69.

LEFROY AND CASSELS'S

NOTES OF PRACTICE CASES

BEING NOTES OF DECISIONS AND DICTA (ENGLISH AND CANADIAN) ILLUSTRATIVE OF THE ONTARIO JUDICATURE ACT AND ORDERS, SUBSEQUENT TO THE ANNOTATED EDITIONS OF THE SAID ACT UP TO JULY 1, 1883.

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PREFACE.

The compilers of these Notes of Practice Cases have aimed at supplying the profession with a useful supplement to the annotated editions of the Ontario Judicature Act. They have endeavoured to note under the various sections and rules such English and Canadian decisions and *dicta*, reported between the periods of June 1, 1881, and July 1, 1883, as illustrate in any way the Ontario Judicature Act and Orders. For this purpose they have endeavoured to make a thorough search through all the various English and Canadian Reports, and it will be found that over four hundred and fifty of such decisions and dicta have been noted. A note is also added under each section and rule referring to any corresponding English section or rule, including the new English Rules of 1883; and at the end will be found two Appendices — one containing the Supplemental Ontario Rules of Court up to date, and the other a double table shewing the correspondence between our present Ontario Rules and the new English Rules of 1883, while a table of cases completes the work.

In spite of doubtless many imperfections, it is nevertheless hoped that the profession will find that they possess in

this little book a useful *vade mecum*. Should it meet with a favourable reception the compilers hope to make it only the first of a periodical series, which, with the aid of the current English decisions published every fortnight in the CANADA LAW JOURNAL, and of the current Canadian decisions published in both the CANADA LAW JOURNAL and the CANADIAN LAW TIMES, will make it easy for practitioners to lay their hand on all the most recent cases on points of practice.

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Sec. 6.

Cf Imp. Jud. Act, 1873, sec. 11.

See *Re North York Election Case*, under sec. 87.

Sec. 9.

Cf Imp. Jud. Act, 1873, sec. 16.

Clarbrough v. *Toothill*, 50 L. J. Ch. 743, 18 C. L. J. 101.

Where an Act passed before the Judicature Act, and referring in terms to common law actions only, empowered a Judge by rule or order to command the attendance of witnesses, and production of documents, at arbitrations holden under that Act, Jessel, M. R., held it was clear that such an order might now be made in the Chancery Division.

Cooper v. *Vesey*, 51 L. J. Ch. 149, 18 C. L. J. 160.

Where a person, fraudulently personating a deceased testator, had forged instruments purporting to be legal mortgages of property of

the said testator in favour of mortgagees, without notice, Kay, J., held that in an action brought for the purpose of obtaining a declaration that the mortgages were void against the persons claiming under the will, and to have the title deeds delivered up, he was bound by the above section to order the title deeds to be given up by the mortgagees, and could not leave the plaintiffs to their legal remedy as to the deeds.

See *Regina* v. *O'Rourke*, under sec. 52.

Re North York Election Case, under sec. 87.

Sec. 10.

Cf. Imp. Jud. Act, 1873, sec. 22.

See *Regina* v. *O'Rourke*, under sec. 52.

Re North York Election Case, under sec. 87.

Sec. 11, sub-sec. 2.

Cf. Imp. Jud. Act, 1873, sec. 22.

Elliot v. *Capell*, 9 O. P. R. 35.

An affidavit entitled in the Queen's Bench, and sworn before the Judicature Act came into force, may be the foundation of an order in the Queen's Bench Division.

See *Re Cameron*, Infants, under Rule 424.

Sec. 12.

Cf. Imp. Jud. Act, 1873, sec. 22.

Peck v. *Peck*, 9 O. P. R. 299.

General Order Chancery 489 is still in force, and an application for interim alimony cannot therefore be made until the statement of defence is filed, or the time for filing it has expired.

See *Exchange Bank* v. *Stinson*, under Rule 127.

Campan v. *Lucas*, under Rule 4.

Beaver v. *Boardman*, under sec. 52.

London and Canadian Loan Co. v. *Merritt*, under Rule 339.

Dobson v. *Marshall*, under Rule 34.

Bucke v. *Murray*, under Rule 255.

Ren v. *Anthony*, under Rule 36.

Sec. 14.

Cf Imp. Jud. Act, 1873, sec. 19.

Harmon v. *Parke*, 29 W. R. 750, 17 C. L. J. 389.

An appeal lies to the Court of Appeal from an order of the Common Pleas Division upon an interlocutory matter arising out of a municipal election petition.

See *Queen* v. *Savin*, under sec. 33.

Sec. 15.

Cf Imp. Jud. Act, 1873, sec. 19.

See *Queen* v. *Savin*, under sec. 33.

Freed v. *Orr*, 9 O. P. R. 181.

It is not now necessary to make the certificate of judgment of the Court of Appeal an order of the High Court of Justice.

National Ins. Co. v. *Egleson*, 9 O. P. R. 203 (*n*).

The proper practice in the Chancery Division is to make the certificate of the judgment of the Court of Appeal an order of that Division.

Lowson v. *Canada Farmers' Ins. Co.*, 9 O. P. R. 185.

Execution issued out of the Chancery Division upon a certificate of the Court of Appeal is irregular, as the certificate has not been made an order of the Court below.

Over-ruled by the Court of Appeal 29th June, 1883, and held not necessary to make certificate an order of Court.

See also *Norvall* v. *Canada Southern R. W. Co.*, 18 C. L. J. 98, 281, 9 O. P. R. 339.

Sec. 16, sub-sec. 2.

Identical with Imp. Jud. Act, 1873, sec. 24, sub-sec. 1.

Gibbs v. *Gould*, 30 W. R. 407, 46 L. T. N. S. 135.

Action for damages for fraudulent misrepresentations: defence of the Statute of Limitations: replication that plaintiff did not discover and had not reasonable means of discovering the fraud within six years before the commencement of the action, held good. And held further, that same relief must be given as ought to have been given by the Court of Chancery, and that the jurisdiction was not limited to cases which, before the Act, would have been solely cognizable in a Court of Law.

Affirmed on appeal, 30 W. R. 591, 46 L. T. N. S. 248.

Adamson v. *Adamson*, 7 A. R. 592.

Per Burton, J. A.—The owner of an equitable estate cannot, notwithstanding the Judicature Act, proceed against a trespasser in his own name. He is still bound to sue in the name of his trustee.

Parties are not now entitled to enforce any remedy which they could have enforced in neither a Court of Law nor a Court of Equity before the Act. *(a)*

Heenan v. *Heenan*, 3 C. L. T. 162.

A plaintiff equitably entitled to the possession of land can, since the Judicature Act, maintain an action for the recovery thereof.

Sec. 16, sub-sec. 2.

Identical with Imp. Jud. Act, 1873, sec. 24, sub-sec. 3.

See *Schneider* v. *Batt*, under Rule 111.

Mudge v. *Adams*, 50 L. J. P. D. 49, 17 C. L. J. 369.

The plaintiff, as executor, propounded the will of the defendant's wife. The statement of claim alleged that the deceased had duly executed the will while living apart from her husband, after obtaining a protection order, and being possessed of separate estate. The statement of defence alleged that the protection order had been obtained fraudulently, and ought to be set aside, and claimed as counter-relief that the protection order might be set aside, the will pronounced against, and administration granted to the defendant. The plaintiff demurred on the ground that it was not alleged that the protection order had been revoked, and that it was not competent to the defendant in this proceeding to assail its validity. Held, the counter-claim was good, and an application to discharge the protection order could be entertained in a probate action. Per Sir J. Hannen.—"The present case, in my opinion, comes exactly within those terms" (sc. of the above section). "If this defendant had instituted a suit or proceeding for the purpose of setting aside this protection order, the action would have been against this same plaintiff as claiming under the alleged will of the wife; and this section says that what might have been asserted in that suit may be asserted by way of counter-claim in answer to the action of the plaintiff against the defendant."

(a) See *Britain* v. *Forrester*, L. R. 11 Q. B. D. 123; also *North London R. Co.* v. *Great Northern R. Co.*, L. R. 11 Q. B. D. 35.

Bowyear v. *Pawson*, 29 W. R. 664.

If A. is entitled to be paid a sum of money by B., the latter cannot set-off his share of a debt, whether legal or equitable, which A. owes to him and another, or others.

See *Barber* v. *Blaiberg*, under Rule 107.

Toke v. *Andrews*, under Rule 152.

McGowan v. *Middleton*, under Rule 170.

Beddall v. *Maitland*, under Rule 127.

Exchange Bank v. *Stinson*, under Rule 127.

Dockstader v. *Phipps*, under Rule 164.

Canadian Securities Co. v. *Prentice*, under Rule 164.

Township of Dundas v. *Gilmour*, under Rule 112.

Sec. 16, sub-sec. 6.

Identical with Imp. Jud. Act, 1873, sec. 24, sub-sec. 5.

Hart v. *Hart*, 45 L. T. N. S. 13, 17 C. L. J. 413.

Where in an arrangement for a compromise and the execution of a deed of separation, entered into between the parties during the trial of a divorce suit, it was agreed, amongst other things, that the petition and answer should be dismissed, and also that "in case of difference in working out these terms, matter to be referred to Mr. W. and Dr. D."

Held, (1) there was nothing in the above section of the Judicature Act to prevent the Court granting specific performance, (2) the clause as to reference to arbitration did not oust the jurisdiction of the Court.

Morton v. *Palmer*, L. R. 9 Q. B. D. 89, 51 L. J. Q. B. 307, 30 W. R. 951, 46 L. T. N. S. 285.

The Court of Appeal had ordered the plaintiff to pay the costs of certain interlocutory proceedings. On a motion for stay of proceedings in the action until payment, it was held that there is no rule of practice by which a plaintiff, ordered to pay costs in the course of an action, and not paying them, is liable to have his action stayed until they are paid.

Sec. 16, sub-sec. 8.

Identical with Imp. Jud. Act, 1873, sec. 24, sub-sec. 7.

Salt v. *Cooper*, 50 L. J. Ch. 529, 17 C. L. J. 366.

Held, after final judgment in an action, a receiver may be appointed (although the writ contains no claim for a receiver) without the issue of any fresh writ, so long as the judgment remains unsatisfied, the action being in such a case "a cause or matter pending" within the meaning of the above section, and Imp. O. 42 (Ont. O. 38, Rules 339-361,) does not at all affect the question.

Thompson v. *South Eastern R. W. Co.*—*South Eastern R. W. Co.* v. *Thompson*, L. R. 9 Q. B. D. 320, 30 W. R. 537, 46 L. T. N. S. 513, 18 C. L. J. 362.

Where two parties bring cross-actions against one another, arising out of the same matter, and it is desirable to consolidate them, the proper criterion for determining which party ought to be made plaintiff and which defendant, and whose claim ought to be converted into a counter-claim, is not the largeness of the claim in the one case as compared with the other, neither is it priority of one party over the other in respect to the threatening or commencement of litigation, but the action brought against the party on whom the burden of proof lies ought to be stayed, and the action brought by him ought to be allowed to proceed, the other party to the litigation being

allowed to raise by defence, set-off, and counter-claim all questions intended to be raised by him in the action which is stayed. At the same time this must not be considered a hard and fast rule, but the Court must use its discretion under the circumstances of each case.

See *McGowan* v. *Middleton*, under Rule 170.

Gathercole v. *Smith*, under Rule 127.

Toke v. *Andrews*, under Rule 152.

Sec. 17, sub-sec. 2.

Cf. Imp. Jud. Act, 1873, sec. 25, sub-sec. 2.

Cook v. *Grant*, 32 C. P. 511.

An express trust need not be evidenced by writing, and the Statute of Limitations is now no bar.

Sec. 17, sub-sec. 8.

Identical with Imp. Jud. Act, 1875, sec. 25, sub-sec. 8.

Robinson v. *Pickering*, 50 L. J. Ch. 527, 17 C. L. J. 342.

The Court will not, in an action by a creditor who has dealt with a married woman on the faith of her separate estate, grant an injunction to restrain her from parting with that estate until the creditor has established his right by obtaining judgment. Per Jessel, M. R.—"According to well established principle and settled law, creditors of a married woman who have obtained no judgment cannot interfere with her right to deal with her separate property."

In re The Cambrian Mining Co., 29 W. R. 881.

A man who is mortgagee of the property of, and a shareholder in, a company, and has filed a petition asking for the winding up of the company, will, to avoid inconvenience and injustice, be restrained from exercising his power of sale under the mortgage until the hearing of the petition.

Quartz Hill Gold Mining Co. v. *Beall*, 30 W. R. 583, 46 L. T. N. S. 746.

Since the Judicature Act, 1873, the Chancery Division has jurisdiction, even upon an interlocutory application, to restrain by injunction the publication of a libel.

Berry v. *Keen*, 51 L. J. Ch. 912.

The Court has power to appoint a receiver where the title to property is disputed.

Gwatkin v. *Bird*, 52 L. J. Q. B. 263.

The Court has power to order the appointment of a receiver whenever it is just and convenient to do so.

In an action for recovery of land brought by a landlord against his tenant under a proviso for re-entry for breach of covenant in his lease, a receiver of the rents and profits of the lands pending the trial of the action, was appointed on the plaintiff's application.

The North London R. W. Co. v. *The Great Northern R. W. Co.*, 52 L. J. Q. B. 380, 31 W. R. 490, W. N. 1883, p. 33, 48 L. T. N.S. 695.

This section has not enlarged the jurisdiction of the High Court in the matter of issuing injunctions; and consequently the High Court has no jurisdiction to issue an injunction in a case where, before the Judicature Act, no Court would have had the power to interfere by injunction or otherwise.

Board of Education of Napanee v. *The Municipal Corporation of Napanee*, 1 C L. T. 699, 17 C. L. J. 452.

Under R. S. O. ch. 40, sec. 86, ch. 49, sec. 21, and ch. 52, secs. 4, *et seq.*, the Court of Chancery could exercise the powers of a Court of Law in any proceeding, and the powers of the Common Law

Courts to grant mandamus upon motion not being by the latter Act restricted, the Court of Chancery might also have granted a mandamus upon motion; and under the Judicature Act, nothing appearing to restrict the jurisdiction, the Chancery Division of the High Court of Justice has the same jurisdiction.

Sec. 17, sub-sec. 9.

Identical with Imp. Jud. Act 1873, sec. 25, sub-sec. 10.

Re Murdoch, 9 O. P. R. 132.

The discretion of the Court in matters relating to the custody of children considered.

Sec. 17, sub-sec. 10.

Identical with Imp. Jud. Act 1873, sec. 25, sub-sec. 11.

Walsh v. *Lonsdale*, 52 L. J. Ch. 2, 31 W. R. 109.

Since the Judicature Acts, where possession has been given under an agreement for a lease, there are no longer two estates as formerly —one at common law, a tenancy from year to year, and the other in equity, an estate under the agreement. The tenant now holds under the lease to be granted in pursuance of the contract on the same terms as if the lease had been granted, *e.g.*, he is subject to the same right of distress to which he would have been subject had a lease been granted.

See *Friendly* v. *Carter*, under Rule 255.

Sec. 20.

See Appendix A.

Sec. 28.

Cf. Imp. Jud. Act, 1876, sec. 17.

Benschor v. *Coley*, 52 L. J. Q. B. 398.

Upon the trial of an action at *Nisi Prius* the Judge may, if he think fit, at or after the trial, leave any party to move a Divisional Court for judgment, notwithstanding this section.

Per Curiam.—We are of opinion that a Divisional Court has still jurisdiction to entertain a motion for judgment. The words, "so far as is practicable and convenient," have been frequently interpreted as authorizing a Judge to reserve such a motion for the determination of a Divisional Court.

Sec. 32.

Cf. Imp. Jud. Act, 1873, sec. 49.

Norman v. *Strains*, 45 L. T. N. S. 191, 17 C. L. J. 435.

The Court will not confirm an arrangement which has been entered into between the parties, prior to the issuing of the writ, especially where the rights of infants are concerned. No action is pending until the writ has been issued, and the Court is not furnished with any materials upon which to form a judgment as to the wisdom and forethought of a compromise.

In re Milton, Bradford, &c., W. N., 1883, p. 112.

The order of a Master that a solicitor who appeared for an applicant at Chambers should personally pay the costs of the application, having been affirmed by an order of a Judge in Chambers, without leave to appeal, the solicitor gave notice of motion on appeal.

Held, that the order came within this section, and that the appeal could not be heard.

Farrow v. *Austin*, L. R. 18 Ch. D. 58, 45 L. T. N. S. 227, 30 W. R. 50, 17 C. L. J. 454.

This was a suit for administration of the trusts of a will. An order was made refusing the plaintiff, a married woman, who was a residuary legatee, and an executrix under the will, any costs of suit, and ordering the next friend to pay the costs of taking an account of what, if anything, was due from an executor on an account current between him and the testator.

The plaintiff appealed.

Held, that as the plaintiff had a *primâ facie* right to costs out of the estate, which right is expressly reserved by Rule 428, and can only be defeated by shewing some special grounds, her costs did not come within the description of costs which are in the discretion of the Court.

Dicks v. *Yates*, 44 L. T. N. S. 660, 17 C. L. J. 393.

In an action for infringement of alleged copyright in the title of a novel, the defendant before trial discontinued the use of the title. At the trial the Judge held that the plaintiff had established his claim to copyright, and that the defendant had invaded it, but he made no order except that the defendant should pay the costs of the action.

Held, that this was not an "order as to costs only," and that the defendant could appeal.

Harpham v. *Shacklock*, L. R. 19 Ch. D. 215, 45 L. T. N. S. 569, 18 C. L. J. 160.

This was a suit to settle priorities between incumbrancers. In the Court below Malins, V. C., after settling the priorities, ordered B., one of the defendants, to pay the costs of the plaintiff and of his co-defendant. B. appealed from the decision as to priorities, but the decision was affirmed. B. then asked the Court to vary the order as to costs, as being without precedent in a priority suit, where no misconduct was alleged.

The Court held that although the disposition of the costs was unusual, yet it was discretionary, and that if they were to vary an order of the Court below as to costs when an appeal on the merits failed, they would practically be allowing an appeal for costs only, and appeals would be brought nominally on the merits, but really only for the purpose of varying orders as to costs.

Johnstone v. *Cox*, 30 W. R. 114, 45 L. T. N. S. 657.

The respective rights of incumbrancers on a fund having been determined in an action brought by one of them, the Court below directed that the costs of all parties should be paid first out of the fund, and that the residue should go to the incumbrancers in order of their priorities. It was found that the fund would be insufficient, after payment of such costs, to satisfy in full K., the incumbrancer, who had been declared entitled to priority.

Held, that an appeal by him was not an appeal as to costs only, and might be brought without special leave.

Hartmont v. *Foster*, 45 L. T. N. S. 429, 30 W. R. 129, 18 C. L. J. 57.

No appeal lies from a Judge's order dealing with the costs of an interpleader issue, made as between the parties.

Rule 2 is not inconsistent with this section, and at any rate does not over-ride it.

See *Hornby* v. *Cardwell*, under Rule 108.

Turner v. *Hancock*, under Rule 428.

May v. *Thompson*, W. N., 1882, p. 53.

A defendant to an action which has been dismissed without costs, if he wishes to obtain leave from the Court to appeal on the question of costs, should apply at the time when the action is so dismissed; and such leave will not be given on an application by the defendant for that purpose after the plaintiff has given notice of, and set down, an appeal from the dismissal of his action.

In re Cooper—Cooper v. *Vesey*, 51 L. J. Ch. 862, 30 W. R. 648. W. N., 1882, p. 55, 47 L. T. N. S. 89.

Where mortgagees were ordered to pay the costs of the plaintiffs in an action for the delivery up of the mortgages and title deeds, and also the costs of some other beneficiaries who had been made parties, it was held that the plaintiffs, under Rule 95, sufficiently represented the beneficiaries, and that they were therefore improperly made parties, and that the order as to their costs might be appealed against, and should be discharged.

Perkins v. *Beresford*, 47 L. T. N. S. 515.

There is no appeal, without leave, to a Divisional Court from the refusal of a Judge at Chambers to deprive the plaintiff of his costs under Rule 157. It is an appeal as to costs only, left to the discretion of the Judge within the meaning of this section.

Mitchell v. *The Darley Main Colliery Co.*, L. R. 10 Q. B. D. 457, 52 L. J. Q. B. 394, 31 W. R. 549.

A Judge at Chambers, on the application of the plaintiff for an order to inspect the defendants' property, made an order that the plaintiff should have the inspection asked for, but that he should pay the costs of the inspection.

Held, on appeal by the plaintiff against the terms so imposed, that the costs so dealt with were costs incident to a proceeding in the High Court, which were by law left to the discretion of the Judge, and that consequently this was an appeal as to costs only, and could not be entertained.

Re Woodhall—Garbutt v. *Hewson*, 2 O. R. 456.

The costs of an administration matter will not be directed to be paid out of the estate, unless the proceedings have been taken with some show of reason, or with a proper foundation for the benefit of the estate, or have resulted in such benefit.

The question of a residuary legatee's costs is an appealable matter.

See *In re Galerno and Rochester*, and *Grant* v. *McAlpine*, under sec. 37.

McTiernan v. *Frazer*, under sec. 37.

Sec. 33.

Cf. Imp. Jud. Act, 1873, sec. 45.

Queen v. *Savin*, 29 W. R. 638, 17 C. L. J. 478.

No leave is necessary to appeal from a decision of the Queen's Bench Division upon a special case stated by Quarter Sessions, where the Court is exercising its original common law jurisdiction.

See *In re Galerno and Rochester*, and *Grant* v. *McAlpine*, under sec. 37.

McTiernan v. *Frazer*, under sec. 37.

O'Donohoe v. *Whitty*, 18 C. L. J. 426.

Bills of costs amounting to $250 were reduced on taxation to $187.

Held, that the matter in controversy did not exceed $200, as no greater sum than $187 could be recovered from the plaintiff, and his application for leave to appeal was dismissed.

On appeal, 2 O. R. 424. Held, where the construction of a statute is involved in a judgment sought to be appealed from, leave to appeal should be granted, although the amount involved be less than $200.

Foley v. *Canada Permanent Loan and Savings Co.*, 18 C. L. J. 444.

Leave to appeal was granted, on payment of costs, where a copy of the judgment desired to be appealed from could not be obtained in time to enable the solicitor to consult either the client or counsel as to the advisability of appealing before the time for setting down expired.

See *Rumohr* v. *Marx*, under Rule 522.

Sec. 34.

See *In re Galerno and Rochester*, and *Grant* v. *McAlpine*, under sec. 37.

McTiernan v. *Frazer*, under sec. 37.

O'Donohoe v. *Whitty*, under sec. 33.

Beaty v. *Bryce*, 18 C. L. J. 443.

Where the amount involved in an interpleader issue was under $500, it was held that even if it was the fact, as alleged, that the decision of the Divisional Court desired to be appealed from affected the right to other property amounting to $2,000, it would not be a sufficient ground for granting leave to appeal.

Sec. 35.

Cf. Imp. Jud. Act, 1875, sec. 12.

Shubrook v. *Tufnell*, L. R. 9 Q. B. D. 621, 30 W. R. 740, 46 L. T. N. S. 749.

An arbitrator, to whom an action had been referred, stated a case for the opinion of the Court, asking whether on the facts stated, the plaintiff had a cause of action; if the Court was of opinion in the affirmative the case was to go back to the arbitrator; but if the Court was of opinion in the negative, judgment was to be entered for the defendant with costs. A Divisional Court answered the question in the affirmative.

Held, on appeal, that the opinion of the Court was a judicial act from which an appeal would lie.

Held, also, that the appeal must be treated as an appeal from a final and not as from an interlocutory order. *Collins* v. *Vestry of Paddington*, 28 W. R. 588, L. R. 5 Q. B. D. 368, explained.

See *In re Galerno and Corporation of the Township of Rochester*, and *Grant* v. *McAlpine*, under sec. 37.

McTiernan v. *Frazer*, under sec. 37.

Sec. 36.

Cf. Imp. Jud. Act, 1873, sec. 50.

Holloway v. *Cheston*, L. R. 19 Ch. D. 516, 51 L. J. Ch. 208, 30 W. R. 120. 18 C. L. J. 218,

Defendants obtained upon summons a certain order from a Judge in Chambers. Plaintiffs thereupon served the defendants with a notice of motion for a certificate from his Lordship that he did not desire to have the summons reheard, so as to enable the plaintiffs to go direct to the Court of Appeal; or in the alternative that the order might be discharged.

Held, that the proper practice was to adjourn summonses into Court for argument or judgment in cases in which an appeal was desired. Where there was no such adjournment the proper course was to move to set aside the order made in Chambers, so that the Judge might have the opportunity of delivering a judgment which would enable the Court of Appeal to understand the reasons for his decision (*b*).

In re Butler's Wharf Co.—Anderson v. *Butler's Wharf Co.*, L. R. 21 Ch. D. 131, 51 L. J. Ch. 694, 30 W. R. 723, W. N., 1882, p. 87.

Held, that where a party is desirous of appealing from an order made by a Judge in Chambers on a summons which has not been adjourned into Court, it is not in general proper for such party to move in Court on notice to discharge the order or for a certificate that the Judge does not desire it to be reheard. Application should be made in Chambers to the Judge to adjourn the summons into Court. *Holloway* v. *Cheston*, not followed.

(*b*) See *Brown* v. *Collins*, W. N. 83, p. 385.

See *Connecticut Mutual Life Ins. Co.* v. *Moore*, under Rule 307.

In re Galerno and Corporation of the Township of Rochester, and *Grant* v. *McAlpine*, under sec. 37.

McTiernan v. *Frazer*, under sec. 37.

Sec. 37.

Cf. Imp. Jud. Act, 1873. secs. 18, 19, 50.

Marsden v. *Lancashire and Yorkshire R. W. Co.*, L. 7 R. Q. B. D. 641, 18 C. L. J. 100.

Where at the trial of an action the Judge gave judgment for the plaintiff without costs, and the plaintiff afterwards applied to the High Court to have this varied, held, under Imp. Jud. Act, 1873, secs. 18 and 19 (which are not, however, identical with this section), that the High Court had no jurisdiction to entertain an appeal from a final judgment, and the application of the plaintiffs ought to have been made to the Court of Appeal in the first instance.

Crawcour v. *Salter*, 30 W. R. 329.

Leave will not be given to a person to appeal from an order made in an action to which he is not a party, unless his interest is such that he might have been made a party by service.

Jarmain v. *Chatterton*, 30 W. R. 461.

An appeal will lie from a Judge of first instance, when he has refused to commit for disobedience of an order, because, upon the construction which he puts upon the order in question, or upon the view which he takes of the person proceeded against, there has been no contempt.

Debenham v. *Wardroper*, 48 L. T. N. S. 235.

A refusal by a Judge at Chambers to make an order to commit a defendant to prison for default of payment of a judgment debt is a matter subject to appeal.

In re Galerno and The Corporation of the Township of Rochester, and *Grant* v. *McAlpine*, 46 U. C. R. 379.

Appeal from single Court Judge.

Where before the Judicature Act a Judge in single Court had decided applications to quash a by-law, and to set off judgments: Held, that under the Act there could be no appeal to the Divisional Court but only to the Court of Appeal, and the fact that the decisions appealed from were given before the Act came into force makes no difference.

HAGARTY, C. J.—The Judge in each of these cases sat with all the powers of the Court, and except by express words the Divisional Court cannot review his judgment.

Where the verdict is that of a Judge, without a jury, it seems to fall under this section.

McTiernan v. *Frazer*, 9 O. P. R. 246, 18 C. L. J. 341.

A Divisional Court has no jurisdiction to entertain an appeal from an order of a Judge, made in Court on motion, except by consent.

Sec. 38.

Becket v. *Atwood*, 29 W. R. 796, 44 L. T. N. S. 660, 50 L. J. Ch. 687, 17 C. L. J. 390.

One of two plaintiffs may appeal, although his co-plaintiff may refuse to join in the appeal. The co-plaintiff should be made a respondent, and in England might apply for security for costs under Imp. O. 58, r. 15. Cf. R. S. O. ch. 38, sec. 26.

In re Jaques, 30 W. R. 394.

Where some of the parties affected by an order lived in America, an extension of time for appealing was granted, but only on payment of costs.

In re The Padstow Total Loss and Collision Assurance Association, 51 L. J. Ch. 344, W. N., 1882, p. 1, 45 L. T. N. S. 774.

If a Court, acting in assumed exercise of a jurisdiction belonging to it, makes an order which, under the particular circumstances of the case, is beyond that jurisdiction, the order must, until it be discharged, be treated as a subsisting order, and can only be discharged upon an appeal.

An appeal against such an order was, however, allowed more than a year after the order was made, the appellant having applied for leave to appeal as soon as he became aware of the existence of the order.

Curtis v. *Sheffield*, L. R. 21 Ch. D. 1, 51 L. J. Ch. 535, 30 W. R. 581, 46 L. T. N. S. 177.

According to the modern practice of the Court an appeal after time will not be allowed unless the respondent has done something to create an equity against him.

Goddard v. *Jeffreys*, 46 L. T. N. S. 904.

Where an appellant is unsuccessful on an appeal upon a point not adjudicated upon in the Court below, the general rule is that he will not be allowed his costs.

In re New Callao, L. R. 22 Ch. D. 484, W. N., 1882, p. 172, 48 L. T. N. S. 251, 52 L. J. Ch. 283, 31 W. R. 185, 19 C. L. J. 207.

A petition for winding up a company having been dismissed, the petitioner's solicitors wrote a letter to the company's solicitor urging

him to get the order drawn up, adding "as we are advised and intend to give notice of appeal." No formal notice of appeal was given till the time allowed had elapsed, when the petitioner gave a supplemental notice of appeal.

Held, that the letter could not be treated as an informal notice of appeal, and therefore the appeal was too late.

Kettlewell v. *Watson*, W. N., 1883, p. 102.

The solicitors in the action were changed, and notice of appeal was given by the agents of the new solicitors before an order changing solicitors was taken out. It was objected that the notice of appeal was invalid, and leave to appeal after the time was applied for.

Held, that the notice of appeal, though inaccurate, was effectual. No order was made except that the applicant should pay the costs.

Watson v. *Cave*, 50 L. J. Ch. 561, 29 W. R. 768, 44 L. T. N. S. 40, 17 C. L. J. 366.

An appellant wrote a letter proposing to withdraw his appeal, and asking the respondent's consent to such withdrawal, which was granted. Two days afterwards he gave notice of his intention to proceed with the appeal, on the ground that he had before been under a misapprehension as to a material matter of fact, which misapprehension had now been removed.

Held, that the withdrawal could not be rescinded, and that the appeal could not be heard.

McClaren v. *Caldwell*, 17 C. L. J. 388.

Money was paid into Court as security for costs on certain appeals in the suit, and as security for costs on appeal from decree, and all the appeals were allowed.

Held, that the moneys should be paid out, notwithstanding an appeal to the Supreme Court was pending.

Hughes v. *Hughes*, 19 C. L. J. 10.

Where the appellant gave notice of discontinuance, and the respondent thereupon, without taking out any order dismissing the appeal, proceeded and taxed his costs, and then applied for, and obtained an order for the delivery out of the appeal bond for suit.

Held, that the order for the delivery out of the bond was regular.

Semble, also, that no order for the payment of the respondent's costs was necessary as a condition precedent to suing on the bond.

Re Laws, Laws v. *Laws*, 9 O. P. R. 72.

By the oversight of a clerk of the appellant's solicitor, the notice of appeal was not given to the Registrar of the Court appealed from, but it was duly served on the respondent, who had not been prejudiced.

Boyd, C., allowed the notice to be filed within four days, upon payment of costs.

Workman v. *Robb*, 9 O. P. R. 169.

Held, that this section did not affect the plaintiff's right under R. S. O. ch. 38, sec. 46, to appeal within a year from the making of the decree, which had been pronounced before the O. J. A. came into force.

International Bridge Co. v. *Canada Southern R. W. Co.*, 9 O. P. R. 250.

The condition of an appeal bond must be based upon the language in R. S. O. ch. 38, sec. 27, sub-sec. 4.

Grand Trunk R. W. Co. v. *Ontario and Quebec R. W. Co.*, 19 C. L. J. 115.

Proceedings can be stayed only on security being given, both for the costs in the Court of Appeal and those in the Court below.

Orders to stay execution pending an appeal should not be made *ex parte*.

Such orders may be appealed to a Judge in Chambers without first moving before the Master in Chambers to rescind them.

Hamilton v. *Tweed*, 19 C. L. J. 115.

Orders extending the time for appealing should not be made *ex parte*.

Allan v. *McTavish*, 19 C. L. J. 111, 3 C. L. T. 196.

A decision was given in 1878 and acquiesced in, until the Court of Appeal in England, in a like case, expressed a contrary opinion.

Held, following *Craig* v. *Phillips*, L. R. 7 Ch. D. 249, not a sufficient ground to entitle to leave to appeal to the Supreme Court.

Lumsden v. *Davis*, 19 C. L. J. 234.

Where, in consequence of the insolvency of one of the sureties in a bond given by the appellant, on appealing to the Court of Appeal, it is considered advisable to obtain further or better security, the application for that purpose should be to the Court appealed from.

Miller v. *Brown*, 19 C. L. J. 233.

The facts of the defendant being resident in England, and that by the judgment in question further directions are reserved, and that in making up an account by a mortgagee in possession unexpected difficulties present themselves, owing to delays by the plaintiff and the death of parties who could give information as to changes, which would probably swell the account of the mortgagee, are not such special circumstances as will induce a Judge to grant leave to appeal after the time for giving notice of appeal has elapsed.

Sec. 39.

Cf. Imp. O. 58.

Harrison v. *Cornwall Mineral R. W. Co.*, L. R. 18 Ch. D. 334, 45 L. T. N. S. 498, 18 C. L. J. 43.

A respondent who has given cross notice of appeal under Imp. O. 58, Rule 6 (which is very similar to No. 16 of our G. O. Court of Appeal), is in the same position as to costs as if he had presented a cross appeal.

Where there were two respondents to an appeal, one of whom gave cross notice of appeal affecting his co-respondent, and the decision appealed from was substantially affirmed, though the contention raised on the cross appeal was allowed, the Court ordered the appellant to pay half the costs of all the respondents, and the respondents who had not joined in the cross appeal, to pay the other half of the costs of the respondents who had appealed.

Sanders v. *Sanders*, 51 L. J. Ch. 276, 45 L. T. N. S. 637, 18 C. L. J. 236.

Decided under Imp. O. 58, Rule 5.

Virtually identical with R. S. O. ch. 38, sec. 22.

That upon a case heard upon admissions, those who advised one of the parties put a construction upon the admissions, which they have since found is not a right construction, is not a sufficient ground on which to apply for leave to adduce further evidence on appeal under this section.

Quilter v. *Mapleson*, 47 L. T. N. S. 561.

The Court of Appeal, on hearing an appeal, may make such an order as is justified by the law as then existing, although the effect will be to vary a decision of the Court below, which was according to the then existing state of the law.

NOTE.—This case, as to this point, was decided under Imp. O. 58, Rule 5. R. S. O. ch. 38, contains similar provisions.

Cooper v. *Dixon*, 3 C. L. T. 198.

When Sunday is the first of the thirty days spoken of in Order XL. of the Court of Appeal it should not be included. (c)

Sec. 43.

McCrae v. *White*, 9 O. P. R. 288.

This case was one in which, by reason of this section, there was no appeal to the Supreme Court without leave. Judgment was

(c) *Goyeau* v. *Great Western R. W. Co.*, 15 C. L. J. N. S. 107.

delivered on the 24th March; leave to appeal was not granted till the 1st May, and the bond was filed on the 22nd May. It was objected that the bond had not been filed and allowed within thirty days from the judgment, as required by the Supreme Court Act.

Held, that the time must count from the granting of leave to appeal.

Forestal v. *Macdonald*, 18 C. L. J. 421.

Leave to appeal to the Supreme Court was refused by the Court of Appeal. A subsequent application was made to the Supreme Court within thirty days from the date of the judgment, and leave to appeal was given.

The opinion was expressed that this section is *ultra vires*.

Sec. 45.

Smith v. *The North Staffordshire R. W. Co.*, 44 L. T. N. S. 85.

The issue in the action was whether certain lands acquired by the defendants for the purposes of constructing a railway had become "superfluous" lands "within the Lands Clauses Act, 1845."

Held, that as the question was one of mixed law and fact, it could be conveniently tried without a jury.

Usil v. *Whelpton*, 50 L. J. Ch. 511, 29 W. R. 799, 45 L. T. N. S. 39.

An action for specific performance was directed, against the wish of the defendant, to be tried without a jury.

Leeson v. *Lemon*, 17 C. L. J. 430, 1 C. L. T. 698.

Held, affirming the order of the Official Referee, that serving a jury notice with the notice of trial, instead of with the issue, is an irregularity and not a nullity, and is waived by not being moved against.

Lett v. *St. Lawrence and Ottawa R. W. Co.*, 1 O. R. 545.

A Judge is not bound, under the Judicature Act, to submit questions in writing to the jury.

See *Vermilyea* v. *Guthrie*, under Rule 392.

Thurlow v. *Beck*, 9 O. P. R. 268.

An action to set aside a conveyance.

Held, that as such an action could, previously to the Ont. Jud. Act, have been brought in the Court of Chancery only, the defendant had no right, as of course, to have the action tried by a jury.

Also, held, that while under the Chancery Act (R. S. O. ch. 40, sec. 99,) the Court might direct an action to be tried by a jury upon notice and for good cause, yet this could only be done by the Court, and not by a Judge or Master in Chambers.

Gowanlock v. *Mans*, 9 O. P. R. 270.

An action brought to reform a lease.

In cases in which, before the Ont. Jud. Act, the Court of Chancery had exclusive jurisdiction, a jury notice is irregular, and will be struck out.

Bank of British North America v. *Eddy*, 19 C. L. J. 158.

The cause of action was one of a purely common law character, and the pleadings presented issues of a merely equitable character.

An order of a Local Master striking out a jury notice was reversed.

Sec. 47.

Similar to Imp. Jud. Act, 1873, sec. 56.

Burrard v. *Callisher*, 51 L. J. Ch. 223, 30 W. R. 321, 45 L. T. N. S. 793, W. N., 1882, p. 11, 18 C. L. J. 180.

Although there should not be a hard and fast rule, for each case must depend on its own circumstances, yet where, under the above

section, the Court has directed "an account of all dealings and transactions between the plaintiff and the defendant" to be taken before the Official Referee, the Referee should not simply certify the result, but should take the account in the way usual in the Chancery Division, and should set out the account, stating what items he has allowed and what items he has disallowed.

See further *S. C.*, W. N., 1882, p. 29, 46 L. T. N. S. 341, 30 W. R. 540, 18 C. L. J. 261.

Where, in an action in which there has been a reference of this kind, and in which further consideration has been adjourned, either party wishes to vary the report, he should serve the opposite party with notice of motion to vary.

Deacon v. *Dolby*, 51 L. J. Ch. 248, 30 W. R. 317, W. N., 1882, p. 8, 18 C. L. J. 180.

Where a trial of an action has been ordered to stand over until the Official Referee has reported on matters referred to him, it is not necessary to move to confirm such report, after it has been made, before restoring the action to the paper for hearing.

In re Evans—Owen v. *Evans*, W. N., 1882, p. 37.

At the trial the action was referred to a Referee to inquire and report as to alleged breaches of trust and the accounts; and the further hearing of the action was adjourned till the Referee made his report, with liberty to apply.

The Referee filed a report, and the defendant moved to have the action restored to the paper for further hearing.

The plaintiff took out a summons asking that the report might be varied as to certain matters.

On the application of the defendant it was directed that the summons should be adjourned to come on with the further hearing of the action.

Walker v. *Bunkell*, L. R. 22 Ch. D. 722, 31 W. R. 138, W. N., 1882, p. 174.

There is no time limited by the Judicature Act, nor will any time be laid down by the Court, within which a motion to remit for further consideration the report of an Official Referee on an account referred to him must be made.

An Official Referee is not required to state reasons for his findings.

It is not necessary to move to confirm such a report, or to move to set it aside. The proper course is to move for judgment on the Referee's findings when the case comes on for trial, or to raise objections to it at that time.

The Court has power, under Rule 281, to require an explanation from the Referee, or remit or otherwise deal with his report.

Held, on appeal, 48 L. T. N. S. 618, that the proper course was for the defendant to move for judgment on the report, and for the plaintiff to move to set it aside. Both orders of Kay, J., were therefore discharged, and the two motions remitted to him to be disposed of on the merits.

See *In re Brook—Sykes* v. *Brook*, under sec. 49.

Wallace v. *Whaley*, 9 O. P. R. 248.

Under the wording of the order of reference to a Local Master, it was held that there was a reference to arbitration under the C. L. P. Act, and not a reference to an official of the Court, acting in the ordinary course of the Court, under secs. 47 or 48, and that under the award judgment might be signed in the cause.

Robertson et al. v. *Kelly*, 2 O. R. 163.

The Registrar of the Queen's Bench Division is an Official Referee under this section. Direction as to form his report should take.

Sec. 48.

Cf. Imp. Jud. Act, 1873, secs. 56 and 57.

Sacker v. *Ragozine & Co.*, 44 L. T. N. S. 308.

An action for damages for wrongful dismissal, for balance of account of money paid to defendant's use, and for an account of profits on sales on which the plaintiff claimed commission.

The plaintiff was charged with wilful misconduct and fraud.

Held, that the action was one mainly to be decided on certain accounts, and that it was a proper case to be referred, and that not even when there is a question of fraud to be tried is there any inherent right to trial by jury.

Ormerod v. *Todmorden Joint Stock Mill Co.*, L. R. 8 Q. B. D. 664, 46 L. T. N. S. 669, 30 W. R. 805, W. N., 1882, p. 56, 18 C. L. J. 303.

The Court of Appeal has jurisdiction to review an order made by a Judge under the above section, referring to a Referee, as therein mentioned, any question or issue of fact. (Lord Coleridge, C. J., *dubitante*.)

Per Brett, L. J.—"Prolonged examination of documents" means of such documents as it is necessary to inquire into in order to enable the Judge to leave questions of fact to a jury.

Miller v. *Pilling*, L. R. 9 Q. B. D. 736, 47 L. T. N. S. 536, 19 C. L. J. 110.

A Referee under this and the next section is not bound to give reasons for his findings; he may simply find the affirmative or the negative of the issues, and the issues in an action cannot be sent back to him for re-trial or further consideration merely on the ground that his report does not set out the reasons for his findings.

See *Cooke* v. *The Newcastle, &c., Water Co.*, under Rule 281.

Dyke v. *Cannell*, W. N., 1883, p. 105.

The plaintiff moved for judgment on the report of a Referee under this section, and the defendant moved on notice to refer back the case.

The plaintiff objected that the defendant should have applied for a rule *nisi* within the time limited for moving against the verdict of a jury.

The Court overruled the objection, holding that as an application for a rule or order to shew cause was not expressly authorized by the Rules, the proper course was by notice on motion (see Rules 405-406), which could be made at any time before judgment was signed.

See *Wallace* v. *Whaley*, under sec. 47.

Sec. 49.

Identical with Imp. Jud. Act, 1873, sec. 58.

In re Brook—Sykes v. *Brook*, 29 W. R. 821, 45 L. T. N. S. 172, 17 C. L. J. 391.

When questions have been referred to an Official Referee for inquiry and report, and he has reported, objections may be made to the report on further consideration, but notice of the objections should be given; and it seems two clear days' notice would be sufficient.

Cooke v. *The Newcastle and Gateshead Water Co.*, 52 L. J. Q. B. 337.

An order referring issues of fact in an action was made under this section. A motion was made before the Judge who ordered the reference to set aside the Referee's findings.

Held, that the findings of the Referee were precisely the same as the findings of a jury, and that the Judge had therefore no jurisdic-

tion to set them aside; that could only be done by a Divisional Court, before which the motion must be made.

See *Miller* v. *Pilling*, under sec. 48.

Cooke v. *The Newcastle, &c., Water Co.*, and

Cumming v. *Law*, under Rule 281.

Sec. 50.

See Imp. Jud. Act, 1873, sec. 59.

Mercier v *Pepperill*, 51 L. J. Ch. 63, 30 W. R. 228.

In analogy to the practice under the C. L. P. Act, a notice of motion in the Chancery Division to set aside the award of an arbitrator should specify the grounds of objection to the award. A notice of motion, stating objections on good grounds, is not sufficient.

Jones v. *Wedgewood*, 51 L J. Ch. 206, 30 W. R. 228.

Where an action in the Chancery Division is referred to an arbitrator, the award need not be made a Rule of Court before any order can be made to enforce it.

Sec. 52.

Cf. Imp. Jud. Act, 1873, sec. 73.

Beaver v. *Boardman*, 9 O. P. R. 239.

Where neither party has taken any proceeding in a suit for a year, a term's notice to proceed, which was required under the common law practice, is not necessary under the Ont. Jud. Act.

Regina v. *O'Rourke*, 32 C. P. 388.

Writ of Error is a form and method of procedure which the Judicature Act did not alter or abolish, although Courts of Oyer and Terminer and Gaol Delivery are now no longer inferior or separate Courts.

Bank of British North America v. *Eddy*, 19 C. L. J. 192.

Proceedings for examination taken in accordance with R. S. O. ch. 50, or G. O. Chancery, 138, are regular and proper.

See *Dobson* v. *Marshall*, under Rule 34.

Campan v. *Lucas*, under Rule 4.

Wilson v. *Cowan*, under Rule 219.

Bucke v. *Murray*, under Rule 255.

London and Canadian Loan Co. v. *Merritt*, under Rule 339.

Sec. 77.

Identical with Imp. Jud. Act, 1873, sec. 89.

Richards v. *Cullerne*, L. R. 7 Q. B. D. 623, 17 C. L. J. 364.

County Court order on the plaintiff to produce certain documents. Said order being disobeyed, application by the defendant to County Court Judge to commit him. Held, the County Court had jurisdiction to commit; and that the case was governed by *Martin* v. *Bannister*, 4 Q. B. D. 491, the fact that the order in that case was final, and in the present interlocutory, not making any difference.

Pryor v. *The City Offices Co. (Limited)*, 52 L. J. Q. B. 362, W. N., 1883, p. 69.

The words "any proceeding" in this section do not mean any step in the action, but the action itself; and then it will appear that an inferior Court can give in any action before it and within its jurisdiction such relief, redress, or remedy as the High Court could in like case grant, but there is nothing in the section which confers on a Judge of an inferior Court the same power as a Judge of the Supreme Court has to arrive at the mode in which such relief,

redress, or remedy is to be granted, or to enable him to apply the provisions of the Rules of the Supreme Court to proceedings in the inferior Court.

A judgment of an inferior Court under Rule 321 was therefore set aside.

Re Fletcher v. *Noble*, 9 O. P. R. 255.

An order for security for costs in a Division Court suit can not be made under this section or section 80, but can be made under section 244, R. S. O. ch. 47.

Except as provided in Rule 431, the practice as to obtaining security for costs is left as it was before the Act.

Granting or refusing security for costs is purely discretionary.

See *Murray* v. *Gillett et al.*, under Rule 93.

Sec. 78.

Cf. Imp. Jud. Act, 1873, sec. 90.

Davies v. *Williams*, 45 L. T. N. S. 469, 17 C. L. J. 455.

Where an action has been transferred from a County Court into the High Court, the proceedings must thenceforth be regulated by the practice of the High Court. Hence, in an action for ejectment so transferred, discovery cannot be obtained before the delivery of a statement of claim.

Sec. 80.

Cf. Imp. Jud. Act, 1873, sec. 91.

See *Re Fletcher and Noble*, under sec. 77.

Sec. 87.

Cf. Imp. Jud. Act, 1875, sec. 19, 21.

See *Regina* v *O'Rourke*, under sec. 52.

Re North York Election Case, 32 C. P. 458.

The Courts of Queen's Bench, Chancery, Common Pleas, and the Court of Appeal still exist as Courts for the trial of election petitions.

See *Re West Huron Election*, 1 O. R. 433.

In Supreme Court, 18 C. L. J. 400.

Re Russell Election, 1 O. R. 439.

In Supreme Court, 18 C. L. J. 400.

Sec. 90, sub-sec. 2.

Cf. Imp. Act, 1875, sec. 33, sub-sec. 2.

See *Vetter* v. *Cowan*, under Rule 5.

Sec. 91.

See *London and Canadian Loan Co.* v. *Merritt*, under Rule 339.

Coulson v. *Spiers*, under Rule 2.

Rule 1.

Cf. Imp. O. 1 R. 1 (1883, R. 1.)

See *Campan* v. *Lucas*, under Rule 4.

Sullivan v. *Harty*, under Rule 3.

Rule 2.

Virtually identical with Imp. O. 1, R. 2 (*a*).

Turner v. *Bridgett*, L. R. 9 Q. B. D. 55, 46 L. T. N. S. 517, 18 C. L. J. 362.

When the Judge in Chambers had referred an interpleader matter to the Divisional Court, and the latter had summarily heard and determined it.

Held, that the practice in interpleader not being altered, no appeal to the Court of Appeal would lie under Imp. C. L. P. Act, 1860, secs. 14, 17, (virtually identical with R. S. O. ch. 54, secs. 5, 7.)

Whenever, upon an interpleader summons, an issue is directed, an appeal will lie to the Divisional Court and to the Court of Appeal from what occurs at the trial of the issue, but where no issue is directed, and the case is disposed of summarily, no appeal will lie.

See *Williams* v. *Mercier*, under Rule 321.

Hartmont v. *Foster*, under sec. 32.

Beaty v. *Bryce*, 9 O. P. R. 320.

The practice which existed as to interpleader in the former Common Law Courts now applies to all Divisions.

All interpleader issues involving a less amount than $400 are to be referred to County Courts, and costs are to be awarded according to 44 Vic. (O.) ch. 7, sec. 3.

The Judge who settles the question of costs may direct what scale should be followed.

(*a*) Where the reference is to "Imp. O." without more, the orders referred to are those of 1875.

Coulson v. *Spiers*, 19 C. L. J. 233.

Upon the return of an interpleader summons taken out by a sheriff, the Judge of the County Court of the County of Grey made an order protecting the sheriff, barring the claimant, and containing other provisions.

Held, on appeal, that an interpleader not being an action under sec. 91, O. J. A., but a proceeding in an action (*Hamelyn* v. *Betteley*, L. R. 6 Q. B. D. 63,) the Master in Chambers had jurisdiction to make such an order, (Rules 2 and 422, O. J. A.,) and so had the County Judge.

See *Arkell* v. *Geiger*, under Rule 428.

Cole v. *Campbell*, under Rule 307.

Rule 3.

Sullivan v. *Harty*, 19 C. L. J. 234.

It is not necessary to file a bill or bring an action for administration except in cases where matters of misconduct are charged which would entitle a plaintiff to apply, at the outset of the case, for an injunction or a receiver; in all other cases in which this course has been taken, the extra costs occasioned thereby must be borne by the plaintiff.

See *Re Allan—Pocock* v. *Allan*, under Rule 422.

Trust and Loan Co. v. *McCarthy*, under Rule 78.

Rule 4.

First clause identical with Imp. O., R. 3 (1883 R. 2.)

See *Clarbrough* v. *Toothill*, under sec. 9.

Campan v. *Lucas*, 9 O. P. R. 142.

Actions of replevin are not within the general provisions of Rules 1 and 2, and the practice and proceedings therein are within the exception of this rule.

A statement of claim filed in such an action was therefore set aside, and the plaintiff allowed to declare according to the old practice.

Fenwick v. *Baker*, 3 C. L. T. 42.

A solicitor had appeared for an absconding debtor, against whom a writ of attachment had issued, and had undertaken to give special bail, and afterwards, with the consent of the plaintiff's solicitor, entered a common appearance.

Held, that an order to proceed was not necessary, the defendant having been let in to defend, and the plaintiff might plead as in an ordinary action, though it would still be necessary for him, before obtaining judgment, to prove his debt under sec. 9 of the Absconding Debtors Act.

See *Wallace* v. *Cowan*, under Rule 255.

Rule 5.

Cf. Imp. O. 2 R. 1. (1883 R. 3.)

Robertson v. *Coulton*, 9 O. P. R. 16.

The writ of summons is now the commencement of the action, and the *capias* is a proceeding in the suit already brought in one of the Divisions of the High Court.

Vetter v. *Cowan*, 46 U. C. R. 435.

Notwithstanding the Judicature Act, sec. 90, and Rule 5, a writ of *capias* may still be issued under R. S. O. ch. 67, and the C. L. P. Act, before an action has been commenced by a writ of summons.

The right to arrest is given by an Act wholly independent of the Acts regulating the practice and procedure of the Court.

Rule 7.

Virtually identical with Imp. O. 2, R. 3. (1883 R. 5.)

The Helenslea, 51 L. J. Ad. 16, 30 W. R. 616, 47 L. T. N. S. 446, 18 C. L. J. 161.

A writ of summons will not be set aside merely because the defendant has been falsely described therein as resident within the jurisdiction, whereas, in fact, he resided out of it.

Rule 9.

Virtually identical with Imp. O. 2, R. 8. (1883 R. 10.)

Clarke v. *Bradlaugh*, L. R. 7 Q. B. D. 151, 29 W. R. 822, 44 L. T. N. S. 779, 17 C. L. J. 343.

It appeared from the statement of claim that the writ of summons in the action issued on the 2nd July, and that on the same day, but before the issuing of the writ, the cause of action arose. The statement of claim was demurred to, on the ground that the issuing of the writ of summons being a judicial act, must be considered as having taken place at the earliest moment of the day, and therefore before the cause of action accrued.

Held, that the Court could, for this purpose, take cognizance of the fact that the writ did not issue till later in the day than the cause of action accrued, and that the statement of claim was therefore good.

Affirmed on appeal, W. N., 1881, p. 137, 30 W. R. 53, 46 L. T. N. S. 49, 17 C. L. J. 480.

Pleasants v. *The East Dereham Local Board*, 47 L. T. N. S. 439.

A writ of summons issued in an action corresponded in all respects with the form prescribed by the Judicature Act and Orders, except

that although issued in the year 1882 it was tested in the name of Earl Cairns.

Held, on motion to dismiss the action, that the inaccuracy must be considered as a clerical error which the Judge had power, under Rule 10, to set right by giving leave to amend.

Wesson Brothers v. *Stalker*, 47 L. T. N. S. 444.

The plaintiffs, in an action for goods supplied, issued a specially endorsed writ against the defendant. The goods were supplied during and after July, 1882. The copy of the writ served upon the defendant was accurate in all respects except that in the "teste." The year was thus given, "one thousand eight hundred and eighty"—instead of "one thousand eight hundred and eighty-two." In default of appearance the plaintiff signed final judgment. The defendant afterwards applied, under Rule 214, to set the judgment aside, on the ground that the "teste" of a writ was a material part of it, and any error in it would be fatal to its validity; and that the affidavit of service by the solicitor's clerk who served it (a "true copy" was sworn to have been served) was false.

Held, that the affidavit could not really be considered a false one, and that to set the proceedings aside would be to give effect to a contemptible quibble. The mistake in the teste of the writ was a mere imperfection, and not a fatal error prejudicing the defendant.

Cornish v. *Manning*, 18 C. L. J. 76.

The ten days for appearance mentioned in a writ of summons includes the first day, and in the computation of this time Sunday counts.

A defendant was served on the 22nd December, and a *fi. fa.* was issued on the 10th January.

Held, not issued too soon, and that it might have been issued on the 9th January.

Rule 10.

Identical with R. Sup. C., Feb., 1876, R. 6.

Musgrave v. *Stevens*, W. N., 1881, p. 163.

The writ was issued claiming an injunction to restrain the defendants, one of whom had a farm under the plaintiff, from removing any hay, straw, &c., produced thereon. The writ had been served upon the defendants, and one of them had appeared. The plaintiff obtained an interim injunction, which was afterwards extended till the trial of the action. The plaintiff then moved *ex parte* for leave to amend the writ by adding a claim to recover possession of the farm for breaches of covenant contained in the lease. Mr. Justice Chitty refused leave, holding himself bound by *Pilcher* v. *Hinds*, 11 Ch. D. 905.

The appellant contended that that case was decided on the construction of Rule 462, while the present application was made under Rule 116, which is perfectly general.

Jessel, M. R., said the words of that Rule were certainly wide enough, but the plaintiff must make a very special case for an amendment after service of the writ. In the present case no special case had been made, and there was no reason why the plaintiff should not commence a separate action. Application refused.

Bagallay and Lush, L.JJ., concurred.

See *Pleasants* v. *The East Dereham Local Board*, under Rule 9.

Rule 14.

Identical with Imp. O. 3, R. 6. (1883 R. 16.)

See *Hill* v. *Sidebottom*, under Rule 80.

Park v. *Patton*, 3 C. L. T. 264.

Judgment cannot be recovered in default of appearance to a writ specially endorsed for amount of claims which have not matured, but only for the amount due at the time the writ of summons was issued.

See *Bank of Commerce* v. *Brickers*, under Rule 80.

Rule 16.

Virtually identical with Imp. O. 3, R. 8. (1883, R. 18.)

In re Bowen—Bennett v. *Bowen*, 51 L. J. Ch. 825, W. N., 1882, p. 45, 47 L. T. N. S. 114.

An account against an executor on the footing of wilful default is not an ordinary account within this Rule.

Rule 17.

See *Hill* v. *Sidebottom*, under Rule 80.

Bank of Commerce v. *Brickers*, under Rule 80.

Rule 20.

Cf. Imp. O. 5, R. 1, (1883, R. 23.)

Canada Permanent Loan and Savings Co. v. *Foley*, 9 O. P. R. 273.

A writ in ejectment for the recovery of the possession of land may issue out of the proper office in any county, without reference to the locality of the land, though the trial must be in the county where the land lies.

Rule 31.

Cf. Imp. O. 8 r. 1, (1883, R. 45.)

Mackelcan v. *Becket*, 9 O. P. R. 289.

A writ of summons was after several renewals finally renewed on the 6th April, 1881, and served on the 27th December, 1881.

Held, that as no declaration had been delivered, the case was governed under Rule 493, by the O. J. A., and that therefore under this rule the service was good.

Rule 34.

Cf. Imp. O. 9, r. 2, ib. O. 10, (1883, R. 49.)

Virtually identical with Imp. O. 9, R. 2, (as far as substitutional service is concerned.)

Mellows v. *Bannister*, 31 W. R. 238, W. N., 1882, p. 183.

Service of writ of summons, together with notice of motion, where the defendant had left his home and could not be found, and the wife of the defendant had left his home and gone to her own relatives, was directed to be effected by the writ and notice of motion being served on the wife, and by copies thereof being left at the house of the defendant, and by advertisements being inserted in the local newspapers.

See *Re Slade—Slade* v. *Hulme*, under Rule 370.

Dobson v. *Marshall*, 9 O. P. R. 1.

Where a judgment debtor had absconded, and his place of abode could not be ascertained, substitutional service upon him of a summons to set aside fraudulent conveyances made by him was allowed, although no express provision for such service is contained in the Judicature Act. Looking at R. S. O. ch. 40, secs. 93 and 94, and secs. 12 and 52 of the Judicature Act, the former Chancery practice can be applied.

Robertson v. *Nero*, 19 C. L. J. 117.

The fact of a defendant being out of the jurisdiction is no reason for dispensing with personal service, unless it appears that he is hiding or evading service, or that his whereabouts cannot be ascertained.

Rule 36.

Cf. Imp. O. 9, R. 4.

Weatherhead v. *Weatherhead*, 9 O. P. R. 96.

Partition suit. Order made allowing substitutional service of thg bill on the official guardian of an infant defendant, the infant beine resident out of the jurisdiction.

Order made, apparently, on the ground of saving expense, the infant s share being small.

Ren v. *Anthony*, 19 C. L. J. 234.

An application for a direction to one of the taxing officers to tax plaintiff's costs of effecting service of process upon the infant defendants resident out of the jurisdiction.

Boyd, C.—The O. J. Act and Rules do not in terms provide for the practice of serving of process upon an infant resident out of the jurisdiction. Rules 36, 37, and 70 all apply to service within the jurisdiction. This appears, therefore, to be a case in which, under sec. 12 of O. J. Act and the headnote of the Rules of Court, the former practice remains in force. That practice is defined by G. O. 610, by which an order may be obtained upon *præcipe* appointing a guardian *ad litem*, on whom service is to be made. The official guardian is to be such guardian under Rule 70. In *Weatherhead* v. *Weatherhead*, 9 O. P. R. 96, an application was made in Chambers for such an order, but that is not necessary under G. O. 610. I cannot give effect to the objection made against the taxing officer's ruling. Something may be allowed on the taxation if the personal service on the infants has facilitated the official guardian in communic ting with them or their relatives but beyond this I do not think I can interfere.

Rule 37.

Cf. Imp. O, 9, R. 4.

See *Ren* v. *Anthony*, under Rule 36.

Rule 38.

Identical with Imp. O. 9, R. 5. (1883, R. 52.)

See *The Fore Street Warehouse Co. (Limited)* v. *Durrant & Co.*, under Rule 41.

Rule 40.

Virtually identical with Imp. O. 9, R. 6. (1883, R. 53)

See *Jackson* v. *Litchfield*, under Rule 346.

Ex parte Young—Re Young, under Rule 346.

Bank of Hamilton v. *Blakeslee et al.*, 9 O. P. R. 130.

Blakeslee, B. & O. carried on business in partnership under the name of B. & Co. Blakeslee absconded, and the business continued. O. assigned his interest to B., and after such assignment, but before it was made public, the plaintiff served his writ of summons against the firm on O.

Held, good service.

Rule 41.

Virtually identical with R. Sup. C., June, 1876, R. 4. (1883, R. 54.)

The Fore Street Warehouse Co. (Limited) v. *Durrant & Co.*, L. R. 10 Q. B. D. 471, 52 L. J. Q. B. 287, 48 L. T. N. S. 531.

This rule, which permits in certain cases the service of a writ at the principal place of business carried on by one person in the name

of a firm apparently consisting of more than one person, does not apply where such person is a lunatic or of unsound mind. In such a case the proper mode of service is that laid down in Rule 38.

Rule 44.

Cf. Imp. O. 9, R. 13. (1883, R. 62)

Hastings v. *Hurley*, 50 L. J. Ch. 577, 17 C. L. J. 368.

In a foreclosure action the writ had been duly served on one of the defendants in the United States by the British Consul, who, however, had omitted to indorse the day of service on the writ.

Fry, J., extended the time for making the indorsement for a month from the date of the application, but required the Consul to make a fresh affidavit of service.

In re Livesy—Fish v. *Chatterton*, 31 W. R. 87, W. N., 1882, p. 145, 47 L. T. N. S. 328.

The rule as to indorsement of the date of service on the writ does not apply where notice of the writ is served out of the jurisdiction under Rule 49.

Sproat v. *Peckett*, W. N., 1883, p. 76.

The writ was duly served on the 22nd March, but the date of service was not indorsed until the 29th March. Proceedings were being taken by default.

The time was extended for making the indorsement on shewing by affidavit that through inadvertence it had not been made, and the plaintiff was given liberty to proceed by default in the same manner as if the indorsement had been duly made within the time limited by the rule.

Rule 45.

Similar to Imp. O. 11, R. 1. (1883, R. 64.)

See Rule 496 in Appendix.

Fowler v. *Barstow* 51 L. J. Ch. 103, 30 W. R. 112, 45 L. T. N. S. 603, 18 C. L. J. 136.

The defendant, in moving to discharge an order for service of a writ out of the jurisdiction, may shew by affidavit that no cause of action has arisen against him within the jurisdiction.

Bree v. *Marescaux*, 29 W. R. 858, 44 L. T. N. S. 644, 765, 17 C. L. J. 344.

Service of a writ out of the jurisdiction cannot be allowed under Rule 45 (d), where the action suggested is to be brought for the utterance of slanderous words abroad, resulting in special damage to the plaintiff within the jurisdiction. Per Denman, J.—"The Act would not of itself be actionable but for the special damage. But would the fact that the special damage occurred in England bring the case within the words that 'the act or thing was done within the jurisdiction?' It appears to me that it would not." *Great Australian Gold Mining Co.* v. *Martin*, L. R. 5 Ch. D. 1, distinguished.

Re Eager—Eager v. *Johnstone*, L. R. 22 Ch. D. 86, W. N., 1882, p. 144, 47 L. T. N. S. 685, 52 L. J. Ch. 56, 31 W. R. 33, 19 C. L. J. 98.

No leave to serve a defendant out of the jurisdiction can be given except in the cases specified in the above rule.

Per Jessel, M. R.—"The new rule is exhaustive; the old practice is no longer applicable. This case is admitted not to be within the rule, therefore we cannot order service."

Martin v. *Lafferty*, 9 O. P. R. 300.

The provisions of sub-rule (e) are not to be extended to all cases under the rule.

Where a defendant has been served out of the jurisdiction, and the service is allowed, but the defendant does not appear, no order to proceed is necessary.

See *Chamberlain* v. *Armstrong*, noted under Rule 78.

Rule 49.

Identical with Imp. O. 11, R. 5. (1883, R. 70.)

See *In re Livesy—Fish* v. *Chatterton*, under Rule 44.

Rule 57.

Identical with Imp. O. 12, R. 12. (1883, R. 85.)

Taylor v. *Collier*, 51 L. J. Ch. 853, 30 W. R. 701, W. N., 1882, p. 83.

An action was brought to which a firm and one of the partners in the firm were made defendants, and separate defences were put in by that partner for himself and for the firm. No appearance was put in by the firm separately or by the other partner.

Held, that the defence of the firm could not be struck out for default of appearance, for this rule gives no power to a firm to enter an appearance.

Munster v. *Railton & Co.*, 48 L. T. N. S. 624, W. N., 1883, p. 93.

The plaintiff issued a writ against R. & Co. R. only appeared to the writ, and the plaintiff delivered a statement of claim against "R. sued as R. & Co.," and all the subsequent proceedings were conducted under this title. At the trial a verdict for the plaintiff

was taken by consent, and judgment was signed against "R. sued as R. & Co." The plaintiff having afterwards discovered that C. was a member of the firm, applied for an order to amend the judgment by making it in accordance with the writ, a judgment against the firm of R. & Co.

Held (reversing the judgment of the Queen's Bench Division), that the amendment ought not to be allowed.

Rule 69.

Cf. Imp. O. 13, R. 1. (1883, R. 101.)

Taylor v. *Pede*, 44 L. T. N. S. 514, 29 W. R. 627.

Decided under R. Sup. Ct., 1875, O. 13, Rs. 1 and 9.

It would seem that it is not imperative on the plaintiff to apply for the appointment of a guardian under this rule, at all events if the defendant is only a formal party. But see Rule 39.

Crawford v. *Crawford*, 9 O. P. R. 178.

An application for an order under this rule, assigning a guardian to a lunatic, not so found by inquisition, should be made to the Master in Chambers or the Official Referee.

Rule 70.

See *Ren* v. *Anthony*, under Rule 36.

Rule 72.

Cf. Imp. O. 13, R. 3. (1883, R. 103.)

Macdonald v. *Crombie*, 19 C. L. J. 153.

Execution issued on the same day as judgment signed is an irregularity only, and not a nullity.

See *Park* v. *Patton*, under Rule 14.

Rule 74.

Cf. Imp. O. 13 R. 5.

See Rule 497 in Appendix.

Rule 78.

See Rules 502 and 520 in Appendix.

Chamberlain v. *Armstrong*, 9 O. P. R. 212.

Where an action has been commenced in a local office, judgment for default of appearance or pleading must be entered in the local office.

An action for foreclosure of a mortgage, where defendants have been served out of the jurisdiction, is governed by this rule, and does not come within Rule 45 (e): no order allowing service is necessary, and on default of appearance judgment may be entered on *præcipe*, according to the former practice in Chancery.

Trust and Loan Co. v. *McCarthy*, 3 C. L. T. 266.

In a foreclosure action the defendant filed a statement of defence, setting up that the plaintiffs were in possession as mortgagees, and that they had not got in all the rents and profits which they should have obtained, and praying a reference.

Held, that the plaintiffs were not entitled to a *præcipe* judgment under this rule, but that under G. O. Chy. 435 and 646, the latter being expressly introduced under Rule 3, and virtually incorporating the former, judgment should issue.

The writ and statement of claim asked for possession: the Registrar, however, refused to insert the usual order for possession, by reason of the allegation in the statement of defence that the plaintiffs were already in possession. After consultation with Proudfoot, J., he order was inserted, without prejudice to any question that the defendant might raise as to the liability of the plaintiffs to account.

Rule 80.

Virtually identical with R. Sup. Ct., May, 1877, R. 3. (1883, R. 115.)

Ortner v. *Fitzgibbon*, 50 L. J. Ch. 17.

In an action against the defendant, who was a widow, in respect f bills of exchange given by her while under coverture, the writ being specially endorsed under Rule 14, application to sign final udgment was made. Held, that the defendant, being under coverture when the bills were given, and there being nothing to shew she had any separate estate, the order could not be made.

Darrant v. *Ricketts*, L. R. 8 Q. B. D. 177, 30 W. R. 428, W. N., 1882, p. 4, 18 C. L. J. 160.

An order cannot be obtained under the above rule against a married woman in an action for the price of goods supplied to her during coverture, inasmuch as there can be no judgment against a married woman personally in respect of such a claim.

Hill v. *Sidebottom*, 47 L. T. N. S. 224.

Where the writ in an action for foreclosure was also specially endorsed under Imp. O. 3, R. 6 (our Rule 14—see also Rule 17) with a claim for the amount due on the covenant to pay in the mortgage deed, an application to enter judgment against the mortgagor under Rule 80 for the amount claimed, was refused.

Carta Para Gold Mining Co. (Limited) v. *Fastnedge*, 30 W. R. 880.

An action for unpaid calls, and a clerk of the company swore by affidavit that a letter of allotment was duly posted to the defendant. The defendant swore that the letter was never received. On an application to sign judgment under Rule 80 a Divisional Court gave the defendant unconditional leave to defend.

Held, on appeal, that on the authority of *Household Fire and*

Carriage Accident Ins. Co. v. *Grant*, 27 W. R. 858, L. R. 4 Ex. D. 216, there was no defence to the action if the letter of allotment was posted. But the defendant desiring to cross-examine the clerk, who swore to the posting of the letter, leave was given to defend upon the defendant paying the amount sued for into Court.

Fuller & Co. v. *Alexander Bros.*, 52 L. J. Q. B. 103, 47 L. T. N. S. 443.

In an action on a bill of exchange the defendants set up a case of fraud, and the plaintiffs, upon a summons under this rule, filed an affidavit that they were *bona fide* holders for value of the bill.

Held, that the defendants were entitled to unconditional leave to defend.

Hood v. *Martin*, 9 O. P. R. 313.

A claim for price of lands which the plaintiff has agreed to sell to the defendant cannot be specially endorsed. The claim must be on an executed and performed consideration.

Lucas v. *Ross*, 9 O. P. R. 251.

The following held not a sufficient special endorsement under this rule:—"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 sold and delivered by the plaintiffs (*sic*) to the defendant, and interest thereon from the 25th of July, 1882."

Liberty was given to the plaintiff to amend, and to renew his application for judgment ten days after service of the amended writ.

Imperial Bank v. *Britton*, 9 O. P. R. 274.

Motion for judgment. Endorsement on writ as follows:—The plaintiffs claim $2,000, being the amount of the defendant's overdrawn account with the plaintiffs' bank, on the 18th September, 1882. Held, sufficient.

Bank of Commerce v. *Brickers*, 17 C. L. J. 476.

Action for foreclosure. Writ endorsed pursuant to Rule 17. Held, that such a case does not come within this rule, which applies only to actions when the writ is endorsed pursuant to Rule 14, a distinct procedure having been contemplated for the various claims in mortgage cases.

Cowan v. *McQuade*, 19 C. L. J. 108.

In Division Court suits leave to sign judgments under this rule, where there is no defence, will not be granted (*d*).

See *Bank of Nova Scotia* v. *La Roche*, under Rule 431.

Rule 86.

Virtually identical with Imp. O. 15, R. 1. (1883, R. 121.)

See *In re Bowen—Bennett* v. *Bowen*, under Rule 16.

Rule 89.

Virtually identical with Imp. O. 16, R. 1. (1883, R. 123.)

D'Hormusgee & Co. v. *Grey*, L. R. 10 Q. B. D. 13, 52 L. J. Q. B. 192, 19 C. L. J. 98.

The above rule makes no alteration in the practice as regards security for costs, so as to alter the law as it existed before the Judicature Act, that where one of two joint plaintiffs is a foreigner out of the jurisdiction, yet if the other resides within the jurisdiction there can be no order for security for costs.

Faulds v. *Harper et al.*, 2 O. R. 405.

A redemption suit. The children of the intestate mortgagor were the plaintiffs. One of the intestate's surviving children died an infant and intestate before suit.

(*d*) But see *Smith* v. *Lawler*, 19 C. L. J. 258, and *Building and Loan Association* v. *Heimrod*, 19 C. L. J. 254.

Held, that the mother had an interest in the suit, and it was directed that she should be made a party in the Master's Office under G. O. 438.

Semble, if the case had come under the Judicature Act the same might have been directed under this rule.

Rule 90.

Identical with Imp. O. 16, R. 2. (1883, R. 124.)

Woodward et al. v. *Shields*, 32 C. P. 282.

Plaintiffs sued for a sum of money as assignees under an assignment from an assignee in insolvency. Held, at the trial, that the amount did not pass to the plaintiffs but belonged to the insolvents, but the Judge refused to add insolvents as co-plaintiffs, because the defendant was not in a position to know whether he had a defence against them. During the following sittings of the Court, the defendant having had time to ascertain his rights, and shewing no defence, the insolvents were added as co-plaintiffs, and judgment given in their favour, but under the circumstances, the action having been brought by the wrong plaintiffs, without costs.

Rule 91.

Virtually identical with Imp. O. 16 R. 3. (1883, R. 126.)

Head v. *Bowman*, 9 O. R. R. 12.

Plaintiff sued defendant for flooding his land by means of a mill-dam. The Great Western Railway Company 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 by the act of the railway company the plaintiff could not obtain complete relief by succeeding against the defendant.

Held, that the plaintiff should have liberty, under Rules 91 and 103, to add the railway company as defendants.

Rule 93.

Murray v. *Gillett et al.*, 18 C. L. J. 78.

Identical with Imp. O. 16, R. 5. (1883, R. 128.)

A promissory note was endorsed, "I guarantee the payment of the within note, and I waive protest and notice."

Held, that this was a guarantee and not an endorsement, and that although the distinct causes of action against the maker and such guarantor might be joined, the plaintiff was bound to make out a substantial case against the guarantor.

The O. J. Act does not affect the nature of the contract, but only the procedure.

Rule 94.

Identical with O. 16, R. 6. (1883, R. 129.)

Harvey v. *Great Western R. W. Co.*, 9 O. P. R. 80.

The plaintiff shipped some machinery from St. John's, Quebec, over the Grand Trunk Railway to Toronto, there to be transferred to the Great Western Railway for carriage to Dundas. The machinery was damaged in transitu, and the plaintiff being in doubt as to which railway did the injury, made both parties defendants to his action. The Master in Chambers refused to strike out the Great Western Railway as defendants, and his judgment was affirmed on appeal.

Affirmed in Appeal, 18 C. L. J. 276.

Rule 95.

Identical with Imp. O. 16, R. 7. (1883, R. 130.)

Jennings v. *Jordan*, L. R. 6 App. Cas. 698, 45 L. T. N. S. 593, 18 C. L. J. 19.

Held, that under the above rule trustees of an equity of redemption sufficiently represent their *cestuis que trustent* in a redemption suit, no direction to the contrary having been made by the Court.

See *In re Cooper—Cooper* v. *Vesey*, under sec. 32.

Rule 97.

Cf. Imp. O. 16, R. 8. (1883, R. 138.)

Kingsman v. *Kingsman*, 50 L. J. Q. B. 81.

Leave for a married woman to sue alone can be obtained under this rule, after action commenced, as well as before.

NOTE.—This case was decided under Imp. R. Sup. Ct., 1875, O. 16, R. 8; the provisions as to obtaining leave to sue being the same.

Brown v. *North*, L. R. 9 Q. B. D. 52, 46 L. T. N. S. 361, 30 W. R. 531, W. N. 1882, p. 56, 18 C. L. J. 325.

When a married woman applies to a Court or Judge for leave to sue without her husband, and without a next friend, under the above rule, she should not be required to give security for costs if she possesses sufficient property available for the payment of costs in the event of her losing the suit. But as to appeals, R. S. O. ch. 38, sec. 26, would govern.

Abouloff v. *Oppenheimer*, 52 L. J. Q. B. 309, 47 L. T. N. S. 702.

A married woman, resident abroad, commenced an action on giving security for costs, upon a judgment recovered by her in her own name in a foreign Court. Her husband was not joined, nor was any leave to sue without a next friend applied for. The defendants applied for a stay of proceedings until such time as the husband should be joined.

Held, that the practice in Chancery before the Judicature Act was not to make the husband a party to the exclusion of a "next friend," and that the defendants had only a right to ask that proceedings should be stayed until a "next friend" should be appointed; and that a married woman has a right to bring an action by a next friend if she chooses, without joining her husband.

In re Payne—Randle v. *Payne*, 31 W. R. 509, W. N., 1883, p. 57, 48 L. T. N. S. 194.

An administration action was commenced by a married woman suing by her next friend, and an order that the next friend should give security for costs not having been complied with, the action was stayed. Afterwards the married woman, having procured the assistance of a new next friend, commenced another action for the same purpose.

Held, that the second action ought to be stayed until the defendants' taxed costs of the first should be paid.

Schjott v. *Schjott*, W. N., 1881, p. 125, 17 C. L. J. 365.

Action by a wife suing by her next friend for the payment of unpaid instalments of maintenance money under a deed of separation.

Held, that the next friend could not be interrogated as to his authority. Unless the wife came forward and said she had not given any authority, the case should go on.

On appeal, W. N. 1881, p. 133, 45 L. T. N. S. 333, 30 W. R. 329, 17 C. L. J. 479, the action was dismissed, with costs to be paid by the solicitors of the next friend, on the ground that the next friend was acting without authority.

Vardon v. *Vardon*, 19 C. L. J. 229.

A married woman can not only bring an action for alimony against her husband in her own name, but she can also compromise it, or deal with it as she pleases, just as any other suitor can: *Besant* v. *Wood*, L. R. 12 Ch. D. 605; *Hart* v. *Hart*, L. R. 18 Ch. D. 670.

If the plaintiff and defendant have agreed to certain terms of settlement of such a suit, such contract can be enforced against the defendant: *Wilson* v. *Wilson*, 1 H. L. Cas. 538.

Rule 98.

Identical with Imp. O. 16, R. 9. (1883, R. 131.)

Fraser v. *Cooper, Hall & Co.*, L. R. 21 Ch. D. 718, 51 L. J. Ch. 575, 30 W. R. 654, 46 L. T. N. S. 371, W. N., 1882, p. 65.

The plaintiffs sued on behalf of themselves and all other members of a class, except a defendant. Another member of the class was made at his own instance a defendant, to represent all dissentients from the plaintiffs. Costs of the application were reserved.

Gillies v. *McConochie*, 18 C. L. J. 179.

Action for the construction of a will.

The widow and four next of kin of the testator were made parties.

It appeared that there were a very large number of next of kin, many of whom were not known, while the service upon others would be difficult and expensive.

Order made that the next of kin were sufficiently represented by those before the Court.

Rule 99.

Identical with Imp. O. June 1876, R. 7. (1883, R. 154.)

See *Gillies* v. *McConochie*, under Rule 98.

Rule 100.

Identical with Imp. O. 16, R. 10. (1883, R. 136.)

See Rule 501 in Appendix.

See *Ex parte Young—Re Young*, under Rule 346.

Rule 102.

Identical *(mutatis mutandis)* with Imp. O. 16, R. 11.

See *In re Holmes.*

Wright v. *Weatherhead*, under Rule 127.

Rule 103.

Identical with Imp. O. 16, R. 13. (1883, R. 133.)

Emden v. *Carte*, L. R. 17 Ch. D. 768, 17 C. L. J. 432.

The plaintiff, who was an architect, sued for remuneration in respect of employment under a contract made in 1877, and for damages for an alleged wrongful dismissal from such employment in 1880. The plaintiff was adjudicated bankrupt in 1878, and had never obtained his discharge.

Held, (affirming Fry, J.,) that the cause of action for remuneration and damages passed to the trustee, and that the proper course was to add him as co-plaintiff in the action, and give him the conduct of the action.

Dalton v. *The Guardians of St. Mary Abbotts, Kensington*, 47 L. T. N. S. 349.

In an action for an injunction to restrain the defendants from using certain premises as a small-pox hospital, application was made 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 brought the original plaintiff had given up his business, and was going abroad.

Application refused on the ground that the cause of action was injury to the plaintiff's own property only, and it was not "necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action" that any other person should be added as plaintiff.

Werderman v. *Société Generale d'Electricité*, 30 W. R. 33, 45 L. T. N. S. 514, 18 C. L. J. 18.

Since the Judicature Act there is no such thing as a demurrer for want of parties. The proper course is, to take out a summons under this rule to have the necessary party or parties added.

Cox v. *James*, W. N., 1881, p. 134, 30 W. R. 228, 45 L. T. N. S. 471, 17 C. L. J. 479.

The consent required to be given by a person whom it is proposed to add as plaintiff need not be in writing. It is sufficient if the solicitor for the existing plaintiff states that he is authorized to consent on behalf of the proposed new plaintiff, the solicitor taking the ordinary responsibility of using a plaintiff's name.

Young v. *Robertson*, 2 O. R. 434.

Misjoinder of parties is not now a ground of demurrer; and an amendment of the record as to parties may be allowed.

Scane v. *Duckett*, 3 C. L. T. 212. 19 C. L. J. 139

The omission of plaintiffs, in an action to set aside a fraudulent conveyance, to allege that they sue on behalf of all other creditors, does not form the subject of a demurrer for want of equity, the averment being a formal one: the objection should be dealt with under this rule, and should be taken as soon as the writ has been served.

Saylor v. *Cooper*, 2 O. R. 398.

Where an equitable owner of the land sued, he was permitted to make the owner a co-plaintiff by amendment at the hearing.

Kitching v. *Hicks*, 19 C. L. J. 158.

Execution creditors of the defendant were added as parties defendants, as they had a substantial interest in the subject matter of the action.

See *Romann* v. *Brodrecht*, under Rule 165.

Head v. *Bowman*, under Rule 91.

Rule 105.

Similar to Imp. O. 16, R. 15. (1883, R. 135.)

Austen v. *Bird*, W. N., 1881, p. 129, 17 C. L. J. 365.

Action commenced July 27, 1880, by a sole plaintiff against a sole defendant. The plaintiff died December 26, 1880, after delivery of statement of claim, and on February 11, 1881, his executors obtained a common order to revive. The plaintiffs had obtained leave to add a new defendant. On application, under above rule, for directions as to service under the above circumstances, held, by the Master of the Rolls, copies of the original writ and the order to revive and the order adding the new defendant should be served upon him.

Head v. *Bowman*, under Rule 91.

Rule 107.

Identical with Imp. O. 16, R. 17.

Barber v. *Blaiberg*, L. R. 19 Ch. D. 473, 30 W. R. 362, W. N., 1882, p. 28, 46 L. T. N. S. 52, 18 C. L. J. 217.

Where a grantee under a subsequent bill of sale is sued as in detinue by the grantee under a prior bill of sale, to recover goods of the grantor wrongfully seized, a counter-claim by him against the grantor, who has been made a party, for the money due to him under the bill of sale, is not a valid counter-claim under the above rule and sec. 16, sub-scc. 4.

Blaina Iron Co. v. *Garbutt*, 46 L. T. N. S. 162.

In an action against the defendant, a shipowner, to recover damages for injury to certain goods shipped on board his ship, to be carried from Newport to Montreal, caused by the unseaworthiness of the vessel, the defendant sought to bring in the shipbuilder as a third party.

Held, that the defendant was not entitled to do so, on the ground that it would inconvenience and prejudice the plaintiffs at the trial, and that the question of seaworthiness of the ship, as between the plaintiffs and the defendant, and the defendant and the shipbuilder, was not identical in point of time.

Piller v. *Roberts*, L. R. 21 Ch. D. 198, 30 W. R. 595, W. N., 1882, p. 78, 46 L. T. N. S. 527.

When a third party is brought into an action by the defendant, who claims indemnity against him, the Court cannot determine questions between such third party and the defendant without an order directing them to be determined.

It is in the discretion of the Court to order such third party to pay to a successful plaintiff the costs occasioned by his defence or counter-claim.

Corrie v. *Allen*, W. N., 1883, p. 35.

A person should not be added as a third party except where there is really a question to be decided between the plaintiff and defendant and the third party, in which all are interested, or where the defendant can shew a clear *prima facie* case to indemnity or relief over against the third party.

Affirmed on appeal, 48 L. T. N. S. 464 W. N., 1883, p. 65.

Also, semble, that notwithstanding the dictum of Hall, V. C., in *Wye Valley R. W. Co.* v. *Howes*, 16 Ch. D. 489, third party notices, under Rule 108 (c), may be made *ex parte* and without notice to the plaintiff.

The Bianca, L. R. 8 P. D. 91. 48 L. T. N. S. 440.

Where in an action for damage by collision, the defendants had by notice brought in the owner of a tug towing the defendants' ship, and sought to make the tug liable for improper navigation and disobedience to orders, and the defendants applied for directions as to the mode of having the questions in the action determined, the Court declined to give directions, and dismissed the third party from the action upon the ground that questions between the defendants

and the third party, totally different from those between the plaintiffs and the defendants, might arise in the case, and would be embarrassing to the plaintiffs.

See *Schneider* v. *Batt*, under Rule 111.

Witham v. *Vane*, under Rule 111.

Druier v. *Canada Permanent Loan and Savings Co.*, 1 C. L. T. 730.

The defendants held a surplus after selling mortgaged lands and paying themselves off, and this surplus the plaintiff and H. D. and W. D. claimed. The plaintiff, not admitting the account, commenced an action to recover the surplus from the defendants, who applied to have H. D. and W. D. made parties, in order that the whole matter in dispute might be disposed of. The defendants claimed an interest in a small portion of the surplus as assignees of a judgment against the plaintiff. An interpleader order had been refused.

Held, that H. D. and W. D. were proper parties, and should be added.

Bradley v. *Clarke*, 19 C. L. J. 80.

An action of replevin. The defendant gave notice to a third party, claiming to be indemnified on a warranty.

Held, on an application for a direction as to mode of procedure, that Rules 107 and 108 apply to actions of replevin.

Rule 108.

Virtually identical with Imp. O. 16, R. 18. (1883, R. 170.)

Hornby v. *Cardwell*, 51 L. J. Q. B. 89, 30 W. R. 263, 45 L. T. N. S. 781, 18 C. L. J. 136.

Judgment was given in a certain action against the defendant, who in his pleadings claimed from H., who had been made a third party under this rule, the amount of the judgment and the

costs of defending the action. H. demurred to the claim for costs, but the Divisional Court overruled the demurrer, and ordered H. to pay all the costs of the action.

Held, H. having been properly made a third party, the costs of all the proceedings were in the discretion of the Court, so that there was no appeal, by reason of sec. 32, from the order dealing with these costs.

See *Schneider* v. *Batt*, under Rule 111.

Witham v. *Vane*, under Rule 111.

Corrie v. *Allen*, under Rule 107.

Bradley v. *Clarke*, under Rule 107.

Romann v. *Brodrecht*, under Rule 165.

The Township of Dundas v. *Gilmour*, under Rule 112.

Rule 111.

Cf. Imp. O. 16, R. 21. (1883, R. 174, 175.)

Witham v. *Vane*, 44 L. T. N. S. 718, 17 C. L. J. 394.

Where third and fourth parties had been brought in, held, that (under Imp. O. 16, R. 21, which does not however contain the power, as in this order, to give directions as to the costs of the proceedings,) there was no jurisdiction to order the plaintiff to pay the costs of the third and fourth parties.

Held, also, that as there was no disputed question of fact relating to them, but only a question of liability as between the plaintiffs and defendants, there should be no order as to the costs of the third or fourth parties.

Schneider v. *Batt*, 45 L. T. N. S. 371, 30 W. R. 420, 18 C. L. J. 56.

B. ordered goods of a certain quality from P. and ordered him to deliver them to S., who had ordered goods of the same quality from

B. When the goods were delivered, S. complained of them to B. as being of an inferior quality. B. subsequently wrote to P. that the goods had been examined by his agent: that they were of inferior quality, and that he should not accept them. S. having commenced an action against B. for the return of the purchase money, B. obtained leave to serve P. with a third party notice under Imp. O. 16, R. 18, (under Ont. Rule 108 no leave is necessary); P. entered an appearance, and pleadings were delivered to and by him. Upon an application under this rule for directions as to the mode of trial,

Held, that the letter written by B. to P. being evidence against him, but not against P., it would be unjust that the liability of B. and P. should be determined at one trial, and that no direction should be given.

Schneider v. *Batt*, L. R. 8 Q. B. D. 701, 50 L. J. Q. B. 525, 17 C. L. J. 368.

Where a person has been served with a third party notice, under Rule 108, and on application under above rule, the Court has decided that all questions cannot be determined in one trial, and so declined to give any directions, the third party ought to be dismissed from the action. Per Bramwell, L. J.—"Assume that the case is properly brought under Imp. O. 16, R. 17, (Ont. Rule 107,) * * when, as in this case, a Court has decided that the same question shall not be tried once for all between all the parties, then the reason for retaining the third party is at an end. * * The Solicitor-General has said that the rules could not limit the operation of Imp. J. A., 1873, sec. 24, sub-sec. 3, (Ont. J. A. sec. 16, sub-sec. 4); but the rules have received a sanction which renders them equivalent to an Act of Parliament, and speaking for myself, I think that, although the rule ought to be interpreted according to the Act, still this view in effect does so. It may be observed that the section of the statute is permissive, not obligatory or compulsory."

See *Piller* v. *Roberts*, under Rule 107.

The Bianca, under Rule 107.

Rule 112.

The Corporation of the Town of Dundas v. *Gilmour*, 2 O. R. 463.

Where the plaintiff is entitled to recover against the defendant, against whom the action is brought, the defendant is precluded from trying questions arising between himself and a third party added at his instigation under Rule 108, in the trial of which the plaintiff has no interest, and which trial would have the effect of delaying the plaintiff in his recovery.

Rule 114.

See Rule 518 in Appendix, and Cf. Imp. Rule Sup. C. April, 1880, R. 8.

Rule 115.

Identical with Imp. O. 17, R. 1. (1883 R. 188.)

See *Dennis* v. *Crompton*, and *Brandreth* v. *Shears*, under Rule 116.

Harvey v. *Great Western R. W. Co.*, under Rule 34.

Murray v. *Gillett et al.*, under Rule 93.

Rule 116.

Identical with Imp. O. 17, R. 2, (except as to provision as to mortgage suits.) (1883 R. 189.)

Kendricks v. *Roberts*, 30 W. R. 365, 46 L. T. N. S. 59.

To join in a writ a claim to recover quiet possession of land, and also an injunction to restrain the defendant from interfering with the plaintiff's quiet possession, is not joining with an action to recover land a separate cause of action.

Dennis v. *Crompton*, W. N., 1882, p. 121.

Leave was granted to join a claim for the recovery of possession of a house with the following claims :—A claim for an injunction to restrain the defendant from interfering with the plaintiff in his possession and enjoyment of the house, and furniture, and effects therein, and from continuing in occupation or possession of the said house and premises, and from removing the said furniture and effects, or any part thereof ; a claim for damages for a trespass upon the premises ; and a claim for damages for an assault committed at the time of the trespass upon the plaintiff.

The defendant claimed to be assignee of the plaintiff's lessor, and had entered the house and forcibly ejected the plaintiff.

Compton v. *Preston*, L. R. 21 Ch. D. 138, W. N., 1882, p. 58, 30 W. R. 563, 47 L. T. N. S. 122, 19 C. L. J. 135.

The provisions of this rule apply to a counter-claim as well as to an original action ; and where the defendant, by counter-claim, sought to set up two causes of action ; the first a right to recover land, the other a right to damages for deceit, and no leave to join the two causes of action had been obtained.

Fry, J., held that the joinder of the two causes of action in the counter-claim was in its nature embarrassing, and made an order excluding the defendant from the benefit of the counter-claim.

Brandreth v. *Shears*, W. N., 1883, p. 89.

An action to recover possession of a messuage. In the original statement of claim the defendants were sued as the legal personal representatives of one Powell, who was treated as being in occupation as a trespasser ; and the claim was for recovery of possession, accounts of rents or mesne profits against Powell or his representatives, and payment thereof, a receiver, damages, and costs. The defendants pleaded the Statute of Limitations, and the plaintiff amended by asserting that Powell was in occupation under a tenancy created by agreement with one of the plaintiff's predecessors in title.

The defendant now applied that proceedings might be stayed,

upon the ground that the action was one for the recovery of land, and that the provisions of this rule had not been complied with, and also argued that the plaintiffs could not in one and the same action claim damages against the defendants as trespassers and mesne profits against them as tenants.

The plaintiffs asked leave to amend, under Rule 474, by striking out the word "damages."

Pearson, J., held that the pleadings presented two incompatible alternatives under which the plaintiffs might either treat the defendants as trespassers or tenants, and granted the motion, refusing liberty to amend, without prejudice, however, to any further action.

See *Musgrave* v. *Stevens*, under Rule 10.

Wood v. *Wheater*, under Rule 341.

McIlhargey v. *McGinnis et al.*, 9 O. P. R. 157.

An application to join another cause of action with an action for the recovery of land, must be made before the action is brought.

Action to recover possession of land as assignee of a lease. Defence, that the lease was in fact a mortgage, and fraud and want of consideration were alleged.

Held, that the plaintiff could not amend his statement of claim and ask a foreclosure of the land as mortgagee.

Rule 124.

Identical with Imp. O. 18. (1883, R. 139.)

Crumley v. *Kingston*, 3 C. L. T. 311.

A person of unsound mind, not so found by inquisition, brought his action by a next friend, who was worthless.

Held, that the plaintiff stood in the same position as an infant, and that his next friend need not be a person of substance. Order for security for costs refused.

See *Ingram* v. *Little*, under Rule 222.

Rule 125, SQ.

See under "Pleadings" (Misc.)

Cf. Imp. O. 19 (1883, O. 19.)

Rule 127.

Identical with Imp. O. 19, R. 3. (1883, R. 199.)

Beddall v. *Maitland*, L. R. 17 Ch. D. 174, 50 L. J. Ch. 401, 17 C. L. J. 454.

A counter-claim may be brought in respect of a cause of action arising after the issue of the writ in the original action.

Gathercole v. *Smith*, L. R. 7 Q. B. D. 626, 45 L. T. N. S. 106, 18 C. L. J. 80.

Where a defendant pleads by way of set-off and counter-claim to a claim of the plaintiff of such a kind that no set-off is permissible—as, for example, a claim for arrears of a pension—the defendant's claim fails altogether, and his set-off and counter-claim must be dismissed.

Two out of three Judges expressed an opinion that a set-off and counter-claim are the same thing.

Dearsby v. *Middleweek*, 30 W. R. 45.

In an action by a tenant against his under tenant for a rescission of the under lease, the defendant by his defence and counter-claim asked that the plaintiff might contribute to the extent of one half in respect of costs payable by himself and the defendant, under an order in another action, to which they were co-defendants, the whole of such costs having in fact been paid by the defendant in the present action.

The counter-claim was dismissed, on the ground that a defendant cannot proceed against a co-defendant by independent proceedings, in respect of costs to which both are equally liable.

In re Milan Tramways Co., L. R. 22 Ch. D. 122, W. N. 1882, p. 146, 48 L. T. N. S. 213, 52 L. J. Ch. 29, 31 W. R. 107, 19 C. L. J. 99.

Per Kay, J.—"In my opinion this rule was not intended to give rights against third parties which did not exist before, but it is a rule of procedure designed to prevent the necessity of bringing a cross-action in all cases where the counter-claim may conveniently be tried in the original action."

See *Compton* v. *Preston*, under Rule 116.

McGowan v. *Middleton*, under Rule 170.

Toke v. *Andrews*, under Rule 152.

Lumsden v. *White*, under Rule 322.

Gray v. *Webb*, under Rule 168.

Mersey Steamship Co. v. *Shuttleworth*, under Rule 322.

Bowyear v. *Powson*, under sec. 16, sub-sec. 4.

Bowker v. *Kesteven*, under Rule 428.

In re Brown—Ward v. *Morse*, W. N., 1883, p. 71.

The principle of *Mason* v. *Brentini*, 15 Ch. D. 287, (see T. and E., p. 42) applies equally to a case where both claim and counter-claim succeed as to a case where both fail.

In re Holmes—Wright v. *Weatherhead*, W. N., 1883, p. 110.

The statement of claim alleged that a testator's share in a partnership business had been purchased by the surviving partners, but that the defendant, the surviving executor and trustee of the will, had allowed the purchase money to remain outstanding, and claimed a declaration that he was liable to make good the outstanding sums to the trust estate, and for a receiver; for removal of the defendant

from the trusteeship, and the appointment of new trustees, and as far as might be necessary for the administration of the estate.

The statement of defence alleged in effect that the retention of the purchase money by the surviving partner was with the full consent of all the testator's children (the plaintiffs were children of one of such children) that the defendant had long ceased to be an acting trustee, and was willing to retire; and there was a counter-claim against all the testator's children and grandchildren, including the plaintiff, for indemnity and for administration of the real and personal estate.

Held, that the plaintiffs would not be embarrassed or delayed by the counter-claim. That the plaintiffs in the original action, being infants, could not be parties to the indemnity, but were interested in the administration of the estate, and it was not to be overlooked that the defendant claimed general administration whilst the plaintiffs claimed administration only so far as might be necessary. In the general administration the defendant sought to have his indemnity established, and with this the plaintiffs' claim was certainly to some extent concerned.

Glass v. *Glass*, 9 O. P. R. 14.

In ejectment the defendant was allowed to set up a counter-claim for dower out of the lands in question.

Sackville v. *Pacey*, 18 C. L. J. 14.

A defendant is not entitled to set up in his counter-claim a hypothetical case for relief against a third party.

Exchange Bank v. *Stinson*, 32 C. P. 158.

Action by assignee of an account for the price of lumber and staves delivered by the assignor to the defendant under two certain contracts therefor.

Held, that the defendant could set up, under R. S. O. ch. 116, secs. 7, 10, and the Judicature Act, secs. 12, 16, and this rule, as a

defence a claim for damage for non-delivery by the assignor to the defendant of certain other timber and staves specified in the contracts, and for the inferior quality of those delivered.

See *Dockstader* v. *Phipps*, and *Canadian Securities Co.* v *Prentice*, under Rule 164.

Hendrie v. *Neelon*, 3 C. L. T. 201.

Action for the price of timber delivered. A counter-claim for damages for non-delivery of some other timber held good.

Midland R. W. Co. v. *Ontario Rolling Mills Co.*, 19 C. L. J. 31, 3 C. L. T. 55.

Action for price of iron delivered. A counter-claim for damages for non-delivery of other iron under the same contract held good.

Rule 128.

Virtually identical with Imp. O. 19, R. 4. (1883, R. 200.)

In re Parton—Townsend v. *Parton*, 30 W. R. 287, 45 L. T. N. S. 755.

In an action to enforce a *donatio mortis causa*, a statement of claim, which alleged simply that a good and valid *donatio mortis causa* was made to the plaintiff, without stating the facts which constituted it, was held demurrable.

Scott v. *Sampson*, L. R. 8 Q. B. D. 491, 30 W. R. 541, 46 L. T. N. S. 412, 18 C. L. J. 236.

If in an action for libel a defendant desires to give evidence of general reputation, or any other material facts, he must shew upon his statement of defence that it is his intention to offer such evidence and to rely on such material facts.

Union Fire Ins. Co. v. *Lyman*, 46 U. C. R. 453.

Demurrer to statement of defence, on the ground (among others) that each paragraph was not by itself a good answer.

Held, that this formal objection was not maintainable: that each paragraph should contain (as nearly as may be) a separate allegation, but it is not said a separate defence.

Scott v. *Creighton*, 9 O. P. R. 253.

The statement of claim must mention the date of the issue of the writ.

Scott v. *Ferguson*, 2 C. L. T. 556.

The mention in the statement of claim of the date of the issue of the writ of summons is essential under this rule. Leave to amend.

Rosenstadt v. *Rosenstadt*, 9 O. P. R. 311.

A general charge of adultery, without specifying particulars, is bad. The plaintiff was ordered to give within a month particulars of the acts of adultery intended to be proved.

See *Kohfreitsch* v. *McIntyre*, under Rule 147.

Rule 131.

Cf. Imp. O. 19, R. 6. (1883, R. 206.)

Burritt v. *Murdock*, 9 O. P. R. 191.

Where a defendant does not appear, notice of motion for judgment must nevertheless be served, or posted up in the proper office.

Rule 133.

Identical with Imp. O. 19, R. 8. (1883, R. 230.)

See *In re Holmes, Wright* v. *Weatherhead*, under Rule 127.

Rule 136.

Identical with Imp. O. 19, R 25. (1883, R. 218.)

See *Kohfreitsch* v. *McIntyre*, under Rule 147.

Rule 141.

Identical with Imp. O. 19, R. 23. (1883, R. 216.)

Futcher v. *Futcher*, 29 W. R. 884, 45 L. T. N. S. 306, 17 C. L. J. 415.

A statement of claim which alleges an agreement in relation to a matter which comes under the Statute of Frauds, but is silent as to whether it is evidenced by writing or not, is not open to a demurrer, though one specifically relying on the statute.

Burnett v. *Union Mutual Fire Ins. Co.*, 32 C. P. 134.

Declaration on a policy of insurance not averring that it was under the corporate seal. Plea, *non est factum*.

Held, on demurrer, plea good, for declaration set forth a complete instrument; and that in any event under this rule such a plea must now be treated at the trial (Rule 493) as a mere denial of the making of the contract of insurance in fact, and not of its legality or sufficiency in law.

Rule 142.

Identical with Imp. O. 19, R. 13. (1883, R. 253.)

Abouloff v. *Oppenheimer*, 30 W. R. 429.

A statement by way of defence that the plaintiff at the time of bringing the action was a married woman, and that the husband is a necessary party, is in reality an informal plea in abatement, and may be demurred to.

Rule 144.

Identical with Imp. O. 19, R. 15. (1883, R. 254.)

Lyell v. *Kennedy*, L. R. 20 Ch. D. 484, 46 L. T. N. S. 752, 30 W. R. 493, W. N. 1882, p. 137, 18 C. L. J. 383.

Per JESSEL, M. R.—This is simply an action to recover land and mesne profits by a legal title, and then the question comes to this: could there have been a bill of discovery filed in aid of such an action if it had been brought before the Judicature Act? The answer to that is to be found in the judgment of the Court of Exchequer in the case of *Horton* v. *Bott*, 2 H. & N. 249, where it is held not to exist. * * We have now to proceed under the Judicature Act, which makes no distinction between equitable and legal actions. Still, this being an action for the recovery of land by a legal right, is exactly the old action of ejectment in substance though not in form. The Judicature Act makes an alteration of procedure merely, and not an alteration of the law, and if there was no right to file a bill of discovery or to administer interrogatories before the passing of the Judicature Acts, there is no such right now.

BRETT, L. J., to same effect.

HOLKER, J., concurred.

On appeal to the House of Lords this decision was reversed, 8 Ap. Cas. 217, 31 W. R. 618, 48 L. T. N. S. 585, 52 L. J. Ch. 385, W. N. 1883, p. 52, and it was held that the plaintiff in an action of ejectment has the same right as the plaintiff in any other action to administer interrogatories and require production.

Wrentmore v. *Hagley*, 46 L. T. N. S. 741.

In an action for the recovery of land, the defendant may be compelled to make an affidavit of documents in his possession relating to the matter in question.

Daniel v. *Ford*, W. N. 1882, p. 165, 47 L. T. N. S. 575.

The plaintiff in an action for the recovery of land, claiming by a purely legal title, is not entitled, except under special circumstances,

to an affidavit of documents from the defendant, nor to any discovery at all which may tend to disclose the defendant's title.

In Appeal, W. N. 1883, p. 52.

The decision in this case was reversed in consequence of the reversal by the House of Lords of the decision of the Court of Appeal in *Lyell* v. *Kennedy*.

See *McIlhargey* v. *McGinnes et al.*, under Rule 116.

Rule 147.

Identical with Imp. O. 19, R. 18. (1883, R. 211.)

Kohfreitsch v. *McIntyre*, 3 C. L. T. 173, 19 C. L. J. 116.

Action on a promissory note. Defence, among others, that the signature was obtained by fraud. Particulars of the fraud alleged were demanded in writing, but not furnished.

Held, on a motion to strike out this part of the defence, or for delivery of particulars, that instead of the circumstances of the fraud being given by particulars they should be alleged in the statement of defence, in conformity with the mode of pleading formerly in vogue in the Court of Chancery; and order made for amendment.

Rule 149.

Identical with Imp. O. 19, R. 19. (1883, R. 212.)

See *Toke* v. *Andrews*, under Rule 152.

Rule 152.

Similar to Imp. O. 20, R. 12. (1883, R. 282.)

Toke v. *Andrews*, L. R. 8 Q. B. D. 428, 30 W. R. 659, 18 C. L. J. 204.

Defendant having set up in his defence, by way of counter-claim, matter arising since the commencement of the action, plaintiff may

in his reply set up by way of counter-claim other matter arising since the commencement of the action (but at the same time and out of the same transaction as the counter-claim of the defendant), although said matter arose before the delivery of the statement of defence.

Rule 157.

Virtually identical with Imp. O. 20, R. 3. (1883, R. 284.)

See *Perkins* v. *Beresford*, under sec. 32.

Oshawa Cabinet Co. v. *Note*, under Rule 385.

Rule 158.

Cf. Imp. O. 21 R. 1. (1883, R. 225.)

Clarke v. *McEwing*, 9 O. P. R. 281.

If a statement of claim is filed after the time limited, the action will not be dismissed for its non-delivery, but the statement is irregular and may be struck out.

Under the circumstances the time of delivery was extended upon payment of costs.

See *Hunter* v. *Wilcockson*, under Rule 324.

Rule 159.

Virtually identical with Imp. O. 21, R. 4.

Fawcus v. *Charlton*, L. R. 10 Q. B. D. 516, W. N. 1883, p. 83.

The plaintiff delivered a notice under this rule, that his claim was that which appeared by the endorsement on the writ, and the defendant demurred on the ground that the statement disclosed no cause of action.

Held, that there was no ground of demurrer, and that the defendant's only remedy, if any, was to apply under the rule for a further statement. *Robertson* v. *Howard*, 3 C. P. D. 280, on which defendant relied, disapproved.

See *Hunter* v. *Wilcockson*, under Rule 324.

Rule 164.

Identical with Imp. O. 22, R. 5. (1883, R. 244.)

See *Fraser* v. *Cooper, Hall & Co.*; *Waddell* v. *Fraser*, under Rule 166.

Dockstader v. *Phipps*, 9 O. P. R. 204.

In an action for the recovery of land and *mesne* profits, a counter claim for damages for illegal distress against the plaintiff and his bailiff who executed the distress was held to be good.

Canadian Securities Company v. *Prentice*, 9 O. P. R. 324.

Counter claims are not to be favoured unless required by the clear legal rights of the defendants.

Action on a promissory note, which plaintiffs had taken for value after dishonour. The defendant had transferred certain timber limits to the original holders, as collateral security, and these limits had been sold.

A counter claim against the plaintiffs and original holders, on the ground that the latter had sold the limits without authority and for an insufficient price, and praying that a set off might be allowed, was held bad.

See *Oshawa Cabinet Co.* v. *Note*, under Rule 385.

Rule 165.

Identical with Imp. O. 22, R. 6. (1883, R. 245.)

See *Fraser* v. *Cooper, Hall & Co.*

Waddell v. *Fraser*, under Rule 166.

Romann v. *Brodrecht*, (by original action). *Brodrecht* v. *Fick*, (by counter-claim), 9 O. P. R. 2.

A defendant cannot by counter-claim raise an issue between himself and a third party, with which the plaintiff is not concerned.

Rule 166.

Identical with Imp. O. 22, R. 7. (1883, R. 246.)

Fraser v. *Cooper, Hall & Co.* *Waddell* v. *Fraser*, W. N. 1883, p. 110, 31 W. R. 714.

A person not a party to an action, when made a defendant to a counter-claim, is not entitled to enter an appearance gratis, unless and until he has been regularly served with a copy of the defence; and if he appears without having been so served, the appearance may be discharged on motion by the plaintiff in the counter-claim.

See *Romann* v. *Brodecht*, under Rule 165.

Rule 168.

Virtually identical with Imp. O. 22, R. 9. (1883, R. 248.)

Gray v *Webb*, L. R. 21 Ch. D. 802, 51 L. J. Ch. 815, 31 W. R. 8, 46 L. T. N. S. 913, W. N. 1882, p. 122.

A counter-claim may be brought on any cause of action against the plaintiff in the same character, subject to the power of the Court to exclude it or strike it out.

To an action by the vendor for the specific performance of a contract for the purchase of premises in the possession of the purchaser, a counter-claim was put in for the return of a part of the price of a business carried on on the same premises under an earlier agreement between the same parties.

Held, that the action being for a sum presently payable, and the counter-claim involving investigation, and the defendant having been guilty of delay, the counter-claim ought to be excluded.

See *Compton* v. *Preston*, under Rule 116.

Rule 170,

Identical with Imp. O. 23, R. 1. (1883, R. 290.)

M'Gowan v. *Middleton*, 52 L. J. Q. B. 355, W. N. 1883 p. 75.

Although a counter-claim is not strictly a cross-action, (as it is not commenced by writ), nevertheless everything which is done in respect of proceedings on a counter-claim, must be treated as though it were a cross-action, and therefore the discontinuance by the plaintiff of an action brought by him against the defendant, does not put an end to a counter-claim pleaded by that defendant. *Vavasseur* v. *Krupp*, L. R. 15 Ch. D. 474, overruled.

Real and Personal Advance Co. v. *McCarthy*, 30 W. R. 481, W. N. 1881, p. 109, 45 L. T. N. S. 116, 17 C. L. J. 345.

A defendant was allowed to withdraw his defence, and ordered to pay the plaintiffs their costs of the action so far as occasioned by his defence.

Held, that the taxing officer in taxing the costs under this order was right in declining to apportion the general costs of the suit up to the time of the withdrawal, and in allowing those only which were occasioned exclusively by the defendant's defence.

See *Friendly* v. *Carter*, under Rule 255.

Rule 171.

Imp. O., Dec. 1875, R. 9. (1883, R. 291.)

See *Chapman et al.* v. *Smith*, and *Friendly* v. *Carter*, under Rule 255.

Rule 173.

Identical with Imp. O. 24, R. 1. (1883 R. 276.)

Eaton v. *Storer*, L. R. 22 Ch. D. 91, 48 L. T. N. S. 204, 31 W. R. 488, 19 C. L. J. 98.

The time for delivering a reply, which would have expired July 25th, was extended to August 22nd, and then to September 19th. On September 26th, no reply having been delivered, the defendant served notice of motion for judgment. On the same day the plaintiff, by leave of the Judge, served notice of motion for the following day for leave to deliver a reply, and on the 27th the Judge refused the plaintiff's motion on the ground of unexplained delay.

Held, on appeal, the application ought to have been granted on the terms of the plaintiff's paying the costs of it.

See *Graves* v. *Terry*, under Rule 322.

Schneider v. *Proctor*, under Rule 176.

Rule 176.

See Imp. O. 29, R. 12. (1883, R. 280.)

See *Lumsden* v. *White*, and *Graves* v. *Terry*, under Rule 322.

Schneider v. *Proctor*, 9 O. P. R. 11.

A cause is at issue where a joinder of issue has been delivered, or where three weeks have elapsed after statement of defence has been delivered.

A notice of trial served before either of these events had happened was held irregular and set aside.

See *Leeson* v. *Leeson*, under sec. 45.
Canadian Securities Co. v. *Prentiss*,
Harper v. *Marx*, under Rule 255.

Rule 178.

Identical with Imp. O. 27, R. 1. (1883 R. 223.)

Laird v. *Briggs*, L. R. 19 Ch. D. 22, 44 L. T. N. S. 361, and 45 L. T. N. S. 238, 17 C. L. J. 346, and 477.

When the refusal of leave to amend the pleadings takes place at the trial of an action, it forms part of the judgment, and an appeal from the judgment includes an appeal from such refusal. The Court of Appeal has full power to give leave to amend on the hearing of the appeal.

Per JESSEL, M. R.—It is not proper to mention the refusal of leave to amend in the judgment as drawn up.

The plaintiff claimed to be tenant in possession of part of the foreshore of the sea at Margate, and sought to restrain the defendant from removing shingle from the foreshore, and from placing bathing machines upon it. The defendant claimed an easement, and by his statement of defence denied that the plaintiff was, or ever had been, in possession of the foreshore in question, "save subject to the rights of the defendant."

Held, by the Court of Appeal, that the defendant should be allowed leave to amend his statement of defence by striking out the qualifying words, making the denial of the plaintiff's possession an absolute one, and claiming the ownership of the foreshore.

Clarke v. *Yorke*, 31 W. R. 62.

Leave to amend should be given where there is a slip in the pleadings, but not so as to raise a fresh cause of action.

Harris v. *Jenkins*, L. R. 22 Ch. D. 481, 47 L. T. N. S. 570. 52 L. J. Ch. 437, 31 W. R. 137, 19 C. L. J. 206.

In an action to restrain the obstruction of an alleged private right of way, the plaintiff ought to show in his statement of claim whether he claims the right by prescription or by grant. He ought also to allege with reasonable certainty the *termini* of the way and its course. If the plaintiff omits to do this his statement of claim is embarrassing, and the Court will order it to be amended.

Webber v. *Wedgwood*, W. N. 1883, p. 8.

A motion for leave to amend was refused, where the effect of the proposed amendment would b to raise a new issue for the purpose only of determining how the costs in the action should be awarded.

Liardet v. *Hammond Electric Light and Power Supply Co.*, W. N. 1883, p. 96.

Action for specific performance of an agreement to purchase certain patents on the terms of a contract set out in the statement of claim. The statement of defence alleged that it was an implied term of the contract that the patents were good and valid, and further alleged that they were not good and valid.

The paragraph was struck out.

On appeal, held, that there was no reasonable ground to contend that the case was taken out of the ordinary rule that the vendor of a patent does not warrant its validity. That the allegation was properly struck out, since if it were not struck out the plaintiff could not prudently abstain from adducing evidence that the patents were valid.

See *Gray* v *Webb*, under Rule 168.

Russell v. *Canada Life Assurance Co*, 32 C. P. 256.

Pleas setting up further defences were added at the trial, after the case had been in progress some time: Held, permissible.

Rule 179.

Identical with Imp O. 27 R. 2. (1883, R. 310.)

See *Schneider* v. *Proctor*, under Rule 176.

Rule 184.

Virtually identical with Imp. O. 27, R. 6. (1883, R. 314.)

Nobel's Explosive Co. v. *Jones et al.*, L. R. 17 Ch. D. 721, 17 C. L. J. 432.

An action for alleged infringement of a patent by the importation into British waters of a material manufactured abroad according to the patent process, for the purpose of having it transhipped for exportation. Evidence was given at the trial that the defendants had acted as Custom House agents for the foreign manufacturing firm, in getting the goods landed and stored in this country.

Upon this the plaintiffs' counsel asked for and obtained leave to amend.

When the case came on again for hearing on April 20th, the plaintiffs (who were suing as assignees of the British Dynamite Co., the prior holders of the patent,) observed that they alleged several breaches prior to the date of the assignment to themselves; and they asked if it should be contended that the right of the British Dynamite Co. to sue did not pass to them, they should have leave to amend by making the liquidator of the British Dynamite Co. a party.

Held, that the plaintiffs must confine their case to the alleged breaches since the assignment, and that it was now too late to amend.

Rule 189.

Identical with Imp. O. 28, R. 1.

See *Werdermann* v. *Société Generale D'Electricité*, under Rule 103.

Gunn v. *Trust and Loan Co.*, 2 O. R. 393.

Where the allegations in a bill of complaint were of an ambiguous character, hovering between two inconsistent alternatives, neither of which supported the conclusion suggested by the pleader, a demurrer for want of equity was upheld.

The Court will regard the *intuitus* with which the allegations in a bill of complaint are made, and will not allow the prayer for general relief to control the obvious frame of the record.

Rumohr v. *Marx*, 18 C. L. J. 55.

The plaintiff replied to the defendant's statement of defence by amending his claim, adding to his statement two new paragraphs which would have been demurrable if pleaded as a reply. The matters thereby set up did not by themselves disclose any distinct cause of action. The defendant then served an amended statement of defence, and demurred to the two paragraphs.

In view of the fact that the paragraphs which had been so added did not disclose any separate or substantial cause of action, and that the demurrer, however decided, could not advance the cause, the Court overruled the demurrer without costs, as it was the first occasion the point had arisen under the Judicature Act.

Attorney General v. *Midland R. W. Co.*, 3 C. L. T. 33.

A demurrer will not lie to an ambiguous or uncertain pleading: the proper remedy is to apply in Chambers to strike out or amend the defective matter.

Where one or more paragraphs of a pleading are demurred to, the Court may properly look at any other paragraph or paragraphs bearing on the same matter, and if the whole taken together disclose a sufficient defence, the demurrer must be overruled.

Rule 190.

Identical with Imp. O. 28, R. 2.

Attorney-General v. *Birmingham, Tame and Rea Drainage Board*, L. R. 17 Ch. D. 685, 17 C. L. J. 431.

A decree was made in 1875 against the corporation of B., as the sanitary authority of B., granting a perpetual injunction to restrain them from allowing sewage to flow into a river so as to be injurious to health, or a nuisance to the plaintiffs; but the injunction was suspended for five years, to give the corporation an opportunity of executing certain works. After the expiration of this period the plaintiffs desired to enforce the injunction, but in the meantime the B. T. and R. District Board had been constituted by Act as the sanitary authority of the district, in place of the corporation of B.

The plaintiffs brought an action against the B. T. and R. Board, claiming a declaration that they were entitled to the same benefit of the decree as against the defendants in the present action, as if they had been defendants in the former suit. The defendants demurred, on the ground that the statement of claim shewed no cause of action against them.

Held, (reversing Bacon, V. C.) that the demurrer must be allowed.

Bidder v. *McLean*, L. R. 20 Ch. D. 512, 30 W. R. 529, W. N. 1882, p. 27, 46 L. T. N. S. 70, 18 C. L. J. 343.

Where the equity of a plaintiff's claim is not apparent on the face of it, a demurrer stating that the claim is "bad in law on the ground that the facts alleged therein do not shew any cause of action to which effect can be given by the Court" is sufficient.

Rule 195.

Identical with Imp. O. 28, R. 5.

Bank of Montreal v. *Cousins*, 3 C. L. T. 265.

In an action against several defendants, some of the defendants combined with their defences on the facts demurrers to the whole

statement of claim. The demurrers were not filed soon enough to permit of their being argued and disposed of before the trial.

An order was made, giving leave to enter the action for trial, notwithstanding the combined demurrers and defences, and notwithstanding that the demurrers had not been argued or disposed of, and also that the demurrers should be argued and dealt with by the Court at the trial of the action.

Rule 203.

Identical with Imp. O. 29, R. 1. (1883, R. 294.)

Metcalfe v. *The British Tea Association*, 46 L. T. N. S. 31.

On the 2nd November an order was made dismissing an action, unless a statement of claim was delivered within seven days, and on the 9th November this time was extended to three days. On the 14th November the plaintiff delivered his statement of claim, and on the following day the defendant drew up and served the order of the 2nd November.

Held, that the time for appealing from the order of the 2nd November should be extended. Per Bowen, J.—An order does not take effect until it is drawn up and served and the action was not dead when the statement of claim was delivered.

Rule 211.

Identical with Imp. O. 29, R. 10. (1883, R. 304.)

Wilmott v. *Young*, 44 L. T. N. S. 331.

A foreclosure action. Defendant appeared and gave notice that he did not require a statement of claim. The time for delivery of statement of defence had expired, and the action was set down on motion for judgment.

Defendant objected that the action must be brought to trial, as there had been no default of pleading, for defendant was not compelled to deliver a statement of defence.

Plaintiff contended that he was at all events entitled to judgment under Rule 322, for the writ was tantamount to a pleading by consent of parties.

JESSEL, M. R. "I see no rule exactly applicable to the case as it now stands. I have pronounced hundreds of judgments upon writs without pleadings where the defendant has not opposed. Let the action go into the general non-witness list * * If I could make the defendant pay the costs of the day I should do so."

Perpetual Investment Building Society v. *Gillespie*, W. N. 1882, p. 4.

An action by a mortgagee for accounts, foreclosure, or sale. The plaintiff society had filed a long affidavit in support of the statement of claim, and had made the mortgage deed, and further charges exhibits. There was no statement of defence.

Upon motion for judgment the defendant submitted that no affidavit was necessary, and that the costs of it should not be allowed.

An order for accounts, and for a sale was made, but the costs of the affidavit were disallowed.

Rule 214.

Identical with Imp. O. 29, R. 14. (1883, R. 308)

Williams v *Brisco*, 29 W. R. 713, 17 C. L. J. 478.

Plaintiff obtained judgment against the defendant on substituted service and in default of pleading.

The judgment was discharged and the defendant was granted liberty to appear and defend, on shewing that the judgment was the earliest notification he had of the action, and that he had a good defence on the merits. He was, however, ordered to pay the plaintiff all the costs of the action subsequent to the delivery of the statement of claim, and the costs of and consequent upon the motion.

In re Aston Hall Coal and Brick Co., (Limited), 30 W. R. 245.

An order was made for winding up a company on the petition of a creditor, neither the company nor any other creditors appearing. On a motion by the company with the consent of the petitioning creditor, who had been satisfied, for discharging such order,

Held, that the order could be discharged, the Court reserving liberty to all persons interested to apply.

See *Wesson Brothers* v. *Stalker*, under Rule 9.

Rule 215.

Identical with Imp. O. 30, R. 1. (1883 R. 255, 256.)

Emden v. *Carte*, 45 L. T. N. S. 328, 18 C. L. J. 18.

Where a defendant denies liability, but pays money into Court, and pleads the sum paid in is enough to satisfy the plaintiff's claim, were his contention right, the plaintiff may obtain payment out under Rule 217, and may either, under Rule 218, accept it in satisfaction of his claim, and tax his costs and sign judgment for his costs so taxed, or may go on with his action for the purpose of recovering more; and whether the plaintiff succeeds or not in recovering more, or even fails altogether in establishing that the defendant is under any liability, he will be entitled to retain the money so taken out of Court.

Nichols v. *Evens*, L. R. 22 Ch. D. 611, W. N. 1883, p. 13, 48 L. T. N. S. 66, 52 L. J. Ch. 383, 31 W. R. 412, 19 C. L. J. 208.

Imp. O. 30 (Ont. O. 26) applies only to an action which is strictly brought to recover a debt or damages. If an account is claimed the order does not apply, and even if the plaintiff accepts in satisfaction of his whole cause of action a sum paid into Court by the defendant, the Court has a discretion as to the costs.

Rules 215-218.

Imp. O. 26. (1883, O. 22.)

King v. *Duncan*, 9 O. P. R. 61.

Where money is paid into Court for a specific purpose, the party paying it in is entitled to withdraw it when that purpose has been answered in his favour.

The money in this case was paid in "to abide the further order of the Court."

Held, that it was not paid in for any specific purpose: that it represented the subject matter of the suit: that it was in the discretion of the Court to act in the premises; and that the money should remain in Court pending an appeal, unless security were given instead.

Rule 217.

Virtually identical with Imp. O 30, R. 3. (1883, R. 259.)

See *Emden* v. *Carte*, under Rule 215.

Rule 218.

Identical with Imp. O. 30, R. 4. (1883, R. 261.)

See *Emden* v. *Carte*, under Rule 215.

Rule 219 SQ.

See *Lyell* v. *Kennedy*, under Rule 144.

Daniel v. *Ford*, under Rule 144.

Hummings v. *Williams*, 52 L. J. Q. B. 273, W. N. 1883. p. 68.

Davis v. *Wickson*, 9 O. P. R. 219.

The former Chancery Practice applies to actions in the Chancery Division, in the case of examinations for discovery.

The defendant may therefore be examined at any time after his defence is filed, or after the time for filing the same has expired.

Maitland v. *Globe Printing Co.*, 19 C. L. J. 174.

Held that the sub-editor or assistant editor of the defendants was an officer of the company, examinable for the purpose of discovery.

Milner v. *Clark*, 3 C. L. T. 215.

The station master of a railway company is an officer of the company, for the purpose of examination.

Wilson v *Cowan*, 19 C. L. J. 140, 3 C. L. T. 216.

The practice of the Court of Chancery as to discovery is continued in the Chancery Division; forty-eight hours notice of an appointment for examination must be given the solicitors of the party to be examined, but it is only necessary to serve the subpœna on the party himself in reasonable time.

A subpœna dated prior to the issue of the appointment for examination is regular, provided it was issued after the time when the party examining was entitled to examine.

Rule 221.

Identical with Imp. O. 31, R. 11. (1883 R. 356.)

Bewicke v. *Graham*, L. R. 7 Q. B. D. 400, 17 C. L. J. 434.

In this case the defendants, in an affidavit of documents made pursuant to an order for discovery, stated as follows:—

"We have in our possession or power certain documents numbered 101 to 110 inclusive, which are tied up in a bundle marked with the letter A., and initialed by the deponent 'C. G.'; 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."

On appeal from the decision of a Judge at Chambers, the Divisional Court refused to order production, and this decision was affirmed by the Court of Appeal.

China Trans-Pacific Steamship Co. v. *Commercial Union Ass. Co.*, L. R. 8 Q. B. D. 142, 51 L. J. Q. B. 132, 30 W. R. 224, 45 L. T. N. S. 647, 18 C. L. J. 118.

In an action on a marine policy, underwriters are entitled to discovery of ship's papers in accordance with the practice before the Judicature Act.

Kearsley v. *Philips and others*, L. R. 10 Q. B. D. 36, 52 L. J. Q. B. 8, 31 W. R. 92, W. N. 1882, p. 149.

A defendant said, in an affidavit on documents, that certain documents were in the joint possession of himself and a person named, not a party to the action, saying also that the documents were their joint title deeds. The plaintiff applied for an order for inspection.

Held (irrespectively of any privilege of title deeds), that inspection could not be ordered, although the defendant did not say either that he was physically unable to produce the documents, or that consent to their production was refused and could not be obtained.

Affirmed on appeal, L. R. 10 Q. B. D. 465, 52 L. J. Q. B. 269, 31 W. R. 467, W. N. 1883, p. 38, 48 L. T. N. S. 468.

See *Danvillier* v. *Myer*, under Rule 278.

Rule 222.

Cf. Imp. O. 31, R. 12. (1883 R. 354.)

See Rule 513 in Appendix.

Wheeler v. *LeMarchant*, 17 Ch. D. 675, 44 L. T. N. S. 632, 30 W. R. 235, 17 C. L. J. 391.

Where a solicitor is consulted by a client, in a matter as to which no dispute has arisen, and applies to a surveyor or other third party for information necessary to enable the solicitor to give legal advice to the client, the communications between the solicitor and third party are not privileged from discovery in legal proceedings subsequently commenced by or against the client.

Fowler v. *Fowler*, 50 L. J. Ch. 686, 17 C. L. J. 396.

A solicitor had been served with a subpœna, *duces tecum* to attend as a witness on behalf of the plaintiff, and to produce a certain marriages ettlement which he had prepared.

On his objecting to produce the settlement, as he had not been paid his costs for preparing it. Held, that he could not set up his solicitor's lien against the plaintiff, and that he was bound to produce the settlement for the plaintiff's inspection.

La Campagnie Financière et Commerciale du Pacifique v. *The Peruvian Guano Co. (Limited)*, 52 L. J. Q. B. 181, 31 W. R. 395, 48 L. T. N. S. 22.

An affidavit of documents is insufficient and a further affidavit will be ordered where it appears from the affidavit of documents itself, or from the documents therein referred to, or from any admission in the pleadings of the party who makes the affidavit, that there are or have been in his possession, or power other documents "relating to any matter in question in the action," within the meaning of this rule; and a document, "relating to any matter in question in the action" is one which it is not unreasonable to suppose contains information which may, directly or indirectly, enable the party who claims the further affidavit either to advance his own case or to damage that of his adversary.

In re Mason—Mason v. *Catley*, L. R. 22 Ch. D. 609, 52 L. J. Ch. 478, 48 L. T. N. S. 631.

Letters between trustees and between trustees and their solicitors, relating to the trust, before action brought, are not privileged against the beneficiaries.

Westinghouse v. *Midland Railway Co.*, 48 L. T. N. S. 98.

In an action to restrain the defendant company from making or using any brake apparatus, similar to the "continuous brake apparatus," of which the plaintiff was the inventor and patentee, the defendant company sought to withhold from production, certain letters which had passed between the officers of the company, and between them and other persons. This correspondence, it was alleged, had arisen in consequence of a claim made by the plaintiff regarding his patents, in a letter addressed to the secretary of the company, which was taken by them to be an intimation that the plaintiff intended to proceed against them for infringement of his various patents. The letter was handed to the company's solicitors with instructions to advise the company as to the merits of the plaintiff's claim, and thereafter the matter had been conducted with the view of getting materials for a contest if necessary.

The Court was of opinion that the plaintiff's letter did not contain any threat of litigation.

Held, that the correspondence which the plaintiff desired to inspect could not be treated as privileged from discovery, and must be produced.

On appeal: 48 L. T. N. S. 462, held, that assuming the plaintiff's letter to amount to a threat of litigation, the affidavit setting out the above reasons for not producing the documents did not disclose a sufficient ground of privilege.

In re Corsellis—Lawton v. *Elwes*, 52 L. J. Ch. 399, 48 L. T. N. S. 425, 31 W. R. 414, W. N. 1883, p. 60.

The next friend of an infant plaintiff is not a "party to the action" within the meaning of this rule, and therefore cannot be compelled

to make discovery as to documents in his possession or power relating to the matters in question in the action.

Ingram v. *Little*, W. N., 1883, p. 124. Neither is the *guardian ad litem* of a lunatic.

Penrice v. *Williams*, 31 W. R. 496, W. N. 1883, p. 40.

An order having been taken by consent, referring the action and all matters in difference between the parties to an arbitrator, the plaintiff afterwards applied for an order for an affidavit on documents.

Held, that the Court had no jurisdiction to make the order, there being no longer before it any "matter in question in the action" within the meaning of the rule.

Vivian v. *Little*, W. N. 1883, p. 112.

An action for trespass to land having been brought against the defendant as committee of a lunatic, the plaintiff sought inspection of certain documents of title. The defendant resisted an order for inspection on the ground that the documents were not in his possession or control, but in the custody of the Court of Chancery.

An order for inspection made by a Master was set aside.

The Attorney General v. *Gaskell*, 51 L. J. Ch. 870.

The right to discovery has not been affected by the Judicature Acts. By those acts every one has a right to interrogate his opponent, subject to certain limitations imposed in the orders, with a view to obtaining an admission from his opponent of everything material and relevant to the issue raised by the pleadings.

See *Davies* v. *Williams*, under sec. 78.

Dale v. *Hall*, 9 O. P. R. 106.

The defendants had filed and delivered their statement of defence, but the pleadings had not been closed

Held, that the plaintiff was entitled to the *præcipe* order for production.

Guelph Carriage Goods Co. v. *Whitehead*, 3 C. L. T. 216, 19 C. L. J. 157.

Documents obtained during the progress of an action for the purpose thereof are privileged, and their production cannot be enforced.

Brigham v. *Bronson*, 3 C. L. T. 311.

The defendant D. was in the same interest as the plaintiff, who had granted him an extension of the time for putting in his defence, which period at the time of the motion had not expired. B., another defendant, who possessed the same knowledge of the facts of the case, left the country immediately after putting in his defence.

The applicant, another defendant, after putting in his defence, procured an order permitting him to examine the defendant D. for the purpose of discovery, the plaintiff having no knowledge of the facts, and also an order for production.

Rule 224.

Turner v. *Kyle*, 18 C. L. J. 402.

In an action for seduction, an application under this rule for the examination of the plaintiff's daughter was refused, but an order was granted under Rule 285, as it was necessary that the defendant should be informed before the trial of the case he would have to meet.

See *Thompson* v. *Birkley*, under "Particulars," Misc. Cases.

Bradley v. *Clark*, 19 C. L. J. 193.

Held, that though on the face of the pleadings there was no direct issue between the plaintiff and third party, yet as the latter had all the rights of the defendant, and virtually took his place, the case was within the spirit, at all events, of this rule, and that the plaintiff should be allowed to examine the third party after issue.

Johnston v. *McIntosh*, 3 C. L. T. 313.

J. L. was trustee for the E. estate for about twenty years before 1881, when the plaintiff was appointed trustee in his stead. The action involved the consideration of transactions which took place during J. L.'s trusteeship, and on being examined the plaintiff was found to know nothing of them. In another action the master had found the E. estate indebted to J. L., and if the plaintiff in this action recovered the property in question for the estate, J. L. would be benefitted.

It was contended that J. L. was one of the plaintiff's witnesses and that the application was a fishing one to discover evidence, but an order for examination of J. L. was made.

Rule 225.

Manchaster Val de Travers Paving Co. v. *Slagg*, W. N. 1882, p. 127.

Application that one Marriott a former director of a defendant company, who was still a shareholder in it, might be ordered to answer interrogatories on behalf of that company. The company had offered to answer the interrogatories through their present secretary, but they objected to answer through Marriott, because he was now a large shareholder in the plaintiff company, and personally interested in the success of the action. The plaintiffs alleged that Marriott was the only member of the defendant company who could give information as to the transactions complained of.

Mr. Justice Kay refused the application.

On appeal Jessel, M. R., and Cotton, L. J., held that the plaintiffs could obtain the required discovery by making Marriott a defendant, and that it was unreasonable to require the defendant company to answer through a person who was interested in the success of the plaintiffs' action. They declined to give an opinion on the question whether an answer to interrogatories given by an officer or member of a company could be read against the company.

Harrison v. *Grand Trunk R. W. Co.*, 2 C. L. T. 104.

It is not now necessary to obtain a special order for production against a company on motion in Chambers, according to the former practice in Chancery. The usual *praecipe* order is sufficient.

Rule 226.

See *Brigham* v. *Bronson*, under Rule 222.

Rule 228.

Similar to Imp. O. 31, R. 13. (1883, R. 355.)

Attorney General v. *Emerson*, L. R. 10 Q. B. D. 191, W. N. 1882, p. 155, 48 L. T. N. S. 18, 52 L. J. Q. B. 67, 31 W. R. 191, 19 C. L. J. 206.

The Court will not accept the statement of a defendant in his affidavit on production that certain documents, which are in his possession and are material to the matter in issue, form and support his own title, and do not contain anything which could form or support the plaintiff's case, or impeach the defence, but will order such documents to be produced, if from the whole of the defendant's answer or from the description of the documents given by the defendant, the Court is reasonably certain that the defendant has erroneously represented or misconceived the nature of such documents.

Walker v. *Poole*, 51 L. J. Ch. 840, L. R. 21, Ch. D. 835.

An affidavit of documents unnecessarily prolix was ordered, on motion, to be taken from the file.

The solicitors who prepared the affidavit were personally ordered to pay the costs.

Letters may be described in an affidavit of documents by bundles, with sufficient references for identification.

Rule 229.

Identical with Imp. O. 31, R. 14. (1883, R. 357.)

Pratt v. *Pratt*, 51 L. J. Ch. 838, 30 W. R. 837, W. N. 1882, p. 117, 47 L. T. N. S. 249.

Any party having a right to the production and inspection of documents has also a right to take copies of them.

A solicitor's lien for costs must be respected, but its existence is not sufficient ground for departing from the rule.

Quilter v. *Heatly*, L. R. 23 Ch. D. 42, 31 W. R. 331, 48 L. T. N. S. 373.

A defendant is entitled to inspection of documents referred to in the plaintiff's statement of claim, or affidavits, before putting in his statement of defence.

If inspection is refused, an order under Rule 233, should be applied for.

This rule applies as between co-defendants.

Rule 233.

Identical with Imp. O. 31, R. 17.

See *Quilter* v. *Heatley*, under Rule 229.

Rule 234.

Identical with Imp. O. 31, R. 18.

See *Danvillier* v. *Myers*, under Rule 278.

Rule 235.

Identical with Imp. O. 31, R. 19. (1883, R. 362.)

Parker v. *Wells*, L. R. 18 Ch. D. 477, 45 L. T. N. S. 517, 18 C. L. J. 44.

Where a defendant's answering an interrogatory cannot help the plaintiff to obtain a decree, but will only be of use to him if he obtains a decree, the Court has a discretion whether to oblige the defendant to answer it before trial, and will not do so where compelling such discovery would be oppressive.

Rule 236.

Virtually identical with Imp. O. 31, R. 20. (1883, R. 363.)

Danvillier v. *Myers*, W. N. 1883, p. 58.

A Referee, who was taking the accounts in the action, required the production of certain books referred to by the plaintiff, and an order for production was taken out. The order was not complied with within the proper time, and the defendant then took a summons to dismiss the action. The plaintiff then produced some books with an affidavit intended to shew they were the books referred to. When the summons came on to be heard the Judge dismissed the action, considering the affidavit insufficient, and that the plaintiff was wilfully withholding information. The plaintiff appealed, and the motion stood with liberty to the plaintiff to file a further affidavit. The plaintiff did file an affidavit, full and sufficient in its terms: the motion then came on again.

The Court held that although an order for dismissal under this rule should not be made unless the Court was satisfied that the plaintiff was endeavouring to avoid giving fair discovery, yet in such a case it might properly be made, that in the present case, though the affidavit was sufficient in form, an inspection of the books satisfied their Lordships that fair discovery had not been made, and that the

plaintiff was keeping back documents which he ought to discover. The appeal was therefore dismissed, though this would have the effect of defeating the plaintiff's action also as to those parts of his demand to which the discovery sought did not relate, but it was held he must take the consequence of having combined the other parts of his demand with claims which he attempted to support by suppression of information which he was bound to give.

See *Danvillier* v. *Myers*, under Rule 278.

Keefe v. *Ward*, under Rule 420.

Rule 237.

Identical with Imp. O. 31, R. 21. (1883, R. 364.)

Joy v. *Hadley*, L. R. 22 Ch. D. 571, W. N. 1883, p. 1, 47 L. T. N. S. 615, 52 L. J. Ch. 471, 31 W. R. 519, 19 C. L. J. 208.

In an action for specific performance of an agreement by the defendant to sell two leasehold houses to the plaintiff, judgment for specific performance was given, and an order was afterwards made that the defendant should, within four days after service of the order, produce to the plaintiff "the abstract, and at the same time produce upon oath for inspection all deeds and writings in his possession or power" relating to the property.

Held, under the above rule, service of this order on the defendant's solicitors was sufficient service to found an application to attach the defendant for disobedience of the order.

Rule 246.

See Rule 498 in Appendix.

Rule 254.

Imp. O. 36, R. 1. (1883. R. 283.)

Goldsmith v. *Walton*, 9 O. P. R. 10.

Held, that under sec. 24 of the Patent Act, 1872, the venue should be laid in the county where the defendant resides.

Davis v. *Murray*, 9 O. P. R. 222.

The power given to a Judge of ordering the place of trial to be changed is not to be used arbitrarily.

A very strong case must be shewn to deprive the plaintiff of the clear right accorded him of selecting the place of trial.

Doctrine of preponderance of convenience considered.

Aitcheson v. *Mann*, 9 O. P. R. 253.

The defendant's right under sec. 24 of Patent Act of 1872 is not taken away by this rule.

Affirmed on appeal, 3 C. L. T. 164.

See *Canada Permanent Loan and Savings Co.* v. *Foley*, under Rule 20.

Schwob v. *McLaughlin*, under Rule 428.

Abell v. *Kirke*, 2 C. L. T. 557.

Action to recover the price of a steam threshing machine. Counter-claim for breach of warranty that the machine would do good work, and would not throw sparks so as to endanger adjacent buildings, &c. The defendant moved to change the place of trial from Toronto to Barrie, on the ground that the cause of action and of the counter-claim arose in the county of Simcoe, and shewed by affidavit a decided preponderance of convenience in favour of Barrie. The plaintiffs opposed the change, on the ground that, owing to the pendency of other similar suits, in which a large number of persons resident in the county of Simcoe were interested, and in which three

of the principal law firms of Barrie were engaged, a fair trial could not be had at Barrie before a jury; and they filed thirty-seven affidavits from residents of the county of Simcoe, averring that in the opinion of the deponents, there would not be a fair trial of the action by a jury at Barrie, but giving no reasons for such belief. The plaintiff having offered to pay the extra expense of the defendant's witnesses attending at Toronto, instead of Barrie,

The Master refused to change the place of trial and dismissed the motion, costs in the cause.

Abell v. *Leadley*, 2 C. L. T. 555.

The facts are similar to those in *Abell* v. *Kirk*, *supra*. The defendant, in March last, had obtained an order to change the place of trial from Toronto to Barrie. Upon a motion by the plaintiff, to retransfer the action to Toronto for trial, on the same grounds as in *Abell* v. *Kirk*, the Master made the order asked for, the plaintiff to pay the extra expense of defendant's witnesses attending at Toronto instead of at Barrie.

On appeal, the Master's order was reversed, without costs.

Robertson v. *Daganeau*, 3 C. L. T. 266.

A very great preponderance of convenience or expense must be shown in order to deprive the plaintiff of his right to name the place of trial wherever he may see fit.

Rule 255.

Cf. Imp. O. 36, R. 4, ib. June, 1876, R. 13. (1883, R. 436.)

Lumsden v. *Davis*, 17 C. L. J. 363.

Where a notice of trial is served upon the Toronto agents of a solicitor he is not allowed two days additional time, as he was under the former practice.

Canadian Securities Co. v. *Prentiss*, 2 C. L. T. 90.

Where a defendant counter-claims against the plaintiff and another, the cause is not at issue until either the counter-claim is struck out or the third party has pleaded, or incurred default.

The plaintiff immediately after delivery of such a counter-claim, joined issue and gave notice of trial.

Held irregular, and that they should be set aside.

Chapman et al v. *Smith*, 32 C. P. 555.

The fact that a suit has once been taken down to a hearing which had turned out to be ineffectual, is no excuse for the plaintiff not proceeding at a subsequent hearing term.

Semble, that the withdrawal of the entry of the pleadings for trial by consent of parties, under Rule 171, is not equivalent to a dismissal of the action.

Friendly v. *Carter*, 9 O. P. R. 41.

Where notice of trial has been given it cannot now be countermanded by either party.

Where in matters of practice there is a conflict between Common Law and Equity, as to matters not provided for by the Judicature Act, the practice which is most convenient is to be followed.

Sec. 17 sub-sec. 10, relates to matters of substantive law, not of mere practice.

Harper v. *Marx*, 3 C. L. T. 309.

The defendant delivered his defence on the 21st April, a Saturday, and the day after it was due. On the same day the plaintiff delivered a replication, containing an admission of a fact set up in the defence, and gave notice of trial for the sittings, which were fixed for the 1st May.

Held that the pleadings were closed. Held, also, that it was not necessary that ten clear days should elapse between the day of the close of the pleadings and the first day of the sittings, and that the notice was regular.

Bucke v. *Murray*, 19 C. L. J. 233.

An appeal from the order of the Local Master at Hamilton dismissing the bill for want of prosecution.

Held, that there is no inconsistency between G. O. Chy. 276, and secs. 12 and 52, and Rule 255, O. J. A.

The general rule still remains that an undertaking to speed the cause is not a sufficient answer to a motion to dismiss for want of prosecution, but it is still discretionary with the Judge to say whether, under all the circumstances, the bill should be dismissed.

The Court, in the exercise of its discretion, allowed the plaintiff to go down to immediate trial, where a delay of a year and a half appeared to have arisen from the residence out of the jurisdiction of the defendant, and from some hesitation as to proceeding with the case from the negligent manner in which the defendant was cross-examined under a commission executed out of the jurisdiction.

McLean v. *Thomson*, 19 C. L. J. 235.

"Either party" in this rule must be read "any party." That is the word used in the original of this part of the rule, namely, G. O. Chy. 161, and the later order G. O. Chy. 605. It is therefore open for one of two defendants to give notice of trial, and not necessarily either the plaintiff or plaintiffs, or the defendant or defendants.

See *Schneider* v. *Proctor*, under Rule 176.

Wallace v. *Cowan*, under Rule 259.

Rule 258.

Cf. Imp. O. 36, R. 8. (1883, R. 437.)

See *Leeson* v. *Leeson*, under sec. 45.

Rule 259.

Similar to Imp. O. 36, R. 9. (1883, R. 438.)

Wallace v. *Cowan*, 9 O. P. R. 144.

In an action for replevin, ten days notice of trial must be given, instead of eight days under the old practice.

The words "subject to these rules" in Rule 4 and Rules 255 and 259, introduce the new practice as to notice of trial in replevin.

See *Harper* v. *Marx*, under Rule 255.

Barker v. *Furze*, under Rule 266.

Rule 260.

Identical with O. 36, R. 10. (1883, R. 439.)

See *Friendly* v. *Carter*, under Rule 255.

Rule 261.

Imp. O. 36, R. 15. (1883, R. 452.)

See *Friendly* v. *Carter*, under Rule 255.

Rule 264.

Hopkins v. *Smith*, 9 O. P. R. 285.

Where the plaintiff fails to enter the cause, the defendant should apply to a Judge under this rule.

The practice of giving costs of the day is superseded by the O. J. A. No officer of the Court has now power to issue a rule for such costs. Where the case is not entered for trial by default of the plaintiff, application should be made to the Judge for an order for costs of postponement.

Parr v. *Lough*, 3 C. L. T. 312.

The sittings at London were fixed for Tuesday, 1st May. On Saturday, 28th April, the plaintiff's solicitor attended to enter the action for trial, but the Deputy Registrar refused to enter it on the ground that the intervening Sunday was excluded from the computation by rule 455, and that the plaintiff was therefore a day late.

Held, that this interpretation of the rules was right, and the defendants not consenting to the case being entered, an order to place it upon the list was refused.

See *Barker* v. *Furze*, under Rule 266.

Rule 266.

Barker v. *Furze*, 9 O. P. R. 83.

The words "according to the present practice of the Court of Chancery," are only intended to determine that the entry of the suit for trial is to be made with the proper officer of the Chancery Division, leaving the time of entry to be determined by the previous Rules, 259 and 269. Ten days' notice of trial is therefore sufficient in all cases coming within the terms of the rule.

Rymal v. *McEachren*, 3 C. L. T. 106.

In an action in the Chancery Division notice of trial for Hamilton Winter Assizes was given. Held, that as no sittings of the Chancery Division had at the time been appointed to be held at Hamilton, and in the ordinary course would only be appointed for a much later date, the plaintiff was not bound to wait, but had a right to a trial at the assizes.

Rule 268.

Identical with Imp. O. 36, R. 18. (1883, R. 455.)

See *Poyser* v. *Minors*, under Rule 330.

Rule 270.

Cf. Imp. O. 36, R. 20. (1883, R. 457.)

Wolfe v. *Hughes*, 17 C. L. J. 427.

When a cause was called on for hearing, neither the defendant nor any one on his behalf appeared, by reason of which a judgment was pronounced in favour of the plaintiff. Subsequently the defendant applied for an order to set aside the judgment. The Court being satisfied that the absence of the defendant and his counsel was purely accidental, granted the order asked for on payment of the full costs of the hearing, including all reasonable disbursements to counsel, &c., together with the costs of the application.

Rule 273.

Cf. Imp. O. 36, R. 22a. (1883, R. 463.)

Benscher v. *Coley*, 48 L. T. N. S. 533.

A Judge who tries an action with a jury has power to leave either party to move the Divisional Court for judgment upon the verdict of the jury, and the Divisional Court has jurisdiction to entertain the motion.

Rule 274.

Cf. Imp. O. 36, R. 3. (1883, R. 365.)

See *Trude* v. *Phœnix Ins. Co.*, under Rule 317.

Rule 278.

Similar to Imp. O. 36, R. 32. (1883, R. 474.)

Dauvillier v. *Myers*, L. R. 17 Ch. D. 346, 17 C. L. J. 323.

The official referees have no jurisdiction to make an order for the production of documents. This action had been referred to one of the official referees who during the trial had ordered the plaintiff to produce certain documents at the office of his solicitor for the defendant's inspection. The plaintiff refused to comply with this order. Per Jessel, M. R. : "The only jurisdiction an official referee has is to make such an order as a Judge of the High Court can make at a trial before him, and the order the official referee has made could not be made at the trial."

Rule 281.

Similar to Imp. O. 36, R. 34. (1883, R. 476.)

Cooke v. *The Newcastle &c., Water Co.*, L. R. 10 Q. B. D. 332, 19 C. L. J. 207.

An application to set aside the findings of a referee appointed under sec. 48 to try the issues of fact in an action, and report to the

Judge making the reference, must be made to a Divisonal Court and not to the Judge ordering the reference, as such findings are by sec. 49, equivalent to the verdict of a jury, and can only be set aside by the Court. This rule does not confer any such power on the Judge making the reference.

Quaere, whether the time for making the application runs from the time when the report is made to the Judge.

See *Cumming* v. *Low*, 2 O. R. 499.

Per OSLER, J.—"I think an appeal under section 48 and 49 (O. J. A.), might also be set down to be heard before a single Judge in Court."

See *Walker* v. *Bunkell*, under sec. 47.

Rule 282.

Virtually identical with Imp. O. 37, R. 1.

Ellis v. *Robbins*, 50 L. J. Ch. 512, 17 C. L. J. 342.

Held, in an action for the rectification of a settlement, where the facts were undisputed, and no statement of defence was put in, but where a married woman and some infants were parties defendant, the above rule did not justify the Court accepting evidence by affidavit on motion for judgment, so as to make a judgment in default of pleading, which would be binding on the married woman and infant defendants. But see Ont. Rule 322.

Rule 283.

Cf. Imp. O. 37, R. 2. (1883, R. 521.)

In re The Quartz Hill Consolidated Gold Mining Co., Ex parte Young, L. R. 21 Ch. D. 642, 51 L. J. Ch. 940, 31 W. R. 173, W. N. 1882, p. 133, 47 L. T. N. S. 644.

An affidavit when once filed for the purpose of being used on any proceeding, and when notice of the intention to use it has been given to the opposite side, cannot be withdrawn so as to avoid cross-examination upon it.

And this rule applies not only to a "party" strictly so called, but to any person who has upon any proceeding before the Court made an affidavit to be used.

Burrows v. *Leavens*, 1 C. L. T. 615.

The parties to a chamber motion are entitled to cross-examine each other pending the motion upon affidavits filed, without an order for that purpose.

Townend v. *Hunter*, 3 C. L. T. 310.

The Master has no discretion to refuse a commission to examine the deponent of an affidavit filed by the opposite party, the applicant being entitled to it as a matter of course.

Bank of Commerce v. *Brickers*, 17 C. L. J. 476.

Held, that Master rightly refused to allow cross-examination on the affidavits filed on a motion that was improperly made.

Rule 284.

Identical with Imp. O. 37, R. 3. (1883, R. 523.)

Hirst v. *Procter*, W. N. 1882, p. 12.

Motion for appointment of a receiver. An order was made for the appointment, the plaintiff to have his costs as costs in the cause: but as two of the affidavits filed by the defendant and one filed by the plaintiff, set out the contents of written documents, the costs of those affidavits were ordered to be borne by the defendant and plaintiff respectively.

Rule 285.

Identical with Imp. O. 37, R. 4. (1883, R. 487.)

Berdan v. *Greenwood*, 46 L. T. N. S. 524.

On an application for the issue of a commission, the Court must consider whether, having regard to all the circumstances of the case,

it is necessary for the purposes of justice, and in the interest of all the parties to the action, and not of the party applying only, that the commission should issue. In so considering the matter the possibility of the witness not being a credible one must be assumed, and regard must be had to the importance of cross-examination before the Court by which the case is to be tried, and if the Court is satisfied that the non-appearance of the witness in Court would place the other parties to the action at a disadvantage, the commission should not issue, even though the result may be to prevent the evidence from being given at all.

The decision of a Court of first instance on such a question is not such an exercise of judicial discretion that the Court of Appeal is fettered in reviewing it.

Raymond v. *Tapson*, L. R. 22 Ch. D. 430, 48 L. T. N. S. 403, 31 W. R. 394, W. N. 1882, p. 144, 19 C. L. J. 206.

This rule must not be read as restrictive, as though it had abolished (although it does not refer to it) the old practice as to subpœnaing witnesses without the leave of any Court. It plainly was intended to be an enabling clause to provide for the taking of evidence in cases where the ordinary practice did not provide for it, and it gave the Court power to take evidence, and the examiner to take evidence *de bene esse* when, for the moment, the cause was not at issue, and you wanted evidence for the hearing and in like cases.

In re Boyse—Crofton v. *Crofton*, 30 W. R. 812, W. N. 1882. p. 88, 46 L. T. N. S. 522.

In an administratiou action a claim was made by C. to a charge upon a document purporting to be a bill of exchange drawn by the intestate and indorsed to one G., who was a Frenchman residing in France. G., who himself had considerable interest in the document, refused to make any affidavit or to come to England to give evidence; but consented to give evidence in France before a commissson issued to the Tribunal of the Department of the Seine.

The evidence shewed that in such case the French Judge would determine the question to be asked, and that English counsel would not be allowed to be present.

G., was a very material witness, but held, that under the circumstances it was not necessary for the purposes of justice, within the meaning of the Rule, that such a commission should issue and that as no proper cross-examination would be insured, it would be prejudicial to the respondents, and ought not to be issued.

McFarlane v. *McFarlane*, 1 C. L. T. 613.

To a bill to set aside a conveyance as obtained by fraud, a defendant, wife of her co-defendant, denied all charges of fraud and disclaimed all interest in the subject matter of the suit, and asked for costs. She declined to be examined after answer upon the alleged fraud.

Held, that the questions were proper, and that the plaintiff was entitled to an order that she attend and be examined at her own expense.

Re Dunsford—Dunsford v. *Dunsford*, 9 O. P. R. 172.

The Master in Chambers has power to direct evidence to be taken at any stage of the proceedings in a cause.

Alexander v. *Diamond et al.*, 9 O. P. R. 274.

If the issues between co-defendants are material to the case of the plaintiff, or to the character of the relief which he seeks, he may examine a defendant upon them, though there is no issue between that defendant and himself.

Fisken v. *Chamberlain et al.*, 9 O. P. R. 283.

This rule applies to examinations for discovery before trial, and the examination of a defendant may be had under it before defence filed.

An examination may be obtained under it at any stage of the cause, and though no motion is pending.

Boyd, C.—Rule 285 is to all intents as to this Province a new provision; there is no antecedent legislation or practice which requires that any curtailed meaning should be given to it. On the contrary, it is to be regarded as a remedial provision, and should receive a fair,

large and liberal construction, such as will best ensure the attainment of the object of the rule.

Monaghan v. *Doblin*, 18 C. L. J. 180.

The examination of witnesses who have not made affidavits on a pending interlocutory motion, cannot be taken except under an order under this rule. G. O. Chy. 266 is superseded.

Hendrie v. *Neelon*, 19 C. L. J. 18.

An order for the examination of a witness before trial will not be made on the ground of discovery alone; some other special ground must be shewn.

Bingham v. *Henry*, 19 C. L. J. 223.

Motion to strike out interrogatories, on the ground, among others, that they were addressed to a professional witness, and that it was not proper that the evidence of professional men, or experts of any kind, should be taken on commission. Such witnesses should be produced at the trial.

The Master thought it would be better that the evidence should be taken in open Court, as it would be impracticable to frame cross-interrogatories to such general questions, requiring expert opinions on foreign law, but referred the motion to a Judge.

See *Johnston* v. *McIntosh*, *Turner* v. *Kyle*, under Rule 224.

Brigham v. *Bronson*, under Rule 222.

Rule 286, SQ.

Wilson v. *De Coulon*, L. R. 22 Ch. D. 841, 48 L. T. N. S. 514.

Where upon a commission being granted to examine witnesses a single commissioner is apponted, the writ should be drawn up in a form to authorize the commissioner to administer the oath to himself. *(e)*.

(e) See also the cases under Rule 285.

Rule 297.

Darling v. *Darling*, 18 C. L. J. 424.

The time for the return of a commission was extended till the 24th February. The witnesses were examined on that day, but the commission and evidence did not reach the Master's Office until some time afterwards.

Held, that the commissioners had the right to take evidence up to the 24th of February, and the commission having been executed and posted within the time there was no irregularity, because of the necessary delay occasioned by the transmission from a foreign country.

Held, also, that the attendance of all parties before the commissioners on the 24th of February had the effect of a waiver.

Rules 307-314.

Cf. Imp. O. 39. Also Imp. O. Dec., 1876, R. 5, and O. March, 1879, R. 6. (1883, O. 39.)

Joyce v. *Metropolitan Board of Works*, 44 L. T. N. S. 811, 17 C. L. J. 411.

Held, that it is the custom of the Court not to grant a new trial on the ground that the verdict is against the weight of evidence where the damages do not exceed £20, except under peculiar circumstances, such as the trial of a right, or where the personal character of a person might be injured.

Rule 307.

See Rules 527-531 in Appendix.

Virtually identical with Imp. O. Dec. 1876, R. 5. (1883, R. 551.)

Connecticut Mutual Life Insurance Co. v. *Moore*, L. R. 6 Ap. Cas. 644, 17 C. L. J. 415.

1. It is not in the power of a Court on the return of a rule *nisi* to enter a verdict in direct opposition to the finding of the jury upon a material issue.

2. R. S. O. ch. 38, sec. 18 sub-sec. 3, as to there being no appeal to the Court of Appeal in cases where a new trial is granted or refused upon matter of discretion only, applies only where an appeal is brought from a judgment of the Court below in which they have exercised a discretion.

3. The Privy Council have the right, if they think fit, to order a new trial on any ground, but that power will not be exercised merely where the verdict is not altogether satisfactory, but only where the evidence so strongly preponderates against it as to lead to the conclusion that the jury have either wilfully disregarded the evidence or failed to understand or appreciate it.

See *Cooke* v. *The Newcastle &c. Water Co.*, under Rule 281.

Cole v. *Campbell*, 19 C. L. J. 236.

This rule, which provides that when there has been a trial by jury any application for a new trial shall be to the Divisional Court, embraces every application of this kind, not excluding interpleader proceedings.

See *In re Galerno and Rochester*, and *Grant* v. *McAlpine*, under sec. 37.

Rule 308.

Imp. O. Dec., 1876, R. 6, *ib.* March, 1879, R. 6.

See Rules 525, 527-531 in Appendix.

Rule 309.

See Rule 256 in Appendix.

Rule 310.

See Rule 526 in Appendix.

Cf. Imp. O. 39, R. 2.

Rule 311.

Identical with Imp. O. 39, R. 3. (1883, R. 556.)

Cook v. *Grant*, 32 C. P. 511.

Some evidence was improperly admitted at the trial, but a new trial was refused as no substantial wrong or injustice was occasioned.

Rule 315.

Identical with Imp. O. 40, R. 1. (1883, R. 559.)

See *Ellis* v. *Robbins*, under Rule 282.

Rules 316-317.

Identical with Imp. O. 1876, R, 7. (1883, R. 561-562.)

See Rules 510, 527-531 in Appendix.

Rule 317.

Cf. Imp. 1876, R. 7. (1883, R. 562.)

Trude v. *Phœnix Ins. Co.*, 18 C. L. J. 54.

This rule and Rule 274 restrict the jurisdiction of the Divisional Court after judgment to cases in which the findings of facts have been undisputed, and it is only sought to modify or set aside the conclusion drawn by the Judges therefrom; but if the appeal is on the whole case, as to both facts and law, it must be to the Court of Appeal.

See *In re Galerno and Rochester*, and *Grant* v. *McAlpine*, under sec. 37.

Rule 318.

Cf. Imp. O. 40 R. 7. (1883, R. 565.)

The Consolidated Bank v. *Wallbridge*, 18 C. L. J. 205.

The point in question was whether an alleged partition in the pleadings mentioned was binding upon the parties thereto. A decree was made referring it to the Master to inquire as to this.

Motion for judgment upon the report allowed.

Rule 321.

Identical with Imp. O. 40, R. 10. (1883, R. 568.)

Cf. G. O. Chy. 272.

Williams v. *Mercier*, L. R. 9 Q. B. D. 337, 47 L. T. N. S. 140, 30 W. R. 720, W. N. 1882, p. 86, 19 C. L. J. 110.

Although by Rule 2 the old practice as to interpleader is continued, yet there are no negative words to exclude the new powers under this Rule 321, of the Court of Appeal in carrying out that practice.

On the trial of an interpleader issue, the jury found that certain properties belonged to B., and that the execution creditor C. was not entitled to seize them. On the application for a new trial the Court of Appeal held the property belonged to A., the execution debtor, and that C. was entitled to seize them; and the Court also held that they had power to order judgment in the interpleader issue to be entered for the execution creditor without directing a new trial.

See *Pryor* v. *The City Offices Co. (Limited)*, under sec. 77.

In re Fitzwater, Fitzwater v. *Waterhouse*, 52 L. J. Ch. 83, W. N. 1882, p. 176.

In this case the Court gave judgment on motion, against an infant, who had delivered no defence, the plaintiff verifying his statement of claim by affidavits. The Court did not think it necessary to direct a notice of trial to be given.

Rosenberger et al v. *Grand Trunk R. W. Co.*, 32 C. P. 349.

Motion for new trial, which was refused.

Held, that under this rule, the whole question of the defendants' liability was open on the pleadings and evidence.

Stewart et al v. *Rounds*, 7 O. A. R. 515.

This rule ought not to be acted on where there is any reason to suppose that on a second trial further evidence may be adduced, or that the facts may be more fully brought out.

Rule 322,

Similar to Imp. O. 40, R. 11. (1883, R 376.)

Pascoe v. *Richards*, 50 L. J. Ch. 337, 44 L. T. N. S. 87.

A defendant who has not counter claimed is entitled to move upon the admissions in the reply and previous pleadings, to have the action dismissed on the ground that the plaintiff is not entitled to any relief against him. Under this rule, the "relief claimed" is not confined to the old technical meaning of relief claimed by bill in Chancery, but the word "relief" is to be used in its larger and more ordinary sense, and will accordingly include relief from the liability incurred by being a defendant to an action, the "relief claimed," being that asked by the motion under the rule.

Brown v. *Pearson*, L. R. 21 Ch. D. 716, 30 W. R. 436, W. N. 1882, p. 45, 46 L. T. N. S. 411.

In an action for the specific performance of an agreement for the purchase of lands, the plaintiff, after reply, moved for judgment upon admissions of fact in the statement of defence.

Held, that he was not too late, and that he was entitled to the order.

Lumsden v. *Winter*, L. R. 8 Q. B. D. 650, 51 L. J. Q. B. 413, 30 W. R. 751, W. N. 1882, p. 68, 18 C. L. J. 261.

Where plaintiff makes default in delivery of reply to the defendant's statement of defence and counter-claim, the latter may obtain an order for final judgment in respect of both claim and counter-claim on the admissions in the pleadings.

Graves v. *Terry*, L. R. 9 Q. B. D. 170, 51 L. J. Q. B. 464, 30 W. R. 748, W. N. 1882, p. 100.

Where the plaintiff failed to deliver a reply to the defendant's statement of defence within the three weeks prescribed by Rule 173, but subsequently delivered a reply before the defendant gave notice of motion to enter final judgment, the Court refused to order final judgment to be entered for the defendant.

Barnard v. *Wieland*, 30 W. R. 947, W. N. 1882, p. 103.

The statement of claim in a foreclosure action set out the purport and effect of several mortgage deeds, and alleged that they were duly executed. The statement of defence craved leave to refer to the deeds when produced, and, save as by such deeds, when produced, should appear, did not admit that the same were of or to the purport or effect in the statement of claim mentioned. Upon motion for judgment on admissions in the pleadings, the deeds being produced in Court :

Held, that there was a sufficient admission of the execution of the deeds, and as it appeared, on their being produced in Court, that they were of the dates and made between the parties mentioned in the statement of claim, the plaintiffs were entitled to judgment.

Wallis v. *Jackson*, L. R. 23 Ch. D. 204, 52 L. J. Ch. 384, 31 W. R. 519, W. N. 1883, p. 40.

The endorsement of a writ is not a "pleading" within the terms of this rule, so as to entitle the plaintiff to move for judgment, without the consent of the defendant, on admissions in the pleadings, although the defendant admits the plaintiffs claim and has given notice that he does not require the delivery of a statement of claim.

Showell & Co. v *Bouron*, 52 L. J. Q. B. 284, 48 L. T. N. S, 613, 31 W. R. 550. W. N. 1883, p. 50.

In an action for goods sold and delivered, by writ specially endorsed, leave being given to defend, the defendant did not plead any defence, but set up a counter-claim for damages in respect of goods sold to the defendant which were alleged to be not according to sample.

Held, on motion for judgment under this rule, on the admissions in the pleadings, that the plaintiffs were entitled to judgment, but upon the terms that if the defendant brought the debt into Court, execution should be stayed until after the trial of the counter-claim.

Mersey Steamship Co. v. *Shuttleworth & Co.*, L. R. 10 Q. B. D. 468, 31 W. R. 609, 48 L. T. N. S. 389, W. N. 1883, p. 68.

In an action for freight the defendant admitted the plaintiffs' claim, but counter-claimed for a larger sum for damages for a breach of agreement.

The plaintiff applied to sign judgment on the admission in the pleadings, and relied on *Showell* v. *Bouron*, 31 W. R. 550, (*supra.*)

Williams, J.—I am clearly of opinion that the plaintiff is not entitled to the order he asks for. It is contended that the plaintiff is entitled to judgment on his claim, notwithstanding this counter-claim. I do not think that view is correct. If it were adopted, the effect would be to annul the provisions of O. 19, R. 3 (our Rule 127). There might be special circumstances which would entitle the plaintiff to sign judgment, but there are none such here.

Mathew, J.—I am of the same opinion. O. 40, R. 11, (our Rule 322,) was intended to apply to cases which arise more often in the Chancery Division, where final redress can be given on one part of the claim, leaving the rest of the claim to be fought out in the action.

Affirmed on appeal, W. N. 1883, p. 94, 48 L. T. N. S. 625.

If in the opinion of the Court the counter-claim is unsubstantial or frivolous, the plaintiff is entitled to have judgment on his claim, and to have the amount paid into Court.

Showell v. *Bouron* is only good authority as a decision in a case of this kind.

Williams v. *Preston*, 51 L. J. Ch. 927, 30 W. R. 555, W. N. 1882, p. 76, 47 L. T. N. S. 265.

Where a solicitor without the knowledge or authority of his client, put in a fraudulent defence making admissions on which judgment was given against the client :

Held, that the Court had jurisdiction to re-hear the case, allowing the client to withdraw the fraudulent defence and put in a fresh one.

See *Wilmot* v. *Young*, under Rule 211.

Ellis v. *Robbins*, under Rule 282.

Trust and Loan Co. v. *Hill*, 9 O. P. R. 8

In an action for the recovery of land the plaintiff may obtain an order to sign final judgment under this rule, upon an admission of the defendant in his examination

Henebery v. *Turner*, 2 O. R. 284.

Action on a judgment obtained in Iowa. Defendant pleaded denying the recovery of the judgment. Upon a motion for judgment upon the pleadings verified by affidavit, and the production of an exemplification of the judgment:

Held, that as the defendant had put the judgment distinctly in issue, and no attempt had been made to shew that his defence was false, judgment could not be ordered. Much more is required of a plaintiff under this rule than merely handing in a document on which he relies, without any proof to connect defendant with it or to support its genuineness.

Crozier v. *Alkenbach*, 19 C. L. J. 79.

The defendant was a mortgagor, and after the execution of the mortgage in question several transactions in regard to the land took place, tne defendant alleging that the plaintiff had notice of them. The defendant submitted that the land should be sold and the proceeds applied in payment of the mortgage, and that he should be only held liable for the balance, if any; or if he should be held liable to pay the full amount, that he was entitled to an assignment of the mortgage.

Held, that a motion for judgment was proper, and that the defendant, as a mortgagor merely, was not entitled to an assignment of the mortgage and mortgage debt.

Rule 323.

Byrne v. *Box*, 2 C. L. T. 47.

The defendant, a Division Court bailiff, seized certain goods of the plaintiff under two writs. H. & Co. claimed the books and book

debts under an assignment of the latter from the plaintiff. The defendant applied for an interpleader order, or that H. & Co. should be made parties.

Held, that inasmuch as the defendant was protected by the Division Courts Act in his duty, and it appeared from the facts sworn to that the result of the action would be a non-suit or a verdict for defendant, the whole proceedings should be set aside with costs under R. S. O. ch. 73, sec. 8, and this rule.

Held, also, that there was no jurisdiction to provide for H. & Co.'s costs.

Rule 324.

Francis v. *Francis*, 9 O. P. R. 209.

In motions for judgment under this rule special circumstances necessitating a hearing of the cause out of the ordinary course must be shewn, according to the former practice of the Court of Chancery under Chy. G. O. 271; *Davidson* v. *McKillop*, 4 Gr. 146.

Hunter v *Wilcockson*. 9 O. P. R. 305.

Motion for judgment.

Action for rectification of a deed and declaration that plaintiff was entitled to a right of way, and for an injunction, and writ so endorsed.

The defendant appeared after the proper time, but did not serve notice. Notice of motion had been posted up as in case of non-appearance.

Held, that plaintiff could not obtain judgment for the relief endorsed on the writ, but must file a statement of claim.

Lucas v. *Fraser*, 9 O. P. R. 319.

The facts that defendant is indebted to plaintiff, and that latter desires speedy judgment, are not special circumstances warranting an order for judgment.

A person of same name as the defendant served by mistake with the writ was held entitled to his costs of opposing a motion for judgment.

Morrison v. *Taylor*, 46 U. C. R. 492.

A Judge sitting in Chambers has no jurisdiction to order judgment to be signed under Rule 324 (a), but a motion for judgment thereunder must be made to the Court.

Leave to serve notice, &c., may be given in Chambers.

Kinlock v. *Morton*, 9 O. P. R. 38.

Where it appears that the defendant has no defence, and has made or is intending to make a fraudulent disposition of his property, or is so dealing with it as to embarrass the plaintiff in reaching it by execution, the Court will on motion, upon a proper case being made, order judgment and immediate execution.

Rule 326.

Identical with Imp. O. 41, R. 2. (1883, R. 571.)

Lyon v. *Tweddell*, 50 L. J. Ch. 571, 44 L. T. N. S. 785, 17 C. L. J. 367.

Where articles of partnership contain no provision for dissolution of the partnership, and a dissolution is decreed by the Court on equitable grounds, the dissolution will date from the date of the judgment and not from the date of issuing the writ.

Rule 330.

Cf. Imp. O. 41, R. 6.

Poyser v. *Minors*, L. R. 7 Q. B. D. 329, 50 L. J. Q. B. 555, 29 W. R. 773, 45 L. T. N. S. 33, 17 C. L. J. 390.

There can now be really no such thing as a non-suit, unless perhaps under Rule 268.

Macdonald v. *Worthington et al.*, 7 O. A. R. 531, at p. 563.

A non-suit is now equivalent to a dismissal on the merits, and if the non-suit be reversed the defendant is not to have, as of right, a new trial for the purpose of adducing evidence on his behalf.

Rule 338.

Identical with Imp. O. Dec., 1879, R. 5. (1883, R. 319.)

Lawrie v. *Lees*, L. R. 7 App. Cas. 34, 18 C. L. J. 203.

Lord Penzance.—"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. I think that power is inherent in every Court. * * Moreover, having regard to the orders made under the Judicature Act, I should myself have thought that it would very well have come under those orders. I recommend your Lordships not to make any variation of this order, but to affirm it as it stands, without prejudice to any such application to the Court below."

Hendrie v. *Beattie*, 2 C. L. T. 102.

On a motion to vary the minutes, nothing can be done at variance with the order as granted, but additions or variations may be made so as to carry out the intention of the Court in pronouncing it.

Rules 339-361.

Cf. Imp. O. 42. (1883, O. 42.)

See *Salt* v. *Cooper*, under Sec. 16, Sub-sec 8.

Rule 339.

Virtually identical with Imp. O. 42, R. 1. (1883, R. 581.)

Snow v. *Bolton*, 50 L. J. Ch. 743, 44 L. T. N. S. 571.

Orders had been served on the plaintiff, who was an officer on half pay, for payment of certain costs to the defendants. An order was made for payment of the costs within four days, and that in default a writ of sequestration might issue against the pension, and it was held, that it was not necessary to issue writs of *fieri facias* in the first place, because the defendant had sworn that the plaintiff had no goods, and this was not denied.

See *Re Slade, Slade* v. *Hulme*, under Rule 370.

London and Canadian Loan Co. v. *Merritt*, 32 C. P. 375.

Process of sequestration must not be extended beyond the cases to which it is clearly applicable, and held that a writ of sequestration could not issue on an ordinary common law judgment for a debt recovered before the passing of the Judicature Act, it not being an order for the payment of a specific sum, and no day being named for payment in it.

Held, also, that under secs. 12, 52 and 91 of the O. J. A., service of notice of motion founded on such writ, on trustees resident out of the jurisdiction, was sufficient, though a judgment founded upon it would not avail the plaintiffs in the Courts of the Province where the trustees were resident.

Rule 340.

Cf. Imp. O. 42, R. 2. (1883, R. 582.)

Stanger Leathes v. *Stanger Leathes*, W. N. 1882, p. 71.

The plaintiff had been ordered to pay a certain sum of money into Court. An application to enforce this order was enlarged upon the plaintiff undertaking to deposit in the joint names of the solicitors

of the plaintiff and defendants at a bank the certificate of certain shares in a colliery company and in a mining company. The deposit was duly made. There was also a sum of consols standing in Court, to the dividends of which the plaintiff was entitled for his life. He was also possessed of a freehold house.

A writ of attachment had afterwards been granted, but had not been served, as the plaintiff's residence was not known.

An order was now made on the application of one of the defendants (notwithstanding the objection of the plaintiff that the order for payment should be enforced by writ of sequestration, or by attachment, and not by the appointment of a receiver and by injunction), appointing a receiver of the dividends of the sums of consols, and of the rents and profits of the freehold house and of the dividends of the deposited shares; that the tenant should attorn; that the companies should respectively pay the dividends to the receiver; that the shares should be sold; with liberty to apply as to the application of the moneys received; and restraining the plaintiff from disposing of, or dealing with the several properties.

Rule 341.

Identical with Imp. O. 42, R. 3. (1883, R. 583.)

Wood v. *Wheater*, L. R. 22 Ch. D. 281, W. N. 1882, p. 165, 52 L. J. Ch. 144, 31 W. R. 117, 47 L. T. N. S. 440, 19 C. L. J. 135.

Chitty, J.—A foreclosure action, although held in *Heath* v. *Pugh*, L. R. 6 Q. B. D. 345; 7 Ap. Cas. 235, to be an action for the recovery of land, is not an action for the recovery of the possession of land within the meaning of this rule. The effect of an order for foreclosure absolute is merely to bar the equity of redemption * * Possibly, in future, it might be advantageous in every foreclosure action to add a claim for possession.

Rule 343.

Identical with Imp. O. 42, R. 5. (1883, R. 585.)

See *Richards* v. *Cullerne*, under sec. 77.

Rule 346.

Identical with Imp. O. 42, R. 8. (1883, R. 588.)

Ex parte Young, re Young, 45 L. T. N. S. 493, 30 W. R. 330, 18 C. L. J. 119.

After the dissolution of a firm, duly advertised, W. issued a writ against the firm in the firm name, on 18th December, 1880. On 21st December, the writ was personally served on one of the continuing partners at the firm's place of business. Y., one of the partners, who had retired shortly before the dissolution, was not served. No appearance was entered for any of the partners, and on 29th December, W. signed judgment for default. In June 1881, W. took out a debtor's summons under the Bankruptcy Act 1869, founded on the said judgment and served Y. Y. applied to the Court to dismiss the summons, and his application was refused.

Held, by the Court of Appeal (diss. Brett, L. J.,) that the summons should have been dismissed.

Jackson v. *Litchfield*, L. R. 8 Q. B. D. 474, 30 W. R. 531, W. N. 1882, p. 56, 46 L. T. N. S. 518, 18 C. L. J. 235.

In this action the writ was issued against a partnership firm in the name of the firm, and was served in accordance with Rule 40, on one of the partners. All the partners entered an appearance except one, against whom the plaintiff moved to sign judgment separately for want of appearance.

The Divisional Court refused to allow this, and the Court of Appeal now upheld their decision.

Brett, L. J. Judgment must follow or accord with the writ, and under the Judicature Act the writ may be against the firm. Therefore the judgment must be against the firm, and the only mode of putting such judgment into execution is by proceeding under this rule. That rule provides that execution may issue "against any person who has been served as a partner with a writ of summons and has failed to appear." It is not necessary now to determine whether such service must be personal, though I still incline to think it must be * * In my opinion the judgment in this action must follow the writ and be against the firm, and then execution may issue against the firm, and against every individual member of it, either without or after leave given to do so."

Clark v. *Cullen*, L. R. 9 Q. B. D. 355, 47 L. T. N. S. 307.

Where a plaintiff has recovered judgment against a partnership firm in the name of the firm, he may bring his action on the judgment against the individual members of the firm without having recourse to the procedure provided by this rule, in respect to the issue of execution.

Jackson v. *Litchfield*, 8 Q. B. D, 474, distinguished. In that case the person against whom judgment was sought to be entered, was admittedly a member of the firm, but in this case there is no such admission by the defendants, who are entitled to defend on the ground that they are not partners.

Rule 352.

Cf. Imp. O. 42 R. 15. (1883, R. 595.)

See Rule 499 in Appendix.

Rule 356.

Identical with Imp. O. 42 R. 19. (1883, R. 601.)

McDougall v. *McDougall*, 3 C. L. T. 42.

Execution had been issued in 1872 and the writs allowed to expire.

Held, on motion upon notice, that the plaintiff was entitled to new writs for the amount of the judgment and interest, costs and interest, together with the amount of fees due on former writs and sheriff's fees. The defendant was ordered to pay the costs of the motion.

Rules 364-365.

Cf. Imp. O. 44 RR. 1, 2. (1883, O. 44.)

Thomas v. *Palin*, L. R. 21 Ch. D. 360, 30 W. R. 716, W. N. 1882, p. 81, 47 L. T. N. S. 207.

On an application to commit for non-compliance with an order, the objection was taken that there was no endorsement on the order of the notification required by the G. O. Chy., of liability to attachment for neglect to obey.

Jessel, M. R., said that although under the old practice such endorsement was necessary, yet as under the Judicature Act an attachment cannot be issued without notice as it formerly could, there is now no need of the endorsement. Every person who is served with an order knows that it will be enforced somehow. No endorsement was required by the Common Law practice, and as this is the better practice it should prevail.

Rule 364.

Virtually identical with Imp. O. 44, R. 1. (1883, R. 620.)

See *Hayter* v. *Beall*, under Rule 366.

Rule 365.

Identical with Imp. O. 44, R. 2. (1883, R. 621.)

Mann v. *Perry*, 50 L. J. Ch. 251, 44 L. T. N. S. 248.

Under ordinary circumstances a notice of motion for the issue of a writ of attachment against a party should be served personally, and not merely on the solicitor on the record of the party. *Browning* v. *Sabin*, 5 Ch. D. 511; *Re a Solicitor*, 14 Ch. D. 152, not followed.

Fowler v. *Ashford*, 45 L. T. N. S. 46.

An application on notice under this rule, to attach the sheriff for not returning a writ of *fi. fa.* should be for an order *nisi*.

Eynde v. *Gould*, L. R. 9 Q. B. D. 335, 31 W. R. 49, W. N. 1882, p. 74, 18 C. L. J. 326.

A motion for an attachment can only be on notice ; and the Court cannot grant a rule *nisi* dispensing with notice, even where it is urged that service of such rule would operate as notice, and that serious mischief would result from delay.

Rule 366.

Cf. Imp. O. 45, R. 1.

Hayter v. *Beall*, 44 L. T. N. S. 131.

A judgment debtor was ordered to attend for examination on 7th December ; he did not attend on that day and the examination was adjourned to the 21st December. Before this day upon a judgment debtor's summons he was ordered to pay the debt by instalments. He did not attend for examination on that day.

Held, that the having obtained an order that the debt should be paid by instalments was not inconsistent with examining the debtor as to debts owing to him, and that an attachment ought to issue unless the debtor attended to be examined within fourteen days.

Beattie v. *Barton*, 2 C. L. T. 104.

The examination of a judgment debtor is not only intended to be an examination, but to be a cross-examination, and that of the severest kind.

Myers v. *Kendrick*, 19 C. L. J. 60.

The plaintiff was non-suited, and the defendant recovered judgment for the costs of defence.

Held, that the plaintiff was not a judgment debtor within the meaning of this rule.

Held also, that under rule 369 an original appointment, signed by the Judge or officer, must be served on the person to be examined.

Rule 369.

See *Myers* v. *Kendrick*, under Rule 366.

Rule 370.

Cf. Imp. O. 45, R. 2. (1883, R. 622.)

Walker v. *Rooke*, 50 L. J. Q. B. 470, 17 C. L. J. 341.

A garnishee order will not be granted on partners in the name of their firm. In this case a garnishee order was sought attaching a debt due "from Messrs. Marshall and Snelgrove to the defendant." The Master in Chambers refused to grant the order, and the Judge at Chambers affirmed his decision. The plaintiff appealed to the Divisional Court, counsel for the plaintiff contending that it was the intention of the Judicature Act to include "firms," under the words "any other person," and to allow service of garnishee orders on the firms in the same way as service of writs. The Court, however, held that the decision of the Master was right and must be affirmed.

Re Slade—Slade v. *Hulme*, 30 W. R. 28, 45 L. T. N.S. 276, 17 C. L. J. 477.

The sequestrators, under a writ issued by the P. & D. Division, applied on motion in the Chancery Division, that a certain annuity, ordered in an administration action in that division to be paid to him, whose property they were directed to sequester, should be paid to them.

Held, that they entitled to the order, and that it was not necessary for them to commence fresh proceedings to obtain such order.

Also, where he, against whose property the writ of sequestration was issued, had left England, and substituted service of the writ of sequestration, and of the order *nisi* for the payment of the annuity to the sequestrators, had been made upon a firm of solicitors who had acted for him both in the divorce and Chancery proceedings, and who instructed counsel to appear for him, and shew cause against the order *nisi* being made absolute :

Held, substituted service had been properly made, although the time allowed rendered communication between the solicitors and the party impossible.

Whittaker v. *Whittaker*, 30 W. R. 431, 47 L. T. N. S. 131.

The Court has power to attach a debt in order to compel obedience to an order for the payment of costs in a divorce suit.

Miller v. *Huddlestone*, L. R. 22 Ch. D. 233, 52 L. J. Ch. 208, 31 W. R. 138, 47 L. T. N. S. 570.

The balance due from his bankers to a party to an action was ordered to be paid into Court on motion in the action, under a sequestration issued on the judgment obtained in the action against such party.

Webb v. *Stenton*, 48 L. T. N. S. 268.

A judgment debtor was entitled for life under a will to an annual income, payable half-yearly by the trustees, and had assigned his interest by mortgage to secure a sum of money borrowed by him. The trustees had advanced to the debtor more than the payment due at the next half yearly period. No receiver had been appointed.

Held, that the debtor's interest under the will was not attachable under this rule.

Affirmed on appeal, W. N. 1883, 108.

Nott v. *Sands*, W. N. 1883, p. 74.

An action had been dismissed with costs, which had been taxed. The defendant's solicitors, without having made any application for

the payment of the costs, obtained a garnishee order *nisi.* On the application to make the garnishee order absolute.

Held, improper to issue a garnishee order without first applying for the payment of the costs; application refused, without costs.

His Lordship during the argument expressed his disapproval of the decision in *Cremetti* v. *Cram*, (4 Q. B. D. 225) which is to the effect that an order merely for the payment of costs cannot be enforced by a garnishee order.

Chapman v. *Biggs*, W. N. 1883, p. 92.

A female defendant was entitled under the trusts of a will to the income of a certain share of residuary estate for her separate use, and money in the hands of the trustees forming part of such income was attached. The trust was subject to a clause restraining anticipation.

Held, that the moneys could not be attached, as that would be in contravention of the restraint on anticipation.

Affirmed in appeal 48 L. T. N. S. 704.

Leaming v. *Woon*, 7 A. R. 42.

Equitable debts can now be garnished and attaching clauses are not now confined to a debt existing at the time but payable *in futuro*, but also extend to income from time to time payable.

Lloyd v. *Wallace*, 9 O. P. R. 335.

An order was made directing trustees to pay over to the plaintiff, a judgment creditor, the interest from time to time accruing on a sum, held by them in trust to pay the income to the defendant, the judgment debtor.

Jackson v. *Cassidy*, 19 C. L. J. 226.

A negotiable promissory note not yet due cannot be attached under this rule.

See ante Park v. [illegible] p 41

Rule 371.

Identical with Imp. O. 45, R. 3. (1883, R. 623.)

Chatterton v. *Watney*, L. R. 17 Ch. D. 259, 17 C. L. J. 322.

A garnishee order under Ont. O. 41, binds the debts attached, but does not amount to a transfer of them with securities. M. mortgaged leasholds to W., and then to B. A., a judgment creditor of B., obtained a garnishee order against M. After this W. sold the property under a power of sale, and an action was brought to distribute the surplus proceeds.

Held, by Court of Appeal, (affirming Bacon, V. C., 16 Ch. D. 378), that the judgment creditor had no claim against the surplus proceeds of sale, for a garnishee order had not the effect of transferring the debt due from the garnishee with the benefit of the securities for it. Per Cotton, L. J.: "There is nothing in the terms of the general order to affect any security for the debt, it only takes away the right of the judgment debtor to receive the money and gives the judgment creditor a right to receive it. It has not the effect of transferring the security, nor does it give the person who obtained the garnishee order any right to the security or any claim against the land comprised in it."

Howell v. *Metropolitan R. W. Co.*, L. R. 19 Ch. D. 508, W. N. 1881, p. 134, 30 W. R. 100, 45 L. T. N. S. 707, 17 C. L. J. 479, 18 C. L. J. 217.

In August, 1878, the defendant company served the plaintiff with a notice to treat, and the purchase money was assessed by a jury and verdict given for £3,650. Before a good title was shewn, but after verdict, garnishee orders *nisi* were obtained and served by judgment creditors of the plaintiff. The plaintiff afterwards issued a writ for specific performance against the company and obtained judgment with costs, and in pursuance of this the company paid the money into Court. Other garnishee orders *nisi* were served after good title shewn, but before judgment.

It was contended that the purchase money in Court was in the nature of an equitable debt from a purchaser to a vendor, and as such

was capable of being attached, but it was held that the purchase money did not constitute a debt "due or accruing," within the meaning of this rule, its payment being conditional only, that is upon the execution of a conveyance by the vendor. The rule meant that a debt had been actually perfected. The fund could therefore not be attached.

Rule 372.

Identical with Imp. O. 45. R. 4. (1883, R. 624.)

See *Chatterton* v. *Watney*. under Rule 371.

Rule 374.

Identical with Imp. O. 45, R. 6. (1883, R. 626.)

Roberts v. *Death*, 51 L. J. Q. B. 15, W. N. 1881, p. 142, 30 W. R. 76, 46 L. T. N. S. 246, 18 C. L. J. 101.

Where in garnishee proceedings the money is trust money, or there is reasonable suspicion that it is trust money, the *cestui que trust* has a right under equitable procedure to come forward, provided he does so in time, and object to an order absolute being made; and he is not to be damaged by such an order merely because the garnishee will not act.

Rule 375.

Identical with Imp. O. 45, R. 7. (1883, R. 627.)

See *Roberts* v. *Death*, under Rule 374.

Rule 376.

Identical with Imp. O. 45, R. 8. (1883, R. 628.)

See Rule 500 in Appendix.

See *Howell* v. *Metropolitan R. W. Co.*

Chatterton v. *Watney*, under Rule 371.

Rules 383-391.

Cf. Imp. O. 50. (1883, O. 17.)

Curtis v. *Sheffield*, W. N. 1882, p. 33, 18 C. L. J. 343.

Where a great lapse of time has occured, the right to revive is not absolute, but is subject to the discretion of the Court.

Rule 383.

Identical with Imp. O. 50, R. 1. (1883, R. 178.)

Warder v. *Saunders*, 47 L. T. N. S. 475.

When a plaintiff in an action is adjudicated a bankrupt, and the trustee appointed elects not to go on with the action, it is not competent for the plaintiff to proceed with it.

See *Miller* v. *Huddlestone*, under Rule 385.

Rule 384.

Identical with Imp. O. 50, R. 3. (1883, R. 180.)

Dyer v. *Painter*, W. N. 1881, p. 105, 17 C. L. J. 345.

Upon the death of the plaintiff in an administration action, his widow and executrix, is under the above rule entitled to carry on and prosecute the action and the proceedings therein in like manner as the deceased plaintiff might have done, if he had not died, by obtaining an order of course. See Rule 385.

Rule 385.

Virtually identical with Imp. O. 50, R. 4. (1883, R. 181.)

Ranson v. *Patten*, 44 L. T. N. S. 688, 17 C. L. J. 394.

Pending an appeal, and after it had been set down for hearing, the defendant died. His executrix obtained an order in the Court of

Chancery, under the analogous Imp. O. 50, R. 4, giving leave to continue proceedings.

Held, that the order was properly obtained in the Court below, and that it was not necessary to apply to the Court of Appeal.

Miller v. *Huddlestone*, W. N. 1881, p. 171.

When upon the death of a sole plaintiff, whose cause of action does not survive, (e. g. in an administration action), an order is made giving liberty to another person to prosecute the action as plaintiff, it is still the practice that, in the subsequent proceeding, the title of the new or revived action shall be added to the title of the original action.

Jameson v. *Marshall*, 46 L. T. N. S. 480.

Upon the death of an accounting party in an action the Court may make an order *ex parte*, that the action be continued between the continuing parties and the executor of the will of the deceased party, notwithstanding that such executor is resident in and has proved the will in Ireland, (out of the jurisdiction).

For the purposes of making the order the Court will require an affidavit showing the circumstances.

Andrew v. *Aitken*, L. R. 21 Ch. D. 175, 51 L. J. Ch. 784, 30 W. R. 701, 46 L. T. N. S. 689, W. N. 1882, p. 88.

A defendant who had put in a counter-claim died. His executors were held entitled to obtain an order *ex parte* (by the Imp. O. the order is granted *ex parte* and not on *praecipe*) to carry on the counter-claim.

Burstall v. *Fearon*, 31 W. R. 581, W. N. 1883, p. 99.

A person who has been served with notice of judgment and has obtained leave to attend proceedings may, upon the death of the plaintiff, apply for leave to prosecute the action, and such application should be made *ex parte*.

Oshawa Cabinet Co. v. *Note*, 18 C. L. J. 60.

Where a cause of action has devolved upon a third party against whom the defendant has a defence on the merits, the proper course is for that party to take out an order upon *praecipe* to continue the action as new plaintiff under this rule, and it is not proper for the defendant to proceed as directed in Rule 164.

The former plaintiffs having admitted the truth of the defendant's plea as to transfer, were held entitled to their costs under Rule 157.

Mitchell v. *Barrett*, 3 C. L. T. 265.

A subsequent encumbrancer redeemed the plaintiff in an action for foreclosure. He then took out an order of revivor.

Held, not improperly issued and that the costs should be allowed.

Rule 392.

Similar to Imp. O. 51, R. 2. (1883, R. 649.)

Ladd v. *Pulleston*, 31 W. R. 539.

P. brought an action against L. in the Queen's Bench Division. L. brought this action for an account against P., and, by way of counter-claim in the Queen's Bench Division action, stated the relief he sought in this action. P. asked that this action might be transferred to the Queen's Bench Division and there stayed.

Held, that this being an action properly triable in the Chancery Division, the Court would not transfer it.

Vermilyea v. *Guthrie*, 9 O. P. R. 267.

An action to restrain the infringement of a patent.

Held, that where a plaintiff brings an action in the Chancery Division which is proper to be brought there, he will not be allowed to transfer, either on the ground that he wishes it tried by a jury, or that a transfer would expedite the trial. Also held, that an action for the infringement of a patent should not ordinarily be tried by a jury.

Hilliard v. *Thurston*, 18 C. L. J. 180.

The Master in Chambers has no jurisdiction to transfer an action from one Division of the High Court of Justice to another. Such power can only be exercised, if at all, by a Judge.

See *Schwob* v. *McLaughlin*, under Rule 428.

Rule 393.

Patterson v. *Murphy*, 9 O. P. R. 306.

An action was transferred to the Common Pleas Division from the Chancery Division. The plaintiff had no notice of the transfer and signed judgment in the Chancery Division.

An order was made retransferring the case and allowing the judgment to stand.

Rule 395.

Cf. Imp. O. 51, R. 4. (1883, R. 656.)

Adamson and another v. *Tuff, Moore, & Roberts.—Tuff, Moore, & Roberts* v. *Adamson and another*, 44 L. T. N. S. 420.

In the former of these actions plaintiffs who were shipowners, claimed against the shippers and consignees for detention at the port of loading and for freight of cattle shipped; in the latter the plaintiffs claimed a very much larger amount for the loss of the cattle by the shipowners' negligence. The writs were issued on the same day, but the statement of claim was delivered in the former action before it was delivered in the other. An order had been made staying proceedings in the latter action, and granting the plaintiffs in that action liberty to set up their claim by counter-claim in the former action.

Held, that although there was jurisdiction to make such an order in cross actions, yet it should only be done when the points at issue are the same, and that it was unjust in the circumstances of these cases.

Taylor v. *Bradford*, 19 C. L. J. 19.

A motion to have this action consolidated with an action brought by the defendant in the Chancery Division against the plaintiffs, in which they had set up, by way of counter-claim, the same cause of action substantially as was set forth in their statement of claim in this action, or to have the action stayed till the other should be determined.

Held, that though the case was not technically one within the terms of this rule, yet there was an inherent right in the Court to prevent an undue use of its process; and an order was made staying proceedings.

Lambier v. *Lambier*, 19 C. L. J. 158.

Local Masters are the proper officers to deal with motions to consolidate conflicting applications for administration or partition under G. O. Chy. 638-640.

Rule 398.

Identical with Imp. O. 52, R. 3. (1883, R. 659.)

See *Mitchell* v. *The Darley Main Colliery Co.*, under sec. 32

Rule 399.

Identical *(mutatis mutandis)* with Imp. O. 52, R. 4. (1883, R. 662.)

Hick v. *Lockwood*, W. N. 1883, p. 48.

This was an action for dissolution of a partnership between the plaintiff and the defendant, and for a receiver. The plaintiff had not made any motion or served notice of any motion for a receiver. On the *ex parte* application of the defendant, who had appeared to the writ, a receiver was appointed. The Registrar declined to draw up the order, on the ground that under this rule the application could not be made *ex parte* by the defendant.

His Lordship was of opinion that this rule did not apply to applications by the defendant under sec. 17, sub-sec. 8, and accordingly directed the order to be drawn up.

Rule 405.

Identical with Imp. O. 53, R. 2. (1883, R. 697.)

See *Dyke* v. *Connell*, under sec. 48.

Rule 406.

Virtually identical with Imp. O. 53, R. 3. (1883, R. 698.)

See *Dyke* v. *Connell*, under sec. 48.

Burritt v. *Murdock*, under Rule 131.

Rule 407.

Identical with Imp. O. 53, R. 4. (1883, R. 699.)

Dawson v. *Beeson*, L. R. 22 Ch. D. 504, 48 L. T. N. S. 407, 31 W. R. 537, W. N. 1882, p. 144, 19 C. L. J. 207.

Where a party applies for special leave to serve short notice of motion, he must distinctly state to the Court that the notice applied for is short; and the same fact must distinctly appear on the face of the notice served on the other party. But in a case where short notice of a motion had been irregularly applied for and served, but the party served had not been injured by the irregularity, the Court exercised its discretion under Rule 473, disregarded the irregularity and heard the motion on the merits.

Rule 414.

Cf. Imp. O. 54 R. 6. (1883, R. 757.)

Friendly v. *Carter*, 1 C. L. T. 614.

Leave to serve short notice of motion on appeal from the Master in Chambers should be obtained from a Judge, and not from the officer appealed from, thus following the former practice in Chancery.

Lowson v. *Canada Farmers' Ins. Co.*, 9 O. P. R. 185.

This rule applies to appeals from a Judge in Chambers to the Divisional Court. Appeals from the Master in Chambers are governed by Rule 427.

Where an appeal from the Master in Chambers should have been set down on the 29th December, but owing to an announcement by the Registrar that cases set down for that day would not be heard until the 9th of January following, the case was not set down till the 9th of January.

Held, that leave must be obtained from the Master in Chambers before the appeal could be heard.

Rand v. *Rolph*, 2 C. L. T. 151.

In the Chancery Division, appeals from the Master in Chambers must be set down for hearing according to the practice of the Court of Chancery, which is not altered in that respect by the Judicature Act.

Hewson v. *Macdonald*, 32 C. P. 407.

Appeal from order of a Judge in Chambers having been brought on at the first sittings of the Court, held not too late, though more than eight days had elapsed, and the time had not been extended.

McNeill v. *McGregor*, 3 C. L. T. 309.

The time for appealing from an order in Chambers runs from the date of the issue thereof and not from the day on which the decision is pronounced.

Rule 416.

Breckenridge v. *Ontario Loan and Deposit Co.*, 19 C. L. J., 140, 3 C. L. T. 212.

Where the parties cannot agree upon the minutes of a judgment before a Local Registrar, a direction should be obtained on motion to a Judge, to refer the minutes for settlement to one of the Judgment Clerks.

Rule 418.

Cf. Imp. O. 35 R. 2.

See Rule 509 in Appendix.

Rule 419.

Cf. Imp. O. 35 R. 3.

See Rules 508, 516, and 517 in Appendix.

Rule 420.

Cf. Imp. O. 54 R. 2.

Keefe v. *Ward*, 9 O. P. R. 220.

An application for committal for non-production.

Held, that although the powers of the Referee in Chambers are vested in the Master in Chambers, yet matters relating to the liberty of the subject having been excepted from the jurisdiction of the Crown and Pleas under the former practice, are still beyond the jurisdiction of such Master.

Rule 422.

Cf. Imp. O. 1876, R. 19.

Re Allan—Pocock v. *Allan*, 9 O. P. R. 277.

The jurisdiction of Local Masters in administration suits, under G. O. Chy. 638, is not interfered with by this rule. The practice in such matters is preserved intact by Rule 3.

In such matters there is power to direct service to be made out of the jurisdiction.

Brown v. *McKenzie*, 18 C. L. J. 203.

When County Court Judges are exercising the delegated authority conferred by this rule, the language of Rule 425 applies, and proceedings must be by summons.

But in ordinary County Court proceedings Rule 490 applies, and applications must be by notice and not by summons.

Clark v. *Auger*, 3 C. L. T. 217.

A Local Master has no power to direct substitutional service on a defendant who is out of the jurisdiction, and service so made is nugatory.

See *Coulson* v. *Spiers*, under Rule 2.

Rule 424.

Re Cameron, Infants, 9 O. P. R. 77.

An order was made in this matter by the Referee in Chambers before the passing of the O. J. A. directing certain ascertained shares then in Court to be paid out to certain infants as they respectively came of age.

Held, that the shares might be paid out without any further order, notwithstanding this rule.

Re Devitt, 9 O. P. R. 110.

The Master in Chambers, or Official Referee sitting for him, should continue to exercise the jurisdiction formerly vested in the Referee in Chancery Chambers in cases of sales of infants' estates, &c., &c., subject to confirmation of so much of the order as relates to distribution and payment out of Court.

Rule 425.

Cf. Imp. O. 35 R. 5.

See Brown v. *McKenzie*, under Rule 422.

Rule 426.

Cf. Imp. O. 35 R. 6 O. 54 R. 3.

Hughes v. *Rees*, 9 O. P. R. 86.

Matters coming within the jurisdiction of any officer of the Court should be disposed of by him in the usual way, and the parties may then appeal from such decision.

Or the officer may certify that the case is a proper one to be heard before a Judge in Chambers.

Rule 427.

Cf. Imp. O. 35 RR. 7, 8, 14 O. 54 R. 4-6.

See *Lawson* v. *Canada Farmers' Ins. Co.*, under Rule 414.

Wigle v. *Harris*, under Rule 462.

Hughes v. *Field*, 1 C. L. T. 702.

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.

The notice of motion to rescind the order was served the day after the order was served on the applicant's solicitors, but this was more than four days from its date.

Dayer v. *Robertson*, 9 O. P. R. 78.

The eight days for appealing counts from the giving of the decision, not from the entry of the order, as formerly.

Where the plaintiff's solicitors, owing to a misapprehension on this point, allowed the eight days to elapse, further time was granted on payment of costs.

Rule 462 gives power to a Judge to enlarge the time appointed by the rules, even though the application for the enlargement is not made until after the expiration of the time appointed.

Rule 428.

See Rules 511, 512-515 in Appendix.

Identical with Imp. O. 55, R. 1. (1883, R. 976.)

Ellis v. *Desilva*, 50 L. J. Q. B. 328.

Action in which defendant counter-claimed : matters indifference referred by an order which provided that costs were to follow the event. Held, that word "event" must be read distributively, as if it were "events," and that the arbitrator should have found the issues specifically instead of merely awarding that there was a balance due to the defendant.

Rudow v. *The Great Britain Mutual Life Association Society*, 50 L. J. Ch. 504, 44 L. T. N. S. 688, 17 C. L. J. 342.

The proper practice now is, not, according to the old practice, to direct a plaintiff to pay the costs of a necessary but formal defendant and to have them over again against the principal defendant, but to give such a defendant his costs by a direct order.

Sparrow v. *Hill*, L. R. 7 Q. B. D. 362,29 W. R. 490, 17 C. L. J. 395 ; and S. C. in appeal, 44 L. T. N. S. 917, 29 W. R. 705, 17 C. L. J. 412.

The plaintiff sued in respect of three heads of claim, as to two of which he failed, and as to the third recovered a small sum under the award of an arbitrator.

Held, by the Court of Appeal, reversing the Court below, that the plaintiff should be allowed the general costs of the action, and that those items only should be disallowed which applied exclusively to the parts of the claim upon which he failed to succeed, and that the defendants should have the costs incurred in defending themselves on those points on which they succeeded.

Held also, that where a general principle of taxation is challenged, it is not necessary under Rules 446 and 449 to specifically state the items objected to in the "objections," but that this need only be done where particular items are objected to.

Ex parte Hospital of St. Katharine, L. R. 17 Ch. D. 378, 17 C. L. J. 323.

Held, following *Ex parte Mercers' Co.*, L. R. 19 Ch. D. 481, that the Court has now, under the Judicature Act and the above rule, a discretion as to directing payment of costs where a provision as to costs is omitted in any public or private Act.

Baines v. *Bromley*, 50 L. J. Q. B. 465, 29 W. R. 706, 17 C. L. J. 340.

In an action for a liquidated money claim, after trial with jury, judgment was entered for the plaintiff on his claim, but for the defendants for a balance on a counter-claim for goods sold, the amount of which exceeded that of the claim. The judgment directed that the "plaintiff should recover against the defendants his costs of suit, and that the defendants recover the costs of the counter-claim." The Master, on taxation, gave the defendants the costs of the cause. The plaintiff appealed, and Lopes, J., having referred the matter to the Court, the Exchequer Division dismissed the summons to review the taxation. The Court of Appeal now held that the plaintiff was entitled to the general costs of the cause. Per Bramwell, L. J.—"No doubt the judgment of the Exchequer Division would be right if the old rule, that the party in whose favour the balance is on the whole, is entitled to the costs of the cause, which still exists, applied to this case; but that is not the judgment which was here given." Per Cotten, L. J.—"The sole question is whether, under this order and judgment, the costs have been rightly taxed."

Willmott v. *Barber*, W. N. 1881, p. 107, 45 L. T. N. S. 229, 17 C. L. J. 345.

Claim for specific performance of sale of land. Counter-claim charging acts of trespass and waste. Both claim and counter-claim having failed, Judge dismissed claim without costs, and also dismissed the counter-claim, but ordered that the defendant should pay the costs thereof, and that if the costs of the claim should exceed half

the whole costs of the claim and counter-claim the defendant should pay the plaintiff the excess. Objection made that this order was beyond the jurisdiction of the Judge.

Held otherwise. Per Jessel, M. R.—No doubt a Judge could not impose costs beyond the costs of the suit by way of penalty. But the order was only wrong in form. What the Judge meant to do was to order the defendant to pay half the whole costs of the claim and counter-claim, and he had full power to do that.

In re Foster v. *Great Western R. W. Co.*, 30 W. R. 398.

The true construction of this rule is, that it adopts the same jurisdiction with the same limitations as existed in the Court of Chancery. The jurisdiction of the Chancery Division has not been enlarged, nor a larger jurisdiction than the Court of Chancery ever had given to the Common Law Division, but the meaning is, that both Divisions should have the same power as the Court of Chancery had before, but no discretion as to costs beyond their jurisdiction.

Abbott v. *Andrews*, L. R. 8 Q. B. D. 648, 30 W. R. 779, W. N. 1832, p. 62, 18 C. L. J. 261.

When in an action tried by a jury the plaintiff succeeds upon same issues but is non-suited upon others, and no order is made as to costs, the defendant is entitled, under the above rule, to the costs of the issues upon which the plaintiff is non-suited.

When a judgment is ambiguous as to costs, the proper course is, not to appeal from the Master's order refusing to tax the costs of one of the parties, but to apply to the Judge who tried the case to correct any ambiguity in the judgment.

Vicary v. *The Great Northern R. W. Co.*, L. R. 9 Q. B. D. 168, W. N. 1882, p. 110, 18 C. L. J. 325.

The discretion of the Court as to costs extends to the costs to be incurred in any future proceeding.

Turner v. *Hancock*, L. R. 20 Ch. D. 303, 46 L. T. N. S. 750, 30 W. R. 480, 18 C. L. J. 342.

A trustee's costs cannot be said to be within the discretion of the Court, and are excepted out of the above rule and sec. 32.

Re Hoskins, L. R. 6 Ch. D. 281, disapproved.

Quære, as to costs of trustees upon proceedings taken under the Trustee Relief Act.

Bowker v. *Kesteven*, 47 L. T. N. S. 545.

The plaintiffs claimed £49 12 s. The defendants admitted the claim and counter-claimed for £75. The judgment was for the plaintiffs on the claim and for the defendants on the counter-claim for £40; the plaintiffs to have the costs of their claim and the defendants to have the costs of their counter-claim.

Held, that the plaintiffs were entitled to the costs of the cause up to the time of the delivery of the statement of defence, and that the defendants were entitled to such costs after the delivery of the statement of defence.

Lowe v. *Holme*. L. R. 10 Q. B. D. 286, 52 L. J. Q. B. 270, 31 W. R. 400, W. N. 1883, p. 36.

The plaintiff claimed a balance due under a contract. The defendants alleged that the work was so badly done that they had been compelled to it over again, and counter-claimed.

On trial of the issues by an official referee, a small balance was found in favour of the defendants, and the defendants in proving their counter claim established a defence to the claim of the plaintiff.

Held, on motion for judgment, that judgment ought to be entered for the defendants with costs, as they were the really successful parties.

And that even if technically the plaintiff was entitled to the costs, the Court could dispose of them in its discretion under this rule.

See *Farrow* v. *Austin*, under Sec. 32.

Harrison v. *Cornwall Mineral R. W. Co.*, under Sec. 39,

Hornby v. *Cardwell*, under Rule 108.

In re Brown—Ward v. *Morse*, under Rule 127.

Nichols v. *Evans*, under Rule 215.

In re Cooper—Cooper v. *Vesey*, under sec. 32.

Real and Personal Advance Co. v. *McCarthy*, under Rule 170.

In re Milton, Bradford, &c., under Sec. 32.

In Re Peck and the Corporation of the Town of Galt, 46 U. C. R. 211.

Rule absolute to quash a by-law: costs not asked for in the rule, though they were at the bar: Held, that as costs are in the discretion of the Court under the Judicature Act, this was no objection.

Clarke v. *Creighton*, 2 C. L. T. 46.

Where a rule was taken out on behalf of two defendants, C. and G. to set aside a verdict against them, and enter a non-suit for one or both, or enter a verdict for the defendant G., and it was made absolute as to the latter party.

Held, that the plaintiff was entitled to tax against the defendant C. a proportion of the costs of the term proceedings.

The defendant G. was a married woman.

Held, that the Master should inquire whether any binding contract of retainer had been entered into by her with her attorney and if not that the costs taxed to her other than disbursements should be disallowed.

Dalby v. *Bell*, 2 C. L. T. 44.

Where costs have been incurred in a proceeding consented to by both parties under a common mistake as to the proper tribunal to dispose of the matter, neither party should be ordered to pay them.

Re Woodhall—Garbutt v. *Hewson*, 2 O. R. 456.

Where it appeared that administration proceedings had been instituted without any shew of reason, or proper foundation for the benefit of the estate, and that they had not, in their results, conduced to that benefit, the plaintiff was ordered to pay all costs.

The question of residuary legatees' costs is an appealable matter.

Whitehead v. *Tait*, 3 C. L. T. 122.

An action for damages, and plaintiff succeeded in part, recovering a verdict of $50: he had sustained other damage, but the jury held the defendant not liable therefor. There was no question raised which might not have been tried in the Division Court.

Held, that Division Court costs only could be allowed.

Schwob v. *McLaughlin*, 3 C. L. T. 172.

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

Held, reversing the ruling of the taxing officer, that the plaintiff was entitled to the costs of the day.

Church v. *Fuller*, 19 C L. J. 96.

The Court has jurisdiction to make a defendant pay costs in a suit for specific performance, though the bill be dismissed.

The ordering such payment of costs is in the discretion of the Judge, and the Court ought not to interfere.

Stetham v. *Ullyott*, 3. C. L. T. 261.

Action for injunction to restrain trespass. Defendant paid $100 into Court. The Court was of opinion that it was not a case for an injunction.

Held, a proper case for the exercise of discretion as to costs, and that the plaintiff should get his costs up to the time of payment in,

if he elected to retain the $100 in full of damages; no further costs to either party. If plaintiff desired a reference further directions and costs should be reserved.

Arkell v. *Geiger*, 19 C. L. J. 234.

Where execution issued out of the High Court of Justice, and the sheriff obtained an interpleader order under which an issue between the parties was directed to be tried in the County Court under 44 Vict. ch. 70.

Held, that the sheriff was entitled to his costs under the interpleader order, to be taxed on the scale of the Court out of which the process on which he seized the goods issued.

Semble, that the parties to the issue should also have their costs prior to the order directing the issue on the Superior Court scale. *Beaty* v. *Bryce*, 9 O. P. R. 320, explained.

See *In re Woodhall*, under Sec. 32.
Ren v. *Anthony*, under Rule 36.
Beaty v. *Bryce* under Rule 2.
Lucas v. *Fraser* under Rule 324.
Mitchell v. *Barrett* under Rule 385.
Oshawa Cabinet Co. v. *Note* under Rule 385.

Rule 429.

Identical with R. Sup. C., February 1876, R. 7.
(1883, R. 981.)

Hamburger v. *Poetting*, 30 W. R. 769, 47 L. T. N. S. 249.

A plaintiff who resides abroad will not be called upon to give security for costs if he has substantial property within the jurisdiction, whether that property be real or personal.

Bell v. *Landon*, 9 O. P. R. 100.

The usual praecipe order for security for costs had been taken out and complied with.

An application by the defendants for further security, when it was found before the case was concluded that the costs largely exceeded the security given, was refused on two grounds :

1. The defendants might have foreseen that the costs would exceed $400.

2. The case was governed by the old practice.

Sutherland v. *McDonald*, 9 O. P. R. 178.

Where a plaintiff resident without the jurisdiction wilfully stated in his bill that he resided within it, security for costs was ordered.

Semble, that security will not be ordered, even where the plaintiff is a foreigner who has come within the jurisdiction temporarily, and only for the purpose of maintaining the suit.

Leroux v. *Lanthier*, 2 C. L. T. 48.

The plaintiff paid to a Local Registrar a sum of money for security for costs, under an order allowing him to do so instead of giving a bond. The defendant refused to accept the security, and the plaintiff signed judgment for default of a defence.

Held, that the Accountant is the only proper person to receive payment of money into Court, and that security had not, technically speaking, been given, and the judgment should be set aside for irregularity in having been signed before security was given.

Napier v. *Hughes*, 2 C. L. T. 103.

The plaintiff who resided in Great Britain, having obtained a verdict for the price of goods sold to the defendants, which were in the defendants' possession, applied, pending an appeal by the defendants, for payment out of Court of the amount paid in as security for the costs of the action.

Held, that it was a proper case for payment out ; for if the defendants succeeded on the appeal, the goods in their possession would be ample security for the costs of the action.

National Ins. Co. v. *Egleson*, 9 O. P. R. 202.

Money paid into Court in lieu of giving the usual bond for security for costs will not be paid out to the party paying it in, in whose favor a decree has been made, pending an appeal to the Court of Appeal.

See *Caswell* v. *Murray*, 18 C. L. J. 76.

As to what is to be considered "same cause of action."

The Grand Trunk R. W. Co. v. *The Ontario and Quebec R. W. Co.*, 3 C. L. T. 173.

The appellants' solicitors executed an appeal bond as sureties, and on motion the bond was disallowed, though the solicitors were solvent.

Rule 431.

See *D'Hormusgee & Co.* v. *Grey*, under Rule 89.

Lawless v. *Radford*, 17 C. L. J. 388.

Action for replevin. The writ did not shew the residence of the plaintiff, who lived out of the jurisdiction. Held, that although the affidavit upon which the writ was granted shewed that the plaintiff resided out of the jurisdiction, yet as the writ did not shew this, the motion for security was regular, and the contention that an order for security might have been obtained on *præcipe*, was overruled.

Bank of Nova Scotia v. *La Roche*, 19 C. L. J. 252.

An action upon a promissory note, commenced by writ of summons. By the endorsement it appeared that the plaintiffs resided at Winnipeg.

After appearance and on the 1st of June, 1883, the plaintiffs obtained a summons from the Local Judge at Belleville, returnable on

the 6th June, to show cause why final judgment should not be signed against the defendants under Rule 80. On the 5th June the defendants obtained a *praecipe* order for security for costs. On the 6th June the plaintiff obtained a summons to set aside the order for security for costs. On the 8th June the plaintiffs moved absolute their summons to set aside the order for security for costs, and for leave to sign judgment; to which no cause was shown except that the proceedings were stayed by the order for security. The Local Judge set aside the order for security and gave leave to the plaintiffs to sign final judgment.

Upon appeal, Cameron, J., held, that the order for security was of as much binding force as if it had been made on an application to a Judge or Master, and the moment it was served it suspended all proceedings. That the defendants have no defence on the merits is not a ground upon which to move to set it aside.

Held also, that the application for security for costs was made at the proper time.

McCready v. *Hennessy*, 19 C. L. J. 210.

An action for goods sold and delivered. Security for costs was ordered on the ground that the plaintiff's residence was out of the jurisdiction. Although the writ of summons did not state the plaintiff's residence, it was admitted on the return of the motion, that he lived in Montreal.

The costs of the defendant's application for security were ordered to be costs to the defendant in the cause, the Master holding that it is necessary to endorse the plaintiff's residence on the writ when he is out of the jurisdiction. If the plaintiff's residence had been so endorsed, an order would have issued on praecipe, of which the plaintiff would have had no costs, so neither can he have any costs of this motion, as might be the case if costs of this application were made costs in the cause generally.

See *Re Fletcher and Noble*, under sec. 77.

Rule 435.

Cf. Imp. O. Aug. 12, 1875, "Costs" R. 18. (1883, R. 100.)

Dominion, &c., Co. v. *Stinson*, 9 O. P. R. 177.

The direction in the order for the issue of a foreign commission that 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.

Rule 438.

Cf. Imp. O. Aug. 12, 1875, "Costs" R. 23. (1883, N. 1002.)

See *Re Solicitors*, under Rule 443.

Rule 439.

See *In re Bleeker and Henderson*, under Rule 443.

Foster v. *Stokes*, 3 C. L. T. 268.

Execution had been issued for costs, which were then paid and the writs withdrawn: a revision was then had.

An order was made in Chambers for the repayment of the amount revised off.

Rule 442.

Identical with R. Sup. Ct. August, 1875, "Costs" R. 26. (1883, R. 1002, Sub-R. 29,)

Warner v. *Mosses*, W. N. 1881, p. 135, 45 L. T. N. S. 359, 17 C. L. J. 479.

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

The Court held that the general rule laid down could not be sustained, and that as the copies were necessary to enable the case to be properly argued, they must be allowed.

Rule 443.

Re Solicitors, 9 O. P. R. 90.

An order to tax a solicitor's bill may issue in the long form in use before the O. J. A., instead of in the form under this rule, as the Master is mentioned in this rule, while the taxing officer is the proper officer to tax bills of costs under Rule 438 of the Act.

In re McClive et al., Solicitors, 9 O. P. R. 213.

The taxing officer has no power to allow interest on a solicitor's bill of costs, unless the matter has been specially referred to him by the order for taxation.

Interest may be allowed if a demand in writing is made for it.

In Re Bleeker & Henderson, 9 O, P. R. 182.

The taxation of a solicitor and client bill by a Local Master is not subject to revision. Any review of the Master's conclusions must be obtained by way of appeal to a Judge.

Re Clarke, 9 O. P. R. 197.

An order for the taxation of a solicitor's bill at the instance of the client, should refer the bill simply for taxation. A clause directing payment of the amount of the taxed bill was struck out.

In Re Solicitor, 2 C. L. T. 106.

A solicitor's bill rendered to his client must be taxed in the County where the work charged for was done, pursuant to the Attorneys Act sec. 33, which has not been affected by any subsequent enactment.

Re Elliott, 2 C. L. T. 104.

Where an order has been made referring a solicitor's bill for taxation and directing the solicitor to refund, what, if anything, has been overpaid him, it is proper to obtain a subsequent express order for payment of the balance found due to the client by the Master's report.

Rule 447.

Identical with R. Sup. Ct. August, 1875, R. 30.
(1883. R. 1002, Sub-R. 39.)

See *Sparrow* v. *Hill*, under Rule 428.

Charlton v. *Charlton*, W. N. 1882, p. 183.

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 made under the order reviewed, ought not to apply by motion to review the taxing officer's certificate, but ought to apply to have the order for taxation set aside.

Morrison v. *Taylor*, 19 C. L. J. 212.

An execution and the judgment under which it issued, were set aside on the ground of irregularity in obtaining the judgment.

Held, that the plaintiff was not entitled to have the sheriff's bill against him taxed under R. S. O. ch. 65., sec. 48, as the setting aside of the execution was not a "settlement by payment, levy or otherwise," within the meaning of the Act, or under sec. 47, as the plaintiff was not a person liable on any execution.

Held, however, that a sheriff, as an officer of the Court, claiming fees by virtue of the process, is so far within its jurisdiction, that his bill may be taxed under this rule, but an appeal as to certain items was dismissed, because notice in writing of the items disputed was not given under rule 449.

Held, also that this case came within the provisions of R. S. O. ch. 66, sec. 45, and that therefore the sheriff was entitled to poundage.

Rule 449.

Identical with Imp. O. Aug. 12, 1875 R. 32. (1883, R. 1002, Sub-R. 41.)

Crowe v. *Steeper*, 2 C. L. T. 88.

The defendant's costs of suit were taxed by the local officer at Chatham. A motion was made to the presiding Judge in Chambers for a revision of taxation.

Held, that the rule applies only to appeals from the taxing officers at Toronto, and that there is therefore no direct appeal to a Judge in Chambers from the taxation of a local officer, the old practice in such cases being continued in all respects, except as to length of notice of revision, by rule 439, (a).

See *Morrison* v. *Taylor*, under Rule 447.

Sparrow v. *Hill*, under Rule 428.

Rule 451.

Cf. Imp. O. 56, R. 1. (1883, R. 1003.)

Blain v. *Blain et al.*, 9 O. P. R. 269.

Motion to set aside the service of a writ as irregular "on the grounds disclosed in the affidavits filed," objected that the irregularities should have been specified in the notice of motion.

Held, sufficient if it is stated in the notice of motion that the irregularities were set out in the affidavit filed, and the affidavit distinctly stated them.

O'Reilly v. *Moore*, 1 C. L. T, 565.

A notice of motion to set aside proceedings for irregularity, must specify on its face the alleged irregularities.

Rule 455.

Cf. Imp. O. 57, R 2. (1883, R. 962.

See *Parr* v. *Lough*, under Rule 264.

Cornish v. *Manning*, under Rule 9.

Rule 456.

Cf. Imp. R. No. 174 of Hil. Term. 1853.

See *Rumohr* v. *Marx*, under Rule 522.

Rule 457.

Identical with Imp. O. 57, R. 3. 1883, R. 963.)

Morris v. *Richards* 45 L. T. N. S. 210, 17 C. L. J. 455.

Action on a promissory note held to be barred, where the limit of time under the Statute of Limitations expired on a Sunday, and the writ was not issued till the following Monday. This rule relates to times limited by the practice of the Court for taking proceedings, and was certainly never intended to affect the Statute of Limitations.

McLean v. *Pinkerton*, 7 A. R. 490.

This rule does not apply to the case of registration of a chattel mortgage.

Rule 461.

Cf. Imp. O. 57 R. 5. (1883, R. 965.)

Sievewright v. *Leys*, 9 O. P. R. 200.

The time for appealing from the report of a Master runs during Christmas vacation.

The defendant did not appeal within the proper time, owing to the mistake as to the effect of the vacation.

Leave to appeal was given on payment of costs, and on payment into Court of the amount found due by the report.

Rule 462.

Cf. Imp. O. 57, R. 6. (1883, R. 967.)

See Rule 514 in Appendix.

Identical with Imp. O. 57 R. 6.

Gilder v. *Morrison* 30 W. R. 815.

By a Master's order, an action was to be dismissed, unless notice of trial were delivered by a certain day. Through a mistake of the solicitor's clerk, notice of trial was not delivered within the required time.

A Judge at Chambers refused in the exercise of his discretion, to extend the time fixed by the Master's order.

On appeal the Court declined to interfere.

See *Sproat* v. *Pecket*, under Rule 44.

Metcalfe v. *The British Tea Association*, under Rule 203.

Eaton v. *Storer*, under Rule 173.

In re The Padstow Total Loss and Collision Assurance Association, under sec. 38.

Musgrave v. *Stevens*, under Rule 10.

Hastings v. *Hurley*, under Rule 44.

Doyer v. *Robertson*, under Rule 427.

Lowson v. *Canada Farmers Ins. Co.*, under Rule 414.

Wigle v. *Harris*, 9 O. P. R. 276.

An order allowing further time to file a statement of claim should not be made *ex parte*.

Any person affected by an order of a Local Master may appeal to a Judge in Chambers, and it is not necessary to apply to the Local Master to rescind his order.

Rules 464-470.

Robertson v. *Coulton*, 9 O. P. R. 16.

Cf. Imp. O. April, 1880, RR. 12-18. (1883, O. 37 RR. 7-15.)

Where an affidavit was entituled in the High Court of Justice, but not in the proper division: Held, that the objection was clearly amendable.

Rule 468.

Cf. Imp. O. April, 1880, R. 16. (1883, R, 532.)

Boyd v. *McNutt*, 19 C. L. J. 211.

Objection being taken to an affidavit upon which a motion was based, on the ground that a word had been erased and another interlined, and that such erasure and interlineation had not been initlialed by the commissioner before whom the affidavit was sworn: it was held that the affidavit could not be read, but the application was enlarged for two days, with leave to the applicant to withdraw the affidavit from the files, and to re-file it when re-sworn.

Rule 471.

Cf. Rule Sup. Ct., December 1876, R. 8.

Clarke, (by next friend,) v. *The Midland R. W. Co.*, 44 L. T. N. S. 131.

In a motion to set aside a judgment refusing to nonsuit misdirection of the Judge is what is really complained of. The Court of Appeal could not give judgment without setting aside the verdict, and they have no power to do that. In cases where the objection is that the verdict is a wrong one, owing to the misdirection of the Judge, the appellant must go to the Divisional Court.

See *In re Galerno and Rochester*, *Grant* v. *McAlpine*, and *McTiernan* v. *Frazer*, under Sec. 37.

Rule 473.

Identical with Imp. O. 59, R. 1. (1883, R. 1037.)

See *Dawson* v. *Beeson*, under Rule 407.

Rule 474.

Similar to R. Sup. C., April 1880, R. 44.

Winkley v. *Wink'ey*, 44 L. T. N. S. 572, 29 W. R. 628.

An order was made for sale of certain property referred to as "firstly &c., described in the said statement of claim." It was afterwards discovered that the property was there misdescribed.

Leave to amend the statement was given and the order was post-dated as of a day subsequent to the amendment.

Clack v. *Wood* L. R. 9 Q. B. D. 276, 30 W. R. 931, 47 L. T. N. S. 144.

A verdict on certain issues had been given for the plaintiff, but it was entered as a general verdict. On motion for judgment the Judge decided for the defendant.

Held that the Court of Appeal had power to amend the record by entering the verdict for the plaintiff on the issues only.

See *Brandreth* v. *Shears*, under Rule 116.

Munster v. *Railton & Co.*, under Rule 57.

Rule 484.

Imp. O. 62.

See *Regina* v. *O'Rourke*, under Sec. 52.

Rule 490.

See *Brown* v. *McKenzie*, under Rule 422.

Rule 493.

Cf. W. N. 1875, Pt. II., p. 469.

Laidlaw v. *Ashbaugh*, 9. O. P. R. 7.

A writ in ejectment was served on 15th August, 1881, and an appearance was entered after the 22nd of the same month.

Held, that the plaintiff need not file a statement of claim, and that the cause was at issue immediately after entry of appearance.

See *Burnett* v. *Union Mutual Fire Ins. Co.*, under Rule 141.

Mackelcan v. *Becket*, under Rule 31.

Rule 494.

Cf. W. N. 1875, Pt. II., p. 468.

Sawyer v. *Short*, 9 O. P. R. 85.

On the 22nd August, 1881, a replication had not been filed, but the suit was in such condition that it could then have been filed.

Held, that under this rule, notice of trial might be given without filing a replication.

Rule 512.

See *Whitehead* v. *Tait*, under Rule 428.

Rule 522.

Rumohr v. *Marx*, 19 C. L. J. 10, 18 C. L. J. 444, 3 C. L. T. 31.

Where by mistake the clerk of defendant's solicitor omitted to set the cause down till too late, thinking the seven days were not clear days, held no ground for granting leave to set the cause down after the time had elapsed.

It was contended that the time mentioned in this rule comes within the operation of Rule 456, but it was held that the expression "at least seven days" is equivalent to "seven clear days."

MISCELLANEOUS CASES.

Action for Recovery of Land.

Western Canada Loan and Savings Co., v. *Dunn*, 19 C. L. J., 211.

The Chancery Rule by which defendants, in an action for foreclosure of a mortgage, may obtain a sale instead of a foreclosure, will not, even when the defendants are infants, be extended to actions of ejectment.

Held, on appeal ; (unreported) per Armour J. The infants might have the sale on paying the deposit of $80 within ten days, unless on substantive application to the Master, payment in of the deposit was excused. Afterward on application to the Master in Chambers by the infants to be excused payment in of the deposit :

Held, such payment in could not be dispensed with (*a*) ; and motion must be dismissed.

Affirmed on appeal per Armour J., (unreported).

Appeal.

See the Cases under sec. 39.

Assimilation of Practice.

Burrowes v. *Forrest*, W. N. 1881, p. 120, 17 C. L. J. 364.

Motion in Chancery Division for an order enforcing an award which had not been made a rule of Court. Order made, without requiring

(*a*) On this application the defendants sought to escape payment of the deposit by shewing there was a margin of value over and above the mortgage debt. These were answered by affidavits shewing there was no such margin.

the award to be made a rule of Court, Per Jessel, M. R:—It is desirable to assimilate the practice of the Chancery and Common Law Divisions.

Awards.

See under "Assimilation of Practice," *supra*.

Ejectment.

See *Western Canada* v. *Dunn*, under "Action for Recovery of Land," *supra*.

Notice of Motion.

See *O'Reilly* v. *Moore*, *Blain* v. *Blain*, under Rule 451.

Particulars.

Thompson v. *Birkley*, 31 W. R. 230, 47 L. T. N. S. 700.

In an action for seduction the defendant applied for particulars of times and places.

Held, that he was not entitled to them unless he first made an affidavit denying the seduction.

Pleadings.

Wolfe v. *Hughes*, 2 C. L. T. 256.

Semble, that where a plaintiff does not ask for reformation of an agreement, on the argument, the mere fact that it is part of the relief sought by his pleadings, does not entitle the defendant, (not having asked it in his defence), to ask therefor on the argument.

Policy of Judicature Act.

Aitken v. *Wilson*, 9 O. P. R. 75.

An application to change a reference. Stated that the policy of the O. J. Act is to decentralize business and send local matters to Local Masters.

See *Re Kirkpatrick—Stevenson* v. *Kirkpatrick*, under "Reference" *infra*.

Reference—Change of Place of.

I*n re Kirkpatrick – Stevenson* v. *Kirkpatrick*, 2 C. L. T. 204.

Held, that the illness of the Master at Goderich, which unfitted him for efficient attention to business, was sufficient ground for changing the reference to Toronto.

Held also, that the mere imputation of centralization of business at Toronto, was not a sufficient answer to the motion to make it the place of reference, it being the most convenient place for all parties.

Service—Substitutional.

Hunt v. *Austin*, L. R. 9 Q. B. D. 598, 47 L. T. N. S. 300.

A solicitor having obtained a charging order upon a fund in Court, payable to the defendant, took out a summons calling upon the defendant to shew cause why the money should not be paid out to him. This summons could not be served, as the defendant's address could not be discovered; and it appeared that he purposely concealed it.

Held, that substituted service of the summons ought to be allowed, by putting up a notice in the Master's Office that, unless the defendant appeared within a month an order upon the summons would be made in his absence; by serving a similar notice upon the persons last in communication with him; and by advertising it once in the *Times*.

See the cases under "Solicitors," *infra*.

Solicitors—and their Town Agents.

Omnium Securities Co. v. *Ellis*, 2 C. L. T., 216, 18 C. L. J., 143.

Held that the most convenient practice was to require country solicitors to have registered agents in Toronto, and that all papers served in the action must be served upon the solicitors themselves or their Toronto agents.

Ronald v. *Brussels*, (unreported.)

This decision was explained, and it was stated that the above note was not wholly correct. It was held that where papers were served on agents, other than the Toronto agents, the service was not void, but good, if the receipt by the principals was proved or admitted.

Taxation.

Agnew v. *Plunkett*, 19 C. L. J. 158.

Necessary letters written by a solicitor to his agent in the county town should be allowed.

Varying Minutes.

See *Hendrie* v. *Beattie*. under Rule 338.

APPENDIX A.

THE HIGH COURT OF JUSTICE OF ONTARIO.

MONDAY, 22*nd August*, 1881.

PRESENT :—

The Hon. John Hawkins Hagarty, C.J., Q. B.

Wilson, C.J., C.P.	Boyd, C.
Galt, J.	Armour, J.
Cameron, J.	Osler, J.

Ferguson, J.

The following General Orders were proposed and adopted :

1. It is ordered by the Judges of the High Court that one of the Judges of the Queen's Bench Division, or of the Common Pleas Division, shall sit in open Court in Osgoode Hall every week, except during the long vacation and except during the period from the twenty-fourth day of December to the sixth day of January, both days inclusive, for the purpose of disposing of all Court business in the said Divisions which may be transacted by a single Judge.

II. Such sittings shall be held on Tuesday and Friday of each week, and on such other days as the Judge holding such sittings may direct.

III. One of the Judges of the Chancery Division of the said High Court shall sit in open Court, in Osgoode Hall every week, except during the long vacation and except during the period from the twenty-fourth day of December to the sixth day of January, both inclusive, for the purpose of disposing of all business of the Division which may be transacted by a single Judge.

IV. The business before the said Judge shall be taken as nearly as may be as provided by the General Orders of the Court of Chancery.

V. Demurrers and special cases shall be set down to be heard and notice thereof given to the opposite party six days before the day on which they are to be heard.

VI. A copy of the demurrer book or of the special case shall be left with the Registrar of the Division in which the action is pending, for the use of the Judge before whom such demurrer or special case is to be heard, two days before the day appointed for the hearing thereof.

VII. All rules or orders *nisi* directed to be issued by the Judge shall be four-day rules, and shall be set down to be heard at the first sittings of the Judge in open Court, for arguments after the same are returnable, unless otherwise ordered by the said Judge.

VIII. The proceedings before a Judge sitting as aforesaid shall show on their face in any judgment, decree, rule, or order to be given or made that the business was carried on before a single Judge, as follows :—"In the High Court of

Justice for Ontario. Before the Hon. Mr. Justice———" [*naming the Judge*].

IX. It is ordered that the Divisional Courts of the High Court do meet on Tuesday, the twenty-third day of August, instant, at eleven o'clock a.m.

THURSDAY, 25*th August*, 1881.

Court met pursuant to adjournment.

PRESENT:—

The Chief Justice of the Queen's Bench.

Wilson, C.J., C.P.	The Chancellor.
Galt, J.	Cameron, J.
Osler, J.	Ferguson, J.

The following Order was proposed and adopted:—

X. All mortgages, stocks, funds annuities, and securities, and all interest and estate therein; and all moneys and effects 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 of the Clerk of the Crown and Pleas of the Common Pleas, on the 21st day of August, 1881, be and the same are hereby transferred to and vested in the Accountant of the Supreme Court as such Accountant, subject to the same trusts as respectively attach thereto, and the same officers are to execute all necessary cheques or documents to effect a formal transfer thereof.

SUPREME COURT OF ONTARIO.

THURSDAY, 25*th August*, 1881.

Court met pursuant to adjournment.

PRESENT :—

The Chief Justice of Ontario.

Hagarty, C. J. Q. B.	Burton, J. A.
Patterson, J. A.	Wilson, C. J. C. P.
The Chancellor.	Galt, J.
Osler, J.	Ferguson, J.

The following Orders were proposed and adopted by the Court :—

GENERAL RULES

Made under the authority of sec. 54 of the Ontario Judicature Act.

495 These Rules may be cited as the Rules of the Supreme Court of Ontario, 1881, or each separate Rule may be cited as if it had been one of the Rules of the Supreme Court, and had been numbered by the number of the Rule mentioned in the margin.

496 In Rule 45, sub-sec. (*d*), the word "act" is hereby substituted for the word "action," in the first line thereof.

497 In Rule 74, sub-sec. (*a*), the word "satisfied" is hereby substituted for the word "notified," in the third line thereof.

498 In Rule 246, sub-sec. (*a*), the word "produce" is hereby substituted for the word "prove," in the third line thereof.

499 In Rule 352, sub-sec. (*b*), the word "periods" is hereby substituted for the word "period." in the fourth line of the said sub-section.

500 In Rule 376 the word "proceeding" is hereby substituted for the word "proceedings," in the fourth line thereof.

501 Rule 100 is hereby amended by inserting after the word "summons," in the fourth line thereof, the words "or on notice, as the case requires."

502 Rule 78 is amended by adding after the word "behalf," in the last line, the words "in which the reference, when required by the practice, shall be to the Master or Local Master."

Court adjourned till Monday, 5th September, at 12 o'clock.

MONDAY, *5th September*, 1881.

Court met pursuant to adjournment.

PRESENT :—

The Chief Justice of Ontario.

Hagarty, C. J. Q. B.	Burton, J. A.
Patterson, J. A.	Morrison, J. A.
Wilson, C. J. C. P.	The Chancellor.
Galt, J.	Osler, J., and

Ferguson, J.

The following Order was proposed and adopted :—

503 Where a seal is, under the fifty-first section of the Judicature Act, impressed on any document which, before the passing of the said Act, did not require to be sealed, the fee of fifty cents mentioned in the fifty-third section of the Superior Courts of Law Act (R. S. O. ch. 39) shall not be payable on such document.

SATURDAY, 10*th September*, 1881.

Court met pursuant to adjournment.

PRESENT :—

The Chief Justice of Ontario.

The Chief Justice of the Queen's Bench.

Burton, J. A.	Patterson, J. A.
Morrison, J. A.	Wilson, C. J. C. P.
The Chancellor.	Galt, J.
Proudfoot, J.	Osler, J.

The Tariff of Costs was this day unanimously adopted and ordered to be signed by the Chief Justice.

TUESDAY, *3rd January*, 1882.

The Court met pursuant to the call of the President.

PRESENT :—

The Chief Justice of Ontario.

Hagarty, C. J. Q. B. Div.	Burton, J. A.
Patterson, J. A.	Morrison, J. A.
Wilson, C. J. C. P. Div.	The Chancellor.
Galt, J. C. P. Div.	Proudfoot, J. Ch. Div.
Cameron, J. Q. B. Div.	Osler, J. C. P. Div.

Ferguson, J. Ch. Div.

The following Rules or Orders were proposed and adopted:—

504 Copies of orders dispensing with payment of money into Court are, in all cases, to be left with the Accountant, forthwith, after entry thereof.

505 Where infants are concerned, no order dispensing with payment of money into Court is to be made without notice to the guardian *ad litem* of the infants.

506 No conveyance of the lands of infants is to be settled until evidence is produced to the officer settling the same of the purchase money having been paid into Court, or of the payment thereof into Court having been dispensed with; and in cases where there is to be a mortgage 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.

507 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.

SATURDAY, 28*th January*.

Court met pursuant to the call of the President.

PRESENT :—

The Chief Justice of Ontario.

Hagarty, C. J. Q. B. Div.	Burton, J. A.
Patterson, J. A.	Wilson, C. J. C. P. Div.
The Chancellor.	Proudfoot, J. Ch. Div.
Cameron, J. Q. B. Div.	Ferguson, J. Ch. Div.

The following Rules or Orders were proposed and adopted :—

508 It shall not be necessary for the deputy Clerk of the Crown or deputy Registrar to transmit to the principal Clerk or Registrar of the several divisions of the High Court at Toronto, the original roll and the papers of or belonging to the same pursuant to section 303 of the Common Law Procedure Act and rule 419 of the Judicature Act; but instead thereof, every deputy Clerk of the Crown and deputy Registrar shall once in every three months transmit to such principal Clerk or Registrar at Toronto a list, in the form hereinafter mentioned, of all judgments which have been entered

by him during such period, and from the said lists the principal Clerks or Registrars shall prepare and from time to time keep up a general index of list of judgments, which shall be open to inspection by all persons interested upon payment of the usual fee.

FORM.

List of judgments entered in the office of the Deputy Clerk of the Crown (or Deputy Registrar, as the case may be) of the County of during the three months ending the day of 18

(1) Plaintiff Defendant
(2) Date of entry of judgment.
(3) The amount recovered or other relief given exclusive of costs.
(4) The amount of costs taxed.

509 All orders issued by a local officer which require to be entered shall be entered at the office of such local officer only. (See R. 418.)

510 In view of the state of business in the several Courts, and of doubts that have arisen upon the construction of rules 316 and 317, it is ordered that where, at or after the trial of an action by a jury, the Judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment and to enter any other judgment, on the ground that the judgment directed to be entered is wrong by reason of the Judge having caused the finding to be wrongly entered with reference to the finding of the jury upon the question or questions submitted to them. Where at or after the trial of an action before a Judge the Judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment and to enter any other judgment, upon the ground that the

judgment so directed is wrong, and such application may in either of the above cases be to a Divisional Court of the High Court or to the Court of Appeal, and this rule is to be substituted for rules 316 and 317.

511 In every case in which judgment is entered without trial or the decision of a court or judge or order as to the costs and where the amount of 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, without proof on affidavit to his satisfaction that the suit was properly instituted therein; and if properly within the jurisdiction of the County or Division Courts, then the taxation shall be on the scale of fees in such courts, subject to revision as in other cases.

512 In cases of trial by jury, and the Judge or Court makes no order respecting the costs, under rule 428, the taxation of costs shall be under such scale of allowance only as would have been applicable before the passing of the Judicature Act; and the event shall in such case be to recover costs according to such scale, subject to such rights of set off as to costs as apply under the Common Law Procedure Act.

513 Discovery may be obtained by either party under rule 222 after the defence is delivered, and by the plaintiff after the time for delivering the defence has expired.

SATURDAY, 17*th March*, 1882.

The Court met pursuant to the call of the President.

PRESENT :—

The Chief Justice of the Queen's Bench.

The Chancellor.	Proudfoot, J.
Galt, J.	Patterson, J. A.
Burton, J. A.	Cameron, J.

Osler, J.

The following Rules or Orders were proposed and adopted :—

514 Rule 462 shall apply to all Rules relating to time.

515 In all actions which (before the passing of the Ontario Judicature Act, 1881, and the Law Reform Act of 1868), might have been brought under the equity jurisdiction of the County Court, and which are now carried on in the High Court of Justice, such fees and disbursements may be charged as are fixed by the lower tariff referred to in Order 553, of the General Orders of the Court of Chancery, and for all fees and disbursements not provided for in the said lower tariff, may be charged the amounts allowed in like cases, by the tariff of the 10th September, 1881, subject however to the same proportion of reduction as exists between the said lower tariff and the higher tariff of the Court of Chancery.

516 So much of Rule 419, as applies to sec. 302, of the Common Law Procedure Act, is hereby rescinded, and judgments of the High Court of Justice, shall not be minuted and docketed, as required by said section 302.

517 Rule 508 is hereby rescinded, and the following substituted therefor :—

It shall not be necessary for any Deputy Clerk of the Crown, Deputy Registrar or Local Registrar to transmit to the Registrars of the several Divisions of the High Court at Toronto the original roll, and the papers of or belonging to the same, pursuant to section 303 of the Common Law Procedure Act and Rule 419 of the Judicature Act; but instead thereof, every Deputy Clerk of the Crown, Deputy Registrar and Local Registrar shall once in every three months transmit to the Registrar of each Division at Toronto a list, in the form hereinafter mentioned, of all judgments which have been entered by him in such Division during such period, and from the said lists the Registrars of the several Divisions shall prepare and from time to time keep up a general index or list of judgments which shall be open to inspection by all persons interested upon payment of the usual fee.

FORM.

List of judgments entered in the office of the Deputy Clerk of the Crown (or Deputy Registrar or Local Registrar, as the case may be) of the County of during the three months ending the day of 18

(1) Plaintiff Defendant.
(2) Date of entry of judgment.
(3) The amount recovered, or other relief given, exclusive of costs.
(4) The amount of costs taxed.

518 Rule 114 is to extend to proceedings in the Master's office, and the Master is to have the same power as the Judge.

519 Every bond or recognizance required by the practice of the Court, for the purpose of security is, unless otherwise

ordered, to be taken in the name of the Accountant of the Supreme Court, his executors, administrators, or assigns.

520 Where the action is in respect of a mortgage, and the plaintiff claims foreclosure, or sale, or redemption, and an appearance has been entered, but default has been made in delivering a defence or demurrer, the plaintiff shall be entitled to a judgment or order on *præcipe* as provided in Rule 78.

521 Whereas, by the Act 35 Victoria, chapter 83, (Ontario), the Toronto General Trusts Company was incorporated, and thereby empowered to act as agents for the transaction of business as therein mentioned. And whereas by the Act 45 Victoria chapter 17, the said company may be accepted by the High Court of Justice as a Trust Company for the purposes of the said Court, in case the Lieutenant-Governor in Council shall approve thereof as therein set forth. And whereas the said company has been so approved of by the Lieutenant-Governor in Council, by Order dated the 10th day of March, 1882. And whereas the expenses of the Accountant's office have been, by the Ontario Judicature Act of 1881, declared to be a first charge upon the income arising from the funds in Court, and it is not desirable to reduce the interest payable to suitors to a less rate than four per cent., and it is necessary to procure the investment of moneys in Court in order to raise a sufficient income to keep up this rate, and provide for the expenses of the Accountant's office. Therefore, *It is ordered*, that the Judges of the Chancery Division may arrange with the said Company to make investments, and to take the securities in the name of the Accountant of the Supreme Court of Judicature, of moneys in Court

upon first mortgages of lands, and may direct the issue of cheques therefor upon condition that the said company do, by proper instrument, guarantee the sufficiency of such securities, and the due payment of interest as the rate of 4½ per cent. per annum, half yearly, on the moneys so invested from the date of the receipt by the company of the money for each investment, and also the due repayment of the principal moneys so invested; and upon further condition that in case the said company makes an investment as aforesaid at a higher rate than 6 per cent., then the said company is to pay interest thereon to the Court at the rate of 4¾ per cent.; and upon further condition that the said company is to satisfy the Official Guardian of the said High Court of the sufficiency of the security as to value, and who is to certify the same to the Court before the cheque issues for each investment.

522 All appeals, proceedings, and matters to be brought before the Divisional Court of the Chancery Division, are to be entered with the Clerk of Records and Writs, at least seven days before the day fixed for the Sittings of the Court, and seven days notice thereof is to be served upon the parties entitled to notice.

523 An application to the Divisional Court of the Chancery Division, to change or reverse any judgment, shall be made at the first Sittings of the Divisional Court, which begins not less than ten days after the pronouncing of the said judgment.

524 After the Sittings in June next of the Chancery Divisional Court the said Divisional Court will hold Sittings on

the first Thursday in September, the first Thursday in December, and the third Thursday in February in each year.

525 Rule 308 is hereby amended by substituting the words "four days, both days inclusive, from the service of the order," for the words "eight days from the date of the order," in the third line of the said rule.

526 Rules 309 and 310 are hereby rescinded.

527 In the Queen's Bench and Common Pleas Divisions. All applications under Rules 307 and 308, and under Rule 510 when made to a Divisional Court, shall be made within the first four days of the Sittings of the Divisional Court for hearing such applications which may take place after the trial or judgment complained of.

(*a*) In case the decision of a question raised at the trial, or the judgment, is reserved, and is not given until the Sittings aforesaid, or in case of a trial during the Sittings of the Divisional Court, any motion or application respecting the same shall be made within six days after the day on which the verdict or judgment is given, if so many days expire in such Sittings, and if not, then within the first four days of the ensuing Sittings.

(*b*) In cases tried by a jury judgment shall not be signed until the time for making such motion or application as aforesaid has expired, unless the Judge shall certify under his hand that in his opinion execution ought to issue in such action forthwith, or at some day to be named in such certificate, and subject or not to any condition or qualification.

528 It shall be sufficient if the notice of any application under Rule 510, is served within the time hereinbefore limited for making the same, provided that the day named in such notice for hearing the motion is not more than two clear days from the last day of the time so limited, and falls within the Sittings of the Divisional Court in which such notice is given, otherwise such notice may be given for the first day of the following Sittings.

529 The party who obtains any order *nisi*, or who serves any notice of motion may, on or after the fourth day inclusive after the serving such order *nisi* or notice, file the same, together with an affidavit or admission of service with the Registrar of the Divisional Court.

530 The party served with any such order *nisi* or notice of motion may (if the same has not been already filed by the party who obtained or served the same), on or after the fifth day, both days inclusive, after the granting of the order or service of the notice, file the same, together with an affidavit of the fact and time of such service with the said Registrar.

531 In case the party to whom such order *nisi* is granted shall neglect or delay to draw up and serve the same, the opposite party may, on or after the third day after granting such order, and upon filing with the Registrar an affidavit that the order has not been served, enter a *ne recipiatur* with such Registrar, after which the Registrar shall not receive or enter such order ; and such order shall be deemed to be abandoned, and the opposite party may proceed as if no such order had been moved for or granted, unless the Divisional Court shall otherwise direct.

In pursuance of the powers conferred upon them by the 20th section of the Judicature Act of Ontario, 1881, the council of Judges of the Supreme Court of Judicature for Ontario recommend that the following orders regulating the Vacations to be observed by the High Court of Justice and the Court of Appeal shall be made by the Lieutenant Governor in Council pursuant to the said Act :—

The Long Vacation is to commence on the 1st day of July, and to terminate on the 1st day of September in each year.

(1) The Christmas Vacation is to commence on the 24th day of December in each year, and to terminate on the 6th day of the following January.

(2) The days of the commencement and termination of each Vacation shall be included in and reckoned part of the Vacation.

June 27th, 1882.

"Every County Court Clerk shall keep his office open for the transaction of business, on every day, except on holidays, and (except as hereinafter provided) from 10 a.m. to 3 p.m. on and between July 1 and September 1 ; and on and between December 24 and January 6, every such Clerk shall keep his office open for the transaction of business from 10 a.m. until noon, and during the statutory sittings of the Court such Clerk shall keep the office open, as aforesaid, on and between the said dates until 4 p.m."

February 5th, 1883.

Except during vacations, and excepting Sundays, Christmas Day, Good Friday, New Year's Day, the birthday of the Sovereign, and any day appointed by general proclamation for a general fast or thanksgiving, the offices of the Court shall be kept open from 10 a.m. to 4 p.m., during the Sittings of the Divisional Courts; and at other times from 10 a.m. to 3 p.m.

APPENDIX B.

Table showing the correspondence between the Rules of the Supreme Court, 1883 (English), and the Rules of the Supreme Court of Judicature for Ontario.

Rules of Supreme Court, 1883.	Marginal Number.	Ontario Orders and Rules.	Marginal Number.
Order I., Rule 1	(1)	Order I., Rule 1	(1)
" " 2	(2)	" " 4	(4)
Order II., Rule 1	(3)	Order II., Rule 1	(5)
" " 2	(4)	" " 2	(6)
" " 3	(5)	" " 3	(7)
" " 5	(7)	" " 4	(8)
" " 8	(10)	" " 5	(9)
Order III., Rule 2	(12)	Order III., Rule 1	(11)
" " 3	(13)	" " 2	(12)
" " 4	(14)	" " 3	(13)
" " 6	(16)	" " 4	(14)
" " 7	(17)	" " 5	(15)
" " 8	(18)	" " 6	(16)
Order IV., Rule 1	(19)	" " 8	(18)
" " 2	(20)	" " 9	(19)
Order V., Rule 1	(23)	" " 10	(20)
" " 3	(25)	" " 12	(22)
" " 4	(26)	" " 12	(22)
" " 10	(32)	" " 13	(23)
" " 11	(33)	" " 14	(24)
" " 12	(34)	" " 15	(25)
" " 13	(35)	" " 16	(26)
Order VI., Rule 1	(40)	" " 17	(27)
" " 2	(41)	" " 18	(28)
Order VII., Rule 1	(42)	Order IV., Rule 1	(29)
" " 2	(43)	" " 2	(30)
Order VIII., Rule 1	(45)	Order V., Rule 1	(31)

Rules of Supreme Court, 1883.	Marginal Number.	Ontario Orders and Rules.	Marginal Number.
Order VIII., Rule 2.....	(46)	Order V., Rule 2.....	(32)
Order IX., Rule 1.....	(48)	Order VI., Rule 1.....	(33)
" " 2.....	(49)	" " 2.....	(34)
" " 3.....	(52)	" " 6.....	(38)
" " 6.....	(53)	" " 8.....	(40)
" " 7.....	(54)	" " 9.....	(41)
" " 8.....	(55)	" " 10.....	(42)
" " 9.....	(56)	" " 11.....	(43)
" " 15.....	(62)	" " 12.....	(44)
Order XI., Rule 1	(64)	Order VII., Rule 1.....	(45)
" " 6.....	(69)	Order II., Rule 4.....	(8)
" " 7.....	(70)	Order VII., Rule 5.....	(49)
Order XII., Rules 1-7 ..(71-77)		Order VIII., Rule 1.....	(50)
" " 8....	(78)	" " 2.....	(51)
" " 9....	(79)	" " 12.....	(61)
" " 10....	(80)	" " 3.....	(52)
" " 11....	(81)	" " 4.....	(53)
" " 12....	(82)	" " 5.....	(54)
" " 13....	(83)	" " 6.....	(55)
" " 14....	(84)	" " 7.....	(56)
" " 15....	(85)	" " 8.....	(57)
" " 16....	(86)	" " 9.....	(58)
" " 17....	(87)	" " 10.....	(59)
" " 18....	(88)	" " 11.....	(60)
" " 22....	(92)	" " 12.....	(61)
" " 25....	(95)	" " 13.....	(62)
" " 26....	(96)	" " 15.....	(64)
" " 27....	(97)	" " 16.....	(65)
" " 28....	(98)	" " 17.....	(66)
" " 29....	(99)	" " 18.....	(67)
Order XIII., Rule 1.....	(101)	Order IX., Rule 1.....	(69)
" " 2.....	(102)	" " 3.....	(71)
" " 3.....	(103)	" " 4.....	(72)
" " 4.....	(104)	" " 5.....	(73)
" " 5.....	(105)	" " 7.....	(75)
" " 8.....	(108)	" " 8.....	(76)
" " 9.....	(109)	" " 9.....	(77)
Order XIV., Rule 1.....	(119)	Order X., Rule 1.....	(80)
" " 2	(116)	" " 2.....	(81)
" " 3.....	(117)	" " 3.....	(82)
" " 4.....	(118)	" " 4.....	(83)
" " 5.....	(119)	" " 5.....	(84)
" " 6.....	(120)	" " 6.....	(85)

RULES OF SUPREME COURT, 1883.

ONTARIO ORDERS AND RULES.

	Marginal Number.
Order XV., Rule 1	(121)
" " 2	(122)
Order XVI., Rule 1	(123)
" " 2	(124)
" " 4	(126)
" " 5	(127)
" " 6	(128)
" " 7	(129)
" " 8	(130)
" " 9	(131)
" " 11	(133)
" " 12	(134)
" " 13	(135)
" " 14	(136)
" " 15	(137)
" " 16	(138)
" " 16	(138)
" " 17	(139)
" " 32	(154)
" Rules 33-38.	(155-160)
" Rule 48	(170)
" " 49	(171)
" " 52	(174)
" " 53	(175)
Order XVII., Rule 1	(178)
" " 3	(180)
" " 4	(181)
" " 5	(182)
" " 6	(183)
" " 7	(184)
Order XVIII., Rule 1	(188)
" " 2	(189)
" " 3	(190)
" " 4	(191)
" " 5	(192)
" " 6	(193)
" " 7	(194)
" " 8	(195)
" " 9	(196)
Order XIX., Rule 1	(197)
" " 2	(198)
" " 3	(199)
" " 4	(200)

	Marginal Number.
Order XI., Rule 1	(86)
" " 2	(87)
Order XII., Rule 1	(89)
" " 2	(90)
" " 3	(91)
" " 4	(92)
" " 5	(93)
" " 6	(94)
" " 7	(95)
" " 10	(98)
" " 15	(103)
" " 16	(104)
" " 17	(105)
" " 12	(100)
" " 13	(101)
" " 8	(96)
" " 9	(97)
Order XIV., Rule 1	(124)
Order XII., Rule 11	(99)
See Order I., Rule 3	(3)
Order XII., Rule 20	(108)
" " 22	(110)
" " 23	(111)
" " 23	(111)
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