr. 188; *McDonald v. Wright*, *ib.*, 284, and the same rule applies where the appeal is successful on a ground not taken before the Master: *Goddard v. Jeffries*, 46 L. T. 304; see also cases, p. 1051. Where an appeal by an executrix was allowed without costs, on the hearing on further directions, the Court refused to order costs of the appellant to be paid out of the estate: *Storg v. Dunlop*, 13 Gr. 375. Where the appeal was unnecessary, and the question raised thereby could have been disposed of on motion in Chambers, no costs were given: *Fouchier v. St. Louis*, 13 P. R. 318.

770. (*Repealed by Rule 126½, 18 June, 1904.*)

771. —(1) A notice of appeal from the report or certificate of a Master to which Rule 770 does not apply, or of an Official Referee, shall be a 7 clear days' notice, setting out the grounds of appeal, and shall be returnable within one month from the date of service of notice of filing of the report or certificate, unless otherwise ordered:

See Chy. O. 612.

(2) The appeal shall be set down for argument before a Judge in Court at latest the day before the day on which the motion is returnable. Con. Rules, 819-859, amended. See Rules of 1 Jan., 1896, 1492; see 59 V. c. 18, s. 3.

As to the time for appealing, see notes to Rule 760, p. 1008.

As to whether appeals now lie from a ruling of a Master, see *Markle v. Ross*, and note thereon in the notes to Rule 760, p. 1008.

A Divisional Court has no power to hear an appeal from a Local Master's report, the appeal is to a single Judge: *Clarke v. Jamieson*, 9 C. L. T. 97; not even, it would seem, by consent; see *In re Wilson*, 16 P. R. 150; *sed vide*, Jud. Act, s. 67 (f).

On an appeal the Court will only recognize the note of the Master, or a certificate from him, as evidence of what took place before him; affidavits are inadmissible: *Spikes v. Spikes*, 1897, 1 P. 396.

Rules

772-774.

Appeal from
order of a
Judge in
Court on
appeal from
a Master.

772. An appeal shall lie to a Divisional Court [or to the Court of Appeal] from the judgment or order of a Judge in Court upon an appeal from the certificate or report of a Master or Official Referee in the same manner and subject to the same restrictions as in the case of other judgments or orders of a Judge in Court. *New.*

This Rule was introduced in consequence of the decision in *Re Atolphy*, 17 P. R. 247.

The words in brackets would seem to be affected by the provisions of 4 Ed. vii. c. 11 (O.). Under the Jud. Act as now consolidated and as amended by 4 Ed. vii. c. 11, s. 2, it is clear that an appeal from a decision of a Judge in Court, on an appeal from a Master's report or certificate, lies, of right, to a Divisional Court: see, 74 (10); and that whether any appeal can be taken to the Court of Appeal instead of to a Divisional Court depends upon the same considerations as in the case of any other judgment of a Judge in Court: see Jud. Act, s. 71a.

3. APPEALS FROM TAXATION.

Solicitor
and client
taxations.

773. An appeal from the report or certificate of an officer to whom the taxation of solicitor's bill under R. 1184 to 1188 inclusive has been referred shall lie and may be brought in the same manner as in the case of a report of a Master. *New.*

See Rule 771.

This Rule and Rule 774 settle the differences of opinion expressed in previous decisions: see *Re Robinson*, 17 P. R. 137; *Re Mearns*, 17 P. R. 180; *Re Crothers*, 15 P. R. 33; *Exchange Bank v. Newell*, 10 P. R. 528; and make it clear that Rules 1182 and 1183 only apply in the case of party and party taxations.

Review of
taxation
by Judge
on party
and party
taxations.

774. In cases to which Rule 773 does not apply, a party dissatisfied with the certificate of a taxing officer may apply to a Judge in Chambers to review the taxation as to any item or part of an item, which has been objected to as provided by Rules 1182 and 1183; but the certificate of the taxing officer shall be final and conclusive as to all matters which have not been objected to in manner aforesaid. *Con. Rule 851.*

See Eng. 11883 R. 41.

See notes to Rule 773.

The Master in Chambers and officers having like powers have no jurisdiction to review taxations, except by consent: *Rule 42* (1) c.

This Rule applies both to appeals from the Taxing Officers in Toronto, and from the Local Taxing Officers: *Rule 87.*

No appeal lies from the taxation under R. S. O. 1897, c. 121, of Rule 774, a mortgagee's costs of proceedings under a power of sale; *Re Taulucon & Walker*, 19 P. R. 216.

Discretion of Taxing Officer.—Where questions of taxation are in the Taxing Officer's discretion, his discretion will not be interfered with, unless it be manifest that he has failed to exercise it in a reasonable manner; *The Aceru*, 5 P. R. 118; *Hargreaves v. Scott*, 4 P. R. 21; *Smith v. Wills*, 34 W. R. 30; 53 L. T. 380; see also *Boxwell v. Coaka*, 36 Ch. D. 111; *Re Hilliard and Royal Ins. Co.*, 12 P. R. 285; *Gall v. Collins*, 12 P. R. 413. Amongst such items placed by the tariff in his discretion, are instructions for motions, entries, attendances; *McGinnon v. Clark*, 9 P. R. 555; see also *Tutnall v. Jansen*, 3 C. P. D. 261. Matters in discretion of T. O.

The Taxing Officer's decision as to the number of counsel will not be interfered with where it is merely the officer's discretion that is in question, and not the correctness of his judgment in following any supposed rule of decision; *Wheeler v. Frazer*, 11 Times, 140; so his decision as to the amount of counsel's fees, will not be interfered with, unless a gross mistake is made; *Brown v. Serrell*, 16 Ch. D. 517; *Talbot v. Poole*, 15 P. R. 274; see also *Fee v. Tarrant & Vipsing Ry.*, 7 P. R. 157; *Betts v. Chance*, L. R. 7 Ch. 513; *Re Bitham & Co.*, 4 C. L. T. 251; *Petrie v. Gulph, etc.*, 10 P. R. 600; *Re Robinson*, 16 P. R. 123; *Rondal v. Monetary Times*, 18 P. R. 141; *Re Solicitors*, 4 O. W. R. 302. The Court will slowly and reluctantly enter into all questions of quantum merely; *Smith v. Butler*, L. R. 19 Eq. 478; *Morgan and Wurtzburg on Costs*, 480; and generally on appeals from a Taxing Officer the Court will not interfere with his discretion as to quantum and qualities of fees, and this rule covers any question of distribution or allotment of charges among different cases or branches of a case; *Canace v. N. American Contracting Co.*, 13 P. R. 433; see also per Barton, J.A., in *Re Robinson*, 17 P. R. 146; and *Oliver v. Robins*, 43 W. R. 137; but an appeal respecting only \$5.32 was entertained where a question of principle was involved; *Moak v. Benjamin*, 13 P. R. 376.

Certificate.—A memorandum at the foot of the bill shewing the result, upon which execution has issued, was held to be a sufficient certificate, when filed in the proper office; *McCallum v. McCallum*, 11 P. R. 179; but an informal certificate written at the end of the bill, shewing that it was fixed at so much, initialed by the Taxing Officer, and marked filed in his office, is insufficient; *Gall v. Collins*, 12 P. R. 413. It must be filed in the proper office for filing a report; see *Langtry v. Dumoulin*, 10 P. R. 44.

Practice on Appeals.—An appeal from a taxation of costs in Appeal is to be made to a Judge of the High Court, *Petrie v. Gulph, etc.*, 10 P. R. 600; *Holmes v. Ready*, 18 P. R. 79.

Two clear days' notice of appeal is sufficient; *McCallum v. McCallum, supra*.

An appeal will not be allowed as to any items not included in the objections brought in under Rules 1182 and 1183; *Platt v. G. T. Ry. Co.*, 12 P. R. 273; and where no objections have been brought in under Rules 1182 and 1183, the appeal will be dismissed; *Sanderson v. Huntington*, 12 P. R. 1; *Caneran v. Caneran*, 9 C. L. T. 190; see also *Hexter v. Hexter*, 34 Ch. D. 607; *Re Norton*, 57 L. T. 648; *Shenaboy v. Sanders*, 38 W. R. 117; except where the whole principle or method of taxation is the subject of the appeal; see *Clark v. Virgo*, 17 P. R. 260, and notes to Rule 1182.

Rules

775, 776. In *Quay v. Quay*, 11 P. R. 258, it was held to be a convenient practice (which was for some time followed), on an appeal from a Local Officer as to numerous items, or on the ground of general exorbitancy, to refer the whole bill to the Taxing Officer in Toronto; and where this was done no costs of the revision and appeal were usually allowed, unless substantially entire success was with one party or the other; *Platt v. G. T. Ry. Co.*, 12 P. R. 273; and where a taxing officer reported that the respondent should have had more allowed to him than had been taxed, he was not allowed the increased amount, as he had not appealed, but the appeal was dismissed; *Loomis v. Pearshall*, 12 C. L. T. R. 10; but this mode of procedure has been held by a Divisional Court to be not warranted by the Rules, and no doubt it will no longer be followed; *Campbell v. Baker*, 11 O. L. R. 291. The Judge in Chambers before whom an appeal is brought may take the opinion of an officer for his own information, but must himself determine the questions arising on the appeal; *Id.*

An appeal lies to the Divisional Court from an order of a Judge in Chambers on appeal from a Taxing Officer; *Yalbot v. Poole*, 15 P. R. 274.

Costs of Appeals in Drainage Cases.—In actions begun in the High Court, and referred to the Drainage Referee, where an order is made by an Appellate Court on the Referee's report for taxation and payment of costs, such costs are not within s. 106 of *The Municipal Drainage Act* (R. S. O. c. 226), but are to be taxed in the same manner, and to be subject to the same right of appeal as costs in an ordinary action; *Crooks v. Ellice*, 16 P. R. 553. See now, however, 1 Ed. vii. c. 39, s. 4, as to the procedure on claims arising under R. S. O. c. 226.

Time within which appeal to be brought on.

775. No appeal under Rule 774 shall lie unless a notice thereof is given within 4 days from the day of the date of the certificate, and the appeal brought on for argument within 10 days from the said day. Con. Rule 852, Rules 23 June, 1894, 1358.

This practice is similar to that on appeals from officers in Chambers; see note to Rule 767; except that there the time for appeal runs from the decision, here from the date of the certificate.

This Rule is in affirmance of what was held to be the practice in *Stark v. Fisher*, 11 P. R. 235; *Ireland v. Pitcher*, *Id.*, 403.

The time runs from the date of the certificate of taxation, and not from the date of each ruling in the course of the taxation; *Re O'Donohoe*, 12 P. R. 612.

The time may be extended under Rule 353; *Clark v. Virgo*, 17 P. R. 260; by the Master in Chambers or officer having like jurisdiction, or by a Judge; *Quay v. Quay*, 11 P. R. 258.

Evidence thereon.

776. The appeal shall be heard by the Judge upon the evidence which was brought in before the taxing officer, unless otherwise ordered. Con. Rule 853.

Similar to the Eng. (1883) R. 42. See English Chancery Order 40, R. 36, *Morgan Chy. Orders*, 4th ed., 594.

Rule 777.

I. APPEALS FROM A JUDGE IN CHAMBERS.

777.—(1) A person affected by any judgment, order or decision of a Judge in Chambers may appeal therefrom to a Divisional Court, by motion, on notice served within 4 days and returnable within 7 days after the date of the judgment, order or decision, or within such further time as may be allowed by such Court or by a Judge of the High Court.

(2) The appeal shall not be a stay of proceedings unless so ordered by such Court or Judge.

(3) The appeal shall be set down at latest on the day before the day on which the motion is made returnable, and shall come on for hearing on the day on which the same is returnable or the first day thereafter upon which the Divisional Court sits. See *Con. Rule 841*, 59 V. c. 18, s. 3. Rules of 9 Jan., 1897, amended.

See *Eug. (1883) R. 757*.

This *Rule* applies only to appeals from a Judge in Chambers, not to appeals from the Master in Ordinary, the Master in Chambers, or Local Judges, or Local Masters. Appeals of the latter kind are governed by *Rules 767, 770, 771*; and see *Louisa v. Canada Packers*, etc., 9 P. R. 185.

An Interpleader order is not an exception. An appeal lies by any party affected by such an order; *Rondot v. Manufacture Times*, 10 P. R. 23.

The motion should be made returnable within seven days, "or so soon thereafter as the Court sits," and it has been held in England not to be sufficient to give notice of motion within that time; see *For v. Wallis*, 2 C. P. D. 45; see also *Jackson v. Gaudier*, 15 Gr. 425; *Harris v. Meyers*, 16 Gr. 117; *Mellroy v. Hawke*, 3 Chy. Cl. 195; *Taylor v. Jones*, 45 L. J. C. P. 110; *Hewson v. Macdonald*, 2 C. L. T. 348; *McLaren v. Marks*, 10 P. R. 451; *Steadman v. Hakim*, 22 Q. B. D. 10.

Notice of the appeal must be served two days or more before the return day named in it, and the motion must be set down, at latest, the day before the day on which it is returnable. The notice must also be served and made returnable as mentioned in clause (1). If a Divisional Court is to sit on the return day the appeal will be set down for that day; but if a Divisional Court is not to sit till after the return day, the appeal will be set down for the first day of the sittings.

As to the time of the sittings of the Divisional Court, see *Jud. Act*, sec. 139, and *Rule 110*.

An application for an extension of the time limited for appealing under this *Rule* must be made to the Divisional Court or a Judge of the High Court, not to the Master in Chambers or other officer having like jurisdiction; clause (1).

Rule 778. An order made at the Assizes on a motion referred from Chambers to change the venue, was held to be in Chambers. The Judge may treat the Court room as his Chambers if he chooses: *Sarnia Agricultural Implement, etc., Co. v. Perdue*, 11 P. R. 224.

Where the appellant neglects to set down his motion he is nevertheless liable to pay the respondent's costs of the motion: see *Regan v. Armstrong*, 13 P. R. 306; and see *Rule 790* as to procedure for obtaining costs of an abandoned motion.

A solicitor knowing of a preliminary objection to an appeal which he intends to raise, ought, as a matter of professional courtesy, to inform his opponent, but the omission to do so is not a sufficient ground for depriving the respondent of the costs of the appeal. *Ex p. Shead*, 15 Q. B. D. 338, not following *Re Spraght*, 13 Q. B. D. 42 and *Ex p. Blaise*, 14 Q. B. D. 123.

The Court on appeal will, in general, not interfere on a question which is, by the practice, purely within the discretion of the Judge. *McDonnell v. McKay*, 2 Chy. Ch. 243; *Neill v. Travellers' Ins. Co.*, 9 Ont. App. 54; and appeals from a Judge in Chambers made on appeal from the Master in Chambers on matters of pleading are not to be encouraged: see *Dodge v. Smith*, 1 O. L. R. 46; *Bateman v. The Mail*, 2 O. L. R. 416.

Judge as Persona Designata.—A Judge making an order under the Dominion Railway Act, 51 V. c. 29, s. 165, for payment out of compensation moneys acts not for the Court but as a *persona designata*, and no appeal lies to a Divisional Court from his order: *Re Toronto H. & B. Ry. Co. and Hendrie*, 17 P. R. 199; and see *Hogg v. Marshhead*, 1903, 2 K. R. 339.

As to appeals from orders of a Judge acting as a *persona designata* under an Ontario Statute, see R. S. O. c. 76, s. 6; *Re King*, 18 P. R. 365; 121 Vic. c. 17, s. 14.

5. MOTIONS AGAINST VERDICTS OR JUDGMENTS.

(i) Generally.

Setting aside
judgment by
default.

778. A verdict or judgment obtained where a party does not appear at the trial may be set aside by a Divisional Court or by a Judge in Court or by the Judge at the sittings, upon such terms as may seem just. Con. Rule 795.

Where a judgment was given at the trial for the defendant owing to the absence of the plaintiff, and an application to reinstate was refused by the Judge, it was held that the plaintiff might apply to the Divisional Court to set aside the judgment, and for a new trial. *Wilson v. Irwin*, 10 P. R. 598.

The regular appellate Court may have jurisdiction to hear an appeal from a judgment by default, such appeals are not encouraged. A party should apply to have the judgment set aside and the case retried: *Finch v. Hadspeth*, 29 Ch. D. 322; *Armour v. Bate*, 1891, 2 Q. B. 232.

Where a defendant was not represented at the trial of an action, **Rule 779**, because his solicitor was ignorant of the fact that the action had with others been transferred from one Judge of the Chancery Division to another, Fry, J., held that the solicitor had therein been guilty of gross negligence, and that the plaintiff could not be relieved. But it was held, on appeal, that the judgment must be set aside, on payment of the costs of the day, Jessel, M.R., observing: "Solicitors cannot any more than other men conduct their business without sometimes making slips; and where a solicitor watches the list, and happens to miss the case, in consequence of which it is taken in his absence, it is in accordance with justice, and with the course of practice, to restore the action to the paper on the terms of the party in default paying the costs of the day; which include all costs thrown away by reason of the trial becoming abortive"; *Burgome v. Taylor*, 9 Ch. D. 4.

Where the Court was satisfied that the absence of the defendant and his counsel was purely accidental, a judgment by default was set aside on payment of plaintiff's costs of hearing, including reasonable disbursements to counsel, and the costs of the application; *Wolffe v. Hughes*, 17 C. L. J. 427. On similar terms an action dismissed was restored to the paper, where, in consequence of the illness of the plaintiff's solicitor, the necessary arrangements were not made; *Burch v. Williams*, W. N. 1876, 168.

Where one counsel had been unavoidably detained by a railway accident, and the other had been prevented by indisposition from conducting the case (see *Cockh v. Joyce*, in *Burgome v. Taylor*, 9 Ch. D. 10), and where the defendant had personally been guilty of no negligence, though his solicitor had neglected to attend to the defence, and the defendant made an application within six days of his having heard that the trial had taken place, the Court granted an extension of time, to enable him to make application to set aside the judgment; *Mitchell v. Wilson*, 25 W. R. 380. So also where one side had trusted to a reasonable expectation of a settlement of the dispute; *Night v. Clifford*, 26 W. R. 363; 47 L. J. Chy. 544.

As to delay in applying, see *May v. Head*, W. N. 1880, 26; *Wilkins v. Bedford*, 35 L. T. 622; *Webster v. Coal Consumers Co.*, 1 Chanc. (Court) 131; *Attwood v. Chickster*, 3 Q. B. 10, 722; *King v. Sandemann*, 38 L. T. 461, and notes to *Rules 575 and 630*.

779. A judgment of nonsuit shall, unless otherwise ^{Judgment of nonsuit.} directed, have the same effect as a judgment upon the merits for the defendant, but may be set aside on such terms as may seem just. Con. Rule 797.

Compare Eng. R. 1875, O. 41, r. 6, which was repealed by the Rules of 1883 and not re-enacted:

Formerly a judgment of non-suit was no bar to a fresh action for the same cause, but a non-suit is now the same as a judgment on the merits, and may be pleaded in bar to a fresh action for the same cause; *Burater v. Dunne*, 10 L. R. Ir. 380; and if the non-suit be reversed on appeal, the defendant is not entitled, as of right, to a new trial for the purpose of adducing evidence on his behalf, where the action is tried without a jury; *Macdonald v. Worthington*, 7 Ont. App. 531, 563 (as to which see *Craig v. McKay*, 8 O. L. R. 651); but where the action is tried by jury, *scilicet*, the defendant is so entitled; *Raker v. The Grand Trunk Ry.*, 11 Ont. App. 68.

Rule 780.

This provision is not applicable to Division Courts under sec. 55, or sec. 312 of *The Division Courts Act*, (R. S. O. c. 60); *Building & Loan Ass. v. Heimrod*, 3 C. L. T. 361; *Bank of Ottawa v. McLaughlin*, 8 Ont. App. 543.

A plaintiff has no right to demand a non-suit, and he cannot discontinue at the trial without the leave of the Judge: *Fox v. The Star*, 1898, 1 Q. B. 636; 78 L. T. 311; 1900, A. C. 19; 81 L. T. 562.

The Judge at the trial has no power to give judgment of non-suit on the opening statement of counsel without hearing evidence, unless the plaintiff's counsel consents to that course: *Fletcher v. London & N. W. Ry.*, 1892, 1 Q. B. 122; 65 L. T. 605; *Isaac v. Evans*, 16 Times, 489; 1899, W. N. 261; and see *Argent v. Donigan*, 8 Times, 432; and in actions for negligence the power of the Judge to non-suit on the ground of contributory negligence is restricted to cases where it is plain and indisputable that the injury of which the plaintiff complains would not have occurred but for his own negligence; where there is any dispute as to the facts, or to the inference from the facts, the case should be submitted to the jury: *Servier v. Lowe*, 32 Ont. 290; and the ruling of a Judge at the trial that there is no evidence in support of a particular issue may be reviewed on appeal: see *McCord v. Cammell*, 1896, A. C. 57.

A non-suit may be ordered, although there is some evidence adduced by the plaintiff, provided it be of such a character that the jury could not reasonably give a verdict in his favour: *Hiddle v. National F. & M. Ins. Co.*, 1896, A. C. 372; *Ryder v. Wombwell*, L. R. 4 Ex. 38; e.g., where his witnesses established contributory negligence as above mentioned: *Danger v. London St. Ry.*, 30 Ont. 493; *Wakelin v. London & S. W. Ry.*, 12 A. C. 52; and see *O'Hearn v. Port Arthur*, 4 O. L. R. 209.

Where a defendant at the close of the plaintiff's case moves for a non-suit, and intimates that he will renew the motion at the close of the case, and then proceeds to call evidence until stopped by the Court, and a non-suit is entered, the defendant, in the event of a successful appeal from the non-suit, will be liable to pay the costs of the trial and appeal, notwithstanding that in deference to the Court he did not complete his evidence: *Mills v. Hamilton St. Ry.*, 17 P. R. 74.

Motion for judgment where jury disagree.

780. If the jury disagree, and find no verdict, the Judge at, or after the trial may, notwithstanding, dismiss the action. Con. Rule 799.

Based upon R. S. O. 1877, c. 50, s. 290.

There is no Eng. R. to the same effect, but under Eng. (1883) R. 463 (corresponding to Ont. Rule 554), upon a disagreement of the jury judgment was directed to be entered for defendant, in *Peters v. Perry*, 10 Times, 366.

The Rule does not apply to every case of disagreement by a jury, but only to cases which may properly be withdrawn from the jury: *Floor v. Michigan Centl. Ry.*, 30 Ont. 635; 27 A. R. 122.

See *Bank of B. N. A. v. Eddy*, in note to Rule 554; also *Casey v. C. P. Ry. Co.*, 15 Ont. 574, where judgment was given for defendants, the plaintiff's own evidence shewing that the accident, the occasion of the damages claimed by him, was caused by his own negligence; and

Gambell v. Heggie, 5 O. W. R. 746, an action for seduction, where **Rule 781**, the Judge was of opinion that there was no reasonable evidence upon which seduction only could be found by the jury, and that the evidence of the plaintiff's daughter, if believed, could only lead to the conclusion that the defendant had committed the offence of rape.

Where after the trial the plaintiff obtains leave to amend his statement of claim, so as to raise new issues, it is not competent for a Divisional Court to give judgment on the original pleadings under this **Rule**: *Canadian Pacific Ry. Co. v. Cobban Mfg. Co.*, 22 S. C. R. 132.

The making of a motion under this **Rule** was held to stay the carrying of the case down to a second trial, where the motion was not heard because the notes of evidence were not ready in time: *Schuhl v. Regenstadt*, 9 C. L. T. 114.

781.—(1) Where the jury is directed to answer questions of fact, and answers some but not all of them, or the answers are conflicting, so that judgment cannot be entered on such findings, it shall not be necessary to move to set aside such findings, but the action may proceed as in the case of a disagreement of the jury. Where judgment cannot be entered on answers.

(2) Where the answers entitle a party to judgment as to some but not all of the causes of action, the Judge may direct judgment to be entered as to those of the causes of action as to which the findings are sufficient to entitle the party to judgment, and it shall not be necessary to move to set aside the findings as to other causes of action, but the action may, as to such last mentioned causes of action, proceed as in the case of a disagreement of the jury. *New.*

The first part of this **Rule** is intended to set at rest the question which led to a difference of opinion in Divisional Courts in the cases of *Stevens v. Grout*, 16 P. R. 210, and *McDermott v. Grout*, *Ib.*, 215, and see *Faulknor v. Clifford*, 17 P. R. 363; *Brown v. Defoe*, 21 Ont. App. 133; and, in the case mentioned in the **Rule**, the action may therefore be taken down to trial again by a new notice of trial, as soon as it has been decided upon motion for judgment, at the trial or afterwards, or under **Rule 780** or **781** (2), that judgment cannot be pronounced: see *Moore v. G. T. Ry. Co.*, 5 O. W. R. 211.

This **Rule** will not enable the Court to direct a judgment to be entered contrary to the findings of a jury on any material question of fact. But, where the jury has found a fact entitling the defendant to a dismissal of the action, a new trial will not be granted merely because, notwithstanding such finding, the jury has also given a verdict for damages against such defendant: *Kerry v. England*, 1898, A. C. 742.

Under the preceding **Rule 780** it would seem to be competent for the Court to dismiss the action, otherwise it must be tried again. A dismissal will, no doubt, only be ordered where the Court is satisfied that the plaintiff has made out no case. The Court would, however,

Rules not arrive at that conclusion on conflicting evidence: see notes to **782, 783. Rules 783, 615.**

**Motions
for a new
trial.**

782 Where there has been a trial with a jury, an application for a new trial, whether made for that relief alone, or combined with, or as an alternative of, a motion under Rule 783, shall be made to a Divisional Court [or to the Court of Appeal]. *New, as amended by Rule 1227.*

Compare Eng. R. Dec., 1876, r. 5; Eng. (1883) R. 551 is different. The words in brackets were added by Rule 1227, 10 Dec., 1898; but it would seem that this Rule must be taken to be modified by 4 Ed. vic. c. 11, s. 2 (76a), and that a motion for a new trial cannot, at the option of the party moving, be made to the Court of Appeal in every case, but can only be made, by leave, in the cases mentioned in sec. 76a of the Jud. Act, *supra*. Ordinarily, the motion should be to the Divisional Court: Jud. Act, s. 67 (a).

**Motions
against
judgment,
not involv-
ing a new
trial.**

783.—(1) Where a judgment has been pronounced at or after a trial, a motion by way of appeal from such judgment and to set aside the same and to enter any other judgment may, without leave reserved, be made by a party:

(a) In actions tried without a jury;

(b) In actions tried with a jury, in the following cases:

1. Upon the ground that the judgment is wrong as directed to be entered upon the findings of the jury;
2. Upon the ground that notwithstanding the findings of the jury the applicant is entitled to judgment;
3. In any case to which Rule 782 does not apply;

(2) The motion or appeal in cases under this Rule may be made either to a Divisional Court of the High Court [or to the Court of Appeal.] See Rules 1st Jan., 1896, 1483.

As to the words in brackets, see note to Rule 782.

(3) The foregoing provisions of Rule 782 and of this Rule are not to restrict or affect the power of the Court of Appeal to direct a new trial in any appeal where such relief appears just and proper. Rule 1228, 10th Dec., 1898.

Compare Eng. (1883) R. 561.

Where the Judge at the trial does not pronounce a judgment, but orders the case to stand over to add parties, either party, or both, may appeal from his decision to a Divisional Court: *Munro v. Toronto Ry.*, 1 O. L. R. 36; and consent to the Court's giving judgment on the merits: *Payne v. Caughell*, 24 Ont. App. 556.

The party against whom a judgment is given in a jury action has **Rule 783.** always to consider, in moving against it, whether his complaint is as to the findings of fact, and this consideration will determine whether his remedy is to move for a new trial, or for such judgment as may be the proper one. Jury cases.

Rule 782 relates to motions for a new trial. The present **Rule 783** relates to motions only incidentally involving a new trial, and primarily being to have the judgment pronounced at the trial set aside and a different judgment entered. Such a motion may be made to a Divisional Court; see, 74 (11); but in cases within sec. 76*a* it may, by leave, be made to the Court of Appeal.

Jury Actions.—In jury actions a motion for a new trial is proper where the jury has made an error which the applicant is entitled to complain of, or where the Judge has prevented the facts from being properly brought forward, such as by misdirection, rejection of evidence, non-suiting or the plaintiff, etc. In such cases the objection is not to the conclusions of the Judge from the findings, and his consequent entry of judgment upon them; but the objection is to the correctness of the findings themselves; for instance, where the Judge misdirects the jury: *Hamilton v. Johnson*, 5 Q. B. D. 263, 266; or non-suits the plaintiff: *Etty v. Wilson*, 3 Ex. D. 359; or refuses to do so, and a verdict is found for the plaintiff, and judgment directed to be entered thereon: *Durica v. Peter*, 4 Ex. D. 32; or where the Judge gives judgment for one party on the findings of the jury: *Hamilton v. Johnson*, 5 Q. B. D. 263; or where, the facts being undisputed, the Judge directs the jury to find for one party, and it is contended that the finding should have been the other way: *Yette v. Foster*, 3 C. P. D. 437; or after leaving the case to the jury the Judge thinks on reflection that there was no evidence to go to the jury and directs judgment to be entered for defendant: *Rocke v. McKerron*, 24 Q. B. D. 463. In all these cases, though the action is that of the Judge, the dispute is in respect to the propriety of the findings of the facts, and the motion should therefore ordinarily be for a *new trial*.

Where the Court considers that it has all the needful evidence before it, it may, under **Rules 817, 615**, instead of directing a new trial, direct the proper judgment to be entered.

Non-Jury Actions.—Where the trial has been had before a Judge Non-jury without a jury, **Rule 783** applies, whether the findings of fact, or the conclusions deduced from them, are questioned, and whether it is proper to direct a new trial or to enter a different judgment.

In such cases the remedy is generally by motion to the Divisional Court to reverse the judgment under this **Rule**, or, in cases within s. 76*a* of the Jud. Act, by appeal to the Court of Appeal in the ordinary way, and if the Judge has improperly rejected evidence, the Court has power to let in the evidence improperly rejected, and give such judgment as, upon the admission of such evidence, may seem proper, instead of directing a new trial; see *Dallman v. Jones*, 12 Ch. D. 753; and **Rule 498**.

The practice adopted by the Court of Appeal in such cases in England is thus explained by Lord Justice Cotton, in *Jones v. Hough*, 5 Ex. D., at p. 125: "When the appeal comes before us, the Court of Appeal has the full right, if it thinks necessary, although there is no motion for a new trial, to say that the conclusion of fact arrived at is not satisfactory; and as they have not the materials before them to arrive at a proper conclusion, the Court will order a new trial; and

Rule 783. I can instance a case where this would be done; where the question turns on the credibility of witnesses who had been heard *voir dire*, and seen by the Judge, who himself has tried the case. In such a case, even although the Court had thought the conclusion was not a correct one, they might direct that the case should go back for a new trial. Here the case is not one which turns on the amount of credibility to be given to the different witnesses, but on the conclusion of fact from certain letters, and from certain evidence which was taken upon commission. Under those circumstances, it is our duty to deal with the matter; and if we see before us the materials for arriving at a conclusion on the facts contrary to that which was arrived at by the learned Judge, we ought not, in my opinion, to put the parties to the expense and delay of sending the matter back for a new trial. Of course I need not say in all questions of fact, especially where there has been *voir dire* evidence before the Judge in the Court below, the Court of Appeal ought to be most unwilling to interfere with the conclusion which the Judge has arrived at when he has had the opportunity, which the Court have not, of seeing the witnesses, and judging of their demeanour."

The finding of a Judge on a question of fact will be regarded by an appellate Court as *prima facie* right, and will not be interfered with unless the appellant can clearly show that it is wrong: *Colonial Securities Co. v. Massey*, 1896, 1 Q. B. 38; 73 L. T. 497.

But it would seem clear that the Court, under this Rule, has full power to review the decision of the Judge upon the facts. See also the language in *Jones v. Hough*, 5 Ex. D., at p. 122 (quoted with approval in *Prentice v. Consolidated Bank*, 13 Ont. App. 74), where Bramwell, L.J., says: "If upon the materials before the learned Judge, he has, in giving judgment, come to an erroneous conclusion upon certain questions of fact, and we see that the conclusions are erroneous, we must come to a different conclusion, and act upon the conclusion that we come to, and not accept his finding." * * A great difference exists between a finding by the Judge, and a finding by the jury. Where the jury find the facts, the Court cannot be substituted for them, because the parties have agreed that the facts shall be decided by a jury; but where the Judge finds the facts then the Court of Appeal has the same jurisdiction that he has, and can find the facts whichever way they like. I have no doubt, therefore, that is our jurisdiction, our power, and our duty." See also the observations of Brett, M.R., in *Read v. Anderson*, 14 Q. B. D. 781, and *N. British, etc., Co. v. Tourville*, 25 S. C. R. 177; *Coghlan v. Cumberland*, 1898, 1 Ch. 704; 78 L. T. 540.

Where there was a conflict of evidence and the Judge who tried the case attributed greater weight to the evidence of some witnesses than others, but in the opinion of the appellate Court took a wrong view of the law, the Court refused to pronounce a judgment upon the evidence, and sent the case for a new trial: *Canada Landed Credit Co. v. Thompson*, 3 C. L. T. 158.

In a non-jury case if evidence has been improperly admitted the appellate Court may reject it and maintain the judgment if the remaining evidence warrants it: *Merritt v. Hepenstall*, 27 S. C. R. 150.

Where a new trial was ordered by a Divisional Court to try certain questions of fact, the Supreme Court on appeal declined to interfere: *Scott v. Bank of New Brunswick*, 21 S. C. R. 30.

As to the principles upon which Courts act in reviewing the findings of a Court of first instance on the facts, see also *supra*, p. 43.

Practice.—Where there is a general judgment against several defendants, they are not entitled to sever, and appeal to several Courts; but they must all appeal to the tribunal to which the defendant who takes the first step has appealed: *per* Armour, J., in *Hateley v. Merchants Despatch Co.*, 4 Ont. 723.

Where some, or one, of the parties only appeal, the judgment will not on such appeal, as a general rule, be varied in favour of an respondent who has not appealed, unless the result of the appeal makes it improper that the judgment against the non-appealing defendant should stand: *Challoucr v. Lobo*, 1 O. L. R. 272; *Attorney-General v. Simpson*, 1901, 2 Ch. 671; 85 L. T. 325. Where the respondent also seeks a reversal or variation of the judgment in any particular, he should give notice of motion by way of cross appeal. This, at least, has been the uniform practice in the Divisional Courts: *sed vide*, *Hunter v. Hunter*, 24 W. R. 527. The rule may be different in the Court of Appeal, see Ind. Act, sec. 53, and *Rule* 813, and notes.

On a motion for a new trial the evidence of persons who had been witnesses to the effect that the evidence they gave was untrue, and that statements made by them to the plaintiff's solicitor before trial were true, is inadmissible: *Pushton v. Grand Trunk Ry.*, 6 O. L. R. 425.

Where a motion for a new trial was made conditionally upon the result of a decision pending in the Court of Appeal, it was held that the usual steps, to bring the motion on within the usual time, should be taken, and that, if necessary, application should be made to the Court to postpone the hearing of the motion till the decision of the Court of Appeal should be given. The Court has full discretion over such an application to extend the time for giving notice of such motion, and is not limited to cases where the party has been misled: *Peckett v. Short*, 32 W. R. 123.

On an appeal by a plaintiff from a judgment dismissing the action, a third party who had obtained leave to appear and oppose the plaintiff's claim, was held not entitled to be heard: *Ewing v. Toronto*, 18 P. R. 137.

Interpleader Issue.—Where a Judge has directed judgment to be entered on an interpleader issue, an appeal lies under this *Rule*: *pleader*. *Witt v. Parker*, 25 W. R. 518; see *Wilson v. Kerr*, 18 U. C. Q. B. 470; *Dodds v. Shepherd*, 1 Ex. D. 75; 45 L. J. Ex. 457; *Withers v. Parker*, 28 L. J. Ex. 383; *Robinson v. Tucker*, 14 Q. B. D. 371; *Dawson v. Fox*, 14 Q. B. D. 377.

Costs.—The costs of the former trial and of the application for a new trial, are in the judicial discretion of the Court: *Rule* 1130.

Where a new trial was granted on the ground that the Judge at the trial improperly non-suited the plaintiff, the defendant was ordered to pay the costs, though the Judge acted *mero motu*, and the defendant forebore to give his evidence in deference to his ruling: *Mills v. Hamilton St. Ry.*, 17 P. R. 74.

784. Where any motion or appeal is set down to be heard before a Court which is not the proper Court for hearing the motion or appeal, the same may, upon such terms as may seem just, be transferred to, and shall be heard by, the proper Court for hearing the same. *New.*

Transfer of
motion
made in
wrong
Court.

Rule 785. Under this *Rule* an appeal from an award under the Dom. Railway Act was transferred from the Divisional Court to the Weekly Court: *Re Montreal & O. Ry. Co. and Ogilvie*, 18 P. R. 120.

This *Rule* does not apply so as to enable a Local Judge before whom a motion is properly pending, to enlarge it to come before the Master in Chambers: *Mahoney v. Walsh*, G. O. L. R. 18.

Restric-
tions on
new trials.

785. A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, [or because the verdict of the jury was not taken upon a question which the Judge at the trial was not asked to leave to them], unless some substantial wrong or miscarriage has been thereby occasioned; and if it appears that such wrong or miscarriage affects part only of the matter in controversy, [or some or one only of the parties], the Court may give final judgment as to part thereof or as to some or one only of the parties, and direct a new trial as to the other part only, [or as to the other party or parties].
Con. Rule 791.

Same as the Eng. R. 1885, O. 39, r. 3, except the provisions in brackets, which are taken from Eng. (1885) R. 556.

Grounds for
new trial.

Grounds for New Trial.—The following are grounds for granting a new trial:—

1. Improper admission, or rejection, of evidence.
2. The improper non-suited of the plaintiff.
3. Misdirection of the jury.
4. Perverse verdict, or verdict against the weight of evidence.
5. Verdict for too small, or too great damages; or damages assessed on improper basis.
6. Surprise, and discovery of new evidence: see Arch. Pr., 13th ed., 1210.

Mistrial.

7. Mistrial: e.g., improper conduct of the parties or others, which has prejudiced the fair trial of the action; e.g., by interfering with the jury: see *Tiffany v. McNee*, 24 Ont. 551; *Stewart v. Woodman*, 26 Ont. 714; or where one of the parties has been denied his right of challenge under R. S. O. c. 16, s. 111; or allowed, in spite of protest, more challenges than he was entitled to: *Empey v. Carscallon*, 21 Ont. 658; misconduct of juror: *Laughlin v. Harvey*, 24 Ont. App. 438; bias of jury, or inclusion in jury of a person not on the jury panel, or of a person too deaf to hear the evidence: *Canoeon v. Ottawa E. Ry.*, 32 Ont. 24.

"Substan-
tial wrong,"
or mis-
carriage.

"Substantial Wrong or Miscarriage." — Substantial wrong was considered to have occurred where, amongst other things, inadmissible evidence was received after objection to it, and was commented on by the Judge in his charge, as being important: *Bank of Hamilton v. Isaacs*, 16 Ont. 450.

In an action for libel where there has been misdirection as to any Rule 785. material part of the alleged libel, there is a "substantial wrong," and a new trial must be ordered, although the Court may be of opinion that other parts of the libel were sufficient to justify the damages given: *Bray v. Ford*, 1806, A. C. 44; 73 L. T. 609.

A new trial was refused on a point not taken at the trial in *Eyre v. Highway Board*, etc., 8 Times, 648.

Where the real issue has not been passed on by the jury a new trial should be granted: *Dunsmuir v. Lowenberg*, 34 S. C. R. 228.

For other cases as to what amounts to "substantial wrong," see *Pickup v. Thames Insurance Co.*, 3 Q. B. D. 594; *Shapcott v. Chappell*, 12 Q. B. D. 58 (rejection of evidence); *Swift v. Nunn*, W. N. 1878, 217; *McDonald v. Murray*, 5 Ont. 559 (misdirection); *Hawell v. Eastern Rink & Park Co.*, 13 Ont. 476 (misdirection); *Wells v. Lindop*, 15 Ont. App. 695 (misdirection); *Hesse v. St. John Ry. Co.*, 30 S. C. R. 218 (misdirection).

A plaintiff is not entitled to a new trial for rejection of evidence, which on the pleadings he was not entitled to give: *Milligan v. Jamieson*, 4 O. L. R. 650. Nor where the case has been improperly withdrawn from the jury and judgment given for defendant, if the appellate Court finds that the only verdict which could be properly given by a jury would be in favour of the defendant: *Goddard v. Midland Ry.*, 80 L. T. 621; nor will a new trial be granted to a plaintiff where he would only be entitled to nominal damages: *Simonds v. Chestley*, 20 S. C. R. 171; *Seammell v. Clarke*, 23 S. C. R. 397; *Milligan v. Jamieson*, *supra*, or where on the findings damages were inappreciable: *Kerry v. England*, 1898, A. C. 742.

An appeal does not lie to the Supreme Court from a judgment upon a motion for a new trial granted as a matter of discretion: *O'Sullivan v. Lake*, 15 Ont. App. 711.

The defendant's counsel, in order to shew that a witness called by him was hostile, and to treat him as such under s. 22 of the C. L. P. Act (Eng.), asked the Judge to look at the affidavit of a witness in a former action. As there was nothing in the witness's demeanour, or way in which he gave his evidence, to shew that he was hostile, the Judge refused to look at the affidavit, and it was held on motion for a new trial that the Judge's discretion was absolute, and the Court had no jurisdiction to review his decision: *Rice v. Howard*, 10 Q. B. D. 681.

An appeal by counsel to the local prejudices of the jury was held by Robertson, J., to be a ground for a new trial: see *Forwood v. Toronto*, 22 Ont. 362-3; but a new trial was refused on the ground that counsel at the trial improperly inflamed the minds of the jury, the objection not having been taken at the trial: *Sornborger v. Canadian Pacific Ry. Co.*, 24 Ont. App. 263. The exhibition of the injury for which the action is brought, to the jury, for the purpose of having it explained by a medical witness is admissible: *Ib.*; but not for the purpose of enabling the jury to form their own opinion and conclusions therefrom, and, if so used, a new trial will be ordered: *Laughlin v. Harvey*, 24 Ont. App. 438.

The omission to swear a juror, where no injustice was done, is not a ground for a new trial: *Goose v. G. T. Ry. Co.*, 9 C. L. T. 403; nor the fact that a jurymen was challenged for cause, the party moving

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for the new trial having accepted the opinion of the Judge that there was no cause, and having proceeded with the trial: *Wood v. McPherson*, 17 Ont. 163.

trial of
right of
challenge.

Where defendants, separately defending and separately represented at the trial, claimed the right of 4 peremptory challenges each, which in spite of objection was allowed them, a new trial was ordered: *Empey v. Carnacallen*, 24 Ont. 658.

Where a jury have been allowed to separate before giving their verdict, but their verdict is subsequently taken without objection, and with knowledge of the fact, the objection to their having been allowed to separate is waived: *Coleman v. Toronto*, 23 Ont. 347; and where, pending the trial, a newspaper containing comments calculated to prejudice the fair trial has been read by many of the jurors, and, with knowledge of the fact, the parties go on with the trial without objection, the objection is waived: *Tiffany v. McVee*, 21 Ont. 551. Where a plaintiff had had conversations with a member of the jury during the trial, and his brother, and also his solicitor, had treated some of them to drinks, a new trial was ordered: *Stewart v. Woolman*, 29 Ont. 714.

Where a jury disagree and the parties agree to accept the verdict of the majority, such agreement does not preclude either party from moving against the verdict: *Groom v. Shuker*, 60 L. T. 293. The agreement is no more than to accept the verdict as if it had been unanimous.

Misdirection

Misdirection.—Formerly a misdirection by the Judge in point of law, or the improper admission or rejection of evidence in any material matter was, at Law, ground for a new trial as of right. The Common Law Courts had only the power to grant a new trial of the action generally: see *Fauld v. Wallace*, 35 L. T. 361. This practice was altered by *The Administration of Justice Act*; see R. S. O. 1877, c. 50, s. 289, which contained a provision to the same effect as the present *Rule*.

A new trial may now be ordered on a particular question: see also *Rule 786*.

"Was the plaintiff guilty of contributory negligence?" is an improper question to put to a jury, involving as it does both fact and law: *Brown v. London St. Ry.*, 2 O. L. R. 53. It is preferable to ask "could the plaintiff by the exercise of reasonable care have avoided the accident?" If so, in what respect do you think the plaintiff omitted to take reasonable care?" *Id.*

Quere whether "misdirection" in the *Rule* applies to the case of the Judge ruling that there is no evidence to go to the jury, and therefore withdrawing the case from them, and giving judgment for defendant: see *Hall v. Jupe*, 43 L. T. 411.

Where a new trial is moved for on the ground of misdirection, the onus of showing that the misdirection did not cause a miscarriage of justice lies upon the party shewing cause: *Anthony v. Halstead*, 37 L. T. 433.

In considering an objection for misdirection the question is not whether every expression in a charge is perfectly accurate, or whether there is any reason to believe that a verdict, which is warranted by the evidence, has been caused or induced by an erroneous enunciation of the law by the Court: *Wells v. Lindop*, 15 Ont. App. 497.

It is not misdirection for the Judge to tell the jury his own opinion **Rule 785**, on the issue before them; *Smith v. Dart*, 14 Q. B. D. 105, 108.

Where the Judge misdirects the jury as to the burden of proof, a new trial, will be ordered; *Kingston v. Kingston*, 1897, A. C. 500.

An improper definition of "malice" by a Judge is misdirection; *English v. Lamb*, 32 Ont. 73.

The refusal of the Judge to submit some particular question to the jury is no ground for a new trial; but if the Judge refused to charge the jury in respect to any material matter which counsel desired to have submitted to them, it may amount to non-direction, for which a new trial may be granted; *Turner v. Burns*, 24 Ont. 28.

Where a new trial is granted on the ground of misdirection the **Costs**, Court, as a general rule, will order the costs to abide the event; *Jones v. Richards*, 15 Times, 398; but they are in the discretion of the Court; *Hamilton v. Seal*, 1904, 2 K. B. 292.

Where the Judge at the trial reported to the Court that he did not make certain remarks which it was contended were objectionable, and stated what he did actually say, this course was held not to be objectionable; *Dickie v. Campbell*, 34 S. C. R. 265.

Verdict against Evidence. — It is the practice in England, ^{Verdict against weight of evidence.} adopting the practice of the former Court of Queen's Bench, not to grant a new trial, on the ground that the verdict is against the weight of evidence, where the damages are under £20, except under peculiar circumstances, such as the trial of a right, or where the personal character of a person may be injured; *Jones v. Metropolitan Board of Works*, 44 L. T. 810; 17 C. L. J. 411; *Booth v. Bryson*, 2 Q. B. D. 490; followed *Crewer v. Holbert*, 17 P. R. 283; see also *Jenkins v. Morris*, 11 Ch. D. 674.

A verdict will not be very readily disturbed on the ground of excessive damages; see *Sornborger v. C. P. Ry. Co.*, 24 Ont. App. 263; *Easton v. Brantford E. Ry. Co.*, C. P. D. Sept., 1897, nor where the evidence as to damages is conflicting; *McCullough v. Anderson*, 27 Ont. 73 (note); *Ferguson v. Southwold*, 16, 69.

If the damages found by the jury are so small, as to shew that they must have omitted to consider some of the elements of damage, the Court will grant a new trial; *Phillips v. London & S. W. Ry. Co.*, 5 Q. B. D. 78; 5 C. L. J. 280; *Church v. Ottawa*, 25 Ont. 298; 22 Ont. App. 348. It has been held that a new trial will not be granted merely to enable a plaintiff to recover nominal damages; *Sammell v. Clarke*, 23 S. C. R. 397; *Simonds v. Chesley*, 19 S. C. R. 174; *Milligan v. Jamieson*, 4 O. L. R. 650; but see *Femp v. Christman*, 195 L. T. Jour. 356.

On an application for a new trial upon the weight of evidence, where there has been no miscarriage in law, the question is, does the verdict in the opinion of the Court do substantial justice, and, if not, does the evidence warrant interference; *Griener v. Hudson's Bank*, 8 Ont. 102, and the Court though considering that a different verdict would have been more satisfactory, may refuse to interfere, the question being one proper for the decision of a jury; *Mulrobinson v. Hamilton Prov. & L. Socy*, 13 Ont. App. 610; *Ferrand v. Bingley*, 8 Times, 70. In an action for slander the jury is not bound to return a verdict for the plaintiff, although the defamatory words are proved; *Milligan v. Jamieson*, *supra*.

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The ordinary reasoning according to which the verdict of a jury on a question of fact ought not to be disturbed unless the preponderance of evidence against the verdict is strong and clear, does not apply to cases in which the verdict depends upon a question of science which is not fully solved, but is still within the region of *bona fide* controversy. The importance of the verdict to others besides the parties to the litigation, and the novelty of the question are elements to be taken into consideration. Where a new trial is granted on the ground of the unsatisfactory nature of the verdict, a condition should not be imposed that the party applying for the new trial should pay the costs of the previous trial: *Managers of Metropolitan Asylum v. Hill*, 47 L. T. 29.

A new trial, on the ground that the verdict is against the weight of evidence, should not be granted, unless the verdict is one which the jury viewing the whole evidence reasonably, after proper directions, could not properly find: *Webster v. Friederberg*, 17 Q. B. D. 736, correcting *Salomon v. Bittou*, 8 Q. B. D. 176; see also *Metropolitan Ry. Co. v. Wright*, 11 App. Cas. 152, as explained in *Jones v. Spencer*, 77 L. T. 536; 14 Times, 4; *Phillips v. Martin*, 15 App. Cas. 193; *Quinlan v. Murnane*, 18 L. R. 1r. 53; *Commissioners for Railways v. Brown*, 13 App. Cas. 133; *Dallas v. Great Western Ry.*, 57 J. P. 581; *Prout v. Graecom*, 21 Q. B. D. 53; *Hampson v. Gup*, 61 L. T. 778; *Beckett v. G. T. Ry.*, 13 Ont. App. 184; see 16 S. C. R. 713; *Logg v. Lethbridge*, 11 Ont. App. 460; *Brisbane v. Martin*, 1801, A. C. 249; *Australian Newspaper Co. v. Bennett*, *Id.*, 284; see also remarks in 31 Sol. Jour. 136. Where the question at issue turns upon a matter involving scientific and expert evidence, and the weight of expert testimony is overwhelmingly in favour of one view, against which there is only the evidence of persons without much practical experience, a verdict based on the latter evidence cannot stand: *Jackson v. Grand Trunk Ry.*, 2 O. L. R. 689; 32 S. C. R. 247.

A new trial should not be granted merely because the Judge who tried the case, or the Court applied to for a new trial, is dissatisfied with the verdict of the jury: *Salomon v. Bittou*, 8 Q. B. D. 176; see *Jenkins v. Morris*, 11 Ch. D. p. 684; *Wildecks v. Hurvell*, 7 Ont. 360; *Murtagh v. Barry*, 24 Q. B. D. 632; *Fraser v. Drew*, 30 S. C. R. 241.

Though the report of the Judge who presided as to whether he was satisfied or dissatisfied with the verdict is not conclusive, great weight will be attached to it: *Webster v. Friederberg*, 55 L. T. 295; affirmed in appeal: *Id.*, 49; 17 Q. B. D. 736.

The Court has in its discretion to weigh the delay, vexation and expense of a new trial, all in fact which forms the foundation of the maxim "*Interest reipublice ut sit finis litium*" against the injustice which may be worked in a particular instance, and may treat as conclusive a verdict which is not perfectly satisfactory: *Metropolitan District Asylum v. Hill*, 47 L. T. 29; *Beckett v. G. T. Ry.*, 13 Ont. App. 207; see 16 S. C. R. 713; *Winch v. Conservators of the Thames*, L. R. 7 C. P. 472.

Where the jury find negligence and specify in what it consisted, but there is no evidence to support the specific finding, the Court may in its discretion order a new trial, notwithstanding that there is evidence of negligence in other respects: *Colden v. C. P. Ry. Co.*, 25 Ont. App. 115.

Where cross-actions involving the same question of law and fact are separately tried with the result that contradictory verdicts are

obtained. If the evidence is so fairly balanced that the jury might Rule 765. reasonably find either way, both cases ought to be tried again, not separately, but together. The Court cannot be called upon either to exercise the functions of a jury, or to issue contradictory judgments: *Australian, etc., Co. v. Smith*, 11 App. Cas. 321.

Excessive Damages.—The granting or refusing a new trial on the ground of excessive damages depends to some extent on the nature of the action, e.g., where the action is on contract, and the amount properly payable depends on computation, in case of error the Court would more readily interfere, even though the amount in excess is small, than in a case of tort, where the jury may properly give vindictive damages.

It was formerly held that the Court may, in its discretion, refuse a new trial on the consent of the plaintiff as to the damages being reduced to such an amount as the Court may think fit given by the jury, would not have been excessive: *Hill v. Lavers*, 12 Q. B. D. 376; *St. Denis v. Baxter*, 15 Ont. App. 387; *Easton v. Brantford E. Ry. Co.* (before C. J. D. 29th Nov. 1897); *Finer v. London St. Ry.*, 29 Ont. App. 111; *Curran v. Grand Trunk Ry.*, 25 Ont. App. 107; *Cobbler v. Michigan Central Ry.*, 27 Ont. App. 630; *Schmidt v. Grand Trunk Ry.*, 31 Ont. App. 164; 18 Ont. App. 184; 28 C. L. J. 245; but all these cases have been over-ruled in the House of Lords, where it has been held that, in an action of tort, where the Court finds the damages to be excessive, it must grant a new trial unconditionally, and except by consent of both parties, it has no power to reduce the damages: *Bull v. Bull*, 1905, A. C. 115; 92 L. T. 489; but where the Court is satisfied with the judgment except as to the amount of damages, a new trial need not be directed generally, but may under Rules 785 and 786 be limited to the quantum of damages: *Huckley v. G. T. Ry. Co.*, 64 W. R. 55.

In an action for libel the Court will not grant a new trial on the ground of excessive damages, unless it thinks that, having regard to all the circumstances of the case, the damages are so large that no jury could reasonably give them: *Pratt v. Graham*, 21 Q. B. D. 53; and in assessing damages the jury are entitled to take into consideration the whole conduct of the defendant in the matter from the time the libel was published down to the time of the verdict; *Id.* See also as to the granting of new trials in actions for libel, *Wilcock v. Horrell*, 5 Ont. 360.

As to the application of *Pratt v. Graham*, *supra*, in cases generally; see *Johnston v. G. W. Ry. Co.*, 1904, 2 K. B. 250; where *Philips v. L. & S. W. Ry. Co.*, 1879, 1 Q. B. D. 106; 5 Q. B. D. 78, was approved, the effect of which is that a new trial may be ordered if the Court, without imputing perversity to the jury, comes to the conclusion from the amount of the damages and other circumstances, that the jury must have considered matters which they ought not to have considered, or have applied a wrong measure of damages.

Where damages are assessed on a wrong basis, e.g., on the ground of neglect of duty, where no such duty existed, a new trial will be ordered: *Dunn v. Prescott Elevator Co.*, 26 Ont. App. 389; 30 S. C. R. 620.

Surprise.—In *Riding v. Hawkins*, 14 F. T. 56, the plaintiff's case, when opened, seemed to proceed on a case of fraud, but undue influence only was alleged. The plaintiff applied for leave to amend, which was granted, and the trial proceeded after the defendant had

Rule 183. refused an offer of the Judge to adjourn the trial at the plaintiff's expense; the finding was for the plaintiff on the question of fraud, but for the defendant on the issues on the original pleadings. It was held that defendant was not precluded, by his refusal of the offer of adjournment, from moving for a new trial on the ground of being surprised by the plaintiff's new case. It was also held that the amendment was properly allowed, the care having been taken that the defendant should not be damaged.

See *Canada Landed Credit Co. v. Thompson*, *supra*, p. 814.

The abstaining by a party from proof under an idea that his adversary had no real intention of putting him to such proof, and being thereby taken by surprise, is no ground for a new trial: *Andriess v. Stuart*, 1 C. L. R. 724.

Where the reason for the application is surprise, the affidavits must state the grounds of surprise: *Doe v. Dickenson*, W. N. 1881, 52. Evidence of persons who were called as witnesses to the effect that the evidence they gave was untrue, and that statements made by them to the plaintiff's solicitor before trial were true, is inadmissible on a motion for a new trial: *Rushton v. Grand Trunk Ry.*, 6 O. L. R. 425.

The fact that on cross-examination of an opposite party's witness a damaging statement was elicited is not surprise: *Shipway v. Broadwood*, 1899, 1 Q. B. 369; 80 L. T. 11.

Discovery of Fresh Evidence. — As to when a new trial or supplemental trial may be had on the ground of discovery of new evidence, see note to *Rule 549*; and see *Rule 642* (1), as to motions to reverse or vary judgments upon the ground of matters arising subsequent thereto, or subsequently discovered; such motions may be made to the Court or Judge who tried the action: *Armour v. Merchants Bank*, 17 P. R. 108.

A new trial will not be granted on the ground of premature admission of evidence which has afterwards become admissible: *Fauvel v. Wallace*, 35 L. T. 361; nor of the discovery of new evidence, unless it is nearly or quite conclusive: *Anderson v. Titmas*, 36 L. T. 711; *Young v. Kershaw*, 81 L. T. 531; 16 Times, 52; and see *Birch v. Birch*, 1902, P. 130.

Where the new evidence is merely corroborative of that given at the trial, a new trial will be refused: *Howarth v. McGowan*, 23 Ont. 396; see *Trumble v. Horton*, 22 Ont. App. 51.

Where the new evidence might have been discovered before trial by examination for discovery, which were not taken, a new trial was refused: *Turnbull v. Dural*, 1902, A. C. 429.

Staying New Trial Pending Appeal.—An application to stay a new trial pending an appeal from the order granting the same was refused: *Hockley v. Grand Trunk Ry.*, 7 O. L. R. 186.

Costs.—*Prima facie*, where a new trial is ordered, the party opposing the motion should be ordered to pay the costs of the motion: *Hamilton v. Seal*, 1904, 2 K. B. 262; 90 L. T. 592; but these costs, as also those of the former trial, are in the discretion of the Court: *ib.*, and see *Rule 1130* (1).

786. A new trial may be ordered on any question in an action, whatever be the grounds for a new trial, without interfering with the finding or decision upon any other question. Rules 766, 787. New trial as to part. Con. Rule 792.

See Eng. (1883) R. 557.

Quere, whether a new trial may not now be ordered as to one defendant, without disturbing the verdict as to another: *Purnell v. G. W. Railway Co.*, 1 Q. B. D. 636; and see *Rule 785*.

A new trial may be ordered as to the assessment of damages, the finding as to the liability of the defendant in respect of the cause of action (for negligence) not being interfered with: *Hesse v. St. John Ry. Co.*, 30 S. C. R. 218, 240; *Hockley v. G. T. Ry. Co.*, *supra*, p. 1029.

Where there are distinct issues, the Judge may, under this *Rule*, accept the verdict of the jury on those issues on which they agree, and discharge them as to others, and a new trial may be ordered on undecided issues: *Marsh v. Isaacs*, 45 L. J. C. P. 505; *Coleman v. Toronto*, 23 Ont. 345.

Where a new trial is granted, if the order is not appealed from, the question determined by it cannot be re-argued upon an appeal from the judgment pronounced at the new trial: *Journal Printing Co. v. Maclean*, 23 Ont. App. 324.

(ii) Procedure in Divisional Courts.

787—(1) A motion to a Divisional Court against judgment or for a new trial, or by way of appeal from the judgment or order of a Judge of the High Court made at the trial, or otherwise in respect of the judgment pronounced at the trial, shall be set down to be heard for, at latest, the first sittings of a Divisional Court which commences after the expiration of one month from the date of judgment, unless otherwise ordered. a Procedure on appeal to Divisional Court from Judge at the trial.

(2) The motion shall be upon a 7 clear days' notice, and shall be set down 2 clear days before the commencement of the sittings of the Divisional Court for which the notice is given, unless otherwise ordered. Rules of 1 Jan., 1896, 1484 (199A).

This *Rule* only applies to appeals from judgments or orders pronounced at trials, or motions for new trials in jury actions; as to appeals from judgments pronounced otherwise than at a trial, see *Rule 788*.

For the Regulation of the Judges with respect to the duty of the officer who sets down a case for a Divisional Court, see note to *Rule 102*.

The Court may, on a special application, allow the appeal to be set down on short notice, and stay proceedings pending the appeal: *Todd v. Russell*, 17 P. R. 127.

Rule 788. As to how far a motion to a Divisional Court operates to stay execution and other proceedings under the judgment, see *Rules* 827, 829.

The "date of judgment" means the day of pronouncing the judgment or order; see *Rule* 629, and *Hickey v. Storer*, 11 P. R. 88; but where judgment is not given in open Court, see *Wallace v. Bath*, 7 O. L. R. 522.

A motion to extend the time for moving under this *Rule* should be made before the Divisional Court itself: *Imperial Loan Co. v. Baby*, 13 P. R. 59. For circumstances under which the time may be extended, see *Hickey v. Storer*, 11 P. R. 88.

A motion for a new trial was allowed after the time for moving had elapsed under peculiar circumstances, in *Wilkins v. Wilkins*, 12 Times 212, where it had been decided at the trial that a man was dead, but he was subsequently found to be alive.

A seven clear days' notice of motion must be given for the first day of the sittings, and will not be sufficient if given for any subsequent day, although given in time to permit the motion to be set down two clear days before the commencement of the sittings: *Sierichs v. Woodcock*, 13 P. R. 260.

Where a solicitor had instructed his clerk to set down a case, but the clerk, by a mistake in supposing that the days limited for that purpose were not clear days, allowed the last day to pass, this was held not a sufficient ground for granting leave to set the case down: *Rumohr v. Marx*, 18 C. L. J. 444; 19 C. L. J. 10; 3 C. L. T. 31.

Where judgment for defendants was delivered on 22nd November, and the plaintiff's solicitor immediately applied for a copy, but did not receive it until 29th November, which was the last day for setting down a motion to reverse the judgment, and there was therefore, no time to consult either the plaintiff or counsel, the Court held that the delay was sufficiently excused, and granted leave to set down, upon payment of costs: *Foley v. Canada Permanent, etc.*, 18 C. L. J. 444; 3 C. L. T. 32.

Where a cause has been set down and notice of abandonment subsequently served, it will not be restored to the list on the appellant's application, unless he make out a case in which it would be proper to grant leave to appeal: *Union Bank of Canada v. Rideau Lumber Co.*, 19 P. R. 106; *semble*, he should show that the judgment or order to be appealed from is *prima facie* wrong and that there is good ground for allowing the appeal to prevent a substantial wrong or injustice: *Id.*

Where a case is improperly set down, a substantive motion to the Divisional Court should be made to strike it out: *Wansley v. Smallwood*, 10 P. R. 223. Where the objection has not been taken until the case has been called on for argument, costs have sometimes been refused, although the objection has been sustained.

A third party who has obtained liberty to contest the plaintiff's claim is not entitled to be heard on an appeal by plaintiff from a judgment dismissing the action; see *Ewing v. Toronto*, 18 P. R. 137.

From
Judge in
Court.

788.—(1) A motion to a Divisional Court by way of appeal from any judgment or order made by a Judge of the High Court, sitting in Court otherwise than at a trial, shall

be set down to be heard for the first sittings of a Divisional Court for which due notice can be served after the expiration of seven days from the date of the judgment or order complained of, unless otherwise ordered. ^{Rules 789, 790.}

(2) The motion shall be upon a 2 clear days' notice, and shall be set down 2 clear days before the first day of the sittings of the Divisional Court for which the notice is given unless otherwise ordered. Rules of 1 Jan., 1896, 1484 (799B); Rules of 9 Jan., 1897, *amended*.

This *Rule* only applies to appeals from judgments or orders pronounced in the Weekly Court.

See notes to *Rule 787*.

For the Regulation of the Judges with respect to the duty of the officer who sets down a case for a Divisional Court, see note to *Rule 102*.

789. Every notice of motion or appeal to a Divisional Court shall set out the grounds of the motion or appeal. ^{Grounds of appeal to be set out in notice.} Con. Rule 790. Rules of 1 Jan., 1896, 1484 (799C); Rules of 9 Jan., 1897, *amended*.

The former Rule 790, only applied to motions for a new trial. Under the present *Rule* it will be necessary to set out the grounds in every notice of motion or appeal to a Divisional Court.

A notice of motion for a new trial on the ground of misdirection, or non-direction, should state how and in what manner the Judge misdirected, or failed to direct, the jury: *Pfeiffer v. Midland Ry. Co.*, 18 Q. B. D. 243; *Murfit v. Smith*, 12 P. D. 116; *Scott v. Orerar*, 11 Ont. 541; *Furlong v. Reid*, 12 P. R. 201; see 12 Ont. 607. Amendment may be allowed in a proper case, but was refused in *Furlong v. Reid*.

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. ^{Abandoning motion.} Con. Rule 801. Rules 1 Jan., 1896, 1485.

(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. ^{Counter-mand notice.} *New*.

(3) In either of such cases the costs may be taxed without an order, upon the production of the notice of motion served, with an affidavit that the motion was not set down,

Rules
791, 792.

or of the notice of countermand served; and if the costs are not paid within 4 days from taxation, the party entitled thereto may obtain on *praeceipe* an order for payment of the same, on filing the certificate of taxation and an affidavit of non-payment of the costs. *New.*

The former mode of obtaining the costs of a motion not set down was to appear on the return day of the motion, and ask for the costs of an abandoned motion: *Reg. v. Armstrong*, 13 P. R. 306. It would not seem to be now proper to do this in the cases provided for by this *Rule*. Unless the party in default obtains leave to set the case down, the present *Rule* will apply. *Semble*, this *Rule* applies to a County Court appeal: *Re Toronto Ry. Co. and City of Toronto*, 18 P. R. 489.

A motion to dismiss an appeal for want of prosecution has been refused as unnecessary: *Id.*

On an application to restore an appeal after it had been abandoned, it was held that a *prima facie* ground of appeal must be made out: *Union Bank v. Rideau Lumber Co.*, 19 P. R. 106. See S. C. in note to *Rule* 787.

Copy of
judgment
or order
as settled
to be
furnished
to Court.

791. On any motion for a new trial or by way of appeal from a judgment or order of the Court or a Judge of the High Court, or to enter a different judgment, the applicant or appellant shall deliver to the proper Registrar a copy of the written opinion (if any), unless it has been reported, of the Judge appealed from, and of the judgment or order in question on the motion or appeal, as the same has been settled or entered, before the motion or appeal is set down for argument; and in default, unless otherwise ordered, the motion or appeal shall be deemed to have been abandoned, and the opposite party shall be entitled to the costs thereof. *New, as amended by Rule* 1271. See Ont. Gaz., 31st Dec., 1900.

Since this *Rule* it is necessary that the judgment or order appealed from be settled, though not necessarily issued, before the appeal comes on for argument. The staying of the entry of the judgment will not prevent its settlement for the purposes of this *Rule*. Where a judgment is entered before the appeal therefrom is heard, a stay of execution where necessary can be obtained under *Rule* 827.

As to whether an appeal will be quashed if this *Rule* has not been complied with, see *Henderson v. Rogers*, 15 P. R. 241.

Copies of
shorthand
notes to be
delivered
on motions
for new
trial, etc.

792—(1) On every motion for a new trial, or by way of appeal or to enter a different judgment, where the evidence was at the trial taken down by a stenographer, 3 copies of the evidence, in words at length, each copy to be certified as correct by the stenographer, shall be delivered to the proper Registrar, at or before the time for setting

down the motion: Provided that if such copies have not then ^{Rule 792.} been prepared the party making the motion shall shew to the officer setting down the motion, by memorandum on the *præcipe*, signed and initialed by the officer whose duty it is to procure such copies from the stenographer, that the same have been bespoken, and the same shall be delivered to the proper Registrar before the argument of the motion. Con. Rule 802, amended.

(2) The party making the motion shall not be entitled, unless by leave of a Judge or of the Court, to set it down until the record and exhibits have been, and it shall be his duty to cause them to be, transmitted to the Central Office. Rule 1486, as amended by Con. Rule 1232.

The Junior Registrar is the officer to whom the copies of the evidence are to be delivered: see Rule 28.

The fees payable to stenographers for copies of evidence on appeals to Divisional Courts and County Courts are regulated by the following Orders in Council.

Order in Council dated 18th March, A.D. 1896.

The Committee of Council advise that the portion of the charges ^{High Court Reporters.} for copies of shorthand notes of evidence at trials at present payable to the "Shorthand Reporters' Fund" be abolished, and that the fees payable and applicable to the personal use of the reporters, be hereafter as follows:—

1. For single copies—five cents per folio.
2. For copies required for the Judges under Rules made or to be made in that behalf, and to be furnished at the expense of the parties, and for one copy for the party desiring to move thereon — six cents per folio of one copy for all the copies required of any one transcription of shorthand notes, not exceeding five altogether.
3. For any additional copies made for the parties—one and one-half cents per folio for each copy.
4. The charges aforesaid shall be paid to the reporter when and as the moneys payable in respect of such copies are collected, and no charge is to be made for copies required by the Attorney-General of Ontario, or by the Judges for their private use and not taxable to any party, or for copies which it is the duty of the reporter to supply without charge.
5. The extra reporters shall be allowed for their own use, the same fees as the regular reporters, with twenty-five per cent. added thereon, to be paid out of the "Shorthand Reporters' Fund."
6. The above charges are to apply only to cases entered for trial after 1st January, 1896.

[Local Masters, Referees, Special Examiners and others, entitled to take examinations or cross-examinations in the High Court and County Court shall, for copies of such examinations or cross-examin-

Rule 793. ations, be entitled to the same fees for copies of notes of evidence at trials, as are payable to the Official Shorthand Reporters, vide 35 Vict. c. 13, s. 40.] (a).

County
Court
Reporters.

Order in Council dated 26th May, A.D. 1896.

Upon the recommendation of the Honourable the Attorney-General, the Committee of Council advise that the Order in Council of 18th March, 1896, fixing the fees for copies of shorthand notes of evidence, payable to the Official Court Reporters, be amended by striking out the last paragraph thereof having reference to the fees for copies of evidence payable to Local Masters, Referees, Special Examiners, etc. (b).

The Committee further advise that the same fees as are under the said Order payable to the Official Court Reporters be paid to the Reporters in the County Courts.

Order in Council dated 12th August, 1897.

Upon the recommendation of the Honourable the Attorney-General, the Committee of Council advise that the same fees as are payable to the Official Court Reporters, for copies of shorthand notes of evidence under Order in Council of 18th March, 1896, be paid to the Official Reporter or other stenographer of the Master in Ordinary, for copies of notes of evidence taken on any reference before the Master in Ordinary.

6. COUNTY COURT APPEALS.

Appeals from County Courts are regulated by R. S. O. c. 55, ss. 50 to 57, and secs. 74 (2), 75, and 76 of the Jud. Act.

Appeals from District Courts are governed by the same Act, see R. S. O. c. 109, s. 7, except in some cases specially provided for, such as where a cause of action in the District Court of Thunder Bay and Rainy River is beyond the jurisdiction of a County Court. See R. S. O. c. 109, s. 15; and see s. 9 (3): *Coutts v. Warton B. & Sugar Co.*, 39 C. L. J. 788.

The above-mentioned sections, 50 and 51 of *The County Courts Act* (R. S. O. c. 55), are as follows:—

Meaning of
"party to a
cause or
matter,"
and "ap-
pellant."

50. The terms "party to a cause or matter," and "appellant," hereinafter used, shall include persons suing or being sued in the name of others, though not mentioned in the record, and per-

(a) This clause was afterwards abrogated by the order of 26 May, 1896, which follows.

(b) The fees payable to Local Masters and Referees remain as provided by Tariff B. By sec. 175 of the Jud. Act power is given to the Lieut.-Governor in Council to fix fees to be taken by Special Examiners. For the tariff promulgated under that section see notes to sec. 175.

sons on whose behalf or for whose benefit any action is prose-
cuted or defended, as well as parties named in the record. R.
S. O. 1887, c. 47, s. 40.

51.—(1) Any party to a cause or matter in a County Court Appeal to
may appeal to a Divisional Court of the High Court of Justice ^{Divisional}
from any judgment directed by a Judge of the County Court ^{Courts.}
to be entered at or after the trial in any case tried without a
jury, and also in any case tried with a jury, [to which sub-sec-
tion 4 does not apply.]

(2) Instead of appealing to a Divisional Court of the High ^{Motion to}
Court of Justice any party may move before the County Court ^{County}
within the first two days of its next quarterly sittings to set ^{Court for}
aside the judgment and enter any other judgment upon any ^{new trial}
ground. ^{or other}
^{judgment.}

(3) A motion for a new trial on the ground of discovery of ^{Moving for}
new evidence or the like shall be made before the County Court. ^{new trial on}
^{discovery}

(4) Where there has been a trial with a jury any motion for ^{of new}
a new trial, whether made for that relief alone or combined ^{evidence}
with, or as an alternative for, any other relief, shall be made to by jury.
the County Court.

(5) If a party moves before a County Court under sub-sec-^{Party}
tion 2 in a case in which he might have appealed to the High ^{moving}
Court, he shall not be entitled to appeal from the judgment of ^{County}
the County Court to the High Court, but the opposite party to appeal ^{Court not}
shall be entitled to appeal therefrom to the High Court. 58 Vict. ^{High}
c. 13, s. 44 (1); 60 Vict. c. 15, Sched. A, (69). ^{Court.}

For a statement of the purview of this section, see *Leishman v. Garland*, 3 O. L. R. 241.

Notwithstanding sub-sec. 3 a Divisional Court on appeal from a
County Court may under *Rule 498* admit new evidence; *Butler v. McKicken*, 32 Ont. 422, even though the time for moving for a new
trial has expired; *Ib.*, but ordinarily in such a case the motion,
whether in a jury or non-jury case, must be to the County or District
Court, sub-sec. (3); and see *Brown v. Carpenter*, 27 Ont. 412.

In other cases the effect of the section seems to be, as follows:—

(1) *In Jury Cases.*—Where a new trial is sought, any motion re-
specting the judgment must be to the County or District Court
at its quarterly sittings; sub-sec. (4); see formerly, *Hunter v. Van-
stone*, 6 Ont. App. 337; *Wilson v. Brown*, 7 Ont. App. 181; *Campbell
v. Prince*, 5 Ont. App. 330; *Ferguson v. McMartin*, 41 Ont. App. 731.

Where a new trial is not sought, but where, accepting the findings
of the jury, the appellant contends that, upon them or notwithstand-
ing them, judgment should be entered in his favour, he may either
appeal to a Divisional Court or move at the next quarterly sittings
of the County or District Court to have judgment entered in his
favour.

An appeal lies to the Divisional Court under sub-sec. (1), where
the County Court Judge withdraws a case from a jury and gives
judgment of non-suit, because that is held not to be a trial with a
jury within the meaning of sub-sec. (4); *Hagen v. Canadian Pacific
Ry.*, 30 Ont. 138.

Rule 793.

(1) *In Non-jury Cases.*—Whatever the ground of complaint, and whether the right to a new trial be involved or not, a party complaining of the judgment has the option of appealing to the Divisional Court of the High Court: sub-sec. (1), or of moving against the judgment at the quarterly sittings of the County or District Court: sub-sec. (2).

A case which the Judge at the trial withdraws from the jury, is for the purpose of appeal a 'non-jury' case: *Hagen v. Canadian Pacific Ry.*, 30 Ont. 138.

Though on an appeal to the Divisional Court a new trial cannot be applied for, the Divisional Court instead of either granting judgment for the appellant or dismissing his appeal, may order a new trial where justice so requires: see R. S. O. c. 55, sec. 54, *infra*.

After an appeal to a Divisional Court, no further appeal from its decision formerly lay to the Court of Appeal: *McConic v. Boller*, 17 P. R. 353; but it would seem that no appeal now lies as in the case of other decisions of a Divisional Court: see Jud. Act, secs. 75 and 76, and *Christie v. Cooley*, 6 O. W. R. 214, (where, however, by order of the Divisional Court, made on consent, the action was transferred to the High Court, and leave granted to appeal to the Court of Appeal).

The Court formerly refused to entertain an appeal where the decision turned wholly upon the evidence, and involved no point of law: *Fowler v. McDonald*, 3 U. C. Q. B. 385; *Bradley v. Crane*, 4 U. C. Q. B. 122; *Manning v. Ashall*, 23 U. C. Q. B. 362; *Clerk v. Hachbart*, 6 C. P. 438; *McKinstry v. Farby*, 24 U. C. Q. B. 176; *Harris v. Robinson*, 25 U. C. Q. B. 247. In such a case, where the trial has been by jury, the remedy will ordinarily be a new trial, so that an appeal will not lie to a Divisional Court. In a non-jury case, an appeal will lie, but the decision of the County Court Judge will not be interfered with, except upon the same principles as are observed in the case of other appeals from a Judge of first instance upon the evidence: see notes to *Rule 783, supra*, p. 1021. Where, therefore, the Judge of the County Court who has heard the witnesses finds in favour of the respondent on contradictory evidence, the Divisional Court will not interfere, even though it may think that, if the matter had come before it in the first instance, it would have decided otherwise: *Rees v. McKeown*, 7 Ont. App. 521. See also cases referred to in note to sec. 52 of the Act, *supra*, p. 43.

Appeals as to Costs.—An appeal as to a question of costs, where a question of principle is involved, has been entertained: *Mitchell v. Lundusen*, 14 Ont. App. 517, in which, however, it was pointed out as a reason for entertaining the appeal that leave to appeal had been granted, (though sec. 72 of the Jud. Act does not seem to apply to such a case: see notes to that section); see also *McDermid v. McDermid*, 15 Ont. App. 287; *Weaver v. Sawyer*, 16 Ont. App. 422; *Grove v. Bender*, 36 C. L. J. 161; 20 C. L. T. Occ. N. 95.

Appeals from decisions of a County Court at its quarterly sittings.—Under clause (5), a party who might have, but has not, appealed to a Divisional Court from the judgment at the trial, but has moved against it at the quarterly sittings of the County Court, is debarred, if unsuccessful on such motion, from appealing further from the order made upon it; but the opposite party may appeal.

Where a new trial is desired, (a) on the ground of discovery of new evidence, or (b) on any other ground, the party complaining can not appeal in the first instance to a Divisional Court: see sec. 54.

Appeals
from
County
Court
quarterly
sittings.

sub-secs. (3) and (4), *supra*, and no appeal lies from the decision of **Rule 793**, the County Court upon a motion (under sub-sec. 3) for a new trial on the ground of discovery of new evidence: *Brown v. Carpenter*, 27 Ont. 412; or on a motion in a jury case (under sub-sec. 4): *Irvine v. Sparks*, 31 Ont. 681, whether a new trial is granted or refused: *Id.*; and see H. & L. Jud. Act, 2nd ed., pp. 979-980.

Clause (1) is the only provision of sec. 51, giving any right of appeal to a Divisional Court, to the party complaining of the judgment at the trial, and, by that clause, where a new trial is part of the relief required no such appeal is given. Clause (4) gives to the opposite party the right to appeal to a Divisional Court where he is respondent to, and unsuccessful upon, a motion to the County Court; but only in a case in which his opponent might have appealed to the Divisional Court instead of moving in the County Court; and a motion for a new trial is not such a case.

Where a motion is made to the County Court to set aside a judgment, and for judgment for the applicant, or in the alternative for a new trial, on which the County Court under **Rule 615**, or otherwise, directs judgment to be entered for the applicant. In such case the opposite party is entitled to appeal from that decision to a Divisional Court, as the order is not merely for a new trial, but is a reversal of the judgment at the trial: *Donaldson v. Wherry*, 20 Ont. 552; *Leishman v. Garlund*, 3 O. L. R. 241.

Staying Execution.—As to stay of execution in a County Court case, pending an appeal, see **Rule 797**.

Power to stay until an appeal can be launched is given to any Judge of the County Court appealed from: **Rule 794**.

Setting Down Appeals.—See **Rule 795**, and notes.

Interlocutory Motions Relating to Appeals.—No power is given to a Judge to deal with matters relating to, but not involving the decision upon, the appeal, as was formerly the case under Ind. Act, sec. 54, when County Court appeals were to the Court of Appeal, and as was the case under 63 V. c. 17, s. 12 (now repealed by 4 Ed. vii, c. 10, s. 15). A motion to strike out or quash an appeal must be made to the Divisional Court: sec. 57, *infra*, and see *O'Donnell v. Guinane*, 28 Ont. 389.

A motion to extend the time for taking any step or proceeding in the appeal would seem to be proper under **Rule 353**, to the County Court or a Judge, until the papers have been certified under sec. 55 and **Rule 793**; and to the Divisional Court thereafter: section 57 (2) and (3) *infra*, but no such motion can be made to the Divisional Court until the papers are (under sec. 55) sent up to it, and filed in the High Court: section 57 (2), *infra*, p. 1014; and see *Gilmor v. McPhail*, 16 P. R. 151; *Owen v. Sprung*, 28 Ont. 607; *Wheeler v. Gibbs*, 3 S. C. R. 374.

Costs.—Costs of the former trial and of the application on the judicial discretion of the Court: **Rule 1130**, they are usually ordered to follow the event of the motion, even though the Judge below has *ex mero motu* made an erroneous adjudication: *Mills v. Hamilton Street Ry. Co.*, 17 P. R. 74; *Eddy v. Ottawa, etc.*, 31 P. C. Q. B. 569, 576; but see *Harris v. Robinson*, 25 P. C. Q. B. 247; and though the Court has no jurisdiction to hear the appeal: *Cole v. Halliday*, 33 C. L. J. 120; S. C., *sub nom.*, *Cole v. Halliday*, 17 C. L. T. 73; and see *Teskey v. Neil*, 15 P. R. 244; *Hewgill v. Chadwick*, 18 P. R. 359; but they may be ordered to abide the result of a new trial, or the applicant, though successful, may be ordered to pay them as a condition of getting a new trial.

Rule 793.

Appeals
from de-
cision of
Judge.

Sections 52 and 52a of *The County Courts Act* are as follows:—

52.—(1) An appeal shall also lie to a Divisional Court of the High Court of Justice, at the instance of any party to a cause or matter, (a) from every decision made by a Judge of a County Court under any of the powers conferred upon him by any Rules of Court or any statute, unless provision is therein made to the contrary; and from every decision or order made by a Judge of a County Court sitting in Chambers under the provisions of the law relating to interpleader proceedings, the examination of debtors, attachment of debts and proceedings against garnishees; and from every decision or order made in any cause or matter disposing of any right or claim, (b) provided always that the decision or order is in its nature final and not merely interlocutory. R. S. O. 1887, c. 41, s. 42; 58 Vict. c. 13, s. 71 (21); 59 Vict. c. 18, Sched. (18); c. 19, s. 14.

(2) This section shall not apply where jurisdiction is given to the Judge of the County Court as *persona designata*, 53 Vict. c. 13, s. 6.

Prior to 15 Vict. c. 6, there could be no appeal from a County Court in garnishee proceedings; *Sato v. Hubbard*, 6 Ont. App. 546.

This section does not apply to cases coming under sec. 51, *supra*; *Weaver v. Sawyer*, 16 Ont. App. 422; *Irvine v. Sparks*, 31 Ont. App. 66.

(a) "Party to a cause or matter." As to the meaning of these words, see sec. 50, *supra*, p. 1036, and sec. 2 (8) of the Jud. Act, also *Henderson v. Rogers*, 15 P. R. 211.

(b) "Right or claim." The right or claim referred to is that which forms the subject of the action, not the right to take any particular piece of procedure in the course of the action; *McPherson v. Wilson*, 13 P. R. at p. 340.

The proviso at the end of sub-section (1) governs the whole sub-section, so that, in interpleader and garnishee matters, and the other proceedings specified, an appeal does not lie unless the order appealed from is in its nature final; *Hunter v. Hunter*, 18 C. L. T. 114; *Arnold v. Van Tuyl*, 30 Ont. 663.

Appeal as to
costs.

52a. An appeal shall also lie to a Divisional Court from any decision or order of a Judge whether pronounced or made at the trial or on appeal from taxation or otherwise, which has the effect of depriving the plaintiff of County Court costs on the ground that his action is of the proper competence of the Divisional Court, or of entitling him to County Court costs on the ground that the action is not of the proper competence of the Divisional Court. 4 Ed. vii. c. 10, s. 13.

Final or Interlocutory Order.—The question as to when an order is final, and when interlocutory, has arisen under various Acts, and may be answered differently under each, according to the intention of the enactment.

For the purpose of determining the time for appealing under English (1883) R. 867, a final order is one made on such an application or proceeding that, for whichever side the decision is given, it will, if it stands, finally determine the matter in litigation; *Salaman v. Warner*, 1891, 1 Q. B. 734; *Standard Discount Co. v. LeGrange*, 3 C. P. D. 67, 74; or disposes of the matter in dispute between the parties, even though inquiries have to be carried out after the order; see *Re Herbert Reeves & Co.*, 50 W. R. 252; 1901, W. N. 213.

For the same purpose an interlocutory order includes an order for **Rule 793**, working out the rights given by a final judgment, e.g., an order setting off costs subject to a solicitor's lien: *Blakey v. Latham*, 43 Ch. D. 25, and see *Leonard v. Burrows*, 7 O. L. R. 316.

See also notes to sec. 73 of the Jud. Act, *supra*, p. 428.

An order interlocutory under the above English Rule is not necessarily interlocutory under the above section 52; see *Rural Mun. of Harris v. London & Canadian, etc., Co.*, 19 S. C. R. at p. 412.

An order has been considered final because there remains nothing further to be done under it: *Re D. A. Jones Co.*, 19 Ont. App. 63; and thus an order to sign judgment under former Rule 730, was considered not final, and therefore not appealable under the Supreme Court Act (R. S. C. c. 335, ss. 24 to 28). Such an order would, however, seem to be final within above section 52; see *Nelson v. Thorne*, 11 Ont. App. 616; *Collins v. Hickok*, *Id.*, 620; *Bank of Minnesota v. Page*, 14 Ont. App. 317, though if judgment were denied to the plaintiff on such a motion, the matter in litigation would not have been determined, and an appeal would thus be excluded, if the rule in *Sulaman v. Warner*, *supra*, were applied. (The decision on an application under the present Rule 961, which takes the place of former Rule 730, would seem now beyond doubt to be appealable as, under it, an order to sign judgment is not what is obtained, but a final judgment in the action).

In view of the cases in which appeals have been entertained under sec. 52 it would seem that a "decision or order in its nature final and not interlocutory" within the meaning of the section, is a decision or order, whether before, or after, or by, the final judgment, (other than a judgment or order to which sec. 51 applies), by which the status of the parties is determined with respect to the matter in dispute, but it is not essential that nothing further has to be done to work out the rights thus determined, nor that the decision, had it been in respondent's favour, would necessarily end the matters in dispute; see cases *infra* and *Standard Discount Co. v. Letcavage*, 3 C. P. 10, 67, 71; *Rural Mun. of Morris v. London & Can. L. & A. Co.*, 19 S. C. R. 434; *Baptist v. Baptist*, 21 S. C. R. 425; *Bucock v. Stoddard*, 19 P. R. 195; but see *Hunter v. Hunter*, 18 C. L. T. 114.

Judgments and Orders Appealable:—

Appeals have been entertained in the following cases:—From a judgment in a partition matter under R. S. O. c. 124; *Furness v. Mitchell*, 3 Ont. App. 510; an order or judgment disposing of an issue directed in a garnishing matter: *Henderson v. Rogers*, 15 P. R. 211; or in interpleader proceedings: *Feckan v. Bank of Toronto*, 10 C. P. 32, see also *Whiting v. Horvy*, 12 Ont. App. 119; *Rural Mun. of Harris v. London and Canadian, etc.*, 19 S. C. R. at p. 412; a judgment on a special case: *Osler v. Mutec*, 19 Ont. App. 94; *Re Sharer v. Hart*, 31 P. C. Q. B. 603; an order refusing to set aside a judgment for partition under *The Partition Act*: *Jenking v. Jenking*, 11 Ont. App. 192; an order for judgment under former Rule 730 (now 961): *Nelson v. Thorne*, 11 Ont. App. 616; *Collins v. Hickok*, *Id.*, 620; *Bank of Minnesota v. Page*, 14 Ont. App. 317; *Sydenham v. Williams*, Divisional Court, 16th January, 1897; an order imposing terms on a defendant as a condition of giving him leave to defend: *McVicar v. McLaughlin*, 16 P. R. 450; or refusing an application to set aside a judgment entered for default of defence, on the ground

Rule 793.

of irrequidity: *Voight v. Orth*, 5 O. L. R. 413; an order granting the instator of a contesting creditor, under *The Creditors' Relief Act*, setting aside a judgment and execution: *Bowerman v. Phillips*, 15 Ont. App. 673; *Molson's Bank v. McHeekin*, 16, 535; an order allowing or refusing to allow execution to issue on a judgment: *Hason v. Johnston*, 20 Ont. App. 412; *McMahon v. Spencer*, 13 Ont. App. 430; an order allowing a set off of costs which were not in the discretion of the Judge, contrary to right of plaintiff: *Holbrook v. Standish*, 19 P. R. 195; an order in proceedings under *The Debtors' Stock Companies Winding-up Act* (R. S. O. c. 222), approving of a sale, by the liquidator, of the assets of a company *en bloc*, and making certain provisions for distributing the purchase money: *Re D. J. Jones Co.*, 19 Ont. App. 631; an order for the examination of the wife of a judgment debtor under *Rule 901*, as a person to whom the judgment debtor had made a transfer of his property: *Gooder v. White*, 15 P. R. 433; an order for the committal of a judgment debtor under *Rule 907* for unsatisfactory answers on his examination as a judgment debtor: *Ruby v. Ross*, 14 P. R. 440; and see *Re Anderson v. Toronto*, 16 P. R. at p. 246 (but see *New Hamburg v. Burden*, *supra*).

An order respecting the person having the right to continue an action after the death of the plaintiff would also seem to be included within the meaning of the section; see *Baptist v. Baptist*, 21 S. C. R. 425. So also a judgment or order made otherwise than at the trial determining a right and providing for the proceedings for working it out; e.g., by taking an account, though such an order may not be final for some purposes; see *The Queen v. Clark*, 21 S. C. R. 656, *Re Alexander*, 1842, 1 Q. B. 216; and an order perpetually restraining plaintiff from proceeding with an action (which is not a final order within *The Supreme and Exchequer Court Acts*); *Mackenzie Bank v. Stewart*, 20 S. C. R. 105.

An appeal now lies from an order or decision as to the scale of costs under a final judgment; see, 52a *supra*, (see formerly *London v. Burrows*, 7 O. L. R. 310).

Judgments and Orders not Appealable:—

Appeals have not been entertained in the following cases, as being final orders not in their nature final:— From an order setting aside a judgment and letting defendant in to defend: *Schroeder v. Brown*, 14 Ont. App. 673; *O'Donnell v. Gaudin*, 28 Ont. 389 (but in *Re Vicar v. McLaughlin*, 16 P. R. 159, an appeal was entertained from an order setting aside a judgment under *Rule 901*, in regard to the terms imposed upon defendant as a condition of being let in to defend); from an order dismissing a motion for judgment under *Rule 902*: *Fisher v. Street*, 17 C. L. T. 82; see *Royal Mail*, *supra*; *Price v. London & Can. L. & S. Co.*, 14 S. C. R. 414; an order enlarging until after a named event, a motion to dismiss an action for want of prosecution: *Slater v. Mader*, 17 C. L. T. 82; an order striking out jury notice: *McPherson v. Wilson*, 13 P. R. 339; an interpleader order directing an issue: *Baxter v. Hunter*, 18 C. L. T. 114; an order or an application to amend: *Readman v. Shaw*, 10 U. C. Q. B. P. 1, and see *Adair v. Kingston*, 16 U. C. Q. B. 121; the decision of a Judge as to the right to begin: *Hastings v. Earnest*, 7 U. C. Q. B. 720; or on a motion to vary the minutes of a judgment: *Re Casper v. Bennett*, 4 O. L. R. 71; an order dismissing an application to commit a defendant for contumacy for refusing to be sworn on a re-examination: *New Hamburg v. Burden*, 37 C. L. J. 420; or order of discharge from custody under a *ca. sa.*: *Gallagher v. Gallagher*, 33 Ont. 172.

An appeal will not lie from a judgment or order pronounced in a **Rule 793** matter in which the Court below had no jurisdiction: *Feskey v. Neil*, 15 P. R. 244, but see *Sweetland v. Turkish Cigarette Co.*, 80 L. T. 172; 47 W. R. 511.

Where the Judge is persona designata.—In such case R. S. O. c. 76, s. 6, applies, which provides that there shall be no appeal from the order of a Judge so made, unless an appeal is expressly authorized by the Statute giving the jurisdiction; see *Re Toronto H. & B. Ry. Co.*, 17 P. R. 199; *Re Simpson v. Clafferty*, 18 P. R. 403; or the Judge gives leave to appeal: 63 Viet. c. 17, s. 14.

Procedure.—The remaining sees. of *The County Courts Act*, relating to appeals, viz.: sees. 53-57 are as follows:—

53. An appeal may be had from any appealable decision of a County Court Judge, notwithstanding judgment has been signed thereon. R. S. O. 1887, c. 47, s. 13, part; 58 V. c. 13, s. 44 (31).

Formerly there could be no appeal after judgment entered: *Murphy v. Northern Ry. Co.*, 13 C. P. 112; *Duffl v. Dickinson*, 14 C. P. 142; *Wood v. Grand Trunk Ry. Co.*, 15 C. P. 275.

54. On an appeal the Divisional Court may set aside any judgment which may have been directed to be entered or may have been signed, and direct any other judgment to be entered or direct a new trial to be had, and make any other order as to such Court may appear requisite and just. 58 V. c. 13, s. 44 (41).

See notes to sec. 51, *supra*, p. 1037.

A respondent, the plaintiff in the action, who has recovered part only of his claim, cannot, on an appeal by defendant, without a cross-appeal, obtain judgment for the whole of his claim: *Spears v. Harnden*, 17 C. L. T. 84; but see *Toronto Junction v. Christie*, 25 S. C. R. 551, and formerly *Hutson v. Valters*, 19 Ont. App. 151.

55. The Judge shall, at the request of the appellant, certify under his hand to the proper officer of the High Court the pleadings in the cause, and all motions, rules or orders made, granted or refused therein, together with the Judge's charge and the judgment or decision on the same, and, where a trial has been had, the evidence and all objections and exceptions thereto, and all other papers in the cause affecting the questions raised by the appeal. R. S. O. 1887, c. 47, s. 51, part; 58 V. c. 13, s. 44 (50).

The certifying of the proceedings under this section is a necessary preliminary to setting down the case: *Smith v. Hay*, 35 C. L. J. 141; *McCarroll v. Metropolitan Gas Co.*, 19 C. L. T. Dec. S. 2; *Rockie v. McVitt*, 31 C. L. J. 41, and see *Mace v. Thompson*, 19 C. P. 94; *Baby v. Ross*, 19 C. R. 140; *Gilmor v. McPhail*, 16 P. R. 151. In *Lucas v. Holliday*, 5 C. L. R. 511, the Court entertained the appeal notwithstanding the omission to certify the proceedings, no objection having been raised.

The Judge should not refuse to certify the papers in a case which is not appealable, it is for the appellate Court to decide whether the appeal can be entertained or not: *Re Taggart v. Bennett*, 6 O. L. R. 71.

Rule 793. What a Judge certifies as his judgment will be treated as conclusive: *Huddleston v. Furness Ry.*, 15 Times, 238.

Certifying
proceed-
ings under
s. 52.

56. In appeals under section 52, the Judge shall only be required under the next preceding section to certify the motions, rules, orders, affidavits, evidence, and other materials, necessary for the full understanding of the matter in appeal, together with his judgment or decision on the same. R. S. O. 1887, c. 47, s. 45.

See *Rule 793* and notes, *infra*, p. 1045.

The certifying of the papers may be compelled by mandamus where the Judge has been applied to, and has refused to certify, and the right to appeal still exists: see *Reg. v. Wells*, 17 U. C. Q. B. 545; *Re Keenahan v. Preston*, 21 U. C. Q. B. 461; *Orr v. Barrett*, 9 C. L. T. 72.

Abandonment or Non-prosecution of a County Court Appeal.—Where an appeal has been properly lodged in the High Court, *semble*, that in case of its abandonment or non-prosecution after service of notice, *Rule 790* is applicable, and a motion to dismiss it is unnecessary: *Re Toronto Ry. Co. and City of Toronto*, 18 P. R. 489.

Setting
down
appeals.

57. The appeal shall be set down for argument at the first sittings of a Divisional Court of the High Court of Justice which commences after the expiration of one month from the judgment, order or decision complained of, and the Divisional Court shall give such order or direction to the Court below, touching the judgment to be given in the matter, as the law requires; and shall also award costs to either party in its discretion, which costs shall be certified to and form part of the judgment of the Court below; and upon receipt of the order, direction and certificate, the Court below shall proceed in accordance therewith. R. S. O. 1887, c. 47, s. 52, part; 58 V. c. 13, s. 44 (6); 63 V. c. 17, s. 12; 4 Ed. vii. c. 10, s. 15.

Costs.

(2) The Divisional Court shall be deemed to be seised of the appeal if and when the Judge has, pursuant to section 55, certified to the pleadings and other papers and the same have been filed in the High Court. 4 Ed. vii. c. 10, s. 14.

Appeals to
Divisional
Court.

(3) A Divisional Court may, subject to rules of Court, extend the time for setting down the appeal, or for giving notice of setting down or for doing any act or taking any proceedings in or in relation to the appeal, and may if the certificate is incomplete or incorrect, direct the same to be amended, or to be sent back to the Judge for amendment, as to the Divisional Court may seem just. 4 Ed. vii. c. 10, s. 14.

The month begins to run from the day on which the order or judgment appealed from was pronounced, but if not delivered in open Court it is not to be considered to be delivered until the parties are notified of it: *Fairclerk v. Sincayie*, 31 Ont. 256; but the appellant is not obliged to wait the expiration of a month from the judgment or order before setting down the appeal: *Lees v. Ottawa & N. Y. Ry.*, 31 Ont. 567; *Smith v. Baptist Church*, 1 O. L. R. 195.

As to setting down appeals from district Courts, see R. S. O. c. 109, s. 9 (3): *Coutts v. Warton Beet Sugar Co.*, 39 C. L. J. 788.

793.—(1) In appeals from County Courts, the pleadings, motions, orders and other papers to be certified to the proper officer of the High Court under section 51 (x) of the Act respecting County Courts, shall include: Rules 793, 794.
Papers to be certified.

(x) Now R. S. O. c. 55, s. 55.

(a) The original pleadings;

Where copies only of the pleadings are certified, the Court may, in a proper case, dispense with a literal compliance with this Rule: *Lees v. Ottawa & N. Y. Ry. Co.*, 20 C. L. T. 75; 31 Ont. 567.

(b) Notices of motion, and orders affecting questions raised by the appeal;

(c) The judgment or orders appealed from and the written opinion or decision of the Judge;
also where a trial has been had

(d) The Judge's notes, or where the evidence has been taken by a stenographer, his notes, of the evidence and of any objections and exceptions thereto, and of the rejection of any evidence, and of the Judge's charge.

(e) The exhibits put in at the trial.

(2) The said papers shall be fastened together and transmitted to the Central Office and the same shall be returned to the County Court when the appeal is disposed of.

(3) It shall not be necessary to certify or transmit the evidence or the objections or exceptions thereto, where the appeal is from a judgment or decision upon the pleadings, or upon a motion not founded upon the evidence. See Rules 1 Jan., 1896, 1489 (835).

Where the appeal is brought under s. 52, as to the papers to be certified, see s. 56, *supra*.

It is not a valid objection to an appeal that the Judge has not expressed in his certificate that the proceedings are certified "to the proper officer of the High Court": see *Baby v. Ross*, 14 P. R. 410.

Formerly the Court would not ordinarily quash or dismiss an appeal because the judgment appealed from had not been drawn up: see *Henderson v. Rogers*, 15 P. R. 241, but the Rule now explicitly requires that the formal judgment shall be among the proceedings to be certified.

794. Subject to the next following Rule, any Judge of the County Court appealed from, may, upon application to him, stay proceedings in the action to enable the appeal

staying proceedings to Court below.

Rule 795 to be brought upon such terms and for such time as may seem just. Rules of 1 Jan., 1896, 1489 (836).

See also *Rule 797*, and *Cotton v. Corby*, 5 U. C. L. J. 67.

Setting
down.

795. The appeal shall be set down to be heard at latest 2 clear days before the first sittings of a Divisional Court, which commences after the expiration of 30 days from the decision complained of, and, where the motion or appeal is founded upon the evidence at or before the time of setting down, the appellant shall deliver to the proper officer 2 copies of the evidence certified as correct for the use of the Judges. Rules of 1 Jan., 1896, 1489 (837), *amended*.

Taken from App. O. 41.

R. S. O. c. 55, s. 57, is similar, but names "one month" instead of "30 days." It is presumed that the provision of this *Rule* will prevail over the Statute, as the *Rule* was passed to vary the Statute, 58 V. c. 13, s. 44 (6), upon which sec. 57 of R. S. O. c. 55, was based, and the Rev Stat. is not to be considered as a new law (69 V. c. 3, s. 9), but as a consolidation of the former Act which fixed the time subject to Rules of Court. The month runs from the date of the delivery of the judicial decision, oral or written, and the order or judgment founded on it must be referred to that date: *Faulkes v. Swanzie*, 31 Ont. 256. If the decision is not given in open Court, it cannot be said to be pronounced until the parties are notified of it: *Id.*

Sunday is not reckoned in the thirty days when it is the first day: *Cooper v. Dixon*, 3 C. L. T. 198 (*sed quare*); nor when it is the last day: see *Rule 345*.

The appeal must be set down for a Divisional Court, which begins its sittings not later than 30 days from the decision, but may be set down for an earlier sittings: *Lees v. Ottawa & New York Ry. Co.*, 31 Ont. 567. The appeal cannot be set down until the Judge has certified the papers under R. S. O. c. 55, ss. 55, 56, and *Rule 795*: *Reckie v. McNeil*, 31 Ont. 444. After the time limited for setting down has expired there was formerly no jurisdiction to hear the appeal: *Id.*; but now the Divisional Court has jurisdiction to extend the time: 4 Ed. v. c. 10, s. 11. See section 57, (3) *supra*, p. 1044.

The fact that a stay of proceedings has been granted by the County Court Judge under *Rule 794* for a time extending beyond the commencement of the sittings at which the appeal should be set down under this *Rule* does not absolve the appellant from the necessity of complying with this *Rule*: *Paul v. Rutledge*, 16 P. R. 140; it is presumed that an extension of the time may be obtained under *Rule 553*: see note on p. 1039; but the appellate Court cannot either dismiss the appeal or extend the time for appealing until the papers are actually sent up: see *Gilmer v. McPhail*, *Id.* 151, and sec. 57 (2), *supra*, p. 1044.

Where notice of hearing is given under *Rule 796*, but the case is not set down, it seems to be doubtful whether *Rule 790* applies. It does not, an application for the dismissal of the appeal or the costs of an abandoned appeal may be made to the Divisional Court on the return day named in the notice of hearing: see notes to *Rule 348*, *supra*, p. 554, and *O'Donnell v. Guinness*, 28 Ont. 389.

796. The appellant shall, at least 7 days before the sitting at which the appeal is to be heard, serve the respondent with notice of hearing and the reasons of appeal. ^{Rules 796-798.} Rules of ^{Notice of} hearing. 1 Jan., 1896, 1489 (845), *amended*.

As to an extension of the time, see note to *Rule 795*, at 'see p. 1039.

Where notice is not given within the time limited, or any extension thereof, an appeal is not instituted.

There appears to be no provision requiring the respondent to serve reasons against the appeal.

797. Where notice of hearing of the appeal has been given and the appeal has been set down to be heard, and notice thereof signed by one of the Registrars of the High Court has been given to the sheriff where execution is in his hands, the execution of the judgment or order appealed from shall be stayed pending the appeal, unless otherwise ordered by the Divisional Court or a Judge of the High Court, or by a Judge of the County Court appealed from; and the order may be on such terms as the Court or Judge applied to thinks fit. Rules of 1 Jan., 1896, 1489 (838), *amended*. (See 58 V. c. 13, s. 8.) ^{staying execution.}

See also *Rule 794*, under which a County Court Judge may stay proceedings to enable the appeal to be brought.

7. APPEALS TO THE COURT OF APPEAL.

A suitor dissatisfied with the judgment of the High Court may, subject to the provisions of the Jud. Act, ss. 72 *et seq.*, *supra*, appeal therefrom to the Court of Appeal, or, by consent of all parties, he may appeal directly to the Supreme Court of Canada: R. S. C. c. 135, s. 26 (2); or, by leave of the Supreme Court, he may also appeal directly to that Court, where the judgment or order to be appealed from is pronounced in any action, cause or matter, or other judicial proceeding, in the nature of a suit or proceeding in equity; or in other cases, when the judgment is a final judgment: *Ib.*, s. 26 (3). Cass. S. C. Pr., 13, 20; but to obtain such leave special circumstances must be shewn: *Ib.*, *Schultz v. Wood*, 6 S. C. R. 587; *Bank of B. N. A. v. Walker*, Cass. Dig. 382; *Scirell v. British Columbia Towing Co.*, *Ib.*, 381; *Moffatt v. The Merchants Bank*, 11 S. C. R. 46; Cass. Dig. 382; *Lungtry v. Dumoulin*, *Ib.*; *Kyle v. Canada Compting*, 15 S. C. R. 188; *Histop v. McGilivray*, *Ib.*

The Rules regulating appeals from the High Court to the Court of Appeal apply, so far as appropriate, to appeals from the Drainage Referee: *R. Raleigh*, 18 P. R. 73.

798. An appeal to the Court of Appeal shall be a step in the cause or matter in which the judgment or order complained of was given, and shall be upon a case to be stated ^{appeal to be a step in cause, and on a case stated.}

Rule 799. by the parties, or in the event of difference, to be settled by the Court appealed from, or a Judge thereof, and such case shall set forth the judgment, order or decision complained of, and so much of the pleadings, evidence and other documents as may be necessary to raise the question for the decision of the Court of Appeal. *New.* See Con. Rule 813 and Rules of 1 January, 1896, 1488 (813).

The formal judgment as drawn up must be included in the appeal book. That is the subject of the appeal, and not the reasons upon which it is founded: *Thompson v. Robinson*, 16 Ont. App. at p. 184.

Documents not proved or produced at the trial cannot be relied on, or made part of the case in appeal: *Lionais v. Holson*, 10 S. C. R. 527.

The burden of procuring from "the Court appealed from, or a Judge thereof," an appointment to settle the appeal book, is on the appellant, though the respondent may under *Rule* 801 (3) move in the matter if he chooses: *Oatman v. Michigan Central R. Co.*, 1 O. L. R. 636.

See also *Rule* 806 and notes.

Commence-
ment of
appeal.

799.—(1) The appeal shall be commenced by a notice of intention to appeal according to Form No. 68.

Notice of
appeal.

(2) The notice shall be filed in the office in which the proceedings were commenced, and shall be served upon the parties affected by the appeal within one month after the date of the judgment, order or decision complained of, or within such further time as the Court of Appeal or a Judge thereof may allow. *New.* See 58 V. c. 12, s. 78 (1).

The date of a judgment or order is the day on which it was pronounced: see *Rule* 629; but see *Wallace v. Bath*, 7 O. L. R. 742.

Vacation is not to be reckoned in the month: *Rule* 352 (c).

The notice, Form 68 (H. & L. Forms, No. 1155), is entitled in the High Court, but it is also the "commencement" of the appeal, and all subsequent proceedings should be entitled in the Court of Appeal. Formerly the appeal was not initiated by a notice under R. S. O. 1887, c. 44, s. 71, nor until security was given: see *Smith v. Smith*, 11 P. R. 6; *Donovan v. Haldane*, 14 P. R. 106.

Service.

The retainer of a solicitor continues after judgment, so as to make service of notice of appeal on him good service on the client until the client takes proper steps to inform his opponent that he has withdrawn his authority: *De la Pole v. Dick*, 20 Ch. D. 351.

Notice must
be formal
notice.

The notice of appeal must be a formal notice, i.e. mere communication, verbal or otherwise, by an unsuccessful party to his opponent of his intention to appeal is not sufficient notice of appeal: *In re Blyth & Young*, 13 Ch. D. 416; *Re New Callan Co.*, 22 Ch. D. 481; see *Kettlewell v. Watson*, W. N. 1883, 102.

Service of the notice is now to be upon all parties "affected by the Rule 799. appeal." It would, therefore, seem to be necessary for a defendant appealing to serve any co-defendant or third party against whom he claims relief over, and probably all against whom the plaintiff, in case the appeal is successful, can claim any relief different from that which the judgment already gives him: see formerly *Freed v. Orr*, 6 Ont. App. 690, not followed in *Johnston v. Petrovic*, 17 P. R. 332; *Re Salmon*, 42 Ch. D. 351; see also *Rules* 811 and 813 and notes.

The service of notice as required by the Statute is not a condition precedent to the jurisdiction of the Court to hear the appeal, and may be waived by the respondent: see *Park Gate Iron Co. v. Coutts*, L. R. 5 C. P. 634. Notice of appeal not necessary to give Court jurisdiction.

Where a notice of appeal has been given contrary to an undertaking not to appeal, the notice may be set aside on a motion to the High Court: *Donovan v. Haldane*, 14 P. R. 106.

"Parties Affected by the Appeal."—Where a plaintiff appeals third parties are apparently, under the corresponding English Rule, not "directly affected by the appeal": *Re Salmon*, 42 Ch. D. 351, but *quære* whether they are not "affected by the appeal," within the above Rule 799: *Eckenswiler v. Coyle*, 18 P. R. 433; but see *O'Sullivan v. Lake*, 12 P. R. 550.

"Within such Further Time."

The language of this Rule is very similar to that of Con. Stat. U. C. c. 13, s. 25, under which it was held that the mere statement of an unexplained oversight on the part of a solicitor, was an insufficient ground for extending the time for giving notice of appeal, though it might be otherwise if an important question of law were involved, as to which there was a conflict between the Courts: *Gordon v. Great Western Ry.*, 6 P. R. 300.

Under the present practice relief will be granted against a slip in practice, such as a failure to give notice of appeal, wherever the justice of the case requires it, and no injury has resulted to the opposite party which cannot be compensated for by costs; and, in considering what justice requires, regard is to be had to the *bona fides* of the applicant, and whether or not his proposed appeal appears to be groundless or frivolous: *Ross v. Robertson*, 7 O. L. R. 464; *Ray v. Port Arthur*, 7 O. L. R. 737.

Before applying for an extension of time, the solicitor requiring the time should apply for it to the opposite solicitor, who should in every proper case grant it: *Bodine v. Howe*, 1 O. L. R. 208. Where the opposite party unreasonably refused to consent to extend the time, an order extending the time was made without costs: *Bodine v. Howe*, 1 O. L. R. 208; and see *McGuire v. Corry*, *Id.*, 590, where the costs of the application were made costs on the appeal. When allowed to be served after time has elapsed.

Where the notice was served on the last day after office hours, the notice was allowed, but the Court doubted whether the section requiring notice applied in that particular case: *Rose v. Hickey*, 7 P. R. 390; and where notice had been served in due time on the respondent, but, through the negligence of a clerk of the appellant's solicitor, notice had not been served on the Registrar of the Court appealed from (which was then necessary), notice was allowed to be served on payment of costs: *Re Laws*, 9 P. R. 72; and see *Re Crosby*, *Munns v. Burn*, 34 Ch. D. 664; and where notice had been given, but the appeal was not set down in time, but security had been given for a large part of the debt and costs, leave to prosecute the appeal

Rules was given on terms: *D'Ivry v. The World*, 17 P. R. 543; see also
800, 801. *Thurcson v. Thurcson*, 18 P. R. 414; but where nothing was done
 within the time, and no sufficient special circumstances were shown,
 leave was refused: *Miller v. Brown*, 9 P. R. 542. In England a delay
 of three days beyond the prescribed time in delivering notice to the
 officer has been held fatal to the right of appeal: *Ex parte Lamb*, 45
 L. T. 639, and see *Ex parte Lyon*, ib. 768; *Re Blyth & Young*, 13 Ch.
 D. 416; and *Wright v. Leys*, 10 P. R. 354.

See also the cases relating to applications for leave to appeal in
 notes to *Rule 353*.

**Sittings at
 which to be
 set down.**

800. The appeal shall be set down to be heard for, at
 latest, the first day of the first sittings of the Court of Appeal,
 which commences after the expiration of 6 weeks from the
 date of the judgment, order or decision complained of, unless
 otherwise ordered by the Court of Appeal or a Judge thereof.
See Rules 1 January, 1896, 1847 (804).

For the sittings of the Court of Appeal, see *Rules 95 and 96*.

The date of the judgment, etc., is the date of pronouncing it; see
Rule 629.

**Statement
 of draft
 case.**

801.—(1) At the time of serving the notice of intention
 to appeal, or within 4 days thereafter, or within such further
 time as the Court of Appeal or a Judge thereof may allow,
 the appellant shall serve the respondent with a draft of the
 appeal case or book as proposed by the appellant, together
 with his reasons of appeal. *See Rules 1 Jan., 1896, 1488*
(814).

**Draft, what
 to contain.**

(2) Such draft shall consist of the documents or copies
 thereof which the appellant proposes shall constitute the
 appeal book, or a list or statement of such of said documents
 as are proposed to be set out in the appeal book in full,
 and copies of the portions proposed to be used of such docu-
 ments as are not proposed to be set out in full.

**To be
 returned by
 respondent.**

(3) The respondent shall return the draft appeal book
 within 4 days, with his modifications or suggestions, and in
 the event of difference, either party may give 2 clear days'
 notice of an application to the Court or a Judge to settle
 the case. The respondent shall serve his reasons against
 appeal within 6 days after service of the draft appeal book.
New.

The "respondent" will, it is presumed, be construed to mean all
 persons who are "affected by the appeal," and who must therefore
 be served with the notices provided for by *Rules 799 and 811*.

The Court, or Judge, to settle the case in the event of the parties differing, is the Court appealed from, or a Judge thereof: see *Rule 801*. 798.

Where the parties cannot agree as to the form of the case the duty rests on the appellant to obtain an appointment from the Court appealed from, or a Judge thereof, to settle it; although under s.-s. (31) of this *Rule*, the respondent may apply therefor if so disposed: *Oatman v. Michigan Centl. Ry.*, 1 O. L. R. 636.

The case should only contain so much of the proceedings as is necessary to raise the questions involved in the appeal. In *Parsons v. Standard Ins. Co.*, 4 Ont. App. at p. 330, Burton, J.A., in remarking upon the unnecessary length of the case, said: "It appears to us to be a very grave abuse and violation of the Rules 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 sufficient reason for refusing the whole costs of the appeal"; see also *Bryce v. Lontel*, 21 Ont. App. 100.

If the notes of the evidence taken have been lost, the Court of Appeal may allow the evidence to be taken over again: *Ex parte Firth, Re Cornburn*, 19 Ch. D. 419; 51 L. J. Chy. 473.

A new point may not be allowed to be raised in the Court of Appeal, where, if raised, it might have been met by evidence: *Th. v. Raudwick v. Australian C. I. Corp.*, 1893, A. C. 322; *Brown v. Dunn*, 6 L. 67; *Martin v. Great Northern Ry.*, 16 C. B. 179; see also *Millar v. McTuygart*, 20 Ont. 617; *Connecticut F. Ins. Co. v. Kavanagh*, 1892, A. C. 473; 67 L. T. 508; and the Court will not decide such point in favour of the party taking it, unless it is satisfied that it has all the facts before it, and that no satisfactory answer to it could have been given: *Tasmania v. City of Corinth*, 15 App. Cas. 223, approved by P. C.; *Karunaratne v. Ferdinandus*, 1902, A. C. 467; 86 L. T. 329; *Archambault v. Archambault*, 1902, A. C. 575; 87 L. T. 404.

Where certain issues were not raised on the pleadings, but at the trial had been treated as if raised, the objection that they were not pleaded was not allowed to be taken in the Court of Appeal, because if taken at the trial an amendment would have been allowed: *Kennan v. Murphy*, 8 L. R. Ir. 285.

A point of law not taken at the trial may be raised for the first time on appeal: see *McKelvey v. Le Roi Mining Co.*, 32 S. C. R. 664; provided that the appellate Court is satisfied that it has before it all the facts bearing on the new contention as completely as if it had been raised at the trial: *Karunaratne v. Ferdinandus*, 1902, A. C. 467; 86 L. T. 329; *Archambault v. Archambault*, 1902, A. C. 575; 87 L. T. 404; and see the *Queen v. Poirier*, 30 S. C. R. 36.

Where an appellant succeeds upon a point not adjudicated upon in the Court below he may not be allowed his costs: *Goddard v. Jeffreys*, 46 L. T. 904; *Page v. Austin*, 7 Ont. App. 1; *Van Velsor v. Hughson*, 9 Ont. App. 290; *Cooper v. Cooper*, 53 L. T. 1. See also p. 1010.

In the Privy Council an appellant is not allowed to take a point not taken in the Court below: *Corporation of Adelaide v. White*, 55

**Rules
802-804.**

L. T. 3; Rundwick v. Australian C. I. Corp., supra; Connecticut P. Ins. Co. v. Kavanagh, 1892, A. C. 473; or to raise questions not raised in the Court below either on the pleadings or evidence; Gies v. Manitoba & N. W. Ry., 1897, A. C. 254; but see McKeel v. Le Roi Mining Co., Karunaratne v. Ferdinandus, and Archambault v. Archambault, supra.

Appeal
books,
when to be
printed.

802.—(1) Unless otherwise ordered by the Court of Appeal or a Judge thereof as hereafter provided, the appeal books need not be printed in the following cases:

(a) Appeals under sub-clauses (a), (b), (d), (e), (f), (g), (h), (i), (j), (k), (n), and (o), of section 50 (2) of the Judicature Act, as amended by the Act 4 Ed. vii. cap. iii, entitled "*An Act to amend the Judicature Act.*"

(b) Appeals under sub-clauses (e) and (f) of section 56 (1) of the Judicature Act as amended by the afore-said Act.

(2) In cases of appeal under sub-clause (c) of the afore-said section 50 (2), only so much of the evidence and exhibits shall be printed as pertain to the questions involved in the appeal; and, in the event of difference between the parties as to what the book should contain, the same shall be settled by the trial Judges, or one of them, on application, of which 7 clear days' notice shall be given to the opposite party. Rule 1265, 20 June, 1904; Ont. Gaz., 25 June, 1904.

Subject to this Rule and Rule 803, appeal books must be printed; see sec. 76b of the Jud. Act, *supra*, p. 138.

What may
be printed.

803. The Court of Appeal or a Judge thereof may order the appeal book in any of the cases specified in Rule 802 (1) or any of the documents or proceedings or other papers therein to be printed; and may under special circumstances dispense with printing in a case in which printing would otherwise be necessary. Rule 1265, 18 June, 1904.

In the cases mentioned in which the printing of appeal books is not compulsory, it is probable that, except where, for the convenience of the Court of Appeal, cases ought to be printed, the Court will not, as a rule, force that course upon an unwilling appellant, at the instance of a respondent, upon a motion under this Rule; see *Trotter v. Dominion Construction Co.*, 18 P. R. 16. If the respondent desires to have the appeal case printed, he may have it done at his own expense; and the appellant may be put on terms in the event of a further appeal by him, upon which a printed case will be necessary, as to the use of the books printed by respondent: *Id.*

Reasons
for and
against
appeal.

804.—(1) The reasons for and against the appeal shall contain a statement of the points of law intended to be argued, and the authorities relied upon. Rules 1 January, 1896, 1488 (817).

(2) If the appeal is from a part only of the judgment, ^{Rules 805, 806.} the reasons of appeal shall specify the part. Rules 1 January, 1896, 1488 (814a).

(3) If the respondent neglects to serve reasons against the appeal, the Court may hear the appeal *ex parte* and give judgment thereon.

(4) A respondent who has made default in service of the reasons against appeal may apply to the Court of Appeal or a Judge thereof for leave to serve his reasons, and leave may be given on such terms as may seem just. See Rules 1 January, 1896, 1488 (815, 816).

See also Rule 805.

805.—(1) The reasons of appeal and reasons against appeal shall form part of the appeal book, and the book shall contain the names and the written opinions of the Judges appealed from, but if such opinions have appeared in the official reports, a reference thereto shall be sufficient. See Rules 1 January, 1896, 1488 (819). ^{Appeal books to contain certain matters.}

(2) The copies of evidence to be contained in the appeal book, where not printed, may be procured from the stenographer, or may be made by the appellant's solicitor; but if made by the appellant's solicitor, no greater sum shall be allowed therefor than would be payable and allowed if the copies were furnished by the stenographer. See Rules 1 January, 1896, 1488 (818). ^{Copies of evidence.}

See Rule 792 and notes.

806.—(1) Where the appeal book or any matter is printed, the same shall be printed on paper of good quality, on one side of the paper only, and in demy-quarto form, with small pica type leaded; and the size of the books shall be 11 inches in length, and 8½ inches in width. Rules of 1 January, 1896, 1488 (821). ^{Form of printed appeal books.}

(2) The Registrar shall not file printed appeal books or printed matter for use on the appeal without the leave of a Judge, if this Rule has not been complied with. Rules of 1 January, 1896, 1488 (822).

Rule 806.

(3) If the press has not been carefully corrected, the Court may disallow the costs of printing, or may decline to hear the appeal, and make such order as to postponement and payment of costs as may seem just. Rules of 1 January, 1896, 1488 (823).

The following directions respecting the printing of appeal books, formerly issued by the Court of Appeal before 38 V. c. 13, s. 8 (G), by which printing of books became no longer necessary, are now again to be followed, having been re-issued on 8th Oct., 1894.

The Registrar, before receiving any appeal book, is to see that the following requirements have been observed:

1. Paper: good quality, printed on one side only. (The book should have the printed page on the *left hand side*).
2. Form: demy quarto, 11 × 8½ inches.
3. Type: pica leaded or small pica leaded. (Pica leaded preferred).
4. Marginal numbering of every tenth line of each page (and see *Rule 809*).

The numbering of the lines is not to run on through the book, but the lines of each page are to be numbered separately, e.g., 10, 20, 30, 40 (and see *Rule 809*).

5. Index of principal matters.

The index is to shew in detail

- (a) Each pleading, rule, order, or entry, with its date.
- (b) Each witness by name.
- (c) Each exhibit or other document, with its description and date.

The index is to be at the beginning of the book, and is not to be arranged alphabetically, but in the order in which the matters are printed in the book.

The Registrar is also to see that the title page contains a correct statement of the Court or Judge whose judgment is appealed from. An appeal from a single Judge is to be stated to be an appeal from the Judge, giving his name.

The appeal book is to contain the date of the first proceeding and the date of the filing of the several pleadings at the commencement of the copy thereof.

The provision as to printed books, which requires the reading matter to be on the *left hand side*, applies also to typewritten appeal books, and to copies of evidence, or examinations, which form part of the case, and the Registrar has been directed by the Court to refuse to accept any books where this rule has not been complied with.

Where no written judgment has been given by the Court or Judge appealed from, a statement of the grounds assigned for the judgment should be obtained from the reporter, or from the notes of counsel, and should be inserted in the appeal book: *Blackley v. Kemp*, 16 Ont. App. 523.

Documents not proved or produced at the trial cannot be put in as a part of the case in appeal: *Lionais v. Molson*, 10 S. C. R. 527.

In *Barber v. Morton*, 2 C. L. T. 340, Burton, J.A., said: "I think Rules 807-810. there is no reason to interfere with the previous decision in this Court as to allowing ten cents a folio 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."

807. The appeal book when not printed shall be legibly type-written, in words at length, in the form in which copies of evidence are furnished by stenographers for use in the High Court. See Con. Rule 818; Rules 1 January, 1896, 1488 (818) b. Form of appeal book when not printed.

808. The appellant, if costs are awarded to him, shall, when the appeal book has not been printed, be entitled to a sum not exceeding 30 cents per folio for one copy of the appeal book, for the making of all copies of necessary matter, other than evidence, included in the appeal books delivered. *New.* Allowance for preparing appeal books when not printed.

809. The appeal books whether type-written or printed shall have the pages numbered consecutively and every tenth line of each page shall be numbered in the margin. The numbering shall be from the top of the page and not from the beginning of the book. See Rules 1 January, 1896, 1488 (821). Pages of appeal books, how to be numbered.

810—(1) Where the appeal book or any matter is printed, the appellant shall, 7 clear days before the first day of the sittings at which the appeal is to be heard, deliver to the respondent 2 printed appeal books or copies of printed matter, and shall, at or before the time when the appeal is required to be set down, deliver one of such copies to the Registrar of the Court of Appeal, to be filed, and 10 copies for the use of the Judges and officers of the Court, and also 30 copies for the purpose of being delivered in the event of an appeal to the Supreme Court of Canada, to the party appealing to that Court, for use upon such appeal. Rules of 1 January, 1896, 1488 (824). Delivery of appeal books.

(2) Where the appeal book is not printed the appellant shall (subject to the provisions of Rule 812) serve the respondent with a copy within the time limited for service of notice of hearing of the appeal. *New.*

Rules
811, 812.
Notice of
argument.

811. Notice of hearing of the appeal (which may be according to Form No. 69) shall be given to all parties affected by the appeal, 7 clear days before the first day of the sittings at which the appeal is to be heard. *New.* See Rules 1 January, 1896, 1487 (804).

For Form No. 69, see H. & L. Forms No. 1162.

"Parties Affected by the Appeal."—See note to Rule 799.

An appellant ought to serve notice on all parties who will be affected by the order of the Court of Appeal; and if such person is not served, he may appear without service and obtain costs: *Re New Cullao, etc.*, 22 Ch. D. 481. A third party who obtains leave to appear at the trial, and take such part as the presiding Judge directs, is entitled to notice of an appeal by the plaintiff from a judgment dismissing the action: *Eckenswiler v. Coyle*, 18 P. R. 123.

See also notes to Rule 799.

Trustees served with notice of appeal, and holding merely a neutral position, without any intention of taking any part in the argument, ought not to appear by separate counsel on the appeal: *Carroll v. Graham*, 1905, 1 Ch. 178.

Setting
down
appeal.

812.—(1) The Registrar shall set down an appeal upon delivery to him 2 clear days before the sittings of the Court at which the appeal is to be heard, of such number of appeal books as are necessary for the use of the Judges who are to hear the appeal.

(2) If at the time when notice of hearing of the appeal should be given or when the appeal should be set down, copies of the stenographer's notes of evidence have not been prepared by him, the appellant, where the appeal book is not to be printed, may deliver the same to the respondent with the notice of hearing, or to the Registrar on setting down the appeal, as the case may be, without the evidence, and shall deliver the necessary copies of the evidence to the respondent and the Registrar as soon as possible thereafter and before the argument of the appeal. *New.* See Rules 1 January, 1896, 1488 (818).

It is the appellant's duty to set down the appeal, and for that purpose to get the case settled by a Judge if the parties differ: *Outman v. Michigan Central Ry.*, 1 O. L. R. 624.

Where a motion was made to confirm an entry of an appeal made after the proper time, which the respondent should have consented to, no costs of the application were allowed: *McLaughlin v. Mayhew*, 7 O. L. R. 111.

818. A cross appeal shall not in any circumstances be necessary, but if a respondent intends upon the hearing to contend that the decision should be varied, he shall, in his reasons against the appeal, give notice of such contention to any party who may be affected thereby, and shall concisely state the grounds. The omission to give such notice shall not affect the power of the Court of Appeal, but may, in the discretion of the Court, be ground for an adjournment of the appeal, or for a special order as to costs. Rules of 1 January, 1896, 1488 (825).

Rule 813.

Cross appeal unnecessary. Proceedings in lieu of.

Taken from App. Orders (1878) O. 16.

As to the concluding clause, see *Toronto Junction v. Christie*, 25 S. C. R. 551, where cross relief was given though there was no cross appeal; and see *Rule 817 (3)*, *infra*; and *Hunter v. Hunter*, 24 W. R. 527; but see *Stephens v. Chausse*, 15 S. C. R. 370, where it was held if there is no cross appeal the judgment cannot be modified in respondent's favour; but see *Atty-Gen. v. Simpson and Challoner v. Lobo*, *infra*.

This *Rule* is substantially the same as the English (1883) R. 570. Under the English practice, however, by which security for costs is not required to be given by an appellant, it is of less importance how parties are brought before the Court, and possibly the present *Rule* may, therefore, be more strictly construed than the corresponding Eng. *Rule*.

Notice by way of cross appeal will come on with the original appeal: see *Coney v. Nichols*, 7 L. R. Ir. 107.

Notice by a respondent under the English *Rule* to vary the decision of the Court was proceeded upon, though the point was one in which the original appellant had no interest: *Ralph v. Carrick*, 11 Ch. D. 873. But the Court will not, under the power contained in this *Rule*, entertain a cross appeal merely on a question of costs: *Harris v. Aaron*, 4 Ch. D. 749.

Where a claim and counter-claim are both dismissed, and the defendant appeals from the judgment on the counter-claim, if the plaintiff desires also to appeal from the judgment on his claim, he must bring a cross-appeal, and cannot raise the question by a notice under this *Rule*: *National Society, etc., v. Gibb*, 1900, 2 Ch. 280.

The *Rule* does not enable a respondent to give notice of cross appeal to parties or persons who are in no way affected by the original appeal: *Begg v. Ellison*, 14 P. R. 267; *Johnston v. Petrolia*, 17 P. R. 332; *Re Cavander*, 16 Ch. D. 270.

A respondent questioning the judgment under this *Rule* is so far in the same position as an appellant, that anything which would be an answer to an independent appeal by him will be an answer to his cross appeal: *Re Charles Stark Co.*, 15 P. R. 451; but proceedings taken under this *Rule* are only a branch of the main appeal, and fall with the latter if it be discontinued, or dismissed for want of prosecution: *Pickering v. Toronto Ry. Co.*, 16 P. R. 144; but see *The Borsring*, 10 P. D. 18, where it was held that where after a cross notice given, the appellant discontinues or abandons, the respondent's notice is to be treated as a cross appeal, but the appellant may bring

Rule 814. forward the matter of his appeal by way of objection to the cross appeal.

A respondent may serve notice under this *Rule* on a co-respondent claiming a variation in his favour of the judgment appealed from: *Ex p. Payne*, 11 Ch. D. 539; *Harrison v. Cornwall, etc.*, 18 Ch. D. 334; but, apparently, not in respect to a question in which the appellant is not interested; an independent appeal in such case would seem to be necessary: *Johnston v. Petrolia*, 17 P. R. 332, not following *Freed v. Orr*, 6 Ont. App. 690.

But where judgment was recovered against a township corporation, and a contractor, restraining them from constructing a drain, and ordering them to pay the costs of the action, but directing the township to indemnify the contractor as to such costs, and the township alone appealed, making the contractor a respondent, which appeal was allowed; it was held that as no case for relief was made against the contractor, except through the township, and the case failing against the township, the action should be dismissed as against both defendants, and that the contractor was entitled to his costs of action, but not of the appeal: *Challoner v. Lobo*, 1 O. L. R. 156, 292; 32 S. C. R. 505.

In *Atty.-Gen. v. Simpson*, 1901, 2 Ch. 671, acting under Eng. R. 808 (o. 58, r. 4), corresponding to Con. *Rule* 817, a judgment was varied in favour of a respondent, where the appeal was being allowed on other points, although there was no cross-appeal.

Where a respondent sought to vary the order appealed from, leave to enforce the order pending the appeal without prejudice to his cross appeal was refused: *Re Stark*, 15 P. R. 451.

Costs.—Where respondents gave notice of intention to have the judgment varied, and both appeals were dismissed, the appellants were ordered to pay the costs, except such as were occasioned by the notice: *The Lauretta*, 4 P. D. 25.

Where there were two respondents, one of whom gave a cross notice affecting the other respondent, the appellant, whose appeal was dismissed, was ordered to pay half the costs of both the respondents, and the unsuccessful respondent in the cross appeal was ordered to pay half the costs of the other respondent: *Harrison v. Cornwall Mineral Ry. Co.*, 18 Ch. D. 334. Where, however, the costs could not have been materially increased by the notice, no apportionment was made, but a fixed sum was allowed for costs incidental to the notice: *Robinson v. Drakes*, 23 Ch. D. 98.

As to the costs of a respondent who has given no notice of objection under this *Rule*, and as to whom the judgment appealed from is reversed, see *Challoner v. Lobo*, *supra*.

Style of
proceedings.

814. The style of the cause in the Court below shall be used and retained in every proceeding in the Court of Appeal, the designation "appellant" or "respondent" being added, *e.g.*,

Between A. B. (*respondent.*)
and PLAINTIFF.
C. D. (*appellant.*)
DEFENDANT.

Rules of 1 Jan., 1896. 1488 (827).

815. Where a party not served ought to be notified, the Court may direct service to be made, and may postpone the hearing of the appeal for that purpose, upon such terms as may seem just. *Con. Rule 828.*

Rules 815-817.
Court may order parties not served to be notified

In *Re Salmon, Priest v. Tophay*, 61 L. T. 146; W. N. 1889, 106, the Court directed third parties to be served, who, if the judgment were reversed, would have to indemnify defendant, the defendant so desiring, though the Court considered that the third parties were only indirectly affected. The defendant was ordered to pay the costs of the adjournment.

As a rule a respondent will not be heard by counsel in support of the appellant's case, but the rule may be relaxed; see *Re Marquis of Ailesbury's Settled Estates*, 1892, 1 Ch. 506.

816. If either party neglects to appear the Court may hear the other party, and give judgment or may postpone the hearing upon such terms as may seem just. *Con. Rule 829.*

Default of parties at hearing—effect of.

817.—(1) The Court shall have power to give any judgment which ought to have been pronounced and to make such further or other order as may seem just.

Powers of Court as to pronouncing judgment in the case.

(2) The Court [shall have power to draw inferences of fact, not inconsistent with the findings of the jury, if any, and] may, if satisfied that there are before the Court all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly; or, if of opinion that there are not sufficient materials before it to enable it to give judgment, the Court may direct the appeal to stand over for further consideration, and such issues or questions to be tried or determined, and such accounts and inquiries to be taken and made, as it may think fit.

(3) The powers aforesaid may be exercised notwithstanding that the appeal is only as to part of the judgment, order or decision, and may be exercised in favour of all or any of the parties, although such parties may not have appealed. *New.*

The powers conferred by clause (2) are similar to those conferred on a Divisional Court by *Rule 615*, except that that *Rule* does not contain the words in brackets. See notes to *Rule 615*.

Clause (3) is only a repetition of what is provided by sec. 76 of the Act.

Rule 818. Under this *Rule* the Court of Appeal may vary a judgment appealed from in favour of a respondent who has not given any notice of cross appeal: *Attorney-General v. Simpson*, 1901, 2 Ch. 671; 85 L. T. 325; see also *Challoner v. Lobo*, 1 O. L. R. 292; 32 S. C. R. 505, in note to *Rule* 813.

Where the Court of Appeal is equally divided the judgment in appeal is affirmed, and usually with costs: *Long v. Hancock*, 12 Ont. App. 156; but the Court may refuse to give costs: *Re Stratford & Huron*, 38 U. C. Q. B. 112; and where, on a motion to quash, the Court was equally divided in opinion as to their jurisdiction to hear the appeal, no costs were given: *Whiting v. Hovey*, 12 Ont. App. 119.

In the Supreme Court the practice in such a case seems uniformly to have been to give no costs, though the Court may give the respondent costs where it thinks that course would be proper: see *Poulin v. Quebec*, 9 S. C. R. 185, and Cassel's Dig. p. 676.

Where a decision is affirmed in consequence of the appellate Court being equally divided, it has been held that the appellate Court is not bound by the decision, where the point involved arises in a subsequent case: *Re Stanstead Election*, 20 S. C. R. 12; see also *Clarkson v. Atty.-Gen.*, 16 Ont. App. 202; and see *supra*, pp. 139-40.

As to costs in the case of a non-suit set aside, where respondents contended that the Judge had acted *ex mero motu*, see *Mills v. Hamilton St. Ry.*, 17 P. R. 74, in note "Costs," on p. 1039.

Where an objection, held to be fatal, was taken by an appellant on appeal, but had not been taken in the Court below, the appellant was allowed costs of the appeal, but not costs of the hearing in the Court below: *Re O. C. S., a Debtor*, 1904, 2 K. B. 161. See also *Horton v. Bosson*, 1899, W. N. 23, 38.

The Registrar to certify result of appeal.

818. The decision of the Court of Appeal shall be certified by the Registrar to the officer of the High Court with whom the judgment or order appealed from was entered, who shall thereupon cause the same to be entered in the proper judgment or order book, and all subsequent proceedings may be taken thereupon, as if the decision had been given in the Court below. Con. Rule 830.

(a) Upon the filing of the order of His Majesty, in His Privy Council, made upon an appeal to His Majesty in Council, with the officer of the High Court with whom the judgment or order appealed from was entered, he shall thereupon cause the same to be entered in the proper book, and all subsequent proceedings may be taken thereupon as if the decision had been given in the Court below.

(b) When the judgment of the Supreme Court of Canada in appeal has been certified by the Registrar of the Court to the proper officer of the High Court he shall thereupon make all proper and necessary entries thereof, and all subsequent proceedings may be taken thereupon as if the judgment had

been given or pronounced in the High Court. See R. S. O. Rule 819. c. 135, sec. 67. Rule 1255, 28th November, 1903.

As to the application of clauses (a) and (b) to pending cases, see *Earle v. Burland*, 8 O. L. R. 174, 176; 5 O. W. R. 629. *44:997.R.663*

Since the Jud. Act, though not by reason of any provision contained in it, the Master in Chambers has held that an order in Chambers making the certificate of the Court of Appeal an order of the High Court is unnecessary: *Freed v. Orr*, 9 P. R. 181; *Lowson v. Canada Farmers Ins. Co.*, ib., 185. Under Rule 818 the proper officer of the High Court can, without order, enter in the Judgment Book the certificate of the Court of Appeal, the Order of His Majesty in His Privy Council, or the certificate of the Supreme Court, and it may thereupon be acted on as a judgment of the High Court: see *Lowson v. Canada Farmers Ins. Co.*, 8 Ont. App. 613. Process may then be issued on the judgment so entered, without further order: *Lowson v. Canada Farmers, etc.*, *supra*. The judgment entered in the High Court must not be altered in accordance with the certificate of the Court of Appeal, where such certificate varies the judgment appealed from. The inconveniences attending any physical alteration of the records of the Court are pointed out in 19 C. L. J. 302; and it is now forbidden by Rule 315, *supra*.

The certificate of the Court of Appeal, or Supreme Court, or the order of His Majesty in His Privy Council, is entered in the judgment book *verbatim et literatim*, and a note referring thereto is made in the margin of the entry of the original judgment, or order, affected thereby: it should be entered in the same office in which the order or judgment appealed from was entered.

The Registrar in drawing up the certificate may introduce any proper and usual provision though not expressly ordered in the judgment delivered on the appeal, and this authority extends to the insertion of directions for the restitution of money paid in obedience to a reversed judgment: *McKindsey v. Armstrong*, 11 P. R. 200.

When the certificate drawn up and issued, does not conform to the judgment of the Court, a motion may be made to amend it, so as to make it conform thereto: *St. John v. Rykert*, 3 C. L. T. 119; *McKindsey v. Armstrong*, 1 P. R. 200; and see notes preceding Rule 640.

Where an injunction order had been varied by the Court of Appeal by suspending its operation for a time, it was held that a further extension might be granted by the Court below: *Shelfer v. London Electric, etc.*, 1895, 2 Ch. 388.

The Supreme Court will not go behind the certificate as to the result of the appeal: *Booth v. Ratté*, 21 S. C. R. 637.

After the certificate of the Court of Appeal has issued under this Rule, the cause is no longer in the Court of Appeal, except as regards any application in reference to the certificate, but all subsequent proceedings are to be taken in the High Court, and any application to stay proceedings pending any further appeal must be made to the High Court: *Hargrove v. Royal Templars*, 2 O. L. R. 126.

819. Where the Registrar considers a notice of settling the certificate of the Court of Appeal to be proper, he shall appoint a time for the purpose, and 2 clear days' notice thereof shall be given. Con. Rule 831. Certificate of appeal—settle-ment of.

Rules
820-822.
 Moving to
 vary min-
 utes of
 certificate.

Appellants
 may dis-
 continue.

Any party dissatisfied with the minutes of the certificate, may move to vary them: *General Share and Trust Co. v. Wetley*, 20 Ch. D. 130; and see notes to *Rules* 624-627.

820 An appellant may discontinue his appeal by giving to the respondent a notice signed by the appellant or his solicitor, stating that he discontinues, and thereupon the respondent shall be entitled to the costs of the appeal. Con. Rule 832.

Where an appellant has given notice of his intention to withdraw his appeal and has obtained respondent's consent, he cannot afterwards revoke it and proceed with the appeal: *Watson v. Cave*, 29 W. R. 768; 44 L. T. 40; 50 L. J. Chy. 561; 17 C. L. J. 366.

After notice of abandonment of an appeal has been given, any application for leave to restore it must be supported by evidence showing the existence of a *prima facie* ground of appeal: *Union Bank v. Rideau Lumber Co.*, 19 P. R. 106.

Where the Court had no jurisdiction, an appeal was quashed, with costs, the Court, on the merits seeing no reason to differ from the decision of the Court below: *Teskey v. Neil*, 15 L. R. 244.

As to the costs on discontinuance, see *Rule* 822.

As to quashing appeals, see sec. 51 of the Act.

Effect of
 default
 in giving
 notice of
 appeal or
 security.

821. If an appellant who has served a notice of appeal does not give security as hereinafter provided, in case security is not dispensed with, or does not set the appeal down, he shall be deemed to have abandoned the same, and the respondent shall be entitled to the costs of the appeal. Rules of 1 Jan., 1896, 1488 (826).

This *Rule* obviates in most cases the necessity of moving, as was the former practice, to dismiss for want of prosecution; see Con. Rules, 1888, R. 826; *Re Toronto Ry. Co. v. Toronto*, 18 P. R. 489.

After an appellant is in default, as in this *Rule* mentioned, he is strictly speaking not entitled to proceed further without obtaining leave, on application, for that purpose, on the granting of which proper terms may be imposed; see *D'Ivy v. The World*, 17 P. R. 543.

Costs on
 discontin-
 uance
 or abandon-
 ment.

822. The costs under Rules 820 and 821 may be taxed without an order upon the production of the notice of discontinuance served, or of the notice of appeal, with an affidavit that the appeal has not been set down; and if the costs are not paid within 4 days from taxation the respondent may obtain on *proceipe* an order, in the Court appealed from, for payment of the same on filing the certificate of taxation and an affidavit of non-payment of the costs. Con. Rule 832. *last part amended.*

823. A respondent may consent to the reversal of the judgment, order or proceeding appealed against, by giving to the appellant a notice of such consent signed by him or his solicitor, and thereupon the Court may pronounce judgment of reversal. Con. Rule 833.

Rules
823-826.

A respondent may consent to a reversal of the judgment, etc.

824 On an appeal to the Supreme Court of Canada a case shall not be certified unless the proof sheets of the judgments in the Court of Appeal have been submitted to the Judges thereof for correction. Con. Rule 834.

Appeal to
Supreme
Court.

8. STAY OF EXECUTION AND SECURITY ON APPEALS.

(i) General Rules.

825. No security for costs shall be required on a motion or appeal to a Divisional Court. See 58 V. c. 12, s. 17; Rules 1 Jan., 1896, 1487 (803).

Security
for costs on
motions or
Divisional
Court.

This Rule applies in County Court appeals as well as in High Court motions and appeals: *Arnold v. Van Tugl*, 30 Ont. 663, and see the Acts from which the Rule was taken, viz.: 58 Vict. c. 12, s. 17; c. 13, s. 3, and R. S. O., pp. 3762, 3763.

The Rule does not apply to appeals from Surrogate Courts: see Surrogate Rule 57; *In re Nichol*, 1 O. L. R. 233. The Rule does not preclude a defendant from obtaining security for costs under Rule 1198, where a plaintiff removes out of the jurisdiction pending the appeal: *Tanner v. Weiland*, 19 P. R. 149.

As to a stay of execution, see Rule 827.

826. Unless otherwise ordered by the Court of Appeal or a Judge thereof, an appeal to the Court of Appeal shall not be allowed unless before delivering his reasons of appeal, the appellant gives security that he will effectually prosecute his appeal and pay such costs as may be awarded in case the judgment appealed from is in whole or in part affirmed. New.

Security
for costs
on appeal
to C. A.

"Unless otherwise ordered."—The Court appealed to, or a Judge thereof, may on special application dispense with security for costs, or may reduce the amount for which security is to be given, below that mentioned in Rule 830; see *Re Sherlock*, 18 P. R. 6. The mere fact that the appellant is suing in a representative capacity is no ground for dispensing with security: *Ib.*; nor is his poverty: *Thursson v. Thursson*, 18 P. R. 414. But where the appellant was an infant, security for costs was dispensed with: *Fahy v. Jephcott*, 1 O. L. R. 108; and so it may be dispensed with where the appellant's interest in the subject matter of the litigation will afford the respondent sufficient security in any event of the litigation: *Thursson v. Thursson*, *supra*.

Rule 827. The *Rule* applies to appeals in mechanics' lien actions: *Sherlock v. Powell*, 18 P. R. 312.

A stay of execution may also be granted although security for costs has not been given: *Rule 827 (2)*.

Unless otherwise ordered, the security for costs is to be by bond for \$400: *Rule 830*.

As to the form of bond, and affidavits of execution and justification, and allowance of bond, see *Rule 830*.

Stay of execution.

827.—(1) Unless otherwise ordered by the Court appealed to or a Judge thereof, the execution of the judgment or order appealed from shall, in the case of a motion or an appeal to a Divisional Court, upon the motion or appeal being set down for argument, and, in the case of an appeal to the Court of Appeal, upon the security in *Rule 826* mentioned being allowed, be stayed pending the motion or appeal, except in the following cases:—

"Execution of the Judgment."—As to these words: see *Mouge v. Toronto Ry. Co.*, 5 O. L. R. 15.

Where partial performance is required execution stayed by delivery into Court.

(a) If the judgment appealed from directs the assignment or delivery of documents or personal property, execution shall not be stayed until the things directed to be assigned or delivered have been brought into the Court appealed from, or placed in the custody of such officer or receiver as that Court or a Judge thereof appoints, or until security has been given to the satisfaction of that Court or Judge, and in such sum as may be directed, that the appellant will obey the order of the Court appealed to;

Or by execution instrument.

(b) If the judgment appealed from directs the execution of a conveyance or any other instrument, execution shall not be stayed until the instrument has been executed and deposited with the proper officer of the Court appealed from, to abide the judgment of the Court appealed to:

Or by the giving of special security not to commit waste.

(c) If the judgment appealed from directs the sale or delivery of possession of real property or chattels real, execution shall not be stayed until security has been given to the satisfaction of the Court appealed from, and in such sum as that Court or a Judge thereof directs, that during the possession of the property by the appellant, he will not commit or suffer to be committed any waste on the property, and that if the judgment be affirmed he will pay the value of the

use and occupation of the property from the time of the ap- Rule 827.
peal. *New.* See Con. Rule 804.

(d) If the judgment appealed from awards a mandamus ^{Where} or an injunction, execution shall not be stayed except upon ^{injunction} application to the Court appealed to or a Judge thereof, and ^{or man-} upon such terms as may seem just. *New.* ^{damus} ^{ordered.}

(2) Upon special application, the Court appealed to or a Judge thereof may order that execution shall not be stayed, in whole or in part, except upon such terms as may seem just, including the giving of security for any sum directed by the judgment or order appealed from to be paid, either as a debt or for damages or costs, or for any less sum; or may order that execution be stayed, although security has not been given under Rule 826, and although the preceding provisions of this Rule have not been complied with, upon such terms as may seem just. *New.* See 58 V. c. 12, s. 77; Rules 1 Jan., 1896, 1496 (803).

Staying Execution under Judgment appealed from:—

The security provided for by Rule 826 is only for the costs of the appeal. The allowance of such security for the costs of the appeal, however, effects a stay of proceedings, and entitles the appellant to a fiat to stay any execution in the sheriff's hands: see *Rules* 828, 829; except in the cases mentioned in clauses (a), (b), (c) and (d) of this Rule: see *McGarvey v. Strathroy*, 6 Ont. 138; *Toronto v. Toronto Street Ry. Co.*, 12 P. R. 361; and in any of such cases if the appellant desires to stay the execution of the judgment he must further comply with those clauses of this Rule; execution will not otherwise be stayed without a special order: see *Fox v. Toronto & Nipissing Ry. Co.*, 26 Gr. 352; *Gossage v. Canadian L. & E. Co.*, 24 U. C. Q. B. 452; *Barker v. Lavery*, 14 Q. B. D. 769; *Rombough v. Balch*, 19 P. R. 123.

In cases coming under clauses (a), (b), (c), (d), the execution of the judgment is not stayed merely on complying with those clauses, but an application to stay execution is necessary, supported by proof that the applicant has duly complied with those clauses, or such one or more of them as may be applicable. Clauses (a), (c) and (d), in terms require the sanction of the Court to the stay of execution. clause (b) does not, but it would seem that even under (b) an order is necessary besides the deposit of the document, before execution can be stayed.

Such application to stay execution must be made in the Court appealed from: see *Rule* 827, and *G. T. Ry. Co. v. Ont. & Que. Ry. Co.*, 9 P. R. 420; *Wilson v. Church*, 11 Ch. D. 576; *Otto v. Lindford*, 18 Ch. D. 394; *Cropper v. Smith*, 24 Ch. D. 315.

In cases coming within clause (1), if it is desired to carry a judgment or order into execution, pending an appeal, a special application must be made for the purpose to the Court appealed to, or a Judge thereof: see clause (2); *Confederation Life Assn. v. Labatt*, 25 C. L. J. 443; *Rice v. Rice*, 35 C. L. J. 535.

Rule 827. An application to stay execution, or to allow execution to issue notwithstanding security has been given under *Rule 826*, should not be made *ex parte*: *Grand Trunk Ry. v. Ont. & Q. Ry.*, 9 P. R. 420.

A stay of execution under clauses (a), (b), (c) and (d), will ordinarily be given to an appellant as a matter of right upon giving the security or conforming to the requirements of this *Rule*; see *Campbell v. Edwards*, 6 P. R. 139; *Fox v. Toronto & Nipissing Ry. Co.*, 26 Gr. 352; *Rice v. Rice*, *supra*. But the Court may on such an application consider whether the appeal is frivolous; *Norval v. Canada Southern Ry. Co.*, 7 P. R. 462; or whether the respondent may suffer any injustice by the stay; see *Wintemute v. Brotherhood of Railway Trainmen*, 19 P. R. 6.

It would seem that an application under *Rule 827* (2) for leave to proceed with an execution for money, or to compel the appellant to give security therefor, will not be granted merely on the ground that the appellant is impecunious; *Confederation Life Assn. v. Labatt*, 35 C. L. J. 443; *Wintemute v. Brotherhood of Railway Trainmen*, 19 P. R. 6.

An order that execution should not be stayed was refused where an appeal appeared to be prosecuted in good faith, and upon substantial grounds, and the effect of the removal of the stay would be practically to close the business of the appellant; *Centaur Cycle Co. v. Hill*, 4 O. L. R. 92.

Where the judgment was for partition execution of the judgment was held to be stayed by giving security for the costs of the appeal pursuant to *Rule 826*: *Monro v. Toronto Ry. Co.*, 5 O. L. R. 15.

Costs of motion.

The costs of an application to stay execution in England, where there is no enactment similar to *Rule 827*, are, as a general rule, ordered to be paid by the applicant; see *Herry v. Nickalls*, L. R. 8 Ch. 205; *Cooper v. Cooper*, 2 Ch. D. 492; *Morgan v. Elford*, 4 Ch. 258. In *Burdick v. Garrick*, L. R. 5 Ch. 453, and *Adair v. Young*, 11 Ch. D. 136, however, they were made costs in the appeal.

In Ontario, the costs of applications to stay execution, or proceedings, are in the discretion of the Court; *Rule 1130*; and the general rule is to make the costs costs in the appeal. Sometimes formerly they were ordered to be paid by the applicant; see *Norval v. Canada Southern Ry. Co.*, 15 C. L. J. 86; 7 P. R. 462; *Fox v. Toronto & Nipissing Ry. Co.*, *supra*; but there is no rule that the costs of a unsuccessful application to remove the stay of execution under *Rule 827* (2) are to be costs in the appeal; they have been ordered to be paid by the applicant; *Wintemute v. Brotherhood of Railway Trainmen*, 19 P. R. 6.

An order made under *Rule 827* (2) is not merely discretionary so as to preclude the right of appeal therefrom; *Centaur Cycle Co. v. Hill*, 4 O. L. R. 92.

Where security has been perfected for a stay of execution under *Rule 827*, the execution is not only stayed, but is superseded, so that it ceases to bind, if it has been issued and placed in the Sheriff's hands; *O'Donoghue v. Robinson*, 10 Ont. App. 622; *Vigcon v. Northcote*, 15 P. R. 171.

When money made under execution, will be ordered to be re-

Where, formerly, in order to stay execution, security was required to be given for money payable under the judgment or order appealed from, if the money had been made by the sheriff, but not paid over before the Judge's fiat to stay execution was served on the sheriff.

the appellant might demand back the amount levied from the sheriff: **Rule 827** see R. S. O. 1887, c. 44, s. 72. Where the money had been made by the sheriff, and transmitted to the respondent's solicitor, before an order staying execution was served, the Court refused to order such money to be refunded, even though the order staying the execution was granted before the money actually reached the solicitor's hands: *McDonnell v. McKay*, 2 Chy. Ch. 354; and see *Rule 828*. But where a suit was brought to restrain an action of ejectment, and the plaintiff failed, and thereupon a writ of *hab. fac. poss.* had been executed before the proceedings thereon could be stayed, possession was ordered to be restored to the appellant pending the appeal, on his giving security as required by *Rule 827*: *Campbell v. Royal Canadian Bank*, 19 Gr. 477.

funded or possession of land be ordered to be restored.

Where an appellant has given security under *Rule 826*, and clause (c) of this *Rule*, proceedings cannot be taken to enforce the judgment or order appealed from, pending the appeal, even against a third person, notwithstanding that the appellant may have neglected to comply with clause (b) of this *Rule*; see *Vigcon v. Northcole*, 15 P. R. 171; and where the judgment or order appealed from directs a reference to the Master, the reference is stayed on security being given under *Rule 826*: *Mouro v. Toronto Ry.*, 5 O. L. R. 15.

After the execution of the judgment or order has been stayed, only the issue of the judgment or order, and the taxation of costs thereunder, can be proceeded with, unless otherwise ordered: *Rule 829*.

stay of proceedings under judgment or order appealed from.

Under the former practice the rule was the reverse, and proceedings under the judgment or order appealed from might be continued, unless expressly stayed; see *Holmsted & Langton*, 1890, p. 672; *Shaw v. Holland*, 1900, 2 Ch. 305; 82 L. T. 782.

Proceedings to commit a defendant for a breach of an injunction, will not be stayed pending an appeal from the judgment or order granting the injunction: *Gamble v. Howland*, 3 Gr. 281, 303; and see *McLaren v. Caldwell*, 20 Gr. 438; unless the operation of the injunction has been suspended under clause (d) of this *Rule*. Formerly pending an appeal from a judgment awarding an injunction, the injunction would not be suspended; *Ib.*, and see S. C., 6 Ont. at p. 491; *Fox v. Toronto & Nipissing Ry. Co.*, 26 Gr. 352, except in the case of a mandatory injunction, where obedience to the injunction would render the appeal nugatory; see *Dundas v. Hamilton & Milton Road Co.*, 19 Gr. 475; but see *McFarvey v. Strataroy*, 6 Ont. 138; 19 C. L. J. 333, where Proudfoot, J., refused a sequestration to enforce an injunction restraining the defendants from permitting water to flow on to plaintiff's land, pending an appeal, after security had been given under R. S. O. 1877, c. 38, s. 26, from which this *Rule* is taken; and see also *Toronto v. Toronto Street Ry. Co.*, 12 P. R. 361; and see *Rule 827 (d)*, which now authorizes the Court to stay an injunction, or mandamus, in any case.

injunction, when suspended.

Where a sum of money was ordered to be paid, or in default a receiver was directed to be appointed, the appointment of a receiver could formerly only be stayed pending an appeal, on security being given for the amount ordered to be paid, as required by the former *Rule 804*; *Fox v. Toronto & Nipissing Ry. Co.*, 26 Gr. 352; and see *Polini v. Gray*, 12 Ch. D. 438; such terms are not necessarily to be imposed under the present *Rule*.

Appointment of receiver, when stayed.

Even before this *Rule* in mortgage cases, simply for foreclosure, or mortgage sale, proceedings were stayed pending an appeal without security actions, being required: *Bank of C. C. v. Pottruff*, 8 C. C. L. J. 328. And it

when stayed

Rule 827. would seem that the Court appealed from, may, in its discretion, irrespective of this Rule, suspend the operation of its judgment in any case pending an appeal: *Cotton v. Corby*, 5 C. C. L. J. 67.

As to the form of bond for security, and affidavits of justification, and execution, see *Rule 830, infra*.

Where an appellant proceeds to enforce an order or judgment appealed from, pending the appeal, and by his appeal he claims relief inconsistent with that given by the order or judgment appealed from, he will be held to have abandoned his appeal: *International Wrecking Co. v. Lobb*, 12 P. R. 297; *Fideau v. Westover*, 29 Ont. 6; but compliance with an order for security for costs, by giving security under protest, and proceeding with the action, was held not to be acceptance of, and acquiescence in, the order, which waived the right of appeal: *Duffy v. Donovan*, 14 P. R. 159.

In *Re Charles Stark Co.*, 15 P. R. 451, a Judge in Chambers refused to enforce an order without prejudice to an appeal.

Money paid
into Court
pending
appeal—
disposition
of.

Where money has been paid into Court for a specific purpose, and that purpose has been answered in favour of the party paying it, it will be paid out to that party: therefore, where security for costs of an appeal to the Court of Appeal has been given, by paying money into Court, the appellant is entitled, in the event of the appeal being successful, to have the money paid out to him, notwithstanding the respondent may desire to appeal to the Supreme Court: *McKenzie v. Caldwell*, 9 P. R. 118; *Wilson v. Beatty, Re Donovan*, 10 P. R. 71; *Atherton v. B. A. I. Co.*, L. R. 5 Chy. 720; *Lindsay Petroleum Co. v. Hurd*, 3 Chy. Ch. 16; *Billington v. Provincial Ins. Co.*, 9 P. R. 67; *Crossman v. Shears*, 15 C. L. J. 110; *Centaur Cycle Co. v. Hill*, 7 O. L. R. 411, 617; and the respondent in such a case, if he desires to stop the payment out, must give security for damages consequent on its detention in Court: *McDonald v. Worthington*, 8 P. R. 554, and see *Polini v. Gray, supra*.

Similarly a bond given as security for the costs of an appeal to the Court of Appeal may be ordered to be delivered up, where the appellant is successful in the Court of Appeal, all liability upon it being at an end, notwithstanding that an appeal to the Supreme Court may be pending: *Burgess v. Conroy*, 11 P. R. 514; so also a bond given for security for costs in the action, where the plaintiff has succeeded in the Court of Appeal: *Marsh v. Webb*, 15 P. R. 64.

This principle does not, however, apply to enable a party who has paid money into Court as security for costs in the High Court, and has succeeded, to obtain payment of the money out to him pending an appeal to the Court of Appeal, as the appeal is a step in the original action: *Rule 798*, and the purpose for which the money is paid is not answered, unless the appeal is unsuccessful: *National Ins. Co. v. Egleson*, 9 P. R. 202; see also *Badische Anilin, etc. v. Johnson*, 1897, 2 Ch. 322; *Scaton v. Burnard*, 15 Times, 342.

But where the opposite party was otherwise secured, payment out was directed: *Napier v. Hughes*, 9 P. R. 164. Similarly while an appeal to the Court of Appeal is pending, a bond given for security for costs in the action, will not be ordered to be delivered up to a successful plaintiff for cancellation: *Hatchey v. Merchants' Despatch*, 12 Ont. App. 640; 11 P. R. 9; nor delivered out for suit to a successful defendant: *Coffey v. Scane*, 16 P. R. 307; but where the plaintiff succeeds in the Court of Appeal, see *Marsh v. Webb*, 15 P. R. *supra*.

Money paid in by one of two appellants, but in the name of both, *Rule 827*, as security for the costs of an appeal, will not be paid out to the party who paid it in, on his abandoning the appeal, if his co-appellant wishes to proceed with the appeal: *Centaur Cycle Co. v. Hull*, 4 O. L. R. 493.

But where money was paid into Court as security for the costs of an appeal, and for the purpose of staying execution, and the appeal was dismissed, upon the appellant giving the farther security required for an appeal to the Supreme Court, it was held that an order for payment out of the costs of the appeal, and of the High Court, on an undertaking of the solicitors to refund should not be made: *Agricultural Ins. Co. v. Sargent*, 16 P. R. 397; and see *Rombough v. Hatch*, 19 P. R. 123.

It has been held that the recovery of costs, payable under an order, will not be stayed by the Court of Appeal, pending an appeal to the House of Lords, if the solicitors to whom they are payable, give their personal undertaking to refund, in case of the order being reversed: *Grant v. The Banque Franco-Egyptienne*, 3 C. P. D. 202; *Morgan v. Elford*, 4 Ch. D. 352; *The Khedive*, 5 P. D. 1; but see *supra* and *Atty.-Gen. v. Emerson*, 88 L. T. Jour. 97.

Money paid in by an appellant as security for costs of appeal, where it becomes liable to be applied to pay the costs of the respondent, will generally be paid out to the solicitor for the respondent on his undertaking to refund it if the appeal is allowed by the Supreme Court: *Kelly v. Imperial, etc.*, 10 P. R. 499; *Steele v. York*, 7 C. L. T. 170; but see *Agricultural, etc. v. Sargent*, 16 P. R. 401; *Rombough v. Hatch*, *supra*.

The solicitors' undertaking may be enforced in a summary manner: *Sney v. Harland*, 1894, 1 Q. B. 707; but where no such undertaking is given the solicitors are not liable to be called on to refund, even though their client is worthless, and is ordered to repay the money: *Hood-Barra v. Heriot*, 1896, 1 Q. B. 610; 74 L. T. 372; *Hood-Barra v. Crossman*, 76 L. T. 297; 1897, A. C. 172.

And where a sum of money has been paid into Court, not to answer any specific purpose, but generally to abide further order, then the Court has a discretion as to ordering the money to be paid out pending an appeal, and in such a case, may require security to be given to refund if required: *King v. Duncan*, 9 P. R. 61; *Canadian Land Co. v. Dysart*, 11 P. R. 51; e.g., where owing to the poverty of the successful party there is danger that it may not be recovered if the decision should be reversed: *Re Airey, Airey v. Bowser*, 70 L. T. Jour. 95.

Where money was retained in Court to abide the result of such proceedings as the plaintiff might be advised to take in reference thereto, and the plaintiffs thereupon brought an action which was dismissed, and the judgment was subsequently affirmed by the Court of Appeal, and the plaintiffs then appealed from the Court of Appeal, a motion for payment out pending such appeal was refused: *Toronto v. Toronto St. Ry.*, 15 P. R. 358.

Where a fund in Court is, by the judgment appealed from, directed to be paid out to the respondent, the Court may stay the payment out, upon the appellant giving security for the difference between legal interest and the interest which will actually accrue in Court: *McDonald v. Worthington*, 8 P. R. 554; *Brewer v. York*, 31 W. R. 109; *Bradford v. Young*, 28 Ch. D. 18; but if payment out is not

Rules stayed, the mere pendency of an appeal will not prevent its being paid
828, 829. out: *McMunster v. Radford*, 16 P. R. 20.

Where money has been paid in as security for costs of an appeal by a party who is unsuccessful, it will be applied in payment of the costs of the appeal, and the balance will not be treated as that party's own moneys and applied to pay other costs of the action payable by him, if it is shown to have been borrowed for the specific purpose of securing the costs of the appeal: *McKenzie v. Kitchridge*, 1 C. L. T. 110; see also *Northington v. Johnson*, 72 L. T. Jour. 373; but *provida facie* it will be considered to be the money of the party on whose behalf it was paid in, and the title of any other person must be made clearly to appear: *Evans v. Huntsville*, 7 O. L. R. 540.

Where money was so paid out to a respondent to satisfy costs of an unsuccessful appeal, but the decision was reversed by the Privy Council, the respondent was compelled, in an action brought for the purpose, to repay the moneys so paid out for principal and interest, with interest on that gross amount at six per cent., and all sums otherwise paid for costs without interest: *Citizens Ins. Co. v. Parsons*, 32 C. P. 492; *semble*, that an action was only necessary in that case because the money had been paid out to persons not parties to the original suit as trustees for the creditors of the original plaintiff: *Id.*; see *McIndsey v. Armstrong*, 11 P. R. 200.

Proceedings in an action upon an appeal bond were stayed, where a further appeal was pending and security had in it been given for the costs secured by the bond: *McLaren v. Stephen*, 10 P. R. 88.

An appeal under *The Joint Stock Companies Winding-up Act* (R. S. O. c. 222), s. 27 (2), cannot be entertained where security has not been given within eight days from the rendering of the final judgment, or order, appealed from: *Re Union Ins. Co.*, 7 Ont. App. 783.

When given
 a *fiat* to stay
 execution
 may be
 granted.

828. Where, under the preceding Rules, an appellant has become entitled to a stay of execution, a Judge of the Court appealed to may issue his *fiat* to the Sheriff, to whom any execution under the judgment has been issued, to stay the execution, and the execution shall be thereby stayed, whether a levy has been made under it or not. *New.* See Con. Rule 805; Rules of 1 Jan., 1896, 1487 (805); 58 V. c. 12, s. 78 (2).

Stay of
 further pro-
 ceedings in
 actions.

829. Where execution of the judgment or order appealed from has become stayed all further proceedings in the action in the Court appealed from, other than the issue of the judgment or order and the taxation of costs thereunder, shall be stayed, unless otherwise ordered by the Court appealed to or a Judge thereof; and the order may be on such terms as may seem just. *New.*

See *Mouso v. Toronto Ry. Co.*, 5 O. L. R. 15.

A judgment on a special case by which the opinion of the Court is given, but upon which there can be no execution issued, is not within this *Rule*. Where, therefore, the opinion of the Court has been asked

on questions of law, "before proceeding to take evidence," Rule 830. It was held that the taking of evidence was not a condition of appeal by virtue of this Rule, though it was a condition of stay existed by virtue of the terms of the *St. Louis & N. W. Ry. Co., 5 O. W. R. 415.*

(ii) *Form of Security.*

830. Where security is required under Rules 823 or 827, the security, unless otherwise ordered by the Court, shall be regulated by the following provisions:

1. The security shall be by bond which may be according to Form No. 197.
2. The bond shall be executed by two sufficient sureties.
3. The sureties shall make affidavit of justification according to Form 197.
4. Where security is to be given for costs of the appeal the same shall be given for \$400.
5. Where security is to be given for payment of money directed by the judgment or order appealed from to be paid either as a debt or for damages or costs, the security shall be in double the amount by the judgment or order directed to be paid; but where security is to be given in a sum above \$2,000, the Court or a Judge may allow security to be given by a larger number of sureties, apportioning the amount among them as may appear reasonable; and where the amount by the judgment directed to be paid exceeds \$10,000, the Court or Judge may allow security to be given for such amount less than double as may appear reasonable.
6. Where the judgment appealed from directs the sale or delivery of possession, of real property or chattels real, the security required by Rule 827 shall be taken in double the yearly value of the property in question.

7. The bond, with an affidavit of the due execution thereof, and affidavit of justification, shall be filed in the office in which the action or matter was commenced, and shall be deemed to be perfected and allowed, unless within 14 days after being served with notice of the filing thereof, the respondent moves for its disallowance; but the appellant may

Rule 830. after the filing make a special application before the expiration of said 14 days to stay execution.

8. Instead of giving a bond the appellant may without order pay into Court a sum of money equal to half the penalty of the bond in cases within clauses 4 and 6 of this Rule, or equal to the amount by the judgment or order directed to be paid in cases within clause 5 of this Rule, and the money when so paid in shall stand as security in lieu of a bond, but either party may apply to the Court or a Judge to increase or diminish the amount of such payment into Court. *New.*

For Form 197, referred to in this Rule, see H. & L. Forms, No. 1161.

The Court, if it sees fit, may reduce the amount of the security to be given: see *Re Sherlock*, 18 P. R. 6.

Money paid in as security for the costs of the appeal cannot be ordered to be increased to more than \$400: *Centaur Cycle Co. v. Hull*, 4 O. L. R. 493.

An application for increased security must be made to the Court of Appeal or a Judge thereof: *Fitzgerald v. Wallace*, 6 O. L. R. 634.

As to bonds of guaranty companies approved by order in council, see 62 Vict. (2) c. 12, s. 2.

After a bond has been given, the Court below may allow money to be paid into Court as security in substitution therefor: *Chatham & Dover, E., v. The Erie & Huron Ry. Co.*, 7 P. R. 339; but it is not sufficient to deposit the money, and obtain a certificate of the deposit: It must also appear that the security so given, is to the satisfaction of the Court appealed from, or a Judge thereof: *Macdonald v. Abbott*, 3 S. C. R. 278.

As to the time for putting in security for costs in appeals to the Court of Appeal, see Rule 826, and *McRae v. White*, 9 P. R. 288.

The former Rule 897 required the appellant to be a party to the bond, unless that was dispensed with. And order dispensing with the execution of the bond by the appellants, or any of the appellants, where there are more than one, was necessary to be obtained before the bond was executed, and only those actually executing it were to be made parties to it: *Grothe v. Pearce*, 15 P. R. 195. Under the present Rule it is not necessary that the appellant shall be a party to the bond; but if he is made a party he must execute the bond or the respondent will be entitled to have it disallowed: *Robinson v. Harris*, 14 P. R. 373.

A surety is liable to cross-examination on the affidavit of justification. A surety who is a member of a mercantile partnership, but who justifies on his own individual property, and not on his share in the partnership is not compellable on cross-examination on his affidavit to disclose the liabilities of the partnership: *Douglas v. Blackey*, 14 P. R. 504.

The affidavit of justification cannot be dispensed with: *Donnelly v. Jones*, 4 Chy. Ch. 48.

The respondent is entitled to a security free from objections which **Rule 831** might be raised by the sureties if sued; *Jones v. Macdonald*, 14 P. R. 335.

Where the respondent objects to the sufficiency of the bond, he must move to disallow it, or it will, under this *Rule*, stand allowed after the lapse of fourteen days from service of notice of its filing. The motion should be made in the Court appealed from. The application may be entertained by the Master in Chambers, or, where the bond is filed in an outer office, by a Local Master, or Local Judge, having jurisdiction; see *Rules 45, 49; Brigham v. Smith*, 1 Chy. Ch. 334.

A bond filed before leave to appeal is granted, in a case where leave is necessary, is irregular, and will be disallowed; and a bond which has been disallowed on that ground cannot afterwards be relied on leave to appeal being granted, without the consent of the sureties; *Jones v. Macdonald*, 14 P. R. 435.

Affidavits may be read in opposition to the affidavits of justification of the sureties; *Campbell v. Royal Canadian Bank*, 6 P. R. 45; *Brigham v. Smith*, 1 Chy. Ch. 334; and also depositions made by the sureties in another action to which the principal was no party; *Jones v. Macdonald*, 14 P. R. 435; and the sureties are also liable to cross-examination on their affidavits of justification; *Rule 499; Douglas v. Blackie*, 14 P. R. 504; and may be compelled to attend to be examined by being served with an appointment and subpoena though no motion against the bond is pending; *Rule 492; Hughes v. Hughes*, 17 C. L. J. 110; 1 C. L. T. 189.

The bond, and affidavits of execution, and justification, are separate documents, and each must be stamped with a proper filing stamp; *McBeth v. Smart*, 1 Chy. Ch. 269.

The affidavit of justification, should be entitled in the cause; see Form 197, H. & L. Forms, No. 1161a. In *Molson's Bank v. Cooper*, 17 P. R. 153, it was held that an affidavit of execution not so entitled is not invalid; but probably the better practice is to entitle both affidavits in the action; see R. S. O. c. 74, s. 12.

Where the bond stands allowed under this *Rule*, by reason of the lapse of fourteen days from its filing, a Judge's fiat to the sheriff to stay execution may be obtained; *Rule 828*. But where the appellant desires to stay execution before the fourteen days have expired, then a special application for that purpose is necessary.

Where the appeal to the Court of Appeal is dismissed, an action on the appeal bond will be stayed, where the appellant has given proper security, and is prosecuting an appeal from the decision of the Court of Appeal to the Privy Council; *McLaren v. Stephen*, 10 P. R. 88; 19 C. L. J. 404.

As to the damages recoverable under the bond, see *Re Alger & Sarina Oil Co.*, 23 Ont. 583.

If either surety dies or becomes insolvent, pending the appeal, an application may be made to compel the appellant to substitute another; *Saunders v. Furnival*, 2 Chy. Ch. 159; *Gage v. Canada Publishing Co.*, 10 P. R. 169. The application must be made to the Court appealed from; *Lumsden v. Davis*, 10 P. R. 10.

Although under clause (b) \$200 is ordinarily sufficient to be paid into Court as security for the costs of an appeal, yet, on application,

Rule 831. it may be increased, but the utmost that can be ordered to be paid in is \$400: *Centaur Cycle Co. v. Hill*, 4 O. L. R. 483; the application for increased security should be made to the Court of Appeal: *Phillips v. Wallace*, 6 O. L. R. 634.

Where a sum of money is paid into Court by one of two appellants, but in the name of both, as security for the costs of an appeal, it will not be ordered to be paid out to the appellant who paid it in on his abandoning the appeal, if his co-appellant wishes to proceed with the appeal: *Centaur Cycle Co. v. Hill*, 4 O. L. R. 483.

Objections
to sureties.

A bond cannot be excepted to on the ground that the sureties are "standing sureties" of the appellant, in the absence of evidence as to their insufficiency: *Norral v. Canada Southern Ry. Co.*, 7 P. R. 313. It is irregular for the solicitor of the appellant to become surety on an appeal bond: *Beckett v. Wragg*, 1 Chy. Ch. 5; *Grand Trunk Ry. Co. v. Ontario & Quebec Ry. Co.*, 3 C. L. T. 173; *Re Gibson*, 13 P. R. 359.

A married woman has been held to be not a proper surety: *Metcalf v. Pascoe*, 8 P. R. 372; *Raham v. The News*; *Raham v. Front*, 44 C.L., 14th March, 1891. But see *The Married Woman's Property Act* (R. S. O. c. 163), and *Kerr v. Stripp*, 40 U. C. Q. B. at p. 134; *Frazee v. McFarland*, 43 E. C. Q. B. 281; *Lueson v. Luidlum*, 3 O. App. 77; and *Hessin v. Baine*, 2 Ont. 302.

An officer of the Court is not an improper surety: *Wilkins v. McLean*, 7 C. L. T. 5.

Where the title to land, in respect of which a surety qualified, was not registered, it was held that he was an insufficient surety unless registration of his title was procured: *Adamson v. Adamson*, 3 P. R. 196.

APPEALS FROM THE COURT OF APPEAL.

The decision of the Court of Appeal on appeals from the High Court of Justice is not in all cases conclusive; and in certain cases an appeal can be had therefrom either to the Supreme Court of Canada or to His Majesty in Council, see *infra*, and p. 1082.

The decision of the Court of Appeal is final in cases which have not come to it from the High Court of Justice, e.g., such as have come from the Drainage Referee: *Re Ratcigh & Harrich*, Cassel's Sup. Court Prac., 2nd ed., 22; or in a case which originated in a County Court, though removed into the High Court: *Young v. Tucker*, 18 P. R. 449; *Tucker v. Young*, 30 S. C. R. 185.

Appeals to Supreme Court of Canada.—Appeals from the Court of Appeal to the Supreme Court of Canada are regulated by *The Supreme and Exchequer Courts Act* (R. S. C. c. 135), and the amendments thereto (see ss. 24, 28); Cass. Pr., 14-17, and 51-56; C. C. c. 25, s. 21.

R. S. C. c. 135, s. 24, is as follows:—

Appeal

24. An appeal shall lie to the Supreme Court:—

From final
judgments

(a) From all final judgments of the highest Court of appeal resort, now or hereafter established in any Province of Canada, whether such Court is a Court of appeal or of original jurisdiction, in cases in which the Court of original jurisdiction is a Superior Court;

(b) From the judgment upon a special case unless the parties agree to the contrary, and the Supreme Court shall draw any inference of fact from the facts stated in the special case which the Court appealed from should have drawn; ^(upon a special case) **Rule 831.**

(c) From the judgment upon any motion to enter a verdict, or consuit upon a point reserved at the trial; ^(Points reserved)

(d) From the judgment upon any motion for a new trial; ^(Motion for new trial) *amended by 54 & 55 Vict. c. 25, s. 2.*

(e) From any judgment, decree, decretal order, or order in any action, suit, cause, matter, or other judicial proceeding originally instituted in any Superior Court of Equity in any Province of Canada other than the Province of Quebec; and from any judgment, decree, decretal order, or order in any action, suit, cause, matter, or judicial proceeding in the nature of a suit or proceeding in equity originally instituted in any Superior Court in any Province of Canada other than the Province of Quebec; ^(Decrees in Equity Courts.)

(f) From the judgment, rule, order, or decision, upon any motion to set aside an award, or upon any motion by way of appeal from any award made in any Superior Court in any of the Provinces of Canada other than the Province of Quebec; ^(Motion to set aside award)

(g) From the judgment in any case of proceedings for or upon a writ of *habeas corpus*, *certiorari*, or prohibition (*etc.*), not arising out of a criminal charge; and in any case or proceedings for or upon a writ of mandamus; and in any case in which a by-law of a municipal corporation has been quashed by rule or order of Court, or the rule or order to quash it has been refused after argument. *R. S. C. c. 135, s. 24, as amended by 54-55 Vict. c. 25, s. 2.* ^(Habeas corpus, mandamus, and mandel-pet by-laws.)

(h) These words in brackets were added by 54-55 V. c. 25, s. 2.

An appeal cannot be had direct from the High Court to the Supreme Court: *R. S. C. c. 135, ss. 24, 26; Cass. Pr. 11, 15*; except by consent of parties: *s. 26 (2)*, or by leave of the Supreme Court, where the judgment sought to be appealed from is final, or is a judgment, decree, decretal order, or order pronounced in any cause, matter, or proceeding in the nature of a suit or proceeding in Equity *Id.*, *s. 26 (3)*.

By *R. S. O. c. 49, s. 2*, a limitation of the right to appeal to the Supreme Court of Canada was imposed in certain cases, but this provision was held to be *ultra vires* of the Provincial Legislature; *Chabou v. Ryan*, 17 S. C. R. 251.

The Dom. Act, 60-61 V. c. 34, *see infra*, p. 1076, now places restrictions on the right of appeal.

Questions not Appealable.—Except as hereafter mentioned an appeal cannot be had to the Supreme Court from any judgment or order which is not final, therefore, as a general rule, appeals from interlocutory orders or judgments will not lie: *R. S. C. c. 135, s. 28*. Nor can appeals be entertained from discretionary orders except when made in the exercise of appellate jurisdiction; *Id.*, *s. 27*; *see Vartan v. Hoxey*, 16 S. C. R. 721; *Martineau Bank v. St. Roch*, 20 S. C. R. 106; *Canadian Pacific P. v. Toronto*, 30 S. C. R. 337. ^(Questions not appealable.)

Thus an order allowing amendment of pleading is not appealable; *Williams v. Leonard*, 26 S. C. R. 406; nor an order as to costs which are in the discretion of the Court: *De Groot v. Vetter*, 21 S. C. R.

Rule 831. 267; unless there be some question of principle involved; *Arch. De Lisle*, 27 S. C. R. 1; *Smith v. St. John City Ry.*, 28 S. C. R. 603; *O'Donohoe v. Beatty*, 19 S. C. R. 356; *Moir v. Huntington*, 19 S. C. R. 363; *Schlomann v. Dorker*, 30 S. C. R. 323. So also no appeal will lie from an order granting or refusing an order on application to set aside a judgment by default; *O'Donohoe v. Bourne*, 27 S. C. R. 654; but see *Voight v. Orth*, 5 O. L. R. 443; nor from an order perpetually staying proceedings; *Maritime Bank v. Stewart*, 20 S. C. R. 105; and it has also been held that an order allowing such judgment to be entered on a specially indorsed writ is discretionary and not appealable; *Morris v. London & Canadian L. & A. Co.*, 19 S. C. R. 434; but see *Voight v. Orth*, *supra*; nor does an appeal lie from an order refusing an application to set aside an order discharging bail; *Scammell v. James*, 16 S. C. R. 593; nor one which involves mere questions of practice or procedure; *Arpin v. Merchant's Bank*, 24 S. C. R. 142; *Macdonald v. Ferdaiz*, 22 S. C. R. 260; *Perre v. Trepanier*, 24 S. C. R. 86; *Toronto Railway v. Balfour*, 32 S. C. R. 239; *Atty.-Gen. v. Scully*, 33 S. C. R. 16; *Gibson v. Nelson*, 33 S. C. R. 181; unless some substantial question of right is involved, or grave injustice has been done; *Lambe v. Armstrong*, 27 S. C. R. 360; *Eastern Townships Bank v. Swan*, 29 S. C. R. 193; see *Voight v. Orth*, *supra*.

Orders granting or refusing a new trial, although discretionary, are appealable; see R. S. C. c. 135, s. 24 (d), as amended by 74 Vict. c. 25, s. 2; the amendment removing the doubt raised by *J. Halifar*, 17 S. C. R. 700; see S. C. c. 22 S. C. R. 258; but the appeal from an order granting a new trial is not absolute, thus, on an appeal to the Court of Appeal that Court granted a new trial, a further appeal by the appellant to the Supreme Court was not allowed, though the appellant desired to contend that the appeal had been dismissed; *Canadian Mutual Reserve v. Dillon*, 24 S. C. R. 111; and see *Confederation Life v. Bodden*, 34 S. C. R. 338.

Questions
appealable

Questions Appealable.—These are now regulated by rule 1, Act, 60-61 Vict. c. 31, s. 1, which provides that no appeal lies to the Supreme Court from the Court of Appeal for Ontario in the following cases:—

(a) Where the title to real estate or some interest therein is in question;

See *Macdonald v. Galivan*, 28 S. C. R. 258; *Deerschel Light Co., Ltd.*, 268; *Jeraga v. Teo*, *Id.*, 497; *Waters v. Ho*, 30 S. C. R. 504; *Aurora v. Markham*, 32 S. C. R. 457.

(b) Where the validity of a patent is affected;

See *King v. Dupuis*, 28 S. C. R. 388; *Ottawa v. Hatcher*, 33 S. C. R. 7.

(c) Where the matter in controversy in the appeal exceeds sum or value of \$1,000, exclusive of costs;

See *Banque du Peuple v. Tootill*, 28 S. C. R. 422; *Bata v. Ltd.*, 181; *Jermyn v. Teo*, *Id.*, 397; *Canadian Accident Co. v. Agnew*, 28 S. C. R. 394; *Frankel v. G. T. Ry. Co.*, 3 O. L. R. 7; *Ward v. Davidson*, 31 S. C. R. 274; *Bouché v. Tensta*, 31 S. C. R. 285; *Goold-Renphr. Co. v. Laishley*, 35 S. C. R. 181.

(d) Where the matter in question relates to the taking of interest or other rent, customary or other duty or fee, or the kind of a general or public nature affecting future rights.

See *Canadian Mutual Loan Co. v. Ltd.*, 31 S. C. R. 224; *Id.*, 31 S. C. R. 274.

(c) In other cases where the special leave of the Court of **Rule 831.** Appeal for Ontario or of the Supreme Court of Canada to appeal to such last mentioned Court is granted.

Special leave to appeal may be granted in cases involving matters of public interest, important questions of law, the construction of Imperial or Dominion statutes, a conflict between Dominion and Provincial authority on questions of law applicable to the whole Dominion: *Lake Erie, &c., Ry. Co. v. Marsh*, 35 S. C. R. 197; but not if there is no doubt about the correctness of the decision: *Id.*

See *Atty.-Gen. v. Scully*, 33 S. C. R. 16; *Rice v. The King*, 32 S. C. R. 450; *Fisher v. Fisher*, 28 S. C. R. 404; *Hagrove v. Royal Templars*, 31 S. C. R. 387; *Tucker v. Young*, 30 S. C. R. 187.

Leave was refused where the judgment was for \$1,000 damages, and the grounds upon which leave was asked for were that the costs had accumulated so as to amount to \$2,000, and the damages it was alleged had been estimated by a mere guess: *Gohl Biegeh Co. v. Lushby*, 35 S. C. R. 184.

(f) Whenever the right to appeal is dependent upon the amount in dispute, such amount shall be understood to be that demanded, not that recovered, if they are different.

See *Ottawa v. Hunter*, 31 S. C. R. 7; *Jeraya v. Ter*, 28 S. C. R. 467; *Bain v. Anderson*, 28 S. C. R. 181.

The fact that the aggregate amount for which several respondents were sought to be made liable exceeded \$1,000 was not sufficient, where the individual liability of each respondent was less than that amount: *Stephens v. Gerth*, 24 S. C. R. 716.

The Court cannot refuse to entertain an appeal because the amount involved has not been found or stated by the Court appealed from, but it can ascertain the amount in dispute on affidavits: *In re Falkner Gold Mining Co. v. McKinnery*, 1901, A. C. 581; *Amor Light v. Heschel*, 18 C. L. 7, 200.

Under these clauses no appeal lies unless the amount in controversy in the appeal exceeds \$1,000, exclusive of costs; the amount demanded (in the clause f), having regard to clause (c), means, "demanded in the appeal": *Bain v. Anderson*, 28 S. C. R. 481. See also *Jeraya v. Ter*, 28 S. C. R. 467; *Ottawa v. Hunter*, and *King v. Dupuis*, *supra*.

Where the jurisdiction of the Supreme Court is doubtful, the Court may assume jurisdiction when it has been decided that the appeal, on the merits, should be dismissed: *Bain v. Anderson*, *supra*.

The Act 60-61 Vict. c. 34, s. 1, applies to civil cases only; criminal appeals are regulated by the Criminal Code, 1892: *Rice v. The King*, 32 S. C. R. 480.

The Supreme Court has entertained an appeal on a question of law appearing on the pleadings, but not raised or adjudicated in the Court below, where no evidence in rebuttal could have been adduced to affect it, had it been taken at the trial: *McKelvey v. Le Roi Mining Co.*, 32 S. C. R. 664.

An appeal may be entertained on a question of fact: *Dempster v. Lewis*, 34 S. C. R. 222; *Behcher v. McDonald*, 33 S. C. R. 321; but see S. C. 1904, A. C. 429. Ordinarily, however, if there is evidence to support a finding of fact an appellate Court will not interfere with that finding, especially if the case has been tried by a jury: *Grand*

Rule 831. *Trunk Railway v. Rairville*, 25 Ont. App. 242, 29 S. C. R. 201; *D. Trignon v. Jonea*, 32 S. C. R. 650; *Parolia v. Lamoille*, 30 S. C. R. 405; *Graham v. Ménard*, 31 S. C. R. 14; even though the Judge at the trial was dissatisfied; *Fraser v. Dreier*, 30 S. C. R. 211. So, ordinarily, an appellate Court will not interfere with the assessment of damages unless they are plainly excessive or inadequate, or have been arrived at by mere guess-work; *Williamson v. Stephenson*, 33 S. C. R. 323. See also notes to sec. 52 of the Jud. Act.

It is only where some fundamental principle of justice has been ignored that appeals on a question of costs can be successful: *Smith v. St. John*, 28 S. C. R. 603; *Schlomann v. Doecker*, 30 S. C. R. 323.

Leave to Appeal.—Where the time for lodging an appeal, or giving notice of an appeal, where notice is necessary, is suffered to elapse without the appeal being lodged or notice given, the Court appealed from, or any Judge thereof, may under special circumstances allow an appeal to be brought: see R. S. C. c. 135, s. 42; *Dewar v. Bank of Montreal*, 20 S. C. R. 435; *Bank of B. N. J. v. Walker*, Countess's Dig. 111; Cass. Dig. (2), pp. 670, 671; but the Court or Judge is to impose such terms as to security or otherwise as seems proper under the circumstances: R. S. C. c. 135, s. 42; the applicant should shew that he had a *bona fide* intention to appeal while the right to appeal without leave existed, and the suspension of further proceedings by reason of some special circumstances: *Smith v. Hunt*, 7 O. L. R. 97; or that the omission to proceed with the appeal in due course was owing to an unintentional slip: *Ross v. Robertson*, 7 O. L. R. 404; *Hewitt v. Mutual Reserve Life Ins. Co.*, 4 O. W. R. 290.

As to what are considered special circumstances, see notes to sec. 42.

Approving of the security for the appeal is the mode of allowing the appeal under sec. 42; Cass. Pr. 2nd ed., p. 433.

Security to be Given.—Security must be given by the appellant to the satisfaction of the Court appealed from, or a Judge thereof, or to the satisfaction of the Supreme Court, or a Judge thereof, to the extent of \$500, that the appellant will effectually prosecute his appeal and pay such costs and damages as may be awarded against him by the Supreme Court; see R. S. C. c. 135, s. 46; except where the appeal is brought by or on behalf of the Crown, or in proceedings for, or upon, a writ of *habeas corpus*; *De. subsec.*, 124, and 50-51 Vol. c. 16 Sched. A. The amount of the security fixed by s. 46 cannot be increased: *Archer v. Seabra*, 12 P. R. 472.

For the form of bond for security on appeal to the Supreme Court, see H. & L. Forms, No. 1165; *Darvill v. Fraser*, 17 P. R. 246; *Molson's Bank v. Cooper*, 17 P. R. 153; *Jamieson v. London & Canadian L. & C.*, 18 P. R. 413.

Instead of giving a bond, the \$500 may be paid into Court on order for that purpose must be obtained for form of such order, see Cassell's Pr. 2nd ed., p. 224.

The application for the allowance of the security should be made in Chambers, either in the Court appealed from, or at the Supreme Court; the application should be made within the sixty days period for lodging the appeal, or within the extended time, if any: *St. Charles v. Ward*, 11 P. R. 288.

For form of certificate that security has been given, see H. & L. Rule 831. Forms, Nos. 1168, 1169.

The giving of security is a condition precedent to the appeal being entertained; and where security has not been given, the appeal will be quashed: *Scammell v. James*, 16 S. C. R. 593; even though there be no one interested in opposing the appeal: *Re Cahan*, 21 S. C. R. 100.

A Judge of the Court of Appeal has no jurisdiction to extend the time for the allowance of the security in a case in which an appeal can only be brought by leave, and such leave has not been obtained: *Tahh v. The G. T. Ry.*, 8 O. L. R. 281; and he has no jurisdiction to grant such leave to appeal: *Id.*

Leave to Appeal, when Necessary.—An appeal can only be brought, without leave or consent, from the decision of the Court of last resort in the Province: R. S. C. c. 135, s. 24; but by consent of parties an appeal may be had direct from a Court of original jurisdiction: R. S. C. c. 135, s. 26 (2); and the Supreme Court may also in its discretion allow an appeal from a superior Court of first instance: R. S. C. c. 125, s. 26 (3).

The Supreme Court has permitted an appeal to be brought from the High Court without first going to the Court of Appeal, where an important constitutional question was involved: *Ontario Mining Co. v. Sepphold*, 31 S. C. R. 125; and also where there were only two Judges on the Bench of the Provincial Court of Appeal: *Schultz v. Wood*, 6 S. C. R. 585; so also in favour of persons interested who desired to prosecute an appeal in the name of a party who refused to allow his name to be used: *Duttonlin v. Langtry*, 13 S. C. R. 278; but the fact that the Provincial Court of Appeal has given an adverse decision on the question involved is not considered sufficient ground for an appeal *per se*: *Hishop v. McGillivray*, 15 S. C. R. 188; and such leave will not be granted in cases where there would be no appeal to the Court of Appeal: *Ottawa Electric Co. v. Brannan*, 31 S. C. R. 311; but see *Farrpharson v. Imperial Oil Co.*, 35 C. L. J. 230; 30 S. C. R. 188.

The Supreme Court will not entertain an application for leave to appeal after a similar application has been made to the Court of Appeal: *Aurora v. Markham*, 32 S. C. R. 457.

There is no appeal to the Supreme Court from the order of a Judge of the Supreme Court in Chambers granting leave to appeal: *Farrpharson v. Imperial Oil Co.*, 30 S. C. R. 188, 201.

Time for Appeal. An appeal to the Supreme Court in a civil action must be brought within sixty days from the signing or entry or pronouncing of the judgment appealed from: R. S. C. c. 135, s. 40, as amended by 50-51 Vict. c. 16, Sch. A. The signing and entry of judgments are, in Ontario, usually contemporaneous acts; but they may take place long after the pronouncing of a judgment. Ordinarily the time runs, from the pronouncing of the judgment, and it is only where some substantial matter remains to be determined before judgment can be entered that the time for appealing runs from the signing or entry: *O'Sullivan v. Harty*, 13 S. C. R. 131; *Wabash v. Griffith*, 13 S. C. R. 131; *Martien v. Carson*, 13 S. C. R. 130. Where the judgment of the Court of Appeal allowed the appeal, and postponed the judgment at the trial, but reduced the amount of damages, it was held that nothing substantial remained to be settled, and that the time ran from the pronouncing of the judgment: *News Printing Co. v.*

Rule 831. *Macrae*, 26 S. C. R. 695; and see *Martin v. Sampson*, 26 S. C. R. 707; as to the time when a judgment not pronounced in open Court is to be deemed to be pronounced for the purposes of appeal; see *Wallace v. Smith*, 7 O. L. R. 542. The vacations of the Supreme Court are not to be excluded in reckoning the time for appeal; *Ates, etc., v. Macrae, supra*. The day of pronouncing or entering judgment, whichever of them is the day from which the sixty days is to be reckoned, is excluded. The time for appealing may be extended even after the time prescribed by the statute has expired; *Vaughan v. Richardson*, 17 S. C. R. 703; but see *Canadian Mut. Loan & T. Co. v. Lee*, 34 S. C. R. 224; *Atty.-Gen. for Quebec v. Scott*, 34 S. C. R. 282; and *Hamilton v. Mut. Reserve*, 4 O. W. R. 290; 5 O. W. R. 102.

Where a party elects to move for an extension of the time for appealing before a Judge of the Court of Appeal in Chambers, he cannot afterwards make a substantive application for the same to the Court; *Hamilton v. Mutual Reserve Life Ins. Co.*, 5 O. W. R. 102. Whether an appeal lies from the Judge in Chambers to the Court, *quære*; *Id.*; see *Fraserharson v. Imperial Oil Co.*, 30 S. C. R. 188, 201.

Notice of Appeal, when Necessary. No appeal upon a special case, or from a judgment upon a motion to enter a verdict, or a result, upon a point reserved at the trial, or from a judgment upon a motion for a new trial upon the ground that the Judge has erred according to law shall be allowed, unless notice thereof is given in writing to the opposite party, or his attorney of record, within twenty days after the decision complained of, or within such further time as the Court appealed from, or a Judge thereof, allows; R. S. C. c. 135, s. 41. Notice of appeal would seem to be unnecessary in the case of all other appeals to the Supreme Court in civil proceedings. The "special case" mentioned in s. 41, *supra*, p. 1075, does not refer to the case prepared for an appeal to the Court of Appeal under Rule 708; *Draper v. Radenhurst*, 14 P. R. 376.

The giving of notice, when necessary, is a condition precedent to the right to appeal; *Vaughan v. Richardson*, 17 S. C. R. 703.

For form of notice of appeal, see *11. & L. Forms*, No. 1164.

Case to be Settled.—The appeal is to be on a case stated by the parties, or, in case of difference, to be settled by the Court appealed from, or a Judge thereof; see R. S. C. c. 135, s. 44.

The case is to set forth so much of the pleadings, evidence, affidavits and documents as is necessary to raise the question for the decision of the Court; it must also include the reasons of the Judge or Judges of the Court or Courts below; see *Rule* S. C. c. 2; but see *Maphew v. Stone*, 26 S. C. R. 58; and also the formal order or judgment of the Court appealed from; R. S. C. c. 135, s. 44; *Reid v. Ransay*, *Cass.* 102, 120, 120; *Kearns v. Keen*, and *Wallace v. Southern, Id.* 672. It must also contain the formal judgment or order of the Court of first instance; *Wright v. Huron, Id.* 373; and also a copy of any order which may have been made by the Court below or a Judge thereof enlarging the time for appealing; *Rule* S. C. c. 3.

It should not contain immaterial documents, or documents, or other matter, not before the Court of first instance; *Lévesque v. The Montreal Bank*, 19 S. C. R. 526; *Exchange Bank v. Gilman*, 17 S. C. R. 498; unless the Court appealed from has formally admitted further evidence to be given; see *Rule* 498; in which case such further evidence would, if material to the question in appeal, be a necessary part of the case.

The Supreme Court does not go behind the statement in the certificate of the Court of Appeal as to the result of the appeal; *Bouth v. Ratté*, 21 S. C. R. 637. **Rule 831**

By R. S. C. c. 135, s. 39, it is provided that proceedings in appeals shall, when not otherwise provided for by that Act, or by the Act providing for the appeal, or by the general Rules of the Supreme Court, be as nearly as possible in conformity with the present practice of the Judicial Committee of the Privy Council; but notwithstanding this provision it is held that the Supreme Court cannot allow an appeal in *forma pauperis*; *Fraser v. Abbott*, Cass. Dig., 695; although the same may be allowed by the Judicial Committee of the Privy Council; *Quintan v. Quintan*, 1901, A. C. 612.

Stay of Proceedings, pending Appeal. Where it is desired to stay execution pending the appeal, further security, in addition to the \$500 above mentioned, is required to be given: see R. S. C. c. 135, s. 17; and an order obtained allowing the security: *Kelly v. Imperial Loan Co.*, 10 P. R. 490; *Agricultural Ins. Co. v. Sargeant*, 16 P. R. 316; and see *Rombough v. Balch*, 10 P. R. 123. After the judgment of the Court of Appeal has been certified under Rule 818, that Court has no jurisdiction to stay proceedings in the Court below pending an appeal to the Supreme Court: *Hargrove v. Royal Templars*, 2 O. L. R. 126.

The Master in Chambers has no jurisdiction in such case, and,semble, a Judge in Chambers, in a case in which an appeal does not lie to the Supreme Court without leave, cannot stay proceedings until leave to appeal can be obtained: *Tabb v. Grand Trunk Railway Co.*, 8 O. L. R. 544.

The Court of Appeal refused to continue an injunction, which was dissolved by the judgment appealed from, pending an appeal to the Supreme Court: *Klee v. Dominion C. & A. Co.*, 3 O. W. R. 937; and see *supra*, p. 1067; or to stay a new trial: *Hockley v. Grand Trunk Ry.*, 7 O. L. R. 186.

Upon the case being agreed to by the parties, or settled by a Judge, the case is to be printed: see *Rules S. C.*, 749; and when printed the Registrar of the Court appealed from is to certify the case and transmit it, with 25 copies, to the Registrar of the Supreme Court: see R. S. C. c. 135, s. 45; *Rule S. C.*, 7. For form of certificate, see 11. & L. Forms, No. 1167; and when the security has been allowed by a Judge of the Court appealed from, the Registrar should also transmit his certificate thereof: see *Id.* Nos. 1168, 1169; and see *Macdonald v. Abbott*, 3 S. C. R. 278.

Together with the printed case, certified copies of all original documents and exhibits used in evidence in the Court of first instance are to be deposited with the Registrar of the Supreme Court, unless their production is dispensed with by order of a Judge of the Supreme Court; and the Supreme Court, or a Judge thereof, may order that all or any of the original documents be transmitted to the Registrar of the Supreme Court: see *Rule S. C.*, 10.

The case must be filed with the Registrar of the Supreme Court twenty clear days, at least, before the first day of the session of the Supreme Court at which the appeal is to be heard: see *Rule S. C.*, 31.

Factams.—At least fifteen days before the first day of the session at which the appeal is to be heard, the appellants and respondents are, respectively, to deposit with the Registrar of the Supreme Court

Rule 831. twenty-five copies of their factums, or points for argument in appeal; see *Rule S. C. 23*. The factum is to contain a concise statement of the facts and of the points of law intended to be relied on, and of the arguments and authorities to be urged and cited at the hearing, arranged under appropriate heads; see *Rule S. C. 24*; and is to be printed in the same style as the case; see *Rule S. C. 25*.

If the appellant does not deposit his factum within the prescribed time, the respondent may move to dismiss the appeal; see *Rule S. C. 26*; and if the respondent does not deposit his factum the appeal may set the appeal down to be heard *ex parte*; see *Rule S. C. 27*; but such setting down may, on application in Chambers, supported by affidavits excusing the default, be set aside; see *Rule S. C. 28*. The factum first deposited is not to be open to inspection by the opposite party until he has deposited his own factum; see *Rule S. C. 29*. After each party has deposited his factum he may, on demand, obtain three copies of his opponent's factum; see *Rule S. C. 30*.

No factums are required in *habeas corpus* appeals; see *Rule S. C. 47*.

Each party states briefly the facts in his factum according to his contention as to the result of the evidence. He then states his proposition of law applicable to those facts, and gives the proper citation of cases and other authorities intended to be relied on in support. Offensive comments on the conduct of Judges of any of the Courts below are irrelevant, and may be ordered to be struck out or taken off the files; see *Vernon v. Oliver*, 11 S. C. R. 156; *O'Sullivan v. Lake*, 16 S. C. R. 436; and the solicitor of the party on whose behalf they are made may subject himself to the censure of the Supreme Court; and costs may be refused to the party so offending, even though successful on the appeal.

Notice of Hearing.—After the case is filed, the appellant is to give 15 days, or, in *habeas corpus* appeals, two weeks, notice of hearing (see H. & L. Forms, No. 1173), for the next following session of the Court is fixed by the Act, or as specially convened for hearing appeals; or, if there be not sufficient time, then for the next session of the Court; *Rules S. C. R. 11, 14, 49, 80*.

Setting Down Appeal for Argument.—The appeal is to be set down for argument at least fourteen days before the first day of the session at which it is to be heard; see *Rule S. C. 31*. A case cannot be set down without the leave of the Supreme Court, or a Judge thereof, which has not been filed with the Registrar of the Supreme Court twenty clear days, at least, before the first day of the session; *Id.*

9. APPEALS TO HIS MAJESTY IN HIS PRIVY COUNCIL.

From Court
of Appeal.

Appeals to His Majesty in His Privy Council.—In cases where the matter in controversy exceeds the sum or value of \$1000, or where the matter in question relates to the taking of an annual or other rent, customary or other duty, or fee, or any like demand of a general and public nature affecting future rights of whatever value or amount soever the same may be, an appeal from the Court of Appeal lies to His Majesty in His Privy Council; but except as aforesaid it is declared that no appeal shall lie to His Majesty in His Privy

This appeal may be had to the Privy Council without first resort-
ing to the Supreme Court of Canada; but it cannot be had *per saltum* from the High Court.

Proceedings in Obtaining Leave to Appeal.—The practice in applying for leave to appeal to His Majesty in Council is comparatively simple. A petition is drafted setting out the matter as briefly as possible, and reducing it as far as possible to the condition of a legal problem; showing that the amount involved is very considerable, or the case otherwise very important, or that it involves matter of public interest; or that an important and far-reaching point of law is involved, and that there is *prima facie* ground for contending that the judgment in the Court below is wrong. Any one of these contentions may turn the scale in favour of the applicant. Their absence is generally the ground for refusing leave, and of the three the question of law is more often the decisive one; see *Daily Telegraph v. McLaughlin*, 1904, A. C. 776; *Montreuil v. St. Sulpice*, 14 App. Cas. 650; *Prince v. Gwynne*, 8 App. Cas. 103.

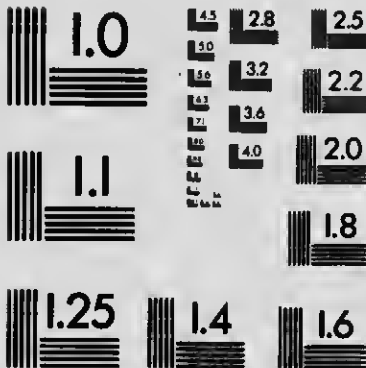
The petition may be drawn, revised and typewritten here, there is no reason why it should not be printed in Canada provided it be printed in the manner prescribed by the Rules of the Privy Council. See *infra*, p. 1088. As a general rule, however, it is drafted and sent over to the London agents who see to its typing or printing. They then set it down with the Registrar of the Privy Council for hearing.

The Privy Council will not advise His Majesty to admit an appeal from the Supreme Court, save where the case is of gravity involving matters of public interest or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance, or of a very substantial character: *Prince v. Gagnon*, 8 App. Cas. 1003; *Jokuston v. St. Andrews*, 3 App. Cas. 159; *Daily Telegraph v. McLaughlin*, 1904, A. C. 770. Amongst the considerations affecting the granting of the leave are—the general importance of the question, whether it has caused great difference of judicial opinion, and the extent to which the decision has been based upon English authorities; *Rohinson v. C. P. Ry.*, 1892, A. C. 481; 67 L. T. 505; it is not enough that the questions involved are of great importance to the parties or calculated to attract public attention; *Dunsmuir v. Langtry*, 57 L. T. 317.



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Rule 831. Special leave to appeal was refused in a case involving only an issue of fact: *Canada Central Ry. Co. v. Murray*, 8 App. Cas. 574.

Leave to appeal was refused though the question sought to be raised was one of public importance, and turned on the construction of a statute, because the Privy Council did not think there was any reasonable doubt as to the correctness of the construction which had been adopted: *Montréal v. Seminaire de St. Sulpice*, 14 App. Cas. 600; 16 S. C. R. 497; and see *Toronto v. Attorney-General*, 29 C. L. J. 601; and where the appellant had the right to appeal either to the Supreme Court or to His Majesty in Council, and has elected to appeal to the Supreme Court and has failed, a further appeal to His Majesty in Council will not be allowed unless some important question of law is involved; the question whether a railway company is bound to protect a passenger on its railway from assault was not considered a question of such importance as to warrant the granting of leave: *Canadian Pacific Ry. v. Blain*, 1904, A. C. 453, and see *Churgue v. Murray*, 1903, A. C. 521.

Where an appellant obtained leave to appeal on the ground that he desired to raise a particular question of great and general importance, he was not permitted on the appeal to contend that no such question arose, and that the case turned upon a question of fact on which the Court below was in error: *St. John's v. Central Vermont Ry. Co.*, 14 App. Cas. 590.

For other cases illustrating the principles on which the Judicial Committee acts in granting special leave to appeal, see 89 L. T. Jour. 287.

Where leave to appeal is granted in a case where the amount in dispute is below that for which an appeal lies in strict course of law, it may be granted only on the terms of the appellant paying the costs of the appeal in any event: *Shenton v. Smith*, 1895, A. C. 229; 72 L. T. 130; *Montreal Gas Co. v. Cadieux*, 1898 A. C. 718.

His Majesty in Council will not entertain appeals on mere questions of procedure, where no substantial injustice has been done, and will not suffer points to be raised on such appeals which were not taken, or have been abandoned, in the Court below: *The Palgrave Gold Mg. Co. v. McMillan*, 1892, A. C. 460; 67 L. T. 425; *Randrick v. Australian C. I. Corp.*, 1893, A. C. 322; *Solling v. Broughton*, 1893, A. C. 556; *Ex p. Kennington*, 8 Jur. N. S. 1111; *Grey v. Manitoba & N. W. Ry.*, 1897, A. C. 254, unless the Judicial Committee of the Privy Council is satisfied that it has before it all the facts bearing on the new contention as completely as if it had been raised at the trial: *Karunaratne v. Ferdinandus*, 1902, A. C. 405, 86 L. T. 329; *Archambault v. Archambault*, 87 L. T. 404; 1902, A. C. 575; and see *The Queen v. Poirier*, 30 S. C. R. 36; and when the question of the illegality of a contract was raised by the Court of Appeal itself, but had not been raised in argument before them, the Judicial Committee, though considering the circumstances suspicious, declined to give judgment on the question and sent the case for a new trial: *Connolly v. Consumers' Cordage Co.*, 89 L. T. 347.

Where the Supreme Court of Canada has acted under a special reference to it, under an agreement between the parties, and not in its ordinary jurisdiction as a Court of Appeal, no appeal lies to His Majesty in Council: *Atty.-Gen. of Nova Scotia v. Gregory*, 55 L. T. 270; 55 L. J. P. C. 40.

Appeal in Forma Pauperis.—By leave of the Judicial Committee an appeal may be allowed to be prosecuted in *forma pauperis* in a proper case; but where it subsequently appeared that such an appeal was frivolous and the leave would not have been granted if all the facts had been disclosed, the order was rescinded: *Quintan v. Quintan*, 1901, A. C. 612. Rules 831, 832.

831 The security to be given in cases of appeal to [His] Majesty in Privy Council, shall be personal, and by bond to the respondent, such bond to be executed by two sufficient sureties (except in special cases), as mentioned in Rule 830, in the penal sum of \$2,000, the condition of which bond shall be to the effect that the appellant shall and will effectually prosecute his appeal, and pay such costs and damages as shall be awarded in case the judgment appealed from shall be affirmed, or in part affirmed. Security to be given on appeal to Privy Council. Con. Rule 855.

R. S. O. c. 48, s. 2, requires this security to be given.

A form of bond is given in the App. Form 198. See H. & L. Forms No. 1178.

A bond according to the terms of this Form having the words "or pay" in the condition, instead of "and pay," the words used in Rule 831, is regular; and "effectually prosecute" means "successfully prosecute." But to secure the amount found due to the respondents by the judgment appealed from, so as to entitle the appellant to a stay of execution, a bond with the condition in the form of Form 198 is not sufficient; see Rule 832 (d). A bond for that purpose must be conditioned in the same way as a bond under Rule 830; see Form 197, H. & L. Forms No. 1161, and Rule 833; *International Bridge Co. v. Canada Southern Ry. Co.*, 9 P. R. 250; *McMaster v. Radford*, 16 P. R. 20; R. S. O. c. 48, s. 4.

832. Upon the perfecting of the security mentioned in Rule 831, execution shall be stayed in the original cause, except in the following cases:—

(a) If the judgment appealed from directs the assignment or delivery of documents or personal property, execution shall not be stayed until the things directed to be assigned or delivered have been brought into the Court of Appeal or placed in the custody of such officer or receiver as that Court or a Judge thereof appoints, nor until security has been given to the satisfaction of that Court or a Judge thereof, and in such sum as may be directed, that the appellant will obey the order of the Judicial Committee of the Privy Council. Subject to certain exceptions in which partial performance is required by delivery into Court.

(b) If the judgment appealed from directs the execution of a conveyance or any other instrument, execution shall not be stayed until the instrument has been executed and deposited. Or by executing instrument.

Rules 833, 834. with the proper officer, to abide the judgment of the said Judicial Committee.

Or by the giving of special security not to commit waste.

(c) If the judgment appealed from directs the sale or delivery of possession of real property or chattels real, execution shall not be stayed until security has been entered into to the satisfaction of the Court of Appeal, and in such sum as that Court or a Judge directs, that during the possession of the property by the appellant, he will not commit or suffer to be committed any waste on the property, and that if the judgment be affirmed, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, and also, in case the judgment is for the sale of property and the payment of a deficiency arising upon the sale, that the appellant will pay the deficiency;

Or to pay debt and costs.

(d) If the judgment appealed from directs the payment of money, execution shall not be stayed until the appellant has given security, to the satisfaction of the Court of Appeal or a Judge thereof, that if the judgment, or any part thereof, be affirmed, the appellant will pay the amount thereby directed to be paid, or the part thereof as to which the judgment may be affirmed if it be affirmed only as to part, and all damages awarded against the appellant on the appeal. Con. Rules 804, 855.

See also R. S. O. c. 48, ss. 3, 4.

The Supreme Court of Canada will not entertain an application to stay proceedings pending an appeal from that Court to His Majesty in Council: *Adams v. Bank of Montreal*, 31 S. C. R. 223.

Form, etc., of security.

833. The provisions of Rule 830 shall apply to security given under Rules 831 and 832. *New. See. Con. Rules 856, 857.*

When given, a *pat* to stay execution to be granted.

Judge may order execution to issue.

834. When the security has been perfected and allowed, a Judge of the Court of Appeal may issue his *fiat* to the Sheriff to whom any execution under the judgment has been issued, to stay the execution, and the execution shall be thereby stayed, whether a levy has been made under it or not; but if the grounds of appeal appear to be frivolous, the Court of Appeal or a Judge thereof, may order execution to issue or to be proceeded with. Con. Rules 805, 855.

Where judgment is given by the Court of Appeal in favour of defendant with costs, he is entitled to payment out of Court of money paid into Court by the plaintiff as security for the costs of the action, notwithstanding an intended appeal by the plaintiff to the Privy Council, as, otherwise, there would in effect be a stay of proceedings without any security being given. In such a case the plaintiff should apply to the Court of Appeal to stay execution: *Centaur Cycle Co. v. Hill*, 7 O. L. R. 317. Rule 834.

Under the Imperial Statute, 7 & 8 Vict. c. 69, s. 11, the Judicial Committee of the Privy Council is empowered to make Rules, and under the power thus conferred the following Rules relating to appeals have been passed.

RULE MADE BY THE JUDICIAL COMMITTEE.

Directing Judges of the Courts in the Colonies and Foreign Settlements of the Crown to give their reasons in writing for the judgment appealed from, and to transmit the same with the transcript of the judgment. Rule of P. C. of 12th Feb., 1845.

AT THE COUNCIL CHAMBER, WHITEHALL, the 12th Feb., 1845.

By the Judicial Committee of the Privy Council:

Whereas, by an Act passed in the eighth year of Her Majesty's reign, intitled, etc. [Here follows a recital of 7 & 8 Victoria, c. 69, s. 11.]

Now, therefore, the Lords of the said Judicial Committee of the Privy Council are pleased to order, as it is hereby ordered, that when any appeal shall be prosecuted from any judgment of any Court in the Colonies or foreign settlements of the Crown, the reasons given by the Judges of such Court, or any of such Judges, for or against such judgment, shall be, by the Judge or Judges of such Court, communicated in writing to the Registrar of such Court, or other officer, whose duty it is to prepare and certify the transcript record of the proceedings in the cause, and that the same be by him transmitted in original to the Clerk of Her Majesty's Privy Council, at the same time when the documents and proceedings proper to be laid before Her Majesty in Council upon the hearing of the appeal are transmitted.

Whereof the Judges of all such Courts in the Colonies or foreign settlements of the Crown are to take notice, and govern themselves accordingly.

C. C. GREVILLE.

This Rule is still in force, and is to be observed: see 12 App. Cas. 133.

ORDERS OF THE PRIVY COUNCIL.

Passed at the Court of Buckingham Palace, the 13th of June, 1853. Rule of P. C. of 13th June, 1853.

Present:

THE QUEEN'S MOST EXCELLENT MAJESTY.

His Royal Highness Prince Albert.

Lord President,
Lord Steward,
Duke of Newcastle.
Duke of Wellington.
Lord Chamberlain,

Earl of Aberdeen,
Earl of Clarendon,
Viscount Palmerston,
Mr. Herbert,
Sir James Graham. Bt.

Rule 834.

Rules of
P. C.

Whereas, there was this day read at the Board a report from the Right Honourable the Lords of the Judicial Committee of the Privy Council, dated the 30th May last past, humbly setting forth that the Lords of the Judicial Committee have taken into consideration the practice of the Committee with a view to greater economy, despatch, and efficiency in the appellate jurisdiction of Her Majesty in Council, and that their Lordships have agreed humbly to report to Her Majesty that it is expedient that certain changes should be made in the existing practice in appeals, and recommending that certain Rules and Regulations therein set forth should henceforth be observed, obeyed, and carried into execution, provided Her Majesty is pleased to approve the same.

Her Majesty, having taken the said report into consideration, was pleased, by and with the advice of Her Privy Council, to approve thereof, and of the Rules and Regulations set forth therein, in the words following, *viz*:—

Appellant
when
successful
may recover
costs of
appeal.

I. That, any former usage or practice of Her Majesty's Privy Council notwithstanding, an appellant who shall succeed in obtaining a reversal, or material alteration, of any judgment, decree or order, appealed from, shall be entitled to recover the costs of the appeal from the respondent, except in cases in which the Lords of the Judicial Committee may think otherwise to direct.

Transcripts
to be sent to
the Registrar
of the
Privy
Council.

II. That the Registrar or other proper officer having the custody of the records in any Court, or special jurisdiction from which an appeal is brought to Her Majesty in Council, be directed to send by post with all possible despatch, one certified copy of the transcript record in each cause to the Registrar of Her Majesty's Privy Council, Whitehall; and that all such transcripts be registered in the Privy Council office, with the date of their arrival, the names of the parties, and the date of the sentence appealed from; and that such transcripts be accompanied by a correct and complete index of all the papers, documents and exhibits in the cause; and that the Registrar of the Court appealed from, or other proper officer of such Court, be directed to omit from such transcript all merely formal documents, provided such omission be stated and certified in the said index of papers; and that special care be taken not to allow any document to be set forth more than once in such transcript; and that no other certified copies of the record be transmitted to agents in England by or on behalf of the parties in the suit; and that the fees and expenses incurred and paid for the preparation of such transcript be stated and certified upon it by the Registrar, or other officer, preparing the same.

Transcripts
may be
printed
abroad.

III. That where a record of proceedings or evidence in the cause appealed has been printed or partly printed abroad, the Registrar or other proper officer of the Court from which the appeal is brought shall be bound to send home the same in a printed form, either wholly or so far as the same may have been printed, and that he do certify the same to be correct, on two copies, by signing his name on every printed sheet, and by affixing the seal, if any, of the Court appealed from to these copies, with the sanction of the Court.

And that in all cases in which the parties in appeals shall think fit to have the proceedings printed abroad, they shall be at liberty to do so, provided they cause fifty copies of the same to be printed in folio, and transmitted, at their expense, to the Registrar of the Privy Council, two of which printed copies shall be certified as above by the officers of the Court appealed from; and in this case no further

expense for copying or printing the record will be incurred or allowed in England (a). Rule 334.

IV. That on the arrival of a written transcript of appeal at the Privy Council office, Whitehall, the appellant or the agent of the appellant prosecuting the same shall be at liberty to call on the Registrar of the Privy Council to cause it, or such part thereof as may be necessary for the hearing of the case, and likewise all such parts thereof as the respondent or his agent may require to be printed by Her Majesty's Printer, or by any other printer on the same terms, the appellant or his agent engaging to pay the costs of preparing a copy for the printer at a rate not exceeding one shilling per brief sheet, and likewise the cost of preparing such record or appendix, and that one hundred copies of the same be struck off, whereof thirty copies are to be delivered to the agents on each side, and forty kept for the use of the Judicial Committee; and that no other fees for solicitors' copies of the transcript, or for drawing the joint appendix, be henceforth allowed, the solicitors on both sides being allowed to have access to the original papers at the Council office, and to extract or cause to be extracted and copied such parts thereof as are necessary for the preparation of the petition of appeal, at the stationer's charge, not exceeding one shilling per sheet.

V. That a certain time be fixed within which it shall be the duty of the appellant or his agent to make such application for the printing of the transcript, and that such time be within the space of six calendar months from the arrival of the transcript and registration thereof in all matters brought by appeal from Her Majesty's Colonies and plantations east of the Cape of Good Hope, or from the territories of the East India Company, and within the space of three months in all matters brought by appeal from any other part of Her Majesty's Dominions abroad; and that in default of the appellant or his agent taking effectual steps for the prosecution of the appeal within such time or times respectively, the appeal shall stand dismissed without further order, and that a report of the same be made to the Judicial Committee by the Registrar of the Privy Council at their Lordships' next sitting (b).

VI. That wherever it shall be found that the decision of a matter on appeal is likely to turn exclusively on a question of law, the agents of the parties with the sanction of the Registrar of the Privy Council, may submit such question of law to the Lords of the Judicial Committee in the form of a special case, and print such parts only of the transcript as may be necessary for the discussion of the same; provided that nothing herein contained, shall in any way bar or prevent the Lords of the Judicial Committee from ordering the full discussion of the whole case, if they shall so think fit; and that in order to promote such arrangements and simplification of the matter

(a) Where the record is printed elsewhere than in England, a successful appellant is unable to recover the cost of printing, whilst he may do so if it is printed in England; Lattey's P. C. Pr., 3. As to form and size, etc., see page 1090.

(b) Where the order of the Court below granting leave to appeal made no provision as to the costs of the motion in the event of the appeal being dismissed for want of prosecution, it was held that the Court below had jurisdiction to rectify the mistake: *Milson v. Carter*, 1894, A. C. 638; 63 L. T. 755.

Rule 834.Rules of
P. C.

in dispute, the Registrar of the Privy Council may call the agents of the parties before him, and having heard them and examined the transcript, may report to the Committee as to the nature of the proceedings.

And Her Majesty is further pleased to order, and it is hereby ordered, that the foregoing Rules and Regulations be punctually observed, obeyed, and carried into execution, in all appeals or petitions, and complaints in the nature of appeals, brought to Her Majesty, or to Her heirs or successors, in Council from Her Majesty's Colonies and plantations abroad, and from the Channel Islands, or the Isle of Man, and from the territories of the East India Company, whether the same be from Courts of Justice, or from special jurisdictions, other than appeals from Her Majesty's Courts of Vice-Admiralty, to which the said Rules are not to be applied.

Whereof the Judges and Officers of Her Majesty's Courts of Justice abroad, and the Judges and Officers of the Superior Courts of the East India Company, and all other persons whom it may concern, are to take notice and govern themselves accordingly.

W. L. BATHURST.

Rule of
P. C. 31
March, 1855.**AT THE COURT AT BUCKINGHAM PALACE.***The 31st Day of March, 1855.**Present:***THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL.**Judicial
Committee,
may relax
Rules.

Whereas doubts have arisen with reference to the power of the Judicial Committee of the Privy Council to suspend or relax, under certain special circumstances, the regulations in appeal cases established by Her Majesty's Order in Council, of the 13th June, 1853; Her Majesty, by and with the advice of Her Privy Council, is pleased to order, and it is hereby ordered, that in appeal cases in which a petition of appeal to Her Majesty shall have been lodged, and referred by Her Majesty to the Judicial Committee, the said regulations shall be subject to any order or direction which, in the opinion of the Lords of the Judicial Committee, the justice of any particular case may seem to require.

C. C. GREVILLE.

Order of P.
C. regulat-
ing print-
ing of
appeal
books.

An Order in Council of 24th March, 1871, has established the following rules for the printing of the transcript:

Form: Deny quarto.*Size:* 11 inches in height, 8½ inches in width.*Types:* for the text,—Pica; for printing accounts, tabular matter, and notes—Long Primer.*Lines:* 47 lines in each page of Pica; each line being 73¼ inches, or 146 millimeters in length.*Price:* in England for printing—38 shillings per sheet of 8 pages of Pica, with marginal notes, not including corrections, tabular matter, and other extras: see Beauchamp Pr. Cal. 32.

AT THE COURT AT WINDSOR CASTLE.

The 26th day of June, 1873.

Present:

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL.

Whereas, in many appeals now pending before Her Majesty in Council, no effectual steps have been taken by the parties or their agents to set down their cases for hearing, although more than twelve months have elapsed since the arrival and registration of the transcript of appeal in this country, and it is expedient to make further provision in that behalf: Her Majesty, by and with the advice of Her Privy Council, and upon a recommendation of the Lords of the Judicial Committee of the Privy Council, is pleased to order, and it is hereby ordered, that the solicitors or agents for the party appellant in all such appeals now pending before Her Majesty in Council are hereby required to take effectual steps to set down their cases for hearing within six months from the date of this Order, and in all other appeals to Her Majesty in Council within a period not exceeding twelve months from the date of the arrival and registration of the transcript in this country.

And Her Majesty is further pleased to order, and it is hereby ordered, that it shall be the duty of the Registrar of the Privy Council to report to the Lords of the Judicial Committee the names of the parties and dates of the decrees in appeals in which no effectual steps have been taken within the aforesaid periods of time to set down the case for hearing; and the Lords of the Judicial Committee of the Privy Council shall be at liberty to call upon the appellant or his agent in such cases to shew cause why the said appeal or appeals should not be dismissed for non-prosecution, and if they shall so think fit to recommend to Her Majesty the dismissal of any such appeal, or to give such directions therein as the justice of the case may require.

And Her Majesty is further pleased to order that nothing in the present Order shall prevent the dismissal of an appeal under the 5th of the Rules approved by Her Majesty on the 13th of June, 1873, in cases to which that Rule is applicable.

Whereof the Governors of Her Majesty's Plantations and Colonies abroad, and the Judges or Officers of Her Majesty's Courts of Justice from which an appeal lies to Her Majesty in Council, and all other persons whom it may concern, are to take notice, and govern themselves accordingly.

ARTHUR HELPS.

AT THE COURT AT WINDSOR.

The 6th day of March, 1896.

Present:

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL.

Whereas there was this day read at the Board a representation from the Lords of the Judicial Committee of the Privy Council, in the words following, viz.:

"The Lords of the Judicial Committee of the Privy Council have the honour, with their humble duty to Your Majesty, to

Rule 834

Rule of P.C.,
26 June,
1873.

Appeals
P.C. may
be dismissed
for want of
prosecution

Order of 6th
March, 1896.

Rule 834.

represent that it would be advisable that the Rules, established by Your Majesty's Order in Council of the 31st March, 1870, should be amended; and their Lordships beg leave to recommend that Your Majesty will be graciously pleased to approve the Rules set forth in the Schedule hereunto annexed, and to declare that the said Rules shall be observed by all Proctors, Solicitors, Attorneys, Agents, or other persons employed in the conduct of appeals, petitions, or other matters pending before Her Majesty in Council."

Her Majesty having taken the said representation and the schedule of Rules annexed into consideration, was pleased, by and with the advice of Her Privy Council, to approve thereof, and to order, as it is hereby ordered, that the said Rules (copy of which is herewith annexed) be punctually observed, obeyed, and carried into execution, in lieu of the Rules established by the Order of Her Majesty in Council of the 31st March, 1870.

C. L. FEEL.

SCHEDULE annexed to the foregoing Order.

Rules.

I. Every Proctor, Solicitor, or Agent admitted to practise before Her Majesty's Most Honourable Privy Council, or any of the Committees thereof, shall subscribe a Declaration to be enrolled in the Privy Council Office, engaging to observe and obey the Rules, Regulations, Orders, and Practice of the Privy Council; and also to pay and discharge, from time to time, when the same shall be demanded, all fees or charges due and payable upon any matter pending before Her Majesty in Council; and no person shall be admitted to practise, or allowed to continue to practise, before the Privy Council, without having subscribed such Declaration in the following terms:

FORM OF DECLARATION.

We, the Undersigned, do hereby declare, that we desire and intend to practise as Solicitors or Agents in Appeals and other matters pending before Her Majesty in Council; and we severally and respectively do hereby engage to observe, submit to, perform, and abide by all and every the Orders, Rules, Regulations, and Practice of Her Majesty's Most Honourable Privy Council and the Committees thereof now in force, or hereafter from time to time to be made; and also to pay and discharge, from time to time, when the same shall be demanded, all fees, charges, and sums of money due and payable in respect of any Appeal, Petition, or other matter in and upon which we shall severally and respectively appear as such Solicitors or Agents.

II. Every Proctor or Solicitor practising in London shall be allowed to subscribe the foregoing Declaration, and to practise in the Privy Council, upon the production of his Certificate for the current year; and no fee shall be payable by him on the enrolment of his signature to the foregoing Declaration.

III. Persons not being certificated London Solicitors, but having been duly admitted to practise as Solicitors by the High Courts of Judicature in England and Ireland, or by the Court of Session in Scotland, or by the High Courts in any of Her Majesty's Possessions respectively, may apply, by petition, to the Lords of the Com-

mittee of the Privy Council, for leave to be admitted to practise **Rule 834.** before such Committee; and such persons may, if the Lords of the Committee please, be admitted to practise by an Order of their Lordships, for such periods and under such conditions as their Lordships are pleased to direct.

IV. Any Proctor, Solicitor, Agent, or other person practising before the Privy Council, who shall wilfully act in violation of the Rules and Practice of the Privy Council, or of any rules prescribed by the authority of Her Majesty, or of the Lords of the Council, or who shall misconduct himself in prosecuting proceedings before the Privy Council, or any Committee thereof, or who shall refuse or omit to pay the Council Office fees or charges payable from him when demanded, shall be liable to an absolute or temporary prohibition to practise before the Privy Council, by the authority of the Lords of the Judicial Committee of the Privy Council, upon cause shown at their Lordships' Bar.

See *Re Tridale*, 14 App. Cas. 328.

PRIVY COUNCIL APPEALS.

AT THE COURT AT RUCKINGHAM PALACE.

The 20th day of March, 1905.

Present:

THE KING'S MOST EXCELLENT MAJESTY,

ARCHBISHOP OF CANTERBURY, LORD PRESIDENT, LORD SUFFIELD, AND
SIR WILLIAM WALROND.

Whereas there was this day read at the Board a representation from the Judicial Committee of the Privy Council, dated the 16th day of March, 1905, and in the words following, viz.:

"The Lords of the Judicial Committee having taken into consideration the practice under which an appeal to Your Majesty in Council cannot in the absence of a special order in that behalf made by their Lordships be set down for hearing *ex parte* as against a respondent to the appeal, who has failed to enter an appearance thereto in the Registry of the Privy Council, unless the appellant shall have previously obtained from their Lordships two successive orders, commonly known as "Appearance Orders," requiring the said respondent to enter an appearance to the appeal within the periods by the said orders respectively limited, and shall have duly published the said orders by affixing the same on the Royal Exchange and elsewhere in the usual manner, and unless the said periods so limited by the said orders as aforesaid shall have expired. And being of opinion that the said practice is inconvenient and ought in certain cases and subject to certain conditions to be dispensed with. Their Lordships do this day agree humbly to recommend to your Majesty to order as follows, that is to say:

"1. That where a respondent to an appeal to Your Majesty in Council, whose name has been entered on the record of the appeal, by the Court admitting the appeal, fails to enter an appearance to the appeal in the Registry of the Privy Council, and it appears from the Transcript Record in the appeal, or from a certificate of the officer of the Court transmitting the said transcript record to the Registrar of the Privy Council, that the said respondent has received notice of the order admitting the appeal to Your Majesty in Council, or of the order of Your Majesty in Council giving the appellant special leave to appeal to Your Majesty in Council (as the case

Rule 834. may be), and has also received notice of the despatch of the said transcript record to the Registrar of the Privy Council, the appellant shall not, subject to any direction by their Lordships to the contrary, be required to take out appearance orders calling upon the said respondent to enter an appearance in the appeal, and the appeal may, subject as aforesaid, be set down for hearing *ex parte*, as against the said respondent, at any time after the expiration of three calendar months from the date of the lodging of the appellant's petition of appeal, in like manner as if the said appearance orders had been taken out by the appellant, and the times thereby respectively limited for the said respondent to enter an appearance had expired.

"2. That where a respondent to an appeal to Your Majesty in Council, whose name has been brought on the record of the appeal by an order of Your Majesty in Council, fails to enter an appearance to the appeal in the Registry of the Privy Council, and it appears, from the transcript record, or from a supplementary record in the appeal, or from a certificate of the officer of the Court transmitting the said transcript record or supplementary record to the Registrar of the Privy Council, that the said respondent has received due notice of any intended application to Your Majesty in Council to bring him on the record as a respondent to the appeal, the appellant shall not, subject to any direction by their Lordships to the contrary, be required to take out appearance orders calling upon the said respondent to enter an appearance in the appeal, and the appeal may, subject as aforesaid, be set down for hearing *ex parte*, as against the said respondent, at any time after the expiration of three calendar months from the date on which the said respondent shall have been served with a copy of Your Majesty's Order in Council bringing him on the record of the appeal, in like manner as if the said appearance orders had been taken out by the appellant, and the times thereby respectively limited for the said respondent to enter an appearance had expired.

"3. That nothing herein contained shall be deemed to affect the power of their Lordships to order the appellant, in an appeal referred by Your Majesty to their Lordships, to take out appearance orders, or to be excused from taking out appearance orders, in any case in which their Lordships shall think fit so to order, and generally to give such direction as to the time at which, and the conditions on which, an appeal so referred as aforesaid shall be set down, as in the opinion of their Lordships the circumstances of the case may require.

"4. That this order shall apply to all appeals in which the petition of appeal shall be lodged after the date hereof."

Enforcing Judgments of His Majesty in Council.—Provision is made by *Rule 818 (a)* for enforcing the judgments of His Majesty in Council by filing the order in the High Court, whereupon it may be entered and acted upon as a judgment of that Court. Where the order reverses a judgment of the Supreme Court of Canada it may be made a rule of that Court: *Lewis v. Howe*, 11 S. C. R. 722; and where costs have been paid under the judgment so reversed the Supreme Court will order them to be refunded: *Ib.*, and *semble* with interest from the date of payment; see *Ashworth v. English Card Clothing Co.* (No. 2), 1904, 1 Ch. 704; 90 L. T. 263.

CHAPTER XIII.

ENFORCING OF JUDGMENTS AND ORDERS.

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| 1. WRITS OF EXECUTION, 835-887. | 2. ENFORCEMENT OF MASTORY ORDERS, 862. |
| (i) <i>General provisions</i> , 835-842. | 3. ISSUE AND FORM OF WRITS, RENEWAL, ETC., 863-874. |
| (ii) <i>Writ of fieri facias</i> , 843, 844. | 4. SALE UNDER WRIT OF FIERI FACIAS, 875-882. |
| (iii) <i>Writ of venditioni exponas</i> , 845. | 5. RETURN OF WRITS, 883-898. |
| (iv) <i>Writ of possession</i> , 846-849. | 6. DISCHARGE OF EXECUTION DEBTORS, 899. |
| (v) <i>Writ of Assignment of Dower</i> , 850, 851. | 7. DISCOVERY IN AID OF EXECUTION, 900-914. |
| (vi) <i>Writ of Delivery</i> , 852. | 8. ATTACHMENT OF DEBTS, 915-921. |
| (vii) <i>Writ of attachment and sequestration</i> , 853-861. | |

1. WRITS OF EXECUTION.

(i) *General Provisions.*

835. In Rules 836 to 921 and 1015 to 1020, unless there is something in the context indicating a different meaning, ^{Interpretation.}

(a) "Judgment" shall include an order to the same effect: ^{"Judgment."}

(b) "Judgment creditor" shall mean the party or person who is entitled to receive payment or to enforce a judgment or order: ^{"Judgment creditor."}

(c) "Judgment debtor" or "debtor" shall mean the party or person to make payment under any judgment or order or against whom the same may be enforced. *New.* See Con. Rules 866, 934. ^{"Judgment debtor."}

See Enr. (1883) R. 602, and R. S. O. 1877, c. 66, s. 72, and *Ib.*, c. 67, s. 12.

This *Rule* only means that an order may be enforced in the action in the same way as a judgment. An order does not create a debt like a judgment, so as to enable an independent action to be maintained upon it: *Re Keer v. Smith*, 24 Ont. 473. By 61 Vict. c. 15, s. 9 (O.), it is now enacted that no suit or action shall be brought in a Division Court upon any judgment, decree, or order, for the payment of money made by the High Court or a County Court, where execution may issue in upon or in respect to such judgment, decree or order.

Rules

836, 837. In England it has been held that it is not intended that all orders are to be equivalent to judgments: *Ex p. Chinery*, 12 Q. B. D. 342; and that the provisions respecting attachment of debts (*Rule 911, et seq.*) which apply to judgments may not be employed to enforce an order dismissing an action with costs for want of prosecution: *Cremetti v. Crom*, 4 Q. B. D. 225; see also *Ex p. Earl of Strathmore*, 20 Q. B. D. 512, *Ex p. Whinney*, 13 Q. B. D. 476; *Ex p. Grimstead*, 17 Q. B. D. 357; *Ex p. Moore, Re Faithfull*, 14 Q. B. D. 627; see, however, *Nott v. Sands*, W. N. 1883, 74; *Whittaker v. Whittaker*, 7 P. D. 15.

As to the practice in this Province, see notes to *Rules 900 and 911*.

As to enforcing orders made by a Judge of the H. C. J., or of a C. C., as *persona designata*, and not in Court, see R. S. O. c. 76.

The non-service of an order under which an execution has been issued, is no ground for setting aside the execution: *Cranston v. Blair*, 15 P. R. 167.

Meaning of
"Writ of
execution,"
and issuing
of execution

836. In these Rules the term "writ of execution" shall include writs of *fiery facias*, *capias*, sequestration and attachment, and all subsequent writs that may issue for giving effect thereto. And issuing execution against any party or person shall mean the issuing of any such process against his person or property as under these Rules is applicable to the case. Con. Rule 858.

See Eng. (1883) R. 586.

"Execution" does not include the appointment of a receiver by way of equitable execution: *Norburn v. Norburn*, 1894, 1 Q. B. 448, *Re Craig v. Leslie*, 18 P. R. 270.

An order may not only be enforced in the manner provided by the following Rules, but also by action, but that course ought not to be adopted except in cases of real necessity and where the ordinary process of execution is inadequate: *Pritchett v. English*, 1899, 2 Q. B. 428; 81 L. T. 706.

As to whether "attachment" includes "attachment of debts," see *Fellows v. Thornton*, 14 Q. B. D. 335. In this Rule the words are "writ of attachment," which would not be applicable to attachment of debts, which is done by order.

In some Rules, e.g. Rules 836-838, the term "writ of execution" seems to be used in its widest signification, and to include other writs than those here mentioned, for example writs of delivery and possession.

Enforcing
judgment
for recovery
of money.

837. A judgment for the recovery by or payment to any person of money may be enforced by any of the modes by which, prior to the passing of *The Ontario Judicature Act, 1881*, a judgment or decree or order of any (a) of the Superior Courts for the payment of money, might have been enforced. Con. Rule 826.

The Eng. (1883) R. 581, has at (a) the words, "Court whose jurisdiction has been transferred by the same Act." The Rules are otherwise the same. Rules 838, 839.

The effect of this Rule is to preserve the right to issue any process of execution which might formerly be adopted to enforce payment of money under a judgment or decree: see *London, etc., v. Merritt*, 32 C. P. 380.

The principal of these were:

1. Writs of *fiat facias* and (in aid thereof) *renditioni caponum*, (as to which see Rule 845) and *distringas*.

2. Writs of sequestration: Rules 859 and 860.

In aid of execution, proceedings might also be taken by way of,

(a) Attachment of debts and garnishee process: Rules 911, *et seq.*

(b) Equitable execution: Rules 1015, 1016.

The word "judgment" in this Rule includes "order." Where execution is required to enforce an order, the original order, or an office copy thereof, should be produced to the officer required to issue the execution, unless he has access to the book in which it is entered: *Peoples B. & L. Assn. v. Stanley*, 4 O. L. R. 644; where costs are to be set off against costs payable under an order the execution should be issued only for the balance after making the set off: *Ib.*

838. Where a judgment directs the payment of money into Court, or to the credit of any cause, or otherwise than to any person, the person having the carriage of the judgment, so far as relates to such payment, shall be deemed the person to receive payment. *Con. Rule 934 (a).*

Person having carriage of the judgment, etc., to be deemed the person to receive payment.

839. Any judgment for the payment of money into Court may be enforced (a) [by any mode by which a judgment for the payment of money to a person may be enforced], and the person having the carriage of the judgment shall be deemed to be the person to receive payment for the purpose of enforcing the same. *Con. Rule 867.*

For payment into Court.

See Eng. (1883) R. 582.

(a) What follows is taken from R. S. O. 1877, c. 66, s. 72 (3).

Instead of the other words in brackets, the Eng. R. has the following: "by writ of sequestration: or, in cases in which attachment is authorized by law, by attachment."

In *Stranger Leathes v. Stranger Leathes*, W. N. 1882, 71, payment of money into Court was enforced by the appointment of a receiver of the dividends of moneys invested in Court, of rents of lands, and of shares in a mining company, in which the party ordered to pay had an interest: so also in *Coney v. Bennett*, 33 W. R. 700; 29 Ch. D. 993, where money was payable by a trustee into Court, he being out of the jurisdiction.

Rules

840, 841. The Eng. (1883) R. 582, enables an order for payment into Court to be enforced by writ of attachment in certain cases: see *Hutchinson v. Hartmont*, W. N. 1877, 29; *Carter v. Roberts* 1903, 2 Cb. 312; but that process cannot be employed here: see notes to *Rules* 854-856.

Where a solicitor is ordered to pay money into Court, which he has improperly obtained out of Court, but he fails to obey the order, the party having the carriage of the order is not obliged to enforce such an order by issuing a *fi. fa.*, but may apply to commit the solicitor for contempt notwithstanding R. S. O. c. 80, s. 5; *Pritchard v. Pritchard*, 18 Ont. 173. and see *Berry v. Donovan*, 21 Ont. App. 14; *Roberts v. Donovan*, 16 P. R. 456; *Swyny v. Harland*, 70 L. T. 227.

On execution by infant, person of unsound mind, or a class, money to be paid into Court.

840 Where money (other than for costs) is recovered by or on behalf of an infant, or a person of unsound mind, by his guardian, next friend, or committee, or on behalf of a class, the same shall, unless otherwise ordered, be paid into Court, subject to further order; and no payment to the guardian, next friend, or committee, of moneys due to such infant or person of unsound mind, or person having the conduct of the proceedings on behalf of the class, otherwise than for the costs of the action, shall be a valid discharge as against the infant or person of unsound mind, or the class. Every writ of execution for the levying of any such moneys shall be indorsed by the officer issuing the same with the following notice: "All moneys made under this execution, other than costs, are to be paid into Court by the Sheriff, as required by Rule 840." Con. Rule 877. *amended*.

Judgment for conditional relief.

841. Where a judgment is to the effect that any party is entitled to any relief subject to or upon the fulfilment of any condition or contingency, the party so entitled may, upon the fulfilment of the condition or contingency, and demand made upon the party against whom he is entitled to relief, apply to the Court or a Judge for leave to issue execution against such party. And the Court or Judge may order that execution issue accordingly, or may direct that any issue or question necessary for the determination of the rights of the parties be tried in any way in which a question arising in an action may be tried. Con. Rule 875.

See Eng. (1883) R. 587.

In an action for specific performance of a contract for the purchase of leaseholds, judgment was obtained for the payment of purchase money on the delivery of deeds. The vendor tendered the deeds, but the purchaser refused to accept them or pay the money. On motion

under this *Rule* the vendor was ordered to deposit the deeds in Court, **Rules 842, 843.**
 and the purchaser was ordered to pay the money within four days:
Bell v. Denvir, 34 W. R. 638; 54 L. T. 724; W. N. 1886, 113; see
 also *Morgan v. Brisco*, 31 Ch. D. 216; 32 Ch. D. 192.

842. In case any action of the proper competence of a Division Court is brought in the High Court or in a County Court, no execution against lands shall issue unless the amount of the judgment exceeds \$40. **Con. Rule 865.**
See The Division Courts Act (R. S. O. c. 60), ss. 230, 231.

No execution in Division Court against lands unless the judgment exceeds \$40

(ii) Writ of Fieri Facias.

843. Every person to whom any sum of money or any *fi. fa.* costs are payable under a judgment shall be entitled immediately to issue one or more writ or writs of *fieri facias* to enforce payment thereof, subject nevertheless as follows:

- (a) If the judgment is for payment within a period therein mentioned, the writ shall not be issued until after the expiration of such period.
- (b) The Court or Judge at the time of giving the judgment, or the Court or a Judge afterwards, may give leave to issue execution before, or may stay execution until after, the expiration of such period. **Con. Rule 863.**
Rules 23 June, 1894, 1859.

See Eng. (1883) R. 595, to the like effect.

Seem, the jurisdiction here given to stay execution cannot be exercised by qualifying a judgment for recovery of money, so as to make it payable by instalments: *Brien v. Sullivan*, 14 L. R. Ir. 391.

Now, in all cases, judgment may be entered as soon as given by the Judge, unless otherwise ordered: **Rule 630.**

The word "immediately," in this *Rule*, means *instantly*: *Clarke v. Creighton*, 14 P. R. 31, and its use probably sets at rest the question raised in *Cullen v. Cullen*, 2 Chy. Ch. 94, and *Coolidge v. Bank of Montreal*, 6 P. R. 73, as to whether the party to pay is entitled to any time to pay, before the issue of execution. *See Peoples B. & L. Assoc. v. Stanley*, 4 O. L. R. p. 645-6.

Notwithstanding this *Rule*, a writ of execution against a mutual, or a cash mutual insurance company cannot, under R. S. O. c. 203, s. 141, issue until after the expiration of sixty days from the recovery of judgment: see *Loewson v. Canada Farmers' Ins. Co.*, 9 P. R. 185; *Lount v. Canada Farmers' Ins. Co.*, 8 P. R. 433. (That provision in R. S. O. 1877, c. 161, s. 61, did not apply to a judgment recovered on a policy issued on the cash premium principle: *Loewson v. Canada Farmers' Mutual Ins. Co.*, 3 C. L. T. 452.) The above section 141

Execution against mutual insurance companies.

Rule 843. now applies to a mutual, or a cash mutual company, except where more than sixty per cent. of the premium or premium note or undertaking was paid in cash at the time of the insurance, or the application therefor; and a Judge, or the Master in Chambers, may, on application of the judgment creditor, inquire into the question, whether sixty per cent. was paid, and, if he certifies that more than 60 per cent. was so paid, execution may issue forthwith: R. S. O. c. 203, s. 141 (2).

Against
municipal
corporations.

For the mode of enforcing execution against a municipal corporation, see 3 Ed. vii. c. 19, s. 471.

Staying
execution.

The Court of Appeal is the proper Court to which to apply to suspend any order which that Court has made; consequently the application should be made to it to stay proceedings under its own order, pending an appeal from that order: *The Khedive*, 5 P. D. 1.

In *Murray v. Infield*, 1 Charl. Ca. (Court) 142, an action for libel, a verdict was given for the plaintiff for £100. "Huddleston, B., said that although he was now able to order immediate execution, he would adopt the old (English) practice, and give execution in fourteen days."

In *Taylor v. Sherley*, 1 Charl. Ca. (Court) 143. "Following the old practice," Pollock, B., gave execution in fourteen days. In Ontario the same result is sometimes attained by staying the entry of the judgment.

See *Hodges v. Fincham*, 1 Ch. D. 9.

This Rule abrogates the old practice, under which if a judgment creditor issued execution before costs were taxed, he was held to have waived his right to costs: *Harris v. Jewell*, W. N. 1883, 216.

Where an application under clause (b) has been refused by the Judge at the trial, special circumstances must be shewn on a subsequent application to the Court, as to which, see *Monk v. Bartram*, 1891, 1 Q. B. 346.

What may be seized under a *fi. fa.*—As to what may be taken under executions against goods and lands respectively, see R. S. O. c. 77, ss. 7, 10, 17, 18, 30, 33, 34, 35.

The writ affects only the interest which may be in the judgment debtor at the time of its delivery to the Sheriff: see *Park v. Riley*, 3 L. & A. 215; *Re Lewis & Thorne*, 14 Ont. 133; *Re Trusts Corporation & Boehmer*, 26 Ont. 191; *Darcy v. Williamson*, 1898, 2 Q. B. 194.

A pawnbroker's interest in redeemable pledges may be taken in execution under a *fi. fa.*: *Re Rolleston*, 43 Ch. D. 495; and see R. S. O. c. 77, s. 17.

As to the effect of an execution in the sheriff's hands upon growing crops, see *Smith v. Union Bank*, 15 C. L. T. 15 (Man.).

A right of dower in an equity of redemption before assignment, is not exigible under a writ of *fi. fa.*, nor is the share of one of several tenants in common of an equity of redemption: *Canadian Bank of Commerce v. Ralston*, 4 O. L. R. 106; nor is the right of property in a registered specific trade-mark; such a right can be sold, if at all, only as appurtenant to the business in which the trade-mark has been used: *Clegg v. Bassett*, 3 O. L. R. 263.

Where an equity of redemption has been sold and only in part ^{Rules} satisfied the judgment, and the purchaser sells his interest in the ^{844-846.} lands to the mortgagor, the lands again become liable to the execution: *Chittick v. Lowery*, 6 O. L. R. 547.

844. Subject to Rule 842, a writ of *fieri facias* issuing ^{Writs to be against both goods and lands.} under a judgment for the payment of money shall be issued against both the goods and chattels and the lands and tenements of the judgment debtor. See 57 V. c. 26, s. 1.

See R. S. O. c. 77, s. 8.

As to the mode of making a return of *nulla bona* without affecting the currency of the writ as to lands, see *Rules* 883, *et seq.*

(iii) Writ of Venditioni Exponas.

845. A writ of *venditioni exponas* may be issued against ^{Ven. ex.} goods and chattels alone or lands alone. *New.* See *Con.* Rule 860.

See Eng. (1883) R. 617, which embraces other writs, viz.: writs of "*distingas nuper vice comitem, fieri facias de bonis ecclesiasticis, sequestrari facias de bonis ecclesiasticis*, and all other writs in aid of a writ of *fieri facias* or of *elegit*."

The sheriff should sell the goods under a writ of *fi. fa.* without the issue of a *ven. ex.*, but where he has seized, but, for some reason, not sold, goods, he may be required to make a return respecting the *fi. fa.*, and thereupon a writ of *ven. ex.* may issue on *præcipe*. After the delivery of this writ to the sheriff he is bound to sell the goods and have the money in Court immediately after its execution: *Chit. Arch.*, 13th ed., 584; *Keightley v. Birch*, 3 Camp. 521.

(iv) Writ of Possession.

846. A judgment for the recovery or for the delivery of ^{For recovery of land.} the possession of land may be enforced by writ of possession. *Con.* Rule 868.

Identical with Eng. (1883) R. 583.

Under a writ of possession, under a judgment for possession, in an action by a landlord against his tenant, sub-tenants, not parties to the action, may be put out of possession: *Synod of Toronto v. Fiske*, 29 Ont. 738.

A writ of possession was ordered to issue in an action by a landlord against a tenant, notwithstanding that the landlord's reversion terminated before the trial, the defendant not shewing affirmatively that it would be unjust and futile to issue the writ: *Knight v. Clarke*, 15 Q. B. D. 294.

A final order of foreclosure is not a judgment for the recovery or delivery of possession of land within this *Rule*: see *Wood v. Wheeler*, 22 Ch. D. 281, although the bringing of an action for foreclosure stops the running of the Statute of Limitations: *Heath v. Pugh*, 6 C.

Rules

847, 848. P. D. 345. Under the practice in Ontario, an order for the delivery of possession forthwith may be contained in the judgment in a foreclosure action: see *Rule 141*, and Forms 153, 154 (H. & L. Forms, Nos. 864 and 865). As to whether an application for an order for delivery of possession may be made on or after obtaining the final order for sale, or foreclosure, see note to *Rule 141*, pp. 275-6.

See *Rudd v. Frank*, 17 Out. at p. 764.

For the purpose of recovering possession of land, the writ of possession supersedes the old writ of assistance: *Wyman v. Knight*, 39 Ch. D. 165.

Writ of possession.

847. Where by any judgment any person therein named is directed to deliver up possession of any lands to some other person [on or at any specified time after being served with the judgment], the person prosecuting the same shall, without any further order for that purpose, be entitled to issue a writ of possession, on filing an affidavit showing due service of the judgment and that the same has not been obeyed. Con. Rule 869.

The same as the Eng. (1883) R. 645, except the words in brackets which are not in the English Rule.

In *Chitty's Forms* (12th ed.), p. 596, note, it is said that the affidavit is only necessary in cases within the words of the *Rule*, viz., where the judgment directs the defendant "to deliver up possession."

The judgment on an award is in this form, and judgments in mortgage actions are so drawn: see Forms 153, 154 (H. & L. Forms, Nos. 864 and 865). In other cases the form is usually "that the plaintiff do recover," etc.: see Forms 140 to 143 (H. & L. Forms, Nos. 866 to 869).

Where plaintiff's title has expired *pro tanto lite*, see *Rule 61* and note.

Effect of writ.

848. A writ of possession shall have the effect of a writ of assistance as well as of a writ of *habere, acias possessi nem*, Con. Rule 861.

Not in any Eng. Rule.

This writ supersedes the old Chancery writ of assistance so far as the recovery of land is concerned: *Hall v. Hall*, 2 L. J. Chy. 680; *Wyman v. Knight*, 39 Ch. D. 165; but in *Eagle* it seems that in case of necessity the writ of assistance may still be used, e.g., to recover possession of personal property which is in danger of being removed beyond the jurisdiction of the Court: *Wyman v. Knight*, *supra*. It may be doubted whether this is so in Ontario in view of *Rule 3*. A special form of writ of delivery might probably in such case be framed from Form No. 175 (H. & L. Forms, No. 1082).

For the form of writ of possession, see Form 174 (H. & L. Forms, No. 1081).

The chief difference between a writ of assistance and the former writ of *habere facias possessionem* was, that the latter used merely to order the Sheriff to put the plaintiff in possession, whereas the former instructed the Sheriff to "defend and keep" the plaintiff "and his assigns in peaceable and quiet possession when and as often as any interruption may or shall be given or offered to them or any of them": see Daniell's Forms 982; thus it is presumed, rendering unnecessary applications for a new writ where a defendant wrongfully resumed possession after being ejected by the Sheriff: see *Hoc d. Peck v. Roe*, 2 U. C. Q. B. 27; *Edwards v. Bennett*, 5 P. R. 161; *McDermott v. McDermott*, 4 P. R. 252. This is now the language of Form 174, and a defendant who retakes possession wrongfully, after being ejected, is liable to be committed for contempt: see *Re Higgs*, *Goddard v. Higgs*, 97 L. T. Jour. 11.

Where a plaintiff has been put in possession under a writ of possession and a defendant soon after regains possession after the return of the writ executed, the plaintiff, on motion, is entitled to an order for a new writ of possession: *Practor v. Weller*, 3 C. L. T. 551; see *Stacpoole v. Walsh*, 6 L. R. Ir. 444.

If in executing the writ a person is found in possession not claiming under the defendant, and is dispossessed by the Sheriff, such person may apply for leave to defend the action under Rule 181; *Minet v. Johnson*, 63 L. T. 507.

849. Upon a judgment for recovery of any land and *mesne* profits or rents in respect of the property claimed and costs, there may be either one writ or separate writs of execution for the recovery of possession, and for *mesne* profits, rents and costs, at the election of the party entitled to recover the same. Con. Rule 870. Execution for lands and costs

It is held in Ireland, under sec. 209 of the C. L. P. Act (46 & 47 V. c. 113), repeated in the Rules under the Ir. Jud. Act, that where a plaintiff has obtained a verdict for possession, *mesne* profits and costs, execution for possession cannot issue till the costs are taxed, unless he has waived them; *Beasley v. Chapman*, 6 L. R. Ir. 393.

That section is as follows:

"209. Upon any judgment in ejectment there may be either one or several writs of execution for the recovery of possession and for the damages, the rents ascertained to be due and costs, at the election of the plaintiff."

(v) Writ of Assignment of Dower.

850. A judgment for the recovery of dower (whether with or without costs or damages) may be enforced by a writ of assignment of dower, directed to the Sheriff of the County in which the lands lie; and the writ shall set forth the lands out of which the plaintiff is to recover dower, and may be according to Form No. 183. R. S. O. 1887, c. 56, s. 7. Con. Rule 871. Writ of assignment of dower

Rules**851, 852.**

A judgment in an action to establish a will, declaring plaintiff entitled to land in question in fee simple subject to the dower of the testator's widow (a defendant) is not a judgment for the recovery of dower within the meaning of this Rule: *Cope v. Cope*, 20 Ont. 441.

For Form No. 183, see H. & L. Forms No. 1084.

Dower
pursuant
to Rule 959.

851. The writ of assignment of dower required to be issued under Rule 959, when the right of dower is acquired in by the owner of the estate, may be according to Form No. 184. Con. Rule 872.

For Form No. 184, see H. & L. Forms, No. 1085.

(vi) *Writ of Delivery.*

Specific
delivery
of goods.

852. Where specific goods, chattels, deeds, securities, valuable papers, or any property other than land or money, are demanded in an action, and judgment has been entered to recover the same or their value, the Court shall at the request of the judgment creditor, where a recovery or delivery of the property in specie is desired, direct a writ of execution to issue on the judgment, commanding the judgment debtor specifically to deliver up forthwith the property demanded, and in case of refusal that the judgment debtor be arrested and detained in prison until he complies with the terms of the writ, and also that the goods and chattels of the judgment debtor to double the value of the property in question be taken and kept until the further order of the Court to enforce obedience to the writ, or that a writ of sequestration may issue; or, at the option of the judgment creditor, the Court may order the Sheriff to make of the judgment debtor's goods the value of such property; but the judgment creditor shall, either by the same or by a separate writ of execution (to be issued in the ordinary manner) be entitled to have made of the judgment debtor's goods and lands, the damages, costs and interest in such action. Con. Rule 873.

Damages,
costs, etc.

See Eng. (1883) R. 649.

The judgment for delivery of the property, or payment of its value, does not divest the plaintiff of the property in the chattel until the satisfaction of the value found by the judgment, even though satisfaction is prevented by the bankruptcy of defendant: *Ex p. Drake*, 5 Ch. D. 866.

It is doubtful under the English Rules, whether an order for the writ is necessary: *Ivory v. Cruickshank*, W. N. 1875, 249. In Ont. it is probable that the direction of the Judge will be given in the judgment.

In *Ivory v. Cruickshank*, W. N. 1875, 240; 1 Charl. Ch. Ca. 123, **Rule 553**.
 an action for rent and for the return of specific goods, judgment having been signed for the amount of rent in default of appearance, the plaintiff was allowed to sign judgment also for the return of the specific goods, and then to proceed under Eng. R. 584 as he might be advised by writ of delivery, attachment or sequestration. In *Battley v. Sears* (Times, 7th March, 1876, cited Charley's Jud. Act, 3rd ed., p. 660), it is stated that a rule nisi for an attachment was granted against a defendant for refusing to give up a diamond ring or pay for it, execution having proved futile, as the defendant was a married woman.

(vii) *Writs of Attachment and Sequestration.*

553. A judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment, or by committal. Con. Rule 874.

Judgment
requiring
person to
do or leave
undone.

Identical with Eng. (1883) R. 585.

A technical difference exists according to the English practice between attachment and committal; an attachment being held to be the proper remedy for punishing the refusal to do any act ordered to be done, and committal the proper remedy for punishing the doing of any act which by any order is prohibited. In England, while an attachment is directed to the Sheriff, committal is executed by an officer (Sergeant at Arms) of the Court. This distinction is still observed in England: *Re Evans*, 1893, 1 Ch. 252; 68 L. T. 271; *Haunder v. Falcke*, 1891, 3 Ch. 488; 64 L. T. 791; *Callow v. Young*, 56 L. T. 147; and see *Harvey v. Harvey*, 26 Ch. D. 654; 51 L. T. nt p. 512, and *D. v. A. & Co.*, 1900, 1 Ch. 484. Formerly an attachment issued at the instance of the party aggrieved, and at his own risk and without motion; whereas a committal could only be obtained on motion: *Ib.*; under the Con. Rules, however, a notice of motion is necessary now in the case of attachment; see *Rule 875*.

On a notice of motion to commit the defendant, Malins, V.-C., ordered a writ of attachment to issue against him: *Piper v. Piper*, W. N. 1876, 202; but after obtaining an order for an attachment, a party cannot move *ex parte* for an order for committal instead: *Buist v. Bridge*, 43 L. T. 432; 29 W. R. 117; and on a motion for an attachment, where the proper remedy was committal, Chitty, J., required the notice of motion to be amended, and re-served.

In Ontario both an attachment, and an order for committal, are directed to the Sheriff, and how far the technical difference between the two remedies which prevails in England has any application here does not appear to have been considered. The only apparent difference in the procedure in Ontario between an attachment and committal is, that in the former case a writ of attachment issues, and in the case of a committal no writ issues and the Sheriff acts under the order.

An attachment, or committal, for contempt, is a punitive process, and not a mere civil proceeding, though issued to enforce private

Rule 853. rights, and the Sheriff is bound to break open the outer door if necessary in order to execute it; see *Harvey v. Harvey*, 20 Ch. D. 654.

As to mode of obtaining a writ of attachment, see notes to *Rules* 854 and 855.

An order for committal may be obtained not only for enforcing a judgment, but also to punish persons guilty of acts calculated to interfere with the course of justice.

The publication in a newspaper of scurrilous abuse of a Judge with reference to his conduct as a Judge in a judicial proceeding which has terminated, is a contempt of Court, punishable on summary process; *Rog. v. Grop*, 1900, 2 Q. B. 36.

It was laid down by the Judicial Committee of the Privy Council that committal for contempt of Court is to be used only with reference to the administration of justice, and not for the vindication of a Judge as a person; thus a person innocently and without knowledge of its contents lending a newspaper to another containing scandalous matter relating to a Court of Justice, was held not to be thereby guilty of contempt of such Court, and his committal was set aside; *McLeod v. St. John*, 1891, A. C. 549; 81 L. T. 178. In that case Lord Morris said "commitments for contempt of Court by scandalizing the Court itself have become obsolete in this country. Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them."

Interfering
with course
of justice.

See Addenda

A proprietor of a newspaper publishing comments on matters in litigation, calculated to interfere with the fair trial of the action by exciting prejudice against one of the parties, is liable to committal and also to be fined for contempt of Court; *Re Crown Bank*, 41 Ch. D. 649; 63 L. T. 304; *Re Labouchere*, *Kensit v. Eng. News*, 18 Times 208; *Phillips v. Has*, *ib.*, 400; even where the case is pending before an inferior tribunal; *Rex v. Parke*, 1903, 2 K. B. 432; 89 L. T. 431. As to the extent to which newspaper comments on cases in litigation are allowable see *Re O'Brien*, 16 S. C. R. 197. On the same principle any person knowing of an injunction, and wilfully assisting or participating in a breach of it, is liable to be committed for contempt of Court, for interfering with the course of justice; *Steward v. Paterson*, 1897, 1 Ch. 545; 76 L. T. 215; and see *Furard v. Furard*, 75 L. T. 664. The fact that the order has not been served on the party sought to be punished is no answer; *ib.* Issuing fraudulent circulars to influence the course of pending litigation was held to be a contempt; *In re Parsonage & Co.*, 1901, 2 Ch. 424. A motion to commit for contempt in publishing comments must be made in Court, and not in Chambers; *Southwick v. Hare*, 15 19 R. 290.

The Court will not encourage motions where the object is not really to commit, but only to obtain an apology and costs, and therefore in *Plating Co. v. Farquharson*, 17 Ch. D. 50, no costs were given; and see *Regina v. Payne*, 1896, 1 Q. B. 577.

Non-pay-
ment of
money,
when pun-
ishable by
attach-
ment.

Under R. S. O. c. 80, s. 5, process of contempt for non-payment of money or costs is abolished; but where, for the purpose of giving a party the equitable relief to which he is entitled, a defendant is ordered to do an act, *e.g.*, procure a mortgage to be discharged which he has wrongfully caused to be put upon the registry, the performance of such act may be enforced by attachment, notwithstanding that, in

order to perform the act, it may be necessary for the defendant to ^{Rule 854} pay money to some other person: *Berry v. Donovan*, 21 Ont. App. 14; and see *Roberts v. Donovan*, 16 P. R. 456; *Pritchard v. Pritchard*, 18 Ont. 173; *Sargny v. Harland*, 70 L. T. 227.

Where a married woman living with her husband was in contempt for disobeying an order of the Court it was formerly considered that her husband was answerable unless he could satisfy the Court that he had used his best endeavours to get his wife to comply with the order: see *Maugham v. Wilkes*, 2 Chy. Ch. 91; *Morckeson v. Donohoe*, 6 P. R. 138; but it would seem that a married woman is now personally liable for her default: see *Re Turnbull*, 1890, 1 Ch. 180; 81 L. T. 439; *Evans v. Jenkins*, 115 L. T. Jour. 457.

Where it is sought to enforce a judgment or order by attachment, or committal, the order or judgment must be first served on the party required to obey the same, except in the case of an injunction order of which the party or his solicitor or counsel has notice. And where some act is to be performed by a time limited by the order or judgment, the service should be effected a reasonable time before the time limited by the order or judgment has expired: *Berry v. Donovan*, *supra*.

Where after a writ of possession has been executed, the defendant wrongfully retakes possession, he is liable to attachment: see *Re Higgs*, *Goddard v. Higgs*, 97 L. T. Jour. 11.

An attachment will only be granted for disobedience of an order or judgment, where the disobedience has been wilful: see *Fairclough v. Manchester Ship Canal*, 102 L. T. Jour. 292.

As to obtaining a writ of sequestration, where an attachment is ineffectual, see notes to *Rule 857*. Also in the case of a corporation: *Cook v. Credit Valley Ry. Co.*, 8 P. R. 167; *Demarest v. Midland*, 10 P. R. 82; *McKeown v. Jobit Stock Institute*, 1899, 1 Ch. 671.

As to enforcing injunctions, and punishing a breach thereof, see further the notes to sec. 58 (3) of the Act.

If the Court had no jurisdiction to make the order sought to be enforced, that is a good answer to a motion to commit for disobedience of it: *McLeod v. Noble*, 28 Ont. 528.

Where there is a remedy by action, and also by attachment, in respect of the same matter, the plaintiff is not precluded from exercising the one remedy by having made an unsuccessful attempt to enforce the other: *Godfrey v. George*, 1896, 1 Q. B. 18; 73 L. T. 599; 44 W. R. 246; but *semble*, if a writ of attachment is obtained and defendant is taken under it, the remedy by action is gone: *Ib.*

As to the right of action in a Division Court to enforce a judgment where execution can be issued upon it, see now 41 Vict. c. 17, s. 19.

854. A writ of attachment against the person shall be ^{Effect of attachment.} issued under the same circumstances, and shall have the same effect, as under the practice of the Court of Chancery, prior to *The Ontario Judicature Act, 1881*. Con. Rule 878.

See Eng. (1883) R. 620.

Rule 854. Chancery Order 288 provided as follows:

Ch. Ord. 288. "288. If a party who is ordered, otherwise than by an order of course, to do any act, other than to pay money, in a limited time, refuses or neglects to obey the order according to the exigency thereof, the party prosecuting the order shall, at the expiration of the time limited, upon filing with the Registrar an affidavit of the service of the order, and of the non-performance thereof, be entitled, upon *præcipe*, to a writ or writs or attachment against the disobedient party."

But *Rule 854* requires a notice to be served, and leave to be obtained, before an attachment is issued. To this extent the former practice preserved by *Rule 854* is varied.

Chy. O. 293. Chy. Order 293, provided that every order requiring a party to do an act, other than the payment of money, should have indorsed upon the copy of the order served, a memorandum to the effect set forth in Schedule N to the Chy. Orders notifying the party as follows:

Schedule N. "If you, the within named (*here insert the name of the party*), neglect to obey this order by the time therein limited, you will be liable to be arrested by the Sheriff; and you will also be liable to have your estate sequestered for the purpose of compelling you to obey this order without further notice. If you wish to apply to the Court to add to, vary, or set aside the said order, or to suspend the operation thereof, you must do so before the expiration of the time within limited."

This Chy. O. 293, is not consolidated in the Ont. Rules, but the corresponding Eng. O. is continued in the Eng. (1883) R. 573. Under the new practice it was held in England under the Rules of 1875 (that of course not under the Rules of 1883, R. 573; see *Hampden v. Mullis*, 36 Ch. D. 746, and *Treherne v. Dale*, 27 Ch. D. 66; 54 L. J. Chy. 831), that this indorsement was not necessary, as an attachment under the new procedure could not be obtained except upon notice: see *Rule 855*, but the rule might be different in the case of a sequestration: *Thomas v. Pullin*, 21 Ch. D. 360; and see *Wadsworth v. Graham*, 11 L. R. Ir. 360. In Ontario a sequestration does not issue *in præcipe* except where a party is already in custody under an attachment; see *Rule 857*; and in other cases, is not, under *Rule 856*, obtained without notice: so that the indorsement would seem to be not necessary in cases either of attachment or sequestration: see *Rule 2*; *sed vide per MacLennan, J.A., Berry v. Doucroun*, 21 Ont. App. at 199, 20, 31.

If the notice referred to above is indorsed, the words "without further notice," at all events, should be now omitted: see *Rule 855*.

Eng. (1883) R. 573 has no application to a prohibitive order: *Silous v. Croydon*, 53 L. T. 210; 20 Sol. Jour. 485; such an order is enforced by committal: see notes to *Rule 853*, *supra*, p. 1105.

The order or judgment sought to be enforced by attachment should limit the time for the performance of the act therein required to be done, and it should be served on the party required to obey it a reasonable time before the time thereby limited has expired: *Brown v. Doucroun*, 21 Ont. App. 14; *Re Seal*, 1903, 1 Ch. 87.

Where default in complying with an order was not clearly enough shown to justify an order for attachment, if the opposite party had not appeared, the defect was held to be cured by his appearing and resisting the motion on other grounds: *Treherne v. Dale*, 27 Ch. D. 66.

855. A writ of attachment shall not be issued without **Rule 855.** the leave of the Court or a Judge, on notice to the person ^{leave to} against whom the attachment is to be issued. **Con. Rule 819.** ^{issue.}

To same effect as Eng. (1881) R. 621.

to the difference between attachment and committal, see *supra*, **Rule 853** and notes.

This *Rule* introduced an important change in the Chancery Practice: see **Rule 853** and notes. A writ of attachment can now never issue as of right without an order, granted after notice to the party: *Baigent v. Baigent*, 1 P. D. 421; W. N. 1875, 218; *Abud v. Riches*, 2 Ch. D. 528; *Dallas v. Glau*, 3 Ch. D. 300; see *Re Heiron's Estate*, *Holl v. Leg*, 12 Ch. D. 705; *Re Knight, Knight v. Gardiner*, 25 Ch. D. 297; *Re Chalkona Harvester Co. v. Campbell*, 12 P. R. 666. This was the rule in the Common Law Courts, except in the case of an attachment against a Sheriff for disobeying an order to return a writ; in which case the rule was made absolute *ex parte*; Reg. Gen. 7th T. 1856, R. 140; see *Jupp v. Cooper*, 5 C. P. D. 26. In *Jupp v. Cooper*, all that the attention of the Court was called to was whether the order should be absolute in the first instance, or only an order nisi, and the latter was granted, as also was done in *Fowler v. Ashford*, 45 L. T. 46. An attachment against the Sheriff, like any other attachment, is now governed by the new *Rule*; *Eynode v. Gould*, 9 Q. B. D. 335; see also *Dallas v. Glau*, *supra*; *Re Heiron's Estate*, *supra*.

The provisions of **Rule 133**, *infra*, apply to an application for an attachment. The costs are therefore in the discretion of the Court; *Abud v. Riches*, *supra*, and should be asked for and dispensed of on the application for the attachment: *Ib.*

An Interlocutory order, under **Rule 405**, *et seq.*, may be enforced by attachment: *Hutchinson v. Hartnunt*, W. N. 1877, 20; and an order directing a solicitor to repay into Court moneys which had been paid out to him, has been so enforced: *Pritchard v. Pritchard*, 18 Ont. 173.

An order should be drawn up and entered before being enforced by process: *Bullard v. Tomlinson*, 48 L. T. 515.

A motion for attachment when made for non-compliance with orders of course, or orders in Chambers, may be made to a Judge in Chambers; see *Sohn Kyebury v. Poznanski*, 13 Q. B. D. 218; *Amstell v. Lessar*, 53 L. T. 759, 34 W. R. 230, but when made for non-compliance with an order or judgment of the Court, it should be made in Court; *Klein v. Fulton Fire Ins. Co.*, 3 C. L. T. 602. The practice in England is not similar to that in Ontario: see *Davis v. Galtoun*, 39 Ch. D. 222; 40 Ch. D. 355.

Neither the Master in Chambers, nor a Local Judge or Master (acting under **Rules 42, 45 or 49**), has jurisdiction to entertain a motion to attach or commit, as such matters are excepted from the powers conferred upon them; see **Rule 42**, and *Keece v. Ward*, 9 P. R. 220, but as to Local Judges see **Rule 47**.

In *Re Steele*, 23 Sed. Jour. 906, the question was raised whether the order to be obeyed need be personally served since an attachment can now only be had upon notice. It is submitted, however, that there is nothing to alter the former practice which required personal ^{Service of} the order ^{to be} obeyed.

Rule 855. service of the order to be obeyed (except in cases under *Rule* 474, and except where it is shown that the order has come to the knowledge of the person sought to be attached, and that he is evading service of it; *Kistler v. Tettmar*, 1905, 1 K. B. 331; 92 L. T. 360), more especially if the notice of motion to attach is not personally served. Where the director of a company was sought to be attached for disobedience of an order against the company, it was held that he must be personally served with the order; *McKenna v. Joint Stock Institute*, 1899, 1 Ch. 671; 80 L. T. 641. The order or judgment must be served a reasonable time before the time limited thereby for the performance of the act ordered to be done, has expired; *Berra v. Donovan*, 21 Ont. App. 14.

An order to deliver a bill of costs served on a solicitor's clerk at his office was disobeyed. On motion for attachment the solicitor swore that he had not been personally served. A letter from him giving reason for delay and promising to deliver bills was produced, but it was held that the necessity for personal service was not waived by the letter; *Re Cunningham*, 55 L. T. 766.

Notice of
motion.

Two clear days' notice of motion is sufficient. The practice laid down in *Abell v. Hiltz*, 6 P. R. 122, and *Bryce v. McIntyre*, 7 P. R. 134, is not now in force; *Monaghan v. Dobbin*, 2 C. L. T. 215; see also *Cook v. Credit Valley Ry. Co.*, 8 P. R. 167.

It is not necessary to serve with the notice of motion copies of the affidavits filed in support of it; *Huffman v. McKee*, 18 P. R. 185.

Service of.

Where the order to be obeyed has been personally served it is nevertheless necessary, in case of disobedience, to serve personally any notice of motion for attachment or committal; *Rule* 855, see also *Ellerton v. Thirsk*, 1 J. & W. 376; *Angerstein v. Hunt*, 6 Ves. 488; *Hope v. Carnegie*, L. R. 7 Eq. 254; *Nelson v. Worsam*, W. N. 1880, 216; except in the case provided for by *Rule* 474 of disobedience of an order to bring accounts into the Master's office, or for production, or inspection of books and papers; in cases under *Rule* 474 it is not necessary to serve a notice of motion to attach personally upon the disobedient party, if he has a solicitor; see *Wilson v. Wilson*, 7 P. R. 57.

Where personal service of notice of motion to attach the defendant could not be effected, the order was made an affidavit of service of the notice on a solicitor who had appeared in the action for the defendant, although the solicitor had ceased to act for him; *Callow v. Young*, 55 L. T. 543; and see *Re Evans*, 1893, 1 Ch. 252; 68 L. T. 271.

There is no distinction, in regard to service of a notice of motion for attachment, between contempt in breach of an undertaking, and contempt in breach of an injunction, knowledge of which is given by previous service of the order; *Id.*

In *Hann v. Perry*, W. N. 1881, 4; 44 L. T. 248; 50 L. J. Chy. 251, it was held that notice of motion to commit must be served personally, unless some reason is shown for dispensing with personal service. On a motion for an attachment, however, it had previously been held that service of notice of motion upon the solicitors on the record of the party to be attached was sufficient, though personal service was not shown to be impracticable; *Browning v. Sabia*, 5 Ch. D. 511; *Richards v. Kitchen*, 25 W. R. 602; or by leaving the notice at the residence of the party affected thereby; *Re a Solicitor*, 14 Ch. D. 152. See also *Tibbitt v. Stansfield*, W. N. 1880, 77; *Trotter v. Leach*, 13 C. L. T. 64.

In Ontario it has been held that *Mann v. Perry*, is to be followed: **Rule 855.**
Smith v. Martin, 4 C. L. T. 493; except where *Rule 474* applies;
Re Hamlen, 11 P. R. 35.

In England it is now held that there is jurisdiction to order substitutional service where every reasonable effort to effect personal service has been made: *Mander v. Fulke*, 1891, 3 Ch. 488; *Re Bassett*, 1894, 3 Ch. 179.

Where a motion is made to attach a defendant who has not appeared in the action, see notes to *Rule 330*.

The copy of order served must be an exact copy: *Re Holt*, 11 Ch. D. 168; see also *Ex p. Smith*, 28 W. R. 174.

Where a party has not been personally served, his appearance on the return of the motion to take the objection is not a waiver of it: *Mander v. Fulke*, 1891, 3 Ch. 488; *Taylor v. Roe*, 68 L. T. 213; but service of notice is waived by counsel appearing and consenting to an enlargement: *Ex p. Meock*, 1 C. P. D. 68. But *scilicet*, an objection that personal service has not been effected, though given effect to, if taken on the return of the motion (see *Taylor v. Roe*, *supra*), will not of itself be a sufficient ground for setting aside the attachment, if granted, where the party did not appear on the return of the motion: *Petty v. Daniel*, 34 Ch. D. 172; 55 L. T. 745; and see *Re Evans*, *Evans v. Norton*, 1893, 1 Ch. 252; 68 L. T. 271.

The provisions as to substituted service have been held not to apply to an application for an attachment, but only to service of writs of summons: *Amos*, W. N. 1876, 105; but see cases *supra*, p. 283, and *Williams v. Johns*, 2 Dick. 477; 1 Mer. 303 (d); *Pultney v. Shelton*, 5 Ves. 347; *DeMauverille v. DeMauverille*, 12 Ves. 202; *Lechevre-Charlton's Case*, 2 M. & C. 335; also *Hope v. Carnegie*, L. R. 7 Eq. 254; *Howarth v. Howarth*, 11 P. D. 35; *Tilney v. Shusfield*, W. N. 1880, 57; *Mander v. Fulke*, 1891, 3 Ch. 488; 65 L. T. 454; *Trout v. Long*, 13 C. L. T. 64; *Re Bassett*, *Bassett v. Bassett*, 1891, 3 Ch. 179.

Service of notice made on the clerk of a solicitor at his office, his residence not being known, was held to be good service, but, notwithstanding, the order was stayed for a week, and notice thereof directed to be served on the solicitor: *Tilney v. Shusfield*, *supra*.

On a motion to commit for contempt, an attachment may issue: *Piper v. Piper*, W. N. 1876, 202; but on a motion for an attachment an order to commit cannot be obtained *ex parte*: *Baist v. Rydop*, 43 L. T. 432; 29 W. R. 117. Issue, and execution, of writ of attachment.

On a motion for attachment for contempt in committing a breach of undertaking contained in an order, a preliminary objection was raised that the proper remedy was committal. The objection was allowed, and the plaintiff given leave to amend his notice of motion and serve it again: *Callow v. Young*, 56 L. T. 147; 56 L. J. Chy. 690. The distinction between attachment and committal still exists in England; see note to *Rule 853*. See also *D. v. A. & Co.*, 1900, 1 Ch. 484.

A writ of attachment may be issued against a party out of the jurisdiction, though it can only be enforced in the event of his coming within the jurisdiction: *Bloomfield v. Brooke*, 6 P. R. 264; *Trout v. Long*, 13 C. L. T. 64.

No particular return day is inserted in the writ: see Form No. 177 (H. & L. Forms, No. 1108); but after a reasonable interval a return may be required: *Orce v. Pritchard*, W. N. 1876, 117.

Rule 856. The officer charged with the execution of the writ may break open the outer door of the house in order to execute it: *Harvey v. Hurrey*, 26 Ch. D. 644.

A further opportunity to comply with the order may be given, or the order may be stayed, pending an appeal, in the discretion of the Judge: *Mellor v. Thompson*, W. N. 1883, 128.

A person attached for misconduct will not be detained for costs: *Jackson v. Marby*, 1 Ch. D. 86; see also *Earl of Lewes v. Barnett*, 6 Ch. D. 252; and *Micklethwaite v. Fletcher*, 27 W. R. 793. But, in order to punish anyone who has been guilty of a contempt, he may be imprisoned for a stated period: see *Rule 861*; and allowed to be discharged if he pays the costs before the expiration of such period: *Harris v. Meyers*, 1 Chy. Ch. 229; see also *Marris v. Ingram*, 13 Ch. D. 338.

The president of a company cannot be attached for non-performance of an act which could only be performed by a majority of the board of directors: *Demorest v. Midland Ry. Co.*, 10 P. R. 82.

As to attaching a Member of Parliament, see *Re Anglo-French Co-operative Soc.*, 14 Ch. D. 533.

Where an attachment issued against a defendant for not complying with an order for discovery, and compliance was then made, but the defendant was nevertheless thereafter arrested, it was held that the arrest was irregular and that it was the duty of the plaintiff's solicitor to have stayed the enforcement of the attachment: *Guy v. Hancock*, 46 L. T. 207.

A party committed for contempt of Court is not entitled to a *habeas corpus*: *Re Anderson v. Faustone*, 16 P. R. 243; not even for the purpose of attending in person to move for his discharge: *Roberts v. Donovan*, *Ib.* 456.

But where a motion is made against a person, in close custody, it is in the discretion of the Court whether a *habeas corpus* be granted to enable him to attend in person to shew cause: *Ib.*

Where an attachment had been properly issued against a solicitor, for non-payment of money, it was held that the subsequent acceptance of part, and giving time for payment of the balance, was no waiver of the right to enforce the attachment for non-payment of the balance as agreed: *Re Fereday*, 1895, 2 Ch. 437; 73 L. T. 56.

Attachment
for non-per-
formance
of an act.

856. If a person who is ordered, otherwise than by an order of course, to do any act other than to pay money, in a limited time, refuses or neglects to obey the judgment, the party prosecuting the same shall be entitled to a writ of attachment against the disobedient party. Con. Rule 880.

Taken from Chy. O. 288.

A writ of attachment cannot issue as of course, because under the preceding *Rule 855* no such writ is to issue without an order to be applied for on notice: *Thomas v. Pollin*, 21 Ch. D. 360; 57 L. T. 207.

An order to discharge a mortgage improperly put upon the registry, may be enforced by attachment, notwithstanding that the person required to obey the order may have to pay money in order to comply

with it: see *Berry v. Donovan*, 21 Ont. App. 14; *Roberts v. Donovan*, Rule 857, 16 P. R. 456; so also, an order requiring a solicitor to refund money he has obtained from the Court under circumstances which make him liable to refund it: *Pritchard v. Pritchard*, 18 Ont. 173; or which has been paid to him under an undertaking to refund it, if required: *Smyth v. Harland*, 70 L. T. 227.

Provision is made by R. S. O. c. 324, s. 20, for the discharge of a person, committed for certain contempts, who is entitled to his discharge but neglects to apply for it.

857. Where a person is, under Rule 856, taken or detained in custody under a writ of attachment, without obeying the judgment, then upon the Sheriff's return that the person has been so taken or detained, the party prosecuting the judgment shall be entitled upon *procipe*, to a commission of sequestration against the estate and effects of the disobedient person. Con. Rule 881.

Taken from Chy. O. 289.

Sequestration.—Originally the writ of sequestration was the last prerogative process, issued out of the Court of Chancery, for the purpose of enforcing obedience to its decrees. The right of the Court of Chancery to issue such writs was at first contested by the Common Law Courts, on the ground that the Court of Chancery could not enforce its decrees by process *in rem*, but only *in personam*. And it was even ruled at Law, that to kill a sequestrator in the execution of such process was no murder. But the authority of the Court to issue such writs was ultimately established, in spite of the "bloody and desperate resolutions" of the common lawyers: see Gilbert's Chy. Pr., 77.

A sequestration is in "the nature of a grand distress." It is a "A grand process of contempt *in rem*:" *Tatham v. Parker*, 1 Sm. & G. 506 (see, *distress*). However, observations of Spragge, C., in *Meyers v. Meyers*, 21 Gr. 216; and may be issued to enforce any mandatory order, or judgment. It affects the personal estate, and the rents and profits of the realty, of the person whose estate is sequestered: *Jackson v. Jackson*, 1 Chy. L.R. 115; but it does not appear to bind the land itself: *Hyde v. Greenhill*, 1 Dick. 197; and lands cannot be sold under a sequestration: *Meyers v. Meyers*, 21 Gr. 218. According to English authorities, it is said that the writ binds from its date, and not merely from its delivery for execution: *Burdett v. Rockley*, 1 Vern. 58; but see *Angel v. Smith*, 9 Ves. 336; *Harris v. Meyers*, 3 Chy. Ch. 107; but though the property be bound, yet the seizure under the writ does not create a charge on the property in favour of the creditor: *In re Pollard*, 1903, 2 K. B. 41; 87 L. T. 61.

The writ of sequestration has been shorn of much of its original efficacy by the enlarged operation given in Ontario to the *fi. fa.* goods. It is now only to be employed as a last resource. *Fi. fa.* goods and proceedings for attaching debts, etc., are first to be used, and if by those the debtor's property cannot be reached, a writ of sequestration may be issued on application in Chambers, upon notice as a general rule, but it will in general only be granted when the debtor's lands are insufficient to satisfy the debt, and it therefore becomes of importance to enter upon the land and realize the profits thereof during

Upon attachment of realty, sequestration may issue on *procipe*.

binds personally, and rents and profits of realty.

From date of sequestration

Rule 857. the year which must elapse before they can be sold under a *fi. fa.* lands, or where the interest of the debtor is such that it cannot be taken under a *fi. fa.*: *Nelson v. Nelson*, 6 P. R. 194. The Court has, however, power to order a sequestration instead of a *fi. fa.*, if occasion should require. *Id.* See note to *Rule 859*.

The granting of the writ is discretionary, and the discretion will not be interfered with by an appellate Court: *Hulbert v. Cathcart*, 1896, A. C. 470. An order for a sequestration must be absolute, and not conditional, and where further time is intended to be given to the debtor, the writ should be directed to file in the office, or not to issue until the expiration of the further time given: *In re Lumley*, 1894, 2 Ch. 271.

Where it was shewn that a debtor had no effects which would be available in execution, a writ of sequestration was granted to enforce payment of costs which had been ordered to be paid: *Snook v. Bolton*, W. N. 1883, 73. The Court must be satisfied that the application is reasonable, but it is not necessary to point to any property which may be made available: *Hulbert v. Cathcart*, *supra*.

It is not necessary here to serve the judgment or order for payment, or a demand thereunder, as a condition precedent to an application for a sequestration: *Long v. Long*, 6 P. R. 137; and see *Re Deakin*, ex p. *Cathcart*, 1900, 2 Q. B. 478.

Writ may issue without order, where contemnor in custody.

Formerly the writ could in no case issue except under special order: *Rule 877* makes an exception to this rule, where the party is in actual custody for contempt, without obeying the judgment, or order, sought to be enforced. In such cases the writ may be obtained on *præcipe*, upon filing the Sheriff's return.

A sequestration to enforce compliance by a railway company with a peremptory mandamus was refused, and an attachment against the directors was held to be the proper remedy: *Demorest v. Midland Ry. Co.*, 10 P. R. 82; see, however, *Rule 858*; but it seems to be a proper mode of enforcing an injunction against a corporation: see *Young v. Ridgetown*, 18 Ont. 140; but see *Rule 862*.

Property liable; goods and chattels.

Property Liable to Sequestration.—All goods and chattels in the possession of the contemnor, are liable to be seized; and also any property belonging to him which can be reached by the sequestrator without suit or action. And if the keys are denied him, the sequestrator may open rooms and boxes that are locked, and schedule the contents; but may not remove property off the premises without the special order of the Court: *Pelham v. Newcastle*, 3 Sw. 200 n. A debtor's seat in the Stock Exchange is not exigible under sequestration: *London & Canadian L. & I. Co. v. Murphy*, 10 Ont. 86. By R. S. O. c. 324 s. 19, sequestrators have the same power over documents in the custody of a person committed for not delivering them, or depositing them in Court, as they have over the contemnor's own property.

Documents in custody of contemnor.

Choses in action, how far bound.

Choses in Action.—At one time it was doubted whether choses in action could be reached by sequestration; the later authorities establish that they can: *Irring v. Boyd*, 15 Gr. 157; and see *McDonnell v. McDonnell*, 1 Chy. Ch. 140; *Wilson v. Metcalfe*, 1 Beav. 263; *Crispin v. Cumana*, L. R. 1 P. & M. 622. As regards choses in action, an order of the Court is necessary, to enable the sequestrators to sue for the recovery: *Irring v. Boyd*, 15 Gr. 157; or they may be reached by motion in the action in which the sequestration issued; see

Ward v. Booth, L. R. 14 Eq. 195; *Ex parte Nelson, Re Hoare*, 14 Ch. R. 557. D. 41.

But the *chase in action* is not bound by the writ of sequestration, until either the sequestrator, or the party prosecuting the writ takes steps to obtain payment: *McBorell v. McDowell*, 1 Chy. Ch. 140; 10 L. J. 48; *London and Canadian Loan and Agency Co. v. Mercitt*, 32 C. P. 375; and the writ does not constitute a charge on a *chase in action*, even after notice to the debtor: *Re Pollard*, 1903, 2 K. B. 41; 87 L. T. 61.

If the debtor admits the liability, and submits to the order of the Court, an order may be made, without further suit, authorizing the debtor to pay, and deliver, the fund, or property, to the sequestrator; or authorizing the latter to seize the property: *Wilson v. Metcalfe*, 1 Beav. 263; *Re Shade, Shade v. Huime*, 18 Ch. D. 653; 45 L. T. 276; *Crispin v. Caniano*, L. R. 1 P. & M. 622; but such order cannot be made without the debtor's assent: *Ib.*

A claim to indemnity, which a surety has against his principal, before payment by the surety, is not a *chase in action*, which can be reached by sequestration: *Irring v. Boyd*, 15 Gr. 157.

The accrued dividend of a fund in Court, to the income of which a married woman is entitled for her separate use without power of anticipation: *Claydon v. Finch*, L. R. 15 Eq. 266; *Bryant v. Bull*, 10 Ch. D. 153; a deposit on appeal: *Conn v. Gacland*, L. R. 9 Chy. 101; and a rent charge: *Wilson v. Metcalfe*, 1 Beav. 263, have been held liable to sequestration.

Money in Bank.—Money of the debtor on deposit in a bank is not bound by a sequestration, until an order has been obtained for its payment to the sequestrator: *In re Pollard*, 1903, 2 K. B. 41; 87 L. T. 61.

Pensions and Salaries.—Pensions granted entirely for past services, may be sequestered: *Willcock v. Terrell*, 3 Ex. D. 323; *Dent v. Dent*, L. R. 1 P. & M. 366; *McCarthy v. Gould*, 1 Ba. & B. 387; but pensions and salaries for services, still being rendered, or which may be required in *future*, cannot be sequestered: *Fenton v. Lowther*, 1 Cox. 315; *McCarthy v. Gould*, *supra*; *Collyer v. Fulbin*, 1 T. & R. 459; *Spooner v. Payne*, 1 D. M. & G. 383; and see *L'gal v. Cheetham*, 3 Giff. 171.

Rents and Profits of Real Estate, including crops, or other natural produce, or rents paid in kind, are liable to sequestration, but land, whether freehold or leasehold cannot be sold under the writ, which only confers a right to the possession, but does not transfer any title to the land, or term, to the sequestrator: *Shaw v. Wright*, 3 Ves. 22; or confer any priority over prior specific charges: *Meyers v. Meyers*, 20 Gr. 187; 21 Gr. 214. Tenants in possession should be notified to attend to the sequestrator, and pay their arrears and growing rents to him: Daml. Pr., 5th ed., 916; and upon refusal the sequestrator may obtain an order compelling them to attend: *Routley v. Ridley*, 3 Sw. 336; *Jackson v. Jackson*, 1 Chy. Ch. 115.

If a tenant attends to the sequestrator, and afterwards pays his rent to another party, he may be compelled to pay it over again to the sequestrator: *Harris v. Meyers*, 2 Chy. Ch. 121. A sequestrator, with the sanction of the Court, may make leases, for any period during which the aggregate rents will not exceed the amount for which the sequestration issued: *Harris v. Meyers*, 3 Chy. Ch. 89. But the

How recovered under.

Money in bank.

Pensions and salaries.

Rents and profits of realty, but land not saleable under.

Tenants to be notified.

Order against.

Paying rents after attornment.

Rule 357.

Lease by
sequestrator.

sequestrator cannot, by his lease, affect the right of a person holding an incumbrance prior to the claim of the party issuing the sequestration: *Meyers v. Meyers*, 19 Gr. 541.

Where a sequestration is issued against a person in contempt for not delivering books, papers, or any other articles or things, the sequestrator may seize such books, papers, writings, or other articles; and the Court may then deal with them as shall be just; and after such seizure the person in contempt may be discharged from custody: see R. S. O. c. 324, s. 19.

Disposition
of property
sequestered

Disposition of Property Sequestered.—*Prima facie* a sequestration confers merely a right of detainer of the property sequestered. Where the sequestration, however, is issued for non-payment of money, the proceeds of the goods seized will be ordered to be applied in satisfaction of the demand: *Davis v. Davis*, 2 Atk. 24. The sequestrator should not, however, so apply them, but should pay the proceeds into Court upon leave obtained on motion in Chambers: *Dani. Pr.*, 5th ed., 917.

The Court may, at the instance of the sequestrator, order payment into Court of the balance standing in a banker's books to the credit of the debtor, upon notice to the banker: *Miller v. Huddleston*, 22 Ch. D. 233; but where after notice of the sequestration, but before an order to pay had been obtained, the banker honored checks of the debtor, the Court refused to order the bank to re-pay to the sequestrator the amount so paid out: *In re Pollard*, 1903, 2 K. B. 41; 87 L. T. 671.

Books, papers, or other articles, writings, &c., ordered to be delivered up, which are seized by a sequestrator, may be dealt with as the Court thinks just: see R. S. O. c. 324, s. 19.

Sale, when
ordered.

Sale of Property.—Where necessary, a sale of personal property sequestered, may, on the application of the sequestrator, be ordered, *e.g.*, where goods are of a perishable nature: *Shaw v. Wright*, 3 Ves. 22; or it is necessary for the satisfaction of the claim for which the writ issued: *Id.*; *Mitchell v. Draper*, 9 Ves. 208; a defendant's lever-sonary interest in a fund in Court, has been ordered to be sold: *Cocper v. Taylor*, 16 Sim. 314. The application for leave to sell must be made on notice to the debtor: *Mitchell v. Draper*, *supra*, *Forbes v. Connolly*, 1 Chy. Ch. 6; but service of notice may be dispensed with *Re Rush*, 19 W. R. 417.

Notice of
application
for sale
must be
given to
debtor.

Lands sequestered cannot be sold.—"All that the Court does is to direct the application of the rents and profits, and this, not by way of execution, but upon the ground that the party is in contempt for disobedience of some order of the Court": *Meyers v. Meyers*, 21 Gr. at p. 218; see also *Nelson v. Nelson*, 6 P. R. 194.

Parties
having
claims
adverse
to seques-
tration—
proceed-
ings by.

Adverse Claims.—Where property affected by a sequestration, or any interest therein, is claimed by some third person, the sequestrator, and possibly the claimant, may apply to the Court for relief, by a summary application in the cause: see *Rule 1102, et seq.* And see *Holmsted's Chy. Orders*, 217. The right of the sequestrator as against such third person where disputed, cannot be determined in proceedings to which the third person is not a party: *Craig v. Craig*, 1896, 1 P. 171.

The claimant should not commence an action against the sequestrator, or disturb his possession without the leave of the Court. If he does so, he may be restrained by injunction.

Obstruction of Sequestrator. is a contempt of Court: *Atwell v. Rule* 858. *Smith*, 9 Ves. 335; *Pelham v. Newcastle*, 3 Sw. 289 n. and see *Fruecklyn v. Colhoun*, 3 Sw. 276. But persons having claims on the property sequestered, adverse to the sequestrator, are not driven to bring actions, but may apply to the Court for relief in a summary way upon petition in the action; and see *Meyers v. Meyers*, 19 Gr. 541.

Death of Contemnor.—Where a sequestration has issued to compel payment of money, in case the contemnor die, an order may be obtained to continue proceedings against his real representative, where the lands descended, or devised, would be assets for the payment of the debt: *Hyde v. Greenhill*, 1 Dick. 407; *Pratt v. Luman*, 43 Ch. 175; 61 L. T. 760; and also as against his personal representative; but where the writ issues for personal contempt, on the part of the contemnor, on the death of the contemnor, no order to continue proceedings can be obtained: *Turley v. Meyers*, 3 Chy. Ch. 102; *Gilbert's Chy. Pr.*, 86-87; except perhaps for the costs: see *Rule* 404.

858. If an attachment cannot be executed against the person refusing or neglecting to obey the judgment, by reason of his being out of the jurisdiction of the Court, or of his having absconded, or that with due diligence he cannot be found or if in any other case the Court may think proper to dispense with a writ of attachment, an order may be granted for a commission of sequestration against the estate and effects of the disobedient person; and it shall not be necessary for that purpose to issue an attachment. *Con. Rule* 882.

Taken from Chy. O. 200.

An order for sequestration will not be granted against a defendant required to do an act, where an appeal is pending from the judgment directing its performance, and the defendant has perfected the security required to entitle him to a stay of proceedings: *Dundas v. Hamilton & Milton R. Co.*, 19 Gr. 455; *McGarren v. Strathroy*, 6 Ont. 138.

Originally the sequestration only issued after an attachment, and all other process had been exhausted. Under this *Rule* in cases where it would be impossible to execute an attachment, it is unnecessary to go through the form of issuing one; and see *Snare v. Bolton*, W. N. 1881, 73.

An attachment may be ordered against a party who is out of the jurisdiction: *Blaomfield v. Brooke*, 6 P. R. 264, and see *Furwell v. Wallbridge*, 3 Gr. 128; but see *Rex v. Pinckney*, 1904, 2 K. B. 84; 90 L. J. 408, where it was held that there is no jurisdiction to order the issue of a writ of *habeas corpus* directed to a person out of the jurisdiction.

A writ of sequestration was issued against a person of unsound mind, not so found, in *Robinson v. Galland*, W. N. 1889, 108; for non-compliance with an order made before he became of unsound mind: see 37 W. R. 296, 60 L. T. 697.

In granting a sequestration for disobedience of an order, the Court acts on the same principle as where committal is sought; a casual

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859-861.

accidental, or unintentional disobedience will not be sufficient ground. The Court must be satisfied that a contempt has been committed. *Fairclough v. Manchester Ship Canal Co.*, W. N. 1897, 7.

Sequestration for default in payment of money.

859. If a person who is ordered to pay money, neglects to obey the judgment, the Court or Judge may, upon the application of the party prosecuting the same, at the expiration of the time limited for performance, make an order for a writ of sequestration. Con. Rule 883.

Taken from Chy. O. 291.

Sequestration when granted to enforce payment of money demand.

Where a writ of sequestration is sought, to enforce the payment of money, unless some special ground is made for proceeding *ex parte*, notice of motion must be given; and the ordinary procedure for recovering money demands, viz.: writs of *fi. fa.*, etc., and attachment of debts, should be first resorted to, or shown to be unavailing; *Nelson v. Nelson*, 6 P. R. 194; but see *Re Russell, Barnett v. Allen*, before Spragge, C., January 24th, 1876, where the writ of sequestration was granted without such preliminary proceedings; and see *Samic v. Bolton*, W. N. 1881, 73, where the sequestration was granted on it being shown that the debtor had no effects exigible under execution.

An order for payment of money need not be personally served in order to found a motion for a sequestration; *Long v. Long*, 6 P. R. 101.

It was at one time held that the writ could not properly be issued to enforce an ordinary judgment for the recovery of money, which does not expressly order payment, or limit a time therefor; *London and Canadian L. & A. Co. v. Merritt*, 32 C. P. 375; *Ex parte Nelson*, *Re Hoare*, 14 Ch. D. 41; and that an order cannot be got limiting the time for payment of an ordinary judgment for debt merely to enable a sequestration to be issued therein; *Hallbert v. Cathcart*, 14, 1 Q. B. 244; 70 L. T. 558; and that the writ could only be issued to enforce the payment of money where the non-payment is still, notwithstanding R. S. O. c. 80, s. 5, a contempt of Court; *Stoner v. Fawcett*, 13 App. Cas. 20; 58 L. T. 1; *Berry v. Donovan*, 21 Ont. App. 14; *Pritchard v. Pritchard*, 18 Ont. 173; but it would now seem that the writ may be issued to enforce an ordinary judgment or order for payment of money or costs; see *Slade v. Hahne*, 18 Ch. D. 653; 45 L. T. 276; *Hallbert v. Cathcart*, 1896, A. C. 470, 75 L. T. 302.

Commissions of sequestration.

860. Commissions of sequestration shall be directed to the Sheriff unless otherwise ordered. Con. Rule 884.

Taken from Chy. O. 292.

For form of writ, see App. Form 182 (H. & L. Forms, No. 1067).

Release from custody or other relief of persons committed for contempt.

861. In case an attachment has been issued under any order of the Court or a Judge that a person be committed to gaol for contempt of Court, and there to be detained and imprisoned until such person shall have purged his said contempt, if it be made to appear that such person is in actual

custody under such attachment, the Court or Judge may, upon such notice as may be directed, modify and change the order and limit the term of imprisonment under such attachment or grant such other relief as may in the nature and circumstances of the case seem just, but any relief that may be granted to any such person shall not relieve him from any civil liability to any other person. 58 V. c. 12, s. 129a. Rules of 1 Jan., 1896, 1494.

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862, 863.

See Rule 900.

Where the contempt consists in not executing a deed or other instrument, the Court has power to appoint some one to execute it on behalf of the contemnor; see R. S. O. c. 324, s. 18. And as to the discharge of prisoners in custody for contempt, who are entitled to their discharge, but neglect to apply for it; see *Ib.*, s. 19.

2. ENFORCEMENT OF MANDATORY ORDERS.

862. If a *mandamus* granted in an action or otherwise, or a mandatory order, injunction, or judgment for specific performance of any contract is not complied with, the Court or a Judge, besides or instead of proceedings against the disobedient party for contempt, may direct that the act required to be done may be done so far as practicable by the party by whom the judgment has been obtained, or some other person appointed by the Court or Judge, at the cost of the disobedient party; and upon the act being done the expenses incurred may be ascertained in such manner as the Court or Judge may direct and execution may issue for the amount so ascertained and costs. Con. Rule 1128.

Mandatory
order, how
enforced.

See Eng. (1883) R. 608. It extends to all kinds of mandatory orders and injunctions, a power which previously existed in regard to a *mandamus*; see R. S. O. 1877, c. 52, s. 9.

In an action for specific performance, where an order had been made requiring defendant to make a certain road, and on his default the plaintiff applied for liberty to complete the road at the cost of defendant, it was held that the case was not within this *Rule*, but an order was made permitting plaintiff to do the work with liberty to apply that the defendant should pay the expense; *Mortimer v. Wilson*, 33 W. R. 927.

3. ISSUE AND FORM OF WRIT, RENEWAL, ETC.

863. As between the original parties to a judgment execution may issue at any time within 6 years from the date of the same. Con. Rule 885.

Execution
within 6
years

See Eng. (1883) R. 600, and R. S. O. 1877, c. 50, s. 322.

Rule 884. Concurrent writs of execution may be issued to different counties when necessary: *Lee v. Dangar*, 1892, 1 Q. B. 237; 60 L. T. 102.

Garishee process is not a form of execution within Rule 880 so as to be subject to Rules 883 and 884: *Felloes v. Thornton*, 14 Q. B. 11, D. 335.

Execution
by leave
of Court.

884. (a) Where the 6 years have elapsed or any change has taken place by death or otherwise in the parties entitled or liable to execution, or

(b) where a husband is entitled or liable to execution upon a judgment for or against his wife, or

(c) where a party is entitled to execution upon a judgment of assets *in futuro*,

the party alleging himself to be entitled to execution may apply to the Court or a Judge for leave to issue execution accordingly, or to amend any execution already issued. And such Court or Judge may make an order to that effect or may order that any issue or question necessary to determine the rights of the parties, shall be tried in any way in which a question in an action may be tried. Con. Rule 886, *amended*.

See Eng. (1883) R. 601.

The Eng. Rule includes the further case of a party entitled to execution against any of the shareholders in a joint-stock company upon a judgment against the company. Previously a writ of *scire facias* was necessary, and in Ont. Rules 642, 865, will probably apply in such a case.

The practice at Common Law in reviving pecuniary judgments for the purpose of execution, after the lapse of six years, or the death of parties, was formerly governed by C. L. P. Act, R. S. O. 1877, c. 50, ss. 322 to 330 (corresponding with Eng. C. L. P. Act, s. 128, *et seq.*). Under those provisions the party seeking execution could apply to the Court or a Judge for leave to enter a suggestion to the effect that such party was shewn to be entitled to execution, and to allow execution to issue, and, if the case was made clear, the suggestion and the consequent execution were allowed. If the case was not made clear, the suggestion and execution consequent upon it were disallowed, and the party was left to his writ of *revivor*. This was a new action, in which, by the ordinary processes of pleading, the questions in dispute were brought to issue and decided.

The above Rule preserves alternative processes, according as the right to execution is, or is not, sufficiently clear to be enforced summarily by a Judge; but a somewhat simpler process is provided; if the case be clear, the Judge may order execution to issue; if it be not, he may direct an issue to try the right.

The *Rules* do not prescribe any form of order to be made on the application, they do not seem to contemplate that the applicant in the case of the death of the plaintiff, or that the representatives of a deceased defendant, are to be made parties to the action, and the somewhat anomalous proceeding of issuing execution by or against persons who are not parties seems to be sanctioned.

It would have been more logical to have required any stranger to the action, by or against whom any proceedings are to be taken, to be first made a party under *Rule 306*. An order giving leave to issue execution against an executor of the debtor does not operate as a judgment so as to make the executor a judgment debtor, and is not equivalent to an order to continue proceedings under *Rules 305 et seq.*, and whenever any further matter or proceeding is desired to be taken other than the mere issue of execution, it is necessary that an order, to continue proceedings should be first obtained. Thus, on the death of a sole plaintiff, his representatives cannot apply under this *Rule* for the appointment of a receiver by way of equitable execution, without first making themselves parties to the action by obtaining an order to continue the proceedings in their names under *Rule 306*; *Norburn v. Norburn*, 1804, 1 Q. B. 440; 70 L. T. 411; so also where a charging order under *Rule 1129* is sought: *Stewart v. Rhodes*, 1900, 1 Ch. 386.

Where judgment is obtained by several executors, and one of them dies after the entering of judgment, there is no "change" of parties within the meaning of this *Rule*. The surviving plaintiffs are entitled to issue execution in the name of all the survivors, adding simply after the name of the deceased plaintiff the words "since deceased," and no order for leave to do so is necessary: *Baird v. Thompson*, 14 L. R. Ir. 497. So also in the case of partners the action survives: *Davies v. Andrews*, 28 Sol. Jour. 411; W. N. 1884, 94.

Successors in title are not bound by a judgment against their predecessors restraining the continuance of a nuisance: *Atty.-Gen. v. Birmingham, etc., Board*, 17 Ch. D. 685.

A writ of *habeas corpus* is within this *Rule*, and therefore if issued without leave after the death of a sole plaintiff is irregular, and may be set aside by the defendant without first reviving the action: *Chambers v. Kitchen*, 16 P. R. 219.

An application for leave to issue execution should be made on notice: *Mercer v. Lawrence*, 26 W. R. 506; *Lysaght v. McGrath*, 7 L. R. Ir. 532; *Allison v. Breen*, 19 P. R. 119, 143; *Re Trusts Corporation, etc.*, and *Boehmer*, 26 Ont. 191.

Where writs had expired, leave was given, on notice to defendant, under this *Rule*, to issue new writs to include the costs of the former ones and the costs of the motion: *McDougall v. McDougall*, 3 C. L. T. 42.

At Common Law, after 20 years without payment, a presumption arises that the judgment is satisfied: see *Coke*, 2 Inst. 470; *Mortimer v. Piggott*, 2 Dowl. 615. But this presumption may be rebutted: *Williams v. Welch*, 3 D. & L. 565, and possibly does not arise where execution has never been issued: see *Jenkins v. Kirby*, 2 C. L. J. 164.

But now under R. S. O. c. 72, s. 1 (b), the right of action on a judgment of a Court of Record is barred after the lapse of twenty years from its recovery, or from the last payment on account, or acknowledgment in writing: *Id.*, s. 8; *Boice v. O'Leane*, 3 Ont. App. 167; *Butler v. McMicken*, 32 Ont. 422.

Rules
865-868.

Leave to issue execution was given where a judgment recovered in 1860 was revived in 1880, twenty years not having elapsed: *McCullough v. Sykes*, 11 P. R. 337; *Allison v. Breen*, 19 P. R. 115, 143.

Where more than 20 years had elapsed after the last execution issued on a judgment had been returned, it was held that a motion for leave to issue execution was properly refused on the ground that no evidence of part payment, or acknowledgment, within the 20 years was adduced: *McMahon v. Spencer*, 13 Ont. App. 430; in this case a doubt was thrown out whether leave to issue execution was necessary at all, execution having issued within six years of the recovery of the judgment; possibly, however, if execution had issued without leave it would have been open to the defendant to apply to stay the proceedings: see *Rule 863*. In *Prine v. Wade*, 14 P. R. 351, an application for leave to issue execution was made under similar circumstances and refused, because it was held by analogy to the rule laid down by R. S. O. c. 72, s. 1, that the Statute of Limitations was a bar to an action on the judgment, and therefore a bar to the right to enforce it by execution: see also *Bolce v. O'Loane*, 3 Ont. App. 167; *Caspar v. Keachie*, 41 U. C. Q. B. 590; *McDonald v. Elliott*, 12 Ont. 98; *MacDonald v. MacDonald*, 11 Ont. 190; *Mason v. Johnston*, 20 Ont. App. 412, and *McCullough v. Sykes*, 11 P. R. 337; *Allison v. Breen*, *supra*.

As to proceedings under this *Rule* in actions against executors, etc., under a judgment of assets *quando*, etc., see note to *Rule 624*.

In case of
persons
not parties.

865. In cases other than those mentioned in *Rule 863* any person, not being a party, who obtains any judgment or in whose favour any judgment is made, shall be entitled to enforce obedience to the same by the same process as if he were a party; and any person not being a party, against whom obedience to any judgment may be enforced, shall be liable to the same process for enforcing obedience to such judgment as if he were a party. *Con. Rule 887*.

See Eng. (1883) R. 604, which is applicable in the case of a "cause or matter," and corresponds with Chy. O. 297.

See note to *Rule 864*.

Præcipe
for writ.

866. A writ of execution shall be issued upon *præcipe*, which may be according to the Forms in the Appendix, Part V. *Con. Rule 888*.

For Forms of *Præcipes* for Writs of Execution, see H. & L. Forms, Nos. 384 to 389.

Date.

867. Every writ of execution shall bear date of the day on which it is issued. *Con. Rule 893*.

Indorse-
ment of
name and
address.

868. Every writ of execution shall be indorsed with the name and place of abode or office of business of the solicitor issuing the same; and if he issues the same as agent for an-

other solicitor, the name and place of abode of such other solicitor shall also be indorsed; where a solicitor is not employed the writ shall be indorsed that the same has been issued by the plaintiff or defendant in person issuing the same, with the name of the city, town, or other place, and also the name of the street and number, if any there be, of the house of his residence. Con. Rule 889.

See Eng. (1883) R. 591.

Where the Sheriff, being misled by an indorsement made on a writ by the plaintiff's solicitor, seized the goods of a wrong person, the plaintiff was held liable in an action of trespass: *Harris v. Southam*, 22 Q. B. D. 614. See also *Smith v. Keel*, 9 Q. B. D. 310; *Lee v. Russell*, 7 Times, 303; but not where there is nothing untrue in the indorsement so as to mislead: *Coady v. Blairberg*, 7 Times, 421.

889. Every writ of execution for the recovery of money shall be indorsed with a direction to the Sheriff, or other officer or person to whom the writ is directed, to levy the money really due and payable and sought to be recovered under the judgment, stating the amount, and also to levy interest thereon, if sought to be recovered, at the rate of 6 per cent. per annum from the time when the judgment was entered; in cases where there is an agreement between the parties that more than 6 per cent. interest shall be secured by the judgment, the indorsement may be to levy the amount so agreed. Con. Rule 891.

Same in effect as Eng. (1883) R. 591, except that the rate of interest therein named is the legal rate of four per cent., and provides for the case of money payable under a judgment or order.

Since this Rule was passed the statutory rate of interest in Canada was reduced to 5 per cent.; after 7 July, 1900, but the reduced rate does not apply to liabilities existing at that date: 35-36 Vict. c. 29 (D.).

It is not quite clear how far the last clause is intended to alter the former rule that a contract for payment of a higher rate of interest than six per cent. when sued on, becomes merged in the judgment under which the statutory rate only will be recoverable; see *St. John v. Rykert*, 4 Ont. App. 213. At all events, in the absence of any agreement operating subsequently to judgment, interest is limited to the statutory rate, though the debt on which the judgment was recovered bore a higher rate: *Re European Central Ry. Co.*, 4 Ch. D. 37; *Ex p. Fewings*, 25 Ch. D. 338.

In indorsing a writ to levy interest upon the amount of the judgment, the interest is to be computed from the day of pronouncing the judgment; that, and not the day of formal entry thereof, is the day from which the judgment takes effect: *Rule 629*, and is, therefore, the day upon which it is entered within the meaning of this Rule; *Kelcher v. McGibbon*, 10 P. R. 89; see *Rule 629*, and *McLure v. Canada Central* there noted.

Rules

870, 871. The date from which the interest is to be computed has been further made clear by sec. 116 of the Jud. Act.

As a general rule, interest cannot be allowed on untaxed costs though awarded out of a fund in Court: *West v. West*, 17 L. R. Ir. 49; but see *Taylor v. Roe*, 1894, 1 Ch. 413; 70 L. T. 232; where costs payable under an interlocutory order were held to bear interest from the date of the order.

Where costs of all parties of an action for the construction of a will were ordered to be paid out of an estate and were taxed, but no estate was available for their payment for five years, interest on the costs was not allowed out of the estate: *Tricker v. Severn*, 12 P. R. 618.

Where costs are paid with interest thereon, under a judgment or order, which is subsequently reversed on appeal, and are then refunded, but on a further appeal the original judgment is restored, the costs bear interest from the date of the original judgment: *Ashworth v. English Card Clothing Co.*, 1904, 1 Ch. 704; 90 L. T. 263.

Interest on costs runs from the date of the judgment, if the amount is specified in the judgment, but if taxed afterwards, then from the date of the certificate of taxation, that being the date given in the form of a writ No. 169 in the App.; H. & L. Forms No. 1067; *Schröder v. Cleugh*, 40 L. J. C. 1, 365; *Trinity College v. Hill*, 8 Ont. 286.

See also notes to secs. 113-116 of the Act.

Indorse-
ment of
amount to
be levied
for costs
of writs.

870. The officer issuing the writ or renewal thereof, shall indorse upon the same a memorandum signed by him of the amount or amounts respectively hereinafter mentioned, which the party issuing such writ is entitled to receive for such writ or renewal, and placing it in the Sheriff's hands, including all attendances, indorsements, letters and postage, and for his costs of any prior or other writs, or renewals, specifying the amount allowed for each writ or renewal; and no sum not so indorsed is to be collected for such costs. Con. Rule 892.

The amounts which may be collected were mentioned in the original Rule 594, but are now contained in the Tariff of Costs, Item 15.

Poundage,
etc.

871. Upon every execution there may be levied, in addition to the sum recovered by the judgment, the poundage, fees, expenses of execution and interest upon the amount recovered. Con. Rule 890.

Identical with the Eng. (1883) R. 563, and to the same effect as R. S. O. 1877, c. 66, s. 44. Poundage was originally given to Sheriffs by 29 Eliz. c. 4.

For the fees to which Sheriffs are entitled: see Tariff C., and Rule 1189.

As to the Sheriff's right to poundage, see notes to Rule 1190.

As to taxation of Sheriff's fees, see Rule 1193, *et seq.*

872. A writ of *feri facias*, if unexecuted, shall remain in force for three years only from its issue, unless renewed in the manner hereinafter provided; but such writ may at any time before its expiration, be renewed by the person issuing it for 3 years from the date of such renewal, and so on from time to time during the continuance of the renewed writ,—either by being marked in the margin with a memorandum signed by the proper officer who issued such writ, or by his successor in office, stating the date of the day, month and year of such renewal, or by such person giving a written notice of renewal to the Sheriff, signed by him or his solicitor, and with the like memorandum; and a writ so renewed shall have effect and be entitled to priority, according to the time of the original delivery thereof. Con. Rule 894. 58 V. c. 13, s. 31. See also R. S. O. c. 77, s. 9.

Rule 872.

Currency of writ of *fi. fa.*

See Eng. (1883) R. 398, which is different, requiring for renewal the leave of the Court or a Judge.

The method of marking provided for in the present Rule is taken from R. S. O. 1877, c. 66, s. 11.

A writ is, for the purpose of renewal, necessarily taken out of the actual possession of the Sheriff, without affecting the position of the party who so withdraws it; but where more than a reasonable time for renewal elapsed, and by mistake a writ was not returned renewed, for more than six months, though there was no intention of withdrawing it except for purposes of renewal, it was held that a mortgage registered before the withdrawal had gained priority, and that it made no difference that no new rights had intervened: *Re Hime v. Lidley*, 13 P. R. 1; and see other cases noted p. 961.

There is no power to enlarge the time for renewing writs where, by an accident, they have not been renewed within the time limited for renewal: *Lowson v. Canada Farmers' Ins. Co.*, 9 P. R. 309.

A writ of assistance was held to be a writ of execution within R. S. O. 1887, c. 66, s. 11, and to be not in force for more than one year from the *teste* unless renewed: *Adamson v. Adamson*, 12 P. R. 21.

It may, however, now be open to question whether writs of execution, other than writs of *ca. sa.* (as to which see Rule 874) and writs of *fi. fa.* do not now remain in force until executed without any renewal.

This Rule only provides for the renewal of writs of *feri facias*, and R. S. O. c. 77, ss. 8 and 9, seem to be intended to be confined to writs for the levying of money; there seems therefore to be now no provision for renewing any other writs of execution except *fi. fas.*, nor any provision limiting the time they are to be in force as in the case of *fi. fas.*

Making the execution creditor a party to a petition for partition under R. S. O. c. 123 s. 10, will not have the effect of keeping the execution alive after the three years have expired: *Macdonell v. Best*, 6 O. L. R. 18.

Rules

873, 874. A sale of land under a *fi. fa.*, after the expiration of the writ, where there has been no previous inception of execution, and no renewal of the writ, is null and void: *Daby v. Gehl*, 18 Ont. 132.

Where a writ is lost in transmission to the Sheriff after renewal, an order may be made for the issue of a new writ *nunc pro tunc*, to bear the same indorsement and evidence of renewal marked by the proper officer as the lost writ, and to have the same force and effect as the lost writ: *Fairchild v. Crauford*, 32 C. L. J. 638; 16 C. L. T. 359 (Man.).

Where a writ under which a seizure had been made, but from which the Sheriff improperly withdrew, was suffered to run out pending a motion to compel the Sheriff to return the writ, it was ordered to be renewed *nunc pro tunc*, so as to continue it in force, and the time for making the return was extended: *Gunge v. Freeman*, 14 P. R. 330.

In *Neil v. Almond*, 29 Ont. 63, and *Re Woodall*, S. O. L. R. 288, it was held that a writ against lands, though kept renewed, must be enforced by sale within 10 years from its first delivery to the Sheriff, otherwise the lien created thereby may be barred under R. S. O. c. 133, s. 23; but by 5 Ed. vii. c. 13, s. 10, an amendment of that Act has been made which prevents s. 23 of the Act from barring the lien or charge created by the placing of an execution against lands in the Sheriff's hands, where the writ has been kept alive by renewals.

Proof of
renewal.

873. The production of a writ of execution, or of the notice renewing the same, purporting to be marked with the memorandum in Rule 872 mentioned, showing the same to have been renewed, shall be sufficient *prima facie* evidence of its having been renewed. Con. Rule 895.

See the Eng (1883) R. 599, and R. S. O. 1877, c. 66, s. 12. It has been said that the expression "sufficient evidence" in the Eng. Rule probably means *prima facie* evidence: *Barracough v. Greenhough*, L. R. 2 Q. B. 612.

Ca. *ret.*
when re-
turnable.

874. Every writ of *capias ad satisfaciendum* against a party who has not been previously arrested or who has not given security pursuant to an order for arrest shall be returnable immediately after the execution thereof, and shall continue in force two months from the day of the issue thereof inclusive, and no longer, but on the expiration thereof another writ may be obtained upon a Judge's order, as provided by section 9 of the *Act Respecting Arrest and Imprisonment for Debt*. Con. Rule 896, amended.

R. S. O.
1857, c. 67.

Taken from R. S. O. 1877, c. 66, s. 53.

Sec. 9 of *The Act Respecting Arrest and Imprisonment for Debt* above referred to is now R. S. O. c. 80, s. 8.

After a writ of *ca. sa.* has expired under this Rule by reason of lapse of time, a concurrent writ cannot be issued: *Merchants Bank v. Sussex*, 4 O. L. R. 524.

4. SALE UNDER WRIT OF *Fieri Facias*.Rules
875-877.

875. Where any goods or chattels are seized in execution under a writ of *fieri facias* issued out of the High Court or a County Court, the Sheriff, his Deputy, or officer who seized the same, shall, on request, deliver to the owner, his agent or servant an inventory thereof before they are removed from the premises on which they have been so seized; and no Sheriff or other officer shall sell any goods or chattels under a writ of execution until he has previously thereto given at least 8 days' public notice in writing of the time and place of sale in the most public place in the municipality where such goods or chattels have been seized. Con. Rule 899.

Taken from R. S. O. 1877, c. 66, s. 19.

There must be reasonable and proper care taken in advertising the sale as this *Rule* requires; failure to give proper notice will render a sale invalid and subject the purchaser and the Sheriff to liability: *McLaughlin v. Allan*, 4 O. W. R. 37.

A sale by a Sheriff or his bailiff under execution is within the Statute of Frauds (R. S. O. c. 338), s. 12, and either of them may sign for the purchaser the memorandum in writing in the same manner as an auctioneer or his clerk; see notes to *Rule* 729. The entry of the purchaser's agent as the purchaser will bind the principal if he afterwards acknowledges the agent's authority: *Flintoft v. Elmore*, 18 C. P. 274.

A sale under execution of goods the subject of a patent, which the execution debtor has a license from the patentee to use, will not confer on the Sheriff's vendee a right to use them: *British Mutoscope Co. v. Horner*, 1901, 1 Ch. 671; 84 L. T. 26.

876. The Sheriff shall, where goods seized by him under a writ of *fieri facias* remain unsold in his hands for want of buyers, state in his return of "goods on hand for want of buyers," the time and place when and where such goods were offered for sale by him, and the names of at least three persons who were present at the time of such attempted sale, if so many were present, but if so many were not present, then the names of those who were present, if any, and that there were no others, and if no person was present then he shall state that fact. Con. Rule 900.

Taken from R. S. O. 1877, c. 66, s. 34.

877. The Sheriff shall not expose the lands for sale under a writ of *fieri facias*, or sell the same within less than twelve months from the day on which the writ is delivered to him. Con. Rule 901.

Taken from R. S. O. 1877, c. 66, s. 14.

Sheriff to deliver inventory to the owner, etc.

Return where goods remain in Sheriff's hands unsold.

Lands not to be sold within 1 year

Rule 877.

It would seem that the Crown is not bound by this *Rule* and that an execution against lands in favour of the Crown may be made returnable before the execution of twelve months: *Reg. v. Desjardins Canal Co.*, 29 U. C. Q. B. 165.

Where a *fi. fa.* lands has been in the Sheriff's hands for a year and is returned, nothing having been done under it, the Sheriff may never- the less sell, under an *alias fi. fa.* land, issued thereon, without wait- ing a year: *Campbell v. Deliaanty*, 24 U. C. Q. B. 236; *Nickall v. Crawford*, Tay. 277; *Rattan v. Levisconte*, 16 U. C. Q. B. 495.

Sale of
lands, when
invalid.

A sale of lands under an expired writ is void: *Doe d. Burnham v. Simmonds*, 9 U. C. Q. B. 436; *Gardiner v. Juson*, 2 E. & A. 188; *Doe d. Greenhields v. Garrow*, 5 U. C. Q. B. 237; *Reynolds v. Streeter*, 3 P. R. 315; *Lee v. Howes*, 30 U. C. Q. B. 292; *Daby v. Gihl*, 18 Ont. 132, but where there has been an inception of execution during its currency, e.g., by advertising the land for sale under it, the sale may be made, and carried out, after the writ has become return- able: *Hull v. Goshe*, 15 C. P. 101; *Rule 882*. Though the advertise- ment may be published during the currency of the writ, yet by the express terms of this *Rule* the day named for the sale must not be earlier than twelve calendar months from the day on which the writ was delivered to the Sheriff. Advertisements of sale under the writ, first published after the writ has expired, are invalid, and a sale in pursuance of such advertisement is void: *Gardiner v. Juson*; *Reynolds v. Streeter*; *Lee v. Howes*, *supra*; and a return of "lands on hand" made after the writ has expired, and without any previous inception of execution under it, is invalid, and will not authorize the issue of a *venditioni exponas*, and if issued, and a sale be made under it, the sale may be set aside: *Lee v. Howes*, *supra*. The Sheriff's telling the execution debtor that he has a *fi. fa.* against his lands, and that his lands will be sold, unless he pays up, is not an inception of execution: *Bradburn v. Hall*, 16 Gr. 518, neither is the mere sending of a list of lands for sale under an execution to the *Gazette* for pub- lication an inception of execution: there must be an actual publi- cation of the advertisement during the currency of the writ: *Reynolds v. Streeter*, *supra*.

Defects in
advertise-
ment of
sale, effect
of.

The selling of land by the Sheriff before the proper period has ex- pired is not a mere irregularity, but renders the sale void: see cases *supra*; whereas defects in the advertisement of sale, to which the purchaser is no party, will not affect the validity of the sale: *Pate- son v. Todd*, 24 U. C. Q. B. 296; *Ross v. Malone*, 7 Ont. 215, 397, unless the circumstances are such that the purchaser's taking the deed can be said to amount to a fraud: *McDonald v. Cameron*, 13 Gr. 84; but where irregularities are committed by the Sheriff by instruc- tions of the execution creditor's solicitor, and the execution creditor himself becomes the purchaser, the Court may, if the sale has been prejudicial, refuse to maintain the Sheriff's deed, if attacked, except as a security for the debt: *Id.*; and see *In re Davis*, 17 Gr. 603; *Kerr v. Bain*, 11 Gr. 423; and where land has been sold under execu- tion at a gross undervalue, owing to the title being in dispute, the Court may refuse to give effect to the Sheriff's deed, except as a security: *Chalmers v. Piggott*, 11 Gr. 475; and see *Malloch v. Plum- kett*, 11 Gr. 439; but the inadequacy of price must be very excessive to induce the Court to refuse to maintain a Sheriff's deed: *Laing v. Matthews*, 14 Gr. 36.

Irregulari-
ties of sale,
effect of.

Where the sale has been improperly conducted, the Sheriff may be restrained by injunction from executing a conveyance: *Jones v. Jones*, 15 Gr. 49.

Lands patented under *The Free Grants and Homesteads Act* (R. S. Rules O. c. 29), are exempt from liability to execution against the grantee even after the 20 years mentioned in the Act, in respect of judgments either previously to the grant, or during such period of 20 years recovered against him: *Re Beatty & Finlayson* 27 Ont. 642 and see, 25 of the Act. **878-881.**

Free grant lands when not saleable under execution.

By R. S. O. c. 109, s. 34, it is provided that no Sheriff, etc., shall sell or expose for sale under execution any lands in Manitoulin, or any lands in Rainy River, which are situate more than 20 miles from the Canadian Pacific Railway, except during the months of July, August, September or October. Sale in Manitoulin and Rainy River.

878. Where a writ of *feri facias* is issued against an absconding debtor (a) in which an order for attachment has been issued, the Court or a Judge may order the Sheriff to sell lands of the absconding debtor before the expiration of the twelve months, but in other respects in like manner as in other cases. Con. Rule 902. *Fe. fa. as to lands against absconding debtor.*

Taken from 50 V. c. 7, s. 7.

(a) Here the words "in an action" appear to have been inadvertently omitted: see former Con. Rule 902.

879. A sale of lands shall not be had under any writ of *feri facias* until after a return of *nulla bona*, in whole or in part, in the same action or matter by the Sheriff of the same county. Con. Rule 904. *No sale of lands until return of nulla bona.*

Taken from R. S. O. 1877, c. 16, ss. 15-16.

The omission to make a return of *nulla bona*, as required by this Rule, before selling lands, is an irregularity only, and will not render the sale of the lands void: *Ross v. Malone*, 7 Ont. 215, 397; *Doc d. Spafford v. Brown*, 3 O. S. 92. So also a return of *nulla bona*, where there are in fact goods liable to execution, is only an irregularity: *Ontario Bank v. Kerby*, 10 C. P. 35, 41; *Molson's Bank v. McMeekin*, 15 Ont. App. 535.

880. If the amount authorized to be made and levied under a writ of *feri facias* is made and levied thereunder out of goods and chattels, the person issuing the writ shall not be entitled to the expenses of any seizure or advertisement of lands thereunder; and the return to be made by the Sheriff to the writ for sale of lands shall be to the effect that the amount has been so made and levied as aforesaid. Con. Rule 905. *If the debt is realized under writ against goods.*

Taken from R. S. O. 1877, c. 16, s. 17.

881. Before the sale of lands under a writ of *feri facias*, the Sheriff shall publish once, not less than three months and *Advertisement by Sheriff*

Rule 882. not more than four months preceding the sale, an advertisement of sale in *The Ontario Gazette*, specifying:

- (a) The particular property to be sold;
- (b) The name of the plaintiff and defendant;
- (c) The time and place of the intended sale;
- (d) The name of the debtor whose interest is to be sold;

and he shall, upon one day at least in each week for four successive weeks next preceding the sale, also publish such advertisement in a public newspaper of the County or District in which the lands lie; and he shall also for three months preceding the sale, put up and continue a notice of such sale in the office of the Clerk of the Peace, and on the door of the Court House or place in which the General Sessions of the Peace of the County or District is usually holden; but nothing herein contained shall be taken to prevent an adjournment of the sale to a future day. Rule 886 as amended by Rule 1268 of 24 Dec., 1904, Ont. Gaz. 31 Dec., 1904.

Taken from R. S. O. 1877, c. 66, s. 41, with amendments.

It would seem that the omission to advertize, where there is an uncertainty as to what has been sold, though it may give a right against the Sheriff, will not invalidate the sale as against a *bond fide* purchaser: *Osborne v. Kerr*, 17 U. C. Q. B. 134, 141; and see *Lee v. Howes*, 30 U. C. Q. B. 292. Defects in the advertisement will not invalidate the sale as against a third person, or even the execution creditor, who *bond fide* becomes the purchaser: *Paterson v. Todd*, 24 U. C. Q. B. 296; but where the execution creditor becomes the purchaser, if he has in any way, by himself, or his solicitor, participated in the irregularities, his deed may be ordered to stand merely as a security: *McDonald v. Cameron*, 13 Gr. 84; *In re Davis*, 17 Gr. 603.

The want of regularity in giving public notice of an adjournment of the sale was held to be cured where the debtor attended the sale by his agent, and afterwards ratified what had been done: *Doe Dissett v. McLeod*, 3 U. C. Q. B. 297. But where a Sheriff refused to execute a deed on the ground of there having been an irregularity in the advertisement, but readvertised the lands and put them up for sale again, when they brought a price far exceeding that offered by the first purchaser, the Court refused to interfere summarily on the application of the first purchaser to compel the Sheriff to make a deed to him: *In re Campbell*, 10 U. C. Q. B. 641.

Notice in
Gazette
shall
constitute
incipient
execution.

882. The advertisement in the *Ontario Gazette* of any lands for sale under a writ of *fieri facias*, during the currency of the writ (containing some reasonably definite description of the land), shall be deemed a sufficient commencement of the execution to enable the same to be completed by a sale and

conveyance of the lands after the writ has become returnable. **Rules**
Con. Rule 907. **583-885.**

Taken from R. S. O. 1877, c. 66, s. 42.

5. RETURN OF WRITS, ETC.

883.—(1) The Sheriff to whom a writ of *fiert facias* Certificate in lieu of return of writ, as to goods. against goods and chattels is directed shall indorse on such writ all necessary returns thereto in respect of his proceedings thereon as to goods and chattels, and shall return a certificate of such indorsements in lieu of the writ; such indorsements, and the certificate so returned, shall be deemed a return for all purposes of the writ as to goods and chattels.

(2) The certificate may be according to Form No. 185. Rules of 1 Jan., 1896, 1503.

For Form No. 185, see H. & L. Forms No. 1113.

884. A return by the Sheriff of "goods (or lands) on hand for want of buyers," may be made by a certificate in the manner in Rule 883 mentioned, and thereupon a writ of *renditioni exponas* may be issued for the sale of such goods or lands as the case may be, and the original writ of execution shall remain in force for the residue. *New.*

See Rule 876, for the particulars required in a return of "goods on hand, etc."

Where a seizure has been made under a writ, the judgment creditor cannot have another *fi. fa.* upon the judgment until a return has been made to the first, even though he has abandoned the seizure, but this does not apply where the Sheriff has seized only goods not belonging to the debtor: *Ex. p. Smith*, 1902, 2 K. B. 260.

885. An order against a Sheriff to return a writ or to bring in the body shall be returnable in 6 days, and shall be issued on *procipe*. **Con. Rules 908-909.**

Taken from Rule T. T. 1856, 101.

Before an order to return a writ is issued, it would seem that a demand for a return should first be made under Rule 888. The neglect to make the demand first would probably be held to disentitle the party issuing the order to the costs thereof: see Rule 890.

An order to bring in the body upon a return of *cepi corpus* may be issued immediately after the time for putting in security in the action has expired: *Poucher v. Liven*, 4 Mo. & Sc. 427; *Hutchins v. Hind*, 5 T. R. 479; *Potter v. Marsden*, 8 East, 525. But the order should

Orders to return writs, or bring in body, to be six-day orders.

**Rules
886-886.**

not issue until the day after the expiration of an order (if any) to return the order for arrest: see *Hutchins v. Hind, supra*. The order to bring in the body cannot be properly issued where the plaintiff has taken an assignment of the bond to the Sheriff: 2 Samd. 606; or where he accepts a *cognovit*, or other security from the defendant, without the privity of the Sheriff: *Re v. Sheriff of Surrey in Brown v. Clarke*, 1 Taunt. 159. The order should be issued and served promptly: *Re v. Sheriff of Middlesex*, 1 Dowl. 53. It would seem that an order to return the writ or bring in the body need not be personally served on the Sheriff, if he cannot conveniently be found: see *Rule 891*.

As to the effect of an order to bring in the body, see *Rule 1045* (1). This order must issue from the office in which the proceedings were commenced: see *Rule 37*.

Sheriff to file writ in office from which order to return issues.

886. The Sheriff shall file the writ in the office from which the order to return the same was issued, and the officer with whom it is filed shall indorse the day and hour when it was filed. Con. Rule 910.

Taken from Rule T. T. 1876, 103.

Where a Sheriff disobeys the order to return the writ, he is liable to attachment for contempt, but an attachment can only be obtained on motion, of which the Sheriff is entitled to notice: see *Rule 877*.

Sheriff not entitled to fees on writs unless returned in 4 days after being ordered, if writ delivered 15 days before such order.

887. Where a writ delivered to a Sheriff for service or execution has remained in his hands 15 days, and he has not been delayed from returning the same by an order in writing from the party from whom he received the writ, his solicitor or agent, and he is afterwards directed by order of Court to return such writ, he shall not be entitled to any fees thereon unless, within 4 days after being so directed, he returns or encloses the writ by post to such party, his solicitor or agent. Con. Rule 913.

Taken from R. S. O. 1877, c. 64, s. 58.

Sheriff refusing to make return when demanded by party who delivered writ to him.

888. Where the party who delivered any writ or process to any Sheriff to be executed, by himself or by his solicitor, or by the agent of such solicitor, requires, by a demand in writing, the Sheriff to return the writ either to the party or to his solicitor or solicitor's agent, or to the Court from which the writ issued (and whether such requisition is made before or after the service or other execution thereof), the Sheriff shall within 8 days inclusive of the day of the service of the requisition return the writ according to the terms of the requisition; and if the Sheriff wilfully refuses or neglects to do so, he may be ordered to return the writ, and

may be further proceeded against as in other cases of con-
tumacy. Con. Rule 914.

Taken from R. S. O. 1877, c. 66, s. 59.

Rules
889-892.

Order
against
Sheriff.

889. Where a party to the writ or process who did not deliver the same to the Sheriff to be executed, is entitled, according to the practice of the Court, to call for a return of the writ or process, he may proceed in like manner to procure such return as is above provided in the case of parties who have delivered the writ or process to the Sheriff for execution. Con. Rule 915.

Other party
entitled to
return may
proceed
in like
manner.

Taken from R. S. O. 1877, c. 66, s. 60.

890. Where a Sheriff neglects or refuses to return any writ when so called upon, he shall be bound to pay the costs of any order taken out to compel the return, and all other costs consequent thereon, and also the costs of the previous requisition to make the return. Con. Rule 916.

When
Sheriff
liable to
costs for
not return-
ing writs

Taken from R. S. O. 1877, c. 66, s. 61.

891. Personal service on the Sheriff shall not be necessary, if it appears by affidavit that inquiry was made for him, and that he could not conveniently be found, but service shall be deemed to have been made upon him by serving the Deputy Sheriff, or if he cannot be conveniently found service may be made upon the Sheriff's clerk, or upon any bailiff of the Sheriff who may for the time being be present in, or have charge of, the Sheriff's office. Con. Rule 917.

Personal
service on
Sheriff un-
necessary.

Taken from R. S. O. 1877, c. 66, s. 64.

892. All rules respecting the delivery of writs and process to and the service, execution and return thereof by Sheriffs, and the fees and expenses relating thereto, shall extend and apply to Coroners and Elisors employed in the service or executing of the process of the High Court, or of any of the County Courts. Con. Rule 918.

Certain
rules to
apply to
Coroners
and Elisors.

Taken from R. S. O. 1877, c. 66, s. 65.

A coroner acting as Sheriff is liable for his acts in the same way as a Sheriff: *Horsfall v. Sutherland*, 35 C. L. J. 245.

Rules
893-897.

Attach-
ments for
non-return
of writ may
be issued
unless fur-
ther time
for return
granted.

893. Where a writ is issued directed to a Sheriff, and is delivered to him for execution, if the Sheriff is ordered to return the same, and does not make the return within the time specified in the order, the judgment creditor may move for an order of attachment against the Sheriff, and the Court or a Judge may order the Sheriff to be attached, or limit a further period after which an order of attachment shall issue unless a return be made in the meantime, or may make such other order as may seem just. Con. Rule 919.

Taken from R. S. O. 1877, c. 66, s. 66.

When at-
tachment
may issue.

894. If the writ is not returned at the expiration of any further time limited by the order mentioned in Rule 893, and if the service of the order and the failure of the Sheriff to return the writ are proved, the Court or Judge may order a writ of attachment to issue forthwith against the Sheriff. Con. Rule 920.

Taken from R. S. O. 1877, c. 66, s. 67.

Judge in
Chambers
may order
issue of
writs of
habeas
corpus.

895. Upon the return of "*cepi corpus*" to any such attachment, the Court or a Judge may direct the issue of a writ of *habeas corpus*, and upon the return thereof may commit the Sheriff to close custody, or admit him to bail, or make such other order as may seem just. Con. Rule 921.

Taken from R. S. O. 1877, c. 66, s. 68.

Such writs
may be
returnable
on a day
certain.

896. Orders of attachment and writs of *habeas corpus* issued against a Sheriff may be returnable on a day certain to be fixed by the order of the Court or Judge; and the return day shall not be more than 30 days from date of the order. Con. Rule 922.

Taken from R. S. O. 1877, c. 66, s. 69.

Duty of
Sheriff's
officers as
to custody
of writs, etc.

897. Every Deputy Sheriff, bailiff or other Sheriff's officer or clerk entrusted with the custody of any writ or process, or of any book, paper or document belonging to the Sheriff or his office, shall, upon demand upon him by the sheriff, restore and return such writ, process, book, paper or document to the custody of the Sheriff; and the Court or a Judge may order any party neglecting or refusing to restore and return such writ, process, book, paper or document, to

restore and return the same to the Sheriff, and may order a writ of attachment to issue, as in other cases of contumacy. **Rules 898-900**
 Con. Rule 923.

Taken from R. S. O. 1877, c. 16 s. 32.

898. If a Deputy Sheriff, bailiff, or Sheriff's officer has in his possession, custody or control, any writ of summons, *feri facias*, or other writ or process, and, upon demand made by the Sheriff from whom the same was received, or his successor in office, or by any other person entitled to the possession of the same, neglects or refuses to deliver up the same, any Judge of the Court out of which the writ or process issued, may, upon the application of the Sheriff or his successor in office, or of the person entitled to the possession of the writ or process, order the production thereof; and the order may be enforced in the same manner as orders for the return of writs against Sheriffs. Con. Rule 924.

Taken from R. S. O. 1877, c. 16, s. 33.

6. DISCHARGE OF EXECUTION DEBTORS FROM CUSTODY.

899. A written order under the hand of the solicitor in the action by whom a writ of *capias ad satisfactionem* has been issued, shall justify the Sheriff, gaoler or officer in whose custody the party is under the writ in discharging such party, unless the party for whom such solicitor professes to act has given written notice to the contrary to the said Sheriff, gaoler or officer; but such discharge shall not be a satisfaction of the debt unless made by the authority of the judgment creditor; and nothing herein contained shall justify the solicitor in giving an order for discharge without the consent of his client. Con. Rule 925.

Taken from R. S. O. c. 66, s. 55.

7. DISCOVERY IN AID OF EXECUTION.

900.—(1) Where a judgment is for the recovery by, or payment to, any person, of money or costs, the judgment creditor may, without an order, examine the judgment debtor upon oath before a Master or Local Master, or an Examiner, or before one of the Registrars, Local Registrars or Deputy Clerks of the Crown, or before the Judge of the County

Proceed
there to
compel
delivery of
writs, etc.,
by Sheriff's
officers.

On what
authority
Sheriffs may
discharge
debtors from
custody

Examina-
tion of
judgment
debtors be-
fore Local
Registrars
etc.

Rule 900. Court of the County within which such debtor resides, or before any Official Referee (or by the order of the Court or a Judge before any other person to be named in such order), touching his estate and effects, and as to the property and means he had when the debt or liability which was the subject of the cause or matter in which judgment has been obtained against him was incurred (or in the case of a judgment for costs only, at the time of the commencement of the cause or matter), and as to the property and means he still has of discharging the said judgment; and as to the disposal he has made of any property since contracting such debt or incurring such liability (or in case of a judgment for costs only, since the commencement of the cause or matter), and as to any and what debts are owing to him. Rules 23 June, 1894, 1360, amended.

(2) In County Court cases the examination may also be had before the Clerk of the County Court. *New.*

See Eng. (1883) Rs. 610, 611, and R. S. O. 1877, c. 49, s. 17; c. 50, s. 304.

"Judgment," "judgment creditor," and "judgment debtor"; as to these expressions, see *Rule 835*.

An examination should not be had under this *Rule* without necessity. The ordinary procedure to obtain payment through the Sheriff should therefore in general be taken, and a return of *nulla bona* obtained from the Sheriff, or intimation procured from him that he is prepared to make such a return: *Ontario Bank v. Trowern*, 13 P. R. 422; but the judgment creditor is *prima facie* entitled to examine his judgment debtor under this *Rule*, and the onus is on the debtor of shewing affirmatively that the issue of the appointment is an abuse of the process of the Court: *Grant v. Cook*, 17 P. R. 362.

The express language of the present *Rule* has removed the doubts formerly entertained as to whether examination of a debtor, and attachment of debts due to him, could be had where the judgment or order was for costs only: see *McLachlin v. Blackburn*, 7 P. R. 287; *Meyers v. Kendrick*, 9 P. R. 363; *Troutman v. Fiskin*, 13 P. R. 153; *Re Irciac*, 12 P. R. 297; *Elliot v. Capel*, 9 P. R. 35, and notes to *Rule 911*.

A judgment for recovery of land, and awarding costs, is within the *Rule*: *Lloyd v. Wallace*, 9 P. R. 335. So also now an order for costs in interpleader proceedings: *Rules 835* and 6 (c); see formerly *McKinnon v. Crowe*, 17 P. R. 291; *Hartley v. Shewell*, 1 B. & S. 1.

Where the debtor was a member of Parliament residing in another Province, although temporarily resident in Ontario in discharge of his parliamentary duties, an order to compel him to attend for examination was refused: *Regan v. McGreevy*, 5 P. R. 94.

A judgment creditor is entitled to examine the judgment debtor notwithstanding the latter has made an assignment for the benefit of his creditors: *McEachern v. Gardau*, 18 P. R. 459; *Bank of Hamilton v. Scott*, 10 C. L. J. 432.

Not only the judgment debtor, but, by order, under *Rule 907*, his **Rule 900**, clerks or employees, may be examined. The *Rules* in this respect are wider than those in England: see *Jewell v. Eden*, 18 Q. B. D. 588; *Hand-Burns v. Heriot*, 1890, 2 Q. B. 338. Who may be examined.

As to the examination of officers of a corporation debtor, see *Rule 902*.

A debtor under arrest on final process may be examined: *Brown v. Beattie*, 2 U. C. L. J. 213; or a garnishee who has been ordered to pay over: *Cowan v. Cuthill*, 33 W. R. 583; 52 L. T. 431.

A married woman may be examined as to her separate estate: *Standard Bank v. McQuaig*, 7 P. R. 356; *Aylesford v. G. W. Ry. Co.*, 1892 2 Q. B. 626; and see *McLeod v. Fudge*, 12 P. R. 150; *Re Teasdale v. Ready*, 18 P. R. 101; *Kistner v. Tottman*, 1905, 1 K. B. 339; 92 L. T. 36.

Where a garnishee has been ordered to pay over, he becomes a judgment debtor, and may be examined under this *Rule*: *Cowan v. Cuthill*, 52 L. T. 431; 33 W. R. 583.

Though an examination may be had without an order in the first instance, yet, where a party wishes to examine a judgment debtor a second time, he must make a substantive motion for that purpose on notice to the judgment debtor, and show grounds for the order: *London & Canadian Loan, etc., v. Merritt*, 2 C. L. T. 260; *Re Central Bank, Watson's Case*, 15 P. R. 127; affirmed by Divisional Court, 16 P. R. 55.

The examination is intended to be a cross-examination of the strictest character: *Beattie v. Barton*, 2 C. L. T. 104; *Re Central Bank, Watson's Case*, *supra*; and may question "fairly pertinent to the subject matter of the inquiry, which means put with a view to ascertain so far as possible, by discovery from a reluctant defendant, what debts are owing to him, ought to be answered by the defendant." He must also "give all necessary particulars to enable the plaintiffs to recover under a garnishee order": *Republic of Costa Rica v. Steamship*, 16 Ch. D. 8, 12; see also *McLean v. Bruce*, 13 P. R. 504. (Examination.)

The examination may extend to property assigned by the debtor to a third party by way of security: *Watkins v. Ross*, 68 L. T. 423. It should not be so conducted as to try to entrap the debtor, but it should be full, fair and searching: *Graham v. Berlin*, 13 P. R. 215.

Where the person examined cannot speak as to the facts about which examination may be had, without referring to books, etc., the Examiner's duty is to require their production and they must be produced: *Russell v. Macdonald*, 12 P. R. 478.

Inquiry as to means of the debtor is not restricted to the period of contracting the debt, but it may be shewn at some anterior time the debtor had property as to which he is required to give an account, and it is not a sufficient answer to say merely that it has all been disposed of before the debt was incurred: *Ontario Bank v. Mitchell*, 32 C. P. 73.

See further as to nature of the examination which may be had under this *Rule*, notes to *Rule 907*.

As to the mode of compelling attendance, see *Rule 905*.

Rules
901-903.

In High Court cases examination not to be before officers ordering same.

901. In High Court cases the examination of a judgment debtor on which fees may be payable otherwise than in law stamps shall not be taken before the Judge of the County Court, or Local Judge of the High Court, or Local Master being also a Judge of the County Court, by whom the order or appointment for the examination has been issued. *Con. Rule 1192, part.*

Application for examination of officers of corporations

902. Where the judgment is against a corporation the judgment creditor may in like manner examine any of the officers of such corporation, upon oath, before a Judge or other officer authorized to take an examination under Rule 900, [touching the names and residences of the stockholders in the corporation, the amount and particulars of stock held or owned by each stockholder and the amount paid thereon, and] as to what debts are owing to the said corporation, and as to the estate and effects of the corporation; and as to the disposal made by it of any property since contracting the debt or liability, in respect of which the said judgment was obtained, or in the case of a judgment for costs only, since the commencement of the cause or matter. *Con. Rule 927.*

Taken from R. S. O. 1877 c. 49, s. 19.

The corresponding provision in England (Rules of 1883, R. 610), does not contain the words in brackets, but in other respects is in substance the same. Before this *Rule* there was no power to order the examination of an officer of the corporation in such case: *Dickson v. Neath, etc., Ry. Co.*, L. R. 4 Ex. 87.

A person who was, but has ceased to be, an officer, may be examined under this *Rule*: *Societe Generale v. Johann Maria Farina*, 1904, 1 K. B. 794; 90 L. T. 472.

Where an officer of a company is examined under this *Rule* the judgment creditor is entitled to a full disclosure of the company's affairs, and as a consequence to have access to its books pertinent to that inquiry: *Charlebois v. Great North-West Ry. Co.*, 15 P. R. 10. The person examined must procure the necessary information to enable him to answer all questions the creditor is entitled to have answered: *Ib.* The creditor has no right to examine as to the dealings with paid-up stock: *Ib.*

Examination of certain persons as to a debtor's means.

903. Where judgment has been obtained as aforesaid, the Court or a Judge, on the application of the judgment creditor, may order any clerk or employee or former clerk or employee of the judgment debtor, or any person, or the officer or officers of any corporation, to whom the debtor has made a transfer of his property or effects, exigible under execution,

since the date when the liability or debt which was the subject **Rule 903.** of the action, in which judgment was obtained was incurred (or where the judgment is for costs only since the commencement of the cause or matter), to attend at the county town of the county in which such person resides, before a Judge or officer authorized to take an examination under Rule 900, and to submit to be examined upon oath as to the estate and effects of the debtor, and as to the property and means he had when the debt or liability aforesaid was incurred (or in the case of a judgment for costs only, at the date of the commencement of the cause or matter), and as to the property or means he still has of discharging the judgment, and as to the disposal he has made of any property since contracting the debt or incurring the liability, and as to any (u) debts are owing to him. The examination shall be for the purpose of discovery only, and no order shall be made on the evidence given on such examination. Con. Rule 928.

Taken from 49 Vict. c. 16, s. 12.

At (a) the words "and what" were in the former Con. Rule 928, and appear to have been inadvertently omitted. The omission would not seem to alter the effect of the *Rule*.

"Exigible under execution."—These words do not include equitable execution or the appointment of a receiver: *Canadian Mining & Investment Co. v. Wheeler*, 3 O. L. R. 210.

An order under this *Rule* should not be made without notice to the transferee; nor without proof that the transfer was made after the date when the liability of the judgment debtor was incurred: *Blakeley v. Blause*, 12 P. R. 565.

A chattel mortgage is a transfer of property and effects within this *Rule*: *Id.*

The wife of a debtor to whom he has transferred property, may be examined notwithstanding that he alleges that the property was her own, and that he was acting as her agent only: *Goodere v. White*, 17 P. R. 431; so also where the transfer has been made to a mortgagee of the wife and she receives a benefit by the reduction of the incumbrance: *Croft v. Croft*, 17 P. R. 452.

The examination of a third mortgagee of real estate of the judgment debtor was refused, and the mortgagee was held not to be a transferee of property exigible in execution under this *Rule*: *Canadian Mining Co. v. Wheeler*, 3 O. L. R. 210; *sed vide* R. S. O. c. 77, s. 30.

This provision being remedial, is to be construed so as to advance the remedy given by it, so far as the fair meaning of the words will permit: *Goreans v. Barnett*, 12 P. R. 320; *Coleman v. Hood*, 4 O. W. R. 300.

It has therefore been held that the word "transfer" in this *Rule* should not be limited to the transfer of the *title* to the property or

Rules effects, but should be regarded as equally applicable to the transfer of
904, 905. the *possession*, and therefore a solicitor to whom under a power of attorney to receive it, the consideration money on a sale of property had been paid, was held to be examinable: *Ib.*

It has been said by Boyd, C., that "transfer" in this *Rule* does not cover an "assignment" for the general benefit of creditors, as such an assignment virtually ends all litigation with respect to property and effects of a debtor, and this *Rule* is only to aid a judgment creditor in proceeding against the debtor's property, which he can no longer do after a valid assignment for all creditors: *British Com. L. & I. Co. v. Britnell*, 13 P. R. 310; in *Canadian Bank of Commerce v. Wall*, 11 C. L. T. 201, the contrary was decided by Street, J.

Examina-
tion of
persons in
possession
of property
of judgment
debtor.

904. Where the Court or a Judge is satisfied that there is reasonable ground for supposing that any person or corporation is in possession of any property of the judgment debtor exigible under execution, the Court or Judge may order such person or any officer of said corporation to attend and submit to examination *vidé voce* upon oath before an examiner named in the order, touching the property and means of the judgment debtor. 56 V. c. 5, s. 9.

See notes to preceding *Rule*.

Compelling
attendance.

905. A person liable to be examined under any of the preceding *Rules* may be compelled to attend and testify, and to produce books and documents, in the same manner and subject to the same rules of examination, and the same consequences of neglecting to attend or refusing to disclose the matters in respect of which he may be examined, as in the case of a witness. Con. Rules 928 (2), 929.

Taken from 49 V. c. 16, s. 12.

The procedure by this *Rule* directed to be followed is that provided in case of examination of witnesses generally: *Rules* 439, 443; see *Rule* 492.

This *Rule* merely regulates the mode of procuring the attendance of a party for examination; it does not enable the subpoena, and appointment under *Rule* 443, to be issued without a previous order for the examination being first obtained, where one is necessary, see *Rules* 902, 903, 904; see *Rule* 906.

If a party liable to examination refuses to be sworn, he will be ordered to attend again at his own expense and to take the oath and submit to be examined; and if he makes default, an application may be made to attach him for contempt: *Chrig v. Chrig*, 15 P. R. 53; and such order may be made where the party has been sworn and has objected to answer questions on the advice of his counsel, and though the Examiner has sustained the objection and there has been no appeal from his ruling: *Hamilton v. Eschery*, 15 P. R. 202.

906. A person liable to be examined under Rules 900 to 904 may be served with an appointment signed by the Judge or officer, and where the examination is to take place under an order, also with a copy of the order; such service shall be made at least 48 hours before the time appointed for the examination. The person to be examined shall be paid the same fees as a witness, and the examination shall be conducted in the same manner as an oral examination of an opposite party. *Con. Rules 930, 931.*

Rules
906, 907.

Service of
appoint-
ment.

Mode of
conducting
examination

Taken from J. A. Rule 369, and R. S. O. 1877, c. 50, s. 366.

Formerly if the original order were not shewn at the time of service, the person served could not be brought into contempt for disobedience of it: *Blakeley v. Blause*, 12 P. R. 565. Now it is only necessary to shew the original if it is demanded: see *Rule 333*.

Insufficient service is waived by attending and submitting to be examined: *Dayfoot v. Byrnes*, 7 C. L. T. 21; *Jones v. Macdonald*, 14 P. R. 109.

An appointment signed by the Judge or officer is what is required to be served, not a copy, nor a subpoena, nor copy: *Meyers v. Kendrick*, 9 P. R. 363.

As an original appointment is required to be served, it would seem advisable, in order to prove service, that the appointment should be signed by the Judge or officer in duplicate.

An order to examine a defendant as a judgment debtor, and an appointment under it, are together equivalent to an order that the debtor should attend on the day mentioned in the appointment: *Re Chatham Harvester Co. v. Campbell*, 12 P. R. 665. Where he attends and offers to be examined, the force of the order is spent, and to obtain a fresh appointment a fresh order is necessary: *Ib.*

In England there is no corresponding provision with reference to the present subject, but there, also, the debtor or other person to be examined is entitled to conduct money. An attachment was refused for disobedience to an order to come up to London for examination, without an affidavit shewing tender of conduct money, and reason for not examining the debtor at his own residence: *Protector Endowment Co. v. Whittam*, 36 L. T. 467.

907. Where the judgment debtor does not attend, does not allege a sufficient excuse for not attending, or if attending refuses to disclose his property or his transactions, or does not make satisfactory answers respecting the same, or if it appears from such examination that such debtor has concealed or made away with his property in order to defeat or defraud his creditors or any of them, the Court or Judge may order the debtor to be committed to the common gaol of the county in which he resides, for any term not exceeding twelve months: or that a writ of *capias ad satis-*

Commitment
of debtor
for non-at-
tendance,
refusal to
answer,
answering
unsatis-
factorily
etc.

Rule 907. *faciendum* may be issued against the debtor, or in case the debtor is at large upon bail, may make an order for his committal to close custody; and the Sheriff, on due notice of the order, shall forthwith take the debtor and commit him to close custody until he obtains an order of the Court or a Judge allowing him to go out of close custody, on giving the necessary bond in that behalf, or until he is otherwise discharged in due course of law. Con. Rule 932.

Taken from R. S. O. 1877, c. 49, s. 18, and *Ib.*, c. 50, s. 205; and A. Rule 369 (a).

The fact that the debtor has made an assignment for the benefit of his creditors is no excuse for his not attending for examination: *McEachern v. Gordon*, 18 P. R. 459; *Bank of Hamilton v. Scott*, 41 C. L. J. 432.

In *McKinnon v. Crowe*, 17 P. R. 291, it was objected that an order for examination under Rule 903 could not properly be made under a judgment for costs in an interpleader issue, but the point not having been raised until a motion to commit for concealment of property, it was held to be too late, and was not adjudicated on: see now *Rules* 835, 909.

An order committing a debtor to close custody under this Rule is "process" in an action within the exception in sec. 1 of R. S. O. c. 83 (respecting *Habeas Corpus*), so that a *habeas corpus* should not be granted in such case, and if granted may be quashed as improvidently issued: *Re Anderson v. Vanstone*, 16 P. R. 243.

Unsatisfactory answers.

The broad test to be applied in gauging the character of the answers, in order to determine whether they are satisfactory, is, having regard to the circumstances of each particular case, are the answers sufficient to satisfy the mind of a reasonable person that a full and true disclosure has been made: *Graham v. Devlin*, 13 P. R. 245; *Miller v. Macdonald*, 14 P. R. 499.

Answers are not "unsatisfactory" because they do not account for the application of the debtor's assets in a proper manner: *Hobbs v. Scott*, 23 U. C. Q. B. 619; but see *Crooks v. Stroud*, 10 P. R. 131. The debtor must have continuously refused to answer, or so equivocated as to render his answer no answer at all: *Lemon v. Lemon*, 6 P. R. 184; see also *Merrill v. McFarren*, 1 C. L. T. 133; *Beattie v. Burton*, 2 C. L. T. 104, and the authorities fully reviewed in *Schneider v. Agnew*, 6 P. R. 138. Where the defendant, a widow, was shown to have received \$500 insurance money payable on the death of her husband, part of which she had lent to her brother, part she had expended on clothing for herself and children, and the remainder, \$100, she still had, but refused to apply on the judgment, as she had no other means with which to support herself and three children, an order to commit for unsatisfactory answers was refused: *McKay v. McEachern*, 12 P. R. 484.

An agreement by a debtor to work for his wife in order to pay her a debt due by him to her was held to be neither an illegal nor unreasonable arrangement: *Baby v. Ross*, 14 P. R. 440.

It is the debtor's duty to furnish such explanation about his affairs as will place his dealings in an intelligible shape, and not leave his

creditors to find out as best they may, what it is the business of the debtor to make clear. It is not enough for the debtor to say, touching any transaction, that he does not know, or does not remember, if he has the means at hand to qualify himself to explain: *Foster v. VanWormer*, 12 P. R. 597. He must produce books, etc., which will enable him to answer: and submit to examination upon them: see *Russell v. Macdonald*, 12 P. R. 458; and any question fairly pertinent and properly asked with a view to ascertain full particulars of what debts there are, and which of them may be attached, must be answered: *Rep. of Cass v. Strousberg*, 10 Ch. D. S.; 43 L. T. 399.

Rule 907.

Where particulars, wherein dissatisfaction is felt, have been pointed out, an opportunity should be given to the debtor of reconciling what may be conceived to be contradictions, or explaining what may appear to be admissions: *Graham v. Devlin*, 13 P. R. 245.

Where answers were considered unsatisfactory the Judge allowed defendant a week to pay costs of examination and of the motion and attend again and give further information, before making an order on the motion to meet the justice of the case: *Dymont v. Jerrett*, 9 C. L. T. 141.

Where a debtor swears that he has lost money by gambling, the Court refused to order him to disclose the particular transactions in which the money was lost, or to commit him for unsatisfactory answers, or for making away with his property: *Harvey v. Aikine*, 17 P. R. 71.

Although the Examiner rules that the debtor need not answer questions, he is not necessarily protected, and it is not necessary for the creditor to appeal from the Examiner's ruling; but on a motion to commit the debtor for not answering, the order may be made for him to attend again at his own expense, if it should appear that the Examiner was wrong: *Bank of Hamilton v. Essery*, 15 P. R. 202.

The latter part of the *Rule* is confined to the case of a *ca. sa.*, or re-commitment upon a *ca. sa.*, and not to the case of a penal order of commitment for not disclosing property or transactions. In such case, therefore, *quære* whether, by submitting to another examination and disclosing his property, the debtor could be relieved from the imprisonment imposed: *Baby v. Ross*, 14 P. R. 440.

An order for committal for a fixed period, is said to be the appropriate punishment authorized by this *Rule*: *Jones v. Macdonald*, 15 P. R. 345; an order for a writ of attachment requiring the Sheriff to hold the debtor in custody for an indefinite period was held to be improper: *Re Chatham Harvester Co. v. Campbell*, 12 P. R. 633.

Motion for committal.

A notice of motion, seeking relief on the ground of unsatisfactory answers, should particularize the answers complained of: *Foster v. VanWormer*, 12 P. R. 597.

The application is to a Judge in Chambers: see *R. C. Bank v. Lockman*, 7 P. R. 102. It may be made at the time of the examination and without further notice, if the officer before whom the examination takes place has jurisdiction to entertain it, e.g., in County Court cases, where the examination is before the Judge: *Pontou v. Bullen*, 2 E. & A. 379; *Baird v. Story*, 23 U. C. Q. B. 624.

An order to commit must be absolute, not upon a condition, e.g., unless the debtor forthwith gives a note: *Chichester v. Gordon*, 25 U. C. Q. B. 527.

Rule 907.

A married woman is liable to be committed: *Metropolitan L. & S. Co. v. Mara*, 8 P. R. 355; *Dillon v. Cunningham*, L. R. 8 Ex. 23; *Watson v. Ontario Supply Co.*, 14 P. R. 96; *Kistler v. Tettmar*, 1905, 1 K. B. 39; 92 L. T. 36.

The committal is for a contempt, and the fact that the judgment is one for costs does not make the committal an imprisonment for non-payment of costs: *Pearson v. Emery*, 12 P. R. 496; and see *Re Tensdall v. Brady*, 18 P. R. 104. The committal is penal in its nature, and a second punishment cannot be awarded for the same offence; therefore where the debtor ordered to be committed was released by mistake it was held that a second order for attachment could not issue; but *semble*, an order for re-arrest under the first order might be made: *Church's Trustee v. Hibbard*, 1902, 2 Ch. 784.

Substituted service of notice of motion to commit for unsatisfactory answers was allowed in *Troat v. Loney*, 13 C. L. T. 64, and an order was made for committal of defendant, though he was out of the jurisdiction: *ib.*, following *Bloomfield v. Brooke*, 6 P. R. 264.

On a motion to commit under this Rule for unsatisfactory answers, where the depositions shew on their face that the party was being examined as a judgment debtor, it is not necessary to prove service of the appointment and payment of conduct money: *Jones v. Macdonald*, 14 P. R. 109. *Secus*, where the motion is to commit for non-attendance. The certificate of the Examiner of the proceedings before him is good evidence although it may have been given *ex parte*: *ib.*

The order must commit the debtor to the common gaol of the county in which he resides; it is not proper, nor warranted by the Rule, to direct that he be committed to the gaol of any other county where he may be found: *Baby v. Ross*, 14 P. R. 440.

Where a debtor contumaciously refused to answer questions, he was committed for three months, and an application for his discharge before the expiry of the three months was refused, though the creditor consented: *Jones v. Macdonald*, 15 P. R. 345. Where after a reasonable opportunity the debtor refused to disclose the whereabouts of his property, he was committed for three months: *McKinnon v. Crowe*, 17 P. R. 291.

Appeal.

An appeal lies to a Divisional Court from the order of a Judge in Chambers refusing an order to commit for unsatisfactory answers: *Millar v. Macdonald*, 14 P. R. 499; but the appellate Court will not reverse the order unless the Judge has erred in principle, or is almost overwhelmingly wrong: *ib.*

Where, therefore, the Court of first instance in its discretion refused to order the debtor to answer questions, the Court of Appeal refused to do so, although of opinion that the Court below would not have been wrong if it had ordered them to be answered: *Watkins v. Ross*, 68 L. T. 423.

An order made in a County Court action by the Judge of the County Court, under this Rule, committing a debtor, is appealable to a Divisional Court of the High Court: see R. S. O. c. 53, s. 52, *supra*, p. 1040 and *Baby v. Ross*, 14 P. R. 440. Where the debtor is ordered to be committed he may also be ordered to pay costs of the motion: *McKinnon v. Crowe*, 17 P. R. 291.

908. Where an officer of a corporation does not attend, ^{Rules 908-911.} and does not show a sufficient excuse for not attending, or if attending, refuses to disclose any of the matters in respect of which he may be examined, the Court or Judge may order him to be committed to the common gaol of the County in which he resides, for any term not exceeding six months. ^{Committal of officer of corporation in like manner} Con. Rule 933.

Taken from R. S. O. 1877, c. 49, s. 19.

Rule 907, it will be noted, is confined to the case of a debtor himself not attending, or making unsatisfactory answers, etc., and this *Rule* is confined to the case of officers of corporations making default, but there appears to be no express provision for the committal of employees of the debtor ordered to attend for examination under *Rule 903* who make default: such cases are left to be governed by the ordinary procedure of the Court for the enforcement of its orders against recalcitrant witnesses. See *Rule 905*.

909. Where under Rules 905, 907 or 908 a person has been committed to gaol, the Court or Judge may, upon such notice as may be directed, limit the term of imprisonment or grant such other relief as may seem just, but the order shall not relieve such person from any civil liability to any other person. *New.* ^{Release or other relief of persons committed for contempt}

See *Rule 861*.

910. Where a difficulty arises in or about the execution or enforcement of a judgment, the judgment creditor interested may apply to the Court or a Judge, and the Court or Judge may make such order thereon for the attendance and examination of any party or person as may seem just. Con. Rule 948, *amended.* ^{Examination in other cases.}

Taken from Eng. (1883) R. 611.

S. ATTACHMENT OF DEBTS.

911.—(1) The Court or a Judge, upon the *ex parte* ^{Court or Judge may order attachment of debts.} application of the judgment creditor, either before or after the oral examination mentioned in Rules 900 to 904 and 910, and upon affidavit by him, or his solicitor [or some other person aware of the facts. (a)] stating that judgment has been recovered, that it is still unsatisfied, and to what amount, and that some third person is indebted to the judgment debtor, and is within Ontario, may order that all debts owing or

Rule 911.

Order that
garnishee
appear.

accruing from the third person (hereinafter called the garnishee) to the judgment debtor, shall be attached to answer the judgment debt; and, by the same or any subsequent order it may be ordered that the garnishee appear before the Court or a Judge or before such officer as the Court or Judge shall appoint, to show cause why he should not pay the judgment creditor the debt due from the garnishee to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt. Con. Rule 935; Rules 23 June, 1894, 1361

Garnishee
out of
Ontario.

(2) Upon a like application where the garnishee is not within Ontario, and upon its being made to appear on affidavit that the garnishee is so indebted to the judgment debtor, and that the debt to be garnished is one for which the garnishee might be sued within Ontario by the judgment debtor, an order may be made that such debt shall be attached to answer the judgment debt; and, by the same or any subsequent order, leave may be given to serve upon the garnishee, or in such manner as may seem proper, a notice (which may be embodied in the order), calling upon the garnishee to appear before the Court or a Judge or before such officer as the Court or Judge may appoint, to show cause why he should not pay the judgment creditor the debt due from the garnishee to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt.

(3) The order allowing the notice so to be given shall limit a time when the motion is to be heard, having regard to the place or country where or within which the notice is to be served. *New.*

(4) Where the garnishee is not within Ontario and is neither a British subject nor in British dominions, notice of the order, according to Form No. 126, and not the order itself, shall be served. *New.*

Clauses (2), (3) and (4), are new in the present Consolidation of the Rules.

Clause (4) contains a similar provision to that made by Rule 165, in the case of writs of summons issued against a foreigner out of the jurisdiction: see notes to Rule 165. This Rule otherwise corresponds with the Eng. (1883) R. 622, and also with R. S. O. 1877, c. 50, ss. 307, and 308, except that those sections did not contain the passage in brackets at (a) owing to the absence of which the affidavit was required to be by the creditor or his solicitor: *Builder v. Kerr*, 7 P. R. 323; *Boyd v. Haynes*, 5 P. R. 15.

The provisions of this *Rule* are held not to apply to the Division **Rule 911**.
 Courts: *Simpson v. Chase*, 14 P. R. 280.

See *The Creditors' Relief Act* (R. S. O. c. 78, s. 371, as to the rights of other creditors to share in moneys attached; and also as to the right of a sheriff to attach debts due to an execution debtor; and as to his right to recover money due on a mortgage to an execution debtor, see R. S. O. c. 77, ss. 23-28.

For Form No. 126, see H. & L. Forms No. 1130.

Scope of the Rule.—As to the meaning of "judgment," "judgment creditor," and "judgment debtor," see *Rules* 835-839.

Under those *Rules* an order for payment of money into Court may, it would seem, be enforced by attachment of debts under *Rule* 911. This can not be done in England: see *Re Giverr, Napper v. Fanshawe*, 1895, 2 Ch. 217; 72 L. T. 865.

The judgment creditor mentioned in *Rule* 911 is a judgment creditor who may examine his debtor under *Rule* 900, and, under that *Rule* where the judgment or order of the creditor is only for costs, the creditor is a judgment creditor within that *Rule*, and therefore also within this *Rule*: *Lloyd v. Wallace*, 9 P. R. 335; *Elliot v. Capell*, 9 P. R. 35; see also *Whittaker v. Whittaker*, 7 P. D. 15; and *Manchester, etc., v. Parkinson*, 22 Q. B. D. 173.

An assignee of the judgment being a "person entitled to enforce the judgment," is "a judgment creditor": *Rule* 835 (b); *Goodman v. Robinson*, 18 Q. B. D. 332; *McLean v. Bruce*, 14 P. R. 190.

The creditor must be one who is entitled to enforce immediate payment. Therefore the holder of a bond of a corporation containing a condition that all bondholders should be paid *pari passu*, was held not to be such a creditor, since an attachment would have given him priority over other bondholders: *Kennett v. Westminster Improvement Commissioners*, 11 Ex. 349.

Only such property can be attached as the debtor could deal with properly, and without violation of the rights of other persons, at the time the attaching order is served: see *Buddeley v. Consolidated Bank*, 34 Ch. D. 536; 38 Ch. D. 238; *Re General Horticultural Co.*, 32 Ch. D. 512; *Vyse v. Brown*, 13 Q. B. D. 199; *McCrancy v. McLeod*, 10 P. R. 541; *Parker v. Howe*, 12 P. R. 351; *Beaty v. Hackett*, 14 P. R. 395.

Proceedings to attach a judgment debt may be taken after the pronouncing, but before the actual entry, of the judgment debtor's judgment: *Holtby v. Hodgson*, 24 Q. B. D. 103; *Davison v. Taylor*, 14 P. R. 78.

A judgment against a married woman, to be executed against her separate estate, is a judgment enabling the judgment creditor to attach debts due to the married woman: *Holtby v. Hodgson*, *supra*.

Where a claim can be attached it has been held that a receiver should not be appointed, even though the claim be one which could formerly be reached only by way of equitable execution: *Fleming v. Stephenson*, 28 C. L. J. 370 (Dartnell, J.C.C.).

Clause (1) of the *Rule* applies where the garnishee is within Ontario. A foreign corporation not shewn to carry on one of the principal parts of its business in Ontario is not within Ontario for the purposes of this *Rule*: *Parker v. Odette*, 16 P. R. 69; *Canada*

Rule 911. *Co. v. Parmelee*, 13 P. R. 308; *Hoswell v. Piper*, 17 P. R. 257; and *vide*, *Huggin v. Comptoir D'Escompte de Paris*, 23 Q. B. D. 519; and *Wentworth v. Smith*, 15 P. R. 372. The mere fact that the foreign corporation has a resident agent, or chief agency in Ontario, is not sufficient to bring the corporation within the first part of this *Rule*; but a Canadian banking corporation authorized by Parliament to do, and doing, business in Ontario, although its head office is in another Province, is resident within Ontario within the meaning of this *Rule*. *Wentworth v. Smith*, 15 P. R. 372.

Where the garnishee is not within Ontario, clauses (2)-(4), may be applied.

Partnership firms.

Debts owing from a firm carrying on business within the jurisdiction may be attached under this *Rule*, although one or more members of the firm be resident out of the jurisdiction: *Rule* 229; but the attaching order must be served on the person having the control or management of the partnership business or on one of the partners within Ontario: *Ib.*

Attachment of debts.

Attachment of Debts.—This *Rule* applies where the interest of the debtor is in the shape of a debt whether legal or equitable: see cases *infra* of debts held to be attachable.

Affidavit.

The affidavit for an attaching order need not state the amount of the debt: *Lucy v. Wood*, 28 Sol. Jour. 326; W. N. 1884, 58; and will be sufficient if it states that the deponent is informed and believes that the garnishee is indebted to the judgment debtor: *Coren v. Buene*, 22 Q. B. D. 249; *De Pas v. Capital & Industries Corporation*, 1891, 1 Q. B. 216; 64 L. T. 93; S. C., *sub nom.* *Vinall v. De Pas*, 1892, A. C. 90; 66 L. T. 422. In answer to such an affidavit it is not sufficient for the garnishee to deny owing the particular debt referred to in the affidavit filed in support of the application, but he must deny owing any debt to the judgment debtor or he may be ordered to pay over: *Ib.*

No distinction between legal and equitable debts.

Since *The Judicature Act* the power of garnishing debts has been very extensive. The word debt has been given a more extended meaning than it had at the time of the passing of the original garnishee clauses in the C. L. P. Act, and under those clauses now embodied in the *Rules* a creditor may attach any debt due by any other person to his judgment debtor, whether legal or equitable: *Leaming v. Woon*, 7 Ont. App. 42; *Wilson v. Dundas*, W. N. 1875, 232; *Summers v. Morphet*, 61 L. T. Jour. 140; *Re Cowan's Estate*, 14 Ch. D. 638; *Hammer v. Giles*, 11 Ch. D. 942; *Webb v. Stenton*, 11 Q. B. D. 518.

Under the present *Rule* it is clear that a claimature legal claim, which has not ripened into a debt, and, by possibility, may never do so, cannot be attached: see *Simpson v. Chase*, 14 P. R. at p. 286.

Moneys in a receiver's hands.

Money of the debtor actually in the hands of a receiver may be attached: *Re Cowan's Estate*, 14 Ch. D. 638; but the future accruing income of a trust fund in the hands of trustees, to which the debtor may become entitled, is not attachable: *Webb v. Stenton*, 11 Q. B. D. 518; nor is the interest of a debtor in the proceeds of land to be sold by trustees attachable before the sale has taken place: *Stuart v. Grough*, 15 Ont. App. 299; and see *Hunsberry v. Kratz*, 5 O. L. R. 635.

Before the Judicature Acts, it was held that on a judgment against a company, money of the company in the hands of an official liquidator might be attached: *Ex parte Turner*, 2 D. F. & J. 354; and though

this was afterwards questioned in *Re Hunter v. Greenhill*, L. R. 8 C. Rule 911 P. 24, *The Indicture Act*, or the present *Rule*, will probably be held to have removed any difficulty in holding the money to be attachable. See also cases, *infra*, p. 1151.

A fair test as to a debt being attachable has been said to be, whether the debt is capable of being the subject of a set-off: *Webster v. Webster*, 31 Heny. 393; *McNaughton v. Webster*, 6 U. C. L. J. 17; see also *Parker v. Howe*, 12 P. R. at p. 353.

The debt must be an absolute and perfected debt, not merely a conditional one, e.g., payable upon the execution of a conveyance: *Howell v. Metropolitan District Ry. Co.*, 19 Ch. D. 508, or payable on a contingency which has not happened: *Carswell v. Langley*, 3 O. L. R. 261, and must be owing to the judgment debtor alone; where it is due to him jointly with another person it cannot be attached: *Macdonald v. Tacquah Gold Mines Co.*, 13 Q. B. D. 535; *Parker v. Gidette*, 16 P. R. 63; *Marshall v. James*, 1905, 1 Ch. 432.

Where the judgment debtors were persons authorized under *Rule 261* to defend on behalf of all persons constituting an unincorporated association, money deposited in a bank at the credit of that association was held to be not attachable for costs payable by the judgment debtors: *Metallic Roofing Co. v. Local Union, &c.*, *supra*, p. 358.

Where a husband and wife joined as plaintiffs in an action for damages for personal injury to the wife, and the jury awarded them each a specific sum, but judgment was entered for the plaintiffs for the whole amount awarded, without stating the proportions assigned to each, it was held that the amount awarded to the wife could not be attached by a judgment creditor of the husband: *Beasley v. Roney*, 1891, 1 Q. B. 509; 65 L. T. 153.

The *Rule* applies to debts accruing, as well as debts actually owing: *Debts accruing.* see *Sparks v. Young*, 8 Ir. C. L. 251; *Tapp v. Jones*, L. R. 10 Q. B. 591; *ex parte Joselyne*, 8 Ch. D. 327; but a future debt, i.e., a debt which has no present existence but can only arise on the happening of some future event, e.g., moneys which may in the future come into the hands of a trustee for the benefit of his *cestui que trust*, cannot be attached: *Fellows v. Thornton*, 14 Q. B. D. 335; but such claims have been made available under equitable execution by the appointment of a receiver: *Block v. Cox*, before Robertson, J., see Judgment Book Chy. D. No. 12, fo. 28. Debts due, but not payable till a future time, may be ordered to be paid at such future date; and it is not necessary to wait and obtain a fresh order for payment of each instalment as it becomes payable: *Tapp v. Jones*, L. R. 10 Q. B. 591; see also *Re Cowan's Estate*, and *Leaming v. Woon*, *supra*; *Booth v. Troil*, 12 Q. B. D. 8, and *Rule 915*; but the garnishee cannot be compelled to pay before credit given to him has expired: *Harding v. Barratt*, 3 U. C. L. J. 31.

Whether money due on cheques or promissory notes or other negotiable instruments is attachable seems doubtful: *pro*, see *Hynd v. Freeman*, 35 Sol. Jour. 87; *Roblee v. Rankin*, 11 S. C. R. 137; *contra*, see *Jackson v. Cassidy*, 2 Ont. 521; *Esley v. Dey*, 15 P. R. 353. Under the present state of the authorities such debts may probably be better made exigible by receiver and injunction: *Esley v. Dey* (No. 2), 15 P. R. 405.

Where a garnishee before service of an attaching order, had given a cheque for the debt due by him to the judgment debtor, which was duly paid, it was held that there was no debt owing or accruing

Rule 211. between the time of giving the cheque and its payment, and no duty upon the garnishee to stop payment on being served with the attaching order: *Elliott v. Jackson*, 1 Cal. & El. 362.

Where, before an attaching order issued, a legacy was payable to the defendant, and he had made a settlement of it, it was held that no debt was due from the executor of the will to the defendant, *es. et.* even if the settlement were set aside by the plaintiff, there was no ground for saying that the executor was obliged to pay over to the defendant. The defendant could not revoke the settlement, and even if it were set aside as void against creditors, it would be still valid as between the executor and the defendant: *Fyfe v. Brown*, 13 Q. B. D. 139; 1 Cal. & El. 225.

Where the trustees of an annuity, payable to a judgment debtor half-yearly, had advanced to him more than was payable at the end of the last half-yearly period, it was held that nothing was attachable as either owing or accruing: *Webb v. Stenton*, 11 Q. B. D. 518; see *Booth v. Trail*, 12 Q. B. D. 8. So a salary which is not payable till earned is not attachable as a debt before the date when it is payable: *Hall v. Pritchett*, 3 Q. B. D. 215; *Shanley v. Moore*, 9 F. C. L. J. 204. But a debtor's interest in a trust fund not yet payable by the trustee has been held to be attachable: *Nash v. Pearce*, 47 L. J. Q. B. 766; *Lloyd v. Wallace*, 9 P. R. 335.

An order to attach a debt may be made, notwithstanding that six years have elapsed since the judgment was obtained by the judgment creditor: *Fellows v. Thornton*, *supra*.

Rule 222 does not apply to garnishee proceedings. Where the debt attached is due by a firm the attaching order should be made not against the firm, but against the several members of the firm: *Walker v. Rooke*, 6 Q. B. D. 631.

Attachable debts.

Debts Attachable.—The following have been held to be attachable:—

Rent.

Rent due by a tenant: *Mitchell v. Lee*, L. R. 2 Q. B. 250. Formerly, rent not due was not attachable: *Commercial Bank v. Jarvis*, 5 F. C. L. J. 90; *McLaren v. Sudworth*, 4 U. C. L. J. 233; but since the Act (now R. S. O. c. 170, s. 41), by which rent is made apportionable, it has been held in Ontario that it may be attached as a debt accruing between gale days; and the judgment creditor is entitled to be paid, on the gale day, such portion as had accrued due on the day of service of the attachment: *Massie v. Toronto Printing Co.*, 12 P. R. 12; but see *contra*, *Barnett v. Eastman*, 67 L. J. Q. B. 517, where notwithstanding the Apportionment Act, rent was held not to be attachable before it was due; and in Division Courts only rent due can be attached: see *Christie v. Casey*, 31 C. L. J. 35; *Birmingham v. Malouf*, 32 C. L. J. 717.

The attachment of rent intercepts the rent up to the day of attachment: *Re Wilson*, 5 R. 455, and suspends the landlord's right of distress therefor: *Patterson v. King*, 27 Ont. 56.

Rents due to a mortgagor before a notice given by the mortgagee to the tenant to pay subsequent rents to him: *Patterson v. O'Reilly*, 10 L. R. 1r. 304, and see *Massie v. Toronto Printing Co.*, *supra*.

Money due by Sheriff.

Money in the hands of a Sheriff, the proceeds of an execution levied by him: *Murray v. Simpson*, 8 F. C. L. App. xlv.; *Re Smart v. Miller*, 3 P. R. 387, or in the hands of a Division Court Clerk:

Blind v. Andrews, 45 F. C. Q. B. 431, or Hailiff: *Lockhart v. Gray*, **Rule 911**, 2 C. L. J. 161, though the contrary has been held in England: *Dolphin v. Layton*, 4 C. P. D. 130.

Money in the hands of a receiver, which is presently payable to by the debtor: *Re Cowan's Estate*, 14 Ch. D. 328; *Leaming v. H'ood*, 7 Ont. App. 42; *Webb v. Stenton*, 11 Q. B. D. 530; *Stuart v. Craugh*, 15 Ont. App. 299; *Carwell v. Langley*, 3 O. L. R. 261; or an official liquidator: *ex parte Turner*, 2 D. F. & J. 354; see *Mack v. Ward*, W. N. 1884, 10; and *Stuart v. McKim*, 8 Ont. 739; but see *contra*, *Perout v. Gregory*, 24 Q. B. D. 281; 61 L. T. 396; *Re Hunter v. Greenhill*, L. R. S. C. P. 24.

Surplus money in the hands of mortgagees after sale under a power in a mortgage: *Nicol v. Ewin*, 7 P. R. 331; see *McKay v. Mitchell*, 6 Q. B. 1, 1, L. J. 31; see also *Chatterton v. Watney*, 16 Ch. D. 378; 17 Ch. D. 259, where it was held that a judgment debtor, who had obtained a garnishee order against a mortgagor debtor of his debtor, was not entitled to surplus proceeds of a sale by a prior mortgagee, which took place after his garnishee order, but the holder of a garnishee order obtained after the sale against the prior mortgagee was entitled.

Money in the hands of Bankers: *Re United Eng. & Saut. Ins. Co.*, By Bankers L. R. 5 Eq. 300; L. R. 3 Chy. 787; *Miller v. Huddleston*, 22 Ch. D. 233; *Wentworth v. Smith*, 15 P. R. 372.

Dividends on Bank stocks: *Salaman v. Donovan*, 10 Ir. C. L. R. App. xlii.

Money payable under a contract for work done for a municipal corporation: *Alden v. Bower*, 2 P. R. 329.

Money payable under a contract to supply a lunch, was held to be due when the purveyor had performed his part and supplied the food, tables and accessories, and where the lunch was over at 2 p.m., the amount was held to be attached by service of an attaching order at 5 p.m.: *Kelly v. Rider*, 11 Times, 206.

Money due to a railway company for the purpose of distribution among its shareholders under an agreement sanctioned by Act of Parliament, may be attached by a creditor of the company: *Bauch v. The Seven Oaks, etc., Railway Company*, 4 Ex. D. 132.

A debt for which a cheque has been given by the garnishee, if the cheque is dishonored or stopped: *Cohen v. Hale*, 3 Q. B. D. 371; but see *Elicell v. Jackson*, *supra*, pp. 1149-50.

Money due for calls on shares in a company: *Re Pass v. Capital & Industries Corporation*, 1891, 1 Q. B. 216, S. C., *sub nom. Tinnall v. De Pass*, 1892, A. C. 90; 66 L. T. 422.

Money in the hands of an agent in this Province may be garnished, though the garnishee resides out of the jurisdiction: *Brown v. Merrills*, 3 F. C. L. J. 31; but not where the garnishee is a foreign corporation: *Bank of British North America v. Longhrey*, 2 C. L. J. 44; *Lundy v. Dickson*, 6 F. C. L. J. 92; and see *Canada Cotton Co. v. Parvashie*, *supra*, pp. 1147-8, unless the claim is within clause (2) of this Rule.

Money placed in the hands of solicitors by their client for a specific purpose which had failed, and even though the solicitors claimed a larger sum to be due them from their client: *Stewart v. Campbell*, 1892, 1 Q. B. 314.

Rule 911.

Debt due
to or by
executor.

Upon a judgment against a deceased person when proceedings are continued against his executor, or in an action against an executor as such, a debt due to the testator's estate may be attached: *Burton v. Roberts*, 6 H. & N. 93; *Fowler v. Roberts*, 2 Giff. 226; *Tiffany v. Bullen*, 18 C. P. 91; *McDonald v. Sullivan*, 5 O. L. R. at p. 300. So also a debt due by an executor to a judgment debtor is attachable, but the order in such case should show on its face that it is directed to the executor as such: *Stevens v. Phelps*, L. R. 10 Ch. 417; but such a debt is not attachable after an administration judgment has been granted: *Ib.*

Imperfect
gift.

A debt of which an incomplete gift has been made: *Davidson v. Cochrane*, 34 C. L. J. 318.

Debt due
one of
several
debtors.

After the analogy of a *fi. fa.* under which the goods of any one of those against whom it is issued may be taken, a debt due to one of several judgment debtors may be attached to satisfy the judgment against all: *Müller v. Mynn*, 1 E. & B. 1075; but a debt owing to two cannot be attached for a debt of one: *Re Smart v. Miller*, 3 P. R. 385; *McCormick v. Park*, 9 C. P. 330; *Macdonald v. Tacquah Gold Mines Co.*, 13 Q. B. D. 555; *Parker v. Odette*, 16 P. R. 69; *Marshall v. James*, 1905, 1 Ch. 432.

Pensions.

As to pensions and superannuation allowances, see *Iunes v. East India Co.*, 17 C. B. 351; *Dent v. Dent*, L. R. 1 P. & D. 366; *Ex parte Hawker*, L. R. 7 Ch. 214; *Willcock v. Terrell*, 3 Ex. D. 323; *Sansom v. Sansom*, 4 P. D. 69; *Birch v. Birch*, 8 P. D. 163; *Lucas v. Harris*, 18 Q. B. D. 127; 55 L. T. 658; *Crowe v. Price*, 22 Q. B. D. 429; *Booth v. Traill*, 12 Q. B. D. 8; *Re Webber*, 18 Q. B. D. 111.

Salaries
of civil
servants

As to garnishment of salaries of civil servants of the Ontario Government: see 61 Vict. c. 7 (O.), and see *Hyde v. Cowan*, 31 Ont. 180.

As to salaries or remuneration of municipal officers, see *Wilson v. Fleming*, 1 O. L. R. 599; *Edmunds v. Edmunds*, 1904, P. 362.

Fees payable to a public vaccinator and registrar of births, etc.: see *Edmunds v. Edmunds*, *supra*.

Debts not
ascertained
in amount.

A debt of an unascertained amount, if only it be payable as soon as ascertained: *Re Sato v. Hubbard*, 8 P. R. 445; *Macpherson v. Tisdale*, 11 P. R. 261, where costs remained to be taxed: *Re Withrow*, *Poucher v. Donovan*, 19 C. L. J. 97, 114, where the amount to be found due to a plaintiff who had been declared entitled to a mechanic's lien, was attached; so also a residuary bequest, though it is undetermined whether anything, and, if anything, how much is due: *McLean v. Bruce*, 14 P. R. 190. As to the mode of making inquiry to ascertain the amount, see *Ib.*

(1) Not at-
tachable as
debts, but
sometimes
exigible by
equitable
execution.

Moneys not Attachable.—The following are not attachable, but probably, in some cases, may be reached by the appointment of a receiver by way of equitable execution: see *Esley v. Day*, 15 P. R. 353, 405:—

Unliqui-
dated dam-
ages.

Unliquidated damages: *Johnson v. Diamond*, 11 Ex. 73; though secured by bond in a penal sum, *Ib.*; *Griswold v. Buffalo*, *Brantford & Goderich Ry. Co.*, 2 P. R. 178; though the amount has been ascertained by the verdict of a jury, or award, but no judgment has been obtained to make the claim a debt: *Jones v. Thompson*, E. B. & F. 63; *Dresser v. Johns*, 28 L. J. C. P. 281; *In re Newman*, 3 Ch. D. 491; *Boyd v. Haynes*, 5 P. R. 15; *Tate v. Corporation of Toronto*,

3 P. R. 181; *Bank of Toronto v. Burton*, 4 P. R. 56; *Gwynne v. Rees*, Rule 911, 2 P. R. 282; *Roberts v. City of Toronto*, 16 Gr. 236; money due under a judgment for unliquidated damages, pronounced but not formally entered, is attachable: *Holtby v. Hodgson*, 24 Q. B. D. 103; 61 L. T. 297, affirmed in appeal, 62 L. T. 145; followed in *Davidson v. Taylor*, 14 P. R. 78; insurance moneys unadjusted, and not payable in respect of any admitted claim, as long as the company's right to have the money applied in rebuilding remains: *Simpson v. Chase*, 14 P. R. 280; and see *Canada Cotton Co. v. Parmelee*, 13 P. R. 308.

Where a claim for work done under a contract, and one for unliquidated damages are referred, there can be no garnishment of the latter until after award: *Tate v. The Corporation of the City of Toronto*, 10 I. C. L. J. 66; 3 P. R. 181. See also *Randall v. Lithgow*, 12 Q. B. D. 525.

So any claim which might or might not result in a debt, e.g., a notice to treat under the English Lands Clauses Act, on which notice nothing had been done: *Richardson v. Eluit*, 2 C. P. D. 9; an unascertained balance due from one partner to another: *Campbell v. Peden*, 3 H. C. L. J. 68.

Salary not yet payable: *Hall v. Pritchett*, 3 Q. B. D. 215; *Re Salary*, *Shanley v. Moore*, 9 I. C. L. J. 264; *Central Bank v. Ellis*, 20 Ont. App. 361; but as to the garnishment of the salaries of civil servants, see 61 Vict. c. 7 (O.).

Full pay of an officer in the Royal Navy on active service cannot be assigned or attached: *Apthorpe v. Apthorpe*, 35 W. R. 728; 12 P. D. 192; nor the pay of a retired officer in the Army: *Crowe v. Price*, 22 Q. B. D. 429. See *Stewart v. Jones*, 1 O. L. R. 34.

A negotiable promissory note not yet due: *Jackson v. Cassidy*, 2 Negotiable Instruments, Ont. 521; *Pyne v. Kinna*, 11 Ir. C. L. R. 10; *Exley v. Day*, 15 P. R. 353; but a receiver may be appointed: *Exley v. Day*, 15 P. R. 405.

A legacy in the hands of an executor unless there has been such an account stated by the executors as would entitle the legatee to sue: *McDowall v. Hollister*, 25 L. T. Jour. 185; see *vide*, *McLean v. Bruce*, 14 P. R. 190, and *Fleming v. Stephenson*, 28 C. L. J. 770 (Dartnell, J.C.C.), which was, however, decided under the former Con. Rule before its amendment by Rule 1361.

The interest of a residuary legatee in the estate of a testator who had died within a year of the application for attachment: *Hunsberry v. Kratz*, 5 O. L. R. 635.

Money deposited with a stock broker to secure any loss on speculations on stocks and shares, so long as the transactions in the stocks and shares are open: *Hutt v. Shaw*, 3 Times, 354. Deposit with stock brokers.

Money sent by a father to his son, the debtor, as a gift, through a bank, was garnished before the debtor was advised of the deposit; it was held not garnishable, as the father had till then power to revoke the gift: *Caisse v. Tharp*, 5 P. R. 265. Gifts.

Money in the hands of a solicitor as purchase money of lands in which the debtor is alleged to have had an interest as tenant by the curtesy which he disclaims: *Palmer v. Lovett*, 14 P. R. 415; and *quære* even though the debtor had been tenant by the curtesy: see *Id.*, per Armour, C.J. Where debtor disclaims interest.

Rule 911.

Money payable by trustees.

A dividend payable to the judgment debtor under an administration in bankruptcy of the estate of a person dying insolvent: *Prout v. Gregory*, 24 Q. B. D. 281; 61 L. T. 696.

Surplus, if any, after payment of the debts of A. by the terms of a trust deed to be paid to the judgment debtor: *McKindsey v. Armstrong*, 10 Ont. App. 17.

Surplus share due debtor, of a fund of a company in liquidation, paid over to the Inspector General by the liquidator pursuant to a statute: *Spence v. Coleman*, 1901, 2 K. B. 199; 84 L. T. 703.

(2) Not attachable or exigible by equitable execution.

In the following cases, the claims can neither be attached nor reached by equitable execution:—

Money on deposit to the credit of the debtor "on trust" where the debtor has no beneficial interest in it: *Stobart v. Asford*, 29 C. L. J. 383 (Man.).

Where debtor has no beneficial interest in fund.

A debt payable to the debtor only as agent for another person: *Burrell v. Read*, 11 Times, 36.

Money in a bank at the credit of the judgment debtor, a stock broker, which was shewn to be wholly money of his clients: *Hancock v. Smith*, 41 Ch. D. 456.

A debt due by the garnishee to the judgment debtor as executor: *Macaulay v. Rumball*, 19 C. P. 284; and a debt due to an administrator as such, cannot be attached to answer a private debt: *Bozman v. Bozman*, 1 Chy. Ch. 172; but *secus* where the personal representative is also beneficially entitled to the debt: *McDonald v. Sullivan*, 5 O. L. R. 87.

Money was held not attachable under a contract which was not performed according to its terms, so that nothing was due at the time of the attaching order: see *McCrancy v. McLeod*, 10 P. R. 539.

When subject to restraint against anticipation.

The income of trust funds payable to a wife for her separate use, subject to a restraint against anticipation, accrued since a judgment against her and her husband, was held not attachable, as otherwise it would in effect enable her to anticipate her income in violation of the restraint on anticipation: *Chapman v. Biggs*, 11 Q. B. D. 27; see also *Stanley v. Stanley*, 7 Ch. D. 589; and notes, *supra*, p. 353; but in the more recent case of *Hood Barrs v. Heriot*, 1896, A. C. 174; 74 L. T. 353, the restraint on anticipation was held to be at an end as regards the instalments of income, as soon as they became payable; but see *Whiteley v. Edwards*, 1896, 2 Q. B. 48; *Bolitho v. Gidley*, 1905, A. C. 98; 92 L. T. 369.

Alleged trustee for debtor.

Money due to the wife of a debtor for purchase money of lands alleged to have been vested in the wife in fraud of the debtor's creditors: *O'Donoghue v. Hull*, 24 S. C. R. 483.

Money of prisoner in hands of police.

Money taken from a prisoner, and in the hands of a police officer: *Noth v. Kerry*, cited 112 L. T. Jour. 495 (N. S. W. W. N. vol. 18, p. 250).

Juror's pay.

The allowance of a juror is not attachable in the hands of the County Treasurer: *Phillips v. Austin*, 3 C. L. T. 316.

Wages.

Wages or salary of servants, etc., to the extent of \$25, are exempt from attachment: R. S. O. c. 156, s. 7. The salary of the secretary of a company amounting to £200, payable quarterly, was held not to be within the meaning of a similar Imperial protecting Act: *Gordon v. Jennings*, 9 Q. B. D. 45.

The future earnings, as wages, or salary, of the debtor: *Holmes v. Millage*, 1893, 1 Q. B. 551; 68 L. T. 205; *Central Bank v. Ellis*, 20 Ont. App. 364.

The salary of a municipal officer which has been, even though irregularly, paid in advance: *Wilson v. Fleming*, 1 O. L. R. 589.

A debt due to a firm cannot be attached to secure a debt of one of the partners: *Marshall v. James*, 1905, 1 Ch. 432.

A garnishing order cannot be made attaching a debt due from a partnership firm described by its partnership name: *Walker v. Rooke*, 6 Q. B. D. 631.

A debt which is attachable does not cease to be so because the debtor has brought an action to recover it: and the giving of a cheque by the garnishee to the debtor, payment of which was stopped on service of the order nisi, was held not to prevent the debt from being attached: *Cohen v. Hale*, 3 Q. B. D. 371; but it is otherwise where a cheque has been given and accepted in payment of a debt, though the cheque has not been presented: *Ellicott v. Jackson*, 1 Times. 454; 1 Cab. & E. 362, and it is not the duty of the garnishee to stop payment on being served with an order attaching debts: *Ib.*, and where the garnishee before the attaching order has given his creditor a negotiable instrument in payment of the debt attached, that would seem to be a defence to any application against the garnishee to pay over: see *Bence v. Shearman*, 1898, 2 Ch. 582; payment to the debtor after service of the attaching order is of no avail against the attaching creditor: *Edmunds v. Edmunds*, 1904, P. 362. An attaching order is no bar to an action by the judgment debtor to recover the debt attached, but payment over by the garnishee pursuant to an order is a defence, but it does not arise until the payment is made, and does not relate back to the date of the attaching order: *Pickard v. Tins*, 19 P. R. 109.

Action by debtor, no bar to attachment.

Payment to debtor by cheque, effect of.

Death of Garnishee.—There was formerly at Law no power to order or permit a suggestion to be entered of the death of a garnishee, so as to get execution against his representative: *Re Ward v. Vance*, 3 P. R. 323; but that end possibly may now be attained under *Rule 306*.

Death of garnishee.

Death of Judgment Creditor.—An executor or administrator of a judgment creditor who has not made himself a party to a judgment cannot proceed under this *Rule* without making himself a party to the record: *Baynard v. Simmonds*, 5 E. & B. 59.

Assignment by Debtor, of Debt due by Garnishee.—A garnishing order can only charge what the judgment debtor can honestly deal with himself without affecting the interests of third persons: *Re General Horticultural Co.*, 32 Ch. D. 512; *Hancock v. Smith*, 41 Ch. D. 456; see also *Wood v. Jasdin*, 18 Ont. App. 59; *O'Connor v. Ireland*, 1897, 2 Ir. Rep. 150. A debt, therefore, bona fide assigned, before service of the attaching order, is not bound by the order: *Hirsch v. Coates*, 18 C. B. 777; *Wise v. Birkenhead*, 29 L. J. Ex. 240; *Graham v. Bourque*, 6 O. L. R. 428, 700; even though the garnishee had no prior notice of the assignment: *Pickering v. Hiramby Railway Co.*, L. R. 3 C. P. 235; *Robinson v. Nesbitt*, L. R. 3 C. P. 261; *Brown v. McGuffin*, 5 P. R. 231; *Grant v. McDonnell*, 39 U. C. Q. B. 412; *Beuty v. Hackett*, 14 P. R. 395; *Parker v. McIlwain*, 37 P. R. 84; *Badeley v. Can. Bank*, 38 Ch. D. 238; *Davis v. Freethy*,

Assignment of the debt garnished.

Rule 911. 24 Q. B. D. 519; *Graham v. Bourque*, 6 O. L. R. 428, 700; and formerly, even though the assignment were attacked as a fraud on creditors; *Type v. Brown*, 13 Q. B. D. 199; *O'Donoghue v. Hall*, 24 S. C. R. 683; but this is no longer the case; see *Rule 912*; *Edmunds v. Edmunds*, 1904, 1 P. 362.

An attaching order though in form attaching "all debts due and owing or accruing due" by the garnishee to the judgment debtor, does not preclude an assignment by the debtor of any part of the debt attached not required for the satisfaction of the claim of the attaching creditor; thus, when, after an attaching order, the debtor assigns part of the debt attached and the assignee gives notice of the assignment to the garnishee, the assignee is entitled to priority over any subsequent attaching creditor; under such circumstances the garnishee cannot safely pay into Court more than sufficient to satisfy the first attaching creditor's claim without setting up the claim of the assignee; and if he does, and the second attaching creditor gets the surplus money out, the garnishee may have to pay it over again to the assignee; *Yates v. Terry*, 1902, 1 K. B. 527; 86 L. T. 133.

An equitable charge given before a garnishee order is obtained takes priority of the order even in the absence of notice of the charge; *Badley v. Consolidated Bank*, 34 Ch. D. 536; 38 Ch. D. 238.

An incomplete gift of a debt is no bar to its attachment; *Davidson v. Cochrane*, 34 C. L. J. 318.

Solicitor's
lien.

Solicitor's Lien.—An attachment of a judgment overrides a solicitor's lien or control over it in respect of general costs; *Davidson v. Douglas*, 15 Gr. 347; *Reg. v. Benson*, 2 P. R. 350; *Bank of U. C. v. Wallace*, 2 P. R. 352; *Cotton v. Vansittart*, 6 P. R. 96; *Hough v. Edwards*, 1 H. & N. 171; *Burchell v. Pugin*, 32 L. T. 495; but the special lien for costs of the action in which the debt attached has been recovered will be protected where the garnishee has notice of it; *The Jeff Davies* L. R. 2 A. & E. 1; *The Leader*, *Ib.*, 314; *Canadian Bank of Commerce v. Crouch*, 8 P. R. 437; *Shippey v. Grey*, W. N. 1880, 99; 28 W. R. 877; *Berneski v. Tourangeau*, 18 P. R. 263; but the solicitor may by conduct waive his lien; *Ib.*

As to the effect of an attachment upon a solicitor's lien, see further *Hough v. Edwards*, 1 H. & N. 171; *Eisdell v. Coningham*, 28 L. J. Ex. 213; *Sympton v. Prothero*, 26 L. J. Chy. 671; *Cole v. Elcy*, 1894, 2 Q. B. 180.

Set-off by
garnishee.

Set-off by Garnishee.—The Judge has no power to go into the state of the accounts between the garnishee and the judgment creditor, or to allow the former to deduct any amount due to him from the latter, but must order execution to issue for the whole amount due by the garnishee, or for so much thereof as may be sufficient to satisfy the debt due from the judgment debtor to the judgment creditor; *Sampson v. Seaton & Beer Railway Co.*, L. R. 10 Q. B. 28. He may, however, go into the state of accounts between the judgment debtor and the garnishee, and give effect to any set-off or cross debt arising before (*Ib.*, and see *Nathan v. Giles*, 5 Taunt. 558), but not after (*Tapp v. Jones*, L. R. 10 Q. B. 591), the service (see *Rule 913*), of the attaching order; but the garnishee cannot set off a counter-claim which he has against the judgment debtor; *Stumm v. Campbell*, 1892, 1 Q. B. 314; 66 L. T. 218.

A garnishee cannot set off against a judgment creditor a debt due to him (the garnishee) from the judgment debtor, if the garnishee

was aware, from the commencement of the transaction which re- **Rule 911.**
sulted in his becoming indebted to the judgment debtor, that the
latter's right to such debt would only be as trustee for the judgment
creditor: *Pitt v. Bryant*, 1 Cal. & El. 194.

A garnishee can set off against a judgment creditor costs incurred
by him, but not paid at the time the issue is directed, against which
the judgment debtor is bound to indemnify the garnishee: *Rynall v.*
Waudsworth, Dist. Bd., 1 Cal. & El. 92.

In an action in the High Court where the amount claimed from the
garnishee is within the jurisdiction of a County or Division Court, Where
amount is
within the
jurisdiction
of County or
Division
Court.
the garnishee is to be directed to appear to shew cause before the
County Court Judge of the County where he resides: *Rule 917 (1).*

For similar procedure in actions in a County Court, see *Rule*
918 (1).

The garnishee should not pay over without an order to do so, or he
may also have to pay the judgment debtor: *Clark v. Clark*, 8 U. C.
L. J. 107; *Turner v. Jones*, 1 H. & N. 878; *Plummer v. Caldwell*, Ch.
Divisional Court, March, 1892.

The judgment debtor should be notified of the application for the Payment
over.
order to the garnishee to pay over: *Beatty v. Hackett*, 14 P. R. 395;
Ferguson v. Carman, 26 U. C. Q. B. 26.

Charging Stocks, etc.—See R. S. O. 1897, c. 324, s. 22.

Debentures are not stock within the statute: *Sellers v. Bright*,
1904, 2 K. B. 446. Charging
stocks

Where under a will a judgment debtor was interested in a share of
the estate payable after 6 years, and the trustees under the will had
invested the fund in stock pending the arrival of the period of dis-
tribution, it was held that the debtor had an interest in the stock
which might be charged: *Bollard v. Young*, 1904, 2 K. B. 824.

The Act does not apply to enable stock to be charged which does
not stand in the name of the debtor or a trustee for him, though it
be alleged that the stock has been fraudulently assigned: *Caffrey v.*
Phelps, 24 Gr. 344.

The Court has not jurisdiction on summary proceedings to order a
sale of stock to enforce a charging order: *Leggott v. Western*, 12
Q. B. D. 287; *Kolchmann v. Maurice*, 1903, 1 K. B. 534; 88 L. T. 369.

Equitable Execution.—Equitable execution is a mode of obtain- Claims and
demands
other than
debts.
ing payment of a judgment by reaching, by means of the assistance
of the Court, property of the debtor which the Sheriff, by reason of
the imperfection of the statutes or Rules respecting execution, is
unable to deal with: see *Kirk v. Burgess*, 15 Ont. 608; *Wills v. Luff*,
18 Ch. D. 200; *Re Shephard*, *Atkins v. Shephard*, 43 Ch. D. 131;
Re Craig & Leslie, 18 P. R. 270.

The principal mode of obtaining equitable execution is by the
appointment of a receiver; and it has now, after some cases to the
contrary (see *Kirk v. Burgess*, *Re Pope*, 17 Q. B. D. 749; *Kincaid*
v. Kincaid, 12 P. R. 462), been decided that, as in other cases where
the auxiliary jurisdiction of Equity is invoked, the power to award
equitable execution is only to be exercised, in general, where the
legal remedy is ineffectual, and therefore a receiver was refused
where an attaching order could be obtained: see *Trust & Loan v.*
Gardine, 12 P. R. 654; or a *fi. fa.* was sufficient: *Manchester, etc.,*
v. Parkinson, 22 Q. B. D. 173; *Harris v. Beauchamp*, 1844, 1 Q. B.
801; and see *Tyrell v. Panton*, 1895, 1 Q. B. 202; 71 L. T. 687.

Rule 911.

Before the Jud. Act, 1881, only a legal debt could be attached. By the Jud. Act and *Rules* the right to attach was extended, and where a judgment debtor had an equitable interest in personalty, if it assumed the shape of an equitable debt, this was held to be attachable; see *Webb v. Stenton*, 11 Q. B. D. 518; *Stuart v. Grough*, 15 Ont. App. 299; and other cases, *supra*, p. 1148. There still, however, remained cases where the *Rules* respecting attachment of debts would not apply, by reason of the judgment debtor not being entitled to a debt either legal or equitable, though he, nevertheless, was entitled to some valuable interest.

Receivers.

The mode in which such equitable interests were reached and made available was generally by the appointment of a receiver. Receivers have thus been appointed of a reversionary interest under a will: *Fuggle v. Bland*, 11 Q. B. D. 711; *Tyrell v. Paine*, *supra*; a legacy expectant on the death of a tenant for life: *Macnicoll v. Parnell* 35 W. R. 773; the income of a trust fund: *Oliver v. Lowther*, 28 W. R. 381; 42 L. T. 42; *Webb v. Stenton*, 11 Q. B. D. 518, 520; an interest in a subsisting life insurance, and in a charge upon land: *Beamish v. Stevenson*, 18 L. R. Ir. 319; moneys secured by mortgage held by the debtor, who resided abroad: *Parent v. Lortie*, 7 C. L. T. 195; the life interest of a married woman in stock: *Bryant v. Bull*, 10 Ch. D. 153; a fund in another Court: *Westhead v. Riley*, 25 Ch. D. 413; the interest of a debtor in a trust estate, being a share of the proceeds of the estate when sold by the trustees: *Stuart v. Grough*, *supra*; an annuity payable to the execution debtor under a contract to which he is not a party, but for which he has given consideration, and to the benefit of which he is entitled: *Moot v. Gibson*, 21 Ont. 248; a receiver by way of equitable execution may be appointed of a debt due by the Crown to the judgment debtor: *Stewart v. Jones*, 19 P. R. 227; but a sum payable merely by the bounty of the Crown cannot be so reached: S. C. 1 O. L. R. 34, and the Court refused to appoint a receiver by way of execution of weekly payments of salary falling due *in futuro*: *Holmes v. Millage*, 1893, 1 Q. B. 551; 68 L. T. 205; *Central Bank v. Ellis*, 20 Ont. App. 364; see also other cases referred to, *supra*, pp. 99 and 100.

The debtor's equity of redemption in chattels is saleable under execution: see R. S. O. c. 77, s. 17.

The proper form of equitable relief can only be granted where proper parties are before the Court, therefore after the death of the debtor it cannot be granted without first making parties those in whom his estate is vested: *Re Shephard*, 43 Ch. D. 131.

Where a receiver is appointed of a debtor's reversionary interest in property: *Flegg v. Prentiss*, 1892, 2 Ch. 428; or a future accruing fund, as for instance a policy on the life of a person still *in esse*: *Weekes v. Frarley*, 23 Ont. 235, that does not give the creditor a charge entitling him to realize it by sale; and where the estate of the debtor is a legal remainder it can only be sold by and under the usual process of execution; there is no jurisdiction to order a sale of it merely because a receiver of it has been appointed by way of equitable execution: *Re Harrison and Bottomley*, 1899, 1 Ch. 465; 80 L. T. 29; the appointment of a receiver does not create a charge on the land: *Ib.*, and see *Thomson v. Cushing*, 30 Ont. 123, 388.

Where the trustees of a will are in their absolute discretion authorized to make payments out of the income of the estate of the testator to a judgment debtor, that is not an interest which can be reached by equitable execution: see *Re McInnes v. McInnes*, 30 Ont. 38.

Where the debtor has an interest in land of such a nature that it **Rule 911.** cannot be sold under a *fi. fa.*, the judgment creditor may reach it, by application under *Rules* 1015. *et seq.*, or by action: see *Johnson v. Bennett*, 9 P. R. 337; *Bowerman v. Hall*, 5 O. W. R. 225; but he must have an execution in the hands of the Sheriff at the time of the commencement of the proceedings or action: *Thomson v. Cushing*, 30 Ont. 123, 388; *Union Bank v. Brigham*, 5 O. W. R. 142, 144; but see *Johnson v. Bennett*, *infra*.

A receiver was appointed, *ex parte*, of a mortgaged estate, by way of execution against the mortgagor: *Minter v. Kent*, 72 L. T. 180.

An equity of redemption in mortgaged lands is saleable under an execution, by virtue of R. S. O. c. 77, s. 30, only in the case of a simple equity arising upon a single mortgage of the land, or at most existing between one mortgagor and one mortgagee: see *Somis v. Ireland*, 4 Ont. App. 122; and cases in which an equity of redemption is not so saleable, furnish familiar examples of suits for equitable execution: see *Donovan v. Bacon*, 16 Gr. 472; *Kerr v. Styles*, 26 Gr. 300; *Johnson v. Bennett*, 9 P. R. 337, in which last case there were no writs of execution in the Sheriff's hands, as to which see *infra*, p. 1160.

Where a receiver was appointed of the interest of a debtor in lands devised to him "during his life for the support and maintenance of himself and his three children, with remainder to the heirs of his body, or to such of his children as he may devise the same to," it was held that although there was no trust in favour of the children, yet that they had an equity which would prevent the whole of the income being appropriated by the creditor to their prejudice, and as they were infants, and in need of maintenance, and the debtor had not otherwise sufficient means to maintain them, the Court ordered that only one-fourth of the fund should be appropriated to the benefit of the creditor: *Allen v. Furniss*, 20 Ont. App. 34; but where land was devised upon trust to permit the debtor and his wife and children to use it for a home, and then to convey it as the debtor by his will should appoint, it was held that the debtor took no estate which could be made available in execution: *Cameron v. Adams*, 25 Ont. 229.

Property settled on a married woman subject to a restraint against anticipation, cannot be made available in execution against her, or by attachment or sequestration, or by the appointment of a receiver, as regards instalments of income accruing due after the judgment: *Whitley v. Edwards*, 1896, 2 Q. B. 48; *Bolitho v. Gidley*, 1905, A. C. 313, and notes, *supra*, p. 353; *Hood-Barrs v. Cathcart*, 1894, 2 Q. B. 559; *Pillers v. Edward*, 71 L. T. 788; but a receiver may be appointed of instalments of income so settled which had accrued due before judgment, but which have not been paid over to the married woman: *Hood-Barrs v. Heriot*, 1896, A. C. 174; 74 L. T. 353.

Practice as to Receivers by way of Equitable Execution.

—As to equitable execution by the appointment of a receiver at the instance of the judgment creditor, see further notes, *supra*, pp. 389, 1001; and for the form of such orders see *Hevett v. Murray*, 52 L. T. 1280; 54 L. J. Chy. 572; H. & L. Forms Nos. 853, 1289.

An order appointing a receiver was held to be "a process of execution" within the Imperial Act, 27 & 28 Vict. sec. 112; *Re Pope*, 17 Q. B. D. 713; but not the issuing of execution within *Rule* 856. See note to that *Rule*.

Rule 911.

An attaching order against a garnishee, and a receiver as against the debtor, were granted on the same application in *Whittaker v. Whittaker*, 7 P. D. 15; but the authority of that case has been doubted in *Manchester, etc., v. Parkinson*, 22 Q. B. D. 173.

The appointment of a receiver would seem to be an effective mode of procedure under circumstances such as existed in *Donovan v. Bacon*, 16 Gr. 472. There the debtor was entitled to the equity of redemption in land, but the land was subject to two mortgages held by different persons, and the mortgagor was in possession and in receipt of the rents. See also *Webb v. Stenton*, *supra*; *London and Canadian, etc., v. Merritt*, 32 C. P. 383, 384, 386.

The receiver will be entitled to an order for leave to bring an action in the name of the debtor, if the latter refuses to bring an action, or unnecessarily delays doing so: *McLean v. Allen*, 14 P. R. 291; *Mones v. MacCullum*, 17 P. R. 398; the debtor is entitled to an indemnity against costs: *Id.*

A receiver was appointed on an interlocutory application in a fresh action by the judgment creditor in *Anglo-Italian Bank v. Davies*, 9 Ch. D. 275; see also *Ex parte Evans*, 13 Ch. D. 252. But a fresh action is unnecessary; the application for receiver may be in the original action after judgment: *Salt v. Cooper*, 16 Ch. D. 544; *Smith v. Cowell*, 6 Q. B. D. 75.

A receiver will, however, only be granted in cases where the amount of the judgment debt warrants the expense, and where there is a fair reason to suppose that there is something to receive: *I. v. K.*, W. N. 1884, 63. See also *Manchester, etc., v. Parkinson*, and other cases *supra*, p. 180; *Taylor v. Gallagher* (before Robertson, J., 7th January, 1890).

A judgment creditor who has obtained a receiver subject to existing incumbrances, cannot place himself in a better position than the debtor, and by giving notice to a trustee obtain priority: *Arden v. Arden*, 29 Ch. D. 702.

Where the interest of the judgment debtor is not one which is exigible under writs of *fi. fa.* goods or lands respectively, it was said by Osler, J.A., that the issue of such writs is an unmeaning and needless formality, and is, therefore, an unnecessary preliminary to proceedings for equitable execution: *Stuart v. Grough*, 15 Ont. App. 309; see formerly *Shea v. Denison*, 14 Gr. 513; *Wilson v. Proudfoot*, 15 Gr. 103; and see *Thomson v. Cushing*, 30 Ont. 123, 388, where the issue of a *fi. fa.* was held to be still necessary. The issue of such writs will not give any priority. The equitable interest of the debtor is only bound by, and from the time of, the issue of the appropriate form of equitable execution: *Stuart v. Grough*, *supra*, and see *supra*, p. 1159.

Whether money realized under equitable execution is subject to the provisions of *The Creditor's Relief Act* is doubtful: see *Sylvester v. McEachon*, 9 C. L. T. 138; *Dawson v. Moffatt*, 11 Ont. 484; *McLean v. Allen*, 14 P. R. 84.

A receiver may be appointed by way of execution on an *ex parte* application, but such an order should not be made *ex parte*, except in exceptional cases: *Minter v. Kent*, 72 L. T. 186; and *semble* the defendant is entitled to notice though he has not appeared: see *Tilling v. Blyth*, 1899, 1 Q. B. 557; 80 L. T. 44. Where such an order is made *ex parte* the debtor is not driven to appeal, he may move to rescind it: see *Rule 358*.

Where a receiver has been appointed by way of equitable execution **Rules**
 on a misapprehension of facts, a third party prejudiced thereby may **912, 913.**
 apply to rescind the order: *McLean v. Allen*, 18 P. R. 235.

Effect of Appointment of a Receiver.—Where a receiver is appointed of a fund by way of equitable execution, the debtor cannot thereafter alienate or encumber the fund to the prejudice of the creditor at whose instance the receiver was appointed: *In re Anglesey, De Gulse v. Gardner*, 1903, 2 Ch. 727.

912. The garnishee shall be deemed to be indebted within the meaning of Rule 911, although any debt sought to be attached has been assigned, charged or incumbered by the judgment debtor, if the assignment, charge or incumbrance is fraudulent as against creditors or is otherwise impeachable by them. *New.*

Formerly a *de facto* assignment, even though impeached as a fraud, prevented the attachment of the debt so assigned: see *Yuse v. Brown*, 13 Q. B. D. 199; *O'Donohoe v. Hull*, 24 S. C. R. 683.

913. The order or the notice in lieu thereof, as the case may require, shall be served personally or as the Court or Judge may direct, and [from the time of service thereof or of] notice thereof to the garnishee in such manner as the Court or Judge shall direct, shall bind the debts in his hands. *Con. Rule 936.*

Taken from J. A. Rule 371.

The words in brackets are new. Otherwise this *Rule* is similar to Eng. (1883) R. 623, and corresponds with part of R. S. O. c. 50, s. 308.

Service of an attaching order does not create the relation of debtor and creditor between the garnishee and attaching creditor: *Wardrop v. Canadian Pacific Railway Co.*, 7 Ont. 321; *Re Combined Weighing & Advertising Co.*, 43 Ch. D. 99; *Cooper v. Lawson*, 6 Times. 34; *Chatterton v. Watney*, 16 Ch. D. 378; 17 Ch. D. 259. It is otherwise, however, after an order to pay over has been made: *Cowan v. Carhill*, 33 W. R. 583; 52 L. T. 431.

Service of the attaching order does not justify the Sheriff in withdrawing from the goods of the garnishee under an execution issued against him by his creditor (the judgment debtor): *George v. Freeman*, 14 P. R. 330.

The effect of service is to prevent the debtor from thereafter dealing with the debt to the prejudice of the garnisher: *Wood v. Joselin*, 18 Ont. App. 60; but the order does not prevent a valid assignment by the debtor of any surplus of the debt beyond what is sufficient to satisfy the claim of the attaching creditor: *Yates v. Terry*, 1302, 1 K. B. 527; 86 L. T. 133.

Money paid into Court in an administration suit by an executor is not money "in the hands" of the executor, and a garnishee order

Rule 913. *nisi* against the executor is not a charge on such money, although paid in after service of the order, so as to give the attaching creditor priority over a trustee in bankruptcy of the debtor: *Stevens v. Phelps*, L. R. 10 Ch. 417; *Jones v. Brown*, 29 L. T. 79.

An order *nisi* does not create any charge till after service: *Hunter v. Giles*, 11 Ch. D. 942; *Re Stanhope*, *ib.*, 100. *Holmes v. Tutton*, 5 E. & B. 65.

By the express terms of this Rule the debts are bound from the date of the service of the order of attachment, though, if nothing was attachable at the time the order was made, doubtless it cannot attach a debt or claim arising after the order, but before service: *McCrany v. McLeod*, 10 P. R. 539; *Parker v. Hove*, 12 P. R. 351; see *Kelly v. Rider*, 11 Times, 206. The *bond fide* payment by the garnishee to the judgment debtor before such service will protect the garnishee: *Cooper v. Brayne*, 27 L. J. Ex. 446; 31 L. T. 205; *Elwell v. Jackson*, 1 Cab. & Ell. 362; but payment to the debtor after service of the attaching order, is no answer to an application under Rule 914: *Edmunds v. Edmunds*, 1904, P. 362. Neither set off nor anything else affecting the state of the accounts between the garnishee and the judgment debtor, arising after that date, can be taken into account: *Tapp v. Jones*, L. R. 10 Q. B. 591; though a set-off existing at that date will avail: *Sampson v. Seaton and Beer Railway Company*, L. R. 10 Q. B. 28; and see *supra*, p. 1156.

In *Fitzpatrick v. Warring*, 13 L. R. Ir. 2, two defendants, S. and W., each had an order against the plaintiff for costs. S. was indebted to the plaintiff for rent. W.'s costs were first taxed, and he obtained an order against S., attaching the rent due by S. to the plaintiff. When an order to pay over was applied for, S.'s costs had been taxed, but it was held that the rent could not be set-off against them as the order *nisi* had attached it, and S. had no claim until his costs were taxed. But see *Re Sato v. Hubbard*, 8 P. R. 445.

Where a banker was served with the usual order attaching all debts, etc., he was held to be justified in refusing to honour any cheques even to the extent of the amount in his hands over and above the amount required to satisfy the judgment of the attaching creditor: *Rogers v. Whitely*, 23 Q. B. D. 236; 1892, A. C. 118; 66 L. T. 303; but an order may be made in form restricting its operation to such amount of the debt owing by the garnishee as will satisfy the judgment debt: *ib.*; but see *Yates v. Terry*, *supra*, p. 1161.

In the case of several attaching orders, the creditors formerly ranked in the order in which their attaching orders were served: *Tate v. The Corporation of Toronto*, 3 P. R. 181; *Succetnam v. Lemon*, 13 C. P. 534; see also *Salamau v. Donovan*, 10 Ir. C. L. R. App. xiii; but see now R. S. O. c. 78, s. 37.

Personal service is not indispensable if the service comes to the garnishee's knowledge: *Ward v. Vance*, 9 U. C. L. J. 214, 244.

The effect of the word "hind" has often undergone discussion, and under the earlier English Bankruptcy Act the assignee was entitled, and not the attaching creditor, if bankruptcy intervened before actual payment under an order to pay over: *Holmes v. Tutton*, 5 E. & B. 80; *Turner v. Jones*, 1 H. & N. 878; *Tilbury v. Brown*, 20 L. J. Q. B. 46; *Rylands v. Reardon*, 5 L. R. Ir. 1; *Stevens v. Phelps*, L. R. 10 Ch. 417; but if the garnishee was compelled to pay under threat of execution after notice of the bankruptcy, he was discharged as against

the assignee: *Wood v. Dunn*, L. R. 2 Q. B. 73. He was bound, however, to set up the bankruptcy, if he had notice of it before the order to pay over: *1b*. The present English law gives the creditor a charge which is good against the trustee in bankruptcy: *Emanuel v. Bridger*, L. R. 9 Q. B. 286; *Ex p. Joselyn*, 8 Ch. D. 327; see *Mayor of London v. Joint Stock Bank*, 6 App. Cas. 333.

An assignment by an insolvent for the general benefit of his creditors does not oust a prior attachment by a creditor of the insolvent of a debt due to him: *Re Thompson*, 17 P. R. 160; a winding-up order does do so, unless the attaching order was obtained before the petition for winding up, and an order for payment has been made before the winding-up order: *Ex p. Hawkins*, L. R. 3 Chy. 787.

The service does not effect a transfer of the debt or securities for it: *Chatterton v. Watney*, 16 Ch. D. 378; 17 Ch. D. 259; see also *Backhouse v. Siddle*, 38 L. T. 487.

914. If the garnishee does not forthwith pay into Court the amount due from him to the judgment debtor or an amount equal to the judgment debt, and does not dispute the debt due or claimed to be due from him to the judgment debtor, or if he does not appear upon notice to him, then the Court or Judge may order payment to the judgment creditor of the debt or so much thereof as may be sufficient to satisfy the judgment debt. Con. Rule 937.

^{Order for execution against garnishee.}
Taken from J. A. Rule 372.

This is similar to Eng. (1883) R. 624, and is in substance the same as the provision of the C. L. P. Act (R. S. O. 1877, c. 50, s. 309).

An action for a debt will lie on a garnishee order, but should not be resorted to if the amount can be recovered by execution under Rule 914: *Pritchett v. English & Colonial Syndicate*, 1899, 2 Q. B. 428. An action is proper where brought with the view of obtaining a judgment to be sued on abroad, or upon which to petition as a judgment creditor for the winding-up of a company which has property only out of the jurisdiction.

61 V. c. 15, s. 9, provides that an action shall not be brought in a Division Court on a judgment or order of the High Court or a County Court, where execution may issue on the judgment or order.

The judgment debtor should be notified of the application against the garnishee to pay over: *Beatty v. Hackett*, 14 P. R. 395.

Payment to the judgment debtor under stress of an execution issued after service of the attaching order was held to discharge the garnishee from liability to the judgment creditor: *Turnbull v. Robertson*, 38 L. T. 380; *sed quare*, if the garnishee should pay the money attached into Court in such a case; he cannot discharge himself after service of an attaching order, by a voluntary payment: *Mayor of London v. Joint Stock Bank*, 6 App. Cas. 333; *Edmunds v. Edmunds*, 1904, P. 362; and where, before payment, a receiver of the fund is appointed, the garnishee should not pay without first bringing the conflicting claims of the receiver and the attaching creditor to the attention of the Court: *Stuart v. Grough*, 15 Ont. App. 299; and the garnishee is also bound to set up any assignment of the debt attached, of which he has notice: *Yates v. Terry*, 1902, 1 K. B. 527, 86 L. T. 133; and see *Rule 920*.

Rules

As to the garnishee's right to set off: see note to *Rule 911, supra*, 918, 919, p. 1150.

After an order absolute, the garnishee may be examined as to his means under *Rule 100*: *Concan v. Carhill*, 33 W. R. 583; 52 L. T. 431.

As to rights of other creditors in the moneys attached, see *The Creditors' Relief Act*, R. S. O. c. 78, s. 37.

An order for payment by the garnishee may be rescinded on its subsequently appearing that the debtor had, before service of the attaching order, validly assigned the debt, and that the garnishee had no notice of the assignment, before the motion to pay over: *Bentley v. Hackett*, 14 P. R. 385; or where the order has been made and acted on under a mutual mistake of the judgment creditor and the garnishee, that the latter was indebted to the judgment debtor: *Moore v. Peachy*, 66 L. T. 198; *Marshall v. James*, 1905, 1 Ch. 432.

A garnishee order made absolute, although no debt was at the time due, is conclusive on the garnishee until it be set aside: see *Moore v. Peachy*, 66 L. T. 198; *Randall v. Lithgow*, 12 Q. B. D. 525.

A garnishee is bound to ascertain that the debtor of the attaching creditor is really the creditor of the garnishee, or payment, though purporting to be made under an attaching order, will not be a bar to recovery by his real creditor: *Andrew v. Canadian Mut. L. Co.*, 29 Ont. 385.

**Order as to
maturing
claims.**

915. If the debt be not payable at the time of the attachment, an order may be made for the payment thereof when it becomes payable. *Con. Rule 938.*

See *Lloyd v. Wallace*, 9 P. R. 335; *Nash v. Pearce*, 47 L. J. Chy. 766.

**Issue where
garnishee
disputes
liability.**

916. If the garnishee disputes his liability, the Court or Judge, instead of making an order for payment, may order that any issue or question necessary for determining his liability be tried in such manner as may be directed. *Con. Rule 939.*

Taken from J. A. Rule 373.

Similar to the Eng. (1883) R. 625, and gives a simpler machinery than R. S. O. 1877, c. 50, s. 310.

Garnishee proceedings will not be set aside after great delay: *Re Gordon v. Bonter*, 6 U. C. L. J. 112, and should not in any case be opened without previous notice to all parties interested: *Bank of U. C. v. Wallace*, 2 P. R. 352.

As to the garnishee's right of set off, see note to *Rule 911, supra*, p. 1150.

In case an issue is ordered between the judgment creditor and garnishee, the judgment creditor stands in the shoes of the judgment debtor, and the garnishee can assert against him all claims he could have asserted against the judgment debtor either as plaintiff or defendant in an action: *Nathan v. Gilca*, 5 Tannt. 558; *Tapp v. Jones*, L. R. 10 Q. B. 591; 1 Cab. & El. 95; up to the time of the service of the attaching order. See also notes to *Rule 913*.

This section does not render it obligatory on the Court to direct an issue. If the matter is clear upon the affidavits, the Court may refuse an issue: *Wise v. Birkenshaw*, 20 L. J. Ex. 241, and rescind the attaching order: *Johnson v. Moody*, 12 L. J. Ex. 263, where the plaintiff cannot suggest a plausible ground on which the money attached to belong to the debtor; but otherwise it would probably be proper to direct an issue, if the plaintiff so desired. On the other hand, execution may be ordered if the garnishee does not satisfy the Judge that he has real ground for disputing his liability for the debt: *Re Sato v. Hubbard*, 8 P. R. 445; *Newman v. Rook*, 1 C. B. N. S. 434; and is acting *bona fide* in making the dispute: *Case v. Birkenshaw*, 20 L. J. Ex. 240.

Where fraud was suggested, and circumstances shown which created a suspicion of fraud and required explanation, the plaintiff was held to be entitled to an issue: *Millar v. Thompson*, 19 P. R. 291.

As to the form of issue, see *Macdonald v. Taqueah*, 13 Q. B. D. 275; *Chitty*, 460.

Where an action is pending against the garnishee at the suit of the judgment debtor, and there is no collusion between them, the Court will not grant an issue: *Richardson v. Greaves*, 40 W. R. 45. The Court will, unless quite satisfied that the debt is not liable to attachment, allow the judgment creditor to have an issue with the garnishee: *Seymour v. The Corporation of Brecon*, 29 L. J. Ex. 243. If the garnishee disputes his liability, and the judgment creditor declines to proceed to try the question, the garnishee is entitled to have the attaching order discharged with costs: *Wintle v. Williams*, 3 H. & N. 288.

In *Wilson v. Dundas*, W. N. 1875, 232, Quinn, J., ordered the liability to be tried by means of a special case; and where the question is one of law, this seems to be a convenient course.

Where an issue is directed to a County Court, the action, nevertheless, remains in the High Court, and the County Court Judge has no authority to order production: *Cochrane v. Morrison*, 10 P. R. 606.

An order for cross-examination of the garnishee was refused in *Storrie v. Simmons*, W. N. 1876, 40, on the ground that the English Rule corresponding with Rule 485 was not intended to apply to such a case, but, in Ontario the garnishee denying liability is subject to cross-examination on his affidavit: *Wilson v. Fleming*, 19 P. R. 263.

917—(1) Where the debt claimed to be due or accruing from a garnishee is of the amount recoverable in a County Court, the order to appear, made under Rule 911, shall be for the garnishee to appear before the Judge of the County Court of the County within which the garnishee resides, at a day and place within his County to be appointed in writing by such Judge; and the order shall be served on the garnishee with written notice of the day and place appointed. Con. Rule 940.

Where the amount claimed to be due from the garnishee is so large as to be not within the jurisdiction of a County Court, the Judge of

Proceed-
ings when
amount is
within the
jurisdiction
of a County
Court.

Rule 91a.

the County Court in which the judgment was recovered, may make the order to appear returnable before himself, though the garnishee resides in another county: *Millar v. Thompson*, 19 P. R. 294., and see *Rule 91b*.

Execution from County Court, if the garnishee does not dispute the debt.

(2) If the garnishee does not forthwith pay the amount due by him, or an amount equal to the judgment debt, or appears and does not dispute the debt due or claimed to be due from him to the judgment debtor, or if he does not appear before the Judge named in the order at the day and place appointed, the Judge, on proof of service of the order and notice of the appointment having been made two clear days previous, may order payment; and execution may issue out of the County Court. *Con. Rule 941*.

Taken from R. S. O. 1877, c. 50, ss. 311, 312.

The Judge referred to is the Judge of the County Court named in the order.

Proceedings if he disputes the debt.

(3) If the garnishee disputes his liability, the Judge may order that the judgment creditor be at liberty to proceed against the garnishee according to the usual practice of the County Court, for the alleged debt, or for the amount due to the judgment debtor if less than the judgment debt, and for costs. *Con. Rule 942*.

Taken from R. S. O. 1877, c. 50, s. 315.

The Judge referred to is the Judge of the County Court named in the order under clause (1).

A garnishee denying liability is subject to cross-examination on his affidavit: *Wilson v. Fleming*, 19 P. R. 203.

Where the garnishee sets up that the debt is owing to some third person, and the creditor claims that such third person is fraudulently substituted for the judgment debtor, he is entitled to an issue: *Millar v. Thompson*, 19 P. R. 294.

Though a garnishee may admit the debt to be due by him, yet if he has notice that it has been assigned he is bound to bring that fact to the notice of the Court on the application for the order to pay over: *Yates v. Terry*, 1902, 1 K. B. 527; 86 L. T. 133; and see note to *Rule 91a*; and see *Rule 920*.

Proceedings when amount within the jurisdiction of Division Courts.

DIS.—(1) Where the debt claimed to be due or accruing from a garnishee is of the amount recoverable in a Division Court, the order to appear, made under *Rule 911*, shall be for the garnishee to appear before the Clerk of the Division Court within whose Division the garnishee resides, at his office, at a day to be appointed in writing by such clerk, and the order shall be served on the garnishee, with written notice of the day appointed by the Clerk.

(2) The Clerk shall report to the Judge whether or not the garnishee appears, and whether he disputes or does not dispute the debt due or claimed to be due from him to the judgment debtor. *New.* Rules
919, 920.

(3) If the garnishee does not forthwith pay the amount due by him or an amount equal to the judgment debt, or appears and does not dispute the debt due or claimed to be due from him to the judgment debtor, or if he does not appear before the Division Court Clerk named in the order at his office at the day appointed, the Judge, on the report of the Clerk, and on proof of the service of the order and notice of the appointment having been made two clear days previous, may order payment; and execution may thereupon be issued out of the Division Court of the Division in which the garnishee resides.

(4) If the garnishee disputes his liability, the Judge may order that the judgment creditor shall be at liberty to proceed against the garnishee, according to the practice of the Division Court, for the alleged debt or for the amount due to the judgment debtor if less than the judgment debt, and for costs. *Con. Rule 943.*

The former *Con. Rule 943*, only applied in cases where the attaching order was obtained in a County Court case. The present *Rule* is intended to apply in High Court cases as well as County Court cases, where the debt claimed to be due or accruing from the garnishee is of the amount recoverable in a Division Court.

By analogy to *Rule 917* the "Judge" referred to in clause (2) would appear to be a County Court Judge having jurisdiction in the Division of the Division Court Clerk referred to.

919 In County Court cases the power conferred by Rules 917 and 918 may be exercised by the Judge although the garnishee does not reside within his County. *New.* County
Judge's
powers under
Rules
917 and 918.

See *Millar v. Thompson*, 19 P. R. 294.

920.—(1) Where it is suggested that the debt sought to be attached belongs to a third person, or that a third person has a lien or charge upon it, the Court or Judge may order him to appear and state the nature and particulars of his claim. *Con. Rule 944.* Order for
third person
to appear

Taken from J. A. *Rule 374*.

Rule 920.

Proceed-
ings as to
claims of
third
persons.

(2) After hearing the allegations of the third person, and of any other person whom by the same or any subsequent order the Court or a Judge may order to appear, or in case of such third person not appearing when ordered, the Court or Judge may order payment of the amount due from the garnishee, or may order an issue or question to be tried or determined in such manner as may be directed, and may bar the claim of the third person, or may make such other order with respect thereto as the Court or Judge thinks fit, upon such terms, as to costs and otherwise, as may seem just. Con. Rule 945.

Taken from J. A. Rule 375.

Clause (1) of this *Rule* is to the same effect as the Eng. (1883) R. 626; and corresponds in substance with R. S. O. 1877, c. 50, s. 313 (1).

A suggestion that the money attached is trust money and not belonging to the judgment debtor, should be listened to, and upon reasonable suspicion of such a fact, the Judge has power (even though no suggestion is made that the money belongs to some third person) to direct an issue to determine whether or not the money is trust money, and any person who has a claim to the money has a *locus standi* to point out the facts to the Judge: *Roberts v. Death*, 8 Q. B. D. 319; 30 W. R. 76; see *Craig v. Craig*, 1896, P. 171. The judgment debtor may appear to inform the Court of any such material fact: *Lovely v. White*, 12 L. R. 1r. 381.

Where the garnishee has notice of the right of some third person to the debt attached, and neglects to bring it to the attention of the Judge, the order to pay over will not protect him as against such third person: *Parker v. Mellican*, 16 P. R. 555; 17 P. R. 84. *The Leader*, L. R. 2 A. & E. 314; *Stuart v. Grough*, 15 Ont. App. 269; *Yates v. Terry*, 1902, 1 K. B. 527; 86 L. T. 133.

The "third person" is a "party affected" by the attaching order within the meaning of *Rule* 358, and may under that *Rule*, or apart from it, move to set aside the attaching order: *Parker v. Mellican supra*.

Clause (2) of this *Rule* is to the same effect as the Eng. (1883) R. 627; and corresponds in substance with R. S. O. 1877, c. 50, s. 313 (2). See *Mitchell v. Lee*, L. R. 2 Q. B. 259.

The Judge under this *Rule* has a discretion to direct, or refuse to direct, the trial of an issue, and his discretion was held properly exercised in refusing, where the plaintiff could not suggest a plausible ground for supposing that the money in the hands of the garnishee belonged to the judgment debtor, or after examination of the third party to cast any suspicion upon the *bona fides* of his claim. Had the plaintiff been able to do this, it would have been the duty of the Judge to direct an issue, if the plaintiff desired it: *Johnson v. Moody*, 12 P. R. 203.

The concluding part of this *Rule* authorizes an order for security for costs against either party to the issue, if residing out of the jurisdiction: *Canadian Bank of Commerce v. Middleton*, 12 P. R. 121.

An order to pay over made under a mutual mistake of the judgment creditor and the garnishee, that the latter was indebted to the judgment debtor, may be rescinded on the mistake being discovered: *Moore v. Peachy*, 66 L. T. 108; *Marshall v. James*, 1905, 1 Ch. 432, where the debt attached as due to the plaintiff (the judgment debtor) was, after order to pay over, discovered to be not due to the plaintiff personally but to a firm of which he was a member.

921. Payment made by or execution levied upon the garnishee under any such proceedings as aforesaid shall be a valid discharge to him, as against the judgment debtor, of the amount paid or levied, although subsequently such proceeding may be set aside or the judgment reversed. Con. Rule 946.

This Rule is identical with the Eng. (1883) R. 628; and corresponds in substance with R. S. O. 1877, c. 50, s. 317.

The mere issue of an attaching order, or order to pay over, is no defence to an action by the judgment debtor: *Lockwood v. Nash*, 18 C. B. 536; *Sykes v. Brockville and Ottawa Ry. Co.*, 22 U. C. Q. B. 459; *Blevins v. Madden*, 11 C. P. 195; *George v. Freeman*, 14 P. R. 330; *Pickard v. Tims*, 19 P. R. 100; *Yates v. Terry*, 1902, 1 K. B. 527; 86 L. T. 133. Payment to the judgment creditor after an attaching order served, but before an order to pay over, is not a discharge, and the garnishee is liable to pay again to the judgment debtor: *Turner v. Jones*, 1 H. & N. 878; *Clark v. Clark*, 8 F. C. L. J. 197; *McGinnis v. Yorkville*, 21 Q. B. 163, 171, but a garnishee order absolute for payment over operates as a stay of an execution on the debtor's judgment against the garnishee: *George v. Freeman*, 14 P. R. 330. Payment into Court discharges the garnishee: *Clark v. Clark*, *supra*, and Rule 914; but payment under an order to pay over, will not protect the garnishee, if, before paying over, he has notice of the fund being claimed by another, who proves to have had the better right: *Stuart v. Grough*, 15 Ont. App. 290; *Yates v. Terry*, *supra*.

As to the practice where orders are made in respect of the same debt in different Counties, see *Victoria Mutual Ins. Co. v. Bethune*, 1 Ont. App. 398.

As to the right of other creditors to share in moneys attached, see *The Creditors' Relief Act* (R. S. O. c. 78, s. 37).

Rule 922.

CHAPTER XIV.

PETITIONS OF RIGHT.

Petition of right.

The Sovereign cannot be sued in the Courts of Law as an ordinary defendant. It has been said that prior to the reign of Edward I. the Sovereign might have been sued as an ordinary defendant, and that by statute of Edward I. it was enacted that all claims against the Crown should thereafter be brought by petition, and this is said to have been the origin of the petition of right; but no such statute has been discovered and the evidence for its existence is by no means conclusive; see *Clode, c. 1*. However that may be, it is certain that the method of procedure by petition of right is of very ancient date, and seems to have been evolved from the practice of petitioning the King in Parliament.

The procedure in England upon petition of right is now regulated by Imp. Stat. 23 & 24 Vict. c. 34, followed in Ont. by R. S. O. 1877, c. 59, to carry out which the following *Rules* have been framed.

Rules how far applicable.

The following *Rules* 322-336, of course, only apply to petitions presented in respect of claims against the Government of Ontario; claims against the Government of any other Province must be prosecuted in the Courts of such Province; and claims against the Dominion Government must be prosecuted in the Exchequer Court of Canada, as to which see 50 & 51 Vict. c. 10, s. 23 (D.1).

Nature of petition.

A petition of right is a petition presented by a subject to the Crown stating an infringement of the suppliant's legal rights by the Crown or its officer, and praying redress therefor; see *Clode, c. 11*.

Equitable claims have also been preferred by petition of right, but some question has been raised whether such claims can properly form the subject of such a petition; see *Clode, c. 11*.

When it may be filed.

As a matter of fact the following classes of claims have been prosecuted by petition of right, viz.: (1) claims for the restitution of property wrongfully taken and detained by the Crown or its officers; (2) claims arising out of some contract made between the Crown and a subject; (3) equitable claims; (4) claims made enforceable by this means by statute; see *Clode, 46-7*.

Whether an alien may present a petition of right does not appear to have been decided; see *Clode, c. 5*.

Where under an Act of Parliament a railway company was entitled to a grant of the Provincial Crown Lands on completion of its road, and to a grant of a proportionate part thereof on the completion of 20 miles of the line, a petition of right was held to be the proper mode of enforcing the claim against the Government of the Province, *Canada Central Ry. v. The Queen*, 20 Gr. 273; but where a discretion is vested in the Crown as to making the grant, it would seem that a petition of right will not lie; see *Hereford Ry. v. The Queen*, 21 S. C. R. 1.

A petition cannot be maintained against the Provincial Govern- **Rule 922.**
ment of Ontario in respect of any contract made with the Govern-
ment of Canada before Confederation: see *Mucedonald v. The Queen*,
44 U. C. R. 239. A contractor may petition for the price of extra
work under a contract: *O'Brien v. The Queen*, 4 S. C. R. 529; *Jones*
v. The Queen, 7 S. C. R. 570; *Isbester v. The Queen*, 7 S. C. R. 1894.
A barrister may thereby claim a quantum meruit for his fees: *The*
Queen v. Doutré, 6 S. C. R. 342; and a Crown lessee of a fishery may
present a petition for damages for breach of a covenant for quiet en-
joyment: *The Queen v. Robinson*, 6 S. C. R. 52; and a petition of
right may be maintained for unliquidated damages resulting from a
breach of contract by the Crown: *Thomas v. The Queen*, L. R. 10
Q. B. 31; *Feather v. The Queen*, 6 B. & S. 283; *The Queen v. Mac-*
Lean, 8 S. C. R. 210; and it is immaterial whether the breach was
occasioned by the acts, or omissions of the Crown official: *Windsor*
d. Annapolis Ry. Co. v. The Queen, 11 App. Cas. 607; but the con-
tract must be a binding one, and within the power of the officer of
the Crown to make: *Humphrey v. The Queen*, 20 S. C. R. 501; *The*
Jacques Cartier Bank v. The Queen, 25 S. C. R. 84. In *Starrs v.*
The Queen, 1 Ex. C. R. 301 the Crown was held to have waived the
right to dispute the validity of a contract, on the ground that it had
referred a claim thereunder to arbitration, and had raised no legal
objection to the investigation of the claim by the arbitrator, and had
not appealed from the award; but as a rule the doctrine of estoppel
cannot be invoked against the Crown; nor can laches be imputed to
the Crown: *Humphrey v. The Queen*, 2 Ex. C. R. 386; 20 S. C. R.
501; *Peterson v. The Queen*, 2 Ex. C. R. 74; yet forfeitures of certain
kinds may be waived by the acts of Ministers and officers of the
Crown: *Attorney-General v. Ettechauck*, L. R. 6 P. C. 374; *Darcen-*
part v. The Queen, 3 App. Cas. 115; *Peterson v. The Queen*, 2 Ex.
C. R. 67. The general rule is that the Crown is not liable to a
suit for the tortious acts of its officers: see *Muskoka Mills Co. v.*
The Queen, 28 Gr. 563; *Releigh v. Gaschoa*, 1898, 1 Ch. 73; nor for
their negligence: see *Regina v. McFarlane*, 7 S. C. R. 216; *Burroughs*
v. The Queen, 2 Ex. C. R. 283; nor for their misfeasance or non-
feasance: *Regina v. McLeod*, 8 S. C. R. 1; *Cococ v. The Queen*, 3
Ex. C. R. 13; *Quebec v. The Queen*, 2 Ex. C. R. 272; 3 Ex. C. R.
164; 24 S. C. R. 420; but such liability may be imposed by statute:
see 50 & 51 Vict. c. 16, s. 16 (11); *Brady v. The Queen*, 2 Ex. C. R.
273; *Laroie v. The Queen*, 3 Ex. C. R. 96; *The Queen v. Martin*,
20 S. C. R. 240.

Where the acts complained of are authorized by a statute which
describes a remedy for any person aggrieved, the claimant cannot
maintain a petition of right, but must pursue the statutory remedy:
Holifar v. The Queen, 2 Ex. C. R. 433.

The Statute of Limitations cannot be set up by the Crown as a
bar to a claim by petition of right: see *per Blackburn, J., Rushin v.*
The Queen, 1 Q. B. 11, 487, at p. 491; *sed vide Martin v. The*
Queen, 20 S. C. R. 240; and it would seem that a third party notified
under Rule 925 would not be able to set it up against the petitioner:
see *Chole*, 175.

922. A petition of right shall be entitled in the High Form of
petition
of right
Court, and shall name the proposed place of the trial; and
such petition shall be according to Form No. 186 and shall

Rules 923-925. be signed by such suppliant, his counsel or solicitor. Con. Rule 949.

For Form No. 186, see H. & L. Forms, No. 1576.

These Rules do not expressly state that the petition shall be filed. The practice usually pursued is first to obtain the *fiat* of the Lieutenant-Governor under Rule 923, and then to file the original petition, with such *fiat* indorsed, in the proper office where the proceedings are to be carried on; and see Rules 929, 267.

Petition to be submitted to Lieutenant-Governor for his *fiat*.

923. The petition shall be left with the Provincial Secretary, in order that the same may be submitted to the Lieutenant-Governor for his consideration, and in order that the Lieutenant-Governor, if he thinks fit, may grant his *fiat* that right be done; and no fee or sum of money shall be payable by the suppliant therefor. Con. Rule 950.

The granting of the *fiat* mentioned in this Rule is an act of grace, and it would seem cannot be enforced by *mandamus* or any other method: see Clode, 115. The petition cannot be proceeded with until the *fiat* has been granted.

Proceedings after *fiat* is obtained.

924. A copy of the petition and *fiat* shall be left at the office of the Attorney-General, with an indorsement thereon according to Form No. 187, praying for an answer on behalf of [His] Majesty within 28 days. Con. Rule 951.

For Form No. 187, see H. & L. Forms No. 1577.

Service on person in possession of real property.

925. Where the petition is presented for the recovery of real or personal property, or any right in or to the same which has been granted or disposed of by or on behalf of [His] Majesty or [His] predecessors, a copy of the petition and *fiat* shall be served upon or left at the last or usual or last known place of abode of the person in the possession, occupation or enjoyment of the property or right, indorsed with a notice according to Form No. 188. Con. Rule 952.

For Form No. 188, see H. & L. Forms, No. 1578.

The persons in possession of the property in question, referred to in this Rule, are not to be made parties to the petition as respondents, but the petition is presumed to set out the facts relating to the possession, and they are to be served with the petition and notice as required by this Rule, and they are to be at liberty to appear and enter a defence and defend as if they were named as parties respondent to the petition: see Rule 924.

Scumble, a subject cannot properly be named as a respondent in a petition of right: see per Wickens, V. C., *Kirk v. The Queen*, L. R. 14 Eq. 558 at p. 563; *sed vide*, *Kiebeck v. The Queen*, W. N. 1882-1883; *Ib.*, 1884, *see*. No provision is made by the Rules for bringing any third party before the Court in a petition of right except by the present Rule.

926. It shall not be necessary to issue any *scire facias* ^{Rules 926-928.} or other process to the person so served for the purpose of requiring him to appear and file his defence to the petition, but he shall, within the time limited, enter an appearance to the same according to Form No. 189, and shall file his defence to the petition within the time specified in such notice, or within such further time as may be allowed by the Court or a Judge. ^{Apparatus} Con. Rule 953.

For Form No. 189, see II. & L. Forms, No. 1570.

Formerly, in England, where land had been granted by the Crown to a third party, and it was sought to rescind the patent, as soon as a petition of right was presented a writ of *scire facias* issued from the Chancery, by which the Sheriff was required to give notice to the grantee to appear and shew cause why the letters patent should not be cancelled, and the grantee so summoned was entitled to make his defence, and the judgment of the Court in the *sci. fa.* proceedings virtually determined the petition of right, and when the letters patent were rescinded a writ of *amoveas manus* was awarded to put the applicant in possession; see Clode, p. 171.

Proceedings to rescind patents in Ontario may be brought by action in the nature of an information in the name of the Attorney-General against the grantee and persons claiming under him; see Ind. Act, sec. 26 (8); see *Fonseca v. Atty.-General*, 17 S. C. R. 612. But an action for that purpose may be entertained in certain cases, without joining the Attorney-General either as plaintiff or defendant; *Martyn v. Kennedy*, 4 Gr. 61; and see *O'Riady v. McCaffrey*, 2 Ont. 309, and *supra*, p. 24.

927. The time for filing a defence to the petition, ^{Time for pleading} on behalf of [His] Majesty, shall be the period of 28 days after the petition has been left as afore-said at the office of the said Attorney-General, or such further time as may be allowed by the Court or a Judge. Con. Rule 954.

928. The petition may be answered by statement of ^{Pleadings in answer to petition.} defence by or in the name of [His] Majesty's Attorney-General, on behalf of [His] Majesty, and by or on behalf of any other person who may be called upon to file his defence thereto, in the same manner as in an action, and without the necessity for any imputation finding the truth of such petition or the right of the suppliant, and any sufficient ground of defence in point of law or fact to the petition on behalf of [His] Majesty, may be alleged on behalf of any other person so called on to defend. Con. Rule 955.

Rule 929.

Rules of
pleading,
etc.

929. So far as the same are applicable, and except in so far as is inconsistent with these Rules, the laws and statutes in force as to pleading, evidence, trial, security for costs, amendment, arbitration, special cases, the means of procuring and taking evidence, set off, appeal, and otherwise in actions and the rules, orders, practice and course of procedure therein for the time being, shall, unless the Court or a Judge otherwise orders, be applicable to petitions of right. Con. Rule 956.

Arbitration.—As to arbitration, see *Rule 647*.

Special Cases.—As to special cases, see *supra*, pp. 351, 379.

Pleadings.—If no defence is filed within the time limited thereof the pleadings cannot be noted closed under *Rule 263*, but the petitioner may apply for an order that the petition may be taken as confessed: see *Rule 930*.

Amendment.—The petition may be amended at the trial: *Smith v. The Queen*, 27 Ont. App. 172.

Security for Costs.—The Crown may under this *Rule* apply for security for costs upon the same grounds as such applications may be made in ordinary actions: see *Rules 1198, et seq.* Where, however, the Crown had offered the suppliant, by its responsible Minister, \$3,950 in settlement of his claim, which was declined, an application by the Crown for security for costs was refused: *Wood v. The Queen*, 7 S. C. R. 631; 13 C. L. J. 114. The Crown, however, cannot be required to give security for costs: per Bramwell, L.J., *Tomlinson v. The Queen*, 4 Ex. D. 252, at p. 254.

Discovery.—Nothing is expressly said in this *Rule* as to discovery, but the concluding part of the *Rule* seems to imply that the ordinary procedure in an action, except where expressly varied, may be followed. The English Act expressly provides that nothing in the Act shall be construed to give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy before the Act: see Imp. St. 23 & 24 Vict. c. 34, s. 7. In England it is held that a suppliant is not entitled to discovery as against the Crown: *Thomas v. The Queen*, L. R. 10 Q. B. 44, and the same rule would seem to apply in Ontario: see *Clode*, 179. But the Crown is entitled to obtain discovery against the petitioner: *Tomlinson v. The Queen*, 4 Ex. D. 252; 40 L. T. 542. See also note *supra*, p. 1143.

Hearing.—The petition may be set down to be heard on motion for judgment: see *Rules 609, 930*. If, however, a defence is put in, the petition may have to be entered for trial as an ordinary action, but the petition must be tried by a Judge without a jury: see *Rule 931*. Where, however, a party notified under *Rule 925* makes no defence, although the petitioner is entitled to have the petition heard *pro confesso* as against him, still if the petitioner fails to establish his case against the Crown, the petition must be dismissed altogether: see *McDermott v. McDermott*, 3 Chy. Ch. 38; *Kinloch v. Secretary of State for India*, W. N. 1884, 80.

930.—(1) In case of a failure on the behalf of [His] Majesty, or of any other person duly called upon to defend in due time, at any stage of the proceedings, the suppliant may apply to the Court or a Judge for an order that the petition may be taken as confessed; and the Court or Judge may order that such petition may be taken as confessed, as against [His] Majesty, or other party so making default; and in case of default on behalf of [His] Majesty, and any other person called upon as aforesaid to defend, judgment may be given by the Court in favour of the suppliant.

Rules
930-933.

In default
of defence,
etc., sup-
pliant may
take peti-
tion pro
confesso.

(2) Such judgment may be set aside by the Court or a Judge, upon such terms as may seem just. Con. Rule 957.

The wording of this *Rule* is not very clear. The "failure" referred to in the first line would, from the context, appear to be a "failure" to put in a defence in proper time.

Although a subject making default in pleading is not entitled to further notice of the subsequent proceedings; see *Rule* 586, yet it would seem that the Crown ought to be notified of a motion for judgment, even though no defence has been filed: *Clode*, 183.

931. Any issue of fact or assessment of damages to be tried or had in respect of a petition of right, shall be tried or had by a Judge without a jury. Con. Rule 958.

Issues to be
tried by a
Judge
without a
jury.

It would seem that the Crown may if it pleases claim a trial at bar: see *Rule* 534, and see *Clode*, 170.

932. The judgment of the Court shall be that the suppliant is or is not entitled either to the whole or to some portion of the relief sought by his petition, or that such other relief may be given, and upon such terms and conditions (if any) as to the Court seems just. Con. Rule 959.

The Judg-
ment.

No execution can issue against the Crown upon any such judgment, but it would seem that any judgment for the payment of any money is to be certified to the Provincial Treasurer, as provided in the case of costs: see *Rule* 957.

933. In cases in which the judgment, commonly called a judgment of *amoveas manus*, was formerly in England pronounced upon a petition of right, a judgment that the suppliant is entitled to relief, as heretofore provided, shall have the same effect as a judgment of *traverse manus*. Con. Rule 960.

When
judgment
to be equi-
valent to
amoveas
manus.

A judgment of *amoveas manus* was formerly a judgment to the effect: "that His Majesty's hands be removed from the possession of the premises mentioned in the petition, and that the suppliant be

**Rules
924-936.**

restored to his possession thereof, together with the rents and profits thereof, which have not yet been answered to His Majesty, and (in case a lease has been made), that the said lease be void: see Clode, 1845; Tidd's Forms, p. 61, s. 42, and upon such judgment the suppliant was also entitled, if the property was in the actual possession of a grantee of the Crown, or Escheator, to a writ of *ouster le mains*, to turn out of possession the Crown's grantee or officer: see Clode, 185.

It is doubted whether under the English Act, s. 10, a writ of *ouster le mains* could now issue: see Clode, 190, but it would seem that if the judgment is to have the same effect as the former judgment of *amoveas manus*, any remedies which might formerly have been available to a suppliant under such judgment are equally available under a judgment under these Rules.

As pointed out in Clode, p. 190, the English Act makes no provision, neither do these Rules, for any mode of executing a judgment as against a third party served with the petition under Rule 925.

Neither is there any express provision for obtaining satisfaction of a judgment in favour of the suppliant for any money demand. It is probably assumed that the infallible justice of the Crown will satisfy such demands, on the judgment of the Court being duly certified to the proper officer: see *infra*, Rule 935.

**Costs
against
suppliant.**

934. The costs of all proceedings under Rules 922 to 936 shall be in the discretion of the Court or a Judge, and shall be recovered in the same way as in ordinary actions, save when costs are ordered to be paid by [His] Majesty. Con. Rule 961.

**If judgment
be for costs,
etc., Judge
to certify to
Provincial
Treasurer.**

935. Upon any judgment or order for the payment of costs by [His] Majesty, the Judge may, upon application in behalf of the party entitled to costs, after the lapse of 14 days from the making, giving or affirming of the judgment or order, certify to the Provincial Treasurer according to Form No. 190; and such certificate may be sent to or left at the office of the Provincial Treasurer. Con. Rule 962.

For Form No. 190, see H. & L. Forms, No. 1580.

**Proceed-
ings under
former
practice.**

936. Nothing in these Rules shall prevent a subject from proceeding by petition of right in any manner in which he might have proceeded before the 23rd day of April, 1887: nor shall anything in these Rules be construed as entitling a subject to proceed by petition of right in any case in which he would not be entitled so to proceed under the Acts passed by the Parliament of the United Kingdom before the said date. Con. Rule 963.

The date mentioned in this Rule is that of the passing 50 Vict. c. 2 (O.), which provided for the R. S. O. 1887 coming into force.

CHAPTER XV.

PROCEEDINGS WITHOUT WRIT.

- | | |
|---|---|
| 1. PETITIONS, 937. | 6. PROPERTY OF INFANTS, 990-970. |
| 2. ORIGINATING NOTICES, 938-943. | 7. DEVOLUTION OF ESTATES, 971, 972. |
| 3. ADMINISTRATION, 944-955. | 8. SETTLED ESTATES, 973-990. |
| 4. PARTITION, 956-957.
Custody of papers in Administration and Partition proceedings. 958. | 9. QUIETING TITLES, 991-1014. |
| 5. POWER, 959. | 10. SUMMARY INQUIRIES INTO FRAUDULENT CONVEYANCES, 1015-1020. |

1. PETITIONS.

The day to be named for the hearing of a petition to the Court or a Judge, must be one on which the Court, or Judge, sits for such business. Petitions to the Court are taken by a single Judge in Court on Mondays, Wednesdays, or Thursdays; and petitions to a Judge in Chambers on Tuesdays, or Fridays, vacations excepted. During vacation a special day is named in each week for hearing matters of urgency: see *Rules* 99 and 114.

A petition presented by a person not a party to the action should set out his residence and occupation: *Hunter v. Mountjoy*, 2 Chy. Ch. 90; *Glazebrook v. Gillatt*, 9 Beav. 492.

A petition need not be filed before the day of hearing, and a petition filed before it had been served, and in the prosecution of which delay had arisen, was ordered to be taken off the files for want of prosecution: *Re Western Insurance Co.*, 6 P. R. 86. But a petition must be filed before any order made thereon can be issued; but where the original is lost or the petitioner refuses to deliver it to the respondent to file, a copy may be filed instead: *Smith v. Harwood*, 1 Sm. & G. 137; *Sanderson v. Walker*, 1 M. & Cr. 359; *Re Hobler*, 9 Jur. 419; *Andrews v. Walton*, 1 M. & Cr. 360.

The Court will sometimes on petition determine questions of conflicting rights, without putting the parties to an action: *Re Hoffe's Estate Act*, 8 L. T. 550; 1900, W. N. 114.

937. There shall be indorsed on every petition a notice addressed to the parties concerned, according to Form No. 70. Con. Rules 964, 784.

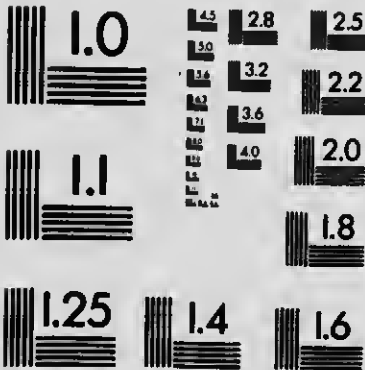
For form No. 70, see H. & L. Forms No. 1325.

Petition to be indorsed with notice of hearing



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Rule 938.

2. ORIGINATING NOTICES.

Originating notices relating to trusts or questions of administration.

938. The executors or administrators of a deceased person or any of them, and the trustees under any deed or instrument or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, next of kin or heir-at-law of a deceased person, or as *cestui que trust* under the trusts of any deed or instrument, or as claiming by assignment or otherwise under any such creditor or other person as aforesaid, may serve a notice of motion returnable in cases under clauses (a), (b), (e), and (h), hereof before a Judge of the High Court sitting in Weekly Court, and in other cases before a Judge of the High Court in Chambers for such relief of the nature or kind following, as may be specified in the notice, and as the circumstances of the case may require; that is to say, the determination, without an administration of the estate or trust, of any of the following questions or matters:

- (a) Any question affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next of kin or heir-at-law, or *cestui que trust*;
- (b) The ascertainment of any class of creditors, legatees, devisees, next of kin, or others;
- (c) The furnishing of any particular accounts by the executors or administrators or trustees, and the vouching (where necessary) of such accounts;
- (d) The payment into Court of any money in the hands of the executors or administrators or trustees;
- (e) Directing the executors or administrators or trustees to do or abstain from doing any particular act in their character as such executors or administrators or trustees.
- (f) The approval of any sale, purchase, compromise or other transaction;
- (g) The opinion, advice or direction of a Judge pursuant to section 37 of *The Act respecting Trustees and Executors and the Administration of Estates*;

(h) The determination of any question arising in the administration of the estate or trust. *New. As amended by Rule 1269 of 24 Dec., 1904. See Ont. Gaz., 31 Dec., 1904.*

See Eng. (1883) R. 765.

In England the summary procedure in respect of the several matters mentioned in this *Rule*, is authorized to be taken by what is there called an originating summons.

By the English Rules it is provided that in certain cases an appearance must be entered to an originating summons as in an ordinary action commenced by writ: see Eng. R. 737 c.; in others an appearance is dispensed with: see Eng. R. 737 f.

As no provision is made by these *Rules* for any formal appearance, or for any special procedure, the practice to be followed is that upon an ordinary motion.

The persons to be served in the first place with the notice of motion are specified in *Rule 1239*, but other persons may, by direction of the Judge, be subsequently required to be served: see *Rule 940*.

A proceeding commenced under this *Rule* would appear to be an "action": see Ind. Act, s. 2 (3); *Re Fawcett*, 30 Ch. D. 231; *Re Vardon*, 31 Ch. D. 275; 75 L. J. Ch. 259.

Where there is only a question of law to be determined, it should be decided on the motion without putting the parties to the expense of another proceeding: *Re Powers*, 30 Ch. D. 296; *Nobbs v. Lane Revivatory Int. Soc.*, 1896, 2 Ch. 830; 75 L. T. 309.

The construction of a will may be determined upon an application under this *Rule*, in cases where a Master in taking accounts and making inquiries in an administration proceeding, for the purpose of determining the matters referred to him, would have to place a construction upon the will: *Re Sherlock*, 18 P. R. 6. The construction of the will declared upon such an application is a sufficient protection to an executor: if he appeals, he does so at his own risk as to costs: *Ib.*

But questions beyond those which would arise in administration proceedings will not be entertained, thus it has been held that the *Rule* gives no jurisdiction, on the application of persons entitled under a devise of lands subject to a restraint on alienation, to determine whether the restraint is valid: *Re Martin*, 8 O. L. R. 618; nor whether a widow can sell without the consent of her children, under a devise to her with full power to dispose of part or the whole as she and the children may think wisest and best at any time: *Re McDougall*, 8 O. L. R. 640.

Where a plaintiff proceeds by writ in a case which could as well have been determined by an application under this *Rule*, he will be allowed costs only as of a motion under this *Rule*: *Re Brown*, 32 Ont. 323.

Clause (a)—As to determining a disputed debt, see *Re Powers*, 30 Ch. D. 291.

Rule 938. The following questions have been determined under the *Rule*, viz.:

A question as to whether the moneys payable under a policy of insurance were validly bequeathed to preferred beneficiaries under R. S. O. c. 203, s. 159, so as to be not subject to creditors' claims, was determined on the application of a creditor in *Re Cheesbrough*, 18 C. L. T. 23; see also *Re Wrighton*, 8 O. L. R. 630; *Re Harkness*, 8 O. L. R. 720; so also whether persons claiming as heirs and next of kin were entitled to any beneficial interest in the testator's estate: *Re Lewis*, 29 Ont. 609; *Re Gardner*, 3 O. L. R. 343; as to whether a devise is conditional: *Re Deller*, 6 O. L. R. 711. So also a question as to the person entitled to a legacy, where there was a misnomer of the legatee: *Re Whitty*, 30 Ont. 300; and whether a trust had arisen under a will: *Re Evans*, 3 O. L. R. 401; and whether a mortgage debt passed under a bequest of chattels: *Re McMillan*, 4 O. L. R. 415; and whether a devisee of a farm was entitled to specific performance of a covenant of the testator to build a house on the property devised: *Re Murray*, 4 O. L. R. 418.

Executors having no interest in the land devised would appear to have no *locus standi* to present a petition for the determination of questions affecting the construction of a will as to the disposition of land; *e. g.*, where there is no devise in terms to them, and no caution registered, or where, if registered, it has expired: see *In re Young*, 38 C. L. J. 81.

Where one of the possible beneficiaries under a will had disappeared and had not been heard of for 24 years, an application by executors under this *Rule* against the personal representatives of such person was entertained to determine the right of such person: *Neville v. Benjamin*, 1902, 1 Ch. 723; 86 L. T. 387; and the personal representatives were authorized to distribute the share bequeathed to the beneficiary who had disappeared, in the absence of evidence to shew that he had survived the testator, after inquiry directed as to his whereabouts: *Id.*

Clause (c)—Where trustees have, without excuse, refused to render an account, they may be ordered to pay the costs of an application under this *Rule*, including the costs of vouching the account: *Re Skinner*, 1904, 1 Ch. 289.

Clause (d)—*Payment into Court, etc.*—Under the corresponding Eng. Rule it is only where money is actually in the hands of the executor, administrator, or trustee, belonging to the estate in question, that its payment into Court will be summarily ordered; the admission that he is indebted will not be sufficient: *Nutter v. Holland*, 1894, 2 Ch. 408; 71 L. T. 508.

Clause (e)—An application to sanction a provision for payment of annuities payable out of residue, and for distribution of the residuary estate after making such provision was entertained under this *Rule*: *Re McIntyre*, 3 O. L. R. 212.

The Court will not authorize the continuation of the business of a deceased person by his personal representatives, where that course is not authorized by his will, except so far as necessary to enable the business to be sold as a going concern: *Re Brain*, 9 O. L. R. 1.

Clause (f)—An application to sanction the raising of money by mortgage to pay debts of a testator cannot be made under this *Rule*,

except in an administration proceeding: see *Walley v. Robinson*, W. Rule 938, N. 1884, 144; nor can a Judge order a sale: he can only approve of one which the trustees, or executors, or administrators, have power to make: *Re Robinson*, 31 Ch. D. 247; *Nelson v. Bell*, 32 Ont. 118.

A trustee has been authorized under this *Rule* to advance to a tenant for life part of the residuary personal estate for the purpose of stocking and cultivating a farm forming part of the real estate: *Houschold v. Houschold*, 27 Ch. D. 553.

Clause (g).—The persons, or one of the persons whose rights or interests are sought to be affected, must be notified of the application: *Rule 939*, (a); see also *Re Harley's Estate*, 17 P. R. 483.

Formerly the Court on a summary application for its opinion or advice, under the statute referred to, refused to declare the construction of a will or other instrument: *In re Williams* 1 Chy. Ch. 372; *In re Hooper*, 29 Beav. 656. The object of the statute, it was said, was to assist trustees and executors in the execution of their trusts, as to matters of discretion. But under the Eng. practice, cases for the construction of wills and originating summonses are of frequent occurrence: *Re Elliot, Kelly v. Elliot*, 1896, 2 Ch. 373; 75 L. T. 138; *Re Lever, Coedice v. Lever*, 1897, 1 Ch. 32; 75 L. T. 383; *Re De Vallery, Leighton v. Leighton*, 75 L. T. 328; *Re Stephenson, Donahyson v. Bamber*, 75 L. T. 495; but see *Re Davies*, 38 Ch. D. 210; *In re Gray*, 1896, 2 Ch. 802; *In re Weeding*, 1896, 2 Ch. 361.

Under this *Rule* the Court has determined whether executors have a power to sell land: *Re Craeford*, 4 O. L. R. 313; and the time when moneys payable under an insurance policy were payable to the beneficiaries: *In re McKellar*, 37 C. L. J. 103.

Also whether executors had power to take shares in a company into which it was proposed to convert a business in which the testator's estate was interested: *In re Morrison*, 1901, 1 Ch. 701; *In re Strathy*, 37 C. L. J. 399.

The Court will not under this *Rule* interfere with the discretion given to trustees by the terms of the trust, or say how it should be exercised: *Re Sergeant*, 8 O. L. R. 260.

Clause (h).—In England it is held that only matters which, before the *Rule*, could have been determined under a judgment for the administration of an estate, or the execution of a trust, can now be determined under the *Rule*. Questions as to a legal devise could not be so determined, and cannot now be determined under the Eng. Rule: *Re Carlyon*, 56 L. T. 151; 35 W. R. 155; *Re Davies*, 38 Ch. D. 210; *Re Royle*, 43 Ch. D. 18; *Re Sherlock*, 18 P. R. 6. Nor can questions affecting a person claiming adversely to the will or deed in question be so determined: *Re Bridge*, 56 L. J. Chy. 779; *Re Gladstone*, W. N. 1888, 185; *Re Royle, supra*, but it is too late to take such an objection to the jurisdiction of the Court upon an appeal: *Re Turcan*, 58 L. J. Chy. 101; but the Ontario Rule 938 is wider than the Eng. Rule: see clause (h), and was intended to save the expense of the administration of an estate or trust: *Re Whitty*, 30 Ont. 300; and see cases noted *supra*, under clause (a).

It is also held, in England, that where the application is founded on an alleged breach of trust, it cannot be maintained under the Eng. Rule except by consent, *per Kekewich, J.*, *Re Wale*, 42 Ch. D. 674; 37 W. R. 779; *Re Neil*, 62 L. T. 649; *per Lord Macnaghten*, *Doe v.*

Rule 938. *Gorton*, 1891, A. C. p. 202; nor where wilful neglect and default is charged: *Re Hooghe*, W. N. 1893, 37. On an application under the Eng. Rule to determine whether a husband was entitled as tenant by the curtesy, a writ was ordered to be issued: *Hope v. Hope*, 1892, 2 Ch. 336.

The Court declined to determine, as a question of management of a trust property, whether the guardian of an infant appointed by the Surrogate Court was entitled to receive from trustees a fund held by trustees for an infant under an express trust, the Official Guardian opposing the claim: *Re Mathers*, 18 P. R. 13.

Questions Determined Upon Applications Under Clause (h).—That a deceased wife had been guilty of a breach of a covenant in her marriage settlement, and that the trustees were entitled to recover damages therefor against her executors: *Re Purkin*, 1892, 3 Ch. 520.

Which of the trustees under two different instruments was entitled to a trust estate on failure of the beneficiaries: *Re Laskinor*, 1891, 1 Ch. 258.

A dispute as to a debt, where the question was one of law, and there were no disputed facts: *Re Powers*, 30 L. J. D. 291.

Whether a power of appointment is valid: *Re Hargreaves*, 43 Ch. D. 401.

Whether a release is valid: *Re Garnett*, 50 L. T. 172; 32 W. R. 474; *sed vide*, *Re Ellis*, 50 L. T. 124, where it was held that a claim which involved the setting aside of a release could not be so determined.

The propriety of applying part of the corpus of a trust fund in the repair of real estate held on the same trusts as the fund: *Conway v. Fenton*, 40 Ch. D. 542; *Re De Teissier*, 1893, 1 Ch. 153; *Re Montagu*, 1897, 1 Ch. 685.

Whether a tenant for life is entitled to be let into possession: *Re Neuen*, 1894, 2 Ch. 207; and see *Re Bagot*, 1894, 1 Ch. 177.

On the application of the guardians of infants who were entitled to maintenance out of a fund in the hands of the executor of their father's will, the fund was ordered to be paid into Court though there was no imputation against the character or solvency of the executor: *Re Humphries*, *Mortimer v. Humphries*, 18 P. R. 283, and generally this will be done where the person holding the money is a mere trustee without discretion as to the application of the money: *Whitwood v. Whitwood*, 19 P. R. 183.

Whether a wife is entitled in equity to a settlement of a fund claimed to be set off against her husband's debt to the testator: *Re Briant*, 39 Ch. D. 471.

Whether the representatives of a deceased tenant for life were entitled to any part of the proceeds of the sale of a reversion, which was subject to the life tenancy, but which was not sold until after the decease of the tenant for life: *Re Pitcairn*, 1893, 2 Ch. 199.

Persons to
be served—

939. The persons to be served with notice under the last preceding Rule in the first instance shall be the following, that is to say:

1. Where the notice is served by an executor or administrator or trustee, **Rule 939.**

1. Where notice served by executors, etc.

(a) For the determination of any question under clauses (a), (e), (f), (g) or (h) of Rule 938, the person or one of the persons whose rights or interests are sought to be affected;

(b) For the determination of any question under clause (b) of Rule 938, any member or alleged member of the class;

(c) For the determination of any question under clause (c) of Rule 938, any person interested in taking such accounts;

(d) For the determination of any question under clause (d) of Rule 938, any person interested in such money;

(e) If there are more than one executor or administrator or trustee, and they do not all concur in the service of the notice, those who do not concur.

2. Where the notice is served by any person other than the executors, administrators or trustees, the said executors, administrators or trustees. *New.*

2. Where served by some other person.

See the Eng. (1883) R. 767.

Notwithstanding the provisions of this *Rule* the Judge will not usually determine any question affecting the rights of other persons unless they are parties, or are properly represented on the application. The Court has no inherent jurisdiction to declare that the parties to an action sufficiently represent absent parties: see *Re Bullen-Smith*, 57 L. T. 924; S. C. 58 L. T. 578; *Morgan's Brewery Co. v. Crosskill*, 1902, 1 Ch. 898. An application may be entertained in the absence of a party: see *Rule* 202; but unless he is clearly represented in accordance with some *Rule* or statute, the absentee will not be bound by the adjudication unless he has subsequently, with notice of it, adopted and acted on it: see *Re Lart*, 1896, 2 Ch. 788; 75 L. T. 175; and see *Uffner v. Lewis*, 27 Ont. App. 242.

An executor is not competent to present a petition for the construction of a devise of real estate, unless he represents the real estate: see *In re Young*, 38 C. L. J. 81.

For the purpose of binding absent parties by proceedings commenced under *Rule* 938, the provisions of *Rules* 200, 201, must be observed: see the notes to those *Rules*.

Although this *Rule* contemplates that the notice of motion shall, in the first instance, be served only on one, or some, of the persons whose rights are affected, yet it is not the practice of the Court to

Rules**940-943.**

decide questions under the similar Eng. Rule unless all persons interested are either parties or sufficiently represented; on the first return of the motion therefor, the Judge will, probably, under *Rule 940*, give all necessary directions either for notifying the other persons interested, or for their representation on the application, so as to bind them by the order that may ultimately be made: see *Re Gardiner*, W. N. 1887, 59.

Service out of the Jurisdiction.—In England the Court cannot give leave to serve an originating summons out of the jurisdiction: *Re Cliff*, 1895, 2 Ch. 21. In Ontario, however, *Rule 162* (3) would seem to apply to an originating notice under *Rules 938 et seq.*

An application for leave to serve it will have to be made under *Rules 162* (3) and 163; *semble*, the order should limit the time at which the notice should be made returnable: *Rule 164* (2).

Special directions as to service.

940. The Judge may direct such other persons to be served as may seem just. *New.*

(a) The Judge may also exercise the powers conferred upon the Court by *Rules 200* and *201*. *Rule 1266*, 19 June, 1904.

See the Eng. (1883) R. 768.

In England it is held that the third party procedure (see *Rules 209-216*), does not apply to proceedings commenced by originating summons: *Re Wilson*, 45 Ch. D. 266; 63 L. T. 100.

Clause (a) will enable an order to be made appointing some person to represent persons interested, who have not been served with notice of the motion. In the absence of any such order, persons who are not served, are not bound by the proceedings or by the order made: see *Uffner v. Lewis*, 27 Ont. App. 242.

Summary judgment or order.

941. The Judge may summarily dispose of the questions arising on the application and make such judgment or order as the nature of the case may require, or may give such directions as he may think just for the trial of any questions arising upon the application. *New.*

Carriage and service of judgment or order.

942. Any special directions, touching the carriage or execution of the judgment or order or the service thereof upon persons not parties, may be given as may seem just. *New.*

See Eng. (1883) R. 771.

Interference with directions of trustees, etc.

943. Service of a notice under *Rule 938*, shall not interfere with, or control any power or discretion vested in any executor, administrator or trustee, except so far as such interference or control may necessarily be involved in the particular relief sought. *New.*

3. ADMINISTRATION.

944. Any person claiming to be a creditor, or a specific legatee, or residuary legatee, or the next of kin, or one of the next of kin, or the heir, or a devisee interested under the will of a deceased person may apply to the Court or a Judge upon motion, without an action being instituted, or any other preliminary proceeding, for judgment for the administration of the estate, real or personal, of such deceased person. *Con.* Rule 965.

Taken from Chy. O. 467.

It is settled that an inquiry as to wilful neglect and default may be made in all cases under an administration judgment granted on motion: *Re Allen, Pocock v. Allen*, 9 P. R. 277; 18 C. L. J. 242; *Carpenter v. Wood*, 10 Gr. 354; *Sullivan v. Harty*, 9 P. R. 500; 19 C. L. J. 234; and that the executor may be charged with a *devastavit* arising on the account: *Re Sterens, Cook v. Sterens*, 1897, 1 Ch. 422; and it would seem that any breach of duty which is practically a matter of account, may be effectually inquired into, and dealt with, under a judgment obtained under this Rule. Where, however, there is any question, to be determined, before a judgment for administration can properly be pronounced, an action should be commenced by writ. Thus it was held that a bill must be filed where the construction of a will was necessary: *Heywood v. Siverwright*, 8 P. R. 79; *Franks v. Worth*, 35 W. R. 663; 56 L. J. Chy. 719; *Carlton v. Carlton*, 35 W. R. 155; 56 L. T. 151; where the claim was for support of the wife and children of deceased, raising substantially the same question as would be raised in an alimony suit: *Re Foster, Griffith v. Patterson*, 20 Gr. 345; *Groom v. Darlington*, 9 P. R. 298; where the claim rose out of a contract of suretyship: *Re Collon*, 8 P. R. 542; see also *Re Allen*, 9 P. R. 277; and *Re Arcdeckne*, 53 L. J. Chy. 102; or where the executor is charged with misconduct: *Re Babcock*, 8 Gr. 409, that is, misconduct which would entitle the plaintiff to apply at the outset for an injunction or a receiver: *Sullivan v. Harty*, 9 P. R. 500; not misconduct consisting merely in not having accounted for moneys received, and which would be shewn upon the taking of accounts: *Eberts v. Eberts*, 25 Gr. 565; *Re McMullan*, 8 C. L. J. 285; *Re Bagwell, Anderson v. Henderson*, 17 P. R. 100; where the plaintiff claimed to be a creditor, and his claim appeared to be barred by the Statute of Limitations, but he claimed to avoid the operation of the Statute, on the ground of fraud on the part of the testator: *Re McDonald, Camecon v. McDonald*, 2 Chy. Ch. 29; and where a legatee claimed administration and it appeared that an award had been made respecting the applicant's claim, but the applicant denied being party to the reference: *Nudell v. Elliot*, 1 Chy. Ch. 326; and see *Groom v. Darlington*, 9 P. R. 298; and *Re Munsie*, 10 P. R. 98; 20 C. L. J. 112. In *Barry v. Brazill*, 1 Chy. Ch. 248, special inquiries as to what would be proper to be allowed to the applicant (the widow and administratrix) for improvements made on the property, and for the maintenance of the infant children of deceased were refused, and the applicant was left to file a bill. But where

Rule 944 the facts are not in dispute, and there is only a question of law as to the right of the applicant to sue, it would seem that such a point would be decided on a motion without putting the parties to the necessity of bringing an action: *Re Powers, Lindell v. Phillips*, 30 Ch. D. 291; and it is possible that under the enlarged powers conferred by *Rule 938*, it may hereafter be held that same cases which, under the above decisions, were held to be necessary to be commenced by writ would now be entertained on motion under *Rule 938*.

Where the application is made on motion, in a case in which the Court is of opinion that a writ should be issued, an order is usually made giving the applicant a day to commence his action, in default, the motion to be dismissed, but if the action be commenced, reserving the costs of the motion until the trial of the action: *Re McDonald, Cameron v. McDonald, supra*. But where the plaintiff commences an action, instead of applying on motion, where the latter course is proper, he will be disallowed the extra costs occasioned thereby: *Sovereign v. Sovereign*, 15 Gr. 559; or, if it is not clear that the action was unnecessary, the question of the additional costs will be reserved until after the Master has made his report: *Eberts v. Eberts*, 25 Gr. 565.

Where proceedings are unnecessary. And where a creditor brings an administration suit, after being informed that there are no assets applicable to the payment of his claim, if the information appears by the result to be substantially correct, he may have to pay the costs of the suit: *The City Bank v. Scatterd*, 18 Gr. 185; and so also a next of kin, or residuary legatee, unnecessarily bringing an action, may be ordered to pay the costs of it: see *Parsill v. Kennedy*, 22 Gr. 417; *Re Woodhall*, 2 Ont. 456; so also a trustee: *Re Cabburn*, 46 L. T. 848.

A suit unnecessarily brought by a residuary legatee claiming, but failing to establish himself, to be a creditor, was on further directions dismissed with costs: *Re Johnston*, 25 Gr. 261; and see *Re Woodhall*, 2 Ont. 456; and a residuary legatee of money and stocks, subject to a prior estate for life, is not entitled, as of course, to have the property brought into Court to be administered; and where the fund is invested in the names of proper trustees, and in proper securities, the Court will refuse to interfere: *Re Brothwaite*, 21 Ch. D. 121; 48 L. T. 857.

The extra costs of bringing an action where a summary application would have sufficed were disallowed between solicitor and client: *Re Allenby & Heir*, 13 P. R. 404; 14 P. R. 227.

The right of a judgment creditor of a legatee or devisee under a will, to bring an action for administration of the testator's estate under this Rule was formerly denied: see *Gilbert v. Jarvis*, 16 Gr. 265; *Blake v. Jarvis*, 16 Gr. 235; 17 Gr. 201; but see now *Mones v. McCallum*, 17 P. R. 102, 398.

Parties.—The provisions of *Rules 193, 203*, apply to proceedings under this Rule. All parties from whom an account is sought, should be served with notice: see *Rule 203* note.

Personal Representative.—The personal representative must always be notified where the application is made by any creditor, devisee, legatee, next of kin, or heir.

Where he makes the application himself he may sometimes do so *ex parte*; see *Rule 950*, and note.

Personal representatives of deceased legatee may apply.

There appears to be some conflict of authority as to whether a **Rule 944** deficiency of assets, for the payment of debts, is a sufficient ground for the personal representative to apply to the Court for administration: see cases *infra*, in note to *Rule 950*, p. 1186.

The personal representative is entitled to bring a suit for administration in order to obtain an indemnity in respect to leasehold estates: *Re Bosworth*, 45 L. T. 130; but he has no right to institute a suit for administration merely to obtain an indemnity by passing his accounts: *White v. Cummins*, 3 Gr. 602; *Cole v. Glover*, 16 Gr. 392; *Barry v. Barry*, 19 Gr. 458; and he may be refused his costs of a suit if unnecessarily brought: *Graham v. Robson*, 17 Gr. 318; *Springer v. Clarke*, 15 Gr. 631; but see *Furcar v. Austen*, 18 Ch. D. 58; 45 L. T. 227; *Re McClellan*, 20 Ch. D. 495; 52 L. T. 711; or he may be ordered to pay the costs of the suit: *Sullivan v. Sullivan*, 16 Gr. 94; *Re Diacen*, before Boyd, C., 13th May, 1884; or the costs of a suit brought by a creditor or legatee, rendered necessary by the action of the executor: *McGill v. Courtice*, 17 Gr. 271; *Re Radcliffe*, 44 L. T. 96; 50 L. J. Ch. 317; *Killian v. Killian*, 20 Gr. 472. An application was held to be proper where one of the legatees was absent from the Province and the executor had taken proper steps to find him, and could not get a discharge without coming to the Court: *Re Wade*, 18 Gr. 485. So also executors have been charged with so much of the costs of the reference as were incurred in establishing charges against them which they disputed: *Stewart v. Fletcher*, 18 Gr. 21; *Smith v. Roe*, 11 Gr. 311; *Bald v. Thompson*, 17 Gr. 151; and see *Ashbough v. Ashbough*, 10 Gr. 433. But an executor may be allowed his costs though he has committed a breach of trust, if the estate has suffered no loss: *Ward v. Gable*, 8 Gr. 458. But a personal representative in default was held not entitled to costs until he had made good his default: *Re Basham*, 23 Ch. D. 195; 48 L. T. 470; *McEwan v. Croucher*, 25 Ch. D. 175; 49 L. T. 490. In *Tekbs v. Carpenter*, 1 Mail. 290, it was laid down that if the suit would have been proper, and the executor a necessary party, if the executor had not misconducted himself, he ought not to pay all the costs of the suit, though in the course of the suit it appears that he has misconducted himself; but if the misconduct of the executor was the sole occasion of the suit, he ought then to pay the costs. This rule was approved in *Smith v. Roe*, 11 Gr. 321; and *Simpson v. Horne*, 28 Gr. 1; but see remarks in the latter case at p. 9.

Applications under this *Rule* are made in Chambers; *Rule 306*; if however, the motion is contested, the jurisdiction of the Master in Chambers is excluded, and the motion must be adjourned before a Judge in Chambers; see *Rule 42*.

Applications by adults may be made for the like purpose to the Local Master having jurisdiction in the county where the deceased resided: *Rule 947*. A Local Master's jurisdiction is ousted by the motion being opposed, and in that event it must be adjourned before a Judge of the High Court in Chambers: *Id.*

Where an administration judgment is made in Chambers, the reference should *prima facie* be to the Master of the County in which the person, whose estate is to be administered, resided: *Thompson v. Fairclain*, 10 P. R. 535; *Armstrong v. Armstrong*, 18 P. R. 55.

Rule 945 provides that fourteen clear days' notice of the motion must be given. Motions for administration, therefore, constitute an exception to ordinary motions, which only require two clear days' notice: *Rule 348*; and see *Exchange Bank v. Newell*, 19 C. L. J. 253.

Suit to obtain indemnity against covenants in lease.

Personal rep., when entitled to costs.

May be ordered to pay costs of unnecessary suit, or of suit rendered necessary by his misconduct.

Application, when to be made

Local Masters.

Fourteen days' notice of motion to be given.

Rule 944

Applica-
tion for
adminis-
tration by
creditors.

Creditors.—A creditor whose debt is payable may make application for administration of his deceased debtor's estate, without waiting a year from his decease. To an application by a creditor for the administration of the personal estate, no one but the personal representative, and any person interested who are infants (see *Rule 948*), need be made defendants. Where an administration of the realty is also sought, some one must be made a party who is interested in the realty; *Rule 951*. Under the *Devolution of Estates Act*, the personal representative sufficiently represents, for the purpose of an application under this *Rule*, both the real and personal estate of all persons dying since 1st July, 1886, and it is not proper to make the heirs or devisees of such persons parties unless the estate has become vested in them under R. S. O. c. 127, s. 13; *see vide Janson v. Clyde*, 31 Ont. 570, *per Boyd, C.*, p. 586; but the beneficiaries must be served with the judgment under *Rule 203* (3). Where the letters of administration are limited to the personality, it will be necessary to get letters of administration as to the realty, in order to obtain proper representation of the realty.

Personal
representa-
tive must
be served.

Where the realty has become divested from the personal representative by reason of the omission to file a caution, he ceases to represent it; and it remains liable to administration in the hands of the devisee or heir; *see 2 Ed. vii, c. 1, ss. 4, 5*.

If more
than one
all must
be served

Where there are several personal representatives all must be served, even though some be resident out of the jurisdiction; *Re Frechorn, Frechorn v. Curcoll*, 3 P. R. 188; *Latch v. Latch*, L. R. 10 Eq. 461.

Executor
de son tort

A judgment for administration could not formerly be granted as against an executor *de son tort* where there was no legal personal representative before the Court; *Russell v. Morris*, 17 Eq. 10. Nor against an executor named in the will who had not proved the will; *Ontrom v. Wyckhoff*, 6 P. R. 150; *Re Cotton*, 8 P. R. 542; but *see now Rule 196*, as to actions against an executor *de son tort*; notwithstanding *Rule 196*, where the action is brought against an executor *de son tort*, it would seem to be the better practice to commence it by writ, and not under *Rules 944, 947*. *See further as to parties, Rule 203, note.*

Evidence
required
on applica-
tion. Proof
of grant of
probate, or
adminis-
tration.

On the motion, the applicant, must be prepared with proof that the defendant is the personal representative; ordinarily, the letters of administration, or letters probate should be produced; *Re Marshall, Foster v. Marshall*, 1 Chy. Ch. 29; *Re Israel*, 2 Chy. Ch. 392. But where the plaintiff swore that the defendant was administrator, and the fact was not disputed, production of the letters was dispensed with; *Re Bell, Bell v. Bell*, 3 Chy. Ch. 397. It is sufficient if the letters of administration be granted at any time before the hearing of the motion, even though subsequent to the giving of the notice; *Edinburgh Life Assurance Company v. Allen*, 19 Gr. 593; *Re Masonic & G. L. A. Co.*, 32 Ch. D. 373; *Trice v. Robinson*, 16 Ont. 433; *Dini v. Fauquier*, 8 O. L. R. 712; *Doyle v. Diamond Flint Glass Co., Ltd.*, 461. It has been held that letters of administration obtained *pendente lite* will not relate back to the commencement of the action so as to bar the running of the Statute of Limitations; *Chard v. Rae*, 18 Ont. 371; but doubt seems to be thrown upon this decision by *Dini v. Fauquier, supra*; *see 40 C. L. J.*, 836. Where the motion was based on the ground that the personal representative was not a party, only the costs necessary to raise that objection were allowed; *Irvine v. Buck*, 6 P. R. 181. The creditor applying must also give *prima facie* evidence of his claim as creditor; *Re Clarke*, 2 Chy. Ch. 57; and where his claim is disputed, he must establish it by proper evi-

Proof of
applicant's
claim.

denial = his own uncorroborated evidence is insufficient: *Viriam v. West*, 40 Gr. 461; *Re Finch*, 23 Ch. D. 267; *Re Ross*, 29 Gr. 385; see R. S. O. c. 73, s. 10; and as to the nature of corroboration required: *Stoddart v. Stoddart*, 30 U. C. Q. B. 207; *Sagden v. Lord St.*, 10 Gr. 12; *Leonard*, 1 P. D. 151, 170; *McDonald v. McKinnon*, 26 Gr. 12; *McKay v. McKay*, 31 C. P. 1; *Adamson v. Adamson*, 28 Gr. 228; *Brown v. Capron*, 24 Gr. 91; *Hallevan v. Maun*, 28 Gr. 310; *Re Laus*, *Laus v. Laus*, *Id.*, 382; *Re Robbins*, 23 Gr. 162; *Re Ross*, 29 Gr. 385; 18 C. L. J. 11; *Parker v. Parker*, 32 C. P. 113, approved in *Radford v. Macdonald*, 8 Ont. App. 167; *Watson v. Severn*, 6 Ont. App. 550; *Watson v. B. Shaw*, *Id.*, 436; *Cook v. Grant*, 32 C. P. 511; *Re Murray*, 29 Gr. 1; 9 Ont. App. 360; *Bach v. Bach*, 8 Ont. App. 237; *Tucker v. McMahon*, 11 Ont. 718; *Hogg v. Haggie*, 11 Ont. App. 507; *Davis v. Walker*, 5 O. L. R. 173; *Thompson v. Coulter*, 34 S. C. R. 261; *Re Curry*, 32 Ont. 150; *Re Jelly*, *Union Trust Co. v. Hanson*, 6 O. L. R. 481; *O'Connor v. O'Connor*, 5 O. W. R. 10. The corroboration may be furnished by production and comparison of the land writing of deceased: *Thompson v. Thong*, 1 O. L. R. 412. It is sufficient if the corroboration is in some material facts, but it is not necessary that the whole of the facts should be established by independent testimony: *Radford v. Macdonald*, *supra*.

Where there is corroborative evidence as to the debt, interest thereon may be allowed without any corroborative proof of an agreement to pay interest: *Seear v. Gray*, 3 O. L. R. 34.

An interested party (e.g., a cestui que trust) may give corroborative evidence of a claim: *Balzold v. Upper*, 4 O. L. R. 116.

No corroboration is necessary as to claims against the estate of a deceased person arising after his death: *McCloughan v. Perkins*, 5 O. L. R. 129.

An annuitant whose annuity is payable under a covenant made by a testator is not entitled to apply for administration of the testator's estate so long as the annuity is not in arrear, even though the estate be deficient: *Re Hargreaves*, *Dicks v. Hargreaves*, 44 Ch. D. 236; 42 L. T. 819.

A partnership creditor suing for the administration of the estate of a deceased partner must join the surviving partner as a party, even though he is insolvent: *Re McCrae*, *Furster v. Davis*, 25 Ch. D. 16; 49 L. T. 544.

Where the applicant was merely a creditor of the personal representative for advances made to him as such, the application was refused: *Campbell v. Bell*, 16 Gr. 115; *Farkall v. Farkall*, L. R. 7 Chy. 123; *Re Potter*, 6 P. R. 157; *Green v. Delmarre*, L. R. 15 Eq. 134; *Evans v. Stecca*, 18 Gr. 35; *Seton*, 5th ed., 1315; and see *Henry v. Sharp*, 18 Gr. 16. Creditors whose debts are incurred by the executor, in carrying on a business of his testator are entitled to indemnity out of the deceased's estate to the extent, if any, to which the executor is entitled: *Re Johnson*, *Shearman v. Robinson*, 15 Ch. D. 548; 43 L. T. 372; and where the business of the testator was carried on by his executors in accordance with his will, creditors of the business were entitled to apply for the administration of the estate although there were no unpaid creditors of the testator himself: *Re Shorey*, 70 L. T. 349; *Re Bach*, W. N. 1892, 108; and a plaintiff, who had made advances to pay the debts of a deceased person, to save the estate the costs of suits to recover them, was held entitled to administration: *Glass v. Mausea*, 32 Gr. 77; see also *Hills v. Cattle*, 17 Gr. 335; *Strickland v. Symons*, 48 L. T. 188, which were cases of advances to trustees.

Rule 944.

Corroborative evidence.

be given if

confessed.

Rule 944.

Effect of
judgment
for admin-
istration as
to claims
of other
creditors.

A judgment for administration cannot be set aside on the ground that the applicant was not a creditor, after other creditors have proved under it: *Re Cannon, Gates v. Cannon*, 13 Ont. 70.

Where the personal representative has duly advertised for creditors under R. S. O. c. 129, s. 38, and has distributed the estate, that is an answer to a subsequent application for administration by a creditor who has failed to send in his claim: *Re Bracken, Doughty v. Tanner*, 61 L. T. 531; unless it can be *prima facie* shown that on a proper accounting the personal representative has still assets applicable to the payment of the applicant's claim.

A judgment for administration, is equivalent to a judgment in favour of all the creditors of the estate, but creditors who are not parties to the action can only claim the benefit of it from its date; as to the claims of the latter, the running of the Statute of Limitations is not stopped until the judgment is obtained: *Re Cannon*, 13 Ont. 705; *Re Greaves*, 18 Ch. D. 551; 45 L. T. 464; *Manby v. Manby*, 3 Ch. D. 101; but see *Crooks v. Crooks*, 4 Gr. at p. 619. The judgment, however, does not prevent the Statute from running in favour of debtors to the estate: *Archer v. Severn*, 12 Ont. 615; 14 Ont. App. 723; and a judgment for the administration of the estate of the owner of the equity of redemption, does not stop the running of the Statute in favour of a mortgagee in possession: *Crooks v. Watkins*, 8 Gr. 340.

An application by a partnership creditor was refused, where it was shewn that the separate estate of the deceased was insufficient to pay his separate creditors: *Re Barnard, Edwards v. Barnard*, 32 Ch. D. 447; 55 L. T. 40. In *Armstrong v. Armstrong*, 18 P. R. 55, the plaintiff being out of the jurisdiction, and his probable interest in the estate appearing to be \$273, he was absolved from giving security for costs, he agreeing that his share in the estate should be charged with any costs he might be ordered to pay.

Statute of
Limitations.

Statute of Limitations.—A judgment for administration of the estate of a deceased person operates as from its date, not merely in favour of a creditor but in favour also of the estate, i.e., of the personal representative and other creditors, when the estate is insolvent, in regard to a set-off against the creditor's demand, and the judgment prevents the further running of the statute (21 Jac. 1, s. 16), against the set-off: *Re Ballard*, 88 L. T. Jour. 379. The judgment also enures to the benefit of residuary legatees, and makes a fresh starting point in their favour against the running of the Statute of Limitations: *Uffner v. Lewis*, 27 Ont. App. 242.

The personal representative is not bound to set up the Statute of Limitations as a bar to a creditor's claim: *Lewis v. Rumney*, L. R. 4 Eq. 451; and if the personal representative, and such of the parties beneficially interested as are parties to the suit, or who have come in under the judgment, do not set up the Statute, the Court is not bound, on behalf of absent parties beneficially interested, to disallow claims against the estate which are barred by the Statute: *Alston v. Trollope*, L. R. 2 Eq. 205. But although the personal representative may refuse to set up the Statute as against the claim of a creditor of the estate, yet any party interested in the estate, whether as creditor, legatee, or next of kin, may set it up as a bar to the claim: *Shewan v. Vanderhorst*, 1 R. & M. 352; *Re Wenham, Hunt v. Wenham*, 1892, 3 Ch. 59; 67 L. T. 648; and after a judicial decision that a claim is barred by the Statute of Limitations, if the personal representative pay the claim, it will be a *devastavit*: *Midgley v. Midg-*

ley, 1893, 3 Ch. 282; 69 L. T. 241. But a trustee or executor cannot be compelled by a beneficiary to set up the Statute of Limitations as a bar to any debt which the trustee or executor has himself incurred, and for which the estate is liable: *Budgett v. Budgett*, 1895, 1 Ch. 202; 71 L. T. 632. Rule 944.

Though a personal representative may pay, or retain, debts barred by the Statute, though otherwise justly due, he cannot properly pay, or retain, a debt due under a promise which cannot be enforced by reason of its not being in writing under the Statute of Frauds: *Re Rowson, Field v. White*, 29 Ch. D. 358; 52 L. T. 825.

Where a cause of action accrues in the lifetime of the creditor, the Statute begins to run against him, and continues to run against his estate, notwithstanding there is no executor, or administratrix thereof; but where the cause of action does not accrue until after his death, then the time does not begin to run until there is a personal representative: *Grant v. McDonald*, 8 Gr. 468; *Stevenson v. Hodder*, 15 Gr. 570. A claim cannot be kept alive by any acknowledgment, or payment, by an executor *de son tort*: *Id.*, *Boatwright v. Boatwright*, L. R. 17 Eq. 71, and see *Ellis v. Ellis*, 1905, 1 Ch. 613.

A personal claim barred as to personal estate by the six years limitation may be preserved by a charge of debts on land as against real estate, so as to become liable to be barred only after ten years: *Re Stephens, Warburton v. Stephens*, 4 Ch. D. 39; R. S. O. c. 133, s. 23, and see *Barnes v. Glenton*, 1898, 2 Q. B. 223; 1899 1 Q. B. 885; 80 L. T. 606.

Where a contract for payment of money at a future time provides that in default of payment of interest for 21 days, at any time, the principal may be called in, the Statute will begin to run as against the principal money from the time when it might have been first called in under such provision, where there has been no subsequent payment: *Reeves v. Butcher*, 1891, 2 Q. B. 509; 65 L. T. 329.

A personal representative cannot set up his own *devastavit* and claim that the Statute of Limitations bars any claim against him by reason of such *devastavit*; but if he is sued for a *devastavit*, he may rely on the Statute as a bar: *Re Hyatt, Bowles v. Hyatt*, 38 Ch. D. 609; 59 L. T. 297.

Staying Proceedings.—As to staying a creditor's action when an administration judgment has been granted, see *Re Langtry*, 18 Gr. 530; *Re Henderson*, 26 Gr. 297; *Bailey v. Monteith*, 3 C. L. T. 500; *Henderson v. Maxwell*, 19 L. R. 1r. 225; *Monteith v. Merchants Bank*, 4 C. L. T. 41; *Harrison v. Stubb*, W. N. 1878, 79; *Re Tims*, W. N. 1878, 141; and see *Doner v. Ross*, in note to Rule 950; and as to staying proceeding on the administration judgment, see Rule 955 (b). Staying creditor's action after administration.

In *Re Womersley*, 29 Ch. D. 557, the Court refused to restrain a creditor who had recovered judgment previously to the administration order, from proceeding against the executor personally.

Proceedings by a creditor may be stayed on the application of any person interested in the estate, on payment of his claim and costs: *Fitten v. Dawson*, 3 Chy. Ch. 461; *Re Henderson*, 26 Gr. 297; 15 C. L. J. 132.

Where some defendants in an administration action by a creditor offered to satisfy the plaintiff's claim and the costs of the action, the Court refused to stay proceedings unless the rights of an infant defendant were provided for: *Clegg v. Clegg*, 17 L. R. 1r. 118.

Rule 944.

After judgment for administration, a creditor cannot, in an action for trespass brought against him by the personal representative, counter-claim for a debt due by the deceased to him: *Monteith v. Walsh*, 10 P. R. 162; 20 C. L. J. 71.

Applications for administration by legatees, or next of kin, cannot be made until lapse of a year from death.

Legatees, Next of Kin, etc.—Applications by legatees, or next of kin, for administration cannot be made until the lapse of a year from the death of the deceased: see R. S. O. c. 335, s. 4; *Slater v. Slater*, 3 Chy. Ch. 1; *Fixian v. Westbrooke*, 19 Gr. 461; *Grant v. Grant*, 9 P. R. 211; but see *contra*, *Wallis v. Wallis*, 9 Ir. Chy. 511; *Prosser v. Mossop*, 29 W. R. 439, which were not followed in *Re Morley*, *Tucker v. Morley*, September, 1882, by Proudfoot, J. When the action is brought unnecessarily, the legatee may be ordered to pay the costs of all parties; *Re Woodhall*, *Garbutt v. Hewson*, 2 Ont. 456. Whenever a legatee, if alive, may apply, his personal representative, in case of his death, may also apply: *Simpson v. Horne*, 28 Gr. 1. As to parties to an application by legatees, see *Rule 203*, and note *supra*, p. 364. The fact that legatees applying for an administration judgment dispute the claim of the personal representative to be a creditor of the estate is no ground for refusing the application: *Re Bagwell*, *Anderson v. Henderson*, 17 P. R. 100.

Where a legatee is a debtor to the estate, the personal representative may set off the debt against his legacy *pro tanto*, notwithstanding that the debt may be barred by the Statute of Limitations: *In re Taylor*, *Taylor v. Wade*, 1894, 1 Ch. 671; 70 L. T. 556; 8 R. 186.

Where land is devised subject to the payment of an annuity, so long as the annuity is promptly paid the annuitant cannot claim to have the land sold: *Re Potter*, 50 L. T. 8; and where a will creates a life estate in chattels, the executor is discharged when he hands over the chattels to the tenant for life: the latter, and not the executor, then becomes liable to the remainderman: *Re Munsie*, 10 P. R. 98; 20 C. L. J. 112.

Administration was refused on the application of a legatee whose claim, including interest on his legacy, only amounted to \$28, notwithstanding that it was alleged that other legacies remained unpaid, which amounted to a considerable amount: *Reynolds v. Coppin*, 19 Gr. 627; and see *Re Johnston*, *Johnston v. Hogg*, 25 Gr. 261.

The fact that the estate was small, and that no misconduct was imputed to the executors, and that it was inadvisable to incur expense, was held to be no ground for refusing the application of a legatee for administration: *Re Falconer*, 1 Chy. Ch. 273. Where, however, the executor swore that the personal estate did not exceed \$50, the Court, before granting the order, required the applicant, who was one of the residuary legatees, to file an affidavit stating that he had reason to believe, and did believe, that the result of the proceedings would shew a substantial balance to be divided among the legatees: *Foster v. Foster*, 19 Gr. 463; and see *Westbrook v. Browett*, 17 Gr. 339; *Shaw v. Freedy*, 8 C. L. J. 136; *Gilbert v. Braithwaite*, 3 Chy. Ch. 413.

Infants.—An application for administration under this *Rule* may probably still be made on behalf of an infant by his next friend: see formerly *Re Hill*, 10 C. L. T. 87; but see *Rule 948* and note, which perhaps, however, applies only to applications under *Rule 947*. It has been granted on the mere suggestion that it would be for the infant's benefit: *Re Wilson*, *Lloyd v. Tichborne*, 9 P. R. 89; but

where the ground of motion was that strangers had got possession of most of the estate, an order was refused, there being no allegation that the executor refused to account, or was colluding, and the Court thought he ought to apply for the order if it were necessary: *Re Dearing, Mitchell v. Dearing*, 12th June, 1882, Proudfoot, J.; see also *Re Blake*, 20 Ch. D. 913. Rules 945, 946.

An administration suit should not be instituted on behalf of infants, where the object is simply to obtain an allowance for their maintenance out of the estate, which can be as readily got by application under *Rule 960, et seq.*: *Feurick v. Feurick*, 20 Gr. 381; *Goodfellow v. Rannie*, *Ib.*, 425.

Where the guardian *ad litem* of an infant defendant had made no objection to the unnecessary proceedings, no costs were given either to the executors or the guardian, of such proceedings: *Springer v. Clarke*, 15 Gr. 664.

Where the estate in question is small, a suit for administration should not be brought until all reasonable means of avoiding the suit have been exhausted; and where a next friend of an infant brought a suit for administration, without having taken steps to avoid litigation, and the suit afterwards appeared to have been unnecessary, he was ordered to pay the costs of the suit: *Hutchinson v. Sargent*, 17 Gr. 8; *McAndrew v. Laflamme*, 19 Gr. 193; *Moodie v. Leslie*, 12 Gr. 357; and see *Re Johnston*, 25 Gr. 261; *Carroll v. Carroll*, 23 Gr. 438; *Re Blake*, 20 Ch. D. 913. Administration, when estate of trifling amount.

945. The notice of motion shall be served upon all necessary parties, including the executor or administrator, 14 clear days before the day named for hearing the application, and shall be according to Form No. 59. *Con. Rule 966.* 14 days' notice of motion.
Form of notice.

Taken from Chy. O. 468, 552, 561.

For Form No. 59, see H. & L. Forms, No. 1327.

Where the administration of the realty is sought, notice must be given to the heirs, or devisees, or one or more of them: *Rule 951*; unless under *The Devolution of Estates Act* the personal representative also represents the realty: see *supra*, p. 1188; *Tausen v. Clyde*, 31 Out. 579; adult next of kin and legatees need not be served with the notice of the motion, but they must be served with an office copy of the judgment, as prescribed by *Rule 263 (3)*; see note to that *Rule*; but infant heirs, devisees, next of kin or legatees, must be made parties to the application before judgment: see *Rule 948*. Heir or devisee, when to be served.

Where infants are to be served with notice of the motion, a guardian *ad litem* must be appointed to them. This is effected by serving the Official Guardian *ad litem* with the notice of motion: see *Rule 152*; only one copy of the notice of motion need be served on him, no matter how many infant defendants there may be. Guardian *ad litem* to infant defendants, how to be appointed.

946.—(1) Upon proof of service of the notice of motion, or on the appearance in person, or by his solicitor or counsel of the executor or administrator, and such other necessary parties, if any, and upon proof by affidavit of such other matter, if any, as may be required, the Court or Judge may Upon proof of service of notice or on appearance of personal representative, etc., and

Rule 947. award judgment for the administration of the estate of the deceased. Con. Rule 967.
 adminis-
 tration may
 be granted.

(2) The judgment may be according to the Forms 156 or 157, as may be necessary. *New.*

See Chy. O. 469.

For Forms 156 and 157, see H. & L. Forms, Nos. 838 and 839.

The affidavit on which the application is founded should be filed with the proper officer, before the notice of motion is served.

Evidence
 in support,
 how ob-
 tained.

The affidavits should establish the facts and circumstances necessary to entitle the applicant to the administration. As to obtaining oral evidence in support of the motion, see *Rules* 490-492; see further as to evidence required, *Rule* 944, note, *supra* p. 1188. A commission may be issued after notice of motion served, for the purpose of obtaining evidence in support of the motion: *Farrell v. Cruickshank*, 1 Chy. Ch. 12. The award of judgment for administration is not in all cases *ex debito justitiæ*, but is in some cases discretionary; and where no good result is likely to accrue, judgment may be refused: *In re Ryan*, 32 Ont. 224, and see *Rule* 954.

Entry of
 judgment
 for admin-
 istration.

The judgment is to be drawn up and entered, as required in the case of other judgments: see *Rule* 635. Where any preliminary question has to be determined, as has been already pointed out, the Court will generally require an action to be brought: see *Rule* 944, note, *supra*, p. 1185.

The reference should be *prima facie* directed to the Master of the county where the person whose estate is to be administered resided: *Thompson v. Fairbairn*, 10 P. R. 533; *Armstrong v. Armstrong*, 18 P. R. 55.

Adult per-
 son may
 apply to
 Local Mas-
 ter for ad-
 ministration
 of deceased
 person's
 estate.

947.—(1) An adult person entitled to apply, under *Rules* 944 to 950, for a judgment for administration may apply to the Master in the County town of the County (other than the County of York) where the deceased person, whose estate is to be administered resided at the time of his death; and the Master may, subject to *Rules* 945, 946, 948, 949 and 951, award judgment for administration according to Form 156. Con. Rule 972.

Opposed
 motions
 to come
 before a
 Judge.

(2) A Local Master shall not entertain the motion for judgment where the same is opposed, but the same shall be adjourned to come before a Judge of the High Court in Chambers. *New.*

Master can
 not enter-
 tain appli-
 cation by
 infants.

The jurisdiction of the Local Masters under this *Rule* is confined to applications made by adult persons: where an administration of an estate is sought on behalf of an infant, or where the person whose estate is to be administered died in the County of York, the application must be made in Chambers at Osgoode Hall under *Rules* 944-946; *Re Hill, Hawse v. Hawse*, 10 C. L. T. 87; or in some cases

It may be necessary to commence an action by writ for that purpose. **Rules 948, 949.**
 Where the application is made by persons claiming as creditors, or as specific, pecuniary, or residuary legatees, or next of kin, notice must be served on the personal representative of the deceased person whose estate is sought to be administered; and where an administration of the realty is required, unless the applicant himself be entitled to some interest therein, some one or more of the heirs or devisees interested therein, must be served with notice of the application, unless under *The Devolution of Estates Act* the personal representative sufficiently represents the estate: *Rule 951*; and see *supra*, p. 1188; where infants are interested they must in all cases be notified by service of the notice of motion on the Official Guardian *ad litem*: see *Rules 948, 152*.

Personal representative, when to be served

Where the application is opposed it must be adjourned to come before a Judge, and the Judge may direct an action to be brought by writ: see *Re Underhill*, 33 C. L. J. 40; 17 C. L. T. 9.

As to who may apply, and the persons to be served, and evidence required on the application, see notes to *Rule 944*.

For form of judgment on applications under this *Rule*, see Form No. 156 (H. & L. Forms, No. 838).

The judgment must be entered in the same way as a judgment in an action: *Rule 635*.

948. A judgment for the administration of an estate in which an infant is interested shall not be made until the infant is represented by the Official Guardian. *Rules 13 Sept., 1890, 1910.*

Representation of infants.

This *Rule* extends to all cases of administration either of real or personal estate, or of both.

The Official Guardian *ad litem* must be served with the notice of motion: *Rule 152*, and only one copy thereof need be served, no matter how many infant parties there may be. The notice of motion should, of course, be directed to the several infants interested, by name.

949. Special directions touching the carriage or execution of the judgment may be given as may be deemed expedient; and in case of applications by two or more persons, or classes of persons, judgment may be granted to one or more of the claimants as may seem just; the carriage of the judgment may be subsequently given to other persons interested. *Con. Rule 968.*

Special directions may be given respecting carriage of order, etc. Carriage of order may be subsequently changed.

Taken from Chy. O. 470.

Where two or more applications are made by different persons under this *Rule*, only one judgment for administration should be granted; and the Court may, determine which of the applicants shall have the carriage of it, the rule being to give the conduct of the proceedings *ceteris paribus* to the party most interested in prosecuting them properly and economically: *Perrin v. Perrin*, 3 Chy. Ch. 452; *Re Adams*, *Adams v. Muirhead*, 6 P. R. 283; *Re Draggan*, 8 P. R.

Several applications - only one judgment should be granted.

Rule 950. 330; *Re Prime*, 48 L. T. 208; *Penny v. Francis*, 7 Jur. N. S. 248; but see *Re Swire*, *Mellor v. Swire*, 46 L. T. 437. The conduct was given to the first applicant in *Re West*, *West v. Falkiner*, 7 C. L. T. 85. The carriage of the judgment may be changed in case of delay: *Patterson v. Scott*, 4 Gr. 145; and see *Rules* 657, 663, and notes. As between a separate creditor and a partnership creditor of the person whose estate is to be administered, the conduct of the proceedings is given to the former: *Re Meftac*, *Foster v. Davis*, 25 Ch. D. 16; 48 L. T. 544.

The conduct of the reference under a judgment obtained by a personal representative may, for good cause, be transferred to a beneficiary named as a defendant, although not actually served with notice of the application on which the judgment was pronounced: *Re Curry*, *Curry v. Curry*, 17 P. R. 69.

An acceding party should not, as a rule, have the carriage of the proceedings, especially where there is a competition between him and beneficiaries as to who should be first in obtaining an administration order: *Id.*

See also notes to *Rule* 263 (2).

Order may be obtained by personal representative.

950. An executor or administrator may apply for judgment for administration. Con. Rule 969.

Taken from Chy. O. 471.

A personal representative may apply *ex parte*: *Re Dunlevy*, Order Book 11, fo. 778; *Re Ette*, 6 P. R. 159; *Re Bromley*, before Blake, V.-C., 28th January, 1878; unless infants are interested, in which case the application must be made on notice to the Official Guardian *ad litem*: *Rules* 948, 152.

Where the application is made by the personal representative *ex parte*, the proceedings should be entitled "In the matter of (*the Estate*)," and no persons should be named as plaintiffs or defendants: *Re Curry*, *Curry v. Curry*, 17 P. R. 69. Where no sufficient ground was shewn for making the order, it was refused: *Barry v. Barry*, 19 Gr. 458; and it is clear that the personal representative cannot apply for administration merely to obtain an indemnity by passing his accounts: *White v. Cummins*, 3 Gr. 602. *Cole v. Glover*, 10 Gr. 392.

Deficiency of assets, how far it justifies application by personal representative.

How far a deficiency of assets justifies a personal representative in applying for administration is the subject of some doubt. In 1874 orders were made on that ground, on the application of the personal representative, in *Sweetnam v. Sweetnam*, 6 P. R. 149, and *Re Ette*, *Id.*, 159. But in the subsequent cases of *Re Shipman*, *Wallace v. Shipman*, 24 Gr. 177; Blake, V.-C., said that the reasons which existed for making the order in *Re Ette* no longer held good, and that the personal representative, on being sued at law, could set up the deficiency of assets, and claim administration under *The Administration of Justice Act*. That Act, however, was in force when *Sweetnam v. Sweetnam* and *Re Ette* were decided. In 1877 in *Marsh v. Marsh*, 7 P. R. 126, Spragge, C., held that the course pointed out in *Re Shipman* should be followed, and refused the order; and in *Re Jack*, *Jack v. Jack*, 13 C. L. J. 358, Proudfoot, V.-C., did the same. On the other hand, in *Re Bromley*, before Blake, V.-C., 28th January, 1878, the order was granted, the applicant having been sued by one creditor in the Division Court, and another creditor having written to him, urging him to obtain the order.

As to the grounds justifying a personal representative in obtaining **Rule 951**, administration, see further *Rule 203*, p. 369.

It is the duty of an executor, on a deficiency of assets to pay all creditors *pari passu*; and even his right of retainer cannot be set up so as to give his own debt any preference, but the lien of any creditor on the real or personal estate, created in the lifetime of the deceased, is not to be prejudiced by this rule. *R. S. O. c. 129, s. 34; Meyers v. Meyers*, 20 Gr. 185; *Willis v. Willis*, 20 Gr. 206; *Re Ross*, 20 Gr. 385; foreign creditors are entitled to the same rights as creditors living within the jurisdiction: *Re Klabe, Kunze v. Gelebrecht*, 28 Ch. D. 175; 21 C. L. J. 155; *Milne v. Moore*, 24 Ont. 456; a creditor who has recovered execution against the executor has no priority: *Bank of British North America v. Mallory*, 17 Gr. 102; and debts due by the deceased as trustee form no exception to the rule: *Brock v. Cameron*, 25 Gr. 363. And it would seem, notwithstanding what is said by Mowat, V.-C., in *Doner v. Ross*, *supra*; that creditors who have been overpaid may be compelled to refund, on the application of a creditor who has not received his due proportion: *Chamberlain v. Clarke*, 1 Ont. 135; 9 Ont. App. 273. But a creditor's claim against a legatee or creditor who has been overpaid, to compel him to refund, will be barred in six years from the time of the overpayment, notwithstanding that the creditor's claim against the testator's estate is not barred: *Blake v. Gale*, 31 Ch. D. 196; this case was subsequently affirmed by the Court of Appeal, however, on the ground that the creditor had acquiesced in the overpayment: 55 L. T. 234; as the circumstances under which beneficiaries who have been paid more than their distributive share can be compelled to refund at the instance of other beneficiaries: see *Re Winslow, Frece v. Winslow*, 45 Ch. D. 249.

Where an executor improperly institutes a suit for administration he may be ordered to pay the costs of it: *Sullivan v. Sullivan*, 16 Gr. 94; or he may be refused his costs and commission: *Graham v. Robson*, 17 Gr. 310; and where he improperly renders a suit necessary by a creditor, he may also be ordered to pay the costs of it: *McGill v. Courtice*, 17 Gr. 271.

Where the personal representative obtains the judgment, the conduct of the reference may be transferred to a beneficiary: *Re Curry, Curry v. Curry*, 17 P. R. 63.

The judgment may be awarded for the purpose of preventing creditors from bringing actions, and the proceedings thereon may be stayed if thought proper: see *Rule 355*.

An executor, who has suffered a creditor of the estate to recover judgment against him by default of appearance, cannot, on subsequently obtaining a judgment for administration, restrain the creditor from proceeding on his judgment, even though there be a deficiency of assets: *Doner v. Ross*, 19 Gr. 229; and see *Hutchinson v. Edmison*, 11 Gr. 477.

951. Accounts or inquiries in respect of the real estate shall not be directed, unless notice of the application has been given to the persons interested therein, or in whom the same is vested, or one or more of them. Con. Rule 970.

Taken from Chy. O. 472.

No accounts to be ordered of realty, unless help or device served.

Rule 952. This *Rule* is merely declaratory of what has before been the practice of the Court: *Eccles v. Lowry*, 23 Gr. 172, per Proudfont, V.C.

In case of intestacy, one or more of heirs must be notified.

In case of an intestacy of a person who died before 1st July, 1880, the heir, or one or more of the heirs, must be a party, or parties, to the application, either as plaintiff, or defendant: *Tiffany v. Tiffany*, 9 Gr. 158; but it is not necessary, where there are several, that all should be joined as defendants: *English v. English*, 12 Gr. 441; and in case of a person who died before 1st July, 1880, leaving a will, it is sufficient to make one, or more, of the devisees, a party, or parties: *Tiffany v. Thompson*, 9 Gr. 244; where the executor was also devisee of part of the realty, it was held that he sufficiently represented the other parties interested in the realty: *Stewart v. Hunter*, 14 Gr. 132; where a devisee is a party, it is not necessary that the heir should be joined: *Fennig v. Priestman*, 1 Gr. 133.

Or in case of testacy, one or more of devisees.

On deficiency of assets, heir entitled to costs as between solicitor and client.

Where, in an administration action, it is necessary to make the heir a party defendant, he is entitled to be paid his costs as between solicitor and client, in priority to the costs and claims of creditors, although the estate may be insufficient for the payment of the debts: *Hartrick v. Quigley*, 21 Gr. 287; *Tardieu v. Howell*, 2 Gr. 530.

In the case of persons dying since the 1st July, 1880, the personal representative, who has obtained administration of both real and personal estate, sufficiently represents the real estate: see R. S. O. c. 59, s. 61; *Ib.* c. 127, s. 4; but see *supra*, p. 1188.

A judgment for the administration of the realty alone will not be granted, unless the personal estate has been previously administered: *Rossell v. Morris*, L. R. 17 Eq. 20; *Re Armour*, *Moore v. Armour*, 10 P. R. 448; but see *Deg v. Dey*, 2 Gr. 149.

Parties to be served with judgment.

Although it is not necessary to serve all the parties interested in the realty with notice of the application for administration, they must, nevertheless, all be served in the Master's office with an office copy of the judgment as prescribed by *Rule 203*; see note to that *Rule*; parties who are not served will not be bound by the accounts: *Norris v. Bell*, 9 Gr. 23; *May v. Newton*, 34 Ch. D. 347; *Uffner v. Lewis*; *Boys Home v. Lewis*, 27 Ont. App. 242. A party improperly served may move to set aside the service: *Re Symons*, *Betts v. Betts*, 54 L. T. 501; and see *Rule 203* (3).

Accounts of realty may be directed by supplemental order.

952. Where inquiries have been directed in respect of the personal estate only, the Court or Judge may afterwards, upon notice being given to persons interested in the real estate or in whom the same is vested, or to one or more of them, make a supplemental order in respect of the real estate, upon such terms as may seem just. Con. Rule 971.

Taken from Chy. O. 473.

Where administration of required, realty order may be made in first instance.

It is now customary, whenever an administration of the realty is likely to be required, to serve all the parties necessary to be served, in order to obtain an administration of both realty and personalty, and a judgment is then awarded for the administration of both the realty and personalty. And whenever the realty is the primary fund for the payment of debts, it is absolutely necessary that this should be done.

As to the parties to be notified in order to obtain an administration of the realty, see note to preceding *Rule*, and *Rule 944*, and notes.

953.—(1) Where judgment for administration is granted **Rule 953.** according to Form 156, the Master to whom the matter is referred shall proceed to administer the estate in the most expeditions and least expensive manner, and in doing so, shall make amongst other inquiries, and take amongst other accounts, the inquiries and accounts mentioned in Form 157, or such of them as may be applicable and necessary. *New.* See Con. Rule 972.

For Forms 156 and 157, see D. & L. Forms, Nos. 838 and 839.

(2) The Master shall, under any such reference, have power to deal with both the realty and personalty of the estate, the subject of administration, and shall dispose of the costs and finally wind up all matters connected with the estate, without any further directions, and without any separate, interim, or interlocutory reports, or orders, except where the special circumstances of the case absolutely call therefor. Con. Rule 973.

(3) All moneys realized from the estate shall forthwith be paid into Court, and subject to Rule 47, no moneys shall be distributed or paid out for costs or otherwise, without an order of a Judge of the High Court in Chambers or the Court, and on the application for an order for distribution, the Judge or the Court may review, amend, or refer back to the Master his report, or make such other order as may seem just. Con. Rule 974.

Based on Chy. O. 638, 639.

In simple cases, where all parties interested are represented before the Master, it would be possible, under this *Rule*, for the Master to defer making any report until the accounts were taken and the estate realized, and then by one general report to wind up all matters connected with the estate, and this course is pursued wherever practicable.

Under *Rule 349* the Master has power to give any special directions he may think proper respecting the carriage of the judgment, where there are conflicting claims, and also to transfer its carriage from one party to another, if occasion should require; or to transfer the conduct of the reference to any party he may find entitled: see *In re Curry, Curry v. Curry*, 17 P. R. 69; the rule being to give the conduct of the proceedings *ceteris paribus*, to the party most interested in prosecuting them properly and economically: *Perrin v. Perrin*, 3 Chy. Ch. 452; *Re Draggan*, 8 P. R. 330; and see *Re Adams, Adams v. Muirhead*, 6 P. R. 283; *Lambier v. Lambier*, 9 P. R. 422; *Re Prime*, 48 L. T. 208; see, however, *Re Swire, Mellor v. Swire*, 46 L. T. 437; *Townsend v. Townsend*, 23 Ch. D. 400; 48 L. T. 694; *Re West, West v. Falkiner*, 9 C. L. T. 85, where it was held that the party first originating proceedings was entitled to the conduct: *sed vide, In re Curry, supra*.

Rule 963. The administration of two estates may be consolidated, where intimately connected: *Re Adams, Adams v. Muirhead*, 6 P. R. 283.

Rule intended to do away with further directions in administration suits.

The object of this *Rule* is to do away with the necessity of a hearing on further directions in administration suits; the judgment granted by the Master covers all those directions which, by the former practice, were usually made on the hearing on further directions, except the order for payment of the fund out of Court: e.g., It directs any balances found in the hands of accounting parties to be paid into Court, it also authorizes a sale of the land, the payment of the purchase money into Court, the execution of conveyances by all proper parties, and empowers the Master also to execute such conveyances for infants, who are incapable of executing the same themselves: see Form 156, H. & L. Forms, No. 838; *Rules* 716, *et seq.* The Master has also power to make any order, or report, which may be necessary for completely winding up the estate, or protecting the rights of the parties to the suit. Where the executor is insolvent a receiver may be appointed: *Harrold v. Wallis*, 9 Gr. 443; and it would seem that a receiver may be appointed, when necessary, in proceedings commenced under *Rules* 944, 947; *Re Francke*, 58 L. T. 365; but any motion for a receiver, or an injunction would have to be made to the Court: see Ind. Act, s. 58 (9), and *Rule* 1091; as to the rights of a specific devisee or legatee in regard to property taken possession of by a receiver or manager, see *Re Day*, 1898, 2 Ch. 504; 79 L. T. 436.

Judgment, form of.

Injunction or receiver, how obtained.

Separate orders and reports only to be made when essential.

The words "without any separate Interim, or interlocutory reports, or orders, except where the special circumstances of the case absolutely call therefor," indicate that it is only unnecessary orders, or reports, that are dispensed with, but that so far as such interlocutory reports, or orders, may be essential to the winding up of the estate, the Master is to have power to make them. Under *Rule* 677, a party directed by the Master to bring in any account, or do any other act, is to be held bound to do the same in pursuance of the direction of the Master without any warrant, or written direction, served for that purpose. The provisions of that *Rule*, of course, only apply when the party attends the Master in person or by solicitor, and has notice of the direction.

Master not to proceed *ex parte*.

The Master should not proceed with the reference *ex parte*, even though the defendant did not appear on the motion for judgment: *Jackson v. Matthews*, 12 Gr. 47; *Robinson v. Whitcombe*, 20 Gr. 415; and see *Rule* 658.

Accounts which may be taken under administration judgment.

Under an ordinary administration judgment, the Master may take an account of timber cut with which a defendant is chargeable: *Stewart v. Fletcher*, 18 Gr. 21; and may also, without any special directions, take evidence, and report the facts, as to payments made by executors for the maintenance and education of infant beneficiaries: *Stewart v. Fletcher*, 16 Gr. 235; and may also take the accounts on the footing of wilful neglect and default: see *supra*, *Rule* 944, and notes; and when the widow of the deceased is found a debtor to the estate, her indebtedness may be set off against her claim for past and future dower: *Williams v. Reynolds*, 25 Gr. 49; and a debt due by a legatee to the estate may be set off *pro tanto* against his legacy: *In re Taylor, Taylor v. Wade*, 1894, 1 Ch. 674, 70 L. T. 556; 8 R. 186. The Master would have similar powers under a judgment granted by himself; he would also be entitled to make all proper allowances to executors, administrators, and trustees, by way of compensation for their services.

Compensation to executors, etc., may be allowed.

As to compensation to be allowed executors and trustees, see notes to *Rule* 667, *supra*, p. 897.

The executor's claim for compensation is prior to the claims of Rules creditors: *Harrison v. Patterson*, 11 Gr. 195; and a trustee's claim 954, 955. for compensation must be satisfied before a conveyance of the trust estate to the *cestui que trust* will be ordered: *Life Association of Scotland v. Walker*, 24 Gr. 203. Compensation prior to right of creditors.

The only order which the Master appears to be precluded from making in suits for administration, in which he has awarded judgment, is that for the payment out of the money in Court; but the Master should state the amount of the commission, and what he finds would be a proper apportionment thereof among the different solicitors under *Rule 1140*, and also the amounts he finds payable to creditors and other beneficiaries respectively. Order for payment out of Court cannot be made by Master.

The order for payment is to be made by a Judge, or the Court. Application for this order is to be made in Chambers on a Tuesday or Friday: *Rule 99*. The application is to be made upon notice; and it would seem that all persons who, under the former practice, would be entitled to notice of a hearing on further directions, would be entitled to notice of such an application. Application to Judge, how made.

Where a party is not satisfied with the findings of the Master, the Judge, on any motion for distribution, may, on notice being given by the complaining party to the other parties, review the Master's decision without an appeal, if the matters complained of can be investigated and disposed of on reading the pleadings (if any), and judgment, and the Master's report without reference to the evidence; otherwise an appeal in the usual way under *Rule 760, et seq.*, is necessary: *Kendrick v. Kendrick*, 9 C. L. T. 310. When an appeal from Master necessary.

954. It shall not be obligatory on the Court or Judge or Local Master to pronounce or make a judgment or order, whether on any summary application or otherwise, for the administration of any trust or of the estate of any deceased person, if the question between the parties can be properly determined without such judgment or order. *New.* Court, etc., not bound to order administration.

Taken from Eng. Rule (1883) 772: see *Campbell v. Gillespie*, 1900, 1 Ch. 225; *Re Ryan*, 32 Ont. 224.

Administration was refused in *Re Ghent*, 5 O. W. R. 148, but an order was made for payment to the applicant a legatee of a sum on account of his share under the will.

955. In any action or proceeding for the administration or execution of trusts by a creditor or beneficiary under a will, intestacy or instrument of trust, where no accounts, or insufficient accounts have been rendered, the Court or a Judge may in addition to any powers already existing, Orders other than for administration which may be made.

- (a) Order that the executors, administrators or trustees, shall render to the plaintiff or applicant a proper statement of their accounts, with an intimation that if it is not done, they may be made to pay

Rule 936.

the costs of the proceedings, and the Court or Judge may direct the action or proceeding to be stayed or to stand over in the meantime, as may seem just;

- (b) Where necessary, to prevent proceedings by other creditors, or by beneficiaries, make the usual judgment for administration, with a provision that no proceedings are to be taken thereunder, without the leave of the Court or a Judge. *New.*

Compare Eng. (1883) R. 772 (a).

After a judgment for administration has been granted, creditors will ordinarily be restrained from bringing actions to enforce their debts against the personal representative: see *Re Langtry*, 18 Gr. 530, and following cases cited in note to *Rule 944, supra*, p. 1191.

The effect of clause (b) of this *Rule* is to enable the Court in a proper case to stay actions by creditors by granting a judgment for administration, and at the same time to stay proceedings on the judgment.

4. PARTITION.

Adult party
may apply
to Local
Master for
partition
on motion.

936.—(1) An adult person entitled to compel partition of land, or any estate or interest therein may, on fourteen clear days' notice of motion to one or more of the persons entitled to a share therein, apply to the presiding Judge in Chambers, or to the Master in the County (other than the County of York) in which the land lies, for partition or sale; and the Judge or Master may award judgment for partition or sale or as may seem just, according to form No. 158.

For Form 158 see H. & L. Forms No. 887.

The Form 158 must be read in the light of legislation by which the Court has been given power to order a sale, and its meaning is that a partition is to be made unless it is shewn by those who ask for a sale, that partition cannot be made without injury to the interests of the owners: *Ontario Power Co. v. Whittier*, 7 O. L. R. 198.

Infants
interested
must be re-
presented
by official
guardian.

Proceed-
ings on
judgment
for par-
tition.

(2) Where an infant is interested, judgment shall not be awarded until he is represented by the Official Guardian:

(3) The Master shall proceed in the least expensive and most expeditious manner, for partition or sale, the adding of parties, the ascertainment of the rights of the various persons interested, the taxation and payment of costs, and otherwise:

(1) All moneys realized shall forthwith be paid into Court, **Rule 986** and, subject to Rule 47, no moneys shall be distributed or paid out for costs or otherwise, without an order of a Judge of the High Court in Chambers or the Court; and on the application for an order for distribution, the Judge may review, amend, or refer back to the Master his report, or make such other order as may seem just. **Con. Rule 989, amended.**

Taken from Chy. O. 610.

This **Rule** is confined to the case of proceedings instituted by adult persons; where an infant institutes proceedings for partition, a writ must be issued: *Brace v. Brown*, 2 C. L. T. 311. This **Rule** extends the principle of **Rule 263** (1), to partition suits; formerly it was necessary to make all tenants or owners of the land in question parties to the bill; under this **Rule**, it suffices to name only one, or more of such persons; all other persons interested must be served with the judgment in the Master's Office: **Rule 263** (3), unless such service is dispensed with; an order dispensing with service must be obtained from the Master to whom the matter is referred: *Re Hyman*, 19 P. R. 217. As to parties who have not been heard of for 3 years, see R. S. O. c. 123, s. 16; a guardian may be appointed for them by a Judge in Chambers: *Re Hyman*, *supra*. Parties on whom service of a judgment is dispensed with are not bound by the proceedings; see note to **Rule 263**. The application cannot be made for the partition of an estate of a deceased person, until the lapse of one year from his death: R. S. O. c. 123, s. 8; *Grant v. Grant*, 19 P. R. 241. Where the interests are unequal, the person having the largest interest should, as a general rule, be notified of the application.

This **Rule** does not apply where it is necessary to add a defendant whose claim to share in the estate is contested, e.g., where a stranger is in possession claiming adversely to the plaintiff and his co-tenants, an action must be brought by writ: see *Macdonell v. McGillivray*, 8 P. R. 330; *Bennett v. Bennett*, 6 P. R. 145; *Young v. Wright*, 8 P. R. 198; *Re McWilliam*, 8 P. R. 746; 17 C. L. J. 80; *Hopkins v. Hopkins*, 9 P. R. 71; and where the defendant claimed to have acquired a title by possession in severalty to part and to have only an easement in the residue: *Strand v. Sun Oil Co.*, 7 O. L. R. 794; 8 O. L. R. 748. Where it appears that some preliminary question must be decided before it can be determined whether partition should be granted, the motion will be adjourned until after the trial of an action to be brought to determine such question: *Smith v. Smith*, 1 O. L. R. 491; but where the Master assumes to decide the preliminary question, his judgment is appealable: *scable*, under **Rule 767**; see *Strand v. Sun Oil Co.*, *supra*. And where after judgment for partition has been granted a question is raised as to the validity of an outstanding lease, it would seem that the Master has no jurisdiction to try it, but an issue may be directed by a Judge under **Rule 761**: *Re Rogers*, 11 P. R. 90.

Where the only defendant was the lessee for 7 years, of an undivided moiety, it was held that the parties interested were sufficiently represented to entitle plaintiff to a judgment for sale: *Johnson v. Hoops*, 78 L. T. 33.

A Local Master has no power to make an order for partition of lands out of his jurisdiction, i.e., his county, and if he does so his order is null and void, even as to lands within his county: *Nichol v.*

Money not to be paid out without order.

When infant plaintiff seeks partition, writ must be issued.

Summary application cannot be made, when any party claims adversely.

Rule 956. *Allenby*, 17 Ont. 275; but see *Rule 957*; and see *Jud. Act*, s. 57 (12).

Lands in County of York, or in several counties. Where the lands are situate in the County of York, or in more counties than one, the application for partition should be made to a Judge in Chambers. The jurisdiction, here conferred on a Judge in Chambers, is, apparently, from the wording of the *Rule*, not intended to be exercised by the Master in Chambers; and see *Rule 42* (9).

Where two or more judgments are granted for partition of different parts of the same person's estate, the proceedings may be consolidated under *Rule 957*.

Accounting parties to be made original defendants. Wherever an account is required from any person, such person should be made a defendant in the first instance, as it would seem that parties served with the judgment in the Master's office cannot be made to account thereunder: *Walker v. Seligmann*, L. R. 12 Eq. 152; *Hopper v. Harrison*, 28 Gr. 22; *Re Parkes*, 66 L. T. 151.

The plaintiff was formerly bound to allege, and, if it was disputed, to prove, his title, and under this *Rule* it will still be necessary that the affidavits in support of the application should establish the applicant's title, and it would also appear to be necessary to shew thereby the estates and interests of all other persons interested as joint owners. The existence of a discretionary power of sale in trustees, does not exclude the jurisdiction of the Court to order partition: *Bond v. Allen*, 48 L. T. 628; but a partition was refused in a case where the trustees were taking active proceedings to execute the power: *Re Dennis*, 14 Ont. 267.

Partition not granted of unpatented land. The Court will not decree partition of lands for which no patent has issued, neither will it decree a sale of such lands at the instance of the representatives of a deceased tenant: *Abell v. Weir*, 24 Gr. 464; *Cuthbert v. Cuthbert*, 11 Gr. 88, at p. 91; *Jenkins v. Martin*, 20 Gr. 611; but the Court may, in an action commenced by writ, make a declaratory judgment as to the rights of parties in unpatented lands, which, if the Crown is willing to act on the judgment of the Court, may have the effect of a partition: see *Prile v. Rodger*, 27 Ont. 320; *Bull v. Frank*, 12 Gr. 80, *sed vide*, *Brown v. West*, 1 O. 8, 287.

Tenant for life, or dowress, how far entitled to partition. A tenant for life of the whole estate is not entitled either to a partition or sale: *Fisken v. Ife*, 28 Ont. 595; *Gaskell v. Gaskell*, 6 Sim. 643; and see *Lalor v. Lalor*, 9 P. R. 455.

Mortgagees not entitled to partition. A tenant for life of a moiety is entitled to partition as against a tenant in fee of the other moiety: *Williams v. Williams*, 81 L. T. 162. A decree for partition was made at the suit of a dowress: *Harrison v. Bottrill*, before Blake, V.-C., 21st January, 1880; *Devereux v. Kearns*, 11 P. R. 452, overruling *Rodn v. Rodn*, 1 C. L. T. 546; but her right to partition is subject to judicial discretion, and it will only be granted when her dower cannot conveniently be otherwise set apart: *Fram v. Fram*, 12 P. R. 185. A dowress in the whole estate is not entitled to partition or sale: see *Fisken v. Ife*, *supra*; but where the dower is claimed out of an undivided share, the dowress would seem entitled to partition or sale, as the only way by which her claim can be properly ascertained and satisfied. A mortgagee of an undivided share, whose title has not been perfected by foreclosure or otherwise, has been held not to be entitled to partition: *Traie v. Smith*, before Spragge, C., 13th April, 1875; followed by *Meredith, J.*, in *Mulligan v. Hendershott*, 17 P. R. 227; and see *Laprade v. Seamen*, 8 Ont. App. 500; but in *Fall v. Elkins*, 9 W. R. 861, it seems to have been assumed that a mortgagee was entitled

to this relief: and see *Davenport v. King*, 49 L. T. 92; *Agar v. Fair-Rule* 955. *fax*, 2 W. & T. L. C. 7th ed. 181; as to whether a tenant in common who has mortgaged his share can have a partition without first paying off his mortgage, see *Gibbs v. Haydon*, 47 L. T. 184; it would seem not, if his mortgagee objects: *Sinclair v. James*, 1894, 3 Ch. 554; 71 L. T. 483. In this Province it would seem that he can, if his mortgagee does not object, and that his mortgagee should be made a party either in the first instance, or in the Master's office, but any additional costs so occasioned must be borne by the mortgagor: *McDougall v. McDougall*, 14 Gr. 297; *Cotton v. Banks*, 1893, 2 Ch. 22; 1894, 3 Ch. 544; *sed vide Belcher v. Williams*, 45 Ch. D. 510; 63 L. T. 673; a mortgagee who comes in and consents to a sale, is not entitled to either six months' notice or six months' interest: *Re Houston*, 2 Ont. 84; and see as to mortgages made since 1st July, 1888, R. S. O. c. 121, s. 67.

Tenant in common, whose share is mortgaged, may have partition.

Extra costs must be borne by his share.

A party wall held in common may be partitioned: *Mayfair Property Co. v. Johnston*, 1894, 1 Ch. 508; 70 L. T. 485.

A mortgagee having a mortgage affecting the whole land should not be made a party unless a sale is to be had, and he consents to its being made free from his mortgage: *Sinclair v. James*, 1894, 3 Ch. 554; 71 L. T. 483.

A partition or sale cannot be ordered as against a tenant for life of the whole estate on the application of those entitled in remainder: *Murcar v. Bolton*, 5 Ont. 164; *Rajotte v. Wilson*, 40 C. L. J. 702.

Not ordered against tenant for life of whole estate.

Where the plaintiff claimed as vendee of the equity of redemption of one of four tenants in common under a sale by the Sheriff, a decree for partition was set aside on appeal, on the ground that the interest was not saleable: *Wood v. Hurl*, 28 Gr. 146.

In determining whether a sale, or partition, should be directed, the Master will be guided by what is best for all parties interested: *Blusdell v. Baldwin*, 3 Ont. App. 6. When the property is not susceptible of partition, a sale should be directed: *Sterea v. Hunter*, 14 Gr. 741; but where partition can be made without injury to the interest of the owners it would seem that a partition ought to be made where any of the parties so desire: *Ont. Power Co. v. Chatter*, 7 O. L. R. 198.

the sale, when ordered.

The discretion exercised by a Judge in granting a partition or sale will not be interfered with by the Court of Appeal: *Re Dyer, Dyer v. Paynter*, 53 L. T. 744; but where the discretion is exercised by an officer of the Court having judicial functions his discretion may be reviewed: see *Bryant v. Reading*, 17 Q. B. D. 128; 54 L. T. 300; *Clench v. Dooley*, 56 L. T. 122.

Where the judgment is pronounced by a Local Master it is appealable under *Rule 767*: *Stroud v. Sun Oil Co.*, 7 O. L. R. 794.

The proceeds of an infants' share in the land would seem to descend on his death as real estate: *Re Norton*, 1900, 1 Ch. 101. See also R. S. O. 1897, c. 168, s. 8.

By this *Rule* the Master is empowered to award such a judgment as the Court of Chancery was accustomed to grant in partition suits, except the order for payment of the money out of Court: see *Rule 955* (4). Under this judgment an account of rents and profits may be taken, and a sum in gross may be allotted in lieu of dower, curtesy, or any other life estate, and all other usual and necessary accounts, and inquiries, may be taken and made, as the circumstances of the case may require.

Form of judgment

Rule 956. Under a judgment in the Form No. 158 (H. & L. Forms No. 887), the Master is to make partition unless it is shewn that it cannot be made without prejudice to the rights of some of the owners: *Ontario Power Co. v. Whittier*, 7 O. L. R. 198.

Service of judgment. All parties interested in the land who are not served with the notice of motion for the judgment, will have to be served with an office copy of the judgment: *Rule 659*; and they will be entitled to move to vary, or set it aside, as provided by *Rule 661*.

Execution creditors' claims are not kept alive merely by their being made parties in a partition action, and their executions will lapse unless kept duly renewed, at all events, until there is some judicial declaration of their right to a lien: *Macdonell v. Best*, 6 O. L. R. 18.

Accounts of rents and profits, etc. A tenant in common who has been himself in actual occupation of the whole estate cannot be charged with an occupation rent: *Henderson v. Eason*, 17 Q. B. 501; *Rice v. George*, 20 Gr. 221; *Re Kirkpatrick*, *Kirkpatrick v. Stevenson*, 10 P. R. 4; *Hill v. Hicken*, 77 L. T. 127, except in favour of an infant co-tenant: *Courcier v. Courcier*, 26 Gr. 307. He is, however, liable to account to his co-tenants for rents and profits received from third parties: *Goodenow v. Farquhar*, 19 Gr. 614; *Curtis v. Coleman*, 22 Gr. 561; and if he makes any claim for improvements made, or for prior incumbrances paid off, by him, he must submit to account for an occupation rent, otherwise he cannot be allowed them: *Rice v. George*, *supra*; *Rivet v. Desourdi*, 12 C. L. J. 203. But as against a mortgagee: *Hill v. Hicken*, *supra*, or an execution creditor of the tenant who has been in possession, the other tenants in common cannot charge his share with the excess of rents received by him, in priority to the mortgage, or execution: *McPherson v. McPherson*, 10 P. R. 140. Where a tenant in common is lessee of his co-tenant's shares and continues in sole possession after the expiration of the lease, he becomes liable to his lessor for use and occupation: *Leigh v. Dickson*, 12 Q. B. D. 194; 15 Q. B. D. 60; 50 L. T. 124; 52 L. T. 790. Only such improvements as are made by a tenant in common to prevent the estate going to ruin are recoverable: *Ib.*

Improvements, how to allot. Improvements made by a tenant in common before the tenancy in common becomes an estate in possession, *e. g.*, during a prior life estate, are not recoverable against his co-tenants: *Lushy v. Croxson*, 21 Ont. 255.

In making partition, those portions on which improvements have been made by any of the tenants in common should, as far as possible, be allotted to the parties by whom they were made; see *Wood v. Wood*, 16 Gr. 471.

As to the principle on which improvements made by a tenant in fee of a moiety should be allowed as against a tenant for life of the other moiety, see *Williams v. Williams*, 81 L. T. 163.

In making a distribution of purchase money derived from land held in common, a tenant in common who has made permanent improvements is entitled to be allowed therefor: see *Re Cook*, 1896, 1 Ch. 923; 74 L. T. 652.

Where a sale is directed in a partition action the Master should inquire as to incumbrances existing on the shares of the parties interested up to the time of sale, and not merely up to the commencement of the proceedings: *Robson v. Robson*, 10 P. R. 324; 20 C. L. J. 192. Such persons as have incumbrances should be made parties under *Rule 659*, and if not made parties they will not be bound by the proceedings: *R. S. O. c. 123, s. 21*.

As to the allowance of a sum in gross in lieu of dower: see R. S. O. Rules c. 168, s. 8, and c. 123, s. 50; and *Gleeson v. Byrne*, 25 L. R. Ir. 957, 958, 361.

957. Where, after judgment for partition or sale, it is made to appear that there are in another county lands of which the parties are entitled to compel partition, application may be made to a Judge of the High Court in Chambers for the partition or sale of such lands under the judgment formerly made; and where two or more judgments have been made by Masters in different counties an application may be made to a Judge of the High Court in Chambers for an order as to the conduct of the future proceedings. Con. Rule 990.

When after judgment, lands discovered in another county.

Taken from Chy. O. 641.

This Rule applies to the case of lands subsequently discovered in another county: it does not apply when it appears on the original application that the lands sought to be partitioned are in different counties: in such case a Local Master has no jurisdiction at all, even as to the lands in his own county: *Nicholl v. Allenby*, 17 Ont. 275.

Where lands are discovered in another county after a judgment has been pronounced by a Local Master, the Judge in Chambers may award judgment as to the lands so discovered: *Clark v. Clark*, S. P. R. 156.

The object of this Rule is to prevent more than one suit from being prosecuted in respect of the same estate. Where several suits are brought, application may be made, under this Rule, to consolidate them. The application must be made before a Judge in Toronto. But where two or more applications are made by different persons to the same Local Master, the latter has jurisdiction to pronounce judgment in one of them, and stay the others: *Lambier v. Lambier*, 9 P. R. 422; 19 C. L. J. 158. Where a suit is stayed, the costs are *prima facie* payable out of the estate *pari passu* with the costs of the suit which is carried on: *Re Clark, Cumberland v. Clark*, L. R. 4 Chy. 412.

Several suits, consolidated or

Costs.

Custody of Papers in Administration and Partition Matters.

958. The Local Masters shall enter in books kept for that purpose, all judgments or orders made by them, in administration and partition matters, and they shall on the conclusion of the proceedings, annex together all the papers filed with them in such proceedings, and transmit the same to the office of the Deputy or Local Registrar for the county in which the proceedings were commenced. Con. Rule 991. Rules of 1st Jan., 1896, 1495, amended. See also Rule 700.

Entry of orders. At conclusion of suit papers to be forwarded to office in which proceedings commenced

Taken from Chy. O. 650.

This Rule constitutes the Local Masters' offices for entering judgments for administration or partition granted by them.

Rules
959-962.

5. DOWER.

Tenant
may notify
dowress of
desire to
assign her
dower;
procedure
thereon.

959. The tenant of the freehold may before action serve upon the dowress a notice in writing that he is willing to assign dower in the land (describing it) out of which she is entitled to dower, and may thereafter apply to the High Court or to a Judge thereof, for judgment that a writ shall issue for the assignment of dower; and a writ therefor may thereupon issue, and the like proceedings may be had thereon as upon such a writ sued out after judgment in an action of dower. R. S. O. 1887, c. 56, s. 3.

For the form of writ of assignment of dower: see Form 184, H. & L. Forms, No. 1085.

6. PROPERTY OF INFANTS.

Applica-
tions to
sell, etc.,
infant's es-
tate, where
made.

960. An application for the sale, mortgage, lease or other disposition of an infant's estate shall be made to the Master in Chambers, or an Official Referee sitting for him, and no reference in any such matter is to be directed to any Local Master, except by leave of a Judge. Con. Rule 992.

Taken from J. A. Rule 585.

These Rules (960-970) apply to cases where some disposition is sought to be made of an infant's estate either for the purpose of raising money to pay charges thereon, or to provide for the maintenance and education of the infant owners, or where the appointment of guardians of their persons or estates is sought.

Official
Guardian to
be notified.

961. The Official Guardian shall be duly notified of all applications under Rule 960. Con. Rule 993.

Taken from J. A. Rule 586; see Jud. Act, s. 157.

Petition,
how entitled

962. A petition for the sale or other disposition of the real estate of an infant, shall be entitled in the matter of the infant. Con. Rule 994.

Taken from Chy. O. 527.

Sale of
infant's
estate,
on what
ground
authorized.

Applications for the sale, leasing, or other disposition of the real estate of infants, are authorized by R. S. O. c. 168, s. 3, where it is made to appear to the Court that it is necessary, or proper, for the maintenance or education of the infant; or that, by reason of any part of the property being exposed to waste and dilapidation, or to depreciation from any other cause, the interest of the infant requires, or will be substantially promoted by such disposition. The Act is held to apply to estates tail: *Re Gray*, 26 Ont. 355. Where a sale is necessary for the payment of the debts of the ancestor it may be

ordered: *Re McDonald*, 1 Chy. Ch. 97; *Re Barker*, 6 P. R. 225. But **Rule 962** it should be shewn that unless the sale, or other disposition, is made, the estate will sustain loss, or that the creditors are about to enforce payment of their demands by suit: *Re Boddy*, 4 Gr. 144. Where none of the circumstances mentioned in the Act are proved to exist, the Court has no authority to make any order: *Calvert v. Godfrey*, 6 Beav. 197; *Re Phelan*, 6 P. R. 250; *Re Robinson*, *Pickard v. Wheeler*, 31 Ch. D. 247; 53 L. T. 865; *Re Hibbard*, 14 P. R. 177; and see *Re Jackes*, 3 C. L. J. 69, where the Court refused to sanction a renewal of a lease made by the infant's ancestor; but see *Blean v. Blean*, 10 Ont. 693; and see sec. 58 (11) of the Act, *supra*, p. 105.

Interest of
infant to be
considered.

Where it appeared that the application was made more for the benefit of the infants' father than of the infants themselves, the application was refused: *Re McDonald*, 1 Gr. 90; *Re Hibbard*, *supra*; and a sale will not be ordered to repay a relative, such as a father, mother, or brother, for the past maintenance of the infant: *Kellar v. Tache*, 1 Chy. Ch. 388; *Re Blair*, 14 P. R. 220; and see *Edwards v. Dargy*, 10 Gr. 101. Nor after a sale has been made, will past maintenance be ordered to be paid out of the corpus of the fund, where it appears that the person making the claim had not maintained the infant on the basis, or with the expectation of being compensated therefor: *In re Renwick*, *Renwick v. Crooks*, 14 P. R. 361.

No sale, lease, or other disposition can be ordered under R. S. O. c. 168, against the provisions of any will or conveyance by which the estate has been devised or granted to the infant, or for his use: R. S. O. c. 168, s. 3, (2); *Re Smith*, 6 P. R. 282; *Re Wilson*, 7 P. R. 244; *Re Callicott*, 1 Chy. Ch. 26, 182; but see *Re Bishoprick*, 21 Gr. 589.

No disposition
can be
authorized
contrary to
any will or
deed.

A guardian of an infant appointed by the Surrogate Court has power without the sanction of the Court, to make a valid lease of his ward's land during the latter's minority but not beyond that period: *Clarke v. Macdonell*, 20 Ont. 564, overruling *Collins v. Martin*, 41 C. C. Q. B. 602; *Switzer v. McMillan*, 23 Gr. 538; *Townley v. Neil*, 10 Gr. 72; the report of the last case appears to be erroneous in describing the guardian who made the lease as a guardian *ad litem*, instead of a guardian of the estate of the infant.

The Statute says the application is to be made in the name of the infant by his next friend or his guardian, but cannot be made without the infant's consent, if he is of the age of fourteen, or upwards: R. S. O. c. 168, s. 4; and see *Rule 966*; but see *Rule 963*.

Applica-
tion for
sale, etc.,
how to be
made.

Applications for the sale, or other disposition, of infants' estates, cannot now be made to the County Court Judges, or Local Masters: *Rule 960*.

The Court may order the execution of the conveyance by the infant, or some one on his behalf, and a conveyance so executed is binding on the infant, as if made after he had attained his majority: R. S. O. c. 168, ss. 5, 6; *Rae v. Geddes*, 3 Chy. Ch. 404; where a mortgage of an infants' land held in trust is authorized by the Court the infant *cestui que trust* cannot properly be required to give any covenant for repayment of the loan: *Brown v. Grady*, 31 Ont. 73.

Execution of
conveyance.

The proceeds of lands sold, or disposed of under the direction of the Court, retain the quality of the estate sold, or disposed of, so far as the rights of the infant's heirs, and next of kin, are concerned: R. S. O. c. 168, s. 8; *Fitzpatrick v. Fitzpatrick*, 6 P. R. 134; *Thompson v. McCaffrey*, 6 P. R. 193; *Campbell v. Campbell*, 19 Gr. 254.

Proceeds of
sale, retain
quality of
estate sold

Rules 963, 964. But where such moneys descend as realty, if the heir does not effect an actual reconversion, they will pass to his representatives as personality: *Mordaunt v. Benwell*, 19 Ch. D. 302; 45 L. T. 585. And as to adult parties jointly interested with the infants, the order for sale operates as a conversion, and the share of such a person dying before sale, but after the order, will descend as personality: *Hyett v. Meekin*, 25 Ch. D. 735.

Order for bar of dower. Where the mother of the infant is a lunatic, an application may be made for an order barring her dower: R. S. O. c. 164, s. 16. The application must be made to a Judge in Chambers: *Re Colthart*, 9 P. R. 356.

Settled estates, jurisdiction of Court in regard to. **Settled Estates.**—The Court has jurisdiction under R. S. O. c. 71, to make orders for the lease, sale, or mortgage, of settled estates in which infants are interested, but the procedure to be followed in such cases is now regulated by *Rules 973, et seq*

In whose name to be presented. **963.** The petition shall be presented in the name of the infant, by his guardian, or by a person applying by the same petition to be appointed guardian as hereinafter provided. **Con. Rule 995.**

Taken from Chy. O. 528.

Variance between Rule and R. S. O. c. 168, s. 4. There is a variance between this *Rule*, and the Statute R. S. O. c. 168, s. 4, which provides that the application shall be in the name of the infant by his next friend, or by his guardian.

What it is to state.

964.—(1) The petition shall state the nature and amount of the personal property to which the infant is entitled, the necessity of resorting to the real estate, its nature, value, and the annual profits thereof; it shall designate the lands to be disposed of, propose a scheme for that purpose, and for the appropriation of the proceeds, state specifically the relief desired, and circumstances sufficient to justify the sale or other disposition of the land, and the application of the proceeds in the manner proposed.

(2) If an allowance for maintenance is desired, a case shall also be stated and made, to justify such an order, and to regulate the amount. **Con. Rule 996.**

Petition may pray for appointment of guardian.

(3) If the appointment of a guardian is desired, a case shall be stated and made, for the appointment of the person proposed. **Con. Rule 997.**

Taken from Chy. O. 529.

A similar procedure prevails in the State of New York: see *Tyler on Infancy*, p. 300, s. 196. Apart from the power given by the statute, the Court has no authority to direct the sale of an infant's estate on the mere ground that it would be beneficial: *Calvert v. Godfrey*, 6 Beav. 197.

The circumstances justifying a sale of an infant's estate, under **Rule 964**, the statute, are: (a) The fact that the sale is necessary, in order to maintain, or educate, the infant; or, (b) that by reason of the property, or any part of it, being exposed to waste and dilapidation, or to depreciation from any other cause, the interest of the infant requires, or will be substantially promoted by, a sale, or other disposition: see R. S. O. c. 168, s. 34, and see notes to *Rule 962*, *supra*, p. 1208.

Circumstances which justify a sale of infant's estate.

The petition must be presented to the Master in Chambers, or to an Official Referee sitting for him, who has power to direct a sale, and take all necessary accounts, and make all necessary inquiries, and to order payment out of Court of any money realized from any sale, or other disposition of the estate; no reference is to be directed to a Local Master except by leave of a Judge: *Rule 960*. These applications are usually taken by the Master in Chambers.

Master in Chambers has jurisdiction to order sale.

Between the years 1881 and 1886 the Master in Chambers had no jurisdiction to order the payment of money out of Court, and during that period a practice grew up of getting an order of a Judge confirming the order of the Master in Chambers, or Official Referee, directing the sale of infants' estates, and the application of the proceeds, and such practice is still continued, although the reason for it has ceased, and all that now seems really necessary is for the Accountant to get such orders initialed by a Judge as provided by *Rule 414*.

The marriage of a female ward of Court without consent of the Court, is a contempt for which the husband may be punished by imprisonment. The Court in such cases usually requires a settlement to be made of the wife's property as a condition of the husband's release, and will provide that the husband shall take no benefit under the settlement, and will also ordinarily exclude the wife from power of appointing by will in his favour in default of issue: *Re Wall*, 50 L. T. 435; and see *Buckmaster v. Buckmaster*, 35 Ch. D. 21; 56 L. T. 795; and see *Field v. Moore*, 19 Beav. 176. But the Court has no power to compel a male infant marrying without leave to execute a settlement of his property against his will: *Re Leigh*, *Leigh v. Leigh*, 40 Ch. D. 290; 60 L. T. 404.

The jurisdiction of the Court over its wards ceases on their attaining 21. Where the Court authorized a man to visit a female ward of Court to pay his addresses, with a view of asking her hand in marriage, on his undertaking to abide by the order of the Court, such undertaking expires on the ward attaining her majority, and the Court has no jurisdiction to compel him to execute a settlement of her property where he has married her after she attained 21 without a settlement, and without the sanction of the Court: *Bolton v. Bolton*, 1891, 3 Ch. 270; 65 L. T. 698.

Maintenance.—A petition for an allowance for maintenance out of an infant's estate will be entertained, even though it be not necessary to ask for a sale of any part of the infant's property: see *Re Wilson*, 14 P. R. 291.

Where the father of an infant is living, it is his duty *prima facie* to support and maintain, and educate, the infant, no matter what the infant's fortune may be: *Simpson, on Infancy*, p. 161; and maintenance is not ordinarily allowed out of the infant's estate, except upon proof that the father is unable to maintain, and educate, his children, according to their station and prospects in life; and although, where there is an express trust in the marriage settlement, to which

Duty of father to maintain his children.

Rule 364. the father is a party, requiring the trustees to expend the trust fund for the support of the children of the marriage, such a trust may be enforced by the father: *Mundy v. Earl Howe*, 4 Bro. C. C. 223; yet where the trustees have an option, or a mere power, to do so, the Court will not compel them so to apply the trust fund, except on evidence of the father's inability to maintain the infant: *Wilson v. Turner*, 22 Ch. D. 521; 48 L. T. 370. The duty of a father to maintain his infant children is at Common Law a moral and not a legal obligation: *Wright v. McCabe*, 30 Ont. at p. 336; *sed vide* Cr. Code, s. 210.

Mother not so bound. A mother is not under any legal obligation to support her offspring, and consequently maintenance will be allowed out of the children's own property, without reference to her ability to support them: *Simp*, 161.

As to claims for past maintenance, see *supra*, p. 1209.

On sale being directed, inquiry as to debts of ancestor made.

Sale not ordered in administration action, when brought merely for maintenance of infants.

Upon an application under the R. S. O. c. 168, s. 3, for the sale of an infant's estate, it is usual before directing any application of the proceeds, to require proof of payment of the debts of the ancestor, in cases where the infant has become entitled to the property directed to be sold, as heir-at-law, or devisee; or to require an advertisement to be issued for creditors, where no sufficient advertisement has previously been issued by the personal representative, and the Court then makes provision for the payment of the debts, if any. Where the sole object of the sale is the maintenance of the infant, the proceedings ought to be taken under R. S. O. c. 168, s. 3, and not by way of action for the general administration of the estate; and the Court has refused, where the latter proceeding has been adopted unnecessarily, to sanction a sale in the administration proceedings, for the purpose of maintenance: *Fenwick v. Fenwick*, 20 Gr. 381; *Goodfellow v. Rannie*, 16, 425; *Foster v. Patterson*, 16, 345.

The proceeds of the sale of an infant's lands will not be ordered to be paid to the infant's guardian; but will be retained by the Court in its own custody until the infant attains majority: *Flanders v. D'Evelyn*, 4 Ont. 74; *Mitchell v. Richey*, 13 Gr. 445; *Blake v. Blake*, 30, & Lef. 26; *Campbell v. Dunn*, 22 Ont. 98; *Re Mathers*, 18 P. R. 13; *Re Harrison*, 18 P. R. 303; *Re Humphries*, 18 P. R. 283; and see *Re Chatard*, 1893, 1 Ch. 712; *Whitewood v. Whitewood*, 19 P. R. 183; *Re Thompson*, 19 P. R. 304; but see *Huggins v. Law*, 14 Ont. App. 383; *Hanrahan v. Hanrahan*, 19 Ont. 396; *Sanborn v. Sanborn*, 11 Gr. 359.

Principal not easily broken into. As a general rule the Court will not break in upon the principal money, for the maintenance and education of infant legatees, still it may be done where necessary: *Ashbough v. Ashbough*, 10 Gr. 430; *Craze v. Craig*, 11 P. R. 236.

Maintenance was ordered out of a fund in which the infant had only a contingent interest, on security being given by way of life insurance for those who would be entitled upon the death of the infant under age: *Re Campbell*, 18 P. R. 400, following *Re Arbuckle*, 14 W. R. 585.

Where money was given to a widow subject to a trust for "the maintenance and bringing up" of her infant children, she was held to be guilty of a breach of trust in maintaining the infants in her house where she was living in adultery; and the Court assumed the administration of the fund: *Re G.*, 1899, 1 Ch. 719; 80 L. T. 470.

Settlements of Infants' Estates.—The Court has jurisdiction **Rule 204.** to sanction the execution of a settlement of an infant's estate on marriage: see *supra*, 32, 33. Applications for that purpose are of infants expressly excluded from the jurisdiction of the Master in Chambers: estate, when see *Rule 42* (8), and must therefore be made to a Judge in Chambers, ordered.

A marriage settlement made by an infant without the sanction of the Court is not void, but voidable; and if not repudiated within a reasonable time after the infant has attained majority will be binding: *Edwards v. Carter*, 1893, A. C. 390; *In re Jones, Farrington v. Forrester*, 1893, 2 Ch. 461; and *Stevens v. Trevor-Garrick*, 1893, 2 Ch. 307.

The provision of Ind. Act, s. 37, only removes the bar of infancy, but does not enable an infant to do more than an adult could do, e.g., when an infant was also a married woman and made a post-nuptial settlement with the sanction of the Court, under those Acts, but the settlement was one which would not have bound her if she had been an adult, it was held to be invalid, notwithstanding it had received the sanction of the Court: *Backmaster v. Backmaster*, 35 Ch. 1, 21; 50 L. T. 795. But the Act enables an infant, with the sanction of the Court, to make a valid post-nuptial settlement so far as an adult could make one: *Re Wall*, 50 L. T. 355.

An infant ward marrying without the consent of the Court cannot, against his will be required to execute a settlement of his estate, and a settlement made by an infant under such circumstances, unwillingly, but with the sanction of the Court, was set aside on the application of the settlor on attaining his majority: *Re Leigh, Leigh v. Leigh*, 60 L. T. 404.

Where there are two or more guardians of an infant, the fact that one of the guardians who has maintained the infant, has been in sole receipt of the income of the infant's estate, is no discharge to the other guardians therefor, but if it is shewn that the infant has been properly maintained and educated by the guardian who received the income, a proper sum will be allowed for that purpose without the details of the expenditure being vouched: *Re Evans, Welch v. Channell*, 51 L. T. 175.

Guardians of Person or Estate.—The Surrogate Court has also power to appoint guardians to minors: see R. S. O. c. 168, s. 10. This statute, however, does not exclude the jurisdiction of the High Court: *Re Stannard*, 1 Ch. Ch. 15; *Re McQueen, McQueen v. McMillan*, 23 Gr. 191; and see R. S. O. c. 168, s. 15.

Where a guardian has been appointed by the Surrogate Court, the High Court will not appoint any other except for cause, and it should therefore be shewn, on applications to appoint guardians under these Rules, that the minor has no guardian.

A guardian may be appointed for an infant who is a British subject, though he is resident out of the jurisdiction, and has no property within the jurisdiction: *Re Willoughby*, 30 Ch. D. 324; 53 L. T. 926; but see *In re Bourgoise*, 41 Ch. D. 310.

Where the High Court appoints a guardian of the person and estate of a minor, it usually requires the guardian to give security. And if a guardian has been appointed by a Surrogate Court, an inquiry is sometimes ordered as to whether the guardian so appointed has given sufficient security; and if he has not, then he is required to give additional security before he is empowered to receive moneys

Rule 961.

Security,
when dis-
pensed with.

To appoint-
ment of
guardian,
Court
considers
interest of
infant.

on account of the infant. Where, however, the fortune of the infant is trifling, and the fund is lodged in Court, the Court frequently dispenses with security being given by the guardian; and requires instead an affidavit to be filed by the guardian from time to time, shewing the due application of moneys paid to him under the order of the Court.

The High Court has also jurisdiction to appoint guardians for infants to receive insurance moneys payable to them under any policy effected by their deceased father; see R. S. O. c. 203, s. 155 (2), or the Court may make order for the payment of such insurance moneys to a guardian appointed by the Surrogate Court, or even by a foreign Court. The proceedings to obtain such appointment of a guardian or trustee, or the payment of such insurance moneys may be made on petition to a Judge in Court; *Re Shasson*, 15 P. R. 156; where the application is for the appointment of a guardian to receive insurance money, the person appointed will be required to give security; and where the application is for payment of the money to a guardian appointed by the Surrogate Court or a foreign Court, it must be shown that such guardian has given security sufficient to answer the amount he is to be authorized to receive; *Re Shasson, supra*; *Re Thin*, 10 P. R. 493; but see *Re Andrews*, 11 P. R. 190; and where the security given to a foreign Court would not cover assets received in this Province, a foreign guardian will be ordered to give additional security as a condition of being authorized to receive the money; *Re Shasson, supra*.

Different considerations will naturally influence the Court in the appointment of a guardian of the person and a guardian of the estate of an infant. In the case of a person who is to be appointed guardian only of an infant's estate, prudence and business capacity may be sufficient qualifications. Where a person is proposed as guardian of an infant's person, other considerations have necessarily to be taken into account.

Although the Court is in the habit of paying respect to the wishes and directions of a testator in reference to the guardianship and care of his children, it will not do so where it is clearly shown that a compliance therewith would be prejudicial to the happiness, and moral training, of the infants; *Comm. G Gr.* 632; *Re McQueen, McQueen v. McMillan*, 23 Gr. 191.

So, where there was a contest between a step-father and an uncle, and the child preferred the former, the Court being satisfied that it was better for the infant that the uncle should be appointed, appointed him; *Re Lavin*, 16 Gr. 461. The Court may remove testamentary guardians and trustees for the same causes as other guardians; R. S. O. c. 168, s. 17.

Where the father is living, if it is proposed to appoint any other person guardian, the father must be notified of the application; *Re Henricks*, 2 Ch. 418.

It is improper to give a reversionary guardianship of wards in Court to the successors in office of any person named; *Murphy v. Lamphier*, 12 Gr. 241.

Removal of
ward from
jurisdiction
a contempt.

It is a contempt of Court to remove a ward of Court from the jurisdiction, without the sanction of the Court; and the Court will interfere on the application of his guardian to prevent his removal; *Re Giltrie*, 3 Gr. 279; but the Court, if it is for the interest of the ward, will authorize his removal out of the jurisdiction, upon the

undertaking of a guardian resident within the jurisdiction to produce **Rules**
the ward to the Court if and when required: *Re Callaghan*, 28 Ch. D. 966, 966.
189; 52 L. T. 7.

A guardian appointed either by the Surrogate Court, or by the High Court: *Huggins v. Laic*, 14 Ont. App. 383; or a tutor appointed by a Quebec Court: *Hanrahan v. Hanrahan*, 19 Ont. 306; is entitled to receive, and can give, a valid discharge for a legacy due to his infant ward; but he has no power to make leases of the infant's lands in his name: *Townshy v. Neil*, 10 Gr. 72; *Steitzer v. McMillan*, 23 Gr. 538. The report of *Townshy v. Neil* appears to be erroneous in describing the guardian as a guardian *ad litem*. See further as to leases by infants: *Lipsett v. Perdue*, 18 Ont. 575.

The sanction of the Court should be obtained to all dispositions, whether by sale, or lease, of an infant's estate.

965. Unless otherwise directed by the Judge, or the Master in Chambers, or other officer making the order, the infant shall be produced before him or before a Master. **Con. Rule 998.**

Taken from Chy. O. 531.

Where the infant is out of the jurisdiction, and not of an age making his consent to the proceedings essential, his production before the Master may, on application to a Judge, be ordered to be dispensed with: *Re Lane*, 9 P. R. 251; S. C., *sub nom.*; *Re Love*, 18 C. L. J. 371.

But unless this order be obtained, the infant should in all cases be produced before the Master, even though he be under fourteen years.

966.—(1) Unless otherwise directed by the Judge, Master in Chambers or other officer, the infant, where above the age of 14 years shall be examined apart by the Judge or officer before whom he is produced, upon the matter of the petition, and as to his consent thereto.

(2) Where the infant is out of Ontario the Judge or officer may direct inquiry as to the infant's consent by his examination in such manner as may seem proper, or by affidavit or otherwise as may seem just. *New.*

(3) An examination shall be stated to have been taken under this Rule, and shall be annexed to and filed with the petition. **Con. Rule 999.**

Based upon Chy. O. 532.

The sale is not to be ordered without the consent of the infant if he is of the age of fourteen years or upwards, unless the Court otherwise directs or allows: R. S. O. c. 108, s. 4; but where there are several infants interested who are over fourteen years, it has been held that the consent of a majority of them is sufficient to

**Rules
967-969.**

authorize the Court to direct a sale, not merely of the shares of the infants who do consent, but also of those who have not consented: *Re Harding*, 13 P. R. 112. In this case one of the infants interested, had disappeared and could not be found, and her examination was dispensed with. Where an infant over fourteen was an imbecile, her examination and consent were dispensed with: *Re Delanty*, 13 P. R. 113.

Where the infants had been examined and consented to a sale, which had been ordered by the Court, but which was not carried out, their further examination and consent to a sale at a less price was dispensed with, on its being shewn that they were out of the jurisdiction, and were satisfied to accept the price offered: *In re Bennett*, 17 P. R. 408.

The Judge or officer before whom the infant is examined, should take down his examination in writing, and also his consent, where the consent is necessary; and this should be signed by the infant and by the Judge or officer, and should be attached to the petition: *Re Arford*, 6 P. R. 192.

Where the infant is under fourteen, the Judge or officer should not only certify the fact, but should also state that the infant was produced before him.

Evidence should be given before the Judge or officer identifying the infant and proving his age: see *Rule 967*.

Infants
under 14
need not be
examined.

967. It shall not be necessary to examine an infant under 14 years of age, unless otherwise ordered; but it shall be sufficient for the officer before whom such infant is produced, to certify that he has been produced, and that he is under the age of 14 years. Con. Rule 1000.

Taken from J. A. Rule 587.

Where the infants under fourteen were living with their mother out of the jurisdiction, and the mother swore that she was unable to produce them, owing to the expense, and the property was shewn to be worth only \$400, the production of the infants was dispensed with: *Re Lane*, 9 P. R. 251.

Witnesses
in support
of petition
to be exam-
ined before
Judge or
Master.

968. The witnesses to verify the petition shall be examined *ex vivo* before the Judge or officer making the order or before a Master of the Supreme Court, as to the matter of the petition, and the depositions so taken shall be stated to have been taken under this Rule. Con. Rule 1001.

Taken from Chy. O. 533.

A subpoena may be issued under *Rule 491* for the examination of witnesses in support of the application: *Raymond v. Tapsen*, 23 Ch. D. 130; 18 L. T. 103; *McHillan v. Wansborough*, 10 P. R. 377.

Masters
authorized
to take ex-
amination
without
special
order.

969. The Masters of the Supreme Court may examine the infants, and witnesses under *Rule 968*, without special order or reference. Con. Rule 1002.

Taken from Chy. O. 534.

There being this special provision as to the officers who may **Rule** examine infants and witnesses under *Rule 1038*, it is possible that **970 972.** Special Examiners are inferentially precluded from taking such examinations.

970. A conveyance of the lands shall not be settled, until evidence is produced, to the officer settling the same, of the purchase money having been paid into Court, or of the payment thereof into Court having been dispensed with; and, where a mortgage is taken for part of the purchase money, until evidence is given to the said officer of such mortgage having been registered and deposited with the Accountant. *Con. Rule 1004.*

Conveyances of infants' lands—evidence to be produced to officer settling.

By analogy, this *Rule* applies not only to sales of infants' lands under *Rule 1030*, *et seq.*, but to sales in actions or other proceedings in Court, in which infants are interested; see *Rule 3*.

The proper evidence of the payment of the purchase money is the Accountant's certificate of its having been paid into Court; and where a mortgage is required to be given, the Accountant's certificate of its having been deposited with him is also necessary.

Where a purchaser makes default, the deposit and all other payments on account of purchase money are forfeited, when the sale is under the standing conditions of sale (Form No. S, H. & L. Forms, No. 1005), and the property may be ordered to be resold, and the defaulting purchaser ordered to pay any deficiency: *Re Hornibrook*, 12 P. R. 501.

7. DEVOLUTION OF ESTATES.

971. Before an executor or administrator takes proceedings under *The Devolution of Estates Act*, for the sale of real estate in which an infant is concerned, he shall give to the Official Guardian or other officer charged with the duties referred to in the 8th section of the said Act notice of the intention to sell, and shall not be entitled to any expenses incurred before giving such notice. *Con. Rule 1005.*

Notice to Official Guardian.

Rev. Stat. 105.

The Devolution of Estates Act is R. S. O. c. 127.

See *Re Booth*, 16 Ont. 429; *Re Gardner*, 7 C. L. T. 133.

Notice is only required to be given to the Official Guardian where infants are interested, and the sale is to be made simply for the purpose of distribution. Where the approval of the Official Guardian is not requisite to the carrying out of the sale, notice to him is not necessary: *Re Fletcher*, 26 Ont. 499.

972. The Official Guardian, or other officer aforesaid, or any person interested in the land or in the proceeds of the

Application to Judge.

Rule 973. sale thereof, may apply in a summary manner to a Judge in Chambers, upon notice to all parties concerned or to such parties as the Judge may direct, for such direction or order touching the real estate and the proceeds thereof or the costs of the proceedings as to the Judge may seem meet. Con. Rule 1006.

Upon an application under this *Rule* lands to which infants were entitled, but which were charged with the payment of a legacy, were authorized to be sold for the purpose of paying the legacy: see *Re Eddie*, 22 Ont. 556.

(a) Costs payable out of the proceeds of lands sold under the Devolution of Estates Act, with the approval of the Official Guardian, shall be taxed by the senior Taxing Officer.

(b) The Official Guardian shall deposit in the Accountant's Office a statement, certified by the proper officer, showing the distribution of the proceeds of lands sold or mortgaged with his approval, and proof of the dates of births of the infants interested.

(c) All moneys received by the Official Guardian on behalf of infants, lunatics, absentees, or other persons for whom he acts, shall, unless otherwise ordered by a Judge of the High Court in Chambers, be paid into Court.

(d) Moneys paid into Court under the next preceding Rule to the credit of infants, shall be paid out to them when they attain their majority, or sooner if so ordered by a Judge of the High Court in Chambers. Con. Rule 1258, 28th Nov., 1903.

8. SETTLED ESTATES.

Title
petition,
affidavits,
etc., ss V,
c. 20.

973. All proceedings under *The Settled Estates Act, 1895*, shall be entitled according to Form No. 191, and the petition shall in the body thereof or in a schedule thereto, or by plan thereto annexed, contain a detailed description of the property proposed to be dealt with, sufficient to identify the same. The petition shall be filed in the Central Office at least 14 days before the day named for the hearing thereof, and all notices required to be given by the said Act or any Rules of Court may be given at any time after the filing of the petition. Sched. to 58 V. c. 20, Rule 1.

The Settled Estates Act, 1895, is now R. S. O. c. 71.

For Form No. 191, see H. & L. Forms, No. 1423.

This and the following *Rules* to, and inclusive of *Rule* 990, are **Rule 974**, taken from the Schedule to 58 Vict. c. 20.

The jurisdiction of the Court to sanction the sale, lease or mortgage, of settled estates, or any timber thereon, is now governed by R. S. O. c. 71.

The Court has no inherent jurisdiction in such matters, and has no power to sanction schemes for the improvement of settled estates for the benefit of the *cestuis que trustent* save so far as is authorized by the statute: see *Re Montagu*, 1897, 1 Ch. 685; 76 L. T. 485. Formerly the Court had no power to order the sale of a part of a settled estate, in order to make improvements on the remainder: *Re Moore*, 6 P. R. 281; *Re Chambers*, 28 Beav. 653; nor could it sanction an exchange of part merely for the purpose of improving the remainder: *Re Bishoprick*, 21 Gr. 589; but in that case, on its being shewn that, unless the exchange were made the property was liable to depreciation in value, the exchange was directed under R. S. O. (1877), c. 40, s. 76; but the provisions of sec. 77 of that Act prohibiting any sale, or disposition against the provisions of any will, or conveyance, do not seem to have been considered.

Sale of settled estate when ordered.

Under the Act above referred to (R. S. O. c. 71) the jurisdiction of the Court is enlarged, and it has now power whenever it deems it proper, and consistent, with a due regard for the interest of all parties entitled under a settlement, to sanction a lease (s. 3) or sale (s. 16) of the whole or any part of a settled estate, or the sale or mortgage for the purpose of making improvements on the estate (s. 14). The statute does not in terms authorize an exchange, but *semble*, an exchange is only a form of sale.

The Court in the exercise of its jurisdiction over settled estates may authorize a lease thereof for 999 years: *Re Watson's Trusts*, 21 Ont. 528.

The Court has also authorized a sale for the support of the tenant for life and her infant child, who was entitled in remainder: *Re Smith*, 4 Ont. 518; and also where the settled land was unproductive and being eaten up with taxes: *Re Hooper*, 28 Ont. 179.

By 53 Vict. c. 14 (O.), the power of the former Court of Chancery to sanction leases containing agreements for renewal, or renewals was ratified and confirmed; and see *Re Watson*, 21 Ont. 528.

Applications as to leases and sales, of settled estates, are excluded from the jurisdiction of the Master in Chambers, and the Local Judges and Local Masters: Rules 42 (8), 45, 49.

Applications respecting settled estates, how made.

974. The notice to be given by the 25th section of the said Act, if given before the hearing (or if given after the hearing and the Judge shall not otherwise direct), may, without any other direction of the Court, be given within the jurisdiction of the Court by delivering to the person to be served, a notice according to Form No. 192, and the time to be specified in the notice for the person served to file and deliver a notification shall be not less than 14 clear days after the service. Sched. to 58 V. c. 20, Rule 2, *part*.

Notice to be given.

For Form No. 192, see H. & L. Forms, No. 1426

Rules

975, 976. Applications under *The Settled Estates Act* must be made with the consent or concurrence of any person interested as tenant in tail, or in case there be more than one then the first of such tenants in tail, and all persons in existence having any beneficial interest under or by virtue of the settlement prior to the estate of the tenant in tail, and all trustees having any estate or interest on behalf of any unborn child prior to the estate of such tenant in tail; and in all other cases the parties whose consent or concurrence is necessary, are all persons in existence, having any beneficial estate or interest under or by virtue of the settlement, and also the trustees having any estate or interest on behalf of any unborn child: see *The Settled Estates Act* (R. S. O. c. 71), s. 23. And where any of these persons do not concur in, or consent to the application, then they are required to be notified as provided by sec. 25 and this *Rule*.

Where any of such parties are out of the jurisdiction an order for service must be obtained under the following *Rule*.

Where property was vested in a trustee in trust after the death of the tenant for life to sell and divide the proceeds among numerous persons who would become absolutely entitled, with power to the trustee to give receipts, on a petition by the tenant for life under Imp. Act. 19 & 20 Viet. c. 120, for a sale of the property, it was held under sec. 17 of that Act (from which R. S. O. c. 71, s. 23, is taken), that the consent of all the beneficiaries was necessary: *Re Ives, Bailey v. Holmes*, 3 Ch. D. 390. The persons whose consent is required by section 23 are persons whose consents are capable of being obtained. The consent of unascertained persons who are interested is not requisite: *Britley v. Carter*, L. R. 4 Chy. 230; *Re Sturt*, L. R. 16 Eq. 629; *Re Potts*, L. R. 16 Eq. 631n.

Service.

975. Upon an application *ex parte* by the petitioner the Court or a Judge may make an order for service of the petition or any notice on any person out of Ontario, or on any person within Ontario, in any other manner than is above provided, as may seem just, and an order as to service of a notice shall contain such directions as to the manner in which such notice shall be given, and as to the time to be specified therein within which the notification is to be made by the person served. Sched. Rule 2, *part*.

See *supra*, p. 296.

Service on infants and persons of unsound mind not so formal.

976.—(1) Infants, and persons of unsound mind (not so found by inquisition or judicial declaration), required to be served with notice of an application, may be served by delivering to the Official Guardian a copy of the petition or other proceeding required to be served;

(2) From the time of such service the Official Guardian shall be the guardian *ad litem* of the infant or person of unsound mind, unless and until the Court or a Judge otherwise orders; and it shall be the duty of the Official Guardian, or of any other guardian *ad litem* appointed for such infant or person of unsound mind, forthwith to attend to the interest of the infant or person of unsound mind, and to take all such proceedings as may be necessary for the protection of such interests in the proceeding in which he is so appointed guardian, and for that purpose to communicate with all proper persons and parties, including the father or guardian of the infant and the person with whom or under whose care the infant or person of unsound mind is;

Rules
977, 978.

(3) In case there is more than one infant or person of unsound mind for whom service is made on the Official Guardian, one copy only of the petition or other proceeding need be served, but the name of each person on whose behalf the Official Guardian is served shall be stated on the copy served;

(4) In the case of a person of unsound mind he shall, where practicable, be also personally served, and where personal service on him is not practicable the person in whose custody or care he is living shall be served. Sched. Rule 3.

The provisions of this Rule are similar to those in Rule 152 relating to the service of infants with a writ of summons.

977. The examination of a married woman apart from her husband as to her knowledge of the nature and effect of an application for the sale, mortgaging or leasing of any settled estate, or as to her consent thereto, shall in no case be necessary unless expressly directed by the Court or a Judge. Sched. Rule 4.

Examination of married women only necessary if directed by the Court or Judge.

A married woman is competent to consent to, or concur in, or oppose an application under the Act, even though she be an infant: see *The Settled Estates Act* (R. S. O. c. 71), s. 45.

978. An infant may make any application to the Court or a Judge under the said Act by his guardian or next friend, and in any such case the Official Guardian or any other guardian *ad litem* appointed shall be served with a copy of the

where infant is applicant.

Rules
979, 980.

petition, and the said Official Guardian, or other guardian *ad litem* shall thereafter attend and watch the proceedings on behalf of such infant. Sched. Rule 5.

The object of this *Rule* is apparently to secure in the infant's behalf the protection afforded by an investigation by the Official Guardian of the propriety of the proceedings, and to prevent infants from being prejudiced by ill-advised applications being made in their names.

A petition presented under this *Rule* must be the petition of the infant by his guardian or next friend, not that of his guardian or next friend.

Infants are by the Act enabled to consent to, or concur in, applications under the Act by their guardians: see *The Settled Estates Act* (R. S. O. c. 71), s. 44.

Notice of
hearing.

979. Notice of the hearing of the petition shall be served on all persons dissenting from, or desiring to be heard in opposition thereto, and upon committees of lunatics, and upon the Official Guardian, or other guardian *ad litem* appointed, who may be interested in the proceedings on behalf of an infant or person of unsound mind (not so found), at least two clear days before the day for hearing the same; and on filing in the Registrars' office on any day before the day fixed for hearing the petition, the notice of hearing with proper proof of service, the petition shall be entered by the proper officer for hearing on the list for the day for which notice of hearing is given. Sched. Rule 6.

As to the persons whose consent or concurrence is necessary, or who must otherwise be notified of the application, see *The Settled Estates Act* (R. S. O. c. 71), ss. 23, 25.

Where a person whose consent or concurrence is necessary is an infant, or of unsound mind, the Court has power to dispense with the consent or concurrence of such person: *Ib.*, s. 24.

The petition must be heard before the Judge presiding in the Weekly Court; as to the days on which these sittings are held, see *Rules* 10, 104.

Where the interests of the infant respondents, on whose behalf the Official Guardian is served, conflict, another guardian *ad litem* will have to be appointed so that each class of infants may be properly represented. The appointment of such other guardian must be made by order, on a special application: see *Rules* 155, 156, *supra*, pp. 288, 289, and *Rule* 980.

Evidence
on applica-
tion as to
lunatic.

980. Where a committee of a lunatic makes or consents to an application, or gives a notification respecting any application, the authority of such committee to act on behalf of the lunatic shall be produced to the Court and also evi-

dence to satisfy the Court that what is proposed is, and the committee shall make an affidavit that he believes that it is, proper and consistent with a due regard to the interest of such lunatic; and if it appears that it is proper and consistent with a due regard for the interest of the lunatic that the committee shall make or consent to the application, or give any specific notification respecting the application, the Court may approve of his so doing. Sched. Rule 7.

Any application under this *Rule* must be made in Court, and *prima facie*, to the Judge of the Weekly Court.

981. Where the Official Guardian or other guardian *ad litem* of an infant, or person of unsound mind (not so found), consents to an application, or gives a notification respecting an application, evidence shall be produced to satisfy the Court that it is, and the guardian shall make an affidavit that he believes that it is, proper and consistent with a due regard to the interest of such infant or person of unsound mind (not so found), that such consent be given, and thereupon the Court may approve of the same being given. Sched. Rule 8.

Evidence as to consent of infant or person of unsound mind not so found.

982. Upon every petition the Court shall be satisfied by sufficient evidence that it is proper and consistent, with a due regard for the interests of all parties entitled under the settlement, that the powers should be exercised, and it shall be stated in the evidence why and upon what ground it is deemed to be so. Sched. Rule 9.

Evidence that application is proper.

983. Upon every petition where there are trustees seised or possessed of any estate in trust for any of the persons whose consent or concurrence to or in the application is required, evidence shall be produced that notice of the application has been served on such trustees. Sched. Rule 10.

Evidence of service on trustees.

984. Upon every petition evidence shall be produced to satisfy the Court that neither the applicant nor any party entitled has previously applied to the Legislature of the Province of Ontario for a private Act to effect the same or similar object, or, if any application has been made, that the same was not rejected on its merits or reported against by the Judges to whom the bill may have been referred. Sched. Rule 11.

Evidence of no previous application to Legislature.

Rules Where any application has been made for a private Act to carry out the objects sought by the petition, and has been rejected on the merits, or reported against by the Judges to whom the proposed Act was referred, it is improbable that the Court will sanction the scheme, on any subsequent application to the Court; where, however, the application for a private Act has been rejected on the ground that the relief sought could be obtained by proceedings under *The Settled Estates Act*, the failure of the application to the Legislature would be no bar to a subsequent proceeding under *The Settled Estates Act*.

Service of advertisement or notice.

985 If upon the hearing of any petition the Court is of opinion that notice ought to be served on any person who has not been served, or that notice of application ought to be inserted in any newspaper, the Court shall give directions accordingly, and the petition shall stand over generally or to such time as the Court shall direct. Sched. Rule 12.

The form of advertisement will probably be referred to be settled by an officer of the Court before publication. Its object is, of course, to give persons interested full information, and where that has been accomplished, small and immaterial defects in the advertisement will not be fatal: see *Re Whiteley*, L. R. 8 Eq. 374; *Re Burley*, W. N. 1868, 148; *Re Bourne*, 16 W. R. 1115; *Re Snell*, 19 W. R. 1000; *Re Nane*, W. N. 1867, 109; *Re Hemmley*, L. R. 16 Eq. 315; *Re Bicknell*, L. R. 14 Eq. 467.

The marriage of a petitioner after the publication of the advertisement was held not to be a ground for requiring its republication: *Re Marshall*, L. R. 15 Eq. 66. And on the death of a petitioner after advertisement, the petition may be amended by stating the fact, and substituting a new petitioner: *Re Wilkinson*, L. R. 9 Eq. 71.

Where advertisement - Persons who may be heard.

986. When the Court, at the hearing, has directed notice of any application to be inserted in any newspapers, any person may at the time specified in the notice, be heard in opposition to or in support of the application, subject to such order as to costs as to the Court may seem just. Sched. Rule 13.

What order is to state.

987. The order made on the adjudication on the petition shall state, in addition to the names of the petitioners, the names of the persons other than the petitioners who concur or consent, or to whom notice of the application has been given, or who have appeared in opposition to or in support of the application, and whether any notice was received from the persons to whom notice had been given, and, if any has been received, the purport thereof, and also the names of the persons, if any, notice to whom has been dispensed with, and whether the order is made subject to any, and what rights, estate or interest of any person whose concurrence or consent

has been refused, or who has not, or is not to be deemed to ^{Rules} have submitted his rights or interests to be dealt with by ⁹⁸⁸⁻⁹⁹¹ the Court, or whose rights or interests ought, in the opinion of the Court, to be excepted. Sched. Rule 14.

988. Where the Court authorizes a lease, the order shall ^{In case of} direct that the lease shall contain such conditions as are re- ^{leases.} quired by the Act, and such other covenants, conditions and stipulations as the Court deems expedient with reference to the special circumstances, or may direct the same to contain such covenants, conditions and stipulations as may be approved by the Master in Ordinary or a Local Master. Sched. Rule 15.

989. In all cases not provided for by *The Settled Estates Act, 1895*, or Rules 973 to 988, the existing forms and mode of procedure and general practice of the Court on similar proceedings shall apply to proceedings under the said Act. Sched. Rule 17.

990. The Court, may by special order, dispense with all ^{Court may} or any of the preceding Rules, in any case in which it thinks ^{dispense} fit, and upon such terms and conditions (if any) as it may ^{with Rules.} deem proper. Sched. Rule 18.

By "*Preceding Rules*" the whole body of *Rules* which precede *Rule* 990, is not meant, but simply the *Rules* 973-989. These *Rules* were originally incorporated in the statute, 58 Vict. c. 20.

8. QUIETING TITLES.

991. A petition for an investigation of titles, under *The* ^{Two or} *Quieting Titles Act*, shall not include two or more properties ^{more prop-} dependent on separate and distinct titles, but may include ^{erties held} any number of lots or parcels belonging to the same person, ^{by separate} and dependent on one and the same chain of title. ^{titles} *Con.* ^{not to be} *Rule* 1013. ^{included in} ^{the same} ^{petition.}

Taken from Chy. O. 492.

The Act referred to in this *Rule* is *The Quieting Titles Act* (R. S. O. c. 135).

Where the provisions of this *Rule* are violated, the Referee may refuse to proceed with the investigation of the title. This may lead to delay and expense, as the objection can only appear before the Referee, after the proceedings necessary to shew the title have been taken. The object of the *Rule* is to prevent the proceedings becoming unnecessarily intricate.

Rule 991.

Who may
file petition
under
Quietting
Titles Act.

Who May File Petition.—Any owner of an estate in fee simple in land, or any trustee for the sale of the fee simple, may file a petition without leave; R. S. O. c. 135, s. 2. Any other person who has any estate, or interest, legal or equitable, in or out of land in Ontario, may also file a petition; *Id.*, s. 3; but under *Rule 992*, the petition in the latter case, must first receive the sanction of a Judge, before it can be referred to a Referee for investigation. A vendee before conveyance, is within sec. 2, and his petition will not be entertained without the consent of his vendor; *Re Brown*, 3 Chy. Ch. 158; and a petitioner who is only a tenant in fee in remainder must first obtain the consent of the tenant for life to the filing of the petition; *Re Pelten*, 8 P. R. 470.

Not neces-
sary that
petitioner
should be in
possession.

Formerly it was necessary that the petitioner should be in possession by himself, or tenant; *Re Bell*, 3 Chy. Ch. 239; *Re Mulholland*, 18 Gr. 528; *Re Mono*, 6 P. R. 150; but that is no longer necessary; and a petitioner, who is out of possession, may, on obtaining a certificate of title, obtain on petition an order for the delivery of possession to him of the land in question, which may be enforced by the same process as a judgment for the recovery of land; see R. S. O. c. 135, s. 43; *Re McDonald*, before Boyd, C., 16th May, 1881.

A petition may be filed by a devisee claiming under a will, where the property intended to be devised has been erroneously described; *Re Lyons*, 2 Chy. Ch. 357; *Re Callaghan*, 8 P. R. 474; but a grantee cannot by this means rectify an erroneous description in a deed under which he claims; *Id.* As to cases in which property intended to be devised, may pass under a will, notwithstanding a misdescription of it in the will, see *Re Shaver*, 6 Ont. 312; *Hickey v. Storer*, 11 Ont. 106; *Young v. Purvis*, 11 Ont. 597; *Summers v. Summers*, 5 Ont. 110; *Wright v. Collins*, 16 Ont. 182; *Re Bain & Leslie*, 25 Ont. 133; *McFadden v. McFadden*, 27 Ont. 508.

Filing a
petition will
not save the
rights of a
contestant
otherwise
barred by
Statute of
Limita-
tions.

Effect of Filing Petition.—The filing of a petition is not such a proceeding as will save the rights of a party *contestant*, otherwise barred by the Statute of Limitations; *Laing v. Avery*, 14 Gr. 33; nor, it would seem, will it have the effect of stopping the running of the Statute in favour of a contestant in adverse possession, until such contestant is notified, or has filed a claim, or otherwise become a party to the proceedings, nor even then, unless the petitioner ultimately obtains a certificate of title. Where a contestant claiming title under a tax sale was barred, but the petition was also ultimately dismissed, it was held that the filing of the petition and the proceedings had on the claim of the contestant, were not an effective questioning of the latter's title, so as to preclude him from the benefit of the Act 37 Vict. c. 15 (O.), curing the defect in the tax sale, under which he claimed, if not questioned within two years; *McNab v. Peer*, 32 C. P. 545.

Description
of land in
petition.

Description of Land.—The description of the land in the heading of the petition should be sufficient to enable the land in question to be identified, but usually it is unnecessary to set out in it the metes and bounds. The description of the lands in the body of the petition should be given in the form in which the petitioner desires the land to be described in the certificate of title. Where there is any plan of the property registered, the description of the land in the petition must be in accordance with the plan; *Re Morse*, 8 P. R. 475; R. S. O. c. 136, s. 100 (3); and where pending the petition, the land was laid out into building lots according to a registered plan, the description was required to be amended according to the registered plan; *Id.*

Where the description of the land in the heading of the petition appears to the Referee of Titles, not to be sufficiently explicit, he should require a sufficient and proper description to be inserted in all notices by him directed to be published, or served; and where it appears that there is no sufficiently definite description of the lands contained in either the heading or the body of the petition, or that the description given is misleading, the Referee may require the petition to be amended in that respect, before proceeding with the investigation. The petition, if amended in this respect, would also require to be re-registered, if it had been previously registered: see R. S. O. c. 135, s. 6.

Rule 991.

Referee may insert more specific description of land in the notices to be served or published.

Estate, or Interest, Claimed.—The estate, or interest, claimed by the petitioner, should also be accurately stated in the petition, and also the estates and interests of all other persons in the land, which are intended to be admitted by the petitioner, otherwise the petitioner may be ordered to pay the costs of such other persons who may come in to prove claims, not admitted in the petition. The petitioner should not allege in his petition that the estate which he claims is *subject to* any rights or claims which he intends to dispute.

State claimed must be correctly stated in petition.

Form of Petition.—The form of petition given in the Schedule to the Act, R. S. O. p. 1231 (H. & L. Forms, No. 1430), should be followed as nearly as may be. It is neither necessary, nor desirable, to set out in detail, in the petition, the facts and circumstances affecting the title; but a concise statement of such facts as are necessary to make out the title, and which do not appear in the produced documents, is to be delivered to the Referee, with the other documents required to be furnished under R. S. O. c. 135, s. 7 (4).

Petition.

Filing the Petition.—Under R. S. O. c. 135, s. 5, the application is required to be made to the High Court or a Judge thereof. The petition is filed in the Central office: *Rule 983.*

Where the investigation of title is to be proceeded with before a Local Referee, the petition before being filed, must be entered with the Inspector of Titles at Toronto: see *Rule 997.*

Indorsement of Petition.—The petition should be indorsed with the usual notice of the name and address of the solicitor by whom it is filed, or of the principal and agent, where it is filed by an agent: see *Rules 134, 136*; or when filed by a petitioner in person, there must be indorsed his place of residence and occupation, and an address for service within 2 miles of the office where the proceedings are to be carried on: see *Rules 135, 136.*

Where it is desired that the petition should be referred for investigation to a Local Master, the memorandum required by *Rule 995* must be also indorsed.

Registering Petition.—Upon filing a petition under the Act, the officer with whom it is filed is to issue a certificate of its filing: see form R. S. O. p. 1279 (H. & L. Forms, No. 1431), which is to be registered in the Registry Office of the Registration Division, in which the lands in question are situate: R. S. O. c. 135, s. 6. This certificate need not be registered immediately on the petition being filed, but its registration may be deferred until it is seen whether the certificate of title will be granted.

If after the registration of a petition it is amended in any material particular, the petition, as amended should be registered. The object

Rule 991. of the registration is to give notice to persons dealing with the land pending the investigation of the title, of the pendency of the proceedings. Owing, however, to the right now to delay its registration until almost the last moment before the granting of a certificate, the object aimed at by this requirement seems to have been rendered nugatory.

Affidavit of
petitioner.

Proofs Required on Investigation of Titles.—The following are the papers which it is necessary to deliver to the Referee of Titles, to whom the petition is referred, in all ordinary cases, and the proofs 1 to 15 should be delivered at one time, not piecemeal.

1. The affidavit of the petitioner, under the 8th section of *The Quieting Titles Act*. If the affidavit is not made by the petitioner, some valid reason should be given why it is not: *Re Raudell*, 1 Chy. Ch. 71. (For form of affidavit and schedule, see H. & L. Forms, Nos. 1132, 1435.) The schedule of documents must be marked, as an exhibit, by the commissioner before whom the affidavit is sworn: *Re Dickson*, 3 Chy. Ch. 352.

N.B.—None of the affidavits in support of the petition should be sworn until the petition has been filed.

Certificate
of counsel.

2. The certificate of counsel, or solicitor, under the 9th section of *The Quieting Titles Act* (see Form, H. & L. Forms, No. 1434). This certificate should not be dated prior to the swearing of the petitioner's affidavit to which it relates. The certificate should follow the language of section 9. A certificate of counsel that he had corresponded with the petitioner was held insufficient: *Re Dickson*, 3 Chy. Ch. 352.

County
Registrar's
certificate.

3. The County Registrar's certificate of all registrations upon the land in question, up to, and including, the date of filing of the petition: *Re Hill*, 2 Chy. Ch. 348; see H. & L. Forms, No. 1432. It is advisable that no further registrations should be made upon the lot by the petitioner pending the investigation. If any transfer by way of mortgage, or otherwise, be made by the petitioner pending the investigation, the Referee of Titles should be immediately notified thereof: see *Re Cummings*, 8 P. R. 473; *Re Morse*, 8 P. R. 475.

When there are a great many registrations recorded against the lot, but not affecting the particular parcel in question, and the Registrar cannot certify those that do affect the land in question, without including in his certificate those that do not, his certificate may be dispensed with, on production of a proper affidavit of search by a Provincial Land Surveyor: *Re Morse*, 8 P. R. 475.

The abstract will have to be subsequently continued to the date of the certificate of title: *Re Cummings*, 8 P. R. 473; and shewing the registration of the certificate of filing the petition: R. S. O. c. 135, s. 6 (24).

Deeds.

4. All deeds and evidences of title in the petitioner's possession or power: see R. S. O. c. 135, s. 7 (1).

5. If the petitioner cannot produce all the deeds relating to the land, under which he derives title, he must procure and produce:—

(a) Certified copies of all registered instruments affecting the title, of which the originals are not produced, including discharged mortgages, and certified copies of all certificates of discharge of mortgages, and of the affidavits of execution thereof.

A certificate of discharge of mortgage has not the effect of reconveying the estate until it is registered: *Re Morse*, 8 P. R. 475; *Re Luckhardt*, 20 Ont. 111.

161. Affidavits of diligent search for the originals of all deeds to which the certified copies of memorials relate (where the memorials are not made sufficient evidence by R. S. O. c. 134, s. 142), 130, and for all other deeds relating to the title which are not produced.

Rule 991.

Affidavits of search for lost deeds.

(c) Proof of contents of the non-produced deeds, where the memorials are not sufficient evidence thereof.

Proof of contents where memorials not sufficient evidence thereof.

16. If there is no release of dower by the wife of a former owner, shew that he was unmarried when he conveyed, or that his wife is dead, or that her dower is barred, or that the land is not subject to her dower: see R. S. O. c. 164, s. 4; otherwise the certificate of title must be subject to her dower.

Proof of bar of dower.

7. Affidavits are required, shewing that possession has always accompanied the title under which the petitioner claims: see Rule 1001. Also affidavits shewing who is, at the time of making such affidavits, in occupation, and under what title, or claim of title. These affidavits should shew how the possession has been held, and should be made by disinterested persons: see H. & L. Forms, No. 1438. See further as to evidence of possession requisite: Rule 1001, note.

Affidavits as to possession.

8. Consent of the person in actual possession (wherever any person other than petitioner is in occupation), duly verified by affidavit. For form of consent, see H. & L. Forms, No. 1442.

Consent required.

9. Consent of any mortgagee, or person entitled, to any outstanding charge, or estate, duly verified by affidavit. For form of consent see H. & L. Forms, No. 1442; and see *Re Currehill*, 8 C. L. J. 50.

N.B.—The consents mentioned in clauses 8 and 9 must be produced even though the petitioner admits that his title is subject to the right of such tenant, mortgagee, etc. In some cases the consent must be filed before the petition will be referred for examination: e.g., where the petitioner is a purchaser who has not obtained his conveyance, the consent of his vendor must be filed: *Re Brown*, 3 Chy. Ch. 158; or where he is tenant in remainder expectant on a life estate, the consent of the tenant for life must be filed: *Re Pelton*, 8 P. R. 470.

10. Sheriff's certificate that the property is not affected by any exception, sale under execution, or tax sale. (For form, see H. & L. Forms, No. 1437). This certificate should include the names of all persons who have owned the land at any time since 1803: see *Re Harding*, 3 Chy. Ch. 232; *Re Rundell*, 4 Chy. Ch. 71; *Ex parte Lyons*, 2 Chy. Ch. 357; and 5 Ed. vii. c. 43, s. 10, which seems to render ineffective the former decisions of *Nut v. Abmond*, 20 Ont. 63, and *Re Wimbull*, 8 O. L. 11, 288.

Sheriff's certificate as to exceptions.

11. County Treasurer's certificate that there are no taxes in arrear, and that there has been no sale for taxes, and stating the year for which the last roll of taxes in arrear has been returned to him. (For form, see H. & L. Forms, No. 1430). Proof must be given of payment of all taxes, except those for the year in which the certificate issues. If the certificate first produced does not cover all such taxes an additional certificate will be required: see *Re Harding*, 3 Chy. Ch. 232; *Re Chamberlain*, 2 Chy. Ch. 352.

County Treasurer's certificate as to taxes.

N.B.—Certificates of title are always granted subject to the taxes for the current year in which the certificate bears date: see R. S. O. c. 135, ss. 12, 25 (b). Whenever the roll of taxes in arrear for any preceding year has not been returned to the County Treasurer, his certificate must be supplemented by the collector's, or township

Rules treasurer's receipt for all taxes not covered by the Treasurer's certificate, other than those for the current year: see R. S. O. c. 224, s. 100.

992, 993 **Statement of facts.** 12. A concise statement of any other facts necessary to make out the title; and affidavits or other evidence to prove the same: R. S. O. c. 135, s. 7 (40, 45).

N.B.—All affidavits to prove facts material to the petitioner's title, should, as far as possible, be made by disinterested persons: *Re Chamberlain*, 2 Chy. Ch. 352.

Schedule of particulars. 13. Schedule of the particulars so produced to be marked as an exhibit to the petitioner's affidavit: *Re Dickson*, 3 Chy. Ch. 352; R. S. O. c. 135, s. 7; see Form, H. & L. Forms, No. 1437.

Crown lands registered in the Queen's Bench office no longer bind lands unless also registered in the Registry office: see R. S. O. c. 113, s. 15; *Re Franklin*, S. P. R. 470; 51 Viet. c. 33 (10, 1).

The Referee's certificate, allowing or disallowing, the claim of any contestant, requires confirmation in the same manner as a Master's report made in an action.

Affidavits of publication of advertisement. Affidavits proving the publication, and posting of the advertisement required under *The Quieting Titles Act*, s. 14, should shew that the deponent has examined issues of the papers in which the advertisement has been published; and also that the notices have remained posted at the Court House, and Post Office, continuously for one month: *Re Chamberlain*, 2 Chy. Ch. 352; *Re Hill*, *Ib.* 348. For forms of affidavits, see Taylor on Titles, 2nd ed., pp. 200, 201.

Petitions to be referred to Judge in certain cases before being referred for investigation. **992.** Where an application is made under section 3 of the said Act, the proper officer in the Central Office shall attend one of the Judges with the petition for directions, before the same is referred for investigation. Con. Rule 1014. Rules 1 Jan., 1896, 1496.

Taken from Chy. O. 493.

Where petitioner has only a partial interest, consent of other parties interested required. Where the petitioner has merely a partial interest, the Court usually requires the consent of the other persons interested in the estate, to be filed, before authorizing the petition to be referred for investigation. Thus, where a purchaser before conveyance filed a petition, the consent of his vendor was required: *Re Brown*, 3 Chy. Ch. 158; and where the petitioner was a tenant in remainder, the consent of the tenant of the particular estate was required: *Re Pelton*, S. P. R. 470.

The consent duly verified by affidavit should be attached to the petition, when brought to be filed.

Petitions, how often to be referred. **993.** All petitions under the said Act shall be filed in the Central Office, and may at the option of the petitioner, be referred to any of the officers of the Court at Toronto, or to any conveyancing counsel, who may from time to time be designated by the Court for the purpose, or to any Local Master. Rules 25 June, 1894, 1362; Rules 1 Jan., 1896, 1497.

Based upon Chy. O. 494.

Where the petitioner desires to have the petition referred to any Local Master as Referee of Titles, he must designate the officer to whom he desires the reference, by indorsement on the petition: see *Rule 995*. If there be no such indorsement the petition will be referred to the Referee of Titles at Toronto: *Rule 996*.

Rules
994-997.

994. The Senior Registrar shall, until further order, be the sole Inspector of Titles, in respect of petitions filed under *The Quieting Titles Act*, and sole Referee of any petitions, the proceedings under which are to be conducted in Toronto. Con. Rule 1016.

Senior Registrar to be Inspector

Taken from Chy. O. 433.

The Inspector of Titles supervises the work of all Local Referees of Titles, and as Referee of Titles at Toronto he investigates titles referred to him for investigation: see *Rules 1007, 1008*.

The fees payable to the Inspector of Titles are regulated by Tariff B., 110.

995. Petitions to be referred to any Local Master shall be indorsed thus: "To be referred to the Master at _____, Inspector of Titles." Rules 23 June, 1894, 1363.

Petitions, how to be indorsed.

Taken from Chy. O. 495.

At present there is only one Inspector of Titles, and this officer is also the sole Referee of Titles at Toronto: see *Rule 994*.

If there be no indorsement, of the name of a Local Master, the petition is to be referred to the Referee of Titles at Toronto: *Rule 996*.

Where the petition is required to be referred to a Local Master, as Referee, it must, before being filed, be entered with the Inspector of Titles, and a fee of \$8 in stamps must be paid thereon: see *Rule 997*, Tariff B., 110.

996. Petitions filed unindorsed with the names of a Referee shall, without order, stand referred to the Referee in Toronto, or to one of the Referees in Toronto (if more than one), in rotation or otherwise as the Court or a Judge from time to time directs; but a petition indorsed with the name of any Local Master shall stand referred to him accordingly, unless the Court or a Judge otherwise directs. Con. Rule 23 June, 1894, 1364.

Petitions, which to be referred to Toronto Referee.

Taken from Chy. O. 496.

At present there is only one Referee at Toronto: see *Rule 994*.

997. Where the petitioner desires the reference to a Local Master, the petition shall be entered with the Inspector of Titles before being filed as required by *The Quieting Titles Act*, and the Inspector shall note thereon the day of entering

Petitions to be referred to Local Referees, to be first entered with Inspector.

Rules
998-1001.

the same, adding to such note his own initials, and shall thereupon deliver the petition to the solicitor to be filed. Con. Rule 1019; Rules 23 June, 1894, 1365.

Taken from Chy. O. 497.

Local
Masters
may confer
with In-
spector.

998. A local Master shall be entitled to confer or correspond, from time to time, with the Inspector of Titles, for advice and assistance on questions of practice or evidence, or other questions arising under the Act or under these Rules. Con. Rule 1020.

Taken from Chy. O. 498.

Certificate
of filing of
petition to
be registered

999. The proper officer in the Central Office shall deliver to the party filing a petition under the Act, a certificate of the filing thereof, for registration; and thereupon the petition shall stand referred and shall be delivered or posted by the proper officer to the Referee named for that purpose. Con. Rule 1021.

Taken from Chy. O. 499.

The form of the certificate referred to in this *Rule* is given in R. S. O. p. 1270, and see H. & L. Forms, No. 1431. The certificate is required to be registered in the proper Registry Office; see R. S. O. c. 135, s. 6.

As to the time for registering the certificate: see note to *Rule* 991, p. 1227.

The originals, or certified copies, of all instruments, registered prior to this certificate are required to be produced to the Referee: see R. S. O. c. 135, s. 7 (1), (2).

Papers in
support of
application
to be deliv-
ered to
Referee and
examined by
him.

1000. The particulars necessary, under section 7 of the Act, to support the petition shall be delivered or sent by the petitioner, or his solicitor, to the Referee, and shall be forthwith examined and considered by him. Con. Rule 1022.

Taken from Chy. O. 500.

On delivering the papers to the Referee a fee of fifty cents is to be paid on each deed in the chain of title, other than satisfied mortgages; and ten cents on each paper filed: see Tariff B., 106.

Where the reference is to the Referee at Toronto the additional fee of \$4 on the certificate of title is also payable; *Ib.*; but this fee is not payable where the reference is to a Local Master as Referee: see Tariff B., 110.

Evidence
required as
to possession

1001. In every case of an investigation of the title to property under the said Act, the petitioner shall show, by affidavit or otherwise, whether possession has always accompanied the title under which he claims the property, or how

otherwise, or shall shew some sufficient reason for dispensing with such proof either wholly or in part. **Con. Rule 1023.**

Taken from Chy. O. 501.

The question of possession is always a very important one, and it is necessary that the affidavits should shew how the possession has been held, *e.g.*: whether by residence, or by cultivation, and by whom, if by tenants, giving their names and the periods during which they occupied. Proof as to possession is indispensable; *Re Wright*, 2 Chy. Ch. 355. For form of affidavit: see H. & L. Forms, No. 1438.

Where the petitioner is a mere trespasser claiming to have acquired title by possession, the evidence as to possession must be very clear and conclusive, and it must be shewn to have actually extended to the whole of the land claimed, and should negative the existence of the exceptions which prevent the Statute from running: *Chapman v. Bunbury*, 31 C. L. J. 103, 15 C. L. T. 57. The actual possession of some part of a lot, or parcel, of land by a mere trespasser, will be insufficient to confer a title by possession as to any other part of which there has been no actual possession, even though the lot be a wild lot: *Harris v. Mudie*, 7 Ont. App. 414; *Reynolds v. Trivett*, 7 O. L. R. 623. In order to confer a title under the Statute of Limitations there must be an actual and visible possession; mere payment of taxes on a vacant lot confers no title: *Re Jarvis v. Cooke*, 29 Gr. 303; *Walton v. The Woodstock Gas Co.*, 1 Ont. 630; but see *Steers v. Shaw*, 1 Ont. 26. Even clearing and fencing, without actual possession or putting the land to any use, is not a sufficient possession to bar the rightful owner: *Stovel v. Gregory*, 21 Ont. App. 137.

In order to defeat a rightful owner's title, by adverse possession, the possession must have been continuous for the required number of years; whenever the possession is vacant, the rightful owner is in possession in contemplation of law: see *Trustees Agency Co. v. Short*, 13 App. Cas. 793; *Reynolds v. Trivett*, 7 O. L. R. 623.

Where the petitioner claims title by possession, he should prove the possession for the requisite time, by the clear and positive evidence of at least two independent witnesses. In such a case a notice, prepared by the Referee, should be served upon the person having the paper title, if he can be found, but if not, evidence of search for him and his representatives should be put in, and in such a case the possession should be shewn to have been long enough to bar him, even though he had no notice of the possession: *Re Caverhill*, 8 C. L. J. 50; *Re Chamberlain*, 2 Chy. Ch. 352. Where the petitioner claims title as against the patentee, or his heirs, or assigns, of land of which they have not taken actual possession by residing on, or cultivating some portion thereof, he must shew either knowledge of his possession by the patentee, or his heirs, or assigns, or else establish a possession for at least twenty years as against the patentee and those claiming under him: R. S. O. c. 133, s. 5 (4); *Re Linct*, 3 Chy. Ch. 230; *Bingle v. Dake*, 42 U. C. Q. B. 250; *VanVelsor v. Hughson*, 45 U. C. Q. B. 252; *Hicks v. Williams*, 15 Ont. 228; *Stovel v. Gregory*, 21 Ont. App. 137; but this is not necessary as to other persons becoming interested in the lands, as to whom ten years' possession may be sufficient, *e.g.*, a purchaser at a tax sale: *Brooke v. Gibson*, 27 Ont. 218, but see *Donnelly v. Ames, Ib.*, 271; proof of notice to the husband of the owner is sufficient: *Harris v. Prentiss*, 30 C. P. 484; S. C. in Appeal, 7 Ont. App. 414. A decree for redemption not prosecuted by the mortgagor for upwards of 21 years

Petitioner originally entering as a trespasser.

Possession of part is not constructive possession of rest of lot.

Evidence where title claimed solely by possession.

Rules was held to constitute no bar to the mortgagee's obtaining a title by
1002-1004. possession, notwithstanding that the mortgagor was a lunatic: *Re Leslie*, 23 Ont. 143.

When actual possession of a parcel may confer title to residue of lot. It is not clear that it is necessary to establish so strict, and actual, possession to all the land claimed, where the petitioner has been in possession under a claim of title which was originally defective. In such a case the doctrine of constructive possession might, and would probably, be held to apply even as against the owner of the paper title: see *Dundas v. Johnston*, 24 U. C. Q. B. 550; *Davis v. Henderson*, 20 U. C. Q. B. 344; per Burton, J., *Harris v. Mudie*, 7 Ont. App. p. 425; *Stevens v. Shuc*, 1 Ont. 26.

A person who has been in possession under a fraudulent grantee, but who has not acquired any title as against the latter, cannot set up a title by possession as against a purchaser of the land from the assignee in bankruptcy of the fraudulent grantor, made after the fraudulent conveyance has been set aside in proceedings instituted against both the fraudulent grantor and grantee: *Donovan v. Herbert*, 4 Ont. 655; unless the possession has continued for a sufficient time after the making of the latter conveyance to bar the title of the grantee.

Where there is no contest, attendance of petitioner's solicitor dispensed with.

1002. Where there is no contest, the attendance of the petitioner, or of any solicitor on his behalf, shall not be required on the examination of the title, except where, for any special reason, the Referee directs such attendance. Con. Rule 1024.

Taken from Chy. O. 502.

Referee to deliver requisitions and objections.

1003. If, on such examination as aforesaid, the Referee finds the proof of title defective, he shall deliver or mail to the petitioner, or to his solicitor or agent, a memorandum of such finding, stating shortly therein what the defects are, and he shall therein state as far as possible all the objections to the title. Con. Rule 1025.

Taken from Chy. O. 503.

Advertisements to be published in Gazette and other newspapers.

1004. When the Referee finds that a good title is shewn he shall prepare the necessary advertisement, and, unless the publication thereof is dispensed with under section 14 of the said Act, the same shall be published in the Official Gazette and in any other newspaper or newspapers in which the Referee thinks it proper to have the same inserted; and a copy of the advertisement shall also be put up on the door of the Court House of the county where the land lies, and, unless the nearest Post Office is in a city, in some conspicuous place in the Post Office which is situate nearest to the property, the title of which is under investigation; and the Referee shall

indorse on the advertisement so prepared by him, the name of the newspaper or newspapers in which the same is to be published, and the number of insertions to be given therein respectively, and the period (not less than four weeks) for which the notice is to be continued at the Court House and Post Office respectively. Con. Rule 1026.

Rule 1004.
Notices to be posted at Court House and Post Office.

Taken from Chy. O. 504.

The notice is not to be published until the Referee finds that a good title is shewn.

The notice is, ordinarily, required to be published once in the *Ontario Gazette*, and at least once a week for two weeks in some local newspaper published in the county town, or other place near where the lands in question are situated; but in some cases it may be found advisable to publish the advertisement more frequently. At least a month should be given from the date of the publication of the first advertisement, for sending in claims.

Advertise-ment, how published.

For form of advertisement, see H. & L. Forms, No. 1439.

The advertisement is principally intended for persons, if any, whose rights are not disclosed on the proceedings. Persons who are known to have, or appear to have, some adverse claim, should generally be required to be served with notice of the proceedings: see R. S. O. c. 135, ss. 16-21; and see note to *Rule 1005*.

The notices required to be posted at the Court House, and Post Office, should be kept up continuously for the period directed, and the person intending to prove the posting up, should take care to see that such notices are kept up continuously for the requisite period: *Re Hill*, 2 Chy. Ch. 348; *Re Chamberlain*, 2 Chy. Ch. 352. For form of affidavits of posting, and of publication of advertisements: see Taylor on Titles, 2nd ed., pp. 200, 201.

Notice how published.

Affidavits proving publication.

Where the lands are situate in a city, posting of a notice at the Post Office is not required.

Where an advertisement was posted at the Court House nearest the lands, which was not the Court House of the County in which the lands were situate, the irregularity was waived by the Judge: *Re Harris*, 12 P. R. 430; and see R. S. O. c. 135, ss. 45, 46.

Where the property in question is proved to be of the value of no more than \$3,000, the publication of an advertisement may be dispensed with: see R. S. O. c. 135, s. 14 (2). The affidavit proving the value of the land should follow the wording of that section, and should show explicitly that it is worth "no more than \$3,000": see Form H. & L. Forms, No. 1441. Where a Local Referee dispenses with an advertisement, it would be convenient for him so to state in his certificate required by *Rule 1007*, *e.g.*, by adding thereto "and it having been proved to my satisfaction that the land in question is of no more value than \$3,000, I dispensed with the publication of any advertisements of this application."

Dispensing with advertisement.

Although publication of the notice in the *Gazette* and local paper is dispensed with, the notice must, nevertheless, be affixed in the Post Office and Court House, as required by this *Rule*, and also in a conspicuous place on the land in question: see s. 14 (2).

Rule 1005.

Notices
required to
be served.

1005. Any notice of the application to be served or mailed under section 16 of the Act, shall be prepared by the Referee; and directions shall in like manner, be given by him as to the persons to be served with the notice, and as to the mode of serving the same. Con. Rule 1027.

Taken from Chy. O. 505.

The 16th section of the Act is as follows:—

Adverse
claimant to
be notified.

"16.—In case there appears to exist any claim adverse to, or inconsistent with, that of the petitioner to, or in respect of, any part of the land, the Judge shall direct such notice as he deems necessary to be mailed to, or served on, the adverse claimant, his agent or solicitor."

By section 23, the Referee of Titles, to whom any petition is referred, is to proceed as the Judge should do under the Act, had the reference not been made, and he is to have the same powers.

Notice should be required to be served on every person known to have a claim adverse to the petitioner, whether the claim be admitted by the petitioner or not, unless the consent of such person be filed, duly verified, consenting to a certificate of title being granted to the petitioner, free from, or subject to, the claim, if any, of such consenting party, and if subject to his claim, setting forth with clearness what his claim is. The notice to be served should contain explicit information why it is served; *Ex parte Hill*, 2 Chy. Ch. 348.

Notice is also often required to be served for the sake of precaution, thus, where an application was made before *The Devolution of Estates Act* by devisees within a year of the death of their testator, notice was required to be served on the heirs-at-law, as the petition was, in effect, a proceeding to establish the will: *Ex parte Hill*, 2 Chy. Ch. 348, and see *Re Dougherty*, 4 Chy. Ch. 80.

When title
claimed by
possession,
owner of
paper title
to be served.

When title is claimed by possession, notice should ordinarily be served upon the persons who, but for such possession, would be the owners: *Re Chamberlain*, 2 Chy. Ch. 352. So also where the petitioner claimed the north-east part of a lot under a will devising the north-west part, alleging that the word "west" was a clerical error, all persons interested in maintaining the opposite view were required to be notified: *Ex parte Lyons*, 2 Chy. Ch. 357.

Where a petitioner claims title under a will in which the land has been misdescribed, his title may be quieted in any case in which the Court would in an action for the construction of the will determine that the land in question passed by the will as claimed by the petitioner, notwithstanding the erroneous description: see *Re Callaghan*, 8 P. R. 474; *Re Shaver*, 6 Ont. 312; but where the defect is in a deed *inter partes* the petitioner must bring an action to reform the deed, he cannot get the defect cured under *The Quieting Titles Act*: see *Re Callaghan*, 8 P. R. 474.

Parol evidence was held to be admissible to shew that "Lot 16, Con. 7, N. H." in a grant "North half of Lot 16, 7th Concession, Township of Mor..." *Young v. Purvis*, 11 Ont. 597; but where a description in a will is free from any patent ambiguity it would seem that parol evidence is inadmissible to shew that it means anything else than what is expressed: *Summers v. Summers*, 5 Ont. 119; *Hickey v. Storer*, 11 Ont. 106; *Re Bain & Leslie*, 25 Ont. 136, and see

Asten v. Asten, 1894, 3 Ch. 260; 71 L. T. 228. But where there is a general devise of all the testator's land, followed by a particular erroneous description, the latter may be rejected; *Wright v. Collins*, 16 Ont. 182; and see *McFayden v. McFayden*, 27 Ont. 598. **Rule 1005.**

Proceedings under *The Quieting Titles Act* being for the most part *ex parte*, it is often necessary to require the petitioner to negative the existence of facts, of which, in the case of a contest between the petitioner and any third person, the onus of proving would be on such third person: *Re Caverhill*, 8 C. L. J. 50. Petitioner may be required to give negative evidence.

Where any transfer of the property has taken place, under circumstances of an unusual nature, it is necessary to require the petitioner to adduce evidence to negative the existence of any fraud, or want of *bona fides*: *Re Dougherty*, 4 Chy. Ch. 80. Where, for instance, the property is claimed by, or on behalf of, a wife, under a conveyance made to her during coverture, an explanation of the transaction should be given on oath to shew that it was *bona fide*, and was such that the husband's creditors could have no claim to the property, and the affidavit of the petitioner should be corroborated by disinterested persons of credibility: *Ex parte Lyons*, 2 Chy. Ch. 357. So where the former owner, a person of the same name as the petitioner, had conveyed the land to the petitioner a few days before the filing of the petition, and the title appeared simple, explanations were required to be given: *Re Wright*, 2 Chy. Ch. 355. Or explain circumstances creating suspicion.

And, in addition, notice must also be required to be served on persons who may appear to have a possible interest in disputing the *bona fides* of any conveyance under which the petitioner claims, wherever there are any circumstances calculated to arouse suspicion: *Re Dougherty*, 4 Chy. Ch. 80.

Notices required by the Referee, to be served, are to be prepared and issued by him. Where service is directed to be effected by mailing the Referee may direct the letter enclosing the notice, to be prepaid and registered, and a notice to be indorsed on the envelope to the effect that if the letter be not called for within eight days that it is to be returned to the Referee of Titles, by whom the notice is issued. Directions to return letters, if not called for, are required by the Post Office authorities, to be printed, in order to secure due attention. Service of notices, how effected.

Where a notice, served in this way, is returned to the Referee of Titles, he should require further service. Where service is authorized on the attorney, solicitor, or agent of the party to be notified, there should be evidence produced that the person served was in fact the attorney, solicitor, or agent of the party required to be notified.

Where the person to be notified is an infant, the Official Guardian *ad litem* may be served for him, and no order appointing him guardian is necessary: *Re Murray*, 13 P. R. 367. Notice to infants.

For form of notice to a person appearing to have an adverse interest, see H. & L. Forms, No. 1445.

Strict proof is required to be given of the due service of all notices required to be served. The entries of service in a deceased solicitor's docket were held insufficient proof: *Ex parte Palmer*, 2 Chy. Ch. 351. Where a certificate was granted on a false affidavit of the due service of a notice, the certificate was set aside on the application of the party directed to be notified, with costs: the Court refusing to enter into the question whether he was properly entitled to notice or not: *Re Ashford*, 3 Chy. Ch. 77. Proof of service.

Rules**1006, 1007.**

Adjudication on claim of contestant.

Where there is a contest, the Referee may, by consent, report on the contestant's claim before disposing of the petitioner's title; but he should not do so, without consent. In general, the petitioner is bound, in the first place, to make out his own title before he can claim to have an adjudication upon the claim of a contestant: *Re Cameron*, 14 Gr. 612. And a contestant is at liberty to point out defects in the petitioner's title, before proceeding to prove his own: *Armour v. Smith*, 16 Gr. 380.

Referee may award costs.

The Referee of Titles may award costs to, or against, a petitioner, or contestant: R. S. O. c. 135, ss. 21, 23; *Rules* 1130 (4), 1137; *Anon.*, 2 Chy. Ch. 22. Where a petitioner claims title by possession and the holder of the paper title on being notified appears and contests the matter, costs will not be awarded against him as a matter of course, even though the petitioner succeeds in establishing his title: *Low v. Morrison*, 14 Gr. 192.

Form of report.

The order or certificate of the Referee should be drawn up in similar terms to a report—e.g., "I find and certify," and not "adjudge and determine": *Anon.*, 2 Chy. Ch. 22.

Inspector and Toronto Referee to confer with Judges

1006. The Inspector or Toronto Referee, shall from time to time confer with one of the Judges in respect of matters before such Inspector or Toronto Referee, as there may be occasion. Con. Rule 1028.

Taken from Chy. O. 506.

When title made out before Local Referee, he is to certify same, and forward papers to Inspector.

1007. When any person has shewn himself, in the opinion of a Local Master, to be entitled to a certificate or conveyance under the Act, and has published and given all the notices required, the Master shall write at the foot of the petition, and sign, a memorandum to the following effect: "I am of opinion that the petitioner is entitled to a certificate of title (or conveyance) as prayed (or subject to the following incumbrances, etc., *as the case may be*):" and shall transmit the petition (if by mail, the postage being prepaid) with the deeds, evidence, and other papers before him in reference thereto, to the Inspector of Titles with whom the petition was entered; and the Inspector shall examine the same carefully, and if he finds any defect in the evidence of title, or in the proceedings, he shall, by correspondence or otherwise, point the same out to the petitioner, or his solicitor, or to the Master, as the case may be, in order that the defect may be remedied before a Judge is attended with the petition and papers for approval. Con. Rule 1029.

Duty of Inspector.

Taken from Chy. O. 507.

Finding of Local Referee not conclusive.

It will be seen from this *Rule* that the finding of a Local Referee of Titles is not conclusive, but that it is the duty of the Inspector of Titles to examine the proceedings, and to require any defects in the proofs to be supplied. Where the Inspector finds the proceedings

defective, he either transmits the papers to the Referee, with a note of the defects, or, where they are few, and of trifling character, he communicates directly with the solicitor of the petitioner. **Rule 1008.**

Where the advertisement is dispensed with, see notes to *Rule 1004.*

Where there has been any contest before a Referee of Titles, he should before certifying in favour of the petitioner, and transmitting the papers to the Inspector, dispose of the claim of the contestant. The order or report of the Referee on the claim of a contestant should be filed and confirmed, in the same manner as a Master's report in an action, before a certificate of title is granted to the petitioner: *Rules 693, 769.* As all proceedings in Quieting Title matters are commenced in Toronto, all reports must be filed in the Central Office there: *Rule 693 (1).*

An appeal will lie from the order, report, or certificate, of a Referee of Titles, or Inspector of Titles, to a Judge in Court in the same manner as an appeal from a report made in an action: *Rule 1013;* seven clear days' notice of appeal must be given to the respondent: see *Rules 1013, 769, 771, 772.*

A contestant who succeeds in establishing an adverse claim, cannot obtain a certificate of title in the proceedings in which he is contestant, but he may himself file a petition, and on such petition, he would be entitled to use the evidence taken in the matter in which he was contestant: *Re Dunham, 8 P. R. 472.*

1008. Where the Inspector, or other Referee (not being a Local Master), finds that the petitioner has shewn himself entitled to a certificate of title, or a conveyance under the Act, and has published and given all the notices required, the Inspector, or Referee (not being a Local Master), shall write at the foot of the petition, and sign a memorandum to the same effect as is required from a Local Master, and shall prepare the certificate of title, or conveyance, and shall engross the same in duplicate, one being on parchment or parchment paper; and shall sign the same respectively at the foot or in the margin thereof; and shall attend one of the Judges therewith, and with the deeds, evidence, and other papers before him in reference thereto; and on the certificate or conveyance being signed by the Judge, the Inspector or other Referee aforesaid, as the case may be, shall deliver or transmit the same to the Central office to be sealed and registered, and the proper officer in the Central office shall deliver or transmit the same when so sealed and registered, to the petitioner, his solicitor or agent, for registration in the proper County. *Con. Rule 1030.*

Taken from Chy. O. 508.

A Local Referee to whom a petition is referred, is not to prepare the certificate or title.

When title is made out to satisfaction of Inspector, or Toronto Referee, he is to certify same; and to prepare certificate of Title.

Certificate to be engrossed in duplicate.

Signed by Judge and sealed.

Certificate on Title, by whom prepared.

Rules 1009. 1011. The Inspector of Titles—or the Referee of Titles, at Toronto, where the petition is referred to him—are the only officers authorized to prepare certificates of title, issued under the Act.

Engrossment of certificate. This *Rule* requires the certificate to be engrossed by the officer preparing it; the object of the *Rule* being, to insure the certificate's being engrossed in a proper manner. but for some time past, the practice has been for the petitioner, or his solicitor, to procure the engrossments to be made on printed headings, supplied for the purpose by the law stationers.

The engrossment should be well and carefully made, without using figures or abbreviations, as the Judges refuse to sign certificates engrossed in a careless and slovenly manner.

Fees on. Where the petition is referred to a Local Referee, no fee is payable on the certificate of title, except the fees for entry; the fee of \$8, payable to the Inspector, being in full of all fees payable to him: *Tariff B.*, 110. Where the petition is referred to the Referee of Titles at Toronto, a fee of \$4 is payable on the certificate of title, in addition to the fees for entry: see *Tariff B.*, 108.

After certificate of title granted, title deeds may be delivered up without order or receipt being given. 1009. When a certificate of title or conveyance under the Act has been granted, the Inspector or Referee may, without further order, deliver, on demand, to the party entitled thereto, or his solicitor, all deeds and other evidences of title, not including affidavits made, and evidence given, in the matter of the title; and shall take his receipt therefor. *Con. Rule 1031.*

Taken from *Chy. O.* 509.

Original deeds only turned to petitioner. Under this *Rule* it has been the practice to return only original deeds and documents of title, but not certified copies, these are retained by the Inspector of Titles, with the other papers in the matter.

Papers filed in Quieting Title proceedings are not open to general inspection; but it has been usual to require the person desiring to search them to shew that he has an interest in the proceedings, or to produce the consent of the petitioner or his solicitor: see *Reg. v. Bank of England*, 64 L. T. 408; and *Re Strachan*, 1895, 1 Ch. 439; 72 L. T. 175; *Re Acory*, before Meredith, C.J., C.P., 11th March, 1896.

Inspector or Toronto Referee to keep copies of all letters. 1010. Every Inspector and other Toronto Referee shall keep a book and preserve therein a copy of all his letters under these Rules. *Con. Rule 1032.*

Taken from *Chy. O.* 510.

Applicant to pay all postage, etc. 1011. The applicant or his solicitor shall pay, or repay, as the case may be, all postages and other expenses of transmitting letters or papers. *Con. Rule 1033.*

Taken from *Chy. O.* 515.

1012. Petitions under section 33 of the Act shall be filed and proceeded with in the same manner (as nearly as may be) as petitions for an indefeasible title; and the fees of officers, solicitors, and counsel, shall be the same as in respect of the like proceedings in a cause or matter. Con. Rule 1034.

Rules
1012-1014.

Proceedings under s. 33, how conducted, and fees therefor.

Taken from Cby. O. 516; and see Imp. Stat, 21 & 22 Viet. c. 93.

The 33rd section of the Act, above referred to, is as follows:—

"33. In case any person domiciled in Ontario, or claiming any real estate in Ontario, desires to establish, not his title to some specific property, but generally that he is the legitimate child of his parents, or that the marriage of his father and mother, or of his grandfather and grandmother, was a valid marriage, or that his own marriage was a valid marriage, or that he is the heir, or one of the co-heirs of any person deceased, or that he is a natural born subject of [His] Majesty, he may, if the said Court thinks fit, have any of the said matters judicially investigated and declared."

Declaration of legitimacy, etc.

Under the Imperial Statutes, 21 & 22 Viet. c. 93, it has been held that a petitioner cannot obtain a declaration of the legitimacy of his grandfather: *Dodds v. Attorney-General*, 42 L. T. 402 nor of the illegitimacy of some other person: *Mansell v. Attorney-General*, 2 P. D. 265, and see *Ib.*, 4 P. D. 232.

A person who appears, and unsuccessfully opposes the claim of the petitioners, may be ordered to pay the costs occasioned by his contestation: see *Rule* 1130 (4), 1137; *Bain v. Attorney-General*, 1892, P. 261.

1013. An appeal shall lie from the order or decision of the Inspector, or Toronto Referee and others when they are acting under the said Act, which shall be prosecuted in the same way as an appeal from a Master. Con. Rule 1035.

Appeals from Referee and Local Masters.

Taken from Cby. O. 591.

Appeals from a Master may be prosecuted in two ways: appeals from Master's reports, and certificates, being governed by *Rules* 769, 771; and appeals from Masters when acting in Chambers being governed by *Rule* 767: it is probably intended that appeals from Masters when acting under *The Quieting Titles Act* shall be had in the same manner as appeals from reports, and such appeals are therefore to be prosecuted as directed by *Rules* 769, 771.

1014 The fees of solicitors and counsel, and the fees payable by stamps, for proceedings under the said Act, shall, respectively, be the same as in respect of the like proceedings in a cause or matter. Con. Rule 1037.

Fees to solicitors and counsel.

Taken from Cby. O. 511.

This *Rule* seems somewhat inconsistent with the Tariff, which prescribes the fees to be paid to Referees of Title, some of which differ from those payable for the like proceedings in suits. Possibly the *Rule* may be construed so far as it relates to disbursements, as if

Rule 1015. it read, "where no other fee is expressly prescribed by the Tariff, the fees payable to Referees of Title shall be the same as for like proceedings in suits."

9. SUMMARY INQUIRIES IN AID OF EXECUTION.

Voluntary
and Fraud-
ulent Con-
veyances.

The principal enactments, under which creditors are enabled to reach property conveyed away by their debtors, are,

(1) The Statute, R. S. O. c. 334, ss. 1-4, (13 Eliz. c. 5), which made void as against creditors all transfers of lands or goods made to delay, hinder or defraud creditors and others, and even though for valuable consideration unless taken *bona fide* and without notice or knowledge on the part of the purchaser; R. S. O. c. 115, s. 3.

(2) R. S. O. c. 147, under which transfers which are made by persons in insolvent circumstances, and which defeat or prejudice creditors, are made void as against such creditors.

Under 13
Eliz. c. 5.
Voluntary
convey-
ance.

The Statute, R. S. O. c. 334, ss. 1-5, (13 Eliz. c. 5).

Under this Act the law infers that creditors are delayed, etc., by a voluntary conveyance made at a time when, by reason of indebtedness, the transferor by so dealing with his property renders himself unable to pay his creditors, if required to do so; *Freeman v. Pope*, L. R. 9 Eq. 206; 5 Chy. 540; whether the conveyance is fraudulent or not; *Irvine v. Freeman*, 13 Gr. 465; *Ferguson v. Keany*, 16 Ont. App. 276; but a *bona fide* conveyance for value, is not voidable under the Act, even though it have the effect of delaying or defeating creditors; *Building & Loan Ass. v. Palmer*, 12 Ont. 1; and see R. S. O. c. 115, s. 3.

A valid voluntary settlement may be made by a settlor, indebted at the time, provided ample available assets are left out of the settlement to meet his debts, whether the debts are then actually payable or not; *Freeman v. Pope*, *supra*; *Re Ridler*, 22 Ch. D. 71; *O'Doherty v. Ontario Bank*, 32 C. P. 285; and an agreement by a solvent person to assign all his personal chattels and effects, where there is no other proof of an intention to defeat creditors, is not of itself proof of such intention; *Honman v. Lyons & Co.*, 39 W. R. 301; and see *Cameron v. Cusack*, 17 Ont. App. 489; but a voluntary conveyance by a solvent person is void, if its result is to denude him of all his property and so render him insolvent thereafter; *Sun Life v. Elliott*, 31 S. C. R. 91.

Even though not indebted there is a presumption of fraudulent intent, where a man, being about to go into business, settles the bulk of his property voluntarily, and becomes unable to pay his debts within a short time afterwards; see *Mackay v. Douglas*, L. R. 14 Eq. 106; *Fleming v. Edwards*, 23 Ont. App. at p. 727; but where a retired and successful hotel-keeper made a voluntary settlement, when about to resume business, the settlement was upheld, the grantor's subsequent insolvency being caused by loss by fire; *Fleming v. Edwards*, *supra*.

What cred-
itors and
subject
matter
within the
Act.

Ordinarily speaking, to entitle a creditor to impeach a deed under the Statute of Elizabeth he must have been a creditor of the grantor at the time the deed was executed; see *Real Estate Loan Co. v. The Yorkville & Vaughan Road Co.*, 9 Ont. 464; but a voluntary disposition of property, which, by reason of indebtedness at the time, is capable of being avoided by creditors, may be avoided not only

by any creditor, who was such at the date of its execution, but also **Rule 1015**, by any who become such after that date, so long as any one of the original creditors is unpaid: *Jenkyn v. Laughan*, 3 Drew, 419; *Freeman v. Pope*, *supra*; *Middleton v. Pollock*, 2 Ch. D. 108; *Vinden v. Fraser*, 28 Gr. 502; *Collard v. Bennett*, *Id.*, 550. Under circumstances also from which intent to delay, etc., may be presumed, a voluntary settlement may be void against subsequent creditors, where it would not be presumed to be fraudulent merely because of the settlor's embarrassed circumstances when he made it: see *May on Fraudulent Conveyances*, 2nd ed., 64.

The protection of 13 Eliz., c. 5, extends not only to "creditors," but to "others" who have lawful actions: *Oliver v. McLaughlin*, 21 Ont. 41.

Where a creditor brings an action to set aside as fraudulent a conveyance made by his debtor, without first obtaining judgment and execution he must sue on behalf of all creditors of the debtor, and it has been held that in such an action, relief will be confined to setting aside the conveyance, leaving him to resort to some independent proceeding to obtain execution against the property: *Oliver v. McLaughlin*, 24 Ont. 41; but *quære*, whether the plaintiff may not obtain judgment and execution for his claim in the same action. In many cases this has been done: see for instance *Building & Loan Assoc. v. Palmer*, 12 Ont. 1.

A creditor for less than \$40 cannot attack a conveyance of lands as fraudulent: *Zilliox v. Deans*, 20 Ont. 539; and see R. S. O. c. 60, s. 230, and *Rule 842*.

A mortgagee is not, merely by reason of his position as such, a creditor of the mortgagor within the statute, nor is the mortgage debt a debt within the statute, unless it is shewn that the mortgage security, at the time of the mortgage, was of less value than the amount of the loan: *Crombie v. Young*, 26 Ont. 194.

A conveyance by a debtor, in good faith, of his assets to pay his existing debts, cannot be impeached by one who has at the time a right of action for a tort, and subsequently recovers judgment, even though the conveyance is made because of the threatened action: *Cameron v. Cusack*, 17 Ont. App. 480; *Gurofski v. Harris*, 27 Ont. 201; 23 Ont. App. 717.

Where the subject of the conveyance cannot be reached by creditors at the time when it was made, the conveyance is not within the Act: *Blakely v. Gould*, 24 Ont. App. 153; 27 S. C. R. 682 (an assignment by way of security of the profit expected to be made out of a contract to do work).

A fraudulent intention is sufficient to avoid the transaction, even in the case of a deed made for value: see *Merchants' Bank v. Clarke*, ^{Fraudulent Int. ac.} 18 Gr. 594; and see R. S. O. c. 115, s. 3; but knowledge on the part of the transferee who has given valuable consideration of the motive or design of the transferor is not conclusive of bad faith: *Mulcahy v. Archibald*, 28 S. C. R. 529.

In the case of voluntary conveyances, it matters not whether the grantee had, or had not, notice of the fraud: fraudulent intent on the part of the grantor will suffice; but in the case of a purchaser for value, fraudulent intent on the part of both parties must be shewn, to avoid the transaction: *Wood v. Irwin*, 16 Gr. 398; *Merchants' Bank v. Clarke*, 18 Gr. 594; *Re Johnson*, 20 Ch. D. 391; *DalGLISH v. McCarthy*, 19 Gr. 578; *Allan v. McFarish*, 8 Ont. App.

Rule 1015. 440; *Oliver v. McLaughlin*, 24 Ont. 41; *Hickerson v. Parrington*, 18 Ont. App. 635; and see R. S. O. c. 115, s. 3.

A transaction by which a creditor is delayed is as much within the statute as one which defeats him altogether: *Martha v. McKenna*, 11 Gr. 59.

A conveyance which has the result of defeating creditors will not be presumed to have been executed with that intent, if from other circumstances the Court is satisfied that such was not the intent: *Ex p. Mercer, Re Wallace*, 17 Q. B. D. 290; *Carr v. Corfield*, 20 Ont. 218; *Randall v. Dopp*, 22 Ont. 422.

Where the object of such a conveyance was to make good breaches of trust committed by the grantor, it was held valid: *New v. Hunting*, 1897, 2 Q. B. 19; 76 L. T. 742.

A transaction by which property purchased by the debtor is conveyed to his wife or other person as his appointee, so as to defeat creditors, is a device within the statute, and the husband is not a proper party to proceedings to set the transaction aside: *Murdock v. O'Sullivan*, 25 Gr. 392.

A conveyance to a wife by her husband in pursuance of an antenuptial contract was held to be in performance of a duty, which divested the transaction of fraudulent colour: *Stuart v. Thomson*, 23 Ont. 503.

As to the circumstances under which a man may validly expend money to make improvements upon lands of his wife, see *Jackson v. Bozman*, 14 Gr. 156; *Davidson v. Macguire*, 7 Ont. App. 98.

Purchasers
for value.

The exception from the operation of the Act, of interests conveyed on good consideration and *bona fide*, includes the case of a purchaser of any interest, whether legal or equitable, under the deed impeached, and prevents the deed from being void as to him: *Halifax Jt. Stk. Bkg. Co. v. Gledhill*, 1891, 1 Ch. 31.

Where a deed is made for value, the question is whether it was made *bona fide*, and the burden of proof of *mala fides* is upon those who seek to set the deed aside: *Re Johnson*, 51 L. J. Chy. 501.

A transfer to secure an existing debt, where the transferor does not either directly or indirectly make himself an instrument for the purpose of subsequently benefiting the transferor, is not void merely by reason of knowledge on the part of the transferee of the intent of the transferor being to prevent a seizure under an execution: *Mulcahy v. Archibald*, 28 S. C. R. 523; but see *Re Jukes*, 1902, 2 K. B. 58.

Following
proceeds of
sale.

Where land is sold by the debtor and with the proceeds other lands are purchased and conveyed to an appointee of the debtor, the consideration money may be followed into the lands conveyed to the appointee: *Fleury v. Pringle*, 26 Gr. 67.

Where the property of the debtor has become incapable of being distinguished, as where the fraudulent grantee has sold the property to an innocent purchaser, and disposed of the proceeds so that they cannot be followed, there is no right of action against the fraudulent grantee to recover the purchase money: *Tennant v. Galloway*, 25 Ont. 56; *Union Bank v. Barbour*, 18 C. L. T. 200.

Delay.

Delay in taking proceedings to avoid a conveyance under the statute is no defence unless continued long enough to bar the legal right: *Re Maddery*, 27 Ch. D. 523.

An action does not lie in Ontario by a judgment creditor to set aside a fraudulent conveyance by his debtor of lands situate in a foreign country, when the plaintiff has no such remedy in the country where the lands lie, and though all parties reside in Ontario: *Burns v. Davidson*, 21 Ont. 547; and see *Purdon v. Parry*, 26 S. C. R. 412. Rule 1015.

Though the object of a conveyance may be to protect property from creditors of the actual purchaser, it nevertheless belongs to such purchaser, and the grantee may be declared a trustee for the real purchaser, at the suit of his creditors; and also at the suit of the real purchaser himself, unless the grantee sets up the criminality of the transaction: *Gibbons v. Tomlinson*, 21 Ont. 489; *Day v. Day*, 17 Ont. App. 157. The grantee having no interest may convey to the real owner at any time, and creditors of the former have no right to have such a conveyance set aside to obtain that which really does not belong to their debtor: *Gibbons v. Tomlinson*, *supra*. Conveyance, when good between the parties.

Fraudulent Assignments and Preferences under R. S. O. c. 147.—R. S. O. 1887, c. 124, s. 2, made void all transfers, etc., if made by an insolvent with intent to delay his creditors, or give one or more of them a preference over his other creditors, or which had such effect. Upon the meaning of these latter words there arose a difference of opinion (see *River Stare Co. v. Sill*, 12 Ont. 557; *Rae v. McDonald*, 13 Ont. 352; *Molson's Bank v. Halter*, 16 Ont. App. 323), some Judges holding that the Act applied if the person who made the transfer was at the time insolvent, and its effect was to defeat or delay creditors, or give one of them a preference, the intent being immaterial. The Supreme Court, however, finally held that the intent to defeat or delay, or to prefer, was still necessary, and that if a transfer was the result of pressure it would not be void as a preference: *Molson's Bank v. Halter*, 18 S. C. R. 88; see also *Benatluck v. Bank of B. N. A.*, 30 S. C. R. 120.

The above section 2 was thereupon, in 1891, repealed by 54 Vict. c. 29, s. 1, and the following (now R. S. O. c. 147, s. 2), substituted:—

2.—(1) Subject to the provisions of section 3 of this Act, every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes or securities, or of shares, dividends, premiums, or bounties in any bank, company or corporation, or of any other property real or personal, made by a person at a time when he is in insolvent circumstances, or is unable to pay his debts in full, or knows that he is on the eve of insolvency, with intent to defeat, hinder, delay, or prejudice, his creditors, or any one or more of them, shall as against the creditor or creditors injured, delayed or prejudiced, be utterly void. Gifts, transfers, etc., made by insolvent which defeat or prejudice creditors to be void.

"Insolvent circumstances."—There seems to be no material difference between the expressions "in insolvent circumstances" and "unable to pay his debts in full": *Dominion Bank v. Cowan*, 14 Ont. 465.

A debtor is in insolvent circumstances if he is unable to meet the current demands of his creditors, and has not sufficient property subject to execution to pay all his debts if sold under legal process at a sale fairly and reasonably conducted: *Warnock v. Klopfer*, 14 Ont. 288; *Dominion Bank v. Cowan*, *Id.*, 465; *Clarkson v. Stirling*, *Id.*, 466; *Rae v. McDonald*, 13 Ont. 352.

See further notes, *infra* "Fraudulent Assignments, etc."

Rule 1015.

(2) Subject to the provisions of section 3 aforesaid, every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels, or effects, or of bills, bonds, notes or securities, or of shares, dividends, premiums, or bonus in any bank, company or corporation, or of any other property, real or personal, made by a person at a time when he is in insolvent circumstances, or is unable to pay his debts in full, or knows that he is on the eve of insolvency, to or for a creditor, with intent to give such creditor an unjust preference over his other creditors, or over any one or more of them, shall as against the creditor or creditors injured, delayed, prejudiced or postponed, be utterly void.

"Insolvent circumstances": see notes to preceding sub-section.

See further notes, *infra* "Fraudulent Preferences."

(3) Subject to the provisions of section 3 aforesaid, if such transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor, or over any one or more of them, it shall in and with respect to any action or proceeding which, within sixty days thereafter, is brought or taken to impeach or set aside such transaction, be presumed *prima facie* (1) to have been made with the intent aforesaid, and to be an unjust preference within the meaning hereof, whether the same be made voluntarily or under pressure.

"Has the effect of giving, etc."—Under the similar language of the previous enactment (R. S. O. 1887, c. 124, s. 21, a transaction which had "the effect of giving a preference" was held to be a transaction by which "that is done indirectly, which, if it had been done directly would have been a preference within the Act": *Stephens v. McArthur*, 19 S. C. R. 446.

"Unjust preference."—There would seem to be no difference between this expression and "preference": see *Lawson v. McGeoch*, 20 Ont. App. at p. 472.

(1) The words "*prima facie*" were introduced in the Revision of the Statutes in 1897 to give effect to the opinions in *Lawson v. McGeoch*, 22 Ont. 474; 20 Ont. App. 464; (see also *Kirby v. The Rathbun Co.*, 32 Ont. 9; and *Craig v. McKay*, 8 O. L. R. 651), that where a transaction which has the effect of giving a preference is attacked within 60 days, the presumption of fraudulent intent is a rebuttable one, and that the onus of proof is only shifted from the creditor attacking to the creditor preferred (see *Brown v. Beamish*, 5 O. W. R. 722; see *contra*, *Cole v. Porteous*, 19 Ont. App. 111, on an appeal from a Division Court; but it would seem that even since the alteration of the Act, where the transaction is not attacked within 60 days, pressure will prevent its being deemed fraudulent: *Morphy v. Colwell*, 3 O. L. R. 314 (and as to what constitutes pressure, see *Ibid.*); but where the transaction is attacked within 60 days, pressure is of no avail to rebut the presumption of intent to give a preference: see *Webster v. Crickmore*, 25 Ont. App. 97 (a transaction before the alteration of the Act).

A transfer is not attacked by the issue of a summons in a Division Court to the transferee as garnishee, nor until the claimant appears or makes default in so doing: *Morphy v. Colwell* 3 O. L. R. 314.

The presumption of invalidity has been held to be rebutted by evidence that the transferee entered into the transaction in good faith without knowing or having reason to believe that the transferor was

insolvent: *Dana v. McLean*, 2 O. L. R. 466; by evidence that a chattel mortgage apparently giving a preference was in substance a renewal of a previous one to secure a debt: *Rogers v. Carroll*, 30 Ont. 328; or by an antecedent contract to give the creditor security: *Clarkson v. Stirling*, 15 Ont. App. 234; *Lawson v. McGeoch*, *supra*; but see *Breese v. Knox*, 24 Ont. App. 203; *Armstrong v. Johnston*, 32 Ont. 15.

(4) Subject to the provisions of section 3 aforesaid, if such transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor, or over any one or more of them, it shall, if the debtor within sixty days after the transaction, makes an assignment for the benefit of his creditors, be presumed, *prima facie*, to have been made with the intent aforesaid, and to be an unjust preference within the meaning hereof, whether the same be made voluntarily or under pressure.

As to the words *prima facie*, see note to sub-section (3).

It would seem that where an assignment is so made within sixty days, pressure is of no avail to rebut the presumption of intent to prefer: see *Webster v. Crickmore*, 25 Ont. App. 97.

(5) [By sub-section (5) it is provided that the word "creditor" in s. 2 (2), *supra*, in the 2nd and 3rd lines of sub-sections (3) and (4) is to include any surety, and the indorser of any promissory note or bill of exchange, who would upon payment by him of the debt, promissory note or bill of exchange, in respect of which such suretyship was entered into, or such indorsement was given, become a creditor of the person giving the preference].

If the person secured is only a creditor in respect of the impeached transaction, he is not within the section, e.g., where he takes or agrees to take, security contemporaneously with the giving of his indorsement: *Kerry v. James*, 21 Ont. App. 338.

Section 3 of R. S. O. c. 147, makes exceptions of certain assignments for the general benefit of creditors, payments of money to creditors, and certain *bona fide* sales and transfers as security for a *bona fide* present advance of money. See *Godfrey v. Poole*, 13 App. Cas. 497, where it was said that a deed which contemplates the full payment of all creditors cannot be held to be void as intended to defeat or delay creditors. See also *Re Laitt & Pratt*, 23 Ont. 78.

The handing by a debtor to his creditor of the unaccepted cheque of a third person upon a bank, the drawer of the cheque having funds there to meet it, is not a "payment of money to a creditor" within the above section 3; see *Davidson v. Fraser*, 23 Ont. App. 439; 28 S. C. R. 272 (overruling *Armstrong v. Hewstreet*, 22 Ont. 336), but see *Gordon Mackay & Co. v. Union Bank*, 26 Ont. App. 157.

This Act is not retrospective, and does not apply to any gift, transfer, etc., made before the passing thereof: *Ormsby v. Jarris*, 22 Ont. 11.

Fraudulent Assignments, etc.—The law in respect to fraudulent assignments under R. S. O. c. 147, would not seem to be different from what it was under the previous Act.

A plaintiff suing for a tort is not a creditor within the Act: *Gurofski v. Harris*, 27 Ont. 201; 23 Ont. App. 717; nor one suing for

Transac-
tions not
accepted
from Act.

Rule 1015. unliquidated damages: *Grant v. West*, 23 Ont. App. 533; *Mail v. Clarkson*, 25 Ont. App. 1; *Clapperton v. Mutchmor*, 30 Ont. 395.

Transfers
when not
impeach-
able.

As in the case of the 13 Elizabeth, c. 5, where the subject of the conveyance or transfer cannot be reached by creditors at the time when it was made, the transaction is not within the Act: *Blakely v. Gould*, 24 Ont. App. 153; 27 S. C. R. 682 (an assignment, by way of security, of the profits expected to be made from a contract).

A creditor cannot take the benefit of a transfer of goods, and at the same time attack the transfer as fraudulent: *Woods v. Reesor*, 22 Ont. App. 57; *Rielle v. Reid*, 26 Ont. App. 54; and an assignee for the benefit of creditors has no higher right than a creditor in this respect: *Woods v. Reesor*, *supra*.

A mortgage by any insolvent person on future acquired chattels, to secure repayment of the price of such chattels to the vendor thereof, is binding and not within the above Act: *Goulding v. Deeming*, 15 Ont. 201.

The Act does not make void a chattel mortgage given in consideration of an actual *bona fide* advance by the mortgagee without knowledge of the insolvency of the mortgagor, or of any intention on his part to defeat, delay or hinder, his creditors: *Campbell v. Patterson*, 21 S. C. R. 645.

The transaction is not impeachable unless it is shewn that the transferor was insolvent, and that the transferee knew it, and did not act in good faith: *Johnson v. Hope*, 17 Ont. App. 10; *Ashley v. Brown*, *Id.*, 500; *Lamb v. Young*, 19 Ont. 104; *Elgin Loan & Savings Co. v. Orchard*, 7 O. L. R. 695. The Court will not act on mere suspicion; there must be affirmative evidence of knowledge of the insolvency: *Burns v. Mackay*, 10 Ont. 167; *M'Roberts v. Steinoff*, 11 Ont. 372; *Rice v. Bryant*, 4 Ont. App. 542, 554; *Morton v. Nihan*, 5 Ont. App. 20, 28.

Preferential
payment
out of
proceeds.

A mortgage given by an insolvent person to secure an actual advance, made without notice of the insolvency, and in good faith is not impeachable, because the moneys advanced are pursuant to the direction of the insolvent paid over to some only of his creditors, who thereby obtain a preference: *Johnson v. Hope*, 17 Ont. App. 10; *semble*, even though the mortgagee knew of the intention to pay certain creditors only, by way of preference over others: *Campbell v. Roche*, 18 Ont. App. 606; but see S. C., 21 S. C. R. 645; see also *Tennant v. Galtow*, 25 Ont. 156.

Where a creditor's solicitor, with consent of a debtor and knowledge of his insolvent circumstances, procured a third person to advance money to the debtor on security of a chattel mortgage on his stock in trade, without divulging anything as to the insolvent's circumstances or why the money was wanted, and out of the money the solicitor paid the creditor in full, it was held that the chattel mortgage was protected by sec. 2 of the Act, as being a person who had made a *bona fide* advance of money within that section: *Gibbons v. Wilson*, 17 Ont. 290; 17 Ont. App. 1; but where in similar circumstances the solicitor for the preferred creditor was also solicitor for the mortgagee, the latter was held to be affected with notice of all the circumstances necessarily known by his solicitor, and the advance was therefore held to be not a *bona fide* payment of money within sec. 3: *Burns v. Wilson*, 28 S. C. R. 207.

For further instances in which transactions have been set aside: see *Stoddard v. Wilson*, 16 Ont. 17; *Johnson v. Cline*, *Id.*, 129.

While the moneys arising from a feigned sale of goods, fraudulent **Rule 1015**, as against creditors, are still in the hands of the nominal purchaser, they may be recovered from him: *Masuret v. Stewart*, 22 Ont. 290; but before 58 Vict. c. 23, it was held that they could not, where the proceeds had been received and disposed of so that they could not be ear-marked: *Tennant v. Galloway*, 25 Ont. 56. See also now R. S. O. c. 147, s. 10.

Where funds assigned remained in the hands and under the control of the assignee, though not in their original shape, they can be reached: *Re Mowat, Kingston Cotton Mills v. Mowat*, 1899, 1, Ch. 831.

As to what is sufficient to shew knowledge of the debtor's insolvent condition: see *Nat. Bank of Australasia v. Morris*, 1892, A. C. 287.

The effect of the transaction is not evidence of fraudulent intent: *Evidence of intent, etc.* *Carr v. Corfield*, 20 Ont. 218; *Randall v. Dopp*, 22 Ont. 422.

As to the effect of the evidence of the parties to the impeached transaction: see *Merchants' Bank v. Clarke*, 18 Gr. 594; *Jack v. Greig*, 27 Gr. 6; *Morton v. Nihan*, 5 Ont. App. 20.

Fraudulent Preferences.—Neither under the Statute of Elizabeth, nor at Common Law, was it wrong to give a preference: *Robertson v. Holland*, 16 Ont. 541; a preference to be impeachable must be one forbidden by R. S. O. c. 147.

Under R. S. O. c. 147, s. 2, it would seem that except in the cases provided for in sub-sections (3) and (4) there must, as formerly under R. S. O. 1877, c. 118, in order to work a fraudulent preference, be a concurrence of intent to do so on the part of both debtor and creditor: *Burns v. Mackay*, 10 Ont. 167; and the rule of the Court is not to act upon mere suspicion in the absence of affirmative evidence of fraud, or of controlling circumstantial evidence leading to that conclusion: *Id.*; and *McRoberts v. Steinoff*, 11 Ont. 372.

Subject also to the above sub-sections (3) and (4) a transaction by a person in insolvent circumstances is not impeachable as a preference unless the person claiming the benefit of the transaction had knowledge of the insolvency and did not act in good faith: *Johnson v. Hope*, 17 Ont. App. 10; *Lamb v. Young*, 19 Ont. 104; see also *Ashley v. Brown*, 17 Ont. App. 500; *Hickerson v. Parrington*, 18 Ont. App. 635; *Benallack v. Bank of B. N. A.*, 36 S. C. R. 120; and see *Gibbons v. Wilson*, and *Burns v. Wilson*, *supra*, p. 1248; and the intent to prefer may be rebutted by shewing pressure exerted by the creditor: *Beattie v. Wenger*, 24 Ont. App. 72; *Slater v. Oliver*, 7 Ont. 158; *Long v. Hancock*, 12 S. C. R. 22; *Re Bond*, 15 L. R. 1r. 321; *Molson's Bank v. Halter*, 16 Ont. App. 323; 18 S. C. R. 88; *Gibbons v. McDonald*, 19 Ont. 290; 18 Ont. App. 159; 20 S. C. R. 587; *Lawson v. McGeech*, 20 Ont. App. 464; *Kirby v. The Rathbun Co.*, 32 Ont. 9; even though the insolvent condition of the debtor is known to the pressing creditor: *Stephens v. McArthur*, 19 S. C. R. 446; *Hickerson v. Parrington*, *supra*; *Davies v. Gillard*, 21 Ont. 431; 19 Ont. App. 432; *Gignac v. Her*, 29 Ont. 147; 25 Ont. App. 393.

But the pressure must be real, not collusive: *Davies v. Gillard*, 21 Ont. 431; *Breese v. Knorr*, 24 Ont. App. 203; and *scumble*, the doctrine of pressure has no application where the debtor has transferred the whole of his property: per Street, J., in *Davies v. Gillard*, *supra*.

Rule 1015. Proof of fraudulent intent to prefer precludes pressure: *Edison, etc., v. Westminster*, 1897, A. C. 193; see also *Breece v. Knox*, 24 Ont. App. 203.

Payment by a debtor to a creditor in the honest belief, on reasonable grounds, that he is legally bound to make the payment, is not a fraudulent preference, even though the debtor is in fact under no such obligation: *Re L'antia, Ex p. Saffery*, 1900, 2 Q. B. 325.

Under sub-section (3) above, where a preferential security is attacked within 60 days, pressure is of no avail to rebut the presumption of intent to prefer: *Webster v. Crickmore*, 25 Ont. App. 97.

Conveyance of property to a trustee for other persons, in order to make good breaches of trust committed by the grantor, even though not communicated to the *cestui que trustent* is valid and irrevocable, and cannot be impeached as a preference: *Nor v. Hunting*, 1897, 2 Q. B. 19; 76 L. T. 742.

The application by a chattel mortgagee of the surplus proceeds of sale of the goods in the mortgage in satisfaction of an unsecured debt due by the mortgagor to him, is not a preference within the meaning of the Act: *Stephens v. Boissenn*, 23 Ont. App. 230; 26 S. C. R. 437.

A person suing for a tort is not, before judgment, a creditor within the Act: *Ashley v. Brown*, 17 Ont. App. 500; *Gurofski v. Harris*, 27 Ont. 201; 23 Ont. App. 717.

Property exempt from seizure is at the absolute disposal of the execution debtor, so that it is not a fraudulent preference to pay with it one creditor in preference to another: *Temperance Ins. Co. v. Coombe*, 28 C. L. J. 88; and see *Blakeley v. Gould*, 24 Ont. App. 153; 27 S. C. R. 682.

Formerly where a fraudulent preference had been made, and the preferred creditor had realized, the proceeds could not be followed unless they were ear-marked: *Davis v. Wickson*, 1 Ont. 369; and where the preferred creditor had been given a note which he had transferred to a *bona fide* holder for value, it was held that no relief could be given at the suit of other creditors: *Robertson v. Holland*, 16 Ont. 532; but see now R. S. O. c. 147, s. 10.

The Court or a Judge may at the instance of any judgment creditor call on the debtor and his grantee, etc., to shew cause why lands conveyed by fraudulent grant should not be sold.

1015. Where a judgment creditor alleges that the judgment debtor has made a conveyance of his lands which is void, as being made to delay, hinder or defraud creditors or a creditor, it shall not be necessary to institute an action for the purpose of setting aside the conveyance, but a motion may be made to the Court or a Judge by the judgment creditor, calling upon the judgment debtor and the person to whom the conveyance has been made, or who has acquired any interest thereunder, to shew cause why the lands embraced therein, or a competent part thereof, should not be sold to realize the amount to be levied under the execution. Con. Rule 1407.

This *Rule* does not exclude proceedings by action in the ordinary **Rule 1016** way, where proceedings in the summary way authorized by the *Rule*, might not be equally effective: see *Brown v. Beamish*, 5 O. W. R. 722.

"*Judgment Creditor*,"—An inquiry into the circumstances under which the judgment was recovered, in the absence of fraud or collusion in the recovery, is not allowable: *Smith v. McDermott*, 5 O. L. R. 515.

This *Rule* has reference only to transfers of land. The conveyances within its purview are such as are "void as being made to delay, hinder or defraud creditors, or a creditor"; in other words, such as come within the Statute 13 Eliz. c. 5 (R. S. O. c. 324, ss. 1-5) (which was directed against conveyances "to the end, purpose and intent to delay, hinder and defraud creditors and others, etc." and which declared such conveyances to be, as against such creditors, "clearly and utterly frustrate, void, and of none effect"); and probably also such as are void under R. S. O. c. 147, s. 2 (1), as to which see *supra*, p. 1245.

The statute from which this *Rule* is taken enacted that, in the cases referred to, "the Court or a Judge in Chambers may upon the application of the judgment creditor call upon, etc." Under this language it was held that the proper practice was to obtain an order *ubi* calling upon the judgment debtor, etc., to shew cause: *Wark v. Moulton*, 7 P. R. 14. The present *Rule* would seem to have been differently expressed in order to shew that a motion is to be made, as in other cases, on notice, and not by way of an order *ubi*: see *Rules* 526 and 1020.

Originally the motion was in Chancery required to be made to a Judge in Chambers: see *Queen v. Smith*, 7 P. R. 429; *Wark v. Moulton*, *supra*; but in the Common Law Courts the Clerk of the Crown and Pleas had exercised jurisdiction: see *Watts v. Hobson*, 7 P. R. 334. Now it would seem that the Master in Chambers, and other officers having like powers, may entertain such applications: see note to *Rule* 42 p. 217.

The inchoate right of dower at law obtained by a wife in land conveyed to her husband formerly made her a proper party defendant to a suit to set the conveyance aside: *McFarland v. McFarland*, 9 P. R. 73; and therefore she would seem to be a proper party to be served with notice under this *Rule*.

Quare, whether an order will be made for a sale at an earlier period than the plaintiff could have a sale if the Sheriff had been able to sell under a *fi. fa.* lands: see *Porte v. Irwin*, S P. R. 40. The practice in Chancery, in setting aside a fraudulent conveyance by an execution debtor, was never to accelerate the sale.

The onus of proof is on the applicant not on the grantee, and if no evidence is offered impeaching the validity of the conveyance an order for sale cannot be made: *Wentorser v. Nicholson*, 5 O. W. R. 645.

1016. Where a judgment creditor alleges that the judgment debtor is entitled to or has an interest in land which can not be sold under legal process, but can be rendered available only by proceedings for equitable execution by sale for

The Court or Judge may call on a judgment debtor, etc., to shew cause why

Rule 1017. satisfaction of the debt, the Court or a Judge may, upon the application of the creditor, call upon the judgment debtor and the trustee or other person having the legal estate in the land in question, to shew cause why the said land, the interest therein of the judgment debtor, or a competent part, should not be sold to realize the amount to be levied under the execution. Con. Rule 1008.

his equitable
interests
should not
be sold
to pay
execution.

Taken from R. S. O. 1877, c. 49, s. 11.

In *Wood v. Hurl*, 28 Gr. 146, in consequence of the section from which this *Rule* is taken having been, with others, grouped under the heading in the statute "Summary Inquiries into Fraudulent Conveyances," it was held that an equitable interest was not within the section unless it was in some way covered up by a fraudulent conveyance. The above heading has now been altered, but even under the Con. Rules of 1888, in which the above heading was carried into the Rules without alteration, it was held that by reason of *Rule 7* the heading was to be regarded as for convenience only, and did not affect the construction of this *Rule*: *Peters v. Stoness*, 13 P. R. 235.

Any interest in land, therefore, which cannot be sold by the Sheriff may be ordered to be sold under this *Rule*: *Id.* The interest which the debtor has under an agreement to purchase land is one which may be sold by the Sheriff, and to which, therefore, this *Rule* is not applicable: *Ward v. Archer*, 24 Ont. 650, not following *Re Prittie & Crawford*, 9 C. L. T. 45.

For what is saleable by the Sheriff, see R. S. O. c. 77, ss. 10 to 20, and note *supra*, p. 1100.

The language of this *Rule* has, probably by an oversight, not been altered as was done in *Rule 1015*, so as to make it clear that the motion is to be made upon notice: see note to *Rule 1015*; it would seem, nevertheless, that an order *nisi* would not now be the proper mode of procedure in view of *Rule 550*: see also *Rule 1020*.

Proceedings under Rules 1016-1018 should, where applicable, be taken instead of a new motion: *Can. Bank of Commerce v. Holston*, 4 O. L. R. 106.

Proceed-
ings after
such appli-
cation.

Cases in
County
Courts

1017. Upon any application under either of the Rules 1015 or 1016, such proceedings shall be had, either in a summary way, or by the trial of an issue, or by inquiry before an officer of the Court, or by an action, or otherwise, as the Court or Judge may deem necessary or convenient for the purpose of ascertaining the truth of the matters in question, and whether the land or the judgment debtor's interest therein is liable for the satisfaction of the execution; but if, in a case in a County Court, there is a dispute as to material facts, and the value of the land, or the debtor's interest therein, appears to be over \$100, the Court or Judge shall direct the trial of an issue in the High Court, and may name the county in

which the trial is to take place, subject to any order that the High Court or a Judge thereof may see fit to make in that behalf. Con. Rule 1009. Rules 1018, 1019.

Taken from R. S. O. 1877, c. 49, s. 12.

This Rule regulates the mode of inquiring into cases under either Rule 1015 or 1016.

The mode in which any question arising will be directed to be tried will be regulated by convenience in the particular case. An issue was directed to be tried in *Merchants' Bank v. Brooker*, 8 P. R. 133; *Ray v. Briggs*, 13 C. L. J. 40; an inquiry by a Master in *Peters v. Stoness*, 13 P. R. 235. An order was made forthwith in *Watts v. Hobson*, 7 P. R. 334, no cause being shewn.

The order if made summarily, or the judgment on the trial of an issue, should probably be in the same form as a decree in the like case would formerly have been in Chancery: see note to Rule 1019.

Where an issue has been directed in a County Court case to be tried in the High Court under the last clause of the Rule, the High Court merely tries the issue and has no further jurisdiction in the matter: the final disposition of the matter, consequent upon the decision on the issue, takes place in the County Court in which the issue was directed: *Merchants' Bank v. Brooker*, 8 P. R. 133.

1018. In County Court [and Division Court] cases the application under Rules 1015 and 1016 shall be made to the County Court, or to a Judge of a County Court, of the county or union of counties in which the land is situate, unless the Court or Judge upon the hearing of the application deems it more convenient and more conducive to the ends of justice to order that the proceedings be had and taken in the Court or before a Judge of the County Court of the county or union of counties within the limits of which the execution was issued; in which case the Clerk of the County Court of the county in which the land lies shall transmit the papers filed with him, together with the order of transference, to the Clerk of such other County Court. Con. Rule 1010.

Application to be made to the Judge of the County in which the lands are situate in County Court cases.

Taken from R. S. O. 1877, c. 49, s. 13.

The words in brackets are new, and were inserted to make the proceedings under these Rules conform to the altered procedure in Division Courts, by which execution against lands may issue (in cases where the sum remaining unsatisfied on a judgment amounts to \$40), out of the Division Court, instead of as formerly out of the County Court, upon a transcript from the Division Court: see R. S. O. c. 60, s. 230. See also *Zilliox v. Deans*, *supra*, p. 1243.

1019. Where in a summary way, or, upon the trial of an issue, or as the result of an inquiry under Rules 1015 to 1018, any land, or the interest of a debtor therein, is found liable If lands or interest of debtor found liable to sale, an

Rule 1020. to be sold, an order shall be made by the Court or Judge, declaring what land or what interest therein is liable to be sold, and directing sale thereof by the Master according to the usual practice. Con. Rule 1011.

order to be
made
specifying
the same.

Taken from R. S. O. 1877, c. 49, s. 14.

The order pronounced should be in form similar to a judgment in an action brought for the like purpose. It is possible, however, that the *Rules* 1015-1018 are only intended to apply to simple cases where it is not necessary to bring in other persons as parties and where a simple order for sale and application of the proceeds will be sufficient; and that where an inquiry as to other creditors and incumbrancers is necessary, an action must be brought.

Where the action is in a County Court, the reference may be directed to the Master of the High Court at the place where the proceedings are being carried on, or to the Clerk of the County Court: R. S. O. c. 55, s. 46, *et seq.*

Lis pendens
may be
registered.

1020. A notice of motion for an order under Rules 1015, 1016 or 1018, may contain a description of the land in question, and upon filing the same with the proper officer, signed by the solicitor of the applicant, a certificate of *lis pendens* may be issued for registration, and in case the said motion is refused in whole or in part, a certificate of the order, for registration, may be issued. Con. Rule 1012.

Taken from R. S. O. 1877, c. 49, s. 16.

As to the effect of registering a certificate of *lis pendens*, and as to discharging, and vacating certificates of *lis pendens*; see *supra*, p. 147.

CHAPTER XVI.

EXTRAORDINARY REMEDIES.

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| <p>1. BAILABLE PROCEEDINGS, 1021-1057.</p> <p>(i) <i>Order for Arrest</i>, 1021-1023.</p> <p>(ii) <i>Arrest</i>, 1027-1029.</p> <p>(iii) <i>Bail to the Sheriff</i>, 1030-1037.</p> <p>(iv) <i>Security in the action</i>, 1036-1043.</p> <p>(v) <i>Delivery of statement of claim</i>, 1044.</p> <p>(vi) <i>Orders to bring in the body</i>, 1045, 1046.</p> <p>(vii) <i>Application for discharge from custody</i>, 1047, 1048.</p> <p>(viii) <i>Surrender by sureties</i>, 1049, 1050.</p> <p>(ix) <i>Capias ad satisfaciendum</i>, 1051-1055.</p> <p>(x) <i>Other writs of execution</i>, 1056, 1057.</p> | <p>2. ASCENDING DEBTORS, 1058-1066.</p> <p>3. REPLEVIN, 1067-1079.</p> <p>4. MANDAMUS, 1080-1093.</p> <p>(i) <i>In actions</i>, 1081-1083.</p> <p>(ii) <i>On Motion</i>, 1084-1090.</p> <p>(iii) <i>Procedure in Chambers</i>, 1091-1093.</p> <p>5. INJUNCTIONS, 1094.</p> <p>6. INTERIM PRESERVATION OF PROPERTY, 1095-1099.</p> <p>7. PROHIBITION, 1100.</p> <p>8. CERTIORARI, 1101.</p> <p>9. INTERPLEADER, 1102-1128.</p> <p>(i) <i>Generally</i>, 1102-1122.</p> <p>(ii) <i>In County Courts</i>, 1123, 1124.</p> <p>(iii) <i>Trial of issues in County or Division Courts</i>, 1125-1128.</p> <p>10. CHARGING ORDERS, 1129.</p> |
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1. BAILABLE PROCEEDINGS.

(i) *Order for Arrest.*

1021.—(1) The procedure for the arrest of a person ^{order for arrest.} under *The Act Respecting Arrest and Imprisonment for Debt* shall be by order of the Court or a Judge, made in an action commenced by a writ of summons. See Con. Rule 1045.

(2) The application for such order may be made at any time before final judgment. *New.*

(3) The order shall be according to Form No. 135 and may be delivered to the Sheriff of any County in Ontario for execution. See Con. Rule 1046.

For Form No. 135, see H. & L. Forms, No. 1183.

An order for arrest will only be granted in those cases, in which a writ of *ca. re.* or a writ of *ne exeat* might have formerly issued.

Rule 1021. A writ of *ne exeat* was a writ formerly issuable in Chancery to restrain a defendant from leaving the Province in cases where the plaintiff had an equitable money demand against the defendant, and there was reason to apprehend that the defendant intended to quit the jurisdiction. A party who, according to the former practice, was entitled to a *ne exeat* is now to proceed under R. S. O. c. 80, s. 1, as modified by these Rules; *ib.*, s. 2.

Defendant may be held to bail on affidavit of certain facts and order of a Judge.

R. S. O. c. 80, s. 1, is as follows:—

1. In case a party or plaintiff being a creditor of, or having a cause of action against a person liable to arrest, by affidavit of himself or some other person shews to the satisfaction of a Judge of the High Court, or to the Judge of a County Court, that such party or plaintiff has cause of action against such person to the amount of \$100 or upwards, or that he has sustained damage to that amount, and also by affidavit shews such facts and circumstances as satisfy the Judge that there is good and probable cause for believing that such person, unless he be forthwith apprehended, is about to quit Ontario with intent to defraud his creditors generally or the said party or plaintiff in particular, the Judge may order that the person against whom the application is made, shall be arrested and held to bail for such sum as the Judge thinks fit, and the Judge, or the acting Judge of the County Court, may grant an order for arrest where process is intended to be sued out of, or an action has been commenced in, the High Court, as well as in his own Court. R. S. O. 1887, c. 67, s. 1. Rules 1888, No. 1045.

Privilege from arrest.

Permanent.

Temporary.

R. S. O. c. 80, s. 1, applies only to actions against persons liable to arrest: see R. S. O. c. 80, s. 4. Some persons are privileged from arrest in civil proceedings. The privilege from arrest is either temporary or permanent. Among those permanently privileged are—members of the Royal Family, and the servants of the Royal Household; peers and peeresses of the realm of England in certain cases; foreign ambassadors and their servants; Judges: see Arch. Pr., 14th ed., p. 1455, and married women: R. S. O. c. 80, s. 6. Among those who have a temporary privilege from arrest are members of the Legislative Assembly during the Session of the House, and for twenty days before, and twenty days after: R. S. O. c. 12, s. 57 (11); probably also members of the Senate, and House of Commons, of Canada for forty days before, and forty days after, the sittings of Parliament: see Arch. Pr., 14th ed., p. 1456; *Wadsworth v. Boulton*, 2 C. L. Ch. 70; *Reg. v. Gamble*, 9 E. C. R. 546; 1 P. R. 222; the privilege does not extend so as to protect a member of Parliament: *Henderson v. Dickson*, 19 E. C. R. 592; and see *Meyers v. Henderson*, 4 Gr. 148; *Re Essery*, 4 V. C. L. J. 212; or a married woman: *Kistler v. Tettmar*, 1905, 1 K. B. 39; 92 L. T. 36, from arrest for contempt of Court. Barristers while attending the Superior Courts for the purpose of being engaged in the business of the same, or while attending circuit, are privileged from arrest, and for this purpose a circuit is continuous from its commencement to its termination: see Arch. Pr., 14th ed., pp. 1484-5. A solicitor is also privileged while attending Court, or any of the officers of the Court, and in going to, and returning therefrom; also Coroners going to, attending at, and returning from Court. Bail were also at Common Law privileged from arrest in actions on bail bonds, replevin bonds, and recognizances of bail: *Brandon v. Robson*, 6 T. R. 336; *Ormond v. Brierly*, 1 Salk. 9; *Mellish v. Petherick*, 8 T. R. 450.

But if the plaintiff obtained judgment on such bond or recognizance **Rule 1021**, he might formerly hold the defendants to bail in an action on the judgment: *Prendergast v. Davis*, 8 T. R. 85; and it is possible they might now be liable to arrest if about to leave the jurisdiction with intent to defraud creditors. Executors and administrators are also privileged: Arch. Pr., 14th ed., pp. 1460-1.

As a general rule where a defendant has a foreign domicile and comes temporarily within the jurisdiction, he is not liable to arrest. In respect of a tort committed within the jurisdiction: *Rice v. Fletcher*, 13 P. R. 46; nor in respect of a debt contracted in the country of his domicile: *Smith v. Smith*, 9 P. R. 511; *Meyer v. Rich*, 14 P. R. 243; *Elgie v. Butt*, 26 Ont. App. 13; provided he is about to return to the country where he is domiciled: *Butler v. Rosenfeldt*, 8 P. R. 175; *Elgie v. Butt*, 26 Ont. App. 13; but even in such a case it may perhaps be shown that the intended departure is with intent to defraud, and so an arrest may be justified: see *Ib.*, per Osler, J.A., at p. 18. If he is going to another country he may be liable to arrest: *Butler v. Rosenfeldt*, *supra*. But where a defendant contracts a debt in Canada and then absconds to, and acquires a domicile in, a foreign country, he may on his subsequently coming within the jurisdiction be held to bail in respect of a debt so contracted: *Kersteman v. MacLellan*, 10 P. R. 122; *Scane v. Coffey*, 15 P. R. 112; *sed vide*, *Clements v. Kirby*, 7 P. R. 103; *Stauffer v. Stauffer*, before Proudfoot, J., May 15th, 16th, 1883; and see *Beam v. Beatty*, 10 P. R. 207; reversed 2 O. L. R. 362. Pecuniary liability arising from a fraud committed by the defendant, is a claim for which he may be arrested: *Hunter v. Mountjoy*, 6 Gr. 421. A trustee not in default, is not liable to arrest: *Colverson v. Bloomfield*, 20 Ch. D. 341; and where a trustee is ordered to pay money after service of the order, he is not in default until the order has been served, and he has failed to comply with its terms: *Ib.*

A defendant in an action for alimony is liable to be held to bail. If he is about to quit Ontario with intent to defraud his creditors in general, or the plaintiff in particular. The amount for which he may be held to bail is a sum sufficient to cover future alimony for two years besides arrears and costs, but may be less, in the discretion of the Court or Judge: **Rule 1022**. The order for arrest may be obtained in a proper case before, or after, judgment. Where a writ of *ne exeat* had been granted before decree, it was held to continue in force after decree: *Macdonald v. Macdonald*, 5 C. C. L. J. 64. Where, in an alimony action, the defendant had been arrested and held to bail, on an application for his discharge, the Judge looked into the merits so far as to see if the plaintiff could reasonably expect to succeed in her case; and the defendant having displaced the *prima facie* case made by the plaintiff, he was ordered to be discharged: *Macpherson v. Macpherson*, 2 Chy. Ch. 222. Such a practice is, however, open to objection, as to some extent involving the trial of the action on the merits on an interlocutory application.

Where the order for arrest was made in a County Court action to recover the price of goods, and judgment for the price of some of the goods had been recovered in a Division Court, so as to reduce the cause of action to a sum less than \$100, the defendant was on application under **Rule 1047** discharged from custody: *Ward v. Brown*, 19 C. L. T. 135.

See further as to the grounds for arresting a defendant, notes to **Rule 1047**.

Rules

1022, 1023. The Master in Chambers, and Local Masters (not being County Court Judges), have no jurisdiction to grant the order for arrest; *Rules 42 (4), 40.* But County Court Judges may grant such orders in actions pending in the High Courts: R. S. O. c. 80, s. 1.

The form of order No. 135, given in the Appendix appears to contemplate that the order shall be directed to no particular Sheriff, but generally to the Sheriff of any County where the defendant may be found. Where it is doubtful in which county the defendant may be found, provision is made by *Rule 1024* for the issue of concurrent or duplicate orders. Formerly when a writ of *capias ad respondendum* issued, it was not necessary to issue an ordinary writ of summons so far as the defendant arrested was concerned, but the issue of an order for arrest is not now intended to dispense with the issue of a writ of summons. The writ of summons should be issued and duly indorsed, and served on the defendant before, or along with, the order for his arrest.

An affidavit for an order for arrest may be sworn before the plaintiff's solicitor: see *Rule 522*.

Limit of
security in
alimony
cases.

1022. Where an order is made for arrest in an action for alimony, the amount for which security is to be given shall not exceed what may be considered sufficient to cover the amount of future alimony for two years, besides arrears and costs, but may be for less at the discretion of the Court or Judge. *Con. Rule 1088.*

Taken from R. S. O. 1877, c. 40, s. 40.

On a motion to discharge a defendant from arrest in an alimony action, the merits of the case were inquired into, so far as to enable the Judge to determine whether there was any reasonable prospect of the plaintiff recovering judgment; and where the *prima facie* case made by the plaintiff on obtaining the order for arrest was clearly rebutted, the defendant was discharged: *Macpherson v. Macpherson*, 2 Chy. Ch. 222; *sed quare* how far this practice can now be followed.

Although the order to hold to bail in an alimony action is not to exceed a sum sufficient to cover future alimony for two years, yet when the Court has acquired control over the funds of the defendant through any default of his, payment of them to him may be refused except on the terms of his securing the future payment of alimony: *Gott v. Gott*, 10 Gr. 543.

Formerly it was held that where bail was given in an alimony suit, the bail could not render their principal, and if the principal did not satisfy the plaintiff's demand, the security given by the bail was forfeited: see *McDonald v. McDonald*, 1 Chy. Ch. 22; *Richardson v. Richardson*, 8 P. R. 274; *Needham v. Needham*, 29 Gr. 117. But these *Rules* appear to place arrests in actions for alimony on the same footing as arrests for purely legal demands.

orders to
be in force
two months
and not
renewable.

1023. The order shall be in force for two months from the day of the date thereof inclusive, and no longer; but on the expiration thereof a new order may be obtained in the

manner directed in *The Act Relating to Arrest and Imprisonment for Debt*. Con. Rule 1047. **Rules 1024-1027.**

From R. S. O. 1877, c. 50, s. 29.

A new order can only be obtained on proof of the like facts and circumstances as were necessary in order to obtain the former order: see R. S. O. c. 50, s. 29. It would seem that the affidavits used on the former application could not be used on a second application: at all events, so far as they related to facts which were susceptible of change or modification, from the date of the affidavits being sworn.

The two months within which an order for arrest is in force are calendar months: R. S. O. c. 1, s. 8 (15). An order made on the 10th day of the month would expire on the 9th day of the second month thereafter, the day of the date of the order being included under this Rule.

1024. Concurrent or duplicate orders may be issued from time to time in like manner and form as the original order, and shall be in force for the same period as such original order and no longer. Con. Rule 1048. Concurrent orders may issue.

Taken from R. S. O. 1877, c. 50, s. 32.

1025. The order, and as many copies thereof as there are persons intended to be arrested thereon shall be delivered to the Sheriff or other officer to whom the order is delivered for execution, and the plaintiff or his solicitor may direct the Sheriff or officer to arrest one or more of the defendants therein named, which direction shall be obeyed by the Sheriff or officer. Con. Rule 1049. Copies, etc., to be served.

Taken from R. S. O. 1877, c. 50, s. 33.

The direction to the Sheriff should be made by indorsement on the order, and signed by the solicitor.

1026. Unless otherwise ordered the costs of and incidental to an order for arrest shall be costs in the cause. *New.* *See Eng. R. 1883, o. 69, r. 5.* Costs.

(ii) Arrest of Defendant.

1027. The Sheriff or officer shall, within two months from the day of the date of the order for arrest, but not afterwards, execute the same according to the exigency thereof, and shall upon or immediately after the execution of such order cause one copy thereof to be delivered to the person whom he is directed to arrest, and shall exhibit the original order to him. Con. Rule 1050. Sheriff to execute within two months from date.

Taken from R. S. O. 1877, c. 50, s. 31.

Rules

1028-1030.

After the lapse of two calendar months from its date, including the day it bears date, the order ceases to be in force: see *Rule 1023*. Although the order is in force for two months, yet if the Sheriff executes it before the expiration of the two months the plaintiff may, immediately after its execution, obtain an order on the Sheriff to return the order for arrest: Arch. Pr., 11th ed., 800. He cannot be so ordered after the plaintiff has taken an assignment of the bail bond, provided it be a valid one, or where he accepts a *cognovit* or other security from the defendant without the privity of the Sheriff: *Id.*

Indorse-
ment of
date of
arrest on
order.

1028. The Sheriff or other officer named in the order for arrest shall, within two days after the arrest, indorse on the order the true date of the arrest. *New.*

Delay of
twenty-four
hours before
taking
person
arrested
to gaol.

1029. The Sheriff, at the request of the person arrested, and upon being prepaid a sum of money sufficient to cover the Sheriff's reasonable fees and expenses incident to the delay, shall grant to such person a delay of twenty-four hours after the arrest before committing him to gaol, and shall take him for the said twenty-four hours to some safe and convenient house in his bailiwick. 55 V. c. 15. s. 2.

The Arrest.—Formerly on the arrest of a defendant on *mesne* process, the Sheriff's officer might not carry him to gaol within twenty-four hours from the time of such arrest, under a penalty of £50, unless the defendant refused to be carried in the meantime, to some safe and convenient dwelling house in the county, to be named by him, not being his own house: 32 Geo. 2. c. 28. ss. 2 and 12; Arch. Pr., 13th ed., 707; this statute was, however, repealed as to this Province by 55 Vict. c. 15. s. 1, from which *Rule 1029* is derived.

See the somewhat similar Imp. Act, 50 & 51 Vict. c. 55. s. 14 (1), and *Mitchell v. Simpson*, 23 Q. B. D. 373; 25 Q. B. D. 183.

Formerly it was the duty of the officer to request the defendant to name such house, before he could take him to gaol within the twenty-four hours: *Deuchirst v. Pearson*, 1 Dowl. P. C. 664; 1 C. & M. 367; *Simpson v. Renton*, 5 B. & Ad. 35, and see *Gordon v. Laurie*, 9 Q. B. 60; 18 L. J. Q. B. 98, but it would seem that the selection of the "convenient house" is now to be made by the Sheriff or his officer.

See also *Sewell on Sheiffs*, 437.

(iii) *Bail to the Sheriff.*

Bail to the
Sheriff.

1030.—(1) At any time before the expiration of 10 days from the date of arrest the defendant shall be entitled to be released from custody upon paying into Court under this Rule, without special order, the amount named in the order for arrest, together with \$40, to answer the costs which may have accrued up to the time limited for giving security in

the action pursuant to the order for arrest, or upon giving to the Sheriff a bail bond, according to Form 199, with two sufficient sureties in a penal sum of double the amount named in the order for arrest, and upon payment of the Sheriff's fees, including the cost of the bond. *New.* Rule 1031.

See 62 V. (2) c. 7, s. 7.

(2) Money so paid into Court shall remain in Court, subject to order of the Court or Judge, as security to the plaintiff that the defendant will raise security in the action to be put in pursuant to the order for arrest. *New.*

Based on Imp. Act, 23 Hen. 6, c. 9, s. 5; 43 Geo. 3, c. 46, and 7 & 8 Geo. 4, c. 71.

For Form 199, see H. & L. Forms, No. 1181.

Bail to the Sheriff.—The Sheriff should not take a bond with less than two sureties. The Sheriff is to take bail for the sum indorsed on the order, and no more; in practice the penalty is usually double the sum for which the defendant is ordered to be held to bail; see *Baker v. Jackson*, 9 Ont. 651. The bond must be to the Sheriff himself, by the name of his office, and in the form No. 199, otherwise it will be void. If the bond be executed before the condition is filled up it will be void; *Powell v. Duff*, 3 Camp. 181. Form of bail bond.

The bond is forfeited if the defendant does not put in security in the action within ten days after his arrest; or if such security be put in within that time, then by his not obtaining the allowance thereof under Rule 1040. Where in consequence of the forfeiture of the bail bond to the Sheriff, an action is brought thereon (upon an assignment thereof by the Sheriff), or proceedings are taken against the Sheriff, upon an application to stay such action or proceedings, in order that the case may be tried on the merits against the original defendant, it is in the power of the Court, or Judge, to direct the bail bond to the Sheriff to stand as security to the plaintiff, should he succeed in establishing his claim against the defendant on the merits. Bail to Sheriff, when forfeited.

Where, in lieu of giving bail, a person arrested pays a sum of money into Court as provided by this Rule, the proper proof of its payment in, to entitle the prisoner to a discharge from arrest, is the certificate of the Accountant; Rule 1043. And on a bond being substituted, money paid in as security may be repaid out of Court; see Rule 1041 (2).

1031. Where default is made in compliance with the condition of the bail bond the Sheriff shall, upon the request and at the cost of the plaintiff, assign the bond to the plaintiff, and the plaintiff may bring an action thereon. See Rule 1055, 4 Anne c. 16, s. 20. Assignment of bail bond.

The action may be brought by the plaintiff in his own name; 7 Ed. Act, s. 58 (54). An action on the bond cannot be proceeded with

**Rules
1032, 1033.**

pending an order to bring in the body: *Rule 1034*; which is a proceeding to compel the defendant to put in security in the action. If the Sheriff refuses to assign the bond, an action will lie against him: see *Stamper v. Milbourne*, 7 T. R. 122. The plaintiff should not take an assignment unless he is satisfied as to the sufficiency of the sureties, as by taking an assignment he waives his right to proceed against the Sheriff to compel him make a return to the order: see *Brooks v. Stone*, 1 Will. 223; *Etherick v. Courper*, Salk. 399. The plaintiff is not bound to take the assignment though tendered by the Sheriff: *Rea v. Daw*, 2 Salk. 608.

For form of assignment of bond, see H. & L. Forms, No. 1185.

Re-arrest
on default
in giving
security in
the action.

1032. Where the plaintiff does not take an assignment of the bond within five days after default, the Sheriff may re-arrest the defendant in any County and bring him into his own bailiwick and retain him in custody until he has given and obtained the allowance of security in the action pursuant to the order for arrest. *New.*

Where security in the action has not been put in, but a bail bond has been given to the Sheriff, the plaintiff may either take an assignment of the bail bond, or may take steps to get a return to the order for arrest. The Sheriff, if he has arrested the defendant, must return *cepi corpus et paratum habeo*; and if he is in actual custody, he should so state in his return; *Sewell*, 287. Where the Sheriff returns *cepi corpus*, and the defendant is not in actual custody, in case security in the action is not put in and allowed as required by *Rules 1034-1043*, the plaintiff may require the Sheriff to bring in the body: *Rule 1045*. If the Sheriff on such proceedings cannot shew that the defendant is in actual custody, or cause the security to be put in by defendant, he may be attached for not obeying the order to bring in the body. The object of the present *Rule* is to enable the Sheriff to put himself in a position to bring in defendant's body unless he gives security in the action.

Security
may be
given after
default.

1033. Notwithstanding such default the defendant may at any time before judgment in an action brought upon the bail bond to the Sheriff, or before the expiration of any order to bring in the body, give security in the original action pursuant to the order for arrest. See *Rules 1061, 1064*.

See *Rule T. T. 1853, 73*.

When
Sheriff
may be
ordered to
bring in
the body.

The Sheriff may be ordered to bring in the body after the time for putting in security in the action has expired: *Poncho v. Liven*, 4 M. & S. 427; *Hutchins v. Hird*, 5 T. R. 479; *Potter v. Marsden*, 8 East. 525. But the order cannot issue after judgment has been recovered against the Sheriff for an escape, *cc.* where the defendant has been released by order of the plaintiffs: *Borwick v. Walton*, 2 R. & M. 623; nor where the plaintiff has taken an assignment of the bail bond: 2 Salk. 60 *bb*, provided it be a valid one; nor where he accepts a *compoit* or other security from the defendant, without the privity of the Sheriff: *Rea v. Sheriff of Sarum* in *Rea v. Clerk*, 1 Taunt. 179; Arch. Pra. 12th ed. p. 812. The order should be issued

and served promptly: *Re v. Sheriff of Middlesex*, 1 Dowl. 53. The Rules order may issue on *procepe* without motion: see *Rule 885*. The Rules 1034-1037.

Orders to bring in the body are returnable in six days: *Rule 885*. Under this *Rule* security in the action may be put in at any time before the expiration of the six days.

1034. A plaintiff shall not be at liberty to proceed upon the bail bond to the Sheriff pending an order to bring in the body of the defendant. When no action on bail bond Con. Rule 1059.

Taken from Rules T. T. 1856, 71.

1035. Where an action is brought upon the bail bond to the Sheriff the Court or a Judge may, upon application in such action, give such relief to the plaintiff and defendant in the original action and to the sureties in the bail bond as may be just and reasonable, and the order made on any such application shall have the effect of a defeasance to the bail bond. A motion to be subject to the discretion of the Court. See 4 Anne c. 16, s. 20.

In this *Rule* are embodied the provisions of the Act, 4 Anne, c. 16, s. 20, referred to.

(iv) *Security in the Action.*

1036. The security in the action to be given by the defendant, pursuant to the order for arrest, may be by payment into Court of the amount mentioned in the order, or by a bond to the plaintiff by the defendant and two sufficient sureties (or with the leave of the Judge or officer who allows the bond, either one surety or more than two) or with the plaintiff's consent by any other form of security. Security in the action to be given by the defendant. *New.* See Eng. Rule 1883, o. 69, r. 3.

For form of bond, see H. & L. For us, No. 1186.

As to the allowance of the bond, see *Rule 1040*.

Where the amount is large a Judge may allow several persons to become sureties in different amounts. *Angell*, 13 Price, 448; *Easton v. Edwards*, 1 Dowl. 39. See also two sureties when allowed.

1037.—(1) Where the security is given by bond, the condition thereof shall be that the defendant will pay the amount by any judgment in the action adjudged to be recovered or directed to be paid, either as a debt or for damages or cost, or will render himself to the custody of the Sheriff of the county in which the action has been commenced, or that the sureties will do so for him. Condition of bond or condition. *New.* See Con. Rule 1062, and Eng. Rule 1883, o. 69, r. 3.

Rules
1038, 1039.

Form of
bond, etc.

(2) The bond and affidavits of execution and justification shall be according to Forms 200, 201 and 202.

Based on R. S. O. 1877, c. 50, s. 40.

For the Forms referred to, see H. & L. Forms, Nos. 1186-1188.

Formerly notwithstanding the condition of the bond to satisfy the costs "and the amount by any judgment, etc.," the sureties were not liable for more than the amount for which security was directed to be given by the order for arrest, and the costs. Thus, where the plaintiff swore to a cause of action in tort for \$500, but security for \$300 only was ordered, it was held, notwithstanding that the plaintiff subsequently recovered judgment for \$400 damages and \$125.27 costs in the action, that the sureties were only liable to the extent of \$300 and the costs: *Baker v. Jackson*, 9 Ont. 661; and see *Laing v. Slingerland*, 17 Ont. 392; but under the changes effected by the present consolidation of the Rules the sureties would be now liable for the full amount recovered, but not exceeding the penalty of their bond: *Rule 1054*.

The condition of the bond prescribed by this Rule is only appropriate where a defendant is arrested on *exce* process; where he is arrested after judgment the bond required is prescribed by R. S. O. c. 80, s. 15.

As to the number of sureties, see *Rule 1030*. Formerly where the affidavit was insufficient the bail might justify in person: *Shaw v. Spade*, 2 M. & W. 12, but the defendant was not in that case entitled to the costs of justification: *Stevens v. Miller*, *Id.*, 368. It would seem probable that under the present Rules if an affidavit of justification is insufficient the sureties cannot justify in person: see *Rule 1040*.

The affidavit of justification cannot be sworn before the defendant's solicitor or his clerk, or partner: *Rule 522*; *Koyle v. Wilson*, 2 O. S. 113.

Cross-examination of the sureties upon their affidavits of justification may be had as in the case of an appeal bond: see *Rule 830* and *notes*.

An action cannot be brought by the plaintiff on the bond until after the return of *non est inventus* to a writ of *capias ad satisfaciendum*: see *Rule 1053*.

1038 A person who has been indemnified for so doing by a solicitor or solicitors concerned for the defendant, shall not be a surety on a bond. See *Con. Rule 1072*.

Taken from *Rule P. T. 1856*, 77.

1039 Where the plaintiff's claim exceeds \$4,000, it shall be sufficient for each surety to justify in \$4,000 beyond the amount of the claim. See *Con. Rule 1097*.

Taken from *Rule P. T. 1856*, 84.

1040. The bond shall be filed in the office in which the action was commenced, and may be allowed by the proper officer in such office, or by the Local Judge or Master upon service, upon the plaintiff or his solicitor, of notice of the filing of the bond and of the names and addresses of the sureties thereto, and a copy of an appointment from such officer, Local Judge or Master at least forty-eight hours (unless otherwise directed by the officer, Judge or Master) before the time named in the appointment. *New.*

Rules
1040-1042.
Allowance
of security.

If the security is not allowed the defendant must get further time to put in security, otherwise the plaintiff may take an assignment from the Sheriff of the bail bond, if any, and commence an action thereon, or proceed against the Sheriff as mentioned in the note to *Rule 1032*. As to persons disqualified from being sureties, see *Rule 1038*.

1041.—(1) Where security is desired to be given by payment of money into Court the same may be paid in under this Rule without an order, and shall stand as security to the plaintiff that the defendant will pay the amount by the judgment in the action adjudged to be recovered or directed to be paid either as a debt or for damages or costs, or will render himself to the custody of the Sheriff of the county in which the action has been commenced, or that the sureties will do so for him. *See 55 V. c. 15, s. 3.*

Security by
payment
into Court.

As to the right of a debtor arrested, to deposit money with the Sheriff and \$40 for costs in lieu of giving security, see *R. S. O. c. 80, s. 21*, as amended by *62 Vict. (2) c. 7, s. 7*.

(2) After payment of money into Court, a bond, or other security in *Rule 1036* mentioned, may be substituted therefor and the money paid in shall be repaid, upon the production of a certificate of the allowance of the bond or other security signed by the officer allowing the same, or by the plaintiff's solicitor. *See 56 V. c. 5, s. 13.*

A suitor desiring to pay money into Court under this *Rule* must proceed in the manner laid down in *Rules 405-410*. In the *præcipe* for the direction to the bank to receive the money, it should be stated that the money is required to be paid into Court under this *Rule*.

1042. The money paid in and the security, and all proceedings thereon, shall be subject to the order and control of the Court or a Judge. [*New.* Taken from *Eng. R. 1883, n. 69, r. 4.*]

Control of
Court over
security.

**Rule
1043-1045.**Discharge
of defendant
on giving
security.

1043. The delivery of a certificate of the Accountant of the payment of the money into Court, or of a certificate of the allowance of the bond or other security, signed by the officer allowing the same, or by the plaintiff or his solicitor, to the Sheriff or other officer executing the order for arrest, shall entitle the defendant to be discharged out of custody. [New. See Eng. Rules 1883, o. 69, r. 6.]

(v) *Delivery of Statement of Claim.*Time for
delivery of
statement
of claim.

1044. Where a defendant is taken or detained in custody under an order for arrest in default of giving security, the plaintiff, if he has not already delivered his statement of claim, shall deliver the same within one month after the arrest, or within the time specified in Rule 243, whichever shall be the earlier date, otherwise the defendant shall, unless further time is given to the plaintiff by the Court or a Judge, be entitled to be discharged from custody. See Con. Rule 1052.

Taken from Rule of T. T. 1856. 100; R. S. O. 1877, c. 50, s. 37.

The month mentioned in this *Rule* is a calendar month: see R. S. O. c. 1, s. 8 (15); *Rule* 5.

The object of this *Rule* is to hasten proceedings against prisoners: *Glenn v. Bor*, 3 U. C. Q. B. 180; *Tyson v. McLeun*, 1 P. R. 339; *Bamberg v. Sulomon*, 3 U. C. L. J. 69; *Glennie v. Ross*, 3 P. R. 289; 10 U. C. L. J. 105. If the defendant be out on bail the *Rule* does not apply: *Glenn v. Bor*, *supra*. Where the statement of claim was delivered 2 days after the month had expired, and the defendant moved for his discharge, an order was made extending the time under *Rule* 353, and validating the statement of claim for all purposes, on terms as to speedy trial and payment of costs: *Winch v. Triviss*, 18 P. R. 102.

The pendency of proceedings to set aside the *capias* and arrest was held to be no excuse for not declaring within the time limited: *Houtaling v. Cattle*, 6 P. R. 251.

(vi) *Orders to Bring in the Body.*order may
issue re-
quiring
Sheriff to
bring body
into CourtAttach-
ment may
issue for dis-
obedience

1045.—(1) Where, on the expiration of an order to return an order for arrest, the Sheriff, or other officer having the return of such order, returns *cepi corpus* thereon, an order may thereupon issue requiring the Sheriff or other officer, within six days after service of the order, to bring the defendant into Court, by bringing in the body or by causing security in the action to be given; and if the Sheriff or other

officer does not duly obey the order, an attachment may be granted for disobedience of the order. **Rule 1046.** Con. Rule 1058.

Taken from Rule T. T. 1856, 74.

The order to bring in the body can only be issued where, after a return of *cepi corpus*, the defendant is at large, and security in the action has not been duly put in and allowed as required by *Rules 1040-1043*; see *Sewell*, 415; and it cannot be issued until the time for putting in and perfecting the security in the action has expired: *Id.*

(2) Where a Sheriff before his going out of office, makes an arrest, and takes security under the order for arrest and makes a return of *cepi corpus*, the order shall and may, within the time allowed by law, be directed to him, notwithstanding he may be out of office before the order is issued. **Con. Rule 911.**

Taken from Rule T. T. 1856, s. 105.

Orders to bring in the body are to be made returnable in six days: **Rule 885.**

The concluding clause of *Rule 1045* (1), as to the issue of an attachment against the Sheriff, or other officer, must be read in connection with *Rule 855*; under that *Rule* an attachment cannot issue in any case without an order therefor, to be applied for on notice to the party against whom it is to be issued: *Jupp v. Cooper*, 5 C. P. D. 26.

The order to bring in the body is obtainable on *præcipe* as against a Sheriff; see *Rule 885*; but where the order is required against one who has ceased to be Sheriff, it is possible that *Rule 885* would not apply, and that the order must be obtained on motion.

1046. An order shall not be drawn up for setting aside an attachment regularly obtained against a Sheriff for not bringing in the body, or for staying proceedings regularly commenced on the assignment of any bail bond, unless the application for the order, if made on the part of the original defendant, be grounded on an affidavit of merits, or if made on the part of the Sheriff, or a surety, or any officer of the Sheriff, be grounded on an affidavit shewing that the application is really and truly made on the part of the Sheriff, or surety, or officer of the Sheriff, as the case may be, at his or their own expense, and for his or their indemnity only, and without collusion with the original defendant. **Con. Rule 1060.**

Taken from Rule T. T. 1856, 72.

Security by bond must not only be put in, but be allowed before the Court will stay proceedings on the bail bond to the Sheriff.

r. de 1047. *Gould v. Birmingham*, 3 O. S. 208. Where the plaintiff had delayed for three years to proceed against the bail to the Sheriff to compel them to cause security in the action to be put in, proceedings on the bail bond were stayed after judgment and execution, on payment of costs: *Young v. Shore*, 2 O. S. 314.

Where sureties rely on the performance of their undertaking they must plead it, they cannot apply summarily to stay proceedings: such a case: *Mitchell v. Noble*, 1 C. L. Ch. 284; and see *Black v. O'Gorman*, 5 U. C. L. J. 161.

Where sureties surrendered their principal and gave due notice within eight days after the return of process on the security, and the plaintiffs, nevertheless, proceeded to judgment, proceedings were stayed without requiring payment of costs up to the notice: *Wright v. Tucker*, 6 U. C. Q. B. 24; see *Rule 1055*.

(vii) *Application to be Discharged from Custody.*

Defendant
may apply
to a Judge
to be dis-
charged
from
custody.

Power of
Judge.

Court may
discharge
or vary
Judge's
order.

1047 A person arrested upon an order for arrest may apply to the Court or a Judge for an order that he be discharged out of custody; and the Court or Judge, subject to appeal, may make such order thereon as may seem just; and a Judge of a County Court making an order for arrest, whether in the High Court or in his own Court, shall, in respect to such order and the arrest made thereupon, possess all the powers given to a Judge of the High Court under this Rule, and may in like manner, on application to him, order the defendant to be discharged out of custody, or make such order therein as to him seems just; and any such order made by a County Court Judge may be discharged or varied by a Divisional Court. *Con. Rule 1051.*

Taken from R. S. O. 1877, c. 50, s. 30.

This Rule does not apply where the arrest has been under a *ca. sa. et satisfaciendum*; in such case the debtor can only be discharged under R. S. O. c. 81: *Gossling v. McBride*, 17 P. R. 585; *Marchant Bank v. Sussner*, 4 O. L. R. 524. There is, however, jurisdiction to set aside an order for a *ca. sa.* made owing to wilful concealment or perversion of material facts: *Id.*

The person against whom an order for arrest has issued would seem to be entitled to move to discharge the order before he has been arrested under it, as well as after: see *Lewis v. Lewis*, 68 L. T. 198; but after an arrest it was held that there is no jurisdiction to set aside an order for arrest under *Rule 378*, but that the defendant's remedy is to apply under *Rule 1047* to be discharged out of custody: *Jurn v. Jurn*, 16 P. R. 375.

A Judge of a County Court who has made an order for arrest in an action in the High Court, under R. S. O. c. 80, s. 1, has power under this Rule to entertain an application to discharge the defendant from arrest.

Under the concluding words of this *Rule* an appeal lies to a Divisional Court of the High Court from any order made under this *Rule* by a County Judge in a County Court action: *Eltham v. McCraig*, 13 P. R. 410; *McVean v. Ridler*, 17 P. R. 353. No further appeal lies to the Court of Appeal, either with or without leave. *Id.*

Where the application under this *Rule* is made to a Judge upon materials not laid before the Judge who made the order for arrest, the application should in general be to discharge the defendant out of custody, or for the bond or other security to be given up to be cancelled, as the case may require. But where the application is based on the alleged insufficiency of the affidavits on which the order for arrest was granted (e. g., that the affidavit discloses no sufficient cause of action, or does not shew facts which should have satisfied the Judge that the defendant was about to quit Ontario), then the application may be in addition to set aside the order, but in such case it would seem that the application should be made to a Divisional Court as it is in the nature of an appeal from the Judge who granted the order: see *Dancer v. Bushy*, 5 P. R. 370, *et seq.*; *Diamond v. Cartwright*, 22 C. P. 401; *Robertson v. Coulton*, 9 P. R. 16; *Scane v. Coffey*, 15 P. R. 112; *Jury v. Jury*, 16 P. R. 375; *Cartwright v. Hinds*, 3 Ont. 384; *Gilbert v. Stiles*, 13 P. R. 121; and see *Palmer v. Rodgers*, 1 P. C. L. 188; and where the application is based upon the insufficiency of the evidence on which the order for arrest was granted, as distinguished from a motion to discharge the prisoner from custody on the merits, no new evidence can be used: *Id.*

Application to set aside order

The decision of the Judge who grants an order is subject to review, but upon the party complaining of it rests the onus of shewing that the decision was wrong: *Beam v. Beatty*, 2 O. L. R. 362.

The application for discharge under *Rule* 1047, when made on new materials, is not an appeal, but a substantive application, on which the Judge to whom it is made has a very large discretion: *Tooth v. Frederick*, 14 P. R. 287, and where the defendant is discharged and an appeal is had from the order, if the appellate Court has any doubt as to the proper result of the evidence, it should lean in favour of personal liberty: *Id.* To justify the defendant's detention in custody there must be not only the intention to quit Ontario, but also the intent thereby to defraud creditors (which are questions of fact to be inferred from the facts and circumstances shown by the affidavits: *Beam v. Beatty*, *supra*). If a debtor resident in Ontario is about to withdraw permanently from the jurisdiction, the opinion has been judicially expressed that that fact, unexplained by him, raises a presumption of intent to defraud his creditors, and is sufficient to warrant his arrest: *Robertson v. Coulton*, 9 P. R. 16; *Coffey v. Scane*, 22 Ont. App. 271; see also *McVean v. Ridler*, 17 P. R. 353; and *a fortiori* if he makes no provision for payment of his creditors: *Vansickle v. Boyd*, 14 P. R. 469; but it has now been held by a Divisional Court (the highest tribunal by which the point has been definitely decided), that besides the existence of the debt and the intended departure from Ontario, the applicant must shew some other facts or circumstances which, coupled with *these facts*, point to an intent to defraud, and that whether or not there exists an intent to defraud is a question of fact in each case: *Phair v. Phair*, 19 P. R. 67, dissenting from the opinions expressed by Hagarty, C.J., and Osler, J.A., in *Coffey v. Scane*, 22 Ont. App. 269, and by Osler, J.A., in *Robertson v. Coulton*, 9 P. R. 16; and following the opinion of Burton and Maclellan, J.A., in *Coffey v. Scane*; see also remarks in *Vansickle v. Boyd*, 14 P. R. 469.

Application to be discharged from custody

Rule 1047. and *McEain v. Ridler*, 17 P. R. 352. The circumstances attending defendant's departure, such as its publicity, and other circumstances, *Seane v. Coffey*, 15 P. R. 112; or the fact of his having made an assignment for the benefit of his creditors; *Rogers v. Knowles*, 11 P. R. 290, or, that he *bona fide* believed that he had satisfied all claims of the plaintiff against him; *Phair v. Phair*, 10 P. R. 67, were held to be sufficient to negative an intent to defraud; but see *Coffey v. Seane*, 25 Ont. 32; 22 Ont. App. 269, 271-2; *McEain v. Ridler*, 17 P. R. 352. In *Tooth v. Frederick*, 11 P. R. 287, it was held that where the defendant had no means, and was leaving Ontario merely to better his condition, he could not be said to be leaving with intent to defraud creditors, nor when departing on a pleasure trip; *Shaw v. McKenzie*, 6 S. C. R. 181; or for a mere temporary purpose; *Palmer v. Scott*, 18 P. R. 368; *Phair v. Phair*, 10 P. R. 67. *Beam v. Beatty*, 2 O. L. R. 362; but see *Coffey v. Seane*, 25 Ont. at p. 32, and *McEain v. Ridler*, 17 P. R. 352, in which *Tooth v. Frederick* was said to have been overruled by *Coffey v. Seane*, 22 Ont. App. 269, though this is denied in *Phair v. Phair*, *supra*; but has now been held by the Court of Appeal that the impecunious condition of a defendant does not of itself minimize or rebut fraudulent intent; *Beam v. Beatty*, 2 O. L. R. 362.

Usually on an application to a Judge to discharge a defendant, the Judge will not, when the affidavits upon which the order for arrest was made, are *prima facie* sufficient, discharge the defendant on affidavits being filed negating his intention to leave Ontario. *McGuffin v. Clin*, 4 P. R. 134; see also *Meyer Rahler Co. v. Rich and Robinson*, 14 P. R. 243; nor on the ground that the plaintiff's cause of action was not sufficiently shown; *Robertson v. Coulton*, 11 P. R. 16; *Terry v. Camstock*, 6 P. C. L. J. 237; *Bank of Montreal v. Campbell*, 2 C. L. J. 18; *Jones v. Grex*, 25 P. C. Q. 13, 594; *Delisle v. Delrand*, 3 P. R. 105; *Coffey v. Seane*, 25 Ont. 22; 22 Ont. App. 269, but see *Brown v. Riddell*, 13 C. P. 457; *Tooth v. Frederick*, 11 P. R. 287. But where it appears that the defendant, though about to leave Ontario, was nevertheless, on grounds disclosed by the defendant, not liable to arrest, he may be discharged; see *Rule 1021*, note; and where the plaintiff's cause of action was denied by the defendant, and not corroborated by the plaintiff, the defendant was discharged; *Donagan v. Short*, 12 P. R. 589; and the omission to swear to damages where the cause of action is tort, also entitles a defendant to his discharge; *Ib.*

Although the indorsement on the writ of summons in an action for breach of promise of marriage claimed a lien on certain specified land of the defendant, but it did not actually appear that the defendant had any land, and defendant did not by his affidavit state that he owned the land referred to in the indorsements or any other land, it was held that this did not constitute any ground for discharging him from arrest; *Lausieckle v. Bapf*, 14 P. R. 469.

But such terms will not be imposed on him unless it appears that the plaintiff has been entirely frank in the evidence he has brought before the Court; *Seane v. Coffey*, 15 P. R. 112; and see *Spencer v. Cowan*, 32 C. L. J. 782 (R.C.).

Irregularities.

The order for arrest will not be set aside for irregularity in the affidavit, after the prisoner has escaped; *Kiefer v. Merrill*, Tav. 490. Where the affidavit to hold to bail was made while the defendant was in the United States, and was left here to be used in case he should come over, the arrest was set aside; *Coxons v. Ritchie*, Dn. 167.

Where in the affidavit on which the order was granted, the words **Rule 1048**, "intent to defeat" were used, instead of "intent to defraud," it was held to be no ground for setting aside the arrest: *Lainy v. Slingerland*, 12 P. R. 300.

Where an objection to the affidavit to hold to bail is relied on, if it be a mere irregularity the objection must be specified in the notice of motion as required by **Rule 302**; the misnomer of the deponent's surname in the commencement of the affidavit is only an irregularity: *Panaickie v. Boyd*, 14 P. R. 469.

An application to set aside the order for arrest on the ground that the affidavit was insufficient in law, will not be entertained after security in the action has been put in, and judgment obtained: *Ruciman v. Armstrong*, 2 C. L. J. 165.

Putting in security in the action is a waiver of technical objections to the order for arrest, but it does not amount to a waiver of objections not of a technical nature: *McGuffin v. Clow*, *supra*; and see *Racey v. Carman*, 3 P. C. L. J. 201; *sed vide*, *Ross v. Balfour*, 5 O. S. 683; *Boxers v. Flower*, 3 P. R. 62; but an undertaking to put in security in due course of law is not a waiver of an objection to the affidavit: *Glass v. Baby*, 1 P. R. 274.

Where an order for arrest is granted on sufficient grounds, but on the application to discharge on further affidavits, an order for discharge is made, terms may be imposed in the order, e.g., that no action be brought; and the costs of the application are in the discretion of the Judge: *Sullivan v. Allen*, 1 O. L. R. 53; *Wilson v. Smith*, 9 Min. R. 318; *Adams v. Annett*, 16 P. R. 356.

Where a defendant is ordered to be discharged from arrest after having given security, the bond should not be ordered to be given up to be cancelled, but an *exoneratur* should be ordered to be entered thereon: *Beam v. Beatty*, 2 O. L. R. 362, and where the order had erroneously directed it be delivered up it was ordered to be restored to the files: *Id.*

1048. Where the defendant is described in the order for arrest, or affidavit therefor, by initials, or by wrong name, or without a Christian name, the defendant shall not for that cause be discharged out of custody, or the security be delivered up to be cancelled on motion for that purpose. See *Con. Rule 1054*.

Taken from *Rule T. T. 1856, 66*.

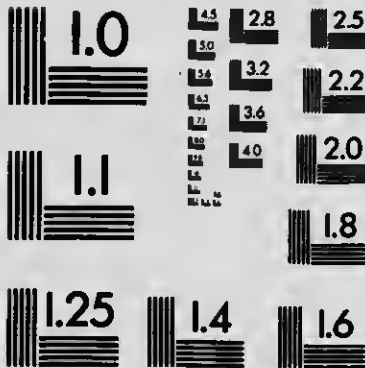
Formerly a defendant arrested, if summoned by a wrong name might still be discharged, and have the bail bond delivered up to be cancelled, unless the plaintiff could shew that he had exercised diligence to ascertain the right name: *Ladbroke v. Phillips*, 1 H. & W. 100; *Rossett v. Hartley*, 7 A. & E. 522; and in determining the question whether due diligence had been used, the Court would consider all the circumstances: see *Hicks v. Marvee*, 1 C. & M. 84; *Finch v. Cacken*, 2 C. M. & R. 196; *Lyon v. Wells*, 2 M. & Sc. 392; *Lindsay v. Wells*, 3 Bing. N. C. 777; but the present *Rule* omits the clause in the former *Rule 1054* (taken from *Rule T. T. 1856, 66*), under which those decisions were arrived at, and the mere misnomer of a defendant would probably under this *Rule* be held to be no ground for his discharge, even though the plaintiff failed to shew due diligence

Misnomer of defendant.



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Rule 1049. to ascertain his right name. The fact that the affidavits to hold to bail are not entitled in any Court is no ground for setting aside the order thereon: *Ellerby v. Walton*, 2 P. R. 147; *Molloy v. Shaw*, 5 P. R. 250; and see *Damer v. Busby*, 5 P. R. 356.

(viii) *Surrender by Sureties.*

Bail may
surrender
his principal
to the
Sheriff of
any County,
etc.

1049. The sureties may at any time surrender their principal to the Sheriff of the county, in which the principal is resident or found, and the Sheriff shall receive the principal into his custody and give the sureties certificate under his hand and seal of office of the surrender, for which certificate the Sheriff shall be entitled to the sum of one dollar, and any Judge of the Court in which the action is pending, upon proof of due notice to the plaintiff or his solicitor of the surrender, and upon production of the Sheriff's certificate thereof, shall order the security to be cancelled, and thereupon the sureties shall be discharged. *See* Con. Rule 1064.

Taken from R. S. O. 1877, c. 50, s. 42.

It is only where a bond by way of security in the action has been given that the sureties thereto can render their principal. Bail to the Sheriff cannot render their principal, they can only discharge themselves by having security in the action put in and allowed; or by such security being put in and the principal thereupon rendered. Where the defendant himself fails to put in security in the action, the bail to the Sheriff may put it in, and may render their principal: see Arch. Pr., 12th ed., 872; and this may also be done by the Sheriff, or Sheriff's officer, and perhaps by the defendant's solicitor in discharge of any undertaking he may have given. And the render may be made after the Sheriff has been ordered "to bring in the body," and after an assignment of the bail bond and proceedings commenced thereon: *Id.* If, however, the plaintiff proceeds against the Sheriff the render should in general be made before the expiration of the order to bring in the body: Arch. Pr. 12th ed., 814. In such cases formerly, bail could render without justifying, and it is presumed that they may now render before having their bond allowed: see Arch. Pr., 861. The sureties may render their principal *ex debito justitiæ* at any time pending the action, or, after judgment, at any time before the return of the *ca. sa.* The Court also as a matter of favour has allowed the sureties a further time after the return of the *ca. sa.* to render their principal, subject to the limitations prescribed by *Rule 1055*. If the sureties do not render their principal within the time allowed by the latter *Rule* their right to render him is gone. As to enlarging time for rendering: see Arch. Pr., 11th ed., 863.

It was formerly held that the bail given under a writ of *ne erant* had no power to surrender their principal as at Common Law, and an application by sureties for a discharge from a bond and for repayment of the money paid to the Sheriff as collateral security was refused: *McDonald v. McDonald*, 1 Chy. Ch. 22; the money deposited

was ordered to be applied in payment of the plaintiff's claim: *Rules Richardson v. Richardson*, S. P. R. 274; *Needham v. Needham*, 29 Gr. 1050, 1051. 117: but it would seem to be the intention of these *Rules* to abolish this distinction, and to allow the surrender of the principal, whether the cause of action in respect of which the defendant has been arrested be legal or equitable.

Where the sureties to a bond render their principal, an order to enter an *exoneretur* on the bond should be obtained; until the *exoneretur* is entered, the sureties remain liable to the plaintiff on the bond: *Laing v. Slingerland*, 17 Ont. 382.

It may be observed that according to the terms of the order for arrest (Form No. 135, H. & L. Forms No. 1183) the sureties are required to undertake to surrender the defendant to the custody of the Sheriff of the county in which the action was commenced; but under *Rule* 1049, they are authorized to surrender their principal to the custody of the Sheriff of the county in which their principal is resident, or found.

1050. Where a person is surrendered by his sureties to the Sheriff of any county, other than that in which he resided or carried on business at the time, such person shall be entitled to be transferred to the gaol of his own county, on prepaying the expenses of his removal; and the Sheriff in whose bailiwick he was arrested, may, if he is satisfied of the facts, transfer him accordingly, but if the Sheriff declines to act without an order of the Court or a Judge, such an order may be made on the application of the prisoner and notice to the other party. *See* Con. Rule 1066.

Person arrested out of his County may be transferred to it, paying the costs.

Taken from R. S. O. 1877, c. 50, s. 44.

(ix) *Capias ad Satisfaciendum.*

1051. Where a defendant has been arrested and has given security in the action, pursuant to the order for arrest, or is imprisoned or detained in custody in default of giving security, any judgment which the plaintiff may obtain in the action may be enforced by writ of *capias ad satisfaciendum* without an order therefor; but where the defendant is so imprisoned or retained in custody the plaintiff shall issue such writ of *capias ad satisfaciendum* within fourteen days after he has become entitled to enter final judgment. *See* R. S. O. c. 67, s. 9. and Con. Rule 1053.

Issue of writ of *capias ad satisfaciendum*.

The first part of this *Rule* is intended to apply to defendants who are imprisoned for failure to give security in the action. The last clause applies only to those who are actually in custody.

The process whereby a prisoner in actual confinement is detained in custody in execution is termed "charging in execution": *Hesketh*

Rule 1052. *v. Ward*, 17 C. P. 667. This is effected by delivering a writ of *ca. sa.* to the Sheriff. Where the defendant is in custody the writ must be delivered to the Sheriff within fourteen days after the time the plaintiff is entitled to enter judgment, and not from the time the judgment is actually entered.

Where the defendant is out on bail before judgment, he need not be "charged in execution," within the time mentioned in this *Rule*: see *Torraunce v. Holden*, 10 U. C. L. J. 298.

Where a defendant is arrested under an order pending action, and, before judgment, gives security in the action, and after judgment and *ca. sa.* for fixing the liability of the sureties returned *non est inventus*, is rendered to the Sheriff's custody by his sureties, in their own discharge, such prisoner is still held under the *mesne* process, and is not charged in execution: *Hesketh v. Ward*, *supra*.

Where the defendant is not a prisoner at the time of the trial, but is rendered, or renders himself in discharge of his sureties before judgment, see *Brash v. Latta*, 5 U. C. L. J. 225; *Curry v. Turner*, 3 P. R. 144. Where the defendant is rendered by his sureties after judgment, and notice thereof given to the plaintiff, see *Torraunce v. Holden*, 10 U. C. L. J. 322.

The writ of *ca. sa.* to fix the liability of sureties must be returnable on a day certain, and not immediately after execution: *Rule 1052*; *Proctor v. McKenzie*, 11 Ont. App. 486.

Where a defendant is ordered to be discharged because plaintiff has not charged him in execution in due time, he cannot be there-after arrested on the same judgment: *Burn v. Straight*, 5 O. S. 523; and see *Wheatley v. Sharpe*, 8 P. R. 307; *Golding v. Mackie*, *Ib.*, 237.

Where a defendant is arrested under a *ca. sa.* he can only be discharged under the provisions of *The Indigent Debtors Act*, R. S. O. c. 81, *Gossling v. McBride*, 17 P. R. 585.

Writs to fix
liability of
sureties.

1052.—(1) A writ of *capias ad satisfaciendum* issued for the purpose of fixing the liability of the sureties shall be returnable on a day certain to be named therein not later than fourteen days from the date of the teste of the writ, and shall be delivered to the Sheriff of the county in which the action was commenced eight clear days before the return day so named.

(2) The sureties shall take notice of the delivery of the writ as aforesaid, and it shall not be necessary for the plaintiff to give them any further or other notice thereof. *New.*

Clause (1) is in furtherance of what was decided in *Proctor v. McKenzie*, 11 Ont. App. 486. Before proceedings can be had against the sureties a writ of *ca. sa.* against the principal must be issued: *Arch. Pr.*, 12th ed., 855. The former practice in regard to such a writ is now embodied in *Rule 1053* (2). The defendant need not be arrested under it, and the Sheriff may return *non est inventus*, unless the defendant is in his custody at the time, even though under another writ, in which case he must return that fact. The issue of this writ

informs the sureties of the kind of execution the plaintiff intends to adopt, viz., against the person of the defendant, and for the purpose of so notifying the sureties the writ must be delivered to a particular Sheriff, viz., the Sheriff of the county in which the action was commenced, where its delivery operates as notice to the sureties, and they are bound to keep themselves informed on the point. The writ may be delivered immediately, but it must be delivered 8 clear days before the return day, which gives the sureties that time within which to render their principal. Upon a return of *non est inventus* an action may be commenced against the sureties on the return day of the *ca. sa.* or afterwards: *Shivers v. Brooks*, 8 T. R. 628.

Rules
1053-1055.

1053.—(1) An action shall not be brought upon the bond or other security given in (a) action pursuant to an order for arrest until after the return of a writ of *capias ad satisfaciendum* for the purpose of fixing the liability of the surety.

No action
till after
return of
ca. sa.

(a) Here the word "the" is probably inserted by mistake.

The action may be commenced on the return day: *Shivers v. Brooks*, 8 T. R. 628.

(2) To such a writ the Sheriff may return *non est inventus*, without taking any steps to arrest the defendant, unless the defendant is already in, or is rendered into, his custody. *New.*

See notes to Rule 1052.

1054. In an action upon the bond, the sureties shall only be liable for the amount secured by the plaintiff in the action in which the bond was given, and the costs of suit, not exceeding in the whole the amount of the penalty in the bond. See Con. Rule 1085.

Limitation
of liability
of sureties.

See note to Rule 1037.

1055.—(1) Subject to Rule 1049 where the plaintiff brings an action on the bond or other security, the sureties thereto or therein shall be at liberty to satisfy the bond or security by rendering up their principal to the custody of the Sheriff of the county in which the action was brought at any time within eight days next after service of the writ of summons upon them, but not at any later period; and, upon notice thereof being given to the plaintiff or his solicitor, the action shall be stayed and the plaintiff shall be entitled to the costs of the action up to the date of service of the notice. See Con. Rule 1084.

When
sureties
shall may
render their
principal.

Taken from Rule T. T. 1856, 88.

(3) Such costs may be taxed upon production of the notice so served without any order and if not paid within

Rules
1056, 1057

four days from taxation the defendant may, without an order, sign judgment therefor. *New.*

Plaintiff
proceeding
after notice
of render
not entitled
to costs
subse-
quently
incurred.

Where after due notice of render, plaintiff proceeded to judgment, the proceedings were stayed, and the costs incurred subsequent to notice, disallowed: *Wright v. Tucker*, 6 U. C. Q. B. 24. The Court will not interfere to stay proceedings where the render is made after the time limited by this Rule: *Read v. Scoville*, 16 U. C. Q. B. 453. Where there is doubt as to the validity of an alleged render of the principal, a Judge in Chambers will not order an *exoneretur*, but will leave the bail to plead: *Blackman v. O'Gorman*, 5 U. C. L. J. 161; *Potts v. Baird*, 7 P. R. 113.

Where the action is brought after render of the principal, but before an *exoneretur* has been entered, the action may be stayed on terms: *Laing v. Slingerland*, 17 Ont. 392.

After the return day of the order for arrest, where security in the action has not been put in, and where bail to the Sheriff are desirous of rendering their principal, security in the action must be put in before the render can be made: *Harrison v. Davies*, 5 Burr. 2233. But it would seem, as formerly, that a render may be made without having the security allowed, as the security is only put in for the purpose of rendering: see notes to Rule 1049.

(x) Other Writs of Execution.

When
plaintiff
may issue
other writs.

R. S. O.,
c. 80.

1056. The party at whose suit a judgment debtor has been taken and confined in execution, may, wherever such debtor has been admitted to bail, under the provisions of *The Act respecting Arrest and Imprisonment for Debt*, obtain or enforce any writ or process of execution, other than against the person of the debtor, notwithstanding that the debtor has been taken and confined in execution, and such other writ or process of execution may be proceeded with, although the debtor be re-committed to close custody. See R. S. O. 1897, c. 67, s. 26.

Formerly if a party was taken under a *ca. sa.* no other writ could be executed against him unless he died in execution, escaped, or was rescued: see Arch. Pr., 4th ed., p. 438. The present Rule only varies that practice in case the defendant is admitted to bail.

Practice
in matters
not pro-
vided for.

1057. In matters not provided for by the preceding Rules respecting bailable proceedings the practice in force at the time of the passing of *The Ontario Judicature Act, 1881*, is continued. *New.*

By this Rule the application of Rule 3 is excluded.

For the former practice in bailable proceedings: see Arch. Pr., 12th ed., pp. 727, *et seq.*

2. ABSCONDING DEBTORS.

Rules
1058, 1059.

1058. Proceedings by way of attachment against an absconding debtor under *The Absconding Debtors' Act* (x) shall be by an attaching order made upon motion to the Court or a Judge in an action commenced by writ of summons. No writ of attachment shall be issued, but the order shall have the same effect as a writ of attachment formerly had. *New.*

Attaching order.
R. S. O.
1887, c. 66.

(x) Now R. S. O. c. 79.

1059. The attaching order shall be issued in duplicate and shall be so marked on its face, and one of the duplicates shall be delivered to the Sheriff, and the other shall be used for the purpose of serving the defendant. *Con. Rule 1089.*

Order in duplicate.

See R. S. O. 1877, c. 68, s. 6.

Sections 1, 2 and 3, of R. S. O. c. 79, are as follows:

1. If a person resident in Ontario indebted to any other person, departs from Ontario with intent to defraud his creditors, and at the time of his so departing is possessed to his own use and benefit, of any real or personal property, credits or effects therein, not exempt by law from seizure, he shall be deemed an absconding debtor, and his property, credits or effects aforesaid, may be seized and taken for the satisfying of his debts by an order of attachment. R. S. O. 1887, c. 66, s. 1; *Con. Rules 1897, No. 1058.*

Who to be regarded as an absconding debtor.

PROCEDURE TO OBTAIN WRIT OF ATTACHMENT.

In the High Court.

2. Upon affidavit made by a plaintiff, his servant or agent that a person so departing is indebted to the plaintiff in a sum exceeding \$100, and stating the cause of action, and that the deponent has good reason to believe and does verily believe that the person has departed from Ontario and has gone to (stating some place to which the absconding debtor is believed to have fled, or that the deponent is unable to obtain any information as to what place he has fled to), with intent to defraud the plaintiff of his just dues, or to avoid being arrested or served with process, and was, at the time of his so departing, possessed of real or personal property, credits or effects, not exempt by law from seizure, to his own use and benefit in Ontario, and upon the further affidavit of two other persons, that they are well acquainted with the debtor mentioned in the first named affidavit, and have good reason to believe and do believe that the debtor has departed from Ontario with intent to defraud the plaintiff, or to avoid being arrested or served with process, the High Court, or a Judge thereof, or the Judge of a County Court, may make an order in the High Court for the attachment of the property, credits and effects of the debtor, and may in the order appoint the time for the defendant's putting in special bail, which time shall be regulated by the distance

Process filed upon affidavit that the defendant has absconded, etc.

Order of attachment to issue.

Rule 1039.

from Ontario of the place to which the absconding debtor is supposed to have fled, having due regard to the means of, and necessary time for, postal or other communication. R. S. O. 1887, c. 60, s. 2.

[Special bail would now appear to be required to be given in the manner prescribed by *Rules 1036 et seq.*; see *Rule 1064*.]

In County Courts.

Proceed-
ings in cases
within
County
Court jur-
isdiction.

3. In case the sum claimed is within the jurisdiction of the County Courts, any such Court, or the Judge thereof, may in like manner make an order of attachment in that Court, and the proceedings thereon shall be the same as in this Act provided. R. S. O. 1887, c. 60, s. 3.

It is now made plain by these sections and the *Rules*, that the necessity for a writ of attachment is abolished, as in the case of writs of *capias ad respondendum*: *Rule 1021*; writs of replevin: *Rule 1067*; writs of *mandamus*: *Rule 1080*; writs of injunction: *Rule 1094*; writs of prohibition: *Rule 1100*; writs of *certiorari*: *Rule 1101*; and for the special form of action commenced by a writ of attachment, interlocutory proceedings in an ordinary action are substituted, by which the property of an absconding debtor may be taken and applied in payment of his debts: see formerly, the observations of Maclellan, J.A., *Bank of Hamilton v. Aitken*, 20 Ont. at p. 626.

Affidavit

Affidavit for Attachment.—The order for an attachment is obtained on motion *ex parte*, supported by an affidavit to be made by the plaintiff, his servant or agent, shewing that the defendant was resident in Ontario, that he is indebted to the plaintiff in a sum exceeding \$100, and stating the cause of action, and that the deponent has good reason to believe and does verily believe that the defendant has departed from Ontario and has gone to (*stating some place to which the absconding debtor is believed to have fled, or that the deponent is unable to obtain any information as to what place he has fled to*), with intent to defraud the plaintiff of his just dues (*or to avoid being arrested or served with process*), and was at the time of his so departing, possessed of real or personal property, credits or effects, not exempt by law from seizure, to his own use and benefit in Ontario: *Hart v. Rutten*, 23 C. P. 613.

There must be the further affidavits of two other credible persons that they are well acquainted with the debtor mentioned in the first named affidavit, and have good reason to believe, and do believe, that the debtor has departed from Ontario with intent to defraud the plaintiff, or to avoid being arrested or served with process.

For forms of affidavit to obtain an attaching order, see H. & L. Forms, Nos. 1214, 1215.

The forfeiture of a recognizance to appear constitutes a debt for which an attachment may issue: *Regina v. Stewart*, 8 P. R. 207.

The debt which the plaintiff claims, must be actually due and payable; where the period of credit had not expired it was held that the plaintiff was not entitled to sue out a writ of attachment therefor: *Kyle v. Barnes*, 10 P. R. 20.

The same particularity in stating the cause of action is not required as was formerly required in an affidavit to hold to bail where no order of a Judge was required, nor the same particularity as is required where personal liberty is involved: *Bank of Hamilton v. Baine* (2), 12 P. R. 439.

Formerly affidavits upon which the order was granted not styled in **Rule 1059**. any Court, although sworn before a Commissioner for taking affidavits in the Q. B., who appended to his signature the words "A Commissioner in B. R., etc.," were held to be sufficient: *Scott v. Mitchell*, 8 P. R. 518, following *Ellerby v. Walton*, 2 P. R. 147; and not following *Hart v. Ruttan*, *supra*; and see *Wakefield v. Bruce*, 5 P. R. 77; but now that the application for the order is to be made in an action commenced in the usual way, it would seem to be proper that the affidavits should be styled in the action. Where the defendant has left the jurisdiction it will be necessary to obtain leave to issue the writ: see notes to *Rules 162 et seq.*

A statement that the defendant was indebted to the plaintiffs in the amount of certain promissory notes described, shewing them to be overdue and held by the plaintiffs, and that defendant had departed, etc., with intent to defraud plaintiffs, was held sufficient: *Wakefield v. Bruce*, 5 P. R. 77. It is not necessary that the plaintiff should swear that the debtor was residing in this Province, if that fact be sworn to by other persons: *Id.* It is sufficient to shew that the debtor intended to defraud the plaintiff, without shewing intention to defraud creditors generally: *Id.*

An affidavit made by a County Crown Attorney proving a debt due to the Crown by an absconding debtor was held sufficient: *Regina v. Stewart*, 8 P. R. 297. On a motion to set aside the writ, it was held that any defect in the affidavits on which the order for the writ was granted, might be supplied by the affidavits filed in answer to the motion: *Id.* Where a defendant had by his solicitor accepted service of the writ with knowledge of certain alleged irregularities, and neglected moving against the writ until after the time for pleading had expired, he was held to have waived the objection: *Id.*

A defendant whose family resided in the United States, but who for several months was in the Province purchasing horses for the United States Army and contracting debts therefor with the declared intention of moving permanently into Canada, was held to be sufficiently a resident within Ontario, to be within the Act: *Higgins v. Brady*, 10 U. C. L. J. 268. Where the deponents reside far from the debtor, the grounds of their belief should be set out: *Bank of Upper Canada v. Spafford*, 2 O. S. 373; and see *Rule 518*. Where the affidavit stated that the defendant "has left the Province or is concealed within the same" it was held sufficient: *Totten v. Fletcher*, T. T. 2 & 3 Vict.; Har. & Jos. Dig. 3. The affidavits must shew that the defendant is, or was, a resident of Ontario: *Higgins v. Brady*, 10 U. C. L. J. 268. It is not sufficient to describe the debtor as "lately doing business" in Ontario, nor to describe him as having "departed from Canada": *Id.*

A claim for unliquidated damages is not one upon which an order for attachment can be obtained: see *Clark v. Ashfield*, E. T., 7 W. 4; Ont. Dig. i., p. 192.

Application for Order, to whom to be made.—The application for the order may be made to a Judge of the High Court, or to the Master in Chambers, or any of the Local Judges, or Masters having jurisdiction in Chambers under *Rules 42, 45, 49*. Where the order has been granted by a Judge of a County Court, it has been held that he has no jurisdiction to entertain an application by the defendant to set it aside: *Disher v. Disher*, 12 P. R. 518, but perhaps in this case it was not sufficiently taken into account that the jurisdiction of

Motion for order

Rule 1059. a County Court Judge in actions in the High Court is not limited by the provisions of the Statute, R. S. O. c. 79, s. 2; and that he has now a general jurisdiction in Chambers in actions in the High Court under the *Rules*, over and above that conferred by the Statute: see J. A. s. 185; and *Rules* 45-47. Where the amount claimed is within the jurisdiction of the County Court the application may be made to and the order may be issued out of that Court: R. S. O. c. 79, s. 3.

Successive applications may be made for an order for attachment to successive Judges upon the same material, and an order granted by any one of them will be as valid as if it had been made by the first one, but on each subsequent application on the same or different material, the Judge should be notified of every previous application, though this is more as a matter of propriety than a legal right, and the omission to do so would not be a ground for setting aside the order: *Bank of Hamilton v. Baine* (2), 12 P. R. 439.

Form of
order

Form of Order.—The Statute (see R. S. O. c. 79, s. 2), enacts that the order is to appoint the time for the defendant's putting in special bail (i.e., security in the action: see *Rule* 1064), which time is to be regulated by the distance from Ontario of the place to which the absconding debtor is supposed to have fled, having due regard to the means of and the necessary time for postal or other communication.

It was formerly held to be unnecessary for the order for the writ to state the amount for which special bail is to be put in: *Regina v. Stewart*, 8 P. R. 297. The sum should, however, now be named in the order of attachment, and the amount sworn to in the affidavits on which the order is obtained is the amount for which security must be put in: *Ib.* at p. 300, and see *Rule* 1064.

For a form of order of attachment, see H. & L. Forms, No. 1216.

As to the duration of the order, see *Rule* 1060.

Effect of Attachment.—The placing of the order of attachment in the Sheriff's hands does not of itself bind the goods of the debtor, there must be a levy made thereunder: *Potter v. Carroll*, 9 C. P. 442; neither does the order bind the debtor's lands until actual seizure: *Kingsmill v. Warrenner*, 13 E. C. Q. B. 18; *Robinson v. Bergin*, 10 P. R. 127. Where there had been no seizure under the order until after a *fi. fa.* had been placed in the Sheriff's hands, the latter was formerly entitled to priority: *Ib.* Since *The Creditors' Relief Act* and s. 18 of *The Absconding Debtors Act*, however, there will be no such priority. Formerly where proceedings under *The Absconding Debtors Act* were taken prior to the delivery of an execution to the Sheriff, it was held that *The Creditors' Relief Act* did not apply; but the distribution of the property attached took place under *The Absconding Debtors Act*, and creditors had to recover execution for their debts in order to participate in the proceeds: *Macfie v. Pearson*, 8 Ont. 745.

The Sheriff may sell perishable goods attached, provided the plaintiff first gives security: see R. S. O. c. 79, ss. 5, 6. Other chattel property is retained by the Sheriff until an execution is placed in his hands under which it may be sold, unless an order for its sale is previously obtained under section 10, and unless the Sheriff is required to restore the property to the debtor on security being given and allowed, see *Rule* 1067, or on the attaching order being set aside.

By R. S. O. c. 79, s. 18, it is provided that "in case the property and effects of the absconding debtor are insufficient to satisfy the executions and other claims certified, none shall be allowed to share, unless their proceedings under this Act (i.e., *The Absconding Debtors Act*), or *The Creditors' Relief Act*, or the provisions of *The Division Courts Act* respecting absconding debtors were commenced within six months from the date of the first order of attachment." By the following s. 19, it is also provided that "the Court or a Judge may deny the distribution in order to give reasonable time for the obtaining of judgment, or allowance of claim, by persons who have commenced proceedings in due time against the absconding debtor."

Rules
1060, 1061.
Distribution
of proceeds.

The probable effect of these provisions is that it is not necessary for other creditors to proceed by attachment, but that where any execution is in the Sheriff's hands, it will suffice for other creditors to obtain executions or certificates under *The Creditors' Relief Act*, and that to that extent the decision in *Hurfe v. Peterson, supra*, may now be considered to be superseded; see *Re Moore v. Wallace*, 13 P. R. 291.

The Sheriff should make his entry under sec. 4 of *The Creditors' Relief Act*, forthwith after any final order for distribution, not at the expiration of 6 months from the date of the issue of the first order of attachment; and a creditor in order to share must prove his claim within 30 days from the order for distribution (even though the Sheriff wrongly makes the actual entry later), or obtain an order for further time under sec. 19; *Thell v. Nicol*, 26 C. L. J. 561. The first attaching creditor is entitled to priority as against other creditors for his costs of issuing the attachment and the Sheriff's fees for executing it, and also the costs of obtaining an order to sell the property; *Darling v. Smith*, 10 P. R. 330; and see R. S. O. c. 79, s. 19 (3); *Hughes v. Field*, 9 P. R. 127.

After an attaching order has been made, an order may be made directing third persons, such as the solicitors of the debtor, to deliver to the Sheriff property of the debtor which may be in their hands; *Buntin v. Williams*, 10 P. R. 43.

Upon service of the writ of summons and order of attachment, the plaintiff may proceed in the action to obtain judgment as in an ordinary action, subject to the provisions of *Rule 1062*.

1060. The attaching order shall be dated on the day on Day which it is made, and shall remain in force as long as the writ of summons is in force. Con. Rule 1090.

The writ of summons remains in force for 12 months; *Rule 132*.

1061. The plaintiff may, at any time within six months from the date of the original order of attachment, upon application to the proper officer, obtain one or more certified copy or copies of the attaching order, which may be delivered to any Sheriff other than the Sheriff to whom the original order was delivered, for the purpose of attaching the property, credits, or effects of the defendant in aid of the original order. Con. Rule 1091.

Further orders within six months

Taken from R. S. O. 1877, c. 68, s. 7.

Rules Six months was mentioned in R. S. O. 1877, c. 68, s. 7, because
1062, 1063. that was the duration of the writ of attachment. It would have
 been more consistent with *Rule 1000* to have limited twelve months
 instead of six months in the above *Rule*.

Plaintiff to
 prove claim.

1062. Before the plaintiff shall be entitled to sign judgment by default he shall file an affidavit, proving the amount of the debt and damages claimed by him in such action, after giving credit for all payments and claims which might be set off or lawfully claimed by the debtor at the time of making the affidavit. Con. Rule 1093.

This *Rule* supersedes R. S. O. 1887, c. 66, s. 9.

Proof of the debtor's signature to a note, without proof of the plaintiffs being the payees, was considered sufficient proof of the debt: *Appleton v. Dieger*, 4 U. C. Q. B. 247.

Defendant
 may be let
 in.

1063. The Court or Judge may, either before or after final judgment, permit the defendant to put in security in the action and defend the action, in the same manner, and subject to the same rules and discretion, as on a like application in an ordinary action. Con. Rule 1094, *amended*.

This *Rule* supersedes R. S. O. 1887, c. 66, s. 10.

The security required to be put in is the same as is required where a defendant is arrested on *mesne* process: see *Rule 1037* and notes, and *Rule 1064*.

Formerly when a defendant entered an appearance, instead of putting in special bail as required by the writ, it was held to be a useless proceeding: *Regina v. Stewart*, 8 P. R. 297; the only way in which the defendant could entitle himself to defend the action being by putting in special bail: *Offay v. Offay*, 26 U. C. Q. B. 363. Under the present *Rules*, however, the defendant may appear and defend the action in the same way as in any other action, and security is only required to be put in to enable him to obtain the return of his property under *Rule 1065*.

Formerly, another attaching creditor of the absconding debtor might appear at the trial of the plaintiff's claim and cross-examine the plaintiff's witnesses, and address the jury against the plaintiff: *Lavis v. Baker*, 13 C. P. 506; and such other creditor might also move for a new trial of the plaintiff's action, upon affidavits shewing fraud and collusion between the plaintiff and the defendant: *Ib.*

The validity of a judgment might formerly have been attacked, and may still be attacked, by another creditor of the debtor in an independent proceeding: *McDonald v. Boice*, 12 Gr. 48; and formerly also by an interlocutory application in the action, in which the impounded judgment was recovered: *Bank of Montreal v. Burnham*, 1 U. C. Q. B. 131; *White v. Lord*, 13 C. P. 289; see also *Bevan v. Wheat*, 14 C. P. 51; *Dickson v. McMahon*; *Ib.* 521; see R. S. O. 1877, c. 68, s. 21; but this section was repealed by 46 Vict. c. 6, s. 4 (O.), and no similar enactment made, so that it would seem that a third party cannot now intervene by such an interlocutory application.

The Master in Chambers has no jurisdiction to set aside a judgment entered pursuant to the finding of a County Court Judge upon a reference, at the instance of another creditor who wishes to be let in to defend: *Wills v. Carroll*, 10 P. R. 142.

Rules
1064-1066.

1064. The security (whether given within the time limited by the order, or within such time as the Court or a Judge directs), shall be given and allowed in like manner as if the defendant had been arrested for the amount sworn to on obtaining the attachment. Con. Rule 1095, *encl.*

Security,
how paid to

This Rule supersedes R. S. O. 1887, c. 66, s. 11.

1065. Upon the defendant's giving and obtaining the allowance of security, all his property, credits and effects attached in the action (excepting any which may have been disposed of as perishable, and then the net proceeds of the goods so disposed of), shall be restored and paid to him, unless there be some other lawful ground for the Sheriff to withhold or detain the same. Con. Rule 1096.

Property to
be returned

This Rule supersedes R. S. O. 1887, c. 66, s. 12.

1066. If at any time before the execution issues it appears, upon motion, that the defendant was not an absconding debtor at the time of obtaining the attaching order, he shall recover his costs of defence, to be deducted from the amount of the plaintiff's claim or judgment; and the plaintiff shall be entitled only to judgment or execution or (a) the excess, if any; and if the taxed costs of the defendant are greater than the amount of the plaintiff's claim or judgment, the defendant shall be entitled to an order for payment of the excess forthwith. Con. Rule 1097.

Costs of
debtor was
not an abs-
conding
debtor

This Rule supersedes R. S. O. 1887, c. 66, s. 13.

(a) "Or" is probably a mistake for "for."

The intent with which the debtor left the Province can be tried on affidavit on an application to set aside the attachment: *Jackson v. Randall*, 6 P. R. 167.

Where property had been sold under the attachment, the Court, on setting it aside, ordered the Sheriff to pay over the moneys realized to the defendant, and directed that no action should be brought for anything done under the attachment: *Hart v. Rutton*, 23 C. P. 613.

3. REPLEVIN.

The action of replevin was originally the form of action for the recovery of goods wrongfully taken out of the possession of a person under a distress; but early in the history of Upper Canadian

Rule 1067. Law the form of action was extended to other cases in which the goods sought to be recovered had not been distrained or taken out of the plaintiff's possession, but were merely wrongfully detained by the defendant. An action of detinue might result in the return of the goods, but was also for damages for the unlawfully taking or detaining of goods, and the value of the goods might be recovered. The object of an action of replevin was to obtain the goods in the first place, and therefore this remedy was extended, so as to be employed in cases in which the obtaining of the goods was the important matter.

C. S. P. C. c. 29, s. 1, and R. S. O. 1877, c. 53, s. 2, provided that an action of replevin might be brought:

(1) Where personal property has been wrongfully distrained under the circumstances in which by the law of England at the date of the Con. Stat. U. C. (viz., 5th Dec., 1859), replevin might be brought:

(2) Where trespass, or trover, would lie for the wrongful taking or detaining of personal property.

This is in effect the present law as embodied in R. S. O. c. 66, ss. 2 and 3, which are as follows:—

When goods
may be re-
plevied.

2. Where goods, chattels, deeds, bonds, debentures, promissory notes, bills of exchange, books of account, papers, writings, valuable securities or other personal property or effects have been wrongfully distrained under circumstances in which by the law of England, on the 5th day of December, 1859, replevin might have been made, the person complaining of such distress as unlawful may bring an action of replevin, or where such goods, chattels, property or effects have been otherwise wrongfully taken or detained, the owner or other person capable of maintaining an action for damages therefor may bring an action of replevin for the recovery of the goods, chattels, property or effects, and for the recovery of the damages sustained by reason of the unlawful caption and detention, or of the unlawful detention, in like manner as actions are brought and maintained by persons complaining of unlawful distresses: R. S. O. 1887, c. 55, s. 2.

Goods seized
not to be
replevied by
parties.

3. No party to an action or proceeding, in any Court, shall replevy or take out of the custody of the Sheriff, Bailiff, or other officer, any personal property seized by him under process against such party: R. S. O. 1887, c. 55, s. 3.

Under section 2, replevin will lie in Ontario though there has been no wrongful taking, but a detention only is complained of: *Deal v. Potter*, 26 U. C. Q. B. 578, and though both a wrongful taking and a detention are alleged, for every detention is a new taking: *Id.*

Cases of
distress.

Replevin may be brought on an improper distress for school rates: *Updegarth v. Graham*, 7 C. P. 171; and see *Hulpin v. Calder*, 26 U. C. P. 501; *Asher v. Manning*, 38 U. C. Q. B. 345; or for other taxes, *Sargent v. City of Toronto*, 12 C. P. 185.

Where a distress is properly made for some taxes, and also for other sums not properly collectable, it would seem that replevin will not lie until what is properly due has been paid: *Corbett v. Johnston*, 11 C. P. 317. Goods improperly pledged or sold, by a person having no right thereto, may be replevied by the owner: *Bush v. Fry*, 15 Ont. 122. Formerly, goods seized under an attachment from a Division Court might have been replevied by a third party claiming them as his

own: *Arnold v. Higgins*, 11 U. C. Q. B. 191; but the proper remedy **Rules** of the claimant is now to proceed under R. S. O. c. 60, ss. 277 et **1067, 1068**, *sup.*; but see *Reid v. McDonald*, 26 C. P. 147.

As being in the custody of the law the following have been held to be not repleviable:—A vessel in the hands of a collector of customs, seized for breach of revenue laws: *Scott v. McFar*, 3 P. R. 16; goods in the hands of an official assignee in insolvency: *Barelay v. Sutton*, 7 P. R. 14; and see the question as to how far goods seized under execution or attachment are protected from the remedy by replevin discussed in *Jameson v. Kerr*, 6 P. R. 3.

Replevin will not lie against a pound-keeper: *Flabottson v. Henry*, 8 Ont. 625.

In replevin against one person goods cannot be taken out of the peaceable possession of another without notice or demand: *G. W. Ry. Co. v. McEwan*, 28 U. C. Q. B. 528; *Stueser v. Springer*, 7 Ont. App. 497; *Hoarigan v. Driscoll*, 8 P. R. 184.

Plaintiffs in possession of certain timber limits were held entitled to maintain replevin against a wrong-doer in respect of saw-logs cut on the limits, though by reason of an infirmity in the license they might have no title as against the Crown: *Gilmour v. Buck*, 24 C. P. 187; and see *Greenwood Lumber Co. v. Phillips*, 1904, A. C. 405; 30 L. T. 741.

Under the terms of the C. S. I. C. c. 29, s. 1, it was formerly held that where there was not sufficient evidence to constitute a conversion of the goods by defendant, so as to support an action of trover, replevin would not lie: *Smalley v. Gallagher*, 26 C. P. 531; but the old learning on the subject of conversion is not imported into the system introduced by the 4th Act: *Stimson v. Block*, 11 Ont. 96. R. S. O. c. 60, s. 2, provides for redress where goods are wrongfully taken or detained, in favour of the person capable of maintaining an action for damages therefor, and in such cases the question is, whether there has been such an unauthorized dealing with the plaintiff's property as has caused him damage; and, if so, to what extent he has sustained damage: *Stimson v. Block*, *supra*.

An equitable title to goods will now be sufficient to support an action for the replevy thereof: *Carter v. Long*, 26 S. C. R. 430.

1067. Where a person is entitled to replevy property he may obtain an order therefor in an action commenced by writ of summons. **Con. Rule 1098.**

The order issued, of which a form is given in the Appendix Form 133 (see H. & L. Forms, No. 1226), contains what was formerly contained in a writ of replevin.

An action of replevin is to be commenced like any other action, by writ of summons, and the return of the goods is to be obtained by order under **Rule 1068**, after the action has been so commenced.

1068.—(1) An order of replevin may be obtained.

1. On motion therefor on an affidavit by the person claiming the property, or some other person, shewing the facts of the wrongful taking or detention complained of, the value and

When
motion for
order re-
quired

Rule 1068. description of the property, and that the person claiming it is the owner thereof, or is lawfully entitled to the possession thereof (as the case may be);

On praece. 2. Or on *praece* if the person claiming the property, his servant or agent, makes an affidavit stating,

Affidavit to obtain order on *praece*.

- (a) That the person claiming the property is the owner or lawfully entitled to the possession thereof (describing the property);
- (b) The value thereof to the best of his belief;
- (c) That the property was wrongfully taken out of the possession of the claimant, or fraudulently got out of his possession within two months next before making of the affidavit;
- (d) That the deponent is advised and believes that the claimant is entitled to the order;
- (e) And that there is good reason to apprehend that unless the order is issued without waiting for a motion, the delay would materially prejudice the just rights of the claimant in respect to the property.

Order may issue on *praece* if the property was distrained for rent or damage feasant.

3. Or on *praece* (in case the property was distrained for rent or damage feasant), if the person claiming the property, his servant or agent, makes an affidavit stating,

- (a) That the person claiming the property is the owner or is lawfully entitled to the possession thereof (describing the property);
- (b) The value thereof to the best of his belief;
- (c) That the property was taken under colour of a distress for rent or damage feasant;

and in such case the order shall state that the defendant has taken and unjustly detains the property, under colour of a distress for rent or damage feasant (as the case may be).

(2) Except as hereinbefore mentioned no order of replevin shall be issued. Con. Rule 1099.

Taken from R. S. O. 1877, c. 53, s. 6.

The order is issued on *praece* (by the officer in whose office the action is commenced; see *Rule 37*), in cases where the goods have

been taken out of the plaintiff's possession, or distrained for rent, or damage feasant. A special application is necessary under clause (1) in other cases.

The latter application is made in Chambers *ex parte* unless the Judge directs notice to be given: *Rule 1069*.

The affidavit for a *præcipe* order is to be by the person claiming the property, his servant or agent. An affidavit not describing the deponent as servant or agent, but using the words "now acting for the said (plaintiff)" was held to be insufficient, but for the fact that it further shewed facts from which the agency might be inferred: *Arnold v. Hamilton*, 1 P. R. 263.

The affidavit on special application under clause (1) may be made by any one cognizant of the facts necessary to be sworn to.

In either case the affidavit must be sufficiently explicit to enable the Sheriff to identify the property: *Jones v. Cook*, 2 P. R. 336; *Hoorigan v. Driscoll*, 8 P. R. 184; and the description must be inserted in the order: *Rule 1071*.

An objection that there was in fact no taking or detention is not a ground for setting aside the order; that is one of the questions to be determined in the action: *Gilchrist v. Conger*, 11 U. C. Q. B. 197.

An order will not be granted to replevy a vessel seized for breach of the revenue laws: *Scott v. McKee*, 3 P. R. 16; neither should the order be issued on *præcipe* in such a case: *Ib.*

Before taking the property the Sheriff takes a bond from the plaintiff under *Rule 1072*, unless otherwise provided by the order.

Where the order is issued on *præcipe* the Sheriff takes the property under it, but does not replevy it without further order directing him to do so, except where the property was distrained for rent or damage feasant: *Rule 1076*.

1069.—(1) Where a motion for an order is made, the Court or Judge may proceed on the *ex parte* application of the plaintiff, or may direct notice to be served on the defendant to shew cause why the order should not issue; and may, in either case, grant or refuse the order, or direct the Sheriff to take a bond in less or more than treble the value of the property, or may direct him, in addition to taking a bond pursuant to *Rule 1072*, to take and detain the property until the further order of the Court, instead of at once replevying the same to the plaintiff; or may order that the plaintiff instead of giving a bond be at liberty to pay into Court to the credit of the action such sum as may be proper (to be named in the order) to stand as security to the defendant in the same manner and to the same extent as any bond which the plaintiff would otherwise be required to give to the Sheriff; or may impose any terms or conditions in granting the order, or in refusing the same, on the return of a motion, as under the circumstances seems just. *Con. Rule 1100*.

Discretionary power of the Court or Judge when an application for an order is made.

Taken from R. S. O. 1877, c. 53, s. 7.

Rules
1070-1072.

(2) Money paid into Court shall remain in Court as security as aforesaid subject to further order by the Court or a Judge. *New.*

Defendant
may apply
to discharge
order.

1070. Where an order of replevin is issued, the defendant may at any time, or from time to time, on notice to the plaintiff, apply to the Court or a Judge, on affidavit or otherwise, to discharge, vary, or modify the order, or to stay proceedings thereunder, or for any other relief, with respect to the return, safety or sale of the property or any part thereof, or otherwise, and the Court or Judge may make such order thereon as may seem just. *Con. Rule 1101.*

Taken from R. S. O. 1877, c. 53, s. 9.

An objection, that there was in fact no taking, is not a ground for setting aside the order: *Gilchrist v. Conger, supra*, in note to *Rule 1068*.

An objection that a writ of replevin was directed to a Sheriff who was sole liquidator of the plaintiff company, was over-ruled, in *Alpha Oil Co. v. Donnelly*, 12 P. R. 515.

This *Rule* applies to applications to discharge the order of replevin on the merits, and not for mere irregularities: *Ib.*

Contents of
order, and
how to be
dated.

1071. The order shall state the description and value of the property, and may be according to Form No. 133. *Con. Rule 1102.*

Taken from R. S. O. 1877, c. 53, s. 10.

For Form No. 133, see H. & L. Forms, No. 1226.

Replevin
bond to be
taken by
Sheriff.

1072.—(1) Subject to any order under Rule 1069 providing for the payment of money into Court instead of the giving of a bond, before the Sheriff acts on the order he shall take a bond from the plaintiff with two sufficient sureties in such sum as may be prescribed by an order made under Rule 1069, if such an order has been made, or if no such order has been made, then in treble the value of the property, as stated in the order of replevin; the bond shall be assignable to the defendant; and the bond and assignment thereof may be according to Form No. 196, the condition being varied to correspond with the order. *Rules 23 June, 1894, 1366.*

Based upon R. S. O. 1877, c. 53, s. 11.

For Form No. 196, see H. & L. Forms, No. 1227.

(2) Where money is paid into Court instead of a bond being given, the Sheriff may, subject to any provisions in the

order, act on the order upon a certificate of the Accountant **Rule 1072.** of the Supreme Court being delivered to him that the money required to be paid into Court has been paid in pursuant to the order. *New.*

The taking of a bond is imperative, and no act can be done under the order until the security is given: see *Lantress v. Radford*, 9 P. R. 33, where the seizure was set aside as irregular.

This *Rule* makes it clear, by the insertion of the words "from the plaintiff with two sufficient sureties," that the Sheriff is bound to use due care to obtain a bond sufficient, at the time of taking it, to answer the damages recoverable in the event of the plaintiff being unsuccessful: see *Norman v. Hope*, 13 Ont. 556; 14 Ont. 287. The Sheriff must exercise a reasonable discretion in inquiring into the sufficiency of the sureties; if he fails to do so, he will be liable to the defendant in the replevin action in case it results in his favour, for all damages, to the amount of the penalty, naturally flowing from the wrongful act, *e.g.* (where the replevin arises out of distress for rent), the rent in arrear, costs of distress, and of the replevin suit, and of any action against the principal and sureties on the bond: *Ib.*

As two sufficient sureties are required, it will not be sufficient if the plaintiff in replevin and one of the sureties are worth the amount of the penalty at the time the bond is taken: *Ib.*

Seem, that a subscribing witness is necessary to the validity of the bond: see *Helcy v. Cousins*, 34 U. C. Q. B. 63.

As to the terms and extent of the security to which defendant is entitled in cases respecting goods not previously taken out of the plaintiff's possession, see also *Rule 1074*.

The defendant is entitled to see the bond in the hands of the Sheriff: *Logue v. Prescott*, 18 C. L. T. 186 (N.B.).

An action lies against the Sheriff for refusing to assign the bond: *Pacaud v. McEwan*, 31 U. C. Q. B. 328. Only nominal damages were recovered where the plaintiff was found not entitled to recover the value of the goods, not being their owner: *Ib.*

An action on the bond will lie,—

(1) For not prosecuting the suit with effect, *i.e.*, not successfully: as to which see *Welsh v. O'Brien*, 28 U. C. Q. B. 405; *Malruay v. Hopkins*, 18 U. C. Q. B. 174; *Patterson v. Fuller*, 31 U. C. Q. B. 323; 32 U. C. Q. B. 240.

(2) For delay in prosecuting: see *Belcher v. Burn*, 24 U. C. Q. B. 124; *Churchill v. Denham*, 29 C. P. 474; but see *O'Donnell v. Duchesneau*, 14 Ont. 1.

(3) For not returning the goods: see *Patterson v. Fuller*, *supra*.

As to the damages recoverable, see *Norman v. Hope*, 13 Ont. 556; 14 Ont. 287. Formerly the excess of solicitor and client costs of defence, over and above taxed party and party costs, were not recoverable: *Williams v. Crow*, 14 Ont. App. 301; but see now *Rule 1074*.

Damages for "illegal distress" and for "annoyance and injury to credit and reputation in trade" are recoverable in an action of replevin arising out of a wrongful distress for alleged arrears of rent: *Smith v. Enright*, 63 L. T. 724.

Rules
1073-1075.

To be sub-
ject to 8 and
9 Wm. III c.
11, s. 5.

1073. Any bond so given shall be subject to the provisions of section 8 of chapter 11 of the Acts passed by the Imperial Parliament in the 8th and 9th years of the reign of His Majesty King William the Third. Con. Rule 1103 (*n*).

Taken from R. S. O. 1877, c. 53, s. 12.

The provisions of 8 & 9 Wm. III, are now embodied in R. S. O. c. 324, s. 4.

Indemnity
of defendant
in replevin
proceedings.

1074. Where an order of replevin is issued for any property which had not been previously taken out of the plaintiff's possession, and for which the plaintiff might formerly have brought an action of trespass or trover, the defendant shall be entitled, if the plaintiff fails in the action, to be fully indemnified against all damages sustained by the defendant, including any extra costs which he may incur in defending the action; and the bond to be taken by the Sheriff or Bailiff shall be conditioned, not only as heretofore required but also to indemnify and save harmless the defendant from all loss and damage which he may sustain by reason of the seizure, and of any deterioration of the property in the meantime, in the event of its being returned, and all costs, charges, and expenses which the defendant may incur, including reasonable costs not taxable between party and party. This Rule shall not apply to cases of distress for rent or damage feasant. Con. Rule 1104.

The statute (48 Vict. c. 13, s. 81), from which this *Rule* is taken was probably passed in consequence of the decision in *Williams v. Croft*, 10 Ont. App. 301, to the effect that a successful defendant in replevin could not recover as damages the extra costs he had been put to between solicitor and client.

Under this *Rule* these extra costs are now recoverable except in cases of replevin where the goods have been distrained for rent or damage feasant.

This *Rule* gives no right of action independently of the bond, but merely adds another condition to the bond beyond that formerly required: *Harper v. Toronto Type Foundry*, 31 Ont. 422.

The sureties are not discharged by the trial being postponed on the application of the plaintiff without the defendant's consent or concurrence: *O'Donnell v. Duchenauff*, 14 Ont. 1.

Sheriff not
to serve writ
of summons
till he has
replevied.

1075. The Sheriff shall not serve a copy of the writ of summons or the order until he has replevied the property, or some part thereof, if he cannot replevy the whole in consequence of the defendant having eligned the same out of his

county, or because the same is not in the possession of the defendant, or of any person for him. ^{Rules 1076, 1077} Con. Rule 1105.

Taken from R. S. O. 1877, c. 53, s. 13.

As to the mode of framing the statement of claim where part of the goods are eloiigned, see *Thurston v. Breard*, 8 P. R. 10.

1076. Where the order is issued on *procepe* the Sheriff shall take and detain the property, and shall not replevy the same to the plaintiff without the order of the Court or a Judge; but may, within 14 days from the time of taking the same, re-deliver it to the defendant, unless in the meantime the plaintiff obtains and serves on the Sheriff an order directing a different disposition of the property; but this Rule shall not apply in case of a distress for rent or damage feasant, under Rule 1068. ^{What Sheriff shall do when the order issues on procepe.} Con. Rule 1106.

Taken from R. S. O. 1877, c. 53, s. 14.

Before acting upon the order the Sheriff must take a bond from the plaintiff, as provided in *Rule 1072*, unless otherwise provided by the order.

In replevying, power is given to the Sheriff by R. S. O. c. 66, s. 4, to search for the property in, and if necessary (but during the daylight only) to break open the door of the defendant's dwelling house, after a demand publicly made at the door for delivery of the property and non-compliance for six hours.

By section 5 of the same Act, if the property is reasonably supposed to be in any enclosure other than the dwelling house, the Sheriff may publicly demand it at the enclosure, and in case it is not forthwith delivered, he may, and if necessary must, at once break open the enclosure to make replevin.

By section 6 of the same Act, if the property is reasonably supposed to be concealed about the person or the premises (other than the dwelling house or other enclosure) of the defendant, or any other person holding the same for him, the Sheriff may demand it from the defendant, or such other person, and upon refusal or neglect to deliver it, may, and if necessary must, search the person of the defendant, or such other person, or such premises.

1077. The Sheriff shall return the order on or before the tenth day after the service thereof, and shall transmit annexed thereto, ^{When order to be returned with Schedule annexed.}

(a) The names of the sureties in, and the date of the bond taken from the plaintiff, and the name or names of the witnesses thereto; ^{What Schedule to contain.}

(b) The place of residence and addition of the sureties;

(c) The number, quantity and quality of the articles of property replevied; and in case he has replevied only a portion of the property and cannot replevy the residue by reason

Rules
1078, 1079.

of the same having been eloigned out of his county, or not being in the possession of the defendant, or of any other person for him, he shall state in his return the articles which he cannot replevy and the reason therefor. Con. Rule 1109.

Taken from R. S. O. 1877, c. 53, s. 17.

If Sheriff
returns that
the property
has been
eloigned,
order to
issue.

1078.—(1) Where the Sheriff makes such a return of the property distrained, taken or detained having been eloigned, as would have warranted the issuing of a *capias in withernam* by the law of England on the 5th day of December, 1859, upon the filing of the return an order shall be issued on *precipe* according to Form 134, which shall have the same force and effect as a *capias in withernam* had, and before executing such order the Sheriff shall take security as provided by Rule 1072.

Taken from R. S. O. 1877, c. 53, s. 18.

For Form 134, see H. & L. Forms, No. 1228.

On the 5th Dec., 1859, the practice in England was that if the Sheriff returned an eloignment (*quod accipit, etc., elongata sunt*) to *alias* and *pluries* writs of replevin, the writ of *capias in withernam* issued; but the plaintiff might take out and deliver to the Sheriff the writ of replevin, *alias* and *pluries* at the same time so as to get a return from the Sheriff to the *pluries* at once: Gilbert on Replevin, 95. It would seem that under the present Rules no *alias* and *pluries* orders or writs are provided for, and the order in *withernam* may be issued upon the Sheriff's return, to the order of replevin, of an eloignment.

Where
Sheriff re-
turns goods
eloigned

(2) Where a Sheriff makes return that the whole or any part of the property has been eloigned, or that for any reason the same cannot be replevied, the plaintiff may, if he so elect, serve the writ of summons, and in his statement of claim, claim either an order for the return of the goods and damages for their detention, or damages for their conversion. Con. Rule 1110; Rules 23 June, 1894, 1367.

Damages on
judgment
by default.

1079. Where the plaintiff is entitled to sign judgment by default, he may sign final judgment for five dollars and costs, but shall not be entitled to recover a larger sum except upon an assessment before a Judge or jury, or upon filing the written consent of the defendant or his solicitor, and an affidavit verifying the signature to such consent. Con. Rule 1111.

Taken from R. S. O. 1877, c. 53, s. 28.

As to the damages recoverable by a plaintiff in replevin at a trial, or on an assessment of damages, see *Graham v. O'Callaghan*, 14 Ont. App. 477.

4. MANDAMUS.

1080. A *mandamus* may be granted by judgment or by order on motion to the Court or a Judge. A writ of *mandamus* shall not be issued but the judgment or order shall have the same effect as a writ of *mandamus* formerly had. Con. Rule 1115.

To same effect as Eng. (1883) R. 722.

This provision is similar to that contained in Rule 1084, providing that no writ of injunction shall issue.

The former Rule applied only to a *mandamus* in an action, and did not refer to the prerogative *mandamus*. Now, however, Rule 1080 applies to the prerogative *mandamus*. See note to Rule 1084, also Rule 3.

(i) In Actions.

1081. In any action (or) the plaintiff may indorse upon the writ and copy to be served, a notice that the plaintiff intends to claim a *mandamus*; and the plaintiff may claim in the statement of claim, either together with any other demand which may be enforced in the action, or separately, a *mandamus* commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested. Con. Rule 1112.

Taken from R. S. O. 1877, c. 52, s. 4. Compare Eng. (1883) R. 719.

(a) Former Con. Rule 1112 (following R. S. O. 1877, c. 52, s. 4), had here "except replevin or ejectment." These exceptions are now removed.

The *mandamus* here referred to is not the prerogative *mandamus* which may be granted where a party has no other remedy; see notes to sec. 58 (90 *supra*, pp. 76-79), but the power to grant a *mandamus* in an action, which was originally a new power conferred on Common Law Courts (analogous to the powers of acting directly in personam possessed by the Court of Chancery) "to direct the performance of some act, of something to be done, which is the result of an action, where an action will lie," *per* Brett, L.J., in *Glossop v Heston Local Board*, 12 Ch. D. 122.

It was thus in the nature of an execution, applicable in cases where relief to a plaintiff, who was damaged by the non-fulfilment of a duty by defendant, would be best given by enforcing the specific performance of that duty, and is in fact the Common Law equivalent of what in Equity was called a "mandatory injunction"; see *Smith v. Charley*, 1897, 1 Q. B. at p. 739.

The original Eng. Act, from which the R. S. O. 1877, c. 52, relating to Prohibition, *Mandamus* and Injunction, was taken, was intended to carry out in some measure the recommendations of the Common

Rule 1061. Law Commissioners of 1834. The view of the Commissioners had been what the Jud. Act has accomplished, viz., that resort should not be had to the auxiliary jurisdiction of Equity, but that each Court should possess within itself the power to give complete redress. They accordingly reported that there was no reason "why a Court of Law should not exercise the same jurisdiction as a Court of Equity, and restrain the violation of legal rights in cases in which an injunction might issue for that purpose from Courts of Equity": Second Report, p. 48.

The Courts of Common Law formerly did not exercise the statutory jurisdiction given them, except in cases where a bill for specific performance would lie in Equity, but the converse did not hold good, viz.: that wherever Courts of Equity would entertain a bill for specific relief, the Court of Law would grant a mandamus: see *Reg. v. Balby & Workop, etc.*, 22 L. J. Q. B. 164; *Edwards v. Loundes*, 1 E. & B. 81. Under the system introduced by the Judicature Act it would seem to be proper to hold, under this Rule and section 58 (9), that, in all cases in which the appropriate relief is to compel the performance by the defendant of that which the plaintiff is in the action held entitled to have performed, performance should be compelled by the issue of a mandamus. It has not, however, been as yet decided that a mandamus is the appropriate remedy for the performance of matters arising out of contract: see, however, Rule 862. In *Re London, Huron & Bruce Ry. Co. v. E. Wawanosh*, 36 U. C. Q. B. 93, it was held that a prerogative writ of mandamus was not the appropriate remedy in such case: see also *Re N. Simcoe Ry. Co. v. Toronto, Ib.*, 101.

It has been said that the only class of cases, to which the section from which this Rule was taken was formerly held to apply, without doubt, was that in which there was a duty of a public nature, or a duty created by an Act of Parliament, in the fulfilment of which the plaintiff had a personal interest: *Harrison, C. L. P. Act*, 461.

Wherever a statute gives a right to a person to have an act or duty fulfilled by another, and that other does not fulfil it, a cause of action arises, for which, at least, nominal damages may be recovered: see *Young v. Eric & Huron, etc.*, 27 Ont. 531.

Under the corresponding English enactment it was decided that the power given is only to be exercised to enforce performance of duties of a public nature, not those arising simply by contract: *Benson v. Paull*, 6 E. & B. 273; *Norris v. Irish Land Co.*, 8 E. & B. 512; and that the duty must be one in which the applicant is interested; and the remedy by mandamus is only available where there is no other effectual legal remedy: *Bush v. Beaven*, 1 H. & C. 500.

Section 58 (9) of the Act goes further, however, than the previous statutes, and enacts that a mandamus may be granted "by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made."

Under that section, or this Rule, the remedy may be held to extend to cases of a more private nature than those to which the prerogative mandamus would apply: see *Norris v. The Irish Land Co.*, 8 E. & B. 527, per Coleridge, J., and *Sivan v. North British Australasian Co.*, 7 H. & N. 603; 2 H. & C. 175; *Worthington v. Hulton*, L. R. 1 Q. B. 63; and in actions even where no actual damage is sustained: *Fotherby v. Metropolitan Ry. Co.*, L. R. 2 C. P. 188.

A mandamus was granted to improvement commissioners, directing them to levy a rate to satisfy the claim of the plaintiff, a creditor:

Ward v. Lowndes, 1 E. & E. 949, 956; and to apply their funds in payment of delinquent taxes: *Webb v. Commissioners of Horne Rgs.*, 1 L. R. 5 Q. B. 642; to a railway company, compelling them to give a notice to treat, and proceed with the purchase of lands as to which they had given notice of an intention to take: *Morgan v. Metropolitan Railway Co.*, 1 L. R. 3 C. P. 553; 4 C. P. 97; *Demoreat v. Midland Ry. Co.*, 10 P. R. 73; see also *Tyson v. Mayor of London*, 1 L. R. 7 C. P. 18; and to issue a precept for the assessment of compensation after a notice to treat had been given: *Fotherby v. Metropolitan Railway Co.*, 1 L. R. 2 C. P. 188; *Guest v. Poole and Bournemouth Ry. Co.*, 1 L. R. 5 C. P. 553; to a municipal corporation to compel the making of repairs to a drain which it was their duty to repair and the non-repairs of which had caused damage to the plaintiff: *White v. Corporation of Gosfield*, 2 Ont. 287; and see *Re Montan, etc., v. Haldimand*, 12 Ont. App. 593; and to compel the opening of a road allowance so as to enable an occupant of land to have access thereto: *Hishop v. McGillivray*, 12 Ont. 749; see also *Re Wilson v. Uniofleet*, 10 P. R. 147; *Clarke v. Palmerston*, 6 Ont. 616; and to compel them to raise the money to pay the claim of the plaintiff as a creditor of the corporation: *Quaintance v. Howard*, 27 C. L. J. 545. See as to the discretion of the Court: *Nicholl v. Allen*, 1 B. & S. 916, 934.

In cases of public nuisance, the public has an interest in the removal of the nuisance, but any private individual who suffers particular injury may have his action for damages; see *Brown v. Mallett*, 5 C. B. 329; *Dobson v. Blackmore*, 9 Q. B. 991. *Quære*, whether in such case, under the present system, such private individual can have a mandamus for the removal of the nuisance.

In order to obtain a prerogative mandamus on motion, proof of a previous demand, and refusal to do the act required, must be adduced; but where a plaintiff has a right to a mandamus in an action, the prerequisites to obtaining a prerogative mandamus are not essential to be observed: *Young v. Erie & Huron Ry.*, 27 Ont. 530.

But where the proper procedure is to apply for a prerogative mandamus, an action for a mandamus cannot be maintained: *Smith v. Chorley*, 1897, 1 Q. B. 532, 678; 76 L. T. 637; *Barter v. London County Council*, 63 L. T. 767; but where an action was brought, and a motion made in it, for a mandamus, the proceedings were amended so as to turn the application into a summary motion for the prerogative mandamus: *Toronto Public Library Board v. Toronto*, 19 P. R. 329.

Where a statutory remedy is prescribed for the neglect of a public duty, or the applicant has other appropriate remedy, a mandamus will not be granted to enforce its performance: *Peebles v. Oswaldtwistle Council*, 76 L. T. 315. See also cases in notes to sec. 58 (1), *supra*, p. 77.

A mandamus will not be granted to enforce the running of a railway in accordance with an agreement between it and the municipality, as that would involve a minute supervision of the management of the railway: *Kingston v. Kingston, etc.*, 28 Ont. 399; 25 Ont. App. 462; nor will the Court by mandamus interfere with the discretion vested in and honestly exercised by a public body: *Smith v. Chorley, supra*; but a contract of a street railway company to sell tickets on its cars at certain specified rates, was enforced by injunction restraining them from running cars on which tickets were not carried for sale at the specified rates: *Hamilton v. Hamilton St. Ry.*, 8 O. L. R. 642.

Rules
1082-1084.
Indorsement
of writ.

1082. The claim for a *mandamus* to be indorsed upon the writ may be according to the Form in Part II., section IV. in the Appendix. Con. Rule 1113.

Compare Eng. 1883, R. 720.

For the Form referred to, see H. & L. Forms, No. 51, p. 25.

Judgment.

1083. If judgment is given for the plaintiff, the Court or Judge may thereby command the defendant, either forthwith or on the expiration of such time and upon such terms as may seem just, to perform the duty in question, and may also extend the time for the performance of the duty. Con. Rule 1114.

To same effect as Eng. (1883) R. 721.

(ii) *Mandamus on Motion.*

Jurisdiction
to grant
prerogative
writ of
mandamus
on motion
not to be
affected

1084. Nothing in Rules 1081 to 1083 contained shall take away the jurisdiction of the High Court to grant an order of *mandamus* where the prerogative writ of *mandamus* might formerly have been granted; nor shall any order of *mandamus* issued be invalid by reason of the right of the prosecutor to proceed by action for *mandamus*, but the preceding Rules, so far as they are applicable, shall apply to the pleadings and proceedings upon a prerogative order of *mandamus* issued by the Court. Con. Rule 1115.

Taken from R. S. O. 1877, c. 72, s. 10, which was taken from the Imp. Act, 17 & 18 Vict. c. 125, s. 75.

The object of the statute from which this Rule is taken was to declare that the right to obtain the prerogative writ of *mandamus* was not interfered with. It would therefore seem to be not interfered with by the Rules, except that in form it is to be an order, not a writ. As to this *mandamus*, see *supra*, pp. 78, 79.

Where a prerogative order of *mandamus* is required it is not proper to bring an action therefor, but the application for the order should be made in a summary way according to the former practice on motions for a prerogative writ of *mandamus*: *Toronto Public Schools Board v. Toronto*, 19 P. R. 329. Under that practice the affidavits to found the application were simply exhibited in the Court, without any cause or matter, e.g., "In the High Court of Justice;" the rule nisi or absolute, for the writ, and all subsequent proceedings were further entitled "the King against (naming the defendants)"; but see *Corner's Crown Pr.*, pp. 220, 224, where it is said that affidavits were not usually so entitled until after the granting of the rule absolute. In the above case the title was amended by adding "In the matter of the Toronto Public Schools Board, etc., etc.," but it is doubtful whether that was a proper carrying out of the Chancellor's direction.

A notice of motion for a prerogative order of mandamus in lieu of **Rule 1085**, an application for an order *nisi* would now appear to be the proper practice: *Rules 1001, 1002*.

A peremptory order is seldom awarded *ex parte*: see *Tapp.* 407; and see *Re Board of Education of Napanee & Napanee*, 20 Q. B. 395, 398; but the Court may grant it: *Rule 1002*.

The motion for an order of mandamus must be made by counsel, an application by a suitor in person will not be entertained. *Ex p. Wallace*, 1002, 2 K. B. 488, where *In re Lewis* (1884), 11 Q. B. D. 474, was held to be no authority for a contrary practice. The notice of motion takes the place of an order *nisi*, and the order, if granted, is usually absolute in the first instance; *sed vide, Re Board of Education of Napanee & Napanee, supra*.

1085. Where an order of *mandamus* shall be issued, the person required to make a return thereto shall, on being duly served therewith, make his return thereto as thereby required, on pain of being proceeded against for contempt of Court. See 9 Anne, c. 25 (or c. 20 in *Ruffhead's Ed.*), s. 1.) R. S. O., c. 324, s. 30.

Mandamus, return to.

The original *Rule 1085* was amended as above by R. S. O. c. 324, s. 30.

This *Rule* embodies the provisions of the 9 Anne, c. 25, which was passed to do away with the former necessity of issuing *alias* and *pluries* writs. The order is peremptory in its terms; if the defendant fails to comply with it, after being duly served, or makes a bad or insufficient return therein, he may be proceeded against for contempt of Court; and upon such motion it would seem that it is intended that the sufficiency of the return should either be summarily determined by the Court, or an issue directed to be tried; and if the return is adjudged to be false or insufficient, damages may be awarded to the applicant: see *Rule 1087 (2)*.

Orders of mandamus awarded in an action are generally peremptory orders made after the question of the right of the applicant to the order has been determined in the action, as also his right to damages; but in case of disobedience to a mandamus so granted in an action, it would seem that the plaintiff would be entitled to proceed for damages for disobedience under *Rule 1087 (2)*, in the same way as an applicant on a summary application.

The Return.—The return is to be made on or before the return day named in the order; on default, and on affidavit of service of the order, if it was only an order *nisi*, a peremptory mandamus will be granted, and after that an attachment: *Mayor of Coventry's Case*, 2 Sack. 419; and if the order was peremptory in the first instance, an attachment will be granted on proof of service and default. On application the Court may extend the time: *Tapp.* 341.

The order must be returned as executed, or its execution must be legally excused or justified: *Tapp.* 340. If the defendant has not had sufficient time, such fact may be returned by stating that "from time to time divers matters and things have been executed for the purpose of complying with the order, and that further matters and things are in the course of procedure": *Tapp.* 340.

Rule 1085. Returns are of three kinds: (1) Traverses; (2) Special returns; (3) A statement in the nature of a demurrer.

(1) *Traverses*.—The general rules of pleading were formerly held applicable, by which it was a rule that every distinct and material allegation must, if it be intended to contradict it, be traversed: Tapp. 348.

(2) *Special returns* by way of confession and avoidance. Where the defendant seeks either to excuse or justify the non-execution of the order, he must, by his returns, in direct terms, state the grounds of his excuse or justification, and under pain of attachment make the best return his case admits of. The whole facts of his case must be set out *in extenso*, in order both to enable the Court to judge of the law and of the legality of the excuse, and as to whether the command has been complied with, and also to apprise the prosecutor of the grounds of defence, to enable him to answer them. The return will, therefore, not be sufficient if made in general terms.

Every good legal cause why the prosecutor is not entitled to a mandamus, whether it arises from his personal incapacity to obtain it, or by reason of the absence of a legal right to what he seeks, will form a good and valid return: Tapp. 358; unless that point has already been determined on the argument of the motion for the order absolute: see *Id.* 407. A return which shews a legal impossibility to perform what the order commands is good: see *Re Bristol & Somerset Ry.*, 3 Q. B. D. 10; but the fact that the defendant had, after notice of the plaintiff's claim, by his own act put it out of his power to comply with the order is not a legal impossibility: see *Regina v. Barnardo*, 23 Q. B. D. 305.

A return will be bad if it shews the legal liability of the defendant, or does not sufficiently answer the command: thus, to a mandamus to ascertain whether a discretion may or may not have been honestly exercised, it is not sufficient to return that "what has been deemed necessary has been done;" it should explicitly shew what has been done, and also expressly allege that no more was necessary, in order that a traverse may be taken which would otherwise be impossible: Tapp. 358.

(3) *A return in the nature of a demurrer*.—The defendant cannot demur to the order, but he may submit that he is not bound by law to execute it, which submission, being the nature of a demurrer, will be treated accordingly: Tapp. 362.

Proceedings on Return.—The return must, together with the order, be filed in the proper office, and then becomes a return: Tapp. 365.

Amendment of the return to correct clerical mistakes may be allowed.

Former Con. Rule 1122 provided that the mode of objecting to the validity of a return should be by demurrer, but a motion to quash a defective return might formerly be made when the return was vicious by reason of any clear and well acknowledged defect, such as that upon its face it was palpably framed only for the purpose of delay: *Rex v. Oundle*, 1 A. & E. 297; Tapp. 372. Now under *Rule 1089* a motion to strike out, or set aside the return, or a motion to commit the defendant for contempt will be the proper course.

It has also been laid down that a return which is evasive, contemptuous, frivolous, nonsensical, hypothetical, or uncertain may be quashed on motion under *Rule 1089*, and see *Tapp.* 350.

As to what constitutes uncertainty: see *Tapp.* 354, 355.

1086. Upon an application for an order of *mandamus* (other than such as relate to the offices and franchises mentioned in or provided for by the said Act), the Court or Judge may hear motions calling not only upon the persons to whom such order is required to issue, but also all and every other person having or claiming any right or interest in or to the matter of such order, to shew cause against the issuing of such order and the payment of costs of the application, and upon the appearance of such other person on such motion, or in default of appearance after notice given, may exercise all such powers and authorities, and make all such orders applicable to the case as are or may be given or mentioned by or in any Act or Rule of Court for giving relief against adverse claims upon persons having no interest in the subject of such claims. *Con.* *Rule 1119.*

Court may make orders calling on all persons having interest in the matter of the writ to shew cause against issuing, etc.

Taken from *R. S. O. 1877, c. 52, s. 12*, omitting the preamble.

The Act referred to in this *Rule* is 9 Anne, c. 20; see former *Rule 1085*.

This and the two next following *Rules* are directed to meet the cases, referred to in the Act, of a *mandamus nisi* issued to officers or persons whose functions are merely ministerial, and to provide that the persons having or claiming right or interest in the matter, may be called upon to shew cause, and may be made liable to costs: see *Demorest v. Midland Ry. Co.*, 10 P. R. 73.

The "notice given" may be by notice of motion; see *Rule 1091*.

Where the order *nisi* is directed to merely ministerial officers who claim no right or interest in the matter in question, they will be usually protected against the payment of costs and damages.

See *Re Massey Mfg. Co.*, 11 Ont. 44; 12 Ont. App. 446 (see *R. S. O. 1887, c. 157, s. 19*, not consolidated); and see *R. S. O. 1897, c. 190*.

Peremptory Mandamus.—The Court has jurisdiction to award a peremptory *mandamus* in the first instance instead of a *mandamus nisi*: *Rule 1092*.

No return except obedience is admissible to a peremptory order: *Tapp.* 408; but, where no order *nisi* has previously issued, if the defendant has any answer to the order, it may be given, not by way of return, but in shewing cause why an attachment should not issue: *Tapp.* 407, and if necessary a peremptory order may be quashed, and a return may be allowed to be made to the order *nisi* if any: *Tapp.* 408; and see *Rule 1089*.

Enforcement of Mandamus.—Attachment is the proper remedy for disobeying a peremptory *mandamus*: *Demorest v. Midland Ry. Co.*, 10 P. R. 82; and see *Rule 1087*.

Rules See also *Rule 862* enabling the Court to direct the performance of
1087, 1088. the act to be done by the party obtaining the order, at the expense of
the party whose duty it is to do the act.

Form of
return of
issues joined
on demur-
rer, etc.

Orders.

For or
against
whom judg-
ment shall
be given.

Costs.

1087. The return to be made to any such order, and issues joined in fact or law upon any traverse thereof, shall be made and joined by and in the name of the person to whom such order is directed; but nevertheless the same shall, if the Court thinks fit so to direct, be expressed to be made and joined on the behalf of such other person as may be ordered; and in that case such other person shall be permitted to frame the return, and to conduct the subsequent proceedings at his own expense; and in such case, if any judgment is given for or against the party applying for the *mandamus*, such judgment shall be given against or for the person on whose behalf the return is expressed to be made, and such person shall have the like remedy for the recovery of costs and enforcing the judgment as the person to whom the order was directed might and would otherwise have had. *Con. Rule 1120.*

Taken from R. S. O. 1877, c. 52, s. 13.

False return

(2) Where the person to whom an order of *mandamus* is directed shall be found by the Court or a Judge to have made a false or insufficient return thereto, the Court or a Judge may order the person making such false or insufficient return to pay to the party prosecuting such order any damages occasioned by such false or insufficient return, to be assessed by such Court or Judge, or otherwise as may be directed. (*See 9 Anne, c. 25 (or c. 20 in Ruffhead's Ed.), s. 2.*)

Damages for
false return.

(3) In case damages are awarded under this Rule, the person against whom the same are awarded shall not be liable to be sued in any other action for the making of such return. (*See 9 Anne, c. 25 (or c. 20 in Ruffhead's Ed.), s. 3.*) 2 E.L. vii. c. 1, s. 10.

Subsections 2 and 3 were added by R. S. O. c. 324, s. 30 (2), and embody certain provisions of the Statute 9 Anne, c. 25.

Cases of
death, resig-
nation or
removal, &
persons
making the
return.

1088 In case the return to any such order is, in pursuance of the authority given as aforesaid, expressed to be made on behalf of any other person as aforesaid, the further proceedings on such order shall not abate or be discontinued by the death or resignation of, or removal from office of the

person having made such return, but the same shall and may be continued and carried on in the name of such person; and if a peremptory *mandamus* is awarded, the same shall and may be directed to any successor in office or right of such person. Con. Rule 1121.

Rules
1089-1091.

Taken from R. S. O. 1877, c. 52, s. 14.

1089.—(1) Where the person prosecuting any order of *mandamus* wishes or intends to object to the validity of any return to the same, he shall do so by way of motion to strike out or set aside the return; and where a person objects to the validity of the order of *mandamus* he may in like manner move to set it aside. *New.*

Form of
objections
to return

(2) The Court or Judge shall adjudge whether or not the return is valid in law, or whether the order of *mandamus* is or is not valid in law; and if it is adjudged that the order is valid in law, but that the return thereto is not valid in law, the Court or Judge shall award (a) a peremptory order of *mandamus* shall issue in that behalf. Con. Rule 1122.

Proceedings
thereon,
Judgment.

Peremptory
mandamus
if the order
be good and
the return
bad

Taken from R. S. O. 1877, c. 52, s. 15, which was taken from Imp. Act. 6 & 7 Vict. c. 67, s. 1.

(a) The word "that" appears to have been omitted in the consolidation of the Rules.

The Statute of Anne permitted the prosecutor merely to plead to or traverse a return, but allowed the defendant to reply, take issue, or demur. This distinction gave rise to a practice in the case of an insufficient return, of allowing the prosecutor to make application to the Court in the nature of a demurrer, and called a *concilium*, to quash it, upon which, if successful, a peremptory *mandamus* was at once awarded. Instead of the *concilium*, a notice to strike out or set aside the return has by this *Rule* been substituted: the proceedings upon it are to be the same as on a motion in an ordinary action.

1090. Upon application by motion for an order of *mandamus* the order may in all cases be made in the first instance, if the Court thinks fit: and the order shall be dated on the day of its being made, and may be made returnable forthwith, but time may be allowed to return it by the Court or a Judge either with or without terms. Con. Rule 1123.

Order may
issue in the
first in-
stance.

Taken from R. S. O. 1877, c. 52, s. 16.

(iii) Applications in Chambers.

1091. Where the High Court has jurisdiction to issue an order of peremptory *mandamus*, application therefor may be made upon affidavit to a Judge of the High Court, upon

Judge may
issue order
of peremptory
mandamus

Rule 1092. notice in the ordinary manner to any person who may be affected by the order made. Con. Rule 1124.

Taken from R. S. O. 1877, c. 52, s. 17.

The prerogative writ was formerly obtained at a sitting of the Court in Term, and was not usually peremptory in the first instance, but in an alternative form, commanding the person to whom it was directed to do the act specified, or shew cause to the contrary, which was done by a return.

The enactment from which this *Rule* is taken was passed to enable applications for the prerogative writ of mandamus to be made in Chambers at any time, instead of only during the sittings of the Court in Term, and to empower the Court to grant a writ to which obedience was the only admissible return. The preamble to the original Act, 35 Vict. c. 14, was: "Whereas in many cases very great injustice is done by the delay in the issue of the prerogative writ of mandamus; and whereas it is necessary to devise a more speedy and summary method for the issue of the same."

That Act and the present *Rule* therefore provide for a summary application to a Judge in Chambers for the issue of a peremptory order in the first instance; so that all questions as to the right to the order, and the matters, which otherwise would be raised by way of return to a mandamus *nisi*, may be argued, and disposed of at once, without any previous order and return thereto. That is the mode of procedure now generally adopted. The right, however, to move the Court for a mandamus *nisi* as formerly is not taken away, but seems by implication to be recognized by *Rule* 1092, which provides that on any such motion the Judge may make an order absolute in the first instance.

In the present form and location of this *Rule* it probably applies to both the prerogative mandamus, and that grantable in an action under sec. 58 (9) of the Jud. Act and *Rule* 1081, but, in an action, a mandamus will not be granted on an interlocutory application unless the plaintiff clearly shews that he will suffer some injury by waiting for the result of the action: *Wines Alkali Co. v. Sheffield, etc.*, 37 L. T. 131.

The Master in Chambers and officers having like jurisdiction have no power to grant orders of mandamus: see *Rules* 42 (12), 45, 49; as to Local Judges, however, see *Rule* 47.

The motion must be made by counsel, an application by a solicitor in person will not be entertained: *Ex p. Wallace*, 1902, 2 K. B. 481.

Where a summary application for a mandamus was made in Court, the costs of a Chamber motion only were allowed, where the circumstances did not justify the imposition of a larger sum for costs than was sufficient to indicate that the respondents were in the wrong: *Re Brookfield and Public School Section 12, Township of Brooke*, 12 P. R. 487.

See notes to Jud. Act, sec. 58 (9), *supra*, p. 16 *et seq.*

Mandamus
nisi or ab-
solute in the
first in-
stance.

1092 The Judge may make an order of mandamus absolute in the first instance. Con. Rule 1125.

Based on R. S. O. 1877, c. 52, s. 18. See note to *Rule* 1091.

1093. The notice of motion may be served upon the person or party to be affected, either personally or by substitution as may be directed by a Judge, and where an order of *mandamus* is made, the same may be enforced by process of attachment. Con. Rule 1126.

Rules
1093-1096.
Service and
direction of
order.

5. INJUNCTIONS.

1094. An injunction may be granted by judgment or order [upon motion to the Court]. A writ of injunction shall not be issued, but the judgment or order shall have the same effect as a writ of injunction formerly had. Con. Rule 1130.

Writ of in-
junction
abolished.

Same in effect as the Eng. R., April, 1880, R. 32, except the words in brackets, which make it clear that in Ontario motions for injunctions must be moved in Court.

See further as to injunctions, *supra*, p. 79.

6. INTERIM PRESERVATION OF PROPERTY, ETC.

1095. Where by any contract a *prima facie* case of liability is established, and there is alleged as a matter of defence a right to be relieved wholly or in part from such liability, the Court or a Judge may make an order for the preservation or interim custody of the subject-matter of the litigation, or may order that the amount in dispute be brought into Court or otherwise secured. Con. Rule 1131.

Order for
interim pre-
servation of
property.

Same as the Eng. (1883) R. 657.

This provision gives increased power to the Court for preserving the rights of the parties uninjured, during the pending of litigation, and an interlocutory order made under this *Rule* may be enforced by attachment: *Hutchinson v. Hartmont*, W. N. 1877, 29.

In *Russell v. Davies*, W. N. 1883, 109; 19 C. L. J. 273, an action to recover arrears of an annuity, an order made for payment of the annuity till the trial, the plaintiff being in destitution, was reversed in appeal, as it appeared in the evidence that the defendant had a *prima facie* case for insisting that the annuity had determined.

As to the stage of the action at which an application may be made, see *Rule* 1098.

1096. The Court or a Judge may, upon the application of any party and upon such terms as may seem just, make any order for the detention or preservation of property, being the subject of the action, or for the inspection of any property, the inspection of which is necessary for the proper determination of the question in dispute; and for all or any of the

Order for
detention
and inspec-
tion of
property.

Rule 1096. purposes aforesaid may authorize any person or persons to enter upon or into any land or building in the possession of a party, and may authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence. *Con. Rule 1135, amended.*

See the Eng. (1883) R. 659.

The powers given by this *Rule* are very much wider than the mere power to allow inspection given by the C. L. P. Act (R. S. O. 1877, c. 59), s. 168 (now *Rule 571*), and under this *Rule* as now framed they are wider than under the former *Rule 1135*, and the Eng. R.

Similar
jurisdiction
of Court of
Chancery.

The Court of Chancery, under its similar jurisdiction, would not grant an inspection on the application of the plaintiff, unless satisfied that he had a case to be tried at the hearing; nor in any case unless the inspection asked for was necessary for the purpose of enabling the party applying for it to prove his case: *Piggott v. Anglo-American Telegraph Co.*, 19 L. T. 46; *Batley v. Kynock*, L. R. 19 Eq. 95.

Semble, a Judge cannot, validly, on an interlocutory motion, take a view of the subject matter in dispute, in lieu of the evidence of witnesses: *London General Omnibus Co. v. Larch*, 1901, 1 Ch. 125; 83 L. T. 453.

Formerly inspection could not be granted to one defendant of property belonging to another defendant, when there was no right in question between them in the action: *Shaw v. Smith*, 18 Q. B. D. 193; but under the *Rule* as now framed such an inspection might be ordered if necessary for the proper determination of the question in dispute in the action.

The power to grant inspection under this *Rule* is limited by the last clause; where, to make the inspection effective, entry into any land or building is necessary, such entry must be limited to any land or building in the possession of a party. An order was refused where the person having possession was not before the Court: *Reid v. Powers*, 28 Sol. Jour. 653; *Garrard v. Edge*, 37 W. R. 501.

In an action to restrain defendants (who were owners of a house fronting on the same street as the house owned by the plaintiff), from causing, or permitting, sewage to be discharged from their premises into a drain belonging to the plaintiff, and from permitting any connection to remain between their premises and the plaintiff's drain, an order was made under this *Rule*, authorizing the plaintiff to enter on that part of the street the soil of which belonged to the defendants, for the purpose of experimenting, in order to discover whether the pipe which joined the plaintiff's drain proceeded directly from the defendant's house, and for this purpose to dig up the street as far as might be necessary: *Lumb v. Beaumont*, 27 Ch. D. 356.

Where the defendant in an action for obstruction of light and air, had not delivered his statement of defence, Archibald, J., refused an order for inspection until he had disclosed his defence: *W. N.* 1876, 53.

In a nuisance action, an application to inspect the defendant's works to ascertain how the nuisance was occasioned was refused, as proof of the nuisance could be obtained from external sources: *Barlow v. Bailey*, 18 W. R. 782; see also *Flower v. Lloyd*, *W. N.* 1876, 169, 230.

Upon a *prima facie* case of mineral trespass, or encroachment by the defendant, or where the fact of trespass (which is denied) can only be ascertained by inspection, and no injury will result to the defendant therefrom, an interlocutory order will be made for the inspection of his mine; and the order will, when necessary, extend to the removal of the obstruction to the inspection: Seton, 5th ed., 503; see *Cooper v. Ince, Hall & Co.*, W. N. 1876, 24.

The Court has jurisdiction under this *Rule* to grant an interim injunction in a proper case, to restrain a defendant from ceasing to pump water out of a mine which the defendant was in possession of, and had agreed to lease, in order to prevent its destruction: *Strelley v. Pearson*, 15 Ch. D. 113.

The rule in actions for the infringement of letters patent is, that where a plaintiff is unable to obtain clear and satisfactory evidence of infringement, the Court, upon a fair *prima facie* case being made out, will order the defendant to permit an inspection to be made of his premises and machinery, by proper persons named on behalf of the plaintiff: Seton, 351. In an action to restrain infringement of a patent for grinding grain so as to separate the germ from the flour, inspection of the plaintiff's process, to see how it was actually carried on under their patent, was granted. The plaintiffs did not claim any novelty in the machinery, their specification was confined to a new process or product: *The Germ Milling Co. v. Robinson*, 53 L. T. 697; 31 W. R. 194; 55 L. J. Chy. 287.

Inspection of samples was ordered in *Munn v. McCannull*, 7 C. L. T. 169.

In an action to recover jewellery, the defendant alleged that it belonged to a third party, and had been deposited by him to secure a debt due to the defendant. The Court ordered it to be given up to an officer of the Court: *Veluti v. Braham*, 46 L. J. C. P. 415.

The Court has full power to allow photographs to be taken by a party to the action of documents in the possession of the other party: *Lewis v. Londenborough*, 1893, 2 Q. B. 191.

On the affidavit of plaintiff, stating that the property was rapidly being damaged, the Court of Appeal appointed him receiver and manager, though no application for this purpose had been made, either to a Divisional Court or a Judge: *Hyle v. Warden*, 1 Ex. D. 309.

As to authorizing the making of experiments, see *Budische Anilin, etc., v. Levinstein*, 24 Ch. D. 156.

Instead of ordering documents to be brought into Court, the Court in a clear case, on an interlocutory motion, directed a defendant to deliver up documents of which he obtained possession while in the plaintiff's service, and which he had improperly carried away on leaving his employ: *Whitcham v. Moss*, 73 L. T. 57.

An application under this *Rule* is generally made to the Court as on Practice motions for injunctions: see *English v. Camberwell*, W. N. 1875, 250; but an order has been made in Chambers: see *Cooper v. Ince, Hall & Co.*, W. N. 1876, 24. It should in general be upon notice: see the next *Rule*, and *Hobershon v. Gill*, W. N. 1875, 231; but where circumstances rendered it proper, on an *ex parte* application, an order for the purpose of inspecting and taking samples was made: *Hennssey v. Rohmann*, 36 L. T. 51; W. N. 1877, 14; an order for detention and preservation of property: *Melnish v. Milton*, 24 W. R. 679; and an order for inspection of a mine, in an action for damages for withdrawing support to land: *Mitchell v. Darley Main Colliery Co.*, 31 W. R. 549.

Rule 1097. A party is bound by an order for preservation of property as soon as he has notice of it: *Ex p. Langley*, 13 Ch. D. 110. See also p. 95, *supra*.

Chattel property in dispute may be ordered to be sent out of the jurisdiction, for the purpose of inspection by a witness out of the jurisdiction whose evidence is ordered to be taken abroad: *Chaplin v. Puttick*, 1898, 2 Q. B. 169; *S. C. sub nom. Chaplin v. Laing*, 78 L. T. 419.

Where the parties agree, without order, to an inspection, the costs thereof are taxable as part of the costs of the action: *Ashworth v. English Card Clothing Co.*, 1904, 1 Ch. 702.

Sale of
perishable
goods.

1097. The Court or a Judge may, on the application of a party, order the sale, by any person or persons named in the order, and in such manner and on such terms as may seem just, of any goods, wares, or merchandise which may be of a perishable nature or likely to be injured from keeping, or which for any other reason it may be desirable to have sold at once. Con. Rule 1133.

See Eng. (1883) R. 658.

Quare, whether an order can only be made under this Rule where the goods, etc., are the subject of the action: *Dongar v. Gospel Oak Iron Co.*, 6 Times, 260, and see Rule 1096.

An order may be made for the sale of a chattel which, for a "just & sufficient reason, it may be desirable to have sold at once." Thus in *Bartholomew v. Freeman*, 3 C. P. D. 316, the Court ordered a horse to be sold, on the ground that it was consuming its value in food, and there was no reason why it should not be sold. In *Coddington v. Jacksonville P. & M. Ry. Co.*, 39 L. T. 12, an order was made for the sale of bonds as perishable property; and in *Evans v. Davies*, 1893, 2 Ch. 216; 68 L. T. 244, a like order was made in respect of shares in a limited company, as being goods within the meaning of this Rule (see also note to Rule 616, *supra*, p. 774); and see *Gee v. Betts*, 193 L. T. Jour. 267.

A foreign ship was ordered to be sold on the report of the Marshal that the sale was desirable: *The Hercules*, 11 P. D. 10.

An order was refused to the plaintiff where there was no dispute in the action that the property in the goods was in the defendant, there being also no urgent reason for a sale: *Dongar v. Gospel Oak Iron Co.*, *supra*.

In an action for an unpaid balance on the sale of a horse, and for breach of warranty of another horse received in part payment plaintiff applied for leave to sell the horse so received in part payment; it was held by Quain, J., that no order was necessary, and that the Rule was not applicable: *Luon.*, 1 Charl. Ch. Ca. 127; 60 L. T. Jour. p. 84.

In an action of replevin an order was refused where applied for by the plaintiff for the sale of six valuable horses which had been delivered to him under an order of replevin in the action, it being held that he was free to sell them, at the risk, of course, of damages, if he failed in his action: *Jones v. Hutcheon*, 5 Q. L. R. 362.

1098. The application may be made by the plaintiff at any time after the right appears from the pleadings, or (if there be no pleadings) is made to appear by affidavit or otherwise. Con. Rule 1132.

Rules
1098-1100.
Application,
when may
be made.

See Eng. (1883) R. 663.

1099. Where an action is brought, or a defendant by way of counter-claim seeks, to recover specific property other than land, and the party from whom such recovery is sought does not dispute the title of the party seeking to recover the same, but claims to retain the property by virtue of a lien or otherwise as security for money, the Court or a Judge, at any time after such last mentioned claim appears from the pleadings, or (if there be no pleadings) by affidavit or otherwise, may order that the party claiming to recover the property be at liberty to pay into Court, to abide the event of the action, the amount of money in respect of which the lien or security is claimed, and such further sum (if any) for interest and costs as the Court or Judge may direct, and that upon such payment into Court being made, the property claimed be given up to the party claiming it. Con. Rule 1136.

Amount of
lien claimed
may be paid
into Court
and proper-
ty delivered
up.

See Eng. (1883) R. 664.

Under *Rule 1099* in order to entitle the plaintiff to an order that the specific property be given up to him, he must pay into Court the whole amount of the lien claimed by the defendant notwithstanding that it exceeds the value of the specific property claimed; *Gebrüder Naf v. Ploton*, 25 Q. B. D. 13; 63 L. T. 328. But this would not prevent the Court from dealing with a case where a fraudulently excessive claim is made for the purpose of defeating the *Rule*; *S. C.*, per Lord Esher, M.R.

1. PROHIBITION.

1100. Prohibition may be granted by judgment or order upon motion to the Court or a Judge. A writ of prohibition shall not be issued, but the judgment or order shall have the same effect as a writ of prohibition formerly had. Con. Rules 1137, 1138.

Application
for order of
prohibition.

Prior to R. S. O. 1877, c. 52, s. 2, a mere surmise or suggestion of the ground for prohibition was enough to put the Superior Court in motion, and the suggestion was not required to be verified where there was a plea in the Court below, but if there was no plea, then an affidavit was required.

The right to the writ has to be tried now upon a motion, subject to the same rules as other motions. Amongst others, *Rules 489-498*

Rule 1101. will be applicable, and, in such cases as the Court would formerly direct a declaration and subsequent proceedings in prohibition, a Court or Judge can now upon a motion direct that evidence be taken in such way as may seem proper, and if necessary that an issue be tried.

The motion has usually been made in Chancery to a Judge. The Master in Chancery and Local Judges and Masters have no jurisdiction: see *Rules* 42, 45, 49, except Local Judges, where *Rule* 47 applies.

A successful party on an application for prohibition is entitled to, and should be awarded, costs, unless the Court, in the proper exercise of a wise discretion, can see good cause for depriving such party of them; and such party should not be deprived of costs, unless there appears to have been impropriety of conduct, which induced the litigation, or impropriety in the conduct thereof: *Re McLeod v. Ritchie* (21, 12 P. R. 503; *Reg. v. Justices of London*, 1894, 1 Q. B. 453; 70 L. T. 148.

Prohibition is the proper remedy where the inferior Court is exceeding its jurisdiction, not where it has committed an error in law, or good conscience: *Siddall v. Gibson*, 17 U. C. Q. B. 98; *In re Dyce & Ellis*, 30 Ont. 437; or merely an error or irregularity in procedure, the remedy, if any, in such case is by appeal, and if there is no appeal there is no remedy: *Reg. v. Mayor of London*, 63 L. T. 721; *Re First D. C. v. Huron*, 5 P. R. 467. A prohibition may be granted though the question of jurisdiction has not been raised in the Court below, but the omission to raise the objection there may disentitle the applicant to costs: *Verlich v. Clifford*, 6 P. R. 212; but if the applicant submits to the jurisdiction of the Court below and cross-examines witnesses, and argues the case on the merits without objecting to the jurisdiction, a prohibition on the ground of excess of jurisdiction may be refused: *In re Barrowes*, 18 C. P. 403; and see *Richardson v. Shaw*, 6 P. R. 296. Where the Judge in the Court below acts under an appealable order of the High Court, which is not appealed from, prohibition will be refused though the Court may think the order of the High Court erroneous: *Dierkin v. Philpot*, 1901, 2 K. B. 380; 85 L. T. 246.

Where the want of jurisdiction is apparent on the face of the proceedings, prohibition must be granted *ex debito justitiæ*, and the applicant is not estopped by any consent or acquiescence on his part, but the granting of prohibition is discretionary where the want of jurisdiction is not apparent, and depends on facts which the applicant has neglected to bring to the attention of the inferior Court: *Farquhason v. Morgan*, 1894, 1 Q. B. 352; 70 L. T. 152.

Prohibition is an extreme measure, granted summarily only in a very plain case of the unlawful exercise of jurisdiction by a subordinate tribunal: *Re Cammings & Carleton*, 25 Ont. 407; *In re Grass v. Allan*, 26 U. C. Q. B. 123.

8. CERTIORARI.

Certiorari.

1101. An order for certiorari may be granted upon motion to the Court or a Judge. A writ of certiorari shall not be issued, but the order shall have the same effect as a writ of certiorari formerly had. Con. Rule 1140.

Where the inferior Court has the like jurisdiction as the High Court **Rules**
in the particular matter, a *certiorari* to bring up and quash the pro- **1102, 1103.**
ceedings cannot be granted; *Skinner v. Judge of North Alberton*,
1860, A. C. 439.

9. INTERPLEADER.

(i) Generally.

1102. In Rules 1103 to 1128.

Interpleader
Rule

- (a) "Execution," "writ" and "writ of execution" shall
include an "order of attachment under *The* ^{Rev. Stat.}
Absconding Debtors Act and Rules 1058 to 1066." ^{1860 (Am.)}
^{R. S. O. c. 30}
- (b) "Execution creditor" shall include "attaching
creditor."
- (c) "Sheriff" shall mean a Sheriff, Coroner, Elisor or
other officer charged with the execution of any
writ or process of the High Court, or of a County
Court in cases where Rule 1123 applies. *New.*

1103. Relief by way of interpleader may be granted.

When relief
by inter-
pleader
granted

- (a) Where the person seeking relief (hereinafter called
the applicant) is under liability for any debt,
money, goods or chattels, for or in respect of
which he is, or expects to be, sued by two or more
persons (hereinafter called the claimants) making
adverse claim thereto;
- (b) Where the applicant is a Sheriff and claim is made
to any money, goods, or chattels, lands or tene-
ments, taken or intended to be taken in execu-
tion under a writ of execution, or to the proceeds
or value thereof, of any person other than the
person against whom the process issued. *Con.*
Rule 1144.

Taken from Eng. (1881) R. 859.

Before this *Rule* the practice in force both in Common Law Courts
and in Equity remained in force under the Judicature Act. The
practice in the Common Law Courts was regulated by R. S. O. 1877,
c. 54, as amended by 44 V. c. 7; 44 V. c. 16, s. 13; the jurisdiction in
Equity except in the case of interpleader by Sheriffs did not depend
upon the statute: *McEthern v. London Masonic, etc.*, 11 P. R. 181.

The practice on interpleader by a Sheriff was the same in all the
Courts, being regulated by R. S. O. 1877, c. 54, and amending Acts.

Rule 1103. In the case of interpleader by a stakeholder, in the Common Law Courts this was only possible where he was a defendant, having been actually sued; in Equity, it was sufficient if a claim was made against the applicant, and he was in danger of being molested by conflicting rights: *Story Eq. Jur. s. 808*.

At Common Law a stakeholder seeking relief could only do so, as above mentioned, when he was a defendant in respect of a claim for money or goods, of which he had to be in possession, as he had to be in a position to dispose of them in any manner directed by the Court; he also was required to have received a distinct notice of the adverse claim, an expectation of being sued was not enough. The claim of the third party had to be in respect of the same subject matter in respect to which the defendant was sued, but it was not necessary that it should be an absolute right of property in the subject matter.

Where rent was claimed from A. by B., and was garnished by creditors of C. (the father of B.), who, it was claimed, was the real lessor, A. refusing to pay rent unless protected from these claims, and being sued in a County Court by B. for the full amount of rent, was held entitled to relief under this *Rule*: *Re Anderson & Barber*, 11 P. R. 21.

Interpleader by Stakeholders.—Under the present *Rule*, which in effect follows the Equity practice, the person seeking relief is only required to be under liability, for the subject matter, it is not necessary that he be first sued, before applying for relief. Probably this *Rule* does not extinguish any power to compel interpleader existing formerly in Equity upon bill filed, and now possessed by the High Court; see *McEltheran v. London Masonic, etc.*, 11 P. R. 181; *Western Canada L. & S. Co. v. Court*, 25 Gr. 151; *Henderson v. Watson*, 23 Gr. 255.

Formerly, if the defendant might be liable to both the plaintiff and the third party, he could not require them to interplead. This may be still the case under this *Rule*: see *Farr v. Ward*, 2 M. & W. 841.

And where a person is sued by two persons in respect of the same transaction, he is not entitled to an interpleader order on the ground that he claims to be indebted to only one of them, *Greator v. Hackle*, 1895, 2 Q. B. 299.

The Crown cannot be compelled to interplead, not having been mentioned in the Act; see *Candy v. Maughan*, 1 D. & L. 745; *McGee v. Baines*, 3 C. C. L. J. 151.

A person outside the jurisdiction may be compelled to interplead. Leave to serve the notice out of the jurisdiction must be obtained under *Rule* 162 (3); *Belmont v. Annard*, 4 C. P. D. 352; *Credit Germandense v. Van Weede*, 12 Q. B. D. 171; *Re Confederation Life Association v. Cordingley*, 19 P. R. 16, 89; thus, where shares in a foreign joint stock company were in dispute, and the company had been sued within the jurisdiction by one of the rival claimants, it was held that the company was entitled to interplead, although the company and both the claimants were out of the jurisdiction, and although a claim for damages against the applicant was made by one of the claimants in respect of the shares: *Re Federated Stoker Co.*, 1 O. L. R. 12; but where the fund in dispute was payable in a foreign country by foreigners residing therein to other foreigners also residing therein, and a claimant within the jurisdiction claimed it, it was held that

the person from whom the fund was claimed could not require the parties to interplead in Ontario: *Re Bonfield & Stereos*, 15 P. R. 300, 330, and this may perhaps still be the case notwithstanding *Rule 102* (3); see *Harria v. Bank of B. N.*, 1, 10 P. R. 51.

It would seem to be immaterial whether the titles on which the adverse claimants rely are legal or equitable, see *Jud. Act*, see 58 (13), and *Ruston v. Pope*, L. R. 3 Ex. 233; *Bank of Ireland v. Perry*, L. R. 7 Ex. 14; *Duncan v. Canadian*, L. R. C. P. 551; *Eaglehawk v. Nixon*, L. R. 10 C. P. 615.

A debtor who is being sued, and who has notice of an assignment of the debt, may require the claimants to interplead as to part and dispute the residue; and his application may be either under this *Rule* or under the Judicature Act, section 58 (6), and the proceedings in the action may be stayed under the latter provision: *Reading v. London School Board*, 16 Q. B. 1, 386.

Where the claim of one of the claimants is for damages for the detention of the subject matter in dispute, the applicant is entitled to an order to interplead: *Attenborough v. St. Katharine Dock Co.*, 3 C. P. D. 450; *Re Canadian Pacific Ry. v. Carruthers*, 15 P. R. 275.

Quare, whether interpleader is a proper remedy for trying the right to securities as between co-ureties: *Trevice v. Buckitt*, 1 Ont. 80.

Interpleader was ordered at the instance of an auctioneer: *Watson v. Henderson*, 12 U. C. L. J. 149; *Tanner v. European Bank*, L. R. 1 Ex. 231; of a bailee of a policy of insurance: *Attenborough v. St. Katharine Dock Co.*, 3 C. P. D. 450; of a broker to whom shares had been transferred for sale, a rival claim to which was set up: *Robinson v. Jenkins*, 24 Q. B. D. 167; 62 L. T. 439; and see *Underwood Stoker Co.*, 1 O. L. R. 42; and of a wharfinger with whom were stored goods claimed by two banks, and notwithstanding a letter written by the wharfinger to one of the banks stating that the goods were held for that bank: *Ex p. Mersey Docks & Harbour Board*, 1891, 1 Q. B. 546.

Interpleader was ordered on the application of a purchaser *pendente lite* of land, the conveyance of which was in the action attacked as fraudulent, as against creditors of the vendor, the purchaser being sued by the vendor in another action, for the purchase money, which he was willing to pay into Court: *Mulsons Bank v. Eager*, 11 O. W. R. 163, 180.

A solicitor who has recovered judgment for a client under an ordinary retainer has no authority, without special instructions, to engage in proceedings in interpleader: *Amos v. Rickwell*, 21 Q. B. D. 164; but where he is retained in interpleader proceedings he has the ordinary powers of a solicitor, as in other contested cases: *Hackett v. Bible*, 12 P. R. 482.

A bailee who is estopped from setting up *jux tertii* may nevertheless be entitled to interplead: *Ex p. Mersey Docks & Harbour Board*, 1891, 1 Q. B. 546.

Practice.—Affidavits entitled "In the H. C. J. Chy. 11. Between A., applicant, and B. and others, claimants," were held sufficient: *Re Anderson & Barber*, 13 P. R. 21.

The costs of proceedings are, under *Rule 1130*, in the discretion of the Court, and were ordered to be paid by the person causing the litigation, in *Re Anderson & Barber*, *supra*.

A stakeholder applying for an interpleader order, and acting *bona fide*, is entitled to deduct from the fund in dispute the taxed costs

Rule 1103 ^{See} occasioned by the interpleader; *Clench v. Dooley*, 56 L. T. 122, without prejudice to the question as to how the costs are to be ultimately borne; *Searle v. Matthews*, W. N. 1883, 176.

Bailees and Carriers.—The former special Rules (1167, *et seq.*), relating to interpleader by Bailees and Carriers have been abrogated, as the provisions of Rules 1103 (a), etc., cover such cases; see *Rogers v. Lambert & Co.*, 61 L. T. 406.

See *Re Canadian Pacific Ry. Co. and Carruthers*, 17 P. R. 277, where an interpleader order was granted respecting claims to grain deposited under a contract in the Ry. Co.'s elevators, notwithstanding that the specific grain could not be delivered, but only grain of like standard and quality.

An interpleader order was granted on the application of a bailee notwithstanding he had by attornment to one of the claimants estopped himself from denying his title, and the claimant alleging the estoppel was restrained from bringing an action, except as to any claim he might have, by reason of the alleged estoppel, if defeated in the issue; *Ex p. Mersey Docks*, 1893, 1 Q. B. 546; 80 L. T. 143.

Sheriffs.—Under clause (b) of the present Rule the practice in interpleader by Sheriffs is substantially the same as under the R. S. O. 1877, c. 54.

A Sheriff's right to call on rival claimants to interplead is not confined to the cases falling within clause (b); but in cases not provided for by that clause he may invoke the assistance of clause (a); *Re Gould v. Hope*, 20 Ont. App. 347.

The disposition of the Court is to be more liberal in relieving the Sheriff than formerly; *Darling v. Collatton*, 10 P. R. 110; *Lucas v. Holliday*, 8 O. L. R. 542.

The right of a Sheriff to an interpleader order depends on his having the subject matter of the rival claims in his possession, and his having the right to take it in execution with an intention so to do. He cannot require claimants to interplead in respect of a mortgage assigned by the debtor (the mortgagee), which (though acting under R. S. O. c. 77, s. 231, he has neither actually seized, nor is able to seize; *Keenan v. Osborne*, 7 O. L. R. 134.

Where the application is made by a Sheriff under clause (b) the Sheriff must have made a seizure (or be ready and intending to make one; see *Keenan v. Osborne*, *supra*), before he can apply, and before the Court can have any summary jurisdiction to direct an issue; *Opden v. Craig*, 10 P. R. 378; *Teskey v. Neid*, 15 P. R. 244; *Goslin v. Tunc*, 2 U. C. Q. B. 177; and he must retain possession; *Wheeler v. Murphy*, 1 P. R. 335. An interpleader order was granted where the goods were dies, plates, etc., admittedly the property of the execution debtors, though in the hands of the claimants in the execution by them of a printing contract with the debtors, and had not been actually seized by the Sheriff; *Braun v. Markland Publishing Co.*, 6 O. W. R. 142.

An interpleader order was granted where the execution creditor alleged that the debtor had a half interest in the goods which was disputed by the person in whose possession the goods were; *Lucas v. Holliday*, 8 O. L. R. 541.

Where the goods seized are in the possession of the debtor, or he is in possession jointly with a third person, the proceedings detailed

When entitled or
not to interplead.

in *Rules 1115* and *1116* should be taken to bring the claim to the notice of the execution creditor, and hear from him whether or not he acknowledges its validity before the Sheriff applies for an interpleader order. **Rule 1103.**

A seizure of moneys paid for entrance to a theatre, after the commencement of proceedings to wind up the theatre company, was held to be void: *Re The Opera, Limited*, 38 W. R. 637; 62 L. T. 859.

A chose in action is not bound by delivery of the writ, but only by seizure: *Rennie v. Quebec Bank*, 1 O. L. R. 302.

Money paid under protest by a claimant was held to be proceeds or value of goods and chattels within the above *Rule*: *Smith v. Critchfield*, 14 Q. B. D. 873.

The expression "goods and chattels" in *The Execution Act*, and in this *Rule*, includes stock of a joint stock company: *Reyn v. Nelson*, 20 C. L. J. 330; 4 C. L. T. 534.

Goods in possession of an Assignee in Insolvency under the Insolvent Act of 1875 could not be taken in execution, and neither a Sheriff nor an execution creditor could sue the Assignee and oblige him to interplead, though the debtor might do so: *McMaster v. Moukin*, 7 P. R. 211.

Interpleader may be directed respecting the proceeds of a sale in the Sheriff's hands: *Booth v. Preston, &c., &c. Co.*, 3 P. R. 90; and respecting money paid under protest by a claimant whose goods were seized, and who claimed the money; the Sheriff was also held to be entitled to protection against an action for trespass for entering upon the premises of a person other than the debtor: *Smith v. Critchfield*, 14 Q. B. D. 873; see also *Edmonds v. Wallingford*, 33 W. R. 647. Goods realized from the sale: *Re Gould v. Hope*, 20 Ont. App. 347.

Where a Sheriff who, without special direction from the execution creditor, had seized and sold goods alleged to have been exempt from execution, was being sued therefor by the execution debtor, it was held that the Sheriff was not entitled to interplead as to the pro-

Where a Sheriff's right to execute a writ of possession of land is contested by persons in possession on the ground that the contestants were not parties to the action, the Sheriff is entitled to interplead: *Emerson v. Humphries*, 15 P. R. 84; see also *Adams v. Admison*, 12 P. R. 21; so also where the premises are vacant, though the doors are locked, the Sheriff being notified of a claim, may, without considering its validity, interplead; or *semble*, he may break open the doors and put the plaintiff in possession: *Hall v. Bowerman*, 19 P. R. 268.

A Sheriff may apply for an interpleader order where a claim for rent is made by a landlord: *McLaughlin v. Hamwell*, 22 Ont. 493; and see *Flynn v. Carey*, 18 P. R. 321.

But where a Sheriff seized, but put no bailiff in possession of the goods, and then the landlord seized them for rent, it was held that a second seizure by the Sheriff was illegal, as they were *in custodia legis*, and also that the validity of the landlord's claim could not be decided in Chambers: *Craig v. Craig*, 7 P. R. 260.

The right of a landlord to be paid out of the proceeds of sale under R. S. O. c. 342, s. 10 (S. Anne, c. 14, s. 11), has been upheld against a trustee in bankruptcy of the debtor: *Re Mackenzie*, 1890, 2 Q. B. 566.

Rule 1103. Where goods distrained for rent have been impounded on the premises under R. S. O. c. 342, s. 14 (31), (11 Geo. II., c. 19, s. 10), it is not requisite that anyone on the landlord's behalf should be left in possession of the goods: *Jones v. Biernskin*, 1899, 1 Q. B. 470; 1100, 1 Q. B. 100.

A Sheriff was held not entitled to an interpleader by reason of a claimant's disputing the right of subsequent execution creditors to the goods seized, where there would be no find to satisfy such subsequent executions: *Canadian Bank of Commerce v. Bruce*, 2 C. L. T. 92.

The question whether the Sheriff by withdrawing for a time from the premises, on which he has made a seizure, has abandoned possession of the goods seized is a question of fact. Where he goes out of possession for some temporary necessity such as to get food, or to see a doctor, he does not abandon possession; but where he went out to assist the debtor and enable a sale of the debtor's business to be carried out, that was held to be an abandonment of possession: *Reg. shares (Limited) v. Deacon*, 1898, 2 Q. B. 173.

The Sheriff was held entitled to make a second application for an interpleader order in respect of a claim by the same claimant, alleging a different title: *Gaynor v. Salt*, 24 T. C. Q. B. 180; but not to contest the claim of a landlord which might have been disposed of on a first application: *Clarke v. Farrell*, 8 P. R. 234. A claimant cannot set up another title in the same issue, but must make a subsequent application to the Court: *Barker v. Leeson*, 1 Ont. 114.

Inquiries
to be made,
and bring-
ing in
claimants.

A Sheriff should exercise no discretion as to the disposition of the goods seized by him, but should come at once to the Court, otherwise he will disentitle himself to protection: *Boswell v. Pettigrew*, 7 P. R. 303; *Adams v. Blackwell*, 10 P. R. 168; *Flynn v. Cooney*, 18 P. R. 321. He should, however, make some inquiry as to the nature of the claims made, and inform the execution creditor of them: *Walker v. Niles*, 3 Chy. Ch. 59.

In *Duncan v. Tees*, 11 P. R. 66, it was said that interpleader orders should only be made with caution, and, where goods were in the possession of a third person, there should be strong presumptive evidence of the goods being the debtor's, which should ordinarily appear on affidavit of the belief of the Sheriff, and also of the execution creditor. This opinion has not been, to the full extent, followed in practice, the affidavit of the execution creditor is not considered necessary; and see *Ib.*, 206; also *Edmonds v. Wallingford*, 33 W. R. 647; and it has been held that the Sheriff is not obliged to shew that the claim of a person not in possession of goods taken in execution, is open to objection, in order to entitle him to interplead: *Doran v. Toronto Suspender Co.*, 14 P. R. 103; see also *Stocker v. Huggerty*, 67 L. T. 27.

Where the Sheriff had sold with the consent of both parties, it was considered that he had not improperly exercised any discretion of his own: *Darling v. Collatton*, 10 P. R. 110.

A Sheriff is not justified in applying for an interpleader order, after he has notice that the execution creditor declines to contest the claim of the third party; and if, notwithstanding, he does apply for an interpleader order, it may be refused, and the Court will not order that no action be brought against him: *Sodeau v. Shorey*, 74 L. T. 249; and see *Rule 1116*.

All claimants of whom the Sheriff is aware should be brought in: **Rule 1103.** *Clarke v. Farrell*, 8 P. R. 234. Division Court execution creditors are proper parties, and should be brought in by the Sheriff along with High Court and County Court execution creditors: *MacFie v. Hunter*, 9 P. R. 149. Claims by the Crown cannot be so dealt with: see *supra*, p. 1310.

Where some writs are in the High Court, the interpleader application should be in the High Court, though the seizure was under a County Court writ, and before the High Court writ came to the Sheriff's hands: *Strange v. Toronto Telegraph Co.*, 8 P. R. 1.

A claimant out of the jurisdiction may by leave be served, and compelled to interplead: *Rule 162 (3)*; *Belmont v. Aynard*, 4 C. P. D. 354; *Credit Gerundense v. Van Nieuwe*, 12 Q. B. D. 171.

A Sheriff may disentitle himself to an interpleader order by not coming promptly to the Court when claims are made to the goods seized. He must come within reasonable time; improper delay will be an answer to the application: *Thompson v. Ward*, 1 P. R. 269; *McMaster v. Milne*, 2 P. R. 386. What will amount to such laches will depend upon the circumstances of each case: see *Boswell v. Pettigrew*, 7 P. R. 393; *Wilkins v. Peatman*, *ib.*, 84. He is not justified by the fact that the first seizure does not embrace all the defendant's goods, in delaying to apply till he can get possession of the residue: *Miller v. Nolan*, 1 C. L. J. 327.

Where the claimant of the goods paid the Sheriff the amount of the execution, and the latter then withdrew; it was held that he had not disentitled himself to relief by interpleader: *Paris Manufacturing Co. v. Walls*, 10 P. R. 138.

The interpleader order usually protects the Sheriff only from action against execution creditor: *Park v. Taylor*, 1 C. P. 414; *McCollum v. Kerr*, 8 C. C. L. J. 71; but the Judge has authority to restrain by the interpleader order actions against the execution creditor as well as against the Sheriff: *Buffalo & Lake Huron Railway Company v. Hemmingway*, 22 U. C. Q. B. 502; *Ex p. Mersey Docks*, *supra*, p. 1312.

Protection from action was refused where the sheriff entered wrongfully and took goods, and a substantial grievance was suffered by the person whose house was entered: *De Coppett v. Bennett*, 17 Times, 273.

Accepting and contesting an interpleader issue will not make execution creditors liable for the previous seizure by the Sheriff; an execution creditor cannot thus be made a trespasser by relation, or liable for the original seizure: *Kennedy v. Patterson*, 22 U. C. Q. B. 556; *Phillips v. Findlay*, 27 U. C. Q. B. 32; neither does acceptance of an issue by the claimant bar his right to sue the execution creditor for trespass; but such an action should not be brought until the issue is disposed of: *Cotton v. Stokes*, 10 U. C. Q. B. 262; *McCollum v. Kerr*, 8 U. C. L. J. 71; *Harmer v. Gouinlock*, 21 U. C. Q. B. 260. Where special directions are given to the Sheriff by the execution creditor, or in writing on the writ, by his solicitor, to make the seizure, an action lies against the execution creditor: *Morris v. Solberg*, 22 Q. B. D. 614; but directions verbally given by the solicitor's clerk were held not sufficient to render the execution creditor liable: *Smith v. Keal*, 9 Q. B. D. 340. So also where there is nothing untrue in the directions on the writ so as to mislead the Sheriff into seizing goods of the wrong person: *Canda v. Blalberg*, 7 Times, 424.

Rule 1103. See also as to actions against the Sheriff or execution creditor, *Le Ruvilly*, 7 Times, 303; *Lee v. Dangar*, 1892, 2 Q. B. 337; *Bayne Whitehead*, 1883, 2 Q. B. 355.

The result of the issue is conclusive as between the claimant and execution creditor, but the latter is not liable for any loss sustained by the successful claimant after the date of the interpleader order: *Kennedy v. Patterson*, 22 U. C. Q. B. 556; *Lister v. Northern Ry.*, 11 C. P. 498; *Henry v. Mitchell*, 37 U. C. Q. B. 217.

Barring
claims.

Where an execution creditor refuses to contest the claim of any claimant, he should be barred as to such claimant by the order: *Doran v. Toronto Suspender Co.*, 14 P. R. 103.

After the claimant has given security, where a surety in the bond becomes insolvent, an order will not be made barring the claimant, in default of giving fresh security: *Hogaboom v. Gillies*, 16 P. R. 266, affirmed by a division of opinion in the Court of Appeal: *Ib.*, 260.

Where a bond is given as security it is usually made by the claimant and two sufficient sureties, but the sole bond of a chartered bank claimant of goods seized in execution, is sufficient: *Ontario Bank v. Merchants Bank of Halifax*, 1 O. L. R. 235.

Where a claimant pays money into Court to abide the result of an issue, and the execution creditor succeeds in the issue, and takes the money out of Court, he is thereby estopped from thereafter disputing that as against himself the claimant is the owner of the goods: *Haddock v. Morton*, 1894, 1 Q. B. 95, 565. *Seem*, he might on the termination of the issue either have the goods sold in execution, or take the money out of Court, but he cannot do both.

Where a claimant is ordered to pay into Court the value of the goods seized, as a condition of the Sheriff's being ordered to withdraw from possession, and the same goods are subsequently seized by another execution creditor, and claimed by the same claimant, he will be ordered to pay into Court the full value of the goods as a condition of the Sheriff being ordered to withdraw under the second execution: *Kotch v. Golden Sovereigns, etc.*, 1898, 2 Q. B. 164; 78 L. T. 429.

Where goods seized were manufactured materials, the product of a going concern, the sheriff was directed to continue in possession until the final disposition of the issue: *Farley v. Pedlar*, 1 O. L. R. 760.

An issue will not be directed unless the sheriff is in possession or is responsible for the goods: *Roudot v. Monetary Times*, 10 P. R. 231, or they are otherwise within the control of the Court. As to what is a sufficient bond or security for the forthcoming of the goods: see *Ontario Bank v. Merchants Bank of Halifax*, 1 O. L. R. 235.

Issue.

Issues between the plaintiff and execution creditors, as to the validity of the plaintiff's judgment and execution against creditors generally, and as to attaching creditors in particular on the ground of fraud, or as being a preference, were held warranted by R. S. O. 1877, c. 54, ss. 3, 10; *Lerch v. Williamson*, 10 P. R. 223; see also *Standard Insurance Company v. Hughes*, 11 P. R. 220; and *Doyle v. Lusher*, 13 C. P. 263; and the present Rule preserves the same power as was contained in the R. S. O. 1877, c. 54, s. 10, or any rate as regards attaching creditors: see Rules 1102 (a) and 1103 (b); and the language of clause (b), authorizing interpleader in the case of a claim by "any person other than the person against whom the process issued," would also seem to be wide enough to enable a claim to be made by any judgment creditor who contends that other

judgments are fraudulent as against him; see *McLaughlin v. Hancock*, 22 Ont. 493, the case of a claim for rent which was also expressly provided for by R. S. O. c. 54, s. 10. **Rule 1103.**

A judgment obtained by one creditor cannot be impeached by other creditors on grounds of defence which the defendant might have, but has not raised; see *Re Hayuc, Traders' Bank v. Murray*, 13 Ont. 727; *Baerman v. White*, 15 Ont. App. 579.

The plaintiff in an issue should be that party on whom the onus lies to establish title to the subject of the interpleader proceedings; *Re Hubbell*, 19 P. R. 240. Where the claimant is out of possession he should be the plaintiff in the issue; *Doran v. Toronto Suspender Co.*, 14 P. R. 133; and so also where the possession is equivocal, as where the goods seized are at the house or residence of the execution debtor where both he and his wife reside, and the wife is the claimant; in such a case she should be made plaintiff to the issue; *Bolster v. Walker*, 30 C. L. J. 140; *Hogaboom v. Gready*, 16 P. R. 17; *Thompson v. Doyle*, 16 C. L. T. 286; and see *O'Neill v. Farr*, 11 C. L. T. 815; but see *Farley v. Pedlar*, *infra*. The term of issue in such case is "whether at the time of (generally the seizure) the goods and chattels seized were the property of the claimant as against the execution creditor"; *Farr v. Every v. Ross*, 11 C. P. 133.

Where the claimant is in possession of the goods at the time of seizure, the execution creditor is made plaintiff in the interpleader issue; see *Duncan v. Tees*, 11 P. R. 66; *Dominion S. & L. Company v. Hilroy*, 15 Ont. App. 487; and see *Winfield v. Forlie*, 14 Ont. 107. This rule has been held to apply, even though the claimant was the wife of the debtor, where the goods were on premises on which the wife carried on a business, in which the debtor, her husband, had no interest, but in which he assisted her; *Farley v. Pedlar*, 1 O. L. R. 569. The form of issue in such case is "whether at the time of the seizure the goods in question were exigible under the execution of (the execution creditor) as against the claimant"; see *Duncan v. Tees*, 11 P. R. 296.

Where proceeds of a policy of insurance, originally taken out in favour of the wife of the insured, were claimed by the widow and also by a third person claiming to be an assignee, the latter was made plaintiff in the issue; *Re Hubbell*, 19 P. R. 240.

An issue is to be taken distributively, so that the claimant may succeed as to part of the goods, though not as to the rest; *Peckham v. Bank of Toronto*, 10 C. P. 32.

The question on the issue, where the claimant is plaintiff, is not whether the execution creditor has a right to seize the goods, but whether the claimant had such an interest in them as entitled him to resist the seizure; *Grant v. Wilson*, 17 Q. L. 144.

The form of issue between a claimant and attaching creditor is whether the goods attached were at the time of the seizure the property of the claimant as against the attaching creditor, and not as against the absconding debtor; *Doyle v. Lasker*, 16 C. P. 263; see form of issue where there were two execution creditors and three claimants; *Merchants Bank v. Herson*, 10 P. R. 117.

For an issue where the execution creditor alleged that the debtor had a half interest in the goods in question; see *Lucas v. Holliday*, 8 O. L. R. 541.

See also *Leech v. Williamson*, 10 P. R. 226; *Standard Insurance Company v. Hughes*, 11 P. R. 229.

Where an issue is made by a creditor against another creditor, the plaintiff in the issue should be the creditor against whom the issue is made.

Rule 1103. The issue is to be filed as soon as settled, and filed in the county in which it is directed to be tried: *Rule 377.*

Issue to be filed. Where an issue is directed, a claimant is not entitled to an order for particulars of the goods taken by the Sheriff: *Banely v. Krouk*, 65 L. T. 377.

Particulars. Where an action had been brought by the execution creditor against a claimant under an assignment, to set aside the assignment, the trial of the issue, directed on an interpleader application to be tried, was postponed till after the trial of the action: *Brace v. Nelson*, 10 P. R. 421.

Disputes between claimants. Where claimants' rights among themselves were in dispute, they were all made defendants, and the execution creditors plaintiffs, it being held that the Court would not try the title of the claimants between themselves, the purpose of the issue being answered if it was determined that the execution creditors were, or were not, entitled to have their execution satisfied out of the goods seized: *Merchants Bank v. Herson*, 10 P. R. 117. See also *Nisbet v. Hill*, 5 O. W. R. 233, 337, 402.

Jury notice. Formerly a jury notice not served with the issue but with notice of trial, was held to be an irregularity only and not a nullity: *Leeson v. Lemon*, 9 P. R. 103. A jury notice will now be served pursuant to sec. 106 of the Act, *supra*, p. 153.

Trial in C. C. Issues involving \$400 or less are to be tried at a County Court sittings: see *Rule 1125.*

Creditors' Relief Act, effect of. Under *The Creditors' Relief Act*, R. S. O. c. 78, s. 4 (4), where the Sheriff takes interpleader proceedings, those creditors only who are parties and agree to contribute *pro rata* to the expense of contesting adverse claims, are entitled to share in any benefit derived from the contestation, so far as may be necessary to satisfy their executions or certificates. The Court or Judge may direct that one creditor shall have the carriage of the interpleader proceedings, and in such case his costs, as between solicitor and client, form a first charge upon the moneys or goods which may in the proceedings be found applicable to pay creditors. See Appendix Form 130, clause 6, H. & L. Forms, No. 1241, cl. 7, p. 735.

As to whether these provisions apply only after an issue is directed, or are also applicable where, under *Rule 1110*, the contest is by consent disposed of summarily, the Court of Appeal, in *Bank of Hamilton v. Durrell*, 15 Ont. App. 500, was equally divided.

The issue should ordinarily be tried in the county where the goods were seized, but where for any cause, a speedy trial is necessary in the interest of justice, the trial may be ordered to take place elsewhere: *Farley v. Pedlar*, 1 O. L. R. 570.

Trial of issue. On the trial of the issue the execution creditor is not required to prove his judgment: *Hammill v. DeWolf*, 10 C. P. 419; *Holden v. Langley*, 11 C. P. 407, 411; *McWhirter v. Learmouth*, 18 C. P. 136.

The object of the issue is to inform the conscience of the Court, and the Judge at the trial should receive any evidence calculated to shew what are the real rights of the parties, and should not be too strictly tied down by the form of the issue, but should amend it if necessary: *Byrne v. Kinneir*, 14 P. R. 509.

Where the claimant's case is upon a chattel mortgage, evidence is necessary to identify the goods mortgaged as those which were seized by the Sheriff and claimed: *Jones v. Jenkins*, 27 P. C. Q. R. 151.

This, coupled with proof of the due execution of the mortgage, on its face purporting to be made for value, constitutes a good *prima facie* case; the consideration for the mortgage need not be proved until evidence has been given impeaching it: *Furlong v. Reid*, 12 Ont. 607, **Rule 1103**.

The defendant in the issue may shew that the goods are not the plaintiff's, by setting up the title of a third party, e.g., a trustee in bankruptcy: *Richards v. Jenkins*, 17 Q. B. D. 544; 18 Q. B. D. 451; but the plaintiff in the issue cannot do so: *Ib.*; unless he claims under such third party: *Bryce v. Kinnee*, *supra*.

A claimant may assert title as assignee of the equity of redemption of the goods seized, as against the execution creditor of his assignor, though the legal right to possession may be in the mortgagee: *Usher v. Martin*, 24 Q. B. D. 272.

Where the plaintiff neglects to bring the issue to trial, the course is to move to rescind the interpleader order: *Scrull v. Buffalo, etc., Railway Company*, 3 U. C. L. J. 29. The application is made in the original cause: *Salter v. McLeod*, 10 U. C. L. J. 290.

Where a bank, one of several execution creditors, made parties to an interpleader issue, did not desire to contest the right of the claimant to its share of the proceeds of the goods seized and sold, but was willing that such share should be paid over to the claimant in the event of the latter not succeeding in the issue; it was held that the bank was not under the circumstances liable to contribute to the costs of the issue; but, nevertheless, was properly made a party to the issue and would be entitled, if the claimant failed, to its proportion of the proceeds arising from the sale of the goods: *Dundas v. Davill*, 12 P. R. 347.

Where on an interpleader by the Sheriff an order is made for satisfaction of the claimant's claim, the claimant is limited to his claim put forward in the proceedings, and cannot demand any amount not included in his particulars of claim, on which the order was made: *Hockey v. Evans*, 18 Q. B. D. 390.

Where the Sheriff sells under the order, pending the trial of an issue, it was held in *Ontario Bank v. Percell*, 11 P. R. 240, that he must pay to Court the gross proceeds of sale, without deducting his charges, but in *Reid v. Murphy*, 12 P. R. 246, 328, it has been held that the net proceeds only need be paid in, after deducting expenses of sale, and possession money. In the event of the claimant succeeding in the trial of the issue, he will not be entitled to recover from the Sheriff the amount deducted for possession money, and expenses of sale. The claimant's remedy is to apply, in a summary way in the proceedings, for recovery of the amount deducted for charges from the execution creditor: *Ib.*

If the execution creditor succeeds, the Sheriff becomes further entitled to his fees, poundage and expenses, other than the amounts deducted from the proceeds of sale in respect to the property which has been found to have been exigible. These charges are payable by the execution creditor: *Ontario Silver Co. v. Tasker*, 15 P. R. 180. The Sheriff's costs of the interpleader proceedings are a first charge upon the fund found liable to the execution: *Rule 1120 (1)*; he will in general have them taxed under *Rule 1120 (2)*, and the execution creditor will be entitled to have an order for them, or for such part of them as was occasioned by the claimant's claim, over against the claimant: *Ontario Silver Co. v. Tasker*, *supra*.

The claimant, if successful, is entitled to recover from the execution creditor, as costs, the Sheriff's charges subsequent to the interpleader

Rule 1103. order: *Goodman v. Blake*, 19 Q. B. D. 77, and cannot be ordered to pay the costs of taking possession, or possession money prior to the interpleader order: *Massey Mfg. Co. v. Gundry*, 7 C. L. T. 127.

Costs of
Sheriff.

Before 5th V. c. 5, s. 10 (now *Rules* 1115, 1116), the Sheriff was not in general entitled to costs, where the execution creditor acted on the motion for an interpleader order, it being held that the latter was entitled to consider the claim when formulated, and to abandon without incurring any liability for costs: see *Wilkes v. Peatouso*, 7 P. R. 84; *Can. Bank of Commerce v. Tasker*, 8 P. R. 351; *C. v. D.*, W. N. 1883, 207; *Arch.*, 12th ed., 1411; *Churchill on Sheriffs*, 183; but he was entitled to costs from the execution creditor where the latter had given special directions to the Sheriff to seize particular goods, and such special directions need not have been given in contemplation of an adverse claim: *Faustuden v. Faustuden*, 10 P. R. 428.

In the cases in which *Rules* 1115 and 1116 apply, however, as the Sheriff, before interpleading, obtains from the execution creditor a notice or intimation that the claimant's claim is disputed, the motion for an interpleader order is only made after consideration of the claim by the execution creditor, and if he, at that stage, abandons, it may be that the rule as to costs should be the same as when special directions to seize are given.

If special directions are sworn to and denied, it must be considered that the Sheriff acted on the writ: *Faustuden v. Faustuden*, *supra*.

For rules generally as to Sheriff's costs, see *Stable v. Matthews*, W. N. 1883, 176.

As to the Sheriff's costs where an issue is directed, see *Rule* 1120, and *Smith v. Darlow*, 25 Ch. D. 607; *Hall v. Bowerman*, 19 P. R. 268.

Sheriff
disobeying
interpleader
order.

A Sheriff was held liable to attachment by an execution creditor for not taking security, or selling, pursuant to an interpleader order, there being no claim for rent or taxes which the Sheriff was justified in acknowledging: *McLean v. Anthony*, 6 Ont. 330.

Withdrawal
from possession.

Where a Sheriff, with the consent of the execution creditor and the claimant, after an interpleader order, temporarily withdrew from possession, it was held that the landlord might distrain, though he knew of the interpleader proceedings: *Cropper v. Warner*, 1 Cal. El. 172.

Receiver.

In *Howell v. Dawson*, 13 Q. B. D. 67, a receiver of property seized in execution was appointed, pending an interpleader issue.

Costs.—Where an issue is directed, the costs of the interpleader proceedings and issue should be disposed of at the trial of the issue, and should not be reserved to be disposed of in Chambers after the trial: see *Rule* 1114; *Grothe v. Pearce*, 15 P. R. 432; see, however, *App. Forms*, Nos. 131, 132, H. & L. Forms, Nos. 1242 and 1243.

For an order as to costs where success was divided at the trial, see *Ont. Silver Co. v. Tasker*, 15 P. R. 180.

Scale of
Costs.

The Judge or officer who disposes of the costs may direct what scale of taxation is to be followed: *Beatty v. Bryce*, 9 P. R. 320.

Where the interpleader proceedings are properly instituted in the High Court, though an issue is directed to be tried in a County Court, the Sheriff's costs will be taxable on the scale of the High

Court, and *semble*, also the costs of the parties up to the interpleader **Rule 1103** order: *Arkell v. Geiger*, 9 P. R. 523. The costs before the issue will ordinarily be on the scale of the forum to which the Sheriff is compelled to resort, and after the issue, on the scale applicable to the forum in which the issue is directed to be tried: see *Beatty v. Bryer*, 9 P. R. 325; *Chrastie v. Conway*, 9 P. R. 529.

Section 72 of the Ind. Act, applies to interpleader matters as well as to actions, so that no appeal lies, without leave, from the decision of a Judge as to the disposition of the costs: *Hartmont v. Foster*, *supra*; *Beatty v. Bryer*, 9 P. R. 323; an appeal lies from the Master in Chambers to a Judge as in other cases: *Christie v. Conway*, 9 P. R. 529.

County and District Courts.—As to how far County Courts have jurisdiction under this Rule, see note to *Rules 1123, 1124*.

In *Baird v. Hunter*, 31 C. L. J. 663, it was held by Macdougall, J., C.C. York, that a Judge in Term has no jurisdiction under former Rule 547 (see now 777) to rescind his order made in Chambers, even though it was not otherwise appealable.

An interpleader order made in a County Court case is not appealable to a Divisional Court unless it is final in its nature: *Hunter v. Hunter*, 18 C. L. T. 137, see notes, *supra*, p. 1040.

The District Courts have jurisdiction in interpleader since R. S. O. c. 104, s. 9; their jurisdiction is "the jurisdiction possessed by the County Courts" and this is determinable by the fact whether the process, under which the goods were seized, issued out of the District Court, and not by the amount for which the recovery was had: *Isbister v. Sullivan*, 9 C. L. T. 3. The High Court has no jurisdiction to entertain a motion against a verdict or judgment of the District Court on the trial of an interpleader issue: *Id.*

Security for Costs.—Under R. S. O. 1877, c. 54, s. 10, provision was expressly made for requiring security for the Sheriff's costs to be given. Under this provision it was held that the Sheriff was only entitled to such security under circumstances where it would be ordered between ordinary litigants: *Streetman v. Morrison*, 10 P. R. 446. Without such express provision, the Sheriff would appear under the present Rules to have the same right as formerly. In *Farley v. Pedlar*, 1 O. L. R. 570, an execution creditor being in insolvent circumstances was under Rule 1122 ordered to give security for the Sheriff's costs.

Either party to an interpleader issue may be ordered to give security for costs: *Swain v. Stoddart*, 12 P. R. 490; over-ruling the dictum in *Canadian Bank of Commerce v. Middleton*, 12 P. R. 121. In a stake-holder's interpleader the party substantially moving in the proceedings, whether named as plaintiff or defendant in the issue, if resident out of the jurisdiction, may be required to give security for costs: *Re Forresters & Castner*, 14 P. R. 47. In a Sheriff's interpleader any party out of the jurisdiction, whether claimant or execution creditor, and whether plaintiff or defendant in the issue, may be ordered to give security for costs to his opponent in the issue: *Kniekerhacker v. Webster*, 17 P. R. 180. See *Re Milward & Co.*, 1900, 1 Ch. 405.

An execution creditor made defendant in the issue was ordered to give security, in *Lovell v. Wardroper*, 4 P. R. 265; and the claimant in *Walker v. Niles*, 3 Chy. Ch. 59.

Rules

1104, 1105. The same grounds for ordering security apply as in an action: see *Rhodes v. Dawson*, 16 Q. B. D. 548; *Tomlinson v. L. & F. Co.*, 14 Q. B. D. 539; *Belmont v. Aynard*, 4 C. P. D. 221, 352. The fact that the claimant was a married woman, and in straitened circumstances, was held an insufficient reason for ordering security: *Rhodes v. Dawson*, 16 Q. B. D. 548.

Matters to
be proved
by appli-
cant.

1104. The applicant shall satisfy the Court or a Judge by affidavit, or otherwise—

(a) That he claims no interest in the subject-matter in dispute, other than in respect of a lien or for charges or costs;

(b) That he does not collude with any of the claimants; and

(c) That he is willing to pay or transfer the subject-matter into Court, or to dispose of it as the Court or a Judge may direct. Con. Rules 1142, 1169.

Taken from Eng. (1883) R. 851.

"Court or Judge": The Master in Chambers and officers having like jurisdiction would seem under these words to have jurisdiction in interpleader proceedings: see *Rules 6a, 42*. So far as interpleader by Sheriffs (and under the former Rule 1167, *et seq.*, by bailiffs and carriers) is concerned, they have always had, and exercised jurisdiction.

Interpleader by stakeholders (except bailees and carriers) when the Rules relating thereto were first made, being a new jurisdiction conferred upon a Judge in Chambers, was not then, but at the date of the passing of the Consolidated Rules, 1897, was jurisdiction "now done, transacted or exercised," by a Judge in Chambers, and so within *Rule 42*. In *Re Anderson v. Borber*, 13 P. R. 21, the application was made to a Judge in Chambers.

The Local Judges were under the former Rules held to have jurisdiction in interpleader matters: see *Coulson v. Spiers*, 9 P. R. 491; *Swain v. Stoddart*, 12 P. R. 490.

A form of affidavit will be found in the Appendix, Form No. 24, (H. & L. Forms, No. 1232).

The objection that a stakeholder has, by taking indemnity from one claimant, disentitled himself to relief, cannot be taken by the claimant who gave the indemnity: *Thompson v. Wright*, 13 Q. B. D. 632.

A lien for "costs and charges" did not formerly deprive the applicant of his right to interplead: see *Best v. Huges*, 1 H. & C. 718, also *Attenborough v. St. Katharines Dock Company*, 3 C. P. D. 450, 466.

As to satisfaction of any lien of the applicant, see *Rule 1122*.

Adverse
titles of
claimants.

1105. The applicant shall not be disentitled to relief by reason only that the titles of the claimants have not a common origin, but are adverse to and independent of one another. Con. Rule 1143.

Taken from Eng. (1883) R. 852.

1106. Where the applicant is a defendant, application for relief may be made at any time after service of the writ of summons; and the Court or a Judge may stay all proceedings in the action. (Con. Rules 1144, 1146.)

Taken from Eng. (1883) R. 853, 855.

Rules
1106-1109.
When application to be made by defendant.

1107. The applicant may make a motion calling on the claimants to appear and state the nature and particulars of their claims, and either to maintain or relinquish them. (Con. Rule 1115.)

Taken from Eng. (1883) R. 854.

Motion by applicant.

Where the amount of claim has been stated under this Rule and an order for payment has been made, the claimant can only recover the amount so stated: *Hockey v. Evans*, 18 Q. B. D. 390.

1108. Where a claimant does not appear on the motion after having been served with a notice of motion calling on him to appear and maintain or relinquish his claim; or, having appeared, neglects or refuses to comply with any order made thereafter, the Court or a Judge may make an order declaring him and all persons claiming under him to be forever barred as against the applicant, and all persons claiming under him, but the order shall not affect the rights of the claimants as between themselves. (Con. Rule 1150.)

Failure of claimants to appear.

Taken from Eng. (1883) R. 859.

In making an order barring a claimant, where the applicant is a defendant in an action, there is no power to make it a term of the order that the plaintiff shall pay the costs of the defendant in the original action, apart from those in the interpleader proceedings: *Hansen v. Maddox*, 12 Q. B. D. 100.

Where a claimant appeared and had in pursuance of an order given security for the goods, and pending the trial of an issue directed to determine the ownership, the goods were sold for taxes, and the surety to the claimant's bond became worthless, it was held that the claimant was, nevertheless, entitled to have the issue tried, and that there was no jurisdiction to bar his claim in default of his giving fresh security: *Hogaboom v. Gillies*, 16 P. R. 93, 260.

1109. Where the claimants appear on the motion, the Court or a Judge may order that any claimant be made a defendant in any action already commenced in respect of the subject-matter in dispute in lieu of or in addition to the applicant, or that an issue between the claimants be stated and tried, and in the latter case may direct which of the claimants shall be plaintiff, and which defendant. (Con. Rule 1147.)

Order.

Taken from Eng. (1883) R. 856. See note to Rule 1108.

See notes to Rule 1103, "Issue," p. 1316.

Rules
1110-1112

Disposition of
matters in
summary
manner

1110. The Court or a Judge may, with the consent of both claimants or on the request of any claimant, if, having regard to the value of the subject-matter in dispute, it seems desirable so to do, dispose of the merits of their claims, and [subject to appeal], decide the same in a summary manner and on such terms as may seem just. Con. Rule 1110.

Taken from Eng. (1883) R. 857.

Under the English Rules 857 and 860, a decision by the Judge summarily is not appealable: see *Lyon v. Morris*, 19 Q. B. 19, 139; *In re Tarn*, 1893, 2 Ch. 280; *Fan Lau & Co. v. Baring Bros.*, 1893, 2 K. B. 277; *Harbottle v. Roberts*, 1905, 1 K. B. 572. The words in brackets in this Rule are not in the English Rule, so that in Ontario the decision will be appealable as in other cases.

see Graham & Co.

As to whether it is necessary that the consent, which gives jurisdiction under this Rule, should appear on the face of the order, see *Bank of Hamilton v. Durrell*, 15 Ont. App. 500, 513-516.

The Court has no power to impose conditions on the claimant, without his consent, affecting his right to raise defences: *Gerhard v. Montagu*, 38 W. R. 76; 61 L. T. 504; unless the claimant is seeking any indulgence from the Court.

Where an execution creditor declines to contest the claim of a claimant to goods seized in execution, the order should bar him of any right to contest the claim: *Doran v. Toronto Suspender Co.*, 11 P. R. 103; and see Rule 1113.

Questions
of law

1111. Where the question is one of law, and the facts are not in dispute, the Court or a Judge may decide the question without directing the trial of an issue, or order that a special case be stated for the opinion of the Court. Con. Rule 1149.

Taken from the Eng. (1883) R. 858, which, however, further provides expressly that the provisions of the Eng. Rules corresponding to Rules 372, *et seq.*, shall apply to the special case. The Rule was held only to apply to simple cases: *In re Choach Friends, Roddy v. Leah*, 28 C. L. J. 35; 12 C. L. T. 72, where a case was stated for a Divisional Court.

Where the question presented is one of fact, an issue must be directed: *Rondot v. Monetary Times*, 19 P. R. 23. Where a Sheriff was authorized to withdraw from possession under an order erroneously made under this Rule, on appeal therefrom, he was authorized to re-seize: *Id.*

Order for
sale of
goods
seized in
execution.

1112 Where goods or chattels have been seized in execution by a Sheriff, and any claimant alleges that he is entitled, under a bill of sale or otherwise, to the goods or chattels by way of security for debt, the Court or a Judge may order a sale of the whole or a part thereof, and direct the ap-

plication of the proceeds of the sale in such manner and upon such terms as may seem just. Con. Rule 1151. Rules
1113, 1114

Taken from Eng. (1883) R. 861.

A sale of the goods will not be ordered in an interpleader matter where the claimant is a chattel mortgagee whose title is undisputed; see *Stern v. Fegner*, 1898, 1 Q. B. 37; *secus*, where his title is disputed; *Archer v. Hill*, 5 O. W. R. 293, 337, 402; see *Piquin v. Robinson*, 87 L. T. 5, where the claimant claimed under an absolute bill of sale.

The sale bond of a chartered bank was accepted as sufficient security, on proof of the responsibility of the bank. *Ontario Bank v. Merchants Bank of Halifax*, 1 O. L. R. 237.

Where the claimant assents to the sale under execution, and accepts part of the proceeds, he thereby adopts the sale, and cannot sue the execution creditor for conversion; *Appley v. Wathall*, 8 O. P. 397.

Where a sale is ordered the purchaser acquires a good title as against all parties to the interpleader proceedings, no matter how the interpleader issue may ultimately be determined; see *Goodback v. Cousins*, 1897, 1 Q. B. 348; 76 L. T. 86, 313. And in the application of the proceeds of the sale the Court is not limited by the principle in Courts of Equity in suits for redemption, and may order a chattel mortgage to be paid off before it is actually due, and without allowing anything in respect of a higher rate of interest, which the money would have earned under the mortgage; *Forster v. Chavory*, 1897, 2 Q. B. 302; 76 L. T. 825.

1113. Where a Sheriff applies for relief by interpleader, and any execution creditor declines to join in contesting the claim of the adverse claimant, the Court or a Judge may direct that such creditor shall be excluded from any benefit which may be derived from the contestation of the claim. Con. Rule 1152.

Excluded creditor may be excluded from benefit.

See *Doran v. Toronto Suspender Co.*, 11 P. R. 183, in note to Rule 1119.

The Creditors' Relief Act (R. S. O. c. 78), s. 4 (4), provides that those creditors only who are parties to interpleader proceedings and agree to contribute *pro rata* to the expense of contesting any adverse claims shall be entitled to share in any benefit derived from the contestation of such claims, so far as it may be necessary to satisfy their executions or certificates; and see *Bank of Montreal v. Darrell*, 15 Ont. App. 590.

See *Duodex v. Darrell*, 12 P. R. 347.

1114. The Court or Judge who tries the issue may finally dispose of the interpleader proceedings, including all costs not otherwise provided for. Con. Rule 1153. Final disposition of matters.

Taken from Eng. (1883) R. 862.

Formerly the interpleader order reserved the question of costs and all other questions to be disposed of in Chambers after the trial of the issue. The form of order now used reserves the disposition of all

Rule 1115. such matters for the Judge who tries the issue, "or if not so disposed of then to be disposed of in Chambers": see Form 130, clause 5 (H. & L. Forms, No. 1241, cl. 6). The costs of the issue at any rate should now be disposed of by the Judge who tries it: *Grothe v. Pearce*, 15 P. R. 432.

In some cases it may be necessary, however, to reserve questions, for instance, if any questions in which the Sheriff is concerned are not disposed of; otherwise, unless the Sheriff is made a party to the issue, the Judge who tries the issue cannot finally dispose of the whole matter.

The Sheriff is not a party to the issue, and cannot be ordered to pay any costs of it: *Temple v. Temple*, 63 L. J. Q. B. 56; and he need not receive notice of a motion respecting the costs of the parties to the issue: *O'Brien v. Bull*, 9 P. R. 494. But he was held entitled to costs of appearing on a motion by a claimant for a final order barring the execution creditor for default in giving security for costs: *Gray v. Alexander*, 10 P. R. 358.

The parties were directed to pay their own costs, and were directed each to pay half the costs of the Sheriff, in *McLaren v. Canada Central Railway Co.*, 10 P. R. 328. A claimant partially succeeding was given the general costs of the issue, with a deduction of one-sixth in respect of the goods as to which he failed: *Segaworth v. Meriden Silver Plating Co.*, 3 Ont. 413.

Where the claimant succeeded as to part of the goods seized in execution, and the execution creditor as to the residue, and no costs were given to either party of the interpleader issue, the execution creditor was ordered to pay the Sheriff's fees and poundage on the value of that part of the goods as to which he succeeded, and his costs of the interpleader application, with an order over against the claimant for half of these costs: *Ontario Silver Co. v. Tasker*, 15 P. R. 180. In this case the claimant also appears to have paid the possession money subsequent to the date of the interpleader order, and the execution creditor that incurred prior to the order.

Claims of
third parties
to goods in
possession
of debtor.

1115. When a Sheriff finds property in the possession of a debtor against whose property he has a writ or other process in his hands, and a claim is set up to such property by or on behalf of a third person who is out of possession or is in joint possession with the debtor, the claim of such third person shall be made in writing, and upon receipt thereof the Sheriff shall forthwith give notice thereof to the execution creditor according to Form No. 72, and the execution creditor shall, within seven days thereafter, give notice to the Sheriff according to Form No. 73, that he admits or disputes the claim. If the execution creditor admits the title of the claimant, and gives notice as directed by this Rule, he shall only be liable to such Sheriff for fees and expenses incurred before the receipt of the notice admitting the claim; [and no action shall be brought against the Sheriff in respect of the seizure of the property.] 56 V. c. 5, s. 10 (1), amended.

See Eng. (1889, r. 9) O. 57, r. 16, which, however, has not the words in brackets, and therefore under the Eng. practice, where after notice of the claim the execution creditor admits its validity, the Sheriff cannot interplead, and remains liable to have an action brought against him by the claimant for the seizure: see *Moore v. Hawkins*, 43 W. R. 235; *Sodeau v. Shorey*, 74 L. T. 240, where the hardship on the Sheriff was pointed out. The words in brackets remove that difficulty in Ontario.

Special directions from the execution creditor as to seizure, and disputing in advance the claim of the claimant, may justify the Sheriff in omitting to notify the execution creditor as here mentioned.

See note to Rule 1103.

1116. Where the execution creditor does not in due time, as directed by Rule 1115, admit or dispute the title of the claimant to the property, and the claimant does not withdraw his claim thereto by notice in writing to the Sheriff, the Sheriff may apply for relief by interpleader; and if the claimant withdraws his claim by notice in writing to the Sheriff, or the execution creditor serves an admission of the title of the claimant [after] the return day of such notice of motion, and at the same time gives notice of such admission to the claimant, the Court or Judge may make all such orders as to costs, fees, charges and expenses as may seem just. 56 V. c. 5, s. 10 (2).

Same as Eng. (1889, r. 10). O. 57, r. 17, except that in the Eng. Rule, instead of the word "after" in brackets, the words are "prior to," as they were also in 56 V. c. 5, s. 10 (2). This is a printer's error and "after" should be read "before."

See note to Rule 1103.

1117. Where it is necessary or expedient to make one order in several actions or matters the order may be made, and shall be entitled in all such actions or matters, and (subject to the right of appeal) shall be binding on all the parties. See Con. Rule 1154.

Taken from Eng. (1883) R. 863.

1118. In case a Sheriff has more than one writ of execution against the same property he shall not make a separate application on each writ, or in each action; but he may make one application, and may make all the execution creditors parties. Con. Rule 1155.

Taken from R. S. O. 1877, c. 54, s. 11.

Rules
1116-1118.

When
execution
creditor
does not
admit or
dispute
claim of
third party
within time
limited.

Title of
order.

In case of
several
executions,
all may be
embraced
in one ap-
plication
for inter-
pleader.

**Rules
1119, 1120.**

Cases of execution from several Courts, to whom application to be made.

1119. Where there are writs from several Courts, including the High Court and one or more County Courts, or including the High Court and one or more Division Courts, against the same property, whether on behalf of the same plaintiff, or of different plaintiffs, the application for interpleader shall be made to the High Court, or a Judge thereof; and such Court or Judge shall dispose of the whole matter, as if all the writs against the property had been issued from the said Court. Con. Rule 1156.

Adapted from R. S. O. 1877, c. 54, s. 12; 49 Vict. c. 16, s. 15.

The application is properly made in the High Court, though the first seizure is made in a County Court: *Strange v. Toronto Telegraph Co.*, S. P. R. 1.

Where the writs are all from County Courts, the Sheriff is now to apply in a County Court under Rule 1123, and the costs will be on the scale of that Court: Rule 1128; see formerly *Phipps v. Beames*, S. P. R. 181; *Masuret v. Landville*, S. P. R. 57. Where one of the writs is in the High Court, the costs of the motion should be on the High Court scale: *Id.*

When an issue is ordered, the Sheriff's costs to be first lien on property excludible.

1120.—(1) Where an issue is directed to be tried, the costs of the Sheriff incurred in consequence of the adverse claim shall be a first lien or charge upon the moneys or goods which may be found in the issue to be applicable upon the execution. *New.*

Sheriff may tax his costs and serve allocation on each party.

(2) In addition and without prejudice to the said lien or charge the Sheriff may, after the issue has been directed to be tried, tax such costs, and may serve a copy of the certificate of taxation upon each of the parties to the issue, and the successful party upon the issue shall tax such costs as part of his costs of the cause, and upon receipt thereof shall pay over the same to the Sheriff unless he has been previously paid. Con. Rule 1158.

The successful party liable to the Sheriff for costs.

(3) Where, after the service of the certificate, the party succeeding upon the issue neglects or refuses to tax such costs, the Sheriff may obtain an order that the successful party shall pay the same. Con. Rule 1159.

In case compromised, who to be liable to the Sheriff for his costs.

(4) Where the proceedings are compromised between the parties thereto, the costs of the Sheriff shall be paid by the party by whom the execution was issued. Con. Rule 1160.

Where the interpleader order was granted to try the right to land, the Sheriff's costs were ordered in the first instance to be paid by the

INTERPLEADER.

1329

party who put him in motion, without prejudice to the question by **Rules** whom they should be ultimately borne: *Hall v. Bowerman*, 19 P. R. 1121-1123, 268.

Where there has been divided success on the trial of an interpleader issue, and costs have not been given to either party, the Sheriff may apply under any reservation in the order (see Form 130, clause 5), or under **Rule 1122**, for such order respecting his costs as may be just: *Ontario Silver Co. v. Tasker*, 15 P. R. 180.

1121. Where, after the seizure, an issue is directed, and the property seized remains, pending the trial of the issue, in the custody of the Sheriff who seized the same, the Court or Judge may make an order for the payment to the Sheriff of such sum for his trouble in and about the custody of the property as the Court or Judge deems reasonable; and the Sheriff shall have a lien upon the property for payment of the same in the event of the issue being decided against the claimant to the extent to which such issue shall be so decided. **Con. Rule 1161.**

Taken from R. S. O. 1877, c. 54, s. 18; 49 V. c. 16, s. 13.

Where the Sheriff remained in possession at the request of the debtor and creditor, he was held to be entitled to possession money as part of the costs of the execution: *R. Beston*, 1890, 1 Q. B. 626, 70 L. T. 561.

1122. The Court or a Judge may, in or for the purposes of an interpleader proceeding, make all such orders [respecting the satisfaction or payment of any lien or charges of the applicant, and] as to costs and all other matters as may be just and reasonable. **Con. Rule 1241.**

The same as Eng. (1883) R. 864, except the words in brackets, which are taken from former Con. Rule 1163, which made provision for the satisfaction or payment of any lien of a carrier or bailee on an interpleader application by him. The present **Rule** will include such a case, as well as others in which a stakeholder may have a lien: see also **Rule 1104** (a).

Where the applicant claims a lien on the goods in question, e.g., for wharfage, the Judge may order by whom it shall be satisfied: *De Rothschild v. Morrison*, 24 Q. R. D. 750; 63 L. T. 46.

Where the execution creditor was insolvent he was ordered to give security for costs: *Farley v. Pollard*, 1 O. L. R. 570.

(ii) In County Courts.

1123. Relief by interpleader may be granted in the County Courts, **County Courts,**

Rules
1124, 1125.

1. Where the person seeking relief (hereinafter called the applicant) is under liability for any debt, money, goods or chattels, for or in respect of which he is or expects to be sued by two or more persons (hereinafter called the claimants) making adverse claim thereto; and in such case,

(a) Where the applicant is being so sued in a County Court the application may be to the Judge of the County Court in which the action is pending; and.

(b) Where the applicant is not being so sued and the debt, money, goods or chattels in question do not exceed in value \$200, the application may be to the Judge of the County Court of the county in which the applicant resides or, in which the money, goods and chattels are situate;

2. Where the applicant is a Sheriff and claim is made to any money, goods, or chattels taken or intended to be taken in execution under a writ of execution, or to the proceeds or value thereof, by any person other than the person against whom the writ was issued; and in such case the application may be made to the Judge of the County Court of the county in which such money, goods or chattels are so taken, or intended to be taken, notwithstanding that the writ may have been issued from another County Court, or that writs may have been issued from two or more County Courts. Rules 23 June, 1894, 1369 (a and b).

Court in
which pro-
ceedings to
be taken.

1124. All subsequent proceedings shall be had and taken in the county where the application is made; but the Judge to whom the application is made may order that the subsequent proceedings be had and taken in any other county, if that course seems just and more convenient. Rules 23 June, 1894, 1369 (c).

See 44 Vict. c. 7, s. 1; 45 Vict. c. 16, s. 42.

(iii) *Trial of Issues in County or Division Courts.*

When issue
may be
tried in
County
Court.

1125 —(1) Where the amount claimed under or by virtue of writs of execution, in the Sheriff's hands, issued out of one or more Courts, does not exceed the sum of \$400, exclusive of interest and Sheriff's costs, or when the goods seized

are not, in the opinion of the Judge, or other person making **Rule 1122**, the order, of the value of more than \$400, the order directing an issue to be tried, may direct that the issue shall be drawn up and tried in the County Court of the county in which the issue would, under the provisions of **Rule 1124** be tried, and in such case the issue shall be drawn up, filed and tried in the County Court, and all subsequent proceedings therein, up to and inclusive of judgment and execution, shall be had and taken in the County Court which shall, where any of the writs of execution were issued out of the High Court, have jurisdiction in the premises as fully as though the same had issued out of the County Court.

(2) Where an application is made for an order, under this **Rule**, upon the ground that the goods seized are not of the value of more than \$400, a list of the goods and of the value placed upon them shall be set out in the affidavits, upon which the application is based. **Con. Rule 1163**.

The Act from which this **Rule** is taken conferred upon the High Court a power which the Court of Chancery had before by previous legislation: *Gourley v. Ingram*, 2 Ch. Ch. 238, 304; *Wilson v. Wilson*, 3 Ont. App. 308; *Beuty v. Bryce*, 9 P. R. 320; and since the Act all interpleader issues involving less than \$400, are to be disposed of by reference to a County Court: *Beuty v. Bryce*, 9 P. R. 320.

There is no jurisdiction to make an order for the trial of an issue under this **Rule**, even though by consent, in respect of property which has not in fact been seized or intended to be seized by the Sheriff: *Teskey v. Neil*, 15 P. R. 244.

Where an interpleader issue is directed by the High Court to be tried at County Court sittings under this **Rule**, the subsequent proceedings, such as, *e.g.*, a motion to postpone the trial, must be taken in the County Court: *London & Can. L. & I. Co. v. Murphy*, 11 P. R. 86; and applications against the verdict or for a new trial must be by way of appeal as in other County Court cases; except where such appeal lies, a Divisional Court of the High Court has no jurisdiction to entertain an appeal from the judgment on an interpleader issue so directed: *Chase v. Exchange Bank*, 11 P. R. 186, distinguishing *Barker v. Leeson*, 9 P. R. 107.

But this **Rule** only applies to issues directed on the application of a Sheriff, and not to issues directed on the application of stakeholders under **Rule 1103** (1); in the latter kind of cases it seems doubtful whether under the **Con. Rules** the issue can be directed to be tried in a County Court; see *Clancy v. Young*, 15 P. R. 248; **Rule 11**; but if under section 128 of the Ind. Act the High Court has power in such cases to direct the trial of the issue in a County Court, an order or judgment must be obtained in the High Court embodying the decision upon the issue; and from such order or judgment an appeal will lie as in the case of any other order or judgment of the High Court specially pronounced: *Id.*

Rules
1126-1129.

Issue when
triable in
Division
Court.

1126. Where the amount of the execution or the value of the goods does not exceed \$100, the issue may be directed to be tried in a Division Court, and thereafter all proceedings shall be carried on in such Court. Rules 23 June, 1894, 1370.

Order for
costs to be
made by
Judge of
County or
Division
Court.

1127. The proceedings for and relating to the order for costs, and for obtaining money out of Court, when the same has been paid into Court by the Sheriff, and for such other purposes as may be necessary, may, in the cases provided for in the Rules 1125 and 1126, be taken either in the original cause or before the Judge of the County Court, or Division Court, as the case may be, who tried the issue, and shall have power and authority to make such order in the premises as a Judge has heretofore had in such cases. Com. Rule 1164; Rules 23 June, 1894, 1371.

Costs of
proceed-
ings in
County or
Division
Court.

1128. In respect of all such proceedings had in the County Court, or Division Court, the costs and disbursements shall be taxed upon the County Court, or Division Court, as the case may be. Com. Rule 1165; Rules 23 June, 1894, 1372.

10. CHARGING ORDERS.

Order for
charge in
favour of
solicitor on
property
recovered
or preserved.

1129.—(1) Where a solicitor has been employed to prosecute or defend any cause, matter or proceeding, it shall be lawful for the Court in which the cause, matter or proceeding has been heard or is pending, or for a Judge thereof, to declare such a solicitor, or his personal representatives, to be entitled to a charge upon the property of whatever nature, tenure or kind, recovered or preserved through the instrumentality of such solicitor; and upon such declaration being made, such solicitor, or his personal representatives, shall have a charge upon and against and a right to payment out of the property so recovered or preserved, for the taxed costs, charges and expenses of or in reference to such cause, matter or proceeding; and all conveyances and acts done to defeat, or which may operate to defeat, such charge or right shall, unless made to a *bona fide* purchaser for value without notice, be absolutely void and of no effect as against such charge or right.

(2) The Court or Judge may make such order for **taxa-** **Rule 1129.**
 tion of such costs, charges and expenses, and for the raising Entire
 of the
 and payment of the same out of the said property, as may charge.
 seem just; but no such order shall be made where the right
 to recover payment of such costs, charges and expenses is
 barred by any Statute of Limitations. *New.*

This *Rule* is based upon Imp. Act, 23 & 24 V. c. 127, s. 28, which
 was enacted in consequence of the decision in *Shaw v. Neale*, 27 L.
 J. Ch. 444; 61 L. L. C. 581, that a solicitor has no lien on real estate
 recovered for the client.

The charge authorized to be declared is more extensive and more Nature of
 being limited to the document and funds of a client, cannot as regards charge.
 beneficial than the ordinary lien of a solicitor; the latter, besides
 documents he actively enforced, and as to them is a mere right of
 retainer, and may be lost by giving up possession; whereas a charge
 under this *Rule* may extend to almost any kind of property, and will
 entitle the chargee to apply for a sale of the property subject thereto,
 in order to raise the amount of the charge.

A charge under this *Rule* is in the nature of a statutory mortgage,
 and, as against purchasers and other incumbrancers, the same pro-
 tections may be necessary to preserve priority, as in the case of an
 ordinary mortgage; where the charge is on land, in order to retain
 priority it would seem to be advisable to register it in the proper
 Registry Office. The registration should be effected by means of a Register
 certificate under the hand of the proper officer, and his seal of office, of the
 or the seal of the Court.

Where a solicitor brought an action to recover his bill of costs of a
 redemption action, and claimed a lien on the land, the subject of the
 redemption action, he was held entitled to register a certificate of
lis pendens against the land: *O'Flynn v. Middleton*, 5 O. L. R. 621.

The *Rule* gives the solicitor an ancillary right—one not intended to
 displace the liability of the client to pay the solicitor out of his own
 pocket—but one ancillary to his right to be paid on his retainer;
Nevills v. Ballard, 18 P. R. 134. See also *Re Born*, 1900, 2 Ch. 433;
 83 L. T. 51.

The *Rule* authorizes the Court to interfere in regard to any pro- Property
 perty, real or personal, for the protection of the solicitor, in the same recovered or
 way as upon equitable grounds it previously interfered in the case of preserved.
 a judgment: *Barker v. St. Quentin*, 12 M. & W. 441; or a fund in
 Court: *Huque v. Cooper*, 33 B. 431; *Re Born*, 1900, 2 Ch. 433; 83
 L. T. 51; recovered through the services of the solicitor.

The construction placed upon the Imp. Act is that it gives a dis-
 cretionary power to the Court; the solicitor has no absolute right to
 the charge, but only power to ask the Court in the exercise of its
 discretion to make the charge: *Nevills v. Ballard*, 18 P. R. 134;
Harrison v. H., 13 P. D. 10; *Pierson v. Knutsford Estates Co.*, 13 Q.
 B. 1, 666; *Re Humphreys*, 1898, 1 Q. B. 523, and see *Re Born*, *supra*.

In the case, therefore, of a judgment recovered by an infant suing
 by his next friend, though the next friend and not the infant was
 liable to the solicitor, a charge was declared in favour of the solicitor
 upon the judgment to the extent only of the costs taxed against the
 defendant, and the Court refused to order a sale of the judgment to
 enforce the charge: *Nevills v. Ballard*, 18 P. R. 134.

Rule 1129. What property has been "recovered or preserved" is a question of fact in each case: *Roslands v. Williams*, W. N. 1885, 194; *Ross v. Buxton*, 42 Ch. D. 198.

Under the Imp. Act property has been held to have been recovered or preserved, by recovery of a judgment for money: *Birchall v. Pugh*, L. R. 10 C. P. 397; *Orford v. Fleming*, 18 C. L. T. 142; 34 C. L. J. 238, 413; or costs: *Dallow v. Garrold*, 13 Q. B. D. 543; 14 Q. B. D. 543; by a judgment, in a foreclosure action: *Hilson v. Round*, 4 Giff. 416; 10 Jur. N. S. 34; in a redemption action: *Scholefield v. Lockwood* (1868), L. R. 7 Eq. 83; *O'Flynn v. Middleton*, *supra*; in an action to establish the validity of a will: *Ex p. Tweed*, 1899, 2 Q. B. 167; or a mortgage: *Keenan v. Armstrong*, 27 L. R. Ir. 371; in a partition action: *Pritchard v. Roberts*, L. R. 17 Eq. 222; in an action of detinue: *Cutlow v. Cutlow*, 2 C. P. D. 362; in an action to remove a cloud on the title to land: *Jones v. Frost*, L. R. 7 Chy. 773.

So money paid into Court as a condition of obtaining leave to defend is "recovered or preserved": *Morson v. Sheppard*, 24 Q. B. D. 627; and money paid into Court with a defence, if the plaintiff comes entitled to take it out: see *Enden v. Carte*, 19 Ch. D. 311; so where the fund consists of rents paid into Court by a receiver in the action: *Re Knight*, 1892, 2 Ch. 598.

A solicitor for the liquidator of a company which had been reconstructed, was allowed a charge on the assets of the company, for costs of proceedings in Court incurred in reconstruction: *Re Clayton*, 118 L. T. Jour. 315.

Property was held to be not recovered or preserved where a winding-up petition was successfully opposed: *Re United Shepherd's Wheel Rose, Co.*, W. N. 1885, 15; nor where in an administration action new trustees were appointed, but further proceedings were stayed: *Pickerton v. Easton*, L. R. 16 Eq. 490; nor where an enurement is the subject of the action and its existence is affirmed: *Foron v. Gascoigne*, L. R. 9 Chy. 654; nor where money is paid into Court by the plaintiff as security for costs, and the plaintiff succeeds in the action: *Re Wadsworth, Rhodes v. Sugden*, 20 Ch. D. 517; but see *Parry v. P.*, 30 Sol. Jour. 388; *Hall v. H.*, 1891, P. 302; but where an appeal is successful the costs paid under the judgment and ordered on the appeal to be refunded are property recovered: *Guy v. Churchill*, 35 Ch. D. 489.

Property
not subject
to charging
order.

The "cause, matter or proceeding," mentioned in the *Rule*, must be some civil cause, matter or proceeding in a Court of Justice; money recovered by means of criminal proceedings: *Re Humphreys*, 1898, 1 Q. B. 520; or in an arbitration: *Macfarlane v. Lister*, 37 Ch. D. 88, are not within the *Rule*; nor is alimony decreed in divorce proceedings: *Lecte v. Lecte*, 48 L. J. P. 61; *Cross v. Cross*, 43 L. T. 522; nor an allowance made by the Court for the maintenance of a lunatic's wife, out of the lunatic's estate: *Re Robinson*, 27 Ch. D. 160. The jurisdiction to declare a charge is discretionary, and, it is said, should be rarely exercised in bankruptcy proceedings: *Re Humphreys*, 1898, 1 Q. B. 520.

A defendant's solicitor may be entitled, as where a defendant successfully resisted claims of a mortgagee in a foreclosure action: *Scholefield v. Lockwood*, L. R. 7 Eq. 83; and where an action to set aside a settlement (*Re Keane*, L. R. 12 Eq. 115), or to attach a vessel (*The Heinrich*, L. R. 3 A. & E. 505) was dismissed; see also *Smith v. Winter*, 18 W. R. 447.

A claim and counter-claim, where both are successful, must be considered as one action for the purpose of determining the solicitor's right to a charging order: *Westacott v. Moran*, 1891, 1 Q. B. 774; *The Philippine*, L. R. 1 A. & E. 309. **Rule 1139.**

The charge may affect not merely the client's interest but the interests of others, the solicitor's services being in the nature of salvage: *Greer v. Young*, 24 Ch. D. 545. See also *Es p. Digby*, 53 L. J. Ch. 972; *Berrie v. Horvitt*, L. R. 9 Eq. 1 (where a charge was refused); *Nevills v. Ballard*, *supra*, p. 1333; and *Bullen v. Bullen*, 8 Ch. D. 479.

The right to a charge is not affected by a subsequent compromise: *Tugman v. Porter*, L. R. 11 Eq. 181; *Moran v. Sheppard*, 21 Q. B. D. 627.

The costs are limited to the costs of the cause, matter or proceeding: see *Wilson v. Round*, 4 Giff. 416; *Re Hall*, 33 Ch. D. 266. The order should direct taxation of the costs, if not already taxed: *Emden v. Carter*, 19 Ch. D. 311, 318. Costs recoverable under charging order.

The solicitor is entitled, though discharged by the client, where the property was recovered while he was solicitor: *Chayer v. Adams*, 4 Q. B. D. 622; *Re Wadsworth*, *Rhodes v. Sugden*, 29 Ch. D. 517; in such case his charge will be subject to the lien for costs of the client's solicitor for the time being: *Id.* Discharged solicitor.

The assignee of a solicitor is entitled to apply: *Briscoe v. Briscoe*, 1892, 3 Ch. 543; or his personal representatives: *Baile v. Baile*, L. R. 13 Eq. 497; but the agents of a solicitor are not entitled to a charge for their costs, they not having been employed by the client: *Macfarlane v. Lister*, 37 Ch. D. 88. Assignee of solicitor.

The solicitor for an infant may apply for a charging order on the infant's share of the subject of litigation: *In re Wright*, 1901, 1 Ch. 217.

The lapse of time may justify a refusal to interfere where in the meantime the rights and interests of the persons entitled to the property have been changed: *Roche v. Roche*, 29 L. R. Ir. 339; but mere delay where no intervening rights have arisen is not sufficient to deprive the solicitor of his right to an order: *Re Rorn*, 1900, 2 Ch. 433; 83 L. T. 51. Delay in applying.

The plaintiff's solicitor was held to have a first charge on the assets of a partnership in an action for dissolution, in which a receiver had been appointed and certain assets recovered: *Ridd v. Thorne*, 1902, 2 Ch. 544; and to have priority over a mortgage made by the plaintiff before the action, where the mortgagee adopted the benefits obtained thereby: *Schady v. Peck*, 1893, 1 Ch. 709; 3 R. 245; 68 L. T. 418; see also *Dennis v. Addy*, 1894, 1 Ir. R. 511.

The solicitor is not entitled to a charging order where he has accepted from his client a mortgage or other security, *e.g.*, where an assignment of the property has been made in trust in the first place for the payment of the solicitor's costs: *Groom v. Chesewright*, 1895, 1 Ch. 739; 72 L. T. 555.

The assignee of a judgment debt, or a creditor garnishing the same: *Dallow v. Gurrell*, 14 Q. B. D. 543, and see *Hawer v. Giles*, 11 Ch. D. 342, takes subject to any existing right of lien upon the judgment, and as against such right the assignee or attaching creditor

Rule 1129. is not a purchaser for value without notice, and a charging order, subsequently obtained by a solicitor having such lien, takes priority over the assignment or attaching order; *Faithful v. Erica*, 7 Ch. 10, 195; *Cole v. Eley*, 1894, 2 Q. B. 350; 9 R. 352; 70 L. T. 892.

As to notice, see also *The Paris*, 1896, P. 77; 73 L. T. 739; *Orford v. Fleming*, 18 C. L. T. 142; 34 C. L. J. 238, 413.

Application for Charging Order.—No procedure is laid down for obtaining a declaration of the charge, nor is any time prescribed when the same may be made. It would seem from the words "as pending," that the *Rule* contemplates the making of such application before, as well as after, final judgment in the action. All parties to the action to be affected by the declaration ought, it would seem, to have notice of the application; see *Brown v. Trotman*, 12 Ch. D. 880; and where the action is defective by reason of death, or transmission of interest, an order to continue proceedings under *Rule 336* should be first obtained; *Stewart v. Rhodes*, 1900, 1 Ch. 380; 82 L. T. 337; but see *O'Flynn v. Middleton*, 5 O. L. R. 421.

In some cases it may be that the object of the application would be defeated if the parties were notified in the first place, and, in such cases, it is possible the application might be entertained *ex parte* in the first instance; but wherever a charging order is granted on an *ex parte* application, it would seem desirable that the order should be in the nature of an order *nisi*, i.e., declaring the charge upon service on the (parties interested) unless they, within a specified time thereafter, on notice to the chargee in that behalf, shew to the Court good cause to the contrary.

The application may be made notwithstanding that the action is no longer pending, or has not been brought to a hearing, or that the property preserved has been sold; *Jones v. Frost*, L. R. 7 Chy. 773.

The order may be intitled in the action only, and not in the matter of the Act or of the solicitor, and may be made upon notice of motion, or petition; *Hamer v. Giles*, 11 Ch. D. 942; *Brown v. Trotman*, 12 Ch. D. 880. See H. & L. Forms, No. 1318.

As to the form of the order, see *Orford v. Fleming*, 34 C. L. J. 413; H. & L. Forms, No. 1320.

Costs of Application.—The solicitor is entitled to his costs as between solicitor and client; *Waterland v. Serle*, 1897, W. N. 163 (9).

Effect of Order.—The charging order gives no higher claim than the ordinary solicitor's lien; see *Goodfellow v. Gray*, 1899, 2 Q. B. 498; 81 L. T. 314; and is subject to any claims, prior to the client's, on the property; *Taylor v. Robinson*, 19 P. R. 31; but a valid charge may be given on property of an estate of a deceased person recovered or preserved by a solicitor on the retainer of the personal representatives, which will be binding on the shares of the beneficiaries therein; *Ex p. Tweed*, 1899, 2 Q. B. 167; and the charging order will take priority over the claims of creditors, though they may have obtained prior charging orders against the assets; *Ridd v. Thorne*, 1902, 9 Ch. 344.

Enforcing Charge.—Where the charge is sought to be enforced, a subsequent application may be made by notice, or petition, in the action in which the charging order is made, and not by a new action;

see *Oxford v. Fleming*, 34 C. L. J. 218, 413; 18 C. L. T. 112; but Rule 1129 if asked for there would seem to be no reason why, where feasible, such relief should not be given by the order declaring the charge.

Where a charge was declared in favour of a solicitor upon a judgment recovered in an action by an infant by his next friend, the Court refused to enforce the charge by sale of the judgment, as that might destroy the value of the whole to the infant, but leave was given to the solicitor to enforce the judgment by execution, and to receive to his own use the amount of his charge: *Aveille v. Ballard*, 18 P. R. 134.

The lien may be enforced by a stop order: *Smith v. Winter*, 18 W. R. 447.

It would appear that the granting of a charging order is not intended to have the effect of a judgment, so as to prevent the running of the Statute of Limitations in respect of the costs intended to be secured thereby; and the charging order must therefore be enforced within the period within which the costs can be recovered by action.

CHAPTER XVII.

COSTS.

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1. GENERAL RULES.

To be in
discretion
of Court.

1130.—(1) Subject to the provisions of *The Judicature Act, 1895*, and to the express provisions of any statute heretofore or hereafter passed, the costs of and incidental to all proceedings in the Supreme Court shall be in the discretion of the Court or Judge, and the Court or Judge shall have full power to determine by whom and to what extent the costs shall be paid.

Saving as
to trustees,
etc.

(2) Nothing herein contained shall deprive a trustee, mortgagee or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the rules acted upon before *The Ontario Judicature Act, 1881*, in Courts of Equity.

Or issues
tried before
jury.

(3) Where an action or issue is tried by a jury, the costs shall, subject to Rule 1132, follow the event, unless the Judge before whom the action or issue is tried, in his discretion, otherwise orders.

Or proceed-
ing before
judicial
officers.

(4) Costs of proceedings before Judicial Officers, unless otherwise disposed of, shall be, in their discretion, subject to appeal. Con. Rule 1170; Rules 4 Nov., 1893, 1274; 59 V. c. 18, s. 11.

Section 110 of the Jud. Act, *supra*, p. 106, provides that "subject to Rules of Court and to the express provisions of any statute, the costs of and incident to all proceedings in the Supreme Court of Judicature, shall be in the discretion of the Court or Judge, and the Court or Judge shall have full power to determine to whom and to what extent such costs are to be paid."

This *Rule* and the Statute apply both to costs in the High Court and in the Court of Appeal, and by *Rule* 1241 are made to apply to proceedings in relation to the quashing of convictions or orders. See also *Rule* 1238. Rule 1130

But the *Rule* does not apply to costs incurred in a matter before the proceedings have actually come into Court: *Re Bonadeth's Trade-mark*, 9 Ch. D. 618.

"Any Statute heretofore or hereafter passed." — The Jud. Act, s. 119, and the present *Rule*, have the effect of preserving in force any special statutory provisions in force at the date of *The Judicature Act*, 1895, relating to costs in particular cases. All such provisions in Ontario Acts have now been inserted in *The Revised Statutes*, 1897. Certain statutory provisions regarding costs are to be found in the Imperial Statutes, revised and consolidated in R. S. O. 1897, vol. 3, e.g., as to costs of contempt: see c. 324, ss. 18-20; of charging orders, c. 321, s. 22; of *quo warranto* proceedings, c. 324, s. 37; of proceedings under *The Trustee Relief Act*, c. 336, s. 20; of proceedings for leasing, or renewing, or surrendering leases of lands in which infants or lunatics are interested; and of applications to apply dividends on stock for maintenance of infants or lunatics: c. 340, s. 20; c. 341, s. 16; actions for wrongful distress: c. 342, s. 18 (21); applications for renewals of leases in case of absentee lessors: c. 342, s. 20.

The discretionary power is not taken away by an Act providing that a judgment in an action contemplated by the Act "shall carry costs to be taxed as between solicitor and client": *Bostock v. Ramsay, Urban, etc.*, 1900, 1 Q. B. 357, 2 Q. B. 616.

Where before the Act the Court had no power, original or statutory, to award costs, it has now power to do so: see *Re Gaulty & Manchester & S. Ry. Co.*, 1896, 2 Q. B. 439; *Ex p. Hospital of St. Katherine's*, 17 Ch. D. 378; *Re Lee v. Hemmings*, 21 Ch. D. 669; see also *Irscott v. Lilley*, 14 Ont. App. 295; *Re Knight's Trusts*, 26 Ch. D. 82; *Re Wood*, 31 Ch. D. 697; *Kingston v. Murphy*, 11 T. R. 304; *London County Council v. Churchwardens of W. Ham.*, 1892, 2 Q. B. 173; *Re Fisher*, 1894, 1 Ch. 459. Prior to the Jud. Act it would seem that the Court had not, (see *The Queen v. Jones*, 1894, 2 Q. B. 382); but it has now power to award costs against a defendant in *habeas corpus* proceedings: *Re Weatheroll*, 1 O. L. R. 542; and it has been held that, in a civil proceeding, where an Act gives jurisdiction to determine questions, but is silent as to costs, the Court has inherent jurisdiction to order a person wrongly putting it in motion to pay costs: *Re Bombay Civil Fund Act*, 40 Ch. D. 288. So where costs are not asked for by a rule nisi, but are asked for at the bar, they are in the discretion of the Court, and may, nevertheless, be awarded, where the opposite party appears: *Re Peck & Galt*, 46 U. C. Q. B. 211; but where the opposite party does not appear the Court will not usually give costs if they have not been asked by the notice of motion. In England neither an order for an interpleader issue: *Wicks v. Wood*, 26 W. R. 680; *Hartmont v. Foster*, 8 Q. B. D. 82, nor sending a case for trial to a County Court: *Farrers v. May*, 44 L. T. 148, removes the case from the jurisdiction of the High Court as to costs; but see *Rules* 1124, 1128, and secs. 92 to 94 of the Act.

This *Rule* also repeals all former practice which laid down any special rule as to costs: *The Friedberg*, 10 P. D. 112.

The *Rule* applies not merely to costs at the trial but also on motions: *Young v. Thomas*, 1892, 2 Ch. 431; and where the Court is

Rule 1130. exercising statutory jurisdiction, as *e.g.*, under an expropriation Act: *Re Schnarr*, 1902, 1 Ch. 326; but it only applies to proceedings in the Supreme Court of Judicature, and does not give a Judge jurisdiction over costs in matters where he acts under a statute merely as *persona designata*, and not by virtue of his office as Judge: *Re Young*, 14 P. R. 303; *Re Pacquette*, 11 P. R. 463; but the costs of such proceedings are now in the discretion of the Judge by virtue of R. S. O. c. 76, s. 5. The Rule not only applies to civil proceedings, but also to proceedings in relation to the quashing of convictions or orders, whether they be affirmed or quashed in whole or in part: *Rules* 1238, 1241; but does not enable the Court or a Judge to award costs in other Crown cases where they are not otherwise by statute or Rule authorized so to do: *London County Council v. West Ham*, 1892, 2 Q. B. 153; and see *The Queen v. Jones*, *supra*; nor in cases where the Court has only a consultative jurisdiction, as upon a special case stated by an arbitrator: *In re Knight & The Tabernacle Building Socy.*, 1892, 2 Q. B. 613.

Notwithstanding that an application fails on the ground that the Court has no jurisdiction to give the relief sought, the unsuccessful party may nevertheless be ordered to pay the costs of the proceeding: *Cote v. Halliday*, 33 C. L. J. 159; 17 C. L. T. 53; *Great Northern v. Inett*, 2 Q. B. D. 284; *Crowther v. Boulton*, 33 W. R. 150; and in cases in the County Court, see *Rule* 1215.

"Full costs" referred to in the Imp. Copyright Act, 5 & 6 Vict., c. 45, s. 26, is held to mean no more than the usual costs taxable between party and party: *Avery v. Wood*, 1891, 3 Ch. 115; and that expression in an order or judgment is in England held to mean merely the ordinary party and party costs taxable according to the scale properly applicable: see *Irvine v. Reddish*, 5 B. & Ald. 796; *Jamieson v. Trevelyan*, 10 Ex. 748; but the words "full costs and expenses" are held to cover costs as between solicitor and client: *Dodd v. Hyde v. Manchester*, 12 C. B. 474. The expression "full costs" has been held in Ontario to mean costs according to the High Court scale: *per Falconbridge, J., Marsh v. Burns*, March, 1897, but see *Ireland v. Pitcher*, 11 P. R. 403.

Proceedings before Judicial Officers.—It has been held by Street, J., that it is not intended by Clause (4) of *Rule* 1130, that the discretion of the appellate tribunal should be substituted for that of the judicial officer whose decision is appealed from: *Campbell v. Wheeler*, 17 P. R. 289; and that the Court will not interfere with the discretion exercised as to costs, unless the officer whose order is appealed from has proceeded upon some erroneous principle of law, or upon some misapprehension of the facts of the case: *Ib.*; see also *Knickerbocker v. Ratz*, 16 P. R. 191.

The costs of proceedings before an Official Referee would seem to be within the provisions of *Rule* 1130 (4); but see *Minister v. Appleby*, 1902, 1 K. B. 643.

Generally.

Costs Generally of Proceedings in the Supreme Court.

The costs of proceedings in the respective branches of the Supreme Court are in the discretion of the Court or Judge before whom such proceedings come for hearing or determination: *Holmes v. Bramble*, 18 P. R. 79; *In re Schnarr*, 1902, 1 Ch. 326.

The provisions of *Rule* 1130 are now applicable to motions to quash convictions: *Rule* 1241.

By various *Rules* special provision is made as to costs in particular **rule 1130**. cases—where a County Court has no jurisdiction; see *Rule* 1215; and *Great Northern, etc., v. Inett*, 2 Q. B. D. 284; *Crookthorpe v. Rault*, 33 W. R. 150; proceedings to examine judgment debtors and to attach delators; *Rule* 1139; on confession of defence; *Rule* 245; on discontinuance; *Rule* 430; on accepting money paid into Court in satisfaction; *Rule* 425; preliminary examinations of parties; *Rule* 1170; production or inspection of documents; *Rule* 1155; proving documents where notice to admit not given; *Rule* 1150; applications to extend the time for taking a proceeding; *Rule* 1152; by reason of a party not making admissions; *Rule* 1141; proceeding relating to "third parties." *Rule* 214, and see *Blare v. Ashby*, 12 Ch. 16, 682.

Costs under special Rules.

Costs at the Trial.—In actions tried without a jury the costs are not subject to certain special exceptions and restrictions in the discretion of the trial Judge, and without an order made in the exercise of such discretion, no costs will be taxable to any party; *Rule* 1130 (1).

Where, in an action tried by a Judge without a jury, no order is made as to costs, none are recoverable by either party; *Re Great Western Advertising Co. v. Rainer*, 9 P. R. 434; *Leamy v. Trimming*, 21 Q. B. D. 230. An order for payment of costs *simpliciter* does not preclude an inquiry under *Rule* 1132, as to the sums properly applicable; *Re Foster*, 18 P. R. 65; and it would seem that in such case where the Judge gives no directions disallowing a set-off of costs by defendant (such as is contemplated by *Rule* 1132), the Taxing Officer has now power to allow such set-off; *Rule* 1132; see formerly *Tenax v. Dixon*, 13 P. R. 273.

In an action tried without a jury, judgment being given for plaintiff, on the claim and counter-claim, but for defendant against third parties with "such costs as defendant would be entitled to by law," it was held that the costs being in the discretion of the Judge, and no discretion being exercised in favour of defendant against the third parties, the defendant was not "entitled by law" to costs; *Leamy v. Trimming*, 21 Q. B. D. 230.

In actions tried by a jury, the costs of the trial period *facie* must always follow the event, but the Judge has a discretion subject to certain special exceptions and restrictions, to make a different order; *Rule* 1130 (3).

Where an action is tried before a Referee, see *supra*, p. 1340.

Where interlocutory costs have been ordered to be paid by either party, a subsequent dismissal of the action without costs, does not affect the order as to such interlocutory costs; *Walter v. Bawle*, 90 L. T. 409.

Costs on Motions.—The power as to costs is exercisable not merely at the trial but also on motions for judgment; *Young v. Thomas*, 1892, 2 Ch. 134; 66 L. T. 575; and extends to costs to be dealt with on interlocutory proceedings before the trial, so that they may be directed to be borne by one party in any event; *Pearcy v. Great Northern Ry. Co.*, 9 Q. B. D. 168. See *infra*, pp. 1346-1349.

Motions.

The dismissal of an action for want of prosecution without costs is within the discretion of the Judge, and there is no appeal without leave; *Soelling v. Pulling*, 20 Ch. D. 87; and see *supra*, p. 123.

The Court has jurisdiction to grant prohibition with costs; *Rex v. JJ. of London, etc.*, 1891, 1 Q. B. 473.

Rule 1130. Costs of *habeas corpus* proceedings in civil cases, are in the discretion of the Court, and where a return has been made to the writ and the body produced, the Court may order the applicant to pay the expenses of complying with the writ: *Re Weatherall*, 1 O. L. R. 512.

Where the Court makes "no order as to costs," that is a refusal of costs to either party: *McCur v. Botsford*, 38 C. L. J. 496; *In re Hodgkinson*, 1897, 2 Ch. 190.

Where judgment is entered without a trial.

Costs where Judgment entered without Trial or Motion.—When judgment is entered without a trial, or motion for judgment, and therefore without any express directions as to costs, the scale of costs is determined by the Taxing Officer, under *Rule 1133*.

Scale of costs.

Scale of Costs.—In the case of actions brought in the High Court, which might have been brought in an inferior Court, if no order is made by the Judge, *Rule 1130* (3) applies and prescribes the scale upon which the costs are to be taxed; but whether the action is tried with, or without, a jury the Judge may give special directions as to the scale. It was said in *Bennett v. White*, 13 P. R. 172, that in exercising the Judge's discretion there was no better guide than the rule laid down by *Rule 1132*, in default of special directions; but the Judge's discretion is not fettered by any *Rule*, except *Rule 1130* (2).

Where a plaintiff takes money out of Court under *Rule 425*, even though the amount be within the jurisdiction of an inferior Court, he is, under that *Rule*, entitled to his full costs without any set off to the defendant; and a Judge has no jurisdiction under this *Rule* to make any other order as to the costs: *Babcock v. Studish*, 11 P. R. 147.

"Full costs," even where given by statute, do not include any more than the usual costs taxable between party and party: see *Avery v. Wood*, 1891, 3 Ch. 115; 65 L. T. 122; *sed vide*, *Marsh v. Burns*, 41 W. R. 1340.

Suggerency and how to dispose of costs.

Disposal of Costs of Action on Motion in Chambers.

Although the discretion of the Court as to the costs of a contested action is usually exercised at the trial, or on motion for judgment, yet, where the object of the action is obtained without a trial or motion for judgment, it is improper to bring the action to trial, or hearing on motion for judgment, merely for the purpose of obtaining an adjudication as to the costs, without first offering to have the question disposed of in Chambers; see *Sirell v. Abraham*, 8 Beav. 598; *Morgan v. Great Eastern Ry. Co.*, 1 H. & M. 78; *O'Sullivan v. Chilton*, 26 Gr. 612; *Webb v. McArthur*, 3 Chy. Ch. 364; but if the opposite party refuses to consent to the disposition of the costs in that way, the action must be tried, or heard on motion for judgment. *Hunter v. Strathroy*, 18 P. R. 127; see also *Sandarschein v. Backus*, 57 L. T. 712; *Blackley v. Tappin*, 9 C. L. T. 143; *Storr v. Malleson*, W. N. 1878, 219; *Dicks v. Yates*, 18 Ch. D. 77; *Landed Estates Company v. Wooding*, W. N. 1871, 138; *White v. White*, 4 D. G. F. & J. 348; *McLean v. Cross*, 3 Chy. Ch. 432; *sed vide* *Kaicherslocher v. Ratz*, 16 P. R. 193, where a contrary view is expressed; and the extra expense so occasioned will be considered in disposing of the costs, and in any event may be ordered to be borne by the party who has occasioned them; see *Eastwood v. Henderson*, 17 P. R. 578; *East v. O'Connor*, 2 O. L. R. 355.

At all events the plaintiff cannot compel the defendant to submit to a disposition of the question of costs in Chambers where the ac-

alleged by the plaintiff to be a satisfaction of his claim is equivocal, **Rule 1130** and the defendant denies that the plaintiff had any cause of action: *Hunter v. Strathroy, supra*.

It was apparently doubted by Spragge, C.: *McLean v. Cross*, 3 Ch. Ch. at p. 433, whether the former Referee in Chambers had jurisdiction to entertain such applications; and as to whether the Master in Chambers has such jurisdiction has been doubted: see *per Meredith, J., Knickerbocker v. Ratz*, 16 P. R. at p. 39, and see *Jones v. Miller*, 16 P. R. 92; *King v. Federal Bank*, 17 P. R. 65.

Sometimes in such cases where parties consent, an interlocutory motion in Court is treated as a trial of the action, and the costs are then disposed of: *Barber v. Penley*, 68 L. T. 662; and where the parties agree to an order being made in Chambers to carry out a settlement, the plaintiff cannot recover the costs of moving in Court: *Allen v. Oakey*, 62 L. T. 724. *See quere*, see *Craig v. Craig*, 1 Ch. Ch. 41.

Where there is no object in proceeding with the action except to determine the question of the costs of it, owing to the loss or destruction of the subject matter, or other circumstances occurring after the commencement of the action, the plaintiff must nevertheless proceed either by trial, or motion for judgment, or, by consent, by motion in Chambers, to have the question of costs disposed of, otherwise the defendant may apply to dismiss for want of prosecution: *Elliott v. Gardner*, 8 P. R. 409; see also *Hogaboom v. Gillies*, 16 P. R. 402.

The Crown.—Formerly the rule was that the Crown, when a party to civil proceedings, was neither ordered to pay nor receive costs: see *Reg. v. Mainwaring*, 5 O. S. 670; *Gibson v. Church*, 1 Ch. Ch. 69; *United States v. Denison*, 2 Ch. Ch. 263; *Johnson v. Rex*, 1904, A. C. 817; 91 L. T. 234; but now in proceedings by petition of right the costs are in the discretion of the Court: *Rule 934*; as also in proceedings on a special case: see *Attorney-General v. Toronto General Trusts Corp.*, 5 O. L. R. 607; but in proceedings of a strictly common law character it would seem that the old rule still prevails: *Rex v. Archbishop of Canterbury*, 1902, 2 K. R. 503; 86 L. T. 459.

Suitors in Person.—As a rule a suitor, not being a solicitor, suing or defending in person, is not entitled to solicitor's costs, but, at most, to his actual disbursements, and a reasonable allowance for loss of time: see *Dax's M. O.* 31; where a suitor in person successfully opposed an appeal to the Divisional Court he was allowed his disbursements, and "a moderate amount for his time and trouble on the argument" to be set off against the debt due by him to the plaintiff in the action: *Miller v. Macdonald*, 14 P. R. 491; but where a duly qualified solicitor sues or defends in person, and he is awarded costs, he is, unless acting in a fiduciary character, entitled to make and recover the same charges as when acting for another: *Lush Pr.* 75, 800; except for taking instructions: *Dax's M. O.* 31; and see *Guy v. Brown*, L. R. 1 P. C. 411; and if he is also a barrister, and also acts as counsel he cannot recover his counsel fee: *Clarke v. Creighton*, 15 P. R. 105; but if his partner acts as counsel he may tax his counsel fee, or such part thereof as he has no interest in: *Henderson v. Camer*, 3 V. C. L. J. 29; *Johanson v. Ryckman*, 7 O. L. R. 511; and even when, being a co-trustee with others, he acts for himself and co-trustees as solicitor and counsel, he may, if awarded costs, tax against the opposite party full costs, including instructions.

Rule 1130. and counsel fees: *Strachan v. Rutlan*, 15 P. R. 169; ordinarily, solicitor, trustee, or mortgagee, when acting in person for himself alone is only entitled to costs out of pocket, either as against the trust or mortgaged estate, or his *cestui que trust*, or mortgagor, as the case may be, unless expressly empowered to charge for his professional services as against the trust estate, or mortgagor: see note to Rule 667, *supra*, pp. 892, 896.

Trustees,
Re.

Suitors in a Fiduciary Capacity.—A trustee or liquidator, or other person in a fiduciary capacity suing or defending in his own name ordinarily becomes liable to be ordered personally to pay costs to the opposite party: *Macdonald v. Balfour*, 20 Ont. App. 404; *L. v. Brown*, 17 Q. B. D. 488; *Smith v. Williamson*, 13 P. R. 126; *Re Ry. Co. v. Jones*, 13 Gr. 355; and where a liquidator of a company intervened and obtained leave to defend an action brought against the company, he was held to be personally liable to the plaintiff for costs: *Boyd v. Dominion Cold Storage Co.*, 17 P. R. 468. But where an action is brought by a liquidator of a company in the name of the company, and the liquidator is not personally a party, he cannot be ordered to pay the costs of the action: *Ontario Forge & B. Co. v. The Comet Cycle Co.*, 17 P. R. 156; and a liquidator who *bond fide* contested a claim was held to be not personally liable for costs, though he failed in the litigation: *Re Bolton*, 1895, 1 Ch. 333, overruling *Staffordshire Gas Co.*, 1893, 3 Ch. 523.

Executors were given costs of opposing an unsuccessful appeal, out of the estate, in the event of their not being able to make them out of the appellant: *Re Cassie*, 17 P. R. 402.

An administrator is entitled to his costs of an administration action (which may, however, be given in the form of a commission under Rule 1146), even though the action has been caused by a claim by him for the allowance of payments which are disallowed in the action, provided the claim is made under an honest mistake, and is neither fraudulent nor unproven: *Re Jones*, 1892, 2 Ch. 190; but see *Re Skinner*, 1904, 1 Ch. 289.

Where in an action between a trustee and his *cestui que trust* the Court makes "no order as to the costs," such adjudication is final, and the trustee cannot afterwards retain his costs of the proceedings out of the trust estate: *Re Hodgkinson*, 1895, 2 Ch. 190; 72 L. T. 517. And when on an appeal on the merits the appellate Court has refused to make an order for the payment of the costs of a trustee or executor out of the estate or fund in litigation, it is not competent for the Court of first instance thereafter to make any such order: *Puccell v. Borgia*, 16 P. R. 301.

Indemnity
out of trust
estate.

A person occupying a fiduciary position, who is improperly paid costs, has no right to indemnity out of the trust estate unless the proceeding was for the benefit or protection of the estate, e.g., a receiver sued for misfeasance and succeeding in the action, which is dismissed with costs, is not in the event of being unable to recover the costs from the plaintiff entitled to payment thereof out of the estate of which he is receiver: *Re Dunn*, 115 L. T. 396; neither can a receiver recover such costs from his *cestui que trust*, unless they have expressly agreed to indemnify him: *Johuston v. Dulmagr*, 30 Ont. 293; and an executor bringing an unsuccessful action to recover a sum of money alleged to be due to the testator's estate, is not entitled to resort to the specifically devised remedy for payment of his costs, even though the personal estate is exhausted: *Le v. Champagae*, 7 O. L. R. 537. And where a defendant is sued in a fiduciary character, and

judgment is given against him with costs, the plaintiff cannot deduct such costs from moneys in his hands to which the defendant is entitled in his fiduciary character, even though the defendant may have a beneficial interest in a share of the fund: *Phillips v. Howell*, 1901, 2 Ch. 773; 85 L. T. 777. **Rule 1130.**

A creditor, or legatee, bringing an action for administration, though not standing in a fiduciary position, is, in case of a deficiency of assets, entitled to costs as between solicitor and client out of the estate: *Re New Zealand M. Ry. Co.*, 1901, 2 Ch. 357; 84 L. T. 852.

Where the costs of a trustee or personal representative in an administration action are ordered to be paid out of the estate in question, which proves deficient, the trustee or personal representative is entitled to be paid his costs in priority to those of the other parties, even though the order be silent on that point: *Re Griffith*, 1904, 1 Ch. 807; 90 L. T. 639.

Where a person suing or sued in a fiduciary character is ordered to pay costs, such order is appealable; but where he is refused costs it was held by Wright, J., that the order is discretionary, and not appealable: *In re Raynes Park Golf Club*, 1899, 1 Q. B. 961.

Pecuniary legatees, defendants in an action in which the validity of a will was in question, who put in formal defences submitting their rights to the protection of the Court, were held to be not entitled to costs out of the estate, nor from the plaintiff who had failed in having the will declared invalid: *Logan v. Herring*, 19 P. R. 168.

Married Women.—A married woman bringing an unsuccessful action, on a motion, may be ordered to pay the costs personally: *Morris v. Freeman*, 3 P. D. 351, followed by *Boyd, C. Barker v. Westover*, 31 May, 1882, and see *Ottway v. Ottway*, 13 P. D. 142; *Coe v. Bennett*, 1891, 1 Ch. 617; 64 L. T. 380.

Next Friend.—In general the next friend of an infant is in the same position as any other litigant, and receives and pays costs personally, as between himself and the opposite party. Where an infant by his next friend brings an unsuccessful action, the latter may be personally ordered to pay the opposite party's costs, but such order may be made without prejudice to any claim he may have to be indemnified out of the infant's estate: *Smith v. Mason*, 17 P. R. 444.

The Official Guardian ad litem.—The costs of the Official Guardian *ad litem* are usually ordered to be paid no matter what may be the result of the litigation, either out of the estate or fund, if any, in question, or by the plaintiff personally, with power to add them to his own costs. Where the action has been occasioned by the personal misconduct of an infant, for whom the Official Guardian *ad litem* appears, the infant may be ordered to pay personally the plaintiff's costs, including those paid by him to the Official Guardian *ad litem*: *Lipsett v. Perdue*, 18 Ont. 575; *Woolf v. Woolf*, 1899, 1 Ch. 343; 79 L. T. 725.

In England the costs of the official solicitor, when appointed guardian *ad litem*, if no special directions are given, are taxable as between party and party, but the Court may allow them as between solicitor and client, and *semble*, the Official Guardian *ad litem*, may obtain a special direction for taxation of his costs as between solicitor and client, even where he appears for an infant defendant *sua sponte*, and such costs may be ordered to be paid by the plaintiff and

Rule 1130. added to his own: see *Eady v. Elsdon*, 1901, 2 K. B. 460; 84 L. T. 615, and *Rule 1138*.

Discretion
of Court.

Discretion of Court or Judge, Extent of.—Where the right to exercise a discretion as to the costs of an action or proceeding exists, no hard and fast rules can be laid down as to the manner of exercising it: *The Friedberg*, 10 P. D. 112; *Badische Anilin, etc. v. Leviustein*, 29 Ch. D. 366.

The discretion is a judicial one, and it has been said that a plaintiff who successfully enforces a substantial legal right, and in no way misconducts himself, may not be deprived of costs, but is entitled to them as of right: *Cooper v. Whittingham*, 15 Ch. D. 501; and see *Bell v. Wilson*, 19 P. R. 167; but see the remarks of Bowen, L.J., in *Young v. Thomas*, 40 W. R. 468, referring to *N. London R. Co. v. G. N. Ry. Co.*, 11 Q. R. D. 30; and *Hayward v. E. London Ry. Works*, 28 Ch. D. 146; *The Condor*, 4 P. D. 120; *The Monkseaton*, 14 P. D. 51; *Upmann v. Forester*, 24 Ch. D. 231; *Goodhart v. Hyett*, 25 Ch. D. 182; *Wittmann v. Oppenheim*, 27 Ch. D. 260; 54 L. J. Chy. 56; *Patullo v. Orangeville*, 31 Ont. 192; *Anglo-Canadian M. P. Assn. v. Somerville*, 19 P. R. 113; but where the plaintiff recovers only nominal damages, or a very trifling part of his claim, he is not entitled to costs as of right: *Florence v. Mallinson*, 65 L. T. 354; and see *American Tobacco Co. v. Guest*, 1892, 1 Ch. 630; and he may be ordered to pay the defendant's costs (even where the case is tried by a jury): *Harris v. Petherick*, 4 Q. B. D. 611; and see *Forget v. Ostiguy*, 1895, A. C. 318.

A successful defendant is *prima facie* entitled to costs, and it is not a proper exercise of discretion as to costs to deprive him of costs, because he has done some act which, although a fraud on the public, is not in any way connected with the issue between himself and the plaintiff: *King v. Gillard*, 1905, 2 Ch. D. 7; 92 L. T. 605; and see *Civil Service Co-operative Soc. v. Gen. Steam Navigation Co.*, 1903, 2 K. B. 756; 89 L. T. 429. If a successful defendant is deprived of costs, where no material exists for the exercise of the Judge's discretion, the order as to costs is appealable: *Ib.*

It was for some time doubtful whether, where the plaintiff fails, the defendant could be ordered to pay the whole costs: see *Dicks v. Yates*, 18 Ch. D. 76; *Foster v. G. W. Ry.*, 8 Q. B. D. 25, 515; *Butcher v. Pooler*, 24 Ch. D. 273; *Lambton v. Parkinson*, 37 W. R. 545; *Mitchell v. Vandusen*, 14 Ont. App. 517; *Forget v. Ostiguy*, 1895, A. C. 318; 72 L. T. 399; but it would now seem to be settled that he cannot be so ordered, unless the plaintiff was entitled to bring the action, and it has failed merely by reason of circumstances subsequently occurring: *Fleming v. Toronto*, 19 Ont. App. 318; *Andrew v. Groce*, 1902, 1 K. B. 625.

Thus a defendant as to whom the action is dismissed cannot (except as above mentioned) properly be ordered to pay the plaintiff's costs: *Wills v. Carman*, 14 Ont. App. 656; confirming *Mitchell v. Vandusen*, 14 Ont. App. 517, where the question of the power to make a successful party pay costs was also raised, but was not necessary to the decision: see also *McDermid v. McDermid*, 15 Ont. App. 287; but he may be ordered to pay the costs of a co-defendant, though there is no issue between them: *Church v. Fuller*, 3 Ont. 417; and see *Rule 1144*, and notes.

In *McNair v. Boyd*, 14 P. R. 132, the C. A. allowed an appeal with out costs, where the case was the first which had come before the Court as to the meaning of a new Rule about which there had been much difference of opinion.

The Court cannot, except under some special statute, impose costs, Rule 1130, beyond the costs of suit, by way of penalty. The discretion as to costs, however, extends to ordering a defendant to pay half the costs, or a fixed sum in lieu of costs: *Rule 1137*; *Wilcott v. Barbee*, 17 Ch. 16, 772; *Ryan v. Fish*, 4 Ont. 335, 344; see *Cockburn v. Edwards*, 18 Ch. D. 449, 459; *Harrison v. McSheehan*, W. N. 1885, 207; or no more costs than the verdict: *Hancock v. Hale*, 28 Sol. Jour. 231, where only £21 was recovered on a much larger claim; or costs as between solicitor and client (in matters of equitable jurisdiction at any rate): *Andrews v. Barnes*, 39 Ch. D. 133; *Sandford v. Porter*, 16 Ont. App. 565, 577; or to giving no costs where the action was within the jurisdiction of an inferior Court: *Vandercaeters v. Hoctou*, 9 Ont. 548; *Kay v. Tighe*, 18 L. R. Ir. 40; or where the defendant, who was nearly of age, had avoided the contract sued on, on the ground of infancy: *Edison Co. v. Smith*, 119 L. T. Jour. 106; or only such costs as would have been incurred had a less costly mode of proceeding been adopted: *Hullis v. Skain*, 21 Ont. 532; *McPherson v. Levin*, 26 Ont. 440; *Re Brown*, 32 Ont. 323; or to directing a solicitor to pay costs personally: *Barnard v. Stoles*, 37 W. R. 658; or to directing costs to be borne by an infant: *Lipscomb v. Perdue*, 18 Ont. 575; *Woolf v. Woolf*, 1894, 1 Ch. 343; 79 L. T. 725; or to refusing costs to a party, though successful, whose conduct has been discreditable in respect to some matter connected with the litigation in question: *Darby v. City of Toronto*, 17 Ont. 554; *Robinson v. Bogle*, 18 Ont. 387; and see *King v. Gillard*, *supra*, p. 1340; or harsh and unreasonable: *American Tobacco Co. v. Guest*, 1892, 1 Ch. 630; or whose claim is trivial: *Lladadno v. Woods*, 1899, 2 Ch. 705; or who has made improper charges of fraud, etc., which are not sustained: *Fry v. Lane*, 40 Ch. D. 312; *Tenute v. Walsh*, 24 Ont. 309; *In re Stanton*, 3 Ont. 86; *Stretton v. Holmes*, 19 Ont. 286; *Beatty v. O'Connor*, 5 Ont. 747; or to directing payment of the opposite party's costs of such charges: see *Neale v. Winter*, 9 Gr. 261; *Hudgins v. McNeil*, *Id.*, 305; *Watson v. Watson*, 23 Gr. 70; *Teucher v. Calder*, 1890, A. C. 451; *McKenzie v. Fielding*, 11 Gr. 406; so also costs may be refused where a party otherwise misconducts himself, as by making an untruthful defence: *Finlayson v. Mallard*, 10 Gr. 130; or unnecessarily bringing a suit: *Darling v. Wilson*, 16 Gr. 255; *Spring v. Cross*, 3 Chy. Ch. 432; *Ashworth v. Lord*, 36 Ch. D. 545; *Geahan v. Ross*, 6 Ont. 154; *Smallpiece v. Lev*, 20 Sol. Jour. 61; *Beatty v. O'Connor*, 5 Ont. 747; or trustee: *Easton v. Landoe*, 67 L. T. 833; or he may be ordered to pay costs: *Faire v. Fane*, 13 Ch. D. 228; *Re Calthorn*, 46 L. T. 848; W. N. 1882, 92.

But in testamentary cases, where a will set up is obtained under suspicious circumstances, a defendant setting up fraud and undue influence, may, though unsuccessful, nevertheless be entitled to costs out of the estate: see *Gilbert v. Ireland*, 9 O. L. R. 124; *Wilson v. Russell*, 1903, P. 235; 89 L. T. 786, but subsequent to the payment of the plaintiff's costs as between solicitor and client; *Id.*, or though the plaintiff be unsuccessful the action may be dismissed without costs: *Logan v. Herring*, 19 P. R. 108.

Costs out of the estate have, under special circumstances, been allowed to all parties, in an action to establish a will; though fraud and undue influence were charged and not established: *Gilbert v. Ireland*, 9 O. L. R. 124.

In an action for the construction of a will, the costs of all parties, in the absence of misconduct, are usually ordered to be paid out of the estate of the testator under whose will the difficulty arose: construction *Shortman v. Shortman*, 37 L. T. 717; and see *Id.* as to the prin. of will.

See v. Shortman
9 O. L. R. 671.

Awarding
costs out of
an estate.

Costs in an
action for
construction
of will.

Rule 1130. principles upon which costs will be allowed out of an estate where a will is disputed on the ground of undue influence, is established; but costs in an action in which an estate is interested cannot properly be ordered to be paid out of such estate unless the estate is before the Court in the litigation: *Crawford v. Broddy*, 18 P. R. 233.

Where money paid into Court.

Where in an action on a covenant the defendant paid money into Court and denied the breach, and a referee, to whom the issues were referred, reported that the money paid in was sufficient to satisfy the claim, it was held that the costs were in the discretion of the Court, and that the proper method of exercising it was by allowing the plaintiff his costs up to the time of payment into Court, and the defendant the costs of the action after that time: *Buckton v. Hogg*, 4 Ex. D. 174.

Where money is paid in with a defence denying liability, and the plaintiff fails to recover as much as is paid in, but succeeds on the issue as to liability, the plaintiff is entitled to the costs of the action up to the time of payment in, and of the issues as to liability raised by the defendant; and the defendant is entitled to his costs of action after payment in, other than the costs of the issues on which he fails: see *Wagstaffe v. Bentley*, 1902, 1 K. B. 124; *Ridout v. Green*, 87 L. T. 670; *Hubbark v. British North Borneo Co.*, 1904, 2 K. B. 473.

Where money is paid into Court in satisfaction of a claim for damages which the plaintiff accepts in full of that claim, but proceeds to trial claiming an injunction, or other relief, which is refused with costs, and the money paid into Court is ordered to be paid to the plaintiff with costs of that claim; under such an order the general costs of the action are apportionable: *Todd v. N. E. Ry. Co.*, 87 L. T. 740, 88 L. T. 112; 1903, W. N. 30.

But where a cause was referred by consent at a trial to the Master under the C. L. P. Act, as a matter of account, formal judgment being entered for the plaintiff, and the order of reference was silent as to costs, after an award that nothing was due to plaintiffs beyond money paid into Court, it was held that the proceedings were not "proceedings in the High Court" within this Rule, but withdrawn from it by an agreement of the parties, and, the parties having agreed to its terms, the Court could not add to it, and had no power to give costs: *Wimburst v. Barrow Ship Building Co.*, 2 Q. B. D. 335.

Effect of the issue of a writ on right to costs.

A defendant cannot escape the costs of a writ of summons by tendering the amount sued for before service, but after the issue of the writ: *O'Malley v. Killmallock*, 22 L. R. Ir. 326, and see *Hughes v. Austin*, 1894, 1 Q. B. 637; *Du Pasquier v. Cudbury, Jones & Co.*, 1903, 1 K. B. 194; but where no writ has been issued, it would seem that no costs of proceedings taken with a view to bringing an action are recoverable from a defendant: *Holman v. Stephens*, 6 Jur. N. S. 124.

Successful defendant.

Where a defendant succeeds generally he may have the costs of some of his defences on which he has not succeeded; but where he has raised a distinct issue and failed he ought not to have the costs of that issue, but should be ordered to pay them: *Blank v. Footner*, 39 Ch. D. 608; *Reinhart v. Mentasti*, 42 Ch. D. 690.

Where plaintiff recovered no more than a sum paid into Court, with a defence denying the negligence on which the action was based, it was held that, though the defendant was entitled to the general costs of the action, there was power in the discretion of the Court to give the plaintiff costs of the issue of negligence on which he had succeeded: *Dunn v. S. E. & Chatham Ry. Co.*, 1903, 1 K. B. 358; *Hubbark v. British North Borneo Co.*, 91 L. T. 672.

As to the costs of a guilty wife in an action for ulimony: see **Rule 1130**, *Thompson v. Townson*, 78 L. T. 54.

In particular classes of cases, where by the practice before the Costs in Jud. Act certain rules have been developed as the just mode of disposing of costs, in such cases the discretion of the Court will probably be exercised in accordance with such rules, for example, as to the costs in partnership cases: *Chapman v. Newell*, 14 P. R. 208; *Ross v. White*, 71 L. T. 277; 1884, 3 Ch. 326; but see *Downey v. Roof*, 4 P. R. 80.

As to the case of "third parties," see *Bhore v. Ashby*, 42 Ch. D. 682; 38 W. R. 141, and notes to **Rule 214**. Third parties

A Judge has no power to delegate his discretion to the Taxing Officer: *Lambton v. Parkinson*, 35 W. R. 545. Delegation of discretion.

The fact that the action was brought without first making an application to the defendant for the relief sought, was not considered sufficient to deprive plaintiff of costs: *Goodhart v. Hyett*, 25 Ch. D. 182; *Wittman v. Oppenheim*, 27 Ch. D. 260; *Ruskin v. Robinson*, 2 Times, 18; but see *Holt v. Smith*, 3 Times, 329. Action brought without notice.

For the effect on costs of a refusal of a reasonable sum tendered before suit, see *The William Synnington*, 10 P. D. 1.

In an action for infringement of trademark, an offer of full compliance with the plaintiff's demands was made after action commenced, but, notwithstanding this, a motion for injunction was brought on. The motion was held not unnecessary, the compromise being insufficient, and the plaintiff was held entitled to costs: *Fenwick v. Day & Martin*, 55 L. T. 161; see also *Knickerbocker v. Ratz*, 14 P. R. 30, 191; *Trotter v. Maclean*, 13 Ch. D. 574; *Anglo-Canadian M. P. Assn. v. Winniffrith*, 15 Ont. 164; but where an action for infringement of trademark was brought against an innocent retail dealer without any previous notice, the Court, though granting an injunction, refused to order the defendant to pay costs: *American Tobacco Co. v. Guest*, 1892, 1 Ch. 630; 66 L. T. 257.

A Judge before whom a second trial is held, has power (subject to any restriction contained in the order granting the new trial) to order a plaintiff who recovers a nominal sum to pay the costs of both trials, even where the action is tried with a jury: *Harvis v. Petherick*, 4 Q. B. D. 611; see *Fane v. Fane*, 13 Ch. D. 228; *Florence v. Mallinson*, 65 L. T. 354; and where the costs of the former trial were "ordered to abide the result" of a new trial, and at the new trial the jury only gave the plaintiff nominal damages, and no order was made as to costs, it was held that he was not entitled to the costs of the former trial; the result in such a case means the result as to costs: *Reutherston v. Metropolitan Dist. Ry.*, 1894, 1 Q. B. 666; *sed vide Kousen v. Rose*, *infra*, p. 1350.

In an action of slander, where the plaintiff only recovered \$1 damages the Court refused to interfere so as to deprive the plaintiff of costs, his conduct not having been reprehensible, and the smallness of the damages being due to the defendant's condition at the time the defamatory words were spoken: *Bell v. Wilson*, 10 P. R. 167.

Costs of Interlocutory Applications adjourned to the Trial.—The Judges in England have laid down the following rules, Costs of viz.: that where applications are adjourned to the trial, and are not adjourned then mentioned to the Judge, the costs of such applications are to be at the trial.

Rule 1130. costs in the cause, and taxed accordingly, and need not be mentioned in the judgment: where, however, an interlocutory application has been disposed of, but the costs of it have been reserved, such costs are not to be mentioned in the judgment or order pronounced at the trial, or allowed on taxation without the special direction of the Judge: see *British Natural Premium, etc., Assoon. v. Bywater*, 1897, 2 Ch. 591; 77 L. T. 22. Thus where a motion by plaintiff is adjourned till the trial and no mention is made of the costs of it then, or at the trial, a judgment dismissing the action with costs carries with it the costs of the motion: *Joanell v. Bishop*, 38 Ch. 15, 387. See also as to costs reserved to be disposed of at the trial: *Hodges v. Hodges*, 25 W. R. 162; *Fritz v. Hobson*, 14 Ch. D. 542. In Ontario no general rule such as that referred to above has been laid down, and it would seem to be necessary that the costs of all interlocutory motions adjourned, and all interlocutory costs reserved, till the trial, should be mentioned to, and disposed of by, the Judge at the trial.

Orders disposing of interlocutory costs are not interfered with by a general award of costs at the trial: *Beynon v. Godden*, 4 Ex. D. 246; *Walter v. Bewicke*, 10 L. T. 400; and cannot be reviewed at the trial. Thus where such costs are ordered to be "costs in the cause," the Judge at the trial cannot deprive the successful party of them: *Koosen v. Rose*, 76 L. T. 145; 45 W. R. 337; this was a decision of the English Court of Appeal; but see *contra, per Meredith, J.*, in *Chambers, Dickerson v. Ratcliffe*, 19 P. R. 223, and *per Rose, J.*, in *Muir v. Squire, Ib.*, 237, where it was held that the making of costs of an interlocutory motion "costs in the action" or "costs in the cause to the successful party in the action," is not a final disposition of the costs, but leaves such costs in the discretion of the Judge at the trial; and see *Beotherton v. Metropolitan Dist. Ry.*, *supra*, p. 1349, where costs were ordered to abide the result, and it was held that the result referred to was the result as to costs.

In *Fritz v. Hobson*, 14 Ch. D. 542, where costs of an injunction had been reserved till the trial, but counsel had then omitted to ask for them, the omission was supplied on subsequent motion under *Rule* 640; but such a motion must be made in Court to the Judge who tried the action, the Master in Chambers has no jurisdiction: *Jones v. Miller*, 16 P. R. 42.

Where upon a reference by consent, but not in a cause, the costs of the reference are left in the discretion of the arbitrator, the costs of negotiating and settling terms of the submission may be taxed as "costs of the reference": *Re Autothreptic, etc., Co., & Tansend & Co.*, 21 Q. B. D. 182.

Costs where equitable relief is claimed.

Equitable Relief.—Where the action is for relief of an equitable nature, the *Rule* limits the discretion of the Judge in his disposition of the costs of the action in certain cases, so that he cannot deprive a trustee, or mortgagee, or other person, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules acted upon before the Ont. Jud. Act, 1881, in Courts of Equity. Where, therefore, the disposition of costs made by a Judge is not in accordance with those rules, the order as to costs is appealable. Those rules affect not only the right to payment out of a particular fund, but also the quantum of costs to be allowed, *e.g.*, ordinary suitors are only entitled to costs as between party and party, but according to the rules in question, a suitor made a party in a fiduciary capacity and awarded costs, is in some cases entitled to them "as between solicitor and client."

A trustee, or other person in a fiduciary position, guilty of no misconduct, who is a party to an action, either as plaintiff or defendant, in his fiduciary character, is usually entitled to his costs either against the opposite party, or out of the trust estate, if it is before the Court in the litigation; *Crawford v. Braddy*, 18 P. R. 233. Where a settlement is set aside, see as to the trustees' costs, *Dutton v. Thompson*, 23 Ch. D. 278, in note to Jml. Act, *supra*, p. 117. Trustees who have been guilty of impropriety of conduct may be deprived of costs in the discretion of the Court; *Re Hoskins's Trusts*, 6 Ch. D. 281; *Turner v. Hancock*, 20 Ch. D. 303; *Re Cabborn, Gage v. Rutland*, 46 L. T. 848; W. N. 1882, 92; *Re Radcliffe, Pearce v. Radcliffe*, 44 L. T. 90; *Re Hawkins*, 16 P. R. 130; or may be ordered to pay costs: *Re Chapman*, 72 L. T. 66; *Re Skinner, Cooper v. Skinner*, 1904, 1 Ch. 289; but such an order is appealable, as the costs are not in the discretion of the Court if there was no misconduct; *Re Pugh, Lucia v. Pritchard*, 57 L. T. 858; *In re Raynes Park Golf Club*, 1890, 1 Q. B. 961. Where *costs in que trustem* were allowed their costs it was held on appeal that as they were improperly made parties, their costs were not in the discretion of the Court, and were disallowed; *Cooper v. Fecy*, 45 L. T. 532; W. N. 1882, 55.

The exception in clause (2) of the *Rule* applies not only to persons in a fiduciary position, but to "other persons" who, according to the rules of Courts of Equity above referred to, were entitled to be paid their costs out of any estate or fund in question; but this does not apply in favour of persons named as executors in a will unsuccessfully attempted to be established; see *Parcell v. Bergin*, 16 P. R. 301; nor to persons unsuccessfully claiming as next of kin against a deceased person's estate; *Lamb v. Clerihand*, 19 S. C. R. 78.

Where a creditor, legatee, or personal representative, takes proceedings for the administration of a deceased person's estate, he is entitled to costs out of the estate, unless there are special grounds for depriving him of them, and this rule is preserved by the present *Rule*, and as to such costs, controls the discretion of the Court; *Farrow v. Justin*, 18 Ch. D. 58; followed as to the costs of residuary legatees in *Re Woodhall, Gurlutt v. Hewson*, 2 Ont. 456; see also *Croggan v. Allen*, 22 Ch. D. 101; *Johnstone v. Cox*, 19 Ch. D. 17; *Turner v. Hancock*, 20 Ch. D. 303; *Re Chevall*, 8 Ch. D. 492; *Re McChellan*, 29 Ch. D. 495; *Sandford v. Porter*, 16 Ont. App. 565; and *Re v. Bew*, 1890, 2 Ch. 467; 81 L. T. 284; *Re New Zealand Ry.*, 1901, 2 Ch. 357; 84 L. T. 852.

Where in an action against a trustee the Judge declared that "he did not see fit to make any order as to the costs of the action," this was held to be a declaration that the trustee was not entitled to his costs, and had no right to retain them out of the estate; *Re Hodgkinson*, 1895, 2 Ch. 190.

Costs of a hostile action against a trustee seeking to charge him with costs on account of misconduct were not within the old rule of Chancery, that the plaintiff in an administration suit is entitled *prima facie* to costs out of the fund. Such costs are in the discretion of the Court and therefore an order as to them is not appealable without leave; *Williams v. Jones*, 3 Ch. D. 120.

An order allowing a trustee costs of some other proceedings as against his trust estate is appealable without leave; *In re Redden*, 1893, 1 Ch. 547; 68 L. T. 595.

Rule 1130. The rule that a trustee's costs are payable as between solicitor and client is not confined to cases where he is brought into Court against his will: *Blackley v. Ingram*, 9 C. L. T. 143.

Trustees and executors are, in litigating with third persons, in the same position in regard to their liability to costs, as parties litigating in their own right: *Smith v. Williamson*, 13 P. R. 129; *G. W. Ry. v. Jones*, 15 Gr. 335; *Macdonald v. Balfour*, 29 Ont. App. 494. As to the right of the trustees, etc., to be recouped out of the trust estate, see *supra*, p. 1344.

Mortgagee. A mortgagee is entitled, as by contract, to all costs properly incurred in enforcing his security, and such costs are not in the discretion of the Court: *Re Rio Grande, etc.*, S. S. Co., 5 Ch. D. 282; and see *supra*, p. 1063. See also notes to Jud. Act, sec. 72, and 29 Sup. Jour. 178, 181; but where he is a solicitor he cannot recover *pro* costs against the mortgagor or those claiming under him: *Eyre v. Wynn-Mackenzie*, 180 L. T. 822; and see *supra*, p. 802. A mortgagee making a wrongful claim and refusing to be redeemed, and thus occasioning the litigation, may be ordered to pay costs: *Squire v. Pardoe*, 60 L. T. 243. See also *Queen's College v. Claxton*, 25 Ont. 282; and, so also, if he is sued for a surplus in his hands after exercising a power of sale in his mortgage, if a balance is found against him he is liable to pay the costs of the action: *Boulton v. Rowland*, 4 Ont. 720.

A mortgagee is not disentitled to costs merely because he has *bona fide* claimed more than is actually found due to him: *Cotterell v. Stratton*, L. R. 8 Chy. 295; *Dalpau v. Dagenais*, 5 O. L. R. 265, nor because he has set up a right to consolidate securities which is disallowed: *Stark v. Reid*, 20 Ont. 257, though he may be disallowed costs occasioned by claims on which he failed; and see *supra*, p. 1063.

An action by a debenture holder to enforce payment of his debenture stands on the same footing as a mortgage action, and the plaintiff is not, even as against his co-debenture holders, who get the benefit of the action, entitled to costs as between solicitor and client: *In re Queen's Hotel*, 1880, 1 Ch. 732; except, perhaps, in the case of a deficient fund; see *Re New Zealand M. Ry.*, 1901, 2 Ch. 377, and *Mortgage Insurance Co. v. Canadian A. C. & C. Co.*, 1901, 2 Ch. 377.

General discretion where equitable relief granted. In cases unaffected by *Rule 1130* (2) where equitable relief is sought, the costs are in the discretion of the Judge, without any restriction. It would be impossible to indicate how that discretion is exercised in all cases, but although there are some cases in which a party, though successful, may be ordered to pay costs, the general rule is that, in the absence of any misconduct on the part of the successful party, he is usually awarded his costs as against the opposite unsuccessful party; see *Downey v. Roaf*, 6 P. R. 89.

Where an action to set aside an alleged fraudulent conveyance by a judgment debtor failed, and the grantee and debtor appeared by the same solicitor, and the action was dismissed with costs, those of the debtor to be set off *pro tanto* against the judgment of the plaintiff against him, it was held that one-third of the total costs taxed should be so set off: *Zoritz v. Dodge*, 17 P. R. 295, following *In re Colquhoun*, 5 D. M. & G. 35, and *Clark v. Firpo*, 17 P. R. 260; *Brunswick v. Sebore*, 1903, 1 K. B. 282, *infra*, p. 1373.

As to costs in administration actions, see notes to *Rule 944*, p. 1187, and *infra*, p. 1190.

For the mode of taxation of costs, where an action is dismissed, and the defendant appearing by the same solicitor was dismissed, with costs, and judgment was given for the plaintiff against the other, with costs, see *Clarke v. Virgo*, 17 P. R. 260.

As to costs of witnesses where plaintiff was ordered to pay the costs of the defendants so much of the costs as were occasioned by a particular contention, see *Lockard v. Waugh*, 17 P. R. 269.

Costs where Success divided on Several Issues:

In jury cases the observations following are in regard to the cases where the costs follow the "event," i.e., where the judge has not otherwise ordered.

Where the "event" is the result of a single issue, no difficulty occurs in the application of the *Rule*. It is where there are several issues, or there is a counter-claim, that difficulty arises.

Where there are several issues, and neither plaintiff nor defendant is wholly successful, the question arises, what the "event" is which the costs are to follow. It has been held that the word "event" in this *Rule* is complex, and must be read distributively as regards distinct causes of action. The general costs of the cause follow the judgment, but the costs of the particular issues must be respectively taxed in favour of the party who has succeeded on them; *Myers v. Defries*, 4 Ex. D. at p. 189; *Stooke v. Taylor*, 5 Q. B. D. 509; in which the previous case of *Staples v. Young*, 2 Ex. D. 324, was not approved of; see also *Ellis v. Doolan*, 6 Q. B. D. 521; *Waring v. Pearman*, 32 W. R. 429; *Lund v. Campbell*, 14 Q. B. D. 821; *Haicke v. Brear*, *ib.*, 841; *Goutard v. Carr*, 13 Q. B. D. 598 n; *Ahrbecker v. Frost*, 17 Q. B. D. 606; *Bertram v. Massey Mfg. Co.*, 13 P. R. 184; *Crepeau v. Pacaud*, 35 C. L. J. 114.

In each issue the "event" is the result of all the proceedings incidental to the litigation, and the costs which follow the event include the costs of all the stages of that litigation; and therefore where a new trial was had and the plaintiff on the second trial recovered a verdict, he was held entitled to the costs of the first trial as part of the costs of the action; *Fild v. Great Northern Ry.*, 3 Ex. D. 261; *Green v. Wright*, 2 C. P. D. 354; *Waring v. Pearman*, 32 W. R. 429; *Right v. Shaw*, 19 Q. B. D. 386. So where at the first trial the jury disagreed; *Copeland v. Blenheim*, 11 P. R. 54.

Where a plaintiff recovered a less sum than an amount paid into Court by the defendants for the sake of peace, the defendants, though held entitled to the general costs of the action, were nevertheless ordered to pay the costs of an issue as to which they had failed; *Hubback v. British North Borneo Co.*, 91 L. T. 672.

In *Abbott v. Andrews*, 8 Q. B. D. 648, where the plaintiff succeeded on some issues but was non-suited on others, no order being made as to costs, the defendant was held entitled to costs of issues on which the plaintiff was non-suited, and the plaintiff to the other costs, including the general costs of the cause.

Where two defendants are jointly represented by the same solicitor, and costs are awarded in favour of one defendant and against the other, the successful defendant, in the absence of any agreement between him and his co-defendant, as to how their costs are to be borne *inter se*, is entitled to recover from the plaintiff half the costs of the defence; *Beaumont v. Senior*, 1903, 1 K. B. 282; and see *Zavitz v. Dodge*, and other cases, *supra*, p. 1352.

Rule 1130. Where the plaintiff's claim is against two defendants in the alternative, he may be ordered to add the costs of the defendant as to whom he fails to his own, and get them over against the defendant as to whom he succeeds: see *Sanderson v. Blyth Theatre Co.*, 1903, 2 K. B. 533; 89 L. T. 159.

Where a judgment is ambiguous as to costs, application should be made to the Judge who pronounced it, to correct the ambiguity. It is not proper to bring the matter up on an appeal from the taxing officer: *Abbott v. Andrews*, 8 Q. B. D. 648; *Sparrow v. Hill*, 8 Q. B. D. 479, may also be referred to, though in that case the Judge made an order as to costs, and the question was the right interpretation of it. There the plaintiff succeeded on three heads of his claim, and was awarded costs in respect of the amounts recovered, and the defendant was given costs in respect of the rest. Therefore the plaintiff was held entitled to the general costs of the cause excepting those which related to the issues on which he had failed, and the defendant was given his costs of the latter issues; and see: *Davis v. Huol*, 4 O. L. R. 466.

Cases of
counter-
claims.

Counter-claims.—In cases where there are counter-claims most difficulty has occurred in jury cases where costs follow the event under Rule 1130 (3), or in any case where an order is made which has the same practical effect as to costs, *e.g.*, giving costs simply to the party successful on the counter-claim.

Strictly speaking a counter-claim is a claim which a defendant prior to the Judicature Act could only have set up by cross-action, or by a claim for cross-relief: see *Girardot v. Welton*, 19 P. R. 162, 201.

There is a distinction between cases where a defendant sets up a counter-claim in the nature of a set-off of a debt or liquidated claim, and a counter-claim for unliquidated damages.

Under the present Rule 251 both kinds of claims may be presented by the defendant in the pleading called a counter-claim: see *Bennett v. White*, 13 P. R. 151; but a true set-off does not lose its real character by being pleaded as a counter-claim: *Ryan v. Fraser*, 16 L. R. Ir. 253; *Cutler v. Morse*, 12 P. R. 594; *Bennett v. White*, 13 P. R. 149; *Sanderson v. Ishfield*, 13 P. R. 230; and the costs are taxable on the same principles as they would have been taxed in like case before the Jud. Act: *Cutler v. Morse*, *supra*; see also *Wight v. Shaw*, 19 Q. B. D. 396; *Girardot v. Welton*, 19 P. R. 162, 201.

In *Boecker v. Kesteren*, 47 L. T. 545, the plaintiff claimed £49 17s., the defendant admitted the claim, and counter-claimed for £75; judgment was for the plaintiff on the claim admitted and costs, and for the defendant for £40 and costs. It was held that the plaintiff was entitled to costs up to and including the statement of defence, and the defendant to costs after that time: see also *O'Riordan v. Kella*, 16 L. R. Ir. 263.

For the purposes of taxation a counter-claim properly so called is now to be treated as a cross action, and the costs thereof may be taxed separately from those of the action: *Emerson v. Garin*, 12 P. R. 330; *Shropnel v. Laing*, 20 Q. B. D. 334; *Amos v. Bobbett*, 22 Q. B. D. 543; *Ontario Forge & Bolt Co. v. Comet Cycle Co.*, 17 P. R. 156; *Haggart v. Brampton*, 17 P. R. 477; but a defence which is not strictly speaking a counter-claim cannot acquire that character merely because the plaintiff or defendant so calls it: *Girardot v. Welton*, 19 P. R. 162, 201.

Where there is a counter-claim in respect of matters which could **Rule 1130.** not be pleaded as a set-off, and the defendant recovers on his counter-claim a sum exceeding that which the plaintiff recovers on his claim, the claim and counter-claim having, for purposes of taxation, to be treated as independent actions, the costs in each should be taxed in favour of the successful party, as if he had wholly succeeded in the action, subject to a deduction in respect of the costs of any issues on which he has not succeeded: *Shrimnell v. Laing*, 20 Q. B. D. 334; *Summerfeldt v. Johnston*, 17 P. R. 6; but "common items," that is items common to the defence and the counter-claim, should not be allowed to the defendant: *Haggart v. Brampton*, 17 P. R. 477. It is immaterial, for purposes of taxation, whether the form of the judgment be for recovery by each party of the amount found due to him, or by plaintiff or defendant for the balance in his favour: *Ib.*

In the case of a true counter-claim the plaintiff cannot foresee that the defendant will set up the counter-claim, but may prefer to bring a cross-action, while in the case of a set-off, he must know of the existence of the claim and should give credit for it, if good: see *Heritage v. Ford*, 71 L. T. Jour. 313; *Stooke v. Taylor*, *infra*.

Therefore where the plaintiff establishes his claim and the defendant a set-off of an equal or greater amount, the defendant has succeeded and the plaintiff failed, and the defendant is therefore entitled to costs of the action: *Stooke v. Taylor*, 5 Q. B. D. 576; *Baines v. Bromley*, 6 Q. B. D. 794; *Heritage v. Ford*, *supra*.

On the other hand, where the plaintiff establishes a claim, and the defendant establishes a counter-claim in the nature of a cross-action, i.e., both claim and counter-claim are successful, the plaintiff is entitled to the costs of the action (without any apportionment of charges common to both claim and counter-claim), and the defendant to such costs only as are properly attributable to the counter-claim: *Re Brown, Ward v. Morse*, 23 Ch. D. 377; *Stooke v. Taylor*, *supra*; *Gray v. Davidson*, 5 Ex. D. 189; *Ellis v. Desilva*, 6 Q. B. D. 521; *Ontario Forge, etc., v. Condit, etc.*, 17 P. R. 156. This gives the general costs of the action not to the party recovering the most, nor to the party to whom the litigation is on the whole favourable, but to the plaintiff: *Baines v. Bromley*, *supra*; *Pearson v. Riphy*, 32 W. R. 463; 50 L. T. 629 (because his costs are those of the action), whether the balance is in favour of the plaintiff: *Haffinan v. Price*, 41 L. T. 627; 27 W. R. 490; or of the defendant: *Re Brown, Ward v. Morse*, *supra*. See also *Waring v. Pearson*, 32 W. R. 429; 50 L. T. 633; and *Coughlin v. Hollingsworth*, 5 Ont. 207, where costs were directed to be taxed upon this principle and judgment was directed to be entered for the party in whose favour the balance should be found.

Similarly, where the claim and counter-claim are both dismissed, the plaintiff is to pay the defendant the general costs of the action, as if no counter-claim had been put in, and the defendant has only to pay the sum by which the costs have been increased by the counter-claim: *Sauer v. Bilton*, 11 Ch. D. 411; *Mason v. Brentini*, 15 Ch. D. 287. No part of the general costs of the action are chargeable against the defendant: *Ib.*, and *Athos, etc., Co. v. Miller*, 1898, 2 Q. B. 500; 79 L. T. 5.

Where the claim was dismissed without costs, and the counter-claim with costs, the Judge ordered defendant to pay half plaintiff's costs, as a convenient mode of settling the matter: *Wilmoth v. Barber*, 15 Ch. D. 96; 17 Ch. D. 774.

Rule 1130. Where the Judge gave the plaintiff the costs of the action, and the defendant the costs of his counter-claim, it was held that the taxing officer could not tax costs to the plaintiff only up to the defence which admitted his claim: *Finska v. Brown*, W. N. 1891, 87.

In *Chatfield v. Sedgwick*, 4 C. P. D. 459, the plaintiff claimed a sum exceeding £50. The defendant pleaded a set-off, and also made a counter-claim for goods to the amount of about £24. The action was referred to a Master, costs to abide the event. The Master certified that there was due to the plaintiff on the claim £16, and to the defendant on the counter-claim £23, and that the balance due to the defendant was £7. It was held that defendant was entitled to his costs, as the question was, taking claim and counter-claim together, which was creditor and which was debtor, and, the finding being in favour of the defendant, that was the event which the costs were to follow. The reasons for this decision are dissented from by Cockburn, C.J., in *Stooke v. Taylor*, 5 Q. B. D. 582, though the decision itself is approved of, as being in accordance with the principles previously above mentioned, not because the defendant succeeded, but because the plaintiff failed as to costs, not having recovered £20, so as to be entitled to costs under the County Court Act. See also *Lowe v. Hobac*, 10 Q. B. D. 280; *Ryan v. Fraser*, 10 L. R. Ir. 253.

Where, in an arbitration, costs were to follow the "event," and the defendant recovered more on his counter-claim than the plaintiff, it was held that the defendant was entitled to the general costs and the plaintiff to costs of the issue on which he succeeded: *Tand v. Campbell*, 14 Q. B. D. 821, where *Baines v. Bromby*, is explained. *Hawke v. Brear*, *Ib.*, 841; see also *Ahrbecker v. Frost*, 17 Q. B. D. 606.

Where the plaintiffs claimed £304 17s. 9d., and the defendants set up a counter-claim for £480, and the arbitrator to whom the matter was referred found in favour of the plaintiffs for £371, and in favour of the defendants for £375, the Court, on appeal from the District Registrar, who had given the costs of the cause to the defendants, ordered "the costs of, and relating to the plaintiff's claim, and the proof thereof to be paid by the defendants, and the costs of, and relating to the defendants' counter-claim, and the proof thereof, to be paid by the plaintiffs": *Cole, Marchant & Co. v. Firth*, 4 Ex. D. 301, 40 L. T. 851.

Assessment of damages.

The costs of an action in which judgment is signed in default of defence, and the damages are assessed by a jury, do not follow the event, but are in the discretion of the Judge, there having been no trial with a jury: *Guth v. Howarth*, 28 Sol. Jour. 427; W. N. 1884, 19; see *Rules 1130 (3)*, and 1131.

The Judge at the trial has the same discretion as to the costs in actions tried by a jury as in those tried without a jury.

Recommendation of jury.

The recommendation of the jury that each party should pay his own costs was not considered; and affidavits by some of the jurymen that they would not have acquiesced in a verdict for defendant if they had supposed the result would be to throw all the costs on the plaintiff, were held inadmissible: *Fargahar v. Robertson*, 13 P. R. 176; *Wentzer v. Sawyer*, 16 Ont. App. 422.

Some of the cases decided under the former *Rules* (repealed in 1893) may still be usefully consulted as showing circumstances when were formerly considered "good cause" for making the costs not follow the event, and may now furnish the Judge who tries the case with reasons for similarly disposing of the costs in the exercise of his

discretion. See H. & L. Jud. Act, 1st ed., pp. 897, 898; 2nd ed., pp. Rule 1130, 1259, 1260.

As to the power of the Judge at the trial to direct a set-off without regard to any claim of lien on the part of the solicitors, see *Blumenfeld v. Edwards*, 5 O. W. R. 796, in notes to Rule 253, p. 475, and in notes to Rule 1165.

Appeals Respecting Costs.—This Rule combined with s. 72 of Appeals in the Act has the effect, that (except in the case of trustees, mortgagees, etc.; see *Farrow v. Austin*, and other cases cited, *supra*, p. 1351; and where the Judge has proceeded on a wrong principle; *Young v. Thomas*, 1892, 2 Ch., per Lindley, L.J., at p. 137; *McCausland v. Quebec F. Ins. Co.*, 25 Ont. 330), no appeal in respect of costs will be allowed, without leave, since s. 72 prohibits appeals, except by leave of the Court or Judge appealed from, in respect of costs, which are by law left to the discretion of the Court; *Mitchell v. Laudman*, 14 Ont. App. 517 (where, on an appeal by leave, the decision was reversed).

An appeal lies to a Divisional Court respecting the award of costs at a trial, where the Judge at the trial proceeded on an erroneous principle; *McCausland v. Quebec Fire Ins. Co.*, 25 Ont. 330; and see *Re Bradford*, *infra*; or where the costs are in fact in his discretion, but he acts on the assumption that his discretion is excluded; *Roe v. Roe*, 1899, 2 Ch. 467; 81 L. T. 284; also see *King v. Gillard*, and *Cord Service Co-operative Socy. v. General Steam Navigation Co.*, *supra*, p. 1346.

Where the costs of an action referred to a Referee for trial are in his discretion, it is held in England that there is no appeal from his disposition thereof; *Minister v. Apperly*, 1902, 1 K. B. 643; but in Ontario on a motion for judgment in accordance with the Referee's report, it would appear to be open to the Judge to adopt or reject or vary the Referee's decision as to costs; and the Referee's decision as to costs, as well as to any other matter involved in the reference, would appear to be subject to appeal; see Rule 653.

Even though leave to appeal has been given, the appellate Court will not review the exercise of his discretion by the Judge; per Lindley, L.J., *Young v. Thomas*, 1892, 2 Ch., p. 136; and the Court will not on appeal interfere with the discretion exercised by a judicial officer as to costs of proceedings before him, unless there is error of law or fact; *Campbell v. Wheeler*, 17 P. R. 289.

Orders have therefore been held unappealable in respect of costs of inspection of a mine allowed under Rule 1006; *Mitchell v. Darby Main Colliery Co.*, 10 Q. B. D. 457; costs directed to be paid to a defendant by a co-defendant though there was no issue between them; *Church v. Fuller*, 3 Ont. 417; see also *Rudac v. Great Britain Assurance Co.*, 17 Ch. D. 600; costs directed to be paid by defendant and given over against a third party; *Hornby v. Caidrell*, 8 Q. B. D. 329; and costs dealt with before the trial and directed to be borne by one party "in any event"; *Ficary v. Great Northern Ry. Co.*, 9 Q. B. D. 168. See other cases in notes to section 72 of the Jud. Act, *supra*, pp. 129-129.

Costs are not in the discretion of the Court, and are therefore the proper subject of an appeal where they come within the exceptional cases in clause (2) of this Rule.

See also notes to sec. 72, and *Bazett v. Morgan*, 24 Q. B. D. 28; *Harpham v. Shacklock*, 19 Ch. D. 207.

**Rules
1131, 1132**

Where one
of several
plaintiffs
fails.

1131 Where several plaintiffs have been joined, and some or one of them only have or has been found entitled to relief, the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who has not been found entitled to relief, unless the Court in disposing of the costs of the action otherwise orders. Con. Rule 1171. See also Rule 185.

Same in effect as Eng. (1883) R. 123, which was taken from s. 19 of the C. L. P. Act of 1852; see Day's C. L. P. Act.

See also Rule 185 and notes.

Where in an action brought by two plaintiffs on separate causes of action, judgment was in favour of the defendants against one plaintiff and in favour of the other plaintiff against the defendants; and the costs were ordered to abide the event of the action, it was held that the defendants were entitled to the costs occasioned by joining the unsuccessful plaintiff, and that the successful plaintiff was entitled to the general costs of the action: *Gort v. Rocewy*, 17 Q. B. D. 625.

Where the plaintiff succeeds against one defendant and fails against another, the costs which the plaintiff has to pay to the successful defendant cannot, without special direction, be recovered by the plaintiff from the unsuccessful defendant: *Child v. Stenning*, 7 Ch. D. 413; 11 Ch. D. 82.

In Superior
Court
actions
brought
in High
Courts.

1132 Where an action of the proper competence of a County Court is brought in the High Court, or an action of the proper competence of a Division Court is brought in the High Court, or in a County Court, (a) and the Judge makes no order to the contrary, the plaintiff shall recover only County Court costs, or Division Court costs, as the case may be, and the defendant shall be entitled to tax his costs of suit as between solicitor and client, and so much thereof as exceeds the taxable costs of defence which would have been incurred in the County Court or Division Court, shall, on entering judgment, be set off and allowed by the Taxing Officer against the plaintiff's County Court or Division Court costs to be taxed, or against the costs to be taxed, and the amount of the verdict if it be necessary; and if the amount of costs so set off exceeds the amount of the plaintiff's verdict and taxed costs, the defendant shall be entitled to execution for the excess against the plaintiff. Con. Rule 1172; Rules 4 November, 1893, 1215.

See corresponding Eng. R.

At one time former Rule 1172 had a proviso that if the plaintiff's costs are not confined to cases of a jury.

The *Rule* to some extent revives the practice prescribed by R. S. **Rule 1132**, O. 1877, c. 50, s. 347.

"Tax his costs of suit."—These words in the 7th and 8th lines mean costs on the scale of the Court in which the action is brought.

The words "taxable costs of defence" referred to in the 10th line of the *Rule*, do not mean costs as between solicitor and client: *Talbot v. Poole*, 15 P. R. 274.

The *Rule* only applies where the Judge "makes no order to the contrary," but an order for payment of costs *simpliciter* does not preclude an inquiry as to the scale properly applicable: *Re Forster*, 18 P. R. 65.

The commencement of the action is the point of time at which the amount of the plaintiff's claim, for the purpose of determining the scale of costs, is determined. Payments *pendente lite* do not affect the question. Thus, where the amount of the plaintiff's claim is reduced to a sum within the jurisdiction of an inferior Court by payment under garnishee proceedings against the defendant, made after action brought, though the attaching order was made before, such payment does not affect the question of jurisdiction so far as costs are concerned: *Pickard v. Tins*, 19 P. R. 109.

Though a plaintiff may only be able to recover from the defendant costs on an inferior Court scale under this *Rule*, yet he may be liable to his solicitor for costs on the High Court scale, if the latter had reasonable ground for thinking the action could not be brought in the inferior Court: *Re Jackson*, 18 P. R. 326.

It does not apply where the plaintiff takes money out of Court under *Rule 423*, in which case he is entitled to costs on the High Court scale, though the amount accepted be within the jurisdiction of an inferior Court, and a Judge has no jurisdiction to make any other order: *Babcock v. Standish*, 19 P. R. 195; *McKelvey v. Chilcote*, 5 O. L. R. 263.

A judgment awarding "costs" in the High Court, whether made by consent or otherwise, does not, since this *Rule*, carry costs on the High Court scale unless the case is one which could not have been brought in an inferior Court: see *Brown v. Rose*, 14 P. R. 3; and *Stokk v. Stokk*, 11 O. L. T. 332; and interlocutory orders awarding costs in any event of the action will carry costs according to the scale upon which the costs of the action when awarded at the trial are taxable: *Blake v. Toronto Brewing & Malting Co.*, 8 O. L. T. 123.

Before this *Rule*, in a jury case, unless the Judge made an order as to costs, the plaintiff, if he recovered anything, was entitled to costs of the Court in which the action was brought, "the event," which the costs were, under former *Rule 1170*, to follow, being in his favour: see *Parsons v. Talling*, 2 C. P. D. 119; *McFarrey v. Strathroy*, 11 P. R. 87; *Wilson v. Roberts*, 11 P. R. 412, following *Garnett v. Brindley*, 3 App. Cas. 944. The principle of these cases may still apply in all actions where a trifling amount is recovered, but the action could not have been brought in an inferior Court: it will also apply to give to the successful party all costs which are "costs in the cause," and so depending upon the event unless the Judge otherwise orders: see *Copeland v. Blechman*, 11 P. R. 74, where the costs of a trial in which the jury disagreed were held to be taxable to the successful party.

Now, however, since this *Rule* "the event" in *Rule 1130* etc., includes amongst other things the scale on which costs may be taxable

Rule 1132. See also *Hyde v. Beardsley*, 18 Q. B. D. 244; *Andrews v. City of London*, 12 P. R. 44. The scale on which the plaintiff's costs will be taxable, if no order is made by the Judge, will be that of the lowest Court in which the action was capable of being brought, and the defendant will have the right to set-off the extra costs incurred by him as in the Rule mentioned: see *Irland v. Pitcher*, 11 P. R. 403.

The interest which a verdict or judgment bears under Jud. Act, s. 88, is no part of the claim, and therefore is not to be considered in determining the question of scale: *Sprule v. Wilson*, 15 P. R. 349.

For the purposes of the scale on which costs are to be taxed the claim and counter-claim are to be treated as separate actions: see *Amon v. Bobbett*, 22 Q. B. D. 543, where a plaintiff recovering on his claim an amount within the jurisdiction of a County Court recovered costs on that footing, but succeeding on the defendant's counter-claim to an amount within the High Court jurisdiction he recovered costs of his defence to the counter-claim on the High Court scale.

Where the defendant recovers on a counter-claim, the costs should be on the scale of the Court in which the action is brought by the plaintiff, unless the Judge makes a different order; the fact that the recovery is for a sum within the jurisdiction of an inferior Court was formerly not considered "good cause" for such an order: *Fisher v. Viegcl*, 13 P. R. 133.

Where on the dismissal of an action with costs, a defendant claims that the costs should be taxed on the High Court scale, if the matter is in doubt, it is proper practice to obtain a direction of a Judge as to the scale of costs before they are taxed: *Dominion Bank v. Hoffmann*, 11 P. R. 501; but the taxing officer is to tax according to the lower scale wherever it is applicable without any express direction: see *Brough v. Brautford*, 25 Gr. 43.

Where only C. C. costs are awarded at the trial to the plaintiff, and the defendant appeals to a Divisional Court, and his appeal is dismissed with costs, such costs are *prima facie* taxable on the H. C. scale: *Holmes v. Bready*, 18 P. R. 79.

Jurisdiction of County Courts:

The jurisdiction of the County Courts is defined in R. S. O. c. 75, ss. 22-29.

Sections 22 and 23 are as follows:—

Matters not to be within jurisdiction of County Courts.

22. Except in the cases of actions in which, by section 27 of this Act, or by any other Act, jurisdiction is conferred upon County Courts, or a Judge thereof, the said Courts shall not have cognizance of any action:

1. In which the title to land of a greater value than \$2000 is brought in question; or

2. In which the validity of any devise, bequest or limitation, exceeding \$200, under any will or settlement, is disputed, or where the assets of the estate or fund out of which the amount in question is payable exceeds \$1,000; or

3. For libel and slander; or

4. For criminal conversation or seduction; or

5. Against a Justice of the Peace for anything done by him in the execution of his office, if he objects thereto. 70 V. c. 19, s. 1.

23. Subject to the exceptions contained in the last preceding section, the County Courts shall have jurisdiction:

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

2. In all causes and actions relating to debt, covenant and contract, to \$600, where the amount is liquidated or ascertained [as being due] by the act of the parties or by the signature of the defendant: (*as amended by 4 Ed. vii. c. 10, s. 10*)

3. To any amount on bail-bonds given to a Sheriff in any case in a County Court, whatever may be the penalty;

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

5. In actions of replevin where the value of the goods, or Key, Stat. other property or effects distrained, taken or detained, does not exceed the sum of \$200, as provided in *The Replevin Act*; 56

6. In interpleader matters, as provided by the Rules respecting Interpleader: R. S. O. 1887, c. 47, s. 10; 50 V. c. 10, s. 2.

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

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

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

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

11. In actions by a legal or equitable mortgagee, whose mortgage has been created by some instrument in writing, or a judgment creditor, or a person entitled to a lien or security for a debt, seeking foreclosure or sale, or otherwise, to enforce his security, where the sum claimed as due does not exceed \$200; A lien on mortgages.

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

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

14. In any action or contestation to establish the right of a creditor to rank upon an insolvent estate, where the amount of such claim does not exceed \$400; Ranking of creditor on insolvent estate. 50 V. c. 10, s. 3.

Rule 1132. The effect of these sections, generally speaking, is that the jurisdiction of a County Court is ousted, and (where no special order as to costs is made) costs are therefore payable on the High Court scale in the case of:—

(1) Particular classes of actions, e.g., libel, slander, crim. con., etc.; see, 22.

(2) Actions where land in question exceeding in value £200; see 22 (1); see, 23 (8); see, 27.

(3) Actions where the amount of the debt or damages claimed above a certain amount; see, 23.

(4) Actions for equitable relief not falling within sec. 23 (3) (1).

(1) Particular Classes of Actions.—The Rule cannot be applied in such actions as are not within the proper competence of a County or Division Court. In an action of libel which cannot be brought in those Courts, if the plaintiff recovers anything, costs, on the High Court scale, follow, unless the Judge orders otherwise. *See Wilson v. Roberts*, 11 P. R. 412; *Wellbanks v. Canger* (20, 12 P. R. 447; and *semble*, the Court should not look behind the finding of the jury and deprive the plaintiff of costs on the ground that he was not really entitled to recover. *Ib.*; and see *Wright v. Shaw*, 19 Q. B. 10 at p. 398.

Formerly a County Court had no jurisdiction to entertain an action asking for a declaration or right to rank on an insolvent estate in *lb.* R. S. O. c. 147, s. 22; *Whidden v. Jackson*, 18 Ont. App. 439. Such an action is not for equitable relief, but is for a newly defined remedy under the statute. *Ib.* Limited jurisdiction in such a case is now given by the above sec. 23 (4).

(2) Title to Land in Question.—Where the title to land is so in question as to oust the jurisdiction of a County or Division Court under R. S. O. c. 55, s. 22 or 27, or R. S. O. c. 160, s. 71, though the amount recovered be within the jurisdiction of a County or Division Court, the plaintiff is entitled to costs on the High Court scale. *Worron v. Brady*, 12 P. R. 618; *Dunaher v. Little*, 13 P. R. 361; *Whitwell v. Beece*, 9 O. L. R. 182.

Neither an action for use and occupation; see *Re Cranford v. See*, 17 Ont. 74, nor an action for trespass to land, nor for breach of covenant in a farm lease (see *Talbot v. Poole*, *infra*), necessarily brings in question the title to land, so as to oust the jurisdiction of the County or Division Court. *Bayley v. Bleecker*, 5 C. L. J. 160; *Richardson v. Jenkins*, 10 P. R. 292; see *Graham v. Spettigue*, 12 Ont. App. 291; *McNeil v. Haines*, 13 P. R. 115; *Talbot v. Poole*, 17 P. R. 99.

The pleadings only should be looked at to see what is in question in the action: *Bruen v. Huse*, 14 P. R. 3.

Where the plaintiff's title is denied on the pleadings, and he is required at the trial to prove it, the title to land is brought in question. *Worron v. Brady*, *supra*; *Dunaher v. Little*, *supra*; *Flett v. Ben*, 11 P. R. 312; *Tomkins v. Jones*, 22 Q. B. 1, 593. A defendant having by his defence contested the plaintiff's title cannot, by obtaining at the trial leave to withdraw it, escape liability for costs on the High Court scale. *Black v. Wheeler*, 7 O. L. R. 745.

(3) Claims for Debt, Damages, etc.—The County Court has **Rule 1132**, jurisdiction to investigate mortgages and claims of suitors, however large, provided the amount sought to be recovered does not exceed the sum prescribed by the Act; *Brant v. White*, 13 P. R. 149; where, therefore, a plaintiff claimed \$1,972 as a balance on transactions comprehending more than \$1,000, and defendant counter-claimed for \$13,255.74, it was held that the plaintiff was only entitled to costs on the County Court scale; *Id.*; and see *Thompson v. Pearson*, 18 P. R. 308, 420; *Knox v. Chandler*, 19 P. R. 161. So also it has been held that a County Court has jurisdiction to try any number of unliquidated causes of action in debt, covenant and contract, so long as each does not exceed \$200, and the aggregate does not exceed \$400; *McLaughlin v. Schaefer*, 13 Ont. App. 253.

As to what are liquidated claims, or claims ascertained by the signature of the party, see *Kecutiger v. Broag*, 32 Ont. App. 608, following *Kinsey v. Roche*, 8 P. R. 515; *McDonald v. McDonald*, 15 Ont. App. 287; but see *contra*, *Re Guthrie v. Tamlivora*, 12 P. R. 337; *Thompson v. Pearson*, 18 P. R. 308, 420; *Ostram v. Buchanan*, 42, 21 Ont. App. 467; *McCormick H. M. Co. v. Warden*, 34, 1. R. 425.

Even before the equitable jurisdiction was restored to the County Courts, it was held that a County Court has jurisdiction in an action by a partner against his copartners for a purely money demand, though it may be only the taking of the partnership accounts, where the amount of the claim does not exceed the ordinary jurisdiction of the County Court to entertain; *Allen v. Fairfar Cheese Co.*, 21 Ont. App. 268.

Where different sums are recovered against different defendants, and as to one of them the amount is within the County Court jurisdiction, that defendant is only liable for costs on the County Court scale, though the amount recovered against other defendants is beyond the County Court jurisdiction; *Duborg v. Buxton*, 1901, 2 L. R. 23.

A County Court has no jurisdiction to entertain an action for more than \$200, on a guaranty, in general terms, for the payment of the price of goods, there being no liquidation or ascertaining of the debt binding on the guarantor; *Thomson v. Eede*, 22 Ont. App. 107.

The plaintiff sued for \$228.20, the balance of a claim for \$1,828.20 worth of butter at 22c. per lb., on which \$1,000 had been paid, and obtained a verdict for \$228.20. It was held that the amount was liquidated by the act of the parties within R. S. O. 1877, c. 43, s. 19 (2); and the plaintiff was entitled to County Court costs only; *Burton v. McLean*, 10 P. R. 295; and see *Lawell v. Phillips*, 5 O. L. R. 235. Where the suit was to recover \$272.03, the return of moneys received by defendant belonging to plaintiff, being the proceeds from sales of goods in plaintiff's shop as follows—etc., it was held that the sum was not so ascertained, and the action was not within the jurisdiction of a County Court; *Roth v. Murray*, 10 Ont. App. 293; so also an unliquidated claim for work and labour and materials to the amount of \$197.01, and \$11.54 for interest, was held not to be within the jurisdiction of a County Court; *Haleck v. Lane*, 15 P. R. 75; and a sale according to a price list was held not to make the claim a liquidated one; *Lucas v. Chandler*, 19 P. R. 160; nor a claim for commission on the sale of land; *Re McKee v. Martin*, 21 Ont. App. 164.

Where an action was brought to recover damages for wrongfully refusing to deliver up, pursuant to a contract, to that effect, a com-

Rule 1132. promissory note for \$800 to the plaintiff, and the plaintiff recovered \$841 the amount of the note and interest, it was held that the action was within the jurisdiction of the County Court; *Johanson v. Keopon*, 14 P. R. 24; but see *Plummer v. Caldwell*, *supra*, p. 1305.

A County Court, however, has no jurisdiction to give a judgment for an amount within its jurisdiction, when it is arrived at by any settlement, or statement of account between the parties, there being the balance due upon a disputed account, the total amount which was beyond the jurisdiction of the Court; *Sherrard v. O'Connell*, 17 Ont. 30.

Cases sometimes arise in which it is somewhat difficult to determine whether an action is founded on tort or contract. It has been held that a claim by a passenger against a railway company for damages for injuries occasioned by the misfeasance of one of its servants is an action of tort; *Taylor v. Manchester & S. Ry.*, 1895, 1 Q. B. 134; 71 L. T. 500; *Kelly v. Metropolitan Ry.*, 72 L. T. 751; so also a claim for damages for negligence in taking care of a horse under a contract for agistment; *Turner v. Stallibrass*, 1898, 1 Q. B. 76; 71 L. T. 482; and a claim by a lessee against the lessor for removing fixtures after the agreement to lease; *Sachs v. Henderson*, 1902, 1 K. R. 612; 86 L. T. 437.

Where a plaintiff sued on a bond for \$500 for security for costs, alleging as a breach the non-payment of \$118.55, for which he recovered judgment, he was held entitled to H. C. costs, as the amount recovered was not ascertained by the signature of defendant within R. S. O. c. 55, and therefore the action could not have been brought in the County Court; *Hager v. Jackson*, 16 P. R. 485.

(4) Equitable Relief.—The equitable jurisdiction of the County Courts, which was abolished by *The Law Reform Act, 1868*, has been restored; see R. S. O. c. 55, s. 23 (9-14), and see also *Id.*, s. 28.

Below will be found cases held out to be within such equitable jurisdiction, and in which, therefore, this *Rule* would seem not to apply.

Mortgage
action.

Where the amount due plaintiff as mortgagee is less than \$200, or there is a subsequent incumbrancer to whom more than that sum is due; *Hynan v. Roots*, 11 Gr. 202; *Scath v. McIlroy*, 2 Chy. Ch. 93; see also *Mitchell v. Martin*, 2 C. L. J. 249.

Where mortgagees after exercise of a power of sale claimed that \$182.61 was due them, but on accounts being taken \$20.07 was found due to the mortgagor, it was held that costs awarded the mortgagees were properly taxable on the higher scale, as \$182.61 plus \$20.07 was involved; *Morton v. Hamilton Prov. & L. Socy.*, 10 P. R. 626, affirmed by the Divisional Court, 11 P. R. 82.

"Subject
matter in-
volved."

On a bill filed by a mortgagor for an account, where the mortgagee had exercised his power of sale and realized \$370, and on taking the account only \$130 was found due to the plaintiff, it was held that "the subject matter involved" was the \$350, and the plaintiff was therefore entitled to costs, on the higher scale; *McGillivuddy v. Griffin*, 20 Gr. 81; *Boulton v. Rowland*, 4 Ont. 720; *Re Lyons*, 10 P. R. 150; 20 C. L. J. 33; *Morton v. Hamilton Provident L. Society*, 11 P. R. 82; but see *Legare v. Canada Loan & Bk. Co.*, 11 P. R. 512; *Beatty v. O'Connor*, 5 Ont. 747; *Reddick v. Traders' Bank*, 22 O. R. 449; and where, besides a money demand within the jurisdiction of the County Court, the plaintiff claimed an injunction, and to have fences erected and maintained, the costs were allowed on the high.

senior, *Brough v. Brantford*, 25 Gr. 43; and see *Helbach v. Barbours*, **Rule 1132** and *Loan Assoc.*, 11 P. R. 161; but these cases were decided before the County Courts had jurisdiction to grant injunctions under R. 8, 11, c. 75, s. 37 (1870), and s. 28; and see *Fitchett v. Mather*, 18 P. R. 161.

An action to restrain the negotiation of a note for \$2200, and to injunction compel its delivery up to the plaintiff, was formerly, and would seem to be still, beyond the jurisdiction of a P. C.; *Plantance v. Caldwell*, 15 P. R. 144; but see *Johnson v. Adams*, *supra*, p. 1341.

An action for an injunction to restrain a sale under a distress under the distress clause in a mortgage for \$2200, by which goods to the value of \$112.55 had been distrained, and for damages, was held not to be within the former equitable jurisdiction of a P. C.; *Welford v. Building & Loan Assoc.*, 11 P. R. 161; *sed quæd.*, see R. 8, c. 55, s. 23 (1870), *supra*.

Since *The Creditor's Relief Act*, where in an action by a judgment creditor to set aside a fraudulent conveyance, the claims of all execution creditors together exceed \$200, the action is not within the jurisdiction of a County Court, and the *Rule* does not apply; *Trinidad Bank v. Hefferman*, 11 P. R. 504; but if there is but one judgment creditor and to him less than \$200 is due, the *Rule* applies, no matter what may be the value of the property fraudulently conveyed; *Parrott v. Lupton*, 18 Gr. 411; *McKay v. Magee*, 13 P. R. 106, 116; *Thomson v. Stone*, 4 O. L. R. 333, 385.

So also in an action by simple contract creditors whose claims amount to \$200, to set aside a fraudulent conveyance, there being execution creditors to the amount of \$200, and the land being worth more than \$200, the County Court would not appear to have jurisdiction; *Morphy v. Farley*, 18 P. R. 24.

In a suit by a purchaser for specific performance of a contract for the sale of land for a sum under \$150, where before suit the plaintiff had entered and improved the land and increased its value to more than \$200, it was held that "the subject matter involved" was over \$200, and higher scale costs were allowed; *Keane v. Brown*, 6 P. R. 318; and see *Rex v. Judge Witherscue*, 1904, 1 K. R. 825.

As to the effect upon the jurisdiction of a County Court of a counter-claim upon which no relief is given, see *Fitchett v. Mather*, 18 P. R. 161.

Division Courts Jurisdiction.—The jurisdiction of the Division Courts is defined by R. 8, O. c. 60, ss. 74 *et seq.*; 41 V. c. 15, s. 1.

As to the jurisdiction of Division Courts, see *Bicknell & Seager*, Div. Courts Acts, pp. 53, *et seq.*

As to what claims are liquidated, or ascertained by the signature of the party, see *supra*, p. 1363, and *Slater v. Lubric*, 9 O. L. R. 545.

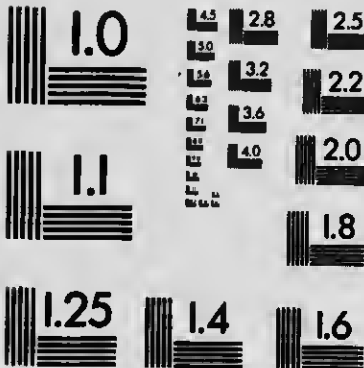
In an action in the High Court for trespass to lands, and removal of fixtures, the plaintiff recovered a verdict for \$50. It was held that Division Court costs were taxable to the plaintiff and full costs to the defendant; *Richardson v. Jenkins*, 10 P. R. 292.

A plaintiff entitled only to Division Court costs under this *Rule* can tax as part of such costs his expenses of travelling from abroad to attend as a witness, if he was a material and necessary witness; *Talbot v. Poole*, 15 P. R. 274.



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Rules

Set-off of Costs by Defendant.—Where a defendant is entitled to a set-off of costs under this *Rule*, if the plaintiff refuses to enter the judgment, an order may be made in Chambers limiting the time for him to do so, and in default allowing the defendant to enter it: *Sinclair v. Barrow*, 3 V. C. L. J. 49.

Costs in actions *prima facie* within the jurisdiction of inferior Courts when judgment entered without trial, how to be taxed.

1133. In every case in which judgment is entered without trial, or the decision of a Court or a Judge, or order as to the costs, and where the amount of, or relief awarded by, the judgment, *prima facie*, appears to be within the jurisdiction of an inferior Court, the Taxing Officer shall not tax full costs of the High Court, with out proof on affidavit to his satisfaction that the action was properly instituted therein; and if properly within the competence of the County, or Division Court, then the taxation shall be on the scale of fees in such Court. Con. Rule 1174.

Adapted from J. A. Rule 511: 48 Vict. c. 13, s. 22.

This *Rule* would appear to apply only to cases where there has been no trial, not to cases where there has been a trial, but no order has been made as to costs: see *Andrews v. London*, 12 P. R. 44; *Dale v. Weston*, 17 P. R. 513. It applies to a consent order providing that the plaintiff shall get costs, without indicating the scale: *Brown v. Rose*, 14 P. R. 3; but see *Steckle v. Stakk*, 11 C. L. T. 332; it does not apply where a plaintiff takes money out of Court paid in with a defence: see *Babcock v. Standish*, 19 P. R. 195.

No set-off of costs (as under *Rule* 1132) is contemplated by this *Rule*, where the plaintiff gets only costs according to the County, or Division Court scale: *Andrews v. City of London*, 12 P. R. 44.

To determine the proper scale of fees, it is the duty of the Taxing Officer to look at the pleadings, and if necessary to receive affidavits so as to ascertain the facts of the case: *White Sewing Machine Co. v. Belfry*, 10 P. R. 64.

Where a plaintiff sues for and recovers an amount beyond the jurisdiction of a County Court, a defendant cannot, by admitting his liability for part of the claim, and paying it into Court, deprive the plaintiff of his right to full costs, because the balance in dispute is within the jurisdiction of an inferior Court: *Brown v. Rose*, 14 P. R. 3; and see *Pickard v. Tins*, 19 P. R. 109.

Where a verdict was taken by consent for \$1 to be altered according to the result of a reference agreed on, costs to abide the event, it was held that it was a judgment without a trial and within this *Rule*: *Andrews v. City of London*, 12 P. R. 44.

This *Rule* does not necessarily affect the scale of costs on a taxation between solicitor and client: *Re Jackson*, 18 P. R. 326.

Non-appearance, subsequent particulars.

1134. Where the plaintiff after default of appearance to a writ not specially indorsed delivers particulars of his claim under *Rule* 576, he shall not be entitled to the costs of the particulars, unless the Taxing Officer is satisfied that there

was good reason for not specially indorsing the writ. **Con. Rules**
Rule 1175. **1135-1137.**

Taken from J. A. (1881) Rules 74, 497.

See note to *Rule 576*.

1135. Where several actions are brought on one bond, ^{Where several actions on bonds, etc.} recognizance, promissory note, bill of exchange, or other instrument, or where several actions are brought against the maker and indorser of a note, or against the drawer, acceptor or indorser of a bill of exchange, there shall be collected or recovered the costs taxed in one action only at the election of the plaintiff, and the actual disbursements only in the other actions, unless the Court otherwise orders; but this provision shall not extend to any interlocutory costs. **Con. Rule 1176.**

Where several actions are properly brought in cases not within the provisions of this *Rule*, against different defendants, although involving the same or similar issues, the plaintiff succeeding is entitled to tax a separate set of costs in each action: *Baldwin v. Quinn*, 16 P. R. 248.

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 \$25.00 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.

(2) Any increase of costs occasioned by proceeding, without good reason, otherwise than as provided by Rules 447 (1) shall not be allowed. Rule 1136 as amended by Rule 1267 of 18 June, 1904.

Somble, the costs of examining a party as a witness before trial may be allowed, though the examination was not in fact used, if such costs were reasonably incurred: *Bartlett v. Higgins*, 1901, 2 K. R. 230; 84 L. T. 509.

1137. Where the Court, or a Judge, or officer exercising ^{sum in} jurisdiction in Chambers or the Master deems it proper ^{cross may} to be allowed, award costs, the judgment or order may direct payment of a

Rules
1138, 1139.

sum in gross in lieu of taxed costs, to be fixed by himself or the officer who settles the order, and direct by and to whom such sum in gross is to be paid. Con. Rule 1178.

In administration proceedings it is usual to allow to creditors who are entitled to costs, a sum in gross, as the amount of their costs is generally small.

In an action for the administration of the estate of a deceased person, no costs should be allowed to creditors whose claims are rendered pursuant to an advertisement, except when formal proof is also required, and given: see *Rule 701 et seq.*; claimants attempting to prove claims as creditors, or as heirs-at-law, or next of kin, who fail to establish their claim, may be ordered to pay the costs occasioned to the opposite party by their claim. In case of a deficiency of assets the costs of creditors proving claims are to be added to their debts, and paid proportionately, but the creditors are not entitled to be paid such costs in priority to the debts: *Re Etna Insurance Co.*, 17 Gr. 160; *Morhead v. Reynolds*, 21 Beav. 638; *Canham v. Neale*, 26 Beav. 266; *Morgan and Wurtzburg*, p. 193.

Court may award C. C. costs, in a case not within C. C. jurisdiction

Under this *Rule* the Court may award a lump sum, not only on interlocutory applications, but also for the general costs of the cause, or may award costs according to the C. C. scale, even in cases which are beyond the equitable jurisdiction of County Courts: *Palmer v. Postle* (Ch.), before full Court, 7th December, 1878; see Reg. Lib. of that date; but *semble*, the Court has no power to award a lump sum for costs exceeding what could be taxed.

In an action for dower a lump sum for costs was awarded to the plaintiff: *Ryan v. Fish*, 4 Ont. 335, 344.

Costs of guardian.

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.

See notes under *Rule 1130*, p. 1345.

An infant may in a proper case be ordered to pay the plaintiff's costs, and also the costs which the plaintiff under this *Rule* is ordered to pay to the Official Guardian: *Lipsett v. Perdue*, 18 Ont. 575; *Woolf v. Woolf*, 1889, 1 Ch. 343.

Costs of examining judgment debtor, attaching, debts, etc.

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. Con. Rule 1180.

This is to the same effect as the Eng. (1883) R. 612, and is the same in substance as R. S. O. 1877, c. 50, s. 321, except the words in

brackets, which are not in the English Rule, or the statute. With-^{Rules} out them it was held in *Ginty v. Rich*, 7 P. R. 319, that an order for ^{1140, 1141.} the payment of the costs of the debtor's examination could not be made on an application for that purpose, though it might perhaps be made by way of punishment, on an application to commit.

The costs of proceedings to examine the debtor may be allowed, though the examination does not actually take place: *Popham v. Flynn*, 15 P. R. 286.

Semble, the costs of the examination of the judgment debtor, and also of garnishee proceedings in which the execution creditor succeeds, where the creditor has not proceeded unreasonably, should be allowed him as against the debtor: see *Arlington v. Coningham*, 1898, 2 Q. B. 32; 79 L. T. 238.

1140. Where the costs of one defendant ought to be paid ^{Costs may be ordered to be paid by one defendant to another} by another defendant, the Court may order payment ^{to be} made by the one to the other directly. Con. Rule 118.

A defendant is usually liable to pay costs to his co-defendant, when ^{Costs between co-defendants.} the latter is an innocent party, and is necessarily brought into the litigation in order to enable the plaintiff to obtain complete relief in the action: see *McLean v. Grant*, 20 Gr. 76. Formerly at law there was no practice authorizing a judgment to be given against a defendant for the payment of the costs of a co-defendant either directly or indirectly; and even in Equity, prior to Chy. O. 319, from which this *Rule* is taken, the Court of Chancery was accustomed only to order such costs to be paid by the circuitous process of directing the plaintiff to pay them, and add them to his own costs. In interpleader proceedings by Sher ^{the} costs of the Sheriff are to be included in the costs of the ^{of} a party under *Rule* 1120 (2).

The Court has ordered a defendant to pay a co-defendant's costs, even though the action was dismissed: *Church v. Fuller*, 3 Ont. 417, but a successful defendant cannot be ordered to pay the plaintiff's costs: *Mitchell v. Vandusen*, 14 Ont. App. 517; *Wills v. Carman*, *Ib.*, 656; unless the plaintiff was entitled to bring the action, and it has failed by reason of circumstances subsequently occurring: see *supra*, p. 1346.

When a plaintiff succeeds against one defendant and fails against another, he is not entitled, without order to that effect, to add in his costs, payable by the unsuccessful defendant, the costs payable by him to the successful defendant: *Child v. Steuning*, 7 Ch. D. 413; 11 Ch. D. 82; *Bergmann v. McMillan*, 17 Ch. D. 423, 428; and see *Beaumont v. Senior*, 1903, 1 K. B. 282; but where the unsuccessful defendant has occasioned the litigation as against the other defendants, he may be ordered to recomp the plaintiff the costs he is ordered to pay the successful defendants: *Child v. Steuning*, *supra*; or under this *Rule* be ordered to pay the costs of his co-defendants directly.

1141. The costs on all proceedings where a High Court ^{Costs at H. C. case in loc. cit.} case is tried in a County Court or a County Court case in the High Court, shall be the usual costs of such cases in the Court in which the action was brought. Con. Rule 1182.

Rules
1142-1144.

Costs of shorthand notes, to be costs in the cause.

Taxing Officer to allow reasonable sum for shorthand writer in cases not provided for

Application for interim costs, when it may be made.

1142. The disbursements incurred in obtaining copies of the evidence for the purpose of moving against a judgment or for a new trial, shall, unless the Court otherwise orders, be costs in the cause to the party obtaining the same. Con. Rule 1183.

1143. In cases not otherwise provided for, the Taxing Officer may allow a reasonable sum for the expenses 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. Con. Rule 1184 as amended by Rule 1270. Ont. Gaz., 31 Dec., 1904.

Official stenographers are now provided for all the ordinary sittings of the Courts. This *Rule* applies when it becomes necessary for the parties specially to engage a stenographer.

The first part of the *Rule* would seem to apply merely to proceedings before a Judge and not to extend to proceedings before judicial officers.

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.

The cash disbursements do not include fees paid to agents for solicitors' services, nor to counsel, when the solicitor or his partner is the counsel: *Gallagher v. Gallagher*, 17 P. R. 575; *Lalonde v. Lalonde*, 11 P. R. 143; *Leslie v. Leslie*, 12 C. L. T. 326. The former decisions of *Magurn v. Magurn*, 10 P. R. 570; *Bradley v. Bradley*, 21 C. L. J. 141; 10 P. R. 571; to the contrary would seem not now to be followed; and see *Ingram v. Ingram*, 10 P. R. 569; and *Bucke v. Bucke*, 21 Gr. 77.

Notwithstanding this *Rule*, prospective witness fees were ordered to be paid on the plaintiff's solicitor's undertaking to account for the money paid and not so expended: *Stevenson v. Stevenson*, 19 P. R. 48.

Where a cause was entered for trial it was ordered to stand over, until the defendant had paid to the plaintiff a sum sufficient to pay plaintiff's witnesses: *Haffey v. Haffey*, 7 P. R. 137.

In *Ottway v. Ottway*, 59 L. T. 153; 13 P. D. 141, a doubt was expressed as to whether the rules respecting a wife's costs in litigation with her husband were affected by *The Married Woman's Property Act*.

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.

Rules
1145, 1146.

Not any
costs by
defendant
beyond dis-
bursements
where
plaintiff
fails.

Where a plaintiff *pendente lite* returned to her husband, on the petition of her solicitor, the defendant was ordered to pay the plaintiff's costs as between solicitor and client: *Leonard v. Leonard*, 9 P. R. 450; *Moore v. Moore*, 10 P. R. 284; 20 C. L. J. 201; but in *Ringrove v. Ringrove*, 10 P. R. 299, 596, Proudfoot, J. refused to follow these cases, and his decision was subsequently affirmed by the Divisional Court; and see *Thompson v. Thompson*, 57 L. T. 374; but see *Ferris v. Ferris*, 7 Ont. 496; *The Friedburg*, 10 P. D. 112. As to what come within the term "cash disbursements," see *Rule 1144*, note.

1146. (1) 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:

Commis-
sion to be
allowed in
lieu of
taxed costs
in adminis-
tration and
partition.

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.

Adapted from Civ. O. 643.

(2) Where an order or judgment in any such action or proceeding by any form of words directs that the costs thereof be taxed, it shall be taken to mean the allowance of commission and disbursements, in accordance with subsection 1.

Rule 1146. 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. June 20, 1903.

Commission in lieu of costs, who entitled to share in.

The commission payable under this *Rule* is divisible only between those who are strictly parties to the action, properly represented by a solicitor, and entitled to costs out of the estate. Persons not originally made parties to the action, but served with a copy of the judgment under *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. The commission is to cover both the solicitors' fees and the fees to counsel and agents. It is of course not intended to cover costs ordered to be paid by one party to another. It is intended to cover only costs payable out of the estate. Costs are to be apportioned under this *Rule* in proportion to the work done by, and responsibility imposed on, the solicitors engaged: *Dodge v. Clapp*, 8 P. R. 388; *Campbell v. Campbell*, 8 P. R. 150; 16 C. L. J. 16.

Mode of apportionment.

The work done in the Master's office is not alone to be considered in making the apportionment of the commission: *Cameron v. Leroux*, 9 P. R. 304. The Master should also consider the circumstances under which the action is brought, when the judgment has been pronounced by himself, and should not award commission to parties who ought to be deprived of, or ordered to pay, costs.

On what sum to be estimated.

In ascertaining the commission, if the estate has been sold subject to a mortgage, the amount of the mortgage is not to be included as part of the "amount realized": *Re McColl*, *McColl v. McColl*, 8 P. R. 480; but in *Re Brown*, *Brown v. Brown*, 19 C. L. J. 367, it was held that the commission is to be computed on the total amount accounted for, and not merely on the balance found in the account of parties' hands; and see *Re Batt*, *Wright v. White*, 9 P. R. 447.

In partition actions extra costs, if any, occasioned by incumbrances on shares, should be borne by such shares: *McDougall v. McDougall*, 14 Gr. 267; *Catton v. Banks*, 1893, 2 Ch. 221; *sed vide*, *Belcher v. Williams*, 45 Ch. D. 510; 63 L. T. 673.

Ordinarily no costs will be allowed in addition to the commission and disbursements: *Re Fleury*, *Fleury v. Fleury*, 9 P. R. 87; and the Court refused to give taxed costs where the estate was large, but insolvent: *Re Stuebing*, *Stuebing v. Dewar*, 10 P. R. 236; 20 C. L. J. 193. Taxed costs were allowed in an administration suit, in *Re Goodfellow*, *Traders' Bank v. Goodfellow*, by Ferguson, J., 10th June, 1889, the deceased having committed suicide, and left his estate in such a condition as to cause special trouble and much work of a difficult nature in administering the same; and see *Wright v. Bell*, 32 C. L. J. 362; 16 C. L. T. 193.

The Master has no power to award taxed costs under this *Rule*; a Judge of the High Court alone has that power: *Hendricks v. Hendricks*, 13 P. R. 79.

Reckd - 1125/-
Dicks - 1625/-
5/-

Comm. 24th July 1903
Dicks - 1125/-
3/-
James Cash 1625/-
Dicks at 1625/-
Share

Where the Master finds, in any administration action commenced **Rules** before himself, that any of the parties to the action should pay the **1147, 1148.** whole, or any part, of the costs of the action, instead of their being borne by the estate, it would seem that he should so direct: *Rule 953 (2)*. But in such a case it would be convenient also to apportion the commission, and ascertain the disbursements payable out of the estate, in case the costs ordered to be paid by any of the parties personally, could not be recovered from them.

Where the principal part of the costs of an action are ordered to **Where** be paid personally by one or more of the parties, and the costs of **taxed costs** only a small proportion of the work done, are chargeable against the **allowed in** estate, it does not appear that in such a case the full amount of the **lieu of some** commission here provided would be payable, and the power reserved to the Judge to make other order would probably be exercised. Cases might arise where from special circumstances, the commission here provided would be clearly inadequate, and in such cases too it is possible that the power to make other order as to the costs would be exercised.

An agent employed by a principal solicitor who is paid by commission, is liable to have his bill taxed: *Re Idington & Mickle*, 8 P. R. 566.

Where proceedings have been taken by writ instead of by motion, and the extra costs occasioned thereby have been disallowed to the client, they are not taxable against him by his solicitor, on a taxation between solicitor and client: *Re Allenby*, 13 P. R. 403.

1147. When two or more actions or proceedings are instituted for administration, or partition, or sale, all or any of the costs of any action or proceeding which has been unnecessarily prosecuted may be disallowed. **Costs of actions unnecessarily prosecuted may be disallowed.** Con. Rule 1188, *part*.

Under this *Rule* the whole costs of an action may be disallowed if it has been commenced, or prosecuted, unnecessarily, and not only the costs of the plaintiff but those of defendants as well; the latter having power to prevent the prosecution of more than one suit.

As to partition suits, see *Rule 1157*.

1148. Where any one of the persons constituting a class party formed by a Master for representation in his office by one **party insisting on being represented by a different solicitor is pay costs incurred thereby** solicitor, under *Rule 662*, insists on being represented by a different solicitor, he shall personally pay the costs of his own solicitor of and relating to the proceedings before the Master, with respect to which the nomination of a solicitor has been made by the Master, and all such further costs as are occasioned to any of the parties by his being represented by a different solicitor from the solicitor so mentioned. Con. Rule 1188.

See *Chy. O.* 218, 641.

Rules A party unnecessarily employing a separate solicitor would not be
1149-1151. entitled to participate in the commission referred to in *Rule 1146*.

Under *Rule 602* the Master has power to classify the parties, and require the parties constituting each or any class to be represented by the same solicitor, and where he appoints a solicitor to act for a class, all the members of that class are bound by the acts of the solicitor so appointed, and cannot repudiate them, unless they have refused to be so represented and have appointed a separate solicitor; *Re McCannell*, 3 Ch. Ch. 423. But where a solicitor was appointed *ex parte* to represent creditors, it was held that the solicitor could not recover costs against creditors who had not proved their claims, and who had no notice of his appointment; *Re Monteith, Merchants' Bank v. Monteith*, 12 F. R. 288; 23 C. L. J. 415.

After the appointment of a solicitor to act for a class, the separate costs of any member of that class, subsequently incurred, will not ordinarily be allowed against the estate under administration; *Re Etua Insurance Co.*, 17 Gr. 160.

The Master should not appoint a separate solicitor for a class already sufficiently represented by the plaintiff; and where the plaintiff *prima facie* represents [see *Rule 203* (1)] the class, if the Master appoints a separate solicitor he should state his reason for so doing in his report; *Gorham v. Gorham*, 17 Gr. 386.

Costs of not
 admitting.

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.

See Eng. (1883) R. 242, and Chy. O. 234, and J. A. Rule 163.

A Master, or other judicial officer has jurisdiction to make the order as regards proceedings pending before him; see *Rule 1130* (4).

Rule 269 requires each party to admit such of the material allegations in the pleading of the opposite party as are true.

Notice to
 admit.

1150. The costs of proving a document shall not be allowed unless a notice to admit has been given under *Rule 327*, except where the omission to give the notice is a saving of expense. Con. Rule 1190.

Same as the last clause of Eng. (1883) R. 372.

Public
 officers not
 entitled to
 professional
 witness fees.

1151. A public official or other witness subpoenaed or called upon to produce before the Court or a Judge or officer any public or other document shall not be entitled to more than ordinary witness fees, unless the Court or Judge or officer otherwise orders, 57 V. c. 25, s. 1; 58 V. c. 12, s. 127; 58 V. c. 18, Sched. (20) and Rules of 1 January, 1896, *Rule 1459, last clause amended*.

See also Ind. Act, s. 120.

1152. The costs of an application to extend the time for taking any proceeding shall, in the absence of an order by the Court or a Judge directing by whom they are to be paid, be in the discretion of the Taxing Officer. Con. Rule 1191.

Rules
1152 1154

Costs of application for extension of time.

See Eng. (1883) 1102 (24).

1153. Where a petition or 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.

Tender of costs on service of petition.

This Rule corresponds with the first part of the Eng. (1883) R. 1002 1191, except that the latter is confined to the Chy. Div., and the amount to be tendered is different.

Where the procedure pointed out by this Rule has not been followed the party served will be entitled to attend, and may be allowed taxed costs: *Gardner v. Burgess*, 13 F. R. 250.

In *Re Sutton*, 21 Ch. D. 857, trustees respondents to a petition under *The Trustee Relief Act*, who had been tendered costs under the corresponding English Rule, were refused costs of appearing, as their appearance was not necessary to give the Court information. In *Re English's Settlement*, 40 L. T. a trustee was allowed cost; no tender of a sum for costs was there made. In *Re Vachon's Trusts*, 33 W. R. 297, executors were given costs notwithstanding the acceptance of the tender.

In *Somey v. Martin*, W. N. 1882, 143, mortgagees of interests of persons entitled under a will having been served and not having been tendered costs, were allowed costs of appearing on a petition for construction of a will.

See also *Campbell v. Helgland*, 7 Ch. D. 166.

Where a trustee appeared on an appeal though not notified he was not allowed costs: *Arden v. Deacon*, 51 L. T. 712.

Trustees served with notice of appeal, and holding a merely nominal position, without any intention of taking part in the argument, ought not to appear by separate counsel on the appeal: *Cavendish v. Bradshaw*, 50 F. R. 478.

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, state-

to allow
amount of
costs of appeal
for costs of
proceeding
in case

Rule 1124. ment 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, or 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 consequences shall ensue as if he had been specially directed to do so. Con. Rule 1195.

To the same effect as Eng. (1883) R. 1002 (20), and founded on Eng. Chy. Order 40, Rules 9 & 10; see *Morgan Orders*, 4th ed., 581 and see Chy. O. 71; J. A. Rule 435 and App. O. 10.

The Court may on its own motion exercise the powers given by this Rule in regard to costs "whether the same is objected to or not" see *Brown v. Burdett*, 37 Ch. D. 207.

Where costs are given as to one cause of action, and not as to another, the Taxing Officer is to apportion the costs; see *Faucher v. Mackinnon*, 15 P. R. 412.

The number of witnesses to prove a point is a matter in the discretion of the Taxing Officer; and so as to witnesses called to establish something on which the party calling them fails; *Lutour v. Smith* 13 P. R. 214.

The Master must inquire on taxation into the propriety of proceedings in an action, though not specially directed to do so; and he may not refuse to do so where an order is made to stay proceedings on payment of costs; *Brimm v. Wormsley*, 47 L. J. Chy. 844; 39 L. T. 85. Costs of affidavits in opposition to a motion were not allowed where the motion was dismissed on a preliminary objection; *Whitehead v. Whitehead*, 10 P. R. 183.

In an administration action, where the defendant had not admitted the plaintiff's right to an account, and had set up a release, and had not objected that the plaintiff should have proceeded under Rule 935, although the plaintiff was disallowed the extra costs so occasioned, yet the defendant was held not entitled to be allowed his extra costs as against the plaintiff; *Moore v. Culbreth*, 15 P. R. 159.

Where an appeal was brought from a Master's report, in order to raise a question which was not the subject of appeal, and a substantive motion was also made concurrently for the same relief; though the relief was given, no costs were given of either application; *Fouchier v. St. Louis*, 13 P. R. 318.

The case stated for the purpose of an appeal should only contain so much of the proceedings as is necessary to raise the questions involved in the appeal; see *Perkins v. Stamford Insurance Co.*, 1140, App. at p. 330, per Barton, J. A.

A direction in an order for a commission in the common form: **Rule 1155**, see No. 120 in App. (H. & L. Forms, No. 747), that the costs are to be costs in the cause, does not preclude the Taxing Officer from disallowing the costs on the ground that the evidence has not been used: *Harrison, etc., v. Stowson*, 9 P. R. 177; but the non-use of the evidence is not necessarily a ground for disallowing the costs of it: *Roudat v. Monetary Trust*, 18 P. R. 111; and see *Burtholme v. Hoggins*, 1891, 2 K. B. 230; 84 L. T. 509.

A defendant's costs of affidavits in answer to a motion for an injunction, prepared pending a stay of proceedings, until a plaintiff should give security for costs, were allowed on the dismissal of the motion for not giving security: *Whitchy Executors v. The Bank*, 1898, 2 Ch. 105; 70 L. T. 20.

Where the costs of a Sheriff in an interpleader matter had been ordered to be paid by the claimant, and the claimant appealed, contending that the execution creditor should pay them, and both were able to pay, the Sheriff was not allowed costs of appearing on the appeal: *Ex p. Webster, Re Harris*, 22 Ch. 11, 130.

In *O'Brien v. Bull*, 10 C. L. J. 211, a Sheriff unnecessarily served with notice of motion for final order in an interpleader matter was allowed costs of appearing: see also *Baker's Case*, 3 Ch. Ch. 331.

Costs of a person appearing in object that there is no jurisdiction, *Great Northern v. Flett*, 2 Q. B. 11, 281, or *quia timet* that by mistake an order will be made against him: *Lucas v. Fraser*, 9 P. R. 319, will be given; but not of a person not interested and appearing merely to ask costs: *Campbell v. Holpland*, 7 Ch. D. 175; *Re Aulsebrook*, 33 W. R. 100; *Walker v. Claria*, 11 P. R. 130.

The Court cannot prevent the appearance of persons entitled to appear, but may sometimes protect an estate by allowing only one set of costs to several parties: *Lucas v. Staden*, 28 Sol. Jan. 115. In *Re English's Settlement*, 60 L. T. 44, the costs of a trustee were allowed, he being properly served.

A solicitor was by direction of the Court called on to shew cause why he should not be personally ordered to pay the costs of an appeal prosecuted by him for an ulterior object, and not for the benefit of his client the appellant; and an order was made directing him to indemnify his client against the costs: *Harbin v. Mashburn*, 1896, 1 Ch. 351.

1155. An allowance shall not be made for any order for Costs of inspection of documents. 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 1156.

Same in substance as Eng. (1883) R. 1002 (17).

Costs of inspection were not allowed between party and party in *Brown v. Search*, 16 Ch. D. 517; *Wickstead v. Bigns*, 52 L. T. 428; and six affidavits on production by the same party were disallowed on a taxation between solicitor and client: *Baldwin v. Quinn*, 16 P. R. 218.

Rules

1158-1159.

Costs of
taking
bond off
files.

1156. The costs of removing a bond or other security from the files of the Court for the purpose of bringing an action thereon, may be taxed as costs in the cause in the action brought thereon. Rules 23 June, 1894, 1373.

2. TAXATION.

(i) Generally.

Taxing
Officers
may tax
costs with-
out express
reference.

1157. Where costs are ordered to be paid, a Taxing Officer may tax the same, without an express reference to him for that purpose. Con. Rule 1197.

Where the suitor is under no liability to pay costs to his solicitor, as, for instance, when the solicitor is working on a salary: *Jarvis v. G. W. R. Co.*, S. C. P. 280; *Stevenson v. Kingston*, 31 C. P. 337; *Ottawa Gas Co. v. Ottawa*, 4 O. L. R. 656; 5 O. L. R. 246; but see *Henderson v. Merthyr Tydvil*, 48 W. R. 332; or the suitor is indemnified by a third party against liability for costs: *Meriden, etc., v. Braden*, 16 P. R. 410; 17 P. R. 77; *Walker v. Gurney*, 19 P. R. 12, he is not entitled to tax costs against the opposite party, though costs are awarded to him; if he is liable for disbursements, or any other part of the costs of the solicitor, such part may be taxed. *Stevenson v. Kingston, supra*. An exception exists in the case of municipal corporations, which are now entitled to recover taxed costs, notwithstanding their solicitor is paid by salary: Con. Mnn. Act (3 Edw. vii. c. 19), s. 320 (3).

As to costs taxable to suitors appearing in person, see note to Rule 1130, *supra*, p. 1343.

The Master or a Taxing Officer is not justified, without a direction from the Court, in striking a balance between cross claims for costs payable in the action: *Fonchier v. St. Louis*, 13 P. R. 318, except where Rule 1164 applies.

Costs in
Canada of
appeal to
P. C.

(a) When the costs incurred in Canada of an appeal to His Majesty in His Privy Council have been awarded, and the same have not been taxed by the Registrar of the Privy Council, the same may be taxed by the senior Taxing Officer, and the taxation shall be according to the scale of the Privy Council. Rule 1256, 28 Nov., 1903.

This Rule does not apply to a case in which the judgment of the P. C. awarding costs was entered before the passing of the Rule: *Earle v. Burland*, 8 O. L. R. 174. 44-90 L.R. 113.

No bill of
costs ex-
ceeding \$30
to be taxed
by Regis-
trars, etc.

1158. No bill of costs where the amount claimed exceeds \$30 is to be taxed by the Registrars, the Master in Ordinary, the Master in Chambers or Clerk in Chambers, but every bill exceeding that sum is in Toronto to be taxed by one of the

Taxing Officers, notwithstanding anything to the contrary **Rules**
contained in the order for taxation. Con. Rule 1198. **1159-1162.**

See Chy. O. 310.

This *Rule* merely applies to costs taxable in Toronto, and does not in any way restrict the jurisdiction of local Taxing Officers.

1159. Where a notice of taxation is necessary, one day's one day's notice of taxation sufficient
notice shall be sufficient if served with a copy of the bill of costs and affidavit of disbursements. Con. Rule 1199.

See Rule T. T. (1856) 48.

Where a party proceeds with a taxation without giving notice, the taxation is not void, and an execution issued for the costs will not be set aside, but the opposite party is only entitled to a re-taxation: *Cranston v. Blair*, 15 P. R. 167.

Where the solicitor for the party ordered to pay costs attend, the taxation thereof, service of the certificate of the Taxing Officer of the amount allowed before issuing execution, is not necessary, though usual: *People's B. & L. Assn. v. Stanley*, 4 O. L. R. 644.

1160. Notice of taxation shall not be necessary where the Notice of taxation unnecessary when defendant has not appeared.
defendant has not appeared in person, or by his solicitor or guardian. Con. Rule 1200.

See Rule T. T. (1856) 50.

As this *Rule* only dispenses with notice of taxation to defendants who have not appeared, it would seem to be intended that wherever a defendant has appeared, he is to be entitled to notice of taxation, and (notwithstanding this *Rule*) notice is necessary when the defendant has done that which is equivalent to appearing, such as consenting to a Judge's order or the like: *Lloyd v. Bent*, 5 Dowl. 125; Arch. Pr., 13th ed., 431.

1161. The Taxing Officer may direct what parties are Parties to attend taxation.
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. Con. Rule 1201.

Identical with Eng. (1883) R. 1002 (27).

1162. Where two or more defendants defend by different Defendants improperly severing are to be allowed but one set of costs without special order.
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

Rule 1162. Taxing Officer shall allow but one defence and set of costs. Con. Rule 1202.

See Chy. O. 315.

As to the circumstances entitling defendants to sever in their defence, see *Melbourne v. Toronto*, 13 P. R. 340.

Where an action is tried against two or more defendants, and the judgment is against all defendants, a defendant who has put in a separate defence is alone liable for the costs occasioned by it; the other defendants are not liable for those costs: *Stuum v. Dixon*, 22 Q. B. D. 99, 529.

As to the right to contribution amongst co-defendants made jointly liable for plaintiff's costs, see *Fouchier v. St. Louis*, 13 P. R. 518.

Where two or more defendants defend by the same solicitor, and the action is dismissed as to one with costs, and succeeds as to others, the plaintiff is liable to pay such proportion of the costs of the joint defence as the successful defendants are liable for; this, in the absence of any special agreement would be an aliquot share: *Beaumont v. Senior*, 1903, 1 K. B. 282; 88 L. T. 234.

Rule as to
defendants
joining in
defence,
to whom it
applies.

The rule which requires defendants in the same interest to join in their defence, appears only to apply to defendants standing in a fiduciary position, either as trustees: *Farr v. Sheriffe*, 4 Hare, 528; or *cestuis que trustent*: *Peillon v. Brooking*, 4 L. T. 731; *Martin v. Sampson*, 33 C. L. J. 200; Sm. Pr., 837-8; but see *Crawford v. Landy*, 23 Gr. 251. Thus in a suit for specific performance by a vendee against the vendor, and a subsequent vendee of the same property, it was held that the defendants might properly sever in their defence, and employ separate solicitors: *Barrett v. Campbell*, 7 P. R. 150. But when husband and wife severed in a partition suit, the costs were ordered to be borne by the wife's share: *Mildmay v. Quicke*, 46 L. J. Chy. 667. Members of a firm which had been dissolved were held entitled to sever in their defence; see *Melbourne v. Toronto*, *supra*. So also in an action by a municipality against a contractor and one of his sureties, and the representatives of a deceased surety, the defendants were held to be entitled to sever: *Logan v. Fick*, 11 P. R. 130.

One defend-
ant im-
properly
severing.

Where one of several defendants is charged with fraud, the others are justified in severing, even though they stand in a fiduciary position; see *Conolly v. Hill*, 7 P. R. 111.

Where defendants have severed under circumstances which, if the severance were improper, would disentitle one of them to costs *in toto*, the Master cannot act under this Rule, if the judgment award the defendants costs generally. The Rule applies only where all the defendants are to blame for the severance, and one set of costs is consequently apportionable between them; *Reid v. Stephens*, 3 Chy. Ch. 372.

The Taxing Officer has a discretion to allow to defendants who appear separately separate sets of costs except in the cases referred to in this Rule; *Boswell v. Cooks*, 36 Ch. D. 444; and also to disallow more than one set of costs where separate defences have been improperly made: *Meriden v. Braden*, 16 P. R. 316, 410; 17 P. R. 77; and see *Re Isaac*, 1897, 1 Ch. 251; 75 L. T. 638.

For the cases in which it is improper for defendants to sever, see *Morgan & Wurtzburg on Costs*, p. 124.

On appeal from a Taxing Officer as to whether defendants were entitled to separate costs, where it was not shown that he had not exercised his discretion at all, or that he had done so on a wrong principle, it was held that an appeal from his decision could not be entertained: *Boswell v. Coake*, 36 Ch. D. 444. **Rules 1163, 1164.**

As to the mode of taxation where two or more defendants defend by the same solicitor, one of whom succeeds, and the other fails: see *Clark v. Virgo*, 17 P. R. 260; and see *Beaumont v. Senior*, *supra*, p. 1380.

Where one of several defendants is ordered to pay the plaintiff's costs of the action, in the absence of any express direction to the contrary, the Taxing Officer should allow the plaintiff the costs incurred against other defendants as to whom the action failed: *Kelley's Directories v. Gavin*, 1901, 2 Ch. 763.

Where a plaintiff succeeds on some issues, and a defendant on others, and the costs are to be taxed to the successful party in such issues, see *Lockard v. Waugh*, 17 P. R. 260; *Brown v. Houston*, 1901, 2 K. B. 855.

Independently of this Rule the Court may allow only one set of costs to several parties appearing by separate counsel: *Harbin v. Masterman*, 1896, 1 Ch. 351.

1163. Where any party entitled to costs refuses or neglects to bring in his bill of costs for taxation, or to procure the same to be taxed, and thereby prejudices any other party, the Taxing Officer shall certify the costs of the other parties, and certify such refusal or neglect, or may allow such party refusing or neglecting a nominal or other sum for such costs, so as to prevent any other party being prejudiced by such refusal or neglect. Con. Rule 1203. Neglect to bring in or tax costs.

Identical with Eng. (1883) R. 1002 (28).

1164. Where a party entitled to receive costs is liable to pay costs to any other party, the Taxing Officer may tax the costs such party is liable to pay, and may adjust the same by way of deduction or set-off, or may delay the allowance of the costs such party is entitled to receive until he has paid or tendered the costs he is liable to pay; or the officer may allow or certify the costs to be paid, and the same may be recovered by the party entitled thereto in the same manner as costs ordered to be paid may be recovered. Con. Rule 1204. Set-off of costs.

Same as Eng. (1883) R. 1002 (21).

Under this Rule a discretion is allowed as to whether or not there shall be a set-off of costs in the same action or proceeding, where costs are awarded to and against the parties. Equitable considerations are allowed to enter into the disposal of the contention and there is no strict right in the matter: *McCarthy v. Cooper*, 12 P. R.

Rule 1164. 125 (where a set-off was refused); *Re Clarke*, 15 P. R. 269; 16 P. R. 94.

This *Rule* does not enable the Taxing Officer to set-off costs payable in different actions between the same parties, but only costs incurred in the same action or proceeding: *David v. Rees*, 1904, 2 K. B. 435; *Barker v. Hemming*, 5 Q. B. D. 609; *Hassell v. Stanley*, 1896, 1 Ch. 607, (where a set-off of costs in the High Court against costs in a County Court was refused); *Girardot v. Welton*, 19 P. R. 201; *Edwards v. Hope*, 14 Q. B. D. 922. Interpleader proceedings (*Barker v. Hemming*, *supra*), and garnishee proceedings, (*David v. Rees*, *supra*), are separate and distinct proceedings from the original action in which they arise. Nor does the *Rule* extend to judgments on a claim and counter-claim where the latter is in the nature of a cross-action, so as to be treated as a distinct judgment: *Link v. Bush*, 13 P. R. 425. It applies to enable costs receivable out of a fund by a party to be set off against costs payable by that party personally in the suit: *Batten v. Wedgwood Coal & Iron Co.*, 28 Ch. D. 317; and to enable costs payable by a married woman out of her separate estate to be set off against costs payable to her in the same proceedings: *Hammond v. Keachie*, 17 P. R. 565; *Pelton v. Harrison*, 1892, 1 Q. B. 118; 65 L. T. 845.

Where judgment is given for the plaintiff on his claim with costs, and for the defendant on his counter-claim with costs, and directing the amounts to be set off, the plaintiff's costs should be taxed as though he had wholly succeeded in the action, and the defendant's costs should be taxed as though he had wholly succeeded in the action: *Summerfeldt v. Johnston*, 17 P. R. 6.

This *Rule*, however, does not appear to authorize the Master or Taxing Officer to adjust the balance due on cross claims for costs, where one of the cross claims is in the nature of a claim for contribution for costs paid by a defendant which the plaintiff was also jointly liable to pay, but of which he has neglected to pay his share: *Fouchier v. St. Louis*, 13 P. R. 318.

A set-off of costs awarded but untaxed was refused, but an opportunity was given to have them taxed, and payment of the costs due to the other party was delayed to enable a set-off to be made: *Re Craieshay*, 45 Ch. D. 318; see also *Re Clarke & Holmes*, 16 P. R. 95.

The Taxing Officer should not close the taxation of the costs of the action where interlocutory costs are to be set off, unless the party entitled to them unduly delays bringing in his bill: *Cousineau v. Park*, 15 P. R. 37.

A change of solicitor is immaterial if the costs are in the same proceeding: *Roberts v. Buée*, 8 Ch. D. 198.

The set-off which is authorized by this *Rule* may be made irrespective of the lien of the solicitor of either party: see *Wright v. Calvert*, 34 C. L. J. 355; 18 C. L. T. 218. But the ultimate balance found due by one of the partners in a partnership suit cannot be set off against costs previously ordered to be paid to him in the action, to the prejudice of his solicitor's lien: *Dawson v. Moffatt*, 10 P. R. 336; nor can the costs payable to a beneficiary out of an estate be set off against the costs payable by him to other parties, to the prejudice of his solicitor's lien: *Wright v. Bull*, 16 P. R. 335; 24 S. C. R. 656; and see *Hieron v. Hobson*, 47 L. J. Chy. 574; see, however, *Brigham v. Smith*, 17 Gr. 512; but in this case no question of lien appears to have been raised. In the case of costs not within this *Rule*, by reason of their not being in the same action or proceeding, the solicitor's lien may prevent a set-off: see notes to *Rule 1165*.

In the following cases a set-off of costs in the same action was **Rule 1165**.
 allowed without regard to the solicitor's lien: *Pringle v. Gloug*, 10 Ch.
 D. 676; 40 L. T. 512; *Cameron v. Campbell*, 12 U. C. Q. B. 159; 1
 P. R. 170; *Young v. Hobson*, 8 P. R. 253; *Maxwell v. Maxwell*, 7 P.
 R. 63; *Rawlings v. Smith*, 7 Sc. 231.

Interlocutory costs incurred before judgment may be set-off by the
 Taxing Officer, without any order: *Rule 1165*; but if incurred after
 judgment an order is necessary: *Elgie v. Butt*, 18 P. R. 403.

Where a set-off of interlocutory costs is ordered, the set-off should
 be made before execution is issued, and the execution should be issued
 only for the balance: *People's B. & L. Assn. v. Stanley*, 4 O. L. R.
 644.

1165. A set-off of damages or costs between parties shall Set-off of
damages
and costs
not to
prejudice
solicitor's
lien.
 not be allowed to the prejudice of the solicitor's lien for costs
 in the particular action in which the set-off is sought: but
 interlocutory costs in the same action awarded to the adverse
 party may be deducted. *Con. Rule 1205.*

Taken from *Rule T. T. 1856, 52.*

This *Rule* adopts the former Equity rule, as to which, see *Pringle*
v. Gloug, 10 Ch. D. 76.

The Eng., 1883, R. 989, is entirely different, and as follows:—

"989. A set-off for damages or costs between parties may be allow-
 ed notwithstanding the solicitor's lien for costs in the particular cause
 or matter in which the set-off is sought."

The concluding clause in this *Rule* appears to be already covered
 by the provision of *Rule 1164*. As to what are "interlocutory costs":
 see *Clarke v. Creighton*, 14 P. R. 100; *Re Clarke*, 15 P. R. 269; 16
 P. R. 94; *Flett v. Way*, 14 P. R. at p. 316; *Elgie v. Butt*, 18 P. R.
 469; *Girardot v. Welton*, 19 P. R. 162, 201.

This *Rule* does not interfere with the power of the Judge at the
 trial in disposing of the costs of an action and counter-claim therein,
 to direct a set-off without regard to any claim of lien on the part of
 the solicitor: *Blancstiel v. Edwards*, 5 O. W. R. 736.

The Common Law Rule 52, from which this *Rule* is taken, was in
 similar terms to the English Rule 63 H. T. 1853. The words "dam-
 ages and costs" in this *Rule* apply to damages and costs payable in
 separate actions; and it is only where a set-off of damages and costs
 in separate actions is sought that the lien of the solicitor is to be
 protected: *George v. Elston*, 1 Sc. 518; *Dunn v. West*, 10 C. B. 420;
Scott v. Richebourg, 11 C. B. 447.

Under this *Rule* a set-off of damages and costs between the same
 parties in different actions cannot be ordered to the prejudice of the
 lien of the solicitor of either of the parties: *Turner v. Dow*, 17 P.
 R. 475; see further as to the application of the *Rule*, *Little v. Phil-
 potts*, 8 Jur. N. S. 1175; *Young v. Hobson*, 8 P. R. 253; *Re Harrold*,
 48 L. T. 352; *Barker v. Hemming*, 5 Q. R. D. 400; *Cuthbert v. Com-
 mercial Travellers' Association*, 7 P. R. 255; *Molson Bank v. Cooper*,
 18 P. R. 396; *David v. Rees*, 1904, 2 K. B. 435.

On the application of defendants who had employed the same
 solicitor, a set-off has been allowed of costs due by the plaintiff to

Rule 1165. one of the defendants as to whom he had failed, against damages and costs due to the plaintiff by the other defendants as to whom he had succeeded, without regard to the plaintiff's solicitor's lien: *Ratcliffs v. Sewell*, 7 Sc. 231; *George v. Elston*, 1 Sc. 518; *Fortune v. Hickson*, 1 U. C. Q. B. 408; *Scoville v. Noble*, 1 H. Bl. 23; *Bank of Upper Canada v. Thomas*, 10 Gr. 356; *Wright v. Chard*, 1 L. T. 182; 4 Drew. 702; but see *Wilson v. Switzer*, 1 Chy. Ch. 160; and this, even though the defendants appeared by different solicitors: *Lees v. Kendall*, 3 A. & E. 707; 5 N. & M. 340; but see *Wilson v. Switzer*, 1 Chy. Ch. 160; in *Flett v. Way*, 14 P. R. 312, a set-off under such circumstances, to the prejudice of the solicitor's lien, was refused.

Claims for contribution cannot be allowed by the Master, or Taxing Officer, by way of set-off: see *Fouchier v. St. Louis*, 13 P. R. 318; the application must be made to a Judge: *ib.*

The lien of the solicitor only holds as against the opposite party to the extent of the costs between solicitor and client of the cause only, he cannot claim a general lien for all costs due him: *Stephens v. Weston*, 3 B. & C. 535; *Watson v. Maskell*, 1 Bing. N. C. 727.

In *Jenner v. Morris*, 11 W. R. 943, the lien of the solicitor was declared to be always subject to the equities between the parties; and see *Mercer v. Graves*, L. R. 7 Q. B. 499; but this view has not always been maintained by the Courts: see *Re Cleland*, L. R. 2 Chy. 508; *Wright v. Bell*, *supra*, p. 1382.

To the ordinary rule that a set-off of damages and costs in separate actions, will not be allowed to the prejudice of the solicitor's lien, costs payable to a trustee out of the trust estate form an exception; and when costs are ordered to be paid out of a trust fund, the lien of the solicitor of the person entitled to receive the costs will not be allowed to interfere with the set-off, against the costs so payable, of any moneys payable by the client to the trust estate, though the latter may be payable under a judgment recovered in a separate action: *Re Harrold*, 51 L. T. 441.

Whether, for the purposes of this Rule, a claim and counter-claim are to be treated as separate actions is not very clear. In *Broken v. Nelson*, 11 P. R. 121, where the claim and counter-claim arose out of the same transaction, the set-off was allowed without providing for the solicitor's lien, see also *Westacott v. Beran*, 1891, 1 Q. B. 774; but in *Canadian Pacific Ry. Co. v. Grant*, 11 P. R. 208, the claim and counter-claim, though arising out of the same transaction, were held to be separate actions, and a set-off, to the prejudice of the solicitor's lien, was refused. In *Flett v. Way*, 29 C. L. J. 192, a set-off of damages was allowed; but not a set-off of costs: S. C., 14 P. R. 312; and see *Westacott v. Beran*, 1891, 1 Q. B. 774.

In the following cases a set-off of costs payable in separate actions to the prejudice of the solicitor's lien was refused: *Webb v. McArthur*, 4 Chy. Ch. 63; *Edwards v. Hope*, 14 Q. B. D. 222; 53 L. T. 60; *Cuthbert v. Commercial Travellers' Assocn.*, 7 P. L. 255; and see *Ross v. McLay*, 7 P. R. 97; *Wardell v. Trenouth*, 8 P. R. 142; *Barker v. Hemming*, 5 Q. B. D. 600; *Blakey v. Latham*, 41 Ch. D. 518.

The solicitor's lien attaches to money payable to the plaintiff by way of compromise where such money is in substance the fruit of the action, and if a solicitor having notice of the lien procures the money to be paid to the plaintiff, he becomes personally liable to satisfy the lien: *Ross v. Burton*, 42 Ch. D. 130.

The possibility of a solicitor being able to recover his costs out of some other fund was held not to be a sufficient ground for allowing a set-off to the prejudice of his lien: *Molsons Bank v. Cooper*, 18 P. R. 396. Rules 1166, 1167.

A set-off of judgments was allowed, notwithstanding an assignment of one of the judgments for the benefit of creditors: *Moody v. Can. Bank of Commerce*, 14 P. R. 258, and see R. S. O. c. 147, s. 26.

Costs due by a party individually cannot be ordered to be set off against a fund due to him in a fiduciary character or even against his beneficial interest therein: *Phillips v. Howell*, 1901, 2 Ch. 773.

1166. Costs may be taxed on an award, although the time for appealing from or moving against the award has not elapsed. Con. Rule 1206. Costs may be taxed on an award, though time for moving not elapsed

Arbitrators who have power under a statute to award costs, cannot, unless expressly authorized so to do, award them "as between solicitor and client": *Re Beatty & Toronto*, 13 P. R. 314; neither could they do so on a reference at Law, but it was otherwise in Equity: see *Mordul v. Palmer*, L. R. 6 Chy. 22, per Mellish, L.J., and *Andrews v. Barnes*, 58 L. T., per Fry, L.J., at p. 759. This excess of jurisdiction may be objected to on taxation, when the objection appears on the face of the award: *Re Beatty & Toronto*, *supra*.

The arbitrators should state the scale on which the costs awarded are to be taxed: see *Re Preston*, 16 P. R. 318.

As to the costs of arbitration generally, see R. S. O. c. 42, ss. 18, *et seq.*

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. Revision of certain costs

Revision of costs payable out of "a fund in Court" is not confined to cases where the Court has judicial control over, or has to exercise some judicial function in regard to the fund. The expression "a fund in Court" has no technical signification which makes it mean anything different from "a sum of money in Court": *Cousineau v. London Fire Ins. Co.*, 13 P. R. 42.

The Court will not permit costs occasioned by improper litigation, or negligent conduct of proceedings, to be paid out of an estate under its care; and the amount of costs allowed between solicitor and client is not conclusive as to the amount which will be allowed out of an estate: *Brown v. Burdett*, 40 Ch. D. 152.

Rules

1168-1170. Where costs are payable out of a fund, a taxation cannot be waived by agreement between the solicitors without the consent of the parties beneficially interested: see *In re Cosier*, 1898, W. N. S. (12). The Rule applies not only to actions *inter partes*, but also to *ex parte* matters: see *Re Norris*, 5 O. L. R. 39.

No sum to be inserted for costs in report, until after revision.

1168. In any such case no sum is to be inserted in the report of a Local Master or other officer as taxed and allowed for costs, until such revision by a Taxing Officer; but in case of urgency a writ of execution may be issued to levy debt or costs, or both, upon the order of a Judge, subject to the future revision by the Taxing Officer. Con. Rule 1210.

See Chy. O. 313.

But in case of urgency execution may issue.

1169. Pending a revision, judgment may be entered and execution issued, unless the Court or a Judge otherwise orders; and in case of an execution being so issued, if the amount taxed is reduced on revision, the party entitled to the costs shall forthwith give notice of the reduction and of the amount thereof to the Sheriff or other officer in whose hands the execution had been placed; and the amount struck off on the revision shall be deducted from the amount indorsed on the execution. Con. Rule 1211.

Judgment and execution pending revision

Not taken from any English Rule. Adapted from J. A. R. 439 (d).

See Rule 1168.

Revision of taxations by local officers.

1170. A Local Master or other local officer shall forthwith, after taxing any such bill of costs, transmit the same by mail to Toronto, addressed to the proper Taxing Officer, and he shall allow in the bill the postage for the transmission and return of the bill, and shall prepay the same; and shall allow in the bill the sum of one dollar as a fee for the revision of the bill by the Taxing Officer at Toronto, and a law stamp for that sum, with postage stamps for the postage, shall be paid at the time of taxation by the party procuring the bill to be taxed; and the Local Master or other officer shall transmit with the bill to the Taxing Officer at Toronto the law stamp, and the necessary stamps for postage on the return of the bill. Con. Rule 1208.

Taken from Chy. O. 311.

Review of taxation.

A revision of taxation is now necessary to be had only in the class of actions mentioned in Rule 1167.

A review of taxation may now be had as provided by *Rules 1182, 1183*; and an appeal therefrom to a Judge, as provided by *Rules 773, 1171, 1172*. These *Rules* supply no machinery for carrying a taxation from a Local Officer before either of the Taxing Officers in Toronto, except in the cases mentioned in *Rule 1167*.

Appeal from taxation by local officers, how brought

1171. The Taxing Officer at Toronto, upon receiving the bill of costs, shall examine the same, and mark in the margin such sums as appear to him to have been improperly allowed, or to be questionable; and he shall revise the taxation either *ex parte* or upon notice to the Toronto agent of the solicitor whose bill is in question, as he may see fit; but he shall notify such agent (if any) in all cases where the taxation is not clearly erroneous, or where the amount in question is so large as in the judgment of the Taxing Officer to make such notification proper. The notification may be by appointment mailed to the address of the agent (if any). If upon the revision the sums disallowed amount to one-twentieth of the amount allowed upon taxation, the Taxing Officer shall add to the amount taxed off the amount of postage, and the sum of one dollar afore-said, and shall thereupon re-transmit the bill so revised to the Local Master or other officer. Con. Rule 1209.

Receipt of Taxing Officer on receipt of bill for

Taken from Chy. O. 312.

The Taxing Officer, on revision, may restore items improperly disallowed by a Local Master; as well as strike out, or reduce, any which may have been improperly allowed, even though in the discretion of the local officer: *Keim v. Yeagley*, 6 P. R. 60; *Re Robertson, Robertson v. Robertson*, 24 Gr. 555.

Powers of Taxing Officer on revision.

But the Taxing Officer cannot receive evidence to shew that costs are payable otherwise than the order awarding them, construed by the ordinary rules of construction, directs: *Keim v. Yeagley*, 6 P. R. 60; and see *Edwards v. Pearson*, 3 C. L. T. 504.

1172. Mileage shall not be taxed or allowed for the service of any writ, paper or proceeding, without an affidavit stating the sum actually disbursed and paid for such mileage, and the name of the person to whom such payment has been made; and, except in cases provided for in *Rule 148*, fees shall not be allowed for the mileage or service of writs of summons unless served, and sworn to have been served, by the Sheriff, his deputy or bailiff, being a literate person (or by a Coroner when the Sheriff is a party to the action), nor unless a return of the Sheriff or Coroner (as the case may be) is indorsed thereon. Con. Rule 1212.

Mileage not allowed on service of writs unless served by Sheriff.

Adopted from R. S. O. 1877, c. 50, s. 365; Rule T. T. 1876, 160.

Rule 1173 It would seem that the rules in regard to the allowance of costs in service of writs of summons apply to the costs of serving subpoenas. *Carty v. City of London*, 13 P. R. 285.

Affidavit of disbursements to be made by solicitor, or his clerk having management of cause, or the client.

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.

Form of.

(2) The affidavit shall set forth the sums paid to counsel, naming them, and for what services, the names of witnesses, their places of abode, the places at which they were subpoenaed, 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.*

Adopted from Rule T. T. (1856) 165.

Costs of witness rejected not allowed.

Where a witness is rejected at *Nisi Prius*, and the ruling of the Judge is acquiesced in by the parties, and upheld by the Court, the expenses of his attendance are not allowed on taxation as between party and party: *Galloway v. Keyworth*, 15 C. B. 228. So, where a witness is rejected by an arbitrator, whether upon a sufficient, or an insufficient ground: *Id.* And where witnesses were subpoenaed by the plaintiff to attend at a trial which was postponed in consequence of the defendant's default, and the defendant was ordered to pay the costs of the day, and at a subsequent trial the witnesses in question were examined and their evidence proved to be immaterial, the costs of their attendance at the abortive trial were disallowed as against the defendant: *Christopher v. Noxon*, 10 P. R. 149. The costs of a commission to take evidence abroad, when the evidence so taken is not actually used at the trial, may be disallowed: *Dominion Co. v. Stinson*, 9 P. R. 177; but the fact of its not being used, is not alone a sufficient ground for disallowing the costs: *Rondot v. Municipal Times*, 18 P. R. 141; *Bartlett v. Higgins*, 1901. 2 K. B. 230, 84 L. T. 509.

Witness fees for attendance, how allowed.

When a cause at the Assizes is over at three o'clock in the afternoon, witnesses may reasonably be allowed the following day for their return home, though their place of residence be distant only about fifty miles, and accessible by trains on the same evening: *Fryer v. Sturt*, 16 C. B. 218. It is not a general rule that parties, if witnesses, are to have an allowance for their attendance: *Dandell v. Australian Royal Mail Steam Navigation Company*, 3 El. & Bl. 902.

Witness fees may be paid by settling off, with the consent of the Rule 1173. witness, the sum payable against a sum due to the party subpoenaing the witness, and an affidavit of disbursements describing such a transaction as a payment of the witness fees was held to be correct: *Re Subpoena*, 9 C. L. T. 35.

Witness fees actually paid are taxable though the witness may have travelled by rail on a free pass: *Kerr v. Canadian Construction Co.*, 5 O. W. R. 108.

Witnesses are not, in general, allowed for attendance before the day appointed for the opening of the Court: see *Harvey v. Dwyer*, 16 C. B. 497. But when a material witness is going abroad, but is detained on subpoena, his subsistence for the whole time he is detained may be allowed: *Potter v. Rankin*, L. R. 5 C. P. 518; and the necessary expenses of procuring the attendance of a witness residing out of the jurisdiction may be allowed: *Bell v. Crompton Carpet Co.*, 11 P. R. 256.

Under the English Rule 1092 (9), which authorizes the allowance of such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence, the expense of surveys by surveyors to qualify themselves to give evidence was allowed: *Mackley v. Chillingworth*, 2 C. P. 16 273; and see *Lea v. Griffith*, L. R. 20 Eq. 650; but there is no corresponding provision in Canada. In *Mellonson v. Clarke*, 9 P. R. 555, it was held that surveys and plans made to enable witnesses to give evidence, are not taxable between party and party; and costs of a preliminary examination of accounts by an accountant to qualify himself to give evidence were disallowed between party and party: *Nelson v. Calceon*, L. R. 8 Q. B. 84. See also *Rule 1174, 1177*, and notes.

The costs of sending a special commissioner abroad to take evidence in a case of a complicated and important character were allowed: *Yglesias v. Royal Exchange Assurance Corporation*, L. R. 5 C. P. 141.

A counsel fee to counsel in British Columbia for attending at an examination of witnesses was held to be taxable between party and party: *Logan v. Kirk*, 14 P. R. 130.

The Taxing Officer may examine into the truth of affidavits of increase: *Boulton v. Seitzer*, 1 C. L. Cham. 83. The omission of the Christian name of a witness in the affidavit is immaterial: *Horn v. Losher*, 24 U. C. Q. B. 357. All witnesses should be paid before taxation, and only the sums actually paid are taxable: *Id.* Milonge for serving subpoenas is not to be allowed unless the service is effected by the Sheriff or his officer: *Rule 1172*; *McLain v. Evans*, 3 P. R. 154; *Carty v. London*, 13 P. R. 285. Where witnesses are subpoenaed and paid by both parties, the successful party is entitled to recover the costs of such witnesses from the other party: *Id.* The costs of a witness called to prove facts admitted by the defendant in his examination for discovery may be allowed: *Alexander v. Gloucester*, 11 P. R. 157; and see *Randall v. Monetary Times*, 18 P. R. 141.

Where it is discovered that fees have been allowed on a false affidavit, and nothing has been paid, on motion to the Court they may be disallowed; but there is no jurisdiction in Chambers to entertain such an application: *Harding v. Knust*, 15 P. R. 80, and *Harnick v. Ramney*, 11 C. L. T. 329. In the latter case counsel fees not paid at the time of the making of the affidavit, which stated that they had been paid, were disallowed, though paid before the taxation was closed.

Rules
1174, 1175.

Maps and
plans.

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*.

The costs of plans and models, etc., useful to aid the Court and jury in coming to a right conclusion may be allowed: *Padgrinc v. Southampton & Dorchester C. R. Co.*, 8 C. L. 25; *Batten v. Kynoch*, L. R. 20 Eq. 632; *McGinnon v. Clarke*, 9 P. R. 555. See note to *Rule 1173, supra*.

Taxations
between
party and
party.

1175. Where [costs] are 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.

See Eng. CASS. R. 1002 (23); and see J. A. Rule 442. The word in brackets, though not in the official copy of the *Rule*, appears to be implied.

As to the general rule that the costs taxable between party and party are only those necessary to enable the party to conduct the litigation, see *Smith v. Butler*, L. R. 19 Eq. 473.

Where, under an order directing an account of what was due to a party in respect of costs of proceedings taken to enforce a judgment in the Exchequer Division, the Taxing Master disallowed the costs of certain abortive garnishee summonses, it was held that the Master was not precluded by the form of order from disallowing any costs he thought proper, and that, under this *Rule*, he was bound to do so: *Shorrocks v. Storer*, 14 Ch. D. 154.

So a clause in an order for a commission directing that costs of the order, commission and depositions to be taken thereunder, should be costs in the cause, was held not to preclude the Taxing Officer from disallowing the costs where the evidence had not been used: *Dominion, etc., v. Stinson*, 9 P. R. 177; see *Declarique v. Ozenhorne & Co.*, W. N. 1883, 227; *Re McMillan*, 8 C. L. J. 285. Charges not strictly under the tariff of costs, but for work done which saves the greater expense of proceeding in the regular way, may be allowed whether done between the solicitors, or by one party alone: *Torrance v. Torrance*, 18 C. L. J. 223; 2 C. L. T. 311; 9 P. R. 271.

Costs of unnecessary proceedings by writ for administration, instead of proceeding by motion, are not taxable, even between solicitor and client: *Re Allenby*, 14 P. R. 235. Where a solicitor is consulted it is an important part of his duty to advise the adoption of a comparatively cheap remedy, in preference to one far more costly, and not more efficacious: *Ib.*, *per* Hagarty, C.J.O.

Copies of pleadings where necessary for an interlocutory motion will be allowed: *Warner v. Mosses*, W. N. 1881, 135; 45 L. T. 359; 17 C. L. J. 479; 17 Ch. D. 72.

Where an action is dismissed with costs it means the cost of all defendants, and in all capacities in which they are defendants: *Woolley v. Coleman*, W. N. 1884, R. 336; 80 L. T. Jour. 329.

Where an action is brought against a solicitor who defends it in person and obtains judgment, he is entitled upon taxation to the

same costs as if he had employed a solicitor except in respect of items **Rule 1176** which the fact of his acting directly renders unnecessary: *London Scottish Benefit Society v. Chorley*, 12 Q. B. 11, 452. Where he nominally appeared by a solicitor, but did the work himself, the same costs were held to be taxable: *King v. Moger*, 9 P. R. 544; see *Bank v. Burroughs*, 12 S. C. R. 184.

As to the allowance of costs to a solicitor conducting several similar actions for different clients at the same time, see *Re Metropolitan, etc., Coal Co.*, 45 Ch. D. 661; *Baldwin v. Quinn*, 16 P. R. 248.

Costs incurred after the death of the client were disallowed, though the solicitor was not aware of the death: *Pool v. Pool*, 61 L. T. 404.

As to when defendants should appear by the same solicitor, or may appear by separate solicitors; see *Morgan & Wurtzburg on Costs*, p. 124; *Barrett v. Campbell*, 7 P. R. 150; *Connolly v. Hill*, 16 L. 441; *Born v. Turner*, 1890, 2 Ch. 211, and notes to *Rule 1162*.

In *Re Lyall*, 20 Sol. Jour. 280, trustees, viz., the widow of the testator, who was also tenant for life, and three others, were allowed two sets of costs, they having severed, on the ground that the *Rush* was, that a trustee, also a tenant for life, might appear separately from his co-trustees.

Defendants joining in a statement of defence may sometimes properly separate at the trial, and be represented by different counsel, where their cases are distinct; see *Ayer v. Blackstock*, 56 L. T. 800; see also *Petrie v. Guelph, etc.*, 10 P. R. 680.

A defendant in person may be made an allowance for his time and trouble in arguing the case: *Miller v. Macdonald*, 14 P. R. 430.

Where by an order allowing the plaintiff to make an amendment the costs were made costs in the cause, it was held that the Taxing Officer had no discretion under this *Rule* to disallow these costs in taxing the plaintiff's costs of the cause: *Edwards v. Pearson*, 20 C. L. J. 93; 3 C. L. T. 504.

In *Christopher v. Noxon*, 10 P. R. 149, a trial was postponed owing to defendant not having obeyed an order to produce, defendant to pay the costs rendered nugatory by the postponement. The plaintiff subpoenaed seventeen witnesses, who were examined at the adjourned trial upon matters which the Judge held could not be interfered with by the Court. It was held that the Taxing Officer in refusing the plaintiff the costs of these witnesses did not erroneously exercise the discretion given him by this *Rule*.

See also *Goodfellow v. Shuttworth*, 3 C. L. T. 105; *Trotter v. Maclean*, 13 Ch. D. 574; *Carlisle v. Roblin*, 16 P. R. 328.

Where solicitor and client costs are to be paid between party and party, the proper form of order is to direct the costs to be taxed "as between solicitor and client," but in such a case where the costs are ordered to be taxed "between solicitor and client" no greater costs can be taxed: *Heastip v. Heastip*, 14 P. R. 165. A retainer fee agreed to be paid by a party cannot be allowed on a taxation "as between solicitor and client": *McKee v. Hamlin*, 16 P. R. 297. As to retainer between solicitor and client, see *infra*, p. 1394.

1176.—(1) Between party and party the Taxing Officer shall not allow the costs of proceedings:

(a) Unnecessarily taken:

Costs of unnecessary proceedings not to be taxed

Rule 1174.

- (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.

Exception in case of taxation between solicitor and his client, when costs incurred at client's request after notice that proceeding unnecessary.

(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.

Adopted from Chy. O. 306.

See also *Rules* 1136, 1154, 1155, which also relate to the disallowance of costs of unnecessary proceedings.

The costs of unnecessary affidavits, going into the merits, filed on a motion for leave to appeal from a Master's report: *Nash v. Glover*, 6 P. R. 267; and on a motion to vacate a decree: *Redford v. Todd*, 4 P. R. 154, and on production of documents: *Baldwin v. Quinn*, 14 P. R. 248, were disallowed. Costs rendered unnecessary by a slip of the solicitor cannot be recovered, even by the solicitor from his client: *Re Massay*, 76 L. T. Jour. 1361; and see *Re Allenby*, and *Baldwin v. Quinn*, *supra*, p. 1390.

The Court does not allow out of an estate costs of proceedings which were of no benefit to it. See notes to *Rule* 944, *supra*, p. 1186, and *Re Gynstow*, 58 L. T. 74; 59 L. T. 594; 33 W. R. 216; *Re Allenby*, 14 P. R. 227.

Where, in an administration suit, the plaintiffs, who were next of kin, had incurred the expense of several journeys to examine the books of the estate and make inquiries, etc.; and also of other proceedings in the Master's office, without the consent of the creditors who were alone beneficially interested, and after they knew that the estate was insolvent, such costs were disallowed: *Re Robertson*, *Robertson v. Robertson*, 24 Gr. 575.

An objection that a person examined for discovery was not liable to be so examined, is not open on taxation: *Logan v. Kirk*, 14 P. R. 130.

The costs of preparing and tendering a conveyance before suit are not taxable as costs in a cause subsequently brought: *Pringh v. ...*, 7 P. R. 152.

Costs incurred in anticipation of a threatened suit were, however, **Rule 1177**, allowed, e.g., where a defendant was threatened with an action in respect to fraud disclosed in another action in which he was not a party, and therefore obtained a transcript of the speeches, evidence and judgment in the latter case, he was allowed on taxation so much of the transcript of the evidence and judgment as related to the question whether the defendant was a party or privy to the fraud: *Bright v. Sellar*, 1904, 1 Ch. 339; 60 L. T. 155.

Costs occasioned by unnecessarily adding a number of sub-tenants as parties defendant, in an action by a landlord to recover possession, were disallowed: *Green v. Herring*, 1905, 1 K. B. 152; 62 L. T. 37.

In some cases it may be necessary to have a direction in the judgment, in regard to costs incurred in consequence of an unreasonable course pursued by the other party, to enable the Taxing Officer to allow such costs: *Garward v. Edge*, 41 Ch. D. 224; 62 L. T. 510.

The amount allowed between solicitor and client is not conclusive as to the amount to be allowed out of an estate: *Broen v. Burdett*, 37 Ch. D. 207; 40 Ch. D. 214.

Notwithstanding this **Rule**, charges and allowances, which might very properly be allowed on a taxation between solicitor and client, when the costs come out of the plaintiff's fund, or one in which he is interested, may nevertheless be disallowed out of a fund in which he has no interest: *Re Robertson*, *supra*; *Ford v. Mason*, 16 P. R. 25.

The mere non-communication by a solicitor to his client of an offer of settlement does not prove that proceedings after the offer were unnecessary, so that the costs of them should be disallowed under this **Rule**, unless the offer was an advantageous one, the acceptance of which the solicitor ought to have advised, and it can be fairly inferred that he did not do so merely to put further costs into his pocket, without regard to the interest of his client: *Re O'Donoghue*, 12 P. R. 612.

Actions by two plaintiffs by the same solicitor against the same defendants, though supported mainly by the same evidence, are upon taxation of plaintiffs' costs to be taxed as two actions (in the absence of special order as to the conduct of the actions), except as regards attendances or other matters which were or ought to have been done at the same time in both cases: *Re Metropolitan Coal Consumers' Assoc.*, *Guest's Case*, 45 Ch. D. 605; *Baldwin v. Quinn*, 16 P. R. 248.

See *Latour v. Smith*, in note to **Rule 1154**.

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;

Certain costs taxable between party and party to be allowed as between solicitor and client.

Rules
1178, 1179.

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.

Taken from Chy. O. 307.

This *Rule* is not so fall as either the Eng. Chy. Order on which it is founded (see Morgan, 548-550), or the present Eng. R. (1883-1902 (27)). In consequence of the omission of some such expression as "procuring evidence," which is to be found in the Eng. O. and Rule, no sum can be allowed between party and party for payment to a scientific witness to get up a case; see *McGannon v. Clarke*, 9 P. R. 555. A reasonable sum is taxable in England; see *Smith v. Buller*, L. R. 19 Eq. 473; *Churton v. Frewen*, 15 W. R. 559; *Mackley v. Chillingworth*, 2 C. P. D. 273; *Windham v. Bainton*, 21 Q. B. D. 190.

Charges for procuring copies of opinions of Judges in another action, which were of assistance to counsel, were disallowed: *Platt v. G. T. Ry. Co.*, 12 P. R. 273.

A retaining fee actually paid by a client was held to be taxable between solicitor and client: *Re Fraser*, 13 P. R. 409; *Ford v. Mason*, 16 P. R. 25; but a retaining fee agreed to be paid but not actually paid, cannot be taxed "as between solicitor and client"; *McKee v. Hamlin*, 16 P. R. 207; nor against the client: *Ford v. Mason*, *supra*; nor can any other bargain to pay more than taxable costs be enforced against the client: *Re Geddes*, 2 Chy. Ch. 447. "The client may pay more if he likes, and the payment may not, under the circumstances, be liable to be recalled; but if he only promise to pay, the promise is a *nudum pactum*," per Mowat, V.C.; *Ib.*, p. 450.

The Court will not on appeal usually interfere with the Taxing Officer's discretion as to the allowance of interlocutory costs, nor as to the amount allowed for counsel fees: *Smith v. Harwood*, 17 P. R. 33.

Tariff of
costs.

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*.

Tariff of
disburse-
ments.

1179. The fees and disbursements payable in stamps or otherwise upon proceedings in the High Court and Court of Appeal and in the County Court shall henceforward be those enumerated in the Tariff B appended to these Rules. Con. Rule 1218, *amended*.

Formerly there was a Lower Scale Tariff applicable to certain cases of an equitable nature; that tariff has not been continued in

the present consolidation, for the reason that the jurisdiction of the Rules County Courts has been extended so as to enable them to grant equitable relief in certain cases: see R. S. O. c. 55, s. 23 (9, 10, 11, 12, 13, 14), *supra*, 1361; and if such cases are now brought in the High Court, the County Court Tariff will be applicable thereto, in like manner as it is applicable to any case of a Common Law character brought in the High Court which ought to have been brought in a County Court: see *Rule* 1132.

Costs of appeals to the Court of Appeal under the Drainage Act from the Drainage Referee are taxable on the High Court scale: *Metcalf v. Colechester*, 2 O. L. R. 103.

Costs are taxable according to the Tariff in force at the time they are incurred, notwithstanding the subsequent repeal of such Tariff: *Delap v. Charlebois*, 18 P. R. 417; *Luch v. Barlaud*, S. O. L. R. 174.

44? 90, R. 613.

1180. Where a seal is under section 154 (x) of *The Judicature Act, 1895*, impressed on any document which before the passing of *The Ontario Judicature Act, 1881*, did not require to be sealed, the fee of fifty cents mentioned in the section 183 (y) of *The Judicature Act, 1895*, shall not be payable on such document. Con. Rule 1225.

Noted for seal when impressed in documents not formerly requiring to be sealed.

Taken from J. A. Rule 503.

(x) Now sec. 152, *supra*, p. 180.

(y) Now sec. 183, *supra*, p. 190.

This *Rule* was passed to prevent the fee of 50 cents, payable under sec. 183 of the Act for the seal of the Court, from being payable on ordinary filings on which, under sec. 152, the seal is to be impressed.

1181. The practice of any Court, whose jurisdiction is vested in the High Court of Justice or Court of Appeal, relating to costs, and to the allowance of the fees of solicitors, and to the taxation of costs, existing prior to *The Ontario Judicature Act, 1881*, shall in so far as not inconsistent with *The Judicature Act, 1895*, and the Rules of Court, remain in force and be applicable to costs of the same or analogous proceedings, and to the allowance of the fees of solicitors of the Supreme Court and the taxation of costs in the High Court of Justice and Court of Appeal. Con. Rule 1226.

Application of former practice.

This corresponds in substance with Eng. (1883) R. 1002 (371); and see J. A. Rule 445.

See *Peinle v. Gibby*, 10 Ch. D. 676.

Rules 154 and 168 of T. T. 1876, and the practice under them not inconsistent with the Jud. Act, are in effect preserved in force by this *Rule*, and under such practice the Taxing Officer may allow what is reasonable for procuring the attendance of foreign witnesses: *Ball v. Compton Carpet Co.*, 11 P. R. 256.

Rule 1182.

(ii) *Review of Taxation Between Party and Party.*objection to
taxation.

1182—(1) A party dissatisfied with the allowance or disallowance by the Taxing Officer, of the whole or any part of any item may, at any time before the certificate is signed, deliver to the other party interested therein and to the Taxing Officer, objections in writing to such allowance or disallowance, specifying concisely the items objected to, and may thereupon apply to the Taxing Officer to review the taxation in respect of the same. Gen. Rule 1230.

Taken from J. A. Rule 447.

Taxation
of costs.

(2) The Taxing Officer shall hold the taxation open for a reasonable time in order to allow such objections to be delivered. Rules 22 June, 1894, 1374.

See the Eng. (1883) R. 1002 (391).

This *Rule* and *Rules* 773 and 774 make it clear that the filing of objections is only necessary in party and party taxations.

The last clause affirms what was decided in *Cousineau v. P.* 15 P. R. 37.

Where the question is as to the principle of the whole taxation, and not as to particular items: *Sparrow v. Hill*, 7 Q. B. D. 362; 8 Q. B. D. 470; *Clark v. Virgo*, 17 P. R. 260; *Re Fletcher & Dunn*, 52 W. R. 27; or where the objection is to the finding of the Taxing Officer on a preliminary question, and the bill is not taxed at all, or for instance, where the Taxing Officer finds that a settlement has been made, which under the terms of the order for taxation is not to be disturbed: *Re Geo. Cuth*, 33 Ch. D. 194; it is not necessary to specify objections under this *Rule*; but see *Craske v. Wade*, 80 L. R. 480, where it was held that the *Rule* applied notwithstanding the cases, where the Taxing Officer refused to tax the plaintiff's costs, meeting a counter-claim on the merits, on the ground that such costs were unnecessarily incurred.

When a party carries in an objection in writing to an allowance or disallowance under this *Rule*, he is only bound to state the item to which he objects, not the reasons of his objection; *Simmons v. Stager*, 11 Ch. D. 154. The present Eng. R. 1002 (391), provides differently as it inserts at (a) the words "and the grounds and reasons for such objection."

A Sheriff, as an officer of the Court claiming fees by virtue of its process, is so far within its jurisdiction that his bill may be taxed, and this *Rule* will therefore apply to prevent an appeal as to fees not brought before the Taxing Officer for review: *Morrison v. Tait*, 5 P. R. 300.

Except therefore, as above mentioned, an appeal does not lie, unless objections are carried before the officer, as required by this *Rule*; see *Rule* 771, and *Smardon v. Huntington*, 12 P. R. 248; nor can an appeal be allowed as to any item not included in such objections: *Platt v. G. T. Ry. Co.*, 12 P. R. 273; *Campbell v. Baker*, D. O. L. R.

291. Any objections to the taxation must be carried in in writing **Rule 1183** before the signature of the officer is affixed to his certificate: *Cuerrier v. White*, 12 P. R. 371; but see clause (2). It is a sufficient certificate if the officer ascertains the correct amount payable at the foot of the bill, and notes the bill of costs as taxed at such sum, with the date, and verifies the whole by his signature: *Id.* After having so acted, the Taxing Officer has no power to alter what has been allowed or allowed, except mere clerical errors: *Id.*; *Langtry v. Dumoulin*, 10 P. R. 444.

A person who is not a party to the making of an order for the taxation of costs, and who desires to have the taxation reviewed, ought to apply to set aside the order for taxation, and not apply to review the taxation: *Charlton v. Charlton*, W. N. 1882, 183; 31 W. R. 237.

For form of stating objections, see H. & L. Forms, No. 1624.

See also *Turnbull v. Janson*, 3 C. P. D. 234, for examples of objections.

1183. Upon the application the Taxing Officer shall re-^{review of} consider and review his taxation upon such objections, and ^{taxation} he may receive further evidence in respect thereof, and, if ^{by Taxing} required, he shall state either in his certificate of taxation or ^{Officer.} by reference to such objections, the grounds and reasons of his decision thereon, and any special facts or circumstance relating thereto. Con. Rule 1231.

See Eng. (1883) R. 1002 (40).

A notice served at 4.30 p.m. to consider objections at 4 p.m. on the following day, was considered sufficient in *Re Hill*, 33 Ch. D. 266.

The officer should include in his certificate of the result the points of objection to his taxation. After giving a certificate of the result he is *functus officio*: *Langtry v. Dumoulin*, 10 P. R. 444. Certificates of ruling on any points pending the taxation may be given, from which an appeal may be had: *Id.*

Appeals from taxations are governed by analogy to appeals from Chamber orders, and should therefore, under *Rule 767*, be brought on within ten days from the date of the certificate on a notice served within four days: *Stark v. Fisher*, 11 P. R. 234.

Upon an appeal the Judge has no power to review or revise the taxation of any items not objected to as provided by *Rule 1182*, nor refer them for review or revision to any officer: *Campbell v. Baker*, 9 O. L. R. 291, and *semble*, he has no power to refer the bill or the items objected to to any officer, but should himself decide the question raised by the objection.

(iii) Taxation of Costs Between Solicitor and Client.

The right of solicitors to recover their costs as against their clients, is governed by *The Act respecting Solicitors* (R. S. O. c. 174), which also regulates the rights of their clients, and third persons liable to pay their costs, to compel a delivery of their bills, and to have the same taxed.

Rule 1184. Notwithstanding that a retainer of a solicitor by two persons is in form a joint one, the Court will look into the facts of the case to discern the real nature of the transaction, and will determine the rights of the solicitor and clients accordingly; such a retainer does not necessarily make the persons signing it joint debtors: *Re Cameron*, 18 P. R. 176.

The relation between country solicitor and town agent is that of client and solicitor: *Reid v. Burrows*, 1892, 2 Ch. 413; 40 W. R. 620.

As to whether a solicitor can recover costs for services performed while he had not taken out his annual certificate, see R. S. O. c. 174, ss. 2, 13, 22-24; *Re Sweeting*, 1898, 1 Ch. 268; *Macdougall v. Law Society*, 18 S. C. R. 203.

Counsel may sue the client for his fees. No preliminary delivery of a signed bill is necessary, as in the case of a solicitor suing for his costs. Solicitors who employ counsel have implied authority to pledge the client's credit for payment, and legal privity exists between the counsel and the client. The solicitor is not liable to the counsel unless it is so agreed expressly or by implication from the course of dealing: *Armour v. Kilmer*, 28 Ont. 618.

The provisions of R. S. O. c. 174, ss. 34-51, which deal with delivery and taxation of solicitor's bills, are as follows:—

Delivery of Bill.

Solicitors
to deliver
their bill
one month
before
bringing
action for
costs.

34. No action shall be brought for the recovery of fees, charges or disbursements, for business done by a Solicitor as such, until one month after a bill thereof, subscribed with the proper hand of such Solicitor, his executor, administrator or assignee (or, in the case of a partnership, by one of the partners, either with his own name, or with the name or style of such partnership), has been delivered to the party to be charged therewith, or sent by the post to, or left for him at his counting-house, office of business, dwelling-house, or last known place of abode, or has been enclosed in or accompanied by a letter subscribed in like manner, referring to such bill. R. S. O. 1887, c. 147, s. 31.

Retainer.—It is always advisable for the solicitor to take a written retainer from his client: see H. & L. Forms, Nos. 1, 3, 4, 5, 6.

The retainer of a solicitor by a corporation should be under the corporate seal, or be authorized by by-law: *Barrie v. Barrie*, 19 P. R. 33, but a retainer of a solicitor by a corporation, sealed after the work has been done, is valid and binding: *Brooks v. Torquay*, 1902, 1 K. R. 601.

The delivery of the bill of costs must be made in one or other of the modes mentioned in this section.

The month referred to in this section is a calendar month: see R. S. O. c. 1, s. 8 (15). It must be computed exclusive of the day of delivery, and of the commencement of the action: see *Blunt v. Heslop*, 8 Ad. & E. 577; *Re Morphy*, 2 Chy. Ch. 56.

The bill must be drawn in proper form and should set out the items of the fees and disbursements in detail, or an action on it cannot be maintained: *Wilkinson v. Smart*, 33 L. T. 573; and see *Re Mount*, 17 P. R. 186; but where a bill is delivered in which some of the items are properly set out, and others are not, it was held that those properly set out were recoverable: *Blake v. Hummell*, 51 L. T. 431.

A payment of the amount of an account in which no items are set out, and which is not a bill of costs, does not prevent the client from obtaining delivery of a proper bill, and the ordinary order for its taxation: *Re Callis*, 49 W. R. 316. See also *Re McBrady & O'Connor*, 19 P. R. 37.

A payment for succession duty made by a solicitor on behalf of his client is not a "disbursement," and should not be included in his bill of costs: *Re Kingston v. Wilson*, 1902, 2 Ch. 242; 50 W. R. 533; *semble*, that the same is the case in regard to counsel fees paid by the solicitor for the client: see *per* Boyd, C., in *Cobham Manufg. Co. v. Lake Simcoe Hotel Co.*, 5 D. L. R. 447.

Agency charges cannot be lumped: *Re Pomeron*, 1807, 1 Ch. 284.

The bill should contain only charges for strictly professional services, for which items should be given. A lump sum for charges for services rendered in other capacities, such as an agent for collection of rents due to the client, should not be inserted in a bill of costs: *Re Shilson*, 10 L. T. 641.

Where the services rendered are not in reference to actual litigation, e.g., for negotiation out of Court, the charges authorized by the tariff do not apply, and a *quantum meruit* for such services may be allowed in a lump sum, having regard to the difficulty or importance of the services rendered and the amount affected: see *Re Johnston*, 3 O. L. R. 1; *In re Attorneys*, 23 C. P. 495; and see *Re McBrady & O'Connor*, 19 P. R. 37.

The assignee of a solicitor may deliver a bill signed by himself, and at the expiration of a month may sue for its recovery: *Lugh v. McUtchan*, 12 Q. B. D. 518; but see *Re Ward*, 28 Ch. D. 719.

The contract of a solicitor retained to conduct an ordinary action of a Common Law nature is to carry it on to a conclusion, and if he refuses to continue to act before the conclusion of the case, except for some reasonable cause, and upon reasonable notice to his client, he cannot maintain an action for his costs: *Underwood v. Levis*, 1894, 2 Q. B. 306; 70 L. T. 833; but the rule seems to be otherwise where the action is one for equitable relief: see *In re Hall*, 9 Ch. D. 738.

This section only applies to services rendered as a solicitor of the Supreme Court of Judicature, the bill of which is properly the subject of a taxation: *Re Shilson*, *supra*; thus it was held not to be applicable to services rendered by a solicitor as a notary in procuring a pension from the United States Government, for which the solicitor was held entitled to sue without previously rendering any bill: *Ostrom v. Benjamin*, 20 Ont. App. 336; but see *O'Connor v. Gaudin*, 29 Ont. 47, 34 Ont. App. 27, the case of a solicitor acting in the Exchequer Court of Canada; and see *Re McBrady*, 19 P. R. 37, where services were rendered in reference to a claim upon an estate in England: *Re Baker v. Lees & Co.*, 1901, 1 K. R. 189, a bill for services before Parliamentary Committees.

Although no action can be brought by a solicitor to recover his bill of costs until a month has expired from the delivery of his bill to his client; still that is a provision merely affecting procedure, and the Statute of Limitations runs against the solicitor from the date when the last service included in the bill was rendered, even though the client was out of the jurisdiction when the bill was delivered, and did not return within the jurisdiction until within six years prior to the commencement of an action on the bill: *Coleburn v. Callidge*,

Rule 1184. 1897, 1 Q. B. 702; 76 L. T. 608; but the solicitor may sue to set aside a fraudulent conveyance by his client before the expiration of a month; *Seane v. Duckett*, 3 Ont. 370; and in case his client is about to abscond, he may by leave of a Judge of the High Court, or of a County Court, be authorized to commence an action, although the month has not expired; s. 44, *infra*; and he may also, notwithstanding that a bill has not been delivered, set up his claim by way of counter-claim or set-off in an action brought against him by his client; *Taylor v. Robinson*, 31 S. C. R. 617; or, where, by agreement with a client who has a cross-claim against him, an account of both has been stated, shewing a balance in the solicitor's favour, he may maintain an action for that balance; *Turner v. Willis*, 1905, 1 K. B. 408; 92 L. T. 412.

To entitle the solicitor to sue, his bill delivered must be signed, or accompanied by a letter referring to the bill signed by the solicitor, but this provision may be waived by the client; *Re Gedge*, 14 Beav. 56; and see *Re Jones*, *infra*; and, *semble*, is not necessary where the services charged for were not rendered as a solicitor of the Supreme Court of Judicature, *e.g.*, where they were performed in the Exchequer Court of Canada; see *O'Connor v. Gemmill*, 20 Ont. 47; but see S. C. in appeal, 20 Ont. App. 27.

Delivery, and constructive delivery, to the third parties liable to pay, were discussed in *Re Robertson*, 42 Ch. D. 553.

Adding
to bill
rendered.

Where, as formerly, the costs of the taxation depended on whether or not one-sixth was struck off, it was held that after a bill was delivered the solicitor could not, without leave of the Court or Judge, withdraw it, and substitute a new one, even though the bill delivered was not signed; *Re Jones*, 54 L. T. 648; and see *Re Kellack*, 56 L. T. 887; nor could a supplemental bill be delivered as of course, but might be allowed on a special application; *Re O'Donoghue*, 14 P. R. 571; 15 P. R. 93.

A bill once unconditionally rendered could not be added to, or deducted from, by the solicitor, without leave; *Re Dapp*, 1 C. L. J. 213; and special circumstances must be shown; see *Re O'Donoghue*, *supra*. A substituted bill was allowed to be delivered in *Re B. & S.*, 6 P. R. 18. But where an unsigned bill has been delivered, which the client treats as a nullity, and applies for and obtains an order for the delivery and taxation of a bill, the solicitor may, in that case, deliver an entirely new bill, and increase his charges; *Re Walsh*, 7 O. L. R. 41.

Where a bill was delivered indorsed as follows:—"In the event of taxation, we reserve to ourselves the right to deliver another and more complete bill," this was held to be an absolute delivery; *Re Spencer & McDonald*, 19 Gr. 467; *Re Thompson*, 30 Ch. D. 441; but *semble*, a bill delivered accompanied by a statement that it contained items which could not be taxed, and reserving the right to deliver another bill in its place if taxation were insisted on, might be withdrawn, and a new one substituted; see *per Cotton, L.J.*, in *Re Thompson*, 30 Ch. D. 441; 53 L. T. 479.

Since the costs of the taxation no longer depend upon the amount taxed off, there seems to be no good reason why amendments should not be allowed, as in other cases, where justice so requires, upon proper terms.

Delivery of
bill

Compelling Delivery of Bill.—Where the client desires to have his solicitor's costs taxed, or to recover documents in his possession on which he claims a lien for costs, it is necessary for him first to

obtain a delivery of the solicitor's bill, and a taxation thereof, if the amount is disputed. If the solicitor neglects or refuses to deliver his bill, an order for its delivery may be obtained: see s. 42, *infra*, p. 1405. Rule 1184

Where the retainer is admitted, and there are no special circumstances, the order for delivery, and taxation of the bill, may be obtained at any time, on *præcipe*: see Rule 1184; where the retainer is disputed, or there are any other special circumstances, the application for the order should be made on notice to the solicitor.

A solicitor cannot set up that the contract between himself and his client was illegal for champerty, as an answer to an application for the delivery of his bill: *Re Thomas*, 1894, 1 Q. B. 747; 70 L. T. 507.

There is power to order the delivery of a bill whether it has been paid or not, and whether or not it is one which the Court would have power to refer for taxation: *Re McBrady & O'Connor*, 19 P. R. 37; and an agreement between a solicitor and his client, as to the remuneration of the solicitor for professional services being void, cannot be an answer to an application for the delivery of a bill or for its taxation: *Id.*

As to items which may properly be included in a bill, see notes on p. 1399.

It has been held that delivery can be compelled under R. S. O. c. 174 of a bill for services performed in the Exchequer Court of Canada: *O'Connor v. Gennell*, 29 Ont. 47; 25 Ont. App. 27; and for services rendered in reference to a claim on an estate out of the jurisdiction: *Re McBrady*, 19 P. R. 37; but not for services performed as a notary: *Ostrom v. Benjamin*, 20 Ont. App. 335; and see *Re Baker*, 1903, 1 K. B. 189; 57 L. T. 662.

If the solicitor refuse to comply with an order for the delivery of his bill, he is liable to attachment: *Re Seal*, 1903, 1 Ch. 87; *Re Landon*, *infra*; but if on the retrial of a motion to attach him, he disclaims all intention of making any charge for costs, and shews by affidavit that he has not deducted any money for costs from moneys of his client which have come to his hands, the motion will be refused: *Re Landon*, 1899, 1 Ch. 818; 80 L. T. 643.

Bill to be Taxed.—The bill is one entire matter even though separate bills be rendered in respect of distinct transactions: *Re what bill may be taxed* *Romer*, 1893, 2 Q. B. 381; 69 L. T. 547; *Stokes v. Trumper*, 2 K. & J. 232; *Re Peach*, 2 D. & L. 33; and the client cannot select certain charges for taxation and ask that they only be referred: *Re Davis*, 1 C. L. J. 213.

Although the general rule is that one of several bills or a part of a bill cannot be taxed: *Storer v. Johnston & Wetherall*, 15 App. Cas. 203; 62 L. T. 710; yet where the solicitor admitted that there was nothing due to him, and it was simply a question whether he had been overpaid, an order to tax one only of several bills delivered was upheld: *In re Ward*, 1896, 2 Ch. 31.

The Court has power under its general jurisdiction to order the taxation of any bill relating to Court business, whether the bill be of the solicitor or his agent, or any part of such bill: *Re Johnson & Wetherall*, 37 Ch. D. 433; 15 App. Cas. 203; though the principal received payment by a commission: *Re Idington & Mickle*, 5 P. R. 568; and upon such taxation a Master should, without specific directions, regard any settlement with the solicitors: *Id.*

Rule 1184. A bill for counsel fees exclusively may be referred: *Re C. K. & Co.*, 6 P. R. 226; and see also *Armour v. Kilmer*, 28 Ont. 618; and *Re Ashbaugh*, 10 C. L. T. 30, where the services were respecting the defence of a prisoner; but where solicitors had agreed not to charge "solicitor's fees," these words were held to preclude charges for services rendered by them as counsel: *Re Solicitors*, 33 C. L. J. 215.

A bill for conveyancing could not formerly be referred: *Re Glass*, 3 P. R. 138, 140; *Re Lemon & Peterson*, 8 V. C. L. J. 185; and per Hagarty, C.J., *Ostrom v. Benjamin*, 20 Ont. App. at p. 339, although in these cases orders for taxation of bills for such services were made, apparently without question; see also *Re O'Donohue & Wainwright*, 4 P. R. 266; and *Re Richprian*, 3 Chy. Ch. 144. But see now R. S. O. c. 171, s. 37, *infra*, and *Ibid.*, ss. 52-55; *Re Pollard*, 20 Q. B. D. 160.

Action on Bill.—After the expiry of the month from the delivery of his bill, the solicitor may, if no order for taxation has been obtained by the client, either himself obtain an order for its taxation, and for payment of what may be found due; see *Rule 1184* and notes *infra*, or he may bring an action for its recovery.

The claim may be specially indorsed, and judgment may be obtained therefor, under *Rule 603*, where there is no defence: *Smith v. Edwards*, 22 Q. B. D. 10; 60 L. T. 10; but where the retainer is admitted, but the amount is disputed, judgment may be awarded subject to a taxation of the bill: *Ibid.*; and see *Re Park*, 41 Ch. D. 329.

The omission of an allegation of the delivery of the bill in the statement of claim, does not render the latter bad in law; see *Seavey v. Duckett*, 3 Ont. 370; and it is a defence only open to the actual client, and not to a third person liable to pay; *Greening v. Redden*, 67 L. T. 28; 40 W. R. 623. As to the evidence required to show compliance with this section, see *see*, 43, *infra*, p. 1400.

Order for Taxation of Costs:—

Taxation
of costs.

35. Upon the application of the party chargeable by such bill within the month, the High Court or a Judge thereof, or a Judge of a County Court, shall, without money being brought into Court, refer the bill and the demand thereon to be taxed by the proper officer of any of the Courts in the County in which any of the business charged for in the bill was done, whether any of such business was done in a Court or not, and the Court or Judge making such reference shall restrain the bringing any action for such demand pending the reference. R. S. O. 1887, c. 147, s. 32; 60 V. c. 15, Sched. A (231).

The "party chargeable" includes both a client or a third person liable to pay the bill; see *Rule 1185*, as to the form of the order; and see *Rule 1184*, as to the time within which the order may be obtained *en principe*; where the order cannot be issued *en principe*, a motion therefor, on notice to the solicitor, is necessary. The motion is usually made to a Judge or judicial officer in Chambers.

The provisions of this section as to the officers to whom the reference for taxation is to be directed are superseded by *Rule 1187*, which directs that it is to be to the proper taxing officer for the County in which the solicitor resides.

36. In case no application is made within the month, then **Rule 1184**, the Court or Judge upon the application of either party may order a reference with such directions and conditions as he may deem proper; and may upon such terms as may be thought just restrain any action for such demand pending the reference. R. S. O. 1887, c. 147, s. 33.

Rule 1181 regulates the practice for obtaining an order for taxation or delivery, and taxation of a bill of costs on *præcipe*.

Where the order is not obtainable on *præcipe* under that **Rule**, it may be made on application to a Judge, or judicial officer, in Chambers, on notice to the opposite party.

The solicitor may obtain an order for taxation on *præcipe* after the expiry of a month from the delivery of the bill, if no order has in the meantime been obtained by his client: see **Rule 1181** *supra*. But after the lapse of the month the client's right to obtain an order on *præcipe* is gone, and he must apply specially under this section, usually on notice to the solicitor.

37. No such reference shall be directed upon an application made by the party chargeable with such bill after a verdict or judgment has been obtained, or after twelve months from the time such bill was delivered, sent or left as aforesaid, except under special circumstances, to be proved to the satisfaction of the Court or Judge to whom the application for the reference is made. R. S. O. 1887, c. 147, s. 34; 60 V. c. 15, Sched. A (34).

Special Circumstances.—Orders for taxation are not made, except on special circumstances being shewn, after the expiration of twelve months from delivery of a bill: *Re Cameron*, 2 Chy. Ch. 311; *Re Thompson*, 2 Chy. Ch. 100; *Re Gildersleeve v. Walker*, 6 P. R. 117; *Read v. Cotton*, 3 P. R. 118; *Pattullo v. Church*, 8 P. R. 363; *Re Norman*, 16 Q. B. D. 673; *Re Nelson*, 30 Ch. D. 1; *Re Pack*, 61 L. T. 173; see *Fletcher v. Field*, 10 P. R. 608; *Saider v. Saider*, 11 P. R. 130; or after payment: see s. 49, *infra*, p. 1409; *Re Walker*, 10 P. R. 100; *Schrögg v. Schrögg*, 11 P. R. 218; *Re Baycott*, 29 Ch. D. 571; *Re Jackson*, 40 Ch. D. 495; *Re Fairbanks*, 1 Chy. Ch. 222; *Re Chisholm*, 16 P. R. 162; or after, with the knowledge of the client, the costs have been deducted from moneys collected: *Re Beatty*, 19 P. R. 271; or after a settled account: *Re Webb*, 70 L. T. 318; but the delivery of a cash account without items is not sufficient to preclude taxation by the client even after the lapse of 12 months: *Re Baylis*, 1896, 2 Ch. 167; 74 L. T. 337, 506.

Where the special circumstances were that the solicitor was paid on the understanding that the bill might be taxed at any time, an order was made for taxation after his death, against his representatives: *Re Baker*, 13 P. R. 227.

Special circumstances signify generally "pressure accompanied by some overcharge" or "gross overcharges or errors so great as to amount to fraud": *Re Strather*, 3 K. & J. 518; *Re Cameron*, 2 Chy. Ch. 311; *Re Walker*, 10 P. R. 400; *Re Griffith*, 50 L. T. 134, but are not confined to such cases: *Re Butterfield*, 14 P. R. 119, 567. The bringing of three separate actions, where one would have been sufficient, constitutes "special circumstances": *Id.*

Where alleged overcharges constitute the special circumstances, they must be specified on the application to tax: *Re Gildersleeve v. Walker*, *supra*; a general allegation of overcharge is not enough: *Re*

Court or Judge may order bill to be referred on application of either party.

Reference may be made on application of party chargeable after verdict, or after 12 months from delivery of bill.

Special circumstances.

Rule 1184. *Boycott*, 20 Ch. D. 571; and they must be on their face excessive: *Re Bethune & Co.*, 4 Ch. L. T. 251. Trifling items will not be sufficient; *Re Drake*, 8 Kay, 121; overcharge by mutual mistake was held not to be a special circumstance: *Re Glaxodine*, 52 L. T. 781.

Where a taxation is ordered after the twelve months, it may be restricted within certain limits: *Re Nicholson*, 3 D. F. & J. 91.

Where bills are delivered from time to time before the litigation is closed, the client has twelve months from the delivery of the final bill after the close of the litigation in which to apply to tax them all: *Re Butterfield*, 11 P. R. 119; *Re Romee*, 1863, 2 Q. B. 280; 69 L. T. 547.

The fact that the solicitor or executors did not inform them that if administration proceedings should be commenced, the executors might be disallowed what might be struck off on moderation, does not constitute "special circumstances": *Re Lupton, Steele & Co.*, W. N. 1890, 112; 38 W. R. 672.

No rigid rule exists as to what kind of circumstances must be shown: *Re Cheesman*, 1891, 2 Ch. 289.

The fact that an action was brought on a number of bills delivered during several years, during which defendant was plaintiff's client, is not a special circumstance: *Read v. Cotton*, 11 V. C. L. J. 114; nor the existence of a controversy as to the terms on which the business was done, nor the continuance of employment after the delivery of the first bill: *Arnold v. O'Donoghue*, 2 Out. 322; see *Gillespie v. Shaw*, 10 V. C. L. J. 100. Where judgment had been signed against the client in an action, during the pendency of negotiations for a settlement, this was held to be a special circumstance: *Pattullo v. Church*, 8 P. R. 363. So conjunction of the following (1) that the relationship of solicitor and client continued after the delivery of the bill, (2) that the solicitor had offered to make a substantial deduction, and (3) that there were items of apparent overcharge of which no explanation was offered: *Re Walker*, 12 P. R. 400.

A lump sum retained for costs out of the proceeds of a sale, and no bill delivered, were held to constitute "special circumstances": *Re Malsbrough & Wade*, 9 P. R. 242; and the retainer of costs out of the proceeds of loans obtained for the client is not a payment under s. 10, *infra*, so as to preclude the right of the client to a taxation: *Re Baylis*, 1896, 2 Ch. 107.

The retaining of an amount agreed upon in full of costs out of moneys in the solicitor's hands without delivering a bill is not payment unless there is a settlement of accounts: *Re West*, 1892, 2 Q. B. 102; 67 L. T. 57; the taking of bills of exchange subsequently dishonoured does not amount to payment, unless the solicitor agrees to accept the bills as payment in any event: *Re Romer & Haslam*, 1883, 2 Q. B. 286; 63 L. T. 547.

The Taxation:—

If either party does not attend, officer may tax bill *ex parte*.

38. In case either party to a reference, having due notice, refuses or neglects to attend the taxation, the officer to whom the reference is made may tax the bill *ex parte*. R. S. O. 1887, c. 147, s. 35; 58 V. c. 13, s. 37, part.

Prima facie the costs are taxable according to the scale of the Court (if any) in which the proceedings were taken for which the services are charged, even though it turned out that the case was within the jurisdiction of an inferior Court, provided the solicitor had not reason-

able ground for knowing or believing it to be so: see *Re Jackson*, Rule 1184 18 P. R. 320.

The taxation must be made according to the tariff in force when the services were rendered, even though it has been subsequently repealed: *Delap v. Charbelala*, 18 P. R. 117; *Rach v. Barband*, S. O. L. R. 174. *aff. 90LR663*.

Formerly if the client did not attend the taxation when the order was obtained by the solicitor, he was not liable for the costs of the taxation, but see now: s. 40, *infra*, and Rule 1185, and notes.

30. Every order for a reference shall direct the officer to order to whom the reference is made, to certify what, upon the reference, he finds to be due to or from either party in respect of such bill. R. S. O. 1887, c. 147, s. 39; 58 V. c. 13, s. 37, part.

Costs of Taxation:—

40. The costs of the reference shall be in the discretion of the Court or Judge or of the Taxing Officer, subject to appeal, but such officer may certify specially any circumstances relating to the bill or taxation, and the Court or Judge may thereupon make such order as may be deemed right respecting the payment of the costs of the taxation. R. S. O. 1887, c. 147, s. 37; 58 V. c. 13, s. 37, part.

Prior to 58 V. c. 13, s. 37, from which this section is taken, the costs of the reference were payable by, or to, the solicitor, according to whether or not one-sixth was, or was not, struck off the bill. But, when the costs were taxed under an order obtained by the solicitor, the client was not liable for the costs of taxation if he did not attend.

The words "Court or Judge" would appear to be intended to include a judicial officer who makes the order.

The costs are always in the discretion of the Taxing Officer, whether the order issues on *pauce*, or is made on a special application, unless otherwise directed: see Rule 1185 (b), and Rule 1186.

41. In case the reference is made when the same is not when authorized except under special circumstances, as hereinafore provided, the Court or Judge, in making the same, may give any special directions relative to the costs of the reference. R. S. O. 1887, c. 147, s. 38.

See s. 37, *supra*, p. 1403, and notes, and see s. 13, *infra*, p. 1403.

This section appears to be unnecessary now, as the costs of the reference are in all cases by s. 40, *supra*, in the discretion of the Court or Judge, or Taxing Officer.

Compelling Delivery of Bill:—

42. Where no bill has been delivered, sent or left as aforesaid, and where the bill if delivered, sent or left, might have been delivered, sent or left, as aforesaid, any such Court or Judge may order the delivery of a bill, and may also order the delivery up of deeds or papers in the possession, custody or power of the solicitor, his assignee or representatives, in the same manner as has heretofore been done in cases where any such business had been transacted in the Court in which such order was made. R. S. O. 1887, c. 147, s. 39.

Rule 1184 Where no bill has been delivered no time is limited within which the party chargeable is to apply under this section. The order for delivery and taxation, where no bill has been delivered, may therefore be obtained by the client on *præcipe* at any time: see *Rule 1184*.

A *præcipe* order for taxation is made at the client's instance, on his submission to pay what may be found due. Where the client obtains an order to tax a bill, some of the items of which are barred by the Statute of Limitations, he is deemed to waive the Statute: *Re Margetts*, 1896, 2 Ch. 263.

The Court has jurisdiction to order the delivery of a bill, whether there has been payment or not, and whether the Court has jurisdiction to order the taxation of the bill or not: *Re Raylis*, 1896, 2 Ch. 107; 14 W. R. 404; 74 L. T. 337.

If the client elect to treat as a nullity an unsigned bill delivered to him, and applies for the delivery and taxation of a bill, the solicitor may deliver an entirely new bill, and may increase or alter his charges: *Re Wals'*, 7 O. L. R. 41.

Proof of Delivery of Bill:—

Not necessary in first instance in a bill to prove contents of bill delivered.

43. In proving a compliance with this Act it shall not be necessary in the first instance to prove the contents of the bill delivered, sent or left, but it shall be sufficient to prove that a bill of fees, charges or disbursements, subscribed in the manner aforesaid, or enclosed in or accompanied by such letter as aforesaid, was delivered, sent or left in manner aforesaid; but the other party may show that the bill so delivered, sent or left, was not such a bill as constituted a *bona fide* compliance with this Act. R. S. O. 1887, c. 147, s. 40.

This section refers to the proof necessary in a proceeding by a solicitor to recover his costs. As to the mode in which a bill is to be delivered: see s. 34, *supra*, p. 1398.

Abandoning Client. Action Against:—

Judge may allow actions for costs, when the neglect or default of a solicitor has caused a bill to be abandoned.

44. A Judge of the High Court or a County Court Judge, on proof to his satisfaction that there is probable cause for believing that the party chargeable is about to quit Ontario, may authorize a solicitor to commence an action for the recovery of his fees, charges or disbursements, against the party chargeable therewith, although one month has not expired since the delivery of a bill as aforesaid. R. S. O. 1887, c. 147, s. 41.

Application by Third Party:—

Where a party, not being the principal, pays a bill of costs, a taxation may be allowed.

45. Where any person not being chargeable as the principal party is liable to pay, or has paid any bill, either to the solicitor, his assignee, or representative, or to the principal party entitled thereto, the person so paying, his assignee or representative, may make the like application for a reference thereof to taxation, as the party chargeable therewith might himself have made, and in like manner, and the same proceedings shall be had thereupon as if the application had been made by the party so chargeable. R. S. O. 1887, c. 147, s. 42.

Where a third party applies to tax an unpaid bill, it would seem advisable for the solicitor to require the client primarily liable to be made a party to the proceedings (see *Rule 1188*), in order that he may enforce payment under the order, because the third party by obeying the order for tax then does not thereby admit any liability to pay the solicitor: *Re Goss*, 1901, 1 Ch. 230; 84 L. T. 21.

A party chargeable who can tax, includes the next friend of an infant: *Re Flower*, 19 W. R. 578.

A mere volunteer, under no previous liability to pay the bill, has no right to obtain a taxation under this section: *Re Bick*, 5 Beav. 406; nor a merely nominal plaintiff who is not liable to the solicitor for the costs: *Re Attorneys*, 6 P. R. 319.

Any one of several *cestui que trustent* may, in the discretion of the Court, obtain an order under this section for taxation of bills of costs of a solicitor employed by executors or trustees in connection with the business of the trust estate: *Sandford v. Porter*, 34 Ont. App. 565; *Re Skinner*, 13 P. R. 276; but where the trustee has paid the costs, the application by a *cestui que trustent* for taxation must be made within twelve calendar months thereafter: *Re Wellbourn*, 1901, 1 Ch. 312; 83 L. T. 611. The costs must be taxed as between the trustee and his solicitor, irrespective of any question as to their ultimate incidence amongst the beneficiaries: *Re Miles*, 1903, 2 Ch. 518.

The bill of a mortgagee's solicitor in regard to the mortgaged estate may be taxed by the mortgagor: *Re Lees*, 5 Beav. 410; *Ex parte Glass*, *Re Macdonald*, 3 P. R. 138; see also *Re Massey*, 34 Beav. 403; or by a subsequent incumbrancer: *Re Taylor*, 18 Beav. 165; *Re Jessop*, 32 Beav. 406. So on a sale by mortgagees under a power of sale, the mortgagor, or a subsequent incumbrancer, is entitled to taxation of the solicitor's bill: *Re Ormer & Muir*, 8 P. R. 56; and under R. S. O. c. 121, s. 30, the taxation may be had without an order, and that clause is retrospective: *Ferguson v. E. & S. Lacey, Co.*, 8 P. R. 404. So also an assignee for creditors is entitled to tax the costs incurred by a prior assignee of the same estate: *Re A. & B.*, 6 P. R. 68; and one of the parties to an arbitration has been held entitled to a taxation of the costs of the solicitor of the umpire for drawing the award: *Crossley v. Lowestoft W. W. Co.*, 85 L. T. 208; *S. Co. sub nom. Re Collyer*, 1901, 2 K. B. 839; but a ratepayer of a school section has been held not entitled to a taxation of the costs incurred by the trustees of the section: *McGinn v. McGinn*, 39 O. C. App. 56; 21 S. C. R. 267; nor can a shareholder tax costs incurred by the company: *Re Stephens*, 17 L. J. Ch. 219, *th.* 372.

A creditor of an estate has no right under sec. 45 as between himself and the personal representative to a taxation of the costs incurred by the latter in collateral proceedings affecting the estate, but he is entitled to have the bill "moderated": *Re Hague, Traders' Bank v. Murray*, 12 P. R. 119; and see *Beatty v. Haldar*, 4 Ont. App. 239; *Re Jackson*, 40 Ch. D. 495; 60 L. T. 589; but see *Re Jones & Levent*, 1904, 2 Ch. 363.

After payment by a mortgagee of his solicitor's bill, the mortgagor's only remedy is for an account: *Re Macdonald, Macdonald & Hinch*, 8 P. R. 88; *Re Croghan, etc.*, *th.* 372; *Re Massey*, 34 Beav. 403; *Re Pacey*, 34 Beav. 140; 13 W. R. 932; but see section 49, *infra*. An account may be had in a summary way under Rule 1188.

Where on the application of a mortgagor the mortgagee's solicitor was ordered under sec. 45, to deliver to a third party a copy of the bill of costs of a sale, it was held that, though the delivery was, under this section, to be regarded as for the purposes of a reference to taxation, yet the person so obtaining the copy had not necessarily the right to tax the bill: *Re Moffatt*, 12 P. R. 240.

And where the parties to an action compromise on the terms that one of them is to pay the others' costs, the party to pay may, either

Rule 1184. this section, obtain an order to tax the costs, but the application should be made, "In the matter of the solicitor"; see sec. 51, *infra*, and should be made on notice to him; and where such an order is obtained *ex parte*, and omitted to direct the account between the solicitor and his client, as provided by *Rule 1187*. *But*, it was set aside with costs: *Re McCarthy*, 15 P. R. 261; *Re Hurlbert*, 71 L. T. 748; *sed vide*, *Re Taylor*, 1894, 1 Ch. 503, 671; 70 L. T. 161; *Re Greenwood*, 19 L. C. L. J. 131.

The parties who institute or intervene upon the taxation being personally liable to pay the costs of taxation, if the same become payable to the solicitor: *Re Rogers & Farwell*, 14 P. R. 38; but the third party by obtaining an order for taxation does not thereby admit his liability to pay the solicitor the costs charged: *Re Gray*, 1901, 1 Ch. 239; 84 L. T. 24.

Where a taxation is obtained by a third party, items outside the scope of the third party's liability must as against him be disallowed, but when the items for which the third party is liable are ascertained, the taxation of those items must be as between the solicitor and the party chargeable in the first instance, and not as between the solicitor and the third party: *Re Cohen & Cohen*, 1905, 1 Ch. 345; 91 L. T. 826, affirmed C. A., 119 L. T. Jour. 60; *Re Longbottom*, 1904, 2 Ch. 152; 90 L. T. 538, 801; *Re Gray*, 1901, 1 Ch. 239; and see *Re Miles*, 1903, 2 Ch. 518; *Re Wells*, 8 Beav. 416; *Re Jones*, 13 Beav. 479; *Re Fyson*, 9 Beav. 117; *Re Burrow*, 17 Beav. 547.

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92 LT 702.

Special Circumstances:—

What special
circumstances
may be
considered
in such cases

46. In case such application is made when, under the provisions hereinbefore contained, a reference is not authorized, it may be made except under special circumstances, the Court or Judge to whom the application is made, may take into consideration any additional special circumstances applicable to the person making it, although such circumstances might not be applicable to the party chargeable with the bill, if he was the party making the application. R. S. O. 1887, c. 147, s. 17.

As to the effect of this section; see *Re Vardy*, 20 L. J. Ch. 325; *Re Macdonaldson*, 9 P. R. 242; *Re Norman*, 16 Q. B. 673; 54 L. T. 143; and as to what are "special circumstances," see *supra*, p. 1403.

Delivery of Bill:—

Court or
Judge may
order the
delivery of
a copy of
the bill.

47. For the purpose of such reference upon the application of the person not being the party chargeable, or of a party interested as aforesaid, the Court or Judge may order the solicitor, his assignee or representative, to deliver to the party making the application a copy of the bill upon payment of the costs of the copy. R. S. O. 1887, c. 147, s. 14.

A creditor who has obtained judgment for administration is a "party interested," and is therefore entitled to delivery and taxation of a bill of costs paid by the deceased person's executor: *Re Jones & Everett*, 1904, 2 Ch. 363.

Re-Taxation of Bill:—

When a bill
may be
re-taxed.

48. No bill previously taxed shall be again referred, unless under the special circumstances of the case the Court or Judge to whom the application is made thinks fit to direct a re-taxation thereof. R. S. O. 1887, c. 147, s. 15.

A re-taxation will **not** be ordered unless improper charges are specified and proved: *Eastman v. Eastman*, 2 Chy. Ch. 325; and see *Cameron v. Campbell*, 1 P. R. 170. In *Clarke v. Manvers*, 4 Gr. 432, a taxation was opened after seven years, the previous taxation having been had by the solicitor without notice to his client.

Payment of Bill, when it does not preclude Taxation:—

49. The payment of any such bill as aforesaid shall in no case preclude the Court or Judge to whom application is made from referring such bill for taxation, if the application is made within twelve months after payment, and if the special circumstances of the case in the opinion of the Court or Judge appear to require the same, upon such terms and subject to such directions as to the Court or Judge seem right. R. S. O. 1887, c. 147, s. 46.

Payment of the costs by the party primarily liable, was held to preclude a third party liable to pay from having a taxation: see s. 45, and note, p. 1406. *See quere*, if payment can in any case intercept the right of taxation, if applied for within twelve calendar months after payment, and there are special circumstances: see *Re Brucey*, 8 Beav. 338; *In re Wellhorue*, 1901, 1 Ch. 342; 83 L. T. 611.

This section seems to extend the time limited by sec. 37, *supra*, for making the application, wherever payment has been made, and special circumstances can be shown.

Where payment was made under protest, a taxation was ordered: *Re Chessman*, 1891, 2 Ch. 289; 64 L. T. 602.

Deduction of costs by the solicitor from moneys of the client in his hands is not payment within the meaning of this section: *Re Stogdon*, 56 L. T. 355; *Re West*, 1892, 2 Q. B. 102; 67 L. T. 57; *Re Baylis*, 1896, 2 Ch. 207; *Re Mulcolmsen*, 9 P. R. 242; unless it is made with the express consent of the client: *Re Thompson*, 1894, 1 Q. B. 402; and at, or after, the delivery of a signed bill: *Re Baylis*, *supra*.

The giving of security is, under this section, equivalent to payment: *Re Boyle*, 5 D. M. & G. 540; *Smyr v. Wagstaff*, 5 Beav. 415; *Re Currie*, 9 Beav. 602; *Re Harper*, 10 Beav. 284; *Re Fairbanks*, 1 Chy. Ch. 222; but *prima facie* it is only a conditional payment: *Re Romer*, 1893, 2 Q. B. 300; 69 L. T. 547.

Payment before the delivery of the bill is not a payment within this section: see *Re Street*, L. R. 10 Eq. 165; *Re Baylis*, 1896, 2 Ch. 107; but see *Hitchcock v. Strutton*, 1892, 2 Ch. 343; 66 L. T. 707; even though the client has examined the solicitor's docket: *Re Phulkerton*, 18 P. R. 331; but payment was held to preclude taxation where a number of bills were delivered in detail, in connection with the management of an estate, a few only being not rendered in detail but only included in statements of account which were not objected to and paid: *Re Beatty et al.*, 19 P. R. 274.

An application under this section must be made on notice, as it is necessary for the applicant to establish the existence of special circumstances. As to what are "special circumstances": see s. 37, *supra*, p. 1403, and notes: *Re Munns*, 50 L. T. 356.

An agreement, for consideration, not to dispute the bill, is an answer to an application to tax after payment: *Re Eley*, 57 L. T. 253.

Rule 1184.

A Taxing Officer may require the assistance of the officer of any other Court.

How applications against solicitor to be entitled.

50. In all cases in which a bill is referred to be taxed, the officer to whom the reference is made may request the proper officer of any other Court to assist him in taxing any part of such bill, and the officer, so requested, shall thereupon tax the same, and shall have the same powers, and may receive the same fees in respect thereof, as upon a reference to him by the Court of which he is an officer, and he shall return the bill, with his opinion thereon, to the officer who so requests him to tax the same. R. S. O. 1887, c. 147, s. 47.

51. All applications made to refer any bill to be taxed, or for the delivery of a bill, or for the delivering up of deeds, documents and papers, shall be made *In the matter of the Solicitor*; and upon the taxation of any such bill, the certificate of the officer by whom the bill is taxed shall, unless set aside or altered by order of a Judge, or by decree or order of Court, be final and conclusive as to the amount thereof, and payment of the amount certified to be due and directed to be paid may be enforced according to the practice of the Court in which the reference has been made. R. S. O. 1887, c. 147, s. 48.

An appeal from the certificate of a Taxing Officer, made on a taxation between solicitor and client, is to be brought in the same manner as an appeal from the report of a Master: *Rule 773*; and see *Rules 769, 771, 772*.

The following *Rules 1184-1188* are framed for the purpose of carrying out the statutory provisions of R. S. O. c. 174.

Order of course to issue on *præcipe*.

1184 Where the retainer of the solicitor is not disputed and there are no special circumstances, an order may be obtained on *præcipe* from the proper officer in the county in which the solicitor resides,

- (a) By the client, for the delivery and taxation of the solicitor's bill;
- (b) By the client, for the taxation of a bill already delivered, within one month from its delivery;
- (c) By the solicitor, for the taxation of a bill already delivered, at any time after the expiration of one month from its delivery, provided no order for its taxation has been previously made. *New. See Con. Rule 1228.*

There is no corresponding Rule in England.

On *præcipe*.

Client's Application.—A client applying on *præcipe* for an order for the delivery and taxation of a solicitor's bill, or for the taxation of a bill delivered, is required to submit to pay what may be found due to the solicitor: see Forms of Order, Nos. 99, 101, in the Appendix (H. & L. Forms, Nos. 1626 and 1629). An order, therefore, should not be issued on *præcipe* by the client unless he admits the retainer.

Wherever a client obtains an order to tax a solicitor's bill, unless the right to dispute the retainer is reserved, it is taken to be admitted; *In re Frazer*, 1894, 2 Ch. 100; *Re Herbert*, 34 Ch. 11, 504, but where the solicitor obtains the common order for taxation *ex parte*, the client is entitled to dispute the retainer as to the whole bill; *In re Macdonald*, 16 F. R. 498.

On the client's application it was held that the right to dispute the retainer cannot be reserved except by consent; *Re Tait*, 27 F. C. Q. B. 449.

An unqualified person acting as a solicitor, and receiving papers and money as such, is subject to the summary jurisdiction of the Court; *Re Hulme*, 66 L. T. 682, but *scatchell*, an order should not be taken against such a person on *principle*, or *ex parte*.

Notwithstanding that the retainer of a solicitor by two persons is in form a joint one, the Court will look into the facts of the case to discover the real nature of the transaction; *Re Cameron & Lee*, 48 F. R. 176.

An order obtained on *principle* where a special application should have been made, may be set aside or varied; *In re Webster*, 1891, 2 Ch. 102; *In re McCarthy*, 15 F. R. 261; *Re Taylor*, 1894, 1 Ch. 503; 70 L. T. 161.

Where the order is obtained on *principle* in ignorance of the fact of the existence of circumstances which, if known to the client, would have made a special application proper, the order may nevertheless be upheld; *Re Bacon*, 3 Chy. Ch. 79; *Re Toms*, 3 Chy. Ch. 204; and if set aside the applicant may not be ordered to pay costs, if he acted in good faith; see *Re Armstrong*, 1896, 1 Ch. 536.

The time for making the application runs from the date of the delivery of the last of a series of bills relating to the same business; *Re Rower*, 1893, 2 Q. B. 286; 69 L. T. 547; *Re Butterfield*, 14 F. R. 133.

Where an order of course lapses, or becomes ineffective, it is irregular to issue a second order on *principle*; *Re Webster*, 1891, 2 Ch. 102; 64 L. T. 250; *Re Taylor*, 1894, 1 Ch. 503; 70 L. T. 161.

A *principle* order is issuable by "the proper officer in the County where the solicitor resides"; in Toronto it must be obtained at the Central Office, in outer counties from the Local Registrar, if any, or from the Deputy Clerk of the Crown, or Deputy Registrar.

Special Application, where necessary.—Wherever the retainer is disputed a special application is necessary, on notice to the solicitor; *Re Thurgood*, 19 Beav. 541; and on such an application the order for taxation will be modified so as to enable the question of retainer to be tried, either in an action to be brought upon the bill, or in some other way to be determined by the Judge or judicial officer granting the order.

When special application necessary

A special application is also necessary wherever there are any special circumstances in the case, or some special order is required; *Re Atkinson*, 1 Chy. Ch. 195; e.g., where there is some special agreement as to costs; *Re Thurgood*, 19 Beav. 541; *Re C. & L.*, 15 C. L. J. 139, or as to the solicitor's lien; *Re Moss*, 17 Beav. 59, or taxation of only part of the bill is desired; *Re Byrch*, 8 Beav. 421; *Re Yotts*, 33 Beav. 412; *Re Johnson & Wichecraft*, 37 Ch. 11, 433; or only some of several parties jointly liable, are applying; *Re Herton*, 33 Beav. 201; see *Re Loring*, 16 Beav. 608; *Re Becker, etc.*, 2 Chy. Ch. 245; or after

Rule 1184. an action has been brought by solicitor or client, or after an order obtained by the client as of course has become effete; *Re Webster*, 1891, 2 Ch. 102; *Re Taylor*, 1894, 1 Ch. 503; 70 L. T. 161; where the client claims an account of moneys in the solicitor's hands, and the solicitor renounces all claim to costs; *Re Lunder*, 1899, 1 Ch. 818, 80 L. T. 643.

Where a bill has been delivered more than a month, the client cannot obtain a *præcipe* order, but must apply in Chambers; *Re Boulton*, 2 Chy. Ch. 58.

One of several clients who have given separate retainers to two solicitors in respect of the same action or matter may apply specially for a taxation of his bill, but, where practicable, the others should be notified so that they may be bound by the taxation; *In re Salaman*, 1894, 2 Ch. 201; and see *Re Macdonald*, 16 P. R. 498; *Re Cameron & Lee*, 18 P. R. 176.

Where a solicitor has funds or papers of a client in his possession, and claims a lien, an order for taxation will be made, though the services for which the solicitor claims have been wholly in County Court proceedings; *Re Prince*, 3 Chy. Ch. 282; and see *Re M. C. Cameron*, 1 Chy. Ch. 356.

Where a solicitor is employed to perform services not necessarily within the scope of his duty as a solicitor, e.g., the procuring a pension from a foreign government, he may make a bargain for the amount to be allowed him for such services, and the client can neither claim a bill nor have a taxation in respect of such services; *Ostrum v. Benjamin*, 20 Ont. App. 336; but see *O'Connor v. Genam*, 20 Ont. 47; 20 Ont. App. 27; *Re McBrady*, 19 P. R. 37.

A client who is merely a nominal plaintiff, his name being used for convenience, and who is not responsible to the solicitor, is not entitled to an order for taxation; *Re Attorneys*, 6 P. R. 319.

On præcipe Solicitor's Application.—A solicitor cannot apply for an order for taxation until a month has elapsed from the delivery of his bill, as provided by R. S. O. c. 174, s. 34; see *supra*, p. 1398, and not then if an order has been previously made on the application of the client; see *Rule 1184 (c)*.

The month is a calendar month: see R. S. O. c. 1, s. 8 (15), and is to be computed exclusively of the day on which the bill is delivered, and the day on which the order was applied for; see *Re Morphon & Kere*, 2 Chy. Ch. 56.

The order should only be obtained on *præcipe* in simple cases. Wherever there are special circumstances, or a special order is required, a special application on notice to the client should be made; *Re Atkinson*, 1 Chy. Ch. 187.

The common order only can be obtained on *præcipe*; *Ib.*

Where for any reason an order of course lapses or becomes ineffective, a second order of course is irregular; *Re Webster*, 1891, 2 Ch. 102; 74 L. T. 250; *Re Taylor*, 70 L. T. 161; 1894, 1 Ch. 503.

Where an order is obtained on *præcipe*, or on motion *ex parte*, where notice should have been given, it may be set aside on application of the client with costs; but if the order was obtained *bona fide* in ignorance of the existence of the circumstances making it proper to apply specially, the order may be upheld; *Re Bacon*, 3 Chy. Ch. 79; *Re Toms*, 3 Chy. Ch. 204; or if set aside the solicitor may not be ordered to pay costs.

Where a solicitor obtained *ex parte* an order against his client pending an application to have the client declared a lunatic, the order was set aside on the declaration of lunacy being subsequently made, but without costs, as the solicitor appeared to have acted in the bona fide belief that the client was sane; *Re Armstrong*, 1891, 1 Ch. 536.

Special application, where necessary.—The order should be issued on *principle* only in simple cases, wherever special circumstances exist a special application for the order should be made in chambers, *e.g.* where there is a special agreement as to retainer; *Re Thurgood*, 10 Beav. 741; or as to the costs; *Ib.*; or as to the solicitor's lien; *Re Moss*, 17 Beav. 569, or where there are any special circumstances, whatever affecting the costs, or the liability of the alleged client; *Re Fitch*, 2 Chy. Ch. 288; *Re C. & L.*, 15 C. L. J. 139.

If a special order is required notice must be given; *Re Atkinson*, 1 Chy. Ch. 187.

Where there are some alleged clients who dispute, and others who admit the retainer, the solicitor may on special application obtain the usual order as to the unresisting clients, and the taxation should be ordered on notice to the others who dispute the retainer, with liberty to them to attend the taxation, which should be conclusive as to them only as to the *quantum* in the event of their being ultimately found liable; *In re Macdonald*, 10 P. R. 498.

The order to tax, if made on a special application, may reserve questions of retainer and negligence, or other matters of defence, in a proper case; *Re Millar*, 12 P. R. 155; or refer them to the Taxing Officer; *Re Bacon*, 3 Chy. Ch. 79; *Re Toms*, *Ib.*, 201; *Re Lewis*, 9 P. C. L. J. 81; *Re Green*, 7 P. R. 89.

Præcipe Order for Taxation, Effect of.—The form of order when obtained by a client (see Form No. 99, H. & L. Forms, No. 1620), contains a submission on the part of the applicant to pay what is found due, this is inserted for the purpose of giving the Court jurisdiction to order payment by the applicant, instead of leaving the solicitor to bring an action; see *In re Battams*, 1897, 1 Ch. 690; 70 L. T. 385, and under such an order the client cannot dispute the retainer; *Re Herbert*, 34 Ch. D. 504; and he is bound to accept the Taxing Officer's decision as to the *quantum* of costs payable, subject to the right of appeal, and cannot thereafter claim to have the amount assessed in an action; *Re Johnston*, 3 O. L. R. 1.

The solicitor is entitled to an unconditional submission without any exception of charges or items barred by the Statute of Limitations; *Re Hughes*, W. N. 1899, 125.

Where the client, while asking for a taxation, at the same time wishes to dispute the retainer, he should move in Chambers for the order on notice to the solicitor, and the order should either omit the submission to pay, or it should be qualified and made subject to the question of retainer being found against him, and the right to dispute the retainer should be reserved to the applicant by the order; but this can only be done by consent; see *Re Tolten*, 27 U. C. Q. 35, 449.

So also the common order where obtained by the client will be deemed to be a waiver of the defence of the Statute of Limitations as to any statute-barred items in the bill; *Re Marrett*, 1896, 2 Ch. 291.

Rule 1184. Where the common order is obtained by the client, the solicitor would appear to have the right to dispute the alleged retainer; see *Re Toms*, 3 Chy. Ch. 204; and it is held in England that under the common order obtained by the solicitor, the client may object to every item on the ground of want of retainer; *Re Jones*, 35 Ch. D. 105; *Re Herbert*, 34 Ch. D. 504; but under an order obtained by the client himself, he cannot object to the whole bill on that ground; *Id.*; and see *Rule 1184*.

Where there is no retainer in writing, and it is disputed, weight is given to the denial of the client; *Re Eccles & Carroll*, 1 Chy. Ch. 263; *Bird v. Harris*, 43 L. T. 434; W. N. 1881, 5.

A contract to pay a retaining fee will not be enforced; *Ford v. Mason*, 16 P. R. 25.

The common order for taxation is now under *Rule 1186*, to be read as if it contained an order for payment of the amount to be found due upon the reference; see *Rule 1185 (d)*, whether the order is made on the application of solicitor, client, or third party liable to pay; it is not necessary to bring an action; *Re Peace & Waller*, 49 L. T. 637. Formerly when the order had been obtained by the solicitor, he was not entitled to such summary order for payment; *Re Washington*, 12 P. R. 386.

Under the common order the Taxing Officer has power to investigate and dispose of questions of carelessness, impropriety and negligence in the conduct of the business to which the bill relates, so far as they affect the solicitor's right to recover the costs in question; and the officer's certificate, unless appealed against in proper time, is conclusive as to all matters within his jurisdiction; *Re Milbar*, *Millar v. Chinc*, 12 P. R. 155; *Re Kerr*, 29 Gr. 188; *Thompson v. Milliken*, 13 Gr. 197; *Re Mansop*, 26 Ch. D. 459; 51 L. T. 390; and R. S. O. c. 174, s. 51; but the Taxing Officer cannot, under the common order, inquire as to the damages sustained by the client by the alleged negligence of the solicitor; *Thompson v. Milliken*, 15 Gr. 197.

Where the solicitor renounces all claim to costs, an account of moneys in his hands cannot be taken under the *præcipe* order; *Re Landon*, 1880, 1 Ch. 818; 80 L. T. 643.

The form of the common order when obtained by the client or person chargeable, or the solicitor, is regulated by *Rule 1187*.

Special
order.

Special Order.—Where the order is made on the special application of the solicitor or client, it may contain any special provisions which the peculiar circumstances of the case may require; it may reserve the question of retainer or any other defence, to be disposed of either in an action to be brought on the bill, or it may refer any such defences to the Taxing Officer; see *supra*, note p. 1413.

Place of Reference:—

Where
taxation to
be had.

R. S. O. c. 174, s. 35, *supra*, provided that a solicitor's bill is to be taxed whether the order for taxation be obtained on motion, or on *præcipe*, in the County in which the work was done; *Re Sabiston*, 2 C. L. T. 100; *Re Idington & Mickle*, 8 P. R. 500; by the proper officer of any of the Courts in the County in which any of the business charged for was done; but this provision of the statute is now superseded by *Rule 1187*, under which the reference, unless otherwise ordered, is to be to the proper Taxing Officer for the County in which the solicitor resides. See formerly *Re Chute & Williams*, 13 P. R. 110.

Where the principal part of the work had been done in the country, **Rule 1185**, and there had also been agency work done in Toronto, although the Court has in such a case a discretion to refer the bill to Toronto, yet on a special application, it was held that the discretion should not be exercised in favour of Toronto except under special circumstances: *Re Skinner*, 13 P. R. 276, 447.

It would seem that the opposite party may apply to change the place of reference where the order has been issued on *pari passu*: *Re Solicitor*, 7 P. R. 263.

Scope of Reference.—Besides taxing the costs, the Taxing Officer Reference is also required to take an account between the parties: see *Rule 1185*, note.

As to the power to inquire into negligence, etc.: see *supra*, p. 1413.

Scale of Costs.—Where the costs being taxed were incurred in an action, the scale on which they are to be taxed between solicitor and client will be that on which the costs in the action are taxable between party and party: *Scandlan v. McDonough*, 10 C. P. 164; *Re Solicitors*, 33 C. L. J. 490; but where the solicitor had reasonable ground for bringing the action in a higher Court than that in which it might have been brought, the costs as against his client may be allowed on the scale of the Court in which the action was brought, though the costs between party and party are taxable on the scale of an inferior Court: *Re Jackson*, 18 P. R. 326.

Where the proceedings for which the services are charged were not taken in any Court, the Taxing Officer may allow a lump sum therefor, having regard to the nature and importance of the business done and the amount involved: *Re Johnston*, 3 O. L. R. 1; and see *Re Shilton*, 30 L. T. 641; *Re Solicitor*, 37 C. L. J. 323.

The tariff in force at the time the business was done governs, although it may have been subsequently repealed: *Delap v. Charlebois*, 18 P. R. 417; *Earle v. Burland*, 8 O. L. R. 174.

Appeal from Taxing Officer's Report.—The Taxing Officer's certificate is a report, and is only appealable as provided by *Rules 769, 771, 772*: see *Rule 773*; *Re Crothers*, 15 P. R. 92; *Ford v. Mason*, 16 P. R. 25; and *Re Robinson*, 17 P. R. 137.

Costs of Taxation.—The costs of the taxation are in the discretion of the Taxing Officer: *Rule 1185* (b). As to special circumstances entitling the solicitor to costs: see *Re Mackenzie*, 43 L. T. 751.

Security for Costs.—The fact of a client applying for taxation being out of the jurisdiction is not sufficient ground for an order for security for costs, without special circumstances being shewn: *Re A. B.*, 6 P. R. 210. But see *Re Cornwall*, in note to *Rule 1198*, p. 1434.

1185. When a client or other person obtains an order for the delivery and taxation of a solicitor's bill of fees, charges and disbursements, or a copy thereof, the bill shall be delivered within fourteen days from the service of the order.

Rule 1185.

- (a) The bill delivered shall stand referred to the proper officer for taxation, and on the reference the solicitor shall give credit for, and an account shall be taken of all sums of money by him received from or on account of the client, and the solicitor shall refund what, if anything, he may on such taxation appear to have been overpaid. Con. Rule 1226.
- (b) The costs of the reference shall unless otherwise directed be in the discretion of the officer, subject to appeal, and shall be taxed by him when and as allowed. 58 V. c. 13, s. 37.
- (c) The solicitor shall not commence or prosecute any action in respect to the matters referred pending the reference without leave of the Court or a Judge;
- (d) The amount certified to be due shall be paid forthwith after confirmation of the certificate by filing, as in the case of a Master's report, by the party liable to pay the same;
- (e) Upon payment by the client or other person of what (if anything) may appear to be due to the solicitor, or if nothing is found to be due to the solicitor, the solicitor (if required) shall deliver to the client or other person, or as he may direct, all deeds, books, papers, and writings in the said solicitor's possession, custody, or power, belonging to the client;
- (f) The order shall be read as if it contained the above particulars, and shall not set forth the same, but may contain any variations therefrom, and any other directions which the Court or Judge shall see fit to make. Con. Rule 1226.

There is no corresponding Rule in England. This *Rule* contains with some changes the provisions which previously thereto it was usual to insert in an order for the taxation of a solicitor's bill. It will not now be proper to insert them, and the order will be read as if it contained them: see clause (f) and *Rule* 1186; but it may contain any variations or additional directions. Forms Nos. 99, 100, 101, in the Appendix (H. & L. Forms, Nos. 1626, 1627, 1629), are the forms of orders to be used in such cases, and should be adhered to: *Re Solicitors*, 9 P. R. 90, is not to be followed.

This *Rule* regulates the practice where a client or other person obtains an order for delivery and taxation, or for taxation only, of a solicitor's bill of costs. The words "other person" are intended to include persons who are not directly liable to the solicitor as his client, but who are nevertheless liable to pay his costs; see *R. S. O. c. 174, ss. 35, 45, supra*, pp. 1402, 1404. Rule 1185

Rule 1184 regulates the time and conditions within, and upon which the order may be obtained on *præcipe*. In cases not coming within that *Rule* the application for the order must be made on notice to the solicitor.

An application for taxation, or delivery and taxation, of a solicitor's bill of costs must be made "in the matter of *the solicitor*"; see *R. S. O. c. 174, s. 51, supra*, p. 1410.

Under the first clause of this *Rule* a bill must be delivered by the solicitor within fourteen days after the service of an order for its delivery. In case the solicitor makes default he is liable to attachment for disobedience; *Dent v. Bushnaq*, 9 Ex. 167; 23 L. J. Ex. 161; but where the solicitor declines to make any charge for his services, the delivery of a bill will not be enforced; *Re Griffith*, 7 Times, 298; and see *Re Kerr*, 12 Leay, 330.

As to the delivery of the bill, see notes to *R. S. O. c. 174, s. 31, supra*, p. 1398.

Clause (a).—As to place of reference: see *Rule 1184*, and note.

Account.—The account authorized to be taken by this clause is confined to moneys received by the solicitor in the transaction of the business to which the bill refers, and does not authorize a general account of all dealings between the client and the solicitor; thus where a barrister obtained an order for taxation against his solicitor, it was held that he was not entitled to call for an account of counsel fees received by the solicitor in other matters in which he had retained the applicant as counsel; *Re Le Brasseur*, 74 L. T. 726, and see *Jones v. James*, 1 Beav. 397; *Re Smith*, 4 Beav. 309; 9 Beav. 182; *Cooper v. Euart*, 2 Ph. 302. The account is incident to the taxation of the solicitor's bill, and where the solicitor disclaims any right to costs, an account of the moneys in his hands cannot be taken under a *præcipe* order, but a special application is necessary; *Re Landor*, 1899, 1 Ch. 818; 80 L. T. 613.

In an action by a firm of solicitors for the recovery of costs, it was held that the client was not entitled to set off against the costs, an amount paid by him to one of the firm, in respect of certain special services rendered by him and not charged for in the costs sued for; *McDougall v. Cameron*, 21 S. C. R. 379.

In taking the account under this clause the Taxing Officer may inquire into an alleged agreement in the nature of a compromise, as to prior bills of costs not referred to taxation, the amount of which the solicitor claims to deduct from the moneys of his client in his hands; *Re O'Donohue*, 14 P. R. 317; 19 S. C. R. 356.

Where with the knowledge of his client a solicitor has bargained for and received a commission from the vendor in a transaction in which his client is vendee, his client cannot claim such commission; *Re Haslam*, 1902, 1 Ch. 765; 86 L. T. 663.

Statute of Limitations.—The Statute of Limitations begins to run against the solicitor from the date when the work included in the bill was completed; *Coburn v. Colledge*, 1897, 1 Q. B. 702; 76 L. T. 608. Statute of Limitations

Rule 1185. Where a client obtains an order to tax a bill some of the items of which are barred by the Statute, he is held to waive the Statute, and is bound to pay whatever is found due: *Re Margetts*, 1803, 2 Ch. 293. The solicitor cannot set off statute-barred items of costs against moneys due by him to his client: *Smith v. Rette*, 1803, 2 K. B. 317, 80 L. T. 258.

Interest

Interest on Costs.—In the absence of special agreement interest cannot be recovered on an untaxed bill: *Cameron v. Heighs*, 14 P. R. 50; and interest on costs recovered from an opposite party, cannot be retained by the solicitor as against his client to whom he has not delivered any bill: *Re Bentwick*, 108 L. T. Jour. 105; and where costs are ordered to be paid out of an estate, but delay has arisen in payment owing to funds not being available, interest of such costs cannot be recovered out of the estate: *Archer v. Scriven*, 12 P. R. 348; but interest is payable on a bill delivered to a client, after demand, and notice, under Jnl. Act, s. 114 (2), *supra*, p. 160, that interest will be claimed: *Re McTear & Gilleland*, 2 C. L. T. 103, but the Taxing Officer has no power to allow interest unless that matter has been expressly referred to him: S. C., 18 C. L. J. 98; see in England under the Solicitors' Remuneration Act, *Blair v. Cordner*, 10 Q. B. 14, 455; *Re Marsden*, 40 Ch. D. 475.

The Taxing Officer has no authority to charge the solicitor with interest upon money in his hands belonging to his client: *Re O'Hanlon*, 12 P. R. 612; 28 C. L. J. 10, in Supreme Court.

Only those payments are allowed which are made by the solicitor in his professional capacity: *Re Remond*, 11 Beav. 603, and no payments in proceedings where he was not professionally concerned: *Hemming v. Wilton*, 4 Car. & P. 318; *Re Lees*, 5 Beav. 410.

Costs

Clause (b).—Prior to 58 Vict. c. 13, the costs of the reference were not in the discretion of the Court, but if the client attended the taxation, or obtained the order, and less than a sixth was struck off the bill, he was liable to pay them, and if a sixth or more was struck off, the solicitor was liable to pay them.

See R. S. O. c. 174, s. 40, *supra*, p. 1405.

Enforcing order.

Clause (d).—After taxation under an order obtained after action brought, the litigation is ended except to enforce payment. If the order does not reserve questions of retainer and negligence, it is open to the client to take a double chance of defeating the solicitor's claim by proceeding to defend the action after the conclusion of the taxation: *Re Millar*, 12 P. R. 155; where *Re Clarke*, 9 P. R. 337, and *Macdonald v. Piper*, 10 P. R. 586, were distinguished. But see *Re Washington*, 12 P. R. 386.

Under this clause no farther order for payment of the balance found due to either party appears to be necessary, whether the order is obtained by the client or solicitor; but the solicitor or client is entitled to enforce payment by execution on the confirmation of the report. The report must be filed, and unless appealed from, is confirmed at the expiration of fourteen days from the service of notice of the filing on the opposite party: *Rule 769*.

Where the result of the taxation is that the solicitor has been overpaid, and that money of the client is in his hands, an order may be made that the solicitor be struck off the Roll, unless by a named day he pay the amount due the client, with any costs of the taxation payable by him, and costs of the motion: *Re Knowles*, 16 P. R. 408; *Re Solicitor*, 1895, 2 Ch. 66.

If, however, the order for taxation is obtained by a third party, he does not thereby admit his liability to pay the solicitor; *Re Group*, 1186-1189, 1001, 1 Ch. 239; 84 L. T. 24, and unless the party primarily liable to pay is also a party to the proceedings for taxation (see *Rule 1188*), the solicitor would not be in a position to enforce payment of the balance, except by action.

1186. An order for reference of a solicitor's bill for taxation shall be presumed to contain the above clauses (a) inclusive of *Rule 1185*, whether obtained on *principle* or otherwise, and by the solicitor, client or other person liable to pay the bill. *Con. Rule 1227.*

1187. The reference for taxation shall unless otherwise ordered be to the proper taxing officer for the county in which the solicitor resides. *Nov.*

This *Rule* varies, and in effect supersedes the provisions of R. S. D. c. 174, s. 35, *supra*, p. 1402, as to the officer to whom the reference is to be directed.

1188.—(1) When a person other than the client applies for taxation of a bill delivered or for the delivery of a copy thereof for the purpose of taxation, and it appears that, by reason of the conduct of the client, the applicant is precluded from taxing the same, but is nevertheless entitled to an account from the client, it shall not be necessary for the applicant to bring an action for an account, but the Court or a Judge may, in a summary manner, refer a bill already delivered or order delivery of a copy of the bill, and refer the same for taxation, as between the applicant and the client, and may add such parties not already notified as may be necessary.

(2) The provisions of *Rule 1185*, so far as they are applicable, shall apply to such taxation. *Con. Rule 1229.*

3. SHERIFFS' FEES.

1189. The fees and allowances 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* appended to these Rules. *Con. Rule 1232.*

A Sheriff is entitled to demand from a person delivering to him an execution to be executed, the fees allowed by the *Tariff*, for receiving.

Rule 1190. warrant, and return; and the fees so paid, if collected from the debtor, are to be refunded by the Sheriff to the person who issued the writ, see 62 Vict. (2) c. 7, s. 2.

As to the fees of a Sheriff acting under an order of a Judge in matters for which no fee is provided, see 62 Vict. (2) c. 8, s. 6.

Sheriff's
poundage,
where goods
seized but
not sold.

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 when 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. Cou. Rule 1233. Rules 23 June, 1894, 1375, *part*.

Sheriff's
poundage
where land
or chattels
real seized,
but not sold.

(2) Where land or chattels real of the judgment debtor have been advertised under an execution, but not sold by reason of payment or satisfaction having been otherwise obtained on, or within one month before the day on which the property has been advertised to be sold, or any day to which the sale may be adjourned, the Sheriff shall be entitled to the fees and expenses of the execution and the poundage, only on the value of the debtor's interest in the property, not exceeding the amount indorsed on the writ, or such less sum as the Court or a Judge may deem reasonable. Rules 23 June, 1894, 1375, *part*.

Poundage
on *v. fa.*
goods.

Poundage.—The mere delivery of the writ, without an actual or virtual seizure, does not entitle the Sheriff to poundage; *Vash v. Dickenson*, L. R. 2 C. P. 252; *Morris v. Boulton*, 2 C. L. Cham. 69; but the receipt of money by the Sheriff under a writ is a virtual execution of the writ, though there is no actual seizure or sale; *Consolidated Bank v. Bickford*, 7 P. R. 172; *Bissicks v. Bath Colliery Co.*, 2 Ex. D. 459; *Ex p. Lithgow*, 10 Ch. D. 169. Where there has been a seizure, the Sheriff is entitled to poundage, though there be no sale, if by compulsion of the writ the debt is recovered directly through the Sheriff; *Mortimore v. Cragg*, 3 C. P. D. 216, overruling *Roe v. Hammond*, 2 C. P. D. 300, or indirectly by means of some compromise which is the consequence of the seizure, subject to *Rule 1190*; *Mortimore v. Cragg*, *supra*; *Thomas v. Cotton*, 12 U. C. Q. B. 118; *Gillespie v. Shaw*, 10 U. C. L. J. 100; *McRoberts v. Hamilton*, 7 P.

R. 95; but not where the writ is withdrawn by direction of law: *Rule 1190*. *Mortimore v. Cragg*, *supra*; *Walker v. Fairfield*, 8 C. P. 95; or where, before sale, an order is made for delivery of the goods to a receiver: *Re Ludford*, 33 W. R. 152; 51 L. T. 240; *Re Ludmore*, 13 Q. B. 16, 415; or to an official receiver in bankruptcy: *In re Thomas*, 1899, 1 Q. B. 400.

Where after seizure but before sale, the execution creditor becomes disentitled to enforce the judgment, the Sheriff cannot sell for the purpose of realizing his fees, charges and expenses: *Sacary v. Abdy*, 1 Ex. D. 293.

Where the money levied has to be restored to defendant in consequence of some act of the plaintiff, the Sheriff may recover poundage from the latter: *Henry v. Commercial Bank*, 17 F. C. Q. B. 191; see *Morrison v. Taylor*, 9 P. R. 390.

A Sheriff upon arresting a judgment debtor under a *ca. sa.* thereby becomes at once entitled, as against execution creditors, to full poundage on the amount of the execution: *McNab v. Oppenheimer*, 11 P. R. 348.

The Sheriff is only entitled to poundage on the sum paid over, not on what he retains for himself: *Mickle v. Remolds*, 24 F. C. Q. B. 303. If he makes part only by force of the execution, the poundage is only on such part; and if a seizure is not followed by a sale by reason of satisfaction having been otherwise obtained, and no money is actually made by the Sheriff on or by force of the execution, the poundage is only on the goods seized, and a Judge may on application award such less sum as may be reasonable: *Rule 1190*, and see *Walsworth v. Bell*, 8 P. R. 478; *Borman v. Mason*, 1 C. L. T. 109; *Morrison v. Taylor*, 9 P. R. 390; *Hamilton, etc., v. Gore Bank*, 20 Gr. 202; *Re Ludford*, 51 L. T. 240. If no such application is made, the Sheriff would seem to be entitled to full poundage on the goods seized; see *Brockville, etc., v. Canada Central*, 7 P. R. 372, 376.

The Sheriff was held entitled to poundage, on three several writs issued by the same solicitor, and placed in his hands at the same time: *Grant v. Grant*, 10 P. R. 40; but see now R. S. O. c. 78, s. 28.

For the proper mode of computing poundage, see *Fleming v. Hall*, 9 P. R. 310.

A Sheriff was formerly not entitled to poundage upon an execution levied against lands, unless there had been an actual sale: *Merchants Bank v. Campbell*, 32 C. P. 170; *French v. Lake Superior Mineral Co.*, 14 P. R. 541; *Rule 1190* (2) now makes provision on that subject.

The plaintiff's solicitors are not liable to the Sheriff for his fees in the absence of any contract, and no contract is implied from lodging the writ in the Sheriff's office: *Raple v. Busby*, 6 Q. B. D. 171.

Allowance where Poundage or Full Poundage not Recoverable.—A Sheriff was formerly only entitled to poundage for money actually passing through his hands, and he was not entitled to charge poundage on moneys paid by the execution debtor direct to the execution creditor or his solicitor: *Hamilton & P. D. R. Co. v. Gore Bank*, 20 Gr. 190; but now where the payment is made, or the claim is settled, after seizure of the debtor's goods, the Sheriff, though not entitled to poundage on the whole amount recovered, is under this *Rule* entitled to poundage on the value of the goods seized not exceeding the amount indorsed on the writ, unless an order for a less sum is made under clause (1); and see *McRoberts v. Hamilton*, 7 P. R. 95. Where the money is paid direct to the Sheriff without any

Rule 1191. seizure he is entitled to his poundage and fees: *Consolidated Bank v. Bickford*, 7 P. R. 172; and where the full amount to be levied is paid to the Sheriff after seizure, but before sale, he is entitled to poundage on the amount received and not merely on the value of the property seized: see *Re Black Eagle Gold Co.*, 6 O. L. R. 312. *Rules 1190-1192* do not apply in such a case: the money so made is made under the execution. Where to avoid a sale judgment debtors agreed with the Sheriff to pay a proportion of the daily taking, money so paid to the Sheriff was held to be made under the execution: *Robinson v. Burnell's Vienna Baking Co.*, 1904, 4 K. B. 624.

The original *Rule* did not authorize a Sheriff to collect poundage under an execution against lands where the lands had been advertised but not sold: see *Merchants Bank v. Campbell*, 32 C. P. 179; *French v. L. Superior, etc.*, 14 P. R. 541; clause (2) now makes provision in that respect.

The Sheriff is not entitled to poundage where the goods seized are upon an interpleader issue determined not to be the goods of the execution debtor, even though they have been sold under the interpleader order: *Furner v. Crozier*, 14 P. R. 272.

Where, in consequence of an appeal by the execution debtor, the Sheriff after seizure withdrew of his own motion to save expense to parties, and the execution was subsequently superseded, he was held entitled to compensation. The principle of the *Rule* is that where the Sheriff has made a seizure, and his proceedings are interrupted before the execution is executed, he is entitled to his poundage, or a sum in lieu thereof, and that the means by which the interruption takes place is of no consequence: *Weeger v. G. T. Ry. Co.*, 16 P. R. 371.

Where by reason of the making of a winding-up order under the Dominion Winding-up Act, an execution becomes intercepted before sale, this *Rule* does not apply so as to entitle the Sheriff to compensation in lieu of poundage: *Re Palmerston Packing Co., Allan's Claim*, 4 O. W. R. 339.

Poundage covers the risk and responsibility cast upon the Sheriff in seizing, retaining, selling and returning the money. If his action be intercepted so that he does not make the money, it is for the Court to say what allowance shall be made to him in lieu of poundage: *Wadsworth v. Bell*, 8 P. R. 478. See also *Morrison v. Taylor*, 9 P. R. 330.

When
Sheriff
entitled to
mileage and
fees only.

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 therefor is assigned in any tariff of costs. Con. Rule 1234.

See *Lee v. Dangar*, 1892, 1 Q. B. 231; 2 Q. B. 337; *Re Wells*, 68 Rules L. T. 231. 1192-1196.

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.

Adopted from R. S. O. 1877, c. 66, s. 47.

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.

Taken from R. S. O. 1877, c. 66, s. 48; and 49 Vict. c. 16, s. 17.

1194. The Taxing Officer shall tax the bill and give, when requested, a certificate of the taxation. Con. Rule 1238.

Taken from R. S. O. 1877, c. 66, s. 50.

1195. A Sheriff shall not without taxation collect any fees, costs or poundage or expenses, after he has been required to have the same taxed. Con. Rule 1237.

Taken from R. S. O. 1877, c. 66, s. 49.

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.

Taken from R. S. O. 1877, c. 66, s. 51.

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taxation.

1197. A party dissatisfied with the taxation may appeal therefrom as in ordinary cases of taxation between party and party. Con. Rule 1240.

Taken from R. S. O. 1877, c. 66, s. 52.

See *supra*, p. 1012, for practice on appeals from taxation in ordinary cases.

4. SECURITY FOR COSTS.

Security
for costs
order for

1198.—(1) Security for costs may be ordered where by law or by the practice a party has heretofore been entitled to obtain security for costs, and, without restricting the generality of this provision, also in the following cases:

- (a) Where the plaintiff resides out of Ontario;
- (b) Where the plaintiff is ordinarily resident out of Ontario, though he may be temporarily resident within Ontario;
- (c) Where the plaintiff has brought another action or proceeding for the same cause which is pending in Ontario or in any other country;
- (d) Where the plaintiff or any person through or under whom he claims, has had judgment or order passed against him, in another action or proceeding for the same cause in Ontario or in any other country, with costs, and such costs have not been paid;

and the Court or a Judge may make such order for security for costs and staying proceedings until security is given as may seem just. See Rules of 23 June, 1894, 1377; Rules of 1 Jan., 1896, 1498.

"Plaintiff."—As to this word, see *Molson Bank v. Sawyer*, and other cases, *infra*, pp. 1433-4.

Security for Costs, when Ordered.—This *Rule* does not limit the right to security for costs to the cases enumerated in clauses (a), (b), (c) and (d), but gives a specific right to security in those cases in addition to any others in which, according to law or the practice of the Court, a party has been heretofore entitled to claim security for costs.

In addition to the cases enumerated in this *Rule* security for costs may be required to be given: (1) Where the action is brought and prosecuted by a *nominal plaintiff*. (2) In actions to recover penalties. (3) In actions for libel under R. S. O. c. 68, s. 10. (4) In

actions of slander imputing unchastity to any woman; see R. S. O. c. Rule 1198, 68, s. 5. (5) In actions by insolvent persons against Justices of the Peace and other public officers; see R. S. O. c. 89. (6) Parties residing out of the jurisdiction coming into the Master's Office to prove claims as creditors or otherwise. (7) Parties to garnishee, or interpleader proceedings, who are in the position of plaintiffs, and are resident out of the jurisdiction. (8) And generally persons out of the jurisdiction initiating any proceedings. (9) A defendant out of the jurisdiction setting up a counter-claim unconnected with the plaintiff's claim.

Quære, whether security will be ordered in a vexatious or frivolous action: *Potter v. Cotton*, W. N. 1879, 204.

The fact that the cause of action is a foreign judgment recovered by the plaintiff does not affect the right to security: *Crozier v. Brogden*, 1894, 2 Q. B. 80.

It will not be ordered in an alimony suit: *Bennett v. Bennett*, 7 P. R. 54, because in such actions the plaintiff is not ordered to pay costs although she fails.

In regard to the liability to give security for costs, an executor stands in no different position from a litigant suing in his own right: *Re Parker*, 16 P. R. 392; nor does a foreign receiver: *Canadian International Mercantile Agency v. International Mercantile Agency*, 4 O. W. R. 338.

(a) Residence out of the Jurisdiction.—A defendant is *prima facie* but not necessarily, entitled to security because the plaintiff's residence is out of the jurisdiction. If it be made apparent from evidence which the Court can look at, such as defendant's admissions on examination, or other admission though not in any technical form: *Anglo-American v. Rowlin*, 10 P. R. 391, that there is no defence, security will not be ordered, or a *præcipe* order will be set aside: *Doer v. Rand*, 10 P. R. 165; *Thibaudau v. Herbert*, 16 P. R. 420; *De St. Martin v. Davis*, W. N. 1884, 86; 28 Sol. Jour. 392.

A plaintiff giving a fictitious address within the jurisdiction, when he is in fact a prisoner under criminal sentence in Ontario, will be ordered to give security for costs: *Fournier v. Hogarth*, 15 P. R. 72; although the fact that the plaintiff is in prison is not of itself a ground for ordering him to give security: see *Dupont v. Crook*, 89 L. T. Jour. 31.

A plaintiff wilfully giving a false or fictitious address within the jurisdiction, though really living without, will be ordered to give security: *Waldron v. McWalter*, 6 P. R. 145; *Sutherland v. McDonald*, 9 P. R. 178; *Redondo v. Chaytor*, 4 Q. B. D. 458; *Manby v. Berville*, 8 De G. M. & G. 468, and see *Re Sturgis, etc.*, 34 W. R. 163; *Andrews v. Read*, 3 Times, 573; *Fraser v. Palmer*, 3 Y. & C. 280; and where this is done, the order will not be discharged merely because the plaintiff comes to reside within the jurisdiction: *Ib.*; but where a plaintiff has by mistake given an erroneous address within the jurisdiction, when he was in fact resident temporarily out of the jurisdiction, on the mistake being established, he will not be ordered to give security, if he has in the meantime come to reside within the jurisdiction: *Anderson v. Quebec Fire Ins. Co.*, 15 P. R. 172. A sole plaintiff residing out of the jurisdiction, will *prima facie* be obliged to give security: Dan. Pr., 5th ed., 28; *Republic of Costa Rica v. Erlanger*, 3 Ch. D. 62; also a sole plaintiff leaving the juris-

Rule 1198. diction during the pendency of the action in order to avoid arrest for contempt of Court: *Codd v. Delap*, 15 P. R. 374; but not one of several plaintiffs, one of whom resides within the jurisdiction, where they sue in respect of a joint claim, even though a several claim be set up in the alternative: *D'Hormusgee v. Grey*, 10 Q. B. D. 13; *McCConnell v. Wakeford*, 13 P. R. 455; *Smith v. Silverthorne*, 15 P. R. 197. But since *Ruhx* 185 and 1131, all the plaintiffs may not be jointly liable for the whole costs; hence, the rule that security for costs should not be ordered where the objection taken to a plaintiff (e.g., residence abroad, insolvency), is not applicable to other co-plaintiffs, does not now universally govern: *Irring v. Clark*, 12 P. R. 29, in which security was ordered for the costs of the defendants against one plaintiff, where the claims of the several plaintiffs were distinct.

Security for costs was refused in an alimony suit though the plaintiff was resident out of the jurisdiction: *Bennett v. Bennett*, 7 P. R. 34.

Security will not be required if the plaintiff is serving abroad in the army or navy: *Evelyn v. Chippendale*, 9 Sim. 497; *Evering v. Chiffenden*, 7 Dowl. 536; *Dickenson v. Duffill*, 1 Chy. Ch. 108; or if a British subject and at the time resident within the jurisdiction, though his movements be uncertain: *Allen v. Globe*, *Globe*, 1st December, 1881; *Gardiner v. Harris*, 8 L. R. Ir. 372; but see *Harkley v. Toronto General Trusts*, 33 C. L. J. 432.

In *Martin v. Russell*, 21 L. R. Ir. 196, security was ordered to be given by a sailor following his calling out of the jurisdiction, though his family resided within it; but where a plaintiff had his home in Ontario, but carried on business out of the jurisdiction, and only visited his home at intervals of a month for a few days at a time, he was held to reside in Ontario: *Moffatt v. Leonard*, 6 O. L. R. 383.

A motion for security was refused where the plaintiffs resident out of the jurisdiction, had recovered judgment, and the defendant was appealing and alleged that since recovery of the judgment, the plaintiffs had removed their assets out of the Province: *Exchange Bank v. Barnes*, 11 P. R. 11; *Small v. Henderson*, 18 P. R. 314.

An infant plaintiff resident out of the jurisdiction will not be ordered to give security for costs, nor will his guardian or next friend, if within the jurisdiction: *Moran v. Kellogg*, 10 C. L. T. 184; *Scott v. Niagara, etc.*, 15 P. R. 403, 455; *Roberts v. Coughlin*, 18 P. R. 94, but see *Stinson v. Martin*, 2 Chy. Ch. 86; but if the infant and his next friend be resident out of the jurisdiction, security for costs will be ordered unless a new next friend resident within the jurisdiction is appointed: *McBain v. Waterloo Manufacturing Co.*, 8 O. L. R. 620; and where the infant plaintiff is within the jurisdiction, and the next friend is resident out of the jurisdiction, and is also a plaintiff, the latter may be required to give security for costs, or in default his claim may be struck out: *Felgate v. Hegler*, 9 O. L. R. 315.

If the plaintiff's permanent residence is foreign, the defendant is entitled to security if the plaintiff is out of the jurisdiction at the time of the motion: *Robertson v. Concan*, 10 P. R. 508.

If a plaintiff goes out of the jurisdiction permanently pending action, he may be required to give security for both past and future costs: *Masson v. Allen*, 12 Ch. D. 807; *Hutelen v. Merchants Despatch Transportation Co.*, 10 P. R. 253; *Codd v. Delap*, 15 P. R. 374; and see *Tanner v. Weiland*, 19 P. R. 149.

Defendants were held not entitled to security from plaintiffs who acted as executors, and who, under a power of attorney from English executors, took out probate in Ontario of the will of a testator who resided and died in England: *Sykes v. Canadian Pacific Rn.*, 3 O. L. T. 505.

Semble, that an affidavit of information and belief as to residence abroad is not sufficient ground for an order for security for costs: *Hollingsworth v. Hollingsworth*, 10 P. R. 5.

As to what constitutes "residence" abroad, see *Re Trench*, 25 Ch. D. 500.

And as to what constitutes residence within the jurisdiction by a foreign company, see *Parker v. Odette*, 13 P. R. 431; *Welsbach L. Light Co. v. St. Ledger, Ltd.*, 382; *Pittsburgh C. S. Co. v. Moxa*, 102 L. T. Jour. 532; W. N. 1897, 306.

(b) Temporary Residence within Jurisdiction.—Formerly if the plaintiff was in fact within the jurisdiction, he could not be required to give security: see *Wilder v. Hopkins*, 4 P. R. 350; *Belton v. Chaytor*, 4 Q. B. D. 471; and other cases cited *supra*; but now under the provisions of this Rule a temporary residence within the jurisdiction will not be sufficient to exonerate a party ordinarily resident abroad from giving security: *Nesbit v. Galna*, 3 O. L. R. 429; *Kerranagh v. Cassidy*, 5 O. L. R. 314. It is no answer to an application for security for costs against a plaintiff ordinarily resident out of the jurisdiction, that he has no fixed place of residence anywhere: *Alcroft v. Morrison*, 19 P. R. 59; overruling *Denier v. Marks*, *Earle v. Marks*, 18 P. R. 465. It is probable that this branch of the Rule may be held to extend to other cases besides that of a plaintiff in an action, where residence abroad is the ground of ordering security to be given. An application to compel security to be given by a foreigner in prison within the jurisdiction was refused: *Dupont v. Crook*, 80 L. T. Jour. 51; but that was before the amendment of the Rule authorizing an application in case of temporary residence.

A plaintiff who comes into the jurisdiction after the issue of an order may be relieved from it, if he is actually, and intends to remain, a resident there: *Nesbit v. Galna*, 3 O. L. R. 429.

(c) Pendency of Another Action.

To bring a case within clause (c) of this Rule it must be clearly shewn that the causes of action are identically the same, and not merely growing out of the same transaction: *Dean v. Lamprop*, 2 Chy. Ch. 202. See also *Hill v. Paulet*, 13 L. T. 645; *Cassell v. Murray*, 18 C. L. J. 76; *Grand Junction Ry. v. Peterborough*, 14 P. R. 107; *Lucas v. Cruickshank*, 13 P. R. 31; *Cobbett v. Warner*, L. R. 2 Q. B. 108; and *Martin v. Branchamp*, 25 Ch. D. 12; approved in *McCabe v. Bank of Ireland*, 14 App. Cas. 113.

In *Brunsdon v. Humphrey*, 14 Q. B. D. 141, it was held that where a judgment had been obtained, in an action to recover damages for injury to the plaintiff's cab, in a collision caused by the defendant's servant, another action might be brought for damages for a personal injury suffered in the same collision, as it was held to constitute a distinct cause of action.

See *Russell v. Waterford & Limerick Rn.*, 16 L. R. Ir. 311, for an instance of splitting a cause of action.

Rule 1198. In *Serrao v. Noel*, 15 Q. B. D. 540, an action had been instituted in the Chancery Division for an injunction to restrain the defendants and a company from parting with shares or registering the defendants as transferees, and for "further and other relief." That action was settled by a consent order for delivery up of shares to the plaintiff, and staying the action. Owing to delay in delivering the shares they were sold at a loss, and this action was brought for damages for detention. It was held that it was the same cause of action as in the Chancery Division, and the plaintiff was estopped by the consent order from recovering damages, the action in the Chancery Division being for all relief necessary to do complete justice between the parties.

Where security is ordered the proceedings are of course stayed until the security is given; see *Campbell v. Elgie*, 10 P. R. 440, and the action may be dismissed if the security be not given within the time limited by the Court; see *Rules* 1202 and 1203. The word "proceeding" in this and the following clause of the *Rule* means a proceeding in Court. An appeal from an order dismissing a motion made aside an award was held not to be a "proceeding for the same cause," as an action to recover moneys in respect of certain matters included in the submission, but not dealt with by the award: *Coughlin v. Bracer*, 17 P. R. 438.

Non-payment of costs.

(d) Non-payment of Costs in another Action for same Cause.—This *Rule* supersedes the former practice under which the second action might be stayed until the costs of the former action were paid: *Campbell v. Elgie*, 10 P. R. 440.

As to the meaning of the word "proceeding": see *Coughlin v. Bracer*, *supra*.

Security for costs may be ordered to be given, even though the former action was not between precisely the same parties, where the plaintiff is suing substantially by virtue of the same alleged facts as that set up in the former action: *May v. Werden*, 17 P. R. 500, where the second plaintiff knew the history of the prior litigation, and appeared to have been made plaintiff in order to evade the practice which would require security to be given.

Where, however, the costs in the former action were not ordered to be paid by the plaintiff personally, but out of an estate, security was refused: *Curtis v. McVabb*, 7 P. R. 240; *Peters v. Tillo*, 11 P. R. 145.

The plaintiff cannot set up that the first action was brought without his authority where, when it became known to him he could move to relieve himself on that ground from liability for the costs, but has not done so: *Lee v. Lang*, 17 P. R. 203; 18 P. R. 1, where the order for security was set aside on terms, the plaintiff having obtained an order setting aside the judgment obtained against him in the first action.

Under the former practice, where some of the causes of action in a second action were the same as in a former action, the plaintiff having discontinued as to those, the Court refused to stay the second action in respect of the new causes of action till costs of the former action were paid: *Bywater v. Dunne*, 10 L. R. Ir. 380.

Where an action by a married woman by her next friend was dismissed with costs, for want of prosecution, a second action on her behalf for the same object, but by a new next friend, was stayed.

the costs of the first action were paid: *Ry Payne, Randle v. Payne*, Rule 1198, 23 Ch. D. 288; and in such a case the defendant would now be entitled to security for costs under this clause of the Rule.

Nominal Plaintiff.—Security may be ordered if the plaintiff is nominal insolvent and the suit is in reality for the benefit of some other person: *Mason v. Jeffrey*, 2 Chy. Ch. 15; *Little v. Wright*, 16 Gr. 576; *Pendry v. O'Neill*, 7 P. R. 52; *Boice v. O'Leary*, 7 P. R. 359; *Delaney v. MacLellan*, 13 P. R. 63; *Delap v. Charlebois*, 15 P. R. 15; *Major v. Mackenzie*, 17 P. R. 18 (explaining *Gordon v. Armstrong*, 16 P. R. 432); *May v. Heeden*, 17 P. R. 530, affirmed by D. C. 33 C. L. J. 568; especially if such other person is out of the jurisdiction, though the plaintiff had a nominal interest: *Re Royal Lake Lumber Co.*, 11 P. R. 311; see also *Savin v. Folloes*, 18 Q. B. 11, 55; and see Part *Kearney & L. S. Ry. Co. v. South Norfolk Ry. Co.*, 13 P. R. 327, where an application for security for costs was made, on the ground that the plaintiff company was alleged to have no corporate existence, and was alleged to be suing on behalf of a third person who was insolvent. So where the plaintiff is only one of a large number interested, and the Court is satisfied that he has been put forward by the others to institute the suit, and he is a man of no means: *Hatheway v. Day*, 11 P. R. 91; *Clark v. St. Catharines*, 10 P. R. 205; *Re Seventh E. C. Bldg. Soc.*, 51 L. T. 109.

Where an action was brought by a mortgagor in respect of the mortgaged estate, and the mortgage was so large as to leave no value in the equity of redemption, so that the action was really for the benefit of the mortgagee, the plaintiff was required to give security for costs as being in effect a nominal plaintiff: *Gordon v. Armstrong*, 16 P. R. 432; see *Major v. Mackenzie*, 17 P. R. 18.

To entitle a defendant to security on this ground it is not sufficient to shew that the plaintiff is a man of no means, and has no beneficial interest; it must be shewn that the action is really that of some other person: *Major v. Mackenzie*, 17 P. R. 18; and security will not be ordered to be given where the plaintiff asserts a cause of action in which no one but himself is interested: *Clarke v. Rama Timber Transport Co.*, 10 P. R. 384; nor where the plaintiff himself has an interest in the suit which is brought partly for the benefit of another: *Wallbridge v. Trust & Loan Co.*, 13 P. R. 67; but the interest must be substantial and not merely nominal: *Delaney v. MacLellan*, 13 P. R. 63.

Where an alleged nominal plaintiff is examined in support of a motion to compel him to give security for costs, he cannot be required to answer as to his financial ability until a *prima facie* case has been made out that he is in fact a nominal plaintiff; such *prima facie* case may be made by the affidavit of the defendant that in his belief such is the fact: *Pritchard v. Pattison*, 19 P. R. 180, 277; very clear proof that the plaintiff has no substantial interest is necessary, or the order will not be made: *S. C.*, 1 O. L. R. 37.

In a class suit brought by four ratepayers against a municipal corporation and reeve for an account of moneys received by the reeve from the corporation, security was refused, although the plaintiffs were alleged to be financially incompetent to answer costs, the action being virtually the plaintiffs' and not that of third persons putting the plaintiffs forward to sue: *McAllister v. O'Meara*, 17 P. R. 176.

An assignee in insolvency *bona fide* suing in the discharge of his duty will not be ordered to give security, though without means and

Insolvent suing for wife's allowance in support of her suit nominal plaintiff
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Rule 1199. not beneficially interested: *Vare v. Gould*, 8 P. R. 311, nor will a receiver of an insolvent company continuing, by order of the Court, an action brought by the company: *Provincial Ins. Co. v. Goodchurch*, 7 P. R. 283; nor an official liquidator: *Cowell v. Taylor*, 31 Ch. D. 34; nor an administrator bringing an action under the Fatal Accidents Act (R. S. O. c. 166); *Sharp v. Grand Trunk Ry.*, 1 O. L. R. 200; but where a plaintiff has entered into an agreement to prosecute the action for the benefit of a trustee for his creditors, he is a nominal plaintiff, and as such liable to be ordered to give security for costs: *Lloyd v. Huthers S. B. Co.*, 85 L. T. 158; and if resident out of the jurisdiction a receiver of a company is liable to give security in the same way as any other person so resident: *Canadian International Mercantile Agency v. International Mercantile Agency*, 4 O. W. R. 338.

Where the plaintiff is a corporation, the fact that it is insolvent, and a receiver of its assets has been appointed, is no ground for ordering security: *Dartmouth Harbour Commission v. Mayor of Dartmouth*, 34 W. R. 774; 55 L. J. Q. B. 483; but see *Harkins H. Co. v. Want*, 60 L. T. 207; 4 R. 577; 9 Times, 481, 538.

Quere, whether the rule that security is not ordered against one only of several plaintiffs was ever applicable to the case of an insolvent plaintiff suing for the benefit of another: *Irving v. Clark*, 12 P. R. 230.

Where the plaintiff parts with his interest *pendente lite*, further proceedings may be stayed until security is given, or the suit is revived in the name of the assignee: *Siran v. Adams*, 7 P. R. 147; see also *Secur v. Lawson*, 16 Ch. D. 121, and *Goatley v. Emmott*, 15 C. R. 291.

Poverty of the plaintiff is no ground alone for asking security: *Ross v. Jacques*, 8 M. & W. 135; *Sweetman v. Morrison*, 10 P. R. 446; *Cowell v. Taylor*, 31 Ch. D. at p. 38; *Heckscher v. Crook*, 1891, 1 Q. B. 224; (as to this case, see *Wightwick v. Pope*, 1902, 2 K. B. 90); *Lemaurier v. Ferguson*, 20 Times, 32; *Cook v. Whellock*, 24 Q. B. D. 658; 38 W. L. R. 334; nor his insolvency where he is suing for his own benefit: *Rhodes v. Lawson*, 16 Q. B. D. 548; nor even though the plaintiff be also a married woman: *McKay v. Baker*, 12 P. R. 341.

A defendant's right to security for costs may, however, be waived by not applying at a proper stage of the cause: *Robertson v. McMaster*, 8 P. R. 14. The rule as to when it is too late to apply is not the same, however, as formerly: see note to *Rule 1201*, and *United Telephone Co. v. Bassano*, 31 Ch. D. 620; and see *Wightwick v. Pope*, *supra*.

Actions to recover Penalties.—See *Rule 1200*, and notes.

Libel

Actions for Libel.—By R. S. O. c. 68, s. 10, in actions for libel contained in a newspaper (as defined by sec. 1 of the Act), the defendant may at any time after the filing of the statement of claim apply for security for costs upon notice, and on an affidavit by the defendant or his agent showing the nature of the action and defence, and showing that the plaintiff is not possessed of property sufficient to answer the costs of the action in case a verdict or judgment is given in favour of the defendant, and that the defendant has a good defence on the merits, and that the statements complained of were published in good faith, or that the grounds of action are trivial or frivolous.

Where, however, the alleged libel involves a criminal charge, the defendant is not entitled to security for costs unless he satisfies the Court or Judge that the action is trivial or frivolous, or that the article was published in good faith, and that there was reasonable ground to believe that the same was for the public benefit, and that the publication took place in mistake or misapprehension of the facts and that there was an equally public retraction as mentioned in sec. 6 (2).

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But on such an application the Judge is not to try the merits, and contentious affidavits in answer will not be received; *Bartram v. London Free Press*, 18 P. R. 11; It is sufficient if the defendant makes out a *prima facie* case for security; *Saugh v. Mail Printing Co.*, 16 P. R. 132; *Lennox v. Star Co.*, 16 P. R. 488; and see *Southwick v. Hare*, 15 P. R. 222; *Bartram v. London Free Press*, 18 P. R. 11.

As to the case where a criminal charge is involved, see *Saugh v. Stephenson*, 17 P. R. 374; *Georgina Bay Co. v. The World*, 16 P. R. 320; *Macdonald v. World*, *Ib.*, 321.

A libel does not involve "a criminal charge" unless the offence imputed is one that could be made the subject of an indictment; e.g., a charge that a joint stock company bribed aldermen is not a "criminal charge," because a company could not be indicted for an offence involving malice or intent on the part of the alleged offender; *Georgina Bay Co. v. The World*, *supra*; *Beckett v. Engraver Print. Co.*, 16 P. R. 63; and see *D'Arcy v. The World*, 17 P. R. 387.

An accusation of "blackmailing" imputes an indictable offence; *Marks v. Samuel*, 1904, 2 K. B. 287; but see *Macdonald v. Mail Printing Co.*, 2 O. L. R. 278.

Where it was shewn that the plaintiff was not in fact the person referred to in the alleged libel, the action was regarded as frivolous; *Girvine v. Globe Printing Co.*, 14 P. R. 72.

A printed paper issued daily by the conductors of a mercantile agency to persons who are subscribers to the agency, for the purpose of giving the information required by such subscribers, is a "news-paper" within R. S. O. c. 68, s. 10, *supra*; *Slattery v. Dun*, 18 P. R. 168; but the Statute only entitles newspaper publishers or proprietors to security for costs; a person sued for libel contained in an advertisement published in a newspaper, of which the defendant is neither the proprietor nor publisher, is not entitled to security; *Parrell v. Ruskin*, 35 C. L. J. 241.

As to what is a good defence on the merits; see *Paladin v. Austin*, 17 P. R. 553. It must be disclosed; see *Leicester v. Ryckman*, 15 P. R. 160; *Georgina Bay, etc., Co. v. The World*, 16 P. R. 320. An order of a Judge granting, or refusing security under R. S. O. c. 68, is final; but not that of the Master in Chambers or other judicial officer; see *Ib.*, and see *Bramt v. Reading*, 17 Q. B. D. 128; 54 L. T. 524; *Church v. Dudley*, 56 L. T. 122; *Christie v. Coochey*, 9 P. R. 529; but see *Reg. ex rel McGuire v. Birkett*, 21 Ont. 192.

Where the alleged libel is against a candidate for a public office in Ontario, the defendant is not entitled to security; R. S. O. c. 57, s. 5 (2), (3); *Cumbee v. Weidman*, 16 P. R. 239.

Actions of Slander for Imputing Unchastity.—By R. S. O. c. 68, s. 5, in actions by women for slander imputing adultery, fornication, or concubinage, the defendant may at any time after the filing of the statement of claim apply to the Court or a Judge, upon notice

slander
imputing
unchastity.

Rule 1198 to the plaintiff, for security for costs to be incurred in such action, upon an affidavit of the defendant showing the nature of the action, and that the plaintiff is not possessed of property sufficient to answer the costs of the action in case a verdict or judgment is given in favour of the defendant, and that the defendant has a good defence to the action on the merits, or that the grounds of the action are trivial or frivolous.

In such an application the nature of the defence must be disclosed. It is not sufficient for the defendant simply to swear that he has a good defence on the merits; *Lancaster v. Ryckman*, 15 P. R. 199, and see *Paladino v. Gustin*, 17 P. R. 553.

Police
officers.

Actions against Justices and other Public Officers.—By R. S. O. c. 89, s. 1, in case an action or other legal proceeding is brought against a Police Magistrate, or other Justice of the Peace, for any act done by him in the execution of his duty as such Justice, or in respect to any matter within his jurisdiction as such Justice, or against any other officer or person fulfilling any public duty for anything by him done in the performance of such duty, whether such duties arise out of the Common Law or are imposed by any Act of Imperial, Dominion or Provincial, the defendant may, at any time after the service of the writ, apply to the Court or a Judge for security for costs to be incurred in such action (see sec. 2), on notice to the plaintiff and on an affidavit by the defendant or his agent, showing the nature of the action and of the defence, and showing to the satisfaction of the Court or Judge that the plaintiff is not possessed of sufficient property to answer the costs of the action, in case a verdict or judgment should be given in favour of the defendant, and that he has a good defence on the merits, or that the grounds of the action are trivial or frivolous.

A police officer laying an information for obscene language is entitled to security for costs in an action brought for maliciously laying such information; *Eaves v. Nesbitt*, 1 O. L. R. 244; so also a police officer sued for trespass in executing a warrant of arrest; *Levie v. Dullip*, 3 O. L. R. 301. A sheriff acting in execution of a *fi. fa.* is not a public officer entitled to security for costs under the statute; *Creighton v. Sweetland*, 18 P. R. 180.

The defence on the merits must be disclosed; see *Lancaster v. Ryckman*, 15 P. R. 199, and *Paladino v. Gustin*, 17 P. R. 553. The merits of the action will not be tried on the application, but a *prima facie* defence must be established; see *Paladino v. Gustin*, *supra*; *Scott v. Mail Printing Co.*, 16 P. R. 132; *Lennox v. Star Co.*, 16 P. R. 488; *Southwick v. Hare*, 15 P. R. 222. Although the application may be made at any time after the service of the writ, yet it has been held that when a person holding a public office is made a defendant, on an application for security the pleadings must be looked at, and if, on them, the case cannot go to the jury against the defendant as a public officer, he is not entitled to security, and even though he shows on affidavit that his sole connection with the matter alleged against him was in his public capacity; *Parker v. Baker*, 17 P. R. 345.

Security,
when
ordered in
Master's
office.

Master's Office.—Parties residing out of the jurisdiction, coming into the Master's office to prove claims as creditors or otherwise, may be required to give security for costs; *Re Rees, Urquhart v. Toronto General Trusts Co.*, 10 P. R. 425; but this case was disapproved of by the Divisional Court of the Q. B. D. in *Palmer v. Lavett*, 14 P. R. 115; but see *Re Parker*, 10 P. R. 392, and *Can. Nat. Mercantile Agency v. International Mer. Agency*, 4 O. W. R. 338.

Interlocutory Proceedings:—

Rule 119a

Attaching Proceedings.—Security has also been ordered to be given by one of the parties to an issue arising out of garnishee proceedings, where he was resident out of the jurisdiction: *Canadian Bank of Commerce v. Middleton*, 12 P. R. 121; *Edwards v. Edwards*, 12 P. R. 538; but a judgment creditor appealing from an order refusing him an attaching order was held not liable to give security for costs: *Palmer v. Lovett*, 14 P. R. 415.

Interpleader Proceedings.—In an interpleader matter either party: *Knickerbocker v. Webster*, 17 P. R. 180; *Sutton v. Stoddart*, 12 P. R. 490; *Walker v. Miles*, 3 Ch. Ch. 108; *Deller v. Peckett*, 20 L. J. Q. B. 151; *Tamlinson v. Land & Finance Co.*, 11 Q. B. 11, 539; *Lorrell v. Warthrop*, 4 P. R. 257; *Farley v. Pedlar*, 1 O. L. R. 570; and see Rule 1122; may be ordered to give security under the same circumstances as a plaintiff in an ordinary action. The substantial, and not the nominal, interest of the parties must be looked at, and therefore where one of the defendants in an interpleader issue was really interested in the result thereof as a plaintiff, he was held not entitled to call upon the plaintiff in the issue to give security for costs, upon the ground that the latter was a foreigner residing abroad: *Belmont v. Aynard*, 4 C. P. D. 352; and see *Knickerbocker v. Webster*, *supra*. If the party substantially moving the proceedings, whether plaintiff or defendant, is out of the jurisdiction, he should give security: *Re Ancient Order of Foresters & Castner*, 11 P. R. 37.

A Sheriff in interpleader proceedings is only entitled to security for costs under the same circumstances as would entitle an ordinary litigant thereto: *Sweetman v. Morrison*, 10 P. R. 406.

Other Summary Applications.—Security was ordered to be given for the costs of opposing a petition for the custody of an infant: *Re Puckey*, 1 O. W. R. 624, 715; a petition for the payment of money out of Court presented by a petitioner resident out of the jurisdiction: *Re Parker*, 16 P. R. 392; *Can. Nat. Mercantile, etc. v. Interborough, etc.*, 1 O. W. R. 338; but see *Palmer v. Lovett*, 14 P. R. 415; and where two persons, both out of the jurisdiction, were claiming the same fund, each was ordered to give security for costs to the other of them: *Stclair v. Campbell*, 2 O. L. R. 1; and a person resident out of the jurisdiction making a claim to a fund in Court, under an inquiry as to who was entitled, was ordered to give security on the ground that he was in the position of a plaintiff in interpleader proceedings: *Re Milward*, 1900, 1 Ch. 405; 82 L. T. 339; see also for costs of opposing a motion for an injunction: *Whitcha-Lee v. Gamage*, 70 L. T. 20; 1898, 2 Ch. 105.

A defendant residing out of the jurisdiction has a right to take any proceeding to defend himself: *Re Percy & Kelly Nickel, etc., Co.*, 2 Ch. D. 531; against the plaintiff, upon the pleadings and proofs between the plaintiff and defendant: *Walmsley v. Griffith*, 11 P. R. 139, as modified by *Molsons Bank v. Sawyer*, 19 P. R. 316; or may move to set aside the service on him of a writ of summons: *Sparrow v. Rice*, 5 O. W. R. 625; 6 O. W. R. 61; or present a petition: *Cochrane v. Fearon*, 18 Jur. 568, without being called on to give security for costs; and a plaintiff moving to set aside proceedings brought in his name without his authority is in the position of a person brought into Court and defending himself: *Sample v. McLaughlin*, 17 P. R. 490; but where a defendant claims indemnity or other relief against a co-defendant, and his claim to such

Rule 1198. relief is altogether independent of any defence to the plaintiff's claim, he is in the position of a plaintiff, and may be ordered to give security for costs to the co-defendant as against whom he seeks relief; and *Walmsley v. Griffith*, *supra*, is to that extent overruled; *Hudson Bank v. Sawyer*, 19 P. R. 316.

In re Cornwall, 15 L. R. Ir. 144, security was ordered to be given by a client out of the jurisdiction, seeking to tax his solicitor's bill; but see *Re A. B.*, 6 P. R. 210.

Quieting
Title pro-
ceedings.

Quieting Title Proceedings.—A Judge, or the Referee of Titles, may at any stage of the proceedings, order security for costs to be given by the applicant for a certificate, or by any person making an adverse claim: R. S. O. c. 135, ss. 20, 23. A petitioner resident out of the jurisdiction, or only temporarily resident within the jurisdiction, may be ordered to give security for the costs of a contestant; but a contestant out of the jurisdiction will not ordinarily be ordered to give security to the petitioner, as he stands in the position of a defendant; see *Law v. Morrison*, 14 Gr. 192, but a contestant whose claim has been disallowed may be required to give security as a condition of obtaining a re-investigation of the title in question; *Re Harland*, 4 Chy. Ch. 74. But in prosecuting a claim to land before the Referee of Titles, a contestant served with notice will not be prevented from asserting his rights until payment of costs of proceedings instituted by him against the claimant, in respect of the property in question, ordered to be paid by the contestant; *Shepherd v. Hayball*, 13 Gr. 681; see also *Re Percy & Kelly Nickel, etc.*, Can. 2 Ch. 11, 531.

Winding-up
proceedings

Winding-up Proceedings.—A Referee acting under the Winding-up Acts (R. S. O. c. 129; 52 V. c. 32, s. 20 D.), has power to order security for costs, and to stay proceedings until it is given; *Re Sarnia Oil Co.*, 14 P. R. 335.

A petitioner for winding up a company who had given an address at which he could not be found, and whose solicitor was unable to state his private address, was ordered to give security; *Re Sturgis Motor Power Syndicate (Ltd.)*, 53 L. T. 715; 34 W. R. 163.

Defendant,
when
ordered to
give security
for costs.

Defendant, when Ordered to give Security for Costs. Security will be ordered to be given by a person out of the jurisdiction applying to be added as a party, and for leave to apply for substantial relief, as he must be considered as in the position of a plaintiff; *Apollinaris Co. v. Wilson*, 31 Ch. D. 632.

A defendant out of the jurisdiction moving for a new trial was ordered to give security for costs, and *Hecksher v. Crossley*, 1891, 1 Q. B. 224, in which a contrary rule was laid down, was amended; *Wightwick v. Pope*, 1902, 2 K. B. 99.

Where a claim and counter-claim arise out of different matters, so that the counter-claim is really in the nature of an independent or cross-action, the defendant, if residing out of the jurisdiction, may be required to give security, and should be so required, if the only dispute in the action is on his counter-claim; *Sykes v. Sacerdotti*, 15 Q. B. D. 423; *Lake v. Haseltine*, 55 L. J. Q. B. 205; see also *The Newbattle*, 54 L. J. (P. D. & Ad.) 16.

In an action for breach of contract against defendant, a foreigner residing abroad, where the defendant denied the breaches, and also made a counter-claim for breaches of the same contract by the plaintiff,

plaintiff, claiming damages to an amount less than the plaintiff's claim. **Rule 1199.** It was held that the defendant could not be ordered to give security for the plaintiff's costs occasioned by the counter-claim: *Mapleson v. Masini*, 5 Q. B. D. 144; and wherever a defendant's counter-claim arises out of the same transaction as the plaintiff's claim, the Court has discretion to refuse to order security for costs: *Neek v. Taylor*, 1893, 1 Q. B. 560; 68 L. T. 399; *Miller's Patent*, 70 L. T. 270.

Where a defendant admitted the cause of action sued upon, and set up a counter-claim founded upon a distinct transaction, he was held not entitled to security for costs from the plaintiff, a foreigner, residing without the jurisdiction: *Winterfield v. Bradnam*, 3 Q. B. D. 324. In the Admiralty Division, in an action of collision a defendant claiming damages by counter-claim was ordered to give security for the plaintiff's costs of the action: *The Julia Fisher*, 2 P. D. 115.

A defendant, out of the jurisdiction, claiming indemnity or other relief against a co-defendant, may be required to give that defendant security for costs: *Molsons Bank v. Sawyer*, 19 P. R. 316.

A defendant out of the jurisdiction disputing the right of a plaintiff to probate of a will is not liable to give security for costs: *Ward v. Benson*, 2 O. L. R. 364.

A foreign claimant putting in a claim under a general inquiry will not as a rule be ordered to give security; but see *Re Milneard & Co.*, 1900, 1 Ch. 405, where security was ordered to be given by a foreign claimant, on an inquiry as to the persons entitled to a fund in Court, on the ground that the inquiry was equivalent to an interpleader issue, in which the foreign claimant was in the position of plaintiff.

1199—(1) Where it appears, by the writ of summons, ^{Order on} notice, or other proceeding by which a cause or matter is ^{præcipe.} commenced, or by an indorsement thereon, that the plaintiff resides out of Ontario, the order may be obtained on *præcipe*, after appearance by the defendant applying therefor pursuant to any such writ of summons.

(2) The order may be according to Form No. 95, and shall require the plaintiff, within 4 weeks from the service of the order, to give security in \$400 for the defendant's costs of the action, and shall direct that all further proceedings be stayed in the meantime, and that in default of such security being given the action shall be dismissed with costs against the defendant obtaining the order, unless the Court or Judge, upon special application for that purpose, otherwise orders. *Con. Rule 1242; Rules 23 June, 1894, 1376.*

(3) In actions in the County Court the amount of the security shall be \$200. *Nem.*

See J. A. Rule 431.

Except in the case provided for in this *Rule*, i.e., where it appears by the writ of summons, notice, or other proceeding, by which a

Rule 1192. cause or matter is commenced, or by an indorsement thereon, that the plaintiff resides out of the jurisdiction, all applications for security for costs must be made in Chambers, on notice to the plaintiff, or other party from whom security is claimed.

Where the order is properly issuable on *praecepe*, it is to be obtained at the office where the action or proceeding is commenced: *Rule 117*. For Form No. 95, see H. & L. Forms, No. 1606.

The word "plaintiff" in this *Rule* should probably be held to include any person initiating a proceeding other than an action, e.g., a petitioner, or person giving an originating or other notice of motion, where such notice is the commencement of a proceeding or application for relief by such person, and not merely incidental to opposing proceedings initiated by some other person: see *Re Paton*, 16 P. R. 392; but see *Palmer v. Lorette*, 14 P. R. 415.

Praeceptum
order, how
obtained.

Praeceptum Order.—The Ontario *Rules* do not expressly require as the English *Rules* do [see Eng. (1881) R. 19], that the address of the plaintiff suing by solicitor shall be indorsed upon the writ: see *Rule 134*. The form of writ, however (Form 1 in the App.), contains plates such an indorsement, and this should therefore be followed. Where the plaintiff is without the jurisdiction and liable to give security, if the writ does not disclose the residence, a special application for security is proper: *Laurless v. Rudford*, 17 C. L. J. 388, 14 L. T. 661; and the costs of it will be to the defendant, as the plaintiff ought in such case to indorse his address on the writ, so as to enable defendant to obtain an order on *praecepe* under this *Rule*: *McCord v. Hennessy*, 3 P. R. 489.

A *praeceptum* order should only issue where it appears by the indorsement on the writ that the plaintiff resides, or all the plaintiffs reside, out of the jurisdiction: *McConnell v. Wakeford*, 13 P. R. 475. *Semble*, the order where obtainable on *praeceptum* may issue at any time before judgment: it was issued after defence and before issue joined in *Smerling v. Kennedy*, 5 O. L. R. 430, and see *Small v. Henderson*, 18 P. R. 314.

Where the indorsement stated that the plaintiffs resided in the Township of Brant in the County of Bruce, and in Wisconsin, U.S.A., this was held to be a statement that they resided out of the jurisdiction: *McConnell v. Wakeford*, *supra*.

If it appears by the indorsement on the writ that one of several plaintiffs resides within Ontario, a *praeceptum* order should not issue, and *semble*, if issued it is void and a nullity: *McConnell v. Wakeford*, 13 P. R. 475. An order issued as to one plaintiff only is irregular: *Id.*, but compliance with it will waive the irregularity: *Id.*

A *praeceptum* order has as much force, upon being served, to effect a stay of proceedings, as if made on application to a Judge: *Reich v. N. S. v. La Roche*, 9 P. R. 503; *Doer v. Rand*, 10 P. R. 165; except so far as is provided by *Rule 1203*. An order under this *Rule* limits in the first instance the time for giving security. Formerly a *praeceptum* order merely stayed proceedings till security was given, and by the Chancery practice, or under 42 Vict. c. 15, s. 2 (now *Rule 1202*), a subsequent application might be made to limit a time.

Where an order has limited a time and provided for dismissal in case of default, a subsequent *ex parte* motion shewing default has been customary in Ontario to obtain the dismissal of the action: see *Brown v. Chisholm*, 2 Chy. Ch. 88. This practice was not approved of

in *Hollender v. Ffoulkes*, 16 P. R. 225, but has now been established Rule 1199, by Rule 1203.

It was doubted under the original *Rule* whether there was any power to fix the amount at less than \$100 where a *procipe* order had been taken out: *North v. Fisher*, 10 P. R. 582. *Rules* 1207 and 1208 were passed to settle this question.

An order made on motion of one of several defendants may properly provide that the security to be given is to answer the costs of all of the defendants: *Delap v. Charlebois*, 15 P. R. 325. See also *Edmunds v. Mabey*, 11 C. L. T. 177, where two defendants having obtained separate orders on *procipe*, an order was made on plaintiff's application that a bond filed in compliance with the first order should stand as security for both defendants, without prejudice to their rights to move to have the amount increased. Where in pursuance of an order obtained by one of several defendants, the plaintiff pays money into Court as security for costs, on the other defendants, or any of them, obtaining similar orders, the money paid in may, on the plaintiff's application, be ordered to stand also as security for such other defendant's costs: *Syracuse Smelting Works v. Sweeney*, 2 O. L. R. 141.

Special Application.—Where a special application is necessary, it must be made on notice to the plaintiff. As to evidence required on such application, see notes to Rule 1198. Unexplained delay in making the application may be a bar to its being entertained: *Bertudato v. Frouquier*, 38 C. L. J. 79.

Time for Obtaining Order for Security for Costs on Praecept.—Formerly a defendant by taking a step in the action after he became entitled to require security for costs to be given, was held to waive his right thereto, but now a defendant may obtain the order on special application at any time before issue joined: see *Caswell v. Murray*, 9 P. R. 102; *Small v. Henderson*, 18 P. R. 314; *Smerling v. Kennedy*, 5 O. L. R. 432; *Martano v. Mann*, 14 Ch. D. 419; 42 L. T. 831; *The Lyle & W. Iron Co. v. Bird*, 23 Ch. D. 358; 48 L. T. 873; *Re Smith*, 75 L. T. 46; W. N. 1896, 88. When the order is properly issuable on *procipe*, it may be obtained at any time before issue joined: *Smerling v. Kennedy*, 5 O. L. R. 430, 432.

It was held to be too late for defendant to apply for security after judgement had gone against him, and he was appealing to the Court of Appeal: *Small v. Henderson*, 18 P. R. 314.

Where the application is made under R. S. O. c. 68, s. 5, or R. S. O. c. 68, s. 10, *supra*, pp. 1430-1; or R. S. O. c. 89, s. 1, *supra*, p. 1432; or under Rule 1200, a special application is necessary; and in such cases, the onus of shewing that the plaintiff has not sufficient property is on the defendant: see *Forster v. Canada*, 15 P. R. 200; property to the value of \$500, unincumbered, has been deemed sufficient: *Id.*, and see *Bryde v. Robertson*, 11 P. R. 7; *Rehair v. Buchanan*, 17 P. R. 413, 476.

As to what is a sufficiently positive statement that the plaintiff's residence is out of the jurisdiction, in an affidavit to obtain an order for security, see *Hollingsworth v. Hollingsworth*, 10 P. R. 58.

Amount of Security.—See Rule 1208, and notes. Security if applied for promptly, is generally for past, as well as future costs: security *Brackelbank v. King's Lynn, etc.*, 3 C. P. D. 365; *Mussen v. Allen*, 12 Ch. D. 807; *Hateley v. Merchants Despatch*, 10 P. R. 253, except where given under R. S. O. c. 68, ss. 5 and 10, or c. 89, s. 1, in which

Rule 1199. ^Ecases the security is only required to be given for the costs "to be incurred": *Budworth v. Bell*, 10 P. R. 544; *Thompson v. Williams*, *supra*, 16 P. R. 368. See note to *Rule 1200*.

Order when
refused or
rescinded.

Grounds for Refusing or Rescinding Order.—If the plaintiff has substantial property within the jurisdiction, of sufficient value, and available in execution, this may be shewn in answer to a motion for security, to displace the *prima facie* case made by proof of residence out of the jurisdiction: *Gault v. Spencer*, 2 Chy. Ch. 392, and see *Bready v. Robertson*, 14 P. R. 7; *Feaster v. Canney*, 15 P. R. 290; *Belair v. Buchanan*, 17 P. R. 413, 476; *Re Armstrong*, 18 P. R. 55; or it may be made the ground for a special motion to discharge any order which has been made on *præcipe* for security: *Ganson v. Fiach*, 3 Chy. Ch. 296; *Belair v. Buchanan*, *supra*. The property must be immediately available in execution: *Welsbach Incandescent, etc., v. St. Leger*, 16 P. R. 382; but it would not seem, according to the latest cases, to make any difference whether the property is real, or personal: *Hamburger v. Poetting*, 30 W. R. 769; 47 L. T. 216; *Rodondo v. Chaptor*, 4 Q. B. D. 453; *Republic of Costa Rica v. Erlanger*, 3 Ch. D. 62; but see *Kilkenny Ry. Co. v. Fielden*, L. R. 6 Ex. 81; *Re Carroll*, 2 Chy. Ch. 305; *Higgins v. Manning*, 6 P. R. 147; *McKenzie v. Sinton*, 6 P. R. 282; *Wilson v. Wilson*, 6 P. R. 152; *Sieglabourne v. Carter*, 23 L. J. Q. B. 16; *Re Howe S. M. Co.*, 61 L. T. 170; *Re Apollinacis Co.*, 1891, 1 Ch. 1; *Duffy v. Donovan*, 14 P. R. 159; *Welsbach L. L. Co. v. St. Leger*, 16 P. R. 382; *Patslaugh v. S. Co. v. Marx*, 102 L. T. Jour. 532. But the acquisition of property subsequently to an order for security is no reason for discharging it: *Reaume v. Lovitt*, 6 P. R. 70. A plaintiff cannot rely on the property which is the subject of litigation, where a *prima facie* good defence is shewn: *Walters v. Duggan*, 33 C. L. J. 362, but where the defendants are possessed of funds belonging to the plaintiff, the discretion of the Court may be exercised against hampering the plaintiff by ordering security: *Duffy v. Donovan*, 14 P. R. 159; *Stock v. Dresden Sugar Co.*, 2 O. W. R. 894; and see *Daniel v. Birkbeck Loan, etc.*, 5 O. W. R. 757; and where, in administration proceedings, the plaintiff resided out of the jurisdiction, but was entitled to an interest worth \$273 in the estate, he was not ordered to give security for costs, upon his consenting that his whole interest in the estate should be subject to a first charge in respect of any costs he might be ordered to pay: *Re Armstrong*, 18 P. R. 55. The fact that the action is brought on a foreign judgment is no ground for refusing the order: *Lenz v. Brayden*, 1894, 2 Q. B. 30; 70 L. T. 522. If the possession of sufficient property at the time of applying for a *præcipe* order was known to the defendant's solicitor, this may be a reason for discharging the order with costs: *Ganson v. Fiach*, *supra*.

As to what is sufficient in *Bready v. Robertson*, 14 P. R. 7; *Feaster v. Canney*, 15 P. R. 290; *Belair v. Buchanan*, 17 P. R. 413, 476. It should be sufficient to pay costs of both parties, and not merely the defendant's costs, otherwise the whole property may be paid over to the plaintiff's own solicitor, during the litigation, to meet his own costs. The omission of shewing property of sufficient value is on the plaintiff on a motion by him to set aside an order for security: *Daniel v. Birkbeck Loan, etc.*, 5 O. W. R. 757.

Return of
plaintiff to
jurisdiction

If a plaintiff returns to reside permanently within the jurisdiction an order for security may be discharged: *Nesbit v. Galton*, 3 O. L. R. 429; *Harvey v. Smith*, 1 Chy. Ch. 392; *sed quare*; see *Rodwell v. Hayley*, 4 M. & W. 735; 7 Dowl. R. referred to in *Hatch v. Merchants Despatch Co.*, 12 Ont. Apr. 643, 646, unless obtained because the plaintiff had wilfully misstated his residence; see *Walden v.*

McWalter, 6 P. R. 145. But if the Court thinks the return is merely **Rule 1200**, to get rid of the order, and the plaintiff has no ties, business or otherwise, to guarantee that he will remain within the jurisdiction, the order will not be rescinded: *Marsh v. Beard*, 1 Chy. Ch. 300, and see *Rule 1198 (b)*.

Where a plaintiff resident abroad was moving to set aside the proceedings, as brought without authority, an application to compel him to give security for costs was refused: *Sampe v. McLoughlin*, 17 P. R. 490.

Where a plaintiff residing out of the jurisdiction obtained judgment by default of defence, but defendant obtained leave to defend on terms of giving security for costs, and the judgment and execution were allowed to stand as security for the plaintiff's claim, a *procipe* order for security for costs subsequently obtained by the defendant was set aside: *Davis v. Teager*, 18 C. L. T. 140; 34 C. L. J. 237.

Where an order for security for costs has been regularly issued and acted on, it will not be rescinded merely because the defendant subsequently pays money into Court in satisfaction of the plaintiff's claim: *American Ariotype Co. v. Eakins*, 7 O. L. R. 127.

Stay of Proceedings until Security Given.—Where an order for security for costs is obtained, the proceedings in the action are stayed from the time of the service of the order until the security is given, and if given by bond, until the bond is allowed: *Rule 1204*; and after notice, under *Rule 1207 (2)*, of payment of money into Court as security, the stay continues for at least one day: see *The Northern Elevator Co. v. N. W. Transfer Co.*, in note to *Rule 1207* p. 1444.

Pending such stay, the plaintiff, subject to the provisions of *Rule 1200*, cannot move, or proceed with a pending motion, even for an interim injunction: *Weekes v. Underfeed Stoker Co.*, 10 P. R. 260; *Whitely Exerciser Co. v. Gamage*, 1808, 2 Ch. 405; 70 L. T. 20; but a plaintiff may move to set aside a *procipe* order for security for costs, notwithstanding the stay of proceedings imposed by the order, and without giving security for the costs of the motion: *Walters v. Duggan*, 17 P. R. 359.

An order obtained by the defendant for security, with a stay of proceedings, does not prevent the defendant from moving to dismiss for want of prosecution: *London Road Car Co. v. Kelly*, 18 L. R. Ir. 31; but see *Duffus v. Scullin*, 20 L. R. Ir. 8.

In default of compliance with an order, where no time has been limited for giving security, a motion may be made under *Rule 1202*, to limit the time, or in default to dismiss the action for want of prosecution: *La Grange v. McLudrow*, 4 Q. B. 11, 210; *White v. Beomige*, W. N. 1878, 28. If the plaintiff then wishes to give security he must pay the defendant's costs of the application: *Ex parte Isaacs*, 10 Ch. D. 1.

It is now made clear by *Rules 1202*, and *1203*, that the order for security may properly limit the time within which it is to be given, and in default dismiss the action. Under the former Rules it was also decided in *Ashcroft v. Tyson*, 17 P. R. 42; distinguishing *Thompson v. Williamson*, 16 P. R. 368; see also *Lau v. Lung*, 18 P. R. 1.

1200. Where the plaintiff sues as an informer, or seeks persons to recover any penalty given to an informer, or person who sues for the same, under a statute or law by which a penalty

Rule 1201. is given to any person who sues for the same, either for his sole benefit, for the benefit of the Crown, or partly for his benefit and partly for the benefit of the Crown,—the person sued may apply to the Court or a Judge for security for costs upon affidavit made by the applicant shewing that the action is brought to recover a penalty, and that in his belief the plaintiff or informer is not possessed of property sufficient to answer the costs of the action in case a judgment is rendered in favour of the defendant, and that he (the applicant) has a good defence to the action upon the merits, as he is advised and believes; and the Court or Judge may make such order for the giving of security for costs by the plaintiff or informer, according to the practice in cases where a plaintiff resides out of the Province, and for the staying of the proceedings until security is given, as may seem just. *Con. Rule 1244.*

Taken from R. S. O. 1877, c. 50, s. 71.

The former *Rule 1244*, from which this *Rule* is taken, provided only for the giving security for the costs "to be incurred," under which wording it was held that security for costs already incurred could not be required: *Thompson v. Williamson*, 10 P. R. 368; *Worth v. Bell*, 10 P. R. 544; but the *Rule* as consolidated here contains no such limitation, and the security to be given under this *Rule* should therefore be for all costs.

Seable, when the defendant is a corporation aggregate it is entitled to obtain security for costs under this *Rule*; see *Maryland Consolidated Bank*, 45 U. C. R. 163, and *Bank of Montreal v. Cameron*, 2 Q. B. D. 536.

The affidavit on which the application is based need not state the merits, it is sufficient if the deponent swears that he has "a good defence upon the merits, as he is advised and believes"; *Buck v. Nat. Electric Co.*, C. P. Divisional Court, 1898.

Amount of security for costs.

1201. In all cases in which security for costs may be ordered the security shall be of such amount and be given at such time or times, and in such manner and form, as the Court or Judge may direct. *Con. Rule 1245.*

Taken from J. A. Rule 429.

See the Eng. R. February, 1876, R. 7.

In fixing the amount of the security the circumstances of the case and the probable costs are to be considered: *Udall v. Charlebois*, 10 P. R. 45.

Ordinarily two sureties are required: see *Rule 1205*, but on a special application the Judge or judicial officer to whom the application is made has a discretion as to the number of sureties.

1202. The Court or Judge may, by the order for security, or by any subsequent order, require the security to be furnished within a time to be limited, and may stay all further proceedings in the meantime, and, in the case of a plaintiff required to give security, may direct that in default of the security being given the action shall be dismissed as for want of prosecution, with costs, as against the defendant entitled to the security, unless the Court or a Judge, upon special application for that purpose, otherwise orders. See *Con. Rule 1246*.

Rules
1202-1204.

Time for
giving
security
for costs
may be
limited.

See *Lea v. Lang*, 18 P. R. 1; *Weekes v. Underford Stoker Co.*, 19 P. R. 299.

Where pending the stay of proceedings, the defendant prepared affidavits for the purpose of opposing a motion for injunction, pending when the order for security for costs issued, the costs of such affidavits were allowed to the defendant on the subsequent dismissal of the action for failure to give security: *Whiteleg Exerciser v. Gamage*, 1898, 2 Ch. 405; 79 L. T. 20.

As to the effect of a stay of proceedings pending the giving of security, see *supra*, p. 1439.

1203. Where an order for security for costs provides that, in default of security being given, the cause or matter shall be dismissed with costs against a defendant, the Court or a Judge, upon default being made in giving security pursuant to the order, may, upon an *ex parte* application, order that the cause or matter be dismissed with costs against such defendant. *New*.

Dismissal of
proceedings
on default.

Where an appeal has been lodged against the order for security, that is a sufficient ground for not dismissing the action until the appeal has been disposed of, and the motion may be adjourned to be heard with the appeal: *Bennett v. Empire*, 15 P. R. 430.

This *Rule* is an affirmation of *Burns v. Chisholm*, 2 Chy. Ch. 88, which had not been followed in *Hollender v. Foulkes*, 16 P. R. 225, 315, which latter case must now, it is presumed, be taken to be superseded by this *Rule*.

1204. Where security for costs is ordered, proceedings in the action shall be stayed, from the service of the order until the security is given, and, if given by bond, until the bond is allowed. *New*.

Stay of pro-
ceedings till
security
given.

The stay of proceedings continues the whole of the day on which the security is actually given, if by payment into Court, or, if by bond, of the day on which the bond is allowed, and the time for taking the next proceeding does not begin to run until the following day:

Rule 1205. see formerly *Campau v. Randall*, 17 P. R. 325. The stay of proceedings does not prevent a motion by the plaintiff to set aside an order for security for costs obtained on *præcipe*: *Walters v. Duggan*, 17 P. R. 359; but proceedings on a pending motion for an interim injunction are stayed: *Whiteley Exerciser v. Gamage*, 1898, 2 Ch. 405; 70 L. T. 20; *Weeks v. Underfeed Stoker Co.*, 19 P. R. 293.

Where the right to security only arises in respect of a particular cause of action: *semble*, the action should only be stayed as to that particular cause of action, *e.g.*, where the action is for libel against a newspaper, or for slander of a woman, and other causes of action as to which no right to security for costs exists, are joined: see *Lancaster v. Ryckman*, 15 P. R. 199.

Security
for costs
where given
by bond.

1205. Unless the Court or a Judge otherwise directs, a bond to be given as security for costs shall be given to the parties or persons requiring the security, and not to an officer of the Court, and shall be executed by two sufficient sureties. Con. Rule 1247.

Adopted from J. A. Rule 430.

For form of bond, see Chitty's Forms, 11th ed. 220; H. & L. Forms, No. 1613.

The bond need not be executed by the plaintiff who is liable without it, but must be executed by two sureties. Formerly one surety might be sufficient, and the plaintiff was ordinarily a party, but the execution of the bond by the plaintiff might be dispensed with: *Delap v. Charlebois*, 15 P. R. 325. Where a guarantee company is approved by order in council, its bond may be given and accepted as sufficient security without any affidavit of justification: see 62 Vic. (2) c. 12, and *Aldrick v. British Griffin, &c., Co.*, 1904, 2 K. B. 850; 91 L. T. 224.

The plaintiff should not now be named as a party to the bond, unless he executes it: see *Grotke v. Pearce*, 15 P. R. 195.

The plaintiff's solicitor should not be a surety: *Beckett v. Waring*, 1 Chy. Ch. 5; *G. T. Ry. Co. v. O. & Q. Ry. Co.*, 3 C. L. T. 173.

The sureties must be solvent: *Cliffe v. Wilkison*, 4 Sim. 122; and residents within the jurisdiction: *Hall v. Mackenzie*, 31 C. L. J. 700; and if the security becomes altered by the death, or insolvency, of a surety, fresh security may be required: *Lautour v. Holcombe*, 1 Ph. 262; *Fitch v. Irvine*, 11 Sim. 122; *Gage v. Canada Publishing Co.*, 10 P. R. 169; *Morgan & Wurtzburg*, p. 22.

Where the order is made on the application of one or several defendants, it may provide that the security to be given shall answer the costs of all of the defendants: *Delap v. Charlebois*, 15 P. R. 325.

As to procuring the allowance of the bond, see *Rule* 1206.

The plaintiff, instead of giving a bond, might formerly *ex parte* obtain an order giving leave to pay \$400 into Court: *Cliffe v. Wilkison*, 4 Sim. 123; *Gannon v. Finch*, 3 Chy. Ch. 296; see also *Re Housland*, 1 Chy. Ch. 6; *Luthy v. Ward*, 2 Chy. Ch. 175; and may now under *Rule* 1207 pay in not less than \$200 without an order. The money should be paid into Court in the usual way: see *Rules* 107 *et seq.* Payment to a Local Registrar is not regular or sufficient: *Pratt v. Luthier*, 2 C. L. T. 48.

1206. Upon filing a bond for security for costs with affidavits of execution and justification with the proper officer, either party may apply to the Court or a Judge to allow or disallow the bond; and in case no application is made to disallow the same within fourteen days after notice of filing it is served, the bond shall stand allowed. Rules 23 June, 1894, 1318.

Rules
1206, 1207

Bond for
security for
costs, how
allowed.

Where a bond filed as security for the costs of an appeal was disallowed because leave to appeal had not been obtained, and subsequently, upon leave being obtained, the same bond was relied, it was held that it was properly disallowed a second time, because the sureties might object that it had been improperly used by the appellant, and the respondent was entitled to security free from any objections of that nature: *Jones v. Macdonald*, 14 P. R. 535.

The party opposing the allowance of the bond may read the sworn statements of a surety made in another action: *Id.*

A surety may be cross-examined on his affidavit of justification; but a surety, justifying on his private property, cannot be compelled to answer questions as to the liabilities of a firm of which he happens to be a member: *Douglas v. Blackey*, 14 P. R. 504.

No affidavit of justification is necessary where a bond of a guarantee company approved by order in council is given: 32 Viet. (2) c. 12.

A bond of a foreign guaranty company doing business in this Province, if otherwise unobjectionable, may be received as sufficient security: *Aldrick v. British Griffin Co.*, 3004, 2 K. R. 850, 31 L. T. 229, 2 K. R. 850.

1207.—(1) Instead of giving a bond as security for costs, a party may, without special order, pay into Court, as such security, a sum of money not less than half the penalty of the bond required. Con. Rule 1248.

Money may
be paid into
Court.

(2) The party paying in the money shall, when paying the same in, state the purpose for which it is paid in, and shall forthwith serve a notice upon the opposite party specifying the fact and purpose of such payment. Con. Rule 1249.

Notice to
be served.

See note to *Rule 1205*.

If the money paid in is not sufficient the opposite party may apply under *Rule 1208*, to have "further" security given.

The money must be paid into Court to the credit of the cause, in the same way as other moneys are paid into Court: see *Rules 405, et seq.*, pp. 616, *et seq.*; and the *præcipe* for the direction to the bank, necessary under *Rule 406*, should contain a statement of the purpose for which the money is paid in. Deposit of the money with a *licencié* is invalid: *Leroux v. Luthier*, 2 C. L. T. 48. After payment of defendant's costs, any surplus of money paid into Court under this *Rule* may be made exigible by means of a stop order to

Rule 1208. satisfy any other claim which the defendant may have against the plaintiff: see *Evans v. Huntsville*, 7 O. L. R. 540.

Money paid in in answer to any order obtained by one of several defendants may be ordered to stand also as security for the costs of the other defendants: *Syracuse Smelting Works v. Stevens*, 2 O. L. R. 141.

A plaintiff is not entitled to get money out of Court, paid in by him under this Rule, merely because the defendant pays money into Court in satisfaction of the plaintiff's claim, except on the terms of first paying the defendant's costs: *American Aristotype Co. v. Eukles*, 7 O. L. R. 127.

After the receipt of the notice mentioned in sub-section 2 of this Rule, the defendant is entitled to at least one day to ascertain if the money has been paid in before the plaintiff can take further proceedings: *The Northern Elevator Co. v. N. W. Transfer Co.*, 6 O. L. R. 23.

Amount may be varied.

1208. The amount of security, whether directed to be given by an order issued on *praecipe* or otherwise, may be increased or diminished from time to time by the Court or a Judge. Con. Rule 1250, amended.

This Rule is said to be merely declaratory of the inherent power of the Court: see *D'Irry v. The World*, 33 C. L. J. 202.

Where the order for security is made upon motion the Judge or officer making it may name such amount in which security is to be given, as the circumstances of the case warrant: *Delap v. Charlehois*, 15 P. R. 45.

Security to the amount of £500 was ordered in *Dona, Braccu v. Lister*, 104 L. T. 127; and to the amount of \$1,000 in *Dechip v. Charlehois*, *supra*.

The security given under a *praecipe* order under Rule 1199, could not formerly be reduced without reason being shewn, and it was held that such reduction was not authorized by Rule 1201: *Riddell v. McKee*, 11 P. R. 439. See now Rule 1207 (1).

Security given under a *praecipe* or special order might even before this Rule have been in a proper case increased. This was refused where the usual amount, \$400, was likely to be insufficient only by reason of an adjournment of the hearing, owing to the Judge having to close the Sittings to take another Circuit, and it was not shewn that defendant might not at the outset have applied for a larger sum than \$400: *Bell v. Landon*, 9 P. R. 100. Also where the trial was postponed on terms, and the giving of security was not imposed as one of the terms: *Simon v. La Banque Nationale*, 7 P. R. 422; and also where it was alleged to be necessary for the defendant to issue a foreign commission to take evidence, there having been delay in making the application, and the effect of granting it would have been to delay the trial: *Trevethan v. Myers*, 15 C. L. T. 135; 31 C. L. J. 284; and see *D'Irry v. The World*, 33 C. L. J. 202.

In a suit by a foreign government £120 security for costs had been given before *The Judicature Act* came into operation. A large amount of costs would be incurred before the suit was heard, and further security to the amount of £500 to cover future costs was

under the Rule corresponding to Rule 1201, ordered to be given: **Rule 1209.** Further security, it was said, could not be ordered to be given for past costs: *Republic of Costa Rica v. Erlanger*, 3 Ch. D. 132.

In a matter in the Surrogate Court security was directed to be given to the amount of \$200. Subsequently the matter was removed to the High Court, nothing at the time being said as to further security. On motion, further security was ordered: *Johnston v. Wilson*, 4 C. L. T. 291.

Obtaining a *procipe* order does not preclude a subsequent application by defendant for increased security, and no reservation of the right to make a further application is necessary in the *procipe* order: *Standard Trading Co. v. Seybold*, 3 O. L. R. 5; but the application for further security must not be made an excuse for checking of proceedings at every step in the action: see S. C., 6 O. L. R. 379.

Additional security for the costs of a motion by the plaintiff for a new trial was ordered: *Bentzen v. Taylor*, 1893, 2 Q. B. 193; 69 L. T. 333.

The application for additional security should be made in Chambers: *Ib.*

1209.—(1) Where an action is brought by a plaintiff resident out of Ontario, and liable to give security for costs, who has indorsed the writ of summons with particulars of his claim in such manner that, upon motion under Rule 603, final judgment might be awarded, he may, on being served with an order for security for costs, pay into Court the sum of \$50, as a partial compliance with such order, and thereupon he shall be at liberty to proceed with a motion for judgment under Rule 603; but the order for security shall, nevertheless, in all other respects, have its full operation and effect. Con. Rule 1251.

(2) Such payment into Court shall not prejudice any motion that may be made to set aside the order for security. *New.*

(3) In actions in the County Court the amount of the partial security shall be \$25. *New.*

(4) Where, upon motion under Rule 603, the plaintiff is awarded judgment for a portion only of his claim, he may issue the judgment and execution thereunder, but, subject to clause (2) of this Rule, shall not take any other proceedings in respect of the residue of his claim until the order for security has been fully complied with. Con. Rule 1252.

This Rule is intended apparently to remove the obstacle which formerly existed in the way of the plaintiff's taking any proceedings

Rules until he had complied with an order for security for costs, or obtained
1210, 1211. its discharge: *Doer v. Rand*, 10 P. R. 165.

Where a plaintiff against whom an order for security for costs had been obtained, moved to set it aside, and also for judgment under *Rule 603*, without paying \$50 into Court under this *Rule*, the motion was refused with costs, and *Doer v. Rand*, 10 P. R. 165, and *Anglo American Co. v. Rowlin, Ib.*, 391, were held to be no longer in force: *Payne v. Newberry*, 13 P. R. 354; but where there was an admission by defendant of the debt sued for, sworn to and not contradicted, an order for security was set aside, notwithstanding that the plaintiff might, under this *Rule*, have paid \$50 into Court and proceeded to move for judgment: *Thibodeau v. Herbert*, 16 P. R. 420, following *Doer v. Rand*, 10 P. R. 165.

This *Rule* does not extend the time for putting in security for costs. It only enables a plaintiff to remove the stay of proceedings for the sole purpose of moving for judgment under *Rule 603*. If he fails on that motion he must put in the security within the time limited, or, in default, the action will stand dismissed, unless the defendant himself treats the action as still alive: *Hollender v. Ffoulkes*, 16 P. R. 225; but the time for putting in security may be enlarged upon an application under *Rule 331*: *S. C.*, 16 P. R. 315.

A plaintiff may move to set aside a *procipe* order for security for costs, without first giving security under this *Rule*: *Walters v. Duggan*, 17 P. R. 359.

See *Rule 1199* and notes, *supra*, p. 1439.

Delivery of
bond out of
Court.

1210. A bond given for security for costs may be delivered up for cancellation or suit upon consent of the solicitors in the cause without order. Rules of 1st January, 1896, 1499.

Where the party giving the security has succeeded on an appeal to the Court of Appeal he is entitled to have the bond delivered up to be cancelled, or where money has been paid into Court as security he is entitled to have it paid out to him, notwithstanding that the opposite party is prosecuting an appeal to the Supreme Court: *Marsh v. Webb*, 15 P. R. 64; *Hamill v. Lilley*, 19 Q. B. 11, 83; 56 L. T. 620; *Centaur Cycle Co. v. Hill*, 7 O. L. R. 411.

Payment
of money
out of
Court.

1211. Where money has been paid into Court as security for costs or with a defence, it may be paid out to the party entitled thereto on the consent of the solicitors in the cause or matter, without order. *New.*

The party entitled means the litigant entitled, and not his solicitor. Where it is desired to obtain payment to the solicitor of the party, an order is still necessary. Such applications are usually required to be supported by evidence shewing either that the money was actually advanced by the solicitor, and is still owing to him by his client; or by the written consent of the client, and proof of its execution, and that he was informed that he was entitled to have a cheque for the amount issued to himself personally.

Rules
191, 1215.

CHAPTER XVIII.

COUNTY AND LOCAL COURTS.

1212. All writs in the County Courts shall be issued by the Clerk and shall be under the seal of the Court, and shall be tested in the name of the Judge thereof; or in the case of the death of such Judge, then in the name of the Junior or acting Judge for the time being. All writs to be under the seal of the Courts, and tested etc. Con. Rules 122, 1253.

See Rules 120-124 and notes.

1213. The County Courts may issue writs of *subpoena* Subpoenas. *ad testificandum*, to enforce the attendance of any witnesses resident within Ontario, and also writs of *subpoena duces tecum*, to enforce the attendance of and the production of deeds and papers by any such witnesses; and may proceed against persons who, having been duly served with a *subpoena*, disregard or disobey the same, with the same powers, in like manner and by the same mode of proceeding as belongs to and is practised in the High Court. Con. Rule 1254.

See Rules 478-482 and notes.

1214. Subject to Rules of Court, the Judges of the County Courts shall have power to sit and act at any time Judge may sit at any time. for the transaction of any part of the business of such Courts, or for the discharge of any duty which by any statute or otherwise was formerly required to be discharged out of or during Term. Con. Rule 1255.

This corresponds with the powers given to the Judges of the High Court of Justice, and the Court of Appeal, by sec. 19 of the J. A. Act, 1881 (see now sec. 62).

1215. Where the plaintiff fails to recover judgment in an action or other proceeding brought in a County or Division Court by reason of such Court having no jurisdiction Costs where action fails for want of jurisdiction

Rules

1216-1218.

over the subject-matter thereof, the County Court, or the Judge presiding in the Division Court, as the case may be, shall have jurisdiction over the costs of such action, or proceeding, and may order by and to whom the same shall be paid, and the recovery of the costs so ordered to be paid may be enforced by the same remedies as the costs in actions or proceedings within the proper competence of the said Courts respectively are recoverable. Con. Rule 1256.

Not in the English Rules.

But for this *Rule*, the Court, having no jurisdiction over the subject matter of the litigation, would have no power to grant costs to either party: *Brown v. Shaw*, 1 Ex. D. 425; see also *Abbott v. Fearp*, 20 L. J. Ex. 476; *Peacock v. Reg.*, 4 C. B. N. S. 268; *Powley v. Whitehead*, 16 U. C. Q. B. 589; *Dempster v. Parnell*, 3 M. & Gr. 375.

But where a case was stated by Justices under a statute, but, in consequence of the appellant not having complied with the conditions required by the Act, there was no jurisdiction to hear the case, and the respondent moved to strike the case out of the paper, the application was granted with costs: *Great Northern, etc., Committee v. Inett*, 2 Q. B. D. 284; *Crowther v. Boulton*, 33 W. R. 150; not following *Peacock v. Reg.*, *supra*; see also *Royal Canadian Bank v. Stevenson*, 22 U. C. C. P. 562; *Cote v. Halliday*, 33 C. L. J. 159, *Re Isaacs*, 4 My. & Cr. 11; *Watson v. Petts* (No. 2), 1890, 1 Q. B. 430.

This *Rule* is held not to apply to proceedings under the Ontario Winding-up Act (R. S. O. c. 222): *Re Cosmopolitan Life Ass.*, 15 P. R. 185.

See also *Sherk v. Evans*, 22 Ont. App. 242.

Procedure
in County
Courts.

1216. These Rules, and the practice and procedure in actions in the High Court of Justice, shall apply and extend to actions in the County Courts. Con. Rule 1257.

This *Rule* is intended to refer to the whole body of *Rules* so far as applicable, and not merely to those mentioned in this chapter.

See *Leach v. Bruce*, 9 O. L. R. 380, and other cases in note to *Rule* 520 (b).

Motions
against
judgments.

1217. Motions against judgments and for new trials in actions in the County Courts shall be disposed of upon the like grounds and principles as in the High Court. Con. Rule 1258.

See R. S. O. 1877, c. 50, s. 292.

Notice of
motion.

1218. A motion against a judgment or for a new trial shall be upon two clear days' notice, and the motion shall

be set down at least one clear day before the first day of the ^{Rules} sittings for which the notice is given unless otherwise ordered. Con. Rule 1259. ^{1219, 1220.}

See R. S. O. 1877, c. 50, s. 293; *Rule* 348 and notes.

1219. In all actions brought in a County Court the Judge of the County Court where the proceedings were commenced, [or the Master in Chambers,] (subject to appeal in either case as if the case were in the High Court) may change the place of trial according to the practice in force in the High Court; and in the event of an order being obtained for that purpose, the Clerk of the County Court in which the action was commenced shall forthwith transmit all papers in the action to the Clerk of the County Court to which the place of trial is changed, and all subsequent proceedings shall be entitled in such last mentioned Court, and carried on in such last mentioned county as if the proceedings had originally been commenced in such last mentioned Court. Con. Rule 1260. ^{Change of place of trial in County Court.}

See R. S. O. 1877, c. 50, s. 155.

The wording of the *Rule* would seem to indicate that the effect of an order to change the place of trial is to transfer the action to the County Court of the County where the trial is to take place, and as "all subsequent proceedings" are to be entitled in that Court it would seem the judgment should be entered there.

The papers in an action under this *Rule* should be entitled in the County Court, and not in the High Court of Justice: *Ferguson v. Golding*, 15 P. R. 43.

The jurisdiction of the Master in Chambers doubted in *Brigham v. McKenzie*, 10 P. R. 406, was made clear on the consolidation of the *Rules* in 1888 by the insertion in this *Rule* of the words in brackets.

Doubts were entertained formerly whether an appeal lay from an order of the Master in Chambers made under this *Rule*: see *Milligan v. Sills*, 13 P. R. 350; *McAllister v. Cole*, 16 P. R. 105; *Cameron v. Elliott*, 17 P. R. 415; but an appeal is now explicitly given by this *Rule*.

The costs of an application to the Master in Chambers under this *Rule* are taxable on the County Court scale, but the costs of any appeal to a Judge, or from the Judge, are taxable on the High Court scale: *Re Hicks v. Mills*, 18 P. R. 123.

Rule 520 (b) applies to the County Courts: see note to that *Rule*.

1220. Every Clerk of a County Court shall keep his office open for the transaction of business on every day except ^{Office hours of Clerks of County Courts.}

Rules
1221, 1222.

holidays, and except as hereinafter provided from the hour of 10 in the forenoon to the hour of 4 in the afternoon, and in Toronto on Saturdays from 10 in the forenoon till 1 in the afternoon. On and between the 1st day of July and the 31st day of August, and on and between the 24th day of December and the 6th day of January, the Clerk shall keep his office open for the transaction of business from 10 in the forenoon until noon. *Con. Rule 1261, amended; 60 V. c. 14, s. 89.*

Payment of
money into
Court.

1221.—(1) Money to be paid into the County Court or Surrogate Court of any county by any person, shall be paid into some incorporated bank designated for that purpose, from time to time, by order of the Lieutenant-Governor in Council; or where there is no such bank, then into some incorporated bank in which public money of the Province is then being deposited, and which has been appointed for this purpose by any General Rule in that behalf; or if no bank has been appointed, into any bank in which public money of the Province is being deposited.

Procedure

(2) The money shall be paid in to the credit of the cause or matter in which the payment is made with the privity of the Clerk or Registrar (as the case may be) of the Court, and in no other manner: and such money shall only be withdrawn on the order of the Court or a Judge thereof, with the privity of the Clerk or Registrar of the Court.

Withdrawal

Plea of
payment
into Court.

(3) Where money is paid in under a plea of payment into Court, the Clerk, on the production of the receipt of the bank for the money or other satisfactory proof of such payment, shall sign a receipt for the amount in the margin of the pleading. *Con. Rule 1262; Rules 23 June, 1890, 1267.*

Clerk or
Registrar
to keep
books and
render
statements.

1222. The Clerk and Registrar of said Courts shall each keep a book or books containing an account of all moneys so paid into their respective Courts, and of the withdrawal thereof; and shall prepare in the month of January in every year a statement of all moneys so paid in and withdrawn respectively, and a statement of the condition of the various accounts upon the thirty-first day of the preceding December, and shall transmit to the Provincial Secretary and to the

Judge or each of the Judges of such Courts, a copy of such **Rule 1223.** statement, with a declaration thereto annexed made before a Justice of the Peace or Commissioner for taking affidavits, according to Form No. 212. Con. Rule 1263.

For Form 212, see H. & L. Forms, No. 541.

1223. The book so to be kept shall be open for inspection within office hours; and the Clerk or Registrar shall give a certificate of the state of an account or an extract therefrom at the request of any party interested, or his solicitor, on payment to the Clerk or Registrar of the sum of twenty cents for such inspection or certificate and the sum of ten cents per folio for such extract. Con. Rule 1264.

Books to be open for inspection. Fees for extracts, etc.

See R. S. O. 1877, c. 42, s. 25.

CHAPTER XIX.

FORMS.

Forms to
be used.

1224. The forms contained in the Appendix hereto shall be used with such variations or modifications as circumstances may require; but any variance therefrom, not being in matter of substance, shall not affect their regularity. Con. Rules 458, 766; Rules 1 Jan., 1896, 1508.

See Eng. R. April, 1880, R. 52.

In *Turquand v. Fearon*, 40 L. T. at p. 545, Thesiger, L.J., said, "although the forms given in the Judicature Acts are not absolutely binding, they are still of assistance as illustrating the meaning of the Act." See also *Scott v. Creighton*, 9 P. R. 253; *Bolton v. Bolton*, 3 Ch. D. 276; *McCready v. Hennessy*, 9 P. R. 480, and *Boxwell v. Cooks*, 36 Ch. D. 444; 36 W. R. 65.

The Forms in the Appendix to the Rules are all included in *Holmes & Langton's Forms*, see schedule, p. xi. of that volume.

SCHEDULE.
OF RULES AND ORDERS NOT REPEALED.
(Rule 2.)

Description of Rule or Order.	Extent to which Unrepealed.
Rules of the Courts of Queen's Bench and Common Pleas of 7th Feb., 1876. (Crown cases reserved.)	The whole (a).
Orders of the Court of Chancery. (Election Court Rule.)	Order 618 (b).
Rules of the Supreme Court of Judicature, under the Judicature Act, 1881.	Rules 393 and 494 referring to proceedings pending at the time of passing <i>The Judicature Act</i> (c); 538 referring to selection of <i>ex officio</i> Judges for trial of election petitions (d); and 605 referring to Fees in Surrogate Courts and Fees of Clerks of the Peace (e).
Rules relating to controverted elections of members of the House of Commons, passed 13th Feb., 1875.	The whole (f).
Rules of the Court of Appeal relating to controverted elections of members of the Legislative Assembly of Ontario.	The whole (g).
Consolidated Rules of 1888	Rules 191 (h) and 1018 to 1014 (i), inclusive.

(a) See *Holmsted's Rules and Orders*, p. 577.(b) See *Holmsted's Rules and Orders*, p. 358.(c) See 44 V. c. 5, p. 139; Macdonald's *Jud. Act* (1st Ed.) 367, 368.(d) See *Holmsted's Rules and Orders*, p. 804.

(e) A new Tariff has since been framed for the Surrogate Courts.

(f) See *Holmsted's Rules and Orders*, p. 663.(g) These Rules have now been repealed by the new *Rules* made by the Court of Appeal, and promulgated on 23rd Dec., 1903.(h) This Rule relates to the investment of moneys in Court. See note to *Rule* 81, p. 235.(i) These Rules relate to the procedure to be followed in Controverted Municipal Elections; See now R. Ed. VI, c. 19, ss. 220, 221, 222, 223 and 224, and *Holmsted and Langton, Jud. Act* (1890) p. 807-827.

SCHEDULE—Continued.

Description of Rule or Order.	Extent to which Unrepealed.
Rules of 13th Sept., 1890.....	Rule 1269 (j).
Rules of 23rd March, 1895.....	Rule 1393 (j) (k).

(j) This Rule relates to the investment of moneys in Court. See note to Rule 81, p. 235.

(k) Two Rules bear this No. See note H. & L. Jud. Act, 2nd ed., p. 220.

Applications to quash Convictions.

The following Rule passed by the High Court on November 17th, 1886, under the authority of 49 V. c. 49, s. 6 (D.), now Crim. Code, sec. 822, is not mentioned in the above schedule, as it does not relate to civil matters:—

"No motion shall be entertained by this Court, or by any Division of the same, or by any Judge of a Division sitting for the Court, or in Chambers, to quash a conviction, order, or other proceeding which has been made by or before a Justice of the Peace (as defined by the said Act) and brought before the Court by *certiorari*, unless the defendant is shown to have entered into a recognizance, with one or more sufficient sureties, in the sum of \$100, before a Justice or Justices of the county or place within which such conviction or order has been made, or before a Judge of the County Court of the said county, or before a Judge of the Superior Court, and which recognizance, with an affidavit of the due execution thereof, shall be filed with the Registrar of the Court in which such motion is made or is pending, or unless the defendant is shown to have made a deposit of the like sum of \$100 with the Registrar of the Court in which such motion is made, with or upon the condition that he will prosecute such *certiorari* at his own costs and charges, and without any wilful or affected delay, and that he will pay the person in whose favour the conviction, order, or other proceeding is affirmed his full costs and charges, to be taxed according to the course of the Court, in case the conviction, order, or proceeding is affirmed."

This Rule remains in force since the Criminal Code of 1892: *Reg. v. Robart*, 13 P. R. 49; and is now applicable to applications to quash convictions under Provincial Statutes: see 1 Ed. Vil. c. 13, ss. 147, 148, *which repeals 542 & 19 as to same*.

The defendant is a necessary party to the recognizance: *Reg. v. Johnston*, 7 P. R. 525; it must be taken before a Justice of the Peace for the county in which the conviction was made: *Id.* The affidavit of the sureties must negative the fact of the sureties being sureties in any other matter, and must state that they are worth \$100 over and above any amount for which they may be liable as sureties: *Reg. v. Robart, supra*. An affidavit of justification by the sureties is necessary: *Reg. v. Richardson*, 17 Ont. 29; 13 P. R. 303.

RULES SUBSEQUENT TO THE CONSOLIDATED
RULES, 1897.

RULES PASSED 29TH SEPTEMBER, 1898.

1225.—[*See Rule 56 (2), (3), (4) ; 58 (2) ; and 66 (2).*]

RULE OF 8TH OCTOBER, 1898.

1226.—[*See Rule 9.*]

RULES PASSED 10TH DECEMBER, 1898.

1227.—[*See Rule 782.*]

1228.—[*See Rule 783.*]

RULES PASSED 14TH JANUARY, 1899.

1229.—[*See Rule 412.*]

RULES PASSED 17TH FEBRUARY, 1900.

1230.—[*See Rule 26 cl. b. (1).*]

1231.—[*See Rule 341.*]

1232.—[*See Rule 792 (2).*]

RULES PASSED 22ND JUNE, 1901.

1233.—[*Repeals Rules 95 and 96.*]

1234.—[*See Rule 347.*]

RULE PASSED 29TH MARCH, 1902.

1235. All proceedings under "The Mechanics' Lien Act,"
R. S. O., Cap. 153, shall be legitly endorsed as follows:—

"In the matter of the Mechanics' Lien Act"

"BETWEEN"

"A. B., Plaintiff"

AND

"C. D., Defendant."

Rules
1236-1246.

RULES PASSED 10TH MAY, 1902.

1236.—[*See Rule 56 (c).*]

1237. The Finance Committee may, subject to the approval of the Attorney General of Ontario being first obtained, arrange for the investment of any moneys in Court in first mortgages on lands in the Province of Manitoba.

RULES PASSED 7TH JUNE, 1902.

1238. The costs of and incidental to the proceedings in the Court of Appeal for Ontario, and in the High Court of Justice for Ontario, and in any Divisional Court thereof for or in relation to the quashing of convictions or orders, shall be in the discretion of the Court, and the Court shall have power to determine and direct by whom and to what extent the same shall be paid, whether the conviction or order is affirmed or quashed in whole or in part.

See Rex v. Muncion, S.O. L.R. 24.

1239. Consolidated Rule 117 is amended by adding to the proceedings and matters which it is thereby provided shall be heard and determined by the Divisional Courts the following: Proceedings for or in relation to the quashing of convictions or orders.

See Rule 117.

1240. Consolidated Rules 355 and 356 shall not extend or apply to proceedings for or in relation to the quashing of convictions or orders.

1241. Consolidated Rule 1130 shall apply to the costs of and incidental to proceedings for or in relation to the quashing of convictions or orders, whether the conviction or order is affirmed or quashed in whole or in part.

RULES PASSED 20TH JUNE, 1903.

1242.—[*See Rule 47.*]

1243.—[*See Rule 48.*]

1244.—[*See Rule 139.*]

1245.—[*Repealed by Rule 1260, infra.*]

1246.—[*See Clause (c) of Rule 162.*]

1247. —[*See Rule 300.*]

1248. —[*See Rule 302.*]

1249. —[*See Rule 414 (2).*]

1250. —[*See Rules 439, 439 a and 439 b.*]

1251. —[*Repeals sub-sections 2 and 3 of Rule 461.*]

1252. —[*Repealed by Rule 1268.*]

1253. —[*See Rule 1146 (2).*]

Rules
1247-1260.

RULE PASSED 27th JUNE, 1903.

1254. —*See Rule 406 (2).*

RULES PASSED 28th NOVEMBER, 1903.

1255. S18 (a) Upon the filing of the order of His Majesty in His Privy Council, made upon an appeal to His Majesty in Council, with the officer of the High Court with whom the judgment or order appealed from was entered, he shall thereupon cause the same to be entered in the proper book, and all subsequent proceedings may be taken thereupon as if the decision had been given in the Court below.

See Rules S18 (a) and (b).

S18 (b) When the judgment of the Supreme Court of Canada in appeal has been certified by the Registrar of the Court to the proper officer of the High Court, he shall thereupon make all proper and necessary entries thereof, and all subsequent proceedings may be taken thereupon as if the judgment had been given or pronounced in the High Court. *See R. S. O., c. 135, s. 67.*

1256. —[*See Rule 1157 (a).*]

1257. —[*See Rule 413.*]

1258. —[*See Rule 972 (a).*]

1259. —[*See Rule 99.*]

1260 Rule 1245 is repealed, and the following is substituted for Form No. 6, sec. 3 of the Appendix:

(Add to the above forms for money claims (a, Nos. 1 and 5), and the plaintiff claims \$ _____ for costs, and if the

Rules

1261-1274.

amount claimed be paid to the plaintiff or his solicitor within the time allowed for appearance, further proceedings will be stayed.

See H. & L. Forms No. 50, which should be amended in accordance with this Rule.

1261. —[*See Rule 348 (a).*]

RULES PASSED 18th JUNE, 1904.

Taking effect on 1st Sept., 1904. (See Out. Gazette 25th June.)

1262. —[*See Rule 635 (4).*]

1263. —[*See Rule 750 (a).*]

1264. —[*Repeals Rule 710 and enacts a new Rule 768 (a); see that Rule.*]

1265. —[*See Rules 802 and 803.*]

1266. —[*See Rule 940 (a).*]

1267. —[*See Rule 1136 (1).*]

RULES PASSED 24th DECEMBER, 1904.

To come into force on 7th Jan., 1905. (See Out. Gazette 31st Dec., 1904.)

1268. —[*See Rule 881.*]

1269. —[*See Rule 938.*]

1270. —[*See Rule 1143.*]

1271. —[*See Rule 791.*]

1272. —[*Repeals clause (2) of Rule 55.*]

1273. —[*See Rule 77.*]

1274. —[*See Rule 407.*]

1275

SUPREME COURT OF JUDICATURE

New Rule

Rule 1304 passed by the Supreme Court of Judicature, 23rd April, 1910.

1304. Any condition precedent the performance or occurrence of which is intended to be contested shall be distinctly specified in his pleading by the plaintiff or defendant as the case may be and subject thereto an averment of the performance or occurrence of all conditions precedent necessary for the case by the plaintiff or defendant, shall be implied in his pleading.

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APPENDIX
TO THE CONSOLIDATED RULES.

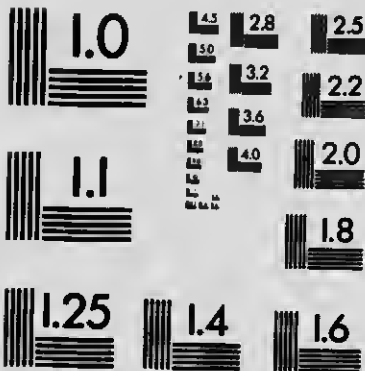
FORMS.

*All the Forms included in this Appendix, are to be found
in Hulmsted & Langton's Forms; see the Schedule at p. xi.
of that volume.*



MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



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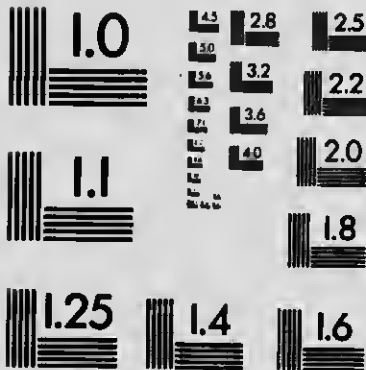
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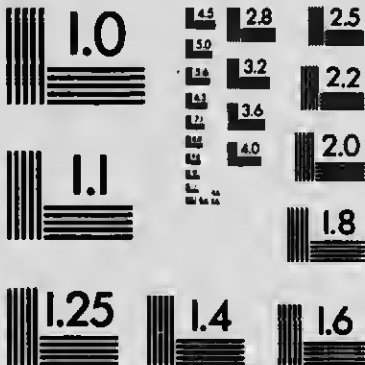
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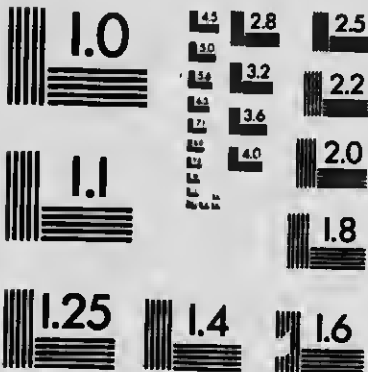
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