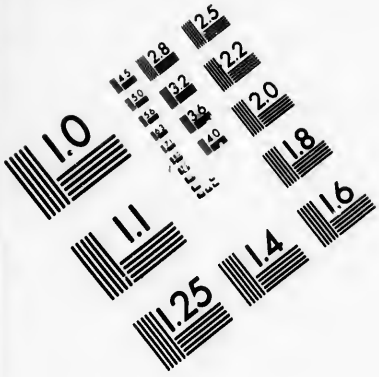
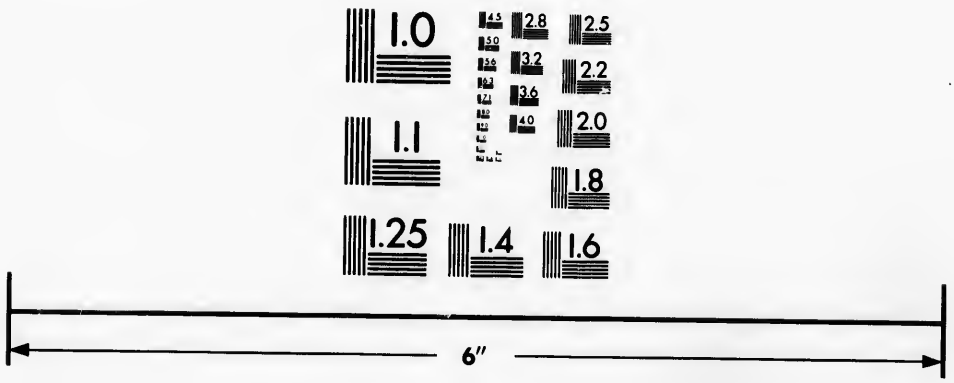
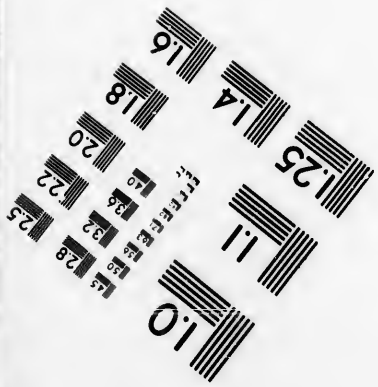
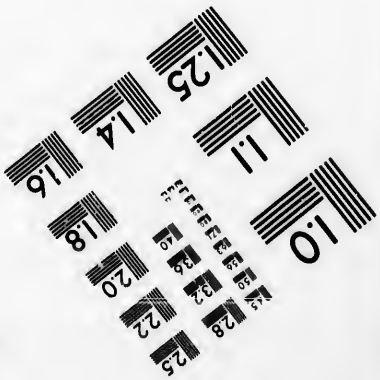


IMAGE EVALUATION TEST TARGET (MT-3)







Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

CIHM
Microfiche
Series
(Monographs)

ICMH
Collection de
microfiches
(monographies)

Canadian Institute for Historical Microreproductions / Institut canadien de microreproductions historiques

© 1993

Technical and Bibliographic Notes / Notes techniques et bibliographiques

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

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

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

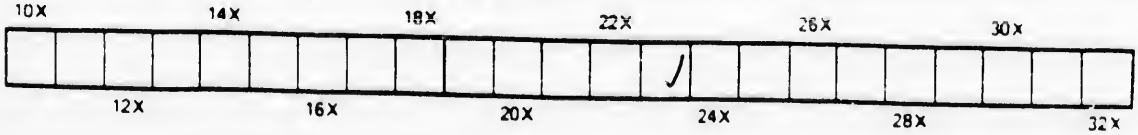
- ☐ Coloured pages/ Pages de couleur
- ☑ Pages damaged/ Pages endommagées
- ☐ Pages restored and/or laminated/ Pages restaurées et/ou pelliculées
- ☑ Pages discoloured, stained or foxed/ Pages décolorées, tachetées ou piquées
- ☐ Pages detached/ Pages détachées
- ☑ Showthrough/ Transparence
- ☐ Quality of print varies/ Qualité inégale de l'impression
- ☐ Continuous pagination/ Pagination continue
- ☑ Includes index(es)/ Comprend un (des) index

Title on header taken from:/ Le titre de l'en-tête provient:

- ☐ Title page of issue/ Page de titre de la livraison
- ☐ Caption of issue/ Titre de départ de la livraison
- ☐ Masthead/ Générique (périodiques) de la livraison

☐ Additional comments:/ Commentaires supplémentaires:

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



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

National Library of Canada

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

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

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

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

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

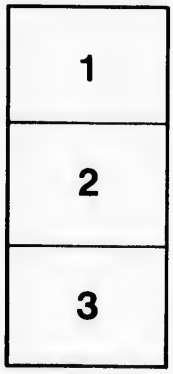
Bibliothèque nationale du Canada

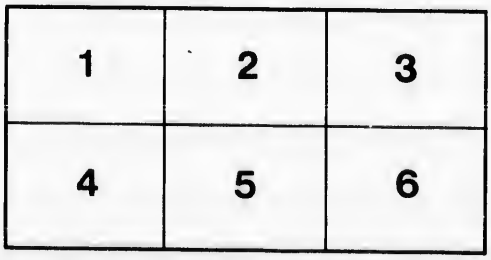
Les images suivantes ont été reproduites avec le plus grand soin, compte tenu de la condition et de la netteté de l'exemplaire filmé, et en conformité avec les conditions du contrat de filmage.

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

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

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





CH

ARCHBOL

UEEN'S BE

High Cou

O ON APPEAL THEREF
AND HO

IN CIVIL

FOURTE

T. WILLI
Of the Inner T

J. ST. L
Of Lincoln's

IN TWO
VO

LO
H. SWEET & SONS,
STEVENS AND SONS,
C. F. MAXWELL, ME
CARSWELL
Law

67

CHITTY'S

ARCHBOLD'S PRACTICE

OF THE

QUEEN'S BENCH DIVISION

OF THE

High Court of Justice,

AND ON APPEAL THEREFROM TO THE COURT OF APPEAL AND HOUSE OF LORDS,

IN CIVIL PROCEEDINGS.

FOURTEENTH EDITION

BY

T. WILLES CHITTY,
Of the Inner Temple, Barrister-at-Law,

ASSISTED BY

J. ST. L. LESLIE,
Of Lincoln's Inn, Barrister-at-Law.

IN TWO VOLUMES.

VOL. II.

LONDON:
H. SWEET & SONS, 3, CHANCERY LANE;
STEVENS AND SONS, 119, CHANCERY LANE;
C. F. MAXWELL, MELBOURNE AND SYDNEY;
CARSWELL & CO., TORONTO.
Law Publishers.

1885

KD7179
A72
1885
v. 2

TABLE

VO

EXECUTION AND ENF
ORDI

CHAP.

LXXVI. Writ of Elegit

LXXVII. Writ of Capias

LXXVIII. Writ of Delivery

LXXIX. Writ of Sequest

LXXX. Execution by A

LXXXI. Charging Stocks

LXXXII. Attachment of

LXXXIII. Attachment -

LXXXIV. Leave to issue E

P

LXXXV. Appeal to the Cou

LXXXVI. Appeal to the Hou

LONDON
PRINTED BY C. F. ROWORTH, GREAT NEW STREET, FETTER LANE—E.C.

TABLE OF CONTENTS.

VOLUME II.

PART X.

EXECUTION AND ENFORCEMENT OF JUDGMENTS AND ORDERS—*continued.*

CHAP.		PAGE
LXXVI.	Writ of Elegit	873
LXXVII.	Writ of Capias ad Satisfaciendum	889
LXXVIII.	Writ of Delivery	904
LXXIX.	Writ of Sequestration	907
LXXX.	Execution by Appointment of a Receiver	914
LXXXI.	Charging Stocks and Shares, &c.	919
LXXXII.	Attachment of Debts	927
LXXXIII.	Attachment	941
LXXXIV.	Leave to issue Execution	955

PART XI.

APPEAL.

LXXXV.	Appeal to the Court of Appeal	964
LXXXVI.	Appeal to the House of Lords	995

PART XII.

THE PARTIES TO AN ACTION AND APPLICATIONS RELATING THERETO, AND PROCEEDINGS BY AND AGAINST PARTICULAR PERSONS.

CHAP.		PAGE
LXXXVII.	Parties to Actions—Adding, Striking out, and Substituting Parties	1014
LXXXVIII.	Change of Parties by Marriage, &c.	1025
LXXXIX.	Peers and Members of Parliament	1036
XC.	Solicitors	1037
XCI.	Justices of the Peace, Constables, &c.	1038
XCII.	Corporations and Companies	1050
XCIII.	Partners and Unincorporated Companies	1092
XCIV.	Local Boards of Health	1096
XCV.	Friendly and other Societies, Trades Unions, &c.	1099
XCVI.	Hundredors	1108
XCVII.	Executors and Administrators	1112
XCVIII.	Heirs and Devisees	1128
XCIX.	Infants	1133
C.	Idiots, Lunatics, and Persons of Unsound Mind	1141
CI.	Husband and Wife and Married Women	1147
CII.	Bankrupts and their Trustees	1162
CIII.	Clergymen	1176
CIV.	Paupers	1182
CV.	Prisoners	1185

PART XIII.

PROCEEDINGS IN PARTICULAR ACTIONS.

CVI.	Action for Recovery of Land	1200
CVII.	Replevin	1253
CVIII.	Action for Mandamus	1274
CIX.	Injunction	1277
CX.	Action on Bonds under 8 & 9 Will. 3, c. 11	1279
CXI.	Petition of Right	1288

PART XIV.

CHAP.		PAGE
CXII.	Judgment, &c., on an Order by Consent	1291
CXIII.	Cognovit or Confession—Judgment and Proceedings thereon	1297
CXIV.	Warrant of Attorney—Judgment and Proceedings thereon	1303
CXV.	Reference to Master, Writ of Inquiry to ascertain Amount of Damages	1326
CXVI.	Issues, Inquiries, and Accounts	1341
CXVII.	Trial of Questions of Law by Special Case	1343
CXVIII.	Trial of Questions of Fact without Pleadings	1347
CXIX.	Remitting Cases to Courts in Her Majesty's Dominions for their Opinion	1349
CXX.	Taking Evidence in matters pending before Foreign Tribunals	1351
CXXI.	Interpleader	1354

PART XV.

APPLICATIONS TO COURT AND AT CHAMBERS, DISTRICT REGISTRIES, TIME, ETC.

CXXII.	Applications to the Court—Motions and Orders	1378
CXXIII.	Applications at Chambers—Summonses and Orders	1401
CXXIV.	District Registries and Proceedings therein	1421
CXXV.	Time—Extension and Computation of—Month's Notice to Proceed	1432
CXXVI.	Service of Proceedings—Notices—Office Copies—Printing Proceedings—Filing, &c., of Documents, &c.	1439

PART XVI.

CXXVII.	Arrest of Defendant before Judgment	1449

PART XVII.

PROCEEDINGS RELATING TO INFERIOR COURTS.

CHAP.		PAGE
CXXVIII.	Application of Judicature Acts to, &c.	1512
CXXIX.	Appeals from Inferior Courts	1516
CXXX.	Appeals from County Courts	1523
CXXXI.	Compelling Judge or Officer of County Court to perform his Duty	1538
CXXXII.	Prohibition	1541
CXXXIII.	Remission of Actions and Issues to County Courts	1548
CXXXIV.	Removal of Causes from Inferior Courts—Certiorari	1555

PART XVIII.

REFERENCES TO REFEREES AND ARBITRATION.

CXXXV.	References to Referees—Official or Special	1575
CXXXVI.	Arbitration by Consent	1585
CXXXVII.	Compulsory References to Arbitration	1664

APPENDIX. (*See Contents at* p. 1670) - - - 1671

TABLE OF STATUTES - - - - - 1711

TABLE OF RULES - - - - - 1719

INDEX - - - - - - - - 1727

(8

PART

EXECUTION AND ENFORC
AND ORDERS

6

CHAPTER

WRIT OF E

	PAGE
1. *What, and what Property it affects*	873
2. *Form of*	882
3. *When to be sued out*	882
4. *How sued out and indorsed*	883
5. *Registration of Writs*	883
6. *When, where, and how executed*	883
7. *When, and how returned*	884
8. *Poundage and Expenses*	885

1. *What, and what Property it affects.* ...der which the lands or chattels ... may be taken in execution (*b*). Form ... also be taken under it, but since the ... (*see post*), this is no longer the case. ... Save in so far as it is affected by ... ruptcy Act, the writ of *elegit* has the ... had before the Judicature Acts, and is ... as before those acts. (*See Ord. XL* ... term "writ of execution," when use ... *elegit*. (*Ord. XLII. r.* 8, *ante*, p. 787. ... Since the 1 & 2 *V. c.* 110, *s.* 11, th ... the judgment debtor's lands instea ... them; and the writ is now accordin

(*a*) *Richardson* v. *Webb*, 76 L. T. ... now ... rn. 397. ... of t

(*b*) Interests in land, which cannot be extended under an elegit, may ... See

PART X.

EXECUTION AND ENFORCEMENT OF JUDGMENTS AND ORDERS—(*continued*).

CHAPTER LXXVI.

WRIT OF ELEGIT.

	PAGE
What, and what Property it affects	873
Form of	882
When to be sued out	882
How sued out and indorsed	883
Registration of Writs	883
When, where, and how executed	883
When, and how returned	884
Poundage and Expenses	885
9. *What Writs may issue after it*	885
10. *How the Execution Creditor shall obtain Possession*	886
11. *How the Debtor shall recover back his Land*	887
12. *Selling Land when Judgment entered up since the 29th July, 1864*	888

What, and what Property it affects.]—The writ of *elegit* is a writ CH. LXXVI.
er which the lands or chattels real (*a*) of a judgment debtor 1. What, and what property it affects.
be taken in execution (*b*). Formerly, the debtor's goods could
be taken under it, but since the *Bankruptcy Act*, 1883 (sect. 146, *post*), this is no longer the case.

ve in so far as it is affected by the provisions of the Bank- Judicature
cy Act, the writ of *elegit* has the same force and effect as it Acts.
before the Judicature Acts, and is executed in the same manner
efore those acts. (*See Ord. XLIII. r.* 1, *ante*, p. 836.) The
"writ of execution," when used in the rules, includes an
(*Ord. XLII. r.* 8, *ante*, p. 787.)

ce the 1 & 2 *V. c.* 110, *s.* 11, the *elegit* creditor may extend 1 & 2 Vict.
e judgment debtor's lands instead of, as theretofore, a moiety c. 110.
m; and the writ is now accordingly for the whole.

Richardson v. *Webb*, 76 L. T. 397.

(*a*) Interests in land, which cannot be attended under an elegit, may now be taken in execution by means of the appointment of a receiver. See post, Ch. LXXX.

PART X.

Bankruptcy Act, 1883.

By the *Bankruptcy Act*, 1883, which came into operation on 1st January, 1884 (*c*), it is provided (sect. 146 (1)), "The she shall not under a writ of *elegit* deliver the goods of a debtor shall a writ of *elegit* extend to goods." The same Act repeals much of the stat. 13 *Edw.* 1, c. 18, as extends an *elegit* to goo Goods are defined by sect. 168 of the *Bankruptcy Act*, 1883, include all chattels personal, and sect. 146 does not affect the ri to take chattels real, such as leaseholds, in execution under *elegit* (*d*).

Chattels real.

Elegit first given by Stat. Westm. 2, c. 18.

By stat. *Westm.* 2 (13 *Ed.* 1), *c.* 18, as altered by the *Bankruptcy Act*, 1883, where a debt is recovered or acknowledged the King's Court, or damages awarded, it shall be in the electi of him that sueth to have a *fieri facias* to the sheriff to levy t debt upon the lands and chattels of the debtor, or that the she shall deliver to him (*e*) the one-half of his land, until the debt levied, upon a reasonable price or extent. From the electi given to the plaintiff by this statute, and from the entry of t award of this execution on the roll, "*quod elegit sibi executionem* &c., the writ of *elegit* derived its name. The effect of the writ, regards the lands of the debtor, has been greatly extended subsequent statutes. The statute, as it originally stood, enab the creditor to seize the debtor's goods under the writ, but t power is taken away by the *Bankruptcy Act*, 1883, *s.* 146 *supra*.

Effect of, extended by 29 C. 2, c. 3, to estates held in trust.

The 10th section of the Statute of Frauds (29 *C.* 2, c. 3), in or to subject trust estates to execution, enacts, "that it shall and be lawful for every sheriff or other officer to whom any writ precept is or shall be directed, at the suit of any person or pers of, for and upon any judgment, statute or recognizance herea to be made or had, to do, make, and deliver execution unto party in that behalf suing, of all such lands, tenements, rectori tithes, rents, and hereditaments, as any other person or person in any manner of wise seised or possessed, or hereafter shall seised or possessed, *in trust for him against whom* execution i sued, like as the sheriff or other officer might or ought to h done, if the said party against whom execution hereafter shall b sued had been seised of such lands, tenements, rectories, tit rents, or other hereditaments of such estate as they be seised o trust for him at the time of the said execution sued (*f*), which la tenements, rectories, tithes, rents, and other hereditaments, force and virtue of such execution, shall accordingly be held enjoyed freed and discharged from all incumbrances of such per or persons as shall be so seised or possessed in trust for the per against whom such execution shall be sued."

(*c*) The statute does not apply to seizures made prior to the 1st January, 1884. *Hough* v. *Windus* (C. A.), 12 Q. D. B. 224; 53 L. J., Q. B. 165; 50 L. T. 312; 32 W. R. 452: *Re Windus and Dunsmore, Exp. Hough*, 50 L. T. 212; 32 W. R. 540.

(*d*) *Richardson* v. *Webb*, 76 L. T. Journ. 397. In the form of writ now in use, the words "chattels real" are added after "lands."

(*e*) The Bank. Act, 1883, 5th sch. repeals the words "all the cha of the debtor, saving only his and beasts of the plough, and" w were in statute 13 Edw. 1, c. it originally stood.

(*f*) Judgments entered up a 29th July, 1864, do not affect until delivered in execution. post, p. 878.

By 1 & 2 *V. c.* 110, *s.* 11, after r defective in not providing adequat creditors to obtain satisfaction from and it is expedient to give judg remedies against the real and perso they possess under the existing la be lawful for the sheriff or other of or any precept in pursuance thereof any person, upon any judgment wh commencement of this Act shall h hereafter recovered in any action i Courts at Westminster, to make a party in that behalf suing of all s tithes, rents, and hereditaments, *inc of copyhold or customary tenure*, as cution is so sued, or any person in *seised or possessed of* (*g*) at the time ment (*h*), or at any time afterwards, at the time of entering up such ju wards, have *any disposing power* assent of any other person, exercise manner as the sheriff or other offic execution of one moiety of the lands against whom a writ of *elegit* is sued rectories, tithes, rents, and hereditar such execution, shall accordingly be to whom such execution shall be so m such account in the Court out of whi been sued out as a tenant by *elegit* i equity: *Provided always*, that such p to whom any copyhold or customary execution, shall be liable and is hereb and render to the lord of the manor such and the like payments and ser whom such execution shall be issue make, perform and render in case suc and that the party so suing out such such copyhold or customary lands sha execution, shall be entitled to hold t such payments, and the value of su mount of the judgment, shall have be By 2 & 3 *V. c.* 11, *s.* 5, as against without notice, no judgment "shall tenements or hereditaments, or any otherwise or more extensively in any r ered, than a judgment of one of th would have bound such purchaser or m of the 1 & 2 *V. c.* 110, where it had be to the law then in force." *See*, as t

(*g*) Cp. *In re South*, L. R., 9 Ch. 369, 373.

(*h*) See note (*f*), p. 874.

(*i*) The further proviso as to pur-

chase 1838, Rev. c. 96)

Further extended by 1 & 2 Vict. c. 110, s. 11, to lands of all tenures, and to the entirety of such lands.

By 1 & 2 *V. c.* 110, *s.* 11, after reciting that "the existing law is efective in not providing adequate means for enabling judgment editors to obtain satisfaction from the property of their debtors; id it is expedient to give judgment creditors more effectual medies against the real and personal estate of their debtors than ey possess under the existing law," it is enacted, "that it shall lawful for the sheriff or other officer to whom any writ of *elegit*, any precept in pursuance thereof, shall be directed at the suit of y person, upon any judgment which at the time appointed for the mmencement of this Act shall have been recovered, or shall be reafter recovered in any action in any of her Majesty's superior urts at Westminster, to make and deliver execution unto the ty in that behalf suing of all such lands, tenements, rectories, ies, rents, and hereditaments, *including lands and hereditaments copyhold or customary tenure*, as the person against whom exeion is so sued, or any person in trust for him, shall have been *ed or possessed of* (*g*) at the time of entering up the said judgat (*h*), or at any time afterwards, or over which such person shall the time of entering up such judgment, or at any time afterds, have *any disposing power* which he might, without the ent of any other person, exercise for his own benefit, in like ner as the sheriff or other officer may now make and deliver cution of one moiety of the lands and tenements of any person nst whom a writ of *elegit* is sued out; which lands, tenements, ories, tithes, rents, and hereditaments, by force and virtue of execution, shall accordingly be held and enjoyed by the party hom such execution shall be so made and delivered, subject to account in the Court out of which such execution shall have sued out as a tenant by *elegit* is now subject to in a Court of ty: *Provided always*, that such party suing out execution, and hom any copyhold or customary lands shall be so delivered in ution, shall be liable and is hereby required to make, perform, render to the lord of the manor or other person entitled all and the like payments and services as the person against n such execution shall be issued would have been bound to , perform and render in case such execution had not issued; hat the party so suing out such execution, and to whom any copyhold or customary lands shall have been so delivered in ation, shall be entitled to hold the same until the amount of payments, and the value of such services, as well as the nt of the judgment, shall have been levied" (*i*).

2 & 3 *V.* c. 11, *s.* 5, as against purchasers and mortgagees 2 & 3 Vict. ut notice, no judgment "shall bind or affect any lands, c. 11, s. 5. ents or hereditaments, or any interest therein, further or wise or more extensively in any respect, although duly regis- than a judgment of one of the superior Courts aforesaid have bound such purchaser or mortgagee before the said Act 1 & 2 *V.* c. 110, where it had been duly docketed according law then in force." *See*, as to registering judgments so

---

p. *In re South*, L. R., 9 Ch. 3.

ee note (*f*), p. 874.

he further proviso as to purchasers, &c. before the 1st October, 1838, is repealed by the Stat. Law Rev. Act, 1874, No. 2 (37 & 38 V. c. 96) sched.

PART X.

as to affect lands, &c., as to purchasers, mortgagees, or creditor *ante*, p. 769. As to when it is necessary to register writs of execu tion issued on judgments obtained after the 23rd day of July, 186 and before the 29th July, 1864, so as to bind lands as again *bonâ fide* purchasers, &c., *see* 23 & 24 *V. c.* 38, *ante*, p. 769. B 27 & 28 *V. c.* 112, noticed *post*, p. 879, judgments entered up aft the 29th July, 1864, do not affect lands until actually delivere in execution.

Changes effected by 1 & 2 Vict. c. 110.

The principal changes produced by the 1 & 2 *V. c.* 110, in th effect of the *elegit*, are:—

Creditors may extend all debtor's land instead of a moiety.

1st. That in most cases the *elegit* creditor may extend all hi debtor's land instead of a moiety. Before the Act, the *elegit* credito was entitled to extend only a moiety (*k*). And if there were tw *elegit* creditors, and the first had a moiety, the other could onl have had a moiety of the remaining moiety (*l*); and if more wer extended the inquisition would have been void (*m*). If, however two *elegits*, issued on judgments signed in the same term, wer delivered to the sheriff together, whether at the suit of the same c different plaintiffs, a moiety of the entirety might have been ex tended on each (*n*). A moiety only should be extended where purchaser or mortgagee without notice is entitled under 2 & 3 *c.* 11, *s.* 5.

Copyhold lands may be extended.

2ndly. That (subject to the rights of the lord of the manor he may extend his debtor's customary and copyhold lands. Thes could not have been extended before the Act (*o*), nor could even term for years of copyhold lands made by licence of the lord (*p*).

So may lands over which debtor has a disposing power.

3rdly. That he may extend lands over which his debtor has an disposing power which he may, without the assent of any othe person, exercise for his own benefit. Before the Act, estates ta even in possession, were not liable to be extended after the death the debtor. Also, where an estate was limited as A. should appoint and in default of appointment to A. in fee, it was held that A might defeat the effect of a judgment on the estate by an executio of the power of appointment (*q*). Also, if one joint tenant suffere a judgment, and died before execution, it could not have bee executed afterwards on the lands held in joint tenancy; though, execution were sued in the lifetime of the conusor, it would bin the survivor (*r*). It would seem, that the statute extends to thes cases, inasmuch as in each of them the debtor has sole power ov

(*k*) After the lands were valued by the jury, the moiety was set out by the sheriff by metes and bounds, and delivered to the plaintiff. *Sparrow* v. *Matersock*, Cro. Car. 319. If he delivered more, or, it seems, even less than a moiety (*Berry* v. *Wheeler*, 1 Sid. 91, 239: *Pullen* v. *Purbeck*, 2 Salk. 563; 1 Ld. Raym. 718; 12 Mod. 355, quære as to *less ?*), or did not set it out by metes and bounds (*Fenny* v. *Durrant*, 1 B. & Ald. 40), the execution would have been void. It was not, however, necessary to set out a moiety of each particular tenement, but only certain tenements, &c., making in value a moiety of the whole. *Denny* v. *Abingdon*, Doug 473. See post, p. 884, as to its n now being necessary to set out th lands by metes and bounds.

(*l*) *Huit* v. *Cogan*, Cro. El. 482.

(*m*) *Morris* v. *Jones*, 3 D. & R 603.

(*n*) *Doe* d. *Cheese* v. *Creed*, 2 M. P. 648.

(*o*) *Morris* v. *Jones*, supra: *Hay don's case*, 3 Rep. 9; 1 Rol. Abr. 88

(*p*) 1 Rol. Abr. 888.

(*q*) *Doe* d. *Wigan* v. *Jones*, 10 B. C. 459; 5 M. & R. 563. See *Skeel* v. *Shirley*, 3 Myl. & Cr. 112.

(*r*) Co. Lit. 184.

his estate, except indeed in the where the consent of the protecte 4thly and lastly. Trust estat judgment was entered up befor the time of entering the judgme of issuing the *elegit*. The words time of the said execution sued of the trustee; and therefore, if direction of the *cestui que trust* trust at the time of the judgmen taken in execution (*t*).

As to what is now extendible:— expressly named in the statutes, 1 & 110, that the following may be e on leases for lives or years, and th which falls due after the return of arrears (*x*). Rent-charges, for the in ancient demesne (*z*). The wife during the coverture (*a*). The la or terms for years may still be ext fall within the 146th section of th existence of an equitable mortgag execution of the *elegit*, but, befo were entertained as to the extent t interfere in such a case, to restrain creditor (*c*). Land conveyed to a I the Public Health Act, may be ta judgment against the Local Board

There seem to be no words in following descriptions of property, w have been extended, viz., an advow be valued at any certain rent tow The glebe belonging to an ecclesiasti because these are each *solum Deo co*

(*s*) Judgments entered up after the above date do not affect lands until delivered in execution. See post, p. 879.

(*t*) *Hunt* v. *Coles*, Comyn, R. 226.

(*u*) *Bishop of Bristol's case*, 3 Leon. 113; Moore, 36; 1 Rol. Abr. 891, pl. 5; *Mayor, &c. of Poole* v. *Whitt*, 15 M. & W. 571, where there was a mortgage for years. As to a sale under an execution, of leaseholds renewable on lives, see *Reg.* v. *Lane*, 6 M. & W. 489. But an estate in remainder belonging to an infant cannot be taken. *In re South*, infra, n. (*q*).

(*x*) *Sharp* v. *Key*, 8 M. & W. 379; 9 Dowl. 770. In which case the rent would be no part of the reversion, but a mere chose in action.

(*y*) Bro. Elegit, 13: *Martin* v. *Wilks*, Moore, 211. See *Wotton* v. *Shirt*, Cr. El. 752.

his estate, except indeed in the case of an estate tail in remainder, where the consent of the protector is necessary.

4thly and lastly. Trust estates as well as others are when the judgment was entered up before 29th July, 1864 (*s*), bound from the time of entering the judgment, and not merely from the time of issuing the *elegit*. The words of the Statute of Frauds, "at the time of the said execution sued," were held to refer to the seisin of the trustee; and therefore, if he had conveyed the lands by the direction of the *cestui que trust* before execution, though seised in trust at the time of the judgment, the lands could not have been taken in execution (*t*).

Trust estates bound in certain cases from time of entering judgment.

As to what is now extendible:—Besides the descriptions of property expressly named in the statutes, it was held, even before 1 & 2 *V.* c. 110, that the following may be extended, viz., estates in reversion on leases for lives or years, and the plaintiff shall have the rent (*u*) which falls due after the return of the inquisition, but not previous arrears (*x*). Rent-charges, for they issue out of the land (*y*). Lands in ancient demesne (*z*). The wife's lands, which the husband has during the coverture (*a*). The lands of a bishop (*a*). Leaseholds for terms for years may still be extended under an *elegit*, and do not fall within the 146th section of the *Bankruptcy Act*, 1883 (*b*). The existence of an equitable mortgage upon the land is no bar to the execution of the *elegit*, but, before the Judicature Acts, doubts were entertained as to the extent to which a Court of Equity would interfere in such a case, to restrain the legal remedy of a judgment creditor (*c*). Land conveyed to a Local Board for the purposes of the Public Health Act, may be taken under an *elegit* issued in a judgment against the Local Board (*d*).

What lands may now, in general, be extended.

There seem to be no words in 1 & 2 *V.* c. 110, to include the following descriptions of property, which, before that Act, could not have been extended, viz., an advowsen in gross, because it cannot be valued at any certain rent towards payment of the debt (*e*). The glebe belonging to an ecclesiastical benefice, or the churchyard, because these are each *solum Deo consecratum* (*f*). A rent-seck (*g*).

Property which cannot even now be extended.

(*s*) Judgments entered up after the above date do not affect lands until delivered in execution. See ante, p. 879.

(*t*) *Hunt* v. *Coles*, Comyn, R. 226. *Bishop of Bristol's case*, 3 Rep. 113; Moore, 36; 1 Rol. Abr. 886, pl. 5; *Mayor, &c. of Poole* v. *Whitt*, 15 M. & W. 571, where there was a mortgage for years. As to a term under an execution, of leaseholds mortgagable on lives, see *Reg.* v. *Lane*, 8 M. & W. 489. But an estate in trust under belonging to an infant cannot be taken. *In re South*, infra, p. 1).

(*u*) *Sharp* v. *Key*, 8 M. & W. 379; *Farwell*. 770. In which case the rent seems to be no part of the reversion, but a mere chose in action.

(*x*) Bro. Elegit, 13; *Martin* v. Moore, 211. See *Wotton* v. Cr. El. 752.

(*y*) *Cox* v. *Barnsby*, Hob. 47; Moore, 211; Brownl. 234; 4 Inst. 270; 2 Id. 397.

(*z*) Dalt. Sheriff, 136. But see now post, Ch. CI.

(*a*) *Richardson* v. *Webb*, 76 L. T. Jour. 397: *Fleetwood's case*, 8 Rep. 171; 2 Inst. 395; Dalt. 137. See further, ante, p. 874.

(*b*) *Whitworth* v. *Gaugain*, 3 Hare, 416; 1 Cr. & Ph. 325; 10 Jur. 531: *Brunton* v. *Neale*, 14 L. J., Ch. 8.

(*c*) *Worral Waterworks Co.* v. *Lloyd*, L. R., 1 C. P. 719.

(*d*) Gilb. Exec. 39. See *Robinson* v. *Tongue*, 3 P. Wms. 401.

(*e*) Gilb. Exec. 40: *Anon.*, Jenk. 207: per Lord *Alvanley*, *Arbuckle* v. *Cowtan*, 3 B. & P. 327: *Parry* v. *Jones*, 1 C. B., N. S. 339; 26 L. J., C. P. 36.

(*f*) *Walsal* v. *Heath*, Cro. El. 656: *Haydon's case*, 3 Rep. 9.

(*g*) *Walsal* v. *Heath*, Cro. El. 656: *Haydon's case*, 3 Rep. 9.

PART X.

Any tenement which cannot be granted over, as the office of filacer (*h*), or the like. An equity of redemption cannot be extended (*i*). As to trust estates, the words of the present statute (except in the instance already mentioned) are nearly similar to those of the Statute of Frauds (29 *C.* 2, *c.* 3, *s.* 10, *ante*, p. 874) (*k*), and it was held that that statute extended only to cases of express trusts, and therefore not to an equity of redemption (*l*), and the 1 & 2 *V.* has not, it appears, altered the law in this respect (*m*). It seems that the Statute of Frauds does not include a mere equitable interest in a chattel (*n*). It does not extend to a trust created by the debtor in favour of himself and another person (*o*). And where lands were vested in trustees in trust for the debtor, and for raising a sum of money for another person, and the trustee permitted the debtor to receive the rents, it was held that a tenant by *elegit*, who had extended a moiety of the land on a judgment against the debtor, could not sue for the rent (*p*). An estate in remainder belonging to an infant cannot be taken (*q*).

In most cases when the interest of the debtor cannot be extended under an *elegit* it may now be got at by means of the appointment of a receiver. See *post*, *Ch. LXXX.*

Legal estate vested in purchaser or mortgagee not to be taken in execution.

By 18 & 19 *V.* *c.* 15, *s.* 11, "And whereas great delay and expense are occasioned upon purchases and mortgages of lands in consequence of judgments against mortgagees and Crown debts and liabilities to the Crown of mortgagees continuing to bind lands although the mortgagees have been *bonâ fide* paid off, and the lands have been actually conveyed to purchasers, or to other mortgagees: for remedy whereof, be it enacted as follows: Where any legal or equitable estate or interest, or any disposing power in or over any lands, tenements or hereditaments shall, under any conveyance or other instrument executed after the passing of this Act, become vested in any person as a purchaser or mortgagee for valuable consideration, such lands, tenements or hereditaments shall not be

(*h*) *Anon.*, Dyer, 7.

(*i*) *Hatton* v. *Haywood*, L. R., 9 Ch. 229; 43 L. J., Ch. 372: *Wells* v. *Kilpin*, L. R., 18 Eq. 298: *Beckett* v. *Buckley*, L. R., 17 Eq. 435: *Salt* v. *Cooper*, 16 Ch. D. 544; 50 L. J., Ch. 529: *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 275, 282. An equity of redemption could be extended under an extent. Tidd, Pr. 9th ed. 1036, citing *Rex* v. *De la Motte*, Forrest. 162: *Rex* v. *Coombes*, 1 Price, 207.

(*k*) And the same construction is put on these. See per Lord *Romilly*, M.R., in *Re The Duke of Newcastle*, L. R., 8 Eq. at p. 705.

(*l*) *Plunket* v. *Penson*, 2 Atk. 290: *Lyster* v. *Dolland*, 1 Ves. jun. 431. See *Scott* v. *Scholey*, 8 East, 467; 2 Saund. 11 a (*n*): *Mayor of Poole* v. *Whitt*, 15 M. & W. 571: *Gore* v. *Bowser*, infra.

(*m*) Per *Jessel*, M. R., *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. at pp. 283, 284: *Hatton* v. *Haywood*, *Wells* v. *Kilpin*, *Beckett* v. *Buckley*, supra, n. (*i*).

(*n*) *Scott* v. *Scholey*, 8 East, 467: *King* v. *Ballett*, 2 Vern. 248; 2 Wms. Saunders, 11 a (17). But in *Doe* v. *Evans*, 1 C. & M. 450, *Bayley*, B. appeared to entertain a strong opinion that an outstanding term vested in a trustee upon trust to attend the inheritance is liable to be seized in execution against the *cestui que trust* the owner of the inheritance. See ante, p. 848: cp. *In re The Duke of Newcastle*, L. R., 8 Eq. 700. As to an execution creditor being entitled to an equitable term belonging to the debtor, see *Gore* v. *Bowser*, supra.

(*o*) *Doe* d. *Hull* v. *Greenhill*, 4 B. & Ald. 684. See *Gore* v. *Bowser*, supra.

(*p*) *Harris* v. *Booker*, 4 Bing. 96; 12 Moo. 283.

(*q*) *In re South*, L. R., 9 Ch. 369; 43 L. J., Ch. 441.

taken in execution under any writ
to be sued upon any judgment, o
any mortgagee or mortgagees the
prior to or at the time of the e
shall any such judgment, decre
thereby secured, be a charge
hereditaments so vested in purcha
lands, tenements or hereditame
mortgagees be extended or taken
under any writ of extent or wr
issued by or on behalf of her Ma
respect of any judgment, statute
or entered into by, or inquisition
specialty made by, or acceptance
mortgagees, whereby he or they
become a debtor or accountant, o
Crown, where such mortgagee or
off prior to or at the time of the e
aforesaid" (*r*).

By 27 & 28 *V.* *c.* 112 [passed 29th
extend to Ireland, *s.* 7; after recitin
the law affecting freehold, copyhol
affecting purely personal estates
statutes, and recognizances (*t*), it is
Sect. 1. "No judgment, statute, o
after the passing of this Act, shall

(*r*) See *Greaves* v. *Wilson*, 4 Jur., N. S. 802, R.; 28 L. J., Ch. 103.

(*s*) *Backhouse* v. *Siddle*, 38 L. T. 857. As to when judgments entered up before this date are a charge upon land, see 1 & 2 V. c. 110, s. 13; and the 12th ed. of this work, p. 537.

(*t*) As to the object and effect of this statute, see per Lord *Selborne*, L. C., *Hatton* v. *Haywood*, L. R., 9 Ch. at p. 232 et seq.

(*u*) Equitable interests in land are within this section; so that when the legal estate is outstanding, and the judgment creditor is consequently unable to obtain delivery of the land, he must apply for an order removing this impediment, and this order will be a delivery in execution. *Hatton* v. *Haywood* (C. A.), L. R., 9 Ch. 229; 43 L. J., Ch. 372: *Kidd* v. *Tallentire*, W. N. 1877, 21: *Wells* v. *Kilpin*, L. R., 18 Eq. 298: 44 L. J., Ch. 184. The semble in *Thornton* v. *Fish*, 4 Giff. 505; 34 L. J., Ch. 466, is not correct. Where land has already been delivered to a prior judgment creditor, a subsequent judgment creditor is not in a position to present a petition under sect. 4. *Re Cowbridge R. Co.*, L. R., 5 Eq. 113; 37 L. J., Ch. 306. After the

taken in execution under any writ of *elegit* or other writ of execution, to be sued upon any judgment, or any decree, order or rule against any mortgagee or mortgagees thereof, who shall have been paid off prior to or at the time of the execution of such conveyance, nor shall any such judgment, decree, order or rule, or the money thereby secured, be a charge upon such lands, tenements or hereditaments so vested in purchasers or mortgagees, nor shall such lands, tenements or hereditaments so vested in purchasers or mortgagees be extended or taken in execution, or rendered liable under any writ of extent or writ of execution or other process sued by or on behalf of her Majesty, her heirs or successors, in respect of any judgment, statute or recognizance obtained against or entered into by, or inquisition found against, or obligation or specialty made by, or acceptance of office by any mortgagee or mortgagees, whereby he or they hath or have become or shall become a debtor or accountant, or debtors or accountants to the crown, where such mortgagee or mortgagees shall have been paid off prior to or at the time of the execution of such conveyance as aforesaid" (*r*).

By 27 & 28 *V. c.* 112 [passed 29th July, 1864], and which does not extend to Ireland, *s.* 7; after reciting that it is desirable to assimilate the law affecting freehold, copyhold, and leasehold estates to that affecting purely personal estates in respect of future judgments, statutes, and recognizances (*t*), it is enacted as follows:—

Judgments entered up after 29 July, 1864, not to affect land until delivered in execution (*s*).

Sect. 1. "No judgment, statute, or recognizance, to be entered up after the passing of this Act, shall affect any land (*u*) (of whatever

---

(*r*) See *Greaves* v. *Wilson*, 4 Jur., N. S. 802, R.; 28 L. J., Ch. 103.

(*s*) *Backhouse* v. *Siddle*, 38 L. T. . As to when judgments entered before this date are a charge on land, see 1 & 2 V. c. 110, s. 13; the 12th ed. of this work, p. 537.

(*t*) As to the object and effect of statute, see per Lord *Selborne*, C., *Hatton* v. *Haywood*, L. R., 9 at p. 232 et seq.

(*u*) Equitable interests in land are in this section; so that when the l estate is outstanding, and the gment creditor is consequently ble to obtain delivery of the land, ust apply for an order removing impediment, and this order will delivery in execution. *Hatton Haywood* (C. A.), L. R., 9 Ch. 43 L. J., Ch. 372: *Kidd* v. *ntire*, W. N. 1877, 21: *Wells* v. *in*, L. R., 18 Eq. 298: 44 L. J., 84. The semble in *Thornton* v. 4 Giff. 505; 34 L. J., Ch. 466, t correct. Where land has ly been delivered to a prior ent creditor, a subsequent ent creditor is not in a position esent a petition under sect. 4. *ebridge R. Co.*, L. R., 5 Eq. 37 L. J., Ch. 306. After the passing of this Act, G. obtained judgment against C., and afterwards M. did the same. M. on 15th and G. on 16th May issued and lodged with the sheriff an elegit. The inquisitions were taken on the same day, and the sheriff, notwithstanding G.'s protest, took that on M.'s elegit first, and delivered the debtor's lands in execution to him. It was held, that he had a charge on the lands prior to G. *Guest* v. *Cowbridge R. Co.*, L. R., 6 Eq. 619; 37 L. J., Ch. 909. And see *Re Bailey's Trusts*, 38 L. J., Ch. 237. Where a judgment creditor had lodged with the sheriff a *fi. fa.* against the goods of his debtor, and the sheriff had under it taken possession of leaseholds in which the debtor had an equitable life interest, it was held, that a Court of Equity had no jurisdiction, under sect. 4, to make an order for sale of such interest, and that the possession of the sheriff was not such a delivery in execution as would give the Court jurisdiction. *Re Duke of Newcastle*, L. R., 8 Eq. 700; 39 L. J., Ch. 69. Where a judgment creditor of a railway company extended certain surplus lands of the company, it was held by the Lords Justices, affirming an order of

PART X.

tenure) until such land shall have been actually delivered in ex
cution (*u*), by virtue of a writ of *elegit* or other lawful authority
in pursuance of such judgment, statute, or recognizance."

Interpretation of terms.

Sect. 2. "In the construction of this Act the term 'judgmer
shall be taken to include registered decrees, orders of Court
equity, and bankruptcy, and other orders having the operation o
judgment; and the term 'land' shall be taken to include all he
ditaments, corporeal or incorporeal, or any interest therein (*y*); a
the term 'debtor' shall be taken to include husbands of marri
women, assignees of bankrupts, committees of lunatics, and t
heirs or devisees of deceased persons."

Writs of execution to be registered.

Sect. 3. "Every writ or other process of execution of any su
judgment, statute or recognizance, by virtue whereof any la
shall have been actually delivered in execution, shall be register
in the manner provided by an Act, 23 & 24 *V. c.* 38 (*ante*, p. 76
intituled, 'An Act to further amend the Law of Property,' but
the name of the debtor against whom such writ or process
issued, instead of, as under the said Act, in the name of t
creditor; and no other or prior registration of such judgmen
statute, or recognizance shall be or be deemed necessary for a
purpose; and no reference to any such prior registration shall
required to be made in or by the memorandum or minute of su
writ or other process of execution, which shall be left with t
senior Master of the Court of Common Pleas for the purpose
such registry."

Creditor entitled to obtain order for sale.

By sect. 4, "Every creditor to whom any land of his debtor sh
have been actually delivered in execution by virtue of any su
judgment, statute, or recognizance, and whose writ or other pr
cess of execution shall be duly registered, shall be entitled fort
with, or at any time afterwards while the registry of such writ
process shall continue in force, to obtain from the Court of Cha
cery, upon petition in a summary way, an order for the sale (*z*)
his debtor's interest in such land, and every such petition may
served upon the debtor only; and thereupon the Court shall dire
all such inquiries to be made as to the nature and particulars of t

Wickens, V.-C., that he was entitled to an order for sale under sect. 4. *Re Ogilvie*, 41 L. J., Ch. 336. In a creditor's suit for the administration of the deceased debtor's estate, an order was made for payment of a sum of money into Court. The order not being complied with, a writ of sequestration of defendant's lands, &c. was issued, and the sequestrators seized his real estate: it was held, that plaintiffs were not entitled to an order for sale, as neither they, nor the sequestrators, nor the Court, were creditors to whom the land of the debtor had been actually delivered in execution. *Johnson* v. *Burgess*, L. R., 15 Eq. 398; 42 L. J., Ch. 400.

(*u*) See per *Jessel*, M. R., 9 Ch. D. at p. 283. The return of the sheriff to an elegit constitutes such actual delivery in execution. *Champne* v. *Burland*, 23 L. T. 584; 19 W. R. 148: per *James*, L. J., *Ex p. Evan* 13 Ch. D. at p. 258.

(*x*) These words "lawful auth rity" include sequestration (*In Rush*, L. R., 10 Eq. 422); they al extend to an order of the Court r moving a legal difficulty, or to a w of assistance, as the appointment a receiver. *Hatton* v. *Haywood*, L R., 9 Ch. 229, 235: *Ex p. Evans, In Watkins*, 13 Ch. D. 253, per *Jame* L. J., at p. 257: *Anglo-Italian Ban* v. *Davies*, 9 Ch. D. 275. A garnishe order nisi cannot affect land, so as conflict with the provisions of th section. *Chatterton* v. *Watney*, Ch. D. 259; 50 L. J., Ch. 535.

(*y*) See note (*u*), ante.

(*z*) Vide ante, p. 879, n. (*u*).

debtor's interest in such land to be necessary or proper (*a*); generally in carrying into effe the said Court with respect to s ons for the payment of debts s as the same may be found conv

This enactment applies onl entered up after the passing of

Sect. 5, "If it shall appear o other debt due on any judgm charge on such land, the credi charge (whether prior or subsequ shall be served with notice of th such service be bound thereby, proceedings under the same, an the proceeds of such sale shall who may be found entitled the priorities."

Sect. 6. "Every person clai through or under the debtor, delivery of such land in executio every such order for sale, and thereon."

The equitable remedies which the 27 & 28 *V. c.* 112, are not pr or by the Judicature Acts. Whe issued writs of *elegit*, and was una tion by reason of the judgment gaged; it was held, in an action in to obtain a charge on the debtor' he was entitled to have a receiver action (*d*). A creditor who recove can now, by summons after judg in the same way as he could have state action instituted to enforce hi

By 22 & 23 *V. c.* 35, *s.* 11, "The of any hereditaments charged there of the judgment as to the heredit as to any other property not specifi nevertheless to the rights of all pe sents or property remaining unrel confirming the release" (*f*).

The debtor has no interest left i which can be extended under a sub

(*a*) See *In re Bishop's Waltham R. Co.*, L. R., 2 Ch. 352.

(*b*) As to the order in the case of a petition against a railway com pany, see *Gardner* v. *London, Chat ham & Dover R. Co.*, *Ex p. Grissell*, L. R., 2 Ch. 384: *In re Bishop's Waltham R. Co.*, L. R., 2 Ch. 383: *In re Calne R. Co.*, L. R., 9 Eq. 658: *In re Hull and Hornsea R. Co.*, L. R., 2 Eq. 262: *Stevens* v. *Mid-Hants R.*

debtor's interest in such land and his title thereto, as shall appear to be necessary or proper (*a*); and in making such inquiries, and generally in carrying into effect such order for sale, the practice of the said Court with respect to sales of real estates of deceased persons for the payment of debts shall be adopted and followed, so far as the same may be found conveniently applicable" (*b*).

This enactment applies only where the judgment has been entered up after the passing of the Act (*c*).

When other creditors, notice of sale to be served on them.

Sect. 5, "If it shall appear on making such inquiries that any other debt due on any judgment, statute, or recognizance, is a charge on such land, the creditor entitled to the benefit of such charge (whether prior or subsequent to the charge of the petitioner) shall be served with notice of the said order for sale, and shall after such service be bound thereby, and shall be at liberty to attend the proceedings under the same, and to have the benefit thereof; and the proceeds of such sale shall be distributed among the persons who may be found entitled thereto according to their respective priorities."

Parties claiming through debtor, bound.

Sect. 6. "Every person claiming any interest in such land, through or under the debtor, by any means subsequent to the delivery of such land in execution as aforesaid, shall be bound by every such order for sale, and by all the proceedings consequent thereon."

The equitable remedies which a judgment creditor had prior to the 27 & 28 *V. c.* 112, are not prejudicially affected by that Act, or by the Judicature Acts. Where, therefore, a judgment creditor issued writs of *elegit*, and was unable to obtain a delivery in execution by reason of the judgment debtor's real estate being mortgaged; it was held, in an action instituted by the judgment creditor to obtain a charge on the debtor's real estate, and for a sale, that he was entitled to have a receiver appointed pending the trial of the action (*d*). A creditor who recovers judgment for a sum of money can now, by summons after judgment, obtain equitable execution in the same way as he could have done before the statute in a separate action instituted to enforce his equitable rights (*e*).

Effect of release of part of land charged with a judgment.

By 22 & 23 *V. c.* 35, *s.* 11, "The release from a judgment of part of any hereditaments charged therewith shall not affect the validity of the judgment as to the hereditaments remaining unreleased, or as to any other property not specifically released, without prejudice nevertheless to the rights of all persons interested in the hereditaments or property remaining unreleased, and not concurring in or confirming the release" (*f*).

Lands extended under prior writ.

The debtor has no interest left in lands extended under an *elegit* which can be extended under a subsequent writ (*g*).

(*a*) See *In re Bishop's Waltham Co.*, L. R., 2 Ch. 352.

(*b*) As to the order in the case of petition against a railway company, see *Gardner* v. *London, Chatham & Dover R. Co., Ex p. Grissell*, L. R., 2 Ch. 384: *In re Bishop's Waltham R. Co.*, L. R., 2 Ch. 383: *Re Calne R. Co.*, L. R., 9 Eq. 658: *Re Hull and Hornsea R. Co.*, L. R., 7. 262: *Stevens* v. *Mid-Hants R. Co.*, L. R., 8 Ch. 1064.

(*c*) *Re Isle of Wight Ferry Co.*, 34 L. J., Ch. 194.

(*d*) *The Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 275; 47 L. J., Ch. 833.

(*e*) See cases post, p. 914.

(*f*) See *Booth* v. *Smith*, W. N. 1884, 230.

(*g*) *Carter* v. *Hughes*, 2 H. & N. 714; 27 L. J., Ex. 225.

PART X.

Effect of bankruptcy of debtor.

By the Bankruptcy Act, 1883 (46 & 47 *V. c.* 52), *s.* 45 (1), "Wher a creditor has issued execution against the . . . . lands of a debto . . . . he shall not be entitled to retain the benefit of the executio . . . . against the trustee in bankruptcy of the debtor, unless he has completed the execution . . . . before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor. (2), "For the purpose of this Act . . . . an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver."

Under the Act of 1869 it was held that as soon as the sheriff had seized the goods under the *elegit*, the execution creditor became a secured creditor and was entitled to the proceeds of the execution (*g*), and this is still so with regard to seizures made before the 1st January, 1884 (*h*).

2. Form of.

2. *Form of.*]—A form of writ is given in Appendix H. to the *R. of S. C.*, 1883. Its use is prescribed by *Ord. XLII. r.* 14. Since the Bankruptcy Act, 1883 (*ante*, p. 874), a new form is used in which all words referring to the goods and chattels of the judgment debtor are omitted, and in which the words "chattels real" are added after "lands."

In the form given in the Appendix to the *R. of S. C.*, when filled up in accordance with the copy of the rules printed by the printer to the House of Commons, the sheriff is directed to deliver all the lands of which the debtor was seized or possessed on "the date of the certificate of taxation" or at any time afterwards. The reference is evidently to the wrong note, but the note intended to be referred to, which directs that the day to be inserted is "the day on which the judgment or order was made," appears to be inconsistent with the stat. 27 & 28 *V. c.* 112, *s.* 1 (*ante*, p. 879).

As to the direction, teste, and return day of the writ, *see ante*, p. 797 *et seq.* This writ, like other writs of execution, must strictly pursue the judgment, and be warranted by it (*i*); *see ante*, p. 79[illegible] *and the instances there.*

The plaintiff may issue writs of *elegit* for the whole debt into as many different counties as he pleases, and may execute all or any of them at his pleasure (*k*).

3. When to be sued out.

3. *When to be sued out.*]—As to this in general, *see Ord. XLII. r.* 17, *ante*, p. 789. After the expiration of six years from the recovery of the judgment, this writ cannot be issued without leave obtained for that purpose; *see post, Ch. LXXXIV.* (*l*).

(*g*) *Ex p. Abbott, In re Gourlay*, 15 Ch. D. 447; 50 L. J., Ch. 80; 43 L. T. 417 (C. A.): *Ex p. Vale, In re Bannister*, 18 Ch. D. 137; 50 L. J., Ch. 797; 45 L. T. 200: *Ex p. Sulger, In re Chinn*, 17 Ch. D. 839; 50 L. J., Ch. 687; 44 L. T. 652: *Ex p. Shaw, In re Henderson*, W. N. 1884, 60. See post, Vol. 2, Ch. CII.

(*h*) *Hough* v. *Windus* (C. A.), 12 Q. B. D. 224; 53 L. J., Q. B. 165; 50 L. T. 312; 32 W. R. 452: *In re Windus, Ex p. Hough*, 50 L. T. 21[illegible] 32 W. R. 540; W. N. 1884, 55, *Cave*, [illegible]

(*i*) See *Rolt* v. *The Mayor of Gravesend*, 7 B. C. 777.

(*k*) *Anon.*, Dyer, 162 b: *Farncom* v. *Kent*, 2 Dowl. 465; ante, p. 793.

(*l*) *Putland* v. *Newman*, 6 M. Sel. 179. But see *Seymour* v. *Gre[illegible]ville*, Carth. 283; Chit. 875, 883.

When to l

As to the mode of obtainin[illegible] deceased defendant where judg[illegible] one of them dies before executi[illegible]

4. *How sued out and indorsed,* [illegible] *up the blanks in it by inserting* [illegible] *accord with the judgment. Pur* [illegible] *5s. fee stamp on it. (See ante,* [illegible] *parties' names, &c. Get the wr* [illegible] *file the præcipe.* As to the form [illegible] and what must be produced to th[illegible] *see ante*, p. 795 (*n*). *Indorse it to* [illegible] p. 801. It is not necessary to in[illegible] and place of abode (*o*). *Take t* [illegible] *executed; or, in country cases, yo* [illegible] *in town, which will be deemed the* [illegible] *office in the country* (*p*). *The und* [illegible] *execution.*

5. *Registration of Writs.*]—As [illegible] writs of *elegit, see* 27 & 28 *V. c.* 11[illegible]

6. *When, where, and how execut* [illegible] writs of execution may in genera[illegible] to how far doors may be broken [illegible] necessity for producing the warra[illegible]

Upon the receipt of the elegit, the [illegible] *are to inquire as to the lands and* [illegible] *value* (*q*).

Attend at the time appointed for e[illegible] *to prove what lands, &c. the debtor i*[illegible] *Proof of possession of the land by th*[illegible] *in respect of the same, is primâ faci*[illegible] *the proceeding is an ex parte one, an* [illegible] *the debtor, it is in general sufficient t*[illegible] *title. The inquisition may be prep*[illegible] *facts, with blanks to be filled up* [illegible] *jurors will seal it immediately afte*[illegible] *No notice of the taking of the inquisi*[illegible] *debtor* (*t*).

Upon the inquisition had, the sh[illegible] caution to the execution creditor [illegible] debtor, after being valued by the [illegible] delivered execution of a moiety before

(*m*) 2 Saund. 50 a, n. 4.

(*n*) See form, Chit. Form, p. 424.

(*o*) See *Clarke* v. *Palmer*, 9 B. & [illegible] 153.

(*p*) Ante, p. 807.

(*q*) *Palmer's case*, 4 Co. 74: *Fulwood's case*, Id. 65: *Semayne's case*, 5 Co. 91: *Anon.*, Dyer, 100; 2 Inst. [illegible] 396; Co. Lit. 389.

As to the mode of obtaining execution against the land of a deceased defendant where judgment is obtained against two, and one of them dies before execution, *see post*, p. 961 (*m*).

After death of one of several defendants.

4. *How sued out and indorsed, &c.*]—*Obtain a form of writ and fill up the blanks in it by inserting the parties' names, &c., making it accord with the judgment. Purchase a præcipe, with an impressed 5s. fee stamp on it.* (*See ante*, p. 795.) *Fill up the same with the parties' names, &c. Get the writ stamped at the proper office, and file the præcipe.* As to the form of, and signature to, the *præcipe*, and what must be produced to the officer when the writ is stamped, *see ante*, p. 795 (*n*). *Indorse it to levy the debt, &c., as directed ante*, p. 801. It is not necessary to indorse on it the defendant's addition and place of abode (*o*). *Take the writ to the sheriff's office to be executed; or, in country cases, you may deliver it to the sheriff's agent in town, which will be deemed the same as delivering it at the sheriff's office in the country* (*p*). *The under-sheriff will appoint a time for its execution.*

4. How sued out and indorsed, &c.

5. *Registration of Writs.*]—As to when it is necessary to register writs of *elegit*, *see* 27 & 28 *V. c.* 112, *s.* 3, *ante*, p. 880.

5. Registration of writs.

6. *When, where, and how executed.*]—As to when, where, and how writs of execution may in general be executed, *see ante*, p. 809; as to how far doors may be broken open, *see ante*, p. 812; as to the necessity for producing the warrant, *see ante*, p. 813.

6. When, where, and how executed.

Upon the receipt of the elegit, the sheriff must impanel a jury, who are to inquire as to the lands and tenements of the debtor, and their value (*q*).

Attend at the time appointed for executing the writ with your evidence to prove what lands, &c. the debtor is seised of, and their annual value. Proof of possession of the land by the debtor, or receipt of rent by him in respect of the same, is primâ facie evidence of his title to it (*r*). *As the proceeding is an ex parte one, and the inquisition not conclusive on the debtor, it is in general sufficient to give slight evidence of the debtor's title. The inquisition may be prepared beforehand, according to the facts, with blanks to be filled up on execution, and the sheriff and jurors will seal it immediately after the taking of the inquisition* (*s*). *No notice of the taking of the inquisition need be given to the judgment debtor* (*t*).

Upon the inquisition had, the sheriff is to make and deliver execution to the execution creditor of all the lands, &c. (*u*) of the debtor, after being valued by the jury, in like manner as he delivered execution of a moiety before 1 & 2 *V. c.* 110, and must return

(*m*) 2 Saund. 50 a, n. 4.
(*n*) See form, Chit. Form, p. 424.
(*o*) See *Clarke* v. *Palmer*, 9 B. & 153.
(*p*) Ante, p. 807.
(*q*) *Palmer's case*, 4 Co. 74: *Fulld's case*, Id. 65: *Semayne's case*, 91: *Anon.*, Dyer, 100; 2 Inst. Co. Lit. 389.
(*r*) *Barnes* v. *Harding*, 1 C. B., N. S. 568. The attendance of witnesses can be compelled by writ of subpœna.
(*s*) See the form, Chit. Forms, p. 428.
(*t*) *Steed* v. *Layner*, 2 Ld. Raym. 1382; Tidd, 9th ed. 1036.
(*u*) As to what may be extended, see ante, p. 873 et seq.

PART X.

the writ, in order that the inquisition may be recorded in the Co out of which the *elegit* issued (*x*). If the sheriff return the *el* that there are no lands, he need not return the inquisition (*y*).

Form of the inquisition (*z*); The inquisition must find the lands with certainty; the place a county where they lie, and where the inquisition is taken (*a*); t estate the defendant has in them (*b*); whether seised in several or as joint tenant, or tenant in common (*c*), and their value (*d*). Before 1 & 2 *V. c.* 110, it was necessary to set out the lands by me and bounds; but since that Act, where the whole of the lands extended, it is sufficient to describe them by their names, or in so

may be good in part and bad in part. other manner by which they may be identified (*e*). If the she extend lands, &c. not extendible by law, and also extend lan which are extendible, the inquisition may be good as to the latt though bad as to the former (*f*).

Term of years, how extended (*g*). A term of years may be delivered to the creditor at an extend annual value, as part of the lands of the debtor (*h*). But the debt may, if he wish it, save the term, by tendering the sum at which has been appraised, at any time before delivery, or, it is said, ev afterwards by a tender in Court (*i*); if delivered to the credit after such tender made, the debtor may be relieved by applicati to the Court. The inquisition, in both cases, should find the co mencement and duration of the term with certainty (*k*).

Possession. The sheriff delivers only legal possession of lands, not actu possession (*l*). As to how actual possession is to be obtained, *post*, p. 886.

Costs. The execution creditor, at all events so long as he reta possession under the writ, cannot obtain an order to tax his co incidental to the issuing of the writ and the inquisition and a them to the sheriff's costs (*m*). Nor can the costs of the inquisiti be levied under the writ (*n*).

7. When and how returned. 7. *When and how returned.*]—We have already noticed (*a* p. 815 *et seq.*) when and how the sheriff may be compelled to retu the writ, and how the return is to be made. Unlike other writs, have seen that an *elegit* must in all cases be returned (*o*). If la have been extended under it, the inquisition must also be return and filed, otherwise not (*p*). If any objection be intended to

(*x*) 2 Bac. Abr. "Execution" (C), 2; Co. Lit. 389 b: 2 Inst. 326: *Anon.*, Dy. 100.

(*y*) *Stonehouse* v. *Ewen*, 2 Str. 874. See infra.

(*z*) See the form, Chit. Forms, 428.

(*a*) *Raysing's case*, Dy. 208.

(*b*) See Moore, 8.

(*c*) *Heard* v. *Baskerfield*, Hut. 16; Browl. 38.

(*d*) *Sparrow* v. *Mattersock*, Cro. Car. 319.

(*e*) *Doe* d. *Roberts* v. *Parry*, 2 D. & L. 430; 13 M. & W. 356: *Sherwood* v. *Clarke*, 15 M. & W. 764. See ante, p. , n.

(*f*) *Morris* v. *Jones*, 3 D. & R. 603; 2 B. & C. 242.

(*g*) See as to selling a term for years under a *fi. fa.*, ante, p.

(*h*) 2 Inst. 395: *Fleetwood's ca* 8 Co. 171; Dalt. 137.

(*i*) 2 Saund. 68, n.

(*k*) Ib.: *Palmer* v. *Humphrey*, C El. 584: *Palmer's case*, 4 Co. Gilb. Execution, 35.

(*l*) See per *Mellish*, L. J., L. R. Ch. at p. 236; ep. *Ex p. Abbott*, Ch. D. 447.

(*m*) *Mahon* v. *Miles*, 45 L. T. 5 32 W. R. 128.

(*n*) *Porter* v. *Wotton*, 28 Sol. Jo 548.

(*o*) Ante, p. 815.

(*p*) *Stonehouse* v. *Ewen*, 2 Str. 8 *Anon.*, Dy. 100 a, pl. 71: and marg. See forms of the return inquisition, &c. Chit. Forms, p. 4

made by the execution creditor matter extrinsic, it must be mad The debtor may compel the cr roll (*r*). The return vests the le ment creditor (*s*), and constitutes 27 & 28 *V. c.* 112, *s.* 1 (*ante*, p. 8

Setting aside or impugning Inqui set aside the writ and order a n finding of the jury is incorrect jury found that the debtor had shown to be wrong by affidavi his notes of the evidence produ set aside the inquisition on th than the creditor or debtor, wh such person not being in any w jury (*y*). It seems that the debt If the inquisition be bad on the proceeding to set it aside is nec extended which cannot properly b in an action by the tenant by *elegi*

8. *Poundage and Expenses.*]—As

9. *What Writs may issue after it* an *elegit*, the execution creditor m another county; or, even if lan *elegit*, he, on a suggestion that the the same or in another county, ma the sheriff of such county (*c*). B an *elegit*, no other writ of executio against the debtor's person or p victed from the lands extended (*d*)

(*q*) 2 Inst. 396; 2 Ch. Ca. 183. So ated in previous editions of this work; but see *Anon.*, 1 Vent. 259.

(*r*) *Casseldine* v. *Munday*, 2 Dowl. 169.

(*s*) See per *Mellish*, L. J., L. R., 9 Ch. at p. 236.

(*t*) *Champneys* v. *Burland*, 23 L. T. 64; 19 W. R. 148.

(*u*) See *Barnes* v. *Harding*, 1 C. B., N. S. 568; ep. *Morris* v. *Jones*, 3 D. & R. 603; 2 B. & Cr. 603; 2 Inst. 396. Cp. the proceedings on setting aside an inquisition on a writ of inquiry, post, Vol. 2, Ch. CXV., "*Writ of Inquiry.*"

(*v*) Id.

(*x*) *Cooper* v. *Gardner*, 3 Ad. & E. 211; Watson on Sheriff, 314, 2nd ed.

(*y*) Id.: *Harris* v. *Booker*, 4 Bing. 96; per *Best*, C. J., at p. 100: *Doe* d. *Hull* v. *Greenhill*, 4 B. & Ald. 684: ep. *Anon.*, Vent. 259: *Morris* v.

made by the execution creditor or debtor to the inquisition, for matter extrinsic, it must be made before the inquisition is filed (*q*). The debtor may compel the creditor to enter the return on the roll (*r*). The return vests the legal estate in the lands in the judgment creditor (*s*), and constitutes actual delivery of the land within 27 & 28 *V.* c. 112, *s.* 1 (*ante*, p. 879) (*t*).

Setting aside or impugning inquisition.

Setting aside or impugning Inquisition.]—The Court may, it appears, set aside the writ and order a new writ and inquisition where the finding of the jury is incorrect (*u*). Thus they did so when the jury found that the debtor had no lands, and such finding was shown to be wrong by affidavits of the under-sheriff verifying his notes of the evidence produced (*v*). But the Court will not set aside the inquisition on the application of a person, other than the creditor or debtor, who is a stranger to the action (*x*), such person not being in any way bound by the finding of the jury (*y*). It seems that the debtor is bound by the inquisition (*z*). If the inquisition be bad on the face of it, it is a nullity, and no proceeding to set it aside is necessary (*a*). And if anything be extended which cannot properly be so, the objection may be taken in an action by the tenant by *elegit* to recover it (*b*).

8. Poundage and expenses.

8. *Poundage and Expenses.*]—As to these, *see ante*, p. 824 *et seq.*

9. What writs may issue after it.

Generally.

9. *What Writs may issue after it.*]—If no land be extended upon a *elegit*, the execution creditor may, of course, have an *elegit* into another county; or, even if lands be extended upon the first *elegit*, he, on a suggestion that the debtor has more lands either in the same or in another county, may have another *elegit* directed to the sheriff of such county (*c*). But where land is extended upon a *elegit*, no other writ of execution but an *elegit* can be sued out against the debtor's person or property, unless the creditor be evicted from the lands extended (*d*).

(*q*) 2 Inst. 396; 2 Ch. Ca. 183. So stated in previous editions of this work; but see *Anon.*, 1 Vent. 259.

(*r*) *Casseldine* v. *Munday*, 2 Dowl. 3.

(*s*) See per *Mellish*, L. J., L. R., 9 Ch. at p. 236.

(*t*) *Champneys* v. *Burland*, 23 L. T. 18; 19 W. R. 148.

(*u*) See *Barnes* v. *Harding*, 1 C. B., N. S. 568; cp. *Morris* v. *Jones*, 3 D. & R. 603; 2 B. & Cr. 603; 2 Inst. 396. Cp. the proceedings on setting aside an inquisition on a writ of inquiry, post, Vol. 2, Ch. CXV., "*Writ of Inquiry.*"

(*v*) Id.

(*x*) *Cooper* v. *Gardner*, 3 Ad. & E. 211; Watson on Sheriff, 314, 2nd ed.

(*y*) Id.; *Harris* v. *Booker*, 4 Bing. 96, per *Best*, C. J., at p. 100: *Doe* d. *Tull* v. *Greenhill*, 4 B. & Ald. 684; cp. *Anon.*, Vent. 259: *Morris* v. *Jones*, 2 B. & C. 242; 3 D. & R. 603: *Doe* d. *Evans* v. *Thomas*, 2 Cr. & J. 71; Cole on Ejectment, 567, 568: *Martin* v. *Smith*, 27 L. J., Ex. 317; Rosc. Ev., 13th ed. 981.

(*z*) *Doe* d. *Evans* v. *Thomas*, supra; *Morris* v. *Jones*, 3 D. & R. at p. 606, per *Abbott*, C. J.

(*a*) *Fenny* v. *Durrant*, 1 B. & Ald. 40, 41: *Doe* d. *Taylor* v. *Lord Abingdon*, Dougl. 473; Watson on Sheriff, 2nd ed. 313, 314. But see *Stamford* v. *Hobart*, Sid. 239.

(*b*) Watson on Sheriff, 2nd ed. 313: *Doe* d. *Parr* v. *Roe*, 1 Q. B. 700. See supra, n. (*a*); Cole on Ejectment, 567, 568.

(*c*) *Foster* v. *Jackson*, Hob. 57; Ro. Abr. 404: *Hunger* v. *Frey*, Moore, 341; Sty. 454, 455: see *Farncombe* v. *Kent*, 2 Dowl. 464. And see the form of the writ, Chit. Forms, p. 430.

(*d*) Bro. Abr. Elegit, 15; 1 Ro. Abr. 896: *Anon.*, Hob. 2: *Foster* v.

PART X.

Where lands are extended under a writ of *elegit*, there is n interest in them left in the debtor which can be extended under subsequent writ (*e*).

Where the elegit is ineffective.

But if the *elegit* be ineffective, as if the sheriff return that he h taken an inquisition of the lands, but could not deliver them becau they are already extended, the execution creditor may then ha execution by *fi. fa.* (*f*). Or, if the inquisition be avoided other matter extrinsic, the creditor shall have a new writ of *eleg* or *fi. fa.*, at his option. Or, if it be void for matter appearing up the face of it, then, as the creditor can never obtain actual posse sion of the land under it, he should apply to the Court to vacate t writ and award another; which may be done either upon a sugge tion of the matter, or upon a *scire facias* (*g*). So, if the sheriff retu *nihil* to an *elegit*, the execution creditor may have execution *fi. fa.* (*h*), or he may sue out another *elegit* (*i*). If formerly t sheriff returned that he had levied upon the goods for part, a *nihil* as to the lands, the creditor might have had exec tion for the residue, either by *fi. fa.* (*k*), or by another *elegit* (or he might have had an action on the judgment (*m*). So, althou an *elegit* be awarded on the roll, yet if no writ in fact issue (*m*); if it have issued but nothing be done or returned on it, the credi is not thereby precluded from having execution by *fi. fa.* if wish it.

Better to issue fi. fa. first.

In most cases it is more advisable to sue out a *fi. fa.* against debtor's goods in the first instance; and if they are not sufficient satisfy the debt, then to sue out an *elegit* against his land (*o*).

10. How the creditor shall obtain possession.

10. *How the Execution Creditor shall obtain Possession, &c.*]—T sheriff delivers only legal possession of the lands (or rather a ri of entry), and not actual possession (*p*). The execution cred may, when the execution debtor is in possession, enter and t possession under the *elegit;* but in some cases it may be advis to proceed by action for the recovery of the lands (*q*). *Be*

Jackson, Id. 58: *Cowley* v. *Lideot*, 2 Bulst. 97: *Blumfield's case*, 5 Co. 87: *Crawley* v. *Lidgeat*, Cro. Jac. 338; 2 Saund. 68, b, c: *R.* v. *Derbyshire, &c. R. Co.*, 23 L. J., Q. B. 333. As to the proceedings under 8 V. c. 16, against the shareholder of a public company after land of the company has been extended under an *elegit*, see Vol. 2, Ch. XCII.

(*e*) *Carter* v. *Hughes*, 2 H. & N. 714; 27 L. J., Ex. 224.

(*f*) Ro. Abr. 905.

(*g*) See Townsend Judgm. 129, 130; 2 Saund. 68 c; 16 & 17 C. 2, c. 5, s. 2; 8 G. 1, c. 25, s. 4.

(*h*) *Knowles* v. *Palmer*, Cro. El. 160.

(*i*) *Anon.*, Hob. 2: *Crawley* v. *Lidgeat*, Cro. Jac. 338; 2 Saund. 68 c.

(*k*) *Beacon* v. *Peck*, 1 Str. 226: *Lancaster* v. *Fidler*, 2 Ld. Raym. 1451: *Foster* v. *Jackson*, Hob. 58: *Crawley* v. *Lidgeat*, Cro. Jac. 33

(*l*) *Glascock* v. *Morgan*, 1 Lev. 1 Sid. 184.

(*m*) See 2 Saund. 68 c.

(*n*) *Cooper* v. *Longworth*, Mo 545.

(*o*) 2 Saund. 69, n.

(*p*) *Brown* v. *Rivers*, Doug. 4 *Jefferson* v. *Dawson*, 2 Keb. 2 *Taylor* v. *Cole*, 3 T. R. 295.

(*q*) In *Rogers* v. *Pitcher*, 6 Tau 207, *Gibbs*, C. J., expressed him to be of opinion that there is no cessity for a tenant by *elegit* to br ejectment to obtain possession, that he might enter at once, exce ing where the tenant in possess held under a lease prior to the pla tiff's judgment. As to a forc entry and the necessity for bring ejectment, see Vol. 2, Ch. CVI. *Hughes* v. *Lumley*, 4 E. & B. 274 L. J., Q. B. 57, it was held, tha could not be set up as a defence

bringing such action the writ mus of the writ and the inquisition tended, such action cannot be b

Where rent became due afte the sheriff, but before the inquis that the execution creditor was execution creditor has a right to

If tenant by *elegit* be evicted b shall recover the lands again by action of *scire facias* and re-exte

Although the *elegit* founded on 1 & 2 *V. c.* 110), says that the his freehold," yet the tenant b chattel interest only, which goes

As to sale, *see ante*, p. 880.

11. *How the Debtor shall recover*

execution creditor shall have fu the extended value of the land, either by an action of ejectmen *vendam terram*. Or, before the ju upon tendering to the creditor in to satisfy the judgment, may of *scire facias ad rehabendam ter* Court out of which the *elegit* issued to ascertain the amount of the re order that, if it appear that the shall be delivered to the debtor (*t* been complied with even before ection of that statute expressly su account in the Court out of whi tenant by *elegit* was subject to in a Before this Act the debtor sometim If the lands were recovered back would be allowed interest on his jud he would be obliged to account, not but for the actual profits of the land as a mortgagee in possession would

an ejectment that the judgment was under a warrant of attorney which was void under the usury laws. As to what is evidence in ejectment against the judgment debtor, see *Martin* v. *Smith*, 27 L. J., Ex. 317.

(*r*) *Mayor of Poole* v. *Whitt*, 15 M. & W. 571.

(*s*) *Sharp* v. *Key*, 8 M. & W. 379; 9 Dowl. 770: *Mayor of Poole* v. *Whitt*, supra.

(*t*) *Lloyd* v. *Davies*, 2 Ex. 103; 18 L. J., Ex. 80.

(*u*) 32 H. 8, c. 5; 15 & 16 V. c. 76, s. 132; Co. Litt. 289 b, 290 a: *Fulwood's case*, 4 Co. 66 a: *Crawley* v. *Lidgeat*, Cro. Jac. 338. And see 16 & 17 C. 1, c. 25, s. 4. The remedy given

bringing such action the writ must be returned and filed, and an award of the writ and the inquisition entered. Where a reversion is extended, such action cannot be brought (*r*).

Right to rent.

Where rent became due after the delivery of a writ of *elegit* to the sheriff, but before the inquisition was taken thereon, it was held that the execution creditor was not entitled to the rent (*s*). The execution creditor has a right to distrain without attornment (*t*).

Where he is evicted.

If tenant by *elegit* be evicted before the debt be wholly levied, he shall recover the lands again by ejectment; or he may proceed by action of *scire facias* and re-extent (*u*).

Creditor's interest is a chattel.

Although the *elegit* founded on the statute of Westminster (but not 1 & 2 *V. c.* 110), says that the plaintiff shall hold the lands "*as* his freehold," yet the tenant by *elegit* has not a freehold but a chattel interest only, which goes to his executors (*x*).

Sale.

As to sale, *see ante*, p. 880.

11. How the debtor shall recover back his land.

11. *How the Debtor shall recover back his Land.*]—As soon as the execution creditor shall have fully satisfied his judgment out of the extended value of the land, the debtor may recover it back, either by an action of ejectment, or by a *scire facias ad rehabendam terram*. Or, before the judgment is so satisfied, the debtor, upon tendering to the creditor in Court whatever may be wanting to satisfy the judgment, may recover the land by an action of *scire facias ad rehabendam terram*. Or he may apply to the Court out of which the *elegit* issued, to refer it to one of the Masters to ascertain the amount of the rents and profits received, and to order that, if it appear that the debt, &c. is satisfied, possession shall be delivered to the debtor (*y*). This application would have been complied with even before 1 & 2 *V. c.* 110; and the 11th section of that statute expressly subjects the *elegit* creditor to such account in the Court out of which the execution is sued, as a tenant by *elegit* was subject to in a Court of equity before the Act. Before this Act the debtor sometimes proceeded by bill in equity. If the lands were recovered back by a suit in equity, the creditor should be allowed interest on his judgment: but, on the other hand, he would be obliged to account, not for the extended value merely, but for the actual profits of the land while in his possession, exactly as a mortgagee in possession would have to account for them (*z*).

---

ejectment that the judgment was under a warrant of attorney which is void under the usury laws. As to what is evidence in ejectment that the judgment debtor, see *Martin* v. *Smith*, 27 L. J., Ex. 317. *Mayor of Poole* v. *Whitt*, 15 M. & W. 571. *Sharp* v. *Key*, 8 M. & W. 379; *Cowl.* 770: *Mayor of Poole* v. *Whitt*, *supra*.

Lloyd v. *Davies*, 2 Ex. 103; 18 L. J., Ex. 80.

32 H. 8, c. 5; 15 & 16 V. c. 76, s. 2; Co. Litt. 289 b, 290 a: *Fulwood's case*, 4 Co. 66 a: *Crawley* v. *Edgeat*, Cro. Jac. 338. And see 1 & 2 V. c. 25, s. 4. The remedy given by Stat. Westminster was by writ of novel disseisin, and after that, by writ of re-disseisin if needs be; but these are now abolished; 3 & 4 W. 4, c. 27.

(*x*) Co. Litt. 42, 43; 2 Inst. 396; 2 Bla. Com. 161. See *Whitworth* v. *Gaugain*, 3 Hare, 416; 1 Cr. & Ph. 325; 13 L. J., Ch. 288.

(*y*) *Price* v. *Varney*, 5 D. & R. 612; 3 B. & C. 733.

(*z*) *Godfrey* v. *Watson*, 3 Atk. 517; Amb. 520; 2 Ves. 589: *Lewis* v. *Morgan*, 3 Y. & J. 394: *Bull* v. *Faulkner*, 12 Jur. 33; 17 L. J., Ch. 23, V.-C. K.; *Rowe* v. *Wood*, 2 Jac. & W. 556: *Mayer* v. *Murray*, L. R., 8 Ch. 424.

PART X.

And the same course would now be pursued before the Maste except that, with regard to judgments entered up before 1 *Oct* ber, 1838, interest would, perhaps, only be reckoned fro that day, pursuant to 1 & 2 *V. c.* 110, *s.* 17. If, on the other han the lands be recovered back by ejectment, or by action of *sci. fa* the creditor will have to account only for the extended value of t land, which is usually very much below the real value; and, und 1 & 2 *V. c.* 110, *s.* 17 (*a*), he will be entitled to interest (at 4*l.* per cen either from 1st October, 1838, or the day of entering the judgme according as the judgment was signed before or after that da The application for a reference to the Master appears to be the m advisable mode of proceeding.

12. Selling land where judgment since 29 July, 1864.

12. *Selling Land where Judgment entered up since 29th July, 186* —As to this, *see* 27 & 28 *V. c.* 112, *s.* 4, *ante*, p. 880.

A tenant by *elegit* on applying under 1 & 2 *V. c.* 110, *s.* 13, f a sale of the extended property and payment of the judgment deb is bound to account, in the same way as a mortgagee in posse sion (*b*).

(*a*) See ante, p. 767.

(*b*) *Bull* v. *Faulkner*, 17 L. J., Ch. 23.

CHAPTER

WRIT OF CAPIAS AI

1. *What it is* 889
2. *Against whom and when it lies — Effect of Debtors Act*, 1869 889
3. *Form of* 892
4. *When to be Sued out* 893
5. *How Sued out and Indorsed* 893
6. *Delivery of the Writ to the Sheriff to be executed* 893
7. *By whom, when, where, and how executed* 893

1. *What it is.*]—This writ command the defendant and him safely keep, Court to satisfy the plaintiff the interest thereon at 4*l.* per cent. Ex *armis*, it was a writ unknown to the in other actions by the express w statutes of Marleberge (52 *Hen.* 3), *Ed.* 1), *c.* 11, having given the writ actions of account, and subsequent s other actions, the 25 *Ed.* 3, *stat.* 5, the 19 *Hen.* 7, *c.* 9, to all actions on necessary consequence, held to lie up plaintiff to obtain its fruits (*a*).

2. *Against whom and when it lies—* By the Debtors Act, 1869 (32 & 33 With the exceptions hereinafter me commencement of this Act [1st J prisoned for making default in pay There shall be excepted from the ment—

1. Default in payment of a penalty, penalty, other than a penalty in r

(*a*) See 3 Salk. 862: *Cassidy* v. *Stewart*, 2 Sc. N. R. 432; 9 Dowl. 872.

(*b*) As to the policy and effect of this Act, see *Marris* v. *Ingram*, 13 Ch. D. 338; 49 L. J., Ch. 123: contra,

CHAPTER LXXVII.

WRIT OF CAPIAS AD SATISFACIENDUM.

1. *What it is* 889
2. *Against whom and when it lies — Effect of Debtors Act*, 1869 889
3. *Form of* 892
4. *When to be Sued out* 893
5. *How Sued out and Indorsed* 893
6. *Delivery of the Writ to the Sheriff to be executed* 893
7. *By whom, when, where, and how executed* 893
8. *Discharge from Custody after Arrest* 895
9. *Escape* 896
10. *Rescue* 899
11. *When and how Returned* .. 899
12. *Poundage and Expenses* 900
13. *What Writs may issue after it* 900
14. *How far a Discharge* 900
15. *Irregularities* 903

CH. LXXVII.

1. What it is.

What it is.]—This writ commands the sheriff to take the body of defendant and him safely keep, so that he may have his body in urt to satisfy the plaintiff the amount of the judgment and erest thereon at 4*l.* per cent. Except in actions of trespass *vi et is*, it was a writ unknown to the common law; nor was it given other actions by the express words of any statute; but the utes of Marleberge (52 *Hen.* 3), *c.* 23, and Westminster 2 (13 1), *c.* 11, having given the writ of *capias ad respondendum* in ons of account, and subsequent statutes having extended it to r actions, the 25 *Ed.* 3, *stat.* 5, *c.* 17, to debt and detinue, and 19 *Hen.* 7, *c.* 9, to all actions on the case, the *ca. sa.* was, as a ssary consequence, held to lie upon the judgment, to enable the ntiff to obtain its fruits (*a*).

2. Against whom, and when it lies. Effect of Debtors Act, 1869.

Against whom and when it lies—Effect of the Debtors Act, 1869.] the Debtors Act, 1869 (32 & 33 *V. c.* 62) (*b*), it is enacted, *s.* 4, ith the exceptions hereinafter mentioned, no person shall, after ommencement of this Act [1st January, 1870], be arrested or soned for making default in payment of a sum of money.

ere shall be excepted from the operation of the above enact-

No arrest to be made for making default in payment of money except in certain cases.

efault in payment of a penalty, or sum in the nature of a penalty, other than a penalty in respect of any contract:

(a) See 3 Salk. 862: *Cassidy* v. *t*, 2 Sc. N. R. 432; 9 Dowl. As to the policy and effect of et, see *Marris* v. *Ingram*, 13 338; 49 L. J., Ch. 123: contra, *Barrett* v. *Hammond*, 10 Ch. D. 285; 48 L. J., Ch. 249: *Street* v. *Hope*, 10 Ch. D. 286: *Evans* v. *Bear*, L. R., 10 Ch. 76: *Lewis* v. *Barnett*, 6 Ch. D. 252, 276. See further post, Ch. LXXXIII., "*Attachment*."

PART X.

2. Default in payment of any sum recoverable summarily before justice or justices of the peace (*c*):

3 (*d*). Default by a trustee (*e*) or person acting in a fiduciar capacity (*f*), and ordered to pay by a Court of equity (*g*) a sum in his possession or under his control (*h*):

4 (*d*). Default by an attorney or solicitor in payment of costs (*i*) wh ordered to pay costs for misconduct as such, or in payment a sum of money when ordered to pay the same in his charac of an officer of the Court making the order (*k*):

5. Default in payment for the benefit of creditors of any portion a salary or other income in respect of the payment of wh any Court having jurisdiction in bankruptcy is authorized make an order:

6. Default in payment of sums in respect of which orders are this Act authorized to be made:

Provided, first, that no person shall be imprisoned in any case e cepted from the operation of this section for a longer period th one year; and secondly, that nothing in this section shall alter effect of any judgment or order of any Court for payment of mo except as regards the arrest and imprisonment of the person mak default in paying such money" (*l*).

Although the above Act abolished imprisonment for debt w certain exceptions, and therefore the writ of *ca. sa.* is now ra resorted to, yet, inasmuch as in cases within the exceptions, it m in some cases still be resorted to, and as by the Act an orde committal is substituted for the writ of *ca. sa.*; and by *s.* 5, "p sons committed under that section by a superior Court may committed to the prison in which they would have been confi

(*c*) See *Reg.* v. *Pratt*, L. R., 5 Q. B. 176; 39 L. J., M. C. 73.

(*d*) By 41 & 42 V. c. 54, s. 1, "In any case coming within the exceptions numbered 3 and 4 in the 4th section of the Debtors Act, 1869, and in the 5th section of the Debtors Act (Ireland), 1872, respectively, or within either of those exceptions, any Court or Judge, making the order for payment, or having jurisdiction in the action or proceeding in which the order for payment is made, may inquire into the case, and (subject to the provisoes contained in the said sections respectively) may grant or refuse, either absolutely or upon terms, any application for a writ of attachment, or other process or order of arrest or imprisonment, and any application to stay the operation of any such writ, process, or order, or for discharge from arrest or imprisonment thereunder." Sect. 2: This Act may be cited as the Debtors Act, 1878, and shall be construed as one with the Debtors Act, 1869, as regards England, and as one with the Debtors Act (Ireland), 1872, as regards Ireland; and the Debtors Act, 1869, and this Act may be cited as the Debtors Acts, 1869 and 1878, and the Debtors Act (Ireland), 1872, and this Act may be cited as the Debtors Acts (Ireland), 1872 and 1878.

(*e*) See *Young* v. *Dallimore*, L. T. 119; 18 W. R. 445.

(*f*) As to who is a person acting in a fiduciary capacity, see *Marra Ingram*, supra: *Phosphate Sewa Co.* v. *Hartmont*, 25 W. R. directors: *Metcalfe's case*, 13 Ch. D 815; 49 L. J., Ch. 347, directors.

(*g*) Read now "High Court Justice." *Marris* v. *Ingram*, supra

(*h*) *Ex p. Cuddiford*, 45 L. J., B 127: *Evans* v. *Bear*, L. R., 10 C 76.

(*i*) See Vol. 1, p. 184. This does not apply to costs payable by solicitor who is an unsuccessful pl gant, but to such costs as a solicit may be ordered to pay as a penal for misconduct. *Re Hope*, 7 Ch. D 797; 41 L. J., Ch. 797: *Jenkins Fereday*, 41 L. J., C. P. 152: *Jo White*, 23 L. T. 387; 19 W. R. 3

(*k*) See Vol. 1, p. 176.

(*l*) See *Re A. B.*, 39 L. J., Q. 159.

When

if arrested on a writ of *ca. sa.*, any superior Court shall, subject obeyed, and executed in the like necessary to retain in this editio *ca. sa.* (*m*). Judgment summonse assigned exclusively to the Bankru fall within the province of this wo

The Debtors Act does not appl liability of the debtor to arrest at t

A *ca. sa.* still lies in the cases n of 32 & 33 *Vict. c.* 62, *s.* 4, *ante*, p. debts (*n*). Before the Debtors Act, a party might be held to bail unde be arrested under this writ (*p*). Be upon a *ca. sa.* (*q*), although they might an infant (*r*): or a *feme cove* out against husband and wife, th and the Court would not discharge rate property out of which the de where there appeared to be collusio plaintiff to keep her in custody (*s*).

(*m*) See the 12th ed. of this work.

(*n*) *Att.-Gen.* v. *Edmonds*, 22 L. T. 667. See *In re Smith*, 2 Ex. D. 47; 46 L. J., Ex. 73, recognizance on appeal.

(*o*) As to this, see Ch. CXXVII.

(*p*) *Harbert's case*, 3 Rep. 12 a. And see *Cassidy* v. *Stewart*, 2 Sc. N. R. 432; 9 Dowl. 366.

(*q*) *Goodchild* v. *Chaworth*, 2 Str. 822, 1139.

(*r*) Post, Ch. XCIX.

(*s*) *Gardiner* v. *Holt*, 2 Str. 1217: *Daw* v. *Clark*, 1 C. & M. 860. As to the effect of a judicial separation or an order for protection obtained under the Divorce Acts, see post, Ch. CI.

(*t*) *Newton* v. *Rowe*, 9 Q. B. 948; 16 L. J., Q. B. 146. "If an action be brought against a woman when sole, and pending the suit she marries, the *capias* shall be awarded against her only, and not against her husband." 3 Bla. Com. 414: *Cooper* v. *Hunchin*, 4 East, 521. See *Thorpe* v. *Argles*, 1 D. & L. 831, where a Judge's order was made by consent to stay proceedings, on payment of the debt and costs by a certain day, otherwise final judgment, and the defendant married before such day.

(*u*) *Roberts* v. *Andrews*, 3 Wils. 124; 2 W. Bl. 720: *Finch* v. *Dubbin*, 2 Str. 1237: *Langstaffe* v. *Rain*, 1 Wils. 149: *Berimon* v. *Gilbert*, Barnes, 203.

f arrested on a writ of *ca. sa.*, and every order of committal by any superior Court shall, subject to the prescribed rules, be issued, obeyed, and executed in the like manner as such writ," it becomes ecessary to retain in this edition some of the law as to writs of *a. sa.* (*m*). Judgment summonses and committal orders are now ssigned exclusively to the Bankruptcy Judge, and therefore do not all within the province of this work.

The Debtors Act does not apply to Crown debts or affect the ability of the debtor to arrest at the suit of the Crown (*n*).

A *ca. sa.* still lies in the cases mentioned in *sub-sects.* 1, 3 and 4 of 32 & 33 *Vict. c.* 62, *s.* 4, *ante*, p. 889, and in the case of Crown debts (*n*). Before the Debtors Act, 1869, as a general rule, where party might be held to bail under a writ of *capias* (*o*), he might e arrested under this writ (*p*). Bail might be taken in execution pon a *ca. sa.* (*q*), although they could not be held to bail. So ight an infant (*r*): or a *feme covert* (*s*); and if a *ca. sa.* were sued t against husband and wife, the wife might be taken on it, d the Court would not discharge her (*t*), unless she had no sepa- te property out of which the demand could be satisfied (*u*), or, here there appeared to be collusion between the husband and the aintiff to keep her in custody (*x*). On an application to discharge

Against whom and when it lies.

(*m*) See the 12th ed. of this work.

(*n*) *Att.-Gen.* v. *Edmunds*, 22 L. 367. See *In re Smith*, 2 Ex. D. 46 L. J., Ex. 73, recognizance appeal.

(*o*) As to this, see Ch. CXXVII.

(*p*) *Harbert's case*, 3 Rep. 12 a. see *Cassidy* v. *Stewart*, 2 Sc. 432; 9 Dowl. 366.

(*q*) *Goodchild* v. *Chaworth*, 2 Str. 1139.

(*r*) Post, Ch. XCIX.

(*s*) *Gardiner* v. *Holt*, 2 Str. 1217: v. *Clark*, 1 C. & M. 860. As to effect of a judicial separation n order for protection obtained r the Divorce Acts, see post, CI.

(*t*) *Newton* v. *Rowe*, 9 Q. B. 948; J., Q. B. 146. "If an action ought against a woman when nd pending the suit she mar- the *capias* shall be awarded st her only, and not against her nd." 3 Bla. Com. 414: *Cooper nchin*, 4 East, 521. See *Thorpe gles*, 1 D. & L. 831, where a 's order was made by consent y proceedings, on payment of bt and costs by a certain day, ise final judgment, and the ant married before such day. *Roberts* v. *Andrews*, 3 Wils. W. Bl. 720: *Finch* v. *Dubbin*, 1237: *Langstaffe* v. *Rain*, 1 119: *Berimon* v. *Gilbert*, , 203.

(*x*) *Edwards and Wife* v. *Martyn*, 21 L. J., Q. B. 86: *Newton* v. *Boodle*, 4 C. B. 359, per Cur.: *Sparkes* v. *Bell*, 8 B. & C. 1; 2 M. & Rob. 124: *Petts* v. *Miller*, 2 Stra. 1167. See *Larkin* v. *Marshall and Wife*, 1 Pr. Rep. 186; 4 Ex. 804; 19 L. J., Ex. 161, where the Court of Exchequer held that this practice of discharging a married woman was not founded upon any legal principle, and that the precedents would only be followed in exactly similar cases. And see *Benyon* v. *Jones*, 15 M. & W. 566, where the action was brought against the wife, when she was a feme sole, and she was arrested on a judgment obtained against her, and the same Court refused to discharge her. See also *Poole* v. *Canning*, 36 L. J., C. P. 166. And see *Roberts* v. *Andrews*, 3 Wils. 124: *Jay* v. *Amphlett*, 1 H. & C. 637; 32 L. J., Ex. 176, where the husband had become bankrupt and obtained his order of discharge. In *Ivens* v. *Butler*, 7 E. & B. 159; 26 L. J., Q. B. 145, Lord *Campbell* said, "The Court of Exchequer has said that she is entitled to be discharged only when taken with her husband. I cannot accede to that doctrine, because it seems to me quite immaterial whether both are taken or only the wife." As to proceedings against husband and wife, see post, Ch. CI.

PART X.

a defendant out of custody, on the ground that she is a married woman, the Court will require the strictest negative proof from her that she has no separate property, where it appears, from the affidavits on the other side, that there are reasons for doubting such to be the fact (*y*). A party may be arrested on a *ca. sa.* though a solicitor or officer of the Court.

Against whom it does not lie.

As a general rule, a *ca. sa.* only lies in cases where a *capias ad respondendum* would formerly (*z*). Therefore, a *ca. sa.* does not lie against any member of the royal family, or against peers or peeresses, or against members of the House of Commons during the time of privilege (*a*). Nor against corporators or hundredors sued as such (*b*). Also it lies not against ambassadors or their servants (*c*). Nor against seamen or soldiers in her Majesty's service, unless in an action for a debt of 30*l.* or upwards, contracted previously to their entering the service (*d*). Nor against executors or administrators for the debts of their testator or intestate, unless a devastavit has been returned (*e*). Nor against an heir for a debt to be levied on the lands descended (*f*). Nor against the servants in ordinary nor menial servants of a king or of a queen regnant, unless leave has previously been obtained of the lord chamberlain of the king or queen's household (*g*).

Against bankrupts.

As to issuing execution against bankrupts, *see post, Ch. CII.*

Ca. sa. cannot be sued out when it does not lie.

If a *ca. sa.* does not lie, it cannot legally be sued out, although there be no intention of executing it (*h*). Therefore, where a *ca. sa.* had been issued against a member of Parliament, during his privilege, for the purpose of proceeding to outlawry, and he had been proclaimed once upon a writ of exigent, the Court set aside the proceedings, although it was sworn that no personal molestation of the defendant was intended whilst his privilege continued (*h*).

Discharge of persons taken under a ca. sa. when it does not lie.

If a *ca. sa.* be sued out and executed in a case where it does not lie, the Court or a Judge will discharge the defendant (*i*). It is not advisable for the sheriff to discharge a bankrupt, or other person privileged from arrest, when arrested on a *ca. sa.*, unless he be a member of the royal family, or a member of Parliament, or an ambassador, or his servant, for he does it on his own responsibility (*k*).

3. Form of.

3. *Form of.*]—As to the direction, teste, and return of this writ, *see ante*, pp. 797 *et seq.* Like other writs of execution, it must strictly

(*y*) *Ferguson* v. *Clayworth*, 2 D. & L. 165; 6 Q. B. 629: *Irens* v. *Butler*, 26 L. J., Q. B. 145, where though the wife was entitled to a contingent pecuniary allowance under a deed of assignment, the Court ordered her discharge from custody.

(*z*) See *Cassidy* v. *Stewart*, 2 Sc. N. R. 432; 9 Dowl. 366: *Crew* v. *Bails*, 1 Leon. 329.

(*a*) *Cassidy* v. *Stewart*, supra: *Digby* v. *Alexander*, 9 Bing. 412; 1 M. & Sc. 559. And see Ch. LXXXIV.

(*b*) See post, Ch. XCVI.

(*c*) 7 Anne, c. 12, s. 3. And see Ch. CXXVII.

(*d*) 44 & 45 V. c. 58, ss. 144, 18[illegible] 45 & 46 V. c. 7, s. 4.

(*e*) 2 H. 6, 12; Bro. Abr. "Executors," 12. And see Ch. XCVII.

(*f*) 2 Saund. 7, n. 4.

(*g*) *Bartlett* v. *Hobbes*, 5 T. R. 6[illegible] And see *Luntley* v. *Battine*, 2 B. & Ald. 234; and the cases, Ch. CXXVII.

Follett v. *Hoppe*, 5 C. B. 226.

(*h*) *Cassidy* v. *Stewart*, 2 Sc. N. R. 432; 9 Dowl. 366.

(*i*) *Green* v. *Rohan*, 4 Dowl. 65[illegible]

(*k*) *Sherwood* v. *Benson*, 4 Taun[illegible] 631.

pursue the judgment, and be warranted fore, if a defendant be sued by a wro advantage of the misnomer, he may be wrong name, and the sheriff may jus writ (*m*).

4. *When to be sued out.*]—As to this issued before the return of a *fi. fa.*, been levied, is irregular; but a *ca. sa.* r or even at the same time as a *fi. fa.*, bu cuted (*n*). It cannot issue after an *elegi* under such writ (*o*).

5. *How sued out and Indorsed.*]—*This way as a writ of fi. fa.* (*Ante*, p. 795.) A to the officer on issuing the writ, and as p. 795. *Indorse it thus*:—"*Levy the whol* entitled to levy for], *and interest thereon per annum, from the —— day of ——*, A judgment was entered up] *besides sheri and expenses of execution.—P. S., plaintiff's Inn Square, London. The —— day of —— named —— is a ——, and he resides at ——*

When the action is against a seaman Majesty's service, *see Ch. CXXVII.*

6. *Delivery of the Writ to the Sheriff t ante*, p. 807.

7. *By whom, when, where, and how ex* of execution is to be executed, *see an* warrant for its execution and the bailif p. 808; and as to when, where, and h executed, *see ante*, p. 809. As to when a arrest, *see ante*, p. 892; *and post, Ch. C ca. sa.* is issued with an indorsement, *incentus*," the sheriff is nevertheless boun party, if he render himself or is rendered has come to the sheriff's hands (*q*). The dorsement is, that the sheriff is not boun The arrest is usually made by actual

(*m*) *Crawford* v. *Satchwell*, 2 Str. 1218. And see *Reeves* v. *Slater*, 7 B. & C. 486: *Fisher* v. *Magnay*, 6 Sc. N. R. 588; ante, p. 796: *Finch* v. *Cohen*, 3 Dowl. 678: *Hoye* v. *Bush*, 2 Sc. N. R. 86.

(*n*) Ante, p. 794.

(*o*) Bac. Abr. "Execution" (D); ante, pp. 795 and 885.

(*p*) It seems this part of the indorsement within brackets is not absolutely *Wooler* Q. B. dorsem from th issued to the i ecution, (*q*) 817; 1

the judgment, and be warranted by it, *ante*, p. 796. There- a defendant be sued by a wrong name, and omit to take age of the misnomer, he may be arrested on a *ca. sa.* by such name, and the sheriff may justify the caption under the).

Then to be sued out.]—As to this, *see ante*, p. 789. A *ca. sa.* before the return of a *fi. fa.*, under which anything has vied, is irregular; but a *ca. sa.* may issue before the return, at the same time as a *fi. fa.*, but they cannot both be exe-). It cannot issue after an *elegit*, if lands have been taken uch writ (*o*).

4. When to be sued out.

ow sued out and Indorsed.]—*This writ is sued out in the same a writ of fi. fa.* (*Ante*, p. 795.) As to what must be produced fficer on issuing the writ, and as to filing a *præcipe*, *see ante*, *Indorse it thus* :—"*Levy the whole* [or *l.* the sum you are to levy for], *and interest thereon at the rate of* 4*l. per cent. um, from the* —— *day of* ——, A.D. 18— [the day when the nt was entered up] *besides sheriff's poundage, officer's fees, enses of execution.—P. S., plaintiff's solicitor, No.* 10, *Gray's are, London. The* —— *day of* ——, A.D. 18—. [*The within- —— is a* ——, *and he resides at* —— (*p*).

5. How sued out and indorsed.

the action is against a seaman, soldier, or marine in her 's service, *see Ch. CXXVII.*

Against seamen or soldiers.

livery of the Writ to the Sheriff to be executed.]—As to this, p. 807.

6. Delivery of writ to sheriff.

whom, when, where, and how executed.]—By whom a writ ution is to be executed, *see ante*, p. 807; and as to the for its execution and the bailiff appointed by it, *see ante*, and as to when, where, and how it is in general to be , *see ante*, p. 809. As to when a party is privileged from e *ante*, p. 892; *and post, Ch. CXXVII.* Where a writ of s issued with an indorsement, "to be returned *non est* " the sheriff is nevertheless bound to arrest and detain the he render himself or is rendered by his bail after the writ to the sheriff's hands (*q*). The meaning of such an in- t is, that the sheriff is not bound to look for the party (*q*). rest is usually made by actual seizure of the defendant's

7. By whom, when, where, and how executed.

How arrest made.

---

eford v. *Satchwell*, 2 Str. see *Reeves* v. *Slater*, 7 B. *Fisher* v. *Magnay*, 6 Se. ; ante, p. 796; *Finch* v. owl. 678: *Hoye* v. *Bush*, . 86.
, p. 791.
Abr. "Execution" (D); 95 and 885.
eems this part of the in- within brackets is not absolutely requisite. See *Childers* v. *Wooler*, 2 El. & El. 287; 29 L. J., Q. B. 129. In some cases the indorsement will be slightly different from the above, as where the writ is issued by a party in person, &c. As to the indorsements on a writ of execution, see ante, p. 800.

(*q*) *Magnay* v. *Monger*, 4 Q. B. 817; 12 L. J., Q. B. 306.

person; but any touching, however slight, of the person, is sufficient for this purpose; and where the officer laid hold of the defendant's hand, as he held it out of the window, it was deemed sufficient (*r*). But the manner of arrest is not confined to corporal seizure; where the officer entered the room in which the defendant was, and locked the door, telling him at the same time that he arrested him, the Court held it to be a good arrest (*s*). And if the officer say, "I arrest you," and the party acquiesce, or afterwards go with him, this is a good arrest (*t*); but, if instead of so doing, the party escape, it would be otherwise (*u*). Mere words, however, such as telling a man you arrest him, or the like, cannot of themselves amount to an arrest (*x*).

Showing warrant.

It seems that, in order to constitute a valid arrest, the warrant should be produced, or the party arrested made aware of it (*y*).

Presence of officer.

As to the necessity for the presence of the officer whose name is in the warrant, *see ante*, p. 809.

When arrested, in custody on all writs in sheriff's hands.

When the defendant is legally arrested, he is considered to be in custody upon all the writs in the sheriff's hands (*z*); but this is not so if the arrest was made under a void writ (*a*). If while the defendant is in the lawful custody of the sheriff, any other writ be delivered to the sheriff, he will, on such delivery, be deemed to be in custody on that writ also (*b*).

Taking defendant to prison.

Upon an arrest in execution, the officer may carry the defendant at once to the county gaol; though upon mesne process he could not do so for twenty-four hours after the arrest (*c*). If the defendant be too ill for removal from his lodging, he should not be removed,

(*r*) *Amon.*, 1 Vent. 306, n.; *Genner* v. *Sparkes*, 1 Salk. 79. See *Homer* v. *Battyn*, B. N. P. 62: *Lloyd* v. *Sandilands*, 8 Taunt. 250: *Nicholl* v. *Darley*, 2 Y. & J. 399; *Sandon* v. *Jervis*, 27 L. J., Q. B. 279; 28 L. J., Ex. 156.

(*s*) *Williams* v. *Jones*, Hardw. 301. And see *Arrowsmith* v. *Le Mesurier*, 1 M. & R. 215; 2 N. R. 211, 212: *Bridgett* v. *Copney*, 1 M. & R. 211.

(*t*) *Grainger* v. *Hill*, 4 Bing. N. C. 412.

(*u*) *Russen* v. *Lucas*, 1 Car. & P. 163.

(*x*) *Genner* v. *Sparkes*, 1 Salk. 79; 6 Mod. 173: *Brown* v. *Chapman*, 6 C. B. 365: *Berry* v. *Adamson*, 2 Car. & P. 503; 6 B. & C. 528: *George* v. *Radford*, 1 M. & M. 244; 3 Car. & P. 464. See *Small* v. *Gray*, 2 Car. & P. 605: *Peters* v. *Stamsay*, 6 Car. & P. 737: *Reece* v. *Griffiths*, 5 M. & R. 120: *James* v. *Askew*, 8 Ad. & E. 351.

(*y*) *Robins* v. *Hender*, 3 Dowl. 543. See per Lord *Kenyon*, in *Hill* v. *Roche*, 8 T. R. 187. See *Barratt* v. *Price*, 1 Dowl. 725; 2 M. & Sc. 339; 9 Bing. 566: *Fownes* v. *Stokes*, 4 Dowl. 125: *Hooper* v. *Lane*, 10 Q. B. 546; 17 L. J., Q. B. 191.

(*z*) *Frost's case*, 5 Rep. 89: *Countess of Rutland's case*, 6 Id. 53: *Barratt* v. *Price*, 9 Bing. 570: *Reynolds* v. *Newton*, 1 G. & D. 153; 1 Q. B. 525: *Collins* v. *Yewens*, 10 Ad. & E. 570: *Hooper* v. *Lane*, supra: *Hooper* v. *Lane*, 27 L. J., Q. B. 75. See *Watson* v. *Carrol*, 4 M. & W. 592; 7 Dowl. 217: *Howard* v. *Cautey*, 8 Jur. 984, where notice was given to the officer not to execute the writ: *The National Ass. Co.* v. *Best*, 27 L. J., Ex. 19: *Semple* v. *Keen*, 28 L. J., Ex. 151.

(*a*) *Hooper* v. *Lane*, 10 Q. B. 546: *S. C.* in error, 6 H. L. 443. And see *Ex p. Freston*, 30 L. J., Ch. 460.

(*b*) See *Frost's case*, 5 Rep. 89: *Wright* v. *Stanford*, 1 Dowl., N. S. 272: *Ex p. Egginton*, 2 E. & B. 717; 23 L. J., M. C. 41, where a party improperly arrested on a Sunday was detained under a *ca. sa.* issued by a third party without collusion, and the Court refused to discharge such party out of custody.

(*c*) 33 G. 3, c. 28, s. 2: *Evans* v. *Atkins*, 4 T. R. 555; Ch. CXXVII. As to the prisons in which debtors may be confined, see 40 & 41 V. c. 21, ss. 26, 27, 28.

but he should be suffered to remain does not escape (*d*).

As to charging a defendant in *Vol. 2, Ch. CV.*

8. *Discharge from Custody after* imprisoned for more than a year. p. 890.)

Payment of the sum indorsed on officer (*e*), or to the keeper of the pr to the plaintiff, and is not, therefo ment (*f*), as such payment on a *fi.* only empowers the sheriff to take the not receive the debt and costs; for i over to the plaintiff, let the defendan But payment to the solicitor on the satisfy the judgment (*i*).

By the *Com. Law Proc. Act*, 1852, under the hand of the attorney in the *capias ad satisfaciendum* shall have sheriff, gaoler, or person in whose cus such writ, in discharging such part such attorney professes to act shall ha contrary to such sheriff, gaoler, or opposite party may be; but such disc tion of the debt, unless made by the a nothing herein contained shall justify order for discharge without the consen enactment the plaintiff's solicitor had defendant from custody, without rece the execution issued, unless the same or the solicitor had the plaintiff's autho

(*d*) See *Perkins* v. *Meacher*, 1 Dowl. 21: *Baker* v. *Davenport*, 8 D. & R. 606: *Cavenagh* v. *Collett*, 4 B. & Ald. 279: *Jones* v. *Robinson*, 2 Dowl., N. S. 1044; 11 M. & W. 759. As to the return in such a case, see post, p. 899.

(*e*) *Wood* v. *Finnis*, 7 Ex. 363; 21 L. J., Ex. 138.

(*f*) *Morton's case*, 2 Show. 139: *Slackford* v. *Austen*, 14 East, 468: *Allanson* v. *Atkinson*, 1 M. & Sel. 351; Bac. Abr. "Execution" (D), 7th ed.

(*g*) Ante, p. 811.

(*h*) *Slackford* v. *Austen*, 14 East, 468: *Hemming* v. *Hale*, 29 L. J., 4P. 137.

(*i*) *Morton's case*, 2 Show. 139. See *Crozer* v. *Pilling*, 6 D. & R. 129; 4 B. & C. 26: *Savory* v. *Chapman*, 11 A. & E. 829; 3 P. & D. 604; 8 Dowl. 3. But quære, whether it would

he should be suffered to remain there, care befng taken that he s not escape (*d*). Ch. LXXVII.

ıs to charging a defendant in execution when in custody, *see* 2, *Ch. CV.* Charging prisoner in execution.

Discharge from Custody after Arrest.]—A debtor cannot be risoned for more than a year. (*Debtors Act*, 1869, *s.* 4, *ante*, 90.) 8. Discharge from custody after arrest under.

ıyment of the sum indorsed on the writ to the sheriff, or his er (*e*), or to the keepor of the prison, is not deemed a payment ıe plaintiff, and is not, therefore, a satisfaction of the judg- t (*f*), as such payment on a *fi. fa.* would be (*g*), for a *ca. sa.* empowers the sheriff to take the body. And the sheriff should eceive the debt and costs; for if he do, and, before payment to the plaintiff, let the defendant go, it will be an escape (*h*). payment to the solicitor on the record for the plaintiff will y the judgment (*i*). Sheriff no right to receive debt and costs; but solicitor on record has.

the *Com. Law Proc. Act*, 1852, *s.* 126 (*k*), "A written order the hand of the attorney in the cause, by whom any writ of *s ad satisfaciendum* shall have been issued, shall justify the f, gaoler, or person in whose custody the party may be under writ, in discharging such party, unless the party for whom ıttorney professes to act shall have given written notice to the ıry to such sheriff, gaoler, or person in whose custody the ite party may be; but such discharge shall not be a satisfac- f the debt, unless made by the authority of the creditor; and ıg herein contained shall justify any attorney in giving such for discharge without the consent of his client." Before this ıent the plaintiff's solicitor had no authority to discharge the lant from custody, without receiving the amount for which ecution issued, unless the same had been paid to the plaintiff, solicitor had the plaintiff's authority for so doing (*l*). Solicitor may give order for discharge.

---

ee *Perkins* v. *Meacher*, 1 21: *Baker* v. *Davenport*, 8 . 606: *Cavenagh* v. *Collett*, 4 d. 279; *Jones* v. *Robinson*, 2 N. S. 1044; 11 M. & W. 759. e return in such a case, see 899.

ood v. *Finnis*, 7 Ex. 363; 21 x. 138.

lorton's case, 2 Show. 139: *l* v. *Austen*, 14 East, 468: v. *Atkinson*, 1 M. & Sel. e. Abr. "Execution" (D),

ıte, p. 811.

ekford v. *Austen*, 14 East, *nming* v. *Hale*, 29 L. J.,

rton's case, 2 Show. 139. *r* v. *Pilling*, 6 D. & R. 129; 26: *Savory* v. *Chapman*, 11 829; 3 P. & D. 604; 8 Dowl. quære, whether it would do so, if the payment were made after the bankruptcy of the client. *S. C.* See *Hemming* v. *Hale*, 29 L. J., C. P. 137, where a payment made to a solicitor's clerk was held good.

(*k*) Not repealed.

(*l*) *Savory* v. *Chapman*, 11 Ad. & E. 829; 3 P. & D. 604; 8 Dowl. 656: *Connop* v. *Challis*, 2 Ex. 484; 6 D. & L. 48: *Levi* v. *Abbott*, 4 Ex. 590; ante. See *Lovegrove* v. *White*, L. R., 6 C. P. 440; 40 L. J., C. P. 253. And see *Savory* v. *Chapman*, supra, as to the liability of the sheriff for discharging a defendant on the authority of plaintiff, or his solicitor, after the bankruptcy of the plaintiff. See *Hodges* v. *Paterson*, 26 L. J., Ex. 223, where the solicitor countermanded the writ after it had been executed, not knowing of its execution.

PART X.

Discharge of defendant when improperly arrested.

If the defendant be improperly arrested, the Court or a Judg will order him to be discharged; but an application for that pu pose must, in general, be made without delay (*m*). If the defenda be entitled to his discharge as a matter of right, the Court, upo ordering him to be discharged, will not impose any terms upon hi unless costs be asked for (*n*).

Search for other writs before discharge.

Whenever the sheriff, or his officer, receives an order for th defendant's discharge, search should be made in the sheriff's offic to ascertain whether or not there are any other writs lodged again the defendant; for a person in custody at the suit of one plaintiff in custody at the suit of any other person who delivers a writ to th sheriff before the discharge of the defendant (*o*). The sheriff entitled to detain the defendant in custody for a reasonable tim after he receives the order for the discharge, for the purpose making such search (*p*).

Detaining party illegally arrested.

As to detaining a party in custody when he has been arrest illegally or whilst he was privileged from arrest, or the like, *see pos Ch. CXXVII.*

9. Escape.

9. *Escape.*]—Escape, in civil cases, is defined to be, in genera where any person who is under lawful arrest and restrained of h liberty, either violently or privily evades such arrest and restrain or is suffered to go at large before delivered by due course of law (*q* If the sheriff, unless authorized by statute (*r*), carry a defendant his custody out of the county, except in conveying him by the m convenient route to the proper gaol, he will be guilty of sufferi an escape (*s*), and even might be liable to an action by the defenda for false imprisonment (*t*). Allowing the defendant arrested on *sa.* to go about his affairs, even in the custody of the officer, is escape (*u*). If the defendant be discharged out of custody with t plaintiff's consent (*x*), or by the fraud of the plaintiff (*y*), it is course no escape as against him. But in order to excuse the she in this case, it is necessary that the plaintiff's consent be gi previously to or at the time of the discharge, and not subsequen to it (*z*). If the sheriff receives the sum indorsed on the writ fr

(*m*) *R.* v. *Burgess*, 8 Ad. & E. 275: *Greenshield* v. *Pritchard*, 8 M. & W. 148; 1 Dowl., N. S. 51. See ante, p. 892, as to discharging a defendant from custody on the ground that no *ca. sa.* lies. And see further as to discharging a party improperly arrested, post, Ch. CXXVII.

(*n*) *Gillott* v. *Aston*, 2 Dowl., N. S. 413. See Vol. 1, p. 831.

(*o*) Ante, p. 894.

(*p*) *Samuel* v. *Buller*, 1 Ex. 439.

(*q*) Bac. Abr. 122, 7th ed.

(*r*) See 40 & 41 V. c. 21, s. 28. As to its not being an escape where the sheriff acts under a writ of habeas corpus, see 8 & 9 W. 3, c. 27: *Rose* v. *Green*, 1 Burr. 437; and 2 Bac. Abr. Escape (B).

(*s*) *Boyton's case*, 3 Rep. 44: *Boothman* v. *Earl of Surrey*, 2 T. R. 5: *Coutant* v. *Chapman*, 2 Q. B. 771 G. & D. 191.

(*t*) Bro. "Escape," 11.

(*u*) *Benton* v. *Sutton*, 1 B. & P. *Balden* v. *Temple*, Hob. 202; 1 R Abr. 806; 8 Co. 44; Plowd. *Hawkins* v. *Plomer*, 2 W. Bl. 10 And see 1 Saund. 35 *a*; 2 Saund. 61 n. (4); and 8 & 9 W. 3, c. 27.

(*x*) 2 Bac. Abr. Escape (E), 3. the plaintiff orders the sheriff to l the defendant out of custody, th plaintiff's solicitor has no right t countermand such order. *Barker* v *St. Quintin*, 1 D. & L. 550, p *Parke*, B., Vol. 1, p. 811. See C. L. P Act, 1852, s. 126, ante, p. 895.

(*y*) *Hiscocks* v. *Jones*, M. & M. 20

(*z*) *Scott* v. *Peacock*, 1 Salk. 27 *Buxton* v. *Home*, 1 Show. 174.

the defendant, and, before payr him, it is an escape (*a*).

It is no escape in law, if the custody (*b*). And in answer to may show that the judgment (*c*) lutely void, but not that it was

If the escape be negligent, *i. e.* of the sheriff or officer, &c., th fresh pursuit and retake the d Sunday (*f*). If any person obs officers from retaking the defend the facts, will grant an attachme other cases of obstructing the Court (*g*). If the sheriff retako escape before any action is brou So, if the defendant, after such before an action is brought for defendant be prevented from retu by a trick of the plaintiff, practi sheriff with the escape (*i*), he sha no notice of the escape, or, if he best endeavours to retake the def voluntary, *i. e.*, with the express co he can never retake the defendant, let go by mistake (*m*); and the she for false imprisonment if he did (*n*) lapse of time is no bar to the priso The new sheriff is not answerabl in execution in the time of his pre to him by the former sheriff (*p*); become such on the death of his pr

(*a*) *Slackford* v. *Austen*, 14 East, 48 : *Crozer* v. *Pilling*, 4 B. & C. 31.

(*b*) 3 Bac. Abr. 122, 7th ed. And as to what is lawful arrest, see Id. And see *Coutant* v. *Chapman*, 2 Q. B. 77 2 G. & D. 191.

(*c*) *Lane* v. *Chapman*, 11 A. & E. 96 980; 1 G. & D. 523; 3 P. & D. 66 B. N. P. 66.

(*d*) *Weaver* v. *Clifford*, Cro. Jac. 3 *Burton* v. *Eyre*, Id. 288; B. N. P. 60.

(*e*) *Jones* v. *Pope*, 1 Saund. 35; *Wilcood* v. *Clement*, 6 Dowl. 508. As to pleading specially a re-taking on fresh pursuit, see 8 & 9 W. 3, s. 27, s. 6.

(*f*) *Anon.*, 6 Mod. 231: *Parker* v. 6 Mod. 95. And see Vol. 1, 0, n. (*q*): *Featherstonehaugh* v. *Anon*, Barnes, 373: *Atkinson* v. *Jackson*, 5 T. R. 25: 1 Anne, c. 6; Anne, c. 9, s. 3 (Revised ed., 6 Anne, c. 12). See Bac. Abr. Escape 3: *Anderson* v. *Hampton*, 1 B. Ald. 308.

(*h*) See *Miller* v. *Knox*, Dom. Proc., Bing. N. C. 574.

the defendant, and, before payment over to the plaintiff, liberates him, it is an escape (*a*).

No escape if custody not lawful.

It is no escape in law, if the party who escapes was in unlawful custody (*b*). And in answer to an action for an escape, the sheriff may show that the judgment (*c*) or writ of execution (*d*) was absolutely void, but not that it was erroneous.

When defendant may be retaken, and effect of.

If the escape be negligent, *i. e.*, without the consent or knowledge of the sheriff or officer, &c., the sheriff or officer, &c. may make fresh pursuit and retake the defendant anywhere (*e*), even on a Sunday (*f*). If any person obstruct or prevent the sheriff or his officers from retaking the defendant, the Court, upon an affidavit of the facts, will grant an attachment against him, the same as in all other cases of obstructing the execution of the process of the Court (*g*). If the sheriff retake the defendant after a negligent escape before any action is brought for it, he shall be excused (*h*). So, if the defendant, after such an escape, return into custody before an action is brought for the escape; or, it seems, if the defendant be prevented from returning before such action brought, by a trick of the plaintiff, practised for the purpose of fixing the sheriff with the escape (*i*), he shall be excused (*k*), provided he had no notice of the escape, or, if he had notice of it, that he used his best endeavours to retake the defendant (*l*). But if the escape be voluntary, *i. e.*, with the express consent of the sheriff or officer, &c., he can never retake the defendant, even though the defendant were to go by mistake (*m*); and the sheriff would be liable to an action for false imprisonment if he did (*n*): and as the retaking is a nullity, lapse of time is no bar to the prisoner's discharge if retaken (*o*).

Sheriff not liable for escape in time of his predecessor.

The new sheriff is not answerable for the escape of a debtor taken in execution in the time of his predecessor, and not delivered over to him by the former sheriff (*p*); unless, indeed, the sheriff has become such on the death of his predecessor.

(*a*) *Slackford* v. *Austen*, 14 East, 468; *Crozer* v. *Pilling*, 4 B. & C. 31.

(*b*) 3 Bac. Abr. 122, 7th ed. And as to what is lawful arrest, see Id. 124; and see *Coutant* v. *Chapman*, 2 Q. B. 933; 2 G. & D. 191.

(*c*) *Lane* v. *Chapman*, 11 A. & E. 980; 1 G. & D. 523; 3 P. & D. 7; 7 B. N. P. 66.

(*d*) *Weaver* v. *Clifford*, Cro. Jac. 3: *Hilton* v. *Eyre*, Id. 288; B. N. P. 60. *Jones* v. *Pope*, 1 Saund. 35; *Filewood* v. *Clement*, 6 Dowl. 508. As to pleading specially a re-taking upon fresh pursuit, see 8 & 9 W. 3, c. 27, s. 6.

(*e*) *Anon.*, 6 Mod. 231: *Parker* v. *Kett*, 6 Mod. 95. And see Vol. I, p. 90, n. (*q*): *Featherstonehaugh* v. *Johnson*, Barnes, 373: *Atkinson* v. *Jameson*, 5 T. R. 25: 1 Anne, c. 6; 1 Anne, c. 9, s. 3 (Revised ed., 6 Anne, c. 12). See Bac. Abr. Escape (C): *Anderson* v. *Hampton*, 1 B. & P. 308.

(*f*) See *Miller* v. *Knox*, Dom. Proc., 2 Sug. N. C. 574.

(*g*) 1 Roll. Abr. 808: *Whiting* v. *Reynel*, Cro. Jac. 657; W. Jon. 144. And see *Stonehouse* v. *Mollins*, 2 Str. 873.

(*h*) *Merry* v. *Chapman*, 10 A. & E. 516; 3 P. & D. 25; 8 Dowl. 81.

(*i*) Comyn, 554: *Bonafous* v. *Walker*, 2 T. R. 126. And see *Lenthal* v. *Lenthal*, 2 Lev. 109: *James* v. *Pierce*, Id. 132; 1 Vent. 269: *Pascoe* v. *Tyrian*, 1 Dowl., N. S. 939.

(*k*) *Davies* v. *Chapman*, 7 Sc. 458; 5 Bing. N. C. 453; 7 Dowl. 429: *Davies* v. *Chapman*, 2 M. & Gr. 921; 3 Sc. N. R. 238; 9 Dowl. 645.

(*l*) *Filewood* v. *Clement*, 6 Dowl. 508.

(*m*) *Vintner* v. *Allen*, Carter, 212: *Ravenscroft* v. *Eyles*, 2 Wils. 294: *Atkinson* v. *Jameson*, 5 T. R. 25: *Jones* v. *Pope*, 1 Saund. 35.

(*n*) *Filewood* v. *Clement*, 6 Dowl. 508.

(*o*) *Davidson* v. *Seymour*, M. & M. 34. See 3 & 4 W. 4, c. 99, s. 7; ante, p. 33: *Westly's case*, 3 Rep. 72 b; B. N. P. 68. And see M. & M. 35, n.

PART X.

From special bailiff.

The sheriff is not liable for an escape from the special bailiff of the plaintiff (*q*).

Remedy for escape.

The remedy against the sheriff or gaoler for the escape, before 5 & 6 *V. c.* 98, was by action of debt, or action on the case (*r*). Debt was in general the preferable form of action; because a verdict for the plaintiff therein must have been for the full amount of the sum recovered in the original action (*s*). But now by sect. 3

5 & 6 Vict. c. 98, s. 31.

of that Act, "if any debtor in execution shall escape out of legal custody after the passing of this Act (August 10, 1842), the sheriff bailiff or other person having the custody of such debtor shall be liable only to an action upon the case for damages sustained by the person or persons at whose suit such debtor was taken or imprisoned, and shall not be liable to any action of debt in consequence of such escape." The true measure of damages under this Act is the value of the custody of the debtor at the moment of the escape, and no deduction ought to be made on account of anything which might have been obtained by the plaintiff by diligence after the escape (*t*). The jury may consider the value of the chances of the creditor obtaining payment by continuing the imprisonment (*u*).

Sheriff no remedy for consequences of voluntary escape.

If, after a voluntary escape, the sheriff be obliged to pay the plaintiff the amount of his debt, neither the sheriff nor his officer can maintain any action against the defendant for the money thus paid (*x*). And where an action was brought against the sheriff for a voluntary escape, in which the plaintiff recovered, but the defendant was subsequently arrested on a second writ of *ca. sa.*, nominally at the suit of the plaintiff, but which was in fact sued out with a view to the indemnification of the sheriff, the Court ordered the writ to be set aside, and the defendant to be discharged out of custody; and costs not being prayed on his behalf, refused to impose terms that he should bring no action (*y*).

Plaintiff may proceed against defendant.

The plaintiff, either in the case of a negligent or voluntary escape, instead of proceeding against the sheriff, may sue out a fresh *ca. sa.* against the defendant, or any other writ of execution against his lands or goods; or he may have an action on the judgment (*z*).

Sheriff not liable for escape from prison.

By 40 & 41 *V. c.* 21, *s.* 31, on and after the commencement of that Act (Jan. 1, 1878), the sheriff of any sheriffdom shall not be liable for the escape of any prisoner. By sect. 57, a "prisoner," for the purposes of this Act, means any person committed to prison on remand or for trial, safe custody, punishment, or otherwise." As to the meaning of prison, *see s.* 60.

(*q*) See *Doe* v. *Trye*, 7 Se. 704; 7 Dowl. 636; 5 Bing. N. C. 573: *Pascoe* v. *Vyvian*, 1 Dowl., N. S. 939; ante, p. 33.

(*r*) See 2 Bac. Abr. "Escape" (F), (G).

(*s*) 1 Saund. 37, 38: *Bonafous* v. *Walker*, 1 T. & R. 129: *Robertson* v. *Taylor*, 2 Chit. Rep. 454.

(*t*) *Arden* v. *Goodacre*, 11 C. B. 371; 2 L. M. & P. 383; 20 L. J., C. P. 114. As to the sheriff in an action for an escape being entitled to avail himself of all the equities which the defendant has against the plaintiff, see *Evans* v. *Manero*, 7 M. & W. 463; 9 Dowl. 256. See *Hemming* v. *Hale*, 29 L. J., C. P. 137.

(*u*) *Macrae* v. *Clarke*, L. R., 1 C. P. 403; 35 L. J., C. P. 247.

(*x*) *Pitcher* v. *Bailey*, 8 East, 171.

(*y*) *Gillott* v. *Aston*, 2 Dowl., N. S. 413; 12 L. J., Q. B. 5.

(*z*) *Jaques* v. *Withy*, 1 T. R. 557, per *Ashurst*, J.: *Baker* v. *Ridgway*, 2 Moore, 123: *Foster* v. *Jackson*, Hob. 29: *Allanson* v. *Butler*, 1 Sid. 330: *Buxton* v. *Home*, 1 Show. 174: *Bassett* v. *Salter*, 2 Mod. 136: *Sudall* v. *Wytham*, Lutw. 1264; 8 & 9 W. 3, c. 27.

10. *Rescue.*]—The sheriff cannot rescue, as he might in the case rescue was by the king's enemies therefore, the plaintiff may either in whose custody he was (*c*); or su against defendant's goods, &c., at

11. *When and how returned.*]—It is necessary to return a writ of sheriff may be compelled to retu return is to be made.

When the sheriff is given notic taken the defendant, he returns *ce* dant is so ill that the sheriff cannot ing his life (*f*), or if he have not *est inventus* (*g*); or if he canno of some privilege enjoyed by the de the fact specially. If the *ca. sa.* *capias*, and the sheriff have sent it his county to be executed, he may together with the bailiff's answer, return of a rescue to a *ca. sa.* is bad (

By *R. of S. C., Ord. LII. r.* 12, " going out of office, arrest any defend *corpus*, he may be called upon by a preceding rule (*k*), to bring in the bo law, although he may be out of offic If the sheriff's return be untrue, action against him for it (*l*). If a pe has a writ does not abscond, but con his usual occupation, appears public

(*a*) Ch. CXXVII.

(*b*) B. N. P. 66: *Howden* v. *Stan* 6 C. B. 504; 18 L. J., C. P. 33.

(*c*) 1 Roll. Abr. 807: *Crompton* v. *Ward*, Str. 409: *O'Neal* v. *Marson*, 5 Burr. 2812.

(*d*) *Monson* v. *Clayton*, Cro. Car. 240, 255; 1 Roll. Abr. 904: *Drury's case*, 8 Co. 142.

(*e*) See forms, Chit. Forms, p. 438.

(*f*) See form of return, Id. See *Baker* v. *Darenport*, 8 D. & R. 606: *Cavenagh* v. *Collett*, 4 B. & Ald. 279: *Perkins* v. *Meacher*, 1 Dowl. 21. The illness of the defendant at the return must appear on the return. *Perkins* v. *Meacher*, supra: *Cavenagh* v. *Collett*, supra. If he be too ill to be removed, the Court or a Judge may enlarge the time for returning the writ. *Jones* v. *Robinson*, 2 Dowl., N. S. 1044; 11 M. & W. 758. See 7 & 8 V. c. 96, s. 2, as to suspending the execution of a *ca. sa.* out of an inferior Court, in the case of illness of a defendant.

(*g*) *Key* v. *Mackyntire*, 5 Dowl.

10. *Rescue.*]—The sheriff cannot excuse himself by returning a rescue, as he might in the case of mesne process (*a*), unless the rescue was by the king's enemies (*b*). If the defendant be rescued, therefore, the plaintiff may either have an action against the sheriff in whose custody he was (*c*); or sue out a fresh *ca. sa.*; or execution against defendant's goods, &c., at his option (*d*). 10. Rescue no excuse.

11. *When and how returned.*]—We have seen (*ante*, p. 815) when it is necessary to return a writ of execution, and when and how the sheriff may be compelled to return it in general, and how the return is to be made. 11. When and how returned.

When the sheriff is given notice to return the writ, if he has taken the defendant, he returns *cepi corpus* (*e*), or that the defendant is so ill that the sheriff cannot remove him without endangering his life (*f*), or if he have not been able to find him, he returns *non est inventus* (*g*); or if he cannot execute the writ on account of some privilege enjoyed by the defendant, or the like, he returns the fact specially. If the *ca. sa.* did not contain a clause of *non omittas*, and the sheriff have sent it to the bailiff of a liberty within the county to be executed, he may return this matter on the writ, together with the bailiff's answer, if he have received it (*h*). A return of a rescue to a *ca. sa.* is bad (*i*). So is a return of an escape. By *R. of S. C., Ord. LII. r.* 12, "When any sheriff shall, before going out of office, arrest any defendant, and render return of *cepi corpus*, he may be called upon by a notice, as provided by the last preceding rule (*k*), to bring in the body within the time allowed by it, although he may be out of office before such notice is given." If the sheriff's return be untrue, the plaintiff may maintain an action against him for it (*l*). If a person against whom the sheriff has a writ does not abscond, but continues in the daily exercise of his usual occupation, appears publicly as usual, and is visible to

What return should be made.

Sheriff going out of office after arrest, and return to bring in body.

False return.

Ch. CXXVII.

B. N. P. 66: *Howden* v. *Standish*, 6 C. B. 504; 18 L. J., C. P. 33. 1 Roll. Abr. 807: *Crompton* v. *Ward*, Str. 409: *O'Neal* v. *Marson*, 2 Dowl. 2812.

Mounson v. *Clayton*, Cro. Car. 255; 1 Roll. Abr. 904: *Drury's* Case, Co. 142.

See forms, Chit. Forms, p. 438. See form of return, Id. See *Davenport*, 8 D. & R. 606: *Hugh* v. *Collett*, 4 B. & Ald. 279: *Jones* v. *Meacher*, 1 Dowl. 21. The absence of the defendant at the return must appear on the return. *Perkins* v. *Parker*, supra: *Cavenagh* v. *Collett*, supra. If he be too ill to be removed, the Court or a Judge may enlarge the time for returning the writ. *Jones* v. *Meacher*, 2 Dowl., N. S. 1014; 11 M. & W. 758. See 7 & 8 V. c. 96, s. 11, as to suspending the execution of a *ca. sa.* out of an inferior Court, in case of illness of a defendant. *Bailey* v. *Mackyntire*, 5 Dowl. 453: *R.* v. *Sheriff of Kent*, in *Potter* v. *Simpson*, 2 M. & W. 316: *Cassidy* v. *Stewart*, 4 Se. N. R. 182. A return that the defendant "is not *to be* found in my bailiwick," is bad. Id.

(*a*) Ante, p. 819. See the form, Chit. Forms, p. 439.

(*b*) Supra. The sheriff might return a rescue to a writ of mesne process. See post, Ch. CXXVII. As to what is a sufficient return, see *Gobby* v. *Dewes*, 2 Dowl. 747: *Woodgate* v. *Knatchbull*, 2 T. R. 155: *R.* v. *Sheriff of Leicestershire*, 11 C. B. 367; 1 L. M. & P. 414. The terms to be imposed on staying an attachment for making such a return will be regulated by the damage sustained by the creditor in accordance with 5 & 6 V. c. 98, s. 31, ante, p. 898. The Court directed an action to be brought in this case, in order to ascertain the amount of damage. See *Arden* v. *Goodacre*, ante, p. 898, n. (*t*).

(*k*) See r. 11, ante, p. 817.

(*l*) Ante, p. 820.

PART X.

every person that comes to him on business, and the bailiff negl... to arrest him, and returns *non est inventus*, it is a false return ... It is not, however, sufficient merely to prove that the debtor ... within the defendant's bailiwick; the plaintiff must go further, ... prove notice to the under-sheriff in the country or to the ba... to whom the warrant was directed; a notice to the town agen... the under-sheriff is not sufficient (*m*). It seems, however, t... the plaintiff is not bound to give notice to the sheriff, and that ... latter is bound to make due inquiries for the purpose of find... the defendant (*n*).

12. Poundage and expenses.

12. *Poundage and Expenses.*]—As to these, *see ante*, p. 829 *et se...*

13. What writs may issue after it.

13. *What Writs may issue after it—Alias and pluries Writs, &c.*]... If the *ca. sa.* be not executed, the plaintiff may, of course, sue ... any other writ of execution, or he may have an *alias ca. sa.*, ... after that a *pluries ca. sa.* (*o*). As to renewing a writ of executi... *see ante*, p. 803. After the writ has once been executed, no ot... writ can in general issue (*p*). *See ante*, p. 868, as to *alias* and *plur...* writs of *fi. fa.*: the observations there made will for the most p... be applicable here.

Where defendant dies in execution.

At common law if the plaintiff had the defendant taken in ex... cution, he could not afterwards, if defendant died, have executi... against his goods, &c.; but now, by the statute 21 *James* 1, *c.* ... if a party die in execution, the other party, at whose suit he w... in custody, may sue out execution against his lands or goods ... the same manner as if the deceased had never been charged ... execution. As to the course to be pursued before issuing ex... cution, when the defendant dies after judgment, *see post*, ... *LXXXVIII.* (*q*).

14. How far a discharge of debt, &c.

14. *Execution of the Writ, how far a Discharge of Debt, &c.*]... The effect of taking the party in execution in general is, that ... operates as a satisfaction of the debt, so that the creditor has ... other remedy on the judgment to recover it, with the exceptio... presently mentioned (*r*). Therefore, a petition in bankruptcy cann... be filed against the debtor for the same debt (*s*), nor can it be set ...

(*l*) *Beckford* v. *Montague*, 2 Esp. 475.

(*m*) *Gibbon* v. *Coggan*, 2 Camp. 189.

(*n*) *Dyke* v. *Duke*, 4 Bing. N. C. 197.

(*o*) See *Wood* v. *Harburn*, Yelv. 52.

(*p*) See infra.

(*q*) See *Brocher* v. *Pond*, 2 Dowl. 472: *Farneombe* v. *Kent*, 2 Dowl. 464.

(*r*) *Foster* v. *Jackson*, Hob. 59: *Cohen* v. *Cunningham*, 8 T. R. 123: *Taylor* v. *Waters*, 5 M. & Sel. 103: *Beavan* v. *Robins*, 8 D. & R. 42: *Baker* v. *Ridgway*, 9 Moore, 122: *Lambert* v. *Parnell*, 10 Jur. 31, Q. B.: *Morgan* v. *Cubitt*, 3 Ex. 615, per *Parke*, B. Debts due to the debt... cannot be attached after he has bee... taken in execution. See *Jauralde* ... *Parker*, 30 L. J., Ex. 237; pos... Ch. LXXXII.

(*s*) *Cohen* v. *Cunningham*, 8 T. R. 123: *M'Master* v. *Kell*, 1 B. & P. 302. See *Watson* v. *Humphrey*, ... Ex. 781; 24 L. J., Ex. 190, where ... was held that a judgment debt is ... good debt on which to found a pet... tion in bankruptcy, although th... debtor has been taken in executi... under a *ca. sa.* and subsequent... and before the date of the petitio... discharged from custody under 1 & ... V. c. 110, and the debt duly inserte... in the schedule.

How far ...

... an action brought by the de... to stay proceedings in a second ... the plaintiff was in execution for ... action (*u*). So, if the plaintiff ... custody, he can never afterwards ... judgment, and this, although tho... of the sum recovered by the ju... fendant agree that he may be a... plaintiff discharge a defendant ... several, he can neither retake hi... others, nor detain them if arrest... *s.* 16, "if any judgment creditor ... Act, shall have obtained any char... any security whatsoever, shall aft... so charged or secured shall hav... realised, and the produce thereof ... judgment debt, cause the person ... taken or charged in execution u... such case such judgment creditor ... have relinquished all right and t... or security, and shall forfeit the sa...

But a *ca. sa.* is no actual satisfa... from taking out execution against ... debt and damages (*a*). Therefore ... in execution on a judgment enter... which had been given by him join... viously been taken in execution ... including that secured by the wa... was held regular (*b*). And if the d... rescued (*c*), the judgment is not ... execution may issue upon it. And ... person being arrested in executi...

(*t*) *Taylor* v. *Waters*, 5 M. & Sel. 103.

(*u*) *Beavan* v. *Robins*, 8 D. & R. 42.

(*v*) *Smith* v. *Dickenson*, 1 D. & L. 158.

(*x*) Ro. Abr. 307: *Vigers* v. *Aldrich*, 4 Burr. 2482: *Jaques* v. *Withy*, 1 T. R. 557: *Tanner* v. *Hague*, 7 T. R. 420: *Blackburn* v. *Stupart*, 2 East, 243. See *Da Costa* v. *Davis*, 1 B. & P. 242: *Atkinson* v. *Baynton*, 1 Sc. 404; 1 Hodges, 7; 1 Bing. N. C. 444, where it was discussed whether an agreement to render the body again in execution, in consideration of a discharge from custody in execution, was valid. And see *Shanley* v. *Colwell*, 6 M. & W. 543; 8 Dowl. 373: *Christopherson* v. *Bare*, 17 L. J. Q. B. 109: *Cattlin* v. *Kerr...ott*, 3 C. B., N. S. 796; 27 L. J., C. P. 186.

in an action brought by the debtor (*t*), and the Court has refused to stay proceedings in a second action for the same cause, where the plaintiff was in execution for the costs of a nonsuit in the prior action (*u*). So, if the plaintiff discharge the defendant out of custody, he can never afterwards have him arrested upon the same judgment, and this, although the writ be indorsed to levy only part of the sum recovered by the judgment (*v*); or, although the defendant agree that he may be again arrested (*x*). And so, if the plaintiff discharge a defendant arrested on a joint *ca. sa.* against several, he can neither retake him nor afterwards arrest any of the others, nor detain them if arrested (*y*). And by 1 & 2 *V. c.* 110, *s.* 16, "if any judgment creditor, who, under the powers of this Act, shall have obtained any charge, or be entitled to the benefit of any security whatsoever, shall afterwards and before the property so charged or secured shall have been converted into money or realised, and the produce thereof applied towards payment of the judgment debt, cause the person of the judgment debtor to be taken or charged in execution upon such judgment, then and in such case such judgment creditor shall be deemed and taken to have relinquished all right and title to the benefit of such charge or security, and shall forfeit the same accordingly" (*z*).

1 & 2 Vict. c. 110, s. 16.

But a *ca. sa.* is no actual satisfaction, so as to bar the plaintiff from taking out execution against other persons liable for the same debt and damages (*a*). Therefore, where a defendant was taken in execution on a judgment entered upon a warrant of attorney, which had been given by him jointly with another, who had previously been taken in execution on a judgment for a larger sum, including that secured by the warrant of attorney, the execution was held regular (*b*). And if the defendant die (*c*), escape (*d*), or be rescued (*e*), the judgment is not satisfied, and another writ of execution may issue upon it. And by the 2 (1) *J.* 1, *c.* 13, "if any person being arrested in execution and, by privilege of either

---

(*t*) *Taylor* v. *Waters*, 5 M. & Sel. 8.

(*u*) *Bearan* v. *Robins*, 8 D. & R.

(*v*) *Smith* v. *Dickenson*, 1 D. & L.

(*x*) Ro. Abr. 307: *Vigers* v. *Aldrich*, arr. 2482: *Jaques* v. *Withy*, 1 T. 557: *Tanner* v. *Hague*, 7 T. R. : *Blackburn* v. *Stupart*, 2 East, See *Da Costa* v. *Davis*, 1 B. & 242: *Atkinson* v. *Baynton*, 1 Sc. ; 1 Hodges, 7; 1 Bing. N. C. 444, re it was discussed whether an ement to render the body again execution, in consideration of a harge from custody in execution, valid. And see *Shanley* v. ell, 6 M. & W. 543; 8 Dowl. *Christopherson* v. *Bare*, 17 . Q. B. 109: *Cattlin* v. *Kerr*, 3 C. B., N. S. 796; 27 L. J., 186.

(*y*) *Clarke* v. *Clement*, 6 T. R. 525: *Ballam* v. *Price*, 2 Moore, 235. See *Tebbutt* v. *Holt*, 1 C. & K. 280: *Heeles* v. *Fraser*, 7 Sc. N. R. 469: *Denton* v. *Godfrey*, 11 Jur. 800, Q. B.

(*z*) See *Houlditch* v. *Collins*, 12 L. J., N. S., Ch. 13: *Wells* v. *Gibbs*, 4 Jur. 1176: *Lewis* v. *Dyson*, 21 L. J., Q. B. 194: *Roberts* v. *Ball*, 24 L. J., Ch. 471, where the defendant was arrested on an attachment, and it was held that this had not the same effect as an arrest on a *ca. sa.*

(*a*) *Foster* v. *Jackson*, Hob. 59. See *Thompson* v. *Parish*, 28 L. J., C. P. 153. A solicitor did not lose his lien by taking his client on a *ca. sa.* on a judgment for the costs. *O'Brien* v. *Lewis*, 32 L. J., Ch. 665.

(*b*) *Bircham* v. *Tucker*, 3 Sc. 469.

(*c*) Ante, p. 900.

(*d*) Ante, p. 896.

(*e*) Ante, p. 899.

PART X.

of the Houses of Parliament, set at liberty, the party at whose suit such writ of execution was pursued, his executors or administrators, after such time as the privilege of that session of Parliament in which such privilege shall be so granted shall cease, may sue forth and execute a new writ or writs of execution, as if no such former execution had been taken forth or served" (*f*). And it seems, that after an arrest and discharge therefrom, on the ground of any other privilege, a party can be again arrested after the privilege has expired (*g*). Where a defendant, after he was arrested on a *ca. sa.* obtained a temporary protection from process under 5 & 6 *V. c.* 116, and the other Acts of Parliament for amending that Act, and was thereby discharged from custody, but on the hearing the petition was dismissed, and no final order made, the plaintiff might issue another *ca. sa.* and again arrest the defendant (*h*). Where one of two defendants was discharged under an Insolvent Act, this was held not to operate as a discharge of the other; for the discharge in that case was not the act of the plaintiff, but an act of law. And if the discharge of the defendant out of custody was on account of any irregularity in the process, he may be again taken on a regular writ (*k*). Also, if the defendant obtain his discharge by fraud (as by concocting a fraudulent bankruptcy, which is afterwards superseded, and procuring the plaintiff to prove under it, and let him go), and the plaintiff, on discovering the fraud, arrest him on a fresh *ca. sa.*, the Court will not discharge him on motion (*l*). Again, the effect of a discharge extends only to the debt for which a defendant is in custody at the time; and, therefore, where a warrant of attorney was given for payment of a sum by instalments with a power to issue execution from time to time for the whole or any part, and the defendant, being in execution on a *ca. sa.* for one instalment, was discharged by plaintiff on the undertaking of a third person, that he should be forthcoming, if necessary, for a second execution, the Court held, that the undertaking was valid, and that the plaintiff, notwithstanding the discharge, might arrest the defendant for any subsequent instalment (*m*). And by 8 & 9 *W.* 3, *c.* 11, where breaches are assigned in debt on bond conditioned to perform covenants, the defendant may, in case of further breaches, be taken in execution a second time upon the original judgment (*n*).

(*f*) See *Barrack* v. *Newton*, 1 Q. B. 533: *Baker* v. *Ridgway*, 9 Moo. 122.

(*g*) See *Towers* v. *Newton*, 1 Q. B. 319: *Barrack* v. *Newton*, Id. 525. See *Phillips* v. *Price*, 1 D. & L. 110.

(*h*) *Parker* v. *Bailey*, 5 D. & L. 296; 17 L. J., Q. B. 45. These Acts were repealed by the Bankruptcy Act, 1861, except as to rights accrued and things done before the passing of that Act.

(*i*) *Nadin* v. *Battie*, 5 East, 147: *Raynes* v. *Jones*, 1 Dowl., N. S. 373: *Franklin* v. *Hodgkinson*, 3 D. & L. 555: *Watson* v. *Humphrey*, 10 Ex. 781; 24 L. J., Ex. 190.

(*k*) *Merchant* v. *Franks*, 3 Q. B. And see *Collins* v. *Beaumont*, 10 Ad. E. 225: *M'Cormack* v. *Melton*, 3 Dowl. 215; 1 C., M. & R. 525; Com. Dig. Execution (H): *Fish's case*, Godb. 372: *Fish* v. *Wiseman*, Latch, 19 Gilb. Execution., 54: *Mackie* v. *Warren*, 2 M. & P. 279; 5 Bing. 176.

(*l*) *Baker* v. *Ridgway*, 2 Moore 122; 2 Bing. 41.

(*m*) *Atkinson* v. *Baynton*, 1 Sc. 404; 1 Hodges, 7; 1 Bing. N. C. 444. See *Smith* v. *Dickenson*, 1 D. & L. 158.

(*n*) *Atkinson* v. *Baynton*, 1 Sc. 404; 1 Hodges, 7, per *Tindal*, C. J.

Before the Debtors Act, 1869, it was held, that the holder of a of exchange might sue an indorser, notwithstanding he had fectually taken in execution the body of a *subsequent* indorser, afterwards set him at liberty (*o*).

5. *Irregular ca. sa.*]—As to this, *see ante*, p. 830.

Hayling v. *Mulhall*, 2 Bla. 1235: *Smith* v. *Knox*, 3 Esp. See *English* v. *Darley*, 2 B. & 2: *Claridge* v. *Dalton*, 4 M. & 226: *Woodward* v. *Pell*, 38 L. B. 30. See *Michael* v. *Myers*, 7 Sc. N. R. 444; 13 L. J., C. P. 14: *Bray* v. *Manson*, 8 M. & W. 668. And see *Eales* v. *Fraser*, 6 M. & G. 755, as to the effect of the discharge of the principal as against a surety.

CHAPTER LXXVIII.

WRIT OF DELIVERY.

PART X.

For recovery of property other than land.

As has been already pointed out (*ante*, p. 788) it is provided by *Ord. XLII. r.* 6, that a judgment for the recovery of any property other than land or money may be enforced *inter alia* by writ for delivery of the property. This writ is called a "writ of delivery," and by it the sheriff is directed to deliver to the party suing out the property recovery whereof has been adjudged to him, and if it cannot be found, either to distrain the person against whom the order is made by all his goods and chattels until the property is delivered up, or to levy the assessed value of the property on the goods and chattels of the defaulter.

Order for execution for delivery of property.

By *R. of S. C., Ord. XLVIII. r.* 1, "Where it is sought to enforce a judgment or order for the recovery of any property other than land or money by writ of delivery, the Court or a Judge may upon the application of the plaintiff, order that execution shall issue for the delivery of the property, without giving the defendant the option of retaining the property, upon paying the value assessed if any, and that if the property cannot be found, and unless the Court or a Judge shall otherwise order, the sheriff shall distrain the defendant by all his lands and chattels in the sheriff's bailiwick till the defendant deliver the property; or at the option of the plaintiff, that the sheriff cause to be made of the defendant's goods the assessed value, if any, of the property."

This rule corresponds with the 78th section of the *Com. Law Proc. Act*, 1854, and is in almost identically the same terms. That section is repealed by the *Stat. Law Rev. and Civil Proc. Act*, 1883.

An order for delivery under that section could not be made unless the value of the goods had been assessed (*a*), because the section dealt with an option only, which did not arise unless the value had been assessed. It has been held that this is so also under the present rule (*b*). Where, therefore, the defendant suffers judgment by default either of appearance or of pleading, and the plaintiff is desirous of obtaining an order for the delivery of the specific chattel, he must first get the value of the chattel assessed under *Ord. XIII. r.* 8 (*ante*, *Vol.* 1, p. 261), or under *Ord. XXVII. r.* 4 (*ante*, *Vol.* 1, p. 331), and then apply *ex parte* to a Master at chambers for an order, under the above rule, that execution shall issue for the delivery of the property, without giving the defendant the option of retaining it upon paying the assessed value (*b*).

Where, at the trial of an action of detinue for a lease deposited

(*a*) *Chilton* v. *Carrington*, 15 C. B. 730; 24 L. J., C. P. 78.

(*b*) *Corbett* v. *Lewin*, Bitt. Ch. C. 103; W. N. 1884, 62. In the case of *Ivory* v. *Cruickshank*, W. N. 1885, 249, contrà, *Chilton* v. *Carrington*, supra, n. (*a*) was not cited.

s security for 150*l.*, which sum had been tendered to defendant, e parties agreed that the jury should be discharged from finding e value of the lease, and a Judge made an order on the defen- nt to deliver up the lease, the Court rescinded that order (*b*). ne Court will review the order of a Judge made under this ction (*b*).

Before the *Com. Law Proc. Act*, 1854, the only mode of compelling arty to deliver up a chattel improperly withheld by him was by plication to a Court of Equity (*c*). Such a Court would order the ivery up of deeds to the party entitled to them (*d*); also of Court ls to the party entitled to hold the Courts (*e*). In some cases, ere damages would not afford an adequate compensation, or ere the chattel had some peculiar value to the owner, equity uld compel the delivery of it up. Thus, pictures and ancient ily furniture have been ordered to be delivered up (*f*). Where lver tobacco box had for a long time belonged to a club, and been nominally held by a particular person during the time he a certain office, the Court compelled a party who persisted in ing it after his office had expired to deliver it up to the club (*g*).

v. 19 & 20 V. c. 97, s. 2, "In all actions and suits in any of the rior Courts of common law at Westminster or Dublin, or in Court of record in England, Wales, or Ireland, for breach of ract to deliver specific goods for a price in money, on the ication of the plaintiff, and by leave of the Judge before whom ause is tried, the jury shall, if they find the plaintiff entitled ecover, find by their verdict what are the goods in respect of non-delivery of which the plaintiff is entitled to recover, and h remain undelivered; what (if any) is the sum the plaintiff d have been liable to pay for the delivery thereof; what ges (if any) the plaintiff would have sustained if the goods d be delivered under execution, as hereinafter mentioned, and damages, if not so delivered; and thereupon, if judgment be given for the plaintiff, the Court or any Judge thereof, at or his discretion, on the application of the plaintiff, shall have to order execution to issue for the delivery, on payment of sum (if any) as shall have been found to be payable by the iff as aforesaid, of the said goods, without giving the de- it the option of retaining the same upon paying the damages ed; and such writ of execution may be for the delivery of goods; and if such goods so ordered to be delivered, or any ereof, cannot be found, and unless the Court, or such Judge on as aforesaid shall otherwise order, the sheriff, or other of such Court of record, shall distrain the defendant by all ds and chattels in the said sheriff's bailiwick, or within the ction of such other Court of record, till the defendant deliver oods, or, at the option of the plaintiff, cause to be made of endant's goods the assessed value or damages, or a due pro-

In action for breach of contract to deliver specific goods for a price in money.

---

illon v. *Carrington*, supra.
e Story's Eq. Jur. s. 703; l. 95.
pillon v. *Voice*, 2 P. Wms. *kson* v. *Butler*, 2 Atk. 306. v. *Lee*, 9 Ves. 24: *Ortigosa* , 17 L. J., Ch. 168.

(*c*) *Brown* v. *Brown*, 1 Dick. 62.
(*f*) *Arundel* v. *Phipps*, 10 Ves. 140: *Dowling* v. *Betjemmann*, 2 Johns. & H. 544; 8 Jur., N. S. 538.
(*g*) *Fells* v. *Read*, 3 Ves. 70. See *Nutbrown* v. *Thornton*, 10 Ves. 159: *Pusey* v. *Pusey*, 1 Vern. 273.

PART X.

portion thereof; provided that the plaintiff shall, either by the same or a separate writ of execution, be entitled to have made of the defendant's goods the damages, costs, and interest in such action or suit."

How issued.

The writ of delivery is issued in the same manner as a writ of *fieri facias* (*see fully, ante*, pp. 837 *et seq.*). A form of præcipe is given in the Appendix (G) to the *R. of S. C., No.* 8 (*h*).

On judgment in default of appearance.

Where the defendant in an action claiming the return of a specific chattel makes default in appearance, the plaintiff's proper course is to sign judgment and get the damages assessed under *Ord. XLII. r.* 5, and then to get leave *ex parte* to issue a writ of delivery (*i*).

Form of (*k*).

By *Ord. XLVIII. r.* 2, "A writ of delivery shall be in the form No. 10 in Appendix (H) (*k*); and when a writ of delivery is issued the plaintiff shall, either by the same or a separate writ of execution, be entitled to have made of the defendant's goods the damages and costs awarded, and interest" (*l*).

Damages, costs and interest.

Delivery to sheriff, &c.

The writ is delivered to the sheriff for execution in the same manner as a *fieri facias*, and the sheriff may be compelled to return it in the same way.

(*h*) See form, Chit. F. p. 446: *Corbett* v. *Lewin*, W. N. 1884, 62, *Field*, J., at Chambers. But see *Ivory* v. *Cruickshank*, W. N. 1875, 249, per *Quain*, J., at Chambers.

(*i*) See ante, p. 904.

(*k*) See form, Chit. F. p. 417.

(*l*) The latter part of this rule corresponds with the last clause of sect. 78 of the C. L. P. Act, 1852. See a form of writ, Chit. F. p. 447.

(9

CHAPTER

WRIT OF SEQU

THE writ of sequestration is solde
Division of the High Court, and it
place to discuss very fully the prac
details the practitioner is referred
6th ed., pp. 908 *et seq.*

What it is.]—The writ of seques
directed to four or more persons n
whom it is to be executed. The wr
two of them, full power and aut
messuages, lands, tenements, and
person against whom it is issued, and
into their hands all the rents and profi
tenements, and real estate, and also
sonal estate whatsoever; and it comm
of them, that they do, at certain pr
hours, go to and enter upon all the
and real estate of the said person, and
get into their hands the rents and pro
also all his goods, chattels and person
the same under sequestration in thei
shall comply with the judgment or
clear his contempt, and the Court m
trary (*a*).

This writ was originally issued by
kind of process of contempt *in rem*, in
in personam (*b*). The property seques
detained from the person in contem
himself to the orders of the Court; b
Thurlow it had become the practice t
sequestration in satisfaction of the cl
nstance it issued (*c*).

In what Cases it may be used.]—By
"A judgment for the payment of money
by writ of sequestration, or, in cases in
rized by law, by attachment."
By *R. of S. C., Ord. XLII. r.* 6 (*ante*,
he recovery of any property other th
nforced . . . . (c) by writ of sequestrat

(*a*) See form of writ, Chit. F. p. & Gif.
(*b*) See *Tatham* v. *Parker*, 1 Sm. Ves. s

CHAPTER LXXIX.

WRIT OF SEQUESTRATION.

HE writ of sequestration is seldom used in the Queen's Bench ivision of the High Court, and it is therefore not proposed in this ace to discuss very fully the practice relating to it. For further tails the practitioner is referred to Daniell's Chancery Practice, h ed., pp. 908 *et seq.*

What it is.]—The writ of sequestration is a writ of execution ected to four or more persons nominated as commissioners, by om it is to be executed. The writ gives them, or any three or of them, full power and authority to enter upon all the ssuages, lands, tenements, and real estate whatsoever of the son against whom it is issued, and to collect, receive and sequester their hands all the rents and profits of his said messuages, lands, ements, and real estate, and also all his goods, chattels, and per- l estate whatsoever; and it commands them, or any three or two hem, that they do, at certain proper and convenient days and rs, go to and enter upon all the messuages, lands, tenements, real estate of the said person, and that they do collect, take and nto their hands the rents and profits of his said real estate, and all his goods, chattels and personal estate, and detain and keep ame under sequestration in their hands until the said person comply with the judgment or order on which it is issued, his contempt, and the Court make other order to the con- (*a*). What it is.

s writ was originally issued by the Court of Chancery as a f process of contempt *in rem*, in aid of its process of contempt rsonam (*b*). The property sequestered was originally simply ed from the person in contempt until he should submit lf to the orders of the Court; but before the time of Lord w it had become the practice to apply the proceeds of the tration in satisfaction of the claims of the party at whose ce it issued (*c*).

hat Cases it may be used.]—By *R. of S. C., Ord. XLII. r.* 4, lgment for the payment of money into Court may be enforced t of sequestration, or, in cases in which attachment is autho- y law, by attachment." In what cases it may be used—judgments, &c.

. of S. C., Ord. XLII. r. 6 (*ante*, p. 788), "A judgment for overy of any property other than land or money may be d . . . . (c) by writ of sequestration."

) form of writ, Chit. F. p. & Gif. 513.

Tatham v. *Parker*, 1 Sm. (*c*) See *Wharam* v. *Broughton*, 1 Ves. sen. 182.

PART X.

By *Ord. XLIII. r.* 6, "Where any person is by any judgment or order directed to pay money into Court or to do any other act in a limited time, and after due service of such judgment or order refuses or neglects to obey the same according to the exigency thereof, the person prosecuting such judgment or order shall, at the expiration of the time limited for the performance thereof, be entitled, *without obtaining any order for that purpose*, to issue a writ of sequestration against the estate and effects of such disobedient person. Such writ of sequestration shall have the same effect as a writ of sequestration in Chancery had before the commencement of the Principal Act, and the proceeds of such sequestration may be dealt with in the same manner as the proceeds of writs of sequestration were before the same date dealt with by the Court of Chancery."

An ordinary judgment for recovery of money cannot be enforced by a writ of sequestration (*c*). An order for payment by instalments under the Debtors Act, 1869 (*d*), or an order against a local board restraining them from allowing sewage to flow into a river so as to pollute it (*e*), may be so enforced.

Judgment or order against corporation,

By *Ord. XLII. r.* 31, "Any judgment or order against a corporation wilfully disobeyed may, *by leave of the Court or a Judge*, be enforced by sequestration against the corporate property, or by attachment against the directors or other officers thereof, or by writ of sequestration against their property." *See*, as to this, *post*, *Ch. XCII.*

—for payment of costs.

By *R. of S. C., Ord. XLIII. r.* 7, "*No subpœna* for the payment of costs, and, unless by leave of the Court or a Judge, no sequestration to enforce such payment, shall be issued" (*f*).

Service of judgment.

Service of Judgment.]—The writ of sequestration cannot be issued until after the judgment or order duly indorsed, as required by *Ord. XLI. r.* 5 (*ante*, p. 766), has been served and default made in obedience thereto. The service of the judgment must (unless otherwise authorized by the Court or a Judge) be personal; and is effected by delivering to, and leaving with, the person required to do the act a true copy of the judgment indorsed as mentioned in that rule, at the same time producing and showing to him the original judgment, or an office copy thereof duly sealed. In some cases the Court or a Judge will allow service to be substituted. The order for substituted service is obtained on an *ex parte* application supported by an affidavit. Where an order for substituted service is made, the service must be in accordance with the terms of such order, and a copy of the order must be served.

By the Debtors Act, 1869 (32 & 33 *V. c.* 62, *s.* 8), "Sequestration against the property of a debtor may, after the commencement of this Act, be issued by any Court of equity in the same manner as if such debtor had been actually arrested" (*g*).

How issued, &c.

How issued, &c.]—This writ is sued out in the same way as a

(*c*) *Ex p. Nelson, In re Hoare*, 14 Ch. D. 41; 42 L. T. 389 (C. A.). See per *James*, L. J., 14 Ch. D. at p. 45.

(*d*) *Willcock* v. *Terrell*, 3 Ex. D. 323. But see *Ex p. Nelson*, supra.

(*e*) *Spokes* v. *Banbury Board of Health*, L. R., 1 Eq. 42.

(*f*) See *Snow* v. *Bolton*, 17 Ch. D. 433; 44 L. T. 571, where leave to issue the writ was granted.

(*g*) *Sykes* v. *Dyson*, L. R., 9 Eq. 228. See *Dent* v. *Dent*, L. R., 1 P. & D. 266. See ante, p. 890, n. (*g*).

writ of *fi. fa.* (*see ante*, p. 837) (*h*). I
it is there mentioned should be pro
the writ, there should be produc
judgment, and that default has be

The writ must be directed to n
These need not be professional per
an account should be ordered, to
may appear.

An order for the writ to issue is
where it is desired to enforce an or
where the writ is issued against a
application to the Court must be m
has been a return of *nulla bona* to
sary for the issue of a second or any

The sequestrators cannot of thei
sequestered, nor apply any of the
without leave for that purpose firs
And in no case, with or without th
estate or chattels real be sold und
order for sale of the personalty will
application may be by summons, or m
but it may be made *ex parte* in cas
cannot be effected (*q*).

A difference formerly existed betw
cess and sequestration on mesne pr
that the latter has become obsolete, t
other means of compelling parties
another in the cause (*s*). Moreover,
now limited to cases where any perso
directed to pay money into Court, or t
time (*t*).

Property liable to Sequestration.]—T
estate, including chattels real, and w
liable to sequestration. Rents paid in
of a farm may be sequestered. But th
trators no title to the land itself; it
enter on and take possession of such
of the person against whom the writ is
call on the tenants to attorn and pay
the land cannot be sold under the writ (

(*h*) See the form of præcipe, Chit. F. p. 448, and the form of writ, Id. 448.

(*i*) *Sprunt* v. *Pugh*, 7 Ch. D. 567; 26 W. R. 473.

(*j*) See Ord. XLIII. r. 7, ante, p. 908. It would seem, that in the Chancery Division the application is to be made at Chambers. *Snow* v. *Bolton*, 17 Ch. D. 433, *Fry*, J.

(*k*) See Ord. XLII. r. 31, ante, p. 908.

(*l*) Braithwaite's Practice, 291:
(*m*) *Shaw* v. *Wright*, 3 Ves. 22.
(*n*) Id.

(*o*
sen.
v.
Cow
versi
(*p*
(*q*)
W. I
(*r*)
(*s*)
the
in pl
(*t*)
(*u*)
(*x*)

rit of *fi. fa.* (*see ante*, p. 837) (*h*). In addition to the documents which is there mentioned should be produced to the officer on stamping e writ, there should be produced an affidavit of service of the dgment, and that default has been made in obedience thereto. The writ must be directed to not less than four commissioners. ese need not be professional persons, but should be able, in case account should be ordered, to make good any deficiency that y appear.

An order for the writ to issue is no longer necessary (*i*) except ere it is desired to enforce an order for payment of costs (*j*), or ere the writ is issued against a corporation (*k*), in which case an lication to the Court must be made. Also in cases where there been a return of *nulla bona* to the first writ, an order is neces- y for the issue of a second or any further remedy (*l*).

The sequestrators cannot of their own motion sell the property nestered, nor apply any of the proceeds of the sequestration nout leave for that purpose first obtained from the Court (*m*). d in no case, with or without the leave of the Court, can real te or chattels real be sold under a sequestration (*n*). But an r for sale of the personalty will as a rule be granted (*o*). The ication may be by summons, or motion, and usually on notice (*p*), it may be made *ex parte* in cases where service of the notice not be effected (*q*).

difference formerly existed between sequestration on final pro- and sequestration on mesne process (*r*). But it is submitted the latter has become obsolete, the new rules having provided means of compelling parties to proceed from one step to her in the cause (*s*). Moreover, the issue of a sequestration is limited to cases where any person is by any judgment or order ted to pay money into Court, or to do any other act in a limited (*t*).

perty liable to Sequestration.]—The rents and profits of all real , including chattels real, and whether legal or equitable, are to sequestration. Rents paid in kind and the natural produce arm may be sequestered. But the writ confers on the seques- s no title to the land itself; it merely gives them a right to on and take possession of such part as is in the occupation person against whom the writ issued, and as to the residue to n the tenants to attorn and pay their rents to them (*u*); and nd cannot be sold under the writ (*x*); but by leave of the Court, Property liable.

---

e the form of præcipe, Chit. F. and the form of writ, Id. 448. *prunt* v. *Pugh*, 7 Ch. D. 567; t. 473.

ee Ord. XLIII. r. 7, ante, It would seem, that in the y Division the application is ade at Chambers. *Snow* v. 7 Ch. D. 433, *Fry*, J.

ee Ord. XLII. r. 31, ante,

aithwaite's Practice, 291: *Coitee*, 19 Beav. 470.

haw v. *Wright*, 3 Ves. 22.

(*o*) *Wharam* v. *Broughton*, 1 Ves. sen. 182, household furniture: *Shaw* v. *Wright*, supra, farm produce: *Cowper* v. *Taylor*, 16 Sim. 314, reversionary interest in fund in Court.

(*p*) *Mitchell* v. *Draper*, 9 Ves. 208.

(*q*) *Re Rush*, L. R., 10 Eq. 442; 18 W. R. 417.

(*r*) See Seton, 1579.

(*s*) See Ord. XXXI. rr. 21, 22, and the various provisions as to default in pleading, &c.

(*t*) Ord. XLIII. r. 6, ante, p. 908.

(*u*) *Shaw* v. *Wright*, 3 Ves. 22.

(*x*) Id.

PART X.

to be obtained on notice or summons, it may be let (*y*), though an order may be obtained for the sale of rents paid in kind and natural produce (*z*). Where the sequestrators are refused possession of lands in the occupation of the contemnor himself, a writ of possession should be issued, as that is now substituted for the writ of assistance, which formerly issued in such cases (*a*).

As to personalty.

As to Personalty.]—All goods and chattels of the person against whom the writ issued which the sequestrators can reduce into their possession without committing a breach of the peace and without suit or action, are liable (*b*); and they may break open rooms and boxes if the keys are denied them (*c*). A balance at a banker's may be taken (*d*).

It seems that such parts of the separate estate of a married woman as would be liable to sequestration if she were a *feme sole*, are liable, notwithstanding her coverture (*e*).

The dividends on a fund in Court standing to the credit of an action may be ordered to be paid to sequestrators, appointed in another action, of the estate of the person to whom such dividends are payable (*f*). So, also, the deposit paid in as security for costs of an appeal may be sequestered after order for payment out to the person entitled (*g*).

Pensions granted wholly in consideration of past services of the grantee are liable to be sequestered (*h*). But where the pension has been granted partly or entirely in respect of services which the grantee may be called on to perform in the future, it cannot be sequestered (*i*).

Where the pension is payable by the Treasury, no order can be made on the Lords of the Treasury to pay the instalments to the sequestrators, but an order will be made restraining the pensioner from receiving the pension, and empowering the sequestrators to receive it (*k*).

So, also, where the property ought to be sequestered is government stock, no order will be made on the Bank of England directing payment of the dividends to the sequestrators (*l*).

(*y*) *Neale* v. *Bealing*, 3 Swanst. 304.

(*z*) See Seton, 1562; and Ord. XLVII. r. 1.

(*a*) See Ord. XLVII. r. 1, post, Ch. CVI.

(*b*) See per *Cotton*, L. J., in *Ex p. Nelson*, 14 Ch. D. at p. 47.

(*c*) *Lord Pelham* v. *Duchess of Newcastle*, 3 Swanst. 290, n.

(*d*) *Miller* v. *Huddlestone*, 22 Ch. D. 233.

(*e*) *Miller* v. *Miller*, L. R., 2 P. & M. 54; 18 W. R. 750. So also dividends accrued due on a fund in Court settled to the separate use of a married woman without power of anticipation. *Claydon* v. *Finch*, 15 Eq. 266; 42 L. J., Ch. 416.

(*f*) *In re Slade*, *Slade* v. *Hulme*, 18 Ch. D. 653.

(*g*) *Conn* v. *Garland*, 9 Ch. D. 101.

(*h*) *Willcock* v. *Terrell*, 3 Ex. D. 323, pension of retired County Court Judge: *Dent* v. *Dent*, L. R., 1 P. & M. 366, retired Indian officer: *Sansom* v. *Sansom*, 4 P. D. 69, civil service pension.

(*i*) *McCarthy* v. *Goold*, 1 Ball & B. 387, officer's half-pay: *Fenton* v. *Lowther*, 1 Cox, 315, salary of an equerry: and see *Stone* v. *Lidderdale*, 2 Anst. 533: *Spooner* v. *Payne*, 1 D. M. & G. 388: *Lloyd* v. *Cheetham*, 3 Giff. 171: *Birch* v. *Birch*, 8 P. D. 163; 52 L. J., P. 88; 32 W. R. 96, officer in Indian army.

(*k*) *Willcock* v. *Terrell*, 3 Ex. D. 323. And see *Crispin* v. *Cumano*, L. R., 1 P. & M. 622: *Sansom* v. *Sansom*, 4 P. D. 69.

(*l*) *Crispin* v. *Cumano*, supra.

Propert

Choses in action cannot be se
Court, which will only be grantec
the chose is to be recovered admi
whom the sequestration has iss
with notice of the proceedings (
admit the title, or seeks some ad
the Court will make no order, a
by action (*n*). The third party in
the sequestrators without any ord
trators neglect to obtain an order
whom the sequestration has issu
it, in order to protect himself from
person (*o*).

Where the sequestrators return
the person against whom the writ
man, and has no lay property, a
ecclesiasticis, and other writs in a
sequester the benefice (*p*).

Effect of Writ on Property.]—The
under their writ constitutes equital
in execution within the 27 & 28 V
party at whose instance the writ ha
creditor) a right to an order for the
the land (*r*). But if he be not a judgr
obtained an order that his opponen
order has been disobeyed, an order
be made (*s*). The writ binds person
affected by it as from the date of its
or anyone taking under him as
notice (*a*), but not as against a purch
without notice (*x*), nor as against
Nor does the mere issue of the writ
behalf it is issued a secured credit
Bankruptcy Act, 1883. To do this t
be delivery in execution within the Ju
and in the case of choses in possessio
and in the case of choses in action
the sequestrators, or an acknowledgm
title (*z*).

Where a third party claims to be
sequestered, whether by title paramou
to the Court to order an enquiry whet
terest in the property (*a*). He cannot

(*m*) *Wilson* v. *Metcalfe*, 1 Beav. 263: *Franklyn* v. *Colhoun*, 3 Swans. 276: *Crispin* v. *Cumano*, L. R., 1 P. & M. 622: *Miller* v. *Huddlestone*, 22 Ch. D. 233.

(*n*) *Simmonds* v. *Lord Kinnaird*, 4 Ves. 735: *Johnson* v. *Chippendall*, 2 Sim. 55.

(*o*) *Wilson* v. *Metcalfe*, supra.

(*p*) *Norton* v. *Pritchard*, 2 Sm. & G. 155, n.: *Rabbitts* v. *Woodward*, 29 L. T. 633. See Ord. XLIII. rr. 3 and 5, post, Ch. CIII.

—Choses in action.

Choses in action cannot be sequestered without an order of the Court, which will only be granted when the third party from whom the chose is to be recovered admits the title of the person against whom the sequestration has issued. The latter must be served with notice of the proceedings (*m*). If the third party does not admit the title, or seeks some additional relief, such as an account, the Court will make no order, and the sequestrators must proceed by action (*n*). The third party may, it seems, if he please, pay to the sequestrators without any order of the Court; or if the sequestrators neglect to obtain an order he may pay to the person against whom the sequestration has issued, although he have notice of it, in order to protect himself from proceedings on the part of such person (*o*).

—Ecclesiastical property.

Where the sequestrators return *nulla bona*, on the ground that the person against whom the writ has issued is a beneficed clergyman, and has no lay property, a writ of *sequestrari facias de bonis ecclesiasticis*, and other writs in aid may issue to the bishop to sequester the benefice (*p*).

Effect of writ on property sequestered.

Effect of Writ on Property.]—The entry of sequestrators on land under their writ constitutes equitable execution (*q*), and is delivery in execution within the 27 & 28 *V. c.* 112; and therefore gives the party at whose instance the writ has issued (if he be a judgment creditor) a right to an order for the sale of his debtor's interest in the land (*r*). But if he be not a judgment creditor, as, *e.g.*, if he have obtained an order that his opponent pay money into Court, which order has been disobeyed, an order for the sale of the land cannot be made (*s*). The writ binds personal property of the person to be affected by it as from the date of its issue as against such person (*t*), and anyone taking under him as a volunteer or purchaser with notice (*u*), but not as against a purchaser for valuable consideration without notice (*x*), nor as against the trustee in bankruptcy (*y*). Nor does the mere issue of the writ constitute the party on whose behalf it is issued a secured creditor within the meaning of the Bankruptcy Act, 1883. To do this there must, in the case of land, be delivery in execution within the Judgments Act (27 & 28 *V. c.* 112), or in the case of choses in possession seizure by the sequestrators, and in the case of choses in action an order directing payment to the sequestrators, or an acknowledgment by the third party of their title (*z*).

Claims by third party.

Where a third party claims to be entitled to land that has been sequestered, whether by title paramount or otherwise, he must apply to the Court to order an enquiry whether he has any and what interest in the property (*a*). He cannot try the quest on in ejectment

(*m*) *Wilson* v. *Metcalfe*, 1 Beav. 263; *Franklyn* v. *Colhoun*, 3 Swans. 129; *Crispin* v. *Cumano*, L. R., 1 P. C. 622; *Miller* v. *Huddlestone*, 22 Beav. 233.

(*n*) *Simmonds* v. *Lord Kinnaird*, 4 Beav. 335; *Johnson* v. *Chippendall*, 2 Sm. & G. 55.

(*o*) *Wilson* v. *Metcalfe*, supra.

(*p*) *Norton* v. *Pritchard*, 2 Sm. & G. 65, n.; *Rabbitts* v. *Woodward*, L. R., 7 Ch. 693. See Ord. XLIII. rr. 3 and 4, post, Ch. CIII.

(*q*) *Hatton* v. *Haywood*, 9 Ch. 229.

(*r*) *Re Rush*, L. R., 10 Eq. 442.

(*s*) *Johnson* v. *Burgess*, L. R., 15 Eq. 398.

(*t*) *Burdett* v. *Rockley*, 1 Vern. 58.

(*u*) *Ward* v. *Booth*, L. R., 14 Eq. 195.

(*x*) Id.

(*y*) *Ex p. Nelson*, 14 Ch. D. 41.

(*z*) Id.

(*a*) *Angel* v. *Smith*, 9 Ves. 335; *Brooks* v. *Greathed*, 1 J. & W. 178.

PART X.

without the leave of the Court first obtained, and if he attempts to do so he will be restrained.

Examination pro interesse suo.

The enquiry is called an examination *pro interesse suo*, and the order for such an enquiry may be obtained as well where the subject-matter of the application is personalty, as where it is real estate (*b*).

The order for an enquiry is usually postponed till the sequestrators have made a return to the writ, as otherwise it cannot appear whether the property in dispute has in fact been sequestered (*c*).

The application may be made by summons at Chambers (*d*).

Where the right of the applicant appears to be clear, the Court has made an order in his favour without directing an enquiry (*e*). The Court has also ordered possession to be given to the applicant, on his giving security to restore the property, if the enquiry should be in the result against him (*f*).

Duties of sequestrators.

Duties of the Sequestrators to account, &c.]—Sequestrators must account for what they receive, and make returns thereof to the Court from time to time; and they may be ordered on motion with notice to pass their accounts, and pay over any balances in their hands (*g*). They can apply no part of the proceeds of the sequestration without the leave of the Court, but should bring all such proceeds into Court on obtaining leave to do so by petition or motion. The party at whose instance the writ issued is the proper person to apply to the Court to have the proceeds applied in satisfaction of his claims.

It is a contempt of Court to disturb sequestrators in the possession of property they have seized under their writ (*h*); and the Court will order restitution to them of any property of which they may have been dispossessed (*i*). Where the lands of the person against whom sequestration has issued are in the possession of tenants, the sequestrators should serve on them a notice to attorn, and pay their arrears of rent and growing rents to them. The notice should be served on the tenant personally, or on some members of his family, and the writ should be shown at the same time. If the tenants refuse to attorn, the names of the tenants should be returned by the sequestrators, and a motion made on notice to the tenants that they be ordered to attorn, and pay their rents to the sequestrators (*k*). The order should be on each tenant by name, and not generally (*l*).

Where sequestrators are in possession of lands in question in the cause, the appointment in the cause of a receiver of the rents and profits of the lands will discharge the sequestration as to those lands (*m*).

(*b*) *Lord Pelham* v. *Duchess of Newcastle*, 3 Swans. 290, n.

(*c*) But in *Alton* v. *Harrison*, 11 Jan. 1869, V.-C. *Stuart* granted an order before the return of the writ, the affidavits showing a sufficiently good case.

(*d*) For form, see Seton, 1583.

(*e*) *Dixon* v. *Smith*, 1 Swans. 457.

(*f*) *Wharam* v. *Broughton*, 1 Ves. sen. 182.

(*g*) See 2 Set. 1579, No. 1; and 1 80, No. 2.

(*h*) *Angel* v. *Smith*, 9 Ves. 33[illegible]; *Lord Pelham* v. *Duchess of Newcastle*, 3 Swans. 290, n.: *Crow* v. *Wood*, 1[illegible] Beav. 271: *Russell* v. *East Anglian R. Co.*, 3 Maen. & Gor. 104.

(*i*) *Pelham* v. *Duchess of Newcastle*, supra.

(*k*) *Rowley* v. *Ridley*, 2 Dick. 62[illegible] See 4 Ves. 738; and see 2 Set. 158[illegible] No. 3.

(*l*) *Anon.*, 2 Ch. Ca. 163.

(*m*) *Shaw* v. *Wright*, 3 Ves. 22.

Reviving Sequestra

Reviving a Sequestration.]—Where t[illegible] sequestration issued dies, the seque[illegible] against his representatives (*n*); but if t[illegible] originally to satisfy a mere personal d[illegible] tinued against the personal represen[illegible] heir (*o*). Where sequestrators abuse [illegible] called on to show cause why they shoul[illegible]

Costs.]—The costs of a sequestration [illegible] the sequestrators are regulated by th[illegible] property sequestered. They are allowe[illegible] sometimes, where their duties have been

Discharge of Sequestration.]—When th[illegible] tion have been satisfied, an order may b[illegible] the party against whom the sequestrat[illegible] and to direct the sequestrators to pass [illegible] after retaining their costs, charges and e[illegible] properly made by them, to pay the bala[illegible] against whom the process issued, and to [illegible] from all liability in respect of their office[illegible] the sequestration the costs are to be ta[illegible] party (*r*).

(*n*) *Burdett* v. *Rockley*, 1 Vern. 58: *Wharam* v. *Broughton*, 1 Ves. sen. 182: *White* v. *Hayward*, 2 Id. 461.

(*o*) *Burdett* v. *Rockley*, supra: *University College* v. *Foxcroft*, 1 Vern. 166: *Hyde* v. *Greenhill*, 1 Ch. 106: *Marquis of Carmarthen* v. *Han*[illegible] (*p*) [illegible] 3 Swan[illegible] (*q*) S[illegible] p. 1586. (*r*) *R*[illegible] W. R. 4

Reviving a sequestration.

iving a Sequestration.]—Where the person against whom the stration issued dies, the sequestration may be continued t his representatives (*n*); but if the sequestration were issued lly to satisfy a mere personal demand, it can only be con- against the personal representative, and not against the). Where sequestrators abuse their powers, they may be on to show cause why they should not be committed (*p*).

Costs.

.]—The costs of a sequestration will be taxed. The fees of uestrators are regulated by the value and nature of the y sequestered. They are allowed sometimes a poundage; nes, where their duties have been onerous, a lump sum.

Discharge.

arge of Sequestration.]—When the objects of the sequestra- e been satisfied, an order may be obtained on summons by ty against whom the sequestration issued, to discharge it, direct the sequestrators to pass their final accounts, and aining their costs, charges and expenses, and any payments made by them, to pay the balance, if any, to the person whom the process issued, and to discharge the sequestrators liability in respect of their office (*q*). On the discharge of estration the costs are to be taxed as between party and

dett v. *Rockley*, 1 Vern. 58; *r. Broughton*, 1 Ves. sen. *e* v. *Hayward*, 2 Id. 461. *ett* v. *Rockley*, supra; *College* v. *Foxcroft*, 1 *Hyde* v. *Greenhill*, 1 *Marquis of Carmarthen* v. *Hanson*, 3 Swans. 294.

(*p*) *Lord Pelham* v. *Lord Harrey*, 3 Swans. 291, n.

(*q*) See form of order in Seton, p. 1586.

(*r*) *Re Shapland*, *Ex p. Hunt*, 23 W. R. 40.

CHAPTER LXXX.

EXECUTION BY APPOINTMENT OF A RECEIVER.

PART X.

In what cases.

In what Cases.]—In many cases where, by reason of the debtor not being the legal owner of the property, or for any other reason, the property of the debtor cannot be taken by any of the ordinary modes of execution, execution may be effected by the appointment of a receiver.

Thus, when the judgment debtor is the owner of an equity of redemption in land (*a*); whether freehold or leasehold (*b*); and whether in fee or for life or for years (*c*); and whether he is, or is not, in possession (*d*), a receiver may be appointed, and the debtor's interest so made available in execution (*e*).

So in cases where the judgment debtor is or may become entitled to money which cannot be attached because there is no "debt owing or accruing," a receiver may be appointed (*e*). This has been done in cases where the debtor was entitled for his life to the income arising from a fund vested in trustees, and payable half-yearly (*f*), and when costs had been ordered to be taxed and paid to the debtor out of a fund in Court (*g*).

A receiver has also been appointed when the plaintiff had obtained judgment against the defendants, husband and wife, to receive the income of the wife's reversionary interest under a will (*h*). In another case, in lieu of sequestration on a judgment, a receiver was appointed to receive the dividends of a share of stock standing in the names of trustees who were not parties to the action, and to which the defendant was entitled for her life for her separate use (*i*).

The application.

The Application.]—The application for the order appointing a receiver should be made at Chambers (*k*). It must be made in the Division of the High Court in which the action is pending (*l*, and to a Judge, as a Master has no jurisdiction to make the order (*m*).

(*a*) *Smith* v. *Cowell*, 6 Q. B. D. 75; 50 L. J., Q. B. 38: *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 275; 47 L. J., Ch. 833: *Salt* v. *Cooper*, 16 Ch. D. 544; 50 L. J., Ch. 529.

(*b*) *Smith* v. *Cowell*, supra.

(*c*) *Anglo-Italian Bank* v. *Davies*, supra.

(*d*) Id.

(*e*) *Westhead* v. *Riley*, 25 Ch. D. 413; 53 L. J., Ch. 1153; 49 L. T. 776; 32 W. R. 273: *Webb* v. *Stenton*, 11 Q. B. D. 518, 519; 52 L. J., Q. B. 584; 49 L. T. 432: *Fuggle* v. *Bland*, 11 Q. B. D. 711.

(*f*) *Webb* v. *Stenton*, supra: *Glover* v. *Lowther*, 42 L. T. 47.

(*g*) *Westhead* v. *Riley*, supra.

(*h*) *Fuggle* v. *Bland*, supra.

(*i*) *Bryant* v. *Bull*, 10 Ch. D. 153; 48 L. J., Ch. 325.

(*k*) *Smith* v. *Cowell*, infra.

(*l*) *Smith* v. *Cowell* (C. A.), 6 Q. B. D. 75; 50 L. J., Q. B. 38: *Salt* v. *Cooper* (C. A.), 16 Ch. D. 545; 50 L. J., Ch. 529: *Ex p. Evans, In re Watkins*, 13 Ch. D. 252; 49 L. J. Bk. 7.

(*m*) See Ord. LIV. r. 12 (*h*).

dinary cases it should be made by summons (*n*), but in cases nergency it may be made *ex parte*, and an *interim* order granted ie first instance. It must be supported by an affidavit (*o*), ig, as fully as may be, the nature of the property, and the r's interest in it, and showing that there is something sub- ial for the receiver to receive (*p*). The affidavit should also that the debtor has no property liable to execution by the ary means (*q*). It should also state what steps, if any, the ition creditor has taken to obtain satisfaction of his judg- (*q*), but it is not necessary that an *elegit* or any other writ l have been issued (*r*). There must also be an affidavit of the s of the person proposed as receiver (*s*). The summons and vit should be intituled in the original action (*t*).

The order.

Order.]—By *R. of S. C., Ord. L. r. 15a* (*October*, 1884, *r.* 12), very case in which an application is made for the appointment eceiver by way of equitable execution, the Court or a Judge in ining whether it is just or convenient that such appointment be made shall have regard to the amount of the debt claimed applicant, to the amount which may probably be obtained receiver, and to the probable costs of his appointment, and f they or he shall so think fit, direct any inquiries on these r matters before making the appointment." The order will e made in cases where both the amount of the judgment is nt to justify the expense, and where there is fair reason to e that there is something for the receiver to receive (*u*). The ppoints a named person as receiver on his giving security, hout prejudice to the rights of prior incumbrancers (*x*). In ses the security will be dispensed with.

ie case of a receiver appointed to receive the rents of pro- of which the debtor is mortgagee in possession, the order provides that the appointment is without prejudice to the of any prior incumbrancers upon the said premises, who nk proper to take possession of the same by virtue of their ve securities, or, if any prior incumbrancer is in possession, thout prejudice to such possession. And further that the of the said premises are to attorn and pay their rents in nd growing rents to the receiver. And that the receiver, e rents and profits to be received by him, is to keep down the upon the prior incumbrances, according to their priorities, llowed the same in passing his accounts, and that the re- all from time to time pass his accounts to the satisfaction of e Masters, and apply any balance in his hands in or towards and satisfaction to the plaintiff of what shall for the time

---

form, Chit. F. p. 251.
form, Chit. F. p. 449.
K., W. N. 1884, 63. See ra.
per *Jessel*, M. R., 16 Ch. 3.; per Id., 9 Ch. D. at 4.
Evans, In re Watkins, This was formerly neces- v. *Duke of Marlborough*, 3 My. & Cr. 407.
(*s*) See form, Chit. F. p. 451.
(*t*) *Smith* v. *Cowell*, supra: *Salt* v. *Cooper*, supra.
(*u*) Per *Field*, J., at Chambers: *I.* v. *K.*, W. N. 1884, 63.
(*x*) See form, Chit. F. p. 451: *Wells* v. *Kilpin*, L. R., 18 Eq. at p. 300: *Ex p. Evans*, supra.

PART X.

being be due to him in respect of the judgment. And further th any of the parties are to be at liberty to apply to the Judge Chambers as there may be occasion.

With regard to costs the usual order now is that the costs of a incident to the application and the order, and of the receivers (to be ascertained if necessary by a Master) shall be paid out of money to be received by the receiver by virtue of the receivers but shall not be added to the judgment debt against the judgm debtor.

Security.

Security.]—By *Ord. L. r.* 16, "Where an order is made direct a receiver to be appointed, unless otherwise ordered, the person be appointed shall first give security, to be allowed by the Court a Judge and taken before a person authorised to administer oat duly to account for what he shall receive as such receiver, and pay the same as the Court or Judge shall direct; and the person to be appointed shall, unless otherwise ordered, be allowed a pro salary or allowance. Such security shall be by recognizance in Form No. 21 in Appendix L. unless the Court or a Judge sh otherwise order" (*y*).

Where security is ordered, the appointment will be conditional security being given, but when security has been given, the ord relates back to the date when it was made (*z*).

The appointment, even where conditional on security being give operates as an immediate delivery of the land in execution (*a*).

By *Ord. L. r.* 17, "Where any judgment or order is pronounc or made in Court appointing a person therein named to be receiv the Court or a Judge may adjourn to Chambers the cause or mat then pending, in order that the person named as receiver may g security as in the last preceding rule mentioned, and may thereu direct such judgment or order to be drawn up."

Effect of appointment.

Effect of Appointment.]—In the case of an execution against equitable interest in land the 45th section of the *Bankruptcy A* 1883, *s.* 45, *sub-s.* 2, provides that an execution shall be "com pleted" for the purposes of that section by the appointment of receiver. Under that section, when execution is so completed, execution creditor is entitled to retain the benefit of it as against trustee in bankruptcy of the debtor. The appointment of a receiv in respect of land operates as an actual delivery in execution lawful authority within the meaning of the statute 27 & 28 *Vict.* *s.* 1 (*b*). But when the land is already legally though not actual

(*y*) In an action begun in a district registry, the Court ordered the receiver to give security in London, but permitted him to pass his accounts in the district registry, *Robertson* v. *Capper*, 26 W. R. 434. A district registrar cannot appoint a receiver. Per *Hall*, V.-C., ld.

(*z*) *Ex p. Evans*, supra.

(*a*) *Ex p. Evans*, supra: *Hatton* v. *Haywood*, L. R., 9 Ch. 229; 43 L. J., Ch. 372: *Anglo-Italian B* v. *Davies*, 9 Ch. D. 275; 47 L. J., C 833 (C. A.). But see as to *chatt Edwards* v. *Edwards*, infra.

(*b*) *Ex p. Evans*, *In re Wat* 13 Ch. D. 252; 49 L. J., Bk. *Anglo-Italian Bank* v. *Davies*, 9 D. 275; 47 L. J., Ch. 833: cp. *Ro house* v. *Siddle*, 38 L. T. 487. the statute, ante, p. 879.

Effect of Appoint

possession of a receiver appointed he execution will be ineffectual (*c*).

Application by Third Party affected. he action is prejudiced by the appoin iver, he may apply to the Judge w lief as he may be entitled to (*d*). T mmons at chambers (*d*). A fresh orrect course (*d*).

The Receiver.]—The receiver of cou ssion of the land—he only receives th *See further as to Receivers, ante*, pp. 4

Passing Accounts.]—By *Ord. L. r.* 18, ' ith a direction that he shall pass ac all fix the days upon which he shal orter periods,) leave and pass such on which he shall pay the balances ap left, or such part thereof as shall be by him. And with respect to any such are and pass his accounts and pay t nes so to be fixed for that purpose as om any such receiver is to account m s subsequent accounts are produced t allow the salary therein claimed by s he shall think fit, charge him with in nt. per annum upon the balances so m ring the time the same shall appear nds of any such receiver" (*f*).

Form of Receivers' Accounts.]—By *r.* all be in the Form No. 14 in Appendi circumstances may require."

Verifying Accounts.]—By *r.* 20, "Eve Chambers of the Judge to whom the c account, together with an affidavit v rm No. 22 in Appendix L. (*g*), with su nces may require. An appointment sh the plaintiff or person having the con rpose of passing such account."

Failure to Account, &c.—Default by Recei any receiver failing to leave any accou

Salt v. *Cooper*, 16 Ch. D. 544; L. J., Ch. 529.

Searle v. *Choat* (C. A.), 25 D. 723; 53 L. J., Ch. 506; 50 T. 470; 32 W. R. 397. See *ndley* v. *Mundy*, *Ex p. Goodod*, 13 Q. B. D. 807; 53 L. J., B. 302; 50 L. T. 317; 32 W. R. where the matter was referred the Court to a Master for report, and it w be revie

(*e*) Se at p. 255

(*f*) Se district r supra.

(*g*) Th altered b 1884, Ap

ssession of a receiver appointed by the Court of Bankruptcy, xecution will be ineffectual (*c*).

plication by Third Party affected.]—If a person not a party to ction is prejudiced by the appointment or conduct of the re-, he may apply to the Judge who made the order for such as he may be entitled to (*d*). The application should be by ions at chambers (*d*). A fresh action for relief is not the t course (*d*). Application by third party affected.

Receiver.]—The receiver of course does not take actual pos- of the land—he only receives the rents (*e*). The receiver.
further as to Receivers, ante, pp. 426, 432.

ing Accounts.]—By *Ord. L. r.* 18, "When a receiver is appointed direction that he shall pass accounts, the Court or Judge ix the days upon which he shall (annually, or at longer or periods,) leave and pass such accounts, and also the days hich he shall pay the balances appearing due on the accounts or such part thereof as shall be certified as proper to be paid . And with respect to any such receiver as shall neglect to nd pass his accounts and pay the balances thereof at the o to be fixed for that purpose as aforesaid, the Judge before ny such receiver is to account may from time to time, when sequent accounts are produced to be examined and passed r the salary therein claimed by such receiver, and may also, all think fit, charge him with interest at the rate of 5*l.* per r annum upon the balances so neglected to be paid by him the time the same shall appear to have remained in the f any such receiver" (*f*). Passing accounts.

of Receivers' Accounts.]—By *r.* 19, "Receivers' accounts in the Form No. 14 in Appendix L., with such variations nstances may require." Form of accounts.

ing Accounts.]—By *r.* 20, "Every receiver shall leave in nbers of the Judge to whom the cause or matter is assigned nt, together with an affidavit verifying the same in the . 22 in Appendix L. (*g*), with such variations as circum- ay require. An appointment shall thereupon be obtained aintiff or person having the conduct of the cause for the f passing such account." Verifying accounts.

to Account, &c.—Default by Receiver.]—By *r.* 21, "In case ceiver failing to leave any account or affidavit, or to pass Failure to account, &c.

---

v. *Cooper*, 16 Ch. D. 544; 529.

e v. *Choat* (C. A.), 25 ; 53 L. J., Ch. 506; 50 32 W. R. 397. See *Mundy, Ex p. Good-*Q. B. D. 807; 52 L. J., 50 L. T. 317; 32 W. R. the matter was referred t to a Master for report, and it was held that such report could be reviewed.

(*e*) See per *James*, L. J., 13 Ch. D. at p. 255.

(*f*) See as to passing accounts in district registry, *Robertson* v. *Capper*, supra.

(*g*) This form has been slightly altered by the R. of S. C., October, 1884, App. Form 3.

PART X.

such account, or to make any payment, or otherwise, the receiver or the parties, or any of them, may be required to attend at Chambers to show cause why such account or affidavit has not been left, or such account passed, or such payment made, or any other proper proceeding taken, and thereupon such directions as shall be proper may be given at Chambers or by adjournment into Court, including the discharge of any receiver and appointment of another, and payment of costs."

CHAPTER L

CHARGING STOCKS AND SHARES, ETC.
OF DISTRIN

1. *Charging Stocks a*

Charging Stock and Shares.]—By *R.*
"An order charging stock or shares m
Court (*a*) or by any Judge, and the p
order shall be such as are directed, a
as provided by 1 & 2 *V. c.* 110, *ss.* 14,
The 1 & 2 *V. c.* 110, *s.* 14, enacts,
whom any judgment shall have bee
Majesty's superior Courts at Westmir
ment stock, funds, or annuities, or a
any public company in England (wh
standing in his name in his own righ
person in trust for him, it shall be law
the superior Courts, on the application
order that such stock, funds, annuities,
or such part thereof respectively as ho
charged with the payment of the an
shall have been so recovered (*c*), and
order shall entitle the judgment credito
would have been entitled to if such cha
favour by the judgment debtor (*d*); pro

(*a*) Since the Jud. Acts it is not necessary to obtain a charging order in the Division in which judgment has been recovered in order to get a stop order on a fund in Court to the credit of a cause in the Chancery Division (*Hopewell* v. *Barnes*, 25 Ch. D. 630; 33 L. T. 777), though it may be observed that formerly it was held that a Judge of the Court of Chancery was not a Judge of one of the superior Courts at Westminster, within the meaning of the statutes, and could not make charging orders (*Miles* v. *Presland*, 4 Myl. & Cr. 431; 2 Beav. 300: *Hulkes* v. *Day*, 10 Sim. 41), though he might make a stop order as auxiliary to the charging order. *Hulkes* v. *Day*, *ubi supra*; *Courtoy* v. *Vincent*, M. R., 15 L. T. 83.

(*b*) See *Fuller* v. *Earle*, 7 Exch. 21 L. J., Ex. 314, where it was held that shares in a joint-stock compa
was t
in the
right,
had m
Contin
Ex. 17
(*c*) S
D. 364
291; 4
order
a judgr
future
v. *Carl*
L. J., C
(*d*) It
this cla
creditor
charging
cumbran
a valid a
the same
self. *W*
743; 23

CHAPTER LXXXI.

RGING STOCKS AND SHARES, ETC., AND PROCEEDINGS IN LIEU OF DISTRINGAS.

1. *Charging Stocks and Shares, &c.*

ging Stock and Shares.]—By *R. of S. C., Ord. XLVI. r.* 1, order charging stock or shares may be made by any Divisional t (*a*) or by any Judge, and the proceedings for obtaining such shall be such as are directed, and the effect shall be such as vided by 1 & 2 *V. c.* 110, *ss.* 14, 15, and 3 & 4 *V. c.* 82, *s.* 1."

Ch. LXXXI.

Charging stock or shares.

1 & 2 *V. c.* 110, *s.* 14, enacts, "That if any person against any judgment shall have been entered up in any of her ty's superior Courts at Westminster shall have any govern- stock, funds, or annuities, or any stock or shares of or in ublic company in England (whether incorporated or not), ng in his name in his own right (*b*), or in the name of any in trust for him, it shall be lawful for a Judge (*a*) of one of perior Courts, on the application of any judgment creditor, to hat such stock, funds, annuities, or shares, or such of them, h part thereof respectively as he shall think fit, shall stand d with the payment of the amount for which judgment have been so recovered (*c*), and interest thereon; and such hall entitle the judgment creditor to all such remedies as he have been entitled to if such charge had been made in his by the judgment debtor (*d*); provided that no proceedings

Judgment a charge on public stock and shares in companies, &c. by order of a Judge. 1 & 2 V. c. 110, s. 14.

---

ice the Jud. Acts it is not to obtain a charging order Division in which judg- been recovered in order to order on a fund in Court dit of a cause in the Chan- sion (*Hopewell* v. *Barnes*, 630; 33 L. T. 777), though observed that formerly it that a Judge of the Court ery was not a Judge of superior Courts at West- within the meaning of the d could not make charging *les* v. *Presland*, 4 Myl. & 2 Beav. 300; *Hulkes* v. im. 41), though he might order as auxiliary to the order. *Hulkes* v. *Day*, *rtoy* v. *Vincent*, M. R., *Fuller* v. *Earle*, 7 Exch. J., Ex. 314, where it was shares in a joint-stock company, of which the defendant was the registered proprietor, were in the defendant's name in his own right, notwithstanding a transfer he had made of them. See also *Gill* v. *Continental Gas Union Co.*, 41 L. J., Ex. 176.

(*c*) See *Widgerry* v. *Tepper*, 6 Ch. D. 364: *Burns* v. *Irving*, 1 Ch. D. 291; 46 L. J., Ch. 423. A charging order may be made in respect of a judgment ordering payment on a future day before such day. *Bagnall* v. *Carlton*, L. R., 6 Ch. D. 130; 47 L. J., Ch. 51.

(*d*) It seems that the meaning of this clause is to give the judgment creditor the same right under the charging order as against prior incumbrances as he would have under a valid and effectual charge made at the same moment by the debtor himself. *Watts* v. *Porter*, 3 E. & B. 743; 23 L. J., Q. B. 315, *Erle*, J.,

PART X.

3 & 4 V. c. 82.

shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order.

By 3 & 4 *V.* c. 82, after reciting the above provision, and that "doubts have been entertained whether the said provisions extend to the cases hereinafter mentioned," it is enacted (sect. 1), "That the aforesaid provisions of the said Act shall be deemed and taken to extend to the interest of any judgment debtor, whether in *possession, remainder or reversion,* and whether *vested or contingent*(*e*), as well in any such stocks, funds, annuities, or shares as aforesaid, as also in the dividends, interest or annual produce of any such stocks, funds, annuities, or shares; and whenever any such judgment debtor shall have any estate, right, title, or interest, vested or contingent, in possession, remainder or reversion, in, to or out of any such stocks, funds, annuities or shares as aforesaid, which now are or shall hereafter be standing in the name of the Accountant-General of the Court of Chancery, or the Accountant-General of the Court of Exchequer, or in, to or out of the dividends, interest or annual produce thereof, it shall be lawful for such Judge to make any order as to such stocks, funds, annuities, or shares, or the interest, dividends or annual produce thereof, in the same way as if the same had been standing in the name of a trustee of such judgment debtor: Provided always, that no order of any Judge as to any stocks, funds, annuities or shares standing in the name of the Accountant-General of the Court of Chancery, or the Accountant-General of the Court of Exchequer, or as to the interest, dividends or annual produce thereof, shall prevent the Governor and Company of the Bank of England, or any public company, from permitting any transfer of such stocks, funds, annuities or shares, or payment of the interest, dividends or annual produce thereof, in such manner as the Court of Chancery or the Court of Exchequer respectively may direct, or shall have any greater effect than if such debtor had charged such stocks, funds, annuities or shares, or the interest, dividends or annual produce thereof, in favour of the judgment creditor, with the amount of the sum to be mentioned in any such order."

Order of Judge to be made in first instance ex parte, and on notice to the bank or company to operate as a distringas.

And "in order to prevent any person, against whom judgment shall have been obtained, from transferring, receiving, or disposing of any stock, funds, annuities, or shares, thereby authorized to be charged for the benefit of the judgment creditor under an order of a Judge," it is further enacted by 1 & 2 *V.* c. 110, *s.* 15, "that every order of a Judge charging any Government stock, funds, or annuities, or any stock or shares in any public company, under this Act, shall be made in the first instance *ex parte*, and without any notice to the judgment debtor, and shall be an order to show cause only; and such order, if any Government stock, funds, or annuities standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is to be affected by such order, shall restrain the Governor and Company of the Bank of England from permitting a transfer of such stock in the meantime

diss. See *Beavan* v. *Lord Oxford*, 25 L. J., Ch. 299; *Scott* v. *Hastings*, 4 Kay & J. 633; *Kinderley* v. *Jervis*, 22 Beav. 1; 25 L. J., Ch. 538; *Baker* v. *Tynte*, 29 L. J., Q. B. 233. See *Crow* v. *Reeves*, 37 L. J., C. P. 124.

(*e*) See *Cragg* v. *Taylor*, L. R., Ex. 148; 36 L. J., Ex. 63; *Jones* v. *French*, L. R., 4 Ex. 151; 38 L. J., Ex. 113.

The Orde

and until such order shall be mad
if any stock or shares, of or in an
the name of the judgment debtor in
of any person in trust for him, is or
order, shall in like manner restrai
permitting a transfer thereof; and
order to the person or persons to be
of corporations to any authorized a
before the same order shall be disch
corporation or person or persons sha
be made, then and in such case tho
sons so permitting such transfer sha
creditor for the value or the amount
so transferred, or such part thereof a
his judgment; and that no dispositio
the meantime shall be valid or effect
creditor; and further, that, unless
within a time to be mentioned in such
of the said superior Courts sufficient c
order shall, after proof of notice ther
his attorney or agent, be made absolu
Judge shall, upon the application of
person interested, have full power to
and to award such costs upon such
fit."

The order referred to in this proviso
is no power to discharge or vary the or
If a Judge at Chambers makes an o
tion to set it aside (*g*).

By 1 & 2 *V.* c. 110, *s.* 16, a creditor
taken or charged in execution relinqui
or security to which he may be entitled
Stock standing in the Accountant-Ge
account of a party against whom a j
covered, may be charged, under the 14
and although the order for such a pu
stock, it affects only the interest of t
therefore does not interfere with the right
Where, by the terms of a will, it is dou
takes a beneficial interest in Governmen
made charging the stock conditionally
dividends as were payable to defenda

(*f*) *Jeffryes* v. *Reynolds*, *Ex p. Reynolds*, 48 L. T. 358.

(*g*) *Brown* v. *Bamford*, 9 M. & W. 1 Dowl., N. S. 361: *Fowler* v. *Churchill*, 2 Dowl., N. S. 562; 11 M. & W. 57. See *Witham* v. *Lynch*, 1 Ex. 391; 17 L. J., Ex. 30, where it was doubtful whether the order was valid, and the Court refused to interfere. *Baker* v. *Tynte*, 29 L. J., Q. B. 233: *Nicholls* v. *Rosewarne*, 6 C. B., N. S. 480; 28 L. J., C. P. 273: *Graham* v. *Connell*, 1 L. M. & P. 438; 19

L. J.,
Ex. 79
L. J.,
7 Q.
where
See al
Wrene
(*h*)
(*i*)
589; 47
a marr
she had
(*k*)

l until such order shall be made absolute or discharged: and ıny stock or shares, of or in any public company, standing in name of the judgment debtor in his own right, or in the name ıny person in trust for him, is or are to be affected by any such er, shall in like manner restrain such public company from nitting a transfer thereof; and that if, after notice of such r to the person or persons to be restrained thereby, or in case orporations to any authorized agent of such corporation, and re the same order shall be discharged or made absolute, such oration or person or persons shall permit any such transfer to ıade, then and in such case the corporation or person or per- so permitting such transfer shall be liable to the judgment tor for the value or the amount of the property so charged and ansferred, or such part thereof as may be sufficient to satisfy udgment; and that no disposition of the judgment debtor in neantime shall be valid or effectual as against the judgment tor; and further, that, unless the judgment debtor shall n a time to be mentioned in such order shewn to a Judge of one e said superior Courts sufficient cause to the contrary, the said shall, after proof of notice thereof to the judgment debtor, torney or agent, be made absolute: Provided that any such e shall, upon the application of the judgment debtor, or any ı interested, have full power to discharge or vary such order, o award such costs upon such application as he may think

Order nisi may be discharged or varied.

order referred to in this proviso is the order nisi, and there power to discharge or vary the order when made absolute (*f*). Judge at Chambers makes an order, the Court has jurisdic- set it aside (*g*).

1 & 2 *V. c.* 110, *s.* 16, a creditor who causes his debtor to be or charged in execution relinquishes all claim to any charge rity to which he may be entitled under the Act (*h*).

Ca. sa. a waiver of charge or security.

k standing in the Accountant-General's name, to the separate t of a party against whom a judgment debt has been re- l, may be charged, under the 14th section, with the debt; though the order for such a purpose in terms charges the it affects only the interest of the debtor in the stock, and re does not interfere with the rights of prior incumbrancers (*k*).

What stock may be charged (*i*).

by the terms of a will, it is doubtful whether a defendant beneficial interest in Government Stock, such order may be harging the stock conditionally; *i. e.* for so much of the ds as were payable to defendant "for his own use and

---

ffryes v. *Reynolds, Ex p.* 48 L. T. 358.

own v. *Bamford*, 9 M. & W. owl., N. S. 361: *Fowler* v. 2 Dowl., N. S. 562; 11 M. See *Witham* v. *Lynch*, 1 17 L. J., Ex. 30, where it tful whether the order was l the Court refused to inter- *ker* v. *Tynte*, 29 L. J., Q. B. *alls* v. *Rosewarne*, 6 C. B., 28 L. J., C. P. 273: *Graham*, 1 L. M. & P. 438; 19

L. J., Ex. 361: *Fuller* v. *Earle*, 7 Ex. 798, n.: *Rogers* v. *Holloway*, 12 L. J., C. P. 182: *Morris* v. *Manesty*, 7 Q. B. 674; 14 L. J., Q. B. 285, where an order nisi was rescinded. See also *Cragg* v. *Taylor*, *Dixon* v. *Wreneh*, ante, n. (*e*).

(*h*) See ante, p. 901.

(*i*) See *Stanley* v. *Stanley*, 7 Ch. D. 589; 47 L. J., Ch. 256, as to charging a married woman's income, which she had no power to anticipate.

(*k*) *Hulkes* v. *Day*, 10 Sim. 41.

PART X.

benefit" (*l*). Funds standing in the name of a trustee in trust for the debtor and another jointly are chargeable (*m*). Stock standing in the name of a trustee is not affected by a charging order in respect of the trustee's own debt (*n*). Nor will an order be made against stock standing in the name of a judgment debtor upon a judgment *de bonis testatoris* against him as administrator (*o*). Where the stock was vested in trustees for defendant by a deed executed under the direction of Chancery, to set aside which as fraudulent the plaintiff had filed a bill in equity: the Court of C. P. refused to interfere to set aside a Judge's order for charging such stock (*p*). Where a Judge made an order under the above sections charging an annuity payable out of the "Suitors Fund" by order of the Lord Chancellor, in pursuance of 46 *G.* 3, *c.* 128, the Court of Exchequer considered it doubtful whether the Judge's order was valid (*q*). The East India Company granted to defendant a pension in consideration of his distressed state and the services of his father; it was held that this could not be charged with a judgment debt under the above sections (*r*). A banking co-partnership which made returns to the Stamp Office pursuant to 7 *G.* 4, *c.* 46, was held to be a public company within the meaning of 1 & 2 *V. c.* 110, *s.* 14 (*s*). It is doubtful whether a mining company formed on the cost-book principle is (*t*). Money deposited in the hands of a third party for the defendant as the price of land sold by him to a public company, cannot be attached by the order of a Judge under the above 14th section (*u*).

The order will not be made unless the debtor has some interest in the stock or shares, but any interest, however slight, is sufficient (*x*).

If the debtor, having assigned the shares, retains a contingent interest in them, that interest may be charged (*y*); but where the interest that he retains is merely an interest in the residue of their proceeds, after payment of debts and legacies, that cannot be charged (*z*).

In an action under 1 & 2 *V. c.* 110, *s.* 15, against a company for allowing the transfer of shares after notice of a charging order *nisi* and before it is made absolute, it is a good answer to show that the person in whose name the shares stood had no interest in them (*a*).

(*l*) *Fowler* v. *Churchill*, 2 Dowl., N. S. 562; 11 M. & W. 57.

(*m*) *South Western Loan, &c. Co.* v. *Robertson*, 8 Q. B. D. 17; 46 L. T. 427.

(*n*) *Re Blakeley Ordnance Co.*, 46 L. J., Ch. 367; 35 L. T. 617.

(*o*) *Hewat* v. *Davenport*, 21 W. R. 78, Ir. Ex.

(*p*) *Rogers* v. *Holloway*, 5 M. & G. 292; 12 L. J., C. P. 182.

(*q*) *Witham* v. *Lynch*, 1 Ex. 391; 17 L. J., Ex. 13. See *Taylor* v. *Turnbull*, 4 H. & N. 495, where a judgment debtor was entitled as sole executor to a government annuity.

(*r*) *Morris* v. *Maxesty*, 7 Q. B. 674.

(*s*) *Macintyre* v. *Connell*, 1 Sim., N. S. 235; 20 L. J., Ch. 284. See *Graham* v. *Connell*, 1 L. M. & P. 438; 19 L. J., Ex. 361.

(*t*) *Nicholls* v. *Rosewarne*, 6 C. B. N. S. 480; 28 L. J., C. P. 273. In this case the debtor had sold his shares before the charging order was made, but no notice of such sale had been given to the purser. See *Warburton* v. *Hill*, 23 L. J., Ch. 633.

(*u*) *Robinson* v. *Peace*, 7 Dowl. See *Brown* v. *Perrot*, 4 Beav. 58 As to attaching debts, see post, p. 92

(*x*) *South Western Loan, &c. Co.* v. *Robertson*, 8 Q. B. D. 17; 51 L. J. Q. B. 79; 46 L. T. 427.

(*y*) *Cragg* v. *Taylor*, L. R., 2 E 131.

(*z*) *Dixon* v. *Wrench*, L. R., 4 E 154, distinguished in *South Wes Loan, &c. Co.* v. *Robertson*, supra.

(*a*) *Gill* v. *Continental Union G Co., Limited*, L. R., 7 Ex. 332.

Effect of the O

In some cases before the Judicat Courts refused to attend to equitab shares, but the *Judicature Act*, 1873, Court to recognize and take notice and rights, duties and liabilities, i matter.

Notwithstanding an order absolut sections, charging stock in the nam England is bound to pay the divido liable for its proper distribution (*c*); a an order is made *nisi*, the bank ought the order is made absolute, it is in the fund; the bank is then to pay the mo bound to see that it is properly applie do with the distribution of the fund, judgment creditor; that is the busin responsible in a Court of equity fo Under the charging order the judgm right as against prior incumbrancers a valid charge made at the same mome But it has no greater effect (*e*); and, t against an infant in respect of a de *Relief Act*, 1874, is inoperative (*e*). A charging order upon a sum of stock s Accountant-General, of which the debt Held, that the judgment creditor was prevent the debtor receiving the dividen stock, in the interval between the date the expiration of the six months limited & 2 *V. c.* 110 (*f*). A judgment credi subsequent mortgagee of an equitable standing such creditor has, since the m thereof to the trustee of the fund, obtai action an order charging the fund (*g*). g order obtained against the seller sub before the transfer, will not prevent the the buyer as owner (*h*).

The application for the order *nisi* is, as *ex parte* one, and is made without a arty. It may be made to a Master at Ch

(*d*) *Fuller* v. *Earle*, 7 Ex. 796; ...er v. *Tyrte*, 2 El. & El. 897; 29 ..., Q. B. 233; *Rogers* v. *Holloway*, ...M. & Gr. 292; *Cragg* v. *Taylor*, ..., 1 Ex. 148.

(*e*) *Fowler* v. *Churchill*, 2 Dowl., ...S. 767; 11 M. & W. 323, nom. ...rchill v. *Bank of England*. As ...an order not interfering with the ...ts of prior incumbrancers, see ...ker v. *Day*, 10 Sim. 41. And see ...tts v. *Porter*, ante, p. 919, n. (*d*).

(*f*) *Watts* v. *Porter*, 3 E. & B. 743; ...e, p. 919, n. (*d*).

(*g*) *In re Onslow*, L. R., 20 Eq. 667, 677

(*f*) ... Ch. 659.

(*g*) *Se* ... & J. 633.

(*h*) *Gi* ... supra.

(*i*) As ... fund in t ... High Cou ... 1 Ch. D.

(*k*) R. ... by which ... exercise a ... diction a

some cases before the Judicature Acts (*b*) the Common Law
ts refused to attend to equitable rights and interests in the
es, but the *Judicature Act*, 1873, *s.* 24, *sub-s.* 4, requires every
t to recognize and take notice of all equitable estates, titles
rights, duties and liabilities, incidentally appearing in any
er.

Effect of charge, &c.

twithstanding an order absolute, under the 14th and 15th
ns, charging stock in the names of trustees, the Bank of
nd is bound to pay the dividend to the trustees, who are
for its proper distribution (*c*); and per *Alderson*, B., "Where
ler is made *nisi*, the bank ought to hold its hand; and when
der is made absolute, it is in the nature of a charge upon the
the bank is then to pay the money to the trustees, who are
to see that it is properly applied; the bank has nothing to
h the distribution of the fund, and is not bound to pay the
ent creditor; that is the business of the trustees, who are
sible in a Court of equity for its proper distribution."
the charging order the judgment creditor has the same
s against prior incumbrancers as he would have had under
charge made at the same moment by the debtor himself (*d*).
has no greater effect (*e*); and, therefore, an order obtained
an infant in respect of a debt void under the *Infants*
ct, 1874, is inoperative (*e*). A judgment creditor obtained
ing order upon a sum of stock standing in the name of the
tant-General, of which the debtor was a tenant for life:—
iat the judgment creditor was entitled to a stop order to
the debtor receiving the dividends accruing due upon the
the interval between the date of the charging order and
ration of the six months limited by the 14th section of the
c. 110 (*f*). A judgment creditor will be postponed to a
ent mortgagee of an equitable interest in stock, notwith-
such creditor has, since the mortgage, but before notice
o the trustee of the fund, obtained under the above 14th
n order charging the fund (*g*). If shares are sold a charg-
obtained against the seller subsequently to the sale, but
e transfer, will not prevent the company from registering
as owner (*h*).

Practical directions as to obtaining order (*i*).

plication for the order *nisi* is, as we have seen *ante*, p. 920,
te one, and is made without any notice to the opposite
may be made to a Master at Chambers (*k*). It should be

---

v. *Earle*, 7 Ex. 796; *nte*, 2 El. & El. 897; 29 233: *Rogers* v. *Holloway*, 292: *Cragg* v. *Taylor*, 148.

v. *Churchill*, 2 Dowl., 11 M. & W. 323, nom. *Bank of England*. As not interfering with the ior incumbrancers, see *y*, 10 Sim. 41. And see *ter*, ante, p. 919, n. (*d*). v. *Porter*, 3 E. & B. 743; n. (*d*). *Onslow*, L. R., 20 Eq. 667, 677; 44 L. J., Ch. 628.

(*f*) *Watts* v. *Jefferyes*, 20 L. J., Ch. 659.

(*g*) *Scott* v. *Lord Hastings*, 4 Kay & J. 633.

(*h*) *Gill* v. *Continental, &c. Co.*, supra.

(*i*) As to applying to charge a fund in the Chancery Division of the High Court, see *Hopewell* v. *Barnes*, 1 Ch. D. 630.

(*k*) R. of S. C., Ord. LIV. r. 12 (l), by which the Master is enabled to exercise all such authority and jurisdiction as may be exercised by a

PART X.

supported by an affidavit concisely stating the facts. The Master thereupon makes an order *nisi*, that, unless cause be shown to the contrary before the Judge in Chambers at a certain time, the stock, funds or shares, as the case may be, shall stand charged with the amount of the judgment, and that in the meantime it shall stand so charged. The order is drawn up and served (*l*) on the opposite party, and upon the bank, or company, or other party having control over the fund. The time thus fixed in the order by the Master is either a particular day or within a certain period, such as a week or more (*m*). It should be a reasonable interval, to enable the opposite party to show cause. If it is not so, the latter should apply to the Master, under the 15th section of the Act, to vary the order; or, if there be any other ground for varying the order to meet the justice of the case, the opposite party should, within the time so limited, apply to the Master for that purpose. It is not competent to him to "show cause" against the order at any time before the time so fixed (*n*). If at that time no cause or no sufficient cause is shown to the contrary, the sitting Judge makes an order absolute, charging the stock, funds or shares with the judgment debt. The order absolute can only be made by a Judge; a Master has no jurisdiction to make it. (*R. of S. C., Ord. LIV. r.* 12 (l).) It cannot be made where it appears that the judgment debtor was dead at the time when the order *nisi* was obtained (*o*). The opposite party, as we have seen *ante*, p. 921, may appeal to the Court against the order.

The order when made absolute takes effect from the date of the rule *nisi* (*p*). The order cannot be made until the sum due has been ascertained and made certain (*q*). In *Bagnall* v. *Carlton*, 6 Ch. D. 130, *Bacon*, V.-C., held that a charging order could be made in respect of a judgment debt payable as on a future day.

No power to sell.

There is no power to order a sale of the stock or shares (*r*).

2. *Proceedings in lieu of Distringas.*

5 V. c. 5, s. 4.

Proceedings in lieu of Distringas.]—By *5 V. c. 5, s.* 4, "It shall be lawful for the said Court of Chancery upon the application of any party interested, by motion or petition in a summary way without bill filed, to restrain the governor and company of the Bank of England, or any other public company, whether incorporated or not, from permitting the transfer of any stock in the public funds or any stock or shares in any public company, which may be standing in the name or names of any person or persons, or body politic or corporate, in the books of the governor and company of the Bank of England, or in the books of any such public company, or from paying any dividend or dividends due or to become due

Judge at Chambers, except, *inter alia*, orders *absolute* charging stock, funds, annuities, or shares of dividends on annual proceeds thereof.

(*l*) Substituted service may be ordered. *In re Gethin, Ex p. Nixon*, 10 Ir. Rep., Eq. 512.

(*m*) See *Robinson* v. *Burbidge*, 9 C. B. 289; 19 L. J., C. P. 242.

(*n*) See per *Wilde*, C. J., Id. See *Finney* v. *Hinde*, 48 L. J., Q. B. 275, where the judgment debtor was dead when the order nisi was obtained.

(*o*) *Finney* v. *Hinde*, 4 Q. B. D. 102; 48 L. J., Q. B. 275.

(*p*) *Haly* v. *Barry*, L. R., 3 Ch. 48

(*q*) *Widgery* v. *Tepper*, 6 Ch. D. 364, where *Burns* v. *Irving*, 3 Ch. D. 291, was not followed.

(*r*) *Leggott* v. *Western*, 12 Q. B. D. 287; 53 L. J., Q. B. 316; 32 W. R. 460.

thereon; and every order of the s
motion or petition as aforesaid
stock or the particular shares to b
or names of the person or perso
which the same shall be standing
Court of Chancery shall have ful
any party interested, to discharg
such costs upon such application a

The power given by this section
on motion for an injunction (*s*).

By *R. of S. C., Ord. XLVI. r.*
hereafter be issued under the Act
By *r.* 3, "In the following Rul
'Company' includes the Governo
England and any other public co
not, and the expression 'stock'
money."

Affidavit and Notice.]—By *Ord.*
ing to be interested in any stock sta
may, on an affidavit by himself or
in Appendix B. (*t*) with such variat
quire, and on filing the same in the
the Form No. 22 in the same Appen
circumstances may require, and on
affidavit and a duplicate of the filed
of the Central Office, serve the offic
the company."

By *r.* 5, "There shall be appende
the person on whose behalf it is fil
(if any) for that person are to be sen

Service of Notice.]—By *Ord. XLV*
be deemed to have been duly sent if
paid letter directed to that person at
such substituted address as hereina
person to whom the notice is sent is

By *r.* 7, "The address so stated
altered by the person by or on whos
but no notice sent by post before
originally given or for the time being
affected by any subsequent alterati
address may be made by service of a
company in the manner required for
order."

Effect of Service of Affidavit and N
"The service of the office copy of the
of the filed notice shall have the sam
company as a writ of *distringas* duly
s. 5, s. 5, would have had against th
Rules had not been made."

(*s*) *In re Blaksley's Trusts*, 23 Ch. D. 549.

thereon; and every order of the said Court of Chancery upon such motion or petition as aforesaid shall specify the amount of the stock or the particular shares to be affected thereby, and the name or names of the person or persons, body politic or corporate, in which the same shall be standing: Provided always, that the said Court of Chancery shall have full power, upon the application of any party interested, to discharge or vary such order, and award such costs upon such application as to the said Court shall seem fit."

The power given by this section still exists and may be exercised on motion for an injunction (*s*).

By *R. of S. C., Ord. XLVI. r.* 2, "No writ of *distringas* shall hereafter be issued under the Act 5 Vict. c. 5, s. 5."

By *r.* 3, "In the following Rules of this Order the expression 'Company' includes the Governor and Company of the Bank of England and any other public company, whether incorporated or not, and the expression 'stock' includes shares, securities, and money."

Affidavit and notice (*t*).

Affidavit and Notice.]—By *Ord. XLVI. r.* 4, "Any person claiming to be interested in any stock standing in the books of a company may, on an affidavit by himself or his solicitor in the Form No. 27 in Appendix B. (*t*) with such variations as circumstances may require, and on filing the same in the Central Office with a notice in the Form No. 22 in the same Appendix (*u*), with such variations as circumstances may require, and on procuring an office copy of the affidavit and a duplicate of the filed notice authenticated by the seal of the Central Office, serve the office copy and duplicate notice on the company."

By *r.* 5, "There shall be appended to the affidavit a note stating what person on whose behalf it is filed, and to what address notices (if any) for that person are to be sent."

Service of the notice.

Service of Notice.]—By *Ord. XLVI. r.* 6, "All such notices shall be deemed to have been duly sent if sent through the post by a prepaid letter directed to that person at the address so stated or at any such substituted address as hereinafter mentioned, whether the person to whom the notice is sent is living or not."

By *r.* 7, "The address so stated may, from time to time, be altered by the person by or on whose behalf the affidavit is filed, but no notice sent by post before the alteration to the address originally given or for the time being substituted therefor shall be affected by any subsequent alteration. Any such alteration of address may be made by service of a memorandum thereof on the company in the manner required for service of a notice under this Rule."

Effect of service.

Effect of Service of Affidavit and Notice.]—By *Ord. XLVI. r.* 8, "The service of the office copy of the affidavit and of the duplicate notice filed notice shall have the same force and effect against the company as a writ of *distringas* duly issued under the Act 5 Vict. c. s. 5, would have had against the Bank of England if these proceedings had not been made."

(*s*) *In re Blaksley's Trusts*, 23 Ch. D. 542.

(*t*) See form, Chit. F. p. 483.

(*u*) Id. p. 484.

PART X.

By *r.* 10, "If, whilst a notice filed under Rule 4 of this Order continues in force, the company on whom it is served receive from the person in whose name the stock specified in the notice is standing, or from some person acting on his behalf or representing him, a request to permit the stock to be transferred or to pay the dividends thereon, the company shall not, by force or in consequence of the service of the notice, be authorized, without the order of the Court or a Judge, to refuse to permit the transfer to be made or to withhold the payment of the dividends for more than eight days after the date of the request."

When a notice was, under *r.* 4, served on the Bank of England, and the bank gave notice to the person who served the notice that they were about to allow a transfer, an interim injunction over the first motion day, restraining them from doing so, was granted on an *ex parte* application (*v*).

Amendment of notice.

Amendment of Notice.]—By *Ord. XLVI. r.* 11, "If the person who files a notice under Rule 4 of this Order desires to correct the description of the stock referred to in the filed notice, he may file an amended notice and serve on the company a duplicate thereof sealed with the seal of the Central Office, and in that case the service of the notice shall be deemed to have been made on the day on which the amended duplicate is so served."

As to amendment of the address, *see r.* 7, *ante.*

Withdrawal and discharge of notice.

Withdrawal and Discharge of Notice.]—By *Ord. XLVI. r.* 9, "A notice filed under Rule 4 of this Order may at any time be withdrawn by the person by whom or on whose behalf it was given on a written request signed by him, or its operation may be made to cease by an order to be obtained by motion on notice or by petition or by summons at Chambers duly served by any other person claiming to be interested in the stock sought to be affected by the notice."

Discharge of order.

Discharge of Order.]—By *r.* 12, "Where any moneys or securities are in Court to the general credit of any cause or matter, or to the account of any class of persons, and an order is made to prevent the transfer or payment of such moneys or securities, or any part thereof, without notice to the assignee of any person entitled in expectancy or otherwise to any share or portion of such moneys or securities, the person by whom any such order shall be obtained on the shares of such moneys or securities affected by such order shall be liable, at the discretion of the Court or a Judge, to pay any costs, charges, and expenses which, by reason of any such order having been obtained, shall be occasioned to any party to the cause or matter, or any persons interested in any such moneys or securities."

By *r.* 13, "Any person presenting a petition or taking out a summons for any such order as aforesaid shall not be required to serve such petition or summons upon the parties to the cause or matter, or upon the persons interested in such parts of the moneys or securities as are not sought to be affected by any such order."

(*v*) *In re Blaksley's Trusts*, 23 Ch. D. 549; 48 L. T. 776.

CHAPTER L

ATTACHMENT O

By the *Com. Law Proc. Act*, 1854, pow
ment creditor to attach debts due to
satisfying the judgment. This powe
the same terms by Ord. XLV. of the
1883. Under these rules debts due
person to a judgment debtor may be
ment or order whereby money is reco
The proceedings to attach debts due
analogous to those by foreign attachm
London. But it will be noticed that
to attach debts under the Rules ti
whereas, by a foreign attachment, del
pose of compelling the defendant to a
action.

The power to attach debts was, pr
confined to the Common Law Courts:
no analogous power (*a*).

Power to order Attachment of Debts.]
Court or a Judge may, upon the *ex pa*
who has obtained a judgment *or order*
of money, either before or after any ora
liable under such judgment *or order*, a
or his solicitor stating that judgment
order made, and that it is still unsati
and that any other person is indebted t
the jurisdiction, order that all debts ow
third person (hereinafter called the gar
be attached to answer the judgment or
any subsequent order it may be order
appear before the Court or a Judge o
such Court or Judge shall appoint, to
not pay to the person who has obtained
debt due from him to such debtor, or s
sufficient to satisfy the judgment or ord
This rule corresponds with sect. 61 o
1854.

In what Cases available.]—Under the
or order for the recovery or payment of

(*a*) *Horseley* v. *Cox*, L. R.,

CHAPTER LXXXII.

ATTACHMENT OF DEBTS.

Attachment of debts.

ıe *Com. Law Proc. Act*, 1854, power was first given to a judg- creditor to attach debts due to his debtor for the purpose of ying the judgment. This power is preserved in practically ıme terms by Ord. XLV. of the Rules of the Supreme Court, Under these rules debts due or accruing due from a third ı to a judgment debtor may be attached to satisfy a judg- or order whereby money is recovered or ordered to be paid. roceedings to attach debts due to the debtor are somewhat ;ous to those by foreign attachment in the Mayor's Court of ın. But it will be noticed that no proceeding can be taken ach debts under the Rules till after judgment or order, as, by a foreign attachment, debts are attached for the pur- f compelling the defendant to appear and put in bail to the .

power to attach debts was, prior to the Judicature Acts, ɔd to the Common Law Courts: the Court of Chancery had ılogous power (*a*).

Power to order attachment of debts.

er to order Attachment of Debts.]—By *Ord. XLV. r.* 1, "The or a Judge may, upon the *ex parte* application of any person ıs obtained a judgment *or order* for the recovery or payment ey, either before or after any oral examination of the debtor ınder such judgment *or order*, and upon affidavit by himself solicitor stating that judgment has been recovered, or the nade, and that it is still unsatisfied, and to what amount, ıt any other person is indebted to such debtor, and is within isdiction, order that all debts owing or accruing from such erson (hereinafter called the garnishee) to such debtor shall ched to answer the judgment or order; and by the same or bsequent order it may be ordered that the garnishee shall before the Court or a Judge or an officer of the Court, as ɔurt or Judge shall appoint, to show cause why he should to the person who has obtained such judgment or order the e from him to such debtor, or so much thereof as may be ıt to satisfy the judgment or order."

rule corresponds with sect. 61 of the *Com. Law Proc. Act*,

In what cases available.

ıat Cases available.]—Under the present rules any judgment for the recovery or payment of money may be enforced by

(*a*) *Horseley* v. *Cox*, L. R., 4 Ch. 92.

PART X.

attachment of debts (*b*). The present rules expressly apply to the case of an order (*b*).

In many cases where there are technical difficulties in the way of attaching a debt, the debt may be made available to satisfy the judgment or order by an order appointing a receiver (*c*).

Where judgment has been recovered in an action against a railway company, a director of the company is not a judgment debtor (*d*).

Examination of the debtor as to debts owing to him.

Examination of the Debtor as to Debts owing to him.]—Under *Ord. XLII. r.* 32, an order may be obtained for the examination of the debtor as to whether any and what debts are due to him. *See the rules and practice, ante,* pp. 791 *et seq.*

What debts can be attached.

What Debts can be attached.]—Under the above rule (*Ord. XLV. r.* 1, *supra*) all debts owing or accruing to the debtor may be attached. This applies to all debts whether legal or equitable (*e*).

The rule applies to all debts payable at a future time (*f*). And such debts may be ordered to be paid as and when they become due (*f*).

There must, however, be a *debt* (*g*) perfected and payable absolutely at once or at some future time (*h*), and as a rule it must be one for which an action would lie (*i*). A debt dependent on a condition cannot be attached (*k*). A mere probability that there will be a debt will not suffice (*l*); and, therefore, income arising from a trust fund payable half-yearly to the debtor cannot be attached (*m*).

Unliquidated damages (*k*), even af
ment (*l*), cannot be attached. No
amount secured by a promissory n
salary not yet payable (*n*). Nor ca
sale of mortgaged land in the hands

The debt must be one in which t
cially interested (*p*). A debt, there
assigned before the judgment (*q*),
although the garnishee had no notic
be attached. Moneys in the hands o
not attachable (*t*). Nor are the wages
s. 233). The stat. 33 & 34 *V.* c. 30, wi
it appears, apply to the High Court
salary of a secretary (*x*).

Formerly, it was held, that a legacy
hands of an executor unless he had
it might now be held that a legacy is
for payment would be made until the
legacy, or until after the expiration
administering the estate (*z*).

Rent actually due may be attache
due (*b*).

(*b*) See Ord. XLV. r. 1, supra. Under the former rules it was held that neither a rule or order for the payment of costs (*Re Frankland*, L. R., 8 Q. B. 18; 42 L. J., Q. B. 13: *Cremetti* v. *Crom*, 4 Q. B. D. 225. But see *Nott* v. *Sands*, W. N. 1883, 74: *Whittaker* v. *Whittaker*, 7 P. D. 15; 47 L. T. 131: *Hartley* v. *Shemwell*, 1 B. & S. 1; 30 L. J., Q. B. 223), nor an order for the costs of an interpleader issue (*Best* v. *Pembroke*, L. R., 8 Q. B. 363; 42 L. J., Q. B. 212), nor an order of the Court of Chancery for the payment of money (*Re Price*, L. R., 4 C. P. 155), could be enforced by attachment of debts. It was held that Ord. XLII. r. 24, made no difference in this respect. *Cremetti* v. *Crom*, supra. (But see *Nott* v. *Sands*, supra: and *Whittaker* v. *Whittaker*, supra). But the present rules clearly do.

(*c*) *Westhead* v. *Riley*, 25 Ch. D. 413; 49 L. T. 776; 32 W. R. 273: *Webb* v. *Stenton* (C. A.), 11 Q. B. D. 518, 519, 531; 52 L. J., Q. B. 584; 49 L. T. 432. See ante, p. 914.

(*d*) *Dickson* v. *Neath and Brecon R. Co.*, L. R., 4 Ex. 87; 38 L. J., Ex. 57.

(*e*) *Wilson* v. *Dundas*, W. N. 1875; Bitt. No. cxii: *Summers* v. *Morphew*, 61 L. T. Jour. 140; Jud. Ch. 24th May, 1876: *Webb* v. *Stenton* (C. A.), 11 Q. B. D. 525, 531; 52 L. J., Q. B. 584; 49 L. T. 432: *Macdonald* v. *Tuequal Gold Mining Co.*, 13 Q. B. D. 535, 538; 53 L. J., Q. B. 376; 32 W. R. 760: *In re Cowen's Estate*, 14 Ch. D. 638; 49 L. J., Ch. 402.

(*f*) *Tapp* v. *Jones*, L. R., 10 Q. B. 591; 44 L. J., Q. B. 127. See *Sparks* v. *Younge*, 8 Ir. C. L. R. 251: *Exp. Joselyne*, 8 Ch. D. 327.

(*g*) *Re Greensill*, L. R., 8 C. P. 24: *Webb* v. *Stenton* (C. A.), 11 Q. B. D. 518; 52 L. J., Q. B. 584; 48 L. T. 268: *Chatterton* v. *Watney* (C. A.), 17 Ch. D. 259; 50 L. J., Ch. 535; 44 L. T. 391. Cp. however, *In re Cowen's Estate*, 14 Ch. D. 638; 49 L. J., Ch. 402: *Vyse* v. *Brown*, 13 Q. B. D. 199.

(*h*) *Jones* v. *Thompson*, El. Bl. & El. 63; 27 L. J., Q. B. 234: *Webb* v. *Stenton*, supra: *Hall* v. *Pritchett*, 3 Q. B. D. 215; 47 L. J., Q. B. 15: *In re Cowen's Estate*, supra.

(*i*) *Webster* v. *Webster*, 31 Beav. 393.

(*k*) *Howell* v. *Metropolitan District R. Co.*, 19 Ch. D. 508; 45 L. T. 707: *Webb* v. *Stenton*, supra.

(*l*) *Webb* v. *Stenton*, supra: *Jones* v. *Thompson*, supra.

(*m*) *Webb* v. *Stenton*, supra. *Nash* v. *Pease*, 47 L. J., Q. B. 766, contra, cannot be supported.

(*k*) *Jones* v. *Thompson*, supra: *Johnson* v. *Diamond*, 11 Exch. 73; 24 L. J., Ex. 217.

(*l*) Id.: *Shaw* v. *Shaw*, 18 L. T. 420, Ir. Q. B.: *Dresser* v. *Johns*, 6 C. B., N. S. 429: cp. *In re Newman*, 6 Ch. D. 494.

(*m*) *Pine* v. *Kinner*, 11 Ir. R., C. L. 40, C. P.

(*n*) *Hall* v. *Pritchett*, supra.

(*o*) *Chatterton* v. *Watney* (C. A.), 17 Ch. D. 259; 50 L. J., Ch. 535; 44 L. T. 391.

(*p*) *Westoby* v. *Day*, 2 El. & Bl. 415; 22 L. J., Q. B. 418. The judgment creditor cannot take moneys out of the hands of a garnishee who has a lien thereon, without discharging the lien. *Giles* v. *Nathan*, 5 Hunt. 558; 1 Marsh. 226: *Caila* v. *Wood*, 2 D. & R. 193. As to the mode of proceeding when the garnishee suggests that a third person has a charge on a debt, see post, 936.

(*q*) *Hirseh* v. *Coates*, 18 C. B. 757; 1 L. J., C. P. 315.

(*r*) *Wise* v. *Birkenshaw*, 29 L. J., Ex. 240. See *Chatterton* v. *Watney* (C. A.), supra.

(*s*) *Pickering* v. *Ilfracombe R. Co.*, L. R., 3 C. P. 235; 37 L. J., C. P. 81: *Robinson* v. *Nesbitt*, L. R., 3 C. P. 264; 37 L. J., C. P. 124. Cp. *Cowell* v. *Isle of Man R. Co.*, 42 L. J. 785.

(*t*) *Dolphin* v. *Layton*, 4 C. P. D.

130;
(*u*)
53 L.
W. R
(*x*)
45; 4
(*y*)
T., O
(*z*)
Ballan
(*a*)
259; 3
(*b*)
Kay, J
Tapp v
In re
Crompt
B. & E
effect
27 & 28
attach f
rect wa
term in
Watney,
Estate a
is submi
are disti
that in t
tain to a
the forfe
never be
ship of at
nishee is
liable the
hands of
not seem
Mitchell v

liquidated damages (*k*), even after verdict but before judg- nt (*l*), cannot be attached. Nor, it has been held, can the ɔrnt secured by a promissory note not yet due (*m*). Nor can ry not yet payable (*n*). Nor can the surplus proceeds of the of mortgaged land in the hands of a mortgagee (*o*). he debt must be one in which the judgment debtor is bene- y interested (*p*). A debt, therefore, which he has *bonâ fide* gned before the judgment (*q*), or before the order (*r*), even ough the garnishee had no notice of the assignment (*s*), cannot ttached. Moneys in the hands of a County Court registrar are ttachable (*t*). Nor are the wages of seamen (17 & 18 *V.* c. 104, 3). The stat. 33 & 34 *V.* c. 30, with respect to wages, does not, pears, apply to the High Court (*u*). It does not protect the y of a secretary (*x*).

ɛmerly, it was held, that a legacy could not be attached in the s of an executor unless he had assented to it (*y*). Possibly ght now be held that a legacy is attachable, though no order yment would be made until the executor had assented to the , or until after the expiration of the year allowed him for istering the estate (*z*).

t actually due may be attached (*a*), but not rent not yet).

---

nes v. *Thompson*, supra: v. *Diamond*, 11 Exch. 73; Ex. 217.

: *Shaw* v. *Shaw*, 18 L. T. 420, 3.: *Dresser* v. *Johns*, 6 C. 5. 429: cp. *In re Newman*, 494.

ne v. *Kinner*, 11 Ir. R., C. P.

ll v. *Pritchett*, supra.

tterton v. *Watney* (C. A.), 259; 50 L. J., Ch. 535; 44

stoby v. *Day*, 2 El. & Bl. J., Q. B. 418. The judg- liter cannot take moneys hands of a garnishee who hereon, without discharg- en. *Giles* v. *Nathan*, 5 ; 1 Marsh. 226: *Caila* v. D. & R. 193. As to the rocceding when the gar- gests that a third person ge on a debt, see post,

h v. *Coates*, 18 C. B. 757; P. 315.

v. *Birkenshaw*, 29 L. J., e *Chatterton* v. *Watney* ra.

ing v. *Ilfracombe R. Co.*, P. 235; 37 L. J., C. P. n v. *Nesbitt*, L. R., 3 C. L. J., C. P. 124. Cp. sle of Man R. Co., 42 L.

v. *Layton*, 4 C. P. D. 130; 48 L. J., C. P. 426.

(*w*) *Booth* v. *Trail*, 12 Q. B. D. 8; 53 L. J., Q. B. 24; 49 L. T. 471; 32 W. R. 122.

(*x*) *Gordon* v. *Jennings*, 9 Q. B. D. 45; 46 L. T. 534.

(*y*) *McDowell* v. *Hollister*, 25 L. T., O. S. 185; 3 W. R. 532.

(*z*) Cp. *In re Cowen's Estate*, supra: *Ballard* v. *Marsden*, 14 Ch. D. 374.

(*a*) *Mitchell* v. *Lee*, L. R., 2 Q. B. 259; 36 L. J., Q. B. 154.

(*b*) *Holsham* v. *Passawer*, cor. *Kay*, J., at Jud. Ch., 29th Oct. 1881; *Tapp* v. *Jones*, *Hall* v. *Pritchett*, and *In re Cowen* being cited. See per *Crompton*, J., *Jones* v. *Thompson*, E. B. & E. at p. 64. And consider the effect of the Judgment Act, 1864, 27 & 28 V. c. 112, ante, p. 879. To attach future rent would be an indirect way of taking the defendant's term in execution: *Chatterton* v. *Watney*, 17 Ch. D. 259. *Re Cowen's Estate* and *Nash* v. *Pease*, which, it is submitted, were wrongly decided, are distinguishable on the ground that in these cases the debt was certain to accrue, whereas by reason of the forfeiture of a term, rent may never become payable. The hardship of attaching rent when the garnishee is only an undertenant and liable therefore to distress at the hands of the superior landlord does not seem to have been considered in *Mitchell* v. *Lee*, supra.

PART X.

Part of a debt may be attached (*c*). It seems that the proceeds of an execution may be attached in the sheriff's hands for a debt due by the execution creditor (*d*). Where a joint-stock company, which was being wound up, was indebted to a judgment debtor, and the official manager had funds in hand applicable to the payment of such debt, it was held that such funds might be attached (*e*). Money guaranteed and payable by the garnishee to the defendants, a railway company, for the payment of interest on their stock, may be attached (*f*).

A debt due to the testator's estate may be attached on a judgment against his executor as such (*g*), but where the order is made against the executors of the debtor of the judgment debtor, the fact that they are sought to be charged as executors, should appear on the face of the order (*h*). On a joint judgment against several, a debt due to any one or more of the judgment debtors may be attached (*i*). But an order cannot be made attaching a debt due from a partnership described by its firm name (*j*). Nor can a debt due to the judgment debtor and a third party jointly be attached (*k*).

Money found by the garnishee belonging to the debtor may be so attached (*l*). So, unless exempted by Act of Parliament, may debts due to a corporation (*m*).

The arrears but not the future payments of a superannuation allowance or pension, given in consideration for past services, can be attached (*n*), provided such superannuation allowance or pension is not in the nature of half-pay given to the debtor to maintain his position, and with a view to his being called upon to serve again (*o*). Thus, the superannuation allowance of a retired police

(*c*) *Anon.*, Godb. 195, No. 282: *Johnson* v. *Diamond*, 25 L. T. 85.

(*d*) *Murray* v. *Simpson*, 8 Ir. C. L. R., App. xlv. But see 1 Leon. 264. See *O'Neil* v. *Cunningham*, 6 Ir. C. L. R. 503. See *Williams* v. *Reeves*, 12 Ir. Ch. Rep. 173, where it was held that money in a sheriff's hands, levied under an attachment for costs awarded by a decree in equity, could not be attached.

(*e*) *Ex p. Turner, Re Warwick, &c. R. Co.*, 2 De G., F. & J. 354; 30 Ch. 92. See *Hunter* v. *Greensill*, post, p. 931, n. (*x*).

(*f*) *Bouch* v. *Sevenoaks, &c. R. Co.*, 4 Ex. D. 133; 48 L. J., Ex. 338.

(*g*) *Burton* v. *Roberts*, 6 H. & N. 93; 29 L. J., Ex. 484. See Rol. 554, L. 20; Com. Dig. Att. D.: *Horsam* v. *Turget*, 1 Vent. 111: *Fowler* v. *Roberts*, 2 Giff. 226. But see *Hewat* v. *Davenport*, 21 W. R. 78, Ir. Ex. A garnishee order made against executors will not affect money paid into Court by them in an administration suit, and carried to a separate account to meet a debt due to the judgment debtor. *Stevens* v. *Phelips*, L. R., 10 Ch. 417; 44 L. J., Ch. 689. As to attaching money paid into Court to the credit of a cause, see *Adams* v. *Gillem*, 9 Ir. C. L. 118.

(*h*) *Stevens* v. *Phelips*, L. R., 10 Ch. 417, per *Mellish*, L. J.

(*i*) *Miller* v. *Mynn*, 1 El. & El. 1075; 28 L. J., Q. B. 324.

(*j*) *Walker* v. *Rooke*, 6 Q. B. D. 631.

(*k*) *Macdonald* v. *Tacquah Gold Mines Co.*, 13 Q. B. D. 535; 53 L. J., Q. B. 376; 32 W. R. 760.

(*l*) *Tros* v. *Michill*, Cro. Eliz. 172: *Michill* v. *Hores*, 1 Leon. 321. Many of the cases here referred to as to the debts which may be attached, were decided upon the right to attach debts by foreign attachment in the Mayor's Court of London, which proceeding, as before stated, is somewhat analogous to the attachment of debts under the above rules.

(*m*) —— v. *Hamburgh Co.*, 1 Mod. 212.

(*n*) *Booth* v. *Trail*, 12 Q. B. D. 8; 53 L. J., Q. B. 24; 49 L. T. 471; 32 W. R. 122.

(*o*) Per Cur. *Wilcock* v. *Terrell*, 3 Ex. D. at p. 334.

constable (*p*), or a retired County servant (*r*), may be attached. Bu army, or the pension of a retired cannot be attached. A superann resolution of the board of director a retired clerk under the authorit be attached, as the same is only a by deed (*t*). The pensions or super or revenue officers are not attachab

Dividends payable under a ban nor could the surplus of a bankru official assignee (*x*); nor money o Court (*y*); nor the property of an ordinary (*z*); nor money in the ha agents, unless where the latter hav responsible (*a*); nor moneys in the trar (*b*); nor money in the hands winding-up (*c*). The property of a potentate cannot be attached (*d*). which a receiver had been ordered debtor, including money which had ceiver's hands at the time of the ap Trust moneys in the hands of a tru respect of which she is restrained attached (*f*). A debt due to the under a specialty given to her *dum* C., having at the request of D., the as a nominal plaintiff, against the pl D. a bond, whereby the latter stipulate tiff such costs as C. should be liable should discontinue, become nonsuit, permit C., during the pendency of arising therefrom, to retain and appl

(*p*) *Booth* v. *Trail*, supra.

(*q*) *Wilcock* v. *Terrell*, 3 Ex. D. 223.

(*r*) *Sanson* v. *Sanson*, 4 P. D. 69: *Cooper* v. *The Queen*, 14 Ch. D. 311.

(*s*) *Birch* v. *Birch*, 8 P. D. 163. See *Dent* v. *Dent*, L. R., 1 P. & D. 366.

(*t*) *Innes* v. *East India Co.*, 17 C. B. 351; 25 L. J., C. P. 154: *Gibson* v. *East India Co.*, 5 Bing. N. C. 262: *Ex p. Hawker*, L. R., 7 Ch. 214.

(*u*) 45 & 46 V. c. 72, s. 3.

(*v*) *Boyse* v. *Simpson*, 8 Irish Com. Law Rep. 523: *Gilmour* v. *Simpson*, Irish C. L. Rep., App. xxxviii. Ex.

(*x*) *Hunter* v. *Greensill*, L. R., 8 C. P. 24; 42 L. J., C. P. 55. In this case the bankruptcy was under the Bank. Act, 1849.

(*y*) *Crometti* v. *Crom*, 4 Q. B. D. 225; 48 L. J., Q. B. 337: *Best* v. *Pembroke*, L. R., 8 Q. B. 363; 42

onstable (*p*), or a retired County Court judge (*q*), or a retired civil servant (*r*), may be attached. But the half-pay of an officer in the army, or the pension of a retired officer in the Indian army (*s*), cannot be attached. A superannuation allowance granted by a resolution of the board of directors of the East India Company to a retired clerk under the authority of 53 *G.* 3, c. 155, *s.* 93, cannot be attached, as the same is only a gratuity, and the grant is not by deed (*t*). The pensions or superannuation allowances of custom or revenue officers are not attachable (*u*).

Dividends payable under a bankruptcy cannot be attached (*v*); nor could the surplus of a bankrupt's estate in the hands of the official assignee (*x*); nor money ordered to be paid by a rule of court (*y*); nor the property of an intestate in the hands of the ordinary (*z*); nor money in the hands of the government or its agents, unless where the latter have made themselves personally responsible (*a*); nor moneys in the hands of a County Court registrar (*b*); nor money in the hands of a liquidator in a voluntary winding-up (*c*). The property of a foreign ambassador or a foreign representative cannot be attached (*d*). It has been held that money which a receiver had been ordered to pay over to the judgment debtor, including money which had not actually reached the receiver's hands at the time of the application, can be attached (*e*). Trust moneys in the hands of a trustee for a married woman, in respect of which she is restrained from anticipation, cannot be attached (*f*). A debt due to the wife of the judgment debtor under a specialty given to her *dum sola* cannot be attached (*g*).

having at the request of D., the defendant, brought an action nominal plaintiff, against the plaintiff Johnson, received from bond, whereby the latter stipulated that he would pay the plain- such costs as C. should be liable to pay the plaintiff in case C. ld discontinue, become nonsuit, &c., and that he would also nit C., during the pendency of the action, or any liability ng therefrom, to retain and apply any money of him D., that

---

Booth v. *Trail*, supra.
Wilcock v. *Terrell*, 3 Ex. D.

Sanson v. *Sanson*, 4 P. D. 69: *oper* v. *The Queen*, 14 Ch. D.

Birch v. *Birch*, 8 P. D. 163.
nt v. *Dent*, L. R., 1 P. & D.

nnes v. *East India Co.*, 17 51; 25 L. J., C. P. 154: *Gibson India Co.*, 5 Bing. N. C. 262: *v. Hawker*, L. R., 7 Ch. 214. 5 & 46 V. c. 72, s. 3.

oyse v. *Simpson*, 8 Irish Com. p. 523: *Gilmour* v. *Simpson*, L. Rep., App. xxxviii. Ex.

unter v. *Greensill*, L. R., 8 ; 42 L. J., C. P. 55. In this bankruptcy was under the ct, 1849.

ometti v. *Crom*, 4 Q. B. D. L. J., Q. B. 337: *Best* v. , L. R., 8 Q. B. 363; 42 L. J., Q. B. 212: *Sunderland Local Marine Board* v. *Frankland*, L. R., 8 Q. B. 18; 42 L. J., Q. B. 13: *Grant* v. *Harding*, 4 T. R. 313, n.: *Coppell* v. *Smith*, 4 T. R. 312.

(*z*) Com. Dig. "Foreign Attachment" (B).

(*a*) *Gidley* v. *Lord Palmerston*, 3 B. & B. 275; 7 Moore, 91: *Macheath* v. *Haldimand*, 1 T. R. 172.

(*b*) *Dolphin* v. *Layton*, 4 C. P. D. 130.

(*c*) *Mack* v. *Ward*, W. N. 1884, 16.

(*d*) 7 Anne, c. 12, s. 3: *Wadsworth* v. *Queen of Spain*, 17 Q. B. 171; 20 L. J., Q. B. 488.

(*e*) *In re Cowan's Estate, Rapier* v. *Wright*, 14 Ch. D. 638; 42 L. T. 866. Sed quære see *Webb* v. *Stenton*, ante, p. 928.

(*f*) *Chapman* v. *Biggs*, 11 Q. B. D. 27.

(*g*) *Dingley* v. *Robinson*, 26 L. J., Ex. 55.

PART X.

might come into the hands of C. towards the discharge of any costs and liabilities which C. might incur by reason of his permitting the action to be brought and carried on in his name, or from any injury to him from the default of D.; C. was nonsuited, and the plaintiff Johnson had judgment to recover against C. the cost of such nonsuit; it was held, that the bond did not constitute a "debt" from D. to C. within the 61st and 64th sections of the *Com. Law Proc. Act*, 1854, and that the debt could not be attached by the plaintiff (*h*). By an Act of Parliament for improving certain parts of Westminster, commissioners were incorporated for that purpose, and were empowered to borrow money on bond, and to advance money to builders for building purposes: by the terms of the bonds all bondholders were to be paid *pari passu;* the commissioners accordingly advanced a sum to M. a builder; the plaintiff, a bondholder, brought an action against the commissioners on one of these bonds, and they suffered judgment to go by default: held, that the debt due from M. the builder to the commissioners was not a "debt" which could be attached under the 61st section of the *Com. Law Proc. Act*, 1854, as the attaching and compelling immediate payment thereof would give a preference to the plaintiff over the other bondholders in violation of the terms of the bonds (*i*).

Where the garnishee had given the debtor a cheque for the debt, but, on service of the rule nisi, stopped its payment, it was held that the debt could be attached (*k*).

A mere notice to treat under the Lands Clauses Consolidation Act, 1845 (8 & 9 *V. c.* 18), upon which nothing has been done, does not constitute a debt which can be attached (*l*).

Who may apply.

An executor or administrator of a judgment creditor who has not made himself a party to the judgment cannot proceed under this enactment, without making himself a party to the record (*m*); and the creditor must be one who is entitled to enforce immediate payment. Therefore the holder of a bond of a corporation containing a condition that all bondholders should be paid *pari passu*, was held not to be such a creditor, since an attachment would have given him priority over other bondholders (*n*).

Against whom.

A debt due from a partnership firm cannot be attached by an order against the firm, but the partners must be individually named (*o*).

As to attaching moneys in the hands of the banker of the judgment debtor, *see Seymour* v. *Corporation of Brecon*, 29 *L. J., Ex.* 243; *Tros* v. *Michill*, *Cro. Eliz.* 172. As to attaching under a foreign attachment, a debt due from the judgment creditor himself, *see Kerry* v. *Bower*, 1 *Cro. Eliz.* 186; 1 *Rol. Ab.* 552, 554; *Com. Dig. Attachment, C.: Harwood* v. *Lee*, 2 *Dyer*, 196 *a: Hope* v. *Hol-*

(*h*) *Johnson* v. *Diamond*, 11 Exch. 73; 24 L. J., Ex. 217. As to attaching under process of foreign attachment money due on bond after the forfeiture thereof, see *Ingram* v. *Bernard*, 1 Ld. Raym. 636; Cro. Eliz. 101: *Robbins* v. *Standard*, 1 Sid. 327.

(*i*) *Kennett* v. *Westminster Improvement Commissioners*, 25 L. J., Ex. 97. The above 61st section is similar to Ord. XLV. r. 1, ante, p. 927.

(*k*) *Cohen* v. *Hall*, 3 Q. B. D. 371; 47 L. J., Q. B. 496.

(*l*) *Richardson* v. *Elmit*, 2 C. P. D. 9.

(*m*) *Baynard* v. *Simmons*, 5 El. & Bl. 69; 24 L. J., Q. B. 253. See post, Ch. LXXXVIII.

(*n*) *Kennett* v. *Westminster Improvement Commissioners*, supra.

(*o*) *Walker* v. *Rooke*, 6 Q. B. D. 631.

man, 1 *Brownl. & Gold.* 60: *Hod*
Foreign Attachment, 34. As to a
hands of himself and partner,
646.

A debt cannot be attached aft
execution on a *ca. sa.* on the jud
or been rescued, or in the other c

But a judgment creditor is not
by the fact that the garnishee is t
While an action is pending agains
without evidence of collusion betw
allow proceedings to be taken aga

If after the service of the order
the sheriff under an execution issu
will discharge him (*s*).

Effect of Order (*t*).]—By *R. of S.*
an order that debts, due or accruing
ment or order, shall be attached, o
in such manner as the Court or Ju
debts in his hands."

This rule corresponds with the 6
Act, 1854.

On and after the 1st January, 18
1883, an attachment of debts is no
the judgment creditor to retain the
he has actually received the debt
With regard to questions of priority
be pointed out that the 62nd sect. o
ith which the present rule corresp
the 184th sect. of the *Bankrupt La*
13 *V. c.* 106), and therefore formerly
bankrupt before the debt was actu
debt passed to his assignees and th
Act was, however, repealed (32 & 3
and there was no corresponding pr
1869 (*x*).

A person who had obtained and ser
to the commission of any act of ban

(*p*) *Jauralde* v. *Parker*, 30 L. J., Ex. 237. See *Jones* v. *Jenner*, 25 L. J., Ex. 319.

(*q*) *Hartley* v. *Shemwell*, 30 L. J., Q. B. 223.

(*r*) *Richardson* v. *Greaves, Clayton, Ire*, 10 W. R. 45, Ex.

(*s*) *Turnbull* v. *Robertson*, 47 L. J., C. P. 294; 38 L. T. 389.

(*t*) The order absolute is not a "final judgment" on which a bankruptcy notice against the garnishee can be founded: *Ex p. Chinery, In re Chinery*, 12 Q. B. D. 342; 53 L. J., Q. B. 663. The order will create a forfeiture under a clause forfeiting

man, 1 *Brownl. & Gold.* 60: *Hodges* v. *Cox*, *Cro. Eliz.* 843: *Locke on Foreign Attachment*, 34. As to a person so attaching money in the hands of himself and partner, see *Nonell* v. *Hullett*, 4 *B. & A.* 646.

After ca. sa. executed, &c.

A debt cannot be attached after the debtor has been taken in execution on a *ca. sa.* on the judgment (*p*), unless he has escaped or been rescued, or in the other cases referred to *ante*, p. 900.

But a judgment creditor is not prevented from attaching a debt by the fact that the garnishee is taken in execution for the debt (*q*). While an action is pending against a garnishee, the Court will not, without evidence of collusion between him and the judgment debtor, allow proceedings to be taken against the garnishee (*r*).

After levy by judgment debtor.

If after the service of the order *nisi* the garnishee pays the debt to the sheriff under an execution issued by the judgment debtor, this will discharge him (*s*).

Effect of order (*t*).

Effect of Order (*t*).]—By *R. of S. C., Ord. XLV. r.* 2, "Service of an order that debts, due or accruing to a debtor liable under a judgment or order, shall be attached, or notice thereof to the garnishee, in such manner as the Court or Judge shall direct, shall bind such debts in his hands."

This rule corresponds with the 62nd sect. of the *Com. Law Proc. Act*, 1854.

On and after the 1st January, 1884, under the *Bankruptcy Act*, 1883, an attachment of debts is not "completed," so as to entitle the judgment creditor to retain the benefit of his attachment, until he has actually received the debt (*Bankruptcy Act*, 1883, *s.* 45). With regard to questions of priority arising prior to that date it may be pointed out that the 62nd sect. of the *Com. Law Proc. Act*, 1854, with which the present rule corresponds, was held to be subject to the 184th sect. of the *Bankrupt Law Consolidation Act*, 1849 (12 & 13 *V. c.* 106), and therefore formerly if the judgment debtor became bankrupt before the debt was actually paid under the order, the debt passed to his assignees and the attachment failed (*u*). That section was, however, repealed (32 & 33 *V. c.* 83, *s.* 20, and *sched.*), and there was no corresponding provision in the *Bankruptcy Act*, 1869 (*x*).

A person who had obtained and served a garnishee order nisi prior to the commission of any act of bankruptcy to which the trustee's

---

(*p*) *Jawralde* v. *Parker*, 30 L. J., 237. See *Jones* v. *Jenner*, 25 L. Ex. 319.

(*q*) *Hartley* v. *Shemwell*, 30 L. J., 223.

(*r*) *Richardson* v. *Greaves*, *Clayton*, 10 W. R. 45, Ex.

(*s*) *Turnbull* v. *Robertson*, 47 L. J., 294; 38 L. T. 389.

(*t*) The order absolute is not a "judgment" on which a bankruptcy notice against the garnishee can be founded: *Ex p. Chinery*, *In re Chinery*, 12 Q. B. D. 342; 53 L. J., 663. The order will create a charge under a clause forfeiting an annuity in case the annuitant does or suffers any act or thing which will deprive him of the right to receive the annuity. *Bates* v. *Bates*, W. N. 1884, 129.

(*u*) *Holmes* v. *Tutton*, 5 El. & Bl. 65; 24 L. J., Q. B. 346; 25 L. T., O. S. 177: *Turner* v. *Jones*, 1 H. & N. 878; 26 L. J., Exch. 262: *Tilbury* v. *Brown*, 30 L. J., Q. B. 46.

(*x*) 32 & 33 V. c. 71. See *Slater* v. *Pinder*, L. R., 6 Ex. 228; affirmed 7 Id. 95: *Ex p. Rooke*, L. R., 6 Ch. 795: *Lowe* v. *Blakemore*, L. R., 10 Q. B. per Cur. at p. 488; cp. 32 & 33 V. c. 71, s. 95, sub-ss. 2 and 3.

PART X.

title related back (*y*), was a "creditor holding a security" within the 12th section of the *Bankruptcy Act*, 1869 (*z*); and his charge was therefore good against the trustee. But a person who had merely obtained the order, without serving it, was not (*a*). Where the garnishee order nisi was not served until after the commission of some act of bankruptcy to which the trustee's title related back, although it was one of which the judgment creditor had no notice, it did not amount to a "dealing" within *s.* 94, *sub-s.* 3, of the *Bankruptcy Act*, 1869, and the title of the trustee prevailed over that of the judgment creditor (*b*), and, in such a case, it was undecided whether, even if the money was paid, the judgment creditor could hold it as against the trustee (*b*).

The service of the order does not operate as an assignment of the debt from the debtor to the judgment creditor (*c*), nor does it operate as a delivery in execution within the *Judgment Act*, 1864 (*c*). Whether a garnishee order nisi is an "attachment against goods" within the *Bankruptcy Act*, 1869, was undecided (*d*).

As to the effect of an assignment by the debtor for the benefit of his creditors, *see Wood* v. *Dunn*, *L. R.*, 2 *Q. B.* 73; and as to a composition deed, *see Kent* v. *Tomkinson*, *L. R.*, 2 *C. P.* 502; *Culverhouse* v. *Wickens*, 3 *Id.* 295.

Foreign attachment.

The existence of an attachment in the Mayor's Court, London, does not prevent the operation of a garnishee order under these rules (*e*).

Solicitor's lien.

A solicitor's lien for his costs or property recovered under 23 & 24 *V. c.* 127, *s.* 28 (*ante*, p. 169) prevails over a garnishee order so as to give priority to the solicitor's charge (*f*) even before the costs have been taxed (*g*).

Proceedings to levy amount due from garnishee when he does not dispute liability.

Proceedings to levy Amount where Garnishee does not dispute Liability.]—By the *R. of S. C., Ord. XLV. r.* 3, "If the garnishee does not forthwith pay into Court the amount due from him to the debtor, liable under a judgment or order, or an amount equal to the judgment or order, and does not dispute the debt due or claimed to be due from him to such debtor, or if he does not appear upon summons, then the Court or Judge may order execution to issue, and it may issue accordingly, without any previous writ or process,

(*y*) *Ex p. Pillers, In re Curtoys*, 17 Ch. D. 653; 50 L. J., Ch. 691 (C. A.).

(*z*) *Ex p. Joselyne, In re Platt* (C. A.), 8 Ch. D. 327; 47 L. J., Bk. 91: *Emanuel* v. *Bridger*, L. R., 9 Q. B. 286; 43 L. J., Q. B. 96: *Lowe* v. *Blakemore*, L. R., 10 Q. B. 485; 44 L. J., Q. B. 155, dissenting from *Ex p. Greenway*, L. R., 16 Eq. 619; 42 L. J., Ch. 110. See *Stevens* v. *Phelips*, L. R., 10 Ch. 417.

(*a*) *In re Stanhope Silkstone Collieries Co.* (C. A.), 11 Ch. D. 160; 48 L. J., Ch. 409: *Hamer* v. *Giles*, 11 Ch. D. 942; 48 L. J., Ch. 508.

(*b*) *Ex p. Pillers, In re Curtoys*, 17 Ch. D. 653; 50 L. J., Ch. 691.

(*c*) *Chatterton* v. *Watney* (C. A.), 17 Ch. D. 259; 50 L. J., Ch. 536; 44 L. T. 391 (C. A.): *Ex p. Pillers, In re Curtoys*, supra.

(*d*) *Ex p. Pillers, In re Curtoys*, supra.

(*e*) *Richter* v. *Laxton*, 39 L. T. 499; 27 W. R. 214: *Newman* v. *Rook*, 4 C. B., N. S. 434: cp. *Levy* v. *Lovell*, 11 Ch. D. 220: *Ex p. Scarf, In re Price*, 17 Ch. D. 74.

(*f*) *Dallow* v. *Garrold*, 13 Q. B. D. 513; affirmed in C. A., W. N. 1884, 231: *Shippey* v. *Grey*, 49 L. J., P. C. 254; 42 L. T. 673: *Faithfull* v. *Ewen*, 7 Ch. D. 495; 47 L. J., Ch. 457 (C. A.): *Birchall* v. *Pugin*, L. R., 10 C. P. 397; 44 L. J., C. P. 278: *Hamer* v. *Giles*, 11 Ch. D. 942; 48 L. J., Ch. 508.

(*g*) Id.

to levy the amount due from such g
may be sufficient to satisfy the judg
This rule is similar to the 63rd s
1854.

The Judge has no power to go int
the garnishee and the judgment cre
deduct any amount due to him fr
execution to issue for the whole an
debtor to the judgment creditor (*h*)
the state of accounts between the j
nishee, and give effect to any set-off
but not after (*k*), the date of the ord
been held at Chambers that the gar
unliquidated damages, which he may
that, if disputed, such claim must be
to the debt (*l*).

If the garnishee does not appear,
and the order is made absolute, he w
the order be allowed to interplead so
the right to the debt tried (*m*).

A composition deed under sect. 194
is a bar to an execution under this ru
is a bar to an execution on a judgmen
As to the effect of payment by the g

Proceedings when Garnishee disputes h
Ord. XLV. r. 4, "If the garnishee dis
or Judge, instead of making an order
may order that any issue or question n
liability be tried or determined in any
or question in an action may be tried or
The 64th section of the *Com. Law P*
this case a process similar to the writ of
is substituted by this rule. Under tha
cretionary with the Master to make the
been a *bonâ fide* dispute on some substa
order for payment would be made and
But in general an order would be made f
any doubt about the garnishee's liabilit
to the judgment debtor (*q*). If the judg
proceed by writ, the attachment might be
to pay the costs (*r*). If he proceeded,
covered his costs, though nothing was

(*h*) *Sampson* v. *Seaton R. Co.*, L. 10 Q. B. 28; 44 L. J., Q. B. 31.

(*i*) Id. See *Nathan* v. *Giles*, 5 unt. 558.

(*k*) *Tapp* v. *Jones*, L. R., 10 Q. B. .

(*l*) *Kaupt* v. *Kaupt*, Cor. *Cleasby*, at Jud. Ch. June 28, 1878, *ex dit.*: cp. *Young* v. *Kitchin*, 3 D. 127.

(*m*) *Randall* v. *Lithgow*, 12 Q. B. 539; 53 L. J., Q. B. 518; 50 L. T. 5
(*n*) *A*
C. P. 50
(*o*) *W*
Ex. 210.
(*p*) *S*
N. S. 43
(*q*) *Se*
Brevon,
(*r*) *W*
288; 27 I

levy the amount due from such garnishee, or so much thereof as y be sufficient to satisfy the judgment or order." This rule is similar to the 63rd sect. of the *Com. Law Proc. Act*, 54.

The Judge has no power to go into the state of accounts between garnishee and the judgment creditor, or to allow the former to uct any amount due to him from the latter, but must order cution to issue for the whole amount due from the judgment tor to the judgment creditor (*h*). He may, however, go into state of accounts between the judgment debtor and the gar- ee, and give effect to any set-off or cross debt arising before (*i*), not after (*k*), the date of the order of attachment. It has also held at Chambers that the garnishee may set off a claim for quidated damages, which he may have against the debtor; and if disputed, such claim must be tried together with the claim e debt (*l*).

the garnishee does not appear, or does not dispute the debt, he order is made absolute, he will not in any proceeding on rder be allowed to interplead so as to have the question as to ght to the debt tried (*m*).

omposition deed under sect. 194 of the *Bankruptcy Act*, 1861, ar to an execution under this rule, to the same extent that it ır to an execution on a judgment (*n*).

o the effect of payment by the garnishee, see *post*, p. 936.

Proceedings when garnishee disputes liability.

ceedings when Garnishee disputes his Liability.]—By *R. of S. C.*, LV. *r.* 4, "If the garnishee disputes his liability, the Court ge, instead of making an order that execution shall issue, der that any issue or question necessary for determining his y be tried or determined in any manner in which any issue tion in an action may be tried or determined."

64th section of the *Com. Law Proc. Act*, 1854, prescribed in e a process similar to the writ of revivor, for which an issue ituted by this rule. Under that section it was held dis- ry with the Master to make the order (*o*). There must have *ond fide* dispute on some substantial ground, otherwise an r payment would be made and not an order for a writ (*p*). eneral an order would be made for the writ where there was bt about the garnishee's liability to the debt, or to pay it dgment debtor (*q*). If the judgment creditor declined to by writ, the attachment might be discharged and he ordered he costs (*r*). If he proceeded, the successful party re- his costs, though nothing was said about them in the

---

pson v. *Seaton R. Co.*, L. 3, 28; 44 L. J., Q. B. 31. See *Nathan* v. *Giles*, 5

v. *Jones*, L. R., 10 Q. B.

t v. *Kaupt*, Cor. *Cleasby*, Ch. June 28, 1878, *ex* p. *Young* v. *Kitchin*, 3

ill v. *Lithgow*, 12 Q. B. L. J., Q. B. 518; 50 L. T. 587; 32 W. R. 794.

(*n*) *Kent* v. *Tomkinson*, L. R., 2 C. P. 502.

(*o*) *Wise* v. *Burkenshaw*, 29 L. J., Ex. 240.

(*p*) See *Newman* v. *Rook*, 4 C. B., N. S. 434.

(*q*) *Seymour* v. *Corporation of Brecon*, 29 L. J., Ex. 243.

(*r*) *Wintle* v. *Williams*, 3 H. & N. 288; 27 L. J., Ex. 311.

PART X.

order (*s*). In *Wilson* v. *Dundas* (*t*), *Quain*, J., ordered the question of liability to be tried by means of a special case. And where the question is one of law, this seems the most convenient course.

Proceedings on suggestion of claim by third party.

Proceedings on suggestion of Claim by Third Party.]—By *R. of S. C., Ord. XLV. r.* 5, "Whenever in proceedings to obtain an attachment of debts it is suggested by the garnishee that the debt sought to be attached belongs to some third person, or that any third person has a lien or charge upon it, the Court or a Judge may order such third person to appear, and state the nature and particulars of his claim upon such debt."

The suggestion that the debt claimed belongs to some other person, as in the case of a trust, need not come from the garnishee (*u*).

By *r.* 6, "After hearing the allegations of any third person under such order, as in rule 5 mentioned, and of any other person whom by the same or any subsequent order the Court or a Judge may order to appear, or in case of such third person not appearing when ordered, the Court or Judge may order execution to issue to levy the amount due from such garnishee, or any issue or question to be tried or determined according to the preceding rules of this order, and may bar the claim of such third person, or make such other order as such Court or Judge shall think fit, upon such terms, in all cases, with respect to the lien or charge (if any) of such third person, and to costs, as the Court or Judge shall think just and reasonable."

These rules are similar to the 29th and 30th sections respectively of the *Com. Law Proc. Act*, 1860, the mode of trying questions by an issue being substituted for the proceeding similar to writ of revivor.

Where, upon an attachment under a garnishee order by a judgment creditor of moneys due to the judgment debtor, a third party claims such moneys for a debt due to him from the judgment debtor, and consents to a Judge at Chambers deciding the issue summarily between him and the judgment creditor, instead of asking under *Ord. XLV. r.* 7, for an issue to be tried in the usual way, such decision of the Judge is final, and cannot be appealed against by such third party (*x*).

Upon payment, &c. garnishee discharged.

Effect of Payment, &c. under Order as a Discharge.]—By *Ord. XLV. r.* 7 (*y*), "Payment (*z*) made by or execution levied upon the garnishee under any such proceeding as aforesaid shall be a valid discharge to him as against the debtor liable under a judgment or

(*s*) *Johnson* v. *Diamond*, 11 Ex. 431; 25 L. J., Ex. 40.

(*t*) W. N. 1875, 232, at Jud. Ch.

(*u*) *Roberts* v. *Deak*, 8 Q. B. D. 319; 51 L. J., Q. B. 15; 46 L. T. 246.

(*x*) *Eade* v. *Winser*, 47 L. J., C. P. 584.

(*y*) See C. L. P. Act, 1854, s. 65, the previous similar enactment.

(*z*) See *Wood* v. *Dunn*, 36 L. J., Q. B. 27; *Turnbull* v. *Robertson*, 41 L. J., C. P. 294. As to a transfer in account amounting to payment, see *Wetter* v. *Rucker*, 4 Moore, 172; B. & B. 494. Payment into Court under a Judge's order is payment within this rule; *Culverhouse* v. *Wickens*, 37 L. J., C. P. 107; L. R. 3 C. P. 295.

order, to the amount paid or levied, be set aside, or the judgment or ord

This rule is similar to sect. 65 of

It seems that payment by the gar upon notice of attachment is no dis garnishee to the judgment debtor, the payment (*b*). The payment m money, and not by bills, unless the Payment into Court by the garnishe within the rule (*d*).

A garnishee in a foreign attachm discharged from the debt attached, a *execution executed* (*e*). A garnishee has no right to substitute a different to that already existing between him Where a garnishee order had been clauses of the *Com. Law Proc. Act*, pointed by the Court of Chancery, being made, and he paid over to the moneys in his hands as such receive of Equity to refund and pay the costs

Attachment Book.]—By *Ord. XLV.* by the proper officer a debt attachme tries shall be made of the attachme names, dates, and statements of erwise; and copies of any entries by any person upon application to the

Costs.]—By *Ord. XLV. r.* 9 (*i*), "The an attachment of debts and of any p incidental to such application, shall be or a Judge."

Where a judgment creditor, after brin Court, declines to proceed against him,

(*a*) See *Westoby* v. *Day*, 2 E. & B. 605; 22 L. J., Q. B. 418, where it was held that the garnishee in a foreign attachment in the Mayor's Court, London, was discharged after execution executed, although the debt sued for in [illegible] did not arise within [illegible] See *The Olive*, 1 [illegible]

[illegible] v. *Jones*, 1 H. & N. 878; [illegible]., 262; *Lockwood* v. *Nash*, C. B. 536; *Mayor, &c. of London Joint Stock Bank*, 45 L. [illegible]

(*c*) *Turner* v. *Jones*, supra.

(*d*) *Culverhouse* v. *Wickens*, L. R., C. P. 295.

(*e*) *Magrath* v. *Hardy*, 6 Sc. 627. *Crosby* v. *Hetherington*, 5 Sc. N.

der, to the amount paid or levied, although such proceeding may set aside, or the judgment or order reversed" (*a*). This rule is similar to sect. 65 of the *Com. Law Proc. Act*, 1854. It seems that payment by the garnishee to the judgment creditor on notice of attachment is no discharge of the debt due from the rnishee to the judgment debtor, but there must be an order for payment (*b*). The payment must be an actual payment in ney, and not by bills, unless they are accepted as payment (*c*). yment into Court by the garnishee under an order is a payment hin the rule (*d*).

garnishee in a foreign attachment in the City of London is harged from the debt attached, after judgment against him *and ution executed* (*e*). A garnishee whose debt has been attached no right to substitute a different mode of discharging his debt at already existing between him and the judgment debtor (*f*). ere a garnishee order had been obtained under the garnishee ses of the *Com. Law Proc. Act*, 1854, against a receiver ap- ted by the Court of Chancery, he not objecting to the order g made, and he paid over to the person named in the order eys in his hands as such receiver, he was ordered by a Court uity to refund and pay the costs (*g*).

achment Book.]—By *Ord. XLV. r.* 8 (*h*), "There shall be kept Debt attachment book to be kept by proper officer. e proper officer a debt attachment book, and in such book s shall be made of the attachment and proceedings thereon, names, dates, and statements of the amount recovered, and vise; and copies of any entries made therein may be taken y person upon application to the proper officer."

s.]—By *Ord. XLV. r.* 9 (*i*), "The costs of any application for Costs. achment of debts and of any proceedings arising from or ital to such application, shall be in the discretion of the Court dge."

re a judgment creditor, after bringing a garnishee before the declines to proceed against him, the garnishee is entitled to

---

Westoby v. *Day*, 2 E. & B. L. J., Q. B. 418, where it was the garnishee in a foreign nt in the Mayor's Court, was discharged after execu- ted, although the debt sued t did not arise within See *The Olive*, 1

v. *Jones*, 1 H. & N. 878; x. 262; *Lockwood* v. *Nash*, 36; *Mayor, &c. of London Joint Stock Bank*, 45 L.

er v. *Jones*, supra. *rhouse* v. *Wickens*, L. R., *ath* v. *Hardy*, 6 Sc. 627. v. *Hetherington*, 5 Sc. N.

R. 637; *Westoby* v. *Day*, 2 El. & Bl. 605; 22 L. J., Q. B. 418; *Denton* v. *Maitland*, 11 Jur. 42, B. C.; 15 L. J., Q. B. 232; *Webb* v. *Hurrell*, 4 C. B. 287; 1 Wm. Saund. 66 a. As to a voluntary payment, see *Wetter* v. *Rucker*, supra. See *Matthey* v. *Wiseman*, 34 L. J., C. P. 216, where the proceedings in the Mayor's Court were null and void, and it was held that the garnishee was not discharged by payment under such proceedings.

(*f*) *Turner* v. *Jones*, supra.

(*g*) *De Winton* v. *Mayor of Brecon*, 6 Jur., N. S. 1046, R.

(*h*) See C. L. P. Act, 1854, s. 66, the previous enactment.

(*i*) See C. L. P. Act, 1854, s. 67, the previous enactment.

PART X.

have the order dismissed with costs to be paid by the judgment creditor (*j*). Under the *Com. Law Proc. Act*, 1854, where a garnishee disputed his liability to the judgment debtor, and the Court, by an order under the 61th section, authorized the judgment creditor to proceed by writ against the garnishee, omitting all mention of costs, the successful party was entitled to his costs in the ordinary way, and no order of the Court under the 67th section was necessary for that purpose (*k*). The Master has power to order the costs of the execution creditor to be added to the judgment, and paid out of the debt due from the garnishee, and this is the proper course to adopt (*l*).

Practical directions as to attaching debts.

Examination of debtor.

Practical Directions as to attaching Debts.]—Where a judgment is for the recovery or payment of money, and the judgment creditor is unable to obtain satisfaction of his judgment, and has reason to suppose that debts are due to the judgment debtor, an order may be obtained for his oral examination as to such debts. As to the mode of obtaining the order and the proceedings under it, *see Vol.* 1, p. 791.

To whom and when application to attach to be made.

The application to attach debts should be made to a Master at Chambers. It cannot be made until judgment has been signed. It may be made either before or after an oral examination of the debtor as to his debts. It may be made after six years after judgment signed (*m*).

Affidavit in support of.

The affidavit in support of the application should be made by the creditor or his solicitor. It should be intituled in the action and should state that the deponent, or the person on whose behalf the application is made, is the judgment creditor or solicitor; that judgment has been recovered; that it is still unsatisfied, and to what amount; that the party indebted to the judgment debtor is so indebted (*n*), and that such party is within the jurisdiction (*o*).

The amount due from the garnishee need not necessarily be stated in the affidavit (*p*).

In the case of a debt due from a partnership, the partners must be individually named (*q*).

In the case of an order against executors as such, it should appear from the order that they are charged as executors (*r*).

The application.

The application is made *ex parte*, and without any notice either to the judgment debtor or to the party alleged to be indebted. *Take the affidavit to a Master at Chambers, and if he is satisfied with it he will make an order that the debt owing or accruing from the third person, called the garnishee, to the judgment debtor, shall be attached to answer the judgment debt;* and by the same or any sub-

(*j*) *Wintle* v. *Williams*, 3 H. & N. 288; 27 L. J., Ex. 311.

(*k*) *Johnson* v. *Diamond*, 11 Ex. 431; 25 L. J., Ex. 40.

(*l*) Per *Jessel*, M. R., *Simmons* v. *Storer*, 14 Ch. D. at p. 154.

(*m*) *Fellows* v. *Thornton*, W. N. 1884, 248.

(*n*) See form, Chit. F. p. 462. Swearing only to information and belief will not do, unless the information be obtained from the judgment debtor.

(*o*) See Ord. XLV. r. 1, and 927. Cp. *Martyn* v. *Keily*, 5 Ir. L. 404.

(*p*) *Lucy* v. *Wood*, W. N. 1884, 9

(*q*) *Walker* v. *Rooke*, 6 Q. B. D. 6

(*r*) *Stevens* v. *Phelips*, L. R., Ch. 417: 44 L. J., Ch. 689.

quent order it may be ordered that the garnishee shall appear before the Master in Chambers, to show cause why he should not y the judgment creditor the debt due from him, the garnishee, the judgment debtor, or so much thereof as may be sufficient satisfy the judgment debt (*s*). In ordinary cases the judgment ditor simply applies for and gets an order for the attachment of debt or debts from the garnishee, which has the effect of ding such debts in the hands of the garnishee, and if the gar- hee were after service thereof to pay the debt to the judgment tor, he would be liable to an attachment for not obeying the er; and the judgment creditor afterwards obtains a separate mons to compel the garnishee to pay the debt. The Master direct how notice of the order is to be given to the garnishee (*t*). costs of the application are in the discretion of the Master (*u*). he order should be served on the garnishee without delay (*v*). Service of order.

er *Ord. XLV. r.* 2, the debts are bound from the time of such ce. It will also be noticed, that by this rule notice to the ishee, in such manner as the Master shall direct, shall bind the s in his hands. When the Master, under this rule, has given pecial directions as to the service of such notice, care should ken that they are complied with (*x*).

the garnishee does not forthwith pay into Court the amount om him to the judgment debtor, or an amount equal to the nent debt, *attend at Chambers at the time appointed for the hee to show cause, when, if the garnishee does not attend, or s and does not dispute the debt due or claimed to be due from him judgment debtor, the Master will make the garnishee order abso- nd order execution to issue to levy the amount due from the hee, or so much thereof as may be sufficient to satisfy the judg- ebt, as pointed out by Ord. XLV. r. 3, ante,* p. 934. If, when the Judge or Master, the garnishee satisfies the Judge or that he has ground for disputing his liability, the Judge or may, instead of making an order as above mentioned, make r as mentioned in *Ord. XLV. r.* 4, *ante,* p. 935. Where an r the attachment of debts due to a judgment debtor has tained *ex parte*, under *Ord. XLV. r.* 1, and a summons, n the garnishee to show cause why he should not pay the o the judgment creditor, has been issued, and the garnishee and disputes his liability, and the judgment creditor does to be allowed to proceed against him, the Master may not miss the summons, but discharge the attachment order r (*y*). As to the mode of proceeding when a garnishee that a third party has a charge upon the debt, *see ante,* Garnishee showing cause.

n may be issued against the garnishee in the ordinary Execution against garnishee.

Ord. XLV. r. 1, ante, p. *Martyn* v. *Keily*, 5 Ir. C.

rd. XLV. r. 2, ante, p.

XLV. r. 9, ante,

(*r*) See *Cooper* v. *Brayne*, 27 L. J., Ex. 446.

(*x*) As to the effect of service of order, see *Lowe* v. *Blakemore*, ante, p. 933, n. (*x*).

(*y*) *Wintle* v. *Williams*, 3 H. & N. 288; 27 L. J., Ex. 311.

PART X.

Garnishee discharged.

Entry of proceedings.

Costs of application, &c.

way. The garnishee order is not a "final judgment" in respect of which a bankruptcy notice can be issued (*z*).

As to a garnishee being discharged after payment or execution levied by or against him, *see ante*, p. 936.

As to entering the proceedings to attach a debt in a book kept for the purpose, *see Ord. XLV. r.* 8, *ante*, p. 937.

As to the costs of the application for an attachment of a debt, &c., *see Ord. XLV. r.* 9, *ante*, p. 937.

(*z*) *Ex p. Chinery*, 12 Q. B. D. 342; 53 L. J., Q. B. 662: cp. *Ex p. Schmitz*, 12 Q. B. D. 509.

CHAPTER LXXXIII.

ATTACHMENT.

	PAGE		PAGE
n what Cases	941	3. *The Writ, and Proceedings thereon*	951
roceedings to obtain Writ..	947	4. *Discharge*	954

1. *In what Cases.*

BEDIENCE to judgments and orders may, in the cases pointed n this chapter, be enforced by attachment, and this remedy be adopted in other cases, which are also treated of in this er.

R. of S. C., Ord. XLII. r. 6, "A judgment for the recovery property other than land or money may be enforced . . . it of attachment . . . ."

Ord. XLII. r. 7, "A judgment requiring any person to do et other than the payment of money, or to abstain from doing ng. may be enforced by writ of attachment, or by com-

Ord. XLII. r. 4, "A judgment for the payment of money ourt may be enforced by writ of sequestration, or in cases h attachment is authorized by law, by attachment."

rd. XLII. r. 24, "Every order of the Court or a Judge in ise or matter may be enforced against all persons bound in the same manner as a judgment to the same effect" (*a*).

the abolition of imprisonment for debt by the Debtors 69 (32 & 33 *V. c.* 62, *s.* 4) (*b*), orders or judgments for pay-

Judgment for recovery of property other than land or money.

Judgment requiring person to do or abstain from doing act.

Judgment for payment of money into Court.

Orders.

Order for payment of money.

---

tchinson v. *Hartmont*, W. 29. See Vol. I, p. 788.

s Act provides (sect. 4), ith the exceptions herein- ntioned, no person shall, commencement of this Act, l or imprisoned for making payment of a sum of There shall be excepted peration of the above en- [*here follow the exceptions, set out verbatim in the text,*

ed, first, that no person prisoned in any case ex- n the operation of this a longer period than one secondly, that nothing in shall alter the effect of nt or order of any Court nt of money, except as regards the arrest and imprisonment of the person making default in paying such money."

There is some difference of opinion as to whether this Act, by retaining certain exceptions, in which a person is liable to be imprisoned for non-payment of money, did so with a view to punish persons whose cases fall within the exceptions. The better opinion appears to be, that the Act is in this sense vindictive. *Marris* v. *Ingram*, 13 Ch. D. 338; 49 L. J., Ch. 123, *Jessel*, M. R.: *In re Knowles*, 52 L. J., Ch. 685: contra, *Barrett* v. *Hammond*, 10 Ch. D. 285; 48 L. J., Ch. 249, V.-C. B.: *Street* v. *Hope*, 10 Ch. D. 286 (n.), V.-C. M.: *Holroyd* v. *Garrett*, 20 Ch. D. 532; 51 L. J., Ch. 663, V.-C. B.

PART X.

ment of money (*c*) can only be enforced by attachment in the cases specially excepted by that Act from its operation (*d*). In all other cases the order cannot be enforced by attachment (*d*). The cases so specially excepted by sect. 4, and in which an attachment may still be issued, are as follows:—

"(1.) Default in payment of a penalty, or sum in the nature of a penalty, other than a penalty in respect of any contract:

"(2.) Default in payment of any sum recoverable summarily before a justice or justices of the peace (*e*):

"(3.) Default by a trustee or person acting in a fiduciary capacity (*f*) and ordered to pay by a Court of equity (*g*) any sum in his possession or under his control (*f*):

"(4.) Default by an attorney or solicitor in payment of costs

(*c*) Or costs. *Micklethwaite* v. *Fletcher*, 27 W. R. 793: *Ex p. Sharp*, 37 L. T. 168: per *Cockburn*, C. J., *Queen* v. *Pratt*, L. R., 5 Q. B. at p. 180; ep. per *Lush*, J., Id.: *Jackson* v. *Mawby*, 1 Ch. D. 86.

(*d*) *Esdaile* v. *Visser*, 13 Ch. D. 421; 41 L. T. 745 (C. A.). See cases in preceding note. Crown debts are not affected by the Act (*Att.-Gen.* v. *Edmunds*, 22 L. T. 667, *Willes*, J., at Jud. Ch.); and, therefore, an appellaut to the House of Lords, whose recognizance has been estreated, is not entitled to the benefit of it. *Re Arthur Heavens Smith*, 2 Ex. D. 47; 46 L. J., Ex. 73.

(*e*) Costs awarded by Quarter Sessions on appeal are within this exception. *Reg.* v. *Pratt*, L. R., 5 Q. B. 176; 39 L. J., Q. B. 73.

(*f*) Since the Debtors Act, 1878, the power to attach in cases within this exception is discretionary. See post, p. 943. In cases within this exception, the trustee is liable to attachment. *Young* v. *Dallimore*, 22 L. T. 119. To bring the case within the exception, it must be shown that the trustee has had the money in his possession or control. *Middleton* v. *Chichester*, L. R., 6 Ch. 152: *Ex p. Cuddiford, In re Hinecks*, 45 L. J., Bk. 127; 34 L. T. 666. It will not suffice to show that he might, but for his neglect, have recovered it. *Ferguson* v. *Ferguson*, L. R., 10 Ch. 661; 44 L. J., Ch. 615. The possession or control may be joint or several. *Evans* v. *Bear*, L. R., 10 Ch. 76; 31 L. T. 625. Possession at the time of the application to attach is not essential. *Middleton* v. *Chichester*, supra. A trustee cannot be committed under this exception for non-payment of costs. *Ex p. Sharp, Re Hind*, 37 L. T. 168. As to who is a "person acting in a fiduciary capacity," see *Marris* v. *Ingram*, 13 Ch. D. 338, fiduciary relation towards person other than party to action will suffice; son managing father's estate is within exception. *Phosphate Sewage Co.* v. *Hartmont*, 25 W. R. 743, promoter of company held not. *Re Hinecks*, supra, trustee who had undertaken to make good default of prior trustee held not. *Ex p. Hooson, Re Chapman and Shaw*, L. R., 8 Ch. 231; 42 L. J., Bk. 19: *S. C.*, nom. *Ex p. Wood*, 21 W. R. 152, creditor who had received money by way of fraudulent preference held not. *In re Diamond Fuel Co., Metcalfe's case*, 13 Ch. D. 815; 49 L. J., Ch. 347, director receiving gratuitous shares, and ordered to pay under Companies Act, 1862, s. 165 held not. *Hutchinson* v. *Hartmont*, W. N. 1877, 29, M. R., agent receiving bills to discount held to be. When the trustee becomes bankrupt between the order to pay and the application to attach, the Court will not attach pending the bankruptcy proceedings. *Cobham* v. *Dalton*, L. R., 10 Ch. 655. But when the attachment preceded the bankruptcy proceedings, the Court refused to discharge the trustee. *Earl of Lewes* v. [illegible]nett, 6 Ch. D. 252; 46 L. J., Ch. 344. When judgment had been [illegible]ainst a trustee in respect [illegible]mon received by him as such, the Court refused an application for an order on him to pay the money within four days. *Drewitt* v. *Edwards*, 37 L. T. 622 (C. A.).

(*g*) This now extends to orders of any Division of the High Court. Per *Jessel*, M. R., *Marris* v. *Ingram*, 13 Ch. D. at p. 345. It extends to decree of the Irish Court of Chancery: *Ferguson* v. *Ferguson*, L. R., 10 Ch. 661.

when ordered to pay costs for misc[illegible] of a sum of money when ordered t[illegible] of an officer of the Court making th[illegible]

"(5.) Default in payment for th[illegible] portion of a salary or other income which any Court having jurisdictio[illegible] to make an order (*i*):

"(6.) Default in payment of sum[illegible] which orders are in this Act authoriz[illegible]

In cases within the exceptions, the [illegible] but the offending party cannot be i[illegible] year (*m*).

The Debtors Act, 1878 (41 & 42 [illegible] cases within exceptions 3 and 4, the [illegible] into the case and grant or refuse t[illegible] absolutely or upon terms. This Act [illegible] its being held that in all cases withi[illegible] attachment was a matter of right (*n*) [illegible] cases within exceptions 3 and 4 the Ju[illegible] depending on the circumstances of [illegible] refusing the writ (*o*). In the case of [illegible] appears to be a matter of right (*l*).

(*h*) Since the Debtors Act, 1878, the power to attach in cases within this exception is discretionary. Default by a solicitor in payment of a balance found to be due from him on taxation of his bill of costs under an order for that purpose is within that exception: *In re White*, 23 L. T. 387: *In re Rush*, L. R., 9 Eq. 147; 39 L. J., Ch. 759. So is default in payment of costs awarded against a solicitor who had defended an action without authority: *Jenkins* v. *Fereday*, L. R., 7 C. P. 358: per *Bovill*, C. J., at p. 359. Default in payment of costs of an appeal from an order to tax is not within the exception (*In re Hope*, L. R., 7 Ch. 523; 41 L. J., Ch. 797), although default in payment of a sum of money *and costs* ordered by the Court to be paid in his character of an officer of the Court would be: per Cur. L. R., 7 Ch. 525. A solicitor may be attached for default in payment of a balance found due from him upon taxation of his bill of costs under the common order for that purpose (*In re Dudley*, 12 Q. B. D. 41; 52 L. J., Q. B. 16; 49 L. T. 736: *In re Rush*, L. R., 9 Eq. 147; 39 W. R. 331: *Re White*, 23 L. T. 387; 39 W. R. 39: *Barfield* v. *Rush*, 24 L. T. 248; 19 W. R. 466: *In re Ball*, L. R., 3 C. P. 104; 42 L. J., C. P. 104, contra, was decided on *Re Robinson*, 36 B. & S. 75, which was decided before the Debtors Act came into

[illegible] ope[illegible] of t[illegible] p[illegible] an o[illegible] taxa[illegible] 523. attac[illegible] the [illegible] by [illegible] parti[illegible] Eq. [illegible] 731, [illegible] (*i*) [illegible] v. *In*[illegible] (*k*) [illegible] to the [illegible] p. 891 [illegible] (*l*) [illegible] N. 187 [illegible] (*m*) [illegible] the sec[illegible] (*n*) [illegible] D. at p[illegible] (*o*) [illegible] 285, V[illegible] D. 286 [illegible] *Garnet*[illegible] 663: *R*[illegible] V.-C. [illegible] refused [illegible] ut me[illegible] settled [illegible] reason [illegible] *Ingram*[illegible] (*p*) [illegible] 76, L.J.[illegible] out hea[illegible]

en ordered to pay costs for misconduct as such, or in payment a sum of money when ordered to pay the same in his character n officer of the Court making the order (*h*):

(5.) Default in payment for the benefit of creditors of any tion of a salary or other income in respect of the payment of ch any Court having jurisdiction in bankruptcy is authorized nake an order (*i*):

(6.) Default in payment of sums in respect of the payment of h orders are in this Act authorized to be made" (*k*).

cases within the exceptions, the attachment may be granted (*l*), the offending party cannot be imprisoned for more than one (*m*).

—Debtors Act, 1878.

e Debtors Act, 1878 (41 & 42 *V. c.* 54, *s.* 1), provides that in within exceptions 3 and 4, the Court or Judge may inquire the case and grant or refuse the writ of attachment either utely or upon terms. This Act was passed in consequence of eing held that in all cases within the exceptions the writ of ment was a matter of right (*n*). The effect of it is, that in within exceptions 3 and 4 the Judge may exercise a discretion ding on the circumstances of the case as to granting or ng the writ (*o*). In the case of the other exceptions the writ rs to be a matter of right (*p*).

Since the Debtors Act, 1878, ver to attach in cases within eption is discretionary. De- y a solicitor in payment of a found to be due from him on n of his bill of costs under an r that purpose is within that n: *In re White*, 23 L. T. 387: *sh*, L. R., 9 Eq. 147; 39 L. J., So is default in payment of arded against a solicitor who nded an action without au- *Jenkins* v. *Fereday*, L. R., 58: per *Bovill*, C. J., at p. fault in payment of costs of t from an order to tax is not ie exception (*In re Hope*, h. 523; 41 L. J., Ch. 797), default in payment of a money *and costs* ordered by to be paid in his character cer of the Court would be: L. R., 7 Ch. 525. A solici- e attached for default in of a balance found due upon taxation of his bill der the common order for se (*In re Dudley*, 12 Q. B. L. J., Q. B. 16; 49 L. T. *Rush*, L. R., 9 Eq. 147; 1: *Re White*, 23 L. T. 387; 9: *Barfield* v. *Rush*, 24 L. W. R. 466: *In re Ball*, L. 104; 42 L. J., C. P. 104, decided on *Re Robinson*, 75, which was decided Debtors Act came into operation), but not for non-payment of the costs of an unsuccessful application from a refusal to discharge, or an order for delivery of his bill and taxation: *In re Hope*, L. R., 7 Ch. 523. The Court refused to order an attachment against a solicitor when the order had been interfered with by an arrangement between the parties: *Harvey* v. *Hall*, L. R., 16 Eq. 324; 43 L. J., Ch. 95; 28 L. T. 734, V.-C. B.

(*i*) See per *Jessel*, M. R., *Marris* v. *Ingram*, 13 Ch. D. at p. 342.

(*k*) These orders are now assigned to the bankruptcy judge. See ante, p. 891.

(*l*) *Hutchinson* v. *Hartmont*, W. N. 1877, 29.

(*m*) See the proviso at the end of the section, ante, p. 941, n. (*b*).

(*n*) See per *Jessel*, M. R., 13 Ch. D. at p. 343.

(*o*) *Barrett* v. *Hammond*, 10 Ch. D. 285, V.-C. B.: *Street* v. *Hope*, 10 Ch. D. 286 (n.), V.-C. M.: *Holroyde* v. *Garnett*, 20 Ch. D. 532; 51 L. J., Ch. 663: *Re Mackenzie*, 44 L. T. 618, V.-C. B. In these cases the writ was refused, as the defaulter was without means of paying; but it is not settled that this is alone sufficient reason for refusing it. See *Marris* v. *Ingram*, infra.

(*p*) *Evans* v. *Bear*, L. R., 10 Ch. 76, L.JJ. (quære whether text bears out head note): *Marris* v. *Ingram*,

PART X.

—Effect of bankruptcy.

Pending bankruptcy proceedings, a debtor is protected from attachment in respect of a debt provable in the bankruptcy, even though the debt is one from which the order of discharge will not release him (*q*). But when the attachment is issued before the bankruptcy proceedings, the institution of the latter will not entitle the debtor to be released (*r*). The Court of Bankruptcy will not order the release of a bankrupt who has been committed by the Queen's Bench Division (*s*).

Disobedience of order other than for payment of money.

If a party wilfully and contemptuously disobeys (*t*) any order of Court or Judge's order, or order of Nisi Prius (*u*), he is punishable by attachment. Thus, the non-performance of an award, if made under an order of Court, or under a submission which could be made an order of Court, is punishable by attachment (*x*). And if the order requires the party to do a thing forthwith,—as, for instance, to reinstate certain premises,—the Court, upon application, would grant an attachment, if the party does not presently begin the work, although the work were of such a nature, that it might take some time to complete it (*y*). But the Court will not grant an attachment against a party for disobedience of a rule or order, if he had obeyed it as far as was in his power (*z*), or for not making a payment on a Sunday (*a*); and they will only grant an attachment for disobedience of some *express* direction (*b*). If by the rule or order the party to whom the money is payable has to perform some act before it becomes so, he cannot apply for an attachment before performing such act (*c*).

A demand of compliance with the order should be made by the person entitled to demand it, or by some person deputed by him by letter of attorney (*d*), such letter being shown to the party ordered to pay at the time the demand is made (*e*), and a copy of the order then served on and left with him (*f*).

Failure to answer interrogatories or give discovery, &c.

A party who fails to comply with an order to answer interrogatories or give discovery or inspection of documents is liable to have

13 Ch. D. 338; 49 L. J., Ch. 123, M. R. See contra, *Ferguson* v. *Ferguson*, L. R., 10 Ch. 661, 662; 44 L. J., Ch. 615, per *James*, L. J.: *Barrett* v. *Hammond*, 10 Ch. D. 285, V.-C. B.: *Street* v. *Hope*, L. R., 10 Ch. 286 (n.), V.-C. M.: *In re Ball*, L. R., 8 C. P. 104. The former view appears to be supported by the passing of the Act of 1878.

(*q*) *Cobham* v. *Dalton*, L. R., 10 Ch. 655.

(*r*) *Earl of Lewes* v. *Barnett*, 6 Ch. D. 252.

(*s*) *In re Deere*, L. R., 10 Ch. 658.

(*t*) *Ex p. Lawrence*, 2 Dowl. 231; 2 Hawk. c. 22, s. 37. See *Davis* d. *Povey* v. *Doe*, 2 W. Bl. 892: *Camden* v. *Edie*, 1 H. Bl. 21, 49: *Cooke* v. *Tanswell*, 8 Taunt. 131; 2 Moore, 513: *Boddington* v. *Harris*, 1 Bing. 187: *Dodington* v. *Hudson*, 8 Moore, 510: *North* v. *Evans*, 2 H. Bl. 35. An attachment for disobedience of a Judge's order could not issue against two partners unless each had been served with the order: *Ex p. Willand*, 11 C. B. 544.

(*u*) *Swinfen* v. *Swinfen*, 18 C. B. 487; 25 L. J., C. P. 303.

(*x*) See post, Ch. CXXXVI.

(*y*) *Dodington* v. *Hudson*, 1 Bing. 464; 8 Moore, 510. See *Doddington* v. *Bailward*, 7 Dowl. 640.

(*z*) *Clare* v. *Blakesley*, 1 Se. N. R. 397; 1 M. & Gr. 567.

(*a*) *Hobdell* v. *Miller*, 2 Se. N. R. 163.

(*b*) *Doe* d. *Earl of Cardigan* v. *Bywater*, 7 C. B. 794: *Field* v. *Sawyer*, 6 C. B. 71.

(*c*) *Bowcker* v. *Tabbutt*, 2 D. & L. 757.

(*d*) *Doe* d. *Hickman* v. *Hickman*, 1 Se. N. R. 398: *Doe* d. *Sturgess* v. *Ward*, 2 Dowl., N. S. 706.

(*e*) See *Price* v. *Duggan*, 1 Se. N. R. 734; 4 M. & Gr. 225; 1 Dowl., N. S. 709.

(*f*) *Doe* d. *Cope* v. *Johnson*, 7 Dowl. 550. See post, p. 948.

In what

a writ of attachment issued again
ante, *Vol.* 1, p. 525.) In this ca
solicitor of the party is sufficient
order did not come to his knowle
solicitor omitting to give notice of t
attachment. (*Ord. XXXI. r.* 23.)

A solicitor who fails to enter an a
undertaking to do so is liable to atta
ante, *Vol.* 1, p. 258.)

As to attachment for non-perfor
post, *Ch. CXXXVI.*

If a person, upon being served w
use contemptuous expressions of s
itself, the Court upon affidavit of the
against him (*g*).

If the sheriff return a rescue, the C
against the rescuers named in the ret
an attachment against persons who fo
out of the sheriff's hands goods seiz
not grant it against an officer of an in
under process of that Court goods alre
process of the superior Court and pe
be his duty, without using force or
like a contempt of the Court or its pro

The High Court of Justice has a
and other officers of the Court, by atta
the exercise of their profession. *See*
may be thus punished, *Vol.* 1, p. 176 *et*

If the sheriff do not obey a notice to
grant an attachment against him (*l*).
executing writs, or for executing them
for not executing them effectually, &c
sheriff or his officers by attachment (*m*)
against the sheriff was directed to the
ruled to bring in the body, the Court gra
him, for not obeying the rule (*n*). The
liable to an attachment for not taking a

(*g*) 2 Hawk. c. 22, s. 36: *Price* *Hutchinson*, L. R., 9 Eq. 534, where a respondent was committed using violent and abusive language wards a process server. See Vol. 1, 35, as to obstructing the service a writ of summons, &c. *Rex* v. 1 Str. 185: *Rex* v. *Kendrick*, 114: *Anon.*, 1 Salk. 84; R. T. 6, 3.

(*h*) As to this, see Vol. 1, p. 815, Corner's Crown Practice, 32.

(*i*) *Burton* v. *Eyndc*, *Ex p. Sheriff* *Yorkshire*, May 11th, 1882, cor. and *Lopes*, JJ., where the had himself removed the *ex relat. ed. Cooper* v. *Asprey*, & S. 932; 32 L. J., Q. B. 209; T. 355, where a claimant seized,

(*k*) *I* 16 L. J.

(*l*) Vo motion i as in all and case

(*m*) 2 *Chapman*

(*n*) *An* 911: *Rex*

writ of attachment issued against him. (*See Ord. XXXI. r.* 20, *ante, Vol.* 1, p. 525.) In this case service of the order on the solicitor of the party is sufficient unless the party shows that the order did not come to his knowledge. (*Ord. XXXI. r.* 22.) A solicitor omitting to give notice of the order to his client is liable to attachment. (*Ord. XXXI. r.* 23.)

Solicitor failing to enter appearance.

A solicitor who fails to enter an appearance pursuant to a *written* undertaking to do so is liable to attachment. (*See Ord. XII. r.* 18, *ante, Vol.* 1, p. 258.)

Award.

As to attachment for non-performance of an award, *see fully*, *post, Ch. CXXXVI.*

Contemptuous expressions towards the Court or its process.

If a person, upon being served with the process of the Court, uses contemptuous expressions of such process, or of the Court itself, the Court upon affidavit of the fact may grant an attachment against him (*g*).

Rescue.

If the sheriff return a rescue, the Court will grant an attachment against the rescuers named in the return (*h*). The Court will grant an attachment against persons who forcibly or clandestinely remove out of the sheriff's hands goods seized by him (*i*). But they will not grant it against an officer of an inferior Court merely for seizing under process of that Court goods already taken in execution under process of the superior Court and performing what he supposes to be his duty, without using force or language imputing anything like contempt of the Court or its process (*k*).

Misbehaviour of solicitors or officers of Court, &c.

The High Court of Justice has a power of punishing solicitors and other officers of the Court, by attachment, for misbehaviour in the exercise of their profession. *See* instances in which solicitors have been thus punished, *Vol.* 1, p. 176 *et seq.*

Sheriff or coroner not executing writ, or executing it oppressively, &c.

If the sheriff do not obey a notice to return a writ, the Court will grant an attachment against him (*l*). So, in other cases, for not executing writs, or for executing them in an oppressive manner, or for not executing them effectually, &c., the Court will punish the sheriff or his officers by attachment (*m*). So where an attachment was directed to the sheriff to bring in the body, the Court granted an attachment against the coroner for not obeying the rule (*n*). The sheriff, however, was not liable to an attachment for not taking a bond in replevin; but the

---

Hawk. c. 22, s. 36: *Price inson*, L. R., 9 Eq. 534, respondent was committed violent and abusive language process server. See Vol. 1, to obstructing the service of summons, &c. *Rex* v. r. 185: *Rex* v. *Kendrick*, *Anon.*, 1 Salk. 84; R. T.

this, see Vol. 1, p. 815, 's Crown Practice, 32.

n v. *Eyndc, Ex p. Sheriff* e, May 11th, 1882, cor. *Lopes*, JJ., where the himself removed the *dat. ed. Cooper* v. *Asprey*, 32; 32 L. J., Q. B. 209; where a claimant seized, removed and sold the goods pending an interpleader summons by the sheriff. In this case the Court refused to follow *Day* v. *Carr*, 7 Ex. 883, where the attachment was refused, on the ground that the goods removed belonged to the party removing them.

(*k*) *White* v. *Chapple*, 1 C. B. 628; 16 L. J., C. P. 233.

(*l*) Vol. 1, p. 822. Notice of motion is now necessary in this case, as in all others. See *Jupp* v. *Cooper*, and cases cited post, p. 949, n. (*s*).

(*m*) 2 Hawk. c. 22, ss. 2 to 5. See *Chapman* v. *Maddison*, 2 Str. 1089.

(*n*) *Andrews* v. *Sharp*, 2 W. Bl. 911: *Rex* v. *Peckham*, Id. 1218.

PART X.

defendant, if damnified, might bring an action against him (*o*). *See Vol.* 1, pp. 34—36, for other cases in which an attachment will be granted against the sheriff or his officers. It may here be added, that an attachment cannot be obtained against the late sheriff for disobedience of an order directed to "the sheriff" generally (*p*).

Against Judges of inferior Courts, justices of peace, &c.

As to the cases in which the Court will punish the judges of inferior Courts, justices of peace, gaolers, &c., by attachment, *see* 2 *Hawk.* P. C. c. 22, *ss.* 25 *to* 32; *Rex* v. *Justices of Seaford*, 1 W. Bl. 432; and *White* v. *Chapple*, 4 C. B. 628; *Danson* v. *Le Capelain*, 7 Exch. 667. And *see post, Ch. CXXXIV.*, as to an attachment lying against a Judge of a County Court for disobeying a writ of certiorari.

Suitors perverting the course of justice.

Suitors amenable to the authority of the Court, who by force or fraud wilfully pervert or obstruct (*q*) the course of justice, are guilty of a contempt of Court, and are liable to an attachment. In one case, where an order was made by a Judge upon the plaintiff's solicitor to declare the place of abode of the plaintiff, on pain of being guilty of contempt, and the plaintiff caused his solicitor to deliver a false account of the same, the Court intimated their opinion that he was guilty of contempt of Court, and subject to an attachment (*r*). Where an action was brought in the name of A., a trustee, by the parties beneficially interested, who under the direction of the Court had given an indemnity to him, and the defendant was taken in execution in the action, the Court granted an attachment against A. for collusively discharging the defendant from custody under such execution (*s*).

Publication of pending proceedings.

As to the publication of pending proceedings, *see Tichborne* v. *Tichborne*, 39 L. J., Ch. 398; 22 L. T. 55; *Vernon* v. *Vernon*, 40 L. J., Ch. 118; *Metzler* v. *Gounod*, 30 L. T. 264; *Reg.* v. *Castro*, L. R., 9 Q. B. 219; *Buenos Ayres Gas Co.* v. *Wilde*, 29 W. R. 43.

Disobedience of process.

In certain cases, where a person wilfully disobeys the process of the Court, he is punishable by attachment (*t*). Thus the Court will in general grant an attachment against a witness if he, in contemptuous disregard of the process of the Court, do not attend at a trial when duly served with a subpœna for that purpose. As to this, *see Vol.* 1, p. 568. The motion for the attachment in such a case must be made as soon as possible (*u*).

Abuse of process of Court.

If any person abuse the process of the Court, he is punishable for it by attachment; as where execution is sued out without judgment to warrant it (*x*); or the like. So, if a person forge the process of the Court, or alter it after it has been sealed: or if he obtain judgment in ejectment, by an affidavit of service on one who is procured to personate the tenant; in these and the like cases, the Court will punish the person so offending by attachment (*y*). But merely altering a sheriff's warrant is not a con-

(*o*) *Rex* v. *Lewis*, 2 T. R. 617. See post, Ch. CVII.

(*p*) *Reg.* v. *Sheriff of Cornwall*, in *Hemming* v. *Tremera*, 7 Dowl. 600.

(*q*) *Schlesinger* v. *Flersheim*, 14 L. J., Q. B. 97; 2 D. & L. 737.

(*r*) *Smith* v. *Bond*, 2 D. & L. 460; 14 L. J., Ex. 114.

(*s*) *M'Gregor* v. *Barrett*, 6 C. B. 262.

(*t*) See the subject of attachment for disobedience of process discussed in the judgment delivered by the judges in Dom. Proc., *Miller* v. *Knox*, 4 Bing. N. C. 574. See *Mungeon* v. *Wheatley*, 6 Ex. 88; 20 L. J., Ex. 1

(*u*) *Thorpe* v. *Graham*, 3 Bi 223; 11 Moore, 55.

(*x*) *Waterhouse* v. *Saltmarsh*, H bart, 264; Fortesc. 267; 8 H. 4 2 Hawk. c. 22, ss. 39, 40.

(*y*) 2 Hawk. c. 22, s. 43.

In what

tempt of Court, unless an improp Court have also granted an attachm inflammatory papers to the jurors and for preventing some of them fr notice that the trial was put off (*a* granted an attachment against a ma with danger to his life because he h offence (*b*).

As to contempts committed in the course no necessity for an attachmen to bring the party before the Cou apprehended and imprisoned at the di any other proof or examination. jurors for misconduct, 2 *Hawk.* c. 22 attending a reference for taxation be at the conclusion of the reference fo parties who during the reference had the steps of the Master's office, assa refused to grant an attachment again assault (*c*).

As to granting an attachment for officer of the Court, *see Vol.* 1, p. 30 (*d*

It may be necessary to add, that, a grant an attachment against peers or the non-performance of an award, or gross contempts, such as rescues, disob or the like, they will (*f*). As to the priv of Parliament, *see post, Ch. CXXVII.*

An attachment does not lie against *Ord. XLII. r.* 31 (*ante*, p. 908), "Any a corporation wilfully disobeyed may, Judge, be enforced by . . . . attachme other officers thereof . . . ."

2. *Proceedings to obtai*

The Application—To whom made.]—Fo a writ of attachment was always made i present practice it has been held that the

Ewerty v. *Smith*, 1 Sc. 743; 1 Bing. N. C. 649.

(*b*) *Hale* v. *Castleman*, 1 W. Bl. 2.

(*c*) *Rex* v. *Lucas*, 3 Burr. 1564.

(*d*) *Rex* v. *Carroll*, 1 Wils. 75.

(*e*) *Ex p. Wilton*, 1 Dowl., N. S. 93; and per *Coleridge*, J., "If any misconduct takes place before a Master, which he finds to impede him in the effective and orderly discharge of his duties, he would, I presume, refuse to proceed, and report the matter to the Court, who would not allow to protect him, or to indemnify the injured party at the expense of the offender, and prevent by due punishment the recurrence of such

miscond (*d*) 1 Suppl. (*e*) T. R. 1 Id. 448. *Co-opera* (*f*) 2 *Earl Fe Langhor of St. As Charlton* (*g*) See *Shannon Ledgard*, N. P. 20 *R. Co.*, 10

mpt of Court, unless an improper use be made of it (*z*). The Court have also granted an attachment against a person for sending flammatory papers to the jurors summoned upon a certain trial, d for preventing some of them from attending, by sending them tice that the trial was put off (*a*). And, in another case, they nted an attachment against a man for threatening a prosecutor h danger to his life because he had prosecuted another for some ence (*b*).

As to contempts committed in the face of the Court, there is of rse no necessity for an attachment, that being merely a process bring the party before the Court; but he may be instantly rehended and imprisoned at the discretion of the Judge, without other proof or examination. *See*, as to the punishment of rs for misconduct, 2 *Hawk. c.* 22, *ss.* 14 *to* 24. Where parties ding a reference for taxation before the Master left the office he conclusion of the reference for the day, and one of those es who during the reference had insulted the other, then, on steps of the Master's office, assaulted the latter; the Court ed to grant an attachment against the party committing the lt (*c*).

Contempts committed in face of Court.

to granting an attachment for not paying fees due to an r of the Court, *see Vol.* 1, p. 30 (*d*). may be necessary to add, that, although the Courts will not an attachment against peers or members of Parliament for on-performance of an award, or the like (*e*); yet, for very contempts, such as rescues, disobedience of the Queen's writs like, they will (*f*). As to the privilege of peers and members liament, *see post, Ch. CXXVII.*

For not paying officer's fees.

Against peers or members of Parliament.

attachment does not lie against a corporation (*g*); but by *LII. r.* 31 (*ante*, p. 508), "Any judgment or order against oration wilfully disobeyed may, by leave of the Court or a be enforced by . . . . attachment against the directors or fficers thereof . . . ."

Against a corporation.

2. *Proceedings to obtain Writ.*

pplication—To whom made.]—Formerly the application for attachment was always made in open Court. Under the practice it has been held that the application may be made

The application.

Smith, 1 Sc. 743; 1 Bing.

v. *Castleman*, 1 W. Bl. 2.
v. *Lucas*, 3 Burr. 1564.
v. *Carroll*, 1 Wils. 75.
. *Wilton*, 1 Dowl., N. S.
ber *Coleridge*, J., "If any takes place before a ich he finds to impede him ive and orderly dischargo s, he would, I presume, proceed, and report the he Court, who would not rotect him, or to indem- red party at the expense ler, and prevent by due the recurrence of such misconduct."

(*d*) 1 Lil. Prac. Reg. 598; Tidd's Suppl. 51.

(*e*) *Walker* v. *Earl Grosvenor*, 7 T. R. 171: *Catmur* v. *Knatchbull*, Id. 448. See *In re Anglo-French Co-operative Society*, 11 Ch. D. 533.

(*f*) 2 Hawk. c. 22, s. 33: *Rex* v. *Earl Ferrers*, 1 Burr. 634: *Foley* v. *Langhorne*, Say. 50. See *R.* v. *Bishop of St. Asaph*, 1 Wils. 332: *Lechmere Charlton's case*, 2 Myl. & Cr. 316.

(*g*) See *Mackenzie* v. *The Sligo and Shannon R. Co.*, 9 C. B. 250: *Reg.* v. *Ledgard*, 1 Q. B. 619; sed vide, Bull. N. P. 201: *Reg.* v. *Eastern Counties R. Co.*, 10 Ad. & El. 567.

PART X.

to a Judge at Chambers (*h*), and it generally is so made. If it is so made, the practice as to the notice of motion referred to in this chapter must be followed with regard to the summons. It should in all cases be made promptly (*i*), and any delay must be explained in the affidavit in support of it (*k*).

Service of order.

Service of Order, for Disobedience to which Attachment is sought.]—Where it is proposed to enforce obedience to, or punish disobedience of, an order, it is necessary that the order should be properly served on the party against whom the attachment is sought (*l*). Except under special circumstances the party must be served personally with a copy of the order, and be shown the original at the same time (*m*); and, moreover, a distinct demand to comply with the order must at the time of the service be made upon him (*n*). In the case of an order for an answer to interrogatories, or for discovery or inspection, *Ord. XXXI. r.* 22 (*Vol.* 1, p. 525) provides that service on the solicitor of the party shall be sufficient (*o*).

Sufficient notice of an injunction may be given by telegram to render a person disobeying it liable to committal for contempt of Court (*o*). It must, however, be shown that the party had notice of the injunction. The Court refused to commit a person who, *bonâ fide*, and not unreasonably, believed a telegram to be a trick (*p*).

Where the judgment or order sought to be enforced is one requiring any person to do any act, the provisions of *Ord. XLI. r.* 5 (*Vol.* 1, p. 766) must be complied with (*q*), whether the order is one of which personal service is necessary or not (*r*).

Notice of motion.

Notice of Motion.]—By *R. of S. C., Ord. XLIV. r.* 2, "No writ of attachment shall be issued without the leave of the Court or a Judge, to be applied for on notice to the party against whom the attachment is to be issued."

(*h*) *Salm Kyrburg* v. *Posnanski*, 13 Q. B. D. 218; 53 L. J., Q. B. 428; 32 W. R. 752. See *In re Knight*, *Knight* v. *Gardiner*, W. N. 1883, 162. Cp. *Snow* v. *Bolton*, 17 Ch. D. 433. A Master has no jurisdiction. Ord. LIV. r. 12 (a).

(*i*) *Rex* v. *Stretch*, 4 Dowl. 30; 3 A. & E. 503; 5 M. & N. 178.

(*k*) *Storey* v. *Garry*, 8 Dowl. 299: *R.* v. *Rogers*, 3 Dowl. 605: *Rex* v. *C. D.*, 1 Chit. 723.

(*l*) *United Telephone Co.* v. *Dale*, 25 Ch. D. 778; 53 L. J., Ch. 295; 50 L. T. 85; 32 W. R. 428.

(*m*) *Rex* v. *Smithies*, 3 T. R. 351: *Barnard* v. *Berger*, 1 New Rep. 121: *Indington* v. *Hudson*, 1 Bing. 410; 8 Moore, 510: *Re Lowe*, 4 B. & Ad. 412: *Greenwood* v. *Dyer*, 5 Dowl. 255. If the defendant admits that he has received (*Phillips* v. *Hutchinson*, 3 Dowl. 583), or refuses to receive (*Rex* v. *Koops*, 3 Dowl. 566), or by knocking down or other violence prevents the serving of the order, this is equivalent to personal service: *Wenham* v. *Downes*, 3 Dowl. 573. It need not be placed in his hands if it is shown so that he could read its contents: *Calvert* v. *Redfearn*, 2 Dowl. 505. A service of the original rule would be sufficient: *Leaf* v. *Jones*, 3 Dowl. 315: *Williams* v. *Davies*, 33 L. J., P. M. & A. 127.

(*n*) *Swinfen* v. *Swinfen*, 18 C. B. 485; 25 L. J., C. P. 303; *Dolfinos* v. *Hudson*, 1 Bing. 410; 8 Moore, 510. To obtain an attachment, all the necessary steps must have been taken at the same time. *Rogers* v. *Twisdel*, 3 Dowl. 572; *Doe d. S.* v. *Bigge* v. *Ward*, 2 Dowl., N. S. 7[illegible]. See *Davies* v. *Skerlock*, 7 Dowl. 592.

(*o*) Cp. *Little* v. *Roberts*, 30 L. T. 367; *Joy* v. *Hadley*, 22 Ch. D. 57[illegible]; 17 L. T. 615.

(*p*) *Ex p. Langley*, 13 Ch. D. 110; 49 L. J., Bk. 1.

(*q*) Cp. *Thomas* v. *Paliv*, 21 Ch. D. 360; 47 L. T. 207; 30 W. R. 7[illegible] (C. A.).

(*r*) *Hampden* v. *Wallis* (C. A. 26 Ch. D. 746; 50 L. T. 515; 32 W. R. 808.

Notice of

By *Ord. LII. r.* 2, "No motion order to show cause shall hereaf . . . . (*b*) for attachment . . . ." cases be made on notice (*s*). From for the writ will no longer in any There appears to have been some applies to applications to attach f before the Judicature Acts came i that, on principle, the view that the is the correct one (*u*). The notice say, two clear days at least must ela it is given and the day named in it f cation is made at Judge's Chambers, tuted for the notice of motion.

By *Ord. LII. r.* 4, "Every notice ment . . . . shall state in general te cation; and, where any such motio affidavit, a copy of any affidavit inten with the notice of motion."

Service of the Notice of Motion.]—U action the notice of motion must be se against whom it is sought to issue the when he is a solicitor (*y*). Where, ho an action, service of the notice on th suffice (*z*). Personal service might in if it were shown that the notice had rea sought to be attached (*a*), or perhaps cumstances were shown (*b*). Service at has been ordered to pay the costs of a held sufficient (*c*).

(*s*) Cp. *Eyude* v. *Gould*, 9 Q. B. D. 265; 51 L. J., Q. B. 425; *Jupp* v. *Cooper*, 5 C. P. D. 26: *Fowler* v. *Ashford*, 45 L. T. 46.

(*t*) *Jupp* v. *Cooper*, supra.

(*u*) See *In re A Solicitor*, 1 Ch. D. 448: *Anon.*, 24 W. R. 103: *Dallas* v. *Glyn*, 3 Ch. D. 190; 46 L. J., Ch. 21: *Baigent* v. *Baigent*, 1 P. D. 421. *Garling* v. *Royds*, 1 Ch. D. 81; 45 L. J., Ch. 56.

(*x*) *Birket* v. *Holme*, 4 Dowl. 556. See R. 163, H. T. 1853: *Anon.*, 1 & R. 520: *Stimmell* v. *Tower*, 1 M. & R. 88: *Anon.*, 1 Chit. Rep. *M'Itham* v. *Smith*, 8 T. R. 86: *Rex* v. *Percy*, 50 L. J., Ch. 251; L. T. 248. But see *In re A rector*, 14 Ch. D. 152.

(*y*) *Wilkinson* v. *Pennington*, 6 Dowl. 183; 5 Se. 401: *Re Pyne*, 1 D. 503; 13 L. J., Q. B. 37: *Albin* Dowl. 563. See 10 Jur. n.

(*z*) *In re A Solicitor*, 14 Ch. D. 45 L. J., Ch. 295, M. R.: *Brown* v. *Sabin*, 5 Ch. D. 511; 46 L. J., Ch. 7 L. T. 248, W action except This a cases a mitted (*a*) L. J., *Bower*, & L. 70 2 Dowl. *Phillips* (*b*) *R Fennell*, 537; *W Re Wha* the part *Guard*, *Williams Prosser*, (*c*) *Ti* 582, V.-C Ch. D. 1 *Perry*, su

By *Ord. LII. r.* 2, "No motion or application for a rule *nisi* or order to show cause shall hereafter be made in any action, or . . . (b) for attachment . . . ." The application must now in all cases be made on notice (*s*). From this it follows that the order or the writ will no longer in any case be made as of course (*t*). There appears to have been some doubt as to whether this rule applies to applications to attach for disobedience of orders made before the Judicature Acts came into force, but it is submitted that, on principle, the view that the rule does apply to those cases is the correct one (*u*). The notice is a two-day notice, that is to say, two clear days at least must elapse between the day on which notice is given and the day named in it for the hearing. If the application is made at Judge's Chambers, a summons should be substituted for the notice of motion.

By *Ord. LII. r.* 4, "Every notice of motion . . . . for attachment . . . . shall state in general terms the grounds of the application; and, where any such motion is founded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion."

Service of the Notice of Motion.]—Unless the motion is made in an action the notice of motion must be served personally on the person against whom it is sought to issue the writ of attachment (*x*), even where he is a solicitor (*y*). Where, however, the motion is made in an action, service of the notice on the solicitor of the party will suffice (*z*). Personal service might in some cases be dispensed with where it is shown that the notice had reached the hands of the person intended to be attached (*a*), or perhaps when some very special circumstances were shown (*b*). Service at the office of a solicitor who has been ordered to pay the costs of a party to an action has been held sufficient (*c*). Service of notice of motion.

Lynde v. *Gould*, 9 Q. B. D. 425; *Jupp* v. L. J., Q. B. 425; *Jupp* v. 5 C. P. D. 26: *Fowler* v. 45 L. T. 46.

pp v. *Cooper*, supra.

In re A Solicitor, 1 Ch. D. *nn.*, 24 W. R. 103: *Dallas* 3 Ch. D. 190; 46 L. J., Ch. *ett* v. *Baigent*, 1 P. D. 421. *ng* v. *Royds*, 1 Ch. D. 81; Ch. 56.

bet v. *Holme*, 4 Dowl. 556. 3, H. T. 1853: *Anon.*, 1 520: *Stannell* v. *Tower*, 1 88: *Anon.*, 1 Chit. Rep. *am* v. *Smith*, 8 T. R. 86; *erry*, 50 L. J., Ch. 251; 218. But see *In re A* 4 Ch. D. 152.

inson v. *Pennington*, 6 5 Se. 401: *Re Pyne*, 1 D. 3 L. J., Q. B. 37: *Albin* 3 Dowl. 563. See 10 Jur.

A Solicitor, 14 Ch. D. Ch. 295, M. R.: *Brown-* 5 Ch. D. 511; 46 L. J., Ch. 728: *Richards* v. *Kitchin*, 36 L. T. 730, V.-C. B. In *Mann* v. *Perry*, 50 L. J., Ch. 251; 44 L. T. 248, V.-C. B. held, that even in an action personal service was necessary, except under special circumstances. This appears inconsistent with the cases above cited, in which it is submitted the correct view was adopted.

(*a*) *Re Morris*, 1 B. C. C. 190; 22 L. J., Q. B. 417: *In the matter of Bower*, 1 B. & C. 264: *Re Pyne*, 1 D. & L. 703. And see *Allier* v. *Newton*, 2 Dowl. 582: *Rex* v. *Koops*, 3 Id. 566: *Phillips* v. *Hutchinson*, Id. 583.

(*b*) *Re Barwick*, 3 Dowl. 703: *Re Fennell*, Id.: *Dicas* v. *Warne*, 1 Se. 537: *Wenham* v. *Downes*, 3 Dowl. 573: *Re Whalley*, 14 M. & W. 731, where the party was evading service: *Re Guard*, 6 Jur. 916, B. C.: *Potter* v. *Williams*, 6 Jur. 508, B. C.: *Green* v. *Prosser*, 2 Dowl. 99.

(*c*) *Tilney* v. *Stansfield*, 28 W. R. 582, V.-C. H.: *In re A Solicitor*, 14 Ch. D. 152, M. R. But see *Mann* v. *Perry*, supra, n. (*z*).

PART X.

The necessity for personal service may be waived by the party appearing at the hearing (*d*), or appearing by consent and consenting to an adjournment (*e*).

Substituted service might perhaps in some special cases be allowed by order for that purpose (*f*), but it is not clear that this could be done (*g*).

Affidavits.

Affidavit in Support.]—The application must be supported by an affidavit showing clearly the nature of the act, or disobedience, or contempt for which the attachment is sought (*h*), and a copy of such affidavit must be served with the notice of motion (*i*). When the disobedience complained of can be sworn to positively by one person only, as when a solicitor has been ordered to deliver a bill of costs to a particular person (*k*), the affidavit should in general be made by that person. The service of the order or judgment (if any) for disobedience of which the attachment is sought, and the demand of compliance (*see ante*, p. 948) must also be shown by affidavit. If the party do not appear, an affidavit of service of the notice of motion is necessary.

The respondent may oppose the application by affidavits denying the act or disobedience complained of, or explaining it away.

Although the party, in showing cause, deny by his affidavit what is imputed to him, yet, if what he states be incredible, the Court will order the attachment to issue (*l*). It is good cause against an attachment for disobeying a rule of Court, that every possible exertion has been made to comply with the rule, but without effect (*m*), or that the disobedience arose from a wrong construction of the order, which the party was advised and believed to be correct (*n*), or, it would seem, that the order, though purporting to be made with his consent, was, in reality, entered into without his knowledge (*o*). And in general it would seem that an attachment would not be granted unless the contempt was intentional.

Hearing.

The Hearing.]—The motion should in general be made by counsel, and not by the party (*p*).

The Court in some cases, as when it appears probable that the party will comply with the order for disobedience to which the attachment is sought, will direct that the writ is to lie in the office

(*d*) *Levy* v. *Duncombe*, 3 Dowl. 447.

(*e*) *Ex p. Alcock*, 1 C. P. D. 68; 45 L. J., C. P. 86; *Cartwright* v. *Blackworth*, 1 Dowl. 489.

(*f*) *Lechmere Charlton's case*, 2 M. & Cr. 316; 6 L. J., Ch. 185: *Tibey* v. *Stansfield*, supra.

(*g*) Per *Denman*, J., at Ch., *Anon.*, W. N. 1876, 166.

(*h*) *Garden* v. *Cresswell*, 2 M. & W. 319. In the case of a rescue, the sheriff's return is, it appears, sufficient without affidavit. *Gobbey* v. *Dewes*, 10 Bing. 112; 3 Moo. & Sc. 556.

(*i*) Ord. LII. r. 4, ante, p. 949: *Litchfield* v. *Jones*, 25 Ch. D. 64; 32 W. R. 288.

(*k*) *Potter* v. *Back*, 8 Dowl. 872.

(*l*) *In the matter of Crossley*, 6 T. R. 701.

(*m*) *Cooke* v. *Tanswell*, 8 Taunt. 131. See *Dodington* v. *Bailward*, 7 Sc. 733; 7 Dowl. 640: *Clare* v. *Blakesley*, 1 Sc. N. R. 397; 1 M. & G. 567; 8 Dowl. 835.

(*n*) *Fuller* v. *Prentice*, 1 H. Bl. 49: *Camden* v. *Edie*, 1 H. Bl. 21.

(*o*) See *Bodington* v. *Harris*, 1 Bing. 187.

(*p*) *Ex p. Fenn*, 2 Dowl. 521: *Ex p. Pitt*, id. 439. But see *Reg.* v. *Lord John Russell*, 7 Dowl. 693.

The He

for a few days. It is not the pr
"unless the order is complied with
Sometimes when an application
reason of a formal defect, another
attachment (*r*).

Costs.]—The costs of the proceedi
and are therefore in the discreti
They should be mentioned, and an
hearing of the application (*s*). The
drawn up as to show that the party
that the committal does not apply
A person who has cleared his conte
paying the costs, but the Court o
make an order for their payment (*u*).

Appeal.]—The Court of Appeal
order granting or refusing the atta
refusal, however, strong grounds m
Court of Appeal to interfere with the

3. The Writ, and Proc

The writ of attachment, of which a
to the *R. of S. C.* (*App. H. No.* 12)
manner as any other writ of executi
Ch. LXXIV.) The term "writ of ex
R. of S. C., includes writs of attachm
the rules with regard to execution ap
Vol. 1, *Ch. LXXIV.*) A *præcipe*, of w
the Appendix to the rules (*App. G. N*
instance, be filled up and presented
should state to whom the writ is to be
act or disobedience in respect whereof t
issue.

In general, the attachment is directed
ments against the sheriff are directed
tachment against the coroner is directed
be tested in the name of the Lord Chan
vacant (*Ord. II. r.* 8, *Vol.* 1, p. 799), and
on which it is issued (*Id.*; and *Ord. XL*
The following practical directions may
præcipe stamped with a 5s. impressed fee
seal), and also a form of writ of attachm
the præcipe should be signed by the solicit
writ, or by the party issuing it, if he d

(*r*) *Dixon* v. *Oliphant*, 15 M. & W.

(*s*) *Abud* v. *Riches*, 2 Ch. D. 528; 45 L. J., Ch. 649.

(*t*) *Ex p. Sharp, Re Hind*, 37 L. 108.

(*u*) *Jackson* v. *Mawby*, 1 Ch. D. 46 L. J., Ch. 53: *Micklethwaite* v. *Fletc*

(*x*) *Jo* 20 Ch. D *Ashwor* is expla L. T. 13

(*y*) Se

(*z*) Id.

or a few days. It is not the practice to order the writ to issue unless the order is complied with."

Sometimes when an application for an attachment has failed by reason of a formal defect, another application may be made for an attachment (*r*). Making second application where first unsuccessful.

Costs.]—The costs of the proceedings are regulated by *Ord. LXV.* d are therefore in the discretion of the Court or Judge (*s*). ey should be mentioned, and an order as to them obtained at the aring of the application (*s*). The order for the writ must be so wn up as to show that the party is ordered to pay the costs, and t the committal does not apply to the nonpayment of them (*t*). person who has cleared his contempt cannot be detained for not ing the costs, but the Court on granting his discharge will ke an order for their payment (*u*). Costs.

ppeal.]—The Court of Appeal will hear an appeal from the r granting or refusing the attachment (*x*). In the case of a sal, however, strong grounds must be shown to induce the t of Appeal to interfere with the decision of the Court below (*x*). Appeal.

3. *The Writ, and Proceedings thereon.*

writ of attachment, of which a form is given in the Appendix e *R. of S. C.* (*App. H. No.* 12) (*y*), is sued out in the same er as any other writ of execution. (*See fully, ante, Vol.* 1, *XXIV.*) The term "writ of execution," when used in the *S. C.*, includes writs of attachment (*Ord. XLII. r.* 8); and les with regard to execution apply to this writ. (*See ante, Ch. LXXIV.*) A *præcipe*, of which a form is also given in ppendix to the rules (*App. G. No.* 10) (*z*), must, in the first ce, be filled up and presented at the office. The *præcipe* state to whom the writ is to be directed and the particular lisobedience in respect whereof the writ has been ordered to How sued out.

eneral, the attachment is directed to the sheriff; but attach- gainst the sheriff are directed to the coroner, and an at- nt against the coroner is directed to elisors. The writ must d in the name of the Lord Chancellor, unless that office is *Ord. II. r.* 8, *Vol.* 1, p. 799), and must bear date on the day h it is issued (*Id.*; and *Ord. XLII. r.* 14).

llowing practical directions may be useful:—*Procure a form* Practical directions. *e stamped with a* 5*s. impressed fee stamp* (*see Orders in App.*, *d also a form of writ of attachment. Fill them both up. ipe should be signed by the solicitor of the party issuing the by the party issuing it, if he do so in person. Take the*

---

n v. *Oliphant*, 15 M. & W.

v. *Riches*, 2 Ch. D. 528; n. 649.

Sharp, Re Hind, 37 L.

n v. *Mawby*, 1 Ch. D. , Ch. 53: *Micklethwaite* v. *Fletcher*, 27 W. R. 793.

(*x*) *Jarman* v. *Chatterton* (C. A.), 20 Ch. D. 493; 51 L. J., Ch. 471, where *Ashworth* v. *Outram*, 5 Ch. D. 943, is explained: *Hayter* v. *Beale*, 41 L. T. 131.

(*y*) See form, Chit. F., p. 476.

(*z*) Id.

PART X.

præcipe and writ, and the order for the attachment, together with an office copy of the judgment or order sought to be enforced, if any (*Vol.* 1, p. 795), *to the proper office at the Royal Courts. The officer there will stamp the writ, and file the præcipe.* The name and address of the solicitor or party suing out the writ should be indorsed thereon (*a*). *When the writ is directed to the sheriff, take the attachment to the under-sheriff's office, where a warrant will be issued to one of the sheriff's officers.* An attachment, it seems, cannot be issued after one year from the date of the order, without an order to revive the attachment, and which may be obtained upon an affidavit that the contempt was not satisfied for which the attachment was granted, and accounting for the delay (*b*). Several writs bearing the same teste may issue at the same time into different counties; but in that case care must be taken, when the party in contempt has been arrested in one county, to countermand the instructions to execute the writ in the others, because if this be not done, he may, after having been taken and discharged, be taken a second time, which might subject the party issuing the attachment to an action for false imprisonment (*c*). *See Vol.* 1, p. 822, where the proceedings by attachment against the sheriff for not returning writs have been considered.

Effect of writ of attachment.

By *R. of S. C., Ord. XLIV. r.* 1, "A writ of attachment shall have the same effect as a writ of attachment issued out of the Chancery Division has heretofore had."

Delivery to sheriff.

The writ should be delivered to the sheriff in the usual way. *See Vol.* 1, p. 807.

Warrant.

On the writ being delivered to him, the sheriff should make out his warrant for the arrest of the party against whom the writ is issued, and deliver it to the officer by whom it is to be executed. (*See as to warrants, Vol.* 1, p. 807.)

Execution of writ.

It may be necessary to mention, that the arrest cannot be made on a Sunday (*d*). It seems the sheriff is not the proper person to receive, and cannot be called upon to pay into Court, money paid to him under an attachment (*e*). The sheriff may break open the outer door of a house in order to execute the writ (*f*).

Where prisoner in custody of keeper of Queen's Prison.

There is some doubt as to the course to be adopted for the purpose of charging a prisoner in custody of the keeper of the Queen's Prison with an attachment. It seems to be the usual practice to have the prisoner brought up on *habeas* for the purpose of so charging him, and to have him charged accordingly (*g*). As to charging a prisoner in execution, *see post, Ch. CV.*

Notice to return.

If the sheriff or other officer to whom the writ of attachment is directed does not return it when necessary, you may give him notice to do so, and if he does not comply with such notice he may

(*a*) As to this indorsement and other indorsements on writs of execution, see Vol. 1, p. 800.

(*b*) See Corner's Crown Practice, Appendix, 18.

(*c*) See Corner's Crown Practice, 27; Vol. 1, p. 793.

(*d*) *Rex* v. *Myers*, 1 T. R. 265, 266: *M'Pherson* v. *Smith*, 8 T. R. 86. But see *Anon.*, Willes, 459: *Ex p. Whitchurch*, 1 Atk. 55.

(*e*) *Rex* v. *Palmer*, 2 East, 411: *Rex* v. *Sheriff of Devon*, 3 Dowl. 10: post, p. 954.

(*f*) *Harvey* v. *Harvey*, 26 Ch. D. 641; 51 L. T. 508; 33 W. R. 75.

(*g*) See *Boucher* v. *Sims*, 2 C. M. & R. 392; 4 Dowl. 173. And see *Briant* v. *Clutton*, 5 Dowl. 66.

be attached for contempt (*h*). It
given in the Rules does not fix any da
executed or returned. If no retur
time the notice requiring a return m
return the writ should be given in
Vol. 1, p. 817). It should require
four days next after the service of t
or Middlesex, or within eight days in

The sheriff may return that he has
the writ is issued—*cepi corpus* (*k*),
bailiwick—*non est inventus* (*k*). He ma
that he has taken the party to be att
be removed from his home—*languidu*

Upon the sheriff returning *non e*
writs of attachment may issue in like
until the party to be attached be fo
Acts, in the Queen's Bench, if an i
application had to be made to the Co
attachment, on an affidavit accountin
that the contempt had not been satisfi

In Chancery, if a defendant was t
want of appearance or answer, he m
safe custody, or put in bail to the sh
only to compel an appearance in Court
an answer to the interrogatories, that p
whether the sheriff detained the defe
cient security for the appearance or a
after taking the defendant as above,
without any sureties, but this was a
would be liable if the defendant was not
time. But an attachment out of Chanc
of a decree or order were not a bailable
taken upon it was committed to prison,
large. If the sheriff neglected his duty i
for the loss actually sustained by his neg

When a person is taken on an attachm
until he clears his contempt by performin
and paying the costs of the contempt, o
due course of law.

As to the treatment of persons imprison
contempt of Court, *see* 40 & 41 *V. c.* 21, *ss.*

Discharge for Irregularity, &c.]—For ce
attachment the party attached may obtain
tion to the Court or a Judge (*o*). The a

See Ord. LII. r. 11, ante, p. 817.
Owen v. *Pritchard*, W. N. 147.
See ante, Vol. 1, p. 817.
See forms, Chit. F. p. 438.
See form, Chit. F. id. See as to return, ante, Vol. 1, p. 818; son on Sheriff, 611; Tidd's ms, 389. Cp. *Culley* v. *Butti-*

fant, 1 C
(*m*) Se
Good v. *
(*n*) Sec
A. 56.
(*o*) See
R. v. *Car*
In re Hol

attached for contempt (*h*). It will be observed that the form ven in the Rules does not fix any date within which the writ is to be ecuted or returned. If no return be made within a reasonable ie the notice requiring a return may be given (*i*). The notice to urn the writ should be given in the ordinary manner (*see ante*, . I, p. 817). It should require the return to be made within r days next after the service of the notice, if served in London Middlesex, or within eight days in all other cases (*j*).

Sheriff's return.

he sheriff may return that he has taken the party against whom writ is issued—*cepi corpus* (*k*), or that he is not within the iwick—*non est inventus* (*k*). He may also return if such be the fact he has taken the party to be attached, but that he is too ill to emoved from his home—*languidus* (*l*).

Alias writs.

pon the sheriff returning *non est inventus*, alias and pluries s of attachment may issue in like manner as the original writ, the party to be attached be found. Before the Judicature in the Queen's Bench, if an interval of a year elapsed, an cation had to be made to the Court or a Judge to revive the ument, on an affidavit accounting for the delay, and showing he contempt had not been satisfied (*m*).

Chancery, if a defendant was taken on an attachment for of appearance or answer, he must have gone to prison for ustody, or put in bail to the sheriff; for, as the arrest was o compel an appearance in Court at the return of the writ, or wer to the interrogatories, that purpose was equally answered r the sheriff detained the defendant's person or took suffi- ecurity for the appearance or answer. The sheriff might, aking the defendant as above, have let him go at large t any sureties, but this was at the sheriff's peril, as he be liable if the defendant was not forthcoming at the proper But an attachment out of Chancery for the non-performance ree or order were not a bailable process (*n*); and a person pon it was committed to prison, and not suffered to go at f the sheriff neglected his duty in this respect, he was liable oss actually sustained by his neglect.

a person is taken on an attachment, he remains in custody clears his contempt by performing the act required of him ng the costs of the contempt, or until he is discharged in se of law.

he treatment of persons imprisoned under attachments for of Court, *see* 40 & 41 V. *c.* 21, *ss.* 26, 41.

Discharge for irregularity, &c.

ge for Irregularity, &c.]—For certain irregularities in the t the party attached may obtain his discharge by appli- he Court or a Judge (*o*). The application must be made

---

d. LII. r. 11, ante, p. 817.
v. *Pritchard*, W. N.

nte, Vol. 1, p. 817.
rns, Chit. F. p. 438.
n, Chit. F. id. See as to
ante, Vol. 1, p. 818;
Sheriff, 611; Tidd's
Cp. *Culley* v. *Butti-*
OL. II.

fant, 1 Ch. D. 84; 45 L. J., Ch. 200.

(*m*) See Corner's Crown Practice: *Good* v. *Wilks*, 6 M. & S. 413.

(*n*) See *Lewis* v. *Morland*, 2 B. & A. 59.

(*o*) See *Rex* v. *Burgess*, 2 Jur. 856; *R.* v. *Carttar*, 19 L. J., Q. B. 422; *In re Holt*, 11 Ch. D. 168.

PART X.

within a reasonable time (*p*). The Court refused to grant a writ of habeas corpus to bring up a party in custody under an attachment, in order to enable him to move in person to set it aside (*q*).

As to setting aside an attachment against a sheriff for not returning a writ, &c. after he has returned it, &c., *see Vol.* 1, p. 824.

4. *Discharge of Party attached.*

For irregularity.

As to the discharge of the writ and proceedings thereon for irregularity, *see supra*, p. 830.

On clearing contempt, &c.

A person taken on an attachment who wishes to obtain his discharge must obtain an order for the purpose. It seems that where the act required to be done is certified by some officer of the Court to have been done, as in the case of an order to make and file an affidavit, the application is *ex parte*, and must be supported by the officer's certificate of the performance of the act. In other cases the application, if made to the Court, is made on notice to the party issuing the attachment, and if made to a Judge at Chambers it is made on summons, and must be supported by an affidavit showing the performance of the act required, or that the contempt has been cleared (*r*).

Cases within Debtors Act at expiration of one year.

In the case of a person against whom the writ of attachment has issued for non-payment of a sum of money, the *Debtors Act*, 1869 (*ante*, p. 891), expressly limits the term for which he can be kept in prison to one year, and at the expiration of the year he is entitled to be released. If the term of imprisonment is not limited by the writ or committal order, an application and order for release appears necessary (*s*). But in the form for use in cases within the Debtors Act, a note to the effect that the writ does not authorize an imprisonment beyond the year is added, and when this is so no order for release is necessary (*t*). A sheriff is not liable for detaining a party beyond the year if the warrant or writ under which he arrests him does not limit the term of his imprisonment (*u*).

In cases within the Debtors Act where the party is entitled to his release on clearing his contempt, he cannot be detained for non-payment of the costs of the motion to commit or release him, though the Court making the order for his release will order him to pay them (*x*).

(*p*) *Reg.* v. *Burgess*, 3 N. & P. 366; 8 A. & E. 275.

(*q*) *Ford* v. *Nassau*, 1 Dowl., N. S. 631.

(*r*) By the Consolidated Orders (Chancery), Ord. XXIX. r. 3, it was provided that when a person is committed for breach of an order he shall not be released until he has performed the same in all things immediately to be performed, and has given such security as the Court may direct to perform the other parts (if any) of the decree or order. See Dan. Ch. Pract. 6th ed. 890.

(*s*) *In re Thompson, Walty* v. *Aylett*, 43 L. J., Ch. 721; 30 L. T. 783.

(*t*) *In re Edwards, Brook* v. *Edwards*, 21 Ch. D. 230; 51 L. J., Ch. 912.

(*u*) *Greaves* v. *Keen*, 4 Ex. D. 73; 40 L. T. 216.

(*x*) *Jackson* v. *Mawby*, 1 Ch. D. 86; 45 L. J., Ch. 53; *Mickelthwaite* v. *Fletcher*, 27 W. R. 793.

CHAPTER LXXXIV.

LEAVE TO ISSUE EXECUTION.

PAGE

1. *In general—When necessary—Proceedings to obtain, &c.* 955
Where Six Years have elapsed since the Judgment or Order 956
Where Change has taken place in the Parties entitled or liable 959
Where a Husband is entitled or liable to Execution for or against a Wife 963
5. *On Judgment of Assets in futuro* 963
6. *Against Shareholders of Company* 963
7. *On Judgment subject to Condition or Contingency* 963
8. *On Judgment against a Firm* 963
9. *For or against Persons not Parties to the Action* 963

1. *In general—When necessary—Proceedings to obtain, &c.*

CH. LXXXIV.

When necessary.

ertain cases it is necessary to obtain leave to issue execution. y *Ord. XLII. r.* 23, "In the following cases, viz.:

a.) Where six years have elapsed since the judgment or date of the order, or any change has taken place by death or otherwise in the parties entitled or liable to execution;

b.) Where a husband is entitled or liable to execution upon a judgment or order for or against a wife;

c.) Where a party is entitled to execution upon a judgment of assets *in futuro*;

d.) Where a party is entitled to execution against any of the shareholders of a joint stock company upon a judgment recorded against such company, or against a public officer or other person representing such company;

rty alleging himself to be entitled to execution may apply Court or a Judge for leave to issue execution accordingly. ch Court or Judge may, if satisfied that the party so applying led to issue execution, make an order to that effect, or may hat any issue or question necessary to determine the rights parties shall be tried in any of the ways in which any question ction may be tried. And in either case such Court or Judge pose such terms as to costs or otherwise as shall be just."

is also necessary where the party seeking to issue execu- nly entitled to do so subject to or upon the fulfilment of dition or contingency. (*See Ord. XLII. r.* 9, *post*, p. 963.) ere it is desired to issue execution on a judgment against rship firm against a person who has not appeared as a or been served with the writ, or admitted on the plead- at he is a partner. (*See Ord. XLII. r.* 10, *post*, *Ch.*

Also, where it is desired to issue execution for or against

PART X.

Proceedings to obtain leave.

a person not a party to the action in which the judgment has been obtained. (*See Ord. XLII. r.* 26, *ante*, p. 793.)

The application for leave to issue execution should be made to a Master at Chambers. In general it should be made by summons, which should be served on the person against whom it is desired to issue execution. In case of a change in the parties entitled to issue execution the application may be made *ex parte* (*a*). In all cases the application should be supported by an affidavit setting out the facts on which it is based.

2. *When Six Years have elapsed since the Date of the Judgment or Order.*

Execution in six years without leave.

By *R. of S. C., Ord. XLII. r.* 22, "As between the original parties to a judgment or order, execution may issue at any time within six years from the recovery of the judgment or the date of the order" (*b*).

(*a*) *Mercer* v. *Lawrence*, 26 W. R. 506, V.-C. M.: *Davis* v. *Andrews*, W. N. 1884, 94.

(*b*) See former enactment on this subject C. L. P. Act, 18[illegible] s. 128. Before this Act, when a year and a day had elapsed after judgment signed, without execution being sued out upon it, the law presumed that the judgment had been satisfied, or that the plaintiff had released the execution; and therefore it was that a scire facias was required in such a case, in order to give an opportunity to the defendant to show that the judgment had been already satisfied, or other cause, if he could, why execution should not issue against him (2 Inst. 470; 2 Bac. Abr. Execution, H.). This was necessary in the case of an elegit, as in other cases: *Putland* v. *Newman*, 6 M. & Sel. 179: *Seymour* v. *Greenvill*, Carth. 283: *Seymour* v. *Greenvill*, 2 Show. 235; Comb. 232; Clift. 874, 883. And so strict was the rule in this respect, that a plaintiff could not sue out a *ca. sa.* after the year, even for the purpose of proceeding against the bail, without first reviving the judgment against the principal by scire facias: *Cholmondeley* v. *Bealing*, 2 Ld. Raym. 1096: *Cholmley* v. *Veal*, 6 Mod. 304. At common law a judgment in a personal action could not be revived, after a year and a day, by scire facias, but the only remedy the plaintiff had was to bring an action of debt on the judgment. 2 Inst. 469; Co. Lit. 290, b. In real (2 Inst. 470: *Booth* v. *Booth*, 6 Mod. 288) and mixed actions (*Withers* v. *Harris*, 1 Salk. 258; 2 Ld. 600; 7 Mod. 64; 2 Ld. Raym. 806: *Proctor* v. *Johnson*, 1 Ld. Raym. 669), it was otherwise. By stat. Westm. 2 (13 Ed. 1), c. 45, however, all matters inrolled, to which the Court can give effect, shall have such force, that it shall no longer be necessary to implead upon them; but if the plaintiff come into the Court within a year, he shall have execution forthwith; or if he come after the year, a scire facias shall issue to warn the defendant to appear and show cause why the said matters inrolled should not be executed: and if he show no cause, or if he do not appear, then the sheriff shall be commanded to cause the said matter inrolled to be executed. This statute extended to judgments in ejectment (*Withers* v. *Harris*, supra: *Underhill* v. *Devereux*, 2 Saund. 72, e: per *Bayley*, J., in *Putland* v. *Newman*, 6 M. & Sel. 181: *Doe* d. *Rawsbottom* v. *Roe*, 2 Dowl. N. S. 690); and, indeed, from the general manner in which it is worded, it would seem to include judgments in every species of action, real, personal and mixed. It seems doubtful whether it extended to interlocutory judgments: *Benn* v. *Greatwoods*, 6 Sc. 821. The year mentioned in the statute was computed from the time of the signing of the judgment (*Simpson* v. *Gray*, Barnes, 197), and by calendar months, and not by terms: *Winter* v. *Lightbound*, 1 Str. 301. If the plaintiff had been prevented from suing out execution by proceedings in error (2 Inst. 471; 5 Co. 88; Ro. Abr. 899: *Winter* v. *Lightbound*, 1 Str. 301: *Booth* v. *Booth*, 6 Mod. 288: 1 Salk. 322: *Adams* v. *Savage*, 3 Id. 321), or injunction (*Michel* v. *Cue*, 2 Burr. 669. And see Tidd, 9th ed. 1105: *Powis* v. *Powis*, 6 Moore, 517. But see *Winter* v. *Lightbound*, 1 Str. 301: *Booth* v. *Booth*, 1 Salk. 322; 3 P. Wms. 36; Bac. Abr. Sci. Fa. C.), or by having a judgment with a *cesset executio* for a certain time (*Hiscocks* v. *Kemp*, 5 N. & M. 113; 3 A. & E. 676: *Dillon* v. *Brown*, 6 Mod. 14: *Booth* v. *Booth*, Id. 288: *Withers* v. *Harris*, supra: *Belloes* v. *Hanford*, 1 Ro. Rep. 104; Tidd, 9th ed. 1104), or by agreement (*Hiscocks* v. *Kemp*, supra: *Morris* v. *Jones*, 2 B. & C. 242; 3 D. & R. 603), the year, it seems, did not begin to run until the proceedings in error were determined, the injunction dissolved, or the time for which the execution was stayed had elapsed. And it seems that, if error were brought after the year, and the judgment was affirmed (Ro. Abr. 899. And see *Fish* v. *Wiseman*, Palm. 449; Latch. 193), or the proceedings in error discontinued (*Bellasis* v. *Hanford*, Cro. Jac. 364. And see 1 Ro. Rep. 104: *Dennis* v. *Brake*, Lane, 20: *Howard* v. *Pitt*, 1 Show. 402, 403), the party might sue out execu-

It seems that if a writ of execut
without obtaining leave for that p
not void, and such an irregularity
application to set aside the writ, p
in due time (*c*). If the writ be i
apprehended it may be renewed w
ante, p. 803, after the expiration o
without obtaining an order for leav

It seems it is not necessary to g
judgment more than six years old,
dispense with the necessity for so
effect is frequently inserted in cogno
A parol agreement is sufficient (*f*).

An application for leave to issue
twelve years from the recovery of th
been a payment on account or an
the existence of the debt, in whic
made within twelve years from the
ledgment.

By the 37 & 38 *V. c.* 57 (*The Real*
s. 8, "No action or suit or other p
recover any sum of money secured
lien, or otherwise charged upon or p
at law or in equity, or any legacy,
after a present right to receive the sa
person capable of giving a discharge
unless in the meantime some part of
interest thereon, shall have been p

It seems that if a writ of execution be issued after the above time, without obtaining leave for that purpose, it would be irregular but not void, and such an irregularity may be taken advantage of upon application to set aside the writ, provided such application be made in due time (*c*). If the writ be issued within the six years, it is apprehended it may be renewed whilst it is in force, as mentioned *ante*, p. 803, after the expiration of such time, until fully executed, without obtaining an order for leave to issue execution (*d*).

It seems it is not necessary to get leave to issue execution on a judgment more than six years old, if the defendant has agreed to dispense with the necessity for so doing; and an agreement to this effect is frequently inserted in cognovits and warrants of attorney (*e*). A parol agreement is sufficient (*f*).

Where six years have elapsed.

An application for leave to issue execution cannot be made after *twelve years* from the recovery of the judgment (*g*), unless there has been a payment on account or an acknowledgment in writing of the existence of the debt, in which case the application must be made within twelve years from the time of the payment or acknowledgment.

By the 37 & 38 *V. c.* 57 (*The Real Property Limitation Act*, 1874), s. 8, "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for, or release of, the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid or some acknowledgment

---

see Tidd, 9th ed. 1105: *Powis v. Powis*, 6 Moore, 517. But see *Archer* v. *Lightbound*, 1 Str. 301: *Clerk* v. *Booth*, 1 Salk. 322; 3 P. Wms. 36; Bac. Abr. Sci. Fa. C.), or having a judgment with a *cesset executio* for a certain time (*Hiscocks v. Kemp*, 5 N. & M. 113; 3 A. & E. 543: *Dillon* v. *Brown*, 6 Mod. 11: *Clerk* v. *Booth*, Id. 288: *Withers* v. *Withers*, supra: *Belloes* v. *Hanford*, 1 Rep. 104; Tidd, 9th ed. 1104), or agreement (*Hiscocks* v. *Kemp*, supra: *Morris* v. *Jones*, 2 B. & C. 232; 3 D. & R. 603), the year, it seems, did not begin to run until proceedings in error were decided, the injunction dissolved, or the time for which the execution was stayed had elapsed. And it seems that, if error were brought within the year, and the judgment affirmed (Ro. Abr. 899. And see *Clerk* v. *Wiseman*, Palm. 449; Sty. 193), or the proceedings in error discontinued (*Bellasis* v. *Honywood*, Cro. Jac. 364. And see 1 Ro. Abr. 904: *Dennis* v. *Drake*, Lane, 64: *Howard* v. *Pitt*, 1 Show. 402, 403), the party might sue out execution, without reviving the judgment, at any time within a year from such determination of the proceedings in error; because the other party, by bringing error, had revived the judgment.

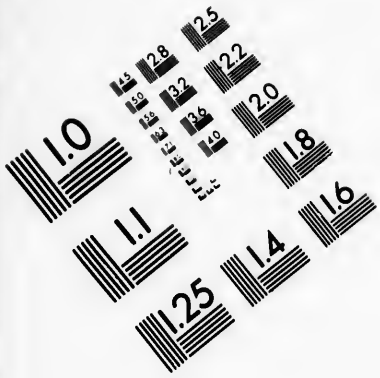
(*c*) *Blanchenay* v. *Burt*, 4 Q. B. 707; 3 G. & D. 613: *Patrick* v. *Johnson*, 3 Lev. 404: *Shirley* v. *Wright*, 1 Salk. 273; 2 Ld. Raym. 775: *Reynolds* v. *Martin*, 1 G. & D. 157: *Mortimer* v. *Piggott*, 2 Dowl. 615; 4 A. & E. 363, n. (*d*): *Putland* v. *Newman*, 6 M. & Scl. 179. Before the Jud. Acts the omission to revive the judgment, when requisite, was also a ground of error. *Goodtitle* d. *Murrell* v. *Badtitle*, 9 Dowl. 1009: *Blanchenay* v. *Burt*, supra.

(*d*) See *Franklin* v. *Hodgkinson*, 3 D. & L. 554: *Holmes* v. *Newlands*, 5 Q. B. 634.

(*e*) See post, Chs. CXIII., CXIV. And see *Harmer* v. *Johnson*, 3 D. & L. 38; 14 M. & W. 336: *Cooper* v. *Norton*, 16 L. J., Q. B. 364.

(*f*) *Morgan* v. *Burgess*, 1 Dowl., N. S. 850.

(*g*) See *Watson* v. *Birch*, 15 Sim. 523.



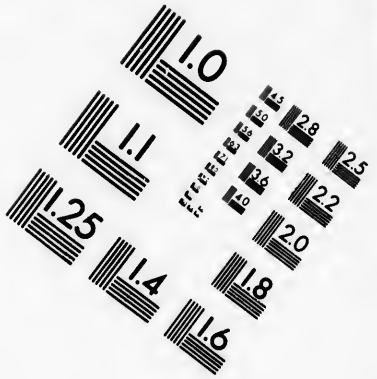
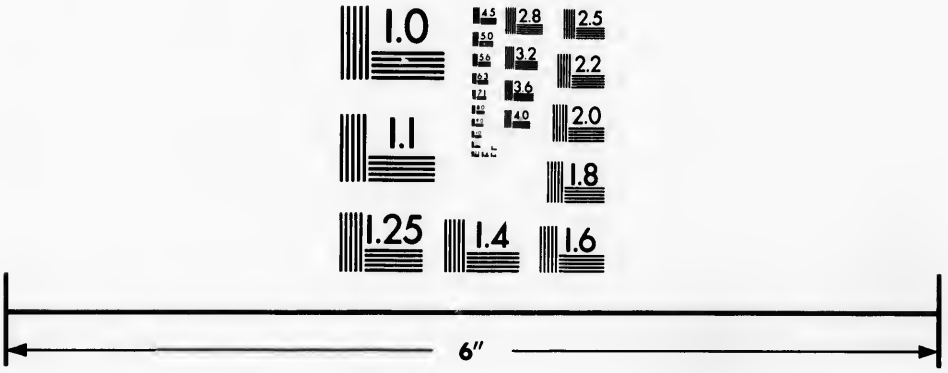
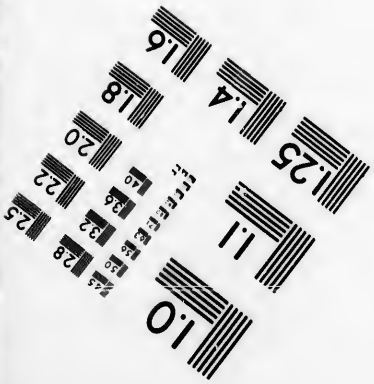
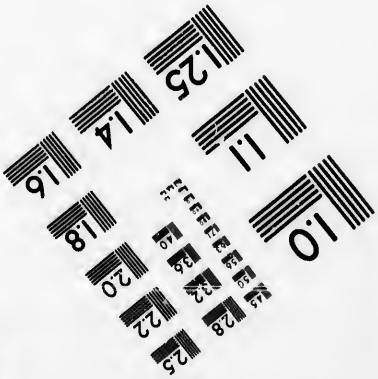


IMAGE EVALUATION TEST TARGET (MT-3)







Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

PART X.

of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action, or suit, or proceeding, shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given." See 19 & 20 *V. c.* 97, *s.* 10, by which a person entitled to revive a judgment, &c., is not entitled to any longer time for doing so by reason of his being beyond the seas, or imprisoned at the time his right accrued.

Application—how made, &c.

The application should be made to a Master upon summons. The affidavit in support of the application should state the existence of the debt, that the judgment remains unsatisfied, and that the defendant is living (or as the case may be) (*g*), and such other facts as may be necessary to show that the application ought to be granted. An affidavit in support of such an application, where the judgment is more than twelve years old, should state that part of the principal or interest has been paid within twelve years, or that there has been an acknowledgment in writing within the same period (*h*). If the affidavit be not made by the plaintiff, it should be made by the person who was his solicitor when the judgment was obtained (*i*); but, under circumstances, such an affidavit may be dispensed with (*k*).

Where the summons is directed to executors it should be served on each of the executors who proved the will (*l*). In a case before the *Com. Law Proc. Act*, 1852, where a motion was made for leave to issue a *sci. fa.* to revive a judgment more than fifteen years old, it appeared that in 1828, the defendant went to reside in America; that a letter from him, dated the 17th October, 1842, was said to have been received by a person in Ireland on the 18th November following; and that the defendant was the owner of some houses in Liverpool; the Court said: "The proper course under the circumstances is, to grant a rule to show cause for next term; notice of the rule to be stuck up in the office, and to be served upon the defendant's tenants in Liverpool" (*m*). The validity of the judgment cannot be impeached on showing cause against the application; if the judgment is invalid, a separate application must be made to set it aside (*n*).

Before the Judicature Acts, to a writ of revivor to revive a judgment by reason of lapse of time, the defendant might plead a seizure under a *fi. fa.* issued on the judgment, though the sheriff had not returned the writ, nor the plaintiff been satisfied (*o*). But

(*g*) *Hardisty* v. *Barny*, 2 Salk. 598: *Lowe* v. *Robins*, 1 B. & B. 381; 3 Moore, 757; Tidd, 9th ed. 1105; 2 Sell. Pr. 196. See the forms, Chit. Forms, p. 457.

(*h*) *Loveless* v. *Richardson*, 2 Jur., N. S. 716, B. C.

(*i*) *Duke of Norfolk* v. *Leicester*, 1 M. & W. 204; 4 Dowl. 746.

(*k*) See *Smith* v. *Mee*, 1 D. & L. 907; 7 Sc. N. R. 799. As to obtaining leave to enter up judgment on an old warrant of attorney, see post, Ch. CXIV.

(*l*) *Thomas* v. *Williams*, 3 Dowl. 655.

(*m*) *Macdonald* v. *Maclaren*, 11 M. & W. 465. The motion in this case was made on the 6th May, 1843, and the time for reviving a judgment was then twenty years.

(*n*) *Thomas* v. *Williams*, 3 Dowl. 655.

(*o*) *Holmes* v. *Newlands*, 5 Q. B. 371, 634. See Vol. 1, p. 869.

After

the defendant could not
ment, matter which ought
action (*p*).

After obtaining leave to
execution, leave must be
sued out (*q*).

3. *Where Change has taken*
entitled or

On Death .....
On Marriage .....

Death of Sole Plaintiff or
before Execution.]—If the
executors, &c. must obtain
r. 23, *ante*, p. 955, to issue e
they can have execution; or
ment, leave must be obtaine
tion against his executors, o
But if the plaintiff die after a
derives authority from the wri
and the executor or adminis
the plaintiff appointed no exec
the money must be brought in
&c. (*u*). So, if the defendant
it has been executed, the writ
goods in the hands of his exec
issue execution against a def
execution, leave must be obt
executors, &c., before the plai

Leave to issue the execution
affidavit showing the right or l
on an *ex parte* application (*z*).
bate or letters of administratio

Leave must be obtained to
person or persons who represen

(*p*) *Bradley* v. *Eyre*, 11 M. & W. 432: *Philipson* v. *Earl of Egremont*, 6 Q. B. 587: *Bradley* v. *Urquhart*, 2 Dowl., N. S. 1042; 11 M. & W. 456; 6 Bac. Abr. Sci. Fa. (E).

(*q*) 2 Sellon, 189.

(*r*) As to the effect of death, &c. of parties before final judgment, see post, Ch. LXXXVIII.

(*s*) Fitz. Execution, 243; 1 Saund. 219 *e*, *f*; 2 Saund. 6, 72 *o*. By a terretenant here is meant the owner of the fee. *Braithwaite* v. *Skinner*, 5 M. & W. 320, per *Parke*, B.; 2 Saund. 9 *a*, n. 9. An executor cannot issue a bankruptcy notice on a judgment obtained by his testator without getting leave to issue execution under the rule: *Ex p. Woodall*, *In re Woodall*, 13 Q. B. D. 479; 53

the defendant could not plead to a writ of revivor on a judgment, matter which ought to have been pleaded to the original action (*p*).

After obtaining leave to issue execution, if six years pass before execution, leave must be again obtained before execution can be sued out (*q*).

3. *Where Change has taken place by Death or otherwise in the Parties entitled or liable to Execution* (*r*).

On Death 959
On Marriage 961
On Bankruptcy 962

Death after final judgment and before execution.

Death of Sole Plaintiff or Defendant after Final Judgment and before Execution.]—If the plaintiff die after final judgment, his executors, &c. must obtain leave under *R. of S. C., Ord. XLII. r.* 23, *ante*, p. 955, to issue execution against the defendant, before they can have execution; or, if the defendant die after final judgment, leave must be obtained under the above rule to issue execution against his executors, or against his heirs and terretenants (*s*). But if the plaintiff die after a *fi. fa.* sued out, inasmuch as the sheriff derives authority from the writ, it may be executed notwithstanding, and the executor or administrator shall have the money (*t*); or if the plaintiff appointed no executor, or administration be not granted, the money must be brought into Court, and there be deposited until, &c. (*u*). So, if the defendant die after a *fi. fa.* sued out, but before it has been executed, the writ may be executed upon the defendant's goods in the hands of his executor, &c. (*x*). If leave be obtained to issue execution against a defendant, and the defendant die before execution, leave must be obtained to issue execution against his executors, &c., before the plaintiff can execute the judgment (*y*).

Leave to issue the execution may be obtained at Chambers on an affidavit showing the right or liability to it. Leave may be granted on an *ex parte* application (*z*). The affidavit should state that probate or letters of administration have been obtained (*a*).

By and against whom to be issued.

Leave must be obtained to issue execution by or against the person or persons who represent the deceased. If the plaintiff in a

---

(*p*) *Bradley* v. *Eyre*, 11 M. & W. 432: *Philipson* v. *Earl of Egremont*, 6 Q. B. 587: *Bradley* v. *Urquhart*, 2 Dowl., N. S. 1042; 11 M. & W. 456; 6 Bac. Abr. Sci. Fa. (E).

(*q*) 2 Sellon, 189.

(*r*) As to the effect of death, &c. of parties before final judgment, see post, Ch. LXXXVIII.

(*s*) Fitz. Execution, 243; 1 Saund. 219 e, f; 2 Saund. 6, 72 o. By a terretenant here is meant the owner of the fee. *Braithwaite* v. *Skinner*, 5 M. & W. 320, per *Parke*, B.; 2 Saund. 9 a, n. 9. An executor cannot issue a bankruptcy notice on a judgment obtained by his testator without getting leave to issue execution under the rule: *Ex p. Woodall*, *In re Woodall*, 13 Q. B. D. 479; 53 L. J., Ch. 966; 50 L. T. 747. Judgments entered up after the 29th July, 1864, do not affect lands until delivered in execution. See ante, p. 879.

(*t*) *Cleeve* v. *Beer*, Cro. Car. 459: *Harrison* v. *Bowden*, 1 Sid. 29: *Clerk* v. *Withers*, 2 Ld. Raym. 1072; 1 Salk. 322; Tidd, 9th ed. 1000.

(*u*) *Thoroughgood's case*, Noy, 73: *Clerk* v. *Withers*, 2 Ld. Raym. 1072.

(*x*) 6 Bac. Abr. Sci. Fa. (C) 1; ante, Vol. 1, p. 810.

(*y*) *Hardsty* v. *Barny*, 2 Salk. 598.

(*z*) *Mercer* v. *Lawrence*, 26 W. R. 506, V.-C. H.

(*a*) See *Vogel* v. *Thompson*, 1 Ex. 60.

PART X.

Against personal representative.

personal action die, the leave must be obtained by his executor or administrator; in a real action by his heir (*b*). In a mixed action, if the lands to be recovered be fee-simple, the heir and executor may join in obtaining leave, and the heir have execution as to the lands, and the executor execution as to the damages (*c*). On the death of a plaintiff, all the executors may apply for leave, though one only has proved the will (*d*). If the defendant in a personal action die, leave must be obtained to issue execution against his executor or administrator.

As to the mode of proceeding where the defendant dies after verdict in an action for recovery of land, *see post, Ch. CVI.*

Against representative of representative.

Leave to issue execution may be obtained by or against the executor of an executor who has proved the will; but not by or against the administrator of an executor, or the executor or administrator of an administrator, because they do not represent the deceased (*e*). By the 17 *C.* 2, *c.* 8, *s.* 2, where any judgment after a verdict shall be had by or in the name of any executor or administrator, in such case, an administrator *de bonis non* might obtain leave to issue execution upon such judgment (*f*). This statute is repealed by the stat. 46 & 47 *V. c.* 49, *s.* 4. It did not extend to allow an administrator *de bonis non* to proceed upon a judgment (*quod habeat executionem*) already obtained by the executor in his lifetime, but he must have revived the original judgment (*g*); nor did it extend to judgments by default, but to judgments after verdict only (*f*). If a judgment be recovered *against* an executor who dies intestate, leave may be obtained to issue execution against the administrator *de bonis non*, at common law, and execution had upon the judgment (*h*).

By administrator durante minori, &c.

If an administrator *durante minori ætate* bring an action, and recover, and the executor then come of age, the latter must obtain leave to issue execution on the judgment (*i*).

Where representative feme covert, &c.

If the personal representative of the deceased be a *feme covert*, her husband must formerly have joined in the application for leave to issue execution (*k*). But this is no longer necessary (*l*). If the personal representative be a bankrupt, he may notwithstanding proceed or be proceeded against; for his bankruptcy does not affect his representative character (*k*).

Against heir and terre-tenants.

As to the practice formerly pursued in order to have execution of any lands of a deceased defendant of which he was seised at the time of or after the judgment, *see* the 12th ed. of this work, p. 1127.

Death between verdict and judgment.

Death of Sole Plaintiff or Defendant between Verdict and Judgment.]—By the common law, if any one of the parties died before final

(*b*) 6 Bac. Abr. Sci. Fa., C. 5.
(*c*) 19 E. 4, 5 b; 43 E. 3, 2; Ro. Abr. 889.
(*d*) *Scott* v. *Briant*, 6 N. & M. 381; 2 H. & W. 54.
(*e*) 5 Co. 9 B.
(*f*) *Clerk* v. *Withers*, 1 Salk. 323; 2 Ld. Raym. 1072; 6 Mod. 290; 11 Id. 34: *Curlewis* v. *Mornington*, 27 L. J., Q. B. 269.
(*g*) *Treviban* v. *Laurence*, 2 Ld. Raym. 1048.
(*h*) 2 Saund. 72 o: *Snape* v. *Norgate*, Cro. Car. 167; 1 Ro. Abr. 890, T. pl. 3: *Norgate* v. *Snape*, W. Jon. 214.
(*i*) Ro. Abr. 888: *Beamond* v. *Long*, Cro. Car. 227; 2 Brownl. 83; Godb. 604: *Hatton* v. *Maseall*, 1 Lev. 181. And see *Morfoot* v. *Chivers*, 1 Str. 631; 2 Ld. Raym. 1395.
(*k*) 2 Saund. 72 o.
(*l*) See Married Women's Property Act, 1882, *s.* 18, post, Ch. XCVII.

judgment, the suit abated (*l*). But, as is noticed whilst treating of the effect of the death of parties pending the suit, if either party dies after verdict and before judgment, judgment may by leave be signed *nunc pro tunc* (*m*). The judgment is entered for or against the deceased party, as if he were living (*n*). But though this is so, leave must be obtained before execution can be sued out upon it (*o*).

Death of Sole Plaintiff or Defendant between Interlocutory and Final Judgment.]—As to this, *see post, Ch. LXXXVIII.* Death of sole plaintiff, &c. after interlocutory and before final judgment.

Death of one of several Plaintiffs or Defendants after Judgment (*p*).]—Where there are two or more plaintiffs or defendants in a personal action, and one dies within six years after judgment and before execution, execution by *fieri facias* or *ca. sa.*, when it will lie, may be sued out against the survivor, without obtaining leave for that purpose (*q*). This execution should be executed against the survivors only (*r*). As to the form of the execution in such a case, *see Vol.* 1, p. 796. If the plaintiff wish to proceed against the realty, he must obtain leave to issue execution against the land and goods of the survivor, and the land of the deceased, as he cannot proceed as to the realty against the survivor only. The persons to be called upon to show cause under *Ord. XLII. r.* 23, *ante*, p. 955, why this leave should not be granted, would be the surviving defendant and the heir and terretenants of the deceased (*s*). But it seems that if all the defendants die, and one leaves lands and the others not, the plaintiff may, upon obtaining leave for that purpose, sue out an elegit against the heir and terretenants of him alone who left the lands. Death of one of several parties after judgment.

Marriage of a Feme Plaintiff.]—In cases where a married woman may sue as a *feme sole*, as under the *Married Women's Property Act*, 1882, the marriage of a female plaintiff does not affect the proceedings. In other cases, if a woman plaintiff marry pending the suit, the action may be continued, and in case of a judgment for the wife, execution may be issued thereupon, by the authority of the husband (*t*). Marriage of a feme plaintiff. Before judgment.

In cases where a married woman may sue as a *feme sole*, if a female plaintiff marries after judgment she may issue execution just as if she remained a *feme sole*. In other cases execution cannot After judgment.

(*l*) See 2 Saund. 72 i.

(*m*) See post, p. 1029.

(*n*) *Weston* v. *James*, 1 Salk. 42: *Colebeck* v. *Peek*, 2 Ld. Raym. 1280.

(*o*) *Earl* v. *Brown*, 1 Wils. 392. See *Saunders* v. *M'Gowran*, 12 M. & W. 221; 1 D. & L. 405: *Burnett* v. *Allen*, 1 Lev. 277; 2 Keb. 549: *Colebeck* v. *Peek*, 2 Ld. Raym. 1280; 2 Saund. 72 m.

(*p*) As to the death of one of several plaintiffs or defendants before judgment, see Ch. LXXXVIII.

(*q*) *Withers* v. *Harris*, 7 Mod. 64; 2 Ld. Raym. 808: *Brace* v. *Pennoyer*, 1 Ld. Raym. 339: *Pennoyer* v. *Brace*, 1 Ld. Raym. 404: *Howard* v. *Pitt*, 1 Show. 402; 2 Saund. 72 l.

(*r*) *Pennoyer* v. *Brace*, 1 Ld. Raym. 244; Comb. 441; 1 Salk. 319. See *Withers* v. *Harris*, 2 Ld. Raym. 808; 7 Mod. 64.

(*s*) *Panton* v. *Terretenants of Hall*, Carth. 107; Saund. 72 l; 2 Saund. 50 a, n. 4. The executor or administrator of the deceased must also be called upon to show cause where it is desired to proceed against the personalty of the deceased, which it seems can be done since the Jud. Acts.

(*t*) See *Eyres* v. *Coward*, 1 Sid. 337; *Butler* v. *Delt*, Cro. El. 844: *Obrian* v. *Ram*, 3 Mod. 186; 2 Saund. 72 m.

PART X.

be issued without obtaining leave for that purpose under *Ord. XLII. r.* 23, *ante*, p. 955 (*u*); and it seems that, if, after such leave granted, but before execution, the wife die, the husband alone may have execution upon the judgment, without even taking out administration (*x*). If, before the Judicature Acts, judgment was recovered by a *feme sole*, and she married, and then the husband and wife took proceedings to revive the judgment, and had an award of execution, and the wife afterwards died, the husband alone might take proceedings to have execution (*y*). But if the husband had not been made party to the judgment in the lifetime of the wife, he could not after the death take proceedings to have execution, unless he took out administration to her (*z*). So, if judgment be recovered by a *feme sole* for the penalty of a bond conditioned for the payment of an annuity to her, and she marries, and then the annuity is in arrear, and afterwards the wife dies, the husband cannot bring a *scire facias*, under the 8 & 9 *W.* 3, *c.* 11, to have execution for such arrears, except as administrator to his wife (*a*). And if the husband and wife have judgment for a debt due to the wife as executrix, and the wife die before execution, the succeeding executor or administrator *de bonis non*, and not the husband, must take proceedings to have execution (*b*).

Marriage of a feme defendant.

Marriage of a Feme Defendant.]—If judgment be recovered against a *feme sole*, and she marry before execution, leave must be obtained under *Ord. XLII. r.* 23, *ante*, p. 955, before issuing execution against them both, or the husband alone (*c*); and if, after execution awarded against them, but before execution, the wife die, the husband is liable to the execution (*d*). But it is not necessary to obtain leave to have execution by *ca. sa.*, when it will lie against a *feme covert* on a judgment obtained against her alone (*e*). As noticed, *Ch. CI.*, the *Married Women's Property Act*, 1882, have made a material difference in the law as to a husband's liability for his wife's torts and debts, &c., committed and contracted before marriage, and in cases within those Acts execution may issue against the separate estate of the wife without any leave for that purpose.

As to issuing execution when a *feme covert*, sued as a *feme sole*, has judgment on a plea of coverture, *see Ch. CI.*

When necessary on bankruptcy of plaintiff.

Bankruptcy.]—As to the effect of the bankruptcy of parties during the pendency of an action, and as to the proceedings by or

(*u*) 2 Saund. 72 k. See *Aggassiz* v. *Palmer*, 6 Sc. N. R. 603; 1 D. & L. 18.

(*x*) 6 Bac. Abr. Sci. Fa. C. 6: *Woodyer* v. *Gresham*, 1 Salk. 116; Comb. 454; Carth. 415; Skin. 682.

(*y*) *Woodyer* v. *Gresham*, 1 Salk. 116; Skin. 642.

(*z*) *Betts* v. *Kimpton*, 2 B. & Ad. 273.

(*a*) Id.

(*b*) *Beamond* v. *Long*, Cro. Car. 208, 227; W. Jon. 248; 6 Bac. Abr. Sci. Fa. C. 6.

(*c*) 2 Saund. 72 m; Thes. Brev. 247, 251.

(*d*) 6 Bac. Abr. Sci. Fa. C. 6: *Obrian* v. *Ram*, 3 Mod. 186. This is subject to the Married Women's Property Acts, 1874 (s. 5) and 1882 (s. 14).

(*e*) See *Cooper* v. *Hunchin*, 4 East, 521: *Thorpe* v. *Argles*, 1 D. & L. 831: *Rayner* v. *Jones*, 6 June, 1846, Ex.: *Jay* v. *Amphlett*, 32 L. J., Ex. 176, where the husband became bankrupt and obtained his order of discharge, and the wife was taken in execution. See *Doe* v. *Butcher*, 3 M. & Sel. 557.

against bankrupts and insolvents, or their assignees, *see post*, CH. LXXXIV. *Ch. CII.*

4. *Where a Husband is entitled or liable to Execution upon a Judgment or Order for or against a Wife.*

See post, Ch. CI

Where a husband is entitled or liable to execution upon a judgment or order for or against a wife.

5. *Where a Party is entitled to Execution upon a Judgment of Assets in futuro.*

See Ord. XLII. r. 23, *ante*, p. 955, *and see fully, post*, "*Actions by and against Executors*," *Ch. XCVII.*

Where a party is entitled to execution upon a judgment of assets in futuro.

6. *Where a Party is entitled to Execution against any of the Shareholders of a Joint Stock Company upon a Judgment recorded against such Company or against a Public Officer, or other Person representing such Company.*

See Ord. XLII. r. 23, *ante*, p. 955, *and see fully, post*, "*Actions by and against Companies*," *Ch. XCII.*

Where a party is entitled to execution against shareholders of company on judgment against public officer, &c.

7. *Where Judgment or Order subject to Condition or Contingency.*

By *Ord. XLII. r.* 9, "Where a judgment or order is to the effect that any party is entitled to any relief subject to or upon the fulfilment of any condition or contingency, the party so entitled may, upon the fulfilment of the condition or contingency, and demand made upon the party against whom he is entitled to relief, apply to the Court or a Judge for leave to issue execution against such party. And the Court or Judge may, if satisfied that the right to relief has arisen according to the terms of the judgment or order, order that execution issue accordingly, or may direct that any issue or question necessary for the determination of the rights of the parties be tried in any of the ways in which questions arising in an action may be tried."

Where judgment or order subject to condition or contingency.

In order to proceed under this rule the judgment should be served on the party against whom relief is sought, as mentioned *Vol.* 1, p. 766—a demand should be made upon him to comply with the judgment—an affidavit should be made of the service of the judgment, of the making of the demand, and of the fulfilment of the condition or contingency; a summons should then be taken out at Judges' Chambers, calling on the party against whom relief is sought to show cause why the required execution should not issue. This summons should be served and attended in the usual way; and the Master, if satisfied by the affidavit that the right to relief has arisen, may order the execution to issue or direct any issue or question to be tried as mentioned in the above rule.

8. *Against Persons on a Judgment against a Firm.*

See Ord. XLII. r. 10, *post*, "*Actions by and against Partners*," *Ch. XCIII.*

Against persons on a judgment against a firm.

9. *For or against Persons not Parties to the Action.*

See Ord. XLII. r. 26, *ante*, p. 793.

For or against persons not parties to the action.

PART XI.

APPEAL (a).

CHAP. PAGE

LXXXV. *Appeal to the Court of Appeal* 964

LXXXVI. *Appeal to the House of Lords* 995

CHAPTER LXXXV.

APPEAL TO THE COURT OF APPEAL.

1. *Constitution of the Court of Appeal* 964
2. *Jurisdiction of Court of Appeal* 967
3. *In what Cases an Appeal lies, and in what not—Who may Appeal* 969
4. *Appeal—How brought* 975
5. *Time within which Appeal must be brought* 975
6. *Notice of Motion on Appeal* .. 979
7. *Setting down Appeal for Hearing* 981
8. *Security for Costs of Appeal* 982
9. *Staying Proceedings pending Appeal* 984
10. *Evidence on Appeal* 985
11. *The Hearing of the Appeal* 988
12. *Judgment or Order of Court of Appeal* 991
13. *Costs of Appeal* 991
14. *Proceedings after Judgment —Execution, &c.* 992
15. *How Applications to Court of Appeal to be made* .. 994
16. *Officers to perform Duties in Court of Appeal* 994

1. *Constitution of the Court of Appeal.*

PART XI.

Constitution of the Court of Appeal.

THE Judicature Act, 1873, consolidated all the Courts existing at the date of its passing into "one Supreme Court of Judicature in England" (sect. 3). By sect. 4 it is enacted that, "The said Supreme Court shall consist of two permanent divisions, one of which, under the name of '*Her Majesty's High Court of Justice*,' shall have and exercise original jurisdiction, with such appellate jurisdiction from inferior Courts as is hereinafter mentioned, and

(a) As to appeals from inferior Courts, see post, Pt. XVII. As to appeals from a Master to a Judge at Chambers, and from a Judge at Chambers to the Court, see post, Ch. CXXIII.

the other of which, under
Appeal,' shall have and e
original jurisdiction as he
to the determination of an

By *Judicature Act*, 1875,
in this Act and in the princ
referred to as the Court of
there shall be five (c) *ex o*
ordinary Judges, *not excee*
Majesty shall from time to

"The *ex officio* Judges s
Chief Justice of England, t

"The first ordinary Judg
Lords Justices of Appeal in
as her Majesty may be pleas
appointment may be made ei
of this Act, but if made bef
ment of the Act.

"The Lord Chancellor ma
of any one or more of the fol
Justice, that is to say, the Qu
Divorce, and Admiralty Divis
except during the times of the
tional Judge from such divisio
or Judges of the Court of A
Appeal, and a Judge, to be se
attendance is requested, shall

"Every additional Judge,
sittings of her Majesty's Cour
diction and powers of a Judge
shall not otherwise be deemed
have ceased to be a Judge o
Justice to which he belongs.

"No Judge of the said Cou
the hearing of an appeal fro
himself, or made by any divi
which he was and is a member

(b) Substituted for Jud. Act, 1873, s. 6, which is repealed by Jud. Act, 1875, s. 33, and sched. In the text of the 4th section, as given above, all those parts which are repealed by the Stat. Law Rev. Act, 1883, are omitted.

(c) Now four, viz., the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, and the President of the Probate, Divorce and Admiralty Division. See Jud. Act, 1881, s. 4, and ante, p. 9.

(d) Repealed by App. Jur. Act, 1876, s. 15, post, p. 966, by which the appointment of additional Judges is provided for.

(e) By sect. 19 of the Appellate Jurisdiction Act, 1876, "Where a

the other of which, under the name of '*Her Majesty's Court of Appeal*,' shall have and exercise appellate jurisdiction, with such original jurisdiction as hereinafter mentioned as may be incident to the determination of any appeal."

By *Judicature Act*, 1875, *s.* 4 (*b*), "Her Majesty's Court of Appeal in this Act and in the principal Act (*i. e. the Judicature Act*, 1873), referred to as the Court of Appeal, shall be constituted as follows: there shall be five (*c*) *ex officio* Judges thereof, and also so many ordinary Judges, *not exceeding three at any one time* (*d*), as her Majesty shall from time to time appoint.

Ex officio Judges.

"The *ex officio* Judges shall be the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls.

Ordinary Judges.

"The first ordinary Judges of the said Court shall be the present Lords Justices of Appeal in Chancery, and such one other person as her Majesty may be pleased to appoint by letters patent. Such appointment may be made either before or after the commencement of this Act, but if made before shall take effect at the commencement of the Act.

Additional Judges.

"The Lord Chancellor may by writing addressed to the president of any one or more of the following divisions of the High Court of Justice, that is to say, the Queen's Bench Division, and the Probate, Divorce, and Admiralty Division, request the attendance at any time, except during the times of the spring or summer circuits, of an additional Judge from such division or divisions (not being *ex officio* Judge or Judges of the Court of Appeal) at the sittings of the Court of Appeal, and a Judge, to be selected by the division from which his attendance is requested, shall attend accordingly (*e*).

Not to be summoned during circuits.

"Every additional Judge, during the time that he attends the sittings of her Majesty's Court of Appeal, shall have all the jurisdiction and powers of a Judge of the said Court of Appeal, but he shall not otherwise be deemed to be a Judge of the said Court, or to have ceased to be a Judge of the division of the High Court of Justice to which he belongs.

Judges not to sit on appeal from their own judgments.

"No Judge of the said Court of Appeal shall sit as a Judge on the hearing of an appeal from any judgment or order made by himself, or made by any divisional Court of the High Court of which he was and is a member (*f*).

(*b*) Substituted for Jud. Act, 1873, s. 6, which is repealed by Jud. Act, 1875, s. 33, and sched. In the text of the 4th section, as given above, all those parts which are repealed by the Stat. Law Rev. Act, 1883, are omitted.

(*c*) Now four, viz., the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, and the President of the Probate, Divorce and Admiralty Division. See Jud. Act, 1881, s. 4, and ante, p. 9.

(*d*) Repealed by App. Jur. Act, 1876, s. 15, post, p. 966, by which the appointment of additional Judges is provided for.

(*e*) By sect. 19 of the Appellate Jurisdiction Act, 1876, "Where a Judge of the High Court of Justice has been requested to attend as an additional Judge at the sittings of the Court of Appeal under section 4 of the Supreme Court of Judicature Act, 1875, such Judge shall, although the period has expired during which his attendance was requested, attend the sittings of the Court of Appeal for the purpose of giving judgment or otherwise in relation to any case which may have been heard by the Court of Appeal during his attendance on the Court of Appeal."

(*f*) By the Jud. Act, 1884, s. 11, "A Judge who was not present and acting as a member of a Divisional Court of the High Court of Justice, at the time when any decision which

Qualification of Judges to sit on appeals.

PART XI.

"Whenever the office of an ordinary Judge of the Court of Appeal becomes vacant, a new Judge may be appointed thereto, by her Majesty by letters patent."

Appointment of three additional ordinary Judges of Court of Appeal.

By the Appellate Jurisdiction Act, 1876 (39 & 40 *V. c.* 59), *s.* 15, "Whereas it is expedient to amend the constitution of her Majesty's Court of Appeal in manner hereinafter mentioned: Be it enacted that there shall be repealed so much of the fourth section of the Supreme Court of Judicature Act, 1875, as provides that the ordinary Judges of her Majesty's Court of Appeal (in this Act referred to as 'the Court of Appeal') shall not exceed three at any one time (*f*).

"In addition to the number of ordinary Judges of the Court of Appeal authorized to be appointed by the Supreme Court of Judicature Act, 1875, her Majesty may appoint three additional ordinary Judges of that Court.

"The first three appointments of additional Judges under this Act shall be made by such transfer to the Court of Appeal as is in this section mentioned of three Judges of the High Court of Justice, and the vacancies so created in the High Court of Justice shall not be filled up, except in the event and to the extent hereinafter mentioned.

First three appointments.

"Her Majesty may by writing, under her sign manual, either before or after the commencement of this Act, but so as not to take effect until the commencement thereof, transfer to the Court of Appeal from the following divisions of the High Court of Justice, that is to say, the Queen's Bench Division, the Common Pleas Division, and the Exchequer Division, such of the Judges of the said divisions, not exceeding three in number, as to her Majesty may seem meet, each of whom shall have been a Judge of any one or more of such divisions for not less than two years previously to his appointment, and shall not be an ex-officio Judge of the Court of Appeal, and every Judge so transferred shall be deemed an additional ordinary Judge of the Court of Appeal in the same manner as if he had been appointed such Judge by letters patent. No Judge shall be so transferred without his own consent (*f*).

Obligation of additional ordinary Judges to go circuit, &c.

"Every additional ordinary Judge of the said Court of Appeal appointed in pursuance of this Act shall be subject to the provisions of sections twenty-nine and thirty-seven of the Supreme Court of Judicature Act, 1873, and shall be under an obligation to go circuits, and to act as commissioner under commissions of assize, or other commissions authorized to be issued in pursuance of the said Act, in the same manner in all respects as if he were a Judge of the High Court of Justice.

"There shall be paid to every additional ordinary Judge appointed in pursuance of this Act, in addition to the salary which he would otherwise receive as an ordinary Judge of the Court of Appeal, such sum on account of his expenses on circuit or under such commission as aforesaid as may be approved by the Treasury upon the recommendation of the Lord Chancellor.

---

may be appealed from was made, or at the argument of the case decided, shall not, for the purposes of the fourth section of the Supreme Court of Judicature Act, 1875, be deemed to be, or to have been, a member of such Divisional Court." See *Fisher* v. *Val de Travers Asphalte Co.*, 1 C. P. D. 259; 45 L. J., C. P. 135 (C. A.).

(*f*) Repealed by Stat. Law Rev. Act, 1883.

Officers of additional ordinary Judges.

"Each of the Judges of the High Court of Justice who is in pursuance of this Act transferred to the Court of Appeal, by writing under the sign manual of her Majesty, shall retain such officers as are attached to his person as such Judge, and are appointed and removable by him at his pleasure, in pursuance of the Supreme Court of Judicature Act, 1873, and the officers so attached shall have the same rank, and hold their offices by the same tenure, and upon the same terms and conditions, and receive the same salaries, and if entitled to pensions be entitled to the same pensions, and shall, as nearly as may be, perform the same duties as if the Judges to whom they are attached had not been transferred to the Court of Appeal.

Further appointments, &c.

"Subject as aforesaid, the provisions of the Supreme Court of Judicature Acts, 1873 and 1875, for the time being in force in relation to the appointment of ordinary Judges of her Majesty's Court of Appeal, and to their tenure of office, and to their precedence, and to their salaries and pensions, and to the officers to be attached to such Judges, and all other provisions relating to such ordinary Judges, shall apply to the additional ordinary Judges appointed in pursuance of this section in the same manner as they apply to the other ordinary Judges of the said Court.

"For the purpose of a transfer to the Court of Appeal under this section, service as a Judge in a Court whose jurisdiction is transferred to the High Court shall be deemed to have been service as a Judge in any one or more of such divisions of the High Court as are in this section in that behalf mentioned; and for the purpose of the pension of any person appointed under this Act an additional ordinary Judge of Appeal, service in the High Court of Justice, or in any Court whose jurisdiction is transferred to the High Court of Justice or to the Court of Appeal, shall be deemed to have been service in the Court of Appeal" (*g*).

By the Great Seal Act, 1880 (43 & 44 *V. c.* 10), *s.* 4, the letters patent for appointing an ordinary Judge of the Court of Appeal are to be passed in the same manner in which letters patent for appointing Judges of the High Court are passed under the Great Seal.

By the *Judicature Act*, 1881, *s.* 3, the number of ordinary Judges of the Court of Appeal is reduced to five.

By the Judicial Committee Act, 1881 (44 *V. c.* 2), *s.* 2, every Lord Justice who is also a Privy Councillor is to be a member of the Judicial Committee of the Privy Council.

2. *Jurisdiction of Court of Appeal.*

Jurisdiction of Court of Appeal.

Jurisdiction of Court of Appeal.]—By *Judicature Act*, 1873, *s.* 18, "The Court of Appeal established by this Act shall be a Superior Court of Record, and there shall be transferred to and vested in such Court all jurisdiction and powers of the Courts following (that is to say):—

(1.) All jurisdiction and powers of the Lord Chancellor and of the Court of Appeal in Chancery, in the exercise of his and its appellate jurisdiction, and of the same Court as a Court of Appeal in Bankruptcy:

(*g*) Repealed by Stat. Law Rev. Act, 1883.

PART XI.

(2.) All jurisdiction and powers of the Court of Appeal in Chancery of the county palatine of Lancaster, and all jurisdiction and powers of the Chancellor of the duchy and county palatine of Lancaster when sitting alone or apart from the Lords Justices of Appeal in Chancery as a Judge of re-hearing or appeal from decrees or orders of the Court of Chancery of the county palatine of Lancaster:

(3.) All jurisdiction and powers of the Court of the lord warden of the stannaries, assisted by his assessors, including all jurisdiction and powers of the said lord warden when sitting in his capacity of judge:

(4.) All jurisdiction and powers of the Court of Exchequer Chamber (*f*):

(5.) All jurisdiction vested in, or capable of being exercised by, her Majesty in council, or the judicial committee of her Majesty's Privy Council, upon appeal from any judgment or order of the High Court of Admiralty, or from any order in lunacy made by the Lord Chancellor, or any other person having jurisdiction in lunacy."

Rules as to exercise of jurisdiction.

By *Judicature Act*, 1873, *s.* 23, "The jurisdiction by this Act transferred to the said High Court of Justice and the said Court of Appeal respectively shall be exercised (so far as regards procedure and practice) in the manner provided by this Act, or by such rules and orders of Court as may be made pursuant to this Act; and where no special provision is contained in this Act or in any such rules or orders of Court with reference thereto, it shall be exercised as nearly as may be in the same manner as the same might have been exercised by the respective Courts from which such jurisdiction shall have been transferred, or by any of such Courts" (*g*).

Power to hear appeals from High Court.

By *Judicature Act*, 1873, *s.* 19, "The said Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order (*h*), save as hereinafter mentioned, of her Majesty's High Court of Justice, or of any Judges or Judge thereof, subject to the provisions of this Act, and to such rules and orders of Court for regulating the terms and conditions on which such appeals shall be allowed, as may be made pursuant to this Act.

Power and authority of Court.

For all the purposes of and incidental to the hearing and determination of any appeal within its jurisdiction, and the amendment, execution and enforcement of any judgment or order made on any such appeal, and for the purpose of every other authority expressly given to the Court of Appeal by this Act, the said Court of Appeal shall have all the power, authority and jurisdiction by this Act vested in the High Court of Justice."

Jurisdiction is appellate only.

The jurisdiction of the Court of Appeal as constituted by the above enactment is exclusively appellate (*i*). The Court has no

(*f*) Under this section the jurisdiction in cases of error from the Mayor's Court, London, is vested in the Court of Appeal. *Le Blanch* v. *Reuter's Telegram Co.*, 1 Ex. D. 408; 34 L. T. 691.

(*g*) See a further saving of the old practice, Jud. Act, 1875, s. 21, Vol. 1, p. 201. As to Acts of Parliament relating to former Courts being read as applying to Courts under Jud. Acts, see Jud. Act, 1873, s. 76.

(*h*) See *Walsall* (*Overseers*) v. *L. & N. W. R. Co.*, 4 App. Cas. 30; 48 L. J., Q. B. 65; reversing (C. A.) 3 Q. B. D. 457; 47 L. J., Q. B. 711: *Reg.* v. *Burial Board of Bishop Wearmouth*, 5 Q. B. D. 67, 69: *Barton* v. *Titchmarsh*, 49 L. J., Ex. 573; 42 L. T. 680.

(*i*) Per *Mellish*, L. J., 33 L. T. 371: *In re Boyd's Trusts*, 1 Ch. D. 12: *Re Hatley*, 1 Ch. D. 11; 45 L. J., Ch. 79: *Flower* v. *Lloyd*, 6 Ch. D., per *Jessel*, M. R., at p. 299, 300, and per *James*, L. J., at p. 301: *Ransom* v. *Patten*, 17 Ch. D. 767; 44 L. T. 688, where defendant appellant died pending appeal, and it was held that proceedings to continue the appeal by his executors were rightly taken in the Court below.

(*k*) *Re Dunraven Adare Coal Co.*, 33 L. T. 371; 24 W. R. 37: *Brown* v. *Collins*, W. N. 1883, 155: *S. C.*, 25 Ch. D. 57: *Ransom* v. *Patten*, supra.

(*l*) See post, p. 991.

(*m*) *Walsall* (*Overseers*) v. *L. & N. W. R. Co.*, supra: *The Queen* v. *Savin*, 6 Q. B. D. 309.

(*n*) See *Ransom* v. *Patten*, supra.

(*o*) Jud. Act, 1873, s. 19, ante, p. 968: *Pollock* v. *Rabbits*, 21 Ch. D. 467, 468.

(*p*) *Walsall* (*Overseers*) v. *L. & N. W. R. Co.*, 4 App. Cas. 30; 48 L. J., Q. B. 65: *Queen* v. *Savin*, 6 Q. B. D.

power to hear an original petition (*k*) or to rehear an appeal once disposed of (*l*).

A decision of the Queen's Bench Division affirming or quashing an order of sessions is an order within sect. 19, *supra*, and is subject to appeal (*m*).

By *Judicature Act*, 1873, *s.* 52, "In any cause or matter pending before the Court of Appeal, any direction incidental thereto, not involving the decision of the appeal, may be given by a single Judge of the Court of Appeal; and a single Judge of the Court of Appeal may at any time during vacation make any interim order to prevent prejudice to the claims of any parties pending an appeal as he may think fit; but every such order made by a single Judge may be discharged or varied by the Court of Appeal or a Divisional Court thereof" (*n*). Power of single judge.

3. *In what Cases Appeal lies, and in what not.*

In what Cases Appeal lies.]—With the exceptions hereafter specially pointed out, an appeal lies to the Court of Appeal from any judgment or order of the High Court or any Judge or Judges thereof (*o*). An appeal lies without any leave from an order of the Queen's Bench Division affirming or quashing an order of sessions (*p*); from an order making absolute a rule for a mandamus (*q*); from an order discharging a rule for a *certiorari* for removing an order of justices (*r*); from the decision on an application for a prohibition to a County Court Judge (*s*); from an order of a Divisional Court upon an interlocutory matter arising in an election petition (*t*); from a decision of a Divisional Court upon a case stated under 12 & 13 *V. c.* 45, *s.* 11, in an appeal against a poor rate (*u*), or upon a case stated by special sessions under the *Highway Act*, 1835 (*x*); from a refusal to commit a party for contempt (*y*); from the decision of a Divisional Court on a case stated by an arbitrator In what cases appeal lies.

12: *Re Hutley*, 1 Ch. D. 11; 45 L. J., Ch. 79: *Flower* v. *Lloyd*, 6 Ch. D., per *Jessel*, M. R., at p. 299, and per *James*, L. J., at p. 301: *Ransom* v. *Patten*, 17 Ch. D. 767; 44 L. T. 688, where defendant appellant died pending appeal, and it was held that proceedings to continue the appeal by his executors were rightly taken in the Court below.

(*k*) *Re Dunraven Adare Coal Co.*, 33 L. T. 371; 24 W. R. 37: *Brown* v. *Collins*, W. N. 1883, 155: *S. C.*, 25 Ch. D. 57: *Ransom* v. *Patten*, supra.

(*l*) See post, p. 991.

(*m*) *Walsall* (*Overseers*) v. *L. & N. W. R. Co.*, supra: *The Queen* v. *Savin*, 6 Q. B. D. 309.

(*n*) See *Ransom* v. *Patten*, supra.

(*o*) Jud. Act, 1873, s. 19, ante, p. 968: *Pollock* v. *Rabbits*, 21 Ch. D. 466, 468.

(*p*) *Walsall* (*Overseers*) v. *L. & N. W. R. Co.*, 4 App. Cas. 30; 48 L. J., Q. B. 65: *Queen* v. *Savin*, 6 Q. B. D. 309; cp. *Reg.* v. *Swindon New Town L. B.*, 49 L. J., Q. B. 532; 42 L. T. 614, when on appeal from sessions under the Public Health Act leave to appeal was held necessary under Jud. Act, 1873, s. 45, post, Ch. CXXIX.

(*q*) *Reg.* v. *Burial Board of Bishop Wearmouth*, 5 Q. B. D. 67, 69.

(*r*) *Reg.* v. *Pemberton*, *Reg.* v. *Smith*, 5 Q. B. D. 95; 49 L. J., M. C. 29.

(*s*) *Barton* v. *Titchmarsh*, 49 L. J., Q. B. 573; 42 L. T. 610.

(*t*) *Harmon* v. *Park*, 6 Q. B. D. 323; 50 L. J., Q. B. 227; 29 W. R. 768.

(*u*) *Corporation of Peterborough* v. *Overseers of Wilsthorpe*, 12 Q. B. D. 1; 53 L. J., M. C. 33; 50 L. T. 189; 32 W. R. 548.

(*x*) *Illingworth* v. *Bulmer East Highway Board*, 53 L. J., M. C. 60; 32 W. R. 451.

(*y*) *Jarmain* v. *Chatterton*, 20 Ch. D. 493; 30 W. R. 461.

PART XI.

pursuant to an order of reference (*z*); from an order striking a solicitor off the rolls (*a*).

Appeal from decision at or after trial.

As to when an appeal lies to the Court of Appeal from the decision or ruling of the Judge at or after a trial at nisi prius, *see ante*, p. 747.

An appeal from an order of reference made at or after the trial lies to the Court of Appeal (*b*).

From Chambers.

An appeal lies to the Court of Appeal from the decision of a Divisional Court on appeal from a Judge at Chambers (*c*); but no appeal lies direct to the Court of Appeal from a Judge at Chambers without special leave (*d*).

Interpleader.

As to when an appeal lies from an order or decision of a Judge in an interpleader matter, *see post, Ch. CXXI.*, "*Interpleader.*"

When statute provides that decision shall be final.

Cases in which Appeal does not lie.]—By the *Appellate Jurisdiction Act*, 1876, *s.* 20, "Where by Act of Parliament it is provided that the decision of any Court or Judge, the jurisdiction of which Court or Judge is transferred to the High Court of Justice, is to be final, an appeal shall not lie in any such case from the decision of the High Court of Justice, or of any Judge thereof, to her Majesty's Court of Appeal."

Where by statute no appeal lies, except by special leave of the Judge whose decision is appealed from, the Court of Appeal will not hear an appeal from a refusal to give such leave (*e*).

Appeals from inferior Courts.

As to appeals from inferior Courts to Divisional Courts of the High Court of Justice, *see Judicature Act*, 1873, *s.* 45, *post*, *Ch. CXXIX.* By this enactment, "the determination of such appeals respectively by such Divisional Courts shall be final, unless special leave to appeal from the same to the Court of Appeal shall be given by the Divisional Court by which any such appeal from an inferior Court shall have been heard." An appeal lies by special leave from a determination of a Divisional Court where the appeal is from the decision of a County Court, notwithstanding sect. 20 of the Appellate Jurisdiction Act, *supra* (*f*), but no appeal lies without such leave (*g*). This applies to appeals from the Mayor's Court, London (*g*), and to an order made on appeal from quarter sessions under the *Public Health Act*, 1875 (*h*); and to an appeal from a decision of a Divisional Court on an appeal from a County Court,

(*z*) *Shubrook* v. *Tufnell*, 9 Q. B. D. 620; 46 L. T. 749; 30 W. R. 740.

(*a*) *In re Hardwick*, 12 Q. B. D. 148; 53 L. J., Q. B. 64; 49 L. T. 584; 32 W. R. 191.

(*b*) *Hoch* v. *Boor*, 49 L. J., Q. B. 665; 43 L. T. 425.

(*c*) *Dickson* v. *Harrison*, 9 Ch. D. 243; 47 L. J., Ch. 761.

(*d*) Jud. Act, 1873, s. 50, post, Ch. CXXIII.: *In re Elsom*, 6 Ch. D. 346; 25 W. R. 871. As to the practice in the Chancery Division, see *Heatley* v. *Newton*, 51 L. J., Ch. 225; 45 L. T. 455; 30 W. R. 72. As to the practice in Probate matters, see *In re Smith*, W. N. 1884, 3. As to the practice in Admiralty matters, see *The Vivar*, 2 P. D. 29; 35 L. T. 782.

(*e*) *The Amstel*, 2 P. D. 186; 47 L. J., P. 11.

(*f*) *Crush* v. *Turner*, 3 Ex. D. 303; 47 L. J., Ex. 639 (C. A.).

(*g*) *Appleford* v. *Judkins*, 3 C. P. D. 489; 47 L. J., C. P. 615.

(*h*) *Queen* v. *Swindon New Town L. B.*, 49 L. J., Q. B. 522; 42 L. T. 614. An appeal lies from the judgment of the Q. B. Division on a case stated for its opinion by a Court of Quarter Sessions: *Walsall (Overseers)* v. *L. & N. W. R. Co.*, and *Illingworth* v. *Bulmer East Highway Board*, ante, p. 969.

In wha

in a case remitted under
decision in an action merel
19 & 20 *V. c.* 108, *s.* 26 (*k*
charging a rule for a *certior*
or to an order making absol
Court Judge (*m*).

An appeal from the Ma
formerly, error would have
in the Court of Appeal (*n*).

By the *Judicature Act*, 18
Court of Justice, or any Ju
or as to costs only which b
Court, shall be subject to an
or Judge making such order.

The above section prohibits
where the appeal is substant
costs are left to the discretion
to all cases where the appella
the order of the Court below
to interpleader orders (*q*).
appeal on the question as to
be awarded where the Judge
has dealt with them as if he w

The section only applies to
but this extends to orders dir
and the Court will not allow th
the appeal for costs another gr
of supporting the appeal for
missed, the Court of Appeal
below as to costs (*u*).

An appeal lies where the
power to make the order.
Judge, after a trial by jury, ref
without "good cause" being sh
should personally pay the costs

(*i*) *Bowles* v. *Drake*, 8 Q. B. D. 325; 45 L. T. 576; 30 W. R. 333.

(*k*) *Babbage* v. *Coulbourn*, 52 L. J., Q. B. 50; 46 L. T. 515.

(*l*) *Reg.* v. *Pemberton*, *Reg.* v. *Smith*, 5 Q. B. D. 95; 49 L. J., M. C. 29.

(*m*) *Barton* v. *Titchmarsh*, 42 L. T. 610.

(*n*) *Pryor* v. *City Offices Co.*, 10 Q. B. D. 504; 52 L. J., Q. B. 363; 31 W. R. 777; *Le Blanch* v. *Reuter's Telegram Co.*, 1 Ex. D. 408.

(*o*) As to what costs are by law left to the discretion of the Court, see Ord. LXV. r. 1, Vol. 1, p. 671. See *Willmott* v. *Barber*, 17 Ch. D. 772; 45 L. T. 229; *Butcher* v. *Pooler*, 24 Ch. D. 273.

in a case remitted under 30 & 31 *V. c.* 142, *s.* 10 (*i*), but not to a decision in an action merely sent to a County Court for trial under 19 & 20 *V. c.* 108, *s.* 26 (*k*). Nor does it apply to an order discharging a rule for a *certiorari* for removing an order of justices (*l*), or to an order making absolute a rule for a prohibition to a County Court Judge (*m*).

An appeal from the Mayor's Court London, in cases where, formerly, error would have lain to the Exchequer Chamber, lies in the Court of Appeal (*n*).

Orders by consent or as to costs.

By the *Judicature Act*, 1873, *s.* 49, "No order made by the High Court of Justice, or any Judge thereof, by the consent of parties, or as to costs only which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court or Judge making such order."

—As to costs.

The above section prohibits an appeal except by leave in all cases where the appeal is substantially as to the costs only, when such costs are left to the discretion of the Court below (*o*). This applies to all cases where the appellant only seeks to impugn that part of the order of the Court below which relates to costs (*p*). It applies to interpleader orders (*q*). But the section does not prevent an appeal on the question as to the principle on which costs should be awarded where the Judge has not exercised his discretion, but has dealt with them as if he were bound by some universal rule (*r*).

The section only applies to appeals from orders as to costs only, but this extends to orders directing how costs are to be paid (*s*); and the Court will not allow the rule to be evaded by coupling with the appeal for costs another ground of appeal for the mere purpose of supporting the appeal for costs (*t*). When an appeal is dismissed, the Court of Appeal cannot vary the order of the Court below as to costs (*u*).

An appeal lies where the Court below had no jurisdiction or power to make the order. Thus it lies against an order of a Judge, after a trial by jury, refusing a successful plaintiff his costs without "good cause" being shown (*x*); or an order that a solicitor should personally pay the costs of a summons taken out on behalf

---

(*i*) *Bowles* v. *Drake*, 8 Q. B. D. 325; 45 L. T. 576; 30 W. R. 333.

(*k*) *Babbage* v. *Coulbourn*, 52 L. J., Q. B. 50; 46 L. T. 515.

(*l*) *Reg.* v. *Pemberton*, *Reg.* v. *Smith*, 5 Q. B. D. 95; 49 L. J., M. C. 29.

(*m*) *Barton* v. *Titchmarsh*, 42 L. T. 610.

(*n*) *Pryor* v. *City Offices Co.*, 10 Q. B. D. 504; 52 L. J., Q. B. 363; 31 W. R. 777; *Le Blanch* v. *Reuter's Telegram Co.*, 1 Ex. D. 408.

(*o*) As to what costs are by law left to the discretion of the Court, see Ord. LXV. r. 1, Vol. I, p. 671. See *Willmott* v. *Barber*, 17 Ch. D. 772; 45 L. T. 229; *Butcher* v. *Pooler*, 24 Ch. D. 273.

(*p*) *Butcher* v. *Pooler*, 24 Ch. D. 273; *Hornby* v. *Cardwell*, 8 Q. B. D. 329; 51 L. J., Q. B. 89; 45 L. T. 781; *Metropolitan Asylum District* v. *Hill*, 5 App. Cas. 582; 49 L. J., Q. B. 745.

(*q*) *Hartmont* v. *Foster*, 8 Q. B. D. 82.

(*r*) *The City of Manchester*, 5 P. D. 221, 223.

(*s*) *In re Chennell*, *Jones* v. *Chennell*, 8 Ch. D. 492, per *Jessel*, M. R., at pp. 502, 503. See *Willmott* v. *Barber*, and *Butcher* v. *Pooler*, supra.

(*t*) *In re Leigh*, *Rowcliffe* v. *Leigh*, 26 W. R. 729.

(*u*) *Harris* v. *Aaron*, 4 Ch. D. 749; *Graham* v. *Campbell*, 7 Ch. D. 491.

(*x*) *Jones* v. *Curling*, 13 Q. B. D. 262; 53 L. J., Q. B. 373; 50 L. T. 349; 32 W. R. 651.

PART XI.

of a client without giving him an opportunity of being heard (*y*); or an order made by a Master as to costs other than the costs of, or relating to, the proceeding before him (*z*).

So an appeal lies where the order is one which the Court cannot legally make, as, for instance, an order that a successful defendant should pay the costs of a plaintiff who it decides has no right to sue (*a*), or where costs are imposed by way of penalty (*b*).

Where a defendant appealed from an order to pay the costs of an application to commit him for disobeying an injunction, he was allowed to do so, as he also was appealing from the judgment of the Court below on the question of a breach of the injunction (*c*). But in the converse case, where the Court below refused to commit, and ordered that the costs of the motion should be costs in the action, the plaintiffs were held not to be entitled to appeal (*d*). Where, however, the appeal involves a question of law and principle, though it also relates to costs, it will be allowed (*e*); but where the appeal as to costs was joined with an appeal on a point *wholly collateral*, it was held that no appeal lay (*f*). The section does not prevent an appeal against an order making the payment of costs a condition precedent to a new trial (*g*).

The section does not apply where the costs are not left to the discretion of the Court. This extends to cases where an executor (*h*), administrator (*h*), trustee (*i*), or mortgagee (*k*), who has not unreasonably instituted or carried on or resisted any proceedings (*l*), is entitled according to the rules of the Chancery Division to costs out of a particular estate or fund (*m*). Thus an appeal for costs has been allowed by an executor and residuary legatee suing for administration of the testator's estate (*h*), by a trustee suing to effectuate the trust (*i*), or by an incumbrancer suing to establish the priority of his charge (*k*). But a trustee has no right to appeal against an order for costs when the settlement under which he was trustee is set aside (*n*).

(*y*) *In re Bradford or Milton*, 53 L. J., Q. B. 65; 50 L. T. 170; 32 W. R. 238: reversing *S. C.*, 11 Q. B. D. 373.

(*z*) *Hansen* v. *Maddox*, 12 Q. B. D. 100; 50 L. T. 123; 32 W. R. 417, where on the hearing of an interpleader summons the Master had made an order as to the costs of the action.

(*a*) *Dicks* v. *Yates*, 18 Ch. D. 76; 50 L. J., Ch. 809; 44 L. T. 661. See *Butcher* v. *Pooler*, 24 Ch. D. 273; 52 L. J., Ch. 930; 49 L. T. 573.

(*b*) See *Willmott* v. *Barber*, 17 Ch. D. 772; 45 L. T. 229.

(*c*) *Witt* v. *Corcoran*, 2 Ch. D. 69; 45 L. J., Ch. 603: *In re Clements*, 46 L. J., Ch. 375.

(*d*) *Ashworth* v. *Outram* (No. 2), 5 Ch. D. 943.

(*e*) *In re Rio Grande Do Sul Steamship Co.*, 5 Ch. D. 282; 46 L. J., Ch. 277.

(*f*) *Graham* v. *Campbell*, supra, n. (*x*).

(*g*) *Metropolitan Asylum District* v. *Hill*, 5 App. Cas. 582; 49 L. J., Q. B. 745.

(*h*) *Farrow* v. *Austin*, 18 Ch. D. 58; 45 L. T. 227; 30 W. R. 50.

(*i*) *Turner* v. *Hancock*, 20 Ch. D. 303; 30 W. R. 480. See *In re Sarah Knight's Will*, 26 Ch. D. 83; 50 L. T. 550; 32 W. R. 417, where the trustees were refused the costs of the appeal: *In re Hoskin's Trusts*, 6 Ch. D. 281.

(*k*) *Johnstone* v. *Cox*, 19 Ch. D. 17; 45 L. T. 657; 30 W. R. 114: *In re Rio Grande Do Sul Steamship Co.*, 5 Ch. D. 282.

(*l*) See *In re Sarah Knight's Will*, supra: *In re Cooper*, *Cooper* v. *Vesey*, 20 Ch. D. 611; 51 L. J., Ch. 862: 47 L. T. 93, beneficiaries improperly joined.

(*m*) R. of S. C., Ord. LXV. r. 1, ante, p. 672. See Dan. Ch. Pr. 5th ed. 1271 et seq.

(*n*) *Dutton* v. *Thompson*, 23 Ch. D. 278; 52 L. J., Ch. 661; 49 L. T. 109.

The Court or Judge may in all cases give leave to appeal from a decision as to costs (*o*). Such leave should be applied for immediately after the decision is given (*p*).

The section applies to appeals from a Judge at Chambers to a Divisional Court (*q*), but it has been held that it does not apply to an appeal from a Master or a District Registrar to a Judge (*r*).

Criminal matters.

By *Jud. Act*, 1873, *s.* 47, "No appeal shall lie from any judgment of the said High Court in any criminal cause or matter, save for some error of law apparent upon the record, as to which no question shall have been reserved for the consideration of the said Judges under the said Act of the eleventh and twelfth years of her Majesty's reign." This section extends to all orders of the High Court in criminal cases, even where the original proceedings were not taken in the High Court (*s*). There is no appeal from a refusal to grant a rule quashing a conviction for trespass in pursuit of game (*t*), nor from a judgment on appeal from an inferior Court as to the validity of a conviction for keeping a gaming-house (*u*), nor from a decision on a case stated by justices as to an information for contravening the bye-laws of a school under the *Elementary Education Act*, 1870 (*x*), nor from an order of the Queen's Bench Division for a *certiorari* to quash an order of justices directing the abatement of a nuisance (*y*), nor from a decision on the taxation of the costs of an information for libel under 6 & 7 *V.* c. 96, *s.* 8 (*z*), nor from a refusal to grant bail to a prisoner (*a*).

But the section does not prevent an appeal from a decision discharging a rule for a mandamus to Election Commissioners to grant a certificate under sect. 7 of the Corrupt Practices Act (*b*). It is doubtful whether it applies to a refusal to grant a writ of *habeas corpus* to bring up a person arrested for an alleged extradition crime (*c*). It does not apply to an appeal from an order striking a solicitor off the rolls (*d*).

Appeals from discretion.

There is no rule prohibiting an appeal from an order or refusal of the Court below made in the exercise of its discretion (*e*). But although an appeal lies in such cases the Court of Appeal will not interfere unless it is shown that the Court below was clearly wrong,

---

(*o*) *Smith* v. *Smith*, W. N. 1882, 91.

(*p*) See *May* v. *Thompson*, W. N. 1882, 53.

(*q*) *Perkins* v. *Beresford*, 47 L. T. 515: *Mitchell* v. *Darley Main Colliery Co.*, 10 Q. B. D. 457: *In re Bradford or Milton*, supra, n. (*y*): *Hansen* v. *Maddox*, 50 L. T. 123.

(*r*) *Foster* v. *Edwards*, 46 L. J., Q. B. 767.

(*s*) *Reg.* v. *Fletcher, Ex p. Birnie*, 2 Q. B. D. 13; 46 L. J., M. C. 4. See *Reg.* v. *Steel*, 2 Q. B. D. 37; 46 L. J., M. C. 1.

(*t*) Id.

(*u*) *Blake* v. *Beech*, 2 Ex. D. 335; 36 L. T. 723.

(*x*) *Mellor* v. *Denham*, 5 Q. B. D. 467; 49 L. J., M. C. 89.

(*y*) *Reg.* v. *Whitchurch*, 7 Q. B. D. 534; 50 L. J., M. C. 99; 45 L. T. 379; 29 W. R. 922.

(*z*) *Reg.* v. *Steel*, supra.

(*a*) *Reg.* v. *Foote*, 10 Q. B. D. 379; 52 L. J., Q. B. 528; 48 L. T. 394; 31 W. R. 490.

(*b*) *Queen* v. *Holl*, 7 Q. B. D. 575; 50 L. J., Q. B. 763.

(*c*) *Queen* v. *Weil*, 9 Q. B. D. 701; 53 L. J., M. C. 74; 47 L. T. 630; 31 W. R. 60.

(*d*) *In re Hardwick*, 12 Q. B. D. 145; 53 L. J., Q. B. 64; 49 L. T. 584.

(*e*) *Omerod* v. *Todmorden Mill Co.*, 8 Q. B. D. 664; 51 L. J., Q. B. 348; 46 L. T. 669; 30 W. R. 805; *Queen* v. *Mayor of Maidenhead*, 9 Q. B. D. 494, 503, 505; 51 L. J., Q. B. 448; *Jarmain* v. *Chatterton*, 20 Ch. D. 493, 499.

PART XI.

or did not in fact exercise any discretion, or acted on a wrong principle (*f*). The Court of Appeal has interfered with orders as to the mode of trial (*g*), or an order refusing to commit for contempt of Court (*h*).

When a defendant has obtained leave to defend under *Ord. XIV.* the Court of Appeal have lately laid it down that they will not entertain an appeal.

Agreement not to appeal.

The parties may agree not to appeal (*i*). Thus, when by an order of reference made by consent it was ordered that neither party should "bring any error," it was held that this precluded an appeal (*i*). But an undertaking not to appeal will not be effectual unless it is embodied in the order of the Court below (*k*).

By party not appearing in Court below.

It does not appear to be quite settled how far a party who does not appear in the Court below can appeal from an adverse decision. In one case, where the appellant did not appear at all below, the Court of Appeal refused to hear the appeal, saying that they could not do so, but that the appellant might apply to the Court below to allow the case to be argued there (*l*). In another case, where the appellant's counsel did not argue the case in the Court below owing to the loss of some affidavits, the Court of Appeal held the above case distinguishable, and heard the appeal (*m*). In another case, Jessel, M. R., cited the first of the above cases, and expressed a doubt on the point, but the respondent did not insist on the objection, and the appeal was heard (*n*). In a later case, the Court expressed an opinion that the appeal would lie (*o*).

Appeal by one of several parties.

Appeal by One of Several Parties.]—One of several plaintiffs may appeal although his co-plaintiffs refuse to join in doing so (*p*).

(*f*) *In re Martin, Hunt* v. *Chambers*, 20 Ch. D. 365; 51 L. J., Ch. 683; 46 L. T. 399; 30 W. R. 527: *Wigney* v. *Wigney*, 7 P. D. 177; 51 L. J., P. 60, where at p. 62, *Jessel*, M. R., says, that "Having regard to the rules that govern appeals when the Judge has a discretion, the appellant must show that there has been what is called a gross miscarriage of justice, or that the order is clearly wrong. It is not sufficient that the Court of Appeal would not have made precisely the same order as has been made by the Court of first instance. It must be shown that the Court below has made some mistake of law, or some mistake of fact, or that the order is utterly unreasonable. Unless something of that kind is shown, the Court of Appeal will not interfere:" *Ex p. Mark, In re Amer*, 31 W. R. 101: *Ex p. Merchant Banking Co. of London, In re Durham*, 16 Ch. D. 623, 635; 50 L. J., Ch. 606: *Hayter* v. *Beall*, 44 L. T. 131, 132: *Huggons* v. *Tweed*, 10 Ch. D. 359, 363, excluding counterclaim: *In re Terrell*, 22 Ch. D. 476; 47 L. T. 588, scale of costs: *Berdan* v. *Greenwood*, 20 Ch. D. 767, n.; 46 L. T. 524, n., commission abroad.

(*g*) *Omerod* v. *Todmorden Mill Co.*, supra: *In re Martin, Hunt* v. *Chambers*, 20 Ch. D. 365.

(*h*) *Jarmain* v. *Chatterton*, 20 Ch. D. 493.

(*i*) *Jones* v. *Victoria Graving Dock Co.*, 2 Q. B. D. 314; 46 L. J., Q. B. 219.

(*k*) *In re Hull and County Bank, Trotter's Claim*, 13 Ch. D. 261.

(*l*) *Walker* v. *Budden*, 5 Q. B. D. 267; 49 L. J., Q. B. 159.

(*m*) *Barton* v. *Titchmarsh*, W. N. 1880, 110.

(*n*) *Allum* v. *Dickinson*, 9 Q. B. D. 632; 47 L. T. 493; 30 W. R. 930.

(*o*) *Ex p. Streeter, In re Morris*, 19 Ch. D. 216; 45 L. T. 634; 30 W. R. 127.

(*p*) *Beckett* v. *Attwood*, 18 Ch. D. 54; 50 L. J., Ch. 657; 44 L. T. 660; 29 W. R. 796.

Appeal by person not a party to the action.

Appeal by Person not a Party to the Action.]—A person sufficiently interested in (*q*) but not a party to an action may, under special circumstances, obtain leave to appeal (*r*). Thus, an assignee *pendente lite* of the interest of the party may obtain such leave (*r*), and so may the personal representative of an appellant who has died pending the appeal (*s*). But where an action has been commenced by one person as representative for others, and an order has been made in his favour, one of the persons represented cannot appeal, but if dissatisfied with the order should get himself made defendant by application to the Court below (*t*). Such leave is obtained on an *ex parte* application to the Court of Appeal (*r*).

4. *Appeal, how brought* (*u*).

Rules.

Rules.]—The modo of proceedings on appeal to the Court of Appeal is regulated by the *R. of S. C., Ord. LVIII.*

Motion.

By Motion.]—By *R. of S. C., Ord. LVIII. r.* 1, "All appeals to the Court of Appeal shall be by way of rehearing, and shall be brought by notice of motion in a summary way, and no petition, case, or other formal proceeding other than such notice of motion shall be necessary. The appellant may by the notice of motion appeal from the whole or any part of any judgment or order, and the notice of motion shall state whether the whole or part only of such judgment or order is complained of, and in the latter case shall specify such part."

From refusal of ex parte application.

Appeal from Refusal of an ex parte Application.]—By *R. of S. C., Ord. LVIII. r.* 10, "Where an *ex parte* application has been refused by the Court below, an application for a similar purpose may be made to the Court of Appeal *ex parte* within four days from the date of such refusal, or within such enlarged time as a Judge of the Court below or of the Court of Appeal may allow." As to the time limit imposed by this rule, *see post*, p. 978.

Leave to appeal.

Leave to appeal.]—When leave to appeal is necessary, it may be obtained on an *ex parte* application (*x*).

5. *Time within which Appeal must be brought.*

Time limited (*y*).

Time limited.]—By *Ord. LVIII. r.* 15, "No appeal to the Court of Appeal from any interlocutory order, or from any order, whether final or interlocutory, in any matter not being an action, shall, except by special leave of the Court of Appeal, be brought after the expiration of *twenty-one days*, and no other appeal shall, except

---

(*q*) *Crawcour* v. *Salter*, 30 W. R. 329.

(*r*) *In re Markham, Markham* v. *Markham*, 16 Ch. D. 1; 29 W. R. 228. See *In re Madras Irrigation, &c. Co.*, 23 Ch. D. 248; 49 L. T. 228.

(*s*) *Ransom* v. *Patten*, 17 Ch. D. 767; 44 L. T. 688.

(*t*) *Watson* v. *Cave* (No. 1), 17 Ch. D. 19; 44 L. T. 40; 29 W. R. 433.

(*u*) As to appeals in actions pending when the Jud. Acts came into force, see *Fitzgerald* v. *Dawson*, 45 L. J., C. P. 152; *Bartlam* v. *Yates*, 1 Ch. D. 13; 33 L. T. 338; *Taylor* v. *Greenhalgh*, 24 W. R. 311 (C. A.).

(*x*) *Hetherington* v. *Groom*, W. N. 1884, 26.

(*y*) See generally as to the objects and history of the time limit, *Curtis* v. *Sheffield*, 21 Ch. D. 1; 46 L. T. 581; 30 W. R. 581.

PART XI.

by such leave, be brought after the expiration of one year. The said respective periods shall be calculated, in the case of an appeal from an order in Chambers, from the time when such order was pronounced, or when the appellant first had notice thereof, and in all other cases, from the time at which the judgment or order is signed, entered, or otherwise perfected, or, in the case of the refusal of an application, from the date of such refusal. Such deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be directed under special circumstances by the Court of Appeal."

The time limit imposed by this rule does not apply to a notice of cross appeal given by a respondent under rule 6 (*infra*, p. 980) (*z*).

—Order—final or interlocutory.

—*Interlocutory or Final Orders.*]—There is often considerable difficulty in determining whether an order is final or interlocutory for the purposes of an appeal. The *Judicature Act*, 1875, *s.* 12, enacts that "Any doubt which may arise as to what decrees, orders or judgments are final and what are interlocutory shall be determined by the Court of Appeal." It may, perhaps, be said that all orders are for this purpose interlocutory which do not finally determine the position of the parties in the litigation, or some portion of, or question arising in it (*a*). An order overruling or allowing a demurrer is not interlocutory (*b*); nor is an order giving the party costs which have been refused at the trial (*c*); but an order empowering the plaintiff to sign judgment under *Ord. XIV. r.* 1, is (*d*). So was an order making absolute (*e*) or discharging (*f*) a rule *nisi* for a new trial. So is the order determining an interpleader issue (*g*). So, also, is the decision of the Court upon a special case stated by an arbitrator who is thereupon to make his award (*h*). The verdict of a Judge sitting without a jury to try specific questions of fact as distinct from his judgment is an interlocutory order for the purpose of an appeal (*i*). An order as to costs forming part of a final judgment, though added to it on motion, is a final order (*k*). An order referring back a case to an arbitrator, where the decision of the Court cannot dispose of the whole matter, is

(*z*) *Ex p. Bishop, In re Fox & Co.*, 15 Ch. D. 400.

(*a*) See cases cited in notes (*b*) to (*u*), infra, and cp. *Krehl* v. *Burrell*, 10 Ch. D. 420: *Lowe* v. *Lowe*, Id. 432: *In re Stockton Iron Furnace Co.*, 10 Ch. D. 335: *In re Compton*, 27 Ch. D. 392; 51 L. T. 277. See *Pheysey* v. *Pheysey*, 12 Ch. D. 305; 41 L. T. 607.

(*b*) *Trowell* v. *Shenton*, 8 Ch. D. 318, 321; 47 L. J., Ch. 738. See per *Bramwell*, L. J., 5 Q. B. D. at p. 370. It should be observed that in this case the demurrer was to the whole of a pleading, and that a distinction might be drawn where only part of a pleading was demurred to, or when the pleading was pleaded to as well as demurred to.

(*c*) *Marsden* v. *Lanc. & Yorks. R. Co.*, 7 Q. B. D. 641; 50 L. J., Ch. 318; 29 W. R. 580.

(*d*) *Standard Discount Co.* v. *Otard de la Grange*, 3 C. P. D. 67. See per *Baggallay*, L. J., 5 Q. B. D. at p. 370. But see per *James*, L. J., *Att.-Gen.* v. *Great Eastern R. Co.*, 27 W. R. at p. 763.

(*e*) *Highton* v. *Treherne*, 48 L. J., Ex. 167; 39 L. T. 411.

(*f*) *Wilks, Trustee, &c.* v. *Judge*, W. N. 1880, 98, 99 (C. A.).

(*g*) *McAndrew* v. *Barker*, 7 Ch. D. 701; 47 L. J., Ch. 340.

(*h*) *Collins* v. *Vestry of Paddington*, 5 Q. B. D. 368; 49 L. J., Q. B. 612.

(*i*) *Krehl* v. *Burrell*, 10 Ch. D. 421; 48 L. J., Ch. 383, and cases supra, n. (*a*).

(*k*) *The City of Manchester*, 5 P. D. 221; 42 L. T. 521: *Marsden* v. *Lanc. & Yorks. R. Co.*, supra, n. (*e*).

Time within u

interlocutory (*l*), but when
it is final (*m*). If an inter
order as a final one, the ap
be brought within the twe

—*Refusal.*]—An order ref
declaration or expression o
of the parties is not a refus
a mere order as to the costs
prevent such dismissal bei
creditor's claim in an admir
rule (*q*).

—*From Refusal of Ex part*
(*supra*, p. 975), "Where an
by the Court below, an app
made to the Court of Appe
date of such refusal, or withi
the Court below or of the Co

—*From Order in Matter not be*
"The time for appealing from
in the matter of the *winding-*
of the Companies Act, 1862, o
order or decision made in the
other matter not being an action,
for appeal from an interlocuto

What must be done within the
be *served* within the time limit
appeal cannot, by reason of the
set down within that time (*s*).
the entry, is now the material
the twenty-one days (*t*).

(*l*) *Collins* v. *Vestry of Paddington*, 5 Q. B. D. 368; 42 L. T. 573; as explained in *Shubrook* v. *Tufnell*, 9 Q. B. D. 621; 46 L. T. 745; 30 W. R. 740.

(*m*) *Shubrook* v. *Tufnell*, supra. See also *Krehl* v. *Burrell*, 10 Ch. D. 420: *Lowe* v. *Lowe*, Id. 432: *In re Stockton Iron Furnace Co.*, 10 Ch. D. 335: *Pheysey* v. *Pheysey*, 12 Ch. D. 305; 41 L. T. 607.

(*n*) *Cummins* v. *Herron*, 4 Ch. D. 787: *White* v. *Witt*, 5 Id. 589.

(*o*) *In re Clay and Tetley*, 16 Ch. D. 3 at p. 7; 50 L. J., Ch. 164; 43 L. T. 402 (C. A.): *Whyte* v. *Ahrens*, W. N. 1884, 102.

(*p*) *In re Smith, Hooper* v. *Smith*, 26 Ch. D. 614: *Swindell* v. *Birmingham Syndicate*, 3 Ch. D. 127; 45 L. J., Ch. 756.

(*q*) *In re Clagett, Fordham* v. *Clagett*, 20 Ch. D. 134; 51 L. J., Ch. 461; 30 W. R. 374.

(*r*) See as to winding-up orders,

interlocutory (*l*), but when it could so dispose of the whole matter it is final (*m*). If an interlocutory order be included in the same order as a final one, the appeal from the former must nevertheless be brought within the twenty-one days (*n*).

—Refusal.

—*Refusal.*]—An order refusing an application, but containing a declaration or expression of opinion of the Judge as to the rights of the parties is not a refusal within the above rule, *r.* 15 (*o*). But a mere order as to the costs of a motion which is dismissed does not prevent such dismissal being a refusal (*p*). A disallowance of a creditor's claim in an administration action is a refusal within the rule (*q*).

—Refusal of ex parte application.

—*From Refusal of Ex parte Application.*]—By *Ord. LVIII. r.* 10 (*supra*, p. 975), "Where an *ex parte* application has been refused by the Court below, an application for a similar purpose may be made to the Court of Appeal *ex parte* within four days from the date of such refusal, or within such enlarged time as a Judge of the Court below or of the Court of Appeal may allow."

—From order in matter not being an action.

—*From Order in Matter not being an Action,*]—By *Ord. LVIII. r.* 9, "The time for appealing from any order or decision made or given in the matter of the *winding-up* of a company under the provisions of the Companies Act, 1862, or any Act amending the same, or any order or decision made in the matter of any *bankruptcy*, or in *any other matter not being an action*, shall be the same as the time limited for appeal from an interlocutory order under Rule 15" (*r*).

What must be done within the time.

What must be done within the Time.]—The notice of motion *must* be *served* within the time limited for appealing (*s*), even though the appeal cannot, by reason of the offices being closed or otherwise, be set down within that time (*s*). The service of the notice, and not the entry, is now the material step (*s*). Sundays are included in the twenty-one days (*t*).

(*l*) *Collins* v. *Vestry of Paddington*, 5 Q. B. D. 368; 42 L. T. 573; as explained in *Shubrook* v. *Tufnell*, 9 Q. B. D. 621; 46 L. T. 745; 30 W. R. 740.

(*m*) *Shubrook* v. *Tufnell*, supra. See also *Krehl* v. *Burrell*, 10 Ch. D. 420: *Lowe* v. *Lowe*, Id. 432: *In re Stockton Iron Furnace Co.*, 10 Ch. D. 335: *Pheysey* v. *Pheysey*, 12 Ch. D. 305; 41 L. T. 607.

(*n*) *Cummins* v. *Herron*, 4 Ch. D. 787: *White* v. *Witt*, 5 Id. 589.

(*o*) *In re Clay and Tetley*, 16 Ch. D. 3 at p. 7; 50 L. J., Ch. 164; 43 L. T. 402 (C. A.): *Whyte* v. *Ahrens*, W. N. 1884, 102.

(*p*) *In re Smith, Hooper* v. *Smith*, 26 Ch. D. 614: *Swindell* v. *Birmingham Syndicate*, 3 Ch. D. 127; 45 L. J., Ch. 756.

(*q*) *In re Clagett, Fordham* v. *Clagett*, 20 Ch. D. 134; 51 L. J., Ch. 461; 30 W. R. 374.

(*r*) See as to winding-up orders, *In re National Funds Assurance Co.*, 4 Ch. D. 305: *In re Madras Irrigation, &c. Co.*, 23 Ch. D. 248; 49 L. T. 228: *In re Normanton Iron Co.*, 50 L. J., Ch. 223; 29 W. R. 300. As to bankruptcy, *Ex p. Viney*, 4 Ch. D. 794: *Ex p. Garrard*, 5 Id. 61: *Ex p. Saffery*, Id. 365: *Ex p. Hall, In re Allen*, 16 Ch. D. 501; 50 L. J., Ch. 400; 40 L. T. 8. As to administration orders, see *Pheysey* v. *Pheysey*, 12 Ch. D. 305; 41 L. T. 607 (C. A.): *In re Clagett, Fordham* v. *Clagett*, 20 Ch. D. 134; 51 L. J., Ch. 461. And as to other cases, *In re Baillie's Trusts*, 4 Ch. D. 785; 46 L. J., Ch. 330, Trustee Relief Act: *In re Blyth and Young*, 13 Ch. D. 416, Vend. and Pur. Act: *In re Leonard Jacques*, 18 Ch. D. 392; 45 L. T. 297.

(*s*) *Ex p. Viney, In re Gilbert*, 4 Ch. D. 794; 46 L. J., Ch. 80: *Ex p. Saffrey, In re Lambert*, 5 Ch. D. 365.

(*t*) *Ex p. Viney*, supra.

PART XI.

From what point time runs.

From what Point the Time runs.]—In the case of an appeal from a judgment or order, the time limited for appealing runs from the time when the judgment or order is signed, entered or otherwise perfected (*n*). But in the case of a refusal (*x*), the time runs from such refusal (*y*), even though the Court below makes an order as to the costs of the motion (*z*); and this is so in the case of a refusal of one of several claims joined in one application, as to some of which an order is made, where the appeal is from the refusal only (*a*). Where an application is partially granted, and the applicant appeals, this is not an appeal from a refusal (*b*). Where an order refusing an application contains any declaration or expression of opinion it is not a mere refusal (*c*). Where an action is dismissed at the trial, the time runs from the time when the judgment is pronounced (*d*).

Objection, how raised.

Objection, how raised.]—No notice of his intention to rely on the objection that the appeal is too late need be given by the respondent; but if he knowingly allow his opponent to incur costs in preparing for the appeal without giving such notice, he may be deprived of his costs (*e*) in the event of his raising the objection. When the objection is raised and the appeal dismissed on the ground that it is too late, the appellant will not be ordered to pay the costs of affidavits filed by the respondent after the appeal is set down (*f*).

Extension of time.

Extension of Time.]—After the time for appealing has expired, leave to appeal will not be granted on an *ex parte* application, but must be moved for on notice (*g*). Leave will only be given under special circumstances (*h*). The mere fact that the Court of Appeal have since come to a different conclusion to that at which the Court below had arrived, is not a sufficient reason for extending the

(*n*) Ord. LVIII. r. 15, supra: *Ex p. Garrard, In re Lewer*, 5 Ch. D. 61; 46 L. J., Bk. 70: *Gathercole* v. *Smith*, W. N. 1880, 102, 103: cp. *Heatley* v. *Newton*, 19 Ch. D. 326; 45 L. T. 455.

(*x*) See *In re Clagett, Fordham* v. *Clagett*, 20 Ch. D. 134.

(*y*) Ord. LVIII. r. 15, supra.

(*z*) *In re Smith, Hooper* v. *Smith*, 26 Ch. D. 614: *Swindell* v. *Birmingham Syndicate*, 3 Ch. D. 127; 45 L. J., Ch. 756. As to what is a refusal, see ante.

(*a*) *Trail* v. *Jackson*, 4 Ch. D. 7; 46 L. J., Ch. 16: *Berdan* v. *Birmingham Small Arms Co.*, 7 Ch. D. 24; 47 L. J., Ch. 96. As to what is a "refusal," see ante.

(*b*) *In re Michell's Trusts*, 9 Ch. D. 5.

(*c*) *In re Clay and Tetley*, 16 Ch. D. 3; 43 L. T. 402.

(*d*) *International Financial Society* v. *City of Moscow Gas Co.*, 7 Ch. D. 241; 47 L. J., Ch. 258.

(*e*) *In re Blyth and Young*, 13 Ch. D. 400.

(*f*) *Ex p. Fardon's Vinegar Co., In re Jones*, 14 Ch. D. 285; 49 L. J., Bank. 74.

(*g*) *In re Lawrence, Emmett* v. *Lawrence*, 4 Ch. D. 139; 46 L. J., Ch. 119. The motion should be made before giving notice of appeal: *Swindell* v. *Birmingham Syndicate*, 3 Ch. D. at p. 132, per *Mellish*, L. J.

(*h*) *In re Manchester Economic Society*, 24 Ch. D. 488, 497; 53 L. J., Ch. 115; 49 L. T. 703; 32 W. R. 325: *Craig* v. *Phillips*, 7 Ch. D. 249; 47 L. J., Ch. 239: *In re Ambrose Lake Tin, &c. Co., Taylor's case*, 8 Ch. D. 643; 47 L. J., Ch. 696: *In re Blyth and Young*, 13 Ch. D. 416: *Collins* v. *Paddington (Vestry)*, 5 Q. B. D. 368; 49 L. J., Q. B. 612. The principles on which time limits are fixed, and on which they should be extended, are fully discussed in the judgments in the latter case: *Ex p. Ward, In re Ward*, 15 Ch. D. 292; 29 W. R. 206.

Time within wh

time (*i*). Nor is the fact th
misconstruing the rules (*k*).
the time intimated his intent
for extending the time (*l*).
future rights is not sufficie
appellant may, under some
although the respondent has
himself (*n*).

6. *Notice o*

Form and Contents of Notice
whether the whole or part onl
from is complained of, and
part (*p*). The notice should s
will be moved on appeal (*o*),
and any notice will suffice pro
will be prosecuted (*q*). But a n
an intention to appeal (*r*), or th
to appeal (*s*), will not suffice.

A notice signed by solicitors
of the solicitors for the appellar

Length of Notice required.]—
"Notice of appeal from any ju
tory, or from a final order, sh
notice of appeal from any inte
notice."

Under special circumstances t
short notice of motion (*u*). If
that such leave has been granted

A party by appearing on the
objection on the ground that the

Service and Amendment of Noti
r. 2, "The notice of appeal shall
affected by the appeal, and it sha
not so affected; but the Court of

(*i*) *Craig* v. *Phillips*, supra.

(*k*) *In re National Funds Assurance Co.*, 4 Ch. D. at p. 314; 46 L. J., Ch. 183: *International Financial Society* v. *Moscow Gas Co.*, 7 Ch. D. 241; 47 L. J., Ch. 258: *Highton* v. *Treherne*, 48 L. J., Ex. 167; 39 L. T. 411: *In re Sceptre Insurance Co., Ex p. Howe*, W. N. 1879, 6: *In re Mansel, Rhodes* v. *Jenkins*, 7 Ch. D. 711; 47 L. J., Ch. 870.

(*l*) *In re Blyth and Young*, 13 Ch. D. 416; 41 L. T. 746: *In re New Callao*, 22 Ch. D. 484; 48 L. T. 251.

(*m*) *Curtis* v. *Sheffield*, 21 Ch. D. 1; 46 L. T. 177.

(*n*) *In re New Callao*, supra: *Collins* v. *Vestry of Paddington*, 5 Q. B. D. 368; 42 L. T. 573. See *In re Manchester Economic Society*, supra.

time (*i*). Nor is the fact that the appellant has been misled by misconstruing the rules (*k*). The fact that the appellant has within the time intimated his intention to appeal, is not sufficient ground for extending the time (*l*). The mere fact that the order deals with future rights is not sufficient (*m*). Mistakes on the part of the appellant may, under some circumstances, be sufficient ground, although the respondent has done nothing to raise an equity against himself (*n*).

6. *Notice of Motion on Appeal.*

Form and Contents of Notice (*o*).]—The notice of motion must state whether the whole or part only of the judgment or order appealed from is complained of, and in the latter case must specify such part (*p*). The notice should state clearly that the Court of Appeal will be moved on appeal (*o*), but no particular form is necessary, and any notice will suffice provided it clearly state that an appeal will be prosecuted (*q*). But a mere suggestion or communication of an intention to appeal (*r*), or that the party is advised and intends to appeal (*s*), will not suffice. Form and contents of notice.

A notice signed by solicitors who are in fact the London agents of the solicitors for the appellant is sufficient (*t*).

Length of Notice required.]—By *R. of S. C., Ord. LVIII. r.* 3, "Notice of appeal from any judgment, whether final or interlocutory, or from a final order, shall be a fourteen days notice, and notice of appeal from any interlocutory order shall be a four days notice." Length of notice required.

Under special circumstances the Court may grant leave to serve short notice of motion (*u*). If this is done the notice should state that such leave has been granted (*u*).

A party by appearing on the hearing of the appeal waives any objection on the ground that the notice is too short (*x*).

Service and Amendment of Notice.]—By *R. of S. C., Ord. LVIII. r.* 2, "The notice of appeal shall be served upon all parties directly affected by the appeal, and it shall not be necessary to serve parties not so affected; but the Court of Appeal may direct notice of the Service and amendment of notice.

(*i*) *Craig* v. *Phillips*, supra.

(*k*) *In re National Funds Assurance Co.*, 4 Ch. D. at p. 314; 46 L. J., Ch. 183: *International Financial Society* v. *Moscow Gas Co.*, 7 Ch. D. 241; 47 L. J., Ch. 258: *Highton* v. *Treherne*, 48 L. J., Ex. 167; 39 L. T. 411: *In re Sceptre Insurance Co., Ex p. Howe*, W. N. 1879, 6: *In re Mansel, Rhodes* v. *Jenkins*, 7 Ch. D. 711; 47 L. J., Ch. 870.

(*l*) *In re Blyth and Young*, 13 Ch. D. 416; 41 L. T. 746: *In re New Callao*, 22 Ch. D. 484; 48 L. T. 251.

(*m*) *Curtis* v. *Sheffield*, 21 Ch. D. 1; 46 L. T. 177.

(*n*) *In re New Callao*, supra: *Collins* v. *Vestry of Paddington*, 5 Q. B. D. 368; 42 L. T. 573. See *In re Manchester Economic Society*, supra.

(*o*) See form, Chit. F. p. 486.

(*p*) R. of S. C., Ord. LVIII. r. 1, ante, p. 975: *Hunter* v. *Hunter*, 24 W. R. 527.

(*q*) *In re West Jewell Tin Mining Co., Little's case*, 8 Ch. D. 806. See as to this case, *Collins* v. *Vestry of Paddington*, 5 Q. B. D. 368, 374; 49 L. J., Q. B. 612.

(*r*) *In re Blyth and Young*, 13 Ch. D. 416.

(*s*) *In re New Callao*, 22 Ch. D. 48; 52 L. J., Ch. 283.

(*t*) *Kettlewell* v. *Watson*, 52 L. J., Ch. 818; 48 L. T. 840; 31 W. R. 709.

(*u*) *Dawson* v. *Beeson*, 52 L. J., Ch. 563.

(*x*) *In re McRae, Forster* v. *Davis*, 25 Ch. D. 16, 19; 32 W. R. 301.

PART XI.

appeal to be served on all or any parties to the action or other proceeding, or upon any person not a party, and in the meantime may postpone or adjourn the hearing of the appeal upon such terms as may be just (*q*), and may give such judgment and make such order as might have been given or made if the persons served with such notice had been originally parties. Any notice of appeal may be amended at any time as the Court of Appeal may think fit" (*r*).

The notice should be served on all parties who will be affected by the order (*s*), but a party not served may appear and get his costs (*t*). The Court has full discretion under this rule to allow the notice to be amended as to dates or otherwise; and special circumstances are not required to justify such amendment (*u*). A person not a party to an action, but affected by an order made in it, may obtain leave to appeal by applying *ex parte* for it (*x*). The personal representative of a deceased appellant may get leave from the Court below to carry on the appeal (*y*).

The Court may make an order for substituted service of the notice of motion (*z*).

Abandonment or withdrawal of notice on appeal.

Abandonment or Withdrawal of Notice on Appeal.]—If the notice is irregular or insufficient and the appeal is not entered, the appellant may abandon it and give a second and proper notice, provided of course the time for appealing has not meanwhile expired (*a*). If the notice is withdrawn the respondent should require the appellant to pay his costs, and in the event of his refusing to do so, he may apply to the Court for them (*b*). This application must be made on notice of motion, and not *ex parte* (*c*).

If the action be discontinued pending an appeal, the appeal comes to an end, and will be struck out of the paper (*d*).

When a party has given notice of withdrawal of his appeal, and the other side has consented, he will not afterwards be allowed to revoke his withdrawal so as to proceed on the original notice (*e*).

Notice by respondent—Cross appeals.

Notice by Respondent—Cross Appeals.]—By *R. of S. C., Ord. LVIII. r.* 6, "It sha" not, under any circumstances, be necessary for a respondent to give notice of motion by way of cross appeal, but if a respondent intends, upon the hearing of the appeal, to contend that the decision of the Court below should be varied, he

(*q*) See *Hunter* v. *Hunter*, 24 W. R. 504.

(*r*) See *Purnell* v. *G. W. R. Co.*, 1 Q. B. D. 636; 45 L. J., Q. B. 687.

(*s*) *In re New Callao*, 22 Ch. D. 485; 52 L. J., Ch. 283; 48 L. T. 251. See *Ex p. Ward, In re Ward*, 15 Ch. D. 292, trustee in bankruptcy.

(*t*) Id.

(*u*) *In re Stockton Iron Furnace Co.*, 10 Ch. D. 335 at p. 348.

(*x*) *In re Markham*, 16 Ch. D. 1: cp. *Watson* v. *Cave*, 17 Ch. D. 19; 44 L. T. 40.

(*y*) *Ransom* v. *Patten*, 17 Ch. D. 767; 41 L. T. 658.

(*z*) *Ex p. Warburg, In re Whalley*, 24 Ch. D. 364; 49 L. T. 243.

(*a*) *Norton* v. *L. & N. W. R. Co.*, 11 Ch. D. 118.

(*b*) *Charlton* v. *Charlton*, 16 Ch. D. 273.

(*c*) *In re Oakwell Collieries*, 7 Ch. D. 706; 26 W. R. 577 (C. A.).

(*d*) *Conybeare* v. *Lewis*, 13 Ch. D. 469; 28 W. R. 330 (C. A.). Whenever an action is settled whilst an appeal is pending, notice should at once be given to the proper officer: *Scott* v. *Turner*, W. N. 1879, 173.

(*e*) *Watson* v. *Cave* (No. 2), 17 Ch. D. 23; 50 L. J., Ch. 561; 44 L. T. 117: 29 W. R. 760.

shall within the time specifi
be prescribed by special ord
parties who may be affected
give such notice shall not di
upon the Court of Appeal, b
be ground for an adjournme
as to costs." This rule on
called (*f*). When the respon
appellant, the usual notice
under this rule will not suffi
The time limit imposed b
to this notice by the respo
be given within a sufficient
hearing to allow of the length
By *r.* 7, "Subject to any
notice by a respondent under
case of any appeal from a fin
and in the case of an appea
days notice." As to what are
see supra, p. 976.
A respondent who gives no
as if he had presented a cross
missed the appellant will have
occasioned by the respondent'
allowed the appellant 5*l.* as the
The withdrawal by the appella
respondent from proceeding (*l*).

7. *Setting down*

By *R. of S. C., Ord. LVIII.*
judgment or order shall produc
of Appeal the judgment or or
shall leave with him a copy o
and such officer shall thereupo
the same in the proper list of a
heard according to its order in s
or a Judge thereof shall other
into the paper for hearing befo
appeal."
The appeal must be set down
in the notice of appeal, or if tha
offices are closed, then before t
Court (*m*), otherwise the respon

(*f*) *In re Cavander's Trusts*, 16 Ch. D. 270; 50 L. J., Ch. 292; 29 W. R. 405. See *Ex p. Payne, In re Cross*, 11 Ch. D. 539, at p. 550: *Ex p. Bishop, In re Fox & Co.*, 15 Ch. D. at p. 420.

(*g*) *Ex p. Bishop, In re Fox & Co.*, 15 Ch. D. 400.

(*h*) *Harrison* v. *Cornwall, &c. R.*

shall within the time specified in the next rule, or such time as may be prescribed by special order, give notice of such intention to any parties who may be affected by such contention. The omission to give such notice shall not diminish the powers conferred by the Act upon the Court of Appeal, but may, in the discretion of the Court, be ground for an adjournment of the appeal, or for a special order as to costs." This rule only applies to cross appeals strictly so called (*f*). When the respondent's appeal does not affect the original appellant, the usual notice of appeal must be given, and a notice under this rule will not suffice (*f*).

The time limit imposed by *r.* 15 (*ante*, p. 975) does not apply to this notice by the respondent (*g*), and it is sufficient if it be given within a sufficient time before the appeal comes on for hearing to allow of the length of notice required by the next rule.

By *r.* 7, "Subject to any special order which may be made, notice by a respondent under the last preceding rule shall in the case of any appeal from a final judgment be an eight days notice, and in the case of an appeal from an interlocutory order a two days notice." As to what are final and what interlocutory orders, *see supra*, p. 976.

A respondent who gives notice is in the same position as to costs as if he had presented a cross appeal (*h*). When the appeal is dismissed the appellant will have to pay the costs, except such as were occasioned by the respondent's notice (*i*). In one case the Court allowed the appellant 5*l.* as the costs of the respondent's notice (*k*). The withdrawal by the appellant of his appeal does not prevent the respondent from proceeding (*l*).

7. *Setting down Appeal for Hearing.*

Setting down appeal.

By *R. of S. C., Ord. LVIII. r.* 8, "The party appealing from a judgment or order shall produce to the proper officer of the Court of Appeal the judgment or order or an office copy thereof, and shall leave with him a copy of the notice of appeal to be filed, and such officer shall thereupon set down the appeal by entering the same in the proper list of appeals, and it shall come on to be heard according to its order in such list, unless the Court of Appeal or a Judge thereof shall otherwise direct, but so as not to come into the paper for hearing before the day named in the notice of appeal."

The appeal must be set down for hearing *before* the day named in the notice of appeal, or if that day be in the vacation when the offices are closed, then before the next day of the sitting of the Court (*m*), otherwise the respondent will be entitled to treat the

---

(*f*) *In re Cavander's Trusts*, 16 Ch. D. 270; 50 L. J., Ch. 292; 29 W. R. 405. See *Ex p. Payne, In re Cross*, 11 Ch. D. 539, at p. 550: *Ex p. Bishop, In re Fox & Co.*, 15 Ch. D. at p. 420.

(*g*) *Ex p. Bishop, In re Fox & Co.*, 15 Ch. D. 400.

(*h*) *Harrison* v. *Cornwall, &c. R. Co.*, 18 Ch. D. 334; 51 L. J., Ch. 98. See *Robinson* v. *Drake*, infra.

(*i*) *The Laurette*, 4 P. D. 25; 48 L. J., P. 55.

(*k*) *Robinson* v. *Drake*, 23 Ch. D. 98; 48 L. T. 740; 31 W. R. 871.

(*l*) *In re Cavander's Trusts*, supra.

(*m*) *Shoetensack* v. *Price & Co.*, W. N. 1880, 69 (C. A.).

PART XI.

appeal as abandoned, and to have it dismissed with costs (*n*). If the appeal be not set down in time, the appellant may abandon his first notice, and serve a second, provided he does so within the time limited by rule 15 (*o*).

When the appeal is from the refusal of an application, it may be set down without production of the order appealed from, or a copy of it, as in that case the rule does not apply (*p*); and when it is the duty of the respondent to draw up the order, he will not be allowed to take any advantage of his own delay in so doing (*q*).

Proceedings when appeal not set down.

Proceedings when Appeal not set down.]—If the appeal is not duly set down, or the notice is withdrawn, the respondent should not appear, but he may make a substantive application on notice (*r*) for his costs (*s*). But before making this application, he should apply to the appellant for payment of the costs (*t*), otherwise he will not get the costs of the application (*t*).

Fee.

Fee.]—The fee for entering or setting down or re-entering or re-setting down an appeal is in general 1*l.*, which is paid by means of a stamp impressed on a process, a form of which, with the impressed stamp, can be purchased at the Inland Revenue Office. (*See the Orders as to Fees and Stamps, post, Appendix.*)

Notice of settlement.

Notice of Settlement.]—When a matter is settled after the appeal is set down, notice should at once be given to the officer of the Court, so as to prevent the case being put in the paper (*u*).

8. *Security for Costs of Appeal.*

Security for costs of appeal.

By *R. of S. C., Ord. LVIII. r.* 15 (*ante*, p. 975), "Such deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be directed under special circumstances by the Court of Appeal."

The fact that the appellant is a foreigner residing abroad is a sufficient special circumstance to entitle the respondent to security (*x*). The insolvency of the appellant is also *primâ facie* a sufficient reason for ordering

when the appeal is unreasonable
or has been unreasonably
But when the question
not been raised before in
order the appellant to
solvency (*c*). Non-compliance
evidence of insolvency (*d*).
may be a sufficient special
being required from an
woman (*f*). When the appellant
he should offer to do so, as
of the application for the
the plaintiff or defendant is
compel the appellant to give
No
be made promptly (*k*). It is
been incurred and a time fixed
The security may be given
or by a bond with sureties (*u*)
of the application are general
appeal (*p*).
The amount of the security
appeal (*q*).
The Court will not generally
to be given (*r*), nor will they or

(*n*) *In re National Funds Assurance Co.*, 4 Ch. D. 305; 46 L. J., Ch. 183: *In re Mansel, Rhodes* v. *Jenkins*, 7 Ch. D. 711; 47 L. J., Ch. 870: *Donovan* v. *Brown*, 4 Ex. D. 148; 48 L. J., Ex. 456: *Machu* v. *O'Connor*, W. N. 1878, 144: *Coathorpe* v. *Lewis*, W. N. 1879, 180: *Shoetensack* v. *Price & Co.*, supra, n. (*m*).

(*o*) *Norton* v. *London & N. W. R. Co.*, 11 Ch. D. 118; 40 L. T. 597.

(*p*) *Smith* v. *Grindley*, 3 Ch. D. 80; 35 L. T. 112.

(*q*) *In re Harker, Goodbarne* v. *Fothergill*, 10 Ch. D. 613; 40 L. T. 408.

(*r*) *In re Oakwell Collieries Co.*, 7 Ch. D. 706; 25 W. R. 577.

(*s*) *Re Mansel* v. *Mansel*, 2 Q. B. D. 137; 25 W. R. 389: *Machu* v. *O'Connor*, W. N. 1879, 141: *Waddell* v. *Blockley*, 10 Ch. D. 416; 40 L. T. 286: *Charlton* v. *Charlton*, 16 Ch. D. 273; 29 W. R. 406: *Coathorpe* v. *Lewis*, W. N. 1879, 180, where the application, which was granted, included the setting aside of a stay of execution granted by the Court below. What costs should be allowed is a question for the taxing Master: *Charlton* v. *Charlton*, supra.

(*t*) *Griffin* v. *Allen*, 11 Ch. D. 913: cp. *Charlton* v. *Charlton*, supra.

(*u*) *Scott* v. *Turner*, W. N. 1879, 173.

(*x*) *Grant* v. *Banque Franco-Egyptienne*, 2 C. P. D. 430: *Walton Block Ice Shipping Co.* v. *Royal Mail Steam Packet Co.*, W. N. 1880, 133, 150*l.*

(*y*) *Re Spencer, Spencer* v. *Hart*, 45 L. T. 396, 15*l.*: *Harlock* v. *Ashberry*, 19 Ch. D. 84; 51 L. J., Ch. 96; 45 L. T. 602, 30*l.*: per *Cotton*, L. J., *In re Ivory, Hankin* v. *Turner*, 10 Ch. D. at p. 377; 39 L. T. 285: *Ex p. Isaacs, In re Baum*, 9 Ch. D. 271: cp. per *Cockburn*, C. J., *Usil* v. *Brearley*, 3 C. P. D. 206; 47 L. J., C. P. 380. As to the case of a company being wound up, see *In re Diamond Fuel Co.*, 13 Ch. D. 400; 49 L. J., Ch. 301: *In re Photographic, &c. Association*, 23 Ch. D. 370; 48 L. T. 454, 25*l.*: *Gathercole* v. *Smith*, W. N. 1880, 102, 20*l.*

(*z*) *Usil* v. *Brearley*, supra.

(*a*) *Waddell* v. *Blockley*, 10 Ch. D. 416; 40 L. T. 286.

(*b*) *Smith* v. *White*, W. N. 1879, 203, 20*l.*

(*c*) *Rourke* v. *White Moss Colliery Co.*, 1 C. P. D. 556, 562; 35 L. T. 160. See also *Potter* v. *Cotton*, W. N. 1879, 204.

(*d*) *Nixon* v. *Sheldon*, 53 L. J., Ch. 624; 50 L. T. 245.

(*e*) *Smith* v. *White*, W. N. 1879, 203.

(*f*) *Brown* v. *North*, 9 Q. B. D. 52; 51 L. J., Q. B. 365.

(*g*) *The Ship Constantine*, 4 P. D.

ficient reason for ordering him to give security (*y*); and, especially when the appeal is unreasonable or vexatious (*z*), or unnecessary (*a*), or has been unreasonably delayed (*b*), he will be ordered to do so. But when the question involved by the appeal was one which had not been raised before in a Court of Error, the Court refused to order the appellant to give security on the ground of his insolvency (*c*). Non-compliance with a bankruptcy notice is sufficient evidence of insolvency (*d*). Unreasonable delay in the prosecution may be a sufficient special circumstance (*e*). The rule as to security being required from an insolvent appellant applies to a married woman (*f*). When the appellant is clearly liable to give the security, he should offer to do so, as otherwise he may have to pay the costs of the application for the security (*g*). It is immaterial whether the plaintiff or defendant is the appellant (*h*). The application to compel the appellant to give security is made on notice of motion. No leave to serve the notice is necessary (*i*). The application must be made promptly (*k*). It is too late to apply after the costs have been incurred and a time fixed for the hearing of the appeal (*l*).

The security may be given by a deposit of money in Court (*m*), or by a bond with sureties (*n*). Except in clear cases (*o*), the costs of the application are generally ordered to follow the result of the appeal (*p*).

The amount of the security depends on the probable costs of the appeal (*q*).

The Court will not generally fix a day on which the security is to be given (*r*), nor will they order the appeal to be dismissed unless

---

(*y*) *Re Spencer, Spencer* v. *Hart*, 45 L. T. 396, 15*l.*: *Harlock* v. *Ashberry*, 19 Ch. D. 84; 51 L. J., Ch. 96; 45 L. T. 602, 30*l.*: per *Cotton*, L. J., *In re Ivory, Hankin* v. *Turner*, 10 Ch. D. at p. 377; 39 L. T. 285: *Ex p. Isaacs, In re Baum*, 9 Ch. D. 271: cp. per *Cockburn*, C. J., *Usil* v. *Brearley*, 3 C. P. D. 206; 47 L. J., C. P. 380. As to the case of a company being wound up, see *In re Diamond Fuel Co.*, 13 Ch. D. 400; 49 L. J., Ch. 301: *In re Photographic, &c. Association*, 23 Ch. D. 370; 48 L. T. 454, 25*l.*: *Gathercole* v. *Smith*, W. N. 1880, 102, 20*l.*

(*z*) *Usil* v. *Brearley*, supra.

(*a*) *Waddell* v. *Blockley*, 10 Ch. D. 416; 40 L. T. 286.

(*b*) *Smith* v. *White*, W. N. 1879, 203, 20*l.*

(*c*) *Rourke* v. *White Moss Colliery Co.*, 1 C. P. D. 556, 562; 35 L. T. 160. See also *Potter* v. *Cotton*, W. N. 1879, 204.

(*d*) *Nixon* v. *Sheldon*, 53 L. J., Ch. 624; 50 L. T. 245.

(*e*) *Smith* v. *White*, W. N. 1879, 203.

(*f*) *Brown* v. *North*, 9 Q. B. D. 52; 51 L. J., Q. B. 365.

(*g*) *The Ship Constantine*, 4 P. D. 156; 27 W. R. 747.

(*h*) *Denee* v. *Mason*, W. N. 1879, 31.

(*i*) *Grills* v. *Dillon*, 2 Ch. D. 325; 45 L. J., Ch. 432.

(*k*) *Mayor, &c. of Saltash* v. *Goodman*, 43 L. T. 464: *In re Indian Kingston, &c. Co.*, 22 Ch. D. 83; 52 L. J., Ch. 31; 48 L. T. 52; semble, especially where poverty is the ground of the application.

(*l*) *Grant* v. *Banque Franco-Egyptienne*, 1 C. P. D. 143; 47 L. J., C. P. 41: *In re Kathleen Mavourneen, Ex p. Hutchins and Romer*, W. N. 1879, 99: *Mayor of Saltash* v. *Goodman*, supra.

(*m*) *Wilson* v. *Smith*, 2 Ch. D. 67; 45 L. J., Ch. 421: *Harlock* v. *Ashberry*, supra.

(*n*) *Phosphate Sewage Co.* v. *Hartmont*, 2 Ch. D. 811.

(*o*) *The Ship Constantine*, supra.

(*p*) *Phosphate Sewage Co.* v. *Hartmont*, supra: *Wilson* v. *Church*, 11 Ch. D. at p. 578.

(*q*) *Morecroft* v. *Evans*, W. N. 1882, 189, 150*l.* See amounts inserted after cases supra, nn. (*c*) and (*g*).

(*r*) *Polini* v. *Gray*, 11 Ch. D. 741; 49 L. J., Ch. 41.

PART XI.

it is given within a limited time (*s*). But they will stay the appeal until the security is given (*s*); and if it is not given within a reasonable time the respondent should move on notice to dismiss the appeal for want of prosecution (*t*).

9. *Staying Proceedings Pending Appeal.*

Staying proceedings pending appeal.

By *R. of S. C., Ord. LVIII. r.* 16, "An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the Court appealed from, or any Judge thereof, or the Court of Appeal, may order; and no intermediate act or proceeding shall be invalidated, except so far as the Court appealed from may direct."

Where an unsuccessful party is exercising an unrestricted right of appeal, the Court in ordinary cases will make such order for staying proceedings under the judgment appealed from as will prevent the appeal, if successful, from being nugatory (*u*). But the Court will not interfere if the appeal appears not to be *bonâ fide*, or there are other sufficient exceptional circumstances (*x*).

The Court will not in general stay the trial of the issues of fact in an action pending an appeal on a question of law (*y*).

The application must be made in the first instance to the Court below (*z*), and the application to the Court of Appeal must be made on notice (*a*). But it is an original application and not an appeal (*b*), and need not, therefore, be made within twenty-one days after the refusal of the Court below (*b*). The costs of the application must as a general rule be paid by the applicant (*c*), but in some cases, as when both parties are benefited by the delay, they will be made costs in the appeal (*d*).

When the Court makes an order to stay proceedings pending an appeal, it will put the appellants on terms to speed the appeal; and it will not interfere with the execution of the order of the Court below respecting costs, except to require the solicitor who is to receive the costs to give an undertaking to refund them if required to do so (*e*).

When an action has been altogether dismissed by a Divisional

(*s*) *Wilson* v. *Smith*, supra.

(*t*) *Harris* v. *Fleming*, 30 W. R. 555: *Polini* v. *Gray*, supra: *Judd* v. *Green*, 4 Ch. D. 784; 46 L. J., Ch. 257: *Vale* v. *Oppert*, 5 Ch. D. 633; 25 W. R. 293: *Ex p. Isaacs, In re Baum* (No. 2), 10 Ch. D. 1: *Kanitz* v. *Scarborough*, W. N. 1878, 216.

(*u*) *Wilson* v. *Church*, 12 Ch. D. 454: *Hyam* v. *Terry*, 29 W. R. 32: *Polini* v. *Gray*, 12 Ch. D. 438, 443.

(*x*) Id.: *Vale* v. *Oppert*, 5 Ch. D. 969: *Bradford* v. *Young*, 51 L. T. 550, W. N. 1884, 194.

(*y*) *In re J. B. Palmer's Application*, 22 Ch. D. 88; 52 L. J., Ch. 224.

(*z*) Ord. LVIII. r. 17, post, p. 994: *Cropper* v. *Smith*, 24 Ch. D. 305; 53 L. J., Ch. 170; 49 L. T. 548; 32 W. R. 212: *Goddard* v. *Thompson*, 38 L. T. 166; 47 L. J., Q. B. 382: *Otto* v. *Lindford*, 18 Ch. D. 394; 51 L. J., Ch. 102; 30 W. R. 418.

(*a*) *Republic of Peru* v. *Weguelin*, 24 W. R. 297.

(*b*) *Cropper* v. *Smith*, supra, where *Att.-Gen.* v. *Swansea Improvement, &c. Co.*, 9 Ch. D. 46; 48 L. J., Ch. 72, is considered.

(*c*) *Cooper* v. *Cooper*, 2 Ch. D. 492; 45 L. J., Ch. 667: *Merry* v. *Nickalls*, L. R., 8 Ch. 205; 42 L. J., Ch. 479: *Morgan* v. *Elford*, 4 Ch. D. 352.

(*d*) *Adair* v. *Young*, 11 Ch. D. 136; 40 L. T. 598: *Eames* v. *Hacon*, W. N. 1881, 4.

(*e*) *Wilson* v. *Church*, 12 Ch. D. 454. See *Grant* v. *Banque Franco-Egyptienne*, 3 C. P. D. 202; 47 L. J., C. P. 455: cp. *Eames* v. *Hacon*, supra.

Court no order to stay ea
case the Court of Appeal
parties from parting wit
appeal (*f*).

Any application to sta
House of Lords must be m

The recovery of costs wi
House of Lords, if the s
payable personally underta
the order being reversed (*h*

If an action be brought
the Court in which the acti
or his discretion stay the
appeal is not pleadable as
for such a stay of proceed
matter of course, it is usua
appellant appear to be vexa
The appellant cannot, it see
make this application until
that in all cases, where a st
appeal, the Court will stay
execution in such second acti
otherwise, it would be allowi
which he could not do direc
Law Proc. Act, 1852, a writ
brought until after plaintiff h
ment, and had obtained judg
aside the execution of a writ
although sued out and execu
error (*o*). The pendency of pr
not prevent it being pleaded

10. *Evi*

Evidence—How brought befor
r. 11, "When any question of

(*f*) *Wilson* v. *Church*, 11 Ch. D. 576; 48 L. J., Ch. 690.

(*g*) *The Khedive*, 5 P. D. 1; 4 L. T. 392. See *Polini* v. *Gray*, 2 W. R. 360; 12 Ch. D. 438; 49 L. J. Ch. 41, where an injunction wa granted pending an appeal to the House of Lords.

(*h*) *Morgan* v. *Elford*, 4 Ch. D. 352; 25 W. R. 136: *Grant* v. *Banque Franco-Egyptienne*, supra. See *Wilson* v. *Church*, 12 Ch. D. 454: *Att.-Gen.* v. *Bray Township Commissioners*, L. R., 5 Ir. 523: *Polini* v. *Gray*, supra. See *Brewer* v. *York*, 20 Ch. D. 669, per *Jessel*, M. R., at p. 670; 31 W. R. 109.

(*i*) *Snook* v. *Mattock*, 5 A. & E. 248: *Riddle* v. *Grantham Canal Navigation Co.*, 16 M. & W. 882: *Dee* v. *Wright*, 2 P. & D. 672.

(*k*) *Christie* v. *Richardson*, 3 T. R.

Court no order to stay can be made under this rule, but in a proper case the Court of Appeal will grant an injunction restraining the parties from parting with the property until the hearing of the appeal (*f*).

—Pending appeal to House of Lords.

Any application to stay proceedings pending an appeal to the House of Lords must be made to the Court of Appeal (*g*).

The recovery of costs will not be stayed pending an appeal to the House of Lords, if the solicitor of the party to whom they are payable personally undertakes that they shall be repaid in case of the order being reversed (*h*).

Action on judgment pending appeal.

If an action be brought upon the judgment pending an appeal, the Court in which the action is pending, or a Master, may in their or his discretion stay the proceedings, but the pendency of the appeal is not pleadable as a defence (*i*). Although an application for such a stay of proceedings is in general not acceded to as a matter of course, it is usually granted, unless the conduct of the appellant appear to be vexatious, or intended merely for delay (*k*). The appellant cannot, it seems, if security for costs be requisite (*l*), make this application until after he has given it (*m*). It seems that in all cases, where a stay of execution is ordered pending the appeal, the Court will stay the issuing or executing of a writ of execution in such second action, until the appeal be determined; for, otherwise, it would be allowing the respondent to do that indirectly which he could not do directly (*n*). But where, before the *Com. Law Proc. Act*, 1852, a writ of error on the first judgment was not brought until after plaintiff had recovered in an action on the judgment, and had obtained judgment therein, the Court refused to set aside the execution of a writ of inquiry and a writ of execution, although sued out and executed after the allowance of the writ of error (*o*). The pendency of proceedings in error on a judgment did not prevent it being pleaded by way of estoppel (*p*).

10. *Evidence on Appeal.*

Evidence on appeal—How brought before the Court.

Evidence—How brought before Court of Appeal.]—By *Ord. LVIII. r.* 11, "When any question of fact (*q*) is involved in an appeal, the

(*f*) *Wilson* v. *Church*, 11 Ch. D. 576; 48 L. J., Ch. 690.

(*g*) *The Khedive*, 5 P. D. 1; 41 L. T. 392. See *Polini* v. *Gray*, 28 W. R. 360; 12 Ch. D. 438; 49 L. J., Ch. 41, where an injunction was granted pending an appeal to the House of Lords.

(*h*) *Morgan* v. *Elford*, 4 Ch. D. 352; 25 W. R. 136; *Grant* v. *Banque Franco-Egyptienne*, supra. See *Wilson* v. *Church*, 12 Ch. D. 454; *Att.-Gen.* v. *Bray Township Commissioners*, L. R., 5 Ir. 523; *Polini* v. *Gray*, supra. See *Brewer* v. *York*, 20 Ch. D. 669, per *Jessel*, M. R., at p. 670; 31 W. R. 109.

(*i*) *Snook* v. *Mattock*, 5 A. & E. 248; *Riddle* v. *Grantham Canal Navigation Co.*, 16 M. & W. 882; *Doe* v. *Wright*, 2 P. & D. 672.

(*k*) *Christie* v. *Richardson*, 3 T. R. 78; *Entwistle* v. *Shepherd*, 2 T. R. 78. And see *Gribble* v. *Abbott*, Cowp. 72; *Hanbury* v. *Guest*, 14 East, 401.

(*l*) As to when such security is requisite, see ante, p. 982.

(*m*) *Bicknell* v. *Longstaffe*, 6 T. R. 455; *Smith* v. *Shepherd*, 5 T. R. 9; *Abraham* v. *Pugh*, 5 B. & Ald. 903; *Bates* v. *Lockwood*, 1 T. R. 638; *Wade* v. *Rogers*, 2 W. Bl. 780.

(*n*) *Benwell* v. *Black*, 3 T. R. 643; *Taswell* v. *Stone*, 4 Burr. 2454. See *Robinson* v. *Tuckwell*, Willes, 183; 2 Bac. Abr. "Error" (H); *Doe* v. *Wright*, 10 A. & E. 763; *Sayer* v. *Herbert*, 6 Sc. N. R. 946.

(*o*) *Bishop* v. *Best*, 3 B. & Ald. 275.

(*p*) *Doe* v. *Wright*, 10 A. & E. 763.

(*q*) *Sugden* v. *Lord St. Leonards*, 1 P. D. 154; 45 L. J., P. 49.

PART XI.

evidence taken in the Court below bearing on such question shall, subject to any special order, be brought before the Court of Appeal as follows:

(*a.*) As to any evidence taken by affidavit, by the production of printed copies of such of the affidavits as have been printed, and office copies of such of them as have not been printed:

(*b.*) As to any evidence given orally, by the production of a copy of the Judge's notes, or such other materials as the Court may deem expedient."

It is the duty of the appellant to bring before the Court of Appeal in the proper manner all the evidence written and oral that was used in the Court below, and if he fails to do so his appeal will be dismissed (*r*).

Affidavits.

Where the evidence in the Court below or any part of it has been taken by affidavit, the appellant must produce in the Court of Appeal printed copies of such of the affidavits as have been printed and office copies of all that have not been printed (*s*). In one case office copies of affidavits were dispensed with by the Court of Appeal on the hearing of an appeal, on the ground of expense, and an order was made that the officer having the custody of the original affidavits should attend with them upon the hearing of the appeal (*t*).

Judge's notes.

Where the evidence below has been taken orally, and the Judge's notes are required, the proper course is for the appellant to hand to the Judge's clerk a written application stamped with a 5*s.* stamp (*u*), requesting that a copy of the notes may be made and furnished to the Court (*x*). In one case, where appellant had by reason of his poverty been unable to take shorthand notes of the evidence in the Court below, the Court of Appeal sent a request in writing to the Judge of the Court below for a copy of his notes of the evidence that the appellant might not be prejudiced in the prosecution of his appeal (*y*).

Shorthand notes.

Either party may use shorthand writers' notes of the evidence given in the Court below as his impression of what took place, subject to correction by notes taken by the Judge (*z*). The Court has power to allow the costs of shorthand writers' notes properly used on the hearing of an appeal (*a*), whether taken for the purposes of the appeal or not (*b*). But the costs of shorthand writers' notes of the proceedings in the Court below will not be

—Costs of.

(*r*) *Ex p. Firth, In re Cowburn*, 19 Ch. D. 419; 51 L. J., Ch. 475; 46 L. T. 120.

(*s*) See the rule, supra.

(*t*) *Sickles* v. *Norris*, 45 L. J., C. P. 148; 24 W. R. 102.

(*u*) S. C. (Fees) Rules. See post, Appendix.

(*x*) *Hemberow* v. *Frost*, 28 Sol. Journ. 708. Formerly the proper course was for the appellant to hand to the Master in attendance in the Court of Appeal a paper signed by counsel, containing the name of the case and of the Judge who tried it, and the date and place of trial, and stating that the notes would be required for the hearing of the appeal; and it was not proper to apply to the Judge's clerk: *Stainbank* v. *Beckett*, W. N. 1881, 203, per *Bramwell*, L.J.: *Swann* v. *Barber*, Id. 171: *Dann* v. *Simmins*, Id. 178, 179.

(*y*) *Dence* v. *Mason*, 41 L. T. 573.

(*z*) *Re Gee, Laming* v. *Gee*, 41 L. T. 744; 28 W. R. 217 (C. A.).

(*a*) *Hill* v. *Metrop. District Asylum*, 49 L. J., Q. B. 668; 43 L. T. 402; 28 W. R. 664: *Smith* v. *Chadwick*, 20 Ch. D. 27, 31.

(*b*) Per *Baggallay* and *Brett*, LL.J., *Bramwell*, L. J., dub., *Hill* v. *Metrop. District Asylum*, supra. Sed vide contra, *Bewley* v. *Atkinson*, infra.

allowed by the Court, u
shewn for allowing them
without an order (*d*).

The costs of shorthand
are sometimes allowed (*e*)
evidence are not (*e*), and t
by the Court (*f*).

The application to be all
must be made before the
entered (*g*).

Where the notes of the
lost, the Court of Appeal
taken over again (*h*).

By *Ord. LVIII. r.* 13,
question arise as to the ruli
or assessors, the Court shall
evidence, and to such oth
expedient."

By *Ord. LVIII. r.* 12, "W
the Court below, the Court
of Appeal or a Judge there
thereof to be printed for th
printing evidence for the pur
shall bear the costs thereof, u
thereof shall otherwise order."

Where the *viva voce* evid
cannot argue the appeal wit
Court will allow the costs of pr

Fresh or further Evidence on
full discretionary power to recei
fact (*k*), which may be given eit
by affidavit, or by deposition ta
sioner (*m*). Such further evid

(*c*) *Kelly* v. *Byles*, 13 Ch. D. 682, 693; 49 L. J., Ch. 181: *Earl de la Warr* v. *Miles*, 19 Ch. D. 80; 45 L. T. 424; *In re Duchess of Westminster Silver Lead Ore Co.*, 10 Ch. D. 307, at p. 312; 40 L. T. 300: *Vernon* v. *Vestry of St. James, Westminster*, 16 Ch. D. 449, at p. 473; 44 L. T. 229: *Ex p. Webster, In re Morris*, 22 Ch. D. 136, 141: *Bigsby* v. *Dickinson*, 4 Ch. D. at p. 32: *Bewley* v. *Atkinson*, 13 Ch. D. 300.

(*d*) *Ashworth* v. *Outram*, 9 Ch. D. 483; 39 L. T. 441: cp. *Ex p. Sawyer*, 1 Ch. D. 698: *In re Albezette*, 8 Ch. D. 599. Where the costs are allowed the costs of copies for counsel will be allowed also: *Singer Manufacturing Co.* v. *Loog*, 31 W. R. 392.

(*e*) *London & South Western R. Co.* v. *Gomm*, 20 Ch. D. 580; 46 L. T. 46; 455: *Ex p. Cocks, In re Poole*,

allowed by the Court, unless some special and sufficient reason is shewn for allowing them (*c*). They will not be allowed on taxation without an order (*d*).

The costs of shorthand notes of the judgment of the Court below are sometimes allowed (*e*), even although the costs of notes of the evidence are not (*e*), and they generally will be if the notes are used by the Court (*f*).

The application to be allowed the costs of shorthand writers' notes must be made before the judgment of the Court of Appeal is entered (*g*).

Where the notes of the evidence taken in the Court below are lost, the Court of Appeal has power to allow the evidence to be taken over again (*h*). Where evidence lost.

By *Ord. LVIII. r.* 13, "If, upon the hearing of an appeal, a question arise as to the ruling or direction of the Judge to a jury or assessors, the Court shall have regard to verified notes or other evidence, and to such other materials as the Court may deem expedient." Evidence as to ruling or direction.

By *Ord. LVIII. r.* 12, "Where evidence has not been printed in the Court below, the Court below or a Judge thereof, or the Court of Appeal or a Judge thereof, may order the whole or any part thereof to be printed for the purpose of the appeal. Any party printing evidence for the purpose of an appeal without such order shall bear the costs thereof, unless the Court of Appeal or a Judge thereof shall otherwise order." Printing evidence.

Where the *viva voce* evidence is voluminous, and the parties cannot argue the appeal without referring to all parts of it, the Court will allow the costs of printing it (*i*).

Fresh or further Evidence on Appeal.]—The Court of Appeal has full discretionary power to receive further evidence upon questions of fact (*k*), which may be given either by oral examination in Court (*l*), by affidavit, or by deposition taken before an examiner or commissioner (*m*). Such further evidence may be given without special Fresh or further evidence.

(*c*) *Kelly* v. *Byles*, 13 Ch. D. 682, 698; 49 L. J., Ch. 181: *Earl de la Warr* v. *Miles*, 19 Ch. D. 80: 45 L. T. 424: *In re Duchess of Westminster Silver Lead Ore Co.*, 10 Ch. D. 307, at p. 312; 40 L. T. 300: *Vernon* v. *Vestry of St. James, Westminster*, 16 Ch. D. 449, at p. 473; 44 L. T. 229: *Ex p. Webster, In re Morris*, 22 Ch. D. 136, 141: *Bigsby* v. *Dickinson*, 4 Ch. D. at p. 32: *Bewley* v. *Atkinson*, 13 Ch. D. 300.

(*d*) *Ashworth* v. *Outram*, 9 Ch. D. 483; 39 L. T. 441: cp. *Ex p. Sawyer*, 1 Ch. D. 698: *In re Albezette*, 8 Ch. D. 599. Where the costs are allowed the costs of copies for counsel will be allowed also: *Singer Manufacturing Co.* v. *Loog*, 31 W. R. 392.

(*e*) *London & South Western R. Co.* v. *Gomm*, 20 Ch. D. 589; 46 L. T. 463, 455: *Ex p. Cocks, In re Poole*, 21 Ch. D. 397.

(*f*) *Collier* v. *Isaacs*, 30 W. R. 70, 71.

(*g*) *Hill's Executors* v. *Metropolitan District Asylum*, 43 L. T. 462; 49 L. J., Q. B. 668: *Earl de la Warr* v. *Miles*, supra.

(*h*) *Ex p. Firth, In re Cowburn*, 19 Ch. D. 419; 51 L. J., Ch. 475; 46 L. T. 120.

(*i*) *Bigsby* v. *Dickinson*, 4 Ch. D. 24; 46 L. J., Ch. 280: *Orr Ewing* v. *Johnston*, 13 Ch. D. at p. 465.

(*k*) R. of S. C., Ord. LVIII. r. 4, post, p. 989. See *Sanders* v. *Sanders*, 51 L. J., Ch. 276; 45 L. T. 637, 638.

(*l*) *Mason* v. *Mason*, 48 L. T. 290: *McCollin* v. *Gilpin*, 6 Q. B. D. 516; 44 L. T. 914; 29 W. R. 408.

(*m*) R. of S. C., Ord. LVIII. r. 4, post, p. 989.

PART XI.

leave upon interlocutory applications (*n*), or in any case as to matters which have occurred after the date of the decision from which the appeal is brought (*o*). Upon appeals from a judgment after trial or hearing of any cause or matter upon the merits, such further evidence (save as to matters subsequent as aforesaid) will be admitted on special grounds only, and not without special leave of the Court (*p*).

When a party desires to give further evidence on appeal by examining witnesses, he must obtain leave to do so by motion or notice before the hearing (*q*); but where the further evidence consists of affidavits or documents, the party desiring to produce such evidence must give notice to his opponent of his intention to apply at the hearing for leave to do so (*r*). No leave to serve this notice is necessary (*r*). As to what are sufficient special grounds in cases where special leave is necessary, see *In re Chennell, Jones* v. *Chennell*, 8 Ch. D. 504—507; 38 L. T. 494: *In re Phœnix Bessemer Steel Co.*, 4 Ch. D. at pp. 115, 116: *Bigsby* v. *Dickinson*, 4 Ch. D. 24: *In re West Jewel Tin Mining Co., Weston's case*, 10 Ch. D. 579, at p. 582: *Taylor* v. *Grange*, 15 Ch. D. 165.

Affidavits containing further evidence will not generally be allowed to be made by witnesses who have been examined *viva voce* at the trial in the Court below (*s*).

If the respondent objects to the appellant using further affidavits, and his objection is allowed, he will not be allowed the costs of affidavits filed in answer to those to the use of which he objects (*t*).

Affidavits intended to be used in the Appeal Court must be filed with the officer of the Court from which the appeal comes (*u*).

11. *The Hearing of the Appeal.*

Before whom.

Before whom.]—By the *Judicature Act*, 1875, *s.* 12, "Every appeal to the Court of Appeal shall, where the subject-matter of the appeal is a final order, decree or judgment, be heard before not less than three Judges of the said Court sitting together, and shall, when the subject-matter of the appeal is an interlocutory (*ante*, p. 976) order, decree or judgment, be heard before not less than two Judges of the said Court sitting together.

Any doubt which may arise as to what decrees, orders or judgments are final, and what are interlocutory, shall be determined by the Court of Appeal.

Subject to the provisions contained in this section, the Court of Appeal may sit in two Divisions at the same time."

(*n*) *Norton* v. *Compton*, 27 Ch. D. 392; 51 L. T. 277; 33 W. R. 160.

(*o*) R. of S. C., Ord. LVIII. r. 4, post, p. 989.

(*p*) Id. See *Sanders* v. *Sanders*, supra.

(*q*) *Dicks* v. *Brooks*, 13 Ch. D. 652; 28 W. R. 525: *Exchange and Discount Bank* v. *Billinghurst*, W. N. 1880, 2.

(*r*) *Hastie* v. *Hastie*, 1 Ch. D. 562; 45 L. J., Ch. 298: *Justice* v. *Mersey Steel and Iron Co.*, 24 W. R. 199: *In re Chennell, Jones* v. *Chennell*, 8 Ch. D. at p. 505.

(*s*) *Taylor* v. *Grange*, 15 Ch. D. 165.

(*t*) *Mitchell* v. *Condy*, W. N. 1881, 83.

(*u*) *Watts* v. *Watts*, 48 L. J., Ch. 658.

The *Judicature Act*, 1875, *s.* 4 (*ante*, p. 965), provides that no Judge of the Court of Appeal shall sit as a Judge on the hearing of an appeal from any judgment or order made by himself or by any Divisional Court of the High Court of which he was and is a member. This section does not, however, prevent a Judge of the High Court from sitting on the hearing of an appeal from a Division of which he is a member, provided he took no part in the decision or order appealed from (*x*).

By the *Appellate Jurisdiction Act*, 1876, *s.* 16, "Orders for constituting and holding Divisional Courts of the Court of Appeal, and for regulating the sittings of the Court of Appeal, and of the Divisional Courts of Appeal, may be made, and when made, in like manner rescinded or altered by the president of the Court of Appeal, with the concurrence of the ordinary Judges of the Court of Appeal, or any three of them; and so much of sect. 17 of the Supreme Court of Judicature Act, 1875, as relates to the regulation of any matters subject to be regulated by orders under this section, and so much of any Rules of Court as may be inconsistent with any order made under this section, shall be repealed, without prejudice nevertheless to any Rules of Court made in pursuance of the section so repealed, so long as such Rules of Court remain unaffected by orders made in pursuance of this section."

Powers of the Court.

Powers of Court of Appeal on Hearing.]—By *Judicature Act*, 1873, *s.* 19, "For all the purposes of and incidental to the hearing and determination of any appeal within its jurisdiction, and the *amendment*, *execution*, and *enforcement* of any judgment or order made on any such appeal, and for the purpose of every other authority expressly given to the Court of Appeal by this Act, the said Court of Appeal shall have all the power, authority and jurisdiction by this Act vested in the High Court of Justice."

—Of amendment or otherwise.

By *R. of S. C., Ord. LVIII. r.* 4, "The Court of Appeal shall have all the powers and duties as to *amendment* (*y*) *and otherwise* of the High Court, together with full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in Court, by affidavit, or by deposition taken before an examiner or commissioner (*z*). Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. Upon appeals from a judgment after trial or hearing of any cause or matter upon the merits, such further evidence (save as to matters subsequent as aforesaid) shall be admitted on special grounds only, and not without special leave of the Court (*z*). The Court of Appeal shall have *power to draw inferences of fact and to give any judgment and make any order* which ought to have been made, and to make such further or other order as the case may require (*a*). The powers aforesaid

—To draw inferences of fact, &c.

(*x*) *Fisher* v. *Val de Travers Asphalte Co.*, 1 C. P. D. 259; 45 L. J., C. P. 135.

(*y*) *Laird* v. *Briggs*, 16 Ch. D. 663; *New Zealand, &c. Co.* v. *Watson*, 7 Q. B. D. at p. 382; *Gill* v. *Woodfin*, 25 Ch. D. 707, notice of motion in Court below amended.

(*z*) As to evidence, see ante, p. 987.

(*a*) See *Quilter* v. *Mapleson*, 9 Q. B. D. 672; *Clack* v. *Wood*, Id. 276; 47 L. T. 144; *Laird* v. *Briggs*, 16 Ch. 663; 44 L. T. 36.

PART XI.

may be exercised by the said Court, notwithstanding that the notice of appeal may be that part only of the decision may be reversed or varied, and such powers may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision (*a*). The Court of Appeal shall have power to make such order as to the whole or any part of the *costs* of the appeal as may be just" (*b*).

The Court may, on appeal, allow an amendment which was refused in the Court below (*c*); and it is not necessary or proper to appeal separately from such refusal (*c*), but leave to amend so as to raise a point not raised in the Court below will not in general be given (*d*).

—To order new trial.

By *R. of S. C., Ord. LVIII. r.* 5, "If upon hearing of an appeal, it shall appear to the Court of Appeal that a new trial ought to be had, it shall be lawful for the said Court of Appeal, if it shall think fit, to order that the verdict and judgment shall be set aside, and that a new trial shall be had."

—Interlocutory order no bar.

By *R. of S. C., Ord. LVIII. r.* 14, "No interlocutory order or rule from which there has been no appeal shall operate so as to bar or prejudice the Court of Appeal from giving such decision upon the appeal as may be just."

Practice on hearing —counsel.

Practice on Hearing.]—Two counsel (*e*), and two only (*f*), will be heard on each side.

—Order of speeches.

The appellant opens the appeal, and the respondent then follows, and the appellant has a right of reply. Where there were cross demurrers and the onus was on the defendant, so that if he failed the result of the plaintiff's appeal would have been immaterial, the Court directed the defendant to begin (*g*).

Party not served.

A party not served with notice of the appeal, but interested in it, may appear at the hearing (*h*).

Non-appearance of parties.

If the appellant does not appear the respondent may apply to have the appeal dismissed with costs, and need not give any proof of the service of the notice of appeal (*i*). Where no one appeared to support a rule *nisi*, the Court discharged the rule, reserving the power to re-enter it if a sufficient reason was given (*k*).

Further evidence.

The Court has power to hear further evidence (*l*), and will sometimes do so by allowing witnesses to be called and examined *viva voce* (*m*).

New points.

As every appeal is a rehearing, either party may, as a general rule (*n*), raise and rely on any point not taken in the Court below,

(*a*) *Hunter* v. *Hunter*, 24 W. R. 527.
(*b*) As to costs, see post, p. 991.
(*c*) See ante, n. (*y*).
(*d*) *New Zealand, &c. Co.* v. *Watson*, 7 Q. B. D. at p. 382; 44 L. T. 675; at pp. 676, 677.
(*e*) *Sneesby* v. *Lanc. & Yorks. R. Co.*, 1 Q. B. D. 42; 45 L. J., Q. B. 1.
(*f*) *Iles* v. *Assessment Committee of West Ham Union*, 46 L. T. at p. 151.
(*g*) *Clarke* v. *Bradlaugh*, 7 Q. B. D. 38.
(*h*) *In re New Callao*, 22 Ch. D. 484.
(*i*) *Ex p. Lows, In re Lows*, 7 Ch. D. 160: *Magnus Spanier* v. *Marchant*, W. N. 1878, 214.
(*k*) *Stokes* v. *Kromshroder*, W. N. 1879, 196.
(*l*) See ante, p. 987.
(*m*) *McCollin* v. *Gilpin*, 6 Q. B. D. 616.
(*n*) See per *Bramwell*, L. J., *New*

subject to the power of the Court of Appeal to deal with the costs (*o*). But an appellant will not be allowed to raise in the Court of Appeal a point which he did not raise in the Court below, even though there is some evidence in support of it, if the nature of that evidence is such that by any possibility the respondent might have been able to rebut it if the point had been raised (*p*).

Rehearing.

Rehearing.]—Since the Judicature Acts it appears that neither the Court of Appeal (*q*) nor any Divisional Court (*r*) or Judge (*s*) has any power to rehear any appeal or application after once pronouncing their judgment on it. But it would appear that this is confined to final judgments and does not extend to interlocutory applications (*t*).

12. *Judgment or Order of Court of Appeal.*

Judgment or order of Court of Appeal.

The order of the Court of Appeal is drawn up by a Master of the Division from which the appeal comes (*u*).

If either party is dissatisfied with the form or manner in which the order is drawn up he may give notice of motion to vary it (*x*).

13. *Costs of Appeal.*

Costs of appeal.

R. of S. C., Ord. LVIII. r. 4, supra, p. 990, gives the Court power to make any order as to the whole or any part of the costs of the appeal, which may seem just. As a general rule, a successful appellant will get his costs (*y*), except that when he succeeds on a point not raised in the Court below he will get the costs below only, and not the costs of the appeal (*z*). When the respondent gives notice

---

Zealand, &c. Co. v. *Watson*, 7 Q. B. D. at p. 382: per *Cotton*, L. J., *Harvey* v. *Croydon Union Sanitary Authority*, 32 W. R. 389.

(*o*) *Goddard* v. *Jeffreys*, 46 L. T. 904: *Hussey* v. *Horne Payne*, 8 Ch. D. 670, 679; 47 L. J., Ch. 751.

(*p*) *Ex p. Firth, In re Cowburn*, 19 Ch. D. 419; 51 L. J., Ch. 473.

(*q*) *Flower* v. *Lloyd*, 6 Ch. D. 297; 46 L. J., Ch. 838: *Benyon* v. *Godden*, 4 Ex. D. 216. But see per *Brett*, L. J., *Ex p. Banco de Portugal, In re Hooper*, 14 Ch. D. 1, at p. 5; 49 L. J., Bk. 21: *Williams* v. *Preston*, 20 Ch. D. 672.

(*r*) *In re St. Nazaire Land Co.*, 12 Ch. D. 88; 41 L. T. 110; 27 W. R. 854: *In re Manchester Economic Building Society*, 24 Ch. D. 488, 495.

(*s*) *Prestney* v. *Corporation of Colchester*, 24 Ch. D. 376, 385.

(*t*) *Mullins* v. *Howell*, 11 Ch. D. 763, 766.

(*u*) See per *Mellish*, L. J., *Justice* v. *Mersey Steel Co.*, 1 C. P. D. at p. 577.

(*x*) *General Share, &c. Co.* v. *Wesley & Co.*, 20 Ch. D. 130; 51 L. J., Ch. 464; 46 L. T. 70; 30 W. R. 695: cp. *Robinson* v. *Local Board for Barton*, 21 Ch. D. 621. As to the power of the Court to vary the order pending an appeal to the House of Lords, see *Ex p. Banco de Portugal, In re Hooper*, 14 Ch. D. 1; 42 L. T. 210: cp. *Robinson* v. *Local Board for Barton*, supra.

(*y*) *Memo.*, 1 Ch. D. 41: *Ex p. Masters*, 1 Ch. D. 113; 47 L. J., Bk. 18: *The City of Berlin*, 2 P. D. 187; 47 L. J., Adm. 2, salvage; *The Swansea* v. *The Condor*, 4 P. D. 115; 48 L. J., Adm. 33: *Olivant* v. *Wright*, 45 L. J., Ch. 1: *Davy* v. *Garrett*, 7 Ch. D. at p. 490. In *McGowan* v. *Middleton*, 11 Q. B. D. at p. 472, *Brett*, M. R., said, "The appellant must have the costs of the appeal, because when notice of appeal is given, a respondent must make up his mind whether he ought to stand by the decision in his favour."

(*z*) *Goddard* v. *Jeffreys*, 46 L. T. 904: *Hussey* v. *Payne*, 8 Ch. D. 670, 679; 47 L. J., Ch. 751.

PART XI.

of his intention to contend that the order appealed from should be varied, and the appeal is dismissed, the appellant will have to pay the costs other than those occasioned by the notice (*a*).

A respondent who successfully objects that an appeal is out of time will not be allowed the costs of affidavits filed after the appeal is set down (*b*), nor will a respondent who successfully objects to the use of fresh affidavits by the appellant be allowed the costs of affidavits filed in answer (*c*).

In the absence of any special order, a party who is entitled to be paid the costs of an interlocutory application to the Court of Appeal may tax his costs and insist on payment at once, and is not bound to wait until the final determination of the appeal (*d*).

14. *Proceedings after Judgment—Execution, &c.*

Proceedings after judgment—execution, &c.

If the judgment is altered or rescinded the judgment of the Court of Appeal is entered in the Court below (*e*). Four days exclusive after the judgment delivered, costs may be taxed, interest when recoverable computed, and judgment signed by one of the Masters of the Court in which the original judgment was given, as in ordinary cases (*f*).

Any further proceedings as are necessary after the judgment of the Court of Appeal are taken in the Court in which the original judgment was given (*g*). If a writ of inquiry were necessary, it would issue out of such Court (*h*).

Interest.

By *R. of S. C., Ord. LVIII. r.* 19, "On an appeal from the High Court, interest for such time as execution has been delayed by the appeal shall be allowed unless the Court or a Judge otherwise orders, and the taxing officer may compute such interest without any order for that purpose" (*i*).

This rule, it seems, extends to all judgments (*k*). The interest is calculated at 4*l.* per cent. (*l*). As to judgment debts carrying interest at 4*l.* per cent., *see ante*, p. 767.

(*a*) See ante, p. 981, n. (*i*).

(*b*) *Ex p. Fardon's Vinegar Co., In re Jones*, 14 Ch. D. 285; 43 L. T. 11.

(*c*) *Mitchell* v. *Condy*, W. N. 1881, 83.

(*d*) *Phillips* v. *Philipps*, 5 Q. B. D. 60: *Chamberlain* v. *Barnwell*, W. N. 1880, 110.

(*e*) Cp. C. L. P. Act, 1852, s. 155; 11 G. 4 & 1 W. 4, c. 70, s. 8.

(*f*) Id. See 7 W. 4 & 1 V. c. 30, ss. 22, 23. As to computing interest, see Ord. LVIII. r. 19, infra.

(*g*) See 11 G. 4 & 1 W. 4, c. 70.

(*h*) See 2 Saund. 101.

(*i*) This rule is similar to the r. 26, T. T. 1853. Before that rule it was entirely in the discretion of the Court whether interest on the judgment of the Court below should be allowed or not: *Shepherd* v. *Mackreth*, 2 H. Bl. 284. But by 3 & 4 W. 4, c. 42, s. 30, "If any person shall sue out any writ of error upon any judgment whatsoever, given in any Court in any action personal, and the Court of error (*Garland* v. *Carlisle*, 5 Cl. & F. 355) shall give judgment for the defendant thereon, then interest shall be allowed by the Court of error for such time as execution has been delayed by such writ of error, for the delaying thereof." This enactment was not confined to judgments of affirmance (*Sykes* v. *Harrison*, 1 B. & P. 29); it was imperative: *Levy* v. *Langridge*, 4 M. & W. 337. It did not apply where the writ of error was sued out before the passing of the Act: *Burn* v. *Carvalho*, 1 A. & E. 895. The interest was calculated at 4 per cent.: *Levy* v. *Langridge*, supra.

(*k*) See *Sykes* v. *Harrison*, 1 B. & P. 29.

(*l*) *Levy* v. *Langridge*, supra.

The costs of an appeal
Division from which the
accordance with the dire
peal (*m*). An application
Judge in Chambers in the
the Court of Error (*n*).

Before the Judicature A
and the proceedings in erro
roll (*o*), the defendant in er
recovered by the original
costs in error; and such ex
The execution was sued ou

By *Judicature Act*, 1873,
poses of execution and enfo
on any appeal the Court of
jurisdiction vested in the H

When a judgment of the
reversed, execution, when ne

Before the Judicature Act
the plaintiff in error might
he might be restored to all h
cution on the former judgme
money paid over, the writ o
previous *scire facias*; but if
scire facias quare restitutione
viz., the sum levied, &c., mu
Com. Law Proc. Act, 1852, *s.*
of *scire facias* must be tes
like manner as writs of rev
writ of restitution, the plaint
obtained redress by applicat
restored to him all that had
the judgment. Under the p
Court would be the proper co

It appears that the Court of
ante, p. 991). When the Cou
the Vice-Chancellors and disr
plaintiff moved the Court of A
and for leave to adduce fresh
judgment of the Court had
was refused: it seems that th
action impeaching the decree,
menced without leave (*r*).

(*m*) *Elliott* v. *Bishop*, 24 L. J., Ex 303. See *Cooper* v. *Slade*, 1 E. & E 336; 28 L. J., Q. B. 32, where the House of Lords affirmed the judgment of the Ex. Ch. in part and reversed it as to part.

(*n*) *Francis* v. *Doe* d. *Harvey*, 5 M. & W. 272.

(*o*) See C. L. P. Act, 1852, s. 155.

(*p*) *Simpson* v. *Juxon*, Cro. Jac.

Taxation of costs.

The costs of an appeal are taxed by one of the Masters of the Division from which the appeal is brought. They are taxed in accordance with the direction or judgment of the Court of Appeal (*m*). An application to review the taxation must be made to a Judge in Chambers in the usual way. Formerly it was made to the Court of Error (*n*).

Execution.

Before the Judicature Acts after judgment of affirmance signed, and the proceedings in error were entered on the original judgment roll (*o*), the defendant in error might take out execution for the sum recovered by the original judgment, as well as the damages and costs in error; and such execution might be by *fi. fa.* or *elegit*, &c. The execution was sued out as in ordinary cases.

By *Judicature Act*, 1873, *s.* 19, noticed *ante*, p. 989, for all the purposes of execution and enforcement of any judgment or order made on any appeal the Court of Appeal has all the power, authority, and jurisdiction vested in the High Court of Justice.

When a judgment of the High Court of Justice is affirmed or reversed, execution, when necessary, is issued out of the Court below.

Restitution.

Before the Judicature Acts, if the judgment below were reversed, the plaintiff in error might have a writ of restitution, in order that he might be restored to all he had lost by the judgment (*p*). If execution on the former judgment had been actually executed, and the money paid over, the writ of restitution might issue without any previous *scire facias*; but if the money had not been paid over, a *scire facias quare restitutionem non*, suggesting the matter of fact, viz., the sum levied, &c., must have previously issued (*q*). By the *Com. Law Proc. Act*, 1852, *s.* 132, which is not repealed, the writ of *scire facias* must be tested, directed, and proceeded upon in like manner as writs of revivor. Instead of thus proceeding by writ of restitution, the plaintiff in error might in most cases have obtained redress by application to the Court or a Judge, to have restored to him all that had been taken or levied from him under the judgment. Under the present practice, an application to the Court would be the proper course.

Fresh facts discovered after final judgment.

It appears that the Court of Appeal cannot rehear an appeal (*see ante*, p. 991). When the Court had reversed the decision of one of the Vice-Chancellors and dismissed the action with costs, and the plaintiff moved the Court of Appeal for a re-hearing of the appeal and for leave to adduce fresh evidence on the ground that the judgment of the Court had been obtained by fraud; the motion was refused; it seems that the plaintiff's remedy was by original action impeaching the decree, which action might have been commenced without leave (*r*).

(*m*) *Elliott* v. *Bishop*, 24 L. J., Ex. 303. See *Cooper* v. *Slade*, 1 E. & E. 336; 28 L. J., Q. B. 32, where the House of Lords affirmed the judgment of the Ex. Ch. in part and reversed it as to part.

(*n*) *Francis* v. *Doe* d. *Harvey*, 5 M. & W. 272.

(*o*) See C. L. P. Act, 1852, s. 155.

(*p*) *Simpson* v. *Jaxon*, Cro. Jac. 698: *Coot* v. *Linch*, 1 Ld. Raym. 427; 1 Salk. 321.

(*q*) *Anon.*, 2 Salk. 588. And see Lil. Ent. 641, 650; 2 Saund, 101 gg; 2 Bac. Abr. Error (M), 3.

(*r*) *Flower* v. *Lloyd*, L. R., 6 Ch. 297; 46 L. J., Ch. 838. See *Aboudoff* v. *Oppenheimer*, 10 Q. B. D. 295; *Flower* v. *Lloyd*, 10 Ch. D. 327, and see ante, p. 991.

PART XI.

15. *Applications to Court of Appeal.*

How applications to Court of Appeal to be made.

By *R. of S. C., Ord. LVIII. r.* 18, "Every application to a Judge of the Court of Appeal shall be by motion, and the provisions of Order LII. (*u*) shall apply thereto."

By *r.* 17, "Wherever under these Rules an application may be made either to the Court below or to the Court of Appeal, or to a Judge of the Court below or of the Court of Appeal, it shall be made in the first instance to the Court or Judge below" (*x*).

16. *Officers to perform Duties in Court of Appeal.*

Officers to perform duties in Court of Appeal.

By *R. of S. C., Ord. LX. r.* 2, "Officers attached to any Division shall follow the appeals from the same Division, and shall perform in the Court of Appeal analogous duties in reference to such appeals as the registrars and officers of the Court of Chancery usually performed as to rehearings in the Court of Appeal in Chancery, and as the Masters and officers of the Courts of Queen's Bench, Common Pleas, and Exchequer respectively performed as to appeals heard by the Court of Exchequer Chamber" (*y*).

An order of the Court of Appeal is drawn up by an officer of the Division from which the appeal comes.

(*u*) This order contains provisions as to motions and applications to the High Court of Justice. See post, Ch. CXXII.

(*x*) See *Cropper* v. *Smith*, 24 Ch. D. 305; 49 L. T. 548; 32 W. R. 212.

(*y*) See 7 W. 4 & 1 V. c. 30, s. 2, ante, p. 992.

CHAPTER LXXXVI.

APPEAL TO THE HOUSE OF LORDS.

	PAGE		PAGE
1. *Constitution and Jurisdiction of the House of Lords as a Court of Appeal*	995	4. *Procedure on Appeal*	997
2. *In what Cases an Appeal lies*	996	5. *The Hearing of the Appeal—Judgment, &c.*	1009
3. *Time within which Appeal must be brought*	997	6. *Taxation of Costs and Payment or Repayment of 200l. paid in*	1011

[As to staying proceedings pending an appeal to the House of Lords, see *ante*, p. 985.]

1. *Constitution and Jurisdiction of the House of Lords as a Court of Appeal.*

Constitution and jurisdiction of the House of Lords as a Court of Appeal.

It does not fall within the province of the present work to treat fully of the practice on appeals to the House of Lords, and still less to trace the history and nature of its constitution and jurisdiction; but the recent legislation and the Standing Orders which are noticed in this chapter will probably be found useful and sufficient for the purposes of the practitioner. The clerks at the office of the House of Lords should be applied to when any difficulty respecting the practice arises.

The appeal to the House of Lords was abolished by the *Judicature Act*, 1873, *s.* 20 (*a*), but this provision was suspended by the *Judicature Act*, 1875, *s.* 2, and repealed by the Appellate Jurisdiction Act of 1876 (39 & 40 *Vict. c.* 59, *s.* 24) (*b*), by which the appointment of "Lords of Appeal in Ordinary" was authorized, and the mode of appealing to the House of Lords regulated.

Lords of Appeal in Ordinary.

Appointment of.

Lords of Appeal in Ordinary.]—By the Appellate Jurisdiction Act, 1876 (39 & 40 *V. c.* 59), *s.* 6, "For the purpose of aiding the House of Lords in the hearing and determination of appeals, her Majesty may, at any time after the passing of this Act, by letters patent appoint two qualified persons to be lords of appeal in ordinary, but such appointment shall not take effect until the commencement of this Act.

Qualification.

"A person shall not be qualified to be appointed by her Majesty a lord of appeal in ordinary unless he has been at or before the time of his appointment the holder for a period of not less than two years of some one or more of the offices in this Act described as high

(*a*) See *Justice* v. *Mersey Steel Co.*, 1 C. P. D. 575.

(*b*) This Act came into operation on November 1st, 1876 (sect. 2). Business then pending is provided for by sect. 13.

PART XI.

judicial offices, or has been at or before such time as aforesaid, for not less than fifteen years, a practising barrister in England or Ireland, or a practising advocate in Scotland.

Removal.

"Every lord of appeal in ordinary shall hold his office during good behaviour, and shall continue to hold the same notwithstanding the demise of the Crown, but he may be removed from such office on the address of both Houses of Parliament.

Salary.

"There shall be paid to every lord of appeal in ordinary a salary of six thousand pounds a year.

Rank.

"Every lord of appeal in ordinary, unless he is otherwise entitled to sit as a member of the House of Lords, shall by virtue and according to the date of his appointment be entitled during his life to rank as a baron by such style as her Majesty may be pleased to appoint, and shall during the time that he continues in his office as a lord of appeal in ordinary, and no longer, be entitled to a writ of summons to attend, and to sit and vote in the House of Lords; his dignity as a lord of parliament shall not descend to his heirs.

Vacancies.

"On any lord of appeal in ordinary vacating his office, by death, resignation, or otherwise, her Majesty may fill up the vacancy by the appointment of another qualified person.

Privy Councillor to sit on Judicial Committee.

"A lord of appeal in ordinary shall, if a privy councillor, be a member of the Judicial Committee of the Privy Council, and, subject to the due performance by a lord of appeal in ordinary of his duties as to the hearing and determining of appeals in the House of Lords, it shall be his duty, being a privy councillor, to sit and act as a member of the Judicial Committee of the Privy Council."

Pension.

By *s.* 7, "Her Majesty may, by letters patent, grant to any lord of appeal in ordinary, who has served for fifteen years, or is disabled by permanent infirmity, from the performance of the duties of his office, a pension by way of annuity to be continued during his life equal in amount to the pension which might under similar circumstances be granted to the Master of the Rolls, in pursuance of the Supreme Court of Judicature Act, 1873.

"Previous service in any office, described in this Act as a high judicial office, shall for the purposes of pension be deemed equivalent to service in the office of a lord of appeal in ordinary under this Act.

"The salary and pension payable to a lord of appeal in ordinary shall be charged on and paid out of the consolidated fund of the United Kingdom, and shall accrue due from day to day, and shall be payable to the person entitled thereto, or to his executors and administrators, at such intervals in every year, not being longer than three months, as the Treasury may from time to time determine."

2. *In what Cases an Appeal lies to the House of Lords.*

In what cases an appeal lies to the House of Lords.

By the Appellate Jurisdiction Act, 1876 (39 & 40 *V. c.* 59), *s.* 3, "Subject as in this Act mentioned, an appeal shall lie to the House of Lords from any order or judgment of any of the Courts following; that is to say,

(1.) Of her Majesty's Court of Appeal in England; and

(2.) Of any Court in Scotland from which error or an appeal at or immediately before the commencement of this Act lay to the House of Lords by common law or by statute; and

(3.) Of any Court in Ireland from which error or an appeal at or immediately before the commencement of this Act lay to the House of Lords by common law or by statute."

Fiat of Attorney-General.

By the *Appellate Jurisdiction Act*, 1876, *s.* 10, "An appeal shall not be entertained by the House of Lords without the consent of the Attorney-General or other law officer of the Crown, in any case where proceedings in error or on appeal could not hitherto have been had in the House of Lords without the fiat or consent of such officer."

3. *Within what Time Appeal must be brought.*

Time within which appeal must be brought. —One year.

Time within which Appeal must be brought.]—By *Standing Order I.* it is "Ordered, that, except where otherwise provided by statute, no petition of appeal be received by this House unless the same be lodged in the Parliament Office for presentation to the House within one year from the date of the last decree, order, judgment or interlocutor appealed from.

In case of infancy, &c.

"In cases in which the person entitled to appeal be within the age of one and twenty years, or covert, *non compos mentis*, imprisoned or out of Great Britain and Ireland, such person may be at liberty to present his appeal to the House, provided that the same be lodged in the Parliament Office within one year next after full age, discoverture, coming of sound mind, enlargement out of prison, or coming into Great Britain or Ireland: But in no case shall any person or persons be allowed a longer time, on account of mere absence, to present an appeal, than five years from the date of the last decree, order, judgment or interlocutor appealed against."

This Standing Order is only applicable to decrees, &c. pronounced on or after the 1st November, 1876.

Cross appeal.

By *Standing Order IV.* it is "Ordered that all cross appeals be presented to the House within the period allowed by Standing Order No. V. for lodging cases in the original appeal" (*c*).

4. *Procedure on Appeal.*

Procedure on appeal.

Procedure on Appeal.]—By the *Appellate Jurisdiction Act*, 1876, *s.* 11, "After the commencement of this Act error (*d*) shall not lie to the House of Lords, and an appeal shall not lie from any of the Courts from which an appeal to the House of Lords is given by this Act, except in manner provided by this Act, and subject to such conditions as to the value of the subject-matter in dispute, and as to giving *security for costs*, and as to the *time* within which the appeal shall be brought, and generally as to all matters of practice and procedure, or otherwise, as may be imposed by orders of the House of Lords."

Standing orders and directions to agents.

The procedure on appeals to the House of Lords is regulated by certain "Standing Orders and Instructions to Agents." These are generally published at the end of each session, and copies of them may be obtained at the Office for the sale of Printed Papers at the House of Lords, Westminster. Those referred to in this chapter

(*c*) See Standing Order V., *post*, p. 1003.

(*d*) "'Error' includes a writ of error or any proceedings in or by way of error." App. Jur. Act, 1876, s. 25.

PART XI.

were published in August, 1884. They only differ in some slight particulars from those published previously. The Directions to Agents are referred to in this chapter as "Directions," followed by the number.

Time, how reckoned.

The several periods limited by the Standing Orders take effect from the date of the *presentation* of the appeal to the House, which is the date at the head of the Order of Service (*e*).

Lodging documents.

All documents must be lodged in the Parliament Office before three o'clock on the day of presentation.

Summary of ordinary procedure on appeals.

The following is a summary of the ordinary procedure on appeals (*f*), viz.:—

1. A proof copy of the petition of appeal may, when deemed necessary, be submitted to the clerks of the Judicial Department.
2. Lodgment of appeal, printed on parchment, together with four paper copies thereof, in the Parliament Office for presentation to the House,—intimation with regard to recognizance and bond.
3. Issue to appellant's agent of "order of service."
4. Payment of 200*l.*, or lodgment of certificate with regard to bond; and lodgment of certificate with regard to substitute for recognizance.
5. Issue to appellant's agent of recognizance and bond for execution.
6. Return of recognizance and bond.
7. Attendance of respondent's agent to enter appearance, and inspect recognizance and bond.
8. Return of "order of service," with affidavit entered thereon.
9. Lodgment of forty printed cases and appendix. A proof copy of the case may, when deemed necessary, be submitted to the clerks of the Judicial Department.
10. Setting down cause for hearing.
11. Lodgment of ten bound cases, &c. by appellant.
12. Hearing of appeal, directions as to original documents.
13. Directions with regard to abatement by death, or defect by bankruptcy.
14. Directions with regard to the taxation of costs, &c.

We shall now proceed to discuss each of these in their order.

Petition of appeal.

The Petition of Appeal.]—By the *Appellate Jurisdiction Act*, 1876, s. 3, "Every appeal shall be brought by way of petition to the House of Lords, praying that the matter of the order or judgment appealed against may be reviewed before her Majesty the Queen in her Court of Parliament, in order that the said Court may determine what of right, and according to the law and custom of this realm, ought to be done in the subject-matter of such appeal."

The first step to be taken in prosecuting an appeal to the House of Lords is to prepare a petition of appeal. Two days' notice of the appellant's intention to present the petition must then be given to the respondent's solicitor, and after the expiration of such two days, the petition must be presented and lodged in the Parliament Office.

(*e*) Direction 4.

(*f*) This summary is printed in the Standing Orders and Directions to Agents.

Pro

The following is the form

To the Right Honourable t
The Humble Petiti
of the appellant].
Your petitioner humbly
orders, *or* judgment,
hereto (*g*) [*or*, so far a
may be reviewed befo
of Parliament, and t
said] may be reverse
tioner may have such
it can be so stated in
Majesty the Queen, i
meet; and that [*her*
the schedule to the a
printed cases as they
of the cause may requi
service of such order o
respondents may be de

[*Here insert Schedu*

FORM O

"From her Majesty's
"In a certain cause [*or* ma
"was defendant. [
whether original pla
added by subsequent
"The order of [*state Court a*
"the words following, viz. [*se*
"*whole of the order appealed fr*
"*from in part only*] The orde
"referred to in the above pra
"portion complained of being
"PORTION *complained of being p*
"*plained of being printed in Ro*

We humbly conceive this to b
your Lordships by way of appea

I , clerk to Messrs.
appellants within named, hereby

(*g*) The schedule must set out the title of, and parties to the cause or matter: and the decrees, orders, judgments, or interlocutors appealed against, and where the appeal is not against the whole decree the part appealed against must be defined.

(*h*) In the event of the autograph Signatures not being subscribed to the *parchment* appeal, the draft con-

The following is the form of the petition:— Form of petition.

To the Right Honourable the House of Lords.

The Humble Petition and Appeal of *A.* [*set forth the address of the appellant*].

Your petitioner humbly prays that the matter of the order [*or* orders, *or* judgment, *or* interlocutor] set forth in the schedule hereto (*g*) [*or*, so far as therein stated to be appealed against] may be reviewed before her Majesty the Queen in her Court of Parliament, and that the said order [*or*, so far as aforesaid] may be reversed, varied, or altered, or that the petitioner may have such other relief [*if specific relief be desired, it can be so stated in the prayer*] in the premises as to her Majesty the Queen, in her Court of Parliament, may seem meet; and that [*here name the respondents*] mentioned in the schedule to the appeal may be ordered to lodge such printed cases as they may be advised, and the circumstances of the cause may require, in answer to this appeal; and that service of such order on the solicitors in the cause of the said respondents may be deemed good service.

To be signed by two counsel (*h*).

[*Here insert Schedule.*]

FORM OF SCHEDULE (*g*).

"From her Majesty's Court of Appeal [*England*].

"In a certain cause [*or* matter] wherein *A.* was plaintiff and *B.* "was defendant. [*The names of all parties to the appeal, whether original plaintiffs or defendants in the cause, or added by subsequent orders, must be here set forth.*]

"The order of [*state Court and date of order*] appealed from is in "the words following, viz. [*set forth, in italics* THROUGHOUT, *the* "*whole of the order appealed from* (*i*)] [or, *when the order is appealed* "*from in part only*] The order of [*state Court and date of order*] "referred to in the above prayer is in the words following, the "portion complained of being printed in italics [*set forth order, the* "PORTION *complained of being printed in italics, the portion not com-* "*plained of being printed in Roman type* (*i*)]."

We humbly conceive this to be a proper case to be heard before your Lordships by way of appeal.

To be signed by two counsel (*h*).

I , clerk to Messrs. , of , solicitors for the appellants within named, hereby certify that on the day of Certificate of notice to respondents (*k*).

(*g*) The schedule must set out the title of, and parties to the cause or matter: and the decrees, orders, judgments, or interlocutors appealed against, and where the appeal is not against the whole decree the part appealed against must be defined.

(*h*) In the event of the autograph signatures not being subscribed to the *parchment* appeal, the draft containing them must be shown to the clerks of the Judicial Department at the time of lodging the appeal. See S. O. 2, post, p. 1000.

(*i*) Where several orders are appealed from, *each* order must be headed with a statement of the Court and the date of the order.

(*k*) This must be written on the last page of the parchment appeal.

PART XI.

, I served Messrs. of , solicitors for , the within-named respondents, with a correct copy of the aforegoing appeal, and with a notice that on the day of , or as soon after as conveniently may be, the petition of appeal would be presented to the House of Lords on behalf of the appellant.

—Printing. The appeal must be printed on parchment quarto size (*l*).

Signature by counsel. By *Standing Order II.*, "Ordered, that all petitions of appeal be signed, and the reasonableness thereof certified, by two counsel who shall have attended as counsel in the Court below, or shall purpose attending as counsel at the hearing in this House."

Notice to respondent. Two clear days' notice of the intention to present the appeal, together with a correct copy of the appeal (*m*), must be served on the respondents or their solicitors prior to presentation, and a certificate of such service entered on the appeal as above (*n*).

Lodging appeal. Order for service on respondent. *Lodging Appeal—Order for Service on the Respondent.*]—The appeal, together with four printed paper copies, may then be lodged in the parliament office (*o*), and if the House be then sitting, or if not, on the next ensuing meeting of the House, the appeal will be presented to the House, and an order made requiring the respondents to lodge cases in answer to the appeal. This order will be issued (*p*) to the appellant's agent for service on the respondents or their solicitors, and the same, together with an affidavit (*q*) of due service entered *thereon*, must be returned to the parliament office *within* the period granted to the appellant for lodging his printed cases under Standing Order No. V. (*r*).

Security for costs. *Security for Costs.*]—By *Standing Order IV.*, "Ordered, in all appeals that the appellant or appellants do give security to the clerk of the parliaments by recognizance (*s*) to be entered into, in person or by substitute, to the Queen of the penalty of five hundred pounds, conditioned to pay to the respondent or respondents all such costs as may be ordered to be paid by the House in the matter of the appeal; and further, that the appellant or appellants do procure two sufficient sureties, to the satisfaction of the clerk of the parliaments, to enter into a joint and several bond to the amount of two hundred pounds, or do pay in to the account

(*l*) Direction 1.

(*m*) It will be found convenient that the appellant's agent should supply the other side with at least five additional printed copies of the appeal.

(*n*) Direction 2.

(*o*) See also post, p. 1002.

(*p*) In Scotch appeals, when the "order of service" is desired on the day of presentation for the purpose of staying execution below, the appeal must be lodged in the Parliament Office not later than *one o'clock* on the day of presentation, accompanied by a letter from the agent stating that the "order" is required for the purpose of staying execution.

(*q*) Affidavit to be sworn before a commissioner duly appointed to administer oaths in England or Ireland or a justice of the peace in Scotland.

(*r*) Direction 3.

(*s*) This recognizance constitutes a Crown debt, to which the Debtors Act, 1869, does not apply: *In re Smith*, 2 Ex. D. 47; 46 L. J., Ex. 73.

of the Fee Fund of the House of Lords the sum of two hundred pounds; such bond, or such sum of two hundred pounds, to be subject to the order of the House with regard to the costs of the appeal: Ordered, that within one week after the presentation of the appeal the appellant or appellants do pay in to the account of the Fee Fund of the House of Lords the said sum of two hundred pounds, or submit to the clerk of the parliaments the names of the sureties proposed to enter into the said bond; and, in the event of a substitute being proposed to enter into the said recognizance, the name of such substitute; two clear days previous notice of the names so proposed for bond and recognizance to be given to the solicitor or agent of the respondent:

Justification of sureties and substitute.

Ordered, that, in the event of the clerk of the parliaments requiring a justification of the sureties, or substitute, the appellant's agent shall, within one week from the date of an official notice to him to that effect, lodge in the parliament office an affidavit or affidavits by the proposed sureties, or substitute, setting forth specifically the nature of the property in consideration of which they claim to be accepted as sureties in respect of the bond, or as substitute in respect of the recognizance, and also declaring that the property in question is unincumbered: Ordered, that, in the event of such sureties not being deemed satisfactory by the clerk of the parliaments, the appellant or appellants shall within four weeks from the date of an official notice by the clerk of the parliaments to that effect, pay into the account of the Fee Fund of the House of Lords the sum of two hundred pounds, to be subject to the order of the House with regard to the costs of the appeal; and, in the event of such substitute not being deemed satisfactory by the clerk of the parliaments, the appellant or appellants shall enter into the usual recognizance in person:

Period for return of bond and recognizance to Parliament Office.

Ordered that the said bond and the recognizance (whether entered into by the appellants or by a substitute) be returned to the parliament office duly executed within one week from the date of the issue thereof to the solicitor or agent of the appellant or appellants.

On default by the appellant or appellants in complying with the above conditions, the appeal to stand dismissed."

By the *Directions to Agents* it is provided that—"5. Security for costs is given by recognizance to the amount of 500*l.*, and a bond for 200*l.* In lieu of the bond, payment must be made of 200*l.* into the Fee Fund of the House of Lords *within* one week after the *presentation* of the appeal to the House. (All drafts and cheques to be made payable to 'House of Lords Fee Fund,' and to be crossed 'Bank of England, Western Branch.')

"6. The *recognizance* must be entered into by each appellant, where there are more than one. (It is usual to issue the recognizance for execution by the appellant at the time of the issue of the bond.) In the event of a *substitute* being proposed, the name of such substitute, together with a certificate of sufficiency by the solicitor or agent of the appellants, must be lodged in the parliament office within one week after the *presentation* of the appeal to the House; two clear days notice of the name so proposed, together with a copy of the certificate, having been previously given

PART XI.

to the solicitor or agent of the respondents. For form of certificate, *see* Appendix A. (*t*).

Bond.

"7. The *bond* must be entered into by two sufficient sureties to the satisfaction of the clerk of the parliaments. The names of the proposed sureties, together with a certificate of sufficiency by the solicitor or agent of the appellants, must be lodged in the parliament office within one week after the *presentation* of the appeal to the House; two clear days notice of the names so proposed, together with a copy of the certificate, having been previously given to the solicitor or agent of the respondents. For form of certificate, *see* Appendix A. (*t*).

Information as to sufficiency of sureties, &c. to be given to respondent's agent.

"8. It is the duty of the solicitor or agent of the appellants, on giving the respondent's solicitor or agent notice of the names proposed as sureties or substitute, to furnish him with such information as will enable him to ascertain the sufficiency of the proposed sureties or substitute.

"9. Whenever possible, it will be found convenient to lodge the above certificates, &c. relating to the recognizance and bond at the time of lodging the appeal. When this cannot be done, the appellant's agent should be prepared to state whether the recognizance is to be entered into by the appellant in person or by substitute, and whether a bond will be executed or the 200*l.* deposited.

Execution of recognizance and bond.

"10. At the termination of one week from the lodgment of the above certificates, the *bond* and *recognizance* are issued to the solicitor or agent of the appellants for execution before a commissioner appointed to administer oaths in the Supreme Court of Judicature in England or in Ireland, or before a justice of the peace in Scotland.

Return of recognizance and bond.

"11. The bond and the recognizance (whether entered into by the appellants or by a substitute) *must* be returned to the parliament office within one week from the date of the issue thereof to the solicitor or agent of the appellants.

Objection to sureties or substitute.

"12. If objection be taken by the respondent to the sureties or substitute proposed by the appellant, the respondent's agent must address a letter to the clerk of the parliaments setting forth the nature of the objection. This letter must be lodged in the parliament office within one week

---

(*t*) Forms to be filled up can be obtained on application to the Judicial Department. The following is the form:—

"Lodged in the Parliament Office on the day of 18 .

In the House of Lords.

'A. and others *v.* B. and others.'

In compliance with Standing Order No. IV., I [we] submit the names of [*full name*] of [*address*] and [*full name*] of [*address*] { as fit and / or, as a fit and } proper sureties / proper substitute } to enter into the { bond / recognizance } thereby required: and I [we] certify that, in { my / our } belief, the said [*full name*] and the said [*full name*] { are each / is } worth upwards of { 200*l.* / 500*l.* } over and above { their / his } just debts.

This certificate may be signed by the country solicitor or agent of the appellants.

I [we] certify that a copy of the above certificate, with two clear days notice of the intention to lodge the same in the Parliament Office, has been served on the solicitors or agents of the respondents.

To be signed by the London solicitor or agent of the appellants."

ment office within one week from the lodgment of the certificates of sufficiency in the parliament office.

"13. In the event of the clerk of the parliaments requiring a justification of the sureties, the appellant's agent must within one week from the date of an official notice to him to that effect, lodge in the parliament office an affidavit or affidavits by the proposed sureties setting forth specifically the nature of the property in consideration of which they claim to be accepted as sureties in respect of the bond and also declaring that the property in question is unincumbered. A copy of the affidavit or affidavits must be served on the agent of the respondents before lodging the same in the parliament office. If the respondents desire to file counter affidavits, the same should be lodged with as little delay as possible, copies having been served on the agent of the appellants. Justification of sureties or substitute.

"14. If on perusing and considering these affidavits, the clerk of the parliaments deems the proposed sureties not satisfactory, the appellant is required to pay into the Fee Fund of the House the sum of 200*l.* as security for the costs of the appeal within four weeks from the date of an official notice by the clerk of the parliaments intimating his dissatisfaction with the proposed sureties. In default of such payment within the period aforesaid the appeal will stand dismissed.

"15. The like practice is to be observed with regard to the substitute for the recognizance, with this exception, that in the event of the substitute being deemed by the clerk of the parliaments not satisfactory, the appellant or appellants are required to enter personally into the usual recognizance."

Return of Order for Service with Affidavit.]—By *Standing Order III.* "Ordered, that the 'order of service' issued upon the presentation of an appeal for service on the respondent or his solicitor, be returned to the Parliament Office, together with an affidavit of due service entered thereon, within the time limited by Standing Order No. V. (*u*) for the appellant to lodge his printed cases, unless within that period all the respondents shall have lodged their printed cases; in default the appeal to stand dismissed." Return of order of service with affidavit.

Appearance by Respondent.]—The solicitors of those respondents who purpose lodging printed cases in answer to the appeal should attend at the Parliament Office for the purpose of ascertaining the due execution of the recognizance and bond, and entering their names in the appearance book. (Only solicitors who have thus entered appearance in the cause are entitled to notice of the meeting of the Appeal Committee) (*x*). Appearance by respondent.

The Cases.]—After the petition of appeal has been presented, and the order for security given, and the order for service returned, the next step is to prepare the printed case and appendix. The cases.

Time for Lodging Cases.]—By *Standing Order V.* it is "Ordered, that in English appeals the printed cases and the appendix thereto —Time for lodging.

(*u*) See infra.

(*x*) Direction 16.

PART XI.

be lodged in the Parliament Office within six weeks from the date of the presentation of the appeal to the House; in Scotch and Irish appeals, within eight weeks; and the appeal set down for hearing on the first *sitting* day after the expiration of those respective periods (or as soon before, at the option of either party, as all the printed cases and the appendix shall have been lodged); on default by the appellant the appeal to stand dismissed."

Expiry during recess.

By *Standing Order VII.* it is "Ordered, with regard to appeals in which the periods under Standing Orders Nos. III., IV., V. and VI. expire during the recess of the House, that such periods be extended to the third sitting day of the next ensuing meeting of the House."

In English appeals six weeks time, and in Irish and Scotch appeals eight weeks time, from the date of the presentation of the appeal, is granted to all parties to lodge printed cases and the appendix thereto. These periods, when expiring during a recess of the House, are extended by Standing Order No. VII. Petitions for extension of time, *lodged* during the *prorogation of Parliament* (unless the House of Lords be sitting for judicial business), in cases in which time has been *already extended* on petition, do not prevent the dismissal of an appeal (*y*).

Extension of time.

The petition must be engrossed on foolscap paper, and lodged in the parliament office, if assented to by respondent's agent. If not assented to, a copy, and two clear days' notice of intention to present, must be given to respondent's agent, and the original petition, and a *duplicate* thereof, lodged in the parliament office.

—Form, &c. of printed cases.

—*Form of printed Cases.*]—The case and appendix must be printed quarto size, with seven or eight letters down the margin, and the title page of the appellant's case must contain, at the top, a reference to the report of the cause below, if reported, or, if not reported, "catch words" or "index words" similar to those prefixed to reports of causes in the Law Reports. The case and appendix should be submitted *in proof* to the clerks in the Judicial Office (*z*).

Reference to report of cause below.

Reference to documents in appendix.

Where reference is made to a document printed in the appendix, the case must contain a marginal note of the page of the appendix

(*y*) Direction 20. The following is the form of petition to extend time:—

"In the House of Lords.

[*Insert short title of cause.*]

To the Right Honourable the House of Lords.

The humble petition of the appellant .

Showeth,

That your petitioner presented petition of appeal on the day of complaining of [*insert dates of orders or interlocutors complained of*].

That the time allowed by Standing Order No. V. ([*or*] extended by your Lordships' order of the [*state date*]) for the appellant to lodge his printed cases and the appendix, will expire on the [*state date*].

That your petitioner [*set forth cause of delay*].

Your petitioner therefore humbly prays that your Lordships will be pleased to grant him an extension of time until [*specify the date to which extension of time is required*] to lodge his printed cases, and the appendix, and set down the cause for hearing.

And your petitioner will ever pray.

——— agents for the appellant.

We consent to the prayer of the above petition.

——— agents for the respondents."

(*z*) Direction 26.

containing such documen
to the documents therein

By Standing Order V. (
signed by one or more cou
the Court below, or shall
ing in this House."

The printed case must
shall have attended as cou
attending as counsel on th

Respondent's Case.]—A re
upon lodging a printed cas
within the time specified in
lodgment of the appellant'
hearing *ex parte*;" but the
time afterwards, lodge his
the same position as if he
in the order of service. W
delayed until a day for hea
pointed, the respondent is re
his printed case, and subm
make on his petition (*c*).

—Joint Case.]—In appeals i
in their statement of the sub
joint case with reasons *pro* a
fore in use in common law ap

The Appendix.]—It is obli
respective periods so limited a
the joint case before mentione
of such documents, or parts th
below, as may be necessary fo
appeal in support of his case.
both parties on the hearing o
graph with regard to the print
respondent) (*e*).

It is the duty of the appell
after the presentation of the ap
list of the proposed documents,
the appendix. The proof is t
documents by the respective sol
of the appendix, as soon as print
of the respondent.) The respon
ditional documents, used in evi
may be necessary for the suppor
the appeal, such documents to be
appendix, in order that the same
the appendix, and form *one* docu
the hearing of the appeal. (The

(*a*) Id. 27. (*b*) Id
(*d*) Id. 21, and post, Ch.

containing such document. The appendix must contain an index to the documents therein (*a*).

—Signature by counsel.

By *Standing Order V.* (3) it is "Ordered, that all printed cases be signed by one or more counsel, who shall have attended as counsel in the Court below, or shall purpose attending as counsel at the hearing in this House."

Signature of counsel to case.

The printed case must be signed by one or more counsel who shall have attended as counsel in the Court below, or shall purpose attending as counsel on the argument at the Bar (*b*).

Respondent's case.

Respondent's Case.]—A respondent can only be heard at the bar upon lodging a printed case. If the respondent's case is not lodged within the time specified in the order of service, the cause is on the lodgment of the appellant's case and the appendix, "set down for hearing *ex parte*;" but the respondent may nevertheless, at any time afterwards, lodge his printed case, and thus put himself in the same position as if he had lodged it within the time specified in the order of service. When, however, the lodgment has been delayed until a day for hearing the cause has been actually appointed, the respondent is required to petition for leave to lodge his printed case, and submit to whatever order the House may make on his petition (*c*).

—Joint case.

—*Joint Case.*]—In appeals in which the parties are able to agree in their statement of the subject-matter, it is optional to lodge a *joint* case with reasons *pro* and *con*, following the practice heretofore in use in common law appeals on a special case (*d*).

The appendix.

The Appendix.]—It is obligatory on the appellant, within the respective periods so limited as above, to lodge his printed case, or the joint case before mentioned, and a printed appendix consisting of such documents, or parts thereof, used in evidence in the Court below, as may be necessary for reference on the argument of the appeal in support of his case. This appendix will be for the use of both parties on the hearing of the appeal. (See following paragraph with regard to the printing of *additional* documents by the respondent) (*e*).

Preparation of appendix.

It is the duty of the appellant, with as little delay as possible after the presentation of the appeal, to furnish to the respondent a list of the proposed documents, and in due course a proof copy of the appendix. The proof is to be examined with the original documents by the respective solicitors of the parties. (Ten copies of the appendix, as soon as printed, to be delivered to the solicitor of the respondent.) The respondent is allowed to print any *additional* documents, used in evidence in the Court below, which may be necessary for the support of his case on the argument of the appeal, such documents to be PAGED CONSECUTIVELY with the appendix, in order that the same may be eventually *bound* up with the appendix, and form *one* document for the use of the House on the hearing of the appeal. (The proof to be examined, as afore-

Respondent's additional documents.

(*a*) Id. 27. (*b*) Id. 25. (*c*) Id. 29.
(*d*) Id. 21, and post, Ch. CXVII. (*e*) Id. 22.

PART XI.

said, by the respective solicitors, and prints delivered to the solicitor of the appellant.) Shorthand notes of arguments in the Courts below must not be printed by either party (*f*).

The costs incurred in printing the appendix will, in the first instance, be borne by the appellant, and the costs of the *additional* documents by the respondent, but these costs will ultimately be subject to the decision of the House with regard to the costs of the appeal (*g*).

Postponing printing of evidence.

In cases where there is a preliminary question of law to be decided, it is often desirable to postpone the printing of the whole of the appendix until that point is decided, and an order for this purpose may be obtained (*h*).

—Binding of printed cases.

—*Binding of Printed Cases.*]—The following are the directions as to binding of the printed cases and printed copies of the appeal for the use of the law lords:—

1. Ten copies bound in purple cloth; two of the ten to be interleaved as regards the cases only.

2. Short title of cause on the back.

3. Label on side, stating short title of cause and contents of the volume, thus:—

"A ——— and others *v.* B ——— and others."
Printed Copy of the Appeal.
Appellants' Case.
Respondent B.'s Case.
Respondent C.'s Case.
Appendix (consisting of the appendix lodged by the appellant, and the *additional* documents, if any, lodged by the respondent).

4. The volume to be indented, and the names of the parties written on the indentations to their respective cases.

5. The bound copies to be lodged immediately after the respondents' cases are delivered in.

In dealing with bulky cases, it may be found advisable to bind the appendix as a separate volume.

It is the duty of the appellants' agent to carry out these directions.

Lodgment of cases in parliament office.

Lodgment of Cases in Parliament Office.]—Forty copies of each case and appendix are required to be lodged in the Parliament Office to comply with Standing Order No. V.; and subsequently, on the lodgment of the Respondent's Case, ten *bound* copies (*i*). *See directions as to binding printed cases, appendix, additional documents, and printed copies of the appeal for the use of the House on the hearing of the appeal, supra.*

See the directions as to binding, *supra*.

Exchange of cases.

After the lodgment of the printed cases by the appellants and respondents, the respective cases are to be exchanged at the offices of the solicitors; the respondents' agent supplying the appellants' agent with the additional number of cases required for the *bound* copies (*k*).

(*f*) Direction 23.
(*g*) Id. 24.
(*h*) *Metropolitan Asylum District* v. *Hill*, 5 App. Cas. 582, 587.
(*i*) Direction 28.
(*k*) Id. 30.

Setting down the appeal for hearing.

Setting down the Appeal for Hearing.]—As soon as the printed cases of all parties and the appendix thereto have been lodged, it is optional for either side to set down the cause for hearing, but it is *obligatory* on the appellant, upon the lodgment of his printed cases and the appendix, to set down the cause for hearing within the time limited by Standing Order No. V. (*ex parte* as to those respondents who have not already lodged printed cases, upon proof, by affidavit, of the due service of the before-mentioned "order of service" upon the respondents or their solicitors). A respondent who has lodged his printed cases, is at liberty to set down the cause for hearing on the first *sitting* day after the expiration of the time limited by the Standing Order for lodging printed cases (*l*).

The cause will then be ripe for hearing, and will take its position on the effective cause list (*m*).

—Causes under compromise.

Causes the hearing of which has been postponed on the ground of their being under compromise are placed at the bottom of the effective cause list in the event of no compromise being arrived at (*n*).

As to setting down for hearing *ex parte*, *see ante*, p. 1005.

Abatement or defect.

Abatement by Death or Defect through Bankruptcy.]—By *Standing Order VIII.*, "Ordered, that in the event of abatement by death or defect through bankruptcy, an appeal shall not stand dismissed for default under Standing Orders Nos. III., IV., V., provided that notice of such abatement or defect be given by letter addressed to the clerk of the parliaments and lodged in the Judicial Office prior to the expiration of the period limited by the Standing Order under which the appeal would otherwise have stood dismissed.

Revivor, &c.

"Ordered, that all appeals marked on the cause list of the House as abated or defective shall stand dismissed unless within three months from the date of the notice to the clerk of the parliaments of abatement or defect, if the House be then sitting, or, if not, then not later than the third sitting day of the next ensuing sittings of the House, a petition shall be presented to the House for reviving the appeal or for rendering the same effective.

Supplemental cases to be delivered in where appeals are revived or parties added.

"Ordered, that where any party or parties to an appeal shall die pending the same, subsequently to the printed cases having been lodged, and the appeal shall be revived against his or her representative or representatives as the person or persons standing in the place of the person or persons so dying as aforesaid, a supplemental case shall be lodged by the party or parties so reviving the same respectively, stating the order or orders respectively made by the House in such case.

"The like rule shall be observed by the appellant and respondent respectively, where any person or persons shall, by leave of the House, upon petition or otherwise, be added as a party or parties to the said appeal after the printed cases in such appeal shall have been lodged."

Death.

By *Direction* 37, "In the event of the death of any of the parties to an appeal, immediate notice should be given by letter addressed to the clerk of the parliaments, and lodged in the Judicial Office. The letter must state whether the appeal abates or does not abate by reason of the death in question.

(*l*) Id. 31. (*m*) Id. 32. (*n*) Id. 33.

PART XI.

"An appeal is held to abate through death when it becomes necessary to add a new party or parties to the appeal to represent the deceased person's interest.

"An appeal is held not to abate through death when the interest of the deceased person is represented by any of the surviving parties to the appeal.

"In appeals from England and Ireland, in which it is necessary to add new parties to the appeal, an order must be first obtained in the Court below making such persons parties to the cause, and an office copy of the order must be annexed to the petition for revival presented to this House.

"In appeals from Scotland, the record being closed in the Court below, the petition for revival is presented directly to the House, and a certified copy of the confirmation of the executors of the deceased person must be annexed to the petition.

"In the case of appeals which do not abate through death it is necessary in the printed cases to print the words '(since deceased)' against the name of the deceased person in the title of the appeal.

Bankruptcy.

"In the case of an appeal which becomes defective through the bankruptcy of any of the parties, a letter must be addressed to the clerk of the parliaments, and lodged in the Judicial Office, stating the fact of such bankruptcy, and to this letter must be annexed an office copy of the order of the Court adjudicating bankruptcy.

"The effect of abatement, or of defect through bankruptcy on the procedure of the appeal, the period within which steps must be taken for a revival of the appeal, or for rendering the same effective, and regulations for the lodgment of supplemental cases, are set forth in Standing Order No. VIII."

Incidental petitions.

Incidental Applications.]—Petitions presented in *incidental* applications are required to be engrossed on *foolscap, bookwise;* with regard to petitions in which an assent cannot be obtained, two clear days previous notice of the intention to present, together with a copy of the petition, must be served on the opposing agent, and a *duplicate* of the petition must be lodged in the Parliament Office, together with the original petition. The form of a petition for extension of time to lodge the appellant's cases is given in Appendix C. (*o*).

Duplicate required where assent is not given.

Forms of petitions (subject to modification, if required) for the restoration of an appeal, for leave to sue in formâ pauperis, for revivor, and for withdrawal of an appeal, can be obtained from the Judicial Department. It will be found advisable in exceptional cases to submit a draft of the petition to the clerks of the Judicial Department (*p*).

Appeal Committee.

Counsel not heard.

Affidavits.

Counsel are not heard before the Appeal Committee. All affidavits intended to be used in the Appeal Committee must be lodged with the opposing agent within a reasonable time before the meeting of the committee, but are not to be filed in the Parliament Office (*q*).

(*o*) Direction 17. See ante, p. 1004, n. (*y*). (*p*) Id. 18. (*q*) Id. 19.

5. Hearing o

Before whom.]—By the
"An appeal shall not be
Lords unless there are pres
not less than three of the f
lords of appeal; that is to s
(1.) The Lord Chancellor
and
(2.) The lords of appeal
Act mentioned; an
(3.) Such peers of parlian
or have held any
high judicial offices

—During Prorogation of Parl
Act, 1876, *s.* 8, "For preve
justice, the House of Lords
hearing and determining app
of appeal in ordinary taking
prorogation of parliament, at
be appointed by order of the
ceding session of parliament
the said house in relation to
with during such prorogation,
been then sitting, but no b
determination of appeals and
lords of appeal in ordinary
aforesaid, shall be transacted
gation.

"Any order of the House o
Act be made at any time after

—During Dissolution of Parlia
Act, 1876, *s.* 9, "If, on the occ
her Majesty is graciously please
with a view to prevent delay
provide for the hearing and de
dissolution, it shall be lawful
her sign manual, to authorize t
the House of Lords, to hear and
solution of parliament, and for

(*r*) By the App. Jur. Act, 1876, s. 25, the following definitions are given, viz.:

"High judicial office" means any of the following offices; that is to say, The office of Lord Chancellor of Great Britain or Ireland, or of paid judge of the Judicial Committee of the Privy Council, or of judge of one of her Majesty's superior Courts of Great Britain and Ireland:

"Superior Courts of Great Britain and Ireland" means and includes,—

5. *Hearing of the Appeal—Judgment, &c.*

Hearing of the appeal.

Before whom.

Before whom.]—By the *Appellate Jurisdiction Act*, 1876, *s.* 5, "An appeal shall not be heard and determined by the House of Lords unless there are present at such hearing and determination not less than three of the following persons, in this Act designated lords of appeal; that is to say,

(1.) The Lord Chancellor of Great Britain for the time being; and

(2.) The lords of appeal in ordinary to be appointed as in this Act mentioned; and

(3.) Such peers of parliament as are for the time being holding or have held any of the offices in this Act described as high judicial offices" (*r*).

—During prorogation.

—*During Prorogation of Parliament.*]—By the *Appellate Jurisdiction Act*, 1876, *s.* 8, "For preventing delay in the administration of justice, the House of Lords may sit and act for the purpose of hearing and determining appeals, and also for the purpose of lords of appeal in ordinary taking their seats and the oaths, during any prorogation of parliament, at such time and in such manner as may be appointed by order of the House of Lords made during the preceding session of parliament; and all orders and proceedings of the said house in relation to appeals and matters connected therewith during such prorogation, shall be as valid as if parliament had been then sitting, but no business other than the hearing and determination of appeals and the matters connected therewith, and lords of appeal in ordinary taking their seats and the oaths as aforesaid, shall be transacted by such house during such prorogation.

"Any order of the House of Lords may for the purposes of this Act be made at any time after the passing of this Act."

—During dissolution.

—*During Dissolution of Parliament.*]—By the *Appellate Jurisdiction Act*, 1876, *s.* 9, "If, on the occasion of a dissolution of parliament, her Majesty is graciously pleased to think that it would be expedient, with a view to prevent delay in the administration of justice, to provide for the hearing and determination of appeals during such dissolution, it shall be lawful for her Majesty, by writing under her sign manual, to authorize the lords of appeal, in the name of the House of Lords, to hear and determine appeals during the dissolution of parliament, and for that purpose to sit in the House of

(*r*) By the App. Jur. Act, 1876, *s.* 25, the following definitions are given, viz.:

"High judicial office" means any of the following offices; that is to say,

The office of Lord Chancellor of Great Britain or Ireland, or of paid judge of the Judicial Committee of the Privy Council, or of judge of one of her Majesty's superior Courts of Great Britain and Ireland:

"Superior Courts of Great Britain and Ireland" means and includes,—

As to England, her Majesty's High Court of Justice and her Majesty's Court of Appeal, and the superior Courts of law and equity in England as they existed before the constitution of her Majesty's High Court of Justice; and

As to Ireland, the superior Courts of law and equity at Dublin; and

As to Scotland, the Court of Session.

PART XI.

Lords at such times as may be thought expedient; and upon such authority as aforesaid being given by her Majesty, the lords of appeal may, during such dissolution, hear and determine appeals and act in all matters in relation thereto in the same manner in all respects as if their sittings were a continuation of the sittings of the House of Lords, and may in the name of the House of Lords exercise the jurisdiction of the House of Lords accordingly."

Practice on hearing.

Practice on Hearing.]—On the hearing of an appeal, the agents are required to have the *originals* (or such copies thereof as were accepted in evidence in the Court below in lieu of the originals) of all documents set forth in the printed case and appendix in readiness below the bar, in case the House desires to refer to such originals or accepted copies (*s*).

When the cause is called on, the senior counsel for appellant is first heard; then appellant's second counsel (not more than two counsel on each side being allowed to address the House); next the two counsel for respondent are heard, in their order of precedence; and, lastly, appellant's senior counsel is heard in reply (*t*). Evidence not presented in the Court below will not be allowed to be used in the House on appeal (*u*).

Affirmance or reversal.

As soon as the appellant's counsel has replied, if time is not taken to consider the judgment, the Lord Chancellor delivers his opinion on the case, and in general moves that the judgment be either affirmed or reversed. The other Law Lords afterwards, if they wish, deliver their opinion; and the affirmance or reversal of the judgment is decided by the votes of peers present, no proxies in this case being allowed. If the votes be equal, the judgment is affirmed (*x*).

In cases of difficulty or importance the Judges of the High Court may be summoned to the House to attend the hearing, and answer any questions of law arising upon the case which may be propounded to them by the Lord Chancellor in his capacity of Speaker of the House (*y*). Time to answer such questions is usually accorded to the Judges at their request.

Decisions of the House of Lords are binding on the House in subsequent cases (*z*); but when there are conflicting and irreconcileable authorities, that which is at once the most recent and the most consistent with general principles must prevail (*a*).

(*s*) Direction 34. There is some difference in this respect in the case of Irish and Scotch appeals.

(*t*) See *Jones* v. *Cannock*, 3 H. L. Ca. 700, where no one appeared for the plaintiff in error. In *Julius* v. *Bishop of Oxford*, 5 App. Cas. 214 at p. 221, the junior counsel for the appellant was allowed to reply, but the House stated that this was as a special favour and was not to be treated as a precedent.

(*u*) *Banco de Portugal* v. *Waddell*, 5 App. Cas. 161, 170, 171; 49 L. J., Bk. 33.

(*x*) *Pryce* v. *Monmouthshire, &c. Co.*, 4 App. Cas. 197 at p. 200: *Thornby* v. *Fleetwood*, 1 Str. 381. See *Vicars* v. *Haydon*, Cowp. 843: *Garland* v. *Carlisle*, 5 Cl. & F. 355: *Hooper* v. *Lane*, 6 H. L. 443.

(*y*) This was done since the Jud. Act in *Angus* v. *Dalton*, 6 App. Cas. 740.

(*z*) *Commissioners of Inland Revenue* v. *Harrison*, L. R., 7 H. L. 1; 43 L. J., Ex. 138: *Att.-Gen.* v. *Windsor*, 8 H. L. C. 369; 30 L. J., Ch. 529: *Thellusson* v. *Rendlesham*, 7 H. L. C. 429: cp. *Wilson* v. *Wilson*, 5 H. L. C. 40; 23 L. J., Ch. 697, contra.

(*a*) *Campbell* v. *Campbell*, 5 App. Cas. 787, per Lord *Selborne*, L. C., at p. 793.

Costs.

Costs (*b*).]—If the appellant fails, he will be ordered to pay the respondent's costs (*c*), although the ground of the decision is different from that in the Court below (*c*). If the appellant succeeds, the respondent will not, in general, be ordered to pay his costs (*d*). If the House is equally divided no costs are given (*e*). Where there were cross appeals and neither was entirely successful, the House made no order as to costs (*f*). An appellant appearing *in forma pauperis* who is successful will be allowed the costs of his so appearing (*g*). If the House do not award costs, the Court in which the original judgment was given can in no case supply the defect by awarding them (*h*). The Court below may allow interest on the amount for which judgment was signed there, but not on the costs of the appeal (*i*). An action lies on the judgment of the House of Lords ordering the appellant in an unsuccessful appeal to that House to pay the costs of such appeal to the respondent (*k*).

Making decree of House of Lords an order of Court below.

Making Decree of House of Lords an Order of Court below.]—The application to have a decree of the House of Lords made an order of the Court below should be made *ex parte* to the Court below (*l*).

Execution.

Execution.]—The execution is issued out of the Court in which the original judgment was given (*see ante*, p. 992).

6. *Taxation of Costs—Payment or Repayment of the* 200*l. paid in.*

Taxation of costs.

Taxation of Costs.]—By *Standing Order X.*, "Ordered, That the clerk of the parliaments shall appoint such person as he may think fit as taxing officer, and in all cases in which this House shall make any order for payment of costs by any party or parties in any cause without specifying the amount, the taxing officer may, upon the application of either party, tax and ascertain the amount thereof, and report the same to the clerk of the parliaments or clerk assistant: And it is further ordered, that the same fees shall be demanded from and paid by the party applying for such taxation for and in respect thereof as are now or shall be fixed by any resolution of this House concerning such fees; and the taxing officer may, if he think fit, either add or deduct the whole or a part of such fees at the foot of his report: and the clerk of the parliaments or clerk assistant may give a certificate of such costs, expressing the amount so reported to him as aforesaid, and in his

(*b*) *Boddily* v. *Bellamy*, 2 Burr. 1097.

(*c*) *Peek* v. *Gurney*, L. R., 6 H. L. 377; 43 L. J., Ch. 19.

(*d*) *De Vitri* v. *Betts*, L. R., 6 H. L. 319, 323, 326; 42 L. J., Ch. 841, where however under special circumstances a respondent was ordered to pay costs: *Denny* v. *Hancock*, 40 L. J., Ch. 193, 194, per *Mellish*, L. J.

(*e*) *Price* v. *Monmouthshire, &c. Co.*, 4 App. Cas. 197, 218—220.

(*f*) *Atchison* v. *Lohre*, 4 App. Cas. 755; 49 L. J., Q. B. 130.

(*g*) *McKenzie* v. *British Linen Co.*, 6 App. Cas. 82 at pp. 112, 113.

(*h*) *Beale* v. *Thompson*, 2 M. & Sel. 249. See *Gann* v. *Johnson*, L. R., 6 C. P. 461; 40 L. J., C. P. 227: *Frith* v. *Leroux*, 2 T. R. 58.

(*i*) *Lane. and Yorks. R. Co.* v. *Gidlaw*, L. R., 9 Ex. 35; 43 L. J., Ex. 1.

(*k*) *The Marbella Iron Ore Co.* v. *Allen*, 47 L. J., C. P. 601; 38 L. T. 815: *Newry R. Co.* v. *Ulster R. Co.*, 4 Ir. R., C. L. 62.

(*l*) *British Dynamite Co.* v. *Krebs*, 11 Ch. D. 448; 48 L. J., Ch. 800.

PART XI.

certificate regard shall be had to the sum of 200*l.* where that amount has been paid in to the account of the Fee Fund of the House as directed by Standing Order No. IV.; and the amount in money certified by him in such certificate shall be the sum to be demanded and paid under or by virtue of such order as aforesaid for payment of costs."

By whom taxed.

The taxing officer of the House of Lords has authority to tax (*inter alia*) all costs, charges and expenses of or incidental to appeal cases in the House of Lords. Such costs are taxed under an order or judgment of the House, and in pursuance of the Standing Order, or upon a requisition from either of the Courts, or at the request of the parties interested in the same; such costs being taxed either as between *party and party*, or as between *solicitor and client*, as the case may require.

Form of bill.

Forms of bills of costs relating to appeal cases may be obtained at the office for the sale of printed papers, House of Lords (*l*).

Application to tax.

Applications must be made by depositing in the office of the taxing officer (*m*) a copy of the bill of costs, with an indorsement thereon stating that "a copy of this bill of costs was on the day of served upon A. B., the agent for the appellant or the respondent, as the case may be, and we hereby request that an appointment may be made to tax the same.

Dated this day of , 18 .

A. B.,
Agent for the appellant or respondent,
as the case may be.

To the
Taxing officer of the House of Lords."

Payment or repayment of the 200*l.*

Payment or Repayment of the 200*l. paid in under Standing Order IV.*]—"In all cases where the appellant has paid in the sum of 200*l.* as directed by Standing Order No. IV., and where the

Appeals dismissed.

House shall make any order for payment of costs by the appellant to the respondent, the clerk of the parliaments or clerk assistant shall pay over to the respondent or his agent the said sum of 200*l.*, or so much thereof as will liquidate the amount reported to the clerk of the parliaments or clerk assistant by the taxing officer, as being due from the appellant to the respondent in respect to the appeal. And in all cases where the amount so reported by the taxing officer shall exceed 200*l.*, the clerk of the parliaments or clerk assistant shall in his certificate credit the appellant with the 200*l.* so paid over to the respondent. And where there be two or more respondents entitled to their separate costs, the said 200*l.* shall be divided between the respondents in proportion to the amount of costs reported by the taxing officer to be due to each respondent. And where, after satisfying the order of the House, there be any sum remaining, part of the said 200*l.*, the same shall be paid back to the appellant or his agent upon a proper receipt for the same being given to the clerk of the parliaments or clerk assistant (*n*).

Appeals allowed.

"In all cases in which the appellant is not ordered to pay the costs of the appeal, the clerk of the parliaments or clerk assistant

(*l*) Direction 38.

(*m*) The Taxing Office is open throughout the session, and from the first Monday in the month of December in each year.

(*n*) Direction 39.

Payment

shall, on receiving a prop
appellant or his agent the
"In cases in which an ap
the appellant shall be at
according to the form set
of the respondents (such se
davit), and unless the respo
date of such service, if the
said four weeks, or, if not,
of the next ensuing sittings
taxing officer of the House
the parliaments or clerk a
the same being given, repa
sum of 200*l.* In the event
costs as aforesaid, the taxin
the respondent be less than
parliaments or clerk assistan
his agent so much of the
amount reported to the cle
as being due from the app
the appeal, and the remain
shall be paid back to the
receipt for the same being g
clerk assistant" (*q*).

(*o*) Id. 40.

(*p*) The following is the form :-
"In the House of Lords.
A. . . . Appellant.
B. . . . Respondent.
(Appeal lately depending in the
House of Lords.)
Take notice that the above appe
has been dismissed for want of pr
secution, and that the appellant i
tends to apply to the Clerk of t
Parliaments for repayment of t
sum of 200*l.* paid by him into t
House of Lords Fee Fund unde
Standing Order No. IV. The re
spondent is required by the rules o
the House, if any costs have bee

shall, on receiving a proper receipt for the same, pay back to the appellant or his agent the said sum of 200*l.* (*o*).

"In cases in which an appeal is dismissed for want of prosecution, the appellant shall be at liberty to serve a notice of such dismissal according to the form set forth in Appendix D. (*p*), upon the agent of the respondents (such service to be verified, if necessary, by affidavit), and unless the respondent shall, within four weeks from the date of such service, if the House be sitting at the expiration of the said four weeks, or, if not, then not later than the third sitting day of the next ensuing sittings of the House, lodge in the office of the taxing officer of the House a copy of his bill of costs, the clerk of the parliaments or clerk assistant shall, upon a proper receipt for the same being given, repay to the appellant or his agent the said sum of 200*l.* In the event of the respondent so lodging his bill of costs as aforesaid, the taxing officer may, if the sum demanded by the respondent be less than 200*l.*, tax the same and the clerk of the parliaments or clerk assistant shall pay over to the respondent or his agent so much of the said sum of 200*l.* as will liquidate the amount reported to the clerk of the parliaments or clerk assistant as being due from the appellant to the respondent in respect of the appeal, and the remaining portion of the said sum of 200*l.* shall be paid back to the appellant or his agent upon a proper receipt for the same being given to the clerk of the parliaments or clerk assistant" (*q*).

Appeals dismissed for want of prosecution.

(*o*) Id. 40.

(*p*) The following is the form:—

"In the House of Lords.

A. . . . Appellant.

B. . . . Respondent.

(Appeal lately depending in the House of Lords.)

Take notice that the above appeal has been dismissed for want of prosecution, and that the appellant intends to apply to the Clerk of the Parliaments for repayment of the sum of 200*l.* paid by him into the House of Lords Fee Fund under Standing Order No. IV. The respondent is required by the rules of the House, if any costs have been incurred by him in respect of the appeal, to lodge with the taxing officer of the House a copy of his bill of costs within four weeks from the date of the service of this notice upon the respondent or his agent, if the House of Lords be then sitting, or not later than the third day on which the House shall sit after the expiration of the said four weeks; and in default, the Clerk of the Parliaments will be at liberty forthwith to repay to the appellant the said sum of 200*l.*

To ."

(*q*) Direction 41.

PART XII.

THE PARTIES TO AN ACTION AND APPLICATIONS RELATING THERETO, AND PROCEEDINGS BY AND AGAINST PARTICULAR PERSONS.

CHAP.		PAGE
LXXXVII.	*Parties to Actions—Adding, Striking out and Substituting Parties*	1014
LXXXVIII.	*Proceedings on Change of Parties by Marriage, &c.*	1025
LXXXIX.	*Peers and Members of Parliament*	1036
XC.	*Solicitors, &c.*	1037
XCI.	*Justices of the Peace, Constables, &c.*	1038
XCII.	*Corporations and Companies*	1050
XCIII.	*Partners and Unincorporated Companies*	1092
XCIV.	*Local Boards of Health*	1096
XCV.	*Friendly and other Societies, Trades Unions, &c.*	1099
XCVI.	*Hundredors*	1108
XCVII.	*Executors and Administrators*	1112
XCVIII.	*Heirs and Devisees*	1128
XCIX.	*Infants*	1133
C.	*Idiots, Lunatics and Persons of Unsound Mind*	1141
CI.	*Husband and Wife and Married Women*	1147
CII.	*Bankrupts and their Trustees*	1162
CIII.	*Clergymen*	1176
CIV.	*Paupers*	1182
CV.	*Prisoners*	1185

CHAPTER LXXXVII.

PARTIES TO ACTIONS—ADDING AND STRIKING OUT, ETC.

	PAGE
Who to be Plaintiffs	1015
Who to be Defendants	1015
Actions by and against Trustees, &c.	1017
Where numerous Parties—Heir-at-Law—Next of Kin, &c.	1017
Effect of Misjoinder and Non-joinder—Proceedings substituted for Plea in Abatement.	1019
Amendment in respect of Parties—Application for—Generally	1020
Adding or Substituting Plaintiff where Mistake has been made.	1021

	PAGE		PAGE
Striking out or adding Party under Ord. XVI. r. 11	1221	*Proceedings against Added Defendant—Service of Writ, &c.*	1223
Adding Plaintiff	1222	*Proceedings against Third Party for Indemnity, &c.*	1224
Adding Defendant	1223	*Proceedings against Person joined as Defendant to Counterclaim*	1224
Striking out Defendant	1223		

BEFORE bringing an action, it is necessary to consider who should be made plaintiff or plaintiffs, and against whom the action should be brought. It does not fall within the province of this work to discuss at any length the law of parties to actions (*a*), but the recent rules and cases as to who may or should be parties, and the effect of misjoinder and nonjoinder, are fully noticed, and the practice as to adding and striking out parties is treated of.

Who may or should be plaintiffs.

Who may or should be Plaintiffs.]—By *R. of S. C., Ord. XVI. r.* 1, "All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though successful, shall be entitled to his costs occasioned by so joining any person who shall not be found entitled to relief, unless the Court or a Judge in disposing of the costs shall otherwise direct."

This rule enables two or more persons separately injured by a tort, although they are not partners or otherwise jointly interested, to join all their claims in one action (*b*). Thus, where eight persons, who were not jointly interested, joined in an action for libel, and no joint injury being shown, the jury returned a verdict for 40*s.* damages, the Court of Appeal refused to interfere (*b*). The rule, however, does not enable plaintiffs to join claims in such a manner as to embarrass the defendant, and claims so joined may be ordered to be struck out (*c*). Thus a statement of claim joining claims by the vendor of goods and the indorsees of a bill given for the price against the purchasers for the price and on the bill, was so struck out (*c*).

The rule is also subject to the special provisions contained in *Ord. XVIII.* with respect to the joinder of causes of action and to the power given by that order to exclude or strike out claims inconveniently joined. *See ante, Vol.* 1, *Ch. XXXV.*

Who may or should be defendants.

Who may or should be Defendants.]—By *R. of S. C., Ord. XVI. r.* 4, "All persons may be joined as defendants against whom the

(*a*) See Diccy on Parties to Actions (1870); Chit. Plead. 7th ed. (1844), vol. 1, pp. 1—105; Lush, Pr. 3rd ed. (1865), vol. 1, pp. 4 et seq.; Daniell, Ch. Pr. 6th ed. (1882), pp. 51 et seq.; Broom, Parties to Actions, 2nd ed. (1846).

(*b*) *Booth* v. *Briscoe* (C. A.), 2 Q. B. D. 496; 25 W. R. 838. See per *Jessel*, M. R., *Pender* v. *Lushington*, 6 Ch. D. at p. 81. And cf. contra, per Id., *Appleton* v. *Chapel Town Paper Co.*, 45 L. J., Ch. 276, which, however, was the case of a bill in Chancery, and where the above rule was not cited or referred to.

(*c*) *Smith* v. *Richardson*, 4 C. P. D. 112.

PART XII.

right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment."

By *r.* 5, "It shall not be necessary that every defendant shall be interested as to all the relief prayed for, or as to every cause of action included in any proceeding against him; but the Court or a Judge may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest."

Parties to contracts.

By *r.* 6, "The plaintiff may, at his option, join as parties to the same action all or any of the persons severally, or jointly and severally liable on any one contract, including parties to bills of exchange and promissory notes."

By *r.* 7, "Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may, in such manner as hereinafter mentioned, or as may be prescribed by any special order, join two or more defendants, to the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties."

Effect of rules.

Under the above rules there is no limit to the number of defendants who may be joined in the same action. All persons against whom any relief is claimed to exist, whether jointly, severally or in the alternative, even though such alternatives be inconsistent, may be joined (*e*). Thus, where the plaintiff is in doubt as to whether he can prove the authority of an agent to contract, he may join the principal and agent in one action claiming on the contract against the former, and in the alternative on the warranty of authority against the latter (*f*). And in an action for trespass to land by S. where the plaintiff was the lessee of W., and the defence was a right of way granted by W., it was held that the plaintiff was entitled to join S. and W. in one action, claiming against the former for trespass, and in the alternative against the latter for breach of a covenant for quiet enjoyment (*g*). It has, however, been held that a person cannot be joined as co-defendant to a *counterclaim*, against whom there is only a claim for relief in one of two inconsistent alternatives (*h*).

(*e*) *Honduras Inter-Oceanic R. Co.* v. *Tucker* (C. A.), 2 Ex. D. 301; 46 L. J., Ex. 391: *Child* v. *Stenning* (C. A.), 5 Ch. D. 695; 46 L. J., Ch. 523: *Howell* v. *West*, W. N. 1879, 90 (C. A.), claim against doctor and schoolmaster for negligence. *Dessilla* v. *Schuneh & Co.* W. N. 1880, 96, where claims against different defendants in respect of different libels of the same class and published to the same persons were joined. As to joining alternative inconsistent claims, see especially *Child* v. *Stenning*, supra. And see *Bagot* v. *Easton*, 7 Ch. D. 1; 47 L. J., Ch. 225, from which it would appear that such claims are allowable. But see contra, *Evans* v. *Buck*, 4 Ch. D. 423; 46 L. J., Ch. 157, per *Jessel*, M. R.

(*f*) *Honduras, &c. R. Co.* v. *Tucker*, supra.

(*g*) *Child* v. *Stenning*, supra. When this case came on for hearing it was held that the plaintiff was not bound to elect against which of the defendants he would proceed, but might open his case against both, 7 Ch. D. 413. The lessor was ultimately ordered to pay the whole costs, 11 Ch. D. 82. See *Rudow* v. *Great Britain, &c. Society*, 17 Ch. D. 600.

(*h*) *Evans* v. *Buck*, 4 Ch. D. 432; 46 L. J., Ch. 157, M. R.

Ord. XVIII. (*Vol.* 1, p
same action several cause
the joinder against diffe
connected causes of actio
See fully as to the join
ceedings in actions by and
Chapters of this Part.

Actions by and against T
tees (*k*), executors (*l*), and
behalf of or as representi
are trustees or representat
beneficially interested in th
as representing such person
stage of the proceedings,
parties either in addition
parties."

Where Numerous Parties—
Next of Kin, &c.]—By *Ord.*
persons having the same i
more of such persons may su
the Court or a Judge to defe
or for the benefit of all perso
Under this rule, when ther
behalf of the others (*m*). Th
may sue on behalf of himself
he do so, the Court will not,
order the other co-owners to
parties sues or is sued on beh
be stated in the writ and state

(*i*) *Burstall* v. *Beyfus* (C. A.),
Ch. D. 35, per Lord *Selborne*, L. C
at p. 39; 53 L. J., Ch. 565; 50 L. T
542; 32 W. R. 418.

(*k*) *Jennings* v. *Jordan*, 6 App
Cas. 698: *Simpson* v. *Denny*, 10 Ch
D. 28: *In re Cooper*, *Cooper* v. *Vesey*
20 Ch. D. 611; 47 L. T. 89. Cp. I
& 16 V. c. 86, s. 42. As to trustees
of bankrupts suing, see Ch. CII.

(*l*) See further, as to executors
suing and being sued, Ch. XCVII.

(*m*) *De Hart* v. *Stevenson*, 1 Q. B.
D. 313, action by one shipowner on
behalf of self and co-owners:
Commissioners of Sewers of the City
of London v. *Gellatly*, 3 Ch. D.
610: *Mills* v. *Jennings*, 13 Ch. D.
639: *S. C.*, 6 App. Cas. 698, sub
nom. *Jennings* v. *Jordan*, bare trus-
tees of equity of redemption on be-
half of *cestuis que trustent*: *Lovesy*
v. *Smith*, 15 Ch. D. 655; 43 L. T.
240, next of kin: *Fraser* v. *Cooper*,

Ord. XVIII. (*Vol.* 1, p. 405) enables the plaintiff to unite in the same action several causes of action, but this does not contemplate the joinder against different defendants of independent and unconnected causes of action (*i*).

See fully as to the joinder of parties and claims, and the proceedings in actions by and against particular persons, the succeeding Chapters of this Part.

Actions by and against trustees, &c.

Actions by and against Trustees, &c.]—By *Ord. XVI. r.* 8, "Trustees (*k*), executors (*l*), and administrators may sue and be sued on behalf of or as representing the property or estate of which they are trustees or representatives, without joining any of the persons beneficially interested in the trust or estate, and shall be considered as representing such persons; but the Court or a Judge may, at any stage of the proceedings, order any of such persons to be made parties either in addition to or in lieu of the previously existing parties."

Where numerous parties—heir-at-law—next of kin, &c.

Where Numerous Parties—Representative Parties—Heir-at-Law—Next of Kin, &c.]—By *Ord. XVI. r.* 9, "Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorized by the Court or a Judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested."

Under this rule, when there are numerous parties, one may sue on behalf of the others (*m*). Thus, one of several co-owners of a ship may sue on behalf of himself and his co-owners for freight, and if he do so, the Court will not, on the application of the defendant, order the other co-owners to be added (*n*). Where one of several parties sues or is sued on behalf of himself and others, this should be stated in the writ and statement of claim (*o*).

(*i*) *Burstall* v. *Beyfus* (C. A.), 26 Ch. D. 35, per Lord *Selborne*, L. C., at p. 39; 53 L. J., Ch. 565; 50 L. T. 542; 32 W. R. 418.

(*k*) *Jennings* v. *Jordan*, 6 App. Cas. 698: *Simpson* v. *Denny*, 10 Ch. D. 28: *In re Cooper*, *Cooper* v. *Vesey*, 20 Ch. D. 611; 47 L. T. 89. Cp. 15 & 16 V. c. 86, s. 42. As to trustees of bankrupts suing, see Ch. CII.

(*l*) See further, as to executors suing and being sued, Ch. XCVII.

(*m*) *De Hart* v. *Stevenson*, 1 Q. B. D. 313, action by one shipowner on behalf of self and co-owners: *Commissioners of Sewers of the City of London* v. *Gellatly*, 3 Ch. D. 610: *Mills* v. *Jennings*, 13 Ch. D. 639: *S. C.*, 6 App. Cas. 698, sub nom. *Jennings* v. *Jordan*, bare trustees of equity of redemption on behalf of *cestuis que trustent*: *Lovesy* v. *Smith*, 15 Ch. D. 655; 43 L. T. 240, next of kin: *Fraser* v. *Cooper*, *Hale & Co.*, 21 Ch. D. 719; 48 L. T. 371, bondholders: *In re Cooper*, 20 Ch. D. 611; 47 L. T. 89, trustees for *cestuis que trustent*: *Conybeare* v. *Lewis*, 48 L. T. 527, bondholders' trustees: *Prestney* v. *Mayor, &c. of Colchester*, 21 Ch. D. 111, one freeman on behalf of self and others. See per *Chitty*, J., *M'Henry* v. *Lewis*, 21 Ch. D. at p. 207. Quære, whether the Court would order security for costs. See per *Blackburn*, J., 1 Q. B. D. at p. 314: *Lovesy* v. *Smith*, supra: *Sheehan* v. *Great Eastern R. Co.*, 16 Ch. D. 69; 50 L. J., Ch. 68.

(*n*) *De Hart* v. *Stevenson*, supra.

(*o*) See *Worraker* v. *Fryer*, 2 Ch. D. 109; 45 L. J., Ch. 273, M. R.: *Adcock* v. *Peters*, W. N. 1876, 139: cp. contra, *Cooper* v. *Blissett*, 1 Ch. D. 691. See *Eyre* v. *Cox*, 24 W. R. 317.

PART XII.

When one or more of the parties, as one of several bondholders whom the plaintiff purposes to represent, dissents from his proceedings, his proper course is to apply by summons to have himself made a defendant (*p*). So one of the parties represented by the plaintiff cannot appeal against an order obtained by the plaintiff, his proper course, if he wishes to do so, is to get added as a defendant (*q*).

As to the effect on the persons represented of a judgment against a defendant who is sued on behalf of himself and others, *see Commissioners of Sewers of the City of London* v. *Gellatly*, 3 Ch. D. 610; 45 L. J., Ch. 788, M. R., from which it appears that, if fairly represented, they are bound.

When a plaintiff sues on behalf of himself and others, he will not (it has been held) be compelled to give the names and addresses of the persons on whose behalf he sues (*r*).

As to the power of the Court to dispense with the presence of a legal personal representative, *see Webster* v. *British Empire, &c. Assurance Co.*, 15 Ch. D. 169: *Curtius* v. *Caledonian Fire, &c. Co.*, 19 Ch. D. 534.

As to partners, &c., suing or being sued in the name of their firms, *see rr.* 14 *and* 15: *post*, p. 1092.

Appointment to represent unknown heir-at-law.

By *r.* 32, "In any case in which the right of an heir-at-law or the next of kin or a class shall depend upon the construction which the Court or a Judge may put upon an instrument, and it shall not be known or shall be difficult to ascertain who is or are such heir-at-law or next of kin or class, and the Court or Judge shall consider that in order to save expense or for some other reason it will be convenient to have the questions of construction determined before such heir-at-law, next of kin, or class shall have been ascertained by means of inquiry or otherwise, the Court or Judge may appoint some one or more persons to represent such heir-at-law, next of kin, or class, and the judgment of the Court or Judge in the presence of such persons shall be binding upon the heir-at-law, next of kin, or class so represented" (*s*).

In actions to restrain waste, &c.

By *r.* 37, "In all cases of actions for the prevention of waste or otherwise for the protection of property, one person may sue on behalf of himself and all persons having the same interest."

Giving conduct of proceedings to one of several parties.

By *r.* 39, "The Court or a Judge may require any person to be made a party to any action or proceeding, and may give the conduct of the action or proceeding to such person as he may think fit, and may make such order in any particular case as he may think just for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matters in question."

Appointment to represent estate of deceased person.

By *r.* 46, "If in any cause, matter, or other proceeding it shall appear to the Court or a Judge that any deceased person who was

(*p*) *Wilson* v. *Church*, 9 Ch. D. 552: *Fraser* v. *Cooper*, *Hale & Co.*, 21 Ch. D. 718; 46 L. T. 371: *Watson* v. *Cave*, 17 Ch. D. 19; 44 L. T. 40: *Conybeare* v. *Lewis*, 48 L. T. 527.

(*q*) *Watson* v. *Cave* (No. 1), 17 Ch. D. 19 (C. A.).

(*r*) *Leathley* v. *M'Andrew*, W. N. 1875, 259; Bitt. No. elv, per *Huddleston*, B. See *S. C.*, W. N. 1876, 38.

(*s*) *In re Peppitt's Estate*, 4 Ch. D. 230; 35 L. T. 902.

interested in the matter in question has no legal personal representative, the Court or Judge may proceed in the absence of any person representing the estate of the deceased person, or may appoint some person to represent his estate for all the purposes of the cause, matter, or other proceeding on such notice to such persons, if any, as the Court or Judge shall think fit, either specially or generally by public advertisement, and the order so made, and any order consequent thereon, shall bind the estate of the deceased person in the same manner in every respect as if a duly constituted legal personal representative of the deceased had been a party to the cause, matter, or proceeding" (*t*).

Effect of misjoinder or nonjoinder.

Effect of Misjoinder or Nonjoinder of Parties.]—By *Ord. XVI.* r. 11, "No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court or a Judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a Judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent in writing thereto. Every party whose name is so added as defendant shall be served with a writ of summons or notice in manner hereinafter mentioned, or in such manner as may be prescribed by any special order, and the proceedings as against such party shall be deemed to have begun only on the service of such writ or notice."

No action can, under the present practice, be defeated by reason of the misjoinder or nonjoinder of parties (*u*). This is expressly declared by the rules (*x*), and ample provision is made for the addition, at any stage of the action, of parties who ought to have been joined (*y*), and also for giving judgment for or against some only of the parties joined (*z*). No demurrer for want of parties can now be sustained (*a*).

Proceedings in lieu of plea in abatement.

Under the former practice the nonjoinder of parties, whether as plaintiffs or defendants, was, in most cases, taken advantage of by a pleading called a plea in abatement (*b*). Under the present practice such pleas (*c*), and also demurrer for want of parties (*a*), are abolished (*c*), and a nonjoinder can only be taken advantage

(*t*) See *Curtiss* v. *Caledonian Fire, &c. Insurance Co.*, 19 Ch. D. 534.
(*u*) R. of S. C., Ord. XVI. r. 11.
(*x*) Id.
(*y*) Id. And see post, p. 1021 et seq.
(*z*) Ord. XVI. rr. 1 and 4, ante, p. 1015.
(*a*) Ord. XXV. r. 1; *Werderman* v. *Société Générale d'Electricité* (C. A.), 19 Ch. D. 246; 45 L. T. 514.
(*b*) Bull. & Leake, Prec. Pl. 3rd ed. 468 et seq.; Chit. Pl. 7th ed. Vol. 1, pp. 462 et seq.
(*c*) Ord. XXI. r. 20, ante, Vol. 1, p. 300.

PART XII.

of by an application, under *Ord. XVI. r.* 11, to have the wanting parties joined (*d*). This proceduro is now substituted for the former plea in abatement (*e*); but it has not affected or destroyed the right of a defendant to insist on the addition of parties such as joint co-contractors, whose joinder he could formerly have insisted on by demurrer or plea in abatement (*f*). This, of course, is subject to the same rules with respect to showing that the party whose joinder is claimed is alive and within the jurisdiction, as were in force with regard to the old plea, and the necessary facts should now be shown by affidavit in support of the application.

By *r.* 3, "Where in an action any person has been improperly or unnecessarily joined as a co-plaintiff, and a defendant has set up a counterclaim or set-off, he may obtain the benefit thereof by establishing his set-off or counterclain. as against the parties other than the co-plaintiff so joined, notwithstanding the misjoinder of such plaintiff or any proceeding consequent thereon."

Application for amendment in respect of parties.

Amendment in respect of Parties—Application for—Generally.]—By *R. of S. C., Ord. XVI. r.* 12, "Any application to add or strike out or substitute a plaintiff or defendant may be made to the Court or a Judge at any time before trial by motion or summons, or at the trial of the action in a summary manner."

The application should be made by summons and not *ex parte* (*g*). It should be supported by an affidavit showing the facts upon which it is based. In the case of a defendant who objects to the non-joinder of a party as co-defendant or co-plaintiff, it should show that the person whom it is desired to add is alive and resident within the jurisdiction. The application should be made without delay as soon as possible after the necessity for it arises (*h*). It may be made at any stage of the proceedings (*i*), and has been granted even at the trial (*k*). It cannot be made after final judgment (*l*), but it may be made after final judgment has been pro-

(*d*) See Ord. XXI. r. 20, ante, Vol. 1, p. 330; and Ord. XVI. r. 11, supra. See per *Jessel*, M. R., 19 Ch. D. at p. 251.

(*e*) *Kendall* v. *Hamilton*, 4 App. Cas. 504. See per *Jessel*, M. R., 19 Ch. D. at p. 251.

(*f*) Id. See per Lord *Blackburn*, 4 App. Cas. at p. 544; per Lord *Cairns*, Id. at pp. 515, 516; per *Jessel*, M. R., 19 Ch. D. at p. 251. See *Sheehan* v. *Great Eastern R. Co.*, 16 Ch. D. 59: *Hunter* v. *Young*, 4 Ex. D. 256: *Scarf* v. *Jardine*, 7 App. Cas. 345.

(*g*) *Tildesley* v. *Harper*, 3 Ch. D. 277, V.-C. H. See *Wilson* v. *Church*, 9 Ch. D. 552; 39 L. T. 413; 26 W. R. 735.

(*h*) *Vallance* v. *Birmingham, &c. Corporation*, 2 Ch. D. 369, 372: *Sheehan* v. *Great East. R. Co.*, 16 Ch. D. 59.

(*i*) See Ord. XVI. r. 11, ante, p. 1019.

(*k*) *Ruston* v. *Tobin*, 49 L. J., Q. B. 262, where the original plaintiff had assigned his interest pendente lite and the assignee was added at the trial. *Kino* v. *Rudkin*, 6 Ch. D. 160, where a person to whom the original defendant had assigned his interest pendente lite was added at the trial. In *Nobel's Explosives Co.* v. *Jones & Co.*, 49 L. J., Ch. 726; 42 L. T. 754, where the assignee of a patent whose interest really only arose after the date of the writ sued leave to add the assignor was refused at the trial. See *Sheehan* v. *Great East. R. Co.*, supra: *Heard* v. *Borgwardt*, W. N. 1883, 173; Bitt. Ch. Cas. 144. See *S. C.*, W. N. 1883, 194; Bitt. Ch. Cas. 146.

(*l*) *Att.-Gen.* v. *Corp. of Birmingham* (C. A.), 15 Ch. D. 423; 43 L. T. 77, where the plaintiffs sought after final judgment to add as defendants a body who had succeeded to the rights and interests of the original

nounced but before it has been drawn up (*m*). An order to add a plaintiff will not be made after the period limited by the statute within which he must bring his action (*n*).

Under an order to strike out the name of one defendant and giving general leave to amend, the plaintiff is not justified in striking out the name of another defendant (*o*).

As to adding or substituting parties after death, bankruptcy, &c., *see the next chapter.*

Adding or substituting plaintiff in case of mistake.

Adding or substituting Plaintiff where Mistake has been made.]— By *Ord. XVI. r.* 2, "Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the Court or a Judge may, if satisfied that it has been so commenced through a *bonâ fide mistake*, and that it is *necessary* for the determination of the real matter in dispute so to do, order any other person to be *substituted* or *added* as plaintiff upon such terms as may be just."

In support of the application under this rule it must be shown, by affidavit or otherwise, that there has been a *bonâ fide* mistake (*p*) of fact or law (*q*) in the original issue of the writ, and that the change is desirable (*r*). If these requirements are not fulfilled the application must be made under *Ord. XVI. r.* 11, *infra* (*s*).

In *Turquand* v. *Fearon* (*t*), which was an action by an equitable assignee of a debt against the debtor, the Court refused to allow the name of the assignee to be added as plaintiff without some proof that he consented to its being so added, or that he had been communicated with and an indemnity offered to him. In *The Val de Travers Asphalte Co.* v. *London Tramways Co.* (*u*), the Court substituted the names of plaintiffs, who were trustees for the original plaintiffs, without any proof of their consent, the order for substitution providing that the new plaintiffs were not to be damnified in any way or put to expense.

Striking out or adding parties under Ord. XVI. r. 11.

Striking out or adding Party under Ord. XVI. r. 11.]—By *R. of S. C., Ord. XVI. r.* 11 (*ante*, p. 1019), ". . . . . The Court or a Judge may, *at any stage of the proceedings* (*x*), either upon or without the application of either party, and on such terms as may appear to the Court or a Judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants,

---

defendants, so as to bind them by the judgment. Leave to do this was refused, on the ground that no such amendment could be made after final judgment. See *Att.-Gen.* v. *Birmingham, &c. Board* (C. A.), 17 Ch. D. 685, where a subsequent action against the successors in interest of the defendants in the prior action claiming the benefit of the judgment as against the former was defeated on demurrer. Cp. *In re Mason*, W. N. 1883, 134, 147.

(*m*) *Keith* v. *Butcher*, 25 Ch. D. 750; 50 L. T. 203; 32 W. R. 378.

(*n*) *The Bowesfield*, 51 L. T. 128.

(*o*) *Wymer* v. *Dodds*, 11 Ch. D. 436; 48 L. J., Ch. 568, *Fry*, J.

(*p*) *Clowes* v. *Hilliard*, 4 Ch. D. 413; 46 L. J., Ch. 271, M. R.

(*q*) *Duckett* v. *Gover*, 6 Ch. D. 82; 46 L. J., Ch. 407, M. R.

(*r*) *Smith* v. *Haseltine*, W. N. 1875, 250; Bitt. No. cliii.

(*s*) See *Emden* v. *Carte*, 17 Ch. D. 169.

(*t*) 4 Q. B. D. 280; 48 L. J., Q. B. 341. See *Sanders* v. *Peek*, 50 L. T. 630; 32 W. R. 462, cited post, p. 1022, n. (*f*).

(*u*) 48 L. J., C. P. 312; 40 L. T. 133.

(*x*) See ante, nn. (*k*) and (*l*).

PART XII.

be struck out, and that the names of any parties, whether plaintiffs or defendants, *who ought to have been joined*, or *whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter*, *be added* (*y*). No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent in writing thereto. Every party whose name is so added as *defendant shall be served* with a writ of summons or notice in manner hereinafter mentioned, or in such manner as may be prescribed by any special order, and the proceedings as against such party, shall be deemed to have begun only on the service of such writ or notice."

It appears that a person not a party to an action, but interested in the result of it, can get himself added as a party on an application made by summons (*z*).

The mode of applying under this rule is pointed out *ante*, p. 1020.

Adding plaintiff.

Adding Plaintiff.]—Where a plaintiff sues (under *Ord. XVI. r.* 9, *ante*, p. 1017) on behalf of himself and others having the same interest the Court will not, in the absence of special circumstances making it necessary for the proper adjudication of the questions involved, order the other parties to be joined as plaintiffs on the application of the defendant so as to make them liable for costs (*a*), nor will they do so on the application of the plaintiff so as to make the other parties defendants to a counterclaim which the original defendant has set up and on which such parties are liable jointly with the plaintiff (*b*). But a plaintiff, whose presence is necessary in order to enable the Court to adjudicate effectually on the question before it, will be added (*c*). Where a person had brought an action in respect of a nuisance causing injury to his property, the Court refused, on his application, to allow another person who complained of an injury to his property by the same nuisance to be substituted as plaintiff (*d*).

A person cannot be added as plaintiff under rule 11 without the consent both of the original plaintiff (*e*) and of the proposed new plaintiff (*f*). Such consent must be in writing (*g*). Formerly, it was sufficient if the solicitor for the existing plaintiff stated that he consents on behalf of the new plaintiff (*h*). A solicitor stating that he consented on behalf of a new plaintiff, of course incurs the usual responsibility if he does so without authority (*i*).

(*y*) *Dalton* v. *Guardians of St. Mary Abbotts, Kensington*, 47 L. T. 349.

(*z*) *Jacques* v. *Harrison*, 12 Q. B. D. 165; 53 L. J., Q. B. 137.

(*a*) *De Hart* v. *Stevenson*, 1 Q. B. D. 313; 45 L. J., Q. B. 575.

(*b*) *Cormack* v. *Grofrian*, W. N. 1876, 22; Bitt. No. cexv.

(*c*) *Long* v. *Crossley*, 13 Ch. D. 388; 49 L. J., Ch. 168, Fry, J.: *Emden* v. *Carte*, 17 Ch. D. 169; 50 L. J., Ch. 492; affirmed 17 Ch. D. 768; 51 L. J., Ch. 41.

(*d*) *Dalton* v. *Guardians of St. Mary Abbotts, Kensington*, supra.

(*e*) *Emden* v. *Carte*, supra.

(*f*) *Turquand* v. *Fearon*, cited ante, p. 1021. See *Sanders* v. *Peck*, 50 L. T. 630; 32 W. R. 462, where the Court refused to add as co-plaintiffs the persons who had assigned to the plaintiffs the contract on which the action was brought without notice to the assignor and giving them an opportunity of being heard.

(*g*) See the rule, supra.

(*h*) *Cox* v. *James*, 19 Ch. D. 55; 51 L. J., Ch. 184; 45 L. T. 471.

(*i*) See ante, Vol. 1, p. 105.

It appears that a plaintiff can only be *substituted* in cases of mistake within *r.* 2, *supra*, p. 1021 (*k*).

Adding defendant.

Adding Defendant.]—In an action against the publisher of a newspaper in respect of a libel published in it, leave was given after issue joined to add the proprietor as a defendant (*l*). In this case Lord Coleridge said that the words "ought to have been joined" meant "in order to do complete justice in the action." In *Harry* v. *Davy* (*m*), an application to add a defendant was refused on the ground that there was no question which for the purpose of being adjudicated upon effectually required that he should be added. The Court will not, in the absence of special circumstances, order a party to be added as a defendant at the instance of the original defendant for the purpose of setting up a counterclaim which the original defendant has jointly with such party against the plaintiff, where the plaintiff objects to the addition (*n*). Indeed, as a general rule, a defendant should never be added without the consent of the plaintiff (*o*).

The Court refused to add as a defendant or to hear a mortgagee of a tenant who had forfeited his lease, and who was being sued in ejectment (*p*).

Striking out defendant.

Striking out Defendant.]—Where the Court is of opinion that a defendant is an improper party to an action, it will order the name of such defendant to be struck out of the record before the trial (*q*). And this even after such defendant has delivered his defence (*q*). A defendant improperly joined for purposes of discovery only was struck out (*r*).

Proceedings against added defendant.

Proceedings against added Defendant—Service of Writ, &c.]—Where a defendant is added as a party to an action under *Ord. XVI.* *r.* 11, that rule provides that such defendant shall be served with a writ of summons or notice, or as may be directed by any special order, and that the proceedings as against him shall be deemed to have begun only on such service.

By *r.* 13, "Where a defendant is added or substituted, the plaintiff shall, unless otherwise ordered by the Court or a Judge, file an amended copy of and sue out a writ of summons, and serve such new defendant with such writ or notice in lieu of service thereof in the same manner as original defendants are served."

Where two actions had been consolidated, the Court, on the application of the plaintiff, added two new defendants without service of any writ of summons, and ordered that one of the

---

(*k*) *Emden* v. *Carte*, supra.

(*l*) *Edward* v. *Lowther*, 45 L. J., C. P. 417; 34 L. T. 522.

(*m*) 2 Ch. D. 721; 45 L. J., Ch. 697; 34 L. T. 842.

(*n*) *Norris* v. *Beazley*, 2 C. P. D. 80; 46 L. J., C. P. 169. But this case was decided before the view that a counterclaim was a cross-action had been adopted, and it is submitted that such an order might now in a proper case be made.

(*o*) Id.: *Howell* v. *London General Omnibus Co.*, 2 Ex. D. 365.

(*p*) *Mills* v. *Griffiths*, 45 L. J., Q. B. 770.

(*q*) *Vallance* v. *Birmingham, &c. Corporation*, 2 Ch. D. 369.

(*r*) *Wilson* v. *Church*, 9 Ch. D. 552.

PART XII.

defendants should be made a defendant in a representative capacity without any further indorsement on the writ, subject to cause being shown within eight days (*t*).

Proceedings against third party.

Proceedings against Third Party for Indemnity, &c.]—See *ante, Vol.* 1, p. 416.

Proceedings against defendant to counter-claim.

Proceedings against Person joined as Defendant to Counterclaim.]—See *ante, Vol.* 1, p. 307.

(*t*) *In re Wortley, Culley* v. *Wortley*, 4 Ch. D. 180.

CHAPTER LXXXVIII.

CHANGE OF PARTIES BY MARRIAGE, DEATH, BANKRUPTCY, ASSIGNMENT, ETC.

	PAGE		PAGE
Effect of Marriage, Death, &c.	1025	*Proceedings on Change before Judgment*	1032
Marriage	1025	*Service of Order—Appearance*	1033
Death	1026	*Application to set aside &c.*	1034
Death after Verdict and before Judgment	1028	*Proceedings on Change after Judgment for purposes of Execution*	1034
Bankruptcy	1030	*Proceedings when Party Dies, and Action is not continued*	1034
Assignment, Devolution of Estate, &c.	1031	*Certificate of Abatement on Change—Entry in Cause Book*	1034
Other Cases	1032		

CHAP. LXXXVIII.

Effect of marriage, death, &c.

Effect of Marriage, Death, &c.]—By *R. of S. C., Ord. XVII. r.* 1, "A cause or matter (*a*) shall not become abated by reason of the marriage, death, or bankruptcy of any of the parties, *if the cause of action survive or continue*, and shall not become defective by the assignment, creation, or devolution of any estate or title *pendente lite*; and, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment, but judgment may in such case be entered, notwithstanding the death."

It will be observed, that except in the case of death between verdict and judgment (*b*), this rule only prevents an action becoming abated by marriage, death, or bankruptcy in cases where the cause of action survives or continues (*b*).

By stat. 33 & 34 *V. c.* 28 (the Attorneys and Solicitors Act, 1870), *s.* 19, "Whenever any decree or order shall have been made for payment of costs in any suit, and such suit shall afterwards become abated, it shall be lawful for any person interested under such decree or order to revive such suit, and thereupon to prosecute and enforce such decree or order, and so on from time to time as often as any such abatement shall happen." *See ante, Vol.* 1, p. 131.

The Court has a discretionary power to revive actions pending at the time of the coming into operation of the Judicature Acts, and which have become defective by death of parties or otherwise (*c*).

Marriage.]—In the event of the marriage of a female plaintiff or Marriage.

(*a*) See *Re Rowe's Trade Mark*, 48 L. T. 388.

(*b*) As to which, see post, p. 1028.

(*c*) See *Curtis* v. *Sheffield*, 20 Ch. D. 398; affirmed in (C. A.), 21 Ch. D. 1.

PART XII.

defendant the action does not abate (*d*), nor since the *Married Women's Property Act*, 1882, need the husband be added as a party (*see post, Ch. CI.*). If in any case it is desired to add him, the application for the purpose may be made *ex parte* by either party.

Death—what actions survive, &c.

Death.]—In regard to the effect of death on rights of action, the rule of the common law was, that as to such actions as are founded on contract, express or implied, the right of suit, or liability to be sued, does not die with the party, but passes to his executors or administrators (*f*). But this rule does not hold where the right of action arises on a breach of contract which was an injury to the person only of the deceased, without any injury to his estate (*g*).

As to such actions as are founded on tort, the rule of the common law was inflexible, *actio personalis moritur cum personâ* (*h*). And first as to torts committed against the deceased. The rule was first altered by statutes 4 *Edw.* 3, *c.* 7 and 25 *Edw.* 3, *stat.* 5, *c.* 5, which gave to executors (*i*) actions of trespass in respect of the goods and chattels of their testator carried away in his lifetime. The stat. 4 *Edw.* 3, being a remedial law, has always been expounded in a very liberal sense, and though it only mentions "trespass" it has been extended to all other cases of tort committed in the lifetime of the deceased whereby the personal estate has been diminished (*k*). But a mere personal tort cannot be brought within this rule merely because as a result of the defendant's wrongful act, the deceased has been put to expense, which has so far diminished his estate (*l*).

Secondly as to torts committed by the deceased. Here the rule holds good, and unless it can be shown that his personal estate has directly benefited by the tort, no action lies against his representatives (*m*). If, however, he committed the tort within six months before his death, and such tort was in respect of the property of the injured party, a remedy is given on certain conditions, by the Act 3 & 4 *Will.* 4, *c.* 42, mentioned below (*n*).

(*d*) See Ord. XVII. r. 1, supra; cp. C. L. P. Act, 1852, s. 141.

(*e*) See post, p. 1032: *Darcy* v. *Whittaker*, 33 L. T. 778.

(*f*) 1 Wms. Saunders, ed. 1871, p. 239, notes to *Wheatley* v. *Lane*. The right of suit was extended to administrators by statute 31 Edw. 3, st. 1, c. 11: *Bradshaw* v. *Lane*. & *Yorks. R. Co.*, L. R., 10 C. P. 189; 31 L. T. 847, explained in *Pulling* v. *Great Eastern R. Co.*, 9 Q. B. D. 110; and questioned in *Leggott* v. *G. N. R. Co.*, 1 Q. B. D. 599.

(*g*) *Chamberlain* v. *Williamson*, 2 M. & S. 408, action by executors for breach of promise of marriage to their testatrix, no special damage to the personal estate being stated. Held, action not maintainable.

(*h*) See *Phillips* v. *Homfray* (C. A.), 24 Ch. D. 439; 52 L. J., Ch. 101; 59 L. T. 49; 32 W. R. 6.

(*i*) Administrators are within the equity of the statutes. See *Smith* v. *Colgay*, Cro. Eliz. 384: *Wilson* v. *Knubley*, 7 East, 134: and *Twycross* v. *Grant*, 4 C. P. D. 40.

(*k*) See *Emerson* v. *Emerson*, 1 Ventr. 187: and per Lord *Ellenborough* in *Wilson* v. *Knubley*, supra: *Twycross* v. *Grant*, supra.

(*l*) *Pulling* v. *Great Eastern R. Co.*, 9 Q. B. D. 110.

(*m*) See per Lord *Mansfield* in *Hambly* v. *Trott*, 1 Cowp. 371: *Phillips* v. *Homfray*, 24 Ch. D. 453. See also *Peek* v. *Gurney*, L. R., 6 H. L. 377: *Chapman* v. *Day*, 49 L. T. 436; reversing *S. C.*, Id. 5: *Young* v. *Wallingford*, 52 L. J., Ch. 590; 48 L. T. 756.

(*n*) See *Powell* v. *Rees*, 7 Ad. & E. 426: *Richmond* v. *Nicholson*, 8 Sc. 134.

Surv

For injuries to the real
if the injured party had
were of a continuing na
the heir or devisee might
and not as representing
for injuries to the real
feasor was in no way resp

But now by statute 3 &
the executors or adminis
injury to his real estate co
have been committed with
and the action be brought
on the other hand, an actio
ministrators of any decease
him in his lifetime to anoth
sonal (*o*), provided such in
calendar months before the
within six months after
assumed the administration

Under the present pract
party to an action when
tinues (*q*), the action does n
continue the action by or a
the deceased party may be ob
r. Master at Chambers, supp
stances (*t*). In the event of
may be made by his persona
the defendant may apply by s
to dismiss it, unless the plai
continue it within a limited
personal representative being
an order appointing a person
enable him to move to dismiss

(*o*) In *Powell* v. *Rees*, 7 Ad. & E 426, coal had been tortiously take from plaintiff's land by a perso who afterwards died intestate. Par was raised within six months, and part more than six months before the death. It was held, that plaintiff might recover for the former under the above statute, and as for money had and received in respect of the latter, according to the rule before stated as to cases where the estate of the tort-feasor has benefited by the tort.

(*p*) See *Kirk* v. *Todd*, 21 Ch. D. 484 (C. A.).

(*q*) See Ord. XVII. r. 1, ante, p. 1025. See *Twycross* v. *Grant*, 4 C. P. D. 40; 48 L. J., C. P. 91: and *Ashley* v. *Taylor*, 10 Ch. D. 768, 772: cp. C. L. P. Act, 1852, ss. 135—140.

For injuries to the real estate there was at common law no remedy if the injured party had failed to sue in his lifetime. If the injury were of a continuing nature, and such as affected the inheritance, the heir or devisee might sue, but the action was in his own right, and not as representing his predecessor in title. And conversely for injuries to the real estate of another, the estate of the tort-feasor was in no way responsible after his death.

But now by statute 3 & 4 *W.* 4, *c.* 42, *s.* 2, an action is given to the executors or administrators of any person deceased for any injury to his real estate committed in his lifetime, so as the injury have been committed within six calendar months before his death, and the action be brought within one year after his death. And, on the other hand, an action is given against the executors or administrators of any deceased person for any wrong committed by him in his lifetime to another in respect of his property real or personal (*o*), provided such injury has been committed within six calendar months before the death (*p*), and the action be brought within six months after the executors or administrators have assumed the administration of the estate of the deceased.

Proceedings on death.

Under the present practice in the event of the death of any party to an action when the cause of action survives or continues (*q*), the action does not abate (*r*), but an order for leave to continue the action by or against the personal representatives of the deceased party may be obtained on an *ex parte* application (*s*) to a Master at Chambers, supported by an affidavit of the circumstances (*t*). In the event of the death of a plaintiff the application may be made by his personal representatives (*u*). If they do not the defendant may apply by summons to continue (*x*) the action or to dismiss it, unless the plaintiff's representatives obtain leave to continue it within a limited time (*y*), and in the event of no personal representative being appointed the defendant may obtain an order appointing a person to represent the plaintiff, so as to enable him to move to dismiss the action (*z*). In the event of the

---

(*o*) In *Powell* v. *Rees*, 7 Ad. & E. 426, coal had been tortiously taken from plaintiff's land by a person who afterwards died intestate. Part was raised within six months, and part more than six months before the death. It was held, that plaintiff might recover for the former under the above statute, and as for money had and received in respect of the latter, according to the rule before stated as to cases where the estate of the tort-feasor has benefited by the tort.

(*p*) See *Kirk* v. *Todd*, 21 Ch. D. 484 (C. A.).

(*q*) See Ord. XVII. r. 1, ante, p. 1025. See *Twycross* v. *Grant*, 4 C. P. D. 40; 48 L. J., C. P. 91: and *Ashley* v. *Taylor*, 10 Ch. D. 768, 772: cp. C. L. P. Act, 1852, ss. 135—140.

(*r*) Id.

(*s*) See Ord. XVII. r. 4, post, p. 1033. See *In re Atkin's Estate*, 1 Ch. D. 82; 45 L. J., Ch. 117: *Ashley* v. *Taylor*, 10 Ch. D. 768, 773.

(*t*) See per *North*, J., *Jameson* v. *Marshall*, 46 L. T. 480.

(*u*) *Twycross* v. *Grant*, supra: *In re Atkin's Estate*, supra.

(*x*) *Burstall* v. *Fearon*, 24 Ch. D. 126; 53 L. J., Ch. 144; 31 W. R. 581: *Jameson* v. *Marshall*, 46 L. T. 480, *North*, J. So far as this decision relates to foreign executions, it is wrong. See per *North*, J., *Morrice* v. *Smart*, 73 L. T. (Journ.) 398, 14th October, 1882.

(*y*) Ord. XVII. r. 8, post, p. 1034.

(*z*) *Wingrove* v. *Thompson*, 11 Ch. D. 419.

PART XII.

death of a defendant the plaintiff may obtain leave to continue the action against his personal representatives, and the personal representatives of the defendant may obtain an order that the action be dismissed unless the plaintiff within a given time obtain an order to prosecute the action against them (*c*), or they may obtain leave to continue a counterclaim against the plaintiff (*d*), or if judgment has been obtained to continue an appeal (*e*), or, pending the appointment of a personal representative, the plaintiff may obtain a receiver (*f*). When the defendant in an action of tort, to which his executors could only have been sued in respect of acts done within six months of his death, dies more than six months after action brought, the plaintiffs cannot obtain an order to continue the proceedings against his executors (*g*). If the death occur pending an appeal, the application may nevertheless be made to a Master at Chambers (*h*). An executor obtaining an order to continue an action, even after judgment, becomes personally liable for the costs *ab initio*, in the same manner as if the action had been commenced by him (*i*).

If the cause of action does not survive or continue, the order cannot be made (*k*), even, it appears, although interlocutory judgment may have been obtained for assessment of damages (*k*).

Death between verdict and judgment.

—*Death between Verdict and Judgment.*]—By the common law if any one of the parties died before final judgment, the suit abated (*l*); but *Ord. XVII. r.* 1 (*supra*, p. 1025), provides that "whether the cause of action survives or not there shall be no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment, but judgment may in such case be entered notwithstanding the death."

The rule extends to all personal actions, notwithstanding the cause of action could not have survived to the representatives of the deceased, as for a libel, &c. (*m*). Where, before the Judicature Acts, after a verdict for the plaintiff, with leave reserved to move for a verdict for the defendant, the latter died before the motion

(*c*) Ord. XVII. r. 18, post, p. 1034: *Motion* v. *King*, 29 W. R. 73, V.-C. H.

(*d*) *Andrew* v. *Aitken*, 21 Ch. D. 175; 51 L. J., Ch. 528; 46 L. T. 689; 30 W. R. 701. An order obtained by the plaintiff to continue the action against the personal representatives of a deceased defendant, does not entitle the latter to continue a counterclaim. They must get leave to do so: Id.

(*e*) *Ranson* v. *Patton*, 17 Ch. D. 767.

(*f*) *In re Parker, Cash* v. *Parker*, 12 Ch. D. 293; 48 L. J., Ch. 691.

(*g*) *Kirk* v. *Todd*, 21 Ch. D. 484; 46 L. T. 192.

(*h*) *Ranson* v. *Patton*, 17 Ch. D. 767; 44 L. T. 686: *Twycross* v. *Grant*, supra, where the death occurred pending an appeal to the House of Lords.

(*i*) *Boynton* v. *Boynton*, 4 App. Cas. 733.

(*k*) *Chapman* v. *Day* (C. A.), 40 L. T. 436: *Phillips* v. *Homfray* (C. A.), 24 Ch. D. 439; 52 L. J., Ch. 101; 49 L. T. 5.

(*l*) See Saund. 72 i.

(*m*) See this rule, supra: cp. stat. 17 Car. 2, c. 8, s. 1; C. L. P. Act, 1852, s. 139: *Palmer* v. *Cohen*, 2 B. & Ad. 966: *Kramer* v. *Waymark*, L. R., 1 Ex. 241; 35 L. J., Ex. 148, an action for personal injuries by defendant's negligence. The C. L. P. Act, 1860, s. 27, it seems applied to actions for dower, for freebench, and in *quare impedit*.

could be made, his execu
such motion was successf
section (*n*). The repealed
Proc. Act, 1852, *s.* 139, m
equivalent to a judgmen
deceased party (*o*). They
was the death of either pa
by them (*q*); but the deat
after the first day of the sit
the assizes or sittings are b
signed and execution issue
day on which he died; it w
were regular (*t*).

The Court will, in genera
pro tunc, where the signing
Court (*u*). Therefore, if a
special case (*v*) has been stat
a motion for a new trial,
argument, and pending the
Court are considering of thei
ment to be entered up after
a party may not be prejudice
Court (*w*). But if the judgr
the laches of the plaintiff,
reason of a proceeding in t
appeal or the like (*x*); the Co
so entered up. In fact, they
except where the party entitle
from so doing by reason of a
act of the Court (*y*). Therefo
to a special case to be agree
not set down for argument u

(*n*) *Freeman* v. *Rosher*, 13 Q. B
780. See *James* v. *Crane*, 3 D. & L
661, where a verdict was taken sub
ject to a special case: *Griffith* v.
Williams, 1 C. & J. 47: *Heatheote* v.
Wing, 11 Ex. 355; 25 L. J., Ex. 23,
where a verdict was taken subject to
a reference, and it was held the
verdict was not complete until the
publication of the award.

(*o*) *Burnett* v. *Holden*, 1 Lev. 277;
2 Keble, 649: *Saunders* v. *M'Gowran*,
12 M. & W. 221; 1 D. & L. 405:
Colbeck v. *Peck*, 2 Ld. Raym. 1280.

(*p*) *Dowbiggin* v. *Harrison*, 10 B.
& C. 480: *Hemming* v. *Batchelor*, 44
L. J., Ex. 54.

(*q*) *Taylor* v. *Harris*, 3 B. & P.
649.

(*r*) *Anon.*, 1 Salk. 8: *Plomer* v.
Webb, 2 Ld. Raym. 1415: *Anon.*, 7
T. R. 32, n.

(*s*) *Jacobs* v. *Miniconi*, 7 T. R. 31:
Johnson v. *Budge*, 3 Dowl. 207. See
Johnson v. *Hamilton*, 4 Dowl. 762.

could be made, his executors might move to enter a verdict, and if such motion was successful, judgment might be entered under this section (*n*). The repealed statutes 17 *C.* 2, *c.* 8, *s.* 1, and *Com. Law Proc. Act*, 1852, *s.* 139, made a judgment entered up under them equivalent to a judgment entered up during the lifetime of the deceased party (*o*). They did not extend to a nonsuit (*p*). Nor was the death of either party before the assizes or sittings remedied by them (*q*); but the death of a party after the assizes began (*r*), or after the first day of the sittings, though before the trial (*s*), was, for the assizes or sittings are but one day in law. Judgment having been signed and execution issued after the death of the defendant on the day on which he died; it was held that the judgment and execution were regular (*t*).

Leave to enter nunc pro tunc.

The Court will, in general, permit a judgment to be entered *nunc pro tunc*, where the signing of it has been delayed by the act of the Court (*u*). Therefore, if a party die after special verdict, or after a special case (*v*) has been stated for the opinion of the Court, or after a motion for a new trial, or after a point of law set down for argument, and pending the time taken for argument, or whilst the Court are considering of their judgment, the Court will allow judgment to be entered up after his death, *nunc pro tunc*, in order that a party may not be prejudiced by a delay arising from an act of the Court (*w*). But if the judgment was not entered up by reason of the laches of the plaintiff, or those representing him (*x*), or by reason of a proceeding in the common course of law, as by an appeal or the like (*x*); the Court will not allow the judgment to be so entered up. In fact, they will not grant such leave in any case, except where the party entitled to sign judgment has been prevented from so doing by reason of an unavoidable delay occasioned by an act of the Court (*y*). Therefore where a verdict was found subject to a special case to be agreed on between the parties, but it was not set down for argument until after the death of one of them,

---

(*n*) *Freeman* v. *Rosher*, 13 Q. B. 780. See *James* v. *Crane*, 3 D. & L. 661, where a verdict was taken subject to a special case: *Griffith* v. *Williams*, 1 C. & J. 47: *Heathcote* v. *Wing*, 11 Ex. 355; 25 L. J., Ex. 23, where a verdict was taken subject to a reference, and it was held the verdict was not complete until the publication of the award.

(*o*) *Burnett* v. *Holden*, 1 Lev. 277; 2 Keble, 549: *Saunders* v. *M'Gowran*, 12 M. & W. 221; 1 D. & L. 405: *Colbeck* v. *Peck*, 2 Ld. Raym. 1280.

(*p*) *Dowbiggin* v. *Harrison*, 10 B. & C. 480: *Hemming* v. *Batchelor*, 44 L. J., Ex. 54.

(*q*) *Taylor* v. *Harris*, 3 B. & P. 549.

(*r*) *Anon.*, 1 Salk. 8: *Plomer* v. *Webb*, 2 Ld. Raym. 1415: *Anon.*, 7 T. R. 32, n.

(*s*) *Jacobs* v. *Miniconi*, 7 T. R. 31: *Johnson* v. *Budge*, 3 Dowl. 207. See *Johnson* v. *Hamilton*, 4 Dowl. 762.

(*t*) *Wright* v. *Mills*, 4 H. & N. 488; 28 L. J., Ex. 223. This case was decided on the ground that a judicial act is to be considered as having taken place at the earliest possible period of the day.

(*u*) Cp. R. of S. C., Ord. XLI. r. 3, ante, Vol. 1, p. 765.

(*v*) *Denison* v. *Holiday*, 26 L. J., Ex. 227, an action of ejectment.

(*w*) *Miles* v. *Bough*, 3 D. & L. 105; 9 Q. B. 47: *Lawrence* v. *Hodyson*, 1 Y. & J. 368: *Moor* v. *Roberts*, 27 L. J., C. P. 161. See R. 53, H. T. 1853.

(*x*) *Bates* v. *Lockwood*, 1 T. R. 637.

(*y*) *Lanman* v. *Lord Audley*, 2 M. & W. 535: *Freeman* v. *Tranch*, 12 C. B. 406; 21 L. J., C. P. 214: *Fowler* v. *Whadcock*, Barnes, 262: *Lawrence* v. *Hodyson*, 1 Y. & J. 368. See *Heathcote* v. *Wing*, supra, n. (*u*): *Hemming* v. *Batchelor*, 44 L. J., Ex. 51, where plaintiff died after nonsuit.

PART XII.

against whom judgment was ultimately given; the Court refused to allow judgment to be entered *nunc pro tunc*, at the instance of the successful party, as the delay in setting down the special case could not be considered as that of the Court (*z*). So, where an instalment on a cognovit became due after the death of the defendant the Court refused to allow judgment to be entered up on the cognovit *nunc pro tunc* (*a*). And so, where a judge's order was made to stay proceedings on a certain day named in the order, on payment of debt and costs, the plaintiff having liberty to sign judgment in case the costs were unpaid, and the plaintiff died before the day named: *Coleridge*, J., held, that the judgment could not be entered *nunc pro tunc* (*b*). It may be added, that the power of the Court to enter judgment *nunc pro tunc* does not depend upon statute; it is a power at common law, and by the ancient practice of the Court, to prevent an unjust prejudice to the suitor by the delay unavoidably arising from the act of the Court. The effect of the judgment, when entered, may depend upon statute; but the power to enter it does not (*c*). The power is confirmed by *Ord. XLI. r.* 3 (*ante, Vol.* 1, p. 765).

Bankruptcy of plaintiff.

Bankruptcy.]—Bankruptcy of one of the parties to an action does not cause it to abate (*d*) provided the cause of action survive or continue (*e*). In the event of the bankruptcy or liquidation of a plaintiff, *pendente lite*, he cannot continue the action (*f*); but when the cause of action survives or continues (*e*) his trustee may obtain leave to do so (*g*); or if there are two trustees, and one of them objects to continue the action, the other may obtain leave to do so, and to make his co-trustee a co-defendant (*h*). The trustee of a claimant on an interpleader issue may obtain leave to be added as claimant (*i*). In case of the bankruptcy of the plaintiff, if the trustee declines to continue the action, the defendant may take out a summons and get an order to stay all proceedings in the action (*i*), or he may plead the plaintiff's bankruptcy in bar of the action as a defence arising after action brought under *Ord. XXIV. r.* 1 (*ante, Vol.* 1, p. 320). Or he may take out a summons at Chambers for an order calling on the trustee to elect within a limited time whether he will continue the action, and that all proceedings be

(*z*) *Doe* d. *Taylor* v. *Crisp*, 7 Dowl. 584: *Fishmongers' Co.* v. *Robertson*, 3 C. B. 970.

(*a*) *Blackburn* v. *Godrick*, 9 Dowl. 337: *Lanman* v. *Lord Audley*, 2 M. & W. 535: *Vaughan* v. *Wilson*, infra.

(*b*) *Wilkins* v. *Canty*, 1 Dowl., N. S. 855, per *Coleridge*, J., "The inconvenience for the future may be very easily remedied by the introduction of a few words into these orders." And see *Wilks* v. *Perks*, 6 Sc. N. R. 42, where the plaintiff was misled by the officer at the Master's office: and per *Tindal*, C. J., *S. C.*, "If it had appeared that the officer refused to sign judgment, the plaintiff might have had good ground for the present application."

(*c*) *Evans* v. *Rees*, 12 Ad. & E. 167; 4 P. & D. 38. See *Copley* v. *Day*, 4 Taunt. 702: *Lanman* v. *Lord Audley*, 2 M. & W. 535: *Vaughan* v. *Wilson*, 4 Bing. N. C. 116: *Doe* d. *Taylor* v. *Crisp*, 7 Dowl. 584: *Lambirth* v. *Barrington*, 2 Bing. N. C. 149.

(*d*) Ord. L. r 1, ante, p. 1025.

(*e*) As to which see post, Ch. CII., and see *Eldridge* v. *Burgess*, 7 Ch. D. 411: *Emden* v. *Carte*, 17 Ch. D. 769.

(*f*) *Jackson* v. *North* [illegible] 5 Ch. D. 844; 46 L. [illegible] (C. A.): *Warden* v. *Sa*[illegible] 768; 51 L. J., Ch. 41.

(*g*) Id.: *Emden* v. *Carte*, [illegible]

(*h*) Id.

(*i*) *Bird* v. *Matthews*, 49 L. T. 513 (C. A.).

stayed meanwhile (*j*). T
for pleading would prol
the refusal of the truste
defence being pleaded the
ment for his costs (*l*). I
action for want of prosec
attempting to continue t
trustee (*m*).

In the event of a sole de
dating pending the action,
tinue it against his trustees
tion being filed against a def
pending may stay all further
for unliquidated damages n
respect of which no proof w
when the bankruptcy would
continue the action against
to do so (*r*). In all cases wh
defendant may obtain an ord
so soon as he has obtained h
the bankruptcy as a defence
Ord. XXIV. r. 1 (*ante, Vol.*
judgment for his costs unde
bankruptcy of one of several d
the action against the others w

Assignment—Devolution of I
Interest or Liability, &c.]—Tho

(*j*) *Warder* v. *Saunders*, 10 Q. B. D. 111; 47 L. T. 475. By the C. L. P. Act 1852, s. 142 (repealed), "The bankruptcy or insolvency of the plaintiff in any action, which the assignees might maintain for the benefit of the creditors, shall not be pleaded in bar to such action, unless the assignees shall decline to continue, and give security for the costs thereof, upon a Judge's order to be obtained for that purpose, within such reasonable time as the Judge may order, but the proceedings may be stayed until such election is made: and in case the assignees neglect or refuse to continue the action, and give such security within the time limited by the order, the defendant may, within eight days after such neglect or refusal, plead the bankruptcy." This section only applied to actions pending at the time of the bankruptcy: *Stanton* v. *Collier*, 3 El. & Bl. 274; 22 L. J., Q. B. 116. The election of the trustee under this section not to continue the action did not debar him from commencing a fresh action for the same cause: *Bennett* v. [illegible] 2 Ex. D. 11; 46 L. J., Ex.

stayed meanwhile (*j*). The eight days limited by *Ord. XXIV. r.* 1 for pleading would probably be held to run from the date of the refusal of the trustee to continue the action (*k*). On this defence being pleaded the plaintiff may confess it, and sign judgment for his costs (*l*). Notice of any application to dismiss the action for want of prosecution, in the event of the plaintiff not attempting to continue the action, should be served on the trustee (*m*).

Of defendant.

In the event of a sole defendant becoming a bankrupt or liquidating pending the action, the plaintiff cannot obtain leave to continue it against his trustees (*n*). In the event of a bankruptcy petition being filed against a defendant, the Court in which the action is pending may stay all further proceedings (*o*). In the case of actions for unliquidated damages not arising out of any contract, and in respect of which no proof would be allowed (*p*), and in other cases when the bankruptcy would be no defence (*q*), the plaintiff may continue the action against the bankrupt defendant if he chooses to do so (*r*). In all cases where the bankruptcy is a defence, the defendant may obtain an order restraining the proceedings (*s*), and so soon as he has obtained his order of discharge (*t*) he may plead the bankruptcy as a defence arising after action brought under *Ord. XXIV. r.* 1 (*ante*, *Vol.* 1, p. 320), and the plaintiff may sign judgment for his costs under that rule (*u*). In the event of the bankruptcy of one of several defendants, the plaintiff may continue the action against the others without joining the trustees (*x*).

Assignment, devolution of estate, &c.

Assignment—Devolution of Estate or Change or Transmission of Interest or Liability, &c.]—The assignment, creation or devolution

(*j*) *Warder* v. *Saunders*, 10 Q. B. D. 114; 47 L. T. 475. By the C. L. P. Act, 1852, s. 142 (repealed), "The bankruptcy or insolvency of the plaintiff in any action, which the assignees might maintain for the benefit of the creditors, shall not be pleaded in bar to such action, unless the assignees shall decline to continue, and give security for the costs thereof, upon a Judge's order to be obtained for that purpose, within such reasonable time as the Judge may order, but the proceedings may be stayed until such election is made; and in case the assignees neglect or refuse to continue the action, and give such security within the time limited by the order, the defendant may, within eight days after such neglect or refusal, plead the bankruptcy." This section only applied to actions pending at the time of the bankruptcy: *Stanton* v. *Collier*, 3 El. & Bl. 274; 23 L. J., Q. B. 116. The election of the trustee under this section not to continue the action did not debar him from commencing a fresh action for the same cause: *Bennett* v. *——*, 2 Ex. D. 11; 46 L. J., Ex. 33; affirmed in C. A., 46 L. J., Ex. 204; 36 L. T. 48.

(*k*) See Day's C. L. P. Act, 4th ed. 160.

(*l*) *Foster* v. *Gamgee*, 1 Q. B. D. 666.

(*m*) *Wright* v. *Swindon, &c. R. Co.*, 4 Ch. D. 164.

(*n*) *Barter* v. *Dubeux*, 7 Q. B. D. 413; 50 L. J., Q. B. 527 (C. A.); cp. *Hale* v. *Bousstead*, 8 Q. B. D. 453; 51 L. J., Ch. 255.

(*o*) Bank. Act, 1883, s. 10, sub-s. 2, post, Ch. CII.

(*p*) Bank. Act, 1883, s. 37.

(*q*) Cp. Bank. Act, 1883, s. 30; post, Ch. CII.

(*r*) Id.

(*s*) Bank. Act, 1869, s. 10, sub-s. 2, post, Ch. CII.

(*t*) *Spencer* v. *Dernett*, L. R., 1 Ex. 123; 35 L. J., Ex. 73.

(*u*) *Champion* v. *Formby*, 7 Ch. D. 373; 47 L. J., Ch. 373; cp. *Foster* v. *Gamgee*, ante, n. (*l*).

(*x*) *Lloyd* v. *Dimmack*, 7 Ch. D. 398; 47 L. J., Ch. 398; cp. *Charlton* v. *Dickie*, 13 Ch. D. 160; 49 L. J., Ch. 40.

PART XII.

of any estate or title *pendente lite* does not make the action defective (*y*); but the action may be continued by or against the persons to or upon whom such estate or title has come or devolved (*z*). In case of any devolution of estate by operation of law (*a*), or of any event occurring after the commencement of an action and causing a change or transmission of interest or liability (*b*), or of any person interested coming into existence after the commencement of an action (*b*), the necessary parties may be added or substituted on an application to a Master at Chambers for the purpose (*c*). Thus a person to whom a plaintiff has assigned his interest in the subject-matter of the action *pendente lite* was substituted as plaintiff (*d*). So a judgment creditor in one action who had obtained a garnishee order attaching moneys due to the plaintiff in another action from the defendant in the latter action, was added as a co-plaintiff in the latter action (*e*). So a person on whom the plaintiff's right to sue had devolved by operation of law was allowed to continue the action (*f*). So a person to whom a defendant had assigned his interest *pendente lite* was added as a co-defendant (*g*). This does not, however, enable the plaintiff, who has obtained a judgment against defendants, to enforce that judgment against the defendants' successors in title without a fresh action (*h*). If the change occurs after the pleadings have been delivered they must be amended so as to show the interests of the continuing parties (*i*).

An infant born after action brought, to which he is a necessary party, may be added as a party (*k*), and so may an infant attaining full age after action brought, and becoming a necessary party on doing so (*l*).

A defendant whose interest has ceased pending action cannot obtain his costs (*m*).

Other cases.

Other Cases.]—As to the proceedings when an infant party attains his majority, *see post, Ch. XCIX.* When a plaintiff becomes insane or becomes sane, *see post, Ch. C.* When a person of unsound mind is found a lunatic, *see Green's Estate, In re Green and Pratt*, 48 L. J., Ch. 681; 41 L. T. 30.

Proceedings on change.

Proceedings on Change for Substitution, Addition, &c. of Parties.]—By *Ord. XVII. r.* 2, "In case of the marriage, death, or bankruptcy, or devolution of estate *by operation of law*, of any party to a cause or matter, the Court or a Judge may, if it be deemed necessary

(*y*) Ord. XVII. r. 1, supra.

(*z*) By Ord. XVII. r. 3, "In case of an assignment, creation, or devolution of any estate or title pendente lite, the cause or matter may be continued by or against the person to or upon whom such estate or title has come or devolved."

(*a*) Ord. XVII. r. 2, infra.

(*b*) Ord. XVII. r. 4, post, p. 1033.

(*c*) See infra.

(*d*) *Seear* v. *Lawson*, 15 Ch. D. 426: *Ruston* v. *Tobin*, 49 L. J., Ch. 262.

(*e*) *Wallis* v. *Smith*, 51 L. J., Ch. 577; 46 L. T. 473.

(*f*) *Dyer* v. *Painter*, W. N. 1881, 105.

(*g*) *Kino* v. *Rudkin*, 6 Ch. D. 160; 38 L. T. 461.

(*h*) *Att.-Gen.* v. *Birmingham, &c. Corporation*, 15 Ch. D. 523. Cp. *S. C.*, 17 Ch. D. 685.

(*i*) *Seear* v. *Lawson*, 15 Ch. D. 121; D. 181; 53 L. J., Ch. [illegible] W. N. 515.

(*k*) *Peter* v. *Thomas*, 26 Ch. D. 1.

(*l*) *In re Gould, Gould* v. *Gould*, W. N. 1884, 16.

(*m*) *Wymer* v. *Dawes*, 11 Ch. D. 436; 48 L. J., Ch. 568.

for the complete settle
that the husband, person
interest, if any, of such
in such manner and fo
terms as the Court or J
order for the disposal of

By *r.* 4, "Where by
or any other event occu
or matter, and causing
liability, or by reason
existence after the co
becomes necessary or des
should be made a party, o
be made a party in *anothe*
shall be carried on betw
party or parties, may be
Court or a Judge, upon a
sion of interest or liability,
into existence."

The application for an o
parties should be made as
it arises (*o*). It should be
bers (*p*), and it should be su
the circumstances under wh
is asked for (*r*). In ordina
but in some cases the Maste
If an order be improperly
apply by summons to set it
it should nevertheless be
the pleadings are delivered, t
As to obtaining leave to iss
see ante, Ch. LXXXIV.

Service of Order—Appearan
r. 5, "An order obtained, as
shall, unless the Court or Jud
upon the continuing party or pa
each such new party, unless th
himself the only new party, a
such service, subject neverthele
be binding on the persons se

(*n*) See *Dalton* v. *Guardians of St. Mary Abbotts, Kensington*, 47 L. T. 349; *Barter* v. *Dubeux*, 7 Q. B. D. 413—416.

(*o*) See *Curtis* v. *Sheffield*, 20 Ch. D. 398; affirmed in C. A., 21 Ch. D. 1.

(*p*) See the rule, supra: *Ashley* v. *Taylor*, 10 Ch. D. 768, per *Fry*, J., at p. 773; *In re Atkins' Estate*, 4 Ch. D. 82.

(*q*) Ord. LIV. r. 12.

(*r*) See per *North*, J., *Jameson* v. *Marshall*, 46 L. T. 480. As to which

for the complete settlement of all the questions involved (*n*), order *that the husband, personal representative, trustee, or other successor in interest*, if any, of such party *be made a party*, or *be served with notice* in such manner and form as hereinafter prescribed, and on such terms as the Court or Judge shall think just, and shall make such order for the disposal of the cause or matter as may be just."

By *r.* 4, "Where by reason of marriage, death, or bankruptcy, or any other event occurring after the commencement of a cause or matter, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the cause or matter, it becomes necessary or desirable that any *person not already a party* should be made a party in *another capacity*, or that any person already a party should be made a party, or that any person who formerly was a party but has ceased to be a party should be added as a party, an order that the proceedings shall be carried on between the continuing parties and such new party or parties, may be obtained *ex parte* on application to the Court or a Judge, upon an allegation of such change, or transmission of interest or liability, or of such person interested having come into existence."

The application for an order substituting or adding the necessary parties should be made as soon as possible after the necessity for it arises (*o*). It should be made *ex parte* (*p*) to a Master at Chambers (*q*), and it should be supported by an affidavit, stating shortly the circumstances under which it is made, and showing what order is asked for (*r*). In ordinary cases it is granted as of course (*s*), but in some cases the Master might direct a summons to be issued. If an order be improperly obtained, any party affected by it may apply by summons to set it aside (*t*). If made pending an appeal, it should nevertheless be made at Chambers (*u*). If made after the pleadings are delivered, they must be amended (*x*).

As to obtaining leave to issue execution after change of parties, *see ante, Ch. LXXXIV.*

Service of Order—Appearance by Party served.]—By *Ord. XVII.* *r.* 5, "An order obtained, as in the last preceding rule mentioned shall, unless the Court or Judge shall otherwise direct, be served upon the continuing party or parties, or their solicitors, and also upon each such new party, unless the person making the application be himself the only new party, and the order shall from the time of such service, subject nevertheless to the next two following rules, be binding on the persons served therewith, and every person

Service of order for change, &c.

(*n*) See *Dalton* v. *Guardians of St. Mary Abbotts, Kensington*, 47 L. T. 349; *Barter* v. *Dubeux*, 7 Q. B. D. 413—416.

(*o*) See *Curtis* v. *Sheffield*, 20 Ch. D. 398; affirmed in C. A., 21 Ch. D. 1.

(*p*) See the rule, *supra*: *Ashley* v. *Taylor*, 10 Ch. D. 768, per *Fry*, J., at p. 773; *In re Atkins' Estate*, 1 Ch. D. 82.

(*q*) Ord. LIV. r. 12.

(*r*) See per *North*, J., *Jameson* v. *Marshall*, 46 L. T. 480. As to which case, see *Morriee* v. *Smart*, 73 L. T. (Jour.) 398.

(*s*) *Dyer* v. *Painter*, W. N. 1881, 105; *Raffey* v. *Miller*, 24 W. R. 109, M. R.

(*t*) See Ord. XVII. r. 6, post, p. 1034.

(*u*) *Ranson* v. *Patton*, 17 Ch. D. 767; 44 L. T. 686; *Twyeross* v. *Grant*, 4 C. P. D. 40; 48 L. J., C. P. 1, where an appeal to the House of Lords was pending.

(*x*) *Secar* v. *Lawson*, 16 Ch. D. 121.

PART XII.

served therewith who is *not already a party* to the cause or matter shall be bound to enter an appearance thereto within the same time and in the same manner as if he had been served with a writ of summons."

A form of appearance is given in the *R. of S. C., App. A., Part II., No.* 6 (*u*).

Application to discharge or vary order.

Application to discharge or vary Order.]—By *r.* 6, "Where any person who is under no disability or under no disability other than coverture, or being under any disability other than coverture, but having a guardian *ad litem* in the cause or matter, shall be served with such order as in rule 4 mentioned, such person may apply to the Court or a Judge to discharge or vary such order at any time within twelve days from the service thereof."

By *r.* 7, "Where any person being under any disability other than coverture, and not having a guardian *ad litem* in the cause or matter, is served with any order as in rule 4 mentioned, such person may apply to the Court or a Judge to discharge or vary such order at any time within twelve days from the appointment of a guardian *ad litem* for such party, and until such period of twelve days shall have expired such order shall have no force or effect as against such last-mentioned person."

The application to discharge or vary the order should be made by summons at Chambers. It must be made within the time limited by the rules unless that time is extended by the Master. It should generally be supported by an affidavit, stating the facts on which the applicant relies as entitling him to have the order discharged or varied.

Proceedings on change after judgment for purposes of execution.

Proceedings on Change after Judgment for Purposes of Execution.]—*See Ord. XLII. r.* 23, *ante*, p. 955 *et seq.*

Proceedings on death, when action not continued.

Proceedings where Party dies and Action is not continued.]—By *Ord. XVII. r.* 8, "When the plaintiff or defendant in a cause or matter dies, and the cause of action survives, but the person entitled to proceed fails to proceed, the defendant (or the person against whom the cause or matter may be continued) may apply by summons to compel the plaintiff (or the person entitled to proceed) to proceed within such time as may be ordered: and in default of such proceeding, judgment may be entered for the defendant, or, as the case may be, for the person against whom the cause or matter might have been continued; and in such case, if the plaintiff has died, execution may issue as in the case provided for by Order XLII., Rule 23" (*x*).

The application should not generally be made until a reasonable time has elapsed to enable the proper parties to apply to continue the action.

Certificate of abatement, &c.

Certificate of Abatement or Change of Interest.]—By *Ord. XVII. r.* 9, "Where any cause or matter becomes abated or in the case of

(*u*) See form, Chit. F., p. 510.

(*x*) See form of summons, Chit. F., p. 511. This rule preserves the old Chancery practice. See *Motion v. King*, 29 W. R. 73.

any such change of interest as is by this Order provided for, the solicitor for the plaintiff or person having the conduct of the cause or matter, as the case may be, shall certify the fact to the proper officer, who shall cause an entry thereof to be made in the cause book opposite to the name of such cause or matter.

Entry in cause book.

By *r.* 10, "Where any cause or matter shall have been standing for one year in the cause book marked as 'abated,' or standing over generally, such cause or matter at the expiration of the year shall be struck out of the cause book."

CHAPTER LXXXIX.

PEERS AND MEMBERS OF PARLIAMENT (a).

PART XII.

Peers, &c. privileged from arrest.

Proceedings against, in ordinary Cases.]—Peers and peeresses, when defendants in an action, cannot be arrested before judgment under a Judge's order (b). Nor can they be taken in execution on a *ca. sa.* (c). Members of the House of Commons, also, during the session of Parliament, and for forty days both before and after it, are privileged from arrest (d); and, therefore, during the time of their privilege, they must not be arrested under a Judge's order, or taken in execution on a *ca. sa.* The privilege extends to a person who was a member of the old, but is not a member of the new, Parliament (e). An unprivileged person in custody in execution, who becomes a peer or member of Parliament, is entitled to his discharge on motion (f).

The process against.

The process to enforce the appearance in a personal action of a person entitled to privilege of peerage or of Parliament, is by writ of summons, the same as in ordinary cases. There is no occasion to state in the writ that the defendant is entitled to privilege of peerage, or of Parliament (g). Where the writ described the defendant as "The Right Honourable Baron Suffield," instead of describing him by his proper title of "The Right Honourable Edward Vernon Harbord, Baron Suffield, of Suffield," the Court refused to set it aside (h).

Other proceedings.

The remaining proceedings in the action are the same as in ordinary cases, excepting that the execution cannot be by *ca. sa.* A *ca. sa.* cannot even be issued, although there be no intention on the part of the party suing it out to execute it. A doubt formerly existed, whether, if a person were taken in execution, and set at liberty by privilege of either house of Parliament, the party at whose suit such execution was issued was for ever barred and disabled from suing forth a new writ of execution; but by 2 *Jac.* 1, *c.* 13, *s.* 2, the plaintiff may sue forth and execute a new writ of execution when the privilege has ceased, as though the former execution had not taken place.

Attachment against.

As to when an attachment will be granted against a peer or member of the House of Commons, *see ante*, p. 947.

(a) As to the privilege of parliament generally, see *Duke of Newcastle* v. *Morris*, L. R., 4 H. L. 661; 40 L. J., Bk. 4: *Ex p. Pooley, In re Russell*, L. R., 7 Ch. 519; 41 L. J., Bk. 67.

(b) Post, Ch. CXXVII.

(c) Ante, p. 892.

(d) *Gouldy* v. *Duncome*, 1 Ex. 430; and see cases post, Ch. CXXVII.

In re Anglo-French Co-operative Society, 14 Ch. D. 533; 49 L. J., Ch. 568.

(f) *Phillips* v. *Wellesley*, 1 Dowl. 9: *Ex p. Burton*, Id. 14.

(g) *Cantwell* v. *Earl Stirling*, 1 M. & Sc. 297; 8 Bing. 174.

(h) *Wells* v. *Baron Suffield*, 4 C. B. 750. As to the effect of a misnomer, see Vol. 1, p. 218.

CHAPTER XC.

SOLICITORS.

[For the law relative to solicitors in general, *see Vol.* 1, *Ch. VIII.*]

Actions by.

Actions by.]—A solicitor sues in the same way as any other person (*a*).

As to what privileges a solicitor plaintiff has, and how they may be lost or waived, *see Vol.* 1, p. 93 *et seq.* The proceedings at his suit, except where they are affected by his privileges, are, in general, the same as in proceedings by ordinary persons.

As to the delivery of his bill of costs before bringing an action for it, *see Vol.* 1, p. 122.

Actions against.

Actions against.]—We have pointed out, in the first volume of this work, the duties and liabilities of solicitors, and many instances in which actions will lie against them; also cases in which the Court will interfere in a summary way against them.

A solicitor must in all cases be sued as any other person.

As to the privileges a solicitor has when defendant, *see Vol.* 1, p. 94. He is not privileged as a solicitor from arrest (*b*).

An appearance is entered as in ordinary cases.

The time for delivering the statement of claim and the form of same are the same as in ordinary cases. The defendant has no privilege as to venue, as in the case of a solicitor plaintiff (*c*).

All the remaining proceedings in the action are the same as in ordinary cases.

(*a*) Cf. 2 W. 4, c. 39, s. 21.

(*b*) Post, Ch. CXXVII.

(*c*) Vol. 1, p. 94.

CHAPTER XCI.

JUSTICES OF THE PEACE, CONSTABLES, REVENUE OFFICERS, AND OTHERS PROTECTED BY STATUTE.

	PAGE		PAGE
1. *Actions against Justices of the Peace*	1038	3. *Actions against Special Constables, Parish Constables, &c.*	1047
2. *Actions against Constables generally*	1044	4. *Actions against others protected by Statute*	1048

1. *Actions against Justices of the Peace.*

PART XII.

For an act by a justice within his jurisdiction, action to be on the case, and malice to be alleged.

By the 11 & 12 *V. c.* 44, *s.* 1, after reciting that "it is expedient to protect justices of the peace in the execution of their duty," it is enacted, "that every action hereafter to be brought against any justice of the peace for any act done by him in the execution of his duty as such justice, with respect to any matter within his jurisdiction as such justice, shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged that such act was done maliciously, and without reasonable and probable cause (*a*); and if at the trial of any such action, upon the general issue being pleaded, the plaintiff shall fail to prove such allegation, he shall be nonsuit, or a verdict shall be given for the defendant."

For an act done without jurisdiction, &c. action will lie without such allegation.

By sect. 2, "For any act done by a justice of the peace in a matter of which by law he has not jurisdiction, or in which he shall have exceeded his jurisdiction, any person injured thereby, or by any act done under any conviction or order made or warrant issued by such justice in any such matter, may maintain an action against such justice in the same form and in the same case as he might have done before the passing of this Act, without making any allegation in his declaration that the act complained of was done maliciously, and without reasonable and probable cause; Provided, nevertheless, that no such action shall be brought for anything done under such conviction or order until after such conviction shall have been quashed, either upon appeal or upon application to her Majesty's Court of Queen's Bench; nor shall any such action be brought for anything done under any such warrant which shall have been issued by such justice to procure the appearance of such party, and which shall have been followed by a conviction or order in the same matter, until after such conviction or order shall have been so quashed as aforesaid; or if such last-mentioned warrant shall not have been followed by any such conviction or order, or if it be a warrant upon an information for

Conviction, &c. must be quashed.

Where act done under a warrant for appearance.

(*a*) See *Gelan* v. *Hall*, 27 L. J., M. C. 78: *Pease* v. *Chaylor*, 3 B. & S. 620; 31 L. J., M. C. 1; 32 L. J., M. C. 121; 1 B. & S. 658.

the alleged indictable offence, nevertheless if a summons were issued previously to such warrant, and such summons were served upon such person, either personally or by leaving the same for him with some person at his last or most usual place of abode, and he did not appear according to the exigency of such summons (*b*), in such case no such action shall be maintained against such justice for anything done under such warrant."

An action of trespass lies against a magistrate if he has exceeded his jurisdiction (*c*), or has acted without jurisdiction (*d*). The above 1st and 2nd sections must be read together; and therefore where, in the course of a matter transacted before a justice, there has been an excess of jurisdiction, the 2nd section does not apply, unless the action in which it is sought to be applied be brought for an act done in respect of that part of the matter, or some part of it, which was beyond the jurisdiction (*e*). An action of replevin may be maintained against magistrates alone who issue a warrant of distress against the goods of a party (*f*).

If one justice convict, &c. and another grant the warrant, action must be against the former.

Sect. 3, "Where a conviction or order shall be made by one or more justice or justices of the peace, and a warrant of distress or of commitment shall be granted thereon by some other justice of the peace *bonâ fide* and without collusion, no action shall be brought against the justice who so granted such warrant, by reason of any defect in such conviction or order, or for any want of jurisdiction in the justice or justices who made the same, but the action (if any) shall be brought against the justice or justices who made such conviction or order."

No action for issuing a warrant for poor rate in certain cases.

Sect. 4, "Where any poor rate (*g*) shall be made, allowed, and published, and a warrant of distress shall issue against any person named and rated therein, no action shall be brought against the justice or justices who shall have granted such warrant by reason of any irregularity or defect in the said rate, or by reason of such person not being liable to be rated therein; and in all cases where a discretionary power shall be given to a justice of the peace by any Act or Acts of Parliament, no action shall be brought against such justice for or by reason of the manner in which he shall have exercised his discretion in the execution of any such power."

Where justices have discretionary power.

Court may order an act to be done, and no action to lie.

Sect. 5, after reciting that "It would conduce to the advancement of justice, and render more effective and certain the performance of the duties of justices, and give them protection in the

(*b*) This part of the section does not apply to a summons and warrant issued after conviction with a view to the levying of penalties and costs. *Bessell* v. *Wilson*, 1 E. & B. 489; 22 L. J., M. C. 94.

(*c*) *Leary* v. *Patrick*, 15 Q. B. 266; 19 L. J., M. C. 211. See *Ratt* v. *Parkinson*, 20 L. J., M. C. 208: *Bessell* v. *Wilson*, supra: *Newbould* v. *Coltman*, 6 Exch. 189; 20 L. J., M. C. 149: *Pedley* v. *Davis*, 30 L. J., C. P. 374; 10 C. B., N. S. 492: *Bott* v. *Ackroyd*, 28 L. J., M. C. 207, where the magistrate signed a conviction and warrant of commitment in which blanks were left for the costs, and it was held there was not an excess of jurisdiction.

(*d*) See *Haylock* v. *Sparke*, 22 L. J., M. C. 67; 1 E. & B. 479: *Kendall* v. *Wilkinson*, 24 L. J., M. C. 89: *Pedley* v. *Davis*, supra: *Pease* v. *Chaytor*, 3 B. & S. 620; 31 L. J., M. C. 1.

(*e*) *Barton* v. *Bricknell*, 13 Q. B. 393; 20 L. J., M. C. 1. See *Gelan* v. *Hall*, 27 L. J., M. C. 78.

(*f*) *Jones* v. *Johnson*, 5 Ex. 862; 20 L. J., M. C. 11.

(*g*) See *Pedley* v. *Davis*, supra.

PART XII.

performance of the same, if some simple means, not attended with much expense, were devised, by which the legality of any act to be done by such justices might be considered and adjudged by a Court of competent jurisdiction, and such justice enabled and directed to perform it without risk of any action or other proceeding being brought or had against him;" enacts, "That in all cases where a justice or justices of the peace shall refuse to do any act relating to the duties of his or their office as such justice or justices, it shall be lawful for the party requiring such act to be done to apply to her Majesty's Court of Queen's Bench, upon an affidavit of the facts, for a rule calling upon such justice or justices, and also the party to be affected by such act, to show cause why such act should not be done; and, if after due service of such rule, good cause shall not be shown against it, the said Court may make the same absolute, with or without or upon payment of costs, as to them shall seem meet; and the said justice or justices upon being served with the rule absolute shall obey the same, and shall do the act required; and no action or proceeding whatsoever shall be commenced or prosecuted against such justice or justices for having obeyed such rule, and done such act so thereby required as aforesaid" (*h*).

The 20 & 21 *V. c.* 43, which enables justices to submit a case for the opinion of one of the superior Courts, also protects justices acting on such decision (sect. 9).

After conviction, &c. confirmed on appeal, no action to lie.

By the 11 & 12 *V. c.* 44, *s.* 6, "In all cases where a warrant of distress or warrant of commitment shall be granted by a justice of the peace upon any conviction or order which, either before or after the granting of such warrant, shall have been or shall be confirmed upon appeal, no action shall be brought against such justice who so granted such warrant for anything which may have been done under the same by reason of any defect in such conviction or order."

If action brought where prohibited, proceedings may be set aside.

Sect. 7, "In all cases where by this Act it is enacted that no action shall be brought under particular circumstances, if any such action shall be brought it shall be lawful for a Judge of the Court in which the same shall be brought, upon application of the defendant, and upon an affidavit of facts, to set aside the proceedings in such action, with or without costs, as to him shall seem meet."

Limitation of action.

Sect. 8, "No action shall be brought against any justice of the peace for anything done by him in the execution of his office, unless the same be commenced within six calendar months next after the act complained of shall have been committed."

The six months are to be reckoned exclusive of the day of committing the act (*i*); for instance, if the imprisonment or cause of action ends on the 14th of December, it is a sufficient commencement of the action if the writ issued on the 14th of June (*j*). In case of a continuing imprisonment, a justice is liable to answer for

(*h*) Under this section it is only when justices would need protection, if they proceeded to do "any act relating to the duties of their office," that a rule calling upon them to show cause why such act should not be done will be granted. *Queen* v. *Percy*, L. R., 9 Q. B. 64.

(*i*) *Clarke* v. *Davey*, 4 Moore, 465.

(*j*) *Hardy* v. *Ryle*, 9 B. & C. 603; 4 M. & R. 295.

such part of it suffere
calendar months before
action for a distress for
bringing the action are
distress was sold (*l*).

An action brought ag
Courts of the metropolis
10 *G.* 4, *c.* 44, and 2 &
province of a county jus
calendar months after th
laid in the county of Mid

Sect. 9, "No such actio
justice of the peace (*p*) u
notice in writing of such i
to him, or left for him a
intending to commence su
which said notice the caus
same is intended to be b
stated; and upon the bac
and place of abode of th
name and place of abode
agent, if such notice have

It seems that a magistra
clause, unless he *bonâ fide*
done by him in the exec
According to one case, in
Judge is to decide whether
jury are not to determine t
trate is entitled to notice of
he acted maliciously and wi

Where the act in questio
a justice, and cannot be r
required (*n*). Thus, it is not

(*k*) *Massey* v. *Johnson*, 12 E
67.

(*l*) *Collins* v. *Rose*, 5 M. & W. 1
7 Dowl. 796.

(*m*) See *Barnett* v. *Cox*, 9 Q.
617; 16 L. J., M. C. 27, where
conviction took place in the exerc
of the jurisdiction given by the 3 &
V. c. 81, s. 6.

(*n*) See *Hazeldine* v. *Grove*,
Q. B. 997; 3 G. & D. 210; 12 L. J
M. C. 10; *Mellor* v. *Leather*,
L. J., M. C. 76.

(*o*) As to notice of action again
a metropolitan police magistrate, se
2 & 3 V. c. 71, s. 53; 10 G. 4, c. 44
s. 41; *Downers* v. *Morgan*, 1 Jur.
N. S. 1051, Ex.

(*p*) See *Jones* v. *Williams*, 3 B. &
C. 762; 5 D. & R. 651; *Morgan* v.
Palmer, 2 B. & C. 729; *Briggs* v.
Evelyn, 2 H. Bl. 114; *Entick* v. *Car-
rington*, 2 Wils. 275.

such part of it suffered under his warrant as was within six calendar months before the action commenced (*k*). In case of an action for a distress for church-rate, the three months limited for bringing the action are to be reckoned from the time at which the distress was sold (*l*).

An action brought against one of the magistrates of the police Courts of the metropolis for anything done in pursuance of the 10 *G.* 4, *c.* 44, and 2 & 3 *V. c.* 71 (*m*), though within the ordinary province of a county justice (*n*), must be commenced within three calendar months after the act committed, and the *venue* must be laid in the county of Middlesex. (*See Vol.* 1, p. 589.)

Sect. 9, "No such action shall be commenced against any such justice of the peace (*p*) until one calendar month, at least, after a notice in writing of such intended action shall have been delivered to him, or left for him at his usual place of abode, by the party intending to commence such action, or by his attorney or agent, in which said notice the cause of action, and the Court in which the same is intended to be brought, shall be clearly and explicitly stated; and upon the back (*q*) thereof shall be endorsed the name and place of abode of the party so intending to sue, and also the name and place of abode or of business of the said attorney or agent, if such notice have been served by such attorney or agent." Notice of action (*o*).

It seems that a magistrate is not within the protection of this clause, unless he *bonâ fide* believed that the act complained of was done by him in the execution of his duty as a magistrate (*r*). According to one case, in an action against a magistrate, the Judge is to decide whether a notice of action is necessary, and the jury are not to determine the question of *bona fides* (*s*). A magistrate is entitled to notice of action under the above section, although he acted maliciously and without reasonable and probable cause (*t*).

Where the act in question has not been done in the capacity of a justice, and cannot be referred to that character, notice is not required (*u*). Thus, it is not required in an action against a justice

---

(*k*) *Massey* v. *Johnson*, 12 East, 67.

(*l*) *Collins* v. *Rose*, 5 M. & W. 194; 7 Dowl. 796.

(*m*) See *Barnett* v. *Cox*, 9 Q. B. 617; 16 L. J., M. C. 27, where the conviction took place in the exercise of the jurisdiction given by the 3 & 4 V. c. 84, s. 6.

(*n*) See *Hazeldine* v. *Grove*, 3 Q. B. 997; 3 G. & D. 210; 12 L. J., M. C. 10; *Mellor* v. *Leather*, 22 L. J., M. C. 76.

(*o*) As to notice of action against a metropolitan police magistrate, see 2 & 3 V. c. 71, s. 53; 10 G. 4, c. 44, s. 41; *Downes* v. *Morgan*, 1 Jur., N. S. 1051, Ex.

(*p*) See *Jones* v. *Williams*, 3 B. & C. 762; 5 D. & R. 654; *Morgan* v. *Palmer*, 2 B. & C. 729; *Briggs* v. *Evelyn*, 2 H. Bl. 114; *Entick* v. *Carrington*, 2 Wils. 275.

(*q*) See Burn's Justice, by Chitty, p. 1038, 3rd vol.

(*r*) *Cann* v. *Clipperton*, 10 A. & E. 582; *Rudd* v. *Scott*, 2 Se. N. R. 631; *Hazeldine* v. *Grove*, supra; *Thomas* v. *Williams & Bower*, 1 D. & L. 624; 13 L. J., Ex. 87; *Booth* v. *Clive*, 10 C. B. 827; 20 L. J., C. P. 151. See *Wedge* v. *Berkeley*, 1 N. & P. 665; 6 A. & E. 663. As to there being grounds for the belief, see *Agnew* v. *Jobson*, 47 L. J., M. C. 67.

(*s*) *Kirby* v. *Simpson*, 23 L. J., M. C. 165. See Vol. 1, p. 207.

(*t*) *Kirby* v. *Simpson*, supra. See *Taylor* v. *Nesfield*, 23 L. J., M. C. 169.

(*u*) *James* v. *Saunders*, 10 Bing. 429; 4 M. & Sc. 316; *Morgan* v. *Palmer*, 2 B. & C. 729; *Livet* v. *Reid*, Peake, 35. And see *Ludster* v. *Borrow*, 9 A. & E. 654.

PART XII.

for not being duly qualified (*v*). See further as to when a notice of action is required and as to the form of (*x*) and mode of giving it, *Vol.* 1, *Ch. XII.* Where a notice of action to a magistrate was signed by the plaintiff himself, but indorsed by his solicitor, it was held that the notice was sufficient (*y*). The notice of action may be served before the quashing of the conviction under which the act complained of has taken place (*z*).

Process.

An action against a magistrate is commenced by writ of summons, and is in the same form as in ordinary cases.

Statement of claim.

The statement of claim is in form the same as in ordinary cases. It must substantially correspond with the notice of action where such notice has been given and was necessary (*a*).

Venue (*a*).

Sect. 10, "In every such action the venue shall be laid in the county where the act complained of was committed (*b*), or in actions in the County Court the action must be brought in the Court within the district of which the act complained of was committed; and the defendant shall be allowed to plead the general issue therein, and to give any special matter of defence, excuse or justification in evidence under such plea, at the trial of such action: Provided always, that no action shall be brought in any such County Court against a justice of the peace for anything done by him in the execution of his office, if such justice shall object thereto; and if within six days after being served with a summons in any such action such justice, or his attorney or agent, shall give a written notice to the plaintiff in such action that he objects to being sued in such County Court for such cause of action, all proceedings afterwards had in such County Court in any such action shall be null and void."

Defendant may plead the general issue, &c.

As to inserting the words "by statute," &c. in the margin of the defence delivered, *see Vol.* 1, p. 300.

Tender, and payment of money into Court.

Sect. 11, "In every such case after notice of action shall be so given as aforesaid, and before such action shall be commenced, such justice to whom such notice shall be given may tender to the party complaining, or to his attorney or agent, such sum of money as he may think fit as amends for the injury complained of in such notice; and after such action shall have been commenced, and at any time before issue joined therein, such defendant, if he have not made such tender, or in addition to such tender, shall be at liberty to pay into Court such sum of money as he may think fit, and which said tender and payment of money into Court, or either of them, may afterwards be given in evidence by the defendant at

(*v*) *Wright* v. *Horton*, Holt, 458.

(*x*) See *Taylor* v. *Nesfield*, 23 L. J., M. C. 169, where a notice was held to apply to a cause of action under sect. 2 of the 11 & 12 V. c. 44, and not to a cause of action under sect. 1 for maliciously doing an act.

(*y*) *Morgan* v. *Leach*, 10 M. & W. 558.

(*z*) *Haylock* v. *Sparke*, 1 E. & B. 470; 22 L. J., M. C. 67.

(*a*) The venue in an action against a police magistrate for anything done by him in pursuance of the 2 & 3 V. c. 71, and 10 G. 4, c. 44, must be laid in the county of Middlesex, though the act be within the ordinary province of a county justice. See *Hazeldine* v. *Grove*, 3 Q. B. 997; 3 G. & D. 210. See Vol. 1, p. 589.

(*b*) Where the act complained of is done in the county of Lancaster the venue must be laid in the division within which the act was committed. See *Atkinson* v. *Hornby*, 2 C. & K. 335; Vol. 1, p. 294.

the trial under the general issue aforesaid; and if the jury at the trial shall be of opinion that the plaintiff is not entitled to damages beyond the sum so tendered or paid into Court, or beyond the sums so tendered or paid into Court, then they shall give a verdict for the defendant, and the plaintiff shall not be at liberty to elect to be nonsuit, and the sum of money, if any, so paid into Court, or so much thereof as shall be sufficient to pay or satisfy the defendant's costs in that behalf, shall thereupon be paid out of Court to him, and the residue, if any, shall be paid to the plaintiff; or if, where money is so paid into Court in any such action, the plaintiff shall elect to accept the same in satisfaction of his damages in the said action, he may obtain from any Judge of the Court in which such action shall be brought an order that such money shall be paid out of Court to him, and that the defendant shall pay him his costs to be taxed, and thereupon the said action shall be determined, and such order shall be a bar to any other action for the same cause."

The defence of payment of money into Court may be in the ordinary form, and the defendant is not bound to state in it the character in which he makes the payment (*c*).

In what cases nonsuit, or verdict for defendant.

Sect. 12, "If at the trial of any such action the plaintiff shall not prove that such action was brought within the time herein-before limited in that behalf, or that such notice as aforesaid was given one calendar month before such action was commenced, or if he shall not prove the cause of action stated in such notice, or if he shall not prove that such cause of action arose in the county or place laid as venue in the margin of the declaration, or (when such plaintiff shall sue in the County Court) within the district for which such Court is holden, then and in every such case such plaintiff shall be nonsuit, or the jury shall give a verdict for the defendant."

Damages.

Sect. 13, "In all cases where the plaintiff in any such action shall be entitled to recover, and he shall prove the levying or payment of any penalty or sum of money under any conviction or order as parcel of the damages he seeks to recover, or if he prove that he was imprisoned under such conviction or order, and shall seek to recover damages for any such imprisonment, he shall not be entitled to recover the amount of such penalty or sum so levied or paid, or any sum beyond the sum of twopence as damages for such imprisonment, or any costs of suit whatsoever, if it shall be proved that he was actually guilty of the offence of which he was so convicted, or that he was liable by law to pay the sum he was so ordered to pay, and (with respect to such imprisonment) that he had undergone no greater punishment than that assigned by law for the offence of which he was so convicted, or for nonpayment of the sum he was so ordered to pay."

Costs (*d*).

Sect. 14, "If the plaintiff in any such action shall recover a verdict, or the defendant shall allow judgment to pass against him by default, such plaintiff shall be entitled (*d*) to costs in such

(*c*) *Aston* v. *Perkes*, 15 L. J., Ex. 211. As to the defence of payment into Court, see Vol. I, Ch. XXIX.

(*d*) See R. of S. C., Ord. LXV. r. 1, and the cases showing that this rule repeals all prior enactments inconsistent with it, *ante*, Vol. I, p. 672.

PART XII.

manner as if this Act had not been passed (*d*); or if in such case it be stated in the declaration, or in the summons and particulars in the County Court if he sue in that Court, that the act complained of was done maliciously and without reasonable and probable cause (*e*), the plaintiff if he recover a verdict for any damages, or if the defendant allow judgment to pass against him by default, shall be entitled (*f*) to his full costs of suit, to be taxed as between attorney and client; and in every action against a justice of the peace, for anything done by him in the execution of his office, the defendant, if he obtain judgment upon verdict or otherwise, shall in all cases be entitled (*f*) to his full costs in that behalf, to be taxed as between attorney and client" (*g*).

Metropolitan police magistrates.

As to costs in actions against magistrates, &c., acting under the Metropolitan Police Acts, *see* 10 *G.* 4, *c.* 44, *s.* 41 (*h*); 2 & 3 *V. c.* 71, *s.* 53.

Act to apply to persons protected by the repealed statutes.

By sect. 18 (11 & 12 *V. c.* 44), "This Act shall apply for the protection of all persons for anything done in the execution of their office, in all cases in which, by the provisions of any Act or Acts of Parliament, the several statutes or parts of statutes hereinbefore mentioned and by this Act repealed would have been applicable if this Act had not passed."

2. *Actions against Constables generally* (*i*).

Limitation of action.

Limitation of Action.]—Actions against constables, headboroughs, or other persons acting by their orders or in their aid, must be commenced within six calendar months after the cause of action has accrued (*j*). A person is within the protection of this clause if he *bonâ fide* believed that the Act complained of was done by him in the execution of his duty (*k*). As to how the six months are to be reckoned, *see ante*, p. 1040. Within what time actions must be brought against special constables, &c., *see post*, p. 1047. *See also* 24 & 25 *V. c.* 96, *s.* 113.

Demand of warrant.

Demand of Warrant.]—Also when an action is intended to be brought against a constable or other officer (*l*), or any person acting

---

(*d*) See 24 G. 2, c. 44, s. 7; 5 & 6 V. c. 97, s. 2.

(*e*) See *Jones* v. *Gurdon*, 2 Q. B. 600.

(*f*) See note (*d*), ante.

(*g*) See *Thomas* v. *Saunders*, 1 A. & E. 552. As to the mode of obtaining these costs, see Vol. I, p. 693. And see *Penney* v. *Slade*, 7 Se. 484; 7 Dowl. 440: *Walker* v. *Sherwin*, 6 Jur. 1126, Ex., cases decided under the repealed Acts. There is some difficulty in reconciling the above 13th and 14th sects.; see Gray's Law of Costs, 245.

(*h*) See *Bartholomew* v. *Carter*, 5 Se. N. R. 498; 1 Dowl., N. S. 212.

(*i*) As to the privilege of other constables, see post, p. 1047. A town council, whose solicitor by their direction has defended an action for malicious prosecution against a chief constable, have now power to order the costs of defending the action to be paid out of the borough fund or rates. 45 & 46 V. c. 50, s. 226, sub-s. (3), *post*, p. 1052.

(*j*) 24 G. 2, c. 44, s. 8. And see 24 & 25 V. cc. 96, 97; Burn's Just., tit. "Constable."

(*k*) See Vol 1, p. 207, and see *Gosden* v. *Elphick*, 4 Ex. 445: *Fragard* v. *Barnes*, 7 Ex. 827; 21 L. J., Ex. 320.

(*l*) See the statutes and cases in 1 Burn's J., ti' "Constable:" *Harper* v. *Carr*, 7 T. R. 270; Bull. N. P. 24: *Entick* v. *Carrington*, 2 Wils. 275. It extends to gaolers, 1 Gow. Rep. 97. See *Pedley* v. *Davis*, 10 C. B., N. S. 492; 30 L. J., C. P. 374, where a collector under a local act was held to be an officer within this section.

(*m*) See 1 Burn's J., tit. "Constable:" *Storch* v. *Clarke*, 4 B. Ad. 113: *Price* v. *Messenger*, 2 B. P. 158; 3 Esp. 96: *Postlethwaite* v. *Gibson*, 3 Esp. 226: *Money* v. *Leach*, 3 Burr. 1742: *Mitton* v. *Green*, 2 East, 233: *Cupey* v. *Henley*, 2 Es. 542, n.: *Anon.*, 1 Str. 416: *Bell* v. *Oakley*, 2 M. & Sel. 259: *Theobald* v. *Crichmore*, 1 B. & Ald. 227: *Partridge* v. *Williams*, 3 Id. 330.

(*n*) 1 Burn's J., tit. "Constable: *Jory* v. *Orchard*, 2 B. & P. 42. See the form, Chit. Forms, p. 51.

(*o*) See *Clarke* v. *Darcy*, 4 Moore 465; 1 Burn's J., tit. "Constable."

(*p*) The defendant may by his conduct dispense with the perusal of the warrant. *Atkins* v. *Kilby*, 11 A. & E. 777; 4 P. & D. 145.

(*q*) *Jones* v. *Vaughan*, 5 East, 445.

(*r*) See *Clark* v. *Woods*, 2 Ex. 395; 17 L. J., M. C. 189.

by his order or in his aid, for anything done by him in obedience to a warrant under the hand and seal of a justice of the peace (*m*). a demand in writing of the perusal and copy of such warrant, signed by the party demanding the same (or by his solicitor) (*n*), must be made or left at the usual place of abode of such constable or officer (*o*), by the plaintiff or his solicitor or agent; and if the perusal (*p*) and copy of the warrant be not granted within six days after being thus demanded, or before the action has been commenced (*q*), the plaintiff may bring his action against the constable or other officer alone; but if such perusal and copy be granted (*r*), then, if the plaintiff sue the constable, &c., without making the justice also a party, upon proof of the warrant at the trial, the jury shall give a verdict for the defendant, notwithstanding any defect of jurisdiction (*s*) in the justice who made the warrant. Or if the action be brought jointly against the justice and such constable, &c., then, upon proof of the warrant, the jury shall find a verdict for such constable; but if they find a verdict also against the justice, he shall pay to the plaintiff as well his costs in the action, as also such costs as the plaintiff may have been obliged to pay to the other defendant (*t*). It may be as well to mention, that this relates to actions of trespass and on the case only (*u*), and not to assumpsit (*x*), replevin (*y*), or the like. If the constable do any act not authorized by the warrant, an action may be brought against him for it without making any demand (*z*). It seems that it is of no importance if the demand require the perusal of the warrant within a less time than six days (*a*). A demand of the copy and perusal of the warrant, signed by the plaintiff's solicitor, was left by his clerk: held a sufficient demand under 24 *G.* 2, *c.* 44, *s.* 6 (*b*).

Notice of Action.]—Constables are not ordinarily entitled to notice of action (*c*). As to special constables, &c., being entitled, Notice of action.

492; 30 L. J., C. P. 374, where a collector under a local act was held to be an officer within this section.

(*m*) See 1 Burn's J., tit. "Constable:" *Starch* v. *Clarke*, 4 B. & Ad. 113: *Price* v. *Messenger*, 2 B. & P. 158; 3 Esp. 96: *Postlethwaite* v. *Gibson*, 3 Esp. 226: *Money* v. *Leech*, 3 Burr. 1742: *Mitton* v. *Green*, 5 East, 233: *Cowpey* v. *Henley*, 2 Esp. 542. n.: *Anon.*, 1 Str. 446: *Bell* v. *Oakley*, 2 M. & Sel. 259: *Theobald* v. *Crichmore*, 1 B. & Ald. 227: *Parton* v. *Williams*, 3 Id. 330.

(*n*) 1 Burn's J., tit. "Constable:" *Jory* v. *Orchard*, 2 B. & P. 42. See the form, Chit. Forms, p. 54.

(*o*) See *Clarke* v. *Darcy*, 4 Moore, 465; 1 Burn's J., tit. "Constable."

(*p*) The defendant may by his conduct dispense with the perusal of the warrant. *Atkins* v. *Kilby*, 11 A. & E. 777; 4 P. & D. 145.

(*q*) *Jones* v. *Vaughan*, 5 East, 445.

(*r*) See *Clark* v. *Woods*, 2 Ex. 395; 17 L. J., M. C. 189.

(*s*) See *Atkins* v. *Kilby*, 11 A. & E. 777; 4 P. & D. 145. And see *Peppercorn* v. *Hoffman*, infra.

(*t*) 24 G. 2, c. 44, s. 6.

(*u*) *Lyons* v. *Golding*, 3 Car. & P. 586.

(*x*) Bull. N. P. 24.

(*y*) *Fletcher* v. *Wilkins*, 6 East, 283: *Waterhouse* v. *Keene*, 4 B. & C. 211; 6 D. & R. 257. And see per *Tindal*, C. J., in *Morrell* v. *Martin*, 8 Sc. 705: *Gay* v. *Matthews*, 32 L. J., M. C. 58; 4 B. & S. 425.

(*z*) *Peppercorn* v. *Hoffman*, 9 M. & W. 618: *Hoye* v. *Bush*, 2 Sc. N. R. 86; 1 M. & G. 775, where the defendant, under a warrant for the arrest of J. H., arrested R. H. *Jones* v. *Chapman*, 14 M. & W. 124.

(*a*) *Collins* v. *Rose*, 5 M. & W. 194; 7 Dowl. 796.

(*b*) *Clark* v. *Woods*, 2 Ex. 395; 17 L. J., M. C. 189.

(*c*) See *Shatwell* v. *Hall*, 10 M. & W. 523, where constables were appointed under a local Act which re-

PART XII.

see post, p. 1047. *See also* 24 & 25 *V.* c. 96, *s.* 113, as to things done under that Act.

Statement of claim.
Venue.

Statement of Claim.]—The venue must be laid in the county in which the facts complained of were committed, in all actions of trespass or on the case against mayors or bailiffs of cities or towns corporate, headboroughs, portreeves, constables, tithing-men, churchwardens, &c., or other persons acting in their aid or by their command (*d*). The statement of claim is in form the same as in ordinary cases. It must substantially correspond with the notice of action, where such notice has been given and was necessary.

Defence and other proceedings, &c.

Defence and other Proceedings, &c.]—By stat. 7 *J.* 1, *c.* 5 (made perpetual by the 21 *J.* 1, *c.* 12), if an action is brought against a constable for anything done by virtue of his office, he and also all others who in his aid, or by his command, shall do a thing concerning his office, may plead the general issue (*e*), and give the special matter in evidence (*f*). As to inserting the words "by statute," &c., in the margin of the defence in such a case, *see Vol.* 1, p. 300. A person who is not an officer within the meaning of these enactments, though he may have supposed he was so, is not within the protection given by them (*g*).

The other proceedings are the same as in ordinary cases.

Costs.
For defendant.

Costs.]—The defendant, if he have a verdict, or if the plaintiff be nonsuit or discontinue the action, is entitled (*h*) to such full and reasonable indemnity, as to all costs, charges, &c. incurred in and about the action, as shall be taxed by the proper officer, subject to review, as in ordinary cases (*h*). In order to entitle an officer to these full costs, he must, when the cause is tried, obtain a certificate from the Judge, at or after the trial, that the action was brought against him as such officer, for something done by him in the execution of his duty (*i*). And it has been held that a

quired a notice of action for anything done in pursuance of it.

(*d*) 21 J. 1, c. 12, s. 5. See *Holton* v. *Boldero*, cited per Cur. 5 Bing. 339. See as to the venue in actions against special constables and others, post, p. 1047. See Vol. 1, p. 589.

(*e*) As to this not applying to an action of replevin, see *Mellor* v. *Leather*, 1 E. & B. 619; 22 L. J., M. C. 76.

(*f*) See *Rowcliffe* v. *Murray*, Car. & M. 513, where constables acted beyond their jurisdiction. As to a constable pleading his justification at common law, see *Morrell* v. *Martin*, 4 Sc. N. R. 300. As to special and other constables so pleading, &c., see post, p. 1047.

(*g*) *Copland* v. *Powell*, 8 Moore, 400; 1 Bing. 369; *Jones* v. *Williams*, 3 B. & C. 762; 5 D. & R. 654.

(*h*) 7 J. 1, c. 5; 21 J. 1, c. 12; 5 & 6 V. c. 97, s. 2, noticed Vol. 1, p. 692: *Blanchard* v. *Bramble*, 3 M. & Sel. 131: *Mackey* v. *Goodden*, 1 Dowl. 463. See 1 Burn's J., titles "Constable," "Justices." These statutes are not expressly repealed, nor, it is submitted, are they inconsistent with R. of S. C., Ord. LXV. so as to be impliedly repealed by that rule. See the rule and cases ante, Vol. 1, pp. 672 and 690.

(*i*) *Penney* v. *Slade*, 7 Sc. 484; 7 Dowl. 440: *Harper* v. *Carr*, 7 T. R. 448: *Grimdley* v. *Holloway*, 1 Doug. 307, 308, n.: *Devenish* v. *Mertins*, 2 Str. 974: *Johnson* v. *Stanton*, 2 B. & C. 621; 4 D. & R. 156. And see *Atkins* v. *Banwell*, 3 East, 92: *Wells* v. *Ody*, 3 Dowl. 799; 2 C. M. & R. 184: and *Walker* v. *Sherwin*, 6 Jur. 1126, Ex., where a verdict was taken subject to a special case.

certificate that the defendant was churchwarden, and acted by virtue of his office, to entitle him to double costs under the statute 7 *J.* 1, *c.* 5 (before the 5 & 6 *V. c.* 97, *s.* 2), need not be granted immediately after the trial; and where the plaintiff was nonsuited, it was considered that the Judge before whom the cause was tried, might, after an interval of four years, upon an affidavit that the defendant was within the provisions of the statute, grant a certificate to entitle him to double costs (*j*). Where a constable appointed under the Municipal Corporation Act, 5 & 6 *W.* 4, *c.* 76, was sued for an act done in the exercise of his general duty as a constable, and the plaintiff discontinued, the defendant was held entitled to full costs under the 21 *J.* 1, *c.* 12, *s.* 5, and 5 & 6 *V. c.* 97, *s.* 2, and not merely to costs as between solicitor and client under the 5 & 6 *W.* 4, *c.* 76, *s.* 133 (*k*). When the chief constable of a borough, by the direction of the borough magistrates, laid an information against a person for conspiracy and was sued for malicious prosecution, and a verdict given against him, it was held, that it was not competent to the town council of the borough to order payment of his costs out of the borough fund or rate under 5 & 6 *W.* 4, *c.* 76, *s.* 82 (*l*). But this could now be done under the *Municipal Corporations Act*, 1882, *s.* 226, *sub-s.* 3, *post*, p. 1052.

3. *Actions against Special Constables, Parish Constables, &c.*

Special constables.

By the 19th sect. of the 1 & 2 *W.* 4, *c.* 41, intituled "An Act for amending the laws relative to the appointment of special constables, and for the better preservation of the peace," it is enacted, "That all actions and prosecutions to be commenced against any person for anything done in pursuance of this Act shall be laid and tried in the county (*m*) where the fact was committed, and shall be commenced within six calendar months after the fact committed, and not otherwise: and notice in writing (*n*) of such cause of action shall be given to the defendant one calendar month at least before the commencement of the action; and in any such action the defendant may plead the general issue, and give this Act and the special matter in evidence at any trial to be had thereupon; and no plaintiff shall recover in any such action if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into Court after such action brought, by or on behalf of the defendant, and if a verdict shall pass for the defendant, or the plaintiff shall become nonsuit, or discontinue any such action after issue joined, or if upon demurrer or otherwise judgment shall be given against the plaintiff, the defendant shall recover his full costs, as between attorney and client, and have the like remedy for the same as any defendant hath by law in other cases; and though a verdict shall be given for the plaintiff in any such action, such plaintiff shall not have costs against the

(*j*) *Norman* v. *Danger*, 3 Y. & J. 233: and see *Penney* v. *Slade*, supra.

(*k*) *Maberley* v. *Titterton*, 7 M. & W. 540. A suggestion for such costs, it seems, is not necessary: Id. And see *Rix* v. *Borton*, 12 Ad. & E. 470: *Forman* v. *Dawes*, 11 M. & W. 730; 1 D. & L. 299.

(*l*) *Reg.* v. *Exeter* (*Mayor, &c.*), 6 Q. B. D. 135; 44 L. T. 101.

(*m*) See Vol. 1, p. 589.

(*n*) As to the form of a notice of action, see Chit. F. p. 51. And see *Jones* v. *Nicholls*, 2 D. & L. 425.

PART XII.

defendant unless the Judge before whom the trial shall be shall certify his approbation of the action and of the verdict obtained thereupon."

As to the costs, see now *R. of S. C., Ord. LXV. ante, Vol.* 1, pp. 672, 690.

No notice of action is required under this section before bringing an action of replevin (*o*).

Parish constables.

Parish constables appointed under the 5 & 6 *V. c.* 109, have the same privileges as other constables (*see s.* 15).

County police.

Also the county police established under the 2 & 3 *V. c.* 93, have the same privileges as constables, and every provision of the 1 & 2 *W.* 4, *c.* 41 (*supra*), shall be deemed to extend to the constables appointed under this Act, except as to any matter therein expressly provided (*p*). *See* 19 & 20 *V. c.* 69, *s.* 6.

Borough constables.

The Municipal Corporations Act, 1882 (45 & 46 *V. c.* 50), *s.* 191, contains provisions as to the powers and privileges of borough constables and the territorial limits of their powers. Sect. 226 provides for a limitation of six months as the period within which any action may be brought, and for a tender of amends and payment into Court (*see post*, p. 1052).

Where the defendant, who was a borough constable appointed under the 5 & 6 *W.* 4, c. 76, was sued in replevin for an act done in discharge of his duty as a constable under that Act, beyond the limits of the borough, but within the county in which the borough was situate, it was held, that he was entitled, under *non cepit*, to give the special matter of defence in evidence (*q*).

Metropolitan police.

By the 10 *G.* 4, c. 44, *s.* 4, the Metropolitan Police have the same privileges as constables have. *See also ss.* 41 *and* 44 *of this Act, and* 2 & 3 *V. c.* 71, *s.* 53.

Other statutes.

Some other Acts of Parliament also give certain protection to constables when they act under them.

4. *Actions against others protected by Statute.*

Besides the above statutes, there are many others protecting persons acting under them in a similar way to those above mentioned (*r*). Such persons are in general protected where they act *bonâ fide* (*s*). As to notice of action, and where parties are entitled to it, *see Vol.* 1, *Ch. XII.*

Double costs, &c. repealed.

The 5 & 6 *V. c.* 97, *s.* 1, repeals the provisions in local and personal Acts giving double and treble costs. This section will be found *Vol.* 1, p. 692.

Sect. 2 repeals the provisions in public Acts giving double and treble costs, and enacts that they shall recover instead certain other costs. This section is noticed *Vol.* 1, p. 692.

(*o*) *Gay* v. *Mathews*, 32 L. J., M. C. 58.

(*p*) See *Freegard* v. *Barnes*, 7 Ex. 827; 21 L. J., Ex. 320.

(*q*) *Mellor* v. *Leather*, 1 E. & B. 619; 22 L. J., M. C. 76.

(*r*) See *Ward* v. *Lee*, 7 E. & B. 426; 26 L. J., Q. B. 142, an action against persons who acted under the direction of the Commissioners of Sewers.

(*s*) See Vol. 1, p. 207. As to actions against officers of customs, see 39 & 40 V. c. 36, ss. 268—272, and 40 & 41 V. c. 13, ss. 3 and 4.

Clauses in local Acts giving general issue, repealed.

The 3rd sect. enacts, that "so much of any clause or provision in any Act or Acts commonly called public, local and personal, or local and personal, or in any Act or Acts of a local and personal nature, whereby any party or parties are entitled or permitted to plead the general issue only and to give any special matter in evidence without specially pleading the same, shall be and the same is hereby repealed."

Uniformity of notice of action.

The 4th sect. provides for the uniformity of notice of action. This section is noticed *ante*, *Vol.* 1, p. 210.

Limitation of actions.

The 5th section, after reciting that "divers Acts commonly called public, local and personal, or local and personal Acts, and divers other Acts of a local and personal nature, contain clauses limiting the time within which actions may be brought for anything done in pursuance of the said Acts respectively; and that the periods of such limitations vary very much, and it is expedient that there should be one period of limitation only;" enacts, "that from and after the passing of this Act the period within which any action may be brought for anything done under the authority or in pursuance of any such Act or Acts, shall be two years, or, in case of continuing damage, then within one year after such damage shall have ceased: and that so much of any clause, provision, or enactment by which any other time or period of limitation is appointed or enacted shall be and the same is hereby repealed."

CHAPTER XCII.

CORPORATIONS AND COMPANIES.

	PAGE
1. *Corporations generally*	1050
2. *Companies registered under the "Companies Acts, 1862 to 1879," and to which those Acts apply* ..	1053
3. *Railway and other similar Companies*	1065
4. *Banking and other Companies Suing or Sued in Name of Public Officer* ..	1080
5. *Companies established by Letters Patent*	1088

1. *Corporations generally.*

PART XII. Proceedings by corporations.

Proceedings by Corporations.]—Corporations aggregate (to which alone this Chapter has reference) cannot sue otherwise than by solicitor, who should be appointed under their common seal (*a*). But a corporation is bound by the act of its solicitor, so far as the defendant is concerned, although there is no such appointment under seal (*b*).

A corporation must sue in its corporate name (*c*).

A corporation may sue one of their members or shareholders, or may be sued by him (*d*).

In actions *by* corporations, they may, in general, proceed in the same manner as individuals. They cannot, however, unless expressly authorized so to do, sue as a common informer (*e*).

It is not necessary to produce the charter of a city to prove that it has a municipal corporation; the production of the minutes of the council at which an alderman was chosen for a ward is sufficient evidence, if it proves that councillors of the ward were present on the occasion, and it is a sufficient compliance with 5 & 6 *W.* 4, *c.* 76, *s.* 43 (*f*).

As to interrogatories, *see Ord. XXXI. r.* 5 (*ante, Vol.* 1, p. 517). If the corporation answer interrogatories by its town clerk, who is also

(*a*) Co. Litt. 66 b; Vol. 1, p. 99. See *R.* v. *Birmingham and Gloucester R. Co.*, 9 C. & P. 469; 1 G. & D. 457: *Arnold* v. *The Mayor, &c. of Poole*, 5 Sc. N. R. 741; 2 Dowl., N. S. 574. As to the mode of appointing a solicitor for the city of London, see *S. C.*

(*b*) *Flaviell* v. *The Eastern Co. R. Co.*, 2 Ex. 344; 17 L. J., Ex. 297.

(*c*) Grant, 50 See post, p. 1080, as to public companies entitled to sue and be sued in the name of one of their public officers, &c.

(*d*) *The Metropolitan Saloon Omnibus Co.* v. *Hawkins*, 28 L. J., Ex. 201.

(*e*) *St. Leonard's, Shoreditch (Guardians)* v. *Franklin*, 3 C. P. D. 377; 47 L. J., C. P. 727: *Wearers' Co.* v. *Forrest*, 2 Str. 1241: cp. *Robinson* v. *Currey*, 6 Q. B. D. 21.

(*f*) *Reg.* v. *Turner*, 12 Cox, C. C. 313, *Lush*, J.

their solicitor, it waives any objection on the ground of professional privilege (*g*).

The Stannaries Act, 1869 (32 & 33 *V. c.* 19), *s.* 13, enables mining associations conducted on the cost-book principle to sue their members for calls in the name of the purser of the mine as nominal plaintiff. They may also now sue in their partnership name (*h*).

Proceedings against corporations.

Proceedings against Corporations.]—An action against a corporation aggregate is commenced in the same manner as in ordinary cases (*i*). Corporations should be sued in their corporate name (*k*). It is not now necessary to add an officer as a defendant for purposes of discovery (*l*).

Service of writ.

R. of S. C., Ord. IX. r. 8 (*ante, Vol* 1, p. 235), provides that a writ of summons issued against a corporation aggregate may be served on the mayor or other head officer, or on the town clerk, clerk, treasurer or secretary of such corporation. This rule corresponds with the 16th section of the *Com. Law Proc. Act*, 1852, which, it was held, did not apply to a foreign corporation (*m*), unless, indeed, it carried on business and had a branch office (*n*) in England (*o*). See as to service on foreign corporations out of the jurisdiction, *ante, Vol.* 1, p. 245.

Must defend by solicitor.

A corporation must defend by solicitor (*p*), who should be appointed under seal. But a corporation is bound by the acts of its solicitor in the action, although he has not been so appointed (*q*). If the solicitor answers interrogatories he cannot raise any objection on the ground that communications between him and the corporation are privileged (*r*).

Statement of claim.

In a statement of claim against a corporation it is sufficient to describe the corporation by its corporate title, without stating how it was incorporated (*s*).

Enforcing judgment or order.

By *R. of S. C., Ord. XLII. r.* 31, "Any judgment or order against a corporation wilfully disobeyed may, by leave of the Court or a Judge, be enforced by sequestration against the corporate property, or by attachment against the directors or other officers thereof, or by writ of sequestration against their property (*t*)."

(*g*) *Swansea (Mayor, &c. of)* v. *Quirk*, 5 C. P. D. 106; 49 L. J., C. P. 157.

(*h*) *Escott* v. *Gray*, 39 L. T. 121.

(*i*) See Vol. 1, p. 214; 2 W. 4, c. 39, ss. 21—23. As to when the word "person" in a statute extends to corporations, see *Pharmaceutical Society* v. *London Supply Association*, 5 App. Cas. 857; 49 L. J., Q. B. 736. It would seem that a corporation cannot be made liable by the process of foreign attachment: *London Joint Stock Bank* v. *London (Mayor, &c.)*, 1 C. P. D. 1; 45 L. J., C. P. 213: S. C. in C. A., 5 C. P. D. 494.

(*k*) See post, p. 1080, as to public companies suing and being sued in the name of one of their public officers, &c.

(*l*) *Wilson* v. *Church*, 9 Ch. D. 552.

(*m*) *Ingate* v. *Austrian Lloyds*, 4 C. B., N. S. 704.

(*n*) See *Mackreth* v. *Glasgow & South West. R. Co.*, L. R., 8 Ex. 149: *Palmer* v. *Gould's Manufacturing Co.*, W. N. 1884, 63; Bitt. 194.

(*o*) *Newby* v. *Van Oppen, &c. Co.*, L. R., 7 Q. B. 293.

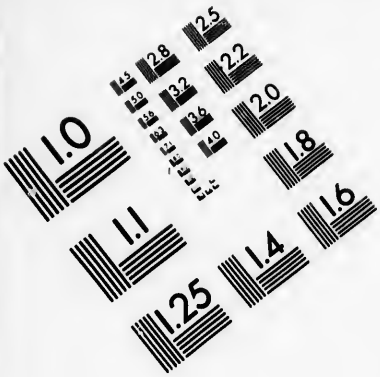
(*p*) Bro. Abr. tit. Corp. 28; Co. Litt. 66 a, b; 10 Co. 30 b; Vol. 1, p. 99.

(*q*) *Faviell* v. *The Eastern Co. R. Co.*, 2 Ex. 344.

(*r*) *Swansea (Mayor of)* v. *Quirk*, 5 C. P. D. 106; 49 L. J., C. P. 157.

(*s*) *Woolf* v. *The City Steam Boat Co.*, 6 D. & L. 606; 7 C. B. 103.

(*t*) See ante, pp. 908 and 947.



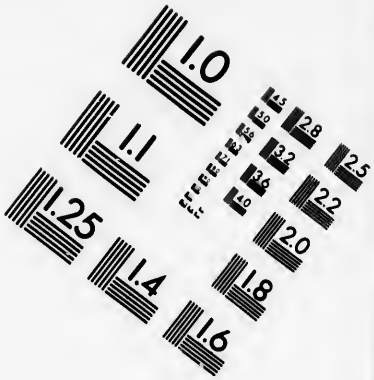
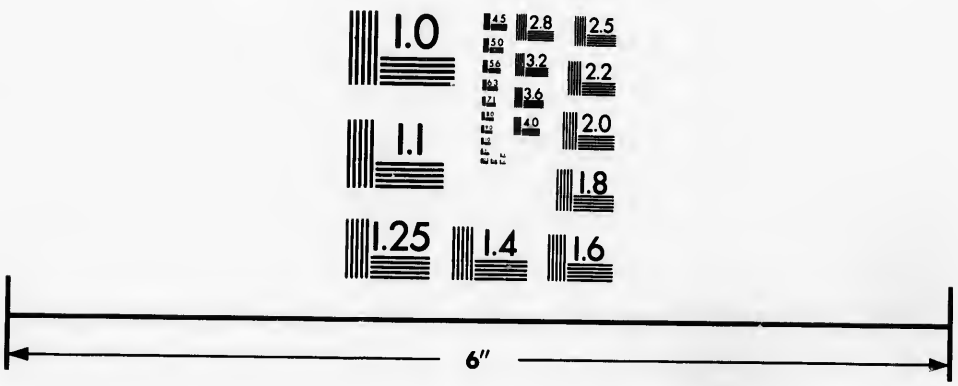
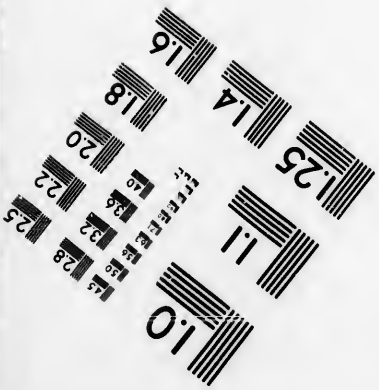
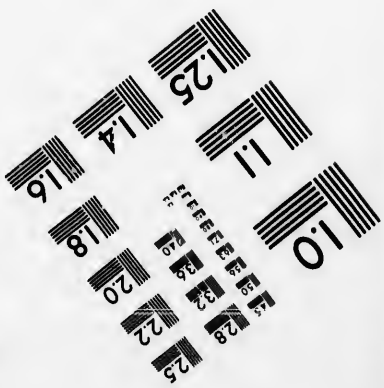


IMAGE EVALUATION TEST TARGET (MT-3)







Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

PART XII.

Execution.

As a general rule, only the property of the corporation is liable to satisfy the judgment, and not the property of individual members (*t*). It would seem that corporate property is not protected by the Municipal Corporations Act, though directed to be applied to public purposes only, from the claims of persons having demands on the corporation (*u*). As to what property of the guardians of a union is liable to be taken in execution, *see Att.-Gen.* v. *Wilkinson*, 28 L. J., Ch. 392. As to taking in execution land belonging to a local board of health, *see Worral Waterworks Company* v. *Lloyd*, L. R., 1 C. P. 719.

As to examining an officer of a corporation in aid of execution, *see Ord. XXXI. r.* 32, *ante*, *Vol.* 1, p. 791.

Other proceedings.

The remaining proceedings are the same as in ordinary cases.

Limitation of actions.

By the Municipal Corporations Act, 1882 (45 & 46 *V. c.* 50), *s.* 226, "(1) An action, prosecution or proceeding against any person for any act done in pursuance or execution or intended execution of this Act, or in respect of any alleged neglect or default in the execution of this Act, shall not lie or be instituted unless it is commenced within six months next after the act or thing is done or omitted, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof.

Tender of amends.

"(2) Where the action is for damages, tender of amends before the action was commenced may, in lieu of or in addition to any other plea, be pleaded. If the action was commenced after the tender, or is proceeded with after payment into Court of any money in satisfaction of the plaintiff's claim, and the plaintiff does not recover more than the sum tendered or paid, he shall not recover any costs incurred after the tender or payment, and the defendant shall be entitled to costs to be taxed as between solicitor and client as from the time of the tender or payment; but this provision shall not affect costs on any injunction in the action.

Costs out of borough fund.

"(3) Subject and without prejudice to any other powers, the council, where the defendant in any such action, prosecution or other proceeding is their officer, agent or servant, may, if they think fit, except so far as the Court before which the action, prosecution or other proceeding is heard and determined otherwise directs, pay out of the borough fund or borough rate all or any part of any sums payable by the defendant in, or in consequence of, the action, prosecution, or proceeding, whether in respect of costs, charges, expenses, damages, fine, or otherwise" (*x*).

(*t*) See *Edmunds* v. *Brown*, 1 Lev. 237; Bac. Abr. "Corporations" (E. 2).

(*u*) *Doe* d. *Parr* v. *Roe*, 1 Q. B. 700; 1 G. & D. 220. See *Arnold* v. *Ridge*, 13 C. B. 745; 22 L. J., C. P. 235: *Arnold* v. *The Mayor, &c. of Gravesend*, 25 L. J., Ch. 530.

(*x*) See *Reg.* v. *Exeter* (*Mayor of*), 6 Q. B. D. 135, as to the law prior to this enactment.

2. *Companies under the "Companies Acts*, 1862—1883" (*p*).

	PAGE		PAGE
(1.) *Actions by such Companies*	1053	(3.) *Actions against such Companies*	1059
(2.) *Actions by such Companies being wound up*	1059	(4.) *Rectification of the Register of Shareholders*	1064

(1.) *Actions by Companies under the Companies Acts*, 1862—1883 (*p*).

Writ of Summons.]—An action at the suit of a company under these Acts (*p*) is commenced in the usual manner by a writ of summons, describing the company by its name. If the company is one with limited liability, the word "limited" must be added, as it forms part of the name. The registered office of the company must be given as its address. Writ.

Company a Corporation.]—By the *Companies Act*, 1862, *s.* 18, "Upon the registration of the memorandum of association, and of the articles of association in cases where articles of association are required by this Act or by the desire of the parties to be registered, the registrar shall certify under his hand that the company is incorporated, and in the case of a limited company, that the company is limited. The subscribers of the memorandum of association, together with such other persons as may from time to time become members of the company, shall thereupon be a body corporate by the name contained in the memorandum of association, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, with power to hold lands, but with such liability on the part of the members to contribute to the assets of the company, in the event of the same being wound up as is hereinafter mentioned. A certificate of the incorporation of any company, given by the registrar, shall be conclusive evidence that all the requisitions of this Act in respect of registration have been complied with." Company a corporation.

Change of Name.]—Sect. 13 provides for the company changing its name, and enacts that, "No such alteration of name shall affect any rights or obligations of the company, or render defective any legal proceedings instituted or to be instituted by or against the company, and any legal proceedings may be continued or commenced against the company by its new name that might have been continued or commenced against the company by its former name." See also sect. 20, which enables a company to change its name when another company is subsequently registered with a name that might give rise to confusion, and which contains a similar proviso to the above. Change of name.

Registered Office.]—By *s.* 39, "Every company under this Act shall have a registered office to which all communications and Registered office.

(*p*) The Companies Acts are the Acts of 1862 (25 & 26 V. c. 89), of 1867 (30 & 31 V. c. 131), of 1870 (33 & 34 V. c. 104), of 1877 (40 & 41 V. c. 26), of 1879 (42 & 43 V. c. 76), of 1880 (43 V. c. 19), of 1883 (46 & 47 V. c. 28), of 1883 (Colonial Registers, 46 & 47 V. c. 30).

PART XII.

notices may be addressed: if any company under this Act carries on business without having such an office, it shall incur a penalty not exceeding five pounds for every day during which business is so carried on."

By *s.* 40, "Notice of the situation of such registered office, and of any change therein, shall be given to the registrar, and recorded by him: until such notice is given the company shall not be deemed to have complied with the provisions of this Act with respect to having a registered office."

Effect of memorandum of association.

Memorandum of Association, Effect of.]—By the *Companies Act*, 1862, *s.* 11, "The memorandum of association shall bear the same stamp as if it were a deed, and shall be signed by each subscriber in the presence of, and be attested by, one witness at the least, and that attestation shall be a sufficient attestation in Scotland as well as in England and Ireland; it shall, when registered, bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in the memorandum contained, on the part of himself, his heirs, executors, and administrators, a covenant to observe all the conditions of such memorandum, subject to the provisions of this Act."

Effect of articles of association.

Articles of Association, Effect of.]—By the *Companies Act*, 1862, *s.* 15, "In the case of a company limited by shares, if the memorandum of association is not accompanied by articles of association, or in so far as the articles do not exclude or modify the regulations contained in the table marked A. in the first schedule hereto, the last-mentioned regulations shall, so far as the same are applicable, be deemed to be the regulations of the comp[illegible]n the same manner and to the same extent as if they had been [illegible]ted in the articles of association, and the articles had been du[illegible]gistered."

By *s.* 16, "The articles of association shall be printed. They shall bear the same stamp as if they were contained in a deed, and shall be signed by each subscriber in the presence of, and be attested by, one witness at the least, and such attestation shall be a sufficient attestation in Scotland, as well as in England and Ireland: When registered they shall bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, executors, and administrators, to conform to all the regulations contained in such articles, subject to the provisions of this Act; and all monies payable by any member to the company in pursuance of the conditions and regulations of the company, or any of such conditions or regulations, shall be deemed to be a debt due from such member to the company, and in England and Ireland to be in the nature of a specialty debt."

Authentication of proceedings by company.

Authentication of Proceedings by Company.]—By the *Companies Act*, 1862, *s.* 64, "Any summons, notice, order, or proceeding requiring authentication by the company may be signed by any director, secretary, or other authorized officer of the company, and need not be under the common seal of the company, and the same may be in writing or in print, or partly in writing and partly in print."

Service of summonses, notices, &c.

Service of Proceedings on Company.]—By the *Companies Act*, 1862, s. 62, "Any summons, notice, order or other document required to be served upon the company may be served by leaving the same, or sending it through the post in a prepaid letter addressed to the company, at their registered office."

A writ of summons may be served by post under this section (*q*).

By sect. 63, "Any document to be served by post on the company shall be posted in such time as to admit of its being delivered in the due course of delivery within the period (if any) prescribed for the service thereof; and in proving service of such document it shall be sufficient to prove that such document was properly directed, and that it was put as a prepaid letter into the post office."

Service of notices on members by company.

Service of Notices on Members by Company.]—In Table A. in the first schedule to the *Companies Act*, 1862, the provisions of which, unless excluded or modified by special article, form the articles of association of the company (*r*), it is provided:—

(*Art.* 95.) "A notice may be served by the company upon any member either personally or by sending it through the post in a prepaid letter addressed to such member at his registered place of abode."

(*Art.* 96.) "All notices directed to be given to the members shall, with respect to any share to which persons are jointly entitled, be given to whichever of such persons is named first in the register of members; and notice so given shall be sufficient notice to all the holders of such share."

(*Art.* 97.) "Any notice, if served by post, shall be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of the post; and in proving such service it shall be sufficient to prove that the letter containing the notices was properly addressed and put into the post office."

The above articles do not extend to legal proceedings, and, therefore, an order for substituted service of a debtor's summons at the registered address of a member of a company, that not being in fact his last known place of abode, was held bad (*s*).

Security for costs.

Security for Costs.]—By the *Companies Act*, 1862, s. 69, "Where a limited company is plaintiff or pursuer in any action, suit or other legal proceeding, any Judge having jurisdiction in the matter may, if it appears by any credible testimony that there is reason to believe that if the defendant be successful in his defence the assets of the company will be insufficient to pay his costs, require sufficient security to be given for such costs, and may stay all proceedings until such security is given."

(*q*) *White* v. *Land and Water Co.*, W. N. 1883, 174; Bitt. 193. See *Towne* v. *The London and Limerick Steam Ship Co.*, 5 C. B., N. S. 730; 28 L. J., C. P. 217. But it must be observed, that that case was decided under stat. 19 & 20 V. c. 47, s. 53, the terms of which are not the same as those of the above section (62), and some, at all events, of the reasons for that decision do not exist under sect. 62. See R. of S. C., Ord. IX. r. 8, ante, Vol. I, p. 235.

(*r*) C. Act, 1862, s. 15, ante, p. 1051.

(*s*) *Ex p. Chatteris, In re Slinder*, L. R., 10 Ch. 227; 44 L. J., Bk. 90.

PART XII.

This section is confined to cases where the plaintiff company is a limited company (*t*). It does not apply to the case of a company registered as an unlimited company (*t*), but it applies to the case of an action brought by the liquidator of a limited company in the company's name (*u*).

The application for the security should be made on summons to a Master at Chambers. It should be supported by an affidavit showing that there is reason to believe that the assets of the company will be insufficient to pay the defendant's costs if he succeeds. The mere fact that the company is being wound up is *primâ facie* a sufficient reason (*x*). The application may be made at any time (*y*).

The security should be for an amount equal to the probable amount of the defendant's costs, and is not limited to any arbitrary amount (*z*).

Action for calls—form of claim.

Action by Company for Calls—Form of Claim.]—By the *Companies Act*, 1862, *s.* 70, "In any action or suit brought by the company against any member to recover any call or other monies due from such member in his character of member, it shall not be necessary to set forth the special matter, but it shall be sufficient to allege that the defendant is a member of the company, and is indebted to the company in respect of a call made or other monies due, whereby an action or suit hath accrued to the company." It may be doubted whether this provision (which, it will be observed, differs from the 26th section of the *Companies Clauses Consolidation Act*, 1845 (*post*, p. 1078), inasmuch as it says "allege," and not "declare") is not impliedly repealed by the Judicature Acts and Rules (*Ord. XIX. rr.* 1, 2, 4).

A form of statement of claim is given in the *R. of S. C.* 1883, *App. C.* (*See Chit. F.* p. 77.)

Effect of registration of company on previous rights of action.

Registration of Company whilst Action pending—Effect of.]—By the *Companies Act*, 1862, *s.* 194, "The registration in pursuance of this part of this Act of any company shall not affect or prejudice the liability of such company to have enforced against it, or its right to enforce, any debt or obligation incurred, or any contract entered into, by, to, with, or on behalf of such company previously to such registration."

By sect. 195, "All such actions, suits, and other legal proceedings as may at the time of the registration of any company registered in pursuance of this part of this Act have been commenced

(*t*) *United Ports, &c. Insurance Co.* v. *Hill*, L. R., 5 Q. B. 395.

(*u*) *Freehold Land, &c. Co.* v. *Spargo*, W. N. 1868, 94, M. R.

(*x*) Per *Jessel*, M. R., *Northampton Coal, &c. Co.* v. *Midland Waggon Co.*, 5 Ch. D. at p. 503: *City of Moscow Gas Co.* v. *International Financial Society*, L. R., 7 Ch. 223: per *Wood*, V.-C., *Accidental, &c. Co.* v. *Mercati*, L. R., 3 Eq. at p. 202: *In re Photographic Artists' Co-operative Supply Association*, 23 Ch. D. 370, 371: *In re Carta Para Mining Co.*, 19 Ch. D. 457; 46 L. T. 406; 30 W. R. 117.

(*y*) *Lydney, &c. Co.* v. *Bird*, 23 Ch. D. 358; 48 L. T. 893, granted after reply and notice of trial.

(*z*) *Imperial Bank of China, &c.* v. *Bank of Hindustan, &c.*, L. R., 1 Ch. 437. See *Washoe Mining Co.* v. *Ferguson*, L. R., 2 Eq. 371: *Western of Canada, &c. Co.* v. *Walker*, L. R., 10 Ch. 628.

by or against such company, or the public officer or any member thereof, may be continued in the same manner as if such registration had not taken place; nevertheless, execution shall not issue against the effects of any individual member of such company upon any judgment, decree, or order obtained in any action, suit, or proceeding so commenced as aforesaid; but in the event of the property and effects of the company being insufficient to satisfy such judgment, decree, or order, an order may be obtained for winding up the company."

By 42 & 43 *V.* c. 76 (*The Companies Act*, 1879), *s.* 4, "Subject as in this Act mentioned, any company registered before or after the passing of this Act as an unlimited company may register under *The Companies Acts*, 1862 to 1879, as a limited company, or any company already registered as a limited company may re-register under the provisions of this Act.

"The registration of an unlimited company as a limited company in pursuance of this Act shall not affect or prejudice any debts, liabilities, obligations, or contracts incurred or entered into by, to, with, or on behalf of such company prior to registration, and such debts, liabilities, contracts, and obligations may be enforced in manner provided by Part VII. of the Companies Act, 1862, in the case of a company registering in pursuance of that part."

Evidence in actions. —Certificate of incorporation.

Evidence—Certificate of Incorporation.]—The *Companies Act*, 1862, *s.* 18, (*ante*, p. 1053), provides that a certificate of the incorporation given by the registrar shall be conclusive evidence that all the requisitions of the Act in respect of registration have been complied with.

By *s.* 192, "A certificate of incorporation given at any time to any company registered in pursuance of this part of this Act, shall be conclusive evidence that all the requisitions herein contained in respect of registration under this Act have been complied with, and that the company is authorized to be registered under this Act as a limited or unlimited company, as the case may be; and the date of incorporation mentioned in such certificate shall be deemed to be the date at which the company is incorporated under this Act."

Any certificate is now as good evidence as the original (40 & 41 *V.* c. 26, *s.* 6, *post*, p. 1058).

—Register of members.

—*Register of Members.*]—By the *Companies Act*, 1862, *s.* 37, "The register of members shall be *primâ facie* evidence of any matters by this Act directed or authorized to be inserted therein."

By *s.* 25, "Every company under this Act shall cause to be kept in one or more books a register of its members, and there shall be entered therein the following particulars:

(1.) The names and addresses, and the occupations, if any, of the members of the company, with the addition, in the case of a company having a capital divided into shares, of a statement of the shares held by each member, distinguishing each share by its number: and of the amount paid or agreed to be considered as paid on the shares of each member:

(2.) The date at which the name of any person was entered in the register as a member:

(3.) The date at which any person ceased to be a member."

PART XII.

—Report of inspectors.

—Report of Inspectors.]—By the *Companies Act*, 1862, *s.* 61, "A copy of the report of any inspectors appointed under this Act, authenticated by the seal of the company into whose affairs they have made inspection, shall be admissible in any legal proceeding as evidence of the opinion of the inspectors in relation to any matter contained in such report."

—Minutes of resolutions and proceedings at meetings.

—Minutes of Resolutions and Proceedings at Meetings.]—By *s.* 67, "Every company under this Act shall cause minutes of all resolutions and proceedings of general meetings of the company, and of the directors or managers of the company in cases where there are directors or managers, to be duly entered in books to be from time to time provided for the purpose; and any such minute as aforesaid, if purporting to be signed by the chairman of the meeting at which such resolutions were passed or proceedings had, or by the chairman of the next succeeding meeting, shall be received as evidence in all legal proceedings: and until the contrary is proved, every general meeting of the company, or meeting of directors or managers in respect of the proceedings of which minutes have been so made, shall be deemed to have been duly held and convened, and all resolutions passed thereat or proceedings had, to have been duly passed and had, and all appointments of directors, managers or liquidators shall be deemed to be valid, and all acts done by such directors, managers or liquidators shall be valid, notwithstanding any defect that may afterwards be discovered in their appointments or qualifications" (*a*).

Seal of the Stannaries Court.

—Seal of the Stannaries Court.]—Sect. 68 enacts, amongst other things, that the seal of the Stannaries Court and the signature of the registrar thereof shall be judicially noticed by all other Courts and Judges in England.

Certified copies of documents at registration office.

—Certified Copies of Documents at Registration Office.]—By the *Companies Act*, 1877 (40 & 41 *V.* c. 26), *s.* 6, it is provided as follows: "And whereas it is expedient to make provision for the reception as legal evidence of certificates of incorporation other than the original certificates, and of certified copies of or extracts from any documents filed and registered under the Companies Acts, 1862 to 1877: Be it enacted, that any certificate of the incorporation of any company given by the registrar or by any assistant registrar for the time being shall be received in evidence as if it were the original certificate: and any copy of or extract from any of the documents or part of the documents kept and registered at any of the offices for the registration of Joint Stock Companies in England, Scotland or Ireland, if duly certified to be a true copy under the hand of the registrar or one of the assistant registrars for the time being, and whom it shall not be necessary to prove to be the registrar or assistant registrar, shall, in all legal proceedings, civil or criminal, and in all cases whatsoever, be received in evidence as of equal validity with the original document."

Power for companies to refer matters to arbitration.

Reference to Arbitration.]—By the *Companies Act*, 1862, *s.* 72, "Any company under this Act may from time to time, by writing under its common seal, agree to refer and may refer to arbitration, in accordance with 'The Railway Companies Arbitration Act, 1859,'

(*a*) *In re Indian Zoedone Co.*, 26 Ch. D. 70 (C. A.).

any existing or future difference, question or other matter whatsoever in dispute between itself and any other company or person, and the companies parties to the arbitration may delegate to the person or persons to whom the reference is made power to settle any terms or to determine any matter capable of being lawfully settled or determined by the companies themselves, or by the directors or other managing body of such companies."

By *s.* 73, "All the provisions of 'The Railway Companies Arbitration Act, 1859,' shall be deemed to apply to arbitrations between companies and persons in pursuance of this Act; and in the construction of such provisions 'The Companies' shall be deemed to include companies authorized by this Act to refer disputes to arbitration."

(2.) *Actions by Companies being Wound up.*

Actions by companies being wound up.

After the making of a winding-up order any action at the suit of the company must be instituted by the liquidator. The liquidator, however, must sue in the name of the company, and his name does not appear in the proceedings as a party to the action at all (*b*). In the case of an official liquidator appointed in a compulsory winding-up by the Court, power to sue is given to the liquidator by sect. 95 of the *Companies Act*, 1862, but he must first obtain the sanction of the Court, unless that is dispensed with under sect. 96. In the case of a voluntary winding-up, or a winding-up under the supervision of the Court, power to sue is given by sect. 133, sub-s. 7, and sect. 151, respectively, and in this case no sanction of the Court is necessary.

In an action by the liquidator in the name of the company, the defendant may set off a claim for unliquidated damages or raise such a claim by counter-claim without any leave from the Court before whom the winding-up proceedings are pending (*c*).

As to security for costs, *see ante*, p. 1055.

(3.) *Actions against Companies under these Acts.*

Writ of summons.

Writ of Summons.]—The company should be described in the writ by its name, and if the company be one with a limited liability the word "limited" forms part of the name and should be inserted.

Service of writ, &c.

Service of Writ, &c.]—*See ante*, p. 1055.

Staying proceedings after petition for winding up.

Staying Proceedings after Petition for Winding-up.]—In the case of companies formed and registered under the *Companies Act*, 1862, it is provided by sect. 85 of that Act that "The Court may, at any time after the presentation of a petition for winding-up a company under this Act, and before making an order for winding-up the company, upon the application of the company, or of any creditor or contributory of the company, restrain further proceedings in

(*b*) Cp. *Cape Breton Co.* v. *Fenn*, 17 Ch. D. 198.

(*c*) *Mersey Steel and Iron Co.* v. *Naylor*, 9 Q. B. D. 648; 51 L. J., Q. B. 570; 47 L. T. 369; affirmed in D. P., 9 App. Cas. 434; 32 W. R. 989. Cp. *In re Milan Tramways Co., Ex p. Theys* (C. A.), 25 Ch. D. 587; 50 L. T. 545; 32 W. R. 601. As to set-off in an action for calls, see *Government Security Investment Co.* v. *Dempsey*, 50 L. J., Ch. 199.

PART XII.

any action, suit or proceeding against the company, upon such terms as the Court thinks fit; the Court may also at any time after the presentation of such petition, and before the first appointment of liquidators, appoint provisionally an official liquidator of the estate and effects of the company."

In the case of a *voluntary* winding-up, sect. 138 of the Act provides that the Court may exercise all the powers which it might exercise in the case of a winding-up by the Court, and this has been held to extend to staying further proceedings in actions whether commenced before or after the resolution to wind up (*d*).

In the case of companies registered under Part VII. of the Act it is provided by sect. 197 that "The Court may, at any time after the presentation of a petition for winding-up a company registered in pursuance of this part of this Act, and before making an order for winding-up the company, upon the *application by motion of any creditor* of the company, restrain further proceedings in any action, suit, or legal proceeding against any contributory of the company as well as against the company, as hereinbefore provided, upon such terms as the Court thinks fit."

In the case of an unregistered company, it is provided by sect. 201 that "The Court may, at any time after the presentation of a petition for winding-up an unregistered company, and before making an order for winding-up the company, upon the *application of any creditor* of the company, restrain further proceedings in any action, suit or proceeding against any contributory of the company, or against the company, as hereinbefore provided, upon such terms as the Court thinks fit."

It will be observed that under the first of these three sections the application may be made by the company or any creditor or contributory, while under the two others it can only be made by a creditor, and not by the company itself.

Sect. 24, sub-sect. 5, of the *Judicature Act*, 1873 (*e*), abolished the power of one Court to restrain the proceedings in another, and substituted an application to stay proceedings (*e*). This application must be made to the Division in which the action which it is sought to stay is pending, and not to the Division in which the winding-up proceedings are taken (*f*). It should be made by sum-

(*d*) *In re Keynsham Co.*, 33 Beav. 123: *In re the Life Assoc. of England*, 34 L. J., Ch. 64: *In re Poole Firebrick, &c. Co.*, L. R., 17 Eq. 268: *In re Sablonière Hotel Co.*, L. R., 3 Eq. 74.

(*e*) See ante, Vol. 1, p. 360.

(*f*) *In re Artistic Colour Printing Co.*, 14 Ch. D. 502; 49 L. J., Ch. 526, M. R.: *In re South of France Pottery Works Syndicate* (C. A.), 37 L. T. 260: Accord. *Garbutt* v. *Fawcus*, 1 Ch. D. 155 (C. A.): *In re People's Garden Co.*, Id. 44: *In re Morriston, &c. Co.*, W. N. 1877, 20: *Walker* v. *Banagher Distillery Co.*, 1 Q. B. D. 129: *Rose & Co.* v. *Garrden Lodge, &c. Co.*, 3 Q. B. D. 235. The decisions contra, viz. *Kingchurch* v. *People's Garden Co.*, 1 C. P. D. 45: *Needham* v. *Rivers Protection, &c. Co.*, 1 Ch. D. 253: *In re Stapleford Colliery Co.*, W. N. 1875, 256, are wrong. It seems that, even before the Jud. Acts, if an action were brought contrary to this provision, the Court or a judge of the Court in which the action was pending, might stay the proceedings. *Thomas* v. *Wells*, 33 L. J., C. P. 211: *M'Kenzie* v. *Sligo and Shannon R. Co.*, 18 Q. B. 862; 21 L. J., Q. B. 380. See *Re Railway Plant and Steel Co.*, 47 L. J., Ch. 321, where an execution was allowed to be proceeded with.

mons to a Master at Chambers (*g*). In some cases it has been made *ex parte* to the Court, and a rule absolute granted in the first instance (*h*), but this is not the proper course. It would appear that if there are several actions they may all be stayed on one application (*i*). If the plaintiff proceeds unnecessarily after notice of the winding-up he will not be allowed his costs of appearing to oppose the application (*k*). The motion should be made as soon as possible after the winding-up proceedings are commenced (*l*).

The same principle now guides the Court in ordering the stay as formerly guided the Court of Chancery in granting the injunction. As a general rule the Court will not interfere where the sheriff is in possession before the presentation of the winding-up petition (*m*). In other cases, as when the writ is only delivered to the sheriff before the presentation of the petition (*n*), the execution will generally be stayed (*o*).

The terms usually ordered when the stay is granted are that the execution creditor shall be admitted to prove in the winding-up for the amount of his debt, the costs of the action and the costs of the application to stay (*o*). If the sheriff is served with notice of the application and appears he will be allowed his costs (*p*).

(*g*) Jud. Act, 1873, s. 39, and R. of S. C., Ord. LIV. r. 12. So held in *Taylor* v. *Danby*, cor. *Lush*, L. J., at Chambers, Jan. 21st, 1881.

(*h*) *Masbach* v. *Anderson & Co.*, 37 L. T. 440, Ex. D.: *Everingham* v. *Co-operative Pure Family Beer Co.*, W. N. 1880, 99 (C. A.): cp. *Ex p. Parry*, 33 L. J., Ch. 245.

(*i*) Per *Jessel*, M. R., *In re People's Garden Co.*, 1 Ch. D. at p. 46.

(*k*) *Rose* v. *Garrden Lodge, &c. Co.*, 3 Q. B. D. 235.

(*l*) *Everingham* v. *Co-operative Pure Family Beer Co.*, W. N. 1880, 99 (C. A.).

(*m*) *Ex p. Parry, In re The Great Ship Co., Limited*, 33 L. J., Ch. 245; 4 D. J. & S. 63: *Ex p. Milwood Colliery Co.*, 24 W. R. 898 (C. A.): *In re London Cotton Co.*, L. R., 2 Eq. 53: *In re Bastow & Co.*, L. R., 4 Eq. 681. In *In re The Great Ship Co.*, supra, which is the leading case on the subject, A., a creditor of an unregistered company, sued for his debt, and, after long litigation, obtained judgment, and issued a *fi. fa.*, which was executed by seizure on the 29th of September; on the 6th of October a petition was presented under the above Act, for the winding-up of the company; and on the 9th of October an order was made by the Master of the Rolls, ex parte, to restrain the sale by the sheriff of the property seized: on appeal, it was held that the creditor ought not to be restrained from reaping the fruits of his action by sale of the property taken in execution. Whether, where an execution has been perfected by seizure before the presentation of a petition for winding-up, the Court has jurisdiction under the 201st section of the above Act, to restrain a sale—quære. Where an execution has been perfected by seizure before the commencement of the winding-up, a sale after the commencement is not a "putting in force of the execution within sect. 163 of the above Act:" per *Turner*, L. J. In *Ex p. Milwood Colliery Co.*, the Court of Appeal refused to follow *In re Hill Pottery Co.*, L. R., 1 Eq. 649: and *In re Plas-yn-Mhowys Coal Co.*, L. R., 4 Eq. 689, where it was held that even when the sheriff was in possession the Court had power to stay the execution, and would exercise this power where the winding-up proceedings would otherwise be prejudicially interfered with, though if it did so it would place the execution creditor in the same position as if the sheriff had sold.

(*n*) *In re London and Devon Biscuit Co.*, L. R., 12 Eq. 190: *Sablonière Hotel Co.*, L. R., 3 Eq. 74. But the Court has a discretion to allow the creditor to proceed. Id.: *In re Barstow & Co.*, L. R., 4 Eq. 681.

(*o*) *In re Poole Firebrick, &c. Co.*, L. R., 17 Eq. 268; *In re Dimson's Estate Fire Clay Co.*, L. R., 19 Eq. 202: *In re the Life Assoc. of England*, 34 L. J., Ch. 64, M. R.

(*p*) *Ex p. Parry*, supra.

After considerable difference of opinion, it has been decided by the Court of Appeal that sect. 10 of the *Judicature Act*, 1875, does not apply the sections of the Bankruptcy Act relating to execution against bankrupts to actions against companies being wound up (*q*).

Winding-up order—effect of, on proceedings—leave to commence or continue action after.

Winding-up Order—Effect of, on Proceedings—Leave to commence or continue Action after.]—In the case of companies formed and registered under the *Companies Act*, 1862, it is provided by sect. 87 of that Act that, "When an order has been made for winding-up a company under this Act, no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the Court, and subject to such terms as the Court may impose."

By sect. 163, "Where any company is being wound up by the Court or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up, shall be void to all intents."

The latter of these sections renders absolutely void any execution put in force after the commencement of the winding-up (*r*), but under the former section, the Court may allow the proceedings to continue, notwithstanding the winding-up order (*s*). In the exercise of this discretion leave to continue an action to restrain a trespass has been granted (*t*). If the proceedings are continued without leave they will be stayed as under sect. 85 (*ante*, p. 1059), on an application to the Court in which they are pending (*u*). These sections apply to unregistered companies being wound up (*v*).

In the case of a voluntary winding-up, the "commencement of the winding-up" dates from the passing of the resolution to wind up, though no liquidator is appointed (*x*).

An execution is not "put in force" until possession is taken (*y*). Selling under an execution is a "proceeding" within sect. 87 (*z*).

The application for leave to commence or continue an action after a winding-up order should be made to the Court in which the winding-up proceedings are pending (*a*), and should be made on notice of motion, and not *ex parte* (*b*). The Court of Appeal will not ordinarily interfere with the discretion of the Court below in granting or refusing leave (*a*).

(*q*) *In re Withernsea Brickworks Co.*, 16 Ch. D. 337; 50 L. J., Ch. 185; 43 L. T. 713; 29 W. R. 178.

(*r*) *In re Artistic Colour Printing Co., Ex p. Fourdrinier*, 21 Ch. D. 510; 31 W. R. 149; 48 L. T. 46.

(*s*) *In re London Cotton Co.*, L. R., 2 Eq. 53: *In re Bank of Hindustan, &c., Ex p. Levick*, L. R., 5 Eq. 69: *In re Universal Disinfector Co.*, L. R., 20 Eq. 162: *In re Dimson's, &c. Co.*, L. R., 19 Eq. 202: *In re Bastow & Co.*, L. R., 4 Eq. 681: *In re Iron Colliery Co.*, 20 Ch. D. 442; 51 L. J., Ch. 398; 30 W. R. 388.

(*t*) *Wyley* v. *Enhalt Coal Mining Co.*, 33 Beav. 539.

(*u*) *In re Waterloo Life, &c. Co.*, 32 L. J., Ch. 371.

(*v*) *Rudow* v. *Great Britain Mutual Life Ass. Society*, 50 L. J., Ch. 504; 44 L. T. 688 (C. A.).

(*x*) *Thomas* v. *Patent Lionite Manufacturing Co.*, 44 L. T. 392; 29 W. R. 596.

(*y*) *In re London and Devon Biscuit Co.*, L. R., 12 Eq. 190.

(*z*) *In re Perkin's Black Lead Mining Co.*, 7 Ch. D. 371. See as to this case, *In re Artistic Colour Printing Co.*, 14 Ch. D. 502, M. R.

(*a*) *Thames Plate Glass Co.* v. *Land and Sea Telegraph Construction Co.*, L. R., 6 Ch. 643.

(*b*) *Western and Brazilian Telegraph Co.* v. *Bibby*, 42 L. T. 821, M. R., dissenting from *Williams* v. *Bristol Marine Insurance Co.*, 39 L. J., Ch. 504, V.-C. M.

Transfer of actions after winding-up order.

Transfer of Actions after Winding-up Order.]—By *R. of S. C., Ord. XLIX. r. 5*, "When an order *has been made* by any Judge of the Chancery Division for the winding-up of any company, or for the administration of the assets of any testator or intestate, the Judge in whose Court such winding-up or administration shall be pending shall have power, without any further consent, to order the transfer to such Judge of any action pending in any other Court or Division brought or continued by or against such company, or by or against the executors or administrators of the testator or intestate whose assets are being so administered, as the case may be" (*c*).

The application under this rule should be made *ex parte* (*c*) and to the Division in which the winding-up or administration order is made.

Effect of winding-up order on action against contributories.

Effect of Winding-up Order on Action against Contributories.]—In the case of companies registered under Part VII. of the *Companies Act*, 1862, it is provided by sect. 198 of that Act that "Where an order has been made for winding-up a company registered in pursuance of this part of the Act, in addition to the provisions hereinbefore contained it is hereby further provided that no suit, action, or other legal proceeding shall be commenced or proceeded with against any contributory of the company in respect of any debt of the company, except with the leave of the Court, and subject to such terms as the Court may impose."

In the case of unregistered companies, it is provided by sect. 202, that, "Where an order has been made for winding-up an unregistered company, in addition to the provisions hereinbefore contained in the case of companies formed under this Act, it is hereby further provided that no suit, action, or other legal proceeding shall be commenced or proceeded with against any contributory of the company in respect of any debt of the company, except with the leave of the Court, and subject to such terms as the Court may impose."

Discovery.

Discovery.]—See *ante*, *Vol.* 1, p. 493.

Execution.

Execution.]—Execution is issued against the company, and its assets and effects are taken, in the usual way.

In the case of companies with limited liability, under the Act of 1862, execution cannot be issued against the property of the individual members of the company, and winding-up proceedings are the only mode in which such property can be made liable.

Other proceedings.

Other Proceedings.]—The other proceedings are the same as in ordinary cases.

(*c*) *In re Landore Siemen's Steel Co.*, 10 Ch. D. 489; 49 L. T. 35: *Field* v. *Field*, W. N. 1877, 98: *Whitaker* v. *Robinson*, Id. 201. See *Re Timms*, 38 L. T. 679: *In re Stubb's Estate*, 8 Ch. D. 154: *Re Thames Steam Ferry Co.*, 40 L. T. 422. See fully ante, Vol. 1, p. 414. When the action is pending before a Judge of the Chancery Division, the application must be made to the Lord Chancellor: *In re Madras Irrigation, &c. Co.*, 16 Ch. D. 702.

(4.) *Rectification of Register of Companies under Companies Act, 1862, s. 35.*

Remedy for improper entry or omission in register.

By the *Companies Act*, 1862, *s.* 35, "If the name of any person is without sufficient cause entered in or omitted from the register of members of any company under this Act, or if default is made, or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved, or any member of the company, or the company itself may, as respects companies registered in England or Ireland, by motion in any of her Majesty's superior Courts of law or equity, or by application to a Judge sitting in chambers, or to the vice-warden of the stannaries in the case of companies subject to his jurisdiction, and as respects companies registered in Scotland by summary petition to the Court of session, or in such other manner as the said Court may direct, apply for an order of the Court that the register may be rectified, and the Court may either refuse such application with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion, application, or petition, and any damages the party aggrieved may have sustained. The Court may in any proceeding under this section decide on any question relating to the title of any person who is a party to such proceeding to have his name entered in or omitted from the register, whether such question arises between two or more members or alleged members, or between any members or alleged members and the company, and generally the Court may in any such proceeding decide any question that it may be necessary or expedient to decide for the rectification of the register; provided that the Court, if a Court of common law, may direct an issue to be tried, in which any question of law may be raised, and a writ of error or appeal, in the manner directed by 'The Common Law Procedure Act, 1854,' shall lie."

The application under this section may be made by summons at Chambers, stating the nature of the rectification desired, and should be supported by an affidavit stating the facts entitling the applicant to the rectification (*d*).

Definition of "member."

By sect. 23, "The subscribers of the memorandum of association (*e*) of any company under this Act shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and upon the registration of the company shall be entered as members on the register of members hereinafter mentioned; and every other person who has agreed to become a member of a company under this Act, and whose name is entered on the register of members, shall be deemed to be a member of the company."

(*d*) It would be foreign to the object of this work to attempt to enter into the question as to when a party is entitled to the rectification. The numerous cases are collected in Buckley on Companies.

(*e*) See *Wilkinson* v. *Anglo-Californian Gold Mining Co.*, 18 Q. B. 728; 21 L. J., Q. B. 327: *Stewart* v. *Id.*, 18 Q. B. 736; 21 L. J., Q. B. 193.

By sect. 25, "Every company under this Act shall cause to be kept in one or more books a register of its members, and there shall be entered therein the following particulars: Register of members.

(1.) The names and addresses, and the occupations, if any, of the members of the company, with the addition, in the case of a company having a capital divided into shares, of a statement of the shares held by each member, distinguishing each share by its number: and of the amount paid or agreed to be considered as paid on the shares of each member:

(2.) The date at which the name of any person was entered in the register as a member:

(3.) The date at which any person ceased to be a member."

[This section also imposes a penalty on any company acting in contravention of it.]

By sect. 26, "Every company under this Act, and having a capital divided into shares, shall make once at least in every year a list of all persons who, on the fourteenth day succeeding the day on which the ordinary general meeting, or if there is more than one ordinary meeting in each year, the first of such ordinary general meetings is held, are members of the company; and such list shall state the names, addresses, and occupations of all the members therein mentioned, and the number of shares held by each of them, and shall contain a summary specifying the following particulars: List of members, &c. to be made and copy sent to registrar.

1. The amount of the capital of the company, and the number of shares into which it is divided:
2. The number of shares taken from the commencement of the company up to the date of the summary:
3. The amount of calls made on each share:
4. The total amount of calls received:
5. The total amount of calls unpaid:
6. The total amount of shares forfeited:
7. The names, addresses, and occupations of the persons who have ceased to be members since the last list was made, and the number of shares held by each of them.

"The above list and summary shall be contained in a separate part of the register, and shall be completed within seven days after such fourteenth day as is mentioned in this section, and a copy shall forthwith be forwarded to the registrar of joint stock companies."

By sect. 32, members of the company and others, subject to reasonable restrictions, may inspect the register, except when closed, and may have a copy of the same or any part thereof. Inspection of register.

By sect. 36, "Whenever any order has been made rectifying the register, in the case of a company thereby required to send a list of its members to the registrar, the Court shall, by its order, direct that due notice of such rectification be given to the registrar." Notice of rectification to registrar.

3. *Proceedings by and against Railway and similar Companies under the 8 & 9 V. c. 16, and the 26 & 27 V. c. 118 (f).*

To what Companies the Acts apply.]—The 8 & 9 V. c. 16, intituled "An Act for consolidating in one Act certain provisions usually To what companies the Acts apply.

(f) See the 17 & 18 V. c. 31, the Act for the better regulation of the traffic on railways and canals. See 31 & 32 V. c. 119, which contains

PART XII.

inserted in Acts with respect to the constitution of companies incorporated for carrying on undertakings of a public nature," by sect. 1, recites that, "It is expedient to comprise in one general Act sundry provisions relating to the constitution and management of joint stock companies, usually introduced into Acts of Parliament authorizing the execution of undertakings of a public nature by such companies, and that as well for the purpose of avoiding the necessity of repeating such provisions in each of the several Acts relating to such undertakings as for insuring greater uniformity in the provisions themselves," and enacts "that this Act shall apply to every joint stock company which shall by any Act which shall hereafter be passed be incorporated for the purpose of carrying on any undertaking, and this Act shall be incorporated with such Act; and all the clauses and provisions of this Act, save so far as they shall be expressly varied or excepted by any such Act shall apply to the company which shall be incorporated by such Act, and to the undertaking for carrying on which such company shall be incorporated, so far as the same shall be applicable thereto respectively; and such clauses and provisions, as well as the clauses and provisions of every other Act which shall be incorporated with such act, shall, save as aforesaid, form part of such Act, and be construed together therewith as forming one Act."

Interpretation clause.

Interpretation Clause, &c.]—Sect. 3 of the 8 & 9 *V. c.* 16, is the interpretation clause, and amongst other things enacts, "That the word *month* shall mean calendar month. The expression *the company* shall mean the company constituted by the special Act. The expression *the directors* shall mean the directors of the company, and shall include all persons having the direction of the undertaking, whether under the name of directors, managers, committee of management, or under any other name. The word *shareholder* shall mean shareholder, proprietor, or member of the company, and, in referring to any such shareholder, expressions properly applicable to a person shall be held to apply to a corporation; and the expression *the secretary* shall mean the secretary of the company, and shall include the word 'clerk.'"

Short title.

By sect. 4, "In citing this Act in other Acts of Parliament, and in legal instruments, it shall be sufficient to use the expression 'The Companies Clauses Consolidation Act, 1845.'"

By 26 & 27 *V. c.* 118, *s.* 1, "This Act may be cited as 'The Companies Clauses Act, 1863.'"

How contracts to be entered into.

How Contracts to be entered into.]—The 8 & 9 *V. c.* 16, *s.* 97, points out how contracts are to be entered into on behalf of the company (*g*).

Directors not personally liable.

By sect. 100, no director by being party to or executing in his

certain provisions as to the obligations and liability of railway companies as carriers, as to compensation for accidents, and for lands taken for or injured by railways, and as to arbitrations by the Board of Trade.

(*g*) See *Panting* v. *London and North Western R. Co.*, 8 Ex. 867; 23 L. J., Ex. 105: *Lowe* v. *Id.*, 18 Q. B. 632; 21 L. J., Q. B. 361: *Bateman* v. *Mid-Wales R. Co.*, 35 L. J., C. P. 205.

capacity of director any contract or other instrument on the part of the company, is to be personally liable.

Mode of proceeding by and against.

Mode of Proceeding by and against.]—The observations that have been made as to the mode of proceeding by and against corporations will for the most part apply here. The company should be described in the writ of summons and other proceedings by their corporate name.

Security for costs.

A foreign railway company is bound to give security for costs, notwithstanding it has personal property in England, and some of its shareholders reside in England, who are responsible to the extent of their unpaid capital (*h*).

Notice of action (*i*).

Sometimes a railway or other similar company is entitled to notice of action under the Act by which it is incorporated, for things done in pursuance of the Act. By a railway Act, it was provided, that no action should be brought against any *person* for anything done or omitted to be done in pursuance of the Act, or in the execution of its powers or authority, unless twenty days' previous notice in writing should have been given by the party intending to commence and prosecute such action, to the intended *defendant*, &c.: held, that the *company* were included in the word "person," and entitled to notice of action, notwithstanding that, in numerous instances throughout the Act, the terms "person" and "party" were used in opposition to "corporation" (*k*). By a railway Act it was enacted, that no action should be brought for anything done or omitted to be done in pursuance of the Act, or in the execution of the powers or authorities given by the Act, unless twenty days' previous notice in writing should be given; the company having, contrary to the provisions of the Act, made excessive charges for the carriage of goods, and claimed and received the amount of such charges from the plaintiff:—Held, that, in an action for money had and received, brought to recover back the sums so extorted, the company were entitled to a notice of action (*l*). A company by their Act were empowered to provide locomotive engines on the railway, and charge for the use of them, and to use locomotive engines and carriages for the conveyance of passengers, &c., and to charge for such conveyance, &c.; it was enacted, that no action or proceeding should be prosecuted against any person or corporation *for anything done in pursuance of the Act, or in the execution of the powers or authorities* given by it, without twenty days' notice in writing; an action was brought against the

(*h*) *The Kilkenny and Great Southern and Western R. Co.* v. *Fielden*, 6 Ex. 81; 20 L. J., Ex. 141. As to security for costs in general, see ante, Vol. 1, p. 360.

(*i*) As to notice of action in general, see ante, Vol. 1, p. 206.

(*k*) *Boyd* v. *The London and Croydon R. Co.*, 6 Sc. 461.

(*l*) *Kent* v. *Great Western R. Co.*, 3 C. B. 714; 16 L. J., C. P. 72, where the Master allowed a large sum for the costs of the notice of action: *Garton* v. *The Great Western R. Co.*, 28 L. J., Q. B. 321. And see *Kennet and Avon Canal Co.* v. *The Great Western R. Co.*, 7 Q. B. 824, where an action of debt given by the company's Act for liquidated damages, incurred by obstructing a canal, was held to be an action for something done in pursuance of the Act, and that a clause as to notice of action, &c. applied. In this case it was held, that the time of limitation for the commencement of the action ran from the last obstruction, and not from the demand of payment.

PART XII.

company in their capacity of carriers, for an injury to the plaintiff whilst he was a passenger on the railway: it was held, that no notice of action was necessary, although, for the purpose of showing that the accident occurred from a speed which was improper under the circumstances, evidence was given of the defective state of the rails (*m*): and the same was held, where the company's Act had similar enactments, in an action against a company for not safely carrying some horses on the railway (*n*): et per *Parke*, B., in this case—"If the action was brought against the company for the omission of some duty imposed upon them by the Act, this notice would be required. If, for instance, it was founded on a neglect in not duly fencing the railway, on account of which the travelling on it was dangerous to those passing along it, assuming that such an obligation arose from the 180th section or from the general provisions of the Act, that case would have fallen within the 214th sect. (the section requiring notice of action)."

Tender of amends.

By the 8 & 9 *V.* c. 16, *s.* 141, "If any party shall have committed any irregularity, trespass, or other wrongful proceeding in the execution of this or the special Act, or by virtue of any power or authority thereby given, and if, before action brought in respect thereof, such party make tender of sufficient amends to the party injured, such last-mentioned party shall not recover in any such action; and if no such tender shall have been made, it shall be lawful for the defendant, by leave of the Court where such action shall be pending, at any time before issue joined, to pay into Court such sum of money as he shall think fit; and thereupon such proceedings shall be had as in other cases where defendants are allowed to pay money into Court."

Service of writ, &c.

By the 8 & 9 *V.* c. 16, *s.* 135 (*o*), "Any summons or notice, or any writ or other proceeding at law or in equity, requiring to be served upon the company, may be served by the same being left at or transmitted through the post, directed to the principal office (*p*) of the company, or one of their principal offices where there shall be more than one, or being given personally to the secretary, or in case there be no secretary then by being given to any one director of the company" (*q*). Under this section, in ejectment against a railway company personal service upon the secretary is good (*r*).

Change of name.

Change of Name.]—By 26 & 27 *V.* c. 118, *s.* 36, "Where by any special Act hereafter passed, and incorporating this part of this

(*m*) *Carpue* v. *The London and Brighton R. Co.*, 5 Q. B. 747.

(*n*) *Palmer* v. *The Grand Junction R. Co.*, 4 M. & W. 749.

(*o*) The 8 & 9 V. c. 20, the Railways Clauses Consolidation Act, contains a clause (sect. 138) similar to the above.

(*p*) *Garton* v. *The Great Western R. Co.*, E., B. & E. 837; 27 L. J., Q. B. 375; where it was held to be insufficient to serve a notice at the Bristol office of the company.

(*q*) Where the secretary sued the company and served the writ on a director it was held that such service was not sufficient. *Lawrenson* v. *Dublin Metropolitan Junction R. Co.*, 37 L. T. 32 (C. A.). See *Wilson* v. *The Caledonian R. Co.*, 5 Ex. 822. Part of this railway is in England and part in Scotland, and it was held that service on the secretary in England was good. See *Evans* v. *The Dublin and Drogheda R. Co.*, 14 M. & W. 142, which company was established for making a railway in Ireland.

(*r*) *Doe* d. *Bayes* v. *Roe*, 16 M. & W. 98; 16 L. J., Ex. 273: *Doe* d. *Bromley* v. *Roe*, 8 Dowl. 858.

Act, the name of any company incorporated either before or after the passing of this Act for the purpose of carrying on any undertaking is changed,—then and in every such case from the passing of the special Act, the company by their new name shall have and may exercise the powers then vested in the company by their original name: and all Acts relating to the company by their original name shall be read and interpreted as if throughout those Acts wherever the original name of the company, or any reference to the company by their original name occurs, the new name of the company or a reference to the company by their new name was substituted."

Actions, &c. not to abate.

By 26 & 27 V. c. 118, *s.* 37, "No action, suit, bill, process, writ, indictment, information or other proceeding, whether civil or criminal, which, at or immediately before the passing of the special Act, is commenced and is then pending,—either at the suit or instance of the company, by their original name, against any other corporation or any person, or at the suit or instance of any other corporation or any person against the company, by their original name,—shall abate, determine or be otherwise impeached or affected for or by reason of the change of the name of the company; nor shall any notice, tender, requisition, warrant, summons, pleading, civil or criminal writ, or other process, record, deed, contract, agreement, writing or instrument then or thereafter to be made, issued, written or commenced, be deemed to be vacated, discharged, invalidated, prejudiced or affected by reason of the company or their undertaking being therein respectively called by the original name of the company or undertaking; and it shall not be necessary in any bill, suit, indictment, information, proceeding, notice, tender, requisition, warrant, summons, pleading, civil or criminal writ or other process, or in any record, deed, contract, agreement, writing or other instrument or matter, to aver that the company had been called or known for any period by the original name of the company, or that their undertaking had been called or known within that period by the original name of the undertaking, and that by the special Act effecting the change the names of the company and their undertaking were changed, and that after the passing of that special Act the company had been called or known by their new name and their undertaking by its new name; but it shall be deemed true, lawful and sufficient therein to aver the style and describe the company by their new name, and their undertaking by its new name, in the same manner as if the company had been originally incorporated, called or known by their new name, and as if their undertaking had been originally called or known by its new name."

Before this enactment it was held that if, pending an action against the company, their name was changed by Act of Parliament, a suggestion should be entered of such fact (*s*).

General saving of rights.

By 26 & 27 V. c. 118, *s.* 38, "Notwithstanding the change of the name of the company, everything before the passing of the special Act effecting the change done, suffered or confirmed, under or by

(*s*) *Hebblethwaite* v. *The Leeds and Thirsk R. Co.*, 21 L. J., Ex. 37. See *Selby* v. *The East Anglian R. Co.*, 7 Ex. 53; 21 L. J., Ex. 27, where a company after giving a bond changed their name.

PART XII.

virtue of any other Act shall be as valid as if the special Act effecting the change were not passed; and the change of name and the last-mentioned special Act respectively shall accordingly be subject and without prejudice to everything so done, suffered or confirmed before the passing of the last-mentioned special Act, and to all rights, liabilities, claims, and demands, then present or future, which, if the change of name had not happened, and such last-mentioned special Act had not been passed, would be incident to or consequent on anything so done, suffered, or confirmed."

Contracts, &c. preserved.

By 26 & 27 *V. c.* 118, *s.* 39, "Notwithstanding the change of the name of the company, all deeds, instruments, purchases, sales, securities, and contracts before the passing of the special Act effecting the change made under any other Act, or with reference to the purposes thereof, shall be as effectual to all intents in favour of, against, and with respect to the company as if the name of the company had remained unchanged."

Proceedings where company unable to meet its engagements.

Proceedings where Company unable to meet its Engagements.]—By 30 & 31 *V. c.* 127, *ss.* 6—9, directors of a railway company unable to meet its engagements with its creditors may prepare a scheme of arrangement, and file the same in the Chancery Division of the High Court of Justice, and thereupon actions and executions against the company may be restrained, or, under the present practice, stayed by the Court in which they are pending. *See ante, Vol.* 1, p. 361.

Compensation for accidents.

Compensation for Accidents.]—By 31 & 32 *V. c.* 119, *s.* 25, "Where a person has been injured or killed by an accident on a railway, the Board of Trade, upon application in writing made jointly by the company from whom compensation is claimed and the person if he is injured, or his representatives if he is killed, may if they think fit appoint an arbitrator, who shall determine the compensation (if any) to be paid by the company." As to the remuneration of the arbitrator, &c., *see sects.* 30—32.

Execution against the company.

Execution against the Company.]—As to issuing execution against a corporation, *see ante*, p. 1052. A mortgage for securing money borrowed by a railway company, according to the form in Schedule (C) annexed to *The Companies Clauses Consolidation Act*, 1845, comprises the lands as well as the rails and chattels of the company, and is entitled to priority over a writ of elegit sued out against the company by a judgment creditor thereof (*t*). By the special Act of a railway company, it was provided that the bond creditors and mortgagees of the company should be entitled to be paid out of the tolls and other estates and effects of the company, the sums advanced, &c., and that, in all other respects, the provisions of the Companies Clauses Consolidation Act should be applicable:—Held, that, having regard to the 36th and 44th sections of the latter Act, a bond creditor had no lien on the estates or effects of the company; and that the goods and chattels of the company were liable to be seized under a writ of *fi. fa.* at the suit of a judgment creditor (*u*).

(*t*) *Legg* v. *Mathieson*, 29 L. J., Ch. 385.

(*u*) *Russell* v. *East Anglian R. Co.*, 3 Mac. & G. 125; 20 L. J., Ch. 257.

By The Railway Companies Act, 1867 (30 & 31 *V. c.* 127), *s.* 4, "The engines, tenders, carriages, trucks, machinery, tools, fittings, materials, and effects constituting the rolling stock and plant used or provided by a company (*x*) for the purposes of the traffic on their railway, or of their stations or workshops, shall not, after their railway or any part thereof is open for public traffic, be liable to be taken in execution at law, or in equity, at any time after the passing of this Act and before the 1st day of September, 1868 (*y*), where the judgment (*z*) on which execution issues is recovered in an action (*a*) on a contract entered into after the passing of this Act [20th August, 1867], or in an action, not on a contract, commenced after the passing of this Act: but the person who has recovered any such judgment may obtain the appointment of a receiver, and, if necessary, of a manager of the undertaking of the company on application by petition in a summary way to the Court of Chancery in England, or in Ireland, according to the situation of the railway of the company: and all money received by such receiver or manager shall, after due provision for the working expenses (*b*) of the railways and other proper outgoings (*b*) in respect of the undertaking, be applied and distributed under the direction of the Court in payment of the debts of the company, and otherwise according to the rights and priorities of the persons for the time being interested therein, and on payment of the amount due to every such judgment creditor as aforesaid the Court may, if it think fit, discharge such receiver or such receiver and manager."

Restriction on execution against personal property of railway company.

Sect. 5. "If in any case where property of a company has been taken in execution a question arises whether or not it is liable to be so taken notwithstanding this Act, the same may be heard and determined on an application by either party by summons in a summary way to the Court out of which the execution issued, or if the Court is one of the superior Courts of law then to a Judge of any one of those Courts, and such determination shall be final and binding."

Determination of questions respecting executions.

This 4th section takes away the right of taking in execution the rolling stock and plant of the company (*c*), and applies to all cases where the company has once been opened for traffic, even though it has since been closed under circumstances rendering it uncertain whether it will ever be re-opened (*d*). It does not apply, however, where the company has never commenced to acquire the land or

---

(*x*) By sect. 3, "company" means a railway company; that is to say, a company constituted by Act of Parliament, or by certificate under Act of Parliament, for the purpose of constructing, maintaining, or working a railway (either alone or in conjunction with any other purpose). The section applies although the railway form but a subordinate part of the company's undertaking: *Great W. R. Co.* v. *Tahourdin*, 13 Q. B. D. 320; 53 L. J., Q. B. 69; 50 L. T. 186.

(*y*) This section was continued by subsequent Acts, and is made perpetual by 38 & 39 V. c. 31.

(*z*) By sect. 3 "judgment" includes decree, order or rule.

(*a*) By sect. 3 "action" includes suit or other proceeding.

(*b*) See *Re Cornwall Minerals R. Co.*, 48 L. T. 41.

(*c*) *In re Manchester and Milford R. Co., Ex p. Cambrian R. Co.*, 14 Ch. D. 645; 49 L. J., Ch. 365 (C. A.).

(*d*) *Midland Waggon Co.* v. *Potteries, &c. R. Co.*, 6 Q. B. D. 36; 43 L. T. 511, Ex. D.

PART XII.

construct the works authorized by the Act (*d*). The section, however, gives the execution creditor new rights, which are independent of the fact whether such company has or has not rolling stock or plant to be taken in execution (*e*).

Wherever the judgment creditor of a railway company is unpaid, the appointment of a receiver or manager is now a matter of right (*e*). And where the debtor company is carrying on its business in the ordinary way, conducting its own traffic arrangements, the appointment of a manager is "necessary" (*e*).

As a general rule, the directors, or secretary, or some of them, will be appointed by the Court managers where they are acting fairly, and the order for the appointment of a manager will be made without prejudice to any application on the part of the directors to propose themselves, or some of their number, to act as managers (*e*).

The only evidence required in support of an application under the 4th section by a judgment creditor for the appointment of a manager is an affidavit that he is such a creditor and that his judgment debt is unsatisfied, and that the company is a going concern, carrying on its own business and conducting its own traffic in the ordinary way (*e*).

Execution against shareholders.

Execution against Shareholders.]—By the 8 & 9 *V. c.* 16, *s.* 8, "Every person (*f*) who shall have subscribed the prescribed sum or upwards to the capital of the company, or shall otherwise have become entitled to a share in the company, and whose name shall have been entered on the register of shareholders hereinafter mentioned (*h*), shall be deemed a shareholder of the company."

Definition of shareholders (*g*).

Every person who shall have subscribed, in this section, means every person who shall have contracted to subscribe (*i*), and who by law can enter into contracts (*k*). Infants may be shareholders. As to their liability for calls, see cases cited *post*, p. 1078, n. (*y*). If there is nothing in the company's Act to the contrary, the purchaser of scrip certificates for shares before the Act is obtained may be registered as a shareholder in respect of such shares (*l*).

Company to keep a register of shareholders.

By the 8 & 9 *V. c.* 16, *s.* 9, the company are to keep a book, to be called the "Register of Shareholders," and in such book is to be entered from time to time (*m*) the names of the parties entitled to shares, and such book is to be authenticated by the common seal of the company being affixed thereto. The provisions of the statute with respect to the mode of keeping this book should be complied with, as, by the 28th section of this Act, it is made *primâ facie* evidence of proprietorship in an action for calls. It would seem

(*d*) *In re Birmingham and Litchfield R. Co.*, 18 Ch. D. 155; 50 L. J., Ch. 594.

(*e*) See note (*e*), ante.

(*f*) See *Powis* v. *Butler*, 27 L. J., C. P. 249; *Poole* v. *Knott*, 28 L. J., Q. B. 323, decided under the 7 & 8 V. c. 113. See *Portal* v. *Emmens*, 1 C. P. D. 664; 46 L. J., C. P. 179, a case under a special Act. And see *Kippling* v. *Todd*, 3 C. P. D. 550; 47 L. J., C. P. 617.

(*g*) See the interpretation clause, ante, p. 1066.

(*h*) See 9th section, infra.

(*i*) 3 Ex. 574, per *Parke*, B.

(*k*) *Newry and Enniskillen R. Co.* v. *Coombe*, 3 Ex. 576, per *Rolfe*, B.

(*l*) *London Grand Junction R. Co.* v. *Freeman*, 2 Sc. N. R. 705.

(*m*) See *Fry* v. *Russell*, 27 L. J., C. P. 153; *Powis* v. *Butler*, 27 L. J., C. P. 249; *Poole* v. *Knott*, 28 L. J., Q. B. 322, cases decided under the 7 & 8 V. c. 113, as to the effect of the death of a shareholder.

that an entry in the book describing a party as possessed of a certain number of shares, numbered from one given number to another given number, and stating a gross amount as paid on those shares, is sufficient (*u*). Where the company's Act required the book "*to be kept by the secretary of the company*," the Court held that the entries therein need not be written with the secretary's own hand (*o*). The Court will not grant a mandamus, commanding a railway company to take the seal off the register of shareholders, on a suggestion that it was affixed without authority, and contrary to the provisions of the 8 & 9 *V. c.* 16 (*p*). As to an execution creditor's right to inspect this book, *see sect.* 36 *of the Act, infra.*

Execution against shareholders to the extent of their shares in capital not paid up.

By the 8 & 9 *V. c.* 16, *s.* 36, "If any execution (*q*), either at law or in equity, shall have been issued against the property or effects of the company, and if there cannot be found sufficient whereon to levy such execution, then such execution may be issued against any of the shareholders (*r*) to the extent of their shares respectively in the capital of the company not then paid up (*s*): Provided always, that no such execution shall issue against any shareholder except upon an order of the Court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open Court after sufficient notice in writing to the persons sought to be charged; and upon such motion such Court may order execution to issue accordingly; and for the purpose of ascertaining the names of the shareholders, and the amount of capital remaining to be paid upon their respective shares, it shall be lawful for any person entitled to any such execution, at all reasonable times, to inspect the register of shareholders without fee."

Mode of procedure (*t*).

By *R. of S. C., Ord. XLII. r.* 23 (*ante*, p. 955), "Where a party is entitled to execution against any of the shareholders of a joint stock company upon a judgment recorded against such company, or against a public officer or other person representing such company, the party alleging himself to be entitled to execution may

---

(*u*) *Bain* v. *The Proprietors of the Whitehaven and Furness Junction R. Co. and Forbes*, 3 H. L. 1.

(*o*) *Southampton Dock Co.* v. *Richards*, 1 Sc. N. R. 219.

(*p*) *Ex p. Nash*, 15 Q. B. 92; 19 L. J., Q. B. 296.

(*q*) As to this section applying where the company are plaintiffs, see *Kilkenny R. Co.* v. *Fielden*, 15 Jur. 191, Ex.

(*r*) That is to say, the shareholders at the time of the return of *nulla bona* to the execution issued against the company: *Nixon* v. *Green*, 11 Ex. 550; 25 L. J., Ex. 209; 3 H. & N. 695; 27 L. J., Ex. 509. As to who are shareholders, see *Portal* v. *Emmens*, 1 C. P. D. 664; 46 L. J., C. P. 179.

(*s*) See *Guest* v. *Worcester, &c. R. Co.*, 38 L. J., C. P. 22.

(*t*) See generally, per *Willes*, J., L. R., 6 C. P. at p. 580. Before the Jud. Acts, under the 36th section the Court would not, except with the consent of the shareholder, order execution to issue against him, but would only, upon sufficient ground being shown, allow a *sci. fa.* to issue, in order that execution might be obtained against him to the extent pointed out by that section. *Burke* v. *Dublin, &c. R. Co.*, L. R., 3 Q. B. 47; 37 L. J., Q. B. 50. A suggestion was not the proper course. *Hitchins* v. *Kilkenny, &c. R. Co.*, 10 C. B. 160; 20 L. J., C. P. 31: *Devereux* v. *The Same Co.*, 5 Ex. 834; 20 L. J., Ex. 37. The *sci. fa.* called on the shareholder to show cause why execution should not be had against him. It may be doubtful whether the *sci. fa.* is not still an existing mode of procedure, especially as sect. 132 of the C. L. P. Act, 1852, is still unrepealed; but it is submitted that it is not, and that the proceedings under Ord. XLII. r. 23, are substituted. See an article in 76 L. T. (Jour.) 279.

PART XII.

apply to the Court or a Judge for leave to issue execution accordingly. And such Court or Judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried. And in either case such Court or Judge may impose such terms as to costs or otherwise as shall be just."

A railway or other company, formed under the 8 & 9 V. c. 16, and 26 & 27 V. c. 118, is a joint stock company (*x*), and, therefore, this rule applies, and, it is submitted, modifies the statute so far as practice is concerned.

The statute, it will be observed, expressly requires that the application should be made "in open Court;" and although an application under the rule might be made at Chambers, there is nothing to prevent its being made to the Court, and in view of the express words of the statute it is submitted that it should still so be made. The statute requires that it should be made after sufficient notice (*y*), but there is nothing to show what is such notice. The ordinary two days' notice of motion would appear very short, but it is submitted that a ten (*z*) days' notice would under most circumstances be sufficient, and should be given.

Directions as to obtaining leave to issue execution.

Issue execution against the property and effects of the company, and use all reasonable efforts to levy under such execution (a). It will be seen what efforts should be made, by referring to what is stated infra as to the form of the affidavit in support of the application to the Court. Serve notice of motion of the intended application upon the shareholder sought to be charged (b). Make an affidavit, stating the facts mentioned infra (b). Give such affidavit, with a brief copy of it, and such observations as you may think necessary, to counsel, with instructions to make the application. Set down the motion. It will come on in its order in the motion list. The shareholder, if he wishes to oppose the application, must appear and do so. The order is made or refused on the hearing of the application, and a rule nisi is not now granted. (See R. of S. C., Ord. LII. rr. 1 and 2, post, Ch. CXXII.) Draw up the order if made, and serve it on the shareholder in the usual way.

Service of notice.

It would seem that the notice of motion must be personally served (*c*).

(*x*) See 8 & 9 V. c. 16, s. 1, ante, p. 1066.

(*y*) A notice under s. 13 of the 7 & 8 V. c. 113, the repealed Banking Act, of an intention to apply to the Court or a Judge for leave to issue execution, was held good, though in the alternative. *Powis* v. *Harding*, 26 L. J., Ex. 107. A joint notice under this Act was sufficient to found a motion against one. *S. C.*

(*z*) 7 & 8 V. c. 110, s. 68.

(*a*) It seems it is not necessary that the sheriff's return to the writ should be filed before making the motion. *Ilfracombe R. Co.* v. *Devon and Somerset R. Co.*, L. R., 2 C. P. 15.

(*b*) See form, Chit. F., p. 521.

(*c*) See *Ilfracombe R. Co.* v. *Devon and Somerset R. Co.*, L. R., 2 C. P. 15. In some cases it has been held, however, that all that was necessary was that the party should have ten days' notice so brought home to him as to enable him to appear to show cause against the application. See *Turner* v. *The Metropolitan Live Stock Co.*, 2 Exch. 567; 6 D. & L. 59, decided on the 7 & 8 V. c. 110, s. 68. And see *Edwards* v. *Kilkenny, &c. R. Co.*, 1 C. B., N. S. 409: *Esdaile* v. *Smith*, 18 L. J., Ex. 120.

Affidavit in support of application to Court.

The affidavit in support of the motion should be entitled in the original action (*c*). It need not state positively that the party against whom the application is made is a shareholder of the company. It will be sufficient if it appear thereby that his name is on the register of shareholders (*d*); or if it appear therefrom in some other way that he is a shareholder (*f*). It should appear how many shares he has, and how much has not been paid up thereon. In order to ascertain this, the plaintiff may, under the 36th section (*ante*, p. 1073), inspect the register of shareholders. It should be shown that the company is within the provisions of the Act—that judgment has been obtained against the company, and how much remains due thereon; that execution has issued against the property and effects of the company; and that the plaintiff has used due diligence to levy under it and obtain his debt from such property and effects (*g*). The Court may order the writ to issue although there be property of the company which has not been taken in execution, provided it be shown that such property is insufficient to satisfy the judgment (*h*). Where the company was established for making a railway in Ireland, although no proceedings had been taken to obtain satisfaction in Ireland, and the affidavits did not expressly negative the existence of property there, the Court granted leave to proceed against a director who had stated at a meeting of the company in London, that, in consequence of the shareholders not paying the calls, the directors had no funds to meet the claims against them, one of the claims being the judgment obtained by the plaintiff (*i*). It is not sufficient, in order to obtain leave to proceed against a shareholder, to show that *fi. fas.* have been issued against the effects of the company into two counties, and *nulla bona* returned to them (*k*). As to using due diligence to enforce a judgment obtained against the public officer of a company against the members for the time being, before proceeding against former members,

(*c*) *Edwards* v. *Kilkenny, &c. R. Co.*, 3 C. B., N. S. 786.

(*d*) See *Turner* v. *The Metropolitan Live Stock Co.*, 2 Ex. 567; 6 D. & L. 59; 17 L. J., Ex. 264: *Corder* v. *The Universal Gas Light Co.*, post, p. 1076: *Palmer* v. *Justice Ins. Co.*, 26 L. J., Q. B. 73, decided on the 7 & 8 V. c. 110, s. 68.

(*f*) *Rastrick* v. *The Derbyshire, &c. R. Co.*, 9 Ex. 149; 23 L. J., Ex. 2. See *Edwards* v. *Kilkenny, &c. R. Co.*, 14 C. B., N. S. 526: *Mather* v. *National Ass. Co.*, 14 C. B., N. S. 676.

(*g*) *Thompson* v. *The Universal Salvage Co.*, 3 Ex. 310; 18 L. J., Ex. 157: *King* v. *Parental Endowment Ass. Co.*, 11 Ex. 443; 25 L. J., Ex. 18: *Ridgway* v. *Security Mutual Life Ass. Soc.*, 18 C. B. 686: *Hill* v. *London and Co. Ass. Co.*, 1 H. & N. 398; 26 L. J., Ex. 89.

(*h*) *Ilfracombe R. Co.* v. *Poltimore*, L. R., 3 C. P. 288.

(*i*) *Dereveux* v. *Kilkenny and Great Southern and Western R. Co.*, 5 Ex. 834; 20 L. J., Ex. 37: *Nixon* v. *Kilkenny, &c. R. Co.*, 25 L. J., Ex. 249. See *Rigby* v. *The Dublin Trunk Connecting R. Co.*, 36 L. J., C. P. 282, where it was alleged the company had property in Ireland.

(*k*) *Hitchins* v. *Kilkenny, &c. R. Co.*, 10 C. B. 160; 20 L. J., C. P. 31. Where the affairs of a company registered under the 7 & 8 V. c. 110, were being wound up under the repealed winding-up Act, the 11 & 12 V. c. 45, the creditor must have proved his debt before the Master, before applying for a *sci. fa.*, see *Thompson* v. *The Universal Salvage Co.*, 3 Ex. 310; 18 L. J., Ex. 157: *Peart* v. *The Universal Salvage Co.*, 6 C. B. 478; 18 L. J., C. P. 23: *Mackenzie* v. *Sligo and Shannon R. Co.*, 4 E. & B. 119; 24 L. J., Q. B. 17: *Hill* v. *London and Co. Ass. Co.*, 1 H. & N. 398; 26 L. J., Ex. 89.

PART XII.

Second application to the Court.

see post, p. 1087. An affidavit must be made of the service of the notice referred to in the 36th section (*ante*, p. 1074).

It would seem that, if an application for leave to proceed is unsuccessful on the ground that no sufficient notice was given as required by the Act, another application may be made upon a fresh notice being given, and that the non-payment of the costs of the first application, ordered to be paid by the applicant, is no bar to a second, unless, perhaps, it appears there is no means of enforcing the payment of such costs (*k*).

Where Court orders executions.

If the Court orders execution to issue against the shareholder, draw up the order and serve it in the usual way, and issue execution in accordance with the order (*see Vol. 1, Ch. LXXIV.*).

In a clear case the Court will order execution to issue (*l*), but the Court might, where the circumstances required it, direct any questions to be tried before ordering execution to issue. (*See Ord. XLII. r. 23, ante*, p. 1074.) Formerly the Court had a discretion as to allowing the writ of *sci. fa.* to issue (*m*), but this was a judicial discretion; and, therefore, if the creditor made out a *primâ facie* legal claim to such writ, and it could not be shown that there was a sufficient answer to it, or that the creditor was himself indebted as a shareholder to the company, or that the writ was applied for vexatiously or oppressively, the Court was bound, in the exercise of its discretion, to allow the writ to issue (*n*). It was no answer to the application for such writ that the judgment was obtained fraudulently or collusively, as this might be pleaded in defence (*o*). Neither was it any reason for refusing the writ that the creditor induced Parliament, by false representations, to pass the Act by which the company was constituted, and to enact that his claim should be a debt payable by the company (*n*).

(*k*) *Corder* v. *The Universal Gas Light Co.*, 6 C. B. 554; 18 L. J., C. P. 90.

(*l*) *Hitchins* v. *Kilkenny, &c. R. Co.*, 10 C. B. 160; 20 L. J., C. P. 31: *Devereux* v. *The Same Co.*, 5 Ex. 834; 20 L. J., Ex. 37. The *sci. fa.* called on the shareholder to show cause why execution should not be had against him; ante, p. 1073, n. (*t*). By Ord. XLII. r. 26, any person, not being a party in an action against whom obedience to any judgment or order may be enforced, shall be liable to the same process for enforcing obedience to such judgment or order as if he were a party to the action; Vol. 1, p. 788: per Cur. *Miller's case*, L. R., 3 Q. B. 47: *Healey* v. *Chichester, &c. R. Co.*, L. R., 9 Eq. 148; Jud. Act, 1873, s. 25, sub-s. 11; Vol. 1, p. 6.

(*m*) *Shrimpton* v. *Sidmouth R. Co.*, L. R., 3 C. P. 80. See *Scott* v. *Uxbridge R. Co.*, L. R., 1 C. P. 596.

(*n*) *Lee* v. *The Bude, &c. R. Co.*, L. R., 6 C. P. 576; 40 L. J., C. P. 285: *Williams* v. *Sidmouth R. and Harbour Co.*, 36 L. J., Ex. 184.

(*o*) See *Marson* v. *Lund*, 16 Q. B. 344; 20 L. J., Q. B. 190. As to pleading that the judgment was obtained by collusion between the plaintiff and the directors of the company, see *Edwards* v. *The Kilkenny, &c. R. Co.*, 25 L. J., C. P. 224: *Green* v. *Nixon*, 27 L. J., Ch. 819: *Lee* v. *The Bude, &c. R. Co.*, L. R., 6 C. P. 576; 40 L. J., C. P. 285. To an application by a judgment creditor, made under the 7 & 8 V. c. 113, the [illegible] Act for incorporating banking companies, for leave to issue execution against a shareholder whose name appeared on the last delivered memorial, it was no answer that the latter was induced to become a shareholder by the fraud of the directors, and that he repudiated his contract as soon as he became aware of the fraud: *Powis* v. *Harding: Dossett* v. *The Same: Bendy* v. *The Same*, 26 L. J., C. P. 107: *Henderson* v. *The Royal British Bank*, 26 L. J., Q. B. 112.

A shareholder is not liable for a part of the debt which has been actually levied on the property of the company; but if land of the company has been extended under an *elegit*, and the only means of satisfying the debt arise from the future rents of the land, execution may issue against a shareholder for the full amount of the debt (*p*). The plaintiff having recovered judgment against the defendants, a railway company, gave a shareholder notice that he was about to apply for a *scire facias* against him; part of the judgment debt was satisfied by payments from other persons. The plaintiff claimed to be entitled to recover from the shareholder a sum which included the residue of the judgment debt, interest thereon, and costs incurred in certain writs of *elegit* against the company. This sum the shareholder offered to pay under protest; but the plaintiff refused to receive it under protest, and applied for leave to proceed against the shareholder:—Held, that the tender under protest was valid; that the costs were not chargeable against the shareholder; and that the rule ought to be refused with costs, without prejudice to a future application, if the sum claimed, less the costs, were not paid within a reasonable time (*q*). When pending a rule for a *scire facias* against a shareholder, obtained by one creditor of the company, a second rule obtained by another creditor against the same shareholder was made absolute, under which he paid all that remained due on his shares:—Held, that the first rule must be discharged (without costs) although the shareholder had paid before execution was issued against him (*r*). Where, after a rule *nisi* for a *scire facias* against a shareholder had been granted, the applicant obtained satisfaction of his judgment by means of rules against other shareholders, it was held that the rule first mentioned must be discharged without costs (*r*).

Reimbursement of shareholders.

By 8 & 9 *V. c.* 16, *s.* 37, "If by means of any such execution any shareholder shall have paid any sum of money beyond the amount then due from him in respect of calls, he shall forthwith be reimbursed such additional sum by the directors out of the funds of the company."

Actions for calls (*s*).

Action for Calls.]—By the 8 & 9 *V. c.* 16, *ss.* 21, 22, the directors have power to make calls upon the shareholders in respect of the capital for which they have subscribed; twenty-one days' notice, at the least, is to be given of each call.

Who liable.

The obligation to pay calls is a statutory one, and cannot be described as a contract to pay same (*t*). It is only shareholders (*u*)

(*p*) *Addison* v. *Tate*, 11 Ex. 250; 24 L. J., Ex. 249; *R.* v. *Derbyshire, &c. R. Co.*, 3 E. & B. 784; 23 L. J., Q. B. 333.

(*q*) *Scott* v. *The Uxbridge and Rickmansworth R. Co.*, 35 L. J., C. P. 293.

(*r*) *Burke* v. *The Dublin Trunk Connecting R. Co.*, 37 L. J., Q. B. 50. See *Rigby* v. *Same Co.*, 36 L. J., C. P. 282.

(*s*) As to a creditor of a cost book mining company bringing an action against a shareholder of the company for the purpose of enforcing a call, see *Escott* v. *Gray*, 47 L. J., C. P. 606.

(*t*) *Birkenhead, Lancashire and Cheshire Junction R. Co.* v. *Pilcher*, 5 Ex. 24; 19 L. J., Ex. 207; *Cork and Bandon R. Co.* v. *Goode*, 22 L. J., C. P. 198, where a plea that the causes of action did not accrue within six years was held bad.

(*u*) *The Wolverhampton New Waterworks Co.* v. *Hawkesford*, 7 C. B., N. S. 795; 28 L. J., C. P. 242.

PART XII.

de jure (*y*), and who are on the sealed register of shareholders (*z*), who are liable to pay calls.

Interest to be paid on.

By the 8 & 9 *V.* c. 16, *s.* 23, "If before or on the day appointed for payment, any shareholder do not pay the amount of any call to which he is liable, then such shareholder shall be liable to pay interest for the same at the rate allowed by law, from the day appointed for the payment thereof to the time of the actual payment."

Enforcement of calls by action.

By sect. 25, "If at the time appointed by the company for the payment of any call, any shareholder fail to pay the amount of such call, it shall be lawful for the company to sue such shareholder for the amount thereof in any Court of law or equity having competent jurisdiction, and to recover the same, with lawful interest, from the day on which such call was payable" (*a*).

Statement of claim in action for calls.

By sect. 26, "In any action or suit to be brought by the company against any shareholder to recover any money due for any call, it shall not be necessary to set forth the special matter, but it shall be sufficient for the company to declare (*b*) that the defendant is the holder of one share or more in the company (stating the number of shares), and is indebted to the company in the sum of money to which the calls in arrears shall amount in respect of one call or more upon one share or more (stating the number and amount of each of such calls), whereby an action hath accrued to the company by virtue of this and the special Act" (*c*).

There may be some doubt as to the effect of the Judicature Acts and the R. of S. C. on this section. (*See Ord. XIX. rr.* 1, 4; *Judicature Act*, 1875, *s.* 21.) No practical difficulty can however arise from this, since it is conceived that a statement of claim (which is clearly substituted for the declaration), containing the facts required by the section, would be sufficient.

The allegation "That the defendant is the holder of the shares," means that he was the holder at the time the calls were made (*d*). Before the *Com. Law Proc. Act*, 1852, a declaration which omitted

---

(*y*) See *West London R. Co.* v. *Bernard*, 1 D. & M. 397: *Newry and Enniskillen R. Co.* v. *Edmunds*, 2 Ex. 118: *Scyles* v. *Blayne*, 19 L. J., Q. B. 19. As to the liability of executors to calls, see *Birkenhead, &c. R. Co.* v. *Cotesworth*, 5 Ex. 226; 19 L. J., Ex. 240. As to the liability of infants for calls, see *Cork and Bandon R. Co.* v. *Cazenove*, 10 Q. B. 935: *North Western R. Co.* v. *M'Michael*, 5 Ex. 114; 20 L. J., Ex. 97: *Birkenhead, &c. R. Co.* v. *Pilcher*, 5 Ex. 121: *Dublin and Wicklow R. Co.* v. *Black*, 22 L. J., Ex. 94. As to the assignees of a bankrupt being liable for calls, see *South Staffordshire R. Co.* v. *Burnside*, 5 Ex. 129. As to the liability of an allottee who has not signed the parliamentary contract, &c., see *Waterford, &c. R. Co.* v. *Pidcock*, 8 Ex. 279; 22 L. J., Ex. 146. See *The Deposit and General Life Ass. Co.* v. *Ayscough*, 6 E. & B. 761; 26 L. J., Q. B. 29, a case decided under the 7 & 8 V. c. 110, where there was a plea of fraud.

(*z*) *Shropshire Union Railway and Canal Co.* v. *Anderson*, 3 Ex. 401. As to who are shareholders, see ante, p. 1066.

(*a*) See *Dundalk Western R. Co.* v. *Tapster*, 1 Q. B. 667; 2 Railw. Cas. 586, where it was held that the company's Act for making a railway in Ireland gave no authority to sue for calls and declare in a general form in an English Court.

(*b*) Now statement of claim.

(*c*) See form, Chit. F., p. 77. See a form of declaration held good on demurrer in *Birkenhead, Lancashire and Cheshire Junction R. Co.* v. *Wilson*, 3 Ex. 478; 6 Ex. 626, *S. C.* in error.

(*d*) *Belfast and County Down R. Co.* v. *Strange*, 1 Ex. 739.

"whereby an action hath accrued to the company by virtue of this and the special Act," was held bad on special demurrer (*e*). A declaration which stated that, "*before the commencement of the suit, and from thence hitherto the defendant hath been and still is the holder of divers, to wit, forty shares,*" and then, and at the time of the commencement of the suit, *was and still is indebted* to the said company in respect of divers shares, to wit, &c., in respect of three calls, whereby an action hath accrued to the said company, by virtue of the 8 & 9 *V. c.* 16, and also by virtue *of another Act*, [naming it,] and *of the* [setting out the title of another special Act], was held good on special demurrer, for that, if the declaration were objectionable, the superfluous words might be rejected (*f*). And a declaration under a local Act, which stated that the defendant *was* a proprietor of shares and *is* indebted, was held good on demurrer (*g*).

When form not applicable.

The form given by the 26th section is not applicable in an action for calls against an executor, where the calls were made in the lifetime of the testator (*h*). It is questionable whether the 26th section applies to a defence (*i*). Interest may be recovered as damages (*k*).

Matter to be proved in action for calls.

By the 8 & 9 *V. c.* 16, *s.* 27, "On the trial or hearing of such action or suit it shall be sufficient to prove that the defendant at the time of making such call was a holder of one share or more in the undertaking, and that such call was in fact made, and such notice thereof given as is directed by this or the special Act; and it shall not be necessary to prove the appointment of the directors who made such call, nor any matter whatsoever; and thereupon the company shall be entitled to recover what shall be due upon such call, with interest thereon, unless it shall appear either that any such call exceeds the prescribed amount, or that due notice of such call was not given, or that the prescribed interval between two successive calls had not elapsed, or that calls amounting to more than the sum prescribed for the total amount of calls in one year had been made within the period."

Before the Judicature Acts, the defendant might, under a traverse of his being a shareholder, prove that he was not such *de jure* as well as *de facto*; et per *Parke*, B.,—"The meaning of the statute is, that a shareholder, who is bound to pay calls, is also

---

(*e*) *Moore* v. *The Metropolitan Sewage Manure Co.*, 3 Ex. 333; 18 L. J., Ex. 164.

(*f*) *The Midland Great Western R. Co. of Ireland* v. *Evans*, 4 Ex. 649; 19 L. J., Ex. 118; *The East Lancashire R. Co.* v. *Croxton*, 5 Ex. 287; 19 L. J., Ex. 313.

(*g*) *Aylesbury R. Co.* v. *Mount*, 8 Sc. N. R. 586, reversing (*S. C.*) 5 Sc. N. R. 127. It was enacted by the local Act, that, in any action to be brought for a call, it should be sufficient to declare *that the defendant, being a proprietor of a share in the said undertaking, is indebted to the said company.*

(*h*) *Birkenhead, Lancashire and Cheshire Junction R. Co.* v. *Cotesworth*, 5 Ex. 226; 19 L. J., Ex. 240.

(*i*) *Moore* v. *The Metropolitan Sewage Manure Co.*, 3 Ex. 333; 18 L. J., Ex. 164. See *Dundalk Western R. Co.* v. *Tapster*, 1 Q. B. 667, where it was held that the company's Act for making a railway in Ireland gave no authority to sue for calls, and declare in a general form, in an English Court.

(*k*) *London and Brighton R. Co.* v. *Fairclough*, 3 Sc. N. R. 68; 2 M. & G. 674; 2 Railw. Cas. 541. See *Cheltenham and Great Western Union R. Co.* v. *Fry*, 7 Dowl. 616.

PART XII.

entitled to participate in the profits" (*l*). And it was held that a plea denying that notice was given of the calls was a traverse, as such fact was impliedly contained in the declaration (*m*). As to when it is a good defence that the defendant became a shareholder by the fraud of the plaintiffs, *see The Bwlch y Plwm Lead Mining Co.* v. *Baynes*, 36 L. J., Ex. 183.

Proof of proprietorship.

By sect. 28, "The production of the register of shareholders (*n*) shall be *primâ facie* (*o*) evidence of such defendant being a shareholder, and of the number and amount of his shares." This section refers to the *sealed register* (*p*). The register is evidence without proof that the seal was affixed to it at a general meeting of the company (*q*). The provisions of the Act as to keeping the register must have been strictly complied with, in order to make the register evidence (*r*). But it is not every defect in the register that will render it inadmissible (*s*).

Where action brought without authority.

As to staying proceedings where an action for calls is brought without authority, *see Thames Haven Dock and Railway Co.* v. *Hall*, 5 M. & W. 274; 6 Sc. N. R. 342; 7 Jur. 238.

4. *Banking and other Companies entitled to sue and be sued in the Name of their Public Officer.*

	PAGE		PAGE
Observations as to	1080	*Writ and other Proceedings till Judgment*	1084
Statutes as to Banking Companies	1081	*Execution against Company and Shareholders*	1085
When Statutes obligatory— When they apply	1082	*Shareholders of some Companies not personally liable*	1088

Observations as to.

Observations as to.]—Certain banking and other companies may, by virtue of different statutes, sue and be sued in the name of one of their public officers, &c. The 7 *G.* 4, c. 46, enables certain banking copartnerships to sue and be sued in the name of their public officer. Most of the cases decided on this subject have been decided under this statute. Many of these cases will apply to the other statutes. The 7 *W.* 4 & 1 *V.* c. 73, which enables the Crown to constitute companies by letters patent, is noticed in the next chapter. Banking companies which are registered as limited companies under the stat. 42 & 43 *V.* c. 76, sue and are sued as is pointed out *ante*, pp. 1053 *et seq.*

(*l*) *Shropshire Union Railway and Canal Co.* v. *Anderson*, 3 Ex. 401; 6 Railw. Cas. 56; 18 L. J., Ex. 232.

(*m*) *Edinburgh, Leith and Newhaven R. Co.* v. *Hebblewhite*, 6 M. & W. 707.

(*n*) See s. 9 of this Act, ante, p. 1072.

(*o*) See *Waterford, &c. R. Co.* v. *Pidcock*, 8 Ex. 279; 22 L. J., Ex. 146, where evidence was given which it was held rebutted the primâ facie inference from the register that the defendant was a shareholder in the company.

(*p*) *Birkenhead, Lancashire and Cheshire Junction R. Co.* v. *Brownrigg*, 4 Ex. 426; 6 Railw. Cas. 47.

(*q*) *The London and North Western R. Co.* v. *Michael*, 5 Ex. 855.

(*r*) *Bain* v. *The Proprietors of the Whitehaven and Furness Junction R. Co. and Forbes*, 3 H. L. Ca. 1, ante, p. 1073.

(*s*) See *London and Grand Junction R. Co.* v. *Freeman*, 2 Sc. N. R. 705: *Southampton Dock Co.* v. *Richards*, 1 Sc. N. R. 219. See *Powis* v. *Harding*, 1 C. B., N. S. 524; 26 L. J., C. P. 107, where a memorial made under the 7 & 8 V. c. 113, was defective.

Statutes as to banking companies.

Statutes as to Banking Companies.]—By the 7 *G.* 4, *c.* 46, *s.* 9 (*An Act for better regulating Copartnerships of certain Bankers in England* (*t*)), all actions and suits, and all other proceedings at law or in equity, to be commenced or instituted for or on behalf of any such copartnership against any person or persons, bodies politic or corporate, or others, whether members of such copartnership or otherwise, for recovering any debts, or enforcing any claims or demands due to such copartnership, or for any other matter relating to the concerns of such copartnership, shall and lawfully may, from and after the passing of this Act, be commenced or instituted and prosecuted in the name of any one of the public officers nominated as aforesaid for the time being of such copartnership, as the nominal plaintiff for and on behalf of such copartnership; and that all actions or suits, and proceedings at law or in equity, to be commenced or instituted by any person or persons, bodies politic or corporate, or others, whether members of such copartnership or otherwise, against such copartnership, shall and lawfully may be commenced, instituted and prosecuted against any one or more of the public officers nominated as aforesaid for the time being of such copartnership, as the nominal defendant for and on behalf of the said copartnership. And the death, resignation, removal, or any act of such public officer shall not abate or prejudice any such action or other proceeding commenced against, or by or on behalf of such copartnership: but the same may be continued, prosecuted, and carried on in the name of any other of the public officers of such copartnership for the time being.

Actions, &c. in name of public officer.

Not to abate by death, &c.

The 27 & 28 *V.* *c.* 32, recites the 7 *G.* 4, *c.* 46, and the 7 & 8 *V.* *c.* 32 (*u*). By sect. 1, "From and after the passing of this Act [30th June, 1864], every banking copartnership registered and carrying on business under the first recited Act, and entitled to issue their own bank notes under the secondly recited Act, which shall discontinue the issue of such bank notes, and shall afterwards commence and carry on the trade or business of bankers in London, or within sixty-five miles from London, in such manner as they will then by law be authorized to do, shall have the same powers and privileges of suing and being sued in the name of any one of the public officers of such copartnership, as the nominal plaintiff, petitioner, or defendant, on behalf of such copartnership, and all judgments, decrees, and orders made and obtained in any such suit, may be enforced in like manner as is provided by the first recited Act, with respect to copartnerships carrying on business under the provisions of that Act, provided that nothing in this Act contained shall empower any copartnership to carry on the trade or business of bankers in London, or within sixty-five miles therefrom, in any case where by the existing law they are not authorized so to do."

By the 1 & 2 *V.* *c.* 96, made perpetual by the Statute Law Revision Act, 1874, No. 2, "Any person now being or having been, or who may hereafter be or have been, a member of any copartnership now carrying on, or which may hereafter carry on, the business of banking under the provisions of the said recited Acts (*v*), may, in

Right of action by shareholder against company, &c.

(*t*) As to copartnership banks in Ireland, see 6 G. 4, c. 62: *Hughes* v. *Thorpe*, 5 M. & W. 656.

(*u*) The Bank Charter Act, 1844.

(*v*) 7 G. 4, c. 46, and 6 G. 4, c. 32.

PART XII.

respect of any demand which such person may have, either solely or jointly with any other person, against the said copartnership or the funds or property thereof, commence and prosecute, either solely or jointly with any other person (as the case may require), any action, suit, or other proceeding, at law or in equity, against any public officer appointed or to be appointed under the provisions of the said Acts to sue and be sued on the behalf of the said copartnership; and that any such public officer may, in his own name, commence and prosecute any action, suit or other proceeding, at law or in equity, against any person, being or having been a member of the said copartnership, either alone or jointly with any other person against whom any such copartnership has or may have any demand whatsoever; and that every person being or having been a member of any such copartnership shall, either solely or jointly with any other person (as the case may require), be capable of proceeding against any such copartnership, by their public officer, and be liable to be proceeded against, by or for the benefit of the said copartnership, by such public officer as aforesaid, by such proceedings and with the same legal consequences, as if such person had not been a member of the said copartnership; and that no action or suit shall in anywise be affected or defeated by reason of the plaintiffs or defendants, or any of them respectively, or any other person in whom any interest may be averred, or who may be in anywise interested or concerned in such action, being or having been a member of the said copartnership; and that all such actions, suits, and proceedings shall be conducted and have effect as if the same had been between strangers."

By sect. 47 of the 7 & 8 *V. c.* 113 (*x*), every company of more than six persons established on the 6th of May, 1844, for the purpose of carrying on business as bankers within the distance of sixty-five miles from London, and not within the 7 & 8 *V. c.* 113, may sue and be sued in the name of one of its public officers as nominal plaintiff or defendant; and judgment may be obtained and enforced in such action in like manner as is provided with respect to such companies carrying on business at a distance exceeding sixty-five miles from London, under the 7 *G.* 4, *c.* 46; provided that such first-mentioned company shall make out and deliver, from time to time, to the Commissioners of Inland Revenue, the several accounts or returns required by the Act last mentioned.

Statutes obligatory.

Statutes obligatory—When they apply.]—The 7 *G.* 4, *c.* 46, renders it obligatory upon a banking company in cases within it, to sue in the name of their public officer (*y*). So, the creditors of such a company cannot sue an individual member of the company for a debt of the company, but must proceed against the public officer; and this is the case though there is no public officer, or he is out of the jurisdiction; but, in such a case, it would seem that the company could be compelled to appoint a public officer (*z*). But

(*x*) See 25 & 26 V. c. 89, s. 205, by which the 7 & 8 V. c. 113, is repealed, except sect. 47.

(*y*) *Chapman* v. *Milvain*, 5 Ex. 61; 19 L. J., Ex. 228.

(*z*) *Steward* v. *Greaves*, 10 M. & W. 711; 2 Dowl., N. S. 415; *Robinson* v. *Farmer*, 6 Ex. 242; 2 Ex. 177; *Todd* v. *Wright*, 1 Q. B. 311.

(*a*) *Breeh* v. *Eyre*, 6 Sc. N. 5 M. & G. 415. The company "Patent Rolling and Comp Iron Company," established 4 & 5 V. c. lxxxix. And see v. *Gordon*, 1 Dowl., N. S. 815 *mouthshire Iron and Coal Co.*).

(*b*) *Davidson* v. *Bower*, 5 Sc. 538.

(*c*) *Smith* v. *Goldsworthy*, 4 430. And see *Skinner* v. *Lam* M. & G. 477; 5 Sc. N. R. 197.

(*d*) *Wills* v. *Sutherland*, 7 L. 89, Ex. See also *Kingsfo Dutton*, 1 Br. Rep. 479, C. P.,

where a statute stated that *it should be sufficient*, in all actions to be instituted or prosecuted against the company, to state the name of the secretary, or some one of the directors, &c. as the nominal defendant representing the company, the Court held, upon the construction of the whole Act of Parliament, that it was not imperative to sue in this manner, but that an individual shareholder might be proceeded against (*a*).

When statutes apply.

It would seem that the 7 *G.* 4, c. 46, and the 1 & 2 *V.* c. 96, enable banking copartnerships to sue in the name of their public officer for the price of shares therein (*b*). If a statute enable a company to sue on covenants in which they are interested in the name of their secretary, an action may be brought in his name upon a covenant entered into with individuals in which the company are interested (*c*). And where an Act provided, that all actions to be instituted "by or on behalf of the company," might be brought in the name of the secretary, it was held that an action of covenant for calls might be brought in his name (*d*). The public officer of a company established under the 7 *G.* 4, may, notwithstanding its change of name and the accession of new proprietors, maintain an action on a guarantee given to the company before its change of name (*e*). Where such a copartnership had begun to carry on the trade and business of bankers, and issued notes accordingly, but subsequently stopped payment, and merely kept the establishment open for the purpose of paying their notes and winding up their affairs, it was held that they still were entitled to sue by their public officer (*f*).

Delivery of return to stamp office not a condition to right to sue.

The delivery of a return to the Stamp Office, as required by the 2nd sect. of the 7 *G.* 4, c. 67, is not a condition precedent to the company's right to sue in the name of their public officer (*g*). A statute enabling a company to sue and be sued by their public officer, required a memorial to be enrolled of the names, *residences* and descriptions of the shareholders, and declared that until such memorial was enrolled, no action should be commenced under the authority of that Act. One of the shareholders was described thus:—"A. B., director of the Hon. East India Company, and Major-General in the East India Company's Service, shareholder;"

W. 711; 2 Dowl., N. S. 415; *Davison* v. *Farmer*, 6 Ex. 242; 20 L. J., Ex. 177; *Todd* v. *Wright*, 16 L. J., Q. B. 311.

(*a*) *Beech* v. *Eyre*, 6 Sc. N. R. 327; 5 M. & G. 415. The company was the "Patent Rolling and Compressing Iron Company," established under 4 & 5 V. c. lxxxix. And see *Blewitt* v. *Gordon*, 1 Dowl., N. S. 815 (*Monmouthshire Iron and Coal Co.*).

(*b*) *Davidson* v. *Bower*, 5 Sc. N. R. 538.

(*c*) *Smith* v. *Goldsworthy*, 4 Q. B. 430. And see *Skinner* v. *Lambert*, 4 M. & G. 477; 5 Sc. N. R. 197.

(*d*) *Wills* v. *Sutherland*, 7 D. & L. 89, Ex. See also *Ringsford* v. *Dutton*, 1 Br. Rep. 479, C. P., where an action was brought in the name of the treasurer to a board of guardians: *Allen* v. *Hayward*, 7 Q. B. 960. See *Reddish* v. *Pinnock*, 10 Ex. 213, where it was held, upon the construction of a private Act of Parliament, that the company might sue in the name of the nominal plaintiff one of its own members, for a debt due to the company.

(*e*) *Wilson* v. *Craven*, 8 M. & W. 584.

(*f*) *Davidson* v. *Cooper*, 11 M. & W. 778. See *Lyon* v. *Haynes*, 6 Sc. N. R. 371.

(*g*) *Bonar* v. *Mitchell*, 5 Ex. 415; 19 L. J., Ex. 302. So held under the Scotch Act, 7 G. 4, c. 67, which is similar to the 7 G. 4, c. 46, s. 4.

PART XII.

held, sufficient, within the meaning of the Act of Parliament, as it corresponded with the register (*h*).

Writ and other proceedings till judgment.

Writ and other Proceedings to Judgment.]—It is not perhaps necessary to describe a public officer or other nominal defendant as such in the title of the action, though it is usual to do so (*i*). He must be so described in the indorsement.

As to the indorsement on the writ of the capacity in which the plaintiff or defendant sues or is sued, *see Vol.* 1, p. 226.

The statement of claim should show that the plaintiff or defendant, as the case may be, is the public officer, and entitled to sue or be sued on behalf of the company (*k*). It should appear that he was such public officer at the time of the commencement of the suit (*l*).

The *Bankers' Books Evidence Act*, 1879, makes entries in bankers' books evidence even in actions to which the bank is a party (*m*).

Judgment.

If a judgment is obtained against a person as the public officer of a company, who in fact is not so, application should be made to set it aside, for until that is done, it is binding upon the company (*n*). But if the judgment was obtained by the collusion and connivance of the plaintiff and the public officer, the same is not binding on the other members of the copartnership, and may be taken advantage of on a motion on the judgment to obtain execution against a member of the company, or, it seems, by motion to set the judgment aside (*o*).

Death, &c. of public officer.

The death or removal of the public officer does not cause the action to abate (*p*). Where a defendant gave a *cognovit actionem* in a suit by a public officer, under the 7 *G.* 4, *c.* 46, and before judgment was entered the nominal plaintiff was removed from his office, but the name of the plaintiff on the record was not altered, and the judgment was signed in the name of such plaintiff, and the defendant was arrested on a *ca. sa.* issued upon the judgment; the Court allowed the record and writ to be amended upon the application of the banking company, who were the real plaintiffs, by the insertion of the name of the new public officer, *nunc pro tunc*, and refused to set aside the judgment on the ground of the irregularity (*q*).

Bankruptcy of public officer.

The deed constituting a banking company, trading under the 7 *G.* 4, *c.* 46, contained a stipulation that if any public officer of the company should become bankrupt, he should be disqualified and his office become vacant; it was held, that this meant that his office was to be void at the election of the company; but if, after the bankruptcy, they treated and held him out to the world as their public officer, they might sue and be sued in his name (*r*).

(*h*) *Wills* v. *Murray*, 4 Ex. 843; 19 L. J., Ex. 209.

(*i*) See Vol. 1, p. 220.

(*k*) See Chit. Forms, p. 514.

(*l*) See *M'Intyre* v. *Miller*, 13 M. & W. 725; 2 D. & L. 708: *Esdaile* v. *Maclean*, 15 M. & W. 277.

(*m*) *Harding* v. *Williams*, 14 Ch. D. 197; 49 L. J., Ch. 661. See Vol. 1, p. 531.

(*n*) *Bradley* v. *Eyre*, 1 D. & L. 260. See *Fowler* v. *Rickerby*, 9 Dowl. 682; 2 M. & G. 760.

(*o*) *Philipson* v. *Earl of Egremont*, 6 Q. B. 587: *Bradley* v. *Eyre*, supra: *Fowler* v. *Rickerby*, supra.

(*p*) 7 G. 4, c. 46, s. 9, *ad fin.*, ante, p. 1081. See *Barnewall* v. *Sutherland*, 19 L. J., C. P. 290: *Paterson* v. *Ironside*, 14 Jur., C. P. 722, n.: *Webb* v. *Taylor*, 1 D. & L. 676: *Todd* v. *Wright*, 16 L. J., Q. B. 311.

(*q*) *Webb* v. *Taylor*, supra.

(*r*) *Steward* v. *Dunn*, 12 M. & W.

Execution against company and shareholders.

Execution against Company and Shareholders.]—By 7 *G.* 4, *c.* 46, *s.* 12, it is enacted that every judgment recovered against any such public officer shall have the like effect and operation upon and against the property of such copartnership, and upon and against the property of every such member thereof, as if judgment had been recovered against the copartnership; and that the bankruptcy or insolvency of any such public officer shall not be construed to be the bankruptcy or insolvency of the company; and that the liability of the company and of its members shall not be affected thereby.

Execution against shareholders for the time being.

By sect. 13, "Execution upon any judgment in any action obtained against any public officer for the time being of any such corporation or copartnership carrying on the business of banking under the provisions of this Act, whether as plaintiff or defendant, may be issued against any member or members *for the time being* of such corporation or copartnership; and that in case any such execution against any member or members for the time being of any such corporation or copartnership shall be ineffectual for obtaining payment and satisfaction of the amount of such judgment, it shall be lawful for the party or parties so having obtained judgment against such public officer for the time being, to issue execution against any person or persons who was or were a member or members of such corporation or copartnership at the time when the *contract or contracts, or engagement or engagements*, in which such judgment may have been obtained, *was or were entered into*, or became a member at any time *before such contracts or engagements were executed*, or was a member *at the time of the judgment obtained*: Provided always, that *no such execution as last mentioned* shall be issued *without leave first granted* on *motion in open Court* by the Court in which such judgment shall have been obtained, and when (*s*) motion shall be made *on notice* to the person or persons sought to be charged, nor *after the expiration of three years* next after any such person or persons shall have ceased to be a member or members of such corporation or copartnership."

Against former shareholder.

Public officer, &c. to be indemnified.

By sect. 14, "Every such public officer in whose name any such suit or action shall have been commenced, prosecuted, or defended and every person or persons against whom execution upon any judgment obtained or entered up as aforesaid in any such action shall be issued as aforesaid shall always be reimbursed and fully indemnified for all loss, damages, costs, and charges, without deduction, which any such officer or person may have incurred by reason of such execution, out of the funds of such copartnership, or in failure thereof by contribution from the other members of such copartnership, as in the ordinary cases of copartnership."

Who liable as shareholders.

A person sought to be made liable must be an actual member of the company (*t*). A shareholder of a banking company is liable

655; 1 D. & L. 642. See sect. 12 of 7 G. 4, c. 46, as to the bankruptcy of the public officer.

(*s*) *Sic*, query which, see 3 C. B. 901.

(*t*) See *Scott* v. *Berkeley*, 11 Jur. 242; 16 L. J., C. P. 107: *Dodgson* v. *Bell*, 5 Ex. 967; 20 L. J., Ex. 137: *Ness* v. *Angas*, 3 Ex. 105: *Ness* v. *Armstrong*, 4 Ex. 31; 7 D. & L. 73; *Ness* v. *Bertram*, 4 Ex. 195. See *Heward* v. *Wheatley*, 22 L. J., Ch. 435, where a question arose as to the liability of a deceased shareholder's estate for calls: *Hay* v. *Willoughby*, 10 Hare, 242, where it was held that the execution of a deed of transfer of the shares was not an execution of the deed of settlement.

PART XII.

until his shares have been transferred, as required by the deed of the company (*u*).

In what order shareholders liable.

The 7 *G.* 4, *c.* 46, *s.* 13, states in what order the shareholders are liable to execution. It should be noticed that there is one class of persons who are altogether exempted from liability; those, namely, who have become partners after the contract was completed, and have ceased to be so before judgment was obtained, although they were partners at the date of the commencement of the action. This is a case not provided for by the Legislature, and the parties specified are clearly exempt, there being no words to embrace them (*x*).

Mode of proceeding against shareholders (*y*).

By the *R. of S. C., Ord. XLII. r.* 23 (*ante*, p. 955), it is provided *inter alia* that when a party is entitled to execution against any of the shareholders of a joint stock company upon a judgment against a public officer or other person representing such company, such party may apply for leave to issue such execution, and such leave may be given or any issue or question may be ordered to be tried. This mode of proceeding is substituted for the former proceeding by writ of *scire facias* (*y*).

The statute, it will be observed, requires the application, in the case of past members, to be made in open Court, and possibly it should still be so made although the rule does not expressly require it.

It will be seen what steps it is necessary to take in order to obtain leave to issue execution, by referring to what is stated *infra*, as to the form of the affidavit in support of the motion for this purpose.

Affidavit in support of motion.

The affidavit in support of the motion against a member for the time being of a banking copartnership should show that judgment has been entered against the public officer of the company for a debt, &c. due from the company to the plaintiff, and when, and for what amount; how much is due on the judgment, and that the party sought to be charged is a member for the time being liable to the execution (*z*).

(*u*) *Bosanquet* v. *Shortridge*, 20 L. J., Ex. 57.

(*x*) *Dodgson* v. *Scott*, 2 Ex. 457: *Bradley* v. *Eyre*, 11 M. & W. 432.

(*y*) Before the Jud. Acts, where judgment was obtained against the public officer, under the 7 G. 4, the proper mode of proceeding to execution against a member not being such public officer, was by *sci. fa.*, and not by suggestion. *Ransford* v. *Bosanquet*, 2 Q. B. 972: *Wingfield* v. *Barton*, 2 Dowl., N. S. 355 (*Patent Rolling and Compressing Iron Co.*): *Wingfield* v. *Peel*, 12 L. J., Q. B. 103, B. C.: *Clowes* v. *Brettel*, 10 M. & W. 506; 2 Dowl., N. S. 528; *Whittenbury* v. *Law*, 8 Sc. 661; 6 Bing. N. C. 345: *Bosanquet* v. *Ransford*, 11 A. & E. 521; *Cross* v. *Law*, 6 M. & W. 217. See *Williams* v. *Aspinall*, 7 Sc. N. R. 822. Execution might, before that Act, have been issued against the public officer without a *sci. fa.* *Harwood* v. *Law*, 7 M. & W. 203; 8 Dowl. 899, *Parke*, B., dub. See *Bosanquet* v. *Ransford*, supra: *Paulett* v. *Nuttall*, 11 A. & E. 520; 3 P. & D. 298. Before the Jud. Acts, a *sci. fa.* might be issued against a member for the time being of a banking copartnership, without the leave of the Court (*Bank of Scotland* v. *Fenwick*, 1 Ex. 795, per *Rolfe*, B.: *Harrison* v. *Tyson*, 1 B. C. 111); but a *sci. fa.* could not be issued against other members liable without notice to the shareholder and leave of the Court. Concurrent writs of *sci. fa.* against different members might be going on at the same time. *Nunn* v. *Lomer*, 3 Ex. 471; 18 L. J., Ex. 247: *Burmester* v. *Cropton*, 3 Ex. 397; 6 D. & L. 430; 18 L. J., Ex. 142. See *Esdaile* v. *Trustwell*, 2 Ex. 312. If, indeed, a number of writs were issued for the purpose of oppression, the Court might interfere to prevent the abuse of its process. *Burmester* v. *Cropton*, supra, per *Parke*, B. See generally ante, p. 1076.

(*z*) See form, Chit. Forms, p. 515.

The affidavit in support of the motion against a former member of a banking copartnership should show *that judgment has been obtained against the public officer of the company for a debt, &c. due from the company to the plaintiff, and when, and for what amount; how much is due on the judgment; the executions that have been issued on the judgment; the means taken to levy under the same; such other facts as may induce the Court to believe that due diligence has been used to obtain satisfaction of the judgment from the members for the time being* (*a*); *when the contract in respect of which the judgment was obtained was entered into, or when the same was executed, as the case may require; that the party sought to be charged was a member of the copartnership "at the time when the contract or contracts, or engagement or engagements, in which such judgment may have been obtained was or were entered into, or became a member at any time before such contracts or engagements were executed, or was a member at the time of the judgment obtained"* (*b*). *An affidavit of the due service of the notice* (*c*) *required by the 7 G. 4, c. 46, s. 13, ante,* p. 1085, *must also be made.*

Motion for.

The application must be made on notice of motion or by summons (*d*). A rule nisi is not now granted (*e*). The Court will, it would seem, in some cases allow a second application to be made upon fresh materials (*f*).

Showing cause against.

It is no answer to the application to issue execution against a former member, that a party, supposed to be solvent, who has ceased to be a member, and is not named in the application, was collusively and fraudulently, for the purpose of protecting him from liability, permitted to transfer his shares, or that another party, not named in the application, but still a member, would, if execution went against him, be entitled to indemnity from solvent persons, though unable to pay the amount himself (*g*). Nor is it any answer on behalf of an individual included in such an application, that judgment is entered up in respect of several distinct causes of action, for one of which such party is not liable (*h*). The Court will not decide on the motion whether a party is a share-

(*a*) *Bank of England* v. *Johnson*, 3 Ex. 598; 18 L. J., Ex. 238: *Eardley* v. *Law*, 4 P. & D. 379; 12 A. & E. 802: *Dodgson* v. *Scott*, 2 Ex. 469. It is enough to show that executions have been issued against several of the present partners, and nulla bona returned; that reasonable inquiry has been made as to the solvency of all: and that there is, on such inquiry, ground for believing that execution would not be effectual against any. On this last point a primâ facie case is sufficient. *Harvey* v. *Scott*, 11 Q. B. 92: *Field* v. *M'Kenzie*, 5 D. & L. 172; 4 C. B. 705. As to using due diligence to obtain satisfaction of a judgment obtained against a railway or similar company before issuing execution against a shareholder, see ante, p. 1075.

(*b*) This may be proved by verifying an extract from the return made to the Stamp Office under the 7 G. 4, c. 46, ss. 4, 5, showing that the party is a shareholder. *Harvey* v. *Scott*, 11 Q. B. 92.

(*c*) See ante, p. 1074, in general, as to the length of notice required before making application to the Court, post, Ch. CXXII.

(*d*) See 7 G. 4, c. 46, s. 13: *Wingfield* v. *Barton*, 2 Dowl., N. S. 355: *Field* v. *M'Kenzie*, 5 D. & L. 172; 4 C. B. 705.

(*e*) See ante, p. 1074, and Ch. CXXII.

(*f*) *Dodgson* v. *Scott*, 2 Ex. 457: *Field* v. *Mackenzie*, 6 C. B. 384. See ante, p. 1076.

(*g*) *Harvey* v. *Scott*, 11 Q. B. 92.

(*h*) Id. Execution, however, in such a case would only be ordered to issue for the cause of action for which the party is liable.

PART XII.

holder or not where there is doubt on the point, but will order the question to be tried by *sci. fa.* or issue (*i*). So a defence that the judgment was fraudulently obtained, may be ordered to be tried in the same way (*k*). If the Court orders execution to issue, draw up the order and serve it on the shareholder in the usual way, and issue execution in accordance therewith.

If execution against a member be issued without the leave of the Court, where such leave is necessary, the Court will set it aside (*l*), on an application for that purpose made promptly (*m*). The Court in one case set aside a *sci. fa.*, which had been issued upon a judgment on a warrant of attorney, given by the public officer of a banking company, under the 7 *G.* 4, *c.* 46, for an irregularity which made it void, and directed issues to try the liability of the defendant, the title of the plaintiff, and the validity of the warrant of attorney (*n*).

Shareholders of some companies not liable.

Shareholders of some Companies not liable.]—The shareholders of some companies are not personally liable, but the plaintiff's only remedy is against the property of the company. Where the trustees of a turnpike road were sued in the name of their clerk, in pursuance of the 3 *G.* 4, *c.* 126, *s.* 74, it was held that the property of the clerk was not liable to be taken in execution to satisfy the judgment (*o*). The remedy, in order to obtain satisfaction of the judgment in such a case, is either by a mandamus or sometimes by action (*p*). Where by a statute a company was established with power to sue and be sued in the name of their treasurer or any director, and an action was brought against the treasurer, and judgment entered up against *the company*, who appeared to have no assets, the Court refused to issue a mandamus commanding the company to pay the sum recovered, and costs (*q*).

5. *Companies established by Letters Patent under* 7 *W.* 4 & 1 *V. c.* 73 (*r*).

Companies established by letters patent under 1 V. c. 73.

By the 7 *W.* 4 & 1 *V. c.* 73, *s.* 2, the Crown is empowered to grant, by letters patent, "to any company or body of persons

(*i*) *Bank of England* v. *Johnson*, 3 Ex. 598; 18 L. J., Ex. 238: *Clowes* v. *Brettell*, 11 M. & W. 461; 2 Dowl., N. S. 1020.

(*k*) *Dodgson* v. *Scott*, 2 Ex. 457; 6 D. & L. 27; or an application may be made to set aside the proceedings: *S. C.* See *Field* v. *Mackenzie*, 5 D. & L. 348; 4 C. B. 725, where plaintiff held collateral security from the bank. See ante, p. 1076.

(*l*) *Bank of Scotland* v. *Fenwick*, 1 Ex. 792; 5 D. & L. 377. This cannot be pleaded as a defence: *Bradley* v. *Warberg*, 11 M. & W. 452.

(*m*) *Ricketts* v. *Bowhay*, 3 C. B. 882. See *Bradley* v. *Urquhart*, 11 M. & W. 583.

(*n*) *Bosanquet* v. *Graham*, 7 Jur. 831, Q. B.: *Bosanquet* v. *Woodford*, 5 Q. B. 310.

(*o*) *Wormwell* v. *Hailstone*, 6 Bing. 668; 4 M. & P. 512. See remarks on this case in *Cobbett* v. *Wheeler*, 30 L. J., Q. B. 64. See *Cane* v. *Chapman*, 5 Ad. & E. 661, per *Coleridge*, J.: *Emery* v. *Day*, 4 Tyr. 695.

(*p*) *Wormwell* v. *Hailstone*, supra: *R.* v. *St. Katharine Dock Co.*, 4 B. & Ad. 360: *Corpe* v. *Glyn*, 3 B. & Ad. 801: *Kendall* v. *King*, 17 C. B. 483; 25 L. J., C. P. 132.

(*q*) *R.* v. *The Victoria Park Co.*, 1 Q. B. 288. As to granting a mandamus to make calls, see *S. C.*: *Myers and another* v. *Rawson*, 5 H. & N. 99; 29 L. J., Ex. 217. See *Dean* v. *Mellard*, 15 C. B., N. S. 19.

(*r*) Sect. 1 of this Act is repealed by 37 & 38 V. c. 35, sched.

associated together for any trading or other purposes whatsoever, and to the heirs, executors, administrators, and assigns of any such persons, although not incorporated by such letters patent, any privilege or privileges which, according to the rules of the common law, it would be competent to her Majesty, her heirs and successors, to grant to any such company or body of persons, in and by any charter of incorporation."

By sect. 7, "During the continuance of any such company or body, after it shall have been so registered, no change shall be made in the name or style thereof."

By sect. 3, such letters patent may provide that all actions and other proceedings, by or on behalf of any such company, against any person or persons, whether bodies politic or others, and whether members or not of such company, shall be prosecuted in the name of one of the public officers appointed to sue or be sued on behalf of such company, and registered in pursuance of the Act; and that all actions or other proceedings by or on behalf of any person or persons, whether bodies politic or others, and whether or not members of such company or body, against such company or body, shall be commenced and prosecuted against one of the public officers appointed to sue and be sued on behalf of the company, and registered in pursuance of the Act; or if there shall be no such officer for the time being, then against any member of such company or body.

May sue and be sued in the name of their public officer.

By sect. 22, no action, suit, or proceeding, commenced by or against the company (whether in the name of one of the officers appointed to sue and be sued as aforesaid, or of some member of such company), shall be abated or prejudiced by the death or by any act of such officer or person, or by the resignation or removal of such officer, either before or after the commencement of such action or proceeding, or by any change in the members of such company or body, by the transfer of shares or otherwise, but that the same shall be continued in the name of such officer or member (as the case may be), notwithstanding such death or act, or such resignation or removal, and notwithstanding such change in the members of such company or body.

Action not to abate by death or removal of officer or member;

By sect. 25, the bankruptcy, insolvency, or stopping payment of any officer or member of such company or body, shall not be construed to be the bankruptcy, insolvency, or stopping payment of the company; but the property and effects of the company, and the persons, property, and effects of the individual members, shall nevertheless be liable to execution in the same manner as if such bankruptcy, insolvency, or stopping payment had not taken place.

or by his bankruptcy, &c.

By sect. 26, "In all cases wherein it may be necessary for any person to serve any summons, demand, or notice, or any writ, or other proceeding at law or in equity, or otherwise, upon the said company or body, service thereof respectively on the clerk of the said company or body, or by leaving the same at the head office for the time being of the said company or body, or in case such clerk of the said office shall not be found or known, then service thereof on any agent or officer employed by the said company or body, or by leaving the same at the usual place of abode of such agent or officer, shall be deemed good and sufficient service of the same respectively on the said company or body."

Service upon the company, how effected.

By sect. 27, "In all cases wherein it may be necessary for the

Same by the company.

PART XII.

said company or body to give any summons, demand, or notice of any kind whatsoever to any person or corporation, under the provisions or directions contained in this Act, such summons, demand, or notice may be given in writing, signed by the clerk, attorney or solicitor for the time being of the said company or body, without being required to be under the common seal of the said company or body."

Execution against company and shareholders.

By sect. 24, "All judgments, decrees, and interlocutors, and orders obtained in any such actions, suits, or other proceedings as aforesaid, against such officer or member, in manner aforesaid, whether such member or officer respectively be party to such actions, suits, or proceedings, as plaintiff, pursuer, petitioner, or defendant or defender, shall have the same effect against the property and effects of such company or body, and also (to the extent hereinafter mentioned) against the persons, property and effects of the individual existing or former members thereof respectively, as if such judgments, decrees, interlocutors, or orders, had been obtained against such company or body in suits or proceedings to which all the persons liable as existing or former members of such company or body had been parties, and that execution or diligence, or executions or diligences, shall be issued thereon accordingly: Provided, nevertheless, that where the extent per share of the liability of the individual members shall have been limited by any letters patent as aforesaid, no such execution or diligence shall be issued against any such individual existing and former member of such company or body as aforesaid, for a greater sum than the residue, if any, of the amount for which, by virtue of such letters patent as aforesaid, such individual member shall be liable in respect of the share or shares then or theretofore held by him in the said company or body, after deducting therefrom the amount, if any, which shall appear by such register as aforesaid (*s*) to have been advanced and paid in respect of such shares, or any of them, by himself or herself, or any previous or subsequent holder of the same shares, or any of them, or the representatives of any such holder, under or by virtue of any former execution or diligence, and not repaid (*t*) at the time of issuing such subsequent execution or diligence." As to getting leave to issue execution against the individual members of the company, *see Ord. XLII. r.* 23 (*ante*, p. 955). It would appear that such leave is necessary.

Proviso as to liability of shareholders.

Extent of liability of shareholder.

By sect. 4, the letters patent may declare and provide that the members of the company "shall be individually liable in their persons and property for the debts, contracts, engagements, and liabilities of such company or body, to such extent only per share as shall be declared and limited in and by such letters patent; and the members of such company or body shall accordingly be individually liable for such debts, contracts, engagements, and liabilities respectively, to such extent only per share as in such letters patent shall be declared and limited, such liability nevertheless to be enforced in such manner and subject to such provisions as are hereinafter contained."

Continuance of liability.

By sect. 21, any person ceasing to be a member of the company, whether by the transfer of any share therein, or by death or

(*s*) See sect. 11.

(*t*) See sect. 12.

otherwise, shall be considered for all purposes of liability as continuing a member of such company, until a return of the transfer, or other fact whereby he shall have so ceased to be a member, shall be registered pursuant to the provisions of the Act (*u*).

Before the Judicature Acts, in *scire facias* against defendant as a member of a company established under letters patent, it was held that the declaration need not show whether the letters patent contain any provision limiting the liability of the individual shareholders, such limitation being matter to be pleaded by the defendant; but fraud and collusion between the plaintiff and the nominal defendant in the original action was a good defence, by plea to the *scire facias* although redress would also, under such circumstances, be afforded to the party against whom it was sought to enforce the judgment, on motion to the Court (*x*).

(*u*) By sect. 8, returns are required to be made of the names of all persons having ceased to be members of the company or having become members thereof.

(*x*) *Philipson* v. *Earl of Egremont*, 6 Q. B. 587.

CHAPTER XCIII.

PARTNERS AND UNINCORPORATED COMPANIES.

PART XII.

Power to sue and be sued.

Power to sue and be sued in the Name of a Firm.]—Under the present rules, a firm consisting of two or more persons may sue or be sued, and a person carrying on business in the name of a firm may be sued in the firm name. In all cases not within the rules, partners must be named individually (*a*).

Two or more persons in firm name.

By *R. of S. C., Ord. XVI. r.* 14, "Any two or more persons claiming or being liable as co-partners may sue or be sued in the name of the respective firms, if any, *of which such persons were co-partners at the time of the accruing of the cause of action;* and any party to an action may in such case apply by summons to a Judge for a statement of the names of the persons who *were at the time of the accruing of the cause of action* co-partners in any such firm, to be furnished in such manner, and verified on oath or otherwise, as the Judge may direct: *Provided that, in the case of a co-partnership which has been dissolved, to the knowledge of the plaintiff, before the commencement of the action, the writ of summons shall be served upon every person sought to be made liable.*"

The words in the above rule printed in italics are new. It will be observed that the rule applies only to cases of a co-partnership carrying on business in the firm name at the time when the cause of action accrued (*b*).

Under these rules a cost book mining company, though unincorporated, may sue and be sued in its partnership name (*c*).

One person in firm name.

By *r.* 15, "Any person carrying on business in the name of a firm apparently consisting of more than one person may *be sued* in the name of such firm."

Statement of names of members of firm.

Statement of Names of Members of Firm.]—By *R. of S. C., Ord. VII. r.* 2, "When a writ is sued out by partners in the name of their firm, the plaintiffs or their solicitor shall, on demand in writing (*d*) by or on behalf of any defendant, forthwith declare in writing (*d*) the names and places of residence of all the persons constituting the firm on whose behalf the action is brought. And if the plaintiffs or their solicitors shall fail to comply with such demand, all proceedings in the action may, upon an application for that purpose, be stayed upon such terms as the Court or a Judge

(*a*) *Walker* v. *Rooke*, 6 Q. B. D. 651, where it was held that a garnishee order could not be made against a firm in the partnership name.

(*b*) This gets rid of much of the difficulty that arose in *Ex p. Young, In re Young*, 19 Ch. D. 124; 51 L. J., Ch. 141; 45 L. T. 493; 30 W. R. 330: and *Davis* v. *Morris*, 10 Q. B. D. 436; 52 L. J., Q. B. 401, 33 W. R. 749; *Ex p. Blain, In re Sawers*, 12 Ch. D. 522, at p. 533.

(*c*) *Escott* v. *Gray*, 39 L. T. 121.

(*d*) See form, Chit. F. p. 534.

may direct. And when the names of the partners are so declared, the action shall proceed in the same manner and the same consequences in all respects shall follow as if they had been named as the plaintiffs in the writ. But all proceedings shall, nevertheless, continue in the name of the firm."

In addition to the power given by the above rule of compelling a plaintiff firm to disclose the names and addresses of the members of the firm, *Ord. XVI. r.* 14 (*supra*) enables either party to apply by summons for a statement of the names of the persons who were at the time of the accruing of the cause of action co-partners in the firm, to be furnished in such manner and verified on oath or otherwise, as the Judge may direct. This application may be made by either party by summons before a Master at Chambers. An order made on such application is not an "order for discovery" within *Ord. XXXI. r.* 21 (*e*).

Service of writ.

Service of Writ.]—By *R. of S. C., Ord. IX. r.* 6, "Where persons are sued as partners in the name of their firm, the writ shall be served either upon any one or more of the partners or at the principal place within the jurisdiction of the business of the partnership upon any person having at the time of service the control or management of the partnership business there; and, subject to these rules, such service shall be deemed good service upon the firm."

By *r.* 7, "Where one person carrying on business in the name of a firm apparently consisting of more than one person shall be sued in the firm name, the writ may be served at the principal place within the jurisdiction of the business so carried on upon any person having at the time of service the control or management of the business there; and such service, if sufficient in other respects, shall be deemed good service on the person so sued."

If the defendant is a person of unsound mind, service effected under *r.* 7 will not support a judgment on default of appearance (*f*); but possibly when one only of several persons sued in a firm name is a lunatic, service under *r.* 6 would suffice (*g*). If the defendant resides out of the jurisdiction, service under *r.* 7 will be good, if the defendant carries on business in the name of a firm, and has a place of business in this country (*h*).

It will be observed that *Ord. XVI. r.* 14 (*ante*, p. 1092), provides that in the case of a co-partnership which has been dissolved to the knowledge of the plaintiff before the commencement of the action the writ of summons must be served upon every person sought to be made liable (*i*).

There is in all cases an advantage to be derived from serving all the persons intended to be made liable, because, by *Ord. XLII. r.* 10 (*post*, p. 1094), in case of default of appearance, execution may be issued against any such person.

(*e*) *Pike* v. *Frank Keene*, 35 L. T. 341; 24 W. R. 322.

(*f*) *Fore Street Warehouse Co.* v. *Durrant*, 10 Q. B. D. 471; 48 L. T. 531; 31 W. R. 765.

(*g*) Id., per *Grove*, J., at p. 474; per *Lopes*, J., Id.

(*h*) *O'Neil* v. *Clason*, 46 L. J., Q. B. 191.

(*i*) See *Scarf* v. *Jardine*, 7 App. Cas. 345.

PART XII.

In a proper case substituted service on a person sued in a firm name may be ordered (*l*).

Appearance.

Appearance.]—By *R. of S. C., Ord. XII. r.* 15, "Where persons are sued as partners in the name of their firm, they shall appear individually in their own names; but all subsequent proceedings shall, nevertheless, continue in the name of the firm" (*m*).

By *r.* 16, "Where any person carrying on business in the name of a firm apparently consisting of more than one person, shall be sued in the name of the firm, he shall appear in his own name; but all subsequent proceedings shall, nevertheless, continue in the name of the firm."

Where one only of several partners enters an appearance, and the others make default, the partner so appearing may put in a defence on behalf of the firm (*n*).

Pleadings.

Pleadings—Denial of Constitution of Firm.]—If either party wishes to deny the alleged constitution of any partnership firm, he must do so specifically. (*Ord. XXI. r.* 5.) As to the costs occasioned by partners severing in their defence, *see Bull* v. *West London School District Board*, 34 L. T. 674—*V.-C. M.*

Judgment.

Judgment.]—When the writ is issued against a firm in the partnership name, the judgment must be against the firm, and it cannot be entered separately against the individual members, or an individual member who has appeared (*o*); but where judgment has been recovered against the firm, the plaintiff may bring an action against the individual members, and is not confined to his remedy by execution (*p*). When the plaintiff sued a firm in the partnership name, R. & Co., and one R. having appeared in his own name, the plaintiff delivered a statement of claim against him as "R., sued as R. & Co.," and obtained judgment against R., it was held that the plaintiff could not afterwards amend the judgment by making it a judgment against the firm (*q*).

Execution.

Execution.]—By *R. of S. C., Ord. XLII. r.* 10, "Where a judgment or order is against a firm, execution may issue:

(*a.*) Against any property of the partnership;

(*b.*) Against any person who has appeared in his own name under Order XII., Rule 15, or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner;

(*c.*) Against any person who has been served, as a partner, with the writ of summons, and has failed to appear.

If the party who has obtained judgment or an order claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the Court or a Judge for

(*l*) *Shillito* v. *Child*, W. N. 1883, 208; Bitt. Ch. Cas. 219.

(*m*) Cp. *Nelson* v. *Pastorino*, 49 L. T. 564.

(*n*) *Taylor* v. *Collier*, 51 L. J., Ch. 853; 31 W. R. 701.

(*o*) *Jackson* v. *Litchfield* (C. A.), 8 Q. B. D. 474; 51 L. J., Q. B. 327; 46 L. T. 518; 30 W. R. 531.

(*p*) *Clark* v. *Cullen*, 9 Q. B. D. 355; 47 L. T. 307.

(*q*) *Munster* v. *Railton* (C. A.), 11 Q. B. D. 435; 52 L. J., Q. B. 409; 48 L. T. 624; 31 W. R. 880, reversing *S. C.*, 10 Q. B. D. 475.

leave so to do; and the Court or Judge may give such leave if the liability be not disputed, or if such liability be disputed, may order that the liability of such person be tried and determined in any manner in which any issue or question in an action may be tried and determined."

Whenever leave to issue execution against any person as a member of a firm against whom judgment has been obtained is necessary, the application should be made by summons before a Master at Chambers, and supported by an affidavit, showing a *primâ facie* case of liability on the part of the person against whom it is sought to issue the execution (*r*). On the hearing of the application the Master, in a clear case, will give the leave, but if there is any difficulty or dispute, he will order an issue as to the liability to be tried, and adjourn the summons pending the trial of such issue (*r*).

This rule does not prevent a plaintiff who has obtained judgment against a partnership in the name of the firm from suing the individual members of the partnership on the judgment (*s*).

Execution against the Property of a Firm upon a Judgment against one of the Members alone.]—*See ante, Vol.* 1, p. 853.

Execution against partnership property on judgment against member.

Execution on Judgment in favour of Firm.]—When judgment is given in favour of a firm, execution may be issued in the usual manner. Where one or more partners die after judgment in favour of the firm, the surviving partner or partners may issue execution on the judgment (*t*).

Execution on judgment for firm.

(*r*) See *Davis* v. *Morris*, 10 Q. B. D. 436; 52 L. J., Q. B. 401; 31 W. R. 719.

(*s*) *Clark* v. *Cullen*, 9 Q. B. D. 355; 47 L. T. 307.

(*t*) *Davis & Son* v. *Andrews*, W. N. 1884, 94; Bitt. 102.

CHAPTER XCIV.

LOCAL BOARDS OF HEALTH.

PART XII. Corporation.

Local Board a Corporation with power to sue and be sued, &c.]—By the Public Health Act, 1875 (38 & 39 *V. c.* 55), sect. 7, "Every local board and any improvement commissioners, being an urban authority and not otherwise incorporated, shall continue to be or be a body corporate, designated (in the case of local boards and improvement commissioners being urban sanitary authorities at the time of the passing of this Act) by such name as they then bear; and (in the case of local boards constituted after the passing of this Act) by such name as they may, with the sanction of the Local Government Board, adopt, with a perpetual succession and a common seal, and with power to sue and be sued in such name, and to hold lands without any licence in mortmain for the purposes of this Act."

Actions by and against.

Actions by and against.]—The board should be described in the writ by their corporate name. The proceedings are in all respects, except where some difference is specially pointed out in this chapter, the same as in ordinary cases. In actions against the board it would appear proper, in addition to the other relief required, to claim a mandamus to the board, to levy a rate to satisfy the plaintiff's claim or judgment. (*See post*, p. 1098.) As to the arbitration clauses of the Public Health Act, *see Brierly Hill Local Board* v. *Pearsall* (H. L.), 51 L. T. 577; 54 L. J., Q. B. 25.

Change of name.

Change of Name not to affect Proceedings.]—By sect. 311, "Any local board constituted either before or after the passing of this Act may, with the sanction of the Local Government Board, change their name. Every such change of name shall be published in such manner as the Local Government Board may direct. No such change of name shall affect any rights or obligations of the local board, or render defective any legal proceedings instituted by or against the local board; and any legal proceedings may be continued or commenced against the local board by their new name which might have been continued or commenced against the local board by their former name."

Appearance by clerk, &c.

Appearance by Clerk, Officer or Member.]—By sect. 259, "Any local authority may appear before any Court, or in any legal proceeding, by their clerk, or by any officer or member authorized generally, or in respect of any special proceeding by resolution of such authority, and their clerk, or any officer or member so authorized, shall be at liberty to institute and carry on any proceeding which the local authority is authorized to institute and carry on under this Act."

Notice of action.

Month's Notice of Action.]—By sect. 264, "A writ or process shall not be sued out against or served on any local authority, or any

member thereof, o
in his aid, for any
to be done under t
one month after n
authority, member
action, and the nat
and of his attorne
any such action th
evidence of any cau
so served, and unle
the defendant" (*b*).

Action within Six
such action *shall be*
accruing of the cau
tried in the county or
elsewhere" (*c*).

Tender of Amends.
person to whom any s
tender amends to the
within one month afte
be not accepted, may
have not been tendered
are insufficient, the de
time before trial, *pay i*
he may think proper;
pleaded for the whole a
dant, or if the plaintiff
defendant, then the def
and have judgment acc

Not Guilty by Statute.
(11 & 12 *V. c.* 63, *s.* 139)
by statute, is not re-enact

Compromise.]—A comp
be valid though not unde

Mode of enforcing Judg
"No matter or thing do
local authority, or joint
matter or thing done by
by any officer of such auth

(*a*) See *Midland R. Co.* v. *W*
ton Local Board, cited ante,
p. 269, n. (*c*).

(*b*) See ante, Vol. 1, p. 210.
notice is not necessary when t
lief sought is an injunction. *Ba*
Corporation of Wisbeach, and
v. *Local Board of Low Leyton*,
ante, Vol. 1, p. 269, n. (*f*). A
tractor employed by the board
entitled to notice under this sec

member thereof, or any officer of a local authority, or person acting in his aid, for anything done or intended to be done (*a*) or omitted to be done under the provisions of this Act, *until the expiration of one month after notice in writing* has been served on such local authority, member, officer or person, clearly stating the cause of action, and the name and place of abode of the intended plaintiff, and of his attorney or agent in the cause; and on the trial of any such action the plaintiff shall not be permitted to go into evidence of any cause of action which is not stated in the notice so served, and unless such notice is proved the jury shall find for the defendant" (*b*).

Six months.

Action within Six Months—Local Venue.]—By sect. 264, "Every such action *shall be commenced within six months* next after the accruing of the cause of action, and not afterwards, and shall be *tried in the county or place where the cause of action* occurred, and not elsewhere" (*c*).

Local venue.

Tender of amends.

Tender of Amends—Payment into Court.]—By sect. 264, "Any person to whom any such notice of action is given as aforesaid may *tender amends* to the plaintiff, his attorney or agent, at any time within one month after service of such notice, and, in case the same be not accepted, may *plead such tender in bar*; and in case amends have not been tendered as aforesaid, or in case the amends tendered are insufficient, the defendant may, by leave of the Court, at any time before trial, *pay into Court* under plea such sum of money as he may think proper; and if upon issue joined, or upon any plea pleaded for the whole action, the jury find generally for the defendant, or if the plaintiff be nonsuited or judgment be given for the defendant, then the defendant shall be entitled to full costs of suit, and have judgment accordingly."

Not guilty by statute.

Not Guilty by Statute.]—The provision in the repealed Act of 1848 (11 & 12 V. c. 63, s. 139), enabling the defendant to plead *not guilty by statute*, is not re-enacted by the Act of 1875, and no longer exists.

Compromise.

Compromise.]—A compromise of an action by a local board may be valid though not under seal (*d*).

Members not personally liable.

Mode of enforcing Judgment against Local Board.]—By sect. 265, "No matter or thing done, and no contract entered into, by any local authority, or joint board, or port sanitary authority, and no matter or thing done by any member of any such authority, or by any officer of such authority or other person whomsoever acting

(*a*) See *Midland R. Co.* v. *Withington Local Board*, cited ante, Vol. 1, p. 209, n. (*e*).

(*b*) See ante, Vol. 1, p. 210. The notice is not necessary when the relief sought is an injunction. *Baker* v. *Corporation of Wisbeach*, and *Flower* v. *Local Board of Low Leyton*, cited ante, Vol. 1, p. 209, n. (*f*). A contractor employed by the board is not entitled to notice under this section. *Stringer* v. *Barker*, W. N. 1879, 127, C. P. D.

(*c*) Id. See *Itchin Bridge Co.* v. *Southampton Local Board*, 8 El. & Bl. 801; 27 L. J., Q. B. 128: cp. R. of S. C., Ord. XXXVI. r. 1, ante, Vol. 1, p. 589.

(*d*) *Att.-Gen.* v. *Gaskell*, 22 Ch. D. 537; 52 L. J., Ch. 163; 47 L. T. 506; 31 W. R. 135.

PART XII.

under the direction of such authority, shall, if the matter or thing were done, or the contract were entered into *bonâ fide* for the purpose of executing this Act, subject them or any of them personally to any action, liability, claim or demand whatsoever; and any expense incurred by any such authority, member, officer or other person acting as last aforesaid, shall be borne and repaid out of the fund or rate applicable by such authority to the general purposes of this Act.

"Provided that nothing in this section shall exempt any member of any such authority from liability to be surcharged with the amount of any payment which may be disallowed by the auditor in the accounts of such authority, and which such member authorized or joined in authorizing."

Execution.

If the board does not pay the amount recovered execution may be issued, and any property belonging to it seized under a *fieri facias* or elegit (*e*), or by sequestration (*f*). As to execution or attachment against the individual members, *see Ord. XLII. r.* 31, *ante*, pp. 908, 947.

Mandamus to levy a rate.

If the board do not pay, the plaintiff should require them to levy a rate for the purpose of satisfying the judgment and costs. If they decline to do this a mandamus to compel them to do so may be applied for and obtained (*g*). The application for this purpose must be made within six months after the judgment is obtained (*h*). It may be granted after six months from the date when the cause of action accrued (*i*). The application has hitherto been usually made to the Court, but it is submitted that it might be made by summons to a Judge at chambers under the *Judicature Act*, 1873, *s.* 25, *sub-s.* 8 (*k*).

(*e*) *Worral Waterworks Co.* v. *Lloyd*, L. R., 1 C. P. 719.

(*f*) Ord. XLII. r. 31, ante, pp. 1051, 1052.

(*g*) *Reg.* v. *Rotherham Local Board*, 8 El. & Bl. 906; 27 L. J., Q. B. 156: *Worthington* v. *Hulton*, L. R., 1 Q. B. 63; 35 L. J., Q. B. 61: per Lord *Blackburn*, *Julius* v. *Bishop of Oxford*, 5 App. Cas. at p. 244.

(*h*) Id. Cp. *Reg.* v. *Wigan*, 1 App. Cas. 611: *Reg.* v. *Maidenhead*, 9 Q. B. D. 494.

(*i*) *Worthington* v. *Hulton*, supra: *Burland* v. *Kingston-upon-Hull*, 3 B. & S. 271; 32 L. J., Q. B. 17; 7 L. T. 316.

(*k*) See ante, Vol. 1, pp. 426, 434, and *Smith* v. *Cowell*, 6 Q. B. D. 75.

CHAPTER XCV.

FRIENDLY AND OTHER SOCIETIES AND TRADE UNIONS.

	PAGE		PAGE
1. *Friendly Societies*	1099	4. *Loan Societies*.....	1104
2. *Building Societies*	1100	5. *Scientific and Literary Societies*	1105
3. *Industrial and Provident Societies*	1103	6. *Trade Unions*.....	1106

1. *Actions by and against Friendly Societies.*

ALL registered friendly societies are now regulated by the Friendly Societies Act, 1875 (38 & 39 V. c. 60) (*a*).

By that Act, sect. 21, "With respect to legal proceedings against (*b*) registered societies, the following provisions shall have effect:

Power to sue and be sued.

(1.) The trustees of any society or branch, or any other officers authorised by the rules thereof, may bring or defend or cause to be brought or defended, any action, suit, or other legal proceeding in any Court whatsoever, touching or concerning any property, right (*c*), or claim of the society or branch, as the case may be, and shall sue and be sued, implead and be impleaded, in their proper names, without other description than the title of their office.

Action by member.

(2.) In legal proceedings, which may be brought under this Act by a member or person claiming through a member, the society may also be sued in the name, as defendant, of any officer or person who receives contributions or issues policies on behalf of the society within the jurisdiction of the Court in which the legal proceeding is brought with the addition of the words 'on behalf of the society' (naming the same).

Effect of death, &c.

(3.) No legal proceeding shall abate or be discontinued by the death, resignation, or removal from office of any officer, or by any act of such officer after the commencement of the proceedings.

Service of writ, &c.

(4.) The summons, writ, process or other proceeding to be issued to or against the officer or other person sued on behalf of a society shall be sufficiently served by personally serving such officer or other person, or by leaving a true copy thereof at the registered office of the society, or at any place of business of the society within the jurisdiction of the Court in which the proceeding is brought, or, if such office or place of business be closed, by posting such copy on the outer door of the same; but in all cases where the said summons, writ, process, or other proceeding shall not be served

(*a*) Amended, 39 & 40 V. c. 32; 42 V. c. 9.

(*b*) The introductory part of the section says "against," but the language of the sub-sections extends to proceedings "by" also.

(*c*) See *Roberts* v. *Page*, 1 Q. B. D. 476.

PART XII.

by means of such personal service or by leaving a true copy thereof at the registered office of the society, a copy thereof shall be transmitted addressed to the committee of management at the registered office of the society, and the same shall be enclosed in a registered letter posted at least six days before any further step shall be taken on such summons, writ, process, or other proceeding."

Change of name.

By sect. 24, sub-s. 2, "A society may, by special resolution, with the approval in writing of the chief registrar, or in the case of societies registered and doing business exclusively in Ireland or Scotland the assistant registrar for Ireland or Scotland respectively, change its name; but no such change shall affect any right or obligation of the society, or of any member thereof, and any pending legal proceedings may be continued by or against the trustees of the society, or any other officer who may sue or be sued on behalf of such society, notwithstanding its new name."

Proof of service of notice.

By sect. 30, sub-s. 11, "In proving service of any notice by this section authorized to be sent by post, it is sufficient to prove that such notice was properly directed, and was put, as a prepaid letter, into the post office in such time as to admit of its being delivered in due course of delivery within the period (if any) prescribed for sending the same."

Rules.

By sect. 31, "The provisions of the present section apply only to registered cattle insurance societies, and to such specially authorized societies as the Treasury may allow to take the benefit of the present section:

(1.) The rules bind the society and the members thereof, and all persons claiming through them respectively, to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such rules contained a covenant on the part of himself, his heirs, executors, and administrators, to conform to such rules subject to the provisions of this Act.

(2.) All moneys payable by a member to the society are deemed to be a debt due from such member to the society, and are recoverable as such in the County Court of the district in which such member resides."

2. *Building Societies* (*n*).

Most building societies are now regulated by the Building Societies Act, 1874 (37 & 38 *V.* c. 42) (*o*).

(*n*) By 37 & 38 V. c. 42, s. 7, "The Act of the 6 & 7 W. 4, c. 32, intituled 'An Act for the Regulation of Benefit Building Societies,' is hereby repealed; but this repeal shall not affect any subsisting society certified under the said Act, until such society shall have obtained a certificate of incorporation under this Act; and this repeal shall not affect the past operation of the said Act, or the force or operation, validity or invalidity, of anything done or suffered, or any bond or security given, or any right, title, obligation or liability accrued, or any proceedings taken thereunder, or under the rules of any society which has been certified thereunder: Provided, that with regard to such subsisting societies as may not obtain certificates of incorporation under this Act, all things required to be done by or sent to the barrister or advocate and the clerk of the peace under the provisions of the said repealed Act, shall be done by or sent to the registrar." See 38 V. c. 9. In the case of societies not registered under the Act of 1874, actions should be brought by or against the society in the name of the trustees for the time being, naming them and describing them as such; 6 & 7 W. 4, c. 32, s. 4, incorporating 10 G. 4, c. 56, s. 21.

(*o*) Amended by 38 V. c. 9, and

By sect. 9 of that statute, "Every society now subsisting or hereafter established shall, upon receiving a certificate of incorporation under this Act, become a body corporate by its registered name, having perpetual succession, until terminated or dissolved in manner herein provided, and a common seal." Incorporation of societies.

The Court has no power to set aside the certificate of incorporation on the ground that it has been obtained by fraud (*p*).

By sect. 20, "Any certificate of incorporation or of registration, or other document relating to a society under this Act, purporting to be signed by the registrar, shall, in the absence of any evidence to the contrary, be received by the Court, and by all Courts of law and equity, and elsewhere, without proof of the signature; and a printed copy of the rules of a society, certified by the secretary or other officer of the society to be a true copy of its registered rules, shall, in the absence of any evidence to the contrary, be received as evidence of the rules." Evidence of registration.

By sect. 22, "A society under this Act may change its name by resolution of three-fourths of the members present at a meeting called for the purpose, provided that the new name is not identical with that of any society previously registered and still subsisting, or so nearly resembling the same as to be calculated to deceive, unless such subsisting society is in course of being terminated or dissolved, and consents to such registration. Notice of the change of name shall be sent to the registrar and registered by him, and he shall give a certificate of registration. Such change of name shall not affect any right or obligation of the society or of any member thereof, or other person concerned." Change of name.

By sect. 17, the society must make rules, and by sect. 16 such rules shall set forth *inter alia* the name of the society, and the chief office or place of meeting for the business of the society. Rules.

By sect. 21, "The rules of a society under this Act shall be binding on the several members and officers of the society, and on all persons claiming on account of a member, or under the rules, all of whom shall be deemed and taken to have full notice thereof."

By sect. 16, the rules are required to set forth *inter alia* "whether disputes between the society and any of its members, or any person claiming by or through any member, or under the rules, shall be settled by reference to the Court (*q*), or to the registrar, or to arbitration" (*r*). Disputes, how determined. Arbitration, &c.

Where the rules provide that disputes shall be referred to arbitration, any action in respect of such dispute will be stayed on an application by summons at Chambers (*s*). The effect of such a

---

40 & 41 V. c. 63. Friendly societies and benefit building societies do not stand on the same footing: *Mulkern* v. *Lord*, 4 App. Cas. 182; 48 L. J., Ch. 745.

(*p*) *Glover* v. *Giles*, 18 Ch. D. 173; 50 L. J., Ch. 568; 45 L. T. 344; 29 W. R. 603.

(*q*) That is to say (by sect. 4), "the County Court of the district in which the chief office or place of meeting for the society is situate."

(*r*) The Court will presume that the society has such a rule: *Johnson* v. *Attrincham Benefit Building Society*, 49 L. T. 568.

(*s*) *Municipal Building Society* v. *Kent* (H. L.), 9 App. Cas. 260; 53 L. J., Q. B. 290; 51 L. T. 6; 32 W. R. 681; *Wright* v. *Monarch Investment Building Society*, 5 Ch. D. 726; 46 L. J., Ch. 649; *Hack* v. *London Provident Building Society* (C. A.), 23 Ch. D. 103; 52 L. J., Ch. 541; 48 L. T. 247; 31 W. R. 392.

PART XII.

rule taken in connection with the 16th, 21st and 35th sections of the statute is to oust the jurisdiction of the Court altogether in matters falling within the rule (*t*).

Definition of word "disputes."

By the Building Societies Act, 1884 (47 & 48 *V. c.* 41), *s.* 2 (*u*), "The word 'disputes' in the Building Societies Acts, or in the rules of any society thereunder, shall be deemed to refer only to disputes between the society and a member, or any representative of a member in his capacity of a member of the society, unless by the rules for the time being it shall be otherwise expressly provided; and, in the absence of such express provision, shall not apply to any dispute between any such society and any member thereof, or other person whatever, as to the construction or effect of any mortgage deed, or any contract contained in any document, other than the rules of the society, and shall not prevent any society, or any member thereof, or any person claiming through or under him, from obtaining in the ordinary course of law any remedy in respect of any such mortgage or other contract to which he or the society would otherwise be by law entitled: Provided always, that nothing in this Act shall apply to any dispute pending at any time before the passing of this Act between any such society and any member thereof, or other person, which before the passing of this Act shall have been actually referred, or agreed to be referred, to arbitration, or as to which the jurisdiction of any Court of law shall have been adjudged to be excluded by a decision of any Court of competent jurisdiction in an action or suit between the society and any member thereof or other person."

To bring a dispute within the rule, it must, in ordinary cases, be one which arises between the society and a member or a representative of a member as such member (*v*): where, therefore, the society denied that the party was a member, it was held that they could not insist on an arbitration (*u*); and where the society sold to a member the property comprised in a mortgage by other members, and an action was brought by the mortgagors to set aside the sale, it was held that this was not a dispute within the rule (*x*).

Proceedings on arbitration.

By 37 & 38 *V. c.* 42, *s.* 34, "Where the rules of a society under this Act direct disputes to be referred to arbitration, arbitrators shall be named and elected in the manner such rules provide, or, if there be no such provision, at the first general meeting of the society, none of the said arbitrators being beneficially interested, directly or indirectly, in its funds; of whom a certain number, not less than three, shall be chosen by ballot in each such case of dispute, the number of the said arbitrators and mode of ballot being determined by the rules of the society; the names of such arbitrators shall be duly entered in the minute book of the society, and, in case of the death or refusal or neglect of any of the said arbitrators to act, the

(*t*) Id.: *Wright* v. *Monarch Investment Building Society*, supra, per *Jessel*, M. R. See *Thompson* v. *Planet Benefit Building Society*, L. R., 15 Eq. 333; 42 L. J., Ch. 364: *Huckle* v. *Wilson*, 2 C. P. D. 410. This is the same with societies under the 10 G. 4, c. 56, s. 27: *Johnson* v. *Altrincham Permanent Benefit Building Society*, 49 L. T. 568, where the objection was raised by demurrer.

(*u*) Passed in consequence of *Municipal Building Society* v. *Kent*, supra, n. (*s*).

(*v*) 47 & 48 V. c. 41, s. 2: *Prentice* v. *London*, L. R., 10 C. P. 679; 44 L. J., C. P. 353: *Mulkern* v. *Lord*, 4 App. Cas. 182; 48 L. J., Ch. 745.

(*x*) *French* v. *Municipal Permanent Building Society*, 53 L. J., Ch. 743; 50 L. T. 567.

society, at a general meeting, shall name and elect an arbitrator to act in the place of the arbitrator dying, or refusing or neglecting to act; and whatever award shall be made by the arbitrators or the major part of them, according to the true purport and meaning of the rules of the society, shall determine the dispute; and should either of the parties to the dispute refuse or neglect to comply with or conform to such award within a time to be limited therein, the Court (*y*), upon good and sufficient proof being adduced of such award having been made and of the refusal of the party to comply therewith, shall enforce compliance with the same upon the petition of any person concerned. Where the parties to any dispute arising in a society under this Act agree to refer the dispute to the registrar, or where the rules of the society direct disputes to be referred to the registrar, the award of the registrar shall have the same effect as that of arbitrators."

Determination of disputes by County Courts.

By sect. 35, "The Court (*y*) may hear and determine a dispute in the following cases:—

1. If it shall appear to the Court, upon the petition of any person concerned, that application has been made by either party to the dispute to the other party, for the purpose of having the dispute settled by arbitration under the rules of the society, and that such application has not within forty days been complied with, or that the arbitrators have refused, or for a period of twenty-one days have neglected to make any award.
2. Where the rules of the society direct disputes to be referred to the Court or to justices."

Decision of arbitrators, &c., to be binding and conclusive.

By sect. 36, "Every determination by arbitrators, or by the Court, or by the registrar, under this Act of a dispute, shall be *binding and conclusive* on all parties, and shall be final to all intents and purposes, and shall not be subject to appeal, and shall not be removed or removable into any Court of law or equity; provided always, that the arbitrators, or the registrar, or the Court, as the case may be, may, at the request of either party, *state a case for the opinion of the Supreme Court* of Judicature on any question of law, and shall have power to grant to either party to the dispute such discovery, as to documents and otherwise, as might now be granted by any Court of law or equity, such discovery to be made on behalf of the society by such officer of the society as the arbitrators, registrar, or Court may determine" (*z*).

Power to state case; — to grant discovery.

3. *Industrial and Provident Societies.*

By the Industrial and Provident Societies Act, 1876 (39 & 40 V. c. 45), sect. 11, "Registered societies shall be entitled to the following privileges:—

Corporation.

(1.) The registration of a society shall render it a body corporate by the name described in the acknowledgment of registry by which it may sue and be sued, with perpetual succes-

(*y*) That is to say, the County Court. See ante, p. 1101, n. (*q*).

(*z*) This Act is amended by 38 V. c. 9, and 40 & 41 V. c. 63. By 40 & 41 V. c. 63, s. 4, all rights of action and other rights held in trust for any society theretofore incorporated under the Act of 1874, are vested in the society without any conveyance or assignment.

sion and a common seal, and with limited liability; and shall vest in the society all property for the time being vested in any person in trust for the society; and all legal proceedings pending by or against the trustees of any such society may be prosecuted by or against the society in its registered name without abatement.

Rules. (2.) The rules of the society shall bind the society and all members thereof and all persons claiming through them respectively to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were contained in such rules a covenant on the part of himself, his heirs, executors, and administrators, to conform thereto, subject to the provisions of this Act: Provided that a society registered at the time when this Act comes into operation, or the members thereof, may respectively exercise any power given by this Act, and not made to depend on the provisions of its rules, notwithstanding any provision contained in any rule thereof certified before this Act was passed.

Money due a debt. (3.) All moneys payable by a member to the society shall be a debt due from such member to the society, and shall be recoverable as such either in the County Court of the district in which the registered office of the society is situate, or that of the district in which such member resides, at the option of the society."

Registered office. By sect. 10, sub-s. 1, every society is required to have a registered office to which all communications and notices may be addressed.

Changing name. By sect. 16, sub-s. 2, "A society may, by special resolution, with the approval in writing of the chief registrar, or, in the case of societies registered and doing business exclusively in Scotland or Ireland, the assistant registrar for Scotland or Ireland respectively, change its name, but no such change shall affect any right or obligation of the society, or of any member thereof, and any pending legal proceedings may be continued by or against the society, notwithstanding its new name."

Evidence. By sect. 24, "Every instrument or document, copy or extract of an instrument or document, bearing the seal or stamp of the Central Office, shall be received in evidence without further proof; and every document purporting to be signed by the chief or any assistant registrar, or any inspector or public auditor under this Act, shall, in the absence of any evidence to the contrary, be received in evidence without proof of the signature."

4. *Loan Societies.*

Property. By stat. 3 & 4 *V. c.* 110, *s.* 8, "And be it enacted, That all moneys and securities for money, and all chattels whatsoever, belonging to any such society, shall be vested in a trustee or trustees for the use and benefit of such society and the members thereof, their executors and administrators respectively, according to their several shares and interests therein, and after the death, resignation, or removal of any trustee or trustees shall vest in the surviving or succeeding trustee or trustees for the same estate and interest as the former trustee or trustees had therein, and subject to the same

trusts, without any assignment or conveyance whatever, and also shall for all purposes of suit, as well criminal as civil, at law or in equity, in anywise concerning the same, be deemed to be the property of the person or persons appointed to the office of trustee or trustees of such society, for the time being, in his or their proper name or names without further description, and such person or persons are hereby respectively authorised to bring or defend, or cause to be brought or defended, any suit, criminal as well as civil, at law or in equity, concerning the property or any claim of such society, and to sue and be sued, plead and be impleaded in his or their proper name or names, as trustee or trustees of such society, without any other description; and no suit shall abate or be discontinued by the death of such person or persons, or his or their removal from the office of trustee or trustees as aforesaid, but the same shall and may be proceeded in and by or against the succeeding trustee or trustees, and such succeeding trustee or trustees shall pay or receive like costs for the benefit of or to be reimbursed from the funds of such society, as if the suit had been commenced in his or their name or names" (*a*).

Sect. 16 provides for the recovery of loans before justices of the peace. Under the stat. 5 & 6 *W.* 4, *c.* 23, *s.* 8, since repealed, which was similar in its terms to sect. 16, it was held that the treasurer for the time being could not maintain an action on a promissory note made payable to the treasurer for the time being and given in the form prescribed by the statute to secure a loan to the society (*b*). When a note is given to two members of a loan society by name, to secure an advance made by the society, it is not necessary in suing on the note to join all the members of the society (*c*).

5. *Scientific and Literary Societies.*

By stat. 17 & 18 *V. c.* 112, *s.* 20, "Where any institution shall be incorporated, and have no provision applicable to the personal property of such institution, and in all cases where the institution shall not be incorporated, the money, securities for money, goods, chattels, and personal effects belonging to the said institution, and not vested in trustees, shall be deemed to be vested for the time being in the governing body of such institution, and in all proceedings, civil and criminal, may be described as the moneys, securities, goods, chattels, and effects of the governing body of such institution by their proper title."

By sect. 21, "Any institution incorporated which shall not be entitled to sue and be sued by any corporate name, and every institution not incorporated, may sue or be sued in the name of the president, chairman, principal secretary, or clerk, as shall be determined by the rules and regulations of the institution, and, in default of such determination, in the name of such person as shall be appointed by the governing body for the occasion; provided, that it shall be competent for any person having a claim or demand against the institution to sue the president or chairman thereof, if,

(*a*) Made perpetual by 26 & 27 V. c. 56.

(*b*) *Tomes* v. *Williams*, 3 Q. B. 413; 11 L. J., Q. B. 210. But see *Albion* v. *Pyke*, 4 M. & Gr. 421; 11 L. J., C. P. 266.

(*c*) *Bawdon* v. *Howell*, 3 M. & Gr. 638; 4 Scott, N. R. 331.

PART XII.

on application to the governing body, some other officer or person be not nominated to be the defendant."

By sect. 22, "No suit or proceeding in any civil Court shall abate or discontinue by reason of the person by or against whom such suit or proceeding shall have been brought or continued dying or ceasing to fill the character in the name whereof he shall have sued or been sued, but the same suit or proceeding shall be continued in the name of or against the successor of such person."

By sect. 23, "If a judgment shall be recovered against the person or officer named on behalf of the institution, such judgment shall not be put in force against the goods, chattels, or lands, or against the body of such person or officer, but against the property of the institution, and a writ of revivor (*c*) shall be issued setting forth the judgment recovered, the fact of the party against whom it shall have been recovered having sued or having been sued, as the case may be, on behalf of the institution only, and requiring to have the judgment enforced against the property of the institution."

By sect. 25, "Any member who may be in arrear of his subscription according to the rules of the institution, or may be (*sic*) or shall possess himself of or detain any property of the institution in a manner or for a time contrary to such rules, or shall injure or destroy the property of the institution, may be sued in the manner herein-before provided; but if the defendant shall be successful in any action or other proceeding at the instance of the institution, and shall be adjudged to recover his costs, he may elect to proceed to recover the same from the officer in whose name the suit shall be brought, or from the institution, and in the latter case shall have process against the property of the said institution in the manner above described."

6. *Trade Unions.*

Power to sue and be sued.

By the Trade Union Act, 1871 (34 & 35 *V.* c. 31) (*d*), *s.* 9, "The trustees of any trade union registered under this Act, or any other officer of such trade union who may be authorized so to do by the rules thereof, are hereby empowered to bring or defend, or cause to be brought or defended, any action, suit, prosecution, or complaint in any Court of law or equity, touching or concerning the property, right (*e*), or claim to property of the trade union: and shall and may, in all cases concerning the real or personal property of such trade union, sue and be sued, plead and be impleaded, in any Court of law or equity, in their proper names, without other description than the title of their office; and no such action, suit, prosecution, or complaint shall be discontinued or shall abate by the death or removal from office of such persons or any of them, but the same shall and may be proceeded in by their successor or successors as if such death, resignation, or removal had not taken place; and such successors shall pay or receive the like costs as if the action, suit, prosecution, or complaint had been commenced in their names for the benefit of or to be reimbursed from the funds of such trade union, and the summons to be issued to such trustee or other officer may be served by leaving the same at the registered office of the trade union."

Death, &c.

(*c*) See now ante, Ch. LXXXIV.
(*d*) Amended by 39 & 40 V. c. 22.
(*e*) Cp. *Roberts* v. *Page*, 1 Q. B. D. 476.

Change of name.

By 39 & 40 *V. c.* 22, *s.* 11, "A trade union may, with the approval in writing of the chief registrar of friendly societies, or in the case of trade unions registered and doing business exclusively in Scotland or Ireland, of the assistant registrar for Scotland or Ireland respectively, change its name by the consent of not less than two-thirds of the total number of members.

"No change of name shall affect any right or obligation of the trade union or of any member thereof, and any pending legal proceedings may be continued by or against the trustees of the trade union or any other officer who may sue or be sued on behalf of such trade union notwithstanding its new name."

Mode of suing and being sued.

The trustees or officer must be described in the title of the action and in the body of the writ by their or his proper names with the addition of their or his title. The claim must be stated in the indorsement to be made by or against them "as trustees [*or* 'as '] of the ." The trustees may be described in the statement of claim as being "the trustees of the Trade Union, which is duly registered under the provisions of the Trade Union Act, 1871." The officer may be described thus:—"The plaintiff [*or* 'defendant '] is the [*title of office*] of the Trade Union, which is duly registered [&c. *as in case of trustees*], and he is authorized by the rules of the said Trade Union to sue [*or* 'be sued '] in this action on behalf thereof."

CHAPTER XCVI.

HUNDREDORS.

PART XII.

Liability of hundredors.

THE statutes now in force, by which hundredors are liable for damage done by rioters, are the 7 & 8 *G.* 4, *c.* 31 (*a*); for damage to threshing machines, 2 & 3 *W.* 4, *c.* 72; for robbery of wreck of ship, 17 & 18 *V. c.* 104, *s.* 477. All the prior statutes relative to such liability are repealed by the 7 & 8 *G.* 4, *c.* 27. Hundredors are now only liable for damage done by riotors acting *feloniously* (*b*). The proceedings which must be taken previous to the action, and those in the action itself, will now be considered.

Action will not lie unless loss exceed 30*l.*

The plaintiff cannot proceed by action, unless his loss exceed 30*l.*; for a loss amounting to that sum or under, his remedy is by summary proceedings before justices at a special petty session (*c*).

Proceedings before action brought.

Proceedings before Action brought.]—Previously to the commencement of the action, there are by the 3rd section of the above Act, certain acts required of the party injured, such as, that he, or his servant having the care of the property injured, shall, within *seven* days after the commission of the offence, go before some near resident (*d*) justice, and state on his oath the names of the offenders, and submit to an examination, and enter into a recognizance to prosecute. The examination of the party must take place within seven days exclusive of the day on which the offence was committed (*e*).

All the persons damnified, who have any knowledge of the circumstances of the offence, or all the servants who had the care of the property damaged, and have any knowledge of such circumstances, should go before the justice to be examined (*f*). It is not necessary that both the person injured and servant be examined (*g*); if the former has no knowledge of the circumstances of the offence, being such a knowledge as is available in evidence, then the servant or servants who had the care of the property should be

(*a*) Sect. 5 is repealed by stat. 36 & 37 V. c. 91, Sched.

(*b*) See Russ. on Crimes, by Prentice, 368.

(*c*) See 7 & 8 G. 4, c. 31, ss. 8 & 9. As to the mode of assessing damages, see *Duke of Newcastle* v. *Hundred of Broxtowe*, 4 B. & Ad. 273.

(*d*) See Bull. N. P. 186.

(*e*) *Pellew* v. *Hundred of Wonford*, 9 B. & C. 134.

(*f*) See *Duke of Somerset* v. *Hundred of Mere*, 4 B. & C. 167; 6 D. & R. 247: *Nesham* v. *Armstrong*, 1 B. & Ald. 146. But see *Lowe* v. *Inhabitants of Broxtowe*, 3 B. & Ad. 550.

(*g*) *Rolfe* v. *Hundred of Elthorne*, 1 M. & M. 185.

examined (*h*). Whe
own oath was held s
servant (*i*). The pa
to state his *suspicio*
before a justice to a
submission to exam
justice require noth
be taken down in wr
be so.

Limitation of Actio
calendar months after
the day the offence
brought by a tormor
house within such th
by his death after the
his executors could no
of doubt whether an ex
action upon this statu
his testator.

Process to compel Ap
to enforce their
by writ of sum
of the hundre
habiting within the hu
or other like district g
name (*p*).

The writ must be serv
of the high constables
which the offence happe
been abolished in most
statute provides that wh
shall be upon the chief
of the county (*q*). The

(*h*) See *Rolfe* v. *Hund*
Elthorne, supra: *Duke of S*
v. *Hundred of Mere*, 4 B. &
6 D. & R. 247.

(*i*) *Pellew* v. *Hundred of W*
9 B. & C. 134.

(*j*) *Lowe* v. *Inhabitants of*
towe, 3 B. & Ad. 550.

(*k*) *Graham* v. *Hundred of*
tree, Bull. N. P. 166. See s
forms in Chit. Gen. Prac. o
Law, 1st ed. 580, 581.

(*l*) See the 3rd section.

(*m*) See *Pellew* v. *Hundr*
Wonford, 9 B. & C. 134: *Nor*
The Hundred of Gawtry, Hob.
2 Roll. Abr. 520 a, pl. 8; 1 Br
156.

(*n*) *Adam* v. *Inhabitants of Br*
4 N. & M. 144; 2 A. & E.
Actions no longer abate by d

examined (*h*). Where the reversioner sued on the Black Act, his own oath was held sufficient, without examining the tenant or his servant (*i*). The party is not, it seems, in his examination, bound to state his *suspicion* respecting the offender (*i*). The swearing before a justice to a deposition *previously* prepared, is a sufficient submission to examination within the meaning of the Act, if the justice require nothing further (*j*). The examinations need not be taken down in writing (*k*), though it is better that they should be so.

Limitation of action.

Limitation of Action.]—The action must be brought within three calendar months after the commission of the offence (*l*), exclusive of the day the offence was committed (*m*). Where an action was brought by a termor upon this statute for an injury done to his house within such three calendar months, and that action abated by his death after the three months had expired, it was held that his executors could not bring a fresh action (*n*). And it is a matter of doubt whether an executor of a termor can, in *any* case, bring an action upon this statute for an injury sustained in the lifetime of his testator.

Process to compel appearance.

Process to compel Appearance.]—The process against hundredors, to enforce their appearance, is the same as in ordinary cases, viz., by writ of summons (*o*). The writ must be against "the inhabitants of the hundred of ———, in the county of ———," or, "the men inhabiting within the hundred of ———, in the county of ———," or other like district generally, and not against any of them by name (*p*).

The writ must be served upon the high constables (if any), or one of the high constables (if any), of the hundred or like district in which the offence happened. But the office of high constable has been abolished in most cases by stat. 32 & 33 *V.* c. 47, and that statute provides that where there is no high constable the service shall be upon the chief constable or acting chief officer of police of the county (*q*). The constable should within seven days after

(*h*) See *Rolfe* v. *Hundred of Elthorne*, supra: *Duke of Somerset* v. *Hundred of Mere*, 4 B. & C. 167; 6 D. & R. 247.

(*i*) *Pellew* v. *Hundred of Wonford*, 9 B. & C. 134.

(*j*) *Lowe* v. *Inhabitants of Broxtowe*, 3 B. & Ad. 550.

(*k*) *Graham* v. *Hundred of Beautree*, Bull. N. P. 166. See several forms in Chit. Gen. Prac. of the Law, 1st ed. 580, 581.

(*l*) See the 3rd section.

(*m*) See *Pellew* v. *Hundred of Wonford*, 9 B. & C. 134: *Norris* v. *The Hundred of Gawtry*, Hob. 139; 2 Roll. Abr. 520 a, pl. 8; 1 Brownl. 156.

(*n*) *Adam* v. *Inhabitants of Bristol*, 4 N. & M. 144; 2 A. & E. 389. Actions no longer abate by death. See Ord. XVII. r. 1, ante, p. 1025.

(*o*) Vol. 1, p. 235; 2 W. 4, c. 39, ss. 21, 1, 3 (repealed).

(*p*) See 2 Saund. 376 f; Id. 573: *Johnson* v. *Pearson*, 2 D. & R. 439; 1 B. & C. 304: *Horton* v. *Inhabitants of Stanford*, 2 Dowl. 96; 1 C. & M. 773; 3 Tyr. 869.

(*q*) See R. of S. C., Ord. IX. r. 8, ante, Vol. 1, p. 235. By stat. 32 & 33 V. c. 47, s. 5, "In every action to be brought or summary claim to be preferred against any hundred or other like district, of which there is no high constable, the process for appearance in the action and the notice required in the case of the claim shall be served upon the chief constable or other acting chief officer of police for the time being of the county in which such hundred or district is

PART XII.

such service give notice thereof to two justices residing in and acting for the hundred, &c. (*r*). If the writ be against the inhabitants of a county of a city or town, or the inhabitants of a franchise, liberty, city, town or place, not being part of a hundred or other like district, it may be served on any peace officer thereof (*s*).

Appearance.

Appearance.]—The constable, upon being served with the writ of summons, may enter an appearance, and defend the action for and on behalf of the inhabitants of the hundred or other like district, &c., as he may be advised (*t*). If he do not, however, the plaintiff may proceed as in other cases. This appearance must be entered as directed in *Vol.* 1, p. 251 *et seq.*

Pleadings.

Pleadings.]—As to the form of the statement of claim, *see* 2 *Saund.* 376, 376 *b*, *e*, *f*, 377 *f*, 379 (*u*). It is delivered as in ordinary cases.

Judgment by default.

The constable may allow judgment to go by default, with the consent and approbation of the two justices to whom he has given notice of the service of the process (*x*).

Defence.

The defendants might formerly plead not guilty, and give all defences in evidence (*y*); but now defences must be specially pleaded as in other cases.

Amendment.

Amendment.]—As this is not a penal action, it was within the statutes of jeofails, and amendments might be made in the same manner as in other civil actions (*z*). As to amendments in general, *see now Vol.* 1, *Ch. XLII.*

Costs.

Costs.]—The plaintiff in this action, if he obtain a verdict, unless an order be made depriving him of them, is entitled to recover costs (*a*). So the defendants will, it seems, be entitled to costs, if they obtain a verdict, as in other cases, if no order be made to the contrary (*b*).

Execution.

Execution.]—The execution is by *fieri facias* against the inhabitants of the hundred, &c., generally, directed to the sheriff of the county in which such hundred, &c. is situate, and indorsed thus: "The within damages are to be levied according to the statute 7 & 8 *G.* 4, *c.* 31," adding the solicitor's name and residence, and

---

situate, and all matters which by any Act the high constable of a hundred is authorised or required to do in either of such cases shall be done by the officer so served, who shall have the same powers, rights and remedies, and be subject to the same liabilities as any high constable would but for the passing of this Act have had and incurred under any Act of Parliament, and in case of the termination of his office by death or otherwise his successor shall act in his stead."

(*r*) 7 & 8 G. 4, c. 31, s. 4.

(*s*) Vol. 1, p. 235.

(*t*) 7 & 8 G. 4, c. 31, s. 4.

(*u*) See *Barwell* v. *Winterstoke* (*Hundred*), 14 Q. B. 704; 19 L. J., Q. B. 206.

(*x*) 7 & 8 G. 4, c. 31, s. 4.

(*y*) See Vid. Ent. 211; Lil. Ent. 296; Hans. Ent. 4; 1 And. 158.

(*z*) *Bearecroft* v. *Hundreds of Burnham and Stone*, 3 Lev. 347: *Merrick* v. *Hundred of Ossulston*, Hardw. 409; Andr. 115.

(*a*) 2 Saund. 378 b: *Ratcliffe* v. *Eden*, Cowp. 485: *Witham* v. *Hill*, 2 Wils. 91; Vol. 1, p. 675.

(*b*) *Greetham* v. *Hundred of Theele*, 3 Burr. 1723.

the day of the month and year (*e*). The 13th section of the Act makes provision for executing writs in certain places. When this writ is delivered to the sheriff, instead of levying the amount on any of the inhabitants of the hundred, &c., he must proceed as directed by the 6th section of the Act. The 7th section of the Act points out the mode of reimbursing the constable for his expenses of defending the action. The 14th section points out the mode of reimbursements in towns, &c. not in a hundred, but contributing to the county rate, and the 15th section the mode in such towns as do not contribute to that rate.

(*e*) See the form of writ, Chit. Forms, p. 537.

CHAPTER XCVII.

EXECUTORS AND ADMINISTRATORS.

1. *Proceedings by Executors and Administrators.*

PART XII. Limitation of actions by.

Limitation of Actions by.]—It is not competent to an executor to maintain an action for a debt which accrued to his testator, and for which the latter might have sued, more than six years before the issuing of the writ. Thus, where A. had a right of action against B. for a debt in respect of which the Statute of Limitations began to run in September, 1856. A. died on the 31st of May, 1862. His executor proved the will on the 12th of July; and commenced an action against B. on the 5th of November:—It was held, that the Statute of Limitations was a bar to the claim, notwithstanding a jury (or an arbitrator) might think that the executor had commenced the proceeding *within a reasonable time* (*a*). Where a party brings an action and dies before judgment, the six years being then expired, his executor, &c. may bring a new action, provided he does it promptly or within a reasonable time, and which time is generally considered to be a year (*b*). But in this case, as the action no longer abates by the plaintiff's death (*R. of S. C., Ord. XVII. r.* 1), his executors should now get leave to continue the action under *R. of S. C., Ord. XVII. r.* 4. (*See ante*, p. 1033.)

Before the statute 19 & 20 *V. c.* 97, *s.* 10, it was held, that when a person died abroad, to whom a right of action had accrued during his residence there, and he never returned to this country after the accrual thereof, his executors might sue for it, although more than six years had elapsed since it accrued (*c*). That statute abolished the exception in the case of absence beyond the sea, but the same principle would still apply to the other disabilities referred to in the stat. 21 *Jac.* 1, *c.* 16, *s.* 7. It seems that, in such a case, the executors are bound to sue within six years after their testator's death (*c*).

When the cause of action accrues after the testator's death, the statute does not begin to run against his administrator until letters of administration are granted (*d*). So, in an action by an administrator upon a bill of exchange payable to the intestate, but accepted *after his death*, it was held that the statute began to run from the grant of the letters of administration, and not from the

---

(*a*) *Penny* v. *Brice*, 18 C. B., N. S. 393.

(*b*) *Matthews* v. *Phillips*, 2 Salk. 421: *Kinsey* v. *Haward*, 1 Lutw. 260; 2 Saund. 63, n. (*g*); 2 Wms. Exors. 1337. And see *Adam* v. *Inhabitants of Bristol*, 2 A. & E. 389: *Curlewis* v. *Earl of Mornington*, 26 L. J., Q. B. 181; 7 E. & B. 283; 27 L. J., Q. B. 439; Wms. on Exors. 8th ed. p. 1892 et seq. As to the effect of the death, &c. of parties to an action, see ante, p. 1026.

(*c*) *Townsend* v. *Deacon*, 3 Ex. 706; 18 L. J., Ex. 298.

(*d*) *Burdock* v. *Garrick*, L. R., 5 Ch. [illegible], 241.

time the bill became due, there being no cause of action until there is a party capable of suing (*e*). But that case would have been decided differently had the bill been due in the lifetime of the testator (*f*). By the 3 & 4 *W.* 4, *c.* 42, *s.* 2, executors and administrators may bring an action for an injury to the real estate of the testator or intestate, provided the injury was committed within six months before the death of the testator, &c., and the action be brought within a year after his death (*g*). An action by an executor or administrator under the 9 & 10 *V. c.* 93 (an Act for compensating the families of persons killed by accidents), must be brought within twelve calendar months after the death of the testator or intestate (*s.* 3) (*h*). By 27 & 28 *V. c.* 95, if the action is not brought within six calendar months after the death by the executor or administrator, it may be brought in the names of the persons beneficially interested.

Parties.

Parties.]—If there are several executors or administrators, all should join in bringing the action (*i*), though one be within the age of seventeen years (*k*), or has not proved the will (*l*).

By 20 & 21 *V. c.* 77, the Act for establishing a Court of Probate, *s.* 79, "Where any person, after the commencement of this Act, renounces (*m*) probate of the will of which he is appointed executor or one of the executors, the rights of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor." And by 21 & 22 *V. c.* 95, *s.* 16, "whenever an executor appointed in a will survives the testator, but dies without having taken probate, and whenever an executor named in a will is cited to take probate, and does not appear to such citation, the right of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects, shall, and may without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor." The non-joinder of a co-executor or administrator could only be taken advantage of formerly by plea or abatement, and now by an application to have the wanting party added under *R. of S. C., Ord. XVI. r.* 11 (*n*). If not so taken, it cannot be taken advantage of at the trial (*o*). One of several executors may alone maintain an action on a sale of goods made by him after the death,

(*e*) *Murray* v. *East India Co.*, 5 B. & Ald. 204. And see *Douglas* v. *Forrest*, 1 M. & P. 663; 4 Bing. 686; post, p. 1118.

(*f*) See *Rhodes* v. *Smethurst*, 4 M. & W. 63. And see in equity, *Freake* v. *Cranefeldt*, 3 My. & Cr. 499; post, p. 1118.

(*g*) See ante, p. 1026, and *Powell* v. *Rees*, 7 A. & E. 426.

(*h*) See as to this Act, ante, Vol. 1, p. 389.

(*i*) *Smith* v. *Smith*, Yelv. 130.

(*k*) Wentw. Executors, 95.

(*l*) *Brooks* v. *Stroud*, infra.

(*m*) Before this Act an executor who renounced had to be joined as plaintiff. *Brooks* v. *Stroud*, 1 Salk. 3: *Benslow's case*, 9 Coke, 37 a; 1 Saund. 291 i.

(*n*) See ante, p. 1019; 1 Saund. 291 i; Selw. N. P. 784: *Tuckey* v. *Hawkins*, 4 C. B. 655; Com. Dig. Abatement, E. 14.

(*o*) 1 Wms. Saund. Ed. 1870, p. 484, per Cur. *Jones* v. *Smith*, 1 Exch. at p. 834.

PART XII.

not naming himself executor(*o*). So, one of several executors may sue for goods taken out of his possession (*p*).

By *R. of S. C., Ord. XVI. r.* 8, "Trustees, executors, and administrators may sue and be sued on behalf of or as representing the property or estate of which they are trustees or representatives, without joining any of the persons beneficially interested in the trust or estate, and shall be considered as representing such persons; but the Court or a Judge may, at any stage of the proceedings, order any of such persons to be made parties, either in addition to or in lieu of the previously existing parties" (*q*).

Action before probate. Stay of proceedings.

An executor may commence an action before he has obtained probate (*r*); but if he does so the proceedings will be stayed until he has proved the will and given reasonable notice thereof to the defendant (*s*). An administrator, whether *cum testamento annexo* or not, cannot commence an action until he has obtained letters of administration (*t*).

As to when an executor can sue as such for work done or goods sold and delivered, *see Moseley* v. *Rendell*, L. R., 6 Q. B. 338; 40 L. J., Q. B. 338: *Abbott* v. *Parfitt*, L. R., 6 Q. B. 346; 40 L. J., Q. B. 115.

Writ of summons, &c.

Writ of Summons, &c.]—Though the plaintiff sue as executor or administrator, the writ of summons by which the action is commenced need not, in the body of it, describe him as such. But by *Ord. III. r.* 4 (*ante, Vol.* 1, p. 226), if the plaintiff sues or the defendant or any of the defendants is or are sued in a representative capacity, the indorsement must show, in manner appearing by the forms given by the Rules, or by any other statement to the like effect, in what capacity the plaintiff or defendant sues or is sued.

An executor or administrator, in proceeding to arrest the defendant before judgment, may swear to the debt according to his belief; he is not obliged to swear positively to it, as he would be if he were not suing *in autre droit* (*u*). Executors who held a party to bail without reasonable or probable cause, for a debt alleged to be due to their testator, were within the 43 *G.* 3, *c.* 46, *s.* 3 (*x*). If the plaintiff, after having arrested the defendant, die, such arrest is no bar to a fresh arrest in an action by the executors (*y*).

Before the 6 & 7 *V. c.* 73, *s.* 37, it was not necessary for the executor or administrator of a solicitor before the commencement of

---

(*o*) *Brassington* v. *Ault*, 2 Bing. 177.

(*p*) Godolp. Pt. 2, Ch. 16, s. 1.

(*q*) See *Goodrich* v. *Marsh*, W. N. 1878, M. R.: *Simpson* v. *Denny*, 10 Ch. D. 28: *Jennings* v. *Jordan*, 6 App. Cas. 698; 45 L. T. 593; 51 L. J., Ch. 129.

(*r*) *Woolridge* v. *Bishop*, 7 B. & C. 406.

(*s*) *Webb* v. *Adams*, 14 C. B. 401; 23 L. J., C. P. 96: *Tarn* v. *Commercial Bank of Sydney*, 12 Q. B. D. 294; 50 L. T. 365; 32 W. R. 492.

(*t*) *Phillips* v. *Hartley*, 3 C. & P. 121.

(*u*) Post, Ch. CXXVII. See form of affidavit to arrest by executor or administrator, Chit. Forms, 748.

(*x*) *Feeley* v. *Reed*, 5 B. & Ald. 515 a: *Dronefield* v. *Archer*, Id. 513; 1 D. & R. 67.

(*y*) *Mellin* v. *Evans*, 1 C. & J. 82.

an action, to deliver a bill of costs for business done by his testator or intestate; but this is now otherwise (*z*).

Joinder of claims.

Joinder of Claims.]—By *R. of S. C., Ord. XVIII. r. 5*, "Claims by or against an executor or administrator as such may be joined with claims by or against him personally, provided the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator" (*a*).

This rule is subject to Rules 1, 8 and 9 of the same Order (*r. 7, ante, Vol. 1, p. 406*), which give a Judge power to sever or order separate trials of causes of action joined in the same action (*see ante, Vol. 1, p. 405*).

It appears doubtful whether this rule applies to counterclaims (*b*). When a person was suing in his personal capacity, a counterclaim against him as executor was struck out (*b*).

Statement of claim and subsequent proceedings.

Statement of Claim and subsequent Proceedings.]—The statement of claim is delivered in the same manner as in ordinary cases. If the plaintiff describes himself in the statement of claim as executor or administrator, and it appears that the cause of action is in his own right, it will be no objection, for the calling himself as such is but surplusage (*c*). As to what claims may be joined, *see supra*. In an action under the 9 & 10 *V. c. 93* (the Act for compensating the families of persons killed by accidents) the plaintiffs must deliver with the statement of claim to the defendant or his solicitor a full particular of the person or persons for whom and on whose behalf the action is brought, and of the nature of the claim in respect of which damages are sought to be recovered (*see ante, Vol. 1, p. 389*).

Defence.

The defence is delivered as in ordinary cases. If either party wishes to deny the right of any other party to claim as executor or in any representative or other alleged capacity, he must deny the same specifically (*Ord. XXI. r. 5, ante, Vol. 1, p. 284*).

The defendant may bring money into Court as in ordinary cases (*d*).

Security for costs.

If the plaintiff reside abroad he may be compelled to give security for costs, as in other cases (*e*), but the fact that he is insolvent is not sufficient ground for compelling him to give security (*f*). In an action by two executors, one of whom is out of the jurisdic-

(*z*) Ante, Vol. 1, p. 122. As to taxing the bill, see Vol. 1, p. 139.

(*a*) Semble, this refers to cases where the personal claim is in respect of the assets of the testator as such. *Johnson* v. *Burgess*, 47 L. J., Ch. 552, V.-C. H.

(*b*) *Macdonald* v. *Carrington*, 4 C. P. D. 28; 48 L. J., C. P. 179. See *Padwick* v. *Scott*, 2 Ch. D. 736; 45 L. J., Ch. 350: *Hodgson* v. *Mochi*, 8 Ch. D. 569. As to joinder of causes of action, see Vol. 1, p. 405: *Bignell* v. *Harpur*, 4 Ex. 773; 19 L. J., Ex. 168: *Kitchenman* v. *Skeel*, 3 Ex. 49; 18 L. J., Ex. 23: *Webb* v. *Cowdell*, 14 M. & W. 820.

(*c*) *Hornsey* v. *Dimocke*, 1 Vent. 119: *Aspinall* v. *Wake*, 3 M. & Sc. 423; Com. Dig. "Pleader," (D. 2).

(*d*) *Crutchfield* v. *Scott*, 2 Str. 796. As to paying money into Court in an action brought under the 9 & 10 V. c. 93, "An Act for compensating the Families of Persons killed by Accident," see Vol. 1, p. 389.

(*e*) *Chevalier* v. *Finnis*, 3 Moore, 602; 1 B. & B. 277. And see ante, Vol. 1, p. 395.

PART XII.

tion, and the other insolvent, the defendant is not entitled to security for costs (*f*). *See Vol.* 1, p. 398.

Staying proceedings till probate.

The Court will, on proper cause being shown, stay the proceedings till probate is taken out, and notice thereof given to the defendant (*g*). Payment to an administrator is a good discharge, though a will exist and be afterwards proved (*h*). In an action by an administrator, the Court refused to allow the defendant to plead that the supposed intestate had made a will and appointed executors (*h*).

Other proceedings.

The subsequent proceedings, together with the verdict, judgment, and execution, are also the same as in ordinary cases. As to an executor, &c. obtaining leave to issue execution on a judgment obtained by his testator, &c., *see ante*, p. 959.

Revocation of administration pending action.

Revocation of Administration pending Action.]—By the 20 & 21 *V. c.* 77, *s.* 76, "Where before the revocation of any temporary administration any proceedings at law or in equity have been commenced by or against any administrator so appointed, the Court in which such proceedings are pending may order that a suggestion be made upon the record of the revocation of such administration, and of the grant of probate or administration which shall have been made consequent thereupon, and that the proceedings shall be continued in the name of the new executor or administrator, in like manner as if the proceeding had been originally commenced by or against such new executor or administrator, but subject to such conditions and variations, if any, as such Court may direct."

Costs.

Costs.]—The costs are now regulated by *R. of S. C., Ord. LXV.* (*see ante, Vol.* 1, p. 672), as in ordinary cases. Subject to this rule, if the judgment be for the plaintiff, he is entitled to costs as in ordinary cases; and where the judgment is for the defendant, he is, in general, entitled to costs as in ordinary cases. Before the stat. 3 & 4 *W.* 4, *c.* 42, *s.* 31, an executor suing as plaintiff was not generally held liable for costs, but by that statute "In every action brought by an executor or administrator in right of the testator or intestate, such executor or administrator shall (unless the Court in which such action is brought, or a Judge of any of the said superior Courts, shall otherwise order) be liable to pay costs to the defendant in case of being nonsuited or a verdict passing against the plaintiff, and in all other cases in which he would be liable if such plaintiff were suing in his own right and upon a cause of action accruing to himself, and the defendant shall have judgment for such costs, and they shall be recovered in like manner." This is, however, expressly repealed by stat. 42 & 43 *V. c.* 59 (2nd Sched., part 1), and stat. 46 & 47 *V. c.* 49, *s.* 4, and is only useful as a guide in applying *Ord. LXV.* As a general rule, executors plaintiffs are or will be made personally liable to costs when they do not succeed (*i*), and it is incumbent on them to show some facts which

(*f*) *Sykes* v. *Sykes*, L. R., 4 C. P. 645.

(*g*) *Webb* v. *Atkins*, 14 C. B. 401; 23 L. J., C. P. 96: *Turn* v. *Commercial Bank of Sydney*, 12 Q. B. D. 294; 50 L. T. 365; 32 W. R. 492.

(*h*) *Prosser* v. *Wagner*, 1 C. B., N. S. 289; 26 L. J., C. P. 81. See 20 & 21 V. c. 77, ss. 75, 77, 78.

(*i*) *Boynton* v. *Boynton*, 4 App. Cas. 733.

may satisfy the Court that they should be exempt in the particular case; and it is not enough to show hardship in the case of the plaintiff, unless it be shown that it was occasioned by the misconduct of the defendant (*k*). This liability extends to cases where the executor has obtained leave to continue an action commenced by his testator (*l*). The fact, that the plaintiffs were advised by counsel that a point of law which was ultimately decided against them was in their favour, or, at all events, that there was sufficient doubt to make it proper for the plaintiffs to take the opinion of a Court of law upon it, is not sufficient (*m*). The conduct of the defendant in the course of the action, as that there was greater prolixity of pleading than necessary, &c., will not be considered by the Court in exercising their discretion as to relieving the executors from costs (*n*). But *mala fides* or misconduct on the part of the defendant in general will be considered (*o*). The application to be relieved from the costs should be made at the trial or, if afterwards, before taxation; otherwise, if granted, it will only be on payment of the costs of the application (*p*). As to costs in general, *see Vol.* 1, p. 671.

Power to compound debts, &c.

Power to compound Debts, &c.]—By the Conveyancing Act, 1881 (44 & 45 *V. c.* 41), *s.* 37, "(1) An executor may pay or allow any debt or claim on any evidence that he thinks sufficient.

(2) An executor, or two or more trustees acting together, or a sole acting trustee where, by the instrument, if any, creating the trust, a sole trustee is authorised to execute the trusts and powers thereof, may, if and as he or they think fit, accept any composition or any security, real or personal, for any debt, or for any property, real or personal, claimed, and may allow any time for payment of any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's estate or to the trust, and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith.

(3) As regards trustees, this section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(*k*) *Godson* v. *Freeman*, 2 C. M. & R. 585; 4 Dowl. 543; 1 Tyr. & Gr. 35; 1 Gale, 329: *Farley* v. *Bryant*, 3 A. & E. 839; 6 L. J., Q. B. 87: *Brown* v. *Croley*, 3 Dowl. 386: *Southgate* v. *Crowley*, 1 Hodges, 1; 1 Bing. N. C. 518; 1 Scott, 374: *Wilkinson* v. *Edwards*, 3 Dowl. 137; 1 Bing. N. C. 301: *Lakin* v. *Massie*, 4 Dowl. 239; 1 Gale, 270: *Engler* v. *Twisden*, 2 Bing. N. C. 263; 4 Dowl. 350: *Prole* v. *Wiggins*, 3 Bing. N. C. 235; 3 Sc. 607: *Birkhead* v. *North*, 4 D. & L. 732.

(*l*) *Boynton* v. *Boynton*, supra. An administrator *de bonis non* takes the estate subject to the liability for costs previously incurred: *In re Watson*, 32 W. R. 477.

(*m*) *Farley* v. *Bryant*, 3 A. & E. 839.

(*n*) Id.; supra, n. (*k*).

(*o*) See *Southgate* v. *Crowley*, *Brown* v. *Croley*, *Godson* v. *Freeman*, supra: *Redmayne* v. *Moore*, 25 L. J., Q. B. 311.

(*p*) *Ashton* v. *Poynter*, 1 Gale, 57; 1 C. M. & R. 738; 5 Tyr. 322; 3 Dowl. 465.

PART XII.

(4) This section applies to executorships and trusts constituted or created either before or after the commencement of this Act."

The power to compromise given by this section is not confined to debts but extends to all claims (*q*).

Continuing actions commenced by testator.

Continuing Actions commenced by Testator.]—As to what actions commenced by the deceased can be continued by his executor or administrator, and the procedure in such case, *see ante*, pp. 1026 and 1032.

2. *Proceedings against Executors and Administrators.*

Limitation of actions against.

Limitation of Actions against.]—An action cannot be maintained against an executor, until he has taken upon himself to act as such, or proved the will. And if the Statute of Limitations has not commenced to run in the testator's lifetime it runs from the date when letters of administration or probate are obtained (*r*). Therefore where a testator died abroad more than six years before the commencement of the suit, but his executors in this country had not proved the will, nor in any manner acted as executors, until within six years, it was held that the Statute of Limitations was no bar (*s*). But when the debtor died *after the statute had begun to run*, and (in consequence of litigation as to the right to probate) an executor of his will was not appointed until after the expiration of the six years, it was held that the debt was barred, and that the creditor was not entitled to a reasonable time after grant of probate within which to bring his action (*t*). Where an action by a creditor against his debtor, commenced within six years, abated by reason of the death of the defendant intestate, the reasonable term allowed for commencing a fresh action against the personal representatives, in order to prevent the operation of the Statute of Limitations, dated from the granting of the letters of administration (*u*).

Under *R. of S. C., Ord. XVII. r.* 1, an action no longer abates by the death of the defendant, and therefore the proper course is to obtain leave to continue the action against his representatives as pointed out *ante*, p. 1032.

Action for torts.

By the 3 & 4 *W.* 4, *c.* 42, *s.* 2, actions of tort may be brought against executors or administrators for any wrong done by the testator, &c., within six calendar months of his death, to the property, real or personal, of another: provided the actions be brought within six calendar months after they have taken upon themselves the administration of his estate (*x*).

(*q*) *In re Warren, Weadon* v. *Reading*, 53 L. J., Ch. 1016; 32 W. R. 916; W. N. 1884, 181.

(*r*) Darby and Bosanquet, Stat. Limit. 33.

(*s*) *Douglas* v. *Forrest*, 1 M. & P. 663; 4 Bing. 686. And see *Murray* v. *East India Co.*, 5 B. & Ald. 204; ante, p. 1113.

(*t*) *Rhodes* v. *Smethurst*, 4 M. & W. 42; affirmed in Ex. Chamb., 6 M. & W. 351. And see in equity *Freake* v. *Cranefeldt*, 3 My. & Cr. 499.

(*u*) *Curlewis* v. *Earl of Mornington*, 7 E. & B. 283; 26 L. J., Q. B. 181, in Ex. Ch.; 27 L. J., Q. B. 439. See *Sturgis* v. *Darell, Bart.*, 6 H. & N. 120; 29 L. J., Ex. 472. See as to actions which do not abate on the death of the defendant, ante, p. 1026.

(*x*) See *Powell* v. *Rees*, 7 A. & E. 426; 2 N. & P. 571, where a tort was waived, and money had and received brought. *Morgan*

An executor is not bound to plead the Statute of Limitations, *see post*, p. 1122.

Parties to action.

Parties to Action.]—If there be several executors, it is necessary only to sue such of them as have administered (*y*). If a married woman be executrix she may now, since the *Married Women's Property Act*, 1882, *s.* 18, be sued alone, and her husband need not be joined as a defendant (*z*). If she and a stranger be executors, the action must be against her and the stranger (*a*). If one of the executors dies, the action must be against the survivor only, and not against the executors of the deceased executor (*b*). If there are several executors defendants, who plead plene administravit jointly, the plaintiff may succeed against one only, who is shown to have assets (*c*). An executor who has acted as such, though he has not proved his testator's will, may be sued, and it is not necessary to prove that he actually received money of the testator as executor (*d*). As to executors and administrators being sued on behalf of or as representing the estate of which they are representatives, *see Ord. XVI. r.* 8, *ante*, p. 1114. In any case non-joinder can only be taken advantage of by an application to add the wanting parties (*e*).

Writ of summons.

Writ of Summons.]—Executors or administrators need not be described as such in the body of the writ of summons. As to the indorsements to be made on the writ, *see Ord. III. r.* 4, *ante*, p. 1114, *Vol. I.* p. 226. An executor is thus described:—"Executor of the last will and testament of C. D., deceased;" an administrator thus:—"Administrator of the goods, chattels, and effects of C. D., deceased, who died intestate."

As to what causes of action may be joined, *see ante*, p. 1115.

Executors or administrators cannot be arrested under Judge's order, unless where they have promised in writing to pay the debt of their testator, &c., or when they have been guilty of a devastavit (*f*).

If the defendant sued as an executor be a solicitor or officer of the Court, he is not entitled to any privileges as such (*g*).

Staying proceedings after judgment or order for administration.

Staying Proceedings after Judgment or Order for Administration.]—Formerly, the Court of Chancery, after a judgment or order (*h*)

---

ceived brought. *Morgan* v. *Ravey*, 6 H. & N. 265; 30 L. J., Ex. 131, an action against an innkeeper for the loss of property: *Erskine* v. *Adeane*, L. R., 8 Ch. 756; 42 L. J., Ch. 835.

(*y*) *Hilbert* v. *Lewis*, Freem. 268; 2 Wms. Exors. 1375: *Ryalls* v. *Bramall*, 1 Ex. 734.

(*z*) See post, p. 1149. This was otherwise formerly Com. Dig. "Administration" (D): *Aylworth* v. *Feren*, Freem. 351.

(*a*) Com. Dig. "Abatement" (F. 20).

(*b*) 1 Roll. Ab. 928, "Executors."

(*c*) 1 Saund. 336, n. (*a*); 2 Wms. Exors. 1218: *Parsons* v. *Hancock*, 1 M. & Mal. 330.

(*d*) *Vickers* v. *Bell*, 4 De G., J. & S. 274. See *Cary* v. *Hills*, L. R., 15 Eq. 79; 42 L. J., Ch. 100.

(*e*) See R. of S. C., Ord. XVI. r. 11, ante, p. 1019: *Hunter* v. *Young*, 4 Ex. D. 256; 48 L. J., Ex. 689.

(*f*) See post, Ch. CXXVII.

(*g*) *Newton* v. *Rowland*, 1 Salk. 2; 1 Ld. Raym. 533.

(*h*) By stat. 23 & 24 V. c. 38, s. 14 (which is repealed by 46 & 47 V. c. 49):—"The order to take an account of the debts and liabilities affecting the personal estate of a deceased per-

PART XII.

had been made for the administration of an estate, would restrain by injunction proceedings against the executors or administrators. Under the present practice an injunction cannot be granted, but an application may be made under sect sub-sect. 5 (*i*), to the Court in which the action is pending t ay all further proceedings in the action (*i*). This application mu be made to the Division in which the action sought to be stayed is pending (*k*), and not to the Court in which the administration decree has been made (*k*), unless, of course, they are the same. It may be made to a Master at Chambers (*l*), and should be made on summons (*m*). A County Court before which an administration suit is pending has no power to stay proceedings in any action in the High Court (*n*).

The principles upon which the Courts now act in granting or refusing the stay are the same as those on which the Court of Chancery formerly acted in granting the injunction (*o*). The stay will not be ordered unless and until the judgment or order for administration is actually made (*p*), nor even then unless it is a decree under which the plaintiff can go on and prove for his debts and costs (*q*). The rule is stated by Lord *Redesdale* (*r*) to be that "Courts of Equity will not restrain proceedings of creditors at law against executors to obtain payment of debts merely on a bill filed by other creditors to carry the trusts of the will into execution

---

son, pursuant to the nineteenth section of the Act of the thirteenth and fourteenth years of Victoria, chapter thirty-five, may be made immediately or at any time after probate or letters of administration shall have been granted; and such order may be made either by the Court of Chancery upon motion or petition of course, or by a Judge of the said Court sitting at Chambers upon a summons in the form used for originating proceedings at Chambers; and after any such order shall have been made, the said Court or Judge may, on the application of the executors or administrators, by motion or summons, restrain or suspend, until the account directed by such order shall have been taken, any proceedings at law against such executors or administrators by any person having or claiming to have, any demand upon the estate of the deceased, by reason of any debt or liability due from the estate of the deceased, upon such notice and terms and conditions (if any) as to the said Court or Judge shall seem just; and the Judge, in taking an account of debts and liabilities pursuant to any such order, shall, on the application of the executors or administrators, be at liberty to direct that the particulars only of any claim or claims which may be brought in pursuance to any such order shall be certified by his chief clerk, without any adjudication therein; and any notices for creditors to come in which may be published in pursuance of any such order, shall have the same force and effect as if such notices had been given by the executors or administrators in pursuance of the twenty-ninth section of the Act of the twenty-second and twenty-third years of Victoria, chapter thirty-five."

(*i*) See the section, ante, Vol. 1, p. 360. See *Crowle* v. *Russell*, 4 C. P. D. 186.

(*k*) See the cases cited ante, Vol. 1, p. 361.

(*l*) See ante, Vol. 1, p. 362.

(*m*) See ante, Vol. 1, p. 362.

(*n*) *Cobbold* v. *Pryke*, 4 Ex. D. 315.

(*o*) See per *Cotton*, L. J., *Crowle* v. *Russell*, 4 C. P. D. at p. 189.

(*p*) Id.: *Rush* v. *Higgs*, 4 Ves. 638: *Teague* v. *Richards*, 11 Sim. 46; 9 L. J., Ch. 293.

(*q*) Id.: *Rankin* v. *Harwood*, 2 Ph. 22; 5 Hare, 215; 15 L. J., Ch. 446: *Costerton* v. *Costerton*, 2 Keen, 774; 7 L. J., Ch. 302.

(*r*) Per Lord *Redesdale* in *Largan* v. *Bowen*, 1 Sch. & Lef. 296, 299. See also *Whitaker* v. *Wright*, 2 Hare, 310; 12 L. J., Ch. 241: *Lee* v. *Park*, 1 Keen, 714; 6 L. J., Ch. 93.

until there is a decree; but from the moment of the decree the Court proceeds on the ground that the decree is a judgment in favour of all creditors, and that all ought to be paid according to their priorities as they then stand, and that the Court cannot execute its own decree if it permits Courts of law to alter the course of payment." So soon as there is a decree under which the plaintiff can prove, all further proceedings will be stayed (*s*).

Where the plaintiff has signed judgment (*t*) before the decree is obtained, the Court will not, unless under special circumstances, stay his action or prevent his realising the fruits of his proceedings (*u*).

Unless the executor admits that he has assets (*x*), an affidavit is required in support of the application, showing what assets there are (*y*).

If the stay is ordered it is usually on the terms that the plaintiff be at liberty to prove in the administration proceedings for his debt and the costs of the action and of the application to stay (*z*). Costs incurred by the plaintiff, after notice of the decree, will not generally be allowed (*a*).

The proceedings will only be stayed so far as they relate to the estate; any right or remedy the plaintiff may have against the executor personally will not be interfered with (*b*).

Transfer after administration order.

Transfer of Action after Administration Order.]—The Judge of the Chancery Division, before whom an administration action is pending, can, after the order for administration has been made, transfer to that Division all actions pending in other Divisions (*c*). This power is confined to actions brought against the executor as such (*d*). The transfer does not stay the action or otherwise prejudice the plaintiff's rights (*e*). As to the application for the transfer see fully *ante*, *Vol.* 1, p. 362.

Judgment in default of appearance.

Judgment in Default of Appearance.]—If the defendant make default in appearance, judgment by default may be signed against him. Such judgment should be for recovery of the debt or damages, and costs to be levied out of the assets of the testator if the de-

---

(*s*) *Vernon* v. *Thelluson*, 14 L. J., Ch. 83: *Fielden* v. *Fielden*, 1 Sim. & S. 255: *Goate* v. *Fryer*, 2 Com. 201: *Douglas* v. *Clay*, Dick. 393: *Kenyon* v. *Worthington*, Id. 668: *In re Stubbs' Estate*, *Hanson* v. *Stubbs*, 8 Ch. D. 154: *Vincent* v. *Godson*, 3 De G. & Sm. 717.

(*t*) *Lee* v. *Park*, 6 L. J., Ch. 93; 1 Keen, 714: *Re Timms*, 38 L. T. 679: *In re Stubbs' Estate*, *Hanson* v. *Stubbs*, 8 Ch. D. 154. In this last case it was held that an order nisi to sign judgment was not enough.

(*u*) Id. See *Rankin* v. *Harwood*, supra.

(*x*) *Lawton* v. *Lawton*, 8 W. R. 458.

(*y*) Id.

(*z*) *Turner* v. *Connor*, 15 Sim. 630: *Roose* v. *Jones*, 14 L. J., Ch. 4: *Panton* v. *Douglas*, 8 Ves. 520: *Gilpin* v. *Lady Southampton*, 18 Ves. 469.

(*a*) *Pepper* v. *Foster*, 6 Ir. Eq. R. 384.

(*b*) *Burles* v. *Popplewell*, 10 Sim. 383: *Kent* v. *Pickering*, 5 Sim. 569.

(*c*) R. of S. C., Ord. XLIX. r. 5, ante, p. 1063: *In re Stubbs' Estate*, *Hanson* v. *Stubbs*, 8 Ch. D. 154.

(*d*) *Chapman* v. *Mason*, 40 L. T. 678, *Fry*, J.

(*e*) *Re Timms*, 38 L. T. 679, V.-C. B.

PART XII.

fendant have any, and if he has not, then as to the costs to be levied out of the defendant's own goods (*f*).

Statement of claim.

Statement of Claim.]—The statement of claim is filed or delivered as in ordinary cases. In an action against an executor or administrator as such, it should appear that he is sued as executor or administrator (*g*).

Defence and subsequent proceedings.

Defence and subsequent Proceedings.]—The defence is regulated by the ordinary rules (*see ante, Vol.* 1, p. 297). It appears, however, that an executor may plead a general denial or non-admission of the facts stated in the statement of claim (*h*). If the defendant allow judgment to go by default, or expressly confess the action, this is deemed a confession of assets, and he will be estopped from denying it afterwards in an action on the judgment suggesting a *devastavit* (*i*). He should, therefore, plead to the action, unless he wish to acknowledge assets (*j*). If he dispute his being executor or administrator, he should plead it specially (*k*). One of two defendants cannot plead that the other is not executor (*l*).

It is not advisable to plead any false plea (*m*). If in an action against several executors, one of the defendants pleaded severally *ne unques* executor, the plaintiff may discontinue as to him, and proceed against the others (*n*). An executor is not bound to plead the statute of limitations (*o*), but of course by not doing so he waives the benefit of the statute.

Proceedings where plene administravit pleaded alone.

If the defendant plead plene administravit or plene administravit præter alone, the plaintiff in his replication may either deny it, or he may confess it, and move for judgment on admissions in the pleadings (*p*) of assets in futuro upon the former plea (*p*); or, upon the latter, judgment presently of the assets acknowledged to be in the hands of the defendant, and of assets in futuro for the residue (*p*). In either of such cases the plaintiff may sign judgment of assets quando acciderint, &c. (*q*), after getting the damages assessed when necessary (*r*): and when assets embraced by such judgment come into (*s*) the hands of the executor, he may apply for leave to issue execution under *Ord. XLII. r.* 23 (c), as pointed out *post*, p. 1127.

(*f*) 1 Saund. 337, n. (10): *Gorton* v. *Gregory*, 3 B. & S. 90; 6 L. T. 656: *Smith* v. *Tatcham*, 2 Exch. 207, per *Parke*, B. at p. 209: *S. C.*, 17 L. J., Ex. 199. The statement at p. 540 of the 12th ed. of Chitty's Forms is wrong.

(*g*) *Dean of Bristol* v. *Guyse*, 1 Saund. 112; 2 Wms. Exors. 1521. It has been held *sufficient* if this appear on the writ (*Johnson* v. *Burgess*, 47 L. J., Ch. 552); but it should always be stated in the claim.

(*h*) *Smith* v. *Gamlin*, W. N. 1881, 110.

(*i*) *Skelton* v. *Hawling*, 1 Wils. 258: *Re Higgin's Trusts*, 30 L. J., Ch. 405. But see *Bird* v. *Culmer*, Hob. 178.

(*j*) 1 Saund. 219 b: *Leonard* v. *Simpson*, 2 Bing. N. C. 176; 2 Sc. 335; 2 Wms. Exors. 1532.

(*k*) Ante, Vol. 1, p. 281: *Tyson* v. *Kendall*, 19 L. J., Q. B. 434.

(*l*) See *Atkins* v. *Humphrey*, 2 C. B. 654.

(*m*) See post, p. 1125. See *Serle* v. *Bradshaw*, 2 C. & M. 148; 2 Dowl. 289.

(*n*) 1 Saund. 207, n. (*a*). Now the plaintiff may get an order to strike out the defendant who is not an executor, Ord. XVI. r. 11, ante, p. 1020.

(*o*) *In re Garratt*, 18 W. R. 684.

(*p*) See ante, Vol. 1, p. 757; Chit. Forms, p. 540.

(*q*) See *Mara* v. *Quin*, 6 T. R. 1.

(*r*) See ante, Vol. 1, p. 261.

(*s*) *Smith* v. *Tatcham*, 2 Ex. 205; 17 L. J., Ex. 198.

Proceedings where it is pleaded with other defences.

But if the defendant plead either of the defences above mentioned, and also some other defence to the same part of the claim to which such plea is pleaded, and the plaintiff deny *both* in his replication, the parties proceed to trial in the ordinary way; and this is so if the plaintiff join issue on the other defence, and confess the defence of plene administravit, &c., and pray judgment of assets in futuro, &c., as above mentioned. In this latter case, if the plaintiff have a verdict, judgment is signed, and he proceeds as in ordinary cases against an executor who has pleaded a false plea; so that, if such plea be false within the defendant's knowledge (as a plea of no unques executor, or the like), he would be personally liable, not only for the costs, but also, it seems, for the debt, and judgment and execution might be issued against him accordingly (*t*); or if not false within his own knowledge (as a plea that the testator did not promise, or the like), he would be personally liable for the costs, and the judgment for the debt or other cause of action signed against him would be of assets quando, &c., upon which the plaintiff might afterwards, when assets are in the defendant's hands, proceed, as is above mentioned, for the debt, and immediately have a *fi. fa.* for the costs de bonis testatoris, et si non, de bonis propriis (*u*).

Executor's right to prefer creditor.

If an action be commenced against an executor or administrator for any specific debt, he may voluntarily pay another creditor and so practically defeat the plaintiff (*x*). In order to prevent this the plaintiff should apply for the appointment of a receiver (*y*). If one creditor commence an action, and another creditor, in equal degree (*z*), commence a subsequent action, and first recover judgment, he must be first satisfied.

(*t*) See post, p. 1125.

(*u*) *Squire* v. *Arnison*, 48 J. P. 758; *Marshall* v. *Wilder*, 9 B. & C. 655; 1 Saund. 336 b, n. (10).

(*x*) *In re Radcliffe, European Assurance Society* v. *Radcliffe*, 7 Ch. D. 733. The rule was otherwise at law. See 11 Vin. Abr. 206; Com. Dig. "Admin." C. 2; Toller, 288, 289.

(*y*) Id.

(*z*) By 32 & 33 V. c. 46, s. 1, after reciting that it is expedient to abolish the distinction as to priority of payment between specialty and simple contract debts of deceased persons, it is enacted by s. 1, "that in the administration of the estate of every person who shall die on or after the 1st day of January, 1870, no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond, deed, or other instrument under seal, or is otherwise made or constituted a specialty debt; but all the creditors of such person, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets of such deceased person, whether such assets are legal or equitable, any statute or other law to the contrary notwithstanding: Provided always, that this Act shall not prejudice or affect any lien, charge, or other security which any creditor may hold or be entitled to for the payment of his debt."

A creditor who has obtained a judgment against the executor of his deceased debtor before a decree is made for the administration of the debtor's estate has priority over other creditors, and that priority is unaffected by the Act 32 & 33 V. c. 46. But where A., a creditor, had obtained in an action in the Exchequer Division an order nisi to sign judgment against the executrix of his debtor, and before judgment had been signed another creditor obtained in the Chancery Division a decree for the administration of the deceased debtor's estate, A. was held to have no priority, and the action in the Exchequer Division was transferred to the Chancery Division. *Re Stubbs' Estate*, 8 Ch. D. 154; 47 L. J., Ch. 671.

PART XII.

Warrant of attorney by one, bad.

If a warrant of attorney be given by one of several executors, to confess a judgment against all, the Court will order it to be delivered up, &c. (*a*).

Judgment in general.

Judgment.]—The judgment by default is interlocutory or final, as in other cases. If interlocutory, it is the same as in ordinary cases, and the damages are assessed and final judgment signed, as stated *ante*, *Vol.* 1, p. 261.

Final judgment against an executor or administrator, sued as such for a debt or damages, after a verdict against him (except when he pleads certain pleas false to his own knowledge, as a plea of ne unques executor or administrator, or release to himself), is that the debt and costs or damages and costs be levied of the goods and chattels of the testator in the hands of the defendant if he have so much thereof in his hands to be administered, and if not then the costs to be levied of his own goods (*b*). But if the defendant, sued as executor or administrator, pleads either of the above pleas, and it is found against him, the judgment is de bonis testatoris, si, &c., et si non, &c., de bonis propriis, or perhaps unconditionally de bonis propriis (*c*). There is not much difference between these judgments; for if the sheriff return, as he might do, not only nulla bona, but also a devastavit to a *fi. fa.* de bonis testatoris, the plaintiff may sue out an execution immediately against the defendant personally. It seems the sheriff runs no great risk by returning a devastavit, for the judgment and the fact of no assets being found is sufficient evidence of a devastavit in an action against him for a false return. If the sheriff do not return a devastavit, the remedy to get execution against the defendant personally is by an action on the judgment suggesting a devastavit, or formerly by a scire fieri inquiry, which, however, was unusual. The above is a statement of the law as it stood before the Judicature Acts. Those Acts have placed it in the power of the Judge to direct exactly how the judgment shall be entered, but they have not altered the principles by which the discretion of the Judge should be guided, and it is submitted that the old principles apply, and, consequently, that the above statement still holds good.

On plea of judgments outstanding.

If the executor pleads judgments obtained against *himself*, and any one or more of them were avoided by the plaintiff's pleading, the plaintiff has judgment against the executor de bonis propriis (*d*). But if he pleads judgments obtained against the testator, and that he had not sufficient to satisfy them or any of them, if any one or more of the judgments were avoided, still there ought not to have been a general judgment against the executor, or at least not until so many of the judgments were avoided as to leave assets in the executor's hands (*e*).

In action suggesting devastavit.

In an action against an executor or administrator, suggesting

(*a*) *Elwell* v. *Quash*, 1 Str. 20. See post, Ch. CXIV.

(*b*) 1 Saund. 336: *Rouse* v. *Etherington*, 1 Salk. 312; 2 Ld. Raym. 870: *Marshall* v. *Wilder*, 9 B. & C. 655.

(*c*) Bro. Executors, 34: *Bull* v. *Wheeler*, Cro. Jac. 647; 1 Saund. 336 b.

(*d*) 1 Saund. 337 a, n. See *Marshall* v. *Wilder*, supra.

(*e*) Id. But see cases cited there to the contrary. See ante, p. 1122.

a devastavit, the judgment against the defendant is de bonis propriis (*f*).

Against executor as assignee.

Where an executor or administrator is charged and made liable as assignee, the judgment is, of course, de bonis propriis (*g*).

Judgment quando, &c.

As to the judgment of assets quando, &c., see *ante*, p. 1122 (*h*).

Costs.

Costs.]—If there be a verdict for the defendant, he is, subject to *R. of S. C., Ord. LXV.*, entitled to costs as in ordinary cases (*i*). By *Ord. LXV.* costs are practically in all cases in the discretion of the Court or Judge (*see ante, Vol.* 1, p. 672), and this rule overrides all former rules on the subject. The principle laid down in the two following paragraphs, which state the principle on which the Courts formerly acted, are subject to this discretionary power, but as principles they are still generally acted on.

For defendant.

When the defendant pleads plene administravit, or judgments outstanding, or plene administravit præter, and the plaintiff, admitting the truth of the plea, takes judgment of assets in futuro, the defendant is not liable to costs (*k*). Nor does he become liable thereto when he pleads plene administravit præter, and the plaintiff, admitting the truth of the plea, takes judgment of the assets admitted in part, and for the residue of assets in futuro (*l*). It was formerly the practice in these cases not to allow the plaintiff his costs, even out of the future assets; but the Court held, that the plaintiff was entitled to them out of such assets, and that judgment might be entered for them accordingly (*m*).

Against defendant on judgment of assets in futuro.

If an executor or administrator pleads a plea which is false within his own knowledge (as no unques executor or administrator, or a release to himself, or a judgment recovered against himself, or the like), he is liable to costs to be levied de bonis propriis absolutely. If he pleads a plea which is false, but not so within his own knowledge (as that the testator or intestate did not promise, or the like), he is liable to costs to be levied de bonis propriis conditionally, provided there are not goods of the testator sufficient to satisfy them (*n*). If, however, an executor or administrator pleads

On pleading a false plea.

(*f*) 1 Saund. 336 e, *n.* (1). As to an action being brought against the executor of an executor, suggesting a devastavit by the former executor, see 1 Saund. 219 c, n. (1). See *Coward* v. *Gregory*, L. R., 2 C. P. 153; 36 L. J., C. P. 1. As to how far a creditor may by his conduct lose his right to insist on a devastavit, see *In re Birch*, 27 Ch. D. 622; 32 W. R. 72.

(*g*) *Tilney* v. *Norris*, 1 Salk. 309; 1 Ld. Raym. 553. See, as to rent, *Rubery* v. *Stevens*, 4 B. & Ad. 241; and as to repairs, *Treemeere* v. *Morison*, 1 Bing. N. C. 89.

(*h*) See forms of judgment of assets *quando*, &c., Chit. Forms, 540.

(*i*) *Ingalden* v. *Terson*, 2 Dowl. 277; *Edwards* v. *Bethel*, 1 B. & Ald. 254; *Ragg* v. *Wells*, 8 Taunt. 129; *Marshall* v. *Wilder*, 9 B. & C. 655; *Hogg* v. *Graham*, 4 Taunt. 135. And see *Hart* v. *Cutbush*, 2 Dowl. 456; *Probert* v. *Phillips*, 5 Dowl. 473; 2 M. & W. 40. See *Farnell* v. *Keightley*, 2 Roll. Rep. 457; Tidd, 887, 976, as to replevin.

(*k*) Tidd, 9th ed. 980; 1 Saund. 336 b; *Hindsley* v. *Russell*, 12 East, 232; per Cur. *Smith* v. *Tatcham*, 2 Ex. 207; 17 L. J., Ex. 199.

(*l*) Id.; Rast. Ent. 323; 8 Co. 134; 2 Saund. 226.

(*m*) *De Tastet* v. *Andrade*, 1 Chit. Rep. 629, 630, n.; *Butt* v. *Deschamps*, Tidd, 9th ed. 980; *Cox* v. *Peacock*, 4 Dowl. 134; 2 Wms. Exors. 8th ed. 1994.

(*n*) Supra: *Howard* v. *Jemmett*, 3 Burr. 1368; 1 W. Bl. 400; 2 Wms. Exors. 8th ed. 1989; cp. *Du Boison* v. *Maxwell*, 28 L. T. 369.

PART XII.

plene administravit, and a plea such as non assumpsit, which, though false, is not so within his own knowledge, and the plaintiff joins issue on both, and either is found in the defendant's favour, he is entitled to judgment and the costs (*o*). Where the defendant pleaded a false plea and plene administravit, if the plaintiff took judgment of assets in futuro upon the latter plea, and went to trial upon the other plea, he would be entitled to costs if he obtained a verdict, to be levied de bonis propriis of the defendant, if there were not sufficient effects of testator to satisfy them (*p*).

Execution, devastavit, &c.

Execution, Devastavit, &c.]—The execution should follow the judgment. Except in the case of a judgment of assets quando, &c., the execution is the same as in ordinary cases (*see ante, Vol. 1, Ch. LXXIV.*). On a judgment against an executor or administrator, that the plaintiff recover the debt and costs to be levied out of the assets of the testator if the defendant has so much, but if not, then the *costs* out of the defendant's own goods, the usual writ of execution against him, for the recovery of the *debt*, is a fieri facias de bonis testatoris (*q*); but if the sheriff returns to this writ nulla bona testatoris, and a devastavit (*r*), the plaintiff may immediately sue out a fieri facias de bonis propriis (*s*), or an elegit (*t*), against the property of the executor or administrator, in as full a manner as in an action against him in his own right (*u*). You cannot, however, sue out these writs of execution against the property or person of the executor or administrator, upon a judgment de bonis testatoris (which is the only one here intended), unless the sheriff has returned a devastavit (*x*). Therefore, if the sheriff returns nulla bona merely, the plaintiff, if he can prove a devastavit, and of which the sheriff's return is evidence (*y*), may either proceed by action of debt upon the judgment, suggesting a devastavit, and if he succeed in that action, he may have execution against the defendant personally as in ordinary cases (*z*);

Action on judgment.

(*o*) *Iggulden* v. *Terson*, 2 Dowl. P. C. 277: *Edwards* v. *Bethel*, 1 B. & A. 254: *Ragg* v. *Wells*, 8 Taunt. 129: *Marshall* v. *Wilder*, 9 B. & C. 655: *Hogg* v. *Graham*, 4 Taunt. 135: *Cockson* v. *Drinkwater*, 3 Dougl. 239.

(*p*) *Dearne* v. *Grimp*, 2 W. Bl. Rep. 1275: *Marshall* v. *Wilder*, supra: *Hindsley* v. *Russell*, 12 East, 232.

(*q*) See the form, Chit. Forms, p. 544.

(*r*) See the form, Chit. Forms, p. 546.

(*s*) Doct. Plac. 169. And see forms, Chit. Forms, p. 546.

(*t*) 1 Crom. 346; Tidd, 9th ed. 1034. As to a *ca. sa.*, see 2 H. 6, c. 12; Bro. Executors, 12.

(*u*) See Rast. 323 b, 326 a, pl. 6.

(*x*) *Wood* v. *Thomas*, 2 Dowl. 87; 1 C. & M. 532: *McStephen* v. *Hartley*, 20 L. T. 225.

(*y*) *Leonard* v. *Simpson*, 2 Bing. N. C. 176; 1 Hodg. 251: *Cooper* v. *Taylor*, 7 Sc. N. R. 950; 13 L. J., C. P. 92: *Dawson* v. *Gregory*, 14 L. J., Q. B. 286.

(*z*) 1 Saund. 219 a. The plaintiff (a creditor of the testator) having recovered judgment for his debt in an action against the executor after issue found for the plaintiff on a plea of plene administravit, sued the executor in an action on such judgment, suggesting a devastavit:—Held, that the defendant could not show that the acts of waste complained of were committed by him before such judgment with the concurrence of the plaintiff, as that would amount to no assets as between the plaintiff and defendant, and would therefore negative the judgment, which the defendant was estopped from doing: *Jervis* v. *Mummery*, L. R., 8 C. P. 56; 42 L. J., C. P. 22: cp. *In re Marsden*, *Bowden* v. *Leyland*, 26 Ch. D. 783; 51 L. T. 417.

or formerly he might sue out a scire fieri inquiry (*a*). This latter remedy was seldom adopted in practice. See more particularly as to these two modes of proceeding, and what is evidence of a devastavit, 1 *Saund.* 219, n. (8); 2 *Williams' Executors, 8th ed.*

Form of execution for debt and costs.

On a judgment against an executor or administrator that the plaintiff recover both the *debt* and *costs* in the first place de bonis testatoris si, &c., et si non, &c., de bonis propriis (*see ante*, p. 1124), the execution pursuing the terms of the judgment is a fi. fa. both as to the debt and costs, de bonis testatoris et si non de bonis propriis; and on a return of nulla bona nec testatoris nec propria, then it seems a ca. sa., when it would lie, might be issued; or, if the judgment was unconditionally de bonis propriis, then, it would seem, the execution may, following the judgment, also be unconditionally de bonis propriis. *See ante*, p. 1124.

Where an executor before probate by his agent takes the goods and carries on the business of the deceased, and judgment is recovered against the agent as executor, and a writ of fi. fa. issues thereunder directing the sheriff to levy on goods of the deceased in his hands as executor of the deceased to be administered, the sheriff is not justified, as against the executor, in seizing goods of the deceased in such agent's hands (*b*).

Where the executor, pursuant to directions in the testator's will, carries on business and, in so doing, employs the testator's assets as if they were his own, a creditor cannot take the testator's assets in execution on a judgment against the executor for a debt incurred whilst he is so carrying on the business (*c*).

Proceedings on judgment of assets quando.

Where judgment of assets in futuro has been signed, and the plaintiff is entitled to execution upon such judgment, he may, under *Ord. XLII. r.* 23 (*ante*, p. 955), apply at Chambers for leave to issue execution, and the Master may either order execution to issue or order an issue to be tried. The application should be made by summons and should be supported by an affidavit showing that assets against which the plaintiff is entitled to issue execution under the judgment have come into the hands of the defendant, and of what such assets consist, and that a demand for payment has been made.

Other cases.

Other Proceedings by or against Executors, &c.]—As to executing a writ of execution on a judgment obtained against the testator, *see Vol.* 1, p. 810. As to obtaining leave to issue execution on a judgment against a testator or intestate, *see ante*, p. 959.

As to executors paying debts upon such evidence as they think sufficient, and as to their compounding debts, &c., *see* 44 & 45 *V.* c. 41, *s.* 37, noticed *ante*, p. 1117.

(*a*) See *Crawford* v. *Kehoe*, 1 H. & J. 1; 1 Saund. 219, n. 303: *Morfoot* v. *Chivers*, 1 Str. 631; 2 Ld. Raym. 1395: *Ward* v. *Thomas*, 2 Dowl. 87: *Biron* v. *Phillips*, 1 Str. 235: *Stead* v. *Lateward*, 1d. 623; 2 Ld. Raym. 1382. See *Palmer* v. *Waller*, 1 M. & W. 689; 5 Dowl. 315.

(*b*) *Sykes* v. *Sykes*, L. R., 5 C. P. 113; 39 L. J., C. P. 179.

(*c*) *In re Morgan*, *Pillgrem* v. *Pillgrem*, 18 Ch. D. 93.

CHAPTER XCVIII.

PROCEEDINGS AGAINST AN HEIR OR DEVISEE ON THE BOND, ETC. OF ANCESTOR, ETC.

1. *Actions against Heirs.*

PART XII.

Liability of heirs.

Liability of.]—An heir is compellable to pay the judgment and specialty debts (*a*) of his ancestor, to the extent of the assets which have come to him by descent (*b*). Even if he alien the property which has descended to him, before action brought, he is still liable to the extent of the value of the property so descended (*c*). For simple contract debts, and debts by specialty, in which the heirs are not expressly bound, heirs or devisees are not liable *at law;* but by the 3 & 4 *W.* 4, c. 104, and 32 & 33 *V.* c. 46 (*ante*, p. 1123), all real estate of the debtor, not charged with or devised subject to the payment of his debts, is made assets, to be administered in equity for payment of such debts *pari passu* with debts by specialty in which the heirs are bound (*d*).

Writ of summons.

Writ of Summons.]—If there be no devisee, the action should be against the heir only. If there be a devisee and heir, the action should be against them jointly (*e*). If there be no heir, then the action should be against the devisee only (*f*). There is no occasion to describe the defendant as heir or devisee in the title of the action or body of the writ of summons (*g*). As to the indorsement on the writ, *see Vol.* 1, p. 226. The defendant cannot be arrested before judgment (*h*).

Statement of claim.

Statement of Claim.]—The statement of claim is filed or delivered as in ordinary cases (*i*).

(*a*) See per *Mellish*, L. J., *British Mutual Investment Co.* v. *Smart*, L. R., 10 Ch. at p. 577. The remedy given by the 11 G. 4 & 1 W. 4, c. 47, s. 6, applies only where a debt in that sense exists between the parties in the lifetime of both. It does not seem from the wording of this enactment, that it gives any remedy against the heir or devisee for breaches of covenant, where the damages are *unliquidated*, and the breach is subsequent to the death of the covenantor. See *Farley* v. *Bryant*, 3 A. & E. 839.

(*b*) As to what are to be considered assets by descent, see 2 Saund. 8 g, &c.

(*c*) 11 G. 4 & 1 W. 4, c. 47, s. 6 (Sir E. Sugden's Act), which Act repeals the 3 & 4 W. & M. c. 14; 6 & 7 W. 3, c. 14; and 47 G. 3, c. 7. See Com. Dig. "Pleader," 2 E. 2: *Hope* v. *Bagne*, 3 East, 2.

(*d*) See *Kinderly* v. *Jervis*, 25 L. J., Ch. 538.

(*e*) 11 G. 4 & 1 W. 4, c. 47, s. 3; 2 Saund. 7, n. (4).

(*f*) Id. s. 4. And see *Wilson* v. *Knubley*, 7 East, 128, 133.

(*g*) Vol. 1, p. 220.

(*h*) See post, Ch. CXXVII.

(*i*) See, as to the form, &c., 2 Saund. 7 d.

The defence. What may be pleaded by an heir.

Defence.]—Besides the defences which the ancestor might have set up to the action, the defendant may plead that he is not heir; or that he has nothing by descent excepting a reversion expectant on the life of another, in which case the plaintiff may take judgment of assets quando acciderint (*k*), and afterwards proceed when the estate has come into possession, as directed *ante*, p. 1122; but if the reversion be expectant on an estate for years, the defendant should confess assets in possession to the amount of the value of the reversion (*l*). The defendant cannot plead that there is an executor who has assets, for the obligee may, at his election, sue either the heir or executor (*m*). Neither can he plead that he has laid out money beyond the amount of the rents in the repairs of the premises descended (*n*).

Consequence of false plea.

If the defendant do not plead riens per descent, or some plea denying the plaintiff's cause of action, he must confess the action, and show the quantity of the assets (*o*); for, by the common law, if issue be taken on the quantity of assets, and it be found that the heir has other lands by descent (*p*), or if the defendant plead a fact which he knows to be false, and it be found against him (as, when he pleads riens per descent, and it is found that he has received something, however, small or insufficient, to discharge the debt (*q*)), the plaintiff (if he have not replied and taken issue according to the statute (*r*)) will be entitled to a general judgment and execution at common law for the debt, damages, and costs against the defendant, in the same manner as if it were for his own debt. And the law is the same where the heir pleads payment by a co-obligor (*s*), or pleads a bad plea (*t*). But, in such cases, if the plea be honest and fair, and the defect arise merely from mispleading, the Court will allow the defendant to amend it (*u*). The plea of non est factum, however, is an exception to the above rule; for, if it be found false, still the judgment shall be of the lands descended only (*x*). Formerly, if the defendant were under age at the time of the action, instead of pleading, he might pray that the parol might demur until he should be of full age (*y*). But this proceeding was abolished by the 11 *G.* 4 & 1 *W.* 4, *c.* 47, *s.* 10 (*z*), and the defendant must now defend the action by his next friend, as pointed out *post*, p. 1137.

Parol demurrer abolished.

(*k*) *Anon.*, Dy. 373 b; *Smith* v. *Angell*, 2 Ld. Raym. 783.
(*l*) 2 Saund. 7 c.
(*m*) Bro. Abr., Assets per Descent, 33; *Davy* v. *Pepys*, Plowd. 439 b; 1 P. Wms. 203.
(*n*) *Shetelworth* v. *Neville*, 1 T. R. 454. As to pleading formerly the payment of bond creditors, &c.; *Buckley* v. *Nightingale*, 1 Str. 665; 32 & 33 V. c. 46; ante, p. 1123, n. (*z*).
(*o*) Plowd. 440; 2 Roll. Abr. 71; *Buckley* v. *Nightingale*, 1 Str. 665.
(*p*) *Smith* v. *Angell*, 7 Mod. 44.
(*q*) *Davy* v. *Pepys*, Plowd. 440; *Hind* v. *Lyon*, 2 Leon. 11; 2 Roll. Abr. 70 (C.), pl. 2.
(*r*) 11 G. 4 & 1 W. 4, c. 47, s. 7: *Brown* v. *Shuker*, 2 C. & J. 311; 2 Tyr. 320.
(*s*) *Brandlin* v. *Milbank*, Carth. 93; Comb. 162.
(*t*) *Smith* v. *Angell*, 2 Ld. Raym. 783; 1 Salk. 354.
(*u*) 2 Saund. 72 b.
(*x*) *Clothworthy* v. *Clothworthy*, Cro. Car. 436.
(*y*) Rast. Ent. 363 b, 362.
(*z*) This section is repealed by 42 & 43 V. c. 59, and 46 & 47 V. c. 49, s. 4. As to its construction, see *Price* v. *Carver*, 3 Myl. & Cr. 157: *Esmonde* v. *Cook*, 1 Drury & W. 250.

PART XII.

Reply, &c.

Reply, &c.]—If the defendant plead riens per descent at the time of the writ brought, the plaintiff may by statute reply that the defendant had lands, &c. from his ancestor before the writ brought; and, if issue be thereon joined, and found for the plaintiff, the jury will then inquire of the value of the lands, &c. so descended, and the plaintiff shall have judgment of them (*a*), in which case the execution must, both for the debt and costs, be confined to the value of the lands descended (*b*). But if, under the old practice, the plaintiff had judgment by confession (without confessing the assets), or on demurrer or nil dicit, it was for the debt and damages, without any inquiry of the value of the lands descended (*c*). Or, instead of replying in this manner, the plaintiff may take issue on the plea of riens per descent, and, if he have a verdict, he may have a general judgment and execution at common law, as above mentioned (*d*). Instead of replying, the plaintiff may confess the truth of the defence, and take judgment of assets quando acciderint.

The subsequent proceedings to judgment are the same as in ordinary cases. On an issue as to the value of the lands, the jury should of course find such value (*e*).

As to when probate, &c. is conclusive evidence against or for the heir, *see* 20 & 21 *V.* c. 77, *s.* 62. And *see ss.* 64, 65 (*ante, Vol.* 1, p. 482), as to when the probate is evidence without producing the original will. And *see ss.* 66—69 of the 20 & 21 *V.* c. 79, the Act for establishing a Court of probate in Ireland.

Judgment in general.

Judgment.]—If the defendant has pleaded non est factum or has confessed the action and shown with certainty the assets descended, the judgment is *special*, that the plaintiff recover his debt, damages and costs, to be levied of the lands descended (*f*); but if he have pleaded riens per descent, and the plaintiff have taken issue thereon at common law, and it be found against defendant, or judgment be given against defendant by default, nil dicit, or by confession (without showing the assets descended), or upon any other matter or ground whatsoever, the judgment may be *general*, in the same manner as if the action had been brought against the defendant for his own debt (*g*); or it may be special, as above mentioned, at the option of the plaintiff, if he think it more advantageous than the general judgment (*h*). Also, if the plaintiff show that the heir has already received profits from the estate to the amount of the debt, and the defendant do not deny it, he may have a general judgment and execution presently (*i*).

When the heir has aliened before action.

If the heir has aliened the lands previously to the suing out of the writ, he is at large rendered liable for the specialty debts of

(*a*) 11 G. 4 & 1 W. 4, c. 47, s. 7.
(*b*) *Brown* v. *Shuker*, 2 C. & J. 311; 2 Tyr. 320.
(*c*) Id. See *Redshaw* v. *Hesther*, Carth. 353; Comb. 344; 2 Saund. 8 a; see the form of the replication, Id.
(*d*) *Matthews* v. *Lee*, Barnes, 444.
(*e*) *Brown* v. *Shuker*, 1 C. & J. 583; 1 Tyr. 400; 1 Price, N. R. 1.
(*f*) 2 Saund. 7 a, c, (n.). See the form, Chit. Forms, p. 550. As to the present law as to costs, see Vol. 1, Ch. LXVII.
(*g*) 2 Saund. 7 c, (n.); *Brown* v. *Shuker*, 2 C. & J. 311; Tidd, New Prac. 546.
(*h*) 2 Saund. 7 d.
(*i*) *Henningham's case*, Dy. 344 b.

his ancestor, to the amount of the lands aliened, by stat. 11 *G.* 4 & 1 *W.* 4, *c.* 47, *s.* 6. If in such a case he plead riens per descent at the time of the writ brought, and the plaintiff reply assets before the writ brought, the jury shall find the value of the lands, and the plaintiff can have judgment and execution for debt and costs only to that extent (*k*), and not a general judgment against the heir, as at common law (*l*); or the plaintiff, instead of replying according to the statute, may take issue on the plea of riens per descent, and, if found for him, may have judgment, either general or special, as before mentioned (*m*). But, although the defendant have not aliened the lands, the plaintiff may, if he wish, reply according to the statute, and have judgment accordingly (*n*); though, indeed, this would be an indiscreet mode of proceeding, if the value of the lands would not amount to the debt and costs.

Execution.

Execution.]—We have just seen that the judgment for plaintiff is general or special. If it be general, the plaintiff may sue out execution as in ordinary cases, and as if the action were against the defendant in his own right (*o*). But if the judgment be special, that the debt be levied of the lands descended, and be not on a verdict upon which the jury (as they must have done) have already found the value of the lands descended, the plaintiff in such a case must sue out a special writ, in the nature of an extent, commanding the sheriff to inquire by a jury of the lands descended, and to deliver them to the plaintiff, to hold until the debt, &c. be thereof fully levied (*p*). It seems, also, that the plaintiff, upon a general judgment, may have this special writ, if he prefer it to the general writs of execution, upon suggesting that the heir has particular land by descent, and praying execution of the whole of them (*q*).

As to obtaining leave to issue execution on a judgment of assets *quando*, &c., *see ante*, p. 1122.

Execution on judgment against the ancestor, &c.

Execution on Judgment against the Ancestor, &c.]—What has now been stated has, of course, reference only to actions against the heir; if judgment was obtained against the ancestor, and leave obtained to issue execution on such judgment against the heir and terretenants, the execution is by elegit. As to judgments entered up after the 29th July, 1864, not affecting lands until delivered in execution, *see ante*, p. 879.

2. *Actions by and against Devisees.*

Actions against devisees.

An action is maintainable against a devisee, and is proceeded with in the same manner and under the same circumstances as an action against an heir (*r*).

(*k*) 11 G. 4 & 1 W. 4, c. 47, s. 7.
(*l*) *Brown* v. *Shuker*, 2 C. & J. 311; 2 Tyr. 320; *Redshaw* v. *Hesther*, Barth. 353; 2 Saund. 8 n.
(*m*) *Matthews* v. *Lee*, Barnes, 444; 2 Saund. 8 a.
(*n*) 2 Saund. 8 n.
(*o*) See the form, Chit. Forms, 551.
(*p*) See 2 Saund. 8 n.; 3 Bac. Abr. 25. See the forms, Chit. Forms, 551.
(*q*) *Bowyer* v. *Rivitt*, W. Jon. 87; 2 Ro. Abr. 71, 72, D. pl. 3. See *Anon.*, Dyer, 271 a; 3 Bac. Abr. 25.
(*r*) See 11 G. 4 & 1 W. 4, c. 47, ss. 3, 4, 8; 3 & 4 W. 4, c. 104; Wms. on Exors. 1520.

PART XII.

The Act 11 *G.* 4 & 1 *W.* 4, *c.* 47, *s.* 2 (Sir Edward Sugden's Act), renders wills in fraud of creditors void as against them. When the obligor of a bond, having devised his land, died before the passing of this Act, it was held that the specialty creditor could not maintain an action against the devisee alone, there being no heir, under 3 *W.* & *M. c.* 14, *s.* 3 (*s*).

Actions by.

A devisee may maintain an action at common law, under the Statute of Wills, against the terretenant of land for a legacy devised out of it (*t*); but it seems with this qualification, viz., that the legacy be an interest which can be enforced by an action at law (*u*). Therefore, if a testator devise an estate in fee to A., and it be apparent that it was his intention to impose a duty upon A. of paying a legacy, an action of debt may be maintained against A. for such legacy, if he accept the estate (*x*). The execution in this case will not be limited to the land which the terretenant has in his hands, belonging to the testator, but will be general against the person or estate of the terretenant (*y*).

(*s*) *Hunting* v. *Sheldrake*, 9 M. & W. 256. See s. 4 of the above Act.

(*t*) *Ewer* v. *Jones*, 2 Salk. 415; 2 Ld. Raym. 937. And see 6 Mod. 27, per Lord *Holt*: *Webb* v. *Jiggs*, 4 M. & S. 113; *Hopkins* v. *Mayor of Swansea*, 4 M. & W. 621.

(*u*) *Braithwaite* v. *Skinner*, 5 M. & W. 313.

(*x*) *Braithwaite* v. *Skinner*, supra. See per *Parke*, B.

(*y*) *Braithwaite* v. *Skinner*, supra, per *Abinger*, C.B., and per *Parke*, B.

CHAPTER XCIX.

INFANTS (a).

	PAGE		PAGE
1. *Actions and Proceedings by Infants*	1133	2. *Actions and Proceedings against Infants*	1137

1. *Actions and Proceedings by Infants.*

Infant cannot sue in person or by solicitor.

AN infant cannot prosecute an action either in person or by solicitor, and therefore he cannot sue as an informer on a penal statute (*b*); for an informer must exhibit his suit in proper person, and prosecute it either in person or by solicitor (*c*). There was before the stat. 3 & 4 *W.* 4, *c.* 42, one exception to this, namely, where several executors, suing as such, were plaintiffs, and one of them was an infant; in such a case all the plaintiffs might sue by solicitor, and those who were of age might appoint the solicitor for themselves and for the infant (*d*). It may be questionable, however, whether this exception was not taken away by that statute, which made plaintiffs suing as executors liable to costs, their former exemption from which was the principal reason for the exception. If an infant commence an action without a next friend the defendant may apply to get it dismissed with costs against the solicitor, if any, issuing the writ (*e*); but in some cases leave to amend, by adding a next friend, would be given (*f*).

May sue by next friend.

An Infant may sue by a next Friend.]—By *R. of S. C., Ord. XVI. r.* 16, "Infants may sue as plaintiffs by their next friends, in the manner heretofore practised in the Chancery Division, and may, in like manner, defend by their guardians appointed for that purpose."

Who may act as next friend.

Any person may act as the next friend provided he has no interest

(*a*) In cases relating to the custody and education of infants, the rules of equity prevail; Jud. Act, 1873, s. 25, sub-s. 10. See *In re Goldsworthy*, 2 Q. B. D. 75: *In re Taylor*, 4 Ch. D. 157; and see 36 V. c. 12: *In re Holt*, 16 Ch. D. 115: *In re Clarke*, 21 Ch. D. 817: *In re Elderton*, 25 Ch. D. 220; 53 L. J., Ch. 258: *In re Agar-Ellis*, 24 Ch. D. 317; 53 L. J., Ch. 10: *In re Ethel Brown*, 13 Q. B. D. 614. The wardship of infants, and the care of their estates, are assigned to the Chancery Division exclusively; Jud. Act, 1873, s. 34. As to the rights of a child *en ventre sa mère*, see *The George and Richard*, L. R., 3 Adm. 466, and S. C. 20 W. R. 245.

(*b*) *Anon.*, Say. 51. See per *Wickens*, V.-C., *In re Keane*, L. R., 12 Eq. at p. 123.

(*c*) 18 Eliz. c. 5; B. N. P. 166.

(*d*) Stat. Westm. 1, c. 48; Westm. 2, c. 15; 2 Inst. 261: *Goodwin* v. *Moore*, Cro. Car. 161.

(*e*) 1 Ro. Abr. 288, pl. 3: *Rutland* v. *Rutland*, Cro. El. 377; 2 Saund. 213, n. (6). See *Finlay* v. *Jowle*, 13 East, 6; 2 Saund. 211, 213, n. 5.

(*f*) *Flight* v. *Bolland*, 4 Russ, 298.

PART XII.

in the suit adverse to that of the infant (*h*). *Primâ facie* the infant's father is entitled to be the next friend of his child (*i*). The next friend of an infant need not be a person of substance (*k*), and the infant may even be allowed to sue in *formâ pauperis* by next friend (*l*).

Appointment and consent of next friend.

No application need be made or leave obtained to entitle an infant to sue by a next friend. The next friend must, however, sign a written consent to his name being used, and authorizing the solicitor, if any, to commence the action, and this should be either written on the copy of the writ which is filed, or on a separate piece of paper filed with it (*m*). This is required by *Ord. XVI. r.* 20, which provides that, "Before the name of any person shall be used in any action as next friend of any infant, or other party, or as relator, such person shall sign a written authority to the solicitor for that purpose, and the authority shall be filed in the Central Office, or in the District Registry if the cause or matter is proceeding therein" (*n*). *Ord. XVI. r.* 11 expressly provides that no person shall be added as the next friend of a plaintiff under disability without his own consent thereto (*o*).

Substitution of next friend.

If the next friend die or become incapacitated from acting, or unwilling to do so any longer, a new next friend may be appointed on an application by summons at Chambers for that purpose (*p*). The Court will not discharge the next friend on his own application unless an equally substantial next friend be substituted (*q*). And an affidavit of the fitness of the proposed next friend should be made in support of the application (*r*); but this is not necessary when the next friend dies, and the new next friend is appointed by the parental relations of the infant (*s*). When the next friend dies, the proper order for the *defendant* to obtain is, not that the infant may appoint a new next friend within a given time, or the action be dismissed, but that the Master may approve a new next friend, and notice of the order must be given to the plaintiff's solicitor (*t*).

Removal of next friend on inquiry whether such for benefit of infant.

In some cases, where the next friend is shown to be an improper person to act as such, the Court will order his removal (*u*), or will direct an inquiry whether the action is for the benefit of the infant (*v*), and whether the next friend is a proper person to conduct it for him (

(*h*) 2 Inst. 261: *Claridge* v. *Crawford*, 1 D. & R. 13. A defendant, or a mere nominee of a defendant, should not be next friend: *In re Burgess*, 25 Ch. D. 243.

(*i*) *Woolf* v. *Pemberton*, 6 Ch. D. 19; 37 L. T. 328.

(*k*) See cases post, p. 1135, n. (*c*): *Davenport* v. *Davenport*, 1 Sim. & Stu. 101.

(*l*) *Lindsay* v. *Tyrrell*, 2 D. & Jo. 7; 24 Beav. 124.

(*m*) See form, Chit. F. 552.

(*n*) This is founded on the stat. 15 & 16 V. c. 86, s. 11. In *Ward* v. *Ward*, 6 Beav. 251; 12 L. J., Ch. 332, where a person, who had been made the next friend of an infant plaintiff without his authority, and his name was struck out, and leave was given to amend by having a new friend.

(*o*) See the rule ante, p. 1022.

(*p*) See form, Chit. F. 553.

(*q*) *Harrison* v. *Harrison*, 3 Beav. 130.

(*r*) See form, Chit. F. p. 553.

(*s*) *Talbot* v. *Talbot*, L. R., 17 Eq. 347; 43 L. J., Ch. 352.

(*t*) *Glover* v. *Webber*, 12 Sim. 351.

(*u*) See *In re Burgess*, *Burgess* v. *Bottomley* (C. A.), 25 Ch. D. 243; 50 L. T. 168; 32 W. R. 511, where a friend of the defendant's had been appointed, and was removed, though nothing was alleged against his character or conduct.

(*v*) *Clayton* v. *Clarke*, 2 L. T. 302, V.-C. S.: *Golds* v. *Kerr*, W. N. 1884, 46: *Re Corsellis*, 50 L. T. 703; 30

---

duct it for him (.
Nor will they do
of explaining his
by different next
the most for the a
proceedings in the
The next friend
costs, even though
be removed, and t
appointed, if it ca
person who is wil
wise (*c*).
The action shou
suing by his next
by C. D. his next f
The next friend
and give all consen
to the evidence bei
enforce a compromi
In the commence
stated that the plai
friend, naming him
pleadings in other re
as in ordinary cases.
A next friend or
pelled to answer inte
inspection of docume

W. R. 965. If the suit
inquiry to be not bene
infant, the next friend
allowed his costs: *Clayt*
3 L. T. 723: *Nalder* v
Myl. & K. 249.
(*r*) *Twesey* v. *Groves*,
V.-C. K.
(*y*) *Smallwood* v. *Rutt*
24; 24 L. J., Ch. 332:
Asprey, 11 Sim. 530;
Elston, 46 L. J., Ch. 792
Welsford, 42 L. T. 730,
appeal held sufficient grou
moval. The Court of A
not interfere with the di
the Judge if he directs a
Pensotti v. *Pensotti*, 30 L.
W. R. 461.
(*z*) *Re Corsellis*, *Lawton*
50 L. T. 703; 32 W. R. 962
(*a*) *Virtue* v. *Miller*, 19 V
(*b*) See *Farworth* v. J
D. & R. 423; cp. *In re Payn*
v. *Payne*, 23 Ch. D. 288.
(*c*) *Watson* v. *Fraser*, 8
600: *Lees* v. *Smith*, 5 H. &
29 L. J., Ex. 291; *Turner* v
1 Str. 708. But see *Squ*
Squirrell, 2 P. Wms. 297, n.
1 Marsh. 4: *Farworth* v.

duct it for him (*x*); but they will not do so on slight grounds (*y*). Nor will they do so without giving the next friend an opportunity of explaining his conduct (*z*). When two actions are commenced by different next friends, the Court will direct an inquiry, which is the most for the advantage of the infant, and will stay all further proceedings in the other (*a*).

Security for costs.

The next friend of an infant is not required to give security for costs, even though he be insolvent (*b*); but in this case, he might be removed, and the proceedings stayed until a new next friend is appointed, if it can be shown that the infant could procure a solvent person who is willing to act as his next friend, but not otherwise (*c*).

Title of the action.

The action should be intituled in the name of the infant as suing by his next friend. Thus:—"A. B. (*the infant*) an infant by C. D. his next friend" (*d*).

Power of next friend.

The next friend has control of the action, and may do all things, and give all consents as an ordinary plaintiff (*e*). He may consent to the evidence being taken by affidavit (*e*). The Court will not enforce a compromise against the will of the next friend (*f*).

Pleadings.

In the commencement of the statement of claim it should be stated that the plaintiff is an infant, and that he sues by his next friend, naming him (*g*). The statement of claim and subsequent pleadings in other respects are the same, and are delivered or filed as in ordinary cases.

Discovery, &c.

A next friend or guardian *ad litem* of an infant cannot be compelled to answer interrogatories (*h*), or to make discovery, or allow inspection of documents (*i*).

W. R. 965. If the suit be found on inquiry to be not beneficial to the infant, the next friend will not be allowed his costs: *Clayton* v. *Clarke*, 3 L. T. 723; *Nalder* v. *Hawkins*, Myl. & K. 249.

(*x*) *Towsey* v. *Groves*, 7 L. T. 778, V.-C. K.

(*y*) *Smallwood* v. *Rutter*, 9 Hare, 24; 21 L. J., Ch. 332; *Bedwin* v. *Asprey*, 11 Sim. 530; *Thomas* v. *Elsam*, 46 L. J., Ch. 792; *Dupuy* v. *Welsford*, 42 L. T. 730, refusal to appeal held sufficient ground for removal. The Court of Appeal will not interfere with the discretion of the Judge if he directs an inquiry: *Pensotti* v. *Pensotti*, 30 L. T. 348; 22 W. R. 461.

(*z*) *Re Corsellis*, *Lawton* v. *Elwes*, 50 L. T. 703; 32 W. R. 965.

(*a*) *Virtue* v. *Miller*, 19 W. R. 406.

(*b*) See *Yarworth* v. *Mitchell*, 2 D. & R. 423; cp. *In re Payne*, *Randle* v. *Payne*, 23 Ch. D. 288.

(*c*) *Watson* v. *Fraser*, 8 M. & W. 660; *Lees* v. *Smith*, 5 H. & N. 632; 29 L. J., Ex. 291; *Turner* v. *Turner*, 1 Str. 708. But see *Squirrell* v. *Squirrell*, 2 P. Wms. 297, n.; *Anon.*, 1 Marsh. 4; *Yarworth* v. *Mitchell*, 2 D. & R. 423; *Anon.*, 2 Chit. Reg. 359; *Duckett* v. *Satchwell*, 12 M. & W. 779; 1 D. & L. 980; *Mann* v. *Burthen*, 4 M. & P. 215. As to compelling the lessor of the plaintiff in ejectment, when an infant, to give security for costs before the C. L. P. Act, 1852, see *Noke* v. *Windham*, 1 Str. 694; *Throgmorton* v. *Smith*, 2 Id. 932; *Thrustout* v. *Perceval*, Barnes, 183; *Maddon* d. *Baker* v. *White*, 2 T. R. 159; *Anon.*, 1 Cowp. 128; *Doe* v. *Roberts*, 6 Dowl. 556.

(*d*) See Chit. F. p. 552.

(*e*) *Knatchbull* v. *Fowle*, 1 Ch. D. 604; *Fryer* v. *Wiseman*, 45 L. J., Ch. 199; 33 L. T. 779.

(*f*) *In re Birchall*, *Wilson* v. *Birchall*, 16 Ch. D. 41.

(*g*) See Chit. Forms: *Combers* v. *Watton*, 1 Lev. 224. See *Bird* v. *Pegg*, 5 B. & Ald. 418; 4 Co. 53 b; Id. 54 a: *Swift* v. *Nott*, 1 Sid. 173: *Young* v. *Young*, Cro. Car. 86; Hutton, 92.

(*h*) *Ingram* v. *Little*, 11 Q. B. D. 251; 52 L. J., Ch. 771; 48 L. T. 793; 31 W. R. 858.

(*i*) *Re Corsellis*, *Lawton* v. *Elwes*, 52 L. J., Ch. 399; 48 L. T. 425; 31 W. R. 414.

PART XII.

Admissions.

The rule as to allegations in pleadings being taken to be admitted, unless denied specifically or by necessary implication (*R. of S. C., Ord. XIX. r.* 13), expressly excepts the case of infants (*k*).

Consents.

By *Ord. XVI. r.* 21, "In all causes or matters to which any infant or person of unsound mind, whether so found by inquisition or not, or person under any other disability, is a party, any consent as to the mode of taking evidence or as to any other procedure shall, if given with the consent of the Court or a Judge by the next friend, guardian, committee, or other person acting on behalf of the person under disability, have the same force and effect as if such party were under no disability and had given such consent. Provided that no such consent by any committee of a lunatic shall be valid as between him and the lunatic unless given with the sanction of the Lord Chancellor or Lords Justices sitting in Lunacy" (*l*).

Special case.

A special case in an action to which an infant is a party, cannot be set down for argument without leave of the Court or a Judge (*m*). Such leave may be obtained by summons at Chambers supported by an affidavit showing that the facts stated, so far as the interests of the infant are concerned, are true (*m*).

Appeal.

The next friend has no power to deprive the infant of his right of appeal; and his refusal to appeal, though *bonâ fide*, will justify his removal by the Court (*n*).

Costs.

The next friend is liable to the defendant for the costs if he fails, and the plaintiff is ordered to pay them (*o*). If the plaintiff succeeds, the next friend is entitled to be paid the costs, charges and expenses properly incurred by him before the action and with reference to its institution, and to be paid out of the fund in Court or recovered (*p*). If, however, the action were commenced without due inquiries, although it is successful, the next friend may be ordered to pay his own costs (*q*). The next friend is liable to pay the bill of costs of the infant's solicitor (*r*).

Order for investment of money recovered.

By *Ord. XXII. r.* 15, "In any cause or matter in the Queen's Bench Division in which a sum of money has been awarded to or recovered by an infant, or person of unsound mind not so found by inquisition, the Court or a Judge may at or after the trial order that the whole or any part of such sum shall be paid into Court to the credit of an account intituled in the cause or matter; and any sum so paid into Court, and any dividends or interest thereon, shall be subject to such orders as may from time to time be made by the Court or a Judge concerning the same, and may either be invested, or be paid out of Court, or transferred to such persons, to be held

(*k*) See the rule, ante, Vol. 1, p. 284.

(*l*) *Knatchbull* v. *Fowle*, 1 Ch. D. 604: *Frye* v. *Wiseman*, 33 L. T. 779.

(*m*) R. of S. C., Ord. XXXIV. r 4, post, Ch. CXVII.

(*n*) *Dupuy* v. *Welsford*, 42 L. T. 730, V.-C. B.

(*o*) *Buckley* v. *Puckeridge*, 1 Dick. 395: *James* v. *Hatfield*, 1 Str. 548: *Slaughter* v. *Talbot*, Barnes, 128; Ca. Pr. C. B. 32: *Evans* v. *Davis*, 1 C. & J. 160: *Newton* v. *The London and Brighton R. Co.*, 7 D. & L. 328. See *Abrahams* v. *Taunton*, 1 D. & L. 319: cp. *Ex p. Brocklebank*, 6 Ch. D. 358: *Bolton* v. *Bolton*, 28 Sol. Journ. 737: *Cayley* v. *Cayley*, W. N. 1877, 89; 25 W. R. 528.

(*p*) *Palmer* v. *Jones*, 22 W. R. 909.

(*q*) *Edgley* v. *Adams*, 31 L. T. 15, M. R.: *Clayton* v. *Clarke*, 3 L. T. 723.

(*r*) *In re Flower*, 19 W. R. 578: *Murnell* v. *Pickmore*, 2 Esp. 473: *Hawkes* v. *Cottrell*, 27 L. J., Ex. 369.

and applied upon and for such trusts and in such manner as the Court or Judge shall direct."

By *r.* 16, "Money paid into Court or securities purchased under the provisions of the last preceding Rule, and the dividends or interest thereon, shall be sold, transferred, or paid out to the party entitled thereto, pursuant to the order of the Court or a Judge."

Infant coming of age.

If the infant come of age whilst the action is pending, he may repudiate the whole proceedings (*s*), or he may obtain an order enabling him to carry on the proceedings in his own name (*t*). Where in a suit instituted by several infants, one of them after decree came of age and objected to remain a plaintiff, he was made a co-defendant instead (*u*). The next friend should not take any steps in the action after the infant has come of age (*x*).

2. *Actions and Proceedings against Infants.*

Writ of summons.

An action against an infant is commenced exactly in the same manner as any other action. The writ should be in the ordinary form, and no notice should be taken in it of the fact of the defendant being an infant.

Service of proceedings.

By *R. of S. C., Ord. IX. r.* 4 (*y*), "When an infant is a defendant to the action, service on his father or guardian, or if none, then upon the person with whom the infant resides or under whose care he is, shall, unless the Court or a Judge otherwise orders, be deemed good service on the infant; provided that the Court or Judge may order that service made or to be made on the infant shall be deemed good service."

Proceedings when infant defendant makes default in appearance.

By *R. of S. C., Ord. XIII. r.* 1, "Where no appearance has been entered to a writ of summons for a defendant who is an infant or a person of unsound mind not so found by inquisition, the plaintiff *shall, before further proceeding with the action* against the defendant, apply to the Court or a Judge for an order that some proper person be assigned guardian of such defendant, by whom he may appear and defend the action. But no such order shall be made unless it appears on the hearing of such application that the writ of summons was duly served, and that notice of such application was, after the expiration of the time allowed for appearance, and at least six clear days before the day in such notice named for hearing the application, served upon or left at the dwelling-house of the person with whom or under whose care such defendant was at the time of serving such writ of summons, and also (in the case of such defendant being an infant not residing with or under the care of his father or guardian) served upon or left at the dwelling-house of the father or guardian, if any, of such infant, unless the Court or Judge at the time of hearing such application shall dispense with such last-mentioned service" (*z*).

(*s*) Such repudiation relates back to the commencement of the proceedings: *Dunn* v. *Dunn*, 3 Drew. 17; 24 L. J., Ch. 581.

(*t*) *Ballard* v. *White*, 2 Hare, 158.

(*u*) *Bicknell* v. *Bicknell*, 32 Beav. 381; *In re Gould, Gould* v. *Gould*, W. N. 1884, 185.

(*x*) *Brown* v. *Weatherhead*, 4 Hare, 122.

(*y*) This corresponds with Ch. Con. Ord. VII. r. 3.

(*z*) In a case under the Chancery Rule, which was similar to the above, service of a copy of the bill, and of notice of an application to appoint a

PART XII.

The application should be made to a Master at Chambers, supported by affidavit, showing the service of the writ of summons, and of the notice as required by the rule (*a*).

Who may be guardian.

Any person not under any disability, such as coverture or infancy, and not having any interest in the suit adverse to that of the infant, may be appointed guardian *ad litem* for him. The plaintiff's solicitor should not be appointed (*b*); a co-defendant having no adverse interest may be (*c*). In the Court of Chancery the solicitor to the suitor's fund was usually appointed (*d*).

By *Ord. LXV. r.* 13, "Where the Court or a Judge appoints one of the solicitors of the Court to be guardian *ad litem* of an infant or person of unsound mind, the Court or Judge may direct that the costs to be incurred in the performance of the duties of such office shall be borne and paid either by the parties or some one or more of the parties to the cause or matter in which such appointment is made, or out of any fund in Court in which such infant or person of unsound mind may be interested, and may give directions for the repayment or allowance of such costs as the justice and circumstances of the case may require."

Guardian ad litem.

An infant, even when sued *en autre droit*, or with other defendants (*e*), can defend by guardian *ad litem* only, and not in person or by solicitor (*f*), or *prochein amy* (*g*). As we have seen, *Ord. XVI. r.* 16 (*h*) provides that infants may defend actions by their guardians (*i*) appointed for that purpose.

By *R. of S. C., Ord. XVI. r.* 18, "An infant shall not enter an appearance except by his guardian *ad litem*. No order for the appointment of such guardian shall be necessary, but the solicitor, applying to enter such appearance, shall make and file an affidavit in the Form No. 8 in Appendix A., Part II., with such variations as circumstances may require" (*k*).

---

guardian ad litem to an infant defendant, upon the principal of the college of which the infant was an undergraduate member, was held sufficient, the plaintiff being unable to discover the residence of the infant's parent: *Christie* v. *Cameron*, 25 L. J., Rep., Ch. 488.

(*a*) See forms, Chit. F. pp. 555—6. It will be observed that this rule makes these proceedings in case of default of appearance compulsory. Under the former rule it would appear that they were optional: *Taylor* v. *Pede*, 44 L. T. 514. But see *Fore Street Warehouse Co.* v. *Durrant*, 10 Q. B. D. 471; 52 L. J., Q. B. 587. And where judgment was signed by the plaintiff in ignorance of the fact that the defendant was an infant, the Court held that they had a discretion as to setting aside the judgment, and refused to do so in the absence of merits: *Furnival* v. *Brooke*, 49 L. T. 134.

(*b*) *Sheppard* v. *Harris*, 15 L. J., Ch. 104.

(*c*) *In re Tayler*, *Tayler* v. *Tayler*, W. N. 1881, 81.

(*d*) Id.: *Stillwell* v. *Blair*, 13 Sim. 299.

(*e*) *Bird* v. *Orms*, Cro. Jac. 289: *King* v. *Marlborough*, Id. 303; 1 Ro. Abr. 776, pl. 9: *Coux* v. *Lowther*, 1 Ld. Raym. 600: *Frescobaldi* v. *Kynaston*, 2 Str. 783.

(*f*) Co. Litt. 135 b: *Frescobaldi* v. *Kynaston*, 2 Str. 784; Com. Dig. Pleader, 2, c. 2.

(*g*) 2 Inst. 261: *Fitzgerald* v. *Villiers*, 3 Mod. 236: *Simpson* v. *Jackson*, Cro. 640. As to the necessity, where error was brought by or against an infant, of appointing a prochein amy or guardian, see *Bevan* v. *Cheshire*, 3 Dowl. 70.

(*h*) See the rule, ante, p. 1133.

(*i*) As to the term guardian, see *Rimington* v. *Hartley*, 14 Ch. D. 630, M. R.

(*k*) See form, Chit. F. p. 557. By R. of S. C., Ord. XVI. r. 19, "Every infant served with a petition or notice of motion, or summons in a

If the infant appears and takes no steps to get a guardian appointed, the plaintiff may make an application for the purpose (*l*), and this need not be supported by an affidavit of service of the writ (*m*).

Consequences of not defending by guardian.

If the infant defend in person, and not by a guardian *ad litem*, and judgment be given against him, it may be set aside (*n*); but not so where judgment is given for him (*o*). The plaintiff, in default of a guardian being appointed for the defendant, may apply that a guardian be appointed to defend for him (*p*). And this, it seems, may be done at any time before judgment (*q*); but the plaintiff may not get the costs of the application where it is not made until a late stage of the proceedings (*r*); and, with a view to get costs, the plaintiff, before making the application, had better request the defendant to name a guardian and defend by him (*s*).

If the guardian die pending the suit, another must be appointed, in the manner above mentioned. For sufficient grounds, the Court will remove the guardian on the application of the infant made by his next friend for the purpose of the application. (*Dan. Ch. Pract.* p. 148.) As to the powers and duties of a guardian, *see ib.* (*t*).

Where, in the Court of Chancery, an answer was put in on behalf of an infant, it was put in on the oath of the guardian; but the infant was not bound by such answer, and it could not be read against him.

Statement of claim, &c.

The statement of claim and the defence are delivered or filed as in ordinary cases. If the defendant intends availing himself of his infancy as a defence, he must plead it specially in bar (*u*). We have seen (*ante*, p. 1129), that by the 11 *G.* 4 & 1 *W.* 4, *c.* 47, *s.* 10, in an action by or against an infant on the bond of his ancestor, he can no longer, as formerly, pray that the parol may demur until he shall be of age (*x*). In an action against several persons one of whom is an infant, the defence of infancy, being personal, should be pleaded separately (*y*). The Court has allowed such a defence to be pleaded, even after setting aside a regular judgment. The

---

matter, shall appear on the hearing thereof by a guardian ad litem in all cases in which the appointment of a special guardian is not provided for. No order for the appointment of such guardian shall be necessary, but the solicitor by whom he appears shall previously make and file an affidavit as in the last rule mentioned."

(*l*) *Cookson* v. *Lee*, 15 Sim. 302: *Bentley* v. *Robinson*, 9 Hare, App. lxxvi.

(*m*) *Wood* v. *Logsden*, 9 Hare, App. xxvi; 22 L. J., Ch. 257.

(*n*) 2 Saund. 212 a (n. 4); 1 Ro. Abr. 287, pl. 1, 2; 747, pl. 13; 8 Co. 58 b; 9 Co. 30 b: *Simpson* v. *Jackson*, Cro. Jac. 610: *Castledine* v. *Mundy*, 4 B. & Ad. 90: *Beven* v. *Cheshire*, 3 Dowl. 70: *Carr* v. *Cooper*, 9 W. R. 611. Before the C. L. P. Act, 1852, infancy of the defendant in ejectment was not ground of error. *Goodright* v. *Wright*, 1 Str. 33.

(*o*) *Bird* v. *Pegg*, 5 B. & Ald. 418. See Lil. Ent. 555, &c.

(*p*) See Ord. XIII. r. 1, ante, p. 1138; 2 Saund. 117 f: *Hindmarsh* v. *Chandler*, 7 Taunt. 488; 1 Moore, 250: *Gladman* v. *Bateman*, Barnes, 418. And see *Boys* v. *Edmeads*, 2 Chit. Rep. 22: *Paget* v. *Thompson*, 3 Bing. 609; 11 Moore, 504: *Bevan* v. *Cheshire*, 3 Dowl. 70.

(*q*) See *Nunn* v. *Curtis*, 4 Dowl. 729, 1 T. & G. 500: *Shipman* v. *Stevens*, 2 Wils. 50: *Kerry* v. *Cade*, Barnes, 413: *Stephens* v. *Lowndes*, 3 D. & L. 205; 14 L. J., C. P. 229.

(*r*) *Shipman* v. *Stevens*, 2 Wils. 50.

(*s*) Id. See Dan. Ch. Prac. 147.

(*t*) See *Knatchbull* v. *Fowle*, L. R., 1 Ch. D. 604.

(*u*) Vol. 1. p. 282.

(*x*) *Aland* v. *Mason*, 2 Str. 861.

(*y*) 1 Chit. Pl. 5th ed.

PART XII.

defence should state that the defence is delivered by the guardian (*z*). The rule that facts stated in the pleadings and not denied are to be treated as admitted, does not apply where the defendant is an infant. *See Ord. XIX. r.* 13, *ante, Vol.* 1, p. 284.

As to discovery and interrogatories, *see ante*, p. 1135.

Compromise.

The Court will not enforce a compromise against the will of the guardian (*a*).

The reply and other pleadings are delivered in the same way as in other cases.

Warrant of attorney, &c.

An infant cannot bind himself by a warrant of attorney or cognovit (*b*). And if a warrant of attorney or cognovit be obtained from one, the Court or a Judge will order it to be given up and cancelled, or judgment and execution thereon to be set aside (*see post, Ch. CXIII.*). When an infant joins an adult in a warrant of attorney, it is void only as regards the former (*c*).

Service of notice of judgment.

By *Ord. XVI. r.* 44, "Notice of a judgment or order on an infant or person of unsound mind not so found by inquisition shall be served in the same manner as a writ of summons in an action."

Costs.

An infant defendant is liable for costs, although a guardian has been appointed (*d*). As a general rule the guardian is not liable for them. Before the Judicature Acts, except in the case of gross misconduct, the guardian would not be ordered by the Court of Chancery to pay the costs of a suit which he had defended unsuccessfully.

As to the guardian's liability to the solicitor for costs, *see ante*, p. 1136.

Execution.

The execution is the same as in ordinary cases (*e*).

An infant cannot be convicted under sect. 12 of the Debtor's Act, 1869 (32 & 33 *V.* c. 62) (*f*).

(*z*) *Combers* v. *Watton*, 1 Lev. 224: *Simpson* v. *Jackson*, Cro. Jac. 640. As to the mode of proceeding when one of several defendants, one of whom is an infant, makes default in delivering a defence, see *National Provincial Bank* v. *Evans*, 51 L. J., Ch. 97; W. N. 1881, 171. As to a motion for judgment against an infant, *In re Fitzwater, Fitzwater* v. *Waterhouse*, 52 L. J., Ch. 83; W. N. 1882, 176.

(*a*) *In re Birchall, Wilson* v. *Birchall*, 16 Ch. D. 41: *Norman* v. *Strains*, 6 P. D. 219.

(*b*) *Oliver* v. *Woodruffe*, 7 Dowl. 166.

(*c*) *Motteux* v. *St. Aubin*, 2 W. Bl. 1133.

(*d*) *Anderson* v. *Warde*, Dyer, 101: *Gardiner* v. *Holt*, 2 Str. 1217: *Dow* v. *Clark*, 1 C. & M. 860; 2 Dowl. 302.

(*e*) Vol. 1, Ch. LXXIV.: *Defries* v. *Davis*, 3 Dowl. 629; 1 Hodges, 103; 1 Sc. 594; 1 Bing. N. C. 692.

(*f*) *Reg.* v. *Wilson*, 5 Q. B. D. 28, C. A.

CHAPTER C.

IDIOTS, LUNATICS AND PERSONS OF UNSOUND MIND (*a*).

	PAGE
1. *Actions by and against Persons of Unsound Mind so found by Inquisition*	1141
2. *Actions by Persons of Unsound Mind not so found by Inquisition*	1143
3. *Actions against Persons of Unsound Mind not so found by Inquisition*	1144

1. *Actions by and against Persons of Unsound Mind so found by Inquisition.*

By *R. of S. C., Ord. XVI. r.* 17, "Where lunatics and persons of unsound mind not so found by inquisition might respectively before the passing of the Principal Act have sued as plaintiffs or would have been liable to be sued as defendants in any action or suit, they may respectively sue as plaintiffs in any action by their committee or next friend according to the practice of the Chancery Division, and may in like manner defend any action by their committees or guardians appointed for that purpose."

Actions by lunatics.

A person who is strictly speaking a "lunatic," that is to say, a person who has been found by inquisition to be of unsound mind, sues by his committee. The lunatic and his committee should be co-plaintiffs in the action. They should be described as, "C. D., committee of the estate of A. B., a person of unsound mind so found by inquisition, and the said A. B. by the said C. D. as his committee" (*b*).

Adverse interest in committee.

If the committee has any interest in the proposed action adverse

(*a*) By the Jud. Act, 1875, s. 7, "Any jurisdiction usually vested in the Lords Justices of Appeal in Chancery, or either of them, in relation to the persons and estates of idiots, lunatics, and persons of unsound mind, shall be exercised by such Judge or Judges of the High Court of Justice or Court of Appeal as may be entrusted by the sign manual of her Majesty or her successors with the care and commitment of the custody of such persons and estates; and all enactments referring to the Lords Justices as so intrusted shall be construed as if such Judge or Judges so intrusted had been named therein instead of such Lords Justices: Provided that each of the persons who may at the commencement of the principal Act be Lords Justices of Appeal in Chancery shall, during such time as he continues to be a Judge of the Court of Appeal, and is entrusted as aforesaid, retain the jurisdiction vested in him in relation to such persons and estates as aforesaid." The proceedings in lunacy are now regulated by the Lunacy Orders, 1882. See W. N. (10th February) 1882. Pt. 2, pp. 33 et seq.

(*b*) Cf. *Hartland* v. *Atcherley*, 7 Beav. 53; 13 L. J., Ch. 123.

PART XII.

to that of the lunatic, a guardian *ad litem* may be assigned to the lunatic on a petition for that purpose (e).

Leave to bring action.

Before commencing any action the committee must apply for, and obtain, the leave of the Lords Justices or Judge intrusted by the sign manual, under sect. 7 of the Judicature Act 1875 (*ante*, p. 1141, n. (*a*)), with the care and commitment of the custody of the persons and estates of lunatics (*d*). This leave may be obtained by presenting a petition to a Master in lunacy (*d*).

The rule as to the admission of facts not denied in the pleadings does not apply as against a lunatic (*e*).

The subsequent proceedings are similar to those in ordinary cases.

Actions against lunatics.

An action may be brought against a person of unsound mind, so found by inquisition, in any case where it would lie against an ordinary person, subject of course to the defendant's lunacy being a defence (*f*). It is not necessary that the plaintiff should obtain leave of the Lords Justices to commence the action. The lunatic and his committee should be made co-defendants. They should be described as, "E. F., committee of the estate of C. D., a person of unsound mind, so found by inquisition, and the said C. D. by the said E. F. as his committee."

Service of writ.

The writ may be served on the committee (*g*) by being served in the usual way (*see ante, Vol.* 1, p. 232). In a case where the defendant had been found a lunatic by inquisition, but no committee had been appointed, service on the keeper of the asylum where the defendant was confined was ordered (*h*).

Leave to defend.

The committee must obtain the sanction of the Lords Justices before defending the action, but no order in the action is necessary (*i*).

The rule that facts not denied in the pleadings are admitted does not apply as against a lunatic (*j*).

The subsequent proceedings are similar to those in ordinary cases. The committee will not be compelled to produce documents which are in the custody of the Court (*k*).

When a lunatic is insolvent the Court considers what is necessary for his maintenance and comfort before the claims of his creditors (*l*).

(*e*) *Worth* v. *Mackenzie*, 3 M. & Gord. 363.

(*d*) *Re Notley*, 3 Jurist, 719; 16 & 17 V. c. 70, ss. 70, 73, 91, 97; Gen. Ord. Lunacy, 7th November, 1853, Ord. XIV.

(*e*) R. of S. C., Ord. XIX. r. 13, ante, Vol. 1, p. 284.

(*f*) Popo on Lunacy (1877), 306, 307.

(*g*) R. of S. C., Ord. IX. r. 5, post, p. 1144.

(*h*) *Thorne* v. *Smith*, W. N. 1879, 81; 27 W. R. 617.

(*i*) Dan. Ch. Pr. 6th ed. 181, 182: *In re Manson*, 21 L. J., Ch. 249.

(*j*) R. of S. C., Ord. XIX. r. 13, ante, Vol. 1, p. 284.

(*k*) *Vivian* v. *Little*, 11 Q. B. D. 370; 52 L. J., Q. B. 771: *In re Smyth* (C. A.), 15 Ch. D. 286: *S. C.*, 16 Id. 673; 43 L. T. 235.

(*l*) *Re Pink* (C. A.), 23 Ch. D. 577; 52 L. J., Ch. 674; 49 L. T. 418; 31 W. R. 728.

2. *Actions by Persons of Unsound Mind not so found by Inquisition (m).*

Actions by next friend.

A person of unsound mind, but who has not been found to be so by inquisition, may, in ordinary cases, sue by a next friend (*n*). But he cannot do so in an action for dealing with his real estate (*o*). No leave or formal appointment is necessary, but the next friend must sign a written consent to the action being brought, and an authority to the solicitor to use it (*p*). This consent must be either endorsed on the copy of the writ which is filed, or be written on a separate paper filed with it (*p*).

Proceedings in the action.

The parties should be described in the writ as "A. B., a person of unsound mind, not so found by inquisition, by C. D., his next friend" (*p*). The rules as to who may act as next friend, and the proceedings as to substituting or removing the next friend, are practically the same *mutatis mutandis* as in the case of an infant, as to which the practice is stated *ante*, p. 1133 *et seq.*

When plaintiff really sane.

Where an action is commenced by a next friend in the name of a person alleged to be of unsound mind, but who is really of sound mind, the action will, on his application, be ordered to be dismissed, and the next friend will be ordered to pay the costs (*q*).

Affidavit of documents.

The next friend may be ordered to make the usual affidavit of documents (*r*), but he will not be ordered to answer interrogatories (*s*).

Plaintiff recovering or being found lunatic.

If the plaintiff recovers his reason while the suit is pending, he may repudiate the next friend's proceedings, or he may adopt them (*t*). If he be found of unsound mind, the next friend should not take any further proceedings, but should give notice of the action to the committee, and leave the further prosecution of it to him (*u*). A suit instituted by a next friend on behalf of a person of

---

(*m*) As to the jurisdiction of the Chancery Division over persons of unsound mind, not so found by inquisition, see *Jones* v. *Lloyd*, L. R., 18 Eq. 265: *Bligh* v. *O'Connell*, 38 L. T. 217: *In re Bligh*, 12 Ch. D. 364; 49 L. J., Ch. 58: *In re Brandon's Trusts*, 13 Ch. D. 773: *Wilder* v. *Pigott*, 22 Ch. D. 263; 48 L. T. 112.

(*n*) See R. of S. C., Ord. XVI. r. 17, ante, p. 1141: *Jones* v. *Lloyd*, L. R., 18 Eq. 265, M. R.: *Beall* v. *Smith*, L. R., 9 Ch. at p. 91, per *James*, L. J.

(*o*) *Halfhide* v. *Robinson*, L. R., 9 Ch. 374.

(*p*) Ord. XVI. r. 20, ante, p. 1134.

(*q*) *Palmer* v. *Walesby*, L. R., 3 Ch. 732.

(*r*) *Higginson* v. *Hall*, 10 Ch. D. 235; 39 L. T. 603. But see *In re Cordellis*, 48 L. T. 425, cited ante, p. 1135, n. (*t*). And see next case.

(*s*) *Ingram* v. *Little*, 11 Q. B. D. 251; 52 L. J., Q. B. 771; 48 L. T. 793; 31 W. R. 855.

(*t*) Per *James*, L. J., *Beall* v. *Smith*, L. R., 9 Ch. at p. 92.

(*u*) *Beall* v. *Smith*, L. R., 9 Ch. 85; 48 L. J., Ch. 245. A suit on behalf of a trader who had become deranged, for an account against his agent and manager, and the appointment of a receiver of his stock-in-trade, &c., was instituted by solicitors who had occasionally acted for the plaintiff, but were not his ordinary family solicitors. A receiver was appointed in the suit with the concurrence of the family solicitor, who consented upon the understanding that no further steps should be taken without notice to him. The suit was proceeded with without such notice. A decree directing accounts and inquiries was obtained, the accounts were taken, the chief clerk made his certificate, and an order on further consideration was obtained directing taxation and payment of the costs of suit which were paid out of the plaintiff's estate. Meanwhile, previously to the last-mentioned order, the plaintiff was found a lunatic by inquisition, but no committee was appointed until

PART XII.

unsound mind, not so found by inquisition, becomes absolutely paralysed by a change in the *status* of the plaintiff. If he becomes of sound mind there is no pretext for the continued intervention of the next friend. If he is found a lunatic by inquisition, and is thus placed under the protection of the Crown, the suit should be continued only with the sanction of the Court in lunacy. Every proceeding taken in the suit after the inquisition, whether or not a committee has been appointed, is irregular and void and a contempt of the Court in lunacy (*u*). The committee may obtain leave to continue the action (*v*).

3. *Actions against Persons of Unsound Mind not so found by Inquisition.*

Writ of summons.

The writ of summons in an action against a person of unsound mind, but who has not been found to be so by inquisition, is exactly the same as in the case of an ordinary defendant.

Service of writ.

By *R. of S. C., Ord. IX. r.* 5, "When a lunatic or person of unsound mind, not so found by inquisition, is a defendant to the action, service on the committee of the lunatic, or on the person with whom the person of unsound mind resides, or under whose care he is, shall, unless the Court or Judge otherwise orders, be deemed good service on such defendant."

In the Court of Chancery, prior to the Judicature Acts, service on a defendant was good, although he was of unsound mind, and a guardian *ad litem* was subsequently appointed (*w*). Substituted service on the medical officer of an asylum where the defendant resided, and who refused to permit any person to see the defendant, has been allowed (*x*). Under the former common law practice personal service was necessary in the case of an action against a lunatic, as he could not know of the writ and evade its service, and the Court would not give the plaintiff liberty to proceed under the 17th section of the *Com. Law Proc. Act*, 1852 (*y*). But if the writ came to his knowledge, as by having been mentioned to him by his keeper, an order might be made (*z*).

When defendant does not enter appearance.

By *R. of S. C., Ord. XIII. r.* 1, "Where no appearance has been entered to a writ of summons for a defendant who is an infant or a person of unsound mind, not so found by inquisition, the plaintiff shall, before further proceeding with the action against the defendant, apply to the Court or a Judge for an order that some pro-

after the said order. The committee, with the sanction of the Master in lunacy, presented a petition for the purpose of setting aside as invalid the proceedings in the suit subsequent to the finding in lunacy:—Held, that all proceedings after the appointment of the receiver were unauthorized and improper, and all after the finding on the inquisition were irregular and void, and that the solicitors of the next friend were liable to refund the costs so paid out of the lunatic's estate under the orders so irregularly obtained, and to pay the costs of the petition.

(*u*) See last note.

(*v*) *In re Green's Estate, Green* v. *Pratt*, 48 L. J., Ch. 681; 41 L. T. 30.

(*w*) Per *James*, L. J., *In re Crabtree's Settled Estates*, L. R., 10 Ch. 201.

(*x*) *Raine* v. *Wilson*, L. R., 16 Eq. 576. See *Thorn* v. *Smith*, cited ante, p. 1142, n. (*h*).

(*y*) *Ridgway* v. *Cannon*, 23 L. T., O. S. 143; 2 W. R. 473; *Holmes* v. *Service*, 15 C. B. 293; 24 L. J., C. P. 24; *Williamson* v. *Maggs*, 28 L. J., Ex. 5.

(*z*) *Kimberley* v. *Allan*, 2 H. & C. 223; 9 Jur., N. S. 650.

per person be assigned guardian of such defendant, by whom he may appear and defend the action. But no such order shall be made unless it appears on the hearing of such application that the writ of summons was duly served, and that notice of such application was, after the expiration of the time allowed for appearance, and at least six clear days before the day in such notice named for hearing the application, served upon or left at the dwelling-house of the person with whom or under whose care such defendant was at the time of serving such writ of summons, and also (in the case of such defendant being an infant not residing with or under the care of his father or guardian) served upon or left at the dwelling-house of the father or guardian, if any, of such infant, unless the Court or Judge at the time of hearing such application shall dispense with such last-mentioned service" (*a*).

The application must be made to a Master at Chambers on notice served as required by the rule (*b*).

In support of the application it must be shown by affidavit that the writ was duly served, that notice of the application was duly given, and that the defendant is of unsound mind. The person who effected the service may swear to the first two, and a medical practitioner to the last of these facts, either in the same or in separate affidavits (*b*).

In a case in the Court of Chancery, where the plaintiff's solicitor, alleging that the defendant was a person of unsound mind, did not serve the writ on her, but entered an appearance for her, and obtained the appointment of a guardian *ad litem*, the Court set aside both appearance and appointment (*c*).

Defence by guardian.

Lunatics not so found must defend by guardian, who will be appointed, on application made on petition, after appearance entered in the lunatic's name (*d*). The application must be supported by affidavits showing the mental incapacity of the defendant, the fitness of the proposed guardian, and that he has no adverse interest (*e*). Any person not under any disability, and having no interest adverse to that of the defendant, may be appointed (*e*). If the guardian dies, a new one may be appointed (*f*). No step in the suit can be taken, after appearance, before the guardian is appointed. The order to appoint the guardian is made by the Division in which the action is pending, and not in lunacy (*g*), and if the infirmity is disputed the plaintiff may move, on notice to the defendant, to discharge the order, and an inquiry will be directed if necessary. The defendant, if he recover, may apply by summons served on the plaintiff and guardian, that the order appointing the latter be discharged.

(*a*) It will be observed, that this rule makes the proceedings referred to in it obligatory, whereas it was doubtful whether the former rule did so: *Taylor* v. *Pede*, 44 L. T. 514: *Fore Street Warehouse Co.* v. *Durrant*, 16 Q. B. D. 471. See ante, p. 1138, n. (*a*).

(*b*) See forms, Chit. Forms, 561. An affidavit referring to the defence of the other defendants, where the defendant who had not appeared was referred to as "imbecile," will not suffice: *Watson* v. *Kinlans*, 22 W. R. 639.

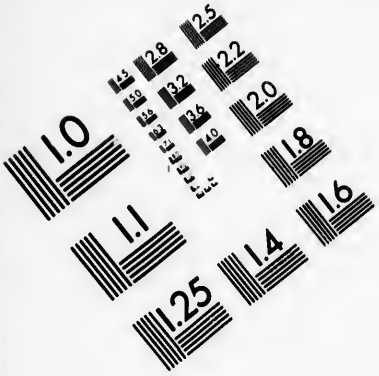
(*c*) *Camps* v. *Marshall*, L. R., 8 Ch. App. 462.

(*d*) *Dobbins* v. *Billing*, 6 Ir. R. Eq. 623: *Piddocke* v. *Smith*, 9 Hare, 395; 21 L. J., Ch. 359. See Chit. F. 562.

(*e*) *Biddulph* v. *Dayrell*, 15 L. J., Ch. 320, M. R. See Chit. F. 563.

(*f*) *Needham* v. *Smith*, 6 Beav. 130.

(*g*) *Pidcock* v. *Boultbee*, 2 De G. M. & G. 898; 22 L. J., Ch. 611.



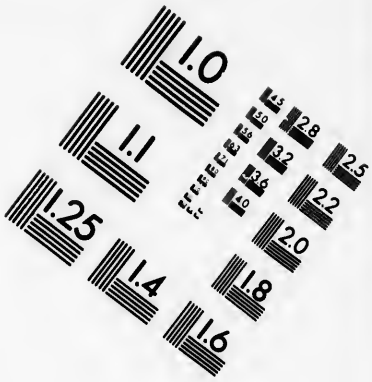
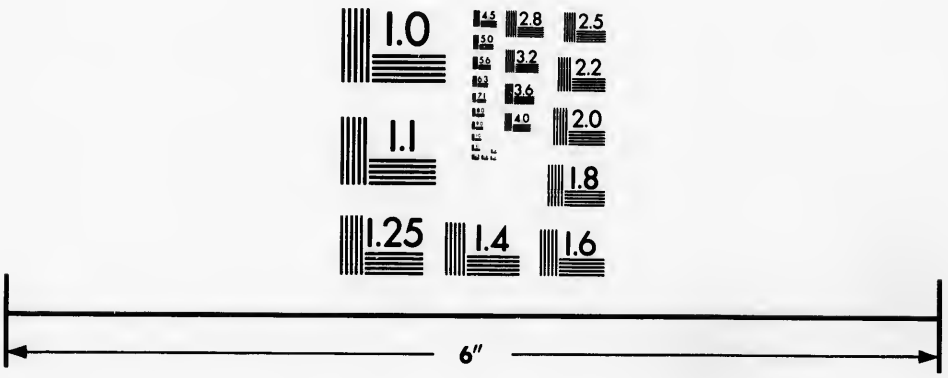
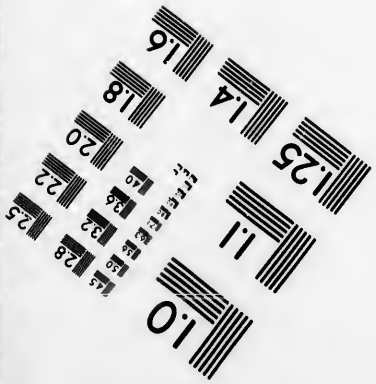
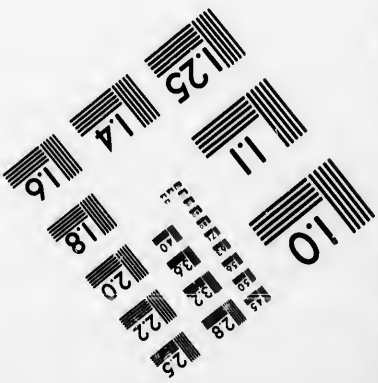


IMAGE EVALUATION TEST TARGET (MT-3)







Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

PART XII.

The appearance is entered in the usual manner. The defence should state that the defendant is a person of unsound mind not so found by inquisition, and that he has obtained leave to defend by guardian.

The guardian, before he consents to any departure from the ordinary course of taking evidence or other procedure in the suit, must first obtain the sanction of the Court or Judge.

Default in defence.

If no application for the appointment of a guardian is made on behalf of the defendant after an appearance has been entered on his behalf, the plaintiff should apply for an order appointing the official solicitor guardian *ad litem* to the defendant. The summons for this purpose may be served on the solicitor who has entered the appearance. The plaintiff in this case will have to undertake to indemnify the guardian against costs (*h*).

Admissions in pleading.

As to admissions in pleading by persons of unsound mind, *see Ord. XIX. r.* 13, *Vol.* 1, p. 284.

Special case.

As to a special case when a person of unsound mind is a party, *see Ord. XXXIV. r.* 4, *post*, *Ch. CXVII.*

As to service of notice of a judgment or order, *see Ord. XVI. r.* 44, *ante*, p. 1140.

(*h*) Dan. Ch. Pr. 6th ed. Vol. 1, p. 183: cp. *Ellis* v. *Gaunt*, Q. B. D. May 10th, 1882; 73 L. T. (Journ.) 28.

CHAPTER CI.

HUSBAND AND WIFE AND MARRIED WOMEN (*a*).

	PAGE		PAGE
1. *Actions by Married Women*	1147	4. *Actions against Husband and Wife jointly*	1159
2. *Actions against Married Women*	1153	5. *Execution by or against Husband on Judgment for or against Wife*	1160
3. *Actions by Husband and Wife jointly*	1158	6. *Question between Husband and Wife as to Property*	1160

1. *Actions by Married Women.*

CHAP. CI.

How brought.

Since the 31st December, 1882 (*b*), a married woman, whether living with her husband or not, may, in all cases, commence and maintain an action in her own name without joining her husband or a next friend, in respect of any tort to her person (*c*) or her property (*d*), whether committed prior to (*e*) or since that date (*f*), and also in respect of any contract made by her since (*g*), or any contract, which she was capable of making, made prior to (*h*) that date. The amount recovered in any such action is the property of the married woman (*i*).

By *R. of S. C., Ord. XVI. r.* 16, "..... Married women may

(*a*) In actions by or against a husband alone the proceedings are the same as in ordinary cases.

(*b*) That is to say, on and since the 1st January, 1883, on which date the Married Women's Property Act, 1882 (45 & 46 V. c. 75), commenced (s. 25). By sect. 22 of that Act, "The Married Women's Property Act, 1870, and the Married Women's Property Act, 1870, Amendment Act, 1874, are hereby repealed: Provided that such repeal shall not affect any act done or right acquired while either of such Acts was in force, or any right or liability of any husband or wife, married before the commencement of this Act, to sue or be sued under the provisions of the said repealed Acts or either of them, for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this Act."

It is not thought necessary in the present edition of this work to treat of actions commenced before the 1st January, 1883.

As to the effect of the marriage of a female plaintiff pending an action, see ante, pp. 961 and 1027.

(*c*) *Weldon* v. *Winslow* (C. A.), 13 Q. B. D. 785; 53 L. J., Q. B. 528: *Severance* v. *Civil Service Supply Association*, 48 L. T. 485.

(*d*) Id.: *James* v. *Barraud*, 49 L. T. 300; 31 W. R. 786: *Weldon* v. *De Bathe*, C. A., W. N. 1884, 250, trespass to house: *Hunt* v. *Hunt*, W. N. 1884, 243, where a married woman sued her husband.

(*e*) *Weldon* v. *Winslow*, supra: *Weldon* v. *Rivière*, 53 L. J., Q. B. 528, contra, must be taken to have been overruled. See *Moore* v. *Robinson*, 40 L. T. 98.

(*f*) Married Women's Property Act, 1882, ss. 2 and 12.

(*g*) Id.

(*h*) *Weldon* v. *Winslow*, supra: *Summers* v. *City Bank*, L. R., 9 C. P. 580.

(*i*) *Weldon* v. *Winslow*, supra.

PART XII.

sue and be sued as provided by the Married Women's Property Act, 1882."

By the Married Women's Property Act, 1882 (45 & 46 *V.* c. 75), sect. 1 (1), "A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property (*k*) as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee (*l*).

(2) A married woman shall be capable of entering into and rendering *herself* liable *in respect of and to the extent of her separate property* on any *contract* (*k*), and of *suing* (*m*) *and being sued*, either in contract or in tort, or otherwise, *in all respects as if she were a feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise."

Remedies of married women for protection and security of separate property.

By the *Married Women's Property Act*, 1882, *s.* 12, "Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies (*n*), and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indict or other proceeding under this section it shall be sufficient ge such property to be her property; and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding: Provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife."

The married woman may obtain an *interim* injunction against her husband to restra
pending proceedi
By the *Marriec*
woman who is an
any other person
or a trustee alone
trust, *may sue or*
any such annuity
of the public stock
ferable as aforesa
stock, or other be
such corporation, c
without her husba
By sect. 23, "F
presentative of an
estate have the sa
same jurisdiction a

Action by Woma
the marriage be v
vinculo matrimonii
a *feme sole*, and in
name (*s*). The wom
nisi only for dissol
made absolute she
under the Act of 18

Action by Marriec
A married woman
were a *feme sole*, ar
been deserted by he
under the stat. 20

(*k*) By sect. 24, "The word 'contract' in this Act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee or executrix or administratrix either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration. The word 'property' in this Act includes a thing in action."

(*l*) See *Riddell* v. *Errington*, 26 Ch. D. 220; 50 L. T. 584, separate examination not necessary.

(*m*) This includes presenting a petition. *In re Ontwin's Trusts*, 48 L. T. 410; 31 W. R. 374.

(*n*) Including a petition for payment out of Court. *Re Foster's Trusts*, 45 L. T. 504; 30 W. R. 56.

(*o*) *Symonds* v. *Hall*
346; 53 L. J., Ch. 60;
32 W. R. 102.

(*p*) Since the Act of
married woman is admi
husband need not joi
ministration bond. *T*
Harriet Ayres, 8 P. D.
P. 98.

(*q*) As to the power
woman to appoint a s
his power to charge
with his costs under 23 &
s. 28, see per *Wickens*,
Keane, Lumley v. *Desbo*
12 Eq. 115, at p. 123,
Vol. I, p. 168.

(*r*) Co. Litt. 133 a;
Baddeley, 2 Wms. Bl. 10
Blackstone, J.

(*s*) *Hamer* v. *Tilsley*,
Evans v. *Carrington*, 6
268; 7 Id. 197. But see
Goldsmid, 2 P. D. 263;
70.

(*t*) *Norman* v. *Villars*

husband to restrain him from interfering with her separate property pending proceedings for judicial separation (*o*).

Married woman executrix (*p*).

By the *Married Women's Property Act*, 1882, *s.* 18, "A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, *may sue or be sued*, and may transfer or join in transferring any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a *feme sole*."

Remedies of personal representative of married woman.

By sect. 23, "For the purposes of this Act the legal personal representative of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living."

Action after divorce.

Action by Woman after Divorce or Dissolution of Marriage.]—If the marriage be void *ab initio* (*q*), or be dissolved by a divorce *a vinculo matrimonii* (*r*), the woman may sue alone as if she were a *feme sole*, and in such cases it is usual for her to use her maiden name (*s*). The woman's status, however, is not affected by a decree *nisi* only for dissolution of the marriage, and until the decree is made absolute she is not a *feme sole* (*t*), though she can sue as one under the Act of 1882.

After protection order.

Action by Married Woman who has obtained a Protection Order.]—A married woman may sue as of right in her own name as if she were a *feme sole*, and without joining her husband, when she has been deserted by her husband, and has obtained a protection order under the stat. 20 & 21 *V. c.* 85, *s.* 21. That statute (the Act for

(*o*) *Symonds* v. *Hallett*, 24 Ch. D. 346; 53 L. J., Ch. 60; 49 L. T. 381; 32 W. R. 102.

(*p*) Since the Act of 1882, when a married woman is administratrix, her husband need not join in the administration bond. *The Goods of Harriet Ayres*, 8 P. D. 468; 52 L. J., P. 98.

(*q*) As to the power of a married woman to appoint a solicitor, and his power to charge her property with his costs under 23 & 24 V. c. 127, s. 28, see per *Wickens*, V.-C., *In re Keane, Lumley* v. *Desborough*, L. R., 12 Eq. 115, at p. 123, cited ante, Vol. I, p. 168.

(*r*) Co. Litt. 133 a: *Hatchett* v. *Baddeley*, 2 Wms. Bl. 1079, 1082, per *Blackstone*, J.

(*s*) *Hamer* v. *Tilsley*, 8 W. R. 20: *Evans* v. *Carrington*, 6 Jur., N. S. 268; 7 Id. 197. But see *Fennell* v. *Goldsmid*, 2 P. D. 263; 46 L. J., P. 70.

(*t*) *Norman* v. *Villars*, 2 Ex. D. 359; 46 L. J., Ex., 579 (C. A.), where to an action by the plaintiff (a petitioner for a divorce who had obtained a decree nisi), for conversion of her goods while she was living apart from her husband during the interval between the making of the decree nisi and the decree absolute, the defendant pleaded the coverture of the plaintiff at the time of the conversion; it was held (reversing the judgment of the Exchequer Division), that this was a good plea, for inasmuch as the plaintiff did not become a feme sole until the decree had been made absolute, she could not sue in her own name during the pendency of the proceedings for the divorce. *Stephenson* v. *Strutt*, 26 L. T. 690. On the decree being made absolute, it has relation back to the time of its being granted nisi. *Prole* v. *Soady*, L. R., 3 Ch. 220. Now under the Act of 1882, the husband need not be joined.

PART XII.

establishing the Court for Divorce and Matrimonial Causes) provides, by sect. 21, that "A wife deserted by her husband may at any time after such desertion, if resident within the metropolitan district, apply to a police magistrate, or if resident in the country, to justices in petty sessions, or in either case to the Court (the Court established by the Act) (*u*), for an order to protect any money or property she may acquire by her own lawful (*x*) industry, and property which she may become possessed of after such desertion, against her husband or his creditors, or any person claiming under him; and such magistrate, or justices, or Court, if satisfied of the fact of such desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and property acquired since the commencement of such desertion (*y*), from her husband and all creditors and persons claiming under him, and such earnings and property shall belong to the wife as if she were a *feme sole:* Provided always, that every such order, if made by a police magistrate or justices at petty sessions, shall (*z*), within ten days after the making thereof, be entered with the registrar of the County Court within whose jurisdiction the wife is resident; and that it shall be lawful for the husband, and any creditor or other persons claiming under him, to apply to the Court, or to the magistrate or justices by whom such order (*a*) was made, for the discharge thereof: Provided also, that if the husband, or any creditor of or person claiming under the husband, shall seize or continue to hold any property of the wife after notice of any such order, he shall be liable, at the suit of the wife (which she is hereby empowered to bring), to restore the specific property, and also for a sum equal to double the value of the property so seized or held after such notice as aforesaid; if any such order of protection be made, the wife shall, during the continuance thereof, be, and be deemed to have been, during such desertion of her, in the like position in all respects with regard to property and contracts, and suing and being sued, as she would be under this Act if she obtained a decree of judicial separation."

Order to protect wife's property after desertion by husband.

A woman who has been deserted by her husband, and has

(*u*) By the 21 & 22 V. c. 108 (an Act for amending the above Act), s. 6, "Every wife deserted by her husband wheresoever resident in England, may, at any time after such desertion, apply to the said Judge Ordinary for an order to protect any money or property in England she may have acquired or may acquire by her own lawful industry, and any property she may have become possessed of or may become possessed of, after such desertion, against her husband and his creditors, and any person claiming under him; and the Judge Ordinary shall exercise, in respect of every such application, all the powers conferred upon the Court for Divorce and Matrimonial Causes under the 20 & 21 V. c. 85, s. 21."

(*x*) See *Mason* v. *Mitchell*, 3 H. & C. 528; 34 L. J., Ex. 68.

(*y*) By 21 & 22 V. c. 108, s. 9, the order must state the time at which the desertion commenced, "and the order shall, as regards all persons dealing with such wife in reliance thereon, be conclusive as to the time when such desertion commenced."

(*z*) This proviso is only directory. See *The Goods of Farraday*, 31 L. J., Prob. 7.

(*a*) This part of the enactment is amended by the 27 & 28 V. c. 44. See *Ex p. Sharpe*, 5 B. & S. 322; 33 L. J., M. C. 152.

obtained an order under the above enactment, for the protection of her money and property from her husband and his creditors, could even before the Act of 1882 maintain an action for a libel without joining her husband (*b*). An order obtained under the above section by a married woman deserted by her husband, for the protection of property acquired since desertion, did not enable her to maintain an action commenced before the date of the order for injuries to or in respect of such property (*c*). *See now the Act of* 1882, *ante*, p. 1148. As to the effect of the reversal of the decree, *see infra*.

Wife judicially separated.

Action by Married Woman judicially separated from her Husband.] —By the stat. 20 & 21 *V.* c. 85, "A judicial separation between husband and wife may be decreed in certain cases;" and by sect. 25, "In every case of a judicial separation the wife shall, from the date of the sentence, and whilst the separation shall continue, be considered as a *feme sole* with respect to property of every description which she may acquire, or which may come to or devolve upon her; and such property may be disposed of by her in all respects as a *feme sole*, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead; provided that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place, shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate."

By sect. 26, "In every case of a judicial separation, the wife shall, whilst so separated, be considered as a *feme sole* for the purposes of contract, and wrongs, and injuries, and suing and being sued in any civil proceedings; and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant: Provided that where upon any such judicial separation alimony has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied for her use: Provided also that nothing shall prevent the wife from joining at any time during such separation, in the exercise of any joint power given to herself and her husband."

Above provisions to extend to property vested in wife as executrix, &c.

By the 21 & 22 *V.* c. 108, *s.* 7, "The provisions contained in this Act and in the said Act of the 20 & 21 *V.* c. 85, respecting the property of a wife who has obtained a decree for judicial separation, or an order for protection, shall be deemed to extend to property to which such wife has become or shall become entitled as executrix, administratrix or trustee since the sentence of separation or the commencement of the desertion (as the case may be); and the death of the testator or intestate shall be deemed to be the time when such wife became entitled as executrix or administratrix."

Effect of reversal of order or decree, &c.

By sect. 8, "In every case in which a wife shall, under this Act or under the said Act of the 20 & 21 *V.* c. 85, have obtained an order to protect her earnings or property, or a decree for judicial

(*b*) *Ramsden* v. *Brearley*, L. R., 10 Q. B. 147; 44 L. J., Q. B. 46.

(*c*) *The Midland R. Co.* v. *Pye*, 10 C. B., N. S. 179; 30 L. J., C. P. 314.

PART XII.

separation, such order or decree shall, until reversed or discharged, so far as necessary for the protection of any person or corporation who shall deal with the wife, be deemed valid and effectual; and no discharge, variation or reversal of such order or decree shall prejudice or affect any rights or remedies which any person would have had in case the same had not so been reversed, varied or discharged in respect of any debts, contracts or acts of the wife incurred, entered into, or done between the times of the making such order or decree, and of the discharge, variation or reversal thereof; and property of or to which the wife is possessed or entitled for an estate in remainder or reversion at the date of the desertion or decree (as the case may be), shall be deemed to be included in the protection given by the order or decree."

By sect. 10, "All persons and corporations who shall, in reliance on any such order or decree as aforesaid, make any payment to or permit any transfer or act to be made or done by the wife who has obtained the same shall, notwithstanding such order or decree may then have been discharged, reversed or varied, or the separation of the wife from her husband may have ceased, or at some time since the making of the order or decree been discontinued, be protected and indemnified in the same way in all respects as if at the time of such payment, transfer or other act, such order or decree were valid and still subsisting without variation in full force and effect, and the separation of the wife from her husband had not ceased or been discontinued, unless at the time of such payment, transfer or other act, such persons or corporations had notice of the discharge, reversal or variation of such order or decree, or of the cessation or discontinuance of such separation."

Proceedings in the action.

Proceedings in the Action.]—The proceedings in an action by a married women suing alone are exactly the same as those in an ordinary action. In the writ and subsequent proceedings she should be described by her married name, and the words "married woman" should be added after her name (*d*). The plaintiff in such a case can only be compelled to give security for costs in cases where an ordinary plaintiff would be so compelled (*e*).

Security for costs.

Statute of Limitations.

The Statute of Limitations, in an action in respect of a cause of action which accrued prior to the 1st January, 1883, so far as the disability arising from coverture is concerned, only commences to run on that day (*f*).

Damages and costs.

The damages and costs recovered by a married woman in an action are her separate property (*g*), even though the cause of action accrued prior to the 1st January, 1883 (*h*). Any damages or costs recovered against the married woman are payable out of her separate property, and not otherwise (*i*).

(*d*) Masters' Practice Rules. See post, Appendix.

(*e*) *Threlfall* v. *Wilson*, 8 P. D. 18; 48 L. T. 238.

(*f*) *Weldon* v. *Neal*, 51 L. T. 289; 32 W. R. 828.

(*g*) M. W. P. Act, 1882, s. 1, sub-s. 2, supra, p. 1148.

(*h*) *Weldon* v. *Winslow*, cited ante, p. 1147, n. (*c*).

(*i*) M. W. P. Act, 1882, s. 1, sub-s. 2, supra, p. 1148.

2. *Actions against Married Women.*

Liability to be sued.

Since the commencement (*k*) of the Married Women's Property Act, 1882 (45 & 46 *V. c.* 75), a married woman may be sued (*l*) in contract or tort in all respects as if she were a *feme sole*, and her husband need not be joined with her as defendant or be made a party to the action (*m*). This is clearly so in respect of contracts made and torts committed on or since the 1st January, 1883 (*l*), and, as regards women married since that date, it is so in respect of all contracts or torts whenever made or committed. And, it is submitted, that it is also so as regards contracts in respect of which the separate estate is liable, made by women married before that date, even though they were made or made and broken before that date (*n*). No question can arise as to torts committed before the 1st January, 1883, by women married before that date, because the separate estate is not liable in respect of such torts (*o*).

Joinder of husband.

Although it is not necessary in any case to join the husband as a co-defendant, it will often be proper to do so, as where it is sought to make him liable in respect of assets received by him with his wife, or for torts committed by her, or otherwise (*p*).

Joinder of trustees.

If the separate estate in respect of which it is sought to make the married woman liable, or any part of it, is vested in trustees, it is not necessary that they should be made parties to the action (*q*). But they may be joined as co-defendants, and if they are known it is generally advisable that they should be so (*r*), since the expense of an inquiry and other proceedings subsequent to the judgment may often be saved by doing so (*s*).

Extent of liability.

Extent of Liability.]—In no case is a married woman personally liable in respect of contracts or torts (*t*). The liability is in all

---

(*k*) The 1st January, 1883. See ante, p. 1147, n. (*b*).

(*l*) As to bringing in a married woman as a third party, see *Gloucestershire Banking Co.* v. *Phillips*, and *Jones* v. *Elderton*, cited ante, Vol. 1, p. 422. As to the liability on a solicitor's bill, see *In re Peace and Waller*, 24 Ch. D. 405; 49 L. T. 637; 31 W. R. 899. As to the effect of the marriage of a female defendant pending an action, see ante, pp. 962 and 1027.

(*m*) M. W. P. Act, 1882, s. 1, sub-s. 2, ante, p. 1148; R. of S. C., Ord. XVI. r. 16. It is not any defence to plead that the defendant was a married woman at the time of the commencement of the action: *Aboulaff* v. *Oppenheimer*, 47 L. T. 702; 30 W. R. 429.

(*n*) *Gloucestershire Banking Co.* v. *Phillips*, 12 Q. B. D. 533; 53 L. J., Q. B. 493; 50 L. T. 360; 32 W. R. 523. See *Weldon* v. *Winslow*, cited ante, p. 1147, n. (*c*). The submission made in the text is based on the principle that the liability to be sued alone is a matter of procedure only, and that statutes as to procedure are retrospective. See per *Pollock*, C. B., *Wright* v. *Hale*, 6 H. & N. at p. 230; 30 L. J., Ex. 40.

(*o*) *Wainford* v. *Heyl*, L. R., 20 Eq. 321; 44 L. J., Ch. 567.

(*p*) See post, p. 1159.

(*q*) *Davies* v. *Jenkins*, 6 Ch. D. 728: *Mathieson* v. *Paton*, "Times," 17th June, 1879: *Flower* v. *Butler*, 15 Ch. D. 665: *Picard* v. *Hine*, L. R., 5 Ch. 278. But see per *Cotton*, L. J., 3 Q. B. D. at p. 725.

(*r*) *Collett* v. *Dickenson*, 11 Ch. D. 687; 40 L. T. 392: *Pike* v. *Fitzgibbon*, 41 L. T. 148, per *Fry*, J., at p. 151: *Barber* v. *Gregson*, 49 L. J., Ex. 713; 43 L. T. 418: *In re Peace and Waller*, supra.

(*s*) *Pike* v. *Fitzgibbon*, supra.

(*t*) *Davis* v. *Lellenden*, 46 L. T. 797; M. W. P. Act, 1882, s. 1, sub-s. 2, ante, p. 1148.

PART XII.

cases limited to her separate property (*u*). With regard to the extent of the liability of the separate estate in respect of contracts, the Married Women's Property Act, 1882, is not retrospective (*x*), and there are very important differences between the liability in respect of contracts made before, and contracts made on and since, the 1st January, 1883 (*y*). The liability in respect of torts is confined to torts committed on or since the 1st January, 1883 (*z*), or torts committed before that date by married women married since (*a*), because, prior to that date, the separate estate was not liable (*b*).

Separate estate.

It would be foreign to the object of this work to enter into any discussion as to what is necessary to constitute property the separate estate of a married woman, or by what acts on her part it may be rendered chargeable (*c*). As to the former, it is sufficient to state that property of a married woman may be such, either by being expressly made so by the donor of it, or by settlement, or by reason of its falling within the provisions of the Married Women's Property Act, 1882. The charge extends to property over which the woman has a power to appoint by deed or will (*d*), or by will only when the power has been exercised (*d*). Unless there is an express charge, general contracts and engagements do not *per se* constitute a charge on the separate estate (*e*), but are only chargeable on it, and in order to complete the charge it is necessary to bring an action, and to claim and obtain a declaration of charge (*f*). Before the Act of 1882 it was held that the Statute of Limitations was no bar in such cases (*g*).

Liability in respect of post-nuptial contracts made on or since 1st January, 1883.

With regard to post-nuptial contracts made on or since the 1st January, 1883, the Married Women's Property Act provides (*s.* 1, *sub-s.* 2, *ante*, p. 1148) that a married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract.

By sect. 1, sub-sect. 3, "Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown."

By sub-sect. 4, "Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire."

It will be seen from what follows that this section has made

(*u*) *Ortner* v. *Fitzgibbon*, 43 L. T. 60: *Barber* v. *Gregson* (C. A.), 49 L. J., Ex. 731; 43 L. T. 428.

(*x*) *Conolan* v. *Leyland*, 27 Ch. D. 632.

(*y*) Ante, p. 1147, n. (*b*).

(*z*) Id.

(*a*) M. W. P. Act, 1884, s. 13, post.

(*b*) *Wainford* v. *Heyl*, ante, n. (*o*).

(*c*) See 1 W. & Tud. Lead. Cas. Eq., 4th ed. p. 481 et seq., in notis; Pollock on Contracts, 3rd ed.

(*d*) *London Chartered Bank of Australia* v. *Lemprière*, L. R., 4 P. C. 572; Married Women's Prop. Act, 1882, s. 4: *Mayd* v. *Field*, 3 Ch. D. 587, M. R.: *In re Harvey's Estate*, *Godfrey* v. *Harben*, 13 Ch. D. 216, V.-C. H.: *Skinner* v. *Todd*, W. N. 1881, 166, as corrected Id. 173. See per *Cotton*, L. J., *Pike* v. *Fitzgibbon*, 17 Ch. D. at p. 466.

(*e*) *Robinson* v. *Pickering*, 16 Ch. D. 660; 50 L. J., Ch. 527; per *Jessel*, M. R., 16 Ch. D. at p. 662.

(*f*) *National Provincial Bank of England* v. *Thomas*, 24 W. R. 1013, M. R.: *Robinson* v. *Pickering*, supra: *Pike* v. *Fitzgibbon*, supra.

(*g*) *Hodgson* v. *Williamson*, 15 Ch. D. 87; 42 L. T. 676; 28 W. R. 944, V.-C.B. Qy. if this is so since the Act of 1882.

important alterations in the extent of the liability of the separate estate.

Liability in respect of ante-nuptial debts, &c. of woman married on or since 1st January, 1883.

By the *Married Women's Property Act*, 1882, *s.* 13, "A woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage, including any sums for which she may be liable as a contributory, either before or after she has been placed on the list of contributories, under and by virtue of the Acts relating to joint stock companies; and *she may be sued for* any such debt, and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act (*h*) for any such debt, contract, or wrong, as aforesaid, except as to any separate property to which she may become entitled by virtue of this Act, and to which she would not have been entitled for her separate use under the Acts hereby repealed or otherwise, if this Act had not passed."

Liability in respect of contracts made before 1st January, 1883.

With regard to contracts made by married women prior to the 1st January, 1883, the Married Women's Property Act, 1882, does not apply (*i*), and the liability of the separate estate is limited to property which was the married woman's separate estate at the time when the contract was made, and which remains hers at the time when judgment is given (*k*), and any judgment given against her must be limited to such separate estate (*k*). The married woman will not be restrained by injunction from parting with her separate estate (*l*), and, consequently, until judgment is obtained, the creditor's claim is always liable to be defeated. The separate estate of a married woman is chargeable with all contracts or engagements made or entered into by her prior to the 1st January, 1883, with the intention to charge it (*m*), and such intention may be either expressed or implied, and will always, in the absence of express evidence to the contrary, be implied where, unless the separate estate is charged, there is no mode in which the obligation can be satisfied (*n*). In all cases the intention to charge the sepa-

(*h*) See *Mercier* v. *Williams* (C. A.), 9 Q. B. D. 237; 51 L. J., Q. B. 594; 47 L. T. 140; 30 W. R. 724, affirmed in D. P., W. N. 1884, 201.

(*i*) See ante, p. 1154, n. (*e*).

(*k*) *Pike* v. *Fitzgibbon* (C. A.), 17 Ch. D. 454; 50 L. J., Ch. 394; 44 L. T. 562; 29 W. R. 551: *Robinson* v. *Pickering* (C. A.), 16 Ch. D. 660; 50 L. J., Ch. 527; 44 L. T. 165; 29 W. R. 355: *Smith* v. *Lucas*, 18 Ch. D. 531; 30 W. R. 451: *King* v. *Lucas*, 53 L. J., Ch. 64; 31 W. R. 904.

(*l*) *Robinson* v. *Pickering*, ubi supra.

(*m*) *Hulme* v. *Tennant*, 1 Bro. P. C. 16; 1 W. & Tud. Lead. Cas. Eq. 4th ed. 481: *Johnson* v. *Gallagher*, 3 De G., F. & Jo. 513; 30 L. J., Ch. 298: *London Chartered Bank of Australia* v. *Lemprière*, L. R., 4 P. C. 573, at p. 590 et seq.: *Matthewman's case*, L. R., 3 Eq. 781, and cases infra.

(*n*) *Picard* v. *Hine*, L. R., 5 Ch. 274; per Lord *Romilly*, M. R., *Shattock* v. *Shattock*, L. R., 2 Eq. at pp.

PART XII.

rate estate must exist, and if it can be shown that there was no such intention, the separate estate will not be charged (*o*). The separate estate is liable on a covenant (*p*) or bond (*q*) of the married woman; it is liable on a bill of exchange drawn (*r*), accepted (*s*) or indorsed (*t*) by her, on a promissory note made (*u*) or cheque drawn (*x*) by her; it is liable on a promissory note signed by a married woman, jointly and severally with her husband, to secure an advance to him (*y*). So it has been held liable on a contract to take shares (*z*), and for calls on shares (*a*), or on a guaranty (*b*) made by her. It is liable on a retainer to a solicitor (*c*); it is also liable on her general engagement (*d*), as for goods sold and delivered to her (*e*), or work done (*f*), or money lent to her to provide necessaries (*g*). It is liable on all debts contracted by the married woman before her marriage (*h*). But the separate estate is not liable in respect of torts or breaches of trust committed by the woman during coverture prior to the 1st January, 1883 (*i*).

Effect of restraint on anticipation.

By the *Married Women's Property Act*, 1882, *s.* 19, "Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman (*k*), or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity

186, 187; per *Turner*, L. J., *Johnson* v. *Gallagher*, 3 De G., F. & Jo. 513; 30 L. J., Ch. 298, 308, cited L. R., 4 P. C. 593.

(*o*) *Bromley* v. *Norton*, 27 L. T. 478, V.-C. M.

(*p*) *Pike* v. *Fitzgibbon*, 14 Ch. D. 837.

(*q*) *Hulme* v. *Tennant*, supra; per *Kindersley*, V.-C., L. R., 3 Eq. 787.

(*r*) *Lancashire and Yorkshire Bank* v. *Tee*, W. N. 1875, pt. i. 213, V.-C. H.

(*s*) L. R., 4 P. C. at p. 591.

(*t*) *McHenry* v. *Davies*, L. R., 10 Eq. 88, M. R.

(*u*) Per *Kindersley*, V.-C., L. R., 3 Eq. 787.

(*x*) *McHenry* v. *Davies*, ubi supra.

(*y*) *Davies* v. *Jenkins*, 6 Ch. D. 728: *Roberts* v. *Watkins*, 46 L. J., Q. B. 552; 36 L. T. 799.

(*z*) *Matthewman's case*, L. R., 3 Eq. 781.

(*a*) *Butler* v. *Cumpston*, L. R., 7 Eq. 16.

(*b*) *Morrell* v. *Cowan*, 6 Ch. D. 166; 7 Id. 151.

(*c*) *Penley* v. *Anstruther*, 48 L. T. 664.

(*d*) *Mayd* v. *Field*, 3 Ch. D. 587; per *Turner*, L. J., *Johnson* v. *Gallagher*, 3 D., F. & Jo. 513; 30 L. J., Ch. 298, 308, cited L. R., 4 P. C. 590, 591: *Pike* v. *Fitzgibbon*, 14 Ch. D. at p. 840; per *Malins*, V.-C.; per *James*, L. J. *The London Chartered Bank of Australia* v. *Lempriere*, L. R., 4 P. C. 572, 593 et seq.

(*e*) *Picard* v. *Hine*, supra.

(*f*) *Skinner* v. *Todd*, 51 L. J., Ch. 198; 46 L. T. 131; 30 W. R. 267.

(*g*) *Hodgson* v. *Williamson*, 15 Ch. D. 87, V.-C. B.

(*h*) *Williams* v. *Mercier* (C. A.), 9 Q. B. D.; 51 L. J., Q. B. 594; 47 L. T. 140; 30 W. R. 724, affirmed in D. P., W. N. 1884, 201: *London and Provincial Bank* v. *Bogle*, 7 Ch. D. 773: cp. *Sanger* v. *Sanger*, L. R., 11 Eq. 470; 40 L. J., Ch. 372.

(*i*) *Wainford* v. *Heyl*, L. R., 20 Eq. 321, M. R.

(*k*) This excepts from the operation of the Act property subject to a covenant to settle after-acquired property: *In re Stonor's Trusts*, 24 Ch. D. 195.

against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors."

If the separate estate of a married woman be subject to a restraint on anticipation then, unless the settlement or agreement come within the provisoes in the above section, it cannot be charged or rendered liable (*l*) even by fraud on the part of the married woman (*m*) so long as the restraint applies. Nor after the restraint is removed, as by the death of the husband, can the property be charged under contracts made whilst it existed (*n*). By the Conveyancing and Law of Property Act, 1881 (44 & 45 *V.* c. 41), *s.* 39, power is given to the Court, in some cases, where it is for the benefit of the woman (*o*), to bind the property, notwithstanding the restraint on anticipation (*p*).

Liability of personal representative.

As to the liability of the personal representative of a married woman, *see sect.* 23, *ante*, p. 1149.

Writ of summons, &c.

Writ of Summons, &c.]—The writ of summons and subsequent proceedings, except where any difference is pointed out in this chapter, are the same as in ordinary cases. A married woman may now retain and appear by a solicitor in the same manner as a *feme sole*.

Application for judgment under Ord. XIV.

Application for Judgment under Ord. XIV.]—Prior to the Married Women's Property Act, 1882, it was held that there was no power to order judgment to be signed against a married woman under *Ord. XIV.* (*see ante, Vol.* 1, p. 269) if she opposed it (*q*). Since that Act the order may be made, but it must state that execution is to be limited to the separate estate of the defendant which she is not restrained from anticipating, unless such restraint exists only under any settlement or agreement for a settlement made by herself (*r*).

Judgment.

Judgment.]—The *Married Women's Property Act*, 1882, provides (*s.* 1, *sub-s.* 2, *ante*, p. 1148) that any damages or costs recovered against a married woman shall be payable out of her separate property and not otherwise. In cases where the liability arises under

---

(*l*) *Roberts* v. *Watkins*, 46 L. J., Q. B. 552; 36 L. T. 799: *Pike* v. *Fitzgibbon*, cited ante, p. 1156, n. (*p*): *Chapman* v. *Biggs*, 11 Q. B. D. 27; 48 L. T. 704: *Re Bowe, O'Halloran* v. *King*, C. A., 27 Ch. D. 411; 53 L. J., Ch. 881; 51 L. T. 796; 33 W. R. 58.

(*m*) *Stanley* v. *Stanley*, 7 Ch. D. 589.

(*n*) *Pike* v. *Fitzgibbon*, ubi supra.

(*o*) *In re Warren's Settlement*, 52 L. J., Ch. 928; 49 L. T. 696: *Tamplin* v. *Miller*, 30 W. R. 422.

(*p*) See *Re Landfield's Settled Estate*, 46 L. T. 227; 30 W. R. 377: *Ex p. Thompson*, W. N. 1884, 28: *Musgrave* v. *Sandeman*, 48 L. T. 215: *Sedgwick* v. *Thomas*, 48 L. T. 100: *Hodges* v. *Hodges*, 20 Ch. D. 749; 51 L. J., Ch. 549; 46 L. T. 366; 30 W. R. 483: *In re Lillwall's Settlement Trusts*, 30 W. R. 243.

(*q*) *Ortner* v. *Fitzgibbon*, 43 L. T. 60: *Durrant* v. *Ricketts*, 8 Q. B. D. 177; 51 L. J., Q. B. 425; 30 W. R. 429: *Saville* v. *Kane*, 28 Sol. Journ. 518. See per *Quain*, J., *Butterworth* v. *Tee*, W. N. 1876, 9.

(*r*) *Bursill* v. *Tanner*, 13 Q. B. D. 691; 50 L. T. 589; 32 W. R. 827: *Perks* v. *Mylrea*, W. N. 1884, 64; Bitt. Ch. Cas. 128. See contra, *Moore* v. *Mulligan*, W. N. 1884, 34; Bitt. Ch. Cas. 127.

PART XII.

the Act of 1882, the judgment should be in the ordinary form, but should provide that any execution to be levied thereon shall be limited to the separate property of the defendant, in respect of which she is not restrained from anticipation, unless such restraint exists under any settlement or agreement for a settlement made by herself (*s*). In cases not coming within the Act, the judgment must be limited in accordance with the decision in *Pike* v. *Fitzgibbon* (*t*). A judgment against a married woman personally in the ordinary form would, at all events prior to the Act of 1882, be irregular (*u*).

Inquiry as to estate.

If it is not certain of what the separate estate consists an inquiry before one of the Masters may be directed (*x*). The inquiry is conducted in the usual way (*see post, Ch. CXV.*), by getting an appointment before the Master and calling witnesses before him and examining them.

Appointment of receiver.

If the property is vested in trustees and they are not parties to the action, no order can be made against them (*x*); but a receiver may be appointed to receive the separate estate (*x*), and no separate proceedings are necessary (*x*).

Costs.

The costs may be ordered to be paid out of the separate estate (*y*).

Execution.

Execution.]—Execution is issued in the ordinary way. The writ must follow the judgment and be expressly limited to the separate estate in the terms of the judgment. Only the separate estate can be taken.

3. *Actions by Husband and Wife jointly.*

In some cases a husband and wife may sue jointly as co-plaintiffs. Thus they may do so in respect of an injury to the wife, in respect of which the husband has a separate right of action (*z*).

By *Ord. XVIII. r.* 4, "Claims by or against husband and wife may be joined with claims by or against either of them separately."

This rule is (by rule 7) subject to rules 1, 8 and 9 of the same Order, which relate to applications to separate causes of action so joined (*see ante, Vol.* 1, p. 406).

(*s*) *Bursill* v. *Tanner*, supra. But see *Brown* v. *Green*, 12 L. R., Ir. 122.

(*t*) See ante, p. 1155, n. (*k*). See a form in *McQueen* v. *Turner*, 30 W. R. 80.

(*u*) *Davis* v. *Ballenden*, 46 L. T. 797: *Barber* v. *Gregson*, 49 L. J., Ex. 731; 43 L. T. 428.

(*x*) *In re Peace and Waller* (C. A.), 24 Ch. D. 405; 49 L. T. 637; 31 W. R. 899.

(*y*) See the M. W. P. Act, 1882, s. 1, sub-s. 2, ante, p. 1148: *Morris* v. *Freeman*, 3 P. D. 65: *Butler* v. *Cumpston*, L. R., 7 Eq. 16, 24: *McHenry* v. *Davis*, L. R., 10 Eq. 88, 92: *Chubb* v. *Stretch*, L. R., 9 Eq. 555, 562. As to the trustee's costs when they are joined, the usual course is to order the plaintiff to pay them, and add them to his own costs, which are to be paid out of the estate: *Collette* v. *Dickinson*, 11 Ch. D. 687, at p. 690: *London and Provincial Bank* v. *Bogle*, 7 Ch. D. 773, 776; 47 L. J., Ch. 301: *Chubb* v. *Stretch*, supra.

(*z*) The 40th section of the C. L. P. Act, 1852, which enabled the husband to add a claim for the injury to himself, is repealed by the Statute Law Revision and Civil Procedure Act, 1883; but its place is taken by Ord. XVIII. r. 4, supra.

4. *Actions against Husband and Wife jointly.*

In some cases a husband and wife may be sued jointly as co-defendants (*a*).

Service of writ.

By *R. of S. C., Ord. IX. r.* 3, "When husband and wife are both defendants to the action, they shall both be served unless the Court or a Judge shall otherwise order."

Action against husband and wife in respect of ante-nuptial liabilities of wife.

By the *Married Women's Property Act*, 1882, *s.* 15, "A husband and wife may be *jointly* (*b*) *sued* in respect of any such debt or other liability (whether by contract or for any wrong) contracted or incurred by the wife before marriage as aforesaid if the plaintiff in the action shall seek to establish his claim, either wholly or in p against both of them; and if in any such action, or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so acquired by him, or to which he shall have become so entitled as aforesaid, he shall have *judgment for his costs of defence*, whatever may be the result of the action against the wife if jointly sued with him; and in any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally, and against the wife as to her separate property; and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only."

If the husband wishes to rely on the want of assets as a defence he must plead it specially, and the plaintiff need not allege it in his claim (*c*).

Extent of liability of husband.

By the Married Women's Property Act, 1882 (45 & 46 *V. c.* 75, *s.* 14), "A husband shall be liable for the *debts* of his wife contracted, and for all *contracts* entered into and *wrongs* committed by her before marriage, including any liabilities to which she may be so subject under the Acts relating to joint stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bonâ fide* recovered against him in any proceeding at law (*d*), in respect of any such debts, contracts or wrongs for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any further or otherwise; and any court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount or value of such

---

(*a*) As to joinder of claims, see Ord. XVIII. r. 4, ante, p. 1158.

(*b*) See *Bell* v. *Stocker*, cited post, n. (*c*), which shows that the liability ceases on the death of the wife.

(*c*) *Matthews* v. *Whittle*, 13 Ch. D. 811; 43 L. T. 114.

(*d*) Cp. *Fear* v. *Castle*, 8 Q. B. D. 380; 51 L. J., Q. B. 279; 45 L. T. 544; 30 W. R. 271, decided on the words "any subsequent action" in the Act of 1874.

PART XII.

property: Provided always, that nothing in this Act contained shall operate to increase or diminish the liability of any *husband married before* the commencement of this Act for or in respect of any such debt or other liability of his wife as aforesaid."

—Ceases on death of wife.

The liability of the husband for the ante-nuptial liabilities of his wife ceases on the death of the wife and he cannot afterwards be sued (*e*). The section limits the liability in an action brought in this country against an Englishman married here to a woman who, prior to her marriage, had contracted debts in Jersey, and for which, by the law of that country, he was liable (*f*).

There does not appear to be anything in the *Married Women's Property Act*, 1882, to take away the liability of a husband for the post-nuptial torts of his wife.

5. *Execution by or against Husband on Judgment given against Wife.*

R. of S. C., Ord. XLII. r. 23 (*ante*, p. 955), provides, that where a husband is entitled or liable to execution upon a judgment or order for or against a wife, the party alleging himself to be entitled to execution may apply to the Court or a Judge for leave to issue execution accordingly. And such Court or Judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried. And in either case such Court or Judge may impose such terms as to costs or otherwise as shall be just.

6. *Questions between Husband and Wife as to Property.*

Summary decision of questions between husband and wife as to property.

By the *Married Women's Property Act*, 1882, *s.* 17, "In any question between husband and wife as to the title to or possession of property, either party, or any such bank, corporation, company, public body, or society as aforesaid, in whose books any stocks, funds or shares of either party are standing, may apply by *summons* or otherwise, in a summary way, to any Judge of the High Court of Justice in England or in Ireland, according as such property is in England or Ireland, or (at the option of the applicant, irrespectively of the value of the property in dispute) in England to the Judge of the County Court of the district, or in Ireland to the chairman of the Civil Bill Court of the Division in which either party resides, and the Judge of the High Court of Justice or of the County Court, or the chairman of the Civil Bill Court (as the case may be), may make such *order* with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit: Provided always, that any order of a Judge of the High Court of Justice to be made under the provisions of this section shall be subject to appeal in the same way as an order made by the same Judge in a suit

(*e*) *Bell* v. *Stocker*, 10 Q. B. D. 129; 52 L. J., Q. B. 49; 47 L. T. 624; 31 W. R. 183.

(*f*) *De Greuchy* v. *Wells*, 4 C. P. D. 362; 48 L. J., C. P. 726.

pending or on an equitable plaint in the said Court would be (*sic*); and any order of a County or Civil Bill Court under the provisions of this section shall be subject to appeal in the same way as any other order made by the same Court would be, and all proceedings in a County Court or Civil Bill Court under this section in which, by reason of the value of the property in dispute, such Court would not have had jurisdiction if this Act or the Married Women's Property Act, 1870, had not passed, may, at the option of the defendant or respondent to such proceedings be removed as of right into the High Court of Justice in England or Ireland (as the case may be), by writ of *certiorari* or otherwise, as may be prescribed by any rule of such High Court; but any order made or act done in the course of such proceedings prior to such removal shall be valid, unless an order shall be made to the contrary by such High Court: provided also, that the Judge of the High Court of Justice or of the County Court, or the chairman of the Civil Bill Court, if either party so require, may hear any such application in his private room: provided also, that any such bank, corporation, company, public body, or society as aforesaid, shall, in the matter of any such application for the purposes of costs or otherwise, be treated as a stakeholder only."

See a form of summons under this section, *Chit F.*, p. 568.

CHAPTER CII.

BANKRUPTS AND THEIR TRUSTEES.

	PAGE		PAGE
1. *Actions by Bankrupts and their Trustees*	1162	2. *Actions against Bankrupts and their Trustees*	1167

1. *Actions by Bankrupts and their Trustees.*

PART XII.

As to the effect of the bankruptcy of the plaintiff or of one of several plaintiffs after action brought, *see ante*, p. 1030.

In whose name to be brought.

For any debt due to the bankrupt previous to the bankruptcy, or for any other cause of action which passes to the trustee, the action should be brought by the latter (*a*). But if the bankrupt at the time of his bankruptcy had no beneficial interest in the debt, as if he were trustee of it for a third person, and for other causes of action which do not pass to the trustee, the action should be in the bankrupt's name (*b*).

What rights of action pass to trustee, and what do not.

As a general rule, all rights of action of a bankrupt pass to his trustee in the bankruptcy; and this is so, even where the *quantum* of damages to be recovered remains still to be ascertained (*c*), and whether the right of action has accrued before or after the date of the bankruptcy.

But to this general rule there are some important exceptions.

First. Rights of action arising from torts which result primarily and chiefly in injuries to the person or feelings of a bankrupt do not pass to the trustee. And that even though such torts cause damage to the bankrupt's estate, if such damage be consequential on and inseparable from the personal injury (*d*).

(*a*) Upon what contracts entered into with the bankrupt the trustee is entitled to sue, see *Drake* v. *Beckham*, 11 M. & W. 315: *Beckham* v. *Drake*, 2 H. L. C. 579: *Gibson* v. *Carruthers*, 8 M. & W. 321: *Whitmore* v. *Gilmour*, 12 M. & W. 808: *Sherrington* v. *Yates*, 1 D. & L. 1032; 12 M. & W. 855; 13 L. J., Ex. 249: *Graham* v. *Allsop*, 3 Ex. 186; 18 L. J., Ex. 85, where the assignees sued for rent which accrued after the bankruptcy: *Ruchbell* v. *Alexander*, 10 C. B., N. S. 324; 30 L. J., C. P. 268. As to the bankrupt suing when all his debts have been satisfied, see *Wearing* v. *Ellis*, 26 L. J., Ch. 15.

(*b*) *Winch* v. *Keeley*, 1 T. R. 619: *Carpenter* v. *Marnell*, 3 B. & P. 40: *Dangerfield* v. *Thomas*, 1 P. & D. 287. See *Mogg* v. *Baker*, 3 M. & W. 195: *Tibbits* v. *George*, 6 N. & M. 804: *Parnham* v. *Hurst*, 8 M. & W. 743: *D'Arnay* v. *Chesman*, 13 M. & W. 796: *Boyd* v. *Mangles*, 3 Ex. 387: *Castelli* v. *Boddington*, 1 E. & B. 66; 22 L. J., Q. B. 5; 1 E. & B. 879; 23 L. J., Q. B. 31, where part of a contract had been assigned by the bankrupt.

(*c*) *Wright* v. *Fairfield*, 2 B. & Ad. 727.

(*d*) *Drake* v. *Beckham*, 11 M. & W. 315: *Howard* v. *Crowther*, 8 Id. 601: *Rogers* v. *Spence*, 1 and 12 Cl. & F. 700. And rupt is entitled to apply th when recovered to his own and the trustee has no righ cept them as forming part tate. *Ex p. Vine, Re Wi* D. 364; 47 L. J., Ch. 116.

(*e*) *Drake* v. *Beckham*, 8

(*f*) 2 H. L. C. 579. contra, per *Bramwell*, B., i v. *Sidney*, L. R., 1 Ex. 313; Ex. 182.

(*g*) See *Hodgson* v. *Sidn* 1 Ex. 313; 35 L. J., Ex. 18

(*h*) *Brewer* v. *Dew*, 11 625: *Rogers* v. *Spence*, 13 1

(*i*) *Clark* v. *Calvert*, 8 Tr and per *Parke*, B., in *Rogers*, 11 M. & W. 191.

Secondly. Rights of action arising from breaches of contracts of a personal nature, such as contracts to cure or to marry, do not pass to the trustee, even though there may have been consequential damage to the bankrupt's estate (*e*).

Thirdly. It would seem from the opinions of the Judges delivered to the House of Lords in *Beckham* v. *Drake* (*f*), that where a tort or breach of contract results in direct injuries both to the person and the estate of the bankrupt, the right of action may be split, remaining, so far as it arises from the former injury, in the bankrupt, and passing, so far as it arises from the latter injury, to the trustee.

Fourthly. Rights of action, whether arising from torts or breaches of contract, which result primarily in injury to the estate, follow the general rule, and pass to the trustee, though there may be also consequential injury to the person or feelings of the bankrupt (*g*). But to this rule there is again an exception. For if the injury, though primarily to the estate, be one for which a jury might award vindictive damages, the right of action will not pass to the trustee (*h*). And further, it seems that if the right of action be in respect of a tort committed before the bankruptcy, causing injury to the real estate of the bankrupt, but which real estate never passed to the trustee in bankruptcy, the trustee cannot maintain the action (*i*).

It is further to be observed that as regards rights of action accruing to a bankrupt in respect of property acquired by him during the bankruptcy, though the trustee may, if he thinks fit, sue thereon, yet, unless and until he intervenes, the bankrupt can maintain the action; and a plea of the plaintiff's bankruptcy, without alleging that the trustee has intervened, will be no defence to such an action, for the plaintiff's right is good against all the world except his trustee in the bankruptcy (*k*), and the after-acquired property of a bankrupt does not vest absolutely in his trustee, but vests in the bankrupt, subject to a right in the trustee to claim it (*l*).

The right to sue for moneys earned during the continuance of the bankruptcy by the bankrupt by his mere personal labour does not

---

601: *Rogers* v. *Spence*, 13 Id. 571, and 12 Cl. & F. 700. And the bankrupt is entitled to apply the damages when recovered to his own purposes, and the trustee has no right to intercept them as forming part of the estate. *Ex p. Vine, Re Wilson*, 8 Ch. D. 364; 47 L. J., Ch. 116.

(*e*) *Drake* v. *Beckham*, supra.

(*f*) 2 H. L. C. 579. But see contra, per *Bramwell*, B., in *Hodgson* v. *Sidney*, L. R., 1 Ex. 313; 35 L. J., Ex. 182.

(*g*) See *Hodgson* v. *Sidney*, L. R., 1 Ex. 313; 35 L. J., Ex. 182.

(*h*) *Brewer* v. *Dew*, 11 M. & W. 625; *Rogers* v. *Spence*, 13 Id. 571.

(*i*) *Clark* v. *Calvert*, 8 Taunt. 742, and per *Parke*, B., in *Spence* v. *Rogers*, 11 M. & W. 191.

(*k*) *Webb* v. *Fox*, 7 T. R. 391: *Fowler* v. *Down*, 1 B. & P. 44: *Jameson* v. *Brick and Stone Co.*, 4 Q. B. D. 208; 48 L. J., Q. B. 247: *Herbert* v. *Sayer*, 2 D. & L. 49; 5 Q. B. 965; 13 L. J., Q. B. 209: *Fyson* v. *Chambers*, 9 M. & W. 460: *Drayton* v. *Dale*, 2 B. & C. 293: *Sprye* v. *Porter*, 7 E. & B. 58; 26 L. J., Q. B. 64: *Elliot* v. *Clayton*, 16 Q. B. 581; 20 L. J., Q. B. 217, cases decided under the repealed Acts.

(*l*) *Drayton* v. *Dale*, 2 B. & C. 293. *Meggy* v. *Imperial Discount Co.*, 3 Q. B. D. 711, is distinguishable. The property there, or the greater part of it, was not acquired after commencement of the bankruptcy, and the point was not taken.

pass to the trustee (*m*). But this does not extend to the profits of a regular trade carried on by the bankrupt during the bankruptcy (*n*). And the trustee may intercept moneys recovered by the bankrupt as damages for breach of a contract to employ the bankrupt made during the bankruptcy (*o*).

A bankrupt has a good title to all property acquired and a right to sue on all contracts made with him between the commencement of the bankruptcy and the order of discharge, unless his trustee interferes and claims the property or the benefit of such contracts (*p*). A bankrupt may sue for remuneration for his personal labour or for a personal wrong after the bankruptcy and before his discharge (*q*).

In an action by the trustee of a bankrupt for breach of a contract made by the latter, the measure of damages is the amount which the bankrupt himself might have recovered and not merely the amount of the injury to the estate in the trustee's hands (*r*).

Trustee may sue and be sued in official name.

By the *Bankruptcy Act*, 1883, *s.* 83, "The trustee may sue and be sued by the official name of 'the trustee of the property of , a bankrupt,' inserting the name of the bankrupt, and by that name may, in any part of the British dominions or elsewhere, hold property of every description, make contracts, sue and be sued, enter into any engagements binding on himself and his successors in office, and do all other acts necessary or expedient to be done in the execution of his office."

The usual practice in the Queen's Bench Division, under the *Bankruptcy Act*, 1869, which was similar in its terms to the above section, was for the trustee to sue and be sued as "A. B., the trustee of the property of C. D., a bankrupt," naming both the trustee and the bankrupt; but it appears that the proper, or, at all events, an admissible course is not to mention the trustee's name at all, but simply to describe the party as "the trustee of the property of C. D., a bankrupt" (*s*).

Actions by trustees assigned to Bankruptcy Judge.

By the *Bankruptcy Rules*, 1883, *r.* 91, "When a trustee, under sect. 57 of the Act (*t*), brings an action in the High Court concerning any matter not specially assigned by the Supreme Court of Judicature Act, 1873, or Acts amending it, or by Rules of the Supreme Court, to a Division other than that to which bankruptcy business is assigned, he shall bring his action in the Division to which bankruptcy business is assigned, and the action shall, unless the Court otherwise directs, be tried by the Judge assigned to transact and dispose of bankruptcy business."

(*m*) *Chippendall* v. *Tomlinson*, 4 Doug. 318: *S. C.*, 1 Co. Bank. Law, 428: *Williams* v. *Chambers*, 10 Q. B. 337.

(*n*) *Crofton* v. *Poole*, 1 B. & Ad. 568: *Elliot* v. *Clayton*, 16 Q. B. 581: *Ex p. Banks, Re Dowling*, 4 Ch. D. 689: *Emden* v. *Carte*, 17 Ch. D. 768.

(*o*) *Wadling* v. *Oliphant*, 1 Q. B. D. 145.

(*p*) *Jameson* v. *Brick and Stone Co.*, 4 Q. B. D. 208; 48 L. J., Q. B. 249: *Herbert* v. *Sayer*, 5 Q. B. 965; 2 D. & L. 49; 13 L. J., Q. B. 209: *Fyson* v. *Chambers*, 9 M. & W. 460: *Drayton* v. *Dale*, 2 B. & C. 293: *Sprye* v. *Porter*, 7 E. & B. 58; 26 L. J., Q. B. 64: *Elliot* v. *Clayton*, 16 Q. B. 581; 20 L. J., Q. B. 217.

(*q*) *Jameson* v. *Brick and Stone Co.*, supra: *Ex p. Vine, In re Wilson*, 8 Ch. D. 364; 47 L. J., Ch. 116.

(*r*) *Ashdown* v. *Ingamells* (C. A.), 5 Ex. D. 280; 50 L. J., Ex. 109; 43 L. T. 424.

(*s*) *Pooley's Trustee in Bankruptcy* v. *Whetham*, 53 L. J., Ch. 1165; 51 L. T. 195; 32 W. R. 1017, *Pearson*, J.: S.C. in C. A., W. N. 1884, 202.

(*t*) See post, p. 1165.

Writ of summons, &c.

In actions by the trustee of a bankrupt the writ of summons is the same, and the pleadings are filed and delivered, as in ordinary cases.

By *R. of S. C., Ord. XVIII. r.* 3, "Claims by a trustee in bankruptcy, as such, shall not, unless by leave of the Court or a Judge, be joined with any claim by him in any other capacity."

The fact that the plaintiff is the trustee of a bankrupt should be stated in the title of the action and in the body of the writ, and the fact that he sues in that capacity should appear in the indorsement. The character in which the plaintiff is stated in the pleadings to sue is not in issue, unless specially denied (*Ord. XXI. r.* 5) (*t*).

The defendant may set up by way of set-off a claim for a debt or unliquidated damages (*u*).

As to security for costs, *see ante, Vol.* 1, p. 398.

The judgment and execution are the same as in ordinary cases.

The trustee is personally liable for the costs in the same manner as an ordinary plaintiff (*x*).

As to the effect of the bankruptcy of the plaintiff, or of one of several plaintiffs, pending an action, *see ante*, p. 1030.

Powers of trustee.

By the *Bankruptcy Act*, 1883, *s.* 57, "The trustee may, with the permission of the committee of inspection, do all or any of the following things:

"(2.) Bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt:

"(3.) Employ a solicitor or other agent to take any proceedings or do any business which may be sanctioned by the committee of inspection:

"(6.) Refer any dispute to arbitration, compromise all debts, claims and liabilities, whether present or future, certain or contingent, liquidated or unliquidated, subsisting or supposed to subsist between the bankrupt and any person who may have incurred any liability to the bankrupt, on the receipt of such sums, payable at such times, and generally on such terms as may be agreed on:

"(7.) Make such compromise or other arrangement as may be thought expedient with creditors, or persons claiming to be creditors, in respect of any debts provable under the bankruptcy (*y*):

"(8.) Make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to the property of the bankrupt, made or capable of being made on the trustee by any person or by the trustee on any person (*y*):

(*t*) See this rule, Vol. 1, p. 284. As to what a plea denying that the plaintiffs were assignees put in issue before the Jud. Acts, see *Butler* v. *Hobson*, 4 Bing. N. C. 290; *Buckton* v. *Frost*, 1 P. & D. 102; 8 A. & E. 844.

(*u*) *Peat* v. *Jones* (C. A.), 8 Q. B. D. 147; 51 L. J., Q. B. 128; 30 W. R. 433; *Jack* v. *Kipping*, 9 Q. B. D. 113; 51 L. J., Q. B. 463; 46 L. T. 169; 30 W. R. 441.

(*x*) *Borneman* v. *Wilson* (C. A.), 28 Ch. D. 53; 33 W. R. 141: *Ex p. Angerstein, In re Angerstein*, L. R., 9 Ch. 479; 43 L. J., Bk. 131, per *Mellish*, L. J.: *Pitts* v. *La Fontaine*, 6 App. Cas. 482; 43 L. T. 479.

(*y*) The trustee has a right to compromise an action instituted by him as such, and this section does not make the permission of the committee of inspection necessary: *Leeming* v. *Lady Murray*, 13 Ch. D. 123,

PART XII.

"The permission given for the purposes of this section shall not be a general permission to do all or any of the above-mentioned things, but shall only be a permission to do the particular thing or things for which permission is sought in the specified case or cases."

Actions by trustee of partner.

With respect to actions by the trustee of one of several partners, the *Bankruptcy Act*, 1883, *s.* 113, provides that "Where a member of a partnership is adjudged bankrupt, the Court may authorize the trustee to commence and prosecute any action in the names of the trustee and of the bankrupt's partner; and any release by such partner of the debt or demand to which the action relates shall be void; but notice of the application for authority to commence the action shall be given to him, and he may show cause against it, and on his application the Court may, if it thinks fit, direct that he shall receive his proper share of the proceeds of the action, and if he does not claim any benefit therefrom he shall be indemnified against costs in respect thereof as the Court directs."

—Joint contractors.

With respect to actions by or against joint contractors, one of whom is bankrupt, the *Bankruptcy Act*, 1883, *s.* 114, provides that "Where a bankrupt is a contractor in respect of any contract jointly with any person or persons, such person or persons may sue or be sued in respect of the contract without the joinder of the bankrupt."

Evidence.

With respect to evidence, the *Bankruptcy Act*, 1883, provides by sect. 132, that—

Gazette to be evidence.

"(1.) A copy of the London Gazette containing any notice inserted therein in pursuance of this Act shall be evidence of the facts stated in the notice.

"(2.) The production of a copy of the London Gazette containing any notice of a receiving order, or of an order adjudging a debtor bankrupt, shall be conclusive evidence in all legal proceedings of the order having been duly made, and of its date."

Evidence of proceedings in bankruptcy.

By sect. 134, "Any petition or copy of a petition in bankruptcy, any order or certificate or copy of an order or certificate made by any Court having jurisdiction in bankruptcy, any instrument or copy of an instrument, affidavit or document made or used in the course of any bankruptcy proceedings, or other proceedings had under this Act, shall, if it appears to be sealed with the seal of any Court having jurisdiction in bankruptcy, or purports to be signed by any Judge thereof, or is certified as a true copy by any registrar thereof, be receivable in evidence in all legal proceedings whatever."

—Seals and signatures.

By sect. 137, "Every Court having jurisdiction in bankruptcy under this Act shall have a seal describing the Court in such manner as may be directed by order of the Lord Chancellor, and judicial notice shall be taken of the seal, and of the signature of the Judge or registrar of any such Court, in all legal proceedings."

Certificate of appointment of trustee.

By sect. 138, "A certificate of the Board of Trade that a person has been appointed trustee under this Act, shall be conclusive evidence of his appointment."

Appeal from Board of Trade to High Court.

By sect. 139, "Where by this Act an appeal to the High Court is given against any decision of the Board of Trade, or of the official receiver, the appeal shall be brought within twenty-one days from the time when the decision appealed against is pronounced or made."

Proceedings of Board of Trade.

By sect. 140, "(1) All documents purporting to be orders or certificates made or issued by the Board of Trade, and to be sealed

with the seal of the Board, or to be signed by a secretary or assistant secretary of the Board, or any person authorized in that behalf by the President of the Board, shall be received in evidence, and deemed to be such orders or certificates without further proof unless the contrary is shown.

"(2.) A certificate signed by the President of the Board of Trade that any order made, certificate issued, or act done, is the order, certificate or act of the Board of Trade, shall be conclusive evidence of the fact so certified."

2. *Actions against Bankrupts and their Trustees.*

Stay of Proceedings after Presentation of Petition.]—By the *Bankruptcy Act*, 1883, s. 10 (1), "The Court may, if it is shown to be necessary for the protection of the estate, at any time after the presentation of a bankruptcy petition, and before a receiving order is made, appoint the official receiver to be interim receiver of the property of the debtor, or of any part thereof, and direct him to take immediate possession thereof or of any part thereof. Stay of proceedings after presentation of petition.

"(2.) The Court may, at any time after the presentation of a bankruptcy petition, stay any action, execution or other legal process against the property or person of the debtor, and any Court in which proceedings are pending against a debtor may, on proof that a bankruptcy petition has been presented by or against the debtor, either stay the proceedings or allow them to continue on such terms as it may think just."

The Court referred to in this section is the Court having jurisdiction in bankruptcy under the Act (*z*), and the section preserves to that Court the power formerly possessed by the Court of Bankruptcy (*a*) of restraining proceedings in other Divisions of the High Court or other Courts. But the section also gives power to "any Court" to stay proceedings on proof of presentation of a petition. The application to stay should generally be made in the division in which the action is pending by a summons at chambers, supported by an affidavit, showing that the petition has been presented.

This section corresponds to the 13th section of the Act of 1869, which, it was held, did not enable the Court to restrain an action for false representation or fraud (*b*), or of tort (*c*), to which the order of discharge would be no defence (*d*). In such actions the proceedings may continue and judgment be given pending the bankruptcy, but execution will not generally be allowed to issue until after the order of discharge (*e*).

By sect. 11, "Where the Court makes an order staying any action or proceeding, or staying proceedings generally, the order may be served by sending a copy thereof, under the seal of the Service of order staying proceedings.

(*z*) Bank. Act, 1883, s. 168.

(*a*) The power was not affected by the Jud. Acts: *Ex p. Dillon, In re Woods*, 1 Ch. D. 557; 45 L. J., Ch. 87 (C. A.); *Ex p. Day, Re Potter*, 48 L. T. 912.

(*b*) *Ex p. Baum, In re Edwards*, L. R., 9 Ch. 673; 44 L. J., Bk. 25; *Ex p. Coker, In re Blake*, L. R., 10 Ch. 652; 44 L. J., Bk. 126.

(*c*) *In re Mead, Ex p. Harold*, 3 Ch. D. 119; 45 L. J., Bk. 51.

(*d*) See post, p. 1169.

(*e*) *Ross* v. *Gutteridge*, 52 L. J., Ch. 280.

PART XII.

Court, by prepaid post letter to the address for service of the plaintiff or other party prosecuting such proceeding."

—Expiration of.

If the restraining order be limited as to time the party restrained may proceed as soon as the time has expired if no further order be obtained (*f*).

Effect of receiving order.

Effect of Receiving Order.]—By the *Bankruptcy Act*, 1883, *s.* 9 (1), "On the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the Court, and on such terms as the Court may impose.

"(2) But this section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed."

Secured creditor.

It will be observed that the section expressly reserves the rights of a "secured creditor" to realize or otherwise deal with his security. By sect. 168, a "secured creditor" is defined to mean any "person holding a mortgage, charge or lien on the property of the debtor, or any part thereof, as security for a debt due to him from the debtor."

As to who is a secured creditor in the case of attachment of debts, *see ante*, p. 933; in the case of a writ of *fi. fa.*, *see post*, p. 1169; in the case of a writ of elegit, *see ante*, p. 882; in the case of sequestration, *see ante*, p. 911.

Effect of order of discharge.

Effect of Order of Discharge.]—By the *Bankruptcy Act*, 1883, *s.* 30 (1), "An order of discharge shall not release the bankrupt from any debt on a recognizance nor from any debt with which the bankrupt may be chargeable at the suit of the Crown or of any person for any offence against a statute relating to any branch of the public revenue, or at the suit of the sheriff or other public officer on a bail bond entered into for the appearance of any person prosecuted for any such offence; and he shall not be discharged from such excepted debts unless the Treasury certify in writing their consent to his being discharged therefrom. An order of discharge shall not release the bankrupt from any debt or liability incurred by means of any fraud or fraudulent breach of trust to which he was a party, nor from any debt or liability whereof he has obtained forbearance by any fraud to which he was a party.

"(2) An order of discharge shall release the bankrupt from all other debts provable in bankruptcy (*g*).

"(3) An order of discharge shall be conclusive evidence of the bankruptcy, and of the validity of the proceedings therein, and in any proceedings that may be instituted against a bankrupt who has obtained an order of discharge in respect of any debt from which he is released by the order, the bankrupt may plead that the

(*f*) *Lomax* v. *Wood*, 50 L. T. 275, proceeding with execution.

(*g*) As to what debts are so provable, see sect. 37.

cause of action occurred before his discharge, and may give this Act and the special matter in evidence."

(4.) "An order of discharge shall not release any person who at the date of the receiving order was a partner or co-trustee with the bankrupt or was jointly bound or had made any joint contract with him, or any person who was surety or in the nature of a surety for him."

Pleading order of discharge as a defence.

It will be observed that the above section enables the debtor to plead his discharge as a defence in all actions in respect of any debt from which he is released by the order of discharge (*h*). The form of defence given in the Appendix to the Rules of the Supreme Court, 1883, simply states that "the defendant became bankrupt" (*i*); but bankruptcy cannot be relied on *as a defence* to an action until the order of discharge has been obtained (*k*). Where the order of discharge is obtained after action brought it should be pleaded as a matter of defence so arising. The plaintiff may confess it, and sign judgment for the costs under *Ord. XXIV. r.* 3 (*l*).

Execution against property of bankrupts.

Execution against Property of Bankrupts.]—As the bankruptcy law stood up to a period not very remote, the sheriff could not, in any case, seize the goods of a party who had previously become bankrupt; because the goods in that case belonged not to the bankrupt but to his assignees. But the legislature, by enactments made from time to time, have made material alterations in this respect.

Under the *Bankruptcy Act*, 1883, a debtor commits an act of bankruptcy if execution issued against him is levied by seizure and sale of his goods under process in an action in any Court, or in any civil proceeding in the High Court (sect. 4).

Restriction of rights of creditor under execution or attachment.

By the *Bankruptcy Act*, 1883, *s.* 45 (1.) "Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has *completed* the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor."

(2.) "For the purposes of this Act, an execution against goods is *completed* by seizure and sale; an attachment of a debt is completed by receipt of the debt; and an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver."

Fieri facias.

In order to determine whether an execution by fieri facias is effectual as against the trustee in bankruptcy, the first thing to be considered is whether there has been a seizure and sale of the goods. If there has been no seizure and sale the execution is not pro-

---

(*h*) As to which, see sect. 30, sub-s. 1, ante, p. 1168.

(*i*) App. D. Sect. IV. Pt. VI. forms 2 and 3.

(*k*) *Jones* v. *Hill*, L. R., 5 Q. B. 230: *Marshall* v. *King*, 31 L. T. 511: *Clifford* v. *Budds*, W. N. 1884, 40, where *Mathew*, J., at Chambers, allowed judgment to be signed under Ord. XIV.

(*l*) Ante, Vol. I, p. 322: *Champion* v. *Formby*, 7 Ch. D. 373; 47 L. J., Ch. 395; 26 W. R. 391.

PART XII.

tected (*m*). If there has been a seizure and sale, it becomes necessary to consider whether the execution is for a sum exceeding 20*l*. If it is, the case is specially provided for by sect. 46 (which *see post*, p. 1172). If it is not, it becomes necessary to consider whether, *before the seizure and sale* (*n*), the defendant has in fact committed an act of bankruptcy which, at the time of the seizure and sale, was available against him for adjudication, or whether a petition has been presented by or against him. If he has not committed such an act of bankruptcy, and no petition has been presented, the execution creditor is a secured creditor within the meaning of sect. 9, and the execution is protected, and the plaintiff is entitled to receive the proceeds (*o*). If, on the other hand, he *has* committed such an act of bankruptcy, or a petition has been presented before the seizure and sale, the first question is whether or not the goods have been sold before the creditor had notice of such petition or act. If they have not, the execution fails, and the trustee is entitled to the goods (*p*). If the goods have been sold, the question is whether the execution creditor had at the time of the sale notice of an act of bankruptcy committed by the defendant available against him for adjudication, or of any petition. If he had no such notice the execution is protected (*q*). If he had such notice the title of the trustee prevails, and the execution fails (*r*). The onus of proving that he had no such notice lies on the judgment creditor (*s*).

Act of bankruptcy available, &c., what is.

An "available act of bankruptcy" means any act of bankruptcy available for a bankruptcy petition at the date of the presentation of the petition on which the receiving order is made (*t*).

It must be one committed before the sale (*u*), the fact that the seizure and sale consequent on it is itself such an act will not suffice (*v*).

Notice of act of bankruptcy, what is.

Notice of an act of bankruptcy means knowledge thereof, or wilfully abstaining from acquiring such knowledge (*x*). A notice that a petition in bankruptcy has been filed on a date, at a Court, and by a person named in the notice, is sufficient (*y*). A notice that the debtor had filed a declaration of insolvency, made under the repealed Act 12 & 13 *V. c.* 106, *s.* 70, was held to be a sufficient

(*m*) Sect. 45, supra: *Ex p. Williams, In re Davies*, L. R., 7 Ch. 314; 41 L. J., Bk. 38: *In re Balbirnie, Ex p. Jameson*, 3 Ch. D. 488.

(*n*) Cp. *Ex p. Schulte, In re Matanlè*, L. R., 9 Ch. 409: *Ex p. Todhunter, In re Norton*, L. R., 10 Eq. 425; 39 L. J. Bk. 17.

(*o*) *Slater* v. *Pinder*, L. R., 6 Ex. 228; *Nicholl*, 7 Id. 95: *Ex p. Rocke, In re* [illegible], 6 Ch. 795; 40 L. J., Bk. 76: *Ex p. Bailey, In re Jeeks*, L. R., 5 [illegible] 384; 41 L. J., Bk. 1. The decision *Ex p. Veness, In re Gwynne*, [illegible] 16 Eq. 419; 39 L. J., Bk. 25, so far as it is to the contrary, cannot be upheld.

(*p*) Sect. 45: *Ex p. Duignan, In re Bissell*, L. R., 11 Eq. 604; 40 L. J., Bk. 33.

(*q*) Sect. 45.

(*r*) Cp. *Ex p. Duignan, In re Bissell*, supra.

(*s*) *Ex p. Cartwright, Re Joy*, 44 L. T. 883: *Ex p. Schulte, In re Matanlè*, L. R., 9 Ch. 409; 30 L. T. 478.

(*t*) Sect. 168.

(*u*) Sect. 45: cp. *Ex p. Schulte, In re Matanlè*, L. R., 9 Ch. 409.

(*v*) Sect. 46, post: *Ex p. Villars, In re Rogers*, L. R., 9 Ch. 432; 43 L. J., Bk. 76.

(*x*) *Bird* v. *Bass*, 6 M. & Gr. 143; 6 Sc. N. R. 928: *Brewin* v. *Briscoe*, post, n. (*e*): *Ex p. Snowball, In re Douglas*, L. R., 7 Ch. 534; 41 L. J., Bk. 49.

(*y*) *Lucas* v. *Dicker*, 6 Q. B. D. 84; 50 L. J., Q. B. 190.

notice of the act of bankruptcy (*z*). So is a notice that a party has executed a conveyance of all his property for the benefit of his creditors (*a*). A general notice that the defendant has committed an act of bankruptcy, without stating the nature of it, is sufficient (*b*); but a notice merely stating circumstances which may or may not constitute such an act is not (*c*). It seems that notice to one of two plaintiffs is sufficient (*d*). Where the plaintiff's solicitor in the cause was informed that the defendant had executed an assignment of all his effects to trustees, in trust for the general body of his creditors, that it would be impossible to carry out the trusts thereof, and that the matter must end in a bankruptcy, and he, in consequence of such information, issued execution; it was held, that the plaintiff, at the time of the execution, had notice of a prior act of bankruptcy (*e*). It is not sufficient to deliver a notice of the act of bankruptcy at a solicitor's office in the same way as a notice in a cause is delivered (*f*). And it seems that notice to the solicitor's clerk, unless he communicates the same to his principal, is not notice to the execution creditor (*g*); and notice to the sheriff, or to a sheriff's officer having the execution of the writ is not, it seems, notice to the execution creditor (*h*). It would seem, that, if the sale and notice of an act of bankruptcy were on the same day, it is open to inquiry at what time of the day each took place; and if the goods were actually sold

---

(*z*) *Green* v. *Laurie*, 1 Ex. 335. See *Conway* v. *Nall*, 1 C. B. 643; 14 L. J., C. P. 165: *Follett* v. *Hoppe*, 5 C. B. 226; 17 L. J., C. P. 76.

(*a*) *Luckington* v. *Elliott*, 8 Sc. N. R. 275.

(*b*) *Udall* v. *Walton*, 14 M. & W. 254; 14 L. J., Ex. 263: *Ramsey* v. *Eaton*, 10 M. & W. 22; 11 L. J., Ex. 333: *Turner* v. *Hardcastle*, 11 C. B., N. S. 683; 31 L. J., C. P. 193. See *Hope* v. *Meek*, 10 Ex. 829; 25 L. J., Ex. 11: *Evans* v. *Hallam*, L. R., 6 Q. B. 713; 40 L. J., Q. B. 229. A notice to the effect that A. had committed an act of bankruptcy by filing a petition under sect. 211 of the repealed Bankruptcy Act, 1849, for a private arrangement with his creditors, and that the sheriff must not sell the goods of A. seized under a writ of fi. fa. delivered to the sheriff on the day of the filing of the petition (such petition having been subsequently dismissed, and A. adjudged a bankrupt on a creditor's petition), was held to be notice of an act of bankruptcy committed by A. at the date of filing the petition: *Edwards* v. *Gabriel*, 7 H. & N. 520; 30 L. J., Ex. 245; 31 L. J., Ex. 113.

(*c*) *Evans* v. *Hallam*, L. R., 6 Q. B. 713; 40 L. J., Q. B. 229. But see *Ex p. Snowball, In re Douglas*, L. R., 7 Ch. 534; 41 L. J., Bk. 49.

(*d*) *Edwards* v. *Cooper*, 11 Q. B. 33.

(*e*) *Rothwell* v. *Timbrell*, 1 Dowl., N. S. 778, and per *Coleridge*, J.:—"I by no means say, that, in every case, notice to or knowledge of the attorney of a party will satisfy these words; but, in the present case, the notice was given to the attorney in the cause, when he was acting in it as such. He was the same agent as issued the execution, and, it should seem, issued it at that time, in consequence of the information, in order to anticipate the fiat. Under these circumstances, it is impossible, I think, to distinguish between him and his client." And see *London* v. *Sharp*, 7 Sc. N. R. 730; 13 L. J., C. P. 67: *Brewin* v. *Briscoe*, 2 El. & El. 116; 28 L. J., Q. B. 329, where it was held that a person was agent to the execution creditor so as to make notice to him notice to the execution creditor.

(*f*) *Pike* v. *Stephens*, 12 Q. B. 465; 17 L. J., Q. B. 282: *Bird* v. *Bass*, 6 Sc. N. R. 928; 6 M. & G. 143.

(*g*) *Pennell* v. *Stevens*, 7 C. B. 987; 7 D. & L. 133; 18 L. J., C. P. 291. See *Pike* v. *Stephens*, 12 Q. B. 465; 17 L. J., Q. B. 282.

(*h*) *Ramsay* v. *Eaton*, 10 M. & W. 22.

PART XII.

before the notice, the execution would be valid (*i*). The sending of a notice of an act of bankruptcy to the residence of the party intended to be affected by it, is no notice until the same is received by such person (*k*). Where there are two writs in the hands of the sheriff, and the first writ delivered to him is void, but the other good, as against the trustees, the execution creditor under the latter writ is entitled to have it executed (*l*). Mere notice of the debtor's intention to commit an act of bankruptcy will not suffice (*m*).

Where two writs in sheriff's hands.

Liability and duty of sheriff (*n*).

It seems that if the sheriff seizes after an act of bankruptcy committed by the execution debtor, and the case is not protected by the above statute, the sheriff will be liable in an action at the suit of the trustee, for executing the writ (*o*). As to the sheriff being entitled to recover from the execution creditor money which he has been compelled to pay over to the trustee, *see Standish* v. *Ross*, 3 Exch. 527; 19 L. J., Ex. 185: *Brydges* v. *Walford*, 6 M. & S. 42.

Duties of sheriff as to goods taken in execution.

By the *Bankruptcy Act*, 1883, *s.* 46 (1) "Where the goods of a debtor are taken in execution, and before the sale thereof notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods to the official receiver or trustee under the order, but the costs of the execution shall be a charge on the goods so delivered, and the official receiver or trustee may sell the goods or an adequate part thereof for the purpose of satisfying the charge."

(2) "Where the goods of a debtor are sold under an execution in respect of a judgment for a sum exceeding twenty pounds, the sheriff shall deduct the costs of the execution (*p*) from the proceeds of sale, and retain the balance for fourteen days (*q*), and if within that time notice is served on him of a bankruptcy petition (*r*) having

(*i*) *Giles* v. *Grover*, 9 Bing. 128; 2 M. & Sc. 197: *Godson* v. *Sanctuary*, 1 N. & M. 52; 4 B. & Ad. 225: *Whitmore* v. *Green*, 13 M. & W. 104: *Bird* v. *Bass*, 6 Sc. N. R. 928; 6 M. & G. 143: *Thomas* v. *Desanges*, 2 B. & Ald. 586: *Stead* v. *Gascoigne*, 8 Taunt. 527: *Pewtress* v. *Annan*, 9 Dowl. 828.

(*k*) *Christie* v. *Winnington*, 8 Ex. 287; 22 L. J., Ex. 212.

(*l*) *Graham* v. *Witherby*, 7 Q. B. 491; 14 L. J., Q. B. 290: *Goldschmidt* v. *Hamlet*, 6 M. & Gr. 187. But see *Congreve* v. *Evetts*, 10 Ex. 298; 23 L. J., Ex. 273.

(*m*) *In re Wright, Ex p. Arnold*, 3 Ch. D. 70; 45 L. J., Bk. 130.

(*n*) As to the sheriff's duty where the execution is against a trader for a debt exceeding 20*l.*, see post, p. 1173.

(*o*) *Garland* v. *Carlisle*, 2 C. & M. 31; 10 Bing. 452; 4 M. & Sc. 21: *Whitmore* v. *Greene*, 13 M. & W. 104. And see *Balme* v. *Hutton*, 2 Tyr. 600; 1 C. & M. 262; 3 M. & Sc. 1: *Chesten* v. *Gibbs*, 12 M. & W. 111.

(*p*) These words, costs of execution, do not enable the sheriff to deduct his poundage. *In re Ludmore*, 13 Q. B. D. 415; 53 L. J., Q. B. 418.

(*q*) If the sale takes place on several days the fourteen days run from the last. *Jones* v. *Perrell*, 11 Q. B. D. 430; 49 L. T. 197; 52 L. J., Q. B. 672.

(*r*) Similar words in the 87th section of Act of 1869 were held to include a petition presented by a debtor under ss. 125, 126. *Re Skinner*, L. R., 10 Eq. 432; 39 L. J., B. 28. If the creditors resolved on liquidation proceedings and appoint a trustee, the proceeds must be paid to such trustee; but if at the first meeting, or the adjourned first meeting, they separated without coming to any resolution, so as to bring the proceedings to any end, and render the appointment of a trustee impossible (*Ex p. James, Re Condon*, L. R., 9 Ch. 609; 43 L. J., B. 107); or, if they resolved to accept a composition (*Ex p. Birmingham Gas Co., Re*

been presented against or by the debtor, and the debtor is adjudged bankrupt thereon or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the trustee in the bankruptcy, who shall be entitled to retain the same as against the execution creditor, but otherwise he shall deal with it as if no notice of the presentation of a bankruptcy petition had been served on him" (*s*).

(3) "An execution levied by seizure and sale on the goods of a debtor is not invalid by reason only of its being an act of bankruptcy, and a person who purchases the goods in good faith under a sale by the sheriff shall in all cases acquire a good title to them against the trustee in bankruptcy."

The corresponding section in the Act of 1869 (sect. 87) applied only to judgments against traders for a sum exceeding 50*l.*, but in other respects the decisions under it still apply.

The execution creditor may abandon the excess over 20*l.*, so as to avoid the section, by signing judgment for less than 20*l.* (*t*), or by issuing execution for less, although the judgment exceeds that sum (*u*), or by directing the sheriff to sell for less than the 20*l.*, although the amount endorsed on the writ of execution exceeds that sum (*x*). The costs of the execution, including possession money (*y*), must be taken into account (*z*). Payments made by the debtor to the sheriff with the assent of the creditor by which the amount for which the sheriff sells is reduced below 20*l.* need not be taken into account (*a*).

Where the sheriff has paid to the execution creditor the proceeds of an execution for a sum of more than 20*l.* against the goods of a debtor, after retaining the same for fourteen days, the creditor was held entitled to retain the amount notwithstanding the bankruptcy of the debtor within a year from the seizure and sale (*b*). Money paid by the execution debtor to a sheriff's officer in part payment of the execution creditor's debt, and in order to prevent the levying

---

Adams, L. R., 11 Eq. 204; 40 L. J., B. 1: *Ex p. Sheriff of Middlesex, Re England*, L. R., 12 Eq. 207; 40 L. J., B. 65), then the proceeds of the sale belonged to the execution creditor.

(*s*) See *Ex p. Halling*, 47 L. J., Bk. 25, where an interpleader order had been made: *Crew* v. *Terry*, 46 L. J., C. P. 787, where the bankruptcy was annulled: *Ex p. Harper, In re Bramner*, L. R., 10 Ch. 379; 44 L. J., Bk. 57, where the sale was delayed by injunction.

(*t*) *Ex p. Reya, In re Salinger*, 6 Ch. D. 332; 46 L. J., Bk. 122.

(*u*) Id.: *In re Hinks, Ex p. Benthier*, 7 Ch. D. 882; 47 L. J., Bk. 64.

(*x*) *Turner* v. *Bridgett*, 8 Q. B. D. 332; 51 L. J., Q. B. 374; 30 W. R. 686.

(*y*) *In re Grubb, Ex p. Sims*, 5 Ch. D. 375; 46 L. J., Bk. 103: *Ex p. Lithgow, In re Fenton*, 10 Ch. D. 169; 48 L. J., Bk. 64. Where the creditor was induced to delay by a promise made by the trustee that the extra possession money would be paid, it was held that the extra possession money must not be taken into account in calculating whether the execution was for a sum exceeding the statutory amount: *Ex p. Ind Coope & Co., Re Bullen*, 44 L. T. 587.

(*z*) *Ex p. Liverpool Loan Co., In re Butler*, L. R., 7 Ch. 732; 42 L. J., Bk. 14: *Howes* v. *Young*, 1 Ex. D. 146; 45 L. J., Ex. 499.

(*a*) *Mostyn* v. *Stock*, 9 Q. B. D. 432.

(*b*) *Ex p. Villars, Re Rogers*, L. R., 9 Ch. 432; 43 L. J., Bk. 76. *Ex p. Keys, In re Skinner*, L. R., 10 Eq. 432; 39 L. J., Bk. 20, so far as it decides otherwise, cannot be sustained.

PART XII.

of execution, is not proceeds of sale of goods taken in execution within this section, and if paid to and accepted by the creditor, may be retained by him notwithstanding the bankruptcy within fourteen days (*c*). Where there are two executions against the same property, one over and the other under 20*l.*, the section does not affect the right of the creditor under the latter (*d*). Where the goods of a debtor have been taken in execution for a sum exceeding 20*l.*, and, bankruptcy ensuing, the sheriff has been restrained from selling, the sheriff is entitled to be paid by the trustee out of the estate of the bankrupt all expenses properly incurred by him in keeping and taking possession of the goods and preparing for a sale, notwithstanding no sale has taken place (*e*).

Actions against trustee of bankrupt.

Actions against Trustee of Bankrupt.]—In all cases when an action lies against the trustee of a bankrupt as such he must be described in the writ and proceedings by his official name (*see sect.* 83, *ante*, p. 1164).

No action for dividend.

By the *Bankruptcy Act*, 1883, *s.* 63, "No action for a dividend shall lie against the trustee, but if the trustee refuses to pay any dividend the Court may, if it thinks fit, order him to pay it, and also to pay out of his own money interest thereon for the time that it is withheld, and the costs of the application."

In an action against liquidating debtors and their trustees and other persons in respect of fraudulent representations where the plaintiffs claimed as against the trustee a declaration that they were entitled to prove against the debtor's estate, a demurrer to the claim on the ground that no action would lie was overruled (*f*).

Costs, &c.

The trustee may be ordered to pay the costs personally (*g*).

As to the proceedings to obtain leave to continue an action after bankruptcy of any of the parties, *see ante*, p. 1030.

If one of several defendants pleads bankruptcy, the plaintiff may discontinue as to him, and proceed against the others (*h*), whether the action be upon contract or in tort; upon which the plaintiff will be liable to the costs of that defendant (*R. of S. C., Ord. XXVI. r.* 1, *ante*, *Vol.* 1, p. 337). Such defendant need not be joined in an action on a contract if his order of discharge was obtained before action brought (*see ante*, p. 1166).

If execution be executed against a party in respect of a debt for which he has been discharged by bankruptcy, the Court or Judge in a clear case will interfere. Where the defendant had an opportunity of pleading his bankruptcy and certificate puis darrein

(*c*) *Ex p. Brooke, In re Hassell*, L. R., 9 Ch. 301; 43 L. J., Bk. 49: *Stock* v. *Holland*, L. R., 9 Ex. 147; 43 L. J., Ex. 112.

(*d*) *Ex p. Lovering, In re Peacock*, L. R., 17 Eq. 452; 43 L. J., Bk. 58.

(*e*) *Re Craycroft, Ex p. Browning*, 8 Ch. D. 596; 47 L. J., Bk. 96.

(*f*) *Hale* v. *Boustead*, 8 Q. B. D. 453; 46 L. T. 533; 30 W. R. 677.

(*g*) *Watson* v. *Holiday* (C. A.), 48 L. T. 545; 31 W. R. 536; affirming *S. C.*, 20 Ch. D. 780. And see cases cited ante, p. 1165, n. (*x*).

(*h*) *Noke* v. *Ingham*, 1 Wils. 189. As to striking out the name of a defendant improperly joined, see ante, p. 1023.

continuance, but had neglected to do so, the Court refused to interfere (*i*).

Although bankrupts who have obtained their order of discharge were privileged from arrest, the sheriff or his officer was not liable to an action for false imprisonment for arresting them (*k*).

In actions against bankrupts, the judgment and other proceedings are the same as in ordinary cases.

(*i*) See *Sharp* v. *D'Almaine*, 8 Dowl. 664: *Denne* v. *Knott*, 7 M. & W. 143; 9 Dowl. 224: *Saddler* v. *Cleaver*, 7 Bing. 769; 5 M. & P. 706.

(*k*) *Tarlton* v. *Fisher*, 2 Doug. 671: *Sherwood* v. *Benson*, 4 Taunt. 631.

CHAPTER CIII.

ACTIONS AGAINST CLERGYMEN.

PART XII.

Arrest of.

CLERGYMEN are privileged from arrest while performing divine service, and while going to church for that purpose, and returning thence (*a*). The only other peculiarity in the mode of proceeding against clergymen is in the execution, which is as follows:—

Judgment not a charge under the 1 & 2 V. c. 110, s. 13.

A judgment entered up against a beneficed clergyman does not create a charge upon his living, under the 1 & 2 *V. c.* 110, *s.* 13 (*b*).

Fieri facias de bonis ecclesiasticis.

When the sheriff, to a *fieri facias* or *elegit*, returns *nulla bona*, and that the defendant is a beneficed clerk, not having any lay fee (*c*), the plaintiff may sue out a *fieri facias de bonis ecclesiasticis*, directed to the bishop of the diocese, or to the archbishop (during the vacancy of the bishop's see), commanding him *to make of the ecclesiastical goods and chattels* belonging to the defendant, within his diocese, the sum therein mentioned (*d*). It is tested and returnable, and must be issued, stamped and indorsed, in the same manner as a common *fieri facias* (*e*). *See ante, Vol.* 1, p. 857 *et seq.*

By *R. of S. C., Ord. XLIII. r.* 3, "Where it appears, upon the return of any writ of *fieri facias* or any writ of *elegit*, that the person against whom such writ was so issued is a beneficed clerk, and has no goods or chattels, nor any lay fee in the bailiwick of the sheriff to whom such writ was directed, the person to whom the sum of money or costs mentioned in such writ is or are payable shall, immediately after such writ with such return shall have been filed as of record, be at liberty to sue out one or more writs of *fieri facias de bonis ecclesiasticas*, or one or more writs of sequestration."

By *r.* 4, "Such writs as in the last preceding Rule mentioned, when sealed, shall be delivered to the Bishop to be executed by him, and such writs, when returned by the Bishop, shall be delivered to the parties or solicitors by whom respectively they were sued out, and shall thereupon be filed as of record in the Central Office; and for the execution of such writs the bishop or his officers shall not take or be allowed any fees other than such as are or shall be from time to time allowed by lawful authority."

By *r.* 5, "Writs of . . . . *fieri facias de bonis ecclesiasticis, sequestrari facias de bonis ecclesiasticis*, and all other writs in aid of a writ of *fieri facias* or of *elegit*, may be issued and executed in the same cases and in the same manner as heretofore."

(*a*) Post, Ch. CXXVII.; 50 Edw. 3, c. 5; 1 R. 2, c. 15. See *Goddard* v. *Harris*, 7 Bing. 320; 5 M. & P. 122. And see 9 G. 4, c. 31, s. 23.

(*b*) *Hawkins* v. *Gathercole*, 24 L. J., Ch. 332.

(*c*) See *Pickard* v. *Paiton*, 1 Sid. 276; Dalt. 219: *Bromage* v. *Vaughan*, 7 Ex. 223; 21 L. J., Ex. 111. And see the form of the return, Chit. Forms, p. 576.

(*d*) See 2 Bac. Abr. Execution, G. 6: *Walwyn* v. *Awberry*, 2 Mod. 258.

(*e*) See the form, Chit. F. p. 572.

Take the writ when directed to the bishop, to the registrar of the diocese, who will thereupon issue a sequestration (*f*) (which is in the nature of a warrant), directed to the churchwardens, requiring them to levy the debt of the profits of the defendant's benefice; or, instead of directing it to the churchwardens, the plaintiff, upon giving security to the bishop, may have it directed to persons of his nomination (*g*). This sequestration must be published; which is now done by affixing a copy of the sequestration, either in writing or in print, or partly in writing and partly in print, previously to the commencement of divine service on a Sunday, on or near to the doors of all the churches and chapels within the parish or place where the benefice is situated (*h*). As the writ does not begin to operate, and has priority only from the time of this publication (*i*), it should be done without delay. It was accordingly held, that a sequestration obtained by the assignees of an insolvent incumbent, operated only from the time of publication, and did not entitle the assignees to the arrears of composition for tithes due before publication (*k*). But the property as against the defendant is, it seems, bound from the time when the sequestrator is appointed, and the publication is only necessary in order to give security against conflicting rights (*l*).

Testatum fi. fa.

If the entire debt be not levied in one diocese, the plaintiff, upon the return of the writ, may have a testatum fi. fa. de bonis ecclesiasticis into another diocese for the residue; or he may have an alias into the same diocese.

Sequestrari facias (*m*).

Or, instead of a fieri facias de bonis ecclesiasticis, the plaintiff may sue out a writ of sequestrari facias, directed, tested and returnable, &c., as the fieri facias (*n*). It is not necessary, even for the purpose of proving the issuing of this writ, that there should be an award of it on the roll (*o*). The writ issues without motion (*p*). It is in the nature of a levari facias; the writ first above mentioned is in the nature of a fieri facias.

A sequestration issued on a sequestrari facias is a charge upon all the rents and profits of the benefice, including the glebe lands, except the parsonage-house in which the incumbent is bound to

---

(*f*) See Forms, Tidd's Forms, 380; Chit. Forms, pp. 573-5.

(*g*) 3 Burn's Ecc. Law, 317; Tidd, 9th ed. 1023.

(*h*) See 7 W. 4 & 1 V. c. 45. See *Bennett* v. *Apperley*, 6 B. & C. 630.

(*i*) *Waite* v. *Bishop*, 3 Dowl. 234; 1 C. M. & R. 507; Tidd, 9th ed. 1024.

(*k*) *Waite* v. *Bishop*, 1 C. M. & R. 507; 3 Dowl. 234. Lodging the writ with the registrar of the bishop of the diocese does not bind the property of the incumbent from the time of such lodging. Id. see *Wise* v. *Beresford*, 2 Con. & L. 282.

(*l*) Per *Bayley*, J., *Bennett* v. *Apperley*, 6 B. & C. 630.

(*m*) See as to the history and nature of this writ, and the office and duties of the bishop and sequestrator, Burn's Ecc. Law, tit. "Sequestration;" Gilb. Execution; Com. Dig. Ecclesiastical Persons (D); Bac. Abr. tit. "Execution:" *Hubbard* v. *Beckford*, 1 Hagg. Consis. Rep. 337, &c.: *Arbuckle* v. *Cowton*, 3 B. & P. 322. As to a justification under a sequestration, see 1 Mod. 258; 2 Id. 254.

(*n*) See form, Chit. F., p. 575. See *Marsh* v. *Fawcett*, 2 H. Bl. 582. As to the direction of the writ where a parish has been transferred from one diocese to another, see *Powell* v. *Hibberd*, 15 Q. B. 129; 19 L. J., Q. B. 347: *Phelps* v. *St. John*, 10 Ex. 895; 24 L. J., Ex. 171.

(*o*) *Pack* v. *Tarpley*, 9 A. & E. 468; 1 P. & D. 478.

(*p*) *Caudwell* v. *Golton*, 10 C. B. 575.

PART XII.

reside so as to disqualify him under the 18 *G.* 2, *c.* 20, from acting as a Justice of the Peace. Writs of levari facias delivered to a bishop's officer in order that writs of sequestration might be issued out thereon, were held not entitled to priority according to the date of their teste, but the bishop's officer was bound to issue the writs of sequestration in the order in which the writs of levari facias were delivered to him (*q*). Writs of lev. fa. were not within the 16th section of the Statute of Frauds (*q*).

After protection from process.

A plaintiff might have issued a sequestrari facias though the defendant had obtained an interim order for protection under the repealed protection Acts (*r*).

Both fi. fa. and seq. fa. continuing writs, &c.

Either of these writs is a continuing execution, that is, continuing until all that has been commanded to be levied is levied (*s*), and this notwithstanding the death of the bishop (*t*). If the sequestration issue before the writ is returnable, it is sufficient, though it be not published till afterwards (*u*). And the plaintiff is entitled to the growing profits from time to time, though long after it is returnable, until he is satisfied the sum indorsed on the writ. If, however, it be actually returned, the bishop's authority is determined (*x*), and the execution creditor loses his priority over other subsequent executions (*y*). The proper way, therefore, is to rule the bishop from time to time "to certify to the Court what he has done under the writ *without returning*" the writ (*z*). While the sequestration is in force the parson's title is ousted (*a*). But the incumbent cannot be turned out of the parsonage-house, as he is bound to reside therein, notwithstanding any sequestration (*b*). Before the 12 & 13 *V.* *c.* 67, it was held that the sequestrator was the mere bailiff or agent of the bishop, and had no such interest in the profits as would enable him to maintain an action at law against a party who wrongfully received them (*c*).

Sequestrator may sue in his own name, &c.

By the 12 & 13 *V.* *c.* 67, after reciting that "it is expedient to extend the remedies for the recovery of the profits of sequestered benefices," it is enacted, "that, from and after the passing of this Act, every sequestrator who shall then have been or who shall thereafter be appointed by a bishop or other ordinary, or by any competent ecclesiastical Court, to levy, collect, gather, or receive the profits of any ecclesiastical benefice, by virtue or in pursuance of any writ of fieri facias de bonis ecclesiasticis, levari facias de bonis

(*q*) *Sturgis* v. *Bishop of London*, 7 E. & B. 542; 26 L. J., Q. B. 209. The writ of levari facias is abolished by the Bank Act, 1883, s. 146, sub-s. 2, ante, Vol. 1, p. 787.

(*r*) *Parry* v. *Jones*, 1 C. B., N. S. 339; 26 L. J., C. P. 36.

(*s*) *Bendry* v. *Price*, 7 Dowl. 753: *Alderton* v. *St. Aubyn*, 6 M. & W. 150; 8 Dowl. 223. See *Moore* v. *Ramsden*, 7 A. & E. 898: *Powell* v. *Hibberd*, 15 Q. B. 129; 19 L. J., Q. B. 347.

(*t*) *Phelps* v. *St. John*, 10 Ex. 895: 24 L. J., Ex. 17.

(*u*) *Bennett* v. *Apperley*, 6 B. & C. 630. See *Colebrooke* v. *Layton*, 1 M. & M. 584: *Cottle* v. *Herrington*, 5 B. & Ad. 447.

(*x*) *Marsh* v. *Fawcett*, 2 H. Bl. 582.

(*y*) Id. See *Phillips* v. *Berkeley*, 5 Dowl. 279.

(*z*) *Disney* v. *Eyre*, 1 Alc. & Nap. 34, Irish: *Marsh* v. *Fawcett*, supra. See post, p. 1179.

(*a*) See *Powell* v. *Hibberd*, 19 L. J., Q. B. 347: *Bunter* v. *Cresswell*, Id. 357; 14 Q. B. 825. As to the legal estate, see 1 P. Wms. 307.

(*b*) *Pack* v. *Tarpley*, 9 A. & E. 468; 1 P. & D. 478.

(*c*) *Harding* v. *Hall*, 10 M. & W. 42. As to the power of the sequestrator to grant leases, see per Cur. *Pack* v. *Tarpley*, 9 Ad. & El. at p. 481.

ecclesiasticis, sequestrari facias, or of any sequestration made or issued by authority of law, may, and is hereby authorized and empowered, from time to time, to bring and prosecute any action at law or suit in equity, or levy any distress, or take any other proceeding in his own name as the sequestrator of such benefice, without further description, for the recovery of any tithes, tithe rent-charge, tithe composition, or substitution, obvention, pension, portion, or other payment for or in the nature or in lieu of tithe, or any other rent or annual sum, dues or fees payable to the incumbent of such benefice, or of any messuages, lands, tenements, or hereditaments subject to such sequestration, or of any rent due or payment reserved or made payable to the incumbent of such benefice under any lease of or covenant or agreement to let any such messuages, lands, tenements, or hereditaments, tithes, tithe rent-charge, or other parcel of the benefice to which the appointment of such sequestrator relates: Provided always, that nothing herein contained shall be construed to empower the sequestrator of any benefice, to bring, prosecute, levy, or take any action, suit, distress, or other proceeding by virtue of this Act, except against the incumbent of such benefice, which might not lawfully have been brought, prosecuted, levied, or taken by the incumbent of such benefice if such benefice had not been under sequestration: Provided also, that no sequestrator appointed under a sequestration issued at the suit or instance of any creditor shall be bound to commence, prosecute, levy, or take any action, suit, distress, or other proceeding as aforesaid under the provisions of this Act, unless and until security, to be approved by such sequestrator, shall be given by the creditor at whose suit or instance such sequestration shall have been issued, for indemnifying such sequestrator and the bishop or other ordinary or ecclesiastical Court from all costs, charges, and expenses incurred or to be incurred in the commencement, prosecution or conduct of such action, suit, or distress, or other proceeding to which he or they respectively may become liable in consequence thereof, the expense of such security to be deducted or allowed out of any money to be received by the creditor by virtue of such action, suit, distress, or other proceeding."

By sect. 2 of this Act, a payment to the sequestrator discharges the party making the same, and the sequestrator is to apply and account for the same in the same way as he has for other profits of the benefice liable to sequestration.

Rule to return, &c.

The bishop, with reference to these writs, stands in the same situation precisely as the sheriff with reference to writs in ordinary cases, and may be ruled, and is bound to obey the orders of the Court, as to their execution, &c., in the same manner as the sheriff (*d*). It may be doubtful how far *Ord. LII. r.* 11 (*ante*, *Vol.* I, p. 817), applies to this case. It is submitted that it does not. If it does, a notice is substituted for the rule to return the writ. Until a sufficient sum has been levied to satisfy the sum indorsed on the writ the plaintiff should not rule the bishop to return it, but should rule him from time to time to know what he has levied (*e*). A bishop cannot be required to make a return of

(*d*) *Hart* v. *Vollans*, 1 Dowl. 431.

(*e*) See *Marsh* v. *Fawcett*, 2 H. Bl. 582; ante, n. (*x*).

PART XII.

what has been levied under a levari facias previous to his coming into office (*f*). If there has been a change of solicitors, notice of the change should be served on the bishop before he can be ruled by the new solicitor to return the writ (*g*). The defendant has no right to have the writ returned, though he may have a return of the amount of the profits received by the sequestrator (*h*). If a bishop is translated to another diocese (*i*) or dies (*k*) pending a sequestration issued by him, the return to the writ should be made by his successor. It seems, that a return merely setting out the debtor and creditor account of the sequestrator is insufficient, but that it should be verified (*l*). Where the writ was returned to the Court before the plaintiff's execution was satisfied, the Court granted a rule absolute in the first instance for it to be taken off the file, and sent back to the bishop, in order that he might take the return off the writ, and certify to the Court what he had done under it (*m*).

Premature return.

Reference of accounts to the Master.

A return having been made by a bishop to a writ of fi. fa. de bonis ecclesiasticis, annexing accounts of moneys levied under that and a prior writ issued to another sequestrator, the Court referred the account to the Master to examine the deductions made from the sum levied, and say whether they were proper to be allowed, notwithstanding the same accounts had been filed in the Ecclesiastical Court (*n*).

Setting aside sequestration.

On an application to set aside the sequestration of a benefice issued by the bishop, it is perhaps requisite for the bishop to have notice of the application (*o*).

Amendment of.

As to amendments in general, *see Vol.* 1, *Ch. XLII.* In one case the Court refused to allow a writ of sequestration to be amended by indorsing it to levy interest on the debt, there being other subsequent writs of sequestration in the hands of the bishop (*p*).

Where a judgment creditor sued out a writ of sequestration against a beneficed clergyman, and another sequestration was subsequently sued out by the assignee of the clergyman who had become bankrupt, it was held that the former sequestration had priority over the latter (*q*).

(*f*) *Phillips* v. *Berkeley*, 5 Dowl. 279.

(*g*) Id.

(*h*) See *Rex* v. *Bishop of London*, 1 D. & R. 486: *Bennett* v. *Apperley*, 6 B. & C. 630; 9 D. & R. 673. And see *Phillips* v. *Berkeley*, 5 Dowl. 279: *Harding* v. *Hall*, 10 M. & W. 42.

(*i*) *Dawson* v. *Symmons*, 12 Jur. 1072, Q. B.; 12 Q. B. 830; 18 L. J., Q. B. 34.

(*k*) *Phelps* v. *St. John*, 24 L. J., Ex. 171.

(*l*) *Elchin* v. *Hopkins*, 7 Dowl. 146.

(*m*) *Alderton* v. *St. Aubyn*, 6 M. & W. 150; 8 Dowl. 223: *Disney* v. *Eyre*, 8 Dowl. 223, n.

(*n*) *Morris* v. *Phelps*, 4 Ex. 895; 19 L. J., Ex. 165. And see *Dawson* v. *Symmons*, 12 Q. B. 830; 18 L. J., Q. B. 34: *Garston* v. *Williams*, 1 Longfield & Townsend, 169, Ir. Ex.: *Dean* v. *Lemprière*, 8th May, 1857, Q. B., where a question arose as to the right of the sequestrator to retain money for future repairs.

(*o*) *Bishop* v. *Hatch*, 1 A. & E. 171.

(*p*) *Watkins* v. *Tarpley*, 5 D. & L. 226; 17 L. J., Q. B. 47. As to amending a writ of execution, see Vol. 1, p. 883.

(*q*) *Hopkins* v. *Clarke*, 33 L. J., Q. B. 93: *S. C.* in error, 33 L. J., Q. B. 334. See cases under repealed insolvent Acts, *Smith* v. *Wetherell*, 5 D. & L. 278; 17 L. J., Q. B. 57: *Powell* v. *Hibbert*, 15 Q. B. 129; 19 L. J., Q. B. 347: *Bishop* v. *Hatch*, 1 A. & E. 171: *Waite* v. *Bishop*, 1 C. M. & R. 507: *Moore* v. *Ramsden*, 7 A. & E. 904: *Parry* v. *Jones*, 1 C. B., N. S. 339; 26 L. J., C. P. 36.

Effect of sequestration under a decree of suspension.

Where, under a writ of sequestration issued out of the Queen's Bench, a sequestrator had been regularly appointed and was in receipt of the profits of a vicarage, and afterwards a second sequestration to a different sequestrator was issued and published by virtue of a decree of suspension for eighteen months, pronounced in a proceeding in the Arches Court against the vicar, under the Church Discipline Act; it was held, that such second sequestration had the effect of suspending, from the time of its publication, all right to receive the profits of the vicarage under the first sequestration (*r*).

Appointing curate.

The Sequestration Act, 1871 (34 & 35 *V.* c. 45), gives power to the bishop where there is a sequestration, under certain circumstances, to appoint a curate and assign a stipend.

Warrant of attorney.

As to setting aside a warrant of attorney creating a charge on an ecclesiastical benefice, *see post*, *Ch. CXIV.*

Where a clergyman has been suspended *ab officio et a beneficio*, he is not entitled to any of the profits of the benefice and cannot recover them by action during the continuance of the suspension, although no sequestration may have issued (*s*).

(*r*) *Hunter* v. *Cresswell*, 14 Q. B. 825; 19 L. J., Q. B. 357.

(*s*) *Morris* v. *Ogden*, L. R., 4 C. P. 687.

CHAPTER CIV.

PROCEEDINGS BY AND AGAINST PAUPERS.

PART XII.

Who may sue or defend as.

Who may sue or defend as a Pauper.]—By *R. of S. C., Ord. XVI. r.* 22, "Any person may be admitted in the manner heretofore accustomed to sue or defend as a pauper on proof that he is not worth 25*l.*, his wearing apparel and the subject-matter of the cause or matter only excepted."

It is discretionary with the Court to grant the indulgence of suing thus *in formâ pauperis*. It will not be granted in any vexatious action; or where it appears that there is no cause of action (*a*). And it will not be granted in a second ejectment, where the costs of a prior ejectment for the same cause are unpaid (*b*).

A person may be admitted to sue *in formâ pauperis* by prochein amy, and the application for this purpose may be made together with that for leave to sue *in formâ pauperis* (*c*).

When admitted.

The order for admission to sue *in formâ pauperis* may be granted either at the commencement of the suit, or at any subsequent period of it (*d*). It has been granted after verdict and a rule absolute for a new trial obtained (*e*). It takes effect from the time when it is served only, and has not a retrospective operation (*f*). When once obtained it will apply to all subsequent proceedings so long as it stands (*g*).

Case for counsel's opinion.

Case for Counsel's Opinion.]—By *Ord. XVI. r.* 23, "A person desirous of suing as a pauper shall lay a case before counsel for his opinion whether or not he has reasonable grounds for proceeding."

By *r.* 24, "No person shall be permitted to sue as a pauper unless the case laid before counsel for his opinion, and his opinion thereon, with an affidavit of the party, or his solicitor, that the case contains a full and true statement of all the material facts to the best of his knowledge and belief, shall be produced before the

(*a*) *Re Cobbett*, 27 L. J., Ex. 199.

(*b*) *Goodtitle* v. *Mayo*, Tidd, 9th ed. 98. See *Weston* v. *Withers*, 2 T. R. 511.

(*c*) *Bryant* v. *Wagner*, 7 Dowl. 676.

(*d*) *Casey* v. *Tomlin*, 7 M. & W. 189; 8 Dowl. 892: *Brunt* v. *Wardle*, 3 M. & Gr. 534; 4 Sc. N. R. 188; 1 Dowl., N. S. 229: *Doe* d. *Ellis* v. *Owens*, 9 M. & W. 455; 1 Dowl., N. S. 404: *Pitcher* v. *Roberts*, 2 Dowl., N. S. 394: *Blood* v. *Lee*, 3 Wils. 24, per *Wilmot*, C. J.: *Jones* v. *Peers*, 2 M'Clel. & Y. 582: *Morgan* v. *Eastwick*, 7 Dowl. 543. The case of *Lovewell* v. *Curtis*, 5 M. & W. 158, is overruled.

(*e*) *Hall* v. *Ives*, 2 D. & L. 610.

(*f*) *Tray* v. *Voules*, L. R., 3 Q. B. 214. See *Doe* d. *Ellis* v. *Owen* (or *Roe*), 10 M. & W. 514; 2 Dowl., N. S. 426.

(*g*) *Drennan* v. *Andrew*, L. R., 1 Ch. 300.

Court or Judge or proper officer to whom the application is made, and no fee shall be payable by a pauper to his counsel or solicitor."

Mode of obtaining leave.

Mode of obtaining Leave.]—The pauper may be admitted to sue as such, upon a petition addressed to the Lord Chief Justice of England (*h*). *Write the necessary affidavit on plain paper* (*i*), *and have it sworn before a commissioner. Write out a petition also on plain paper, and signed by the pauper, stating the cause of action, and praying to be admitted to sue in formâ pauperis, and that counsel and solicitor (naming them) may be assigned to him* (*j*). *Annex the affidavit to the petition; take them to a Master at Chambers and leave them with him, and he will make the order if the proceedings are in form and the case is one in which it ought to be made. The order is made ex parte* (*k*). *It need not be drawn upon reading counsel's certificate, as that instrument is only for the information of the Court* (*l*). *Take this order to the different offices through which you pass the proceedings, in order to avoid any demand for fees; and annex a copy of it to the writ or to the next proceedings after obtaining the order, if after action, before you deliver or file it* (*m*).

The order only takes effect from the time of its being served (*n*). When once obtained it will carry the party through all the subsequent stages of the action (*o*).

Assignment of counsel or solicitor.

Assignment of Counsel or Solicitor.]—By *Ord. XVI. r.* 26, "Where a person is admitted to sue or defend as a pauper, the Court or a Judge may, if necessary, assign a counsel or solicitor, or both, to assist him, and a counsel or solicitor so assigned shall not be at liberty to refuse his assistance unless he satisfies the Court or Judge that he has some good reason for refusing."

Effect of admission.

Effect of Admission.]—The order for admission extends only to the particular cause in which it is granted (*p*); and, if granted *pendente lite*, it has in general no retrospective effect (*q*); therefore, the plaintiff may be liable to the costs up to the time of his admission (*r*).

No fees, &c. payable by pauper.

After admission to sue or defend *in formâ pauperis*, the party is at liberty to carry on all the proceedings without paying fees to the officers of the court, or to his counsel or solicitor.

By *r.* 25, "A person admitted to sue or defend as a pauper shall not be liable to any court fee."

By *r.* 27, "Whilst a person sues or defends as a pauper no person shall take, or agree to take, or seek to obtain from him any fee,

(*h*) Cp. *In re Lewin*, 33 W. R. 128; W. N. 1884, 224.

(*i*) See the form, Chit. Forms, p. 577. See *Seymour* v. *Maddox*, 19 L. J., Q. B. 525. The affidavit should be intituled in the Court, and also "In the matter of the Judicature Acts, and of an intended action between A. B., plaintiff, and C. D., defendant."

(*j*) See the form, Chit. Forms, p. 578.

(*k*) *Hall* v. *Ive*, 8 Sc. N. R. 715.

(*l*) *Bryant* v. *Wagner*, 7 Dowl. 676.

(*m*) *Stockdale* v. *Hansard*, 1 Jur. 355.

(*n*) *Tray* v. *Voules*, L. R., 3 Q. B. 214.

(*o*) *Drennan* v. *Andrew*, L. R., 1 Ch. 300.

(*p*) Lil. Pr. Reg. 683. And see *Gibson* v. *M'Carty*, Hardw. 311.

(*q*) Note (*f*), supra: *Jones* v. *Peers*, 1 M'Clel. & Y. 282. See *Blood* v. *Lee*, 3 Wils. 24.

(*r*) *Casey* v. *Tomlin*, 7 M. & W. 189; 8 Dowl. 892. And see *Doe d. Ellis* v. *Owens*, 9 M. & W. 455; 10 M. & W. 514; 2 Dowl., N. S. 426: *Pitcher* v. *Roberts*, 2 Dowl., N. S. 394.

PART XII.

profit, or reward, for the conduct of his business in the Court, and any person who takes, or agrees to take, or seeks to obtain any such fee, profit, or reward shall be guilty of a contempt of Court."

This does not prevent the solicitor taking out of pocket costs (*s*).

By *r.* 28, "If any person admitted to sue or defend as a pauper gives, or agrees to give, any such fee, profit, or reward, he shall be forthwith dispaupered, and shall not be afterwards admitted again in the same cause to sue or defend as a pauper."

Signature of notice of motion or summons.

Signature of Notice of Motion or Summons.]—By *Ord. XVI. r.* 29, "No notice of motion shall be served or summons issued, and no petition shall be presented, on behalf of any person admitted to sue or defend as a pauper, except for the discharge of his solicitor, unless it is signed by his solicitor."

By *r.* 30, "It shall be the duty of the solicitor assigned to a person admitted to sue or defend as a pauper to take care that no notice is served, or summons issued, or petition presented, without good cause."

Proceedings in the action.

Proceedings in the Action.]—The proceedings in the action are the same as in ordinary cases.

In what cases dispaupered or compelled to pay costs.

Though an order has been made for admitting a party to sue *in formâ pauperis*, yet, if it appear that the plaintiff has no meritorious cause of action, or that he is acting vexatiously or improperly in the conduct of the suit, the Court will discharge the order (*t*). A plaintiff will not be dispaupered for not paying the costs of the day (*u*). The only punishment which the Court ever inflicts, and this only in cases where the pauper has been guilty of very gross laches or other misbehaviour (*x*), is to dispauper him; and when thus dispaupered, he is not liable for costs previously incurred (*y*). A plaintiff cannot be dispaupered after judgment as in case of a nonsuit, because the action is then at an end (*z*).

Costs.

Costs.]—By *Ord. XVI. r.* 31, "Costs ordered to be paid to a person admitted to sue or defend as a pauper shall, unless the Court or a Judge shall otherwise direct, be taxed as in other cases."

Costs of prior action.

The Court have stayed proceedings in a second action by a pauper, until the costs of a nonsuit in a former action for the same cause were paid (*a*); though there are instances in which they have refused even this (*b*).

Set off of costs.

The costs of an action may be set off against the costs of an action in which the plaintiff sues *in formâ pauperis* (*c*).

(*s*) *Holmes* v. *Penny*, 9 Ex. 581; 23 L. J., Ex. 132.

(*t*) *Hawes* v. *Johnson*, 1 Y. & J. 10.

(*u*) *Waller* v. *Joy*, 16 M. & W. 60.

(*x*) See *Winter* v. *Slow*, 2 Str. 878, 983: *Doe* d. *Leppingwell* v. *Trussell*, 6 East, 505: *Anon.*, 2 Salk. 507: *Ancell* v. *Sloman*, 8 Mod. 344: *Bedwell* v. *Coulstrong*, 3 D. & L. 767; Tidd, 9th ed. 98.

(*y*) *Sloman* v. *Aynell*, Fortesc. 320: *Munford* v. *Pait*, 1 Sid. 261: *Pratt* v. *Delarue*, 10 M. & W. 512, per *Abinger*, C. B.

(*z*) *Jenkins* v. *Hide*, 6 M. & Sel. 228.

(*a*) *Weston* v. *Withers*, 2 T. R. 511. See *Goodtitle* v. *Mayo*, Tidd, 98: *Hoare* v. *Dickenson*, 18 L. J., C. P. 158.

(*b*) *Brittain* v. *Greenville*, 2 Str. 1121: *Winter* v. *Slow*, Id. 878. And see *Butler* v. *Inneys*, Id. 891: *Blood* v. *Lee*, 3 Wils. 24.

(*c*) *O'Hare* v. *Reeves*, 18 L. J., Q. B. 231. As to setting off the costs of one action against the costs of another, see Vol. 1, p. 781.

CHAPTER CV.

PROCEEDINGS BY AND AGAINST PRISONERS.

	PAGE		PAGE
1. *Enactments as to Prisons and Prisoners*	1185	3. *Against Prisoners*	1193
2. *Appointment of Administrator and Curator to Convict's Property*.....	1187	4. *By Prisoners*	1197

1. *Enactments in Prisons Acts.*

Holloway Prison, now Queen's Prison.

By the 25 & 26 *V. c.* 104, the prison then known as the Queen's Prison was discontinued as a prison, and by sect. 2 of that Act, "All persons who before the passing of this Act might lawfully have been committed to the keeper of the Queen's Prison, may be committed to the keeper of Whitecross-street Prison, subject to this proviso, that no person shall be removed by writ of *habeas corpus* from any other prison to Whitecross-street Prison, and Whitecross-street Prison shall for all purposes of law be deemed and regarded as the Queen's Prison." By sect. 4, "Any part of Whitecross-street Prison may from time to time be appropriated for the purposes of the prisoners committed there in pursuance of this Act, and the intermixture of the said prisoners with other prisoners in the said prison shall not be construed to be an escape from the custody under which the first mentioned prisoners are held." By the 28 *V. c.* cxvii. ("Metropolitan Railway Act, 1865,") Holloway Prison is substituted for Whitecross-street Prison, "And the said substituted prison, and the space between the city and the said prison, shall, for the purpose of giving jurisdiction to the justices and sheriffs of the City of London, and for conveying prisoners to and from the said prison, and for all purposes of and incidental thereto, be deemed to be situate in the City of London, and the altered or new prison shall in all respects be a substitute for the Whitecross-street Prison, according to the provisions of the said statute of the 25 & 26 *V. c.* 104."

Pleading and costs, &c. in action against person acting under Prison Act, 1865.

By 28 & 29 *V. c.* 126 (The Prison Act, 1865), *s.* 49, "If any suit or action is prosecuted against any person for anything done in pursuance of this Act, such person may plead the general issue, and give this Act and the special matter in evidence, at any trial to be had thereupon, and that the same was done by authority of this Act; and if a verdict passes for the defendant, or the plaintiff becomes nonsuited, or discontinues his action after issue joined, or if, upon demurrer or otherwise, judgment be given against the plaintiff, the defendant shall recover double costs (*a*), and have

(*a*) See Vol. 1, p. 692.

PART XII.

the like remedy for the same as any defendant hath by law in other cases; and though a verdict be given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant, unless the Judge before whom the trial takes place certifies his approbation of the action and of the verdict obtained thereupon."

By sect. 50, "All actions, suits and prosecutions commenced against any person for anything done in pursuance of this Act shall be laid and tried in the county or place where the act complained of was committed, and shall be commenced within six calendar months after the committal thereof, and not otherwise."

Where prison deemed to be.

By sect. 57, "Every prison, wheresoever situate, shall for all purposes be deemed to be within the limits of the place for which it is used as a prison."

Prisoner in custody of gaoler.

By sect. 58, "Every prisoner confined in a prison shall be deemed to be in the legal custody of the gaoler." There is a proviso in this section respecting the jurisdiction and responsibility of the sheriff in respect of prisoners under sentence of death.

Direction of writs, &c. addressed to gaoler.

By sect. 61, "Any writ, warrant or other legal instrument addressed to the gaoler of a particular prison, describing the prison by its situation or other definite description, shall be valid, by whatever title such prison is usually known, or whatever be the description of the prison, whether gaol, house of correction, bridewell, penitentiary or otherwise" (*b*).

Appointment of prisons in which debtors are to be confined.

By 40 & 41 *V. c.* 21 (The Prison Act, 1877), *s.* 26, "The Secretary of State may from time to time by any general or special rule appoint in any county a prison or prisons in which debtors and prisoners who are not criminal prisoners are to be confined during the period of their imprisonment, and it shall be lawful to confine in any prison so appointed during the period of his imprisonment any debtor or prisoner who is not a criminal prisoner who might, if this Act had not passed, have been confined during such period in any prison situate within the area of the county."

By sect. 27, "Subject to this Act, and any rules made in pursuance thereof, prisoners may be committed to the same prison to which they might have been committed if this Act had not passed. The committal or imprisonment of a prisoner to or in a prison, if otherwise valid, shall not be illegal by reason only that such prisoner ought, according to the law for the time being in force, to have been committed to or imprisoned in some other prison, but any such prisoner as is mentioned in this section shall, on application made on his behalf in a summary manner to any Judge of the High Court of Justice, be entitled to be removed at the public expense to such other prison as aforesaid."

Prisoners outside prison when in legal custody.

By sect. 28, "A prisoner shall be deemed to be in legal custody whenever he is being taken to or from, or whenever he is confined in any prison in which he may be lawfully confined, or whenever he is working outside or is otherwise beyond the walls of any such prison in the custody or under the control of a prison officer belonging to such prison, and any constable or other officer acting under the order of any justice of the peace or magistrate, having

(*b*) It seems that a writ, &c. to the Governor of the Queen's Prison is directed "To the Governor of Holloway Prison."

power to commit a prisoner to prison, may convey a prisoner to or from any prison to or from which he may be legally committed or removed, notwithstanding such prison may be beyond the constablewick or other jurisdiction of such constable or officer, in the same manner and with the same incidents as if such prison were within such constablewick or other jurisdiction."

Treatment of person in prison for contempt.

By sect. 41, "Any person who shall be imprisoned under any rule, order or attachment for contempt of any Court shall be in like manner treated as a misdemeanant of the first division within the meaning of the said section of the said Act" (*c*).

2. *Appointment of Administrator and Curator to Property of Convict.*

By statute 33 & 34 *Vict. c.* 23 (which abolishes forfeiture for treason or felony), it is provided:—

The word "convict" defined.

"6. The expression 'convict,' as hereinafter used, shall be deemed to mean any person against whom, after the passing of this Act, judgment of death, or of penal servitude, shall have been pronounced or recorded by any Court of competent jurisdiction in England, Wales, or Ireland upon any charge of treason or felony.

When convict shall cease to be subject to operation of the Act.

"7. When any convict shall die or be made bankrupt, or shall have suffered any punishment to which sentence of death if pronounced or recorded against him may be lawfully commuted, or shall have undergone the full term of penal servitude for which judgment shall have been pronounced or recorded against him, or such other punishment as may by competent authority have been substituted for such full term, or shall have received her Majesty's pardon for the treason or felony of which he may have been convicted, he shall thenceforth, so far as relates to the provisions hereinafter contained, cease to be subject to the operation of this Act.

Convict disabled to sue for or to alienate property, &c.

"8. No action at law or suit in equity for the recovery of any property, debt, or damage whatsoever shall be brought by any convict against any person during the time while he shall be subject to the operation of this Act; and every convict shall be incapable, during such time as aforesaid, of alienating or charging any property, or of making any contract, save as hereinafter provided." (*See Ex parte Graves, In re Harris*, W. N. 1881, p. 136.)

The Crown may appoint administrator of any convict's property.

"9. It shall be lawful for her Majesty, or for any person in that behalf authorized by her Majesty, under her royal sign manual (and which authority may be given either generally or with reference to any particular case), if to her Majesty or to the person so authorized it shall seem fit, by writing under her Majesty's royal sign manual, or under the hand of the person so authorized as aforesaid, to commit the custody and management of the property of any convict, during her Majesty's pleasure, to an administrator, to be by such writing appointed in that behalf; and every such appointment may be revoked by the same or the like authority by which it is made; and upon any determination thereof, either by revocation or by the death of any such administrator, a new administrator may be appointed by the same or the like authority from time

(*c*) See 28 & 29 V. c. 126, s. 67.

PART XII.

to time; and every such new administrator shall upon his appointment, be and be deemed to be the successor-in-law of the former administrator; and all property vested in, and all powers given to, such former administrator by virtue of this Act shall thereupon devolve to and become vested in such successor, who shall be bound by all acts lawfully done by such former administrator during the continuance of his office; and the provisions hereinafter contained with reference to any administrator shall, in the case of the appointment of more than one person, apply to such administrators jointly.

Convict's property to vest in administrators on their appointment.

"10. Upon the appointment of any such administrator in manner aforesaid all the real and personal property, including choses in actions, to which the convict named in such appointment was at the time of his conviction, or shall afterwards while he shall continue subject to the operations of this Act, become or be entitled, shall vest in such administrator for all the estate and interest of such convict therein.

Remuneration of administrator.

"11. If, in the instrument by which any such administrator is appointed, provision shall be made for the remuneration of such administrator out of the property of the convict, the said administrator may receive and retain for his own benefit such remuneration accordingly.

Powers of administrators.

"12. The administrator shall have absolute power to let, mortgage, sell, convey and transfer any part of such property as to him shall seem fit.

Administrator to pay out of property costs of prosecution and costs of executing the Act.

"13. It shall be lawful for the administrator to pay or cause to be paid out of such property, or the proceeds thereof, all costs and expenses which the convict may have been condemned to pay; and also all costs, charges, and expenses incurred by such convict in and about his defence; and also all such costs, charges, and expenses as the said administrator may incur or be put to in or about the carrying this Act into execution with reference to such property, or with reference to any claims which may be made thereon.

Administrator may pay out of property debts or liabilities of convict.

"14. The administrator may cause payment or satisfaction to be made out of such property of any debt or liability of such convict which may be established in due course of law or may otherwise be proved to his satisfaction, and may also cause any property which may come to his hands to be delivered to any person claiming to be justly entitled thereto, upon the right of such person being established in due course of law, or otherwise to his satisfaction.

Administrators may make compensation out of property to persons defrauded by criminal acts of convict.

"15. The administrator may cause to be paid or satisfied out of such property such sum of money by way of satisfaction or compensation for any loss of property or other injury alleged to have been suffered by any person through or by means of any alleged criminal or fraudulent act of such convict, as to him shall seem just, although no proof of such alleged criminal or fraudulent act may have been made in any Court of law or equity; and all claims to any such satisfaction or compensation may be investigated in such manner as the administrator shall think fit, and the decision of the administrator thereon shall be binding: Provided always, that nothing in this Act shall take away or prejudice any right, title or remedy to which any person alleging himself to have suffered any such loss or injury would have been entitled by law if this Act had not passed.

"16. The administrator may cause such payments and allowances for the support or maintenance of any wife or child, or reputed child of such convict, or of any other relative or reputed relative of such convict dependent upon him for support, or for the benefit of the convict himself, if and while he shall be lawfully at large under any licence, as to such administrator shall seem fit to be made from time to time out of such property, or the income thereof.

Administrator may make allowances out of property for support of family of convict.

"17. The several powers hereinbefore given to the said administrator, or any of them, may be exercised by him in such order and course, as to priority of payments or otherwise, as he shall think fit; and all contracts of letting or sale, mortgages, conveyances, or transfers of property, *bonâ fide* made by the said administrator under the powers of this Act, and all payments or deliveries over of property *bonâ fide* made by or under the authority of the said administrator for any of the purposes hereinbefore mentioned, shall be binding; and the propriety thereof, and the sufficiency of the grounds on which the said administrator may have exercised his judgment or discretion in respect thereof, shall not be in any manner called in question by such convict, or by any person claiming an interest in such property by virtue of this Act.

Exercise of administrator's power as to priority of payments; payments by administrator for purposes of Act not to be called in question.

"18. Subject to the powers and provisions hereinbefore contained, all such property, and the income thereof shall be preserved and held in trust by the said administrator, and the income thereof may, if and when the said administrator shall think proper, be invested and accumulated in such securities as he shall from time to time think fit, for the use and benefit of the said convict and his heirs, or legal personal representatives, or of such other persons as may be lawfully entitled thereto, according to the nature thereof; and the same, and the possession, administration and management thereof, shall re-vest in and be restored to such convict upon his ceasing to be subject to the operation of this Act, or in and to his heirs or legal personal representatives, or such other persons as may be lawfully entitled thereto; and all the powers and authorities by this Act given to the said administrator shall from thenceforth cease and determine, except so far as the continuance thereof may be necessary for the care and preservation of such property or any part thereof, until the same shall be claimed by some person lawfully entitled thereto, or for obtaining payment out of such property, or of the proceeds thereof, of any liabilities, or any costs, charges, or expenses, for which provision is made by this Act; for which purposes such powers and authorities shall continue to be in force until possession of such property shall be delivered up by the said administrator to some person being or claiming to be lawfully entitled thereto.

Property to be preserved for convict, and to revert to him or his representatives on completion of sentence, pardon, or death.

"19. The said administrator shall not be answerable to any person for any property which shall not actually have come to his hands by virtue of this Act, nor for any loss or damage which may happen through any mere omission or nonfeasance on his part to any property vested in him by virtue hereof.

Administrators not to be liable, except for what they receive.

"20. The costs as between solicitor and client of every action or suit which may be brought against the said administrator with reference to any such property as aforesaid, whether during the time while the same shall be and continue vested in him under this

Administrator to receive costs of suits of property

PART XII.

as between solicitor and client.

Act, or after the same shall cease to be so vested, and all charges and expenses properly incurred by him with reference thereto, shall be a first charge upon and shall be paid out of such property, unless the Court before which such action is tried or such suit is heard shall think fit otherwise to order.

If no administrator, interim curator may be appointed by justices.

"21. If no such administrator as aforesaid shall have been appointed an interim curator of the property of any convict may be appointed by any justices of the peace in petty sessions assembled, or, where there are no petty sessions, by any justice of the peace having jurisdiction in the place where such convict before his conviction shall have last usually resided, upon the application of any person who shall be able to satisfy such justice that the application is made *bonâ fide* with a view to the benefit of the convict or of his family, or to the due and proper administration and management of his property and affairs; and the interim curator to be appointed may be either the person making the application or any other person willing to accept the office, and competent to discharge its duties, as to such justice shall seem fit.

Proceedings before justices.

"22. Before making any such appointment the justice shall require the applicant to make oath that no administrator or interim curator of the property of such convict has been to his knowledge or belief already appointed; and the applicant shall also state upon oath, to the best of his knowledge and belief, who are the nearest relatives (including any husband or wife) of such convict, and (if any such there be) where they are residing, and whether any and which of them have consented to or have had notice of such application; and it shall be competent for such justice to require notice of such application to be given to all such persons and in such manner as to such justice shall seem fit.

Removal of interim curator for cause shown.

"23. Any interim curator so appointed may be removed, for any cause shown to the satisfaction of the justices or justice or the Court, upon the application of any relative of the convict, or of any person interested in the due and proper administration and management of his property and affairs, either by the petty sessions or justice by whom he was appointed (or, in the event of such justice dying or being unable to act, by any other justice having the like jurisdiction) or by any Court in which proceedings for an account may be instituted as hereinafter provided; and upon the death or removal of any such interim curator a new interim curator may be appointed in the same manner and by the like authority as aforesaid, or (in case any such proceedings shall be then depending) by the Court in which any such proceedings shall be so depending as aforesaid.

Powers of interim curator.

"24. Every interim curator so appointed as aforesaid shall have power (unless and until an administrator shall be appointed under this Act, in which case the authority of such interim curator shall thenceforth cease and determine) to sue in his own name as such interim curator, at law or in equity, for the possession and recovery of any part of the property in respect of which he shall have been so appointed, or for damages in respect of any injury thereto, and to defend in his own name as such interim curator any action or suit brought against such convict or against

himself in respect of such property, and to receive and give legal discharges for all rents, dividends, interest and income of or arising from such property, and also to receive and give discharges for any debts due to such convict, or forming part of his property, and to pay and discharge all or any debts due from such convict out of such property, and to settle and adjust accounts with any debtor or creditor of such convict, and generally to manage and administer the property of such convict; and also to make or cause to be made such payments and allowances for the support or maintenance of any wife or child of such convict, or of any other relative dependent on him for support, as shall be specially authorized by any such justice or Court aforesaid (who shall have power from time to time to authorize the same), or by any other Court having competent jurisdiction to authorize the same, out of the income of such property, or (in case such income shall be insufficient for that purpose) out of the capital thereof; and every such interim curator shall be entitled to retain out of such property, or out of the income thereof, all his costs, charges and expenses properly incurred in and about the discharge of his duties as such curator.

Personal property may be sold by interim curator under special order of justices or Court.

"25. Any personal property of such convict may be sold and transferred by such interim curator by and with the authority of such justice or Court as aforesaid, or of any other Court having competent jurisdiction to order the same, but not otherwise; and such interim curator shall be accountable for the proceeds of any property so sold in the same manner as for such property while remaining unsold.

Proceedings by or against interim curator not to abate if administrator is appointed.

"26. All proceedings at law or in equity duly instituted by or against any such interim curator may (in case of an administrator or a new interim curator being afterwards appointed) be continued by or against such administrator or such new interim curator without any abatement thereof, the appointment of such administrator or new interim curator being entered by way of suggestion on the record, or otherwise stated upon the proceedings, according to the practice of such Court; and all acts lawfully done and contracts lawfully made by such interim curator with respect to any property of such convict before the appointment of such administrator or such new interim curator shall be binding upon such administrator or such new interim curator after his appointment.

Execution of judgments against convict provided for.

"27. All judgments or orders for the payment of money of any Court of law or equity against such convict which shall have been duly recovered or made, either before or after his conviction, may be executed against any property of such convict under the care and management of any such interim curator as aforesaid, or in the hands of any person who may have taken upon himself the possession or management thereof without legal authority, in the same manner as if such property were in the possession or power of such convict; and all such judgments or orders may likewise be executed by writ of scire facias or otherwise, according to the practice of the Court, against any such property which may be vested in any administrator of the property of such convict under the authority of this Act.

Proceedings may be taken

"28. It shall be competent for her Majesty's Attorney-General,

PART XII.

to make administrator or interim curator, &c. accountable before property reverts to convict.

or other the chief law officer of the Crown for the time being in any part of her Majesty's dominions, or for any person who (if such convict were dead intestate) would be his heir at law, or entitled to his personal estate, or any share thereof, under the Statutes of Distribution or otherwise, or for any person authorized by her Majesty's Attorney-General, or by such chief law officer as aforesaid, in that behalf, to apply in a summary way to any Court which (if such convict were dead) would have jurisdiction to entertain a suit for the administration of his real or personal estate, to issue a writ of summons calling upon any administrator or interim curator of the property of such convict appointed under this Act, or any person who without legal authority shall have possessed himself of any part of the property of such convict, to account for his receipts and payments in respect of the property of such convict, in such manner as such Court shall direct; and it shall be lawful for such Court thereupon to issue such writ of summons, and to enforce obedience thereto, and to all orders and proceedings of such Court consequent thereon, in the same manner as in any other case of process lawfully issuing out of such Court; and such Court shall thereupon have full power, jurisdiction, and authority to take all such accounts, and to make and give all such orders and directions as to it shall seem proper or necessary for the purpose of securing the due and proper care, administration, and management of the property of such convict, and the due and proper application of the same, and of the income thereof, and the accumulation and investment of such balances, if any, as may from time to time remain in the hands of any such administrator or interim curator, or other person as aforesaid in respect of such property; and so long as any such proceedings shall be pending in any such Court, every such administrator or interim curator, or other person, shall act in the exercise of all powers vested in him under this Act, or otherwise in all respects as such Court shall direct; and it shall be lawful for such Court (if it shall think fit) to authorize and direct any act to be done by any such interim curator which might competently be done by an administrator duly appointed under this Act.

Administrator, &c. to be accountable to convict when property reverts.

"29. Subject to the provisions of this Act, every such administrator, interim curator, and other person as aforesaid shall, from and after the time when such convict shall cease to be subject to the operation of this Act, be accountable to such convict for all property of such convict which shall have been by him possessed or received and not duly administered, in the same manner in which any guardian or trustee is now accountable to his ward or *cestui que trust*; but subject nevertheless and without prejudice to the administration and application of such property under and according to the powers of this Act.

Property of convict acquired while lawfully at large not to be subject to the operation of this Act.

"30. Provided always, that no property acquired by a convict during the time which he shall be lawfully at large under any licence shall vest in any administrator appointed under this Act, but such convict shall be entitled thereto without any interference on the part of any administrator or interim curator appointed under this Act, and during the time last aforesaid the disabilities mentioned in the eighth section of this Act shall, as to such convict, be suspended.

"32. Provided always, that nothing in this Act shall be deemed to alter or in anywise affect the law relating to felony in England, Wales, or Ireland, except as herein is expressly enacted. Saving of general law as to felony.

"33. This Act shall not apply to Scotland." Extent of Act.

3. *Proceedings against Prisoners.*

It should be premised, that in actions against prisoners, the proceedings are the same, with some trifling exceptions here noticed, as in actions against persons not in custody, except as to the mode of charging in execution. These exceptions will be considered under the following heads, viz.—

	PAGE		PAGE
Writ of Summons	1193	*Execution*	1194
Statement of Claim	1193	*Other Proceedings*	1197
Defence	1194		

Writ of Summons.]—The action is commenced by writ of summons. The governor of a prison having, in obedience to an order of the visiting justices, refused to allow service of a writ upon a defendant, who was in the prison under a criminal sentence, the Court granted a rule to show cause why an attachment should not issue against him; after which the justices permitted service of the writ (*c*). Writ of summons.

As to when a defendant can be arrested before judgment, and as to the mode of doing so, *see post, Ch. CXXVII.* The mode of proceeding to arrest a defendant in custody of the sheriff is the same as in ordinary cases (*d*).

As to the detainer of a prisoner who has been wrongfully arrested or detained in custody, *see post, Ch. CXXVII.*

Statement of Claim.]—The form of, the time for and the mode of delivering the statement of claim are the same as in ordinary cases (*e*). Where formerly the defendant was not in custody on a criminal charge, it was held unnecessary to bring the defendant up by habeas corpus in order to charge him with a declaration (*f*). Statement of claim.

When the defendant is in custody, and no other mode is prescribed for the delivery of them, all papers, notices, &c., which have to be served on him, and which do not ordinarily require personal service, may be delivered for him to the turnkey of the prison (*g*).

(*c*) *Danson* v. *Le Capelain*, 21 L. J., Ex. 219.

(*d*) As to arresting the defendant when he was in the Queen's Prison, see *Edwards* v. *Robertson*, 5 M. & W. 520; 7 Dowl. 857; 1 & 2 V. c. 110, s. 3; *Grainger* v. *Moore*, 5 Dowl. 456.

(*e*) See the former rule, H. T. 3 W. 4: *Hallett* v. *Cresswell*, 1 B. C. 1; 15 L. J., Q. B. 129: *Neale* v. *Snoulten*, 2 C. B. 322. As to the gaoler or keeper delivering the copy of a declaration left with him to his prisoner, under pain of an attachment, see R. E. 5 W. & M. r. 3, s. 7.

(*f*) *Barnett* v. *Harris*, per *Taunton*, J., 2 Dowl. 186: *Millard* v. *Millman*, 3 M. & Sc. 63; 2 Dowl. 723; 4 W. & M. c. 21.

(*g*) *Whitehead* v. *Barber*, 1 Str. 248: *Moore* v. *Newbold*, 11 Leg. Obs. 307.

PART XII.

Defence, &c.

Defence, &c.]—The defendant must plead to the statement of claim in the same way as in ordinary cases (*h*). As to the time for pleading, *see Vol.* 1, p. 297.

The notice of trial or inquiry is the same as in ordinary cases (*i*).

How charged in execution —when in custody of sheriff.

Execution against.]—If the defendant is in custody of the sheriff, the mode of charging the defendant in execution, where the plaintiff is entitled to execution against the person of the defendant—as to which *see ante*, p. 889—is by lodging a ca. sa. *with the sheriff of the county in whose custody the defendant is, as in ordinary cases, and obtaining a warrant thereon directed to the officer who has him in custody* (*k*). Before the 40 & 41 *V. c.* 21 (noticed *ante*, p. 1186, which transferred the prisons to which that Act applies to the Secretary of State), if the defendant were in custody in a prison in the country for debt, it would suffice to deliver the ca. sa. to the sheriff's agent in town (*l*). Where, before the above Act, the defendant was in the county jail, and a ca. sa. against him, at the suit of the sheriff, directed to the coroner, was handed by the coroner to the gaoler, this was held to be a sufficient charging of the defendant in execution (*m*).

—When in prison of the Court.

Before the *Com. Law Proc. Act*, 1852, if the defendant was in custody in the Queen's Prison at the suit of a third party, and not of the plaintiff, it was necessary to issue a habeas corpus ad satisfaciendum for the purpose of charging him in execution. But by that Act, *s.* 127 (*n*), "It shall not be necessary in any case to sue out a writ of habeas corpus ad satisfaciendum to charge in execution a person already in the prison of the Court (*o*), but such person may be so charged in execution by a Judge's order made upon affidavit that judgment has been signed, and is not satisfied; and the service of such order upon the keeper of the prison for the time being shall have the effect of a detainer."

Before the passing of the 25 & 26 *V.* c. 104 (The Queen's Prison Discontinuance Act, 1862), if the defendant was in the custody of the keeper of the Queen's Prison (*o*), at the suit of the same plaintiff (*p*), the mode of charging him in execution was thus:—A side-bar rule was obtained at the proper office, requiring the keeper to acknowledge the defendant to be in his custody (*q*); this rule was taken to the keeper's office, and you got the acknowledgment

(*h*) See the repealed rule of T. T. 3 W. 4.

(*i*) *Whitehead* v. *Barber*, 1 Str. 248.

(*k*) *Poole* v. *Cooke*, Barnes, 389: *Astley* v. *Goodjer*, 2 Dowl. 619; Tidd, 9th ed. 363; 2 Lee, Pr. Dict. 1075: *Owen* v. *Owen*, 2 B. & Ad. 805; 1 Dowl. 335: *Searl* v. *Johnson*, Id. 384. See *Williams* v. *Jones*, 2 C. & J. 611: *Deemer* v. *Brooker*, 3 Dowl. 576; 1 H. & W. 206.

(*l*) *Williams* v. *Waring*, 2 C. M. & R. 354; 4 Dowl. 200; 1 Gale, 268.

(*m*) *Bastard* or *Burston* v. *Trutch*, 3 A. & E. 451; 5 Nev. & M. 109; 4 Dowl. 6; 1 H. & W. 321.

(*n*) Not repealed.

(*o*) Holloway Prison is now the prison of the Court. See ante, p. 1185.

(*p*) "The proceeding by side-bar rule does not operate to charge a prisoner in execution unless he be at the time in custody in the particular suit." See per Lord *Denman*, C. J., in *Furnival* v. *Stringer*, 5 Nev. & M. 60.

(*q*) See 8 & 9 W. 3, c. 7, s. 9.

written on it, paying him his fee. A committitur piece was then made out on a plain piece of parchment and filed with the officer who acted as clerk of the judgments. And lastly (although not essentially necessary) (*r*), the committitur was entered in the keeper's book, which was kept in the judgment office; you could see the form of the entry there. The keeper's acknowledgment must have been of the same term the defendant was charged in execution, and not of a preceding term, otherwise the defendant would be entitled to a supersedeas (*s*). If the committitur were erroneous, the plaintiff must have given the defendant notice of his having abandoned it, before he could enter a second rectifying the mistake (*t*). It was not necessary to enter the proceedings of record, and to docket and file the judgment roll (*u*). It is submitted that when a defendant is committed to Holloway Prison, which, as we have seen, *ante*, p. 1185, is now the Queen's Prison, that the above course must, as near as circumstances will allow, be pursued for charging him in execution when he is in custody at the suit of the same plaintiff (*x*).

When in criminal custody.

Before the *Judicature Acts*, if the defendant, or one of several defendants (*y*), was in custody of the keeper of the Queen's (*y*) Prison, or sheriff, on a criminal charge, and the action was in the Queen's Bench, he could not be charged in custody in a civil action without the leave of the Court or a Judge (*z*); upon which leave being granted, a habeas corpus ad satisfaciendum, in order to charge him in execution, was issued out of the Crown side of the Court, and he was brought up under it and charged accordingly. This could not be done when the action was in the Common Pleas or Exchequer, they not being Courts of criminal jurisdiction; and in such a case the plaintiff must have waited until the criminal custody was over (*a*). Nor could it be done if the prisoner was in custody on a criminal charge in any other than the Queen's Prison, or of the sheriff (*b*). Where a defendant was under military arrest at Woolwich, under circumstances which might or might not lead to a court-martial, the Court refused a habeas to charge him in execution (*c*). The leave of the Court or a Judge for liberty to charge the defendant in custody was generally granted as of course, if he was not in custody for punish-

(*r*) MS. East. 1819.

(*s*) *Fisher* v. *Stanhope*, 1 T. R. 464.

(*t*) *Topping* v. *Ryan*, 1 T. R. 227: *Cunningham* v. *Cogan*, 10 East, 46.

(*u*) *Deemer* v. *Brooker*, 3 Dowl. 576; 1 H. & W. 206; Tidd, New Prac. 189; Imp. K. B. 10th ed. 619; Tidd, 9th ed. 363: *Purdom* v. *Brockridge*, 2 B. & C. 342: *Fotterel* v. *Philby*, 3 Burr. 1841.

(*x*) See ante, Vol. 1, p. 201.

(*y*) *Ess* (or *Williams*) v. *Smith*, 3 Tyr. 363; 1 Dowl. 703.

(*z*) *Crackall* v. *Thomson*, 1 Salk. 354: *Ramsden* v. *Macdonald*, 1 Wils. 217: *S. C.*, 1 W. Bl. 30, nom. *Ramsay* v. *M'Donald*: *Coppin* v. *Gunner*, 2 Ld. Raym. 1572; 2 Str. 873: *Goodman* v. ——, 1 Dowl. 128: *Attroffe* v. *Lunn*, 9 B. & C. 395; Tidd, 9th ed. 345.

(*a*) *Gibb* v. *King*, 1 C. B. 1; 2 D. & L. 806; 14 L. J., C. P. 85. And see *Walsh* v. *Davies*, 2 N. R. 245: *Freeman* v. *Weston*, 1 Bing. 221; 8 Moore, 81.

(*b*) *Guthrie* v. *Ford*, 4 D. & R. 271; semb. overruling *Morland* v. *Weston*, 3 Id. 31. And see *Brandon* v. *Davis*, 9 East, 154.

(*c*) *Jones* v. *Danvers*, 7 Dowl. 394; 5 M. & W. 234.

PART XII.

ment, or if the leave was not inconsistent with the terms of a conditional pardon already granted to the defendant (*e*), or the like. A Judge's signature to the writ of habeas was a sufficient authority for the writ being issued, and evidence of his leave having been granted for it (*f*). If the habeas was issued, and the defendant charged in custody without such leave being granted, the proceeding was irregular; but the irregularity might be waived (*g*). The Court of Common Pleas held, that a person in custody under process of contempt of that Court, was liable to be charged in execution in the ordinary way (*h*).

When defendant in prison in an inferior Court.

If a defendant, against whom a judgment was obtained in the Superior Courts, were a prisoner in the prison of any inferior Court, but at the suit of a third person, and not of the plaintiff, the latter might, where he was entitled to execution against the person (*Vol.* 1, p. 889), have the defendant brought up before the Court in which the judgment is obtained by writ of habeas corpus ad satisfaciendum, in order to charge him in execution (*i*).

How hab. cor. ad sat. issued.

A habeas corpus ad satisfaciendum, it seems, must bear teste on the day on which it is issued, and be returnable in Court upon a day certain in the sittings (*j*). As to the indorsement on the writ, *see* *Vol.* 1, p. 800. *Get a blank form of writ at the stationer's and fill it up; and purchase a præcipe for the same, with an impressed 5s. fee stamp on it. Take the præcipe and writ to the proper office, and get the latter stamped, and leave the præcipe there* (*k*). The writ used to be signed by the Chief Justice, or, in his absence, by one of the other Judges of the Court out of which it issued (*l*). No affidavit is necessary to

(*e*) Fost. 61: *Foxworthy's ease*, 2 Ld. Raym. 848; 7 Mod. 153; 2 Salk. 500.

(*f*) *Gibb* v. *King*, 1 C. B. 1; 2 D. & L. 806; 14 L. J., C. P. 85.

(*g*) *Pepper* v. *Bawden*, Cas. Pr. C. P. 31. And see *Rose* v. *Christfield*, 1 T. R. 591: *Williams* v. *Seudamore*, 1 Chit. Rep. 368; Tidd, Pract. 9th ed. 345.

(*h*) *Wade* v. *Wood*, 1 C. B. 462. See *Bonafous* v. *Schoole*, 4 T. R. 316: *Pletwood* v. *Turty*, Prac. Reg. 325: *Allgood* v. *Howard*, Cas. Pr. C. P. 27.

(*i*) See *Sandys* v. *Hornby*, 5 N. & M. 59: *Furnival* v. *Stringer*, 3 Sc. 551: *Williams* v. *Jones*, 2 C. & J. 611. *Query*, however, whether the above is the course to be pursued since the 25 & 26 V. c. 104, s. 2 (noticed post, p. 1199), which enacts that no person shall be removed by writ of habeas corpus from any other prison to the Queen's Prison. Perhaps by this enactment it was only intended to do away with the former practice of removing a defendant to the Queen's Prison.

(*j*) See *Newton* v. *Rowe*, 1 D. & L. 814; 7 Scott, N. R. 543.

By 28 & 29 V. c. 126, s. 57, "every prison, wheresoever situate, shall for all purposes be deemed to be within the limits of the place for which it is used as a prison."

By s. 61, "any writ, warrant, or other legal instrument, addressed to the gaoler of a particular prison, describing the prison by its situation or other definite description, shall be valid by whatever title such prison is usually known, or whatever be the description of the prison, whether gaol, house of correction, bridewell, penitentiary, or otherwise." Ante, p. 1185.

By s. 3, "this Act shall not extend to Scotland or Ireland, and shall not apply to prisons for convicts under the superintendence of the directors of convict prisons, or to any military or naval prison."

By s. 4, "gaoler" shall mean governor, keeper, or other chief officer of a prison.

(*k*) As to the form of and signature to the præcipe and what must be produced to the officer on his stamping the writ, see Vol. 1, p. 795.

(*l*) 1 & 2 P. & M. c. 13, s. 7, repealed by 7 G. 4, c. 64, s. 32: *R.* v. *Rodham*, Cowp. 672.

obtain the writ (*m*). It need not be marked or indorsed with the number of the roll of the judgment (*n*). *Having made a duplicate of it, deliver the writ to the officer to whom it is directed, who will bring the prisoner up in open Court on the return day.* It is usual to deliver the writ to the officer at least four days before the prisoner is to be brought up (*o*). *When the prisoner is brought up into Court, he will be charged in execution; unless he pays the condemnation money; no motion is necessary* (*p*), *all that you have to do is to hand in the original habeas to the Master, and he will charge the prisoner.* No opposition can be offered to the commitment on the ground of any illegality in the arrest; such illegality must form the subject of a separate motion for his discharge (*q*). A prisoner cannot be detained until payment of the court fees on this writ, which is merely a substitution for a ca. sa. (*r*). Where a party in custody under this writ had removed himself by habeas corpus into a different custody, for the purpose of taking the benefit of an Insolvent Act, it was held, that he had thereby waived an irregularity in the teste of the first writ (*s*).

When protected from process.

A prisoner cannot be charged in execution if protected from process under the Bankrupt Acts (*t*).

The plaintiff may sue out execution as in ordinary cases except as above mentioned (*u*).

Execution against plaintiff.

A *plaintiff* in prison at the suit of a third person might be charged in execution for the costs of a nonsuit (*x*).

Other proceedings against prisoners.

Other Proceedings against Prisoners.]—As to an attachment against, *see ante, Ch. LXXXVIII.* As to the sheriff removing prisoners for debt or contempt of Court, to the common gaol of the county, *see* 17 & 18 *V. c.* 115.

4. *Proceedings by Prisoners.*

Proceedings by prisoners.

The proceedings in an action brought by a prisoner are the same as in ordinary cases. Sect. 8 of the statute 33 & 34 *V. c.* 23 prohibits any action by a convict whilst he is subject to the operation of that Act.

As to the service of proceedings on prisoners, *see ante*, p. 1193.

A prisoner in lawful custody for debt was not entitled to a habeas corpus for the purpose of enabling him to conduct his own case in a suit for damages; although it might be otherwise under particular circumstances, as, for instance, if the object was to

(*m*) *Furnival* v. *Stringer*, supra.

(*n*) See *Wilson* v. *Bacon*, 2 Dowl. 459. See *Wilson* v. *Bacon*, 1 Dowl. 118. See *Green* v. *Foster*, 2 Dowl. 191; where there were several defendants and only one in custody.

(*o*) See *Park* v. *Torre*, 3 B. & B. 93.

(*p*) See *Aldridge* v. *Stanford*, 3 M. & Gr. 409, C. P.

(*q*) *Aldridge* v. *Stanford*, supra: *Wright* v. *Stanford*, 1 Dowl., N. S. 272.

(*r*) *Dalzell* v. *Cullen*, 12 M. & W. 1; 1 D. & L. 448.

(*s*) *Newton* v. *Rowe*, 1 D. & L. 814; 7 Se. N. R. 543.

(*t*) *Sloman* v. *Williams*, 4 D. & L. 49.

(*u*) *Jones* v. *Tye*, 1 Dowl. 181: *Green* v. *Foster*, supra.

(*x*) *Furnival* v. *Stringer*, 3 Bing. N. C. 96; 5 Dowl. 195.

PART XII.

make an application for his discharge, as being wrongfully in custody (*a*).

Discharge of prisoner.

We shall notice, *post*, *Ch. CXXVII.*, whilst treating of arrest of defendant before final judgment, where a party improperly arrested is entitled to be discharged from custody, also where he is entitled to be discharged for a defect in the proceedings.

A defendant arrested before judgment may get discharged upon giving the required security at any time before judgment (*b*); he will also be discharged when the action is discontinued, or decided in his favour. So, if the defendant, when arrested before judgment, settle or compromise the debt with the plaintiff, he or his solicitor, if he sue by one, should give the defendant a discharge in writing; and upon this being lodged with the keeper or gaoler, the prisoner should be discharged (*c*). Or, if the defendant, when arrested on a ca. sa. after judgment, or any one for him, pay the amount of it to the plaintiff or his solicitor, the Court or Judge upon application will order his discharge (*d*). Indeed, the plaintiff and his solicitor are bound at their peril to discharge him in such a case (*e*). Or, if the plaintiff give a written discharge to the gaoler or sheriff in whose custody the debtor may be, he should be discharged (*f*). As to its not being competent to issue any other execution against a defendant after he has been discharged from custody under a ca. sa., *see ante*, p. 900 (*g*). Where a plaintiff's name had been used in an action by parties beneficially interested, and he colluding with the defendant discharged him from custody, the Court granted an attachment against the plaintiff (*h*).

After death of the plaintiff, &c.

The Court will discharge a defendant in execution after the plaintiff's death, if intestate, if it appears that no one intends to administer (*i*). The notice should be served on the next of kin (*i*). Where administration had been taken out, the Court refused, without the authority of the administratrix, to discharge the defendant out of execution after the death of the plaintiff, who had become bankrupt, although his administratrix and assignees disclaimed all interest in the action (*k*). In a case where the wife of the defendant, who was a prisoner, became administratrix to the plaintiff, the Court ordered the defendant to be discharged (*l*).

(*a*) *Re Cobbett*, 3 Ex. 155; 27 L. J., Ex. 199.

(*b*) See post, Ch. CXXVII.

(*c*) See ante, p. 895. See *Butt* v. *Conant*, 3 B. & B. 3; 6 Moore, 65.

(*d*) *Rimmer* v. *Turner*, 3 Dowl. 601.

(*e*) *Crozer* v. *Pilling*, 6 D. & R. 129; 4 B. & C. 26.

(*f*) As to the solicitor's authority to give a discharge, see ante, p. 895. As to a solicitor's lien on a judgment, see Vol. 1, p. 165. And see *Marr* v. *Smith*, 4 B. & A. 466.

(*g*) See also *Jacques* v. *Withy*, 1 T. R. 557.

(*h*) *M'Gregor* v. *Barrett*, 6 C. B. 262.

(*i*) *Parkinson* v. *Horlock*, 2 N. R. 240: *Broughton* v. *Martin*, 1 B. & P. 176: *Gore* v. *Wright*, 1 Dowl., N. S. 864: *R.* v. *Davis*, 1 B. & P. 336: *Camp* v. *Pote*, 8 C. B. 375; 7 D. & L. 289, where a solicitor's lien for costs was disregarded: *Taylor* v. *Burgess*, 16 M. & W. 781: *Ridsdale* v. *Latour*, 2 L. M. & P. 318, where it was referred to the Master by consent to inquire who were the next of kin, &c. See *Holmes* v. *Marcott*, 1 Bing. 431; 8 Moore, 529: *Cox* v. *Prichard*, 20 L. J., Q. B. 353: *Danford* v. *Gouldsmith*, 8 Moore, 145.

(*k*) *Fothergill* v. *Walton*, 4 Bing. 711; 1 M. & P. 743.

(*l*) *Pyne* v. *Earle*, 8 T. R. 407.

The Court refused to discharge a plaintiff from an execution for costs, although the defendant had absconded and his solicitor consented to such discharge (*m*).

Removal of prisoner.

Before the 25 & 26 *V. c.* 104 (The Queen's Prison Discontinuance Act, 1862), if the defendant was in custody of the sheriff, or in some other prison than the Queen's Prison, under process of one of the Superior Courts, he (*n*) had a right to remove himself into the custody of the keeper, if he wished it, by the writ of habeas corpus cum causâ, even although he should also at the same time be detained upon process of other Courts. But the above Act, which directs that the Queen's Prison shall be discontinued as a prison, enacts by sect. 2, that "All persons who, before the passing of this Act, might lawfully have been committed to the keeper of the Queen's Prison, may be committed to the keeper of Whitecross Street Prison, subject to this proviso, that no person shall be removed by writ of habeas corpus from any other prison to Whitecross Street Prison, and Whitecross Street Prison shall for all purposes of law be deemed and regarded as the Queen's Prison." As noticed (*ante*, p. 1185), Holloway Prison is now substituted for Whitecross Street Prison as the Queen's Prison.

As to the removal of lunatic prisoners from the Queen's Prison, *see* 25 & 26 *V. c.* 104, *s.* 5.

(*m*) *Pearce* v. *Scaif*, 6 C. B. 200. 3 Burr. 1875; Sa[illegible]; 2 Str. 1262:

(*n*) See Tidd's Prac. 9th ed. 348; *Gurney* v. *Hallen*, 25 L. J., Ex. 277.

PART XIII.

PROCEEDINGS IN PARTICULAR ACTIONS.

CHAP.		PAGE
CVI.	*Action for Recovery of Land*	1200
CVII.	*Replevin*	1253
CVIII.	*Action for Mandamus*	1274
CIX.	*Injunction*	1277
CX.	*Action on Bond under* 8 & 9 *Will.* 3, *c.* 11	1279
CXI.	*Petition of Right*	1288

[By *R. of S. C., Ord. II. r.* 6, "No writ shall hereafter be issued under the Summary Procedure on Bills of Exchange Act, 1855 (18 & 19 Vict. c. 67)."]

CHAPTER CVI.

PART XIII.

ACTION FOR RECOVERY OF LAND—EJECTMENT (*a*).

SECT.		PAGE
I.	*In Ordinary Cases*	1201
II.	*By Landlord on Termination of Tenancy by Expiration of Term or Notice to quit*	1230
III.	*By Landlord for Breach of Covenant under Right of Re-entry or Forfeiture to which Sect.* 14 *of the Conveyancing Act,* 1881, *applies*	1236
IV.	*By Landlord against Tenant for Nonpayment of Rent*	1240
V.	*By Mortgagee*	1247
VI.	*Action for Mesne Profits*	1249

(*a*) In the Jud. Acts this action is called an action for the recovery of land; but before these Acts it was called an action of ejectment, and is still generally so called. The Jud. Acts have abolished most of the previously existing differences between an action of ejectment and an ordinary action. The proceedings in an action for recovery of land are now, with a few exceptions, similar to those in an ordinary action. Only those points which are peculiar to this particular action are noticed in this chapter; on all other points the practice and procedure is the same as that in an ordinary action.

Sect. I.—In Ordinary Cases.

	PAGE
(1) *Nature of the Action, &c.*	1201
(2) *How Action now commenced*	1206
(3) *Joinder of Causes of Action*	1207
(4) *Service of Writ*	1208
(5) *Tenant to give Notice of Ejectment to Landlord*	1213
(6) *Appearance*	1213
(7) *Judgment in Default of Appearance*	1216
(8) *Pleadings*	1219
(9) *Judgment in Default of Delivery of Defence*	1220
(10) *Particulars*	1220
(11) *Staying Proceedings*	1221
(12) *Discovery — Inspection — Interrogatories*	1223
(13) *Receiver*	1224
(14) *Proceedings to Trial—The Trial*	1224
(15) *Judgment*	1225
(16) *Execution*	1226
(17) *Restitution*	1229
(18) *Appeal*	1230

(1) *Nature of the Action, &c.*

Chap. CVI.

Right to enter upon land without action.

Whenever a person entitled to land has a right of entry (excepting under a forfeiture for non-payment of rent, where there is no sufficient distress on the premises, and a formal legal demand of the rent is not dispensed with by the terms of the lease, and except in cases within sect. 14 of the *Conveyancing Act*, 1881), he may in a peaceable manner, and without using such violence as would amount to a forcible entry, enter and take possession without any legal formality (*b*). In general, however, and especially if the right of entry be contested, it is best to proceed by action.

Ejectment, the action for the recovery of land.

An action is now the mode of recovering the possession of land. Whenever the right of entry is taken away, the right to recover in an action is also gone. An action for not delivering possession of land or for specific performance of an agreement to deliver it may, in some cases, be maintained, but, in the former, damages only (and not the land itself) can be recovered. An action of ejectment will not lie against the Crown; and if brought, the proceedings may be set aside (*c*).

Equivalent to ancient entry.

The bringing of an action of ejectment is equivalent to the ancient entry (*d*), and when the action is founded on a forfeiture of

(*b*) *Taylor* v. *Cole*, 3 T. R. 295. See *Taunton* v. *Costar*, 7 T. R. 431: *Turner* v. *Meymott*, 1 Bing. 158; 7 Moore, 574: *Butcher* v. *Butcher*, 7 B & C. 399; 1 M. & R. 220: *Doe* d. *Roby* v. *Maisey*, 8 B. & C. 767: *Wildbor* v. *Rainforth*, Id. 4. A party may be indicted for a forcible entry. See 1 Russ. on Crimes, by Prentice, p. 404. As to what amounts to a forcible entry, see *Lows* v. *Telford*, 1 App. Cas. 414; 45 L. J., Ex. 613: *Edwick* v. *Howes*, 18 Ch. D. 199; 50 L. J., Ch. 577, *Fry*, J.: *Scott* v. *Matthew*, W. N. 1884, 209. As to trespass not lying because entry a forcible one, and as to the effect of a forcible entry, see *Beddall* v. *Maitland*, 17 Ch. D. 174; 50 L. J., Ch. 401: *Taylor* v. *Cole*, supra: *Newton* v. *Harland*, 1 Sc. N. R. 474: *Harvey* v. *Bridges*, 14 M. & W. 437; 1 Ex. 261, in error: *Davison* v. *Wilson*, 11 Q. B. 890; 17 L. J., Q. B. 196. A licence giving power to a landlord to eject without an action is void: *Edwick* v. *Howes*, supra.

(*c*) *Doe* d. *Legh* v. *Roe*, 8 M. & W. 579. The proper way to proceed to recover property in the possession of the Crown is by petition of right: *Marquis of Salisbury* v. *G. N. R. Co.*, 28 L. J., C. P. 40.

(*d*) Per *Willes*, J., *Grimwood* v. *Moss*, L. R., 7 C. P. at p. 364.

PART XIII.

a lease, operates as a conclusive election by the landlord to determine the lease (*e*).

Actual entry or notice, when necessary before action.

An actual entry upon the premises sought to be recovered, or a claim where an actual entry is impracticable, or a notice given to the tenant to quit at the end of his period of tenancy, or a demand of possession, is in some cases necessary before bringing an action of ejectment. An actual entry into lands is only necessary to avoid a fine with proclamations (*f*). The entry, to avoid a fine, must be made within five years after the fine has been levied and the proclamations completed; provided the party be not an infant or a married woman, or insane, or beyond seas at the time, and then within five years after the disability ceases (*g*). And by 4 & 5 *Anne*, *c.* 16, *s.* 16, no entry or claim shall be of force to avoid a fine with proclamations (or be sufficient within the 21 *Jac.* 1, *c.* 16, the statute which until lately governed the period of limitations in ejectment) unless the action be commenced within one year afterwards.

Notice to quit.

A notice to quit is, in general, necessary in order to determine a tenancy from year to year. The notice must be to quit at the end of the year of the tenancy, and must be given at least half a year (182 days) previously, except when the rent is payable on the usual quarterly feast-days, in which case notice given on or before one of such days to quit on the next but one is necessary and sufficient (*h*). Where the letting is for less than a year, the time of notice must in general be equal to the period of the letting (*i*), such being the general usage.

In the case of agricultural or pastoral holdings of not less than two acres where a half year's notice was formerly necessary, the Agricultural Holdings Act, 1883 (46 & 47 *V. c.* 61, *ss.* 33, 51; cp. the Agricultural Holdings Act, 1875 (38 & 39 *V. c.* 92, *ss.* 51, 59)), requires a year's notice. When a six months' notice is expressly agreed on, this statute does not apply (*k*).

The service of a notice to quit made at the house of the tenant upon a person whose duty it would be to deliver the notice to the tenant, is sufficient, although in fact the notice never was delivered to the tenant, the presumption being that it did reach him (*l*).

The notice must be certain and not optional; but where plaintiff gave the defendant six months' notice to quit on the 1st May, and on the same document gave further notice that if the defendant

(*e*) Id.: *Jones* v. *Carter*, 15 M. & W. 718: per *Blackburn*, J., in *Toleman* v. *Portbury*, L. R., 6 Q. B. at p. 250; affirmed, 7 Id. 344. See *Ex p. Dyke*, *In re Morrish*, 22 Ch. D. 410; 48 L. T. 305.

(*f*) *Berrington* v. *Parkhurst*, 2 Str. 1086: *Doe* d. *Compere* v. *Hicks*, 7 T. R. 433; 1 Saund. 319 b, &c.: *Doe* v. *Rollings*, 17 L. J., C. P. 270. Fines have been abolished, and other modes of assurance substituted for them by the 3 & 4 W. 4, c. 74; but the necessity of an entry to avoid fines previously commenced must still be kept in mind, especially as no limit of time has been prescribed for completing them. See *Doe* d. *Blight* v. *Pett*, 4 P. & D. 278; 11 A. & E. 842.

(*g*) 4 H. 7, c. 24.

(*h*) *Morgan* v. *Davies*, 3 C. P. D. 260. See the forms, Chit. Forms, p. 580.

(*i*) See Woodfall's "Landlord and Tenant:" *Doe* v. *Hazell*, 1 Esp. 94: *Doe* d. *Peacock* v. *Raffan*, 6 Esp. 4: *Huffill* v. *Armistead*, 7 C. & P. 56: *Jones* v. *Mills*, 10 C. B., N. S. 788; 31 L. J., C. P. 66.

(*k*) *Wilkinson* v. *Calvert*, 3 C. P. D. 360; 47 L. J., C. P. 679.

(*l*) *Tanham* v. *Nicholson*, L. R., 5 H. L. 561. See *Liddy* v. *Kennedy*, L. R., 5 H. L. 134.

retained possession
and made payable i
In a notice to qui
the fact of his age
case of a *particular*
In cases of tenan
the landlord or tena
effected by a deman
it seems has a right
the tenant being in
a reasonable time to
It is not necessar
of possession, as abo
if the tenant has dis
With respect to a
s. 25. *sub-s.* 5, provi
being to the possess
land as to which no
enter into the recei
been given by the n
the recovery of su
damages in respect o
in his own name o
lease or other contr
son" (*s*).
By 37 & 38 *V.*
which came into op
"After the commen
entry or distress, or
rent, but within tw
right to make such
suit, shall have firs
claims; or if such
through whom he cl
time at which the rig
such action or suit,
or bringing the samo
Sect. 2. "A right

(*m*) *Ahearn* v. *Bellme*
201; 48 L. J., Ex. 681;
(C. A.); diss. *Brett*, L.J
(*n*) See *Jones* v. *Phi*
3 Q. B. 567; 37 L. J., Q
(*o*) 2 Bl. Com. 146, &
v. *Street*, 4 N. & M. 42
amounts to a terminatio
nancy at will, Co. Litt. 5
Bennett v. *Turner*, 7 M
9 M. & W. 643, in erro
v. *M'Intosh*, 1 P. & D. 6
(*p*) *Doe* v. *M'Kaeg*, 10
The tenant may enter to
goods without being su
action of trespass, provid
no longer than is absol
sary for that purpose, a

retained possession after the 1st May the rent would be increased and made payable in advance, this was held a good notice (*m*).

In a notice to quit by a general agent, it seems unnecessary that the fact of his ageney should appear in the notice, though in the case of a *particular* or *special* agent it must do so (*n*).

Determination of tenancy at will.

In cases of tenancy at will, the will must be determined by either the landlord or tenant before action brought (*o*). This is generally effected by a demand of possession on the part of the landlord, who it seems has a right of entry immediately after the demand (*p*); but the tenant being in the position of a licensee would be entitled to a reasonable time to remove his goods (*q*).

Disclaimer of landlord's title.

It is not necessary to give a notice to quit, or to make a demand of possession, as above, before commencing an action of ejectment, if the tenant has disclaimed the title of the landlord (*r*).

By mortgagor.

With respect to actions by mortgagors, the *Judicature Act*, 1873, *s.* 25, *sub-s.* 5, provides that "A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession, or to enter into the receipt of the rents and profits thereof, shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person" (*s*).

Statute of Limitations (*t*).

By 37 & 38 *V. c.* 57 (Real Property Limitation Act, 1874, which came into operation on the 1st day of January, 1879), *s.* 1, "After the commencement of this Act no person shall make an entry or distress, or bring an action or suit, to recover any land or rent, but within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same."

Sect. 2. "A right to make an entry or distress, or to bring an

---

(*m*) *Ahearn* v. *Bellman*, 4 Ex. D. 201; 48 L. J., Ex. 681; 40 L. T. 771 (C. A.); diss. *Birett*, L.J.

(*n*) See *Jones* v. *Phipps*, L. R., 3 Q. B. 567; 37 L. J., Q. B. 173.

(*o*) 2 Bl. Com. 146, &c. See *Roe* v. *Street*, 4 N. & M. 42. See what amounts to a termination of a tenancy at will, Co. Litt. 55 b: *Doe* d. *Bennett* v. *Turner*, 7 M. & W. 226; 9 M. & W. 643, in error: *Lapierre* v. *M'Intosh*, 1 P. & D. 629.

(*p*) *Doe* v. *M'Kaeg*, 10 B. & C. 721. The tenant may enter to remove his goods without being subject to an action of trespass, provided he stays no longer than is absolutely necessary for that purpose, and does not disturb the landlord's possession.

(*q*) *Cornish* v. *Stubbs*, L. R., 5 C. P. 334: *Mellor* v. *Watkins*, L. R., 9 Q. B. 400.

(*r*) See *Doe* d. *Graves* v. *Wells*, 10 A. & E. 427; 2 P. & D. 396, as to an oral disclaimer. See *Doe* d. *Davies* v. *Evans*, 9 M. & W. 48: *Doe* d. *Williams* v. *Cooper*, 1 Sc. N. R. 36; 1 M. & Gr. 185: *Doe* d. *Burnett* v. *Long*, 9 Car. & P. 773: *Doe* d. *Wyatt* v. *Stagg*, 7 Sc. 690.

(*s*) Cp. *Fairclough* v. *Marshall*, 4 Ex. D. 37; 39 L. T. 389.

(*t*) See *Asher* v. *Whitelock*, 35 L. J., Q. B. 17: *Ecclesiastical Commissioners for England* v. *Rowe*, 48 L. J., Q. B. 152.

PART XIII.

action or suit, to recover any land or rent, shall be deemed to have first accrued, in respect of an estate or interest in reversion or remainder, or other future estate or interest, at the time at which the same shall have become an estate or interest in possession, by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land or rent, or some person through whom he claims, shall at any time previously to the creation of the estate or estates which shall have determined, have been in the possession or receipt of the profits of such land, or in receipt of such rent; but if the person last entitled to any particular estate on which any future estate or interest was expectant shall not have been in the possession or receipt of the profits of such land, or in receipt of such rent, at the time when his interest determined, no such entry or distress shall be made, and no such action or suit shall be brought, by any person becoming entitled in possession to a future estate or interest, but within twelve years next after the time when the right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent, shall have first accrued to the person whose interest shall have so determined, or within six years next after the time when the estate of the person becoming entitled in possession shall have become vested in possession, whichever of those two periods shall be the longer; and if the right of any such person to make such entry or distress, or to bring any such action or suit, shall have been barred under this Act, no person afterwards claiming to be entitled to the same land or rent in respect of any subsequent estate or interest under any deed, will or settlement, executed or taking effect after the time when a right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent, shall have first accrued to the owner of the particular estate whose interest shall have so determined as aforesaid, shall make any such entry or distress, or bring any such action or suit, to recover such land or rent."

Sect. 3. "If at the time at which the right of any person to make an entry or distress, or to bring an action or suit, to recover any land or rent, shall have first accrued as aforesaid, such person shall have been under any of the disabilities hereinafter mentioned (that is to say) infancy, coverture, idiotcy, lunacy, or unsoundness of mind, then such person, or the person claiming through him, may, notwithstanding the period of twelve years, or six years (as the case may be), hereinbefore limited shall have expired, make an entry or distress, or bring an action or suit, to recover such land or rent, at any time within six years next after the time at which the person to whom such right shall first have accrued shall have ceased to be under any such (*t*) disability, or shall have died (whichever of those two events shall have first happened)."

Sect. 4. "The time within which such entry may be made, or any such action or suit may be brought as aforesaid, shall not in any case after the commencement of this Act be extended or enlarged by reason of the absence beyond seas during all or any part of that time of the person having the right to make such

(*t*) See *Borrows* v. *Ellison*, 40 L. J., Ex. 131.

entry, or to bring such action or suit, or of any person through whom he claims."

Sect. 5. "No entry, distress, action, or suit shall be made or brought by any person who at the time at which his right to make any entry or distress, or to bring an action or suit, to recover any land or rent, shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within thirty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such thirty years, or although the term of six years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired."

Sect. 6 relates to possession under an assurance by a tenant in tail which does not bar the remainder.

By sect. 7, a mortgagor is to be barred at the end of twelve years from the time when the mortgagee took possession, or from the last written acknowledgment of his title.

By sect. 9, the Act is to be read as one with 3 & 4 *W.* 4, *c.* 27, *&c.*; and 7 *W.* 4 & 1 *V. c.* 28 is to be read with the Act.

It may be as well here to notice the following provisions in the County Courts Acts.

Where County Court has jurisdiction.

By 9 & 10 *V. c.* 95, *s.* 58, "the Court shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market or franchise, shall be in question; or in which the validity of any devise (*u*), bequest or limitation under any will or settlement may be disputed: or for any malicious prosecution, or for any libel or slander, or for criminal conversation, or for seduction or breach of promise of marriage."

But by 30 & 31 *V. c.* 142, *s.* 11, "All actions of ejectment where neither the value of the lands, tenements or hereditaments, nor the rent payable in respect thereof, shall exceed the sum of 20*l.* by the year may be brought and prosecuted in the County Court of the district in which the lands, tenements or hereditaments are situate." By *s.* 12, "The County Courts shall have jurisdiction to try any action in which the title to any corporeal or incorporeal hereditaments shall come in question where neither the value of the lands, tenements or hereditaments in dispute, nor the rent payable in respect thereof, shall exceed the sum of 20*l.* by the year, or in case of an easement or licence where neither the value nor reserved rent of the lands, tenements or hereditaments, in respect of which the easement or licence is claimed, shall exceed the sum of 20*l.* by the year: provided that the defendant in any such action of ejectment or his landlord may within one month from the day of service of the writ apply to a Judge at Chambers for a summons to the plaintiff to show cause why such action should not be tried in one of the superior Courts, on the ground that the title to lands or hereditaments of greater annual value than 20*l.* would be affected by the decision in such action; and on the hearing of such summons, the Judge, if satisfied that the title to other lands would

(*u*) In some editions of the statutes this word is printed demise.

PART XIII.

be so affected may order such action to be tried in one of the superior Courts, and thereupon all proceedings in the County Court in such action shall be discontinued." In an action under this section, the summons must be delivered to the bailiff forty clear days at least, and served thirty-five clear days, before the return day (*C. C. R.* 1875, *Ord. VIII. r.* 7), so as to give the defendant time to apply under sect. 12 to have the action tried in a superior Court. The "rent payable" in the above section means rent payable as between the litigant parties; and the jurisdiction of the County Court is not affected by the mere fact that the rent paid by sub-lessees who are not parties exceeds 20*l.* (*x*). The "value" means the actual marketable value, of which the rent payable may be a fair criterion (*y*). Where the County Court Judge assumes jurisdiction by deciding on conflicting evidence that the value does not exceed 20*l.*, the Court will not review his decision by prohibition (*x*); though it will do so when he assumes jurisdiction by acting on a wrong assumption as to a point of law (*y*). The County Court jurisdiction is extended to 50*l.*, in cases of ejectment by a landlord where the term has expired or been determined by notice (19 & 20 *V. c.* 108, *s.* 50), or in certain cases for non-payment of rent (*Id. s.* 52). As to the jurisdiction of the County Courts to try an ejectment by agreement of the parties, see 19 & 20 *V. c.* 108, *s.* 23.

(2) *How Action now commenced* (*z*).

How action now commenced.

An action for the recovery of land is commenced by a writ of summons issued as mentioned *Vol.* 1, p. 215 (*a*), and the proceedings, except as here noticed, are the same as in ordinary actions. The person who has the right to recover the possession should be the plaintiff (*b*), and the tenant in possession of the land sought to be recovered should be made defendant. The writ should be directed to all the tenants in possession by their names (*c*). Tenants

(*x*) *Re Brown* v. *Cocking*, L. R., 3 Q. B. 674; 37 L. J., Q. B. 250.

(*y*) *Re Elstone* v. *Rose*, L. R., 4 Q. B. 4; 38 L. J., Q. B. 6. In this case the County Court Judge having decided upon contradictory evidence as to value, the Court of Q. B. granted a prohibition, as he was clearly wrong in having deducted a ground rent payable to the superior landlord.

(*z*) In an action for recovery of land against a local board, notice of action is not necessary under sect. 264 of the Public Health Act, 1875 (38 & 39 V. c. 55). *Foat* v. *Mayor, &c. of Margate*, 11 Q. B. D. 299; 52 L. J., Q. B. 711.

(*a*) The fee on sealing the writ is ten shillings, which is paid by means of a stamp impressed on the writ before it is sealed at the office. The fee stamp to be impressed on sealing a concurrent, renewed, or amended writ is 2*s.* 6*d.* See Orders, post, App.

(*b*) As to when a mortgagor may sue, see ante p. 1203.

(*c*) See *Thompson* v. *Slade*, 25 L. J., Ex. 306: *Gulliver* v. *Smith*, 2 Ken. Rep. 511, where a labourer not paying rent, who occupied a house, was held to be tenant in possession. Before the C. L. P. Act, 1852, service of a declaration in ejectment on the churchwardens and overseers of a parish, who rented a house for harbouring some of the parish poor, and did not otherwise occupy the house than by placing the poor in it, was held sufficient. *Tupper* v. *Doe*, dem. *Mercer*, Barnes, 181. See *Doe* d. *Graves* v. *Wells*, 2 P. & D. 396; 10 Ad. & El. 427; *Doe* d. *Bennett* v. *Long*, 9 Car. & P. 773, as to a vacant possession.

in common can
the property to
It is presumed
as a plaintiff, w
instance (*e*), will
the case would
the proceedings
costs, to the sati
indemnity had b
avoid the costs o
the plaintiff's na
speedily as possil

By *R. of S. C*
unless by leave o
for the recovery o
or arrears of re
claimed, or any
contract under w
any wrong or inju
This rule appl
claim (*i*).
The leave to joi
must be obtained
ex parte applicatio
an action "for rec
seem that an act
nistration of perso
where the plaintiff
the same will, have
for recovery of an
his personalty (*o*).

(*d*) *Elliss* v. *Elliss*, 316; E., Bl. & E. 81; *bell* v. *Hamilton*, 13 Q
(*e*) *Doe* v. *Fillis*, 2 v. *Roe*, Id. 171. Quer dant's instance. And s 2 Jur. 861.
(*f*) *Doe* d. *Hurst* v. & E. 809: *Spicer* v. *T* 165.
(*g*) *Doe* v. *Figgins*, *Doe* d. *Hannah* v. *Plymouth*, 2 Chit. Rep *King*, 2 Dowl. 580; *S* 2 C. & J. 165. See Ch.
(*h*) See *Doe* d. *Shep* Chit. Rep. 171; Id. *Hurst* v. *Clifton*, supr of affidavit, Chit. Form
(*i*) *Compton* v. *Preste* 128; 47 L. T. 122; 51 L 30 W. R. 563.
(*k*) *Re Pilcher*, 11 Ch L. J., Ch. 587; 40 L. T. *Musgrave* v. *Stevens*,

in common can recover in ejectment in a joint writ the whole of the property to which they are entitled in common (*d*).

It is presumed that if the name of a party be inserted in the writ as a plaintiff, without his consent, the Court or a Judge, at his instance (*e*), will order it to be struck out (*f*), unless the justice of the case would be defeated; in which case they would only stay the proceedings temporarily, until a sufficient indemnity against costs, to the satisfaction of the Master, were given him (*g*). The indemnity had better be tendered before the action is brought, to avoid the costs of the application. The application to strike out the plaintiff's name or stay the proceedings should be made as speedily as possible after he has knowledge of the proceedings (*h*).

Striking out name of plaintiff inserted without consent.

(3) *Joinder of Causes of Action.*

By *R. of S. C., Ord. XVIII. r.* 2, "No cause of action shall unless by leave of the Court or a Judge be joined with an action for the recovery of land, except claims in respect of mesne profits or arrears of rent or double value in respect of the premises claimed, or any part thereof, and damages for breach of any contract under which the same or any part thereof are held or for any wrong or injury to the premises claimed."

This rule applies to a counterclaim as well as an original claim (*i*).

The leave to join claims, other than those specified in this rule, must be obtained before the writ is issued (*k*). It is obtained on an *ex parte* application. An action "to establish title to land" is not an action "for recovery of land" within this rule (*l*); but it would seem that an action for foreclosure is (*m*). Claims for administration of personal estate and to establish title to real estate where the plaintiff claimed both estates under a common gift in the same will, have been allowed to be joined (*n*). So have claims for recovery of an intestate's real estate and for administration of his personalty (*o*). A claim for recovery of a deed relating to the

(*d*) *Elliss* v. *Elliss*, 27 L. J., Q. B. 316; E., Bl. & E. 81: *Doe* d. *Campbell* v. *Hamilton*, 13 Q. B. 977.

(*e*) *Doe* v. *Fillis*, 2 Chit. 170: *Doe* v. *Roe*, Id. 171. Quære, if at defendant's instance. And see *Doe* v. ——, 2 Jur. 861.

(*f*) *Doe* d. *Hurst* v. *Clifton*, 4 Ad. & E. 809: *Spicer* v. *Todd*, 2 C. & J. 165.

(*g*) *Doe* v. *Figgins*, 3 Taunt. 440: *Doe* d. *Hannah* v. *Corporation of Plymouth*, 2 Chit. Rep. 170: *Doe* v. *King*, 2 Dowl. 580: *Spicer* v. *Todd*, 2 C. & J. 165. See Ch. XXX.

(*h*) See *Doe* d. *Shepherd* v. *Roe*, 2 Chit. Rep. 171; Id. 170: *Doe* d. *Hurst* v. *Clifton*, supra. See form of affidavit, Chit. Forms, p. 588.

(*i*) *Compton* v. *Preston*, 21 Ch. D. 138; 47 L. T. 122; 51 L. J., Ch. 680; 30 W. R. 563.

(*k*) *Re Pilcher*, 11 Ch. D. 905; 48 L. J., Ch. 587; 40 L. T. 832 (C. A.): *Musgrave* v. *Stevens*, W. N. 1881, 163 (C. A.): *Brandreth* v. *Shears*, W. N. 1883, 89.

(*l*) *Gledhill* v. *Hunter*, 14 Ch. D. 492; 49 L. J., Ch. 333, M. R., refusing to follow *Whetstone* v. *Dewis*, 1 Ch. D. 99; 45 L. J., Ch. 49; 33 L. T. 501, V.-C. H.: *Mayor, &c. of Norwich* v. *Brown*, 48 L. T. 898.

(*m*) *Hoar* v. *Lee*, V.-C. B., W. N. 1884, 241: *Horlock* v. *Ashbury*, 18 Ch. D. 229, *Fry*, J., affirmed on this point, 19 Id. 539; 46 L. T. 356, decided under stat. 3 & 4 W. 4, c. 27. But see contra, *Tawell* v. *Slate Co.*, 3 Ch. D. 629, *Jessel*, M. R. See *Suteliffe* v. *Wood*, 50 L. T. 755, where leave to add a claim for recovery of land to an action for foreclosure was refused. *Wood* v. *Wheater*, 22 Ch. D. 281; 52 L. J., Ch. 145; 47 L. T. 440; 31 W. R. 117.

(*n*) *Whetstone* v. *Dewis*, supra.

(*o*) *Kitching* v. *Kitching*, 24 W. R. 901; W. N. 1876, 225, M. R.

PART XIII.

land, or for recovery of personal estate comprised in the same instruments with the land, will be allowed to be joined in an action for recovery of the land (*p*). So will a claim for a receiver (*q*).

A claim for an injunction may be joined without leave (*r*).

If the plaintiff joins claims other than those allowed by the above rule, it has been held that the defendant does not waive the objection by appearing, but may raise it by his defence (*s*), and moreover that the plaintiff does not cure the objection by omitting the claims in his statement of claim (*s*). It is submitted, however, that the objection should be taken by summons to strike out the unauthorised claims.

(4) *Service of Writ.*

Service of writ.

The service should, if practicable, be made upon the defendant personally (*see ante, Vol.* 1, p. 232). As to the Court or Judge making an order for substituted or other service, or for the substitution of notice for service, *see Vol.* 1, p. 236. The writ may by leave be served out of the jurisdiction (*see Ord. XI. r.* 1 (a), *ante, Vol.* 1, p. 244). A service made on a Sunday is void (*t*).

It may be as well to make some few observations as to the mode of service before the *Com. Law Proc. Act*, 1852, of the declaration in ejectment, as they may assist in showing what kind of service may be allowed where personal service cannot be effected.

In general, before the above enactment, it was necessary that the party serving the declaration should deliver it personally to the tenant or his wife. It was not necessary to the validity of the service, however, that the tenant or his wife received the copy of the declaration; it was sufficient if it was tendered to him or her; after which it might be left at the place where the tender was made (*u*). Where the person serving the declaration began to read and explain it to the tenant, but before he could deliver it, the tenant turned him out of the house, and he then thrust the declaration under the door, it was held sufficient (*x*).

On serving the declaration, the notice at the foot of it had to be read over, or at least the purport of it had to be signified, and the nature and meaning of the service explained to the person upon whom it was served, so as to be fully understood by him (*y*). It was not sufficient to read it over without explaining it (*z*), but it

(*p*) *Cook* v. *Euchmarch*, 2 Ch. D. 111; 45 L. J., Ch. 504, M. R.

(*q*) *Allen* v. *Kennet*, 24 W. R. 845, M. R.

(*r*) *Kendrick* v. *Roberts*, 46 L. T. 59; 30 W. R. 365: cp. *Dennis* v. *Crompton*, W. N. 1881, 121.

(*s*) *Wilmott* v. *Freehold House Property Co.* (C. A.), 51 L. T. 552. But see *Mulkern* v. *Doerks* (Q. B. D.), 53 L. J., Q. B. 526; 51 L. T. 429, where it was held that the misjoinder was an irregularity which was waived by appearance.

(*t*) *Doe* d. *Warren* v. *Roe*, 8 D. & R. 342. And see *Doe* v. *Roe*, Id. 592; 5 B. & C. 764: *Doe* d. *Hine* v. *Roe*, 5 Sc. N. R. 174. But see *Goodtitle* v. *Thrustout*, Barnes, 183.

(*u*) *Bagshaw* v. *Toogood*, Barnes, 185: *Halsall* v. *Wedgwood*, Id. 174: *Goodtitle* v. *Thrustout*, Id. 183. And see *Douglas* v. ——, 1 Str. 575: *Sprightly* v. *Dunch*, 2 Burr. 1116: *Anon.*, 2 Chit. Rep. 185; *Doe* d. *Courthorpe* v. *Roe*, 2 Dowl. 441: *Doe* d. *Forbes* v. *Roe*, Id. 452: *Doe* d. *Visger* v. *Roe*, Id. 449.

(*x*) *Doe* d. *Frith* v. *Roe*, 3 Dowl. 569: *Doe* d. *Ross* v. *Roe*, 7 Sc. 816: *Doe* d. *Barrow* v. *Roe*, 1 Sc. N. R. 25: *Doe* d. *Mann* v. *Roe*, 11 M. & W. 77: *Doe* d. *Nash* v. *Roe*, 8 Dowl. 365.

(*y*) See *Doe* v. *Roe*, 3 Jur. 24: *Griffith* v. *Edwards*, 2 Jur., N. S. 584, V.-C. S.: *Edwards* v. *Griffith*, 15 C. B. 397.

(*z*) *Doe* d. *Wade* v. *Roe*, 6 Dowl. 51, C. P.

seems it was to
prudent to do be
Where differe
ferent tenants, e
the declaration,
tained against th
A service of the
possession was
addressed to all
possession of the
The declaration
himself or his w
where (*f*), even
or at the husban
anywhere else, p
time (*i*): but in a
premises. Servic
even where the
abroad (*k*). Servi
session was bad if
The modes of s
regular service on
now be considered

(*a*) *Doe* v. *Roe*, 1
Dowl. 199. See *Do*
Roe, 4 Dowl. 566.

(*b*) *Doe* d. *Bromley*
Rep. 141: *Doe* d. *E*
Moore, 578: *Doe* d.
Dowl. 66: *Doe* d. *Lo*
Cock, 4 B. & C. 259:
v. *Roe*, 8 Sc. 126: *D*
Roe, 3 M. & W. 279:
v. *Roe*, 1 D. & L. 657
v. *Roe*, 4 Dowl. 86.

(*c*) *Doe* d. *William*
Moore, 493: *Doe* d. *B*
C. B. 663. And see
v. *Roe*, 1 Chit. Rep.
Bailey v. *Roe*, 1 B. &
Hutchins v. *Roe*, 2 Dow
Clothier v. *Roe*, 6 Dow
Strickland v. *Roe*, 1
D. & L. 431, where th
on one of two execu
Bennett v. *Roe*, 7 C. B
Hewson v. *Roe*, 5 Dow
overseers not being join
Doe d. *Weeks* v. *Roe*, 5

(*d*) *Doe* d. *Overton* v.
1039.

(*e*) *Goodright* v. *Thr*
Bl. 800: *Doe* d. *Neale* v
263. In *Doe* d. *Walker*
& P. 11, the service was
who represented herse
tenant's wife, and it w
cient. The affidavit up

seems it was to explain it without reading it over (*a*); it was more prudent to do both.

Where different parts of the premises were in possession of different tenants, each of them must have been served with a copy of the declaration, otherwise a rule for judgment could only be obtained against the casual ejector as against those actually served (*b*). A service of the declaration on one of two or more *joint tenants* in possession was good service on all, if the notice to appear was addressed to all (*c*). Service on the acting partner of a firm in possession of the premises was held sufficient (*d*). Where several tenants.

The declaration should regularly have been served on the tenant himself or his wife (*e*). On the former it might be served anywhere (*f*), even abroad (*g*). On the latter, either on the premises, or at the husband's house, or place of business (*h*); or, it seems, anywhere else, provided she was living with her husband at the time (*i*): but in all other cases it must have been served upon the premises. Service on the wife on the premises was held sufficient, even where the husband had left the kingdom and had settled abroad (*k*). Service on the executors of the late tenant in possession was bad if they were not tenants in possession (*l*). Service in ordinary cases on the tenant or his wife.

The modes of service which might have been adopted, where regular service on the tenant or his wife could not be effected, will now be considered. When regular service could not be effected.

(*a*) *Doe* v. *Roe*, 1 Dowl. 428; 2 Dowl. 199. See *Doe* d. *Downs* v. *Roe*, 4 Dowl. 566.

(*b*) *Doe* d. *Bromley* v. *Roe*, 1 Chit. Rep. 141: *Doe* d. *Elwood* v. *Roe*, 3 Moore, 578: *Doe* d. *Slee* v. *Roe*, 8 Dowl. 66: *Doe* d. *Lord Darlington* v. *Cock*, 4 B. & C. 259: *Doe* d. *Timothy* v. *Roe*, 8 Sc. 126: *Doe* d. *Hindle* v. *Roe*, 3 M. & W. 279: *Doe* d. *Henson* v. *Roe*, 1 D. & L. 657: *Doe* d. *Grimes* v. *Roe*, 4 Dowl. 86.

(*c*) *Doe* d. *Williamson* v. *Roe*, 10 Moore, 493: *Doe* d. *Braby* v. *Roe*, 10 C. B. 663. And see *Doe* d. *Bromley* v. *Roe*, 1 Chit. Rep. 141: *Doe* d. *Bailey* v. *Roe*, 1 B. & P. 369: *Doe* d. *Hutchins* v. *Roe*, 2 Dowl. 418: *Doe* d. *Clothier* v. *Roe*, 6 Dowl. 291: *Doe* d. *Strickland* v. *Roe*, 1 B. C. 210; 4 D. & L. 431, where the service was on one of two executors: *Doe* d. *Bennett* v. *Roe*, 7 C. B. 127: *Doe* d. *Howson* v. *Roe*, 5 Dowl. 404. As to overseers not being joint tenants, see *Doe* d. *Weeks* v. *Roe*, 5 Dowl. 405.

(*d*) *Doe* d. *Overton* v. *Roe*, 9 Dowl. 1039.

(*e*) *Goodright* v. *Thrustout*, 2 W. Bl. 800: *Doe* d. *Neale* v. *Roe*, 2 Wils. 263. In *Doe* d. *Walker* v. *Roe*, 4 M. & P. 11, the service was on a woman who represented herself to be the tenant's wife, and it was held sufficient. The affidavit upon which the motion for judgment was made should state, in such a case as this, that the deponent believed such representation to be true. *Doe* d. *Grange* v. *Roe*, 1 Dowl., N. S. 274: *Doe* d. *Bremner* v. *Roe*, 8 Dowl. 135. And see *Doe* d. *Simmons* v. *Roe*, 1 Chit. Rep. 228: *Doe* d. *Smith* v. *Roe*, 1 Dowl. 614: *Doe* d. *Pamphilon* v. *Roe*, 1 Dowl., N. S. 186.

(*f*) Tidd, 1210; 2 Sellon, 96: *Wright* d. *Bayley* v. *Wrong*, 2 Chit. 185.

(*g*) *Doe* d. *Daniel* v. *Woodroffe*, 7 Dowl. 494; 8 L. J., Ex. 254.

(*h*) *Doe* d. *Graef* v. *Roe*, 6 Dowl. 456: *Doe* d. *Lord Southampton* v. *Roe*, 1 Hodges, 24: *Doe* d. *Morland* v. *Baylis*, 6 T. R. 765: *Doe* d. *Baddam* v. *Roe*, 2 B. & B. 55. And see *Right* v. *Wrong*, 2 D. & R. 84: *Doe* d. *Boullot* v. *Roe*, 7 Dowl. 463.

(*i*) *Doe* d. *Briggs* v. *Roe*, 2 C. & J. 202; 1 Dowl. 312: *Doe* d. *Mingay* v. *Roe*, 6 Dowl. 182: *Doe* d. *Wingfield* v. *Roe*, 1 Dowl. 693: *Doe* d. *Boullot* v. *Roe*, 6 Dowl. 463: *Doe* d. *Bath* (*Marquis of*) v. *Roe*, 7 Dowl. 692, where service on the wife "near the premises" was held sufficient for a rule *nisi* for judgment, the rule *nisi* to be served on the husband.

(*k*) *Doe* v. *Roe*, 1 D. & R. 514.

(*l*) *Doe* d. *Paul* v. *Hurst*, 1 Chit. 162.

PART XIII.

Service on child, &c., with proof that tenant received it before term.

Service on a child or servant, or other person than the tenant or his wife, would not in general suffice. Even service on the tenant's solicitor (*m*), or a receiver appointed by the Court of Chancery to manage an estate for an infant, was by itself insufficient (*n*). If, however, the tenant or his wife was not at home, and the declaration was served on his child (*o*) or servant, or, as it seems, on any other person (*p*), and it afterwards appeared from the acknowledgment of the tenant (*q*), or his solicitor (*r*), or from other sufficient evidence (*s*), that the tenant received the declaration before the first (*t*) day of the term, the service would be deemed sufficient (*u*). The wife's acknowledgment in such a case would not in general suffice (*x*). An acknowledgment made *within* the term of a receipt *before* the term was sufficient (*y*). But unless it appeared from the acknowledgment, or otherwise, that the declaration was received before the term, not even a rule *nisi* would be granted (*z*). Service on a clerk of the tenant (a solicitor), who, in his absence, accepted service thereof for him, was, in one case, held sufficient (*a*).

Service on servant, &c. when sufficient for a rule nisi.

Also, where service had been effected on a servant, child, &c., on the premises, if a reasonable probability of the declaration having come to the tenant's hands before the first day of term was made out, a rule *nisi* for judgment would be granted (*b*). See many cases as to this in 12th edition of this work, pp. 1023 *et seq.*

Service where tenant resided abroad or evaded service.

Where the tenant had absconded to another country (*c*), or resided abroad (*d*), or was clearly keeping out of the way to avoid

---

(*m*) *Doe* d. *Collins* v. *Roe*, 1 Dowl. 613.

(*n*) *Goodtitle* d. *Roberts* v. *Badtitle*, 1 B. & P. 385.

(*o*) See *Doe* d. *Emerson* v. *Roe*, 6 Dowl. 736.

(*p*) *Doe* d. *Harris* v. *Roe*, 2 Dowl. 607.

(*q*) *Doe* d. *Hambrook* v. *Roe*, 14 East, 441: *Doe* d. *Agar* v. *Roe*, 6 Dowl. 624: *Doe* d. *Harris* v. *Roe*, 1 Dowl., N. S. 704.

(*r*) *Doe* d. *Teverell* v. *Snee*, 2 D. & R. 5: *Anon.*, 2 Chit. Rep. 187. And see *Doe* v. *Roe*, 2 D. & R. 12: *Tenny* d. *Mills* v. *Cutts*, 1 Sc. 52: *Doe* d. *Gibbard* v. *Roe*, 9 Dowl. 844; 3 Sc. N. R. 363: *Doe* d. *Reynolds* v. *Roe*, 1 C. B. 711.

(*s*) See *Doe* d. *Eaton* v. *Roe*, 7 Sc. 124: *Doe* d. *Harrison* v. *Roe*, 1 B. C. Rep. 172.

(*t*) See *Doe* v. *Roe*, 5 B. & C. 764: *Doe* d. *Warren* v. *Roe*, 8 D. & R. 342: *Doe* d. *Hambrook* v. *Roe*, 14 East, 441: *Doe* d. *Halsey* v. *Roe*, 1 Chit. Rep. 100; R. T. T. 1 W. 4.

(*u*) See *Goodtitle* v. *Thrustout*, Barnes, 183: *Smith* v. *Hurst*, 1 H. Bl. 644.

(*x*) *Goodtitle* v. *Badtitle*, 1 B. & P. 384: *Doe* d. *James* v. *Staunton*, 1 Chit. Rep. 121; 2 B. & Ald. 371: *Doe* d. *Briggs* v. *Roe*, 1 Dowl. 312: *Doe* d. *Wilson* v. *Smith*, 3 Id. 403. See *Doe* v. *Roe*, 2 D. & R. 12: *Doe* d. *Finch* v. *Roe*, 5 Dowl. 225: *Doe* d. *Tucker* v. *Roe*, 2 Dowl. 775; 4 M. & Sc. 165.

(*y*) *Doe* d. *Smith* v. *Roe*, 4 Dowl. 265: *Doe* d. *Durrant* v. *Roe*, 8 Sc. 459: *Doe* d. *Figgins* v. *Roe*, 2 Sc. N. R. 448; 2 M. & G. 294. But see *Doe* d. *Emsley* v. *Roe*, 1 M. & G. 840.

(*z*) *Doe* d. *Finch* v. *Roe*, 5 Dowl. 225: *Doe* d. *Brittlebank* v. *Roe*, 4 M. & Sc. 562. See *Doe* d. *Marshall* v. *Roe*, 2 A. & E. 588; 4 N. & M. 553: *Doe* d. *Hine* v. *Roe*, 5 Sc. N. R. 171: *Doe* d. *Ginger* v. *Roe*, 9 Dowl. 336.

(*a*) *Doe* d. *Gawar* (or *Bower*) v. *Roe*, 6 Sc. N. R. 41; 2 Dowl., N. S. 923.

(*b*) See *Doe* d. *Watson* v. *Roe*, 5 C. B. 521.

(*c*) *Doe* d. *Robinson* v. *Roe*, 3 Dowl. 11.

(*d*) *Doe* d. *Treat* v. *Roe*, 4 Dowl. 278: *Doe* v. *Roe*, 4 B. & Ald. 653: *Doe* d. *Potter* v. *Roe*, 1 Hodg. 316: *Doe* d. *Robinson* v. *Roe*, 3 Dowl. 11: *Doe* d. *Harrison* v. *Roe*, 10 Price, 30: *Doe* d. *Mather* v. *Roe*, 5 Dowl. 552. See *Roe* d. *Fenwick* v. *Doe*, 3 Moore, 576; 1 D. & R. 514: *Doe* d. *Tabay* v. *Roe*, 1 D. & L. 118, B. C.: *Doe* d. *Chippendale* v. *Roe*, 7 C. B. 125: *Doe* d. *Pope* v. *Roe*, 7 M. & G. 602.

being served (*e*), a copy of the declaration should have been delivered (*f*), if possible, to his relation or servant, or some other person on the premises, to whom the notice should have been read over and explained; another copy also should in general have been affixed on the outer door, or on some conspicuous part of the premises; and thereupon, if it was made to appear to the satisfaction of the Court that due diligence had been used (*g*), and that the tenant resided abroad, or had absconded, or kept out of the way to avoid being served, the Court, on an affidavit of the facts, would grant a rule *nisi*, that the service on his relation, or servant, or by posting, &c., should be deemed good service, and direct in what manner the rule should be served (*h*). Where the tenant had absconded, leaving the key of the house in the care of a broker, with directions that he should let the premises, and a copy of the declaration had been served on the broker, and another copy had been affixed to the door of the house, the Court granted a rule absolute in the first instance (*i*). So, where the tenant absconded, leaving the key of the premises with his solicitor, to whom he by letter referred the landlord; it was held that service of the declaration and notice, by affixing a copy on the door of the premises, and by delivering another copy to the solicitor, was sufficient to entitle the landlord to judgment against the casual ejector (*k*). And where the service was effected by passing the copy of the declaration and notice under the roof of the dwelling-house, the tenant being at the time in the house, but refusing to open the door or to listen to the explanation which was attempted to be given of the object and notice of the service, a rule absolute was granted (*l*). See other cases upon this subject, in the 12th edition of this work, pp. 1023 *et seq.*

Service in case of lunacy.

As to service in case of lunacy, *see ante*, p. 1144, and as to proceedings against lunatics, *see Ch. C.* Before the Judicature Acts, where the tenant in possession was a lunatic, but no committee had been appointed either of her person or estate, a service upon her was held to be sufficient (*m*).

Service in case of bankruptcy.

Service on one of the assignees, who was tenant in possession, was

(*e*) *Doe* d. *Luff* v. *Roe*, 3 Dowl. 575.

(*f*) See *Doe* d. *Wilson* v. *Roe*, 7 Jur. 513, B. C.: *Doe* d. *Tarlny* v. *Roe*, 1 Chit. Rep. 506: *Anon.*, 2 Chit. 177.

(*g*) *Doe* d. *George* v. *Roe*, 3 Dowl. 9. See *Doe* d. *Tarlny* v. *Roe*, 1 Chit. Rep. 506: *Doe* d. *Nottage* v. *Roe*, 4 Sc. N. R. 706.

(*h*) *Douglass* v. ——, 1 Str. 575; Tidd, 9th ed. 1214: *Doe* d. *Mather* v. *Roe*, 5 Dowl. 552, and cases there cited: *Doe* d. *Osbaldiston* v. *Roe*, 3 Dowl. 456: *Doe* d. *Morpeth* v. *Roe*, 3 Dowl. 577: *Doe* d. *Luff* v. *Roe*, Id. 575. See *Roe* d. *Fenwick* v. *Doe*, 3 Moore, 576. It may be generally stated that wherever a *bonâ fide* attempt to effect regular service was frustrated by the fraud or artifice of the tenant, the Court would grant a rule *nisi*. See *Doe* d. *Frith* v. *Roe*, 3 Dowl. 569: and per *Tindal*, C. J., *Doe* d. *Wright* v. *Roe*, 6 Dowl. 455.

(*i*) *Doe* d. *Scott* v. *Roe*, 8 Sc. 468; 6 Bing. N. C. 207; 8 Dowl. 254. See *Doe* d. *Haggett* v. *Roe*, 6 Jur. 950, B. C.: *Doe* d. *Nottage* v. *Roe*, 1 Dowl., N. S. 750; 4 Sc. N. R. 706.

(*k*) *Doe* d. *Dovaston* v. *Roe*, 5 Sc. N. R. 174.

(*l*) *Doe* d. *Lowndes* v. *Roe*, 7 M. & W. 439.

(*m*) *Doe* d. *Gibbard* v. *Roe*, 3 Sc. N. R. 363; 3 M. & G. 87; 9 Dowl. 844: *Doe* d. *Brown* v. *Roe*, 6 Dowl. 27.. *Doe* v. *Wright*, Barnes, 190: *Doe* d. *Aylesbury* v. *Roe*, 2 Chit. Rep. 183: *Anon.*, Lofft. 401: *Goodtitle* v. *Badtitle*, 1 B. & P. 385: *Doe* d. —— v. *Roe*, 7 Jur. 725, B. C. 5 June, 1843.

PART XIII.

good service (*n*). As to proceedings against bankrupt, *see ante*, p. 1167.

Service on holders of chapel.

In ejectment for the recovery of a chapel which was vested in the minister, service on the chapel-warden, sexton or other person holding the keys, and fixing up the declaration on the chapel doors, would suffice, if the minister could not be found (*o*). Where the tenant in possession having quitted England, and not being likely to return, service was made on the clerk who was entrusted with the keys, on the wife of the tenant, on his gardener, on a person claiming as mortgagee, and by affixing a copy on the notice-board, the Court granted a rule absolute for judgment against the casual ejector (*p*). And service on the surviving lessees and the sextoness has been held sufficient (*q*); and so has service by serving the minister and one of the trustees, and fixing up a copy of the declaration and notice on the door (*r*).

Service on corporations, public companies, &c.

As to service of a writ of summons on a corporation, *see Vol.* 1, p. 235; and as to proceedings by and against corporations, *see ante*, p. 1050 (*s*).

Charitable institutions.

Where, before the *Com. Law Proc. Act*, 1852, the premises were in possession of a charitable association, service upon the matron on the premises, and upon the secretary, and a subsequent acknowledgment by the solicitor to the association, that he had received the declaration, was held sufficient for a rule *nisi* (*t*). Where part of the premises sought to be recovered was a free school, and service was effected on the master, and a copy of the declaration, &c. stuck on the door, a rule absolute for judgment was granted (*u*). In an ejectment brought for land taken by road commissioners, service effected upon one of the commissioners, and also upon their clerk, was considered insufficient (*x*).

Free school.

Road commissioners.

Service in case of vacant possession.

By *R. of S. C., Ord. IX. r.* 9, "Service of a writ of summons in an action to recover land may, in case of vacant possession, *when it cannot otherwise be effected*, be made by posting a copy of the writ upon the door of the dwelling-house or other conspicuous part of the property."

What a vacant possession.

It will be observed that this rule only applies when service cannot otherwise be effected, in which respect it differs from the former enactment on the subject (*y*). Where there is no tenant upon the premises, a distinction must be taken between cases where the tenant has actually *abandoned* the possession and where he still retains the virtual possession (*z*). In the former case

(*n*) *Doe* d. *Ask* v. *Roe*, 6 Jur. 238, B. C.: *Doe* d. *Groves* v. *Roe*, 6 Jur. 438, B. C.: *Doe* d. *Wyatt* v. *Roe*, 6 Jur. 781, B. C. See *Doe* d. *Baring* v. *Roe*, 6 Dowl. 456: *Doe* d. *Johnson* v. *Roe*, 1 Dowl., N. S. 493: *Doe* d. *Chadwick* v. *Roe*, 9 Dowl. 492.

(*o*) *Doe* d. *Scott* v. *Roe*, 6 Sc. 732.

(*p*) *Doe* d. *Diekens* v. *Roe*, 7 Dowl. 121; 6 Sc. 754: *Doe* d. *Scott* v. *Roe*, 8 Sc. 468.

(*q*) *Doe* d. *Kirschner* v. *Roe*, 7 Dowl. 97. And see *Anon.*, T. 1839, B. C.; 3 Jur. 460.

(*r*) *Doe* d. *Smith* v. *Roe*, 8 Dowl. 509: *Doe* d. *Gray* v. *Roe*, 7 Dowl. 700: *Doe* d. *Somers* v. *Roe*, 8 Dowl. 292.

(*s*) *Doe* d. *Coopers' Co.* v. *Roe*, 8 Dowl. 134: *Doe* d. *Fisher* v. *Roe*, 10 M. & W. 21; 2 Dowl., N. S. 225: *Doe* d. *Ross* v. *Roe*, 5 Dowl. 147: *Doe* d. *Martyns* v. *Roe*, 6 Sc. 610.

(*t*) *Doe* d. *Fishmongers' Co.* v. *Roe*, 2 Dowl., N. S. 689 (*South London Institution*).

(*u*) *Doe* d. *Smith* v. *Roe*, 8 Dowl. 509: *Doe* d. *King* v. *Roe*, 1 B. C. 39.

(*x*) *Doe* d. *White* v. *Roe*, 8 Scott, 146; 8 Dowl. 71.

(*y*) C. L. P. Act, 1852, s. 170.

(*z*) See *Doe* d. *Hindle* v. *Roe*, 6 Dowl. 393; 3 M. & W. 279: *Doe* d.

only can the possession be considered as vacant (*a*). Nice distinctions are drawn as to what is a *vacant* possession. Where the tenant of a house locked it up, and quitted it, it was held that the landlord should treat it as a vacant possession (*b*). But where the lessee of a public-house took another, and removed his goods and family, but left beer in the cellar, it was held that the possession was not vacant. In the case of land, on which there is no house or barn, if it be known where the tenant lives, he should be served (*c*).

(5) *Tenant to give Notice of Ejectment to Landlord.*

Tenant to give notice of ejectment to landlord.

By the *Com. Law Proc. Act*, 1852, *s.* 209, "Every tenant to whom any writ in ejectment shall be delivered, or to whose acknowledge shall come, shall forthwith give notice thereof to his landlord, or his bailiff or receiver, under penalty of forfeiting the value of three years' improved or rack rent of the premises, demised or holden in the possession of such tenant, to the person of whom he holds, to be recovered by action in any Court of common law having jurisdiction for the amount." (*See form of notice, Chit. Forms*, p. 584.)

(6) *Appearance.*

By defendant named in writ.

By Defendant named in Writ.]—The appearance by a defendant named in the writ is entered in the same manner as in ordinary cases. *See ante, Vol.* 1, *Ch. XV.* (*d*).

Appearance by defendant;

The defendant, or any or either of them (*d*), may appear as required by the writ. A tenant is not bound to appear, even although his landlord offer to indemnify him (*e*); nor can the landlord appear and defend the action in the tenant's name, without his consent (*f*); and if he do, the appearance will be irregular, and it may be set aside (*g*) at the instance of the tenant.

by landlord or person not named in writ.

By Landlord or Person not named in Writ.]—By *R. of S. C., Ord. XII. r.* 25 (*h*), "Any person not named as a defendant in a

---

Burrows v. *Roe*, 7 Dowl. 326: *Doe* d. *Atkins* v. *Roe*, 2 Chit. 179: *Doe* d. *Timothy* v. *Roe*, 8 Sc. 126: *Doe* d. *Chippendale* v. *Roe*, 7 C. B. 125: *Doe* d. *Lord Darlington* v. *Cock*, 4 B. & C. 259: *Doe* d. *Henson* v. *Roe*, 1 D. & L. 657.

(*a*) See *Doe* d. *Schorell* v. *Roe*, 3 Dowl. 691; 2 C. M. & R. 42, nom. *Doe* d. *Showell* v. *Roe*: *Doe* d. *Norman* v. *Roe*, 2 Dowl. 399, 428: *Doe* v. *Roe*, 4 Dowl. 173. See *Isaacs* v. *Diamond*, W. N. 1880, 75 (C. A.).

(*b*) *Doe* d. *Darlington* (*Lord*) v. *Cock*, 4 B. & C. 259; Harr. L. & T. 827.

(*c*) *Savage* v. *Dent*, 2 Str. 1064.

(*d*) As to the effect of the wife of the plaintiff appearing to defend an action of ejectment, see *Doe* d. *Merigan* v. *Daly*, 8 Q. B. 934. As to the mode of entering an appearance, in general, see Vol. 1, p. 254. A form of memorandum of appearance, with the impressed stamp for one or more defendants, can be obtained at the Inland Revenue Office, Royal Courts of Justice. The fee payable for each defendant is 2*s*. Where there is only one defendant, the stamp must be impressed; but where the appearance of more than one person is entered by the same memorandum, the fees for all persons beyond the first may be denoted by means of impressed or adhesive stamps. See Orders, post, Appendix.

(*e*) *Right* v. *Wrong*, Barnes, 173.

(*f*) *Roe* d. *Jones* v. *Doe*, Barnes, 178.

(*g*) 2 Sellon, 179; Barnes, 39: *Doe* d. *Turner* v. *Gee*, 9 Dowl. 612. See Vol. 1, p. 106, as to a solicitor defending an action without authority.

(*h*) See former enactment, C. L. P. Act, 1852, s. 172. In *Longbourne* v. *Fisher*, 47 L. J., Ch. 379; 38 L. T.

PART XIII.

writ of summons for the recovery of land may by leave of the Court or a Judge appear and defend, on filing an affidavit showing that he is in possession of the land either by himself or by his tenant."

This rule is for the purpose of preventing collusion between the plaintiff and the tenant. It is submitted, that a liberal construction will be given to it (*i*); and that the Court will allow the heir or devisee of the landlord, although the heir or devisee has never been in possession or received rent (*k*), a remainderman under the same title with the original landlord (*l*), or a mortgagee (*m*), to defend the action.

Upon an application to be allowed to appear and defend under the above rule, the Court will not consider nice questions as to the applicant's right of possession. It is enough if a *primâ facie* case be shown by affidavit, stating that the applicant is in possession by himself or his tenant (*n*). It seems that a tenant by elegit, who has recovered the premises in ejectment against the tenant, but has never been put into actual possession, will not be permitted to come in and defend (*o*). In ejectment by the devisees of a person who had died seised, and had let in as tenants the defendants, who had (since action) paid rent and attorned to the plaintiffs, it was held that certain persons who claimed to be entitled to an estate in remainder in fee, but who had never been acknowledged by the tenants, were not entitled to be let in to defend as landlords, they not being, by themselves or their tenants, in possession of the land in question (*o*). It seems that a landlord residing out of the jurisdiction of the Court, who can satisfy the Court or a Judge that he is in possession of the land either by himself or his tenant, has a right to come in and defend without giving security for costs (*p*).

The following cases were decided previous to the *Com. Law Proc. Act*, 1852, but are for the most part now applicable:—Where a lord, claiming by escheat, applied to be admitted a defendant in an action brought by one claiming as heir, the Court directed the lord to bring an ejectment, and the heir to be admitted to defend; and said that, if the lord refused, they would discharge his rule to be admitted; or if the heir refused, they would allow the lord to defend (*q*). But a mortgagee would not be permitted to come in and defend as landlord, unless he was interested in the result of the action, and was not put forward merely to further the purposes of the tenant (*r*). And if the question was whether the party claiming as landlord were landlord or not, as if the heirship of the party claiming as heir, or the will under which the party claimed to be

---

216, it was held, that an equitable tenant for life in possession was the proper person to defend an ejectment against the trustees.

(*i*) *Doe* v. *Birchman*, 9 A. & E. 669, per *Coleridge*, J.

(*k*) *Lovelock* v. *Doncaster*, 4 T. R. 122. And see 3 T. R. 783.

(*l*) *Lovelock* v. *Doncaster*, 3 T. R. 783.

(*m*) *Doe* d. *Tilyard* v. *Cooper*, 8 T. R. 645: *Doe* d. *Tubb* v. *Roe*, 4 Taunt. 887.

(*n*) *Croft* v. *Lumley*, 4 E. & B. 608; 24 L. J., Q. B. 78. See *Thompson* v. *Tomkinson*, 11 Ex. 442.

(*o*) *Whitworth and another* v. *Humphrey and others*, 5 H. & N. 185; 24 L. J., Ex. 113.

(*p*) *Butler* v. *Meredith*, 11 Ex. 185; 24 L. J., Ex. 239, *Parke*, B., diss.

(*q*) *Fairclaim* v. *Shamtitle*, 3 Burr. 1290.

(*r*) *Doe* d. *Pearson* v. *Roe*, 6 Bing. 613; 4 M. & P. 437.

devisee was the point to be contested, the case did not fall within the meaning of the enactment, the 11 *G.* 2, *c.* 19, *s.* 13 (*s*). Where the tenant came into possession under an agreement with the lessor of plaintiff for a term of years, but afterwards disclaimed the tenancy, the Court held that a stranger claiming title should not be admitted to defend: or that if he happened to be admitted, he should not be allowed to impeach the title of the lessor of the plaintiff, or to set up any other defence than that of which the tenant might have availed himself had he appeared (*t*).

Order to appear, &c. as landlord, &c.

If there are several actions brought by the same person against different tenants, and a party is desirous of defending all such actions as landlord, he should obtain an order for such purpose in each action (*u*). If there be any irregularity in the order, or it be obtained by a party who has no right to appear in the character of landlord, the Court or a Judge will discharge it, on an application made in due time (*x*), and generally with costs. The order is obtained on an *ex parte* application to a Master at Chambers.

As to setting aside a judgment by default, and allowing a landlord to defend, *see post*, p. 1218.

Appearance as landlord.

By *Ord. XII. r.* 26 (*y*), "Any person appearing to defend an action for the recovery of land as landlord, in respect of property whereof he is in possession only by his tenant, shall state in his appearance that he appears as landlord" (*y*).

By *Ord. XII. r.* 27 (*z*), "Where a person not named as defendant in any writ of summons for the recovery of land has obtained leave of the Court or a Judge to appear and defend, he shall enter an appearance (*a*), according to the foregoing Rules of this Order, intituled in the action against the party named in the writ as defendant, and shall forthwith give notice of such appearance to the plaintiff's solicitor, or to the plaintiff if he sues in person, and shall *in all subsequent proceedings be named as a party defendant* to the action."

Limiting defence on appearance to part of land.

Limiting Defence to part of Land claimed.]—By *Ord. XII. r.* 28 (*b*), "Any person appearing to a writ of summons for the recovery of land shall be at liberty to limit his defence to a part only of the property mentioned in the writ, describing that part with reasonable certainty in his memorandum of appearance, or in a notice intituled in the action and signed by him or his solicitor. Such notice shall be served within four days after appearance; and an appearance, where the defence is not limited as above mentioned, shall be deemed an appearance to defend for the whole."

By *Ord. XII. r.* 29, "The notice mentioned in the last preceding Rule shall be in the form No. 3 in Appendix A., Part II., with such variations as circumstances may require." *See the form in Chitty's Forms*, p. 584.

(*s*) See *Fairclaim* v. *Shamtitle*, 3 Burr. 1304: *Lovelock* v. *Doncaster*, 3 T. R. 783.

(*t*) *Doe* d. *Knight* v. *Smythe*, 4 M. & S. 347.

(*u*) See *Doe* d. *Faithful* v. *Roe*, 7 Dowl. 718.

(*x*) See *Doe* d. *Harwood* v. *Lippencott*, Ad. Eject 260: *Doe* d. *Carr* v. *Jordan*, 4 Sc. 370.

(*y*) See former enactment, C. L. P. Act, 1852, s. 173. See form, Chit. F. p. 586.

(*z*) See former rule 113, H. T. 1853.

(*a*) As to the mode of entering an appearance, see ante, Vol. 1, p. 254.

(*b*) See former enactment, C. L. P. Act, 1852, s. 174.

PART XIII.

The defendant should take care to limit his defence to that part of the property for which he intends to defend, when he does not wish to defend for the whole; otherwise he may be made liable for the costs of the action, although he succeed as to that part of the property which he really claims or intended to defend for (*e*).

Want of reasonable certainty in the above notice does not nullify it, but is only ground for an application to a Master for better particulars of the land defended for.

(7) *Judgment in Default of Appearance.*

Judgment in default of appearance.

By *Ord. XIII. r.* 8 (*d*), "In case no appearance shall be entered in an action for the recovery of land, within the time limited by the writ for appearance, or if an appearance be entered but the defence be limited to part only, the plaintiff shall be at liberty to enter a judgment that the person whose title is asserted in the writ shall recover possession of the land, or of the part thereof to which the defence does not apply."

The judgment is signed in the same way as an ordinary judgment for default of appearance. (*See the form, Chit. F.* p. 590.) As to judgment in default of appearance in general, *see ante, Vol.* 1, p. 259 *et seq.*

The plaintiff cannot sign judgment for his costs. The reason for which probably is that he might name as defendants persons who do not claim any title, and who are not in possession. As to his recovering such costs in an action for mesne profits as consequential damages, *see post*, p. 1251 (*e*).

By *Ord. XIII. r.* 9, "Where the plaintiff has indorsed a claim for mesne profits, arrears of rent, or damages for breach of contract, upon a writ for the recovery of land, he may enter judgment as in the last preceding Rule mentioned for the land (*f*); and may proceed as in the other preceding Rules of this Order mentioned as to such other claim so indorsed."

These rules are referred to *ante, Vol.* 1, p. 262.

Affidavit of service of writ.

Before signing judgment plaintiff must file an affidavit of service of the writ. *See ante, Vol.* 1, p. 260 (*g*). The affidavit should be made by the party who effected the service, though perhaps it may be made by one who was present at the time of the service, and who saw and heard what took place (*h*). It must state when, where, how and by whom service was effected. (*Ord. LXVII. r.* 9, *ante, Vol.* 1, p. 260.)

The affidavit should be properly intituled in the Court and with the names of the plaintiff and defendant. Where there are more than one plaintiff or defendant, it is sufficient to give the full name of the first, and state that there are others (*i*). Inverting the order

---

(*c*) See post, p. 1226: *Doe* d. *Davenport* v. *Rhodes*, 1 D. & L. 292; 11 M. & W. 600.

(*d*) See former enactment, C. L. P. Act, 1852, s. 177.

(*e*) See *Morris* v. *Barry*, 1 Wils. 1; 2 Str. 1180: *Symonds* v. *Page*, 1 C. & J. 29.

(*f*) One judgment will be signed, which, as to the land and any liquidated claim, will be final, and as to any damages claimed, interlocutory. As to the mode of proceeding on an interlocutory judgment, see ante, Vol. 1, p. 264.

(*g*) See Bitt. p. 8.

(*h*) *Goodtitle* v. *Badtitle*, 2 B. & P. 120. But see *Doe* d. *Hulme* v. *Roe*, 8 L. J. (N. S.), C. P. 16.

(*i*) Ord. XXXVIII. r. 2, ante, Vol. 1, p. 454: cp. *Doe* d. *Cousins* v. *Roe*, 4 M. & W. 68; 7 Dowl. 53:

of the plaintiffs is of no consequence (*k*). Perhaps, if the writ describes the plaintiff as suing as executor, assignee, &c., he need not be so described in the title of the affidavit (*l*). Where, before the *Com. Law Proc. Act*, 1852, the declaration described the lessor of the plaintiff as A. B. C., known at the time of the demise as A. B., an affidavit of service describing him only as A. B. was held sufficient. Before the *Com. Law Proc. Act*, 1852, it was necessary to swear to the service being on the "*tenant in possession :*" and merely stating a service on the "*person*" in possession, or upon a person whom deponent believed to be tenant in possession, was insufficient (*m*). So, stating the service to have been on the tenant "*as executor*" would not suffice (*n*); nor would an affidavit that the service was on a tenant in "*legal*" possession (*o*), nor on the "occupier" (*p*). But it is apprehended that it will now suffice simply to swear to a service on the defendants, stating them to be the tenants or persons in possession. Where, before the *Com. Law Proc. Act*, 1852, the premises were used as a gambling-house, and it was impossible to gain access or information, a rule *nisi* was, before the Act, granted on an affidavit, which stated service on the tenant in possession, as deponent believed (*q*). The affidavit must also be certain and positive as to the person served (*r*). An affidavit stating deponent to have "personally served J. T., W. E., J. E. and C. T., the four persons in possession, with true copies of the declaration," was held, before the *Com. Law Proc. Act*, 1852, not sufficient; it ought to have been sworn that each was personally served (*s*); but, as we have seen, *ante*, p. 1209, an affidavit of service upon one of several joint tenants will suffice, if it be sworn that they are such. An affidavit of service on the wife, "as she informed deponent, and as he verily believes," was deemed sufficient (*t*).

Where several tenants have been served with copies of the same writ, one affidavit of the service on all is sufficient (*u*). The affidavit, as we have just seen (*supra*), must, in general, state the service upon each of the tenants separately (*x*).

Doe d. *Thorn* v. *Roe*, 7 Sc. 172: *Doe* d. *Pryme* v. *Roe*, 8 Dowl. 340: *Doe* d. *Pennington* v. *Barrell*, 16 L. J., Q. B. 296.

(*k*) *Doe* v. *Butcher*, 2 Chit. 174: *Doe* d. *Montgomery* v. *Roe*, 1 D. & L. 695.

(*l*) *Doe* d. *Jenks* v. *Roe*, 2 Dowl. 55.

(*m*) Tidd, 1245: *Doe* v. *Roe*, 1 Chit. Rep. 574: *Doe* v. *Badtitle*, 1 Chit. Rep. 215; Id. 505: *Doe* d. *Oldham* v. *Roe*, 4 Dowl. 714: *Doe* d. *Fraser* v. *Roe*, 5 Dowl. 720: *Doe* d. *Dolby* v. *Hitchcock*, 2 Dowl., N. S. 1: *Doe* d. *Story* v. *Roe*, 5 Sc. N. R. 838.

(*n*) *Doe* v. *Roe*, 2 C. & J. 45; 1 Dowl. 295. See *Doe* d. *Rigby* v. *Roe*, 4 Dowl. 14.

(*o*) *Doe* d. *Osbaldiston* v. *Roe*, 30th April, 1832, Q. B.

(*p*) *Doe* d. *Jackson* v. *Roe*, 4 Dowl. 609. And see *Doe* d. *Jones* v. *Roe*, 5 Dowl. 226: *Doe* d. *Burrows* v. *Roe*, 7 Dowl. 326: *Doe* d. *Loraine* v. *Roe*, 6 Jur. 463, B. C.

(*q*) *Doe* d. *George* v. *Roe*, 3 Dowl. 22. See *Doe* d. *Hunter* v. *Roe*, 5 Dowl. 553.

(*r*) *Birkbeck* v. *Hughes*, Barnes, 173: *Harding* v. *Greensmith*, Barnes, 174: *Doe* d. *Simmons* v. *Roe*, 1 Chit. Rep. 223: *Doe* d. *Walker* v. *Roe*, 4 M. & P. 11: *Doe* d. *Smith* v. *Roe*, 1 Dowl. 614: *Doe* d. *Grange* v. *Roe*, 1 Dowl., N. S. 274.

(*s*) *Doe* d. *Levy* v. *Roe*, 7 Dowl. 102: *Doe* d. *Cock* v. *Roe*, 6 Sc. N. R. 961.

(*t*) *Doe* d. *Deily* v. *Roe*, Barnes, 194. See *Doe* d. *Jenkins* v. *Roe*, 5 Dowl. 155.

(*u*) 2 Sell. Prac. 178. See *Doe* d. *Vorley* v. *Roe*, 2 Dowl., N. S. 52.

(*x*) *Doe* d. *Ludford* v. *Roe*, 8 Dowl. 500.

PART XIII.

Where the service is good, but the affidavit defective, the defect may generally be remedied by a supplemental affidavit (*y*).

Setting aside judgment by default, &c.

Where regular.

Setting aside Judgment by Default.]—At any time before the writ of possession is executed, a Master, upon an affidavit of merits, may set aside or stay the proceedings, though the same be regular, on payment of costs, and let in the tenant (*z*) or other person claiming title (*a*) to defend the action. This indulgence to parties will sometimes be granted after execution executed (*b*), where there is no laches in making the application. The Court have set aside a regular judgment and writ of possession executed, on an affidavit by the solicitor for the landlord and tenant, that he had received instructions for entering an appearance, but had neglected it, owing to matters personally affecting himself, which had prevented his attending to it (*c*). In another case, a judgment by default was set aside after execution executed, on the ground that there had been no notice given to the landlord by the tenant in possession of the premises, and consequently no trial of the merits; and the terms made were, that the landlord should pay costs to the plaintiff, and that the possession should be, in the meantime, retained by the latter (*d*); and in a similar case, where the tenant was brought before the Court, he was made to pay the costs (*e*). And in cases of collusion between the plaintiff and the tenant, the Court will always thus interfere (*f*), and in most cases will order possession to be restored. A stranger to the action injuriously affected by the judgment may apply by summons to set it aside (*a*). Where the landlord, after notice to quit, brought an ejectment against the tenant, and obtained a verdict, and the latter still continuing in possession, he distrained on him for rent which became due after the verdict, and which he paid, it was held, that the execution in the ejectment could not be stayed, as the tenant should have disputed the distress (*g*). If the Court or Judge will not interfere, then the landlord's or tenant's remedy is to bring an ejectment and try his right (*h*).

Where irregular.

If judgment by default be signed irregularly, or sooner than the

(*y*) 2 Sell. 99; Tidd, 1216.

(*z*) *Doe* d. *Mullarkey* v. *Roe*, 11 A. & E. 333: *Anon.*, 2 Salk. 516: *Dobbs* v. *Passer*, 2 Str. 975: *Doe* v. *Troughton* v. *Roe*, 4 Burr. 1996.

(*a*) *Jacques* v. *Harrison* (C. A.), 12 Q. B. D. 165; 53 L. J., Q. B. 137; 50 L. T. 246; 32 W. R. 470.

(*b*) Ad. Eject. 223: *Dobbs* v. *Passer*, 2 Str. 975, where the Court observed, great inconvenience might arise from changing the possession; timber might be felled, &c. *Mason* v. *Hodgson*, Barnes, 250: *Doe* d. *Grocers' Company* v. *Roe*, 5 Taunt. 205: *Doe* d. *Mullarkey* v. *Roe*, 11 A. & E. 333: *Doe* d. *Shaw* v. *Roe*, 13 Price, 260: *Doe* d. *Ingram* v. *Roe*, 11 Price, 507: *Doe* d. *Meyrick* v. *Roe*, 2 C. & J. 682: *Doe* v. *Alderson*, 4 Dowl. 701: *Doe* d. *Poole* v. *Willes*, 6 D. & L. 253: *Doe* d. *Ledger* v. *Roe*, 3 Taunt. 506: *Goodtitle* v. *Badtitle*, 4 Taunt. 820: *Doe* d. *Thompson* v. *Roe*, 4 Dowl. 115; 3 Sell. 178.

(*c*) *Doe* d. *Shaw* v. *Roe*, 13 Price, 260: *Doe* d. *Mullarkey* v. *Roe*, 11 A. & E. 333.

(*d*) *Doe* d. *Ingram* v. *Roe*, 11 Price, 507: *Doe* d. *Meyrick* v. *Roe*, 2 C. & J. 682: *Doe* d. *Stratford* v. *Shail*, 2 D. & L. 161.

(*e*) *Doe* d. *Troughton* v. Burr. 1996.

(*f*) See *Doe* d. *Grocers' Comp.* *Roe*, 5 Taunt. 205: *Goodtitle* v. *Badtitle*, 4 Taunt. 820.

(*g*) *Doe* d. *Holmes* v. *Davis*, 2 Moore, 581.

(*h*) See 2 Sell. 230; Harr. L. & T. 708.

practice of the C
the tenant or th
As to restituti

Before the Ju
of ejectment. I
of the possession
In cases withi
against a tenant
has expired or h
may be specially
further statemer
In other cases, t
referred to *ante*,
Forms of state
R. of S. C. (*k*).
facts upon which
title step by step
mere general sta
grants in the pos
the land will not
As a general rule
under whom the
claim of title.
We have alread
joined in this acti
The defendant
ante, *Vol.* 1, p. 29
R. of S. C. (*m*).
an action for the r
his tenant need *p*
equitable estate
ground against a
except in the case
state by way of d
taken to be implied
the allegations of f
He may nevertheh
can prove except
where the defenda
fully the material
The words printed
held to be implied

(*i*) See *Doe* d. *Vern*
& E. 14; 2 N. & P.
Goodtitle d. *Murrell*
Dowl. 1009: *Doe* v.
R. 393.

(*k*) See forms, Chit

(*l*) *Philipps* v. *Phil*
127; 39 L. T. 329,
James, 26 Ch. D. 778
523; 50 L. T. 115; 3
Hodgins v. *Hickson*,

practice of the Court warrants, it will be set aside on application by the tenant or the landlord (*i*).

As to restitution, *see post*, p. 1229.

Restitution.

(8) *Pleadings.*

Before the Judicature Acts there were no pleadings in an action of ejectment. But since those Acts, in an action for the recovery of the possession of land, there are pleadings as in other actions.

Pleadings.

In cases within *Ord. III. r.* 6, where the claim is by a landlord against a tenant or persons claiming under a tenant, whose term has expired or has been duly determined by notice to quit, the writ may be specially indorsed with the statement of claim, and no further statement of claim is necessary (*see fully, post*, p. 1230). In other cases, the rules as to the delivery of a statement of claim, referred to *ante, Vol.* 1, p. 288 *et seq.*, apply.

Statement of claim.

Forms of statement of claim are given in the Appendix to the *R. of S. C.* (*k*). The statement of claim must state all the material facts upon which the plaintiff intends to rely, and should trace his title step by step from the person under whom he claims (*l*). A mere general statement that by assurances, wills, documents, and grants in the possession of the defendant the plaintiff is entitled to the land will not suffice, and may be struck out as embarrassing (*l*). As a general rule, the title should be deduced from the last person under whom the plaintiff claims who was in possession under a claim of title.

We have already seen, *ante*, p. 1207, what causes of action can be joined in this action.

The defendant must deliver a defence as in ordinary actions (*see ante, Vol.* 1, p. 297 *et seq.*). Forms are given in the Appendix to the *R. of S. C.* (*m*). By *R. of S. C., Ord. XXI. r.* 21, "No defendant in an action for the recovery of land who is in possession by himself or his tenant need *plead his title*, unless his defence depends on an equitable estate or right or he claims relief upon any equitable ground against any right or title asserted by the plaintiff. But, except in the cases hereinbefore mentioned, it shall be sufficient to state by way of defence that he is so in possession, and *it shall be taken to be implied in such statement that he denies, or does not admit, the allegations of fact contained in the plaintiff's statement of claim.* He may nevertheless rely upon any ground of defence which he can prove except as hereinbefore mentioned." Under this rule, where the defendant relies upon an equitable title, he must state fully the material facts and assurances on which he relies (*n*). The words printed in italics are new and merely express what was held to be implied in the former rule (*o*).

Defence.

(*i*) See *Doe* d. *Vernon* v. *Roe*, 7 A. & E. 14; 2 N. & P. 237. And see *Goodtitle* d. *Murrell* v. *Badtitle*, 9 Bowl. 1009: *Doe* v. *Hedges*, 4 D. & R. 393.

(*k*) See forms, Chit. F. p. 135.

(*l*) *Philipps* v. *Philipps*, 4 Q. B. D. 127; 39 L. T. 329, 556: *Davis* v. *James*, 26 Ch. D. 778; 53 L. J., Ch. 523; 50 L. T. 115; 32 W. R. 406: *Hodgins* v. *Hickson*, Ir. Q. B. D., 39 L. T. 644, where see form: *Selchon* v. *Cawley*, Ir. Ex. D., 64 L. T. (Jour.) 462. See *Evelyn* v. *Evelyn*, 42 L. T. 248.

(*m*) See Chit. F. p. 151.

(*n*) *Suteliffe* v. *James*, 40 L. T. 875; 27 W. R. 759.

(*o*) *Danford* v. *McAnulty* (H. L.), 8 App. Cas. 456; 52 L. J., Q. B. 652; 49 L. T. 207; 31 W. R. 817.

PART XIII.

Counterclaim.

The defendant may set up a counterclaim, as, for instance, for specific performance of an agreement for a lease. But probably a counterclaim would not be allowed, unless connected with the original cause of action (*p*). *Ord. XVIII. r. 2* (*ante*, p. 1207), as to joinder of causes of action, applies to a counterclaim (*q*).

(9) *Judgment in Default of Defence.*

Judgment in default of defence.

By *R. of S. C., Ord. XXVII. r.* 7, "In an action for the recovery of land, if the defendant makes default as mentioned in Rule 2, the plaintiff may enter a judgment that the person whose title is asserted in the writ of summons shall recover possession of the land, with his costs." The default mentioned in Rule 2 (*r*) here referred to is default in delivering a defence within the time limited for that purpose.

By *r.* 8, "Where the plaintiff has indorsed a claim for mesne profits, arrears of rent, or double value in respect of the premises claimed or any part of them, or damages for breach of contract upon a writ for the recovery of land, if the defendant makes default as mentioned in Rule 2, or if there be more than one defendant, some or one of the defendants make such default, the plaintiff may enter judgment against the defaulting defendant or defendants and proceed as mentioned in Rules 4 and 5" (*r*).

Where the defence purports to offer an answer to part only of the claim, the plaintiff may apply for leave to sign judgment for that part of the claim which is unanswered (*see R. of S. C., Ord. XXVII. r.* 9) (*s*).

(10) *Particulars.*

Particulars of land.

Particulars.]—If there is any uncertainty as to what property the action is brought to recover, a Master will order better particulars of the same to be given; and so, if there be any doubt in respect of what property the defendant defends for, further particulars of same may be ordered (*t*).

Particulars of premises, &c.

Where there is any doubt what premises the action is brought to recover, an application should be made for better particulars of the premises, otherwise the defendant may defend for premises which he does not intend to defend for, and to the possession of which he is not entitled, and thereby lose the costs of the action, although he has a good defence to the part he intended to defend for. The order for better particulars is obtained upon a summons taken out in the ordinary way (*u*). It would seem that the summons may be taken out before appearance. The order does not, it seems, operate as a stay of proceedings unless there is a clause to that effect (*x*).

(*p*) *Fitzgerald* v. *Kemp*, 6 L. R., Ir. 326: *Hildige* v. *O'Farrell*, 8 L. R., Ir. 158 (C. A.): *Carew* v. *Christopher*, 8 L. R., Ir. 252, affirmed 10 Id. 38.

(*q*) *Compton* v. *Preston*, 21 Ch. D. 138; 51 L. J., Ch. 680; 47 L. T. 122; 30 W. R. 563.

(*r*) Ante, Vol. 1, pp. 328 et seq. See *Gossett* v. *Cox*, [illegible] V. 1877, 134, V.-C. H.

(*s*) Ante, Vol. 1, [illegible].

(*t*) See C. L. P. Act, 1852, s. 195: *Doe* d. *Saxton* v. *Tucker*, 10 C. B. 896.

(*u*) See form of summons and order, Chit. Forms, p. 661.

(*x*) See *Doe* d. *Roberts* v. *Roe*, 2 D. & L. 673.

In some cases it may be advisable to obtain an order for particulars of the premises defended for. Such order is also obtained from a Master on a summons.

Of breaches of covenant, &c.

Where the action is brought for a forfeiture by breaches of covenant, &c., particulars of the breaches complained of are usually contained in the statement of claim, but a Master, upon summons, will, if necessary, order the plaintiff to give the defendant, after appearance entered, particulars of the covenants and breaches, &c. on which the forfeiture is founded (*y*). Where, in ejectment by landlord against tenant, particulars of breaches of covenant are delivered, for selling hay and straw off the land, removing manure, and non-cultivation, evidence of a breach of covenant by mismanagement in overcropping, or by deviating from the usual rotation of crops, is inadmissible (*z*). In ejectment brought by remainderman against lessee of the late tenant for life, on the ground that the lease was granted under a power not properly executed, a Master will, if necessary, order the plaintiff to give particulars of the alleged defects in the execution (*a*).

(11) *Staying Proceedings.*

Staying proceedings.

Staying Proceedings, &c.]—Upon the application of a defendant in a second action of ejectment, brought by a person claiming under the same title as the plaintiff in the first action, a Master at Chambers on a summons will stay the proceedings until the costs of the first action are paid (*b*), even though the parties are not precisely the same, provided that the title in both actions is substantially the same (*b*). Thus, where the first action was brought by the father of the present lessor of the plaintiff claiming by the same title against the present defendant's father (*c*); and where the first action was brought by an insolvent, the second ejectment being by his assignee (*d*), the proceedings were so stayed. And the proceedings would be stayed, although the lessor in the first action was discharged as an insolvent while in custody under an attachment for non-payment of such costs (*e*), or although the second action were not for the same lands as the first, provided the same title was in dispute (*f*). And it was not material, in this respect, in which

Until costs of former action paid.

(*y*) *Doe* d. *Birch* v. *Phillips*, 6 T. R. 597: *Tenny* v. *Moody*, 3 Bing. 3; 10 Moore, 252: *Sowter* v. *Hitchcock*, 5 Dowl. 724. See form of particulars, Chit. Forms.

(*z*) *Doe* d. *Winnall* v. *Broad*, 2 M. & G. 523; 2 Sc. N. R. 685.

(*a*) *Doe* d. *Lord Egremont* v. *Williams*, 7 Q. B. 686.

(*b*) *Tichborne* v. *Mostyn*, L. R., 8 C. P. 29; 41 L. J., C. P. 113: *Harvey* d. *Beal* v. *Baker*, 2 Dowl., N. S. 75. And see *Doe* d. *Bailey* v. *Bennett*, 9 Dowl. 1012, in which case it was held that the lessor of the plaintiff, in answer to a rule to stay proceedings upon the above ground, need not show under what title he claims: it is sufficient to show that he does not claim under the same title which was previously litigated. See also *Doe* d. *Mudd* v. *Roe*, 8 Dowl. 444: *Doe* d. *Pinehard* v. *Roe*, 4 East, 585: *Lord Coningsby's case*, 1 Str. 548.

(*c*) *Doe* d. *Feldon* v. *Roe*, 8 T. R. 645. And see *Doe* d. *Pinehard* v. *Roe*, 4 East, 585: *Doe* d. *Chambers* v. *Law*, 2 W. Bl. 1180: *Doe* d. *Hamilton* v. *Hatherly*, 2 Str. 1152: *Doe* d. *Blackburn* v. *Standish*, 2 Dowl., N. S. 26.

(*d*) *Doe* d. *Standish* v. *Roe*, 5 B. & Ad. 878.

(*e*) *Doe* d. *Heighley* v. *Harland*, 10 Ad. & E. 761. And see *Benn* v. *Denn*, Barnes, 180: *Stilwell* v. *Clarke*, 3 Ex. 264.

(*f*) *Keene* d. *Angel* v. *Angel*, 6 T. R. 740: *Doe* d. *Heighley* v. *Harland*,

PART XIII.

Court the former action was (*g*), or whether there was any plea or consent-rule in the former ejectment, or whether the lessor in the former ejectment ever entered into the consent-rule (*h*). And where a defendant in ejectment, who had improperly obtained a tenant right to property sought to be recovered, was held estopped from disputing the lessor's title, and he afterwards brought another ejectment in respect of property part of the same estate, he was compelled to pay the costs of the action in which he had been defendant, before proceeding (*i*). Also, where the defendant, after verdict against him, brought a writ of error, and, pending the writ, brought a new ejectment to recover the same premises, the Court stayed proceedings in the new action until he quitted possession, or the tenants attorned to the lessor of plaintiff in the former action (*k*). Besides the costs of the former ejectment, the Court or a Judge would in some cases also oblige the party to pay the *costs* of the action for mesne profits (*l*); but in no case would they oblige him to pay the *damages* in such action, however vexatious the proceedings of the lessors of the plaintiff might have been (*m*).

When not.

But if the lessor of the plaintiff, upon discovering a material mistake before trial, abandoned that ejectment and brought another (*n*), or abandoned his suit in one Court and brought a new action in another (*o*), the Court or a Judge would not stay proceedings until the costs of the former action were paid, particularly if the proceedings did not appear to be vexatious (*p*). Nor would they stay proceedings if the first action were brought without the authority of the lessor of the plaintiff so that he could have had no control over it (*q*). So, if the plaintiff were nonsuit, &c. in the first action, by the fraud or perjury of the other party, the proceedings would not be stayed in the second action (*r*). And the Court refused to stay proceedings in an ejectment, until the taxed costs of a suit in equity brought by the same party for the recovery of the same premises were paid (*s*). And the Court refused to stay the proceedings in a writ of right, until the costs of a prior ejectment for the same property were

10 Ad. & E. 761: *Doe* d. *Brayne* v. *Bather*, 12 Q. B. 941; 18 L. J., Q. B. 2, where the wife was made one of the lessors of the plaintiff in the second action, and the ejectments were against different defendants: *Tichborne* v. *Mostyn*, L. R., 8 C. P. 29; 41 L. J., C. P. 113.

(*g*) *Lord Coningsby's case*, 1 Str. 548: *Grumble* v. *Bodily*, Id. 554; 8 Mod. 225: *Doe* v. *Law*, 2 W. Bl. 1158: *Anon.*, 1 Salk. 255: *Doe* d. *Carthew* v. *Simeon*, 1 C. B. 610.

(*h*) *Smith* v. *Barnardiston*, 2 W. Bl. 904: *Doe* v. *Langdon*, 5 B. & Ad. 864.

(*i*) *Doe* v. *Shadwell*, 7 Dowl. 527: *Thrustout* v. *Holdfast*, 6 T. R. 223: *Doe* v. *Stevenson*, 3 B. & P. 22.

(*k*) *Fenwick* v. *Grosvenor*, 1 Salk. 258.

(*l*) *Doe* d. *Pinchard* v. *Roe*, 4 East, 585: *Doe* d. *Green* v. *Packer*, 2 Dowl. 373.

(*m*) *Doe* d. *Church* v. *Barclay*, 15 East, 233.

(*n*) *Short* v. *King*, 2 Str. 681: *Thrustout* v. *Troublesome*, 2 Id. 1099.

(*o*) *Doe* d. *Selby* v. *Alston*, 1 T. R. 491.

(*p*) See *Doe* d. *Blackburn* v. *Standish*, 2 Dowl., N. S. 26. The defendant in this case was the heir of the defendant in the former ejectment, to whom the costs were payable in his lifetime, and whose executors were entitled to receive them.

(*q*) *Souter* v. *Watts*, 2 Dowl. 263.

(*r*) *Doe* d. *Rees* v. *Thomas*, 4 D. & R. 145; 2 B. & C. 622.

(*s*) *Doe* d. *Williams* v. *Winch*, 3 B. & Ald. 602. And see *Murphy* v. *Cadell*, 2 B. & P. 137: *Bowyear* v. *Bowyear*, 2 Dowl. 207.

paid (*t*). And w
ejectment broug
seizing goods or
proceedings unti
Court of Commo
of ejectment on
ground that anot
Queen's Bench i
rule for a nonsu
ejectment for lan
to B., who recov
succeeded in a se
lands in the cou
paid, the Court w
of ejectment bro
the county of C.,
unless B.'s heir w
save by estoppel
ings in a second
where the lessor o

Where several
same premises in
motion, or a Judg
but one action to
plaintiff pay the c
to stay the proce
payment of rent,
previously been br
action a rule for a

If the title of th
the action, the Cou
has a right to proc

As to staying p
p. 1238.

As to staying pr
upon payment of r

As to staying p
mortgagor, *see post*,

(12) *Di*

The defendant in
to make an affida

(*t*) *Chatfield* v. *Sout*
10 Moore, 572: *Bowyea*
M. & Sc. 65; 9 Bing. 67

(*u*) *Carnaby* v. *Welb*

(*x*) *Doe* d. *Henry*
Sc. N. R. 818; 2 Dow
4 M. & Gr. 987.

(*y*) *Doe* d. *Evans* v.
L. 119.

(*z*) *Benn* v. *Denn*,
See the remarks of *Den*
this case in *Doe* v. *Ha*
E. 761. See also *Bea*
8 D. & R. 42: *Stilwe*

paid (*t*). And where an unsuccessful defendant in an action of ejectment brought an action against the lessors of the plaintiff for seizing goods on the land in question, the Court refused to stay proceedings until the costs of the ejectment were paid (*u*). The Court of Common Pleas refused to stay the proceedings in an action of ejectment on a forfeiture for non-payment of rent, on the mere ground that another ejectment had previously been brought in the Queen's Bench in respect of a former forfeiture, in which action a rule for a nonsuit was pending (*x*). Where A., the defendant in ejectment for land in the county of C., had attorned and paid rent to B., who recovered, but did not pay costs, and A. afterwards succeeded in a second action brought by B. upon the same title for lands in the county of G., the costs of which had also not been paid, the Court would not stay proceedings in a subsequent action of ejectment brought by A. against the heirs of B., for the land in the county of C., till the costs of the former ejectment were paid, unless B.'s heir would undertake not to rely on his ancestor's title, save by estoppel only (*y*). The Court refused to stay the proceedings in a second ejectment until the costs of the first were paid, where the lessor of the plaintiff was in custody for those costs (*z*).

Where several actions brought.

Where several ejectments were unnecessarily brought for the same premises in the names of the same claimants, the Court, on motion, or a Judge at Chambers, would order the proceedings in all but one action to be stayed, and in some cases would make the plaintiff pay the costs of the application (*a*). But the Court refused to stay the proceedings in an ejectment on a forfeiture for non-payment of rent, on the mere ground that another ejectment had previously been brought in respect of a former forfeiture, in which action a rule for a nonsuit was pending (*b*).

Where title determines.

If the title of the plaintiff determines after the commencement of the action, the Court will not stay the proceedings, as the plaintiff has a right to proceed for the recovery of his costs (*c*).

Or forfeiture.

As to staying proceedings in ejectment for forfeiture, *see post*, p. 1238.

For non-payment of rent.

As to staying proceedings in ejectment for non-payment of rent, upon payment of rent due, together with the costs, *see post*, p. 1245.

On application of mortgagor.

As to staying proceedings in ejectment by mortgagee against mortgagor, *see post*, p. 1247.

(12) *Discovery, Inspection and Interrogatories.*

The defendant in an action for recovery of land may be ordered to make an affidavit of documents (*d*); even though he may be

(*t*) *Chatfield* v. *Souter*, 3 Bing. 167; 10 Moore, 572: *Bowyear* v. *Bowyear*, 3 M. & Sc. 65; 9 Bing. 670; 2 Dowl. 207.

(*u*) *Carnaby* v. *Welby*, 7 Dowl. 315.

(*x*) *Doe* d. *Henry* v. *Gustard*, 4 Sc. N. R. 818; 2 Dowl., N. S. 615; 4 M. & Gr. 987.

(*y*) *Doe* d. *Evans* v. *Snead*, 2 D. & L. 119.

(*z*) *Benn* v. *Benn*, Barnes, 180. See the remarks of *Denman*, C. J., on this case in *Doe* v. *Harland*, 10 A. & E. 761. See also *Beaven* v. *Robins*, 8 D. & R. 42: *Stilwell* v. *Clarke*, 3 Ex. 264; 18 L. J., Ex. 165.

(*a*) See Harr. L. & T. 847: *Doe* d. *Carthew* v. *Brenton*, 6 Bing. 469; 4 M. & P. 186.

(*b*) *Doe* d. *Henry* v. *Gustard*, 5 Sc. N. R. 818; 2 Dowl., N. S. 615.

(*c*) See *Thrustout* v. *Grey*, 2 Str. 1056; C. L. P. Act, 1852, s. 181: *Spicer* v. *Dodd*, 1 Dowl. 306; 2 C. & J. 165: *Doe* d. *Cozens* v. *Cozens*, 9 Dowl. 1040.

(*d*) *Wentmore* v. *Hagley*, 46 L. T. 741. But see *Daniel* v. *Ford*, 47 L. T. 575.

PART XIII.

entitled to object to the production of the documents (*e*), but he will not, as a general rule, be ordered to make an affidavit unless the Court is satisfied upon the pleadings or upon affidavit that the plaintiff has a *bonâ fide* cause of action (*f*). The order will not, at least in ordinary cases, be made before the statement of claim is delivered (*g*). Neither party will be compelled to produce deeds or documents which he swears relate exclusively to his own title, and not to that of his opponent, and do not tend to support the latter (*see ante, Vol.* 1, p. 501).

The plaintiff may put to the defendant interrogatories directed to matters relevant to the plaintiff's case, and they must be answered (*h*); but interrogatories as to the defendant's case and title are not admissible (*i*).

See as to discovery and inspection, *ante, Vol.* 1, p. 491 *et seq.*, and as to interrogatories, *ante, Vol.* 1, p. 515 *et seq.*

(13) *Receiver.*

In proper cases a receiver may be appointed to receive the rents and profits of the property pending the action (*k*). This has been done in an action by a mortgagee (*l*) and in an action by a reversioner under a proviso for re-entry for breach of covenant (*m*).

(14) *Proceedings to Trial—The Trial.*

Proceedings to trial.

The proceedings to trial and at the trial are the same, except in the particulars noticed below, as in ordinary cases. As to a trial at Nisi Prius, *see Vol.* 1, *Ch. LXV.*

Trial.

Where party does not appear at.

Before the Judicature Acts, if the plaintiff appeared at the trial but the defendant did not, the former was entitled to recover without any proof of his title (*see Com. Law Proc. Act*, 1852, *s.* 183; *R.* 144, *H. T.* 1853); and this is the practice now frequently adopted (*n*), though some of the Judges think that *Ord. XXXV. r.* 32, noticed *Vol.* 1, p. 625, applies to an action of ejectment, and that the same course ought to be pursued in this action as in others where the plaintiff appears at the trial and the defendant does not. In either case the jury must be sworn and find a verdict.

Right of parties to be heard separately.

It seems that, if there be several plaintiffs, they cannot be heard separately by counsel, although they are separately interested (*o*).

(*e*) *New British Mutual Investment Co.* v. *Peed*, 3 C. P. D. 196: *Fortescue* v. *Fortescue*, 34 L. T. 847. As to the last case, see *Taylor* v. *Batten*, 4 Q. B. D. 85: *Taylor* v. *Oliver*, 34 L. T. 902.

(*f*) *Philipps* v. *Philipps*, 40 L. T. 815.

(*g*) Id.

(*h*) *Lyell* v. *Kennedy* (H. L.), 8 App. Cas. 217; 52 L. J., Q. B. 385; 48 L. T. 585.

(*i*) Id. at p. 223: *Horton* v. *Bott*, 2 H. & N. 249; 26 L. J., Ex. 267.

(*k*) *Real and Personal Advance Co.* v. *McCarthy*, 40 L. T. 878; and the cases cited ante, Vol. . p. 422.

(*l*) *Newman* v. *Redgrave*, 50 L. J., Ch. 801.

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

(*n*) Per *Lopes*, J., *Donne* v. *Fulbrow*, February 12th, 1882, recovery on forfeiture: per Id. *Russell* v. *Crump*, March 14th, 1882, *ex rel. edit.*; accord. Roscoe on Evidence, 13th ed. 921, citing *Steele* v. *Prendergast*, Cor. *Cockburn*, C. J., and *Steel* v. *Roberts*, Cor. *Manisty*, J., Sitt. in Middx., H. S. 1878.

(*o*) *Doe* d. *Fox* v. *Bromley*, 6 D. & R. 292.

And if a landlord and tenant defend by different solicitors, and have different counsel, but it appears that the tenant claims no title but what he derives from the landlord, the Judge at the trial will only allow one counsel to address the jury for the defence; but the party's counsel who does not address the jury will be at liberty to cross-examine, and also to call witnesses (*p*). As to the right in general of parties to be heard separately on a trial, *see Vol.* 1, p. 634.

As to making amendments at the trial, *see Vol.* 1, p. 646 (*q*). Where an ejectment was brought in the name of a plaintiff who was the *cestui que trust*, an amendment was allowed at the trial by adding the names of the trustees (*r*). Amendments at the trial.

Where damages are claimed they should be assessed at the trial. As to the action for mesne profits, *see post*, p. 1249. As to recovering on the trial of an ejectment by landlord against tenant damages for mesne profits, *see Com. Law Proc. Act*, 1852, *s.* 214, *post*, p. 1235. As to damages.

15. *Judgment.*

As to judgment in general, and when it may be signed, *see Vol.* 1, p. 764. Upon a finding for the plaintiff, judgment may be given and signed, and execution issued for the recovery of possession of the property, or such part thereof as the jury shall find the plaintiff entitled to, and for costs when the plaintiff is entitled to recover them (*s*). Judgment—for plaintiff;

Where the lessor of the plaintiff, after obtaining a verdict and judgment, delayed to tax his costs (although apparently for the purpose of recovering the extra costs in an action for mesne profits), a Judge had no authority to order that the defendant should be at liberty to enter satisfaction on the record, unless the lessor of the plaintiff taxed his costs within a limited time (*t*). If there are several defendants, and the plaintiff has a judgment against them with costs, each of them is liable for the entire costs, even although they defended severally (*u*).

Upon a finding for the defendants, or any of them, judgment may be given and signed, and execution issued for costs, when they or he is entitled to recover them against the plaintiffs (*x*). for defendant.

(*p*) *Doe* d. *Hogg* v. *Tindale*, 3 Car. & P. 565.

(*q*) *Doe* v. *Leach*, 3 Se. N. R. 509: *Doe* v. *Hall*, 1 D. & L. 49.

(*r*) *Blake* v. *Done*, 7 H. & N. 465; 31 L. J., Ex. 100. In this case the trustees were in Court, and consented to their names being inserted. The real question in dispute was the competence of a testator to make a will. See *Frampton* v. *Williams*, 2 F. & F. 603, and ante, p. 1213, n. (*h*). As to adding plaintiffs, see ante, p. 1021.

(*s*) See C. L. P. Act, 1852, s. 185. As to ordering judgment at the trial, see Vol. 1, p. 653; as to the motion for judgment, see Vol. 1, p. 755; and as to costs, see Vol. 1, p. 671.

(*t*) *Doe* d. *Drax* v. *Filliter*, 11 M. & W. 80; and per *Parke*, B., "I think, however, that the defendant should try the experiment of an application for a judge's order upon the lessor of the plaintiff to deliver his bill of costs, and then he may tax upon that. There ought certainly to be some mode of enabling the defendant to pay the taxed costs."

(*u*) Bull. N. P. 335, 336. As to the plaintiff, when he had a verdict, before the Jud. Acts, being entitled to the general costs of the cause against a defendant who had limited his defence to a part, see *Johnson* v. *Mills*, 37 L. J., C. P. 57.

(*x*) Cp. C. L. P. Act, 1852, s. 186; note (*s*), supra.

PART XIII.

If several defendants defend jointly, and succeed and get judgment for costs, the plaintiff may pay the costs to which of them he pleases (*y*). Where the defendant defends for the whole of the premises claimed, and the plaintiff only succeeds as to part, the defendant is entitled to have the verdict entered for him for the residue (*z*).

Costs.

The costs in actions for recovery of land are regulated by *Ord. LXV. r.* 1. This rule, and the various decisions on it, will be found *ante, Vol.* 1, p. 671 *et seq.* Under it the costs, when the action is tried by a Judge alone, are in his discretion, but when it is tried with a jury the costs follow the event unless the Judge or the Court for good cause otherwise orders. As to what is good cause, *see ante, Vol.* 1, p. 679. In an action tried with a jury, when there are several issues and each party succeeds as to some, the costs of each issue are apportioned, and each party gets the costs of the issues on which he succeeds (*a*); but the plaintiff, if he succeeds in recovering the property claimed, or part of it, gets the general costs of the cause unless an order is made depriving him of them (*b*). The fact that the plaintiff fails as to part of the property claimed when the claim to the whole was made *bonâ fide*, is not sufficient "good cause" for depriving him of the costs (*c*).

Mode of signing judgment.

As to the mode of signing judgment, *see Vol.* 1, p. 766.

Effect of judgment.

A judgment in ejectment is not conclusive as to the title, and the unsuccessful party may bring another action of ejectment to try his right if he thinks proper (*d*). The judgment, when it is for the plaintiff, is conclusive as to his right to the possession of the property recovered, during the time it is found by the verdict he was entitled to possession (*e*). This matter is further considered *post*, p. 1250, whilst treating of the action for mesne profits.

After death of party.

As to judgment in case of the death of any of the parties, *see ante*, p. 1028 (*f*).

16. *Execution.*

When to issue.

As to when execution may issue where the finding is for the plaintiff, *see ante, Vol.* 1, p. 789. Execution may issue for the defendant's costs when he is entitled to recover them (*see ante, Vol.* 1, p. 792).

As to execution in general, and as to when and how it is to be issued, *see Vol.* 1, p. 786 *et seq.*

If execution be issued after six years have elapsed from the recovery of the judgment without an order for that purpose, where

(*y*) *Jordan* v. *Harper*, 1 Str. 516: *Duthy* v. *Tito*, 2 Str. 1203. See ante, p. 675.

(*z*) *Alcock* v. *Wilshaw*, 29 L. J., Q. B. 143; 2 E. & B. 633: *Doe* v. *Lewis*, 13 M. & W. 241: *Doe* v. *Errington*, 4 Dowl. 602: cp. *Jones* v. *Curling*, infra.

(*a*) *Jones* v. *Curling* (C. A.), 13 Q. B. D. 262; 53 L. J., Q. B. 373; 50 L. T. 349; 32 W. R. 651.

(*b*) Id.

(*c*) Id.

(*d*) See *Taylor* v. *Horde*, 1 Burr. 60: cp. *Talbot* v. *Earl of Shrewsbury*, L. R., 14 Eq. 503; 20 W. R. 854, V.-C. M. As to staying proceedings in a second action until the costs of the first are paid, see ante, p. 1221.

(*e*) See *Harris* v. *Mulkern*, 1 Ex. D. 31, which shows that the judgment is not conclusive as to the derivation of the plaintiff's title. See *Pearse* v. *Coaker*, L. R., 4 Ex. 912, cited post, p. 1250.

(*f*) See *Denison* v. *Holiday*, 1 H. & N. 61; 26 L. J., Ex. 227.

an order is necessary, the Court, upon application, will set it aside, and, if executed, order the possession to be restored (*g*).

As to issuing execution after the death of parties to the judgment, *see ante*, p. 959.

By *R. of S. C., Ord. XLII. r.* 5, "A judgment for the recovery or for the delivery of the possession of land may be enforced by writ of possession" (*h*).

Writ of possession.

By *Ord. XLVII. r.* 1, "A judgment or order that a party do recover possession of any land may be enforced by writ of possession in manner before the commencement of the Principal Act used in actions of ejectment in the Superior Courts of Common Law" (*i*)—that is to say, by writ of habere facias possessionem. Judgment is usually entered in the form pointed out in the rule, that is to say, that the plaintiff "do recover possession" of the land (*j*). If it be so entered, execution may be issued at once without any leave.

By *Ord. XLVII. r.* 2, "Where by any judgment or order any person therein named is directed to deliver up possession of any lands to some other person, the person prosecuting such judgment or order shall, without any order for that purpose, be entitled to sue out a writ of possession on filing an affidavit showing due service of such judgment or order and that the same has not been obeyed." The form of judgment intended by this rule is only used when judgment is signed on an award. The affidavit of service of the judgment is only necessary when the judgment is in this form.

May include costs.

By *r.* 3 (*k*), "Upon any judgment or order for the recovery of any land and costs, there may be either one writ or separate writs of execution for the recovery of possession and for the costs at the election of the successful party."

Form of writ.

See forms of præcipe and writ, *Chit F.* p. 596 (*l*).

How sued out.

The mode of issuing the writ can be gathered from what is stated *Vol.* I, p. 795. *When the writ of habere facias is issued, leave the same at the sheriff's office, and get a warrant on it; give the warrant to the officer, and he will execute the writ, putting the plaintiff, or some person on his behalf, into possession, upon the premises being pointed out to him.*

How executed.

The officer, if necessary, may break open doors, in order to execute an habere, if the possession be not quietly given up; or he may take the *posse comitatus* with him if he fear violence (*m*). And after he has got admission, he may remove all persons, goods, &c. from off the premises before he gives possession (*n*). If there be several tenements in the possession of several tenants, the officer must give possession of each separately; the delivery of the posses-

(*g*) See ante, p. 956. And see *Doe* v. *Lord*, 7 A. & E. 610; 3 N. & P. 604; *Goodtitle* d. *Murrell* v. *Badtitle*, 9 Dowl. 1009. See *Withers* v. *Harris*, 2 Ld. Raym. 806; Ad. Eject. 346: *Doe* d. *Stevens* v. *Lord*, 1 P. & D. 388: *Doe* d. *Ramsbottom* v. *Roe*, 2 Dowl., N. S. 690; Tidd, Prac. 9th ed. 1249.

(*h*) This does not apply to an order for a foreclosure absolute. *Wood* v. *Wheater*, 22 Ch. D. 281; 52 L. J., Ch. 145; 47 L. T. 440; 31 W. R. 117.

(*i*) See *Hall* v. *Hall*, 47 L. J., Ch. 680.

(*j*) See form, Chit. F. p. 595.

(*k*) Cp. C. L. P. Act, 1852, s. 187.

(*l*) The writ is returnable immediately after the execution thereof. See *Doe* d. *Hudson* v. *Roe*, 18 Q. B. 806; 21 L. J., Q. B. 359.

(*m*) 5 Co. 91 b; Vol. 1, p. 814.

(*n*) *Upton & Well's case*, 1 Leon. 145.

PART XIII.

sion of one tenement in the name of all is not sufficient (*o*), unless, indeed, the plaintiff can have execution for so much as the tenant who defends, or his landlord, was possessed of (*p*). If the several tenements be in possession of one tenant, and included in the same action, possession of one in the name of the whole will be sufficient. If he give possession of more than he ought, the Court or Judge, on application for that purpose, will order it to be restored (*q*).

Crops.

Where, in ejectment by a landlord against his tenant, who had holden over, the crops upon the lands, when seized under the writ of possession, were more than sufficient to pay the arrears of rent, &c., the Court of Common Pleas refused to order the landlord to pay over the surplus to the tenant (*r*). When the plaintiff recovers only an undivided portion of the property, the duty of the sheriff is not to turn out the persons in possession, but only to put the plaintiff in the possession as to the portion to which he is entitled (*s*).

Where plaintiff joint tenant.

Alias habere where possession not completely given.

If the writ of habere be not executed, or only partly executed (*t*), then upon the return of it, an alias, &c. may be sued out (*u*). But if possession be once completely given under it, the plaintiff cannot sue out another writ of possession, although he is disturbed in his possession by the same defendant, and although the sheriff have not yet returned the writ; otherwise the plaintiff by omitting to call on the sheriff to return the writ, might retain the right of suing out a new writ of habere as a remedy for any trespass which the defendant might commit within twenty years next after the date of the judgment (*x*). In such a case, however, if the disturbance took place recently after the possession delivered, it is probable that the Court, upon application, would order the possession to be restored, and punish the defendant by attachment (*y*). And where a writ of habere had been executed, and possession had been given to the plaintiff, but the tenant a few days afterwards forcibly dispossessed him, the writ not having been returned, *Wightman*, J., granted a rule *nisi* for a new writ, by which rule the tenant was also called upon to show cause why he should not restore possession of the premises (*z*).

Writ should be executed within a reasonable time.

The sheriff should execute the writ within a reasonable time after he receives it. But, though the sheriff has a reasonable time for executing the writ, this does not excuse him in refusing to execute it when he has the opportunity, and is required to do so, and nothing occurs to prevent him (*a*).

(*o*) 2 Ro. Abr. 180; 2 Sellon, 203.

(*p*) See *Fenn* d. *Blanchard* v. *Wood*, 1 B. & P. 573.

(*q*) *Connor* v. *West*, 5 Burr. 2673: *Roe* d. *Saul* v. *Dawson*, 3 Wils. 49; Runn. Eject. 432.

(*r*) *Doe* d. *Upton* v. *Witherwick*, 3 Bing. 11; 10 Moore, 267.

(*s*) See *Doe* d. *Hellyer* v. *King*, 6 Ex. 793, per *Parke*, B.

(*t*) *Devereux* v. *Underhill*, 2 Keb. 245.

(*u*) *Molineux* v. *Fulgam*, Palm. 269. See *Lessee of Massey* v. *Ejector*, 1 Jones, Rep. Ex. Ir. 457: *Lessee of Lincham* v. *Antony*, Patty, Rep. Q. B. Ir. 453.

(*x*) *Doe* d. *Pate* v. *Roe*, 1 Taunt. 55; overruling *Radcliffe* v. *Tate*, 1 Keb. 779: and semble, also overruling *Kingsdale* v. *Mann*, 6 Mod. 27; 1 Salk. 321: and narrowing the doctrine laid down in Tidd, 9th ed. 1247.

(*y*) See *Doe* d. *Williams* v. *Williams*, 2 Ad. & E. 381: *Davies* d. *Povey* v. *Doe*, 2 W. Bl. 892. And see *Doe* d. *Thompson* v. *Mirehouse*, 2 Dowl. 200.

(*z*) *Doe* d. *Lloyd* v. *Roe*, 2 Dowl., N. S. 407: *Doe* d. *Pitcher* v. *Roe*, 9 Dowl. 971.

(*a*) *Mason* v. *Paynter*, 1 Q. B. 974, ante, Vol. 1, p. 809.

If the yearly value of the premises do not exceed 100*l.*, the sheriff is entitled to a poundage of 12*d.* in every 20*s.*; but if it exceed 100*l.*, then to 6*d.* for every 20*s.* above that sum (*b*). Sheriff's poundage on.

The tenant or tenants in possession, however, in order to save the expense of executing a writ of possession, may attorn to the plaintiff (*c*). Attornment in lieu of execution.

It would seem that the plaintiff having judgment may, if he can do so without force, enter without suing forth a writ of possession; for, where the land recovered is certain, the recoveror may, without force, enter at his own peril; and the assistance of the sheriff is only to preserve the peace (*d*). Where, indeed, a writ of possession was set aside for irregularity after it had been executed, the Court ordered the plaintiff to restore possession, though he contended, that, being entitled by the judgment to and being actually in possession, it was immaterial by what means he had obtained it (*e*). Entry without habere facias, or on irregular one.

A judgment in an action of ejectment in an inferior jurisdiction was not within the meaning of the 19 *G.* 3, *c.* 70, *s.* 11; and if, therefore, the defendant leaves the jurisdiction, the judgment cannot, under that Act, be removed into a superior Court for the purpose of execution (*f*). Execution on judgment of inferior Court.

17. *Restitution.*

A writ of restitution may be awarded when the judgment is reversed (*g*). It seems that it is not necessary that such writ should be founded on matter of record (*h*). And where a judgment irregularly obtained was set aside, and the possession that had been given upon the execution ordered to be restored, but by reason of the plaintiff, who held the possession, having absconded, the rule became ineffectual—a writ of restitution was awarded (*i*). So, where judgment was set aside and possession ordered to be restored as above, unless the plaintiff proceeded to trial and established his title at the next assizes, a writ of restitution was awarded, the plaintiff failing to do so, although he was alone prevented by the misconduct of his own solicitor, and although the title was still undetermined (*k*). But a writ of restitution does not lie to obtain repossession of premises obtained possession of under a writ of habere when the writ only has been set aside; but the Court in such a case will nevertheless award possession to be restored (*l*). If the plaintiff take, under a writ of possession, more than he has recovered, the Court or a Judge will, on application for that purpose, order him to restore it (*m*). When awarded or not.

The order to restore possession on setting aside judgment should be directed in the first instance to the plaintiff (*n*). Where the de- The order should be directed to plaintiff.

(*b*) 3 G. 1, c. 15, s. 16. See Vol. 1, p. 824.

(*c*) See form of attornment, Chit. Forms, p. 599.

(*d*) Run. Ejectt. 424; 2 Sellon, 121.

(*e*) *Doe* d. *Stevens* v. *Lord*, 6 Dowl. 256; 2 N. & P. 604; 7 A. & E. 610.

(*f*) *Doe* d. *Stansfield* v. *Shipley*, 2 Dowl. 408. See further, post, Ch. CXXXIV.

(*g*) 2 Lil. Pr. Reg. 777.

(*h*) *Doe* d. *Whittington* v. *Hards*, infra.

(*i*) 2 Sellon, Pract. 204: *Doe* d. *Whittington* v. *Hards*, 20 L. J., Q. B. 406.

(*k*) *Doe* d. *Stratford* v. *Shaill*, 8 Jur. 538; 2 D. & L. 161.

(*l*) *Doe* d. *Stevens* v. *Lord*, 6 Dowl. 256; 2 Nev. & P. 604; 7 A. & E. 610.

(*m*) *Roe* v. *Dawson*, 3 Wils. 49.

(*n*) See *Doe* d. *Whittington* v. *Hards*, 20 L. J., Q. B. 406.

PART XIII.

fendant obtained an order setting aside a judgment irregularly obtained, and commanding the sheriff to restore possession, the Court held, that the order should have been on the plaintiff and not on the sheriff, and set aside writs of restitution sued out on the order together with so much of the order as was directed to the sheriff (*o*). And where a rule of Court in an ejectment required possession of certain premises to be delivered up, but did not mention by whom, the Court refused to make a rule absolute for an attachment against the tenant in possession for not delivering them up; and, as he was a stranger to the ejectment, also refused to grant a rule requiring him to deliver up possession (*p*).

Enforcing same.

If an order ordering restitution be not complied with it may be enforced by attachment (*q*). Where a rule of Court ordered possession of lands to be restored to A., B. and C., or to D. their tenant, a demand by A. alone, without any special authority from B. or C., was held sufficient (*r*). Upon a refusal to comply with that demand the Court granted an attachment, though the affidavits in support of the rule *nisi* did not negative that possession had not been delivered to B. and C., or to D. (*r*).

18. *Appeal to the Court of Appeal.*

As to appealing to the Court of Appeal, *see ante*, p. 964 *et seq.*

SECT. II.—RECOVERY OF POSSESSION BY LANDLORD ON TERMINATION OF TENANCY BY EXPIRATION OF TERM OR NOTICE TO QUIT.

PAGE
1. *Proceedings under Ord. XIV.* 1230
2. *Proceedings under Com. Law Proc. Act*, 1852, *s.* 213 1231

1. *Proceedings under Ord. XIV.*

In actions for recovery of land, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired, or has been duly determined by notice to quit, or against persons claiming under such tenant, the writ of summons may be specially indorsed; and if the defendant appears, the plaintiff may apply, under *Ord. XIV.* (*ante*, *Vol.* 1, p. 269), for summary judgment against the defendant, and will be entitled to such judgment unless the defendant, by affidavit or otherwise, satisfy the Master that he has a good defence to the action on the merits, or discloses such facts as may be deemed sufficient to entitle him to defend (*see ante*, p. 270).

This can only be done in cases within *Ord. III. r.* 6 (which *see ante*, *Vol.* 1, p. 221), which provides that "In actions for the recovery of

(*o*) *Doe* v. *Williams*, 2 A. & E. 381; 4 N. & M. 259. See the notes in 4 N. & M. 259.

(*p*) *Doe* d. *Lewis* v. *Ellis*, 9 Dowl. 491. See *Doe* d. *Stratford* v. *Shaill*, supra.

(*q*) 2 Salk. 508, per *Holt*, C. J.: *Davies* d. *Povey* v. *Doe*, 2 W. Bl. 892.

(*r*) *Corbett* v. *Nicholls*, 2 Pr. Rep. 87, C. P.

land with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or against persons claiming under such tenant, the writ of summons may, at the option of the plaintiff, be specially indorsed with a statement of his claim, or of the remedy or relief to which he claims to be entitled. Such special indorsement shall be to the effect of such of the forms in Appendix C, sec. IV., as shall be applicable to the case." These forms will be found in *Chitty's Forms*, p. 135.

It will be observed that the rule is confined to claims by a landlord against a tenant or person claiming under a tenant, and to cases where the tenant's term has expired or been duly determined by notice to quit (*s*). This does not apply to a case where the term has been determined by a forfeiture for breach of covenant (*t*), but only to the expiration of the term by lapse of time. It applies to an action by a mortgagee against a mortgagor when the latter has attorned tenant at will to the mortgagee by the mortgage deed, and the tenancy has been duly determined by notice (*u*).

The application is made by a summons at Chambers (*x*) after the defendant has appeared. The practice is the same as in ordinary applications under *Ord. XIV.*, as to which *see ante*, *Vol.* 1, p. 272 *et seq.* The plaintiff's affidavit (*x*) should show the creation of the relationship of landlord and tenant; that the term has expired or been duly determined by notice to quit; that the defendant withholds possession; and that, in the belief of the deponent, there is no defence to the action.

2. *Proceedings under the Com. Law Proc. Act*, 1852, *s.* 213.

Statute as to.]—By the *Com. Law Proc. Act*, 1852, *s.* 213 (*y*), "Where the term or interest of any tenant now or hereafter holding under a *lease or agreement in writing* any lands, tenements, or hereditaments for any term or number of years certain (*z*), or from year to year, shall have expired or been determined either by the landlord or tenant by regular *notice to quit*, and such tenant, or any one holding or claiming by or under him, shall refuse to deliver up possession accordingly, after lawful *demand in writing* made and signed by the landlord or his agent, and served personally upon or left at the dwelling-house or usual place of abode of such tenant or person, and the landlord shall thereupon proceed by action of ejectment for the recovery of possession, it shall be lawful for him, at the foot of the writ in ejectment, to address a *notice* to such tenant or person requiring him to find such bail, if ordered by the Court or a Judge, and for such purposes as are

Statute as to.

(*s*) *Mansergh* v. *Rimell*, W. N. 1884, 34; Bitt. 210: cp. the C. L. P. Act, 1852, s. 213, and the decisions thereon, infra.

(*t*) *Burns* v. *Walford*, W. N. 1884, 31; Bitt. 208; *Mansergh* v. *Rimell*, supra: cp. *Doe* d. *Cundey* v. *Sharpley*, 15 M. & W. 558.

(*u*) *Daubuz* v. *Lavington*, 13 Q. B. D. 347; 52 L. J., Q. B. 283; 51 L. T. 206; 32 W. R. 772, which overrules *Hobson* v. *Monk*, W. N. 1884, 17, contra.

(*x*) See Chit. F. p. 603.

(*y*) See the 1 G. 4, c. 87, ss. 1—4, of which this is a re-enactment. This and sections 208—220 of the C. L. P. Act, 1852, are still unrepealed.

(*z*) See *Doe* d. *Newstead* v. *Roe*, 1 B. C. Rep. 86.

PART XIII.

hereinafter next specified . . . . . ." *See the remainder of this section, post*, p. 1233.

To what cases the statute applies.

To what Cases the Statute applies.]—To bring a case within the Act the holding must have been under a lease or agreement in writing (*a*). An agreement in writing for three months certain is a tenancy for a term within the meaning of the Act (*b*). So is a mere agreement in writing for a lease for a term certain, and a holding over beyond that term (*c*). But a tenancy for years determinable on lives is not (*d*). And the Act only applies where there was a term certain, and the lease has expired by effluxion of time, or a tenancy from year to year, determined by regular notice to quit, and not to the case of a term for fourteen years, determinable by notice at the end of the first seven, and determined by such notice accordingly (*e*). It does not extend to a holding over after a term has been surrendered (*f*), nor to the case of a tenant for a term of years who has been allowed to remain in possession for more than a year after his term expired and a new tenancy from year to year created (*g*), nor to the case of a tenant holding premises from quarter to quarter on an agreement providing that the tenant shall quit possession upon receiving six months' notice in writing, and, in the event of his losing his licence to sell ale, &c., through misconduct at any time during the term, shall then forthwith quit possession, on being requested so to do by his landlord (*h*). In the case of lessee and under-lessee, the former is a landlord within the Act (*i*). A tenant in common may proceed under the Act for the recovery of his undivided moiety (*k*). It does not, it seems, extend to cases where the tenant *bonâ fide* disputes the landlord's title; as if the tenant claim the premises as heir-at-law, or the like (*l*).

Statute not compulsory.

A landlord is not confined to the mode of proceeding given by the statute; but he may adopt it, or have recourse to the ordinary mode of proceeding at his option (*m*).

Demand of possession.

Demand of Possession.]—This demand must be in writing and "made and signed by the landlord or his agent, and served personally upon, or left at the dwelling-house or usual place of abode of such tenant, or person" holding or claiming by or under him (*n*).

(*a*) *Doe* d. *Bradford* v. *Roe*, 5 B. & Ald. 770: *Rees* v. *Thrustout*, M'Clel. 492: *Doe* d. *Thomas* v. *Field*, 2 Dowl. 542.

(*b*) *Doe* d. *Phillips* v. *Roe*, 5 B. & Ald. 766; 1 D. & R. 433.

(*c*) See *Doe* d. *Marquis of Anglesea* v. *Roe*, 2 D. & R. 565.

(*d*) *Doe* d. *Pemberton* v. *Roe*, 7 B. & C. 2.

(*e*) *Doe* d. *Cardigan* v. *Roe*, 1 D. & R. 540: *Doe* d. *Cundy* v. *Sharpley*, 15 M. & W. 558.

(*f*) *Doe* d. *Tindal* v. *Roe*, 1 Dowl. 143; 2 B. & Ad. 922.

(*g*) *Doe* d. *Thomas* v. *Field*, 2 Dowl. 542.

(*h*) *Doe* d. *Carter* v. *Roe*, 10 M. & W. 670; 2 Dowl., N. S. 449.

(*i*) *Doe* d. *Watts* v. *Roe*, 5 Dowl. 213.

(*k*) *Doe* v. *Rotherham*, 3 Dowl. 690.

(*l*) *Doe* d. *Sanders* v. *Roe*, 1 Dowl. 4; sed vide per *Lord Abinger*, C. B., 4 M. & W. 75.

(*m*) See C. L. P. Act, 1852, s. 218, post, p. 1236.

(*n*) C. L. P. Act, 1852, s. 213, supra. See *Doe* d. *Marquis of Anglesea* v. *Roe*, 2 D. & R. 565. See form, Chit. Forms, pp. 605—6.

And if such tenant or person thereupon refuse to deliver up possession, the landlord may commence his action (*o*).

Writ and Notice.]—The writ is in the usual form (*p*); but at the foot thereof the landlord is to address a notice to such tenant or person requiring him to find such bail, if ordered by the Court or a Judge, and for such purposes as are hereinafter next specified (*q*). Before the *Com. Law Proc. Act*, 1852, a notice, signed A. B., agent for the plaintiff, and calling upon the tenant to appear and be made defendant, and find such bail, &c., "and for such purposes as are specified in the Act of Parliament," without detailing them, was held sufficient (*r*). And before this Act it was held, that if the notice was signed in a wrong name it was no objection to the landlord obtaining judgment against the casual ejector (*s*). The writ is served as in ordinary cases (*see ante*, p. 1208). Writ and notice. Service of.

Appearance.]—The defendant should appear as in ordinary cases (*ante*, p. 1213). Appearance.

Bail.]—By the *Com. Law Proc. Act*, 1852, *s.* 213 (*t*), " . . . And upon the appearance of the party on an affidavit of service of the writ and notice (*u*), it shall be lawful for the landlord producing the lease or agreement, or some counterpart or duplicate thereof, and proving the execution of the same by affidavit, and upon affidavit that the premises have been actually enjoyed under such lease or agreement, and that the interest of the tenant has expired, or been determined by regular notice to quit, as the case may be, and that possession has been lawfully demanded in manner aforesaid, to move the Court or apply by summons to a Judge at Chambers for a rule or summons for such tenant or person to show cause, within a time to be fixed by the Court or Judge on a consideration of the situation of the premises, why such tenant or person should not enter into a recognizance by himself and two sufficient sureties in a reasonable sum conditioned to pay the costs and damages which shall be recovered by the claimants in the action; and it shall be lawful for the Court or Judge upon cause shown, or upon affidavit of the service of the rule or summons in case no cause shall be shown, to make the same absolute in the whole or in part, and to order such tenant or person, within a time to be fixed, upon a consideration of all the circumstances, to find such bail, with such conditions and in such manner as shall be specified in the said rule or summons, or such part of the same so made absolute; and in case the party shall neglect or refuse so to do, and shall lay no ground to induce the Court or Judge to enlarge the time for obeying the same, then the lessor or landlord filing an affidavit that such rule or order has been Bail.

(*o*) See C. L. P. Act, 1852, s. 213, ante, p. 1232.

(*p*) See ante, p. 1206.

(*q*) See C. L. P. Act, 1852, s. 213, ante, p. 1231. For what purposes bail is to be found, see infra. See the form of the notice in Chit. Forms, p. 606.

(*r*) *Doe* d. *Beard* v. *Roe*, 1 M. & W. 360.

(*s*) *Goodtitle* v. *Notitle*, 5 B. & A. 849; 5 Moore, 56 a.

(*t*) See the first part of this section, ante, p. 1231.

(*u*) This means that an affidavit of service is to be made where the party does not appear.

PART XIII.

made and served and not complied with, shall be at liberty to sign judgment for recovery of possession and costs of suit in the form contained in the schedule (A.) to this Act annexed, marked No. 21 (*x*) or to the like effect."

The application, to whom and how made.

The application under this enactment must in general be made to a Master on summons. The summons must be supported by production of the original or a counterpart or duplicate of the lease or agreement properly stamped (*y*). The application may be made by one of several tenants in common (*z*).

The affidavit.

The summons must be supported or the motion made upon the affidavit prescribed by the Act, and the lease, &c. should be exhibited or annexed to the affidavit (*a*). The affidavit should show that the tenancy, if from year to year, has been determined by a "regular" notice to quit (*b*). It is not necessary that the attesting witness should depose to the execution of the lease, if it be sufficiently proved by other witnesses (*c*). As to the person before whom the affidavit must be sworn, *see ante, Vol.* 1, p. 466 (*d*).

The order.

It is not necessary to express in the summons the amount of the security required (*e*). *Serve a copy of the summons and attend it in the usual way* (*f*). The time within which the security is to be entered into, as required by the Act, is fixed by the Master by his order (*g*). Bail is to be taken for one year's value of the premises, and a reasonable sum to be settled by the Master for the costs of the action and not for mesne profits (*h*).

Draw up the order and serve it in the same manner as the summons.

Bail, how put in.

Security must be given as directed by the order (*i*). The defendant cannot be examined as to his sufficiency (*k*).

Judgment for not putting in bail, &c.

Judgment for not putting in Bail, &c.]—If the defendant neglect or refuse to find bail, then the plaintiff on filing an affidavit that the order requiring bail has been made and served and not complied with, may sign judgment for recovery of possession and costs of suit (*l*). After judgment signed execution may be issued as in ordinary cases. The defendant may obtain further time for obeying the order (*m*).

(*x*) See form, Chit. Forms, p. 609.

(*y*) *Doe* d. *Caulfield* v. *Roe*, 3 Bing. N. C. 329; 5 Dowl. 365. See *Doe* d. *Holder* v. *Rushworth*, 4 M. & W. 74. But see *Doe* v. *Roe*, 1 D. & R. 433, contra.

(*z*) Id.

(*a*) *Doe* d. *Foucan* v. *Roe*, 2 L. M. & P. 322. See form of affidavit, Chit. Forms, p. 606.

(*b*) *Doe* d. *Topping* v. *Boast*, 7 Dowl. 487: *Doe* d. *Platter* v. *Bell*, 8 Jur. 1100, B. C.

(*c*) See C. L. P. Act, 1854, s. 26. And see *Doe* d. *Morgan* v. *Rotheram*, 3 Dowl. 690: *Doe* d. *Gowland* v. *Roe*, 6 Dowl. 35. See per *Williams*, J., in *Doe* d. *Avery* v. *Roe*, 6 Dowl. 521.

(*d*) *Doe* d. *Pryme* v. *Roe*, 8 Dowl. 340.

(*e*) *Doe* d. *Phillips* v. *Roe*, 5 B. & Ald. 766; 1 D. & R. 433: *Doe* d. *Gowland* v. *Roe*, 6 Dowl. 35.

(*f*) See Chit. Forms, p. 608.

(*g*) See *Doe* d. *Anglesea* v. *Brown*, 2 D. & R. 688: *Anon.*, 4 Jur. 1205, Ex.: *Doe* d. *Sampson* v. *Roe*, 6 Moore, 54.

(*h*) *Doe* d. *Levy* v. *Roe*, 6 C. B. 272.

(*i*) See C. L. P. Act, 1852, s. 213, ante, p. 1233.

(*k*) Semb. see *Keane* v. *Deardon*, 8 East, 298. See *Roe* d. *Durant* v. *Moore*, 6 Bing. 656; 4 M. & P. 531.

(*l*) See C. L. P. Act, 1852, s. 213, ante, p. 1233. See form, Chit. Forms, p. 609.

(*m*) See C. L. P. Act, 1852, s. 213, ante, p. 1233.

Proceedings to trial.

Proceedings to Trial, &c.]—When the time given to the tenant to put in bail, &c. has expired, proceed in the action to trial as in ordinary cases.

Trial, &c.

Juries to give damages for mesne profits.

Trial.]—By the *Com. Law Proc. Act*, 1852, *s.* 214, "Wherever it shall appear on the trial of any ejectment, at the suit of a landlord against a tenant, that such tenant or his attorney hath been served with due notice of trial (*n*), the Judge before whom such cause shall come on to be tried shall, whether the defendant shall appear upon such trial or not, permit the claimant on the trial, after proof of his right to recover possession of the whole or of any part of the premises mentioned in the writ in ejectment, to go into evidence of the mesne profits thereof which shall or might have accrued from the day of the expiration or determination of the tenant's interest in the same down to the time of the verdict given in the cause, or to some preceding day to be specially mentioned therein; and the jury on the trial finding for the claimant shall in such case give their verdict upon the whole matter, both as to the recovery of the whole or any part of the premises, and also as to the amount of the damages to be paid for such mesne profits; [and in such case the landlord shall have judgment within the time hereinbefore provided, not only for the recovery of possession and costs, but also for the mesne profits found by the jury] (*o*): Provided always, that nothing hereinbefore contained shall be construed to bar any such landlord from bringing any action for the mesne profits which shall accrue from the verdict, or the day so specified therein, down to the day of the delivery of possession of the premises recovered in the ejectment."

It was held unnecessary to state anything either in the writ or issue in order to recover mesne profits under the above enactment (*p*).

On trial after bail found, judge shall not stay the execution except by consent, or on tenant's finding security.

By sect. 215, "In all cases in which such security shall have been given as aforesaid (*q*), if upon the trial a verdict shall pass for the claimant, unless it shall appear to the Judge before whom the same shall have been had that the finding of the jury was contrary to the evidence, or that the damages given were excessive, such Judge shall not, except by consent, make any order to stay judgment or execution, except on condition that within four days from the day of the trial the defendant shall actually find security, by the recognizance of himself and two sufficient sureties, in such reasonable sum as the Judge shall direct, conditioned not to commit any waste, or act in the nature of waste, or other wilful damage, and not to sell or carry off any standing crops, hay, straw, or manure produced or made (if any) upon the premises, and which may happen to be thereupon, from the day on which the verdict shall have been given to the day on which execution shall finally be made upon the judgment, or the same be set aside, as the case may be: Provided always, that the recognizance last above mentioned shall imme-

(*n*) See *Doe* d. *Thompson* v. *Hodgson*, 12 Ad. & E. 135; 4 P. & D. 142, decided under former Act.

(*o*) The words within brackets are not in the former enactment. They refer to sect. 185 of the above Act. See Vol. 1, p. 764, as to when judgment may now be signed.

(*p*) *Smith* v. *Tett*, 9 Ex. 307; 23 L. J., Ex. 93.

(*q*) See sect. 213 of this Act, ante, p. 1233.

PART XIII.

Bail in error to discharge such security.

diately stand discharged and be of no effect in case proceedings in error shall be brought upon such judgment, and the plaintiff in error shall become bound in the manner hereinbefore provided" (*r*).

Recognizances to be taken as other recognizances of bail; actions on them limited.

By the *Com. Law Proc. Act*, 1852, *s.* 216, "All recognizances and securities entered into as last aforesaid may and shall be taken respectively in such manner and by and before such persons as are provided and authorized in respect of recognizances of bail upon actions and suits depending in the Court in which any such action of ejectment shall have been commenced; and the officer of the same Court with whom recognizances of bail are filed shall file such recognizances and securities, for which respectively the sum of two shillings and sixpence, and no more, shall be paid; but no action or other proceeding shall be commenced upon any such recognizance or security after the expiration of six months from the time when possession of the premises, or any part thereof, shall actually have been delivered to the landlord."

Where the landlord had obtained possession under an habere, the Court refused to compel him on motion to pay over to the tenant the value of the crops after deducting the rent (*s*).

Landlord not prejudiced by enactments.

Landlord's Rights not prejudiced.]—By the *Com. Law Proc. Act*, 1852, *s.* 218, "Nothing herein contained shall be construed to prejudice or affect any other right of action or remedy which landlords may possess in any of the cases hereinbefore provided for, otherwise than hereinbefore expressly enacted."

SECT. III.—BY LANDLORD FOR BREACH OF COVENANT UNDER RIGHT OF RE-ENTRY OR FORFEITURE TO WHICH SECT. 14 OF THE CONVEYANCING ACT, 1881, APPLIES (*t*).

PAGE
1. *General Observations* 1236
2. *Statutory Restrictions on Right of Re-entry or Forfeiture* 1237
3. *Relief against Forfeiture* 1238

1. *General Observations.*

General observations.

The proceedings in an action by a landlord for recovery of possession of land under a right of re-entry or forfeiture contained in a lease, other than for nonpayment of rent (*t*), are exactly the same as in ordinary cases; but the Conveyancing and Law of Property Act, 1881 (44 & 45 *V.* c. 41, *s.* 14), has imposed certain restrictions on provisoes and stipulations for re-entry and forfeiture which it is important to observe before commencing any such action, and has also empowered the Court to grant relief to the tenant sought to be

(*r*) *Roe* d. *Durant* v. *Moore*, 6 Bing. 656; 4 M. & P. 531; 7 Bing. 124; 4 M. & P. 761; 1 Dowl. 203. As to an appeal now being substituted for proceedings in error, see ante, p. 975.

(*s*) *Doe* v. *Witherwick*, 10 Moore, 267; 3 Bing. 11.

(*t*) As to the case of non-payment of rent, see post, p. 1240.

ejected. This statute came into force on the 1st January, 1882 (sect. 1 (2)), and applies to leases made either before or after that date, and is not affected by any stipulation excluding its operation (sect. 14 (9)).

The assignee of the reversion need not give any notice of the assignment before suing for a forfeiture for breach of covenant other than nonpayment of rent (*u*). Nor is any demand of possession necessary (*x*).

2. *Statutory Restrictions.*

Statutory restrictions.

Statutory Restrictions on Right of Re-entry or Forfeiture—Notice, &c.]—By the Conveyancing and Law of Property Act, 1881 (44 & 45 *V. c.* 41), *s.* 14 "(1) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition (*y*) in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice (*z*) specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and in any case requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

Notice required before enforcement of right of re-entry or forfeiture.

"(2) [Power to grant relief in certain cases, *see post*, p. 1238.]

Relief.

"(3) For the purposes of this section a lease includes an original or derivative under-lease, also a grant at a fee farm rent, or securing a rent by condition; and a lessee includes an original or derivative under-lessee, and the heirs, executors, administrators and assigns of a lessee, also a grantee under such a grant as aforesaid, his heirs and assigns; and a lessor includes an original or derivative under-lessor, and the heirs, executors, administrators and assigns of a lessor, also a grantor as aforesaid, and his heirs and assigns.

Lease defined.

"(4) This section applies although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any Act of Parliament.

Applies to statutory leases,

"(5) For the purposes of this section a lease limited to continue as long only as the lessee abstains from committing a breach of covenant, shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.

—and to lease, with conditional limitation.

"(6) This section does not extend—

In what cases the section does not apply.

"(i) To a covenant or condition against the *assigning, underletting, parting with the possession, or disposing* of the land leased; or to a condition for forfeiture on the *bankruptcy* of the lessee, or on the *taking in execution* of the lessee's interest (*a*); or

---

(*u*) *Scaltock* v. *Harston*, 1 C. P. D. 106; 45 L. J., C. P. 125. See 44 & 45 V. c. 41, s. 10, which enacts, that the benefit of the lessee's covenant in leases made after the commencement of that statute shall run with the reversion.

(*x*) See *Talbot de Malahide* v. *Oolum*, 5 Ir. R., C. L. 302, C. P.

(*y*) Certain covenants are excluded from the operation of the section. See sub-s. 6, infra.

(*z*) See form of notice, Chit. F. p. 600. It must be in writing: 44 & 45 V. c. 41, s. 67.

(*a*) See *Ex p. Gould, In re Walker*, 13 Q. B. D. 454.

PART XIII.

"(ii) In case of a *mining lease*, to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines, or other things, or to enter or inspect the mine or the workings thereof.

Repeal. "(7) The enactments described in Part I. of the Second Schedule to this Act are hereby repealed (*a*).

Section does not apply to non-payment of rent. "(8) This section shall not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent (*b*).

Applies to leases before Act, and cannot be excluded. "(9) This section applies to leases made either before or after the commencement of this Act; and shall have effect notwithstanding any stipulation to the contrary."

Form of notice. *Form of Notice.*]—No particular form of notice is prescribed by the statute (*c*). The requirements of sect. 14, sub-s. 1, must be complied with (*d*). The statute (sect. 67, sub-s. 1) requires that the notice shall be in writing.

—To whom addressed. —*To whom Notice to be addressed.*]—By sect. 67, sub-s. 2, of the above statute, "Any notice required or authorized by this Act to be served on a lessee or mortgagor shall be sufficient, although only addressed to the lessee or mortgagor by that designation, without his name, or generally to the persons interested, without any name, and notwithstanding that any person to be affected by the notice is absent, under disability, unborn or unascertained."

—Service of notice. —*Service of the Notice.*]—By sect. 67 of the above statute, sub-s. 3, "Any notice required or authorized by this Act to be served shall be sufficiently served if it is left at the last known place of abode or business in the United Kingdom of the lessee, lessor, mortgagee, mortgagor, or other person to be served; or, in case of a notice required or authorized to be served on a lessee or mortgagor, is affixed or left for him on the land or any house or building comprised in the lease or mortgage; or, in case of a mining lease, is left for the lessee at the office or counting-house of the mine."

By sub-s. 4, "Any notice required or authorized by this Act to be served shall also be sufficiently served if it is sent by post in a registered letter addressed to the lessee, lessor, mortgagee, mortgagor, or other person to be served, by name, at the aforesaid place of abode or business, office or counting-house, and if that letter is not returned through the post-office undelivered, and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered."

3. *Relief against Forfeiture.*

Relief. *Relief against Forfeiture.*]—The Conveyancing and Law of Property Act, 1881 (44 & 45 *V.* c. 41), sect. 14, sub-s. 2, empowers the Court to grant relief against the effect of a proviso or stipulation

(*a*) That is to say, the 22 & 23 V. c. 35, ss. 4—9, and 23 & 24 V. c. 126, s. 2 (C. L. P. Act, 1860), which enabled the Court to grant relief in case of non-insurance.

(*b*) As to re-entry for non-payment of rent, see post, p. 1240.

(*c*) See form, Chit. F. p. 690.

(*d*) *North London Freehold Land and House Co.* v. *Jacques*, 49 L. T. 659; 32 W. R. 283.

empowering a landlord to re-enter or creating a forfeiture in certain cases.

This power applies to all leases as defined by the statute (*see* sect. 14, sub-ss. 3, 4 and 5, *supra*), whether granted before or after the Act came into force, and notwithstanding a stipulation purporting to exclude its operation (sect. 14, sub-s. 9, *supra*). It applies to breaches committed before the Act came into operation, and to actions and proceedings pending at that time (*e*).

But it does not apply (*f*) to a right of re-entry or forfeiture for (1) non-payment of rent (sect. 14, sub-s. 8, *supra*; *see post*, p. 1240), or (2) breach of a covenant or condition against assigning, underletting, parting with the possession or disposing of the land leased (sect. 14, sub-s. 6 (i), *supra*), or (3) to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest (sect. 14, sub-s. 6 (i), *supra*), or (4) certain clauses in mining leases (*see* sect. 14, sub-s. 6 (ii), *supra*).

By sect. 14, sub-sect. 2, "Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief; and the Court may grant or refuse relief, as the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court, in the circumstances of each case, thinks fit."

The sub-section, it will be observed, enables the lessee to apply for relief, either in an action brought by himself, or in an action brought by the lessor against him. In the latter case, the application should be made in the Division in which the action is pending (*g*) by a summons at Chambers returnable before a Master (*h*). The application should be supported by an affidavit, stating the circumstances under which it is made, and especially with reference to the proceedings and conduct of the parties under the first sub-section. It should state whether any prior application for relief has or has not been made.

In a case where the breach was of a covenant to repair, relief was granted on the terms that the defendant should execute the repairs under the superintendence of the plaintiff's surveyor, and should

---

(*e*) *Quilter* v. *Mapleson* (C. A.), 9 Q. B. D. 672; 47 L. T. 561; 31 W. R. 75.

(*f*) See *Ex p. Gould, In re Walker*, 13 Q. B. D. 154.

(*g*) The Court is defined by sect. 1 (xviii) to be "her Majesty's High Court of Justice." By sect. 69 (1), "All matters within the jurisdiction of the Court under this Act shall, subject to the Acts regulating the Court, be assigned to the Chancery Division of the Court." It may be doubted whether this does not render it necessary in all cases to make the application for relief to the Chancery Division; but in view of the words of sect. 14, sub-s. 2 (supra), enabling the lessee to make the application "in the lessor's action," it is submitted, that when it is made in an action by the lessor in the Queen's Bench Division, it may and should be made in that Division. As a fact, it is often made in the Queen's Bench Division in an action there pending. See, for instance, *Bond* v. *Freke*, W. N. 1884, 47.

(*h*) By sect. 69 (3), "Every application to the Court shall, except where it is otherwise expressed, be by summons at Chambers." See form of summons, Chit. F. p. 602.

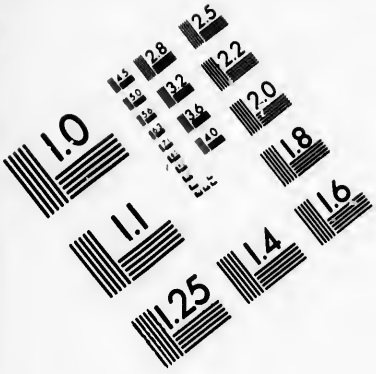
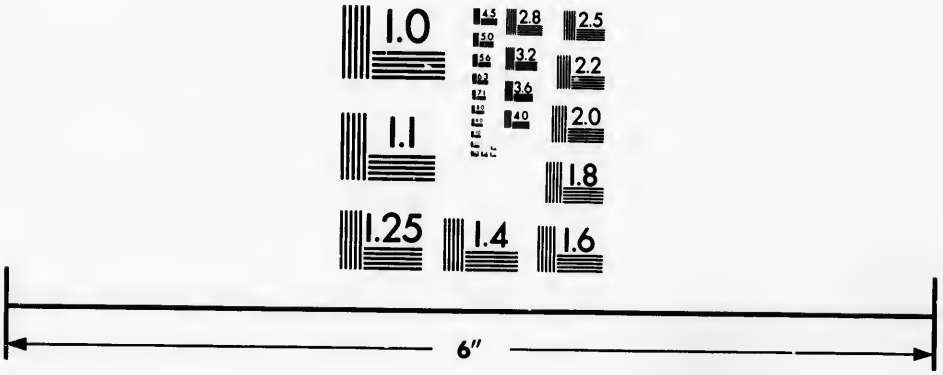
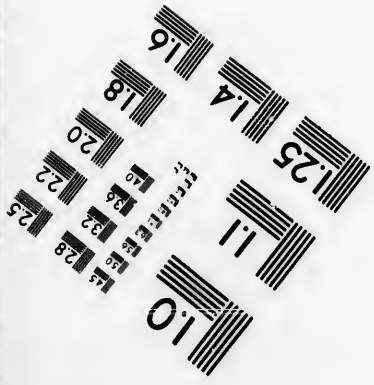
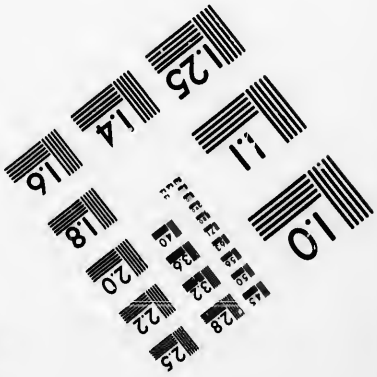


IMAGE EVALUATION TEST TARGET (MT-3)







Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

PART XIII.

pay the costs of the action, and the reasonable expenses of surveys (*f*).

SECT. IV.—EJECTMENT BY LANDLORD ON FORFEITURE BY NON-PAYMENT OF RENT (*g*).

1. *Where there is a sufficient Distress upon the Premises* PAGE 1240
2. *Where there is not a sufficient Distress upon the Premises* PAGE 1242

Mere non-payment of rent does not create a forfeiture of a lease or give a landlord any right of re-entry unless the lease contains an express proviso to that effect. The proceedings referred to in this section only apply where there is such a proviso. This case is expressly excluded from the operation of the *Conveyancing Act*, 1881, *s.* 14 (*see sub-s.* 8, *supra*, p. 1238).

1. *Where there is a sufficient Distress upon the Premises.*

When to proceed under the Act.

If the tenant forfeit (*h*) his term by the nonpayment of rent, the landlord may proceed to recover possession of the premises by ejectment. The mode of proceeding, however, varies, according as there is or is not a sufficient distress upon the premises to answer the amount of the rent due; if there be half a year's rent in arrear, and not a sufficient distress upon the premises, the proceeding may be under the *Com. Law Proc. Act*, 1852, *s.* 210; if there be a sufficient distress, the proceeding must be at common law (*i*). The proceeding at common law shall be first considered.

Demand of rent at common law.

Before the action can be commenced, and, indeed, before the forfeiture can be incurred, a demand, attended with the old formalities (*j*), must have been made of the rent (*k*); unless there be an express stipulation or agreement between the parties dispensing with such demand (*l*). A clause, giving a right of re-entry if the rent were not paid within twenty-one days after it became due, "being demanded," has been held to exclude the necessity for a formal demand, and to be satisfied by an ordinary demand in writing (*m*).

(*f*) *Bond* v. *Freke*, W. N. 1884, 47; Bitt. 188: cp. *North London Freehold, &c. Co.* v. *Jacques*, 49 L. T. 659; 32 W. R. 282.

(*g*) An assignee of the reversion must give a notice of the assignment to the lessee before bringing an action for such a forfeiture. *Mallory's case*, 5 Rep. 113 *b*: *Fraunce's case*, 8 Rep. 92 *a*; 1 Godb. 272. See *Sealtock* v. *Harston*, 45 L. J., C. P. 125. The assignee of the reversion may take advantage of a forfeiture. See 44 & 45 V. c. 41, s. 10. In such cases an actual entry is not necessary to enable the landlord to take advantage of the forfeiture. *Oates* v. *Brydon*, 3 Burr. 1897. The proceedings are the same as in ordinary cases.

(*h*) Where landlord only entitled to enter for a term, see *Doe* d. *Chawner* v. *Boulter*, 6 A. & E. 675.

(*i*) *Doe* d. *Forster* v. *Wandlass*, 7 T. R. 117: *Doe* d. *Chandless* v. *Robson*, 2 Car. & P. 245.

(*j*) See Cole on Ejectment, 412.

(*k*) Bro. Abr. Demaunde, p. 19: *Hill* v. *Kempshall*, 7 C. B. 975.

(*l*) *Dormer's case*, 5 Coke, 40: *Doe* d. *Harris* v. *Masters*, 2 B. & C. 490; 4 D. & R. 45: *Goodright* v. *Cator*, 2 Doug. 486.

(*m*) *Phillips* v. *I*
P. 48; 43 L. J., C.
(*n*) *Kidwelly* v.
a, b.
(*o*) *Roe* d. *West*
363.
(*p*) Co. Lit. 201
Forster v. *Wandla*
Doppa v. *Mayo*, 1 S
(*q*) Co. Litt. 202
(*r*) Co. Litt. 202
Hill v. *Grange*, 1 Plo
v. *Mayo*, 1 Saund. 2
ment under which
let at a rent payal
quarter-days, a rig
was reserved to the
fault should be ma
of the rent or an
within twenty-one
same shall become
manded)":—Held,

writing (*m*). If the necessity for a formal demand is not dispensed with by the lease, great strictness is required in this respect; for the common law does not favour forfeitures. The demand must be made, in fact, although no person be present on the part of the tenant to answer (*n*). The landlord must go in person, or execute a formal power to another, who must go in person (*o*). If the lease do not specify where the rent is to be paid, the demand must be made upon the land, and at the most notorious place of it; and, therefore, if there be a dwelling-house upon the land, the demand must be made at the front door of it; but it is not necessary to enter the house. Yet, if the tenant were to meet the lessor on or off the land, at any time on the last day given him to pay the rent, and then tender him the rent, it would be sufficient to save the forfeiture (*p*). If the lease, however, specify a place for the payment of the rent, the demand must be made at that and no other (*q*). Also, the demand must be made precisely on the last day on which it can be paid to save the forfeiture; as, where the proviso in the lease is, that if the rent be behind and unpaid for the space of twenty days the lessor may re-enter, the demand must be made on the twentieth day, at some convenient time before sunset (*r*); or according to a dictum of Lord *Tenterden*, C. J., at sunset (*s*); a demand at one o'clock in the day will not do (*s*); and, lastly, the demand must be made of the precise sum due, and not a penny more or less (*t*). Where the rent was payable quarterly, and more than one quarter was due, it was held, that only a quarter's rent should have been demanded (*u*). If the rent be not paid when thus demanded, the tenant forfeits his term. An actual entry is not necessary before bringing ejectment (*x*).

Other proceedings.

The proceedings in this action are the same as in ordinary cases.

This mode of proceeding upon a forfeiture for non-payment of rent, when the lease does not dispense with the necessity for a formal demand and there is a sufficient distress upon the premises,

(*m*) *Phillips* v. *Bridge*, L. R., 9 C. P. 48; 43 L. J., C. P. 13.

(*n*) *Kidwelly* v. *Brand*, Plowd. 70 a, b.

(*o*) *Roe* d. *West* v. *Davis*, 7 East, 363.

(*p*) Co. Lit. 201 b, 202 a: *Doe* d. *Forster* v. *Wandlass*, 7 T. R. 117: *Duppa* v. *Mayo*, 1 Saund. 287.

(*q*) Co. Litt. 202 a.

(*r*) Co. Litt. 202 a, and note 3: *Hill* v. *Grange*, Plowd. 172 b: *Duppa* v. *Mayo*, 1 Saund. 287. By an agreement under which premises were let at a rent payable on the usual quarter-days, a right of re-entry was reserved to the landlord, if default should be made "in payment of the rent or any part thereof, within twenty-one days after the same shall become due (being demanded)":—Held, that to entitle the landlord to bring ejectment on such right of re-entry, there must be a demand of the rent after such twenty-one days have elapsed, and a demand made during such twenty-one days was not sufficient: *Phillips* v. *Bridge*, L. R., 9 C. P. 48; 43 L. J., C. P. 13.

(*s*) *Doe* d. *Wheeldon* v. *Paul*, 3 Car. & P. 613.

(*t*) *Fabian and Windsor's case*, 1 Leon. 305: *Fabian* v. *Winston*, Cro. El. 209: *Doe* d. *Wheeldon* v. *Paul*, 3 Car. & P. 613.

(*u*) *Doe* d. *Wheeldon* v. *Paul*, 3 Car. & P. 613.

(*x*) *Anon.*, 1 Vent. 248: *Little* v. *Heaton*, 2 Ld. Raym. 750; 1 Salk. 259: *Clerke* v. *Pywell*, 1 Saund. 319: *Duppa* v. *Mayo*, Id. 287. See per *Willes*, J., *Grimwood* v. *Moss*, L. R., 7 C. P. at p. 364.

PART XIII.

is seldom, however, adopted in practice, on account of the great nicety to be observed in the previous demand of the rent.

2. *Where there is not a sufficient Distress upon the Premises.*

Statute as to.

Statute as to.]—If there be one half-year's rent in arrear and a power of re-entry for non-payment of such rent and not a sufficient distress upon the premises (*x*), the proceedings in an ejectment by the landlord for the recovery of the possession are regulated by the *Com. Law Proc. Act*, 1852, *s.* 210 (*y*), which enacts that, "In all cases between landlord and tenant, as often as it shall happen that one half-year's rent shall be (*z*) in arrear, and the landlord or lessor (*a*), to whom the same is due, hath right by law to re-enter for the non-payment thereof (*b*), such landlord or lessor shall and may, without any formal demand or re-entry, serve a writ in ejectment for the recovery of the demised premises, or in case the same cannot be legally served, or no tenant be in actual possession of the premises, then such landlord or lessor may affix a copy thereof upon the door of any demised messuage, or in case such action in ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, tenements, or hereditaments comprised in such writ in ejectment, and such affixing shall be deemed legal service thereof, which service or affixing such writ in ejectment shall stand in the place and stead of a demand and re-entry; and in case of judgment against the defendant for non-appearance, if it shall be made appear to the Court where the said action is depending, by affidavit, or be proved upon the trial in case the defendant appears (*c*), that half-a-year's rent was due before the said writ was served, and that no sufficient distress was to be found (*d*) on the demised premi[illegible]ountervailing the arrears then (*e*) due, and that the lessor had [illegible]r to re-enter, then, and in every such case, the lessor shall [illegible]ver judgment and execution in the same manner as if the rent in arrear had been legally demanded, and a re-entry made . . . . . " (*f*).

(*x*) *Doe* d. *Forster* v. *Wandlass*, 7 T. R. 117: *Doe* d. *Chandlass* v. *Robson*, 2 Car. & P. 245.

(*y*) The former enactment on this subject was the 4 G. 2, c. 28; see ss. 2, 3, 4.

(*z*) See *Cotesworth* v. *Spokes*, 10 C. B., N. S. 103; 30 L. J., C. P. 220. From this case it would seem that there must be one half-year's rent in arrear at the time the writ is served.

(*a*) This includes the assignee of the lessor. See 44 & 45 V. c. 41, s. 10, which applies to leases granted on and after January 1st, 1882. By 22 & 23 V. c. 35, s. 3, "where the reversion upon a lease is severed, and the rent or other reversion is legally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent or other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry for non-payment of the original rent or other reservation, in like manner as if such conditions or powers had been reserved to him as incident to his part of the reversion in respect of the apportioned rent or other reversion allotted or belonging to him." See also 44 & 45 V. c. 41, s. 12.

(*b*) That is to say, where, by the express terms of the lease, a right of re-entry has been reserved: *Brewer* v. *Eaton*, 3 Doug. 230, per *Mansfield*, C. J.; *Doe* d. *Dixon* v. *Roe*, 7 C. B. 164. The Act does not apply unless the lease is avoided, see *Doe* d. *Darke* v. *Bowditch*, 8 Q. B. 973; 15 L. J., Q. B. 266.

(*c*) See *Doe* d. *Haverson* v. *Franks*, 2 C. & K. 678.

(*d*) See *Doe* d. *Bedford Charity* v. *Payne*, 7 Q. B. 287.

(*e*) See *Cross* v. *Jordan*, noticed post, p. 1244, n. (*a*).

(*f*) See the remainder of this section, post, p. 1246.

Although the lease expressly requires a lawful demand, no demand is necessary to proceed under this Act (*g*).

Search for distress.

Search for Distress.]—Before proceeding under this Act, a diligent search over the premises must be made after the expiration of the time limited for payment of the rent, to ascertain the insufficiency of the property there to answer the distress, and such search will have to be proved at the trial (*h*). It seems it is sufficient to prove that there was no sufficient distress on the premises on a day between the day when the plaintiff was entitled to re-enter and the date of the writ (*i*). It must appear that every part of the premises has been searched, unless the tenant has prevented the landlord from having access to the premises, as by locking the doors; for a distress which cannot be made without a trespass is no available distress within the Act (*k*). As to the effect of taking an insufficient distress for the rent, for the non-payment of which the lease has become forfeited, *see Doe* d. *Chippendale* v. *Dyson*, M. & M. 77; *Doe* d. *Cox* v. *Roe*, 5 D. & L. 272; *Ward* v. *Day*, 33 L. J., Q. B. 3. Distraining, after action brought to recover land by reason of a forfeiture incurred by breach of a covenant in a lease, for rent due after the forfeiture incurred, is not a waiver of the forfeiture, as the lease is void on action brought (*l*).

Writ, and service of.

Writ, and Service of.]—The writ is the same as in ordinary cases of ejectment (*m*). It should not be issued until the forfeiture is complete (*n*). If the tenant be in the occupation of the premises, the writ is served as in an ordinary case. But if "the same cannot be legally served, or no tenant be in actual possession (*o*) of the premises, then a copy of the writ may be affixed upon the door of any demised messuage; or in case such ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, tenements, or hereditaments comprised in such writ in ejectment, and such affixing shall be deemed legal service thereof;

(*g*) See *Doe* d. *Scholefield* v. *Alexander*, 2 M. & Sel. 525: *Doe* v. *Wilson*, 5 B. & Ald. 363.

(*h*) See *Doe* d. *Forster* v. *Wandlass*, 7 T. R. 117: *Doe* d. *Haverson* v. *Franks*, 2 C. & K. 679.

(*i*) *Doe* v. *Fuchau*, 15 East, 286.

(*k*) *Doe* d. *Chippendale* v. *Dyson*, M. & M. 77: *Rees* d. *Powell* v. *King*, cited 2 B. & B. 514; Forrest, 19: *Price* v. *Worwood*, 4 H. & N. 412; 28 L. J., Ex. 326: *Hammond* v. *Mather*, 3 F. & F. 151: *Wheeler* v. *Stevenson*, 6 H. & N. 155; 30 L. J., Ex. 46, where part of the premises had been abandoned by the tenant, and the landlord had entered into such part.

(*l*) *Grimwood* v. *Moss*, L. R., 7 C. P. 360; 41 L. J., C. P. 239. See *Toleman* v. *Portbury*, L. R., 6 Q. B. 245; L. R., 7 Q. B. 344; 40 L. J., Q. B. 125; 41 L. J., Q. B. 98. See *Cotesworth* v. *Spokes*, 10 C. B., N. S. 103; 30 L. J., C. P. 220, where the plaintiff distrained before writ served, for rent due subsequent to the forfeiture, and it was held that the forfeiture was waived.

(*m*) Ante, p. 1206.

(*n*) *Doe* v. *Fuchau*, 15 East, 286: *Doe* v. *Shaweross*, 3 B. & C. 752; 5 D. & R. 711. It seems that in cases to which the Act applies, the plaintiff's title accrues at the time when the demand of the rent ought to have been made at common law: *Cotesworth* v. *Spokes*, 10 C. B., N. S. 103; 30 L. J., C. P. 220; ante, p. 1241.

(*o*) *Doe* d. *Pugh* v. *Roe*, 1 Se. 464; 1 Hodges, 6.

PART XIII.

which service or affixing such writ shall stand in the place and stead of a demand and re-entry" (*p*).

Judgment by default.

Judgment by Default.]—If the tenant does not appear and defend (*q*), the plaintiff may sign judgment by default, as in ordinary cases (*r*), except that an affidavit must also be made, stating that "half a year's rent was (*s*) due before the writ was served, and that no sufficient distress was to be found on the demised premises countervailing the arrears then due, and that the lessor had power to re-enter" (*t*). After judgment and execution, it will be presumed that the affidavit was made (*u*). It may be made by a third party (*x*). It must be positive as to there being no sufficient distress: swearing to the fact from mere information and belief will not do (*y*), unless when search for the distress has been prevented by the tenant keeping the premises locked and preventing access to them (*z*). If more than half a year's rent be sworn to be due, the affidavit will suffice if it alleges that no sufficient distress was to be found on the premises countervailing the arrears (*a*). Where judgment had been obtained upon an affidavit which the plaintiff was apprehensive might be held to be defective, the Court, at his instance, allowed such judgment to be superseded, and another judgment to be signed, upon an amended affidavit (*b*). *Issue execution as in ordinary cases.* (*See ante*, p. 1226.)

Appearance, and subsequent proceedings.

Appearance, and subsequent Proceedings.]—The appearance, and other proceedings to trial, &c., are the same as in ordinary cases, and as already mentioned. At the trial, however, the plaintiff, in addition to what in other cases he would have to give in evidence, must prove "that half a year's rent was due before the said writ was served, and that no sufficient distress was to be found on the demised premises countervailing the arrears then due, and that the lessor had power to re-enter" (*c*). As to the proof of the insufficiency of the distress, *see ante*, p. 1243. It seems that it is essential to prove the service of the writ (*d*).

Mesne profits.

As to the plaintiff recovering mesne profits on the trial as damages, *see Com. Law Proc. Act*, 1852, *s.* 214, *ante*, p. 1235.

Verdict for defendant.

By the *Com. Law Proc. Act*, 1852, *s.* 210, "If on such ejectment a verdict shall pass for the defendant, or the claimant shall be non-suited therein, then in every such case such defendant shall have and recover his costs." *But see Vol.* 1, p. 672 *et seq.*, as to when the Judge or the Court may prevent him recovering costs.

(*p*) C. L. P. Act, 1852, s. 210, ante, p. 1242.
(*q*) See *Doe* v. *Payne*, 7 Q. B. 287; 14 L. J., Q. B. 246.
(*r*) Ante, p. 1216.
(*s*) See ante, p. 1242, n. (*d*).
(*t*) C. L. P. Act, 1852, s. 210, ante, p. 1242. See form of affidavit, Chit. F., p. 613.
(*u*) See *Doe* v. *Lewis*, 1 Burr. 614.
(*x*) *Doe* d. *Charles* v. *Roe*, 3 M. & Sc. 751; 2 Dowl. 752.
(*y*) *Doe* v. *Roe*, 2 Dowl. 413: *Doe* d. *Hicks* v. *Roe*, 1 Dowl., N. S. 180.
(*z*) *Doe* d. *Cox* v. *Roe*, 5 D. & L. 272.
(*a*) *Cross* v. *Jordan*, 8 Ex. 149; 22 L. J., Ex. 70.
(*b*) *Doe* d. *Gretton* v. *Roe*, 4 C. B. 576.
(*c*) C. L. P. Act, 1852, s. 210, ante, p. 1242. See *Doe* v. *Lewis*, 1 Burr. 614: *Doe* v. *Payne*, 7 Q. B. 287; 14 L. J., Q. B. 246.
(*d*) *Doe* d. *Gooch* v. *Knowles*, 1 D. & L. 198; 12 L. J., Q. B. 332.

Staying proceedings before trial on payment of rent and costs.

Staying Proceedings before Trial on Payment of Rent and Costs.]— By the *Com. Law Proc. Act*, 1852, *s.* 212 (*e*), "If the tenant or his assignee do or shall, at any time before the trial (*f*) in such ejectment, pay or tender to the lessor, or landlord, his executors or administrators, or his or their attorney in that cause, or pay into the Court where the same cause is depending, all the rent and arrears, together with the costs, then and in such case all further proceedings on the said ejectment shall cease and be discontinued; and if such lessee, his executors, administrators or assigns shall, upon such proceedings as aforesaid (*g*), be relieved in equity (*h*), he and they shall have, hold and enjoy the demised lands, according to the lease thereof made, without any new lease."

A sub-lessee of the original tenant, or his assignee, is within the Act (*i*). So is a mortgagee (*k*). The application to stay the proceedings may be made to the Court or to a Judge (*l*). The application may be made, though the ejectment be not wholly brought under the Act; and in such case the Court will grant it, reserving, however, to the plaintiff the liberty of proceeding on any other title (*m*). Where the plaintiffs were both devisees and executors, and in each capacity rent was due to them, and the defendant moved to stay the proceedings on payment of the rent due to the plaintiffs as devisees, they not being entitled to bring an ejectment as executors, and there appearing to be a mutual debt due to the defendant by simple contract, the defendant offered to go into the whole account, taking in demands both as devisees and executors, saving just allowances; which the plaintiffs refused: the rule was made absolute to stay the proceedings, on payment of the rent due to the plaintiffs as devisees, and costs (*n*). Where the rent was tendered before action brought, the proceedings were set aside (*o*). The rent to be paid, must, it seems, be calculated only to the last rent-day (*p*).

The acceptance by the plaintiff of the money paid into Court under this section does not operate as a waiver of other forfeitures relied on in the same action (*q*).

Relief against forfeiture under the

Relief against Forfeiture under the Com. Law Proc. Act, 1860.]— By the *Com. Law Proc. Act*, 1860, *s.* 1, "In the case of any eject-

(*e*) See the prior enactment, the 4 G. 2, c. 28, s. 4: *Doe* v. *Byron*, 14 L. J., C. P. 207.

(*f*) See *Roe* d. *West* v. *Davis*, 7 East, 363: *Goodtitle* v. *Holdfast*, 2 Str. 900: *Doe* d. *Harris* v. *Masters*, 4 D. & R. 45; 2 B. & C. 490: *Doe* d. *Lambert* v. *Roe*, 3 Dowl. 557: *Smith* v. *Parks*, 10 Mod. 383: *Doe* d. *Downes* v. *Turner*, 2 Salk. 597.

(*g*) See sect. 211, post, p. 1246.

(*h*) As to the Court or a Judge giving relief against a forfeiture for non-payment of rent, see C. L. P. Act, 1860, infra.

(*i*) *Doe* v. *Bryon*, 3 D. & L. 31; 1 C. B. 623; 14 L. J., C. P. 207. This and the following cases were decided before the C. L. P. Act, 1852, but are applicable to the present enactment.

(*k*) *Doe* d. *Whitfield* v. *Roe*, 3 Taunt. 402; Ad. Eject. 214.

(*l*) Ca. Pr. C. B. 6; 2 Sellon, 127. See forms, Chit. Forms, p. 614.

(*m*) *Pure* v. *Sturdy*, Bull. N. P. 97. See *Doe* v. *Asby*, 10 A. & E. 71: *Doe* v. *Maberly*, Id. 74, n.

(*n*) 2 Sel. Prac. 211: *Duckworth* d. *Tubley* v. *Tunstall*, Barnes, 184.

(*o*) *Goodright* d. *Stevenson* v. *Noright*, 2 W. Bl. 746.

(*p*) *Doe* d. *Harcourt* v. *Roe*, 4 Taunt. 883.

(*q*) *Toleman* v. *Portbury*, L. R., 6 Q. B. 245; affirmed, L. R., 7 Q. B. 344.

PART XIII.

C. L. P. Act, 1860, for non-payment of rent.

ment for a forfeiture brought for non-payment of rent (*r*), the Court or a Judge shall have power, upon rule or summons, to give relief in a summary manner, but subject to appeal as hereinafter mentioned, up to and within the like time after execution executed (*s*), and subject to the same terms and conditions in all respects, as to payment of rent, costs and otherwise (*t*), as in the Court of Chancery (*u*); and if the lessee (*x*), his executors, administrators or assigns shall upon such proceeding be relieved, he and they shall hold the demised lands according to the lease thereof made, without any new lease."

Proceedings for relief.

Proceedings for Relief.]—By the *Com. Law Proc. Act*, 1852, s. 210 (*y*), " . . . And in case the lessee or his assignee, or other person claiming or deriving under the said lease, shall permit and suffer judgment to be had and recovered on such trial (*z*) in ejectment and execution to be executed thereon, without paying the rent and arrears, together with full costs, and without proceeding for relief in equity within six months (*a*) after such execution executed, then and in such case the said lessee, his assignee, and all other persons claiming and deriving under the said lease, shall be barred and foreclosed from all relief or remedy in law or equity, other than by bringing error for reversal of such judgment, in case the same shall be erroneous, and the said landlord or lessor shall from thenceforth hold the said demised premises discharged from such lease: and if on such ejectment a verdict shall pass for the defendant, or the claimant shall be nonsuited therein, then in every such case such defendant shall have and recover his costs: Provided that nothing herein contained shall extend to bar the right of any mortgagee of such lease, or any part thereof, who shall not be in possession, so as such mortgagee shall and do, within six months (*a*) after such judgment obtained and execution executed, pay all rent in arrear, and all costs and damages sustained by such lessor or person entitled to the remainder or reversion as aforesaid, and perform all the covenants and agreements which, on the part and behalf of the first lessee, are and ought to be performed."

By sect. 211, "In case the said lessee, his assignee, or other person

---

(*r*) As to staying proceedings *before* trial, on payment of rent and costs, see ante, p. 1245.

(*s*) That is to say, six calendar months after the execution of an hab. fa. poss.: 4 G. 2, c. 28, ss. 2, 3.

(*t*) See Dan. Ch. Pract.

(*u*) See sect. 211, infra. See *Hill* v. *Barclay*, 16 Ves. 405; 18 Ves. 61. It seems that relief may be given though the default in non-payment of the rent was wilful or arose through negligence: *Sanders* v. *Pope*, 12 Ves. 289.

(*x*) Where there are several underlessees, relief will be given on the application of one of them on his paying *all* the rent in arrear to the original lessor: *Webber* v. *Smith*, 2 Vern. 103. As to such lessee compelling the other lessees to contribute their proportion of the sum so paid, see *S. C.*

(*y*) See the first part of this section, ante, p. 1242.

(*z*) These words, "trial in," are not in the 4 G. 2, c. 28, s. 2, and it would seem have been inserted by mistake.

(*a*) This means calendar months. See 13 & 14 V. c. 21, s. 4. See *Wadman* v. *Calcraft*, 10 Ves. 67: *Davis* v. *West*, 12 Id. 475: *Hill* v. *Barclay*, 16 Id. 405; 18 Id. 58: *Lovat* v. *Lord Ranelagh*, 3 V. & B. 24: C. L. P. Act, 1852, ss. 211, 212, infra, and ante, p. 1245.

claiming any right, title, or interest in law or equity, of, in, or to the said lease, shall, within the time aforesaid, proceed for relief in any Court of equity (*b*), such person shall not have or continue any injunction against the proceedings at law on such ejectment, unless he does or shall, within forty days next after a full and perfect answer shall be made by the claimant in such ejectment, bring into Court, and lodge with the proper officer, such sum and sums of money as the lessor or landlord shall in his answer swear to be due and in arrear over and above all just allowances, and also the costs taxed in the said suit, there to remain till the hearing of the cause, or to be paid out to the lessor or landlord on good security, subject to the decree of the Court; and in case such proceedings for relief in equity shall be taken within the time aforesaid, and after execution is executed, the lessor or landlord shall be accountable only for so much and no more as he shall really and *bonâ fide*, without fraud, deceit, or wilful neglect, make of the demised premises from the time of his entering into the actual possession thereof; and if what shall be so made by the lessor or landlord happen to be less than the rent reserved on the said lease, then the said lessee or his assignee, before he shall be restored to his possession, shall pay such lessor or landlord what the money so by him made fell short of the reserved rent for the time such lessor or landlord held the said lands" (*c*).

Landlord's rights and remedies are not to be prejudiced by the above enactments. See *Com. Law Proc. Act*, 1852, *s.* 218, *ante*, p. 1236.

Landlord's rights not prejudiced by above.

SECT. V.—EJECTMENT BY MORTGAGEE (*d*).

By the *Com. Law Proc. Act*, 1852, *s.* 219 (*e*), "Where an action of ejectment shall be brought by any mortgagee, his heirs, executors, administrators, or assigns, for the recovery of the possession of any mortgaged lands, tenements, or hereditaments, and no suit shall be then depending in any of her Majesty's Courts of equity in that part of Great Britain called England, for or touching the foreclosing or redeeming of such mortgaged lands, tenements or hereditaments, if the person having right to redeem such mortgaged lands, tenements, or hereditaments, and who shall appear and become defendant (*f*) in such action, shall, at any time pending (*g*) such

In ejectment by mortgagee, the mortgagor's rendering the principal, &c. in Court shall be deemed satisfaction, and Court may compel mortgagee to reconvey.

(*b*) An application to the Division in which an action is pending is now substituted for an injunction. See ante, Vol. 1, p. 360.

(*c*) See 4 G. 2, c. 28, s. 2: *Doe* d. *Hitchings* v. *Lewis*, 1 Burr. 614; 2 Ld. Ken. 320.

(*d*) As to when a mortgagor may sue for possession, see ante, p. 1203. As to proceeding for summary judgment under Ord. XIV., see ante, p. 1231, n. (*u*).

(*e*) See the 7 G. 2, c. 20, ss. 1 and 3, the former enactments on this subject. These enactments also apply to an action on a bond given as a collateral security with the mortgage, and also to an action on the mortgage deed: *Smeeton* v. *Collier*, 1 Ex. 457; 17 L. J., Ex. 57: *Sutton* v. *Rawlings*, 3 Ex. 407; 18 L. J., Ex. 249.

(*f*) *Doe* d. *Hurst* v. *Clifton*, 6 N. & M. 857; 4 A. & E. 814: *Doe* d. *Cox* v. *Brown*, 6 Dowl. 471.

(*g*) See *Doe* d. *Tubb* v. *Roe*, 4 Taunt. 887. The Act does not, it seems, apply if judgment has been

PART XIII.

action, pay unto such mortgagee, or in case of his refusal, shall bring into Court, where such action shall be depending, all the principal moneys and interest due on such mortgage, and also all such costs as have been expended in any suit at law or in equity upon such mortgage (such money for principal, interest, and costs to be ascertained and computed by the Court where such action is or shall be depending, or by the proper officer by such Court to be appointed for that purpose), the moneys so paid to such mortgagee, or brought into such Court, shall be deemed and taken to be in full satisfaction and discharge of such mortgage, and the Court (*h*) shall and may discharge every such mortgagor or defendant of and from the same accordingly; and shall and may, by rule of the same Court, compel such mortgagee, at the costs and charges of such mortgagor, to assign, surrender, or re-convey such mortgaged lands, tenements, and hereditaments, and such estate and interest as such mortgagee has therein, and deliver up all deeds, evidences, and writings in his custody relating to the title of such mortgaged lands, tenements, and hereditaments, unto such mortgagor who shall have paid or brought such moneys into the Court, his heirs, executors, or administrators, or to such other person or persons as he or they shall for that purpose nominate or appoint."

Not to apply where right of redemption controverted or money due not adjusted; or to prejudice any subsequent mortgage.

By sect. 220, "Nothing herein contained shall extend to any case where the person, against whom the redemption is or shall be prayed, shall (by writing under his hand, or the hand of his attorney, agent, or solicitor, to be delivered before the money shall be brought into such Court of law, to the attorney or solicitor for the other side) insist (*i*), either that the party praying a redemption has not a right to redeem, or that the premises are chargeable with other or different principal sums than what appear on the face of the mortgage, or shall be admitted on the other side (*k*); or to any case where the right of redemption to the mortgaged lands and premises in question in any cause or suit shall be controverted (*l*), or questioned by or between different defendants in the same cause or suit; or shall be any prejudice to any subsequent mortgage or subsequent incumbrance, anything herein contained to the contrary thereof in anywise notwithstanding" (*m*).

A reference under the Act will not be granted unless all the defendants admit the plaintiff's title (*n*). A reference will be refused if the defendant has agreed to sell the equity of redemption to the plaintiff, and has declined to complete the contract (*o*). In a case decided under the previous enactments on this subject, where a first mortgagee brought an action of covenant on the covenant in the

---

signed, and plaintiff is entitled to execution: *Amis* v. *Lloyd*, 3 Ves. & B. 15. See *Gorely* v. *Gorely*, 1 H. & N. 144.

(*h*) Or a Master at Chambers. See *Felton* v. *Ash*, Barnes, 177: *Lawrence* v. *Hogben*, 26 L. J., Ex. 55.

(*i*) See *Doe* d. *Harrison* v. *Louch*, 6 D. & L. 270.

(*k*) See *Goodtitle* v. *Bishop*, 1 Y. & J. 344.

(*l*) See *Hewson* v. *Hewson*, 4 Ves. 105.

(*m*) See the following cases on the previous enactment: *Roe* d. *Kay* v. *Soley*, 2 W. Bl. 726: *Stiles* d. *Redhead* v. *Oakes*, Barnes, 182: *Felton* v. *Ash*, Id. 177: *Goodright* v. *Moore*, Id. 176: *Archer* v. *Snatt*, 2 Str. 1107; Andr. 341: *Anon.*, 1 Str. 413: *Berthen* v. *Street*, 8 T. R. 326.

(*n*) *Roe* v. *Wardle*, 3 Y. & C. 70.

(*o*) *Goodtitle* v. *Pope*, 7 T. R. 185. But see *Skinner* v. *Stacey*, 1 Wils. 80.

mortgage deed, having received notice from a second mortgagee not to deliver up the deed, and the mortgagor applied to the Court to compel the plaintiff, under the Act, to re-convey the premises upon payment of the principal, interest, and costs, the Court held it to be a case within the Act, and made the order (*p*). The defendant is entitled to have the proceedings stayed under the Act, without paying the expense of preparing the mortgage-deed, or any assignment of it (*p*), or any collateral debt (*q*). The costs also are taxed only as between party and party, and not as between solicitor and client (*r*). To a rule calling upon the mortgagee, under the 7 & 8 *G.* 2, *c.* 20, *s.* 1, the previous enactment on this subject, to show cause why, upon payment of principal, interest, and costs, he should not re-convey the mortgaged premises, and deliver up deeds, &c., it was held, that it was an answer that the mortgagee had delivered a notice in writing under sect. 3, that he disputed the right of the mortgagor to redeem, although such notice had been delivered since the rule was obtained (*s*).

SECT. VI. ACTION FOR MESNE PROFITS.

Usually included in action to recover land.

Under the present practice it is usual to include a claim for mesne profits in the same action as is brought for the recovery of the land, and this is expressly sanctioned by *R. of S. C., Ord. XVIII. r.* 2 (*ante*, p. 1207).

Action for mesne profits.

If no claim for mesne profits has been joined in the action for the recovery of the land, the plaintiff may, after judgment obtained in such action, bring an action against the defendant for the damages the former has sustained by the latter wrongfully keeping the possession of the land. This is called an action for mesne profits. The plaintiff should make an entry into the premises before bringing the action, as it seems doubtful whether trespass with a *continuando* lies after disseisin and before re-entry; but, for the first trespass and disseisin, trespass lies before re-entry (*t*). It seems that after entry the plaintiff may recover mesne profits from the time when his right of entry accrued (*u*).

By whom to be brought.

The action should be brought in the name of the plaintiff who has recovered in the action of ejectment. A tenant in common, who has recovered in ejectment, may maintain an action for mesne profits against his co-tenant (*x*). Before the *Com. Law Proc. Act*,

(*p*) *Dixon* v. *Wigram*, 2 C. & J. 613: *Doe* d. *Blagg* v. *Steel*, 1 Dowl. 359.

(*q*) *Archer* v. *Snatt*, 2 Str. 1107. As to payment of the costs of an abortive attempt at sale under a power, see *Dowle* v. *Neale*, 10 W. R. 627.

(*r*) *Doe* d. *Capps* v. *Capps*, 3 Bing. N. C. 768.

(*s*) *Filbee* v. *Hopkins*, 6 D. & L. 264.

(*t*) *Doe* v. *Wright*, 10 Ad. & E. 780; Co. Litt. 257 a; 2 Roll. Abr. 550, 553, 554.

(*u*) *Barnett* v. *The Earl of Guildford*, 25 L. T. 85, Ex. See *Litchfield* v. *Ready*, 5 Ex. 939; 20 L. J., Ex. 51: *Turner* v. *Camerons, &c. Co.*, 5 Ex. 932; 20 L. J., Ex. 71.

(*x*) *Goodtitle* v. *Tombs*, 3 Wils. 118: *Cutting* v. *Derby*, 2 W. Bl. Rep. 1077.

PART XIII.

1852, a joint action for mesne profits might be maintained by several lessors of the plaintiff in ejectment after recovery therein, although the declaration in ejectment contained only a separate demise by each (*y*).

Against whom.

The action is, in general, brought against the person against whom the judgment in ejectment is given (*z*); but it may be brought against any person found in possession prior to the judgment (*a*). The defendant is only liable for the mesne profits for the time he was in possession (*b*). It seems that a tenant is liable for mesne profits, if his under-tenant hold over after his interest has determined, if the former has in any way acquiesced in the overholding of his under-tenant; as, for instance, if he has received rent from his under-tenant for the period during which possession was improperly detained, or the like (*c*). As to when an action can be maintained against executors or administrators for the profits during the lifetime of the testator or intestate received by him, *see ante*, p. 1118.

Arrest for.

As to when defendant can be arrested before final judgment when he is about to quit England, &c., *see post*, *Ch. CXXVII.* (*d*).

What a defence.

The defendant may plead the Statute of Limitations as to all the profits excepting those which may have accrued within the last six years (*e*). If the defendant, by his defence, seek to raise any point decided by the judgment in ejectment, the plaintiff may reply the judgment in ejectment by way of estoppel (*f*); but, unless he so reply, the defendant will not be estopped by the judgment (*g*). The judgment does not operate as an estoppel with respect to the duration of the plaintiff's title (*h*). The plaintiff may plead the judgment in ejectment by way of estoppel, as above, though an appeal be pending on it (*i*). A landlord is estopped by the judgment in ejectment from saying he was not landlord in

---

(*y*) *Chamier* v. *Clingo*, 5 M. & Sel. 64; 2 Chit. Rep. 410.

(*z*) 1 Chit. Pl. 6th ed. 195.

(*a*) See 1 Chit. Pl. 6th ed. 195: *Doe* v. *Harvey*, 8 Bing. 242: *Doe* v. *Whitcombe*, 8 Bing. 46.

(*b*) *Aslin* v. *Parkin*, 2 Burr. 668 (as to which, see *Harris* v. *Mulkern*, 1 Ex. D. 31): *Doe* d. *James* v. *Staunton*, 1 Chit. Rep. 121; 2 B. & Ald. 373. As to judgment by default in ejectment being evidence of defendant's possession at time of the action brought, see *Pearse* v. *Coker*, L. R., 4 Ex. 92; 38 L. J., Ex. 82, from which it appears that the better opinion is that it is.

(*c*) *Doe* v. *Harlow*, 12 Ad. & E. 40: *Roe* v. *Wiggs*, 2 N. R. 330: *Ibbs* v. *Richardson*, 9 Ad. & E. 849; 1 P. & D. 618: *Harding* v. *Crethorn*, 1 Esp. 57: *Levy* v. *Lewis*, 6 C. B., N. S. 766; 28 L. J., C. P. 304. Sed vide per *Mansfield*, C. J., in *Burne* v. *Richardson*, 4 Taunt. 720. See *Christy* v. *Tancred*, 7 M. & W. 127; 9 M. & W. 438; 12 M. & W. 316, as to one co-tenant being liable for the holding over of another.

(*d*) See *Hunt* v. *Hudson*, Barnes, 55.

(*e*) Bull. N. P. 88. As to pleading bankruptcy, see ante, p. 1169; *Goodtitle* v. *North*, 2 Doug. 584: *Lloyd* v. *Peel*, 3 B. & Ald. 407.

(*f*) *Harris* v. *Mulkern*, 1 Ex. D. 31; 45 L. J., Ex. 244: *Doe* v. *Wright*, 10 A. & E. 763: *Bather* v. *Brayne*, 7 C. B. 815: *Doe* v. *Welsman*, 2 Ex. 368; 18 L. J., Ex. 277: *Litchfield* v. *Ready*, 5 Ex. 939; 20 L. J., Ex. 51: *Wilkinson* v. *Kirby*, 15 C. B. 430; 23 L. J., C. P. 224. See *Campbell* v. *Loader*, 34 L. J., Ex. 50, where an action for mesne profits was brought after a County Court Judge had made an order for giving up possession.

(*g*) *Doe* v. *Huddart*, 2 C., M. & R. 316. And see *Vooght* v. *Winch*, 2 B. & Ald. 662: *Matthew* v. *Osborne*, 13 C. B. 919; 22 L. J., C. P. 241.

(*h*) *Harris* v. *Mulkern*, supra.

(*i*) *Doe* v. *Wright*, 10 A. & E. 763.

possession at the time he appeared to and defended the action of ejectment (*k*).

Where a landlord defended an action of ejectment, and the action of trespass for mesne profits was brought against him, his tenant, and the tenant's under-tenant, the Court held, that the record in the action of ejectment was admissible in evidence, as against the tenant, to prove that he was a joint trespasser with the landlord, as it appeared that they were privy in estate (*l*).

Amount of damages.

The jury are not, in estimating the damages, confined to give the mere rent or annual value of the premises; but may give such extra damages as they may think fit, as a compensation for plaintiff's trouble, &c. (*m*). The plaintiff may also recover, as damages, the costs of the action of ejectment; but if that action were defended and the costs taxed, he cannot recover more than such taxed costs (*n*); though, if judgment went by default in the action, he may recover the actual costs of the judgment (*o*). It has been held that the plaintiff may also recover, by way of damages, the costs incurred by him in a Court of error, in reversing the judgment in ejectment erroneously obtained by the defendant (*p*). And the plaintiff is not restricted to the time mentioned in the statement of claim as the time from whence he claimed to be entitled to possession, but may also recover the profits which accrued previously, if he had title to the premises at the time and the defendant were in possession (*q*). The jury, however, are to give damages only for the time the defendant is proved to have been in possession (*r*), and since the plaintiff's title accrued. And where an actual entry had been made to avoid a fine, the jury could give damages only as to the profits accruing since the time of the entry (*s*).

It seems that if the defendant suffer judgment by default, the plaintiff should, upon executing a writ of inquiry, prove the length of time the defendant has been in possession (*t*).

Ground-rent necessarily paid by the defendant while in possession should be deducted by the jury from the damages (*u*).

(*k*) See *Doe* v. *Challis*, 17 Q. B. 166; 20 L. J., Q. B. 478.

(*l*) *Doe* v. *Harlow*, 12 Ad. & E. 42, n. (*d*).

(*m*) *Goodtitle* v. *Tombs*, 3 Wils. 121: *Doe* v. *Hare*, 2 C. & M. 145; 4 Tyr. 29: *Dunn* v. *Large*, 3 Doug. 335: *Doe* d. *Levy* v. *Roe*, 6 C. B. 275, per *Cresswell*, J.

(*n*) *Doe* v. *Filliter*, 13 M. & W. 47.

(*o*) *Pearse* v. *Coaker*, L. R., 4 Ex. 92; 38 L. J., Ex. 82: *Gulliver* v. *Drinkwater*, 2 T. R. 261: *Doe* v. *Davis*, 1 Esp. 358: *Doe* v. *Huddart*, 2 C., M. & R. 316: *Symonds* v. *Page*, 1 C. & J. 29: *Goodtitle* v. *Tombs*, 3 Wils. 121; Bull. N. P. 88, 89. And see *Hunter* v. *Britts*, 3 Camp. 455: *Brooke* v. *Bridges*, 7 Moore, 471: *Doe* v. *Hare*, 2 Dowl. 245.

(*p*) *Newell* v. *Roake*, 7 B. & C. 404; 1 M. & R. 170. On an appeal, costs are now usually given by the Court of Appeal to the successful party. See ante, p. 991.

(*q*) Bull. N. P. 87.

(*r*) *Stanynought* v. *Cosins*, Barnes, 456.

(*s*) See *Compere* v. *Hicks*, 7 T. R. 727. And see *Berrington* v. *Parkhurst*, 2 Str. 1086; 4 Brown, P. C. 353.

(*t*) *Ive* v. *Scott*, 9 Dowl. 993. It appears, however, to be the better opinion that a judgment by default is sufficient evidence of possession at the date of the writ of ejectment. See the point fully discussed in *Pearse* v. *Coaker*, L. R., 4 Ex. 92; 38 L. J., Ex. 82, where *Ive* v. *Scott*, supra, is commented on. See *Harris* v. *Mulkern*, 1 Ex. D. 31, 35.

(*u*) *Doe* v. *Hare*, 2 C. & M. 145; 4 Tyr. 29. See *Lord Cawdor* v.

PART XIII.

Action pending appeal.

Costs.

Other proceedings.

If the action is brought pending an appeal on the judgment in ejectment, the plaintiff may proceed to judgment; but the Court will stay execution until the appeal is determined (*x*).

As to costs, *see Vol.* 1, p. 671 *et seq.* (*y*).

In all other respects the proceedings in this action are the same as in ordinary cases.

Lewis, 1 Y. & C. 427, where there was a claim by defendant for money expended on the land.

(*x*) Ca. Pr. C. B. 46. And see *Doe* v. *Wright*, 10 A. & E. 763.

(*y*) See also *Doe* v. *Davis*, 1 Esp. 358; 6 T. R 593.

CHAPTER CVII.

REPLEVIN (a).

	PAGE
1. *What, and in what Cases it lies, and by whom, &c.* ..	1253
2. *Enactments as to*	1254
3. *Proceedings to obtain the Replevin*	1255
4. *Proceedings in High Court of Justice when Action of Replevin commenced there* .	1258
5. *Proceedings in County Court when Action of Replevin commenced there*	1266
6. *Proceedings in High Court of Justice when Action commenced in the County Court, and removed by Certiorari*	1267
7. *Proceedings on the Replevin Bond against the Sureties.*	1270
8. *Proceedings against the Registrar of the County Court for taking insufficient or no Sureties*	1271

1. *What, and in what Cases it lies, and by whom, &c.*

What.

REPLEVIN is a re-delivery by the Registrar of the County Court to the owner of his chattels taken upon any cause, upon surety that he will pursue the action against him that took them (*b*). An action of replevin is a personal action (*c*).

In what cases.

It is a remedy that may be adopted by a party in all cases where chattels are unlawfully taken (*d*) from him (*e*); except where the taking was in execution under a judgment of a superior Court (*f*), or in order to a condemnation under the revenue laws (*g*), or for a duty due to the Crown (*h*).

For what.

Whatever may be distrained may be replevied (*i*). The action lies for beasts *ferœ naturœ* when reclaimed (*k*), or for the young of animals distrained, born since the distress (*l*). It does not lie for money generally (*m*); nor for title-deeds (*m*), nor for things annexed to the freehold (*n*). But it lies for growing corn, &c., taken under a distress under the 11 *G.* 2, *c.* 19, *s.* 8.

(*a*) See *Messiter* v. *Rose*, 13 C. B. 162; 22 L. J., C. P. 78: *Marshall* v. *Bishop of Exeter*, 6 C. B., N. S. 716; 28 L. J., C. P. 300.

(*b*) 19 & 20 V. c. 108, s. 63; Bac. Ab. Repl. A.

(*c*) *Eaton* v. *Southby*, Willes, 134.

(*d*) Com. Dig., Repl.; 2 Roll. Ab. 430; Bull. N. P. 52: *George* v. *Chambers*, 11 M. & W. 149; 2 Dowl., N. S. 783; 12 L. J., M. C. 94: *Allen* v. *Sharp*, 2 Ex. 352; 17 L. J., Ex. 209; *Mellor* v. *Leather*, 1 E. & B. 619; 22 L. J., M. C. 76: *Gay* v. *Mathews*, 32 L. J., M. C. 58: *London and North West. R. Co.* v. *Buckmaster*, L. R., 10 Q. B. 70; affirmed Id. 444; 44 L. J., M. C. 29, poor rate.

(*e*) *Mennie* v. *Blake*, 6 E. & B. 842; 25 L. J., Q. B. 399.

(*f*) *George* v. *Chambers*, supra.

(*g*) *Cawthorne* v. *Camp*, 1 Anst. 212.

(*h*) *Rex* v. *Oliver*, Bunb. 14.

(*i*) 1 Swanst. R. 296; Cowp. 214.

(*k*) *Davies* v. *Powell*, Willes, 46; 2 Roll. Ab. 430.

(*l*) Gilb. Repl. 156; Sid. 82.

(*m*) Bac. Ab., Repl. F.

(*n*) *Niblett* v. *Smith*, 4 T. R. 504.

PART XIII.

By whom.

Prior to the Married Women's Property Acts, if the goods of a *feme sole* were taken, and she married, the husband alone might sue the replevin (*o*), or they might both join (*p*). Executors may have replevin for the goods of the testator taken in his lifetime (*q*). Several persons cannot join in one replevin for several goods, where the property is several (*r*).

Against whom.

It lies against the party who actually took the chattels, or who directed or ordered the taking. If goods are taken by A. by the command of B., the replevin may be against both, or either (*s*).

2. *Enactments as to.*

Registrar of County Court to grant replevins.

By the 19 & 20 *V. c.* 108, *s.* 63, "The powers and responsibilities of the sheriff (*t*) with respect to replevin bonds and replevins shall henceforth cease, and the registrar of the County Court of the district in which any distress (*u*) subject to replevin shall be taken shall be empowered, subject to the regulations hereinafter contained, to approve of replevin bonds, and to grant replevins, and to issue all necessary process in relation thereto, and such process shall be executed by the high bailiff."

Securities to be given.

By sect. 64, "Such registrar shall, at the instance of the party whose goods shall have been distrained, cause the same to be replevied to such party, on his giving one or other of such securities as are mentioned in the next two succeeding sections."

Replevin may be commenced in superior Court.

By sect. 65, "An action of replevin may be commenced in any superior Court in the form applicable to personal actions therein, and such Court shall have power to hear and determine the same; and if the replevisor shall wish to commence proceedings in any superior Court, he shall, at the time of the replevying, give security, to be approved of by the registrar, for such an amount as such registrar shall deem sufficient to cover the alleged rent or damage in respect of which the distress shall have been made, and the probable costs of the cause in a superior Court, conditioned to commence an action of replevin against the distrainer in such superior Court as shall be named in the security, within one week from the date thereof, and to prosecute such action with effect and without delay, and unless judgment thereon be obtained by default, to prove before such superior Court that he had good ground for believing either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair or franchise, was in question, or that such rent or damage exceeded 20*l.*, and to make return of the goods, if a return thereof shall be adjudged."

Conditions of security in such cases.

Conditions of security when replevin

By sect. 66, "If the replevisor shall wish to commence proceedings in a County Court, he shall at the time of replevying give security, to be approved of by the registrar, for such an amount as

(*o*) Gilb. Repl. 156.
(*p*) See Cas. t. Hardw. 119.
(*q*) Gilb. Repl. 156.
(*r*) Id. 153; Bro. Ab., Repl., pl. 12.
(*s*) Gilb. Repl. 152; 2 Roll. Ab. 431; *Jones* v. *Johnson*, 5 Ex. 862; 20 L. J., Ex. 45.
(*t*) As to a franchise for granting replevins, see *Hiltawell* v. *Eastwood*, 6 Ex. 295; 20 L. J., Ex. 154: *Mounsey* v. *Dawson*, 6 A. & E. 752.
(*u*) This and the other enactments in this statute relating to replevin are extended to all cases of replevin by the C. L. P. Act, 1860, s. 22, post, p. 1255, which is expressly left unrepealed by the stat. 46 & 47 V. c. 49.

such registrar shall deem sufficient to cover the alleged rent or damage in respect of which the distress shall have been made, and the probable costs of the cause in the County Court, conditioned to commence an action of replevin against the distrainer in the County Court of the district in which the distress shall have been taken, within one month from the date of the security, and to prosecute such action with effect, and without delay, and to make return of the goods, if a return thereof shall be adjudged." brought in County Court.

By sect. 67, "Any action of replevin brought in a County Court shall be removed into any superior Court by writ of certiorari, if the defendant shall apply to such superior Court, or to a Judge there for such writ, and shall give security, to be approved of by the Master of such superior Court, for such amount, not exceeding 150*l.*, as such Master shall think fit, conditioned to defend such action with effect (*v*), and, unless the replevisor shall discontinue, or shall not prosecute such action, or become nonsuit therein, to prove before such superior Court that the defendant had good ground for believing, either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair or franchise was in question, or that the rent or damage in respect of which the distress shall have been taken, exceeded 20*l.*; and every such superior Court shall have power to determine the same action." Replevins may be removed into superior Court in certain cases.

By sect. 68, an appeal from the decision of a County Court is allowed in all actions of replevin, where the amount of rent or damage exceeds 20*l.* See this section, *post*, *Ch. CXXX.* Appeal from decision of County Court.

Sect. 70, *post*, *Ch. CXXX.*, directs how securities under this Act are to be given and enforced. How securities given.

By sect. 71, *see post*, *Ch. CXXX.*, where security is required to be given by the above Act, a deposit of money may be made in lieu thereof. Deposits in lieu thereof.

By the *Com. Law Proc. Act*, 1860, *s.* 22, "The provisions of the 19 & 20 *V. c.* 108, which relate to replevin, shall be deemed and taken to apply to all cases of replevin, in like manner as to the cases of replevin of goods distrained for rent or damage feasant" (*w*). 19 & 20 Vict. c. 108, extended to all cases of replevin.

3. *Proceedings to obtain the Replevin.*

By the 19 & 20 *V. c.* 108, *ss.* 63 & 64 (*x*), the Registrar of the County Court of the district in which the distress is taken is to approve of the replevin bonds, and grant replevins, and to issue all necessary process in relation thereto. Such process is to be executed by the high bailiff of the County Court. The above enactments are extended to all cases of replevin by the *Com. Law Proc. Act*, 1860, *s.* 22, *supra*. Who to grant.

Before this Act it was enacted by the statute of Marlbridge (*y*),

---

(*v*) See *Tummons* v. *Ogle*, 6 E. & B. 571; 25 L. J., Q. B. 403; a case decided as to the meaning of the words "prosecute the suit with effect," in the 121st sect. of the 9 & 10 V. c. 95. A question was also raised in this case whether under a bond given under this section a party was liable for more than the taxed costs as between party and party.

(*w*) This section is expressly excepted from the repeal effected by the 46 & 47 V. c. 49.

(*x*) See these sects. ante, p. 1254.

(*y*) 52 H. 3, c. 21; 2 Inst. 138.

PART XIII.

that the sheriff, without any writ being sued out of Chancery, should proceed to replevy the goods, immediately upon complaint being made to him; and by the 1 & 2 *P. & M. c.* 12, the sheriff of every county (*z*) had to appoint four deputies (*a*) at least, dwelling not above twelve miles distant from each other, for the purpose of making replevies (*b*). One of the sheriffs of the city of London might grant them (*c*). Bailiffs of liberties and other persons had in some cases power to do so (*d*). Where the lord of the franchise had the prescriptive right to grant replevins in the same manner as the sheriff had before the statute of Marlbridge, the sheriff had no concurrent jurisdiction with him (*e*). If the replevin were granted by a party having no authority to grant it, the whole proceeding for the replevin suit would fail, and a prohibition would lie against a continuance of it (*f*).

At whose instance.

The replevin is granted at the instance of the party whose goods are distrained. See 19 & 20 *V. c.* 108, *s.* 64, *ante*, p. 1254.

Security to be given when action to be brought in a superior Court.

By the 19 & 20 *V. c.* 108, *s.* 65 (*g*), if the replevisor wishes to commence proceedings in a superior Court (*h*), he must at the time of replevying give security, to be approved of by the registrar, for such an amount as such registrar shall deem sufficient to cover the alleged rent or damage in respect of which the distress has been made, and the probable costs of the cause in the superior Court. The security is in the form of a bond, with sureties, to the distrainer (*i*), which must be conditioned in the manner pointed out by the above 65th section. It is given at the cost of the replevisor (*k*). Instead of giving a bond, a deposit of money may be made in the manner mentioned in the 71st section of the above Act (*l*). As to enforcing the bond, and giving relief to the obligors, *see* 19 & 20 *V. c.* 108, *s.* 70, noticed *Ch. CXXX.*; and as to obtaining out of Court the money deposited in lieu of a bond, *see* sect. 71 of the above Act, *Ch. CXXX.*

Security when replevin to be brought in a County Court.

By the 19 & 20 *V. c.* 108, *s.* 66 (*m*), if the replevisor wishes to commence proceedings in a County Court, he must, at the time of replevying, give security, to be approved of by the registrar, to such an amount as the registrar shall deem sufficient to cover the alleged rent or damage in respect of which the distress shall have been made, and the probable cost of the cause in the County Court, conditioned to commence an action of replevin against the distrainer

(*z*) *Thompson* v. *Farden*, 1 Sc. N. R. 285; 8 Dowl. 823, per *Maule*, J.

(*a*) *Faulkner* v. *Johnson*, 11 M. & W. 581; 1 D. & L. 346.

(*b*) See *Bowdon* v. *Hall*, 4 Q. B. 841.

(*c*) *Thompson* v. *Farden*, 1 Sc. N. R. 275; 1 M. & G. 535; 8 Dowl. 813.

(*d*) Bac. Ab. tit. "Replevin." See *Thompson* v. *Farden*, supra, per *Tindal*, C. J., and *Maule*, J.

(*e*) *Mounsey* v. *Dawson*, 1 N. & P. 765.

(*f*) *Griffiths* v. *Stephens*, 1 Chit. Rep. 196.

(*g*) See this section, ante, p. 1254.

(*h*) The action of replevin should be brought in the County Court, unless the replevisor has good ground for believing either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair, or franchise, is in question, or where the rent or damage in respect of which the distress was made exceeds 20*l*. See 19 & 20 V. c. 108, s. 65, ante, p. 1254.

(*i*) See 19 & 20 V. c. 108, s. 70; Ch. CXXX.: *Stansfield* v. *Hellawell*, 7 Ex. 373; 21 L. J., Ex. 148. See County Court Rules as to security in County Courts in Ch. CXXX.

(*k*) 19 & 20 V. c. 108, s. 70; Ch. CXXX.

(*l*) See this section, Ch. CXXX.

(*m*) See this section noticed ante, p. 1254.

in the County Court of the district in which the distress shall have been taken, within one month from the date of the security, and to prosecute such action with effect and without delay, and to make a return of the goods, if a return thereof shall be adjudged. The security is in the form of a bond, with sureties to the distrainer (*n*), which must be conditioned in the manner above mentioned. It is given at the cost of the repleviser (*o*). Instead of giving a bond, a deposit of money may be made, as mentioned in the 71st section of the above Act (*p*). As to enforcing the bond, and giving relief to the obligors, *see* 19 & 20 *V.* c. 108, s. 70, noticed *Ch. CXXX.*; and as to obtaining out of Court money deposited in lieu of a bond, *see* the 71st section of the above Act, *Ch. CXXX.*

What security had to be taken on granting a replevin before 19 & 20 V. c. 108.

Prior to the 19 & 20 *V.* c. 108, before the sheriff or his deputy could replevy, he must, by 13 *E.* 1, c. 2, have taken pledges from the plaintiff, not only to prosecute his suit, but also to return the cattle or goods, if a return should be adjudged; and, if he took pledges in any other manner, he was answerable to the defendant for the price or value of the cattle or goods replevied. The security taken by the sheriff, in pursuance of this Act, was usually a bond, conditioned as is above mentioned (*q*). Also, by the 11 *G.* 2, c. 19, s. 23, in every replevin of a distress for rent (*r*), the sheriff or his deputy had to take from the plaintiff, and two responsible persons as sureties, a bond in double the value of the goods distrained (to be ascertained on the oath of one witness), conditioned for prosecuting the writ with effect (*s*) and without delay, and for duly returning the goods, if a return should be awarded. This statute gave the power to take the replevin bond to the officer who granted the replevin (*t*). The bond might be taken by one of the sheriffs of London in his own name only (*u*). Although the statute directed the bond to be taken with two sureties, yet a bond by one surety only was not void (*x*). The bond ought to have been in the terms of the statute. It should not have been taken in a penalty beyond the amount specified by the Act (*y*), nor should it, it seems, have contained a condition for the sheriff's indemnity (*y*). Where, since the County Courts Act (the 9 & 10 *V.* c. 95) and before the 19 & 20 *V.* c. 108, in a case of distress for rent in arrear, the sheriff took a bond conditioned for the obligor to appear "at the next County Court for the county of M., to be holden at the sheriff's

(*n*) 19 & 20 V. c. 108, s. 70; Ch. CXXX.; *Stansfeld* v. *Hellawell*, 7 Ex. 373; 21 L. J., Ex. 148.

(*o*) See 19 & 20 V. c. 108, s. 70; Ch. CXXX.

(*p*) See this section, Ch. CXXX.

(*q*) *Blackett* v. *Crissop*, 1 Ld. Raym. 278. See *Edmonds* v. *Challis*, 7 C. B. 413; 18 L. J., C. P. 164, decided after the 9 & 10 V. c. 95, and before 19 & 20 V. c. 108.

(*r*) A distress for a rent-charge is within the Act: *Short* v. *Hubbard*, 2 Bing. 349; 9 Moore, 667.

(*s*) That is to say, to a not unsuccessful termination: *Jackson* v. *Hanson*, 8 M. & W. 477; 1 Dowl., N. S. 69.

(*t*) *Thompson* v. *Farden*, 1 Sc. N. R. 275; 8 Dowl. 813; 1 M. & G. 535.

(*u*) *Thompson* v. *Farden*, supra. It would seem that one of two sheriffs of any other place might also take the bond, provided each were a separate and distinct officer. See Id.

(*x*) *Austen* v. *Howard*, 7 Taunt. 28. And see Id. 327; 1 Moore, 68; 2 Marsh. 352. And see *Hacker* v. *Gordon*, 1 C. & M. 58.

(*y*) *Miers* v. *Lockwood*, 9 Dowl. 975. But see *Dunbar* v. *Dunn*, 10 Price, 51: *Short* v. *Hubbard*, 9 Moore, 667; 2 Bing. 349, showing that the insertion of such a condition would not invalidate the bond.

PART XIII.

office in, &c., and *then and there* to prosecute his suit with effect," &c., it was held bad (*a*). After the 9 & 10 *V. c.* 95, and before the 19 & 20 *V. c.* 108, in cases other than distresses for rent and damage feasant, the bond should have been conditioned for the plaintiff to appear at the next County Court (the old County Court), and prosecute his suit with effect and without delay, and not for his *then and there* prosecuting his suit, &c. (*b*). There were various cases in which the Courts held that bonds not strictly conformable to the statute were assignable within it, so as to enable the assignee to maintain an action on the bond, where there had been a breach of one of the branches of the condition, which had been taken conformably to the statute (*c*).

At what time replevin to be made.

Care should be taken, in cases of distress for rent, to replevy before the expiration of five days after the distress made; otherwise the distrainer may sell the goods; though, indeed, they may be replevied at any time before they have been actually sold; and this, although after the five days (*d*). In all other cases of distress at common law, no time is limited for replevying, because the distrainer cannot sell the distress.

Proceedings when goods removed out of county.

Before the above Act of 19 & 20 *V. c.* 108, if the goods had been carried out of the county, or eloigned, or removed to places unknown, so that the sheriff could not replevy them, and the officer returned an eloignment, the sheriff issued a precept in the nature of an alias writ of replevin, and if that should fail, another precept in the nature of a pluries replevin, and then, on the return that the goods were eloigned, a precept in the nature of a capias in withernam (*e*), commanding his officer to take goods or cattle of the defendant, to the value of those taken by him, and deliver them to the plaintiff; or, instead of this course of proceeding, if the goods were withheld, the plaintiff might proceed in the cause, and recover damages to the full value of his goods, as well as for the detention. If the defendant came in and pleaded *non cepit*, or property in the goods distrained, he had his own back again (*f*).

As to ordering delivery up of the bond on the ground that the proceedings are *malâ fide*, see *London and North Western Rail. Co.* v. *Bedford*, 17 Q. B. 978: *Leicester Waterworks Co.* v. *Cropstone (Overseers, &c.)*, 32 L. T. 567.

4. *Proceedings in the High Court of Justice when Action of Replevin commenced there.*

Action may be commenced in superior Court.

Under the 19 & 20 *V. c.* 108, *s.* 65 (*g*), an action of replevin may be commenced in the High Court of Justice in the form applicable

(*a*) *Edmonds* v. *Challis*, 7 C. B. 413; 18 L. J., C. P. 164.

(*b*) *Jackson* v. *Hanson*, 8 M. & W. 477. See *Morris* v. *Matthews*, 2 Q. B. 293; 1 G. & D. 677: *Dunbar* v. *Dunn*, 10 Price, 54: *Short* v. *Hubbard*, 2 Bing. 349; 9 Moore, 667.

(*c*) See per *Maule*, J., in *Edmonds* v. *Challis*, supra, and cases there cited.

(*d*) See *Jacob* v. *King*, 1 Marsh. 135; 5 Taunt. 451. These days are reckoned exclusive both of the day of distress and of the day of sale: *Robinson* v. *Waddington*, 13 Q. B. 753; 18 L. J., Q. B. 250.

(*e*) See form, Chit. Forms, p. 627. See Wilk. Repl. 20; 3 Bl. Com. 179; Fitz. N. B. 74 B.

(*f*) 1 Ld. Raym. 614. See the 19 & 20 V. c. 108, s. 63, ante, p. 1254.

(*g*) See this section, ante, p. 1254.

to personal actions therein, and such Court has power to hear and determine the same. The action must be commenced within one week from the date of the replevin bond (*h*).

Must be prosecuted without delay.

The action must be prosecuted without delay, or the replevin bond will be forfeited (*h*).

Proof of belief that title, &c. in question.

The replevisor must, unless judgment be obtained by default, prove that he had good grounds for believing either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair, or franchise, was in question, or that the rent or damage in respect of which the distress was made exceeded 20*l*. *See* 19 & 20 *V. c.* 108, *s.* 65, *ante*, p. 1254.

Special statutes relating to action of replevin repealed.

The statutes relating to the procedure in the action of replevin, and from which it derived most of the peculiarities that distinguished it from an ordinary action, have now all been repealed. The principal of these statutes were the 52 *H.* 3, *c.* 3 (repealed by 44 & 45 *V. c.* 59), 52 *H.* 3, *c.* 21 (repealed by 44 & 45 *V. c.* 59), 13 *Edw.* 1, *c.* 2 (repealed by 44 & 45 *V. c.* 59), 7 *H.* 8, *c.* 19 (repealed by 42 & 43 *V. c.* 59 and 26 & 27 *V. c.* 125), 21 *H.* 8, *c.* 19 (repealed by 42 & 43 *V. c.* 59 and 46 & 47 *V. c.* 49, *s.* 4), 17 *C.* 2, *c.* 7 (repealed by 44 & 45 *V. c.* 59), 4 & 5 *Ann. c.* 3, *ss.* 4, 5 (repealed by 42 & 43 *V. c.* 59 and 46 & 47 *V. c.* 49), 11 *G.* 2, *c.* 19, *s.* 22 (repealed by 42 & 43 *V. c.* 59 and 46 & 47 *V. c.* 49), *s.* 23 (repealed by 44 & 45 *V. c.* 59), 5 & 6 *V. c.* 54, *s.* 18 (repealed by 44 & 45 *V. c.* 59).

Present procedure.

The proceedings in the action of replevin are now the same as those in an ordinary action, except in the respects particularly pointed out in the following pages.

Writ of summons.

Writ of Summons.]—The writ of summons is issued and served in the same manner as in an ordinary action (*see ante, Vol.* 1, *Ch. XIII.*). It should be indorsed as follows:—"The plaintiff's claim is in replevin for goods wrongfully distrained," *or* "The plaintiff's claim is for damages for improperly distraining" (*i*). This latter form will be sufficient, whether the distress complained of be wrongful, or excessive, or irregular, and whether the claim be for damages only, or for double value (*k*). Special damages are recoverable if claimed (*l*).

Appearance.

Appearance.]—The appearance may be entered as in ordinary cases (*see ante, Vol.* 1, *Ch. XV.*).

Default in appearance.

Default in Appearance.]—If the defendant fails to appear within the time limited by the writ for that purpose, the plaintiff may sign judgment in the ordinary way (*see ante, Vol.* 1, *Ch. XVI.*).

Such judgment will in the first instance be interlocutory only, and a writ of inquiry must be issued, and the damages assessed. Final judgment may be signed after the inquisition is returned (*see ante, Vol.* 1, p. 259).

Statement of claim.

Statement of Claim.]—The statement of claim must be delivered within the time limited for that purpose (*see ante, Vol.* 1, *Ch. XIX.*).

(*h*) See this section, ante, p. 1254.

(*i*) This is the form given in the R. of S. C., App. A., Pt. 3, sect. 4.

(*k*) Note to form in Appendix to R. of S. C.

(*l*) *Gibbs* v. *Cruikshank*, L. R., 8 C. P. 454; 42 L. J., C. P. 273.

PART XIII.

See a form of statement in *Chit. F.*, p. 625. Special damages may be specially stated and claimed (*l*).

Default in delivering statement of claim.

Default in delivering Statement of Claim.]—If the plaintiff fail to deliver his statement of claim within the time limited for that purpose, the defendant may, under *R. of S. C., Ord. XXVI. r.* 1 (*ante, Vol.* 1, p. 326), apply to a Master at Chambers by summons, to dismiss the action with costs for want of prosecution, and, on the hearing of the application, the Master may, if no statement of claim be delivered, order the action to be dismissed, or make such other order on such terms as he shall think just. In ordinary cases, an order dismissing the action with costs is all that is necessary; but in replevin it will, in most cases, be desirable to obtain a judgment in the following form, viz., that the action be dismissed with costs for want of prosecution, and that the plaintiff do return to the defendant the goods and chattels replevied, and that the defendant be at liberty to issue a writ of retorno habendo for recovery of them (*m*). This is the equivalent of the old common law judgment in such cases, and could be asked for in the summons; and it is conceived that, under the above rule, the Master has ample power to make an order for it. Inasmuch as the old practice may to a considerable extent be followed by means of an order, it may be useful to state that the judgment of nonpros in an action of replevin at common law was, that the defendant have a return of the goods (*n*), and was final (*o*).

(*l*) *Gibbs* v. *Cruikshank*, L. R., 8 C. P. 454; 42 L. J., C. P. 273.

(*m*) See forms, Chit. F. pp. 624, 625.

(*n*) See the form, Chit. F. 10th ed. p. 609: *Edwards* v. *Dunch*, 11 East, 183. It seems that under the old practice judgment of nonpros could not be signed after declaration had been actually delivered or tendered, although the time had expired: *Gray* v. *Pennell*, 1 Dowl. 120: *Ariel* v. *Barrow*, 8 Bing. 375. Nor could the defendant sign such a judgment pending an order for a stay of proceedings. If the action was against *several* defendants, the plaintiff might have been nonprossed by anyone having authority on that behalf, on behalf of all, if all had appeared, and he was in default as to all. See *Hamlet* v. *Bingham*, 5 Sc. N. R. 889; 4 M. & Gr. 909: *Philpott* v. *Muller*, 1 Doug. 169, 3rd ed. n. 56: *Palmer* v. *Fiestel*, 2 Dowl. 507: *Inwood* v. *Mawley*, 5 D. & R. 351; 3 B. & C. 553: *Jones* v. *Gibson*, 5 B. & C. 768; 8 D. & R. 592: *Murphy* v. *Donlan*, 5 B. & C. 178; 7 D. & R. 618. If one defendant only was in a position to sign judgment, he must have signed it on behalf of himself alone, and could not do so on behalf of all: *Hamlet* v. *Bingham*, supra: *Roe* v. *Cock*, 2 T. R. 257: *Buller* v. *Upton*, Id. 259, n.: *Price* v. *Foulkes*, 4 Burr. 2418; 1 Comyns, 74: *Bancroft* v. *Greenwood*, 1 H. & C. 778; 32 L. J., Ex. 154: *Topham* v. *Kidmore*, 5 Dowl. 676: *Emmott* v. *Standen*, 3 M. & W. 497; 6 Dowl. 591: *Coates* v. *Stevens*, 2 C. M. & R. 118; 1 Gale, 75; 3 Dowl. 784. As to executing a writ of inquiry, see post, Ch. CXV. Under the old practice, if the judgment were regular, it was discretionary with the Court or a Judge to set it aside, and they would in most cases do so upon an affidavit of merits, or that the plaintiff had at the commencement of the action, and still had, a good cause of action in that suit (*Cortessos* v. *Hume*, 2 Dowl. 134: *Bennett* v. *Smith*, 1 Burr. 401), and upon payment of costs, in order to let in a trial of the merits. Where a regular judgment is set aside on payment of costs, this means the costs of the judgment and of resisting the application to set it aside: *Christie* v. *Thompson*, 1 Dowl., N. S. 592. If the judgment be irregular, it may in all cases be set aside with costs, provided the application be made in due time: *Barlow* v. *Kaye*, 4 T. R. 638. See *Kiblewhite* v. *Jeffreys*, 1 Chit. 142.

(*o*) See *Wright* v. *Lewis*, 9 Dowl. 183: *Davies* v. *James*, 1 T. R. 371; 4 J. 1, c. 3.

If the distress were for rent, customs, services or damage feasant, the defendant was entitled to judgment for his damages and costs, by the 7 *H.* 8, *c.* 4, *s.* 3, and 21 *H.* 8, *c.* 19, *s.* 3 (both repealed, *see supra*, p. 1259). The damages and costs to which the defendant was entitled under these last-mentioned statutes must have been assessed by a jury, under a writ of inquiry (*p*); consequently, the judgment in those cases was not final until such damages and costs had been ascertained (*p*); and after the entry of the judgment of nonpros on the roll, followed the award of a writ of inquiry (in the same manner as in ordinary cases on a judgment by default), the sheriff's return of the inquest, and final judgment. Before the 19 & 20 *V. c.* 108, the plaintiff was not prevented by judgment of nonpros from proceeding, for he might sue out a writ of second deliverance (*q*); in execution of which the sheriff must again have taken the goods from the defendant, and delivered them to the plaintiff; or the writ would operate in the sheriff's hands as a supersedeas of the writ de retorno habendo, if the latter writ had not been executed (*r*), but not of the writ of inquiry of damages (*r*). If the plaintiff intended to proceed thus, an award of the writ of second deliverance was entered upon the roll after the judgment of nonpros, which writ was sued out at the Petty Bag Office (*s*). If upon this writ being sued out, the defendant had judgment, either upon verdict, demurrer, or of nonpros, it was for a return irreplevisable, and he might have a writ de retorno habendo (*t*); which being executed, the plaintiff could not have any further writ of deliverance. But if the plaintiff did not sue out a writ of second deliverance, and to the writ de retorno habendo the sheriff returned that the goods, &c. were eloigned, the defendant then might have a capias in withernam, and after that an alias and pluries, until it was executed. The capias in withernam, however, in this case, was but mesne process, to compel the plaintiff to declare (*u*): and as soon as he had declared, he might, it seems, obtain a restitution of the goods taken under it, upon motion (*x*).

Writ of second deliverance.

The statute 17 *C.* 2, *c.* 7, *s.* 2, which provided a special procedure by writ of inquiry to ascertain the amount of rent due, is repealed by the stat. 44 & 45 *V. c.* 59, sched.

Writ of inquiry after nonpros in case of a distress for rent.

The Court, in some cases, under particular circumstances, would set aside a judgment of nonpros, &c., and let in the plaintiff to declare upon payment of costs (*y*).

Setting aside judgment of nonpros.

As to proceeding upon the replevin bond against the plaintiff and his pledges, *see post*, p. 1270.

Defence.]—The defendant may either deny the taking of the goods, or the plaintiff's property in them, or justify the taking, or may do all. In the case of a denial of the taking, equivalent to the old plea of non cepit, or a denial of the plaintiff's property in

Defence.

(*p*) *Wright* v. *Lewis*, supra.
(*q*) 2 Inst. 340; Stat. Westm. 2, c. 2.
(*r*) *Anon.*, Latch, 72; *Argol* v. *Cheney*, Palm. 403: *Pratt* v. *Rutledge*, 1 Salk. 95.
(*s*) See 11 & 12 V. c. 94; 12th ed. of this work, Part XII
(*t*) 2 Inst. 341.
(*u*) *Moor* v. *Watts*, 1 Ld. Raym. 613; 12 Mod. 423.
(*x*) *Webbe* v. *Hinde*, Noy, 50. And see *De la Bastide* v. *Reynell*, Comb. 201: *Moor* v. *Watts*, 2 Salk. 582.
(*y*) *Playters* v. *Sheering*, 1 Vent. 64. See ante, p. 126[illegible] (*m*).

PART XIII.

the goods, the defence will be the same as in ordinary cases (*z*). In the case of a justification the defendant may either simply state in the ordinary manner the facts on which he relies (*a*), or he may state the facts and add a claim (by way, it is suggested, of counter-claim) for a return of the goods replevied. In the latter case the pleading under the old system was called an *avowry* when the defendant justified in his own right, and a *cognizance* when he justified in the right of another (*b*). *See* the forms and notes in *Bullen & Leake's Pleadings*, 3rd ed., p. 777 *et seq.*

Default in delivering defence.

Default in delivering Defence.]—If the defendant does not deliver his defence in due course judgment may be signed against him in the usual manner. In the first instance interlocutory judgment only can be signed and a writ of inquiry issued. Final judgment may be signed on the return of the inquisition (*see ante*, p. 332).

Reply, &c.

The Reply, &c.]—The reply will be in the usual form, either joining issue simply or stating the facts in answer to the defendant's defence when he justifies and claims a return of the goods. In former days, when the defendant pleaded an avowry or cognizance which was in the nature of a cross-claim for the return of the goods, the plaintiff's pleading was called a plea in bar and all the subsequent pleadings were postponed one stage. The subsequent pleadings will be in the ordinary form.

Default in replying.

Default in delivering Reply.]—If the defendant has not set up any claim for a return of the goods, he may, in case the plaintiff fails to reply, proceed in the usual way to have the action dismissed for want of prosecution (*see ante, Vol.* 1, p. 327). If any such claim be set up and the plaintiff makes default, the defendant's proper course would be to obtain leave to sign a judgment equivalent to the old common law judgment, viz., judgment dismissing the action for want of prosecution, and ordering that the plaintiff do return to the defendant the goods replevied and do pay to the defendant his costs of the action and counter-claim to be taxed. This may be done by an application for judgment under *Ord. XXXII. r.* 6 (*c*). This judgment may be enforced by writ of fi. fa. (*see ante, Vol.* 1, *Ch. LXXV.*) and retorno habendo (*see ante*, p. 1260). Under the old system, if the plaintiff did not reply or plead in bar at the expiration of the notice for that purpose, the defendant might sign judgment of nonpros. If the replevin were of a distress for rent, the defendant might enter his judgment, and execute a writ of inquiry, under stat. 17 *C.* 2, *c.* 7, *s.* 2 (repealed, *see ante*, p. 1259); and the prayer for the writ of inquiry, &c., was entered

(*z*) The C. L. P. Act, 1852, s. 67, abolished all formalities in the plea avowry or cognizance. The C. L. P. Act, 1854, s. 83, gave the plaintiff in replevin power to set up equitable defences. This power is now conferred on all parties by the Jud. Acts.

(*a*) Com. Dig. Pl. 3, K. 12: *Morrell* v. *Martin*, 3 M. & Gr. 581.

(*b*) Com. Dig. Pl. 3, K. 13 & 14. The plaintiff's reply to the avowry or cognizance was called a *plea in bar*, after which followed the replication, rejoinder, &c. Com. Dig. Pl. 3, K. 16; Steph. Pl. 7th ed. 180 (*t*).

(*c*) See *Lumsden* v. *Winter*, 8 Q. B. D. 650; 51 L. J., Q. B. 413. And see ante, Vol. 1, p. 757 et seq. To apply to dismiss the action under Ord. XXXVI. r. 12 (ante, Vol. 1, p. 327) would be another, but not, it is conceived, so good a course.

immediately after the judgment for a return. Or the defendant, instead of executing a writ of inquiry, might, after signing judgment of nonpros, proceed upon the replevin bond (*d*).

Payment into Court.

Payment into Court.]—Money may now be paid into Court in replevin in the same way as in any other action (*see ante, Vol.* 1, *Ch. XXIX.*) (*e*).

Sects. 23 and 24 of the *Com. Law Proc. Act*, 1860, are repealed by the 46 & 47 *V. c.* 49 (*f*).

Before the Com. Law Proc. Act, if the defendant avowed or made cognisance for rent, the plaintiff might obtain an order for staying proceedings on payment of the rent admitted to be due, and costs (*g*); or, if the amount were disputed, and the defendant refused to accept the sum offered, then an order for payment into Court of the sum which plaintiff admitted to be due, and that, in case defendant should not recover a greater sum, or should accept the sum paid in in satisfaction, he should pay all costs incurred by the plaintiff subsequent to the date of the order (*h*). Upon the application of the defendant, the Court have stayed the proceedings, upon payment of the costs of the action, and of the costs of replevying, and upon giving up the replevin bond, where no special damage was laid in the declaration (*i*).

Before the Judicature Acts, if the grantee of a rent-charge avowed against several under-tenants for the same rent, the Court would, upon a tender pleaded by the under-tenants, make an order, that the payment of the rent into Court in one action should serve for all (*k*).

Discontinuing.

Discontinuing.]—The plaintiff may discontinue the action, as in other cases. But, formerly, the defendant could not (*l*). But he may do so now by leave. See fully as to discontinuance, *ante*, p. 337.

Trial, &c. Verdict for plaintiff.

Trial, &c.]—If a verdict be found for the plaintiff, and the goods have not been delivered to him on replevying them, damages are given as well for the value of the goods as for their detention, and this is said to be better than to proceed by way of withernam; but, if the goods have been delivered on the replevin, which is generally the case, damages are not given for the value of the goods; and the amount of the damages usually given by the jury is the expense of

(*d*) *Waterman* v. *Vea*, 2 Wils. 41; *Turnor* v. *Turner*, 2 B. & B. 107; 4 Moore, 606.

(*e*) Cp. *Lambert* v. *Hepworth*, 2 Q. B. 729.

(*f*) Perhaps these sections were rendered necessary by reason of the 19 & 20 V. c. 108, ss. 65 and 67, ante, pp. 1254, 1255, requiring the bond to be conditioned, amongst other things, that the plaintiff, except in certain cases, should prove before the Court that he had good ground for believing that title was in question, &c.; which proof, it seems, should be given at the trial.

(*g*) *Gregg's case*, 2 Salk. 597: *Vernon* v. *Wynne*, 1 H. Bl. 24: *Hopkins* v. *Shrole*, 1 B. & P. 382: and see *Davis* v. *Prince*, Barnes, 429.

(*h*) *Gaylor* v. *Cleeve*, 28th June, 1837, cor. *Coltman*, J., after taking time to consider the point.

(*i*) *Banks* v. *Brand*, 3 M. & Sel. 525. See *Hodgkinson* v. *Snibson*, 3 B. & B. 603, cont.

(*k*) *Anon.*, 1 Ld. Raym. 429. As to plea of tender before Jud. Acts see Bull. N. P. 60: *Mattravers* v. *Fossit*, 3 Wils. 295.

(*l*) *Long* v. *Buckeridge*, 1 Str. 112.

PART XIII.

the replevin bond (*m*). Special damages, however, arising from the taking of the goods by defendant can be recovered (*n*). As to the plaintiff proving that he had ground for believing that title, &c. would come in question, *see ante*, p. 1259.

Verdict for defendant, or nonsuit.

At common law, no damages were recoverable by the defendant in an action of replevin or second deliverance, and the judgment after verdict for the defendant was, that he have a return of the goods irreplevisable. But by the stat. 7 *H.* 8, *c.* 4, *s.* 3, and 21 *H.* 8, *c.* 19, *s.* 3 (*o*), "Every avowant and other person making avowry, justification or cognizance as bailiff, in any replevin or second deliverance, for any rent, custom or service, or for damage feasant, upon any distress taken in any lands or tenements, if the avowry, or cognizance, or justification be found for him, or the plaintiff be nonsuit or otherwise barred, shall recover his damages, as the plaintiff should have done if he had recovered therein" (*p*). These statutes extended to avowries, &c. made by an executor (*q*); and, as it should seem, for an amercement by a court leet (*r*); but not to pleas upon which the writ was abated (*s*), or to pleas of property in the thing distrained (*t*). The damages given by the above statutes are inconsiderable, being merely such as the defendant has sustained by the delay of his remedy, in consequence of the replevin. And by 17 *C.* 2, *c.* 7, *s.* 2 (which applied in the case of a distress for rent and which is repealed, *see ante*, p. 1259 (*u*)), "And in case such plaintiff shall be nonsuit after cognizance or avowry made, and issue joined, or if the verdict shall be given against such plaintiff, then the jurors who are impannelled or returned to inquire of such issue, shall, at the prayer of the defendant, inquire concerning the sum of the arrears, and the value of the goods or cattle distrained; and thereupon the avowant, or he that makes cognizance, shall have judgment for such arrearages, or so much thereof as the goods or cattle distrained amount unto, together with his full costs, and shall have execution for the same by fieri facias or elegit, or otherwise, as the law shall require" (*x*). In general, in cases not provided for by the above statutes, the defendant was not entitled to damages (*y*).

Second deliverance after nonsuit.

As the judgment at common law after nonsuit was not for a return of the goods irreplevisable, the plaintiff might sue out a writ

(*m*) See Tidd's Pract. 887, 9th ed., Cro. Eliz. Before the 19 & 20 V. c. 108, the amount of the damages usually given by the jury was 2*l.* 2*s.* in London and Middlesex and some other places, and 2*l.* 10*s.* elsewhere, being the supposed expense of the replevin bond.

(*n*) *Gibbs* v. *Cruikshank*, L. R., 8 C. P. 454; 42 L. J., C. P. 273.

(*o*) Both these statutes are repealed—the former by 26 & 27 V. c. 125, the latter by 42 & 43 V. c. 59 and 46 & 47 V. c. 49.

(*p*) *Turnor* v. *Turner*, 2 B. & B. 107; 4 Moore, 606. See *Wright* v. *Lewis*, 9 Dowl. 183.

(*q*) 12 Rol. Rep. 457.

(*r*) See *Hodgkinson* v. *Chapman*, Cro. Eliz. 330: *Samuel* v. *Hiller*, Cro. Jac. 520. See *Gotobed* v. *Wood*, 6 M. & Sel. 128.

(*s*) *Smith* v. *Walker*, 2 Ld. Raym. 788.

(*t*) Hardr. 153.

(*u*) See *Pollitt* v. *Forrest*, 11 Q. B. 949; 17 L. J., Q. B. 291, where a sum payable under a lease was a penal sum, and not a rent.

(*x*) See *Turnor* v. *Turner*, 2 B. & B. 107; 4 Moore, 606.

(*y*) In some cases, where the defendants are sued as public officers, they are entitled to treble or more than the usual damages. As to when defendant is entitled to costs, see post, p. 1265.

of second deliverance, and proceed upon it as mentioned *ante*, p. 1261. This writ was a supersedeas of the writ de retorno habendo; but the defendant was not precluded by it from levying the damages and costs awarded to him by the judgment. Probably the proper course under the present system would be to issue a writ of delivery in the ordinary form. See generally, *ante*, p. 1260.

New trial. *New Trial.*]—In replevin, where the verdict is for the plaintiff, the Court will not, in general, grant a new trial, even on payment of costs, without very clear grounds; for the landlord has other remedies for his rent, and a new trial would renew the liability of the sureties, and the plaintiff's risk of paying full costs (*z*). The rule that a new trial will not be granted when the amount recovered is under 20*l.*, does not apply to replevin (*a*). See further, as to new trials, *ante*, *Ch. LXVIII.*

Costs. *Costs.*]—The costs are now, in all cases, regulated by *R. of S. C., Ord. LXV. r.* 1, which is set out and discussed *ante*, p. 672. By that Order, it is provided that where an action or issue is tried by a jury, the costs shall follow the event, unless upon good cause shown the Judge before whom such action or issue is tried or the Court shall otherwise order.

There is no difference as to the mode of taxation between replevin and any other action (*b*).

Judgment. *Judgment.*]—A judgment for the plaintiff in replevin is a bar to an action for damages for the same taking of the goods in respect of which the replevin was brought (*c*).

Appeal. *Appeal.*]—As to appeals, *see ante, Ch. LXXXV.*

Execution. *Execution.*]—The execution for the plaintiff is the same as in ordinary cases where a plaintiff has a judgment for damages and costs (*d*). When the defendant had judgment at common law, he had execution by a writ de retorno habendo, to have a return of the things distrained, and a fieri facias, &c., for his costs. Or if the defendant had judgment under stat. 21 *H.* 8, *c.* 19, he had a writ de retorno habendo for a return of the goods, and also a fi. fa., &c., for his damages or costs. It seems the writ de retorno habendo, and a fi. fa. for his damages and costs might be included in one writ. The sheriff was not bound to execute a writ de retorno habendo, unless some person attended on behalf of the defendant, to show him the goods, and it was a good return to the writ to say that no person did attend (*e*). Since the Judicature Act a writ of fi. fa. for the costs, and (probably) a writ of retorno habendo for the goods may be issued. *See ante, Vol.* 1, *Ch. LXXV., and ante*, p. 1260.

Proceedings on return of elongata. If to the retorno habendo the sheriff returned that the goods, &c. were eloigned (that is, conveyed to places unknown to him, so that he could not execute the writ), the defendant might then sue

(*z*) *Parry* v. *Duncan*, 7 Bing. 243; 5 M. & P. 19.

(*a*) *Edgson* v. *Cardwell*, L. R., 8 C. P. 647; 28 L. T. 819.

(*b*) See *Spencer* v. *Hamerton*, 4 A. & E. 413.

(*c*) *Gibbs* v. *Cruikshank*, L. R., 8 C. P. 454; 42 L. J., C. P. 273.

(*d*) See Vol. 1, Ch. LXXIV.

(*e*) 2 Saund. 74 b, c.

PART XIII.

out a capias in withernam (*f*), requiring the sheriff to take other cattle, &c. of the plaintiff, to the value of the cattle, &c. eloigned, and deliver them to the defendant, to be kept by him until the plaintiff should deliver to him the cattle, &c. originally replevied. If this writ were returned nihil, the defendant might sue out an alias, and after that a pluries: and if the pluries were returned nihil, the defendant might then, it seems, sue out a scire facias against the plaintiff's pledges, to show cause why the price of the cattle, &c. eloigned should not be made of their lands and goods, and rendered to the defendant. If no cause were shown to this scire facias, a writ issued to take the cattle, &c. of the pledges. If the registrar of the County Court who granted the replevin had not taken pledges, or the pledges were insufficient, through his negligence, the defendant, upon the return of the elongata, might, it seems, bring an action on the case against the registrar, and recover damages (*g*).

5. *Proceedings in County Court when Action of Replevin commenced there.*

In case of distress for rent or damage feasant.

By the 9 & 10 *V. c.* 95, *s.* 119, the County Courts Act, "All actions of replevin in case of distress for rent in arrear or damage feasant, which shall be brought in the County Court, shall be brought without writ in a Court held under this Act" (*h*).

Sect. 120. "In every such action of replevin the plaint shall be entered in the Court holden under this Act for the district wherein the distress was taken."

By the 19 & 20 *V. c.* 108, *s.* 66 (*i*), an action of replevin in the County Court must be brought within one month of the date of the

---

(*f*) *Anon.*, 2 Leon. 174.

(*g*) 16 Vin. Abr. 399, 400: *Richards* v. *Acton*, 2 W. Bl. 1220: *Tesseyman* v. *Gildart*, 1 N. R. 292: *Page* v. *Eamer*, 1 B. & P. 378. And see *Turner* v. *Turner*, 2 B. & B. 107; 4 Moore, 606, 616. Before the 19 & 20 V. c. 108, if after writ issued as above mentioned to take the cattle, &c. of the pledges it was found that they had none, and the sheriff returned nihil to the writ, the defendant might then have a scire facias against the sheriff himself, requiring him to show cause why he should not render to the defendant, cattle, &c. to the value of those eloigned: *Trevors* v. *Michelborne*, Hutt, 77; 1 Saund. 195, n. (3).

(*h*) When title is in dispute, see *R.* v. *Raines*, 1 E. & B. 855; 22 L. J., Q. B. 223: *Fordham* v. *Akers*, 4 B. & S. 578; 33 L. J., Q. B. 67. See *Edmonds* v. *Challis*, 7 C. B. 413; 18 L. J., C. P. 164: *Mungeam* v. *Wheatley*, 6 Ex. 88; 20 L. J., Ex. 108. The suit might be prosecuted in the old County Court, however considerable the value of the goods might be: 52 H. 3, c. 21; 2 H. 7, 5, b; 2 Inst. 139. But if any right of freehold or ancient demesne were pleaded (Finch. L. 317; 4 H. 6, 30; 2 H. 7, 6; Co. Litt. 145: *Timiswood* v. *Pattison*, 3 C. B. 243), or if the Queen were a party, or the taking were in right of the Crown (Bro. Abr. Replevin, 3), the sheriff could not proceed in the cause. So, if the defendant claimed property in the goods, and on a writ de proprietate probandâ they were found to be his, the sheriff could proceed no further, but must have returned the proceedings to one of the superior Courts, to be there, if thought advisable, finally determined: Bac. Ab. Rep. (E. 4) Edmonds, 6, 7. It was usual in practice, in all cases of the least importance, to remove the plaint as soon as it was levied, and before any proceedings were taken on it, into one of the Courts at Westminster, in the first instance.

(*i*) See this sect. ante, p. 1254. The provisions of this Act are extended to all cases of replevin: ante, p. 1255.

security taken on granting the replevin, and such action must be prosecuted with effect and without delay.

As to the mode of proceeding in an action of replevin in the County Court, *see Pitt-Lewis's C. C. Practice, 2nd ed.*

As to when an appeal lies from the decision of a County Court in an action of replevin, and as to the proceedings thereon, *see post, Ch. CXXX.* Appeal.

6. Proceedings in High Court of Justice when Action commenced in the County Court, and removed by Certiorari.

An action of replevin may be removed into the High Court of Justice at the instance of the defendant, by a writ of certiorari, by leave of the Court or a Judge, upon giving security as hereafter mentioned (*k*). The certiorari will only be granted where the defendant has good ground for believing either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair, or franchise, is in question; or that the rent or damage in respect of which the distress was taken exceeded 20*l.* (*l*). The 90th sect. of the 9 & 10 *V. c.* 95 (*m*), does not apply to the action of replevin (*n*). Action may be removed from County Court by certiorari.

The application should be made to a Master at Chambers. Application for writ.

The application should be supported by an affidavit, which should be entitled in the way affidavits in the High Court usually are entitled, but not in any matter or cause. It should state sufficient facts to induce the Court or Judge to grant the certiorari. *See supra* in what cases the action may be removed. Affidavit.

The certiorari may generally be obtained on an *ex parte* application. Sometimes only a summons to show cause will be granted. By the 19 & 20 *V. c.* 108, *s.* 40 (*o*), the Court or a Judge may direct that the summons shall operate as a stay of proceedings. Rule nisi, &c. sometimes only granted.

Where a summons is taken out, it should be served without delay. As to the Judge of the County Court ordering the party applying for the certiorari to pay the costs of the day fixed for the hearing of the cause, when the summons is not served two clear days before such day, *see* 19 & 20 *V. c.* 108, *s.* 40, noticed *Ch. CXXXIV.* Service of rule or summons.

The order for the certiorari should be drawn up and served without delay. As to the Judge of the County Court ordering the applicant for the certiorari to pay the costs of the day fixed for the hearing of the cause, when the rule or order has been obtained *ex parte*, and has not been lodged with the registrar of the County Court, and notice given of the issuing of it to the opposite party two clear days before such day, *see* 19 & 20 *V. c.* 108, *s.* 41, *Ch. CXXXIV.* Service of order.

As to the writ of certiorari, quashing it, and service of the same, &c., *see Ch. CXXXIV.* (*p*). Writ of certiorari, &c.

(*k*) See 19 & 20 V. c. 108, s. 67, ante, p. 1255. The 9 & 10 V. c. 95, ss. 121 and 127, the former enactments on this subject, are repealed by the 19 & 20 V. c. 108.

(*l*) See 19 & 20 V. c. 108, s. 67, ante, p. 1255.

(*m*) See this sect. post, Ch. CXXXIV.

(*n*) *Mungean* v. *Wheatley*, 6 Ex. 88; 20 L. J., Ex. 108.

(*o*) See this sect. post, Ch. CXXXIV.

(*p*) As to the mode of obeying the writ of certiorari under the repealed section, the 9 & 10 V. c. 95, s. 121, see *Mungean* v. *Wheatley*, supra.

PART XIII.

Security to be given.

The defendant must give security, to be approved of by the Master, for such amount, not exceeding 150*l.*, as he shall think fit, conditioned as pointed out by the 67th section of the 19 & 20 V. c. 108, *s.* 67 (*q*). The security is in the form of a bond with sureties to the plaintiff (*r*). It is given at the cost of the defendant (*r*). Instead of giving a bond, a deposit of money may be made, as mentioned in the 71st section of the above Act (*s*).

Appeal.

Second application for certiorari.

As to appealing when the certiorari is refused, and as to making a second application for the writ to the same or another Court, *see* 19 & 20 *V.* c. 108, *s.* 44, noticed *Ch. CXXXIV.*

Proceedings after removal.

When the action is removed, it will be prosecuted in the High Court. After removal, the proceedings are regulated by the practice of the High Court. The defendant must enter an appearance before the plaintiff can deliver his statement of claim in the High Court. The appearance is entered in the usual way. *See Vol.* 1, *Ch. XV.*

Appearance.

It seems doubtful what is the course to be pursued to compel a defendant to appear (*t*). In order to compel the defendant to appear when the cause had been removed from an old County Court, the plaintiff, it seems, obtained a rule to appear from one of the Masters (*u*), and served a copy of it upon the defendant. This was usually done where the plaintiff's attorney filed the re. fa. lo. This rule expired in four days (*x*); and if the defendant had not entered an appearance within that time, then, if the plaint had been removed by the plaintiff by pone or recordari, a pone per vadios might be obtained at the proper office (*y*); upon which the sheriff would summon the defendant (*z*). On the quarto die post of the return day of the pone, if the defendant had not entered an appearance, a distringas might be sued out, which might be obtained from one of the Master's clerks (*a*), upon furnishing him with a præcipe. This was a judicial writ, commanding the sheriff to distrain the defendant by all his goods and chattels, so that he be before the Queen on a general return day, wheresoever, &c., or in the Common Pleas, before the Queen's Justices at Westminster, or, in the Exchequer, before the barons of the Exchequer at Westminster, to answer the plaintiff of a plea of, &c. (*b*). It bore teste in term time, was returnable on a general return day in the same or in the next term (*c*), and had fifteen days between the teste and return. Care must have been taken that the defendant was cor-

(*q*) See this sect. ante, p. 1255.

(*r*) See 19 & 20 V. c. 108, s. 70, Ch. CXXX. See *Mungean* v. *Wheatley*, 6 Ex. 88; 26 L. J., Ex. 108.

(*s*) See this sect. Ch. CXXX. See *Stansfeld* v. *Hellawell*, 7 Ex. 373.

(*t*) See *Evans* v. *Bowen*, 7 D. & L. 320, B. C.; 19 L. J., Q. B. 8, where the plaintiff in replevin had been prevented from proceeding in the replevin suit, by reason of the defendant therein not having appeared in the superior Court, although the plaintiff had taken steps to compel him to do so, and the Court stayed proceedings taken on the replevin bond.

(*u*) Tidd, 9th ed. 416; Pr. Reg. 371. See Chit. Forms, 10th ed.

(*x*) By R. 115, H. T. 1853, "Rules to appear in causes removed from inferior Courts shall in all cases be a four day rule, both in term and vacation."

(*y*) See the form, Chit. Forms, 10th ed.

(*z*) See the form of the summons, id.

(*a*) See the form, id.

(*b*) See the form, id.

(*c*) *Wright* v. *Lewis*, 9 Dowl. 183.

rectly named in the writ, otherwise the sheriff would not be justified in executing it (*d*). This writ was taken to the sheriff's office, and a warrant obtained thereon and given to the officer, who thereupon levied the sum of 40*s.* (*e*). If the defendant had not entered an appearance on the quarto die post of the return of the distringas, the plaintiff got the writ returned, and sued out an alias, and after that a pluries; or, if the sheriff returned nulla bona, a testatum distringas might be sued out into a different county (*f*). Upon suing out the alias, the Court was moved to increase the issues, and would thereupon grant a rule absolute in the first instance; this rule was drawn up at the proper office (*g*), and a copy of it annexed to the alias distringas, which was left with the sheriff to be executed, as above directed. If upon the quarto die post of the return of this writ the defendant had not entered an appearance, a pluries distringas was sued out, and the Court was again moved to increase the issues, which they then ordered to the amount of the debt and costs; this rule was drawn up, and the writ executed as above directed. If on the quarto die post of this writ the defendant had not appeared, then, in pursuance of stat. 10 *G.* 3, *c.* 50, a motion was made for a rule to show cause "why the issues returned upon the several writs of distringas should not be sold, and the monies arising from the sale thereof should not be forthwith brought into Court; and why it should not be referred to one of the Masters to tax the plaintiff his costs, occasioned by his issuing out the said several writs; and why such costs, when taxed, should not be paid out of the monies so brought into Court; and why the surplus of the said monies, after payment of the said costs, should not be retained in Court until the purpose of the said writs be answered." This motion was made upon an affidavit, stating the issuing and returns of the writs of distringas, and that the defendant had not appeared. The rule was drawn up and a copy of it served upon the sheriff. Afterwards a motion was made to make the rule absolute; this rule was drawn up and a copy served on the sheriff, at the same time showing the original; and if he did not pay the money into Court, an attachment was moved for. If the money was paid in, the plaintiff made out his bill of costs, and got it taxed; took the rule and allocatur to one of the Masters, and he paid the plaintiff the amount of the costs (*h*). The plaintiff might afterwards proceed by distringas thus *ad infinitum*, applying from time to time to sell the issues for payment of costs, until the defendant appeared (*i*); but if nulla bona were returned to the distringas, then a capias was sued out, and proceedings taken to outlawry (*k*). If the plaint, however, had been removed by the defendant (*l*), or by the plaintiff by writ of accedas ad curiam (*m*),

(*d*) *Cole* v. *Hindson*, 6 T. R. 234: *Hoye* v. *Bush*, 2 Sc. N. R. 86.

(*e*) See *Bloxam* v. *Surtees*, 4 East, 162.

(*f*) Id.

(*g*) See the forms, Chit. Forms, 10th ed.

(*h*) See *Martin* v. *Townsend*, 5 Burr. 2725.

(*i*) See form of alias and pluries, Chit. Forms, 10th ed.

(*k*) F. N. B. 70 A (*a*). See form of capias, Chit. Forms, 10th ed.

(*l*) F. N. B. 70 A (*a*).

(*m*) *Thompson* v. *Jordan*, 2 B. & P. 137. And see *Topping* v. *Fuge*, 5 Taunt. 771; 1 Marsh. 341, as to former practice.

PART XIII.

Statement of claim.

the first process after the rule to appear was the distringas, omitting the pone per vadios.

When the defendant has appeared, the plaintiff may deliver his statement of claim, as in ordinary cases. The statement of claim may be amended as in other cases (*n*). Where a replevin suit was removed by a defendant from an inferior jurisdiction into the Queen's Bench, by certiorari, and the defendant signed judgment of nonpros for not declaring, the Court held the judgment irregular, on the ground of a distinction between a re. fa. lo. and a certiorari, the former giving a day to the parties to appear in Court, the latter not (*o*).

The proceedings after statement of claim are the same as when the action of replevin is commenced in the superior Court. As to which *see ante*, p. 1260.

Proof that title, &c. came in question.

By the 19 & 20 *V. c.* 108, *s.* 67 (*p*), the defendant must, unless the replevisor discontinue or does not prosecute the action, or become nonsuit therein, prove before the superior Court that he, the defendant, had good ground for believing either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair or franchise, was in question, or that the rent or damage in respect of which the distress was taken exceeded 20*l.*

7. *Proceedings on the Replevin Bond against the Sureties.*

Proceedings against sureties on the replevin bond.

As we have seen (*ante*, p. 1254), the registrar of the County Court, in granting the replevin, is bound to take certain security, and that such security may be in the form of a bond, with sureties to the defendant. If the condition of the bond is not complied with, an action may be brought thereon.

How bond forfeited before 19 & 20 V. c. 108.

Before the 19 & 20 *V. c.* 108, the replevin bond was forfeited by not prosecuting the replevin suit with success, as well as by making default in the prosecuting of it; therefore you might sue the pledges on their bond, or the sheriff for not taking pledges, or not taking sufficient pledges, without suing out a retorno habendo (*q*), unless in the case of a distress damage feasant (*r*). So the bond, before that Act, would be forfeited if the plaintiff delayed or did not use diligence in prosecuting the suit; as, if he delayed proceeding for two years (*s*), or even for a less time, and though the suit were not determined (*t*); or, although the delay did not exceed the time allowed by the ordinary practice of the Courts, if the defendant was unduly prejudiced by such delay. Where, therefore, before the above Act, a plaint in replevin was removed into the superior Court on the 2nd November, and the plaintiff obtained several

(*n*) See Vol. 1, p. 442. See *Eubanke* v. *Owen*, 5 A. & E. 298.

(*o*) *Clerk* v. *Mayor of Berwick*, 4 B. & C. 649: *Garton* v. *Great Western R. Co.*, 1 E. & El. 258; 28 L. J., Q. B. 103. See *Norrish* v. *Richards*, 5 N. & M. 268; 3 A. & E. 733; 1 H. & W. 437.

(*p*) See this sect. ante, p. 1255.

(*q*) *Perreau* v. *Bevan*, 8 D. & R. 72: *Morgan* v. *Griffith*, 7 Mod. 381.

(*r*) *Hucker* v. *Gordon*, 1 C. & M. 58.

(*s*) *Axford* v. *Perrett*, 1 M. & P. 470; 4 Bing. 586. And see *Dias* v. *Freeman*, 5 T. R. 195.

(*t*) *Harrison* v. *Wardle*, 5 B. & Ad. 146; 2 N. & M. 703. And see *Rider* v. *Edwards*, 3 Sc. N. R. 463; 3 M. & G. 202; per *Tindal*, C. J.

successive orders for time to declare, and did not declare until the 30th of April following, it was held, in debt on the replevin bond, that there was evidence for a jury of delay in prosecuting the replevin (*u*). The bond might be forfeited, notwithstanding the removal of the cause into the superior Court (*x*). But it was not forfeited by the plaintiff not prosecuting the suit with effect at the same old County Court at which he was bound to appear (*y*), or not declaring in such County Court, if the defendant had not appeared therein to the summons (*z*). As if the plaintiff entered his plaint, and afterwards were restricted by injunction till his death, whereby the plaint abated, the bond would not be forfeited (*a*). So, if he died before the termination of the suit, it would abate, and the bond would not be forfeited (*a*).

Mode of proceeding on bond, Court giving relief, &c.

As to the mode of proceeding on the bond, *see Ch. CXXX.*; as to the Court giving relief to the parties to it, *see ib.*; and as to how far the sureties are liable, *see ib.*

If the defendant in an action on the bond claiming the amount of the bond, and not damages, fails to appear in due course, final judgment may be signed against him for the amount for which it is given (*b*).

8. *Proceedings against the Registrar of the County Court for taking insufficient or no Sureties.*

Proceedings against the sheriff before the 19 & 20 V. c. 108.

Before the 19 & 20 *V. c.* 108, if the sheriff neglected to take a bond, he was not liable to an attachment nor would the Court grant relief against him on motion (*c*): but the defendant, if damnified, had his remedy against him by action on the case (*d*). So, the defendant might have such action against him for taking insufficient pledges (*e*), and this, it seems, without getting a return of elongata to the writ de retorno habendo, or without even suing out that writ (*f*), unless in the case of a distress damage feasant (*g*). The high-sheriff, under-sheriff, and replevin clerk, were all answerable to the defendant for the sufficiency of the pledges de retorno habendo (*h*). The sheriff, however, was not liable for taking insufficient pledges, if they were apparently responsible at the time

---

(*u*) *Gent* v. *Cutts*, 11 Q. B. 288; 17 L. J., Q. B. 55.

(*x*) *Gwillim* v. *Holbrook*, 1 B. & P. 410; *Waterman* v. *Tea*, 2 Wils. 41; *Edmonds* v. *Challis*, 7 C. B. 413; 18 L. J., C. P. 164.

(*y*) *Jackson* v. *Hanson*, 8 M. & W. 477.

(*z*) *Seal* v. *Phillips*, 3 Price, 17.

(*a*) *Ormond* (*Duke of*) v. *Bierly*, Cath. 519; 12 Mod. 380. See 2 Q. B. 297, n. (*d*); *Morris* v. *Matthews*, 2 Q. B. 293; 1 G. & D. 677, where the plaintiff died after the suit had been removed by a re. fa. lo. And see *Jackson* v. *Hanson*, 8 M. & W. 477; 1 Dowl., N. S. 69, per Cur.

(*b*) *Dix* v. *Groom*, 5 Ex. D. 91; 49 L. J., Ex. 430.

(*c*) *R.* v. *Lewis*, 2 T. R. 617: *Twells* v. *Colville*, Willes, 375.

(*d*) *R.* v. *Lewis*, 2 T. R. 617: *Tesseyman* v. *Gildart*, 1 N. R. 292; 1 Saund. 195; 2 Inst. 340. In *Perreau* v. *Bevan*, 5 B. & C. 284, an action was held to lie against the sheriff for losing the bond.

(*e*) *Rouse* v. *Patterson*, 16 Vin. Ab. 399.

(*f*) *Perreau* v. *Bevan*, 5 B. & C. 284. See 1 Brown, C. C. 427.

(*g*) *Hucker* v. *Gordon*, 1 C. & M. 58; 3 Tyr. 107.

(*h*) *Richards* v. *Acton*, 2 W. Bl. 1220.

PART XIII.

of taking the bond (*i*); but if the sheriff had notice of the fact of their insufficiency, or neglected the means in his power of knowing it, and did not use a reasonable degree of caution in deciding upon their sufficiency, he would be liable; and it was for the jury to say whether he used such caution or not (*k*). If a person known to the sheriff made inquiries as to the credit or reputation of a tradesman, and the value of his stock, and communicated the result of such inquiry to the sheriff, if it were favourable, the latter need not have made personal inquiry (*l*). And the sheriff or replevin clerk was not bound to go out of the office to make inquiries; but if the sureties were unknown to him, he ought to have required information beyond their own statement as to their sufficiency (*m*). And where persons of respectable appearance were brought to the replevin clerk as sureties, by the attorney's clerk, on behalf of the party replevying, their circumstances being unknown both to the attorney's clerk and to the replevin clerk, and the latter caused the sureties to make affidavit in detail as to their sufficiency, with which he was satisfied, and an action was afterwards brought against the sheriff for taking insufficient sureties, it was considered that the jury might properly find that the inquiry made did not excuse the sheriff (*n*). The sheriff was, it seems, liable in this respect, if one of the sureties was insufficient (*o*). A declaration against the sheriff for not taking sufficient sureties was held good in arrest of judgment, though it alleged only that the sureties were insufficient, making no such averment as to the plaintiff in replevin who was a party to the bond (*p*).

Extent of sheriff's liability before the statute.

The sheriff was liable only to the extent to which the sureties themselves were liable (*q*); and this was the limit, although a greater loss was confessed on the pleadings (*r*). In an action against the sheriff for taking an insufficient replevin bond, in the case of a distress for rent, the reasonable measure of damages was the amount of the rent and the expenses of the distress (*s*). Where the plaintiff had brought actions against the sureties (without notice to the sheriff), which actions had proved unproductive, it was held that the plaintiff might recover the costs from the sheriff, their amount not exceeding, with the other damages proved, the penalty of the bond (*t*). Taking an assignment of the replevin-bond was not a waiver of the remedy against the sheriff (*u*).

(*i*) *Hindle* v. *Blades*, 1 Marsh. 27; 5 Taunt. 225.

(*k*) *Jeffery* v. *Bastard*, 4 A. & E. 823: *Plumer* v. *Brisco*, 11 Q. B. 46; 17 L. J., Q. B. 158: *Scott* v. *Waithman*, 3 Stark. 168; 1 Phil. Ev. 433. And see *Gwillim* v. *Scholey*, 6 Esp. 100.

(*l*) *Sutton* v. *Waite*, 8 Moore, 28.

(*m*) *Jeffery* v. *Bastard*, 4 A. & E. 823; 6 N. & M. 303.

(*n*) *Jeffery* v. *Bastard*, supra.

(*o*) *Scott* v. *Waithman*, 3 Stark. 168.

(*p*) *Plumer* v. *Brisco*, supra.

(*q*) *Evans* v. *Brander*, 2 H. Bl. 547: *Baker* v. *Garratt*, 3 Bing. 56; 10 Moore, 324: *Paul* v. *Goodluck*, 2 Bing. N. C. 220: overruling *Tea* v. *Lethbridge*, 4 T. R. 433. As to the extent of the liability of the sureties, see Ch. CXXX.

(*r*) *Jeffery* v. *Bastard*, 4 A. & E. 823.

(*s*) *Edmonds* v. *Challis*, 7 C. B. 413; 18 L. J., C. P. 164.

(*t*) *Plumer* v. *Brisco*, supra.

(*u*) 1 Saund. 195 e. And see *Baker* v. *Garratt*, 3 Bing. 56; 10 Moore, 324.

As to the evidence in an action against the sheriff for taking insufficient sureties on granting a replevin, *see Plumer* v. *Brisco*, 11 *Q. B.* 46.

Liability of registrar of County Court.

It seems that the registrar of a County Court, if he grant a replevin without taking the security required by the Act, is liable to an action at the suit of the defendant if he is damnified by the registrar's neglect. So he will be liable if the sureties are insufficient, if he did not use a reasonable degree of caution for the purpose of ascertaining their sufficiency (*x*).

(*x*) See *Young* v. *Brompton, &c. Waterworks Co.*, B. & S. 675; 31 L. J., Q. B. 14.

CHAPTER CVIII.

ACTION FOR MANDAMUS (*a*).

PART XIII.

On interlocutory application.

THE practice on granting a mandamus on an interlocutory order under the *Judicature Act*, 1873, *s.* 25, *sub-s.* 8, has been discussed *ante*, *Vol.* 1, p. 431. An interlocutory order under this section has been held to include any order made in an action other than final judgment, whether made before or after final judgment (*b*). It includes, therefore, a mandamus granted for the purpose of enforcing a judgment, such as a mandamus to a local board of health to levy a rate to satisfy a judgment against them (*b*). In all cases, therefore, except where the mandamus is granted by final judgment, the reader is referred to *Vol.* 1, p. 431.

Action for.

A mandamus may be claimed by the plaintiff in the indorsement on the writ, and may be the relief or part of the relief adjudged by the final judgment of the Court.

Indorsement on writ.

By *R. of S. C., Ord. LIII. r.* 1, "The plaintiff, in any action in which he shall claim a mandamus to command the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested, shall indorse such claim upon the writ of summons" (*c*).

By *r.* 2, "The indorsement shall be in the form given in Section IV. of Appendix A., Part III." (*d*).

The *Com. Law Proc. Act*, 1854, *ss.* 68—74 (repealed by 46 & 47 V. c. 49), enabled the plaintiff to indorse his writ with a claim for, and the Court to give judgment for a mandamus.

Proceedings.

The proceedings in the action are the same as in ordinary cases.

The statement of claim should state the grounds upon which the claim for a mandamus is founded, and state that the plaintiff is personally interested therein, that he sustains, or may sustain, damage by the non-performance of the duty sought to be enforced, and that performance has been demanded by him, and refused or neglected (*e*).

The duty required to be performed must be one of a public or quasi-public character (*f*), and one that cannot be enforced by any other remedy (*g*). It is not necessary to show that any actual damage has been sustained (*h*).

(*a*) It does not fall within the province of the present work to treat of the practice with regard to the prerogative writ of mandamus, which is not affected by the proceedings treated of in the chapter.

(*b*) *Smith* v. *Cowell*, 6 Q. B. D. 75; 50 L. J., Q. B. 38.

(*c*) This rule does not interfere with the jurisdiction of the Queen's Bench Division to grant a prerogative writ of mandamus. See R. of S. C., Ord. LIII. rr. 5 et seq.

(*d*) See the form, Chit. F. 636.

(*e*) Cp. C. L. P. Act, 1854, s. 69.

(*f*) *Benson* v. *Paul*, 6 El. & Bl. 273; 25 L. J., Q. B. 274. See *Morris* v. *Irish Land Co.*, 8 El. & Bl. 512; 27 L. J., Q. B. 115.

(*g*) *Bush* v. *Beavan*, 1 H. & C. 500; 32 L. J., Ex. 54.

(*h*) *Fotherby* v. *Metrop. R. Co.*, L. R., 1 C. P. 188; 36 L. J., C. P. 88.

A mandamus will not be granted under this section to compel the performance of a mere private contract (*i*), or to compel the payment of a debt (*j*). Nor, it appears, will the Court make an order against a public body or individuals to do an act unless it is satisfied that it is within their power to comply with it (*k*).

A mandamus has been granted to compel a railway company to issue a warrant to the sheriff to summon a jury to assess the value of land taken under compulsory powers (*l*); to compel a company to restore (*m*) or remove (*n*) a shareholder's name to or from its register; to compel improvement commissioners to levy a rate to pay the plaintiff's claim (*o*), and to pay the plaintiff's claim out of a rate levied (*p*).

Judgment.

By *Ord. LIII. r.* 3, "If judgment be given for the plaintiff the Court or Judge may by the judgment command the defendant either forthwith, or on the expiration of such time and upon such terms as may appear to the Court or a Judge to be just, to perform the duty in question. The Court or a Judge may also extend the time for the performance of the duty" (*q*).

Writ of mandamus in action abolished.

By *r.* 4, "No writ of mandamus shall hereafter be issued in an action, but a mandamus shall be by judgment or order, which shall have the same effect as a writ of mandamus formerly had."

Proceedings to compel compliance with mandamus or mandatory order, injunction or judgment.

The judgment should be served on the defendant duly indorsed, as required by *Ord. XLI. r.* 5 (*ante, Vol.* 1, p. 766). If the defendant do not comply with it, an application to attach him may be made (*see Ord. XLII. r.* 7, *ante*, p. 941).

By *R. of S. C., Ord. XLII. r.* 30, "If a mandamus, granted in an action or otherwise, or a mandatory order, injunction, or judgment for the specific performance of any contract be not complied with, the Court or a Judge, besides or instead of proceedings against the disobedient party for contempt, may direct that the act required to be done may be done so far as practicable by the party by whom the judgment or order has been obtained, or some other person appointed by the Court or Judge, at the cost of the disobedient party, and upon the act being done, the expenses incurred may be ascertained in such manner as the Court or a Judge may direct, and execution may issue for the amount so ascertained, and costs."

Execution of instruments by

By the *Judicature Act*, 1884, *s.* 14, "Where any person neglects or refuses to comply with a judgment or order directing him to

(*i*) *Benson* v. *Paul*, supra.
(*j*) *Bush* v. *Beavan*, supra.
(*k*) *Att.-Gen.* v. *Guardians of Dorking Union*, 20 Ch. D. 595, per Jessel, M. R.
(*l*) *Fotherby* v. *Metrop. R. Co.*, supra: *Morgan* v. *Metrop. R. Co.*, L. R., 3 C. P. 553; affirmed L. R., 4 C. P. 97; 37 L. J., C. P. 265: *Guest* v. *Poole and Bournemouth R. Co.*, L. R., 5 C. P. 553; 39 L. J., C. P. 329. See *Tyson* v. *Mayor of London*, L. R., 7 C. P. 18; 41 L. J., C. P. 6.
(*m*) *Swan* v. *N. British Australasian Co.*, 7 H. & N. 603; 31 L. J., Ex. 425; 2 H. & C. 175; 32 L. J., Ex. 273.
(*n*) Companies Act, 1862 (25 & 26 V. c. 89), s. 35: *Ex p. Ward*, L. R., 3 Ex. 181. See ante, p. 1064.
(*o*) *Ward* v. *Lowndes*, 1 El. & El. 940; 28 L. J., Q. B. 265; affirmed 1 El. & El. 956; 29 L. J., Q. B. 10.
(*p*) *Webb* v. *Herne Bay Commissioners*, L. R., 5 Q. B. 642: *Hastings* v. *Lower Bann Navigation Trustees*, 10 Ir. C. L. R., Q. B. 534.
(*q*) See form of judgment, Chit. F. p. 637.

PART XIII.

order of the Court.

execute any conveyance, contract or other document, or to indorse any negotiable instrument, the Court may, on such terms and conditions (if any) as may be just, order that such conveyance, contract or other document shall be executed, or that such negotiable instrument shall be indorsed by such person as the Court may nominate for that purpose; and in such case the conveyance, contract, document or instrument so executed or indorsed shall operate and be for all purposes available as if it had been executed or indorsed by the person originally directed to execute or indorse it."

CHAPTER CIX.

INJUNCTION.

WE have already (*ante*, *Vol.* 1, p. 427) discussed the power to grant an interlocutory order for an injunction given by sect. 25, sub-sect. 8 of the *Judicature Act*, 1873. That section has been held to apply to any order other than final judgment (*a*), and under it an injunction may be granted either before or at or after the hearing or trial of the action (*a*).

An injunction may be claimed on the writ (*b*), and be granted at the trial so as to form part of the final judgment in the action. In this case the officer's certificate will embody the terms of the injunction, and this, again, will be embodied in the judgment signed.

No writ of injunction is now necessary nor will any be issued (*c*), but the injunction is embodied in the judgment, and such judgment has the same effect as a writ of injunction formerly had (*c*).

It would be beyond the province of the present work, the object of which is to treat of the practice of the Courts, to discuss the principles on which the Courts act in granting injunctions. For these the reader is referred to the learned works of Mr. Kerr and Mr. Joyce.

By *Ord. L. r.* 12, "In any cause or matter in which an injunction has been, or might have been claimed, the plaintiff may, before or after judgment, apply for an injunction to restrain the defendant or respondent from the repetition or continuance of the wrongful act or breach of contract complained of, or from the commission of any injury or breach of contract of a like kind relating to the same property or right, or arising out of the same contract; and the Court or a Judge may grant the injunction, either upon or without terms, as may be just."

Enforcing obedience.

If the party against whom an injunction is granted does not obey it, an attachment or sequestration may be applied for. Before taking proceedings for attachment or sequestration, the judgment or order, duly indorsed as required by *Ord. XLI. r.* 5 (*ante*, *Vol.* 1, p. 766), must be duly served on the party to whom it is directed (*d*). The proceedings by attachment are treated of *ante*, p. 941; those by sequestration, *ante*, p. 907.

(*a*) *Smith* v. *Cowell*, 6 Q. B. D. 75; 50 L. J., Q. B. 38.

(*b*) See ante, Vol. 1, p. 226.

(*c*) By Ord. L. r. 11, "No writ of injunction shall be issued. An injunction shall be by a judgment or order, and any such judgment or order shall have the effect which a writ of injunction previously had."

(*d*) As to the mode of service, see post, Ch. CXXVI. As to giving notice of the injunction by telegram, see *Ex p. Langley*, cited ante, p. 948, n. (*p*).

PART XIII.

By *R. of S. C., Ord. XLII. r.* 30, "If a mandamus, granted in an action or otherwise, or a mandatory order, injunction, or judgment for the specific performance of any contract be not complied with, the Court or a Judge, besides or instead of proceedings against the disobedient party for contempt, may direct that the act required to be done may be done so far as practicable by the party by whom the judgment or order has been obtained, or some other person appointed by the Court or Judge, at the cost of the disobedient party, and upon the act being done, the expenses incurred may be ascertained in such manner as the Court or a Judge may direct, and execution may issue for the amount so ascertained, and costs."

CHAPTER CX.

ACTIONS ON BONDS WITHIN 8 & 9 WILL. 3, c. 11.

THE writ of summons and subsequent proceedings, except so far as is pointed out in this chapter, are the same as in ordinary cases.

By *R. of S. C., Ord. XXII. r.* 1 (*ante, Vol.* 1, p. 342), which authorizes payment into Court, it is provided that in an action on a bond under the stat. 8 & 9 W. 3, *c.* 11, payment into Court shall be admissible to particular breaches only, and not to the whole action.

By *R. of S. C., Ord. XIII. r.* 14, "Where the writ is indorsed with a claim on a bond within 8 & 9 Wm. III. c. 11, and the defendant fails to appear thereto, no statement of claim shall be delivered, and the plaintiff may at once suggest breaches by delivering a suggestion thereof to the defendant or his solicitor, and proceed as mentioned in the said statute and in 3 & 4 Wm. IV. c. 42, s. 16."

Before the 8 & 9 W. 3, *c.* 11, the plaintiff, if he obtained a judgment in an action on a bond, recovered the full penalty of the bond besides costs of suit, and he was also entitled to take out execution for the whole without any regard to the damages which he had actually sustained by the breach of the condition, &c., and the defendant could only obtain relief against this by application to a Court of equity. To remedy this it was enacted by that Act, sect. 8, that, "In all actions which shall be commenced or prosecuted in any of his Majesty's Courts of record, upon any bond or bonds, or on any penal sum, for non-performance of any covenants or agreements, in any indenture, deed, or writing contained, the plaintiff or plaintiffs may *assign* as many breaches as he or they shall think fit, and the jury, upon *trial* of such action or actions, shall and may assess not only such damages and costs of suit as have heretofore been usually done in such cases, but also damages for such of the said breaches so to be assigned as the plaintiff upon the trial of the issues shall prove to have been broken (*a*); and that the like judgment shall be entered on such verdict as heretofore hath been usually done in such like actions. And if judgment shall be given for the plaintiff on a demurrer, or by confession or *nihil dicit*, the plaintiff upon the roll may (*b*) *suggest* as many breaches of the covenants and agree-

Stat. 8 & 9 Will. 3, c. 11, s. 8.

In actions on bond, &c. plaintiff to assign breaches.

On judgment by default, &c.

Breaches to be suggested.

(*a*) It would seem that the enactment applies only to the assessment of damages on issues joined on breaches assigned, but does not provide for the case of a judgment by default after breaches assigned. But it would probably be held, that, on judgment by default after breaches assigned the truth of the breaches would be confessed; and that a writ of inquiry would therefore be merely to assess the damages, and not to inquire into the truth of the breaches.

(*b*) See the rule, Ord. XIII. r. 14, *supra*: cp. *Steward* v. *Greaves*, 10 M. & W. 715, per *Parke*, B.

PART XIII.

Writ of inquiry to be issued, &c.

Stay on payment into Court of damages after judgment.

Or on satisfaction of execution.

Judgment to stand for further breaches.

Scire facias and further proceedings on.

Effect of statute.

ments as he shall think fit; upon which shall issue a writ to the sheriff of that county where the action shall be brought, to summon a jury to appear before the justices, or justice of assize at Nisi Prius [or now, in cases within the 3 & 4 W. 4, *c.* 42, *s.* 16, *post*, p. 1282, before the sheriff], of that county, to inquire of the truth of every one of these breaches, and to assess the damages that the plaintiff shall have sustained thereby; in which writ it shall be commanded to the said justices or justice of assize or Nisi Prius, that he or they shall make return thereof to the Court from whence the same shall issue, at the time in such writ mentioned. And in case the defendant or defendants, after such judgment entered, and before any execution executed, shall *pay into the Court* where the action shall be brought, to the use of the plaintiff or plaintiffs, or his or their executors or administrators, such damages so to be assessed by reason of all or any of the breaches of such covenants, together with the costs of suit, *a stay of execution* of the said judgment shall be entered upon record; or if, by reason of any *execution* executed, the plaintiff or plaintiffs, or his or their executors or administrators, shall be fully paid or satisfied all such damages so to be assessed, together with his or their costs of suit, and all reasonable charges and expenses for executing the said execution, the body, lands, or goods of the defendant shall be thereupon forthwith discharged from the said execution, which shall likewise be entered upon record. But, notwithstanding in each case such judgment shall remain, continue, and be as a *further security*, to answer to the plaintiff or plaintiffs, and his or their executors or administrators, such damages as shall or may be sustained for *further breach* of any covenant or covenants in the same indenture, deed, or writing contained; upon which the plaintiff or plaintiffs (*c*) may have a *scire facias* upon the said judgment against the defendant, or against his heir, terre-tenants, or his executors or administrators, suggesting other breaches of the said covenants or agreements, and to summon him or them respectively to show cause why execution should not be had or awarded upon the said judgment upon which there shall be the like proceeding as was in the action of debt, upon the said bond or obligation for assessing of damages upon trial of issues joined upon such breaches, or inquiry thereof upon a writ to be awarded in manner as aforesaid; and that, upon payment or satisfaction in manner as aforesaid of such future damages, costs, and charges as aforesaid, all further proceedings on the said judgment are again to be stayed, and so *toties quoties*, and the defendant, his body, lands, or goods, shall be discharged out of execution, as aforesaid."

The statute 8 & 9 W. 3, *c.* 11 prevents the plaintiff from recovering the full penalty of the bond, and limits him to damages only in respect of particular breaches committed (*d*). It would seem that, if breaches take place after action brought, and before judgment, still plaintiff

(*c*) The statute does not mention the executors or administrators of the plaintiff; it is apprehended, however, that it extends to them.

(*d*) See *Preston* v. *Dania*, L. R., 8 Ex. 19; 42 L. J., Ex. 33, per *Bramwell*, B. Before the Act, only one breach could have been assigned. See *Steward* v. *Greaves*, 10 M. & W. 715, per *Parke*, B. See *Hardy* v. *Bern*, 5 T. R. 636: *Roles* v. *Rosewell*, Id. 538, 540: *Drage* v. *Brand*, 2 Wils. 377: *Godwin* v. *Crutch*, 1 Cowp. 357.

cannot assign or suggest them. He must bring a scire facias. As to staying proceedings in an action on a bond within this statute, *see ante*, *Vol.* 1, p. 364. And as to pleading payment of money into Court, *see ante*, *Vol.* 1, p. 342.

To what cases it extends.

The statute extends to actions on bonds, &c., for the performance of covenants, &c., whether the covenant, &c., be contained in the same or in any other deed or writing (*e*). It extends to bonds, &c., for the payment of money by instalments (*f*), for the payment of an annuity (*g*), for the performance of an award (*h*), or for the performance of any other specific act,—but not to a bond for the payment of one sum of money in gross at a certain time (*i*); nor to the case of a bail-bond (*k*), or a replevin-bond (*l*), or a bond for payment of money, at a given rate of interest in the meantime, by instalments, with a clause that all shall be due on any default in payment of the interest (*m*), or a bond to replace stock (*n*), or to bonds where the damages assessed are calculated by the jury to meet and satisfy the entire condition (*o*). It extends to actions upon a written instrument for the recovery of a penalty, though not under seal (*p*). A warrant of attorney for the payment of money by instalments, or to secure the payment of an annuity, is not within the Act (*q*), and this, although a bond be also given (*r*). The Crown is not bound to pursue the course pointed out by the Act (*s*).

What amount recoverable.

The defendant is liable only to the extent of the *penalty* and costs of the action (*t*). However, in an action on a *judgment*

(*c*) *Collins* v. *Collins*, 2 Burr. 824, 826; *Hurst* v. *Jennings*, 5 B. & C. 650; 8 D. & R. 421.

(*f*) *Preston* v. *Dania*, supra, n. (*d*): *Willoughby* v. *Swinton*, 6 East, 550; 2 Smith, 663. See *Marson* v. *Souchet*, 2 W. Bl. 706, 958.

(*g*) *Walcot* v. *Goulding*, 8 T. R. 126.

(*h*) *Welch* v. *Ireland*, 6 East, 613; 2 Smith, 666: *Hanbury* v. *Guest*, 14 East, 401.

(*i*) 2 Camp. 285, n.: *Murray* v. *Earl of Stair*, 2 B. & C. 82, 89; 3 D. & R. 278: *Cardozo* v. *Hardy*, 2 Moore, 220: *Smith* v. *Bond*, 10 Bing. 131; 3 M. & Sc. 528.

(*k*) *Moody* v. *Pheasant*, 2 B. & P. 446. The reason why, before the Jud. Acts, a bail-bond and replevin-bond were held not to be within the Act, was because the Courts of law could afford relief to the defendant in actions on them, without his being compelled to file a bill in equity; and therefore such cases did not fall within the rule which produced the statute.

(*l*) 2 Saund. 187, n. (2): *Middleton* v. *Brown*, 3 M. & Sel. 155. See note (*k*), supra. See *Smith* v. *Broomhead*, 7 T. R. 300: *Smithey* v. *Edmonson*, 3 East, 22.

(*m*) *James* v. *Thomas*, 5 B. & Ad. 40; 2 N. & M. 663. And see *Van Sandau* v. ——, 1 B. & Ald. 214: *Kepp* v. *Wiggett*, 4 C. B. 678: *Hodgkinson* v. *Wyatt*, 1 D. & L. 668.

(*n*) See *Savile* v. *Jackson*, 13 Price, 715.

(*o*) See *Savile* v. *Jackson*, supra: *Smith* v. *Bond*, 10 Bing. 125; 3 M. & Sc. 528.

(*p*) See *Drage* v. *Brand*, 2 Wils. 377; 1 Saund. 58 b, n.

(*q*) *Cox* v. *Rodbard*, 3 Taunt. 74: *Kinnersley* v. *Musson*, 5 Taunt. 264: *Shaw* v. *Lord Worcester*, 6 Bing. 385; 4 M. & P. 21. And see per *Littledale*, J., 5 B. & Ad. 41.

(*r*) *Austerbury* v. *Morgan*, 2 Taunt. 195. When otherwise, see *Hurst* v. *Jennings*, 5 B. & C. 650.

(*s*) *R.* v. *Pelo*, 1 Y. & J. 171, per *Alexander*, C. B.

(*t*) *Brancombe* v. *Scarborough*, 6 Q. B. 13; 13 L. J., Q. B. 247: *Braquin* v. *Perrott*, 2 W. Bl. 1190: *Wilde* v. *Clarkson*, 6 T. R. 303: *Shutt* v. *Proctor*, 2 Marsh. 226: *Overseers of St. Martin* v. *Warren*, 1 B. & Ald. 491; 1 Saund. 58 b, 6th ed. The case of *Lonsdale* v. *Church*, 2 T. R. 388, is overruled by the case of *Wilde* v. *Clarkson*, and subsequent cases.

PART XIII.

recovered on a bond, though it be a foreign judgment, interest may be recovered as damages beyond the penalty (*u*). Also, when the penalty is contained in any other instrument than a bond, damages may be recovered beyond it, if the plaintiff sue for the breach of the contract, and not for the penalty (*x*).

Proceedings when Defendant fails to appear.

Suggestion of breaches.

Suggestion of Breaches.]—Formerly when the defendant failed to appear an entry was made on the roll of the breaches suggested, but now under *Ord. XIII. r.* 14 (*supra*, p. 1279), the suggestion is to be delivered to the defendant or his solicitor (*y*).

Before whom inquiry executed.

Before whom Inquiry executed.]—The statute of 8 & 9 W. 3, so far as it requires the writ to be executed before the justices of assize or Nisi Prius, is, in cases where breaches are *suggested* on the roll after a judgment for the plaintiff, by confession or *nil dicit*, and perhaps in all cases where no issue is joined, altered by the statute 3 & 4 W. 4, *c.* 42, *s.* 16, which, to prevent delay, enacts that *all* writs issued under 8 & 9 W. 3, "shall, *unless the Court where such action is pending, or a judge of one of the said superior Courts, shall otherwise order*, direct the sheriff of the county where the action shall be brought to summon a jury to appear before such *sheriff*, instead of the justices or justice of assize or Nisi Prius of that county, to inquire of the truth of the breaches suggested, and assess the damages that the plaintiff shall have sustained thereby, and shall command the said sheriff to make return thereof to the Court from whence the same shall issue at a day certain, in *term* or in *vacation*, in such writ to be mentioned; and such proceedings shall be had after the return of such writ as are in the said statute in that behalf mentioned, in like manner as if such writ had been executed before a justice of assize or Nisi Prius." It seems that this latter Act does not extend to cases where the plaintiff *assigns* breaches of the condition of the bond, &c., in his statement of claim or reply (*z*). Where questions of difficulty, either in law or evidence, are likely to arise, the Court or a Judge will order the writ to be executed before a Judge at Nisi Prius in a town case or at the assizes in a country case (*a*).

Proceeding after judgment by default.

Proceedings after Judgment by Default.]—*After judgment by default, the plaintiff should deliver to the defendant or his solicitor a suggestion of the breaches relied on written on foolscap paper in the usual manner. Serve also the notice of inquiry, as post*, p. 1333, *to inquire of the truth of the breaches suggested, and to assess the damages* (*b*). *Then sue out the writ of inquiry* (*c*) *as directed post*, p. 1332, *to be exe-*

(*u*) *M'Clure* v. *Dunkin*, 1 East, 436. And see *Grant* v. *Grant*, 3 Sim. 341: *Jendwine* v. *Agate*, Id. 129.

(*x*) *Winter* v. *Trimmer*, 1 W. Bl. 395; *Harrison* v. *Wright*, 13 East, 343; *Francis* v. *Wilson*, R. & M. 105; 1 Saund. 58 b.

(*y*) See a form of suggestion, Chit. F. p. 639.

(*z*) See 1 Saund. 58 g, n. (*l*), 6th ed. See Tidd's Sup. 1833, 135.

(*a*) *Archbishop of Canterbury* v. *Burlington*, 1 Dowl., N. S. 285. See form of order, Chit. Forms, p. 642.

(*b*) See 1 Saund. 58 f, 6th ed. See Chit. Forms, p. 641.

(*c*) See the form, Chit. Forms, p. 643.

cuted before the sheriff: deliver it to the sheriff or his deputy, who will thereupon summon the jury, and the writ will be executed accordingly. The same practice as to attending by counsel, subpœnaing witnesses, and the mode of executing the writ of inquiry in ordinary cases, as noticed post, p. 1335, *will apply to this case.* The defendant cannot deny the breaches suggested (*d*), but can only defend as to the quantum of damages (*d*).

Leave to try at sittings or assizes.

Where questions of difficulty either as to the law or facts are likely to arise, and you are desirous that the writ shall be executed before a Judge of the High Court at the sittings if the venue is laid in Middlesex or London, or at the assizes if the venue is laid in any other county, you should obtain leave of the Court or a Judge for that purpose, who may grant it under the 3 & 4 *W.* 4, *c.* 42, *s.* 16 (*ante*, p. 1282). *Having obtained and drawn up the order, make and serve a copy of the suggestion of breaches, and the notice of inquiry, as directed supra. Then sue out a writ of inquiry, as directed post*, p. 1332, *to be executed before a Judge of the High Court at the sittings, or at the assizes, as the case may be* (*e*): *enter the cause as directed Vol.* 1, p. 598. When the cause is called on, the inquest is taken precisely in the same manner as a cause is tried at Nisi Prius.

The evidence.

As to the *evidence* on executing a writ of inquiry in general, *see post*, p. 1336. The plaintiff need not prove the breaches if they have been assigned, or any averments contained in the statement of claim, further than is necessary to entitle him to the damages sought to be recovered, in the same manner as on a writ of inquiry in ordinary cases. But he must prove the truth of the breaches that have been *suggested* in the record after judgment, and the defendant is at liberty to controvert the truth of them, though he cannot offer evidence in excuse for them (*f*). Where, in debt on bond conditioned for the performance of covenants in an indenture, &c., or of an award, judgment is suffered to pass by default, and breaches are *suggested*, the plaintiff must prove the condition of the bond, the award, indenture, &c., as well as the breaches suggested (*g*). He must also prove that the bond mentioned in the suggestion and produced to the jury is that on which the action is brought (*h*).

Final judgment, when signed, and execution issued.

The 3 & 4 *W.* 4, *c.* 42, *s.* 18, provides, "That at the return of any such writ of inquiry, or writ for the trial of such issue or issues as aforesaid, *costs shall be taxed, judgment signed*, and *execution issued forthwith*, unless the sheriff or his deputy before whom such writ of inquiry may be executed, or such sheriff, deputy, or Judge before whom such trial shall be had, shall *certify under his hand* (*i*), upon such writ, that *judgment ought not to be signed until*

(*d*) 1 Saund. 58 f, 6th ed. And see *Archbishop of Canterbury* v. *Robertson*, 1 C. & M. 690. But see *Plomer* v. *Ross*, 5 Taunt. 391: *Webb* v. *James*, 8 M. & W. 645; 1 Dowl., N. S. 36.

(*e*) See the forms, Chit. Forms, p. 642.

(*f*) See 1 Saund. 58 a, 5th ed.: *Archbishop of Canterbury* v. *Robertson*, supra: *Barwise* v. *Russell*, 3 C. & P. 608: *Collins* v. *Rybot*, 1 Esp. Rep. 157.

(*g*) 1 Saund. 58 d. See *Williamson* v. *Sills*, 2 Camp. 519: *Bartlett* v. *Pentland*, 1 B. & Ad. 704.

(*h*) *Hodgkinson* v. *Marsden*, 2 Camp. 121.

(*i*) See a form, Chit. Forms, p. 677; but instead of the words "to set aside the execution of the within writ," say, "for a new writ of inquiry."

PART XIII.

the defendant shall have had an opportunity to apply to the Court for a new inquiry or *trial*, or a *Judge* of any of the said Courts shall think fit to order that *judgment* or *execution shall be stayed* till a day to be named in such order."

How signed, and costs taxed.

If the inquiry was executed before the sheriff, *the inquisition and return will be framed* (*l*) *and procured as directed post*, p. 1338. *You may then sign judgment.* If it was executed before a Judge of the High Court of Justice, *the associate will prepare the inquisition, and have it sealed with the seal of the Court, and annex it to the writ of inquiry* (*l*). *You may then sign judgment.* As to taxing costs and signing final judgment, *see post*, p. 1340 (*m*).

Subsequent proceedings on roll.

The remaining proceedings are as follows:—After the execution and return of the writ of inquiry, final judgment may be entered in the usual manner (*see post*, p. 1340) for the amount at which the damages are assessed. Execution may then be issued or the judgment so entered in the usual way (*see ante, Vol.* 1, p. 786) (*n*). The costs above mentioned include the costs of the inquiry (*o*).

Form of execution.

The writ of execution must, as to the amount to be levied, pursue the judgment; it must be indorsed to levy the money really due and payable, &c. (*p*).

Proceedings when Defendant appears.

Proceedings upon issue joined.

Proceedings upon Issue joined.]—When in an action on a bond, within the Act, the statement of claim, as it always should do, sets forth the condition of the bond, and assigns the breaches thereof, the issue joined is tried as in ordinary cases (*q*).

If the statement of claim be not framed in this way, but is on the bond generally, without setting out the condition, which is now rarely the case, and the defendant plead any defence which made it necessary at common law for the plaintiff to assign a breach in his reply, as, for instance, general performance (*r*), the plaintiff must still *assign* the breach in his reply, with this difference, that now he may *assign* several breaches under the statute, whereas at common law he could assign only one (*s*). The issue in this case is also tried as in ordinary cases (*t*).

If to such a statement of claim the defendant plead any defence on which the plaintiff might at common law have taken an issue in

(*l*) See the form, Chit. Forms, pp. 643, 644.

(*m*) See *Nicholls* v. *Chambers*, 2 Dowl. 693; 1 C., M. & R. 385: *Gill* v. *Rushworth*, 2 D. & L. 416. As to costs in general, see Vol. 1, p. 671 et seq.

(*n*) See the form of the execution, Chit. Forms, p. 645; 1 Saund. 58 e.; 2 Saund. 187.

(*o*) See *Hankin* v. *Broomhead*, 3 B. & P. 607.

(*p*) See Vol. 1, p. 801; 1 Saund. 58 b, n. 1.

(*q*) *Quin* v. *King*, 1 M. & W. 42: *Parkins* v. *Hawkshaw*, 2 Stark. 381.

(*r*) When such a plea would suffice before the Jud. Acts, see *Roakes* v. *Manser*, 1 C. B. 531; 3 D. & L. 17; 14 L. J., C. P. 199.

(*s*) 2 Saund. 187 b, c: *De la Rue* v. *Stewart*, 2 N. R. 362: *Ethersey* v. *Jackson*, 8 T. R. 255: *Tombs* v. *Painter*, 13 East, 1: *Webb* v. *James*, 8 M. & W. 645, 656; 1 Dowl., N. S. 36. Where the plea is of specific performance of a specific condition, the repl'ication need not assign a breach: see *Darbishire* v. *Butler*, 5 Moore, 198: *Smith* v. *Bond*, 10 Bing. 130; 3 M. & Sc. 528.

(*t*) *Scott* v. *Staley*, 4 Bing. N. C. 724; 6 Scott, 598; 6 Dowl. 714: *Parkins* v. *Hawkshaw*, *Quin* v. *King*, supra.

his reply, without assigning a breach of the condition of the bond (if, for instance, he plead *non est factum* (*u*), or *non est factum* and that the bond was obtained by fraud and covin (*x*), or the like), the plaintiff should still take such issue, and, in addition, he must deliver a *suggestion* of breaches under the statute. Formerly he could not incorporate such issue and such *suggestion* in one and the same reply (*y*), but there would appear to be no reason why he should not do so now. In this case the jury must try the issue or issues, and assess damages on the breaches suggested (*z*).

Evidence.

The evidence upon the issues joined, whether upon an assignment of breaches or otherwise, is the same as in ordinary cases. If the breaches be suggested, the plaintiff must prove the truth of them, and the defendant is at liberty to controvert the truth of them, but he cannot adduce anything in evidence in excuse for them (*a*).

Verdict.

The *verdict* for plaintiff is the same as in ordinary cases: but the jury must also assess damages for the breaches.

Judgment.

The *judgment* for plaintiff is, that he recover the debt; that is to say, the penalty, together with costs when he is entitled to the same (*b*); and there is an award of execution for the damages assessed, and the costs, when he recovers same.

Form of execution.

As to the writ of *execution* pursuing the judgment, and as to the indorsement of the amount to be levied, *see ante, Vol.* 1, p. 791.

Scire Facias on further Breaches.

Scire facias on further breaches.

Scire Facias after.]—If, after the first inquisition or trial, the defendant be guilty of any further breaches, as the statute says, that in such a case the judgment already signed shall remain as a security to the plaintiff, the plaintiff, in order to obtain damages, must proceed by writ of scire facias on the judgment, and thereupon suggest the further breaches (*c*); and upon the defendant pleading thereto or making default, the plaintiff must proceed in the manner directed by the statute.

Definition of sci. fa.

A scire facias is a judicial writ, founded upon some record, and requires the person against whom it is brought to show cause why the party bringing it should not have advantage of such record, or (as in the case of a scire facias to repeal letters patent) why the record should not be annulled and vacated. It is, however, considered in law as an action (*d*); and, when brought to repeal letters patent, might in fact be an original writ, returnable in Chancery (*e*), or a judicial writ returnable in the superior Court (*f*).

(*u*) *Etherscy* v. *Jackson*, 8 T. R. 255.

(*x*) *Homfray* v. *Rigby*, 5 M. & Sel. 60.

(*y*) 2 Saund. 187e: *Etherscy* v. *Jackson*, 8 T. R. 255. And see *Hanbury* v. *Guest*, 14 East, 491.

(*z*) See *Etherscy* v. *Jackson*, 8 T. R. 255: *Quin* v. *King*, 1 M. & W. 42: *Scott* v. *Staley*, 4 Bing. N. C. 724; 6 Sc. 598; 6 Dowl. 714.

(*a*) Ante, p. 1283: *Archbishop of Canterbury* v. *Robertson*, 1 C. & M. 690.

(*b*) 1 Saund. 58 b, n. See the form, Chit. Forms, p. 644. As to costs, see Vol. 1, p. 671 et seq.

(*c*) See the forms, Chit. Forms, p. 645.

(*d*) *Woodyer* v. *Gresham*, Skin. 682; Comb. 455: *Winter* v. *Kretchman*, 2 T. R. 46: *Fenner* v. *Evans*, 1 Id. 267.

(*e*) See the form, Tidd's Forms: *Attorney-General* v. *Sewell*, 4 M. & W. 77; 6 Dowl. 673; 8 Car. & P. 376; 11 & 12 V. c. 94.

(*f*) 3 H. 4, 6, 29.

PART XIII.

The writ in this case should recite the whole proceedings in the former action, or at least so much of them as to make it appear that the judgment is warranted by the statute; and it must then suggest the further breaches (*g*). Or, where the plaintiff in the original action has set forth only some of the covenants, and he wishes to recover damages for breaches of others, it would seem that he may now state these latter covenants in the writ, and assign breaches on them (*h*). Nothing can be suggested as a breach which might have been originally assigned or suggested as a breach (*i*).

The proceedings upon this scire facias are the same as in the original action; but it is not necessary that there should be any other judgment than the usual one in an action of scire facias, namely, an award of execution (*k*). If the plaintiff obtain a judgment by default, he must issue a writ of inquiry. The judgment will be the common judgment in scire facias.

Nothing is said in the Judicature Acts or the Rules of the S. C. with regard to the writ of scire facias; but inasmuch as that writ was a judicial writ and the commencement of a new action on the judgment, and the Rules of Court provide that all actions hitherto commenced by writ shall be instituted by a proceeding to be called an action (*Ord. I. r.* 1, *ante*, *Vol.* 1, p. 215), and that every action shall be commenced by a writ of summons (*Ord. II. r.* 1, *ante*, *Vol.* 1, p. 215), it may be doubted whether the old writ of scire facias is not abolished and an ordinary writ of summons indorsed with a claim for execution on the judgment substituted in its place. This view was adopted in the 13th edition of this work, but the old writ is treated by the highest authority as if it were an existing mode of procedure (*Lindley*, *Partnership*, *4th ed.*, p. 522 *et seq.*), and has been adopted in several cases since the Judicature Acts have been in operation (*l*). It is submitted that probably the old writ can still be issued.

Proceedings in scire facias must strictly pursue the terms of the judgment, recognizance or other record upon which they are founded (*m*). In a case decided before the *Com. Law Proc. Act*, 1852, a scire facias for the non-performance of a certain promise (in the singular number), where the judgment was upon several promises, was held bad (*n*).

A scire facias, being founded on matter of record, was not within the Statute of Limitations (21 *Jac.* 1, *c.* 16, *s.* 3). As to the time limited for bringing proceedings to recover money secured by a judgment, *see ante*, p. 957; as to recognizances, *see* 3 & 4 *W.* 4, *c.* 42, *s.* 3.

The action should be brought in the Court in which the record is supposed to remain.

By the *Com. Law Proc. Act*, 1852, *s.* 132, "All writs of scire

(*g*) 1 Saund. 58 c. See the forms, Chit. Forms.

(*h*) 2 Saund. 187 b.

(*i*) 2 Saund. 187 c, n. (*g*), 7th ed.: *Harrap* v. *Armitage*, 12 Price, 441. And see *Savile* v. *Jackson*, 13 Price, 715.

(*k*) 1 Saund. 58 e.

(*l*) See *Portal* v. *Emmens*, 1 C. P. D. 201, 664: *Kipling* v. *Todd*, 3 C. P. D. 350.

(*m*) *Panton* v. *Hall*, 2 Salk. 598; 2 Inst. 395. And see 2 Ro. Abr. 468; 2 Saund. 72 b, c: *Sainsbury* v. *Pringle*, 10 B. & C. 751.

(*n*) *Baynes* v. *Forrest*, 2 Str. 893.

facias issued out of any of the superior Courts of Law at Westminster against bail on a recognizance; ad audiendum errores; against members of a joint-stock company or other body, upon a judgment recorded against a public officer or other person sued as representing such company or body, or against such company or body itself; by or against a husband to have execution of a judgment for or against a wife; for restitution after a reversal in error; upon a suggestion of further breaches after judgment for any penal sum, pursuant to the statute passed in the session holden in the eighth and ninth years of the reign of King William the Third, intituled 'An Act for the better preventing frivolous and vexatious suits;' or for the recovery of land taken under an elegit, shall be tested, directed and proceeded upon, in like manner as writs of revivor" (*o*).

Before the *Com. Law Proc. Act*, 1852, if the defendant pleaded to the scire facias, and the plaintiff proceeded to trial after verdict, all defects in form and substance were aided by 18 *Eliz. c.* 14, and defects both in form and substance by 5 *G.* 1, *c.* 13; and the defects aided after verdict by 18 *Eliz. c.* 14, were aided, after judgment by confession or default, by 4 & 5 *Anne, c.* 16, *s.* 2 (*p*).

Costs.

Before the Judicature Acts the plaintiff was always entitled to costs on this scire facias, even before the 3 & 4 *W.* 4, *c.* 42, *s.* 34, whether the defendant pleaded to it or not, notwithstanding sect. 3 of the 8 & 9 *W.* 3, *c.* 11 gave costs in suits upon writs of scire facias generally only in cases where the plaintiff obtained an award of execution after plea pleaded or demurrer joined (*q*). As to costs, *see Vol.* 1, p. 671.

Execution.

As to the execution, *see Vol.* 1, p. 786.

(*o*) This section is unrepealed, being one of those expressly excepted by the stat. 46 & 47 V. c. 49 (see ante, Vol. 1, p. 199, n. (*c*)). In all the cases mentioned in it except those of bail on a recognizance, restitution after a reversal in error, and on a suggestion of further breaches, a new mode of procedure is expressly provided by the present Rules. As to the writ of revivor, see the 12th edition of this work, p. 1133 et seq.

(*p*) See 6 Bac. Abr. Sci. Fa. (D).

(*q*) Id. *Brooke* v. *Booth*, 11 East, 387.

CHAPTER CXI.

PETITION OF RIGHT.

PART XIII.

In what cases maintainable, &c.

In what Cases maintainable, &c.]—The practice and procedure on petitions of right are now regulated by the statute 23 & 24 *V. c.* 34 (*a*), which was passed, as appears from the recital at the commencement, "to simplify the procedure therein, and to make provision for the recovery of costs in such cases, and to assimilate the proceedings as nearly as may be to the course of practice and procedure now [3rd July, 1860] in force between subject and subject." This statute, although it greatly facilitates the prosecution by the subject of any claim he may have against the Crown, does not create or give any new grounds of claim, or any new causes of petition or remedy which he did not possess before it was passed (*b*). A petition of right will not lie to recover compensation for a wrongful act done by a servant of the Crown in the supposed performance of his duty (*c*), nor to recover unliquidated damages for a trespass (*d*), nor for infringement of a patent (*e*). It will lie for a breach of a contract resulting in unliquidated damages (*f*).

(*a*) By sect. 16 of this Act it is provided, that "In the construction of this Act the words 'her Majesty' shall extend to and include her Majesty's successors: and the words 'Lord High Chancellor' and 'Lord Chancellor' respectively shall mean and include Keeper of the Great Seal and Commissioners for executing the office of Lord Chancellor or Keeper of the Great Seal; the word 'Court' shall be understood to mean any one of the superior Courts of common law or equity at Westminster in which any such petition is presented; the word 'relief' shall comprehend every species of relief claimed or prayed for in any such petition of right, whether a restitution of any incorporeal right, or a return of lands or chattels, or a payment of money or damages or otherwise; and the word 'Judge' shall be understood to mean a Judge or Baron of any of the said Courts respectively; and wherever in this Act, in describing or referring to any person, party, or thing, any word importing the singular number or masculine or feminine gender is used, the same shall be understood to include and be applicable to several persons and parties as well as one person or party, and to females as well as males, and males as well as females, and bodies corporate as well as individuals, and several matters and things as well as one matter or thing, unless it otherwise be provided, or there be something in the subject or context repugnant to such construction."

By sect. 17, "In citing this Act in any instrument, document, or proceeding it shall be sufficient to use the expression 'The Petitions of Right Act, 1860.'"

(*b*) *Tobin* v. *The Queen*, 16 C. B., N. S. 310; 33 L. J., C. P. 199. See the express proviso at the end of sect. 7 of this statute, post, p. 1291.

(*c*) Id.

(*d*) Id. See *Kirk* v. *The Queen*, L. R., 14 Eq. 558.

(*e*) *Feather* v. *The Queen*, 6 B. & S. 257; 35 L. J., Q. B. 200. See *Dixon* v. *London Small Arms Co.*, 1 App. Cas. 632.

(*f*) *Thomas* v. *The Queen*, L. R., 10 Q. B. 31; 44 L. J., Q. B. 9. See *Churchward* v. *The Queen*, L. R., 1

The Courts will not entertain a petition of right which seeks an inquiry into the circumstances attending the dismissal of an officer from the army (*g*), or to question the decision of the Commissioners of the Treasury as to a Civil Service pension (*h*).

It may be useful to note that the Government revenue cannot be reached by a suit against a public officer in his official capacity (*i*).

By sect. 18 of the Act, "Nothing in this Act contained shall prevent any suppliant from proceeding as before the passing of this Act."

Nothing to prevent suppliant proceeding as before.

Form of, &c.]—By 23 & 24 *V. c.* 34, *s.* 1, "A petition of right may, if the suppliant think fit, be intituled in any one of the superior Courts of common law or equity at Westminster in which the subject-matter of such petition or any material part thereof would have been cognizable if the same had been a matter in dispute between subject and subject, and if intituled in a Court of common law shall state in the margin the venue for the trial of such petition; and such petition shall be addressed to her Majesty in the form or to the effect in the Schedule to this Act annexed (No. 1 (*j*)), and shall state the christian and surname and usual place of abode of the suppliant and of his attorney, if any, by whom the same shall be presented, and shall set forth with convenient certainty the facts entitling the suppliant to relief, and shall be signed by such suppliant, his counsel or attorney."

Petitions of right may be intituled in High Court.

The form, nature and contents of the petition.

Venue—Change of Venue or Court.]—Sect. 1 (*supra*) requires that the venue shall be stated in the margin of the petition. By sect. 4 it is provided, "that it shall be lawful for the Lord Chancellor, on the application of the Attorney-General or of the suppliant, to change the Court in which such petition shall be prosecuted or the venue for the trial of the same."

Venue, change of, &c.

Presentation at Home Office for Fiat.]—By 23 & 24 *V. c.* 34, *s.* 2, "The said petition shall be left with the Secretary of State for the Home Department, in order that the same may be submitted to her Majesty for her Majesty's gracious consideration, and in order that her Majesty, if she shall think fit, may grant her fiat that right be done, and no fee or sum of money shall be payable by the suppliant on so leaving such petition, or upon his receiving back the same."

Petition to be left at Home Office.

It would appear that the Secretary of State is bound to submit the petition to her Majesty, but that he cannot be compelled to state what advice he has given her with reference to it (*k*).

Q. B. 173: *Firth* v. *The Queen*, L. R., 7 Ex. 365; 41 L. J., Ex. 171: *Rustomjee* v. *The Queen*, 1 Q. B. D. 487; affirmed, 2 Id. 69; 46 L. J., Q. B. 238. See *Palmer* v. *Hutchinson*, 6 App. Cas. 619; 50 L. J., P. C. 62.

(*g*) *In re Tufnell*, 3 Ch. D. 164; 45 L. J., Ch. 731: cp. *Grant* v. *Secretary of State for India*, 2 C. P. D. 445.

(*h*) *Cooper* v. *The Queen*, 14 Ch. D. 311; 49 L. J., Ch. 490.

(*i*) *Palmer* v. *Hutchinson*, supra: cp. *Kirk* v. *The Queen*, L. R., 14 Eq. 558, where the distinction between the Secretary of State for War, who is a corporation, and the other secretaries, who are agents for the Crown, is pointed out.

(*j*) See the form, Chit. F. p. 647.

(*k*) *Irwin* v. *Gray*, 3 F. & F. 635. See *Queen* v. *Lords Commissioners of the Treasury*, 41 L. J., Q. B. 178.

PART XIII.

Upon fiat being obtained, petition, &c. to be left at office of solicitor of Treasury.

Presentation at Office of Solicitor to Treasury after Fiat obtained.]—By sect. 3, "Upon her Majesty's fiat being obtained to such petition, a copy of such petition and fiat shall be left at the office of the solicitor to the Treasury, with an endorsement thereon in the form or to the effect in the Schedule (No. 2 (*k*)) to this Act annexed, praying for a plea or answer on behalf of her Majesty within twenty-eight days, and it shall thereupon be the duty of the said solicitor to transmit such petition to the particular department to which the subject-matter of such petition may relate, and the same shall be prosecuted in the Court in which the same shall be intituled, or in such other Court as the Lord Chancellor may direct."

The answer.

The Answer, &c.]—By sect. 6, "Such petition may be answered by way of answer, plea, or demurrer in a Court of equity, or in a Court of common law, by way of plea or demurrer, or by both pleas and demurrer, by or in the name of her Majesty's Attorney-General on behalf of her Majesty, and by or on behalf of any other person who may in pursuance hereof be called upon to plead or answer thereto, in the same manner as if such petition in a Court of equity were a bill filed therein, or if the petition be prosecuted in a Court of common law as if the same were a declaration in a personal action, and without the necessity for any inquisition finding the truth of such petition or the right of the suppliant, and such and the same matter as would be sufficient ground of answer or defence in point of law or fact to such petition on the behalf of her Majesty may be alleged on behalf of any such other person as aforesaid called on to plead or answer thereto."

The answer may now take the form of a defence (*l*). The Act did not affect the prerogative of the Crown to plead double or plead and demur without leave (*m*).

The Statute of Limitations does not apply (*n*).

As to set-off, *see De Lancey* v. *The Queen*, L. R., 6 Ex. 286; L. R., 7 Ex. 140.

Time for answering by the Crown.

Time for answering, &c. by Crown.]—By sect. 4, "The time for answering, pleading, or demurring to such petition, on behalf of her Majesty, shall be the said period of *twenty-eight days* after the same, with such prayer of a plea or answer as aforesaid, shall have been left at the office of the solicitor to the Treasury, or such further time as shall be allowed by the Court or a Judge . . ." (*see the rest of the section, ante*, p. 1289).

Service on persons other than Crown.

Service on Persons other than Crown—Parties.]—By sect. 5, "In case any such petition of right shall be presented for the recovery of any real or personal property, or any right in or to the same, which shall have been granted away or disposed of by or on behalf of her Majesty or her predecessors, a copy of such petition, allowance, and fiat shall be *served* upon or left at the last or usual or last known place of abode of the person in the possession, occupation, or enjoyment of such property or right, endorsed with a *notice* in the form set forth in the Schedule (No. 3) (*o*), *requiring*

(*k*) See form, Chit. F. p. 648.
(*l*) See form, Chit. F. p. 649.
(*m*) *Tobin* v. *The Queen*, 14 C. B., N. S. 505; 32 L. J., C. P. 216.
(*n*) *Rustomjee* v. *The Queen*, 1 Q. B. D. 487; affirmed 2 Id. 69.
(*o*) See form, Chit. F. p. 649.

such person to appear thereto within eight days, and to plead or answer thereto in the Court in which the same shall be prosecuted *within fourteen days* after the same shall have been so served or left as aforesaid; and it shall not be necessary to issue any scire facias or other process to such person for the purpose of requiring him to appear and plead or answer to such petition, but he shall within the time so limited, if it be intended by him to contest such petition, *enter an appearance* to the same in the form set forth in Schedule (No. 4) (*o*) to this Act annexed, or to the like effect, and shall plead, answer, or demur to the said petition *within the time specified* in such notice, or such further time as shall be allowed by the Court or a Judge."

Appearance.

See, as to joining persons other than the Crown as respondents to a petition of right, *Kirk* v. *The Queen*, L. R., 14 Eq. 558.

Practice and Procedure generally.]—By sect. 7, "So far as the same may be applicable, and except in so far as may be inconsistent with this Act, *the laws and statutes in force* as to pleading, evidence, hearing and trial, security for costs, amendment, arbitration, special cases, the means of procuring and taking evidence, set-off, appeal, and proceedings in error in suits in equity, and personal actions between subject and subject, and the practice and course of procedure of the said Courts of law and equity respectively *for the time being* in reference to such suits and personal actions, shall, unless the Court in which the petition is prosecuted shall otherwise order, be applicable and apply and extend to such petition of right: provided always, that nothing in this statute shall be construed to give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy before the passing of this Act."

Procedure in action between subject and subject to extend to petitions of right, so far as applicable.

Sect. 15, which gave power to the Judges to make rules and regulations, is repealed by the Statute Law Revision and Civil Procedure Act, 1881 (44 & 45 *V.* c. 59). There were no Common Law Rules under the repealed section, but there were some in Chancery which will be found set out in Morgan's Chancery Acts and Orders, 5th ed. p. 256 *et seq.*

Rules, &c.

The Crown may obtain discovery from the suppliant (*p*), but it has been held that the suppliant could not obtain discovery from the Crown (*q*).

Discovery.

Judgment by Default.]—By sect. 8, "In case of a failure on the behalf of her Majesty, or of any such other person as aforesaid called upon to answer or plead to such petition, to plead, answer, or demur in due time, either to such petition or at any subsequent stage of the proceedings thereon, the suppliant shall be at liberty to apply to the Court or a Judge for an order that the petition may be taken as confessed; and it shall be lawful for such Court or Judge, on being satisfied that there has been such failure to plead, answer or demur in due time, to order that such petition may be taken as confessed as against her Majesty or such other party so

Judgment by default.

(*o*) See form, Chit. F. p. 649.

(*p*) *Tomline* v. *Reg.*, 4 Ex. D. 252; 48 L. J., Ex. 453 (C. A.).

(*q*) *Thomas* v. *Reg.*, L. R., 10 Q. B. 44; 44 L. J., Q. B. 17. But see now preceding case, n. (*p*).

PART XIII.

making default; and in case of default on the behalf of her Majesty and any other such person (if any) called upon as aforesaid to answer or plead thereto, a decree may be made by the Court, or leave may be given by the Court, on the application of the suppliant, to sign judgment in favour of the suppliant; provided always, that such decree or judgment may afterwards be set aside by such Court or a Judge, in their or his discretion, on such terms as to them or him shall seem fit."

Form of judgment.

Form of Judgment.]—By sect. 9, "Upon every such petition of right the decree or judgment of the Court, whether given upon demurrer upon the pleadings or upon a default to answer or plead in time, or after hearing or verdict, or in error, shall be that the suppliant is or is not entitled either to the whole or to some portion of the relief sought by his petition, or such other relief as the Court may think right, and such Court may give a decree or judgment that the suppliant is entitled to such relief, and upon such terms and conditions (if any) as such Court shall think just."

Effect of judgment.

Effect of Judgment.]—By sect. 10, "In all cases in which the judgment commonly called a judgment of amoveas manus has heretofore been pronounced or given upon a petition of right, a judgment that the suppliant is entitled to relief as hereinbefore provided shall be of such and the same effect as such judgment of amoveas manus."

Costs recoverable by the Crown and any other person party to the petition.

Costs, Crown may recover.]—By sect. 11, "Upon any such petition of right the Attorney-General, or other person appearing on behalf of her Majesty, and every such other person as aforesaid who shall appear and plead or answer to such petition, shall be entitled respectively to recover costs against the suppliant, in the same manner, and subject to the same restrictions and discretion, and under the same rules, regulations and provisions, so far as they are applicable, as are or may be usually adopted or in force touching the payment or receipt of costs in proceedings between subject and subject, and for the recovery of such costs such and the same remedies and writs of execution as are authorized for enforcing payment of costs upon judgments in personal actions or decrees, rules or orders, shall and may be prosecuted, sued out and executed respectively by or on behalf of her Majesty and of such other person as aforesaid as shall appear and plead to such petition, and any costs recovered on behalf of her Majesty shall be paid into the exchequer, and shall become part of the consolidated fund, except where such petition shall be defended on behalf of her Majesty in her private capacity, in which case such costs shall be paid to the treasurer of her Majesty's household, or such other person as her Majesty shall appoint to receive the same."

The suppliant to be entitled to costs against the Crown and other parties to the proceedings.

—*Suppliant may recover.*]—By sect. 12, "Upon any such petition of right the suppliant shall be entitled to costs against her Majesty, and also against any other person appearing or pleading or answering to any such petition of right, in like manner and subject to the same rules, regulations and provisions, restrictions and discretion, as far as they are applicable, as are or may be usually adopted or in force touching the right to recover costs in

proceedings between subject and subject; and for the recovery of any such costs from any such person, other than her Majesty, appearing or pleading or answering in pursuance hereof to any such petition of right, such and the same remedies and writs of execution as are authorized for enforcing payment of costs upon rules, orders, decrees or judgments in personal actions between subject and subject shall and may be prosecuted, sued out and executed on behalf of such suppliant."

Interest, Crown liable for.

Interest, Crown liable for.]—The Crown may be declared liable to pay interest (*r*).

Judgment in favour of the suppliant to be certified to the treasury or the treasurer of the household.

Certificate of Judgment for Presentation to Treasury or Treasurer of Household.]—By sect. 13, "Whenever, upon any such petition of right, a judgment, order or decree shall be given or made that the suppliant is entitled to relief, and there shall be no rehearing, appeal or writ of error, or in case of an appeal or proceedings in error a judgment, order or decree shall have been affirmed, given or made that the suppliant is entitled to relief, or upon any rule or order being made entitling the suppliant to costs, any one of the Judges of the Court in which such petition shall have been prosecuted shall and may, upon application in behalf of the suppliant, after the lapse of fourteen days from the making, giving or affirming of such judgment or decree, rule or order, certify to the commissioners of her Majesty's treasury, or to the treasurer of her Majesty's household, as the case may require, the tenor and purport of the same, in the form in the schedule (No. 5 (*s*)) to this Act annexed, or to the like effect; and such certificate may be sent to or left at the office of the commissioners of her Majesty's treasury, or of the treasurer of her Majesty's household, as the case may be."

Satisfaction of the judgment and costs.

Satisfaction of Judgment and Costs.]—By sect. 14, "It shall be lawful for the commissioners of her Majesty's treasury and they are hereby required to pay the amount of any moneys and costs as to which a judgment or decree, rule or order shall be given or made that the suppliant in any such petition of right is entitled, and of which judgment or decree, rule or order, the tenor and purport shall have been so certified to them as aforesaid, out of any moneys in their hands for the time being legally applicable thereto, or which may be hereafter voted by parliament for that purpose, provided such petition shall relate to any public matter; and in case the same shall relate to any private property of or enjoyed by her Majesty, or any contract or engagement made by or on behalf of her Majesty, or any matter affecting her Majesty in her private capacity, a certificate in the form aforesaid may be sent to or left at the office of the treasurer of her Majesty's household, or such other person as her Majesty shall from time to time appoint to receive the same, and the amount to which the suppliant is entitled shall be paid to him out of such funds or moneys as her Majesty shall be graciously pleased to direct to be applied for that purpose."

(*r*) *In re Gosman*, 15 Ch. D. 67; 49 L. J., Ch. 590.

(*s*) See Chit. F. p. 650.

PART XIV.

CHAP.		PAGE
CXII.	*Judgment, &c., on an Order by Consent*	1294
CXIII.	*Cognovit or Confession—Judgment and Proceedings thereon*	1297
CXIV.	*Warrant of Attorney—Judgment and Proceedings thereon*	1303
CXV.	*Reference to Master—Writ of Inquiry, to ascertain Amount of Damages*	1326
CXVI.	*Issues, Inquiries and Accounts*	1341
CXVII.	*Trial of Questions of Law by Special Case*	1343
CXVIII.	*Trial of Questions of Fact without Pleadings*	1347
CXIX.	*Remitting Case to Courts in Her Majesty's Dominions for their Opinion*	1349
CXX.	*Taking Evidence in Matters pending before Foreign Tribunals*	1351
CXXI.	*Interpleader*	1354

CHAPTER CXII.

JUDGMENT, ETC. ON AN ORDER BY CONSENT.

PART XIV.

The order for judgment.

IT has become the practice in an action for a debt, where the defendant has no defence, instead of suffering at once a judgment by default, with the consent of both parties to obtain a Master's order for staying the proceedings, with a condition that final judgment shall be signed, and execution issued, in the event of the debt and costs not being paid within a certain time. There can be no doubt of a Master's power to make such an order (*a*), provided both parties consent to it; otherwise not (*b*).

Consent to same.

The consent on the defendant's part much resembles a cognovit, but it is not one (*c*); nor does it require a stamp (*d*).

By *R. of S. C., Ord. XLI. r.* 9, "In any cause or matter where the defendant has appeared by solicitor, no order for entering judg-

(*a*) See per *Parke*, B., in *Baker* v. *Flower*, 8 M. & W. 671.

(*b*) *Kirby* v. *Ellison*, 2 Dowl. 219; 2 C. & M. 315; 4 Tyr. 239: *Reynolds* v. *Sherwood*, 8 Dowl. 183: *Norton* v. *Fraser*, 2 M. & Gr. 916; 3 Sc. N. R. 293.

(*c*) See *Dixon* v. *Sleddon*, 15 M. & W. 427.

(*d*) *Brooks* v. *Hodson*, 8 Sc. N. R. 223: *Baker* v. *Flower*, supra: *Bray* v. *Manson*, 8 M. & W. 668; 9 Dowl. 748: *Thorne* v. *Neale*, 2 G. & D. 48; 2 Q. B. 726: *Stevens* v. *Miller*, 3 M. & Gr. 228.

ment shall be made by consent unless the consent of the defendant is given by his solicitor or agent."

By *Ord. XLI. r.* 10, "Where the defendant has not appeared, or has appeared in person, no such order shall be made unless the defendant attends before a Judge and gives his consent in person, or unless his written consent is attested by a solicitor acting on his behalf, except in cases where the defendant is a barrister, conveyancer, special pleader, or solicitor" (*e*).

By one of several partners.

One partner has no implied authority to consent to an order for judgment in an action against himself and his co-partner (*f*).

Stay of proceedings.

The order does not operate as a stay of proceedings during the time given by it for the payment of the debt and costs, unless it expressly orders it (*g*).

Filing order.

By 32 & 33 *V. c.* 62 (The Debtors Act, 1869), *s.* 27, "Where a Judge's order made by consent is given by a defendant in a personal action whereby the plaintiff is authorized forthwith or at any future time to sign or enter up judgment, or to issue or to take out execution, whether such order is made subject to any defeazance or condition or not, then if the action is in the Court of Queen's Bench the order, and if the action is in any other Court a true copy of the order shall, together with an affidavit of the time of such consent being given, and a description of the residence and occupation of the defendant, be filed with the officer acting as clerk of the docquets and judgments in the Court of Queen's Bench within twenty-one days after making of the order, otherwise the order, and any judgment signed or entered up thereon, and any execution issued or taken out on such judgment, shall be void."

By sect. 28, the provisions of the 3 *G.* 4, *c.* 39, and 6 & 7 *V. c.* 66 (*post*, p. 1314), "for liberty to file a warrant of attorney or cognovit actionem, or a copy thereof, with the clerk of the docquets and judgments, and for that clerk to make certain entries and search in relation thereto, and for entering satisfaction thereon, and for fees for search, and filing and taking office copies, shall extend and be applicable to every such Judge's order" (*h*).

Setting aside order, &c.

If there be any fraud practised on the defendant in obtaining the order, the order and any proceedings had under it may be set aside (*i*). Even without such fraud, the Court may, it seems, under very special circumstances, set aside the order, and, upon terms, let the defendant in to defend the action (*k*).

Revocation by death.

Where, by the terms of a Master's order, made by consent, a plaintiff is to be at liberty to sign judgment for debt and costs on a particular day, but before that day the defendant dies, the Court will not permit the plaintiff to enter up judgment *nunc pro tunc*, as of the day when the consent was given (*l*).

(*e*) *Bray* v. *Manson*, supra.

(*f*) *Hambidge* v. *De la Croudee*, 3 C. B. 742.

(*g*) *Michael* v. *Myers*, 6 M. & Gr. 702; 13 L. J., C. P. 15; *Filmer* v. *Burnby*, 2 M. & Gr. 529; 9 Dowl. 466.

(*h*) *La Farron* v. *Mayes*, 18 Q. B. 16; *Dimmock* v. *Bowley*, 2 C. B., N. S. 542; 26 L. J., C. P. 231.

(*i*) See *Thorne* v. *Neale*, 2 Q. B. 726; 2 G. & D. 48.

(*k*) *Wade* v. *Simeon*, 13 M. & W. 647; 2 D. & L. 658.

(*l*) *Wilkins* v. *Canty*, 1 Dowl., N. S. 855, et per *Coleridge*, J.—"The inconvenience for the future may very easily be remedied by the introduction of a few words into these orders."

PART XIV.

If the order was given by a woman *dum sola*, it will not be revoked by her marriage (*m*).

Not revoked by marriage.

If the debt and costs be not paid according to the terms of the order (*n*), judgment may, if the order so directs, be signed and execution issued. (*See Vol.* 1, *Chs. LXX. and LXXIV.*) The judgment, as expressed in the order, is a final one. The costs are frequently agreed on (*o*); if not, they must be taxed in the usual manner, the same as on a cognovit; as to which *see post*, p. 1301. The mode of signing the judgment is much the same as on a cognovit.

Judgment and execution.

On signing the judgment, the order and allocatur (if any) must be produced, and a copy of the pleadings (if any) must be filed. It seems that the costs of signing judgment must be taxed after the same is signed, and the officer who signs judgment will insert the amount of the costs in the original judgment on the production of the Master's allocatur.

The judgment under the order is a judgment by *nil dicit* (*p*) or confession (*q*).

Execution.

The execution is the same as in ordinary cases.

Fraudulent preference.

As to a Judge's order given by a person by way of fraudulent preference being void under the bankrupt laws as against his trustees if he afterwards become bankrupt, *see Bankruptcy Act*, 1883, *s.* 48 (*r*).

(*m*) *Thorpe* v. *Argles*, 8 Jur. 602, B. C.; 1 D. & L. 831.

(*n*) Where a Master's order is made for payment of debt and costs, with leave to sign judgment on default, there must be a reasonable time allowed for payment, after taxation of costs; and, it seems that, as the Master's office is not a proper place for payment of money, and a solicitor is not bound to authorize every one of his clerks to pay or receive money, there must at least be an application at the office of the defendant's solicitor, although it does not appear that any time for communication with the client is allowable. But, an immediate demand of the money at the Master's office is unreasonable, and non-payment by a solicitor's clerk on such a demand is not a default which authorizes the plaintiff in signing judgment, even although the order stays proceedings only "on payment of debt and costs," and expresses that judgment may be signed on default in payment of debt and costs; and it seems that on such an order the plaintiff could not sign judgment for the debt before taxation of costs. *Perkins* v. *The National Investment Society*, 26 L. J., Ex. 182. See *Toms* v. *Wilson*, 9 Jur., N. S. 492; 32 L. J., Q. B. 382. Where an instalment fell due on a Sunday, and on the Monday the defendant tendered it, the Court held that a judgment afterwards signed was irregular. *Morris* v. *Barrett*, 7 C. B., N. S. 139; 29 L. J., C. P. 102. See *Hackin* v. *Hassells*, 1 D. & L. 1006; 12 M. & W. 776; *Grandin* v. *Maddans*, 2 B. C. Rep. 343; 18 L. J., Q. B. 31.

(*o*) See *Deacon* v. *Allison*, 6 C. B. 434; where the costs were agreed on at 24*l.* by the Judge's order, and the costs of signing judgment were taxed at 2*l.*; and it was held that the Master should have given his allocatur for 26*l.*

(*p*) *Bell* v. *Bidgood*, 8 C. B. 763; 19 L. J., C. P. 15.

(*q*) See *Andrews* v. *Diggs*, 4 Ex. 827; 20 L. J., Ex. 127, nom. *Andrews* v. *Decks*.

(*r*) See *Andrews* v. *Diggs*, 4 Ex. 827; 20 L. J., Ex. 127: *Stevenson* v. *Newnham*, 13 C. B. 285; 17 Jur. 600.

CHAPTER CXIII.

JUDGMENT BY COGNOVIT.

	PAGE		PAGE
The Cognovit	1297	*Execution on*	1301
How attested	1299	*In what Cases it may be set aside*	1301
Filing of	1299	*Implied Confession of Action* ..	1302
Judgment on	1299	*Writ of Inquiry*	130.
Mode of signing Judgme ..	1300		

The cognovit.

The Cognovit (*a*).]—Where the defendant has no defence to the action, he may give the plaintiff a cognovit or written confession of the action, usually, in an action for a debt or damages, upon condition that the defendant shall be allowed a certain time for the payment of the debt or damages, the amount of such debt or damages being, in general, first ascertained and agreed upon. It may be given in respect of part of the cause of action only, in which case the plaintiff can only sign judgment for the part confessed, and proceed in the action as to the residue (*b*). Except in the case of actions for the recovery of land, a cognovit is rarely, if ever, now given in practice, the proceeding by Master's order (*ante*, p. 1294) having completely superseded the proceeding by cognovit.

At what stage of proceedings given.

A cognovit is supposed to be given by the defendant in Court, and it impliedly authorizes the plaintiff's solicitor to do everything necessary for proceeding with the action in order to obtain judgment, and, consequently, to enter an appearance, if necessary (*c*). It may be given at any time after the writ of summons is sued out (*d*), even before it is served (*e*), and even after the time limited for the service of it (*f*). It may be given before statement of claim (*g*). If given after defence, it usually contains an agreement to withdraw the same (*h*).

By whom executed.

If the action be against two or more defendants, the cognovit should be signed by all, to warrant a judgment against them. It seems that one partner cannot bind his co-partner by a cognovit

(*a*) See *Hurst* v. *Jennings*, 5 B. & C. 650, where a document was held in effect to be a cognovit.

(*b*) 1 Sellon, 373; Tidd, 9th ed. 560.

(*c*) *Richardson* v. *Daly*, 4 M. & W. 381; 7 Dowl. 25: *Thompson* v. *Langridge*, 1 Ex. 351; 17 L. J., Ex. 4.

(*d*) *Shanley* v. *Colwell*, 6 M. & W. 643; 8 Dowl. 373. But perhaps no objection to the want of process can be taken after judgment signed. See 18 Eliz. c. 14, s. 1, and 4 & 5 Anne, c. 16, s. 2.

(*e*) *Kerby* v. *Jenkins*, 2 Tyr. 499. And see *Wade* v. *Smith*, 8 Price, 513.

(*f*) *Richardson* v. *Daly*, supra.

(*g*) *Morley* v. *Hall*, 2 Dowl. 494: *Clarke* v. *Jones*, 3 Dowl. 277: *Webb* v. *Aspinall*, 7 Taunt. 701; 1 Moore, 428: *Thompson* v. *Langridge*, supra, per Cur. See *Davis* v. *Hughes*, 7 T. R. 207, n. (*a*): *Hurst* v. *Jennings*, 5 B. & C. 650.

(*h*) See form, Chit. Forms, p. 657.

PART XIV.

without his consent (*i*). Where one of several parties signs after the others, his signing relates back to the time of their signing (*j*). It will be invalid if given by an infant (*k*), or formerly if given by a married woman (*l*). It may be doubtful whether, since the Debtors Act, 1869 (*post*, p. 1299), an execution of a cognovit by an agent, unless in the presence of the party, will suffice: that enactment evidently supposes the presence of the party himself at the time of the execution.

Form of, and how affected by collateral agreement.

No prescribed form of cognovit is, in general, requisite (*m*). It ought, however, always expressly to show the terms upon which it is given. If any agreement or understanding be entered into contrary to the express terms of it, the Court will not, in general, regard such agreement, but put the party to his remedy, if any, by action (*n*). In some cases, however, they will set aside a judgment entered up, and execution issued out, contrary to the express agreement or understanding of the parties at the time of confessing the judgment (*o*).

Writing defeazance on same paper.

The defeazance must be written on the same piece of paper as the cognovit before the filing thereof: *see post*, p. 1314.

Agreement not to appeal, &c.

The cognovit generally contains an agreement upon the part of the defendant that no appeal shall be brought, nor other matter or thing done to delay judgment or execution (*p*); and if, notwithstanding this, the defendant does appeal, execution may be allowed to be issued (*q*). In one case it was made a question, but not decided, whether a stipulation that the defendant would not "bring any writ of error, or file any bill in equity, or obtain any summons or rule of Court to set aside any proceedings for irregularity, or otherwise," was a legal stipulation, and could be enforced (*r*). It would seem that it could as against the defendant (*s*), though not as against his personal representatives (*t*). An agreement not "to bring any writ of error" bars an appeal (*u*).

Stamp on.

The cognovit need not be stamped, unless it contain terms of

(*i*) *Rathbone* v. *Drakeford*, 4 M. & P. 57; 6 Bing. 375. See *Hambidge* v. *De la Cronée*, 3 C. B. 742; 4 D. & L. 466; 16 L. J., C. P. 85: *Brutton* v. *Burton*, 1 Chit. Rep. 707: *Stead* v. *Salt*, 10 Moore, 389; 3 Bing. 101: *Adams* v. *Bankart*, 1 C. M. & R. 681: *Beckham* v. *Knight*, 4 Bing. N. C. 243; 1 Sc. N. R. 675: *Beckham* v. *Drake*, 9 M. & W. 79.

(*j*) *Perry* v. *Turner*, 1 Dowl. 300; 2 C. & J. 89; 2 Tyr. 128.

(*k*) *Oliver* v. *Woodruffe*, 7 Dowl. 166; 4 M. & W. 650: *Sanderson* v. *Marr*, 1 H. Bl. 75.

(*l*) *Faithorne* v. *Blaquire*, 6 M. & S. 73: *M'Lean* v. *Douglas*, 3 B. & P. 128. But it would now probably be held valid. See the Married Women's Property Act, 1882, ante, Ch. CI.

(*m*) See *Hurst* v. *Jennings*, 5 B. & C. 650; 8 D. & R. 424: *Beckham* v. *Knight*, 4 Bing. N. C. 243.

(*n*) See *Anon.*, 1 Salk. 400: *Anon.*, 7 D. & R. 375.

(*o*) *Dillon* v. *Browne*, 6 Mod. 14; *Hatton* v. *Young*, 2 W. Bl. 943. See *Woodman* v. *Ford*, 2 Jur. 11.

(*p*) But this stipulation does not, it should seem, oust the Courts of their jurisdiction. See *Wade* v. *Rogers*, 2 W. Bl. 780: *Kill* v. *Hollister*, 1 Wils. 129: *Shaw* v. *Marquis of Worcester*, 4 M. & P. 21; 6 Bing. 387: *Howell* v. *Stratton*, 2 Smith, 65.

(*q*) *Best* v. *Gompertz*, 2 Dowl. 395; 2 C. & M. 423.

(*r*) *Webb* v. *Taylor*, 1 D. & L. 676; 13 L. J., Q. B. 24.

(*s*) *Sherran* v. *Marshall*, 1 D. & L. 689; 13 L. J., Q. B. 66: *Howell* v. *Stratton*, 2 Smith, 65: *Morriss* v. *Jones*, 2 B. & C. 242; 3 D. & R. 603: *Hiscocks* v. *Kemp*, 3 A. & E. 676: *Tripp* v. *Stanley*, 17 L. J., Q. B. 19: *Morgan* v. *Burgess*, 1 Dowl., N. S. 850.

(*t*) See *Heath* v. *Brindley*, 2 A. & E. 368: *Mann* v. *Audley*, 5 Dowl. 596.

(*u*) *Jones* v. *Victoria Graving Dock Co.*, 2 Q. B. D. 314; 46 L. J., Q. B. 219.

agreement between the parties which require to be stamped as an agreement—in which case it must be stamped (*v*). The want of, or a defect in, the stamp, will not in general render the cognovit unavailable, for a proper stamp may be procured on payment of the penalty, and this even after a summons taken out to set aside a judgment entered up on it (*x*). But the Masters will not, in general, allow a cognovit to be filed, unless duly stamped.

How attested.

How attested.]—By the *Debtors Act*, 1869, *s.* 24, the cognovit, if in a personal action, is required to be executed in the presence of, and to be attested by, a solicitor. This enactment, together with the consequences of non-compliance with it, will be found hereafter (*post*, p. 1305), while treating of warrants of attorney. A cognovit, if not thus duly attested, would be of no force whatever, and the plaintiff might proceed in the cause notwithstanding it was given. But if the invalidity of the execution arose in any way from his or his solicitor's act, then, perhaps, before proceeding, it would be proper to require the defendant to re-execute the cognovit properly.

Filing of.

Filing of.]—As to filing cognovits, in order to render them operative, *see post*, p. 1314. And as to its being necessary to file a cognovit before signing judgment, *see post*, p. 1304.

Judgment, when it may be signed.

Judgment on.]—If the cognovit be made unconditionally, the plaintiff may sign judgment and sue out execution when he pleases (*y*); even after a year has elapsed from the giving of the cognovit or taking any step under it (*z*). Judgment, of course, cannot be signed, or execution sued out contrary to the terms of the cognovit (*a*). Under a cognovit by which it is agreed that no judgment is to be signed or execution issued unless default made in payment of a certain sum, with costs, by instalments, the plaintiff may sign judgment and issue execution for the whole sum, if default is made in one instalment, unless there be clear words restraining him from so doing (*b*). Where judgment was not to be entered up until the final hearing of a Chancery suit, it was held that the plaintiff was not authorized to enter up judgment pending an appeal (*c*). In one case the defendant gave a cognovit, whereby it was stipulated that no judgment should be entered up, unless default should be made in payment of the debt, with interest and costs, on the 9th November; and in case the defendant made

---

(*v*) *Ames* v. *Hill*, 2 B. & P. 150: *Reardon* v. *Swaby*, 4 East, 188: *Jay* v. *Warren*, 1 Car. & P. 532: *Morley* v. *Hall*, 2 Dowl. 494: *Pitman* v. *Humfrey*, 2 Tyr. 500: *Green* v. *Gray*, 1 Dowl. 350.

(*x*) See *Burton* v. *Kirkby*, 7 Taunt. 174; 2 Marsh. 480: *Clarke* v. *Jones*, 3 Dowl. 277: *Rose* v. *Tomlinson*, Id. 49: *Pitman* v. *Humfrey*, 2 Tyr. 500. See *Semple* v. *Nicholson*, noticed post, p. 1303 n. (*b*): *Brembridge* v. *Wildman*, 1 Dowl., N. S. 774.

(*y*) *Calbert* v. *Tomlin*, 5 Bing. 1; 2 M. & P. 1.

(*z*) *Thompson* v. *Langridge*, 1 Ex. 351; 17 L. J., Ex. 4.

(*a*) *Hatton* v. *Young*, 2 W. Bl. 943: *Perry* v. *Turner*, 2 Tyr. 121.

(*b*) *Rose* v. *Tomlinson*, 3 Dowl. 49: *Barrett* v. *Partington*, 5 Bing. N. C. 487; 7 Dowl. 447.

(*c*) *Jones* v. *Reynolds*, 3 N. & M. 465; 1 A. & E. 384. See *Dummer* v. *Pitcher*, 3 B. & Ad. 347.

PART XIV.

default in payment, the plaintiff was to be at liberty to enter up judgment and proceed to execution: it was held, that no default could be made until the plaintiff had furnished the defendant with a bill of the costs, and given notice of taxation; and not having done so, that judgment signed on the 10th November was irregular, although the defendant had paid no part of either the debt or costs (*d*). But, had there been a stipulation for payment by instalments, it seems the plaintiff might have signed judgment, though not issued execution, without taxation (*e*); and in either case the plaintiff might, if he thought fit to waive his costs, sign judgment and issue execution for the debt, only first giving defendant notice of such waiver (*f*). If, before judgment signed, the defendant tender the amount of the cognovit to the plaintiff or his solicitor, any judgment signed afterwards will be irregular, unless the plaintiff have made a subsequent demand, and payment has been refused (*g*). It seems that parol evidence is inadmissible to show that a cognovit, absolute in its terms, was given upon a condition that the defendant should have three months' time (*h*).

After death of parties.

Before the *Com. Law Proc. Act*, 1852, if judgment had not been signed in the lifetime of the plaintiff or defendant, by reason of the laches of the former (*i*), or if the money payable on the cognovit did not become due until after the death of one of them (*k*), the Court would not allow judgment to be entered up *nunc pro tunc* (*l*). As to the effect of the death, &c. of parties under the present practice, *see ante*, p. 1025.

After removal of public officer in action by a banking company.

A cognovit having been given in an action brought by the public officer of a banking company, under the 7 *G.* 4, *c.* 46, by which it was provided that upon default in payment of a sum of money, the plaintiff should be at liberty to enter up judgment and issue execution, it was held to be sufficient to authorize signing judgment in the name of another public officer, upon a suggestion being entered of the removal of the original plaintiff, &c. (*m*).

How signed.

As to the Mode of signing Judgment, and the Practice to be adopted on it.]—With regard to this the terms of the cognovit must be followed. If the cognovit has been given before statement of claim, there is no occasion to file or deliver any statement of claim (*n*). The mode of signing the judgment can be gathered from what is stated *ante*, *Vol.* 1, p. 259, as to signing judgment for default of appearance; and from what is stated *ante*, *Vol.* 1, p. 329, as to signing judgment for default in delivery of defence. As to filing the cognovit before signing judgment on it, *see post*, p. 1314.

(*d*) *Booth* v. *Parker*, 3 M. & W. 54; 6 Dowl. 87. And see *Wilson* v. *Northern*, 4 Dowl. 212.

(*e*) *Barrett* v. *Partington*, 5 Bing. N. C. 487; 7 Sc. 595; 7 Dowl. 447.

(*f*) *Booth* v. *Parker*, supra. See now ante, Vol. 1. p. 766.

(*g*) *Anon.*, 1 Dowl. 173.

(*h*) *Woodman* v. *Ford*, Q. B., M. 1837; 2 Jur. 11; ante, p. 1298.

(*i*) *Lamman* v. *Lord Audley*, 2 M. & W. 535.

(*k*) *Blackburn* v. *Godrick*, 9 Dowl. 337.

(*l*) As to when the Court will allow judgment to be entered up *nunc pro tunc* in general, see ante, Vol. 1, p. 764.

(*m*) *Webb* v. *Taylor*, 1 D. & L. 676; 13 L. J., Q. B. 24. See ante, Ch. XCII.

(*n*) *Morley* v. *Hall*, 2 Dowl. 194: *Clarke* v. *Jones*, 3 Dowl. 277.

If, by the terms of the cognovit, the costs are to be taxed, they must be taxed accordingly (*o*). *A notice of taxation must, it seems, be given, and the costs taxed as in other cases* (*p*). *If the cognovit agrees on a fixed sum for costs, then the Master taxes only the usual costs of signing the judgment, and gives his certificate for them; and it is not necessary to give notice of taxing these costs* (*q*). If a cognovit be given after a defence has been delivered, it usually contains an agreement to withdraw the defence. In order to withdraw the defence leave is necessary, which must be obtained as stated *ante*, *Vol.* 1, p. 337. As to signing final judgment, *see Vol.* 1, p. 766.

Execution on.

Execution on.]—*After signing judgment* (which is always a final one, unless the cognovit is in an action for damages, and it does not in any way fix the amount of them), *you may at once proceed to sue out execution, if the terms of the cognovit do not prohibit it; if they do, execution must be sued out according to these terms* (*r*). Where the cognovit is given to secure the payment of a sum by instalments, and default is made, but the whole sum does not become due thereon, execution, it seems, may be issued against the defendant for each of those defaults, as they are made, without any leave of the Court or a Judge (*s*). If the judgment be not final, in consequence of the cognovit not agreeing upon the amount of the damages, you must proceed to get the damages assessed, as pointed out *post*, *Ch. CXV.* The observations already made as to execution in ordinary cases will be, for the most part, applicable to executions on a judgment by cognovit (*see Vol.* 1, *Ch. LXXIV.*). As to an execution being valid as against the trustees of a bankrupt, *see ante*, p. 1169.

In what cases it may be set aside.

In what Cases it may be set aside.]—In some cases the Court or a Judge will order the cognovit to be delivered up or taken off the file to be cancelled, or set aside a judgment and execution thereon: *ex. gr.* where it was given by an insolvent before his discharge under the Insolvent Act, for a debt purposely omitted in his schedule (*t*), or by an infant (*u*), or were obtained by fraud or duress, or the like (*x*). Where the plaintiff brought an action on a promissory note for which defendant gave a cognovit, the Court refused to set aside the cognovit on the grounds that part of the note had been paid, and that it was given for an illegal consideration (*y*). See the cases as to warrants of attorney, *post*, p. 1311.

(*o*) *Wilson* v. *Northern*, 4 Dowl. 212: *Booth* v. *Parker*, 3 M. & W. 54. See Vol. 1, p. 793. As to plaintiff waiving his right to the costs, see Vol. 1, p. 766: *Booth* v. *Parker*, supra.

(*p*) See Vol. 1, p. 693 et seq.: *Clarke* v. *Jones*, 3 Dowl. 277: *Clothier* v. *Ess*, 3 M. & Sc. 216: *Griffiths* v. *Liversedge*, 2 Dowl. 143; 3 M. & Sc. 217, n.

(*q*) *Griffiths* v. *Liversedge*, supra. And see *Clothier* v. *Ess*, supra.

(*r*) See the form of the entry of the judgment, &c., Chit. Forms, p. 657.

(*s*) *Davis* v. *Gompertz*, 2 Dowl. 407; 2 N. & M. 607. And see *Atkinson* v. *Baynton*, 1 Hodg. 7.

(*t*) *Tabram* v. *Freeman*, 2 Dowl. 375: *Collins* v. *Benton*, 9 Dowl. 905. But see *Philpot* v. *Astlett*, 1 C. M. & R. 85.

(*u*) *Oliver* v. *Woodruffe*, 7 Dowl. 166; 4 M. & W. 650.

(*x*) *Anon.*, 1 Chit. 268. Per Cur. in *Fell* v. *Riley*, Cowp. 281.

(*y*) *Bligh* v. *Brewer*, 3 Dowl. 266; 1 C. M. & R. 651, but not *S. P.* And see *Philpot* v. *Astlett*, 1 C. M. & R. 85: *Lane* v. *Chapman*, 11 A. & E. 966: *Wade* v. *Simeon*, 2 D. & L. 660; 13 M. & W. 647.

PART XIV.

Where it is against good faith.

Also if the execution be against good faith, or contrary to the terms of the cognovit, the Court, we have seen (*z*), will sometimes set it aside. Where the defendant, in an action on the case, gave a cognovit for 200*l.* with a defeazance conditioned for the performance of various matters by a given time, and performed the matters, in part at least, in two months after the time stipulated, the plaintiff having issued execution on the cognovit, the Court of Common Pleas referred it to the prothonotary, to see how much, if anything, ought to be paid to the plaintiff (*a*). If the plaintiff levy for too much, the Court or a Judge will interfere (*b*). If there be a dispute as to the amount due, it may be referred to one of the Masters, or, if necessary, to a jury, to ascertain for what sum the execution ought to stand (*c*). An action may, perhaps, be supported against the plaintiff by the defendant for levying for too much (*d*).

Excessive levy.

Implied confession of action.

Implied Confession of Action.]—Besides the case of a judgment by default, where the defendant's default is deemed tantamount to a confession, there is also a confession of action in some cases implied in the defendant's pleading; as where an executor or administrator pleads plene administravit or plene administravit præter, without any other defence, this is impliedly a confession of the action. As to the mode of proceeding in these cases, *see ante*, p. 1122.

Writ of inquiry.

Writ of Inquiry.]—In cases of express and implied confessions, where the damages are not ascertained, it is necessary to execute a writ of inquiry, or get the damages assessed as mentioned *post*, p. 1331.

(*z*) Ante, p. 1299.

(*a*) *Charrington* v. *Laing*, 3 M. & P. 587; 6 Bing. 242: *Wilson* v. *Price*, 4 Dowl. 213. And see *Doe* d. *Holt* v. *Roe*, 4 M. & P. 177; 6 Bing. 447.

(*b*) See *Tilby* v. *Best*, 16 East, 163: *Amery* v. *Smalridge*, 2 W. Bl. 760; Vol. 1, p. 802.

(*c*) See per *Tindal*, C. J., in *Shaw* v. *Marquis of Worcester*, 4 M. & P. 26; 6 Bing. 389: *Evans* v. *Pugh*, 2 Dowl. 360.

(*d*) *Wentworth* v. *Bullen*, 9 B. & C. 840. As to maintaining an action for indorsing a writ of execution for too much, where there is malice and want of reasonable and probable cause, see Vol. 1, p. 803.

CHAPTER CXIV.

JUDGMENT UPON A WARRANT OF ATTORNEY.

	PAGE		PAGE
The Warrant—By whom, and when it may be given, &c. ..	1303	*In what Cases it may be set aside*	1311
Form of, Stamp on, &c.	1303	*Filing of*	1314
Defeazance	1304	*Judgment on, when to be signed, Form of*	1316
How executed	1305	*When Leave to sign necessary* ..	1318
How attested	1305	*Judgment, how signed*	1322
How far revocable, and how affected by Death, &c.	1309	*Appeal*	1323
		Execution	1323

Warrant—by whom it may be given.

Warrant—By whom and when it may be given.]—The warrant must be given by a party capable of appointing a solicitor. If, therefore, it be given by an infant (*ante*, p. 1298) it will be invalid. It seems that one partner cannot give a warrant of attorney to bind his co-partner without his consent (*a*).

As to an execution, founded on a judgment on a warrant of attorney or cognovit given by way of fraudulent preference, being void as against the trustee of the debtor if he become bankrupt, *see Bank. Act*, 1883, *s.* 48 (*b*).

When it may be given.

It may be given whether an action be pending or not (*c*).

Form of.

Form of the Warrant, Stamp on, &c.]—A warrant of attorney is a written authority directed to one or more solicitors to appear for the party executing it, and receive a statement of claim for him in an action at the suit of a person therein mentioned, and thereupon to confess the same, or to suffer judgment to pass by default (*d*).

Stamp.

The warrant must be on a proper stamp (*e*). The defeazance does not require a separate stamp (*f*). But, although the warrant be not stamped at all, or be improperly stamped, and therefore unavailable, yet it may in general be made available on payment of the penalty (*g*), and getting the proper stamp affixed (*h*).

(*a*) See ante, p. 1297: *Brutton* v. *Burton*, 1 Chit. Rep. 707: *Hunter* v. *Parker*, 7 M. & W. 322.

(*b*) See *Newnham* v. *Stevenson*, 10 C. B. 713; 20 L. J., C. P. 111. As to when executions are void as against trustees of a bankrupt, see ante, Ch. CII.

(*c*) See *Baddely* v. *Shafto*, 8 Taunt. 434: *Reeves* v. *Slater*, 7 B. & C. 486; 1 M. & R. 265. See the form, Chit. Forms, p. 659.

(*d*) See *Dalrymple* v. *Fraser*, 2 C. B. 698; 15 L. J., C. P. 193.

(*e*) See *Pierpoint* v. *Gower*, 5 Se. N. R. 605; 2 Dowl., N. S. 652; 4 M. & G. 795.

(*f*) *Cawthorne* v. *Holben*, 1 N. R. 279.

(*g*) See 33 & 34 V. c. 97, s. 15.

(*h*) *Semple* v. *Nicholson*, 4 H. & N. 298; 28 L. J., Ex. 217: *Burton* v. *Kirkby*, 7 Taunt. 174; 2 Marsh. 480: *Brembridge* v. *Wildman*, 1 Dowl.,

PART XIV.

By the 33 & 34 V. c. 97 (sched.), a warrant of attorney must be stamped as follows:—

Mortgage, bond, debenture, covenant, warrant of attorney to confess and enter up judgment, and foreign security of any kind.

(1.) Being the only or principal or primary security for:—

	£	s.	d.
The payment or repayment of money not exceeding 25*l.*	0	0	8
Exceeding 25*l.* and not exceeding 50*l.*	0	1	3
,, 50*l.* ,, 100*l.*	0	2	6
,, 100*l.* ,, 150*l.*	0	3	9
,, 150*l.* ,, 200*l.*	0	5	0
,, 200*l.* ,, 250*l.*	0	6	3
,, 250*l.* ,, 300*l.*	0	7	6
For every 100*l.*, and also for any fractional part of 100*l.*, of such amount	0	2	6

(2.) Being a collateral, or auxiliary, or additional, or substituted security, or by way of further assurance for the above-mentioned purpose where the principal or primary security is duly stamped:—

For every 100*l.*, and also for any fractional part of 100*l.*, of the amount secured	0	0	6

Defeazance to be written on same paper, &c.

Defeazance.]—By *r.* 27, *H. T.* 1853, "Every attorney or other person who shall prepare any warrant of attorney to confess judgment, which is to be subject to any defeazance, *shall cause such defeazance to be written on the same paper or parchment on which the warrant is written;* or cause a memorandum in writing to be made on such warrant, containing the substance and effect of such defeazance" (*i*). This rule is repealed by the *R. of S. C.* 1883, but its requirements must still be followed, because by 32 & 33 V. c. 62, *s.* 26 (*post*, p. 1314), where a warrant of attorney is given to confess judgment, the defeazance (if any) must be written on the same paper or parchment on which the warrant is written, before the filing thereof, otherwise the warrant will be void (*k*). Where the defeazance stated that the warrant was given for the purpose of securing a specific sum, and the plaintiff nevertheless issued execution for a further sum, the Court, at the instance of the assignees of the defendant, who became bankrupt after the execution was executed, ordered the plaintiff to refund such last-mentioned sum, although the plaintiff swore that it was understood between him and the defendant that the warrant was given as a security for it (*l*).

Usual stipulations in.

The defeazance also usually contains a stipulation dispensing with the necessity of applying to a Judge for leave to issue execution after six years from the judgment (*see ante*, p. 956);

N. S. 774: *Rose* v. *Tomblinson*, 3 Dowl. 49: *Clarke* v. *Jones*, Id. 277: *Pittman* v. *Humfrey*, 2 Tyr. 500.

(*i*) See *Barber* v. *Barber*, 3 Taunt. 465: *Burdekin* v. *Potter*, 1 Dowl., N. S. 134. As to the effect of non-compliance with this rule, see *Shaw* v. *Evans*, 14 East, 576: *Partridge* v. *Frazer*, 7 Taunt. 307; 1 Moore, 54: *Joel* v. *Dieker*, 5 D. & L. 1: *Semon* v. *Goode*, 2 B. & A. 568; 1 Chit. Rep. 311.

(*k*) See *Bennett* v. *Daniel*, 10 B. & C. 500: *Morris* v. *Mellon*, 6 B. & C. 446: *Aireton* v. *Davis*, 3 M. & Sc. 138; 9 Bing. 740.

(*l*) *Bell* v. *Tidd*, 9 Dowl. 949. See *Robinson* v. *Robinson*, 3 D. & L. 134.

that judgment may be entered up after a year, without leave of the Court or a Judge; and such stipulation will, it seems, be binding on the defendant, though not on his personal representatives. If the warrant be given for the purpose of securing the payment of an annuity, or of money by instalments, it has been usual to insert a clause in it dispensing with the necessity of a suggestion of breaches and scire facias thereon, under 8 & 9 *W.* 3, *c.* 11, *s.* 8; though, it seems, such clause is unnecessary, as a warrant of attorney is not within the above statute (*u*), even although it be given as a collateral security with a bond (*o*).

Construction of.

The defeazance to the warrant cannot, it seems, in general, enlarge it, though it may qualify the authority given by it (*p*). In the construction of the terms of the warrant and defeazance, a fair and reasonable construction must be given (*q*). In general a warrant of attorney speaks from the time of its execution, and not from its date (*r*). An action will not lie on the implied contract contained in it (*s*).

How executed.

How executed.]—The warrant of attorney is signed, sealed, and delivered; the defeazance only signed. It is not necessary, however, that the warrant should be sealed (*t*). It seems that the warrant must be executed by the party himself or in his presence, and that an execution of it by an agent, in his absence, will not suffice (32 & 33 *V. c.* 62, *s.* 24, *infra*). A warrant purporting to be given by three parties, but executed by two only, the third having refused, was held to be an incomplete instrument, and not enforceable (*u*). But it might be otherwise, if the warrant authorized a judgment against any one or more of the parties, and not simply a judgment against all (*x*).

How attested.

How attested.]—By 32 & 33 *V. c.* 62, *s.* 24, re-enacting the stat. 1 & 2 *V. c.* 110, *s.* 9, which is repealed by stat. 32 & 33 *V. c.* 83, it is enacted that, "After the commencement of this Act, a warrant of attorney to confess judgment in any personal action or cognovit actionem given by any person shall not be of any force unless there is present some attorney of one of the superior Courts on behalf of such person expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant or cognovit before the same is executed, which attorney

---

(*u*) See ante, Ch. CX.: *Shaw* v. *Marquis of Worcester*, 6 Bing. 385; 4 M. & P. 21: *Cox* v. *Rodbard*, 3 Taunt. 74: *Kimmersley* v. *Mussen*, 5 Taunt. 264. See *Tilby* v. *Best*, 16 East, 163.

(*o*) *Austerbury* v. *Morgan*, 2 Taunt. 195: *Tripp* v. *Stanley*, 17 L. J., Q. B. 19; ante, p. 1298, n. (*s*).

(*p*) See *Henshall* v. *Matthews*, 1 Dowl. 217: *Manvill* v. *Manvill*, Id. 544: *Foster* v. *Claggett*, 6 Dowl. 524: *Chalk* v. *Walton*, 1 D. & L. 39: *Shipton* v. *Shipton*, 1 Dowl. 518; post, p. 1318: *Woolley* v. *Jennings*, 5 B. & C. 165: *Stovel* v. *Eade*, 12 Moore, 370.

(*q*) See *Biddlecombe* v. *Bond*, 5 N. & M. 621: *Duke* v. *Watchorn*, 1 Dowl., N. S. 265; 11 L. J., Q. B. 53.

(*r*) *Brown* v. *Burton*, 5 D. & L. 289; 17 L. J., Q. B. 49: *Fernell* v. *Adams*, 12 L. J., Q. B. 81.

(*s*) *Sherborn* v. *Huntingtower* (*Lord*), 13 C. B., N. S. 742.

(*t*) *Kimmersley* v. *Mussen*, 5 Taunt. 264: *Brutton* v. *Burton*, 1 Chit. Rep. 707.

(*u*) *Harris* v. *Wade*, 1 Chit. Rep. 322.

(*x*) See *Jordan* v. *Farr*, 2 A. & E. 437; 4 N. & M. 347.

PART XIV.

shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and states that he subscribes as such attorney."

By sect. 25, "A warrant of attorney to confess judgment or cognovit actionem not executed in manner aforesaid shall not be rendered valid by proof that the person executing the same did, in fact, understand the nature and effect thereof, or was fully informed of the same."

What warrants or cognovits within the act.

The object of the enactment was the protection of the debtor, and that he might have professional aid and advice while executing the warrant or cognovit. It does not, therefore, apply where the debtor himself is a solicitor (*y*). The enactment, as far as regards warrants of attorney, applies only to a warrant to confess a judgment in a *personal* action (*z*). But it applies to all cognovits, whatever may be the nature of the action, for entering up judgment in England (*a*). It extends, it seems, to a warrant for entering up a judgment in England executed in Ireland (*b*), or Scotland or elsewhere out of the jurisdiction of the Court (*c*). A consent of a defendant to a Master's order for payment of debt and costs, and for judgment in default of payment, is not a cognovit within the meaning of the Act (*d*).

Principal requisitions of the statute.

The principal requisitions of the statute, and the cases decided on it, will now be stated. A strict compliance with it is required.

A solicitor of the Supreme Court must be present.

1st. There must be present a solicitor of the Supreme Court (*e*). An attestation by an uncertificated solicitor was held good (*f*). An attestation by a solicitor's clerk is insufficient (*g*).

Where a cognovit was executed by a person whom the defendant, without fraud, and in ignorance that he was not a solicitor, expressly represented as a solicitor, *Coleridge*, J., held that he was notwithstanding entitled to the protection of the rule of 2 W. 4, and set aside the cognovit (*h*). Where, however, in a case under that rule, the defendant, on being informed that a solicitor must be present on his behalf, knowingly and for the purpose of cheating the plaintiff, produced as a solicitor a person whom he knew not to be so, and in his presence executed the warrant, the Court refused to set aside proceedings on the warrant on the ground that the person so produced was not a solicitor (*i*).

He must be present on behalf of the

2ndly. The solicitor must be present on behalf of the person who executes (*k*). The presence of the *plaintiff's* solicitor, or plaintiff's

(*y*) *Chipp* v. *Harris*, 5 M. & W. 430: *Downes* v. *Garbutt*, 2 Dowl., N. S. 939; 12 L. J., Q. B. 269.

(*z*) *Doe* v. *Kingston*, 1 Dowl., N. S. 263.

(*a*) *Doe* v. *Howell*, 4 P. & D. 361; 12 A. & E. 696.

(*b*) See *Fitzgerald* v. *Plunkett*, 2 Str. 1247.

(*c*) *Davis* v. *Trevannion*, 2 D. & L. 743; 14 L. J., Q. B. 138.

(*d*) *Baker* v. *Flower*, 8 M. & W. 670: *Bray* v. *Manson*, Id. 668.

(*e*) *Bland* v. *Pakenham*, 1 Str. 530: *Wilmott* v. *Barry*, Barnes, 44.

(*f*) *Holdgate* v. *Slight*, 21 L. J., Q. B. 74. See *Verge* v. *Dodd*, Tidd, Supp. 57: *Price* v. *Carter*, 7 Q. B. 280.

(*g*) *Barnes* v. *Ward*, Barnes, 42: *Paul* v. *Cleaver*, 2 Taunt. 360.

(*h*) *Wallace* v. *Brockley*, 5 Dowl. 695.

(*i*) *Jeyes* v. *Booth*, 1 B. & P. 97. See *Cox* v. *Cannon*, 6 Dowl. 625; 4 Bing. N. C. 453, where the solicitor was a prisoner. The doctrine of estoppel applies in such a case. See per *Erle*, J., in *Holdgate* v. *Slight*, supra.

(*k*) *Cocks* v. *Edwards*, 2 Dowl., N. S. 55: *Durrant* v. *Blurton*, 9 Dowl. 1015: *Todd* v. *Gompertz*, 6 Dowl. 266.

solicitor's agent (*l*), will not be sufficient, even though the defendant consent at the time to his acting as his solicitor also (*m*). Several defendants may be attended by the same solicitor (*n*).

executing party and not as plaintiff's solicitor.

3rdly. The solicitor must be expressly named by, and attend at the request of the person who executes. There should be some distinct *expression* of request or appointment by the person who executes, and such request or appointment should be the result of a free choice. If, where a solicitor appears, the party clearly adopts him as his solicitor, for the purpose of the attestation, it is, in the absence of fraud, sufficient (*o*). Therefore, where a party went to a solicitor's office for the purpose of executing a warrant of attorney, and found the plaintiff and the plaintiff's solicitor, and the solicitor's brother, also a solicitor, there, and the plaintiff's solicitor read from the warrant, and the defendant repeated after him, a form of words nominating the brother as the defendant's solicitor, it was held, that such nomination was sufficient (*p*). But the adoption of the solicitor by the party should be clear and unequivocal; and, if it is to be implied only from the party allowing the solicitor to attest the instrument or the like, or if the party had no fair opportunity to exercise his discretion in the employment of him for the purpose, the attestation by such solicitor will be insufficient (*q*).

He must be named by, and attend at the request of, the executing party.

4thly. The solicitor should inform the person about to execute of the nature and effect of the warrant or cognovit before the same is executed. If, however, there be no collusion with the plaintiff, a neglect of the solicitor's duty in this respect will not vitiate the instrument (*r*). If there be collusion, then the warrant would be void on the ground of fraud, and not for non-compliance with the Act (*s*). It is not necessary that it should be read over to the defendant (*t*), except, perhaps, he be a marksman (*u*). Nor is it necessary for the solicitor to consult with his client in private before he signs, or that the solicitor be cognizant of the facts under which the warrant is given (*x*).

He should inform his client of the nature and effect of warrant.

(*l*) *Rice* v. *Linsted*, 7 Dowl. 153: *Mason* v. *Riddle*, 5 M. & W. 513; 8 Dowl. 207.

(*m*) *Sanderson* v. *Westley*, 6 M. & W. 98: *Rising* v. *Dolphin*, 8 Dowl. 309: *Cooper* v. *Grant*, 21 L. J., C. P. 197: *Pryor* v. *Swaine*, 2 D. & L. 37; 13 L. J., Q. B. 214: *Joel* v. *Dicker*, 5 D. & L. 1.

(*n*) See *Haigh* v. *Frost*, 7 Dowl. 743: *Cooper* v. *Grant*, 21 L. J., C. P. 197.

(*o*) See per *Tindal*, C. J., in *Walton* v. *Chandler*, 1 C. B. 306; 2 D. & L. 802; 14 L. J., C. P. 149: *Barnes* v. *Pendrey*, 7 Dowl. 747. See *Levinson* v. *Syer*, 21 L. J., Q. B. 16, where the solicitor who attested was held to be the defendant's solicitor, though authority was given to him by the warrant to enter up judgment. See the prior cases of *White* v. *Cameron*, 6 Dowl. 476: *Fisher* v. *Nicholas*, 2 C. & M. 215; 4 Tyr. 44; 2 Dowl. 251: *Walker* v. *Gardner*, 4 B. & Ad. 371.

(*p*) *Walton* v. *Chandler*, supra. And see *Bligh* v. *Brewer*, 3 Dowl. 266; 1 M. & R. 651: *Oliver* v. *Woodruffe*, 7 Dowl. 166: *Taylor* v. *Nicholls*, 6 M. & W. 91: *Hale* v. *Dale*, 8 Dowl. 599. There is no objection to the plaintiff paying the defendant's solicitor for his attendance: *Pease* v. *Wells*, 8 Dowl. 626.

(*q*) *Gripper* v. *Bristow*, 6 M. & W. 807: *Rice* v. *Linsted*, 7 Dowl. 153: *Barnes* v. *Pendrey*, Id. 747.

(*r*) *Haigh* v. *Frost*, 7 Dowl. 743.

(*s*) Per *Parke*, B., in *Taylor* v. *Nicholls*, 6 M. & W. 96.

(*t*) *Oliver* v. *Woodruffe*, 7 Dowl. 166; 4 M. & W. 650: *Taylor* v. *Parkinson*, 2 H. Bl. 383.

(*u*) See *James* v. *Harris*, 6 Dowl. 184.

(*x*) *Joel* v. *Dicker*, 5 D. & L. 1.

PART XIV.

Lastly. He should attest and declare himself to be solicitor for the executing party.

Lastly. The solicitor should subscribe his name as a witness to the due execution of the instrument, and should, *in the attestation*, declare himself to be solicitor for the person executing the same, and state that he subscribes as such solicitor (*y*). An attestation in the following form:—"Signed in the presence of me, A. C.; and I declare myself to be the attorney of the said R. G., expressly named by him, and attending at his request, and subscribe myself accordingly," has been held sufficient (*z*). It will be sufficient to declare that he is solicitor for the party, and that he subscribes his name as such solicitor, without declaring that he is appointed by him (*a*), or that he attends at his request and that he was named by him (*b*), or the like. The declaration that he is such solicitor, and that he subscribes as such, must appear in the attestation in express terms (*c*), or by necessary inference (*d*), though the exact words of the statute need not be followed (*e*). An attestation in the following form:—"Witnessed by me, W. P., as the attorney of the said A. B., attending at the execution hereof at his request, and expressly named by him," was held insufficient (*f*). So, an attestation in the following form:—"Signed, sealed and delivered by the above-named C. P., in the presence of me the attorney expressly named by him, and acting at his request, and by whom the above written warrant of attorney was read over, and the nature and effect thereof explained to the said C. P. before the execution thereof by him," and subscribed by the attorney, has been held insufficient (*g*). But where it was "in the presence of me, J. N., attorney of the said W. H.," &c., it was held sufficient (*h*). It was not necessary to state in the attestation that the attorney is an attorney of one of the superior Courts (*h*). The Act does not require the solicitor to subscribe his name at the foot of the attestation (*i*). Where, after a warrant was regularly executed and attested, but, being afterwards altered, the defendant again executed it by tracing his signature with a dry pen, and the solicitor did the same with the attestation, the Court held that this was not a compliance with the statute, and that there should have been a new attestation (*k*). There being two attestations, the second added on account of the first being insufficient, has been held not to affect the validity of the instrument (*l*).

(*y*) *Poole* v. *Hobbs*, 8 Dowl. 113: *Potter* v. *Nicholson*, 8 M. & W. 294; 9 Dowl. 808: *Phillips* v. *Gibbs*, 16 M. & W. 208; 16 L. J., Ex. 48.

(*z*) *Lindley* v. *Girdler*, 1 D. & L. 699; 13 L. J., Q. B. 53. And see *Knight* v. *Hasty*, 12 L. J., Q. B. 293: *Ledgard* v. *Thompson*, 11 M. & W. 40.

(*a*) See per *Parke*, B., in *Oliver* v. *Woodruffe*, 7 Dowl. 166.

(*b*) *Gay* v. *Hall*, 5 D. & L. 422; 18 L. J., Q. B. 12.

(*c*) *Hibbert* v. *Barton*, 10 M. & W. 678; 2 Dowl., N. S. 434; 12 L. J., Ex. 70: *Poole* v. *Hobbs*, and *Potter* v. *Nicholson*, supra.

(*d*) *Pocock* v. *Pickering*, 18 Q. B. 789; 21 L. J., Q. B. 365: *Lewis* v. *Lord Kensington*, infra: *Elkington* v. *Holland*, 9 M. & W. 659; 1 Dowl., N. S. 643; 11 L. J., Ex. 273.

(*e*) *Pope* v. *Kershaw*, 2 B. C. 198: *Lewis* v. *Lord Kensington*, 2 C. B. 463; 3 D. & L. 637: 15 L. J., C. P. 100.

(*f*) *Hibbert* v. *Barton*, 10 M. & W. 678; 2 Dowl., N. S. 434; 12 L. J., Ex. 70.

(*g*) *Everhard* v. *Popleton*, 5 Q. B. 181; 13 L. J., Q. B. 1.

(*h*) *Knight* v. *Hasty*, supra: *Phillips* v. *Gibbs*, 16 M. & W. 208, per *Pollock*, C. B.

(*i*) *Lewis* v. *Lord Kensington*, supra.

(*k*) *Bailey* v. *Bellamy*, 9 Dowl. 507; 10 L. J., Q. B. 41.

(*l*) *Ledgard* v. *Thompson*, 2 Dowl., N. S. 766; 11 M. & W. 40; 12 L. J., Ex. 229.

The enactment was passed for the benefit of the debtor only; and, therefore, a third party, who may be prejudiced by a judgment against his debtor, cannot object to the invalidity of the warrant for want of a due attestation (*m*). But the trustee of the defendant can, in case he becomes bankrupt (*n*). So may, it seems, any person duly authorized by him, or claiming under him, provided such authority or claim be clearly made out (*o*). The defendant may apply notwithstanding a petition in bankruptcy is filed against him (*p*). Who may take advantage of non-compliance with Act.

As the warrant is a nullity if not duly attested, the application to set aside the judgment and execution signed and issued on it may be made at any time (*q*). It would seem that the objection is one that cannot be waived (*r*). Time of application to set it aside.

The Court will in some cases give the defendant the costs of the application where he succeeds (*s*). Costs of application.

How far revocable—How affected by Death, Marriage, &c.]—A warrant of attorney to confess a judgment cannot be expressly revoked; if the defendant do that which purports to be a revocation of it, the plaintiff may enter up judgment notwithstanding (*t*). There are some cases of implied revocation, however, which should be here mentioned. How far revocable, &c.

The *death* of either party is, in general, a revocation of the warrant (*u*). Where the warrant, in its terms, *expressly* authorized the judgment to be entered up by the plaintiff's representatives, the Court allowed it to be so entered up (*x*). Where the warrant merely empowered the plaintiff to enter up judgment, without mentioning his executors, although the defeazance stated the judgment was to secure the payment of 200*l.* "to plaintiff, his executors," &c., it was held that the executors could not enter up judgment (*y*). If the warrant be given *to* two or more, and one of Effect of death of parties.

(*m*) *Chipp* v. *Harris*, 5 M. & W. 430; 9 L. J., Ex. 64.

(*n*) *Cocks* v. *Edwards*, 2 Dowl., N. S. 55.

(*o*) See *Lewis* v. *Earl of Tankerville*, 2 Dowl., N. S. 754; 11 M. & W. 109; 12 L. J., Ex. 234.

(*p*) *Taylor* v. *Nicholls*, 6 M. & W. 91: *Pinches* v. *Harvey*, 1 Q. B. 868.

(*q*) *Cocks* v. *Edwards*, 2 Dowl., N. S. 55.

(*r*) *Gripper* v. *Bristowe*, 6 M. & W. 807; 8 Dowl. 797. See *Kemp* v. *Finden*, 12 M. & W. 421; 13 L. J., Ex. 137: *Price* v. *Carter*, 14 L. J., Q. B. 140.

(*s*) *Cooper* v. *Grant*, 21 L. J., C. P. 197.

(*t*) *Odes* v. *Woodward*, 2 Ld. Raym. 850; 1 Salk. 87: *Walsh* v. *Whitcomb*, 2 Esp. 565.

(*u*) *Cowie* v. *Alloway*, 8 T. R. 257: *Wild* v. *Sands*, 2 Str. 718; Co. Lit. 52 b; Ventr. 310. See *Heath* v. *Brindley*, 2 A. & E. 365: *Blackburne* v. *Godrick*, 9 Dowl. 337. In the former of these cases the defendant was dead when the judgment was entered up, and the warrant expressly allowed the judgment to be signed notwithstanding his death; but the Court held the judgment irregular, and set aside the execution, saying that this allowance by the defendant was not binding on his representatives, and still less on the Court. See *Harden* v. *Forsyth*, 1 Q. B. 177.

(*x*) *Coles* v. *Haden*, Barnes, 44. And see *Baldwin* v. *Atkins*, 2 Dowl. 591: *Edwards* v. *Holiday*, 9 Dowl. 1023.

(*y*) *Henshall* v. *Matthew*, 7 Bing. 337; 5 M. & P. 157; 1 Dowl. 217. And see *Manville* v. *Manville*, 1 Dowl. 544, *S. P. Foster* v. *Claggett*, 6 Dowl. 524, though the defeazance in that case stated that the executors and administrators might enter up judgment. And see *Short* v. *Coglin*, 1 Anst. 225: *Cowie* v. *Alloway*, 8 T. R. 257: *Dalrymple* v. *Fraser*, 3 D. & L. 818.

PART XIV.

them die, the survivor may obtain leave to enter up judgment at his suit (*a*). But if the warrant be given *by* two, and one of them die, the plaintiff cannot afterwards, unless the terms of the warrant allow it, enter up the judgment—not against both, on account of the rule above mentioned; nor against the survivor, for the judgment would not, in that case, pursue the authority (*b*). If the warrant be to enter up judgment "against us or either of us," judgment may be entered up against one only (*c*). And where a warrant was given by two persons, to enter up judgment on a joint bond against *me*, not *us*, the Court, after the death of one of them, allowed judgment to be entered up against the other (*d*). If a warrant be given by one person, judgment cannot be entered up after his death, even though it were stipulated for by the defeazance (*e*).

Effect of marriage of parties on.

Prior to the commencement of the Married Women's Property Act, 1882, if a *feme sole* give a warrant of attorney, it was held, that her subsequent marriage, before judgment was entered up, was a revocation of the warrant (*f*). But, from subsequent cases, it appears, the Court or a Judge would, notwithstanding the marriage, have allowed the judgment to be entered up against the husband and wife (*g*). And in *Walter* v. *White* (*h*), the Court of Queen's Bench, on an affidavit intituled as against both husband and wife, gave the plaintiff leave to enter an appearance for, and enter up judgment against, the husband and wife, on a warrant of attorney executed by the wife whilst unmarried; and the rule was made absolute in the first instance (*i*), though the Master suggested a doubt whether it ought not to have been made a rule *nisi*. The judgment would have been bad if entered up against the wife alone; though she, and not her husband, was liable to execution (*k*). If a warrant of attorney were given to a *feme sole*, her subsequent marriage would not be a revocation of it (*l*); and, upon application to the Court or a Judge, founded upon a proper affidavit of the marriage, the execution of the warrant, and the non-payment of the debt (*m*), they would grant a rule without notice to the defendant, allowing the judgment to be entered up in the names of the husband and wife (*n*). And if one *feme sole* gave a warrant of

(*a*) *Fendall* v. *May*, 2 M. & S. 76: *Johnson* v. *Jenkins*, 1 Dowl. 367: *Build* v. *Wightman*, Id. 545: *Fulcher* v. *Smith*, 2 W. Bl. 1301: *Todd* v. *Dodd*, 1 Wils. 312; Barnes, 48: *Hind* v. *Kingston*, 6 Dowl. 523.

(*b*) *Gee* v. *Lane*, 15 East, 592: *Raw* v. *Alderson*, 7 Taunt. 453; 1 Moore, 115: *Gainsborough* v. *Follyard*, 2 Str. 1121.

(*c*) *Jordan* v. *Farr*, 2 A. & E. 437; 4 N. & M. 347: —— v. *Hobson*, 1 Chit. Rep. 314: *Dalrymple* v. *Fraser*, 3 D. & L. 18; 2 C. B. 698.

(*d*) *Gladwin* v. *Scott*, Barnes, 53, C. P.

(*e*) *Mason* v. *Audley*, 5 Dowl. 596: *Heath* v. *Brindley*, 2 A. & E. 365: *Chancey* v. *Needham*, 2 Str. 1051: *Calvert* v. *Tomlin*, 5 Bing. 1; 2 M. & P. 1.

(*f*) *Anon.*, 1 Salk. 117.

(*g*) *Staples* v. *Purser*, 2 Dowl. 764; 3 M. & Sc. 800: *Higginbottom* v. *Higginbottom*, 8 Dowl. 126: *Peacock* v. *Fry*, Id.: *Anon.*, 1 Show. 89: *Hartford* v. *Mattingly*, 2 Chit. Rep. 117.

(*h*) K. B., 24th June, 1829.

(*i*) See *Staples* v. *Purser*, 2 Dowl. 764; 3 M. & Sc. 800.

(*k*) *Read* v. *Jewson*, 4 T. R. 362.

(*l*) *Anon.*, 1 Salk. 117. See *Dolling* v. *White*, 22 L. J., Q. B. 327, where a warrant was given by W. to D. and S., and W. & S. afterwards intermarried.

(*m*) *Marder* v. *Lee*, 3 Burr. 1469: *Metcalfe* v. *Boote*, 5 D. & R. 46.

(*n*) *Anon.*, 7 Mod. 53.

attorney to another, and they both married, the Court would allow judgment to be entered up by husband and wife against husband and wife. The above cases were all decided prior to the Married Women's Property Act, 1882, under which it is submitted that marriage would not affect or revoke the warrant.

In what cases it may be set aside, &c.

Where consideration illegal or fraudulent.

In what Cases it may be set aside, &c.]—If the warrant of attorney have been obtained by fraud (*o*) or misrepresentation (*p*), or for a gambling debt (*q*), or to compound a felony (*r*), or to stay an application to strike a solicitor off the roll (*s*), or to induce the plaintiff to live in a state of prostitution (*t*), or to defraud creditors, and the application be made on their behalf (*u*), or if given formerly by an insolvent debtor previous to his discharge, it being agreed that the debt should be omitted in his schedule (*x*), or in consideration of foregoing an opposition to his discharge (*y*), or for a debt discharged by the Insolvent Debtors Act (*z*), or if given expressly and in terms for creating a charge on an ecclesiastical benefice (*a*),

(*o*) *Duncan* v. *Thomas*, 1 Doug. 196: *Fell* v. *Riley*, 1 Cowp. 281: *Parkinson* v. *Caines*, 3 T. R. 616: *Bayley* v. *Taylor*, 8 D. & R. 56: *Martin* v. *Martin*, 3 B. & Ad. 934: *Turner* v. *Shaw*, 2 Dowl. 244.

(*p*) *Anon.*, 2 Ken. 294.

(*q*) See *George* v. *Stanley*, 4 Taunt. 683: *Lane* v. *Chapman*, 11 A. & E. 966. The Court would not interfere if the plaintiff were the assignee of the debt, and the defendant represented to the assignee, before the purchase, that the debt was a valid one. See *Davison* v. *Franklin*, 1 B. & Ad. 142.

(*r*) *Webb* v. *Taylor*, 1 D. & L. 676. See *Ex p. Critchley*, 3 D. & L. 527: *Ward* v. *Lloyd*, 6 M. & G. 785, where there was only a threat of a prosecution, and the Court refused to interfere.

(*s*) *Kirwan* v. *Goodman*, 9 Dowl. 330.

(*t*) Tidd, 517.

(*u*) *Harrod* v. *Benton*, 2 M. & R. 130; 8 B. & C. 217: *Martin* v. *Martin*, 3 B. & Ad. 934: *Sharpe* v. *Thomas*, 6 Bing. 416: *Dukes* v. *Saunders*, 1 Dowl. 522: *Brown* v. *Burton*, 17 L. J., Q. B. 49, where *Patteson*, J., refused, at the instance of assignees, to go into the question whether a warrant of attorney was given by way of fraudulent preference. See *Young* v. *Billiter*, 25 L. J., Q. B. 169, as to a warrant of attorney being void as against assignees under the 1 & 2 V. c. 110, s. 59.

(*x*) *Tobrum* v. *Freeman*, 2 Dowl. 375.

(*y*) *Rogers* v. *Kingston*, 10 Moore, 97; 2 Bing. 441: *Jackson* v. *Davison*, 4 B. & Ald. 691.

(*z*) *Smith* v. *Alexander*, 5 Dowl. 13: *Collins* v. *Benton*, 9 Dowl. 905; 1 Sc. N. R. 183; 2 M. & G. 861: *Ex p. Hart*, 2 D. & L. 778: *Humphries* v. *Smith*, 22 L. J., Q. B. 121: *Kernot* v. *Pattis*, 2 E. & B. 421; 23 L. J., Q. B. 33: *Ashley* v. *Killick*, 5 M. & W. 509: *Denne* v. *Knott*, 7 M. & W. 143. But it seems the Court will not interfere if the defendant has had an opportunity of pleading his discharge. *Philpot* v. *Astlett*, 1 C., M. & R. 85; 2 Dowl. 669: cp. *Jones* v. *Phelps*, 20 W. R. 92: *Heather* v. *Webb*, 2 C. P. D. 1; 46 L. J., C. P. 89: *Jakeman* v. *Cook*, 4 Ex. D. 26; 48 L. J., Ex. 165.

(*a*) *Flight* v. *Salter*, 1 B. & Ad. 673: *Kirlew* v. *Butts*, 2 B. & Ad. 736, n.: *Britten* v. *Wait*, 3 B. & Ad. 915: *Colebrooke* v. *Layton*, 1 N. & M. 374: *Aberdeen* v. *Newland*, 4 Sim. 281: *Alchin* v. *Hopkins*, 1 Bing. N. C. 99: *Saltmarsh* v. *Hewett*, 1 A. & E. 812: *Skrine* v. *Same*, Id.: *Arison* v. *Holmes*, 30 L. J., Ch. 564. But the warrant of attorney will not be set aside, unless it does in terms create a charge upon the benefice contrary to 13 Eliz. c. 20. See *Moore* v. *Ramsden*, 3 N. & P. 180. Nor will it be set aside merely upon the ground that it is given collaterally with another security, which is void by reason of its being a charge upon a benefice. *Bendry* v. *Price*, 7 Dowl. 753. The Court will not look beyond the warrant of attorney, to ascertain whether it has been given contrary to the statute. See *Bishop* v. *Hatch*, 7 Dowl. 763.

PART XIV.

or for securing an annuity void by the Annuity Act (*c*), or for securing a solicitor payment by his client of costs to which he is disentitled for want of re-admission (*d*), or the like (*e*), the Court or a Judge, having in all cases jurisdiction over the warrant, will, if the fact be clearly made out, order it to be delivered up to be cancelled; or, if judgment have been entered up, they will set it aside, and any proceedings that may have been had upon it; and, if money has been paid under it, they will in general order it to be refunded (*f*). If, however, part of the consideration is good, and severable from the bad, the Court will then only destroy the effect of the bad part (*g*). If the fact relied on for setting aside the warrant be doubtful, and be fairly contested, the Court will not at once grant the application, but will direct an issue to try it, and order the motion to stand over in the meantime (*h*), or dismiss the application altogether (*i*). The Court refused to decide the question, whether a joint-stock company was a nuisance within the 6 *G.* 1, *c.* 18, upon a motion to set aside a judgment on a warrant of attorney (*k*). And where the defendant has had an opportunity of pleading the illegality or want of consideration, the Court will not, it seems, in general, interfere summarily in this way (*l*). It seems that the mere fact of absence of consideration is no ground for setting aside the warrant on an application by the party who gave it (*m*).

Where the warrant has been forged or altered.

If it be alleged that the warrant is forged, or the like, the Court may direct an issue to try whether it has been duly executed or not (*n*). But, where a joint warrant of attorney had been altered after its execution in the christian name of one of the parties, who had re-executed the same without the knowledge of the other, the Court refused, on the application of the former, to set aside the judgment which had been signed thereon (*o*). Where a blank for the date had been filled up since execution with the true date, the Court refused to set aside the warrant (*p*).

Where given by an infant.

If a warrant of attorney be given by an infant, the Court will order it to be delivered up to be cancelled, even although there

---

(*c*) *Ex p. Chester*, 4 T. R. 694: *Steadman* v. *Purchase*, 6 T. R. 737: *Storton* v. *Tomlins*, 10 Moore, 172: *Nash* v. *Godmond*, 1 B. & Ad. 634: *Huggins* v. *Coates*, 1 Dowl., N. S. 827. And see *Earle* v. *Browne*, 10 A. & E. 412: *Wade* v. *Simeon*, 13 M. & W. 647.

(*d*) *Wilton* v. *Chambers*, 2 N. & P. 392; 7 A. & E. 524.

(*e*) See *Jackson* v. *Davison*, 4 B. & Ald. 691.

(*f*) *Ex p. Hart*, 2 D. & L. 778. And see *Evans* v. *Williams*, 1 C. & M. 30.

(*g*) *Holdsworth* v. *Wakeman*, 1 Dowl. 532. And see *Smith* v. *Alexander*, 5 Dowl. 13; 2 H. & W. 82: *Collins* v. *Benton*, 9 Dowl. 905.

(*h*) *Cook* v. *Jones*, 2 Cowp. 727: *Harrod* v. *Benton*, 8 B. & C. 217; 2 M. & R. 130.

(*i*) See *Flight* v. *Chaplin*, 2 B. & Ad. 112: *Ferguson* v. *Sprang*, 3 N. & M. 665; 1 A. & E. 576: *Ex p. Nash*, 4 M. & P. 793: *Brembridge* v. *Wildman*, 1 Dowl., N. S. 774: *Downs* v. *Garbutt*, 2 Dowl. 939: *Webb* v. *Taylor*, 1 D. & L. 676; 13 L. J., Q. B. 2.

(*k*) *Bolt*, 4 Taunt. 587. And see other cases in Tidd, 9th ed. 547.

(*l*) *Bligh* v. *Brewer*, 3 Dowl. 266: *Philpot* v. *Astlett*, 1 C. M. & R. 85; 2 Dowl. 669. And see *Dennie* v. *Knott*, 7 M. & W. 141: *Lane* v. *Chapman*, 11 A. & E. 966.

(*m*) *Say* v. *Hall*, 18 L. J., Q. B. 12.

(*n*) *Gibson* v. *Bond*, Barnes, 239.

(*o*) *Coke* v. *Brummell*, 2 Moore, 495; 8 Taunt. 439.

(*p*) *Keane* v. *Smallbone*, 25 L. J., C. P. 72.

may be circumstances of fraud on the part of the infant, and though the consideration be for necessaries (*q*), on his clearly showing that he was under age when he gave the warrant (*r*). But if an infant and another join in a warrant of attorney, and judgment be entered up against both, the judgment may be vacated as to the infant, and remain good as to the other (*s*).

By a married woman (*t*).

If, prior to the Married Women's Property Acts (*t*), a *feme covert* gave a warrant of attorney, it was absolutely void; and the Court or a Judge would order it to be delivered up to be cancelled, or would set aside the judgment, &c. (*u*), even though the warrant was given by her in an assumed name, and the plaintiff was wholly ignorant of the marriage (*x*). In another, however, the Court refused to relieve her, where, at the time she executed the warrant, she lived by herself, and acted as a *feme sole:* and they put her to her writ of error (*y*). A warrant to confess a judgment to a *feme covert* was, it seems, void (*z*).

By one of several executors.

Where one of several executors gave a warrant of attorney to confess a judgment against all, the Court ordered it to be delivered up to be cancelled (*a*).

By a lunatic.

It is not an objection to signing judgment on a warrant of attorney, that the defendant has, since its execution, become insane (*b*).

Where another security is given.

Nor, that he has since given another security for the same debt; unless there be some agreement that the latter shall be substituted for the former (*c*).

Warrant unstamped.

A judgment signed on an unstamped warrant of attorney is not available as against subsequent judgments, and will be set aside on the application of a judgment creditor (*d*).

Application by whom to be made.

The application to have the warrant given up to be cancelled, or to have judgment or execution on it set aside, may, if the objection be a substantial one,—going to the consideration for the warrant,—be made by any person interested in impeaching the warrant, though not a party to it (*e*). Where it has been given for a fraudulent purpose, it would seem that the application can only be made by third parties, and not by the defendants (*f*). An objection to the war-

(*q*) *Saunderson* v. *Marr*, 1 H. Bl. 75: *Wood* v. *Heath*, 1 Chit. Rep. 708, n.: *Oliver* v. *Woodruffe*, 7 Dowl. 166; 4 M. & W. 650: *Storton* v. *Tomlins*, 10 Moore, 172; 2 Bing. 475.

(*r*) *Weaver* v. *Stokes*, 1 M. & W. 293; 1 T. & G. 512; 4 Dowl. 724. The affidavit of the party as to his infancy was, in this case, held insufficient, though supported by the register of baptism, without the testimony of some person who knew his age.

(*s*) *Motteux* v. *St. Aubin*, 2 W. Bl. 1133: *Wood* v. *Heath*, 1 Chit. 708, n.: *Ashlin* v. *Langton*, 4 M. & Sc. 719.

(*t*) Since the Married Women's Property Act, 1882, a warrant given by a married woman would, it is submitted, be just as valid as any other contract made by her. See ante, Ch. CI.

(*u*) *Oulds* v. *Sansom*, 3 Taunt. 261: *Faithorne* v. *Blaquire*, 6 M. & S. 73.

(*x*) *Selby* v. *White*, 4 Leg. Obs. 390.

(*y*) *Anon.*, 1 Salk. 400. And see *Wilkins* v. *Wetherill*, 3 B. & P. 220: *Maclean* v. *Douglass*, Id. 128.

(*z*) *Roberts* v. *Pierson*, 2 Wils. 3.

(*a*) *Elwell* v. *Quash*, 1 Str. 20.

(*b*) *Piggott* v. *Killick*, 4 Dowl. 287.

(*c*) *Stoveld* v. *Eade*, 4 Bing. 154: *Anon.*, 2 Chit. 423.

(*d*) *Semple* v. *Nicholson*, 4 H. & N. 298; 28 L. J., Ex. 217.

(*e*) *Harrod* v. *Benton*, 2 M. & R. 130; 8 B. & C. 217: *Martin* v. *Martin*, 3 B. & Ad. 934: *Semple* v. *Nicholson*, supra.

(*f*) See *Doe* d. *Roberts* v. *Roberts*, 2 B. & Ald. 367: *Dukes* v. *Saunders*, 1 Dowl. 522.

PART XIV.

rant being by an infant, cannot be made by third parties (*g*). The defendant may make the application, notwithstanding a petition in bankruptcy against him (*h*). It may be made by his trustee (*i*).

Affidavit in support of.

The affidavit in support of the application should show that it is made by a proper party (*j*).

Costs on.

The Court in general give the successful party his costs.

Filing of warrant of attorney.

Filing of.]—By 32 & 33 *V. c.* 62 (The Debtors Act, 1869), *s.* 26, "Where in an action a warrant of attorney to confess judgment or a cognovit actionem is given, and the same or a true copy thereof, is not filed with the officer acting as clerk of the docquets and judgments in the Court of Queen's Bench within twenty-one days next after the execution thereof, as required by the Act (3 *G.* 4, *c.* 39), *infra*, the same shall be deemed fraudulent and shall be void; and if any such warrant of attorney or cognovit actionem so filed was given subject to any defeazance or condition, such defeazance or condition shall be written on the same paper or parchment with the warrant or cognovit before the filing thereof, otherwise the warrant or cognovit shall be void."

The 7 *G.* 4, *c.* 57, *s.* 33, and 1 & 2 *V. c.* 110, *s.* 60, extended the provisions of the 3 *G.* 4, c. 39, in favour of the creditors of an insolvent debtor (*k*); and the 7 & 8 *V. c.* 96, *s.* 20, extended these provisions to the assignees of insolvent petitioners under that Act (*l*).

3 Geo. 4, c. 39.

By the 3 *G.* 4, *c.* 39, *s.* 1, "If the holder thereof shall think fit, every warrant of attorney to confess judgment in any personal action, or a true copy thereof, and of the attestation thereof, and the defeazance and indorsements thereon, in case such warrant of attorney shall be given to confess judgment in his Majesty's Court of King's Bench at Westminster, or such a true copy thereof as aforesaid in case such warrant of attorney shall be given to confess judgment in any other Court, shall, within twenty-one days after the execution of such warrant of attorney, be filed (*m*), together with an affidavit of the time of execution thereof, with the clerk of the docquets and judgments in the said Court of King's Bench."

By sect. 2, "If, at any time after the expiration of twenty-one days next after the execution of such warrant of attorney, a commission of bankrupt shall be issued against the person who shall have given such warrant of attorney, under which he shall be duly found and declared a bankrupt, then and in such case, unless such warrant of attorney, or a copy thereof, shall have been filed as aforesaid within the said space of twenty-one days from the execution thereof, or unless judgment shall have been signed, or execu-

(*g*) *Motteux* v. *St. Aubin*, 2 W. Bl. 1133: *Ashlin* v. *Langton*, 4 M. & Sc. 719.

(*h*) *Pinches* v. *Harvey*, 1 Q. B. 868.

(*i*) See *Bell* v. *Tidd*, 9 Dowl. 949.

(*j*) *Hume* v. *Lord Wellesley*, 8 Q. B. 521.

(*k*) See *Collis* v. *Stone*, 4 Q. B. 655.

(*l*) See *Lawrence* v. *Lawrence*, 1 D. & L. 219: *Collis* v. *Stone*, 4 Q. B. 655, decided before the passing of this Act. The jurisdiction under these insolvent Acts was abolished by the Bankruptcy Act, 1861, except as to rights accrued and things done, &c. before the commencement of that Act.

(*m*) It must be duly stamped before it is filed; ante, p. 1303.

tien issued (*n*) on such warrant of attorney, within the same period, such warrant of attorney, and the judgment and execution thereon, shall be deemed fraudulent and void against the assignees under such commission, and such assignees shall be entitled to recover back and receive, for the use of the creditors of such bankrupt at large, all and every the monies levied or effects seized under and by virtue of such judgment and execution" (*o*).

Sect. 3, reciting that the object of the above provisions may be defeated by any person giving a cognovit instead of a warrant of attorney, enacts, "That every cognovit actionem, given by any defendant in any personal action, in case the action in which such cognovit actionem shall be given shall be in the said Court of King's Bench, or a true copy of such cognovit actionem in case the action wherein the same is given shall be in any other Court, shall, together with an affidavit of the time of the execution thereof, be filed with the said clerk, in like manner as such warrants of attorney, or copies thereof and affidavits, within the space of twenty-one days after such cognovit actionem shall have been executed, otherwise such cognovit actionem, and any judgment entered up thereon, and any execution taken out on such judgment, shall be deemed fraudulent and void against the assignees of the person giving such cognovit actionem, under a commission of bankrupt issued against him, after the expiration of the said space of twenty-one days, in like manner as warrants of attorney, and judgments and executions thereon, are deemed and taken to be fraudulent and void by this Act." It is not necessary within this section to file a cognovit within twenty-one days if judgment is signed within that period (*p*).

By sect. 4, if the warrant or cognovit be made subject to a defeazance or condition, such defeazance or condition must, in order to make the warrant or cognovit effectual against the assignees, be written on the same paper or parchment on which the warrant or cognovit is written before the time when the same or a copy thereof respectively shall be filed (*q*).

By sect. 5, the Masters shall keep a book containing particulars of each warrant or cognovit filed, &c. The 6 & 7 *V.* c. 66, enacts, that, in addition to this book another book or index shall be kept of the names, &c. of persons by whom warrants or cognovits are given, and which shall be open to inspection.

Sect. 6 provides that the Master's fee for filing shall be 1*s.*

Sect. 7 provides that any person shall be entitled to have an office copy of the warrant or cognovit, upon paying for the same at the like rate as for an office copy of a judgment.

(*n*) The words "or execution issued" have no meaning in this section: *Green* v. *Wood*, 7 Q. B. 178.

(*o*) This section does not invalidate the warrants as between the parties themselves. See *Bennett* v. *Daniel*, 10 B. & C. 500; *Morris* v. *Mellin*, 6 B. & C. 446: *Aireton* v. *Davis*, 3 M. & Sc. 138: *Everett* v. *Wells*, 2 Sc. N. R. 525; 9 Dowl. 424: *Godson* v. *Sanctuary*, 4 B. & Ad. 255; 1 N. & M. 52: *Biffin* v. *Yorke*, 5 M. & G. 428; 6 Sc. N. R. 222: *Brooke* v. *Mitchell*, 8 Sc. 739: *Wilson* v. *Whittaker*, 1 M. & M. 8. See *Hurst* v. *Jennings*, 5 B. & C. 650; 8 D. & R. 424, where an indenture was held in effect to be a cognovit within the 3 G. 4, c. 39.

(*p*) *Bushell* v. *Boord*, 1 B. C. Rep. 260; 4 D. & L. 359; 16 L. J., Q. B. 57.

(*q*) *Bennett* v. *Daniel*, 10 B. & C. 500: *Green* v. *Gray*, 1 Dowl. 350.

PART XIV.

Sect. 8. If the warrant or cognovit have been filed as above mentioned, and the debt be afterwards satisfied or discharged, a Judge upon being satisfied of that fact, may order a memorandum of satisfaction to be written upon it.

The twenty-one days limited by the Act for the filing of the warrant or cognovit, or signing judgment, or issuing execution, are to be reckoned exclusive of the day of execution of the warrant or cognovit; and a cognovit, therefore, executed on the 9th, is duly filed on the 30th of the month (*r*).

It will suffice to render the warrant or cognovit operative under the 3 *G.* 4 as against assignees, that judgment be signed within the twenty-one days after its execution, though execution be not issued until afterwards (*s*).

The 3 *G.* 4, *c.* 39, it will be seen, requires an affidavit of the due execution of the warrant or cognovit to be filed at the same time, and such affidavit must state the day of the execution. An affidavit made by an attesting witness to the warrant and filed with it, merely stating its date, and that he saw the party execute the same, without verifying the day on which it was executed, would be insufficient (*t*). The affidavit in the case of a cognovit should be intituled in the cause. It may be so intituled in the case of a warrant of attorney, but it may be intituled only in the Court (*u*).

There is no necessity for filing an agreement between the parties subsequent to the warrant, altering the terms of it (*x*).

Fee on filing.

The fee on filing a warrant of attorney or cognovit is 2*s.* 6*d.*, which is paid by a fee stamp impressed or adhesive on the same (*see Orders, post, Appendix*).

Judgment, when to be signed, form of, &c.

Judgment on, when to be signed—Form of, &c.]—In entering up the judgment, the authority given by the warrant should be strictly pursued, otherwise the judgment will be irregular.

When to be signed.

The judgment may be entered up at the time allowed by the warrant, and this as of course, without applying to the Court or a Judge, if entered up within a year and a day next after the date of the warrant, and if there has not been a change of the parties, or some other event which makes an application to the Court or a Judge necessary (*see ante, Ch. LXIX.*). If the warrant is given to secure the payment of money, it is not necessary to delay the signing of the judgment until default made in the payment (*z*), unless that be expressly stipulated for in the defeazance (*a*). And if the warrant be given to confess judgment absolutely for a sum certain, but it be understood between the parties that it is given only to indemnify the plaintiff against his suretyship for a smaller sum, the plaintiff need not defer the signing of the judgment or issuing execution until the contingency happen (*b*). If by the

(*r*) *Williams* v. *Burgess*, 12 A. & E. 635; 4 P. & D. 443.

(*s*) *Green* v. *Wood*, 7 Q. B. 178; 14 L. J., Q. B. 217.

(*t*) *Dillon* v. *Edwards*, 2 M. & P. 550. See *Robinson* v. *Robinson*, 3 D. & L. 134. See form, Chit. F. 664.

(*u*) *Sowerby* v. *Woodroffe*, 1 B. & A. 567: *Ex p. Gregory*, 8 B. & C. 409: *Davis* v. *Stanbury*, 3 Dowl. 440.

(*x*) *Harmer* v. *Johnson*, 14 M. & W. 336; 3 D. & L. 38.

(*z*) MS. M. 1814. And see *Anon.*, Hardw. 270.

(*a*) See *Nicholl* v. *Bromley*, 2 B. & B. 464; 5 Moore, 307: *Capper* v. *Dando*, 1 H. & W. 11; 2 A. & E. 458; 2 N. & M. 335.

(*b*) *Barber* v. *Barber*, 3 Taunt. 465. And see *Partridge* v. *Fraser*,

defeazance judgment is not to be entered up until after demand made of the money secured by the warrant, an actual demand must be made; and a proposal to settle amicably does not amount to such demand (c). If the judgment is not to be entered up before a certain day, unless the party giving it shall in the meantime become bankrupt or insolvent, judgment may be entered up before the day specified, if the former be in insolvent circumstances, although he may not have become bankrupt, or taken the benefit of an Insolvent Debtors Act (*d*). If the warrant specify any particular time at which the judgment is to be signed, it cannot be entered up at any other time (*e*). And it seems that an application to set aside a judgment, on the ground that it was signed at a time not authorized by the warrant, should be made within a reasonable time, or the irregularity will be cured (*f*).

In what Court.

The warrant, in general, points out the Division of the High Court in which the judgment is to be signed (*g*).

In whose name and against whom.

The judgment must be entered up in the name of the party as authorized by the warrant (*h*). If the warrant authorizes a judgment at the suit of A., this does not authorize one at the suit of his executors (*i*). So, upon a *joint* warrant given by two, without words of severalty, judgment cannot, in general, be entered up against one, even after the death of the other (*k*). So, a warrant given by one of two executors will not authorize the plaintiff in entering up judgment against both (*l*). Where a judgment creditor applied to set aside a judgment and execution, upon the ground that the judgment was entered up against the defendant by a different christian name from that signed to the warrant of attorney,

---

Taunt. 307; 1 Moore, 54: *Carr* v. *Roberts*, 5 B. & Ad. 78: *Ikin* v. *Brook*, 1 B. & Ad. 124: *Duke* v. *Watchorn*, 1 Dowl., N. S. 265; 11 L. J., Q. B. 53: *Kirk* v. *Scott*, 1 Dowl., N. S. 267.

(*c*) *Nicholl* v. *Bromley*, 5 Moore, 307; 2 B. & B. 464. See *Capper* v. *Dando*, 4 N. & M. 335; 2 A. & E. 458, where a demand on a lunatic was held insufficient. *Abbott* v. *Greenwood*, 2 Jur. 989, Q. B.

(*d*) *Biddlecombe* v. *Bond*, 5 N. & M. 621; 1 H. & W. 612. See *Partridge* v. *Frazer*, 7 Taunt. 307; 1 Moore, 54.

(*e*) *Mynn's case*, 1 Mod. 1: *Anon.*, 7 Mod. 53: *Todd* v. *Gompertz*, 6 Dowl. 296: *Bate* v. *Lawrence*, 5 Sc. N. R. 122; 2 D. & L. 83: *Bird* v. *Manning*, 13 L. J., Q. B. 128: *Alcock* v. *Sutcliffe*, 4 D. & L. 612: *Cobbold* v. *Chilver*, 1 Dowl., N. S. 726; 4 M. & G. 62; 11 L. J., C. P. 173: *Rayment* v. *Smith*, 1 D. & L. 166; 12 L. J., Q. B. 278: *Bosanquet* v. *Graham*, 7 Jur. 831: *Jarvis* v. *South*, 1 D. & L. 962; 13 M. & W. 152.

(*f*) See *Bate* v. *Lawrence*, 2 D. & L. 83; 8 Sc. N. R. 122; 13 L. J., C. P. 147: *Anderson* v. *Harrison*, 2 D. & L. 91; 13 L. J., Q. B. 293.

(*g*) *Harris* v. *Peck*, 2 D. & L. 106; 13 L. J., Q. B. 295.

(*h*) *Doe* v. *Stewart*, 1 Dowl., N. S. 813. A cognovit having been given in an action brought by the public officer of a banking company, under the 7 G. 4, c. 46, by which it was provided, that, upon default in payment of a sum of money, the plaintiff should be at liberty to enter up judgment and issue execution, it was held to be sufficient to authorize signing judgment in the name of another public officer, upon a suggestion being entered of the removal of the original plaintiff. *Webb* v. *Taylor*, 1 D. & L. 676; 13 L. J., Q. B. 24. But this would not, it is apprehended, apply to the case of a warrant of attorney. See *Howard* v. *Batho*, 5 D. & L. 396.

(*i*) *Short* v. *Coglin*, 1 Anstr. 225. See ante, p. 1309.

(*k*) *Gee* v. *Lane*, 15 East, 592: *Jordan* v. *Farr*, 2 A. & E. 437: *Dalrymple* v. *Fraser*, 2 C. B. 698; 3 D. & L. 611; 15 L. J., C. P. 193; ante, p. 1310.

(*l*) *Elwell* v. *Quash*, 1 Str. 20.

PART XIV.

the Court refused even a rule *nisi* (*m*); but this was, probably, on the ground that a mere formal objection cannot be taken advantage of by a third party (*n*).

For what amount of debt and costs.

The warrant in general authorizes a judgment for more than the amount of the debt really due, usually double the amount (*o*). Where the warrant empowered the plaintiff to sign judgment and issue execution for the debt, but omitted the words "together with costs of suit," it was held that judgment could not be signed for those costs (*p*). Signing judgment for too large a sum is only an irregularity (*r*). For what amount judgment may be signed and execution issued, where the debt is payable by instalments, *see post*, p. 1324. As to the costs of signing judgment, *see post*, p. 1323.

The words "or otherwise," in the warrant, mean otherwise "by default" (*s*).

Suggestion of breaches.

It is not necessary to suggest breaches in the same cases in which breaches must be assigned or suggested in an action on a bond, even though a bond has been given as well as the warrant (*t*).

Setting aside at plaintiff's instance.

Where a judgment has been irregularly signed at a time not authorized by the warrant or otherwise, the Court or a Judge, at the plaintiff's instance, will set it aside, so as to give him an opportunity of signing a new judgment rightly (*u*).

At defendant's instance.

An application on the part of the defendant to set aside the judgment for irregularity must in general be made within four days after notice of the irregularity (*x*).

When leave necessary before signing judgment (*y*).

When Leave of a Judge necessary before signing Judgment.]—Within a year from the date of the warrant, judgment may be entered up as of course (*z*). But possibly not after that time without leave of a Judge (*a*), unless the warrant or defeazance, in express terms, dispenses with the necessity for such leave (*b*).

By *R. 26, H. T. 1853*, it was provided that, "Leave to enter up judgment on a warrant of attorney above one, and under ten years old, is to be obtained by order of a Judge made *ex parte*, and if ten years old or more, upon a summons to show cause" (*c*). But this rule is repealed by the Rules of the Supreme Court, 1883 (*App. C.*),

---

(*m*) MS. M. 1815.

(*n*) See ante, p. 1309.

(*o*) See *Chalk* v. *Walton*, 1 D. & L. 39; 6 Se. N. R. 3: *Shipton* v. *Shipton*, 1 Dowl. 5.

(*p*) *Page* v. *Sou* 2 D. & L. 108: *Thornton* v. *Merr* *w*, 3 D. & P. 362, as to the costs of judgment and execution.

(*r*) *Stopford* v. *Fitzgerald*, 16 L. J., Q. B. 310.

(*s*) *Rawdon* v. *Wentworth*, 10 M. & W. 36; 2 Dowl., N. S. 287.

(*t*) See ante, p. 1305.

(*u*) *Coulson* v. *Clutterbuck*, 2 Dowl., N. S. 391: *Bennett* v. *Simmons*, 13 L. J., Q. B. 308; 2 D. & L. 98. Notice of the application should be given if made to the Court.

(*x*) *Alcock* v. *Sutcliffe*, 4 D. & L. 612; where the application was made by assignees of a bankrupt. As to the time for taking advantage of an irregularity, see Ch. XLII.

(*y*) Perhaps it may be necessary to obtain such leave where the party to whom such warrant is given dies, and his representatives are authorized to enter up the judgment, see ante, p. 1309.

(*z*) *Calvert* v. *Tomlin*, 5 Bing. 1; 2 M. & P. 1.

(*a*) *Anon.*, 6 Mod. 212: *Lushington* v. *Waller*, 1 H. Bl. 94.

(*b*) *Sherran* v. *Marshall*, 1 D. & L. 689; 13 L. J., Q. B. 66.

(*c*) This rule is similar to the repealed rule of H. T. 2 W. 4, s. 73, except that by that rule the application in term must have been made to the Court.

and these rules contain no similar provision. It would appear, therefore, that the leave is no longer necessary, but it is not certain that it might not be held to be necessary, and the practice under the rule is therefore retained here. It is safer to get the leave.

Under the above rule it was held that in the case of a warrant to secure the payment of a *post-obit bond* (*d*), or under peculiar circumstances (*e*), a Judge might refuse to grant more than a summons to show cause in the first instance, though the warrant was under ten years old (*f*). An *ex parte* order would be granted though the defendant was insane (*g*). But such an order would not be granted where the warrant was *more* than ten years old, although the defendant, shortly before the application, had acknowledged the sum secured by the warrant to be due (*h*), or though the warrant were to confess a judgment on a bond, and the defendant was resident abroad (*i*). The Court would, if the circumstances of the case required it,—as if the party who gave the warrant were keeping out of the way,—give special directions as to the mode of service (*k*). In one case, under special circumstances, service on the landlady of the house in which the defendant lodged was held sufficient (*l*).

The original warrant must be forthcoming.

Leave has been refused to sign judgment on a copy of the warrant, although the original was in defendant's possession, and the copy in his handwriting (*m*).

Consequences of signing judgment without leave.

Although judgment be entered up without the leave of a Judge when necessary, yet it seems that none but the defendant himself (*n*), or his personal representatives in case of his death, or his trustees in case of his bankruptcy (*o*), could object to the irregularity. The irregularity is one that may be waived.

Affidavit in support of application for leave.

The application for leave to sign judgment is founded upon an affidavit, stating the execution of the warrant—the consideration for it—the amount remaining due to the plaintiff, and that the defendant is alive (*p*).

Title of.

The affidavit may or may not, it seems, be entitled in the action in which the judgment is to be entered up (*q*).

Must state execution of warrant.

1. The execution of the warrant must be sworn to. Where an attesting witness is necessary, the execution must be sworn to by the attesting witness (*r*).

(*d*) *Lushington* v. *Waller*, 1 H. Bl. 94. See form of the order, Chit. Forms, p. 668.

(*e*) *Edwards* v. *Holiday*, 9 Dowl. 1023.

(*f*) *Lushington* v. *Waller*, 1 H. Bl. 94. See form of the order, Chit. Forms, p. 668.

(*g*) *Piggott* v. *Killick*, 4 Dowl. 287; 1 H. & W. 518. In the report of this case in Dowling, the warrant is stated to have been more than ten years old; sed quære.

(*h*) *Nicholas* v. *Merit*, 9 Dowl. 101.

(*i*) *Fletcher* v. *Everard*, 13 L. J., Q. B. 44.

(*k*) *Croft* v. *Lord Egmont*, 8 Dowl. 95.

(*l*) *Wortham* v. *Tuck*, 9 Dowl. 335.

(*m*) *Anon.*, M. 1838, B. C., *Littledale*, J., 2 Jur. 944: *Jacobs* v. *Neville*, 8 Dowl. 125. See *Doe* d. *Beaumont* v. *Beaumont*, 2 Dowl., N. S. 972: *Anon.*, M. 1838, B. C., *Littledale*, J., 2 Jur. 1067.

(*n*) *Jones* v. *Jones*, 1 D. & R. 558. And see ante, p. 1309.

(*o*) See *Cocks* v. *Edwards*, 2 Dowl., N. S. 55.

(*p*) See the form of the affidavit, Chit. Forms, 665.

(*q*) *Danis* v. *Stanbury*, 3 Dowl. 440: *Sowerby* v. *Woodroffe*, 1 B. & Ald. 567: *Poole* v. *Robberds*, Id. 568, n.; 1 Chit. 315, n.: *Ex p. Gregory*, 8 B. & C. 409.

(*r*) See *Field* v. *Beaveroft*, 1 Dowl. 308; 2 Tyr. 283; 2 C. & J. 217: *Jones* v. *Knight*, 1 Chit. 743: *Mille*

PART XIV.

Before the Act requiring an attestation by a solicitor, an affidavit that the defendant had recently acknowledged the execution expressly for the purpose of enabling the plaintiff to enter up judgment without being at the trouble of sending for the subscribing witness, was held sufficient by the Court of Common Pleas (*s*); though, indeed, the Court of Queen's Bench decided otherwise (*t*). If, indeed, the attesting witness were dead (*u*), or abroad, or out of the jurisdiction of the Court (*x*), or transported (*y*), and that fact were substantiated by affidavit, or if he could not be found after due search, and the affidavit stated the endeavours which had been made to find him (*z*), then the Court would receive secondary evidence of the execution, and an affidavit verifying his handwriting (*a*), or an affidavit by another party who saw the execution (*b*), or an affidavit that defendant had acknowledged the debt and the handwriting of the witness (*c*), would in general suffice. Where the attesting witness was the clerk of the solicitor who prepared the warrant, the want of his affidavit was considered sufficiently supplied by that of his master verifying the handwriting of his clerk and that of the defendant, and stating that the former had absconded and could not be found (*d*). The illness of the witness was no excuse for his not making the affidavit, because a commissioner might attend him and take it (*e*). The production of an office copy of the affidavit of the due execution of the warrant at the time it was filed, if it was so, will be sufficient (*f*). If the defendant be a marksman, it seems that the affidavit should state that the warrant was read over to him before execution (*g*). The Court might, by order, compel the attesting witness to swear to the execution if he refused to swear to it (*h*); and sometimes they would make him pay the costs of the rule (*i*).

Must show that a debt exists.

2. The consideration and the sum remaining due must be stated in the affidavit (*k*): these are usually sworn to by the plaintiff

v. *M'Donoughoo*, 1 H. & W. 184. When an attesting witness is necessary, see ante, p. 1308. See C. L. P. Act, 1854, s. 26.

(*s*) *Laing* v. *Kaine*, 2 B. & P. 85.

(*t*) *Jones* v. *Knight*, 1 Chit. Rep. 743: *Holiday* v. *Lord Oxford*, 10 Leg. Obs. 430.

(*u*) *Constable* v. *Wren*, 3 M. & Sc. 210 a. And see *Taylor* v. *Leighton*, Id. 423; 2 Dowl. 746.

(*x*) *Taylor* v. *Leighton*, 3 M. & Sc. 423; 2 Dowl. 746: *Appleton* v. *Bond*, 1 Chit. Rep. 744.

(*y*) *Edwards* v. *Penney*, 2 Dowl., N. S. 425.

(*z*) *Young* v. *Showler*, 2 Dowl. 556: *Waring* v. *Bowles*, 4 Taunt. 132: *Jones* v. *Knight*, 1 Chit. Rep. 743. And see *Cope* v. *Lea*, 9 Dowl. 102: *Reid* v. *Ford*, 1 Dowl., N. S. 187; 3 M. & Gr. 546.

(*a*) *Jones* v. *Knight*, *Young* v. *Showler*, infra.

(*b*) *Hunthwaite* v. *Hood*, 5 M. & P. 321: *Taylor* v. *Leighton*, supra.

(*c*) *Reid* v. *Ford*, 3 M. & Gr. 546; 1 Dowl., N. S. 187.

(*d*) *Young* v. *Showler*, 2 Dowl. 556.

(*e*) *Owen* v. *Hollis*, 4 Dowl. 572.

(*f*) *Webb* v. *Webb*, 4 Dowl. 599: *Bland* v. *Wilson*, 1 Dowl., N. S. 200.

(*g*) *James* v. *Harris*, 6 Dowl. 184.

(*h*) *Clark* v. *Elwick*, 1 Str. 1: *Caffin* v. *Idle*, M., 3 G. 4, K. B.; Tidd, 9th ed. 551: *Mille* v. *M'Donoughoo*, 1 H. & W. 184. See *Doe d. Avery* v. *Roe*, 6 Dowl. 518, per *Williams*, J.

(*i*) *Ex p. Morrison*, 8 Dowl. 94, in *Croft* v. *Lord Percival*. See C. L. P. Act, 1854, s. 48.

(*k*) *Barton* v. *Turner*, 8 Dowl. 122. See *Hulke* v. *Pickering*, 2 B. & C. 555; 4 D. & R. 5. But where the warrant was given to secure the guarantee, it was deemed sufficient to swear that the guarantee was still in force, without stating that any sum was owing on it: *Pickering* v. *Carnell*, 8 Dowl. 300.

himself; and if not sworn to by the plaintiff himself, the affidavit must show why not (*l*). Where the plaintiff was a lunatic, an affidavit of the debt being unpaid, made by a person who had received the interest due upon it for the last three years, was deemed sufficient (*m*); and an affidavit by the plaintiff's solicitor, swearing to the consideration and that the money remained unpaid, and that he had been employed in managing the money and paying over the interest, was admitted as sufficient, without any affidavit by the plaintiff himself (*n*). And so has an affidavit by the plaintiff's solicitor's clerk, stating that the money remained unpaid, that he had received money on several occasions in respect of the sum secured by the warrant, and that he had lately seen the defendant, when he promised to pay a further instalment upon it (*o*). Where a warrant of attorney given to secure a debt and future advances due to and to be made by a banking company, was given to two persons, public officers of the company, but was not given to them as such, judgment was permitted to be entered up in the names of such persons, upon an affidavit stating the original debt to be unpaid, and a further sum to have been advanced by the company, but not alleging that the debt was still owing to the plaintiffs, one of them having ceased to be a public officer (*p*).

Defendant insane.

Where the warrant was given to secure the re-transfer of stock on demand, leave was refused to enter up judgment on proof of a demand made while defendant was insane (*q*).

—That the defendant is alive.

3. It must appear from the affidavit that the defendant is alive either from the deponent having seen him alive, or otherwise. If the affidavit show that the defendant was alive within a *reasonable* time before the day on which the application is made (*r*), and state the deponent's belief that the defendant is still alive, it will suffice (*s*). As to what is a reasonable time must depend upon the circumstances of each particular case. In one case the application was granted on the *third* day of term, upon an affidavit stating that the defendant was alive on a day six days before the commencement of the term (*t*), and, in another case, the application was granted where the defendant had last been seen alive above three weeks (*u*), and in another (*x*), five weeks, before the application. If the defendant be abroad, a longer time is of course allowed, according to the distance of the place and the circumstances. Judgment has been allowed to be entered up against a defendant

(*l*) *Barton* v. *Turner*, 8 Dowl. 122, per *Littledale*, J. See *Cobbold* v. *Adams*, 10 Jur. 72, B. C.

(*m*) *Coppendale* v. *Sunderland*, Barnes, 42.

(*n*) *Ashman* v. *Bowdler*, 2 C. & M. 212; 4 Tyr. 84. And see *Hill* v. *Ince*, 13 L. J., Q. B. 65.

(*o*) *Middleton* v. *Stockdale*, 1 Dowl., N. S. 776.

(*p*) *Howard* v. *Batho*, 5 D. & L. 396, B. C.

(*q*) *Capper* v. *Dando*, 2 A. & E. 335; 4 N. & M. 335; 1 H. & W. 11.

(*r*) *Jordan* v. *Farr*, 4 N. & M. 347; 2 A. & E. 437.

(*s*) *Richardson* v. *Scholefield*, 2 Dowl., N. S. 36: *Reeder* v. *Whip*, 5 Dowl. 576.

(*t*) *Jordan* v. *Farr*, 4 N. & M. 347; 2 A. & E. 437.

(*u*) *Watts* v. *Bury*, 4 Dowl. 44.

(*x*) *Stockes* v. *Willes*, 13 Leg. Obs. 29; 5 Dowl. 221. And see *O'Neill* v. *Coghlan*, 2 D. & L. 5; 13 L. J., Q. B. 204: *Krell* v. *Joy*, 4 Dowl. 660; 1 H. & W. 670.

PART XIV.

residing in Jamaica, upon an affidavit that he was alive four months before (*y*); and against a defendant at Nice, on production and verification of a letter from him, dated thirteen days before (*z*); and against a defendant residing in France, upon an affidavit that he was alive on the 20th February next preceding the application, the application being made in the Easter Term following (*a*); and against a defendant in New South Wales, upon an affidavit stating the receipt of a letter from him dated from that place in the August preceding, the application being made in November (*b*); and against a defendant in Newfoundland, upon an affidavit showing he was alive eight months before (*c*). An affidavit merely stating that the deponent *saw* the defendant is not enough, unless it state that he saw him *alive* (*d*). And where the affidavit stated merely that the deponent was told by the defendant's wife that her husband was living, it was held to be insufficient (*e*). An affidavit stating the receipt of a letter from the defendant, in his handwriting, is sufficient evidence of his being alive at the time it bears date (*f*). So is an affidavit showing that a cheque of the defendant's, dated thirteen days before the application, had been paid in the interim (*g*); but not so an affidavit merely showing that the defendant's solicitor had lately moved to set aside a judgment of outlawry against him (*h*). If the warrant be a joint one by several parties, it must be shown that they are all alive (*i*), unless the warrant be joint and several, and the application be for the purpose of signing judgment against the survivors only (*k*). Where a defendant had been transported for life, an affidavit stating the conviction, and the certificate from the Home Office, certifying the transportation, and that no return of the convict's death had been made, and that by the practice of that office no return was made of a convict continuing alive, was held sufficient (*l*).

Where several defendants.

Where defendant transported.

Dispensing with affidavit that defendant alive.

A party giving a warrant of attorney may by an agreement dispense with an affidavit of his being alive at the time of entering up judgment (*m*).

Judgment, how signed.

Judgment, how signed.]—The judgment must be signed in the way authorized by the warrant. It is always final, and signed

(*y*) *Rowndell* v. *Powell*, Willes, 66: *Fursey* v. *Pilkington*, 2 Dowl. 452.

(*z*) *Grantley* v. *Summers*, 6 Dowl. 478.

(*a*) *Bayley* v. *Western*, 7 Dowl. 601.

(*b*) *Hopley* v. *Thornton*, 2 D. & R. 12.

(*c*) *Pemberton* v. *Browning*, 2 Bing. 204; 9 Moore, 389. And see *Johnson* v. *Fry*, 5 Dowl. 215: *Grantley* v. *Summers*, 6 Dowl. 478: *Hawke* v. *Harris*, 1 Dowl., N. S. 261.

(*d*) *Chell* v. *Oldfield*, 4 Dowl. 629: *Howard* v. *Batho*, 5 D. & L. 396, where "been in company" was held sufficient: *Watson* v. *Matthews*, 2 Dowl., N. S. 670: 12 L. J., Q. B. 139.

(*e*) T. S., M. 1824: —— v. *Hobson*, 1 Chit. Rep. 314: *Reeder* v. *Whip*, 5 Dowl. 576.

(*f*) *Bidlake* v. *Carter*, MS. E. T. 1824: *Sanders* v. *Jones*, 1 Dowl. 367: *Gray* v. *Withers*, 4 Dowl. 656; 1 H. & W. 659. See *Goodman* v. *Trevannion*, 9 Dowl. 328: *Key* v. *Mountague*, 1 Dowl., N. S. 853: *Levi* v. *Cohen*, 2 Dowl., N. S. 687: 12 L. J., Q. B. 137.

(*g*) *Jacobs* v. *Griffiths*, 5 Dowl. 377.

(*h*) *Croft* v. *Lord Egmont*, 8 Dowl. 95.

(*i*) —— v. *Hobson*, 1 Chit. 314: *Id.* v. *Anderson*, 1 Dowl., N. S. 305.

(*k*) See *Jordan* v. *Farr*, 2 A. & E. 437; 4 N. & M. 347: —— v. *Hobson*, 1 Chit. Rep. 314.

(*l*) *Dalrymple* v. *Fraser*, 3 D. & L. 611; 2 C. B. 698.

(*m*) *Chipp* v. *Stanley*, 11 Jur. 1062, B. C. See ante, p. 1305.

in like manner as a final judgment by confession or default in an adverse suit (*n*). *The warrant of attorney (if not filed), must be filed* (*o*). *If judgment be signed by leave of a Judge, take the order to the office where you sign judgment.* It seems there is a fixed amount of 3*l.* 10*s.* for costs on judgment on warrant of attorney (Walker on Judgments, p. 4). There is no occasion to tax these costs (*p*).

Appeal.

Appeal.]—The warrant generally authorizes the solicitor to execute a release of all grounds and rights of appeal; and if the defendant, notwithstanding, take proceedings by way of appeal upon the judgment (*q*), the Court would refuse to entertain the appeal.

Execution on.

Execution, &c.]—The observations already made as to executions in ordinary cases will be, for the most part, applicable to executions on warrants of attorney (*Vol.* 1, *Ch. LXXIV.*).

When it may be issued.

In considering the practice as to when the judgment may be signed, we have already mentioned several points as to the execution thereon (*r*). In general, as soon as judgment is signed, the plaintiff may sue out execution as in ordinary cases, unless prevented from so doing by the terms of the defeazance. In some cases, where the warrant is given to indemnify the plaintiff against the payment of a debt, judgment may be signed and execution issued for the whole amount, before he has paid it (*s*). Where a warrant was given by two persons, and the party to whom it was given stipulated that he should not proceed hostilely against them, unless he would conceive that there was danger of their failure, it was held, that he might sue out execution immediately upon the failure of one of them (*t*). If the defeazance state that a demand must be made before execution issued, such demand must be made accordingly (*u*). As to its being necessary to apply to a Master for leave to issue execution where more than six years have elapsed since the judgment was signed, *see ante, Ch. LXXXIV.* The defeazance in general dispenses with the necessity of making such application (*see ante*, p. 1304) (*x*).

For what amount.

The writ of execution must not be indorsed to levy a greater amount than that authorized by the warrant and defeazance;

(*n*) Tidd, 9th ed. 556: *Bircham* v. *Tucker*, 8 Sc. 469: *Kemp* v. *Matthew*, Id. 399: *Charlesworth* v. *Ellis*, 7 Q. B. 678. As to signing judgment by default, see ante, Vol. 1, p. 259.

(*o*) See ante, p. 1314: *James* v. *Heward*, 3 Q. B. 948, 3 G. & D. 264.

(*p*) See per *Patteson*, J., *Griffiths* v. *Lucevsedge*, 2 Dowl. 143.

(*q*) *Baddeley* v. *Shafto*, 8 Taunt. 434. See *Solomon* v. *Graham*, 24 L. J., Q. B. 332, a case decided before the Jud. Acts, where a power to release errors in a warrant of attorney was held not to extend to a release of errors in any proceeding or process by way of execution or outlawry after the judgment entered up under the warrant of attorney.

(*r*) Ante, p. 1316.

(*s*) *Barber* v. *Barber*, 3 Taunt, 465: *Duke* v. *Watchorn*, 1 Dowl., N. S. 265; 11 L. J., Q. B. 53: *Kirk* v. *Scott*, 1 Dowl., N. S. 267. And see ante, p. 1316.

(*t*) *Partridge* v. *Fraser*, 7 Taunt. 307; 1 Moore, 54.

(*u*) Ante, p. 1317.

(*x*) See *Hiscocks* v. *Kemp*, 3 A. & E. 676: *Dollings and Sandys* v. *White*, 22 L. J., Q. B. 327.

PART XIV.

otherwise the Court or a Judge may, at the cost of the plaintiff, order the execution to stand only for the real amount due (*y*), or in case of dispute may refer it to one of the Masters, or to a jury, to ascertain the amount. And an action might, perhaps, be supported against the plaintiff (*z*). Where a warrant was given to a surety, and the defeazance, after reciting that the warrant was given to secure the plaintiff from all responsibility, and to give him the means of providing for the payment of the bills for which he was surety, empowered him "at any time, or from time to time, to take out execution for the whole or any part of the amount," the Court held that he might at any time take out execution for the whole of the amount of the bills, and that he was not confined to the sum which had then become due in respect of them (*a*). Where a warrant was given for the payment of money by instalments, and by the terms of the defeazance the plaintiff was to be at liberty to enter up judgment immediately, "but no execution to be issued until default made in payment of the said sum of 1,402*l.* 18*s.* 8*d.*, with interest as aforesaid, by the instalments and in the manner hereinbefore mentioned," the Court held, that the plaintiff upon a fair construction of the above terms of the defeazance, was at liberty to sue out and execute a writ of execution for the entire sum, upon default in payment of any one of the instalments (*b*). In such or similar cases, where the sum secured by the warrant is payable by instalments, and default is made, the plaintiff may, on each default made, have and execute a fresh execution, if the terms of the warrant authorize it, otherwise not (*c*).

After a change of parties, by death, &c.

As to the course to be pursued where there has been a change of the parties to the judgment, *see ante*, p. 959.

Suggestions of breaches, and sci. fa. under 8 & 9 Will. 3, c. 11, unnecessary.

Although a warrant of attorney be given to secure the payment of an annuity, or of a sum of money by instalments, or the like, it seems a writ of scire facias is not necessary, previous to suing out execution for every periodical payment or instalment, as would be the case if a bond only had been given; for the stat. 8 & 9 W. 3, c. 11, *s.* 8, which requires suggestions of breaches and the scire facias in such cases (*d*), does not extend to warrants to confess judgment, even when given merely as a collateral security with a bond (*e*).

Execution in case of bankruptcy, &c.

As to how far an execution is or is not available in case of bankruptcy (*f*) of the defendant, *see ante, Ch. CII.*

Setting aside

If the execution be issued against good faith, the same may be

---

(*y*) See *Brown* v. *Burton*, 5 D. & L. 289: *Tilby* v. *Best*, 16 East, 163: *Amery* v. *Smalridge*, 2 W. Bla. 760: *Bell* v. *Tidd*, 9 Dowl. 949: *Greenslade* v. *Vaughan*, 8 Dowl. 687. See ante, p. 1302; Vol. 1, p. 802.

(*z*) *Wentworth* v. *Bullen*, 9 B. & C. 840.

(*a*) *Duke* v. *Watchorn*, 11 L. J., Q. B. 53; 1 Dowl., N. S. 265. And see *Kirk* v. *Scott*, 1 Dowl., N. S. 267.

(*b*) *Leveridge* v. *Forty*, 1 M. & Sel. 706. See *Rose* v. *Tomlinson*, 3 Dowl. 49: *Gowlett* v. *Hanforth*, 2 Bla. W. 958: *Davis* v. *Gompertz*, 2 Dowl. 467: *Cuthbert* v. *Dobbin*, 1 C. B. 278.

(*c*) See *Atkinson* v. *Baynton*, 1 Bing. N. C. 444; 1 Hodges, 7.

(*d*) See ante, Ch. CX.

(*e*) *Anstenbury* v. *Morgan*, 2 Taunt. 195. See per *Littledale*, J., in *Jones* v. *Thomas*, 5 B. & Ad. 41. But see *Hall* v. *Blackwell*, 10 Ir. Com. Law Rep. 38, Q. B.: *Quin* v. *O'Keefe*, 10 Ir. Com. Law Rep. 393, Q. B.

(*f*) See *Young* v. *Billiter*, 30 L. J., Q. B. 153.

execution for breach of faith, &c.

set aside (*g*). The observations already made (*Vol.* 1, p. 850), as to setting aside executions in general for irregularity, will be here applicable.

Under the former practice, it was held that assumpsit would not lie by the party against whom a fi. fa. has issued on a subsisting judgment, to recover the sum levied under it, on the ground that such judgment was signed on a warrant of attorney which was obtained by fraud or duress (*h*).

(*g*) See *Joel* v. *Dicker*, 5 D. & L. 1; 2 B. C. Rep. 127.

(*h*) *De Medina* v. *Grove*, 10 Q. B. 152; 15 L. J., Q. B. 287.

CHAPTER CXV.

REFERENCE TO MASTER AND WRIT OF INQUIRY TO ASCERTAIN THE AMOUNT OF DAMAGES.

	PAGE		PAGE
1. *In what Cases necessary*....	1326	3. *Writ of Inquiry for that purpose*.....	1331
2. *Reference to Master, &c. to ascertain the Amount of Damages*	1327		

1. *In what Cases necessary.*

PART XIV.

After interlocutory judgment.

WHEN the judgment is interlocutory merely (*a*), the plaintiff's title to damages is thereby established, but the amount of them yet remains to be ascertained. This is in general done by a reference, or by means of a writ of inquiry, as presently mentioned.

In action on bonds.

As to a writ of inquiry after judgment by default in an action on a bond under the 8 & 9 *W.* 3, *c.* 11, *see ante*, p. 1282.

Where one of several defendants suffers judgment.

Where there are several defendants, if some let judgment go by default, and others plead to issue, the jury who try the issue should, unless otherwise directed (*ante*, *Vol.* 1, pp. 262, 332), assess the damages against all the defendants (*b*). Formerly, in actions where the plea of one defendant enured to the benefit of all (*c*), if the plaintiff failed in obtaining a verdict against those who had pleaded, he could not have damages assessed against the others who let judgment go by default. In actions *ex contractu*, the plea of one defendant formerly enured to the benefit of all; but this was otherwise as a general rule in actions *ex delicto* (*d*). This is probably still so. As to the effect of misjoinder, &c., *see ante*, p. 1019.

Where the jury omit to assess damages.

Where the jury on a trial at Nisi Prius, or at bar, acted as an inquest—as, where they had to assess damages on a judgment by default (*e*), and the jury omitted to assess such damages, the omission of the jury to assess the damages might afterwards, upon

---

(*a*) An interlocutory judgment establishes the plaintiff's right to recover something, but leaves the amount he is entitled to recover unascertained. As to when a judgment by default is interlocutory, see ante, Vol. 1, p. 259 et seq.

(*b*) See Ord. XIII. r. 6, ante, Vol. 1, p. 262; Ord. XXVII. r. 5, ante, Vol. 1, p. 332; 11 Co. 5: *Dicker* v. *Adams*, 2 B. & P. 163.

(*c*) *Morgan* v. *Edwards*, 6 Taunt. 398: *Porter* v. *Harris*, 1 Lev. 63: *Boulter* v. *Ford*, 1 Sid. 76; Ca. Pr. C. P. 107; Pr. Reg. 102: *Hannay* v. *Smith*, 3 T. R. 662: *Biggs* v. *Boger*, 2 Ld. Raym. 1372; 1 Str. 619; 8 Mod. 217.

(*d*) *Jones* v. *Harris*, 2 Str. 1108: *Cressey* v. *Webb*, Id. 1222.

(*e*) See *Townshend* v. *Pool*, Barnes, 228: *Darrose* v. *Newbott*, Cro. Car. 143: *Valentine* v. *Fawcett*, Hardw. 138; 2 Str. 1021: *Herbert* v. *Waters*, 1 Salk. 205; 1 Ld. Raym. 69: *Deverell* v. *Marshall*, 2 W. Bl. 921; 3 Wils. 442; 10 Co. 118.

application to the Court, be supplied by a writ of inquiry; and the same in all other cases where an attaint would not lie (*f*). But wherever an attaint (abolished by the stat. 6 *G.* 4, *c.* 50, *s.* 60) would have lain, if the jury had assessed the damages, as in an ordinary personal action, and the jury found a verdict for the plaintiff, but omitted to assess the damages (*g*)—the omission could not be supplied by a writ of inquiry (*h*). Also, in a replevin for a distress for rent, if the jury found for the defendant, but omitted to inquire of the arrears of rent, in pursuance of stat. 17 *C.* 2, *c.* 7, this omission could not be remedied by a writ of inquiry; because the statute requires that the inquiry be made by the same jury who try the issue (*i*). And in this last class of cases, where there was an omission to assess the damages, the proper course was to award a trial *de novo* (*k*). Under the present practice, an omission by the jury to assess damages can in some cases be supplied under *Ord. XL. r.* 10, *ante*, *Vol.* 1, p. 760.

2. *Reference to the Master, &c. to ascertain the Amount of Damages.*

Enactments and rules as to.

Enactments and Rules as to.]—By *R. of S. C., Ord. XXXVI. r.* 57 (reproducing the *Com. Law Proc. Act*, 1852, *s.* 94), "In every action or proceeding in the Queen's Bench Division in which it shall appear to the Court or a Judge that the amount of damages sought to be recovered is substantially a matter of calculation, it shall not be necessary to issue a writ of inquiry, but the Court or a Judge may direct that the amount for which final judgment is to be entered shall be ascertained by an officer of the Court, and the attendance of witnesses and the production of documents before such officer may be compelled by subpœna, and such officer may adjourn the inquiry from time to time, and shall indorse upon the order for referring the amount of damages to him the amount found by him, and shall deliver the order with such indorsement to the person entitled to the damages, and such and the like proceedings may thereupon be had as to taxation of costs, entering judgment, and otherwise, as upon the finding of a jury upon a writ of inquiry."

See the provisions of the 8 & 9 *W.* 3, *c.* 11, *s.* 8, as to the assignment or suggestion of breaches, and as to judgment for a penalty as a security for damages in respect of further breaches of conditions of bonds within that Act (*ante*, p. 1279).

We have noticed (*ante*, *Chs. XVI.* and *XXVI.*), that where interlocutory judgment is signed for default of appearance or in delivering defence, and the plaintiff's claim is not for a debt or liquidated demand only, but for detention of goods and pecuniary damages, or either of them, the Court or a Judge may order that, instead of a writ of inquiry, the value and amount of damages, or either of them, be

(*f*) See *Eichorn* v. *Le Maitre*, 2 Wils. 367: *Kinaston* v. *Mayor, &c. of Shrewsbury*, Hard. 295: *Phillips* v. *Jones*, 15 Q. B. 859; 19 L. J., Q. B. 374.

(*g*) *Clement* v. *Lewis*, 3 B. & B. 297; 7 Moore, 200: *Pim* v. *Reid*, 6 M. & Gr. 1; 6 Sc. N. R. 1011; 1 D. & L. 512; 12 L. J., C. P. 299.

(*h*) See *Eichorn* v. *Le Maitre*, 2 Wils. 367: *Pim* v. *Reid*, supra.

(*i*) *Herbert* v. *Waters*, 1 Salk. 205; 1 Ld. Raym. 59. See *Freeman* v. *Archer*, 2 W. Bl. 763.

(*k*) *Lewis* v. *Clement*, 3 B. & Ald 702. And see *Clement* v. *Lewis*, 3 B. & B. 297; 7 Moore, 200: *Gregory* v. *Duke of Brunswick*, 1 D. & L. 835.

PART XIV.

ascertained in any way in which any question arising in an action may be tried (*m*). Under these rules, it may be referred to a Master to ascertain the amount of damages for which final judgment is to be signed.

In what cases there should be a reference.

In what Cases there should be a Reference.]—We have already shown (*n*) where there should be either a reference or a writ of inquiry to ascertain the amount of damages. We will now proceed to show when there should be a reference, which in general is to the Master, and not a writ of inquiry (*o*).

Before the *Com. Law Proc. Act*, 1852, as the inquest under a writ of inquiry was merely for the purpose of informing the conscience of the Court, the Court might in all cases, if they pleased, assess the damages, and thereupon give final judgment (*p*); and therefore it was the practice in actions upon bills of exchange, promissory notes (*q*), bankers' cheques (*r*), of covenant for non-payment of a sum certain (*s*), and the like, to refer it to the Master to compute the amount of principal and interest due, without a writ of inquiry. But when the computation of damages was not a mere *matter of calculation* of figures, the Court, before the above Act, would not refer it to one of the Masters, but would put the plaintiff to sue out his writ of inquiry. Thus, in an action on a bill of exchange for foreign money (*t*), or on a foreign judgment (*u*), or on a bond to save harmless (*x*), or on a covenant to indemnify (*y*), or on a bottomry bond (*z*), or for calls due on railway shares (*a*), and even in an action upon a judgment recovered on a bill of exchange where interest was sought for (*b*), or in an assumpsit for a sum certain due upon an agreement (*c*), the Court, before the above Act, have refused to refer it to the Master. In cases before the

(*m*) How actions may be tried, see Vol. 1, p. 582.

(*n*) Ante, p. 1326.

(*o*) In some cases, as shown supra, in cases of interlocutory judgment by default the reference may be to an official referee or other officer.

(*p*) *Bruce* v. *Rawlins*, 3 Wils. 61: *Thelluson* v. *Fletcher*, 1 Doug. 316, n.; 1 Esp. 73: *Gould* v. *Hammersley*, 4 Taunt. 148.

(*q*) *Shepherd* v. *Charter*, 4 T. R. 275; 2 Saund. 107, n. (2): *Eyre* v. *Bank of England*, 1 Bligh, 582. And in *Goldsmid* v. *Taite*, 2 B. & P. 55, the Court referred it to the prothonotary to compute principal, interest, *exchange*, *re-exchange*, and costs, but not charges and expenses. But in *Napier* v. *Schneider*, 12 East, 419, the Court refused to direct the Master to allow *re-exchange*, on a bill drawn in Scotland upon and accepted by the defendant in England. And see *Kendrick* v. *Lomax*, 2 Tyr. 438; 8 Dowl. 240.

(*r*) *Rastatti* v. *Webb*, H. T. 1839, Ex.: *Bentham* v. *Chesterfield*, 5 Sc. 417.

(*s*) *Thelluson* v. *Fletcher*, 1 Doug. 316; 1 Esp. 73: *Wingfield* v. *Crowley*, 13 Price, 53: *Berton* v. *Sant*, 8 T. R. 326: *Byron* v. *Johnson*, 8 T. R. 410: *Campion* v. *Cowslay*, 6 Taunt. 256; 2 Marsh. 56: *Alsop* v. *Hill*, 2 Chit. Rep. 32.

(*t*) *Mannell* v. *Massareene*, 5 T. R. 87.

(*u*) *Messin* v. *Massareene*, 4 T. R. 493. See *Doran* v. *O'Reilly*, 5 Dow. 133.

(*x*) *Cooke* v. *Pettit*, 2 Wils. 5.

(*y*) *Dennison* v. *Muir*, 14 East, 622. See *Smith* v. *Nesbitt*, 2 C. B. 288; 3 D. & L. 420, an action of covenant to pay over first-fruits received under a sequestration.

(*z*) Tidd, 9th ed. 571.

(*a*) *Cheltenham R. Co.* v. *Fry*, 1 Dowl. 616.

(*b*) *Nelson* v. *Sheridan*, 8 T. R. 395: *Bishop* v. *Best*, 2 Chit. Rep. 233; 3 B. & Ald. 275. See *Blenkmore* v. *Flemyng*, 7 T. R. 446: *Taylor* v. *Capper*, 14 East, 442: *M'Clure* v. *Dunkin*, 1 East, 436.

(*c*) Tidd, 9th ed. 571.

above Act, where the Court would refer it, as when the action was on a bill of exchange, or other matter where the damages were merely the subject of calculation, it was necessary that this should appear upon the face of the declaration, and not be mere matter of evidence (*d*). And if one of several counts contained matters of this kind, you could, after a judgment by default, have it referred to the Master to compute the damages upon that count, upon your entering a *remittitur damna* as to the others (*e*), but not after payment had been made generally on account (*f*).

By the above rule, wherever the amount of damages *is substantially a matter of calculation*, it may be referred to the Master to ascertain the same (*g*). It is questionable what is meant by these words *substantially a matter of calculation*. The Common Law Commissioners, from their report, seem to have considered that the damages in an action for the non-repair of a house, or the like, are substantially a matter of calculation. In a case of this kind, however, the evidence may be very conflicting, and the damages anything but a mere matter of calculation (*h*).

Advisable to proceed by reference when practicable.

It is advisable and proper to get the damages ascertained by a reference when practicable, as it is a more expeditious and less expensive mode of proceeding than executing a writ of inquiry. Where there are two or more claims in the statement of claim, one of which is for a cause of action the damages upon which may be ascertained by the Master, and the others not, and the plaintiff has obtained interlocutory judgment upon all, if he has sustained no real damages upon the latter, or if he has, but is willing to abandon his claim to them, his course is to withdraw his claim as to these, and obtain a reference as to the former (*i*). As to the withdrawal by the plaintiff of part of his claim, *see ante, Vol.* 1, p. 338.

Obtaining order for reference.

Obtaining Order for Reference to the Master (k).]—*After interlocutory judgment has been signed (l), make an affidavit (m), stating what the action is brought for, that interlocutory judgment has been signed, and any other facts showing that the case is a proper one to be referred to the Master (n). Take out a summons for an order that the amount*

(*d*) *Osborne* v. *Noad*, 8 T. R. 648.

(*e*) *Duperoy* v. *Johnson*, 7 T. R. 473: *Heald* v. *Johnson*, 2 Smith, 46, 47, n.: *Hoard* v. *Hunt*, C. P., M. 1838; 2 Jur. 24: *Bowden* v. *Horne*, 7 Bing. 716; 5 M. & P. 756.

(*f*) *Jones* v. *Shiel*, 6 Dowl. 579.

(*g*) See *National Insurance Co.* v. *Best*, 27 L. J., Ex. 19.

(*h*) See *Re Cummins* v. *Birkett*, 3 H. & N. 156; 27 L. J., Ex. 216.

(*i*) Formerly, a *remittitur damna* was entered. *Fleming* v. *Langton*, 1 Str. 632: *Heald* v. *Johnson*, 2 Smith, 44: *Duperoy* v. *Johnson*, 7 T. R. 473: *Jones* v. *Shiel*, 6 Dowl. 579; 3 M. & W. 433. Possibly this might still be done. See ante, Vol. 1, pp. 261 and 331, as to the mode of proceeding where plaintiff's claim is for a liquidated demand and also for damages.

(*k*) An order for a reference to an official referee, &c. is obtained in the same way as this order.

(*l*) *Moses* v. *Compton*, 6 M. & Sel. 381: *Pocock* v. *Carpenter*, 3 M. & Sel. 109: *Haywood* v. *Chambers*, 5 B. & Ald. 753; 1 D. & R. 411: *Russen* v. *Hayward*, 1 D. & R. 444; 5 B. & Ald. 752.

(*m*) Before the C. L. P. Act, 1852, the affidavit for a rule to compute on a bill of exchange might describe the defendant by initials, if he so signed the bill, and was so described in the writ. The affidavit in such a case should have shown the form of signature to the bill: *Hilbert* v. *Wilkins*, 8 Dowl. 139.

(*n*) See Chit. Forms, p. 670.

PART XIV.

of damages for which final judgment is to be signed, be ascertained by one of the Masters. Serve (*o*) *such summons and attend in the usual way. If the order is made, draw it up, and obtain an appointment from the Master on it to proceed with the reference. Serve a copy of the order and appointment a reasonable time before the time appointed* (*p*). *If the claim is of a simple character, or mere matter of calculation, and the plaintiff is entitled to recover costs, notice of taxation of costs may be given for the same time as that at which the reference is to be proceeded with* (*q*).

If there be several defendants who have suffered judgment by default, though separate interlocutory judgments be signed against each, still there should be but one order of reference, and the application for the same should not be made until the last of the judgments is signed (*r*). Formerly it was held that service of a copy of the order of reference upon one of several defendants would suffice (*s*), and possibly this is still so, but it is advisable, if possible, to serve all.

Showing cause.

No irregularity in the judgment or previous to the judgment can be shown as cause against the summons; but a cross application must be made to set aside the judgment for the irregularity complained of; and pending which the summons to refer may be adjourned (*t*). Nor is it any answer to the application to refer, that the defendant has brought an action against the plaintiff for an account (*u*). It cannot be granted pending a summons with a stay of proceedings after it is attendable (*x*) to set aside the judgment (*y*).

Proceedings on reference.

Proceedings on Reference to the Master.]—*At the time appointed by the Master attend at his room with the order of reference, your bill of costs and papers, and with your witnesses and documents, if any. The Master will ascertain the amount of the damages, and indorse the same upon the order of reference, and deliver the same to you. He will also, where the claim is of a simple nature, and the plaintiff is entitled to recover costs, and has given notice of their taxation, tax the costs in the usual way. The Master may adjourn the inquiry if he thinks proper* (*z*). *The attendance of witnesses, and the production of documents before the Master, may be compelled by subpœna, in the same manner as before a jury upon a writ of inquiry* (*a*). As to the evidence upon a writ of inquiry, and as to when it is necessary to

---

(*o*) As to serving a summons, see Ch. CXXVI. As to serving a defendant, who has appeared in person, see ib.

(*p*) *Branning* v. *Paterson*, 4 Taunt. 487: *Sellers* v. *Tufton*, 1 Chit. Rep. 466, n.; Tidd, 9th ed. 590: *Huckfield* v. *Kendall*, 1 Chit. Rep. 693.

(*q*) Vol. 1, p. 693 et seq.

(*r*) *Field* v. *Pooley*, 3 M. & Gr. 756; 4 Sc. N. R. 524.

(*s*) *Carter* v. *Southall*, 3 M. & W. 128: *Amlot* v. *Evans*, 7 M. & W. 462; 9 Dowl. 219: *Grant* v. *Stoneham*, 7 Dowl. 126: *Figgins* v. *Ward*, 2 Dowl. 364; 2 C. & M. 424: *Ettison* v. *Wood*, 21 L. J., Q. B. 317.

(*t*) *Marryatt* v. *Winkfield*, 2 Chit. Rep. 119: *Pell* v. *Brown*, 1 B. & P. 369: *Luxford* v. *Groombridge*, 2 Dowl., N. S. 332: *Keily* v. *Villebois*, 8 Dowl. 136. And see *Middleton* v. *Woods*, 6 M. & W. 156; 8 Dowl. 170, nom. *Middleton* v. *Hughes*, per *Parke*, B.

(*u*) *Berthen* v. *Street*, 8 T. R. 326.

(*x*) *Anderson* v. *Southern*, 9 Dowl. 994.

(*y*) *Trego* v. *Tatham*, 2 Sc. N. R. 537; 9 Dowl. 379.

(*z*) See the rule, ante, p. 1327.

(*a*) See the rule, ante, p. 1327.

produce a bill of exchange or document mentioned in the statement of claim and upon which the claim is founded, *see post*, p. 1336.

Proceedings after Reference.]—By *Ord. XXXVI. r.* 57, *post*, p. 1337, after the Master has ascertained the amount of damages, "such and the like proceedings may thereupon be had as to taxation of costs, entering judgment, and otherwise, as upon the finding of a jury upon a writ of inquiry." As to which, *see post*, p. 1340. Proceedings after reference.

By *R. of S. C., Ord. XLI. r.* 8 (reproducing *r.* 171, *H. T.* 1853), "Where reference is made to a Master to ascertain the amount for which final judgment is to be entered, the Master's certificate shall be filed in the Central Office when judgment is entered."

As to the form of judgment after judgment by default and assessment of damages, *see* Chitty's Forms, pp. 110, 185.

3. *Writ of Inquiry to ascertain the Amount of Damages.*

	PAGE		PAGE
In what Cases necessary, &c. ..	1331	*The Execution of the Writ* ..	1335
Form of, &c.	1331	*Return of*.....	1338
How sued out, &c.	1332	*Setting aside Inquisition, &c.*...	1338
Before whom to be executed....	1333	*Amendment of*.....	1340
Order for a good Jury.....	1333	*Costs*.....	1340
Notice of Inquiry	1333	*Final Judgment, &c.*	1340
Subpœnaing Witnesses	1335	*Execution*.....	1340
Attending by Counsel.....	1335		

By *Ord. XXXVI. r.* 56, "The provisions of Rules 14, 15, 19, 34, 35, 36, and 37 of this Order, shall, with the necessary modifications, apply to an inquiry, pursuant to a writ of inquiry."

Rule 14 relates to the length of notice (*ante*, p. 578); Rule 15 to entry for trial (*ante*, p. 598); Rule 19 to countermand (*ante*, p. 580); Rule 34 to adjournments (*ante*, p. 647); Rule 35 to habeas corpus (*ante*, p. 568); Rule 36 to the conduct of the trial (*ante*, p. 644); and Rule 37 to particulars in actions for libel and slander (*ante*, p. 393).

In what Cases necessary.]—We have already shown (*ante*, p. 1326) when it is necessary to get damages for which final judgment is to be signed ascertained by the Master, &c., or by means of a writ of inquiry. In what cases necessary.

Form of, &c.]—The writ (which is a judicial one) is directed to the sheriff of the county in which the action would have been tried, stating the judgment by default and commanding the sheriff or other officer having the execution of such writs, that, by the oath of twelve honest and lawful men of his county, he diligently inquire the same, and return the inquisition into Court (*b*). Under the present practice, if the judgment is signed in default of a defence, the writ should be directed to the sheriff of the county named by the plaintiff in his statement of claim as the Form of.

(*b*) A form of writ of inquiry is prescribed by the R. of S. C., App. J., No. 8. See Chit. Forms, p. 672. As to the form in an action of detinue, see *Phillips* v. *Jones*, 15 Q. B. 859.

PART XIV.

place for trial, or if no place be so named, then to the sheriff of Middlesex, unless an order be obtained ordering it to be executed elsewhere. When the judgment is signed in default of appearance, it has been doubted whether the effect of *Ord. XXXVI. r.* 1 (*ante, Vol.* 1, p. 589), is not to make it necessary that the writ should be executed in Middlesex, unless an order to the contrary be obtained. But the practice of the Queen's Bench Division is for the plaintiff to issue the writ directed to the sheriff of the county in which he would have proposed to have the action tried, and to give notice to the defendant of the inquiry there, and if the latter desires that the writ be executed elsewhere, he must apply for an order for that purpose (*e*). If the sheriff be a party to the suit, the writ must be directed to the coroner, and state in the writ that the sheriff is a party. In cases of difficulty it may by leave of the Court or a Judge be executed before a Judge of assize or Nisi Prius, and in that case it is usual, and it would seem proper, to direct the writ to the Judges of assize, or Chief Justice if the case is to be tried at Nisi Prius, and the sheriff, the Judge in such a case being deemed an assistant to the sheriff.

Teste. It is tested on the day on which it is issued (*Ord. II. r.* 8; 2 *W.* 4, *c.* 39, *s.* 11) (*d*).

Return. The return-day is usually the day after that on which it is intended to execute the writ. It must not be before that day.

Must include all the defendants. The writ must in general be against all the defendants jointly who have allowed judgment to go by default (*e*).

Before the Judicature Acts, in entering the proceedings to judgment on the roll, an award of the writ of inquiry was always inserted, and the writ must have agreed with it (*f*). No such entry is now necessary.

How sued out, &c. *How sued out, &c.*]—*Get a form of writ and a præcipe with an impressed* 5*s. fee stamp on same* (*Orders, post, Appendix*). *Fill them up and take them to the proper office and get the writ stamped, and leave the præcipe there. Indorse on the writ a memorandum of the day on which it is to be executed; and leave it at the sheriff's or deputy sheriff's office two days before at latest if it is to be executed in the country, or one day before at the latest if it is to be executed in London or Middlesex* (*g*), *the sheriff will thereupon summon a jury for the execution of it. When the writ is to be executed in London, it is left at the secondary's office,* 5, *Basinghall Street.* If the Court of Appeal or House of Lords, on appeal from a judgment for the defendant, reverse it, and a writ of inquiry is necessary, the writ issues out of the Court below (*h*).

(*c*) By the 3 & 4 W. 4, c. 42, s. 22, the Court or a Judge might, in a *local* action, order the inquiry to be executed in another county than that in which the venue was laid, and for that purpose might order a suggestion to be entered on the record, that the inquiry might be more conveniently executed in the other county.

(*d*) See *Seaton* v. *Heap*, 5 Dowl. 247. See Vol. 1, p. 220.

(*e*) *Mitchell* v. *Milbank*, 6 T. R. 199. And see *Field* v. *Pooley*, 3 M. & Gr. 756; 4 Sc. N. R. 524: *Onslow* v. *Orchard*, 1 Str. 422.

(*f*) See *Gould* v. *Hammersley*, 4 Taunt. 148.

(*g*) See R. H. 23 G. 3, K. B. It is usual to leave the writ a longer time before it is to be executed than here mentioned.

(*h*) Ante, p. 992. And see *Vicars* v. *Haydon*, Cowp. 843.

CHAP. CXV.

Before whom to be executed.]—The writ is usually executed before the sheriff or his deputy (*i*). It may, however, under special circumstances, by leave of the Court or a Judge, be executed before one of the Judges of the High Court, in Middlesex or London, or before a Judge of assize, as an assistant to the sheriff, in another county (*k*). It is only, however, where some difficult point of law or nice question of evidence is likely to arise in the course of the inquiry, or where the cause is of great importance, that this indulgence will be granted (*l*). *The application for this purpose should be made to a Master on a summons, and is not an ex parte application (m). Serve a copy of the order as in ordinary cases, and annex the rule or order to the writ of inquiry, and leave it at the sheriff's or deputy sheriff's office. You then enter the cause in the same manner as if the action were to be tried at Nisi Prius. The sheriff afterwards returns the inquisition as in other cases.* Before whom to be executed.

Good Jury.]—Before the 6 *G.* 4, *c.* 50, *s.* 52, jurors summoned upon writs of inquiry were of such inferior persons, that it was the common practice to obtain an order for the sheriff to return a "good jury," but this is now no longer the practice, though if the case is of sufficient importance to warrant it, a Master's order upon summons (*n*) may be obtained for the sheriff to summon a jury from the special jury book (*o*). By *R.* 46, *H. T.* 1853, "There shall be no rule for the sheriff to return a good jury upon a writ of inquiry, but an order shall be made by a Judge upon summons for that purpose" (*p*). The costs of this jury are usually allowed as costs in the cause (*q*). Good jury.

Notice of Inquiry.]—The plaintiff must give a written notice of executing the writ of inquiry (*r*) to the defendant's solicitor in the action, if the defendant has appeared by solicitor (*s*). In an action against several defendants, where all of them suffer judgment by default, it is as well to give the notice to each of them (*t*): it seems, Notice of inquiry. To whom given.

(*i*) See *Wallace* v. *Humes*, Barnes, 231: *Davis* v. *Skyllins*, Id. 232. The sheriff cannot appoint more than one deputy to execute the writ. See *Denny* v. *Trapnell*, 2 Wils. 378; and per *Patteson*, J., in *Reg.* v. *Sheffield R. Co.*, 11 A. & E. 201.

(*k*) See *Anon.*, 12 Mod. 609; Tidd, 487, 576: *Waite* v. *Smales*, Barnes, 135. See the forms, Chit. Forms, p. 673.

(*l*) 1 Sellon, 344.

(*m*) See *The Archbishop of Canterbury* v. *Burlington*, 1 Dowl., N. S. 285.

(*n*) See the form, Chit. Forms, p. 673.

(*o*) See *Price* v. *Williams*, 5 Dowl. 160. In this case each juror receives one guinea, which is allowed on taxation: *Vickory* v. *London, Brighton and S. C. R. Co.*, L. R., 5 C. P. 165; 39 L. J., C. P. 169: *Vines* v. *Same*, L. R., 5 Ex. 201; 39 L. J., Ex. 175.

(*p*) The rules of H. T. 1853, as to juries are expressly excepted from the repeal effected by the R. of S. C. 1883, App. O. See ante, Vol. 1, p. 199, n. (*b*).

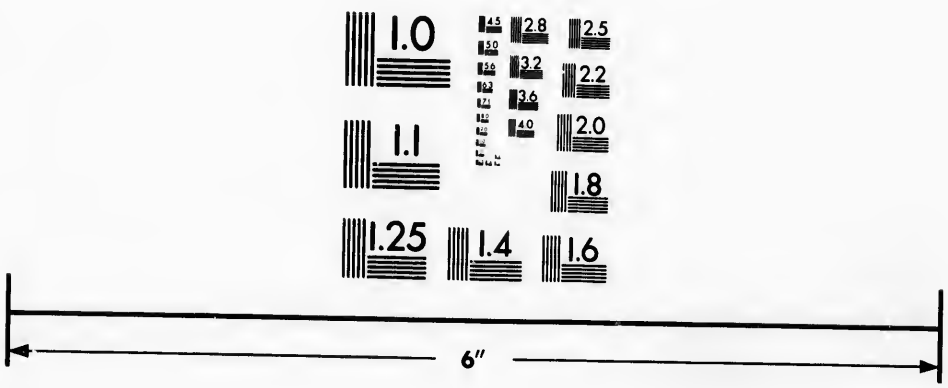
(*q*) *Wilkinson* v. *Malin*, 1 Dowl. 630; 1 C. & M. 238. Before the rule of H. T. 2 W. 4, r. 10, it was otherwise. (See *Calvert* v. *Gordon*, 3 M. & R. 124, 128; Chapman, 1 Ad. 26.)

(*r*) See R. 161, H. T. 1853.

(*s*) *Harding* v. *Stafford*, Say. 133; Cas. Pr. C. P. 62: *Lee* v. *Bradford*, Barnes, 300: *Mosely* v. *Sandford*, Barnes, 311; Pr. Reg. 276: *Knibbs* v. *Hopcroft*, 10 Price, 147: *Brookes* v. *Till*, 2 Y. & J. 276. As to the service of proceedings, where the defendant has appeared in person, see post, Ch. CXXVI. As to the service of a notice of trial, see Vol. 1, p. 580.

(*t*) Pr. Reg. 443; Tidd, 9th ed. 676.

IMAGE EVALUATION TEST TARGET (MT-3)



Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

2.8
2.5
3.2
2.2
3.6
2.0
1.8
1.6
1.1
1.0

PART XIV.

however, that where the cause of action is a joint one, the service of it upon any one will suffice (*u*).

Ten days' notice of inquiry must be given, and is sufficient in all cases, whether in town or country, unless otherwise ordered by the Court or a Judge (*x*).

Short notice.

"Short notice" of inquiry means four days' notice (*x*). But being under terms to take short notice of trial does not bind the defendant to take short notice of inquiry (*y*).

Calendar month's notice, when necessary.

As to its being necessary to give a calendar months' notice of intention to proceed in a cause where no proceedings have been had for one year, *see post*, *Ch. CXXV.* (*z*).

Form of notice.

The notice is in writing, and usually on a separate piece of paper. When the writ is to be executed before the sheriff, the notice states that it will be executed on a day therein stated, which must be on or before the return-day of the writ (*a*), not being Sunday (*b*), usually between two certain hours (*c*), as between the hours of eleven and one o'clock in the forenoon, "at the Secondary's Office, No. 19, Gresham Street, in the city of London," if in London; or, "at the Sheriff's Office, in Red Lion Square, near Holborn, in the county of Middlesex," if in Middlesex; or if in any other county, then at some place within the county appointed for that purpose, and particularly described in the notice (*d*). A notice of executing the writ "*by* ten o'clock" (*e*), or "at ten o'clock, or as soon after as the sheriff can attend" (*f*), will be bad for uncertainty; so, "between the hours of ten and two o'clock," has been holden insufficient, as not being sufficiently definite (*g*). But a notice to execute "at eleven o'clock" is good (*h*). And where the notice was given for Wednesday, the 11th of June, when Wednesday fell on the 10th, on which day the inquiry was executed, the Court refused to set it aside, the defendant refusing to swear that he was misled by it (*i*). If the writ is to be executed before a Judge of the High Court of Justice or Judge of Assize, the notice is given generally (*k*), in the same manner as in a notice of trial (*Vol.* 1, *Ch. LVII.*).

Countermand, &c. of notice.

Notice of inquiry cannot be countermanded without leave (*l*). See fully, *ante*, *Vol.* 1, p. 580.

The notice can be continued but once (*m*). The notice of con-

(*u*) See *Figgins* v. *Ward*, 2 Dowl. 364: *Amlot* v. *Evans*, 7 M. & W. 462; 9 Dowl. 219, nom. *Arnold* v. *Evans*.

(*x*) Ord. XXXVI. r. 14, ante, Vol. 1, p. 578; applied to writs of inquiry by Ord. XXXVI. r. 56, ante, p. 1331.

(*y*) *Stevens* v. *Pell*, 2 Dowl. 355; 2 C. & M. 421; Vol. 1, p. 578.

(*z*) See *Peyton* v. *Burdus*, 2 Str. 1100: *Smith* v. *Paull*, 3 Smith, 101. Per *Parke*, B., in *Simpson* v. *Heath*, 7 Dowl. 837.

(*a*) *Davies* v. *Salter*, 2 Salk. 627: *Dyke* v. *Blaekston*, 2 Ld. Raym. 1449.

(*b*) *Hoyle* v. *Cornwallis*, 1 Str. 387.

(*c*) *Arnold* v. *Squire*, Say. 181.

(*d*) See Comyns, 551: *Squire* v. *Almond*, Barnes, 297: *Le Mark* v. *Newnham*, Id. 300: *Arnold* v. *Squire*, Say. 181; Pr. Reg. 121.

(*e*) *Ison* v. *Fowen*, 2 Str. 1142.

(*f*) *Hannaford* v. *Holman*, Barnes, 295.

(*g*) *Foster* v. *Smales*, Barnes, 295, 296: *Robinson* v. *Phillips*, Id. 296; Comyns, 551. And see 1 Barnard, 139: *Langstaffe* v. *Lamb*, Barnes, 293.

(*h*) *Last* v. *Denny*, Barnes, 302.

(*i*) *Eldon* v. *Haig*, 1 Chit. Rep. 11: *Batten* v. *Harrison*, 3 B. & P. I. But see *Abraham* v. *Noakes*, 1 Chit. Rep. 615.

(*k*) Tidd, 579; 1 Sellon, 353.

(*l*) Ord. XXXVI. r. 19, ante, Vol. 1, p. 580; applied to writs of inquiry by Ord. XXXVI. r. 56, ante, p. 1331.

(*m*) *Price* v. *Bambridge*, Barnes, 297: *Burgess* v. *Royle*, 2 Chit. Rep. 220: *Fryer* v. *Binns*, B. C., M. 1837, 2 Jur. 15. A notice by continuance,

tinuance need not specify the place or hour, for it shall be taken to refer to the place and hour specified in the original notice (*u*).

Costs of day for not proceeding on notice.

If the plaintiff do not either proceed to execute his writ according to the notice, or countermand it in time, the defendant will be entitled to his *costs of the day*, on an affidavit of attendance and necessary expenses incurred (*o*).

Irregularity in notice.

If no notice of executing a writ of inquiry or an insufficient one be given, the Court may set aside the execution of the writ (*p*). An *irregularity* in the notice of inquiry, or in the time and place of executing it, is *waived*, in general by the defendant or his solicitor attending at the inquiry, and making a defence on the execution of the writ (*q*). But retaining the notice is no waiver of the irregularity (*r*).

Subpœnaing witnesses, &c.

Subpœnaing Witnesses, &c.]—After the notice of inquiry, the next step to be taken is to subpœna the witnesses necessary to prove the amount of the damages (*s*). The enactments and rules as to the admission of documentary evidence apply to writs of inquiry (*see Vol.* 1, p. 484).

Attending by counsel.

Attending by Counsel.]—If you wish to attend the execution of the writ of inquiry by counsel, you should give notice thereof to the opposite party (*t*), in order to get the expense of counsel's attendance, briefs, &c., allowed you. Moreover, the sheriff may, it seems, at the request of the opposite party, postpone the execution of the writ, unless such notice be given (*u*). The notice should be in writing (*x*). The Master may or may not, in his discretion, allow costs for the attendance of counsel, and preparing briefs, &c. (*y*).

The execution of the writ.

The Execution of the Writ.]—*Immediately upon the receipt of the writ, the sheriff will summon a jury. Attend at the time appointed, with your witnesses: and the inquest will be taken in nearly the same manner as at a trial at Nisi Prius*, excepting that the jurors cannot be challenged (*z*). The execution of the writ may be *adjourned* by the sheriff, if necessary, after it is entered upon (*a*). The Court

---

which is in effect a short notice of inquiry, is now seldom adopted. As to the former practice of notice of trial by continuance, see 12th ed. of this work, p. 316.

(*u*) *Jones* v. *Chuze*, 1 B. & P. 363: *Fryer* v. *Binns*, supra. As to notice of continuance, see supra, n. (*m*).

(*o*) See *Sutton* v. *Bryam*, 2 Str. 728.

(*p*) *Yate* v. *Swaine*, Barnes, 233.

(*q*) See Vol. 1, p. 581.

(*r*) Vol. 1, p. 581. See *Stevens* v. *Pell*, 2 Dowl. 355.

(*s*) See Vol. 1, Ch. LV. See form of a subpœna, &c., Chit. Forms, p. 677.

(*t*) See the form, Chit. Forms, p. 676.

(*u*) See *Elliott* v. *Nicklin*, 5 Price, 641: *Coleman* v. *Mawby*, 2 Str. 853: *Markham* v. *Middleton*, Id. 1259; 1 Sel. 544.

(*x*) R. 161, H. T. 1853. See *Elliott* v. *Nicklin*, 5 Price, 641.

(*y*) *Hullock* v. *Hemsworth*, Tidd, 9th ed. 80. By R. T. T. 1870, on taxation of costs on a writ of inquiry, the Master should allow only for one counsel, unless, in the exercise of his discretion on all the circumstances of the case, including the amount in dispute, he is satisfied that there was more to do in the case than could reasonably be imposed on one counsel only: see Vol. 1, p. 713, n. (*u*).

(*z*) *Anon.*, 3 Salk. 81.

(*a*) *Coleman* v. *Mawby*, 2 Str. 853: *Markham* v. *Middleton*, Id. 1259: *Elliott* v. *Nicklin*, 5 Price, 641.

PART XIV.

will not, at his instance, stay the execution of the writ (*b*). After the delivery of the verdict by the jurors, the under-sheriff will prepare the inquisition on parchment, and get the jurors to sign it.

Defendant must attend punctually.

The defendant should attend punctually at the time mentioned in the notice (*c*). If the defendant attend at the hour, he will not be warranted in leaving the Court at the expiration of the time mentioned in the notice; for the sheriff may have prior business, which may detain him beyond that time (*d*). But, if the plaintiff, in the absence of the defendant, have the writ executed at a different time or place from that specified in the notice, it will be irregular, and the Court upon application will set it aside.

Proceedings at inquiry.

The proceedings at the inquiry are the same as at an ordinary trial at Nisi Prius. The sheriff has power to adjourn the hearing (*e*). The addresses to the jury are regulated by the rules applicable to a trial at Nisi Prius (*f*).

Evidence and damages.

By *Ord. XXXVI. r.* 58, "Where damages are to be assessed in respect of any continuing cause of action, they shall be assessed down to the time of the assessment."

All the plaintiff has to prove, or the defendant is permitted to controvert, is the *amount* of the *damages* (*g*); for the cause of action itself, as stated in the plaintiff's claim, and the right to some damages in respect of it, is admitted by the defendant, by his suffering judgment to pass against him by default (*h*). Therefore, in an action on a deed, agreement, &c., set out or referred to in the statement of claim, it need not be proved (*i*), So, if the action be on a bill of exchange or promissory note, it need not be proved, nor need any allegation in the statement of claim, [illegible] plaintiff's right to sue upon it (*k*), nor is it necessary to [illegible]ce it (*l*), unless perhaps for the purpose of getting interest allowed from the time it became due (*m*). In an action on a policy of insurance, the plaintiff need not prove an interest in the subject-matter of it (*n*). Nor can the defendant, to mitigate the damages, or for any other purpose, go into any evidence of matter amounting to a defence to the action or any part of it, and which he might have pleaded (*o*);

(*b*) *Stoekdale* v. *Hansard*, 8 Dowl. 148.

(*c*) 1 Barnard, 233.

(*d*) *Williams* v. *Frith*, 1 Doug. 198; Lofft. 193; 2 Barnard, 214.

(*e*) Ord. XXXVI. r. 34, ante, Vol. 1, p. 647, and r. 56, ante, p. 1331.

(*f*) Ord. XXXVI. r. 36, ante, Vol. 1, p. 644, and r. 56, ante, p. 1334.

(*g*) *De Gaillon* v. *L'Aigle*, 1 B. & P. 368.

(*h*) *Eadem* v. *Lutman*, 1 Str. 612. And see 2 Saund. 107, n. 2. As to what is admitted by a defence of payment into Court, see ante, Ch. XXIX.

(*i*) *Collins* v. *Rybot*, 1 Esp. 157. See *Banbury Union Guardians* v. *Robinson*, 1 Dav. & M. 92; 12 L. J., Q. B. 327: *Cooper* v. *Blick*, 2 C. & D. 295; 2 Q. B. 915: *Stevens* v. *Pell*, 2 Dowl. 629; 2 C. & M. 710: *De Gaillon* v. *L'Aigle*, 1 B. & P. 368: *Shepherd* v. *Charter*, 4 T. R. 275.

(*k*) *Green* v. *Hearne*, 3 T. R. 301: *Anon.*, 3 Wils. 155. And see *Beris* v. *Lindsell*, 2 Str. 1149.

(*l*) *Lane* v. *Mullins*, 2 Q. B. 254; 1 Dowl., N. S. 562. This was otherwise before the rule as to pleading payment (see *Green* v. *Hearne*, 3 T. R. 301); though, even if not produced, plaintiff would still have been entitled to nominal damages. *Marshall* v. *Griffin*, R. & M. 41.

(*m*) *Hutton* v. *Ward*, 19 L. J., Q. B. 293.

(*n*) *Thellusson* v. *Fletcher*, 1 Doug. 316; 1 Esp. 73.

(*o*) *Speek* v. *Phillips*, 5 M. & W. 279; 7 Dowl. 470.

therefore, in an action on a bill or note, he will not be allowed to prove that there was no consideration for it (*p*), or that it has no stamp, or an improper one (*q*); or, in an action on a contract, that it was obtained by fraud (*r*); or, in an action for goods sold, that he purchased them merely as an agent for another (*s*); or in any action, that he has a set-off (*t*), or that he has paid the amount or any part of it (*u*). Where, indeed, the statement of claim is so general as to admit of proof of any facts to meet it, there the defendant is allowed to bring forward evidence to contravert those facts so as to reduce the damages. Thus, if the sum claimed in the statement of claim is so alleged that the plaintiff would not be compelled to prove the sum claimed, had the allegation been traversed, he ought, it would seem, to go into evidence to prove the amount, otherwise he might recover only nominal damages (*x*). So, in an action for mesne profits, the plaintiff in some cases may have to prove the length of time the defendant has been in possession (*y*). In actions for libel or slander the defendant will not be allowed to give evidence as to the circumstances under which the libel or slander was published, or the character of the plaintiff, unless he has delivered particulars (*z*). As to assessing the damages in an action of detinue, *see Phillips* v. *Jones*, 15 Q. B. 859.

As above observed, the right to some damages is admitted by the judgment by default, and in all cases the plaintiff must have nominal damages given him by the inquest, though he brings forward no evidence whatever in support of his claim. In an action for a trespass, or any other action, where the damage actually sustained by the plaintiff is the measure of the damages to be given by the jury, if the plaintiff do not prove the nature of the injury, and the amount of the damage sustained by him, the jury always give nominal damages merely; and in such cases, therefore, it is expedient to prove nearly the whole cause of action. But where the jury are to imply the amount of the damages from the nature of the injury, and where no special damage could be proved, unless laid in the statement of claim,—as for instance, in an action for slander, or the like,—there, although the plaintiff do not offer evidence, yet the jury may give such damages as the circumstances of the case warrant, and which they may estimate from the effect the slander set forth in the statement of claim is calculated and likely to have had on the character and prospects of the plaintiff (*a*). Amount of damages, where no evidence given.

The jury may give damages in the nature of interest, over and above the value of the goods at the time of the conversion or Interest as damages.

(*p*) *Shepherd* v. *Charter*, 4 T. R. 275.

(*q*) *Watson* v. *Glover*, 12 L. J., C. P. 184.

(*r*) *Eadem* v. *Lutman*, 1 Str. 612: *Shepherd* v. *Charter*, 4 T. R. 275.

(*s*) *De Gaillon* v. *L'Aigle*, 1 B. & P. 368.

(*t*) *Carruthers* v. *Graham*, 14 East, 578.

(*u*) Vol. I, p. 304: *Lane* v. *Mullins*, Dowl., N. S. 562; 2 Q. B. 254.

(*x*) See *Banbury Union Guardians* v. *Robinson*, 4 Q. B. 919; 1 D. & M. 92; 12 L. J., Q. B. 327: *King* v. *Beck*, 8 Dowl. 735: *Cooper* v. *Blick*, 2 Q. & D. 295; 2 Q. B. 915: *Williams* v. *Cooper*, 3 Dowl. 204: *Davis* v. *Holdship*, 1 Chit. Rep. 644, n.

(*y*) *Ive* v. *Scott*, 9 Dowl. 993.

(*z*) Ord. XXXVI. r. 37, ante, p. 393, applied to writ of inquiry by r. 56, ante, p. 1331.

(*a*) *Tripp* v. *Thomas*, 3 B. & C. 327; 5 D. & R. 276.

PART XIV.

seizure, in an action for the conversion of goods or trespass *de bonis asportatis;* and over and above the money recoverable in an action on a policy of insurance (*b*); and they ought to assess interest in the same cases in which it may be given by a jury at Nisi Prius (*c*).

Where the damages may be severed.

If there be two or more defendants who suffer judgment to go by default, the inquest cannot, in any action for a joint trespass, sever the damages (*d*).

See further as to damages on a verdict, *Vol.* 1, p. 661.

Costs.

The under-sheriff may certify for costs under the *County Courts Act*, 1867, *s.* 5 (*ante*, *Vol.* 1, p. 684) (*e*).

Return of writ.

Return of.]—*Call at the sheriff's or deputy sheriff's office, at or after the expiration of four days from the return day of the inquiry, and a clerk there will deliver to you the writ and the sheriff's return, with the inquisition.* The return is indorsed on the writ. The inquisition is engrossed on parchment, and signed and sealed in the name of the sheriff and by the jurors (*f*). If the sheriff refuse to make a return, you must give him notice to do so, and proceed as pointed out *ante*, *Vol.* 1, p. 815 *et seq.* Formerly the Court would grant a rule absolute, in the first instance, to compel him to make it (*g*). The defendant is entitled to have the inquisition filed; and if the plaintiff's solicitor refuses to file it or show it to the defendant's solicitor, the Court will compel him to do so, and to pay the costs (*h*).

Setting aside inquisition, &c.

Setting aside Inquisition, or staying Judgment, &c.]—Within four days after the return day of the writ, or, it seems, at any time before final judgment signed (*i*), the defendant may move the Court to set aside the execution of it, or, if in vacation, may apply to a Judge (*j*) to stay the proceedings in order that an application may be made to the Court. The sheriff or other officer before whom the writ was executed may also prevent the signing of judgment immediately, if he certify under his hand upon the writ that judgment ought not to be signed till defendant shall have had an opportunity of applying to the Court to get the execution of the writ set aside (*k*). If such order or certificate is obtained and judgment thereby postponed, the judgment, if afterwards obtained, will be entered on record as of the day of the return of the writ, unless the Court otherwise order (*k*). If a party be unable to obtain an order or certificate as above, and in consequence thereof judgment be signed and execution issued, the Court may order such judgment

(*b*) 3 & 4 W. 4, c. 42, s. 29.

(*c*) —— v. *Edmunds*, 6 Taunt. 346. See 3 & 4 W. 4, c. 42, s. 29. And see Vol. 1, p. 663.

(*d*) *Onslow* v. *Orchard*, 1 Str. 422; Vol. 1, p. 666. See *Chapman* v. *House*, 2 Str. 1140, where, before the Jud. Acts, there was judgment by default against one defendant, and judgment on demurrer against the other. See Vol. 1, p. 666.

(*e*) *Craven* v. *Smith*, L. R., 4 Ex. 146. But see ante, Vol. 1, p. 684, n. (*t*).

(*f*) See a form of the sheriff's return and inquisition, Chit. Forms, p. 677.

(*g*) *Stoekdale* v. *Hansard*, 8 Dowl. 297. See Vol. 1, p. 815 et seq., as to compelling the sheriff to return writs.

(*h*) *Townsend* v. *Burns*, 1 Dowl. 629; 1 C. & M. 177.

(*i*) *Denny* v. *Trapnell*, 3 Wils. 87

(*j*) See 1 W. 4, c. 7, s. 1. See form of summons, Chit. Forms, 67

(*k*) 1 W. 4, c. 7, s. 1.

to be vacated and execution to be stayed or set aside, or grant a new writ of inquiry; and thereupon the party affected by such execution will be restored to all that he may have lost thereby, in like manner as upon the reversal of a judgment on appeal or otherwise, as the Court may direct (*m*).

The application to set aside the inquisition and have a new inquiry is looked upon as on the same footing as an application for a new trial. As to the grounds on which the Court will grant a new trial or inquiry, *see Ch. LXVIII.* The motion for a new inquiry upon the ground that the damages are excessive or not sufficient should be supported by the production of the notes of the under-sheriff, verified by affidavit (*n*), or by the production of an examined copy of such notes, together with an affidavit verifying such copy to be a true one (*o*); or, if this cannot be done, the reason why it cannot must be stated upon affidavit, and the facts proved at the trial must be sworn to. The affidavit verifying the sheriff's notes should be intituled correctly in the cause (*p*). It is sufficient if it state that the paper annexed contains the notes sent by the sheriff to the Court (*q*); it need not state the pleadings (*r*). Where the application is supported by an affidavit verifying the sheriff's notes, it seems that affidavits are not admissible on the other side of evidence given at the inquiry which does not appear on the notes (*s*). Where there is nothing on the under-sheriff's notes, or otherwise, to show how the case had been presented to the jury, the Court, in the absence of any affidavit showing that the case was improperly left to the jury, will assume it to have been left properly (*t*). It seems the Court will not compel the under-sheriff to make an affidavit of circumstances which occurred at the inquiry (*u*). The sheriff's notes if only exhibited to the affidavit need not be filed (*x*). If a misdirection by the sheriff is relied on, the Court can hear, from counsel present at the trial, a statement made as to what passed

The application to set aside, &c.

(*m*) See *Angel* v. *Ihler*, 5 M. & W. 609; 7 Dowl. 846. The stat. 1 W. 4, c. 7, s. 4, is repealed.

(*n*) *Stevens* v. *Pell*, 2 Dowl. 629: *Hall* v. *Middleton*, 4 N. & M. 368; 1 H. & W. 7. The sheriff or Judge before whom the inquiry is executed should, on being applied to by either of the parties for that purpose, produce his notes of the inquiry, and give such party a copy thereof, if required. On sending his notes to the Court on a motion for a new inquiry, on the ground of misdirection, he should state the manner in which he submitted the case to the jury, and not leave it to be shown by affidavit: *Ralph* v. *Harvey*, 1 Q. B. 845. Where an under-sheriff refused to produce his notes on a trial, the Court made him pay the costs consequent on such refusal: *Metcalf* v. *Parry*, 2 Dowl. 589; 3 Dowl. 93; *Vickers* v. *Cook*, 3 Dowl. 492. The Court will not compel him to produce them for the purpose of another action: *Parkhurst* v. *Gosden*, 2 C. B. 894.

(*o*) *Memo.* 4 Moore & Sc. 484.

(*p*) *Reynolds* v. *Stone*, 1 Dowl., N. S. 578: *Bodley* v. *Reynolds*, 15 L. J., Q. B. 152.

(*q*) *Hellings* v. *Stevens*, 4 Tyr. 1001.

(*r*) *Milligan* v. *Thomas*, 2 C. M. & R. 756; 1 Tyr. & G. 134; 4 Dowl. 373; 1 Gale, 320. See *Angel* v. *Ihler*, 7 Dowl. 846; 5 M. & W. 600.

(*s*) *Coles* v. *Bulman*, 6 C. B. 184; 17 L. J., C. P. 302: *Jones* v. *Howell*, 4 Dowl. 176: *Doe* v. *Baytup*, 1 H. & W. 270. But see *Lilley* v. *Johnson*, 2 M. & W. 386; 5 Dowl. 606.

(*t*) *Margetts* v. *Cowley*, 2 Sc. N. R. 583. See *Evans* v. *Downes*, Q. B., B. C., M. 1838, 2 Jur. 1066: *Waite* v. *Gale*, 2 D. & L. 929. See *Whitehouse* v. *Hemmant*, 27 L. J., Ex. 295.

(*u*) *Power* v. *Horton*, 3 Hodges, 14.

(*x*) *Mansfield* v. *Brearey*, 1 Ad. & E. 347; 3 N. & M. 471: *Stevens* v. *Pell*, 2 Dowl. 629; 2 C. & M. 710.

PART XIV.

at the trial (*y*). A motion to set aside an inquiry for excess in the damages will not be granted, unless a strong case be made out (*z*).

Costs of first inquiry.

Where the Court, upon application, ordered a new inquiry, on the ground that, as to part of the damages found, there was no evidence to warrant the finding of the jury; and the defendant, in order to save the expense of a second inquiry, paid the plaintiff the whole of his demand; it was held, that he was not bound to pay the plaintiff the costs of the first inquiry (*a*). As to the costs of the first trial where a new trial is granted, *see Vol.* 1, p. 751.

Amendment of inquisition, &c.

Amendment of Inquisition, &c.]—Before the *Com. Law Proc. Act*, 1852, defects or errors in a writ of inquiry might be amended by the award of it on the roll (*b*). So, before that Act, if the jury, in an action of debt, omitted the formal finding of damages, which entitled the plaintiff to costs *de incremento*, the Court might order the requisite entry to be made on the postea (*c*). Where the writ and inquisition were lost, the Court ordered new ones to be made out according to the sheriff's notes, and that the costs which had been taxed should be indorsed by the Master (*d*). As to the present power of amendment, *see ante*, *Vol.* 1, *Ch. XLII.*

Costs.

Costs.]—The judgment generally awards to the plaintiff costs to be taxed, but it has been held that the assessment of the damages by the jury does not amount to a trial with a jury within *Ord. LXV. r.* 1, so that the costs do not "follow the event" under the proviso in that rule (*e*).

Final judgment, &c.

Final Judgment, &c.]—*At the expiration of four days from the return of the inquiry* (if the sheriff has not certified on the writ as above mentioned, and a Judge has not ordered the staying the judgment till a day not yet arrived, and the defendant has not moved to set aside the inquisition, or if he has moved, and the inquisition be not set aside) judgment may be signed. As to the form of judgment, &c., *see ante*, p. 1331 (*f*). *When judgment is signed and completed, you may sue out execution.* As to judgments in general, *see Vol.* 1, p. 764.

After death of party.

As to the effect of the death, &c. of a party to the action after interlocutory and before final judgment, *see ante*, p. 1028.

Execution.

Execution.]—The execution after a writ of inquiry is the same as in ordinary cases.

(*y*) *Jones* v. *Lewis*, 9 Dowl. 145, per *Coleridge*, J.

(*z*) *Lothbury* v. *Brown*, 10 Moore, 106. As to setting aside a perverse verdict, see *Weeding* v. *Mason*, 2 C. B., N. S. 382.

(*a*) *Porter* v. *Cooper*, 3 Dowl. 662.

(*b*) *Johnson* v. *Toulmin*, 4 East, 173: *Conden* v. *Coulter*, Hardw. 314: *Hughes* v. *Alvarez*, 1 Str. 684: *Ingham* v. *Chishull*, Barnes, 15: *Pippett* v. *Hearn*, 1 D. & R. 266.

(*c*) *Bale* v. *Hodgetts*, 1 Bing. 182; 7 Moore, 602.

(*d*) *Bean* v. *Elton*, 2 Str. 1077.

(*e*) *Gath* v. *Howarth*, W. N. 1884, 99; Bitt. Ch. Cas. 29, *Field*, J., at Chambers.

(*f*) *Townsend* v. *Burns*, 1 Dowl. 629; 1 C. & M. 177. See forms, Chit. F. pp. 109, 185.

CHAPTER CXVI.

ISSUES, INQUIRIES AND ACCOUNTS.

Order to prepare issues.

Order to prepare Issues.]—By *Ord. XXXIII. r.* 1, "Where in any cause or matter it appears to the Court or a Judge that the issues of fact in dispute are not sufficiently defined, the parties may be directed to prepare issues, and such issues shall, if the parties differ, be settled by the Court or a Judge."

Power to order inquiries and accounts.

Power to order Inquiries or Accounts.]—By *Ord. XXXIII. r.* 2, "The Court or a Judge may, at any stage of the proceedings in a cause or matter, direct any necessary inquiries or accounts to be made or taken, notwithstanding that it may appear that there is some special or further relief sought for or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner" (*a*).

This rule gives the Court power to direct any necessary inquiry to be made before the trial (*b*). The order may be made on a summons at Chambers.

The costs of the inquiry are generally reserved (*c*).

Account when writ indorsed under Ord. III. r. 8.

Order for Account when Writ indorsed under Ord. III. r. 8.]—By *Ord. XV. r.* 1, "Where a writ of summons has been indorsed for an account, under Order III., Rule 8, or where the indorsement on a writ of summons involves taking an account, if the defendant either fails to appear, or does not after appearance, by affidavit or otherwise, satisfy the Court or a Judge that there is some preliminary question to be tried, an order for the proper accounts, with all necessary inquiries and directions now usual in the Chancery Division in similar cases, shall be forthwith made" (*d*).

By *r.* 2, "An application for such order as mentioned in the last preceding Rule shall be made by summons, and be supported by an affidavit, when necessary, filed on behalf of the plaintiff, stating concisely the grounds of his claim to an account. The application may be made at any time after the time for entering an appearance has expired."

The application may be made in an action in the Queen's Bench Division (*e*), but an order will only be made there in simple cases (*f*). The order may be made by a District Registrar (*g*), and in that case he can take the account himself (*d*).

(*a*) See Jud. Act, 1873, s. 66.
(*b*) *West London Dairy Society, Limited* v. *Abbott*, 44 L. T. 376.
(*c*) *Slack* v. *Midland R. Co.*, 50 L. J., Ch. 196.
(*d*) See *Clover* v. *Wilts and Western Benefit Building Society*, 53 L. J., Ch. 622; 50 L. T. 382; 30 W. R. 895.
(*e*) *York* v. *Stowers*, W. N. 1883, 174; Bitt. Ch. Cas. 2.
(*f*) Note in Bitt. Ch. Cas. at p. 3.
(*g*) *In re Bower, Bennett* v. *Bower*, 20 Ch. D. 538; 51 L. J., Ch. 825.

PART XIV.

Special direction.

Special Directions.]—By *Ord. XXXIII. r.* 3, "The Court or a Judge may, either by the judgment or order directing an account to be taken or by any subsequent order (*h*), give special directions with regard to the mode in which the account is to be taken or vouched, and in particular may direct that in taking the account, the books of account in which the accounts in question have been kept shall be taken as *primâ facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised."

Mode of taking account.

Mode of taking Account.]—By *Ord. XXXIII. r.* 4, "Where any account is directed to be taken, the accounting party, unless the Court or a Judge shall otherwise direct, shall make out his account and verify the same by affidavit. The items on each side of the account shall be numbered consecutively, and the account shall be referred to by the affidavit as an exhibit and be left in the Judge's Chambers, or with the official or other referee, as the case may be."

By *r.* 5, "Any party seeking to charge any accounting party beyond what he has by his account admitted to have received shall give notice thereof to the accounting party, stating, so far as he is able, the amount sought to be charged and the particulars thereof in a short and succinct manner."

By *r.* 6, "Every judgment or order for a general account of the personal estate of a testator or intestate shall contain a direction for an inquiry what parts (if any) of such personal estate are outstanding or undisposed of, unless the Court or a Judge shall otherwise direct."

By *r.* 7, "Where by any judgment or order, whether made in Court or in Chambers, any accounts are directed to be taken or inquiries to be made, each such direction shall be numbered so that, as far as may be, each distinct account and inquiry may be designated by a number, and such judgment or order shall be in the Form No. 28, in Appendix L., with such variations as the circumstances of the case may require."

By *r.* 8, "In taking any account directed by any judgment or order, all just allowances shall be made without any direction for that purpose."

By *r.* 9, "If it shall appear to the Court or a Judge, on the representation of any Chief Clerk or otherwise, that there is any undue delay in the prosecution of any accounts or inquiries, or in any other proceedings under any judgment or order, the Court or Judge may require the party having the conduct of the proceedings, or any other party, to explain the delay, and may thereupon make such order with regard to expediting the proceedings or the conduct thereof, or the stay thereof, and as to the costs of the proceedings, as the circumstances of the case may require; and for the purposes aforesaid, any party or the official solicitor may be directed to summon the persons whose attendance is required, and to conduct any proceedings and carry out any directions which may be given; and any costs of the official solicitor shall be paid by such parties or out of such funds as the Court or Judge may direct; and if any such costs be not otherwise paid, the same shall be paid out of such moneys (if any) as may be provided by Parliament."

(*h*) See *Shaw* v. *Brown*, 44 L. T. 338.

CHAPTER CXVII.

TRIAL OF QUESTIONS OF LAW BY SPECIAL CASE (*a*).

Special case by agreement.

By *R. of S. C., Ord. XXXIV. r.* 1, "The parties to any cause or matter may concur in stating the questions of law arising therein in the form of a special case for the opinion of the Court. Every such special case shall be divided into paragraphs numbered consecutively, and shall concisely state such facts and documents as may be necessary to enable the Court to decide the questions raised thereby. Upon the argument of such case the Court and the parties shall be at liberty to refer to the whole contents of such documents, and the Court shall be at liberty to draw from the facts and documents stated in any such special case any inference, whether of fact or law, which might have been drawn therefrom if proved at a trial" (*b*).

Under the former practice, which was regulated by the *Com. Law Proc. Act*, 1852, *ss.* 42—48, it was necessary to obtain a Judge's order in all cases before stating a special case on questions of law. The order would not be granted for the special case if there was reason to believe that the action was not *bonâ fide* brought to determine a matter really in controversy between the parties; as if the action were a mere friendly suit for the purpose of obtaining the opinion of the Court upon the construction of a will, or the like (*c*). The case must have been confined to questions of law. If matters of fact were in issue, the Court would leave the parties to go to a jury (*d*).

The Court will not decide as to future rights depending on contingent events, upon fictitious interests and statements made for the purpose of obtaining such decision (*e*).

By *R. of S. C., Ord. XXXIV. r.* 2, "If it appear to the Court

(*a*) As to the power of the Court or a Judge to direct a special case to be stated where there is a compulsory arbitration, see C. L. P. Act, 1854, s. 4, post, Ch. CXXXVII. As to an arbitrator stating a special case for the opinion of the Court, see sect. 5 of the same Act, post, Ch. CXXXVI. A case cannot be sent by the Committee of Appeals of the Privy Council for the opinion of the Courts of law. See 1 Doug. 344, n. By 22 & 23 V. c. 63, Courts in one part of her Majesty's dominions may remit cases for the opinion of Courts in other parts thereof for their opinion on questions of law. See this stat. noticed p. 1349. See the Borough and Local Courts of Record Act, 1872 (35 & 36 V. c. 86), ss. 6, 7, 8. Also other inferior Courts, post, Ch. CXXIX. The Court will not hear a special case unless there is some rule or statutory power to state it: *Bexley Local Board* v. *West Kent Sewerage Co.*, 9 Q. B. D. 518.

(*b*) This was otherwise under the old procedure, where leave to draw inferences was not expressly reserved: *Latter* v. *White*, L. R., 5 H. L. 578; 41 L. J., Q. B. 342.

(*c*) See *Doe* d. *Duntze* v. *Duntze*, 8 C. B. 100.

(*d*) *Aldridge* v. *Great Western R. Co.*, 3 M. & Gr. 515: *Price* v. *Quarrell*, 12 Ad. & El. 784.

(*e*) *Bright* v. *Tyndall*, 4 Ch. D. 189: cp. *Pryse* v. *Pryse*, L. R., 15 Eq. 86; 42 L. J., Ch. 253: *Fosbrook* v. *Fosbrook*, L. R., 3 Ch. 93: *Lord*

PART XIV.

Special case by order.

or a Judge, that there is in any cause or matter a question of law which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, or before any reference is made to a referee or an arbitrator, the Court or Judge may make an order accordingly, and may direct such question of law to be raised for the opinion of the Court, either by special case or in such other manner as the Court or Judge may deem expedient, and all such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed" (*f*).

The Judge may make the order before the statement of claim has been delivered (*g*). The rule only applies where the action has not come on for trial, but by an analogous proceeding, the Judge may try questions of law first at the trial, if it appears that the decision of such questions will render the trial of the issues of fact unnecessary (*h*).

The order will not be granted where the legal liability depends on facts which are in dispute (*i*). It will be confined to questions which must necessarily arise in the action (*k*).

The case.

The case is usually prepared by the plaintiff, and a draft of it is sent to the defendant, who makes any alteration in it which he desires and returns it to the plaintiff, and it is interchanged again until the parties are agreed. The case must be divided into paragraphs numbered consecutively, and must concisely state the facts and documents necessary to enable the Court to decide the question raised (*l*).

The provision as to the division of the case into paragraphs, &c., is similar to *R. G. H. T.* 1862, which provided that unless the case were so divided, &c., the costs of drawing and copying should not be allowed without a special order. This rule applied to evidence and documents set out at length in an appendix to the case (*m*).

By *R. of S. C., Ord. XXXIV. r.* 3, "Every special case shall be printed by the plaintiff, and signed by the several parties or their counsel or solicitors, and shall be filed by the plaintiff. Printed copies for the use of the Judges shall be delivered by the plaintiff."

Agreement as to payment of money and costs.

By *R. of S. C., Ord. XXXIV. r.* 6, "The parties to a special case may, if they think fit, enter into an agreement in writing, which shall not be subject to any stamp duty, that, on the judgment of the Court being given in the affirmative or negative of the questions of law raised by the special case, a sum of money, fixed by the parties, or to be ascertained by the Court, or in such manner as the Court may direct, shall be paid by one of the parties to the other of them, either with or without costs of the cause or matter;

Wellesley v. *Withers*, 4 El. & Bl. at p. 759: *Smith* v. *Gibson*, 25 L. T. 559; 20 W. R. 88: *Savage* v. *Tyers*, 20 W. R. 817.

(*f*) See, for instance, *Tattersall* v. *National Steamship Co., Limited*, W. N. 1884, 32; Bitt. 207.

(*g*) *Metropolitan Board of Works* v. *New River Co.*, 1 Q. B. D. 727; affirmed, 2 Id. 67; 45 L. J., Q. B. 759; affirmed, 46 Id. 183. The order in this case was made on an affidavit by the plaintiff, uncontradicted by the defendant, that the sole question was one of law.

(*h*) *Pooley* v. *Driver*, 5 Ch. D. 458, M. R.; 46 L. J., Ch. 466.

(*i*) Per *Lush*, J., W. N. 1875, 209; Bitt. No. xiii. See *Borthwick* v. *Ramsford*, 28 Ch. D. 79.

(*k*) *Republic of Bolivia* v. *National Bolivian Navigation Co.*, 24 W. R. 361. M. R.

(*l*) Ord. XXXIV. r. 1, supra.

(*m*) *Hadley* v. *Perks*, L. R., 1 Q. B, 444.

and the judgment of the Court may be entered for the sum so agreed or ascertained, with or without costs, as the case may be, and execution may issue upon such judgment forthwith, unless otherwise agreed, or unless stayed on appeal" (cp. *Com. Law Proc. Act*, 1852, *s.* 43).

By *Ord. XXXIV. r.* 7, "This order shall apply to every special case stated in a cause or matter, or in any proceeding incidental thereto."

By *r.* 8, "Any special case may hereafter be stated, for the same purposes and in the same manner as was provided by the Act 13 & 14 Vict. c. 35, and the same shall be deemed to be a special case stated in a matter within the meaning of this Order."

Amendment.

The Court may order the case to be amended, though one of the parties refuse his consent to the amendment (*n*).

An amendment will not be allowed after the case has been argued and disposed of (*o*); but if there be a mistake of fact in a case stated in an action, the Court may disregard the decision on the special case (*o*).

Entry of case for argument.

By *R. of S. C., Ord. XXXIV. r.* 5, "Either party may enter a special case for argument by delivering to the proper officer a memorandum of entry, in the Form No. 25 in Appendix G., and also if any married woman, infant or person of unsound mind not so found by inquisition be a party to the cause or matter, producing a copy of the order giving leave to enter the same for argument."

Leave to enter when necessary.

By *Ord. XXXIV. r.* 4, "No special case in any cause or matter to which a married woman, (not being a party thereto in respect of her separate property or of any separate right of action by or against her), infant, or person of unsound mind not so found by inquisition is a party, shall be set down for argument without leave of the Court or a Judge, the application for which must be supported by sufficient evidence that the statements contained in such special case, so far as the same affect the interest of such married woman, infant, or person of unsound mind, are true."

Similar leave was required to set down a case under 13 & 14 *V.* c. 35, where a married woman, infant or lunatic was a party (sect. 13). Leave is obtained on summons before a Master at Chambers (*p*). Where a female defendant married after the case had been set down for hearing, it was not necessary to set it down again (*q*). In one case (*r*), however, it was held that the proper course was to discharge the order for hearing, and amend the case by adding the husband, and apply for leave to set down again. Where an infant tenant in tail was born after a case had been set down, he being a

(*n*) See per *Byles*, J., *Yorkshire, &c. Co.* v. *The Rotherham Local Board*, 27 L. J., C. P. 235; *Carpenter* v. *Parker*, 8 C. B., N. S. 206, 236; 27 L. J., C. P. 78. Sed vide *Mersey Docks, &c.* v. *Jones*, 8 C. B., N. S. 124. See *Notman* v. *Anchor Assurance Co.*, 6 C. B., N. S. 536. As to the amendment where a necessary party has been accidentally omitted, see *Barnaby* v. *Tassell*, L. R., 11 Eq. 363.

(*o*) *In re Taylor's Estate, Tomlin* v. *Underhay*, 22 Ch. D. 495; 48 L. T. 552.

(*p*) See *Sidebotham* v. *Watson*, 1 W. R. 229. In *Elwes* v. *Elwes*, 20 W. R. 480, M. R., the Court accepted the statement of counsel as sufficient evidence of the truth of the facts stated in the case.

(*q*) *Johnston* v. *Brown*, L. R., 8 Eq. 584.

(*r*) *Atty* v. *Etough*, L. R., 13 Eq. 462; 41 L. J., Ch. 782.

PART XIV.

necessary party, the proper course was to discharge the original order for setting down, and amend the special case by making the infant a party (*s*). See further as to the practice when a child was born after a case had been set down, *ante*, p. 1032 (*t*).

Fee on filing.

The fee on filing a special case for argument is 1*l.*, which is paid by a stamp impressed on special case where practicable, or otherwise on the præcipe; *see Orders, post, App.*

Delivery of copies for judges.

The plaintiff must deliver to the Chamber Order Office two copies of the case for the use of the Judges.

In one case, where the plaintiff had failed to deliver copies of the case for the use of the Judges, but appeared at the hearing, the Court refused to hear him, and gave judgment for the defendant (*u*). This judgment was afterwards set aside on payment of the costs thrown away.

Points.

Points for argument must be prepared and delivered (*v*).

Proceedings to argument.

The course of the proceedings to the argument of the case is for the most part the same as that adopted with reference to proceedings in lieu of demurrer. As to which, *see Vol.* 1, *Ch. XXV.* The case is inserted by the proper officer in the Special Paper.

A special case is heard before a divisional Court, where all parties agree that the same shall be so heard (*ante*, p. 17); otherwise it is heard before a single Judge sitting in Court (*Judicature Act*, 1876, *s.* 17, *ante*, p. 16, n. (*c*)). The case comes on for argument before the Court in its order. One counsel only on each side is heard. Upon the argument the plaintiff usually commences even in an action of replevin (*w*). The order for stating the special case, or the case, provides for the form of the order or judgment to be made or given. Where the answers to the special case in fact dispose of the action, the proper course is to take the answers in the shape of a judgment making declarations to the effect of the answers, the action being, if necessary, set down *pro formâ* for trial on motion for judgment (*y*).

Appeal.

An appeal lies against the judgment (*z*). The judgment on a special case stated for the opinion of the Court by an arbitrator is a final order for the purposes of an appeal (*a*) except, perhaps, where only one of several questions is submitted by the special case (*b*). It would seem that if a party do not appear in the Court below, and judgment is given against him in his absence, he cannot appeal, but must apply to the Court below to rehear the case (*c*).

(*s*) *Savage* v. *Snell*, L. R., 11 Eq. 264; 40 L. J., Ch. 216.

(*t*) *Palmer* v. *Flower*, L. R., 13 Eq. 250; 41 L. J., Ch. 193; 18 W. R. 887.

(*u*) *Leftly* v. *Monnington*, Ex. D., May 26th, 1879.

(*v*) See form, Chit. F. p. 684.

(*w*) *Vigar* v. *Dudman*, 24 L. T. 734.

(*y*) *Harrison* v. *Cornwall Minerals R. Co.*, 16 Ch. D. 66; 49 L. J., Ch. 834.

(*z*) Ante, p. 969. See C. L. P. Act, 1854, s. 32, and see the end of sect. 4 of C. L. P. Act, 1852: *Elliott* v. *Bishop*, 24 L. J., Ex. 158: *Chanter* v. *Leese*, 5 M. & W. 698: *Llewellyn* v. *Swansea Canal Navigation Co.*, 2 H. & N. 516, n.: *Howell* v. *London Dock Co.*, 6 Jur., N. S. 676, Ex. Ch.

(*a*) *Shubrook* v. *Tufnell*, 9 Q. B. D. 621; 46 L. T. 749; 30 W. R. 740.

(*b*) *Collins* v. *Vestry of Paddington*, 5 Q. B. D. 368.

(*c*) *Allum* v. *Dickinson*, 9 Q. B. D. 632; 47 L. T. 493. See ante, p. 974.

CHAPTER CXVIII.

TRIAL OF QUESTIONS OF FACT WITHOUT PLEADINGS (*a*)

Questions of fact may, after writ issued, by consent and leave of a judge, be decided without pleadings (*b*).

By *R. of S. C., Ord. XXXIV. r.* 9, "When the parties to a cause or matter are agreed as to the questions of fact to be decided between them, they may, after writ issued, and before judgment, by consent and order of the Court or a Judge, proceed to the trial of any such questions of fact without formal pleadings; and such questions may be stated for trial in an issue in the Form No. 15, in Appendix B., with such variations as circumstances may require (*c*), and such issue may be entered for trial and tried in the same manner as any issue joined in an ordinary action; and the proceedings shall be under the control and jurisdiction of the Court or Judge in the same way as the proceedings in an action." (*Cp. Com. Law Proc. Act*, 1852, *s.* 42.)

Under the above rule, where the parties are agreed upon what question or questions of fact are to be tried, they may obtain an order for the trial of those questions without pleadings, and thereby a saving of costs may be effected, and any risk avoided of being defeated through the pleadings not properly raising the questions of fact to be tried; and the judgment may be moulded to meet the circumstances of each case. The parties to obtain the order must satisfy the Master that they have a *bonâ fide* interest in the questions to be decided (*d*), and that the same are fit to be tried.

Agreement may be entered into for the payment of money and costs according to the result of the issue.

By *r.* 10, "The Court or a Judge may, by consent of the parties, order that, upon the finding in the affirmative or negative of such issue as in the last preceding rule mentioned, a sum of money, fixed by the parties, or to be ascertained upon a question inserted in the issue for that purpose, shall be paid by one of the parties to the other of them, either with or without the costs of the cause or matter." (*Cp. Com. Law Proc. Act*, 1852, *s.* 43.)

The object of this rule is to enable the parties to agree upon the amount which the successful party will be entitled to, and save the costs of ascertaining it by a jury; or else to have it ascertained by the jury.

When judgment to be entered and execution issued.

By *r.* 11, "Upon the finding on any such issue, as in Rule 9 mentioned, judgment may be entered for the sum so agreed or ascertained as aforesaid, with or without costs, as the case may be, and execution may issue upon such judgment forthwith, unless other-

(*a*) As to the course to be pursued where the pleadings do not sufficiently define the issue in fact, see ante, p. 1341.

(*b*) As to directing an issue to be tried where there is a compulsory arbitration, see C. L. P. Act, 1854, s. 4, post, Ch. CXXXVII.

(*c*) See the form, Chit. F. p. 687.

(*d*) See *Doe* v. *Duntze*, 6 C. B. 100.

PART XIV.

wise agreed, or unless the Court or a Judge shall otherwise order for the purpose of giving either party an opportunity for moving to set aside the finding, or for a new trial." (*Cp. Com. Law Proc. Act*, 1852, *s.* 44.)

As to the motion for judgment after the trial of issues of fact, *see ante, Vol.* 1, p. 756.

Proceedings upon issue may be recorded.

By *r.* 12, "The proceedings upon such issue, as in Rule 9 mentioned, may be recorded at the instance of either party, and the judgment, whether actually recorded or not, shall have the same effect as any other judgment in a contested action" (*e*).

Costs.

The costs are regulated by *Ord. LXV. r.* 1, *ante, Vol.* 1, p. 672 (*f*).

(*e*) See *Chanter* v. *Leese*, 6 M. & W. 698.

(*f*) See *Elliott* v. *Bishop*, 10 Ex. 522; 24 L. J., Ex. 33: *Hayne* v. *Robertson*, 17 C. B. 548. As to the present law of costs, see ante, Ch. LVII.

CHAPTER CXIX.

REMITTING CASES TO COURTS IN HER MAJESTY'S DOMINIONS FOR THEIR OPINION ON QUESTIONS OF LAW (a).

THE 22 & 23 *V. c.* 63, recites that, "Great improvement in the administration of the law would ensue if facilities were afforded for more certainly ascertaining the law administered in one part of her Majesty's dominions when pleaded in the Courts of another part thereof."

Courts in one part of her Majesty's dominions may remit a case for the opinion of a Court in any other part thereof.

By sect. 1, "If in any action depending in any Court within her Majesty's dominions, it shall be the opinion of such Court that it is necessary or expedient for the proper disposal of such action to ascertain the law applicable to the facts of the case, as administered in any other part of her Majesty's dominions on any point on which the law of such other part of her Majesty's dominions is different from that in which the Court is situate, it shall be competent to the Court in which such action may depend, to direct a case to be prepared, setting forth the facts, as these may be ascertained by verdict of a jury or other mode competent, or may be agreed upon by the parties, or settled by such person or persons as may have been appointed by the Court for that purpose, in the event of the parties not agreeing; and upon such case being approved of by such Court or a Judge thereof, they shall settle the questions of law arising out of the same on which they desire to have the opinion of another Court, and shall pronounce an order remitting the same, together with the case, to the Court in such other part of her Majesty's dominions, being one of the superior Courts thereof, whose opinion is desired upon the law administered by them as applicable to the facts set forth in such case, and desiring them to pronounce their opinion on the questions submitted to them in the terms of the Act; and it shall be competent to any of the parties to the action to present a petition to the Court whose opinion is to be obtained, praying such last-mentioned Court to hear parties or their counsel, and to pronounce their opinion thereon in terms of this Act, or to pronounce their opinion without hearing parties or counsel; and the Court to which such petition shall be presented shall, if they think fit, appoint an early day for hearing parties or their counsel on such case, and shall thereafter pronounce their opinion upon the questions of law as administered by them which are submitted to them by the Court; and in order to their pronouncing such opinion they shall be entitled to take such further procedure thereupon, as to them shall seem proper."

(a) By the 24 V. c. 11, the superior Courts within her Majesty's dominions may remit a case to a Court of any foreign state, with which her Majesty may have made a convention for that purpose, for ascertainment of the law of such state.

PART XIV.

How opinion to be authenticated.

By sect. 2, "Upon such opinion being pronounced, a copy thereof, certified by an officer of such Court, shall be given to each of the parties to the action by whom the same shall be required, and shall be deemed and held to contain a correct record of such opinion."

Opinion to be applied by the Court making the remit.

By sect. 3, "It shall be competent to any of the parties to the action, after having obtained such certified copy of such opinion, to lodge the same with an officer of the Court in which the action may be depending, who may have the official charge thereof, together with a notice of motion, setting forth that the party will, on a certain day named in such notice, move the Court to apply the opinion contained in such certified copy thereof to the facts set forth in the case hereinbefore specified, and the said Court shall thereupon apply such opinion to such facts in the same manner as if the same had been pronounced by such Court itself upon a case reserved for opinion of the Court, or upon special verdict of a jury; or the said last-mentioned Court shall, if it think fit, when the said opinion has been obtained before trial, order such opinion to be submitted to the jury with the other facts of the case as evidence, or conclusive evidence as the Court may think fit, of the foreign law therein stated, and the said opinion shall be so submitted to the jury."

Her Majesty in council or House of Lords on appeal may adopt or reject opinion.

By sect. 4, "In the event of an appeal to her Majesty in council or to the House of Lords in any such action, it shall be competent to bring under the review of her Majesty in council or in the House of Lords, the opinion pronounced as aforesaid by any Court whose judgments are reviewable by her Majesty in council or by the House of Lords, and her Majesty in council or that House may respectively adopt or reject such opinion of any Court whose judgments are respectively reviewable by them, as the same shall appear to them to be well founded or not in law."

Interpretation of terms.

By sect. 5, "In the construction of this Act, the word 'action' shall include every judicial proceeding instituted in any Court, civil, criminal, or ecclesiastical; and the words 'superior Courts,' shall include in England the superior Courts of law at Westminster, the Lord Chancellor, the Lords Justices, the Master of the Rolls, or any Vice-Chancellor, the Judge of the Court of Admiralty, the Judge Ordinary of the Court for Divorce and Matrimonial Causes, and the Judge of the Court of Probate; in Scotland, the High Court of Justiciary, and the Court of Session acting by either of its Divisions; in Ireland the Superior Courts of Law at Dublin, the Master of the Rolls, and the Judge of the Admiralty Court, and in any other part of her Majesty's dominions, the superior Courts of Law or Equity therein."

CHAPTER CXX.

TAKING EVIDENCE IN MATTERS PENDING BEFORE FOREIGN TRIBUNALS.

THE 19 & 20 *V. c.* 113, recites that it is expedient that facilities be afforded for taking evidence in her Majesty's dominions in relation to civil and commercial matters pending before foreign tribunals.

Order for examination of witnesses in this country in relation to any civil or commercial matter pending before a foreign tribunal.

By sect. 1, "Where, upon an application for this purpose, it is made to appear to any Court or Judge having authority under this Act that any Court or tribunal of competent jurisdiction in a foreign country, before which any civil or commercial matter is pending, is desirous of obtaining the testimony in relation to such matter of any witness or witnesses within the jurisdiction of such first-mentioned Court, or of the Court to which such Judge belongs, or of such Judge, it shall be lawful for such Court or Judge to order the examination upon oath, upon interrogatories or otherwise, before any person or persons named in such order, of such witness or witnesses accordingly; and it shall be lawful for the said Court or Judge, by the same order, or for such Court or Judge or any other Judge having authority under this Act, by any subsequent order, to command the attendance of any person to be named in such order, for the purpose of being examined, or the production of any writings or other documents to be mentioned in such order, and to give all such directions as to the time, place, and manner of such examination, and all other matters connected therewith, as may appear reasonable and just; and any such order may be enforced in like manner as an order made by such Court or Judge in a cause depending in such Court or before such Judge."

Certificate of ambassador, &c. sufficient evidence in support of application.

By sect. 2, "A certificate under the hand of the ambassador, minister, or other diplomatic agent of any foreign power, received as such by her Majesty, or in case there be no such diplomatic agent, then of the consul-general or consul of any such foreign power at London, received and admitted as such by her Majesty, that any matter in relation to which an application is made under this Act in a civil or commercial matter pending before a Court or tribunal in the country of which he is the diplomatic agent or consul having jurisdiction in the matter so pending, and that such Court or tribunal is desirous of obtaining the testimony of the witness or witnesses to whom the application relates, shall be evidence of the matter so certified: but where no such certificate is produced, other evidence to that effect shall be admissible."

Examination of witnesses to be taken upon oath.

By sect. 3, "It shall be lawful for every person authorized to take the examination of witnesses by any order made in pursuance of this Act to take all such examinations upon the oath of the

PART XIV.

witnesses or affirmation in cases where affirmation is allowed by law instead of oath, to be administered by the person so authorized; and if upon such oath or affirmation any person making the same wilfully and corruptly give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury."

Persons giving false evidence guilty of perjury.

Expenses of witnesses.

By sect. 4, it is provided, "That every person whose attendance shall be so required shall be entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial." (*See Vol.* 1, p. 562.)

Persons to have right of refusal to answer questions and to produce documents.

By sect. 5, it is provided, "That every person examined under any order made under this Act shall have the like right to refuse to answer questions tending to criminate himself, and other questions which a witness in any cause pending in the Court by which or by a Judge whereof or before the Judge by whom the order for examination was made would be entitled to: and that no person shall be compelled to produce, under any such order as aforesaid, any writing or other document that he would not be compellable to produce at a trial of such a cause."

Certain Courts and judges to have authority under this Act.

By sect. 6, "Her Majesty's superior Courts of common law at *Westminster* and in *Dublin* respectively, the Court of Session in *Scotland*, and any Supreme Court in any of her Majesty's colonies or possessions abroad, and any Judge of any such Court, and every Judge in any such colony or possession who by any order of her Majesty in council may be appointed for this purpose, shall respectively be Courts and Judges having authority under this Act" (*a*).

The 22 *V.* c. 20, recites, "That it is expedient that facilities be afforded for taking evidence in or in relation to actions, suits, and proceedings pending before tribunals in her Majesty's dominions, in places in such dominions out of the jurisdiction of such tribunals" (*b*).

Order for examination of witnesses out of the jurisdiction, in relation to any suit pending before any tribunal in her Majesty's possessions.

By sect. 1, "Where upon an application for this purpose, it is made to appear to any Court or Judge having authority under this Act, that any Court or tribunal of competent jurisdiction in her Majesty's dominions has duly authorized by commission, order or other process, the obtaining the testimony in or in relation to any action, suit or proceeding pending in or before such Court or tribunal of any witness or witnesses out of the jurisdiction of such Court or tribunal, and within the jurisdiction of such first-mentioned Court, or of the Court to which such Judge belongs, or of such Judge, it shall be lawful for such Court or Judge to order the examination before the person or persons appointed, and in manner and form directed by such commission, order or other process as aforesaid, of such witness or witnesses accordingly; and it shall be lawful for the said Court or Judge by the same order, or for such Court or Judge, or any other Judge having authority under this Act, by any subsequent order, to command the attendance of any person to be named in such order for the purpose of being examined, or the production of any writings, or other documents to be mentioned in such order, and to give all such directions as to the time, place and manner of such examination, and all other matters

(*a*) The rest of this section is repealed by stat. 44 & 45 V. c. 59.

(*b*) See 6 & 7 V. c. 82, noticed Vol. ', p. 551, as to compelling the attendance of a witness under a commission when he is in Scotland or Ireland.

connected therewith, as may appear reasonable and just, and any such order may be enforced, and any disobedience thereof punished, in like manner as in case of an order made by such Court or Judge in a cause depending in such Court or before such Judge."

Persons falsely swearing guilty of perjury.

By sect. 2, "Every person examined as a witness under any such commission, order or other process as aforesaid, who shall upon such examination wilfully and corruptly give any false evidence, shall be deemed and taken to be guilty of perjury."

Expenses of witnesses.

By sect. 3, "Provided always, that every person whose attendance shall be so ordered shall be entitled to the like conduct money and payment for expenses and loss of time, as upon attendance at a trial." (*See Vol.* I, p. 562.)

Witnesses may refuse to answer certain questions, &c.

By sect. 4, "Provided also, that every person examined under any such commission, order or other process as aforesaid, shall have the like right to refuse to answer questions tending to criminate himself, and other questions which a witness in any cause pending in the Court by which, or by a Judge whereof, or before the Judge by whom the order for examination was made, would be entitled to; and that no person shall be compelled to produce under any such order as aforesaid, any writing or other document, that he would not be compellable to produce at a trial of such cause."

What Courts to have authority under the Act.

By sect. 5, "Her Majesty's superior Courts of common law at *Westminster* and in *Dublin* respectively, the Court of Session in *Scotland*, and any supreme Court in any of her Majesty's colonies or possessions abroad, and any Judge of any such Court, and every Judge in any such colony or possession who by any order of her Majesty in council, may be appointed for this purpose, shall respectively be Courts and Judges having authority under this Act."

Power to judges to frame rules.

By sect. 6, "It shall be lawful for the Lord Chancellor of Great Britain, with the assistance of two of the Judges of the Courts of common law at *Westminster*, so far as relates to England, and for the Lord Chancellor of Ireland, with the assistance of two of the Judges of the Courts of common law at Dublin, so far as relates to Ireland, and for two of the Judges of the Court of Session, so far as relates to Scotland, and for the chief or only Judge of the Supreme Court in any of her Majesty's colonies or possessions abroad, so far as relates to such colony or possession, to frame such rules and orders as shall be necessary or proper for giving effect to the provisions of this Act, and regulating the procedure under the same."

CHAPTER CXXI.

INTERPLEADER.

SECT.		PAGE
I.	*Relief of Persons in general against Adverse Claims*	1354
II.	*Relief of Debtors from Adverse Claims of Creditor and Assignee of Debt*	1365
III.	*Relief of Sheriffs and other Officers*	1368

SECT. I.—RELIEF OF PERSONS IN GENERAL AGAINST ADVERSE CLAIMS.

PART XIV.

THE statute 1 & 2 *Will.* 4, c. 58, enabled the Courts of Common Law to grant relief by way of interpleader, in case of adverse claims to the same subject-matter, made upon persons claiming no interest therein, and the provisions of that statute were supplemented by the *Com. Law Proc. Act*, 1860. The Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 *V.* c. 49), repeals the whole of the statute 1 & 2 *Will.* 4, c. 58, and all the provisions of the *Com. Law Proc. Act*, 1860, relating to interpleader, except sect. 17 (*a*). The proceedings are now regulated by *Ord. LVII.* of the *R. of S. C.* 1883, which reproduces the above enactments with alterations and additions.

In what cases relief may be granted.

In what Cases Relief may be granted.]—By *R. of S. C., Ord. LVII. r.* 1, "Relief by way of interpleader may be granted,—

(a) "Where the person seeking relief (in this Order called the applicant) is under liability for any debt, money, goods, or chattels, for or in respect of which he is, *or expects to be*, sued by two or more parties (in this Order called the claimants) making adverse claims thereto:

(b) "Where the applicant is a sheriff or other officer charged with the execution of process by or under the authority of the High Court, and claim is made to any money, goods, or chattels taken or intended to be taken in execution under any process, or to the proceeds or value of any such goods or chattels by any person other than the person against whom the process issued."

In the case of a person other than a sheriff or other officer charged with the execution of process, it must, in order to entitle him to get relief by way of interpleader, be shown that there is a debt, money, goods or chattels, that the applicant is under liability therefor, that adverse claims are made thereto by two or more persons, that the applicant is, or expects to be, sued in respect

(*a*) It is not clear why sect. 17 was excluded from the repeal, since Ord. LVII. r. 11 (post, p. 1364) treats of the same subject-matter.

thereof (*b*), and, moreover (*c*), that the applicant claims no interest in the subject-matter in dispute other than for charges or costs, that he does not collude with any of the claimants, and that he is willing to pay or transfer the subject-matter into Court, or to dispose of it as he may be directed.

The rival claims must relate to the same subject-matter (*d*); but they need not be co-extensive (*e*). Thus, where one claim was for goods and the other for the price of them, the order was refused (*f*); but where both parties claim the goods, but one also claims damages, the order may be made, the action being allowed to go on as to the damages (*e*).

Where actions were commenced against an acceptor of a bill by two parties, each of whom claimed to be the lawful owner of it, an issue was ordered between the two plaintiffs, to try whether one of them was lawfully entitled to recover on the bill (*g*). Where the assignee of a bankrupt factor sued for goods sold by the bankrupt to defendant, and a third party claimed the proceeds as having been the consignor of the goods, it was held that the defendant was entitled to the benefit of an interpleader rule (*h*). In a joint action of trover against two defendants, one of them who claims no title to the goods may be entitled to interplead (*i*). The rule does not apply where the applicant claims any interest in the subject-matter in dispute (*k*). But a claim for charges or costs (*l*), or a claim to a lien is not an interest which prevents the defendant from interpleading (*m*). Relief was refused where an action had been brought against the holder of a stake deposited with him to abide the event of an illegal race (*n*). The rule adopted by the Court of Chancery that relief could not be granted on an interpleader bill when the applicant was under any special obligation towards one of the claimants in respect of the matter in dispute (*o*), was at one time thought binding on the common law Courts (*p*);

(*b*) The words of the rule appear to show that the mere fact that the right is claimed or supposed to belong to a third party is not sufficient reason for expecting that he will sue for it. Some reasonable ground for expecting that the third party will sue must be shown to satisfy the statute. *Sharpe* v. *Redman*, W. W. & D. 375: *Harrison* v. *Payne*, 2 Hodges, 107. In the former case, *Coleridge*, J., says, "It is necessary that something more should appear on the affidavits than the mere words of the Act that some third party is expected to sue."

(*c*) See Ord. LVII. r. 2, post, p. 1358.

(*d*) *Slaney* v. *Sidney*, 14 M. & W. 800; 3 D. & L. 250: *Smith* v. *Saunders*, 37 L. T. 359: *Wright* v. *Freeman*, 40 L. T. 134; affirmed Id. 358: *S. C.*, 48 L. J., C. P. 276.

(*e*) *Attenborough* v. *St. Katherine's Dock Co.*, 3 C. P. D. 450; 47 L. J., C. P. 763.

(*f*) *Slaney* v. *Sidney*, supra; *Wright* v. *Freeman*, supra.

(*g*) *Regan* v. *Serle*, 9 Dowl. 193.

(*h*) *Johnson* v. *Shaw*, 4 M. & Gr. 916; 12 L. J., C. P. 112. And see *Crellin* v. *Leland*, 6 Jur. 733, a case of deposit with bankers: and *Frost* v. *Heywood*, 2 Dowl., N. S. 801; 12 L. J., Ex. 242.

(*i*) *Gladstone* v. *White*, 1 Hodges, 386.

(*k*) *Lindsey* v. *Barron*, 6 C. B. 293, per *Maule*, J.: *Newton* v. *Moody*, 7 Dowl. 582.

(*l*) Rule 2, post, p. 1358.

(*m*) *Attenborough* v. *St. Katherine's Dock Co.*, 3 C. P. D. 450, 454; 47 L. J., C. P. 763, per *Bramwell*, L. J.: *Cotter* v. *Bank of England*, infra: *Braddick* v. *Smith*, 2 M. & Sc. 131; 9 Bing. 84.

(*n*) *Applegarth* v. *Colley*, 2 Dowl., N. S. 223.

(*o*) *Crawshay* v. *Thornt* Myl. & Cr. 1; 2 Dowl., N. S. 86.

(*p*) *Patorin* v. *Campbell*, 12 M. &

PART XIV.

but it was since held not to be so (*p*). Where an action of trover was brought for goods deposited with the defendants, which were claimed by B., who did not appear to a rule calling on him to interplead, the Court barred B.'s claim, and made an order as to the delivery of the goods to the plaintiff, but held that the stat. 1 & 2 *W.* 4, *c.* 58, did not prevent the plaintiff from recovering his special damage, if any (*q*). A party may apply for relief, although he claims a lien on the goods against all parties (*r*), if he consent to relinquish the lien. A defendant who is sued for the recovery of property in his possession, in which he has no interest, but which is claimed by a third person, cannot apply to be relieved, if he has taken an indemnity from the claimant: for he has thereby identified himself with the claimant (*s*), and the rule expressly excludes defendants who collude with the third party. But the claimant who has himself given the indemnity cannot insist on it as an objection to the application to interplead (*t*). So, if a defendant officiously interposes in the affairs of another, and so has placed himself in a difficulty between adverse claims, the Court will, in its discretion, generally refuse to relieve him (*u*). A foreigner may take advantage of the rule and interplead (*v*). And a foreigner residing abroad may be barred if, after due service of the summons, he refuses to attend (*x*). The statute did not extend to cases in which the Crown was a party (*y*).

When titles have not a common origin.

By *Ord. LVII. r.* 3, "The applicant shall not be disentitled to relief by reason only that the titles of the claimants have not a common origin but are adverse to and independent of one another" (*z*).

W. 277; 1 D. & L. 397: *Horton* v. *The Earl of Devon*, 4 Ex. 497: *Lindsey* v. *Barron*, 6 C. B. 291: *James* v. *Pritchard*, 7 M. & W. 216: *Farr* v. *Ward*, 2 M. & W. 844.

(*p*) *Best* v. *Hayes*, 1 H. & C. 718; 32 L. J., Ex. 129: *Tanner* v. *European Bank*, L. R., 1 Ex. 261: *Attenborough* v. *St. Katherine's Dock Co.*, supra.

(*q*) *Lucas* v. *The London Dock Co.*, 4 B. & Ad. 378: *Attenborough* v. *St. Katherine's Dock Co.*, supra. As to the Act applying to an action for unliquidated damages, see *Watter* v. *Nicholson*, 6 Dowl. 517.

(*r*) *Cotter* v. *Bank of England*, 2 Dowl. 728; 3 M. & Sc. 180: *Braddick* v. *Smith*, 9 Bing. 84; 2 M. & Sc. 131. See *Attenborough* v. *St. Katherine's Dock Co.*, supra.

(*s*) *Tucker* v. *Morris*, 1 Dowl. 639; 1 C. & M. 73.

(*t*) *Thompson* v. *Wright*, 13 Q. B. D. 632.

(*u*) *Belcher* v. *Smith*, 9 Bing. 82; 2 M. & Sc. 184.

(*v*) Per *Bramwell*, L. J., *Attenborough* v. *St. Katherine's Dock Co.*, 3 C. P. D. at pp. 454, 455.

(*x*) *Credits Gerundcuse, Limited* v. *VanWeede*, 12 Q. B. D. 171; 53 L. J., Q. B. 142; 32 W. R. 414: *Paterin* v. *Campbell*, 12 M. & W. 277: and see *Lindsey* v. *Barron*, 6 C. B. 291.

(*y*) *Candy* v. *Maugham*, 1 D. & L. 745; 7 Sc. N. R. 401.

(*z*) This corresponds with sect. 12 of the C. L. P. Act, 1860. The following cases were decided before this enactment. See *Sidney* v. *Sidney*, 14 M. & W. 800, as to the Act applying where actions brought for the price of goods and also by a third party to recover the value of them in trover. And see *James* v. *Prichard*, 7 M. & W. 216; 8 Dowl. 890: *Turner* v. *The Mayor and Corporation of Kendal*, 2 D. & L. 197; 13 M. & W. 171, where an action was brought on an express contract. See *Baker* v. *Bank of Australasia*, 26 L. J., C. P. 93, where there was a question as to the capacity of a party to indorse a bill. *Grant* v. *Fry*, 4 Dowl. 135, where there was a contested claim to a reward advertised for the apprehension of a felon: *Gibbs* v. *Lee*, 1 Hodg. 204: *Dalton* v. *Midland R. Co.*, 12 C. B. 458, where an action

The defendant had contracted with the plaintiff for the completion of some building works by the latter; the plaintiff did the work and received part payment; before the residue due under the contract was paid, C. claimed the money from the defendant, alleging that the plaintiff was merely his agent in making the contract: held, that the defendant, who was willing to pay the money to the right party, was entitled to relief (*a*). The defendant was intrusted by the plaintiff with furniture, &c., to sell for him by auction, and the defendant having sold, and between 300*l.* and 400*l.* of the proceeds being still in his hands, the defendant received a notice from G. that she claimed the goods; an action having been brought by the plaintiff against the defendant to recover the balance in his hands, the defendant sought to deduct his charges for commission, &c., and asked for an interpleader order between the plaintiff and G. as to the residue; G. was willing to allow the defendant his charges, and to take the issue: Held, that an order as prayed might be made (*b*).

Effect may now be given to equitable as well as legal claims, titles and interests (*c*).

The Application for Relief.]—The application for relief is made by a summons (*d*), returnable before a Master at Chambers (*e*).

The application for relief.

—How made.

By *r.* 5, "The applicant may take out a summons calling on the claimants to appear and state the nature and particulars of their claims, and either to maintain or relinquish them."

When to be made.

Formerly, the application for relief could not be made until after an action had been actually commenced, as the statute 1 & 2 *W.* 4, *c.* 58, *s.* 1, only empowered a defendant to apply, but it is submitted that under the above rule (*r.* 1, *supra*, p. 1354), the application may be made without any action being actually commenced. Where the application is made by a defendant in an action, *Ord. LVII. r.* 4 provides that, "Where the applicant is a defendant, application for relief may be made at any time after service of the writ of summons."

Service out of jurisdiction.

Leave to serve the summons out of the jurisdiction on a foreigner may be obtained on an ex parte application (*f*).

---

was brought against a railway company for dividends which were claimed by a third party: *Newton* v. *Moody*, 7 Dowl. 582.

(*a*) *Meynell* v. *Angell* (*Calverly claimant*), 32 L. J., Q. B. 14.

(*b*) *Best* v. *Hayes*, 1 H. & C. 718; 32 L. J., Ex. 129: *Tanner* v. *The European Bank*, L. R., 1 Ex. 261; 35 L. J., Ex. 151, where an action was brought to recover a policy and also special damage.

(*c*) Jud. Act, 1873, s. 24, sub-s. 4. The efforts made to introduce into the C. L. P. Act, 1860, provisions giving the common law Courts power to deal with equitable rights, were unsuccessful (see per *Willes*, J., 13 C. B., N. S. 753); and it was accordingly held that the titles of both the claimants must be legal, and that an equitable claim could not be the subject of an interpleader summons: *Hurst* v. *Sheldon*, 13 C. B., N. S. 750. Recently, however, this was doubted, and effect given to equitable claims: *Rusden* v. *Pope*, L. R., 3 Ex. 269; 37 L. J., Ex. 137: *Duncan* v. *Cashin*, L. R., 10 C. P. 554; 44 L. J., C. P. 225: *Engleback* v. *Nixon*, Id. 645; Id. 396.

(*d*) See a form of summons, Chit. F. p. 692.

(*e*) Formerly interpleader was excluded from the jurisdiction of a Master. By the Rules of November, 1878, a limited jurisdiction was conferred. Under the present rules there is no limit. See Ord. LIV. r. 12, post, Ch. CXXIII.

(*f*) *The Credits Gerundense, Limited* v. *Van Weede*, 12 Q. B. D.

PART XIV.

The affidavit in support (*e*).

Affidavit in support.]—The application must be supported by an affidavit (*e*).

By *R. of S. C., Ord. LVII. r.* 2, "The applicant must satisfy the Court or a Judge by affidavit or otherwise—

(a) "That the applicant claims no interest in the subject-matter in dispute, other than for charges or costs; and

(b) "That the applicant does not collude with any of the claimants (*f*); and

(c) "That the applicant is willing to pay or transfer the subject-matter into Court or to dispose of it as the Court or a Judge may direct."

The affidavit must state so much of the facts as is necessary to show that the case comes within *Ord. LVII. r.* 1 (*supra*, p. 1354), and to satisfy the requirements of *r.* 2, *supra* (*g*). If made in an action, it should be intituled in it (*h*). If made in several, under *r.* 14 (*post*, p. 1360) it should be intituled in them all. If not made in an action, it should be intituled, "In the matter of an interpleader application by ——— (*the applicant*)." It should state what proceedings have taken place in the action, if any (*i*).

The hearing.

Hearing of the Application.]—The application may be heard before a Master (*k*). On the return of the summons it will be called on in the usual way.

If the claimant or one of the claimants does not appear, or if he appears, and does not persist in his claim, an order will be made against him, barring him from prosecuting his claim against the defendant (*l*). If the claimant is desirous of appearing on the summons, he or some one on his behalf should make a short affidavit of the nature of his claim (*m*). If the claimant appears and persists in his claim, an order will be made, that he be made defendant in the action, if one be pending, instead of the original defendant, or that an issue be tried between the plaintiff and the claimant to decide the right; and that, in the meantime, the subject-matter in dispute be deposited in some safe custody, usually in Court (*n*). With the consent of both claimants, their counsel or solicitors, or on the request of one, if having regard to the value of the subject-matter in dispute it seems desirable to do so, the Master may dispose of the merits of the claim, and determine the same in a summary manner (*o*). Where the question is one of law, and the facts are not in dispute, the Master may decide the question or order a special case to be stated for the opinion of the Court (*p*). The Master may refer the matter to the Judge at Chambers. An appeal

(*e*) 53 L. J., Q. B. 142; 52 W. R. [illegible]. *Van der Kan* v. *Ashworth*, [illegible] N. 1884, 58; Bitt. Ch. Cas. 202. [illegible] see the form, Chit. F. p. 693.

(*f*) See *Mandy* v. *Robinson*, L. R., 4 C. P. 347: *Beleher* v. *Smith*, 9 Bing. 82.

(*g*) *Webster* v. *Delafield*, 7 C. B. 187.

(*h*) *Pariente* v. *Pennell*, 7 Scott, N. R. 834: *Levi* v. *Coyle*, 2 Dowl., N. S. 932.

(*i*) *Frost* v. *Heywood*, 2 Dowl., N. S. 801.

(*k*) See ante, p. 1357.

(*l*) See r. 10, infra, p. 1359.

(*m*) *Powell* v. *Lock*, 3 Ad. & El. 315: *Webster* v. *Delafield*, 7 C. B. 187. There appears to be no necessity for any affidavit by the plaintiff: *Angus* v. *Wootton*, 3 M. & W. 310.

(*n*) See r. 7, infra.

(*o*) See r. 8, infra.

(*p*) See r. 9, infra.

lies from the decision on the summons (*q*), unless it is disposed of summarily under *Ord. LVII. r.* 8 (*infra*). As the granting of the relief is discretionary, the Court of Appeal will not generally interfere with its exercise (*q*).

Stay of proceedings.

By *Ord. LVII. r.* 6, "If the application is made by a defendant in an action the Court or a Judge may stay all further proceedings in the action."

When the claimants appear.

By *Ord. LVII. r.* 7, "If the claimants appear in pursuance of the summons, the Court or a Judge may order either that any claimant be made a defendant in any action already commenced in respect of the subject-matter in dispute in lieu of or in addition to the applicant, or that an issue between the claimants be stated and tried, and in the latter case may direct which of the claimants is to be plaintiff, and which defendant" (*r*).

The order substituting the claimant for the defendant is *No.* 51 in *App. K.* to the *R. of S. C.*, and is there called "*Interpleader Order, No.* 2" (*r*).

Where the question is one of law.

By *r.* 9, "Where the question is a question of law, and the facts are not in dispute, the Court or a Judge may either decide the question without directing the trial of an issue, or order that a special case be stated for the opinion of the Court. If a special case is stated, Order XXXIV. shall, as far as applicable, apply thereto."

This rule corresponds with sect. 15 of the *Com. Law Proc. Act*, 1860. As to the proceedings on the special case, *see ante, Ch. CXVII.*

Summary decision.

By *R. of S. C., Ord. LVII. r.* 8, "The Court or a Judge may, with the consent of both claimants or on the request of any claimant, if, having regard to the value of the subject-matter in dispute, it seems desirable so to do, dispose of the merits of their claims, and decide the same in a summary manner and on such terms as may be just" (*s*).

As to appealing from the decision in a summary manner under this rule, *see post*, p. 1364.

Where claimant does not appear or does not comply with order.

By *Ord. LVII. r.* 10, "If a claimant, having been duly served with a summons calling on him to appear and maintain, or relinquish, his claim, *does not appear* in pursuance of the summons, or, having appeared, *neglects or refuses to comply* with any order made after his appearance, the Court or a Judge may make an order declaring him, and all persons claiming under him, for ever barred against the applicant, and persons claiming under him, but the order shall not affect the rights of the claimants as between themselves."

When a Master makes an order barring a claimant under this

(*q*) *Wright* v. *Freeman* (C. A.), 48 L. J., C. P. 276; 40 L. T. 134, 358. See *Webster* v. *Delafield*, 7 C. B. 187; 18 L. J., C. P. 136: *Teggin* v. *Langford*, 10 M. & W. 556: *Drake* v. *Brown*, 2 M. & R. 270. But see post, p. 1364, where no appeal lies from the Judge's order: *Walker* v. *Kerr*, 12 L. J., Ex. 204: *Kirke* v. *Clarke*, 4 Dowl. 363: *Lydal* v. *Biddle*, 5 Dowl. 244.

(*r*) See form of order, Chit. F. p. 693.

(*s*) This corresponds with sect. 14 of the C. L. P. Act, 1860. See the form of order, Chit. F. p. 695.

PART XIV.

rule, he has no power to make any order as to the costs of the action in which the interpleader summons is taken out (*t*).

Power to make one order in several causes or matters.

Power to make one Order in several Causes or Matters.]—By *Ord. LVII. r.* 14, "Where in any interpleader proceeding it is necessary or expedient to make one order in several causes or matters pending in several Divisions, or before different Judges of the same Division, such order may be made by the Court or Judge before whom the interpleader proceeding may be taken, and shall be entitled in all such causes or matters; and any such order (subject to the right of appeal) shall be binding on the parties in all such causes or matters."

Power to transfer interpleader proceedings to County Court.

28 & 29 Vict. c. 99.

30 & 31 Vict. c. 142.

Power to transfer Proceedings to the County Court.]—By the Judicature Act, 1884 (47 & 48 *V.* c. 61), s. 17, "If it shall appear to the Court or a Judge that any proceeding now pending or hereafter commenced in the High Court of Justice by way of interpleader, in which the amount or value of the matter in dispute does not exceed the sum of five hundred pounds (being the limit of the equitable jurisdiction given to County Courts by the County Courts Act, 1865), may be more conveniently tried and determined in a County Court, the Court or Judge may at any time order the transfer thereof to any County Court, in which an action or proceeding might have been brought by any one or more of the parties to such interpleader against the others or other of them, if there had been a trust to be executed concerning the matter in question; and every such order shall have the same effect as if it had been for the transfer of a suit or proceeding under section eight of the County Courts Act, 1867; and the County Court shall have jurisdiction and authority to proceed therein, as may be prescribed by any County Court rules for the time being in force."

Issue.

Issue.]—If an issue is directed to be tried between the parties, the party directed to be plaintiff should frame it (*u*). The plaintiff must deliver the issue within the time limited by the order; or if no time be limited, and he neglect to deliver it in a reasonable time, an order may be obtained, or the order amended, limiting the time for its delivery. If not delivered by the plaintiff within the time limited, an order may be obtained, for delivering over to the claimant the subject-matter in dispute, with costs (*x*).

Security for costs, &c.

The party who is substantially the plaintiff in the issue may be ordered to give security for costs under the same circumstances as an ordinary plaintiff (*y*); but a person who, though nominally a plaintiff, is not substantially so, will not (*z*). In a sheriff's inter-

(*t*) *Hansen* v. *Maddox*, 12 Q. B. D. 100; 53 L. J., Q. B. 67; 50 L. T. 123; 32 W. R. 183.

(*u*) See the form, Chit. F. p. 696.

(*x*) *Stanley* v. *Perry*, 1 H. & W. 669.

(*y*) *Benazech* v. *Bessett*, 1 C. B. 313. And see *Frost* v. *Heywood*, 2 Dowl., N. S. 801; 12 L. J., Ex. 242: *Williams* v. *Crosling*, 3 C. B 957; 4 D. & L. 660; 16 L. J., C. P. 112: *Hammond* v. *Navin* (or *Nairn*), 1 Dowl., N. S. 351; 9 M. & W. 221. See fully ante, Vol. 1, Ch. XXXIII. p. 395.

(*z*) *Belmonte* v. *Aynard* (C. A.), 4 C. P. D. 352; affirming Id. 221.

pleader the execution creditor, though he is defendant in the issue, may be ordered to give security for costs under the same circumstances as a plaintiff in an action (*a*). Where an auctioneer, who was sued for the deposit-money paid on a sale by auction of real estate, on the ground that the vendor's title was defective, applied for a rule, calling upon the vendor and the purchaser to interplead, the Court, on its appearing that the vendor had no other property than that of which the title was disputed, refused to substitute the vendor as defendant, unless the original defendant gave security for costs; and refused to allow the defendant his costs of the application out of the deposit-money (*b*). The plaintiff, the assignee of an insolvent debtor, sued the defendant for the proceeds of goods intrusted to him by the insolvent, before his insolvency, for sale; the insolvent claimed them as executor, and the assignee and the insolvent were ordered to interplead, on the defendant bringing the money into Court; the Court refused to make it a condition of the order, that the insolvent or the defendant should give security for costs (*c*). As to the costs of the application, *see post*, p. 1362.

If part of a sum claimed by the parties has been paid to one of them before an adverse claim made, the adverse claimant may have a right to have the whole sum he claims paid into Court on the holder's applying for relief under the Act (*d*).

Discovery. Trial.

By *R. of S. C., Ord. LVII. r.* 13, "Orders XXXI. and XXXVI. shall, with the necessary modifications, apply to an interpleader issue; and the Court or Judge who tries the issue may finally dispose of the whole matter of the interpleader proceedings, including all costs not otherwise provided for."

Ord. XXXI. relates to discovery, inspection and interrogatories (*see ante, Vol.* 1, *Chs. XLVIII.—L.*). *Ord. XXXVI.* relates to the trial (*see ante, Vol.* 1, *Ch. LXV.*). Notice of trial must be given in the ordinary way (*see ante*, p. 577). The issue is entered for trial in the same manner as an action (*e*). Under the former rules it was held that the issue must be tried by a Judge and jury, and that the Judge had no power to try it without a jury (*f*), but it is submitted that rule 13, *supra*, alters this.

Adding parties.

When an execution debtor filed a liquidation petition after the issue had been settled, his trustee, who claimed the goods, was added as a party (*g*).

Special case.

Special Case.]—If a special case is ordered, the proceedings are regulated by *Ord. XXXIV.* (*See fully, ante*, p. 1343 *et seq.*)

Judgment, &c.

Judgment, &c.]—Under *Ord. LVII. r.* 13 (*supra*), which applies the provisions of *Ord. XXXVI.* to an interpleader issue, and provides that the Judge who tries the issue may finally dispose of the whole matter of the interpleader proceedings including all costs

(*a*) *Williams* v. *Crosling*, supra: *Tomlinson* v. *Land Corporation* (C. A.), 53 L. J., Q. B. 561.
(*b*) *Deller* v. *Prickett*, 20 L. J., Q. B. 151.
(*c*) *Ridgway* v. *Jones*, 39 L. J., Q. B. 97.
(*d*) *Allen* v. *Gilby*, 3 Dowl. 143.
(*e*) See ante, Vol. 1, Ch. LXI.
(*f*) *Hamlyn* v. *Betteley* (C. A.), 6 Q. B. D. 63; 50 L. J., Q. B. 1; 43 L. T. 790; 29 W. R. 275.
(*g*) *Bird* v. *Matthews*, 41 L. T. 512.

PART XIV.

not otherwise provided for, the Judge may order final judgment to be entered for the successful party, and make such other order as may be necessary with regard to the subject-matter of the dispute (*h*). If he does not do so judgment must be obtained on notice of motion. (*See ante, Vol.* 1, *Ch. LXIX.*)

Costs.

Costs.]—By *R. of S. C., Ord. LVII. r.* 15, "The Court or a Judge may, in or for the purposes of any interpleader proceedings, make all such orders as to costs and all other matters as may be just and reasonable."

In general, no costs on interpleader proceedings are allowed as between the claimants until the termination of the proceedings (*i*). If the party making the application acts bonâ fide, he will generally, in the first instance, be allowed his costs out of the funds or proceeds of the goods in dispute, and the party ultimately unsuccessful will have to repay them (*k*). And it seems that the failure to proceed of the party in the wrong does not affect the right of the applicant to receive his costs out of the fund, and the successful party will be left to his remedy by action against the other party for the sum deducted, even though he be insolvent (*l*). Where the applicant was offered an indemnity, and refused it, the Court would not allow him his costs (*m*). If the claimant does not appear on the interpleader summons, he cannot be ordered to pay the costs of the application (*n*). Nor, in such a case, will the costs be ordered to be paid out of the funds in dispute (*o*). Where the claimant did not appear to maintain his claim, the Court ordered that the plaintiff and defendant respectively should each bear his own costs of the rule, and that the proceedings in the action should be stayed on payment by the defendant of the debt and costs in the action (*p*). If the claimant does not persist in his claim, and is consequently barred, a Master at Chambers has no jurisdiction over the costs of the

Where claimant does not appear.

(*h*) *Burstall* v. *Bryant*, 12 Q. B. D., per Lord *Coleridge*, C. J., at p. 104: *Robinson* v. *Tucker*, 53 L. J., Q. B. 317; 50 L. T. 381; 32 W. R. 697.

(*i*) *Hood* v. *Bradbury*, 7 Sc. N. R. 892; 6 M. & G. 981.

(*k*) *Searle* v. *Matthews*, W. N. 1883, 176; Bitt. Ch. Cas. 113, *Field*, J., at Chambers, Nov. 13 and 14, 1883: *Parker* v. *Linnett*, 2 Dowl. 562: *Cotter* v. *Bank of England*, 2 Dowl. 728; 3 M. & Sc. 180: *Duer* v. *Mackintosh*, 2 Dowl. 730; 3 M. & Sc. 174: *Agar* v. *Bleghegn*, 1 T. & G. 160: *Reeves* v. *Barraud*, 7 Sc. 281: *Attenborough* v. *St. Katherine's Dock Co.*, 3 Ex. D. at p. 468, where the C. A. ordered that the defendant's costs should be a first charge on the proceeds of the sale of the goods. But see *Deller* v. *Prickett*, 20 L. J., Q. B. 151, where the Court refused to allow an auctioneer his costs out of certain deposit moneys in dispute.

(*l*) *Pitchers* v. *Edney*, 4 Bing. N. C. 721; 6 Sc. 582.

(*m*) *Gladstone* v. *White*, 1 Hodges, 380. And see *Jones* v. *Regan*, 9 Dowl. 580.

(*n*) *Rooda* v. *Gun, &c. Co.*, 28 L. T. 635, Q. B.: *Jones* v. *Lewis*, 8 M. & W. 264; 9 Dowl. 652: *Lambert* v. *Cooper*, 5 Dowl. 547: *Grazebrook* v. *Pickford*, 10 M. & W. 279; 2 Dowl., N. S. 249; 12 L. J., N. S., Ex. 171, where it was held that an appearance merely to object to the irregularity of the proceedings does not subject a party to costs. Quære, whether a fresh application could be made to the Court to order the claimant to pay such costs; see per *Williams*, J., in *Lambert* v. *Cooper*, supra. It seems not; see *Murdock* v. *Taylor*, infra: *Jones* v. *Lewis*, supra.

(*o*) *Lambert* v. *Cooper*, 5 Dowl. 547: *Murdock* v. *Taylor*, 8 Sc. 604; 6 Bing. N. C. 293.

(*p*) *Murdock* v. *Taylor*, supra.

action in which the interpleader summons is taken out (*q*). When the plaintiff in the issue neglects to proceed with it, the Judge has power to discharge the order, and make him pay the defendant's costs (*r*).

Costs of issue, &c.

In general, the costs of the issue are ordered to be paid to the successful party. If the claimant succeeds as to a part only of his claim, the Court or Judge will exercise a discretion as to the costs. In general, where he has succeeded, except as to a very trifling part, he will be allowed his costs. On the other hand, if he only succeeds as to a trifling part of his claim, he may be ordered to pay costs. In some cases each party may be ordered to bear his own costs (*s*). Where actions had been brought on a bill of exchange by J. and R., each of whom claimed to be the lawful owner of it against the acceptor, and the Court had directed an issue to try whether R. was lawfully entitled to recover on the bill, the costs of the issue to abide the order of the Court, and the issue was found against R.: it was held that J. was entitled to have the amount of the bill (which had been paid into Court) intact, the costs of the issue and of his action on the bill of exchange and of the application to the Court for the costs, such costs to be paid to him by R.; and that the acceptor, as he had refused an indemnity offered to him by J., was only entitled to his costs in the action brought by R., to be paid by him (*t*).

In general the party entitled to costs is entitled to the costs of all the steps taken in the cause or issue, and incidental to it (*u*). Where a Judge's order was made that so much of the costs of the interpleader issue as related to the goods recovered by the claimant should be allowed to the claimant, and so much as related to the goods recovered by the defendant should be allowed to the defendant, and that the costs should be considered as commencing from the date of the interpleader order; it was held that the costs were to be taxed without reference to who was the plaintiff or defendant, and as if there were no general costs of the cause; each party to be allowed the costs as to that part of the issue on which he had succeeded (*x*). Where a plaintiff was liable to pay costs to a defendant in an action, and, in interpleader proceedings arising out of the same action, the plaintiff was entitled to receive costs from such defendant, it was held, that such costs could not be set off on taxation (*y*).

New Trial.]—A new trial may be applied for on the same grounds as in an ordinary action (*z*), and the application is regulated

New trial.

(*q*) *Hansen* v. *Maddox*, 12 Q. B. D. 100; 53 L. J., Q. B. 67; 50 L. T. 123; 32 W. R. 183.

(*r*) *Wicks* v. *Wood*, 26 W. R. 680.

(*s*) See *Kerr* (or *Carr*) v. *Edwards*, 6 Sc. 337; 8 Dowl. 29: *Lewis* v. *Holding*, 3 Sc. N. R. 191; 3 M. & Gr. 875; 9 Dowl. 652: *Soames* v. *Ambridge*, cited in arg., 9 Dowl. 654: *Bayley* v. *Bedwell*, 2 P. & D. 309; 10 A. & E. 145. These cases possibly are not quite consistent.

(*t*) *Jones* v. *Regan*, 9 Dowl. 580.

(*u*) See *Cusel* v. *Pariente*, 7 M. & G. 527: *Melville* v. *Smark*, 3 M. & G. 67; 5 Sc. N. R. 357: *Meredith* v. *Rogers*, 7 Dowl. 596: *Barnes* v. *Bank of England*, 7 Dowl. 319. And see *Reeves* v. *Barraud*, 7 Sc. 281: *Cusel* v. *Pariente*, 7 M. & G. 527; 8 Sc. N. R. 240: *Kimberley* v. *Hickman*, 1 B. & C. 90; per *Bramwell*, L. J., 3 C. P. D. at pp. 454, 455.

(*x*) *Davis* v. *Clifton*, *Bart.*, 25 L. J., Q. B. 344.

(*y*) *Barker* v. *Hemming*, 43 L. T. 678.

(*z*) *Robinson* v. *Tucker* (C. A.), 53

PART XIV.

by the same rules (*z*). Consequently, if the issue be tried by a Judge with a jury, the application must be made to the Divisional Court (*z*). An appeal lies to the Court of Appeal from the decision of the Divisional Court on the application for a new trial (*a*). The power given by *Ord. XL. r.* 10 (*ante*, p. 760), to enter judgment on an application for a new trial applies to interpleader (*b*).

Effect of judgment or decision—Appeal.

Effect of Judgment or Decision—Appeal.]—By *R. of S. C., Ord. LVII. r.* 11, "Except where otherwise provided by statute, the judgment in any action or on any issue ordered to be tried or stated in an interpleader proceeding, and the decision of the Court or a Judge in a summary way, under Rule 8 of this Order, shall be final and conclusive against the claimants, and all persons claiming under them, unless by special leave of the Court or Judge, as the case may be, or of the Court of Appeal."

In all cases within this rule the judgment or decision of the Court or Judge at the trial, or a Judge or Master (*c*) at Chambers, is final, and no appeal lies without leave. This, however, only applies to the claimants as defined by Rule 1 (u) (*ante*, p. 1354) and persons claiming under them, and does not prevent an appeal by the sheriff (*d*).

By the *Com. Law Proc. Act*, 1860, *s.* 17, "The judgment in any such action or issue as may be directed by the Court or Judge in any interpleader proceedings, and the decision of the Court or Judge in a summary manner, shall be final and conclusive against the parties, and all persons claiming by, from, or under them."

This section is still in force, but it is, it is submitted, controlled by Rule 11 (*supra*) so far as regards an appeal with leave.

Under this section no appeal would lie from the decision of a Judge in a summary manner (*e*), or the decision of the Court on a matter referred to them by a Judge (*f*), even by consent or with leave (*g*). But an appeal would lie from the decision of a Judge at the trial of an interpleader issue (*h*).

Leave to appeal.

Leave to appeal may now be granted by the Master, Judge or Court whose decision is appealed against, or it may be obtained on an ex parte application to the Court of Appeal (*i*).

To what Court appeal lies.

Where, at the trial of the issue, the Judge disposes of the whole

---

L. J., Q. B. 317; 50 L. T. 381; 32 W. R. 697, overruling *Burstall* v. *Bryant* and *Parnell* v. *Steadman*, 12 Q. B. D. 103; 49 L. T. 717; 32 W. R. 495: *James* v. *Whitbread*, 11 C. B. 406; 20 L. J., C. P. 217; 2 L. M. & P. 407.

(*z*) See preceding note.

(*a*) Id. See *Witt* v. *Parker*, 46 L. J., Q. B. 450; 36 L. T. 538.

(*b*) *Williams* v. *Mercier*, 10 Q. B. D. 337; 51 L. J., Q. B. 594; 47 L. T. 140; 30 W. R. 720.

(*c*) *Westerman* v. *Rees*, W. N. 1883, 228; Bitt. Ch. Cas. 112.

(*d*) *Smith* v. *Darlow* (C. A.), 26 Ch. D. 605; 53 L. J., Ch. 696; 50 L. T. 571.

(*e*) *Dodds* v. *Shepherd*, 1 Ex. D. 75; 45 L. J., Ex. 457; 34 L. T. 358; 24 W. R. 322: *Hartmont* v. *Foster* (C. A.), 8 Q. B. D. 82, 51 L. J., Q. B. 12; 45 L. T. 429; 30 W. R. 129: *Edd* v. *Winson*, W. N. 1878, 88. See, however, *Ex p. Strecker, In re Morris* (C. A.), 19 Ch. D. at p. 220; 45 L. T. 634; 30 W. R. 125.

(*f*) *Turner* v. *Bridgett*, 9 Q. B. D. 55; 51 L. J., Q. B. 377; 46 L. T. 517; 30 W. R. 586.

(*g*) *Dodds* v. *Shepherd*, *supra*: *Buse* v. *Roper*, 41 L. T. 457.

(*h*) *Witt* v. *Parker*, 46 L. J., Q. B. 450; 36 L. T. 538: *Withers* v. *Parker*, 4 H. & N. 810.

(*i*) *Hetherington* v. *Groom*, W. N. 1884, 26.

matter and gives judgment under Rule 13 (*supra*, p. 1361), the appeal (if leave to appeal be obtained) is to the Court of Appeal (*k*). When there is both an appeal and a motion for a new trial (*see supra*, p. 1363), both the appeal and the motion go to the Divisional Court under *Ord. XL. r.* 5 (*l*).

When appeal must be brought.

Under the former rules it was held that an order made on an interpleader issue was an interlocutory order from which an appeal must be brought within twenty-one days (*m*); but this was before the Judge at the trial had any power such as is now given by Rule 13 (*supra*, p. 1361) finally to dispose of the whole matter, and it is submitted that whether the order is final or interlocutory now depends on its terms.

The stat. 1 & 2 *W.* 4, *c.* 58, *s.* 7 did not make the person who had obtained an order for the costs of an interpleader issue, which had been entered of record, a judgment creditor within the meaning of the rules as to attachment of debts (*n*).

Taking money, &c. out of Court.

Taking Money, &c. out of Court.]—The Judge who tries the issue has now, under *Ord. LVII. r.* 13 (*ante*, p. 1361), power to finally dispose of the whole matter, and may and should be asked to make an order as to the disposal of any money, &c. that has been deposited in Court or otherwise. If he does not do so a subsequent application must be made in the original action (*o*). Where the original interpleader order is made by a Judge who has reserved the question of costs, the application, it seems, should be made to him (*p*). The application should be made on summons (*q*).

SECT. II.—RELIEF OF DEBTORS FROM ADVERSE CLAIMS BY CREDITORS AND ASSIGNEES OF DEBT.

By the *Judicature Act*, 1873, *s.* 25, *sub-s.* 6, "Any absolute *assignment, by writing under the hand of the assignor* (not purporting to be by way of charge only), of any debt or other legal chose in action, of which *express notice in writing* shall have been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the

(*k*) *Robinson* v. *Tucker* (C. A.), 53 L. J., Q. B. 317; 50 L. T. 381; 32 W. R. 697, overruling *Burstall* v. *Bryant* and *Parnell* v. *Steadman*, 12 Q. B. D. 103; 49 L. T. 712; 32 W. R. 495.

(*l*) Id. See ante, Vol. 1, p. 756.

(*m*) *McAndrew* v. *Barker*, 7 Ch. D. 701; 47 L. J., Ch. 340. See fully as to the time within which an appeal must be brought, ante, p. 975.

(*n*) *Best* v. *Pembroke*, L. R., 3 Q. B. 363: *Cremetti* v. *Crom*, 4 Q. B. D. 225. But see now post, p. 1396, n. (*x*).

(*o*) *Levi* v. *Coyle*, 2 Dowl., N. S. 932: *Pariente* v. *Pennell*, 7 Se. N. R. 834: cp. *Cooper* v. *Lead Smelting Co.*, 1 Dowl. 728; 2 M. & S. 714, 810; 9 Bing. 634: *King* v. *Birch*, 7 Q. B. 669. See *Smith* v. *Clinch*, 2 Dowl., N. S. 48, where a suit of a creditor against the claimant to whom money had been ordered to be paid out of Court was pending in Chancery.

(*p*) *Marks* v. *Ridgway*, 1 Ex. 8.

(*q*) *Stanley* v. *Perry*, 1 H. & W. 669: *Smith* v. *Clinch*, supra.

PART XIV.

legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor: Provided always, that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he thinks fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees" (*r*).

A deed by which debts are assigned to a creditor upon trust to receive them and pay his debts and to pay the surplus to the assignor is an assignment sufficient to satisfy this section (*s*).

Rent is a chose in action assignable within this section (*t*).

The assignee of a chose in action under this section takes it subject to all equities (*u*).

The application for interpleader under this section is made by a summons at Chambers. It is not necessary that any action should have been commenced (*x*).

The Trustees Relief Acts are 10 & 11 *V. c.* 96, 12 & 13 *V. c.* 74 and 22 & 23 *V. c.* 35. Cp. *In re Haycock's Policy*, 1 Ch. D. 611.

SECT. III.—RELIEF OF SHERIFFS AND OTHER OFFICERS CHARGED WITH THE EXECUTION OF PROCESS.

The *R. of S. C., Ord. LVII. r.* 1 (b) (*ante*, p. 1354) provides that relief by way of interpleader may be granted, inter alia, "Where the applicant is a sheriff or other officer charged with the execution of process by or under the authority of the High Court, and claim is made to any money, goods, or chattels taken or intended to be taken in execution under any process, or to the proceeds or value of any such goods or chattels by any person other than the person against whom the process issued."

When relief

A sheriff who intends to levy may, before actual seizure, apply

(*r*) See *Brice* v. *Bannister*, 3 Q. B. D. 569: *Buck* v. *Robson*, Id. 686: *In re Freshfield's Trust*, 11 Ch. D. 198: *Young* v. *Kitchin*, 3 Ex. D. 127: *In re Sutton's Trusts*, 12 Ch. D. 174: *Walker* v. *Bradford Old Bank*, 12 Q. B. D. 511; 53 L. J., Q. B. 280; 32 W. R. 644: *In re Milan Tramways Co., Ex p. Theys*, 25 Ch. D. 587.

(*s*) *Burlinson* v. *Hall*, 12 Q. B. D. 347; 53 L. J., Q. B. 222; 50 L. T. 723; 32 W. R. 492: where *National Provincial Bank* v. *Hunk*, 6 Q. B. D. 626; 50 L. J., Q. B. 437; 44 L. T. 585; 29 W. R. 564, where it was held that a mortgage was not within the section, is commented on.

(*t*) *Southwell* v. *Scotter*, W. N. 1880, 49.

(*u*) *West of England Bank* v. *Batchelor*, W. N. 1882, 11; 46 L. T. 132.

(*x*) Per *Field*, J., in *Field* v. *G. N. R. Co.*, Jud. Ch., February 2nd 1878. See also per *Quain*, J., *In re New Hamburg and Brazilian R. Co.*, W. N. 1875, 239; Bitt. No. cxxx. See *Lacy* v. *Wieland*, W. N. 1876, 24; Bitt. No. ccxxv.

for relief (*y*); but before actual seizure, relief will only be granted under special circumstances (*y*). But relief will not be granted to the sheriff or officers, unless an actual claim to the property (*z*) has been made. Giving notice of a petition in bankruptcy having been filed, is not equivalent to a claim by the trustee (*a*), unless, perhaps, where it appears to have been given by them (*b*). When an action has been commenced against the sheriff, further proceedings in it may be stayed (*c*). It seems that the power of the Court or a Judge to stay proceedings in actions against the sheriff is not confined to disputed claims to the goods seized, but extends to actions of trespass against him for breaking and entering the house of the claimant (*d*). The claim must, it seems, be of such a nature as may be followed by an action (*e*) at the suit of the party making it (*f*), though an action need not be actually brought before making the application (*g*). The claim may be a mere equitable one (*h*). The execution debtor cannot apply under the rule, which applies only to persons not being the parties against whom the process issues: so that the rule does not apply to the case of a defendant alleging the judgment or execution to be void. But an order was made in a case where an executrix claimed *as such* goods taken under a fi. fa. against her on a judgment for her own debt, A. B., executrix to C. D., being a different person from A. B. simpliciter (*i*). And although the rule, from its language, may seem to have in view only those cases in which the absolute property is claimed, yet it comprehends cases of lien (*k*). The case may be within the rule, although the goods seized are in the possession of a stranger, and not of the defendant against whom the execution issued (*l*). A person in actual possession of the goods seized under a fi. fa. against the defendant may be a claimant (*m*). If an execution creditor abandons his execution against certain goods seized under a fi. fa. in favour of a claimant, and the sheriff not-

will be granted.

Claim must have been made.

Claim must be such that it may be followed by an action.

In general the defendant cannot apply.

Where a lien claimed.

Goods seized in possession of a stranger.

Execution abandoned.

(*y*) *Day* v. *Carr*, 7 Ex. 883: *Lee* v. *Rossi*, 11 Ex. 13; 24 L. J., Ex. 280. As to *Day* v. *Carr*, see *Cooper* v. *Asprey*, 3 B. & S. 932; 32 L. J., Q. B. 209.

(*z*) See *Bateman* v. *Farnsworth*, 29 L. J., Ex. 365, where a landlord made a claim for rent.

(*a*) *Bentley* v. *Hook*, 2 Dowl. 339; 2 C. & M. 426; *Tarleton* v. *Dummelow*, 5 Bing. N. C. 110; 6 Sc. 843, semb. But see *Barker* v. *Phipson*, 3 Dowl. 590.

(*b*) Per *Bayley*, J., in 2 C. & M. 426.

(*c*) *Hilliard* v. *Hanson* (C. A.), 21 Ch. D. 69, 72; 47 L. T. 342; 31 W. R. 151.

(*d*) *Winter* v. *Bartholomew*, 25 L. J., Ex. 62. See *Abbott* v. *Richards*, 3 D. & L. 487; 15 M. & W. 194: *Holker* v. *Laurie*, 3 C. B. 334.

(*e*) *Isaac* v. *Spilsbury*, 10 Bing. 3; 3 M. & Sc. 341; 2 Dowl. 211.

(*f*) *Roach* v. *Wright*, 8 M. & W. 157.

(*g*) *Green* v. *Brown*, 3 Dowl. 337.

(*h*) See Jud. Act, 1873, s. 24, sub-s. 1, 4; W. N. 1875, 203; Id. 1876, 64. Before the Jud. Acts, it seems the claim must have been a legal one: *Sturgess* v. *Claude*, 1 Dowl. 505: *Roach* v. *Wright*, 8 M. & W. 155; 1 Dowl., N. S. 56. See *Putney* v. *Tring*, 5 M. & W. 425; 7 Dowl. 811: *Bird* v. *Crab*, 30 L. J., Ex. 318: *Shingler* v. *Holt*, Id. 322. But in cases of equitable claims, the Court would sometimes enlarge the time for returning the writ, unless the plaintiff would indemnify the sheriff. See *Roach* v. *Wright*, 8 M. & W. 157: *Holmes* v. *Mentz*, 4 A. & E. 131, 132.

(*i*) *Fenwick* v. *Layeock*, 1 G. & D. 532; 2 Q. B. 108.

(*k*) *Ford* v. *Baynton*, 1 Dowl. 359. See form of issue where a lien was in dispute, *Frith* v. *Simpson*, 13 Q. B. 680.

(*l*) *Allen* v. *Gibson*, 2 Dowl. 292.

(*m*) *Barker* v. *Dynes*, 1 Dowl. 169.

PART XIV.

Where sheriff has exercised a discretion.

withstanding sells them under it, he may still apply (*n*). But the Court will not relieve the sheriff where he has already exercised a discretion in the matter (*o*), or where he has paid over the proceeds of the execution to the judgment creditor (*p*); nor where he has handed over any part of the goods to the party claiming them (*q*); nor where the sheriff has paid over the proceeds of the execution to the judgment creditor, though before he had notice of the claim (*r*), even if he is willing to bring a similar amount into Court (*s*). And where the sheriff, finding the goods claimed by a third party, withdrew without making any seizure under the fi. fa., it was held that he was not entitled to relief (*t*). Nor is he entitled to relief if he has seized goods in execution which were under a distress for rent (*u*); nor if he has seized under one fi. fa., and the question is, whether that writ ought to have precedence of another (*x*); nor if he is placed in circumstances which give him an interest on either side, as where the under-sheriff's partner is concerned for some of the parties, or the like (*y*). Where it appeared that the under-sheriff was plaintiff in the action in which the execution had been issued and executed, the Court would not interfere to relieve the sheriff although the sheriff himself swore, in the usual way, that he did not collude either with the execution creditor or the claimant whom he sought to bring before the Court for the adjustment of their respective claims on the property seized (*z*). Nor will relief be granted to the sheriff where he has himself brought about the claim. And where an under-sheriff, who was acting as solicitor for certain creditors of the defendant, informed him of a fi. fa. at the suit of the plaintiff having been placed in his hands to execute, by which means the issuing of a fiat against the defendant was accelerated, and the execution thereby defeated, the Court refused to relieve the sheriff (*a*). If the sheriff has been guilty of neglect, and incurred a liability thereby, the Court will not relieve him from it (*b*).

Where no seizure made.

Where question is which writ is to have priority.

Where sheriff interested.

Where sheriff has brought about the claim.

Or guilty of neglect.

Sheriff cannot be compelled to apply.

The sheriff cannot, in any case, be compelled to interplead if, in the exercise of his discretion, he thinks fit to proceed without doing so (*c*). This applies even in cases where the goods are claimed as security for a debt only, and where on an interpleader application an order for sale under *Ord. LVII. r.* 12 (*post*, p. 1371) could be made (*c*).

(*n*) *Baynton* v. *Harvey*, 3 Dowl. 344.

(*o*) *Crump* v. *Day*, 4 C. B. 760.

(*p*) *Anderson* v. *Calloway*, 1 C. & M. 182; 1 Dowl. 636: *Chalon* v. *Anderson*, 3 Tyr. 327.

(*q*) *Braine* v. *Hunt*, 2 Dowl. 391; 2 C. & M. 418.

(*r*) *Scott* v. *Lewis*, 1 Gale, 204; 4 Dowl. 259; 2 C. M. & R. 289.

(*s*) *Ireland* v. *Bushell*, 5 Dowl. 147; 2 H. & W. 118. See, however, *Anderson* v. *Calloway*, supra.

(*t*) *Holton* v. *Guntrip*, 6 Dowl. 130; 3 M. & W. 145. See *Holt* v. *Frost*, 28 L. J., Ex. 55, where the sheriff was the solicitor for the claimant, and the parties were ordered to interplead. As to the sheriff being entitled to relief when he intends to levy, before actual seizure, see ante, p. 1366.

(*u*) *Haythorn* v. *Bush*, 2 Dowl. 644. See *Clark* v. *Lord*, Id. 227: *Gethin* v. *Wilks*, 2 Dowl. 189.

(*x*) *Day* v. *Waldock*, 1 Dowl. 523. See *Salmon* v. *Jones*, Id. 369.

(*y*) *Duddin* v. *Long*, 3 Dowl. 139; 1 Bing. N. C. 299; 1 Sc. 281.

(*z*) *Ostler* v. *Bower*, 4 Dowl. 605; 1 H. & W. 653.

(*a*) *Cox* v. *Balne*, 2 D. & L. 718; 14 L. J., Q. B. 95.

(*b*) *Brackenbury* v. *Laurie*, 3 Dowl. 180. See *Lewis* v. *Jones*, 2 M. & W. 203.

(*c*) *Scarlett* v. *Hanson* (C. A.), 12 Q. B. D. 213; 52 L. J., Q. B. 62; 32 W. R. 310.

Application for Relief—Proceedings on Hearing, &c.]—It has been said, that the sheriff, before he makes the application, is bound to inquire of the nature of the claims set up by the adverse parties, and to ascertain whether the execution creditor submits to, or intends to contest them; for, if it afterwards appear by the disclaimer of the parties, or otherwise, that they have been brought before the Court or Judge without reasonable cause, and that there are, in fact, no conflicting claims, the sheriff will probably be ordered to pay the costs of the parties so disclaiming (*d*). He need not apply for (*e*), nor is he bound to accept an indemnity, if offered (*f*). If, however, he accept one, the Court will not relieve him (*g*).

Application for relief.

Proceedings on hearing, &c.

Taking indemnity.

The application should be made to a Master at Chambers (*h*). As to the power to make one application when there are several causes or matters pending, *see Ord. LVII. r.* 14 (*ante*, p. 1360).

Application to whom made.

The application should be made in a reasonable time after receiving notice of the adverse claim (*i*). Under special circumstances the Court or Judge may interfere after some lapse of time (*j*). The application may be made either before or after an action has been commenced against the sheriff (*k*).

Must be made promptly.

The application should be supported by an affidavit, stating the seizure of the goods by the sheriff under the execution, that the goods, or the proceeds of the sale, are in his hands, and the notice of the claim by the party who made it (*l*). It must comply with the provisions of *Ord. LVII. r.* 2 (*ante*, p. 1358), and state any other facts which are relied on in support of the application.

Affidavits in support of.

In general, no one has a right to be heard against the application, unless he is included in the summons, although he is in fact a claimant (*m*). However, in some cases, as where the execution debtor becomes bankrupt, the Court may allow the trustee to be heard (*n*).

Who entitled to appear on application.

An execution creditor appearing need not produce an affidavit (*o*). But the claimant must do so, and he should state in it the nature or particulars of his claim (*p*). Such affidavit need not be made by the claimant himself (*p*). Where the claimant's solicitor, the claimant being absent from England, made an affidavit that he

Affidavits on showing cause

(*d*) *Bishop* v. *Hinxman*, 1 Dowl. 106; *R.* v. *Sheriff of Oxfordshire*, 6 Dowl. 136.

(*e*) *Crossley* v. *Ebers*, 2 H. & W. 216; *Wilks* v. *Popjoy*, 10 Leg. Obs. 12.

(*f*) *Levy* v. *Champneys*, 2 Dowl. 451.

(*g*) See *Ostler* v. *Bower*, 4 Dowl. 605.

(*h*) See ante, p. 1357. Cp. *Bragg* v. *Hopkins*, 2 Dowl. 151.

(*i*) *Devereux* v. *John*, 1 Dowl. 618; *Cooke* v. *Allen*, 2 Dowl. 11; 1 C. & M. 542; *Barker* v. *Phipson*, 3 Dowl. 590; *Crump* v. *Day*, 4 C. B. 760; *Mutton* v. *Young*, 4 C. B. 371; *Redpeny* v. *Fisher*, 3 Dowl. 567; *Beale* v. *Overton*, 2 M. & W. 534; 5 Dowl. 599; *Sableman* v. *Claringbold*, 2 H. & W. 87.

(*j*) *Dixon* v. *Ensell*, 2 Dowl. 621; *Skipper* v. *Lane*, 2 Dowl. 781; 4 M. & Sc. 283.

(*k*) *Hilliard* v. *Hanson* (C. A.), 21 Ch. D. 69; 47 L. T. 342; 31 W. R. 151; *Aylwin* v. *Evans*, 52 L. J., Ch. 105; 47 L. T. 565.

(*l*) *Northcote* v. *Beauchamp*, 1 M. & Sc. 158; *Cooke* v. *Allen*, 2 Dowl. 11; 1 C. & M. 542; 3 Tyr. 586.

(*m*) *Clarke* v. *Lord*, 2 Dowl. 55.

(*n*) *Kirk* v. *Clarke*, 4 Dowl. 363; *Ibbotson* v. *Chandler*, 9 Dowl. 250; *Nason* v. *Redshaw*, 2 Dowl. 395.

(*o*) *Angus* v. *Wootton*, 3 M. & W. 310.

(*p*) *Powell* v. *Lock*, 1 H. & W. 281; 4 N. & M. 852; 3 A. & E. 15; *Plues* v. *Capel*, Ex. D., March 7th, 1880; 68 L. T. Journ. 351.

PART XIV.

had been informed, and, from documents, vouchers and receipts in his possession, believed that the goods seized were the *bond fide* property of the claimant, it was held that the affidavit was sufficient to justify the Court in directing an issue (*q*). An affidavit for showing cause may be sworn at any time before cause is shown (*r*).

Proceedings on hearing where the parties appear.

If all the parties appear, the Master will hear their statement and the claims, and the proceedings are regulated by *Ord. LVII. rr.* 7 and 9 (*ante*, p. 1359). The Master may direct an issue or a special case to try the question between the parties (*s*). In the cases mentioned in *Ord. LVII. r.* 8 (*ante*, p. 1359), the case can be disposed of in a summary manner (*t*). In the issue the claimant should in general be the plaintiff, and the execution creditor the defendant (*u*). If the claimant (*v*) or the execution creditor (*w*) be resident abroad, it may be made part of the order that he shall give security for costs (*v*). Where an issue or action is directed, it will, in general, be made part of the order that the proceedings against the sheriff be stayed until some time after the trial of it; and, by the order, directions will in general be given respecting the sale of the goods and application of the proceeds, or value thereof (*y*). The Master or Judge has power to restrain an action against the execution creditor, as well as against the sheriff (*z*). In one case, where an action of trespass having been brought against the sheriff for seizing a horse which had been expressly pointed out to the officer as the defendant's property, by the clerk to the plaintiff's solicitor, the Court, upon a motion under the 1 & 2 W. 4, *c.* 58, instead of an issue, directed that the action should proceed, the name of the execution creditor being substituted for that of the sheriff; and they further directed that the horse should be delivered up to the claimants, they giving security to the satisfaction of the Master for the return of the horse in the event of their claim turning out to be unfounded (*a*). With the consent of

(*q*) *Webster* v. *Delafield*, 7 C. B. 187.

(*r*) *Brame* v. *Hunt*, 2 Dowl. 391.

(*s*) See ante, p. 1360. *Harrison* v. *Wright*, 13 M. & W. 816; 2 D. & L. 695; *Allen* v. *Gibbons*, 2 Dowl. 292; *Bramidge* v. *Adshead*, Id. 59; *Badcock* v. *Beauchamp*, 8 Bing. 86; 1 M. & Sc. 158; *Slowman* v. *Back*, 3 B. & Ad. 103. An execution creditor does not, by becoming a party to an interpleader issue, ratify or adopt the act of the sheriff, so as to render himself liable for the seizure of the goods which are the subject of the interpleader issue: *Woollen* v. *Wright*, 1 H. & C. 554; 31 L. J., Ex. 513.

(*t*) See ante, p. 1364.

(*u*) *Bramidge* v. *Adshead*, 2 Dowl. 59. See forms of order, Chit. Forms, pp. 700—702.

(*v*) *Tomlinson* v. *Land and Finance Corporation* (C. A.), 53 L. J., Q. B. 561; 28 Sol. Jour. 734: *Webster* v. *Delafield*, 7 C. B. 187. See *Williams* v. *Gray*, 19 L. J., C. P. 382, a case on the construction of a bond given as a security for a claimant. See cases ante, p. 1360.

(*w*) *Williams* v. *Crossling*, 3 C. B. 957, where the execution creditor was defendant.

(*y*) See Ord. LVII. r. 12, post, p. 1371, as to the power to order the sale of goods and the application of the proceeds: *Darby* v. *Waterlow*, L. R., 3 C. P. 452; 37 L. J., C.P. 203, where it had been ordered that the sheriff should withdraw from the possession of goods upon security being given to the satisfaction of the Master, and it was held that as against the sheriff such security had been given.

(*z*) *Carpenter* v. *Pearce*, 27 L. J., Ex. 143.

(*a*) *Brown* v. *Ludham*, 6 Sc. N. R. 934, where consequential damages were insisted on. See *Slowman* v. *Back*, 3 B. & A. 103, where a special order was made.

the execution creditor and the claimant, the Master or Judge will dispose of the merits of their claims, and determine the same in a summary way (*b*). And in a case where a small amount only (less than 50*l.*) is in dispute he may do so at the request of either party (*Ord. LVII. r.* 8, *ante*, p. 1359). When the question is one of law, and the facts are not in dispute, the Master may decide the question, or order that a special case be stated for the opinion of the Court (*c*). If the execution creditor take an issue he does not, by so doing, ratify or become liable for the act of the sheriff in seizing the goods (*d*).

Order for receiver.

The Master, instead of making the usual order that the sheriff sell the goods unless the claimant pays money into Court, may order that a receiver be appointed pending the trial of the issue (*e*).

By *R. of S. C., Ord. LVII. r.* 12, "When goods or chattels have been seized in execution by a sheriff or other officer charged with the execution of process of the High Court, and any claimant alleges that he is entitled, under a bill of sale or otherwise, to the goods or chattels by way of security for debt, the Court or a Judge may order the sale of the whole or a part thereof, and direct the application of the proceeds of the sale in such manner and upon such terms as may be just" (*f*).

Order for sale of the goods when claimed as security.

The rule does not enable the execution creditor to compel the sheriff to interplead even in cases where, if he did so, an order for sale might be made (*g*).

If the claimant does not appear the proceedings are regulated by *Ord. LVII. r.* 10 (*ante*, p. 1359), and the Master will bar such claim as against the sheriff, saving, nevertheless, the claimant's right against the execution creditor (*h*). And if the execution creditor does not appear, his claim will be barred (*i*) in respect of the matters brought in question by the summons, and the order will be, not that the execution creditor shall be barred of his demand generally, but that the sheriff shall withdraw from possession, and that the execution creditor take no proceedings against him in respect of the goods claimed (*k*); or, if the sheriff have sold, he will be

When claimant does not appear.

(*b*) Ord. LVII. r. 8, ante, p. 1359: *Ford* v. *Baynton*, 1 Dowl. 357: *Curlewis* v. *Peacock*, 5 Dowl. 381.

(*c*) Ord. LVII. r. 9, ante, p. 1359; cp. C. L. P. Act, 1860, ss. 15 and 16.

(*d*) *Woollen* v. *Wright*, 1 H. & C. 554; 31 L. J., Ex. 513. Where goods seized by the sheriff under a fi. fa. are claimed and subsequently sold under an interpleader order (which does not restrain any action except against the sheriff), the execution creditor is not liable to the claimant (who having succeeded in the interpleader issue, sues the execution creditor in trespass), for damages sustained subsequent to the order: *Walker* v. *Olding*, 1 H. & C. 621; 32 L. J., Ex. 142.

(*e*) *Howell* v. *Dawson*, 13 Q. B. D. 67.

(*f*) This corresponds with sect. 13 of the C. L. P. Act, 1860. See as to the right of the execution creditor to the surplus, *Chesworth* v. *Hunt*, 5 C. P. D. 266.

(*g*) *Scarlett* v. *Hanson* (C. A.), 12 Q. B. D. 213; 53 L. J., Q. B. 62; 32 W. R. 310.

(*h*) See *Bowdler* v. *Smith*, 1 Dowl. 417: *Perkins* v. *Burton*, 3 Tyr. 51; 2 Dowl. 108: *Twogood* v. *Morgan*, 3 Tyr. 52 a: *Ford* v. *Dillon*, 5 B. & Ad. 885; 2 N. & M. 662. A claimant who is served and does not appear will be estopped from afterwards asserting the same claim as against the sheriff. *Williams* v. *Richardson*, 36 L. T. 506, Q. B.

(*i*) *Doble* v. *Cummins*, 7 A. & E. 580; 2 N. & P. 575. But see *Donniger* v. *Hinxman*, 2 Dowl. 424.

(*k*) *Eccleigh* v. *Salisbury*, 3 Bing. N. C. 298; 5 Dowl. 369.

PART XIV.

directed to pay over the produce of the sale to the claimant. Where neither the claimant nor the creditor appear, the sheriff will be allowed to sell so much of the goods seized as will satisfy his poundage and expenses, and then withdraw from possession. If an execution creditor abandon his process against certain goods seized under a fi. fa. in favour of the claimant, the sheriff may still show, in an action against him, that the goods were the defendant's property (*l*).

Appeal.

As to appeals, *see Ord. LVII. r.* 11 (*ante*, p. 1364).

Rescinding or amending order.

If an order directing a trial of an issue become useless, the Master may order it to be discharged (*m*).

Time to return writ.

Before the Judicature Acts, if the rule *nisi* was obtained before the time for returning the writ had expired and was discharged, the sheriff was allowed a reasonable time to return the writ, before an attachment could issue against him (*n*).

Sheriff withdrawing.

In a case where the claimant's solicitor on the last day for giving the security induced the Master to accept it by untruly representing that the execution creditor had given his approval of it, and on notice of such acceptance, although the bond was not stamped until the next day, the sheriff withdrew, it was held that as between himself and the execution creditor, he was justified in doing so (*o*).

Compelling sheriff to re-enter.

Where the sheriff has been allowed to withdraw from possession, he cannot, after he is out of office, be compelled to re-enter, however the question between the parties be determined (*p*).

Order, made by consent, binding.

An order, if made by their consent, will be binding on the parties, like an award, though the consent be not stated in the order (*q*).

Particulars.

The claimant may be ordered to give particulars of the goods which he claims (*r*). If there are no particulars, and on the trial of the issue he is found to be entitled to some of the goods only, he is entitled to the sum which he has paid into Court to abide the event (*s*).

Issue, &c.

Issue, &c.]—The observations made *ante*, p. 1360, as to the issue, and the proceedings thereon, will be here applicable. The issue must be framed in accordance with the order directing it to be tried. Where a question between the execution creditor and the assignees of a bankrupt was stated as being, "whether the aforesaid execution was valid against the said fiat;" it was held that the plaintiff could not dispute the bankruptcy (*t*). But where the question was, "whether the plaintiffs were entitled to the goods seized, as against and free from the defendant's execution, and whether they were liable to be seized as against the plaintiffs:" it was held that the plaintiffs, claiming as assignees under the bankruptcy of a judgment debtor, were bound to prove the trading, the petitioning creditor's debt, and the act of

(*l*) *Baynton* v. *Harvey*, 3 Dowl. 344.
(*m*) *Luckin* v. *Simpson*, 8 Sc. 676.
(*n*) *R.* v. *Sheriff of Hertfordshire*, 2 H. & W. 122; 5 Dowl. 144.
(*o*) *Darby* v. *Waterlow*, L. R., 3 C. P. 453; 37 L. J., C. P. 203.
(*p*) *Wilton* v. *Chambers*, 3 Dowl. 12.
(*q*) *Harrison* v. *Wright*, 13 M. & W. 816; 2 D. & L. 695; 14 L. J., Ex. 196.
(*r*) *Price* v. *Plummer*, 25 W. R. 45, C. P. D.
(*s*) *Plummer* v. *Price* (C. A.), 39 L. T. 657: reversing, C. P. D., Id. 38; 26 W. R. 682.
(*t*) *Linnit* v. *Chaffers*, 4 Q. B. 762.

bankruptcy, although no notice had been given to dispute them (*u*). Upon an interpleader issue whether certain goods and chattels seized in execution were "at the time of the seizure, the goods and chattels of the plaintiff," the plaintiff proved a bill of sale of the goods to himself, it was held that the defendant, the execution creditor, might set up, by way of answer, a prior bill of sale to a third party (*x*). In an interpleader issue between a claimant under a *bonâ fide* bill of sale duly registered, and an execution creditor of the assignor, the latter cannot set up a prior bill of sale to a third party, also *bonâ fide*, but void as against execution creditors for want of being filed under the 17 & 18 *V. c.* 36, *s.* 1 (*y*). Where the question was, whether certain goods which had been seized by the sheriff under a fi. fa. were the property of the plaintiffs as assignees of a bankrupt, or of the defendant, the execution creditor, and the defendant pleaded by virtue of the said fi. fa., and as against the plaintiffs, that he was entitled to the goods; it was held that the plaintiffs were entitled to begin at the trial (*z*). See *Bird* v. *Crabb*, 30 L. J., Ex. 318, where the wife of the judgment debtor was claimant; and *see Shingler* v. *Holt*, 7 H. & N. 65; 30 L. J., Ex. 322.

As to the trial of the issue and proceedings preliminary thereto, *see ante*, pp. 1360—1361.

Special Case.]—As to this, *ante*, p. 1361.

Special case.

Costs, Poundage, &c.]—*Ord. LVII. r.* 15 (*ante*, p. 1362), gives the Court or a Judge power to make all such orders as to costs and all other matters as may be just and reasonable. Costs, poundage, &c.

The costs are in the discretion of the Master or Judge before whom the application is made (*a*). In general, no costs on matters arising out of interpleader motions are allowed until the termination of the proceedings (*b*). As to security for costs, *see ante*, p. 1360.

If the claimant does not appear upon the summons, it would seem the Master or Judge has no power to order him to pay the costs of the application (*c*). So, on the other hand, if the claimant does appear, and the judgment creditor does not, the Court will not order the latter to pay the claimant's costs; for the judgment creditor is not bound to appear when there are no goods liable to his execution (*d*). If the claimant, after an order has Costs between the claimant and creditor.

(*u*) *Lott* (or *Scott*) v. *Melville*, 3 M. & G. 40. The bankruptcy proceedings in this case were under the 6 G. 4, c. 16—the 90th sect. of which required a notice to dispute certain requisites to constitute a valid bankruptcy to be given in certain cases.

(*x*) *Gadsden* v. *Barrow*, 9 Ex. 514; 23 L. J., Ex. 134. See *Carne* v. *Brice*, 7 M. & W. 183, where the claimants were the defendants in a feigned issue, and were not allowed to set up a jus tertii. See *Belcher* v. *Patten*, 6 C. B. 608; 18 L. J., C. P. 69. And see *Rogers* v. *Kenny*, 9 Q. B. 592, where the claimant of some goods taken in execution was the plaintiff, and it was held that he proved his case by showing a lien on the goods. See *Withers* v. *Parker*, 29 L. J., Ex. 321.

(*y*) *Edwards* v. *English*, 7 E. & B. 565; 26 L. J., Q. B. 193.

(*z*) *Edwards* v. *Matthews*, 16 L. J., Ex. 291.

(*a*) See ante, Vol. 1, p. 672; *Seaward* v. *Williams*, 1 Dowl. 528; *Long* v. *Williams*, 4 A. & E. 365; *Lewis* v. *Holding*, 3 Sc. N. R. 191; 2 M. & Gr. 875; 9 Dowl. 652; *Kerr* v. *Edwards*, 8 Sc. 337; 8 Dowl. 29.

(*b*) *Hood* v. *Bradbury*, 6 M. & Gr. 981.

(*c*) Ante, p. 1360.

(*d*) *C.* v. *D.*, W. N. 1883, 207;

PART XIV.

been made directing the trial of an issue between him and the execution creditor, abandons his claim, he will in general be ordered to pay the latter's costs down to the time of the claim being abandoned, and of applying to take out of Court the money, if any, paid in by the sheriff (*e*). So, he may be ordered to pay them if he neglect to pay money into Court in pursuance of an order for that purpose (*f*). So, if the execution creditor, instead of proceeding with an issue directed to be tried, abandon his claim to levy upon the goods, the claimant will be entitled to his costs in like manner (*g*). Where the issue has been tried with a jury, the costs of it and of the application and subsequent proceedings, in the absence of a special order, follow the event; and the unsuccessful party is liable for them (*h*), even though he be the trustee of a bankrupt (*i*), and this even though the issue has been ordered by consent (*k*). As to costs when the claimant succeeds only in part, *see ante*, p. 1363 (*l*). The successful party is entitled to the costs of an order for taking the money out of Court, or for having the property in dispute delivered to him by the stakeholder, though he has not applied for the consent of the other party (*m*).

How obtained.

The Judge who tries the issue should generally be asked at the trial to make an order as to the cases under *Ord. LVII. r.* 13 (*ante*, p. 1361). If he does not do so, the party claiming the costs, in order to obtain them, must, after notice, apply to a Judge at Chambers for an order on a summons (*n*). The affidavit in support of an application for costs, where the claimant relinquishes his claim, must be entitled in the names of the parties in the original cause (*o*).

Sheriff's costs attending the application.

Under the present practice, when an order is made on the application of the sheriff, he will, in general, be allowed his costs from the period at which he has been called into interpleader action, that is to say, he is entitled as against an unsuccessful claimant to costs and possession money, from the time of the notice of claim or the time of sale, whichever would be first; and when the sheriff is ordered to withdraw he is entitled to costs as against the execution creditor from the time at which the latter authorized the carrying on of the interpleader proceedings, that is to say, generally from the return of the interpleader summons (*p*). When the execution

Bitt. Ch. Cas. 114: *Prosser* v. *Mallinson* (C. A.), 28 Sol. J. 616. See *Glazier* v. *Cooke*, 5 N. & M. 680: *Swaine* v. *Spencer*, 9 Dowl. 347. But see *Bryant* v. *Ikey*, 1 Dowl. 428: *Beswick* v. *Thomas*, 5 Dowl. 458.

(*e*) *Wills* v. *Hopkins*, 3 Dowl. 346.

(*f*) *Scales* v. *Sargeson*, 3 Dowl. 707; 4 Dowl. 232.

(*g*) *Dabbs* v. *Humphries*, 1 Bing., N. C. 412; 3 Dowl. 377.

(*h*) See Ord. LXV. r. 1, ante, Vol. 1, p. 672. *Bowen* v. *Bramidge*, 2 Dowl. 213: *Armitage* v. *Foster*, 1 H. & W. 208. And see *Staley* v. *Bedwell*, 2 P. & D. 309; 10 A. & E. 145.

(*i*) *Melville* v. *Smark*, 3 Sc. N. R. 257; 2 M. & Gr. 57.

(*k*) *Matthews* v. *Sims*, 4 Dowl. 234.

(*l*) See *Lewis* v. *Holding*, 3 Sc. N. R. 191; 2 M. & Gr. 875; 9 Dowl. 652: *Staley* v. *Bedwell*, 2 P. & D. 309; 10 A. & E. 145: *Davis* v. *Clifton*, 25 L. J., Q. B. 344.

(*m*) *Meredith* v. *Rogers*, 7 Dowl. 596: *Barnes* v. *Bank of England*, 7 Dowl. 319.

(*n*) *Burgh* v. *Schofield*, 2 Dowl., N. S. 261; 9 M. & W. 478. See ante, p. 1361. See *Bowen* v. *Bramidge*, 2 Dowl. 213: *Scales* v. *Sargeson*, 3 Dowl. 707: *Bland* v. *Delano*, 6 Dowl. 293.

(*o*) *Elliott* v. *Sparrow*, 1 H. & W. 370. And see *Levi* v. *Ayle*, 2 Dowl., N. S. 932.

(*p*) *Searle* v. *Matthews*, W. N. 1883, 176; Bitt. Ch. Cas. 113, *Field*, J., at Chambers.

creditor consents to the withdrawal of the sheriff, or does not appear on the hearing of the application, the sheriff will not generally get any costs (*q*). Under the former common law practice the sheriff was not, in general, allowed his costs of making and attending the application (*r*); nor was he allowed them, though the claimant did not appear (*s*). But he might have been allowed them if the claimant did appear, if he could show that the claimant's conduct was vexatious (*t*). Also, he was, in general, allowed the costs of any application made to open the order already made, where such application was made by the claimant or execution creditor, and the sheriff was no way in fault (*u*); but not so if the fresh application could be considered but as a prolongation of the original one (*x*). It was held that the costs of an interpleader order were "expenses of the execution," within the 43 *G.* 3, *c.* 46, *s.* 5 (*y*).

Costs when payable by the sheriff.

The Master or Judge, when he discharges the sheriff's summons, frequently, upon doing so, orders him to pay the costs (*z*); and he will invariably do so, if the sheriff do not appear to support it, or if it is clear that he has unnecessarily brought the parties before the Master or Judge (*a*). And where the Court had ordered the sheriff to pay the rent, upon the landlord giving security, and also to pay his costs, it was held, that the sheriff was liable to pay the expenses of the security (*b*). If the sheriff has been given notice to return the writ, and an attachment obtained for not returning it, the Court will only grant the sheriff an order on payment by him of the costs of the attachment (*c*).

Sheriff's poundage and expenses of execution, &c.

The sheriff's claim to poundage, fees, and expenses of the execution, depends in general upon the legality of the seizure; and if the parties appear, and an interpleader order is made, he will be ordered to pay into Court the proceeds of the goods, without allowing him to deduct such poundage, fees, &c., his claim for them being reserved for future determination. His right to them will then depend upon the event of the issue ordered (*d*). If decided in favour of the execution creditor, he will get them, otherwise not. If the issue is decided in favour of the execution creditor, the sheriff is entitled to be paid them by the execution creditor (*e*), who may recover them from the clainant (*e*). This applies even when the value of the goods is not sufficient to satisfy the

Where the parties appear.

(*q*) *C.* v. *D.*, W. N. 1883, 207; Bitt. Ch. Cas. 114, *Field*, J., at Chambers: *Prosser* v. *Mallinson* (C. A.), 28 Sol. J. 616.

(*r*) See per Cur. in *Bowdler* v. *Smith*, 1 Dowl. 418: *Field* v. *Cope*, 1 Dowl. 567; 2 C. & J. 480; 2 Tyr. 458: *Morland* v. *Chitty*, 1 Dowl. 520: *Seward* v. *Williams*, 1 Dowl. 528: *Bryant* v. *Ikey*, Id. 430: per *Parke*, B., in *Scales* v. *Sargeson*, 4 Dowl. 232.

(*s*) *Jones* v. *Lewis*, 8 M. & W. 264; 9 Dowl. 652: *Thomson* (or *Oram*) v. *Sheldon*, 1 Sc. 607: *Lambert* v. *Cooper*, 5 Dowl. 547. And see *Philby* v. *Ikey*, 2 Dowl. 222: *Lewis* v. *Ikey*, Id. 338.

(*t*) *Cox* v. *Fenn*, 7 Dowl. 50.

(*u*) *Bryant* v. *Ikey*, 1 Dowl. 428.

(*x*) See *Tilleard* v. *Cave*, 6 Bing., N. C. 251; 8 Sc. 511.

(*y*) *Hammond* v. *Nairn*, 9 M. & W. 221; Vol. 1, p. 827.

(*z*) See *Anderson* v. *Calloway*, 1 C. & M. 182; 1 Dowl. 636: *Re Sheriff of Oxfordshire*, 6 Dowl. 136.

(*a*) *Bishop* v. *Hinxman*, 2 Dowl. 166.

(*b*) *Clarke* v. *Lord*, 2 Dowl. 227.

(*c*) *Almore* v. *Adeane*, 3 Dowl. 408.

(*d*) See *Barker* v. *Dynes*, 1 Dowl. 169: *Morland* v. *Chitty*, 1 Dowl. 520: *Clarke* v. *Chetwode*, 4 Dowl. 635.

(*e*) *Smith* v. *Darlow* (C. A.), 26 Ch. D. 605; 50 L. T. 571; 53 L. J., Ch. 696.

PART XIV.

debt (*e*). If the parties come to an arrangement, and do not try the issue ordered, still the sheriff will not be entitled to the costs, unless, perhaps, it could be shown that the execution creditor had realized his debt, or part of it, by such arrangement; in which case, perhaps, he would be ordered to pay poundage, &c., or some part of it, in proportion to the amount realized. And, it seems, the sheriff would be entitled, on such arrangement, to expenses incurred by him in keeping possession of the goods, or otherwise, *after* the interpleader order was made; and these expenses must, it would seem, be paid by the party who gives up his claim to the goods or proceeds (*f*). Also, the sheriff will be allowed the costs of keeping possession, after making the application, where it is for the benefit of both parties, and not merely in furtherance of his duty (*g*). And, in general, if the sheriff have kept possession or sold the goods (*h*), or done any other act by order of the Court or Judge, he will be allowed the costs of so doing (*i*). As to the expense of keeping cattle, *see Vol.* 1, p. 825, n. (*k*) (*k*). If neither the execution creditor nor the claimant appears after service of the interpleader summons, the Master or Judge will order so much of the goods to be sold as will satisfy the sheriff's poundage and expenses, &c., and the rest to be abandoned (*l*).

Where parties do not appear to the summons.

Judgment.

Judgment.]—*See ante*, p. 1361.

New trial.

New Trial.]—*See ante*, p. 1363.

Appeal.

Appeal.]—*See Ord. LVII. r.* 11, *ante*, p. 1364. This rule does not prevent the sheriff from appealing without leave (*m*). The sheriff should not, as a rule, be served with notice of an appeal from the judgment or order made on the trial of an interpleader issue (*n*). Unless he is really a party interested, he will not get his costs if he appears on the appeal (*n*).

Proceedings in violation of interpleader order.

Proceedings in Violation of Interpleader Order or Pending Summons.]—Where proceedings are taken in violation of the interpleader order, application should be made to the Master or Judge (*o*).

The sheriff having seized goods under a writ of fi. fa. against A., B. claimed them, whereupon an interpleader summons was taken out by the sheriff and served on B., notwithstanding which

---

(*e*) *Smith* v. *Darlow* (C. A.), 26 Ch. D. 605; 50 L. T. 571; 53 L. J., Ch. 696.

(*f*) See *Dabbs* v. *Humphries*, 3 Dowl. 377; 1 Hodges, 4; 1 Bing., N. C. 412; 1 Sc. 325; *Scales* v. *Sargeson*, 4 Dowl. 231. And see *Armitage* v. *Foster*, 1 H. & W. 208.

(*g*) *Underden* v. *Burgess*, 4 Dowl. 104.

(*h*) *Brown* v. *Delano*, 6 Dowl. 293: *Dabbs* v. *Humphries*, supra.

(*i*) See the cases supra, and *West* v. *Rotherham*, 2 Bing., N. C. 527.

(*k*) See *Gaskell* v. *Sefton*, 3 D. & L. 267; 14 M. & W. 802; 15 L. J., Ex. 107.

(*l*) *Eveleigh* v. *Salisbury*, 3 Bing., N. C. 298; 5 Dowl. 369.

(*m*) *Smith* v. *Darlow* (C. A.), 26 Ch. 605; 50 L. T. 571; 53 L. J., Ch. 696.

(*n*) *Ex p. Webster*, *In re Morris*, 22 Ch. D. 136, 141: cp. *Ex p. Strater*, *In re Morris*, 19 Ch. D. 216, 223.

(*o*) *Hollier* v. *Laurie*, 3 C. B. 331.

B. took the goods forcibly out of the possession of the officer in whose custody they were, and sold them:—Held that B. was guilty of contempt, and the Court granted a rule for an attachment against him, not to be enforced if he paid the amount of the execution into Court (*p*).

The sheriff will not be compelled to make any return to a fi. fa. pending interpleader proceedings (*q*).

(*p*) *Cooper* v. *Asprey*, 3 B. & S. 932; 32 L. J., Q. B. 209.

(*q*) *Angell* v. *Baddeley*, 3 Ex. D. 86; 47 L. J., Ex. 86.

PART XV.

APPLICATIONS TO THE COURT AND AT CHAMBERS—DISTRICT REGISTRIES—TIME, ETC.

CHAP.		PAGE
CXXII.	*Applications to the Court—Motions and Orders*	1378
CXXIII.	*Applications at Chambers—Summonses and Orders*	1401
CXXIV.	*District Registries and Proceedings therein*	1421
CXXV.	*Time, Extension and Computation of, &c.—Month's Notice to proceed*	1432
CXXVI.	*Service of Proceedings — Notices — Office Copies — Printing Proceedings—Filing, &c. of Documents, &c.*	1439

CHAPTER CXXII.

APPLICATIONS TO THE COURT—MOTIONS AND ORDERS.

PART XV.

What applications to be made to Court.

What Applications to be made to the Court—Divisional Courts.]—As a general rule, every application should be made, in the first instance, at Chambers, and not to the Court, unless it is one of the proceedings or matters required by *Ord. LIX. r.* 1 (*infra*), to be made to a Divisional Court, or is expressly required by statute to be made to the Court (*a*).

Divisional Courts.

By *R. of S. C., Ord. LIX. r.* 1, "The following proceedings and matters shall continue to be heard and determined before Divisional Courts; but nothing herein contained shall be construed so as to take away or limit the power of a single Judge to hear and determine any such proceedings or matters in any case in which he has heretofore had power to do so, or so as to require any interlocutory proceeding therein heretofore taken before a single Judge to be taken before a Divisional Court:—

(a) "Proceedings on the Crown side of the Queen's Bench Division;

(b) "Appeals from revising barristers, and proceedings relating to election petitions, parliamentary and municipal;

(c) "Appeals under sect. 6 of the County Courts Act, 1875;

(*a*) Where an application is required so to be made, this will be found expressly stated in that part of this work in which that particular application is treated of.

(d) "Proceedings on the revenue side of the Queen's Bench Division;

(e) "Proceedings directed by any Act of Parliament to be taken before the Court, and in which the decision of the Court is final;

(f) "Cases stated by the Railway Commissioners under the Act 36 & 37 Vict. c. 48;

(g) "Cases of habeas corpus, in which a Judge directs that an order nisi for the writ, or the writ be made returnable before a Divisional Court;

(h) "Special cases where all parties agree that the same be heard before a Divisional Court;

(i) "Appeals from Chambers in the Queen's Bench Division;

(j) "Applications for new trials where there has been a trial with a jury."

As to the constitution and formation of Divisional Courts, *see ante, Vol.* 1, p. 15.

Application to Court, how made.

Application to the Court, how made.]—By *R. of S. C., Ord. LII. r.* 1, "Where by these Rules any application is authorised to be made to the Court or a Judge, such application, if made to a Divisional Court or to a Judge in Court, shall be made by motion."

Orders granted upon motion by counsel are granted, in the Queen's Bench Division, either on the *plea* side, or on the *crown* side of the Court. Orders on the plea side only are treated of here.

Applications' to be made on notice.

As a general rule, under the present practice, every application in an action is required to be made after notice of motion. Formerly, most applications were made in the first instance ex parte, and a rule nisi or order to show cause was granted in the first instance, but the present practice has, in most cases, abolished rules nisi and orders to show cause, and substituted a notice of motion.

—No rules nisi in certain cases.

By *Ord. LII. r.* 2, "No motion or application for a rule nisi or order to show cause shall hereafter be made in any action, or (a) to set aside, remit, or enforce an award, or (b) for attachment, or (c) to answer the matters in an affidavit, or (d) to strike off the rolls, or (e) against a sheriff to pay money levied under an execution."

The rule, it will be observed, is confined to the particular applications expressly named in it, and to motions or applications "in an action" (*b*). In the case of applications other than those expressly named, and applications in an action, a notice or application for an order to show cause may still be made (*b*). Thus such an application may still be made on appeal from a County Court (*c*), or for a prerogative writ of mandamus (*d*). But in the cases mentioned in

---

(*b*) *Re Phillips and Gill*, 1 Q. B. D. 78; 45 L. J., Q. B. 36; 24 W. R. 158. The application in this case would now fall within rule 2 (a), and should be made by motion. *In the goods of Mary Cartwright*, 1 P. D. 422; 34 L. T. 72; 24 W. R. 214. See Ord. I. r. 2, ante, Vol. 1, p. 201, by which all applications, other than those in an action, may, subject to the other rules, be made in the same manner as they would have been made if the Jud. Acts had not been passed.

(*c*) *Mathews* v. *Ovey* (C. A.), 13 Q. B. D. 403; 52 L. J., Q. B. 439; 50 L. T. 776, overruling *Harris* v. *Galpin*, 47 J. P. 727.

(*d*) *Exp. Gribthorpe School Board*, 47 J. P. 727.

PART XV.

—No rules absolute, ex parte or orders to show cause except in certain cases.

the rule, and in all applications made in an action, notice of motion must be given (*e*).

By *Ord. LII. r.* 3, "Except where according to the practice existing at the time of the passing of the principal Act any order or rule might be made absolute ex parte in the first instance, and except where notwithstanding rule 2, a motion or application may be made for an order to show cause only, no motion shall be made without previous notice to the parties affected thereby. But the Court or a Judge, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief, may make any order ex parte upon such terms as to costs or otherwise, and subject to such undertaking, if any, as the Court or Judge may think just; and any party affected by such order may move to set it aside."

The cases where, by the practice existing at the time of the passing of the Judicature Act, an order or rule might be made absolute ex parte in the first instance are pointed out in the course of this work in treating of that particular application. This part of the rule is subject to the express provisions of the other rules as to how particular motions shall be made (*f*). Rule 2 is set out *supra*, p. 1379. The effect of rule 3 is that, except in the cases expressly provided for by rule 2, in all cases where, under the former practice, an order or rule might have been made absolute ex parte in the first instance, or an order to show cause only made, this may still be done (*g*).

How facts brought before the Court.

Affidavit (*h*).

How Facts brought before the Court.]—Matters of fact are brought before the Court on a motion or a Judge or Master on a summons by affidavit (*Ord. XXXVIII. r.* 1, *ante*, *Vol.* 1, p. 453). The formal requisites and other general matters relating to affidavits, will be found treated of *ante*, *Vol.* 1, *Ch. XLIV.* As regards the contents of the affidavit, the necessary requisites in each particular case will be found noticed under the particular heads throughout this work. It should state such facts as may induce the Court to grant the application, and as positively and distinctly as the case will admit of (*i*). Where it is sought to impeach a rule of Court or Judge's order, the materials upon which it was founded should be brought before the Court (*j*). Formerly the Court would not even notice the fact of an application having previously been made to a Judge at Chambers on the same subject, unless it were substantiated by affidavit, but the same strictness is not now observed (*k*). Where, upon a motion to set aside a Judge's order, it was objected that the order was not annexed to the affidavit, or set out verbatim in it, but the substance only of it was stated, the Court held that to be suffi-

(*e*) *Delmar* v. *Freemantle*, 3 Ex. D. 237; 47 L. J., Ex. 767; 26 W. R. 683, application for order on sheriff to pay over money levied: *Eynde* v. *Gould*, 9 Q. B. D. 335; 51 L. J., Q. B. 425; 31 W. R. 49.

(*f*) See *Jupp* v. *Cooper*, 5 C. P. D. 26: *Fowler* v. *Ashford*, 45 L. T. 46: *Eynde* v. *Gould*, supra.

(*g*) See Ord. I. r. 2, ante, Vol. 1, p. 201.

(*h*) As to the course to be pursued where a party refuses to make an affidavit, see ante, p. 474.

(*i*) See *Green* v. *Rohan*, 4 Dowl. 659: *Classey* v. *Drayton*, 6 M. & W. 17.

(*j*) *Needham* v. *Bristowe*, 4 Sc. N. R. 773; 4 M. & G. 262.

(*k*) *Goren* v. *Tute*, 7 M. & W. 142.

cient (*l*). And where all mention of the order was omitted in the affidavit, but the rule appeared to have been drawn up upon reading the order, the Court held it to be sufficient (*m*). An order making the same order in several causes may be moved for on a single affidavit intituled in all the causes (*n*).

When and how made and filed, &c.

The affidavit *must be made before the motion is made, and produced in Court at the time of making* (*o*). In general, it seems to be no objection to an affidavit that it was sworn before the precise circumstances arose on which the motion is founded, provided it could in any way be material at the time (*p*). If not already filed, the affidavit must be handed in to the Master, whether the order be granted or refused (*q*). Under very particular circumstances the Court may allow the affidavit to be made after a rule nisi is moved for (*r*), but this is very seldom done (*s*). As to filing affidavits in general, *see ante, Vol.* 1, *Ch. XLIV.* If, when an order is moved for, you intend, on arguing the case, to rely on any affidavits in the same cause already on the files of the Court, such affidavits must be specified in the notice of motion (*t*). In some cases a copy of the affidavit must be served with the notice of motion, *see Ord. LII. r.* 4 (*post*, p. 1383).

Using affidavits already filed.

Practice where affidavits conflicting.

When the affidavits are conflicting, the Court will sometimes refer the matter to the Master to report what the facts really are, and then the Court will in general act upon such report (*u*). In some cases upon the hearing of a motion where the facts are in dispute, the Court will direct certain questions to be tried by a jury, and afterwards act upon their verdict.

Ex parte motions.

Ex parte Applications.]—In certain cases (*see supra*, p. 1380) which are noticed in the course of this work, an application may be made by motion ex parte without any notice of motion. Ex parte motions may generally be made in Court on the days on which motions are taken. The days on which and the Court in which they may be made will be found notified in the daily cause list. Ex parte applications generally precede opposed motions.

Pre-audience and going through the bar.

Counsel have pre-audience in ex parte motions in the order of their precedence; those within the bar first, as the Attorney-General, the Solicitor-General, the Queen's counsel, &c.; then the barristers without the bar beginning from the centre to the left, and thence

(*l*) *Shirley* v. *Jacobs*, 3 Dowl. 101: *Bland* v. *Dax*, 8 Q. B. 126.

(*m*) *Atwill* v. *Baker*, 5 Dowl. 462.

(*n*) *Barrack* v. *Newton*, 1 Q. B. 525.

(*o*) Ord. XXXVIII. r. 19, ante, Vol. 1, p. 470. See *Williams* v. *Reeves*, 2 Chit. Rep. 218: *Ditchett* v. *Tollett*, 3 Price, 259: *Salloway* v. *Whorewood*, 2 Salk. 461: *Pilmore* v. *Hood*, 8 Dowl. 21: *Tilley* v. *Henley*, 1 Chit. Rep. 136: *Shaw* v. *Mansfield*, 7 Price, 709: *Doe* d. *Hill* v. *Tollett*, 1 D. & L. 121, B. C.

(*p*) *Read* v. *Massie*, 4 Dowl. 681. See *Lang* v. *Comber*, 4 East, 348: *Langston* v. *Wetherell*, 14 M. & W. 104: *Barkett* v. *Barnard*, 4 M. & S. 331.

(*q*) See ante, Vol. 1, p. 471. *Ex p. Dicas*, 2 Dowl. 92: *Ex p. Elderton*, Id. 568: *R.* v. *Peterhouse*, 1 Q. B. 314. When a motion is argued, the affidavits on both sides must be handed in to the Master, whether the order is granted or not.

(*r*) See *Perrin* v. *Kymer*, 1 H. & W. 20; 4 H. & W. 477: *Davis* v. *Skerlock*, 7 Dowl. 592.

(*s*) See *Bury* v. *Clench*, 1 Dowl., N. S. 848.

(*t*) See *De Woolf* v. ——, 2 Chit. Rep. 14: *R.* v. *Peterhouse*, 1 Q. B. 314: *Cliffe* v. *Prosser*, 2 Dowl. 21.

(*u*) As to reviewing the Master's report in such a case, see *Walmsley* v. *Mundy* (C. A.), 13 Q. B. D. 807; 53 L. J., Q. B. 302; 50 L. T. 317; 32 W. R. 602.

PART XV.

from the centre to the right of each row, until all the counsel in Court shall have moved. This is usually termed "going through the bar." The motion then recommences with the Attorney-General, and goes through the bar in the same order as long as it is convenient for the Court to take motions (*u*). Formerly, before the Judicature Acts, on the last day of Term, this order of moving was reversed the first and second time round, when the Court commenced by calling on the bar in the back row to move (*x*), but this practice is not now observed.

What motions could not be made on last day of term.

Under the former practice, certain motions could not be made on the last day of Term; thus, a rule for an attachment (*y*), or to answer matters of an affidavit (*z*), or to stay proceedings (*a*), or for the Master's report after the examination of a party on interrogatories (*b*), or to enter a suggestion for costs (*c*), could not be moved for on the last day of Term. It was formerly the practice that no motion could be made, nor any question touching an award be discussed on that day; but this practice was not always adhered to (*d*). Nor would the Courts as a general rule on that day permit a matter of law to be discussed upon motion (*e*), but this would sometimes be allowed when there was time, or under special circumstances (*f*). Nor would any of the Courts make a rule nisi which was granted on that day a stay of proceedings. But a motion for an attachment for non-payment of costs on the Master's allocatur (*g*), or against the sheriff for not returning a writ of capias or bringing in the body (*h*), might be moved for on the last day of Term. And where the subject-matter of the motion had occurred at the end of the Term, and the party had not been able to complete his affidavits before the last day, and the matter was of a nature pressing for immediate decision, the Court, on the last day of the Term, would sometimes grant a rule nisi to show cause in the following vacation, on an early day, before a Judge at Chambers (*i*), or direct the party to apply by summons to a Judge at Chambers; and such Judge would, when justice required it, either make an order, or stay the proceedings till the next Term, to give the party

(*u*) See *Hollis* v. *Hoscason*, 19 L. J., Ex. 269, as to counsel in the Queen's Bench before the Jud. Acts not being allowed, except in certain cases, to move twice in the same day.

(*x*) See *Anon.*, 2 Dowl., N. S. 929.

(*y*) *Anon.*, 3 Smith, 118: *Ashmore* v. *Rypley*, 2 Sc. N. R. 203.

(*z*) *Bailey* v. *Jones*, 1 Chit. Rep. 744: *Ex p. Anon.*, 2 Dowl. 227: *Re Turner*, 3 Dowl. 557: *Jacob's case*, 4 Burr. 2502.

(*a*) *Bailey* v. *Jones*, 1 Chit. Rep. 744: *Anon.*, 2 Price, 143. See *Gronow* v. *Pointer*, 3 Dowl. 571.

(*b*) *R.* v. *Wheeler*, 1 W. Bl. 311. Under special circumstances, a rule for this purpose might be moved for on the last day of Term. *S. C.*

(*c*) *Anon.*, 4 M. & Gr. 906.

(*d*) *Bignall* v. *Gale*, 2 Sc. N. R. 582; 9 Dowl. 393: *Kerr* v. *Jeston*, 1 Dowl., N. S. 340: *Watkins* v. *Philpots*, M'Clel. & Y. 393: *Nettleton* v. *Crosby*, Tidd's Pract. 9th ed. 498: *Freame* v. *Pinneger*, Cowp. 23: *Re Evans* v. *Howell*, 5 Sc. N. R. 219: *Brooks* v. *Parsons*, 7 Jur. 1016, B. C. And see 9 & 10 W. 3, c. 15, s. 2: and the repealed rule of M. T. 36 G. 3, K. B.

(*e*) See *Turner* v. *Mayor of Kendal*, 2 D. & L. 197.

(*f*) See *Drury* v. *Hounsfield*, 11 A. & E. 105, n.: *R.* v. *Wheeler*, 1 W. Bl. 311: *Doe* d. *Stevens* v. *Lord*, 6 Dowl. 256.

(*g*) 5 Burr. 2686.

(*h*) See 1 Burr. 651, n., K. B., R. T. 38 G. 3; C. P., 1 B. & P. 312: *Rex* v. *York*, 5 Burr. 2686: *Walker* v. *Whaley*, 1 Chit. Rep. 249; R. 168, H. T. 1853.

(*i*) Chit. Sum. Prac. 106. See *Fall* v. *Fall*, 2 Dowl. 88: *Casse* v. *Wight*, 23 L. J., C. P. 141: *Drew* v. *Woolcock*, 24 L. J., Q. B. 22.

an opportunity then to move the Court. But under the present practice these rules are not observed with regard to motions on notice, and are rarely, if ever, insisted on in regard to ex parte motions.

Notice of motion.

Notice of Motion.]—The notice of motion must be in writing (*k*). A form of notice of motion is given in the Appendix to the Rules of the Supreme Court (*l*). This form should be substantially followed in all cases. The notice should state the exact order that the applicant is desirous of obtaining. It may ask for several orders, either together or in the alternative. An order as to the costs should be asked for when one is required.

Form of motion.

—Grounds to be stated in some cases.

By *Ord. LII. r.* 4, "Every notice of motion to set aside, remit, or enforce an award, or for attachment, or to strike off the rolls, shall state in general terms the grounds of the application; and, where any such motion is founded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion."

In a notice of motion to set aside a proceeding for irregularity, the objections intended to be insisted on must be stated (*m*).

As to the service of the copy affidavit, *see post*, p. 1384.

Length of notice—two clear days.

By *Ord LII. r.* 5, "Unless the Court or a Judge give special leave to the contrary there must be at least two clear days between the service of a notice of motion and the day named in the notice for hearing the motion; provided that in applications to answer the matters in an affidavit or to strike off the rolls, the notice of motion shall be served on the parties not less than ten clear days before the time fixed by the notice for making the motion."

—Short notice.

Leave to serve short notice of motion, that is to say, less than two clear days' notice, may in urgent cases or for special reasons be obtained on an ex parte application. When such leave is given the fact that the leave has been granted must be stated in the notice (*n*). During the vacation any application to serve short notice of motion must be made to the vacation Judge (*o*).

—Return day.

The notice should name the day on which, or so soon thereafter as counsel can be heard, the application is intended to be made. The day named must be a day on which the Court can sit. A notice naming a day in vacation is bad (*p*).

Service of the notice of motion,

As to the service of the notice of motion *see post*, p. 1439. Service on the solicitor in the action of the party against whom the application is made is sufficient (*q*). The notice should be served on all parties affected by the application (*r*).

—on defendant who has not appeared;

By *Ord. LII. r.* 8, "The plaintiff shall, without any special leave, be at liberty to serve any notice of motion or other notice, or any petition or summons upon any defendant, who having been duly served with a writ of summons to appear, has not appeared within the time limited for that purpose."

(*k*) Ord. LXVI. r. 1, post, p. 1443.
(*l*) App. B. No. 18. See the form, Chit. F., p. 705.
(*m*) Ord. LXX. r. 1, ante, Vol. 1, p. 448.
(*n*) *Dawson* v. *Beeson*, W. N. 1882, 144; 52 L. J., Ch. 563; 31 W. R. 537.
(*o*) *Conacher* v. *Conacher*, W. N. 1881, 2; 29 W. R. 230.
(*p*) *Daubney* v. *Shuttleworth*, 1 Ex. D. 53: *Deykin* v. *Coleman*, 36 L. T. 195.
(*q*) See post, p. 1439. *Browning* v. *Sabin*, 5 Ch. D. 511. See *In re A Solicitor*, 14 Ch. D. 152; 42 L. T. 310.
(*r*) Cp. *In re New Callao*, 22 Ch. D. 484, 494.

PART XV.

—on defendant before appearance by leave.

A summons served under this rule need not be filed under *Ord. XIX. r.* 10 (*s*).

By *Ord. LII. r.* 9, "The plaintiff may, by leave of the Court or a Judge, to be obtained *ex parte*, serve any notice of motion upon any defendant along with the writ of summons, or at any time after service of the writ of summons and before the time limited for the appearance of such defendant."

Service of copy affidavit.

In the cases mentioned in *Ord. LII. r.* 4 (*supra*, p. 1383), a copy of any affidavit intended to be relied on by the applicant must be served with the notice of motion. This applies to the case of an application to commit a party for disobeying an order for discovery (*t*). When the affidavits in support of an application to commit were not served with the notice, but were served two clear days before the hearing, this was held not fatal to the application (*u*).

Entry of motion for hearing.

Entry of Motion for Hearing.]—The notice must be set down in the list of motions for hearing. This is done by taking a copy of the notice of motion to the Order Office in the Central Office, and delivering it to the officer in charge of the motion list there to be entered. It will then be inserted in the list, and will come on for argument in its order.

All opposed motions, enlarged rules and peremptory motions (other than those on the Crown side and on appeals from inferior Courts) are put in a list and taken in their order.

All rules and other opposed motions on the Crown side and on appeals from inferior Courts assigned to the Queen's Bench Division must be entered in the Crown paper, at the Crown Office at the Royal Courts, and will be taken in their order.

Hearing of application on notice.

Hearing of Application on Notice.]—After the motion has been set down for hearing (as directed *supra*), it will, in due course, appear in the daily cause list, and be called on in Court in its order in the list. The counsel for the applicant is heard in support of the application, and then counsel for party served with the notice is heard, and counsel for the applicant replies. Two counsel will be heard in support of and in opposition to the application, except in the case of an application for a new trial, in which case only one counsel is heard.

Amendment of notice of motion.

The Court has power to amend the notice of motion so as to make the order which, under the circumstances, is just and proper (*x*).

Order for service of notice on parties not before the Court.

By *Ord. LII. r.* 6, "If on the hearing of a motion or other application the Court or a Judge shall be of opinion that any person to whom notice has not been given ought to have or to have had such notice, the Court or Judge may either dismiss the motion or application, or adjourn the hearing thereof, in order that such notice may be given, upon such terms, if any, as the Court or Judge may think fit to impose."

(*s*) Ante, Vol. 1, p. 280: *Whitaker* v. *Thurston*, W. N. 1884, 232: *Renshaw* v. *Renshaw*, W. N. 1880, 7.

(*t*) *Litchfield* v. *Jones*, W. N. 1883, 164.

(*u*) *Hampden* v. *Wallis*, 50 L. T. 515, 517.

(*x*) See *Gill* v. *Woodfin*, 25 Ch. D. 707, 709.

It is the duty of the applicant to serve the notice of motion on all parties affected by the application (*y*). If he does not do so, any party affected may appear on the application, and in the event of its failing get his costs (*y*). In a case where parties to the action in which an application was made, but who were not interested in it, were not served, and did not appear, an order was made, so that it should be binding on them three days after service, unless they showed cause against it (*z*).

Party not appearing.

If the respondent does not appear to oppose the application, the Court will generally hear the applicant, and grant or refuse the application according as they think fit. If an order is made, it will be subject to the production of an affidavit of service of the notice of motion (*a*). If the application is refused, no order will generally be made as to costs.

If a party having given notice of motion does not appear, and the party to whom the notice was given does, the latter is entitled to the costs of his appearing (*b*), unless, indeed, the notice is clearly bad or insufficient, in which case the party served is not bound to appear, and if he does so will not get his costs (*c*). A notice of motion naming a day in vacation, although it says "or so soon thereafter as counsel may be heard," is bad (*d*).

As to an appeal to the Court of Appeal by a party who does not appear in the Court below, *see ante*, p. 974.

Adjournment.

By *Ord. LII. r.* 7, "The hearing of any motion or application may from time to time be adjourned upon such terms, if any, as the Court or Judge shall think fit."

Consent order.

If the parties consent to an order, the Court must be asked to sanction it. A consent once given in Court cannot be withdrawn, even although the order has not been drawn up (*e*); but an application to be relieved from the consent on sufficient grounds, such as mistake or surprise, may be made (*e*).

Costs.

The costs are in the discretion of the Court (*f*), and such order will be made as to them as the Court may think fit.

—Abandoned motion.

Where a motion is abandoned, the party called on to oppose it may apply to the Court for his costs. Before doing so, he should write to the applicant and solicitor, and ask for a consent to his having them, and should only apply in the event of their being refused. On taxation, the costs of all work reasonably done, and expense incurred before the notice of abandonment is received, will be allowed (*g*).

(*y*) *In re New Callao*, 22 Ch. D. 484, 494.

(*z*) *Wilson* v. *Church*, 9 Ch. D. 552; 39 L. T. 413.

(*a*) In the Chancery Division the affidavit should be made and produced to the Court on the same day as the motion is heard: *Scear* v. *Webb* (C. A.), 25 Ch. D. 84; 53 L. J., Ch. 464; 49 L. T. 481; 32 W. R. 351; *Jones* v. *Bartholomew*, W. N. 1883, 205.

(*b*) *Berry* v. *The Exchange Trading Co.*, 1 Q. B. D. 77.

(*c*) *Daubney* v. *Shuttleworth*, 1 Ex. D. 53; 34 L. T. 357: *Brown* v. *Shaw*, 1 Ex. D. 425: cp. *Great Northern, &c. Committee* v. *Inett*, 2 Q. B. D. 284.

(*d*) See *Daubney* v. *Shuttleworth*, supra: *Deykin* v. *Coleman*, 36 L. T. 195 (C. A.), per *Mellish*, L. J.

(*e*) *Harrey* v. *Croydon Union Sanitary Authority* (C. A.), 26 Ch. D. 249; 53 L. J., Ch. 707; 50 L. T. 291; 32 W. R. 389. See the cases there cited.

(*f*) Ord. LXV. r. 1, ante, Vol. 1, p. 672.

(*g*) *Harrison* v. *Leutner*, 16 Ch. D. 559; 50 L. J., Ch. 264; 44 L. T. 331; 29 W. R. 393.

PART XV.

Order absolute in the first instance.

Order Absolute in the First Instance.]—Sometimes, as noticed in the course of this work, an order is made ex parte absolute in the first instance. Where the order is absolute in the first instance, it is obtained thus:—*Annex the necessary affidavit to a motion paper, and endorse the latter correctly as to the nature of the order required. Give the motion paper and affidavit to counsel, who will either give it to one of the Masters, after signing it, or move it in Court, according to the nature of the motion. If the order be granted call at the proper office, and draw up the order, and serve a copy of it upon the solicitor or agent of the opposite party, or on the party himself, if he sue or defend in person, as directed post*, p. 1439.

Motion for rule nisi.

Motions where Rule Nisi in First Instance.]—In some cases a rule nisi only is granted in the first instance. The cases in which this can be done are greatly limited by *Ord. LII. r.* 2, *ante*, p. 1379. Such cases are noticed in the different parts of this work. A rule nisi is a rule calling on a party to show cause why a certain order should not be made by the Court.

Proceedings to obtain rule nisi.

If the rule required be a rule nisi only, *give the motion paper, with the affidavit annexed, to counsel, who will move it accordingly. If granted, draw up the rule at the proper office, and serve a copy of it as directed post*, p. 1439 (*h*). All proper parties should be called on by the rule to show cause (*see post*, p. 1387). In some cases the Court will allow a motion to be renewed, when it is discovered, upon making it, that the affidavits to ground it are insufficient. They will not do so where the motion is beside the merits (*i*).

Directions as to service where residence unknown, &c.

Sometimes, where the residence of the opposite party is unknown, the Court will, on an affidavit showing the necessity of it, make it part of the rule nisi (*k*), that it be served in a particular manner, being the best the circumstances will admit of, as by leaving a copy of it at a particular place, or by sticking it up in the office; or in the case of absence abroad and an agent here, by serving it on such agent, or the like (*l*). Where the Court gives leave to serve a party in a particular manner, they will not, in general, make a prospective order, that service of future orders may be effected in the same way (*m*).

Showing cause in the first instance.

In some cases cause is permitted to be shown in the first instance, instead of granting a rule nisi; but this is a matter entirely in the discretion of the Court (*n*). If cause is shown in the first instance, the party moving for the rule is entitled to a reply (*o*). Formerly, where a party thus showed cause in the first instance, and was successful, he was not entitled to costs (*p*). But

(*h*) As to the order in which counsel move, &c., see ante, p. 1381. As to the form of a rule nisi, see Chit. Forms, p. 708.

(*i*) *Elderton* v. *Burt*, 6 C. B. 433.

(*k*) It must be part of the rule. See *Neilson* v. *Shee*, 8 Dowl. 32.

(*l*) See *Neilson* v. *Shee*, 8 Dowl. 32: *Sealey* v. *Robertson*, 2 Dowl. 568: *Brown* v. *Stittle*, 1 M. & W. 672: *Gibson* v. *Lord Ranelagh*, 7 Sc. 251: *Wright* v. *Gardner*, 3 Dowl. 657. See *Maddie* v. *Newman*, 2 Dowl. 639.

(*m*) *Davies* v. *Jenner*, 2 Sc. N. R. 202; 9 Dowl. 45: *Martin* v. *Colvill*, 2 Dowl. 694: *Layton* v. *Mason*, 6 Dowl. 275.

(*n*) *Doe* v. *Smith*, 3 N. & P. 335; 8 A. & E. 259. See *Quin* v. *King*, 4 Dowl. 736: *Anon.*, 4 Taunt. 690.

(*o*) *Anon.*, 4 Taunt. 650.

(*p*) *Fitch* v. *Green*, 2 Dowl. 493: *Reed* v. *Speer*, 5 Dowl. 330: *Norris*

where the rule, if obtained, would have operated as a stay of proceedings, it seems he was (*q*). In both cases he would probably be allowed his costs now.

Form of rule nisi.

The rule nisi must be drawn up (*r*) upon reading all the affidavits upon which it is intended to rely in support of the rule. It is also sometimes necessary to draw it up upon reading other documents, as orders, rules of Court, &c.

The rule should call on all parties who are to be affected by it, to show cause against it: for the Court cannot make an order upon any person, not even on the solicitor in the cause, for payment of costs, unless he be called upon by the rule nisi to show cause against it (*s*). If the rule is moved for in a cause, it should in general call upon the party, and not merely his solicitor, to show cause (*t*), unless it be a matter of complaint against the solicitor personally (*u*).

Sometimes the rule directs that notice of the rule shall be given to persons named in it, who are interested. The rule, when nisi only, unless when moved for on the last day of the sittings, requires the opposite party to show cause upon some day certain, usually three or four days in a town cause, or six days in a country cause (*x*), or more (according to the distance of the opposite party's residence), after it is drawn up; but where the rule is obtained the day before the last day of sittings, and the transaction to which it relates took place in town, it may sometimes be drawn up after the last day of the sittings, and may be made absolute at the rising of the Court on that day. A rule nisi, except under special circumstances, will not be granted to show cause at chambers (*y*). It is, however, sometimes, so granted (*z*).

Stating grounds of rule in rule nisi.

A rule nisi cannot, in general, be supported or made absolute on a ground different from that stated therein (*a*). An objection to the grounds, arising from the mistake of the clerk of the Court, will not be allowed to prevail (*b*).

Amendment of.

If the rule be wrongly drawn up by mistake, the Court will sometimes order it to be amended (*c*).

Service of rule nisi.

A copy of the rule nisi (*d*) must be served on the party against whom it has been obtained, or his solicitor in the cause. As to when the service must be on the party himself, and when on his

---

v. Carrington, 16 C. B., N. S. 396. And see *Reglic* v. *Grenville*, 3 Dowl. 502: *Cusel* v. *Pariente*, 8 Sc. N. R. 240.

(*q*) *Rennie* v. *Beresford*, 3 D. & L. 469; 15 L. J., Ex. 78. And see *Blackburn* v. *Edwards*, 2 P. & D. 237; 10 A. & E. 21. As to costs on orders in general, see post, p. 1392.

(*r*) The fee for drawing up a rule is in general 5*s*., which is paid by a fee stamp impressed on the rule. See Orders in the Appendix, post.

(*s*) *Chesley* v. *Pearce*, 4 Dowl. 693: *Norton* v. *Curtis*, 3 Dowl. 245. See post, p. 1394.

(*t*) *Engler* v. *Twisden*, 4 Bing. N. C. 714; 8 L. J., C. P. 128.

(*u*) *Baber* v. *Harris*, 7 Dowl. 589.

(*x*) See *Arthur* v. *Marshall*, 2 D. & L. 376; 13 M. & W. 465.

(*y*) *Fall* v. *Fall*, 2 Dowl. 88: *Arthur* v. *Marshall*, 2 D. & L. 376.

(*z*) *Poweller* v. *Lock*, 4 N. & M. 852: *Beames* v. *Cross*, 4 Dowl. 122 *Haines* v. *Disney*, 2 Sc. 183.

(*a*) See *Smith* v. *Clark*, 2 Dowl. 218: *Doe* d. *Fish* v. *Macdonnell*, 8 Dowl. 488. See post, p. 1392, as to the Court moulding the rule to meet the justice of the case.

(*b*) *Walker* v. *Needham*, 1 Dowl., N. S. 224.

(*c*) Post, p. 1396.

(*d*) *Leaf* v. *Jones*, 3 Dowl. 315, where the original was served and held sufficient.

PART XV.

solicitor, *see post*, p. 1439. And *see ib.* as to the mode of service. A rule becomes operative only from the time when it is served.

The service must be made a reasonable time before the day specified in it for showing cause. Where a rule nisi was served at York on the day cause was to be shown, it was held insufficient to authorize making the rule absolute, even although ten days had elapsed since the service (*g*). As to enlarging the rule when it is served so late that the party cannot show cause against it in time, &c., *see post*, p. 1389. If there is not time to draw up the rule, arising from a press of business in the office, or the like, a notice of the same having been obtained should be served, in order to give the rule effect as to staying proceedings or otherwise, until it is drawn up (*h*).

As we have seen (*ante*, p. 1386), the Court will sometimes, where the residence of a party is unknown, make it part of the rule nisi that the service of it be made in a particular manner. In such a case care should be taken to effect the service in the way pointed out by the rule.

Irregularities in service, how waived.

In all cases, even where personal service is required, any irregularity in it is deemed to be waived by the party moving to enlarge the rule (*i*), or appearing to show cause against it (*k*). But by thus appearing he does not waive any irregularity in the copy of the rule served, as, that it is not intituled in the cause, or the like (*l*).

Affidavit of service.

An affidavit, which stated that the service of the rule had been made on a party "who acts as the attorney or agent of the defendant in this cause," was held sufficient (*m*). In general, the affidavit of service of a rule must allude to the "*copy of a rule hereunto annexed*," and not to "the rule in this cause" (*n*). An affidavit stating the service "of a true," omitting the word "copy," has been held sufficient (*o*). So has an affidavit of the service of the original rule, and not a copy (*p*). An affidavit alleging a service "on the day of the date hereof," no date appearing in the affidavit except the date of the jurat, is sufficient (*q*). Where a rule is served on a sister or daughter of a party at his dwelling-house, the affidavit must state that she resided there at the time of the service, but this is otherwise where the service has been on a wife or domestic servant (*r*). Where the service is upon the wife of a party at his address, the affidavit must show where the address is (*s*). In some cases, where the rule has been served upon a person who it may be considered was not authorized to receive it, the affidavit should state the deponent's belief that the copy of the rule has come to the defendant's hands. *See Vol.* 1, p. 236 *et seq.*

(*g*) *Farrell* v. *Dale*, 2 Dowl. 15, per *Gurney*, B.

(*h*) See *Tiley* v. *Hodgson*, 2 D. & L. 655; 13 M. & W. 638.

(*i*) *Cartwright* v. *Blackworth*, 1 Dowl. 489.

(*k*) Tidd, 445: *Levy* v. *Duncombe*, 3 Dowl. 447.

(*l*) *Wood* v. *Critchfield*, 1 C. & M. 72; 1 Dowl. 587. And see *Clothier* v. *Ess*, 3 M. & Sc. 216; 2 Dowl. 731.

(*m*) *Patrick* v. *Rickards*, 15 L. J., Q. B. 204.

(*n*) *Fidlett* v. *Bolton*, 4 Dowl. 282.

(*o*) *R.* v. *Sheriff of Stafford*, 3 Dowl. 238.

(*p*) *Leaf* v. *Jones*, 3 Dowl. 315.

(*q*) See ante, Vol. 1, Ch. XLIV.

(*r*) *Holland* v. *Wright*, 9 Jur. 405, Ex.: *Sidney* v. *Magill*, 9 Jur. 666, B. C.

(*s*) *Abrahams* v. *Davison*, 6 C. B. 622.

When rule nisi a stay of proceedings (*t*).

The rule nisi, when it states that "all proceedings shall be in the meantime stayed," suspends the proceedings for all purposes, until the rule is disposed of; and, therefore, pending such rule, the plaintiff cannot move to make a rule in the cause absolute (*u*), or move to enlarge another rule in the cause (*x*), or even discontinue the action (*y*). If the rule operate as a stay of proceedings, any proceedings, directly or collaterally, had in the cause, whilst the rule so operates, may be set aside. As to what time a party has for taking the next step after the rule is disposed of, *see post*, p. 1395.

Abandoning rule nisi.

A party who has obtained a rule nisi cannot be compelled to proceed with it (*z*); and it would seem that he may abandon it, even after service, on giving notice of abandonment to the opposite side, and paying, or offering to pay, any costs which may have been incurred in consequence of the rule. If the rule be not drawn up within the time for acting upon it, it will be considered as abandoned (*a*). As to the time allowed for service of the rule in general, *see ante*, p. 1388. As to moving to rescind a rule, or moving a second time upon the same subject, *see post*, p. 1398.

Enlarging rule nisi.

Either party, if not prepared to support or show cause against the rule, should, if the opposite party will not consent to an enlargement, move that it be *enlarged* to a future day. If a rule be drawn up to show cause in one sittings, it cannot be made absolute in the next sittings without enlarging it, though it may in some cases be revived (*b*). It is not by any means as of course that the Court will enlarge a rule; sufficient grounds must be stated to induce them to do so. If the application be made by the party who obtained the rule, the Court usually grant it where it is in his own delay: but not where it would have the effect of detaining the opposite party in custody; nor, in other cases, without consent or some evident necessity. The Court refused to enlarge a rule nisi after it was returnable on the ex parte application of the party who had obtained it (*c*). If the enlargement be moved for by the opposite party, the Court will frequently enlarge the rule upon terms (*d*); or, if the rule were not served in time to give the party an opportunity of showing cause against it, he may demand that the rule be enlarged as a matter of right (*e*); in which case no terms will be imposed (*f*). As to the Court adjourning the argument or enlarging a rule upon its coming on for argument, *see post*, p. 1392. When the rule is set down in the motion list no enlargement is necessary.

(*t*) As to giving a notice of application for a rule nisi, in order that it may operate as a stay of proceedings, cf. R. 160, H. T. 1853.

(*u*) *Anderson* v. *Southern*, 9 Dowl. 994.

(*x*) *Wyatt* v. *Prebble*, 5 Dowl. 268. And see *Swayne* v. *Cramond*, 4 T. R. 176.

(*y*) *Murray* v. *Silver*, 1 C. B. 638; 3 D. & L. 26.

(*z*) *Doe* d. *Harcourt* v. *Roe*, 4 Taunt. 883.

(*a*) *Gingell* v. *Bean*, 1 Sc. N. R. 390.

(*b*) *Smith* v. *Collier*, 3 Dowl. 100; *Rowbottom* v. *Ralps*, 6 Dowl. 291.

(*c*) *Abrahams* v. *Davison*, 6 C. B. 622: *Price* v. *Thomas*, 11 C. B. 543. Where a rule cannot be served it may be amended and enlarged, even though it has run out: *Grissold* v. *Harding*, 1 C. B., N. S. 556.

(*d*) See 6 Sc. 900. As to when affidavits should be filed, when rule enlarged, see post, p. 1391; and Ch. CXXVI.

(*e*) Tidd, 447, 448. See *Anon.*, 1 Smith, 199.

(*f*) *R.* v. *Anderson*, 9 Dowl. 1041, B. C.

PART XV.

If the rule be enlarged to some day in the same sittings, it will come on for argument in its order in the list in the same way as if the rule had been originally returnable on that day. Rules enlarged to a subsequent sittings also come on in their order in the list. Where a rule was enlarged for the purpose of the party showing cause and obtaining affidavits, but he, upon doing so, produced no fresh affidavits, but relied upon that on which the motion for enlargement was made, the Court discharged the rule only on payment of the costs of the enlargement (*g*).

Showing cause against rule nisi.

No person not included in the rule nisi has a right to show cause against it, even although he may have been served with a copy of the rule; and the Court will not allow him his costs of appearing (*h*). Upon the day appointed by the rule, the opposite party should show cause against it unless it be enlarged, or by consent it stands over until another day in the same sittings (*i*). Except where it is otherwise ordered, the rule comes on for argument in its order in the motion list. No cause can be shown after the day mentioned in a rule nisi which becomes absolute without further motion (*k*). As to showing cause in the first instance, *see ante*, p. 1386.

Office copies of rule nisi must be obtained.

In order to show cause against a rule nisi, an office copy of the rule, and of the affidavits (*l*) upon which it was granted, must be obtained. It is not necessary to obtain office copies of exhibits to such affidavits (*m*). If such office copies of the rule and affidavits be not obtained, cause cannot be shown, though sometimes, when counsel, on appearing to show cause, is not prepared with such copies, as a matter of discretion, the Court will allow time to obtain the same (*n*). When affidavits intended to be used on showing cause are filed, it is not necessary for the party who moved for the rule nisi to obtain office copies of them, before he is heard in support of his rule (*o*).

Affidavits for showing cause.

Where a rule is moved on affidavits, affidavits may be used in showing cause against it; but where it is moved without affidavits, none can be used in answer to it (*p*). The affidavits to be used in showing cause should, strictly, be sworn, and handed to the counsel who is to show cause, before the day named in the rule for doing so (*q*). But, an affidavit sworn before the actual time of showing cause may be read (*r*). And in practice affidavits are frequently

---

(*g*) *Chambers* v. *Briant*, 2 Dowl., N. S. 671.

(*h*) *Johnson* v. *Marriat*, 2 Dowl. 343: *Clarke* v. *Lord*, 2 Dowl. 55: *Ibbotson* v. *Chandler*, 9 Dowl. 250: *Kirk* v. *Clark*, 4 Dowl. 363.

(*i*) See *Smith* v. *Cotter*, 3 Dowl. 100.

(*k*) *Scott* v. *Marshall*, 2 C. & J. 60.

(*l*) See *Brown* v. *Probert*, 1 Dowl. 659: *Walker* v. *Needham*, 4 Sc. N. R. 222; 1 Dowl., N. S. 220: *R.* v. *Carter*, 15 Jur. 176, B. C. As to the fees for office copies of affidavits, which are paid by stamps impressed or adhesive on the copies, see Orders in the Appendix, post.

(*m*) *Hawkyard* v. *Stocks*, 2 D. & L. 936.

(*n*) *Re Rogers*, 9 Dowl. 926. See *Walker* v. *Needham*, 4 Sc. N. R. 222; 1 Dowl., N. S. 220.

(*o*) *Pitt* v. *Coombs*, 4 N. & M. 535; 1 H. & W. 13.

(*p*) *Atkins* v. *Meredith*, 4 Dowl. 658: *Doe* v. *Baytup*, 1 H. & W. 270.

(*q*) *Kibblewhite* v. *Jeffreys*, 1 Chit. Rep. 142: *Tripp* v. *Bellamy*, 5 Price, 384: *Oaks* v. *Athin*, M'Clel. 582.

(*r*) 1 Chit. Rep. 27 a: *Tilley* v. *Henly*, Id. 136: *Brain* v. *Hunt*, 2 Dowl. 391: *Graham* v. *Beaumont*, 5 Dowl. 49: *Pim* v. *Grazebrook*, 4 Sc. N. R. 567; 3 M. & Gr. 863.

sworn and handed to counsel after the day named in the rule for showing cause against it. Except where the rule requires it, or in case of enlarged rules, it is unnecessary to file affidavits in opposition to a rule before showing cause. When a particular day or time for filing affidavits is prescribed by the rule nisi, or where it is made a term of enlarging such rule, that the affidavits shall be filed before a certain time, no affidavit filed afterwards is admissible, unless by the leave of the Court or a Judge (*s*); and then a special motion should be made, before the day of showing cause, for an extension of the time for filing the affidavits (*t*). A rule for this purpose is only nisi in the first instance (*u*). If a rule is enlarged from one sittings to another, affidavits to be used in showing cause must be filed a week before the latter sittings (*x*). Where a rule is enlarged, and affidavits to be used on showing cause are, by the rule, to be filed on a certain day, and affidavits are filed accordingly, the opposite party has a right to take office copies, and make use of them, though the party who filed them may not be desirous of doing so (*y*).

Affidavits sworn in another rule.

Affidavits used on one rule may be used in showing cause against another, provided the matters which it is desired to make use of were material in the first rule (*z*).

Practical directions as to showing cause.

Give the office copy of the rule nisi and affidavits upon which it was obtained, any affidavit to be used in showing cause, and such observations as the case may require, to counsel, who will show cause against the rule. It is the practice, as a matter of courtesy, for the counsel who is instructed to show cause, to hand over the affidavits on his side to the opposite counsel, a reasonable time before the day appointed for showing cause (*a*).

The argument, &c.

Upon the argument, the counsel showing cause is first heard: and the counsel for the party who obtained the rule will then be heard in reply. Although the Court will only hear one counsel upon moving for a rule nisi, yet, upon showing cause, the number is not limited: and if there be two counsel on either side, they are heard in the order of their precedence. Counsel must confine themselves to the facts stated in the affidavits (*b*); but of some facts the Court will take judicial notice. After the argument is concluded, the Court deliver their judgment, and make the rule absolute or discharge it accordingly.

(*s*) See Ord. XXXVIII. r. 18, ante, vol. 1, p. 471. See *Hoar* v. *Hill*, 1 Chit. Rep. 27: *Harding* v. *Austen*, 8 Moore, 523: *Turner* v. *Unwin*, 1 D. & W. 186; 4 Dowl. 16: *Cosby* v. *Ellis*, 1 Dowl., N. S. 503; 3 M. & G. 882; 4 Sc. N. R. 373: *Wright* v. *Ellis*, 8 Dowl. 298: *Lewis* v. *Kirby*, 2 Id. 179: *R.* v. *Keen*, 4 D. & L. 622: *Waterlony* v. *Gibson*, 5 M. & Gr. 579. *Hoar* v. *Hill*, 1 Chit. Rep. 27: *Mackay*, 1 D. & L. 206; 12 L. J., N. S. 337.

Pryor v. *Swaine*, 2 D. & L. 37; 13 L. J., Q. B. 214.

See *Gilson* v. *Carr*, 4 Dowl. 618: *Johnson* v. *Marriat*, 2 Dowl. 343: *Harding* v. *Austen*, 8 Moore, 523: *Barker* v. *Richardson*, 1 Y. & J. 362.

(*y*) *Price* v. *Hayman*, 4 M. & W. 8.

(*z*) *Quelle* v. *Boucher*, 1 Sc. 283; 3 Dowl. 107: *R.* v. *Mixen*, 1 Dowl., N. S. 865. See *Baskett* v. *Barnard*, 4 M. & Sel. 331: *Lang* v. *Comber*, 4 East, 348: *Read* v. *Massie*, 4 Dowl. 681: *Ryan* v. *Smith*, 9 M. & W. 223: *Langston* v. *Wetherell*, 14 M. & W. 104.

(*a*) See *R.* v. *Hudson*, 9 Jur. 315, Q. B., H. T. 1845.

(*b*) See *Aliven* v. *Furnival*, 2 Dowl. 49.

PART XV.

As to adjourning the argument, *see Ord. LII. r. 7, ante*, p. 1385. Sometimes, upon the rule coming on for argument, the Court will adjourn it in order that a defect in an affidavit used in showing cause may be cured. For the purpose of curing a defect in the title (*d*) or the jurat of such an affidavit an enlargement has been permitted, upon payment of the costs occasioned by the enlargement (*e*).

Either party may, with leave of the Court or a Judge, make affidavits in answer to the affidavits of the opposite party upon any new matter arising out of such affidavits.

The rule nisi cannot in general be supported or made absolute upon a ground different from that stated therein: therefore, if a rule nisi be drawn up for setting aside proceedings for irregularity, it cannot be made absolute on the ground of such proceedings being against good faith (*f*). The Court, however, are not bound by the exact terms of the rule nisi, but may mould it so as to meet the justice of the case (*g*).

In a case involving complicated accounts, or confused or contradictory statements of fact, the Court will frequently refer it to one of the Masters. On such a reference the Master may receive fresh affidavits, but cannot, except by special direction in the rule, receive viva voce evidence (*h*). Sometimes the rule directs what evidence the Master shall receive.

Costs.

Where rule nisi upon payment of costs.

The costs of the application are wholly in the discretion of the Court (*i*). If the rule nisi be drawn up with costs, and no cause be shown against it, it is made absolute with costs, as of course; if cause be shown against it, and the rule is made absolute, the Court will make it absolute with costs or without in their discretion, according to the circumstances of the case; but if it be discharged, the Court almost always order the costs to be paid by the party who obtained it. But if, in discharging it after argument, nothing be said as to costs by the Court, it must be understood that the Court make no order as to costs (*k*).

Where silent as to costs.

If the rule nisi be silent as to costs, then, if no cause be shown, neither party is ordered to pay costs (*l*); but if cause be shown, the rule is made absolute or discharged, with or without costs in the discretion of the Court, according as they are of opinion that the motion ought or ought not to have been made, and ought or ought not to have been resisted (*m*). If, in such a case, the Court say nothing

(*d*) *Anderson* v. *Ell*, 3 Dowl. 73. See *Davies* v. *Skerlock*, 7 Dowl. 592.

(*e*) *Cass* v. *Cass*, 1 D. & L. 698: *Re Templeman*, 9 Dowl. 962.

(*f*) *Smith* v. *Clark*, 2 Dowl. 218. And see *Doe* d. *Fish* v. *Macdonnell*, 8 Dowl. 488.

(*g*) *Doe* d. *Stevens* v. *Lord*, 6 Dowl. 256. See *Higgins* v. *Nicholls*, 7 Dowl. 551: *Bate* v. *Kinsey*, 1 C. M. & R. 38.

(*h*) *Noy* v. *Reynolds*, 4 N. & M. 483.

(*i*) Ord. LXV. r. 1, ante, Vol. 1, p. 672. Every person who comes before the Court subjects himself to its jurisdiction as to costs. *Peters* v. *Sheehan*, 10 M. & W. 213, per *Alderson*, B.

(*k*) See *Drinker* v. *Pascoe*, 4 Dowl. 566.

(*l*) See *Jeres* v. *Hay*, 1 Sc. N. R. 399; 1 M. & Gr. 390: *Re Darrell*, 4 Jur., N. S. 417, Ex.

(*m*) See *Cassidy* v. *Steuart*, 3 M. & Gr. 575; 4 Sc. N. R. 187. Where a rule nisi does not ask for costs, it is not the practice to make it absolute with costs, though perhaps the Court may have power to do so if they think proper. See *Re Marriott*, 1 C. B., N. S. 499: *Gladdon* v. *Trebble*, 9 C. B., N. S. 369, per *Erle*, C. J.

as to costs, it must be considered that costs are not granted (*n*), and no subsequent application can be made for them (*o*). Where a rule is discharged on a mere technical objection, it is generally so without costs (*p*), but sometimes with costs (*q*). Where a party, required by law to pronounce a decision on certain points, is brought before the Court by a motion impugning such decision, the general rule is, that he shall have costs if the application fails (*r*).

Where the moving party is successful, and the motion is necessarily made, costs are in general allowed (*s*). If the party who obtained the rule succeed only in part, the Court will not give costs (*t*); and it seems that the opposite party would be entitled to costs, if he gave notice that he was ready to yield the points on which the rule was afterwards made absolute (*u*). Where a party applies to the Court, where the case is such that he ought to have applied to a Judge at Chambers, he will not in general be allowed costs (*x*). Where libellous and impertinent matter is introduced into an affidavit in support of the rule, the Court will sometimes deprive the party of the costs to which otherwise he would have been entitled (*y*). Where a rule to refer a matter to the Master has been moved without costs, and the subject-matter for inquiry is matter of fact only, the Court will not entertain an application for costs of the inquiry after the report of the Master is made (*z*). As to when the costs of a rule are costs in the cause, *see Vol.* I, p. 710.

The Court, upon making a rule absolute upon payment of costs, refused to limit any time for the payment of them, as the rule did not operate as a stay of proceedings (*a*). But in some cases the Court will make a rule absolute upon payment of costs within a certain time, and order that, if the costs are not then paid, the rule be discharged with costs.

Limiting time for payment of.

Where a party obtained leave to do an act, as to amend his pleadings or the like, upon payment of costs, there formerly was no mode of obtaining the payment of any costs which the opposite party might have been put to by such a rule if it was abandoned (*b*). To obviate this, care should be taken to ask the Court, upon the

When payment of costs made conditional to doing an act.

(*n*) *Anon.*, 1 Chit. 398.

(*o*) *Holmes* v. *Edwards*, 6 Dowl. 51. And see *Shelton* v. *Braithwaite*, 8 M. & W. 252.

(*p*) *Joll* v. *Lord Curzon*, 5 C. B. 206: *Treedy* v. *Lovell*, 4 Dowl. 671: *Doe* d. *Neville* v. *Lloyd*, 2 Dowl., N. S. 330.

(*q*) *Houlditch* v. *Swinfen*, 5 Dowl. 36.

(*r*) *Queen* v. *The Mayor of Bridgnorth*, 10 A. & E. 67. And see *Reg.* v. *Dodson*, 9 A. & E. 704.

(*s*) *Cusel* v. *Pariente*, 8 Sc. N. R. 240.

(*t*) *Aliven* v. *Furnival*, 2 Dowl. 49: *Newton* v. *Harland*, 3 Sc. N. R. 232: *Wilson* v. *Knapp*, 8 Dowl. 426: *Rising* v. *Dolphin*, 4 Jur. 193, B. C.; 8 Dowl. 309.

(*u*) Id. And see *M'Andrew* v. *Adams*, 3 Dowl. 120.

(*x*) *Vaughan* v. *Trewent*, 2 Dowl. 299.

(*y*) *Thompson* v. *Dicas*, 2 Dowl. 93. See Vol. 1, p. 461.

(*z*) *Holmes* v. *Edwards*, 6 Dowl. 51.

(*a*) *Bennett* v. *Gardiner*, 2 Dowl., N. S. 50.

(*b*) *Pugh* v. *Kerr*, 5 M. & W. 164; 6 M. & W. 17; 8 Dowl. 218. See *Horton* v. *The Westminster Improvement Commissioners*, 21 L. J., Ex. 325, where the words "upon payment of costs" were held under the circumstances to be words of agreement, and not words of condition.

PART XV.

argument of the rule, to order that such costs should be paid at all events (*c*). The Court in some cases might have ordered that, unless the amendment so prayed for were made within one week, or some reasonable time named by them, the rule be discharged with costs (*d*).

Ordering costs to be paid by person not party to the rule.

The Court will not order a person not a party to the rule to pay the costs, without a separate application for that purpose (*e*). As to how far third parties can be ordered to pay costs, *see* Vol. 1, p. 675.

When cause shown in first instance.

As to costs where cause is shown in the first instance, *see ante*, p. 1386.

Drawing up rule.

When the rule is disposed of, the rule by which it is made absolute or discharged must, in all cases, be drawn up, and in strictness ought to be served. As a general rule it is the successful party who procures the rule to be drawn up, and served. But although the general practice may be for one party to the suit to draw up a rule, it may sometimes be necessary for the other party, if he wishes to act upon it, to draw it up. If not drawn up and served it will be considered as abandoned (*f*). Where formerly it was sought to draw up a rule for an attachment for non-performance of an award, it was held, that it was competent for the officer of the Court to object to the absence of a stamp on the award, and, therefore, to refuse to draw up the rule (*g*).

Making rule absolute where no cause shown.

If counsel in support of the rule receives no notice that any one will show cause, he moves to make the rule absolute (*h*) on an affidavit of service of the rule nisi (*i*). A rule is not generally so made absolute until two or three days after it is returnable. If, after a rule has been made absolute, it appear that counsel was instructed in time, it is usual and proper courtesy, in most cases, to open the rule, and obtain back the brief, without compelling such counsel to move the Court that he may be heard; but if this be refused the Court will order the rule to be opened.

Where a rule is drawn up to show cause peremptorily on a certain day, counsel may move to make it absolute when it is called on in its order in the day's list (*k*). *Draw up this latter rule at the proper office, and serve a copy of it upon the opposite solicitor or agent before six at night* (*l*).

Rules absolute without motion.

In some cases which are noticed in the course of this work the Court will grant a rule nisi, which will make itself absolute unless cause be shown to the contrary within a limited time.

Time for taking next

As regards the time allowed for taking the next step after a rule staying the proceedings, or operating as such stay, is disposed of,

(*c*) See *Field* v. *Sawyer*, 6 C. B. 71.

(*d*) See ante, Vol. 1, p. 751, as to costs on an order for a new trial. See *Bennett* v. *Gardiner*, supra.

(*e*) *R.* v. *Philp*, 7 A. & E. 608: *R.* v. *Dodson*, 9 A. & E. 704: *R.* v. *Green*, 2 G. & D. 789: *Hayward* v. *Gifford*, 4 M. & W. 194: *Rust* v. *Kennedy*, 4 M. & W. 586: *R.* v. *Borron*, 3 B. & Ald. 432.

(*f*) See *Gingell* v. *Bean*, 1 M. & Gr. 50; 1 Sc. N. R. 153: *Sawyer* v. *Thompson*, 2 M. & W. 248. And see cases cited, post, p. 1414, n. (*i*). *Nathan* v. *Storey*, 18 L. J., Q. B. 25.

(*g*) *Hilt* v. *Slocombe*, 9 Dowl. 339.

(*h*) See the form, Chit. Forms, p. 709.

(*i*) See ante, p. 1388, and see form of affidavit, Chit. Forms, p. 709.

(*k*) Cp. as to the former practice, *Lace* v. *Adamson*, 12 M. & W. 807.

(*l*) Post, p. 1439. On Saturday the service must be before 2 P.M.

a distinction has been taken between such rules obtained by a plaintiff and by a defendant; if obtained by a *plaintiff*, the defendant is allowed the same time after the rule is disposed of to take the next step, that he had when the rule nisi was served upon him; but if the rule were obtained by the *defendant*, then he must take the next step on the same day the rule is disposed of (if discharged) at his peril; but he is allowed the whole of that day so to do (*m*). The defendant ought, therefore, in the latter case, pending the rule, to take all proceedings essential to be completed by the time the rule will be disposed of, or else obtain time for that purpose, if he can, when it is disposed of (*n*).

step after rule disposed of.

Rules granted without Motion by Counsel.]—Rules which are granted upon the mere signature of counsel—as rules to make submissions rules of Court—are obtained thus:—*Get the motion paper signed by counsel; take it to the proper office, and draw up the rule; serve a copy of the rule upon the opposite solicitor or agent.*

Rules granted without motion by counsel.

Certain rules, referred to in the course of this work, are obtained upon a Judge's fiat.

When you have obtained the Judge's fiat, take it to the proper office, and draw up the rule. In some cases, which are noticed in this work, you must also take a motion-paper, signed by counsel, to the office, together with the fiat.

Rules obtained upon a judge's fiat.

In these cases you make out a præcipe or memorandum of the rule you want; take it to the proper office, and draw up the rule.

Rules obtained upon a præcipe.

Side-bar rules are obtained at the proper office, upon a præcipe or memorandum in the manner above mentioned. If obtained irregularly, the Court or Judge may set them aside on application made for that purpose.

Side-bar rules.

Order of the Court on Motion.]—Except in the cases provided for by Rule 14 (*infra*), the order of the Court, if intended to be enforced, should be drawn up by the party obtaining it (*see ante*, p. 1394.

The order of the Court on motion.

Drawing up.

By *Ord. LII. r.* 14, "Where an order has been made not embodying any special terms, nor including any special directions, but simply enlarging time (*o*) for taking any proceeding or doing any act or giving leave (a) for the issue of any writ other than a writ of attachment, (b) for the amendment of any writ or pleadings, (c) for the filing of any document, or (d) for any act to be done by any officer of the Court other than a solicitor, it shall not be necessary to draw up such order unless the Court or a Judge shall otherwise direct; but the production of a note or memorandum of such order, signed by a Judge, Registrar, Master, Chief Clerk, or District Registrar, shall be sufficient authority for such enlargement of time, issue, amendment, filing, or other act. A direction that the costs of such Order shall be costs in any cause or matter

Where order need not be drawn up.

Notice.

(*m*) *Hughes* v. *Walden*, 5 B. & C. 771, n.; *St. Hamlaire* v. *Byam*, 4 Id. 970; 7 D. & R. 458: *Vernon* v. *Hodgins*, 1 M. & W. 151; 4 Dowl. 665; *Mengens* v. *Perry*, 15 M. & W. 537; 15 L. J., Ex. 307. See *Darrington* v. *Price*, 6 C. B. 318, per *Cresswell*, J. See the prior case of *Swayne* v. *Crammond*, 4 T. R. 176.

(*n*) See per *Parke*, B., 1 M. & W. 152.

(*o*) *Ambroise* v. *Evelyn*, 11 Ch. D. 759.

PART XV.

shall not be deemed a special direction within the meaning of this Rule. The solicitor of the person on whose application such Order is made, shall forthwith give notice in writing thereof to such person (if any) as would, if this Rule had not been made, have been required to be served with such Order."

Date of order.

By *Ord. LII. r.* 13, "Every order, if and when drawn up, shall be dated the day of the week, month, and year, on which the same was made, unless the Court or a Judge shall otherwise direct, and shall take effect accordingly."

Entry nunc pro tunc.

By *r.* 15, "It shall not be necessary to obtain an order to enter a judgment or order *nunc pro tunc*, but in all cases in which such entries were formerly made under orders of course, the solicitor applying to have a judgment or order so entered, shall leave with the clerk of entries a memorandum in writing countersigned by the Chancery Registrar, and bearing a stamp according to the scale of Court fees for the time being in force" (*p*).

Amendment of.

See as to amendment generally, *ante, Vol.* 1, p. 442 *et seq.* By *Ord. XXVIII. r.* 11 (*post*, p. 1399), clerical mistakes in orders or errors arising therein from any accidental slip or omission may at any time be rectified by the Court or a Judge on motion or summons without an appeal (*q*). If an order of the Court be drawn up wrongly by mistake, the Court will order it to be amended (*r*). Where the Christian and surname were transposed by mistake in an order of reference, the Court allowed it to be amended (*s*). Where the defect is attributable to the officer of the Court, it will be amended without costs (*t*).

Service of order.

The order should be served on the party against whom it is made. It is served in the same manner as other documents in an action. (*See post*, p. 1439.) As to when service of an order at Chambers is necessary, *see post*, p. 1414.

Indorsement as to effect of disobedience.

In the case of an order requiring any person to do any act, the requirements of the order must be indorsed and served as required by *Ord. XLI. r.* 5 (*ante, Vol.* 1, p. 766). This applies equally to orders of which personal service is not required as to those of which it is (*u*). It applies to an order for discovery (*u*).

Enforcing orders.

Enforcing Order of Court.]—By *R. of S. C., Ord. XLII. r.* 24, "Every order of the Court or a Judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect" (*x*).

(*p*) This rule appears from its terms to apply to the Chancery Division only.

(*q*) See post, p. 1399.

(*r*) See *Lopez* v. *De Tastet*, 8 Taunt. 712; 7 Moore, 120: *Sherry* v. *Oake*, 3 Dowl. 349: *R.* v. *The East Lancashire R. Co.*, 9 Q. B. 980: *Cranch* v. *Tregoning*, 5 Dowl. 230.

(*s*) *Price* v. *James*, 2 Dowl. 435.

(*t*) *Downing* v. *Jennings*, 5 Dowl. 373. See *Walker* v. *Needham*, 4 Sc. N. R. 222, n.

(*u*) *Hampden* v. *Wallis*, 26 Ch. D. 746; 54 L. J., Ch. 83; 50 L. T. 515; 32 W. R. 808.

(*x*) Under the former rules, it was held that an order could not be enforced by attachment of debt, and that the rule did not make an order equivalent to a judgment for all purposes: *Crowetti* v. *Crow*, 4 Q. B. D. 225. But this decision has been doubted (*Nott* v. *Sands*, W. N. 1883, 74), and in the Rules of 1883 the words "judgment or order" are almost invariably used. See former enactments, 1 & 2 V. c. 110, ss. 18, 19; 18 & 19 V. c. 15, s. 2; *Lee* v. *Green*, 25 L. J., Ch. 269. As to the

As to the modes in which a judgment may be enforced *see ante, Vol.* 1, p. 787 *et seq.* In most of the rules treating of execution, the words "judgment or order" are used, and the same methods of enforcement are available. This applies to the ordinary writs of execution (*see ante, Vol.* 1, p. 788), attachment of debt (*see* p. 928), and attachment (*ante*, p. 944).

Any person, not being a party in an action, who obtains any order or in whose favour any order is made, is entitled to enforce obedience to such order by the same process as if he were a party to the action; and any person not being a party to an action, against whom obedience to any judgment or order may be enforced, is liable to the same process for enforcing obedience to such judgment or order as if he were a party to the action (*Ord. XLII. r.* 26, *Vol.* 1, p. 787).

When an order of Court orders (*y*) the payment of a specific sum of money, execution may be issued upon it as of course without any leave of the Court, or demand, or other preliminary proceeding other than service of the order (*z*). So execution may be issued for costs ordered to be paid immediately after they have been taxed, and the Master's certificate obtained without obtaining any fresh order of Court specifying specifically what their amount is (*a*), and, in fact, the Court will not make such an order (*b*). But execution cannot be issued directly upon an order of Court for a sum of money other than costs not mentioned in it, or where something is to be done by the party who is to receive it, before he is entitled to do so (*c*). In such cases an order may be obtained by obtaining a summons for the payment of the money, upon which order execution may be issued. The Court or Judge, however, will not, in general, grant this further order in these cases, unless the same formalities as to service, &c. are observed as in the case of an application for an attachment (*d*). But, under special circumstances, the Court or Judge will dispense with personal service (*e*). Upon applying for the order, there should be an affidavit of the personal service (*f*), or an affidavit stating such circumstances as may induce the Court or Judge to dispense with

When a further order necessary.

How such order obtained.

---

difference between an "order" and a "judgment," see *Ex p. Chinery*, 12 Q. B. D. 342; 53 L. J., Q. B. 663: *Ex p. Schmitz*, 12 Q. B. D. 509; 50 L. T. 747; 31 W. R. 812: *Farmer* v. *Mottram*, 7 Sc. N. R. 408; 1 D. & L. 781: *Newton* v. *Boodle*, 18 L. J., C. P. 73.

(*y*) *Gibbs* v. *Flight*, 13 C. B. 803; 22 L. J., C. P. 256.

(*z*) Ord. XLII. r. 1, ante, Vol. 1, p. 789: *Wallis* v. *Sheffield*, 7 Dowl. 793: *Hobson* v. *Paterson*, 2 Dowl., N. S. 129.

(*a*) *Hobson* v. *Paterson*, 2 Dowl., N. S. 129; 5 Sc. N. R. 764; 4 M. & Gr. 333: *Watson* v. *Holcombe*, 4 M. & Gr. 136: *Jones* v. *Williams*, 8 M. & W. 349; 9 Dowl. 702: *Badman* v. *Pugh*, 8 Sc. N. R. 150: *Wright* v. *Burroughes*, 2 D. & L. 94; 13 L. J., Q. B. 248: *Doe* d. *Pennington* v. *Barrell*, 10 Q. B. 531.

(*b*) See Id.: *Wright* v. *Burroughes*, supra: *Doe* d. *Harrison* v. *Hampson*, 4 C. B. 745; 5 D. & L. 484.

(*c*) See *Shaw* v. *Neale*, 6 H. L. 581.

(*d*) *Doe* d. *Steer* v. *Bradley*, 1 Dowl., N. S. 259.

(*e*) *Hawkins* v. *Benton*, 8 Q. B. 479: *Doe* d. *Steer* v. *Bradley*, supra: *Smith* v. *Troup*, 7 C. B. 757; 18 L. J., C. P. 209. As to personal service being necessary in the case of an attachment, see ante, p. 948. *Abrahams* v. *Taunton*, 1 D. & L. 319.

(*f*) *Pearsons* v. *Archbold*, 11 M. & W. 108; 2 Dowl., N. S. 769.

PART XV.

it (*g*). A summons should be personally served, though, perhaps, under very special circumstances personal service might be dispensed with (*h*).

The writ of execution.

The practice and law as to suing out and executing a writ of execution on orders is the same, mutatis mutandis, as that of suing out and executing execution on a judgment.

Where, before the *Com. Law Proc. Acts*, the trial of a cause at the assizes was postponed by order of Nisi Prius on payment by the defendant of the costs of the day "to be taxed;" and the defendant died before any verdict, and before the order of Nisi Prius was made a rule of Court; the suit having abated, the Court discharged a rule calling on the defendant's executrix to show cause why the costs should not be taxed; the remedy for recovering the costs under the 1 & 2 *V. c.* 110, *s.* 18, not being clear as against an executrix (*i*).

Bankruptcy.

An order cannot be enforced by a notice in bankruptcy (*k*).

Rules, &c. of inferior Courts.

As to the removal of rules and orders of certain inferior Courts into the superior Courts, for the purpose of having execution on them, *see post, Ch. CXXXIV.*

Rehearing.

Re-hearing, rescinding or altering Order.]—When there is a clerical mistake in an order, or an error arising therein from any accidental slip or omission, the order may be corrected on an application to the Court for that purpose by motion or notice without any appeal (*l*). Except in these cases, neither the Court nor a Judge has any power to re-hear an application or to rescind or vary an order once made (*m*) and drawn up (*n*), even though the Court has been misled, or all the evidence has not been brought before it (*o*). Any party desiring a re-hearing, or that an order should be rescinded or varied, must appeal to the Court of Appeal.

Before the Judicature Acts, the Judges of the Court of Chancery possessed a theoretically unlimited power of re-hearing their own decrees and those of their predecessors in office, subject to certain restrictions as to time. In the Courts of Common Law, re-hearings were unknown (*p*). But it is now held that this jurisdiction to

(*g*) See *Smith* v. *Troup*, supra: *Burton* v. *Mendizabel*, 1 Dowl., N. S. 336, B. C.: *Drew* v. *Woolcock*, 24 L. J., Q. B. 22.

(*h*) *Jordan* v. *Berwick*, 1 Dowl., N. S. 271. See *Wilson* v. *Foster*, 1 D. & L. 496; 6 Sc. N. R. 936: *Doe* v. *Amey*, 1 Dowl., N. S. 23: *Winwood* v. *Holt*, 3 D. & L. 87.

(*i*) *Hill* v. *Brown*, 16 M. & W. 796. See *Doe* d. *Harrison* v. *Hampson*, 4 C. B. 745. See as to an action not abating by the death of parties, ante, p. 1025.

(*k*) *Ex p. Chinery* and *Ex p. Schmitz*, cited ante, p. 1397, n. (*x*).

(*l*) See Ord. XXVIII. r. 11, post, p. 1399.

(*m*) *In re St. Nazaire Company* (C. A.), 12 Ch. D. 88; 41 L. T. 110; 27 W. R. 854: *Benyon* v. *Godden*, 4 Ex. D. 246: *Prestney* v. *Mayor, &c. of Colchester*, 24 Ch. D. 376: 52 L. J. Ch. 877; 48 L. T. 749; 31 W. R. 757. The fact that such an order as Ord. XXVIII. r. 11 (post, p. 1399) was thought necessary shows that no such power exists.

(*n*) Id. A judge can always reconsider his decision until the order has been drawn up: Per *Jessel*, M. R., 12 Ch. D. at p. 91.

(*o*) Per *Thesiger*, L. J., 12 Ch. D. at p. 101.

(*p*) *Re St. Nazaire Co.*, 12 Ch. D. 88 (C. A.): *Flower* v. *Lloyd*, 6 Ch. D. 297 (C. A.): *Re Manchester Economic Building Society*, 24 Ch. D. 488, per *Brett*, L. J., at p. 495. There was an old rule of Court, 11. 3 J. 1, by which it was ordered, that, if a cause be moved in Court in the presence of

re-hear, being in fact appellate jurisdiction, does not exist in the Judges of the High Court, but is vested in the Court of Appeal by the effect of sections 17 and 18 of the *Judicature Act*, 1873 (*q*); while the Court of Appeal is precluded from re-hearing its own decisions by reason of its possessing no original jurisdiction, but only an appellate jurisdiction from the High Court (*r*). But though the Court or a Judge has now no power to alter its decisions where and in so far as these have dealt with the rights of the parties, this being matter for appeal only, yet in the case of interlocutory applications (*s*), and in matters of mere procedure, the Court has power to vary a former order, and to give new directions when it appears necessary to do so for the due administration of justice (*t*); and in the Chancery Division it seems a Judge may always re-consider his decision until the order has been drawn up (*u*).

By *Ord. XXVIII. r.* 11, "Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court or a Judge on motion or summons without an appeal."

Under the corresponding former rule, *Fry*, J. (*x*), amended a judgment, by providing therein for the costs of some interlocutory

---

counsel of both parties, and the Court should thereupon make an order, no person should afterwards cause the same to be moved contrary to such rule or order, under pain of an attachment; and the counsel knowingly making such motion should not be heard here in any cause during the same term. See *Joynes* v. *Collinson*, 2 D. & L. 449; 13 M. & W. 558. If, however, the rule was made absolute too soon, or either party was taken by surprise, or the like (see *Sanson* v. *Price*, 17 L. J., Ex. 205), the Court might open it. But they would not do so upon the ground that the affidavit upon which cause was shown against it was false (*Davies* v. *Cottle*, 3 T. R. 405: *Rossett* v. *Hartley*, 1 H. & W. 581; 7 A. & E. 522, n.: *Ditcsmore* v. *Capon*, 1 Bing. 398: *Bickley* v. *Fill*, 6 Sc. N. R. 706); nor, because counsel omitted to present to their notice a statute, or other authority, which might have affected their decision (*Dillamore* v. *Capon*, 8 Moore, 462; 1 Bing. 398); nor, upon a suggestion by affidavit, that the report of the Master, upon which the Court acted in disposing of the rule, was erroneous (*Gingell* v. *Bean*, 1 M. & Gr. 555; 1 Sc. N. R. 390); nor, upon the ground that it was moved contrary to an alleged understanding between the plaintiff's solicitor and the defendant's counsel, at a conversation which took place upon their accidentally meeting in the street. *Richardson* v. *Peto*, 9 Dowl. 73. This rule against opening or rescinding rules made after hearing both parties did not apply to rules which were made absolute in the first instance. The party against whom such rules were made absolute might move to discharge them, on showing sufficient reasons why they should have not been granted.

(*q*) *Re St. Nazaire Co.*, supra, per *Jessel*, M. R.

(*r*) *Flower* v. *Lloyd*, supra: *Earl De la Warr* v. *Miles*, 19 Ch. D. 80 (C. A.): *Ex p. Banco de Portugal, In re Hooper*, 14 Ch. D. 1: *Ex p. Streeter*, 19 Ch. D. 216.

(*s*) *Mullins* v. *Howell*, 11 Ch. D. 763: *Penrice* v. *Williams*, 23 Ch. D. 353; 31 W. R. 496.

(*t*) *Prestney* v. *Corporation of Colchester*, 24 Ch. D. 376, per *Cotton*, L. J., at p. 385.

(*u*) Per *Jessel*, M. R., 12 Ch. D. at p. 91. And this may be done even after drawing up the order where the order was by consent. *Mullins* v. *Howell*, 11 Ch. D. 763, *Jessel*, M. R. But see *Att.-Gen.* v. *Tomline*, 7 Ch. D. 388, per *Fry*, J.

(*x*) In *Fritz* v. *Hobson*, 14 Ch. D. at p. 558. The judgment had been drawn up and entered. See also *Eckersley* v. *Eckersley*, W. N. 1884, 133: *In re Riley's Trusts*, 30 W. R. 78: *In re Clinton, Jackson* v. *Slaney*, W. N. 1882, 176. The application should be made as soon as the mistake is discovered. *In re Tibbitts*, 30 W. R. 177.

PART XV.

proceedings to which his attention had not been called when pronouncing judgment.

Where a party has not appeared on the argument and the decision has gone against him in his absence, it seems the Court may, in the exercise of its discretion, allow the case to be re-argued (*y*).

Where a judgment has been obtained by the fraud of a party to the suit, it is doubtful whether an action lies to set it aside (*z*).

Renewal of ex parte applications.

As a general rule, if a party make an ex parte application to the Court, and fail from a defect in the body of his affidavit, he cannot renew his application upon an amended affidavit (*a*). But this rule is not binding in all cases (*b*). Where a new state of facts has arisen since the application was refused, the Court will sometimes allow a second application to be made (*c*). Where a rule, which by mistake purported to be moved for on behalf of B., was discharged upon an affidavit of B., showing that the rule had been moved without his authority, and that an alteration complained of by the rule had been made with his authority, it was held, that the second application might be made on behalf of A., the party really interested (*d*). Where an application is refused upon the ground that the affidavit is defective in the title or the jurat, the Court will allow the application to be renewed upon the affidavit being amended and resworn (*e*). And if a party has succeeded in obtaining an order, but has not acted upon it, he may move to revive it, or obtain a new order upon the same subject (*f*); but the Court will not always grant this indulgence (*g*).

(*y*) *Walker* v. *Budden*, 5 Q. B. D. 267 (C. A.). The remedy is not by appeal against the former judgment. Id.; and see *Allum* v. *Dickinson*, 9 Q. B. D. 632 (C. A.). See also cases cited ante, p. 974.

(*z*) *Flower* v. *Lloyd*, 10 Ch. D. 327 (C. A.): cp. *Abouloff* v. *Oppenheimer*, 10 Q. B. D. 295 (C. A.).

(*a*) *Levy* v. *Coyle*, 2 Dowl., N. S. 932; 12 L. J., Q. B. 295: *R.* v. *Pickles*, 12 L. J., Q. B. 40: *R.* v. *Barton*, 9 Dowl. 1021: *R.* v. *Manchester and Leeds R. Co.*, 1 P. & D. 164; 8 A. & E. 413: *Joynes* v. *Collinson*, 2 D. & L. 449; 13 M. & W. 558: *Withers* v. *Spooner*, 6 Sc. N. R. 165: *R.* v. *Harland*, 8 Dowl. 323: *Ex p. Haslam*, 1 Dowl., N. S. 792: *Saunderson* v. *Westley*, 8 Dowl. 652, where the application was made by a prisoner: *Hankins* v. *Akrill*, 1 L. M. & P. 242: *Leggo* v. *Young*, 25 L. J., C. P. 176.

(*b*) See *Pocock* v. *Pickering*, 21 L. J., Q. B. 365.

(*c*) *Re Butler*, 13 Q. B. 311: *Peterson* v. *Davis*, 17 L. J., C. P. 290: *Dodyson* v. *Scott*, 2 Ex. 157: *Dixon* v. *Oliphant*, 15 M. & W. 152.

(*d*) *Tilt* v. *Dixon*, 4 C. B. 736; 17 L. J., C. P. 61.

(*e*) *R.* v. *Great Western R. Co.*, 1 D. & L. 874; 5 Q. B. 597: *Shaw* v. *Perkin*, 1 Dowl., N. S. 306: *R.* v. *Jones*, 8 Dowl. 307. See *Doe* d. *Hill* v. *Tollett*, 1 D. & L. 121.

(*f*) *Rowbottom* v. *Ralphs*, 6 Dowl. 291: *Dodyson* v. *Scott*, 2 Ex. 457, where the rule was abandoned.

(*g*) See *Jeves* v. *Hay*, 1 M. & Gr. 390; 1 Sc. N. R. 399.

CHAPTER CXXIII.

APPLICATIONS AT CHAMBERS—SUMMONS AND ORDER.

Jurisdiction of a Judge at Chambers.

Jurisdiction of a single Judge.]—By *Judicature Act*, 1873, s. 39, "Any Judge of the said High Court of Justice may, subject to any rules of Court, exercise in Court or in Chambers all or any part of the jurisdiction by this Act vested in the said High Court, in all such causes and matters, and in all such proceedings in any causes or matters, as before the passing of this Act might have been heard in Court or in Chambers *respectively*, by a single Judge of any of the Courts whose jurisdiction is hereby transferred to the said High Court, or as may be directed or authorized to be so heard by any rules of Court to be hereafter made. In all such cases, any Judge sitting in Court shall be deemed to constitute a Court."

Certain matters are by *Ord. LIX. r.* 1 (*ante*, p. 1378), directed to be heard by Divisional Courts. In all other cases the above section confers on a Judge sitting at Chambers jurisdiction in all cases where before the Judicature Acts he would have had such jurisdiction; and, moreover, it confers on a single Judge sitting in Court all the jurisdiction which a Judge sitting in Court would have had before the passing of the Act. The effect of the word "*respectively*" used in the section would appear to be to limit the jurisdiction to be exercised in Chambers (except when enlarged by the other rules) to those cases where such jurisdiction existed before the Act (*a*). Practically a Judge at Chambers has jurisdiction in all cases where his jurisdiction is not excluded expressly or by necessary implication by some rule or statute (*b*). Except under very special circumstances, where both the Court and Judge have jurisdiction, the application should be made to the latter (*c*). Where a statute expressly or impliedly directs that the application shall be made only to the Court, a Judge has no power to interfere (*d*), and *vice versâ* (*e*). But, when a statute, in general

(*a*) See per *Brett*, L. J., *Baker* v. *Oakes*, 2 Q. B. D. at p. 176; *S. C.*, 46 L. J., Q. B. 246; per *Day*, J. (diss.), in *Salm Kyrburg* v. *Posnanski*, infra: *Hillman* v. *Mayhew*, 1 Ex. D. 132. But see *Salm Kyrburg* v. *Posnanski*, 13 Q. B. D. 218; 53 L. J., Q. B. 428; 32 W. R. 753, where it was held by the majority of the Court that a Judge at Chambers could order a writ of attachment to issue; but the use of the word "Judge" in Ord. XLIV. r. 2 probably justifies this decision.

(*b*) See *Clover* v. *Adams*, 6 Q. B. D. 622, per *Lindley*, J., at p. 625: *Hillman* v. *Mayhew*, 1 Ex. D. 132. As to the origin of the power of Judges at Chambers, see *R.* v. *Aleuin*, Wilmot's Notes, 264. As to the jurisdiction of a Judge of the Chancery Division in Chambers, see *Frodsham* v. *Frodsham*, 15 Ch. D. 317.

(*c*) See *Bowen* v. *Evans*, 18 L. J., Ex. 38.

(*d*) *Morgan* v. *Lute*, 1 Chit. Rep. 381: *Shaw* v. *Roberts*, 2 Dowl. 25: *Jones* v. *Fitzaddams*, 2 Dowl. 111; 3 Tyr. 904; 1 C. & M. 855: *Geach* v. *Coppin*, 3 Dowl. 74: *Ex p. Owen*, 1 Dowl. 511: *Lander* v. *Gordon*, 7 M. & W. 218: *Ross* v. *Gandell*, 7 C. B. 766; 18 L. J., C. P. 224: *Tewkesbury Election Petition*, W. N. 1880, 124.

(*e*) See per *Coleridge*, J., 7 Dowl. 735: *Morse* v. *Apperley*, 6 M. & W. 145: *Barnett* v. *Craw*, 1 Dowl., N. S. 774: *Wearing* v. *Smith*, 16 L. J., Q. B. 1.

terms, and without any special limitation, either expressed or to be inferred from its terms, gives any power to the Court, that power may be exercised by a Judge at Chambers (*f*). When the expression "the Court or a Judge" is used in the Rules of the Supreme Court, a Judge at Chambers has jurisdiction; but when the expression "the Court" alone is used, he has not (*g*). A Judge at Chambers has power to order a writ of attachment to issue (*h*). Under the *Judicature Act*, 1884, he may give leave to issue a subpœna to compel the attendance of a witness in Scotland or Ireland (*i*). A Judge at Chambers has no power over an order of the Court, unless the Court direct it, or unless by consent of the parties (*k*). But a Judge may set aside a side-bar rule or other rule obtained as a matter of course (*l*).

By the 11 *G.* 4 & 1 *W.* 4, *c.* 70, *s.* 4 (*m*), every Judge was authorized to transact such business at Chambers or elsewhere depending (*n*) in any of the superior Courts, as related to matters over which the said Courts had a common jurisdiction (*o*), and as might, according to the course and practice of the Court, be transacted by a single Judge. And by 1 & 2 *V. c.* 45, *s.* 1 (*p*), every Judge of the superior Courts was authorized "to transact out of Court such business as may, according to the course and practice of the Court, be so transacted by a single Judge, relating to any suit or proceeding in either of the said Courts of Queen's Bench or Common Pleas, or on the common law or revenue side of the said Court of Exchequer, or relating to the granting writs of certiorari or habeas corpus, or the admitting prisoners on criminal charges to bail, or the issuing of extents or other process for the recovery of debts due to her Majesty, or relating to any other matter or thing usually transacted out of Court, *although the said Courts have no common jurisdiction therein*, in like manner as if the Judge transacting such business had been a Judge of the Court to which the same by law belongs." The Judges might also, before these enactments, by stat. 1 *G.* 4, *c.* 55, *ss.* 5, 6, besides granting summonses and making orders at Chambers, grant and make them upon circuit, in cases depending in any of the Courts at Westminster, in which the issues, if brought to trial, would be tried

(*f*) *Smeeton* v. *Collier*, 1 Ex. 457; 17 L. J., Ex. 57; et per *Parke*, B., "In the 43 G. 3, c. 46, where the enactment is that the motion is to be made in open Court, it is clear that the Judge is not to have any power in the matter. Again, in the 48 G. 3, c. 123, it is enacted, that the application must be made in term time to one of the superior Courts, which shows that the legislature intended that the power should be exercised by the Court and not by the Judge." *Hunt* v. *Clifford*, W. N. 1884, 86, order for sale by private contract under Bankruptcy Act, 1883, s. 145: *Clover* v. *Adams*, supra.

(*g*) *Baker* v. *Oakes*, 2 Q. B. D., per *Brett*, L. J., at p. 173: *S. C.*, 46 L. J., Q. B. 246.

(*h*) Ord. XLIV. r. 2, ante, p. 948: *Salm Kyrburg* v. *Posnanski*, 13 Q. B. D. 218; 53 L. J., Q. B. 428; 32 W. R. 753.

(*i*) 47 & 48 V. c. 61, s. 13. See ante, Vol. 1, p. 572.

(*k*) See *Joseph* v. *Perry*, 3 Dowl. 699.

(*l*) *Darrington* v. *Price*, 6 C. B. 309; 17 L. J., C. P. 326.

(*m*) Repealed by 42 & 43 V. c. 59.

(*n*) See *Griffin* v. *Taylor*, 6 Dowl. 620.

(*o*) See *Phillips* v. *Drake*, 2 Dowl. 45. Extended by 1 & 2 V. c. 45, s. 1, to cases in which there was not a common jurisdiction. See *Edwards* v. *The Camerons R. Co.*, 15 Jur. 470.

(*p*) Repealed by 42 & 43 V. c. 59.

upon their circuits respectively, in the same manner as if they were Judges of the Court in which such causes were so depending (*g*). These statutes gave to the Judges of the respective Courts, when sitting at Chambers or on circuit, a general and concurrent jurisdiction in the transaction of business, the same as if they were Judges of the Court in which the business or action was pending (*r*).

The acceptance of costs under a Judge's order is a waiver of an objection that the Judge had no jurisdiction to make it (*s*).

One Judge at Chambers may refer a summons to another (*t*).

Jurisdiction of a Master.

Jurisdiction of a Master.]—By the *R. of S. C., Ord. LIV. r.* 12, "In the Queen's Bench Division a Master, and in the Probate Divorce and Admiralty Division a Registrar, may transact all such business and exercise all such authority and jurisdiction in respect of the same, as under the Acts or these Rules may be transacted or exercised by a Judge at Chambers, except in respect of the following proceedings and matters; that is to say,—

(a) All matters relating to criminal proceedings or to the liberty of the subject:

(b) Granting leave for service out of the jurisdiction of a writ, or notice of a writ, of summons (*u*):

(c) The removal of actions from one Division or Judge to another Division or Judge (*x*):

(d) The settlement of issues, *except by consent* (*y*):

(e) Inspection and other orders under Order L., Rules 1 to 5 (*z*):

(f) Appeals from District Registrars (*a*):

(g) Prohibitions (*b*):

(h) Injunctions and other orders under sub-section 8 of section 25 of the Principal Act (*c*):

(i) Awarding of costs, other than the costs of or relating to any proceeding before a Master, or Registrar, and other than any costs which by these Rules, or by the order of the Court or a Judge, he is authorized to award (*d*):

(k) Reviewing taxation of costs (*e*):

(l) Orders absolute for charging stocks, funds, annuities, or share of dividends, or annual proceeds thereof (*f*):

(m) Acknowledgments of married women."

(*q*) See Vol. 1, p. 197, n. (*f*). See *Hathead* v. *Abrahams*, 3 Taunt. 81: *Ashworth* v. *Heathcote*, 6 Bing. 596.

(*r*) *Bennett* v. *Dean*, 5 Sc. N. R. 196: *Dew* v. *Katz*, 8 C. & P. 315: *Palmer* v. *The Justice Insur. Co.*, 6 E. & B. 1015; 26 L. J., Q. B. 73.

(*s*) *Tinkler* v. *Hilder*, 4 Exch. 187; 18 L. J., Ex. 429.

(*t*) *Hartmont* v. *Foster*, 8 Q. B. D. 2.

(*u*) See ante, Vol. 1, p. 246.

(*x*) See ante, Vol. 1, p. 412.

(*y*) See ante, p. 1341.

(*z*) See ante, Vol. 1, p. 437.

(*a*) See post, p. 1428.

(*b*) See post, Ch. CXXXII.

(*c*) See ante, Vol. 1, p. 426.

(*d*) The Master has power to direct the costs of a viva voce examination, ordered for default in answering interrogatories, to be paid by the party to be examined in any event: *Vicary* v. *Great Northern R. Co.*, 9 Q. B. D. 168; 52 L. J., Q. B. 462. But the Master has no power on the hearing of an interpleader summons to make an order as to the costs of the action in which the summons is taken out: *Hansen* v. *Maddox*, 12 Q. B. D. 100; 53 L. J., Q. B. 67; 50 L. T. 123.

(*e*) See ante, Vol. 1, p. 699.

(*f*) See ante, p. 923. The Master has jurisdiction to make an order nisi for charging stocks, &c.

PART XV.

Master may refer matter to a Judge.

By *Ord. LIV. r.* 20, "If any matter appears to the Master proper for the decision of a Judge the Master may refer the same to a Judge, and the Judge may either dispose of the matter or refer the same back to the Master with such directions as he may think fit."

Mode of proceeding to obtain a Master's or Judge's order.

Mode of Proceeding to obtain a Master's or Judge's Order.]—The usual mode of obtaining a Master's or Judge's order is by taking out a summons, calling on the opposite party, or his solicitor or agent, where he has appeared by solicitor, to appear on the hearing of an application for the order. The mode of taking out this summons and proceeding on it will be presently noticed.

By *Ord. LIV. r.* 1, "Every application at Chambers not made *ex parte* shall be made by summons."

There are some cases where an order may be obtained on an ex parte application; thus, an order to arrest the defendant before judgment (*g*), and to compel the attendance of a witness before an arbitrator (*h*), may be so obtained. Other instances are noticed in the course of this work where an order may be so obtained (*i*). *To obtain such an order, make the necessary affidavit in support of the application. Indorse it with the terms of the order required, and take it to Chambers and leave it with the officer there. Attendance before the Judge is only necessary if there is any difficulty in the matter.*

By *Ord. LIV. r.* 2, "Every application for payment or transfer out of Court made *ex parte*, and every other application made *ex parte* in which the Judge or proper officer shall think fit so to require, shall be made by summons."

If a party obtain an order ex parte without summons, where the opposite party ought to have had an opportunity of showing cause, the order may be rescinded on a summons by the latter party (*k*).

Order nisi making itself absolute.

In some cases, an order nisi is granted without summons, and makes itself absolute, unless cause be shown, as in some cases a rule nisi will do (*l*). When the party obtaining such an order does not attend, the other party should go before the Judge and say that he is ready to show cause, and apply to have the order discharged, otherwise the order will become absolute (*m*).

The summons, how obtained.

The Summons, how obtained, and Service of, &c.]—As we have stated above, to obtain an order at Chambers you must in general first summon the opposite party, or his solicitor or agent, to attend (*n*); *for which purpose fill up a form of summons and take it to the officer at the Central Office, who will seal it with the seal of the Court* (*o*). *If it is intended to attend the hearing of the summons by*

(*g*) Post, p. Ch. CXXVII.
(*h*) Post, Ch. CXXXVI.
(*i*) See *Re Hammersmith Rentcharge*, 4 Ex. 87.
(*k*) See cases cited post, p. 1418, n. (*f*): *Clark* v. *Stocken*, 2 Bing. N. C. 651. And see ante, p. 1398.
(*l*) See ante, p. 1394.
(*m*) *Humphreys* v. *Jones*, 6 M. & W. 418; 8 Dowl. 408. See *Spicer* v. *Bond*, 2 Dowl., N. S. 955.
(*n*) *Clark* v. *Stocken*, supra.
(*o*) See as to the form, Chit. Forms, p. 711. See *Barrett Navigation Co.* v. *Shower*, 8 Dowl. 173, per Cur. The fee stamp on an ordinary summons is a 3*s.* impressed or adhesive stamp. The fee on a summons for directions is 10*s.*

counsel, notice thereof should be given to the opposite party, either on the face of the summons or otherwise.

Form of (*p*).

By *Ord. LIV. r.* 10, "A summons other than an originating summons shall be in the Form No. 1 in Appendix K., with such variations as circumstances may require, and shall be addressed to all the persons on whom it is to be served" (*p*).

By *Ord. LIV. r.* 11, "In all cases of applications originating in Chambers, a summons shall be prepared by the applicant or his solicitor, and shall be sealed in the Central Office, and in Admiralty actions in the Admiralty Registry, and when so sealed shall be deemed to be issued. The person obtaining a summons shall leave at the Central Office or Admiralty Registry, as the case may be, a copy thereof, which shall be filed, and stamped in the manner required by law."

Title and direction of.

The summons should be correctly intituled in the cause (*q*). It is generally directed "to the solicitor or agent" in the cause; where there is no solicitor or agent in the cause, it is in like manner directed to the party himself. When the summons is to be attended, as is usually the case, at the Royal Courts, no place for attendance need be mentioned, but in other cases this must be done. A summons may be attended at the Judge's private house or elsewhere, if the Judge thinks fit, and the case requires it. During the sittings, it is sometimes made attendable in the Judge's private room in the Royal Courts (*r*). So it is sometimes made attendable before the Judge at the assize town, in a cause triable at the assizes.

Place and time of attendance.

Contents.

The summons should state in clear terms the order or orders which the party who takes it out is desirous of obtaining (*s*). When the application is to set aside a proceeding for irregularity, the grounds of the irregularity must be stated in the summons (*t*).

Several matters may be included.

By *Ord. LIV. r.* 9, "In every cause or matter where any party thereto makes any application at Chambers, either by way of summons or otherwise, he shall be at liberty to include in one and the same application all matters upon which he then desires the order or directions of the Court or Judge; and upon the hearing of such application it shall be lawful for the Court or Judge to make any order and give any directions relative to or consequential on the matter of such application as may be just; any such application may, if the Judge thinks fit, be adjourned from Chambers into Court, or from Court into Chambers."

Alteration of.

By *Ord. LIV. r.* 3, "Summonses shall not be altered after they are sealed except upon application at Chambers."

Date of.

As to the time at which the summons is to be made returnable, and as to entering the same in the list, *see post*, p. 1406. The summons should bear date the day on which it is issued; but an imperfect designation of the year, or even its omission, has been held to be immaterial (*u*).

When to be served.

By *Ord. LIV. r.* 4, "An originating summons, where service is

(*p*) See the form, Chit. F. p. 711.

(*q*) *Jeves* v. *Hay*, 1 Sc. N. R. 399; 1 M. & Gr. 390.

(*r*) See per *Alderson*, B., in *Bebb* v. *Wales*, 5 Dowl. 458: *Byles* v. *Walter*, 5 Dowl. 233: *Spenceley* v. *Shouls*, Id. 562.

(*s*) See the form, Chit. F. p. 711.

(*t*) Ord. LXX. r. 3, ante, Vol. 1, p. 448.

(*u*) *Solomon* v. *Nainby*, 7 Dowl. 459; 5 M. & W. 389.

PART XV.

necessary, shall be served seven clear days before the return thereof. Every other summons shall be served two clear days before the return thereof, unless in any case it shall be otherwise ordered."

Service of.

Make a copy of the summons, and let the person who is to serve it, examine it with the original, that he may be able to swear to the service, if it afterwards become necessary to do so: then serve the copy on the solicitor or agent of the opposite party, or on the party himself, where the case requires it. As matter of precaution, the person who is to serve the summons should indorse on the original, immediately after service of the copy, the day when and the place where served, that he may be able to swear to the service, if necessary. The law and practice as to the service of the summons is the same as that relative to the service of a rule nisi, which is noticed *ante*, p. 1387. Substituted service of a summons may be ordered (*x*), and so may service out of the jurisdiction (*y*). As to the service of notices, &c., in general, *see post*, p. 1439.

Entry of in list.

The summons must be taken to the officer in charge of the list and entered in it. The room in which the Judge's list is kept is generally stated at the foot of the day's list, which is posted in the hall near the Judge's room.

When summons operates as a stay of proceedings.

When Summons operates as a Stay of Proceedings.]—As a general rule, a summons does not operate as a stay of proceedings, unless it be a part of the application "that in the meantime all further proceedings should be stayed," nor does an order, unless it be so expressed. The exceptions are where the applicant has to take the next step, and the application relates to the time or mode of taking that step; as where the summons is for time to plead (*z*), where a stay of proceedings is necessarily implied (*a*). It seems, that a summons served after judgment signed (*b*), or a summons taken out for a purpose collateral to the proceedings in the cause, does not operate as a stay of proceedings (*c*). Nor does a summons, it is apprehended, operate as such stay, if it can be clearly established that it was not *bonâ fide* taken out, and was an abuse of the party's right to take it out, otherwise a party might by repeated summonses delay the proceedings as long as he might think fit (*d*). A summons is a stay of proceedings only from the time at which it is *attendable*, and not from the time of the service (*e*), and it operates

(*x*) *Hunt* v. *Austin*, 9 Q. B. D. 598; 51 L. J., Q. B. 455; 48 L. T. 300; cp. *Hamilton* v. *Thomas*, W. N. 1883, 31. See ante, Vol. 1, pp. 236 et seq.

(*y*) *The Credits Gerundeuse* v. *Van Weede*, 12 Q. B. D. 171; 53 L. J., Q. B. 142; 32 W. R. 414: *Van der Kan* v. *Ashworth*, W. N. 1884, 58; Bitt. Ch. Cas. 202.

(*z*) As to when a summons for time to plead is a stay of proceedings, see Vol. 1, p. 301. And see *Beazley* v. *Bailey*, 16 M. & W. 58; 16 L. J., Ex. 1: *Spenceley* v. *Shouls*, 5 Dowl. 562.

(*a*) *Redford* v. *Edie*, 6 Taunt. 240: *Barnett* v. *Newton*, 1 Chit. Rep. 689: *Anthill* v. *Metcalfe*, 2 N. R. 169: *Hodgson* v. *Co[illegible]* Dowl. 318: *Phillips* v. *Bu[illegible]*, N. S. 101; 5 Sc. N. R. [illegible] Gr. 403.

(*b*) *Phillips* v. *Bu[illegible]*, supra.

(*c*) *Phillips* v. *Bush*, supra: *Anon.*, M. T. 28 G. 3, Q. B.: Tidd's New Prac. 256; Tidd, 9th ed. 470.

(*d*) *Bobb* v. *Wales*, 5 Dowl. 458.

(*e*) *Morris* v. *Hunt*, 2 B. & Ald. 355; 1 Chit. Rep. 93: *Rex* v. *Sheriff of Middlesex*, 5 B. & Ald. 746: *Glover* v. *Watmore*, 5 B. & C. 769: *Anthill* v. *Metcalfe*, 2 N. R. 169: *Redford* v. *Edie*, 6 Taunt. 240. There is a difference in this respect between a

as such stay the moment the clock strikes the hour at which it is attendable (*f*); therefore a summons for further time to plead, is a stay of proceedings if it is returnable before or at the time the judgment office opens on the day after the time for pleading expires, and the plaintiff cannot sign judgment until the summons is disposed of (*g*). And it operates as such a stay, although it be attendable at ten or eleven o'clock in the morning at Chambers, provided the Master specially grants such a summons, and this notwithstanding the Master does not attend Chambers at that hour (*h*). It operates as a stay of proceedings from the time it is attendable until it is disposed of, provided the party who obtains it uses due diligence in following it up (*i*). If the parties attend and agree to adjourn the summons, the stay continues until it is disposed of (*k*). It will cease to operate as a stay if the party taking it out, expressly, by notice or otherwise, abandon it.

What proceedings stayed.

When the summons operates as a stay, it has the same effect as where a rule nisi does so, which has been already noticed *ante*, p. 1398. A party cannot make even an application to the Court respecting a matter pending before a Judge at Chambers (*l*).

Time to take next step after summons disposed of.

A party has the same time for taking the next step after a summons has been disposed of, as he has where a rule nisi has been disposed of,—as to which *see ante*, p. 1395.

Abandoning summons.

Abandoning Summons.]—The party taking out the summons may of course abandon it if he thinks fit, either by non-attendance before the Judge at the time appointed for its hearing, or by giving express notice of such abandonment. The Judge can, in such a case, dismiss the summons, and make an order on it for the costs occasioned by it. (*Ord. LIV. r.* 6, *post*, p. 1412.) Where a summons for stay of proceedings on payment of debt and costs in a fortnight was returnable at eleven o'clock, at which time also judgment was due, and at half-past ten the defendant delivered a plea, it was held that he had abandoned the summons, by delivering the plea before it was attendable (*m*).

Attendance and rotation of Masters at Chambers.

Attendance and Rotation of Masters at Chambers.]—By *Ord. LIV. r.* 13, "Six of the Masters shall be selected (according to a rota to be fixed, and submitted to the approval of the Lord Chief Justice of England, before the commencement of the Christmas vacation in each year,) to attend as Masters at Chambers in the Queen's

---

rule nisi and a summons, the former operating as a stay from the time of the service: the reason for such difference being, that the latter is the act of the Court, the former the act of the party.

(*f*) *Wells* v. *Secret*, infra: *Abernethy* v. *Paton*, 6 Sc. 586.

(*g*) *Wells* v. *Secret*, 2 Dowl. 447: *Knowles* v. *Vallance*, 1 Gale, 16: *Roberts* v. *Cuttill*, 4 Dowl. 204: *Spenceley* v. *Shoulds*, 5 Dowl. 562: *Barton* v. *Warren*, 3 D. & L. 142. It is a stay though defendant was under a *peremptory* order to plead: *Beazley* v. *Bailey*, 16 M. & W. 58; 4 D. & L. 271; 16 L. J., Ex. 1.

(*h*) *Byles* v. *Walter*, 5 Dowl. 232. See as to making a summons so returnable, post, p. 1409.

(*i*) *Knowles* v. *Vallance*, 1 Gale, 16: *Spenceley* v. *Shoulds*, 5 Dowl. 562: *Sarjent* v. *Brown*, 2 Dowl., N. S. 985: *Trego* v. *Tatham*, 2 Sc. N. R. 537; 9 Dowl. 379; 2 M. & Gr. 409.

(*k*) See *Sarjent* v. *Brown*, 2 Dowl., N. S. 985.

(*l*) *Abbott* v. *Hopper*, 8 Dowl. 19. And see *Trego* v. *Tatham*, 9 Dowl. 379.

(*m*) *Barton* v. *Warren*, 3 D. & L. 142.

PART XV.

Bench Division during each of the four sittings of the offices in the year."

By *r.* 14, "The six Masters, to whom, according to such rota, the attendance during any particular sittings has been allotted, shall, before the first day of such sittings, by arrangement amongst themselves, select three of their number to sit, one in each of the three rooms appropriated for that purpose in the Royal Courts of Justice, every Monday, Wednesday, and Friday throughout such sittings, the remaining three to sit on Tuesdays, Thursdays, and Saturdays throughout the same sittings."

By *r.* 15, "Each of the Masters so selected shall, when so sitting at Chambers, occupy the same room, and take all applications (under such alphabetical division of actions as the Masters may from time to time arrange) proper to be made to a Master at Chambers, except applications in such actions as may have been under the provisions of Order V. (*n*) assigned to any other Master."

By *r.* 16, "The arrangements made under the three last preceding Rules shall be publicly announced in such manner as the Lord Chief Justice of England shall from time to time direct" (*o*).

Assignment of actions to particular Masters.

Assignment of Actions to particular Masters.]—Under the present rules an action becomes assigned to the particular Master before whom the first summons taken out in it is heard, and all subsequent applications in the action must be made to that particular Master.

By *Ord. V. r.* 6, "Every action in the Queen's Bench Division not proceeding in a District Registry shall be assigned to one of the Masters of the Supreme Court at the time and in manner provided by Order LIV., and all documents and proceedings therein shall thereafter be marked with the name of the Master to whom the action has become so assigned, and every application or proceeding therein which by these Rules is to be heard and dealt with by a Master, including taxation of the costs, shall be heard and dealt with by such Master."

By *Ord. LIV. r.* 17, "Every application to a Master at Chambers shall, at the time of hearing (unless any other Master's name shall already have been marked thereon), be marked by such Master with his name, and the cause or matter in which such application has been so marked shall thereupon become assigned to such Master."

By *r.* 18, "Every subsequent application, which under the provisions of Order V. must be made to the same Master, shall, if during any sittings, from urgency or other cause it cannot conveniently be heard on the days when, under the above-mentioned arrangements, such Master would be sitting in the proper room as Master at Chambers, or if it is made at any time after the sittings of such Master have under the same arrangements ceased, be taken by such Master in his own room, at such time as he may, either by special appointment in any particular case or by general rule to be published in the ante-room of Masters' Chambers and other convenient places, direct."

(*n*) See infra.

(*o*) Notices of the arrangements made are posted from time to time in various parts of the Royal Courts.

—Transfer from Master to Master.

By *Ord. V. r.* 7, "Where actions have become assigned to the Masters under the provisions of the last preceding Rule [*see r.* 6, *supra*], it shall be lawful for the Lord Chief Justice of England to transfer all or any number of actions from any one Master to any other Master."

—Absence, &c. of Master.

By *r.* 8, "During the absence from illness or any other urgent cause, or during a vacancy in the office, of any Master to whom any action may have been assigned, or during any vacation, any other Master may hear and dispose of any application therein on behalf or in the place of such Master."

Time for return of summonses, lists, &c.

Time for Return of Summonses, Lists, &c. (*p*).]—By *Ord. LIV. r.* 26 (*p*), "Unless a Judge otherwise specially directs, summonses for time only shall be returnable at 10.30 in the forenoon, and be heard by the Masters in priority to other business. Other summonses shall, unless a Judge otherwise specially directs, be returnable at successive hours, commencing at 11 in the forenoon. In settling the number of summonses returnable at each hour regard shall be had to the nature of the several applications."

By *r.* 27 (*p*), "Each summons, not being a summons for time only, shall, when issued, be entered by the proper officer in a list. The lists of summonses shall distinguish those which a Master has jurisdiction to hear from those which a Master has not jurisdiction to hear, and those which are to be attended by counsel from those which are not to be so attended."

By *r.* 28 (*p*), "The summonses in each list for hearing by a Judge or Master shall be called on in their order. If when a summons is called on neither party appears, the summons shall be passed over until the list for the hour has been gone through. The summonses passed over shall then be called on a second time in their order. If neither party appears to a summons so called on it shall be struck out."

Consent to summons.

Consent to Summons.]—When the opposite solicitor, &c., is served with a copy of the summons, he may, if he have no cause to show, indorse upon the summons his consent to an order being made (*q*); it is optional with him, however, whether he will do so or not. If he indorse his consent, then, if the order is one that requires to be drawn up (*see post*, p. 1413), *the summons so indorsed should be taken to the Order Office at the Royal Courts, and the order drawn up* (*r*). *In some cases, however, notwithstanding the opposite party is thus willing to consent to the order, the Judge may require his attendance before making it* (*r*). *On the order being obtained, serve it on the opposite solicitor or agent.* If the order is one that requires to be drawn up, unless it be actually drawn up and served without delay, the other party may proceed as if no summons had been taken

(*p*) By Ord. LIV. r. 25, "The following Rules numbered 26 to 29, both inclusive, shall apply to all applications at Chambers in the Queen's Bench Division: but shall not apply to proceedings in District Registries."

(*q*) Cp. *Ambroise* v. *Evelyn*, 11 Ch. D. 759. As to one partner having no authority to consent to an order for judgment in an action against himself and his co-partner, see ante, p. 1295.

(*r*) See Ord. XLI. r. 10, ante, p. 1295, as to a defendant attending before the Judge to give his consent to an order for judgment.

PART XV.

out, and this although he has indorsed his consent, as above mentioned (*s*).

Attendance on summons.

Attendance on Summons.]—During the sittings a Judge attends at Chambers generally every day. Three of the Masters attend at the three rooms for hearing summonses, and the others, except such of them as are engaged in Court, sit in their private rooms.

The party taking out the summons, and the party served with it, must attend at Chambers at the hour at which the summons is returnable. The lists will be called over at the hour stated in them, and the summonses called on and disposed of in their order in the list.

With regard to summonses returnable before the Judge, it is ordered by a notice printed on the daily list that "Summonses will be called on in their order. If when a summons is called on either party does not appear, the summons will be passed over until the list for the hour has been gone through. The summonses passed over will then be called on a second time in their order. If neither party appears to a summons so called on it will be struck out. If one party only appears such order as seems just will on an affidavit of service be made ex parte."

Where parties agree to adjourn.

The parties frequently agree, subject to the approval of the Judge, to the summons being adjourned till the next or a future day: in which case the summons will operate as a stay of proceedings until it is disposed of (*t*): on such adjournment no second summons is necessary. A summons in the list cannot be adjourned except by order of the judge.

When opposite party attends.

If the opposing solicitor or agent attend, the summons will be called on in its turn, and upon the applicant stating the grounds of the application, and the opposite party showing cause against it, the Master or Judge either grants or refuses the order as he thinks fit. The party applying is bound to state fully and fairly the grounds of his application (*u*).

Affidavit, when required.

In general, an affidavit is not absolutely necessary in support of the application or against it, unless expressly required by Act of Parliament, or by rule of Court (*x*). Where, however, the facts are disputed, and sometimes in other cases, the Master or Judge requires one. An affidavit if made should contain all the general requisites of an affidavit: as to which *see ante, Vol.* 1, p. 453. The affidavit must be duly stamped, and the stamp cancelled by the Judge's clerk or doorkeeper before being used. All affidavits used before the Master or Judge must be left with the Judge's clerk or doorkeeper, in order that the same may be filed (*y*).

Judge directing examination of witnesses.

A Judge has power upon the hearing of a summons to direct the examination of witnesses or the production of documents (*see ante*, p. 533). As to a subpœna to compel the attendance of a witness at

(*s*) *Joddrell* v. ——, 4 Taunt. 253: *Wood* v. *Harding*, 3 C. B. 968. And see post, p. 1414.

(*t*) See ante, p. 1407.

(*u*) 7 T. R. 455; 1 H. Bl. 101; 1 East, 527; 5 Taunt. 859. See *Thorpe* v. *Beer*, 1 Chit. 124.

(*x*) See *Joseph* v. *Perry*, 3 Dowl. 699. Where a statute directs that a proceeding under it may be enforced by a Judge upon a summons granted upon an affidavit of the facts, the granting of the summons without an affidavit is only an irregularity, and does not affect the validity of an order duly made in other respects upon such summons: *Ex p. Farber*, 3 H. & N. 521; 27 L. J., Ex. 453.

(*y*) See ante, Vol. 1, p. 471.

Chambers, *see Ord. XXXVII. r.* 28, *post*, p. 1412. As to a Judge upon the hearing of a summons disallowing the costs of unnecessary affidavits and statements therein, and as to disallowing the costs of parties unnecessarily appearing on a summons, *see Vol.* 1, pp. 705, 706.

Attendance by counsel, &c.

In ordinary cases, the solicitors, by themselves or their clerks, attend and support the application, or show cause against it; but in cases of difficulty they usually attend with counsel (*y*). Notice of attendance by counsel should be given a reasonable time before the hearing of the summons, otherwise the Judge will postpone the case if the opposite party wishes it, in order that he may have counsel's assistance. When a respondent to a summons is desirous of appearing by counsel where it has not been entered in the counsel's list, he must give notice to the officer in charge of the list and get the case transferred to the counsel's list. The costs of counsel attending at Chambers are not allowed, unless the Judge certifies that the case was a proper one for counsel to attend (*Ord. LXV. r.* 27, *sub-r.* 16, *ante*, *Vol.* 1, p. 704). And this applies even as between solicitor and client (*z*). The successful party should, therefore, ask the Judge to certify that the case was one fit to be attended by counsel.

Summons dismissed.

If the summons be dismissed the Judge will mark such dismissal on the back of the summons; and if dismissed with costs, or on any terms, the same will be so marked accordingly; and, in that case, the party called on to show cause should have an order drawn up for such costs, &c., and serve it on the opposite solicitor or agent, and proceed to enforce it accordingly, if the costs be not paid.

Referring application to the Court.

Upon the hearing of the summons the Judge, instead of making or refusing an order, may refer the parties and the questions arising on the summons to a Divisional Court: in which case the application must be made to such Court (*Judicature Act*, 1873, s. 46 (*a*)). If the Judge refers the matter to the Court, the summons should be indorsed by the Judge. In practice, the party making the application which is referred to the Court is required to give a notice of motion for an order in the terms of the summons, and to leave a copy of that notice with the officers for entry in the list (*see ante*, p. 1384) (*b*).

Reference by one Judge to another.

One Judge may refer an application to another Judge (*c*); and this is often done when, by reason of the action having already been before the latter Judge, or for some other reason, he is specially qualified to deal with the application.

Reference by

By *Ord. LIV. r.* 20, "If any matter appears to the Master

(*y*) *Doe* d. *Roberts* v. *Roe*, 13 M. & W. 691; 14 L. J., Ex. 101.

(*z*) *In re Chapman*, 10 Q. B. D. 52; S. C. affirmed in C. A., 47 L. T. 426.

(*a*) By this enactment, "Subject to any Rules of Court, any Judge of the said High Court, sitting in the exercise of its jurisdiction elsewhere than in a Divisional Court, may reserve any case, or any point in a case, for the consideration of a Divisional Court, or may direct any case, or point in a case, to be argued before a Divisional Court; and any Divisional Court of the said High Court shall have power to hear and determine any such case or point so reserved or so directed to be argued." See Jud. Act, 1876, s. 17, Vol. 1, p. 16.

(*b*) *Warne* v. *Haddon*, 9 Dowl. 960; *King* v. *Birch*, 3 Q. B. 425; *Bate* v. *Lawrence*, 2 D. & L. 83; *Butterworth* v. *Williams*, 1 B. C. Rep. 168.

(*c*) *Hartmont* v. *Foster*, 8 Q. B. D. 82.

PART XV.

Master to Judge.

proper for the decision of a Judge, the Master may refer the same to a Judge, and the Judge may either dispose of the matter or refer the same back to the Master with such directions as he may think fit."

Adjournment where all matters not disposed of.

By *Ord. LIV. r.* 8, "Where matters in respect of which summonses have been issued are not disposed of upon the return of the summons, the parties shall attend from time to time without further summons, at such time or times as may be appointed for the consideration or further consideration of the matter."

Proceedings where party fails to appear.

Proceedings where Party fails to appear.]—By *Ord. LIV. r.* 5, "Where any of the parties to a summons fail to attend, whether upon the return of the summons, or at any time appointed for the consideration or further consideration of the matter, the Judge may proceed *ex parte*, if, considering the nature of the case, he think it expedient so to do; no affidavit of *non-attendance* shall be required or allowed, but the Judge may require such evidence of *service* as he may think just."

—Reopening proceedings.

By *r.* 6, "Where the Judge has proceeded *ex parte*, such proceeding shall not in any manner be reconsidered in the Judge's Chambers, unless the Judge shall be satisfied that the party failing to attend was not guilty of wilful delay or negligence; and in such case the costs occasioned by his non-attendance shall be in the discretion of the Judge, who may fix the same at the time, and direct them to be paid by the party or his solicitor before he shall be permitted to have such proceeding reconsidered, or make such other order as to such costs as he may think just."

—Costs.

By *r.* 7, "Where a proceeding in Chambers fails by reason of the non-attendance of any party, and the Judge does not think it expedient to proceed *ex parte*, the Judge may order such an amount of costs (if any) as he shall think reasonable to be paid to the party attending by the absent party or by his solicitor personally."

Compelling attendance of witness.

Compelling Attendance of Witness.]—The attendance of a witness at Chambers may be compelled by a subpœna, which will be issued upon a note from a Judge.

By *Ord. XXXVII. r.* 28, "Where a *subpœna* is required for the attendance of a witness for the purpose of proceedings in Chambers, such *subpœna* shall issue from the Central Office upon a note from the Judge."

Costs.

Costs.]—A Master or Judge at Chambers has power to give costs on a summons (*d*). The granting or refusing of them is entirely in the discretion of the Master or Judge, and he may, if he like, refuse them altogether, or he may fix the amount of them, or make the payment of them a condition of his granting the order (*e*).

(*d*) *Doe* d. *Prescott* v. *Roe*, 1 Dowl. 274; 2 M. & Sc. 119; 9 Bing. 104: *Hughes* v. *Brand*, 2 Dowl. 131: *Clement* v. *Weaver*, 4 Sc. N. R. 229; 3 M. & G. 551. This was formerly much doubted: *Bridge* v. *Wright*, 2 A. & E. 48; 4 N. & M. 5: *Spicer* v. *Todd*, 2 C. & J. 165; 1 Dowl. 306: *Read* v. *Lee*, 2 B. & Ad. 415; 1 Dowl. 52.

(*e*) See *Collins* v. *Aaron*, 4 Bing. N. C. 233; 6 Dowl. 423: *Tomlinson* v. *Bollard*, 4 Q. B. 642: 12 L. J., Q. B. 257. See also *Davey* v. *Brown*, 1 Sc. 384; 1 Bing. N. C. 4

If the order set aside proceedings "on payment of costs," by this is meant the costs of the particular act or acts set aside, the costs of the application, *i. e.* the summons, &c., and the costs of actually setting it aside (*f*). When the order contains a condition which requires the taxation of costs, it may be taken, in the first instance, to the Master for an appointment, which he will mark on the original order (*g*). The appointment so marked should then be copied on the copy of the order to be served; and the Master's appointment should, of course, be attended to, or he will proceed ex parte, without making a second appointment (*h*). An order that the costs shall be "the plaintiff's (or defendant's) in any event," means that he will get them whether he wins or fails in the action. When the costs are made the "plaintiff's (or defendant's) costs in the cause," he gets them if he wins, but in no event has he to pay them. When a summons is indorsed by the Master, "no order counsel," the party opposing the application will get the costs if he is entitled to the general costs of the cause, but not otherwise. The solicitor of a party cannot, except in the cases provided for by *Ord. LIV. r.* 7 (*ante*, p. 1412), and *Ord. LXV. r.* 27, *subr.* 13 (*infra*), be ordered to pay costs unless he is a party to the summons (*i*).

By *Ord. LXV. r.* 27, *subr.* 13, "As to attendances at the Judges' Chambers, where by reason of the non-attendance of any party (unless it be considered expedient to proceed *ex parte*), or where by reason of the neglect of any party in not being prepared with any proper evidence, account, or other proceeding, the attendance is adjourned without any useful progress being made, the Judge may order such an amount of costs (if any) as he shall think reasonable to be paid to the party attending by the party so absent or neglectful, or by his solicitor personally; and the party so absent or neglectful is not to be allowed any fee as against any other party, or any estate or fund in which any other party is interested." Costs caused by non-attendance, neglect, &c.

As we have seen (*ante*, p. 1411), the costs of the attendance of counsel are not allowed except where the Judge or Master certifies for their allowance.

As to a Judge upon the hearing of a summons disallowing the costs of unnecessary affidavits or statements therein, &c., and as to disallowing costs of parties unnecessarily appearing on a summons, *see Vol.* 1, pp. 705, 706.

As to when the costs of orders, &c. are costs in the cause, *see Vol.* 1, p. 710.

As to the amount of costs to be allowed on taxation, *see Ord. LXV. r.* 27, *subr.* 12, *ante*, *Vol.* 1, p. 704.

The Order, Drawing up, Service of, &c.]—In the cases provided for by *Ord. LII. r.* 14 (*ante*, p. 1395), namely, where an order is made not embodying any special terms nor including any special directions but simply (i) enlarging time for taking any proceeding or doing any act, or (ii) giving leave for the issue of any writ other than a writ of attachment, or (iii) for the amendment of any writ The order—drawing up and service of.

(*f*) *Caristie* v. *Thomson*, 1 Dowl., N. S. 592.

(*g*) See *Waller* v. *Jay*, 16 L. J., Ex. 17.

(*h*) See ante, p. 1412.

(*i*) *Roueh* v. *Alberty*, 33 L. J., Q. B. 127: *In re Bradford* (C. A.), 53 L. J., Q. B. 65; 50 L. T. 170; 32 W. R. 238. See Order LXV. r. 11, ante, Vol. 1, p. 184.

PART XV.

or pleading, or (iv) for the filing of any document, or (v) for any act to be done by any officer of the Court other than a solicitor, it is not necessary to draw up an order unless this is specially directed, but notice of the order must be served as directed by that rule.

In other cases the order should be drawn up and served within a reasonable time (*k*), or the opposite party may treat it as abandoned, even though the order was drawn up by consent (*l*), or though his solicitor was present at the time the order was made (*m*), or though the order be conditional, as "on the payment of costs" (*n*).

It appears, however, that it is not *necessary* to draw up and serve an order where the party to be served himself has to take the next step under the order, and that the necessity only arises where the opposite side may suppose that the order is abandoned (*o*), as on an order for judgment, unless a sum of money is paid into Court before a certain day, judgment may be signed if the money be not paid in, although the order is not drawn up and served (*o*).

As to the indorsement and service of an order requiring any act to be done, *see Ord. XLI. r. 5, ante, Vol.* 1, p. 766.

Who may draw up the order.

The Judge, after hearing the parties, indorses upon the summons a minute of his order, and gives it to the successful party, who gets the officer at the order office to draw up the order. If the party do not like the order, he should not get it drawn up (*p*). If he does not do so, and the other party considers that the order pronounced is in his favour, he should take out a summons for the purpose of obtaining a similar order. If parties being before a Judge at Chambers go into matter not within the summons, and the Judge make a minute of an order, the party in whose favour the minute is made, is entitled to draw up an order accordingly.

Form of.

By *Ord. LIV. r.* 29, "An order shall be in the Form No. 2 in Appendix K., with such variations as circumstances require. It shall be sealed, and shall be marked with the name of the Judge or Master by whom it is made" (*q*).

Fee for drawing up.

The fee for drawing up an ordinary order is 5*s.*, which is paid by a stamp impressed on the order (*see Orders in the Appendix, post*).

Effect of order, and how enforced.

Effect of the Order, and how enforced.]—The order made as abovementioned is in effect as binding and imperative as an order of

(*k*) *Metcalfe* v. *The British Tea Association*, 46 L. T. 31: *Ballard* v. *Tomlinson*, 52 L. J., Ch. 656; 48 L. T. 515; 31 W. R. 563: *Kenney* v. *Hutchinson*, 6 M. & W. 134; 8 Dowl. 171: *Joddrell* v. ——, 4 Taunt. 253. See *Maple* v. *Woodgate*, 10 Jur. 839; 1 B. C. Rep. 79: *Belcher* v. *Goodered*, 4 C. B. 472; 16 L. J., C. P. 176: *Normanby* v. *Jones*, 3 D. & L. 143.

(*l*) *Charge* v. *Farhall*, 4 B. & C. 865; 7 D. & R. 422: *Edensor* v. *Hoffman*, 2 C. & J. 140: *Sedgwick* v. *Allerton*, 7 East, 542. See *Wright* v. *Stevenson*, 5 Taunt. 850: *Wilson* v. *Hunt*, 1 Chit. 647.

(*m*) *Kenney* v. *Hutchinson*, supra.

(*n*) *Normanby* v. *Jones*, 3 D. & L. 143.

(*o*) *Hopton* v. *Robertson*, W. N. 1884, 77; Bitt. Ch. Cas. 203, *Field*, J., at Chambers.

(*p*) *Macdougall* v. *Nicholls*, 5 N. & M. 366; 3 A. & E. 813: *Solly* v. *Richardson*, 6 Dowl. 774; Tidd, New Pract. 258.

(*q*) See the form, Chit. F. p. 712.

Court (*r*). If, indeed, it has been obtained by a fraud practised on the clerk who drew it up, or if the Judge had no jurisdiction whatever over the subject matter of the application, and consequently none to make it, it seems it might be disregarded altogether (*s*).

The order may be enforced in the same way as a judgment to the same effect (*see Ord. XLII. r.* 24, *ante*, p. 1396). See *ante*, p. 1397, the observations as to enforcing orders of Court, which apply to enforcing orders made at Chambers.

It is no longer necessary to make an order of a Master or Judge a rule of Court before proceeding to enforce it, nor is it necessary to sign any judgment on it unless the order requires this.

An action will not lie on a Judge's order (*t*). By action.

A Judge's order proves itself on mere production (*u*). How proved.

When and how it may be abandoned.]—As soon as the order is drawn up and served, it is binding upon the party who obtains it (*x*), unless, indeed, it gives him liberty to adopt its terms or not; as, for instance, an order for liberty to amend, or the like (*y*). A defendant who has obtained an order for particulars of the plaintiff's demand, with a stay of proceedings until they are delivered, may waive the delivery of such particulars, and plead or demur to the statement of claim (*z*). Where a defendant obtained an order to set aside a judgment upon payment of costs, the Court would not relieve him from the condition, and held that he was not at liberty after service to abandon the order, and apply to the Court (*a*). As to treating an order as abandoned, when not served within a reasonable time, *see ante*, p. 1414. When and how it may be abandoned.

Setting aside or amending Order.]—As to the power of a Master or Judge to rehear an application once disposed of, *see ante*, p. 1398. It appears that there is no such power now. Under the former practice, when an order had been made, or the conditions annexed to an order imposed, under a mistake, or when new circumstances arose which rendered it clearly essential to the justice of the case, a Judge would amend (*b*) or vary his order, or would sometimes even rescind it, when it appeared to have been Setting aside, &c. order.

(*r*) See per Lord *Mansfield*, C. J., in *R.* v. *Wilkes*, 4 Burr. 2569: *Wood* v. *Plant*, 1 Taunt. 47: *Lench* v. *Pargiter*, Doug. 68: *Briggs* v. *Sharp*, 6 Bing. 517: *Wilson* v. *Northorp*, 4 Dowl. 441.

(*s*) *Woosnam* v. *Price*, 1 C. & M. 352: *Lander* v. *Gordon*, 7 M. & W. 218.

(*t*) *Dent* v. *Basham*, 9 Ex. 469: *Phillips* v. *Broadley*, 9 Q. B. 744: *Hookpayton* v. *Bussell*, 9 Ex. 24; 23 L. J., Ex. 267, where the order is made by consent, an action may be maintained on the agreement. See *S. C.*: *Wentworth* v. *Bullen*, 9 B. & C. 840, per *Parke*, J.: *Thames Iron Works* v. *Patent Derrick Co.*, 29 L. J., Ch. 714.

(*u*) *Davis* v. *Parsons*, 2 Dowl., N. S. 934: *Sill* v. *Halford*, 4 Camp. 17: *Berney* v. *Read*, 7 Q. B. 79.

(*x*) *Griffin* v. *Dickenson*, 7 Dowl. 860: *Wilson* v. *Hunt*, 1 Chit. Rep. 647. See *Macdougall* v. *Nicholls*, 3 A. & E. 813; 5 N. & M. 366; 4 Dowl. 76.

(*y*) *Black* v. *Sangster*, 3 Dowl. 206; 1 C. M. & R. 521.

(*z*) *Maunder* v. *Collett*, 3 C. B. 554; 16 L. J., C. P. 17. But see *Wickens* v. *Cox*, 4 M. & W. 67.

(*a*) *Giraud* v. *Austen*, 4 Sc. N. R. 750; 1 Dowl., N. S. 703.

(*b*) See *Oldershaw* v. *King*, 26 L. J., Ex. 384, where an order made by consent was amended.

PART XV.

irregularly and improperly obtained (*c*). The application for this purpose was by summons, as in the first instance, which was granted by any Judge of the Court, but it could only be heard before the Judge who made the order; and, in general, no Judge would hear a summons relating to, or, indeed, interfere in any way with the order of another Judge (*d*), unless the Judge who made the order was not in town, or some new matter was to be considered, or when some urgent and peculiar circumstances rendered it obviously necessary for the purposes of justice (*e*). It seems a party was not prevented from applying to the Court to rescind an order by applying to the Judge who made it to do so, unless he had agreed to be bound by the Judge's decision (*f*).

Clerical mistakes or errors arising from any accidental slip or omission may be corrected on summons (*g*).

Appeal from Master to Judge.

Appeal from Master to Judge.]—By *Ord. LIV. r.* 21, "Any person affected by any order or decision of a Master may appeal therefrom to a Judge at Chambers. Such appeal shall be by way of indorsement on the summons by the Master at the request of any party, or by notice in writing to attend before the Judge without a fresh summons, within four days after the decision complained of, or such further time as may be allowed by a Judge or Master."

—By indorsement.

A party desirous of appealing from the decision of a Master on a summons may request the Master to indorse on the summons a statement that he appeals. A party has a right to have this indorsement made, and the Master has no discretion to refuse to make it (*h*). If no request to make the indorsement be made, the party desirous of appealing should serve his opponent with a notice in writing to attend before the Judge on the hearing of the appeal.

—By notice.

—Time for.

The appeal must be made within four days after the decision complained of, unless the time is enlarged by the Master or Judge. In the case of a notice being given, the notice must be made returnable within the four days (*i*), it is not sufficient to give it within that time (*j*); but the time may be extended on the hearing of the appeal without any separate summons for that purpose (*k*).

—Length of notice.

The rule does not specify the length of notice that is required, but in practice a notice served on one day, and returnable the next, is sufficient, and in view of the power of appeal by indorsement this appears reasonable.

—Extension of time.

The time for appealing may be ex-

(*c*) *Clark* v. *Mams*, 1 Dowl. 656; Bagley's Prac. 29: *Hall* v. *West*, 1 D. & L. 412: *Thompson* v. *Beeke*, 4 Q. B. 759: *Thomas* v. *Evans*, 9 M. & W. 829: *Grandin* v. *Maddans*, 6 D. & L. 241: *Re Stretton*, 14 M. & W. 806.

(*d*) 2 Chit. Rep. 83: *Wright* v. *Stevenson*, 5 Taunt. 850: *Thompson* v. *Beeke*, supra.

(*e*) Price's N. R. 317.

(*f*) *Re Stretton*, 14 M. & W. 806; 3 D. & L. 278: *Grandin* v. *Maddans*, 6 D. & L. 241; 18 L. J., Q. B. 31: *Thomas* v. *Evans*, 9 M. & W. 829. *Thompson* v. *Beeke*, 4 Q. B. 759, so far as it conflicts with the statement in the text, cannot be supported. See 14 M. & W. 867.

(*g*) See Ord. XXVIII. r. 11, ante, p. 1399.

(*h*) *Danger* v. *Nelson*, W. N. 1884, 96; Bitt. Ch. Cas. 15.

(*i*) *Bell* v. *North Staffordshire R. Co.*, 4 Q. B. D. 205; 48 L. J., Q. B. 513; 27 W. R. 263, decided with reference to the summons required by the former rules.

(*k*) *Gibbons* v. *London Financial Association*, 4 C. P. D. 263; 48 L. J., C. P. 514; 27 W. R. 619: *Burke* v. *Rooney*, 4 C. P. D. 226; 27 W. R. 915.

tended by the Master or a Judge either at (*k*) or before the hearing of the appeal. It may be extended at the hearing without any separate summons (*k*). When there is no Judge sitting within the four days, the time will be extended almost as of course (*l*).

Setting down appeal.

The appeal is set down by taking the summons indorsed with the statement or the notice of appeal to the officer in charge of the Judge's list at the Central Office, and getting it entered in that list. As to the service of the notice, *see post*, p. 1439. Any affidavits required for use on the appeal must be bespoken at the proper office, so that they may be taken to the Judge's room.

Fresh affidavits.

The appeal is a re-hearing, and fresh evidence may be used (*m*); but when such fresh evidence is sought to be used, the Judge will frequently refer the matter back to the Master to re-hear it. It has been held, that the 49th section of the *Judicature Act*, 1873 (*infra*, n. (*p*)), which prohibits an appeal for costs, does not apply to an appeal from a Master to a Judge (*n*).

Costs.

The successful party should ask for costs, as the costs are not costs in the cause, and neither party will get them, unless an order is made (*o*).

No stay.

By *Ord. LIV. r.* 22, "An appeal from a Master's decision shall be no stay of proceeding unless so ordered by a Judge or Master."

Appeal from Judge to Court, —in what cases,

Appeal from the Judge to the Court.]—By the *Judicature Act*, 1873, s. 50, "Every order made by a Judge of the said High Court in Chambers, except orders made in the exercise of such discretion as aforesaid (*p*), may be set aside or discharged upon notice by any Divisional Court, or by the Judge sitting in Court (*q*), according to the course and practice of the Division of the High Court to which the particular cause or matter in which such order is made may be assigned: and no appeal shall lie from any such order, to set aside or discharge which no such motion has been made, unless by special leave of the Judge by whom such order was made, or of the Court of Appeal."

Under this section, as a general rule, every order made by a Judge at Chambers may be appealed from (*r*). This rule is subject to exceptions. No appeal lies from an order as to costs only which

---

(*k*) See note (*k*), ante.

(*l*) Id. See cases cited post, p. 1419.

(*m*) *Anon.*, per *Quain*, J., W. N. 1875, 250; Bitt. No. cl; per *Lindley*, J., Bitt. No. clxxxvi; per *Lush*, J., Id. No. lxi.

(*n*) *Foster* v. *Edwards*, 48 L. J., Q. B. 767.

(*o*) *Mann* v. *Harbord*, L. R., 5 Ex. 17.

(*p*) By sect. 49, "No order made by the High Court of Justice or any Judge thereof, by the consent of parties, or as to costs only, which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court or Judge making such order." As to appeals for costs, see ante, p. 971.

(*q*) This has no application to appeals in the Queen's Bench Division, but refers to the Chancery Division, and the Probate, Divorce and Admiralty Division.

(*r*) *Pollock* v. *Rabbits*, 21 Ch. D. 466; 47 L. T. 637: *Debenham* v. *Wardroper*, 48 L. T. 235, refusal to commit under Debtors Act: *Pike* v. *Davis*, 8 Dowl. 387: *Re Stretton*, 14 M. & W. 806, where an application was first made to the Judge who made the order, and it was held that this did not prevent an appeal to the Court.

PART XV.

are left to the discretion of the Judge (*s*), or from an order made by consent (*t*), except by leave of the Judge who makes the order.

This section does not confer a right of appeal against a Judge's order where the appeal is specially taken away before the Act (*u*). Where, by an Act of Parliament, power is given to a single Judge to decide a matter, an appeal lies to the Court against his decision (*x*); unless where the power is vested in him alone, and the jurisdiction of the Court to interfere is excluded (*y*). The Court will not, in general, review a Judge's order in cases where the subject-matter is left exclusively to his discretionary power (*z*). The Court will not rescind a Judge's order, which appears upon the face of it to have been made by consent; and if the words "by consent" have been improperly inserted, application should be made to the Judge to set it right (*a*). Other instances also have been noticed in other parts of this work, where the Court will not interfere with a Judge's decision. A party cannot, in general (*b*), after availing himself of a Judge's order (*c*), as by accepting costs under it, move to rescind it (*d*). It may be added, that there is no necessity for applying to the Court to set aside an order which is a nullity (*e*), but this can rarely be the case.

When a party alleges that an order has been improperly obtained against him ex parte, the proper course, it seems, is to apply to the Judge who made the order to review it (*f*).

Where there is a clerical error, it may be set right without appeal (*see Ord. XXVIII. r.* 11, *ante*, p. 1399).

—to what Court,

By *Ord. LIV. r.* 23, "In the Queen's Bench Division the appeal from a decision of a Judge at Chambers shall be to a Divisional Court."

As to Divisional Courts, *see ante*, *Vol.* 1, p. 15. The Court of Appeal has no power to hear an appeal direct from a Judge at Chambers (*g*). The appeal from a Judge sitting in Court is to the

(*s*) See sect. 49, supra, n. (*p*): *Mitchell* v. *Darley Main Colliery Co.*, 10 Q. B. D. 457, order as to costs of inspection of property: *Perkins* v. *Beresford*, 47 L. T. 515, refusal to deprive plaintiff of costs on defence arising after action brought. Where the costs are not in the discretion of the Judge, this does not apply: *In re Bradford*, 50 L. T. 170; 53 L. J., Q. B. 65; 32 W. R. 238: *Hanson* v. *Maddox*, cited ante, p. 1403, n. (*a*). And see fully ante, p. 971.

(*t*) See sect. 49, supra, n. (*p*): cp. *Dodds* v. *Shepherd*, 1 Ex. D. 75; 45 L. J., Ex. 457.

(*u*) *Dodds* v. *Shepherd*, supra.

(*x*) *Shortridge* v. *Young*, 12 M. & W. 5: *Teggin* v. *Langford*, 2 Dowl., N. S. 467; 10 M. & W. 556: *Fowler* v. *Churchill*, 2 Dowl., N. S. 562: *Brown* v. *Bamford*, 9 M. & W. 42.

(*y*) See *Wearing* v. *Smith*, 10 Jur., Q. B. 924: *Kilkenny R. Co.* v. *Fielden*, 20 L. J., Ex. 141.

(*z*) See *Jenkins* v. *Treloar*, 1 M. & W. 16: *Cholmondeley* v. *Payne*, 3 Bing. N. C. 708: *Tadman* v. *Wood*, 4 A. & E. 1011: *Lane* v. *Newman*, 1 B. C. Rep. 93.

(*a*) *Hall* v. *West*, 1 D. & L. 412. See ante, p. 1399. See a case in which the Court, under special circumstances, interfered, though the order was drawn up by consent: *Wade* v. *Simeon*, 2 D. & L. 658.

(*b*) See *Connelly* v. *Bremner*, 35 L. J., C. P. 319.

(*c*) *Pearce* v. *Chaplin*, 9 Q. B. 802: *Hayward* v. *Duff*, 12 C. B., N. S. 364.

(*d*) *Simmons* v. *King*, 2 D. & L. 786: *Tinkler* v. *Hilder*, 4 Ex. 187; 18 L. J., Ex. 429.

(*e*) *Lander* v. *Gordon*, 7 M. & W. 218: *Woosnam* v. *Price*, 1 C. & M. 352.

(*f*) *Daniel* v. *Clapham* (C. P. D.), 63 L. T. (Jour.) 7. See ante, p. 1398.

(*g*) *Campbell* v. *Fairlie*, W. N. 1880, 17.

Court of Appeal (*h*). This is so in the case of an order of reference made at nisi prius (*h*).

—how brought,

By *Ord. LIV. r.* 24, "In the Queen's Bench Division, every appeal to the Court from any decision at Chambers shall be by motion, and shall be made *within eight days* after the decision appealed against, or, if no Court to which such appeal can be made shall sit within such eight days, then on the first day on which any such Court may be sitting after the expiration of such eight days."

—time within which appeal must be brought.

Unless the time for appealing is enlarged (*i*), the appeal must be brought, that is to say, notice of motion must be given so as to be returnable within eight days (*k*) after the decision appealed from if the Court be sitting, but if no Court to which the motion can be made (*l*) sits within the eight days, then the appeal must be made on the first day on which such a Court shall sit after the eight days.

If the last of the eight days is on a Sunday the notice may be made returnable on the following Monday (*m*).

Form of application.

If any proceedings have been taken under the order appealed from, the application should be to set aside the proceedings, as well as the order (*n*). If money has been paid under the order, the application should be not only to rescind the order, but also for a return of the money (*o*). It is no longer necessary to make a Judge's order a rule of Court before moving to set it aside (*p*).

—Setting down.

The appeal is set down by taking a copy of the notice to the officer in the Central Office in charge of the motion list. (*See ante*, p. 1384.) As to the service of the notice of motion, *see ante*, p. 1399.

Affidavits, &c.

It is the duty of the appellant to bring before the Court all the materials which were used before the Judge (*q*). And all affidavits so used must be bespoken at the Filing Office in the Central Office

(*h*) *Hoch* v. *Boor*, 49 L. J., C. P. 665; 43 L. T. 425.

(*i*) *Burke* v. *Rooney*, 4 C. P. D. 226; *Gibbons* v. *London Financial Association*, 4 C. P. D. 263.

(*k*) *Crom* v. *Samuels*, 2 C. P. D. 21; 35 L. T. 423; *Runtz* v. *Sheffield*, 4 Ex. D. 150; 40 L. T. 539; *Stirling* v. *Du Barry*, 5 Q. B. D. 65. A notice, therefore, given on the eighth day is too late. *Fox* v. *Wallis* (C. A.), 2 C. P. D. 45; 35 L. T. 690; *Deykin* v. *Coleman* (C. A.), 36 L. T. 195. It must be noticed that these cases were decided under the old rule, and they therefore only apply when there is a Court sitting within the eight days. See *Stirling* v. *Du Barry*, supra; ep. *Wallingford* v. *Mutual Society*, 5 App. Cas. 685; *Forrest* v. *Davies*, W. N. 1878, 88.

(*l*) Cp. *Stirling* v. *Du Barry*, 5 Q. B. D. 65, 66.

(*m*) *Taylor* v. *Jones*, 34 L. T. 131; 45 L. J., C. P. 110; *Lewis* v. *Kent*, 63 L. T. Jour., May 26th, 1877, 61, Q. B. D.

(*n*) See per Lord *Mansfield*, C. J., in *Rex* v. *Wilkes*, 4 Burr. 2569; *Granby* v. *Frowd*, 11 Leg. Obs. 213; *Cocker* v. *Tempest*, 7 M. & W. 502; 9 Dowl. 306; *Collins* v. *Johnson*, 16 C. B. 588; 24 L. J., C. P. 231.

(*o*) *Thompson* v. *Langridge*, 5 D. & L. 213, Ex.

(*p*) As to the former practice, see *Spicer* v. *Todd*, 2 C. & J. 165; 1 Dowl. 306; *Hawes* v. *Johnson*, 1 Y. & J. 12; *Cranch* v. *Tregoning*, 5 Dowl. 230; *Clement* v. *Weaver*, 4 Sc. N. R. 229; 1 Dowl., N. S. 193. See *Flight* v. *Cook*, 1 D. & L. 714.

(*q*) *Holmes* v. *Mountstephen*, L. R., 10 C. P. 474; 33 L. T. 351; *Needham* v. *Bristow*, 4 Sc. N. R. 773; 1 Dowl., N. S. 700; 4 M. & Gr. 262; *Heath* v. *Neshitt*, 2 Dowl., N. S. 1041; *Pocock* v. *Pickering*, 8 Q. B. 789; 21 L. J., Q. B. 365; *Bennett* v. *Benham*, 33 L. J., C. P. 153, where it was held to be sufficient to bring before the Court such of the affidavits used before the Judge as related to the matter in question.

PART XV.

so that they may be in Court on the hearing of the appeal (*r*). The same affidavits as were used at Chambers may be used on the appeal (*s*). Further affidavits may by leave of the Court be used (*t*). It is no longer necessary to have any affidavit verifying a copy of the Judge's order.

Costs.

The costs are in the discretion of the Court (*u*). As a general rule they follow the event of the appeal (*x*).

Appeal to Court of Appeal.

An appeal lies to the Court of Appeal from the decision of the Divisional Court on appeal from a Judge at Chambers.

(*r*) *Pickford* v. *Ewington*, 4 Dowl. 453; 1 T. & G. 29; 1 Gale, 357.

(*s*) *Robinson* v. *Bradshaw*, 32 W. R. 95.

(*t*) *Gibbons* v. *Spalding*, 2 Dowl., N. S. 746; 11 M. & W. 174; 12 L. J., Ex. 185: *Pike* v. *Davis*, 6 M. & W. 546; 8 Dowl. 387: *Peterson* v. *Davis*, 6 C. B. 235. But see *Alexander* v. *Porter*, 1 Dowl., N. S. 299: *Flight* v. *Cook*, 1 D. & L. 714; 13 L. J., Q. B. 78: *Edwards* v. *Martyn*, 17 Q. B. 693; 21 L. J., Q. B. 87. This is not so in the Chancery Division. *Re Munns and Longden*, 50 L. T. 356.

(*u*) Ord. LXV. r. 1, ante, Vol. 1, p. 672.

(*x*) Formerly no costs were, as a rule, allowed when an order was rescinded. *Hargrave* v. *Holden*, 3 Dowl. 176: *Wright* v. *Skinner*, 1 T. & G. 69: *Wilkes* v. *Ottley*, 2 N. & P. 99: *Eckbank* v. *Owen*, 5 A. & E. 298. See *Jeves* v. *Hay*, 1 Sc. N. R. 329: *Wright* v. *Skinner*, 1 T. & G. 59.

CHAPTER CXXIV.

DISTRICT REGISTRIES AND PROCEEDINGS THEREIN.

Formation of district registries.

Formation of District Registries.]—The 60th section of the *Judicature Act*, 1873, gives power to the Queen by Order in Council to direct that there shall be District Registries (*a*).

By *Order in Council, dated the 12th August*, 1875, it is ordered :—

"That there shall be district registrars in the places of Liverpool, Manchester and Preston, and the district registrar at Liverpool of the High Court of Admiralty, and the district prothonotary at Liverpool of the Court of Common Pleas at Lancaster, shall be and are hereby appointed the district registrars in Liverpool; and the district prothonotary at Manchester of the said Court of Common Pleas shall be and is hereby appointed the district registrar in Manchester (*b*); and the district prothonotary at Preston of the said Court of Common Pleas shall be and is hereby appointed the district registrar at Preston; and that the district for each such place shall be the district now assigned to each such district prothonotary, under the provisions and authority of 'The Common Pleas at Lancaster Amendment Act, 1869' (*c*).

"That there shall be a district registrar in Durham, and that the district prothonotary of the Court of Pleas at Durham shall be and is hereby appointed the district registrar in Durham; and that the

(*a*) Sect. 60 is as follows :—"And whereas it is expedient to facilitate the prosecution in country districts of such proceedings as may be more speedily, cheaply, and conveniently carried on therein, it shall be lawful for her Majesty, by order in council, from time to time to direct that there shall be district registrars in such places as shall be in such order mentioned for districts to be thereby defined, from which writs of summons for the commencement of actions in the High Court of Justice may be issued, and in which such proceedings may be taken and recorded as are hereinafter mentioned; and her Majesty may thereby appoint that any registrar of any County Court, or any registrar or prothonotary or district prothonotary of any local Court whose jurisdiction is hereby transferred to the said High Court of Justice, or from which an appeal is hereby given to the said Court of Appeal, or any person who, having been a district registrar of the Court of Probate, or of the Admiralty Court, shall under this Act become and be a district registrar of the said High Court of Justice, or who shall hereafter be appointed such district registrar, shall and may be a district registrar of the said High Court for the purpose of issuing such writs as aforesaid, and having such proceedings taken before him as are hereinafter mentioned. This section shall come into operation immediately upon the passing of this Act."

(*b*) The district prothonotary at Manchester having died, another order in council, dated 9th December, 1876, has been made.

(*c*) These districts were assigned by certain rules made 23rd October, 1869, and published in the London Gazette. The Liverpool district was directed to consist of the hundred of West Derby, the Manchester district of the hundred of Salford, and the Preston district of the hundreds of Lonsdale, Amounderness, Leyland, and Blackburn.

PART XV.

district shall be the district, for the time being, of the County Court holden at Durham.

"That in the places mentioned in the schedule annexed, there shall be district registrars, and that the registrar of the County Court held in any such place shall be and is hereby appointed the district registrar in such place, and that the district for each such place shall be the district, for the time being, of the County Court holden at such place.

"SCHEDULE.

Bangor.	East Stonehouse.	Nottingham.
Barnsley.	Exeter.	Oxford.
Barnstaple.	Gloucester.	Pembroke Docks.
Bedford.	Great Grimsby.	Peterborough.
Birkenhead.	Great Yarmouth.	Poole.
Birmingham.	Halifax.	Portsmouth.
Boston.	Hanley.	Ramsgate.
Bradford.	Hartlepool.	Rochester.
Bridgewater.	Hereford.	Sheffield.
Brighton.	Huddersfield.	Shrewsbury.
Bristol.	Ipswich.	Southampton.
Bury St. Edmunds.	Kingston-on-Hull.	Stockton-on-Tees.
Cambridge.	Kings Lynn.	Sunderland.
Cardiff.	Leeds.	Swansea.
Carlisle.	Leicester.	Truro.
Carmarthen.	Lincoln.	Totnes.
Cheltenham.	Lowestoft.	Wakefield.
Chester.	Maidstone.	Walsall.
Colchester.	Newcastle-upon-Tyne.	Whitehaven.
Derby.	Newport, Monmouthshire.	Wolverhampton.
Dewsbury.	Newport, Isle of Wight.	Worcester.
Dover.	Newtown.	York."
Dorchester.	Northampton.	
Dudley.	Norwich.	

By *Order in Council, dated the 11th August*, 1884, it is ordered that there shall be district registries at

Aberystwith,
Carnarvon, and
Winchester,

and that the district of each place shall be the district, for the time being, of the County Court holden there.

Appointment of registrars.

District Registrars.]—The *Judicature Act*, 1873, *s.* 60 (*ante*, p. 1421 (*a*)), provides for the appointment of "District Registrars of the High Court of Justice." That section provided for the appointment of certain County Court and other officers as registrars; but by sect. 22 of the Judicature Act, 1881 (44 & 45 V. c. 68) (*d*), provision is made for the appointment of solicitors of the

(*d*) By the Jud. Act, 1881 (44 & 45 V. c. 68), s. 22, "And whereas by the Judicature Acts, 1873, 1875, and 1877, and the Supreme Court of Judicature (Officers) Act, 1879, no provision is made for the appointment of district registrars of the High Court of Justice other than persons holding or having held the offices in section sixty of the Supreme Court of Judicature Act, 1873, and section thirteen of the Supreme Court of Judicature Act, 1875, respectively mentioned: Be it enacted, that if on

Supreme Court of not less than five years' standing (*d*). Sect. 13 of the *Judicature Act*, 1875 (*e*), provides for the appointment of certain registrars of inferior Courts of Record (*e*).

Sect. 13 of the *Judicature Act*, 1875, provides for the appointment of joint district registrars (*e*); and sect. 22 of the *Appellate Jurisdiction Act*, 1876, provides for the appointment by registrars, with the approval of the Lord Chancellor, of a deputy (*f*).

Joint registrars—deputy registrars.

Powers and Duties of Registrars.]—The District Registrars are officers of the Supreme Court (*g*), and subject to the jurisdiction of that Court and the divisions of it (*g*).

Powers and duties of Registrars.

By *Ord. XXXV. r.* 11, "Every District Registrar and other officer of a district registry shall be subject to the orders and directions of the Court or a Judge, as fully as any other officer of the Court, and every proceeding in a District Registry shall be

Subject to control of Court.

---

any vacancy in the office of district registrar under the said Acts, or upon the appointment by any Order in Council to be hereafter made of any new district within which there shall be a district registrar (unless by such Order in Council it shall be otherwise directed), it shall appear to the Lord Chancellor, with the concurrence of the Treasury, that from the nature and amount of the business to be transacted by such district registrar it is expedient that such office should be conferred upon a person not so qualified as aforesaid, it shall be lawful for the Lord Chancellor, with the concurrence of the Treasury, to appoint to such office any solicitor of the Supreme Court of Judicature of not less than five years standing.

"A district registrar shall not, either by himself or his partner, be directly or indirectly engaged as solicitor or agent for a party to any proceeding whatsoever in the district registry of which he is registrar."

(*d*) See preceding note.

(*e*) By the Jud. Act, 1875 (38 & 39 V. c. 77), s. 13, "Whereas by section sixty of the principal Act it is provided that for the purpose of facilitating the prosecution in country districts of legal proceedings, it shall be lawful for her Majesty by Order in Council from time to time to direct that there shall be district registrars in such places as shall be in such order mentioned for districts to be thereby defined; and whereas it is expedient to amend the said section: Be it therefore enacted that—

"Where any such order has been made, two persons may, if required, be appointed to perform the duties of district registrar in any district named in the order, and such persons shall be deemed to be joint district registrars, and shall perform the said duties in such manner as may from time to time be directed by the said order, or any Order in Council amending the same.

"Moreover the registrar of any inferior Court of Record having jurisdiction in any part of any district defined by such order (other than a County Court) shall, if appointed by her Majesty, be qualified to be a district registrar for the said district, or for any and such part thereof as may be directed by such order or any order amending the same.

"Every district registrar shall be deemed to be an officer of the Supreme Court, and be subject accordingly to the jurisdiction of such Court, and of the divisions thereof."

(*f*) By the Appellate Jurisdiction Act, 1876 (39 & 40 V. c. 59), s. 22, "A district registrar of the Supreme Court of Judicature may from time to time, but in each case with the approval of the Lord Chancellor and subject to such regulations as the Lord Chancellor may from time to time make, appoint a deputy, and all acts authorized or required to be done by, to, or before a district registrar may be done by, to, or before any deputy so appointed: Provided always, that in no case such appointment shall be made for a period exceeding three months. This section shall come into force at the time of the passing of this Act," *i. e.* 11th August, 1876.

(*g*) See Jud. Act, 1875, s. 13, ad fin., *supra*, n. (*e*).

PART XV.

subject to the control of the Court or a Judge, as fully as a like proceeding in London."

Power to administer oaths, &c.

By the *Judicature Act*, 1873, s. 62, "All such district registrars shall have power to administer oaths and perform such other duties in respect of any proceedings pending in the said High Court of Justice or in the said Court of Appeal as may be assigned to them from time to time by rules of Court, or by any special order of the Court."

Same powers as Master at Chambers.

By the *R. of S. C., Ord. XXXV. r.* 6, "Where a cause or matter is proceeding in a district registry the District Registrar may exercise all such authority and jurisdiction in respect thereof as may be exercised by a Judge at Chambers, except such as by these rules a Master is precluded from exercising." *See post*, p. 1425.

Not to practise in registry.

A registrar must not, either by himself or his partner, be directly or indirectly engaged as solicitor or agent for a party to any proceeding whatsoever in the District Registry of which he is Registrar.

To account for and pay over moneys.

By *R. of S. C., Ord. XXXV. r.* 23, "Every district registrar shall account for and pay over to the Treasury all moneys paid into Court at the Registry of which he is Registrar, in such manner and at such times as may be from time to time directed by the Treasury."

Seal to be used.

Seal to be used.]—By the *Judicature Act*, 1873, *s.* 61, "In every such district registry such seal shall be used as the Lord Chancellor shall from time to time, either before or after the time fixed for the commencement of this Act, direct, which seal shall be impressed on every writ and other document issued out of or filed in such district registry, and all such writs and documents, and all exemplifications and copies thereof, purporting to be sealed with the seal of any such district registry, shall in all parts of the United Kingdom be received in evidence without further proof thereof."

What proceedings may be taken in district registry.

What Proceedings may be taken in District Registry.]—Sects. 60 and 64 of the Judicature Act, 1873, provide for the issue of a writ for the commencement of an action from a District Registry (*i*).

(*i*) See also Ord. V. r. 1, post, p. 1426. By the Jud. Act, 1873, s. 64, "Subject to the rules of Court in force for the time being, writs of summons for the commencement of actions in the High Court of Justice shall be issued by the district registrars when thereunto required; and unless any order to the contrary shall be made by the High Court of Justice, or by any Judge thereof, all such further proceedings, including proceedings for the arrest or detention of a ship, her tackle, apparel, furniture, cargo, or freight, as may and ought to be taken by the respective parties to such action in the said High Court down to and including entry for trial, or (if the plaintiff is entitled to sign final judgment or to obtain an order for an account by reason of the non-appearance of the defendant) down to and including final judgment, or an order for an account, may be taken before the district registrar, and recorded in the district registry, in such manner as may be prescribed by rules of Court: and all such other proceedings in any such action as may be prescribed by rules of Court shall be taken and if necessary may be recorded in the same district registry."

By the Jud. Act, 1884, s. 12, "Nothing in this Act shall interfere with any existing provisions as to any proceedings before district registrars."

By *Ord. XXXV. r.* 1, "Where a cause or matter is proceeding in a District Registry, all proceedings, except where by these Rules it is otherwise provided, or the Court or a Judge shall otherwise order, shall be taken in the District Registry, down to and including the entry of final judgment, and every final judgment and every order for an account, by reason of the default of the defendant, or by consent, shall be entered in the District Registry in the proper book, in the same manner as a like judgment or order in an action proceeding in London would be entered in the Central Office."

By *r.* 5, "Where a cause or matter is proceeding in a District Registry, all proceedings relating to the following matters, namely,—

(a) Leave to enter judgments under Order XVI., Rules 50 and 51;
(b) Leave to issue or renew writs of execution;
(c) Examination of judgment debtors for garnishee purposes, or under Order XLII., Rule 32;
(d) Garnishee orders;
(e) Charging orders nisi;

shall, unless the Court or a Judge otherwise order, be taken in the District Registry."

By *r.* 4, *post*, p. 1430, costs may be taxed in the Registry on a judgment signed there.

Under *Ord. XXXV. r.* 6 (*ante*, p. 1424), when a cause or matter is proceeding in a District Registry the District Registrar may exercise all such authority and jurisdiction in respect thereof as may be exercised by a Master at Chambers. As to the authority and jurisdiction of a Master at Chambers, *see ante*, p. 1403. It will be observed that rule 6 is confined to cases where the cause or matter is proceeding in the District Registry, and that by rule 1 (*supra*), a cause or matter can so proceed down to and including final judgment. It would seem, therefore, that a District Registrar has no jurisdiction (except in the cases expressly provided for by rule 5, *supra*, and rule 4, *post*, p. 1430) in respect of proceedings after final judgment, such as interpleader (*k*).

The Registrar has power to make an order for an account under *Ord. XV. r.* 1 (*ante*, p. 1341), and if he does so he may take the account himself (*l*); but a Registrar has no power to take accounts unless specially directed to do so (*m*).

Reference of accounts and inquiries to registrar.

By the *Judicature Act*, 1873, *s.* 66, "It shall be lawful for the Court or any Judge of the Division to which any cause or matter pending in the said High Court is assigned, if it shall be thought fit, to order that any books or documents may be produced, or any accounts taken or inquiries made, in the office of or by any such District Registrar as aforesaid; and in any such case the District Registrar shall proceed to carry all such directions into effect in the manner prescribed; and in any case in which any such accounts or inquiries shall have been directed to be taken or made by any District Registrar, the report in writing of such District Registrar as to the result of such accounts or inquiries may be acted upon by the Court, as to the Court shall seem fit."

The report under this section should be in the form of a Chief

(*k*) This was so held per *Cave*, J., at Chambers.

(*l*) *In re Bowen, Bennett* v. *Bowen*, 20 Ch. D. 538; 47 L. T. 114: cp. *Sykes* v. *Schofield*, 14 Ch. D. 629; 42 L. T. 822.

(*m*) *In re Smith, Hutchinson* v. *Ward*, 6 Ch. D. 692: cp. *Irlam* v. *Irlam*, 2 Ch. D. 608.

PART XV.

Clerk's certificate in Chancery, and should state the persons who were before the Registrar, and the materials upon which he proceeded (*m*).

Forms to be used.

Forms to be used.]—By *Ord. XXXV. r.* 24, "The forms contained in the Appendices shall, as far as they are applicable, be used in or for the purposes of District Registries, with such variations as circumstances may require."

See these forms, *Chit. F.*, p. 734 *et seq.*

Writ of summons.

Writ of Summons.]—By *R. of S. C., Ord. V. r.* 1, "In any action other than a probate action, the plaintiff wherever resident may issue a writ of summons out of any District Registry." Only such matters as are peculiar to a writ of summons issued out of a District Registry are noticed in this chapter. See as to the writ of summons generally, *ante*, *Vol.* 1, *Ch. XIII.*, p. 214. A District Registrar has no power to grant leave for service of a writ out of the jurisdiction (*Ord. LIV. r.* 12, *ante*, p. 1403).

—Name of registry.

—*Name of Registry.*]—By *R. of S. C., Ord. V. r.* 13, every action is to be distinguished by the date of the year and a letter and a number (*see ante*, *Vol.* 1, p. 228), "and when such action shall be commenced in a District Registry it shall be further distinguished by the name of such Registry."

—Statement of place for appearance.

—*Statement of Place for Appearance.*]—By *R. of S. C., Ord. V. r.* 3, "In all cases where a defendant neither resides nor carries on business (*n*) within the district out of the Registry whereof a writ of summons is issued, there shall be a statement on the face of the writ of summons that such defendant may cause an appearance to be entered at his option either at the District Registry or at the Central Office, or a statement to the like effect."

By *r.* 4, "In all cases where a defendant resides or carries on business (*n*) within the district, and a writ of summons is issued out of the District Registry, there shall be a statement on the face of the writ of summons that the defendant do cause an appearance to be entered at the District Registry, or a statement to the like effect."

—Indorsement of address.

—*Indorsement of Address.*]—By *R. of S. C., Ord. IV. r.* 3, "In all cases where a writ of summons is issued out of a District Registry the solicitor of a plaintiff suing by a solicitor shall indorse upon the writ, and notice in lieu of service of a writ, the address of the plaintiff, and his own name or firm and place of business, which shall, if his place of business be within the district of the Registry, be an address for service, and if such place be not within the district, he shall add an address for service within the district, and, where the defendant does not reside within the district, he shall add a further address for service, which shall not be more than three miles from the principal entrance of the Central Hall at the Royal Courts of Justice; and where the solicitor issuing the writ is only agent of another solicitor, he shall add to his own name or firm and place of business the name or firm and place of business of the principal solicitor. Where the plaintiff sues in person, he shall indorse upon the writ, and notice in lieu of service of a writ, his place of residence and occupation, which shall, if his place of resi-

(*m*) *In re Bowen, Bennett* v. *Bowen*, supra.

(*n*) As to the meaning of these words, see ante, Vol. 1, p. 252.

dence be within the district, be an address for service, and if such place be not within the district, he shall add an address for service within the district, and where the defendant does not reside within the district, he shall add a further address for service, which shall not be more than three miles from the principal entrance of the Central Hall at the Royal Courts of Justice."

Appearance.

Appearance.]—By *Ord. XII. r.* 4, "If any defendant to a writ issued in a District Registry resides or carries on business (*o*) within the district, he shall appear in the District Registry."

By *r.* 5, "If any defendant neither resides nor carries on business in the district, he may appear either in the District Registry or at the Central Office."

By *r.* 6, "If a sole defendant appears, or all the defendants appear in the District Registry, or if all the defendants who appear appear in the District Registry and the others make default in appearance, then, subject to the power of removal in Order XXXV., Rules 13 to 16 provided, the action shall proceed in the District Registry."

By *r.* 7, "If the defendant appears, or any of the defendants appear, in London the action shall proceed in London; provided that if the Court or a Judge shall be satisfied that the defendant appearing in London is a merely formal defendant, or has no substantial cause to interfere in the conduct of the action, such Court or Judge may order that the action may proceed in the District Registry, notwithstanding such appearance in London."

See as to the mode of entering and giving notice of appearance and the practice thereon, *ante*, *Vol.* 1, p. 251 *et seq.*

Judgment in default of appearance.

Judgment in Default of Appearance or Pleading.]—By *Ord. XXXV. r.* 2, "Where the writ of summons issues out of a District Registry, and the plaintiff is entitled to enter interlocutory judgment under any of the Rules of Order XIII., or where the cause or matter is proceeding in the District Registry and the plaintiff is entitled to enter interlocutory judgment under any of the Rules of Order XXVII., in either case such interlocutory judgment, and when damages shall have been assessed final judgment, shall be entered in the District Registry, unless the Court or a Judge shall otherwise order."

By *Ord. XIII. r.* 11, "Where a defendant fails to appear to a writ of summons issued out of a District Registry, and the defendant had the option of entering an appearance either in the District Registry or in the Central Office, judgment for want of appearance shall not be entered by the plaintiff until after such time as a letter posted in London on the previous evening, in due time for delivery to him on the following morning, ought, in due course of post, to have reached him."

As to entering judgment in default of appearance, *see ante*, *Vol.* 1, p. 259 *et seq.*

Interlocutory and other applications —summons.

Interlocutory and other Applications—Summons.]—By *Ord. XXXV. r.* 7, "Every application to a District Registrar shall be made in the same manner in which applications at Chambers are directed to be made by these Rules."

(*o*) See ante, n. (*n*).

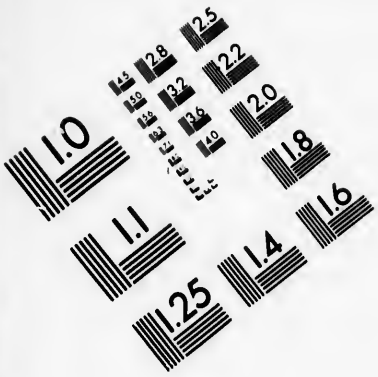
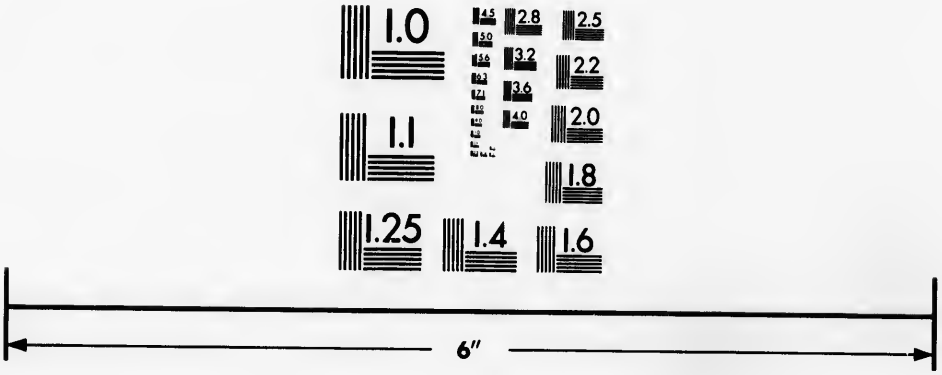
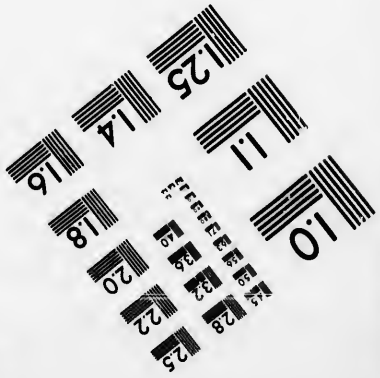


IMAGE EVALUATION TEST TARGET (MT-3)





Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

PART XV.

As to the mode in which applications at Chambers are directed to be made, *see ante*, p. 1404 *et seq.* As to what applications may be made to a Registrar, *see ante*, p. 1424. A summons in a Registry is issued in the same manner as one issued out of the Central Office (*see ante*, p. 1404).

—Reference to Judge.

—*Reference to Judge.*]—By the *R. of S. C., Ord. XXXV. r.* 8, "If any matter appears to the District Registrar proper for the decision of a Judge, the Registrar may refer the same to a Judge, and the Judge may either dispose of the matter or refer the same back to the Registrar with such directions as he may think fit."

A Registrar cannot refer a matter to a Judge under this Rule, unless a summons has first been taken out, calling on the other side to appear before him (*n*).

—Appeal to Judge.

—*Appeal to Judge.*]—By *R. of S. C., Ord. XXXV. r.* 9, "Any person affected by any order, finding, or decision of a District Registrar may appeal to a Judge. Such appeal may be made notwithstanding that the order or decision was in respect of a proceeding or matter as to which the District Registrar had jurisdiction only by consent. Such appeal shall be by way of indorsement on the summons by the Registrar at the request of any party, or by notice in writing to attend before the Judge without a fresh summons within six days after the party complaining has notice of the order, finding, or decision complained of, or such further time as may be allowed by a Judge or the Registrar."

The Registrar has no discretion to refuse to make the indorsement that the party appeals, but must do so if requested by either party (*o*). If a notice of appeal be given, it is sufficient if it is signed by the country solicitor of the party appealing (*p*). The summons indorsed or the notice of appeal must be sent to London and entered at the Central Office in the Judge's list, after which the appeal will come on on the day for which it is in the list in the usual course (*see ante*, p. 1417).

—No stay.

By *r.* 10, "An appeal from a District Registrar shall be *no stay of proceedings* unless so ordered by a Judge or the Registrar."

Removal of actions from district registries.

Removal of Actions from District Registries.]—The action may be removed from the Registry to London (*q*). In some cases this may

(*n*) *Anon.*, W. N. 1875, 250; Bitt. No. cxlix.

(*o*) *Danger* v. *Nelson*, W. N. 1884, 96; Bitt. Ch. Cas. 15.

(*p*) *Mayor, &c. of Rotherham* v. *Peace*, W. N. 1884, 216; Bitt. Ch. Cas. 14.

(*q*) By the Jud. Act, 1873, s. 65, "Any party to an action in which a writ of summons shall have been issued from any such district registry shall be at liberty at any time to apply, in such manner as shall be prescribed by rules of Court, to the said High Court or to a Judge in Chambers of the Division of the said High Court to which the action may be assigned, to remove the proceedings from such district registry into the proper office of the said High Court; and the Court or Judge may, if it be thought fit, grant such application, and in such case the proceedings and such original documents, if any, as may be filed therein, shall upon receipt of such order be transmitted by the district registrar to the proper office of the said High Court, and the said action shall thenceforth proceed in the said High Court in the same manner as if it had been originally commenced by a writ of

be done as of right by giving a notice; in others, an application is necessary.

1. As of right by notice.

1. *Removal as of Right by Notice.*]—By *R. of S. C., Ord. XXXV. r.* 13, "In any action which would, under the foregoing Rules, proceed in the District Registry, the action may, subject to Rule 14, be removed from the District Registry *as of right* in the cases, and within the times following:—

(1) Where the writ is specially indorsed under Order III., Rule 6, and the plaintiff does not within four days after the appearance of such defendant give notice of an application for an order against him under Order XIV.; then such defendant may remove the action as of right at any time after the expiration of such four days, and before delivering a defence, and before the expiration of the time for doing so:

(2) Where the writ is specially indorsed and the plaintiff has made such application as in the last paragraph mentioned, and the defendant has obtained leave to defend in manner provided by Order XIV.; then such defendant may remove the action as of right at any time after the order giving him leave to defend, and before delivering a defence and before the expiration of the time for doing so:

(3) Where the writ is not specially indorsed under Order III., Rule 6, any defendant may remove the action as of right at any time after appearance, and before delivering a defence, and before the expiration of the time for doing so."

Notice—service and delivery of.

By *r.* 14, "Any party or person desirous to remove an action as of right under the last preceding Rule may do so by serving upon the other parties to the action, and delivering to the District Registrar, a *notice*, signed by himself or his solicitor, to the effect that he desires the action to be removed to London, and the action shall be removed accordingly: Provided, that if the Court or a Judge shall be satisfied that the defendant giving such notice is a merely formal defendant, or has no substantial cause to interfere in the conduct of the action, or that there is other good cause for proceeding in the District Registry, such Court or Judge may order that the action may proceed in the District Registry notwithstanding such notice" (*r*).

Certificate that no defence delivered.

By *r.* 15, "Except in Admiralty actions in rem, the notice for removal shall be accompanied by a certificate signed by the defendant or his solicitor that his defence has not been delivered, and that the time for delivering the same has not expired" (*s*).

Order to proceed in registry notwithstanding notice.

It will be observed that *r.* 14 (*supra*) gives power to the Court or a Judge in certain cases to order that the action shall proceed in the Registry, notwithstanding the notice. The defendant's right of removal will only be interfered with on clear grounds (*t*).

(*r*) See form of notice, Chit. F., p. 741.

(*s*) Ib.

(*t*) *Walker* v. *Crabtree*, W. N. 1884, 197; Bitt. Ch. Cas. 93.

PART XV.

2. By summons.

2. *By Summons.*]—By *R. of S. C., Ord. XXXV. r.* 16, "In any case not provided for by Rules 13 and 14, any party to a cause or matter proceeding in a District Registry may apply to the Court or a Judge, or to the District Registrar, for an order to remove the cause or matter from the District Registry to London, and the Court, Judge, or Registrar, may make an order accordingly, if satisfied that there is sufficient reason for doing so, upon such terms, if any, as shall be just."

—Notice of address for service on removal.

—*Notice of Address for Service on Removal.*]—By *Ord. XXXV. r.* 18, "Where, under the preceding Rules of this Order, a cause or matter is removed from a District Registry, the defendant shall, upon such removal, give notice to the plaintiff of an address for service in London; in all respects as if the appearance had been originally entered in London."

Removal from London to district registry.

Removal from London to District Registry.]—By *R. of S. C., Ord. XXXV. r.* 17, "Any party to a cause or matter proceeding in London may apply to the Court or a Judge for an order to remove the cause or matter from London to any District Registry, and the Court or Judge may make an order accordingly, if satisfied that there is sufficient reason for doing so, upon such terms, if any, as shall be just." As to the proceedings when the plaintiff is entitled to set down the action in the Chancery Division on motion for judgment, *see Walker* v. *Robinson*, 33 L. T. 779. See, however, *Birmingham Waste Co.* v. *Lane*, W. N. 1876, 50—V.-C. H.

Payment into Court.

Payment into Court.]—The rules under which money paid into Court is paid into the Law Courts Branch of the Bank of England (*see ante, Vol.* 1, p. 335), do not apply when the action is pending in a District Registry, in which case the money must be paid into the Registry, and a receipt for it obtained from the Registrar. The Registrar must pay over all moneys paid to him as he is directed by the Treasury (*see Ord. XXXV. r.* 23, *ante*, p. 1424).

Entry for trial in registry.

Entry for Trial in Registry.]—*See Ord. XXXVI. r.* 22 (b) (*ante, Vol.* 1, p. 598).

Judgment, entry of, &c.

Judgment.]—As to interlocutory judgment in default of appearance or pleading, *see ante*, p. 1427.

By *Ord XXXV. r.* 3, "Where a cause or matter is proceeding in a District Registry, and the judgment or any other order therein is directed to be entered in the Central Office, the same shall be so entered, and an office copy of every such judgment or order shall be transmitted to the District Registry to be filed with the proceedings in the action."

Execution and taxation of costs.

Execution and Taxation of Costs.]—By *R. of S. C., Ord. XXXV. r.* 4, "Where a cause or matter is proceeding in a District Registry all writs of execution for enforcing any judgment or order therein, and all summonses under the Debtors Act, 1869, shall issue from the District Registry, unless the Court or a Judge shall otherwise direct. Where final judgment is entered in the District Registry,

costs shall be taxed in such Registry unless the Court or a Judge shall otherwise order."

In the Chancery Division costs will not be ordered to be taxed in the Registry, except under special circumstances (*u*).

Fees, allowances, costs, &c.

Fees, Allowances, Costs, &c.]—By *Ord. LXV. r.* 27, *sub-r.* 43, "When a writ of summons for the commencement of an action shall be issued from a District Registry, and when an action proceeds in a District Registry, all fees and allowances, and rules and directions relating to costs, which would be applicable to such proceeding if the writ of summons were issued at the Central Office, and if the action proceeded in London, shall apply to such writ of summons issued from and other proceedings in the District Registry" (*x*).

Filing pleadings and other documents.

Filing Pleadings and other Documents.]—By *Ord. XXXV. r.* 19, "Where a cause or matter is proceeding in a District Registry all pleadings and other documents required to be filed shall be filed in the District Registry."

Transmission of documents to Central Office.

Transmission of Documents to Central Office.]—By *Ord. XXXV. r.* 20, "Whenever a defendant appears in London to a writ issued out of a District Registry or any proceedings are removed from the District Registry to London, by notice under Rule 14 of this Order, or by order of the Court or a Judge, the District Registrar shall transmit to the Central Office all original documents (if any) filed in the District Registry, and a copy of all entries of the proceedings in the books of the District Registry."

Removal of documents from registry.

Removal of Documents from Registry.]—By *Ord. XXXV. r.* 22, "No affidavit or record of the Court shall be taken out of a District Registry (except upon removal of the proceedings to London) without the order of a Judge or of the District Registrar, and no subpœna for the production of any such document shall be issued."

If documents in the Registry are wanted for the purpose of evidence, office copies should be taken (*see Ord. XXXVII. r.* 4, *ante*, p. 452).

(*u*) *In re Wilson, Wilson* v. *Alltree*, 32 W. R. 897: *Day* v. *Whitaker*, 6 Ch. D. 734.

(*x*) Cp. sect. 63 of the Jud. Act, 1873, repealed by sect. 33 of the Jud. Act, 1875.

CHAPTER CXXV.

TIME, EXTENSION AND COMPUTATION OF, ETC.—MONTH'S NOTICE TO PROCEED.

PART XV.

Extension by consent.

Extension of Time by Consent.]—By *R. of S. C., Ord. LXIV. r. 8*, "The time for delivering, amending or filing any pleading, answer or other document, may be enlarged by consent in writing, without application to the Court or a Judge."

Order for extension.

Order for Extension of Time.]—By *R. of S. C., Ord. LXIV. r. 7*, "The Court or a Judge shall have power to enlarge or abridge the time appointed by these Rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed."

Under this Rule the Court or a Judge has a discretionary power to enlarge the time for doing any act limited by the Rules or by any order, and may do so, either before or after the time so limited has expired (*a*).

But where an order has been made dismissing an action unless some act be done within a time limited by the order, and default has been made in doing such act, the Court has no power to extend the time for doing the act, for through default in complying with the former order, the action stands dismissed (*b*). But though this is so, the Court will in a proper case enlarge the time for appealing from the original order dismissing the action, upon

---

(*a*) See, for example, *Gibbons* v. *London Financial Association*, 4 C. P. D. 263: *Burke* v. *Rooney*, Id. 226: *Carter* v. *Stubbs*, 5 Q. B. D. 116; 50 L. J., Q. B. 161, extension of time to appeal from Master to Judge at Chambers. *Eaton* v. *Storer*, 22 Ch. D. 91; 48 L. T. 204; 31 W. R. 488: and *Graves* v. *Terry*, 9 Q. B. D. 170, of time to reply. *Hastings* v. *Hurley*, 16 Ch. D. 734: and *Sproat* v. *Peckett*, 48 L. T. 755, of time for endorsement on writ of date of service. *Welply* v. *Buhl*, 3 Q. B. D. 80, 253, of time for giving security for costs. Leave will be given to renew a writ after the expiration of twelve months, where no question arises as to the Statutes of Limitations: *Eyre* v. *Cox*, 46 L. J., Ch. 316. Where the time for appealing would expire in vacation, the time will be extended almost as a matter of course: *Wallingford* v. *Mutual Society*, 5 App. Ca. 685. See also *Canadian Oil Works Corporation* v. *Hay*, 38 L. T. 519: *Metcalfe* v. *British Tea Association*, 46 L. T. 31.

(*b*) *Whistler* v. *Hancock*, 3 Q. B. D. 83; 47 L. J., Q. B. 152: *King* v. *Davenport*, 4 Q. B. D. 402. And see *Welply* v. *Buhl*, 3 Q. B. D. 80. But until the order has been drawn up, it does not take effect, and therefore, before it is drawn up, the time limited by it may be extended: *Metcalfe* v. *British Tea Association*, 46 L. T. 31.

application made to them for that purpose (*e*). The rule gives no power to reverse the order in which the rules require any acts to be done—thus, leave to join another cause of action with ejectment cannot be granted under this rule *after* a writ has been issued joining them without leave (*d*).

It would seem that where a power given by the rules to the Court or a Judge is directed to be exercised on some particular occasion, or at some specified time, there is no power under this rule to enlarge the time for its exercise (*e*). It seems, also, that there is no power to enlarge the time limited by the *County Courts Act*, 1875, *s.* 6, for moving by way of appeal against the decision of a County Court (*f*). Where, by the omission to renew a writ the Statute of Limitations has operated to bar the cause of action, the time for renewal cannot be extended (*g*). But *Malins*, V.-C., extended the time for the delivery of a statement of claim, which, by a slip, had not been delivered in time, in a case where the Statute of Limitations had been prevented from operating only by the renewal of the writ (*h*).

The principles on which extension of time should be granted were discussed in *Collins* v. *Vestry of Paddington* (*i*). The rule laid down by *Bramwell*, L. J., in that case is that applications for extension of time ought to be granted at any stage of the action whenever an unintentional mistake has been made, and the damage to the opposite party may be repaired by payment of costs. *Baggallay* and *Thesiger*, L.JJ., thought that although such applications should be granted freely before judgment, yet after judgment more care must be exercised (*k*).

The power to grant extension of time is discretionary, and its exercise will not generally be interfered with on appeal (*l*).

Moreover the various cases must not be considered as laying down positive rules as to all the kinds of cases in which, and in which only, this discretion of the Court will be exercised (*m*).

By *Ord. LII. r.* 14 (*ante*, p. 1395), no order simply enlarging time need be drawn up. Order need not be drawn up.

By *Ord. LXV. r.* 27, *sub-r.* 24, "The costs of applications to extend the time for taking any proceedings shall be in the discretion of the taxing officer unless the Court or Judge shall have specially directed how the costs are to be paid or borne. The taxing officer shall not allow the costs of more than one extension of time, unless he is satisfied that such extension was necessary, and could Costs of application.

(*e*) *Burke* v. *Rooney*, 4 C. P. D. 226: *Carter* v. *Stubbs*, 6 Q. B. D. 116; 50 L. J., Q. B. 161 (C. A.), citing and distinguishing *Whistler* v. *Hancock* and *King* v. *Davenport*, supra.

(*d*) *Pilcher* v. *Hinds*, 11 Ch. D. 905 (C. A.).

(*e*) *Baker* v. *Oakes*, 2 Q. B. D. 171 (C. A.).

(*f*) *Tennant* v. *Rawlings*, 4 C. P. D. 133, following *Brown* v. *Shaw*, 1 Ex. D. 425 (C. A.). But see *Mason* v. *Wirral Highway Board*, 4 Q. B. D. 459.

(*g*) *Doyle* v. *Kaufman*, 3 Q. B. D. 7; affirmed, Id. 340.

(*h*) *Canadian Oil Works Corporation* v. *Hay*, 38 L. T. 549.

(*i*) 5 Q. B. D. 368; 36 L. T. 573.

(*k*) Cp. *Atwood* v. *Chichester*, 3 Q. B. D. 722, 723: *Davis* v. *Ballenden*, 46 L. T. 797: *May* v. *Head*, W. N. 1880, 26: *Wallingford* v. *Mutual Society*, 5 App. Cas. 685: *Eaton* v. *Storer*, 22 Ch. D. 91; 48 L. T. 205.

(*l*) *Gilder* v. *Morrison*, 31 W. R 815.

(*m*) Per Lord *Selborne*, C., in *Carter* v. *Stubbs*, 6 Q. B. D. at p 119.

PART XV.

not, with due diligence, have been avoided. The costs of a summons to extend time shall not be allowed in cases to which Rule 8 of Order LXIV. (*l*) applies, unless the party taking out such summons has previously applied to the opposite party to consent, and he has not given a consent, to a sufficient extension of time, or the taxing officer shall consider there was a good reason for not making such application; and in case the taxing officer shall not allow the costs of such summons, and shall consider that the party applying ought to pay the costs of any other party occasioned thereby, he may direct such payment, or deal with such costs, in the manner provided by Regulation 21" (*m*).

Computation of time.

Days excluded when less than six days.

Computation of Time.]—By *Ord. LXIV. r.* 2, "Where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceeding, Sunday, Christmas Day, and Good Friday shall not be reckoned in the computation of such limited time."

Sunday or day when offices closed.

By *r.* 3, "Where the time for doing any act or taking any proceeding expires on a Sunday, or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall, so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open" (*n*).

This rule does not apply so as to extend the time given by the Statute of Limitations (*o*).

Long vacation.

By *r.* 4, "No pleadings shall be amended or delivered in the Long Vacation, unless directed by a Court or a Judge."

By *r.* 5, "The time of the Long Vacation shall not be reckoned in the computation of the times appointed or allowed by these Rules for filing, amending, or delivering any pleading, unless otherwise directed by the Court or a Judge."

Day on which order for security for costs served.

By *r.* 6, "The day on which an order for security for costs is served, and the time thenceforward until and including the day on which such security is given, shall not be reckoned in the computation of time allowed to plead, answer interrogatories, or take any other proceeding in the cause or matter." (*See ante, Vol.* 1, p. 403.)

When days are to be reckoned inclusive or exclusive.

By *Ord. LXIV. r.* 12, "In any case in which any particular number of days, not expressed to be clear days, is prescribed by these Rules, the same shall be reckoned exclusively of the first day and inclusively of the last day."

(*l*) See ante, p. 1432.

(*m*) See ante, Vol. 1, p. 706.

(*n*) See Ord. LXIV. rr. 2 & 3, supra. See *Ryland* v. *Wormald*, 2 M. & W. 393; 5 Dowl. 581: *Ex p. Simpkin*, 29 L. J., M. C. 23. As to Sunday being included, though the last day, in cases not within this rule, see *R.* v. *Justices of Middlesex*, 7 Jur. 396, B. C.; and as to its being excluded, though an intermediate day, see *R.* v. *Justices of Middlesex*, 17 L. J., M. C. 111. Sunday is not to be excluded in computing the three days within which application must be made to justices to state a case under 20 & 21 V. c. 43, s. 2: *Peacock* v. *The Queen*, 4 C. B., N. S. 264; 27 L. J., C. P. 224. See *Morris* v. *Barrett*, 7 C. B., N. S. 139; 29 L. J., C. P. 102, where by a Judge's order a debt was to be paid by instalments on the 25th day of certain months, one of which days was a Sunday. See *Lewis* v. *Cator*, 1 F. & F. 906, a case under the Bills of Exchange Act. See *Pennell* v. *Uxbridge (Churchwardens)*, 31 L. J., M. C. 92.

(*o*) See *Morris* v. *Richards*, 45 L. T. 210.

It seems that where a party had a certain number of days to do an act by the practice of the Courts, and the last day for doing such act fell on a holiday (*o*), then such day was not excluded from computation; but that, if the party could not do the act unless the offices were open, and the last day for doing it fell on a day upon which the offices were closed, by reason of its being a holiday there, then such day was not reckoned (*p*).

Meaning of "clear" days; "from;" "after;"

Where a certain number of *clear* days are given to do an act by the rules or the practice of the Court, the time is to be reckoned exclusively both of the first and last days (*q*). When time *from* or *after* or *within* a certain time of a particular period is allowed to a party to do any act, the first was to be reckoned exclusively (*r*). So, where time is to be computed from, or after, or within a certain time of an act done, the day upon which the act is done is in general to be reckoned exclusively, and this whether the party affected is privy to the act or not (*s*). So, it seems, that where an act is required by statute to be done so many days "at least" before a given event, the time must be reckoned excluding both the day of the act and that of the event (*t*); and it would seem that this is the case though the words "at least" be not inserted (*t*). So, where a statute enacts, that not less than fifteen days shall intervene between the teste and return of a writ, both the day of the teste and that of the return are to be reckoned exclusively (*u*). And where there is given to a party a certain space of time to do some act, which space of time is included between two other acts, both the days of doing these acts ought to be excluded, in order to insure to him the whole of that space of time (*x*). It seems that, as a general rule, where a party has "until" a particular day to do an act, such day is to be included (*y*). So, if a party is not to do an act until after the expiration of a certain time from an act done, both the day upon which the act was done and the day upon which the time expires are to be reckoned exclusively (*z*). "Forthwith" must be

"at least;"

"until;"

"forthwith;"

(*o*) See *Morris* v. *Richards*, 45 L. T. 210.

(*p*) *Mumford* v. *Hitchcocks*, 32 L. J., C. P. 168; 14 C. B., N. S. 361: *Wilkinson* v. *Britton*, 1 Sc. N. R. 348; 1 M. & Gr. 557; 8 Dowl. 825. See *Mesure* v. *Britten*, 2 H. Bl. 616: *Wheeler* v. *Green*, 7 Dowl. 194: *Hughes* v. *Griffith*, 13 C. B., N. S. 324; 32 L. J., C. P. 47; *Flower* v. *Bright*, 2 Johns. & H. 590.

(*q*) *Liffin* v. *Pitcher*, 1 Dowl., N. S. 767. If one day's time be given to plead, or the like, it seems doubtful when the time expires for doing so. Id. And per *Coleridge*, J., Id.:—"I am in the habit of giving twenty-four hours to plead when I give one day." As to the meaning of "day," see *Tutton* v. *Darke*, 5 H. & N. 647; 29 L. J., Ex. 271.

(*r*) *Young* v. *Higgon*, 6 M. & W. 49; 8 Dowl. 212, overruling *Castle* v. *Burditt*, 3 T. R. 623, and other cases.

(*s*) *Young* v. *Higgon*, supra: *Williams* v. *Burgess*, 12 A. & E. 635; 4 P. & D. 348; 9 Dowl. 544: *Gibson* v. *Muskett*, 3 Sc. N. R. 429: *Mercantile Marine Ins. Co.* v. *Titherington*, 34 L. J., Q. B. 11.

(*t*) *R.* v. *Justices of Shropshire*, 8 A. & E. 173; 3 N. & P. 286: *Mitchell* v. *Foster*, 9 Dowl. 527; 4 P. & D. 150: *R.* v. *Aberdare Canal Co.*, 14 Q. B. 854; 19 L. J., Q. B. 251: *R.* v. *Justices of Middlesex*, 9 Jur. 758.

(*u*) *Young* v. *Higgon*, supra: *Robinson* v. *Waddington*, 13 Q. B. 753; 18 L. J., Q. B. 250. See *Russell* v. *Ledsam*, 14 M. & W. 574.

(*x*) *Chambers* v. *Smith*, 12 M. & W. 2.

(*y*) *Kerr* v. *Jeston*, 1 Dowl., N. S. 538; *Dakins* v. *Wagner*, 3 Dowl. 535.

(*z*) *Blunt* v. *Heslop*, 8 A. & E. 577; 3 N. & P. 553; 9 Dowl. 982. And see *Re Higham*, 9 Dowl. 203: *Backhouse* v. *Mellor*, 28 L. J., Ex. 141.

PART XV.

construed with reference to the circumstances in which it is used (*a*). It generally means that the act is to be done within a reasonable time (*a*). But "immediately," it seems, must receive a stricter construction than "forthwith" (*b*).

"immediately."

Fraction of day.

The Court will take notice of the fraction of a day, if it be necessary for the purposes of justice (*c*). But where the title of the Crown and of the subject accrue on the same day, the title of the Crown should be preferred (*d*). Judgment having been signed and execution issued on the day on which defendant died: held, that the judgment and execution were regular (*e*), et per *Pollock*, C. B., "The case of *Edwards* v. *The Queen* was decided in this Court on the ground of prerogative, but in the Court of Error upon a far broader ground, upon the principle that, even between subject and subject, a judicial act is to be considered as having taken place at the earliest possible period of the day, and therefore to prevail over any other act which might occur on the same day. In that case it was admitted that the Court could inquire at what time a party does a particular act in a suit, as declaring or pleading, and for that purpose take notice of the hours at which the Courts sit, or the offices open, or the precise time of the day at which any step has been taken. But the Court laid it down that it was otherwise with judicial acts."

"Month."

By *Ord. LXIV. r.* 1, "Where by these Rules, or by any judgment or order given or made after the commencement of the Principal Act, time for doing any act or taking any proceeding is limited by months, and where the word 'month' occurs in any document which is part of any legal procedure under these Rules, such time shall be computed by calendar months, unless otherwise expressed."

Formerly in legal proceedings a month generally meant a lunar month, unless otherwise expressed (*f*).

Hour of day for service of proceedings.

Hour of Day for Service of Proceedings.]—By *Ord. LXIV. r.* 11, "Service of pleadings, notices, summonses, orders, rules, and other proceedings, shall be effected before the hour of six in the afternoon, except on Saturdays, when it shall be effected before the hour of two in the afternoon. Service effected after six in the afternoon on any weekday except Saturday shall, for the purpose of computing any period of time subsequent to such service, be

(*a*) *Ex p. Lamb, In re Southam* (C. A.), 19 Ch. D. 169; 45 L. T. 639: *Ex p. Lyon*, 45 L. T. 768. See *R.* v. *Justices of Worcester*, 7 Dowl. 789: *Costar* v. *Hetherington*, 1 El. & El. 802; 28 L. J., M. C. 189: *Roberts* v. *Brett*, 34 L. J., C. P. 241.

(*b*) *R.* v. *Justices of Huntingdonshire*, 5 D. & R. 588: *R.* v. *Justices of Worcester*, supra: *R.* v. *Justices of Berkshire*, 4 Q. B. D. 649.

(*c*) *Clarke* v. *Bradlaugh*, C. A., 8 Q. B. D. 63: *Sadler* v. *Leigh*, 4 Camp. 197: *Thomas* v. *Desanges*, 2 B. & A. 586: *Ex p. Farquhar*, 1 Mont. & Mac. 7: *Godson* v. *Sanctuary*, 1 N. & M. 52: *Woodland* v. *Fuller*, 11 A. & E. 859: *Chick* v. *Smith*, 8 Dowl. 337: *Pewtress* v. *Annan*, 9 Dowl. 828: *R.* v. *Justices of Middlesex*, 9 Jur. 758.

(*d*) *Edwards* v. *The Queen*, 9 Exch. 628; 23 L. J., Ex. 165.

(*e*) *Wright* v. *Mills*, 28 L. J., Ex. 223.

(*f*) See *Soper* v. *Curtis*, 2 Dowl. 237: *Tullett* v. *Linfield*, 3 Burr. 1455; 1 W. Bl. R. 450: *Simpson* v. *Margitson*, 11 Q. B. 23: *Hart* v. *Middleton*, 2 C. & K. 9. The word "month" in Acts of Parliament passed since 13 & 14 V. means calendar month, unless words be added showing lunar months to be intended (13 & 14 V. c. 21, s. 4).

deemed to have been effected on the following day. Service effected after two in the afternoon on Saturday shall for the like purpose be deemed to have been effected on the following Monday."

Month's notice of proceeding.

Month's Notice of Proceeding.]—By *Ord. LXIV. r.* 13, "In any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party (*g*) who desires to proceed shall give a month's notice to the other party of his intention to proceed. A summons on which no order has been made shall not, but notice of trial although countermanded shall be deemed a proceeding within this Rule."

This rule is in practically the same words as the *R. H. T.* 1853, *r.* 176, which, it was held, only required a notice to be given before taking a proceeding towards judgment, and which did not therefore apply to a motion to set aside proceedings (*h*); nor to proceedings after verdict (*i*), or after final judgment: but it applied to proceedings after interlocutory judgment, as notices of inquiry, &c. (*k*). Nor did the rule apply to a case of signing judgment on a cognovit whether given before or after appearance (*l*). Under the present rule it has been held that the notice is necessary before signing judgment when the defendant had made default in appearance and no proceedings had been taken for more than a year after service of the writ (*m*), and before signing judgment on an order more than a year old (*n*). It seems that the notice is not necessary if the proceedings in the cause were suspended by order in the nature of an injunction (*o*), or delayed by consent, or at defendant's request (*p*). But it may be otherwise in the case of an order for security for costs, or for particulars, or the like.

A notice that plaintiff will proceed in the cause, though not acted under (*q*), or a notice of trial though countermanded (*r*), or a Judge's summons if an order be obtained on it (*s*), is deemed a proceeding in the cause, so as to render the month's notice unnecessary. But obtaining an order for changing the solicitor in the cause was not such a proceeding (*t*). Nor is a solicitor writing to the solicitor

(*g*) See *Metcalf* v. *Hetherington*, 3 H. & N. 755; 28 L. J., Ex. 155.

(*h*) *Lumley* v. *Hempson*, 6 Dowl. 558: *Lumley* v. *Thompson*, *S. C.* 3 M. & W. 632. See *Lord* v. *Hilliard*, 9 B. & C. 621.

(*i*) *Newton* v. *Boodle*, 3 C. B. 795; 4 D. & L. 664: *May* v. *Wooding*, 3 M. & Sel. 500. See *Tipton* v. *Meeke*, 8 Moore, 579: *Lord* v. *Wardle*, 3 C. B. 295.

(*k*) See *Peyton* v. *Burdus*, 2 Str. 1100.

(*l*) *Thompson* v. *Langridge*, 1 Ex. 351; 5 D. & L. 213.

(*m*) *Webster* v. *Myer* (C. A.), 51 L. T. 560.

(*n*) *The Staffordshire Joint Stock Bank* v. *Wearer*, W. N. 1884, 78; Bitt. Ch. Cas. 243.

(*o*) See *Hayley* v. *Riley*, 1 Doug. 71, 72, and n.; *Bosworth* v. *Phillips*, 2 W. Bl. 784: *Stockton and Darlington R. Co.* v. *Fox*, 6 Ex. 127; 20 L. J., Ex. 96.

(*p*) *Bland* v. *Darley*, 3 T. R. 530: *Watkins* v. *Haydon*, 2 W. Bl. 762: *Hayley* v. *Riley*, 1 Doug. 71: *Evans* v. *Davies*, 3 Dowl. 786: *Bosworth* v. *Phillips*, supra. See *Doe* d. *Vernon* v. *Roe*, 7 A. & E. 14.

(*q*) *Richards* v. *Harris*, 3 East, 11: *Green* v. *Gauntlett*, 1 Str. 531.

(*r*) See the rule supra: *Richards* v. *Harris*, 3 East, 2, n.: *Hatchell* v. *Griffiths*, 3 Salk. 645.

(*s*) See the rule supra; 1 Sellon, 408: *Deacon* v. *Fuller*, 1 Dowl. 675; 1 C. & M. 349.

(*t*) *Deacon* v. *Fuller*, supra. See as to the notice now substituted for the Order, ante, Vol. 1, p 109.

PART XV.

of the opposite party, asking what course his client means to take, and threatening immediate proceedings (*u*).

The notice should state the proceeding intended to be taken: at least this is usual in practice (*x*).

It should be given by the solicitor on the record (*y*).

(*u*) *Doe* d. *Vernon* v. *Roe*, 7 A. & E. 14.

(*x*) See *Burlington* v. *Richardson*, 22 L. J., Q. B. 385. As to the former practice, where a term's notice of trial or inquiry was required, see R. H., 2 W. 4: *Smith* v. *Paull*, 3 Smith, 101: *Tilley* v. *Collins*, 4 C. B. 758. See the form, Chit. F. p. 733.

(*y*) *Lord* v. *Wardle*, 3 C. B. 295.

CHAPTER CXXVI.

SERVICE OF PROCEEDINGS — NOTICES — OFFICE COPIES — PRINTING PROCEEDINGS — FILING, ETC. OF DOCUMENTS IN CENTRAL OFFICE, ETC.

Service of proceedings.

Service of Proceedings.]—In some few cases—as, for instance, attachment—which are noticed in the course of this work when treating of the particular proceedings, personal service is necessary, but in all other cases service of proceedings at the address for service given in the writ on appearance is sufficient.

Service at address for service.

By *Ord. LXVII. r.* 2, "All writs, notices, pleadings, orders, summonses, warrants, and other documents, proceedings, and written communications in respect of which personal service is not requisite shall be sufficiently served if left within the prescribed hours, at the address for service of the person to be served as defined by Orders IV. and XII., with any person resident at or belonging to such place."

As to the plaintiff's address for service, *see Ord. IV.* (*ante, Vol.* 1, p. 226). As to the defendant's address for service, *see Ord. XII.* (*ante, Vol.* 1, p. 255).

Where party sues or defends by solicitor.

Where plaintiff sues by a solicitor, and where defendant has appeared by solicitor, all writs, notices, pleadings, orders, summonses, warrants, and other documents, and other proceedings and written communications must be delivered to that solicitor (or his agent, if it be a country cause), and not to the party himself, so long as the solicitor's authority continues (*a*). Where a party sues or defends in person the service must be made on him at the address for service. Service on the under-sheriff or deputy sheriff is sufficient in the case of an order against the sheriff (*b*).

We have already (*ante, Vol.* 1, pp. 226 and 255) referred to the rules requiring a solicitor to state his address for service on the writ of summons by which the action is commenced, or on the appearance for defendant, where he may be served with proceedings. All notices, rules, summonses, orders, pleadings, and proceedings

(*a*) *Tashburn* v. *Havelock*, Barnes, 306. And see *Howard* v. *Ramsbottom*, 3 Taunt. 530: *Ward* v. *Nethercote*, 7 Taunt. 145: *Margetson* v. *Rush*, 8 Dowl. 388: *Barraclough* v. *Greenough*, L. R., 2 Q. B. 612. Where the solicitor is dead, see *Collins* v. *Arnold*, 1 B. C. R. 217. As to service when the action is pending in a district registry, see ante, p. 1426.

(*b*) See Vol. 1, p. 32.

PART XV.

relative to business done in town (*e*), such as notice of trial, must be served on the agent in town. Under the former practice countermand of notice of trial or inquiry might be given either in town or country, unless otherwise ordered by the Court or a Judge (*f*).

Where party sues or defends in person.

We have also already (*ante*, *Vol.* 1, pp. 227 and 255) referred to the rules requiring a plaintiff or defendant suing or defending in person to state on the writ of summons or appearance an address for service where proceedings may be left for him.

Where party having sued or appeared in person appoints solicitor.

By *Ord. LXVII. r.* 7, "Where a party, after having sued or appeared in person, has given notice in writing to the opposite party or his solicitor, through a solicitor, that such solicitor is authorized to act in the cause or matter in his behalf, all writs, notices, pleadings, summonses, orders, warrants, and other documents, proceedings, and written communications which ought to be delivered to or served upon the party on whose behalf the notice is given shall thereafter be delivered to or served upon such solicitor."

Person not a party appearing by solicitor.

By *Ord. LXVII. r.* 8, "Where a person who is not a party appears in any proceeding either before the Court or in Chambers, service upon the solicitor in London by whom such person appears, whether such solicitor act as principal or agent, shall be deemed good service except in matters requiring personal service."

On prisoner.

In the case of a prisoner, service on the turnkey of the prison in which he is detained will suffice (*g*).

On particular persons.

As to service on particular persons, see the different titles throughout this Work.

On one of several parties.

Where an action is brought against several as makers of a joint promissory note, they, by suffering judgment by default, acknowledge a joint cause of action and that, *quoad hoc*, they are partners; service, therefore, on one is service on all (*h*).

At what time service to be made.

By *R. of S. C., Ord. LXIV. r.* 11, "Service of pleadings, notices, summonses, orders, rules and other proceedings, shall be effected before the hour of six in the afternoon, except on Saturdays, when it shall be effected before the hour of two in the afternoon. Service effected after six in the afternoon on any weekday except Saturday shall, for the purpose of computing any period of time subsequent to such service, be deemed to have been effected on the following day. Service effected after two in the afternoon on Saturday shall for the like purpose be deemed to have been effected on the following Monday."

As to the manner in which pleadings and other documents are to be delivered, *see Ord. XIX. r.* 10, *ante*, *Vol.* 1, p. 280.

Mode of service on solicitor.

Where the service is on the solicitor, a copy of the proceeding

(*e*) *Griffiths* v. *Williams*, 1 T. R. 711. See *Thompson* v. *Billing*, 11 M. & W. 316; 2 Dowl. 824: *Elwood* v. *Elwood*, Barnes, 311: *Evans* v. *Flack*, Ca. Pr., C. P. 109.

(*f*) R. 34, H. T. 1853: *Hayes* v. *Perkins*, 3 East, 568: *Cheslyn* v. *Pearce*, 1 M. & W. 56: *Haselfoot* v. *Duke*, Barnes, 251.

(*g*) *Moore* v. *Newbold*, 11 Leg. Obs. 307; ante, Ch. CV.

(*h*) *Figgins* v. *Ward*, 2 Dowl. 364; 2 C. & M. 424: *Amlot* v. *Evans*, 7 M. & W. 462; 9 Dowl. 219, nom. *Arnold* v. *Evans*. And see *Grant* v. *Stoneham*, 7 Dowl. 126: *Carter* v. *Smithall*, 3 M. & W. 128. See *Panter* v. *Seaman*, 5 N. & M. 679, as to serving each of several executors.

should be left at his office, with some person resident at or belonging to the same (*i*). It seems that service at the chambers of a solicitor on his laundress, acting as his servant, will suffice (*k*).

Putting a copy of a rule under the door of the solicitor's chambers, or place of business (*l*), or into a letter-box (*m*), unless there was a notice requesting papers, &c., to be so left (*n*), or unless it is ascertained that it had been received, and the server could swear to the belief of such receipt (*o*), would not suffice.

Former mode of service where party sued or defended in person.

Before the rules as to the address for service were made, where a party sued or defended in person, a copy of a rule might be left at his residence with his wife or a domestic servant, or some person who, from the habit of receiving messages for him or otherwise, might be presumed to have authority from him to receive it (*p*). Thus, service upon the party's mother (*q*), or sister (*r*), at his residence while she was residing there (*s*), was sufficient. So was a service on a female who was sworn to be a member of the party's family, though the degree of relationship was not known (*t*). But service on a person whom deponent believed to be a friend of the party staying at his house and authorized to receive messages for him," was not sufficient (*u*). Nor was service on the landlord (*x*) or a housekeeper (*y*), at a place where several persons were residing, without showing that he or she had authority to receive papers for the party (*y*).

At place of reference.

Where, before the above rule, there was a board on the door of the party's residence, desiring all messages and parcels to be left at a particular place off the premises, service of a rule there would not perhaps of itself be sufficient (*z*); but if it were left there, and the person with whom it was left afterwards said that he gave it to the party, that, it seems, would be sufficient (*a*).

At chambers.

Service by putting the copy of a rule under the door of defendant's (a solicitor's) chambers was, before the above rule, not

---

(*i*) See Ord. LXVII. r. 2, ante, p. 1439.

(*k*) *Kent* v. *Jones*, 3 Dowl. 210: *Williams* v. *Passmore*, Id. 211, n.: *Smith* v. *Spurr*, 2 Dowl. 231: *Brown* v. *Wildbore*, 1 Se. N. R. 159; 8 Dowl. 592: *Kealey* v. *Cartwright*, 11 Jur. 378: *Robinson* v. *Gompertz*, 4 A. & E. 82.

(*l*) *Strutton* v. *Hawkes*, 3 Dowl. 25.

(*m*) *Braham* v. *Sawyer*, 1 D. & L. 466; 13 L. J., Ex. 40; *Jèminez* v. *Owen*, W. N. 1883, 232; Bitt. Ch. Cas. 201.

(*n*) *Warren* v. *Thompson*, 2 Dowl., N. S. 224. See *Stout* v. *Smith*, 1 Dowl. 506: *Engleheart* v. *Morgan*, Id. 422.

(*o*) See *Clarke* v. *Roberts*, 1 Dowl., N. S. 778: *Rayner* v. *Hodges*, Id. 863: *Witham* v. *Tuck*, 9 Dowl. 335: *Robinson* v. *Gompertz*, 3 A. & E. 82: *Josephs* v. *Steegman*, 7 Jur. 725: *Burdett* v. *Lewis*, 7 C. B., N. S. 791.

(*p*) See *Roland* v. *Vizetelly*, 7 Sc. N. R. 429; 1 D. & L. 767: *Taylor* v. *Whitworth*, 9 M. & W. 478; 1 Dowl., N. S. 600; 11 L. J., Ex. 137: *Smith* v. *Stubbs*, 6 Jur. 300: *Alanson* v. *Walker*, 3 Dowl. 258: *Thomas* v. *Lord Ranelagh*, 5 Id. 258: *Edwards* v. *Napier*, 9 Id. 177.

(*q*) *Warren* v. *Smith*, 2 Dowl. 216. And see *Payett* v. *Hill*, Id. 688.

(*r*) *Archer* v. *Evans*, 1 Dowl., N. S. 861.

(*s*) See *Holland* v. *Wright*, 9 Jur. 405, Ex.: *Alanson* v. *Walker*, 3 Dowl. 258.

(*t*) *Weedon* v. *Lipman*, 9 Dowl. 111.

(*u*) *Brandon* v. *Edwards*, 2 Dowl., N. S. 255. And see *Taylor* v. *Whitworth*, 9 M. & W. 478; 1 Dowl., N. S. 600; 11 L. J., Ex. 137: *Monroe* v. *Reader*, 1 Dowl., N. S. 564.

(*x*) *Gardner* v. *Green*, 3 Dowl. 343: *Salisbury* v. *Sweetheart*, 5 Dowl. 243. See *Lawes* v. *Scales*, 2 Dowl., N. S. 342.

(*y*) *Lewis* v. *Blurton*, 7 C. B. 102.

(*z*) *Stout* v. *Smith*, 1 Dowl. 506.

(*a*) *Engleheart* v. *Morgan*, 1 Dowl. 422.

PART XV.

College, &c.

Letter-box.

Warehouse, &c.

Proceeding should be left open.

Sending by post.

Personal service.

Showing office copy instead of original.

Substituted service.

Service out of jurisdiction.

sufficient, although the laundress afterwards stated that defendant would probably have the copy in the course of the day (*b*). Service by leaving the copy of a rule in the party's room in a college, or in apartments in which he resided, no person being there to receive it (c); or by leaving it at the party's office in which there was a letter-box, over which was written "letters," would not suffice (*d*); but it was otherwise, if there was a notice on the door directing papers, &c., to be put into the box, &c. (*e*). Service on a workman on the party's premises before the above rule was held insufficient (*f*).

The copy of the proceeding served should be delivered open, and not enclosed in a sealed letter, otherwise it would have to be established, in order to render it good service, that it was opened by the solicitor or his clerk, or the party, or some one authorized by him, and this within the time within which the service ought to have been made (*g*).

Service by means of the post will not, in general, suffice; but where a copy of a rule was sent in a letter by post to defendant with the rule itself, and the latter was returned indorsed "received a copy of the within rule," and signed by defendant, the service was held to be sufficient (*h*).

By *Ord. LXVII. r.* 5, "Where personal service of any writ, notice, pleading, order, summons, warrant, or other document, proceeding, or written communication is required by these Rules or otherwise, the service shall be effected as nearly as may be in the manner prescribed for the personal service of a writ of summons."

The cases in which personal service is necessary are noticed in the course of this work. As to the personal service of a writ of summons, *see ante, Vol.* 1, p. 232 *et seq.*

By *Ord. LXVII. r.* 1, "Except in the case of an order for attachment, it shall not be necessary to the regular service of an order that the original order be shown if an office copy of it be exhibited."

By *Ord. LXVII. r.* 6, "Where personal service of any writ, notice, pleading, summons, order, warrant, or other document, proceeding, or written communication is required by these Rules or otherwise, and it is made to appear to the Court or a Judge, that prompt personal service cannot be effected, the Court or Judge may make such order for substituted or other service, or for the substitution of notice for service by letter, public advertisement, or otherwise, as may be just" (*i*).

See as to substituted service, *ante, Vol.* 1, p. 236 *et seq.*

Leave may, in some cases, be given to serve proceedings out of

---

(*b*) *Stratton* v. *Hawkes*, 3 Dowl. 25.

(*c*) *Chaffers* v. *Glover*, 5 Dowl. 81.

(*d*) *Braham* v. *Sawyer*, 1 D. & L. 466; 13 L. J., Ex. 40.

(*e*) *Warren* v. *Thompson*, 2 Dowl., N. S. 224.

(*f*) *Hitchcock* v. *Smith*, 5 Dowl. 248. See *Ibotson* v. *Phelps*, 6 M. & W. 626; 8 Dowl. 770.

(*g*) See *Arrowsmith* v. *Ingle*, 8 Taunt. 234.

(*h*) *Smith* v. *Campbell*, 6 Dowl. 728. As to service by post in the case of companies, see ante, p. 1055.

(*i*) See *Hunt* v. *Austin*, 9 Q. B. D. 598; 51 L. J., Q. B. 544; 47 L. T. 300.

the jurisdiction. Such leave has been given in the case of an interpleader summons (*k*), or a third party notice (*l*).

As to service out of the jurisdiction of a writ of summons, *see ante, Vol.* 1, p. 244.

Service when no appearance entered.

By *Ord. LXVII. r.* 4, "Where no appearance has been entered for a party, or where a party or his solicitor, as the case may be, has omitted to give an address for service as required by Orders IV. and XII., all writs, notices, pleadings, orders, summonses, warrants, and other documents, proceedings, and written communications in respect of which personal service is not requisite may be served by filing them with the proper officer."

Waiver of irregularity in service.

Irregularities in the service may be waived, as by the party appearing or otherwise acting as if a regular service had been effected (*m*).

Affidavit of service.

By *Ord. LXVII. r.* 9, "Affidavits of service shall state when, where and how and by whom, such service was effected" (*n*).

Notices from office of Supreme Court.

By *Ord. LXVII. r.* 3, "Notices sent from any office of the Supreme Court may be sent by post; and the time at which the notice so posted would be delivered in the ordinary course of post shall be considered as the time of service thereof, and the posting thereof shall be a sufficient service."

Notices to be in writing.

Notices to be in Writing.]—By *Ord. LXVI. r.* 1, "All notices (*o*) required by these Rules shall be in writing, unless expressly authorised by the Court or a Judge to be given orally."

Indorsement of address on proceedings.

Indorsement of Address on Commencement of Proceedings otherwise than by Writ of Summons.]—By *Ord. IV. r.* 4, "In all cases where proceedings are commenced otherwise than by writ of summons, the preceding Rules of this Order shall apply to the document by which such proceedings shall be originated as if it were a writ of summons."

See Ord. IV. rr. 1 *and* 2, *ante*, pp. 226—7; *and r.* 3 (*as to District Registries*), *ante*, p. 1426.

Office copies of writs, &c. may be used.

Office Copies of Writs, &c. may be used.]—By *Ord. XXXVII. r.* 4, "Office copies of all writs, records, pleadings and documents filed in the High Court of Justice shall be admissible in evidence in all causes and matters and between all persons or parties, to the same extent as the original would be admissible."

Copies, &c. sealed with seal of Central Office to be evidence (*p*).

Copies, &c. sealed with Seal of Central Office to be Evidence.]—By *Ord. LXI. r.* 7, "All copies, certificates and other documents appearing to be sealed with a seal of the Central Office (*p*) shall be presumed to be office copies or certificates or other documents issued from the Central Office, and if duly stamped may be received in evidence, and no signature or other formality, except the sealing

(*k*) See *Credits Gerundense* v. *Van Weede*, cited ante, p. 1357.

(*l*) See cases cited ante, Vol. 1, p. 419.

(*m*) See ante, Vol. 1, p. 416.

(*n*) See the form, Chit. F. p. 104 et seq.

(*o*) See *Woodward* v. *North*, 5 H. & W. 795; 29 L. J., Ex. 471.

(*p*) By Ord. LXI. r. 6, "The official seals to be used in the Central Office shall be such as the Lord Chancellor from time to time directs."

PART XV.

with a seal of the Central Office, shall be required for the authentication of any such copy, certificate or other document."

How documents left at Chambers to be written.

Documents left at Chambers.]—By *Ord. LXVI. r.* 2, "All accounts, copies and papers left at Chambers, shall be written upon foolscap paper, bookwise, unless the nature of the document renders it impracticable."

Printing proceedings.

—Paper and type to be used.

Printing Proceedings, Copies of Documents, &c.]—By *Ord. LXVI. r.* 3, "Proceedings required to be printed shall be printed on cream wove machine drawing foolscap folio paper, 19 lbs. per mill ream, or thereabouts, in pica type leaded, with an inner margin about three quarters of an inch wide, and an outer margin about two inches and a half wide" (*q*).

—Affidavits.

By *r.* 4, "Any affidavit may be sworn to either in print or in manuscript, or partly in print and partly in manuscript" (*r*).

—Depositions.

By *r.* 5, "Where any written deposition of a witness has been filed, such deposition shall be printed, unless otherwise ordered" (*s*).

By *r.* 6, "The Rules of Court as to printing depositions and affidavits to be used on a trial shall not apply to depositions and affidavits which have previously been used upon any proceeding without having been printed."

By *r.* 7, "Where, pursuant to these Rules, any pleading, notice, special case, petition of right, deposition or affidavit is to be printed, and where any printed or other office copy of any such document is to be taken, the following regulations shall be observed:

Who to print.

(a) The party on whose behalf the deposition or affidavit is taken and filed is to print the same in the manner provided by Rule 3 of this Order:

Copies of deposition and affidavit filed for printing.

(b) To enable the party printing to print any deposition or affidavit, the officer with whom it is filed shall on demand deliver to such party a copy written on draft paper on one side only:

Copies to be furnished to other party.

(c) The party printing shall, on demand in writing, furnish to any other party any number of printed copies, not exceeding ten, upon payment therefor at the rate of 1*d.* per folio for one copy, and ½*d.* per folio for every other copy:

Credit to client for amount received.

(d) As between a solicitor delivering any printed copies and his client, credit shall be given by the solicitor for the whole amount payable by any other party for such printed copies:

No charge for written copies.

(e) The party entitled to be furnished with a print shall not be allowed any charge in respect of a written copy, unless the Court or a Judge shall otherwise direct:

Copy to be left with officer filing.

(f) Except as provided by Order LV., Rule 48, the party by or on whose behalf any deposition, affidavit or certificate is filed shall leave a copy with the officer with whom the same is filed, who shall examine it with the original, and mark it as an office copy; such copy shall be a copy printed as above provided where such deposition or affidavit is to be printed:

(*q*) See ante, Vol. 1, p. 279.
(*r*) Id. p. 466.
(*s*) Id. p. 538.

Production of proceedings.

(g) The party or solicitor who has taken any printed or written office copy of any deposition or affidavit is to produce the same upon every proceeding to which the same relates:

Copies of documents not printed.

(h) Where any party is entitled to a copy of any deposition, affidavit, proceeding, or document filed or prepared by or on behalf of another party, which is not required to be printed, such copy shall be furnished by the party by or on whose behalf the same has been filed or prepared:

—Written application.

(i) The party requiring any such copy, or his solicitor, is to make a written application to the party by whom the copy is to be furnished, or his solicitor, with an undertaking to pay the proper charges, and thereupon such copy is to be made and ready to be delivered at the expiration of twenty-four hours after the receipt of such request and undertaking, or within such other time as the Court or a Judge may in any case direct, and is to be furnished accordingly upon demand and payment of the proper charges:

Copies of affidavits on application for injunction or writ of ne exeat.

(j) In the case of an *ex parte* application for an injunction or writ of ne exeat regno, the party making such application is to furnish copies of the affidavits upon which it is granted, upon payment of the proper charges immediately upon the receipt of such written request and undertaking as aforesaid, or within such time as may be specified in such request, or may have been directed by the Court or a Judge:

Note at foot of affidavit.

(k) It shall be stated in a note at the foot of every affidavit filed on whose behalf it is so filed, and such note shall be printed on every printed copy of an affidavit or set of affidavits, and copied on every office copy and copy furnished to a party:

Name, &c. of solicitor on copies.

(l) The name and address of the party or solicitor by whom any copy is furnished is to be indorsed thereon in like manner as upon proceedings in Court, and such party or solicitor is to be answerable for the same being a true copy of the original, or of an office copy of the original, of which it purports to be a copy, as the case may be:

Folios to be marked.

(m) The folios of all printed and written office copies, and copies delivered or furnished to a party, shall be numbered consecutively in the margin thereof, and such written copies shall be written in a neat and legible manner on the same paper as in the case of printed copies:

Neglect to furnish copies.

(n) In case any party or solicitor who shall be required to furnish any such written copy as aforesaid shall either refuse or, for twenty-four hours from the time when the application for such copy has been made, neglect to furnish the same, the person by whom such application shall be made shall be at liberty to procure an office copy from the office in which the original shall have been filed, and in such case no costs shall be payable to the solicitor so making default in respect of the copy so applied for:

Special order as to cost of printing, &c.

(o) Where, by any order of the Court (whether of appeal or otherwise) or a Judge, any pleading, evidence, or other document is ordered to be printed, the Court or Judge may

order the expense of printing to be borne and allowed, and printed copies to be furnished by and to such parties and upon such terms as shall be thought fit."

Not necessary to enrol judgments or orders.

Enrolment of Documents.]—By *Ord. LXI. r.* 8, "It shall not be necessary to enrol any judgment or order, whether dated before or since the commencement of the Principal Act."

Enrolment of deeds.

By *r.* 9, "All deeds which by any statute or statutory rule are directed or permitted to be enrolled in any of the Courts whose jurisdiction has been transferred to the High Court of Justice may be enrolled in the Enrolment Department of the Central Office."

Acknowledgments for purpose of enrolling.

By *r.* 12, "All acknowledgments required for the purpose of enrolling any deed or other document may be made before the Clerk of Enrolments or before a Master, as occasion may require."

Transmission of documents to Public Record Office.

By *r.* 13, "The records of all deeds and recognizances enrolled shall be sent by the Clerk of Enrolments, so long as that office shall continue, or by the proper officer of the Enrolment Department, to the Public Record Office, Rolls Yard, within two years from the time of the enrolment thereof."

Recognizances to be enrolled within six months.

By *r.* 14, "No recognizance shall be enrolled after six months from the acknowledgment thereof, except under special circumstances, and by an order made by the Court or a Judge upon motion for the enrolment thereof after that time."

Petitions, submissions, &c. to be filed.

Filing Documents.]—By *Ord. LXI. r.* 15, "No order made on a petition, and no order to make a submission to arbitration, or an award, an order of the Court, and no judgment or order wherein any written admissions of evidence are entered as read, shall be passed, until the original petition, submission to arbitration, or award, or written admissions of evidence, shall have been filed in the Central Office, or, where the proceedings are taken in a District Registry, in the District Registry, and a note thereof made on the judgment or order by the proper officer."

Date to be printed on pleadings, &c. filed.

By *r.* 16, "Upon every pleading or other proceeding which is filed in the Central Office, the date of filing the same shall be printed or written."

Petitions, submissions, &c. to be transmitted to Central Office.

Office copies.

By *r.* 31, "All certificates of the Chief Clerk of a Judge and all petitions and written admissions of evidence whereon any order is founded, and all submissions to arbitration made orders of the Court, shall be transmitted to and left at the Central Office, to be there filed or preserved. And all office copies thereof, or of any part thereof that may be required, shall be ready to be delivered to the party requiring the same within forty-eight hours after the same shall have been bespoken."

Indexes, &c. to be kept.

By *r.* 17, "Proper indexes or calendars to the files or bundles of all documents filed at the Central Office shall be kept, so that the same may be conveniently referred to when required; and such indexes or calendars and documents shall, at all times during office hours, be accessible to the public on payment of the usual fee."

Entry of date of filing.

By *r.* 18, "There shall also be entered in proper books kept for the purpose the time when any certificate is delivered at the Central Office to be filed, with the name of the cause and the date of the certificate; and the like entry shall be made of the time of delivery of every other document filed at the Central Office; and such books shall, at all times during office hours, be accessible to the public on payment of the usual fee."

Year, letter and number to be stated.

By *r.* 19, "Every judgment, order, certificate, petition, or document made, presented, or used in any cause or matter, shall be distinguished by having plainly written or stamped on the first page thereof the year, the letter, and the number by which the cause or matter is distinguished in the books kept at the Central Office."

Entry of date of judgment, &c.

By *r.* 20, "There shall also be entered in the cause books the date of every judgment, order, and certificate made in every cause or matter."

Memorandum of judgment, &c. to be filed before two o'clock.

By *r.* 22, "The Registrar of Judgments shall not receive any memorandum of a judgment, execution, lis pendens, order, rule, annuity, Crown debt, or other incumbrance, or any memorandum of satisfaction relating to the same, for registration, after the hour of two in the afternoon."

Certificate of entries,

Certificate as to Entries.]—By *Ord. LXI. r.* 23, "The Clerk of Enrolments and each of the following Registrars, namely—

(a) The Registrar of Bills of Sale;

(b) The Registrar of Certificates of Acknowledgments of Deeds by Married Women;

(c) The Registrar of Judgments;

—as to judgment, &c.,

shall, on a request in writing giving sufficient particulars, and on payment of the prescribed fee, cause a search to be made in the registers or indexes under his custody, and issue a certificate of the result of the search."

—as to state of cause or matter.

By *r.* 24, "For the purpose of enabling all persons to obtain precise information as to the state of any cause or matter, and to take the means of preventing improper delay in the progress thereof, the proper officer shall, at the request of any person, whether a party or not to the cause or matter inquired after, but on payment of the usual fee, give a certificate specifying therein the dates and general description of the several proceedings which have been taken in such cause or matter in the Central Office."

Production of documents, &c. filed.

Production of Documents filed.]—By *Ord. LXI. r.* 28, "No affidavit or record of the Court shall be taken out of the Central Office without the order of a Judge or Master, and no subpœna for the production of any such document shall be issued."

Affidavits and records not to be removed.

Deposit for fees, &c. of officer attending to produce documents.

By *r.* 29, "Any officer of the Central Office, being required to attend with any record or document at any assizes or at any Court or place out of the Royal Courts of Justice, shall be entitled to require that the solicitor or party desiring his attendance shall deposit with him a sufficient sum of money to answer his just fees, charges and expenses in respect of such attendance, and undertake to pay any further just fees, charges and expenses which may not be fully answered by such deposit."

PART XV.

Forms for use in Central Office.

Modification of or addition to.

Forms for use in Central Office.]—By *Ord. LXI. r.* 32, "The forms contained in the appendices shall be used in or for the purposes of the Central Office, with such variations as circumstances may require."

By *r.* 33, "The Masters may from time to time prescribe the use in or for the purposes of the Central Office of such modified or additional forms as may be deemed expedient."

Masters' Practice Rules.

Masters' Practice Rules.]—Rules have been made by the Masters for regulating the business at the Central Office. These will be found noticed in that part of the present work which treats of the particular matter to which they relate. They will be found printed *in extenso* in the Appendix at the end of this volume.

PART XVI.

CHAPTER CXXVII.

ARREST OF DEFENDANT BEFORE JUDGMENT (a).

	PAGE
1. *In what Cases Order for Arrest may be made*	1449
2. *Privilege from Arrest*	1454
3. *The Affidavit to Arrest*....	1464
4. *Judge's Order to Arrest* ..	1477
5. *The Arrest*.....	1483
6. *Application to discharge or vary the Order, or for other Relief*	1492
7. *Proceedings on the Arrest—the Security, &c.*	1496
8. *Proceedings against the Sheriff*.....	1504
9. *Liability and Discharge of Sureties—Proceedings by and against them*.....	1506

Sect. 1. *In what Cases Order for Arrest may be made.*

THE Act for abolishing arrest on mesne process in civil actions, except in certain cases (1 & 2 *V. c.* 110), introduced important changes into the law rolative to bailable proceedings. By that Act the writ of capias, as a means of commencing an action, was abolished (*b*). Proceedings to arrest a defendant before judgment are now entirely collateral to the main proceedings in the action (c). The 32 & 33 *V. c.* 62 has again much altered the law on this subject.

By the Debtors Act, 1869 (32 & 33 *V. c.* 62), it is enacted, sect. 6, that after 1st January, 1870, "a person shall not be arrested upon mesne process (*d*) in any action.

Power under certain circumstances to arrest defendant about to quit England.

"Where the plaintiff in any action (*e*) in any of her Majesty's superior Courts of Law at Westminster *in which, if brought before the commencement of this Act, the defendant would have been liable to*

(*a*) Inasmuch as the application to arrest a defendant before judgment is still occasionally made, it has been thought necessary to treat of the practice in this place; but the application is very rarely made now. Many of the matters treated of are also useful for collateral purposes.

(*b*) See *Turner* v. *Darnell*, 7 Dowl. 356; 5 M. & W. 28.

(*c*) *Ball* v. *Stanley*, 6 M. & W. 396; 8 Dowl. 344.

(*d*) A writ of capias issued under the stat. 1 & 2 V. c. 110, s. 3, was a "mesne process:" *Mainwaring* v. *Milner*, 4 Q. B. 149.

(*e*) This means in any species of action; *Brown* v. *M'Millan*, 7 M. & W. 201, per *Parke*, B. See *Agassiz* v. *Palmer*, 6 Sc. N. R. 603; 1 D. & L. 18; 5 M. & Gr. 697.

PART XVI.

arrest, proves at any time before final judgment (*f*) by evidence on oath, to the satisfaction of a Judge of one of those Courts that the plaintiff has good cause of action against the defendant to the amount of 50*l.* or upwards, and that there is probable cause for believing that the defendant is about to quit England unless he be apprehended, and that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action, such Judge may in the prescribed manner order such defendant to be arrested and imprisoned for a period not exceeding six months, unless and until he has sooner given the prescribed (*g*) security, not exceeding the amount claimed in the action, that he will not go out of England without the leave of the Court.

Where action for a penalty.

"Where the action is for a penalty or sum in the nature of a penalty other than a penalty in respect of any contract, it shall not be necessary to prove that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action, and the security given (instead of being that the defendant will not go out of England) shall be to the effect that any sum recovered against the defendant in the action shall be paid, or that the defendant shall be rendered to prison."

The above statute, it will be observed, confines the actions in which an arrest can be ordered to those *in which, if brought before* the commencement of the Act (1st January, 1870), the *defendant would have been liable to arrest*. It becomes necessary, therefore, to consider in what actions the defendant was liable to arrest before 1st January, 1870.

The amount and nature of the cause of action.

The Amount and Nature of the Cause of Action.]—The amount for which the action is brought must be 50*l.* or upwards. When defendant is a seaman, soldier, &c., *see post*, pp. 1460, 1461.

As to the nature of the action, the 1 & 2 *V.* c. 110, s. 3, restricted the power of arrest to those actions (*i.e.*, those species of actions (*h*)) in which the defendant was liable to arrest before the passing of the Act, whether upon the order of a Judge or without such order. And before that Act the general rule adopted by the Court in their construction of 7 & 8 *G.* 4, c. 71 (which then regulated arrests, and was in most respects worded like the prior Acts), was, that where the cause of action arose from a *debt* or money demand, or where it sounded in damages, but the damages were capable of being ascertained with certainty by mere calculation, the defendant might have been held to bail as of course. But where the cause of action sounded merely in *damages*, and these damages were *unliquidated*, or could not be reduced to certainty without the intervention of a jury, the defendant could not be held to bail unless a *Judge's order* were first obtained for that purpose: as in the following instances:

In actions on contract.

In Actions on Contract.]—Before 1 & 2 *V.* c. 110, where the action sounded in *debt*, as where it was brought for goods sold, money lent, or on a bill of exchange or promissory note, or the like, the defendant might have been held to bail as of course; but where it

(*f*) See *Hume* v. *Druyff*, L. R., 8 Ex. 214; 42 L. J., Ex. 145; *Yorkshire Engine Co.* v. *Wright*, 21 W. R. 15, Ex.

(*g*) See post, p. 1496.

(*h*) See per *Parke*, B., in *Brown* v. *M'Millan*, 7 M. & W. 196; 8 Dowl. 852.

sounded merely in *damages*, and those damages were unliquidated, as for breach of an agreement, and to receive or deliver goods or the like, special bail might have been required, upon a Judge's order (*i*), but not without it. The defendant could not have been held to bail as of course in an action upon a policy of insurance, where there had been no adjustment, although the plaintiff swore to a total loss, or the defendant had made an unqualified offer to pay a part of it: this being an action for unliquidated damages (*k*).

Where a defendant was arrested in an action on a contract, the legality of which was doubtful and which might subject the plaintiff himself to a penalty, the Court of Common Pleas discharged him (*l*). Where the party obtained a judgment in a foreign Court, in a suit for a malicious prosecution, the Court held, that he could not hold defendant to bail in an action here upon that judgment (*m*).

A defendant could not be arrested on an affidavit merely for goods *bargained* and sold (*n*), or for goods *sold* only (*o*), without averring that they were delivered, or some special circumstances to warrant the Judge in making the order for arrest; this was upon the ground that the plaintiff had the security of the goods. The defendant might be arrested on a written guarantee or undertaking to be answerable to a certain amount for goods sold to a third person in the event of the latter failing to pay for them (*p*). So, it would seem, he might be arrested for *stipulated damages*, if clearly such; but not for a *penalty* (*q*).

Interest.

Generally speaking, a party cannot, in the absence of an express contract to pay it, and which must appear on the affidavit, arrest for *interest* (*r*).

Where a set-off.

If there have been mutual dealings between the parties, the defendant should be arrested for the balance only (*s*).

On bond.

A defendant might be held to bail in an action on a bond, unless it were a replevin or bail-bond (*t*). If it were a bond conditioned for the payment of money, the defendant should have been held to bail merely for the principal and interest due on it, and not for the

---

(*i*) See *Waters* v. *Joyce*, 1 D. & R. 150.

(*k*) *Lear* v. *Heath*, 5 Taunt. 201.

(*l*) *Sumner* v. *Green*, 1 H. Bl. 301: *Fry* v. *Malcolm*, 4 Taunt. 705. And see *Emerson* v. *Lashley*, 2 H. Bl. 251: *Field* v. *Bezant*, 5 B. & Ad. 357.

(*m*) *De Balf* v. *Mackenzie*, 2 Str. 1243.

(*n*) *Hopkins* v. *Vaughan*, 12 East, 398.

(*o*) *Loisada* v. *Maryoseph*, 8 Moore, 366; 1 Bing. 357. See *Hargreaves* v. *Hayes*, 24 L. J., Q. B. 281, where an affidavit for shares sold was held sufficient.

(*p*) *Cope* v. *Joseph*, 9 Price, 155: *Chmas* v. *Wallis*, 11 Moore, 248. See *Morley* v. *Inglis*, 4 Bing. N. C. 58, which seems to throw a doubt upon this point. See *Taylor* v. *Higgins*, 3 East, 169.

(*q*) See *Wildey* v. *Thornton*, 2 East, 409: *Stinton* v. *Hughes*, 6 T. R. 13. As to the difference between *stipulated damages* and *penalties*, see Vol. I, p. 665.

(*r*) *Callum* v. *Leeson*, 2 Dowl. 381.

(*s*) *Tarlington's case*, 4 Burr. 1996: *Bromfield* v. *Areher*, 1 D. & R. 67; 5 B. & Ald. 513: *Austin* v. *Debnam*, 4 D. & R. 653; 3 B. & C. 139. See *Germain* v. *Burrowes*, 5 Taunt. 259, where defendant had refused to furnish an account of work done by him. See *Sims* v. *Jaquest*, 10 Bing. 510.

(*t*) *Ormond* v. *Brierly*, 1 Salk. 99: *Brandon* v. *Robson*, 6 T. R. 336: *Mellish* v. *Petherick*, 8 T. R. 450: and see ante, p. 1270.

PART XVI.

penalty (*u*). So, on bonds conditioned for the performance of covenants, or to indemnify, or the like, bail ought to have been required to the amount only of the real damages sustained, and not to the amount of the penalty (*x*). But in all cases where the penalty is in the nature of *liquidated* damages, as, where a bond is conditioned for the performance of a promise to marry (*y*), or the like, the defendant might be held to bail for the penalty; the penalty, in such a case, being the debt.

On recognizance of bail.

In an action on a recognizance of bail, the defendant could not be held to bail, as we have already seen (*ante*, p. 1451); and though an arrest was not, as noticed *supra*, permitted in an action upon a bail or replevin bond, yet, after judgment was obtained against the bail in such action, he might be arrested in an action on the judgment (*z*).

On judgment.

In an action on a judgment, special bail could not, in general, be required, if defendant was held to bail in the original action (*a*); although the bail in the original action had absconded or become insolvent (*b*); or although the defendant was superseded in the first action (*c*); unless the supersedeas had been gained by surprise, and not by the laches of the plaintiff (*d*); or even although the plaintiff had waived the bail in the first action, by declaring for a different cause of action from that mentioned in the writ (*e*), or by taking a warrant of attorney from defendant in the first action, the second action being upon the judgment entered up on the warrant of attorney (*f*). So where a defendant was superseded in an action upon a judgment, and again arrested in an action upon the second judgment, the Court discharged him (*g*). What has now been observed relates to actions upon judgments of the *superior* Courts only; for if the action were brought on the judgment of an inferior Court, the defendant might be held to bail, although he was held to bail in the original action (*h*). Also, if defendant were not held to bail in the original action, he might in general have been so in an action on the judgment (*i*), though error were pending on it (*k*); provided the original cause of action were such that defendant might have been held to bail for it (*l*). The defendant, in such case, might

(*u*) See *Talbot* v. *Hodson*, 7 Taunt. 251. A mortgagee who had a bond collateral to his mortgage might hold the mortgagor to bail on the bond, though there were a suit pending for a foreclosure: *Burnell* v. *Martin*, 2 Doug. 417.

(*x*) 1 Sid. 63: *Stapleton* v. *Baron de Stark*, Barnes, 109: *Anon.*, 1 Salk. 100; Say. 109: *Hatfield* v. *Linguard*, 6 T. R. 217: *Kirk* v. *Strickland*, Doug. 449: *Anderson* v. *Bell*, 2 C. & J. 630: *Edwards* v. *Williams*, 5 Taunt. 247.

(*y*) *Kirk* v. *Strickland*, Doug. 449. And see *Kettleby* v. *Woodcock*, Barnes, 86.

(*z*) *Butt* v. *Moore*, Tidd, 9th ed. 173: *Prendergast* v. *Davis*, 8 T. R. 85.

(*a*) *Kendal* v. *Carey*, 2 W. Bl. 768. And see *Collins* v. *Powell*, 2 T. R. 756.

(*b*) *Brown* v. *Barnett*, Say. 160.

(*c*) *Hall* v. *Howes*, 2 Str. 1039: *Chambers* v. *Robinson*, Id. 782: *Blandford* v. *Foot*, Cowp. 72: *Huggins* v. *Bambridge*, Barnes, 383. But see *De la Cour* v. *Reed*, 2 H. Bl. 278.

(*d*) *Whalley* v. *Martin*, Barnes, 62.

(*e*) *Crutchfield* v. *Seyward*, 2 Wils. 93.

(*f*) *Salkeld* v. *Lands*, 2 B. & P. 416.

(*g*) *Chambers* v. *Robinson*, 2 Str. 782.

(*h*) *Davies* v. *Leekie*, Barnes, 94.

(*i*) *Hessie* v. *Stevenson*, 1 N. R. 133. And see *Combs* v. *Blackall*, 1 Str. 477.

(*k*) *Kendal* v. *Carey*, 2 W. Bl. 768; Comyns, 566: *Weyman* v. *Weyman*, Barnes, 71.

(*l*) See *Gammage* v. *Watkin*, 2 Str. 975; Cowp. 128: *Palmer* v. *Needham*,

be held to bail on the judgment for the balance after a levy of part by a fi. fa., and this before the return of the fi. fa. (*m*). Before 7 & 8 *G. 4, c.* 71, *s.* 1, by which, to entitle a party to arrest, the cause of action must have originally amounted to 20*l.* or upwards, exclusive of *costs*, &c., where a *defendant* obtained judgment, he might always in the Court of Common Pleas have held plaintiff to bail in an action of debt upon it (*n*); in the Court of Queen's Bench it was formerly otherwise (*o*): but it seems that the practice of that Court in this respect was afterwards assimilated to that of the Common Pleas (*p*).

On award.

In an action on an award, defendant might be held to bail, although he had before been held to bail for the same cause of action which was the subject of the award (*q*).

Covenant.

In covenant the defendant might be held to bail, if the covenant were for the payment of a sum certain (*r*).

In actions of tort, &c.

In Actions of Tort, &c.]—In detinue or trover the defendant could not, before 1 & 2 *V. c.* 110, have been held to bail without a Judge's order (*s*).

In trespass, also, the defendant could not, before 1 & 2 *V. c.* 110, have been held to bail without a Judge's order (*t*), and this was seldom granted, unless in cases of very violent and cruel assaults (*u*), or where defendant was about to quit the kingdom (*u*), or in trespass for mesne profits (*x*).

So, in case for a tort, the defendant could not, before 1 & 2 *V. c.* 110, have been held to bail without a Judge's order. This was sometimes granted in actions for criminal conversation (*y*), and in actions for scandalum magnatum (*z*), where it was apparent the damages would exceed the bailable amount.

On penal statutes.

In actions on penal statutes, the defendant could not be held to bail (*a*) unless the statute expressly authorized an arrest (*b*); but in actions on remedial statutes, as on 9 *Anne, c.* 14, by the loser at play against the winner (*c*), or on 4 *G.* 2, *c.* 28, for double rent for holding over (*d*), or the like, he might. Where a tenant fraudulently removed his goods to prevent a distress, *Taunton*, J., refused an order to hold him to bail in an action for double the value of the

---

3 Burr. 1389: *Belither* v. *Gibbs*, 4 Burr. 2117: *Lewis* v. *Pottle*, 4 T. R. 570: *Cressy* v. *Kell*, 1 Wils. 120: and 43 G. 3, c. 46.

(*m*) *Green* v. *Elgie*, 3 B. & Ad. 437.

(*n*) *Nightingale* v. *Nightingale*, 2 W. Bl. 1274.

(*o*) *Bush* v. *Bates*, 5 Burr. 2660.

(*p*) See *Lewis* v. *Pottle*, 4 T. R. 570; 1 Sellon, Pr. 39, 40.

(*q*) *Collins* v. *Powell*, 2 T. R. 756: *Anon.*, 1 Dowl. 5.

(*r*) See *Lambert* v. *Wray*, 3 Dowl. 169; R. E. 5 G. 2.

(*s*) R. H. 48 G. 3; 9 East, 325; 1 Taunt. 203.

(*t*) See R. H. 48 G. 3; K. B. & C. P., and Dax, Exch. Pr. 50.

(*u*) 1 Sellon, Pr. 36.

(*x*) *Hunt* v. *Hudson*, Barnes, 85.

(*y*) *Hadderweek* v. *Catmur*, Barnes, 61.

(*z*) *Chetwin* v. *Venner*, 1 Sid. 183: *Earl Stamford* v. *Gordal*, T. Raym. 74.

(*a*) *St. George's case*, Yelv. 53: *Whittingham* v. *Coghlan*, Barnes, 80; Comyn, 75.

(*b*) See *R.* v. *Rebord*, 3 Burr. 1569: *Davies* v. *Mazzinghi*, 1 T. R. 705: *Holland* v. *Bothmar*, 4 T. R. 228: *R.* v. *Horne*, Id. 349: *Goodwin* v. *Parry*, Id. 578.

(*c*) *Turner* v. *Warren*, 2 Str. 1079; Andr. 70.

(*d*) *Wheeler* v. *Copeland*, 5 T. R. 364.

PART XVI.

goods, saying, there was no instance of an order having been granted in such a case (*x*).

Scire facias.

In Scire Facias.]—A defendant could not be held to bail in proceedings by sci. fa. (*y*).

Action of account.

In Action of Account.]—The 1 & 2 *V. c.* 110, did not affect the writ of capias ad computandum (*z*).

Sect. 2. *Privilege from Arrest.*

	PAGE
Consequences of the Privilege ..	1454
Who privileged	1455
The Royal Family, &c.	1455
Peers	1455
Members of the House of Commons	1456
Ambassadors and their Servants	1457
Aliens	1458
The Judges, Barristers, &c...	1458
Solicitors and Officers of the Court	1458
Coroners	1459
Who privileged—continued.	
Parties to a Suit, Witnesses, &c.	1459
Bail	1459
Corporators and Hundredors	1459
Executors, Administrators and Heirs	1459
Infants and Lunatics	1460
Seamen	1460
Soldiers and Marines	1461
Where the Defendant has been before arrested for same Cause	1461

Consequences of the Privilege.

Consequence of privilege from arrest.

There are some cases, where the defendant, by reason of the dignity of his station, or of other circumstances, is privileged from arrest. Where a defendant thus privileged is arrested, the Court or a Judge will in general order him to be discharged out of custody (*a*); and an action of trespass for false imprisonment lies against a sheriff for refusing to discharge a defendant, after a notice of a Judge's order for that purpose (*b*). But an action is not maintainable for merely holding a privileged person to bail; though, if the party were aware of the privilege, an action might, perhaps, be maintained (*c*). The order for discharge on the ground of privilege only extends to the action mentioned in it (*d*). It has

(*x*) *Sutton* v. *Oswald*, 1 Dowl. 348.

(*y*) *Agassiz* v. *Palmer*, 6 Se. N. R. 603; 1 D. & L. 18. Perhaps a defendant might now be arrested in some actions of sci. fa.

(*z*) *Pryor* v. *Pettingell*, 2 Dowl., N. S. 755.

(*a*) See *Gilpin* v. *Cohen*, L. R., 4 Ex. 131.

(*b*) *Martin* v. *Francis*, 1 Chit. Rep. 245: *Magnay* v. *Burt*, 5 Q. B. 381; 1 D. & M. 652. See, however, *Watson* v. *Carroll*, 4 M. & W. 592; 7 Dowl. 217; see post.

(*c*) See *Nurl* v. *Isaac*, 1 C., M. & R. 753: *Whalley* v. *Pepper*, 7 Car. & P. 506: *Burt* v. *Magnay*, 7 Jur. 127, Q. B.: *Magnay* v. *Burt*, supra: *Yearsley* v. *Heane*, 14 M. & W. 322: *Ewart* v. *Jones*, 14 M. & W. 774. See post, p. 1483, as to an action not lying for arresting a party temporarily privileged from arrest.

(*d*) *Watson* v. *Carroll*, 4 M. & W. 592; 7 Dowl. 217.

been doubted whether a writ of privilege could be obtained, except for officers of the Court (*e*); it is submitted, however, that it could (*f*). Where such a writ lay the Court would not discharge a party arrested on motion, if it be doubtful whether he was privileged or not, but would leave him to sue out his writ of privilege (*g*).

The cases in which this privilege is enjoyed will be considered under the following heads. The cases in which a party has a mere *temporary* or *local* privilege from arrest will be treated of while considering the arrest itself.

Who privileged from being Arrested.

Who privileged.

The royal family, &c.

The Royal Family, &c.]—The royal family cannot be held to bail (*h*). Also the servants in ordinary or menial servants of a king, or of a queen regnant, cannot be arrested (*i*), even although they be in trade (*j*), unless upon notice first given to, and leave obtained from, the lord chamberlain of the royal household (*k*). A chaplain to the king is privileged (*l*); so is a lord of the bedchamber (*m*); a page of the presence in ordinary (*n*); the Somerset herald at arms (*o*); the serjeant at arms in ordinary to the queen, if he has duty to perform by virtue of his office (*p*); a clerk of the kitchen (*q*): and a candle and fire lighter to the yeoman of the guards at St. James's Palace (*r*). But this privilege does not extend to the servants of a queen consort, queen dowager, &c. (*s*); to a gentleman of the queen's privy chamber (*t*); to the fort major, or deputy governor of the Tower of London (*u*); or, as it seems, to the wardens of the Tower (*x*). The reason for the privilege is, that their continual service and attendance upon the royal person is necessary (*y*).

Peers.

Peers.]—Peers of the realm of England are privileged from arrest, both upon an order to arrest before judgment and final process (*z*). But it seems, a peer by patent, if sued by

(*e*) *Dyer* v. *Disney*, 16 M. & W. 314, per *Parke*, B.

(*f*) See a form of the writ, Rastell's Entries.

(*g*) *Luntley* v. *Battine*, 2 B. & Ald. 234: *Pitt's case*, 2 Str. 985: *Leslie* v. *Disney*, 1 C., M. & R. 578; 3 Dowl. 437.

(*h*) 2 Inst. 50.

(*i*) *Rex* v. *Moulton*, 2 Keb. 3: *R.* v. *Frampton*, T. Raym. 152: *Bartlett* v. *Hebbes*, 5 T. R. 686. And see *R.* v. *Stobbs*, 3 T. R. 735.

(*j*) *King* v. *Forster*, 2 Taunt. 167.

(*k*) See Tidd, Prac. 9th ed. 190.

(*l*) *Paine* v. *Dibdin*, 1 Gale, 58; 1 C., M. & R. 821; 3 Dowl. 448: *Winter* v. *Dibdin*, 13 M. & W. 25; 2 D. & L. 211; 14 L. J., Ex. 263, a case of final process: *Harvey* v. *Dakins*, 3 Ex. 267.

(*m*) *Aldridge* v. *Barry*, 3 Dowl. 459, n.

(*n*) *Reynolds* v. *Peacock*, 4 M. & W. 371; 7 Dowl. 4.

(*o*) *Dyer* v. *Disney*, 16 M. & W. 312.

(*p*) *Robson* v. *Doyle*, 7 May, 1855, Q. B.

(*q*) *Bartlett* v. *Hebbes*, 5 T. R. 686.

(*r*) *Hatton* v. *Hopkins*, 6 M. & Sel. 271.

(*s*) *Starkie's case*, 1 Keb. 842: *Rex & Capel* v. *Bawd*, Id. 377.

(*t*) *Luntley* v. *Battine*, 2 B. & A. 234: *Tapley* v. *Battine*, 1 D. & R. 70.

(*u*) *Batson* v. *M'Lean*, 2 Chit. Rep. 48: *Sard* v. *Forrest*, 1 B. & C. 189; 2 D. & R. 250. Semble, that he cannot be arrested within the Tower unless by the governor's leave.

(*x*) *Bidgood* v. *Davies*, 6 B. & C. 84; 9 D. & R. 153. See *Bell* v. *Jacobs*, 1 M. & P. 309; 4 Bing. 523; Tidd, 9th ed. 190. See last note.

(*y*) 2 Inst. 631. And see Chitty, jun., Prerog. Cr. 374: *Dyer* v. *Disney*, supra, n. (*o*).

(*z*) *Countess of Rutland's case*, 6 Co. 52: *Earl of Shrewsbury's case*,

PART XVI.

his christian and surname, and not by his title of nobility, cannot claim this privilege, if he has never sat in Parliament (*a*). Peeresses are also entitled to the same privilege, whether they are peeresses by birth, by creation, or by marriage (*b*); but if a peeress by marriage afterwards marry a commoner, she thereby loses all her privileges, as well as her title of nobility (*c*). This privilege from arrest is extended to Scotch peers and peeresses, by 5 *A.* c. 8, *art.* 23, whether such peers have been chosen to sit in Parliament or not (*d*); and to Irish peers and peeresses, by 39 & 40 *G.* 3, *c.* 67, *art.* 4 (*e*). If arrested, the Court or a Judge will discharge them, the privilege, especially in the case of an Irish peer, being primâ facie made out (*f*): and they will not go into the defendant's right to his title; being a peer de facto, and having acted as such or voted at the election of Scotch peers, will suffice to entitle him to his discharge (*g*). The defendant will not be put under terms of entering an appearance (*h*). It seems the sheriff would not be a trespasser in making the arrest (*i*).

Servants of.

The servants of peers also were formerly privileged from arrest; but this was abolished by 10 *G.* 3, *c.* 50, *s.* 10 (*k*).

Members of House of Commons.

Members of the House of Commons.]—Members of the House of Commons are privileged from arrest during the session of Parliament, and for a convenient time before and after it (*l*). The privilege eundo et redeundo continues for forty days before and forty days after the Parliament (*m*). The members enjoy this privilege after a dissolution, as well as after a prorogation (*n*).

Discharge of, from arrest.

If a member be arrested during the period of privilege, the Court or a Judge will discharge him on application for that purpose, and will not oblige him to sue out a writ of privilege (*o*). He must, however, in general, produce the return of his writ of election (*o*), affidavits of that fact not being deemed sufficient (*p*).

Members of convocation.

Members of convocation seem also to enjoy the same privilege, in this respect, as members of the House of Commons (*q*).

---

9 Co. 49 a, 68 a: *Foster* v. *Jackson*, Hobart. 61: *Earl of Lonsdale* v. *Littledale*, 2 H. Bl. 272: *Couche* v. *Lord Arundel*, 3 East, 127: *The Duke of Newcastle* v. *Morris*, L. R., 4 H. L. 661.

(*a*) *Lord Banbury's case*, 2 Ld. Raym. 1247; 2 Salk. 512.

(*b*) *Countess of Rutland's case*, 6 Co. 52: *Huntingdon's case*, 1 Vent. 283: *Cassidy* v. *Stewart*, 2 Sc. N. R. 432; 9 Dowl. 366. See *Countess Rivers' case*, Style, 252, contra.

(*c*) Co. Lit. 16 b.

(*d*) *Lord Mornington's case*, Fort. 165.

(*e*) *Coates* v. *Lord Hawarden*, 7 B. & C. 388; 1 M. & Rob. 110.

(*f*) *Storey* v. *Birmingham*, 8 D. & R. 488. See *Davies* v. *Lord Rendlesham*, 1 Moore, 410; 7 Taunt. 679.

(*g*) *Digby* v. *Lord Stirling*, a Scotch peer, 8 Bing. 55; 1 M. & Sc. 116; 1 Dowl. 248.

(*h*) *Holiday* v. *Pitt*, 2 Str. 985.

(*i*) *Tarlton* v. *Fisher*, 2 Dowl. 671.

(*k*) See *Connelly* v. *Smith*, 1 Chit. Rep. 83: *Chester* v. *Upsdale*, 1 Wils. 278.

(*l*) *Executors of Skewys* v. *Chamond*, 1 Dyer, 60: *Holiday* v. *Pitt*, 2 Str. 985: *Phillips* v. *Wellesley*, 1 Dowl. 9: *Cassidy* v. *Stewart*, 2 Sc. N. R. 432; 9 Dowl. 366: *Butcher* v. *Stewart*, 9 M. & W. 405.

(*m*) *Goudy* v. *Duncombe*, 1 Ex. 430; 17 L. J., Ex. 76; Scobell, 109, 110: *Earl of Athol* v. *Earl of Derby*, 2 Lev. 72; 1 Brownl. 21; Bac. Abr. "Privilege" (C), 4.

(*n*) *Holiday* v. *Pitt*, 2 Str. 985; Fort. 159; 2 Comyns, 444: *Goudy* v. *Duncombe*, supra.

(*o*) Id.: and *Fenwick* v. *Fenwick*, 2 W. Bl. 788.

(*p*) See also Dyer, 59 b, 60 a.

(*q*) 8 H. 6, c. 1; 1 Eq. Ca. Abr. 349.

It seems that a candidate to be elected a member of the House of Commons is not privileged from arrest, either in going to, remaining at, or returning from the election (*r*); and it would seem also that voters are not so privileged. Candidates and voters at elections.

Ambassadors and their Servants.]—Ambassadors and other public ministers of foreign princes or states, at this Court, and their "domestics and domestic servants," are, by 7 *A.* c. 12, *s.* 3, privileged from arrest; and all process, &c. against them for that purpose is void (*s*). If a person thus privileged be arrested, the Court or a Judge will order him to be discharged, or, if he have given security, order it to be given up to be cancelled (*t*). The Act, however, does not extend, generally speaking, to consuls or their servants (*u*); nor to such of the domestic servants of an ambassador, &c., as are subject to the bankrupt laws (*x*); nor to persons holding situations inconsistent with the office of such a domestic (*y*); nor to any person colourably only, and not bonâ fide, in the service of such ambassador (*z*); nor to a courier or messenger, for he is not a domestic (*a*). But it is not necessary that the servant should reside in the ambassador's house (*b*), provided he do the duties of his office there (*c*); and it seems that a chorister, bonâ fide employed by an ambassador in the performance of religious worship in his chapel, is thus privileged (*d*). It is not material whether the servant be a foreigner or a native of this country (*e*). A secretary and councillor of legation of a foreign sovereign, appointed by him, and having charge of the executive of the legation, and acting in the absence of the ambassador as chargé-d'affaires, is a public minister to whom the privileges of ambassadors apply (*f*). Ambassadors and their servants.

The plaintiff, solicitor, officer, and others concerned in suing out and executing process against such public ministers or their servants, shall, upon a summary conviction (*g*) before the Court appointed for that purpose by the statute, suffer such pains, penalties and corporal punishment, as to such Court shall seem Punishment of those who arrest.

(*r*) See *London's case*, 2 Peek. 268; Wordsworth on Elect. 234.

(*s*) An ambassador cannot even be sued in the Courts in this country: *Magdalena Steam Navigation Company* v. *Martin*, 2 El. & El. 94; 28 L. J., Q. B. 310.

(*t*) *Cross* v. *Talbot*, 8 Mod. 288. The privilege given by the Act is the privilege of the ambassador, and not of the servant: *Fisher* v. *Begrez*, 2 C. & M. 240; 2 Dowl. 279.

(*u*) *Viveash* v. *Becker*, 3 M. & Scl. 284.

(*x*) 7 Anne, c. 12, s. 5. And see Rep. Pract. C. B. 65, 134: *Toms* v. *Hammond*, Barnes, 370: *Cain* v. *Molineux*, Id. 374: *Triquet* v. *Bath*, 1 W. Bl. 471; 3 Burr. 1478; Id. 1731. An ambassador does not lose his privilege by trading in this country: *Taylor* v. *Best*, 14 C. B. 487; 23 L. J., C. P. 89.

(*y*) *Masters* v. *Manby*, 1 Burr. 401: *Darling* v. *Atkins*, 3 Wils. 33.

(*z*) *Malachi Carolina's case*, 1 Wils. 78: *Lockwood* v. *Coysgarne*, 3 Burr. 1676: *Flint* v. *De Logant*, Tidd, 9th ed. 191.

(*a*) *Deserisay* v. *O'Brien*, Barnes, 375.

(*b*) *Widmore* v. *Alvarez*, Fitzg. 200: *Evans* v. *Higgs*, 2 Str. 797; 2 Ld. Raym. 1524. See *Novello* v. *Toogood*, 1 B. & C. 544; 2 D. & R. 833.

(*c*) Semb. Id.

(*d*) *Fisher* v. *Begrez*, 1 C. & M. 117; 1 Dowl. 568.

(*e*) *Lockwood* v. *Coysgarne*, 3 Burr. 1676.

(*f*) *Taylor* v. *Best*, 14 C. B. 487; 23 L. J., C. P. 89.

(*g*) See *Triquet* v. *Bath*, 3 Burr. 1480.

PART XVI.

meet (*h*). Provided, that no officer, &c. shall be so punished, unless the name of such servant have been registered at the office of the secretary of state, and from thence transmitted to the office of the sheriffs of London and Middlesex (*i*). But although the name of such person be regularly registered as the Act directs, yet, if he be not in the bonâ fide and actual service of the ambassador, and such as the statute otherwise protects, he may be held to bail, and the sheriff is bound to execute the process against him (*k*).

Sheriff refusing to arrest.

If the sheriff refuse to execute process against a defendant, who claims this privilege, but who is not bonâ fide an ambassador's servant, and such as is protected by the statute, the plaintiff may maintain an action against him.

Discharge of ambassador's servant from arrest.

If a servant of an ambassador be arrested, he, or the ambassador, or some one on behalf of the latter, may move the Court or a Judge, that the servant be discharged out of custody, or that the security (if he has given one) may be delivered up to be cancelled. The affidavit in support of such an application should show that it is made by the ambassador, or some one on his behalf, or else it should make out a clear case of a bonâ fide service as a *domestic* servant of such ambassador (*l*), and that the defendant was such at the time of the arrest (*m*); it should also state the capacity in which he was hired (*n*), and that he performed the duties of such office (*o*). It would not suffice for him merely to state that his name was registered at the office of the secretary of state, and from thence transmitted to the sheriff's office (*p*).

Aliens.

Aliens.]—Aliens are not privileged from arrest (*q*). One foreigner may arrest another in this country for a debt which accrued in a foreign country while both resided there, though the law of such a country does not allow of arrest for debt (*r*).

The Judges, serjeants, barristers, &c.

The Judges, Barristers, &c.]—The Judges of the Supreme Court of Judicature are privileged from arrest both before judgment and on a ca. sa. Perhaps the Queen's serjeants have the same privilege. Barristers may be arrested, though they in certain cases enjoy a temporary privilege from arrest; as to which, *see post*, p. 1484.

Solicitors and officers of the Courts.

Solicitors and Officers of the Courts.]—Solicitors and other officers of the Courts could not, before 1 & 2 *V. c.* 110, be held to bail

(*h*) 7 Anne, c. 12, s. 4.

(*i*) Id. s. 5. See *Heathfield* v. *Chilton*, 4 Burr. 2017: *Hopkins* v. *Roebuck*, 3 T. R. 79. Secretary privileged: Id.

(*k*) *Seacomb* v. *Brownley*, 1 Wils. 20; *Devallo* v. *Plomer*, 3 Camp. 47.

(*l*) *Fisher* v. *Begrez*, 2 C. & M. 240; 2 Dowl. 279: *Toms* v. *Hammond*, Barnes, 370: *English* v. *Caballero*, 3 D. & R. 25.

(*m*) *Heathfield* v. *Chilton*, 4 Burr. 2015.

(*n*) *Holmes* v. *Gordon*, Hardw. 3: *Widmore* v. *Alvarez*, Fitz. 200.

(*o*) *Seacomb* v. *Brownley*, 1 Wils. 20: *Malachi Carolina's case*, Id. 78: *Triquet* v. *Bath*, 3 Burr. 1478, 1731: *Potier* v. *Croza*, 1 W. Bl. 18: *Crosse* v. *Talbot*, 8 Mod. 288; 1 Barnard, 79, 80, 401.

(*p*) *Fisher* v. *Begrez*, 1 C. & M. 117; 1 Dowl. 588.

(*q*) By some old expired statutes, aliens were in certain cases protected from arrest. See 38 G. 3, c. 50, s. 9; 41 G. 3, c. 106; and 43 G. 3, c. 155, s. 28. See *Sinclair* v. *Phillippe*, 2 B. & P. 363.

(*r*) *De la Vega* v. *Vianna*, 1 B. & Ad. 284, overruling *Milan* v. *Duke de Fitz James*, 1 B. & P. 138. See also *Imlay* v. *Ellefsen*, 2 East, 453.

except in certain cases, when they lost their privilege in this respect. But, as they lose this privilege when they are about to leave the country, they may now be arrested in the same way as other persons (*s*). They have no privilege, as such, from arrest on final process.

Coroners.]—A coroner (*t*), or deputy coroner (*u*), whilst engaged in executing his office, is privileged from arrest. Coroners.

Parties to a Suit, Witnesses, &c.]—Every person connected with a cause, and attending in the course of it, whether compelled to attend by process or not, such as parties, witnesses, solicitors, &c., are privileged from arrest, whilst going to, attending and returning from Court. See *Gilpin* v. *Cohen*, L. R., 4 Ex. 131. Parties to a suit, witnesses, &c.

Bail.]—In actions on bail-bonds, replevin-bonds, and recognizances of bail, the defendant cannot be held to bail (*x*). But if the plaintiff obtained judgment in an action on such bond or recognizance, he may hold the defendant to bail in an action on the judgment (*y*). Bail.

Corporators and Hundredors.]—Members of a corporation aggregate could not be held to bail for anything done by them in their corporate capacity (*z*). Nor could hundredors in actions against them under 7 & 8 *G.* 4, *c.* 31 (*a*). Corporators and hundredors.

Executors, Administrators and Heirs.]—Executors, administrators and heirs could not in general be held to bail in actions against them for the debts of the deceased; because the action in such a case is not so properly against them personally, as against the effects of the deceased in their possession (*b*). But if they gave a sufficient promise in writing (*see* 29 *C.* 2, *c.* 3) to pay such debts, they thereby made their own property liable for the payment of them, and might consequently be held to bail thereon (*c*). Or, if an executor or administrator were guilty of a devastavit, he might afterwards be held to bail in an action by a creditor upon a judgment, suggesting such devastavit (*d*); for he thereby rendered his effects liable for the debt. In this case, however, a Judge's order was necessary for the purpose of holding defendant to bail, before 1 & 2 *V.* *c.* 110, *s.* 3; and the Judge must have been satisfied of Executors, administrators and heirs.

(*s*) *Thompson* v. *Moore*, 1 Dowl., N. S. 283: *Flight* v. *Cooke*, 1 D. & L. 714.

(*t*) See *Callaghan* v. *Twiss*, 9 Irish L. R. 422.

(*u*) *Ex p. Deputy Coroner for Middlesex*, 30 L. J., Ex. 77.

(*x*) *Brandon* v. *Robson*, 6 T. R. 336: *Ormond* v. *Brierley*, 1 Salk. 9: *Mellish* v. *Petherick*, 8 T. R. 450.

(*y*) *Prendergast* v. *Davis*, Id. 85.

(*z*) Bro. Abr. "Corporation," pl. 43.

(*a*) Ante, p. 1108: *Stewart* v. *Howey*, 3 Keb. 126.

(*b*) See R. M. 15 C. 2, r. 2; 3 Bl. Com. 292; 2 Brownl. 293: *Smale* v. *Warne*, 3 Buls. 316.

(*c*) *Mackenzie* v. *Mackenzie*, 1 T. R. 716.

(*d*) *Page* v. *Price*, 1 Salk. 98; 1 Sid. 63: *Seaton* v. *Gilbert*, 2 Lev. 145: *Anon.*, 1 Vent. 355. And see a form of affidavit, Chit. Forms, p. 761.

PART XVI.

the devastavit, either by the sheriff's return (if the devastavit had been returned), or by affidavit of the fact (*e*).

Infants and lunatics.

Infants and Lunatics.]—An infant should not have been held to bail for any debt or other matter, where the plea of infancy would have been a legal bar to the action. If held to bail, however, the Court or a Judge, it seems, would not discharge him (*f*).

Nor was insanity a sufficient ground for discharging a defendant (*g*), although the fact of insanity had been established by a commission of lunacy, previously to the arrest (*h*).

Seamen, &c. of R. N.

Seamen.]—By 29 & 30 *V. c.* 109, *s.* 97, "It shall not be lawful for any person to arrest any petty officer or seaman, non-commissioned officer of marines or marine, belonging to any ship of her Majesty, by any warrant, process or writ issued in any part of her Majesty's dominions for any debt, unless the debt was contracted at a time when the debtor did not belong to her Majesty's service, nor unless before the issuing of the warrant, process or writ, the plaintiff in the suit, or some person on his behalf, has made an affidavit (*i*), in the Court out of which it issued, that the debt justly due to the plaintiff (over and above all costs) was contracted at a time when the debtor did not belong to her Majesty's service, nor unless a memorandum of such affidavit is marked on the back of the warrant, process or writ."

Sect. 98. "If any petty officer or seaman, non-commissioned officer of marines or marine, is arrested in contravention of the provisions of the last foregoing section, the Court out of which the warrant, process or writ issues, or any Judge thereof, may, on complaint by the party arrested, or by his superior officer, investigate the case on oath or otherwise, and if satisfied that the arrest was made in contravention of the provisions of the last foregoing section, may make an order for the immediate discharge of the party arrested, without fee, and may award to the complainant the costs of his complaint, to be taxed by the proper officer; for the recovery whereof he shall have the like remedy as the plaintiff in the suit would have on judgment being given in his favour with costs."

Armourers, gunners, &c., enlisted as common seamen, are within the meaning of these provisions (*j*).

Where, under the old practice, a defendant who came within a statute similar to the above, had given a bail-bond, and the plaintiff proceeded against the bail upon the bond to judgment, it was held that the bail were too late in applying to the Court for relief (*k*).

(*e*) *Dupratt* v. *Testard*, Carth. 264. And see *Leonard* v. *Simpson*, 2 Bing. N. C. 176; and ante, Ch. XCVII.

(*f*) *Madox* v. *Eden*, 1 B. & P. 480.

(*g*) *Nutt* v. *Verney*, 4 T. R. 121: *Kernott* v. *Norman*, 2 T. R. 390.

(*h*) *Steel* v. *Allan*, 2 B. & P. 362.

(*i*) There must also be an affidavit as mentioned ante, p. 1450, in order to obtain an order to arrest.

(*j*) *Barnsley* v. *Archer*, Barnes 114: *Studwell* v. *Bunton*, Id. 95.

(*k*) *Bryan* v. *Woodward*, 4 Taunt 557: *Robertson* v. *Patterson*, 7 East 405: *Methuen* v. *Martin*, Say. 107.

CH. CXXVII.

Soldiers and marines.

Soldiers and Marines.]—By the Army Act, 1881 (44 & 45 *V. c.* 58), *s.* 144, soldiers (*l*) are protected from arrest except on account of a debt, damages or sum of money proved by affidavit of the plaintiff or of some one on his behalf to amount to 30*l.* over and above all costs of suit, which affidavit may be sworn, without payment of any fee, of which affidavit, when duly filed in such Court, a memorandum shall, without fee, be indorsed upon the back of such process.

This enactment extends to marines whilst on shore.

Marines on shore.

Where defendant before arrested for the same cause of action.

Where the Defendant has been before arrested for the same Cause of Action.]—It is apprehended that a Judge, in his discretion, will in general allow a defendant to be arrested, although he has been before arrested for the same cause of action, unless the proceeding is vexatious or oppressive.

Former practice as to.

It will be useful here to refer to the practice before 1 & 2 *V. c.* 110, as to holding a defendant to bail twice for the same cause of action, as it will assist in showing when he can now be so arrested. Before the above Act, if a defendant was once arrested, he could not, in general, be arrested again at the suit of the same plaintiff, for the *same cause* of action (*m*), unless, perhaps, the proceedings had been set aside for irregularity (*n*); or unless by a rule of Court or Judge's order, which in some instances was allowed upon terms (*o*). Formerly, indeed, the defendant might, in the Queen's Bench, have been arrested a second time for the same cause in a second action, where the plaintiff in the first action was nonprossed, or nonsuited, or discontinued it; for the plaintiff, it was said, suffered enough by paying the costs in the first action, and therefore ought not to be in a worse situation than before; but the practice was different in the Common Pleas (*p*); and, by a general rule of all the Courts, *H. T.*, 2 *W.* 4, *r.* 7, "after *nonpros*, *nonsuit*, or *discontinuance*, the defendant shall not be arrested a second time without the order of a Judge" (*q*). If a defendant was superseded for the laches of the plaintiff, he could not afterwards be held to bail for the same cause of action; and this, although the second arrest was in a different form of action, provided it was for the same cause (*r*). Where plaintiff arrested defendant for the amount of two items, and recovered for one only, offering no evidence on

(*l*) As to who this includes, see sect. 176. As to what soldiers were within the meaning of the Mutiny Acts, see *Lloyd* v. *Woodall*, 1 W. Bl. 29; 1 Wils. 216: *Bayley* v. *Jenners*, 1 Str. 2: *Johnson* v. *Lowth*, 1 Str. 7; 10 Mod. 346: *Flanders* v. *Nicholls*, Barnes, 432: *Bowler* v. *Owen*, 2 T. R. 279: *R.* v. *Archer*, 1 Burr. 446, 636, 647: *R.* v. *Dawes*, 8 East, 105: *Rickman* v. *Studwick*, 2 Ld. Raym. 1246: *Bryan* v. *Woodward*, 4 Taunt. 557.

(*m*) See R. M. 15 Car. 2, *s.* 2: *Belifante* v. *Levy*, 2 Str. 1209: *Housin* v. *Barrow*, 6 T. R. 218: *M'Clure* v. *Pringle*, 13 Price, 8; M'Clel. 2.

(*n*) See *Halliday* v. *Lawes*, 3 Bing. N. C. 541; 5 Dowl. 485: *Nyas* v. *Noy*, 2 Jur. 547.

(*o*) See *Richards* v. *Stuart*, 10 Bing. 322: *Olmius* v. *Delaney*, 2 Str. 1216.

(*p*) See Tidd, New Prac. 118.

(*q*) This rule was repealed by R. H. T. 1853. See *Wheelwright* v. *Joseph*, 5 M. & S. 93: *Bates* v. *Barry*, 2 Wils. 381: *White* v. *Gompertz*, 5 B. & Ald. 905; 1 D. & R. 6: *Belifante* v. *Levy*, 2 Str. 1209: *Turton* v. *Hayes*, 1 Str. 439: *Kearney* v. *King*, 1 Chit. Rep. 273.

(*r*) *Imlay* v. *Ellefsen*, 3 East, 309. See *Musgrave* v. *Medex*, 8 Taunt. 24: *England* v. *Lewis*, 3 D. & R. 189.

PART XVI.

the other, the Court discharged defendant on entering an appearance, upon plaintiff arresting him a second time for the item in respect of which no evidence had been offered in the first action (*s*). If the Court or a Judge allowed a second arrest, on the terms of discontinuing the first action, &c., and the first action were discontinued, the second arrest might have taken place on the same affidavit of debt as the first, if sworn before the same officer (*t*). Notice of discontinuance of a bailable action was not necessary previously to the second arrest, pursuant to the rule or order allowing it (*u*).

Arrest on fresh security.

Where defendant was arrested, and discharged from arrest on giving a fresh security, he might be again arrested on such fresh security, for that would not be an arrest for the *same cause* of action (*x*).

Arrest got rid of by fraud, no bar to a second arrest.

When a party rid himself of an arrest by subterfuge or fraud, plaintiff might have arrested him again without any rule of Court or order. Thus, where defendant, on being arrested, gave plaintiff a draft for part of the debt on a person with whom he had no connexion, and promised to settle the remainder in a few days; the draft not being paid when presented for payment, plaintiff sued out a new writ on the former affidavit (*y*), and had defendant arrested on it; the Court held that he was justified in doing so, for the draft was a fraud upon him (*z*). But in a similar case where the security given by defendant was worthless, and there was no fraud, the Court would not sanction defendant's second arrest upon the original cause of action (*a*).

Second arrest after compromise.

Where the first action was compromised, and a second action brought for the same cause, the Court or a Judge could not discharge the bail bond taken on an arrest, unless the proceedings appeared to be vexatious (*b*). And where defendant was let out of custody at his own request, to give him an opportunity of attending to his business, he might have been again arrested on the same affidavit (*c*).

Where defendant discharged from first arrest without default of plaintiff.

If defendant was discharged out of custody for some act for which plaintiff was not answerable, as, for an alteration in the sheriff's warrant, or the like, defendant, in such case, might be again held to bail for the same cause of action (*d*). Where defendant had given a bond conditioned to pay a sum of money if a sentence of a vice-admiralty Court should be affirmed on appeal; and the appeal being afterwards dismissed for want of prosecution, defendant was arrested and holden to bail on the bond; the appeal, however, was afterwards restored upon petition, and the action

(*s*) *Hamilton* v. *Pitt*, 7 Bing. 230; 4 M. & P. 868; 1 Dowl. 299.

(*t*) *Richards* v. *Stuart*, 10 Bing. 322.

(*u*) *Price* v. *Day*, 3 Dowl. 463; 1 C., M. & R. 837; 5 Tyr. 456.

(*x*) *Hamber* v. *Cooper*, 1 Gale, 103; 3 Dowl. 671; 2 C., M. & R. 148. But see *Taylor* v. *Wasteneys*, 2 Str. 1218.

(*y*) See *Richards* v. *Stuart*, 10 Bing. 322.

(*z*) *Puckford* v. *Maxwell*, 6 T. R. 52: *Cantellow* v. *Freeman* or *Trueman*, 1 C. & M. 536; 2 Dowl. 2; 3 Tyr. 579.

(*a*) *Wilson* v. *Hamer*, 8 Bing. 54; 1 M. & Sc. 120; 1 Dowl. 248.

(*b*) *Brown* v. *Davis*, 1 Chit. Rep. 161.

(*c*) *Penfold* v. *Maxwell*, 1 Chit. Rep. 275: *Cantellow* v. *Trueman*, 2 Dowl. 2; 1 C. & M. 536; 3 Tyr. 579. *Anon.*, 1 Chit. Rep. 274.

(*d*) *Housin* v. *Barrow*, 6 T. R. 218

consequently was suspended and the bail discharged; but being again dismissed, plaintiff commenced a new action on the bond, and again held defendant to bail; the Court, under these circumstances, refused to discharge him (*e*). Sometimes, where the judgment in the first action had been reversed for error (*f*), plaintiff might, after payment of costs, hold defendant to bail in a new action for the same cause (*g*).

After arrest in foreign country.

A defendant who had been arrested in a foreign country might be again arrested in this country for the same cause of action (*h*). And where defendant who had been arrested in a foreign country on a judgment obtained there, escaped and came to this country, the Court of Queen's Bench decided that he might be held to bail here in an action on the judgment (*i*). But after an arrest in Ireland (*k*), or Scotland, defendant could not, in general, be again arrested here for the same debt, neither of them being deemed a foreign country for such a purpose. Where defendant had surrendered upon a foreign attachment, sued out in the Mayor's Court in London, and plaintiff thereupon abandoned the suit, and held defendant to bail in an action in the Common Pleas for the same cause, the Court refused to discharge him on entering a common appearance (*l*).

Second arrest by executors.

If plaintiff arrested defendant, and died, his executors might again arrest defendant for the same cause (*m*). So, where plaintiff became bankrupt before interlocutory judgment, defendant might be arrested and held to bail by the assignees in a second action for the same cause (*n*). But where defendant had been arrested in an action brought in the name of a bankrupt by the authority of his assignees, he could not afterwards be arrested at the suit of the assignees for the same cause of action, unless the first action had been discontinued, and the costs paid (*o*).

Arrest in two counties.

Where plaintiff sued out writs into two counties, and arrested defendant on both, who gave bail upon each arrest, the Court of Common Pleas directed that the bail given upon the first arrest should stand, but that the proceedings upon the second arrest should be set aside with costs to be paid by plaintiff (*p*).

Waiver by putting in bail.

An undertaking to put in bail waived the objection to a second arrest, being for the same cause of action, without a Judge's order (*q*).

Maliciously arresting twice for same cause of action.

As to defendant maintaining an action if maliciously arrested twice for the same cause of action, *see Heywood* v. *Collinge*, 9 A. & E. 268.

(*e*) *Woodmeston* v. *Scott*, 1 N. R. 13.
(*f*) *Cartwright* v. *Keely*, 7 Taunt. 192.
(*g*) *Turton* v. *Hayes*, Str. 439.
(*h*) *Maule* v. *Murray*, 7 T. R. 704. And see *Imlay* v. *Ellefsen*, 2 East, 453.
(*i*) *Alicen* v. *Furnival*, 1 Dowl. 660.
(*k*) *Gunn* v. *M'Clintock*, 2 Dowl. 660.
(*l*) *Bromley* v. *Peck*, 5 Taunt. 852, n.; *Wood* v. *Thompson*, Id. 851. See *Paine* v. *Gawdery*, 3 D. & R. 33: *Musgrave* v. *Medex*, 8 Taunt. 24: *Chamberlayne* v. *Green*, 9 M. & W. 790. But see *England* v. *Lewis*, 3 D. & R. 189.
(*m*) *Mellin* v. *Evans*, 1 C. & J. 82.
(*n*) *Barnes* v. *Maton*, Tidd, 9th ed. 175, 176; 15 East, 631.
(*o*) *Carter* v. *Hart*, 1 Chit. Rep. 276.
(*p*) *Bullock* v. *Morris*, 2 Taunt. 67.
(*q*) *Halliday* v. *Lawes*, 5 Dowl. 485.

Sect. 3. *The Affidavit to Arrest* (*a*).

	PAGE
Form of	1464
How intituled	1464
Deponent's Abode and Addition	1464
Names of the Parties	1464
Statement of Cause of Action	1465
Statement that Defendant is about to quit England, &c.	1474
Statement that an Action is pending	1475
Form of—continued.	
Statement that the Absence of the Defendant will materially prejudice the Plaintiff	1475
Jurat	1476
Mode and Time of Swearing	1476
By whom to be sworn	1476
Before whom sworn	1476
When to be sworn, and Duration of	1476

Form of.

Form of.

The order for the arrest is obtained on an affidavit (*a*). *When prepared, the affidavit must be ingrossed on plain paper* (*b*), *and sworn as directed ante, Vol.* 1, p. 462.

How intituled.

How intituled.]—As to the mode of intituling an affidavit, *see Vol.* 1, *Ch. XLIV.* As a general rule it should be intituled in the High Court of Justice, and in the Division in which the action is pending (*c*).

If the affidavit be sworn before the issuing of the writ of summons, it should not be intituled in any cause (*d*). But the Court refused to set aside a Judge's order to hold to bail, upon the ground that the affidavit which was sworn before the writ issued was intituled in the cause (*e*). If sworn after the issuing of the writ, it should be intituled in the cause (*f*).

It has been held, that affidavits used shortly before on a similar application against the same defendant at the suit of another plaintiff, intituled in that cause, were admissible (*g*).

Deponent's abode and addition.

Deponent's Abode and Addition.]—As to the deponent's abode and addition, *see Vol.* 1, *p.* 454. For an error in this respect a defendant might formerly have been discharged from custody (*h*).

Names of the parties.

Names of the Parties.]—In general, under the old practice, the affidavit must have set forth the *christian* and *surname* of the *defendant* in full (*i*); and the adoption of initials or contractions would

---

(*a*) See R. of S. C., Ord. LXIX. r. 1, post, p. 1477.

(*b*) See forms, Chit. Forms, p. 774, et seq.

(*c*) *Molling* v. *Poland*, 3 M. & Sel. 157: *R.* v. *Hare*, 13 East, 189. And see *Kennett and Avon Canal Co.* v. *Jones*, 7 T. R. 451.

(*d*) See *Hollis* v. *Brandon*, 1 B. & P. 36: *Green* v. *Redshaw*, Id. 227.

(*e*) *Hargreaves* v. *Hayes*, 5 El. & Bl. 272; 24 L. J., Q. B. 281.

(*f*) *Schletter* v. *Cohen*, 7 M. & W. 389; 9 Dowl. 277: *Ball* v. *Stanley*, 6 M. & W. 399, per *Alderson*, B., and per *Campbell*, C. J., in *Hargreaves* v. *Hayes*, supra.

(*g*) *Langston* v. *Wetherell*, 14 L. J., Ex. 229; 14 M. & W. 104.

(*h*) *Jarrett* v. *Dillon*, 1 East, 18.

(*i*) *Waters* v. *Joyce*, 1 D. & R. 150.

not suffice (*k*). But by 3 & 4 *W.* 4, *c.* 42, *s.* 12, "In all actions upon *bills of exchange* or *promissory notes*, or other *written instruments*, any of the parties to which are designated by the initial letter or letters, or some contraction, of the *christian* or first name or names, it shall be sufficient in every affidavit to hold to bail, and in the process or declaration, to designate such person by the same initial letter or letters, or contraction, of the *christian* or first name or names, instead of stating the *christian* or first name or names in full" (*l*). It is sufficient to describe the defendant in the same way as he is described in the writ of summons (*ante*, *Vol.* 1, p. 217); but care must be taken that he be described by his right name (*post*, p. 1474). An affidavit that "*Edward Joyce*" is indebted in a sum due to deponent from "George Page Edward Joyce," was held bad (*m*).

It is not necessary to give an *addition* to the defendant.

Addition of defendant.

Statement of Cause of Action.]—By 32 & 33 *V. c.* 62, *s.* 6, noticed *ante*, p. 1450, the affidavit must show that the plaintiff has good cause of action against the defendant to the amount of 50*l.* or upwards. The general rule as to the statement of the cause of action is, that the affidavit must be such that perjury may be assigned on it, if false; and whatever is necessary to show the plaintiff's right of action must be expressly stated (*n*). It would not be safe to deprive a defendant of his liberty, without calling on the plaintiff to show the character in which he sues, or at least that he has authority to sue; for defendant might be indebted, and to a great amount, and yet the debt might be one on which plaintiff might have no right to arrest him (*o*). The affidavit ought to be certain and explicit, and nothing left to intendment (*p*). An affidavit that the defendant *in* indebted, instead of *is* indebted, has been held bad (*q*).

Statement of cause of action.

The affidavit must be such that perjury can be assigned.

The affidavit must be *direct and positive* as to the existence of the debt or other cause of action, and not merely argumentative (*r*). Consequently, swearing to the debt, "as the deponent believes" (*s*); or, "as appears by the bond;" or, "by the books;" or, "by the confession of the defendant," or the like (*t*); or, "as appears by the Master's allocatur" (*u*), or, "according to the bill delivered by the plaintiff to the defendant" (*x*); or even swearing that defendant is indebted to plaintiff in a certain sum, adding,

Must be direct and positive.

(*k*) *Reynolds* v. *Hankin*, 4 B. & A. 536; *Lake* v. *Silk*, 3 Bing. 296.

(*l*) See Vol. 1, p. 218.

(*m*) *Waters* v. *Joyce*, 1 D. & R. 150.

(*n*) See per *Vaughan*, B., 2 C. & J. 471. See per *Dallas*, C. J., *Skeen* v. *M'Gregor*, 8 Moore, 108. See *Handley* v. *Franchi*, L. R., 2 Ex. 34; 36 L. J., Ex. 32.

(*o*) See *Hughes* v. *Brett*, 2 Bing. 239, per *Jones*, Serjt.: per *Kelly*, C. B., *Handley* v. *Franchi*, L. R., 2 Ex. 34.

(*p*) *Fricke* v. *Poole*, 9 B. & C. 43, 45; M. & R. 448.

(*q*) *Reeks* v. *Groeman*, 2 Wils. 224.

(*r*) *Sheldon* v. *Baker*, 1 T. R. 87: *Wheeler* v. *Copeland*, 5 T. R. 364: *Poup* v. *Ludvigson*, 2 Burr. 655: *Van Morsel* v. *Julian*, 1 Wils. 231: *Long* v. *Lynch*, 3 Wils. 154.

(*s*) *Rios* v. *Belifante*, 2 Str. 1209: *Claphamson* v. *Bowman*, Id. 1226.

(*t*) *Kelly* v. *Devereux*, 1 Wils. 339: *Rollin* v. *Mills*, Id. 279: *Anon.*, Id. 121: *Heatheote* v. *Gosling*, 2 Str. 1157: *Walrond* v. *Fransham*, Id. 1219: *Jennings* v. *Martin*, 3 Burr. 1447: *Swarbreck* v. *Wheeler*, Barnes, 100: *Kelly* v. *Devereux*, Say. 59.

(*u*) *Powell* v. *Portherch*, 2 T. R. 55.

(*x*) *Williams* v. *Jackson*, 3 T. R. 575.

PART XV.

"for which he has not accounted" (*g*), is not sufficient. And where the affidavit is not positive as to the debt, but merely states the circumstances of the case, and then adds, "therefore the defendant is indebted," &c. (*z*); or where the affidavit states that the defendant is indebted unto the plaintiff for goods sold and delivered, &c., to defendant, and proceeds to state that the plaintiff has received no other security, save some bills of exchange, overdue and unpaid, without stating that the plaintiff is the holder thereof (*a*); in these cases it is insufficient. But an affidavit that the defendant is indebted to the plaintiff in such a sum "as he computes it," is good (*b*). So, in an affidavit made by the plaintiff's agent (plaintiff himself being abroad), a debt on a judgment being first positively sworn to, a subsequent statement that the judgment is still in force, unpaid and unsatisfied, "as deponent verily believes," will not vitiate it (*c*). An affidavit, that defendant is "indebted," &c., without also using the usual words "justly and truly," is sufficient (*d*).

Except where it is impossible to swear positively.

Where it is *impossible* to swear *positively*, as if the cause of action arose from the nonpayment of bills in India, it is sufficient for the party to swear, that they were not paid "to his knowledge and belief" in India or elsewhere (*e*). So, where the plaintiff sues in autre droit, as executor or administrator, or as trustee of a bankrupt, it is not required that he should swear positively to the debt; and if an executor swear to his belief (*f*), or if a trustee of a bankrupt swear to the debt, "as appears by the bankrupt's books," or "by his last examination," or the like, "and as he verily believes" (*g*), it will be sufficient. But an affidavit by an executor, of the defendant having been indebted to the testator "as appears from a statement made from the testator's books by an accountant employed to investigate the same, as deponent verily believes," has been held insufficient (*h*). So, where an assignee of a bankrupt swore to a debt as appeared from the letters of A. and B. "as this deponent believes," the affidavit was considered insufficient (*i*). So, it was considered insufficient, where it was made by a bankrupt, who swore that defendant was indebted to deponent before the commission, and "as he believes" was still indebted to his assignees, on a bill accepted by defendant, indorsed by the drawer to deponent, and "as he believes" still unpaid (*k*). In the case of an assignee of a bond, or the like, he will be allowed to swear "to the best of his knowledge and belief," to all facts not within his

By executors or trustee.

(*g*) *Champion* v. *Gilbert*, 4 Burr. 2126: *Mackenzie* v. *Mackenzie*, 1 T. R. 716, sed. qy.

(*z*) *Mackenzie* v. *Mackenzie*, 1 T. R. 716: *Fowler* v. *Morton*, 2 B. & P. 48.

(*a*) *Bostock* v. *White*, cor. *Tenterden*, C. J., at Chambers, 6th Sept. 1830.

(*b*) *Moulthy* v. *Richardson*, 2 Burr. 1032.

(*c*) *Blunde* v. *Drake*, 1 Chit. Rep. 165.

(*d*) *Lee* v. *Bidwell*, 4th July, 1831, cor. *Alderson*, B., at Chambers: *Polleri* v. *De Souza*, 4 Taunt. 154.

(*e*) *Hobson* v. *Campbell*, 1 H. Bl. 245.

(*f*) *Sheldon* v. *Baker*, 1 T. R. 87: *Roche* v. *Carey*, 2 W. Bl. 350. And see *Garnham* v. *Hammond*, 2 B. & P. 298: *Rowney* v. *Dean*, 1 Price, 402.

(*g*) *Swayne* v. *Crammond*, 4 T. R. 176: *Tonna* v. *Edwards*, 4 Burr. 2283: *Barclay* v. *Hunt*, Id. 1992: *Lowe* v. *Farley*, 1 Chit. Rep. 92.

(*h*) *Rowney* v. *Deane*, 1 Price, 402.

(*i*) *Molling* v. *Buckholtz*, 2 M. & Sel. 563.

(*k*) *Tucker* v. *Francis*, 1 Bing. 142; 12 Moore, 347.

own knowledge (*l*). If, in any of these cases, the executor, assignee, &c. take upon himself to swear positively to the debt, the affidavit will not be rejected on that account, however improbable it may be that he should have a positive knowledge of it (*m*). An affidavit that defendant is indebted to plaintiff and his wife as administratrix of J. P., deceased, in 1,455*l.*, for principal and interest due on a bond for 2,400*l.* made by defendant to the said J. P., and conditioned for the payment of 1,200*l.* and interest at a day past, is sufficient, and this without stating expressly that J. P. died intestate, &c. (*n*).

By partner.

An affidavit of debt by a surviving partner must show distinctly that the other partner is dead (*o*).

Stating right to sue by law of foreign country.

An affidavit stating that defendant was indebted to B. for goods sold and delivered in Holland, and that the debt was assigned to plaintiff, according to the laws of that country, and concluding with a statement that the assignees of a debt may sue the debtor according to the laws of Holland, "as plaintiff is informed and believes," was held sufficient to hold the defendant to bail here (*p*). But an affidavit that defendant was indebted to plaintiff as liquidator of an estate, duly appointed by the law of France, is bad, unless it show that by the law of France a liquidator is entitled to sue (*q*).

Affidavit must disclose a sufficient cause of action.

The affidavit must not only be direct and positive as to the existence of the debt or other cause of action, but must also show a *sufficient cause of action* for which defendant *may be arrested* for the amount stated (*r*), and such cause of action must be stated explicitly, and with a sufficient degree of particularity and certainty. Therefore, an affidavit that defendant "is indebted to the plaintiff in trover" (*s*), or in so much "upon promise" (*t*), or in so much "as a balance of accounts between the plaintiff and defendant" (*u*), is insufficient. So is an affidavit that defendant is indebted to plaintiff in 1,000*l.* under an agreement in writing, whereby defendant undertook to pay plaintiff the balance of accounts, &c., "which said balance is still due and unpaid," without stating that the balance was 1,000*l.* (*x*). But an affidavit "that the defendant is indebted to the plaintiff in 22*l.* and upwards, upon the balance of an account *for goods sold and delivered* by the plaintiff to the defendant, and at his request," was held sufficient (*y*). So is an affidavit that defendant is indebted to plaintiff "on the balance of

(*l*) *Creswell* v. *Lovell*, 8 T. R. 418: *Loveland* v. *Bassett*, 1 Wils. 232. And see *Fairman* v. *Farquharson*, 1 M. & P. 179.

(*m*) See *Andrioni* v. *Morgan*, 4 Taunt. 231: *Polleri* v. *De Souza*, Id. 154. And see *Knight* v. *Keyte*, 1 East, 415: *Byland* v. *King*, 7 Taunt. 275: *Warmsley* v. *Macey*, 2 B. & B. 339. And see the forms, Chit. Forms.

(*n*) *Coppin* v. *Copper*, 10 Bing. 443; 2 Dowl. 785; 4 M. & Sc. 272.

(*o*) *Edgar* v. *Watt*, 1 H. & W. 108. See *Morrell* v. *Parker*, 6 Dowl. 123.

(*p*) *Scuerhop* v. *Schmanuel*, 4 D. & R. 189.

(*q*) *Tenons* v. *Mars*, 8 B. & C. 638; 3 M. & Rob. 38. See *De la Vega* v. *Vianna*, 1 B. & Ad. 284.

(*r*) *Cooke* v. *Dobree*, 1 H. Bl. 10: *Jacks* v. *Pemberton*, 5 T. R. 552. As to an affidavit where damages unliquidated, see *Bullock* v. *Jenkins*, 1 Pr. Rep. 645.

(*s*) *Hubbard* v. *Pacheco*, 1 H. Bl. 218.

(*t*) *Cope* v. *Cook*, 2 Doug. 467. And see *Areher* v. *Ellard*, Say. 109.

(*u*) *Polleri* v. *De Souza*, 4 Taunt. 154: *Jones* v. *Collins*, 6 Dowl. 526. And see *Eicke* v. *Evans*, 1 Chit. Rep. 15.

(*x*) *Hatfield* v. *Linguard*, 6 T. R. 217.

(*y*) *Kenrick* v. *Davis*, 9 M. & W. 22; 1 Dowl., N. S. 347.

PART XVI.

an account stated," without adding "and settled between them" (*z*). And so is an affidavit stating that defendant is indebted to plaintiff "on an account stated between them" (*a*). An affidavit for so much for "interest money," under and by virtue of an agreement, is insufficient (*b*). So is an affidavit "for money due and payable for interest upon, and for forbearance of, divers sums of money due and payable, and by the plaintiff forborne for divers spaces of time now elapsed, at the defendant's request," without stating some express contract or agreement to pay interest (*c*). But an affidavit for money lent by plaintiff to and had and received by defendant for his use, "and for interest thereon agreed to be paid by the defendant," is sufficient (*d*). An affidavit on a guarantee for goods should show the terms of the guarantee, and that the time for the payment has elapsed (*e*). So, an affidavit to arrest for a certain sum for the breach of an agreement must show that the sum demanded is stipulated damages, and not merely a penalty (*f*); and if even for stipulated damages, it must state a breach of the agreement (*g*). And the plaintiff swearing that they are "liquidated damages" will not of itself suffice (*h*). And wherever it appears that there is a condition precedent to be performed before plaintiff has a right to sue, the performance of it must be averred (*i*). An affidavit on an agreement or promise not under seal must always show a consideration (*k*); therefore, where an affidavit upon an agreement to marry the plaintiff under a penalty did not state the promises to be mutual, or show other consideration for the promise to the plaintiff, it was held insufficient (*l*). An affidavit for money lent by plaintiff to defendant for the use of another, and which defendant promised to repay or cause to be secured to plaintiff, was held bad, because it omitted to state that the money had not been secured to plaintiff (*m*). An affidavit that defendant is indebted to plaintiff "upon and by virtue of a charterparty of affreightment, bearing date, &c. for and on account of the hire of a ship let to hire by plaintiff to defendant, and by him taken for a certain voyage from ——— to ———," is sufficient (*n*).

(*z*) *Tyler* v. *Campbell*, 3 Bing. N. C. 567; 4 Sc. 384. See *Hargreaves* v. *Hayes*, 5 El. & Bl. 272; 24 L. J., Q. B. 281.

(*a*) *Balmano* v. *May*, 6 Dowl. 306, overruling *Hooper* v. *Vestris*, 5 Dowl. 700.

(*b*) *Brook* v. *Trist*, 10 East, 358. And see *Anon.*, 1 Salk. 100: *Executors of Boothby* v. *Buller*, 1 Sid. 63: *Whitfield* v. *Whitfield*, Barnes, 109: *Bosanquet* v. *Fillis*, 4 M. & Sel. 330.

(*c*) *Drake* v. *Harding*, 1 H. & W. 364; 4 Dowl. 34: *Callum* v. *Leeson*, 2 Dowl. 381; 3 C. & M. 406: *Neale* v. *Snoulton*, 9 Jur. 1058, C. P. But see *White* v. *Sowerby*, 3 Dowl. 584: *Pickman* v. *Collis*, 3 Dowl. 429.

(*d*) *Harrison* v. *Turner*, 4 Dowl. 72; 1 H. & W. 340: *Hutchinson* v. *Hargrave*, 1 Bing. N. C. 369; 1 Sc. 269.

(*e*) *Angus* v. *Robilliard*, 2 Dowl. 90. And see *Elworthy* v. *Maunder*, 5 Bing. 295. The affidavit usually states that the guarantee is in writing, signed by defendant, &c.

(*f*) *Wildey* v. *Thornton*, 2 East, 409.

(*g*) *Stinton* v. *Hughes*, 6 T. R. 13. See ante, p. 1451.

(*h*) *Chambers* v. *Ward*, 1 Dowl. 139.

(*i*) *Elworthy* v. *Maunder*, 5 Bing. 295: *Young* v. *Dowlman*, 2 Y. & J. 31: *Sykes* v. *Ross*, Id. 2.

(*k*) *Walker* v. *Gregory*, 1 Dowl. 21.

(*l*) *Macpherson* v. *Lovie*, 1 B. & C. 108; 2 D. & R. 69.

(*m*) *Jacks* v. *Pemberton*, 5 T. R. 552. See *Jenkins* v. *Law*, 1 B. & P. 365: *Elworthy* v. *Maunder*, 2 M. & P. 482; 5 Bing. 295: *Townsend* v. *Burns*, 1 Dowl. 562.

(*n*) *Skeen* v. *M'Gregor*, 8 Moore, 107; 1 Bing. 242.

So, an affidavit that defendant is indebted to plaintiff in trust for dependent, under a *deed* by which defendant covenanted to pay to plaintiff money "at certain times and on certain events now passed and happened," is sufficient (*o*). So is an affidavit that defendant is indebted to plaintiff in 500*l*. "upon a certain *indenture of mortgage*, by which the defendant covenanted to pay the said sum of money to the plaintiff at a certain day now past" (*p*). So is an affidavit for so much "for *principal* and *interest* due on a *bond* made and entered into by the defendant," without expressly stating the bond to be conditioned for the payment of money (*q*). But where the affidavit merely stated defendant to be indebted to plaintiff in 6,000*l*., without adding for principal and interest on a bond in the penal sum of 25,000*l*., the Court held it to be insufficient, as it did not appear what was the condition of the bond (*r*). The affidavit should, at all events, state that the bond is due and payable (*s*).

On a deed.

On a bond.

An affidavit of debt on an *award* ought to state the fact of the submission to arbitration, the making of the award, and that the money was due at a day past (*t*). And if the award direct money to be paid by defendant to plaintiff upon demand, the affidavit must state such demand (*u*).

On an award.

An affidavit of debt on an Irish judgment must before the assimilation of the currency have stated the value of the sum recovered (*x*); but this is no longer requisite (*y*).

On Irish judgment.

An affidavit on a *bill of exchange* or *promissory note*, not expressly payable with interest, should show that the sum for which the arrest is to be made is for principal money only, either by an express allegation to that effect (*z*), or else by stating the sum payable by the bill or note (*a*). It must state that it is due and unpaid (*b*), or some other circumstance from which that fact may

On bills or notes.

(*o*) *Barnard* v. *Neville*, 3 Bing. 126; 10 Moore, 475. And see *Lambert* v. *Wray*, 3 Dowl. 169; 1 C. M. & R. 576.

(*p*) *Masters* v. *Billing*, 3 Dowl. 751.

(*q*) *Byland* v. *King*, 7 Taunt. 275; 1 Moore, 24.

(*r*) *Bosanquet* v. *Fillis*, 4 M. & Sel. 330: *Chambers* v. *Ward*, 1 Dowl. 139.

(*s*) *Smith* v. *Kendall*, 7 D. & R. 232.

(*t*) *Anon.*, 1 Dowl. 5. See the forms, Chit. Forms, p. 758.

(*u*) *Driver* v. *Hood*, 7 B. & C. 494; 1 M. & Rob. 324. See further, as to an affidavit of debt on an award, *Jenkins* v. *Law*, 1 B. & P. 365: *Musel* v. *Angel*, 6 D. & R. 15.

(*x*) *Storie* v. *Ball*, 2 Chit. Rep. 16: *Kearney* v. *King*, 2 B. & Ald. 301; 1 Chit. Rep. 28, 273.

(*y*) See 6 G. 4, c. 79, which assimilated the currency. See *Picardo* v. *Machado*, 4 B. & C. 886; 7 D. & R. 478.

(*z*) According to *Fowell* v. *Petrie*, 1 N. & P. 227, an affidavit that defendant was indebted to plaintiff in 500*l*. for principal money due on a bill, without stating the sum for which the bill was drawn, is bad, for the Court do not understand what is meant by the words "principal money."

(*a*) *Brook* v. *Colman*, 2 Dowl. 7; 6 Leg. Obs. 444; 1 C. & M. 621: *Westmacott* v. *Cook*, 2 Dowl. 519: *Latraile* v. *Hoepfner*, 10 Bing. 334; 3 M. & Sc. 801; 2 Dowl. 758; overruling the cases of *Hanley* v. *Morgan*, 2 C. & J. 331; 1 Dowl. 322: *Lewis* v. *Gompertz*, 2 C. & J. 352; 1 Dowl. 319. Stating defendant to be indebted in 304*l*. 4*s*. 7*d*. for principal and interest, by virtue of an indenture covenanting to pay 300*l*., sufficiently distinguishes the principal and interest. *Jones* v. *Collins*, 6 Dowl. 526. See the forms, Chit. Forms, p. 755 et seq.

(*b*) *Kirk* v. *Almond*, 1 Dowl. 318; 2 C. & J. 354: *Halcombe* v. *Lambkin*, 2 M. & Sel. 475: *Edwards* v. *Dick*, 3 B. & Ald. 495: *Machu* v. *Fraser*, 7 Taunt. 171.

PART XVI.

be presumed: such as the date or time of acceptance, and at what period the note was payable, or that it was payable on demand, or on a day past, or the like (c); but it is not otherwise necessary to state the date (d). Where a note is payable by instalments, the affidavit should show what instalments are due, and it will not suffice to state that the sum for which the note was given has not been paid (e). An affidavit stating that defendant was indebted to plaintiff in a certain sum, upon the balance of a bill drawn by plaintiff and accepted by defendant, and due at a day past, is sufficient (f). It must also show how defendant is indebted, and the character in which he is sued, whether as acceptor, drawer or indorser (g). It is a matter of doubt whether it is necessary for the affidavit to show the character in which plaintiff sues, whether as indorsee or payee: it is submitted that it is (h). In an action by an indorsee, it must, according to some authorities, be stated by whom the bill was indorsed; and it is not enough to state that it was "duly indorsed" (i): but, according to other cases, it is enough to show that plaintiff claims as indorsee without stating an actual indorsement (k). An affidavit that defendant was indebted to plaintiff "on a bill of exchange drawn by M. D. on and accepted by defendant, and indorsed by M. D. to plaintiff," without saying that the bill was payable to order, has been deemed sufficient (l); and intermediate indorsements need not be stated (m). In an action against the drawer or indorser, the affidavit must allege the presentment and default of the acceptor, or else something to dispense with it; but it need not allege notice of dishonour (n). It has been considered that the default of the acceptor was sufficiently stated in

(c) *Kirk* v. *Almond*, 1 Dowl. 318; 2 C. & J. 354: *Jackson* v. *Yate*, 2 M. & Sel. 148: *Elstone* v. *Mortlake*, 1 Chit. Rep. 648. See *Mann* v. *Sheriff*, 2 B. & P. 355: *Shirley* v. *Jacobs*, 3 Dowl. 101: *Phillips* v. *Turner*, Id. 163; 1 C. M. & R. 597: *Davidson* v. *Marsh*, 1 N. R. 157.

(d) See *Irving* v. *Heaton*, 4 Dowl. 638.

(e) *Hart* v. *M'Gerris*, 3 Tyr. 228. And see *Roberts* v. *Pilkinton*, 7 Leg. Obs. 388.

(f) *Walmsley* v. *Dibden*, 4 M. & P. 10.

(g) *Humphreys* v. *Winslow*, 6 Taunt. 531; 2 Marsh. 231: *M'Taggart* v. *Ellis*, 4 Bing. 114; 12 Moore, 326; 4 M. & Sc. 357 (e). An affidavit stating defendant to be indebted, &c., on a bill *drawn and accepted* by him, has been held sufficient. *Harrison* v. *Rigby*, 6 Dowl. 93; 3 M. & W. 66.

(h) See *Balbi* v. *Batley*, 6 Taunt. 25; Marsh. 424: *Mammatt* v. *Mathew*, 4 M. & Sc. 356; 10 Bing. 506: *Warmsley* v. *Macey*, 5 Moore, 52, 168; 2 B. & B. 338. But see Tidd, New Prac. 121: *Bradshaw* v. *Saddington*, 7 East, 94; 3 Smith, 117: *Elstone* v. *Mortlake*, 1 Chit. 648: *Brooks* v. *Clark*, 2 D. & R. 148: *Walmsley* v. *Dibden*, 4 M. & P. 10. The practice, at all events, is to state the character in which the plaintiff sues.

(i) *Lewis* v. *Gompertz*, 2 C. & J. 352; 1 Dowl. 319: *M'Taggart* v. *Ellis*, 4 Bing. 114.

(k) *Mammatt* v. *Mathew*, 4 M. & Sc. 356; 10 Bing. 406: *Bradshaw* v. *Saddington*, 7 East, 94.

(l) *Hughes* v. *Brett*, 6 Bing. 239; 3 M. & P. 566. And see *Bradshaw* v. *Saddington*, 7 East, 94: *Bennett* v. *Dawson*, 4 Bing. 609; 1 M. & P. 594. *Sed quære.*

(m) Chit. jun. on Bills, 741: Tidd, New Prac. 122: *Luce* v. *Irvin*, 6 Dowl. 92; 3 M. & W. 27.

(n) *Simpson* v. *Dick*, 4 Dowl. 731: *Witham* v. *Gompertz*, 4 Dowl. 382; 2 C. M. & R. 736: *Banting* v. *Jadis*, 1 Dowl. 445: *Cross* v. *Morgan*, Id. 122: *Buckworth* v. *Levy*, 7 Bing. 251; 5 M. & P. 23; 1 Dowl. 211: *Crosby* v. *Clark*, 1 M. & W. 296; 1 T. & G. 660; 5 Dowl. 62: *Hopkins* v. *Salembier*, 5 M. & W. 423; 7 Dowl. 493. In an action against the acceptor the allegation is not necessary.

the affidavit by this averment, "and which having become due, is wholly unpaid," without stating any presentment to the acceptor (*o*); but the correctness of this seems questionable; and, in a subsequent case, a statement, that the amount "is now due and unpaid," was held not to be a sufficient statement of the acceptor's default (*p*). An affidavit, stating that several persons are jointly indebted to the plaintiff, on a bill of exchange accepted in the name and firm of A. and Co., "*by them or one of them*," is insufficient (*q*).

For ordinary claims, goods sold, &c.

An affidavit that defendant is indebted to plaintiff for *goods sold and delivered*, not stating "by the plaintiff to defendant" (*r*), or for goods sold and delivered to defendant, without saying "by the plaintiff" (*s*); or for goods sold and delivered *for* the defendant, instead of *to* the defendant (*t*); or, it seems, for goods bargained and sold, without alleging that they were "delivered" (*u*); or, for meat, lodging, &c. found and provided by plaintiff for defendant, and at his request, and for money paid, laid out, and expended, and lent and advanced by plaintiff "to" the defendant, and at his request, omitting the words "for the defendant" (*x*); or in "1,000*l.* on *balance of account* for money paid, laid out, and expended by plaintiff, *to and for defendant*, and at his request," &c. (*y*); or, "for money had and received by the defendant for and on account of the plaintiff, and at his request," instead of "to and for the use of the plaintiff" (*z*), is bad. But where an affidavit stated that defendant was indebted to plaintiff for materials found and provided, goods sold and delivered, and work and labour done and performed by the plaintiff, to and for the use of the defendant, the Court held that the latter allegation had reference to the whole of the items, and that the affidavit was sufficient (*a*). And an affidavit for money had and received on account of plaintiff, without adding "by the defendant" (*b*), has been held sufficient. So, an affidavit that defendant was indebted to plaintiff in 20*l.*, lent and advanced on a bill of exchange for 37*l.*, drawn by J. S. on, and accepted by, defendant, and now overdue and unpaid, is sufficient, without saying to whom the money was lent (*c*). So is an affidavit that defendant is indebted to plaintiff "for the use and occupation of a certain dwelling-

(*o*) *Weedon* v. *Medley*, 2 Dowl. 689. But the case in 7 Bing. 251; 5 M. & P. 23, was not there cited.

(*p*) *Jones* v. *Collins*, 6 Dowl. 526. And see *Hopkins* v. *Salembier*, supra.

(*q*) *Harmer* v. *Ashby*, 10 Moore, 323.

(*r*) *Perks* v. *Severn*, 7 East, 194: *Taylor* v. *Forbes*, 11 East, 315: *Young* v. *Gatien*, 2 M. & Sel. 603: *Handley* v. *Franchi*, L. R., 2 Ex. 34; 36 L. J., Ex. 32.

(*s*) *Cathrow* v. *Haggar*, 8 East, 106: *Fenton* v. *Ellis*, 6 Taunt. 192; 1 Marsh. 535.

(*t*) *Bell* v. *Thrupp*, 2 B. & Ald. 596; 1 Chit. Rep. 331.

(*u*) *Hopkins* v. *Vaughan*, 12 East, 388: *Loisada* v. *Maryoseph*, 8 Moore, 366; 1 Bing. 357: *Pontifex* v. *De Maltzoff*, 1 Ex. 436; 17 L. J., Ex. 55. See *Hargreaves* v. *Hayes*, 5 El. & Bl. 272; 24 L. J., Q. B. 281, where an affidavit for shares sold was held sufficient.

(*x*) *Fricke* v. *Poole*, 9 B. & C. 543; 4 M. & R. 448.

(*y*) *Visger* v. *Delegal*, 2 B. & Ad. 571; 1 Dowl. 333. See *Stratton* v. *Matthews*, 6 D. & L. 229; 3 Ex. 48; a case of money paid on an accommodation acceptance.

(*z*) *Kelly* v. *Curzon*, 4 A. & E. 622; 1 H. & W. 678.

(*a*) *Lucas* v. *Goodwin*, 4 Sc. 502; 3 Hodges, 32.

(*b*) *Coppinger* v. *Beaton*, 8 T. R. 338. But see *Kelly* v. *Curzon*, 4 A. & E. 622; 1 H. & W. 678.

(*c*) *Bennett* v. *Dawson*, 1 M. & P. 594; 4 Bing. 609.

PART XVI.

house, &c. of the plaintiff, held and enjoyed by the defendant as tenant thereof," without saying as tenant to the plaintiff, or that defendant held at his request (*d*). So, an affidavit, which states that defendant is indebted to plaintiff for the hire of divers carriages, &c. of plaintiff, hired to and for the use of defendant, is sufficient, without stating that they were hired of plaintiff, or by whom they were hired (*e*). So is an affidavit stating the debt to be "for money paid, laid out, and expended, and wages due to the plaintiff for his services on board the defendant's ship," without expressly stating that the wages were due from defendant (*f*). And an affidavit stating that defendant was indebted to plaintiff in 130*l.* and upwards, for work and labour done, and for paper found by plaintiffs and their servants, in and about the printing of a certain book of defendant's and at his request, was held to be sufficient to show that the work was done, and the materials found for defendant, and at his instance (*g*). An affidavit stating defendant to be indebted to plaintiff for money had and received to the use of his *wife* (*h*) is bad. An affidavit for *interest* must show an express contract for it, or otherwise that it is claimable as a debt (*i*). But it need not state the amount of the principal, nor the time when the interest began to run (*k*). We have already noticed (*l*) instances as to what will be a sufficient or insufficient affidavit of debt on an *account stated*.

Statement of defendant's request.

As regards the statement of defendant's *request*, it has been held that an affidavit for *money lent* and advanced (*m*), or for goods sold and *delivered* (*n*) to defendant is sufficient, without stating *expressly* that the money was lent or the goods sold at defendant's *request*. Affidavits to arrest for *money paid* to the use of the defendant, or for *work and labour done*, should state the money to have been paid, or the work and labour to have been done, at the *request* of the defendant (*o*). In an affidavit for the agistment of cattle, it must be stated that the agistment was at defendant's request (*p*).

In trover.

An affidavit to arrest in *trover* should state that plaintiff was possessed of the goods, their value, and a conversion by defendant, either express or implied (*q*). Where it did not appear from the

---

(*d*) *Lee* v. *Sellwood*, 9 Price, 332: and *Bostock* v. *White*, cor. *Tenterden*, C. J., at Chambers, 6th Sept. 1830, MS.

(*e*) *Brown* v. *Garnier*, 6 Taunt. 389; 2 Marsh. 83. *Sed quære.*

(*f*) *Symonds* v. *Andrews*, 1 Marsh. 317.

(*g*) *Gale* v. *Leekie*, 6 M. & Sel. 228.

(*h*) *Wade* v. *Wade*, 4 Bing. 50. And see *Morgan* v. *Baylis and Wife*, 3 Dowl. 117: *Coppin* v. *Potter*, 2 Dowl. 785.

(*i*) See *Neale* v. *Snoulten*, 9 D. & L. 422; 2 C. B. 320: *Drake* v. *Harding*, 4 Dowl. 34; 1 H. & W. 364: *Hutchinson* v. *Hargreave*, 1 Bing. N. C. 369; 1 Se. 269: *Harrison* v. *Turner*, 4 Dowl. 72; 1 H. & W. 346: *Callum* v. *Leeson*, 2 Dowl. 381; 2 C. & M. 406. And ante, pp. 1468-9.

(*k*) *White* v. *Sowerby*, 3 Dowl. 581; 1 H. & W. 364.

(*l*) Ante, p. 1467.

(*m*) *Bostock* v. *White*, cor. *Tenterden*, C. J., at Chambers, 6th Sept. 1830, MS. And see *Victors* v. *Davis*, 1 D. & L. 984.

(*n*) *Rowley* v. *Bayley*, 11 Moore, 383. And see *Gray* v. *Shepherd*, 3 Dowl. 442.

(*o*) See *Durnford* v. *Messiter*, 5 M. & Sel. 446: *Pitt* v. *New*, 8 B. & C. 654; 3 M. & R. 129: *Bardoe* v. *Spittle*, 1 Ex. 175; R. 8, H. 2 W. 4.

(*p*) *Smith* v. *Heap*, 5 Dowl. 11.

(*q*) See *Molling* v. *Buckholtz*, 2 M. & Sel. 563: *Anon.*, 1 Chit. 168: *Imlay* v. *Ellefsen*, 2 East, 453. The value must be 50*l.* or upwards, ante, p. 1450. See the form, Chit. Forms, p. 761.

affidavit that the goods ever were in the possession of defendant, though it stated that he refused to deliver them up, the Court discharged him (*r*). But an affidavit that defendants possessed themselves of divers goods belonging to plaintiff, and refused to deliver them up, and that they or some of them had converted and disposed of them to their own use, was held sufficient (*s*). So was an affidavit that defendant was indebted to plaintiff in 103*l.* for goods, which defendant converted to his own use (*t*). In trover for a bill of exchange, the affidavit must, it seems, allege that the bill remains unpaid (*u*).

On a penal statute.

An affidavit on a *penal statute* should specify the nature of the offence, and aver that defendant has incurred the forfeiture (*x*); but the offence need not be described circumstantially (*y*); nor is it necessary to swear that defendant is indebted to plaintiff in the amount of the penalty (*z*). But in an action for double rent under the statute, the affidavit stated a notice to quit, and a holding over by defendant, "by reason of which and by force of the statute an action accrued," &c.; and it was deemed bad because it did not state positively that defendant was indebted, &c. (*a*). Where such an affidavit stated the statute under which a penalty was incurred to have been made in 27 *G.* 3, which in fact was made in 22 *G.* 3, it was held a fatal objection, even although the title of the statute was correctly set forth (*b*).

May be good in part and bad in part.

Where there are two or more causes of action described in the same affidavit, as, for instance, where the action is brought for money had and received, and also for money lent, or the like, it is not necessary to distinguish how much defendant is indebted on each account; it suffices to state him to be indebted in one entire sum on both accounts (*c*). If the affidavit state one cause of action perfectly and another imperfectly, defendant may be arrested for the former, if separate and independent of the latter (*d*).

Must not contain causes of action which cannot be joined.

An affidavit to arrest must not comprise two causes of action which cannot be joined in one action (*e*). But an affidavit to arrest on a penal statute may include several offences committed by the same defendant (*f*). The affidavit to arrest must not include several defendants who cannot be joined in one action (*g*).

(*r*) *Wooley* v. *Thomas*, 7 T. R. 550.

(*s*) *Charter* v. *Jaques*, Cowp. 529.

(*t*) *Emerson* v. *Hawkins*, 1 Wils. 335. See *Imlay* v. *Ellefsen*, 2 East, 453; Lofft, 85.

(*u*) *Clarke* v. *Cawthorne*, 7 T. R. 321.

(*x*) *Davies* v. *Mazzinghi*, 1 T. R. 705.

(*y*) Id.: *Watson* v. *Shaw*, 2 T. R. 654.

(*z*) *Davies* v. *Mazzinghi*, 1 T. R. 705.

(*a*) *Wheeler* v. *Copeland*, 5 T. R. 463.

(*b*) *Watson* v. *Shaw*, 2 T. R. 654. See the following cases on the Lottery Acts: *R.* v. *Horne*, 4 T. R. 349: *King* v. *Pacey*, 2 H. Bl. 641: *Pritchet* v. *Cross*, Id. 17: *Holland* v. *Bothmar*, 4 T. R. 228: *Goodwin* v. *Parry*, Id. 577.

(*c*) *Hague* v. *Levi*, 9 Bing. 595; 1 Dowl. 720. And see *Rogers* v. *Godbold*, 3 Dowl. 106.

(*d*) *Jones* v. *Collins*, 6 Dowl. 526: *Carunce* v. *Rigby*, 3 M. & W. 67: *Bank of England* v. *Reid*, 7 M. & W. 161, per *Parke*, B.: *Cunliffe* v. *Maltass*, 7 C. B. 695; 6 D. & L. 723.

(*e*) *Crooke* v. *Davis*, 5 Burr. 2690: *Dean and Chapter of Exeter* v. *Seagell*, 6 T. R. 688. As to what causes of action may be joined, see Vol. 1, p. 405.

(*f*) *Holland* v. *Bothmar*, 4 T. R. 228.

(*g*) *Gilby* v. *Lockyer*, 1 Doug. 217: *De la Preuve* v. *Duc de Biron*, 4 T. R. 697: *Goodwin* v. *Parry*, 4 T. R. 577: *Hussey* v. *Wilson*, 5 T. R. 244, 254; 4 T. R. 557.

PART XVI.

Must correspond with the writ.

Must correspond with statement of claim.

The affidavit should correspond with the claim on the writ of summons (*h*).

Care should also be taken that the cause of action stated in the affidavit be that set out or intended to be set out in the statement of claim (*i*); for, if the statement of claim varies from the affidavit in the cause of action, the sureties may be thereby discharged (*k*). If the affidavit state that defendant is indebted to plaintiff as indorsee of a bill of exchange, &c., and the statement of claim be on a foreign bill, there would be no variance (*l*). The sureties may be discharged if the statement of claim varies from the affidavit in the character in which the plaintiff sues, or the defendant is sued (*m*), or in the name of plaintiff (*n*), or even in the name of defendant (*o*), unless, indeed, in the latter case, the sureties have waived the objection, as by their entering into the bond by the name in which he is described in the statement of claim. But the fact of the statement of claim containing other causes of action than that stated in the affidavit, so long as it has the cause of action mentioned in the affidavit, would not affect the sureties.

Statement that defendant is about to quit England.

Statement that Defendant is about to quit England, &c.]—By 32 & 33 *V. c.* 62, *s.* 6 (*ante*, p. 1450), the affidavit must show that there is probable cause for believing that the defendant is about to quit England, unless he be apprehended, and that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action. Where the action is for a penalty or sum in the nature of a penalty, other than a penalty in respect of any contract, it is not necessary to show in the affidavit that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action. The affidavit as to the probable cause for believing that the defendant is about to quit England, must set forth the circumstances, in order that the Judge may determine whether there is such probable cause (*p*). It need not state in express terms the deponent's belief that the defendant is about to quit England, but it is as well to do so (*q*). An affi-

(*h*) See *Green* v. *Elaie*, 3 B. & Ad. 437; 1 Dowl. 344: *Richards* v. *Stuart*, 10 Bing. 319; 2 Dowl. 537.

(*i*) It would seem that the cases decided on this subject before the Debtors Act, 1869, are still in general applicable.

(*k*) 2 Saund. 72 a: *Tetherington* v. *Goulding*, 7 T. R. 80: *Kerr* v. *Sheriff*, 2 B. & P. 358: *De la Cour* v. *Read*, 2 H. Bl. 278: *Knight* v. *Dorsey*, 1 B. & B. 48; 3 Moore, 305: *Vernon* v. *Turley*, 4 Dowl. 660; 1 M. & W. 316: *Firth* v. *Harris*, 8 Dowl. 689. If the affidavit state defendant to be indebted on a bill of exchange, and the statement of claim be on a foreign bill, there would be no variance: *Phillips* v. *Don*, 6 D. & L. 527.

(*l*) *Phillips* v. *Don*, 18 L. J., Q. B. 104: *Burns* v. *Chapman*, 5 C. B., N. S. 481.

(*m*) See per Lord *Tenterden*, C. J., *Marzetti* v. *Jouffroy*, 1 Dowl. 44: *Manesty* v. *Stevens*, 9 Bing. 400: *Ilsley* v. *Ilsley*, 1 Dowl. 310; 2 C. & J. 330: *Anon.*, 1 Dowl. 97. See *Spalding* v. *Mare*, 6 T. R. 363: *Forbes* v. *Phillips*, 2 N. R. 98, as to a variance in the names of plaintiffs or defendants.

(*n*) *Grindall* v. *Smith*, 1 M. & P. 24: *Christie* v. *Walker*, 8 Moore, 33.

(*o*) See *Clarke* v. *Baker*, 13 East, 273.

(*p*) *Bateman* v. *Dunn*, 7 Dowl. 105; 5 Bing. N. C. 49: *Harvey* v. *O'Meara*, 7 Dowl. 725.

(*q*) *Willis* v. *Snook*, 8 M. & W. 147: *Hargreaves* v. *Hayes*, 24 L. J., Q. B. 281: *Bateman* v. *Dunn*, supra.

davit of plaintiff that he has been informed and believes that defendant is about to quit England, is sufficient, provided it states the name and description of the person from whom he has received such information (*r*). Where before the above Act the affidavit stated that "the defendant is a lieutenant in her Majesty's 78th Highlanders, which said regiment is under orders to embark for India, and deponent believes, and has no doubt, that the defendant intends to embark with his regiment, and quit England," a Judge's order was obtained on it to hold defendant to bail: afterwards, defendant's solicitor made an affidavit, stating that, upon inquiry at an army agent's, it appeared that the 78th Highlanders were not under orders for India, and that deponent had been informed and believed that the said regiment was then in India; defendant did not deny that he was going abroad; upon motion to set aside the order, it was held that the affidavit on which the order was granted was primâ facie sufficient to support it, and that no sufficient ground was shown for rescinding it (*s*). Where defendant was arrested, and it appeared that he had no intention of leaving England for two months, it was held that the arrest was premature (*t*). The affidavit should also, except in the case above mentioned, show how the absence of the defendant will materially prejudice the plaintiff in the prosecution of his action. It was held that the repealed Act, 1 & 2 *V. c.* 110, *s.* 3, applied to every case of intended absence from England, which would prevent the plaintiff, if successful, from having execution by ca. sa. at the proper time (*u*); but that it did not apply to the case of a captain of a steamer trading between an English port and Hamburg, and about to depart on one of his regular voyages (*x*).

Statement that an action is pending.

Statement that an Action is pending.]—The affidavit may be made before the issuing of a writ of summons. If it is so made, it may be as well to state in it that it is the plaintiff's intention to sue out such a writ for the same cause for which it is sought to arrest the defendant. If an action has been commenced, it is as well that the affidavit should state the fact, and what it is brought for (*y*).

Statement that the defendant's absence will materially prejudice the plaintiff in the prosecution of the action.

Statement that the Defendant's Absence will materially prejudice the Plaintiff in the Prosecution of the Action.]—The Debtors Act, sect. 6 (*supra*), requires the plaintiff in all actions, except where the claim is for a penalty irrespective of any contract only, to show to the satisfaction of the Judge that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action. In order to do this, the plaintiff must show that he requires the defendant for the purpose of giving evidence either by

(*r*) *Gibbons* v. *Spalding*, 11 M & W. 173; 2 Dowl., N. S. 811: *Graham* v. *Sandrinelli*, 16 M. & W. 191.

(*s*) *Arkenheim* v. *Colegrave*, 13 M. & W. 620; 14 L. J., Ex. 113.

(*t*) See *Pegler* v. *Hislop*, 1 Ex. 436, decided under the repealed Act, 1 & 2 V. c. 110, s. 3.

(*u*) *Larchin* v. *Willan*, 7 Dowl. 11; 4 M. & W. 351: *Lamond* v. *Eiffe*, 3 Q. B. 910; 3 G. & D. 256.

(*x*) *Atkinson* v. *Blake*, 1 Dowl., N. S. 849. And see *Larchin* v. *Willan*, 7 Dowl. 11; 4 M. & W. 351, per *Parke*, B.

(*y*) See *Bullock* v. *Jenkins*, 20 L. J., Q. B. 90.

PART XVI.

way of discovery or viva voce, as in this case only can the plaintiff be prejudiced within the meaning of the section (*z*). And it is not sufficient for the affidavit simply to state that the defendant is a material witness, but it should state why his presence as a witness is material, by showing what he is required to prove and why his appearance is necessary (*a*).

Jurat.

Jurat.]—As to the form of the jurat, and as to the effect of an interlineation or erasure in it, *see Vol.* 1, *Ch.* 465 (*b*). Where the jurat was not signed by the Judge before whom it was sworn until after the order was made and acted upon, the Court set aside the proceedings for irregularity (*c*).

Mode and Time of Swearing.

By whom to be sworn.

By whom to be sworn.]—The affidavit as to the cause of action may be made either by the plaintiff himself, or by one of several plaintiffs (*d*); or by any other person (*e*) who can swear positively to the debt or cause of action; and if made by a third person, it is not necessary to state any connection between the deponent and the plaintiff (*f*). The affidavit as to the other facts necessary to be sworn to can be made by any person who is able to depose to them. Before 6 & 7 *V. c.* 85, *s.* 1, the person making the affidavit must not have been convicted of any infamous crime which would have rendered him incompetent as a witness (*g*); but since that Act this, it seems, is otherwise.

Before whom to be sworn.

Before whom to be sworn.]—Before whom affidavits may be sworn, *see Vol.* 1, *Ch.* 466. It may be here observed, that an affidavit made abroad must contain all the requisites of an affidavit to arrest made in this country (*h*); it should also, in general, show that the amount sworn to is British sterling money (*ante*, p. 1469).

When to be sworn, and duration of.

When to be sworn, and Duration of.]—The affidavit may be sworn before the issuing of the writ of summons (*i*). It should not, as a general rule, be sworn long before the application to the judge for the order to arrest. The Court, before 1 & 2 *V. c.* 110, considered a year the extent of time during which the affidavit should be considered as effectual, upon the presumption that the debt has been paid during that period (*k*). The same rules would still apply to

(*z*) Day's C. L. P. Acts, 4th ed. 407. See *Yorkshire Engine Co., Limited* v. *Wright*, 21 W. R. 15: *Hume* v. *Druyff*, L. R., 8 Ex. 214.

(*a*) Per *Lopes*, J., *Comedy Opera Co.* v. *Carte*, W. N. 1879, 213.

(*b*) See Ord. XXXVIII. r. 12, ante, p. 465.

(*c*) *Bill* v. *Bament*, 8 M. & W. 317; 9 Dowl. 810.

(*d*) *Swayne* v. *Crammond*, 4 T. R. 176.

(*e*) See 1 & 2 V. c. 110, s. 3, and 32 & 33 V. c. 62, s. 6.

(*f*) *Holliday* v. *Lawes*, 3 Bing. N. C. 541: *Short* v. *Campbell*, 3 Dowl. 487; 1 Gale, 60: *Pieters* v. *Luytjest*, 1 B. & P. 1: *Andrioni* v. *Morgan*, 4 Taunt. 231.

(*g*) *Nicholls* v. *Tallyhanty*, Barnes, 79. And see *Walker* v. *Fearney*, 2 Str. 1149; Cowp. 3. But see *Park* v. *Strockley*, 4 D. & R. 144: *Horsley* v. *Somers*, Barnes, 116: *Davis and Carter's case*, 2 Salk. 461: *Bland* v *Drake*, 1 Chit. Rep. 165.

(*h*) *Nesbitt* v. *Pym*, 7 T. R. 763, n.

(*i*) *King* v. *The Queen*, 14 Q. B. 31.

(*k*) *Collier* v. *Hague*, 2 Str. 1270: *Taylor* v. *Slater*, 2 Se. 839: *Ramsden* v. *Maughan*, 2 C. M. & R. 634: 4 Dowl. 403; 1 T. & G. 40; 1 Gale, 345: *Burt* v. *Owen*, 1 Dowl. 691: Tidd, New Prac. 125: *Hill* v. *Jervis*, 1 Leg. Obs. 30: *Doe* d. *Clark* v. *Still-*

that part of the affidavit which states the cause of action, but the statements that the defendant is about to quit England unless apprehended, and that his absence from England will materially prejudice the plaintiff in the prosecution of his action, must, of course, be sworn to at, or shortly before, the time of the application for the order to arrest.

Sect. 4. *Judge's Order to Arrest.*

	PAGE		PAGE
When and to whom applied for	1477	*Duration of the Order*	1481
Form of Order	1477	*Defects in, how and when taken advantage of*	1481
Indorsements on	1480	*Amendment of*	1482
Concurrent Orders	1481	*Action for maliciously obtaining*	1483
Costs	1481		
Practical Directions as to obtaining the Order, &c.	1481		

When and to whom applied for.

When and to whom applied for.]—From what has been stated *ante*, p. 1449 *et seq.*, it can be gathered under what circumstances a defendant can now be arrested before final judgment. He is so arrested by virtue of a Judge's order, which is made on an ex parte application.

By *R. of S. C., Ord. LXIX. r.* 1, "An order to arrest under the 6th section of the Debtors Act, 1869 (which shall be in the form No. 31 in Appendix K., with such variations as circumstances may require (*l*)), shall be made upon affidavit and ex parte; but the defendant may at any time after arrest apply to the Court or a Judge to rescind or vary the order or to be discharged from custody, or for such other relief as may be just" (*cp. Reg. Gen. M. T.* 1869, *r.* 6).

The application for the order should not be made until a writ of summons has been issued (*m*); but it may be made before the writ has been served (*m*). It seems that if by a Judge's order all further proceedings in the cause are stayed for a certain time, the plaintiff cannot until such time has expired obtain an order to arrest defendant, the obtaining such order being a proceeding in the cause (*n*). The application must be made to a Judge at Chambers, and not to the Court (*o*).

Form of the order.

Form of the Order.]—The form of the order is given by *R. of S. C., App. K. No.* 30 (which see *Chit. Forms*, p. 762).

The order directs the sheriff to make the arrest. It was held, before the Debtors Act, 1869, that a capias could not be directed to

---

well, 3 N. & P. 701: *Wynn* v. *Wynn*, 2 Sc. N. R. 615. This rule does not apply to other affidavits: Id.

(*l*) See the form, Chit. F. p. 762.

(*m*) *Brook* v. *Snell*, 8 Dowl. 370: *Williams* v. *Griffith*, 3 Ex. 584.

(*n*) *Ball* v. *Stanley*, 6 M. & W. 396; 8 Dowl. 341.

(*o*) 32 & 33 V. c. 62, s. 6, ante, p. 1450: *Barnett* v. *Craw*, 1 Dowl., N. S. 774: *Pentley* v. *Berry*, 7 M. & W. 146. As to the Judge exercising discretion in granting or refusing the order, see *Stein* v. *Valkenhuysen*, 27 L. J., Q. B. 236: *Hitchcock* v. *Hunter*, 5 Jur. 770. A Master has no jurisdiction. See R. of S. C., Ord. LIV. r. 12, ante, p. 1403.

PART XVI.

the keeper of the Queen's prison for the purpose of enabling him to detain a prisoner in his custody (*p*).

The parties' names.

Care should be taken that the parties' names be inserted correctly in the order, which should be properly intituled in the cause and in the Court in which the action is pending.

Of plaintiff.

Where, before the Debtors Act, 1869, the affidavit of debt described the plaintiff as "W. B. the younger," but in a capias he was called "W. B." only, his father bearing the same name, and residing in the same town as himself; the Court held that the writ was bad (*q*).

Of defendant.

As to the defendant's names, see the observations made *ante*, p. 1464.

Discharge of defendant arrested by wrong name.

Before the Debtors Act, 1869, if the case was not within the statute or rule referred to *ante*, p. 1465, and the defendant was arrested on a capias by initials, or by a wrong christian or surname, or without a christian name, the Court or a Judge would order him to be discharged out of custody, or the bail bond (if any) to be delivered up to be cancelled (*r*); unless the name were idem sonans (*s*), or defendant had on several occasions gone by the name by which he was described (*t*), or had represented such name to be his real one (*u*), or had waived the objection by executing the bail bond, or putting in bail above. The summons for this purpose must, before 1 & 2 *V. c.* 110, have been made or taken out before defendant had put in bail (*x*), or before an undertaking to put in bail (*y*), or, as it seems, before the time for putting it in had elapsed (*z*), and, at all events, before he had obtained time to put it in (*a*); and it would seem that 1 & 2 *V. c.* 110, *s.* 6, made no difference in this respect, for though the words of that section were "*at any time* after such arrest," yet it would seem that the defendant might waive the benefit of the statute, just in the same way as in the above-mentioned cases he was held to have waived the common law right of applying to be discharged (*b*). The Court or a Judge would generally, on making

(*p*) *Edwards* v. *Robertson*, 5 M. & W. 520: *Richards* v. *Dispraile*, 1 Dowl., N. S. 384; 9 M. & W. 459, where the plaintiff was suing as a public officer.

(*q*) *Bilton* v. *Clapperton*, 9 M. & W. 473; 1 Dowl., N. S. 386. An amendment, however, was allowed.

(*r*) *Ladbrooke* v. *Phillips*, 1 H. & W. 109, decided since 3 & 4 W. 4, c. 42, s. 11. And see *Callum* v. *Leeson*, 2 Dowl. 381; 2 C. & M. 406: *Smith* v. *Innes*, 4 M. & Sel. 360: *Reynolds* v. *Hankin*, 4 B. & A. 536: *Parker* v. *Bent*, 2 D. & R. 73: *M'Beath* v. *Chatterley*, Id. 237: *Wilks* v. *Lorch*, 2 Taunt. 399.

(*s*) *Ahitbol* v. *Beniditto*, instead of *Benedetto*, 2 Taunt. 401: *Homan* v. *Tidmarsh*, 11 Moore, 231: *Dickenson* v. *Bowes*, 16 East, 110: *R.* v. *Shakespeare*, 10 East, 83. See —— v. *Rennolls*, 1 Chit. Rep. 659, n.: *Macdonald* v. *Mortlock*, 2 D. & L. 963; 14 L. J., Q. B. 244.

(*t*) *Walker* v. *Willoughby*, 6 Taunt. 530; 2 Marsh. 230: *Mesnier* v. *Hertz*, 3 M. & Sel. 453: *Newton* v. *Maxwell*, 2 C. & J. 215; 1 Dowl. 515.

(*u*) *Morgans* v. *Bridges*, 1 B. & A. 647. And see *Brunskill* v. *Robertson*, 9 A. & E. 846, per *Denman*, C. J.: *Fisher* v. *Magnay*, 6 Sc. N. R. 602, per *Cresswell*, J.

(*x*) *Murray* v. *Hubbart*, 1 B. & P. 647. And see *Clark* v. *Baker*, 13 East, 273: *Hole* v. *Finch*, 2 Wils. 393.

(*y*) *Holliday* v. *Lawes*, 3 Bing. N. C. 541.

(*z*) See *Tucker* v. *Colegate*, 1 Dowl. 574; 2 C. & J. 489: *Firley* v. *Ralfett*, 2 Dowl. 708: *Fowens* v. *Stokes*, 4 Dowl. 125. And per *Littledale*, J., in *Newnham* v. *Hannay*, 5 Dowl. 263.

(*a*) *Moore* v. *Stockwell*, 6 B. & C. 76; 9 D. & R. 124: *Binfield* v. *Maxwell*, 15 East, 159. And see *Smith* v. *Patten*, 6 Taunt. 115.

(*b*) *Sugars* v. *Concannon*, 5 M. & W. 30; 7 Dowl. 391, nom. *Shugars* v. *Concannon*.

the order to discharge defendant, or to cancel the bail-bond, refuse to grant him the costs of the application, unless he would undertake not to bring any action against the sheriff, &c., to which he might have been otherwise liable.

Signing security by wrong name, a waiver of irregularity.

If the defendant sign the security in the full name by which he is described (though improperly) in the order for the arrest, he will in general be precluded from getting his discharge out of custody, or cancelling the security; but not if he sign it by his real name, describing himself also as arrested by an order describing him by the wrong one, which is the proper way of signing the security, where the defendant is described in the order by his wrong name. Before the Debtors Act, 1869, the defendants having signed a regular bail-bond, on a writ of capias merely describing them as "Messrs. Llewellan and Belchier," were held to have waived the irregularity of their description in the writ (*c*).

Action against sheriff for an arrest in a wrong name.

If a defendant was arrested on mesne process, by a wrong name, he might maintain an action for false imprisonment against the sheriff or his officers, or anyone interfering in the arrest (*d*); but not so if commonly known by the name by which he was sued as his real name (*e*), or if he had represented the wrong name to be his real one (*f*), or if it were idem sonans (*see ante*, p. 1478). The Court or a Judge, in discharging defendant out of custody, &c. for a misnomer, usually restrain him from bringing any action, or also refuse to give him the costs of the application.

Sheriff not bound to execute process where defen-

If defendant is known by two names, by one as well as the other, and he is described by either in the order to arrest, the sheriff is, it seems, bound to execute it (*g*). And, it seems, that if the sheriff,

(*c*) *Kingston* v. *Llewellyn*, 1 B. & B. 529; 4 Moore, 317. See *Taylor* v. *Rutherman*, 6 Moore, 264: *Lake* v. *Silk*, 3 Bing. 296; 11 Moore, 57: *Grindall* v. *Smith*, 1 M. & P. 24: *Reynolds* v. *Hankin*, 4 B. & A. 536: *Parker* v. *Bent*, 2 D. & R. 73: *M'Beath* v. *Chatterley*, Id. 237: *Ogden* v. *Barker*, 1 Dowl. 125: *Howell* v. *Coleman*, 2 B. & P. 466: *R.* v. *Sheriff of Suffolk*, 4 Taunt. 818: *Smithson* v. *Smith*, Barnes, 94; Willes, 462: *Stroud* v. *Gerrard*, 1 Salk. 8: *Meredith* v. *Hodges*, 2 N. R. 453.

(*d*) *Finch* v. *Cocken*, 3 Dowl. 678; 2 C. M. & R. 196; 1 Gale, 130. See *De Mesnil* v. *Dakin*, L. R., 3 Q. B. 18; 37 L. J., Q. B. 42, where the sheriff arrested the wrong man, who paid the money and afterwards recovered it from the sheriff.

(*e*) *Shadgett* v. *Clipson*, 8 East, 328: *Cole* v. *Hindson*, 6 T. R. 234: *Finch* v. *Cocken*, 3 Dowl. 678; 2 C. M. & R. 196; 1 Gale, 130: *Hoye* v. *Bush*, 2 Sc. N. R. 86. And see *Brunskill* v. *Robertson*, 9 A. & E. 840: *Fisher* v. *Magnay*, 6 Sc. N. R. 588.

(*f*) *Morgans* v. *Bridges*, 1 B. & A. 647. And see *Brunskill* v. *Robertson*, 9 A. & E. 846, per *Denman*, C. J.: *Price* v. *Harwood*, 3 Camp. 108: *Walker* v. *Willoughby*, 6 Taunt. 530.

(*g*) *Brunskill* v. *Robertson*, 9 A. & E. 840: *Finch* v. *Cocken*, 3 Dowl. 678; 2 C. M. & R. 196; 1 Gale, 130. And see *Cole* v. *Hindson*, 6 T. R. 234: *Hoye* v. *Bush*, 2 Sc. N. R. 86. And see *Morgans* v. *Bridges*, 1 B. & A. 647. It seems doubtful whether, if defendant had gone on one occasion by the name by which he was described in mesne process, the sheriff was *bound* to execute it. That he was, see *Brunskill* v. *Robertson*, 9 A. & E. 846, per *Denman*, C. J. That he was not, see *Morgans* v. *Bridges*, 1 B. & Ald. 652, per *Holroyd*, J. He was not so bound if the defendant was described by a wrong name; and this, though the sheriff might be justified in doing so, as if defendant has misrepresented such name to be his real one: *Morgans* v. *Bridges*, supra: *Keisar* v. *Tyrrell*, 2 Bulstr. 256 But if defendant be described by a wrong name in final

dant is described by wrong name.

in a case where he is not bound to execute an order to arrest, by reason of defendant being described in it by a wrong name, do so, he is not bound to detain him (*i*).

Character in which parties sue, &c.

If the plaintiff is suing or the defendant is sued en autre droit (as executor, administrator, assignee or the like), it seems that it is unnecessary to state in the order to arrest that he is so suing, though it may be as well to do so (*k*).

Defendant's addition.

No *addition* need be given to the plaintiff nor to the defendant in ordinary cases (*l*); but if he have a name of dignity, it should, perhaps, be stated (*m*).

Plaintiff's residence.

It is not necessary to give in the order to arrest itself any description of the *plaintiff's* residence; such description, however, must (*by Ord. LXIX. r. 2, infra*) be given by an indorsement on the order to arrest, when obtained by the plaintiff in person.

Where several defendants.

Where there are several defendants the order to arrest may be made against one or more of them, as the Judge thinks fit; and there is nothing in the form of the order to arrest to show that defendants who are not to be arrested are to be mentioned. It seems, however, to be safer to mention them, for the purpose of identifying the order to arrest and the proceedings thereon with those in the action.

Return of.

The order to arrest does not specify any particular return day (*n*).

Indorsements on.

Indorsements on.]—By *Ord. LXIX. r. 2*, "An order to arrest shall before delivery to the sheriff be indorsed with the plaintiff's address for service as required by Order IV., Rules 1 and 2. Concurrent orders may be issued for arrest in different counties. The sheriff or other officer executing the order shall be entitled to the same fees as heretofore" (*o*).

An irregularity in the form of this indorsement may afford a ground for setting aside the order, or discharging the defendant, or cancelling the security (*p*).

It would seem not to be necessary to indorse the place of abode and addition of the defendant (*q*).

As to the necessity for the officer making the arrest indorsing the true date of the arrest, *see Ord. LXIX. r. 7, post*, p. 1491.

---

process, the sheriff must execute it provided it correspond with the judgment: *Reeves* v. *Slater*, 7 B. & C. 486. See ante, p. 796.

(*i*) *Morgans* v. *Bridges*, supra: *Brunskill* v. *Robertson*, supra.

(*k*) There were conflicting decisions on this subject before the Debtors Act, 1869. See *Ilsley* v. *Ilsley*, 2 C. & J. 330; 1 Dowl. 310: *Ashworth* v. *Ryal*, 1 B. & Ad. 19: *Marzetti* v. *Jouffroy*, 1 Dowl. 44: *Manesty* v. *Stevens*, 9 Bing. 400; 1 Dowl. 711.

(*l*) *Sidney* v. *Bingham*, at Chambers, 20th June, 1839, *Coleridge*, J.

(*m*) See Tidd, Sup. N. P. 66.

(*n*) See *Hudgson* v. *Mee*, 5 N. & M. 302; 3 A. & E. 765.

(*o*) Cp. Reg. Gen. M. T. 1869, r. 6. See Ord. IV. rr. 1, 2, ante, Vol. 1, pp. 226, 227.

(*p*) See *Cook* v. *Cooper*, 7 A. & E. 605; 2 N. & P. 607: *Plock* v. *Pacheo*, 9 M. & W. 342; 1 Dowl., N. S. 380.

(*q*) See *Bodfield* v. *Pidmore*, 5 B. & Ad. 1095: *Clarke* v. *Palmer*, 9 B. & C. 153; 4 M. & R. 141: *Kenrick* v. *Nanney*, 1 Dowl. 58: *Childers* v. *Wooler*, 29 L. J., Q. B. 129.

Concurrent orders.

Concurrent Orders.]—Concurrent orders may be issued (*r*) for arrest in different counties at the same time, and this is usual where it is doubtful in which of several counties the defendant is to be found. But the defendant, it seems, is liable only to the costs of the order upon which he is arrested (*s*).

Costs.

Costs.]—By *Ord. LXIX. r. 5*, "Unless otherwise ordered, the costs of and incidental to an order of arrest shall be costs in the cause." (*See post*, p. 1496.)

Practical directions as to obtaining the order.

Practical Directions as to obtaining the Order, &c.]—To obtain a Judge's order for arrest, *sue out a writ of summons as directed ante, Vol.* 1, p. 214 *et seq. This need not be served until after the defendant is arrested* (*t*). *Then prepare the necessary affidavits* (*u*), *as pointed out ante*, p. 1464 *et seq. Swear them as directed ante*, p. 1476 (*x*). *Take them to a Judge at Chambers, and lay them before him, and if he thinks them sufficient, he will make an order that the defendant (or any one or more of the defendants, as the case may be) be arrested until he give security for a sum specified, not exceeding the amount claimed in the action* (*y*). *Draw up the order in the usual way. The affidavits are left with the Judge's clerk. Before delivery to the sheriff the order must be indorsed with the particulars required by Ord. LXIX. r. 2* (*supra*, p. 1480). *Make a copy of it, including the memoranda and indorsements, for the purpose of service on the defendant* (*z*). *If more than one defendant is to be arrested, make as many copies as there are defendants. Leave the order and copy or copies at the sheriff's office, or at his deputy's in London, with directions to execute the order. The sheriff's officer will arrest the defendant, and proceed as pointed out post*, p. 1483. As shown *supra*, concurrent orders may be issued.

Duration of the order.

Duration of the Order.]—The order must be executed within *one calendar month from the date of it*, including the day of such date, and not afterwards (*a*).

Defects in, how and when taken advantage of.

What defects immaterial.

Defects in, how and when taken Advantage of.]—Some defects will render the order absolutely void (*b*), others only irregular. It will be noticed that *Ord. LXIX. r.* 1 (*ante*, p. 1477), requires the form therein referred to to be adopted. An immaterial omission in the order or indorsements is not, it would seem, an irregularity of which the Court will take notice, if the omission do not alter the meaning (*c*). And where the writ under 2 *W.* 4, *c.* 39, was in this form, "if *he* shall be found in your bailiwick," instead of "if *she* shall,"

(*r*) Ord. LXIX. r. 2, supra. See *Dunn* v. *Harding*, 10 Bing. 553; 2 Dowl. 803, as to concurrent writs of capias.

(*s*) See *Angus* v. *Coppard*, 3 M. & W. 59.

(*t*) *Brook* v. *Snell*, 8 Dowl. 370.

(*u*) See the form of affidavits, Chit. Forms. See *Davies* v. *Chippendale*, 2 B. & P. 282.

(*x*) The affidavits may be sworn before the writ of summons is issued. See ante, p. 1475.

(*y*) See the form of the order, Chit. F., p. 762.

(*z*) See *Copley* v. *Medeiros*, 8 Sc. N. R. 172.

(*a*) See the form, Chit. F., p. 762.

(*b*) See *Brown* v. *McMillan*, 7 M. & W. 106, per *Parke*, B.

(*c*) *Pocock* v. *Mason*, 1 Bing. 245; *Forbes* v. *Mason*, 3 Dowl. 104: *Yardley* v. *Jones*, 4 Dowl. 45.

PART XVI.

&c., it was held not to be so defective as to warrant the Court in discharging defendant from custody (*d*); and the same was held where the words "the" and "by" were omitted in the copy served (*e*): and where the word Middlesex was by mistake written Middsex (*f*). These decisions as to *immaterial* defects seem to be equally applicable to orders to arrest under 32 & 33 V. c. 62.

If the order itself is irregular it may be set aside (*g*). *Ord. LXIX. r.* 1 (*ante*, p. 1477) specially provides that the defendant shall be at liberty at any time after the arrest to apply to rescind or vary the order, or to be discharged from custody, or for such other relief as may be just.

An application to set aside the order for irregularity must be made in a reasonable time, and, at all events, before the defendant has taken a fresh step after knowledge of the irregularity (*h*). A defect in the order which renders it only irregular, is in general cured by defendant giving the security required by it, &c. (*i*). If the order is void, which, as we have seen *ante*, p. 1481, is sometimes the case, and not merely irregular, the defect cannot be waived, and advantage may be taken of it at any stage (*k*).

Justification under a writ of capias if not set aside.

It may be as well here to observe, that in an action for false imprisonment for an arrest upon a writ of capias issued on an informal affidavit, the defendant might justify under the writ, if it had not been set aside (*l*).

Amendment of.

Amendment of.]—It seems that the Court or a Judge may allow to be amended a defect in the order which does not render it void (*m*), if plaintiff's conduct has not been oppressive, and defendant has not suffered by the defect (*n*). Where, before the *Debtors*

(*d*) *Sutton* v. *Burgess*, 3 Dowl. 489; 1 Gale, 17.

(*e*) *Pocock* v. *Mason*, 1 Bing. N. C. 245.

(*f*) *Colston* v. *Berens*, 1 C. M. & R. 833: overruling *Hodgkinson* v. *Hodgkinson*, 2 Dowl. 535.

(*g*) When the Court will allow of an amendment, see infra.

(*h*) Within what time an irregularity must in general be taken advantage of, see Vol. 1, Ch. XLII. See *Sugars* v. *Concanen*, 5 M. & W. 1; 7 Dowl. 391, nom. *Shugars* v. *Concannon*. See per *Littledale*, J., *Newnham* v. *Hanny*, 5 Dowl. 263: *Firley* v. *Rallett*, 2 Dowl. 708: *Fownes* v. *Stokes*, 4 Dowl. 125.

(*i*) *Widdrington* v. *Charlton*, 1 Str. 155: *Wilson* v. *Finch*, Barnes, 163, 167, 415: *Fox* v. *Money*, 1 B. & P. 250: *Davis* v. *Owen*, Id. 344: *Green* v. *Glassbrook*, 1 Bing. N. C. 516; 1 Sc. 402: *Moore* v. *Stockwell*, 6 B. & C. 76; 9 D. & R. 124: *Holliday* v. *Laws*, 3 Bing. N. C. 541.

(*k*) See *Ballantyne* v. *Wilson*, For. 31; 2 Price, 9: *Taylor* v. *Phillips*, 3 East, 155: *Roberts* v. *Monkhouse*, 8 East, 547: *Osborne* v. *Taylor*, 1 Chit. Rep. 400: *Gurney* v. *Hopkinson*, 3 Dowl. 189; 1 C. M. & R. 587: *Hanson* v. *Shackleton*, 4 Dowl. 48. As to the distinction between proceedings which are void and those which are merely irregular, see Vol. 1, Ch. XLII.

(*l*) *Reddell* or *Riddel* v. *Pakeman*, 3 Dowl. 714; 2 C. M. & R. 30. See *Lock* v. *Ashton*, 18 L. J., Q. B. 77, per *Coleridge*, J. The sheriff may justify under a writ that has been set aside for *irregularity*, though not under a void writ; see per *Parke*, B., *In re Glatton*, Land tax, 4 M. & W. 574.

(*m*) See *Kenworthy* v. *Peppiatt*, 4 B. & A. 288.

(*n*) *Flock* v. *Pacheo*, 9 M. & W. 342; 1 Dowl., N. S. 380: *Moore* v. *Magan*, 16 M. & W. 95: *Rennie* v. *Bruce*, 2 D. & L. 246. See *Bilton* v. *Clapperton*, 1 Dowl., N. S. 386; 9 M. & W. 473, where a capias issued under 1 & 2 V. c. 110, s. 85, was allowed to be amended by inserting the word "junior" after the plaintiff's name, to make it correspond with the affidavit.

ive as to warrant the Court
tody (*d*); and the same was
"by" were omitted in the
d Middlesex was by mistake
ons as to *immaterial* defects
s to arrest under 32 & 33 *V.*

y be set aside (*g*). *Ord. LXIX.*
that the defendant shall be
st to apply to rescind or vary
ustody, or for such other relief

rder for irregularity must be
l events, before the defendant
ge of the irregularity (*h*). A
t only irregular, is in general
ity required by it, &c. (*i*). If
een *ante*, p. 1481, is sometimes
the defect cannot be waived,
any stage (*k*).
re, that in an action for false
writ of capias issued on an
ht justify under the writ, if it

e Court or a Judge may allow
der which does not render it
ot been oppressive, and defen-
). Where, before the *Debtors*

ast, 547: *Osborne* v. *Taylor*, 1 Chit.
ep. 400: *Gurney* v. *Hopkinson*,
Dowl. 189; 1 C. M. & R. 557:
anson v. *Shackleton*, 1 Dowl. 48,
s to the distinction between pro-
edings which are void and those
hich are merely irregular, see Vol.
Ch. XLII.
(*f*) *Reddell* or *Riddel* v. *Pakeman*,
Dowl. 714; 2 C. M. & R. 30. See
ock v. *Ashton*, 18 L. J., Q. B. 77, per
oleridge, J. The sheriff may justify
nder a writ that has been set aside
r *irregularity*, though not under
void writ; see per *Parke*, B., *In re*
latton, Land tax, 4 M. & W. 574.
(*m*) See *Kenworthy* v. *Peppiatt*, 4
. & A. 288.
(*n*) *Plock* v. *Pacheo*, 9 M. & W.
2; 1 Dowl., N. S. 380: *Moore* v.
agan, 16 M. & W. 95: *Rennie* v.
ruce, 2 D. & L. 216. See *Billon* v.
apperton, 1 Dowl., N. S. 386; 9
. & W. 473, where a capias issued
nder 1 & 2 V. c. 110, s. 85, was
lowed to be amended by inserting
e word "junior" after the plain-
ff's name, to make it correspond
ith the affidavit.

Act, 1869, the plaintiff obtained a Judge's order to hold defendant to bail for 422*l.*, but indorsed the capias for 422*l.* 13*s.* 4*d.*, which was the amount of the debt, the Court allowed the capias to be amended on payment of costs (*o*). They will not allow an amendment to be made to the prejudice of the sureties (*p*). As to amendments in general, *see Vol.* 1, *Ch. XLII.*

Action for maliciously obtaining.

Action for maliciously obtaining.]—An action will lie against a plaintiff if he maliciously and without reasonable or probable cause arrest a defendant under an order for his arrest (*q*).

Sect. 5. *The Arrest.*

	PAGE		PAGE
Duty of Sheriff to execute the Order	1483	*Delivery of Copy of Order to the Defendant*	1491
The Warrant, and Bailiff appointed by	1483	*Indorsement on Order of the Day of Arrest*	1491
Who may be arrested under the Warrant; temporary Privilege from Arrest	1483	*Detainer*	1491
By whom, when, where, and how Arrest made	14	*What done after the Arrest*	1491
		Improper Arrest or Detainer	1492

Duty of sheriff to execute the order.

Duty of Sheriff to execute the Order.]—It is the duty of the sheriff to set about executing the order in a reasonable time after he receives it, and to arrest the defendant at the first opportunity; and if he does not arrest as soon as he can, he is guilty of negligence, and will, if actual damage arises to the plaintiff, be liable to an action, and answerable for such damage (*a*).

The warrant, and bailiff appointed by.

The Warrant, and Bailiff appointed by.]—As to these, *see ante*, Vol. 1, p. 808.

Who may be arrested under the warrant.

Who may be arrested—Temporary Privilege from Arrest.]—The officer of the sheriff is authorized by his warrant to arrest the person against whom the order is made. But he must, at his peril, take care that he arrest no other person; for if he arrest C. D. upon an order against A. B., C. D. may, except in certain cases, maintain an action for false imprisonment against the sheriff, although he be the person actually intended to be arrested, but by mistake is misdescribed as A. B. in the order.

(*o*) *Plock* v. *Pacheo*, supra.
(*p*) See Tidd, 9th ed. 161: *Inman* v. *Huish*, 2 N. R. 133: *Marsh* v. *Blackford*, 1 Chit. Rep. 323: *Bradshaw* v. *Davis*, Id. 374.
(*q*) See *Daniels* v. *Fielding*, 16 M. & W. 200; 4 D. & L. 329: *Gibbons* v. *Allison*, 3 C. B. 181.
(*a*) *Brown* v. *Jarvis*, 5 Dowl. 285; 1 M. & W. 704. And see *Jacobs* v. *Humphrey*, 2 C. & M. 413: *Bates* v. *Wingfield*, 2 N. & M. 83. As to the sheriff not being liable formerly where, on being called on to return the writ, he returned cepi corpus, and put in bail within eight days from such return, see *Randell* v. *Wheble*, 10 A. & E. 719; 2 P. & D. 602: *Williams* v. *Griffith*, 3 Ex. 584: *Howden* v. *Standish*, 6 C. B. 504. As to the sheriff's duty in executing a writ of execution, see ante, p. 809.

PART XVI.

Liability of sheriff for arresting privileged persons.

Also, if defendant be privileged from arrest, it would be extremely dangerous, in some cases, for the sheriff to arrest him. If an order to arrest were to be made against a member of the Royal Family, or against a peer, peeress, or member of the House of Commons, the sheriff, by executing it, would render himself liable to be committed by the House of Lords or House of Commons, respectively, for a breach of privilege. So, if the sheriff were to arrest an ambassador or his servant, the sheriff and his officer, &c. would be subject to fine, imprisonment, &c., by stat. 7 *A.* *c.* 12 (*ante*, p. 1457). But in all other cases of permanent privilege the sheriff may execute the order, without any regard to the privilege of the defendant (*b*); and no action of trespass for false imprisonment can be maintained against him for so doing (*c*). Also, except where a party is privileged from arrest by the Queen's writ of protection, the sheriff is not bound to notice a party's temporary privilege from arrest. No action lies against a sheriff for arresting a party whilst temporarily privileged from arrest (*d*). Nor does an action lie against the sheriff for arresting a person after notice that he was privileged redeundo from attending as a witness before a Court of competent jurisdiction (*e*). If the sheriff, however, detain a party after he has had notice of an order of the Court to discharge such party from the arrest, it seems he is liable to an action (*f*). A sheriff is not bound to arrest a party privileged from arrest (as a witness returning from Court (*g*)). Unless the party arrested claims his privilege, he is in legal custody, and the sheriff is bound to detain him (*h*). If a party is improperly arrested whilst privileged from arrest, he may obtain his discharge upon application to the Court or a Judge at Chambers (*i*). *See post*, p. 1492 *et seq.*

Who privileged from arrest.

Privilege from arrest is either permanent or temporary. The permanent privilege of a party has been already considered, *ante*, p. 1455 *et seq.* We will now point out when a party has a temporary privilege from arrest.

Writ of protection.

The Queen may, by her writ of protection, privilege any person in her service from arrest during a year and a day (*k*); but at present this prerogative is seldom, if ever, exercised. If the sheriff arrest a person thus protected, he would, perhaps, be punishable for the contempt.

Parties, witnesses, &c. connected with a cause.

Every person connected with a cause, and attending in the course of it, whether compelled to attend by process or not (*l*), such

(*b*) *Duncombe* v. *Church*, 1 Salk. 1; Co. Lit. 131: *Turlton* v. *Fisher*, 2 Doug. 676: *Crossley* v. *Shaw*, 2 W. Bl. 1085: *Watson* v. *Carroll*, 4 M. & W. 592: *Walters* v. *Rees*, 4 Moore, 36.

(*c*) *Turlton* v. *Fisher*, 2 Doug. 676. And see *Cameron* v. *Lightfoot*, 2 W. Bl. 1194: *Sherwood* v. *Benson*, 4 Taunt. 631.

(*d*) *Magnay* v. *Burt*, 5 Q. B. 381, Ex. Ch.: *Cameron* v. *Lightfoot*, 2 W. Bl. 1193: *Turlton* v. *Fisher*, Doug. 671.

(*e*) *Burt* v. *Magnay*, infra: *Magnay* v. *Burt*, 5 Q. B. 381, Ex. Ch. If the arrest was a contempt of Court, an attachment might be awarded against him: *S. C.*

(*f*) *Magnay* v. *Burt*, supra.

(*g*) *Burt* v. *Magnay*, 12 L. J., Q. B. 225.

(*h*) *Magnay* v. *Burt*, supra.

(*i*) See *Magnay* v. *Burt*, supra, per Cur. In ancient times the remedy for the party was by suing out a writ of privilege: *S. C.*

(*k*) Finch, L. 454: *Barrudale* v. *Cutts*, 3 Lev. 332.

(*l*) *Montague* v. *Harrison*, 27 L. J., C. P. 24.

as parties, witnesses (*m*), bail, solicitors (*n*), &c., are privileged from arrest whilst going to, attending, and returning from Court (*o*), or the Judges' Chambers (*p*). And barristers enjoy the same privilege whilst attending upon the superior Courts for the purpose of being engaged in the business of the same (*q*). Also, a barrister whilst on circuit is privileged from arrest (*r*), and this whether he has business or not (*s*). A circuit is continuous from its commencement to its termination (*s*). So a solicitor is privileged from arrest whilst in attendance at the Master's office taxing costs, as well as going to and returning therefrom (*t*). So, where a person attending to justify as bail was arrested, the Court ordered him to be discharged (*u*). And the husband of a petitioner to the Court of Review, though not a party to the petition, who was arrested for debt while in attendance in Court upon the hearing of the petition, was ordered to be discharged (*v*). But a solicitor's clerk going to or returning from Judge's Chambers on business having reference to a pending suit is not privileged from arrest (*v*). A person arrested on a criminal charge is not entitled to privilege from arrest under a capias ad respondendum process morando aut redeundo (*y*). But a prisoner on bail on remand before a police court is (*z*). It is not considered as the privilege of the person attending the Court, but of the Court which he attends; and, therefore, the allowing or not allowing the privilege is discretionary (*a*); and it has been disallowed where the party attended as a volunteer, and not upon process (*b*), and in other cases (*c*).

(*m*) *Gillman* v. *Wright*, 1 Vent. 11, n: *Clerk* v. *Molineux*, T. Raym. 100: *Fennell* v. *Tait*, 1 C. M. & R. 584; though not subpœnaed: *Meekins* v. *Smith*, 1 H. Bl. 636.

(*n*) A solicitor attending a Court of justice simply as the solicitor of persons putting in bail, and who is not the solicitor in the cause, is not privileged from arrest: *Jones* v. *Marshall*, 26 L. J., C. P. 229.

(*o*) *Meekins* v. *Smith*, 1 H. Bl. 636: Peake, Ev. 202. See 2 Salk. 544: *Newton* v. *Harland*, 8 Sc. 70; Rastell, tit. Privilege, Jurors: *Eyre* v. *Barrow*, 27 L. J., Ch. 784.

(*p*) See *Re Jewitt*, 33 L. J., Ch. 730.

(*q*) *Newton* v. *Constable*, 9 Dowl. 933; 1 G. & D. 408; 2 Q. B. 157: *Meekins* v. *Smith*, 1 H. Bl. 636: *Lumley* v. *Nathaniel*, 2 Dowl. 51; 1 C. & M. 579: *Newton* v. *Harland*, 8 Sc. 70. And see *Pitt* v. *Coombs*, 3 N. & M. 212.

(*r*) *Case of the Sheriff of Kent*, 2 C. & K. 197, where a barrister was arrested at his private residence, and was held under the circumstances to be on circuit: *Meekins* v. *Smith*, 1 H. Bl. 636: *Hippesley's case*, 1 H. Bl. 636: *Phillips* v. *Pound*, 21 L. J., Ex. 277.

(*s*) *The Case of the Sheriff of Oxfordshire*, 2 C. & K. 200.

(*t*) *Re Hope*, 9 Jur. 856, B. C.

(*u*) *Rimmer* v. *Green*, 1 M. & Sel. 638.

(*v*) *Ex p. Britten, Re Britten*, 4 Jur. 943, C. P. Semble, where a person ought to be a party to a petition, but is not, he is entitled to the protection of the Court, as fully as if he were a party: *S. C.*

(*x*) *Phillips* v. *Pound*, 7 Ex. 881; 21 L. J., Ex. 277.

(*y*) *Hare* v. *Hyde*, 16 Q. B. 394; 20 L. J., Q. B. 185.

(*z*) *Gilpin* v. *Benjamin*, 38 L. J., Ex. 50: *S. C.*, nom. *Gilpin* v. *Cohen*, L. R., 4 Ex. 131.

(*a*) *Cameron* v. *Lightfoot*, 3 W. Bl. 1193, *De Grey*, C. J.: *Magnay* v. *Burt*, ante, p. 1184, n. (*d*), per Cur.

(*b*) See Rast. 476: *Anon.*, 11 Mod. 79. A voluntary prosecutor as a common informer is not entitled to any privilege from arrest. A person attended before a justice of the peace to obtain a summons against a clerk to the trustees of a turnpike road for not transmitting a statement of the accounts to the trust, pursuant to 12 & 13 V. c. 87, s. 5 (which subjects the clerk so offending to a penalty), and obtained the summons:—Held, that he was not entitled to privilege from arrest in returning: *Ex p. Cobbett*, 26 L. J., Q. B. 293.

(*c*) *Anon.*, Salk. 544.

PART XVI.

To what Courts and proceedings it extends (*d*).

This privilege is not confined to an attendance in the superior Courts. It extended to the Bankruptcy Court (*e*). And it extends to all inferior Courts of Law, such as the sessions (*f*), County Courts, &c. (*g*), and to witnesses attending the execution of a writ of inquiry before the sheriff (*h*); and by 44 & 45 V. c. 58, s. 125, to witnesses attending before a court martial. Even where a cause was referred under an order of Nisi Prius, it was held that all parties, witnesses, &c., attending before the arbitrator, were privileged in the same manner as if the cause had been before the Court (*i*). And so a witness attending before an arbitrator appointed by a submission, containing a clause that it may be made a rule of Court, is privileged from arrest (*k*). But the privilege of legal officers is not so extensive as that of parties and witnesses. It seems that a barrister or solicitor is not so privileged whilst going to petty sessions to seek for practice there, or whilst returning therefrom (*l*). Where a barrister was arrested on his return from petty sessions, where he had been engaged in defending a party charged with assault, it was held that he was not privileged, not having been retained previously to his attendance there (*l*).

Duration of this privilege.

As to the duration of this temporary privilege from arrest. Where a party, attending from day to day at the sittings in expectation of his cause coming on, and whilst waiting at a coffee-house in the vicinity of the Court for that purpose, was arrested, the Court discharged him, although it was before the actual day of trial (*m*). So, if a party or witness should come to town or from abroad for the purpose, bonâ fide, of attending a trial, the Court, it seems, would afford him protection, although he had come before the time appointed for the trial (*n*). So a convenient time is allowed to parties, witnesses, &c. to return home, after the trial or hearing of the cause is over; and the privilege should be construed liberally (*o*). Thus, where a cause was tried at the assizes at Winchester on Friday in the afternoon, and one of the witnesses was arrested at seven o'clock on Saturday evening, as she was

---

(*d*) The deputy coroner for a county, while on his way to hold an inquest, is privileged from arrest on civil process: *Ex p. Deputy Coroner for Middlesex*, 30 L. J., Ex. 77.

(*e*) *Selby* v. *Hills*, 8 Bing. 166; 1 M. & Sc. 253; 1 Dowl. 257, *S. C.*: *Willingham* v. *Matthews*, 2 Marsh. 57; 6 Taunt. 356: *Eyre* v. *Barrow*, 27 L. J., Ch. 784: *Chaurin* v. *Alexander*, 2 B. & S. 47; 31 L. J., Q. B. 79: *Andrews* v. *Maxfin*, 12 C. B., N. S. 371.

(*f*) Com. Dig "Privilege" (A). But see infra, as to the barrister's or solicitor's privilege whilst going or returning from petty sessions. See *Ex p. Cobbett*, supra.

(*g*) See *Clutterbuck* v. *Halls*, 4 D. & L. 80, where it was held, that an affidavit to obtain a solicitor's discharge from custody, upon the ground that he was arrested whilst attending professionally a County Court, need not show that he had signed the roll of solicitors of the County Court, or that there was no such roll of solicitors kept in the County Court.

(*h*) *Walters* v. *Rees*, 4 Moore, 34.

(*i*) *Spence* v. *Stuart*, 3 East, 89: *Arding* v. *Flower*, 8 T. R. 536: *Randall* v. *Gurney*, 3 B. & Ald. 252; 1 Chit. Rep. 679. The arbitrator has no power of discharging the witnesses.

(*k*) *Webb* v. *Taylor*, 1 D. & L. 676; 13 L. J., Q. B. 24.

(*l*) *Newton* v. *Constable*, 9 Dowl. 933; 1 G. & D. 408; 2 Q. B. 157.

(*m*) *Childerton* v. *Barrett*, 11 East, 439.

(*n*) *Ex p. Tillotson*, 1 Stark. 470: *Persse* v. *Persse*, 5 H. L. 671.

(*o*) See *Selby* v. *Hills*, 8 Bing. 166; 1 M. & Sc. 253; 1 Dowl. 257.

entering the stage-coach which was to convey her to her residence at Portsmouth, the Court held that her privilege had not expired, and ordered her to be discharged (*p*). Also, where a defendant, after the rising of the Court, went with his solicitor and witnesses to dinner at a tavern in New Palace Yard, and was arrested whilst at dinner, the Court held that his privilege redeundo had not expired, and accordingly discharged him (*q*). A slight deviation will not deprive the party of this privilege (*r*). Where a plaintiff came from Yorkshire to London, to attend a meeting before an arbitrator, on 6th January; it took place on 7th, when it was objected, that he had obtained the order of reference surreptitiously, and that the opposite party would apply to the Court to set it aside; and thereupon the arbitrator adjourned the meeting until 15th February, to allow the motion to be made; the party then went to his inn in the city, and remained until 16th January, not having means sooner to return to his home, and waiting to see if any motion were made in the Court; no motion having been made within the first four days of term, he was proceeding to take his place on the 16th to return to Yorkshire, when he was arrested: it was held that he was not privileged from arrest (*s*).

Where a party to a cause is arrested upon process while attending at Nisi Prius in expectation of its coming on, he may apply for relief to the Judge at Nisi Prius, or at Chambers (*t*). If a party be arrested whilst coming to Court for the purpose of attending his cause, the Judge at Nisi Prius will order him to be brought up by habeas corpus, and discharge him (*u*), or will order the officer who made the arrest to attend, to show cause why the party should not be discharged (*x*), and will also put off the trial, if the party require it (*y*). The application for the discharge of a defendant, on the ground of his having been arrested while attending a writ of inquiry, must not be made to the sheriff. In one case, where a person was arrested whilst attending before the Commissioners of Bankrupts to prove a debt, the Court of Queen's Bench refused to discharge him (*z*); and it was decided that he should, in such a case, have applied to the Court of Chancery (*a*). In a later case, however, the Court of Common Pleas discharged a defendant out of custody when he was arrested whilst returning from the Court of Commissioners of Bankrupts, where he had been acting as petitioning creditor (*b*). As to the order for the discharge protecting the

To what Court the application for discharge should be made.

(*p*) *Halliday* v. *Pitt*, Gilb. Rep. 308; 2 Str. 986.

(*q*) *Lightfoot* v. *Cameron*, 2 W. Bl. 1113. But see *Anon.*, 1 Smith, 355.

(*r*) *Pitt* v. *Coombs*, 3 N. & M. 212: *Luntley* v. *Nathaniel*, 2 Dowl. 81: *Williams* v. *Webb*, 5 So. N. R. 898; 2 Dowl., N. S. 660: *Attorney-General* v. *The Leather Sellers' Co.*, 7 Beav. 157.

(*s*) *Spencer* v. *Newton*, 1 N. & P. 818; 6 A. & E. 623; 6 L. J., N. S., Q. B. 119.

(*t*) *Kimpton* v. *London and North Western R. Co.*, 23 L. J., Ex. 232: *Pitt* v. *Evans*, 2 Dowl. 223. See *Jacob* v. *Rule*, 1 Dowl. 349: *Ex p. Tillotson*, 1 Stark. 470: *Attorney-General* v. *Skinners' Co.*, 1 Coop. t. 229: *Ex p. Tillotson*, 1 Stark. 470.

(*u*) *Solomon* v. *Underhill*, 1 Camp.

(*x*) MS. Sittings after Trin. 1817.

(*y*) *Solomon* v. *Underhill*, 1 Camp. 229.

(*z*) *Kinder* v. *Williams*, 4 T. R. 377.

(*a*) See *Ex p. Kerney*, 1 Atk. 54: *List's case*, 2 V. & B. 373: *Eyre* v. *Barrow*, 27 L. J., Ch. 784.

(*b*) *Selby* v. *Hills*, 8 Bing. 166; 1 M. & Sc. 253; 1 Dowl. 257. See *Andrews* v. *Martin*, 12 C. B., N. S. 371

PART XVI.

officer, *see Ex parte Deputy Coroner for Middlesex*, 30 L. J., Ex. 77: *Brown* v. *Compton*, 8 T. R. 424.

Time for applying for discharge.

As to the time for applying for a discharge in case of privilege from an arrest, *see post*, p. 1495.

Where defendant has been wrongfully arrested or detained in custody.

If the defendant be wrongfully taken without an order for his arrest, or on an irregular or void order (*c*), or, after it is no longer in force (*d*), or whilst he is privileged from arrest, or the like (*e*), he cannot be lawfully *detained* in custody under another order for his arrest at the suit of the same plaintiff though regularly obtained (*f*). Where by the contrivance of the plaintiff's solicitor, a party was arrested on a Sunday on criminal process, for the purpose of effecting his arrest on civil process, and he was detained in custody till the Monday, and then arrested on the civil process, the Court ordered him to be discharged out of custody (*g*); but they would not have done so if there had been no such contrivance (*h*).

If the defendant be entitled to his discharge, the same plaintiff cannot, while he is in custody, or while he is returning from custody, and until he completely regain his liberty, detain or arrest him, though for a totally different cause of action (*i*). But if the defendant delay going out of custody, it seems he might be arrested. Where before the *Debtors Act*, 1869, defendant, having been arrested by the plaintiff in an illegal manner, was ordered by the Court to be discharged out of custody at his suit; defendant being in custody, however, in another action, plaintiff lodged a fresh detainer against him: it was held, that the plaintiff could not legally do this till he had served the rule for his discharge (*k*). It was held, before the 1 & 2 *V. c.* 110, that the plaintiff might lodge a detainer against the defendant in custody upon mesne process, after his bail had justified, if the defendant had not *completed* his discharge, and was still within the prison; and that he was not entitled to be discharged upon an affidavit that the sum for which the detainer was lodged was due at the time of the first arrest (*l*).

In case of wrongful

Before the case of *Chapman* v. *Freston*, 30 L. J., Exch. 89 (*m*),

(*e*) *Barlow* v. *Hall*, 2 Anst. 461: *Birch* v. *Prodger*, 1 N. R. 137: *Attorney-General* v. *Dorkins*, 11 Price, 156: *Attorney-General* v. *Carl Cass*, Id. 345: *Ex p. Scott*, 9 B. & C. 446; 4 M. & R. 361.

(*d*) See *Ex p. Ross*, 1 Rose, 261: *R.* v. *Blake*, 4 B. & Ad. 355: *Loveridge* v. *Plaistow*, 2 H. Bl. 29.

(*e*) *Barratt* v. *Price*, 9 Bing. 566; 1 Dowl. 725.

(*f*) *Hall* v. *Hawkins*, 4 M. & W. 591; 7 Dowl. 200.

(*g*) *Wells* v. *Gurney*, 8 B. & C. 769. See *Anon.*, 1 Dowl. 157: *Goodman* v. *London*, 2 Dowl. 504

(*h*) *Jacobs* v. *Jacobs*, 8 Dowl. 677: *Goodwin* v. *Lordon*, 1 A. & E. 378: *Mackie* v. *Warren*, 2 M. & P. 279; 5 Bing. 176: *Re Douglas*, 3 Q. B. 825: *Re Ramsden*, 15 L. J., Q. B. 234.

(*i*) See *Farmer* v. *Jenkinson*, Cook, 34: *Webb* v. *Dorwell*, Barnes, 400: *Ex p. Eggington*, 23 L. J., M. C. 41.

(*k*) *Pearson* v. *Yewens*, 5 Bing. N. C. 567.

(*l*) *Quin* v. *Reynolds*, 3 M. & Sel. 144. See *White* v. *Gompertz*, 3 B. & Ald. 905; 1 D. & R. 556.

(*m*) In this case it was held (*Martin*, B., *dub.*), that a ca. sa. issued on a certificate granted under 12 & 13 V. c. 106, s. 257 (repealed by the Bankruptcy Act, 1861), on the day to which the final examination had been adjourned, but after the termination of such examination, though valid, would not operate as a detainer against a bankrupt already in custody under a writ founded on a void certificate; for whether the circumstances under which the sheriff arrested would render him liable to an action or not, if the custody under the original arrest be illegal, no subsequent writ, though valid, could

arrest by third party.

it seems it was considered that the above rules did not apply to detainers or arrests by *third persons*, unless there was some collusion between them and the plaintiff, or those who had the defendant in custody (*n*); but that if the first arrest was illegal, by the wrongful act of the sheriff himself, the defendant could not be arrested or detained in custody either by the plaintiff at whose suit he was arrested, or by any other party (*o*). Where defendant was arrested at suit of M. by S., who had a warrant from the late sheriff, but none from the present, and there was, at the same time, another writ in the sheriff's office against the defendant, the warrant on which from the present sheriff was directed to N.; N. delivered this warrant to S., and the under-sheriff substituted S.'s name, and detained the defendant at suit of R.: it was held, by the Court of Common Pleas, that the defendant was not in the lawful custody of S., and that the sheriff having, by the alteration of the warrant, become a party to the illegal act of the officer, the defendant was not liable to be detained upon other writs then in the sheriff's hands (*p*). But on an application by the same defendant to the Court of Exchequer to be discharged out of custody at the suit of R., it appearing, on affidavit, that there was no collusion on the part of the sheriff, and that he had not adopted the illegal act of his officer, the Court held that the defendant was not entitled to be discharged (*q*). But, in a case in the Queen's Bench, where S., a sheriff's officer, arrested the defendant without a warrant, but it did not appear at whose suit he professed to arrest him, and afterwards obtained a warrant against the defendant in an action at the suit of C., on a writ which was in the office before the arrest, and then obtained from one N., a sheriff's officer, a warrant which he held against the defendant at the suit of R., and procured his (S.'s) own name to be inserted therein, and persuaded the sheriff that the defendant had been arrested under that warrant; it was held that the defendant was entitled to be discharged out of custody; but it was held, that, if the defendant had

---

operate as a detainer. But see contra, *Bateman* v. *Freston*, 30 L. J., Q. B. 133, where per Cur.: "The principle appears to be this: that whenever an arrest by a detaining party would have been good, a detainer by him, being equivalent to an arrest, will be good also, unless it appears that the first arrest was a wrongful act of the sheriff himself, or that there was some collusion between him and the creditor making the arrest, or between him and the sheriff; and this seems consistent with reason and justice, and it would be a great hardship upon an innocent party to be prejudiced by the wrongful acts of other persons." See *Ex p. Freston*, 30 L. J., Ch. 460, where the Lord Chancellor and the Lords Justices decided in accordance with the decision of the Court of Exchequer. These cases render the law upon this subject unsettled.

(*n*) *Howson* v. *Walker*, 2 Bl. Rep. 823: *Spence* v. *Stuart*, 3 East, 89: *Davies* v. *Chippendale*, 2 B. & P. 282: *Hutchins* v. *Renrick*, 2 Burr. 1048: *Barclay* v. *Faber*, 2 B. & Ald. 743; 1 Chit. Rep. 579: *Arundell* v. *Chitty*, 1 Dowl. 499: *Barrack* v. *Newton*, 1 Q. B. 525; 1 G. & D. 153: *R.* v. *Stanford*, 4 Sc. N. R. 24: *Ex p. Eggington*, 23 L. J., M. C. 41.

(*o*) *Barratt* v. *Price*, 1 Dowl. 725; 2 M. & Sc. 339; 9 Bing. 556: *Pearson* v. *Yewens*, 5 Bing. N. C. 489: *Collins* v. *Yewens*, 10 A. & E. 570: *Robinson* v. *Yewens*, 5 M. & W. 149: *Barrack* v. *Newton*, supra: *Hooper* v. *Lane*, 17 L. J., Q. B. 189: *S. C.* in error, 6 H. L. 443.

(*p*) *Pearson* v. *Yewens*, 5 Bing. N. C. 489; 7 Sc. 435; 7 Dowl. 451.

(*q*) *Robinson* v. *Yewens*, 5 M. & W. 149; 7 Dowl. 377.

PART XVI.

been arrested by N., upon the warrant which he held, whilst he was in S.'s custody, without any collusion with S., such arrest would have been good (*r*). Where a defendant was regularly arrested on an attachment out of Chancery, it was held that the fact of an irregular writ of ca. sa. issuing against the defendant after the arrest, did not interfere with the right of another plaintiff to detain the defendant by virtue of a subsequent ca. sa. (*s*). Where a defendant had been wrongfully arrested upon a Sunday on a charge of forgery without any warrant, it was held that he might be lawfully arrested upon *civil* process as he was leaving the police office after he had been ordered by the magistrate to be discharged (*t*).

The defendant is not privileged from arrest whilst returning from lawful custody (*u*).

Privilege of clergymen.

Also, *clergymen* are privileged from arrest whilst performing divine service, and while going to church for that purpose and returning thence (*x*). And by 24 & 25 *V. c.* 100, *s.* 36, whosoever shall upon any civil process, or under the pretence of executing any civil process, arrest any clergyman or other minister who is engaged in, or to the knowledge of the offender is about to engage in, celebrating divine service or otherwise officiating in any church, chapel, meeting-house, or other place of divine worship, or in the performance of his duty in the lawful burial of the dead in any churchyard or other burial place, or who to the knowledge of the offender shall be going to perform the same or returning from the performance thereof, shall be guilty of a misdemeanor (*y*).

Candidates at an election.

A candidate to be elected a member of the House of Commons, whilst going, &c. to an election, or persons going to vote for such a candidate, are not privileged from arrest (*z*).

Bankrupt has the same privilege as other persons.

A bankrupt enjoys the same privilege that parties and witnesses do in all other cases; and, therefore, where a bankrupt was arrested as he was returning from the hearing of his petition for leave to surrender, he was held to be privileged, and was discharged (*a*). So, where a bankrupt was attending a meeting of the commissioners to declare a dividend several years after his final examination, being directed verbally by the commissioners to do so, he was held to be privileged, eundo, morando, et redeundo (*b*). The husband of a petitioner, who accompanied his wife to attend the hearing of a petition, is protected from arrest (*c*).

By whom, when, where, and how arrest made.

By whom, when, where, and how Arrest made.]—By whom the arrest is made, *see ante*, p. 893. It may be made before the writ of

(*r*) *Collins* v. *Yewens*, 10 A. & E. 570; 2 P. & D. 439. And see *Wright* v. *Stanford*, infra.

(*s*) *Wright* v. *Stanford*, 1 Dowl., N. S. 272.

(*t*) *Jacobs* v. *Jacobs*, 3 Dowl. 675. And see *Goodwin* v. *Lordon*, 1 A. & E. 378: *Re Douglas*, 3 Q. B. 825; ante, p. 1488.

(*u*) *Goodman* v. *London*, 2 Dowl. 504: *Anon.*, 1 Dowl. 157: *Rex* v. *Priddle*, 1 Tidd, 9th ed. 196.

(*x*) 50 Ed. 3, c. 5; 1 R. 2, c. 16: *Goddard* v. *Harris*, 7 Bing. 320; 5 M. & P. 122.

(*y*) See Russ. on Crimes, by Prentice, p. 401.

(*z*) Ante, p. 1457.

(*a*) *Ex p. Jackson*, 15 Ves. 116.

(*b*) *Arding* v. *Flower*, 3 Esp. 117; 8 T. R. 534. See *Selby* v. *Hills*, 8 Bing. 166; 1 M. & Sc. 253; 1 Dowl. 257.

(*c*) *Ex p. Britten*, 1 M. D. & De G. 278.

summons is served (*d*), and at any time within one calendar month from the date of the order, including such date, but not afterwards (*e*). As to its being the duty of the sheriff to execute the order within a reasonable time after he receives it for that purpose, *see ante*, p. 809; and as to when a writ of execution may be executed, *see ante*, p. 810. As to where the arrest may be made, *see ante*, p. 811; and as to how the arrest is made, *see ante*, p. 811. It is the duty of the sheriff when going to make the arrest to take with him such a force as will enable him to overcome any resistance which he could reasonably anticipate (*f*).

Delivery of copy of order to defendant.

Delivery of Copy of Order to the Defendant.]—The 2 *W.* 4, *c.* 39, *s.* 4, required a copy of the capias to be delivered to the defendant. That statute and the 1 & 2 *V. c.* 110, *s.* 4, under which the capias was issued, are repealed by the 32 & 33 *V. c.* 83 (*sched.*). Neither the *Debtors Act*, 1869, nor the *Reg. Gen. M. T.* 1869, nor the *R. of S. C. require* a copy of the order to arrest to be given to the defendant. It is, however, desirable in all cases to serve him with a copy in order that he may know for what sum he has to give security. But as he has no *right* to a copy, it follows that he can take no advantage of any mistake or inaccuracy in the copy delivered to him.

Indorsement on order of the day of arrest.

Indorsement on Order of the Day of Arrest.]—By *Ord. LXIX. r.* 7, "The sheriff or other officer named in an order to arrest shall, within two days after the arrest, indorse on the order the true date of such arrest." (*Cp. Reg. Gen. M. T.* 1869, *r.* 11) (*g*).

Detainer.

Detainer.]—When the defendant is arrested, he is considered to be in custody under all the orders or writs for his arrest in the sheriff's hands (*see ante*, p. 894). The process of detainer of a defendant in custody of the sheriff is the same as the process where he is at large; and the defendant should forthwith, after the delivery of the order to arrest to the sheriff, be served with a copy of it, as pointed out *supra*. As to detaining a defendant illegally arrested, &c., *see ante*, p. 1488. As to detaining a party already in prison, *see ante*, *Ch. CV.*

The defendant cannot be detained in prison under the order after final judgment has been signed (*h*).

What done after the arrest.

What done after the Arrest, &c.]—As soon as the party is arrested, he is usually carried to the house of the officer who arrests him, or some other officer of the sheriff within the county, city, &c. As to what is to be done if the party be too ill to be removed, *see ante*,

(*d*) *Brooke* v. *Snell*, 8 Dowl. 370.

(*e*) See *Coates* v. *Sandy*, 2 Sc. N. R. 535; 9 Dowl. 381.

(*f*) *Howden* v. *Standish*, 6 C. B. 504; 6 D. & L. 312.

(*g*) See *Ridley* v. *Weston*, 2 M. & Sc. 724; *Moore* v. *Thomas*, 3 M. & Sc. 810; 2 Dowl. 760; *Copley* v. *Medeiros*, 8 Sc. N. R. 172. The form of this indorsement is thus:—"*The within named C. D. was arrested by me, X. Y., by virtue of this order, on the* —— *day of* ——, 18—. *X. Y.*"

(*h*) *Hume* v. *Druyff*, L. R., 8 Exch. 214.

PART XVI.

p. 894. He must not be taken to gaol within twenty-four hours after the arrest, unless he refuse to go to a place of safe custody (*post*, p. 1503). He is discharged either upon depositing in Court the sum mentioned in the order, or on giving to the plaintiff a bond or other security as mentioned in the order; or he escapes or is rescued, or is lodged in the prison of the county, &c. These several subjects will be considered *post*, p. 1503.

Improper arrest or detainer.

Improper Arrest or Detainer.]—We have seen in the preceding pages in what cases the arrest would be improperly made. In such cases the Court or a Judge will, on application for that purpose, made within a reasonable time after the arrest (*i*), order the defendant to be discharged out of custody; or it a deposit has been made or security has been given, that it shall be returned or cancelled (*k*). As to the discharge of the defendant from custody, when the order for his arrest ought not to have been made, see *infra*.

Sect. 6. *Application to discharge or vary the Order, or for other Relief.*

Rule as to.

Rule on this Subject, &c.]—By *Ord. LXIX. r.* 1, *ante*, p. 1477, "The defendant may at any time after arrest apply to the Court or a Judge to rescind or vary the order, or to be discharged from custody, or for such other relief as may be just."

Where cause of action insufficient.

If the action is such that the order for the arrest should not have been made (*ante*, p. 1465), the Court or a Judge will interfere and relieve the defendant. As to affidavits contradicting the cause of action sworn to in the affidavit upon which the order was made, *see post*, p. 1493.

Where defendant privileged from arrest.

If the defendant was a privileged person at the time of the arrest, or for any other reason was not subject to an arrest in the action, the Court or a Judge will in general discharge him, or if he has deposited money in Court, order it to be returned to him, or, if he has given a bond or other security, order it to be delivered up to be cancelled (*see post*, p. 1503). So, if he become a peer or member of Parliament at any time pending the action, the Court or a Judge will thus give him the full effect of his privilege (*l*). But where the question of privilege from arrest is doubtful, the defendant will not in general be thus relieved, but will be left to his writ of privilege (*m*).

Where defendant not about to quit England.

If it be shown by affidavit (*n*) that the defendant was not about to quit England, or that his intended absence was not such as the Act contemplated (*o*), the Court or a Judge may order him to be discharged from custody, or the money deposited to be returned, or the bond or security, if given, to be cancelled. It seems doubtful

---

(*i*) *R.* v. *Burgess*, 8 A. & E. 275.

(*k*) *Byfield* v. *Street*, 10 Bing. 27; 3 M. & Sc. 406; 2 Dowl. 789: *Rennie* v. *Bruce*, 2 D. & L. 946.

(*l*) *Trinder* v. *Shirley*, 1 Doug. 45. See *Phillips* v. *Wellesley*, 1 Dowl. 9.

(*m*) *Luntley* v. *Battine*, 2 B. & Ald. 234. See ante, p. 1455.

(*n*) As to such affidavits, see post, p. 1494.

(*o*) See *Larchin* v. *Willan*, 7 Dowl. 11; 4 M. & W. 351, per *Parke*, B., and *Alderson*, B.: *Harvey* v. *O'Meara*, 7 Dowl. 725: *Walker* v. *Lamb*, 9 Dowl. 131: *Bullock* v. *Jenkins*, 20 L. J., Q. B. 90.

whether, if it appear on the fresh affidavits that the defendant was about to quit England at the time when those affidavits were made, though he was not when the order for his arrest was made, the Court ought to discharge him (*p*). It seems that if the affidavit, whether as to the cause of action or as to the defendant being about to leave England (*q*), be defective in any material part, the defendant may be relieved. So he may be if the affidavit vary as to the cause of action, &c., from the statement of claim (*r*).

Where affidavit to arrest defective.

And the Court or a Judge will relieve the defendant, as above, if he has been arrested without an affidavit being previously made, or without a Judge's order, &c. (*s*). And for certain irregularities in the order to arrest, as if the defendant's name is incorrectly stated therein, or the like, he may be relieved (*t*). We have noticed (*ante*, p. 1484 *et seq.*), when defendant may be discharged out of custody on the ground that he has been improperly arrested when temporarily privileged from arrest or the like. Where before the *Debtors Act*, 1869, defendant had not been served with a copy of the writ of summons, the Court granted a rule to show cause why he should not be discharged out of custody, unless within four days the plaintiff served him with a copy of such writ (*u*). A defendant formerly was not entitled to be discharged out of custody if plaintiff did not declare within the time limited to him for that purpose, but the proper course was to proceed by judgment of nonpros (*x*).

Irregular proceedings.

The plaintiffs and defendant being foreigners resident abroad, the debt having been also contracted abroad, the defendant was induced by S. acting in collusion with plaintiffs, on the pretence of arranging an agency, to come to England, and immediately on his arrival was arrested at the suit of the plaintiffs on an order to hold to bail, under the now repealed Act 1 & 2 *V. c.* 110, *s.* 3; the Court, on motion, rescinded the order and discharged the defendant and set aside the service of the writ of summons and all proceedings thereunder (*y*).

Where process has been abused.

It seems that, if the plaintiff, after he has made the affidavit of debt, receive part of the debt, and thereby reduce it to an amount not sufficient to warrant an arrest, and the defendant is, notwithstanding, afterwards arrested, the Court or a Judge will discharge him out of custody, or order the security if given to be cancelled (*z*).

Debt reduced below 50*l.* after affidavit made.

Affidavits upon applying for.]—It seems that upon an application under the above rule to rescind or vary the order, &c., affidavits may be used in denial of plaintiff's cause of action. But the Court will not interfere unless it most *distinctly* appears that plaintiff has

Counter-affidavit as to cause of action.

(*p*) *Graham* v. *Sandrinelli*, 16 M. & W. 191.

(*q*) See *Bateman* v. *Dunn*, 7 Dowl. 105: *Graham* v. *Sandrinelli*, 16 M. & W. 191: *Brackenbury* v. *Needham*, 1 Dowl. 439: *Imlay* v. *Ellefsen*, 2 East, 453; ante, p. 1474.

(*r*) *Naylor* v. *Eagar*, 2 Y. & J. 90. See *Burns* v. *Chapman*, 28 L. J., C. P. 6: *Green* v. *Elgie*, 3 B. & Ad. 437; 1 Dowl. 344. See *Richards* v. *Bernard*, 10 Bing. 319; 2 Dowl. 537; ante, p. 1474.

(*s*) *Hussey* v. *Baskerville*, 2 Wils. 225. But see *Knowles* v. *Stevens*, 1 C. M. & R. 26.

(*t*) See ante, p. 1483.

(*u*) *Brook* v. *Snell*, 8 Dowl. 371.

(*x*) *Turner* v. *Parker*, 2 D. & L. 444.

(*y*) *Stein* v. *Valkenhuysen*, 27 L. J., Q. B. 236.

(*z*) *Shore* v. *Cunningham*, 1 Dowl. 662.

PART XVI.

no cause of action against defendant (*a*). In one case, under the 1 & 2 V. c. 110 (now repealed), where it appeared that the plaintiff, shortly before he made the affidavit to hold to bail, wrote a letter stating defendant to be a creditor of his; the Court, upon application, interfered, in a summary way, to discharge defendant out of custody, on an affidavit denying the debt, the plaintiff not having denied the writing of the letter, or alleged that the debt due to him had accrued subsequently to it (*b*). And in a case decided under the last-mentioned Act, where the affidavit stated that defendant was indebted to two persons, for money lent by them and their late co-partner; on an affidavit that the third partner was alive, the Court ordered the bail-bond to be delivered up to be cancelled (*c*). And in a case decided under the same Act the Court would not discharge a defendant out of custody, in an action on a promissory note, on an affidavit being produced, showing that the consideration for the note was a gambling debt. The defendant will not be discharged merely because facts stated in an affidavit subsequently made by plaintiff are inconsistent with the affidavit upon which the arrest was made (*d*).

As to quitting England.

Where the application is made upon the ground that it was not the defendant's intention to leave England, he should do more than negative such intention, he should show facts negativing such intention (*e*). In such a case the affidavit should distinctly show that the defendant was not about to quit England (*f*).

Where it is sought to rescind order.

Where an application is made to the Court to rescind the Judge's order, the Court will not receive affidavits of collateral facts not submitted to the Judge (*g*). In general, it is necessary that the affidavits used before the Judge should be brought before the Court (*h*).

(*a*) *Stammers* v. *Hughes*, 25 L. J., C. P. 247: *Pegler* v. *Hislop*, 1 Ex. 437; 5 D. & L. 223: et per *Parke*, B., "I have relieved parties where the debt was barred by the Statute of Limitation;" but see *Pottier* v. *Macdonnell*, 1 H. & W. 189; 3 Dowl. 583: *Mercerон* v. *Mercerон*, 5 Dowl. 271: *Curzon* v. *Hodges*, 5 Dowl. 98. See *Bullock* v. *Jenkins*, 20 L. J., Q. B. 90; 1 L. M. & P. 645: *Austin* v. *Mills*, 22 L. J., Ex. 263: *Graham* v. *Sandrinelli*, 16 M. & W. 191, 197. See *Copeland* v. *Child*, 22 L. J., Q. B. 279: *Burns* v. *Chapman*, 5 C. B., N. S. 487; 28 L. J., C. P. 6; *Steward* v. *Waugh*, 33 L. J., Q. B. 86. The above cases were decided under the repealed Act, 1 & 2 V. c. 110, ss. 3 and 6.

(*b*) *Nizetich* v. *Bonocich*, 5 B. & Ald. 904. And see *Chambers* v. *Bernasconi*, 6 Bing. 498; 1 C. & J. 451.

(*c*) *Morrell* v. *Parker*, 6 Dowl. 123; 3 M. & W. 65. See *Wightwick* v. *Banks*, Forrest, 152: *Taylor* v. *Higgins*, 3 East, 160: *Jackson* v. *Tomkins*, 2 Chit. Rep. 20: *M'Clure* v. *Pringle*, 13 Price, 8; M'Clel. 2; 6 D. & R. 24: *Burton* v. *Haworth*, 1 N. & M. 318; 4 B. & Ad. 462: *Mason* v. *Smith*, 5 Dowl. 179: *Isaacs* v. *Silver*, 11 Moore, 348. As to discharging the defendant on the ground that the arrest was against good faith, *Udall* v. *Nelson*, 1 H. & W. 177; 3 Ad. & E. 215; 6 N. & M. 637.

(*d*) *Vaughan* v. *Goadby*, 6 Dowl. 96; 3 M. & W. 113.

(*e*) See *Walker* v. *Lamb*, 9 Dowl. 134, *Patteson*, J.

(*f*) *Robinson* v. *Gardner*, 7 Dowl. 716: *Duncan* v. *Jacobs*, 3 Jur. 1149, B. C.: *Steward* v. *Waugh*, 33 L. J., Q. B. 86.

(*g*) *Bullock* v. *Jenkins*, 20 L. J., Q. B. 90. See *Thomas* v. *Evans*, 12 L. J., Ex. 41.

(*h*) *Heath* v. *Nesbitt*, 11 M. & W. 669; 12 L. J., Ex. 408; 2 Dowl., N. S. 1041: *Needham* v. *Bristowe*, M. & G. 262; 4 Sc. N. R. 775.

The application for.

Form of motion.

The Application for.]—An application under the above rule may be made either to the Court or a Judge. Where the application is founded upon materials not laid before the Judge who made the order to arrest, the application should in general be to discharge the defendant out of custody, or for the bond or other security to be given up to be cancelled, or for a return of the money deposited in Court, as the case may require (*i*). And it seems that the application may be in such form where the affidavit to obtain the order to arrest is defective (*k*). But in this latter case, or if the order has been irregularly obtained, it seems the application may be also to set aside the Judge's order (*l*).

Time of making application.

Before 1 & 2 *V. c.* 110, s. 6, the affidavit of debt could not, it seems, unless an absolute *nullity* (*m*), have been objected to, after the time for putting in bail (*n*), and at all events not after bail had been perfected (*o*), or put in (*p*), or after time obtained (*q*), or an undertaking to put in bail (*r*), or after paying money into Court in lieu of bail (*s*). It will be observed that the words of *Ord. LXIX. r.* 1 (*ante*, p. 1477), are "*at any time after arrest*," but the above cases as to the time within which the objection must be made are still law, if the application be made to discharge the defendant on the ground of an *irregularity*; but where it is founded on a substantial defect in the affidavit to arrest, or on the fact of defendant not having intended to go abroad, or on some other ground not being a mere irregularity in the proceedings, the application may be made at any time while the action is pending (*t*). A party arrested whilst privileged from arrest does not waive his right to be discharged by delaying to apply for his discharge for twenty-three days if the situation of the other party has not been changed (*u*).

(*i*) See *Barness* v. *Guiranovich*, 4 Ex. 520: *Pegler* v. *Hislop*, 1 Ex. 437; 17 L. J., Ex. 53: *Talbot* v. *Bulkeley*, 16 M. & W. 191; 16 L. J., Ex. 67: *Needham* v. *Bristowe*, 4 Sc. N. R. 773; 1 Dowl., N. S. 700. See *Bullock* v. *Jenkins*, 20 L. J., Q. B. 90: *Williams* v. *Webb*, 2 Dowl., N. S. 904; 5 Sc. N. R. 898.

(*k*) See *Gadsden* v. *M'Lean*, 9 C. B. 283.

(*l*) *Hopkinson* v. *Salembier*, 7 Dowl. 493; 5 M. & W. 423. See *Bullock* v. *Jenkins*, 20 L. J., Q. B. 90. As to setting aside the order when defective, see ante, p. 1493.

(*m*) See *Morgan* v. *Baylis and Wife*, 3 Dowl. 117: *Hussey* v. *Wilson*, 5 T. R. 254; 4 T. R. 577. It would be a nullity if sworn before a person having no authority to take it: *Sharpe* v. *Johnson*, 2 Bing. N. C. 246; 2 Sc. 405; 4 Dowl. 324.

(*n*) See *Tucker* v. *Colegate*, 1 Dowl. 574; 2 C. & J. 489: *Firley* v. *Ralfett*, 2 Dowl. 708: *Fownes* v. *Stokes*, 4 Dowl. 125. And see per *Littledale*, J., in *Newnham* v. *Hanny*, 5 Dowl. 263.

(*o*) *Jones* v. *Price*, 1 East, 81: *Chapman* v. *Snow*, 1 B. & P. 132. See *Robinson* v. *Nicholls*, 2 Str. 1077.

(*p*) *D'Argent* v. *Vivant*, 1 East, 330: *Shawman* v. *Whalley*, 6 Taunt. 185: *Dalton* v. *Barnes*, 1 M. & Sel. 230: *Reeves* v. *Hudker*, 2 C. & J. 44; 2 Tyr. 161.

(*q*) *Moore* v. *Stockwell*, 6 B. & C. 769; 9 D. & R. 124.

(*r*) *Holliday* v. *Lawes*, 3 Bing. N. C. 541.

(*s*) *Green* v. *Glassbrooke*, 1 Bing. N. C. 516; 1 Sc. 402: *Nesbitt* v. *Pym*, 7 T. R. 376, n.: *Desborough* v. *Coppinger*, 8 T. R. 77: *Hussey* v. *Wilson*, 5 T. R. 254: *Norton* v. *Danvers*, 7 T. R. 375: *Mammatt* v. *Matthew*, 2 Dowl. 797; 4 M. & Sc. 356; and ante, p. 1478.

(*t*) *Walker* v. *Lamb*, 9 Dowl. 131: *Newton* v. *Harland*, 3 Jur., C. P. 679. But see *Shugars* v. *Concannon*, 7 Dowl. 891; 5 M. & W. 30, nom. *Sugars* v. *Concannon*. See ante, p. 1482.

(*u*) *Webb* v. *Taylor*, 1 D. & L. 676; 13 L. J., Q. B. 24.

PART XVI.

Affidavits in answer.

Affidavits made on the part of defendant in support of the application, for the purpose of showing that defendant did not intend to quit England, may be answered (*x*).

Costs of the application.

By *Ord. LXIX. r. 5* (*ante*, p. 1481), unless otherwise ordered, the costs of and incidental to an order to arrest are costs in the cause. In general, upon granting the application the plaintiff will be ordered to pay the costs where his conduct has been oppressive, or otherwise improper. In one case, before the *Debtors Act*, 1869, where the Court discharged defendant out of custody for a defect in the affidavit to hold to bail, they did so without costs, as there was no untrue statement or concealment of facts on the part of the plaintiff (*y*). In some cases, upon making the rule absolute, the Court will direct that defendant's costs of the application be defendant's costs in the cause (*z*). When the application is refused, it will be so with or without costs at the discretion of the Court or Judge.

Where application made to a Judge.

It seems doubtful whether, if a Judge is applied to, and he should differ from the Judge who made the order on the same state of facts, he has power or right to order the defendant's discharge, as upon an appeal to the Court (*a*). A defendant, on applying to a Judge at Chambers to be discharged because of his privilege, ought fully to state the grounds on which he seeks to be released, for, should he subsequently apply to the Court, he will be precluded from availing himself of any point or objection, omitted to be urged at Chambers (*b*). If the application be made to a Judge, his decision may be reviewed by the Court (*c*).

Justification of arrest where affidavit informal.

It seems that in an action for false imprisonment for an arrest upon an order made on an informal affidavit, defendant may justify under the order if it has not been set aside (*d*). And he may, perhaps, do so even if it has been set aside (*e*).

Sect. 7. *Proceedings on the Arrest—The Security, &c.*

	PAGE		PAGE
Deposit of Money in Court	1497	*Payment of Debt and Costs, &c.*	1503
Bond or Security to the Plaintiff	1498	*Taking the Defendant to Prison*	1503

The order is that the defendant be arrested and imprisoned for ——— months (*not exceeding six*) from the date of his arrest, including the day of such date, unless and until he shall sooner deposit in the Court the sum of £——— by way of security, or give to the plaintiff a bond executed by him and two (*f*) sufficient sureties in the penalty of £——— (*g*), or some other security satis-

(*x*) *Graham* v. *Sandrinelli*, 16 M. & W. 191: *Gibbons* v. *Spalding*, 11 M. & W. 173; 2 Dowl., N. S. 746.

(*y*) *Graham* v. *Sandrinelli*, 16 M. & W. 191.

(*z*) *Pegler* v. *Hislop*, 1 Ex. 437.

(*a*) *Graham* v. *Sandrinelli*, 16 M. & W. 191.

(*b*) *Flight* v. *Cooke*, 1 D. & L. 714; 13 L. J., Q. B. 78.

(*c*) *Graham* v. *Sandrinelli*, 16 M. & W. 191: *Bullock* v. *Jenkins*, 20 L. J., Q. B. 90.

(*d*) *Reddell* v. *Pakeman*, 3 Dowl. 714; 2 C. M. & R. 30; 1 Gale, 104.

(*e*) See per *Coleridge*, J., in *Lock* v. *Ashton*, 18 L. J., Q. B. 77.

(*f*) With leave of the Judge there may be more than two sureties (post, p. 1498).

(*g*) When the action is for a penalty or sum in the nature of a penalty,

factory to the plaintiff, that he will not go out of England without leave of the Court [*or that any sum recovered against him in this action shall be paid, or that he shall be rendered to prison*].

By *Ord. LXIX. r.* 3, "The security to be given by the defendant may be—

"A deposit in Court of the amount mentioned in the Order, *or*

"A bond to the plaintiff by the defendant and two sufficient sureties [*or* with the leave of the Court or a Judge either one surety or more than two], *or*

"With the plaintiff's consent, any other form of security.

"The plaintiff may within four days after receiving particulars of the names and addresses of the proposed sureties give notice that he objects thereto, stating in the notice the particulars of his objections. In such case the sufficiency of the security shall be determined by a Master, who shall have power to award costs to either party; it shall be the duty of the plaintiff to obtain an appointment for that purpose, and unless he do so within four days after giving notice of objection, the security shall be deemed sufficient" (*h*).

By *r.* 4, "The money deposited, and the security and all proceedings thereon, shall be subject to the order and control of the Court or a Judge" (*i*).

By *r.* 6, "Upon payment into Court of the amount mentioned in the order, a receipt shall be given, and upon receiving the bond or other security, a certificate to that effect shall be given, signed or attested by the plaintiff's solicitor if he have one, or by the plaintiff if he sue in person. The delivery of such receipt or a certificate to the sheriff or other officer executing the order shall entitle the defendant to be discharged out of custody" (*k*).

See a form of certificate, *Chit. F.*, p. 768.

Deposit of Money in Court.

Deposit of money in Court.

If the defendant is prepared to do so, he can at once deposit in Court the amount mentioned in the order to arrest, and obtain a receipt from the proper officer (*Ord. LXIX. r.* 6, *supra*), which receipt should be delivered to the sheriff, and then the defendant will be entitled to be discharged out of custody. The sheriff or his bailiff (*l*) is not authorized to receive the money.

The money deposited, and all proceedings thereon, are subject to the order and control of the Court or a Judge (*r.* 4, *supra*). In a case where money was paid into Court in lieu of bail in error by consent, the Court refused, after the reversal of the judgment, to retain any portion of it to satisfy a demand made by the adverse

---

other than a penalty in respect of any contract, this must be sufficient to include the probable costs of the action, and the terms must be those given in italics (supra).

(*h*) Cp. Reg. Gen. M. T. 1869, r. 7.

(*i*) Id. r. 8.

(*k*) Id. r. 10.

(*l*) See *Stackford* v. *Austen*, 14 East, 468: *Wooden* v. *Moxon*, 6 Taunt. 490: *Wood* v. *Finnis*, 7 Ex. 363: *De Mesnil* v. *Dakin*, L. R., 3 Q. B. 18; 37 L. J., Q. B. 42. The stat. 43 G. 3, c. 46, s. 2 is repealed by 32 & 33 V. c. 83.

PART XVI.

party for costs incurred in the cause antecedent to the writ of error being obtained (*i*).

It was held before the *Debtors Act*, 1869, that money deposited in Court in lieu of bail in one action, could not when defendant was entitled to have it paid out to him, be paid out to an execution creditor in another action, in satisfaction of his claim (*k*).

Bond or Security to the Plaintiff.

If the defendant is not prepared to deposit in Court the amount mentioned in the order to arrest, he may procure his discharge upon giving *to the plaintiff* the bond mentioned in the order (*l*) executed by himself and two sufficient sureties (or with leave of a Judge, more than two) (*m*), in the penalty mentioned in the order to arrest, or with the plaintiff's consent any other form of security. If he intends to give a bond he should forthwith give to the plaintiff particulars of the names and addresses of the proposed sureties and the form of the proposed bond. The plaintiff may then, within four days after receiving such particulars and form, give notice that he objects thereto, stating what he objects to therein; and in case of his so doing the sufficiency of the security shall be determined by the Master, who shall have power to award the costs of such reference to either party. It is the plaintiff's duty to obtain an appointment for that purpose, and unless he does so within four days after giving notice of objection the security will be deemed sufficient (*Ord. LXIX. r.* 3, *ante*, p. 1497). Upon receiving the bond or other security, a certificate to that effect must be given, signed or attested by the plaintiff's solicitor, or by himself if he sue in person, and the delivery of such certificate to the sheriff will entitle the defendant to be discharged out of custody (*R.* 6, *ante*, p. 1497).

When it may be given.

The deposit or security, *may*, it seems, be made or given by defendant after the order to arrest made, although no arrest has taken place (*n*). The deposit or security may be made or given at any time for the purpose of obtaining the defendant's release (*o*).

Particulars of sureties.

If the defendant intends to give a bond he must give to the plaintiff particulars of the names and addresses of the proposed sureties and the form of the proposed bond (*Ord. LXIX. r.* 3, *ante*, p. 1497).

If a surety and his father have the same names the former should

(*i*) *Gwynne* v. *Collins*, 2 Se. N. R. 85; 1 M. & G. 938; 9 Dowl. 70.

(*k*) *France* v. *Campbell*, 9 Dowl. 914.

(*l*) See ante, p. 1496, as to the condition of the bond, &c. As to the stamp on the bond, see 33 & 34 V. c. 97.

(*m*) Before the Debtors Act, 1869, where the debt was large, the Court or a Judge would allow three or four or more persons to become bail in different sums, amounting together to the requisite sum. *Anon.*, 13 Price, 418: *Easter* v. *Edwards*, 1 Dowl. 39; 1 Sellon, 159.

(*n*) See Barnes, 43; Imp. C. P. 170: *Hyde* v. *Whiskard*, 8 T. R. 457: *Evans* v. *Sweet*, 9 Moore, 556; 2 Bing. 271; 1 M. & M. 177: *Randell* v. *Wheble*, 10 Ad. & E. 719.

(*o*) See *Young* v. *Wood*, Barnes, 69: *Anon.*, 2 Chit. Rep. 103: *Baillie* v. *Hole*, 1 M. & M. 289: *Dyott* v. *Dunn*, 2 Chit. Rep. 72; 1 D. & R. 9: *Todd* v. *Etherington*, 2 Marsh. 375: *Stanton's bail*, 2 Chit. Rep. 73: *Davis* v. *Fowler*, Id. 74: *Bircham* v. *Chambers*, 11 Moore, 343.

be described as "the younger" (*p*). The address of a surety is, it seems, sufficiently described by stating it to be at a small place, well known as a village, without mentioning any street in it (*q*). Obtaining time to inquire after the sureties will, in general, cure a defect in the particulars of their names and addresses, unless it be such as would mislead the plaintiff in his inquiries (*r*). If the plaintiff or his solicitor has been misled by the particulars, &c., so as not to be able to make inquiries respecting the sureties, the Master on the reference before him as to the sufficiency of the sureties will give time and adjourn for that purpose, or else order the defendant to give fresh particulars (*s*).

Objection to particulars.

The plaintiff may within four days after receiving the above mentioned particulars and form give notice that he objects thereto, stating therein in what particulars (*Ord. LXIX. r.* 3, *ante*, p. 1497). Under the old practice, if an affidavit were used against bail, it must have set forth the particular objections intended to be relied on against them; merely stating matters of report and general opinion would not suffice (*t*).

Master to determine sufficiency of security.

If the plaintiff gives such notice of objection to the sureties, &c., the sufficiency of the security is determined by the Master, who has power to award the costs of such reference to either party. It is the plaintiff's duty to obtain the appointment from the Master, and unless he does so within four days after giving his notice of objection the security is deemed sufficient (*Ord. LXIX. r.* 3, *ante*, p. 1497).

The plaintiff if he objects to the sufficiency of the sureties, &c. will obtain an appointment from the Master to enquire into the sufficiency of the proposed security and serve such appointment on the defendant or his solicitor, if he defends by one, in the usual way.

Sufficiency of sureties.

Before the *Debtors Act*, 1869, a solicitor, knowing that bail were insufficient, put them in, and gave notice of justification, the Court held him personally responsible for the costs of the opposition (*u*).

Under the old practice it was necessary that the bail should be housekeepers or freeholders. This is not now in terms required; but in general a surety would be considered insufficient unless he is either one or the other. If they were, however, housekeepers or freeholders the amount of the rent of their houses or annual value of their freeholds was not material (*x*), nor was it necessary that they should be assessed to the poor's rate, &c. (*y*). A copyhold estate of the bail in right of his wife was not sufficient (*z*). Although in one case (*a*), it was decided that long beneficial leases, at small

(*p*) *Smith* v. *Mellon*, 5 Taunt. 854; 1 Marsh. 836.

(*q*) *Smith's bail*, 1 Dowl. 499: *Lanyon's bail*, 3 Dowl. 85: *Topham* v. *Calvert*, 1 Price, N. R. 140: *Hanwell's bail*, 3 Dowl. 425: *Treasurer's bail*, 2 Dowl. 670.

(*r*) *Foster's bail*, 2 Dowl. 586: *Bigg* v. *Dick*, 1 Taunt. 17: *Welsh* v. *Lywood*, 1 Bing. N. C. 258.

(*s*) See *Fearnley's bail*, 1 Dowl. 40.

(*t*) *Sanderson's bail*, 1 Chit. Rep. 676: *Williams* v. *Hunt*, Id. 321.

(*u*) *Blundell* v. *Blundell*, 5 B. & Ald. 533; 1 D. & R. 142; ante, p. 184. See *Bolland* v. *Pritchard*, 2 W. Bl. 799: *Doldern* v. *Feast*, 2 Str. 890; Lofft, 153: *Hawkins* v. *Magnall*, Doug. 466: *Daly* v. *Brooshaft*, 2 B. & B. 359; 5 Moore, 72: *Faulkner* v. *Wise*, 2 B. & P. 150: *Chick's bail*, 1 Chit. Rep. 714.

(*x*) Lofft, 148.

(*y*) Id. 328.

(*z*) *Anon.*, 2 Chit. Rep. 97.

(*a*) Id. 96.

PART XVI.

rents, were sufficient to entitle the bail to justify; yet it was afterwards settled that no bail should be allowed to justify, unless he were a housekeeper or freeholder (*b*). The bail must have been in actual possession of the whole or some main part of the house (*c*). A notice of bail, describing him as a housekeeper, was insufficient, if he was only a lodger, although on examination it appeared that he was a freeholder (*d*). If the bail were likely to become a housekeeper in two or three days, time to justify might be allowed (*e*). Being a housekeeper or freeholder in Scotland or Ireland would not suffice (*f*). The Court of Common Pleas allowed a person to justify as bail in respect of a house kept by him and his partner, who carried on business therein, where the rent and taxes were paid by them jointly, and his partner resided in the house, though he lodged himself at a considerable distance therefrom (*g*); and where a person had taken a house occupied by several tenants or lodgers, from one of whom he had received rent, he was holden to be qualified to justify as bail, though he had not occupied the house himself (*h*). With the plaintiff's consent, persons who were not housekeepers or freeholders might justify (*i*).

Under the present practice, as above observed, the sureties must be sufficient. The following cases, decided under the old practice, will assist in showing what will now be a sufficient objection to a surety. Under the old practice it was a ground of opposition to bail, that they were not worth double the sum indorsed on the writ (or if that sum exceeded 1,000*l.*, then 1,000*l.* in addition to it), after payment of all their just debts; or, that they were uncertificated bankrupts; or insolvent debtors, and had not paid 20*s.* in the pound on the debts inserted in their schedule (*k*). So they might be examined as to any circumstance of suspicion, such as their being unable to pay their rent, taxes (*l*), small debts, &c. It was no objection of itself, however, that the bail was drawer or indorser of the bill of exchange upon which the action was brought against the defendant (*m*). But it might be an objection that he remained liable on outstanding dishonoured bills (*n*); and the acceptor of a dishonoured bill was, in one case, held not competent to become bail in an action against the drawer (*o*). Where the qualifying property consisted of money deposited in the hands of bail to indemnify him, the qualification was held insufficient (*p*). Where

---

(*b*) *Smith's bail*, 1 Dowl. 1. And per Cur. M. T. 10 G. 4, C. P., after conference with all the judges: and *Anon.*, 1 Dowl. 127.

(*c*) *Bold's bail*, 1 Chit. Rep. 288. *Anon.*, Id. 6: *Walker's bail*, 1 Dowl. 8. *Slade's bail*, Id. 502.

(*d*) *Wilson's bail*, 2 Dowl. 431.

(*e*) *Bold's bail*, 1 Chit. Rep. 288.

(*f*) See *Anon.*, 1 Dowl. 61; but perhaps this would have been held otherwise now, see Vol. 1, Ch. LXXI.

(*g*) *Hemming* v. *Plenty*, 1 Moore, 529: *Savage* v. *Hall*, 1 Bing. 420; 8 Moore, 525.

(*h*) *Coehn* v. *Waterhouse*, 8 Moore, 365.

(*i*) *Saggers* v. *Gordon*, 5 Taunt. 174.

(*k*) See *Smith* v. *Roberts*, 1 Chit. Rep. 9.

(*l*) *Lewis* v. *Thompson*, Id. 309.

(*m*) *Prince* v. *Beesley*, 3 Bing. N. C. 391; 5 Dowl. 477: *Harris* v. *Manley*, 2 B. & P. 526: *Mitchell's bail*, 1 Chit. Rep. 287.

(*n*) *Barnesdell* v. *Stretton*, 2 Chit. Rep. 79.

(*o*) *Anon.*, 1 Dowl. 183.

(*p*) *Nicholl's bail*, 1 Hodges, 77.

justify; yet it was after-
wed to justify, unless he
The bail must have been
main part of the house (*c*).
isekeeper, was insufficient,
mination it appeared that
were likely to become a
me to justify might be
freeholder in Scotland or
t of Common Pleas allowed
a house kept by him and
ierein, where the rent and
his partner resided in the
onsiderable distance there-
ken a house occupied by
whom he had received rent,
istify as bail, though he
(*h*). With the plaintiff's
epers or freeholders might

observed, the sureties must
ided under the old practice,
e a sufficient objection to a
s a ground of opposition to
e the sum indorsed on the
ien 1,000*l.* in addition to it),
or, that they were uncertifi-
and had not paid 20*s.* in the
chedule (*k*). So they might
of suspicion, such as their
l), small debts, &c. It was
bail was drawer or indorser
action was brought against
n objection that he remained
s (*n*); and the acceptor of a
l not competent to become
(*o*). Where the qualifying
in the hands of bail to in-
ield insufficient (*p*). Where

(*h*) *Cochn* v. *Waterhouse*, 8 Moore,
(*k*) *Saggers* v. *Gordon*, 5 Taunt.
(*k*) See *Smith* v. *Roberts*, 1 Chit.
p. 9.
(*l*) *Lewis* v. *Thompson*, Id. 309.
(*m*) *Prince* v. *Beesley*, 3 Bing. N. C.
; 5 Dowl. 477: *Harris* v. *Manley*,
B. & P. 526: *Mitchell's bail*, 1
t. Rep. 287.
(*n*) *Barnesdell* v. *Stretton*, 2 Chit.
p. 79.
(*o*) *Anon.*, 1 Dowl. 183.
(*p*) *Nicholl's bail*, 1 Hodges, 77.

the bail had suffered his children (*q*) or father (*r*) to receive parochial relief, he was rejected. Where the bail did not know whether he had been arrested or not during the space of two years, he was rejected (*s*). Bail might justify in respect of shares in a railway company in actual operation (*t*).

That they were foreigners, and had no property in this country, was an objection to their being bail (*u*). Yet a *native* of England was allowed to justify in respect of property partly in England and partly abroad (*x*).

Under the old practice it was a good ground of opposition to bail that they were privileged persons; as, for instance, any person having privilege of Parliament would not be allowed to justify, on account of his privilege from arrest (*y*); so a person entitled to privilege as one of the servants in ordinary of the Queen (*z*), or a domestic servant of a foreign ambassador (*a*), would not be allowed to justify; but, as arrest in civil actions is now abolished, except in a few cases, sureties may in some cases be considered sufficient, though privileged as above.

Bail who had been bail before, and did not know in how many actions or for what sums (*b*), were under the old practice rejected. A bail was rejected who had been bail to the sheriff in a former action and not excepted to, it appearing that his property was not sufficient for both actions (*c*); and bail were rejected who had been before rejected as bail (*d*), and upon the ground that they were hired bail (*e*). In one case bail was rejected where he was to receive a commission on the amount for which he proposed to justify (*f*). That he did not know the defendant was but a mere circumstance of suspicion, and might be explained (*g*). It was no objection that the bail was a gaming-house keeper (*h*), or a brothel-house keeper (*i*), or that he had been transported (*k*); the inquiry being not as to the character of the bail, but as to the sufficiency of his property.

Costs of reference.

The Master has power to award the costs of the reference to either

(*q*) *Anon.*, 2 Chit. Rep. 77.
(*r*) *Holn* v. *Booth*, 2 Chit. Rep. 78.
(*s*) *Newman's bail*, 2 Chit. Rep. 95.
(*t*) *Pierpoint* v. *Brewer*, 15 M. & W. 201; 3 D. & L. 487.
(*u*) *Boddy* v. *Leyland*, 4 Burr. 2526: *Levy's bail*, 1 Chit. Rep. 285. But see *Smith* v. *Scandrett*, 1 W. Bl. 444: *Gleud* v. *Mackay*, 2 Id. 957; *Christie* v. *Fillett*, 2 Id. 1323; Tidd, 9th ed. 270.
(*x*) *Beardmore* v. *Phillips*, 4 M. & Sel. 173: *Graham* v. *Anderson*, Id. 371. And see Tidd, 9th ed. 246: *Tomsey* v. *Napier*, 8 Taunt. 148. The distinction seems to have been between foreigners and British subjects. The former are not allowed to justify in respect of property abroad, but the latter, under circumstances, might. See Tidd, 9th ed. 271; 1 Chit. Rep. 285, n.
(*y*) *Duncan* v. *Hill*, 1 D. & R. 126; 2 B. & B. 682; 5 Moore, 567: *Graham* v. *Stuart*, 4 Taunt. 249.
(*z*) See ante, pp. 1455 et seq.: *Anon.*, 1 D. & R. 127: *Gleud* v. *Mackay*, 2 W. Bl. 956.
(*a*) *Lock's bail*, 1 Dowl. 124.
(*b*) Lofft, 72, 194.
(*c*) *Varden* v. *Wilson*, 1 Chit. Rep. 287.
(*d*) *Laporte's bail*, 3 Dowl. 110. See Tidd, 9th ed. 275: *Snell's bail*, 1 Chit. Rep. 82: *Monk's bail*, Id. 676: *Pickard* v. *Dobson*, 3 D. & R. 5: *Gould* v. *Berry*, 1 Chit. Rep. 143: *Waterhouse's bail*, Id. 307: —— v. *Hallett*, 1 D. & R. 488.
(*e*) See 4 Bing. 38; 7 D. & R. 783.
(*f*) *Foxall's bail*, 7 D. & R. 783. And see *Wylie* v. *Jones*, 2 D. & R. 253: *Ward* v. *Jones*, 1 B. & C. 268.
(*g*) *Jameson's bail*, 2 Chit. Rep. 97: *Anon.*, 1 Dowl. 1.
(*h*) *Anon.*, 1 Dowl. 160.
(*i*) *Gouge's bail*, 3 Dowl. 320.
(*k*) *Hatfield's case*, 2 Chit. Rep. 98.

PART XVI.

party. (*Ord. LXIX. r.* 3, *ante*, p. 1497.) In general, it seems, the costs of opposing bail will not be allowed, where they have been rejected on purely technical grounds (*l*). Under the old practice, where several notices of bail were vexatiously given, without justifying, the Judge would compel the defendant to pay the costs occasioned by them to the plaintiff, though the bail did not appear to justify (*m*); and, in some cases, the defendant's solicitor might be ordered to pay the costs (*n*).

Adjournment of reference.

If, at the time appointed by the Master for inquiring into the sufficiency of the security, the defendant is not prepared to prove the same, the Master, upon reasonable grounds, may grant an adjournment. Thus he might do so, if, from illness or any unforeseen accident, the sureties are unable to attend (*o*). Under the old practice, if one of the bail only attended, and the Judge gave a further time to justify, or to add and justify another, the one in attendance would, in general, if plaintiff consented, be allowed to justify immediately, and not be put to the trouble of attending a second time; and the same in all other cases where a further time was required and granted as to one of the bail only; but this could not be done without plaintiff's consent (*p*). If the plaintiff has been taken by surprise, or there be some defect in the particulars of the security (*q*), which may have misled or deprived the plaintiff of the means of making due inquiries, or the sureties, on examination, give evasive answers (*r*), or the account given of them be suspicious (*s*), further time will in general be given by the Master to inquire into their position and circumstances. The obtaining time to inquire after the sureties will, in general, cure any defect in the particulars (*t*).

Fraud, &c. in procuring allowance of sureties.

Under the old practice, if any fraud or malpractice had been used in procuring the justification of the bail, and which was not known to the plaintiff or his solicitor at the time, the Court or a Judge, upon application, would, in general, set aside the rule of allowance (*u*). Perhaps, now, in such a case, a fresh order for the arrest of the defendant might be obtained.

If the bail forswore themselves, they might be indicted for the perjury (*x*). But the Court would not, in general, in such a case, set aside the rule of allowance (*y*); at least, unless it appeared that the defendant or his solicitor was privy to the fraud (*z*).

(*l*) *Innis* v. *Mair*, 2 C. & J. 634; 2 Tyr. 742: *Hanwell's bail*, 3 Dowl. 425; Tidd, New Prac. 157.

(*m*) See *Aldiss* v. *Burgess*, 3 B. & Ald. 759.

(*n*) See *Blundell* v. *Blundell*, 1 D. & R. 142; 5 B. & Ald. 533: and *Hall* v. *Clarke*, 2 Chit. Rep. 89.

(*o*) See *West's bail*, 1 Chit. Rep. 96: *Dixon* v. *Clarke*, 1 C. & J. 94: *Ward's bail*, Id. 288: *Gwillim* v. *Holbrook*, 2 Chit. Rep. 107: *Gabbett's bail*, 1 H. & W. 10. Where the plaintiff alarmed the bail, and deterred them from justifying, the Court compelled him to pay the cost of putting in fresh bail. *Gwinn* v. *Fuller*, 1 Dowl. 444.

(*p*) *White's bail*, 5 Dowl. 133.

(*q*) *Vandermooten's bail*, 1 Chit. Rep. 289.

(*r*) *Anon.*, 1 Chit. Rep. 354, n.

(*s*) *Spur* v. *Mahoney*, 1 Chit. Rep. 209, n.

(*t*) See *Foster's bail*, 2 Dowl. 586, ante, p. 1499.

(*u*) See *Pickard* v. *Dobson*, 3 D. & R. 5: *Wylie* v. *Jones*, 2 D. & R. 253: *Foxall's bail*, 7 D. & R. 783.

(*x*) *Royson's case*, Cro. Car. 146. See *Eaglefield* v. *Stephens*, 2 Dowl. 438.

(*y*) *Eaglefield* v. *Stephens*, 2 Dowl. 438. See Tidd, New Prac. 147.

(*z*) *A'Beckett* v. *Rawley*, 5 Taunt. 776: *Shee* v. *Abbott*, 2 B. & B. 619;

As to the offence of falsely personating bail, *see* 24 & 25 *V. c.* 98, *s.* 34 (*a*).

If bail became incompetent after the recognizance had been completed, the defendant could not be called upon to find fresh bail (*b*).

Payment of Debt and Costs, &c.

Discharge on payment of debt and costs, &c.

It seems that the sheriff is bound to discharge a defendant, although no deposit be made or security given, upon receiving a written discharge from the plaintiff or his solicitor (*c*). So, if the debt and costs in the action are paid to the plaintiff, the defendant is entitled to be discharged out of custody (*d*). He may, however, be detained for a reasonable time, until the office is searched to see if there be any detainers against him (*e*). But it seems the sheriff has no right to detain a defendant in custody, although he has been compelled to pay the debt and costs under an attachment (*f*).

If the sheriff improperly discharge a defendant, and be obliged to pay the plaintiff the amount of his debt, neither he nor his officer can maintain any action against the defendant for the money so paid (*g*).

Taking the Defendant to Prison.

Taking the defendant to prison.

When.

A sheriff's officer, having arrested a defendant upon mesne process, must not carry him to any tavern or public-house, or to the private house of the officer himself, or any tenant or relative of his, without the defendant's free consent; nor carry him to gaol or prison within twenty-four hours from the time of such arrest, under a penalty of 50*l.* with treble costs; unless the defendant *refuse* to be carried, in the meantime, to some safe and convenient dwelling-house of his nomination or appointment within a city, borough, corporation, or market town, in case the defendant be there arrested, or within three miles from the place where the arrest was made, if made out of any city, borough, corporation, or market town, the house nominated not being his own house, and being within the county, riding, division, or liberty in which the defendant was arrested (*h*). It is the duty of the officer, before he can take the defendant to gaol or prison within the twenty-four hours, to inform him that he may be carried to such a safe and convenient dwelling-house of his own nomination, not being his own house (*i*). It is not enough that the defendant does not

---

5 Moore, 321: *Dicas* v. *Warne*, 4 M. & Sc. 470: *Stockham* v. *French*, 1 Bing. 365; 8 Moore, 381: *Barling* v. *Waters*, 6 Bing. 423.

(*a*) 21 J. 1, c. 26. See *Anon.*, 1 Str. 384, where the bail assumed feigned names.

(*b*) *R.* v. *Shirley*, 12 L. J., Q. B. 346, B. C.

(*c*) See *Taylor* v. *Brander*, 2 Esp. 45: *Martin* v. *Francis*, 2 B. & Ald. 402: *Hookham* v. *Monckton*, 6 Moore, 497.

(*d*) *Rimmer* v. *Turner*, 3 Dowl. 601.

(*e*) *Taylor* v. *Brander*, 1 Esp. 45. As to detaining the defendant for the sheriff's fees, see *Martin* v. *Francis*, 2 B. & Ald. 402.

(*f*) *Rimmer* v. *Turner*, 3 Dowl. 601.

(*g*) *Fitcher* v. *Bailey*, 8 East, 171.

(*h*) 32 G. 2, c. 28, ss. 1, 12.

(*i*) *Dewhurst* v. *Pearson*, 1 Dowl. 664; 1 C. & M. 365: *Simpson* v. *Renton*, 5 B. & Ad. 35, overruling *Pitt* v. *Sheriff of Middlesex*, 1 Dowl. 201; 4 M. & P. 726. And see *Gordon* v. *Laurie*, 9 Q. B. 60; 18 L. J., Q. B. 98.

PART XVI.

dissent from being taken to the gaol or prison; he must first *refuse* to be carried to a house of his own nomination. He may refuse in many ways; he may nominate a house, and then refuse to go to it; or he may refuse to nominate, or he may nominate and go, and then refuse to stay (*k*). If the defendant name a safe and convenient house within the meaning of the statute, he should be taken to it accordingly. The officer has a right to exercise a judgment whether it is safe and convenient, but he must exercise it properly. It is not, however, necessary that the house named should be a place of custody, as a lock-up house, or the like (*l*). An officer was illegally carrying a party to gaol within twenty-four hours after arrest, and he, to avoid being taken to gaol, consented to go to a tavern, and there drew up an agreement for the purpose of being discharged: it was held, that such consent was not free and voluntary within the statute (*m*).

In what prison defendant to be confined.

The officer may lodge the defendant in the proper gaol at any time, after the expiration of twenty-four hours from the time of arrest (*n*). Holloway Prison is now the Queen's Prison.

When defendant too ill to be removed.

As to taking a party to prison when he is too ill to be removed, *see ante*, p. 894.

Sect. 8. *Proceedings against the Sheriff.*

	PAGE		PAGE
Compelling Sheriff to Return Order, &c.	1504	*Escape*	1505
		Rescue	1505

Compelling sheriff to return order, &c.

Compelling Sheriff to return Order, &c.]—It seems that the sheriff may give notice to return the order for the arrest, and that proceedings by attachment might be taken against him for disobedience of such notice, and that such proceedings would be similar to those taken to compel the return of a writ of execution (*see ante*, p. 815).

If any of the proceedings against the sheriff be irregular, the Court or a Judge, upon an application made in a reasonable time, will set them aside, or any attachment founded on them, with costs. In a case before 1 & 2 *V. c.* 110, where the attachment was obtained pending a summons to stay proceedings in the original action on payment of debt and costs, the Court set it aside for irregularity (*o*).

So, if the order upon which the defendant was arrested is *void*, perhaps the Court or a Judge would set aside the proceedings against the sheriff (*p*); but not if it is merely irregular (*q*). Even in cases where the proceedings against the sheriff are perfectly regular, the Court or Judge, it seems, will sometimes exercise a

---

(*k*) See *Silk* v. *Humphrey*, 4 A. & E. 959.

(*l*) See per *Denman*, C. J., in *Silk* v. *Humphrey*, 4 A. & E. 967.

(*m*) *Barsham* v. *Bullock*, 10 A. & E. 23.

(*n*) *Planck* v. *Anderson*, 5 T. R. 37, 41. See also *Brandling* v. *Kent*, 1 T. R. 60: *Williams* v. *Mostyn*, 4 M. & W. 145; 7 Dowl. 38: *Stevens* v. *Jackson*, 6 Taunt. 206; 1 Marsh. 469: *Baker* v. *Davenport*, 8 D. & R. 608. See *Houlditch* v. *Birch*, 4 Taunt. 608.

(*o*) *R.* v. *Sheriff of Middlesex*, in *Woodward* v. *Feltham*, 5 B. & Ald. 746.

(*p*) See *Mills* v. *Bond*, 1 Str. 399.

(*q*) *Yeates* v. *Chapman*, 3 Bing. N. C. 262.

discretionary power to stay them upon certain terms (*see Ord. LXIX. r. 4, ante*, p. 1497), in the same way as they formerly did by analogy to the practice under the 4 & 5 *Anne, c.* 15, *s.* 20 (*r*). In some cases the proceedings might be stayed on the sheriff depositing in Court the required amount, or giving security to the amount required to the satisfaction of the Master, or on render of the defendant and payment of costs (*s*).

Remedy of sheriff when attachment not set aside.

If the attachment against the sheriff be not set aside, the sheriff, it seems, can be discharged from it only by payment of the sum mentioned in the order for the arrest and costs (*t*), and also the costs of the attachment, &c. (*u*). The sheriff or officer cannot, after paying the debt and costs in the action, maintain an action against defendant for money paid (*x*). Nor can he detain defendant in custody for the same (*y*).

If the defendant pay the debt and costs in the action against him, it seems that the proceedings against the sheriff will be stayed upon payment of the costs of the proceedings against him (*z*).

Escape.

Escape.]—As to the escape of a party from custody under a writ of execution, *see ante*, p. 896.

An escape is either negligent or voluntary: negligent, where the party escapes without the consent of the sheriff or his officer; voluntary, where the sheriff or his officer permits him to escape (*a*). The plaintiff must have sustained some damage in order to enable him to maintain an action against the sheriff for the escape (*b*). The law as to escape from custody under a writ of execution is for the most part applicable to an escape from custody under an order to arrest. (*See ante*, p. 896.)

Rescue.

Rescue.]—Under the old practice, if the defendant, after he was arrested, and before he was carried to prison, were rescued from the

(*r*) See *R.* v. *Sheriff of Kent*, 5 Dowl. 451; 2 M. & W. 316; where the sheriff made an insufficient return, and an attachment was granted against him, and the Court allowed the return to be amended, and set aside the attachment on payment of costs, though it was urged as a fact that the sheriff had not used due diligence in endeavouring to make the arrest: *Parke*, B., saying, that the Court could not decide as to the amount of damage the plaintiff had sustained by the sheriff's neglect in the execution of mesne processes.

(*s*) See *Edge* v. *Collingridge*, 11 M. & W. 61; 2 Dowl., N. S. 764. See *R.* v. *The Sheriff of Middlesex*, 15 M. & W. 146.

(*t*) See *R.* v. *Sheriff* (late) *of Devon*, 1 B. & Ad. 159: *Heppel* v. *King*, 7 T. R. 370: *R.* v. *Sheriff of Middlesex*, 2 East, 604: *R.* v. *Sheriffs of London*, 2 East, 316: *Fowlds* v. *Mackintosh*, 1 H. Bl. 233.

(*u*) See *R.* v. *Sheriffs of London*, in *Hollier* v. *Clark*, 2 B. & Ald. 192: *R.* v. *Sheriff of Middlesex*, 15 M. & W. 146; 3 D. & L. 472.

(*x*) *Pitcher* v. *Bailey*, 8 East, 171.

(*y*) *Rimmer* v. *Turner*, 3 Dowl. 601. See *White* v. *Laroux*, 1 M. & M. 347, where under circumstances it was held that an action would lie against the defendant.

(*z*) *Betts* v. *Smith*, 2 Q. B. 113.

(*a*) See the following cases as to the former practice: *Hodgson* v. *Mee*, 5 N. & M. 302; 3 A. & E. 765: *Atkinson* v. *Matteson*, 2 T. R. 176, 177: *Moses* v. *Norris*, 4 M. & Sel. 397; 1 Saund. 35 a: *Pariente* v. *Plumbtree*, 2 B. & P. 35: *Randell* v. *Wheble*, 10 A. & E. 728, per *Denman*, C. J. Per Cur. in *Brown* v. *Jarvis*, 5 Dowl. 285: *Scott* v. *Henley*, 1 M. & R. 227: *Neek* v. *Humphrey*, 4 M. & N. 738: *Williams* v. *Mostyn*, 4 M. & W. 145.

(*b*) *Williams* v. *Mostyn*, 7 Dowl. 38: *Randell* v. *Wheble*, supra.

PART XVI.

sheriff or his officer, the sheriff was excused from having his body in Court at the return of the writ, and might make his return to the writ accordingly (*c*). An escape owing to the negligence of the officer would not justify the return of a rescue (*d*).

If the sheriff return a rescue, the offender may be punished by attachment (*e*), or by indictment, and by a special action on the case against him by the plaintiff for damages, whether the rescue be returned or not (*f*). The Court have permitted a defendant to show, by affidavit, in mitigation of punishment, that in fact there had been no legal arrest (*g*).

Formerly, the punishment on an attachment for a rescue was a fine of four nobles; but latterly the Courts have fined the parties according to the circumstances of the case (*h*). As to the proceedings on an attachment, *see ante, Ch. LXXXIII.*

Sect. 9. *Liability and Discharge of Sureties—Proceedings against them.*

Liability and Discharge of .... PAGE 1506 | *Proceeding against Sureties*.... PAGE 1511

Liability and Discharge of Sureties.

Discharge of sureties by variance between the affidavit and statement of claim.

Discharge by Variance between Affidavit and Statement of Claim.]—As to how far the sureties will be discharged by a variance between the affidavit to arrest and the writ of summons or statement of claim, *see ante*, p. 1474. It seems that if the affidavit to arrest state a cause of action to the plaintiff as executor (*i*) or as assignee of a bankrupt (*k*), and the statement of claim set out only a cause of action due to the plaintiff in his own right and unconnected with his executorship, &c., the sureties would be discharged (*l*). Under the old practice, if plaintiff put into his declaration a cause of action distinct from that in the affidavit of debt, and recovered on that cause only, the bail were not liable; though, if he recovered both on the original and added cause, the bail were liable as far as regarded the original cause (*m*). The following cases were decided

(*c*) Com. Dig. "Rescous." And see *R.* v. *Sheriff of Middlesex*, in *Williams* v. *Pennell*, 1 B. & Ald. 190; [illegible], C. N. P. 539, n.: *Howden* v. [illegible]*lish*, 6 C. B. 504: *O'Neil* v. [illegible]*on*, Burr. 2812; ante, p. 809.

(*d*) *H*[illegible] v. *Leigh*, Holt, C. N. P. 5[illegible]: *Fermor* v. *Phillips*, 5 Moore, 184; 3 B. & B. 27 a.

(*e*) *Sheather* v. *Holt*, 1 Str. 631: *R.* v. *Belt*, 2 Salk. 586. And see *White* v. *Chapple*, 4 C. B. 628: *Anon.*, Say. 121: *R.* v. *Elkins*, 4 Burr. 2129: *Gobby* v. *Dewes*, 10 Bing. 112: *R.* v. *Pember*, Hardw. 112: *R.* v. *Horsley*, 5 T. R. 362.

(*f*) Com. Dig. "Rescous:" *R.* v. *Osmer*, 5 East, 304.

(*g*) *R.* v. *Minify*, 1 Str. 602.

(*h*) Ibid.: *R.* v. *Elkins*, 4 Burr. 2129.

(*i*) *Murrell* v. *Jowatt*, MS., T. 1823: *Ashworth* v. *Ryal*, 1 B. & Ad. 19: *Delves* v. *Strange*, 6 T. R. 158: *Attwood* v. *Rattenbury*, 5 Moore, 209: *Douglas* v. *Irlam*, 8 T. R. 416: *Holly* v. *Tipping*, 3 Wils. 61.

(*k*) Ib.; 1 Tidd, 9th ed. 450, n. (*e*): *Canning* v. *Davis*, 4 Burr. 2417.

(*l*) See ante, p. 1474. As to allowing an amendment of the statement of claim, see *Levet* v. *Knobelsdale*, 6 Taunt. 483. See *Gent* v. *Abbott*, 8 Taunt. 304.

(*m*) 2 Saund. 2, 72; [illegible]*heebright* v. *Jutting*, 7 Taunt. 3[illegible]; 1 Moore, 51. And see *Caswell* v. *Coare*, 2 Taunt. 107; *Taylor* v. *Wilkinson*, 5 N. & M. 189; 1 H. & W. 451; 3 A. & E. 784; *Green* v. *Elgie*, 3 B. & Ad. 437; *Firth* v. *Harris*, 8 Dowl. 689, where it did not appear upon which count the plaintiff recovered.

before 1 & 2 *V. c.* 110. Where, after an arrest for goods sold, plaintiff added in his declaration a special count for not delivering a bill of exchange, and recovered on that count *only*, it was held that the bail were discharged (*n*). But where a defendant was arrested in an entire sum for goods sold and money lent, and the declaration contained no count for goods sold, the bail were held not to be discharged (*o*). Where the declaration contained counts on causes of action not included in the affidavit of debt, and plaintiff recovered both on the original and added causes, the bail were held not liable to the costs of the counts on the latter; and it was held, that it was for plaintiff to have the costs separated on taxation (*p*). A trifling variance in the declaration of the names of the parties was not, it seems, ground for discharging the bail (*q*). And where defendant was held to bail by a wrong christian name, but put in and justified bail above by his right name, and plaintiff declared against him by such right name, the bail were not exonerated (*r*). And the same, where the affidavit of debt was on a note payable to A. and by him indorsed to plaintiff, and the declaration was on a note payable to A., by him indorsed to C., and by C. to plaintiff (*s*).

Discharge of sureties by giving time to defendant, &c.

By giving Time to Defendant, &c.]—Giving time by the plaintiff to the defendant may, in some cases, have the effect of discharging the sureties. The old practice on this subject should, therefore, be referred to. Under the old practice, any time given by the plaintiff to the principal, without the consent of the bail (*t*), which put them in a different situation from that in which they placed themselves by entering into the recognizance, would discharge their liability. Thus a cognovit by the principal, by the terms of which he was to have a longer time for the payment of the debt and costs than he would have had if plaintiff had proceeded regularly and gone to trial in the action, would discharge the bail, if they did not consent thereto (*u*). But a cognovit by the principal, by which such time was not given (as, if it were agreed that judgment was to be entered up immediately, or that the debt was to be paid by instalments, within the time in which plaintiff would have been entitled to judgment and execution, had he gone to trial), would not discharge the bail, though taken without their knowledge or consent (*x*). If, without notice to the bail, plaintiff took the joint bills of defen-

(*n*) *Thompson* v. *Macirone*, 4 D. & R. 619; 3 B. & C. 1.

(*o*) *Gray* v. *Harvey*, 1 Dowl. 114.

(*p*) *Taylor* v. *Wilkinson*, 1 N. & P. 629; 6 A. & E. 533. See *Taylor* v. *Wilkinson*, 5 N. & M. 189; 1 H. & W. 451.

(*q*) —— v. *Rennels*, 1 Chit. Rep. 659.

(*r*) *Clark* v. *Baker*, 13 East, 273.

(*s*) *Luce* v. *Irwin*, 6 Dowl. 92: *Forbes* v. *Phillips*, 2 N. R. 98: *Yates* v. *Thelton*, 3 Lev. 235, 245; R. E. 2 G. 2.

(*t*) See *Howard* v. *Bradberry*, 2 Dowl. 92.

(*u*) *Thomas* v. *Young*, 15 East, 617: *Bowsfield* v. *Tower*, 4 Taunt. 456: *Croft* v. *Johnson*, 5 Taunt. 319: *Charleton* v. *Morris*, 6 Bing. 427; 4 M. & P. 114: *Farmer* v. *Thorley*, 4 B. & Ald. 91: *Clift* v. *Gye*, 9 B. & C. 422.

(*x*) *Stevenson* v. *Roche*, 9 B. & C. 707: *Ladbrook* v. *Hewett*, 1 Dowl. 488. If a cognovit was taken with consent of the bail, and the debt was not paid in pursuance of it, it seems notice should have been given to the bail before taking proceedings against them: *Clift* v. *Gye*, supra: *Surman* v. *Bruce*, 4 M. & Sc. 181.

PART XVI.

dant and another for debt and costs (*y*), or agreed to take a composition for the same (*z*), the bail were discharged. A mere honourable obligation on the part of plaintiff not to press defendant for payment of debt and costs would not discharge the bail (*a*).

The application by the bail for relief on the ground of time having been given to the principal had to be made in a reasonable time after the bail knew of the agreement to give time (*b*).

Discharge of sureties by death of defendant, &c.

By Death, &c. of Defendant.]—When the security is, that the defendant will not go out of England without leave of the Court, the sureties are discharged by final judgment being obtained, or the death of the defendant, before any breach of the security. And it seems that if the action is for a penalty, or sum in the nature of a penalty, other than a penalty in respect of any contract, and the condition of the security is, as mentioned *ante*, p. 1497, that any sum recovered against the defendant in the action shall be paid or that he shall be rendered to prison, then, if the defendant die at any time before the return of the ca. sa. against the defendant, the bail are thereby discharged (*c*). But if he die after the ca. sa. is returnable (*d*), although before the return is filed (*e*), the sureties are fixed and the Court cannot relieve them. Under the old practice, where the defendant died before the return of the ca. sa. the bail might apply to the Court or to a Judge to have an exoneretur entered on the bail-piece; or they might plead the death to any proceeding against them on the recognizance (*f*).

Under the old practice, if the principal became bankrupt (*g*), and obtained his certificate before the bail were fixed, the bail were thereby discharged in all cases where the certificate was a bar; but if the bail were fixed before the allowance of the certificate they remained liable, and the Court could not relieve them (*h*). If the

---

(*y*) *Willison* v. *Whittaker*, 7 Taunt. 53: aliter, if agreed that plaintiff might still proceed in the action, notwithstanding the bills. See *Melville* v. *Glendinning*, 7 Taunt. 126: *Vernon* v. *Turley*, 4 Dowl. 660; 1 M. & W. 316.

(*z*) Semb. *Thackeray* v. *Whitaker*, 1 Moore, 457. See *Brickwood* v. *Annis*, 5 Taunt. 614; 1 Marsh. 250, where the composition was taken after a judgment against the bail: *Vernon* v. *Turley*, 4 Dowl. 660; 1 M. & W. 316.

(*a*) *Ladbrooke* v. *Hewett*, 1 Dowl. 488.

(*b*) *Vernon* v. *Turley*, 4 Dowl. 660; 1 M. & W. 316. See *Knight* v. *Dorsey*, 1 B. & B. 48; 3 Moore, 305.

(*c*) *Sparrow* v. *Lowgate*, W. Jon. 29.

(*d*) *Glynn* v. *Yates*, 1 Str. 511: *Parry* v. *Berry*, 2 Str. 717; 2 Ld. Raym. 1452: *Filewood* v. *Popplewell*, 2 Wils. 65.

(*e*) *Rawlinson* v. *Gunston*, 6 T. R. 284.

(*f*) 2 Sellon, 55; Tidd, 9th ed. 1129.

(*g*) As to entering an exoneretur where the defendant had become bankrupt and obtained his certificate in a foreign country, see *Ballantine* v. *Golding*, 4 T. R. 185, n.: *Pedder* v. *M'Master*, 8 N. R. 609: *Jones* v. *Chartres*, Hayes, Rep. Ex. Ir. 175.

(*h*) *Wooley* v. *Cobb*, 1 Burr. 224: *Mannin* v. *Partridge*, 14 East, 599: *Harmer* v. *Hagger*, 1 B. & Ald. 332: *Johnson* v. *Linsey*, 1 B. & C. 247; 1 D. & R. 285: *Stapleton* v. *Macbar*, 7 Taunt. 589: *Thackeray* v. *Turner*, 8 Taunt. 28: *Walker* v. *Giblett*, 2 W. Bl. 811: *Payne* v. *Spencer*, 6 M. & S. 231: *West* v. *Ashdown*, 1 Bing. 164; 7 Moore, 566. A certificate under 6 & 7 W. 4, c. 14 (a repealed Irish Bankrupt Act) operates as a bar as well of debts due from the bankrupt in England or Scotland as of those incurred by him in Ireland. See *Fergusson* v. *Spencer*, 2 Sc. N. R. 229. As to the effect of the plaintiff proving his debt under a bankruptcy against

certificate were obtained before the bail were fixed, the bail might apply to the Court, or to a Judge at Chambers in vacation, to have an exoneretur entered on the bail-piece (*i*); for they could not *plead* the bankruptcy and certificate of their principal in their own discharge (*k*). This application had to be made before any proceedings were had against the bail, otherwise they would have to pay the costs of such proceedings (*l*). But such proceedings being taken were not an answer to the application (*m*). If there had been much delay, the Court might altogether refuse to relieve them (*n*). The Court, however, generally speaking, would order an exoneretur to be entered on the bail-piece in all cases where defendant was entitled to be discharged out of custody (*o*). If the validity of the bankruptcy were disputed, the Court would sometimes order it to be tried on a feigned issue, before they directed an exoneretur to be entered (*p*).

Old practice as to rendering defendant.

Under the old practice *bail above* might as a *matter of right* (ex debito justitiæ), at any time pending the suit, or before the return of a ca. sa. against their principal, surrender him in their discharge, and might plead this render in any action against them (*q*). The Court also, as a *matter of favour* (ex gratia), have allowed the bail a further time after the return of the ca. sa. to render their principal; which, however, being mere matter of favour could not be *pleaded*, but the bail might have the full benefit of it upon motion (*r*).

Time to render, when enlarged.

The Court would not, in general, enlarge the times above mentioned, the bail, by their recognizance, having bound themselves to render their principal or pay the debt and costs; and they would not, in general, be excused from the performance of the condition of their recognizance, merely because the render had become impossible without any default of theirs. The Court, therefore, would not enlarge the time for rendering, even on the ground that the principal could not be removed without endangering his life (*s*) (unless he were already in custody, and his illness were returned specially on the habeas corpus (*t*)); or that he had become a lunatic (except under very special circumstances (*u*)); or that he was un-

---

the defendant, see *Aylett* v. *Harford*, 2 W. Bl. 1317: *Linging* v. *Comyn*, 2 Taunt. 246. See *Duncan* v. *Scott*, 1 Bing. N. C. 431: *Duncan* v. *Sutton*, 1 Sc. 338.

(*i*) *Martin* v. *O'Hara*, Cowp. 324.

(*k*) *Donelly* v. *Dunn*, 2 B. & P. 45: *Beddowe* v. *Holbrooke*, 1 B. & P. 450, n.

(*l*) *Mannin* v. *Partridge*, 14 East, 599: *Harmer* v. *Hagger*, 1 B. & Ald. 332: *Thackeray* v. *Turner*, 8 Taunt. 28.

(*m*) *Jones* v. *Ellis*, 1 A. & E. 382.

(*n*) *Swayne* v. *Bland*, 4 D. & R. 373. And see *Clarke* v. *Hoppe*, 3 Taunt. 46: *Humphreys* v. *Knight*, 4 M. & P. 370; 6 Bing. 569, where the certificate was obtained after issue and before judgment.

(*o*) *Todd* v. *Maxfield*, 3 B. & C. 222; 5 D. & R. 258.

(*p*) Tidd, 292. And see *Stacey* v. *Frederica*, 2 B. & P. 390: *Woolcott* v. *Leicester*, 6 Taunt. 75: *Harmer* v. *Hagger*, 1 B. & Ald. 332.

(*q*) *Simmons* v. *Middleton*, 8 Mod. 341; 1 Ld. Raym. 156; 1 Wils. 270: *Mannin* v. *Partridge*, 14 East, 599: *Armitage* v. *Rigbye*, 5 A. & E. 81: *Sherratt* v. *Floyer*, 2 Bing. 81.

(*r*) See *Wilmore* v. *Clark*, 1 Ld. Raym. 156: *Anon.*, 1 Salk. 101: *Armitage* v. *Rigbye*, 5 A. & E. 81.

(*s*) *Wynn* v. *Petty*, 4 East, 102: *Grant* v. *Fagan*, Id. 190.

(*t*) *Winstanley* v. *Gaitskell*, 16 East, 389.

(*u*) *Cock* v. *Bell*, 13 East, 355. But a lunatic might be brought up by habeas from St. Luke's Hospital, and rendered. *Pillop* v. *Sexton*, 2 B. & P. 550.

before Judgment.

(*y*), or agreed to take a compo- discharged. A mere honourable not to press defendant for pay- ischarge the bail (*a*).

lief on the ground of time having be made in a reasonable time it to give time (*b*).

When the security is, that the ud without leave of the Court, judgment being obtained, or the breach of the security. And it ualty, or sum in the nature of a espect of any contract, and the oned *ante*, p. 1497, that any sum the action shall be paid or that , if the defendant die at any time inst the defendant, the bail are die after the ca. sa. is return- rn is filed (*c*), the sureties are them. Under the old practice, ie return of the ca. sa. the bail Judge to have an exoneretur y might plead the death to any ognizance (*f*).

ncipal became bankrupt (*g*), and bail were fixed, the bail were re the certificate was a bar; but llowance of the certificate they ld not relieve them (*h*). If the

---

(*f*) 2 Sellon, 55; Tidd, 9th ed. 1129.

(*g*) As to entering an exoneretur where the defendant had become bankrupt and obtained his certificate in a foreign country, see *Ballantine* v. *Golding*, 4 T. R. 185, n.: *Pedder* v. *M'Master*, 8 N. R. 609: *Jones* v. *Chartres*, Hayes, Rep. Ex. Ir. 175.

(*h*) *Wooley* v. *Cobb*, 1 Burr. 224: *Mannin* v. *Partridge*, 14 East, 599: *Harmer* v. *Hagger*, 1 B. & Ald. 332: *Johnson* v. *Linsey*, 1 B. & C. 247; 1 D. & R. 285: *Stapleton* v. *Machar*, 7 Taunt. 589: *Thackeray* v. *Turner*, 8 Taunt. 28: *Walker* v. *Giblett*, 2 W. Bl. 811: *Payne* v. *Spencer*, 6 M. & S. 231: *West* v. *Ashdown*, 1 Bing. 164; 7 Moore, 566. A certificate under 6 & 7 W. 4, c. 14 (a repealed Irish Bankrupt Act) operates as a bar as well of debts due from the bankrupt in England or Scotland as of those incurred by him in Ireland. See *Fergusson* v. *Spencer*, 2 Sc. N. R. 229. As to the effect of the plaintiff proving his debt under a bankruptcy against

PART XVI.

warrantably arrested and detained by a foreign enemy (*x*). But if, from any act or law of our own state, it became impossible to render a defendant (*y*); as, if he had been actually sent out of the kingdom under the Alien Act (*z*); or were actually on board a convict ship, in order to be transported (*a*); or when a seaman, being out upon bail for a debt under 30*l.*, was impressed into the Queen's service (*b*), or the like (*c*): the Court or a Judge, upon application, would order an exoneretur to be entered on the bail-piece. Also, where defendant was in custody under a warrant of commissioners of bankrupt, the Court or a Judge would enlarge the time for rendering him, though the bail had not justified, he being in such a case, as it were, in criminal custody, so that the bail could not render him (*d*). The Court or a Judge would enlarge the time for bail to render a defendant, who was under imprisonment in a county gaol upon conviction for libel, until a week after the imprisonment under the sentence had expired; but not until a week after the term for which he was sentenced to be imprisoned (*e*).

Mode and time for applying for enlargement.

It must have been sworn that the application was made on behalf of the bail (*f*). And, in general, the bail could make no motion until they justified; but when defendant was already in custody, and the bail could not make the render in due time, it was an exception to the general rule, and the bail might obtain time to render (*g*). In all other cases, the bail must have rendered their principal within the time above mentioned, or pay the debt and costs (*h*).

Discharge of sureties by other causes.

Discharge of Sureties by other Causes.]—The sureties will not be discharged merely by the plaintiff not delivering his statement of claim in due time, as the proceedings to arrest are now altogether collateral to the action (*i*). Under the old practice the bail were discharged if the cause were referred to arbitration; but this was not so if a verdict were taken subject to a reference (*k*). If the defendant obtain judgment in the action, or if the defendant pay the debt and costs, the sureties will be discharged. So, under the old practice, if the defendant (or, where there were two defendants,

(*x*) *Grant* v. *Fagan*, 4 East, 189.

(*y*) See the notes in 13 Price, 525, 532.

(*z*) See *Folkein* v. *Critico*, 13 East, 457.

(*a*) *Wood* v. *Mitchell*, 6 T. R. 247: *Fowler* v. *Dunn*, 4 Burr. 2034.

(*b*) *Robertson* v. *Patterson*, 7 East, 405. And see ante, p. 1460.

(*c*) See *Maude* v. *Jowett*, 3 East, 145. As to enlarging the time when the defendant became bankrupt until after he had finished his last examination, see Id.: *Offley* v. *Dickens*, 6 M. & Sel. 348: *Glendining* v. *Robinson*, 1 Taunt. 320: *Coombs* v. *Dod*, 2 Dowl. 766; 3 M. & Sc. 817: *Shaw* v. *Cash*, 12 Moore, 257; 4 Bing. 80: *Ruston* v. *Greene*, 2 Dowl. 617.

(*d*) *Gibson* v. *White*, 1 Dowl. 297; 2 C. & J. 85; 2 Tyr. 162. And see *Waugh* v. *Ashford*, 1 Sc. 167; 3 Dowl. 123: *Harris* v. *Alcock*, 2 C. & J. 486.

(*e*) *Campbell* v. *Ackland*, 1 C. & M. 73; 1 Dowl. 635. See *Rouch* v. *Boucher*, 10 Price, 104: *Ashmore* v. *Fletcher*, 13 Price, 630.

(*f*) *Harris* v. *Glossop*, 2 Chit. Rep. 101.

(*g*) *Golding* v. *Haverfield*, 13 Price, 593.

(*h*) *Bird* v. *Atkins*, 7 Dowl. 769.

(*i*) *Ireland* v. *Berry*, 1 D. & M. 508: *Brown* v. *M'Millan*, 7 M. & W. 196: *Walter* v. *De Richemont*, 6 Q. B. 544; 2 D. & L. 506; 14 L. J., Q. B. 22.

(*k*) 2 Saund. 72 b: *Archer* v. *Hale*, 1 M. & P. 285; 4 Bing. 464.

then if both) were taken on the ca. sa. (*l*), or if the plaintiff, instead of suing out a ca. sa. against the principal, sued out an elegit and extended lands under it, or sued out a fi. fa. and levied the whole amount of his debt under it (*m*), the bail were thereby discharged.

Under the old practice, if defendant became a peer (*n*), or a member of the House of Commons (*o*), pending the action, the Court or a Judge would allow an exoneretur to be entered (*p*). So, if defendant were actually on board a convict-ship, in order to be transported; or a seaman impressed in the Queen's service; or an alien, and were sent out of the kingdom under the Alien Act; or if, from any other Act or law of our own state, it became impossible to render defendant, the Court or a Judge would allow an exoneretur to be entered on the bail-piece (*q*). But this would not be allowed where defendant was merely detained by a foreign enemy (*r*), or had become lunatic (*s*), or where plaintiff recovered under a bailable amount (*t*).

Proceedings against Sureties.

The remedy against the sureties is by action on the bond or other security, which bond and security and all proceedings thereon are subject to the order and control of the Court or a Judge (*Ord. LXIX. r. 4, ante*, p. 1497).

As already noticed (*ante*, p. 1497), when the action is for a penalty or sum in the nature of a penalty other than a penalty in respect of any contract, the security given is to the effect that any sum recovered against the defendant in the action shall be paid or that he shall be rendered to prison; in such cases, therefore, it will be necessary in some measure to consider the old practice as to proceedings against bail to the action; and it should be stated that bail to the action undertook that if the defendant was condemned in the action he would satisfy the costs and condemnation or render himself to the custody of the prison of the Court, or that the bail would do it for him. For the old practice, *see the 12th edition of this work, Vol.* 1, p. 818 *et seq.*

(*l*) *Higgin's case*, Cro. Jac. 320: *Gee* v. *Fane*, 1 Lev. 226.

(*m*) MS., E. 1820. And see 2 Sellon, 44: *Gubbs* v. *Blackwell*, 2 Lutw. 1273: *Stevenson* v. *Roche*, 9 B. & C. 707.

(*n*) *Trinder* v. *Shirley*, 1 Doug. 45.

(*o*) See *Langridge* v. *Flood*, 4 East, 190: *Phillips* v. *Wellesley*, 1 Dowl. 9.

(*p*) See ante, pp. 1455, 1456.

(*q*) Ante, p. 1456. See *D'Argent* v. *Wilson*, 1 East, 330: *Chapman* v. *Snow*, 1 B. & P. 132. As to the form of affidavit in support of application when defendant an alien, see *Merrick* v. *Voucher*, 6 T. R. 50, 52: *Coles* v. *De Hayne*, 6 T. R. 246.

(*r*) See *Grant* v. *Fagan*, 4 East, 189.

(*s*) *Ibbotson* v. *Lord Galway*, 6 T. R. 133; Lofft, 617. See *Cock* v. *Bell*, 13 East, 355.

(*t*) See *Thwaites* v. *Piper*, 4 D. & R. 194. But see Tidd, 9th ed. 294.

PART XVII.

PROCEEDINGS RELATING TO INFERIOR COURTS.

CHAP.		PAGE
CXXVIII.	*Application of Judicature Acts to*	1512
CXXIX.	*Appeals from Inferior Courts*	1516
CXXX.	*Appeals from County Courts*	1523
CXXXI.	*Compelling Judge or Officer of County Court to perform Duty*	1538
		1541
CXXXII.	*Prohibition*	1548
CXXXIII.	*Remission of Actions and Issues to County Courts*	1555
CXXXIV.	*Removal of Actions from Inferior Courts—Certiorari*	

CHAPTER CXXVIII.

APPLICATION OF THE JUDICATURE ACTS TO, ETC.

PART XVII.

Power to confer jurisdiction.

Power by Order in Council to confer Jurisdiction on Inferior Courts.]—By the *Judicature Act*, 1873, s. 88, "It shall be lawful for her Majesty from time to time, by Order in Council, to confer on any inferior Court of civil jurisdiction the same jurisdiction in equity and in admiralty respectively, as any County Court now has, or may hereafter have; and such jurisdiction, if and when conferred, shall be exercised in the manner by this Act directed."

Power to grant relief and to give effect to defences and counterclaims.

Power of Inferior Courts to grant Relief and to give Effect to Defences and Counterclaims.]—By the *Judicature Act*, 1873, s. 89, "Every inferior Court which now has, or which may, after the passing of this Act have jurisdiction in equity, or at law and in equity, and in admiralty respectively, shall, as regards all causes of action within its jurisdiction for the time being, have power to grant, and shall grant in any proceeding before such Court, such relief, redress or remedy, or combination of remedies, either absolute or conditional, and shall in every such proceeding give such and the like effect to every ground of defence or counterclaim, equitable or legal (subject to the provision next hereinafter contained), in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice."

This section confers on all such inferior Courts the power to give the same relief, redress or remedy, as the result of an action, as the superior Court could give, but the words "in any proceeding" must be read as "in any action," and the section does not enable the inferior Court to apply all the modes of granting that relief which a superior Court could (*a*). It does not give power to the inferior Court to direct judgment to be entered on a motion for a new trial (*a*). The section confers jurisdiction on a County Court to grant an injunction, and to enforce it by committal (*b*).

Jurisdiction with respect to counterclaims.

Jurisdiction with respect to Counterclaims.]—The *Judicature Act*, 1873, *s.* 89 (*supra*, p. 1512), confers on inferior Courts power to entertain, and requires them to give effect to, counterclaims.

By *s.* 90, "Where in any proceeding before any such inferior Court any defence or counterclaim of the defendant involves matter beyond the jurisdiction of the Court, such defence or counterclaim shall not affect the competence or the duty of the Court to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff and the defence thereto, but no relief exceeding that which the Court has jurisdiction to administer shall be given to the defendant upon any such counterclaim: provided always, that in such case it shall be lawful for the High Court, or any Division or Judge thereof, if it shall be thought fit, on the application of any party to the proceeding, to order that the whole proceeding be transferred from such inferior Court to the High Court, or to any Division thereof; and in such case the record in such proceeding shall be transmitted by the Registrar, or other proper officer, of the inferior Court to the said High Court; and the same shall thenceforth be continued and prosecuted in the said High Court as if it had been originally commenced therein" (*c*).

By the *Judicature Act*, 1884, *s.* 18, "The jurisdiction of an inferior Court in cases of counterclaim under sections eighty-nine and ninety of the Supreme Court of Judicature Act, 1873, shall not be excluded by reason (1) that any such counterclaim involves matter not within the local jurisdiction of such inferior Court, but within the jurisdiction of any other inferior Court in England; or (2) that, where the counterclaim involves more than one cause of action, as to each of which the defendant might have maintained a separate action, each such cause of action being within the jurisdiction of the Court, the aggregate amount of the counterclaim exceeds the jurisdiction of the Court; or (3) that the counterclaim is for an amount of money exceeding the jurisdiction of the Court, provided that the plaintiff does not object in writing, within such time as may be prescribed by any rules, to the Court giving relief exceeding that which the Court would have had jurisdiction to administer prior to the commencement of this Act. In any case where the counterclaim involves matter beyond the jurisdiction of the Court, notwithstanding the provisions of this section, the

(*a*) *Pryor* v. *City Offices Co.*, 10 Q. B. D. 504; 52 L. J., Q. B. 362; 48 L. T. 698; 31 W. R. 777.

(*b*) *Martin* v. *Bannister*, 4 Q. B. D. 491; 48 L. J., Q. B. 667; 28 W. R. 143; *Richards* v. *Cullerne*, 7 Q. B. D. 623.

(*c*) See the County Court Rules, 1875, Ord. XX. r. 7.

PART XVII.

Court may, on such terms (if any) as the Court may think just, either adjourn the hearing of the case, or stay execution on the judgment, for such time as may be necessary to enable any party to apply to remove the proceedings into the High Court of Justice or to enable the defendant to prosecute in a Court of competent jurisdiction an action for the purpose of establishing his counterclaim; and in default of any such application being made, or action brought, the Court shall, after the expiration of the time limited, have jurisdiction to hear and determine the whole matter in controversy, to the same extent as if all parties had consented thereto" (*d*).

As to the proceedings for removal to the High Court where a counterclaim beyond the jurisdiction of the inferior Court is set up, *see post*, p. 1562.

Rules of law applicable to inferior Courts.

Rules of Law applicable to Inferior Courts.]—By the *Judicature Act*, 1873, s. 91, "The several rules of law enacted and declared by this Act shall be in force and receive effect in all Courts whatsoever in England, so far as the matters to which such rules relate shall be respectively cognizable by such Courts."

Under this section it has been held that *Ord. LV.* (now *Ord. LXV.*) of the *Rules of the S. C.*, as to costs, is applicable to proceedings in the Liverpool Court of Passage (*e*).

The Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 *V. c.* 49), which repeals parts of the Com. Law Proc. Acts, preserves those Acts in cases where they have been applied to inferior Courts (*ss.* 5 and 7), and also gives power to apply the Judicature Acts and Rules of the Supreme Court to inferior Courts (*s.* 8).

Power to extend enactments to borough and local Courts.

Power to extend Enactments to Borough and Local Courts.]—By the Borough and Local Courts of Record Act, 1872 (35 & 36 *V. c.* 86), s. 2, "It shall be lawful for her Majesty from time to time by an Order in Council to direct that all or any part of the provisions of an Act passed in the first and second years of his late Majesty King William the Fourth, intituled 'An Act to enable Courts of Law to give relief against adverse claims made upon persons having no interest in the subject of such claims,' and of the provisions set forth in the schedule to this Act, shall apply to all or any local Court or Courts of Record in England or Wales; and within one month after such order shall have been made and published in the London Gazette such provisions shall extend and apply in manner directed by such order, and any such order may be in like manner from time to time altered and annulled, and in and by such order her Majesty may alter and modify such provisions as are mentioned in the schedule so as to adapt the same to the constitution, jurisdiction and procedure of any such Court or Courts, and may direct by whom and at what time or times any powers and duties incident to the provisions applied under this Act shall and may be exercised

(*d*) This section meets the difficulty that arose in the case of *Davis* v. *Flagstaff Mining Co.*, 3 C. P. D. 228; 47 L. J., C. P. 503; 38 L. T. 769; 26 W. R. 431.

(*e*) *King* v. *Hawksworth*, 4 Q. B. D. 371; 41 L. T. 411.

with respect to matters in such Court or Courts, and may make any orders or regulations which may be deemed requisite for carrying into operation in such Court or Courts the provisions so applied."

By sect. 3, "It shall also be lawful for her Majesty from time to time by such order as aforesaid to direct that any writ, order, summons or process issuing out of or made or taken in any such Court of Record may be served in such part or parts of England and Wales as shall be specified in such order."

By Order in Council published in the London Gazette, June 27th, 1873, this Act is extended to the Tolzey Court and Pie Poudre Court of Bristol, the Courts of Record of Scarborough and Poole, and the Salford Hundred Court; and part of its provisions (*sched., rr.* 1, 2, 9, 10, 11 and 12) are applied to the Mayor's Court, London.

Power to make rules as to appeals from.

Power to make Rules as to Appeals from.]—By the *Judicature Act*, 1884, *s.* 23, "The power to make rules conferred by section seventeen of the Supreme Court of Judicature Act, 1875 (*f*), and enactments amending the same (*f*), shall be deemed to include the power to make rules for regulating the procedure on appeals from inferior Courts to the High Court" (*f*).

Power over rules of inferior Courts.

Power over Rules of Inferior Courts.]—By the *Judicature Act*, 1884, *s.* 24, "Where by virtue of any statute or charter or otherwise powers of making rules and orders for regulating the procedure or practice of or the costs or fees in any inferior Court of civil jurisdiction are given to or have been exercised by the Judge of any such Court or any other person, either solely or jointly with any other person, and either with or without the concurrence of any Judge of her Majesty's Supreme Court of Judicature or any other person, any rules or orders made after the commencement of this Act by virtue of any such powers as aforesaid shall be subject to the concurrence of the authority for the time being empowered to make rules for the Supreme Court: Provided that the same authority may alter or annul any existing rule or order as to the matters aforesaid in any such Court, if after communication with the Judge or other person by whom such rule or order was made it shall think fit to do so, subject, where such rule has been made with the concurrence of any Judge of the Supreme Court existing at the commencement of this Act, to the consent of such Judge."

(*f*) See ante, Vol. 1, pp. 200 et seq.

CHAPTER CXXIX.

APPEALS FROM INFERIOR COURTS (*a*).

PART XVII.

Appeals from inferior Courts (*a*).

By *Judicature Act*, 1873, *s.* 45, "*All appeals from Petty or Quarter Sessions*, from a *County Court*, or *from any other inferior Court*, which might before the passing of this Act have been brought to any Court or Judge whose jurisdiction is by this Act transferred to the High Court of Justice, may be heard and determined by Divisional Courts of the said High Court of Justice, consisting respectively of such of the Judges thereof as may from time to time be assigned for that purpose, pursuant to Rules of Court, or (subject to Rules of Court) as may be so assigned according to arrangements made for the purpose by the Judges of the said High Court. The determination of such appeals respectively by such Divisional Courts shall be final unless *special leave to appeal* from the same to the Court of Appeal shall be given by the Divisional Court by which any such appeal from an inferior Court shall have been heard" (*b*).

Before whom to be heard.

It will be observed that the above section provides that appeals from inferior Courts shall be heard by a Divisional Court.

By *R. of S. C., Ord. LIX. r.* 4, "Every Judge of the High Court of Justice for the time being shall be a Judge to hear and determine appeals from inferior Courts, under section 45 of the Principal Act. All such appeals (except probate and admiralty appeals from inferior Courts, and from justices, which shall be to a Divisional Court of the Probate, Divorce, and Admiralty Division), shall be entered in one list by the officers of the Crown Office Department of the Central Office, and shall be heard by such Divisional Court of the Queen's Bench Division as the Lord Chief Justice of England shall from time to time direct."

When a rule nisi is obtained, or a notice of motion on appeal from an inferior Court is given, the appeal must be entered in the list at the Crown Office under this rule before the day mentioned in the rule or in the notice of motion (*c*). Where a rule nisi to reverse a judgment of an inferior Court was obtained on the 5th November, calling on the opposite party to show cause at the expiration of eight days, or so soon after as the case could be heard, and the rule was not set down at the Crown Office for hearing, in the list, under this rule, before the day named in the rule nor until the following 3rd of February, it was held, that the appellant had lost his right to be heard (*c*).

As to Divisional Courts, *see Vol.* 1, p. 15.

(*a*) As to appeals from County Courts, see post, Ch. CXXX., p. 1523.

(*b*) This section does not repeal special enactments with reference to the mode of and procedure on such appeals: *The Ganges*, 5 P. D. 247; 43 L. T. 12.

(*c*) *Donovan* v. *Brown*, 4 Ex. D. 148; 48 L. J., Ex. 456.

By *R. 22nd January*, 1877 (*c*), "It is ordered that the party entering a special case under Order 58 of Rule 19 [now *Ord. LXX. r.* 4, *supra*], at the Crown Office of the Queen's Bench Division, shall, four clear days before the day appointed for argument, deliver two copies of the case to the Judges of the Divisional Court to which such case has been assigned for argument, at the Judges' Chambers in Rolls Gardens, Chancery Lane (*d*), such copies to be marked 'For the use of the Judges in the Queen's Beneh Division,' and not with the name of any particular Judge, and to be divided into paragraphs and numbered as in the special case.

In cases tried before an inferior Court a motion for a new trial or on leave reserved cannot be made in the High Court except by leave under *Ord. LIX. r.* 8, *supra*, unless either counsel moving was present at the trial, or the Judge's notes are produced with an affidavit verifying his signature; and in any case, except by such leave, the Judge's notes so verified must be produced on the argument of the rule (*e*). The notes, if erroneous or defective, cannot be corrected by affidavit (*e*).

Costs.

In all cases where the proceeding is not excluded from the application of the Rules of 1883 (*f*), the costs of the appeal are in the discretion of the Court (*g*). They are so on a case stated by sessions on appeal from a poor rate (*h*); but not on an appeal by special case against a conviction under the Weights and Measures Acts (*i*).

The successful party generally gets the costs (*k*).

Appeal to Court of Appeal.

No appeal lies from the decision of the Divisional Court without special leave (*l*). With such leave an appeal lies, notwithstanding sect. 20 of the *Appellate Jurisdiction Act*, 1876 (*m*). See fully as to when an appeal lies, *ante*, p. 969.

Power to draw inferences of fact, and give judgment, &c.

By *R. of S. C., Ord. LIX. r.* 7 (*R. October*, 1884, *r.* 15), "On any motion by way of appeal from an inferior Court, the Court to which any such appeal may be brought shall have power to draw all inferences of fact which might have been drawn in the Court below, and to give any judgment and make any order which ought to have been made. No such motion shall succeed on the ground merely of misdirection or improper reception or rejection of evidence, unless, in the opinion of the Court, substantial wrong or miscarriage has been thereby occasioned in the Court below."

Judge's notes, evidence of proceedings below.

By *R. of S. C., Ord. LIX. r.* 8 (*R. October*, 1884, *r.* 16), "On any motion by way of appeal from an inferior Court, the Court to

(*c*) W. N. 1877, Feb. 3rd, Misc. p. 58.

(*d*) Now at the Crown Office, Royal Courts of Justice.

(*e*) *Welsh* v. *Mercer*, L. R., 8 Exch. 71. See contra *Bridge* v. *Daine*, 29 L. T. 477, from which it appears that the Liverpool Court of Passago is privileged in this respect.

(*f*) See Ord. LXVIII., ante, Vol. 1, p. 202.

(*g*) See Ord. LXV. r. 1, ante, Vol. 1, p. 672.

(*h*) *Clark* v. *Fisherton-Angar*, 6 Q. B. D. 139: *Clark* v. *Aberdare Union*, 29 W. R. 334.

(*i*) *Queen* v. *Baxendale*, 6 Q. B. D. 144, n. (1); 29 W. R. 335.

(*k*) *Clark* v. *Aberdare Union*, 29 W. R. 334.

(*l*) Sect. 45, ante, p. 1516. See fully ante, p. 969.

(*m*) *Crush* v. *Turner*, 3 Ex. D. 303; 47 L. J., Ex. 639. In *Ashenden* v. *London, B. & S. C. R. Co.*, 42 L. T. 588, the Court, on giving leave, refused to impose the terms that the appellants should pay the costs in any event.

PART XVII.

which any such appeal may be brought shall have power, if the notes of the Judge of such inferior Court are not produced, to hear and determine such appeal upon any other evidence or statement of what occurred before such Judge which the Court may deem sufficient."

Power to apply statutes as to appeals from County Courts to other Courts.

Power to apply Statutes as to County Court Appeals to other Courts.]—By the *Judicature Act*, 1875, *s.* 15, "It shall be lawful for her Majesty from time to time, by Order in Council, to direct that the enactments relating to appeals from County Courts shall apply to any other inferior Court of record; and those enactments, subject to any exceptions, conditions, and limitations contained in the order, shall apply accordingly, as from the date mentioned in the order."

Power to make rules as to.

Power to make Rules as to.]—*See Judicature Act*, 1884, *s.* 23, *ante*, p. 1515.

Up to the present time no rules have been made under this section.

Mayor's Court, London.

Mayor's Court, London (*n*).]—The Mayor's Court, London, is an inferior Court within the meaning of sect. 45 of the *Judicature Act*, 1873 (*supra*, p. 1516) (*n*), and, consequently, no appeal lies from a decision of the Divisional Court on an appeal or application for a new trial, without special leave (*n*). But in the case of a decision of the Mayor's Court, where the defect appears on the face of the proceedings, and where formerly, error lay to the Exchequer Chamber, the appeal is now to the Court of Appeal, and not to the Divisional Court (*o*).

—Appeal by motion.

By 20 & 21 *V. c. clvii. s.* 10 (*p*), "If *upon the trial* (*q*) of any issue the Judge shall grant *leave* to the plaintiff or defendant to move in any of the superior Courts to set aside a verdict or a nonsuit, and to enter a verdict for the plaintiff or defendant, or to enter a nonsuit (as the case may be), or for a new trial, the party to whom such leave may have been given may apply by *motion* to such superior Court, within such period of *time* after the trial as motions of the like kind shall from time to time be permitted to be made in such superior Court, for a *rule to show cause* why such verdict or nonsuit should not be set aside, and a verdict entered for the plaintiff or defendant or a nonsuit entered, or why a new trial should not be had (as the case may be) in such action; which Court is hereby authorized and empowered to grant or refuse such rule (which rule when granted shall operate as a *stay of proceedings* until the determination thereof) and afterwards to proceed to hear and determine the merits thereof and to make such orders thereupon, and as to *costs*, as the same Court shall think proper; and in case such Court shall order a new trial to be had in any such action, the party obtaining such order shall deliver the same or any office copy thereof to the Registrar of the said Court, and

(*n*) *Appleford* v. *Judkins*, 3 C. P. D. 489; 47 L. J., C. P. 615; 38 L. T. 801.

(*o*) *Le Blanch* v. *Reuter's Telegram Co.*, 1 Ex. D. 408; 34 L. T. 691; 25 W. R. 115: *Pryor* v. *City Offices Co.*, 10 Q. B. D. 504; 52 L. J., Q. B. 362; 48 L. T. 698; 31 W. R. 777.

(*p*) The Mayor's Court of London Act, 1857.

(*q*) *Folkard* v. *Metropolitan R. Co.*, L. R., 8 C. P. 470.

thereupon all the proceedings on the former verdict or nonsuit shall cease and the action shall proceed to trial according to the practice of the Court in like manner as if no trial had been had therein; or in case the Court before whom such rule shall be heard shall order the same to be discharged, the party obtaining any such order may upon delivering the same or an office copy thereof to the Registrar be at liberty to proceed in any such action as if no such rule nisi had been obtained; and if a verdict be ordered to be entered for the plaintiff or defendant or a nonsuit be ordered to be entered (as the case may be) judgment shall be entered accordingly."

Where in a cause tried on a Thursday the Judge immediately after the trial refused leave to move, but on the following Monday changed his mind and granted it, it was held that the leave could not be considered as given "upon the trial," in accordance with the above section (*q*). This section does not empower the High Court to prevent the Mayor's Court from re-trying an action after a rule absolute for a nonsuit under this section (*r*). Where a rule is obtained under this section to enter a nonsuit the costs must be asked for by the rule, otherwise they cannot be allowed (*q*). Where a rule has been obtained in the Mayor's Court under sect. 22 of the Act, no motion can afterwards be made to the Queen's Bench Division under sect. 10, even with leave of the Judge (*s*).

Appeal by special case.

By 20 & 21 *V. c. clvii. s.* 8, "If either party appearing on the trial of any cause in which the sum sought to be recovered shall exceed the sum of twenty pounds shall be dissatisfied with the determination or direction of the Court in point of law, or upon the admission or rejection of any evidence, such party may appeal from the same to any one of the superior Courts (two or more of the puisne Judges or Barons thereof shall sit out of term as a Court of Appeal for that purpose), provided that such party shall, within two days after such determination or direction, give notice of appeal to the other party or his attorney, and also give security within such time or times as the Court shall direct to be approved of by the Registrar of the Court (if the Judge shall so direct) for the costs of the appeal whatever be the event of the appeal, and for the amount of the judgment if he be the defendant, and the appeal be dismissed; provided nevertheless that such security, so far as regards the amount of the judgment, shall not be required in any case where the Judge of the Court shall have ordered the party appealing to pay the amount of such judgment into the hands of the Registrar, and the same shall have been paid accordingly; and the said Court of Appeal may either order a new trial, on such terms as it shall think fit, or may order judgment to be entered for either party (as the case may be) and may make such order with respect to the costs of the said appeal as such Court may think proper; and such orders shall be final."

By *s.* 9, "Such appeal shall be in the form of a case agreed on by both parties or their attorneys; and if they cannot agree the Judge of the Court, upon being applied to by them or their attorneys, shall

---

(*q*) *Lebeau* v. *General Steam Navigation Co.*, L. R., 8 C. P. 129.

(*r*) *Phillips* v. *Bridge*, L. R., 9 C. P. 324.

(*s*) *Mears* v. *Chittick*, 9 Q. B. D. 35.

PART XVII.

settle the case and sign it, and such case shall be transmitted by the Registrar to the Rule department of the Master's office of the Court in which the appeal is to be brought."

Salford Hundred Court.

Appeal by motion pursuant to leave reserved.

Salford Hundred Court.]—By *stat.* 30 & 31 *V. c. cxxx. s.* 89, "If upon the trial of any issue the Judge shall grant leave to the plaintiff or defendant to move in any one of the superior Courts to set aside a verdict or nonsuit, and to enter a verdict for the plaintiff or defendant, or to enter a nonsuit, or to arrest the judgment, or for judgment non obstante veredicto, as the case may be, or for a new trial, the party to whom such leave may have been given may apply by motion to such superior Court within such period of time as the Judge shall then appoint for a rule to show cause why such verdict or nonsuit should not be set aside, and a verdict entered for the plaintiff or defendant, or a nonsuit entered, or the judgment arrested, or judgment non obstante veredicto entered, or why a new trial should not be had, as the case may be, in such action, which superior Court is hereby authorized and empowered to grant or refuse such rule (which rule, when granted, shall operate as a stay of proceedings until the determination thereof), and afterwards to proceed to hear and determine the merits thereof, and to make such orders thereupon and as to costs as the same Court shall think proper."

Appeal by motion.

By *stat.* 30 & 31 *V. c. cxxx. s.* 91, "It shall be lawful for any party to any suit in the Court who shall be dissatisfied with any verdict or judgment given, or any nonsuit entered against him in any action which shall have been tried in the Court to apply, within one month next after such verdict or judgment given or nonsuit entered, to any of the superior Courts, or to any Judge of any of the said Courts, for a rule to show cause why a new trial of such action should not be granted, or nonsuit set aside and a new trial granted, or a verdict entered, or judgment for the plaintiff or defendant, or a nonsuit entered, as the case may be, in the same manner as is customary in actions depending in the superior Courts and tried at nisi prius before any Judge of assize by virtue of any record in any of the superior Courts, and thereupon it shall be lawful for any of the superior Courts or any Judge of one of the superior Courts, to grant such rule, and to hear and determine the merits of the same in like manner as in actions depending in the superior Courts and tried as aforesaid, and in case any of the superior Courts, or any Judge of one of the superior Courts, shall make the rule absolute (which they are severally empowered to do upon such terms as they shall respectively think reasonable), then on delivery of an office copy of such rule by the party who shall have obtained the same to the Registrar, all proceedings upon the former verdict, judgment, or nonsuit so obtained in the Court shall cease, and the said action shall proceed anew to a trial in the Court, or a verdict or judgment for the plaintiff or defendant, or a nonsuit shall be entered according to the tenor of such absolute rule: provided always, that it shall not be lawful for any party to move for any such rule, nor shall any such rule be of any force, unless and until the party intending to apply for such rule shall become bound by recognizance, with two sufficient sureties to be approved by the Registrar, in such reasonable sums as he shall deem sufficient for the security of the party against whom such rule is to be applied for, that the party intending to apply for such rule will, in case such rule is not granted, or

in case it be granted and not made absolute, pay the debt, damages and costs, or the damages and costs, or costs, as the case may be, adjudged or to be adjudged, and all costs incurred by the other party in showing cause against the rule; provided that no proceedings upon such verdict, judgment, or nonsuit, shall be stayed, where such application is not made by leave of the Judge, until such security shall have been given, but the giving of such security shall operate as a stay of proceedings until the expiration of the said month, and until the decision of the rule, in case such rule to show cause be granted within such month. But when the application shall be made by leave of the Judge, such leave shall operate as a stay of proceedings for one month."

Liverpool Court of Passage.

Liverpool Court of Passage—Appeal by Motion.]—By *stat.* 16 *V. c. xxi. s.* 45, 'If upon the trial of any issue the assessor shall grant leave to the plaintiff or defendant to move, in any one of the superior Courts of common law at Westminster, to set aside a verdict or a nonsuit, and to enter a verdict for the plaintiff or defendant, or to enter a nonsuit, as the case may be, or for a new trial, the party to whom such leave may have been given may apply by motion to such superior Courts, within such period of time after the trial as motions of the like kind shall from time to time be permitted to be made in such superior Courts, for a rule to show cause why such verdict or nonsuit should not be set aside, and a verdict entered for the plaintiff or defendant or a nonsuit entered, or why a new trial should not be had, as the case may be, in such action; which Court is hereby authorized and empowered to grant or refuse such rule, which rule, when granted, shall operate as a stay of proceedings until the determination thereof, and afterwards to proceed to hear and determine the merits thereof, and to make such orders thereupon and as to costs as the same Court shall think proper."

In the case of the Liverpool Passage Court it appears that a copy of the notes taken by the Judge at the trial is not necessary in support of a motion for a new trial, nor need the motion be made by counsel who appeared in the Court below (*t*).

Stannaries.

Stannaries Court.]—The appeal is to the Court of Appeal (*Judicature Act*, 1873, *s.* 18, *ante*, p. 968. *See* 18 & 19 *V. c.* 32, *s.* 26).

Petty sessions.

Petty Sessions—Magistrates.]—The appeal is by special case. (*See* 20 & 21 *V. c.* 43; Burn's Justice, 30th ed., Vol. 1, p. 218 *et seq.*)

Quarter sessions.

Quarter Sessions.]—*See stats.* 12 & 13 *V. c.* 45, *s.* 11 and 42 & 43 *V.* 49, *s.* 33. *See Re Ellershaw*, 1 Q. B. D. 481.

The case should contain a statement of the agreement as to entry of judgment (*u*).

Railway commissioners.

Railway Commissioners.]—*See* 36 & 37 *V. c.* 48, *s.* 26.

(*t*) *Bridge* v. *Daine*, 29 L. T. 477 (C. P. 1873). But see contra, *Welsh* v. *Mercer*, L. R., 8 Ex. 71 (1872), which was not cited in *Bridge* v. *Daine*.

(*u*) *Peterborough* (*Corporation of*) v. *Overseers of Thurlby*, 8 Q. B. D. 586.

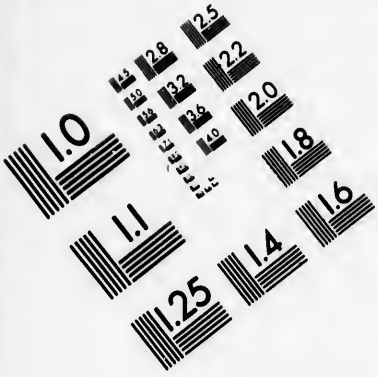
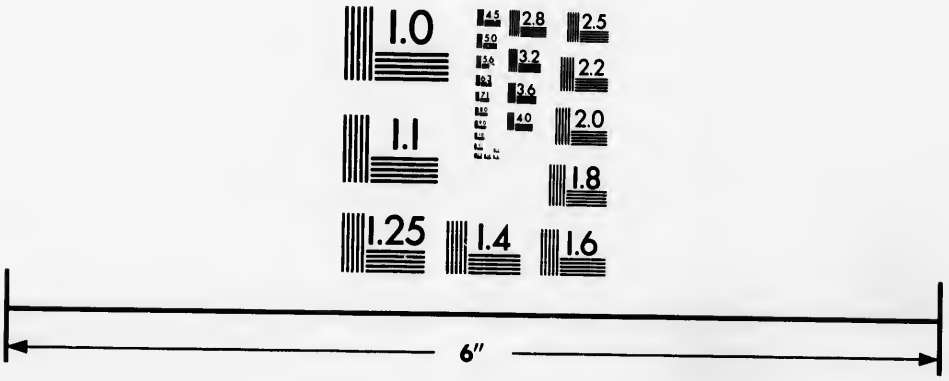
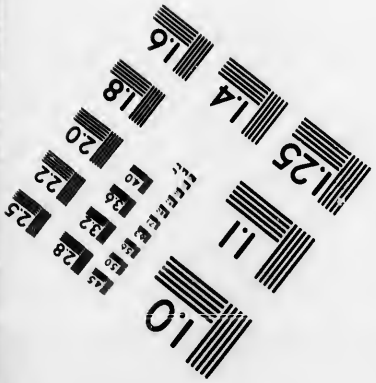
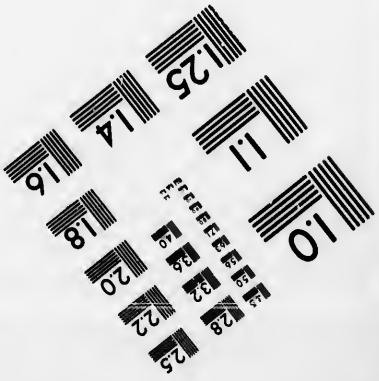


IMAGE EVALUATION TEST TARGET (MT-3)







Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

PART XVII.

County Palatine of Lancaster.

Common Pleas of Lancaster.

County Palatine of Lancaster (*x*).]—*See Lee* v. *Nuttall*, 12 Ch. D. 61; 48 L. J., Ch. 616; 41 L. T. 4; *and see Judicature Act*, 1873, *s.* 18, *ante*, p. 967.

Common Pleas of Lancaster.]—When an action was brought in the Court of Common Pleas of Lancaster and tried at the assizes, it was held that a rule for a new trial must be made at Westminster (*y*).

(*x*) Appeals from the Lancaster Chancery Court are now governed by the Rules of the S. C., Ord. LVIII.: *Lee* v. *Nuttall*, supra.

(*y*) *Cox* v. *Sillen*, 25 L. T. 425, Q. B.

CHAPTER CXXX.

APPEALS FROM COUNTY COURTS (a).

1. *Appeal by Motion* ..... PAGE 1523 | 2. *Appeal by Special Case* .... PAGE 1525

1. *Appeal by Motion.*

CHAP. CXXX.

Appeal from County Court by motion.

By the County Courts Act, 1875 (38 & 39 V. c. 50), sect. 6, "In any cause, suit or proceeding other than a proceeding in bankruptcy, tried or heard in any County Court, and in which any person aggrieved has a right of appeal, it shall be lawful for any person aggrieved by the ruling, order, direction, or decision of the Judge, at any time within eight days after the same shall have been made or given, to appeal against such ruling, order, direction, or decision, by motion to the Court to which such appeal lies, instead of by special case, such motion to be ex parte in the first instance, and to be granted on such terms as to costs, security, or stay of proceedings as to the Court to which such motion shall be made shall seem fit. And if the Court to which such appeal lies be not then sitting, such motion may be made before any Judge of a superior Court sitting in Chambers. And at the trial or hearing of any such cause, suit, or proceeding, the Judge, at the request of either party, shall make a note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the cause, suit, or proceeding, and he shall, at the expense of any person or persons, being party or parties in any such cause, suit, or proceeding, requiring the same for the purpose of appeal, furnish a copy of such note, or allow a copy to be taken of the same by or on behalf of such person or persons, and he shall sign such copy, and the copy so signed shall be used and received on such motion and at the hearing of such appeal" (b).

In what cases appeal lies.

The appeal under this section is confined to questions of law; there is no appeal from a decision of a Judge of a County Court upon a question of fact in a suit arising within its jurisdiction as a Court of common law (c). There is no appeal from a garnishee

---

(a) As to the power to make rules for regulating the procedure on appeals from County Courts, see Jud. Act, 1884, s. 23, ante, p. 1515. No rules have yet been made under this section.

(b) The power of appealing under this section is not affected by the C. C. Rules, 1875, Ord. XXIX. r. 12. Nor does the section put an end to any other modes of appealing: *The Humber*, 9 P. D. 12; 49 L. T. 604; or affect any statutory rights on an appeal: *Andrew* v. *Swansea Benefit Society*, 44 L. T. 106.

(c) *Cousins* v. *Lombard Deposit Bank*, 1 Ex. D. 404; 45 L. J., Ex. 573; 35 L. T. 484: *Seymour* v. *Coulson*, 5 Q. B. D. 359; 49 L. J., Q. B. 604: *Wilton* v. *Leeds Forge Valley Co.*, 32 W. R. 461. As to appeals under the Companies Act, 1867, see *Andrew* v. *Swansea Benefit Society*, supra.

Inferior Courts.

c).]—*See Lee* v. *Nuttall*, 12 Ch. D. 4; *and see Judicature Act*, 1873,

-When an action was brought in Lancaster and tried at the assizes, v trial must be made at Westmin-

LVIII.: *Lee* v. *Nuttall*, supra.
(y) *Cox* v. *Sillen*, 25 L. T. 425, Q. B.

PART XVII.

order (*d*). The section applies to cases where leave to appeal must be obtained as well as to those where it is unnecessary (*e*). It would seem that a nonsuit, if applied for at the trial, may be moved for under this section (*f*).

Points not taken below.

The point relied on must be one that was raised in the Court below (*g*), and the County Court Judge must be asked to take a note of it (*h*); but the decision appealed from may be upheld on grounds different from those relied on by the Judge below if they appear on his notes (*i*).

The motion.

To whom made.

The motion must be made to a Divisional Court (*k*) taking ex parte motions on the Crown side, if one be sitting, but if not, it may be made to a Judge at Chambers (*l*). A Judge sitting at Chambers (or in Court (*m*)) has no power to make an order under this section on a day on which a Court to which the application can be made sits (*n*). If he does so, the Court has no power to grant costs to the party appearing to show cause against it (*o*). If the order is applied for to a Judge at Chambers on a day on which the Court is not sitting, he must hear it himself and cannot adjourn it to the Court (*o*).

—How made.

The motion is made ex parte in the first instance (*p*), and if it is successful, an order in the form of a rule to show cause is granted (*q*), which must be served on the other side.

—Within what time motion must be made.

The motion must be made within the eight days limited by the section. This time cannot be extended (*r*); and the County Court Judge cannot extend the time by allowing his judgment to be post dated (*s*). But when the applicant, by reason of the absence of the Judge's notes, or for other good reason, is not ready to move within the eight days, the Court will generally hear enough to justify an adjournment, and order the [illegible] to be taken as part heard.

—Production of Judge's notes evidence of proceedings in Court below.

The County Court Judge's notes signed by him should be produced on the hearing of the application. The application to the County Court Judge to take a note must be made at the hearing, or during, or immediately after the hearing before him (*t*). If he

(*d*) *Mason* v. *Wirral Highway Board*, 4 Q. B. D. 459; 27 W. R. 676.

(*e*) *Turner* v. *Great Western R. Co.*, 2 Q. B. D. 125; 46 L. J., Q. B. 226; 35 L. T. 809.

(*f*) *Whale* v. *Hitchcock*, 34 L. T. 136. See *Robins* v. *Cubitt*, 46 L. T. per *Grove*, J., at p. 538.

(*g*) *Clarkson* v. *Musgrave*, 9 Q. B. D. 386; 52 L. J., Q. B. 525; 31 W. R. 47: *Ex p. Firth, In re Cowburn*, 46 L. T. 120.

(*h*) *Rhodes* v. *Liverpool Commercial Investment Co.*, 4 C. P. D. 425: *Morgan* v. *Rees*, 6 Q. B. D. 508; 50 L. J., Q. B. 491; 44 L. T. 133.

(*i*) *Chapman* v. *Knight*, 5 C. P. D. 308; 49 L. J., C. P. 425; 42 L. T. 580. See *Seymour* v. *Coulson*, supra: *Great Eastern R. Co.* v. *Giddons*, 44 J. P. 284.

(*k*) See the section, supra, p. 1523. And see Ord. LIX. r. 4, ante, p. 1516.

(*l*) See the section, supra, p. 1523.

(*m*) See *Eccles* v. *Eccles*, 33 L. T. 338.

(*n*) *Brown* v. *Shaw*, 1 Ex. D. 425.

(*o*) *Button* v. *Woolwich Building Society*, 5 Q. B. D. 88; 49 L. J., Q. B. 249; 42 L. T. 54.

(*p*) *Matthews* v. *Orey* (C. A.), 13 Q. B. D. 403; 53 L. J., Q. B. 439; 50 L. T. 776, overruling *Harris* v. *Galpin*, 47 J. P. 727.

(*q*) See form, Chit. F. 12th ed. p. 772.

(*r*) *Tennant* v. *Rawlings*, 4 C. P. D. 133: *Brown* v. *Shaw*, supra. But see *Mason* v. *Wirral Highway Board*, 4 Q. B. D. 459; 48 L. J., Q. B. 679: *Morgan* v. *Davies*, 3 C. P. D. 260; 39 L. T. 60; 26 W. R. 816.

(*s*) *Wilberforce* v. *Sowton*, 39 L. T. 474; 48 L. J., C. P. 28.

(*t*) *Pierpoint* v. *Cartwright*, 5 C. P. D. 139; 42 L. T. 259; 28 W. R. 583: *Rhodes* v. *Liverpool Com*

cases where leave to appeal must
nore it is unnecessary (*e*). It would
for at the trial, may be moved for

one that was raised in the Court
rt Judge must be asked to take a
appealed from may be upheld on
ed on by the Judge below if they

a Divisional Court (*k*) taking ex
le, if one be sitting, but if not, it
Chambers (*l*). A Judge sitting at
no power to make an order under
Court to which the application can
the Court has no power to grant
show cause against it (*m*). If the
t Chambers on a day on which the
ar it himself and cannot adjourn it

n the first instance (*p*), and if it is
f a rule to show cause is granted (*q*),
er side.
hin the eight days limited by the
tended (*r*); and the County Court
allowing his judgment to be post
nt, by reason of the absence of the
reason, is not ready to move within
enerally hear enough to justify an
to be taken as part heard.
tes signed by him should be pro-
plication. The application to the
ote must be made at the hearing,
the hearing before him (*t*). If he

(*l*) See the section, supra, p. 1523.
(*m*) See *Eccles* v. *Eccles*, 33 L. T. 338.
(*n*) *Brown* v. *Shaw*, 1 Ex. D. 425.
(*o*) *Button* v. *Woolwich Building Society*, 5 Q. B. D. 88; 49 L. J., Q. B. 249; 42 L. T. 54.
(*p*) *Matthews* v. *Ovey* (C. A.), 13 Q. B. D. 403; 53 L. J., Q. B. 439; 50 L. T. 776, overruling *Harris* v. *Galpin*, 47 J. P. 727.
(*q*) See form, Chit. F. 12th ed. p. 772.
(*r*) *Tennant* v. *Rawlings*, 4 C. P. D. 133: *Brown* v. *Shaw*, supra. But see *Mason* v. *Wirral Highway Board*, 4 Q. B. D. 459; 48 L. J., Q. B. 679: *Morgan* v. *Davies*, 3 C. P. D. 260; 39 L. T. 60; 26 W. R. 816.
(*s*) *Wilberforce* v. *Sowton*, 39 L. T. 474; 48 L. J., C. P. 28.
(*t*) *Pierpoint* v. *Cartwright*, 5 C. P. D. 139; 42 L. T. 259; 28 W. R. 583: *Rhodes* v. *Liverpool Commercial Investment Co.*, 4 C. P. D. 425. As to what is a sufficient request, see *Morgan* v. *Rees*, 6 Q. B. D. 508; 44 L. T. 133 (C. A.).
(*u*) *Seymour* v. *Coulson*, 5 Q. B. D. 359: *Hills* v. *Perssé*, 25 W. R. 275.
(*x*) *Morgan* v. *Rees* (C. A.), 6 Q. B. D. 508; 50 L. J., Q. B. 491; 44 L. T. 133; 29 W. R. 345.
(*y*) See *The Confidence*, 40 L. T. 201: *Morgan* v. *Davies*, 39 L. T. 60: *Artistic Colour Printing Co.* v. *Fillan*, W. N. 1881, 97.
(*z*) *Matthews* v. *Ovey* (C. A.), 13 Q. B. D. 403; 53 L. J., Q. B. 439; 50 L. T. 776: *Swansea Building Society* v. *Davies*, 12 Q. B. D. 22; 49 L. T. 603; 32 W. R. 185. *Shapcott* v. *Chappell*, 12 Q. B. D. 58; 53 L. J., Q. B. 77; 32 W. R. 183, contra, was much questioned in *Matthews* v. *Ovey*, supra.
(*a*) See *Whiteman* v. *Hawkins*, 4 C. P. D. 13; 39 L. T. 629; 32 W. R. 262: *King* v. *Oxford Co-operative Society*, 51 L. T. 94.
(*b*) *Schroder* v. *Ward*, 13 C. B., N. S. 410; 32 L. J., C. P. 150: *Conybeare* v. *Farries*, L. R., 5 Ex. 16: *Richardson* v. *North Eastern R. Co.*, L. R., 7 C. P. 83: *Ashby* v. *Sedgwick*, L. R., 15 Eq. 245: *Leach* v. *S. E. R. Co.*, 34 L. T. 134. As to the costs of a shorthand writer's notes and copies of them, see *Ex p. Sawyer*, 1 Ch. D. 698.
(*c*) *Taylor* v. *Great Northern R. Co.*, L. R., 1 C. P. 430.
(*d*) *Crush* v. *Turner*, 3 Ex. D. 303; 47 L. J., Ex. 639.
(*e*) By 28 & 29 V. c. 99 (entitled

takes a note without any request, that will suffice (*u*); but the Court will not compel him to sign any notes he may have taken without being requested to do so (*x*). As we have seen (*ante*, p. 1517), by *Ord. LIX. r.* 8 (*October*, 1884), the Court may, if the Judge's notes are not produced, hear and determine the appeal upon any other evidence or statement of what occurred before the Judge which the Court may deem sufficient (*y*).

Setting down motion.

The order, if granted, must be served in the usual manner (*see ante*, p. 1439) on the opposite party. It must also be entered in the list of opposed motions on the Crown side by taking it to the officer at the Crown Office for that purpose.

Hearing.

The motion will be called on in its order in the list. The practice on hearing is the same as on an ordinary rule nisi (*see ante*, p. 1391). The Rules of *Ord. XXXIX.* (*ante*, *Vol.* 1, *Ch. LXVIII.*) as to new trials do not apply to applications for new trial on appeal from County Courts (*z*). But, as we have seen (*ante*, p. 1517), the Court, by *Ord. LIX. r.* 7 (*October*, 1884), has power to draw all inferences of fact which might have been drawn in the Court below, and to give any judgment (*a*) and make any order which ought to have been made. The same rule also provides that no appeal shall succeed on the ground merely of misdirection or improper reception or rejection of evidence unless, in the opinion of the Court, substantial wrong or miscarriage has been thereby occasioned in the Court below.

Costs.

The costs of the appeal are in the discretion of the Court. They are generally awarded to the successful party unless there is something very special in the case (*b*). They must be applied for at the hearing of the rule (*c*).

Appeal to Court of Appeal.

No appeal lies from the decision of the Divisional Court, except by special leave of the Court hearing the rule, but with such leave an appeal lies (*d*).

2. *Appeal by Special Case.*

Enactments as to.

Enactments as to—When Appeal lies (e).]—By the 13 & 14 *V. c.* 61, s. 14, "If either party in any cause of the amount to which juris-

PART XVII.

diction is given to the County Courts by this Act [that is to say, in any case where the amount sought to be recovered is above 20*l.*(*f*)], shall be *dissatisfied with the determination or direction* (*g*) of the said Court *in point of law* (*h*), or upon the *admission or rejection of any evidence*, such party may appeal from the same to any of the superior Courts of common law at Westminster, two or more of the puisne Judges whereof shall sit out of term as a Court of Appeal for that purpose [*see* 15 & 16 *V. c.* 54, *s.* 2](*i*); provided that such party shall, *within ten days* (*g*) after such determination or direction, give *notice of such appeal* to the other party, or his attorney, and also give *security*, to be approved by the clerk of the Court, for the

---

An Act to confer on the County Courts a limited jurisdiction in equity), s. 18, "If any party in a suit or matter under this Act shall be dissatisfied with the determination or direction of a Judge of a County Court on any matter of law or equity, or on the admission or rejection of any evidence, such party may appeal from the same to the Vice-Chancellor authorized as aforesaid, provided that such party shall, within thirty days after such determination or direction, give notice of such appeal to the other party or his attorney, and also deposit with the registrar of the County Court the sum of 10*l.* as security for the costs of the appeal; and the said Court of Appeal may make such final or other decree or order as it shall think fit, and may also make such order with respect to the costs of the said appeal as such Court may think proper; and such order shall be final: Provided that nothing herein contained shall authorize any party to appeal against any decision of a County Court, given upon any question as to the value of any real or personal property, for the purpose of determining the question of the jurisdiction of the Court under this Act, nor to appeal against the decision of a County Court on the ground that the proceedings might or should have been taken in any other County Court." Now, under Ord. LIX. r. 4 (ante, p. 1516), all appeals from inferior Courts within sect. 45 of the Jud. Act, 1873 (except Probate and Admiralty appeals), are to be heard by Divisional Courts of the Queen's Bench Division.

(*f*) An appeal will not lie, without leave, where the amount sought to be recovered by the plaint is under 20*l.*, although the objection is not taken until the case has been stated and has come on for hearing. *Blowers* v. *Raekham*, 20 L. J., Q. B. 397. As a general rule, the right to appeal depends upon the amount of the plaintiff's claim, and not on the amount for which judgment is given. *Dreesman* v. *Harris*, 9 Exch. 485; 23 L. J., Ex. 210: *Mayer* v. *Burgess*, 4 Q. B. 655; 24 L. J., Q. B. 76. But if the nature of the case is such that the Judge of the County Court cannot lawfully give higher damages than 20*l.*, there is no right of appeal without leave (post, p. 1528). A plaintiff cannot at the trial abandon the excess of his claim over 20*l.*, so as to deprive the defendant of his right of appeal. *North* v. *Holroyd*, L. R., 3 Exch. 69; 37 L. J., Exch. 42.

(*g*) Where the Judge, upon a special finding of the jury, directed the verdict to be entered for the defendant, but "reserved leave for the plaintiff to move to enter a verdict or for a new trial," and notice of the application was afterwards given, it was held that the time for appealing ran from the day the motion was refused, and not from the day of trial: *Foster* v. *Green*, 6 H. & N. 793; 30 L. J., Ex. 253.

(*h*) There is no appeal from a decision on a question of fact: *Sharrock* v. *L. & N. W. R. Co.*, 1 C. P. D. 70; 33 L. T. 341; 24 W. R. 346: *Cousins* v. *Lombard Deposit Bank*, 1 Ex. D. 404; 45 L. J., Ex. 573: *Great Northern R. Co.* v. *Shepherd*, 8 Ex. 34; 21 L. J., Ex. 114: *Cawley*, App., *Furnell*, Resp., 12 C. B. 291; 20 L. J., C. P. 197, where there was a mixed question of law and fact. And see *Vallance* v. *Naish*, 27 L. J., Ex. 142. There is no appeal from a refusal of a County Court Judge to set aside an award in an action referred by him to an arbitrator: *Mayor* v. *Farmer*, 3 Ex. D. 235; 47 L. J., Ex. 760.

(*i*) The appeal now lies to a Divisional Court, as mentioned ante, p. 1516.

'ourts by this Act [that is to say, in
ht to be recovered is above 20*l.*(*f*)],
etermination or direction (*g*) of the
r upon the *admission or rejection of*
ppeal from the same to any of the
at Westminster, two or more of the
out of term as a Court of Appeal
c. 54, s. 2](*i*); provided that such
ter such determination or direction,
o other party, or his attorney, and
l by the clerk of the Court, for the

v. *Ruckham*, 20 L. J., Q. B. 397. As a general rule, the right to appeal depends upon the amount of the plaintiff's claim, and not on the amount for which judgment is given. *Dreesman* v. *Harris*, 9 Exch. 485; 23 L. J., Ex. 210: *Mayer* v. *Burgess*, 4 Q. B. 655; 24 L. J., Q. B. 76. But if the nature of the case is such that the Judge of the County Court cannot lawfully give higher damages than 20*l.*, there is no right of appeal without leave (post, p. 1528). A plaintiff cannot at the trial abandon the excess of his claim over 20*l.*, so as to deprive the defendant of his right of appeal. *North* v. *Holroyd*, L. R., 3 Exch. 69; 37 L. J., Exch. 42.

(*g*) Where the Judge, upon a special finding of the jury, directed the verdict to be entered for the defendant, but "reserved leave for the plaintiff to move to enter a verdict or for a new trial," and notice of the application was afterwards given, it was held that the time for appealing ran from the day the motion was refused, and not from the day of trial: *Foster* v. *Green*, 6 H. & N. 793; 30 L. J., Ex. 233.

(*h*) There is no appeal from a decision on a question of fact: *Sharrock* v. *L. & N. W. R. Co.*, 1 C. P. D. 70; 33 L. T. 341; 24 W. R. 346: *Cousins* v. *Lombard Deposit Bank*, 1 Ex. D. 404; 45 L. J., Ex. 573: *Great Northern R. Co.* v. *Shepherd*, 8 Ex. 34; 21 L. J., Ex. 114: *Cawley*, App., *Furnell*, Resp., 12 C. B. 291; 20 L. J., C. P. 197, where there was a mixed question of law and fact. And see *Vallance* v. *Naish*, 27 L. J., Ex. 142. There is no appeal from a refusal of a County Court Judge to set aside an award in an action referred by him to an arbitrator: *Mayor* v. *Farmer*, 3 Ex. D. 235; 47 L. J., Ex. 760.

(*i*) The appeal now lies to a Divisional Court, as mentioned ante, p. 1516.

costs of the appeal, whatever be the event of the appeal, and for the amount of the judgment, if he be the defendant and the appeal be dismissed; provided, nevertheless, that such security, so far as regards the amount of the judgment, shall not be required in any case where the Judge of the County Court shall have ordered the party appealing to pay the amount of such judgment into the hands of the clerk of the County Court in which such action shall have been tried, and the same shall have been paid accordingly; and the said Court of Appeal may either order a new trial on such terms as it thinks fit, or may order judgment to be entered for either party, as the case may be, and may make such order with respect to the costs of the said appeal, as such Court may think proper; and such orders shall be final" (*k*).

By the 15th section of this Act, "Such appeal shall be in the form of a case agreed on by both parties or their attornies, and if they cannot (*l*) agree the Judge of the County Court, upon being applied to by them or their attornies, shall settle the case and sign it (*m*); and such case shall be transmitted by the appellant to the Rule Department of the Master's office of the Court in which the appeal is to be brought" (*n*). Appeal to be in form of a case.

The *Judicature Act*, 1884, *s.* 23 (*ante*, p. 1515), extends the power of the Rule Committee to making rules as to County Court appeals. Rules to be made.

By the 19 *& 20 V. c.* 108, *s.* 68, "An appeal from the decision of In replevin.

(*k*) The London Small Debts Act contains an exactly similar provision to the 13 & 14 V. c. 61, s. 14, only such provision commences thus:—"That if either party in any cause of an amount exceeding 20*l.* and not exceeding 50*l.* shall be dissatisfied," &c. See 15 & 16 V. c. lxxvii. s. 78. The London Act also contains a similar provision to the 13 & 14 V. c. 61, s. 15. By 30 & 31 V. c. 142 (The County Courts Act, 1867), s. 35, the words "County Court," when used in this Act or in any future Act, shall mean a Court holden by virtue of the Act 9 & 10 V. c. 95, "for the more easy recovery of small debts and demands *in England*," and shall mean and include the Court held by virtue of "The *London* (City) Small Debts Extension Act, 1852," unless otherwise provided, and such Court shall be holden by the name of "The City of London Court," and shall be a Court of record, and its decision shall be subject to appeal in the same way and on the same conditions as the decisions of a County Court are subject for the time being. The rules and orders in force for the time being for regulating the practice of and costs in the County Courts, and forms of proceedings therein, shall be in force in "The City of London Court," to the exclusion of any rules and orders now in force in that Court; and the same fees shall be taken for proceedings in which jurisdiction is hereby given to the Court as upon similar proceedings in the County Courts, and such fees shall be applied in the same manner as the fees taken under the provisions of the said Act of 1852. Provided that nothing in this Act, or in any of the Acts specified in Schedule (D) to this Act, shall take away, lessen, or diminish any of the powers, rights, or privileges of the Judge of the said Court, or the authority of the mayor, aldermen and commons of the city of *London* in common council assembled in relation to such Court, or to the Judge or officers thereof, or to the fees taken therein, as such powers or authority existed previously to the passing of this Act.

(*l*) See *Warner* v. *Riddiford*, 4 C. B., N. S. 180.

(*m*) See *M'Allum* v. *Cookson*, 5 C. B., N. S. 498; 28 L. J., C. P. 1, where the Judge died before he had settled the case.

(*n*) How now entered, see ante, p. 1516.

PART XVII.

In ejectment.

a County Court, on the same grounds, and subject to the sam conditions as are provided by the 13 & 14 *V. c.* 61, *s.* 14, shall b allowed in all actions of replevin where the amount of rent o damage exceeds 20*l.*, and in all actions for the recovery of tene ments where the yearly rent or value of the premises exceed 20*l.* (*o*), and in proceedings in interpleader (*p*) where the mone claimed, or the value of the goods or chattels claimed, or of th proceeds thereof, exceeds 20*l.* (*q*), and in all actions where th parties agree that the Court shall have jurisdiction."

Interpleader, and when parties agree to give jurisdiction, &c.

By sect. 69, "No appeal shall lie from the decision of a Count Court if, before such decision is pronounced, both parties shal agree in writing, signed by themselves or their attornies or agents that the decision of the Judge shall be final, and no such agreemen shall require a stamp" (*r*).

By 30 & 31 *V. c.* 142, *s.* 15, "An appeal from the decision of County Court on the same grounds, and subject to the same conditions as are provided by sect. 14 of the 13 & 14 *V. c.* 61 (*s*) shall be allowed in all actions of ejectment, and in all actions in which the title to any corporeal or incorporeal hereditament shall have come in question, and, with the leave of the Judge, an appeal shall be allowed in actions in which an appeal is not now allowed, if the Judge shall think it reasonable and proper that such appeal should be allowed."

Decisions as to.

There is no appeal from a decision on a question of fact (*t*), or from a refusal to set aside an award in a case referred by the County Court Judge to arbitration (*t*).

Where appeal lies,

It seems there is a right of appeal where the case has been decided without the intervention of a jury (*u*). On a trial in the County Court, the plaintiff having closed his case, it was submitted by the advocate on the part of the defendant that there was no evidence to go to the jury; the Judge deciding that there was, evidence was offered on behalf of the defendant, and a verdict was ultimately found for the plaintiff; it was held that the defendant did not, by calling witnesses, preclude himself from appealing, on the ground that the Judge had ruled erroneously (*x*). No appeal lies, under the 13 & 14 *V. c.* 61, *s.* 14, from the decision of a County Court in an interlocutory matter, such as the taxation of costs under 19 & 20 *V. c.* 108, *s.* 34 (*y*).

—Interlocutory matters.

(*o*) It seems there was no appeal in these actions before this enactment: *Earl of Harrington* v. *Ramsay*, 22 L. J., Ex. 226. See 30 & 31 V. c. 142, s. 13, infra.

(*p*) Where a landlord appeared upon the hearing of an interpleader summons in the County Court, it was held he had a right to appeal: *Wilcoxon* v. *Scarby*, 29 L. J., Ex. 154.

(*q*) See *Vallance* v. *Naish*, 27 L. J., Ex. 142. There was no appeal in interpleader cases before this enactment: *Beswick* v. *Boffey*, 9 Ex. 315; 23 L. J., Ex. 89: *Fraser* v. *Fothergill*, 14 C. B. 298; 23 L. J., C. P. 53.

(*r*) See *Groves* v. *Janssens*, 9 Ex. 481; 23 L. J., Ex. 91.

(*s*) See this section, ante, p. 1525.

(*t*) See ante, pp. 1523, 1526, n. (*h*).

(*u*) See *Templeman* v. *Haydon*, 19 L. T. 218. See *East Anglian R. Co.* v. *Rythgoe*, 10 C. B. 726; 20 L. J., C. P. 84, where law and fact were mixed up together.

(*x*) *Great Northern R. Co.* v. *Rimell*, 18 C. B. 575; 27 L. J., C. P. 201.

(*y*) *Carr* v. *Stringer*, 1 El. Bl. &

When an appeal by motion has been tried and failed, the Court will not compel the County Court Judge to sign a case, so as to give the party a second attempt to upset his decision (*z*).

Rules, &c. as to Proceedings in the County Court.]—The County Court Rules were consolidated by "The County Court Rules, 1875." By *Ord. XXIX.* (*C. C.*), *r.* 12, "The foregoing rules in this order shall not apply to appeals by motion, but such appeals may be had under the provisions of section 6 of 'The County Courts Act, 1875.'" (*See ante*, p. 1523.) Rules, &c. as to proceedings in County Court.

By *Ord. XXIX.* (*C. C.*), *r.* 1, "Any party dissatisfied with the judgment, order, or direction of the Court in point of law, or upon the admission or rejection of evidence, may, before the rising of the Court on the day on which judgment was pronounced, deliver to the Registrar a statement in writing, signed by him, his counsel or solicitor, containing the grounds of his dissatisfaction; and in the event of no such statement being delivered, the successful party may proceed on the judgment unless the Judge shall otherwise order; but the Judge may direct proceedings to be taken on the judgment notwithstanding such statement has been delivered: provided that the party so dissatisfied may appeal on grounds different from those contained in such statement, and although he shall not have delivered any such statement."

Notice of Appeal.]—By the 13 & 14 *V. c.* 61, *s.* 14 (*a*), the party desirous of appealing must, *within ten days* after the determination or direction complained of, give notice of the appeal to the other party or his solicitor. Notice of appeal.

By *Ord. XXIX.* (*C. C.*), *r.* 2, "The ten days within which notice of appeal may be given shall be exclusive of the day of trial." The ten days run from the time of the decision, and are not prolonged by any subsequent application to the Judge (*b*).

By *Ord. XXIX.* (*C. C.*), *r.* 3, "The notice of appeal shall be in writing and shall state the grounds on which the party appeals, and shall be signed by the appellant, his solicitor or agent, and such notice shall be sent to the Registrar as well as to the successful party, by post or otherwise."

The sufficiency of the notice is a question for the Judge of the County Court, and if he thinks it sufficient, the objection, that it does not contain any statement of the grounds of dissatisfaction with the decision, cannot be taken before the High Court (*c*). The respondent may waive his right to the notice (*d*).

By *Ord. XXIX.* (*C. C.*) *r.* 4, "The notice of appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, unless the Judge shall otherwise order, but the

El. 123. See *Foster* v. *Green*, ante, p. 1526, note (*g*). See *Henderson* v. *Bambir*, 35 L. J., Ex. 65, where County Court Judge had made an order to stay proceedings in a winding up case.

(*z*) *Rhodes* v. *Liverpool Commercial Investment Co.*, 4 C. P. D. 425.

(*a*) See this sect. ante, p. 1525.

(*b*) *Hemming* v. *Blanton*, 42 L. J., C. P. 158; 21 W. R. 636.

(*c*) *Cannon* v. *Johnson*, 21 L. J., Q. B. 164: *Evans* v. *Matthews*, 26 L. J., Q. B. 166.

(*d*) *Parkgate Iron Co.* v. *Coates*, L. R., 5 C. P. 634: cp. *Ward* v. *Raw*, L. R., 15 Eq. 83.

grounds, and subject to the same
the 13 & 14 *V. c.* 61, *s.* 14, shall be
ovin where the amount of rent or
ll actions for the recovery of tene-
or value of the premises exceeds
interpleader (*p*) where the money
goods or chattels claimed, or of the
(*q*), and in all actions where the
all have jurisdiction."
ll lie from the decision of a County
is pronounced, both parties shall
mselves or their attornies or agents,
hall be final, and no such agreement

'An appeal from the decision of a
grounds, and subject to the same
sect. 14 of the 13 & 14 *V. c.* 61 (*s*),
s of ejectment, and in all actions
eal or incorporeal hereditament shall
th the leave of the Judge, an appeal
which an appeal is not now allowed,
onable and proper that such appeal

ecision on a question of fact (*t*), or
n award in a case referred by the
ion (*t*).
peal where the case has been decided
jury (*u*). On a trial in the County
ed his case, it was submitted by the
ndant that there was no evidence to
iding that there was, evidence was
lant, and a verdict was ultimately
ield that the defendant did not, by
self from appealing, on the ground
neously (*x*). No appeal lies, under
the decision of a County Court in
s the taxation of costs under 19 & 20

23 L. J., Ex. 89: *Fraser* v. *Fothergill*, 14 C. B. 298; 23 L. J., C. P. 53.

(*r*) See *Groves* v. *Janssens*, 9 Ex. 481; 23 L. J., Ex. 91.

(*s*) See this section, ante, p. 1525.

(*t*) See ante, pp. 1523, 1526, n. (*h*).

(*u*) See *Templeman* v. *Haydon*, 19 L. T. 218. See *East Anglian R. Co.* v. *Rythgoe*, 10 C. B. 726; 20 L. J., C. P. 84, where law and fact were mixed up together.

(*x*) *Great Northern R. Co.* v. *Rimell*, 18 C. B. 575; 27 L. J., C. P. 201.

(*y*) *Carr* v. *Stringer*, 1 El. Bl. &

PART XVII.

Registrar shall detain the proceeds of any execution which may then be in or may come into his hands pending such appeal, to abide the event of such appeal, unless the Judge shall otherwise order."

Security for costs of appeal, &c.

Security for Costs of Appeal, &c.]—The appellant is required within ten days to give security for the costs of the appeal, and if he be a defendant, for the amount of the judgment if the appeal be dismissed (13 & 14 *V. c.* 61, *s.* 14, *ante*, p. 1525). Where, however, the Judge has ordered the appellant to pay the amount of the judgment into the hands of the Registrar, and he has paid the same accordingly, the security as regards the amount of the judgment is not required. The security may be either a bond by the appellant and two sureties, or a deposit of money.

At whose cost security to be and form of same.

Relief may be given to obligors.

By 19 & 20 *V. c.* 108, *s.* 70, "Where by this Act, or any Act relating to the County Courts, a party is required to give security, such security shall be at the cost of the party giving it, and in the form of a bond, with securities, to the other party or intended party in the action or proceeding; provided always that the Court in which any action on the bond shall be brought may by rule or order give such relief to the obligors as may be just, and such rule or order shall have the effect of a defeazance of such bond."

Deposit may be made in lieu of giving security.

By the 19 & 20 *V. c.* 108, *s.* 71, "Where, by this Act, or any Acts relating to the County Courts, a party is required to give security, he may, in lieu thereof, deposit with the Registrar, if the security is required to be given in a County Court, or with a Master of the superior Court, if the security is required to be given in such Court, a sum equal in amount to the sum for which he would be required to give security, together with a memorandum, to be approved of by such Registrar or Master, and to be signed by such party, his attorney or agent, setting forth the conditions on which such money is deposited, and the Registrar or Master shall give to the party paying a written acknowledgment of such payment: and the Judge of the County Court, when the money shall have been deposited in such Court, or a Judge of the superior Court when the money shall have been deposited in a superior Court, may, on the same evidence as would be required to enforce or avoid such bond as in the last preceding section is mentioned, order such sum so deposited to be paid out to such party or parties as to him shall seem just."

The provision of the above statute requiring the security to be given is strictly enforced (*e*), unless it is waived by the respondent (*f*), or the default is not occasioned by any act of the appellant (*g*).

Security by deposit.

Security by Deposit.]—*See* 19 & 20 *V. c.* 108, *s.* 71 (*supra*). That statute requires a memorandum, to be approved of by the Registrar or Master, signed by the party, his solicitor or agent,

(*e*) *Stone* v. *Dean*, 1 El. Bl. & El. 504; 27 L. J., Q. B. 319: *Griffin* v. *Colman*, 28 L. J., Ex. 136: *Francis* v. *Dowdeswell*, L. R., 9 C. P. 423; 43 L. J., C. P. 248: *Norris* v. *Carrington*, 16 C. B., N. S. 10: *Blenkairne* v. *Slatter*, 31 L. T. 413: *Waterton* v. *Baker*, L. R., 3 Q. B. 173; 37 L. J., Q. B. 65, where security not perfected till after ten days.

(*f*) *Parkgate Iron Co.* v. *Coates*, L. R., 5 C. P. 634.

(*g*) *Waterton* v. *Baker*, supra. See *Francis* v. *Dowdeswell*, supra.

of any execution which may
ands pending such appeal, to
less the Judge shall otherwise

c.]—The appellant is required
the costs of the appeal, and if
f the judgment if the appeal be
tc, p. 1525). Where, however,
to pay the amount of the judg-
rar, and he has paid the same
the amount of the judgment is
either a bond by the appellant
ney.
Where by this Act, or any Act
ty is required to give security,
of the party giving it, and in
, to the other party or intended
g; provided always that the
e bond shall be brought may
the obligors as may be just,
he effect of a defeazance of such

, "Where, by this Act, or any
ts, a party is required to give
eposit with the Registrar, if the
in a County Court, or with a
security is required to be given
ount to the sum for which he
, together with a memorandum,
r or Master, and to be signed by
setting forth the conditions on
l the Registrar or Master shall
acknowledgment of such pay-
ty Court, when the money shall
rt, or a Judge of the superior
e been deposited in a superior
as would be required to enforce
preceding section is mentioned,
paid out to such party or parties

te requiring the security to be
ess it is waived by the respon-
casioned by any act of the ap-

20 *V. c.* 108, *s.* 71 (*supra*).
dum, to be approved of by the
he party, his solicitor or agent,

Baker, L. R., 3 Q. B. 173; 37 L. J., Q. B. 65, where security not perfected till after ten days.

(*f*) *Parkgate Iron Co.* v. *Coates*, L. R., 5 C. P. 634.

(*g*) *Waterton* v. *Baker*, supra. See *Francis* v. *Dowdeswell*, supra.

setting forth the conditions on which the deposit is made, to be deposited together with the money. The Registrar is to give a certificate in a prescribed form (*C. C. R.*, 1875, *Sched. No.* 46). This certificate, if it embodies the conditions on which the deposit is made, may be a sufficient fulfilment of the requirements of the statute so as to dispense with the necessity for a memorandum (*h*). The party making the deposit must forthwith give notice to the opposite party, by post or otherwise, of such deposit having been made (*C. C. R.*, 1875; *Ord. XXX. r.* 4).

Security by Bond.]—*See* 19 & 20 *V. c.* 108, *s.* 70 (*ante*, p. 1530). By *C. C. R.*, 1875, *Ord. XXX. r.* 1, "In all cases where a party proposes to give a bond by way of security, he shall serve, by post or otherwise, on the opposite party and the Registrar, at his office, notice of the proposed sureties according to the form in the schedule, and the Registrar shall forthwith give notice to both parties of the day and hour on which he proposes that the bond shall be executed, and shall state in the notice to the obligee, that should he have any valid objection to make to the sureties, or either of them, that it must then be made." Security by bond.

A form of notice to sureties is given in the schedule (No. 47) (*i*). A form of notice of the time for execution of the bond is given in the schedule to the *C. C. R.*, 1876 (No. 301) (*i*). See as to the attendance of the sureties and execution of the bond, *Francis* v. *Dowdeswell*, L. R., 9 C. P. 423.

By *Ord. XXX.* (*C. C.*), *r.* 2, "The sureties shall make an affidavit of their sufficiency, according to the form in the schedule, unless the opposite party shall dispense with such affidavit."

By *r.* 3, "The bond shall be executed in the presence of the Judge or Registrar, or a Commissioner of the Supreme Court of Judicature."

By *r.* 4, "Where a party makes a deposit of money in lieu of giving a bond, he shall forthwith give notice to the opposite party, by post or otherwise, of such deposit having been made."

By *r.* 5, "In all cases where the security is by bond, the bond shall be deposited with the Registrar until the action be finally disposed of."

By *r.* 6, "No Registrar, Deputy Registrar, Registrar's Clerk, Bailiff, Broker, or other officer of the Court, shall become surety in any case where, by the practice of the Court, security is required."

It has been held that it is no ground for striking out a case stated for appeal, that in giving security for the costs of the appeal as required by sect. 14 of the 13 & 14 *V. c.* 61, a practising solicitor was one of the sureties contrary to a rule of practice in the County Courts (*k*).

A form of bond is prescribed by the *C. C. R.*, 1875, *Sched. No.* 127. It may be observed that the words "his certain attorney" are used, whereas in the next form the words are "his certain solicitor." The bond must be executed in the presence of the Judge or Registrar, or a Commissioner of the Supreme Court of Judi-

(*h*) *Walters* v. *Coglan*, L. R., 8 Q. B. 61; 42 L. J., Q. B. 20.

(*i*) See forms, Chit. F. p. 776.

(*k*) *Carr* v. *Stringer*, 4 Jur., N. S. 439, n.— Q. B.

PART XVII.

cature (*C. C. R.*, 1875, *Ord. XXX. r.* 3). It must be deposited with the Registrar until the action is finally disposed of (*Id. r.* 5). The bond requires a stamp (*note to form in schedule to C. C. R.*).

The case.

The Case.]—By the 13 & 14 *V. c.* 61, *s.* 15, the appeal is to be in the form of a case, which is to be settled in the way pointed out by that section (*k*). The case should separate the facts and law (*l*). It should not set forth the reasons given by the Judge for his decision, nor the observations which he may have made by way of foundation for his judgment. It ought, in general (*m*), merely to state the facts, and the Judge's determination or direction in point of law (*n*). The appellant should so frame his case as to raise fully any objection on which he may intend to rely; for both parties are bound by the case stated, and will not be allowed before the High Court to travel out of it (*o*). On the other hand, the respondent should be careful that the case, when settled, does not contain any ground of appeal which was not taken before the Judge of the County Court, since, if an objection appears on the face of the case, it will be considered as evidence that it was raised before the County Court; although probably if it could be shown that it was not so raised, the High Court would refuse to entertain it (*p*). In an action for malicious prosecution, where the case set out "the result of the evidence," it was sent back to be amended by setting out the evidence (*q*). Where the case is settled by the Judge, it should appear from it that the parties could not agree upon the statement of it (*r*). If the case is defective, the Court may send it back to the County Court Judge to re-state it (*s*). The Judge is bound to sign a case agreed on between the parties if it correctly states the facts and the judgment (*t*). If he refuses to do so, a rule may be applied for under 19 & 20 *V. c.* 108, *s.* 43; 21 & 22 *V. c.* 74, *s.* 4 (*u*), to compel him to do so; but the granting of such rule is a matter in the discretion of the Court, and where it appears that no question of law can arise, it will be refused (*x*). Nor will it be granted after an unsuccessful attempt to appeal by motion (*y*).

By *Ord. XXIX.* (*C. C.*), *r.* 5, "The appellant shall prepare the case for appeal, and all cases on appeal shall, unless the Judge shall otherwise order, be presented to him for signature at the Court held next (*z*) after the parties shall have agreed upon the same; and if

(*k*) See this sect. ante, p. 1527. See the form, Chit. F. p. 779.

(*l*) *Cawley*, App., *Furnell*, Resp., 12 C. B. 291; 20 L. J., C. P. 197.

(*m*) When otherwise, see *Thornewell* v. *Wignor*, L. R., 6 Ex. 87; 40 L. J., Ex. 48.

(*n*) *East Anglian R. Co.* v. *Lythgoe*, L., M. & P. 221. It should not be stated at unnecessary length: *Evans* v. *Mathias*, 7 El. & Bl. 590.

(*o*) *Watson* v. *Ambergate, &c. R. Co.*, 15 Jur. 448: *Williams* v. *Evans*, L. R., 19 Eq. 547.

(*p*) *Yorke* v. *Smith*, 21 L. J., Q. B. 53.

(*q*) *Thornewell* v. *Wignor*, supra.

(*r*) *Cawley* v. *Furnell*, supra.

(*s*) *Great Northern R. Co.* v. *Shepherd*, 8 Exch. 31; 21 L. J., Ex. 114.

(*t*) *Irving* v. *Askew*, infra.

(*u*) *Clarke* v. *Roche*, 36 L. T. 727.

(*x*) *Sharrock* v. *L. & N. W. R. Co.*, 1 C. P. D. 70 (C. A.).

(*y*) *Rhodes* v. *Liverpool Commercial Investment Co.*, 4 C. P. D. 425, 430.

(*z*) See *Hacking* v. *Lee*, 2 E. & E. 906; 29 L. J., Q. B. 204: *Ex p. Farber*, 27 L. J., Ex. 453. See *M'Callum* v. *Cookson*, 5 C. B., N. S. 498; 28 L. J., C. P. 1, where the Judge died before signing. See *Irving* v. *Askew*, L. R., 5 Q. B. 208; 39 L. J., Q. B. 118, where the Judge altered his judgment after notice of appeal.

the Judge approves thereof, it shall be signed by him, and sealed with the seal of the Court; but where the Judge does not approve of the case submitted to him, both parties shall be summoned to attend him where and when the Judge shall appoint, and at the place and time so appointed both parties shall be heard as to the form of the case, and the Judge shall finally settle and sign the same, and it shall then be sealed by the Registrar."

By *Ord. XXIX. (C. C.)*, *r.* 6, "Where the parties do not agree upon the form of the case to be stated, the appellant shall lodge with the Registrar the draft case prepared by him, and the Registrar shall give notice to the parties that the same has been so lodged, and will, on a day to be named in the notice, be presented to the Judge for his signature, and on such day the parties may appear before the Judge, who shall determine the form of the case, and finally settle and sign the same, and it shall then be sealed by the Registrar."

By *Ord. XXIX. (C. C.)* *r.* 7, "When the case shall be so signed and sealed, a copy thereof shall be deposited with the Registrar, and another sent by post or otherwise by the appellant to the successful party within three clear days next after the time of signing (*a*) and sealing the same, and if the appellant do not comply with this rule the successful party may proceed upon the order, notwithstanding proceedings have been stayed by order of the Judge, unless the Judge shall otherwise direct."

Setting down case for argument.

Setting down Case for Argument—Delivery of same to Judges.]—As to this, *see ante*, p. 1517.

By *Ord. XXIX. (C. C.)*, *r.* 8, "The appellant shall, within three days next after the case has been signed and sealed, transmit the same with a copy thereof under the seal of the Court, by post or otherwise, to the proper officer (*b*) of the High Court of Justice, and shall give notice, by post or otherwise, to the successful party that he has done so; in default whereof the successful party may proceed on the judgment as if no appeal had been made, and shall, on the application to the Court, be entitled to such costs as he shall have incurred in consequence of the appellant's proceedings; provided that, instead of proceeding on such judgment, the respondent, if he think fit, may, within twenty-eight clear days from the signing and sealing of the case, transmit it in the manner prescribed, and give the like notice to the appellant of such transmission." *See* 13 & 14 *V. c.* 61, *s.* 15, *ante*, p. 1527. The transmission of the case within three days is not a condition precedent to the right of appeal (*c*). As to proceedings on the death of the respondent, *see Hemming* v. *Williams*, L. R., 6 C. P. 480; 40 L. J., C. P. 270.

As to delivering copies of the case for the Judges, *see R.* 22 January, 1877, *ante*, p. 1517.

Argument of appeal, costs, &c.

Argument of Appeal, Costs, &c.]—As to the argument of appeals from inferior Courts, *see ante*, p. 1517 (*c*). It seems the High Court will not entertain an objection not taken in the Court

(*a*) See *Egg* v. *Wilkinson*, 9 Exch. 475; 23 L. J., Ex. 129.

(*b*) See ante, p. 1516.

(*c*) *Richardson* v. *Silvester*, 29 L. T. 395.

PART XVII.

below (*d*). No question will be entertained which is not raised by the case (*e*). By the 13 & 14 *V. c.* 61, *s.* 14, the High Court may either order a new trial on such terms as it thinks fit, or may order judgment to be entered for either party as the case may be, and such order shall be final (*f*). In one case it was held that the functions of the High Court were not limited to answering the questions put in the case, but that the Court had power to look at the direction of the Judge to the jury set out in the case, and, as that was erroneous, to order a new trial (*g*). Where judgment below has been given for the plaintiff, the High Court has power to order a nonsuit to be entered (*h*). Where the case has been tried by a jury, the High Court has no power on appeal by the defendant to set aside the verdict, and to order judgment to be entered for him, but can only order a new trial (*i*).

Costs.

By the 13 & 14 *V. c.* 61, *s.* 14, the High Court may make such order with respect to the costs of the appeal as it may think proper, and such order shall be final (*k*). As a general rule, the Court will give the successful party his costs of the appeal (*l*). Where a new trial only was granted, the Court of Common Pleas allowed the appellant the costs of the appeal (*m*). And the same Court have held that upon an appeal on the ground of misdirection the appellant if successful is entitled to costs (*n*). It seems, the High Court cannot make a conditional order that the costs of the appeal abide the event of a new trial in the County Court (*o*).

The imposition of terms compelling the appellant to pay the costs in any event has been judicially condemned (*p*). Where, however, the County Court Judge imposes such terms, the Court has no power to interfere (*q*). An appeal lies to the Court of Appeal by leave (*r*).

Appeal.

(*d*) *Yorke* v. *Smith*, 21 L. J., Q. B. 53: *Watson* v. *The Ambergate, &c. R. Co.*, 15 Jur. 448, Q. B. But cp. cases ante, p. 1532.

(*e*) *Williams* v. *Evans*, L. R., 19 Eq. 547; 44 L. J., Ch. 319.

(*f*) See this sect. ante, p. 1525.

(*g*) *Stancliffe*, App. v. *Clarke*, Resp., 7 Ex. 439; 21 L. J., Ex. 129.

(*h*) *Fuller* v. *Cleveley*, 17 Jur. 736.

(*i*) *Jonas* v. *Adams*, 20 L. J., Q. B. 397.

(*k*) See this sect. ante, p. 1525. See *Fraser* v. *Fothergill*, 14 C. B. 295; 23 L. J., C. P. 53, as to costs when appeal struck out on the ground of want of jurisdiction to hear it.

(*l*) *Onthwaite*, App. v. *Hudson*, Resp., 21 L. J., Ex. 151: *Cannon* v. *Johnson*, 21 L. J., Q. B. 164: *Daniels* v. *Charsley*, 11 C. B. 739; 21 L. J., C. P. 31: *Schultz* v. *Leidman*, 14 C. B. 38; 18 Jur. 44 n.: *Robinson* v. *Lawrence*, 7 Ex. 128; 21 L. J., Ex. 36: *Hunt* v. *Wray*, 7 Exch. 125 n.; 21 L. J., Ex. 37: *Foster* v. *Smith*, 18 C. B. 161: *Conybeare* v. *Farries*, L. R., 5 Ex. 16; 39 L. J., Ex. 26: *Richardson* v. *N. East R. Co.*, L. R., 7 C. P. 83: *Ashby* v. *Sedgwick*, L. R., 15 Eq. 245; 42 L. J., Ch. 355: *Leach* v. *S. E. R. Co.*, 34 L. T. 134. See *Yorke* v. *Smith*, 21 L. J., Q. B. 53, where costs were not given. And see *Mountney* v. *Collier*, 2 E. & B. 100; 22 L. J., Q. B. 124. As to the costs ordered by the Court below when a new trial is granted, see *Gage* v. *Collins*, L. R., 2 C. P. 381; 36 L. J., C. P. 144.

(*m*) *Gibbon* v. *Gibbon*, 13 C. B. 219; 22 L. J., C. P. 135 n.: *Leidman*, App. v. *Schultz*, Resp., 14 C. B. 38; 23 L. J., C. P. 17: *Alcock* v. *Delay*, 4 El. & B. 660.

(*n*) *Schroder* v. *Ward*, 13 C. B., N. S. 410; 32 L. J., C. P. 150. See *Gee* v. *The Lancashire and Yorkshire R. Co.*, 6 H. & N. 215; 30 L. J., Ex. 11.

(*o*) *Gibbon* v. *Gibbon*, supra. But see now Order LXV. r. 1, ante, Vol. 1, p. 672.

(*p*) *Ashenden* v. *L. B. & S. C. R. Co.*, 42 L. T. at p. 529.

(*q*) *Goodes* v. *Cluff*, 13 Q. B. D. 694.

(*r*) *Crush* v. *Turner*, 3 Ex. D. 303; 47 L. J., Ex. 639.

Proceedings after appeal determined.

Proceedings after Appeal determined.]—By *Ord. XXIX.* (*C. C.*), *r.* 9, "When the Court of Appeal has pronounced judgment, either party may deposit the same, or an office copy thereof, with the Registrar of the County Court, and upon being so deposited such judgment shall be filed and may be enforced as if it had been made by the County Court."

By *Ord. XXIX.* (*C. C.*), *r.* 10, "A new trial, in pursuance of the order of the Court of Appeal, shall be entered for trial at the County Court which shall be holden next after twelve clear days from the time when such order or office copy thereof shall have been deposited as aforesaid, unless the parties agree that it shall take place sooner, or the Judge otherwise order, and it shall be conducted in the same manner as any new trial granted by the County Court itself."

By *Ord. XXIX.* (*C. C.*), *r.* 11, "In the order of the Court of Appeal be that judgment shall be entered for either party, then such judgment shall be entered accordingly, and the successful party shall be at liberty to proceed on such judgment as on a judgment of the County Court."

Action on bond.

Action on the Bond for securing Costs.]—An action on the bond may be brought immediately on the condition being broken (*r*). It should be brought in the name of the obligee (*s*). It may be brought in the High Court of Justice (*t*).

Court may give relief.

It will be noticed that by the 19 & 20 *V. c.* 108, *s.* 70 (*ante*, p. 1530), the Court may give such relief to the obligors as may be just. Before this Act, it was enacted by the 11 *G.* 2, *c.* 19, *s.* 23, that the Court, where such action (an action on a replevin bond) shall be brought, may, by a rule of the same Court, give such relief to the parties upon such bond as may be agreeable to justice and reason, and such rule shall have the nature and effect of a defeasance to such bond. This enactment it will be seen is very similar to the proviso in the above 70th section of the 19 & 20 *V. c.* 108. Under the above statute of *G.* 2, the Court or a Judge would order the proceedings in an action on the replevin bond to be stayed on payment into Court of the value of the goods distrained, the costs of the replevin suit, and the costs of the action on the bond (*u*); or if the value of the goods exceeded the amount of the rent due at the time of the distress, then, it would seem, on payment of the rent due and costs (*x*). And if, in such a case, the amount of rent due was disputed, then the Court or a Judge would, perhaps, as in other cases of liquidated claims (*y*), allow the defendants to pay into Court the sum admitted by them to be due, and order that the plaintiff should proceed at the peril of costs, if he did not prove a greater sum due. And in

(*r*) Gilb. Replevin, 225: *Waterman* v. *Vea*, 2 Wils. 41: *Turnor* v. *Turner*, 2 B. & B. 107; 4 Moore, 606: *Perreau* v. *Bevan*, 8 D. & R. 72.

(*s*) See *Page* v. *Eamer*, 1 B. & P. 378.

(*t*) *Dias* v. *Freeman*, 5 T. R. 195: *Brackenbury* v. *Pell*, 12 East, 585: *Wilson* v. *Hartley*, 7 Dowl. 461, cases decided on replevin bonds before the 19 & 20 V. c. 108.

(*u*) *Gingell* v. *Turnbull*, 3 Bing. N. C. 881. The value being disputed was, in that case, ordered to be ascertained by the prothonotary.

(*x*) See *Hunt* v. *Round*, 2 Dowl. 558: *Miers* v. *Lockwood*, 9 Dowl. 975.

(*y*) See *Gower* v. *Elkins*, 6 Dowl. 385: *Parsons* v. *Pitcher*, 6 Dowl. 432.

PART XVII.

all cases the proceedings might be stayed on payment of the penalty and costs, and this though the plaintiff's costs in the replevin suit much exceeded the penalty (*z*). If separate actions were brought against the sureties without sufficient reason, the Court would in general stay proceedings upon payment of the sum recoverable, and the costs in one action (*a*). Where three actions were brought against the principal and sureties on a replevin bond, the Court stayed the proceedings in two of them, the defendants therein undertaking to be bound by the decision in the other action (*b*). The Court would not in general stay the proceedings, unless it clearly appeared that the application was made on behalf of the sureties, and not of the principal (*c*).

Setting aside irregular proceedings.

The proceedings may, if irregular or defective, be set aside, as in other cases. (*See Ch. XLII.*) The Court will not, it seems, set the proceedings aside because the action is commenced before the forfeiture of the bond, for that may be pleaded (*d*). Nor will they set aside an execution thereon upon an objection which might have been taken before judgment (*e*). And where, before the 19 & 20 *V. c.* 108, it appeared that a greater sum had been indorsed on the writ of execution, and levied, than that to which the plaintiff was entitled, and that that amount had been paid over to him, the Court would not, at the instance of the sheriff or a second execution creditor, compel the plaintiff to refund the overplus (*f*).

Sureties how far liable.

The plaintiff may, in general, recover to the extent of the penalty, but not beyond it (*g*). Where before the 19 & 20 *V. c.* 108, separate actions were brought against each of the pledges, it was held, that the plaintiff could recover, from both, damages only to the amount of the penalty, and from each the costs in the separate action against him individually (*h*). So before the above Act it was held that if the distress were for rent, they were not, either jointly or separately, liable beyond the amount of the rent in arrear at the time of the distress, and the costs of the replevin suit (*i*): and they were only liable to the amount of the value of the goods seized, if the rent amounted to so much, or to the amount of the rent if it were less than the value, adding to such liability in either case the amount of the costs of the replevin suit (*k*); but in no case, as just observed, were they liable beyond the amount of the penalty. Where, before the above Act, a sheriff took a replevin bond with one surety only, and was sued for taking insufficient pledges, in which action the plaintiff recovered damages and costs, it was held that the sheriff could not recover against the surety the costs of defending such action, nor more than a moiety of the damages awarded, the surety being deprived of his right of calling on a co-surety for contribution (*l*).

(*z*) *Branscombe* v. *Searbrough*, 6 Q. B. 13.

(*a*) See *Bartlett* v. *Bartlett*, 4 Sc. N. R. 779; 4 M. & G. 269; *Warton* v. *Blacknell*, 1 D. & L. 650.

(*b*) *Bartlett* v. *Bartlett*, 4 Sc. N. R. 779; 4 M. & G. 269.

(*c*) *Warton* v. *Blacknell*, 1 D. & L. 650; 12 M. & W. 558; 13 L. J., Ex. 112.

(*d*) *Anon.*, 5 Taunt. 776. See *Evans* v. *Bowen*, 7 D. & L. 320.

(*e*) *Short* v. *Hubbard*, 10 Moore, 107; 2 Bing. 445.

(*f*) *Bowser* v. *Lloyd*, 9 Dowl. 1029.

(*g*) *Branscombe* v. *Searbrough*, 6 Q. B. 13.

(*h*) *Hefford* v. *Alger*, 1 Taunt. 218.

(*i*) *Ward* v. *Henley*, 1 Y. & J. 285.

(*k*) *Hunt* v. *Round*, 2 Dowl. 558. And see *Miers* v. *Lockwood*, ante, p. 1535.

(*l*) *Austen* v. *Howard*, 1 Moore, 68; 7 Taunt. 28; Id. 327; 2 Marsh, 352.

Before the 19 & 20 *V. c.* 108, it was held that the pledges in replevin could not *plead* to an action on the replevin bond, that they were discharged by a reference to arbitration (*m*), or by time having been given to the plaintiff in replevin (*n*). But though they could not so *plead*, nevertheless the Court or a Judge might on application relieve them: and where the plaintiff and defendant, without the privity of the pledges, agreed to refer the replevin cause to arbitration, and that the replevin bond should stand as a security for the performance of the award, the Court relieved the pledges (*o*). They were not discharged by the defendant taking a verdict and judgment for the arrears of rent, &c., under the 17 *C.* 2, *c.* 11, *ss.* 2, 3 (*p*).

How discharged.

By the 19 & 20 *V. c.* 108, *s.* 76, "If any bond, given under the provisions of any Act relating to the County Courts, shall have been registered in the Court of Common Pleas in England, and the condition of such bond shall have been satisfied, the Commissioners of her Majesty's Treasury, by certificate under the hands of any two of them, may authorize the proper officer of the said Court to enter up satisfaction on the record of such bond or obligation."

Entering satisfaction on bond registered in the Common Pleas.

(*m*) *Moore* v. *Bowmaker*, 7 Taunt. 97; 7 Price, 223; 2 Marsh, 392: *Aldridge* v. *Harper*, 10 Bing. 118; 3 M. & Sc. 518. And see *Hallett* v. *Mountstephen*, 2 D. & R. 343.

(*n*) *Moore* v. *Bowmaker*, 6 Taunt. 379.

(*o*) *Archer* v. *Hale*, 1 M. & P. 285; 4 Bing. 464. And see *Aldridge* v. *Harper*, 10 Bing. 124; 3 M. & Sc. 518: *Bank of Ireland* v. *Beresford*, 6 Dowl. 238: *Donelly* v. *Dunn*, 2 B. & P. 45.

(*p*) *Turner* v. *Turner*, 2 B. & B. 107; 4 Moore, 606, 616.

CHAPTER CXXXI.

COMPELLING JUDGE OR OFFICER OF COUNTY COURT TO PERFORM HIS DUTY.

PART XVII.

Enactment respecting.

By the 19 & 20 *V. c.* 108, *s.* 43, "No writ of mandamus shall henceforth issue to a Judge or an officer of the County Court for refusing to do any act relating to the duties of his office (*a*); but any party requiring such act to be done may apply to any superior Court or a Judge (*b*) thereof, upon an affidavit (*c*) of the facts, for a rule or summons calling upon such Judge or officer of a County Court, and also the party to be affected by such act, to show cause why such act should not be done; and if after the service of such rule or summons good cause shall not be shown, the superior Court or Judge thereof may by rule or order direct the act to be done, and the Judge or officer of the County Court, upon being served with such rule or order shall obey the same on pain of attachment; and in any event the superior Court or the Judge thereof may make such order with respect to costs as to such Court or Judge shall seem fit."

When Judge will be compelled to hear a case.

If a County Court Judge improperly refuse to hear a case, the Court will compel him to do so; and they will so interfere if the Judge so refuse to hear the case in consequence of his arriving at a wrong decision upon a preliminary point (*d*). Thus, if the Judge erroneously decides in an interpleader case that the particulars sent in are insufficient, and thereupon refuses to allow the party to go into his claim (*e*), or if so refusing he makes an order adjudging the goods to be the property of the execution creditor (*f*), the Court

(*a*) *Re Brighton Sewers Act*, 9 Q. B. D. 723.

(*b*) By the 21 & 22 V. c. 74, s. 4, "No rule or summons requiring a Judge or an officer of a County Court to show cause why any act relating to the duties of his office should not be done, nor any rule or order directing such act to be done, shall be issued or made except by the superior Court, and the said section 43 (19 & 20 V. c. 108, s. 43) and any provisions of the said Act, having reference thereto, shall be read and construed as if the words 'or a Judge thereof' were not inserted in the said section."

(*c*) *Ex p. Furber*, 3 H. & N. 521; 27 L. J., Ex. 453.

(*d*) *R.* v. *Richards*, 20 L. J., Q. B. 351: *Ex. p. Milner*, 15 Jur. 1037, Q. B. This enactment applies to the City of London Court. *Blades* v. *Lawrence*, L. R., 9 Q. B. 374; 43 L. J., Q. B. 133.

(*e*) *R.* v. *Stapylton*, 21 L. J., Q. B. 8: *Ex p. M'Fee*, 9 Ex. 261; 23 L. J., Ex. 57, where the Judge erroneously decided that the statement of the claimants was insufficient. See *Richardson* v. *Wright*, 44 L. J., Ex. 230: *Churchward* v. *Coleman*, 36 L. J., Q. B. 57, where a question arose as to the power of interfering with the County Court Judge's order as to costs: and see *Gage* v. *Collins*, L. R., 2 C. P. 381, as to this.

(*f*) *R.* v. *Richards*, 20 L. J., Q. B. 351.

will compel the Judge to hear and adjudicate upon the claim. Where the Judge improperly refused to try a cause with a jury, and in consequence the cause was not tried, the Court interfered (*g*). But they will not do so where the cause has been heard (*h*). Upon an application for a rule to compel a County Court Judge to review the taxation of costs in a plaint tried before him, it was held, that the reviewal of taxation of costs was in the discretion of the Judge, and that the refusing by him to review was not the refusing to do an act relating to the duties of his office within the meaning of the above section (*i*).

The above section, however, only applies to matters which come within the ordinary jurisdiction of the County Court Judge (*k*). In other cases the application should be for a mandamus (*k*).

When application should be against the clerk.

Where before the above enactments a plaintiff in the County Court having obtained a judgment for debt and costs received payment of the debt only, and required the clerk of the County Court to issue execution against the debtor's goods for the costs only, which he refused to do; it was held that a mandamus to issue execution was properly directed to the clerk and not to the Judge (*l*). It seems that before applying to the Court for such a mandamus, application should have been made to the Judge of the County Court to order the Registrar to issue execution (*m*).

When to be applied for.

The application should be made promptly (*n*).

The affidavit.

The affidavit in support of the application should be intituled in the High Court of Justice and in the Division to which the application is made, but not in any cause. It should state the facts, showing that the applicant is entitled to the interference of the Court.

The rule nisi.

The rule is nisi only in the first instance. The rule should call not only on the Judge of the County Court, but also on the party affected by the act to be done to show cause (*o*). The rule nisi is drawn up as in ordinary cases, and a copy served on the parties called on to show cause. The service need not be personal.

Showing cause.

The party showing cause against the rule must take an office copy of the rule and the affidavits on which it was moved, otherwise he cannot be heard. The affidavits used in showing cause should be intituled in the High Court of Justice, and also in the Division in which the application is made, and they should also be intituled in the same way as the rule nisi.

Costs of the rule.

The costs of the application, whether the same be granted or refused, are entirely in the discretion of the Court (*o*). On discharging the rule the Court generally gives the party showing

---

(*g*) *R.* v. *Harwood*, 22 L. J., Q. B. 127. As to the Court having a discretion, see *Sharrock* v. *L. & N. W. R. Co.*, L. R., 1 C. P. 70.

(*h*) *Re Corbett*, 4 H. & N. 452; 28 L. J., Ex. 254: *Pearson* v. *Glazebrook*, 37 L. J., Ex. 15. As to when a mandamus will be granted to hear an appeal, see Burn's Justice, tit. "Appeal."

(*i*) *Clifton* v. *Furley*, 7 H. & N. 783; 31 L. J., Ex. 170.

(*k*) *In re Brighton Sewers Act*, 9 Q. B. D. 723.

(*l*) *R.* v. *Fletcher*, 2 El. & Bl. 279.

(*m*) *Ex p. Christchurch* (*Overseers*), 2 Pr. Rep. 660, B. C.

(*n*) See *R.* v. *West Riding Justices*, 1 Q. & D. 706: *Coke* v. *Jones*, 7 Jur., N. S. 545.

(*o*) See 19 & 20 V. c. 108, s. 43, ante, p. 1538.

)

CXXXI.

F COUNTY COURT TO PERFORM TY.

"No writ of mandamus shall officer of the County Court for the duties of his office (*a*); but done may apply to any superior an affidavit (*c*) of the facts, for uch Judge or officer of a County ected by such act, to show cause and if after the service of such not be shown, the superior Court order direct the act to be done, ounty Court, upon being served the same on pain of attachment; t or the Judge thereof may make to such Court or Judge shall seem

operly refuse to hear a case, the and they will so interfere if the n consequence of his arriving at ury point (*d*). Thus, if the Judge leader case that the particulars upon refuses to allow the party to ing he makes an order adjudging execution creditor (*f*), the Court

---

(*d*) *R.* v. *Richards*, 20 L. J., Q. B. 351: *Ex. p. Milner*, 15 Jur. 1035, Q. B. This enactment applies to the City of London Court. *Blades* v. *Lawrence*, L. R., 9 Q. B. 374; 43 L. J., Q. B. 133.

(*e*) *R.* v. *Stapylton*, 21 L. J., Q. B. 8: *Ex p. M'Fee*, 9 Ex. 261; 23 L. J., Ex. 57, where the Judge erroneously decided that the statement of the claimants was insufficient. See *Richardson* v. *Wright*, 44 L. J., Ex. 230: *Churchward* v. *Coleman*, 36 L. J., Q. B. 57, where a question arose as to the power of interfering with the County Court Judge's order as to costs: and see *Gage* v. *Collins*, L. R., 2 C. P. 381, as to this.

(*f*) *R.* v. *Richards*, 20 L. J., Q. B. 351.

PART XVII.

Proceedings on rule absolute.

cause his costs (*p*). If the rule be made absolute the Court will in general, where asked for by the rule nisi, give costs (*q*).

If the rule be made absolute, it should be drawn up and served. It is enforced by attachment (*r*). As to the mode of proceeding by attachment, *see ante, Ch. LXXXIII.*, p. 941.

As to making a fresh application to the Court after an application refused, see 19 & 20 *V. c.* 108, *s.* 44, by which "When any superior Court or a Judge thereof shall have refused to grant a writ of certiorari or of prohibition to be addressed to a Judge, or such rule or order as in the last preceding section is specified, no other superior Court or Judge thereof shall grant such writ or rule or order; but nothing herein shall affect the right of appealing from the decision of the Judge of the superior Court to the Court itself, or prevent a second application being made for such writ or rule or order to the same superior Court or a Judge thereof on grounds different from those on which the first application was founded."

(*p*) See *R.* v. *Mayor of Bridgnorth*, 10 A. & E. 66.

(*q*) See *The Queen* v. *Harden*, 23 L. J., Q. B. 127: *R.* v. *Surrey Justices*, 14 Q. B. 684; 19 L. J., M. C. 171.

(*r*) See 19 & 20 V. c. 108, s. 43, ante, p. 1538. See *Ex p. Furber*, 27 L. J., Ex. 453.

CHAPTER CXXXII.

PROHIBITION.

	PAGE		PAGE
1. *To Inferior Courts generally*	1541	3. *To Mayor's Court, London*..	1546
2. *To County Courts*	1543	4. *To Salford Hundred Court*..	1547

1. *To Inferior Courts generally.*

CH. CXXXII.

In what cases.

If an inferior Court attempts to exceed its jurisdiction, a prohibition may be granted, restraining it from doing so (*a*).

Where an inferior Court proceeds in a cause properly within its jurisdiction, the prohibition cannot be awarded until some issue is raised on the pleadings which the Court is incompetent to try (*b*); but where the foundation for the jurisdiction is itself defective, the prohibition may be applied for at once (*c*). When the superior Court is clearly of opinion, both with regard to the facts and the law, that an inferior Court is exceeding its jurisdiction, it is bound to grant the writ, whether the applicant be the defendant below, or a stranger (*d*). In *Chambers* v. *Green* (*e*), the late Master of the Rolls refused to follow *Worthington* v. *Jeffries* (*d*), and held that where a stranger applied, the granting of the writ was discretionary (*f*). In *Ellis* v. *Fleming* (*g*), however, the Common Pleas Division adhered to their former decision. In such a case neither the smallness of the claim, nor delay on the part of the applicant, is ground for refusing the writ (*h*). In a doubtful case the Court will not interfere (*i*).

The jurisdiction to grant prohibition is now conferred by the Judicature Acts upon every Judge of the High Court; but, inasmuch as one of the main objects of the Acts (*Judicature Act*, 1873, s. 24, *sub-s.* 7), is to enable the Court to decide, if possible, in one proceeding all the questions in dispute in the same matter and between the same parties, and (*Judicature Act*, 1873, *s.* 25, *sub-s.* 8) to grant an injunction in all cases in which it shall appear to the Court "just and convenient" so to do, the Court may in any case

(*a*) See as to when a prohibition will lie, &c., Com. Dig. "Prohibition;" Bac. Ab. "Prohibition;" 1 Saund. 136: *Mayor of London* v. *Cox*, L. R., 2 H. L. 239; 36 L. J., Ex. 225: *Wadsworth* v. *Queen of Spain*, 17 Q. B. 171; 20 L. J., Q. B. 88: *Wright* v. *Cattell*, 13 Beav. 81; 19 L. J., Ch. 527.

(*b*) *Mayor of London* v. *Cox*, supra.

(*c*) Id.

(*d*) *Worthington* v. *Jeffries*, L. R., 10 C. P. 379: *Taylor* v. *Nicholls*, 1 C. P. D. 242.

(*e*) L. R., 20 Eq. 552.

(*f*) Cp. *Reg.* v. *Twiss*, L. R., 4 Q. B. 407.

(*g*) 1 C. P. D. 237.

(*h*) Id.

(*i*) *Taylor* v. *Nicholls*, supra.

Judge to perform his Duty.

be made absolute the Court will rule nisi, give costs (*q*).
should be drawn up and served.
As to the mode of proceeding by *II.*, p. 941.
n to the Court after an applica-08, *s.* 44, by which "When any eof shall have refused to grant on to be addressed to a Judge, or preceding section is specified, no reof shall grant such writ or rule all affect the right of appealing the superior Court to the Court ation being made for such writ or ior Court or a Judge thereof on which the first application was

tices, 14 Q. B. 684; 19 L. J., M.C. 171.
(*r*) See 19 & 20 V. c. 108, s. 43, ante, p. 1538. See *Ex p. Farber*, 27 L. J., Ex. 453.

PART XVII.

in which it has power to grant prohibition, grant an injunction to restrain the proceedings in the inferior Court (*k*). For instance, the Court will grant an injunction to restrain a landowner from taking proceedings before justices of the peace on an irregular notice under sects. 72 & 73 of the Land Drainage Acts, 1861 (24 & 25 *V.c.* 133) (*k*).

As to the cases in which an appeal is the proper proceeding, see *Barker* v. *Paliner*, 8 Q. B. D. 9; 51 L. J., Q. B. 110; 45 L. T. 48; 30 W. R. 59.

The application.

The Application.]—The application for a writ of prohibition is made either ex parte (*l*), or on summons to a Judge at Chambers, or by motion on notice to the Court. A Master has no jurisdiction (*m*).

The stat. 1 *W.* 4, c. 21, relating to prohibition, is repealed by the Stat. Law Revision and Civil Proc. Act, 1883 (46 & 47 *V.* c. 49). By *R. of S. C., Ord. LXVIII. r.* 2 (*ante, Vol.* 1, p. 203), several of the provisions of the rules are applied to prohibition. The application should be made on affidavit. The affidavit will vary according to the facts of each particular case. It must state clearly and distinctly the facts which show that the application should be granted, and it must appear affirmatively that the inferior Court has no jurisdiction, or has gone beyond it (*n*).

Affidavits.

The affidavit should be intituled in the Court (*o*), but not in any cause (*p*). There is, however, no objection to an affidavit entitled "In the Matter of an action commenced in the Mayor's Court, London, by *W. W.* and *A. W.* against *J. A.*" (*q*).

Pleadings and subsequent proceedings.

Pleadings and subsequent Proceedings.]—By *R. of S. C., Ord. LXVIII. r.* 3, "Where pleadings in prohibition are ordered, the pleadings and subsequent proceedings, including judgment and assessment of damages, if any, shall be, as nearly as may be, the same as in an ordinary action for damages."

As there is an appeal to the Court of Appeal (*r*), the applicant is now seldom required to declare in prohibition (*s*). Formerly, in cases of doubt or difficulty, the Court would order the applicant to declare in prohibition (*t*), and they will sometimes do so still, but the matter is in the discretion of the Court; and the plaintiff in the inferior Court has not any absolute right to have the plaintiff in prohibition put to declare (*u*).

(*k*) *Hedley* v. *Bates*, 13 Ch. D. 498; 49 L. J., Ch. 170; 42 L. T. 41. See *Stannard* v. *Vestry of St. Giles, Camberwell*, 20 Ch. D. 190; 51 L. J., Ch. 629: *Great Western R. Co.* v. *Waterford, &c. R. Co.*, 17 Ch. D. 493: cp. *North London R. Co.* v. *Great Northern R. Co.*, 11 Q. B. D. 30; 52 L. J., Q. B. 308; 48 L. T. 695; 31 W. R. 490.

(*l*) See a form of rule nisi, 8 Q. B. D. 609.

(*m*) Ord. LIV. r. 12 (g), ante, p. 1403.

(*n*) See per *Wilde*, C. J., in *Kimpton* v. *Willey*, 1 L. M. & P. 280; 19 L. J., C. P. 269. See form, Chit. F. p. 782.

(*o*) See Ord. LXVIII. r. 4, ante, Vol. 1, p. 454.

(*p*) *Ex p. Evans*, 2 Dowl., N. S. 410. See *Breedon* v. *Capp*, 9 Jur. 781.

(*q*) *Wallace* v. *Allen*, 44 L. J., C. P. 351.

(*r*) *Barton* v. *Titchmarsh*, 42 L. T. 610.

(*s*) See *Serjeant* v. *Dale*, 2 Q. B. I per Cur. at p. 569: *Toomer* v. *L.* & *D. R. Co.*, 2 Ex. D. at p. 458 *Martin* v. *Mackonochie*, 3 Q. B. D. at p. 783.

(*t*) *Gare* v. *Gapper*, *Gould* v. *Gapper*, 3 East, 472: cp. *Whinney* v. *Schmidt*, L. R., 8 C. P. 118.

(*u*) *Worthington* v. *Jeffries*, L. R., 10 C. P. 379.

See forms of declaration and plea in *London Joint Stock Bank* v. *Mayor of London*, 1 C. P. D. 1: *S. C.*, 5 C. P. D. 496; 6 App. Cas. 393; and *South Eastern Rail. Co.* v. *Rail. Commissioners*, 41 L. T. 760: *S. C.* in C. A., 44 Id. 203; Chit. F., 10th ed. p. 795.

When a declaration was ordered, the defendant was not confined to one plea (*x*).

Costs.

Costs.]—The costs are in the discretion of the Court (*y*). When the rule was made absolute without pleadings (*z*), the stat. 1 *W.* 4, *c.* 21, *s.* 1 (*a*), did not entitle the plaintiff to costs, as there was no "judgment" within its meaning (*b*); but this did not prevent the Court from granting costs in such a case (*c*). The Court may discharge the rule without costs (*d*). It has been held that the costs incurred by the plaintiff in prohibition in his defence to the suit in the inferior Court are not recoverable as damages (*e*). The Judge of the inferior Court may in some cases get his costs of appearing (*f*).

Restitution.

Restitution.]—The Court may order restitution of the subject-matter of the action, but it will not, it seems, do so, when the subject-matter of the suit is no longer within the control of the inferior Court (*g*).

Appeal to Court of Appeal.

Appeal to Court of Appeal.]—An appeal lies to the Court of Appeal from the decision of a Divisional Court on a rule for a prohibition (*h*).

2. *Prohibition to County Courts.*

Enactments as to.

A County Court may be restrained from proceeding in a cause by a writ of prohibition where it acts without jurisdiction or exceeds it.

By the 13 & 14 *V. c.* 61, *s.* 22, "It shall be lawful for any Judge of any of her Majesty's superior Courts of common law at Westminster, [as well in term time as in vacation (*i*),] to hear and determine applications for writs of prohibition directed to the Judges of the said County Courts, and to make such rules or orders for the issuing of such writs as might have been made by the Court, and all such rules or orders so made by any such Judge shall have the same force and effect as rules of Court for such purposes now have, and such writs shall be issued by virtue of such rules or orders [as well in term time as in vacation (*i*)]: Provided always, that any

(*e*) *Hall* v. *Maule*, 4 Ad. & El. 286.
(*g*) Ord. LXV. r. 1 (ante, Vol. 1, p. 672), applied to prohibition by Ord. LXVIII. r. 2, ante, Vol. 1, p. 203.
(*c*) As it generally is now. See *Serjeant* v. *Dale*, 2 Q. B. D. at p. 559: *Martin* v. *Mackonochie*, 3 Id. at p. 783: *Toomer* v. *L. C. & D. R. Co.*, Ex. D. at p. 458.
(*a*) Repealed by 46 & 47 V. c. 49.
(*b*) *Ex p. Overseers of Everton*, L. 6 C. P. 245.
(*c*) *Wallace* v. *Allen*, L. R., 10 C. P. 607.
(*d*) *Ellis* v. *Fleming*, 1 C. P. D. 237.
(*e*) *White* v. *Steele*, 13 C. B., N. S. 231; 9 Jur., N. S. 648.
(*f*) *Ex p. Dale, Re Serjeant* v. *Dale*, 43 L. T. 769, 786 (C. A.).
(*g*) See per *Martin*, B., *Denton* v. *Marshall*, 1 H. & C. 654; 32 L. J., Ex. 89.
(*h*) *Barton* v. *Titchmarsh*, 42 L. T. 610; 49 L. J., Ex. 570: *Reg.* v. *Local Government Board*, 10 Q. B. D. 309; 48 L. T. 173; 31 W. R. 74.
(*i*) words in brackets are repealed by the Stat. Law Rev. Act, 1875.

PART XVII.

rule or order made by any such Judge, or any writ issued by virtue thereof, may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such rule or order."

No pleadings.

By the 19 & 20 *V. c.* 108, *s.* 42, "When an application shall be made to a superior Court or a Judge thereof, for a writ of prohibition to be addressed to a Judge of a County Court, the matter shall be finally disposed of by rule or order, and no declaration or further proceedings in prohibition shall be allowed" (*i*).

Appeal.

An appeal lies to the Court of Appeal from the decision of a Divisional Court making absolute a rule for a prohibition to a County Court Judge (*k*).

When the prohibition will lie.

It is often a difficult matter to determine whether a writ of prohibition will lie. Where the existence of jurisdiction in the County Court depends upon the decision of a preliminary point of law, a prohibition will be issued if the County Court assumes jurisdiction in consequence of a wrong decision of the point (*l*). If it depends upon a preliminary question of fact, and the County Court Judge decides it upon evidence, a superior Court may review his decision (*m*). Where in a claim of debt (as in use and occupation) under 20*l.* in a County Court, it is alleged that the title to land comes in question in the action, the Judge has power to inquire into and determine that point; but if he decides that title does not come in question, and the fact is otherwise, a prohibition will lie (*n*). Where a County Court Judge decides that the particulars of a claim in an interpleader summons are not sufficient according to the rule made under the County Court Acts, and refuses on that account to hear the claimant, a prohibition lies to stay the further proceedings under the execution, if the particulars ought to have been held sufficient (*o*). So, a prohibition lies if a Judge, after refusing a new trial, entertain another motion for that purpose and grant a new trial (*p*). It will not lie where the Judge of the County Court makes a mistake in fact or law in a matter within his jurisdiction (*q*). Where, on summons in the County Court, the defendant pleaded judgment recovered, and execution issued for the same claim, and the plaintiff admitted the truth of the plea, but the Judge nevertheless decided in his favour, the matter was held

---

(*i*) See ss. 40, 41, and 44 of this Act. See *Lawford* v. *Partridge*, 1 H. & N. 621; 26 L. J., Ex. 147.

(*k*) *Barton* v. *Titchmarsh*, 49 L. J., Ex. 573; 42 L. T. 610.

(*l*) *Elston* v. *Rose*, L. R., 4 Q. B. 4.

(*m*) *Brown* v. *Cocking*, L. R., 3 Q. B. 672; 37 L. J., Q. B. 250: *Elston* v. *Rose*, supra.

(*n*) *Thompson* v. *Ingham*, 14 Q. B. 710; 19 L. J., Q. B. 189: *Re Bowen*, 21 L. J., Q. B. 12: *Sewell* v. *Jones*, 19 L. J., Q. B. 372: *Kimpton* v. *Willey*, 19 L. J., C. P. 269, per *Maule*, J.: *Lilley* v. *Harvey*, 9 C. B. 719; 5 D. & L. 618: *Chew* v. *Holroyd*, 8 Ex. 249; 22 L. J., Ex. 95: *Re Knowles* v. *Holden*, 24 L. J., Ex. 253.

(*o*) *Re Hardy* v. *Walker*, *Ex p. M'Fee*, 9 Ex. 261: 23 L. J., Ex. 57.

(*p*) *Mossop* v. *The Great Northern R. Co.*, 21 Nov. 1855, C. P., 26 L. T. 91.

(*q*) See *Ellis* v. *Watt*, 8 C. B. 614; 19 L. J., C. P. 113: *Zohrab* v. *Smith*, 5 D. & L. 639; 17 L. J., Q. B. 176: *The Guardians of the Lexden Union* v. *Southgate*, 10 Ex. 201; 23 L. J., Ex. 316: *Re Bowen*, 21 L. J., Q. B. 10: *Chivers* v. *Savage*, 5 El. & Bl. 697; 25 L. J., Q. B. 85, where it was contended that the Judge in estimating the damages erroneously took into consideration matters not within his jurisdiction.

to be within the jurisdiction, and a prohibition was accordingly refused (*r*). A plaint for 20*l.* damages was removed into the superior Court by certiorari; another plaint, including the same cause of action, but laying the damage at 5*l.*, and consequently not removable by certiorari, was then entered: *Rolfe*, B., discharged a rule for a writ of prohibition, but made the plaintiff undertake not to proceed with the first action (*s*). In one case a prohibition moved for by the defendant was refused, as the plaint stated a matter within the Judge's jurisdiction, and the objection to the jurisdiction arose on contested facts which the Judge had power to inquire into, and as the decision on the merits turned on the very point on which the question of jurisdiction arose, and as the affidavits were conflicting (*t*). Upon a question of prohibition to the County Court, the Court will look not merely at the plaint and particulars, but at the actual facts; and if, upon the particulars, coupled with the facts, it appears that the claim is in substance for damage arising out of a matter excluded from the jurisdiction of the Court (as malicious prosecution), a prohibition will be granted (*u*).

Partial prohibition.

If the Court has no jurisdiction as to part of the proceedings, a partial prohibition may be granted (*x*).

Time when application should be made.

The application for the prohibition may in general (*y*) be made before the case is heard in the County Court (*z*). It has been held, that a writ of prohibition may issue after judgment in a County Court for an excess of jurisdiction not appearing on the face of the proceedings there (*a*). It seems a prohibition can be moved for after an appeal (*b*). As a general rule, the application for the writ could not be made on the last day of term (*c*). A rule nisi for a prohibition was obtained on the 5th of June, a warrant of possession under the judgment was executed on the 6th, and the rule for the prohibition was served on the Judge of the County Court in Wales on the 7th; it was held, that it was not too late, and the rule was made with a clause of restitution (*d*).

To whom.

The application may be made either to the Court or to a Judge at Chambers. Except under special circumstances it should be made at Chambers. A Master has no jurisdiction (*Ord. LIV. r.* 12 (g), *ante*, p. 1403).

Affidavit.

The affidavit upon which the rule nisi is moved for should be

(*r*) *Toft* v. *Rayner*, 5 C. B. 162.

(*s*) *Edwards* v. *Rogers*, 19 L. J., Ex. 149.

(*t*) *Joseph* v. *Henry*, 19 L. J., Q. B. 369, *Coleridge*, J.

(*u*) *Hunt* v. *South Staffordshire R. Co.*, 2 H. & N. 45; 26 L. J., Ex. 74: *Hopper* v. *Warburton*, 32 L. J., Q. B. 104.

(*x*) *Walsh* v. *Ionides*, 1 E. & B. 383; 22 L. J., Q. B. 137: *Kerkin* v. *Kerkin*, 3 E. & B. 399.

(*y*) See *The Skipton Industrial Corporation Society (Limited)* v. *Prince*, 33 L. J., Q. B. 323.

(*z*) *Sewell* v. *Jones*, 19 L. J., Q. B. 2: *Wadsworth* v. *The Queen of Spain*, 17 Q. B. 171; 20 L. J., Q. B. 488, 491.

(*a*) *Marsden* v. *Wardle*, 3 El. & B. 695; 23 L. J., Q. B. 263: *Kimpton* v. *Willey*, 19 L. J., C. P. 269: *Jones* v. *Owen*, 18 L. J., Q. B. 8. Query whether prohibition can go after judgment and execution executed: see *Denton* v. *Marshall*, 32 L. J., Ex. 89: *Mayor of London* v. *Cox*, L. R., 2 H. L. 239, 282; 36 L. J., Ex. 225: *Ex p. Michael*, 41 L. J., Q. B. 349.

(*b*) *Earl of Harrington* v. *Ramsay*, 22 L. J., Ex. 326. See *Jackson* v. *Beaumont*, 11 Ex. 300; 24 L. J., Ex. 301.

(*c*) *Thorne* v. *Simmons*, 9 C. B. 223.

(*d*) *Jones* v. *Owen*, 18 L. J., Q. B. 8.

PART XVII.

intituled in the Queen's Bench Division of the High Court of Justice, but not in any cause or matter. It should state such facts as will satisfy the Court or Judge that the writ of prohibition ought to issue. The affidavits used in showing cause should, it seems, be intituled in the same way as the rule nisi or summons is intituled (*e*).

Stay of proceedings.

As to the rule or summons operating as a stay of proceedings, *see* 19 & 20 *V.* c. 108, *s.* 40, noticed *post*, p. 1564.

Service of rule nisi or summons.

The rule nisi or summons should be served without delay. Where a rule for a prohibition to a County Court is directed to be served on the plaintiff and on the Judge, service on the Judge and the solicitor of the plaintiff in the County Court is insufficient (*f*). As to the Judge of the County Court ordering the payment of the costs of the day fixed for the hearing of the cause by the party applying for the prohibition when the rule or summons has not been served two clear days before such day, *see* 19 & 20 *V.* c. 108, *s.* 40, noticed *post*, p. 1564.

Hearing of same.

The matter is to be finally disposed of by the Court or Judge, and no declaration or further proceeding in prohibition can be allowed. *See* 19 & 20 *V.* c. 108, *s.* 42, *ante*, p. 1544.

It seems that it is not necessary that the grounds for issuing the prohibition should appear in the rule or order for it (*g*).

Appealing, &c. Second application.

A Judge's decision on an application for a writ of prohibition may be reviewed as in ordinary cases. But, after an application made to one Division of the High Court or a Judge thereof, no application could be made to any other Division or any Judge thereof (*h*). A second application might be made to the same Court or a Judge thereof, on grounds different from those on which the first application was founded (*i*).

Service of writ of prohibition when obtained ex parte.

As to the County Court Judge ordering the payment of the costs of the day fixed for the hearing of the cause when the writ of prohibition is obtained on an ex parte application, and has not been served two clear days before such day, *see* 19 & 20 *V.* c. 108, *s.* 41, noticed *post*, p. 1564.

As to the effect of the service of the writ of prohibition, *see Jones* v. *Owen*, 18 L. J., Q. B. 8; Fitz. N. P. 40; 2 Inst. 601—618; Bac. Ab. tit. "*Prohibition*."

3. *Prohibition to Mayor's Court, London.*

Mayor's Court, London.

The Mayor's Court in London is an inferior Court (*k*). In order to give the Mayor's Court jurisdiction in cases of foreign attachment, both the cause of action, *i.e.* the whole substantial cause of action (*l*), must arise, and the garnishee reside or carry on business within the city (*m*).

(*e*) See ante, p. 1539.

(*f*) *Massey* v. *Burton*, 3 Jur., N. S. 1108, Ex.

(*g*) *Eversfield* v. *Newman*, 4 C. B., N. S. 418.

(*h*) 19 & 20 V. c. 108, s. 44, noticed ante, p. 1540.

(*i*) 19 & 20 V. c. 108, s. 44, ante, p. 1540. When in general a second application can be made to the Court, see ante, p. 1398.

(*k*) *Mayor, &c. of London* v. *Co* L. R., 2 H. L. 239: *Appleford* *Judkins*, 3 C. P. D. 489.

(*l*) *Cooke* v. *Gill*, L. R., 8 C. 107: *Alderton* v. *Archer*, 14 Q. B. 1 1; 54 L. J., Q. B. 12; 51 L. T. 661 33 W. R. 136.

(*m*) *Mayor, &c. of London* v. *Co* supra: *Cooke* v. *Gill*, supra. As t what is a cause of action arisin withiu the city, see *Tapp* v. *Jones*

The Mayor's Court of London Procedure Act, 1857 (20 & 21 *V. c. clvii*), sect. 12, provides that where the debt or damage claimed in any action does not exceed 50*l*., no plea to the jurisdiction shall be allowed if the defendant or one of the defendants shall dwell or carry on business within the city or its liberties at the time of action brought, or shall have done so within six months next before that time, or if the cause of action, either wholly or in part, arose therein. And by sect. 15, "No defendant shall be permitted to object to the jurisdiction of the Court in or by any proceeding whatsoever except by plea." In cases within the 12th section, the jurisdiction of the Court is extended, and no prohibition can be granted (*n*). The 15th section, however, only regulates the mode of objecting to the jurisdiction *within* the Mayor's Court (*o*), and does not take away the right of a defendant to move in the High Court for a prohibition (*p*), even although the claim is less than 50*l*. (*q*). The Act clearly does not prevent a stranger or garnishee from applying (*r*). The process of foreign attachment will not lie against a corporation (*s*).

The Application.]—See *ante*, p. 1542.

4. *To the Salford Hundred Court.*

Salford Hundred Court.

A defendant, in an action in the Salford Hundred Court, may obtain a writ of prohibition, notwithstanding that he has not pleaded to the jurisdiction, although the Act regulating the procedure in that Court enacts that "No defendant shall be permitted to object to the jurisdiction of the Court otherwise than by special plea; and if the want of jurisdiction be not so pleaded, the Court shall have jurisdiction for all purposes" (*t*).

As to the application, *see ante*, p. 1542.

L. R., 10 Q. B. 591, judgment of Q. B.: *Banque de Credit Commercial* v. *De Gas*, L. R., 6 C. P. 142, bill of exchange: *Wirth* v. *Austin*, L. R., 10 C. P. 689, cheque payable out of city where drawer had no effects, &c.: *Taylor* v. *Jones*, 1 C. P. D. 87, goods ordered by letter posted, and accepted by delivery within city: *Bennett* v. *Cosgriff*, 38 L. T. 177, goods ordered by letter posted in Liverpool, and received in London: *Taylor* v. *Nicholls*, 1 C. P. D. 242, account stated within city: *Alderton* v. *Archer*, 14 Q. B. D. 1; 54 L. J., Q. B. 12; 51 L. T. 661; 33 W. R. 136, sale of lease, goodwill and fixtures. The plaintiff may abandon one or more severable items. See *Ellis* v. *Fleming*, 1 C. P. D. 237.

(*n*) *Hawes* v. *Paveley*, 1 C. P. D. 418: *Hawkins* v. *Jeffreys*, 34 L. T. 837.

(*o*) *Jacobs* v. *Brett*, L. R., 20 Eq. 1: *Bridge* v. *Branch*, 1 C. P. D. 633: *Hawes* v. *Paveley*, supra: cp. *Oram* v. *Brearey*, 2 Ex. D. 346.

(*p*) Id.: *Bridge* v. *Branch*, supra, explaining *Baker* v. *Clark*, L. R., 8 C. P. 121: *Worthington* v. *Jeffries*, L. R., 10 C. P. 379: contra, *Manning* v. *Farquharson*, 30 L. J., Q. B. 23.

(*q*) *Quartly* v. *Timmins*, L. R., 9 C. P. 416: *Robinson* v. *Emanuel*, Id. 414.

(*r*) *Baker* v. *Clark*, supra: *Cooke* v. *Gill*, L. R., 8 C. P. 107.

(*s*) *London Joint Stock Bank* v. *Mayor, &c. of London*, 1 C. P. D. 1: *S. C.* in C. A., 5 C. P. D. 495; and in D. P., 6 App. Cas. 393.

(*t*) *Oram* v. *Brearey*, 2 Ex. D. 346; 46 L. J., Ex. 481.

CHAPTER CXXXIII.

REMISSION OF ACTIONS AND ISSUES TO COUNTY COURTS, AND PROCEEDINGS THEREON.

	PAGE
1. *Remission of Actions of Contract under* 30 & 31 *V. c.* 142, *s.* 7	1548
2. *Remission for Trial only under* 19 & 20 *V. c.* 108, *s.* 26.....	1550
3. *Remission of Actions of Tort under* 30 & 31 *V. c.* 142, *s.* 10.....	1552

[As to the power given by the *Judicature Act*, 1884, *s.* 17, to transfer interpleader proceedings to the County Court, *see ante*, p. 1360.]

1. *Remission of Actions of Contracts to County Courts under Stat.* 30 & 31 *V. c.* 142, *s.* 7 (*a*).

PART XVII.

Ordering actions of contract to be tried in County Court.

By the County Courts Act, 1867 (30 & 31 *V. c.* 142 (*a*)), sect. 7, "Where in any action of contract brought or commenced in any of her Majesty's superior Courts of common law the claim indorsed on the writ does not exceed 50*l.*, or where such claim, though it originally exceeded 50*l.*, is reduced by payment, an admitted set-off, or otherwise to a sum not exceeding 50*l.*, it shall be lawful for the defendant in the action, within eight days from the day upon which the writ shall have been served upon him, if the whole or part of the demand of the plaintiff be contested, to apply to a Judge at Chambers for a summons to the plaintiff to show cause why such action should not be tried in the County Court or one of the County Courts in which the action might have been commenced; and on the hearing of such summons the Judge shall, unless there be good cause to the contrary, order such action to be tried accordingly, and thereupon the plaintiff shall lodge the original writ and the order with the Registrar of the County Court mentioned in the order, who shall appoint a day for the hearing of the cause, notice whereof shall be sent by post or otherwise by the Registrar to both parties or their attorneys, and the cause, and all proceedings therein, shall be heard and taken in such County Court as if the action had been originally commenced in such County

(*a*) By Jud. Act, 1873, s. 67, "The provisions contained in the fifth, seventh, eighth and tenth sections of the County Courts Act, 1867, shall apply to all actions commenced or pending in the said High Court of Justice *in which any relief is sought which can be given in a County Court.*" This limitation refers to the nature of the action, and not to the amount claimed. See per *Jessel*, M. R., *Chatfield* v. *Sedgwick*, 4 C. P. D. at p. 461: per *Cockburn*, C. J., *Stooke* v. *Taylor*, 5 Q. B. D. at pp. 578, 579. See further, as to this section, ante, Vol. I, p. 681.

Court; and the costs of the parties in respect of proceedings subsequent to the order of the Judge of the superior Court shall be allowed according to the scale of costs in use in the County Courts, and the costs of the proceedings previously had in the superior Court shall be allowed according to the scale in use in such latter Court."

The "payment" intended by *this* section is a payment before action brought; when the payment is made afterwards it does not apply (*b*). Under the County Court Act, 1856 (19 & 20 *V. c.* 108), sect. 24, it was held that the "admitted set-off" meant one admitted before action brought (*c*). A claim for "*50l. and interest*" cannot be sent to the County Court (*d*).

The application is made by summons at Chambers. A Master has power to remit a cause under this section (*e*). The order will not be made pending a summons for judgment under *Ord. XIV.* (*f*). There is no power, on an application under this section, to impose terms as to the costs of the trial (*g*). The application.

When an order purporting to be made by a Judge at Chambers, and bearing the signature of the Judge impressed by a stamp, transferring the cause to the County Court, is served on the Judge of the latter Court, he cannot inquire into the circumstances under which the order was made, but is bound to obey it (*h*).

Should the County Court Judge refuse to proceed with the case, a rule may be obtained under 19 & 20 *V. c.* 108, *s.* 43, and 21 & 22 *V. c.* 74, *s.* 4, to compel him to do so (*i*).

When an action is remitted under this section it becomes a County Court cause.

With respect to the proceedings in actions remitted to the County Court, the *County Court Rules*, 1875, provide by *Ord. XX. r.* 1, "Where any action is remitted by order of the High Court of Justice to a County Court, the plaintiff shall lodge with the Registrar thereof the order and the writ, and also a statement of the names and addresses of the several parties to the action, and their solicitors, if any, and a concise statement of the particulars, such as would be required upon entering a plaint, signed by the plaintiff or his solicitor, and the Registrar shall thereupon enter the action for trial and give notice to the parties of the day appointed for such trial, by post or otherwise, ten clear days before such day, and shall annex to the notice to the defendant a copy of the particulars." Proceedings in the County Court.

By *r.* 2, "Upon being served with a notice of trial under the last preceding rule, a defendant may proceed in all things in the same way as if the action had been brought in the County Court, and the notice so served upon him was an ordinary summons."

By *r.* 3, "The Registrar shall forthwith indorse on the order the date on which the same was lodged and file the same, and the action

(*b*) *Osborne* v. *Homburg*, 1 Ex. D. 48; 45 L. J., Ex. 65; *Foster* v. *Usherwood*, 3 Ex. D. 1; 47 L. J., Ex. 30 (C. A.).

(*c*) *Walesby* v. *Goulston*, L. R., 1 C. P. 567.

(*d*) *Insley* v. *Jones*, 4 Ex. D. 16.

(*e*) *Walsh* v. *Smith*, 30 L. T. 304; 22 W. R. 576. And see R. of S. C., Ord. LIV. r. 12, ante, p. 1403.

(*f*) *Smith* v. *Hurley*, W. N. 1884, 99; Bitt. Ch. Cas. 56; *Miers* v. *Gardner*, 28 Sol. Jour. 495.

(*g*) *Insley* v. *Jones*, supra.

(*h*) *Blades* v. *Lawrence*, L. R., 9 Q. B. 374.

(*i*) See these sections, ante, p. 1538.

PART XVII.

shall proceed in all things as if it were an ordinary action in the County Court."

Form.

Forms of particulars and notice of trial are given in the Schedule of Forms to the *C. C. R.*, 1875, *Nos.* 50, 51 (*l*).

By the *C. C. R.*, 1875, *Ord. IX. r.* 7, "Where the defendant intends to rely upon any of the grounds of defence hereinafter mentioned in this order, he shall file a notice stating thereon his name and address, together with a concise statement of such grounds, five clear days before the return-day of the summons; and the Registrar shall thereupon, within twenty-four hours after receiving the same, transmit by post one copy of such notice and particulars to the plaintiff: Provided that in case of non-compliance with these rules, and of the plaintiff's not consenting at the trial to permit the defendant to avail himself of such defence at the trial, the Judge may, on such terms as he shall think fit, adjourn the trial of the action to enable the defendant to give such notice."

The grounds of defence alluded to in this rule are, *Set-off, Infancy, Coverture, Statute of Limitation, Bankruptcy, Statutory Defence, Truth of Libel or Slander and Equitable Relief* (*see C. C. R.*, 1875, *Ord. IX. rr.* 8—15. Amended *C. C. R.*, 1876).

Where the defence is a tender, such defence shall not be available unless, before or at the trial of the action, the defendant pays into Court (which may be without costs) the amount alleged to have been tendered (*C. C. R.* 1875, *Ord. IX. r.* 16).

Notices of special defence, in cases commenced in a superior Court and sent to the County Court for trial under sects. 7 or 10 of 30 & 31 *Vict. c.* 142, must have, in addition to the usual heading, in cases under sect. 7, the heading of Form 22, and in cases under sect. 10 the heading of Form 24.

The reference to Forms Nos. 22 and 24 is a mistake. The forms alluded to were so numbered in the old rules, but in the new they are Nos. 51 and 53 respectively.

2. *Remission of Actions of Contract and Issues to County Courts for Trial only under* 19 & 20 *V. c.* 108, *s.* 26.

Remission of actions of contract to County Courts for trial only.

By the County Courts Act, 1856 (19 & 20 *V. c.* 108), sect. 26 (*m*), "Where, in any action of contract brought in a superior Court, the claim indorsed on the writ does not exceed 50*l.*, or where such claim, though it originally exceeded 50*l.*, is reduced by payment into Court, payment, an admitted set-off, or otherwise, to a sum not exceeding 50*l.*, a Judge of a superior Court, on the application of either party, *after issue joined*, may, in his discretion, and on such terms as he shall think fit, order that the cause be tried in any County Court which he shall name; and thereupon the plaintiff shall lodge with the Registrar of such Court such order and the issue; and the Judge of such Court shall appoint a day for the hearing of the cause, notice whereof shall be sent by post or otherwise by the Registrar to both parties or their attorneys; and after such hearing the Registrar shall certify the result to the Master's Office of such superior Court, and judgment in accordance with such certificate may be signed in such superior Court" (*m*).

(*l*) Chit. F. p. 788.

(*m*) By 30 & 31 V. c. 142, s. 32, the above section is extended and applied to the City of London Court.

In what cases.

It will be observed that this section is confined to actions of contract. And it has been held that it is confined to liquidated demands, and that an action for an unliquidated demand, even though arising out of a contract, cannot be remitted (*n*). As to the meaning of an "admitted set-off," *see ante*, p. 1549.

Application.

The application is made by a summons at Chambers before a Master. It may be made by either party. It cannot be made until after issue joined.

Effect of order.

It will be observed that this section differs from sects. 7 and 10 of the *County Courts Act*, 1867, under which the action is remitted to the County Court entirely. Under this section the action is only sent to the County Court for trial, and is not remitted there for any other purpose (*o*). The Division, therefore, of the High Court in which it was originally instituted, and by which it was remitted, still retains it for purposes of further directions (*p*).

The trial is governed by the County Court practice (*q*). The plaintiff has no right of reply (*q*). The County Court Judge has power to amend variances and accidental mistakes (*r*); but it seems that he cannot add a new plea (*s*). He was held to have power to amend a misjoinder of defendants under 15 & 16 *V. c.* 76, *s.* 37 (*t*).

Notice of trial.

The proceedings, the order and pleadings must be lodged with the Registrar of the County Court, who will give notice of trial to the parties (*u*).

New trial.

The jurisdiction to grant a new trial remains in the Division from which the action was remitted (*x*). The application for a new trial must in the first instance be for a rule nisi (*y*). It must be made to a Divisional Court and not to the Court of Appeal (*z*), even when it was tried by the County Court Judge without a jury (*a*), and within the time limited by the common law practice before the Judicature Acts (*b*). The *Rules of the Supreme Court*, 1883, do not apply (*b*). The time limited by the old practice was four days from the day of the trial if the case were tried in term, or within the first four days of the ensuing term, when the case was tried out of term (*c*). The Judge's notes must be produced at the hearing of the application for the new trial, unless the counsel moving was himself present, and the notes have been asked for and refused (*d*).

See *Blades* v. *Lawrence*, L. R., 9 Q. B. 374.

(*n*) *Knight* v. *Ablott*, 10 Q. B. D. 11; 52 L. J., Q. B. 131; 31 W. R. 505.

(*o*) *Babbage* v. *Coulburn*, 52 L. J., Q. B. 50; 46 L. T. 515 (C. A.).

(*p*) *Swan* v. *Inglis*, 36 L. T. 114, C. P. D.

(*q*) *Dymock* v. *Watkins* (C. A.), 10 Q. B. D. 451; 48 L. T. 393; 31 W. R. 331.

(*r*) *Thomas* v. *Purcell*, 22 L. T. 474.

(*s*) Id.

(*t*) *Rennison* v. *Walker*, L. R., 7 Ex. 143.

(*u*) See form of notice, C. C. R. 1875, Sched. No. 79; Chit. F. p. 791.

(*x*) *Bamforth* v. *Pledge*, L. R., 1 Q. B. 427; cp. *White* v. *Mainwaring*, 25 W. R. 253, decided under sect. 23, contra.

(*y*) *Pritchard* v. *Pritchard*, 14 Q. B. D. 55; 54 L. J., Q. B. 30; 33 W. R. 198.

(*z*) *Davis* v. *Godbehere*, 4 Ex. D. 215; 40 L. T. 358.

(*a*) *Swansea Co-operative Building Society* v. *Davies*, 12 Q. B. D. 21; 49 L. T. 603; 32 W. R. 185.

(*b*) *Pritchard* v. *Pritchard*, supra; *London* v. *Roffey*, 3 Q. B. D. 6; 26 W. R. 79; *Copcutt* v. *Great Western R. Co.*, L. R., 2 C. P. 465; *Dunn* v. *Pearson*, W. N. 1878, 82, C. P. D.

(*c*) Reg. Gen. H. T. 1853, r. 50; cf. as to "terms," *College of Christ* v. *Martin*, 3 Q. B. D. 16, and ante, Vol. I, p. 190.

(*d*) *Dene* v. *Sawyer*, 26 L. T. 646. See *Artistic Colour Printing Co.* v. *Fillan*, W. N. 1881, 97.

PART XVII.

Appeal.

An appeal lies from the decision of the Divisional Court to the Court of Appeal without leave (*e*).

Second trial.

Where a cause ordered under this section to be tried in a County Court has been tried there accordingly, and afterwards a new trial has been ordered, either party has a right to require a jury on the second trial, notwithstanding the order for the second trial does not direct how the cause shall be tried, and the first trial was by a Judge without a jury (*f*).

Judgment.

The judgment may be signed on the certificate without any motion for judgment being made or leave obtained (*g*). The Court has power to vary the certificate (*h*).

Costs.

By *R. of S. C., Ord. LXV. r.* 4, "Where an action is ordered to be tried in a County Court under the provisions of 19 & 20 Vict. c. 108, s. 26, the costs of the action shall, subject to the provisions of the Principal Act and these Rules (*i*), follow the event, unless by the Registrar's certificate of the result of the trial it shall appear that the Judge before whom the action was tried was of opinion that the question of costs ought to be referred to a Judge of the High Court, in which case no costs shall be recovered unless ordered by the Court or a Judge (*i*)."

As to the meaning of following the event, *see ante, Vol.* 1, pp. 675 *et seq.* The rule is subject to sect. 5 of the *County Courts Act*, 1867 (*see ante, Vol.* 1, p. 680), and *Ord. LXV. r.* 12 (*see ante, Vol.* 1, p. 685) (*i*). The County Court Judge may give the certificate required by the *County Courts Act*, 1867, *s.* 5 (*k*). Where the Judge refuses to certify, or does not do so, an application may be made to a Judge at Chambers for an order for costs (*i*). Where there was a reasonable prospect of the plaintiff getting judgment under *Ord. XIV.*, such an order will generally be made (*i*). Unless it is otherwise provided in the remitting order, the costs will be taxed on the County Court scale (*l*).

3. *Remission of Actions of Tort under* 30 & 31 *V. c.* 142, *s.* 10.

Remission of actions of tort to County Courts.

By the *County Courts Act*, 1867, *s.* 10, "It shall be lawful for any person against whom an action for malicious prosecution, illegal arrest, illegal distress, assault, false imprisonment, libel, slander, seduction, or other action of tort may be brought in a superior Court to make an affidavit that the plaintiff has no visible means of paying the costs of the defendant should a verdict be not found for the plaintiff, and thereupon a Judge of the Court in which the action is brought shall have power to make an order that unless the plaintiff shall, within a time to be therein mentioned, give full security for the defendant's costs to the satisfaction of one of the Masters of the said Court, or satisfy the Judge that he has a cause of action fit to be prosecuted in the superior Court

(*e*) *Babbage* v. *Coulburn*, 46 L. T. 515; 52 L. J., Q. B. 50.

(*f*) *Ford* v. *Taylor*, 3 C. P. D. 21; 47 L. J., C. P. 116; 37 L. T. 431.

(*g*) *Scott* v. *Freeman*, 2 Q. B. D. 177; 35 L. T. 939: *Johnson* v. *Wilson*, 46 L. T. 647 (C. A.). See the form of judgment, Chit. F. p. 792.

(*h*) *Davidson* v. *Gray*, 42 L. T. 834.

(*i*) *Emeny* v. *Sandes* (C. A.), 1 Q. B. D. 6; 54 L. J., Q. B. 82; 5 L. T. 641; 33 W. R. 187: *Evans* v. *Edwards*, W. N. 1883, 194; Bitt. Ch. Cas. 32.

(*k*) *Taylor* v. *Cass*, L. R., 4 C. P. 614: cp. *Farmer* v. *May*, 50 L. J. Q. B. 295; 44 L. T. 148; 29 W. R. 61

(*l*) *Wheatcroft* v. *Foster*, El. Bl. & El. 737; 27 L. J., Q. B. 277.

f the Divisional Court to the

section to be tried in a County
gly, and afterwards a new trial
right to require a jury on the
ler for the second trial does not
l, and the first trial was by a

on the certificate without any
leave obtained (*y*). The Court

"Where an action is ordered to
the provisions of 19 & 20 Vict.
shall, subject to the provisions
s (*i*), follow the event, unless by
sult of the trial it shall appear
action was tried was of opinion
o be referred to a Judge of the
osts shall be recovered unless
)."

he event, *see ante*, *Vol.* 1, pp. 675
5 of the *County Courts Act*, 1867
d. LXV. r. 12 (*see ante*, *Vol.* 1,
e may give the certificate required
5 (*k*). Where the Judge refuses
application may be made to a
or costs (*i*). Where there was a
iff getting judgment under *Ord.*
y be made (*i*). Unless it is other-
er, the costs will be taxed on the

under 30 & 31 *V. c.* 142, *s.* 10.

37, *s.* 10, "It shall be lawful for
ction for malicious prosecution,
ssault, false imprisonment, libel,
on of tort may be brought in a
rit that the plaintiff has no visible
defendant should a verdict be not
reupon a Judge of the Court in
ill have power to make an order
within a time to be therein men-
defendant's costs to the satisfaction
d Court, or satisfy the Judge that
prosecuted in the superior Court,

(*i*) *Emeny* v. *Sandes* (C. A.), 14
Q. B. D. 6; 54 L. J., Q. B. 82; 51
L. T. 641; 33 W. R. 187; *Evans* v.
Edwards, W. N. 1883, 194; Bitt. Ch
Cas. 32.

(*k*) *Taylor* v. *Cass*, L. R., 4 C. P.
614; ep. *Farmer* v. *May*, 50 L. J.,
Q. B. 295; 44 L. T. 118; 29 W. R. 612.

(*l*) *Wheatcroft* v. *Foster*, El. Bl. &
El. 737; 27 L. J., Q. B. 277.

all proceedings in the action shall be stayed, or in the event of the plaintiff being unable or unwilling to give such security, or failing to satisfy the Judge as aforesaid, that the cause be remitted for trial before a County Court to be therein named; and thereupon the plaintiff shall lodge the original writ and the order with the Registrar of such County Court, who shall appoint a day for the hearing of the cause, notice whereof shall be sent by post or otherwise by the Registrar to both parties or their attorneys; and the County Court so named shall have all the same powers and jurisdiction with respect to the cause as if both parties had agreed, by a memorandum signed by them, that the said County Court should have power to try the said action, and the same had been commenced by plaint in the said County Court; and the costs of the parties in respect of the proceedings subsequent to the order of the Judge of the superior Court shall be allowed according to the scale of costs in use in the County Courts, and the costs of the proceedings in the superior Court shall be allowed according to the scale in use in such latter Court."

In what cases.

By *Judicature Act*, 1873, *s.* 67, the provisions of the above section were applied to "all actions commenced or pending in the High Court of Justice, in which any relief is sought which can be given in a County Court" (*m*).

The above section applies to all actions of tort, the words "or other action of tort" having a general and not a limited application (*n*). It applies to an action of trover (*n*). An action for damages in respect of an irregular execution under County Court process may properly be remitted, although it is suggested that the amount which the plaintiff is entitled to recover exceeds 50*l.* (*o*).

The application.

The application is made by the defendant by a summons before a Master (*p*) at Chambers. It *must* (*q*) be supported by an affidavit showing that the plaintiff has no visible means of paying the costs should a verdict not be found for the plaintiff (*r*). "Visible means" are such means as may be reasonably discovered by the defendant (*s*). It is for the Master to decide, after hearing both sides, whether the plaintiff has any means at all of paying the costs, and the Master has a judicial discretion whether he will make the order (*s*).

The plaintiff may show cause against the application by showing that he has the necessary means, or that the cause is one fit to be tried in a superior Court. He should generally produce an affidavit, but this is not essential (*t*).

(*m*) See ante, Vol. 1, p. 681.

(*n*) *Clapham* v. *Oliver*, 30 L. T. 963.

(*o*) *Owens* v. *Jones*, 37 L. J., Q. B. 159.

(*p*) *Palmer* v. *Roberts*, 22 W. R. 777, n.; 29 L. T. 403; *Walsh* v. *Smith*, 30 L. T. 304.

(*q*) *Reg.* v. *Judge of the Marylebone County Court*, 50 L. T. 97. The Master has no jurisdiction to make any order unless the affidavit is produced, and if an order is made without any affidavit the County Court Judge should postpone the trial and make a special report of the fact to the Court. Id.: *Lea* v. *Parker* (C. A.), infra.

(*r*) See the form, Chit. F. 12th ed. 793. As to what is a fit case to be tried in the superior Court, see *Loughnan* v. *McGregor*, 28 Sol. J. 632, where an action for negligence causing serious personal injuries to the plaintiff was held to be such.

(*s*) *Lea* v. *Parker* (C. A.), 13 Q. B. D. 835; 54 L. J., Q. B. 38; 33 W. R. 101. See *Watson* v. *McCann*, 6 L. R., Ir. 21.

(*t*) *Corwell* v. *Lond. Gen. Omnibus Co.*, 27 W. R. 381.

PART XVII.

Appeal from order.

The decision of the Master or Judge as to whether the cause is a fit one to be tried in a superior Court is not final, but may be reviewed on appeal, though a strong case must be made out to induce the Judge or Court to interfere (*u*).

Effect of order.

When an action is removed under this section it becomes a County Court cause, and the County Court Judge has full control over it (*x*), and the superior Court has no jurisdiction over it, and cannot make an order to tax (*y*), but until the plaintiff has lodged the writ and order with the Registrar the action remains in the superior Court, and the time for giving the security can be enlarged by that Court (*z*), or the action dismissed if the plaintiff does not proceed (*a*).

Lodging writ, &c.

If the plaintiff cannot or will not give the security, he must lodge the original writ with the Registrar of the County Court, who will in due course give notice of trial to the parties. If the plaintiff delays lodging the writ for an unreasonable time, an application may be made at Chambers to compel him to do so or abandon the action (*a*), but the County Court Judge cannot refuse to try the action on the ground of such delay (*b*).

Proceedings in the County Court.

When the writ and statement of claim are lodged in the County Court the Judge must not confine himself to the writ, but must take cognizance of the statement of claim (*c*).

By *C. C. R.*, 1875, *Ord. XX. r.* 4, "Where in any action for libel or slander remitted under sect. 10 of the County Courts Act, 1867, to be tried in a County Court, the defendant intends to avail himself of the provisions of sects. 1 and 2 of 6 & 7 Vict. c. 96, he shall give notice in writing of such intention, signed by himself or his solicitor, to the Registrar five clear days before the day appointed for the trial of the action" (*d*).

Appeal.

The appeal from the County Court is made in the same way as in the case of an ordinary County Court cause (*see ante*, p. 1523).

No appeal lies from the decision of a Divisional Court on appeal from the County Court without leave (*e*).

(*u*) *Owens* v. *Woosman*, L. R., 3 Q. B. 469: *Jennings* v. *London Gen. Omnibus Co.*, 30 L. T. 266, Ex.: *Rippon* v. *Joyce*, 31 Id. 475, C. P. See, however, *Palmer* v. *Roberts*, 29 Id. 403; 22 W. R. 577 (*n*), Ex. If the order be appealed from, the defendant's affidavit must be produced on the appeal. *Holmes* v. *Mountstephen*, L. R., 10 C. P. 474.

(*x*) *Reg.* v. *Bayley*, 8 Q. B. D. 411; 51 L. J., Q. B. 244; 30 W. R. 522: *Bowles* v. *Drake*, 8 Q. B. D. 325; 51 L. J., Q. B. 66; 45 L. T. 576; 31 W. R. 333, where it was held that the County Court Judge had power to stay all proceedings until the costs of a previous action were paid.

(*y*) *Moody* v. *Steward*, L. R., 6 Ex. 35; 19 W. R. 161.

(*z*) *Welply* v. *Bahl*, 3 Q. B. D. 80, affirmed Id. 253.

(*a*) *Driscol* v. *King*, 49 L. T. 599: *Reg.* v. *Holroyd*, 32 W. R. 370. See *David* v. *Howe* (V.-C. B.), 32 W. R. 814; 50 L. T. 753, according to which the remitting order should limit a time within which the writ shall be lodged.

(*b*) Id.

(*c*) *Johnson* v. *Palmer*, 4 C. P. D. 258.

(*d*) See ante, Vol. 1, p. 393.

(*e*) *Bowles* v. *Drake*, 8 Q. B. D. 325; 51 L. J., Q. B. 66; 45 L. T. 576; 31 W. R. 333.

CHAPTER CXXXIV.

REMOVAL OF CAUSES FROM INFERIOR COURTS—CERTIORARI (a).

PAGE

I. *Removal before Judgment*—
(a) *In General* 1555
By what Writs 1555
When not Removable 1556
When Bail required before Removal 1557
Form, &c. of Writs..... 1557
How Sued out 1558
Within what Time 1558
How Obeyed and Returned 1559
Bail and Appearance after 1559
Quashing Certiorari, &c. Procedendo 1560
Proceedings after Removal 1561
(b) *Removal where Defence or Counterclaim beyond Jurisdiction* 1562
(c) *Removal of Causes from County Courts* 1562
(d) *Removal of Causes from Mayor's Court, London* .. 1568
II. *Removal after Judgment for the Purpose of Execution*—
Generally by 19 *G.* 3, *c.* 70 1569
Where the Judge is a Barrister of Seven Years' Standing, under the 1 *&* 2 *V. c.* 110 1569
From County Courts 1571
From Mayor's Court of London 1571
From Court to which Borough and Local Court of Record Act, 1872, *applies* 1572
From the Stannaries Courts 1573

SECT. I.—REMOVAL OF CAUSES BEFORE JUDGMENT.

(a) *In General.*

By what Writs.]—Causes from inferior Courts, not being Courts of record, are seldom, in practice, removed into the High Court of Justice (b). We shall accordingly confine our attention in this section to the writs of habeas corpus cum causâ and certiorari, the writs used to remove causes into the High Court of Justice from inferior Courts of record. By what writs.

The writ of habeas corpus cum causâ lies to remove the proceeding from an inferior Court of record, where the defendant is actually or virtually in the custody of the Court below (c); and therefore, where the proceedings in the inferior Court are by plaint only, the proceedings cannot be removed by that writ (d). By the 2 *V. c.* 110, *s.* 1 (repealed by 32 & 33 *V. c.* 83), a defendant can no longer be held to bail in an action in an inferior Court; and by the Debtors Act, 1869 (32 & 33 *V. c.* 62, amended by 41 & 42 *V. c.* 54, which *see ante*, pp. 889, 890, n. (*d*)), imprisonment for debt is abolished By habeas corpus cum causâ.

(a) As to removing a cause from the Sheriff's Court of the County Palatine of Durham to the Court of Queen's Bench, see *Robinson* v. *Shinwaring*, 10 Q. B. 274.

(b) See 30 & 31 V. c. 142, s. 28.

(c) *Mitchell* v. *Mitchenham*, 1 B. & C. 513; 2 D. & R. 722: *Palmer* v. *Forsyth*, 4 B. & C. 401; 6 D. & R. 407; 3 Bac. Ab. 15; Cas. Pr. C. P. 15; Pr. Reg. 216.

(d) *Mitchell* v. *Mitchenham*, ubi supra.

(y) *Moody* v. *Steward*, L. R., 6 Ex. 35; 19 W. R. 161.

(z) *Welply* v. *Buhl*, 3 Q. B. D. 80, affirmed Id. 253.

(a) *Driscol* v. *King*, 49 L. T. 599: *Reg.* v. *Holroyd*, 32 W. R. 570. See *David* v. *Howe* (V.-C. B.), 32 W. R. 844; 50 L. T. 753, according to which the remitting order should limit a time within which the writ shall be lodged.

(b) Id.

(c) *Johnson* v. *Palmer*, 4 C. P. D. 258.

(d) See ante, Vol. 1, p. 393.

(e) *Bowles* v. *Drake*, 8 Q. B. D. 325; 51 L. J., Q. B. 66; 45 L. T. 576 31 W. R. 333.

PART XVII.

except in certain specified cases, and, therefore, as a general rule, this writ can no longer be used, and the writ for the removal of a cause before judgment is a certiorari. Before the 20 & 21 V. c. clvii., the Mayor's Court of London Procedure Act, 1857, where the proceedings were by foreign attachment in that Court, and bail had been given, it seems they should have been removed by habeas corpus (*e*).

By certiorari.

The certiorari lies, as of course, in all cases before judgment with the exceptions presently mentioned (*f*); and it may, it seems, be sued out to remove an ejectment, as well as other actions (*g*). It will not, in general, lie to remove proceedings in an inferior Court after judgment (*h*).

When not removable.

When not removable.]—Neither the habeas nor the certiorari lies where the debt or damages laid, or things demanded in the declaration in the Court below, do not amount to 5*l.*, if the steward or Judge of such Court be a barrister of three years' standing; unless the action concerned the freehold or inheritance, or title to lands lease or rent (*i*); or if there be several causes, some under and others above 5*l.*, those only which are above 5*l.* shall be removed (*j*).

It does not lie where the action is maintainable only in the inferior Court (*k*); as, for instance, where an action was brought in the Court in London for calling a woman a whore (*l*), or against a feme covert as sole trader (*m*), it cannot be removed by this or any other writ except a writ of error (*n*).

Nor does it, in general, lie after judgment, except for the purpose of suing out execution, or giving the judgment of an inferior Court the effect of a judgment of a superior Court, under the 1 & 2 V. c. 110, as to which *see post*, p. 1569 (*o*). And it has been decided, that, in the case of a judgment by default, if the writ is not delivered until after the jury have assessed the damages on the writ of inquiry, the Court will award a procedendo (*p*).

(*e*) *Blanchard* v. *De la Cronée*, 9 Q. B. 869. Tidd's Pract. 9th ed. 403. By the 52nd sect. of the above Act, no cause shall be removable from the above Court, otherwise than by a writ of certiorari, or by the order of a Judge of one of the superior Courts, &c.; see also ss. 16—20. See these sections, post, p. 1568.

(*f*) See *Lambens* v. *Shiel*, 3 Dowl. 90: *Edwards* v. *Bowen*, 5 B. & C. 206; 7 D. & R. 709: *Reg.* v. *Justices of Surrey*, L. R., 5 Q. B. 466; 39 L. J., M. C. 145.

(*g*) *Goodright* d. *Sadler* v. *Dring*, 2 D. & R. 407; 1 B. & C. 253: *Patteson* v. *Eades*, 2 B. & C. 550; 5 D. & R. 445.

(*h*) *R.* v. *Seton*, 7 T. R. 373: *Kemp* v. *Balne*, 1 D. & L. 885; 13 L. J., Q. B. 149.

(*i*) 21 J. 1, c. 23, ss. 4, 5, 6. See *Fairley* v. *M'Connell*, 1 Burr. 515: *Franks* v. *Quinsee*, 7 Dowl. 607.

(*j*) 12 G. 1, c. 29, s. 3. As to removing a cause from a County Court see post, p. 1562; from the Mayor's Court, London, post, p. 1568.

(*k*) See *Rees* v. *Williams*, 21 L. J. Ex. 24.

(*l*) *Watson* v. *Clerke*, Carth. 75.

(*m*) *Pope* v. *Vaux*, 2 W. Bl. 1067.

(*n*) As to when it lay to the courties palatine, see *Zink* v. *Langt* 2 Doug. 749: *Williams* v. *Thom* Id. 751, n.: *Jones* v. *Dan*, 1 B. & 143: *Patterson* v. *Reay*, 2 D. & 177: *Edwards* v. *Bowen*, 5 B. & 206; 7 D. & R. 709.

(*o*) See *Fox* v. *Veale*, 8 M. & 126; 9 Dowl. 798: *Kemp* v. *Balne* D. & L. 885; 13 L. J., Q. B. 149.

(*p*) *Smith* v. *Sterling*, 3 Dowl. 1 H. & W. 194. And see *Wa* v. *Gann*, 7 D. & R. 799: *Lawe Hutchinson*, 3 Dowl. 506.

and, therefore, as a general rule,
and the writ for the removal of
ertiorari. Before the 20 & 21 V.
ondon Procedure Act, 1857, where
attachment in that Court, and bail
ould have been removed by habeas

, in all cases before judgment with
ned (*f*); and it may, it seems, be
nt, as well as other actions (*g*). It
re proceedings in an inferior Court

r the habeas nor the certiorari lies
or things demanded in the decla-
not amount to 5*l.*, if the steward or
ter of three years' standing; unless
ld or inheritance, or title to lands,
e several causes, some under and
which are above 5*l.* shall be re-

n is maintainable only in the inferior
an action was brought in the Courts
a whore (*l*), or against a feme covert
removed by this or any other writ,

fter judgment, except for the pur-
giving the judgment of an inferior
nt of a superior Court, under the
post, p. 1569 (*o*). And it has been
judgment by default, if the writ is
ry have assessed the damages on the
award a procedendo (*p*).

9 *Franks* v. *Quinsee*, 7 Dowl. 607.
3. (*j*) 12 G. 1, c. 29, s. 3. As to re-
t, moving a cause from a County Court
n see post, p. 1562; from the Mayor'
y Court, London, post, p. 1568.
er (*k*) See *Rees* v. *Williams*, 21 L. J.
or Ex. 24.
eo (*l*) *Watson* v. *Clerke*, Carth. 75.
(*m*) *Pope* v. *Vaux*, 2 W. Bl. 1069.
1. (*n*) As to when it lay to the cou
C. ties palatine, see *Zink* v. *Langto*
es 2 Doug. 749: *Williams* v. *Thomo*
Id. 751, n.: *Jones* v. *Dan*, 1 B. &
143: *Patterson* v. *Reay*, 2 D. & R
177: *Edwards* v. *Bowen*, 5 B. &
206; 7 D. & R. 709.
(*o*) See *Fox* v. *Veale*, 8 M. & W
126; 9 Dowl. 798: *Kemp* v. *Balne*
D. & L. 885; 13 L. J., Q. B. 149.
(*p*) *Smith* v. *Sterling*, 3 Dowl. 60
1 H. & W. 194. And see *Wall*
v. *Gann*, 7 D. & R. 799: *Lawes*
Hutchinson, 3 Dowl. 506.

It of course does not lie where it is expressly taken away by statute (*q*). Ch. CXXXIV.

When Bail required before Removal.]—By the 19 *G.* 3, *c.* 70, *s.* 6, "No cause where the cause of action shall not amount to the sum of 10*l.* [now 20*l.* (*r*)] or upwards, shall be removed or removable into any superior Court by any writ of habeas corpus or otherwise, unless the defendant, who shall be desirous of removing such cause, shall enter into the like recognizance for payment of the debt and costs in case judgment shall pass against him" (*s*). The above recognizance is the recognizance mentioned in the 5th section of the Act, which enacts that no execution shall be stayed upon a writ of error for the reversing of any judgment given in any inferior Court of record, &c., "unless such person or persons in whose name or names such writ of error shall be brought, with two sufficient sureties, such as the Court (wherein such judgment is or shall be given) shall allow of, shall first, before such stay made or supersedeas to be awarded, be bound unto the party for whom any such judgment is or shall be given by recognizance to be acknowledged in the same Court in double the sum adjudged to be recovered by the said former judgment, to prosecute the said writ of error with effect, and also to satisfy and pay, if the said judgment be affirmed, or the said writ of error be nonprossed, all and singular the debt, damages and costs, adjudged or to be adjudged, and all costs and damages to be awarded for the same delaying of execution." When bail required before removal.

The first-mentioned section applies only to cases of removal before judgment from Courts of record (*t*). If the sum in the declaration be 20*l.* or more, the plaintiff is precluded from his right to require a recognizance under the statute, though the sum sought to be recovered be really less (*u*). The statute extends to actions of tort; such as trover (*x*), slander (*y*), injury to right of way (*z*), and so forth, where the damages claimed are less than 20*l.*

As to the necessity for giving bail before removing a cause from the Mayor's Court of London, *see* 20 & 21 *V. c.* clvii. *ss.* 16, 18, 19, *post*, p. 1568.

Form, &c. of the Writ.]—The writ of certiorari should be directed to the Judge or Judges of the inferior Court from which the cause is intended to be removed; and when it is for the removal of a cause, should command them to certify the record itself, with all things touching the same (*a*). The writ is tested on the day on which it is issued (*R. of S. C., Ord. II. r.* 8, *ante*, p. 220), and is made returnable on a day certain during the sittings. As to Form, &c. of the writ of certiorari.

(*q*) See *Fox* v. *Veale*, 8 M. & W. 9; 9 Dowl. 798. As to the effect a statute taking away the right a certiorari, see *Colonial Bank of Australasia* v. *Wilton*, L. R., 5 P. 417; 43 L. J., P. C. 39: *Ex p. Indlangh*, 3 Q. B. D. 509.

(*r*) See 7 & 8 G. 4, c. 71, s. 6. All s statute, except sect. 6, is re-aled by 32 & 33 V. c. 83, s. 2. And t of sect. 6 is repealed by 37 & 38 c. 35, sched.

(*s*) See *Attenborough* v. *Hardy*, 4 D. & R. 362; 2 B. & C. 802: *Cotton* v *Baiers*, 1 Jur. 22.

(*t*) *Crookes* v. *Longden*, 7 Dowl. 413; 5 Bing. N. C. 410, nom. *Longden* v. *Croots*, 7 Sc. 377: *Steer* v. *Potter*, 9 Jur. 12, B. C.

(*u*) *Brady* v. *Veeres*, 5 Dowl. 416.

(*x*) *Furnish* v. *Swann*, 10 B. & C. 458.

(*y*) *Lee* v. *Goodlad*, 4 D. & R. 350.

(*z*) *Franks* v. *Quinsee*, 7 Dowl. 607.

(*a*) 2 Atk. 317. See Chit. Forms, p. 801.

PART XVII.

quashing the writ for an informality in it, *see post*, p. 1560. When the certiorari issues out of the Chancery Division, it is issued out of the Petty Bag Office (*b*).

Of habeas corpus.

The writ of habeas corpus cum causâ was a judicial writ, and like the certiorari was directed to the Judge or Judges of the inferior Court in which the record was, commanding them to have the body of the defendant, together with the day and cause of his being taken and detained, to do and receive, &c. (*c*).

Writ, how issued out, &c.

Writ, how issued out, &c.]—In some cases it is required by statute that leave of the Court or a Judge shall be obtained to issue the writ. Thus, it is necessary to obtain such leave before issuing a writ of certiorari to remove a cause from a County Court established under the 9 & 10 V. c. 95 (*d*). And in some cases it is necessary before removing a cause from the Mayor's Court of London (*e*). By the Borough and Local Courts of Record Act, 1872 (35 & 36 V. c. 86 (*see ante*, p. 1514)), in the case of Courts to which that Act has been applied (*see ante*, p. 1514), it is provided by the Schedule to the Act (*r.* 12), that "No action entered in the Court shall before judgment be removed or removable from the Court into any superior Court by any writ or process except by leave of a Judge of one of the superior Courts in cases which shall appear to such Judge fit to be tried in one of the superior Courts, and upon such terms, as to payment of costs, security for debt and costs, or such other terms as such Judge shall think fit." In other cases no such leave is necessary (*f*), and the writ may be sued out as a matter of course (*g*). The affidavit for an order to sue out the writ, where necessary, must not be intituled in any cause (*h*). The order for the writ is absolute in the first instance (*i*). *Sue out the writ at the proper office, and leave it with the proper officer of the inferior Court* (*k*).

Within what time to be sued out and delivered.

Within what Time to be sued out and delivered.]—The writ must by the 43 *Eliz.* c. 5, be delivered to the Judge or officer of the inferior Court, at latest, before any of the jury are sworn (*l*); and

(*b*) 12 & 13 V. c. 109; Thes. Brev. 67, 68. See *Rowell* v. *Breedon*, 3 Dowl. 324; *Symonds* v. *Dimsdale*, 2 Ex. 533; 17 L. J., Ex. 247. As to the return of a writ of certiorari to remove a cause from a County Court, see post, p. 1566. A certiorari to remove a cause from the Mayor's Court of London must be made returnable immediately, whether in or out of term, see 20 & 21 V. c. clvii. s. 52. See post, p. 1568.

(*c*) See Tidd's Prac. 9th ed. 404: *Perrin* v. *West*, 3 A. & E. 405; 5 N. & M. 291.

(*d*) As to removing a cause from a County Court, see post, p. 1562. See 35 & 36 V. c. 86 (The Borough and Local Courts of Record Act, 1872).

(*e*) See 20 & 21 V. c. clvii. ss. 16—20; post, p. 1568.

(*f*) *Walkington* v. *Davis*, 29 April, 1839, at Chambers, coram *Erskine*, J., after consulting with other judges. It was the case of habeas to the Palace Court.

(*g*) See per *Littledale*, J., in *Lawdens* v. *Shiel*, 3 Dowl. 90; *Walkington* v. *Davis*, ubi supra: *Edwards* v. *Bowen*, 5 B. & C. 206; 7 D. & R. 7. See *Reg.* v. *Justices of Surrey*, L. 5 Q. B. 466.

(*h*) *Ex p. Nohro*, 1 B. & C. 2 See *Reg.* v. *Chasemere*, 12 Jur. 11.

(*i*) *Pawsey* v. *Gooday*, 3 Dowl. As to obtaining leave to issue a to remove a cause from a Cou Court, see post, p. 1563.

(*k*) As to serving the writ whe has issued to remove a cause fro County Court, see post, p. 1566.

(*l*) See *Lawdens* v. *Shiel*, 3 D 90.

ality in it, *see post*, p. 1560. When
ancery Division, it is issued out of

causâ was a judicial writ, and like
e Judge or Judges of the inferior
ommanding them to have the body
he day and cause of his being taken
&c. (*c*).

some cases it is required by statute
udge shall be obtained to issue the
obtain such leave before issuing a
use from a County Court established
And in some cases it is necessary
the Mayor's Court of London (*e*).
urts of Record Act, 1872 (35 & 36
he case of Courts to which that Act
4), it is provided by the Schedule to
n entered in the Court shall before
novable from the Court into any
process except by leave of a Judge
n cases which shall appear to such
the superior Courts, and upon such
security for debt and costs, or such
l think fit." In other cases no such
writ may be sued out as a matter of
n order to sue out the writ, when
l in any cause (*h*). The order for the
nstance (*i*). *Sue out the writ at the*
h the proper officer of the inferior

out and delivered.]—The writ must,
ered to the Judge or officer of the
any of the jury are sworn (*l*); and,

(*f*) *Walkington* v. *Davis*, 29th April, 1839, at Chambers, coram *Erskine*, J., after consulting with other judges. It was the case of habeas to the Palace Court.

(*g*) See per *Littledale*, J., in *Lawdens* v. *Shiel*, 3 Dowl. 90: *Walkington* v. *Davis*, ubi supra: *Edwards* v. *Bowen*, 5 B. & C. 206; 7 D. & R. 70. See *Reg.* v. *Justices of Surrey*, L. R. 5 Q. B. 466.

(*h*) *Ex p. Nohro*, 1 B. & C. 26. See *Reg.* v. *Chasemere*, 12 Jur. 11.

(*i*) *Pawsey* v. *Gooday*, 3 Dowl. 60. As to obtaining leave to issue a w to remove a cause from a Coun Court, see post, p. 1563.

(*k*) As to serving the writ when has issued to remove a cause from County Court, see post, p. 1566.

(*l*) See *Lawdens* v. *Shiel*, 3 Dow 90.

by the 21 *Jac.* 1, *c.* 23, *s.* 2, before issue or demurrer joined, if such issue or demurrer be "not" joined within six weeks after the appearance of the defendant; and, as we have seen *ante*, p. 1556, before a writ of inquiry has been executed in case of a judgment by default (*m*): otherwise, in either of these cases, if not so delivered in such time, the writ shall not be received or allowed by such Judge or officer, and the inferior Court may proceed in the cause. If the Judge or officer of the inferior Court receives the certiorari after the time thus limited, a procedendo will issue, and that although in the meantime the record has been filed in the Court above (*n*).

As to when the writ is to be lodged with the proper officer upon the removal of a cause from the Mayor's Court of London, *see* 20 & 21 *V. c. clvii. s.* 17, *post*, p. 1568.

How obeyed and returned.

How obeyed and returned.]—In cases where the writ lies, it has the effect of suspending all proceedings in the action against the defendant in the inferior Court, immediately upon its being delivered to the Judge or officer (*o*), and the writ must be obeyed without delay (*p*). The habeas corpus was obeyed by bringing up the defendant (if in custody (*q*)), and by returning the causes with which he stood charged. The record itself was not removed by this writ into the Court above, but remained in the Court below (*r*). The certiorari is obeyed by returning the record itself, formally made up, and not a mere transcript or copy of it, into the Court above, in order to be further proceeded upon there (*s*). If, under the particular circumstances of the case, the writ does not lie, those circumstances must be stated specially in the return (*t*). As to the fees for returning the writ, *see Batt* v. *Price*, 1 Q. B. D. 264.

Bail and appearance after removal.

Bail and Appearance after Removal.]—As a general rule, it is not now necessary to give bail in the High Court on the removal of a cause from an inferior Court. In a cause commenced by foreign attachment in the Mayor's Court, London, since the 1 & 2 *V. c.* 110, the defendant must put in special bail on the removal of the cause (*u*), and this is so when the defendant is an executor or administrator (*x*); though, as a general rule, an executor or administrator

(*m*) In one case, it was held it could not be delivered after an interlocutory judgment by default, though inquiry not executed, see *Wyatt* v. *Markham*, Barnes, 221; but, in more recent cases, it appears to have been considered, that it may at any time before inquiry. See *Cox* v. *Hart*, 2 Burr. 759; *Godley* v. *Marsden*, 4 M. & P. 138; 6 Bing. 433.

(*n*) *Lavrack* v. *Bean*, 3 M. & W. 52.

(*o*) *Fazeharly* v. *Baldo*, 1 Salk. 352; *Mungean* v. *Wheatley*, 1 Tidd, 394; 20 L. J., Ex. 110. It suspends the power of the inferior Court, so that, if they proceed, the proceedings would be void, and coram non judice: 1 N. B. 4 E.: Tidd, 9th ed. 415: *Bean* v. *Prothesk*, 2 Burr. 1151: *Wright* v. *Lewis*, 9 Dowl. 183.

(*p*) See *Bettesworth* v. *Bell*, 3 Burr. 1875.

(*q*) See ante, p. 1558.

(*r*) *Fazeharly* v. *Baldo*, 1 Salk. 352.

(*s*) See *Palmer* v. *Forsyth*, 4 B. & C. 401; 6 D. & R. 497: *Askew* v. *Haytan*, 1 Dowl. 410. See *Franks* v. *Wicks*, 9 Dowl. 589, where, upon an application in the cause, an omission in the return was allowed to be supplied by affidavit.

(*t*) See the forms of return, Tidd's Forms.

(*u*) *Day* v. *Paupiere*, 13 Q. B. 802; 7 D. & L. 12. See *Tassie* v. *Kennedy*, 5 D. & L. 587; 20 & 21 V. c. clvii. s. 18.

(*x*) *Bastow* v. *Gant*, 21 L. J., Q. B. 377.

PART XV.

nistrator is not bound to find special bail where a cause is removed from an inferior Court (*z*).

Appearance.

On the removal of the action, the defendant should enter an appearance thus:—*Ingross the form of appearance, and annex it to the writ and return; file the same at the proper office, and give notice to the plaintiff's solicitor or agent of your having done so* (*a*). *The plaintiff may at any time, after the return of the writ* (*b*), *compel the defendant to appear, by obtaining, from a Judge at Chambers, an order for a procedendo, unless the defendant appears within four days after notice thereof* (*c*). And if there be several defendants, and the cause be removed by one, an appearance must be put in for all, otherwise a procedendo may be awarded (*d*).

Several defendants.

Quashing writ of certiorari—procedendo.

Quashing Writ of Certiorari—Procedendo.]—The writ of certiorari, if it has been issued where it would not lie (*e*), or if it be misdirected (*f*), or otherwise bad in point of law, may be quashed by the Court or a Judge (*g*), and a procedendo awarded (*h*). But, if the writ has not been returned, it cannot be quashed, but a supersedeas will be awarded. And, though the parties to whom the certiorari is directed, and in whose keeping the record is, may object to make a return to it, on account of an informality in the direction, yet they having in fact returned it into the Court above, no such objection can be taken by third persons (*i*). The Court may quash the writ where it is clear from the admission of the party suing it out, or something tantamount to it, that it has been sued out only for the purpose of delay (*k*). Where a defendant who had improperly sued out a certiorari instead of a re. fa. lo. or pone, sought to quash his writ, no step having been taken on it, the rule was absolute for that purpose in the first instance (*l*).

Where appearance not entered in due time.

If the defendant do not enter an appearance within the time limited by the rule for that purpose, the plaintiff may sue out a procedendo (*m*). But if the appearance be filed after the expiration of the rule, and before the procedendo is sued out, it seems the procedendo cannot be sued out afterwards (*n*).

(*z*) *Paye* v. *Price*, 1 Salk. 98; Bac. Ab. "Executors and Administrators," P. pl. 5.

(*a*) See the form of the appearance, Chit. Forms, p. 803; and of the notice of having filed it, Id. See Tidd, 9th ed. 407.

(*b*) *Clarke* v. *Harbin*, Barnes, 90. See *Lee* v. *Goodlad*, 4 D. & R. 350.

(*c*) By R. 115, H. T. 1853, "Rules to appear in causes removed from inferior Courts shall in all cases be a four-day rule both in terms and vacation." See the form, Chit. Forms, p. 804.

(*d*) *Kent* v. *Goldstein*, 7 B. & C. 525; 1 M. & R. 305; *Jameson* v. *Schonswar*, 1 Dowl. 175.

(*e*) As to quashing a writ of certiorari issued for the removal of a cause from a County Court, see post, p. 1566.

(*f*) 2 Atk. 318.

(*g*) See *R.* v. *Mayor*, 21 L. J., M C. 221. It seems from this case tha the Judge may grant the writ on a ex parte application, or require summons to show cause.

(*h*) 2 Atk. 318. And see Say. Re 186. As to quashing a writ of ce tiorari issued to remove a cause fro a County Court, see post, p. 1566.

(*i*) *Daniels* v. *Phillips*, 4 T. 499. See 3 Dowl. 325, n. As amending the writ, see *Rowell Breedon*, 3 Dowl. 324.

(*k*) *Landens* v. *Shiel*, 3 Dowl. 9

(*l*) *Ruffman* v. *Thornwell*, 7 Dow 613.

(*m*) See R. 115, H. T. 1853, sup n. (*e*).

(*n*) See *Johnson* v. *Walker*, 4 & Ald. 535, a case of special b And see *Wiggins* v. *Stephens*, 5 E 533.

A procedendo may issue when special bail is required and has not been put in in due time on the removal of the cause (*o*).

When special bail not put in.

And, generally, if the defendant, upon removing a suit commenced against him, does not comply with the statutes and rules of Court, made to regulate the proceedings therein upon such removal, as by not pleading in due time, or the like, the plaintiff may obtain a procedendo. Also, if the Court below state, in their return to the habeas or certiorari, circumstances from which the Court judge that the writ ought not to have issued, a procedendo will be awarded (*p*).

For other causes.

Issuing procedendo.

Ingross the writ (*q*), *directed to the inferior Court, commanding them to proceed in the action. Make out a præcipe for the office. Get the writ stamped at the proper office: Take the writ to the proper officer of the inferior Court, and file it;* and the cause will then be proceeded in, in the inferior Court, from the stage in which it was at the time the writ for the removal of it was served.

Quashing procedendo.

If the procedendo has been improperly awarded or issued, the opposite party may apply to the Court out of which it issued, to have it quashed.

No removal after procedendo.

By stat. 21 *Jac.* 1, *c.* 23, *s.* 3, after the cause has thus been remanded, it can never afterwards be removed before final judgment (*r*).

Proceedings after removal.

Proceedings after Removal.]—After the cause has been removed into the Court above by certiorari or habeas, the plaintiff may proceed in the action or not, as he thinks fit. The defendant could not, in such a case, nonpros him (*s*) for not declaring, for by neither of these mode of removal is any day given to the parties to appear in the Court above (*t*), but this was otherwise on a removal by re. fa. lo. (*t*). Where, before the *Com. Law Proc. Act*, 1852, an action was removed from an inferior Court by a writ of habeas corpus, it was held that the cause was not out of Court till a year after the return of the writ by which the action was removed (*u*). If the plaintiff do proceed, he must begin de novo, by delivering his statement of claim against the defendant, whatever may have been the stage in which the cause was in the inferior Court at the time it was removed (*x*). The plaintiff, however, cannot deliver his state-

(*o*) See ante, p. 1559: *Scarnett* v. *Price*, 1 Dowl., N. S. 333, a case before the Mayor's Court of London Procedure Act, 1857.

(*p*) See *Watson* v. *Clerke*, Carth. 19: *Pope* v. *Vaux*, 2 W. Bl. 1060: *Fazacharly* v. *Baldo*, 1 Salk. 352: *Horton* v. *Beckman*, 6 T. R. 760: *Jones* v. *Davies*, 1 B. & C. 143. And see *Fry* v. *Carey*, 1 Str. 527.

(*q*) See form of procedendo, Chit. Forms, p. 804.

(*r*) See *Lawes* v. *Hutchinson*, 3 Dowl. 506: *Dixon* v. *Heslop*, 6 T. R. 265: *Glynn* v. *Hutchinson*, 3 Dowl. 229; 2 Ad. & E. 660.

(*s*) *Garton* v. *Great Western R. Co.*, 28 L. J., Q. B. 103: *Clark* v. *Dixon*, 3 M. & Sel. 93: *Clerk* v. *Mayor of Berwick*, 4 B. & C. 649; 7 D. & R. 104: *Norrish* v. *Richards*, 5 N. & M. 268.

(*t*) *Davies* v. *James*, 1 T. R. 372.

(*u*) *Norrish* v. *Richards*, 5 N. & M. 268; 1 H. & W. 437: *Clarke* v. *Harbin*, Barnes, 90: *Hutton* v. *Stourbridge*, 1 Str. 631. See *Garton* v. *Great Western R. Co.*, supra, where, per *Campbell*, C. J., the plaintiff, if he does not proceed, loses his costs out of pocket, and his cause of action. See as to the former practice as to rules and notices to declare, R. G. H. 2 W. 4, ss. 37, 38; Barnes, 90: *Stourbridge* v. *Walker*, 1 Str. 631; C. L. P. Act, 1852, s. 58.

(*x*) See R. M. 16 C. 2: *Fazacharly* v. *Baldo*, 1 Salk. 352: *Tanner* v. *Bean*,

PART XVII.

ment of claim before appearance is entered. There is, it seems, no objection to the plaintiff declaring in a different form of action from that which he commenced in the Court below, provided it be for the same cause of action (*y*), and not for a larger amount (*z*).

Defence, &c.

The time for pleading, discovery, &c. and the subsequent proceedings, are the same as in ordinary cases (*a*).

Costs.

By *R. of S. C., Ord. LXV. r.* 3, "If a cause be removed from an inferior Court having jurisdiction in the cause, the costs in the Court below shall be costs in the cause." Sect. 5 of the *County Court Act*, 1867 (*ante*, *Vol.* 1, p. 680), applies to actions removed by certiorari (*b*).

Affidavits.

If the plaintiff proceeds, the proceedings are regulated by the practice of the superior Court (c). After the cause has been removed, affidavits to be used in the superior Court may be intituled in the cause (*d*).

(b) *Removal when Defence or Counterclaim beyond Jurisdiction is set up.*

Removal when defence or counter claim beyond jurisdiction is set up.

Sects. 89 and 90 of the *Judicature Act*, 1873 (*see ante*, pp. 1512, 1513) confer on certain inferior Courts therein specified power to entertain all defences and counterclaims, subject to certain restrictions, and this power is enlarged by sect. 18 of the *Judicature Act*, 1884 (*ante*, p. 1513). By sect. 90 of the *Judicature Act*, 1873, it is enacted that where in any proceeding before any inferior Court any defence or counterclaim of the defendant involves matter beyond the jurisdiction of the Court, it shall be lawful for the High Court or any Division or Judge thereof, if it shall be thought fit, on the application of any party to the proceeding, to order that the whole proceeding be transferred from such inferior Court to the High Court, or to any Division thereof; and in such case the record in such proceeding shall be transmitted by the Registrar, or other proper officer, of the inferior Court to the said High Court; and the same shall thenceforth be continued and prosecuted in the said High Court as if it had been originally commenced therein. The application for removal under this proviso should be made by summons to a Master at Chambers, and not ex parte (*e*). The summons should be intituled in the Queen's Bench Division of the High Court, and in the matter of the cause in the inferior Court.

(c) *Removal of Causes from County Courts.*

By certiorari.

By Certiorari.]—A cause may be removed from a County Court by a writ of certiorari, subject to the limitations mentioned in th

---

Barnes, 345. As to the form of the commencement of the declaration after the R. of M. T. 3 W. 4, see *Dod* v. *Grant*, 6 N. & M. 70; 4 A. & E. 485; and per *Patteson*, J., in 2 D. & L. 525.

(*y*) *Gunn* v. *Maehenry*, 1 Wils. 277: *Bowerbank* v. *Walker*, 2 Chit. Rep. 519.

(*z*) *Wyatt* v. *Evans*, 3 Salk. 45, per Cur.: *Bowerbank* v. *Walker*, 2 Chit. Rep. 519.

(*a*) Id. See *Smith* v. *James*, T. R. 752.

(*b*) *Pellas* v. *Breslauer*, 1 Q. B. D 438; 40 L. J., Q. B. 161.

(*c*) *Davies* v. *Williams*, 13 Ch. D 550; 49 L. J., Ch. 352.

(*d*) *Franks* v. *Wicks*, 9 Dowl. 48 *Perrin* v. *West*, 5 N. & M. 291; A. & E. 405; 1 H. & W. 401

(*e*) *Anon.*, W. N. 1876, 12; Bi No. ccciii. For an instance where t order has been made, see *Vickers Stevens*, 44 L. T. 679; 29 W. R. 5

County Courts Acts (*f*). As to removing an action for recovery of land, *see* 30 & 31 *V. c.* 142, *s.* 12, *post*, p. 1567. As to removing a judgment of a County Court into the High Court for the purpose of execution, *see post*, p. 1571.

Enactments respecting (*g*).

By the 9 & 10 *V. c.* 95, *s.* 90, "No plaint entered in any Court holden under this Act shall be removed or removable from the said Court into any of her Majesty's superior Courts of record by any writ or process, unless the debt or damage claimed shall exceed 5*l.* (*h*), and then only by leave of a Judge of one of the said superior Courts, in cases which shall appear to the Judge fit to be tried in one of the superior Courts, and upon such terms as to payment of costs, giving security for debt or costs, or such other (*i*) terms as he shall think fit" (*j*).

By 13 & 14 *V. c.* 61, *s.* 16, "No judgment, order, or determination, given or made by any Judge of a County Court, nor any cause or matter brought before him or pending in his Court, shall be removed by appeal, motion, writ of error, certiorari, or otherwise, into any other Court whatever, save and except in the manner and according to the provisions hereinbefore mentioned" (*k*). The writ of certiorari is not taken away by this section, either where the claim is less than or exceeds 20*l.*; it leaves the right of removing a cause by certiorari untouched (*l*).

By the 19 & 20 *V. c.* 108, *s.* 38, "Any action commenced in a County Court for a *claim not exceeding 5l.*, may be removed by writ of certiorari into a superior Court, if such superior Court, or a judge of a superior Court, shall deem it desirable that the cause shall be tried in such superior Court; and if the party applying for such writ shall give security (*m*), to be approved of by one of the Masters of such superior Court, for the amount of the claim, and the costs of the trial, not exceeding in all 100*l.*, and shall further assent to such terms, if any, as the superior Court or Judge shall think fit to impose."

By sect. 39, "If in any action of contract the plaintiff shall claim a sum exceeding 20*l.*, or if in any action of tort the plaintiff shall claim a sum exceeding 5*l.*, and the defendant shall give *notice that he objects to the action being tried* in the County Court, and shall give security (*n*), to be approved of by the Registrar, for the

(*f*) See *Symonds* v. *Dimsdale*, 2 Ex. 533, per Cur. As to removing an action of replevin from a County Court, see ante, p. 1267.

(*g*) As to the enactments on this subject in the Mayor's Court Acts, see post, p. 1568.

(*h*) See *Box* v. *Green*, 9 Ex. 503.

(*i*) *Ex p. Great Western R. Co.*, 2 H. & N. 657.

(*j*) See *Montjoy* v. *Wood*, 2 Jur., N. S. 452, where the rights of the Crown were involved.

(*k*) *I.e.* by special case; see ante, p. 1525 et seq.

(*l*) *Parker* v. *The Bristol and Exeter R. Co.*, 6 Ex. 184; 20 L. J., Ex. 212; *Brookman* v. *Wenham*, 20 L. J., Q. B. 278.

(*m*) As to the mode of giving such security, see sects. 70 and 71 of this Act, ante, p. 1530.

(*n*) As to the mode of giving such security, see 19 & 20 V. c. 108, ss. 70, 71, ante, p. 1530. Where a defendant seeks to remove a cause under this section, and tenders to the registrar a bond executed by himself and two sureties, the registrar's duty is only to inquire into the sufficiency of the sureties; and he cannot refuse to receive the bond, on the ground that the defendant, by law, is incapable of executing a valid bond: *Young* v. *Brompton, &c. Waterworks Co.*, 1 B. & S. 675; 31 L. J., Q. B. 14. In this case the defendants were a body corporate.

PART XVII.

amount claimed, and the costs of trial in one of the superior Courts of common law, not exceeding in the whole the sum of 150*l.*, all proceedings in the County Court in any such action shall be stayed; but if in any such action the defendant do not object to the same being tried by the County Court, or shall fail to give the security aforesaid, the County Court shall dispose of the cause in the usual way; and the entry of the plaint in such action shall be a sufficient commencement of the suit to prevent the operation of any statute of limitation applicable to such claim. Provided that nothing herein contained shall prevent the removal of any cause from a County Court by writ of certiorari in the cases and subject to the conditions in and subject to which such cause may now be removed."

By *Ord. IX.* (*C. C. R.* 1875), *r.* 5, "A defendant intending to avail himself of the power given by section 39 of 'The County Courts Act, 1856,' to object to an action being tried in the County Court, shall give notice personally or by post of such intention to the Registrar and to the plaintiff five clear days before the return day, according to the form set forth in the schedule; and shall therein name the parties whom he proposes to be his sureties, or state therein his willingness to deposit money in lieu of giving security, and if he shall fail to give such security or make such deposit before the return day, or shall fail to give such notice of his intention to object as aforesaid, he shall not be entitled to object to the action being tried in the County Court."

By 19 & 20 *V. c.* 108, *s.* 40, "The granting by any of the superior Courts, or by any Judge thereof, of a rule or summons to show cause why a writ of certiorari or prohibition should not issue to a County Court, shall, if the superior Court or a Judge thereof so direct, operate as a stay of proceedings in the cause to which the same shall relate until the determination of such rule or summons, or until such superior Court or Judge shall otherwise order; and the Judge of the County Court shall from time to time adjourn the hearing of such cause to such day as he shall think fit, until such determination or until such order be made; but if a copy of such rule or summons shall not be served by the party who obtained it on the opposite party, and on the Registrar of the County Court two clear days before the day fixed for the hearing of the cause the Judge of the County Court may, in his discretion, order the party who obtained the rule or summons to pay all the costs of the day, or so much thereof as he shall think fit, unless the superior Court or a Judge thereof shall have made some order respecting such costs."

By sect. 41, "Where a writ of certiorari or of prohibition addressed to a Judge of a County Court shall have been granted by a superior Court or a Judge thereof, on an ex parte application and the party who obtained it shall not lodge it with the Registrar and give notice to the opposite party that it has issued, two clear days before the day fixed for hearing the cause to which it shall relate, the Judge of the County Court may, in his discretion, order the party who obtained the writ to pay all the costs of the day or so much thereof as he shall think fit, unless the superior Court or a Judge thereof shall have made some order respecting such costs."

By sect. 44, "When any superior Court or a Judge thereof shall

have refused to grant a writ of certiorari or of prohibition to be addressed to a Judge, or such rule or order as in the last preceding section is specified, no other superior Court or Judge thereof shall grant such writ, or rule, or order; but nothing herein shall affect the right of appealing from the decision of the Judge of the superior Court to the Court itself, or prevent a second application being made for such writ, or rule, or order, to the same superior Court or a Judge thereof, on grounds different from those on which the first application was founded."

When certiorari will be granted.

That difficult questions of law are likely to arise upon the trial of the cause is a ground for applying for a certiorari (*n*). Where a plaint was removed from the County Court by certiorari, on the affidavit of the defendant's solicitor that difficult questions of law would arise, the Court refused to quash the certiorari, though the affidavits of the plaintiff's solicitor averred that no such difficult questions of law would arise (*o*). If the cause is to be tried before a jury, and it be made clearly to appear that an impartial jury cannot be obtained within the limits of the County Court, a certiorari may be obtained (*p*). Cases affecting the revenue of the Crown will be removed on the application of the Attorney-General (*q*). A plaint cannot be removed to a superior Court, if such Court would have no jurisdiction over it when removed (*r*). Under the Employers Liability Act, 1880 (43 & 44 *V. c.* 42), which provides for the removal of actions commenced in the County Court (sect. 6), it has been held that neither the fact that the action involves questions of a technical character necessitating an intricate scientific inquiry, nor the fact that an action has been brought in the High Court in respect of the same inquiry, is a sufficient reason for the removal of the action from the County Court (*s*). Where a justice of the peace, who has been sued in a County Court for an act done in the execution of his office, has given notice under the 11 & 12 *V. c.* 44, *s.* 10, of his objection to be sued in such Court, he is not entitled to remove the plaint by certiorari into the superior Court (*t*).

Affidavit in support of application for certiorari.

The application for the certiorari should be supported by an affidavit, which should be intituled in the Court to which it is wished to remove the cause, but not in any cause or matter. All the material facts of the case must be stated in the affidavit, in order that the Judge may see what terms ought to be imposed (*u*). Where the affidavit did not state what questions of law would arise, nor the nature of them, the Court refused to set the writ aside, as it was not shown that the Judge had not inquired what questions of

---

(*n*) See *Hunt* v. *The Great Northern R. Co.*, 2 Pr. Rep. 268: *Longbottom* v. *Longbottom*, 22 L. J., Ex. 74.

(*o*) *Rees* v. *Williams*, 21 L. J., Ex. 24.

(*p*) See *Symonds* v. *Dimsdale*, 2 Ex. 533.

(*q*) *Churton* v. *Wilkin*, W. N. 1884, 62; Bitt. Ch. Cas. 134.

(*r*) *Rees* v. *Williams*, 21 L. J., Ex. 24, a case of partnership accounts. As to when a cause cannot in general be removed from an inferior Court, see ante, p. 1556.

(*s*) *Munday* v. *Thames Ironworks, &c. Co.*, 10 Q. B. D. 59; 52 L. J., Q. B. 119; 47 L. T. 351.

(*t*) *Weston* v. *Sneyd*, 26 L. J., Ex. 161. See ante, p. 1042.

(*u*) *Parker* v. *The Bristol and Exeter R. Co.*, 6 Ex. 184; 20 L. J., Ex. 112: *Robertson* v. *Womack*, 19 L. J., Q. B. 367.

PART XVII.

law were likely to arise, and a discretion is given him by the Act (*x*).

The application.

The application for the certiorari should, except under particular circumstances, be made to a Master at Chambers (*y*). The application in general is made ex parte, without any notice to the other side (*z*). Where it is sought to obtain a stay of proceedings, a summons should be taken out. The Master, upon granting the writ, will impose such terms as he thinks proper. If the certiorari will stay execution for a considerable period, he may order the money to be brought into Court, the costs to be paid or security given for the same, or the like (*a*). If the action is for a claim not exceeding 5*l.*, the party applying for the certiorari must in all cases give security to be approved of by one of the Masters of the superior Court, for the amount of the claim, and the costs of the trial, not exceeding in all 100*l.* (19 & 20 *V. c.* 108, *s.* 38, *ante*, p. 1563). As to the mode of giving such security, *see ss.* 70 *and* 71 of this Act, noticed p. 1530. As to directing the rule or summons to operate as a stay of proceedings, *see* 19 & 20 *V. c.* 108, *s.* 40, *ante*, p. 1564.

What terms imposed.

Service of rule or summons.

When a summons is taken out, it should be served without delay. As to the Judge of the County Court ordering the party applying for the certiorari to pay the costs of the day fixed for the hearing of the cause when the rule or summons is not served two clear days before such day, *see* 19 & 20 *V. c.* 108, *s.* 40, *ante*, p. 1564.

Service of order.

The order for the certiorari should be drawn up and served without delay. As to the Judge of the County Court ordering the applicant for the certiorari to pay the costs of the day fixed for the hearing of the cause, when the rule or order has been obtained ex parte, and has not been lodged with the Registrar of the County Court and notice given of the issuing of it to the opposite party two clear days before such day, *see* 19 & 20 *V. c.* 108, *s.* 41, *ante*, p. 1564.

Appealing, &c. when application refused.

As to appealing when the certiorari is refused, and as to making a second application for the same, *see* 19 & 20 *V. c.* 108, *s.* 44, *ante*, p. 1564. It has been held that the appeal to the Court from the refusal of a Judge to grant the order nisi for the issue of the writ must be made on notice of motion and not ex parte (*b*).

The writ of certiorari.

The writ is dated as of the day on which it is issued (*c*). It is made returnable on a day in the sittings (*d*). As to the form of a writ of certiorari for the purpose of removing a cause from an inferior Court, *see ante*, p. 1557, and as to the issuing of it, *see ante* p. 1558.

Quashing it.

If the writ is issued where it does not lie, the Court will quash it (*e*). As to quashing a writ for the removal of a cause from a

(*x*) *Golding* v. *Caudwell*, 2 Pr. Rep. 175. See *R.* v. *Hodges*, Cox, Crim. Rep. 194.

(*y*) *Robertson* v. *Womack*, 19 L. J., Q. B. 367: *Bowen* v. *Evans*, 3 Ex. 111.

(*z*) *Symonds* v. *Dimsdale*, 2 Ex. 533.

(*a*) See *Symonds* v. *Dimsdale*, 2 Ex. 538, per Cur.

(*b*) *Apps* v. *Smith*, 28 Sol. Jour. 514.

(*c*) Ord. II. r. 8, ante, Vol. p. 220. See *Symonds* v. *Dimsda* 2 Ex. 533; Tidd, 9th ed. 403.

(*d*) It seems that now the writ tested on the day it is issued (Ord. r. 8, Vol. 1, p. 220), and is ma returnable on a day certain in t sittings.

(*e*) See *Rees* v. *Williams*, 21 L. Ex. 24.

inferior Court, *see ante*, p. 1560, and as to awarding a procedendo, *see ante*, p. 1560.

Service of writ, &c.

Service of the writ upon the Registrar of the County Court, or upon a person acting as clerk at the office of the registrar, is good service on the Judge; though where the writ does not come to the Judge's knowledge until after the return day, the proper course is to rule the Judge to return the writ, and not to move for an attachment against him in the first instance (*f*). As to the mode in general of obeying a writ for the removal of a cause from an inferior Court, *see ante*, p. 1559. As to the cost of returning the certiorari, *see Batt* v. *Price*, 1 Q. B. D. 264.

Proceedings after removal.

The proceedings in the cause after removal are regulated by the practice of the Court into which it is removed (*g*). As to the proceedings in general after the removal of a cause from an inferior Court, *see ante*, p. 1561.

London Small Debts Act.

In the London Small Debts Act there is an exactly similar provision to the 9 & 10 *V. c.* 95, *s.* 90; only it commences thus: "No plaint entered in the Court under the provisions or by the authority of this Act, or by this Act directed to be continued therein, shall be removed . . . . ." *See* 15 & 16 *V. c. lxxvii. s.* 76. There is also in the London Act a similar provision to the 13 & 14 *V. c.* 61, *s.* 16. *See* 15 & 16 *V. c. lxxvii. s.* 80. *See* 30 & 31 *V. c.* 142, *s.* 35, by which a County Court in that Act is defined to include the London Small Debts Courts.

Action of ejectment. Order for trial in superior Court of action of ejectment commenced in County Court.

Action of Ejectment—Order for Trial in Superior Court of Action of Ejectment commenced in County Court.]—By the County Courts Act, 1867 (30 & 31 *V. c.* 142), sect. 11, "All actions of ejectment where neither the value of the lands, tenements or hereditaments, nor the rent payable in respect thereof, shall exceed the sum of 20*l.* by the year, may be brought and prosecuted in the County Court of the district in which the lands, tenements or hereditaments are situate."

By sect. 12, "The County Courts shall have jurisdiction to try any action in which the title to any corporeal or incorporeal hereditaments shall come in question, where neither the value of the lands, tenements or hereditaments in dispute, nor the rent payable in respect thereof, shall exceed the sum of 20*l.* by the year, or, in case of an easement or licence, where neither the value nor reserved rent of the lands, tenements or hereditaments in respect of which the easement or licence is claimed, or on, through, over or under which such easement or licence is claimed, shall exceed the sum of 20*l.* by the year: Provided that the defendant in any such action of ejectment or his landlord may, within one month from the day of the service of the writ, apply to a Judge at Chambers for a summons to the plaintiff to show cause why such action should not be tried in one of the superior Courts on the ground that the title to lands or hereditaments of greater annual value than 20*l.* would be affected by the decision in such action, and on the hearing of

(*f*) *Brookman* v. *Wenham*, 20 L. J., Q. B. 278. An attachment will lie against a County Court Judge for disobeying a writ of certiorari: see *Mungean* v. *Wheatley*, 6 Ex. 88. It may be questionable whether a notice to return the writ under Ord. LII. r. 11, ante, Vol. 1, p. 817, would not be the proper course; but it appears doubtful whether that rule is not confined to writs directed to sheriffs.

(*g*) *Davies* v. *Williams*, 13 Ch. D. 550; 49 L. J., Ch. 352.

PART XVII.

such summons the Judge, if satisfied that the title to other lands would be so affected, may order such action to be tried in one of the superior Courts, and thereupon all proceedings in the County Court in such action shall be discontinued."

See ante, p. 1206.

(d) *Removal of Causes from the Mayor's Court, London, before Judgment.*

No cause to be removed except by certiorari or order.

By the Mayor's Court of London Procedure Act, 1857 (20 & 21 *V. c. clvii.*), sect. 52, "No cause shall be removable from the Court otherwise than by a writ of certiorari, or by the order of a Judge of one of the superior Courts, or by the special order of the Lord High Chancellor, the Master of the Rolls, or one of the Vice-Chancellors, and every writ of certiorari shall be made returnable immediately, whether in or out of term."

Causes under 50*l.* not to be removed except under Judge's order or on security.

By sect. 16, "No cause depending in the Mayor's Court in which the debt or damages sought to be recovered shall not exceed fifty pounds shall be removed by any defendant before judgment therein into any superior Court, except in pursuance of a Judge's order, as hereinafter mentioned, unless the defendant, with two sufficient sureties, such as the Mayor's Court shall allow, shall first be bound to the plaintiff in the cause by recognizance, to be acknowledged in the Mayor's Court, in a sufficient sum for the payment of the debt or damages and costs in case judgment shall pass against the defendant in the superior Court, or in case the cause shall be brought back by procedendo in the Mayor's Court: Provided always, that any Judge of any of the superior Courts may in the exercise of his discretion order a writ of certiorari to issue to remove any such cause depending in the Mayor's Court into any superior Court without such recognizance as aforesaid, and such cause may be removed into such superior Court accordingly."

Writ to remove causes to be lodged within one month after service of plaint.

By sect. 17, "No cause depending in the Mayor's Court shall be removed before judgment therein into any superior Court, unless the writ removing such cause shall have been lodged with the proper officer of the Court within one month after the service of the plaint, or unless such writ shall have been lodged with such officer before such action shall have been entered for trial according to the practice of the Mayor's Court."

Foreign attachment not to be removed after set down for trial except by express direction of Judge upon terms.

By sect. 18, "No foreign attachment shall be removed from the Mayor's Court at any time after the same shall be set down for trial except by the express order of one of the Judges of the superior Courts, and then upon such terms as to costs, bail, or payment of money into Court as such Judge on summons shall think fit; provided that a summons only, without an order of the Judge thereon, shall not stay the trial of the attachment in the Mayor's Court."

No cause to be removed into superior Court after filed except by leave of Judge, and upon certain terms.

By sect. 19, "No cause depending in the Court shall, before judgment be recovered, be removable into any of the superior Courts (after plea pleaded), unless by leave of a Judge of one of the said superior Courts in cases which shall appear to such Judge fit to be tried in one of the superior Courts, and upon such terms if any, as to payment of costs, giving security for debt and costs or damages and costs, or such other terms as he shall think fit upon summons."

No suit on

By sect. 20, "No suit commenced on the equity side of th

Mayor's Court shall be removed from out of the said Court into Chancery without the special order of the Lord High Chancellor, the Master of the Rolls, or one of the Vice-Chancellors, upon application for that purpose made; and no cause shall be so removed from out of the said equity side of the Mayor's Court if the Judge to whom such application shall be made shall consider that the matter in question in the said suit is fit to be tried in the Mayor's Court; and the said Master of the Rolls shall have power from time to time to make rules and regulations respecting the removal of such suits as aforesaid." CH. CXXXIV.

equity side of Court to be removed unless by special direction of Judge.

SECT. II.—REMOVAL OF CAUSES AFTER JUDGMENT FOR THE PURPOSE OF EXECUTION.

Removal of Judgments of Inferior Courts of Record generally by 19 G. 3, c. 70.]—By stat. 19 *G.* 3, *c.* 70, *s.* 4 (*h*), where judgment is given in an inferior Court of record (*i*), it shall be lawful for any of the superior Courts at Westminster (upon affidavit of such judgment being obtained, and of diligent search and inquiry having been made after the person of the defendant or his effects, and of execution having issued against his person or effects, as the case may be, and that his person or his effects are not to be found within the jurisdiction of the inferior Court), to cause the record of the judgment to be removed into such superior Court, and issue writs of execution thereon against the person or effects of the defendant in the same manner as upon judgment in the said Courts at Westminster (*k*). This statute does not extend to an ejectment (*l*). Nor to judgments against the garnishee in foreign attachment in the Mayor's Court of London (*m*), the statute being confined to cases where the proceedings below are similar to those in the Court above (*n*). Nor, as it seems, to judgments for defendants (*o*). The amount for which the judgment was obtained, or of the original debt or damages, is immaterial (*p*). According to one case, it would seem that the Court, and not a Master at Chambers, can grant the writ for the removal of the cause (*q*); but this is questionable, and it is the common practice for Masters at Chambers to grant it. The rule on application to the Court is absolute in the first instance (*r*). Where the original judgment was destroyed by accidental fire, the Court ordered execution to issue on a verified copy of the judgment (*s*).

Removal of judgments of inferior Courts of record generally by 19 G. 3, c. 70.

Removal of Judgments, &c., where the Judge is a Barrister of Seven Years' Standing, under 1 & 2 V. c. 110.]—The 22nd section of 1 & 2 *V. c.* 110, enacts, "That in all cases where final judgment shall be

Removal of judgments, rules and orders of inferior Courts

(*h*) By stat. 32 & 33 V. c. 83, so much of this Act "as relates to execution against the person of a defendant and to detaining a defendant" is repealed.

(*i*) See *Steer* v. *Potter*, 9 Jur. 13.

(*k*) See the form of the affidavit in this latter case, Chit. Forms, p. 805; of the Order, Id.; and of the certiorari, Id. See *Jordan* v. *Cole*, 1 H. Bl. 532.

(*l*) *Doe* d. *Stansfield* v. *Shipley*, 2 Dowl. 408.

(*m*) *Bulmer* v. *Marshall*, 1 D. & R. 537; 5 B. & Ald. 821.

(*n*) Per *Abbott*, C. J., 5 B. & Ald. 823.

(*o*) *Batten* v. *Squires*, 4 Dowl. 53.

(*p*) *Knowles* v. *Lynch*, 2 Dowl. 623.

(*q*) *Rowell* v. *Breedon*, 3 Dowl. 324.

(*r*) *Knowles* v. *Lynch*, 2 Dowl. 623.

(*s*) *Cheesewright* v. *Franks*, 6 Dowl. 471.

PART XVII.

where the Judge is a barrister of seven years' standing, under 1 & 2 V. c. 110.

obtained in any action or suit in any inferior Court of record, in which at the time of passing of this Act a barrister of not less than seven years' standing shall act as Judge, assessor, or assistant in the trial of causes, and also in all cases where any rule or order shall be made by any such inferior Court of record as aforesaid, whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, it shall be lawful for the Judges of any of her Majesty's superior Courts of record at Westminster [or, if such inferior Court be within the county palatine of Lancaster, for the Judges of the Court of Common Pleas at Lancaster (*t*)], or for any Judge of any of the said Courts at Chambers, either in term or vacation, upon the application of any person who at the time of the commencement of this Act shall have recovered, or who shall at any time thereafter recover such judgment, or to whom any money or costs, charges, or expenses shall be payable by such rule or order as aforesaid, or upon the application of any person on his behalf, and upon the production of the record of such judgment, or upon the production of such rule or order, such record, or rule or order, as the case may be, being respectively under the seal of the inferior Court and signature of the proper officer thereof, to order and direct the judgment, or as the case may be, the rule or order of such inferior Court to be removed into the said superior Court [or into the Court of Common Pleas at Lancaster, as the case may be (*u*)]: and immediately thereupon such judgment, rule, or order shall be of the same force, charge, and effect as a judgment recovered in, or a rule or order made by, such superior Court, and all proceedings shall and may be immediately had and taken thereupon or by reason or in consequence thereof, as if such judgment so recovered, or rule or order so made, had been originally recovered in or made by the said superior Court [or into the Court of Common Pleas at Lancaster, as the case may be (*u*)]; and all the reasonable costs and charges attendant upon such application and removal shall be recovered in like manner as if the same were part of such judgment, or rule or order: [Provided always, that no such judgment, or rule or order, when so removed as aforesaid, shall affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, any further than the same would have done if the same had remained a judgment, rule, or order of such inferior Court, unless and until a writ of execution thereon shall be actually put into the hands of the sheriff or other officer appointed to execute the same" (*x*)] (*y*). It seems doubtful whether the removal of a transcript of the judgment of an inferior Court made from the minutes or roll of the Court, sealed with the seal and signed by the officer of the Court, for the purpose of suing out execution from a superior Court on a judgment in an inferior one, is a compliance with this enactment (*z*). Where a judgment has been remov

(*t*) The words in brackets are repealed by 42 & 43 V. c. 59. See sched. Pt. I. As to the jurisdiction of this Court being transferred to the High Court of Justice, see Vol. 1, p. 4.

(*u*) The words in brackets are repealed by stat. 42 & 43 V. c. 59.

(*x*) This proviso is repealed b & 19 V. c. 15, s. 7.

(*y*) See the forms of affid order, and writs of execution on section, Chit. Forms, p. 807.

(*z*) *Kemp* v. *Parry*, 8 Jur. B. C.

any inferior Court of record, in
Act a barrister of not less than
dge, assessor, or assistant in the
es where any rule or order shall
of record as aforesaid, whereby
charges, or expenses, shall be
lawful for the Judges of any of
cord at Westminster [or, if such
y palatine of Lancaster, for the
leas at Lancaster (*t*)], or for any
at Chambers, either in term or
ny person who at the time of the
have recovered, or who shall at
udgment, or to whom any money
all be payable by such rule or
application of any person on his
f the record of such judgment, or
or order, such record, or rule or
respectively under the seal of the
he proper officer thereof, to order
he case may be, the rule or order
oved into the said superior Court
eas at Lancaster, as the case may
pon such judgment, rule, or order
ge, and effect as a judgment recole by, such superior Court, and all
mediately had and taken thereupon
thereof, as if such judgment so
ade, had been originally recovered
Court [or into the Court of Common
may be (*u*)]; and all the reasonable
on such application and removal
er as if the same were part of such
rovided always, that no such judgn removed as aforesaid, shall affect
litaments, as to purchasers, mort-
r than the same would have done if
nent, rule, or order of such inferior
execution thereon shall be actually
eriff or other officer appointed to
seems doubtful whether the removal
t of an inferior Court made from the
aled with the seal and signed by the
rposo of suing out execution from a
in an inferior one, is a compliance
ere a judgment has been removed

(*x*) This proviso is repealed by & 19 V. c. 15, s. 7.
(*y*) See the forms of affidavi order, and writs of execution on t section, Chit. Forms, p. 807.
(*z*) *Kemp* v. *Parry*, 8 Jur. 5 B. C.

under it, the Court cannot inquire into the merits or regularity of the proceedings of the Court below (*a*). It may be observed, that this enactment does not contain the words on the construction of which it has been held that the above statute, 19 *G.* 3, c. 70, does not include judgments for defendants. It applies to inferior Courts of equity as well as law (*b*). The judgment of a County Court cannot be removed into a superior Court under this enactment, for the purpose of issuing execution thereon (*c*).

Judgments of inferior Courts, when removed, shall be registered.

By the 18 & 19 *V.* c. 15, *s.* 7, "Where, by the section numbered 22 of the said Act of the first and second years of her Majesty (*d*), power is given to remove judgments, rules, or orders obtained in or made by certain inferior Courts into the said superior Courts, or into the Court of Common Pleas of Lancaster, as the case may be, no such judgment, rule, or order, which has already been or hereafter shall be so removed, shall bind any lands, tenements, or hereditaments as to purchasers, mortgagees, or creditors, unless and until after such removal it shall be registered, and, if necessary, re-registered, in like manner as, in order to bind such purchasers, mortgagees, or creditors, it must have been if originally entered up in one of the said superior Courts, or in the said Court of Common Pleas of Lancaster, as the case may be; but from and after the passing of this Act every such judgment, rule, or order so registered, and where necessary re-registered, shall be binding in like manner, but not further or otherwise, as other judgments, rules, or orders of the said superior Courts or of the said Court of Common Pleas of Lancaster respectively, and the proviso at the end of the said section 22, restricting the operation of the same, is hereby repealed." *See Vol.* 1, *ante*, p. 769. As to judgments entered up after 29th July, 1864, not affecting lands until actually delivered in execution, *see ante*, p. 879.

Removal of judgment of a County Court.

Removal of Judgment of a County Court.]—By the 19 & 20 *V.* c. 108, *s.* 49, "If a Judge of a superior Court shall be satisfied that a party against whom judgment for an amount exceeding 20*l.*, exclusive of costs, has been obtained in a County Court, has no goods or chattels which can be conveniently taken to satisfy such judgment, he may, if he shall think fit, and on such terms as to costs as he may direct, order a writ of certiorari to issue to remove the judgment of the County Court into one of the superior Courts, and when removed it shall have the same force and effect, and the same proceedings may be had thereon, as in the case of a judgment of such superior Court; but no action shall be brought upon such judgment."

Removal of judgment, &c. from Mayor's Court, London.

Removal of Judgment, &c. from Mayor's Court, London.]—By Stat. 20 & 21 *V.* c. *clvii.* *s.* 48, "In every case where final judgment shall have been obtained in the Mayor's Court, and also in every

(*a*) *Williams* v. *Bolland*, 1 C. P. D. 27; 34 L. T. 904: *Simons* v. *Count Wuts*, 1 Dowl. 646: cp. *Bridge* v. *Branch*, 1 C. P. D. 633; 34 L. T. 55.
(*b*) *Harvey* v. *Gilbard*, 7 Dowl. 616.
(*c*) *Moreton* v. *Holt*, 10 Ex. 707; 24 L. J., Ex. 169. See 19 & 20 V. c. 108, s. 49, infra.
(*d*) 1 & 2 V. c. 110, s. 22, ante, p. 1569.

PART XVII.

case where any rule or order shall have been made by the Court, whereby any sum of money, or any costs, charges or expenses, shall be payable to any person, any writ of execution upon such judgment, or any rule or order so made by the Court, shall be sealed by the sealer of writs of any of the superior Courts upon a præcipe of the same being lodged with him, together with an affidavit verifying the judgment or order, and that the same remains unreversed and unsatisfied, and immediately thereupon such writ of execution and such judgment, rule or order shall become and be of the same force, charge and effect as a writ of execution or judgment recovered in or a rule or order made by such superior Court, and all the reasonable costs and charges attendant upon such sealing shall be recovered in like manner as if the same were part of such judgment or rule or order. Provided always, that no such judgment or rule or order, when so removed as aforesaid, shall affect any lands, tenements or hereditaments as to purchasers, mortgagees or creditors, any further than the same would have done if the same had remained a judgment, rule or order of the Mayor's Court, unless and until a writ of execution thereon shall be actually put into the hands of the sheriff or other officer appointed to execute the same."

This section is not repealed or affected by sect. 6 of the *Borough and Local Courts of Record Act*, 1872 (*f*). Under it the plaintiff has an absolute right in all cases to remove the judgment although the amount does not exceed 20*l*. (*f*), and although he could just as well issue the execution in the Mayor's Court (*g*).

The præcipe and affidavit required by the section must be taken together with the writ of execution (*h*), to the officer at the Central Office by whom writs of execution are sealed, and he will seal the writ. The costs of removal are fixed at one guinea (*i*).

Where a judgment is removed under this section the High Court may set it aside on the ground of want of jurisdiction in the Mayor's Court (*j*); but not, it appears, on the ground that the proceedings in the Mayor's Court were taken contrary to an order of the High Court (*k*).

Removal from Court to which Borough and Local Courts of Record Act, 1872, applies.

Removal from Court to which the Borough and Local Courts of Record Act, 1872, *applies.*]—In the case of Courts to which the Borough and Local Courts of Record Act, 1872 (35 & 36 V. c. 86), has been applied (*see ante*, p. 1515), it is provided by the schedule to that Act (*r.* 9) that "In all cases where final judgment shall be obtained in any action brought in the Court, where the sum recovered exclusive of costs is not less than twenty pounds, a

(*f*) *Paine* v. *Slater* (C. A.), 10 Q. B. D. 120; 52 L. J., Q. B. 282; 48 L. T. 623; 31 W. R. 941. See sect. 6, post.

(*g*) *Heywood* v. *Saint*, 32 L. T. 566.

(*h*) See the form given in the Appendix to the R. of S. C. (App. H. No. 15), Chit. F. 12th ed. p. 811. It is necessary that a writ of execution should be sealed and paid for. *Munday* v. *Pigott*, W. N. 1884, Bitt. Ch. Cas. 131.

(*i*) Master's Practice Rules, Appendix, post.

(*j*) *Bridge* v. *Branch*, 1 C. P. 633: cp. *Williams* v. *Bolland*, P. D. 227.

(*k*) *Re Greening*, 28 Sol. J. where (although this does not pear from the report) *Brid Branch* was cited and distinguis

have been made by the Court,
any costs, charges or expenses,
ny writ of execution upon such
so made by the Court, shall be
y of the superior Courts upon a
with him, together with an affi-
rder, and that the same remains
mmediately thereupon such writ
rule or order shall become and be
ct as a writ of execution or judg-
ler made by such superior Court,
d charges attendant upon such
manner as if the same were part
. Provided always, that no such
n so removed as aforesaid, shall
hereditaments as to purchasers,
rther than the same would have
a judgment, rule or order of the
a writ of execution thereon shall
of the sheriff or other officer ap-

affected by sect. 6 of the *Borough*
1872 (*f*). Under it the plaintiff
to remove the judgment although
(*f*), and although he could just as
layor's Court (*g*).
ired by the section must be taken,
ion (*h*), to the officer at the Central
on are sealed, and he will seal the
fixed at one guinea (*i*).
l under this section the High Court
ud of want of jurisdiction in the
t appears, on the ground that the
rt were taken contrary to an order

h the Borough and Local Courts of
n the case of Courts to which the
Record Act, 1872 (35 & 36 V. c. 86),
15), it is provided by the schedule to
ases where final judgment shall be
ght in the Court, where the sum
s not less than twenty pounds, and

Q. *Munday* v. *Pigott*, W. N. 1884, 57
L. Bitt. Ch. Cas. 131.
6, (*i*) Master's Practice Rules, i
Appendix, post.
T. (*j*) *Bridge* v. *Branch*, 1 C. P. D
633: cp. *Williams* v. *Bolland*, 1
the P. D. 227.
H. (*k*) *Re Greening*, 28 Sol. J. 4
It where (although this does not a
en- pear from the report) *Bridge*
for. *Branch* was cited and distinguished.

also in all cases where any rule or order shall be made by the Judge for the payment of any sum of money not less than twenty pounds, it shall be lawful for any Judge of any of the superior Courts, either in term or vacation, upon the application of any person entitled to the benefit of such judgment, rule, or order, and upon the production of such judgment, rule, or order, under the seal of the Court and signature of the proper officer, to direct such judgment, rule, or order, or a copy of such judgment, rule, or order, verified by affidavit, to be filed with the Clerk of the Judgments of one of the superior Courts, and thereupon such judgment, rule, or order shall be of the same effect as a judgment recovered in or a rule or order made by such superior Court, and all proceedings shall and may be immediately had and taken thereupon or by reason or in consequence thereof as if such judgment so recovered or rule or order so made had been originally recovered in or made by the superior Court; and all the reasonable costs and charges of such application and removal shall be recovered in like manner as if the same were part of such judgment, rule, or order."

Removal of judgment, &c. from Stannaries Court.

Removal of Judgment, &c. from Stannaries Court.]—By stat. 18 & 19 *V. c.* 32, *s.* 9 (*l*), "In actions commenced therein on the common law side of the Court, where judgment shall have been duly recovered in a cause whereof the said Court has cognizance, but which cannot be conveniently or effectually enforced by the ordinary process of that Court within the jurisdiction thereof, it shall be lawful for any one of the superior Courts of Common Law at Westminster or for any Judge thereof, upon application of the party entitled to the benefit of such judgment, and production of a certificate from the Registrar of the Court of the Vice-Warden under the seal of the Court of the judgment so recovered, and a satisfactory affidavit of the ground of the application, to cause process to issue and proceedings to be taken for the recovery of the amount due on the judgment, including the costs of the certificate and of the application, in the same manner as upon a like judgment recovered in an action commenced in the superior Court; and it shall not be necessary for this purpose or for any other purpose, that the record of any judgment in the Vice-Warden's Court shall be engrossed on parchment or enrolled; and where the debt or damages recovered by judgment of the Court of the Vice-Warden, or sought to be recovered in actions commenced either by writ, plaint, or other legal procedure, according to the practice of the said Court, shall not exceed fifty pounds, and the judgment of the Court cannot be conveniently or effectually enforced within the jurisdiction of the said Court, it shall be lawful for the party entitled to the benefit of the judgment to sue out a writ of execution, and to send the same to the Clerk of any County Court within the district of which the judgment debtor or his goods and chattels shall then be or be believed to be, with a warrant thereto annexed, under the hand of the Registrar and seal of the Court of the Vice-Warden, requiring execution of the same, and with the fees lawfully payable in like cases for execution of such a writ in

(*l*) See the prior Act, 6 & 7 Will. 4, c. 106, s. 11. And see *Harvey* v. *Gibbard*, 7 Dowl. 525, 616, per *Williams*, J.

PART XVII.

the County Court, and thereupon the said clerk shall cause the same to be executed by the High Bailiff of the County Court in due course of law, as if the same had been issued by the Court of which he is High Bailiff, and the said bailiff shall have the same powers and protection as if he were executing the process of such County Court and shall make his return to the Clerk of the said Court, and pay over to him the amount levied, if any; and the Clerk shall forthwith certify the said return, and remit the amount so paid, less the costs of making such levy according to the practice of the County Courts, to the party prosecuting the writ; and the Judge of the said County Court shall have and exercise the same power and authority over the Clerk and High Bailiff, and shall have power to adjudicate upon summons of interpleader in case of adverse claims to goods taken in execution as if the execution had been under the warrant of his own Court."

om *Inferior Courts.*

the said clerk shall cause the Bailiff of the County Court in due id been issued by the Court of said bailiff shall have the same re executing the process of such return to the Clerk of the said amount levied, if any; and the aid return, and remit the amount uch levy according to the practice ty prosecuting the writ; and the shall have and exercise the same Clerk and High Bailiff, and shall ummons of interpleader in case of execution as if the execution had n Court."

PART XVIII.

REFERENCES TO REFEREES AND ARBITRATION.

CHAP.		PAGE
CXXXV.	*References to Referees—Official or Special*	1575
CXXXVI.	*Arbitration by Consent*	1585
CXXXVII.	*Compulsory References to Arbitration*	1664

CHAPTER CXXXV.

REFERENCES TO REFEREES—OFFICIAL OR SPECIAL.

"Official referees."

Referees.]—The *Judicature Act*, 1873, *s.* 83 (*a*), provides for the appointment of officers to be called "Official Referees," for the trial of questions to be referred to them under the Act. Four official referees have been appointed under this section.

"Special referees."

The Act also contains provisions for references to "Special Referees"—that is to say, referees nominated by the Court, Judge or Master, or by the parties.

Control of Court over proceedings before referees.

Control of the Court over Proceedings before Referees.]—By the *Judicature Act*, 1873, *s.* 59, "With respect to all such proceedings before referees and their reports, the Court or such Judge as aforesaid shall have, in addition to any other powers, the same or the like powers as are given to any Court whose jurisdiction is hereby

(*a*) This section enacts that "There shall be attached to the Supreme Court permanent officers to be called official referees, for the trial of such questions as shall under the provisions of this Act be directed to be tried by such referees. The number and the qualifications of the persons to be so appointed from time to time, and the tenure of their offices, shall be determined by the Lord Chancellor, with the concurrence of the Presidents of the divisions of the High Court of Justice, or a majority of them (of which majority the Lord Chief Justice of England shall be one), and with the sanction of the Treasury. Such official referees shall perform the duties entrusted to them in such places, whether in London or in the country, as may from time to time be directed or authorized by any order of the said High Court or of the Court of Appeal; and all proper and reasonable travelling expenses incurred by them in the discharge of their duties shall be paid by the Treasury out of moneys to be provided by Parliament."

PART XVIII.

transferred to the said High Court with respect to references to arbitration and proceedings before arbitrators and their awards respectively, by the Common Law Procedure Act, 1854."

What may be referred. —Section 56.

What may be referred.]—By *Judicature Act*, 1873, *s.* 56, "Subject to any Rules of Court and to such right as may now exist to have particular cases submitted to the verdict of a jury, any question arising in any cause or matter (other than a criminal proceeding by the Crown) before the High Court of Justice or before the Court of Appeal, may be referred by the Court or by any Divisional Court or Judge before whom such cause or matter may be pending, for inquiry and report to any official or special referee, and the report of any such referee may be adopted wholly or partially by the Court, and may (if so adopted) be enforced as a judgment by the Court. The High Court or the Court of Appeal may also, in any such cause or matter as aforesaid in which it may think it expedient so to do, call in the aid of one or more assessors specially qualified, and try and hear such cause or matter wholly or partially with the assistance of such assessors. The remuneration, *if any*, to be paid to such special referees or assessors shall be determined by the Court."

—Section 57.

By sect. 57, "In any cause or matter (other than a criminal proceeding by the Crown) before the said High Court in which all parties interested who are under no disability consent thereto, and also without such consent in any such cause or matter requiring any *prolonged examination of documents or accounts, or any scientific or local investigation* which cannot, in the opinion of the Court or Judge, conveniently be made before a jury, or conducted by the Court through its other ordinary officers, the Court or a Judge may at any time, on such terms as may be thought proper, order any *question or issue of fact* or any *question of account* arising therein to be tried either before an official referee, to be appointed as hereinafter provided, or before a special referee to be agreed on between the parties; and any such special referee so agreed on shall have the same powers and duties and proceed in the same manner as an official referee. All such trials before referees shall be conducted in such manner as may be prescribed by Rules of Court, and subject thereto in such manner as the Court or Judge ordering the same shall direct."

Reference by consent.

The first of these sections (sect. 56) empowers the Court or Judge to refer any question arising in a cause or matter to a referee for inquiry and report, a proceeding similar to the old reference in Chambers in Chancery. The second (sect. 57) gives power to order any question or issue of fact or any question of account to be tried before a referee.

By consent any question or issue may be referred under either of these sections either for inquiry or report, or the whole cause or matter may be referred for trial (*see Judicature Act*, 1884, *s.* 9, p. 1577). Thus, in an action for infringement of a patent a Judge may refer a question requiring scientific investigation or experiments to a referee for inquiry and report (*b*).

(*b*) *Badische Anilin und Soda Fabrik* v. *Levinstein*, 52 L. J., Ch. 48 L. T. 822; 31 W. R. 913.

urt with respect to references to
ore arbitrators and their awards
v Procedure Act, 1854."

dicature Act, 1873, *s.* 56, "Subject
ch right as may now exist to have
e verdict of a jury, any question
other than a criminal proceeding
n Court of Justice or before the
by the Court or by any Divisional
h cause or matter may be pending,
official or special referee, and the
be adopted wholly or partially by
ed) be enforced as a judgment by
the Court of Appeal may also, in
foresaid in which it may think it
d of one or more assessors specially
cause or matter wholly or partially
essors. The remuneration, *if any*,
ees or assessors shall be determined

r matter (other than a criminal pro-
the said High Court in which all
or no disability consent thereto, and
any such cause or matter requiring
ocuments or accounts, or any scientific
not, in the opinion of the Court or a
before a jury, or conducted by the
ry officers, the Court or a Judge may
ay be thought proper, order any *ques-*
tion of account arising therein to be
eferee, to be appointed as hereinafter
referee to be agreed on between the
referee so agreed on shall have the
proceed in the same manner as an
uls before referees shall be conducted
escribed by Rules of Court, and sub-
as the Court or Judge ordering the

s (sect. 56) empowers the Court or a
rising in a cause or matter to a refere
ceeding similar to the old reference to
o second (sect. 57) gives power to orde
or any question of account to be trie

or issue may be referred under eithe
quiry or report, or the whole cause o
rial (*see Judicature Act*, 1884, *s.* 9, *po*
on for infringement of a patent, t
requiring scientific investigation a
inquiry and report (*b*).

da Fabrik v. *Levinstein*, 52 L. J., Ch. 7

These sections do not interfere with the power to order a reference under the *Com. Law Proc. Act*, 1854, which exists concurrently with and is distinct from them (*c*).

Reference by consent of whole cause to official referee for trial.

By the *Judicature Act*, 1884, *s.* 9, "In any cause or matter (other than a criminal proceeding by the Crown) now pending or hereafter commenced before the High Court of Justice or Court of Appeal, in which all parties who are under no disability consent thereto, the Court or a Judge may at any time, on such terms as may be thought proper, order the whole cause or matter to be tried before an Official Referee, who shall have power to direct in what manner the judgment of the Court shall be entered, and to exercise the same discretion as to costs as the Court or Judge could have exercised."

Compulsory reference.

It will be observed that the power to refer given by sect. 56 is subject to any right to have particular cases submitted to the verdict of a jury (*d*), and that the cases in which questions or issues can be referred for trial under sect. 57 without the consent of the parties, are confined to those therein specified, viz. those requiring any prolonged examination of documents or accounts, or any scientific or local investigation which cannot, in the opinion of the Court or a Judge, conveniently be made before a jury, or conducted by the Court through its ordinary officers.

The effect of these sections and of *rr.* 4 and 5 of *Ord. XXXVI.* (*ante*, *Vol.* 1, p. 585), is that it is only in cases which, previously to the passing of the Judicature Acts, could, without any consent, have been tried without a jury (*e*), and in cases requiring prolonged examination of documents or accounts, or any scientific or local investigation which cannot, in the opinion of the Court or a Judge, be conveniently made before a jury, that a reference can be ordered without the consent of both parties. In cases coming within either of these descriptions, a trial (*f*) before an official or special referee may be ordered without any consent (*f*), and if any substantial question in an action comes within the description the whole action may be referred (*g*).

Any question that could have been referred under sect. 3 of the *Com. Law Proc. Act*, 1854 (*post*, p. 1664), may be referred under this section (*h*). In actions involving questions of fraud, issues involving prolonged examination of documents may be referred (*i*). An action for wrongful dismissal and an account of money received,

(*c*) *Cruikshank* v. *Floating Baths Co.*, 1 C. P. D. 260; 34 L. T. 733: *Lloyd* v. *Lewis*, 2 Ex. D. 7; 35 L. T. 539; per *Brett*, L. J., 3 C. P. D. p. 153.

(*d*) As to which, see ante, Vol. 1, p. 582 et seq.

(*e*) As to which, see ante, Vol. 1, p. 583.

(*f*) See Ord. XXXVI. r. 7 (a), ante, Vol. 1, p. 582, which provides that where a trial by jury is not ordered or required (*i. e.* in cases where it can be required), the Court or a Judge may order a trial by (*inter alia*) an official or special referee.

(*g*) *Ward* v. *Pilley* (C. A.), 5 Q. B. D. 427; 43 L. T. 301; *Ward* v. *Hall*, W. N. 1880, 69; *Martin* v. *Fyfe* (C. A.), 50 L. T. 73. It should be noticed that *Clow* v. *Harper*, 3 Ex. D. 198, does not appear to have been cited in *Ward* v. *Pilley*; nor is there, so far as the editor can find, any report of the case referred to by *Bramwell*, L. J.

(*h*) *Ward* v. *Pilley*, supra.

(*i*) *Hoch* v. *Boor*, 43 L. T. 425; 49 L. J., C. P. 655. See *Leigh* v. *Brooks*, 5 Ch. D. 592; 45 L. J., Ch. 344.

PART XVIII.

in which the defendant pleaded misconduct, has been referred (*k*). So has an action for money had and received, in which the defendant pleaded a continuing partnership (*l*); so has an action for infringement of patent (*m*).

The expression "question of account" in the above section receives a wide construction (*n*). The prolonged examination of documents must be one that is necessary for the purpose of enabling the Judge to leave the case to the jury, not merely one that is necessary to enable him to decide questions of law (*o*). Reading a number of letters is not what the Act means by a prolonged examination of documents (*p*).

Cases which may be referred to arbitrator may be referred to official referee.

By the *Judicature Act*, 1884, *s.* 10, "In all cases in which the Court or a Judge may, under sections three, six or twelve of the Common Law Procedure Act, 1854, direct any matter to be ascertained by a Master or referred to an arbitrator, or to an officer of the Court, or appoint an arbitrator, such Court or Judge may direct such matter to be ascertained by or referred to an Official Referee, who shall in that case perform all such duties and exercise all such powers as would have been performed or could have been exercised by such Master, arbitrator, or officer."

The sections referred to in this section, and the procedure under them, will be found treated of in the two next chapters of this Part (*q*). The cases referred to in sects. 3 and 6 are those where the matter in dispute are questions of account which cannot conveniently be tried in the ordinary way (*q*). Sect. 12 provides for the case where parties fail to agree on an arbitrator or an arbitrator refuses to act or becomes incapable of doing so or dies (*q*).

Reference to official referee by agreement between parties without action.

By the *Judicature Act*, 1884, *s.* 11, "Whenever the parties to any deed or instrument in writing, made or executed after the commencement of this Act, or any of them, shall agree that any existing or future difference between them, or any of them, shall be referred to an Official Referee, it shall be the duty of any one of the Official Referees to whom application shall be made for the purpose, subject to any order which may be made by the Court or a Judge for the transfer of the matter to any other Official Referee or otherwise, to hear and determine any difference so agreed to be referred, and every such agreement shall be deemed to be an agreement to refer to arbitration within the meaning of sections eleven and seventeen of the Common Law Procedure Act, 1854."

This section enables parties to agree to a reference to an official referee without any action being commenced. If an action be commenced contrary to such an agreement, the proceedings may be stayed on summons under *s.* 11 of the *Com. Law Proc. Act*, 1854 (as to which, *see post*, p. 1599). The submission may, under *s.* 17 of the *Com. Law Proc. Act*, 1854 (which *see post*, p. 15

(*k*) *Sacker* v. *Ragozine*, 44 L. T. 308.

(*l*) *Godwin* v. *Budden*, 42 L. T. 536.

(*m*) *Saxby* v. *Gloucester Wagon Co.*, W. N. 1880, 28.

(*n*) *In re Leigh*, 3 Ch. D. 292, V.-C. H.: cp. *Leigh* v. *Brooks*, supra.

(*o*) *Omerod* v. *Todmorden Mill* (C. A.), 8 Q. B. D. 664; 51 L Q. B. 348; 46 L. T. 669; 30 W 805.

(*p*) Per *Lush*, J., *Barrett* v. *R that*, W. N. 1875, 204; Bitt. xxii.

(*q*) See sect. 3, post, p. 1664; s post, p. 1666; sect. 12, post, p.

nisconduct, has been referred (*k*). nd received, in which the defen- nership (*l*); so has an action for

account" in the above section The prolonged examination of essary for the purpose of enabling the jury, not merely one that is questions of law (*o*). Reading a Act means by a prolonged exami-

s. 10, "In all cases in which the ections three, six or twelve of the 854, direct any matter to be ascer- to an arbitrator, or to an officer of rator, such Court or Judge may ained by or referred to an Official erform all such duties and exercise een performed or could have been rator, or officer."

is section, and the procedure under f in the two next chapters of this in sects. 3 and 6 are those where the ns of account which cannot con- ary way (*q*). Sect. 12 provides for ee on an arbitrator or an arbitrator able of doing so or dies (*q*).

, s. 11, "Whenever the parties to riting, made or executed after the any of them, shall agree that any etween them, or any of them, shall ree, it shall be the duty of any one m application shall be made for the which may be made by the Court or matter to any other Official Referee, rmine any difference so agreed to be ment shall be deemed to be an agree- ithin the meaning of sections eleven Law Procedure Act, 1854."

to agree to a reference to an official being commenced. If an action is an agreement, the proceedings may r s. 11 of the *Com. Law Proc. Act,* 1599). The submission may, under *Act,* 1854 (which *see post,* p. 1594),

(*o*) *Omerod* v. *Todmorden Mill C* (C. A.), 8 Q. B. D. 664; 51 L. Q. B. 348; 46 L. T. 669; 30 W. 805.

(*p*) Per *Lush*, J., *Barrett* v. *Ros that*, W. N. 1875, 204; Bitt. xxii.

(*q*) See sect. 3, post, p. 1661; sect post, p. 1666; sect. 12, post, p. 15

be made a rule of Court and enforced in the same manner as an ordinary award (*see post,* p. 1651).

Proceedings to obtain reference.

Proceedings to obtain Reference.]—Either party to an action may take out a summons at Chambers before a Master for an order for a reference. The summons should specify the form of reference which the party requires, that is to say, whether a reference of some question or questions for inquiry and report under sect. 56, or of some issue or issues, or of all the issues in the action for trial under sect. 57, and whether to an Official or a Special Referee. An order may be made on the summons (*r*). The reference may also be ordered by the Court or by a Judge at Nisi Prius, or at the Assizes.

The order should state clearly what is referred and for what purpose, and under which section the reference is made. An order may now by consent be made for the trial of the whole action before the referee (*s*). As to the power to order a reference to a particular Official Referee, *see Ord. XXXIII. r.* 47 (*post,* p. 1580).

The order of reference must be drawn up (*r*). When the reference is to an Official Referee the order itself, or a duplicate of it, must then be taken to the clerk to the Registrars of the Chancery Division in the Central Office, who, unless the order provides for a reference to a particular referee (*t*), will indorse on it the name of the referee in rotation to whom the matter is referred (*u*). The order so indorsed must then be taken to the clerk of the referee, who will name a date and time when the reference is to commence.

An appeal lies from the order directing a reference (*x*). When the order is made by a Judge at Nisi Prius or at the Assizes the appeal is direct to the Court of Appeal (*y*).

Rotation of official referees.

Rotation of Referees.]—By *Ord. XXXVI. r.* 45, "The business to be referred to the Official Referees appointed under the Principal Act shall be distributed among such Official Referees in rotation by the clerks to the Registrars of the Supreme Court, Chancery Division, in the manner now used in the distribution of business amongst the conveyancing counsel of the Court."

By *Ord. XXXVI. r.* 46, "When an order shall have been made referring any business to the Official Referee in rotation, such order, or a duplicate of it, shall be produced to the Registrar's clerk, whose duty it is to make such distribution as in the last Rule mentioned; and such clerk shall (except in the case provided for by

(*r*) See the form of order, R. of S. C., App. K., Nos. 32 and 33; Chit. F. p. 820. See 3 C. P. D. 163, n. (l).

(*s*) See Jud. Act, 1881, s. 9, ante, p. 577; and R. of S. C., Ord. XXXVI. 7, ante, Vol. 1, p. 582, under which there is now power to order a trial before an official referee or special referee. Cp. the decisions under the former rules in *Longman* v. *East, antifex* v. *Severn, Mellin* v. *Monieo,* 2 C. P. D. 142; 47 L. J., C. P. 211; 37 L. T. 11 (C. A.); *Braginton* v. *Yates,* W. N. 1880, 150.

(*t*) See Ord. XXXVI. r. 47, post, p. 1580.

(*u*) Id. r. 46, supra.

(*x*) *Omerod* v. *Todmorden Mill Co.* (C. A.), 8 Q. B. D. 664; 51 L. J., Q. B. 348; 46 L. T. 639; 30 W. R. 805.

(*y*) Id.; *Hoch* v. *Boor,* 49 L. J., C. P. 665; 43 L. T. 425; cp. *Morgan* v. *Ainslie,* 28 L. T. 120; *Saxby* v. *Gloucester Wagon Co.,* W. N. 1880, 28.

PART XVIII.

rule 47 of this Order), endorse on the reference a note specifying the name of the Official Referee in rotation to whom such business is to be referred; and the order so endorsed shall be a sufficient authority for the Official Referee to proceed with the business so referred."

By *Ord. XXXVI. r.* 47, "The two last preceding Rules of this Order are not to interfere with the power of the Court or a Judge to direct or transfer a reference to any one in particular of the said Official Referees, where it appears to the Court or Judge to be expedient; but every such reference or transfer shall be recorded in the manner mentioned in Order LI., Rule 10, and a note to that effect be endorsed on the order of reference or transfer; and in case any such reference or transfer shall have been or shall be made to any one in particular of the said referees, then the clerk in making the distribution of the business according to such rotation as aforesaid shall have regard to any such reference or transfer."

Times of sittings of official referees.

Times of Sittings of Official Referees.]—By *Ord. LXIII. r.* 16, "The Official Referees shall sit at least from 10 a.m. to 4 p.m. on every day during the Michaelmas, Hilary, Easter and Trinity sittings of the High Court of Justice, except on Saturdays, during such sittings, when they shall sit, at least, from 10 a.m. to 1 p.m.; but nothing in this Rule shall prevent their sitting on any other days."

Proceedings before the referee.

—Authority of reference.

Proceedings before the Referee.]—By *Judicature Act*, 1873, *s.* 58, "In all cases of any reference to or trial by referees under this Act the referees shall be *deemed to be officers of the Court*, and shall have such authority for the purpose of such reference or trial as shall be prescribed by Rules of Court or (subject to such Rules) by the Court or Judge ordering such reference or trial; and the report of any referee upon any question of fact on any such trial shall (unless set aside by the Court) be equivalent to the verdict of a jury."

—Place of reference.

—Inspection.

—To proceed de die in diem.

By *Ord. XXXVI. r.* 48, "Where any cause or matter, or any question in any cause or matter, is referred to a referee, he may subject to the order of the Court or a Judge, hold the trial at or adjourn it to any place which he may deem most convenient, and have any inspection or view, either by himself or with his assessor (if any), which he may deem expedient for the better disposal of the controversy before him. He shall, unless otherwise directed by the Court or a Judge, proceed with the trial de die in diem, in like similar manner as in actions tried with a jury."

This rule is directory only. An award will not be set aside, therefore, on the ground that the referee did not sit de die in diem (*z*).

Peremptory appointment.

A referee has power to make a peremptory appointment and may proceed ex parte if either party does not appear (*a*).

Conduct of trial.

Attendance of witnesses.

By *Ord. XXXVI. r.* 49, "Subject to any order to be made by the Court or Judge ordering the same, *evidence* shall be taken at any trial before a referee, and the attendance of witnesses may

(*z*) *Robinson* v. *Robinson*, 35 L. T. 337.

(*a*) *Wenlock* v. *River Dee Co.* L. J., Q. B. 208; 49 L. T. 61; W. R. 220.

the reference a note specifying
rotation to whom such business
endorsed shall be a sufficient
proceed with the business so

wo last preceding Rules of this
power of the Court or a Judge to
ny one in particular of the said
to the Court or Judge to be ex-
or transfer shall be recorded in
LL., Rule 10, and a note to that
reference or transfer; and in case
ll have been or shall be made to
eferees, then the clerk in making
cording to such rotation as afore-
reference or transfer."

eferees.]—By *Ord. LXIII. r.* 16,
t least from 10 a.m. to 4 p.m. on
nas, Hilary, Easter and Trinity
stice, except on Saturdays, during
, at least, from 10 a.m. to 1 p.m.;
revent their sitting on any other

]—By *Judicature Act*, 1873, *s.* 58,
or trial by referees under this Act
officers of the Court, and shall have
f such reference or trial as shall be
or (subject to such Rules) by the
reference or trial; and the report
on of fact on any such trial shall
be equivalent to the verdict of a

Where any cause or matter, or any
, is referred to a referee, he may,
urt or a Judge, hold the trial at or
he may deem most convenient, and
ther by himself or with his assessors
xpedient for the better disposal of
He shall, unless otherwise directed by
l with the trial de die in diem, in a
ied with a jury."
. An award will not be set aside,
t the referee did not sit de die in

e a peremptory appointment and may
y does not appear (*a*).
Subject to any order to be made by
the same, *evidence* shall be taken
l the attendance of witnesses may

T.

(*a*) *Wenlock* v. *River Dee Co.*, L. J., Q. B. 208; 49 L. T. 617; W. R. 220.

enforced by subpœna, and every such trial shall be conducted in the same manner, as nearly as circumstances will admit, as trials are conducted before a Judge."

Discovery, &c. Judgment.

By *Ord. XXXVI. r.* 50, "Subject to any such order as last aforesaid, the referee shall have the same authority with respect to discovery and production of documents (*b*), and in the conduct of any reference or trial, *and the same power to direct that judgment be entered for any or either party* as a Judge of the High Court."

No power to commit or attach.

By *Ord. XXXVI. r.* 51, "Nothing in these Rules contained shall authorize any referee to commit any person to prison or to enforce any order by attachment or otherwise."

The referee's report, form of, &c.

The Referee's Report, Form of, &c.]—The report of the referee should be addressed to the Court or the Judge by whom the matter was referred. On a reference under sect. 56 for inquiry and report it should state the findings of the referee on each question or issue and the facts (*c*), but not the evidence (*d*), on which each is founded, so that the Court may have all the materials and information necessary to enable it to arrive at a decision (*e*). If it does not do so it may be referred back to the referee for this to be done (*f*). On a reference under sect. 57 the referee in his report need only find the issues in the affirmative or the negative, and need not state either the facts or the reasons on which the findings are founded (*g*).

Power to submit question to Court or to state facts specially.

Power to submit Question to Court or state Facts specially.]—By *Ord. XXXVI. r.* 52, "The referee may, before the conclusion of any trial before him, or by his report under the reference made to him, submit any question arising therein for the decision of the Court, or state any facts specially, with power to the Court to draw inferences therefrom, and in any such case the order to be made on such submission or statement shall be entered as the Court may direct; and the Court shall have power to require any explanation or reasons from the referee, and to remit the cause or matter, or any part thereof, for re-trial or further consideration to the same or any other referee; or the Court may decide the question referred to any referee on the evidence taken before him, either with or without additional evidence as the Court may direct" (*h*).

(*b*) Under the former rules, the referee had no power to order production of documents: *Danvillier* v. *Myers*, 17 Ch. D. 346; 29 W. R. 535: cp. *In re Leigh*, 4 Ch. D. 661: *Penriee* v. *Williams*, 23 Ch. D. 353.

(*c*) *Mayor of Birmingham* v. *Allen*, W. N. 1877, 190: *Sheffield* v. *Managers of Metropolitan Asylum District*, C. P. D., 64 L. T. Jour. 25, 388: *Badische Anilin, &c. Fabrik* v. *Levinstein*, 48 L. T. 822: *Burrard* v. *Callisher*, 51 L. J., Ch. 223; 45 L. T. 793; 30 W. R. 317: cp. *Cardinall* v. *Cardinall*, 25 Ch. D. 772, 777.

(*d*) Per *Brett*, L. J., 3 C. P. D. at p. 155.

(*e*) *Mellin* v. *Monico*, 4 C. P. D. per *Bramwell*, L. J., at p. 149: *Badische Anilin und Soda Fabrik* v. *Levinstein*, 52 L. J., Ch. 704; 48 L. T. 822; 31 W. R. 913.

(*f*) Id. See *Dunkirk Colliery Co.* v. *Lever*, 9 Ch. D. 20; 39 L. T. 239.

(*g*) *Miller* v. *Pilling*, 9 Q. B. D. 736; 51 L. J., Q. B. 481; 47 L. T. 536.

(*h*) Cp. *Walker* v. *Bunkell*, 22 Ch. D. 722: *Ellis, Lever & Co.* v. *Dunkirk Colliery Co.*, 9 Ch. D. 20; 39 L. T. 239.

PART XVIII.

Notice that report ready.

Notice that Report ready.]—By *Ord. XXXVI. r.* 53, "Whenever a report shall be made by a referee, he shall on the same day cause notice thereof to be given to all the parties to the trial or the reference before him by prepaid post letter directed to the address for service of each party, who shall in due course of post be deemed to have notice of such report."

Application to adopt, vary, or remit report or reference under sect. 56. —Where further consideration adjourned pending reference.

Application to adopt, vary, or remit Report.]—By *Ord. XXXVI. r.* 54, "Where under the *fifty-sixth* section of the Principal Act the report of the referee has been made in a cause or matter, the further consideration of which has been adjourned, it shall be lawful for any party, on the hearing of such further consideration, *without notice of motion or summons*, to apply to the Court or Judge *to adopt* the report, or without leave of the Court or a Judge to give not less than four days' notice of motion, to come on with the further consideration, *to vary* the report or *to remit* the cause or matter or any part thereof for re-hearing or further consideration to the same or any other referee" (*i*).

It will be observed that this and the following rule are confined to references under sect. 56.

—In other cases.

By *Ord. XXXVI. r.* 55, "Where under the *fifty-sixth* section of the Principal Act the report of the referee has been made in a cause or matter, the further consideration of which has not been adjourned, it shall be lawful for any party by an eight days' notice of motion to apply to the Court to adopt and carry into effect the report of the referee, or to vary the report, or to remit the cause or matter or any part thereof for re-hearing or further consideration to the same or any other referee."

Application to set aside findings on reference under sect. 57.

Application to set aside Findings on Reference under Sect. 57.]—The rules 54 and 55 (*supra*), only apply to references under sect. 56. Where the reference is under sect. 56, the report may be wholly or partially adopted by the Court. But where the reference is under sect. 57 the referee's finding is equivalent to the verdict of a jury (*j*), and no motion to adopt it is necessary (*k*), and if either party desires to question the findings of the referee he must apply to the Division Court on notice of motion (*l*). No time is limited for this application (*m*), which may be made at any time before judgment has been given on the report (*n*), but it should be made promptly (*o*).

(*i*) Cp. as to the practice under the former rules, *Burrard* v. *Callisher*, 19 Ch. D. 644; 51 L. J., Ch. 510; 46 L. T. 341; 30 W. R. 540: *In re Evans, Owen* v. *Evans*, W. N. 1882, 36: *Re Brook, Sykes* v. *Brook*, 50 L. J., Ch. 744; 45 L. T. 172; 29 W. R. 821: *Deacon* v. *Dolby*, 51 L. J., Ch. 248; 30 W. R. 317.

(*j*) Jud. Act, 1873, s. 58, ante, p. 1580: *Cooke* v. *Newcastle, &c. Water Co.*, 10 Q. B. D. 332; 52 L. J., Q. B. 337: *Miller* v. *Pilling*, 9 Q. B. D. 736, 738; 51 L. J., Q. B. 481; 47 L. T. 536: *Deacon* v. *Dolby*, W. N. 1882, 8; 51 L. J., Ch. 248; 30 W. R. 317: per *Jessel*, M. R., *Guardians of Mansfield Union* v. *Wright*, 9 Q. B. D. at p. 685.

(*k*) *Deacon* v. *Dolby*, supra; *Jessel*, M. R., 9 Q. B. D. at p. 68

(*l*) *Cooke* v. *Newcastle, &c. W Co.*, ubi supra: *Dyke* v. *Cannel* Q. B. D. 180; 49 L. T. 174 W. R. 747.

(*m*) Id.: *Bedborough* v. *Army Navy Hotel Co.*, 53 L. J., Ch. 50 L. T. 173. But see *Sullive Rivington*, 28 W. R. 372.

(*n*) Id.

(*o*) Cp. *Re Brook, Sykes* v. *B* 45 L. T. 172.

If the referee has improperly admitted or refused to receive evidence, or has, so to speak, misdirected himself, or his report or finding is against the evidence or in other respects wrong, the party affected may move to set the report or finding aside, or to refer the report back to the referee (*p*).

The party objecting should be prepared with some evidence of what took place before the referee (*q*). He should generally produce a copy of the referee's notes. If the referee refuses to give such a copy, an application to the Court to request him to do so should be made.

Motion for judgment.

Motion for Judgment.]—By *Ord. XL. r.* 2, "Where at the trial the Judge or referee abstains from directing any judgment to be entered, the plaintiff may set down a motion for judgment. If he does not set down such a motion and give notice thereof to the other parties within ten days after the trial, any defendant may set down a motion for judgment, and give notice thereof to the other parties."

As to the proceedings on motion for judgment, *see ante*, *Vol.* 1, p. 755 *et seq.*

Motion to set aside judgment directed to be entered.

Motion to set aside Judgment directed to be entered.]—By *Ord. XL. r.* 6, "Where at a trial by a referee he has directed that any judgment be entered, any party may move to set aside such judgment, and to enter any other judgment, on the ground that upon the finding as entered the judgment so directed is wrong: provided that in the Queen's Bench Division such motion shall be made to a Divisional Court."

As to the proceedings on the motion, *see ante*, *Vol.* 1, p. 759 *et seq.*

Judgment.

Judgment.]—By *Ord. XXXVI. r.* 50 (*ante*, p. 1581), the referee, when a cause or matter is referred to him for trial, has power to direct that judgment be entered for any party (*r*). The same power is conferred by sect. 9 of the *Judicature Act*, 1884 (*ante*, p. 1577), in cases where the whole cause or matter is referred to an official referee for trial by consent. If the referee directs that judgment be entered for either party, judgment will be entered on the production, at the judgment office in the Central Office, of the referee's certificate or report.

Costs.

Costs.]—Where a whole cause or matter is referred by consent to an official referee, as provided by sect. 9 of the *Judicature Act*, 1884 (*ante*, p. 1577), that section empowers him to exercise the same discretion as to costs as the Court or a Judge could have exercised. In other cases, unless the costs are provided for by the order of reference, the referee has no power over them, and an application to a Judge is necessary to obtain them (*s*).

(*p*) *Cooke* v. *Newcastle, &c. Water Co.*, supra: *Miller* v. *Pilling*, ubi supra, per *Brett*, L. J., at p. 739: *Walker* v. *Bunkell*, 22 Ch. D. 723, per *Jessel*, M. R., at p. 726: *S. C.*, 2 L. J., Ch. 596; 48 L. T. 618; 31 W. R. 661: *Wood* v. *Bornicott*, W. N. 1878, 25, 36. See per *Brett*, L. J., C. P. D. at p. 155.

(*q*) *Stubbs* v. *Boyle*, 2 Q. B. D. 124: *Miller* v. *Pilling*, ubi supra, per *Brett*, L. J., 9 Q. B. D. at p. 739.

(*r*) Under the former rules, the referee had no power to direct judgment to be entered: *Longman* v. *East*, cited ante, p. 1579, n. (*s*).

(*s*) *Lowe* v. *Holme*, 52 L. J., Q. B. 270.

PART XVIII.

Appeal in compulsory reference.

Appeal in Compulsory Reference.]—See *Ord. LIX. r.* 3, and *Judicature Act*, 1884, *s.* 8, *post*, p. 1669.

Fees.

Fees of Referees.]—By *Order*, dated the 24th April, 1877, "From and after the date hereof, the fee to be taken by an Official Referee (*t*) attached to the Supreme Court, in respect of all matters, questions or issues referred to him by any order, shall be the sum of 5*l.* for the entire reference, irrespective of the time occupied, which sum shall be paid before the reference is proceeded with.

"Every such fee shall be collected by means of a stamp or stamps to be affixed to the appointment paper or summons issued by the Official Referee for appointing the time and place for proceeding with the reference.

"Where the sittings under a reference are to be held elsewhere than in London, a convenient place in which the sittings may be held shall be provided to the satisfaction of the Official Referee, by and at the expense of the party proceeding with the reference; and there shall be paid in addition to the above fee of 5*l.*, 1*l.* 11*s.* 6*d.* for every night the Official Referee, and 15*s.* for every night the Official Referee's clerk is absent from London on the business of the reference, together with the reasonable expenses of their travelling from London and back.

"A deposit on account of expenses may be required before proceeding with the reference, or at any time during the course thereof; and a memorandum of the amount deposited shall be delivered to the party making the deposit.

"The fees and expenses and deposit (if any) hereby authorized in respect of any reference shall be paid in the first instance by the party proceeding with the reference.

"The Official Referees shall conform to all regulations that may be made from time to time by the Treasury for the accounting for all moneys received by them."

(*t*) The remuneration, if any, to be paid to a special referee must be determined by the Court. See Judicature Act, 1873, *s.* 56, *ante*, p. 1576.

CHAPTER CXXXVI.

ARBITRATION BY CONSENT.

SECT.		PAGE
I.	*Preservation of former Law and Practice*	1586
II.	*What may be referred*	1586
III.	*The Order or Agreement to refer*	1587
	Mode and Form of Submission	1587
	Appointment of Arbitrator when not named in the Submission	1592
	Alteration of Submission	1593
	Making Submission a Rule of Court	1594
	Effect of Agreement to refer on Right to Sue—Staying Proceedings in Action brought in contravention of	1599
	Revocation of Submission	1602
	Costs in case of Abortive Reference	1605
IV.	*Proceedings upon the Reference*	1606
	Obtaining Appointment from Arbitrator	1606
	Mode of conducting Reference	1607
	Compelling Attendance of Witnesses, &c.	1610
	Enlargement of Time for making Award	1611
	Arbitrator's Authority, how determined	1614
	Appointment of Umpire, and Proceedings by him	1615
V.	*The Award*	1617
	By whom to be made	1617
	When to be made	1617
	Form of	1618
	As to Costs	1628
	Award in form of Special Case	1634
	Award Bad in Part	1636
	Stamp on	1637
	Execution of by Arbitrator	1637
	Publication of	1638
	Alteration of	1638
VI.	*Taxation of the Costs Awarded*	1638
VII.	*Setting aside the Award —Referring back Matters referred to the Arbitrator*	1640
	In what Cases	1640
	How Objections may be Waived	1643
	Who may apply to set aside the Award	1643
	To what Court Application must be made	1643
	Within what Time Application to be made	1644
	How same to be made	1646
	Costs of Application	1648
	Referring back Matters to Arbitrator	1648
	Action against and Evidence by him	1651
VIII.	*Enforcing Performance of the Award*	1651
	By Order and Execution	1651
	By Judgment	1653
	By Attachment	1654
	Where a Verdict has been taken at the Trial	1659
	Where Award directs Possession of Land to be given up	1660
	By Action	1661
IX.	*Effect of the Award*	1662

PART XVIII.

SECT. I.—PRESERVATION OF FORMER PRACTICE.

THE old law and practice relating to references to arbitration is not abolished by the Judicature Acts, but continues to exist, in addition to the powers of reference given by those Acts (*a*).

The Rules of the Supreme Court, which provide for the trial of actions in some cases otherwise than with a jury (*see Ord. XXXVI. rr. 4 and 5, ante, Vol.* 1, p. 585), expressly provide by *Ord. XXXVI. r.* 10, that "Nothing in this order shall affect any proceedings under any of the provisions of the Common Law Procedure Acts relating to arbitration." The provisions of the Common Law Procedure Acts relating to arbitration are sections 3 to 17 inclusive of the Act of 1854. None of these sections are repealed by the *Stat. Law Revision and Civil Proc. Act*, 1883. The chief statutes relating to arbitration now in force, are the 9 & 10 W. 3, c. 15; 3 & 4 W. 4, c. 42, *ss.* 39—41; and the *Com. Law Proc. Act*, 1854, *ss.* 3—17.

SECT. II.—WHAT MAY BE REFERRED.

What may be referred.

As a general rule any matters in difference between parties may by consent be referred to arbitration. A criminal charge, however, cannot be so referred. Therefore, an indictment for perjury (*b*), or for non-repair of a highway (*c*), cannot be referred. In one case (*b*), the Court of Queen's Bench, in delivering their judgment, said that "The rule is correctly laid down by *Gibbs*, C. J., in *Baker* v. *Townsend*, 7 Taunt. 422: where a party injured has a remedy by action as well as by indictment, nothing can deter such party from referring the adjustment of the reparation which he is to receive to arbitration, although a criminal prosecution may have been commenced. It should also be added, 'with leave of the Court.' When a verdict of guilty is taken and the Court suspends judgment, and allows the questions between the parties to be referred, the matter is very different, for then it is only to enable the Court the better to see what sentence and judgment ought to be given."

(*a*) *Cruikshank* v. *Floating Baths Co.*, 1 C. P. D. 260; 45 L. J., C. P. 684; 34 L. T. 733: *Lloyd* v. *Lewis*, 2 Ex. D. 7; 46 L. J., Q. B. 81; 35 L. T. 539.

(*b*) See *R.* v. *Hardey*, 14 Q. B. 529; 19 L. J., Q. B. 195.

(*c*) *R.* v. *Blakemore*, 14 Q. B. 3

to references to arbitration is
cts, but continues to exist, in
iven by those Acts (*a*).
which provide for the trial of
n with a jury (*see Ord. XXXVI.*
pressly provide by *Ord. XXXVI.*
hall affect any proceedings under
on Law Procedure Acts relating
f the Common Law Procedure
tions 3 to 17 inclusive of the Act
are repealed by the *Stat. Law*
. The chief statutes relating to
& 10 W. 3, c. 15; 3 & 4 W. 4,
w Proc. Act, 1854, ss. 3—17.

MAY BE REFERRED.

in difference between parties may
ion. A criminal charge, however,
re, an indictment for perjury (*b*),
(*c*), cannot be referred. In one
nch, in delivering their judgment,
ly laid down by *Gibbs*, C. J., in
22: where a party injured has a
indictment, nothing can deter such
nent of the reparation which he is
gh a criminal prosecution may have
also be added, 'with leave of the
ty is taken and the Court suspends
estions between the parties to be
ferent, for then it is only to enable
at sentence and judgment ought to

hs L. T. 539.
P. (*b*) See *R.* v. *Hardey*, 14 Q. B.
s, 529; 19 L. J., Q. B. 196.
35 (*c*) *R.* v. *Blakemore*, 14 Q. B. 544

SECT. III.—THE ORDER OR AGREEMENT TO REFER.

	PAGE
Mode and Form of Submission, &c.	1587
Appointment of Arbitrator when not named in the Submission, &c.	1592
Alteration of Submission	1593
Making Submission a Rule of Court	1594
Effect of Agreement to refer on Right to Sue—Staying Proceedings in Action brought in contravention of	1599
Revocation of Submission, &c.	1602
Costs in Case of abortive Reference	1605

Mode and Form of Submission, &c.]—Where the matter intended to be submitted to arbitration is the subject of an action pending in the High Court of Justice, the action may, by the consent of the parties, be referred, at any time before trial, by Master's order or order of Court. It is usually referred by the former. An action may also, by consent, be referred by an order of the Court (*d*), when it is called on for trial, with or without a verdict being taken, as the parties may think proper. Upon the argument of a motion, the matter of it will sometimes be referred (*e*). CH. CXXXVI.

Where there is a cause in Court.

The solicitor in the action has authority to refer it on the part of his client (*f*). If the client withdraws such authority, and the solicitor nevertheless refers the action, the validity of the reference cannot be disputed upon showing cause against a motion to enforce the award, and it seems that in such a case the client's only remedy is against the solicitor (*g*). But it would seem that a client would not be bound by his solicitor's unauthorized agreement to refer an action in an unusual manner (*h*). Solicitor has power to refer.

If the action is to be referred before trial, a Master's order may be obtained for the purpose. *In order to obtain this order, let the solicitors on both sides sign a consent to an order to refer on the terms agreed on. Take this consent to the clerk at the Central Office or in the Registry, who will draw up the order. Or the solicitor on one side may take out a summons for an order that the action be referred upon the terms agreed upon. To this summons a consent should be given in the usual way, whereupon the officer will draw up the order. Serve the order in the usual way.* The order should direct that all proceedings in the action be stayed (*i*). It seems that a stranger Order of reference, how obtained.

(*d*) See *R.* v. *Hardey*, 14 Q. B. 529; 19 L. J., Q. B. 196, as to the effect of an order of Nisi Prius referring all matters in difference, as well as the cause.

(*e*) See *Brandon* v. *Smith*, 22 L. J., Q. B. 321.

(*f*) *Faviell* v. *The Eastern Counties Co.*, 2 Ex. 344; 17 L. J., Ex. 297, where the submission was held to be valid, though the solicitor for the defendants (a body corporate) had no authority under seal to defend or refer the cause: *Smith* v. *Troup*, 6 D. & L. 679; 18 L. J., C. P. 209: *Filmer* v. *Delber*, 3 Taunt. 486. See Vol. 1, p. 103: *Hancock* v. *Reid*, 21 L. J., Q. B. 78.

(*g*) *Smith* v. *Troup*, 6 D. & L. 679; 18 L. J., C. P. 209: *Faviell* v. *The Eastern Counties R. Co.*, supra. As to counsel's authority, see Vol. 1, p. 103, n. (*l*).

(*h*) See *Iveson* v. *Conington*, 2 D. & R. 307; 1 B. & C. 160.

(*i*) As to the power of the Court to stay proceedings after an agreement to refer, see C. L. P. Act, 1854, s. 11, post, p. 1599.

PART XVIII.

to the action may, with his consent, be made a party to the order of reference (*j*).

Order of Nisi Prius, how obtained.

If the cause be referred at the trial, the leading counsel on each side agree upon the terms of the reference, and indorse their briefs accordingly. They also, in general, agree upon an arbitrator. Counsel frequently indorse their briefs "referred on usual terms." These are well known terms, which are embodied in a printed form of order used by the associates (*k*). The briefs when indorsed are given to the associate, who draws up the order from such indorsements (*l*). *Obtain the order from the associate, and serve a copy of it on the opposite party, and proceed in the reference as directed in the next section.* If a verdict is taken subject to the certificate of an arbitrator, the officer of the Court keeps the record, and enters the verdict when the certificate is given in accordance therewith (*m*).

Form of, &c.

Forms of orders of reference will be found in Chitty's Forms, p. 827 *et seq.* Where a Judge indorsed a summons to refer a cause "By consent of all parties order on the usual terms," it was held that this included a power to the arbitrator to amend as a Judge would have done at the trial (*n*). As to the form of a submission by deed, &c., *see infra*.

Where no action in Court.

If there is no action pending in Court, the submission cannot be by order. In this case, as also where an action is pending, the matters in difference may be referred to arbitration by mutual bonds, by deed, by written agreement, and by parol agreement; in which last-mentioned case, however, the submission cannot be made a rule of Court, even although the parties consent to it (*o*).

By deed or agreement.

With whom to be entered into.

Care should be taken that all necessary parties join in the submission, in order that the award may be an effectual and binding one. The submission, if by deed, should be executed by the parties themselves, and not by their solicitors or agents, unless by virtue of a power of attorney (*p*). One of two or more partners cannot bind the others by a submission to arbitration of matters arising out of the business of the firm, without an express authority for that purpose (*q*). But the parties to the submission will in general be bound by the award (*r*). A submission by a bankrupt

(*j*) See *Williams* v. *Lewis*, 7 El. & B. 929.

(*k*) See *Thompsett* v. *Bowyer*, 9 C. B., N. S. 284; 30 L. J., C. P. 1. As to what are "usual terms as to costs," see *Morel* v. *Byrne*, 28 L. T. 627.

(*l*) See form of order, Chit. Forms, p. 828. See *Williams* v. *Lewis*, 7 El. & Bl. 929, where a person not a party to the action became a party to the order of Nisi Prius, and it was held he was bound by it.

(*m*) See *Kenrick* v. *Phillips*, 7 M. & W. 515, per *Alderson*, B.

(*n*) *Thompsett* v. *Bowyer*, 9 C. B., N. S. 284; 30 L. J., C. P. 1: *Vanderhyl* v. *McKenna*, L. R., 3 C. P. 141.

(*o*) *Ansell* v. *Evans*, 7 T. R. *Godfrey* v. *Wade*, 6 Moore, 488.

(*p*) *Bacon* v. *Dubarry*, 1 Ld. Ra 246; 1 Salk. 70.

(*q*) *Stead* v. *Salt*, 10 Moore, 3 Bing. 101: *Boyd* v. *Emerson*, & E. 184: *Adams* v. *Bankart*, M. & R. 681; 1 Gale, 48. *Burnell* v. *Minot*, 4 Moore, *Robertson* v. *Hatton*, 26 L. J. 293: *Hatton* v. *Royle*, 3 H. & N 27 L. J., Ex. 486. They w bound by acquiescence: *Tho Atherton*, 10 Ch. D. 185; 48 Ch. 370.

(*r*) *Strangford* v. *Green*, 228.

binding upon him (*s*). Married women could not before the Married Women's Property Act, 1882, in general enter into a submission (*t*).

Form of submission.

The submission should distinctly specify the matter of controversy submitted. In case of a general reference, the phrase "of all matters in difference between the parties" may be used, or, if an action only is referred, the phrase "of all matters in difference in the action" (*u*). It seems, that a stipulation may be inserted to the effect, that the death of either party shall not operate as a revocation of the submission (*x*). It is usual to insert a clause enabling the arbitrator to enlarge the time for making his award (*z*). Where an action is referred, it is usual to give the arbitrator the powers of certifying and amending which a Judge at the trial has (*a*). It is the practice to insert a clause in the submission empowering the Court or a Judge, in the case of any dispute relative to the validity of the award, or of a motion to set it aside, to remit the matters referred to the reconsideration and determination of the arbitrator (*b*). Such a clause should be to remit the matters, or any or either of them (*b*). It is usual and advisable to insert a clause that the submission may be made a rule of Court (*c*). It seems questionable whether a provision that unstamped documents shall be admitted in evidence is not illegal (*d*).

Construction of.

If an action only is referred, the arbitrator cannot decide upon other matters in difference between the parties (*e*). Where an action is referred, it seems the arbitrator cannot direct a verdict or judgment to be entered, unless a power has been given for that purpose (*f*). An authority to the arbitrator to enter a verdict does

Where a cause referred.

Authority to enter verdict, &c.

(*s*) *Re Milnes*, 15 C. B. 451; 24 L. J., C. P. 29; see post, p. 1605. As to trustees of a bankrupt referring matters relating to the bankrupt's estate, see ante, p. 1165. See *Sutcliffe* v. *Brooke*, 14 M. & W. 855: *Proudfoot* v. *Boyle*, 15 M. & W. 198.

(*t*) See *Strachan* v. *Dougall*, 7 E. Moore, 365: *Re Warner*, 2 D. & L. 148; see ante, Ch. CI.

(*u*) See *Charleton* v. *Spencer*, 3 Q. B. 693, where an agreement was construed to extend to a reference of all matters in dispute between the parties, notwithstanding a recital as to a particular difference. And see *Benson* v. *Heathorn*, 1 Y. & C. C. 326: *Re Warner and Others*, 2 D. & L. 148. "All matters in dispute between the parties in the cause" extends to all matters in difference: *Malcolm* v. *Fullarton*, 2 T. R. 644; 2 Lund. 64 (7): *Smith* v. *Muller*, 3 T. R. 626.

(*x*) See post, p. 1604.

(*z*) See *Kirk* v. *Unwin*, 20 L. J., Ex. 345, where the words "shall appoint" were left out by mistake from such a clause, and the Court held the omission immaterial. As to enlarging the time, see post, p. 1611.

(*a*) See post, p. 1608.

(*b*) See *Nickalls* v. *Warren*, 6 Q. B. 615; 2 D. & L. 549; 14 L. J., Q. B. 75. See section 8 of the C. L. P. Act, 1854.

(*c*) See C. L. P. Act, 1851, s. 17: *Smith* v. *Whitmore*, 33 L. J., Ch. 218, 713, post, p. 1594.

(*d*) *Phillips* v. *Higgins*, 20 L. J., Q. B. 357.

(*e*) *Atkinson* v. *Jones*, 1 D. & L. 225.

(*f*) *Cock* v. *Gent*, 13 M. & W. 364; 14 M. & W. 680; 15 L. J., Ex. 33: *Hawkyard* v. *Stocks*, 2 D. & L. 936: *Law* v. *Blackburrow*, 23 L. J., C. P. 28: *Hutchinson* v. *Blackwell*, 1 M. & Sc. 513; 8 Bing. 331; 1 Dowl. 267: *Jackson* v. *Clark*, 1 M'Clel. & Y. 200: *Donlan* v. *Brett*, 4 N. & M. 854: *Hayward* v. *Phillips*, 1 N. & P. 288; 6 A. & E. 119: *Doe* d. *Body* v. *Cox*, 15 L. J., Q. B. 317; 4 D. & L. 75, where the Court held that the arbitrator had no authority to direct judgment to be entered up. By a judge's order, after issue joined, an action was referred to a lay arbitrator, who, by his award, ordered "that there should be a verdict for the plaintiff for 7*l.* 9*s.* 11*d.*:" – Held, that although there was no power to enter a verdict, the award was good,

---

, Consent.

, be made a party to the order

al, the leading counsel on each
ference, and indorse their briefs
ral, agree upon an arbitrator.
iefs "referred on usual terms,"
are embodied in a printed form
k). The briefs when indorsed
draws up the order from such
from the associate, and serve a
and proceed in the reference as
verdict is taken subject to the
cer of the Court keeps the record,
certificate is given in accordance

will be found in Chitty's Forms,
dorsed a summons to refer a cause
on the usual terms," it was held
o arbitrator to amend as a Judge
As to the form of a submission

in Court, the submission cannot
also where an action is pending,
e referred to arbitration by mutual
ement, and by parol agreement; in
owever, the submission cannot be
hough the parties consent to it (*o*).
all necessary parties join in the
award may be an effectual and
if by deed, should be executed by
by their solicitors or agents, unless
ey (*p*). One of two or more partners
submission to arbitration of matters
the firm, without an express autho-
the parties to the submission will in
d (*r*). A submission by a bankrupt is

(*o*) *Ansell* v. *Evans*, 7 T. R. 1
Godfrey v. *Wade*, 6 Moore, 488.

(*p*) *Bacon* v. *Dubarry*, 1 Ld. Raym
246; 1 Salk. 70.

(*q*) *Stead* v. *Salt*, 10 Moore, 38
3 Bing. 101: *Boyd* v. *Emerson*, 2
& E. 184: *Adams* v. *Bankart*, 1
M. & R. 681; 1 Gale, 48.
Burnell v. *Minot*, 4 Moore,
Robertson v. *Hatton*, 26 L. J.,
293: *Hatton* v. *Royle*, 3 H. & N.
27 L. J., Ex. 486. They will
bound by acquiescence: *Thom*
Atherton, 10 Ch. D. 185; 48 L
Ch. 370.

(*r*) *Strangford* v. *Green*, 2
228.

not authorize him to order a stet processus (*g*). And before the Judicature Acts it was held that an arbitrator, to whom a cause was referred, without an express reservation of authority for that purpose, has no power to order the judgment to be arrested, or judgment non obstante veredicto to be entered: and this is so though all matters in difference are referred (*h*). As to the power of an arbitrator to state a special case, *see C. L. P. Act*, 1854, *s.* 5 *post*, p. 1634.

Submission between several parties.

Where all differences between A. on the one side, and B. and C. on the other, are referred, the arbitrator may award as to differences which A. has with B. or C. severally, as well as those which he has with them jointly (*i*). Where two persons bound themselves jointly and severally to perform an award and the arbitrator awarded a sum to be paid by each, the Court held that both were jointly liable for each of the sums awarded (*k*).

Partnership differences.

Where upon a submission of all matters in difference, by partners, the arbitrator awarded that the partnership should be dissolved, the award was held good (*l*). An arbitrator who has authority to decide on what terms a partnership agreement should be cancelled, directed, amongst other things, that one of the partners should have all the debts due to the firm, and should, if necessary, sue for them in the name of his late partner: it was held, that in authorizing one of the parties to sue in the name of the other, the arbitrator had not exceeded his authority (*m*).

Power to arbitrator to say what is to be done.

Where the arbitrator is "to determine what he shall think fit to be done by either of the parties," he is not bound to direct affirmatively that something shall be done, unless he shall so think fit (*n*).

Accruing debt.

Where an arbitrator awarded payment of a debt which did not accrue until after the parties had entered into the submission, the Court set aside the award (*o*); they, however, will not presume that

---

and an action maintainable upon it, for the award must be read as an expression of the arbitrator's opinion that the plaintiff was entitled to the sum mentioned, and not as an award that a verdict should be entered for that sum: *Everest* v. *Ritchie*, 31 L. J., Ex. 350.

(*g*) *Hunt* v. *Hunt*, 5 Dowl. 442: *Ward* v. *Hall*, 9 Dowl. 610.

(*h*) *Toby* v. *Lovibond*, 5 C. B. 770; 17 L. J., C. P. 201: *Britt* v. *Pashley*, 1 Ex. 64; 5 D. & L. 97: *Linegar* v. *Pearse*, 23 L. J., Ex. 25.

(*i*) *Adcock* v. *Wood*, 20 L. J., Ex. 435: *S. C.* in error, 7 Ex. 468; 21 L. J., Ex. 204. See *Rees* v. *Waters*, 16 M. & W. 263.

(*k*) *Mansell* v. *Burridge*, 7 T. R. 352. See Barnes, 55.

(*l*) *Green* v. *Waring*, 1 W. Bl. 475. See *Simmonds* v. *Swaine*, 1 Taunt. 549.

(*m*) *Burton* (or *Burt*) v. *Wigmore*, (or *Wigley*), 1 Bing. N. C. 665; 1 Hodges, 81; 1 Se. 610: *Round* v. *Hatton*, 10 M. & W. 660; 2 Do N. S. 446.

(*n*) *Angus* v. *Redford*, 11 M. & 69: *Greenfill* v. *Edgcomb*, 7 Q. B. *Nickolls* v. *Jones*, 20 L. J., Ex. 2

(*o*) *Banfil* v. *Leigh*, 8 T. R. *Re Morphett*, 2 D. & L. 967. *Brown* v. *Watson*, 8 Se. 386; 8 D 22, where it was held that the trators had rightly taken into consideration a demand which accruing at the time of the mission; but this was by reas the particular terms of the rence: *Wynne* v. *Wynne*, 3 Se. 435; 4 M. & G. 253, where an of replevin brought in respec distress for an annuity was ref and by reason of the particular of the reference, it was held th arbitrator had not exceeded h thority in dealing with the arr the annuity accruing after the of action arose. And see *Re & Croydon Canal Co.*, 9 A & E 1 P. & D. 391.

fact; it must be proved (*p*). So, if a party bring an action for the arrears of an annuity, a reference of the cause, and even of all matters in difference, will not give the arbitrator power to award to the plaintiff the value of the annuity (*q*). But if the submission give the arbitrator power to order and determine what he shall think fit to be done by the parties respecting the matters in dispute, and one matter in dispute before the arbitrator is, that the defendant has not given security for the annuity, as he has agreed to do, the arbitrator may award the defendant to pay to the plaintiff the value of the annuity (*r*). Where a set-off was pleaded, and by a judge's order all matters in difference, including the *claim* of defendant in his set-off in the said action, were referred, it was held that the arbitrator had properly taken the set-off into consideration as a matter in difference, though not payable until after the date of the action and judge's order (*s*). If, by the submission, the arbitrator has to determine the boundaries of certain lands, he cannot enter into the question of title and decide upon it (*t*). Where the sufficiency of a title is referred, the arbitrator exceeds his authority by awarding a conveyance with a bond of indemnity (*u*). On a reference as to rent, the arbitrator cannot award a power of distress unless expressly authorized (*x*). Where the question submitted was whether A. or B. had the right to the tithes of certain lands, an award of an undivided moiety to each was held good (*y*). Where there was an agreement for a lease of a coal mine for sixty-three years, from the 1st of May, 1801, the lessee to be allowed three years from that time for winning the colliery, without payment of rent; and an arbitrator, being authorized to give such directions for a lease, according to the terms of the agreement, as he should think fit, directed a lease for sixty-three years, from the 1st of May, 1804; it was held, that he had exceeded his authority and that the award was consequently bad (*z*). See *Baxter* v. *Hozier* (*a*) as to an arbitrator's power, where an action of account is referred.

Question of title.

Power of distress.

Moiety to each.

Directions as to lease.

Action of account.

A submission to arbitration by an executor or administrator is not of itself an admission of assets (*b*), but it impliedly includes in it a submission of the question whether the executor has assets; and if the arbitrator award that he shall pay a sum of money, this is virtually an award that he has assets to that amount, and he must pay it (*c*).

Submission by an executor.

Where, by the terms of the submission, the costs of the cause, &c., were to abide the event, and the arbitrator had found that the plaintiff was entitled to recover a less sum than 20*l.*, it was held,

Stamp on agreement of reference.

(*p*) Ibid.

(*q*) *Taylor* v. *Shuttleworth*, 2 Sc. N. R. 374; 8 Dowl. 281, per *Tindal*, J.

(*r*) *Taylor* v. *Shuttleworth*, supra.

(*s*) *Petch* v. *Fountain*, 5 Bing. N. C. 442; 7 Sc. 441: nom. *Petch* v. *Allan*, 7 Dowl. 426.

(*t*) See *Doe* d. *Lord Carlisle* v. *Cliff of Morpeth*, 3 Taunt. 378. *Price* v. *Popkin*, 2 P. & D. 304: *Holm* v. *Fullarton*, 2 T. R. 615: *Western Counties R. Co.* v. *Robertson*, 2 M. & G. 498; 6 Sc. N. R. 802.

(*u*) *Ross* v. *Boards*, 3 N. & P. 382. But see post, p. 1625, and cases there cited, as to where an arbitrator may award a bond to be given.

(*x*) *Pascoe* v. *Pascoe*, 3 Bing. N. C. 898.

(*y*) *Prosser* v. *Goringe*, 3 Taunt. 426.

(*z*) *Bonner* v. *Liddell*, 1 B. & B. 80.

(*a*) 7 Sc. 250.

(*b*) *Pearson* v. *Henry*, 5 T. R. 6.

(*c*) *Worthington* v. *Barlow*, 7 T. R. 453: *Barry* v. *Rush*, 1 Id. 691.

PART XVIII.

that the submission might be made a rule of Court without being stamped (*d*). Where several underwriters on a policy agreed to refer the demand of the assured, it was held, that, as they had a community of interest in the subject of the insurance, and were all underwriters on the same policy, one stamp for the submission and one stamp for the award were sufficient (*e*). So, if there are two memoranda relative to a reference constituting only one agreement, one stamp is sufficient (*f*). Documents made under the *Com. Law Proc. Act*, 1854, do not require stamps (*see Com. Law Proc. Act*, 1854, *s.* 30).

Appointment of arbitrator when not named in the submission, &c.

Appointment of Arbitrator when not named in the Submission, &c. —By the *Com. Law Proc. Act*, 1854, *s.* 12, "If in any case of arbitration the document authorizing the reference provide (*g*) that the reference shall be to a single arbitrator, and all the parties do not after differences have arisen, concur in the appointment of an arbitrator; or if any appointed arbitrator refuse (*h*) to act, or become incapable of acting, or die, and the terms of such document do not show that it was intended that such vacancy should not be supplied, and the parties do not concur in appointing a new one; or if, where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator, such parties or arbitrators do not appoint an umpire or third arbitrator (*i*); or if any appointed umpire or third arbitrator refuse to act, or become incapable of acting, or die, and the terms of the document authorizing the reference do not show that it was intended that such a vacancy should not be supplied, and the parties or arbitrators respectively do not appoint a new one; then in every such instance any party may serve the remaining parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator respectively; and if, within seven clear days after such notice shall have been served, no arbitrator, umpire, or third

(*d*) *Lloyd* v. *Mansell*, 1 L. M. & P. 130; 19 L. J., Q. B. 192, B. C. When this case was decided, an agreement, where the matter thereof was of the value of 20*l.* or upwards, with certain exceptions, required a stamp. And now an agreement, where the matter thereof shall be of the value of 5*l.* or upwards, with certain exceptions, requires a stamp. See 33 & 34 V. c. 97, sched.

(*e*) *Goodson* v. *Forbes*, 6 Taunt. 171; 1 Marsh. 525.

(*f*) *Taylor* v. *Parry*, 1 M. & G. 604; 1 Sc. N. R. 576.

(*g*) See *Re Brazilian, &c. Co.*, and *Western, &c. Co.*, 42 L. T. 234, where the agreement provided for a reference to an arbitrator to be appointed by the Board of Trade, who refused to appoint one.

(*h*) See *Woolley* v. *Clark*, 2 D. & R. 158; 1 B. & C. 63; *Kirkus* v. *Hodgson*, 8 Taunt. 733; 3 Moore, 64: *Porch* v. *Hopkins*, 1 D. & L. 881: *Harper* v. *Abrahams*, 4 Moore, *Hall* v. *Rouse*, 4 M. & W. 24 Dowl. 656, cases decided before above Act.

(*i*) *In re Evans*, 22 L. T. 507; W. R. 723. Arbitrators were nam in a contract, to determine the va of a brewery premises and the pl &c. Before entering upon the val tion they were to appoint an ump whose authority was to be limite the matters in difference betwee arbitrators. The arbitrators c not agree in the appointment o umpire:—Held, by the Master of Rolls, that this was not an arbi tion within the meaning of this and that the Court had no auth to appoint an umpire: *Collin Collins*, 26 Beav. 306; 28 L. J., 184: *Bos* v. *Helsham*, L. R., 2 72; 36 L. J., Ex. 20: cp. per *Wood*, *Vickers* v. *Vickers*, L. Eq. at p. 536: *Re Hopper*, L. Q. B. 367.

arbitrator be appointed, it shall be lawful for any Judge of any of the superior Courts of law or equity at Westminster, upon summons to be taken out by the party having served such notice as aforesaid, to appoint an arbitrator, umpire, or third arbitrator, as the case may be, and such arbitrator, umpire, and third arbitrator respectively shall have the like power to act in the reference, and make an award as if he had been appointed by consent of all parties."

When reference is to two arbitrators, and one party fails to appoint, other party may appoint arbitrator to act alone.

By the *Com. Law Proc. Act*, 1854, *s.* 13, "When the reference is or is intended to be to two arbitrators (*j*), one appointed by each party, it shall be lawful for either party, in the case of the death, refusal to act, or incapacity of any arbitrator appointed by him, to substitute a new arbitrator, unless the document authorizing the reference show that it was intended that the vacancy should not be supplied; and if on such a reference one party fail to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party shall have appointed an arbitrator, and shall have served the party so failing to appoint with notice in writing to make the appointment, the party who has appointed an arbitrator may appoint such arbitrator to act as sole arbitrator in the reference, and an award made by him shall be binding on both parties as if the appointment had been by consent; provided, however, that the Court or a Judge may revoke such appointment, on such terms as shall seem just."

Meaning of refusal to *nominate* a referee.

Where, by the terms of an agreement, the defendant agreed to purchase certain crops of the plaintiff, the price to be paid on the 5th of June, the valuation to be made by the 3rd of June by two persons, one named by each person by the 31st of May; and in case either party neglected or refused to nominate a referee within the time appointed, the referee of the other party alone to make a final decision: held, that the word "*nominate*" meant not only the choice of a referee, but the communication of the appointment to the other party; and that an appointment by the plaintiff of a referee on the 31st of May, and communication of that appointment to the defendant by letter, which reached him on the 1st of June, did not entitle the plaintiff to proceed ex parte within the meaning of the agreement (*k*).

Umpire.

As to the appointment of an umpire, *see post*, p. 1615.

Alteration of submission.

Alteration of Submission.]—An order of reference made by consent cannot except by consent be amended, except where fraud has been practised, or by some mistake or accident the order is not in accordance with the intention of the parties, or a mistake has been made by the officer of the Court in drawing it up (*l*).

After a submission by deed, a new arbitrator may be substituted in the place of one of the original arbitrators, by consent of both

(*j*) This section does not apply to case when the reference is to three arbitrators, one to be appointed by each party, and the third to be appointed by the two so appointed: *Emma* v. *Hallett*, L. R., 14 Eq. 555; 41 L. J., Ch. 514.

(*k*) *Tew* v. *Harris*, 11 Q. B. 7; 17 L. J., Q. B. 1.

(*l*) *Vanderbyl* v. *M'Kenna*, L. R., 3 C. P. 252. See *Wynn* v. *Nicholson*, 7 C. B. 819; 18 L. J., C. P. 231: *Rawtree* v. *King*, 5 Moore, 167: *Thompset* v. *Bowyer*, 9 C. B., N. S. 284; 30 L. J., C. P. I.

PART XVIII.

parties, without deed; and such appointment constitutes a new submission, not under seal, incorporating all the remaining provisions of the former submission (*m*). The remedy by action on the deed of submission would, however, be lost, unless the substitution were also by deed (*n*). A recognizance to perform the award of B. is not forfeited by non-performance of the award of C., who by consent of the parties is substituted for B. by rule of Court (*o*). The remedy in such cases is by action on the award (*p*), or by execution. As to appointing an arbitrator under the *Com. Law Proc. Act*, 1854, where the arbitrator mentioned in the submission refuses to act, or dies, &c., *see ante*, p. 1592.

An arbitrator cannot alter the terms of the submission (*q*).

If the order of reference is improperly obtained, an application should be made to the Court within a reasonable time to set it aside (*r*).

Making submission a rule of Court.

Making Submission a Rule of Court.]—By the *Com. Law Proc. Act*, 1854, *s.* 17 (*s*), "Every agreement or submission (*t*) to arbitration by consent, whether by deed or instrument in writing, not under seal, may be made a rule of any one of the superior Courts of law or equity at Westminster, on the application of any par

(*m*) *Re Tunno*, 2 N. & M. 328.

(*n*) *Brown* v. *Goodman*, 3 T. 592.

(*o*) *R.* v. *Bingham*, 3 Y. & J. 101.

(*p*) *Evans* v. *Thomson*, 5 East, 189: *Re Tunno*, 2 N. & M. 328. But see *Reade* v. *Dutton*, 2 M. & W. 69.

(*q*) *In re Morphett, &c.*, 2 D. & L. 967.

(*r*) *Sackett* v. *Owen*, 2 Chit. Rep. 39.

(*s*) The enactment enabling submissions in certain cases to be made rules of Court before the above Act, was the 9 & 10 W. 3, c. 15, s. 1, which enacts, that "it shall and may be lawful for all merchants and traders, and others, desiring to end any controversy, suit, or quarrel, controversies, suits, or quarrels, for which there is no other remedy but by personal action or suit in equity, by arbitration to agree that their submission of their suit to the award or umpirage of any person or persons should be made a rule of any of his Majesty's Courts of record which the parties shall choose, and to insert such their agreement in their submission, or the condition of the bond or promise, whereby they oblige themselves respectively to submit to the award or umpirage of any person or persons: which agreement being so made and inserted in their submission or promise or condition of their respective bonds, shall or may, upon producing an affidavit thereof made by the witnesses thereunto, or any one of them, in the Court of which the same is agreed to be made a rule, and reading and filing the said affidavit in Court, and entered of record in such Court, a rule shall thereupon be made by the said Court, that the parties shall submit to, and finally be conclud by, the arbitration or umpirage which shall be made concern them by the arbitrators or umpi pursuant to such submission; and case of disobedience to such arbit tion or umpirage, the party negl ing or refusing to perform and e cute the same, or any part ther shall be subject to all the penal of contemning a rule of Court w he is a suitor or defendant in Court, and the Court on motion issue process accordingly; w process shall not be stopped layed in its execution by order, rule, command, or proce any other Court, either of la equity, unless it shall be made pear on oath to such Court, tha arbitrators or umpire misbeh themselves, and that such a arbitration, or umpirage was cured by corruption or other means."

(*t*) The agreement or submi and not the award, should be a rule of Court, even in the Cha Division: *Jones* v. *Jones*, 14 C 593 (C. A.).

thereto, unless such agreement or submission contain words purporting that the parties intend that it should not be made a rule of Court (*u*), and if in any such agreement or submission it is provided that the same shall or may be made a rule of one in particular of such superior Courts, it may be made a rule of that Court only (*x*); and if, when there is no such provision, a case be stated in the award for the opinion of one of the superior Courts, and such Court be specified in the award, and the document authorizing the reference have not, before the publication of the award to the parties, been made a rule of Court, such document may be made a rule only of the Court specified in the award, and when in any case the document authorizing the reference is or has been made a rule or order of any one of such superior Courts, no other of such Courts shall have any jurisdiction to entertain any motion respecting the arbitration or award."

Cases within the statute.

A covenant by indenture, that any differences which may thereafter arise between the parties touching certain matters shall be and they are thereby referred to an arbitrator named, constitutes a submission, which may be acted upon and made a rule of Court, under this section, when such differences arise (*y*). Where two persons agree by deed to refer all matters in dispute which shall arise between them to two arbitrators, one to be chosen by each for that purpose; and on such disputes arising, in pursuance of such agreement the arbitrators are appointed by parol; the submission to arbitration is a parol submission, and therefore cannot be made a rule of Court under the above section (*z*). An order of reference of an inferior Court of record, made by consent of the parties, may, as an agreement of reference between the parties, be made a rule of Court (*a*). As to whether a submission under the Lands Clauses Consolidation Act, 1845, is within the section, see *In re Harper*, L. R., 20 Eq. 39: *Rhodes* v. *Airedale Drainage Commissioners*, 1 C. P. D. 402: *Bidder* v. *N. Staffordshire Rail. Co.*, 4 Q. B. D. 412. The submission may be made a rule of Court, though the proceedings under it are void (*b*).

Cases not within it.

A parol submission cannot be made a rule of Court under the statute, even by consent (*c*). The statute only refers to civil disputes (*d*). A contract between parties, that one shall purchase, and the other convey, land at a price to be named by third persons, it would seem is not within the statute (*e*).

Order of reference.

An order of Nisi Prius referring a cause to arbitration, may be

(*u*) *Re Drury and Lyne*, 38 L. J., Q. 278: *Wadsworth* v. *Smith*, L. R., 3 Q. B. 332; 40 L. J., Q. B. 118.
(*x*) *Re Fitzwilliam* (*Lord*), 4 L. T., N. S. 508.
(*y*) *Parkes* v. *Smith*, 15 Q. B. 297.
(*z*) *Ex p. Glaysher*, 3 H. & C. 442; 34 L. J., Ex. 41. See *Newton* v. *Cherington*, 19 C. B., N. S. 342, where the appointment was in writing and was made a rule of Court: *Re Teor*, L. R., 1 C. P. 672.
(*a*) *Harlow* v. *Winstanley*, 15 Jur. 1 *Wightman*, J.
(*b*) *Anon.*, 10 Jur. 525, B. C.
(*c*) *Ansell* v. *Evans*, 7 T. R. 1: *Godfrey* v. *Wade*, 6 Moore, 488.
(*d*) *Watson* v. *M'Cullum*, 8 T. R. 520. See *R.* v. *Cotesbatch*, 2 D. & R. 265: *R.* v. *Bardell*, 1 N. & P. 74; 5 A. & E. 619; but see *Baker* v. *Townsend*, 7 Taunt. 422; 1 Moore, 120, 287.
(*e*) See *Parkes* v. *Smith*, 15 Q. B. 309, per *Campbell*, C. J.: *Re Hopper*, 36 L. J., Q. B. 97: *Wadsworth* v. *Smith*, supra.

made a rule of Court (*f*). A Judge's order referring a cause may be so. But this is only necessary when the order itself provides that it shall be made a rule of Court. In other cases the order has the same effect as a rule of Court, and need not be made one (*g*).

Rule no evidence of agreement.

If one party make an agreement of reference a rule of Court under the above Act, such rule is no evidence of the agreement as against the other party, but a Judge's order for referring a cause may be proved by the rule, if there be one, making the order a rule of Court (*h*).

Making enlargements rule of Court.

If the time for making the award has been enlarged, and the award has been made within such enlarged time, it is necessary to make the enlargement or all the enlargements, if more than one, a rule of Court before moving to enforce the award, though this is not necessary before moving to set it aside (*i*). The submission and enlargements are made a rule of Court by one motion (*k*).

At what time submission should be made a rule of Court.

It is not usual to make the submission a rule of Court until it necessary to do so for the purpose of giving the Court jurisdiction to enforce the award or set it aside, or the like (*l*). The Court has no jurisdiction, even by consent, to set aside or enforce an award until the submission has been made a rule of Court (*m*). The submission may be made a rule of Court after the last day of the term following the publication of the award (*n*). Before the passing of the 3 & 4 W. 4, c. 42, s. 39, it was held, that an agreement of reference could not be made a rule of Court after it had been revoked by one of the parties to it (*o*), but that a Judge's order might, with a view to costs (*p*). But, as noticed *post*, p. 1602, the submission cannot now, except in certain cases, be revoked.

Of what Court.

If the submission does not state of what Division of the High Court it is to be made a rule, it may be made a rule of either of the Divisions of such Court. But if by the submission it is provided that it shall be made a rule of one in particular of such Divisions, then the submission must be made a rule of such Division (*q*). Where there is no such provision, and a case is stated in an award for the opinion of one of the Divisions of the High Court, and such Division is specified in the award, and the submission

(*f*) *Millington* v. *Claridge*, 3 C. B. 609; *Harrison* v. *Smith*, 1 D. & L. 876.

(*g*) *Jones* v. *Wedgewood*, 19 Ch. D. 56; 51 L. J., Ch. 206; 30 W. R. 228; *Burrowes* v. *Forrest*, W. N. 1881, 120.

(*h*) *Berney* v. *Read*, 7 Q. B. 7[illegible]

(*i*) *Gripe* v. *Wilkie*, 20 W. R. [illegible] C. P.; *Re Welsh*, 1 Dowl., N. S. 3[illegible] But before the latter case [illegible]ctice was otherwise. See *Jones* [illegible]th v. *Blake*, 8 Dowl. 130.

(*k*) *Re Smith* v. *Blake*, 8 Dowl. 132.

(*l*) As to the costs of making a submission a rule of Court when unnecessarily so made, see *Carter* v. *Burial Board of Tonge*, 5 H. & N. 523; 29 L. J., Ex. 293. A [illegible] when the order is not required for any present purpose, may be dismissed with costs: *In re Davey* [illegible] *the Railway Passengers' Assur[illegible] Co.*, 49 L. J., Ch. 568 (C. A.): S[illegible] cor. V.-C. H., Id. 236.

(*m*) *Owen* v. *Hurd*, 2 T. R. [illegible] *Re Ross*, 4 D. & L. 648, where submission was made a rule of C[illegible] after the rule nisi for setting the award was obtained and Court refused to antedate the f[illegible] rule.

(*n*) *Heming* v. *Swinnerton*, 5 [illegible] 350.

(*o*) *King* v. *Joseph*, 5 Taunt. [illegible]

(*p*) *Aston* v. *George*, 2 B. & [illegible] 395. See *Gloster* v. *Honan*, 1 [illegible] Rep. Irish Ex. 269.

(*q*) See C. L. P. Act, 1854, [illegible] ante, p. 1594; cp. *In re L[illegible] Arbitration*, 42 L. T. 391; 28 [illegible] 485, M. R.

has not, before the publication of the award, been made a rule of Court, then the submission can only be made a rule of the Division specified in the award (*q*). The Act only authorizes making the submission a rule of one Court (*r*). Where an action in the Court of Exchequer had been referred by a Judge's order, and it was part of such order that it be made a rule of the Queen's Bench, there was no objection to its being so made (*s*).

Motion to Court must be made on the original submission.

The motion must be made on the original submission. Where the original has been lost, the Court will, upon a verified copy thereof, make it a rule of Court (*t*). If the original be in the possession of the other party, the Court will make an order calling upon him to produce it (*u*). Where a submission was by order of Nisi Prius, and the defendant, in whose favour the award was made, had possession of the order, and, although requested by the plaintiff, delayed making it a rule of Court till it was too late to move within the time ordinarily limited for setting aside an award: the Court ordered the defendant either to make the order of reference a rule of Court, or to file it with one of the Masters, so as to enable the plaintiff to make it a rule of Court, and allowed the plaintiff to move to set the award aside in a subsequent term (*x*). In one case, where the opposite party had possession of the agreement of reference, and would not produce it for the purpose of its being made a rule of Court, though the agreement provided that this should be done, the Court allowed a copy of the submission to be made a rule of Court, for the purpose of enabling a motion to be made to set aside the award (*y*). A., one of the parties to an award, had reason to believe that B., the opposite party, in whose hands the original deed of submission was, was going to make it a rule of Court, and B., in point of fact, intended to do so, and was prevented by accident only; on the last day but one of the term next after the making of the award, A. obtained a rule nisi to set aside the award, and also a rule nisi for B. to file the submission with the Master, in order to its being made a rule of Court as of the day on which the motion to set aside the award was made, and that the rule to set aside the award should be drawn up on reading such rule, and the Court, in the following term, made the rule absolute (*z*). If through the misconduct of the arbitrators the order

(*q*) See note (*q*), ante.

(*r*) See the Act, ante, p. 1594: *Impenny* v. *Bates*, 2 C. & J. 379; 2 r. 466.

(*s*) *Milstead* v. *Cranfield*, 9 Dowl. .

(*t*) *Short* v. *Frank*, 3 Jur. 341, C. See *Robinson* v. *Davis*, 1 Str. : *Parker* v. *Bach*, 17 C. B. 512, ere an order of reference, with appointment of an umpire, and enlargements of the time for king the award indorsed thereon, ing been accidentally destroyed, Court (on payment of costs) wed a duplicate of the order, ther with copies of the indorse- ts on the original, verified by affidavit to the best of the deponent's knowledge and belief, to be made a rule of Court. *Hill* v. *Townsend*, 3 Taunt. 45.

(*u*) *Lord Boston* v. *Mesham*, 8 Dowl. 867. See *Re Smith* v. *Blake*, 8 Dowl. 132. In general this application should be made at Chambers: *Gething* v. *Fotheringham*, 13 W. R. 96.

(*x*) *Bottomley* v. *Buckley*, 4 D. & L. 157, B. C.

(*y*) *Re Plews*, 6 Q. B. 848, n. See *Re Perring*, 3 Dowl. 98: *Bligh* v. *Cotton*, 12 W. R. 102, Q. B.

(*z*) *Midland R. Co.* v. *Heming*, 4 D. & L. 788, B. C.

missed with costs: *In re Davey and the Railway Passengers' Assurance Co.*, 49 L. J., Ch. 568 (C. A.): *S. C.*, cor. V.-C. H., Id. 236.

(*m*) *Owen* v. *Hurd*, 2 T. R. 643: *Re Ross*, 4 D. & L. 648, where the submission was made a rule of Court after the rule nisi for setting aside the award was obtained and the Court refused to antedate the form of rule.

(*n*) *Heming* v. *Swinnerton*, 5 H. & N. 350.

(*o*) *King* v. *Joseph*, 5 Taunt. 4.

(*p*) *Aston* v. *George*, 2 B. & A. 395. See *Gloster* v. *Honan*, 1 Jo. & Rep. Irish Ex. 269.

(*q*) See C. L. P. Act, 1854, s. ante, p. 1594: cp. *In re Lon Arbitration*, 42 L. T. 391; 28 W. 485, M. R.

PART XVIII.

of reference cannot be obtained, the Court will allow a duplicate to be made a rule of Court (*a*).

And enlargements.

The motion should also be made on the original enlargements. Where two parts of a deed of submission to arbitration were executed, and the arbitrator indorsed the enlargements on one part, the Court compelled the party in whose possession that part was to make it a rule of Court, the party making the application paying the expense of so doing (*b*).

Submission must be duly stamped.

The submission should be properly stamped before the motion is made, otherwise the Master may refuse to draw up the rule (*c*).

Affidavit in support of motion.

In support of the motion to make the submission a rule of Court, an affidavit must be made of the due execution of the instrument of submission (*d*). Also, when it is necessary to make any enlargements of the time for the making of the award a part of the rule of Court, there should be an affidavit that the enlargements have been duly made (*e*). If a cause has been referred by a Judge's order, no affidavit is necessary, unless, indeed, it is necessary to make any enlargement of the time for making the award a part of the rule of Court, in which case there must be an affidavit of the due enlargement. Since the *C. L. P. Act*, 1854, *s.* 26, where there is an attesting witness, the affidavit need not be made by him (*f*). As to the title of it, *see ante*, *Vol.* 1, p. 456. The affidavit should be intituled in the cause if there is one in Court (*g*).

How rule obtained.

Obtain counsel's signature to a motion paper indorsed to make the submission a rule of Court. Take the motion paper with the above affidavit and documents to the proper office, and the rule will be drawn up. The motion is a motion of course, and absolute in the first instance (*h*).

Filing the submission.

By *Ord. LXI. r.* 15 (*ante*, p. 1446) no order to make a submission to arbitration or an award an order of Court shall be passed until the original submission to arbitration or award shall have been filed in the Central Office. By *Ord. LXI. r.* 31, *ante*, p. 1446, all submissions to arbitration made orders of Court shall be transmitted to and left at the Central Office to be there filed and preserved, and office copies are to be ready forty-eight hours after they are bespoken.

Office copies.

(*a*) *Thomas* v. *Philby*, 2 Dowl. 145.

(*b*) *Re Smith* v. *Blake*, 8 Dowl. 132. See *Phillips* v. *Higgins*, 2 L. M. & P. 96, B. C., where the enlargement had been lost.

(*c*) See *Lloyd* v. *Mansell*, 1 L. M. & P. 130; 19 L. J., Q. B. 192, B. C. See ante, p. 1592.

(*d*) See form, Chit. Forms, p. 850. See *Newton* v. *Hetherington*, 19 C. B., N. S. 342. Upon a submission between two individuals and a third person, when the agreement of reference is signed by one of them thus, "A., for self and B.," on making the submission a rule of Court it must be shown by affidavit that A. had authority from B. to sign for him: *Re Aldington and Hancox*, 15 C. B., N. S. 375.

(*e*) *Dickins* v. *Jarvis*, 5 B. & C. 528. See *Roberts* v. *Evans*, 34 L. J. Q. B. 73, per *Cockburn*, C. J.

(*f*) By this sect., "It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite; and such instrument may be proved by admission, or otherwise, as if there had been no attesting witness thereto." See *Newton* v. *Hetherington*, 19 C. B., N. S. 342.

(*g*) *Doe* v. *Stilwell*, 6 Dowl. 30.

(*h*) *Re Taylor*, 5 B. & A. 217. *In re Oglesby's Arbitration*, W. 1879, 151: *In re An Arbitra between Davey and the Railway Passengers' Assurance Co.*, 49 L. J., 568 (C. A.).

Effect of agreement to refer on right to sue.

Effect of Agreement to refer on Right to Sue—Staying Proceedings in Action brought in Contravention of.]—An agreement to refer matters in difference to arbitration does not oust the Courts of their jurisdiction, and a party thereto may commence proceedings notwithstanding (*i*). But the parties may make arbitration a condition precedent to any right of action (*k*), as when they agree to pay an amount to be determined by arbitration, in which case, until the amount has been so determined, no action will lie (*l*). Whether such an agreement is a condition precedent or merely collateral is often a question of much nicety (*m*). Such proceedings, however, may in some cases be stayed by the Court or a Judge, as presently mentioned. A party will be subject to an action if he refuses to enter into an arbitration after having agreed to do so (*n*); but specific performance of such an agreement will not be enforced (*o*).

Staying proceedings after agreement to refer.

By the *Com. Law Proc. Act*, 1854, *s.* 11, "Whenever the parties to any deed or instrument in writing (*p*) to be hereafter (*q*) made or executed, or any of them, shall agree that any then existing or future differences between them or any of them shall be referred to arbitration, and any one or more of the parties so agreeing, or

(*i*) *Thompson* v. *Charnock*, 8 T. R. 139: *Kill* v. *Hollister*, 1 Wils. 129: *Tattersall* v. *Groote*, 2 B. & P. 131: *Street* v. *Rigby*, 6 Ves. jun. 815: *Harris* v. *Reynolds*, 7 Q. B. 71; 9 Jur. 808: *Horton* v. *Sayer*, 4 H. & N. 643; 28 L. J., Ex. 29: *Roper* v. *London*, 1 El. & El. 825; 28 L. J., Q. B. 260: cp. *Cooke* v. *Cooke*, L. R., 4 Eq. 77; 36 L. J., Ch. 480. In some cases the jurisdiction of the Court is ousted by the legislature, as where the agreement to refer is confirmed by Act of Parliament: *Watford, &c. R. Co.* v. *Lond. & N. W. R. Co.*, L. R., 8 Eq. 231: *Caledonian R. Co.* v. *Greenock, &c. R. Co.*, L. R., 2 Sc. App. 347, or where under the Building Societies Acts the legislature provides for the making of rules, that all disputes shall be referred to arbitration: *Municipal Building Society* v. *Kent*, 9 App. Cas. 260: *Wright* v. *Monarch Investment Building Society*, 5 Ch. D. 726; 46 L. J., Ch. 649: *Thompson* v. *Planet Building Society*, L. R., 15 Eq. 333; 42 L. J., Ch. 364: cp. *Hadley* v. *Wilson*, 2 C. P. D. 410: *Prentice* v. *London*, L. R., 10 C. P. 679; 44 L. J., C. P. 353: *Mulken* v. *Lord*, 4 App. Cas. 782; 48 L. J., Ch. 745.

(*k*) *Scott* v. *Avery* (D. P.), 5 H. L. C. 811; 25 L. J., Ex. 308; *S. C.*, 1 Ex. 487, 497; 22 L. J., Ex. 157, 167, where upon the construction of a policy it was held that the settlement of the amount of loss by arbitration was a condition precedent to suing on the policy: *Sharpe* v. *San Paulo R. Co.*, L. R., 8 Ch. 597: *Edwards* v. *Aberayron Mutual Ship Insurance Society*, 1 Q. B. D. 563, Ex.: *Elliott* v. *Royal Exchange Assurance Co.*, L. R., 2 Ex. 237; 36 L. J., Ex. 129: *Scott* v. *Corporation of Liverpool*, 3 De G. & J. 334; 27 L. J., Ch. 230; 28 Id. 641: *Lawson* v. *Wallasey Local Board*, 48 L. T. 507: *Lowndes* v. *Stamford and Warrington*, 18 Q. B. 425: *Williams* v. *London Commercial Exchange Co.*, 10 Ex. 569: *Tredwin* v. *Holdway*, 1 H. & C. 72; 31 L. J., Ex. 398: *Wood* v. *Copper Miners' Co.*, 17 C. B. 561; 25 L. J., C. P. 166: *Mills* v. *Bayley*, 2 H. & C. 36; 32 L. J., Ex. 179: *Braunstein* v. *Accidental Death Insurance Co.*, 1 B. & S. 782; 31 L. J., Q. B. 17.

(*l*) *Pompe* v. *Fuchs*, 34 L. T. 800, Q. B. D.

(*m*) See *Dawson* v. *Lord Otho Fitzgerald*, 1 Ex. D. 257; 45 L. J., Ex. 893 (C. A.): *Alexander* v. *Campbell*, 41 L. J., Ch. 478: *Collins* v. *Locke*, 4 App. Cas. 674; 48 L. J., P. C. 68: *Roper* v. *London*, supra: *Babbage* v. *Coulburn*, 9 Q. B. D. 235; 51 L. J., Q. B. 638; affirmed in C. A., 9 Q. B. D. 237, n.

(*n*) See *Livingstone* v. *Ralli*, 5 E. & B. 132; 24 L. J., Q. B. 269: *Donegal* v. *Verner*, 6 Ir. R., C. L. 504.

(*o*) *Street* v. *Rigby*, 6 Ves. 815, 818: *Vickers* v. *Vickers*, L. R., 4 Eq. 529. See *Dinham* v. *Bradford*, L. R., 5 Ch. 519.

(*p*) See *In re Wilcox and Staker's Arbitration*, L. R., 1 C. P. 671.

(*q*) *Harwood* v. *Royal Exchange Assurance*, W. N. 1878, 214 (C. A.).

PART XVIII.

any person or persons claiming through or under (*r*) him or them, shall nevertheless commence any action at law or suit in equity against the other party or parties, or any of them, or against any person or persons claiming through or under him or them in respect of the matters so agreed to be referred (*s*), or any of them, it shall be lawful for the Court in which action or suit is brought, or a Judge thereof, on application by the defendant or defendants (*t*) or any (*u*) of them, after appearance and before plea or answer (*x*) upon being satisfied that no sufficient reason exists why such (*y*) matters cannot be or ought not to be referred to arbitration according to such agreement as aforesaid, and that the defendant was at the time of the bringing of such action or suit and still is ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit, on such terms as to costs and otherwise as to such Court or Judge may seem fit: Provided always, that any such rule or order may at any time afterwards be discharged or varied (*z*) as justice may require.

The exercise of the jurisdiction under this section is a matter of discretion (*a*). The agreement to refer need not be contained in the same instrument as that on which the cause of action arises. A collateral agreement is sufficient (*b*). But there must be an existing agreement capable of being carried into effect (*c*). The distinction in this respect between a submission in pursuance of a general agreement to refer all future matters in difference to arbitration and a submission of particular existing difference to a particular arbitrator should be remembered (*c*). Differences of law as well

---

(*r*) It seems that trustees of a bankrupt are not persons claiming through or under him within the meaning of this Act: *Fennell* v. *Walker*, 18 C. B. 651; 26 L. J., C. P. 9. See *Pierce* v. *Young*, 14 Ch. D. 200; 42 L. T. 710; 28 W. R. 845 (C. A.).

(*s*) *Russell* v. *Pellegrini*, 26 L. J. [illegible] B. [illegible] per *Wightman*, J. *Lury* v. *Pea*[illegible] 1 C. B., N. S. 639: *Alexander* v. *Meade*, 22 L. T. 609.

(*t*) The plaintiff cannot make the application: *Weir* v. *Johnson*, W. N. 1882, 159.

(*u*) *Willesford* v. *Watson*, L. R., 14 Eq. 572; 42 L. J., Ch. 447; affirmed, L. R., 8 Ch. 473. The dissent of one of several defendants would not necessarily be a ground for refusing the order.

(*x*) The application must be made before delivery of the defence. *West London Dairy Society* v. *Abbott*, 44 L. T. 376. It will not be granted after the defendant has obtained time to plead and is under terms to take short notice of trial. *Smith* v. *British, &c. Association*, W. N. 1883, 176.

(*y*) See *Smith* v. *Allen*, 3 F. & F. 156: *Halsey* v. *Windham*, W. N. 1882, 108: *Compagnie du Sénég &c.* v. *Smith*, 53 L. J., Ch. 166; L. T. 527; 32 W. R. 111, where cross motion for a receiver and stay, *Kay*, J., appointed a receiver and stayed all the rest of the action with a general liberty to apply.

(*z*) See *Bustros* v. *Lenders*, L. 6 C. P. 259, 40 L. J., C. P. 1 where the order was varied as award made so as to direct the fendant to pay costs.

(*a*) *Wickham* v. *Hardina*, 28 L Ex. 215: *Mason* v. *Haddan*, 6 C N. S. 526. See *Cook* v. *Cat* 34 L. J., Ch. 60, where there an arbitration clause in partner articles. *Wheatly* v. *W* *Brymbo Coal Co.*, 2 Drew. & Sm. where a bill was filed to res lessees from working a mine con to the provisions of the lease.

(*b*) *Randell* v. *Thompson*, 1 D. 748; 45 L. J., Q. B. 713: v. *Haddan*, 6 C. B., N. S. 526: *Ge* v. *Morrison*, 37 L. T. 270. v. *Jones*, contra, 1 El. & Bl. 28 L. J., Q. B. 164, is overruled

(*c*) *Piercy* v. *Young*, 14 Ch. D.

of fact are within the section (*d*); so are questions of construction of agreements (*e*). It applies to agreements to refer disputes to a foreign tribunal (*f*); to a provision for reference contained in the rules of a building society (*g*). Whether the disputes are within the agreement to refer is a question for the Court, and will not be left for the arbitrator to decide (*h*). A charter-party between the plaintiff, on behalf of the ship-owner, and the defendant as charterer, stipulated for the payment of a certain sum per ton per month for the hire of the vessel; and, further, that any difference of opinion between the parties, either in principle or detail, should be referred to arbitration; the plaintiff brought an action for the sum which appeared to be clearly due from the defendant for the hire of the vessel; the defendant resisted payment, on the ground of a bonâ fide cross claim to damages for a breach of the charter-party, by reason of the unseaworthiness of the vessel at the time she was placed at the defendant's disposal under the charter-party; the defendant had always been ready and willing to refer the matter to arbitration, but the plaintiff had refused to do so, and insisted on his right to recover the claim for the hire of the vessel: it was held that the defendant was entitled to stay the proceedings in the action under the above section, there being a bonâ fide difference of opinion between the parties in respect of a matter within the agreement to refer; and that it was not necessary that the action should be brought in respect of the same matter of difference if brought in respect of a matter within the agreement to refer (*i*). The Court will in general refuse to stay proceedings under this section where fraud is charged, and the party charged with it desires a public inquiry (*j*). And in some cases, where the

42 L. T. 710; 28 W. R. 845 (C. A.): *Moffatt* v. *Cornelius*, 39 L. T. 102 (C. A.): *Christie* v. *Noble*, W. N. 1880, 71; 14 Ch. D. 203 (n), M. R. In *Gillett* v. *Thornton*, L. R., 19 Eq. 599, a clause in a partnership agreement for a year was held in force where the partnership continued after the year. *Randell* v. *Thompson*, supra. In the latter case, *Mellish*, L. J., says, "But I think there is an important distinction between a general agreement to refer in future such disputes as may arise between the parties and an agreement by which matters in difference between the parties are presently submitted to a named arbitrator. In the case of the general agreement I should say that though after a submission had been made in compliance with it, one of the parties might in that particular instance revoke the authority of the arbitrator, yet *the general agreement would remain capable of being carried into effect.* But here the instrument is no more than a reference of a particular matter to a particular arbitrator, and when that agreement, or submission, or reference is revoked, it is at an end," and though a new agreement may be made to refer the same matter to the same arbitrator, yet the original agreement after the revocation can never be carried into effect, and, therefore, can never be enforced." See further as to revocation, post, p. 1602.

(*d*) *Randegger* v. *Holmes*, L. R., 1 C. P. 679.

(*e*) *Plews* v. *Baker*, L. R., 16 Eq. 564; 43 L. J., Ch. 212: *Witt* v. *Corcoran*, L. R., 8 Ch. 476, n.

(*f*) *Law* v. *Garrett*, 8 Ch. D. 26.

(*g*) *Municipal Building Society* v. *Kent*, and other cases cited ante, p. 1599, n. (*i*).

(*h*) *Piercy* v. *Young*, 14 Ch. D. 200; 42 L. T. 710; 28 W. R. 845 (C. A.), distinguishing *Willesford* v. *Watson*, ubi sup. on this point.

(*i*) *Russell* v. *Pellegrini*, 26 L. J., Q. B. 75; 6 E. & B. 1020: *Seligmann* v. *Le Boutillier*, L. R., 1 C. P. 681: *Willesford* v. *Watson*, supra. See *Daunt* v. *Lazard*, 27 L. J., Ex. 399.

(*j*) *Russell* v. *Russell*, 14 Ch. D. 471; 49 L. J., Ch. 268, M. R.

PART XVIII.

plaintiff bonâ fide alleges that the question raised is one of fraud, they have refused the stay (*k*). When the time for referring had expired, except as to an isolated dispute arising in the course of other differences, the stay was refused (*l*).

A counter-claim set up in respect of a matter which the parties have agreed to refer to arbitration will be stayed under this section (*m*).

Before this Act, if a reference were pending, and it had been agreed that it should operate as a stay of proceedings, the Court would sometimes stay the proceedings in an action brought respecting the matters referred until an award was made (*n*). But before the Act the Court would not stay an action by the provisional assignees of an insolvent debtor against an alleged debtor of the insolvent, on the ground that, by an order of Nisi Prius, made in an action between the insolvent himself and the same debtor for the same cause of action, all matters in difference in the cause were referred to an arbitrator, before whom the matters so referred were still pending (*o*). As to the award, when made, being binding on the parties, *see post, Sect. IX. of this Chapter* (*p*).

As to staying proceedings brought under a section of a statute providing for a reference to arbitration, *see Hodgson* v. *Railway Passengers Assurance Co.*, 9 Q. B. D. 188: *Minifie* v. *Railway Passengers Assurance Co.*, 44 L. T. 552; *Johnson* v. *Altrincham Permanent Benefit Building Society*, 49 L. T. 568.

Revocation of submission, &c.

Revocation of Submission, &c.]—After entering into the submission, either party, before the 3 & 4 W. 4, c. 42, might revoke his submission at any time before the making of the award (*q*); and this though the cause was referred by order of Nisi Prius (*r*); but if the revocation was made after the submission had been made a rule of Court, the party so revoking was liable to an attachment (*s*).

Former practice.

bond of submission, however, became forfeited by such revocation and the obligee might have immediately sued upon it (*t*); or the Court might upon the rule, or upon the Judge's order being made a rule of Court (*u*), have ordered the party revoking to pay the other "such costs as the Court shall think reasonable and just," accord

(*k*) *Wallis* v. *Hirsch*, 1 C. B., N. S. 316; 26 L. J., C. P. 72. See *Hirsch* v. *Im-Thurn*, 4 C. B., N. S. 569; 27 L. J., C. P. 254: cp. *Minifie* v. *Railway Pass. Ass. Co.*, 44 L. T. 552.

(*l*) *Young* v. *Buckett*, 51 L. J., Ch. 504; 46 L. T. 266, *Fry*, J.

(*m*) *Spartali* v. *Van Hoom*, W. N. 1884, 32; Bitt. Ch. Cas. 216.

(*n*) See *Dicas* v. *Jay*, 6 Bing. 519; 4 M. & P. 285: *Cocker* v. *Tempest*, 7 M. & W. 502; 9 Dowl. 306: *Lowes* v. *Kermode*, 8 Taunt. 146.

(*o*) *Sturgis* v. *Lord Curzon*, 21 L. J., Ex. 38.

(*p*) See *Parkes* v. *Smith*, 15 Q. B. 297.

(*q*) *Vynoron's case*, 8 Co. Rep. 81b. See the whole law historically stated by *Willes*, J., L. R., 6 C. P. pp. 217 et seq.

(*r*) See *Rex* v. *Burridge*, 1 S 593: *Lowes* v. *Kermode*, 2 Moo 30; 8 Taunt. 146: *Green* v. P 6 Bing. 443; 4 M. & P. 198: *M* v. *Gratrix*, 7 East, 608: *King* *Joseph*, 5 Taunt. 452: *Clapham* *Higham*, 7 Moore, 403; 1 Bing. *Skee* v. *Coxon*, 10 B. & C. 483: *Lo* v. *Kermode*, 2 Moore, 30; 8 Ta 146. And see *Dicas* v. *Jay*, 5 B 281; 2 M. & P. 448.

(*s*) *Re Rouse and others*, L. 6 C. P. 212; 40 L. J., C. P. 145, *Willes*, J.

(*t*) *Warburton* v. *Storr*, 4 B. 103.

(*u*) *Aston* v. *George*, 2 B. & 395; 1 Chit. Rep. 200.

ie question raised is one of fraud,
When the time for referring had
dispute arising in the course of
fused (*l*).
ect of a matter which the parties
vill be stayed under this section (*m*).
e were pending, and it had been
a stay of proceedings, the Court
eedings in an action brought re-
til an award was made (*n*). But
d not stay an action by the pro-
nt debtor against an alleged debtor
that, by an order of Nisi Prius,
insolvent himself and the same
on, all matters in difference in the
rator, before whom the matters so
As to the award, when made, being
Sect. IX. of this Chapter (*p*).
ought under a section of a statute
bitration, *see Hodgson* v. *Railway*
. B. D. 188: *Minifie* v. *Railway*
. T. 552: *Johnson* v. *Altrincham*
ty, 49 L. T. 568.

]—After entering into the submis-
& 4 *W.* 4, *c.* 42, might revoke his
e making of the award (*q*); and this,
y order of Nisi Prius (*r*); but if the
submission had been made a rule of
as liable to an attachment (*s*). A
became forfeited by such revocation,
mediately sued upon it (*t*); or the
pon the Judge's order being made a
the party revoking to pay the other
think reasonable and just," accord-

(*l*) by *Willes*, J., L. R., 6 C. P. at pp. 217 et seq.
(*r*) See *Rex* v. *Burridge*, 1 Str. 593: *Lowes* v. *Kermode*, 2 Moore, 30; 8 Taunt. 146: *Green* v. *Pole*, 6 Bing. 443; 4 M. & P. 198: *Milne* v. *Gratrix*, 7 East, 608: *King* v. *Joseph*, 5 Taunt. 452: *Clapham* v. *Higham*, 7 Moore, 403; 1 Bing. 87: *Skee* v. *Coxon*, 10 B. & C. 483: *Lowes* v. *Kermode*, 2 Moore, 30; 8 Taunt. 146. And see *Dicas* v. *Jay*, 5 Bing. 281; 2 M. & P. 448.
(*s*) *Re Rouse and others*, L. R. 6 C. P. 212; 40 L. J., C. P. 145: *Willes*, J.
(*t*) *Warburton* v. *Storr*, 4 B. & 103.
(*u*) *Aston* v. *George*, 2 B. & A. 395; 1 Chit. Rep. 200.

ing to the terms of the rule or order (*v*). But now, by the 3 & 4 *W.* 4, *c.* 42, *s.* 39, "the power and authority of any arbitrator or umpire appointed by or in pursuance of any rule of Court, or Judge's order, or order of Nisi Prius *in any action* (*x*) now brought, or which shall be hereafter brought, or by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of any of his Majesty's Courts of record, shall not be *revocable by any party* to such reference without the leave of the Court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a Judge; and the arbitrator or umpire shall and may and is hereby required to proceed with the reference, notwithstanding any such revocation, and to make such award, although the person making such revocation shall not afterwards attend the reference; and that the Court, or any Judge thereof, may from time to time enlarge the time (*y*) for any such arbitrator making his award." To bring a case within this statute the reference must be complete; therefore the Act does not apply where arbitrators are appointed in pursuance of a clause in a deed, that all disputes shall be referred to the arbitration of two persons, who are directed to choose an umpire before they proceed, but which umpire has not been appointed (*z*). Present statute.

This statute does not affect the right of either party to revoke the submission made by an agreement which does not contain provision for making it a rule of Court, even though one of the parties purporting to be acting under sect. 17 of the *Com. Law Proc. Act*, 1854, has made it a rule of Court (*a*), or even though one of the parties has, under sect. 13 of the *Com. Law Proc. Act*, 1854, appointed his own arbitrator to act as sole arbitrator on his opponent failing to appoint one (*b*). But although a submission of particular disputes to a particular arbitrator can be revoked, a general agreement to refer all future disputes to arbitration cannot (*c*), and there is, therefore, practically an important difference between the case where the particular submission is made in pursuance of a general agreement to refer and where it is not (*c*). When statute applies.

The Court or a Judge will not allow a party to rescind his submission, except upon strong grounds (*d*). If it be shown that the Where revocation allowed.

(*v*) See *Skee* v. *Coxon*, 10 B. & C. 483: *Morgan* v. *Williams*, 2 Dowl. 123: *Aston* v. *George*, 2 B. & Ald. 395; 1 Chit. Rep. 200.
(*x*) *R.* v. *Hardey*, 14 Q. B. 529; 19 L. J., Q. B. 196: *Rex* v. *Bardell*, 5 A. & E. 619; cp. *Re Rouse and Meier*, infra.
(*y*) See post, p. 1611.
(*z*) *Bright* v. *Durnell*, 4 Dowl. 756; 1 T. & G. 576. See *Mills* v. *Bayley*, 2 H. & C. 36; 36 L. J., Ex. 179.
(*a*) *Re Rouse and Meier*, L. R., 6 C. P. 212; 40 L. J., C. P. 145: *Thomson* v. *Anderson*, L. R., 9 Eq. 323; 39 L. J., Ch. 468: *Re Drury and Lyre*, 38 L. J., Ch. 278: *Fraser* v. *Ehrensperger* (C. A.), 12 Q. B. D. 310; 53 L. J., Q. B. 73; 49 L. T. 646; 32 W. R. 240.
(*b*) *Fraser* v. *Ehrensperger*, supra.
(*c*) *Pierey* v. *Young*, 14 Ch. D. 200; 42 L. T. 710; 28 W. R. 845 (C. A.): *Christie* v. *Noble*, 14 Ch. D. 203 (n.); W. N. 1880, 71: *Moffatt* v. *Cornelius*, 39 L. T. 102; affirming 26 W. R. 914: *Randall* v. *Thompson*, 1 Q. B. D. 748; 45 L. J., Q. B. 713 (C. A.).
(*d*) *James* v. *Attwood*, 7 Sc. 841: *Re Wooderoft* v. *Jones*, 9 Dowl. 538. As to restraining an arbitrator from proceeding on the ground of corruption, see *The Malmesbury R. Co.* v. *Budd*, 45 L. J., Ch. 271. See *Beddow* v. *Beddow*, 47 L. J., Ch. 588, where an injunction was granted to restrain an arbitrator from acting.

PART XVIII.

arbitrator intends to exceed his jurisdiction, the submission may be revoked (*d*). So it may if he improperly examine witnesses in the absence of one of the parties; but the application for liberty to revoke on this ground must be made before the irregularity is waived (*e*).

Where not.

Where, by an order of Nisi Prius, all matters in difference in a cause were submitted to arbitration, with liberty to the arbitrator to reserve questions for the opinion of the Court on certain points of law which had been raised at the trial, evidence was offered before the arbitrator to which the defendant objected; the arbitrator thought the objections weighty, but refused to decide upon them, and declared his intention to receive the evidence, stating that he should raise on his award such objections to it as appeared to him, on consideration, to be important, but he declined pledging himself to raise any objection in particular; the Court refused to allow the defendant to revoke his submission, though he stated that the admission of the evidence would make many additional meetings necessary, and cause great expense; and though the objections to the evidence might be well founded (*f*). The Court or Judge will not revoke the submission without hearing both parties (*g*); or, after the arbitrator has made his award (*h*).

Revocation by death.

The authority of the arbitrator is impliedly revoked by the death of either party before the award is actually made (*i*). And this is so, even where a verdict is taken subject to an award (*j*). Where by the terms of the reference, the arbitrators were to make and *publish* their award in writing, ready to be delivered to the parties in difference before a certain day, it was held that the execution of the award by the arbitrators was a sufficient publication for the purpose of making it valid in the lifetime of the plaintiff, who died after the execution, but before any notice of the award being made was given to either party to the reference (*k*). But the death of a party, as above, will not operate as a revocation if the submission contains an express stipulation to the contrary (*l*); and such a stipulation may be inserted with effect in an order of reference or

---

(*d*) See *Faviell* v. *The Eastern Counties R. Co.*, 2 Ex. 350, per *Alderson*, B.: *Hart* v. *Duke*, 9 Jur., N. S. 119; 32 L. J., Q. B. 55.

(*e*) *Drew* v. *Drew*, 25 L. T. 282, H. L. 8 March, 1855.

(*f*) *Scott* v. *Van Sandau*, 1 Q. B. 102; 4 P. & D. 725. See *Drew* v. *Drew*, supra, where the Court refused an application to revoke on the ground that the arbitrator had an interest in the matters in dispute, his interest being remote. *Wilson* v. *Morrell*, 15 C. B. 720, where a party to a Chancery suit refused to be a party to the reference.

(*g*) *Clarke* v. *Stocken*, 2 Bing. N. C. 651; 3 Sc. 90; 5 Dowl. 32.

(*h*) *Phipps* v. *Ingram*, 3 Dowl. 669.

(*i*) *Cooper* v. *Johnson*, 2 B. & Ald. 394. See *Bristow* v. *Binns*, 3 D. & R. 184: *Lowes* v. *Kermode*, 2 Moore 30; 8 Taunt. 146: *Dowse* v. *Cox*, 1 Moore, 272; 3 Bing. 20: *Edmunds* v. *Cox*, Chit. Rep. 432: *Caledonian R. Co.* v. *Lockart*, 3 Macq. H. L. Ca. 80

(*j*) See *Toussaint* v. *Hartop*, 7 Taunt. 571; 1 Moore, 287: *Anon.*, Chit. Rep. 187, n. (*a*). And see *Tyler* v. *Jones*, 4 D. & R. 740; 3 B. & C. 144: *Macdougall* v. *Robertson*, 2 Y. & J. 11; 1 M. & P. 147. But see *Bower* v. *Taylor*, 3 D. & R. 610, and *Bowen* v. *Williams*, 3 Exch. 93

(*k*) *Brooke* v. *Mitchell*, 6 M. & W. 473; 8 Dowl. 392, but not *S. P.*

(*l*) See *Biddell* v. *Dowse*, 6 B. C. 255: *Clarke* v. *Crofts*, 4 Bin. 143; 12 Moore, 319: *Lewin* v. *Holbrook*, 11 M. & W. 110; 2 Dowl., S. 991: *Edwards* v. *Davies*, 23 L. Q. B. 278.

rule of Court (*m*), or where a verdict is taken subject to an award (*n*). It seems very questionable whether an award made after the death of one of several parties on one side of a reference is void (*o*). Where differences arose between the owners of a ship and the freighters (the latter having distinct interests in the cargo), and it was agreed between them that the matters in difference should be referred to arbitration, it was held, that the death of one of the freighters before award made, only affected the award as to him, and was no revocation as to the others (*p*).

As to appointing a new arbitrator in case of his death, &c., *see Com. Law Proc. Act*, 1854, *s.* 12, *ante*, p. 1592.

By marriage.

The marriage of a feme sole, party to a submission, after entering into the same and before award made, was, prior to the *Married Women's Property Act*, 1882, a revocation of the arbitrator's authority (*q*).

Bankruptcy.

But, it seems, that the bankruptcy of either party is not so (*r*), and this whether the submission be by order of Nisi Prius, or otherwise (*s*). The trustee cannot be compelled to become a party to the reference, nor is the submission binding upon him (*t*). Where a cause was referred by order of Nisi Prius, and pursuant to the terms of such order the defendant paid to the arbitrator 3,500*l.*, to be paid out by him to such of the parties as he should think fit, the Court, under the circumstances, considered that he held such sum of money as a stakeholder between the parties, and, therefore, that the bankruptcy of the defendant, before the making of the award, did not entitle his assignees to claim the same (*u*).

Costs in case of abortive reference.

Costs in Case of abortive Reference.]—Where a cause was referred before trial, and an arbitration bond entered into, but which could not be made a rule of Court, and the reference proving abortive, the cause was afterwards tried; it was held, that the successful party was not entitled to the costs of the abortive reference

(*m*) *Macdougall* v. *Robertson*, 1 M. & P. 147; 2 Y. & J. 11: *Prior* v. *Hembrow*, 8 M. & W. 873.

(*n*) *Toussaint* v. *Hartop*, 7 Taunt. 571: 1 Moore, 287. See *Biddell* v. *Dowse*, 6 B. & C. 255: *Clarke* v. *Crofts*, 12 Moore, 349; 4 Bing. 143: *Wrightson* v. *Bycater*, 6 Dowl. 359: *Re Hare, Milne and Haswell*, 8 Sc. 367; 8 Dowl. 71; 6 Bing. N. C. 158.

(*o*) *Re Hare, Milne and Haswell*, supra: *Lewin* v. *Holbrook*, ante, n. (*l*). As to the executor of one of several parties upon one side of a reference being liable to contribute towards the costs of the reference incurred after the death of his testator, see *Prior* v. *Hembrow*, 8 M. & W. 873.

(*p*) Per three Justices, MSS. H. 1820.

(*q*) *Charnley* v. *Winstanley*, 5 East, 266: *McCave* v. *O'Ferrall*, 9 C. & F. 30: *Marsh* v. *Wood*, 9 B. & C. 659, 661. See ante, p. 1147.

(*r*) *Hemsworth* v. *Brian*, 1 C. B. 131; 2 D. & L. 844; 14 L. J., C. P. 138: *Sturgis* v. *Lord Curzon*, 21 L. J., Ex. 38; 1 Ex. 17, per *Parke*, B.: *Taylor* v. *Shuttleworth*, 8 Sc. 565; 6 Bing. N. C. 277; 8 Dowl. 281, per *Erskine*, J., and *Maule*, J.: *Taylor* v. *Marling*, 2 Sc. N. R. 374; 2 M. & Gr. 55, per *Tindal*, C. J., and *Coltman*, J.: *Andrews* v. *Palmer*, 4 B. & Ald. 250: *Haswell* v. *Thorogood*, 7 B. & C. 705: *Snook* v. *Hellyer*, 2 Chit. 43: *Gibson* v. *Carruthers*, 8 M. & W. 321. See *Marsh* v. *Wood*, 9 B. & C. 659: *Ex p. Kemshead*, 1 Rose, 149: *Dod* v. *Herring*, 1 Russ. & My. 153; 3 Sim. 143: *Re Milnes*, 24 L. J., C. P. 29, where it was held that a submission by a bankrupt is not void: *Hobbs* v. *Ferrars*, 8 Dowl. 779.

(*s*) *Andrews* v. *Palmer*, supra: *Taylor* v. *Marling*, supra, per *Bosanquet*, J.

(*t*) See *Pennell* v. *Walker*, 26 L. J., C. P. 9.

(*u*) *Taylor* v. *Marling*, supra. See *Hobbs* v. *Ferrars*, 8 Dowl. 779.

by Consent.

jurisdiction, the submission may
improperly examine witnesses in
but the application for liberty to
made before the irregularity is

ius, all matters in difference in a
on, with liberty to the arbitrator
on of the Court on certain points
at the trial, evidence was offered
he defendant objected; the arbi-
ighty, but refused to decide upon
to receive the evidence, stating
l such objections to it as appeared
portant, but he declined pledging
particular; the Court refused to
s submission, though he stated that
ould make many additional meet-
expense; and though the objections
nded (*f*). The Court or Judge will
t hearing both parties (*g*); or, after
d (*h*).
is impliedly revoked by the death
is actually made (*i*). And this is
subject to an award (*j*). Where,
the arbitrators were to make *and*
eady to be delivered to the parties
ay, it was held that the execution
was a sufficient publication for the
e lifetime of the plaintiff, who died
ny notice of the award being made
reference (*k*). But the death of a
e as a revocation if the submission
to the contrary (*l*); and such a
effect in an order of reference or

R. 184: *Lowes* v. *Kermode*, 2 Moore,
30; 8 Taunt. 146: *Dowse* v. *Coxe*, 10
Moore, 272; 3 Bing. 20: *Edmonds* v.
Cox, Chit. Rep. 432: *Caledonian R.
Co.* v. *Lockart*, 3 Macq. H. L. Ca. 808.

(*j*) See *Toussaint* v. *Hartop*, 7
Taunt. 571; 1 Moore, 287: *Anon.*, 1
Chit. Rep. 187, n. (*a*). And see
Tyler v. *Jones*, 4 D. & R. 740; 3 B
& C. 144: *Macdougall* v. *Robertson*,
2 Y. & J. 11; 1 M. & P. 147. But
see *Bower* v. *Taylor*, 3 D. & R. 610, a
and *Bowen* v. *Williams*, 3 Exch. 93.

(*k*) *Brooke* v. *Mitchell*, 6 M. & W
473; 8 Dowl. 392, but not *S. P.*

(*l*) See *Biddell* v. *Dowse*, 6 B.
C. 255: *Clarke* v. *Crofts*, 4 Bin
143; 12 Moore, 349: *Lewin* v. *Ho
brook*, 11 M. & W. 110; 2 Dowl.,
S. 991: *Edwards* v. *Davies*, 23 L.
Q. B. 278.

PART XVIII.

as costs in the cause (*v*). Where, upon a cause coming on to be tried, a verdict was taken for the plaintiffs, subject to an order of reference, but by reason of obstacles wilfully presented by the plaintiffs (who were trustees), and their cestui que trust, the order was rendered abortive, the Court, at the instance of the plaintiffs they being only trustees, and infants being interested in the action granted a new trial, upon the terms of payment of the costs of the former trial by the plaintiffs, and the payment by the plaintiffs and cestui que trust of the costs incurred by the defendants in the several motions made in the Court (*x*). Before the Judicature Acts it seems, that if a cause was referred at Nisi Prius, and the award was afterwards set aside, and the cause was tried again, the party ultimately succeeding was not entitled to the costs of the first trial (*y*). There is often a clause in the submission that if either party prevents the arbitrator making an award he shall pay such costs as the Court may think reasonable (*z*).

SECT. IV.—PROCEEDINGS UPON THE REFERENCE (*a*).

	PAGE		PAGE
Obtaining Appointment from Arbitrator	1606	*Enlargement of Time for making Award*	16
Mode of conducting Reference	1607	*Arbitrator's Authority, how determined*	16
Compelling Attendance of Witnesses, &c.	1610	*Appointment of Umpire, and Proceedings by him*	16

Obtaining appointment from the arbitrator.

Obtaining Appointment from the Arbitrator.]—The first step is to obtain an appointment from the arbitrator. If the action was referred at the trial, *get the order from the officer. Then get an appointment in writing from the arbitrator to proceed with the reference; and make a copy of the order and appointment, and serve it on the opposite solicitor; give him notice of attending by counsel, if intended to do so* (*b*). If the action was referred by rule of Court, *draw up the rule at the proper office; or, if by Master's order, draw*

(*v*) *Doe* d. *Davis* v. *Morgan*, 4 M. & W. 171.

(*x*) *Morgan* v. *Miller*, 8 Sc. 266.

(*y*) See *Wood* v. *Duncan*, 5 M. & W. 87: *Brown* v. *Clark*, 12 M. & W. 25: *Seeley* v. *Powis*, 3 Dowl. 372. But see now *Collen* v. *Wright* and *Field* v. *G. N. R. Co.*, ante, vol. 1, p. 676.

(*z*) See *Bradley* v. *Phelps*, 21 L. J., Ex. 310.

(*a*) The Court has no power to restrain parties from proceeding with an arbitration, on the ground that the arbitrator has no jurisdiction, and that the matters in dispute are not within the terms of the submission: *North London R. Co.* v. *Great Northern R. Co.* (C. A.), 11 Q. B. D. 30; L. J., Q. B. 380. But a prohibit has been issued prohibiting the Ra way Commissioners from undertak an arbitration beyond their jurisd tion: *Great Western R. Co.* v. *Wa ford, &c. R. Co.* (C. A.), 17 Ch. D. 4 44 L. T. 723; 29 W. R. 826. As the jurisdiction to restrain an ar trator from proceeding with a ference, on the ground of corrupt see *Malmesbury R. Co.* v. *Budd* Ch. D. 113; 45 L. J., Ch. 271: *Bed* v. *Beddow*, 9 Ch. D. 89; 47 L. Ch. 588.

(*b*) *Whatley* v. *Morland*, 2 D 249.

up the order at the proper office; get an appointment from the arbitrator, and serve a copy of the rule or order and appointment as above directed. In all other cases, a notice of the time and place appointed by the arbitrator will be sufficient (*c*). The Court may set aside an award if notice of the meetings (*d*) was not given, provided, of course, the objection has not been waived (*e*).

Mode of conducting the reference.

Mode of conducting the Reference.]—The mode of conducting the reference must in general be left to the arbitrator. He has a discretion as to this (*f*). Accordingly the Court have refused to set aside an award, on the ground that the arbitrator had declined to permit a stranger to be present, for the purpose of assisting the defendant's solicitor with practical hints for the conduct of the defence (*g*). Where the reference is to a barrister the usual mode of proceeding is, for the party entitled to begin to make a short statement of his case, and then call his witnesses in support of it, who, of course, may be cross-examined; the other party then makes a short statement of his case and produces his evidence in support of it; he then replies on the whole case, and the party beginning has a general reply: if any question arises as to who is entitled to begin, the arbitrator will decide it. The mode of conducting a reference must, of course, sometimes vary from the above.

Mode of conducting the reference.

Arbitrator's discretion as to this.

General course of proceedings.

All of several joint arbitrators should attend the reference, and the evidence should be taken in their joint presence (*h*), or the Court may set the award aside. Joint arbitrators should communicate and agree together before signing the award (*i*). One of them cannot delegate his authority to another (*k*), and if this is done the award may be set aside.

Where several arbitrators.

If either party, after sufficient notice and proper opportunity of attending will not appear, the arbitrator may proceed in his absence (*l*). An arbitrator should not proceed ex parte if there is a reasonable excuse for a party's non-attendance (*m*).

Proceeding ex parte.

The Court will not make an order for discovery or interrogatories after an order has been made referring an action and all matters in difference to arbitration (*n*).

Discovery.

The arbitrator should only inquire into the matters referred to

Examination of witnesses, &c.

(*c*) See Chit. Forms, p. 836.

(*d*) *Anon.*, 1 Salk. 71. See *Oswald* v. *Earl Grey*, 24 L. J., Q. B. 69: *Hobbs* v. *Ferrars*, 8 Dowl. 779: *Bignall* v. *Gale*, 3 Sc. N. R. 108. See *Re Morphett*, 2 D. & L. 967, where, under circumstances, it was held, that one of the parties not having had notice of a meeting, was not sufficient for setting aside the award.

(*e*) *Whatley* v. *Morland*, 2 Dowl. 249.

(*f*) As to an arbitrator declining to hear counsel, see *Re Macqueen*, 9 C. B., N. S. 793: and as to his declining to hear a solicitor, see *Proctor* v. *Williams*, 8 C. B., N. S. 38: and as to his declining to postpone a case, see *Guider* v. *Curtis*, 14 C. B., N. S. 723.

(*g*) *Tillam* v. *Copp*, 5 C. B. 211.

(*h*) See *Re Plews*, 6 Q. B. 845: *Dobson* v. *Groves*, 6 Q. B. 637: *Bates* v. *Townley*, 19 L. J., Ex. 396: *Peterson* v. *Ayre*, 23 L. J., C. P. 129: *Re Marsh*, 16 L. J., Q. B. 330: *Dalling* v. *Matchett*, Willes, 215.

(*i*) *Little* v. *Newton*, 2 Sc. N. R. 509: *Templemen* v. *Reed*, 9 Dowl. 962.

(*k*) *Little* v. *Newton*, supra.

(*l*) *Scott* v. *Van Sandau*, 6 Q. B. 237: *Bignall* v. *Gale*, 9 Dowl. 631: *Re Morphett*, 2 D. & L. 967.

(*m*) See *Gladwin* v. *Chilcote*, 9 Dowl. 550: *Proctor* v. *Williams*, supra.

(*n*) *Penrice* v. *Williams*, 23 Ch. D. 353; 52 L. J., Ch. 593; 48 L. T. 868; 31 W. R. 496.

PART XVIII.

him (*o*). The evidence should be taken in the presence of the arbitrator (*p*) and of the parties, or of some one attending on their behalf; or the Court may set the award aside (*q*) if the irregularity is not waived (*r*). The arbitrator may, if he think fit, exclude persons who are to be examined before him whilst a witness is under examination or the like (*s*). It is not usual to exclude the parties themselves. The arbitrator should examine and receive all the witnesses and evidence properly tendered by either party. The plaintiff and defendant are, since the 14 & 15 *V.* c. 99, competent witnesses. Where an arbitrator refuses to examine witnesses, or to receive evidence, the Court will sometimes set aside the award (*t*); and this, though he thought that he had sufficient evidence without examining the witnesses. But where he refused to examine a witness because he thought him inadmissible, the Court refused to set aside an award (*u*). And where the arbitrator, after closing the examination, refused to call another meeting, and made his award, the Court refused to set it aside, although the defendant's solicitor swore that he was in possession of evidence which would have repelled that upon which the award was founded (*x*). The arbitrator is the judge of the competency of the witnesses and of the admissibility of the evidence (*y*), and any mistake made by him in these respects is no ground for setting aside the award (*z*). It is in the discretion of the arbitrator, to whom an action in respect of a claim for work has been referred, to inspect the premises on which the work was done; and his refusal to inspect is no ground for setting aside his award (*a*).

Swearing witnesses.

It is usual to have witnesses sworn who give evidence on an arbitration. But where a cause was referred by order of *Nisi Prius*, which stated that the arbitrators should be at liberty, if they should think fit, to examine the parties and their respective

---

(*o*) As to the form of the submission, and what it includes, see ante, pp. 1589 et seq.

(*p*) *Bedington* v. *Southall*, 4 Price, 232.

(*q*) See *Re Plews*, 6 Q. B. 845: *Dobson* v. *Groves*, 6 Q. B. 937. See *Re Hick*, 8 Taunt. 694: *Bignall* v. *Gale*, 3 Sc. N. R. 108; 9 Dowl. 631: *Atkinson* v. *Abraham*, 1 B. & P. 175: cp. *Hewlett* v. *Laycock*, 2 C. & P. 574.

(*r*) See *Drew* v. *Drew*, 25 L. T. 282.

(*s*) *Hewlett* v. *Laycock*, 2 Car. & P. 574.

(*t*) See *Phipps* v. *Ingram*, 3 Dowl. 669: *Morris* v. *Reynolds*, 2 Ld. Raym. 857: 1 Salk. 73: *Hewlett* v. *Laycock*, 2 C. & P. 574: *Samuel* v. *Cooper*, 2 Ad. & El. 752; 1 H. & W. 86: *Peterson* v. *Ayre*, 23 L. J., C. P. 129: *Re Maunder*, 49 L. T. 535. The affidavit in support of a motion to set aside an award, on the ground that the arbitrator has refused to examine a material witness, should state what reason, if any, the arbitrator gave for refusing to hear the witness: *Bradley* v. *Ibbetson*, 3 M. & P. 583.

(*u*) *Campbell* v. *Twemlow*, 1 P. 81. See *Scales* v. *East London Waterworks Co.*, 1 Hodges, 91.

(*x*) *Ringer* v. *Joyce*, 1 Marsh. But see *Doddington* v. *Hudson*, Bing. 384; 8 Moore, 163: *Re Maun* 49 L. T. 535.

(*y*) See *Lloyd* v. *Archbow* Taunt. 324: *Eastern Counties R* v. *Robertson*, 6 M. & Gr. 38: *P man* v. *Steggall*, 9 Bing. 679; 3 Sc. 93; 2 Dowl. 726.

(*z*) *Perriman* v. *Steggall*, s *Huntig* v. *Ralling*, 8 Dowl. *Hagger* v. *Baker*, 2 D. & L. See *Smith* v. *Sparrow*, 4 D. 604; 16 L. J., Q. B. 139, whe fore the 14 & 15 V. c. 99, the trator improperly examined the tiff, and the award was set asi

(*a*) *Munday* v. *Black*, *Bl Munday*, 9 C. B., N. S. 557; 3 C. P. 193.

witnesses on oath; it was held, that it was discretionary with the arbitrators, whether they would examine the witnesses on oath or not (*b*). The order of reference may make it obligatory upon the arbitrator to swear the witnesses; yet even in this case the Court will not set aside the award upon the ground that the witnesses were not sworn, if the objection be not taken before the arbitrator (*c*). If the submission to arbitration be "so that the witnesses be examined on oath," affidavits cannot be read; and if they are, the award may be set aside (*d*).

Authority to arbitrator to administer oath.

By the 14 & 15 *V. c.* 99, *s.* 16, every arbitrator having authority to hear, receive, and examine evidence is empowered to administer an oath to all such witnesses as are legally called before him (*e*). By the 3 & 4 *W. 4, c.* 42 (*f*), *s.* 41, "When in any rule or order of reference, or in any submission to arbitration containing an agreement that the submission shall be made a rule of Court, it shall be ordered or agreed that the witnesses upon such reference shall be examined upon oath, it shall be lawful for the arbitrator or umpire, or any one arbitrator, and he or they are hereby authorized and required, to administer an oath to such witnesses, or to take their affirmation in cases where affirmation is allowed by law instead of oath; and if upon such oath or affirmation any person making the same shall wilfully and corruptly give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury, and shall be prosecuted and punished accordingly."

Private communications ought on no account to be made to an arbitrator by a party previously to the making of the award (*g*). But the Court will not set aside the award on this ground, if acquiescence by the other party be shown (*h*).

Private communications to arbitrator.

An arbitrator cannot delegate his authority (*i*). Even one of several joint arbitrators cannot delegate his authority to another (*k*). Where, pending a reference, the parties, by a memorandum, to which the arbitrator was an assenting party, agreed that a particular portion of the account in dispute between them should be settled and adjusted by a third person, whose report was to be adopted by the arbitrator as conclusive evidence, it was held that this was not an improper delegation of authority by the arbitrator (*l*). And an arbitrator

Delegation of authority.

(*b*) *Smith* v. *Gaff*, 14 M. & W. 261; 3 D. & L. 47.

(*c*) *Ridout* v. *Pye*, 1 B. & P. 91: *Briggs* v. *Hansell*, 16 C. B. 562.

(*d*) *Banks* v. *Banks*, 1 Gale, 46. See *Oswald* v. *Grey* (*Earl*), 24 L. J., Ch. 69, where it was contended that there was a usage for arbitrators appointed to determine as between outgoing and incoming tenants of a farm, the value of crops, &c., to make their award on inspection of the crops, &c., and without evidence. (*e*) *Rodsell* v. *Wise*, 4 M. & W. 536; 1 Dowl. 15. As to when a witness may make a solemn declaration instead of an oath, see Vol. 1, p. 633.

(*f*) Before this Act of Parliament an arbitrator had no power to swear witnesses: *R.* v. *Hallett*, 20 L. J., M. C. 197, per *Campbell*, C. J.

(*g*) *Harvey* v. *Shelton*, 13 L. J., Ch. 166. See *Crossley* v. *Kay*, 5 C. B. 581: *Re Hopper*, 36 L. J., Q. B. 97.

(*h*) See *Hamilton* v. *Bankin*, 19 L. J., Ch. 397: *Mills* v. *Bowyers' Society*, 3 Kay & J. 66.

(*i*) *Re Hare*, 8 Sc. 367: *Eastern Counties R. Co.* v. *Eastern Union R. Co.*, 3 De G. J. & S. 619.

(*k*) *Little* v. *Newton*, 2 Sc. N. R. 509.

(*l*) *Sharp* v. *Nowell*, 6 C. B. 253.

PART XVIII.

may make use of the judgment of another, and the opinion of that person is his if he choose to adopt it (*m*). And an arbitrator may get a solicitor or barrister to draw his award, in order to make it good in point of form (*n*). Where a cause was referred at Nisi Prius to Y., a mining agent, objection having been made to any legal arbitrator, and Y. called in a solicitor to sit with him, whereupon the defendants protested and withdrew from the reference, and an award was made ex parte in their absence; it was held, that the award was bad (*o*).

Compelling attendance of witnesses.

Compelling Attendance of Witnesses, &c.]—By the 3 & 4 W. 4. c. 42, s. 40 (*p*), "When any reference shall have been made by any such rule or order as aforesaid, or by any submission containing such agreement as aforesaid (*q*), it shall be lawful for the Court by which such rule or order shall be made, or which shall be mentioned in such agreement, or for any Judge, by rule or order to be made for that purpose, to command the attendance and examination of any person to be named, or the production of any documents to be mentioned in such rule or order; and the disobedience to any such rule or order shall be deemed a contempt of Court, if, in addition to the service of such rule or order, an appointment of the time and place of attendance in obedience thereto, signed by one at least of the arbitrators, or by the umpire, before whom the attendance is required, shall also be served, either together with or after the service of such rule or order: Provided always, that every person whose attendance shall be so required, shall be entitled to the like conduct-money, and payment of expenses and for loss of time, for and upon attendance at any trial; provided also, that the application made to such Court or Judge for such rule or order shall set forth the county where such witness is residing at the time, satisfy such Court or Judge that such person cannot be found; provided also, that no person shall be compelled to produce, under any such rule or order, any writing or other document that would not be compelled to produce at a trial, or to attend on more than two consecutive days, to be named in such order."

Where it is requisite to resort to the above compulsory proceeding, course is for the solicitor of the party desiring the attendance of witness to lay before a Judge or Master at Chambers a memorandum signed by the solicitor, stating the existence of the reference, that witness or the production of the document is material, and annexing or inserting a copy of the appointment of the arbitrator; upon which the Judge or Master will make his order (r) for the attendance of witness. An appointment in writing of the time and place of a

(*m*) *Emery* v. *Wase*, 5 Ves. 848: *Anderson* v. *Wallace*, 2 C. & F. 26: *Whitmore* v. *Smith*, 29 L. J., Ex. 402.

(*n*) See *Baker* v. *Cotterill*, 18 L. J., Q. B. 345; *Galloway* v. *Keyworth*, 15 C. B. 228; 23 L. J., C. P. 218: *Underwood* v. *The Bedford and Cambridge R. Co.*, 11 C. B., N. S. 442; 31 L. J., C. P. 10.

(*o*) *Proctor* v. *Williamson and others*, 8 C. B., N. S. 386; 29 L. J., C. P. 157.

(*p*) This applies to the Cha Division: *Clarbrough* v. *Fouth* Ch. D. 787; 50 L. J., Ch. 743: v. *Ellis*, 9 Sim. 530. Befor statute, there was no mode of pelling the attendance of a w before an arbitrator: *Wan Southwood*, 4 M. & R. 359.

(*q*) See sect. 39, ante, p. 16

(*r*) See form, Chit. Forms,

dance in obedience to the order signed by the arbitrator, or, if more than one, by one at least of the arbitrators, should be obtained (*s*). *A copy of the order and appointment should then be served upon the witness a reasonable time before that appointed for the attendance, the originals being at the same time shown to him, and a sum sufficient for his expenses and loss of time being paid or tendered to him at the same time.* If the witness do not comply with the order and appointment, he may be proceeded against for a contempt of Court (*t*). A habeas corpus may issue to bring up a prisoner to be examined before an arbitrator (*u*).

Where a defendant submitted all matters in difference to arbitration, and the arbitrators required him, in pursuance of a power given to them for that purpose, to produce certain books and papers, and an attachment was moved for against him for not producing them, the Court held, that he could not, by *affidavit*, bring before the Court the question, whether those books related to matters in difference between the parties or not (*x*).

Except in the case of references to official or special referees (*see ante*, p. 1580) there is no power to compel the attendance of a witness before an arbitrator by subpœna (*y*). Subpœna.

The statute 17 & 18 *Vict. c.* 34, *s.* 1 (*ante, Vol.* 1, p. 570), as to compelling the attendance of witnesses residing in Scotland and Ireland does not apply to the case of an arbitration, as there is no trial within the meaning of that section (*z*). Witnesses from Scotland and Ireland.

As to the privilege of witnesses, &c. from arrest whilst attending the reference, *see ante*, p. 1486 (*a*).

Enlargement of Time for making Award.]—If it be necessary that the time limited for making the award should be enlarged, the arbitrator may enlarge it as a matter of course, if a power be given him for that purpose in the submission. The mode of enlargement by the arbitrator depends entirely upon the terms of the submission (*b*). A power to enlarge must be strictly pursued (*c*). A general power to enlarge is sufficiently exercised by Enlargement of time for making award. By arbitrator.

made on or before the —— day of ——, or any other day to which the submission may be enlarged, is a general authority to be executed, in a reasonable time. *Macdougall* v. *Robertson*, 2 Y. & J. 11; 1 M. & P. 147. See as to a plea of no award in a reasonable time, *Curtis* v. *Potts*, 3 M. & Sel. 145. As to an umpire under the Public Health Act enlarging the time for making the umpirage within the time limited for making same, *Kellett* v. *The Local Board of Health of Tranmere*, 34 L. J., Q. B. 87: *Holdsworth* v. *Wilson*, 4 B. & S. 1.

(*c*) *Mason* v. *Wallis*, 10 B. & C. 107: *Leggett* v. *Finlay*, 6 Bing. 255; 3 M. & P. 629. See *Davidson* v. *Gauntlet*, 4 Sc. N. R. 220; 1 Dowl., N. S. 198; 3 M. & Gr. 550: *Reid* v. *Fryatt*, 1 M. & Sel. 1.

(*s*) *In re Guarantee Society, &c.*, 1 D. & L. 907, C. P.

(*t*) See ante, Ch. LXXXIII.

(*u*) *Graham* v. *Glover*, 5 E. & B. 591; 25 L. J., Q. B. 10: *Marsden* v. *Overbury*, 18 C. B. 31; 25 L. J., C. P. 200, where the witness was in custody on criminal process. See 16 & 17 V. c. 30, s. 9, noticed Vol. 1, p. 568.

(*x*) *Arbuckle* v. *Price*, 4 Dowl. 174.

(*y*) *Rooney* v. *Whiteley*, W. N. 1883, 225; Bitt. Ch. Cas. 20.

(*z*) *Hall* v. *Brand* (C. A.), 12 Q. B. D. 49; 52 L. J., Q. B. 19; 49 L. T. 492; 32 W. R. 133.

(*a*) See *Webb* v. *Taylor*, 1 D. & L. 676.

(*b*) See *Reid* v. *Fryatt*, 1 M. & Sel. 1: *Davies* v. *Vass*, 15 East, 97: *Peake* v. *Deakle*, 1 Taunt. 509: *Rapelje* v. *Parry*, 4 Id. 658. A submission by which an award is to be

PART XVIII.

appointing a subsequent day for a meeting in the presence of the parties (*d*). And it would seem that where there is such a power, any words which express the arbitrator's opinion that the time should be enlarged are sufficient (*e*). The enlargement is considered as part of the original submission (*f*). Where an arbitrator enlarges the time for making his award until a particular day, the time is to be construed as inclusive of that day (*g*). As to the umpire enlarging the time, *see post*, p. 1617. As to giving notice of the enlargement to a party before moving for an attachment &c. against him for non-performance of the award, *see post*, p. 1656.

The arbitrator has no power to limit the time for making the award, unless the submission enable him to do so (*h*).

By consent of parties.

If no such power is given the parties on both sides may *consent* to the time being enlarged. Where the action is referred under an order of Court not containing any such power, and the parties thus consent to the enlargement, *get motion-papers signed by counsel* (*i*); *draw up the rule for the enlargement, and serve a copy of it on the opposite solicitor*. Where an action is referred by a Master's order, the time may be enlarged by consent by a Master's order (*k*).

In all other cases of consent, a consent in writing by the parties will be sufficient (*l*), unless the submission was by deed, in which case the consent must be by deed, if it be intended to retain the remedy by action on the original deed (*m*). The time may also be enlarged by altering, re-executing, and re-stamping the agreement or deed of submission (*n*). An enlargement, in general terms, virtually incorporates all the terms of the original submission (*See Vol.* 1, p. 121, a case where it was held, that a solicitor was discharged from his undertaking to pay what should be awarded to be paid by his client, by the time for making the award being enlarged.

By Master's order.

If no such power was given to the arbitrator, and one of the parties would not consent to the enlargement of the time, then, previous to the 3 & 4 *W.* 4, c. 42, *s.* 39 (*p*), the enactment on this subject at the time of the passing of the *Com. Law Proc. Act*, 1854, there was no mode of enlarging the time; and this is still the case where the submission cannot be made a rule of Court. By the 15th section of the *Com. Law Proc. Act*, 1854 (*q*), "It shall be lawful for the superior Court of which such (*r*) submission, document, or order is or may

---

(*d*) *Burley* v. *Stevens*, 4 Dowl. 770; 1 M. & W. 156.

(*e*) *Hallett* v. *Hallett*, 7 Dowl. 389; 5 M. & W. 25.

(*f*) *Re Smith* v. *Blake*, 8 Dowl. 130, per *Coleridge*, J.

(*g*) *Kerr* v. *Jeston*, 1 Dowl., N. S. 538. See *Watson* v. *Bennett*, 5 H. & N. 831.

(*h*) *Re Morphett*, 2 D. & L. 967.

(*i*) See *Halden* v. *Glasscock*, 5 B. & C. 340: *Dickens* v. *Jarvis*, Id. 528.

(*k*) See *Armitage* v. *Coates*, 4 Ex. 641; 19 L. J., Ex. 95, as to the effect of such an enlargement on the original promise to perform the award.

(*l*) See *Evans* v. *Thomson*, 5 East, 189; C. L. P. Act, 1854, s. 15, post, p. 1618. See the forms, Chit. Fo

(*m*) *Brown* v. *Goodman*, 3 T 592, n.: *Greig* v. *Talbot*, 2 B. 185, 188: *Rex* v. *Bingham*, 3 Y. 101, 113.

(*n*) *Watkins* v. *Philpotts*, M Y. 393.

(*o*) *Evans* v. *Thomson*, 5 East See *Jenkins* v. *Law*, 8 T. R. 8

(*p*) See *Re Burdon*, 27 L. P. 250: *Burley* v. *Stevens*, 1 W. 156: *Re Salkeld* v. *Slater*, & E. 767.

(*q*) See the commencement section, post, p. 1618.

(*r*) This refers to a sub which may be made a rule of or to a compulsory order of

be made a rule or order, or for any Judge thereof, for good cause to be stated (*s*) in the rule or order for enlargement, from time to time to enlarge the term for making the award; and if no period be stated for the enlargement in such consent or order for enlargement, it shall be deemed to be an enlargement for one month; and in any case where an umpire shall have been appointed, it shall be lawful for him to enter on the reference in lieu of the arbitrators, if the latter shall have allowed their time or their extended time to expire without making an award, or shall have delivered to any party, or to the umpire, a notice in writing stating that they cannot agree" (*t*).

The time may be thus enlarged under this Act, whether the submission contains a power (*u*) to enlarge the original term or not (*v*), and even after the time limited by the submission for making the award has elapsed (*y*). It cannot be enlarged after the submission has been revoked (*z*). If an arbitrator make his award after the time limited for making it, and no enlargement has been made, the Court may enlarge the time under this statute (*a*). If no proceedings have been taken for some time under the reference, the Court may refuse to enlarge the time (*b*). The Court have no power under this section or otherwise to enlarge the time in arbitrations under the Public Health Act (*c*).

The application for the enlargement (*d*) *should in general be made by summons before a Master* (*e*). Before making the application, the submission, if not a rule of Court, should be made one (*f*). Whether the 15th section of the *Com. Law Proc. Act*, 1854 (*supra*), which says "is or may be made a rule of Court," dispenses with the necessity for making the submission a rule of Court before applying

---

cence. As to when a submission may be made a rule of Court, see ante, p. 1594. As to a compulsory order of reference, see next Chapter. See *Bennett* v. *Watson*, 5 H. & N. 831; 29 L. J., Ex. 357, where it was doubted whether the above section applies to references by consent.

(*s*) *Re Burdon*, 27 L. J., C. P. 250.

(*t*) As to the proceedings by an umpire, see post, p. 1617: *Burley* v. *Stevens*, 1 M. & W. 156.

(*u*) See *Parbery* v. *Newnham*, 7 M. & W. 378; 9 Dowl. 288: *Leslie* v. *Richardson*, 6 C. B. 378; 6 D. & L. 91: *Edwards* v. *Davies*, 23 L. J., Q. B. 278: *Lambert* v. *Hutchinson*, 3 Sc. N. R. 221; 2 M. & Gr. 558: *In re Salkeld* v. *Slater*, 12 A. & E. 767.

(*v*) See *Potter* v. *Newman*, 2 C. M. & R. 742; 1 T. & G. 29; 4 Dowl. 504; 1 Gale, 373.

(*y*) *Re Denton*, L. R., 9 Q. B. 117; 43 L. J., Q. B. 41. See *Leslie* v. *Richardson*, supra: *Bowen* v. *Williams*, 3 Ex. 93; 6 D. & L. 235. Query whether the enlargement can be made after the death of one of the parties to the reference. (*S. C.*) See *Gaffney* v. *Killen*, 12 Ir. Com. L. Rep. App. xxv., Q. B.

(*z*) *Randall, Saunders & Co., Limited* v. *Thompson*, 1 Q. B. D. 748; 45 L. J., Q. B. 713; ante, p. 1603.

(*a*) *May* v. *Harcourt*, 13 Q. B. D. 688. See *Brown* v. *Collyer*, 2 L. M. & P. 470: 20 L. J., Q. B. 426. It seems this enlargement made the award a good one. See *Lord* v. *Lee*, 37 L. J., Q. B. 121: *Ward* v. *Secretary of State for War Department*, 32 L. J., Q. B. 53.

(*b*) See *Andrews* v. *Eaton*, 21 L. J., Ex. 110: *Edwards* v. *Davies*, 23 L. J., Q. B. 278, where one of the parties had died.

(*c*) *Kellett* v. *The Local Board of Health of Tranmere*, 34 L. J., Q. B. 89.

(*d*) *Doe* v. *Powell*, 2 Dowl. 539.

(*e*) See *Clark* v. *Stocken*, 2 Bing. N. C. 651; 3 Sc. 90; 5 Dowl. 32; 2 Hodges, 1.

(*f*) *Lambert* v. *Hutchinson*, 2 M. & Gr. 858, 859: *Brown* v. *Collyer*, 2 L. M. & P. 470; 20 L. J., Q. B. 426.

PART XVIII.

for an extension of time appears doubtful, but it is submitted t it does not (*g*). The order for the enlargement should state a g cause for the enlargement (*h*); but the omission to do so is a m irregularity (*i*).

Proceeding without proper enlargement, &c.

Proceeding in a reference, with knowledge that the time making the award has not been duly enlarged, may be evidence a parol submission on the terms of the original submission, and award in such case may be good (*k*), but it cannot be enforced execution (*k*). When the parties have proceeded with the re ence after knowledge that the enlargement has been irregul made, the Court will not set aside the award (*l*). If an arbitra who has suffered his time to expire, determine to proceed in reference, notwithstanding an objection taken on that ground party to the reference, and the party protests that any award w the arbitrator may make will be therefore void, his continuin attend and contest the case before the arbitrator under protest, does not give the arbitrator authority to make award (*m*).

In a case where a verdict was taken for the plaintiff for dama subject to the award of an arbitrator, and the arbitrator ha omitted to make the award within the period limited by the r ence, without any fault on the part of the defendant, the refused to allow judgment to be entered for the plaintiff, and that the cause must go down to trial again (*n*). But it is a hended that, now, the Court in such a case would enlarge the for making the award, and not send the cause down again for except under peculiar circumstances.

Arbitrator's authority, how determined.

Arbitrator's Authority, how determined.]—The arbitrator, as as he has made his award, is *functus officio*, and cannot after alter it in any material part (*o*). So, if he do not make his within the time limited by the submission, or within the en time (if the time has been enlarged), any award made by him wards will be bad unless the time be subsequently enlarged (*p*) in general, but not necessarily, by the appointment of an umpi

(*g*) The point was discussed before *Pollock*, B., and *Hawkins*, J., on the 11th February, 1884, and the Court appeared disposed to hold that the 15th section dispensed with the necessity for making the submission a rule of Court; but the matter was settled, and no judgment was given.

(*h*) See C. L. P. Act, 1854, s. 15, supra.

(*i*) *Re Burdon*, 27 L. J., C. P. 250.

(*k*) *Reade* v. *Dutton*, 2 M. & W. 69: *Hallett* v. *Hallett*, 5 M. & W. 25; 7 Dowl. 389.

(*l*) *Benwell* v. *Hinxman*, 3 Dowl. 500; 1 C. M. & R. 935: *Lawrence* v. *Hodgson*, 1 Y. & J. 16: *Re Hick*, 8 Taunt. 694: *Matson* v. *Trower*, R. & M. 17: *Leggett* v. *Finlay*, 3 M. & P. 629; 6 Bing. 255: *Hallett* v. *Hallett*, 7 Dowl. 389; 5 M. & W. 25.

(*m*) *Ringland* v. *Lowndes*, 17 N. S. 514; 33 L. J., C. P. 337

(*n*) *Hale* v. *Phillips*, 2 M. 167; 9 Bing. 89, 158: *Doe* v. *ders*, 3 B. & Ad. 783: *Ha Abrahams*, 4 Moore, 3, wh arbitrator died. And see *E Davies*, 3 Dowl. 786: *Taylor gory*, 2 B. & Ad. 774: *Wilki Time*, 4 Dowl. 37: *Porch* v *kins*, 1 D. & L. 881. As to t of the motion, see *Hall* v. 4 M. & W. 24: *Bacon* v. C 1 Hodges, 189.

(*o*) Post, p. 1638.

(*p*) See ante, p. 1613. Th has power to enlarge the tim the award is made: *May* v. *H* 13 Q. B. D. 688.

(*q*) Post, p. 1616.

or by an express (*r*) or implied (*s*) revocation of authority of the arbitrator is determined.

bmission the CH. CXXXVI.

Appointment of Umpire and Proceedings by him.]—Where a matter is referred to two arbitrators, it is usual to provide in the submission, that, if the arbitrators shall not agree upon their award before a time therein specified, the matter shall be referred to an umpire. This umpire is either named in the submission (which is much the preferable mode), or the arbitrators are therein given a power to appoint one. In the latter case the umpire should be appointed at the time and in the mode directed by the power (*t*). Unless there is anything in the power to the contrary, the arbitrators may appoint the umpire at any time before or after the time limited for them to make their award, provided it be before the time limited for the umpire to make his umpirage (*u*); and they may in general do so even before they have themselves entered upon an examination of the matter referred to them (*x*). If one arbitrator requires more evidence to be laid before him, and the other does not, this is a sufficient disagreement to warrant the appointment or interference of the umpire, when it has been agreed that such shall take place upon the arbitrators disagreeing (*y*). An appointment of an umpire by several arbitrators should be made by all at the same time in the presence of each other (*z*). As to an umpire proceeding with the reference after the time for the arbitrators making their award has elapsed, or after notice of their disagreement, *see Com. Law Proc. Act*, 1854, *s.* 15, *ante*, p. 1612. Appointment of umpire, &c.

By the *Com. Law Proc. Act*, 1854, *s.* 14, "When the reference is to two arbitrators, and the terms of the document authorizing it do not show that it was intended that there should not be an umpire, or provide otherwise for the appointment of an umpire, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award, unless they be called upon by notice as aforesaid to make the appointment sooner." Where no power of appointment in submission.

The appointment of the umpire must not be decided by chance; if so decided, the Court may set aside the award (*a*). But, under Must not be appointed by lot.

(*r*) Ante, p. 1603.

(*s*) Ante, p. 1605.

(*t*) *Re Hick*, 8 Taunt. 694, where the appointment was irregular, and the Court refused to set aside the award, as the parties proceeded with the reference with knowledge of the facts. And see *Matson* v. *Trower*, 8 B. & M. 17: *Lawrence* v. *Hodgson*, 1 Y. & J. 16: *Leggett* v. *Finlay*, 3 M. & P. 639: 6 Bing. 255: *Cudliffe* v. *Walters*, 2 M. & Rob. 232.

(*u*) *Harding* v. *Watts*, 15 East, 556: *Smailes* v. *Wright*, 3 M. & Sel. 559. See *Sprigens* v. *Nash*, 5 M. & Sel. 193: *Re Hick*, 8 Taunt. 694: *Re Johnson*, 24 L. J., Q. B. 63, where in the appointment it was stated that the umpire's duties should commence on a future day: *Holdsworth* v. *Wilson*, 4 B. & S. 1; 32 L. J., Q. B. 289, a case under the Public Health Act, 1848.

(*x*) *Roe* d. *Wood* v. *Doe*, 2 T. R. 614: *Bates* v. *Cook*, 9 B. & C. 407: *Winteringham* v. *Robertson*, 27 L. J., Ex. 301. But see *Reynolds* v. *Gray*, 1 Ld. Raym. 222; 1 Salk. 70

(*y*) *Cudliffe* v. *Walters*, 2 M. & Rob. 232. See *Wicks* v. *Cox*, 11 Jur. 542, B. C.: *Winteringham* v. *Robertson*, 27 L. J., Ex. 301.

(*z*) *Re Lord*, 5 E. & B. 405; 26 L. J., Q. B. 34. See *Re Hopper*, infra, where the arbitrators jointly appointed an umpire and signed the appointment at different times, and the Court refused to set aside the award.

(*a*) *Ford* v. *Jones*, 3 B. & Ad. 248;

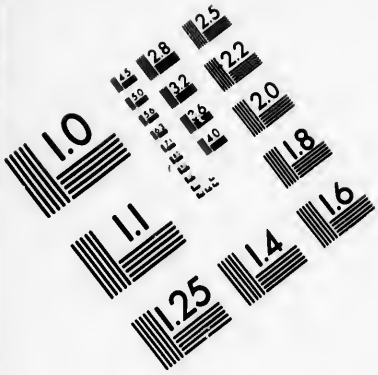
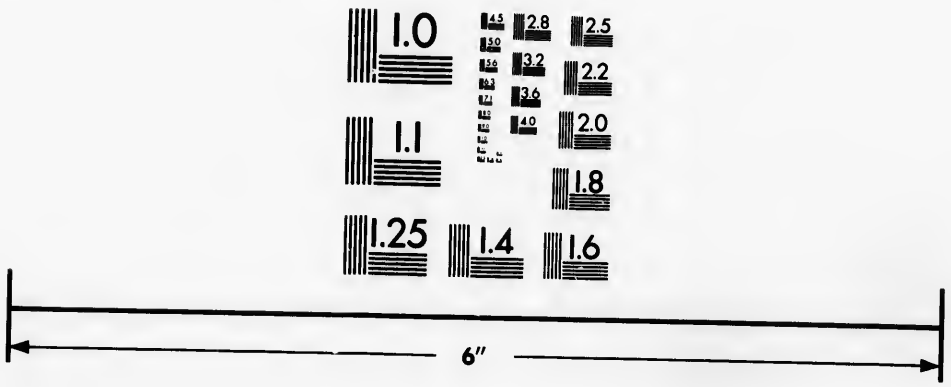
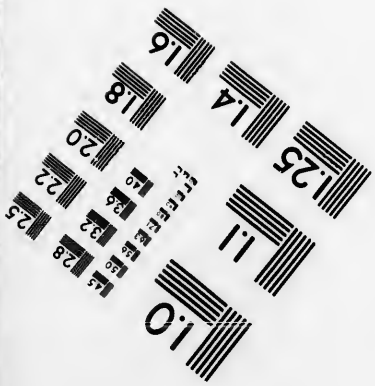
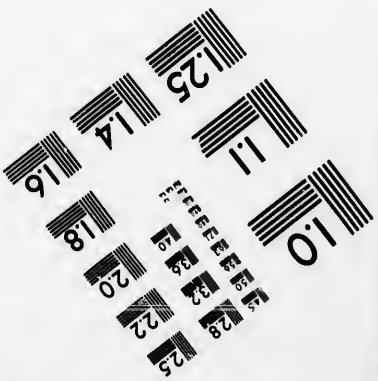


IMAGE EVALUATION TEST TARGET (MT-3)







Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

particular circumstances, such an appointment was held g
And it would be so if the parties assented to it, with a kn
of all the circumstances under which the choice was made (
not otherwise (*d*). A consent by an agent appointed to re
a party on the reference and to conduct it on his behalf
cient (*e*). But a consent by the solicitor's clerks on both
not (*f*).

Where parties to appoint cannot agree.

As to the appointment of an umpire when the parties to
him cannot agree upon the appointment, or in case of his de
Com. Law Proc. Act, 1854, *s.* 12, *ante*, p. 1592.

Stamp.

It is not necessary to affix any stamp to the appointment
umpire (*g*).

How far arbitrators may act after appointing an umpire.

The office of arbitrator is often determined by the appoi
of the umpire (*h*). If the arbitrators appoint an umpire who
to accept the appointment, they may afterwards appoint anot
If they join with the umpire in his umpirage, it is surplusa
will not vitiate the instrument (*k*). The award cannot prop
made in part by the arbitrators, and as to the other part
umpire (*l*), unless, indeed, there be an express provision in th
mission for the purpose (*m*).

Examination of witnesses, &c. by.

The general rule is, that the umpire should examine th
nesses, &c. himself (*n*); but, if no objection be made, or by
ment of the parties, he may receive the evidence from th
trators (*o*). Where an umpire improperly refuses, on an
request, either to re-hear evidence given before the arbitrat
to examine new witnesses, the Court will set aside the awa
And the not insisting on this objection at the time of maki
award does not amount to a waiver of it (*p*). The objection
ever, may be waived, though, to prevent the award being se
on this account, clear proof must be given of the waiver (*q*).

---

5 E. & B. 405: *Young* v. *Miller*, 4 D. & R. 263; 3 B. & C. 407: *Wills* v. *Cooke*, 2 B. & Ald. 218: *Re Cassell*, 9 B. & C. 624: *Re Hodson & Drury*, 7 Dowl. 569: *Re Vinnikum*, 5 Jur. 72, B. C.

(*b*) *Neale* v. *Ledger*, 16 East, 51: *Re European, &c. Co.* v. *Croskey & Co.*, 8 C. B., N. S. 397; 29 L. J., C. P. 155: *Re Hopper*, L. R., 2 Q. B. 367; 36 L. J., Q. B. 97.

(*c*) *Re Tunno*, 5 B. & Ad. 488.

(*d*) *Jamieson* v. *Binns*, 4 A. & E. 945: *In re Greenwood*, 1 P. & D. 461; 9 A. & E. 699.

(*e*) *Backhouse* v. *Taylor*, 20 L. J., Q. B. 233.

(*f*) *Re Hodson and Drury*, 7 Dowl. 569.

(*g*) *Routledge* v. *Thornton*, 4 Taunt. 704. See ante, p. 1592.

(*h*) *Reynolds* v. *Gray*, 1 Ld. Raym. 222; 1 Salk. 70. And see *Mitchell* v. *Harris*, 1 Ld. Raym. 671; 1 Salk. 71; 2 Saund. 133 a.

(*i*) See *Reynolds* v. *Gray*, Com. Dig. Abr. F.; 2 Saund.

(*k*) *Bates* v. *Cook*, 9 B. & C *Beck* v. *Sargent*, 4 Taunt. *Soulsby* v. *Hodgson*, 1 W. B And see generally, 2 Saund n. (7).

(*l*) *Tollit* v. *Saunders*, 9 Pric

(*m*) Per *Wood*, B., *Tollit* v. *ders*, 9 Price, 619. See *Hether* v. *Robinson*, 7 Dowl. 192.

(*n*) *Re Salkeld* v. *Slater*, 12 E. 767; 4 P. & D. 732.

(*o*) *Hall* v. *Lawrence*, 4 T. R *Re Tunno*, 2 N. & M. 328: *Tu* v. *Twogood*, Id. 335, n.: *Re Je and Wife*, &c., infra: *In re and Howlett*, 19 L. J., Q. B. *Bottomley* v. *Ambler*, 38 L. T. 26 W. R. 556 (C. A.).

(*p*) *Re Jenkins and Wife*, Dowl., N. S. 276: *Re Salke Slater*, 12 A. & E. 767; 4 P. 732.

(*q*) *Re Salkeld* v. *Slater*, supr

The power of the umpire to enlarge the time for making his umpirage depends on the terms of the submission (*s*).

The umpirage, like the award, must be ready to be delivered within the limited time (*t*). If an umpire is to make his award within a certain time, to be calculated from a certain day, such day is to be excluded from the calculation (*u*).

Enlargement of time by umpire (*r*).

Umpirage must be made within time limited.

Sect. V.—The Award.

	PAGE		PAGE
By whom to be made	1617	*When bad in Part*	1636
When to be made	1617	*Stamp on*	1636
Form of	1618	*Execution of by Arbitrators*	1637
As to Costs	1628	*Publication of*	1637
Award in Form of special Case	1634	*Alteration of*	1838

By whom to be made.]—The award must be made by the arbitrators or umpire, to whom the reference is made. Where the reference is to several joint arbitrators, they must all join in making the award, and the parties are entitled to their joint judgment (*x*). If the submission be to perform the award of the arbitrators *and* their umpire, it would seem that an award by the arbitrators only is bad (*y*). And where the reference was to the award of two named persons and of such persons as they should nominate before they proceeded to act, or of a majority of them, in case they could not unanimously agree, *Coleridge*, J., held, that no award of two could be good until the third had had a full opportunity of joining in it, and had declared his dissent from it, or withdrawn from the reference (*z*). Joint arbitrators should execute the award at the same time and place, and in the presence of each other (*a*).

A lay arbitrator may employ a solicitor or barrister to prepare his award (*b*).

By whom to be made.

When to be made.]—The award must be made within the time limited for that purpose or within the enlarged time, if the time has been enlarged (*c*). The award cannot be made after an ex-

When to be made.

(*r*) See *Winteringham* v. *Robertson*, 27 L. J., Ex. 301, where it was held there had been an implied enlargement.

(*s*) *Doddington* v. *Baitward*, 7 Dowl. 640; 7 Se. 733: *Killett* v. *Tranmere Local Board of Health*, 34 L. J., Q. B. 87; 13 W. R. 207.

(*t*) *Re Swinford*, 6 M. & Sel. 226, where the word months was held to mean lunar months.

(*u*) *Re Higham*, 9 Dowl. 203. See ante, p. 1435.

(*x*) See ante, p. 1607.

(*y*) *Hetherington* v. *Robinson*, 7 Dowl. 192.

(*z*) *Templeman* v. *Reed*, 9 Dowl. 962; ante, p. 1607.

(*a*) *Peterson* v. *Eyre*, 15 C. B. 724; 23 L. J., C. P. 129; *Wade* v. *Dowling*, 4 El. & Bl. 44; 23 L. J., Q. B. 302.

(*b*) *Galloway* v. *Keyworth*, 15 C. B. 228; 23 L. J., C. P. 218.

(*c*) See *Marks* v. *Marriott*, 1 Ld. Raym. 115: *Freeman* v. *Bernard*, Id. 247; 1 Salk. 69; 3 Id. 45: *Brown*

PART XVIII. pressed or implied revocation of the arbitrator's authority (*d*), after his authority has determined (*e*). When a verdict is taken the assizes, subject to the certificate of an arbitrator as to the amount of damages, such certificate may be given after the assizes (*f*). Such certificate when given relates back to the time when the verdict was given by the jury (*g*).

By the *Com. Law Proc. Act*, 1854, *s.* 15, "The arbitrator acting under any such (*h*) document or compulsory order of reference aforesaid (*i*), or under any order referring the award back, shall make his award under his hand, and (unless such document or order respectively shall contain a different limit of time) within three months after he shall have been appointed, and shall have entered on the reference (*k*), or shall have been called upon to act by notice in writing from any party, but the parties may by consent in writing enlarge the term for making the award" (*l*).

Where a cause was referred to an officer of the Court under the compulsory powers of this Act, and the award was not made within three months, and the time was not enlarged by the Court or a Judge, or the written consent of the parties, as required by sect. 15, but they continued to attend before the arbitrator after the expiration of the three months without objection, it was held that the party against whom judgment had been signed upon the award was estopped from alleging that there had been no written consent to the enlargement (*m*).

As to enlargement of time under the *Com. Law Proc. Act*, 1854, *s.* 15, and stat. 3 & 4 *W.* 4, *c.* 42, *s.* 39, *see ante*, p. 1603.

Form of. *Form of* (*n*).]—No precise form of words is necessary to constitute an award: it is sufficient if the arbitrator expresses by it a decision upon the matter submitted to him. A mere proposal or recommendation, however, is not sufficiently decisive (*o*). Where an enlargement of time has been made, the omission to recite it is no objection to the award (*p*). It is as well, however, to recite it, and the

Recitals.

---

v. *Vawser*, 4 East, 584: *Henfree* v. *Bromley*, 6 East, 310: *Re Higham*, 9 Dowl. 203: *Re Morphett*, 2 D. & L. 267, where it was held that the arbitrators had no power to limit the time for making the award. As to the computation of time when there has been an enlargement, see ante, p. 1612.

(*d*) As to such revocation, see ante, p. 1602.

(*e*) As to when an arbitrator's authority is determined, see ante, p. 1614.

(*f*) *Salter* v. *Yeates*, 5 Dowl. 291: *Tomes* v. *Hawkes*, 2 P. & D. 248; 10 A. & E. 32.

(*g*) *Cremer* v. *Churt*, 3 D. & L. 672; 15 M. & W. 310.

(*h*) A document which may be made a rule of Court. As to when a submission may be made a rule of Court, see ante, p. 1594.

(*i*) As to a compulsory order of reference, see the next chapter.

(*k*) *Baker* v. *Stephens*, L. R. Q. B. 523; 36 L. J., Q. B. 329, where the award was referred back to the arbitrator. In such a case the three months begin to run from the time when the arbitrator again proceeds with the reference by the parties.

(*l*) See the remainder of this rule, ante, p. 1612. As to a Court or Judge enlarging the time, see ante, p. 1603.

(*m*) *Tyerman* v. *Smith*, 6 E. & B. 719; 25 L. J., Q. B. 359.

(*n*) See the forms of awards, Forms, pp. 840 et seq.

(*o*) *Lock* v. *Tulliamy*, 5 B. & Ad. 600. See *Ferguson* v. *Norman*, 1 Bing. N. C. 52.

(*p*) *George* v. *Lousley*, 8 East, 1. See *Re Lloyd*, 6 D. & L. 531, where the enlargement was properly recited.

view has been had if the submission required the arbitrator to have one (*q*). An untrue recital in the award is not binding on the Court (*r*). Though the order of reference direct the witnesses to be sworn, it need not be stated in the award that the evidence upon which the arbitrator acted was given upon oath (*s*). The non-recital in the award of any submission beyond the original agreement does not invalidate the award (*t*).

A plan may be annexed to the award and incorporated with it (*u*). Plan may be annexed.

The award must pursue the submission in every material point, or the Court may set it aside (*x*). The arbitrator must thereby decide only upon the matters submitted to him (*y*). As to the form of the submission, and what it includes, *see ante*, p. 1587. Submission must be pursued.

If there be any uncertainty in a material part of the award, at least if it do not contain certainty to a common intent (*z*), it is bad (*a*). Upon reference to an arbitrator of a cause and all matters in difference, an award that defendant had overpaid plaintiff 34*l*. was held insufficient to entitle the defendant to enforce the award by attachment (*b*). In a case where a cause in which there were several issues was referred at Nisi Prius, the costs to abide the event, and the arbitrators found for the defendant on two of the issues, neither of which covered the entire cause of action, and for the plaintiff on the others, but omitted to award damages, the award was held bad, it being impossible to ascertain from it which way the arbitrator meant to find (*c*). In some cases, where a cause and all matters in difference are referred, the award may be bad for uncertainty, for not awarding for what amount the plaintiff is entitled to recover in respect of the action (*d*). Where certain specified matters in dispute and all matters in difference are referred to arbitration, the arbitrator is not bound to award sepa- The award must not be uncertain or ambiguous.

(*q*) *Spence* v. *Eastern Counties R. Co.*, 7 Dowl. 697. See *Davies* v. *Pratt*, 17 C. B. 183; 25 L. J., C. P. 71.

(*r*) *Price* v. *Popkin*, 10 A. & E. 139, per *Denman*, C. J.: *Harlow* v. *Read*, 1 C. B. 733; 3 D. & L. 203: *Re Addison and Spittle*, 18 L. J., Q. B. 51.

(*s*) *Hannan* v. *Jubc*, 10 Jur. 926, C. C.

(*t*) *Thames Iron Works, &c. Co.* v. *Reg.*, 10 B. & S. 33; 20 L. T. 18.

(*u*) See *Johnson* v. *Latham*, 20 L. Q. B. 236, where it was held, that some words on the map were part of the same.

(*x*) *Henderson* v. *Williamson*, 1 T. 116.

(*y*) See *Faviell* v. *The Eastern Counties R. Co.*, post, p. 1662, as to arbitrator's decision upon what is claim referred to him being final. *Davies* v. *Price*, 33 L. J., Q. B. where it was held that the objection was not waived. See *Thames Iron Works, &c. Co.* v. *Reg.*, supra, where matters outside the original submission were submitted to the arbitrator by mistake.

(*z*) *Hawkins* v. *Colclough*, 1 Burr. 274.

(*a*) See *Tipping* v. *Smith*, 2 Str. 1024: *Ferguson* v. *Norman*, 4 Bing. N. C. 52.

(*b*) *Thornton* v. *Hornby*, 1 M. & Sc. 48; 8 Bing. 13.

(*c*) *Wood* v. *Duncan*, 7 Dowl. 91. See post, p. 1626.

(*d*) *Lund* v. *Hudson*, 1 D. & L. 236; 12 L. J., Q. B. 365: *Martin* v. *Burge*, 4 Ad. & E. 973. See *Taylor* v. *Shuttleworth*, 8 Sc. 565; 8 Dowl. 281, where an award was held good, though it did not distinguish how much was to be paid by the defendant in respect of the cause, and how much in respect of the matters in difference: *Taylor* v. *Marling*, 2 Sc. N. R. 374: *Hemsworth* v. *Bryan*, 2 D. & L. 144: *Crosbie* v. *Holmes*, 3 D. & L. 566, B. C.: *Rule* v. *Bryde*, 1 Ex. 151; 16 L. J., Ex. 256. See post, p. 1624.

rately what sum is to be paid in respect of any specific matter i dispute, unless it clearly appears from the submission that th parties intended that he should so find (*e*).

In an action against an executor, where the arbitrator found certain sum due to the plaintiff on the balance of accounts, an awarded that the defendant should pay it out of assets on a give day, it was held to be sufficiently certain, without stating expressl that the defendant had assets to that amount (*f*). Where a action of trespass was referred by order of Nisi Prius, the defe dant had pleaded not guilty, and a justification, and the arbitrat awarded, "that as the defendant had not proved his plea, th verdict for the plaintiff ought to stand:" *Coleridge*, J., held th award sufficient (*g*). And where a verdict for 50*l.* damages w taken at Nisi Prius, subject to a certificate, and the arbitrat certified that a verdict ought to be entered for the plaintiff on t first, and for the defendant on the second issue, which cover the whole cause of action, but omitted to give any direction express terms as to vacating the verdict as to the damages, *Pat son*, J., inclined to think the certificate sufficient (*h*). Where cause and all matters in difference were referred, and the ar trator found that the plaintiff had no cause of action against t defendant, the Court refused, at the instance of the plaintiff, to the award aside, upon the ground that it did not appear that arbitrator had taken into consideration, or decided on certain cla which the defendant alleged he had on the plaintiff (*i*). An aw

Award in alternative.

that A. or B. shall do an act is void for uncertainty (*k*). Where award ordered that a defendant should do one or other of things, in the alternative, it was held that the award was good

Should state how an act is to be done.

either of the things were capable of being performed (*l*). If award direct an act to be done, it should point out the mod doing it in a specific manner, so that it may be strictly obey and, therefore, an award that a party should put up certain gra

Award good if it can be rendered certain.

without stating at what price and quality, is bad (*m*). A prima uncertainty or want of conclusiveness in an award does not vi it, if it be capable of being rendered certain or conclusive; and award may be bad or good, according to the event (*n*). Thus, w

(*e*) *Re Whitworth and Hulse*, 35 L. J., Ex. 149: *Robinson* v. *Henderson*, 6 M. & S. 276; *Re Rider*, 3 Bing. N. C. 874. See *Mays* v. *Cannel*, 15 C. B. 107; 24 L. J., C. P. 41.

(*f*) *Lore* v. *Honeybourne*, 4 D. & R. 814. And see *Doe* d. *Williams* v. *Richardson*, 8 Taunt. 697.

(*g*) *Archer* v. *Owen*, 9 Dowl. 341.

(*h*) *Nalder* v. *Batts*, 1 D. & L. 700.

(*i*) *Hayllar* v. *Ellis*, 6 Bing. 225; 3 M. & P. 553; *Dickens* v. *Jarvis*, 5 B. & C. 528.

(*k*) *Lawrence* v. *Hodgson*, 1 Y. & J. 6. And see *Edgell* v. *Dallimore*, 11 Moore, 541; 3 Bing. 634.

(*l*) *Simmonds* v. *Swaine*, 1 Taunt. 549.

(*m*) *Price* v. *Popkin*, 2 P. & D. 304; 10 Ad. & E. 139: *Stoucher Farrar*, 6 Q. B. 730: *Johns Latham*, 19 L. J., Q. B. 329; J., Q. B. 236, where an award maintaining some weirs was sufficiently specific.

(*n*) *Aitcheson* v. *Cargey*, 13 639; 2 B. & C. 170; 2 D. & R See *Waddle* v. *Dawnman*, 12 W. 562; 1 D. & L. 560, whe arbitrator awarded that th fendant should pay to the pl for certain iron according *market price* of pig iron, and held that the award was not b uncertainty, in omitting to st time and market at which th of the iron was to be ascer See *Mays* v. *Cannel*, 15 C. B. L. J., C. P. 41.

a sum of money was ordered to be paid within a certain time from the date of the award, and the award bore no date, it was held to be sufficiently certain (*o*). So, where a bond was ordered to be delivered up to be cancelled within a certain time from the date of it, without stating the date, it was considered sufficient (*p*). So, where an action on a money bond, and all matters in difference, were referred to an arbitrator, and he directed a verdict to be entered for the plaintiff generally, it was held sufficient, although he did not state for what amount (*q*). And where a verdict was taken for the plaintiff, subject to a reference of the cause and all matters in difference, the arbitrator having power to vacate the verdict or reduce the damages, and he awarded that the plaintiff was entitled to demand of the defendant 90*l.* in respect of the cause of action, and that the defendant was entitled to set off 35*l.* in respect of his journeys, &c., mentioned in the plea of set-off, and that the defendant should deliver up certain securities to the plaintiff: it was held that the award sufficiently ascertained the amount for which the verdict was to be entered (*r*). So, in the common cases of costs, where their amount is not ascertained by the award, still this circumstance does not render the award bad for uncertainty; the maxim in these and the like cases being, "Id certum est quod certum reddi potest;" and in such cases the Master or other officer of the Court will tax them (*s*). But the arbitrator should assess the costs of an action in an inferior Court, for there may be no proper officer in such Court to tax them (*t*).

The award must finally settle all the matters referred.

The award must be a final and conclusive settlement of all the matters referred; otherwise it will be bad (*u*). Thus, where several matters are submitted, and the arbitrator omits to decide on one or more of them (*x*); or where all matters in difference are submitted, and he omits to decide as to some one matter which has been pointed out to him (*y*), the award is bad (*z*). Where a cause and

(*o*) *Arnat* v. *Breame*, 1 Salk. 76; 2 Ld. Raym. 1076.

(*p*) *Bell* v. *Gipps*, 2 Ld. Raym. 1141.

(*q*) *Cayme* v. *Watts*, 3 D. & R. 224. And see *Cargey* v. *Aitcheson*, 2 B. & C. 170; 2 D. & R. 222; 13 Price, 639; 2 Bing. 199: *Dicas* v. *Jay*, 5 Bing. 281; 2 M. & P. 418.

(*r*) *Platt* v. *Hall*, 2 M. & W. 391. And see *Smith* v. *The Festiniog R. Co.*, 6 Dowl. 190: *King* v. *Earl of Dundonald*, 5 Dowl. 589.

(*s*) See *Cargey* v. *Aitcheson*, 2 D. & R. 222; 2 B. & C. 170: *Dudley* v. *Littlefield*, 2 Str. 737: *Fox* v. *Smith*, 1 Wils. 267: *Barrett* v. *Parry*, 4 Taunt. 658.

(*t*) *Winter* v. *Garlick*, 1 Salk. 75: *Addison* v. *Gray*, 2 Wils. 293.

(*u*) See *Tipping* v. *Smith*, 2 Str. 1024: *Cargey* v. *Aitcheson*, 2 D. & R. 222; 2 B. & C. 170; 2 Bing. 199, 2 C. in error: *Mauser* v. *Weaver*, 3 B. & Ad. 295: *Plummer* v. *Lee*, 2 M. & W. 495; 5 Dowl. 755. The arbitrator should not decide upon matters abandoned by the parties: *Hooper* v. *Hooper*, 1 M'Clel. & Y. 509. See *Bird* v. *Cooper*, 4 Dowl. 148.

(*x*) *Re Robson*, 1 B. & Ad. 723: *Randall* v. *Randall*, 7 East, 81: *Bradford* v. *Brigan*, Willes, 268: *Price* v. *Popkin*, 2 P. & D. 304: *Hewitt* v. *Hewitt*, 1 Q. B. 110; 4 P. & D. 598: *Re Marsh*, 16 L. J., Q. B. 330.

(*y*) *Price* v. *Popkin*, 2 P. & D. 304: *Stone* v. *Phillips*, 6 Dowl. 247: *Rees* v. *Waters*, 16 M. & W. 263: *Ingram* v. *Milnes*, 8 East, 445. See *Smith* v. *Johnson*, 15 East, 213: *Pinkerton* v. *Caslon*, 2 B. & Ald. 704: *Day* v. *Bonnin*, 3 Bing. N. C. 219: *England* v. *Davison*, 9 Dowl. 1058: *Duke of Beaufort* v. *Welch*, 10 Ad. & E. 527. An affidavit to set aside an award on this ground should clearly show what matters have been brought before the arbitrator and left by him undetermined: *Hancock* v. *Reed*, 2 L. M. & P. 584. As to an arbitrator limiting the extent of his authority, see *Toby* v. *Lovibond*, post, p. 1662. And as to an arbitrator's decision as to what is a matter referred being conclusive, see *Farielly* v. *The Eastern Counties R. Co.*, post, p. 1662.

(*z*) *Samuel* v. *Cooper*, 4 N. & M.

PART XVIII.

all matters in difference were referred, the costs to abide the event, as upon a trial, and final judgment to be entered up by the successful party the arbitrator awarded that the plaintiff had no cause of action, and that he should pay defendant a sum of money, but added that it was not intended to prevent plaintiff recovering on a certain agreement signed by the defendant, but only that at *present* he had no cause of action, the award was held sufficiently final (*a*). So, where by an order of Nisi Prius, an action at law and all matters in difference between the parties at law and in equity, including a Chancery suit, were referred to an arbitrator, who by his award ordered that a sum of money should be paid to the plaintiff in the action, and that the bill in Chancery should be dismissed, and that all proceedings thereon should utterly cease and determine; it was held, that the suit in equity, and all matters in difference in that suit, and all matters in difference between the parties, were thereby finally determined: although one of the matters in dispute in the Chancery suit was brought before the arbitrator as a matter in difference between the parties, and was not otherwise disposed of than by the ending of the Chancery suit (*b*). And where a cause was referred to an arbitrator, who was to settle all matters in difference between the parties at law and in equity, so that he made his award by a certain day (with power of enlargement), to be delivered to the parties, or, if either of them should be dead, to their personal representatives: the arbitrator was to be at liberty to make *one or more awards at his discretion*; at the time of this submission two equity suits were pending, in which the parties to the action, and also certain infants, were concerned; before any award was made, one of the parties to the equity suits died; the arbitrator, by his award, ordered a verdict to be entered for the plaintiff, damages 500*l.*; and also that the defendant should pay to the plaintiff 350*l.* for *grievances not included* in his declaration: it was held, first, that the award was sufficiently final although it did not dispose of the equity suits; secondly, that the circumstance of infants being parties to those suits did not invalidate it; thirdly, that the arbitrator's authority was not revoked by the death of one of the parties; and, lastly, that the award of 350*l.* was sufficiently certain (*c*). So, where, one of the parties admits the claim of the other, but seeks to reduce the balance by set-off, it is sufficient for the award to find a sum due to one party by the other, without noticing the set-off (*d*). Where the defendant was ordered to pay the plaintiff a sum of money, unless within twenty-one days he should exonerate himself by affidavit from certain payments, &c., in which case he was to pay a less sum; the award was held bad (*e*). So, where the award ordered, among

---

520; 1 H. & W. 86. See *Phipps* v. *Ingram*, 3 Dowl. 669: *Gisburne* v. *Hart*, 7 Dowl. 402; 5 M. & W. 50: *Doe* d. *Madkins* v. *Horner*, 3 N. & P. 344; 8 A. & E. 235: *Doe* d. *Starling* v. *Hiller*, 2 Dowl., N. S. 694; 12 L. J., Q. B. 166: *Wykes* v. *Shipton*, 8 A. & E. 246, n.: *Williamson* v. *Mouldsdale*, 7 M. & W. 134: *Maloney* v. *Stoekley*, 2 Dowl., N. S. 122.

(*a*) *Harding* v. *Forshaw*, 4 Dowl. 761; *Cockburn* v. *Newton*, 9 Dowl. 676; 2 M. & G. 899; 3 Sc. N. 261.

(*b*) *Pearse* v. *Pearse*, 9 B. & C.

(*c*) *Wrightson* v. *Bywater*, 6 D. 359. See *Re Warner and Other* D. & L. 148.

(*d*) *Brown* v. *Croydon Canal* 1 P. & D. 391; 9 A. & E. 522.

(*e*) *Pedley* v. *Goddard*, 7 T. R See *Miller* v. *De Burgh*, 4 Ex. 19 L. J., Ex. 127.

other things, that the defendant should do certain work, and that the plaintiff should be at liberty to produce evidence before the arbitrator of the insufficiency of the work at any time within two months, the Court held that part of the award bad (*f*). So an award that a party shall execute conveyances to be settled by such counsel as he the arbitrator shall appoint is bad (*g*). So is an award that a party shall put certain premises in repair to the satisfaction of A. B. (*h*). So, where the award was, that the defendant should beg the plaintiff's pardon, in such manner and place as the plaintiff should appoint, it was held bad; for the manner and place, which were the most material circumstances, were yet to be determined (*i*). But, where the time and manner of executing general mutual releases were not pointed out, the Court held the award sufficient (*k*). Where the parties bound themselves to abide by the opinion of counsel on the construction of a statute, and the counsel gave his opinion in favour of one of the parties, it was held that this opinion was final and conclusive, notwithstanding it also recommended that the printed statute should be compared with the Parliament roll before the matter should be settled (*l*). If the award be ineffective,—as, if upon a submission for a partition between tenants in common, the arbitrator award their several portions, but omit to order deeds of conveyance to be executed, so as to vest the several allotments to their respective owners—the award is bad (*m*). An award that one of the parties do pay a sum of money to the other on a future day, in full of all demands, is sufficiently final (*n*). And an award, that one do give the other his promissory note for a certain sum, is good, being the same as awarding payment at a future day (*o*). So is an award that one shall be bound in a bond to another (*p*), as in a bond of indemnity in respect of certain debts (*q*). So an award that the defendant should execute a covenant to indemnify the plaintiff against all costs, damages, and expenses, which should happen by means of any further proceedings in an action begun at the instance of the defendant, was held good (*r*). But an award that one shall give the other a bond for such a sum, with such sureties as the other shall approve, is bad (*s*). And so is an award, that one shall find a surety to enter into a bond (*t*).

Awarding payment at a future day, or note or bond to be given.

(*f*) *Manser* v. *Heaver*, 3 B. & Ad. 295.

(*g*) *Tandy* v. *Tandy*, 9 Dowl. 1044: *Goddard* v. *Mansfield*, 1 L. M. & P. 7; 19 L. J., Q. B. 305.

(*h*) *Tomlin* v. *Mayor, &c. of Fordwich*, 5 A. & E. 147: *Tandy* v. *Tandy*, 9 Dowl. 1044.

(*i*) *Glover* v. *Barrie*, 1 Salk. 71. See *Ross* v. *Clifton*, 9 Dowl. 356.

(*k*) *Toby* v. *Loribond*, 5 C. B. 770. See *Freeman* v. *Bernard*, 12 Mod. 130.

(*l*) *Price* v. *Hollis*, 1 M. & S. 105.

(*m*) *Johnson* v. *Wilson*, Willes, 248.

(*n*) *Squire* v. *Grevett*, 2 Ld. Raym. 1: *Robinett* v. *Cobb*, 3 Lev. 188.

(*o*) *Booth* v. *Garnett*, 2 Str. 1082.

(*p*) *Cook* v. *Whorwood*, 2 Saund. 337; 2 Lev. 6. See *Goddard* v. *Mansfield*, 19 L. J., Q. B. 305.

(*q*) *Brown* v. *Watson*, 8 Sc. 386; 8 Dowl. 22. But see *Maule*, J.'s judgment in the former report of this case, from which it seems that he was of opinion, that an arbitrator has no right to award a bond, except for payment, at a day certain, of a sum for which he might have awarded a money payment. And see *Ross* v. *Boards*, 8 Ad. & E. 290.

(*r*) *Phillips* v. *Knightley*, 2 Str. 903.

(*s*) *Brown* v. *Watson*, supra, per *Tindal*, C. J.: *Thirsby* v. *Helbot*, 3 Mod. 272; 1 Show. 82; Carth. 159.

(*t*) *Cook* v. *Whorwood*, 2 Saund. 337.

PART XVIII.

Need not be stated that every matter referred has been adjudicated on.

If all matters in difference be referred, it need not be formally stated in the award that the arbitrator has adjudicated on every matter in difference (*a*). Where a cause and all matters in difference having been referred by an order of Nisi Prius, the arbitrator, after reciting the order of reference, made his award "of and concerning the said several premises so referred as aforesaid," and proceeded to award for the plaintiff on all the issues, directing the defendant to pay a sum of money to the plaintiff, but not finding specifically on other matters in difference; it was held, that the award was good, and that it sufficiently appeared on the face of it that the arbitrator had decided on all matters in difference referred to him (*x*).

The award must not be inconsistent.

If one part of an award be inconsistent with another, it will be bad: as where the arbitrator awarded that A. should pay B. 100*l.* and both should give general releases, and that at a subsequent time B. should pay A. 20*l.*, the award was held bad (*y*). But an award that the defendant should pay to the plaintiff 50*l.* towards the costs of the cause and reference, and the plaintiff should pay his own and the defendant's costs of the same, has been held not to be inconsistent (*z*). And where a cause and all matters in difference were referred, the costs to abide the event, and the arbitrator found several of the issues inconsistently, as, for instance, where he found that the defendant did not promise to perform certain work, and that he did perform part of such work, and that he did not perform other parts of it, the Court held the award good, regarding the finding on all the issues after the first as hypothetical, and only for the purpose of distributing the costs (*a*). Before the *Judicature Acts*, it was held that if an arbitrator find one plea, which goes to the whole cause of action, for the defendant, and other pleas for the plaintiff, and give him damages, that part of the award giving damages may be rejected as surplusage (*b*).

The award must not

If the arbitrator award any of the parties to do an act which is illegal, the award is so far bad (*c*). But, it seems, it is not so if

(*a*) *Creswick* v. *Harrison*, 10 C. B. 441; 20 L. J., C. P. 56; *S. C.* in error; 13 C. B. 399; 21 L. J., C. P. 113: *Re Brown and Croydon Canal Co.*, 9 Ad. & E. 522; 1 P. & D. 391.

(*x*) *Creswick* v. *Harrison*, supra, overruling *Gyde* v. *Boucher*, 5 Dowl. 127. See *Jewell* v. *Christie*, 36 L. J., C. P. 168: *Re Duke of Beaufort* v. *Swansea Harbour Trustees*, 29 L. J., C. P. 24: *Perry* v. *Mitchell*, 2 D. & L. 452; 12 M. & W. 792: *Bird* v. *Cooper*, 4 Dowl. 148: *Day* v. *Bonnin*, 3 Bing. N. C. 219: *Re Brown and Croydon Canal Co.*, 9 Ad. & E. 522; 1 P. & D. 391: *Wyatt* v. *Carnell*, 1 Dowl., N. S. 327: *Gray* v. *Greennap*, 1 B. & Ald. 106: *Dunn* v. *Warlters*, 9 M. & W. 293. See *Wynne* v. *Edwards*, 12 M. & W. 708; 1 D. & L. 976.

(*y*) *Storke* v. *De Smeth*, Willes, 66. See *Figes* v. *Adams*, 4 Taunt. 632: *Ames* v. *Milward*, 8 Id. 637; 2 Moore, 713.

(*z*) *Seccombe* v. *Babb*, 6 M. & 129; 8 Dowl. 167.

(*a*) *Duke of Beaufort* v. *Wilc* A. & E. 527. See *Cooper* v. *L* *don*, 9 M. & W. 60; 1 Dowl., 392; 10 M. & W. 785: *Warwi* *Cox*, 12 M. & W. 774: *Malon* *Stockley*, 2 Dowl., N. S. 122; *Oxenden* v. *Cropper*, per *Jer* C. J., 10 A. & E. 197: *Greaf* *Edgcombe*, 7 Q. B. 661.

(*b*) *Ross* v. *Clifton*, 2 Dowl., 983; 12 L. J., Q. B. 265. See v. *Loribond*, 5 C. B. 770; see p. 1662.

(*c*) See *Alder* v. *Saville*, 8 T 454: *Turner* v. *Swainson*, 1 M. 572, where the award directed to be done on another party's But it may be good for all b illegal part, semble, see *Dobi* v. *Bailward*, 7 Dowl. 640; 7 S post, p. 1636: *Lewis* v. *Ross* L. J., Ex. 136.

doing of the act is against some rule of practice merely (*d*). If a sum of money be awarded to be paid on or before a certain day, which happens to be a Sunday, the award is not bad (*e*). If a sum awarded appear on the face of it to have arisen out of an illegal transaction, the award will be bad pro tanto (*f*). Where an award recited a clause in the submission which provided that documents should be admitted in evidence without a stamp, but it did not appear that the arbitrator had admitted in evidence any unstamped documents, *Wightman*, J., held the award good (*g*). An award, made upon a submission of all matters in difference by executors and others, respecting the estate of the deceased, directing one of the parties to the submission to pay the amount of the legacy duty on certain shares of the assets of which he had become the owner, was held good (*h*).

direct an illegal act to be done.

An award made in favour of a person who is a stranger to the submission is bad, unless it is for the advantage of one who is a party to it (*i*), which will be presumed until the contrary is shown (*k*). Where a cause was referred by a Judge's order, an award that the debt should be paid to the plaintiff *or S. his solicitor*, was held good (*l*). Arbitrators cannot cancel a deed of apprenticeship where the apprentice is not a party to the submission (*m*).

Making award in favour of or against a stranger.

In one case it was held, that the arbitrator had not exceeded his authority in directing a payment to be made to the wife of a party to the reference, who was also a party to the same (*n*).

Directing payment to wife.

If an arbitrator, by the submission, has power to direct what he shall think fit to be done, he has power to direct mutual releases to be executed (*o*). He should only direct the releases to extend to the time of the submission (*p*). An award that the parties shall execute mutual releases to be settled by a third party in case of dispute, is bad (*q*). So, if there be a submission of a particular difference, and there are other things in controversy, and a general

Mutual releases.

(*d*) See *Re Bunger*, 2 B. & Ald. 391: *Bedington* v. *Southall*, 4 Price, 232. See, however, *Broadhurst* v. *Darlington*, 2 Dowl. 38.

(*e*) *Hobden* v. *Miller*, 2 Se. N. R. 68.

(*f*) *Aubert* v. *Maze*, 2 B. & P. 371. See *Steers* v. *Lashley*, 6 T. R. 61: *Taylor* v. *Marling*, 2 Se. N. R. 68, per *Tindal*, C. J.

(*g*) *Phillips* v. *Higgins*, 20 L. J., Q. B. 357; see ante, p. 1589.

(*h*) *Re Warner*, 2 D. & L. 148; 13 L. J., Q. B. 370.

(*i*) *Ridaw* v. *Clarkson*, 1 Ld. Raym. 383: *Eccleston* v. *Maliard*, Cro. El. 76 Co. 78: *Bretton* v. *Pratt*, Cro. El. 78: *Bird* v. *Bird*, 1 Salk. 74: *Fisher* v. *Pimbley*, 11 East, 188: *Ingram* v. *Lukes*, 8 East, 445. And see 1 Ro. Ab. 249, pl. 15: *Adcock* v. *Wood*, 20 L. J., Ex. 435: *S. C.* in error, 21 L. J., Ex. 204, where it was held that the award could not be enforced by attachment, upon the application of a stranger. See *Re Warner and others*, 2 D. & L. 148, where an award directing conveyances to be executed to a stranger to the submission was held good: *Kirk* v. *Unwin*, 2 L. M. & P. 519; 20 L. J., Ex. 345, where the not doing of certain acts by a stranger was made, by the award, a condition precedent to the doing of an act by a party to the reference. See *Hawkins* v. *Benton*, 8 Q. B. 479: *Re Laing*, 13 C. B. 276.

(*k*) *Adcock* v. *Wood*, 20 L. J., Ex. 435.

(*l*) *Hare* v. *Fleay*, 11 C. B. 472; 20 L. J., C. P. 249.

(*m*) *Wicks* v. *Cox*, 11 Jur., B. C. 542.

(*n*) *Wynne* v. *Wynne*, 3 Se. N. R. 435; 4 M. & G. 253.

(*o*) See *Toby* v. *Lovibond*, 5 C. B. 770. The form of the direction in this case was held sufficient.

(*p*) See *Pickering* v. *Watson*, 2 Wm. Bla. 1117.

(*q*) *Goddard* v. *Mansfield*, 1 L., M. & P. 25; 19 L. J., Q. B. 305.

release is awarded, the award is bad, at least pro tanto; but it must be shown that there were such other matters to avoid the award (*r*).

Where a cause is referred.

Where an action is referred, the pleadings need not be set out in the award (*s*). It is not necessary that the arbitrator should find for the plaintiff or defendant in the very words of the issue; it is sufficient if he decide substantially the question in dispute (*t*). It is sufficient if he find in the words of the issue; he need not find in express terms for plaintiff or defendant (*u*). As a general rule, where an action in which there are several issues is referred at the trial, the arbitrator should, if requested, direct how each issue is to be determined (*x*). Where there were several issues, and the costs of *the action* had to abide the event of the award, the arbitrator had to find upon each issue, so as to enable the officer properly to tax the costs (*y*). It was not, however, necessary for the arbitrator to find specifically upon each issue; if it could be clearly inferred from the award in which way each of the issues had been found, it was sufficient (*z*). The award in an action where damages are claimed, if in favour of the plaintiff, should state the amount of damages he is entitled to recover (*a*). Where on a reference of an action for damages, the costs to abide the event, the arbitrator finds for the defendant on a defence which covers *the whole* cause of action, it is no objection to the award, that, on other issues, he finds for the

Finding on each issue.

Amount of damages.

(*r*) *Hill* v. *Thorne*, 2 Mod. 309.

(*s*) *Johnson* v. *Latham*, 20 L. J., Q. B. 236.

(*t*) *Wykes* v. *Shipton*, 3 N. & M. 240. See infra.

(*u*) *Allen* v. *Lowe*, 4 Q. B. 66; 3 G. & D. 395.

(*x*) See *Woof* v. *Hooper*, 6 Sc. 281; 4 Bing. N. C. 449: *Williams* v. *Monksdale*, 7 M. & W. 134.

(*y*) *Kilburn* v *Kilburn*, 13 M. & W. 671; 2 D. & L. 33: *Bourke* v. *Lloyd*, 10 M. & W. 550; 2 Dowl., N. S. 452. See *Waddle* v. *Downman*, 12 M. & W. 562; 1 D. & L. 569, where by reason of the terms of the order, it was held, that the arbitrator was not bound to find upon each issue. See also *England* v. *Davison*, 9 Dowl. 1052: *Bradley* v. *Phelps*, 21 L. J., Ex. 310, where the arbitrator had to tax the costs: *Stonehewer* v. *Farrer*, 6 Q. B. 730: *Doe* d. *Starling* v. *Hiller*, 2 Dowl., N. S. 694: *Pearson* v. *Archbold*, 11 M. & W. 477: *Williamson* v. *Locke*, 2 D. & L. 782: *Dibben* v. *Marquis of Anglesey*, 10 Bing. 568: *Gore* v. *Baker*, 4 E. & B. 470; 24 L. J., Q. B. 94. See Vol. 1, p. 676.

(*z*) *Humphrey* v. *Pearce*, 22 L. J., Ex. 120: *Wilcox* v. *Wilcox*, 4 Ex. 500; 19 L. J., Ex. 27: *Hobson* v. *Stewart*, 4 D. & L. 589: *Phillips* v. *Higgins*, 20 L. J., Q. B. 357; 2 L., M. & P. 355: *Armitage* v. *Cotte* 4 Ex. 641: *Maloney* v. *Stockley*, Dowl., N. S. 122: *Addom* v. *Roe* 15 L. J., Q. B. 223; 3 D. & L. 33 1 B. C. Rep. 81: *Baker* v. *Cotterl* 18 L. J., Q. B. 345; 7 D. & L. 20 *Re Smith*, 6 D. & L. 523: *Buck worth* v. *Harrison*, 7 Dowl. 71 S *Rennie* v. *Mills*, 7 Sc. 276: *Cooper* *Langdon*, 9 M. & W. 60.

(*a*) See *Wood* v. *Duncan*, 7 Dow 91: *Brown* v. *The Somerset and Dor Rail. Co.*, 34 L. J., Ex. 152: *Platt* *Hall*, ante, p. 1621, where it was hel it could be sufficiently ascertained f what amount the verdict was to entered: *Nicholson* v. *Sykes*, 9 E 357; 23 L. J., Ex. 193, where, bef the Jud. Acts, the cause and matte in difference were referred bef declaration, and it was held unnec sary to state how much was due respect of the cause. See *Lind Hudson*, 1 D.& L. 236: ante, p. 16 *Bradley* v. *Phelps*, 21 L. J., Ex. 3 Where a cause and all matters difference are referred, and the ar trator finds that the plaintiff is titled to recover, it is advisable state in the award how much is in respect of the cause, and h much in respect of the matter difference, as there is some diffic in reconciling the cases on this ject.

plaintiff without damages (*b*). In fact he should so find (*c*). The arbitrator cannot (as far as relates to the action referred) award the payment of a greater sum than is claimed as damages in the statement of claim. If the arbitrator should so award, judgment should be entered up for the amount of damages claimed; but if by mistake judgment is entered up for the sum awarded, the Court will allow an amendment (*d*). Before the Judicature Acts, the Court would not, after a verdict taken for the damages laid in the declaration, allow the declaration to be amended, so as to enlarge these damages, even upon affidavit that a greater debt could be proved before the arbitrator (*e*). The arbitrator, it seems, is also bound by the particulars of demand delivered in the action, in the same way as the Judge and jury would have been if the action had been tried (*f*). But the particulars are not necessarily before the arbitrator, even where the cause is referred at the trial; therefore, if it is intended to limit the plaintiff's demand to the amount claimed by the particulars, they should be brought before the arbitrator (*g*). If an action, *and all matters in difference*, be referred, the arbitrator may award the defendant to pay the plaintiff a larger sum than that for which the verdict is taken in respect of such matters in difference, for which the plaintiff would have a remedy under the award but not under the verdict (*h*). Where the award was, that an action pending between the parties should be discontinued, and that each should pay his own costs, it was considered sufficiently final, being in effect an award of a stet processus (*i*). It seems that where an action was referred after a demurrer to one of the pleadings, the arbitrator might have directed a judgment to be entered as to the demurrer where it was necessary for the purpose of properly determining the action (*k*). As to an arbitrator's authority to direct a verdict to be entered, *see ante*, p. 1589. By an order of Nisi Prius, a general verdict was taken for the plaintiffs on all the issues joined, subject to a reference of that and another cross action between the same parties; in the latter action issue had not been joined; by the terms of the order the arbitrator was empowered to make "an award or certificate;" the arbitrator signed two separate certificates, and delivered them to the parties; on application to set aside these certificates, it was held that, as they purported to be made at one and the same time, they might be considered as one instrument, containing the decision in each cause (*l*).

Award that action be discontinued, &c.

Where arbitrator has power to enter a judgment, &c.

Where two certificates given.

(*b*) *Warwick* v. *Cox*, 1 D. & L. 986: *Savage* v. *Ashwin*, 4 M. & W. 530.

(*c*) See *Ross* v. *Clifton*, 2 Dowl., N. S. 983; 12 L. J., Q. B. 265: *Wood* v. *Duncan*, 7 Dowl. 91.

(*d*) *Pearse* v. *Cameron*, 1 M. & Sel. 705: *Prentice* v. *Reed*, 1 Taunt. 151: *Bonner* v. *Charlton*, 5 East, 139. See *Annan* v. *Job*, 10 Jur. 1083.

(*e*) *Pearse* v. *Cameron*, 1 M. & Sel. 705: *Prentice* v. *Reed*, 1 Taunt. 151. In such a case it is presumed an amendment would now be allowed: the arbitrator might amend if the order of nisi prius gave him power to do so.

(*f*) *Kenrick* v. *Phillips*, 7 M. & W. 415; 9 Dowl. 308. See *Eastham* v. *Tyler*, 2 B. C. Rep. 136.

(*g*) *Kenrick* v. *Phillips*, supra.

(*h*) *Pearse* v. *Cameron*, supra.

(*i*) *Blanchard* v. *Lilly*, 9 East, 497. And see *Jackson* v. *Yabsley*, 5 B. & Ald. 848: *Hancock* v. *Reid*, 15 Jur. 1036; 21 L. J., Q. B. 78.

(*k*) *Matthew* v. *Davis*, 1 Dowl., N. S. 679.

(*l*) *Re Smith*, 6 D. & L. 520.

M. & P. 355: *Armitage* v. *Coates*, 4 Ex. 641: *Maloney* v. *Stockley*, 2 Dowl., N. S. 122: *Adam* v. *Rose*, 15 L. J., Q. B. 223; 3 D. & L. 331; 1 B. C. Rep. 81: *Baker* v. *Cotterill*, 18 L. J., Q. B. 345; 7 D. & L. 20: *Re Smith*, 6 D. & L. 523: *Inglesworth* v. *Harrison*, 7 Dowl. 71. See *Rennie* v. *Mills*, 7 Sc. 276: *Cooper* v. *Langdon*, 9 M. & W. 60.

(*a*) See *Wood* v. *Duncan*, 7 Dowl. 91: *Brown* v. *The Somerset and Dorset Rail. Co.*, 31 L. J., Ex. 152: *Platt* v. *Hall*, ante, p. 1621, where it was held, it could be sufficiently ascertained for what amount the verdict was to be entered: *Nicholson* v. *Sykes*, 9 Ex. 357; 23 L. J., Ex. 193, where, before the Jud. Acts, the cause and matters in difference were referred before declaration, and it was held unnecessary to state how much was due in respect of the cause. See *Lund* v. *Hudson*, 1 D. & L. 236: ante, p. 1035: *Bradley* v. *Phelps*, 21 L. J., Ex. 310. Where a cause and all matters in difference are referred, and the arbitrator finds that the plaintiff is entitled to recover, it is advisable to state in the award how much is due in respect of the cause, and how much in respect of the matters in difference, as there is some difficulty in reconciling the cases on this subject.

PART XVIII.

Other cases as to the form of an award where an action is referred, are noticed *ante*, pp. 1618 *et seq.*, whilst treating generally of the form of the award.

Award as to costs.

Of the reference.

Award as to Costs.]—The arbitrator's power over the costs of the reference depends entirely upon the terms of the submission. Sometimes by the submission the costs are to abide the event; in which case the arbitrator has no power over them (*m*). If the costs generally are to abide the event, this includes the costs of the reference as well as the costs of the action (*n*). Where there is no cause in Court, and nothing is said about costs in the submission, the arbitrator has no power over them (*o*). But where an action is referred, and the order of reference is silent as to costs, the arbitrator has power over the costs of the action, but not over the costs of the reference (*p*). Generally, where an action is referred, the costs of the reference are not costs in the cause (*q*). But where a verdict is taken subject to a reference of the action to an arbitrator, who is to certify for whom and for what amount the verdict shall be entered, and the costs of the action and reference are to abide the event, the costs of the reference are costs in the cause, and follow the legal event of the verdict (*r*). Where a cause is referred at Nisi Prius "on the usual terms as to costs," this means that the costs of the cause are to abide the event, and the costs of the reference are to be in the discretion of the arbitrator (*s*). An agreement of reference contained a stipulation, "that the costs of the agreement, and of the reference and award, should be in the discretion of the arbitrator, and be defrayed as he should direct;" the arbitrator awarded that the defendant should pay a certain sum to the plaintiff, but made no mention of costs: it was held that the

(*m*) When, by an order of reference, the costs of the award and of the reference are to abide the event of the award, if the award be partly in favour of one party, and partly in favour of the other, though there be a substantial balance in favour of one, each party has to pay his own costs of the reference and award. See *Kelsey* v. *Stupples*, 1 H. & C. 576; 32 L. J., Ex. 6. So, where an action and all matters in difference were referred, the costs of reference and award to abide the event of the award, and the arbitrator found for the plaintiff in the action for 80*l.*, and for the defendant for the matters in difference for 6*l.*, and directed the defendant to pay the balance to the plaintiff; it was held that the plaintiff was not entitled to the costs of the reference and award: *Gribble* v. *Buchanan*, 18 C. B. 691; 26 L. J., C. P. 24: *Reynolds* v. *Harris*, 3 C. B., N. S. 267; 28 L. J., C. P. 26: *Marsack* v. *Webber*, 2 El. & El. 637; 20 L. J., Q. B. 109.

(*n*) *Wood* v. *O'Kelly*, 9 East, 436.

(*o*) *Firth* v. *Robinson*, 1 B. & C. 277: *Candler* v. *Fuller*, Willes, 64: *Strutt* v. *Rogers*, 7 Taunt. 213; 2 Marsh. 524. See *Grove* v. *Cox*, 1 Taunt. 165: *Mackintosh* v. *Blyth*, 1 Bing. 269; 8 Moore, 211.

(*p*) *Buller* v. *King*, 36 L. T. 732: *Firth* v. *Robinson*, 1 B. & C. 277: *Candler* v. *Fuller*, Willes, 64; Roll. Arbitr. K. 13; *Whitehead* v. *Firth*, 12 East, 167: *Bell* v. *Bellson*, 2 Chit. Rep. 157: *Bradley* v. *Taustoe*, 1 B. & P. 34.

(*q*) *Brown* v. *Nelson*, 13 M. & W. 397; 2 D. & L. 405; 14 L. J., Ex. 62: *Tregoning* v. *Attenborough*, Dowl. 225; 5 M. & P. 453; 7 Bing. 733. See *Mackintosh* v. *Blyth*, Moore, 211; 1 Bing. 269: *Taylor* v. *Gordon*, 1 Dowl. 720: *Firth* v. *Robinson*, 1 B. & C. 277: *Sim* v. *Edward*, 17 C. B. 527; 25 L. J., C. P. 175.

(*r*) *Deere* v. *Kirkhouse*, 1 L. M. & P. 783; 20 L. J., Q. B. 195: *Brown* v. *Nelson*, 13 M. & W. 397; *Pollock*, C. B.: *Mackintosh* v. *Blyth*, 8 Moore, 211; 1 Bing. 269. See Vol. 1, pp. 672 et seq.

(*s*) *Morel* v. *Byrne*, 28 L. T. 62

award was therefore bad (*t*). Where an arbitrator has a discretion to exercise upon the subject of costs, he may order either party to pay the costs, or each to pay a moiety, or the like (*u*). It seems that if each party be ordered to pay a moiety of the arbitrator's charges, one of them may pay the entire sum, in order to get the award from the arbitrator, and he may afterwards have the same remedy against the other, if he refuses to pay his moiety, as he would have for the non-performance of any other part of the award (*x*). In practice, however, in order to obviate all questions upon this point, it is usual in the award to order, that if either of the parties, for the purpose of taking up the award, pay the whole of the arbitrator's charges, then the other shall repay him a moiety thereof. An award that the costs of making a submission a rule of Court should be paid by the parties through whose default in the performance of the award the same should become necessary, was held bad as not being sufficiently certain or final (*y*). Where an agreement of reference provided that the arbitrator should by his award direct by whom, to whom, and in what proportions and manner the costs of the award and the compensation to the arbitrator should be paid, and the award directed the same to be paid by A., B., and C. in equal proportions; the award was held good, although it did not otherwise show by whom, to whom, or in what manner those costs were to be paid, as it sufficiently indicated that each of the three parties was to pay one-third of them to the arbitrator (*z*).

Where the submission gives the arbitrator power over the costs "of the reference," this includes the costs of the award, and gives him power over them (*a*).

Costs of action.

As to the costs of the *action*, where an action is referred, the arbitrator may order either party to pay them, although no express authority is given to him upon that subject by the rule or order of reference (*b*). But if, by such rule or order, the costs are "to abide the event" (*c*), the arbitrator cannot exercise any discretion in the

(*t*) *Richardson* v. *Worsley*, 19 L. J., Ex. 317. See *Re Lloyd*, 6 D. & L. 531, B. C.

(*u*) *Proudfoot* v. *Boyle*, 15 M. & W. 198. See *Rose* v. *Redfern*, 10 W. R. 91, Ex., where it was held it sufficiently appeared that the party against whom the award was made was to pay his own costs.

(*x*) *Ricks* v. *Richardson*, 1 B. & P. 93; *Stokes* v. *Lewis*, 2 Smith, 12. See *Bates* v. *Townley*, 2 Ex. 152; 19 L. J., Ex. 309, as to an action for money paid being maintainable to recover one moiety of the costs from the party not paying them. And see *Marsack* v. *Webber*, 6 H. & N. 1.

(*y*) *Smith* v. *Wilson*, 2 Ex. 327: *Williams* v. *Wilson*, 9 Ex. 90; 23 L. J., Ex. 17.

(*z*) *Re Young and others*, 13 C. B. 623; 22 L. J., C. P. 160.

(*a*) *In re Walker & Son and Brown*, 9 Q. B. D. 434; 51 L. J., Q. B. 424; 30 W. R. 703.

(*b*) *Roe* d. *Wood* v. *Doe*, 2 T. R. 644: *Firth* v. *Robinson*, 1 B. & C. 277. See *Lewis* v. *Harris*, 4 D. & R. 129; 2 B. & C. 620: *Rigby* v. *Okell*, 7 B. & C. 57: *Mordue* v. *Palmer*, L. R., 6 Ch. 22; 40 L. J., Ch. 8.

(*c*) Query as to the meaning of these words, when a cause and all matters in difference are referred. See *Matlock Gas Light Co.* v. *Peters*, 6 E. & B. 215; 25 L. J., Q. B. 273: *Gribble* v. *Buchanan*, 26 L. J., C. P. 24: *Reynolds* v. *Harris*, 18 C. B. 691; 3 C. B., N. S. 267; 28 L. J., C. P. 26: *Marsack* v. *Webber*, 2 E. & E. 637; 29 L. J., Q. B. 109: *Dunhill* v. *Ford*, L. R., 3 C. P. 36: *Woodhams* v. *Woodhams*, 25 L. T. 460; 37 L. J., C. P. 32. A cause having been referred, together with all matters in difference between the parties, the costs of the cause to abide the event of the reference, the arbitrator

PART XVIII.

awarding of them, or even in fixing their amount (*d*), unless the same be necessary for properly adjudicating upon all the matters referred (*e*).

Costs to abide event.

Where a cause is referred, and the costs of the action, reference and award are to abide the event, the event is in favour of the party for whom judgment would have been entered if the action had been tried at law with the same event (*f*); but the other party is entitled to the costs of the issues on which he succeeds (*g*); and if there are several issues the arbitrator should, in his award, state separately his finding as to each so that the costs may be apportioned (*h*); and if he does not do so the award may be sent back to him to do so (*h*).

Effect of the County Courts Act.

The 5th section of the *County Courts Act*, 1867 (*i*), so far as it is preserved by the *Judicature Act*, 1873, *s.* 67 (*i*), applies to the case where an *action* is referred (*k*), and the plaintiff "recovers" the amount found to be due to him on his claim within the meaning of that section (*k*). This is so, whether the reference is by consent or compulsory, and whether the action be referred before trial or a verdict is taken subject to a reference (*k*). If, therefore, the action is one "in which any relief is sought which can be given in a County Court" (*l*), and the plaintiff recovers a sum less than twenty pounds, if the action is founded on contract, or ten pounds

---

awarded first, as to the cause, that there was due to the plaintiff from the defendant the sum of 259*l.* 1*s.*; and secondly, as to the matters in difference other than the cause, that there was due from the plaintiff to the defendant the sum of 242*l.* 13*s.* 10*d.*; and the arbitrator directed the latter sum to be allowed out of and deducted from the damages and costs recoverable by the plaintiff in the action, and the balance to be paid to the plaintiff:—Held, that the event of the reference was in favour of the plaintiff, and that he was not precluded from recovering his costs of the action by the 5th section of the County Court Act, 1867; *Stevens* v. *Chapman*, L. R., 6 Ex. 213; 40 L. J., Ex. 123.

(*d*) *Kendrick* v. *Davis*, 5 Dowl. 693. See *Hemsworth* v. *Brian*, 2 D. & L. 844, where the costs were to abide "the result."

(*e*) *Reeves* v. *M'Gregor*, 9 Ad. & E. 576; 1 P. & D. 372, where an action at law and a suit in equity were referred, and the costs were "to abide the event," and it was held that the event meant the ultimate and general event, and not that the costs of each suit should abide the event as regarded that suit: *Highgate Archway Co.* v. *Nash*, 2 B. & Ald. 597: *Boodle* v. *Davies*, 4 N. & M. 788: *Whaley* v. *Laing*, 5 H. & N. 480; 29 L. J., Ex. 313, where at Nisi Prius it was referred to an arbitrator to state a case, and the judgment was arrested: *Garvey* v. *Buller*, 1 B. & Ald. 670: *Holder* v. *Raith*, 4 N. & M. 466: *Dawson* v. *Garrett*, 2 Dowl. 624.

(*f*) *Gontard* v. *Carr* (C. A.), 32 W. R. 242; 13 Q. B. D. 598, n.; 53 L. J., Q. B. 55: cp. *Smith* v. *Edge*, 2 H. & C. 659. See *Danbury* v. *Rickman*, 18 C. 564: *Yates* v. *Knight*, 2 Bing. N. C. 277: *Reynolds* v. *Harris*, 3 C. B., N. S. 267; 28 L. J., C. P. 26. See ante. Vol. 1, p. 676.

(*g*) Id.

(*h*) *Ellis* v. *Desilva* (C. A.), 6 Q. B. D. 521; 50 L. J., Q. B. 328; 44 L. T. 209; 29 W. R. 493.

(*i*) See the section and cases ante, Vol. 1, p. 680.

(*k*) *Ferguson* v. *Davison* (C. A.), 8 Q. B. D. 470; 51 L. J., Q. B. 266; 46 L. T. 191; 30 W. R. 462: *Cowell* v. *Amman Colliery Co.*, 34 L. J., Q. B. 161. See accord. *Robertson* v. *Stone*, 13 C. B., N. S. 248; 31 L. J., C. P. 362: *Smith* v. *Edge*, 2 H. & C. 659: 33 L. J., Ex. 9: contra *Jones* v. *Jones*, 7 C. B., N. S. 832; 29 L. J., C. P. 151: overruled by *Fergusson* v. *Davison*, supra: cp. *Frean* v. *Sargent*, 2 H. & C. 293; 32 L. J., Exch. 281.

(*l*) See ante, Vol. 1, p. 681. This refers to the nature of the relief, not the amount sought to be recovered. *Stooke* v. *Taylor*, 5 Q. B. D. 569, per *Cockburn*, C. J., at p. 578: *Chatfield* v. *Sedgwick*, 4 C. P. D., per *Jessel*, M. R., at p. 461. But see *Potter* v. *Chambers*, 4 C. P. D. 457; sed quære this decision.

if founded on tort (*m*), he will not be entitled to any costs of suit unless the arbitrator, as he has power to do (*n*), certifies in his award or certificate that there was sufficient reason for bringing the action in the High Court, or unless the Court or a Judge at Chambers by rule or order allow such costs (*o*). The parties may contract themselves out of this section (*p*). But it applies when the costs of the cause are to abide the event (*q*). The statute only affects the costs of the action and does not interfere with the power of the arbitrator over the costs of the reference and award when they are left in his discretion (*r*).

When defendant has a counterclaim or set-off.

Considerable discussion and apparent difference of opinion has taken place as to what is the event, and what the plaintiff "recovers" where the defendant sets up a counterclaim and where he sets up a set-off. It is submitted that the following statement contains not only what ought to be the rule, but what is established by the cases. There is a difference between the case where the defendant sets up a counterclaim and that where he sets up what is technically and strictly a set-off (*s*). When the defendant sets up a counterclaim as distinguished from a set-off, the plaintiff recovers whatever is found to be due to him on his claim irrespective of the amount (if any) found to be due to the defendant on his counterclaim, so that even though the latter exceeds the amount due to the plaintiff, still if the amount due to the plaintiff is not less than 20*l.* in an action of contract, or 10*l.* in an action of tort, the plaintiff is entitled to the costs of the cause when they are to abide the event, although he may only get judgment for a balance of less amount, or even have to pay the defendant a balance (*t*). In this case the findings are distributed and the plaintiff gets or loses the costs of the cause according as he succeeds or fails in establishing his claim to the required amount (*u*). And the defendant is entitled to the costs of proving his counterclaim if he succeeds on it (*v*) to any

(*m*) See note (*i*), ante.

(*n*) See *Smith* v. *Hailey*, L. R., 8 Ex. 16; 27 L. T. 426: *Bedwell* v. *Wood*, 2 Q. B. D. 626; 46 L. J., Q. B. 725: cp. *Taylor* v. *Cass*, L. R., 4 C. P. 614: *Craven* v. *Smith*, L. R., 4 Ex. 146. The certificate must be included in the award, it cannot be given afterwards. *Bedwell* v. *Wood*, supra.

(*o*) See note (*i*), ante.

(*p*) Per *Bramwell*, L. J., *Galatti* v. *Wakefield*, 4 Ex. D. at p. 250.

(*q*) See note (*k*), ante.

(*r*) *Galatti* v. *Wakefield*, 4 Ex. D. 249; 48 L. J., Ex. 70: *Forshaw* v. *De Wette*, L. R., 6 Ex. 200; 40 L. J., Ex. 153: contra, *Moore* v. *Watson*, L. R., 2 C. P. 314; 36 L. J., C. P. 122, where the reference was compulsory. Sed quere if this be any distinction, and consequently whether the last case was rightly decided.

(*s*) *Barnes* v. *Bromley*, 6 Q. B. D. 197. See per *Pollock*, B. at pp. 199, 200: *Stooke* v. *Taylor*, 5 Q. B. D., per *Cockburn*, C.J., at p. 578.

(*t*) *Stooke* v. *Taylor*, 5 Q. B. D. 569; 49 L. J., Q. B. 857: *Cole* v. *Firth*, 40 L. T. 851; 4 Ex. D. 301, (*u*): *Neal* v. *Clarke*, 4 Ex. D. 286: *Barnes* v. *Bromley*, 6 Q. B. D. 197, per *Pollock*, B., at pp. 199, 200. This was a case of set-off, and *Pollock*, B., clearly points out the distinction. But see *Chatfield* v. *Sedgwick*, 4 C. P. D. 459 (C. A.), which, however, was a case of set-off, and may be distinguished on this ground: and *Staples* v. *Young*, 2 Ex. D. 324, which it is submitted is wrong.

(*u*) *Myers* v. *Defries*, 4 Ex. D. 176; 48 L. J., Ex. 446 (C. A.): *Mason* v. *Brentini*, 15 Ch. D. 287; 43 L. T. 557: *Saner* v. *Bilton*, 11 Ch. D. 416; 48 L. J., Ch. 545: *Waring* v. *Pearman*, 50 L. T. 633; 32 W. R. 429: *Pearson* v. *Ripley*, 50 L. T. 629; 32 W. R. 463.

(*v*) *Davidson* v. *Gray*, 42 L. T. 834; 5 Ex. D. 189 (1). (C. A.): *Neal* v. *Clarke*, 4 Ex. D. 286. But see *Potter* v. *Chambers*, 4 C. P. D. 69.

---

y Consent.

ng their amount (*d*), unless the judicating upon all the matters

he costs of the action, reference it, the event is in favour of the have been entered if the action e event (*f*); but the other party es on which he succeeds (*g*); and trator should, in his award, state n so that the costs may be ap- lo so the award may be sent back

Courts Act, 1867 (*i*), so far as it is 1873, *s.* 67 (*i*), applies to the case and the plaintiff "recovers" the on his claim within the meaning hether the reference is by consent action be referred before trial or reference (*k*). If, therefore, the f is sought which can be given in aintiff recovers a sum less than ounded on contract, or ten pounds

judgment was arrested: *Garvey* v. *Buller*, 1 B. & Ald. 670: *Holder* v. *Raith*, 4 N. & M. 466: *Dawson* v. *Garrett*, 2 Dowl. 624.

(*f*) *Gouland* v. *Carr* (C. A.), 32 W. R. 242; 13 Q. B. D. 598, n.; 53 L. J., Q. B. 55: cp. *Smith* v. *Edge*, 2 H. & C. 659. See *Danbury* v. *Rickman*, 1 Sc. 564: *Yates* v. *Knight*, 2 Bing. N. C. 277: *Reynolds* v. *Harris*, 3 C. B., N. S. 267; 28 L. J., C. P. 26. See ante, Vol. 1, p. 676.

(*g*) Id.

(*h*) *Ellis* v. *Desilva* (C. A.), 6 Q. B. D. 521; 50 L. J., Q. B. 328; 44 L. T. 209; 29 W. R. 493.

(*i*) See the section and cases ante, Vol. 1, p. 680.

(*k*) *Fergusson* v. *Darison* (C. A.), 8 Q. B. D. 470; 51 L. J., Q. B. 266; 46 L. T. 191; 30 W. R. 462: *Cowell* v. *Amman Colliery Co.*, 34 L. J., Q. B. 161. See accord. *Robertson* v. *Sterne*, 13 C. B., N. S. 248; 31 L. J., C. P. 362: *Smith* v. *Edge*, 2 H. & C. 659; 33 L. J., Ex. 9: contra *Jones* v. *Jones*, 7 C. B., N. S. 832; 29 L. J., C. P. 151: overruled by *Fergusson* v. *Darison*, supra: cp. *Evean* v. *Sargent*, 2 H. & C. 293; 32 L. J., Exch. 281.

(*l*) See ante, Vol. 1, p. 681. This refers to the nature of the relief, not the amount sought to be recovered. *Stooke* v. *Taylor*, 5 Q. B. D. 569, per *Cockburn*, C. J., at p. 578: *Chatfield* v. *Sedgwick*, 4 C. P. D., per *Jessel*, M. R., at p. 461. But see *Potter* v. *Chambers*, 4 C. P. D. 457; sed quære this decision.

amount, because the *County Courts Act*, 1867, *s.* 5, does not apply to a counterclaim (*u*). When, however, the defendant sets up a set-off within the statutes of set-off, the plaintiff only recovers the balance (if any) found to be due to him (*x*), and the defendant gets the costs of the cause if the balance is in his favour (*y*).

Where there is a claim and a counterclaim the arbitrator should, by his award, state his finding as to each issue, and if he fail to do so the award may be remitted to him for that purpose (*z*). The arbitrator need not in his award notice the costs of the action where they are to abide the event (*a*).

Costs allowed by particular statutes.

In some cases, where several actions are referred, the submission provides that the costs shall abide the event of each (*b*). It should be observed, however, that the award does not of itself entitle the party in whose favour it is made to costs allowed by particular statutes, on verdict, non-suit, or other specified modes of termination of the suit, unless the arbitrator has and exercises the power of ordering the suit to be terminated in that particular mode (*c*). Upon a reference at the trial, the parties might by the order have agreed that the arbitrator should be in the same situation and have the same powers that a judge had under the 3 & 4 V. *c.* 24, *s.* 2; and if so agreed, the arbitrator must, in all substantial matters, have followed the rules laid down in that statute for the guidance of the judges (*d*). The arbitrator's certificate for costs under this Act had to be made in the award itself (*e*). The Court would not interfere to control the discretion of an arbitrator who, having power to do so, had refused to certify under this enactment (*f*). An arbitrator to whom a cause is referred with all the powers of a Judge at Nisi Prius, cannot give a certificate for the costs of a special jury, after he has published his award, without providing for them therein (*g*). Where a cause was referred by order at the trial, and by the order the costs of the cause were to abide the event of the award, and the costs of the special jury which had been obtained on the motion of the defendant, and of the reference, were to be in the discretion of the arbitrator; the Court held, that the arbitrator had only the power of allowing the costs of the special jury as costs in the cause, if the party who moved for the same were to succeed; and, therefore, that after awarding a verdict for the

(*u*) *Blake* v. *Appleyard*, 3 Ex. D. 195; 47 L. J., Ex. 407.

(*x*) *Barnes* v. *Bromley*, supra; *Stooke* v. *Taylor*, per *Cockburn*, C. J., 5 Q. B. D., at p. 575: *Ashcroft* v. *Foulkes*, 18 C. B. 261: *Beard* v. *Perry*, 2 B. & S. 493.

(*y*) *Barnes* v. *Bromley*, 6 Q. B. D. 197.

(*z*) *Ellis* v. *Desilva* (C. A.), 6 Q. B. D. 521; 50 L. J., Q. B. 328; 44 L. T. 209; 29 W. R. 493. See ante, Vol. I, p. 686.

(*a*) *Jupp* v. *Grayson*, 1 C., M. & R. 523: *Grayson* v. *Jupp*, Id.: *Spivey* v. *Webster*, 2 Dowl. 46: *Ward* v. *Hall*, 9 Dowl. 610.

(*b*) *Jones* v. *Powell*, 6 Dowl. 48 See *Rennie* v. *Mills*, 5 Bing. N. C 249.

(*c*) Per *Littledale*, J., *Holder* v *Raith*, 4 N. & M. 466: *Gurney* v *Buller*, 1 B. & Ald. 670. See *Barnar* v. *Moss*, 1 H. & Bl. 107.

(*d*) *Spain* v. *Cadell*, 8 M. & W 129; 9 Dowl. 745: *Angus* v. *Belfor* 11 M. & W. 69; *Cooper* v. *Pegg*, 1 C. B. 264; 24 L. J., C. P. 167.

(*e*) *Spain* v. *Cadell*, 8 M. & W 129; 9 Dowl. 745.

(*f*) *Bury* v. *Dunn*, 1 D. & L. 14 12 L. J., Q. B. 351.

(*g*) *Geeves* v. *Gorton*, 15 M. & W 186: *Bedwell* v. *Wood*, 46 L. J., B. 725.

plaintiff, he could not award that he should pay the costs of the special jury (*h*).

CH. CXXXVI.

Arbitrator's authority over amount of costs.

If the costs are to be in the discretion of the arbitrator, *who is to ascertain the same*, the arbitrator is bound to ascertain and determine them (*i*). The arbitrator should not fix his own charges by the award (*k*). The Court has no power to compel him to submit his costs to taxation (*l*). An order of reference directed that the costs of the award should be in the discretion of the arbitrator; the arbitrator awarded that the costs of the award should be borne by the defendant, "which said costs I do assess at the sum of 39*l.* 17*s.* 4*d.*;" it appeared that part of that sum was the amount of charges of a solicitor, whom the arbitrator, who was a layman, had employed to assist him in taking the evidence and drawing up the award; the plaintiff took up the award, and afterwards demanded payment of the 39*l.* 17*s.* 4*d.* of the defendant, who refused to pay it: on motion for an attachment against the defendant, it was held that the arbitrator had power in the first instance to name the sum to be paid for the costs of the award, and that if the defendant did not proceed with due diligence to procure a taxation, and insist on the necessity of it, he could not set up the want of taxation as a ground for opposing an attachment (*m*). In one

(*h*) *Finlayson* v. *M'Leod*, 1 B. & Ald. 663.

(*i*) *Morgan* v. *Smith*, 9 M. & W. 427; 1 Dowl. N. S. 617. The party entitled to the costs being willing to waive them, the award was set aside only as respected the costs of the reference and the award. As to an arbitrator assessing the costs of an action in an inferior Court, see *Winter* v. *Garlick*, 1 Salk. 75. See *Addison* v. *Gray*, 2 Wils. 293; *Fox* v. *Smith*, Id. 268; *Hanson* v. *Liversedge*, 2 Vent. 242, 243.

(*k*) *Re Coombes*, 4 Ex. 839; *Roberts* v. *Eberhardt*, 27 L. J., C. P. 70; 3 C. B., N. S. 482; 28 L. J., C. P. 74; 3 C. B., N. S. 506. If he does do so, it seems the Court will not in general set aside the award: *Rose* v. *Redfern*, 10 W. R. 91, Ex.; but in one case, where the arbitrator had fixed the amount of his own costs, the Court refused to enforce the award in a summary way: *Parkinson* v. *Smith*, 30 L. J., Q. B. 178. See *Threlfall* v. *Fanshawe*, infra.

(*l*) *Withington* v. *Wrexham Waterworks Co.*, 32 W. R. 1000. See *Barnes* v. *Hayward*, 1 H. & N. 742; 25 L. J., Ex. 318; *Fitzgerald* v. *Graves*, 5 Taunt. 342; *Miller* v. *Rabe*, 3 Taunt. 461; *Re Coombes*, 4 Ex. 839; *Galloway* v. *Kenworth*, 23 L. J., C. P. 218; 15 C. B. 228. See *Dossett* v. *Gingell*, 3 Sc. N. R. 179; 2 M. & G. 870, as to the Court not having a general jurisdiction over arbitrators as to the amount of fees charged by them. As to the arbitrator charging for professional assistance in drawing the award, see *Galloway* v. *Kenworth*, supra.

(*m*) *Threlfall* v. *Fanshawe*, 1 L., M. & P. 340; 19 L. J., Q. B. 334, B. C. But see *Parkinson* v. *Smith*, 30 L. J., Q. B. 178. See *Dixie* v. *Alexander*, 1 L., M. & P. 338, Ex. The arbitrator has a lien upon the award for his services: *Re Coombes*, 4 Ex. 839. If an arbitrator will not part with the award except upon the payment of a larger fee than he is entitled to, which is paid to obtain possession of the award, the excess may be recovered by the party paying the same, in an action for money had and received: *Fernley* v. *Branson*, 20 L. J., Q. B. 178; *Re Coombes*, 4 Ex. 841, per *Parke*, B., and *Alderson*, B.: in which case it is a question for the jury whether the amount charged is reasonable: *Fernley* v. *Branson*, supra: *Barnes* v. *Braithwaite*, 2 H. & N. 569. It may be here noticed, that an arbitrator may recover his costs of the award, if there has been an express promise to pay them: *Huggins* v. *Gordon*, 3 Q. B. 466; but, it seems, he cannot do so upon an implied promise: *Huggins* v. *Gordon*, supra: *Virany* v. *Warne*, 4 Esp. 47; *Burroughes* v. *Clarke*, 1 Dowl. 48. See *Re Coombes*, 4 Ex. 839, per *Parke*, B.

PART XVIII.

case the charges of the arbitrators were held to be costs of the umpirage (*n*).

Ordering taxation of same.

Where a reference was by a Judge's order, it was held, that the arbitrator, under a power to award the costs of the reference and award, might direct such costs to be taxed by the officer of the Court, although no cause was pending at the time of the reference (*o*). An arbitrator cannot award costs to be taxed by any person except the proper officer of the superior Court; for this would be a delegation of his authority: the taxation of costs by the Master being a ministerial act, but in any other person a judicial act (*p*). An arbitrator cannot award any other costs than the common costs between party and party, unless he be expressly authorized so to do (*q*). If he do so, and the costs be so taxed, the Court should be moved to set aside the award, not to review the taxation (*r*). Where, by an order of reference, the costs of the cause were to abide the event of the award, and the arbitrator decided the suit in favour of the defendant, and ordered the plaintiff on a certain day to pay him those costs; it was held that the award was good, as the defendant was not deprived of any right which he possessed to recover the costs at an earlier date (*s*).

Error as to costs.

An error as to costs does not necessarily vitiate the whole award (*t*).

Awarding set-off of costs.

As to awarding the costs of one action to be set off against the costs of another to the prejudice of the solicitor's lien, *see* Vol. I. p. 783.

Stating case for the opinion of the Court.

Award in Form of Special Case.]—By the *Com. Law Proc. Act* 1854, *s.* 5, "It shall be lawful for the arbitrator upon any compulsory reference under this Act, or upon any (*u*) reference by consent of parties where the submission is or may be made a rule or order of any of the superior Courts of law or equity at Westminster,

(*n*) *Ellison* v. *Ackroyd*, 20 L. J., Q. B. 193; 1 L., M. & P. 806.

(*o*) *Bhear* v. *Harradine*, 7 Ex. 269; 21 L. J., Ex. 127: *Holdsworth* v. *Wilson*, 32 L. J., Q. B. 289.

(*p*) *Knott* v. *Long*, 2 Stra. 1025; Cas. temp. Hardw. 181.

(*q*) *Whitehead* v. *Firth*, 12 East, 167: *Barker* v. *Tibson*, 2 Bla. Rep. 953: *Marder* v. *Cox*, Cowp. 127: *Seccombe* v. *Babb*, 6 M. & W. 129; 8 Dowl. 167: *Bartle* v. *Musgrove*, 1 Dowl., N. S. 325. But see *Mordue* v. *Palmer*, L. R., 6 Ch. 22; 40 L. J., Ch. 10, where Lord Justice *Mellish* said, "a Court of equity has jurisdiction to give costs as between solicitor and client when it pleases, and, therefore, if there is a claim in equity a party may, if the Court chooses to give it to him, get his entire costs. I think, therefore, when there is a reference leaving the costs both of the suit and of the reference in a suit in equity in the discretion of the arbitrator, gives him a jurisdiction to give as between solicitor and client thinks fit."

(*r*) *Bartle* v. *Musgrove*, 1 D N. S. 325. See *Hartnall* v. Forrest, 73.

(*s*) *Cockburn* v. *Newton*, 9 676.

(*t*) *Aitcheson* v. *Carpey*, 9 381: *Roberts* v. *Eberhardt*, 28 C. P. 74. See infra as to an being good in part and bad in

(*u*) An arbitrator under the Clauses Act, 1845, may state under this section: *Rhodes* v. *Drainage Commissioners* (C.A. P. D. 402. The section only to references that can be mad of Court. See *Bexley Local B West Kent Sewerage Board*, 9 518; 47 L. T. 192; 31 W. See *Bidder* v. *North Staffords Co.*, 4 Q. B. D. 412.

minster (*x*), if he shall think fit (*y*), and if it is not provided to the contrary, to state his award, as to the whole or any part thereof, in the form of a special case for the opinion of the Court, and when an action is referred, judgment (*z*), if so ordered, may be entered according to the opinion of the Court."

Sometimes by the terms of the submission the arbitrator is to be *at liberty* to raise any question of law for the opinion of the Court. In such a case it is discretionary with him whether he will raise such question or not, and the Court will not interfere with his discretion (*a*). The submission may of course render it imperative on the arbitrator to raise such question. The provisions of *Order XXXIV.* (*ante*, pp. 1343 *et seq.*) apply to this special case (*ord. XXXIV. r. 7, ante*, p. 1345). In the special case, the arbitrator should state whether the arbitration is under a compulsory reference under the Act, or whether it is upon a reference by consent of the parties, where the submission has been or is to be made a rule or order of Court. In the former case the award should be intituled in the Court and cause, and the order of the Court must be set forth. In the latter case, the terms of the reference relating to the submission being made an order of Court must be set forth. When the arbitrator has power to report specially to the Court, he should not state the evidence in order that the Court may judge what are the facts, but he should state the facts, in order that the Court may decide any question of law arising thereupon (*b*). Where an arbitrator who had power to decide on the admissibility of evidence as a Judge at Nisi Prius might, and to reserve points of law for the decision of the Court, made a special statement of facts, affecting the admissibility of certain depositions in evidence, and awarded that the verdict should be reduced to 1,358*l.* if the Court should be of opinion that the depositions of A. and B. were admissible; to 1,165*l.* if the Court should think that the depositions of A. only were admissible; and to 579*l.*, if the Court should think neither of the depositions admissible: it was held that the award was good (*c*). Where a sum is awarded, subject to be reduced by the Court on a statement of facts, an application to the Court for that purpose must be made within the time for moving to set aside the award (*d*). As to appealing from the decision of the Divisional Court on a special case, *see ante*, p. 1346 (*e*).

(*x*) As to when the submission may be made a rule or order of Court, see ante, p. 1594.

(*y*) The arbitrator is not bound to state a case upon the demand of either party. See *Baggalay* v. *Borthwick*, 10 C. B., N. S. 61; nom. *Bagaley* v. *Borkwick*, 30 L. J., C. P. 342.

(*z*) A form of judgment was prescribed by R. M. V. 1854, form 15. Chit. Forms.

(*a*) *Miller* v. *Shuttleworth*, 7 C. B. 274. See *Wood* v. *Hotham*, 5 M. & G. 474.

(*b*) *Jephson* v. *Hopkins*, 2 Sc. N. R. 695; 2 M. & G. 366.

(*c*) *Scott* v. *Van Sandau*, 6 Q. B. 237. See *Bradbee* v. *Christ's Hospital*, 2 Dowl., N. S. 164; 5 Sc. N. R. 79; 4 M. & Gr. 715, where facts were stated for the opinion of the Court; and under particular circumstances it was held, that it was not necessary for the arbitrator to decide finally as to the amount of damages to be recovered, and to direct how the judgment should be entered up.

(*d*) *Anderson* v. *Fuller*, 4 M. & W. 470; 7 Dowl. 51; *Paxton* v. *The Great North of England R. Co.*, 8 Q. B. 938; 3 D. & L. 773.

(*e*) Where a case had been stated under the C. L. P. Act, 1851, s. 5,

PART XVIII.

Award bad in part.

Award bad in Part.]—If an award be good in part, the performance of that part which is good may be enforced, provided it be final in itself and perfectly distinct from, and independent of, that part which is bad (*f*). Therefore an award directing a defendant to remove certain hatches, part of which belonged to him absolutely, but in other parts of which he had only a share; at the same time providing that the directions of the award should affect the latter only so far as his interest extended, was held good as to all but that part in respect of which the defendant might show his inability to proceed (*g*). An award of a release up to the time of the award was formerly held to be void in toto, not being divisible; but now an award of a release which would extend beyond the arbitrator's power is held to be void only for the time between the submission and the award (*h*). And if the arbitrator direct mutual releases or payment of a sum over which he has jurisdiction, and also of a sum over which he has none, the award is good as to the former. So, where an arbitrator, having power, but not being bound by the terms of the submission, to direct as to a particular matter, gives a direction which is invalid, the whole award is not thereby vitiated, but such invalid direction may be treated as surplusage (*j*). And it seems, that when an arbitrator has ordered a verdict to be entered, or judgment signed, without authority, if the award dispose of all matters referred independently of the verdict, that part of the award may be rejected and the rest held good (*k*). And where the arbitrator, after having found on all the issues, awarded a stet processus, having no authority so to do, *Coleridge*, J., considered that this part of the award might be separated from the residue (*l*). Where, however, an arbitrator, to whom a cause before being at issue was referred by rule of Court, awarded thus —"I award and direct that a verdict in this cause be finally entered for the plaintiffs, with £—— damages," the Court held that he had exceeded his authority in directing the entry of the verdict, and that, as the award consisted of only one sentence, the direction could not be rejected, and the residue considered as a award that so much was due and to be paid, and that therefore t

error could not be brought under the 32nd section of that Act: *Gumm* v. *Fowler*, 2 E. & E. 890; 29 L. J., Q. B. 189: *Courtauld* v. *Legh*, 38 L. J., Ex. 124.

(*f*) *Candler* v. *Fuller*, Willes, 64, 253: *Addison* v. *Gray*, 2 Wils. 293: *Ingram* v. *Milnes*, 8 East, 445: *George* v. *Lousley*, Id. 13; *Stone* v. *Phillips*, 6 Dowl. 217: *Kendrick* v. *Davies*, 5 Dowl. 693: *Ward* v. *Hall*, 9 Dowl. 610: *Mauser* v. *Heaver*, 3 B. & Ad. 295: *Tomlin* v. *Mayor of Fordwich*, 5 Ad. & E. 147: *Re Marshall* v. *Dresser*, 3 Q. B. 878; 3 G. & D. 253. In *Doe* v. *Richardson*, 8 Taunt. 697, the defect in the award was only as to the direction of mutual releases. In *Aitcheson* v. *Cargey*, 2 Bing. 199, the arbitrator exceeded his authority by directing the mode in which certain matters were to be de See *Price* v. *Popkin*, 2 P. & D. 3 *Rees* v. *Waters*, 16 M. & W. 2 where the arbitrator had the po of a Judge at Nisi Prius, and orde the damages and costs to be paid a stated time and place, and t part of the award was held void tanto as surplusage.

(*g*) *Doddington* v. *Bailward*, Dowl. 640; 7 Sc. 733.

(*h*) *Pickering* v. *Watson*, 2 Bl. H 1117.

(*i*) *Kendrick* v. *Davies*, 5 D 693.

(*j*) *Nicholls* v. *Jones*, 6 Ex. 3 20 L. J., Ex. 275.

(*k*) See *Price* v. *Popkin*, 2 P D. 304: *Doe* d. *Body* v. *Cox*, 15 Q. B. 317: and per *Alderson*, B *Spain* v. *Cadell*, 8 M. & W. 131.

(*l*) *Ward* v. *Hall*, 9 Dowl. 61

award was bad (*m*). And where the arbitrators awarded that the plaintiff should pay the costs of the reference, &c., such costs to be taxed *as between solicitor and client;* and that the defendant should pay to the plaintiff 50*l.* towards such costs, the Court considered that the award of the costs as between solicitor and client was so connected with the rest of the award that it could not be rejected (*n*).

Stamp on.

Stamp on.]—The award is engrossed on paper and stamped (*o*). The amount of the stamp duty payable is as follows (*p*):—

	£	*s.*	*d.*
Where the amount or value of the matter in dispute does not exceed 5*l.*	0	0	3
Exceeds 5*l.* and does not exceed 10*l.*	0	0	6
„ 10*l.* „ „ 20*l.*	0	1	0
„ 20*l.* „ „ 30*l.*	0	1	6
„ 30*l.* „ „ 40*l.*	0	2	0
„ 40*l.* „ „ 50*l.*	0	2	6
„ 50*l.* „ „ 100*l.*	0	5	0
„ 100*l.* „ „ 200*l.*	0	10	0
„ 200*l.* „ „ 500*l.*	0	15	0
„ 500*l.* „ „ 750*l.*	1	0	0
„ 750*l.* „ „ 1,000*l.*	1	5	0
And where it exceeds 1,000*l.*, and in any other case not above provided for	1	15	0

If an award is not properly stamped, it cannot be given in evidence on a trial, nor can it be enforced by an application to the Court, or otherwise (*q*). But the Court will not set aside an award on the ground that it is not properly stamped (*r*). Where a verdict is taken at the trial, subject to the certificate of an arbitrator as to the amount of damages, the certificate does not require a stamp (*s*).

Execution of award by arbitrators.

Execution of Award by Arbitrators.]—The award should be signed (*t*) by the arbitrators, and usually in the presence of a witness, who attests the execution.

Where a matter is referred to the determination of two or more arbitrators, the award should be executed by all at the same time, and in the presence of each other (*u*). Where a cause was referred

(*m*) *Jackson* v. *Clarke*, M'Clel. & Y. 269. And see *Rex* v. *Washbrooke*, 7 D. & R. 221: *Hayward* v. *Phillips*, 1 N. & P. 288: *Donlan* v. *Bell*, 4 N. & M. 854: overruling *Cartwright* v. *Blackworth*, 1 Dowl. 269. See *Cock* v. *Gent*, 13 M. & W. 241: 14 M. & W. 689: *Hawkyard* v. *Stocks*, 2 D. & L. 936: *Moore* v. *Catlin*, 2 N. & P. 436.

(*n*) *Secombe* v. *Babb*, 6 M. & W. 229: 8 Dowl. 167. And see *Tandy* v. *Tandy*, 9 Dowl. 1044. See ante, 1634, as to an error as to costs not necessarily vitiating the whole award.

(*o*) See *Goodson* v. *Forbes*, 6 Taunt. 171: 1 Marsh. 525: *Boyd* v. *Emerson*, 2 N. & M. 99: *Jebb* v. *Kierman*, 1 M. & M. 340: *Carr* v. *Smith*, 5 Q. B. 128; 1 D. & M. 192: *Goodyear* v. *Simpson*, 15 M. & W. 16.

(*p*) Stamp Act, 1870, 33 & 34 V. c. 97, sched.

(*q*) *Hill* v. *Slocombe*, 9 Dowl. 339, where the officer who had to draw up the rule took the objection.

(*r*) *Preston* v. *Eastwood*, 7 T. R. 95.

(*s*) *Salter* v. *Yeates*, 5 Dowl. 291, per *Parke*, B.

(*t*) See C. L. P. Act, 1854, s. 15, ante, p. 1618.

(*u*) *Wade* v. *Dowling*, 23 L. J., Q. B. 302: *Stalworth* v. *Inns*, 13 M. & W. 466; 2 D. & L. 428: *Little* v. *Newton*, 2 Sc. N. R. 509; 9 Dowl. 437: *Re Templeman and Reed*, 9 Dowl. 962: *Wright* v. *Graham*, 3 Ex. 131; 18 L. J., Ex. 29.

PART XVIII. to three arbitrators, with a power to them, or any two of them, to make an award, an award made by two of them was held good, it appearing that the third had notice of the meetings, &c. (*r*).

Publication of. *Publication of.*]—When the award is made, the arbitrator give notice to the solicitors of the parties that it is ready for delivery, and that each of them may have his part on the day therein specified on payment of expenses. An award is only considered published within the meaning of the stat. 9 & 10 W. 3, c. 15, s. 2, and within the meaning of the rule (see *post*, p. 1644) for regulating the time for making an application to set aside an award, from the time of giving this notice; but, so far as the arbitrator is concerned so as to determine his authority, an award is deemed published from the time of its execution (*x*). This notice is considered to be the publication of the award, though the expenses, on payment of which the arbitrator by such notice informs the parties they may have the award, are unreasonable (*y*). When an award purports and is attested to be published on a certain day, the Court will presume it to have been published on that day, without any positive affidavit to that effect (*z*).

Alteration of. *Alteration of.*]—After the award is delivered (*a*), or after notice given by the arbitrator of its being ready (*b*), or, it would seem after it is executed (*c*), no mistake in a material part of it, as in the sum awarded, &c., can be corrected (*d*), unless with the consent of both parties (*e*); but it seems that a mistake in an immaterial part may (*f*). An alteration of the award by the arbitrator after his authority is at an end, is the same as if made by a stranger, and the award, if legible, will stand as originally executed (*g*). He cannot, afte. the award is made, give any certificate for costs (*h*).

SECT. VI.—TAXATION OF THE COSTS AWARDED.

Taxation of the costs awarded. When the submission can be made a rule of Court, and the arbitrator has not awarded a gross sum for costs, but costs generally with or without any express direction or order (*i*) as to their be

(*r*) *Dalling* v. *Matchett*, Willes, 215: *White* v. *Sharp*, 12 M. & W. 712; 1 D. & L. 1030.

(*x*) *Brooke* v. *Mitchell*, 6 M. & M. 477; 8 Dowl. 392.

(*y*) *M'Arthur* v. *Campbell*, 5 B. & Ad. 8: *Brooke* v. *Mitchell*, 6 M. & W. 477, per *Parke*, B., and *Alderson*, B. But see *Musselbrook* v. *Dunkin*, 2 M. & Sc. 740; 9 Bing. 605; 1 Dowl. 722.

(*z*) *Doe* d. *Clarke* v. *Stilwell*, 3 N. & P. 701; 8 Ad. & E. 645.

(*a*) *Irvine* v. *Elnon*, 8 East, 54.

(*b*) *Henfree* v. *Bromley*, 6 East, 309.

(*c*) *Brooke* v. *Mitchell*, supra.

(*d*) See *Ward* v. *Deane*, 3 B. & 234: *Hall* v. *Alderson*, 2 Bing. *Mordue* v. *Palmer*, L. R., 6 Ch. 40 L. J., Ch. 8.

(*e*) *Ex p. Cuerton*, 7 D. & R. 7

(*f*) *Trew* v. *Burton*, 1 C. & 533. And see as to what is an im terial part, Id.

(*g*) *Henfree* v. *Bromley*, 6 E 309. See *Trew* v. *Burton*, 1 C. & 533.

(*h*) *Geeves* v. *Gorton*, 15 M. & 186.

(*i*) *In re Clark and the Corpora of Bath*, W. N. 1884, 127.

taxed by the Master (*j*), *make the submission a rule of Court, as mentioned ante*, p. 1594; *draw up the rule at the proper office, and get an appointment from the Master at the foot of it; give the usual one day's notice of taxation; serve a copy of the rule and appointment on the opposite solicitor; and at the time appointed attend before the Master, who will tax the costs and mark them on the proper document.*

At what time costs may be taxed.

By *R. of S. C., Ord. LXV. r.* 15, "Costs may be taxed on an award, notwithstanding the time for setting aside the award has not elapsed" (*k*).

Mode of taxation.

The costs must be taxed as between party and party, unless the arbitrator, having power so to do, orders to the contrary (*l*). If a verdict has been taken at the trial, and one party is entitled to the costs of the action, and also to the costs of the reference, such costs should be separately taxed, if it is intended to sign judgment for the costs of the action (*m*). When the arbitrator directs that the costs of the action shall be taxed by the proper officer, they should be taxed as upon a verdict (*n*). On taxing the costs of the reference, in general, only one counsel on each side will be allowed for (*o*). When a Queen's Counsel acts as arbitrator, the ordinary scale of fees applies, but it is competent to the Master to increase the allowance if, in the exercise of his discretion, he thinks fit to do so (*p*).

An action involving long accounts between plaintiff and defendant was referred; and it was ordered that plaintiff, by an accountant to be named by the arbitrator, should have inspection of and take extracts from defendant's books. An accountant was named, and he was engaged many days over the books, and afterwards gave evidence before the arbitrator. The award was made in plaintiff's favour, with the costs of the action, reference and award. On taxation, held, that the case came within the ordinary rule: and that plaintiff was not entitled to the costs of the preliminary examination of the books by the accountant (*q*).

(*j*) As to when the submission can be made a rule of Court, see ante, p. 1594. As to when the arbitrator should ascertain the amount of costs, see ante, p. 1633. And as to his directing them to be taxed, see ante, p. 1634. See *Barrett* v. *Parry*, 4 Taunt. 558. As to maintaining an action for the costs before taxation, see *Holdsworth* v. *Wilson*, 4 B. & S. 1.

(*k*) Cp. R. 170, H. T. 1853. See *Poole* v. *Pott*, 7 E. & B. 102; 26 L. J., Q. B. 88. As to the practice before this rule, see *Little* v. *Newton*, 2 Sc. N. R. 159: *Hobdell* v. *Miller*, 2 Sc. N. R. 163: *Jones* v. *Ives*, 10 C. B. 429; 20 L. J., C. P. 69. As to the defendant getting the costs taxed when he is ordered to pay them before a particular day, see *Camdler* v. *Miller*, Willes, 62: *Bigland* v. *Kelton*, 1 East, 438.

(*l*) *Pratt* v. *Salt*, Cas. temp. Hardw. 338: *Eccles* v. *Mayor, &c. of Blackburn*, 30 L. J., Ex. 358.

(*m*) *Bignall* v. *Gale*, 4 Sc. N. R. 570; 1 Dowl., N. S. 497. The costs in the cause are those which are incurred up to the time of the reference. *Brown* v. *Nelson*, 13 M. & W. 397. Where a verdict is taken subject to the certificate of an arbitrator, the costs of the cause and reference to abide the event, the costs of the reference are costs in the cause and follow the legal event of the verdict. *Deere* v. *Kirkhouse*, 20 L. J., Q. B. 195.

(*n*) *Allenby* v. *Proudlock*, 5 N. & M. 636: *Linegar* v. *Pearse*, 9 Exch. 417; 23 L. J., Ex. 225: *Daubuz* v. *Rickman*, 1 Sc. 564; 1 Hodges, 75; Vol. 1, p. 676.

(*o*) *Sinclair* v. *Great Eastern R. Co.*, L. R., 5 C. P. 135; 39 L. J., C. P. 165: *Hawkins* v. *Rigby*, 8 C. B., N. S. 271; 29 L. J., C. P. 229. This, however, is matter for the Master's discretion. There is no inflexible rule on the subject.

(*p*) Id.

(*q*) *Nolan* v. *Copeman*, L. R., 8 Q. B. 84; 42 L. J., Q. B. 44: *Hawkins*

PART XVIII.

Review of taxation.

Apportionment of costs.

An application to review the taxation should be made promptly (*r*). As to reviewing a taxation, *see Vol.* 1, p. 699.

Where the arbitrator awarded that the amount of the costs to be taxed should be paid, one-third part thereof by the plaintiff, and the other two-third parts thereof by the defendant, the plaintiff's taxed costs were 68*l.*, and the defendant's 45*l.*: the Court considered the sum to be paid by the defendant to the plaintiff was the sum of 80*l.* 6*s.* 8*d.* (*s*). So, where the award directed that the costs of the reference and award, including the arbitrator's charges, should be borne, one moiety by the plaintiff and the other by the defendant, the Court held that the defendant was only liable to pay one moiety of all the costs brought into hotch-pot (*t*).

SECT. VII.—SETTING ASIDE THE AWARD—REFERRING BACK MATTERS REFERRED TO THE ARBITRATOR.

	PAGE		PAGE
In what cases	1640	*How same to be made*	1646
How Objections may be Waived	1643	*Costs of Application*	1648
Who may apply to Set Aside the Award	1643	*Referring back Matters to Arbitrator*	1648
To what Court Application must be made	1643	*Action against Arbitrator for Negligence—Evidence by him*	1650
Within what Time Application to be made	1644		

In what cases an award may be set aside.

In what Cases.]—Where the submission is by or can be made a rule of Court (*u*) and the award is defective, and can be enforced without suit or application to the Court, the Court will set it aside (*v*). In some cases the Court will set aside a defective award though it can only be enforced by an action or by an application to the Court or a Judge. Thus they will do so in some such case where the arbitrator has been guilty of misconduct in the course of the proceedings under the reference (*x*): and for matters ex

v. *Rigby and others*, 8 C. B., N. S. 271; 29 L. J., C. P. 228. But see cases cited ante, Vol. 1, p. 703, n. (*u*).

(*r*) *Bignall* v. *Gale*, 1 Dowl., N. S. 497; 4 Sc. N. R. 570.

(*s*) *Walton* v. *Ingram*, 5 Jur. 462, C. P. See *Day* v. *Norris*, 1 Dowl., N. S. 353.

(*t*) *Bates* v. *Townley*, 2 Ex. 152; 19 L. J., Ex. 399.

(*u*) As to this, see ante, p. 1595.

(*v*) *Doe* d. *Turnbull* v. *Brown*, 5 B. & C. 385; *Hobbs* v. *Ferrars*, 8 Dowl. 779; and *ex parte Manser* v. *Heaver*, 3 B. & Ad. 295; *Wilson* v. *Thorpe*, 6 M. & W. 721; *Harrison* v. *Greenwood*, 3 D. & L. 356.

(*x*) See *Lucas* v. *Wilson*, 2 Burr. 701; *Anon.*, 1 Salk. 71; *Braddick* v. *Thomson*, 8 East, 344; *Grazebrook* v. *Davis*, 5 B. & C. 534; *Brazier* v. *Bryant* [illegible] 587; 3 Bing. 167; 9 & 10 W. 3, c. 15, s. 3. The misconduct need not be such in the bad sense of the word. See *Phipps* v. *Ingram*, 3 Dowl. 670; *Re Hall* v. *Hinds*, 3 Sc. N. R. 250, where the arbitrator had made a plain gross mistake in casting up figures, and the Court set aside the award, considering such carelessness to amount to *misconduct* on the part of the arbitrator. This, however, is an extreme case. See *Hutchinson* v. *Shepperton*, 13 Q. B. 955; 13 Jur. 1098, Q. B.; *Phillips* v. *Edwards*, 1 D. & L. 463; 12 M. & W. 30; *Hagger* v. *Baker*, 2 D. & L. 856; 13 M. & W. 9. Such misconduct, it seems, does not afford any defe

trinsic not appearing on the face of the award, which makes it defective (*y*). And in some such cases the Court may set aside an award for a defect apparent on the face of it: but in general it is unnecessary to move to set aside an award on this ground, as it cannot be enforced. We have already noticed, whilst treating of the proceedings under the reference and of the award, many instances where the award is defective and may be set aside. CH. CXXXVI.

The Court cannot set aside the award on a summary application when the submission cannot be made a rule of Court (*z*). The Court, as a general rule, will not enter into an examination of the merits, upon an application to set aside an award (*a*), unless it appear manifestly from the merits that the arbitrators have acted dishonestly or corruptly (*b*); for the parties having chosen to substitute the decision of an arbitrator for that of a Judge and jury, must abide by his determination (*c*). But where, on a question of account, both parties to a suit agreed before an arbitrator that a given sum was due to the plaintiff on a particular item, and it appeared by the arbitrator's affidavit that he, conceiving this to be no longer a matter in difference, omitted the sum in the amount which he awarded to the plaintiff, the Court, on motion by the plaintiff (who had objected to the adjudication without loss of time after the delivery of the award), set aside the award (*d*). Nor will the Court set aside the award on the ground of the arbitrator having decided contrary to law (*e*); or having made a mistake as to the legal effect of his award as to the costs (*f*); and this though the arbitrator be not a barrister (*g*), unless the mistake appear on the face of the award, or upon the face of another paper delivered with it (*h*) forming part of the award (*i*). An award cannot be set aside on a mere suspicion of When not.

---

an action or attachment. We ve noticed, whilst treating of the roceedings under the reference, ut misconduct on the part of the rbitrator is and is not sufficient to aside the award: *Rex* v. *Wheeler*, Burr. 1250. See *Smith* v. *Whitr*, 33 L. J., Ch. 218; *Harding* v. kham, 2 Johns. & H. 676.

(*y*) As to what defects in an d cannot be shown as cause nst a rule for an attachment, &c. the non-performance of it, see p. 1658.

(*z*) As to when a submission can made a rule of Court, see ante, 594.

(*a*) *Lucas* v. *Wilson*, 2 Burr. 701; erson v. *Coxeter*, 1 Str. 301; ams v. *Mouldsdale*, 7 M. & W. Phillips v. *Edwards*, 1 D. & L. See *Hutchinson* v. *Shepperton*, B. 955.

(*b*) 1 Saund. 327 d.

See *Sharman* v. *Lell*, 5 M. & 4; *Richardson* v. *Nourse*, 3 B. & 237; *Anon.*, 1 Chit. Rep. 674; v. *Price*, 9 Dowl. 334; *Archer* n, 9 Dowl. 341.

(*c*) *Allen* v. *Greenslade*, 33 L. T. 567; *Wade* v. *Malpas*, 2 Dowl. 638; *Campbell* v. *Twemlow*, 1 Price, 81; *Wilson* v. *King*, 2 Dowl. 638, n.; *Hardy* v. *Ringrose*, 1 H. & W. 185; *Fuller* v. *Fenwick*, 3 C. B. 705; 16 L. J., C. P. 79: cp. *In re Dare Valley R. Co.*, L. R., 6 Eq. 429, where the Court admitted the evidence of an arbitrator to explain his award, and on his admitting the mistake referred the award back to him.

(*d*) *Hutchinson* v. *Shepperton*, 13 Q. B. 955.

(*e*) *Allen* v. *Greenslade*, 33 L. T. 567: *Wade* v. *Malpas*, 2 Dowl. 638: *Campbell* v. *Twemlow*, 1 Price, 81; *Wilson* v. *King*, 2 Dowl. 638, n.; *Hardy* v. *Ringrose*, 1 H. & W. 185; *Fuller* v. *Fenwick*, 3 C. B. 705; 16 L. J., C. P. 79: cp. *In re Dare Valley R. Co.*, L. R., 6 Eq. 429, where the Court admitted the evidence of an arbitrator to explain his award, and on his admitting the mistake referred the award back to him.

(*f*) *Greenwood* v. *Brownhill* (C. A.), 44 L. T. 47.

(*g*) *Fuller* v. *Fenwick*, supra: *Huntly* v. *Ralling*, 8 Dowl. 879; *Ashton* v. *Poynter*, 3 Dowl. 201; *Jupp* v. *Grayson*, Id. 199; 1 C., M. & R. 523; *Perryman* v. *Steggall*, 2 Id. 726; 3 M. & Sc. 93, overruled by *Ashton* v. *Poynter*, 3 Dowl. 201; *Hodgkinson* v. *Fernie*, 3 C. B., N. S. 189; 27 L. J., C. P. 66.

(*h*) See post, p. 1662, as to an arbitrator's decision being final.

(*i*) *Holgate* v. *Killick*, 7 H. & N. 418; 31 L. J., Ex. 7.

PART XVIII.

favour; for instance, it cannot be set aside merely because the arbitrators have partaken of luncheon with, and at the expense of one of the parties (*k*), or because the arbitrator is indebted to one of the parties, though the other party was ignorant of the fact, and objected as soon as he became aware of it (*l*). It seems that it is no ground for setting aside an award, that the unsuccessful party was misled by an intimation of opinion on the part of the arbitrator in the progress of the reference, which induced him to rely on the absence of proof on the part of his adversary at all events, he should show that he was prepared with negative evidence, and would have produced it, but for that expression of opinion (*m*). An award will not be set aside although the affidavits in support of the application disclose strong imputations upon the testimony of a material witness, who was examined before the arbitrator (*n*). And the Court sometimes will not set aside an award when the bad part is perfectly distinct from and independent of the residue, which is good in itself. Where there is a doubt as to the validity of an award, the Court will not set it aside, but will leave the party to his action except where it is capable of being enforced without suit (*p*). The Courts are generally desirous of sustaining an award (*q*). An award will not be set aside on the ground that the order of reference has been improperly obtained; the application in such a case should be to set aside the order of reference itself, and should be made within a reasonable time after it was obtained (*r*). Where a party filed a bill in equity to set aside an award, after entering into a rule of Court to abide by it, the Court held it to be a contempt, and granted an attachment against him (*s*).

When useless to apply to set aside award.

It should be here noticed that it is now usual to insert a clause in the submission enabling the Court to send the matters referred back to the arbitrator, in case of any application being made to set aside the award, in order that he may correct any mistake he may have made therein. Where there is such a clause, it is generally useless to move to set aside the award for a technical objection, where the only object is to get rid of the award, as the Court will, upon such motion being made, remit to the arbitrator the matters objected to, for amendment. As to referring matters back to an arbitrator under such a clause as the above, *see post*, p. 1648. As to its being in general unnecessary to move to set aside an award which cannot be enforced without action or application to the Court or a Judge for a defect apparent upon the face of it, *see ante*, p. 1640.

(*k*) *Moseley* v. *Simpson*, L. R., 16 Eq. 226; 42 L. J., Ch. 739: *Crowley* v. *Kay*, 5 C. B. 581: *Re Hopper*, L. R., 2 Q. B. 367.

(*l*) *Morgan* v. *Morgan*, 1 Dowl. 611: *Ellis* v. *Hopper*, 28 L. J., Ex. 1.

(*m*) *Wynne* v. *Wynne*, 3 Sc. N. R. 435; 9 Dowl. 901. See *Solomon* v. *Solomon*, 28 L. J., Ex. 129.

(*n*) *Scales* v. *East London Water Works Co.*, 1 Hodges, 91: *Pilmore* v. *Hood*, 8 Sc. 180.

(*o*) See ante, p. 1636. *Re Goddard*, 1 L., M. & P. 25; 19 L. J., Q. B. 305.

(*p*) *Richardson* v. *Nourse*, 3 Ald. 237: *Burley* v. *Stevens*, 4 770: *Re Hare*, 8 Sc. 371; 8 D per *Tindal*, C. J.: *Robbs* v. 8 Dowl. 779: *Taylor* v. *Shutt* 8 Sc. 577; 8 Dowl. 289.

(*q*) See *Re Templeman* a 9 Dowl. 966, per *Coleridge*, J.

(*r*) *Sackett* v. *Owen*, 2 Ch 39.

(*s*) *Rex* v. *Wheeler*, 3 Bu 1 W. Bl. 311. And see *Almanza*, 1 Salk. 73.

How objections may be waived.

How Objections may be waived.]—Many objections, which otherwise would be fatal to the award, may be waived by proceeding with the reference with a knowledge of the same or the like. Thus, an objection to the award upon the ground of misconduct on the part of the arbitrator may be waived (*t*). We have already noticed several instances where objections may be waived (*u*). The evidence of waiver ought to be clear (*x*). If a party to a reference objects that the arbitrators are entering upon the consideration of a matter not referred to them, and protests against it, and the arbitrators nevertheless go into the question and receive evidence on it, and the party still under protest continues to attend before the arbitrators and cross-examines the witnesses on the point objected to, he does not thereby waive his objection, nor is he estopped from saying that the arbitrators have exceeded their authority by awarding on the matter (*y*).

Waiver of objections by accepting a benefit under award.

If a party accept a benefit under an award—as, for instance, if an award direct, amongst other things, that the costs of the cause and of the reference be paid to the plaintiff, and he accept such costs—he is thereby precluded from afterwards moving to set aside the award (*z*). Where, however, an award published nine days before the end of Hilary Term, directed the defendant to pay the plaintiff a sum of money, and the plaintiff to lay out a sum of money on premises which the defendant held of him as tenant, it was held, that the defendant had not waived any objections that might be taken to the award by not giving notice to the plaintiff of his intention to apply to the Court after he had heard that the plaintiff had commenced the repairs, nor by the defendant's solicitor attending the taxation of costs and requesting a week's time to pay the money (*a*).

Who may apply to set aside award.

Who may apply to set aside the Award.]—It seems that, in general, a party in whose favour a mistake has been made, cannot avail himself of it to set aside the award (*b*).

To what Court application must be made.

To what Court application must be made.]—The application must be made in the Division of the High Court of which the submission has been made a rule (*c*).

(*t*) *Moseley* v. *Simpson*, L. R., 16 Eq. 226; 42 L. J., Ch. 739: *Kingsdale* v. *Elliott*, 7 Dowl. 423: *Bignall* v. *Allen* v. *Francis*, 9 Jur. 691: *Clout and Metropolitan R. Co.*, 46 L. J. 141.

(*u*) See *Gravatt* v. *Attwood*, 19 L. Q. B. 474: *Jones* v. *Powell*, 6 Dowl. 483, where, after award made, the unsuccessful party obtained that infants were parties to the reference, and certain interested parties were not parties to it. See *Watson* v. *Bywater*, 3 M. & W. 240: *Re Warner*, 2 D. & L. 148.

(*x*) *Atkinson* v. *Jones*, 1 D. & L. 225: *Jenkins* v. *Leggo*, 6 Jur. 397.

(*y*) *Davies* v. *Price*, 34 L. J., Q. B. 8: *Ringland* v. *Lowndes*, 33 L. J., C. P. 337. See per Lord *Selborne*, L. C., *Hamlyn* v. *Betteley*, 6 Q. B. D. at p. 65.

(*z*) *Kennard* v. *Harris*, 4 D. & R. 272; 2 B. & C. 801.

(*a*) *Hayward* v. *Phillips*, 1 N. & P. 288; 6 A. & E. 119.

(*b*) *Moore* v. *Butlin*, 2 N. & P. 436: *Taylor* v. *Shuttleworth*, 8 Scott, 565.

(*c*) *In re Lomax's Arbitration*, 42 L. T. 391; 28 W. R. 485. See C. L. P. Act, 1854, s. 17, ad fin., ante, p. 1595.

PART XVIII.

Within what time application must be made.

Within what Time application must be made.]—By *R. of S. C. Ord. LXIV. r.* 14, "An application to set aside an award may be made at any time before the last day of the sittings next after such award has been made and published to the parties."

This rule would appear to apply to and govern all applications to set aside an award. Previous to this rule the time for applying was regulated by the statute 9 & 10 *W.* 3, *c.* 15, *s.* 2, which has been expressly repealed, and by which "any arbitration or umpirage procured by corruption or undue means, shall be judged and esteemed void and of none effect, and accordingly be set aside by any Court of law or equity, so as complaint (*d*) of such corruption or undue practice be made in the Court where the rule is made for submission to such arbitration or umpirage, before the last day of the next term (*e*) after such arbitration or umpirage made and published (*f*) to the parties; anything in this Act contained to the contrary notwithstanding" (*g*). A submission must have been in writing to be within this Act (*h*). It did not extend to awards where the reference was by order of Nisi Prius (*i*); nor to those cases where an action was pending in one of the superior Courts and the reference was by rule of Court or Judge's order (*k*). A notice of motion to set aside the award was a complaint within this section, so that if such a notice were served on the last day but one of the term next after the publication of the award, although the affidavit was filed until afterwards, this was sufficient to save the time (*l*). If the award was made in vacation, an application within this Act to set it aside must have been made in the next term; but if the award was made in term, the parties had until the last day of the following term to make the application (*m*). Such application could not have been made on the last day of term (*n*).

Where motion can be made after the above times.

In cases within the statute the Court would not, after the time above mentioned, entertain a motion to set aside an award for any defect (*o*), or on any account whatever (*p*), even by consent (*q*).

(*d*) See *Corporation of Huddersfield* v. *Jacomb*, and *Smith* v. *Parkside Mining Co.*, cited post, n. (*l*).

(*e*) For the purpose of this section, the old terms still existed as a measure of time: *Christ's College, Breeknock* (*The Governors of*) v. *Martin*, 3 Q. B. D. 16; 46 L. J., Q. B. 591; 36 L. T. 539 (C. A.).

(*f*) As to when the award is considered as published, see ante, p. 1638.

(*g*) *Smith* v. *Whitmore*, 33 L. J., Ch. 218; from which it seems that there must be a clause in the agreement of reference that it may be made a rule of Court in order to bring the submission within the Act. See ante, p. 1594.

(*h*) *Re Harper and Great Eastern R. Co.*, 44 L. J., Ch. 507, a case under the Lands Clauses Act.

(*i*) *Synge* v. *Jervais*, 8 East, 466: *Lucas* v. *Wilson*, 2 Burr. 701: *Manser* v. *Heaver*, 3 B. & Ad. 295: *Rawsthorne* v. *Arnold*, 6 B. & C. 629.

(*k*) *Rogers* v. *Dallimore*, 6 Taunt. 111; 1 Marsh. 471: *Sherry* v. *Oke*, 3 Dowl. 349; 1 H. & W. 191: *worth* v. *Barrow*, 3 Dowl. 317 & W. 122: *Hobbs* v. *Ferrars*, 1 779.

(*l*) *Smith* v. *Parkside Mini* 6 Q. B. D. 67; 50 L. J., Ex. *re Corporation of Huddersfi Jacomb*, L. R., 17 Eq. 476; a L. R., 10 Ch. 92; 44 L. J., C

(*m*) *Re Burt*, 5 B. & C *Allenby* v. *Proudlock*, 4 Do *Smith* v. *Blake*, 8 Dowl. 133.

(*n*) *Freame* v. *Pinneger*, Co *Hobdell* v. *Miller*, 2 Sc. N. *Re Evans*, 4 M. & G. 767.

(*o*) *Pedley* v. *Goddard*, 7 T *Reynolds* v. *Askew*, 5 Dowl.

(*p*) *Smith* v. *Blake*, 8 133: *Reynolds* v. *Askew*, 682. See *Re Perring*, 3 D *Lowndes* v. *Lowndes*, 1 E *Sell* v. *Carter*, 2 Dowl. 24 v. *Whitmore*, 33 L. J., *North British R. Co.* v. T L. R., 1 C. P. 401; 35 L. 262: *Holloway* v. *Monk*, 8 L

(*q*) *North British R. Co. dale*, supra.

cases not within the statute, it has been held that the motion could not be made even by consent of both parties later than one term after the publication of the award (*r*); but there is an earlier case showing it was not imperative on the Court to refuse motions made after the time above specified, provided very clear and satisfactory reasons were given for the delay (*s*). But it was not a sufficient excuse for lateness that the arbitrator refused to give up his award without payment of an exorbitant sum (*t*): nor that the party moving did not believe that the other party intended to proceed upon the award, as there had been a previous revocation (*u*); nor that the party making the application was a trustee of one of the parties to the reference who had become bankrupt, and that he was only appointed a short time before coming to the Court (*x*).

Where reference at the trial.

Formerly, where a verdict was taken at the trial, and *the action* [illegible] referred, and the arbitrator put merely in the place of a jury, the motion should, it appears, in ordinary cases, have been made within the time limited for a motion for a new trial (*y*). And when an action *and all matters in difference* were referred at the trial, the application to set aside an award should have been made before the last day of the next term after the publication of the same (*z*). But in both these cases *Ord. LXIV. r.* 14, would now apply.

Motion to set aside judgment on award not limited.

A motion to set aside a *judgment* entered up on an imperfect award is not limited to the periods above specified (*a*). But it is, in general, better to apply in proper time to set aside the award itself; for on motion to set aside the judgment entered on it, only such defects as appear *on the face* of the award, and would be

---

(*r*) Id.

(*s*) See per Lord *Tenterden*, C. J. in *Rawsthorne* v. *Arnold*, 6 B. & C. 629: per *Coleridge*, J., in *Reynolds* v. *Askew*, 5 Dowl. 682: *Berry* v. *Oke*, 3 Dowl. 349: *Carmichael* v. *Houchen*, 3 N. & M. 203. And see a case, ante, p. 1597, where a motion was allowed after the usual time, the opposite party having possession of the submission (which was by order of *Nisi Prius*) and having neglected to make the same a rule of Court, though requested so to do. *Berry* v. *Oke*, 3 Dowl. 349.

(*t*) *M'Arthur* v. *Campbell*, 5 B. & Ald. 518. And see *Brooke* v. *Mitchell*, 6 M. & W. 473: per *Parke*, B., and *Alderson*, B., *Moore* v. *Darley*, 1 C. B. 145. But see per *Tindal*, C. J., in *Musselbrook* v. *Dunkin*, 1 Dowl. 222.

(*u*) *Worrall* v. *Deane*, 2 Dowl. 1.

(*x*) *Hobbs* v. *Ferrers*, 8 Dowl. 779. But perhaps, under certain circumstances, this might be deemed a sufficient excuse: *Hemsworth* v. *Brown*, 8 Se. N. R. 842. See *Guadino* v. *Brown*, 2 Jur., N. S. 358. Ex., where the party against whom the award was made was ill.

(*y*) *Jones* v. *Ives*, 10 C. B. 429; 20 L. J., C. P. 69; *O'Toole* v. *Pott*, 7 E. & B. 102; 26 L. J., Q. B. 88: *Rawsthorne* v. *Arnold*, 6 B. & C. 629. And see *Paxton* v. *The Great North of England R. Co.*, 8 Q. B. 938; 3 D. & L. 773, n. (*a*): *Riccard* v. *Kingdon*, 1 B. C. Rep. 122; 15 L. J., Q. B. 269; *Borrowdale* v. *Hitchener*, 3 B. & P. 244: *Kennard* v. *Harris*, 2 B. & C. 801; 4 D. & R. 272: *Sell* v. *Carter*, 2 Dowl. 245: *Thomson* v. *Jennings*, 10 Moore, 110: *Reynolds* v. *Askew*, 5 Dowl. 682: *Allenby* v. *Proudlock*, 4 Dowl. 54.

(*z*) *Hayward* v. *Phillips*, 1 N. & P. 288: *Moore* v. *Butlin*, 2 N. & P. 436: *Allenby* v. *Proudlock*, 4 Dowl. 54: *Jones* v. *Ives*, supra: *Lyng* v. *Sutton*, 5 Dowl. 39. See Vol. 1, p. 189: *Re Governors of Christ College, Brecknock and Martin*, 3 Q. B. D. 16; 46 L. J., Q. B. 591.

(*a*) *Manser* v. *Heaver*, 3 B. & Ald. 295: *Doe* d. *Madkins* v. *Horner*, 3 N. & P. 344; 8 A. & E. 235: *Brooks* v. *Parsons*, 1 D. & L. 691; 13 L. J., Q. B. 50: *Wilcox* v. *Wilcox*, 19 L. J., Ex. 27.

PART XVIII.

available in answer to an application for an attachment for obeying it, can be taken advantage of (*b*).

When proceedings stayed.

An application cannot be made to set aside an award respecting a cause, pending an order staying all further proceedi until security for costs is given (*c*).

Application, how made.

Application, how made.]—By *R. of S. C., Ord. LII. r.* 2 p. 1379), "No motion or application for a rule nisi or order to cause shall hereafter be made in any action, or (a) to set a remit, or enforce an award, or (b) for attachment, or (c) to an the matters in an affidavit, or (d) to strike off the rolls, or (e) ag a sheriff to pay money levied under an execution."

Under this rule the application to set aside or remit an aw must in all cases be made on notice of motion. Before giving notice of motion, if the submission is not by rule or ord Court, it must be made a rule of Court in the manner pointed *ante*, p. 1598 (*d*).

The application should be made to the Division by which the making the submission a rule of Court, or the order of refe itself, has been made (*e*).

The notice of motion.

The notice of motion must state in general terms the grou the application (*f*).

It is not sufficient to state a general head of objection, as good grounds (*g*)" or as "misapprehension of the terms reference," or "that the arbitrator has exceeded his authorit "that the award is uncertain," or "not final" (*h*), or "tha arbitrator has not awarded on all matters referred to him" the like. The order if made, *should be drawn up on readi award itself, or a copy of it* (*j*). Where a rule nisi was dra on reading the *affidavit* and *paper writing* annexed, which fact a copy of the award, but was not stated to be so, the held that the rule was bad and could not be amended (*k*); would have been good if the affidavit had stated that the writing was a copy of the award (*l*). A rule nisi to set as

Order should be drawn up on reading award.

(*b*) *Doe* d. *Madkins* v. *Horner*, supra. See post, p. 1658.

(*c*) *Badham* v. *Badham*, 1 Ex. 824.

(*d*) See *Clapham* v. *Higham*, 7 Moore, 403; 1 Bing. 87: *Kirkus* v. *Hodgson*, 3 Moore, 64; 8 Taunt. 733.

(*e*) *In re Lomax's Arbitration*, 42 L. T. 391.

(*f*) By R. of S. C., Ord. LII. r. 4, "Every notice of motion to set aside, remit, or enforce an award, or for attachment, or to strike off the rolls, shall state in general terms the grounds of the application: and, where any such motion is founded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion." Cp. the former rule, R. 109, H. T. 1853: *Allenby* v. *Proudlock*, 4 Dowl. 54. As to a defective statement of the objection in the notice being helped by the affidavits directing attention to the particular point, see *Dunn* v. *Warlters*, 1 Dowl 626: *Staples* v. *Hay*, 1 D. & 13 L. J., Q. B. 60: *Ravesh Arnold*, 6 B. & C. 629; 9 D 556: *Gray* v. *Leaf*, 8 Dowl.

(*g*) *Mercier* v. *Pepperell*, 1 58; 51 L. J., Ch. 63; 45 L. 30 W. R. 228.

(*h*) *Boodle* v. *Davies*, 4 N 788: *Gray* v. *Leaf*, 8 Dow *Staples* v. *Hay*, 1 D. & L. L. J., Q. B. 60.

(*i*) *Gray* v. *Leaf*, 8 Dowl.

(*j*) *Sherry* v. *Oke*, 3 Dow 1 H. & W. 119: *Price* v. Dowl. 73: *Barton* v. *R* Dowl. 597: *Carmichael* v. H. & W. 120, n.: *Davis* v. L. J., Q. B. 134.

(*k*) *Sherry* v. *Oke*, supra.

(*l*) *Platt* v. *Tutt*, 2 M. & *Hayward* v. *Phillips*, 1 N. 6 Ad. & E. 119: *Hawkes* 9 Jur. 451.

pplication for an attachment for dis-
ntage of (*b*).
made to set aside an award made
n order staying all further proceedings,
en (*c*).

By *R. of S. C., Ord. LII. r.* 2 (*ante*,
ication for a rule nisi or order to show
do in any action, or (a) to set aside,
or (b) for attachment, or (c) to answer
(d) to strike off the rolls, or (e) against
l under an execution."
cation to set aside or remit an award,
n notice of motion. Before giving the
ubmission is not by rule or order of
le of Court in the manner pointed out,

made to the Division by which the order
ule of Court, or the order of reference

t state in general terms the grounds of

e a general head of objection, as "on
'misapprehension of the terms of the
bitrator has exceeded his authority," or
ain," or "not final" (*h*), or "that the
on all matters referred to him" (*i*), or
de, *should be drawn up on reading the*
(*j*). Where a rule nisi was drawn up
l *paper writing* annexed, which was in
but was not stated to be so, the Court
l and could not be amended (*k*); but if
the affidavit had stated that the paper
award (*l*). A rule nisi to set aside an

Torner,
s. 824.
am, 7
kus v.
t. 733.
ion, 42

I. r. 4,
t aside,
or for
e rolls,
ns the
; and,
onnded
opy of
e used
otice of
R. 109,
ndlock,
e state-
notice
direct-
r point,

see *Dunn* v. *Warlters*, 1 Dowl., N. S. 626: *Staples* v. *Hay*, 1 D. & L. 711; 13 L. J., Q. B. 60: *Rawsthorne* v. *Arnold*, 6 B. & C. 629; 9 D. & R. 556: *Gray* v. *Leaf*, 8 Dowl. 654.

(*g*) *Mercier* v. *Pepperell*, 19 Ch. D. 58; 51 L. J., Ch. 63; 45 L. T. 69; 30 W. R. 228.

(*h*) *Boodle* v. *Davies*, 4 N. & M. 788: *Gray* v. *Leaf*, 8 Dowl. 654: *Staples* v. *Hay*, 1 D. & L. 711; 13 L. J., Q. B. 60.

(*i*) *Gray* v. *Leaf*, 8 Dowl. 654.

(*j*) *Sherry* v. *Oke*, 3 Dowl. 361; 1 H. & W. 119: *Price* v. *Jones*, 3 Dowl. 73: *Barton* v. *Ransom*, 3 Dowl. 597: *Carmichael* v. *Hunter*, 1 H. & W. 120, n.: *Davis* v. *Potter*, 1 L. J., Q. B. 131.

(*k*) *Sherry* v. *Oke*, supra.

(*l*) *Platt* v. *Hall*, 2 M. & W. 1: *Hayward* v. *Phillips*, 1 N. & P. 1; 6 Ad. & E. 119: *Hawkes* v. *Shaw*, 9 Jur. 451.

award which had not been taken up, on the ground that two out of the three arbitrators had made it without consulting the other or communicating with him, was granted without the production of the award or a copy of it (*m*). It is as well that the order should be drawn up on reading the rule making the submission a rule of Court (*n*).

The notice of motion to set aside the award should not be served on the arbitrators (*o*).

Affidavit in support of.

A copy of any affidavit intended to be used on the hearing of the application must be served with the notice of motion (*p*).

When there is no cause in Court the affidavit should only be intituled in the High Court of Justice and in the Division in which the application is made (*q*), and in the matter of an arbitration between A. B. and C. D. It is not necessary that there should be an affidavit by one of the attesting witnesses to the award, of its execution (*r*). An affidavit verifying a copy of the award to be a true copy, need not state that the copy has been compared with the original award (*s*). An affidavit which stated that the paper writing produced was delivered by the arbitrator personally into the hands of the deponent as a copy of the award, was held sufficient primâ facie evidence that such writing was a copy of the award (*t*). And the same was held where the affidavit stated that the paper writing annexed was or contained, as deponent believed, a true copy of the award, the deponent having been served with the same by the solicitor for the other side (*u*). On a motion to set aside an award as not final in respect of the pleadings in the action, the pleadings should be brought before the Court by affidavit (*x*). Where the objection is that the arbitrator has not decided on some of the matters referred to him, the affidavit should distinctly show that such matters were brought before the arbitrator, and have not been determined by him (*y*). As to when an arbitrator's evidence is receivable respecting his award, *see the cases referred to, post*, p. 1651.

Arbitrator's notes.

The Court, upon the application being argued, will not look at the arbitrator's notes, nor at a copy of them, unless verified by affidavit (*z*).

Second application.

If an application to set aside an award has been refused, the Court will not entertain another application on a suggestion of fresh objections (*a*). If the application was refused for some slip in form, the application may sometimes be renewed (*b*).

(*m*) *Hinton* v. *Mead*, 24 L. J., Ex. 30.

(*n*) See *Brown* v. *Collyer*, 20 L. J., Q. B. 426: *Oswald* v. *Earl Grey*, 24 L. J., Q. B. 69.

(*o*) *Moseley* v. *Simpson*, L. R., 16 Eq. 226; 42 L. J., Ch. 739.

(*p*) See Ord. LII. r. 4, ante, (*f*).

(*q*) As to the title of affidavits, see *ante*, Vol. I, p. 456.

(*r*) *England* v. *Davison*, 9 Dowl. 482.

(*s*) *Hawkyard* v. *Stocks*, 2 D. & L. 763.

(*t*) *Lund* v. *Hudson*, 1 D. & L. 236.

(*u*) *Hayward* v. *Phillips*, 6 A. & E. 119.

(*x*) *Allen* v. *Lowe*, 4 Q. B. 66. See *Sherry* v. *Oke*, 3 Dowl. 349: *Dicas* v. *Jay*, 5 Bing. 281; 2 M. & P. 448.

(*y*) *Hancock* v. *Reede*, 15 Jur. 1036, B. C.

(*z*) See *Doe* d. *Haxby* v. *Preston*, 3 D. & L. 768; 1 B. C. Rep. 77.

(*a*) *Carmichael* v. *Houcken*, 3 N. & M. 203.

(*b*) *Sherry* v. *Oke*, 3 Dowl. 361; 1 H. & W. 119. See *ante*, p. 1400.

PART XVIII.

Costs of application.

Costs of first trial.

Costs of Application.]—In general, where the Court refus application to set aside an award, they will do so with cost but sometimes they will do so without costs (*d*).

Where a cause was referred at the trial, and the award th was afterwards set aside, and the cause tried again, it was that the party ultimately succeeding was not entitled to the of the first trial (*e*).

Referring back matters to arbitrator.

Referring back Matters to Arbitrator.]—We have seen, *ante*, p. that as soon as the arbitrator has made his award, he is fun officio, and cannot afterwards alter it in any material part, u the parties consent to his doing so; and before the *Com. Law Act*, 1854, without such consent the Court had no power to r the matter back to him to do so (*f*). As we have seen, *ante*, p. it is the practice to insert a clause in the submission, enabling Court or a Judge, in case of any dispute as to the validity of award, to remit the matters referred back to the arbitrator, fo purpose of curing the defect.

By *Com. Law Proc. Act*, 1854, *s.* 8, "In any case where refer shall be made to arbitration as aforesaid (*g*) the Court or a J shall have power at any time, and from time to time, to remit matters referred, or any or either of them, to the reconsider and re-determination of the said arbitrator, upon such terms costs and otherwise, as to the said Court or Judge may seem prop This section only empowers the Court or Judge to remit the ma referred to the reconsideration of the arbitrator in cases wh before that Act, the Court might have remitted them if the sub sion had contained a clause empowering the Court to do s Where the plaintiff was described by a wrong christian name i award, the Court sent it back to the arbitrator for correction u such a clause (*i*). A cause was referred to a Master; at the s tration it was admitted that something was due to the plain the Master certified that nothing was due; it was admitted e hands and stated by the Master that he had made a mistake; defendant, however, objected to the matter going back to the a trator: it was held, that the Court had power, and ought to se back (*k*). In one case, where a letter alleged to have been wri by one of the parties to the reference was discovered after the aw was made, which the arbitrator swore would have mater affected his decision, the Court under such a clause sent back matters referred for reconsideration (*l*). Where a letter-book, taining copies of letters which had been adduced in evidence be

(*c*) See *Snook* v. *Hellyer*, 2 Chit. Rep. 43.

(*d*) *Hocken* v. *Greenfell*, 6 Dowl. 250; 4 Bing. N. C. 103. But cp. now *Green* v. *Wright*, and *Field* v. *Great Northern R. Co.*, ante, Vol. 1, p. 676.

(*e*) *Wood* v. *Duncan*, 5 M. & W. 87. See *Doe* d. *Davies* v. *Morgan*, 4 M. & W. 171. See ante, p. 1606.

(*f*) See *Porch* v. *Hopkins*, 1 D. & L. 881.

(*g*) See sect. 3, post, p. 1661. This section applies to references by consent: *Re Morris*, 6 E. & B. 38 L. J., Q. B. 261: *Warburto Haslingden Local Board*, 48 L C. P. 451, a case under sect. the Public Health Act, 1875.

(*h*) *Hodgkinson* v. *Fernie*, 3 C N. S. 189; 27 L. J., C. P. 66; v. *Bowyers' Society*, 3 Kay & J.

(*i*) *Howett* v. *Clements*, 7 M. 1044; 8 Sc. N. R. 851.

(*k*) *Flynn* v. *Robertson*, L. C. P. 324; 38 L. J., C. P. 240.

(*l*) *Barnard* v. *Wainwright*, M. & P. 455; 19 L. J., Q. B. 42

an arbitrator and marked by him as read, was, at the close of the case, left in his hands in order that he might, before making his award, refer to the copies so adduced, and he referred to a copy of a letter contained in the book which had not been marked as having been adduced in evidence, the Court directed that the case should be referred back to the arbitrator, in order that the party against whom the letter complained of had been used might have an opportunity of explaining its contents; but refused to set aside the award (*m*). In one case the matter was referred back to the arbitrator in favour of the party disputing the validity of the award (*n*). An award will not be sent back on the ground that the arbitrator has made a mistake in the legal principle on which his award is based, unless he himself admits that he has done so (*o*), in which case the award will be sent back (*p*).

When application to be made.

An application to remit matters to an arbitrator must be made on notice of motion (*q*), which must state the grounds on which the application is made (*r*), and a copy of any affidavit intended to be used on the motion must be served with the notice (*s*). It may (*t*) be entertained at any time, but in general should be made within the same time as an application to set aside the award (*u*). Where the submission contained a clause, "that in the event of any application being made to the Court on the subject of the said award," the Court might remit the matter back to the arbitrator; it was held, that an application for a rule for payment of money under the award was an application on the subject of the said award within the above clause (*v*).

Course to be pursued on reference back.

Where, upon a rule to set aside an award, upon the ground that it was not final, and that the arbitrator had not awarded on one of the matters in difference, the Court ordered, under a clause to that effect in the submission, "that the matters referred, &c., be remitted back to the arbitrator for his reconsideration and re-determination"; it was held that the arbitrator was bound to hear evidence tendered by one of the parties respecting the matters in difference, which had come to the knowledge of that party since the making of the original award (*x*). But where the arbitrator not having formally determined an issue on an account stated, the Court directed the award to be sent back to him, to be corrected in this particular: it was held, that the arbitrator was

(*m*) *Davenport* v. *Vickery*, 9 W. R. 701. See *Webber* v. *Lee*, 1 D. & L. 684; *Caswell* v. *Growcott*, 13 C. B., N. S. 253; 31 L. J., C. P. 361.

(*n*) *Bradley* v. *Phelps*, 21 L. J., Ex. 310. See *Anning* v. *Hartley*, 27 L. J., Ex. 145, where one of several arbitrators had not executed in the presence of the others: and see *Lord* v. *Hawkins*, 2 H. & N. 55, where one of several arbitrators died after the award was made.

(*o*) *Dinn* v. *Blake*, L. R., 10 C. P. 388; 44 L. J., C. P. 276: *Allen* v. *Greenslade*, 33 L. T. 567.

(*p*) *In re Dare Valley R. Co.*, L. R., 6 Eq. 429, V.-C. G.

(*q*) Ord. LII. r. 2, ante, p. 1646.

(*r*) Ord. LII. r. 4, ante, p. 1646, n. (*f*).

(*s*) Id.

(*t*) *Leicester* v. *Grazebrook*, 40 L. T. 883: *Warburton* v. *Haslingden Local Board*, 48 L. J., C. P. 451, where the Court refused the application on the ground that it was too late: *In re Dare Valley R. Co.*, L. R., 4 Ch. 554.

(*u*) *Doe* d. *Banks* v. *Holmes*, 12 Q. B. 951. See *Zachary* v. *Shepherd*, 2 T. R. 781: *Doe* d. *Mays* v. *Connell*, 22 L. J., Q. B. 321.

(*v*) *Johnson* v. *Latham*, 1 L., M. & P. 348; 19 L. J., Q. B. 329.

(*x*) *Nickalls* v. *Warren*, 2 D. & L. 549; 6 Q. B. 615; 14 L. J., Q. B. 75.

PART XVIII.

not bound to re-hear the case (*y*). Nor in such a case would it necessary for the arbitrator to give any notice to the parties attend him (*z*). Where the principal matter referred back v confined to the prospective directions to the defendant relative t weir to be maintained by him, *Erle*, J., said, "It may well h been that the arbitrator required no further evidence or discussi and if so, it was not necessary to hear the parties again either the principal matter referred back or on the costs as incide thereto" (*a*). If an award is good as to three points, and bad a one, and is sent back to the arbitrator as to that alone, it se that the arbitrator is functus officio as to the three and cannot a his judgment as to them (*b*). Where, after an award was refer back as above, the arbitrator made a new award, copying verba the part of the award not referred back, and awarding afresh the point sent back; it was held that the course pursued correct (*b*). An arbitrator, in making his award in favour of defendant, by mistake called him David instead of Daniel; award having been sent back to him for amendment, he w at the bottom of it the following certificate: "In pursuance rule of Court, I do hereby certify that this my award ought t amended, by substituting the name of Daniel P. for the nam David P., the name of David P. having been inserted therei mistake instead of Daniel P.:" held a sufficient amendment (*c*).

Amended award.

The amended award need not recite the order referring matters back (*d*). As to the time within which the award mus made in cases within the *Com. Law Proc. Act*, 1854, *s.* 15, *see* p. 1618.

Costs of reference back.

Where the submission contemplates the possibility of an orig and supplementary award and gives the arbitrator discretio power over the costs of the reference and award, and it is refe back to him to reconsider a prospective direction, and the referring it back is silent as to costs, it seems that the clause in submission as to costs gives the arbitrator power over the cos the second reference; for the second reference is a part of reference, or rather a continuance of it (*e*). Where an award, b defective, is referred back by the Court to the arbitrator, who h fresh evidence and makes a second award, the party entitled t costs of the reference cannot charge the other with the whole o arbitrator's charges for the first award, but, it would seem, on such of them as were useful for the second award (*f*). Where, certain costs which the arbitrator by his award had directe defendant to pay had been taxed, the award was, as to one of it, referred back to the arbitrator, it was held, that a se

Second taxation.

(*y*) *Bird* v. *Penrice*, 6 M. & W. 754: *Ex p. Huntley*, 22 L. J., Q. B. 277.

(*z*) *Howett* v. *Clements*, 1 C. B. 128; 8 Se. N. R. 851: *Baker* v. *Hunter*, 16 M. & W. 672: *Re Morris*, 6 E. & B. 383; 25 L. J., Q. B. 261: *Anning* v. *Hartley*, 27 L. J., Ex. 145.

(*a*) *Johnson* v. *Latham*, 2 L. M. & P. 205; 20 L. J., Q. B. 236. See *Baker* v. *Hunter*, 16 M. & W. 673; 16 L. J., Ex. 203.

(*b*) *Johnson* v. *Latham*, 20 L Q. B. 236, per *Erle*, J.

(*c*) *Davies* v. *Pratt*, 17 C. B. 25 L. J., C. P. 71.

(*d*) *Baker* v. *Hunter*, 16 M. 673; 16 L. J., Ex. 203.

(*e*) *Johnson* v. *Latham*, 20 Q. B. 236, per *Erle*, J. See v. *M'Lean*, 2 El. & El. 946.

(*f*) *Blair* v. *Jones*, 6 Ex. 7 L. J., Ex. 295.

(y). Nor in such a case would it be o give any notice to the parties to principal matter referred back was ections to the defendant relative to a n, *Erle*, J., said, "It may well have ed no further evidence or discussion; to hear the parties again either on back or on the costs as incidental good as to three points, and bad as to rbitrator as to that alone, it seems fficio as to the three and cannot alter Where, after an award was referred made a new award, copying verbatim ferred back, and awarding afresh on held that the course pursued was making his award in favour of the him David instead of Daniel; the k to him for amendment, he wrote ving certificate: "In pursuance of a tify that this my award ought to be name of Daniel P. for the name of P. having been inserted therein by " hold a sufficient amendment (c). not recite the order referring the time within which the award must be . *Law Proc. Act*, 1854, *s.* 15, *see ante*,

templates the possibility of an original nd gives the arbitrator discretionary reference and award, and it is referred a prospective direction, and the rule to costs, it seems that the clause in the the arbitrator power over the costs of he second reference is a part of the nance of it (e). Where an award, being the Court to the arbitrator, who hears second award, the party entitled to the charge the other with the whole of the irst award, but, it would seem, only to for the second award (f). Where, after itrator by his award had directed the taxed, the award was, as to one part arbitrator, it was held, that a second

: W. 16 L. J., Ex. 203.
Q. B. (b) *Johnson* v. *Latham*, 20 L. J., Q. B. 236, per *Erle*, J.
'. B. (c) *Davies* v. *Pratt*, 17 C. B. 187;
r v. 25 L. J., C. P. 71.
orris, (d) *Baker* v. *Hunter*, 16 M. & W.
261: 673; 16 L. J., Ex. 203.
, Ex. (e) *Johnson* v. *Latham*, 20 L. J., Q. B. 236, per *Erle*, J. See M'Ea v. *M'Lean*, 2 El. & El. 946.
L. M. (f) *Blair* v. *Jones*, 6 Ex. 701; 2
See L. J., Ex. 295.
673;

taxation of costs after the making of the new award was necessary (g). CH. CXXXVI.

Action against arbitrator for negligence.

Action against Arbitrator for Negligence, &c.—Evidence by him.]—As to an action lying against an arbitrator for negligence, dishonesty, &c., *see The Tharsis Sulphur and Copper Co. Limited* v. *Loftus*, L. R., 8 C. P. 1; 42 L. J., C. P. 6; *Turner* v. *Goulden*, L. R., 9 C. P. 57; 43 L. J., C. P. 60; *Pappa* v. *Rose*, L. R., 7 C. P. 525; 41 L. J., C. P. 187; *Stevenson* v. *Watson*, 4 C. P. D. 148; 48 L. J., C. P. 318.

Evidence of arbitrator.

As to when an arbitrator's evidence is admissible for the purpose of explaining his award, &c., *see Duke of Buccleuch* v. *Metropolitan Board of Works*, L. R., 5 H. L. 418; 41 L. J., Ex. 137; *Re Dare Valley Railway Co.*, L. R., 6 Eq. 429; *S.C. nom. Re Rhys and others*, 37 L. J., Ch. 719.

SECT. VIII.—ENFORCING PERFORMANCE OF THE AWARD.

	PAGE		PAGE
By Order and Execution	1651	*Where Award directs Possession of Land to be given up*	1650
By Judgment and Execution ..	1653		
By Attachment	1654	*By Action*	1661
Where Verdict taken at the Trial	1659		

Where the submission was made by consent, it may be enforced by action (h). Where it can be made an order of Court (as to which *see ante*, p. 1594), the successful party may enforce the performance of the award by order and execution (i). When the reference is by an order which provides for judgment being signed the award may be enforced by judgment. Where a verdict has been taken at the trial the award may in some cases be enforced by entering up judgment in the action. An award may also in some cases be enforced by attachment. We will now notice the different modes of enforcing an award.

By order and execution.

By Order and Execution.]—Whenever the submission is by order of Court or has been made so (*see ante*, p. 1594), the award may be enforced by obtaining an order at Chambers or in Court for that purpose, which order may be enforced by execution. When the reference is by an order which provides that judgment may be signed, an order to enforce the award is unnecessary as judgment may be signed at once (*see post*, p. 1653).

Before applying for an order to enforce the award the submission must be made a rule of Court. (*See ante*, p. 1594.) This, however, is unnecessary when the reference is by order made in an action (k),

(g) *Johnson* v. *Latham*, 2 L. M. & P. 205; 20 L. J., Q. B. 236.

(h) See *Stock* v. *De Smith*, Hardw. 106; *Badley* v. *Loveday*, 1 B. & P. 22.

(i) 9 & 10 W. 3, c. 15, s. 1, ante, p. 1594, n. (s); Willes, 292, n.: *Bailey* v. *Cheesely*, 1 Salk. 72; 1 Ld. Raym. 674: *Hopcraft* v. *Fermor*, 1 Bing. 378; 8 Moore, 424.

(k) *Jones* v. *Wedgwood*, 19 Ch. D. 56: *Burrowes* v. *Forrest*, 19 Ch. D. 57, n. (1): *Jones* v. *Jones*, 14 Ch. D. 593. See ante, p. 1596.

PART XVIII. unless, indeed, as is sometimes the case, that order provides for being made a rule of Court.

If it is sought to enforce the payment of costs, and the amo of them is not mentioned in the award, they should be taxed, a the allocatur for the same obtained. A copy of the rule maki the submission a rule of Court, of the allocatur, where there one, and of the award, must be served upon the party requi to do the act. If the party on being served require to see originals, he should be shown the same. If there have been enlargements of the time for making the award, serve a not of such fact, and that the award was made within the enlar time. At the time of the above service being effected, serv written demand of performance of the award. A personal serv and demand is in general requisite, but in some cases, as mentio *post*, p. 1656, personal service may be dispensed with. An affid in support of the application must be made. It should be intitu as mentioned *ante*, *Vol.* 1, p. 456. It should show that the aw which should be annexed or exhibited to the affidavit, was executed; that the enlargements, if any, were duly made; that award was made within the enlarged time; that there has been a service of the documents above mentioned; that demand of formance of the award was duly made; the performance of conditions precedent, and such other facts as may be necessar satisfy the Master that the applicant is entitled to issue execu as prayed for. The application, except under very special cir stances, is made to a Master at Chambers on summons. summons should be personally served, but in some cases this be dispensed with (*ante*, p. 949). If the application is made t Court it must be on notice of motion, which must state grounds on which it is made (*m*), with which must be served a of any affidavit intended to be used (*n*). The Master, if sati that the right to relief has arisen according to the terms o submission and award, will make the order, or may direct any issue or question necessary for the determination of the ri of the parties be tried in any of the ways in which ques arising in an action may be tried.

When the award is for payment of a sum of money the sum should ask for an order that the party against whom it is sou enforce the award do forthwith pay to the applicant the said pursuant to the award (*o*). The order for payment of mon pursuance of an award will only be made when formerly an at ment would have been granted for its non-payment (*p*). order will not be made if it is doubtful whether the award is a one (*q*). It seems it is not necessary that the award should

(*m*) Ord. LII. r. 2, ante, p. 1646. This renders the decision in *Re Phillips and Gill*, 1 Q. B. D. 78, obsolete.

(*n*) Ord. LII. r. 4, ante, p. 1646, n. (*f*).

(*o*) See the form, Chit. F. 12th ed. p. 851. See *Jones* v. *Williams*, 11 A. & E. 175; *Rickards* v. *Paterson*, 1 Dowl., N. S. 52, per *Parke*, B.: *Jones* v. *Williams*, 8 M. & W 9 Dowl. 702; *Doe* v. *Amey*, 8 W. 565; 1 Dowl., N. S. 23.

(*p*) *Creswick* v. *Harrison*, 1 & P. 721; 20 L. J., C. P. *Laing*, 13 C. B. 276. As to w attachment will be granted, se p. 1654.

(*q*) *M'Kenzie* v. *The Sli Shannon R. Co.*, 9 C. B.

the money to be paid (*r*). Where an arbitrator made his award on the 1st of September, 1841, directing payment on the 25th of January, 1842, of a certain sum, "with interest," it was held, that, under that award, the plaintiff could recover no interest accruing subsequently to the 25th of January (*s*). If a person ordered to pay money under an award satisfies the Court that he has a bonâ fide claim for a cross demand larger than the sum awarded, which he might reasonably hope to support by way of set-off to an action on the award, the Court will not order him to pay the sum awarded (*t*).

The application for the order may be made before the time for setting aside the award has elapsed (*u*). It is not necessary to make it part of the order that the applicant should be at liberty to issue execution, &c., or that he abandon the remedy by attachment (*x*).

The order may be enforced by execution in the same manner as a judgment. (*See ante*, p. 1396.)

By Judgment.]—Where an action, or an action and some other or all other matters in difference between the parties, is or are referred to arbitration by consent, the usual form of order (*y*) provides that unless restrained by any order of the High Court of Justice, or of any Judge thereof, the party or parties in whose favour the award shall be made, shall be at liberty, within a limited number of days, usually fourteen, after service of a copy of the award on the solicitor or agent of the other party, to sign final judgment in accordance with the award, and for all costs that he or they may be entitled to under the order of reference and under the award, together with the costs of the judgment. When the order of reference contains this or a similar clause, the judgment may be signed without any order on production of the order and the original award or a duplicate of it and an affidavit verifying the award and swearing to the service of the copy of it. Unless the order of reference contains this or a similar clause judgment cannot be signed on the award. By judgment.

When a verdict is taken subject to a reference, the arbitrator having power to direct a verdict to be entered for either party, judgment may be signed on the award without any order (*z*).

L. J., C. P. 142: *Dickenson* v. *Allsop*, 2 D. & L. 657; 13 M. & W. 722: *Re Walker and the Local Board of Beckenham*, 50 L. T. 207.

(*r*) *Baker* v. *Cotterill*, 7 D. & L. 20, B. C.: *Bowen* v. *Bowen*, 31 L. J., Ex 193. This was necessary, in order to obtain an attachment for the non-payment of the money. See post, p. 1654.

(*s*) *Doe* d. *Moody* v. *Squire*, 2 Dowl., N. S. 327. See *Churcher* v. *Stringer*, 2 B. & Ad. 777.

(*t*) *Swayne and Borrill* v. *White and Ponsford*, 31 L. J., Q. B. 260: *Lawkins* v. *Benton*, 2 D. & L. 65: *Fulson* v. *Foster*, 6 Sc. N. R. 936: *Smith* v. *Troup*, 7 C. B. 757; 6 D. & L. 679; 18 L. J., C. P. 209: *Pearson* v. *Archbold*, 11 M. & W. 108. As to such personal service, &c., where an attachment was moved for, see post, p. 1656. As to dispensing with a personal demand of the money where the party was keeping out of the way, see *Smith* v. *Troup*, supra.

(*u*) See *O'Toole* v. *Pott*, 7 E. & B. 102; 26 L. J., Q. B. 88: *Hare* v. *Fleay*, 2 L. M. & P. 392; 20 L. J., C. P. 249.

(*x*) *Burton* v. *Mendizabel*, 1 Dowl., N. S. 336, B. C.

(*y*) See the form, Chit. F., 12th ed. p. 830.

(*z*) *Lloyd* v. *Lewis*, 2 Ex. D. 7; 46 L. J., Ex. 81. See post, p. 1659.

PART XVIII.

By attachment.

By Attachment.]—Where the submission is by, or has been ma a rule of Court, and a party wilfully disobeys the award, Court (*a*) will grant an attachment against him (*b*). But w the award is for the payment of money the Court will not, since Debtors Act, grant an attachment, but the party must be proceed against under that Act (*c*). The payment of interest accruing after the award cannot be enforced by attachment (*d*). If the pa has performed the award as far as is in his power, the Court will not grant an attachment (*e*). Nor will they do so if it is doubt whether the award is a good one (*f*), nor unless all conditions p cedent on the part of the party applying for the attachment h been performed (*g*). And an attachment will not be granted, unless the award contains a distinct order to do the act, the omiss of which forms the ground of the application. Therefore, wh an arbitrator found by his award that, on the balance of accou the defendant had overpaid the plaintiff a certain sum, but did award that the plaintiff was to repay it to defendant, the Co would not grant an attachment against the plaintiff for the n payment of that sum (*h*). And where an award directed that should pay whatever sums B. should be compelled to pay in spect of a certain bill of exchange, the Court refused a rule for an attachment against A. for non-payment of what B. sta he had been compelled to pay (*i*). Where, in an action agai E. H. and W. T., the award purported to be made in an act against E. H. and E. T., and awarded that E. H. and E. T. sh pay a certain sum of money to the plaintiff, the Court refused grant an attachment (*k*). An attachment would not be granted not making a payment on a Sunday (*l*). The Court refused a r for payment of money under an award where it appeared that costs (unascertained) of proceedings in Chancery were payable the party against whom the motion was made under the sa award (*m*). The Court, in one case, under peculiar circumstanc made absolute a rule for an attachment for non-payment of a s awarded to the wife of one of the parties, although it was sw that the money had been demanded and paid to her husband (*n*)

(*a*) See C. L. P. Act, 1854, s. 17, ante, p. 1594.

(*b*) As to attachment in general, see Ch. LXXXIII.

(*c*) *Esdaile* v. *Visser*, 13 Ch. D. 421; 41 L. T. 745: *Hutchinson* v. *Hartmont*, W. N. 1877, 29. See ante, p. 941.

(*d*) *Churcher* v. *Stringer*, 2 B. & Ad. 777.

(*e*) *Dodington* v. *Bailward*, 7 Sc. 733; 7 Dowl. 640.

(*f*) See *Tattersall* v. *Parkinson*, 2 Ex. 342.

(*g*) Watson, 210: *Standley* v. *Hemington*, 2 Marsh. 276; 6 Taunt. 561. As to what is not a condition precedent, see *Doe* d. *Clarke* v. *Stilwell*, 3 N. & P. 701; 8 A. & E. 645.

(*h*) *Re Seaward*, 7 Dowl. 318: *Thornton* v. *Hornby*, 1 Dowl. 237; 1 M. & S. 48; 8 Bing. 13. And *Scott* v. *Williams*, 3 Dowl. *Hopkins* v. *Davies*, 1 C., M. & 846: *Edgell* v. *Dallimore*, 3 B 634; 11 Moore, 541: *Re Lee*, 3 & M. 860: *Baker* v. *Cottrill*, 7 L. 20, B. C.: *Donlan* v. *Brett*, 4 & M. 854.

(*i*) *Graham* v. *D'Arey*, 6 D. & 385, C. P.; 6 C. B. 537.

(*k*) *Lees* v. *Hartley*, 8 Dowl. *Davies* v. *Pratt*, 16 C. B. 586, w the defendant was described b wrong christian name.

(*l*) *Hobdell* v. *Miller*, 2 Sc. N. 163.

(*m*) *Lambe* v. *Jones*, 9 C. B., N 478.

(*n*) *Wynne* v. *Wynne*, 3 Sc. N 442; 1 Dowl., N. S. 723; 4 M. & 253.

It seems that the attachment may be applied for before the time has elapsed for moving to set aside the award (*o*).

At what time attachment to be applied for.

The Court will not grant an attachment pending a motion to set aside the award (*p*): nor pending an action on it (*q*). A rule for an attachment was, however, made absolute, on the terms of the plaintiff discontinuing his action and paying the costs (*r*). Where a party obtained an attachment to enforce an award, and afterwards proceeded by action, the Court set aside the attachment, upon the terms of the defendant giving a bond to the plaintiff, with sureties to the Master's satisfaction, and conditioned to the same effect as in the case of a recognizance of bail (*s*). An attachment was granted pending a foreign attachment in London upon the same award (*t*).

Pending rule to set aside award, &c.

An attachment will not be granted on behalf of a stranger to the award (*u*); nor even on behalf of the administrator or executor of a party who had died after the award made, and to whom the money awarded is to be paid (*x*).

At whose instance attachment will be granted.

The Court will not grant an attachment against a peer (*y*), or member of the House of Commons (*z*); or against an administrator or executor, where the submission is made by the intestate or testator (*a*). But an attachment will be granted against one of several of the parties against whom the award is made (*b*); or against a party residing out of the jurisdiction of the Court (*c*).

Against whom.

In order to enforce the award by attachment, the submission must have been made a rule of Court, as mentioned *ante*, p. 1594; also all enlargements of the time for the making of the award, where the award is made within the enlarged time.

Submission must have been made a rule of Court.

A copy of the rule making the submission a rule of Court—of the allocatur (*d*) where there is one—of the award—of the power of attorney (*e*) enabling the party making the demand to do so (if

Service of rule, &c. on party to perform award.

(*o*) *O'Toole* v. *Pott*, 26 L. J., Q. B. 88; 7 E. & B. 102.

(*p*) *Dalling* v. *Matchett*, Willes, 215.

(*q*) *Badley* v. *Loveday*, 1 B. & P. 81. See *Baker* v. *Wells*, 9 Dowl. 323: *Mandell* v. *Tyrrell*, 9 M. & W. 217.

(*r*) *Paull* v. *Paull*, 2 Dowl. 340; 2 C. & M. 235. See *Higgins* v. *Willes*, 3 M. & R. 382.

(*s*) *Earl of Lonsdale* v. *Whinnay*, 3 Dowl. 263; 1 C., M. & R. 591.

(*t*) *Coppell* v. *Smith*, 4 T. R. 313, n.

(*u*) *In re Skete*, 7 Dowl. 618; *Dunn* v. *West*, 10 C. B. 420; 20 L. J., C. P. 1, where application was made by the solicitors for the party to whom the money was to be paid. *Bracy* v. *Kemp*, 24 L. J., Q. B. 310, where a rule for the payment of the money awarded was applied for after the plaintiff's bankruptcy, nominally by him, but really by his solicitor. And see *Holcroft* v. *Hanby*, 7 M. & G. 843; 8 Sc. N. R. 473; 2 D. & L. 319: *Lloyd* v. *Mansell*, 22 L. J., Q. B. 110.

(*x*) *Rex* v. *Maffey*, 1 Dowl. 538; semble, overruling *Rogers* v. *Stanton*, 7 Taunt. 576: *Re Hare, Milne, and Haswell*, 8 Sc. 371. See now Ord. XLII. r. 23, ante, p. 955.

(*y*) *Walker* v. *Earl Grosvenor*, 7 T. R. 171.

(*z*) *Catmur* v. *Knatchbull*, 7 T. R. 448.

(*a*) *Newton* v. *Walker*, Willes, 315. But they would when the submission was made by himself. *Spiry* v. *Webster*, 2 Dowl. 46.

(*b*) *Richmond* v. *Parkinson*, 3 Dowl. 703. See *Gulliver* v. *Summerfield*, 5 Dowl. 401.

(*c*) *Hoperaft* v. *Fermor*, 8 Moore, 424; 1 Bing. 378.

(*d*) *Rex* v. *Smithies*, 3 T. R. 351: *Reed* v. *Deer*, 7 D. & R. 612: *Bellairs* v. *Poultney*, 6 M. & S. 230.

(*e*) See *Price* v. *Duggan*, 1 Dowl., N. S. 709.

PART XVIII.

any), must be personally (*f*) served upon the party who has perform the award. He must at the same time (*g*) be shown originals in such a way that he can read the contents (*h*). the arbitrators have enlarged the original time given them making their award pursuant to a power contained in the s mission, a notice of such fact, and that the award was m within the enlarged time, should also be given to the party has to perform the award (*i*). A parol notice is sufficient though, of course, it is advisable that it should be in writing. Court will not in general grant an attachment without *pers* service, in any case where the party applying has another reme and this, although the party purposely avoids the service (*l*). where the party has personal knowledge of the award and ru Court, the Court of Queen's Bench granted an attachment aga him for non-performance of the award, although he had not personally served (*m*).

Demand of performance.

In order to obtain the attachment, the person in whose favour award is made must, at the time of the serving of the copies of award and other documents as above mentioned (*n*), *demand the other party performance of the award* (*o*). This deman necessary, even where the award specifies the time and plac performance (*p*). It may be made on a day subsequent to on which the award directs the performance (*q*). But wher award directed that the plaintiff should on or before a certain duly execute an indenture to be prepared by the defendant. Court refused an attachment, no demand of the execution o indenture having been made on or before such day (*r*). It see demand of money payable by an award made by one of se plaintiffs was sufficient (*s*). If it is inconvenient for the party self to make the demand personally, he may depute his sol

(*f*) *Thomas* v. *Rawlings*, 28 L. J., Ex. 347.

(*g*) *Lloyd* v. *Harris*, 8 C. B. 63; 18 L. J., C. P. 346.

(*h*) See *Calvert* v. *Redfearn*, 2 Dowl. 505.

(*i*) *Re Dodington and Bailward*, 7 Sc. 733; 7 Dowl. 640: *Davis* v. *Vass*, 15 East, 97: *Wohlenberg* v. *Lageman*, 6 Taunt. 251: *Hilton* v. *Hopwood*, 1 Marsh. 66.

(*k*) *Re Dodington and Bailward*, supra.

(*l*) *Richmond* v. *Parkinson*, 3 Dowl. 703: *Re Lowe and another*, 4 B. & Ad. 412. And see *Stummel* v. *Tower*, 1 C. M. & R. 88: *Brandon* v. *Brandon*, 1 B. & P. 394: *Brander* v. *Penleaze*, 5 Taunt. 813: *Read* v. *Fore*, 1 Chit. Rep. 170.

(*m*) *Re Bower*, 1 B. & C. 264. And see *Allen* v. *Newton*, 2 Dowl. 582: *Re Dodington and Bailward*, 7 Sc. 733; 7 Dowl. 640: *Smith* v. *Troup*, 7 C. B. 757; 18 L. J., C. P. *Hawkins* v. *Benton*, 2 D. & L.

(*n*) See *Lloyd* v. *Harris*, 7 L. 118, C. P.

(*o*) All conditions precedent performance, &c. should be formed before making this de

(*p*) *Brandon* v. *Brandon*, P. 394. An award directin ment of costs "immediately a execution of the award," construed to mean "within a able time after notice:" *Ho Gordon*, 3 Q. B. 466.

(*q*) *Re Craike*, 7 Dowl. 603.

(*r*) *Doe* d. *Williams* v. *H* Ex. 299.

(*s*) *Baily* v. *Curling*, 2 L. 161; 20 L. J., Q. B. 235: *Woolcock*, 21 L. J., Q. B. affidavit in support of the att in such a case should show claim of neither of the plain been satisfied.

served upon the party who has to
at the same time (*g*) be shown the
he can read the contents (*h*). If
the original time given them for
t to a power contained in the sub-
ct, and that the award was made
uld also be given to the party who
). A parol notice is sufficient (*i*),
ble that it should be in writing. The
ant an attachment without *personal*
party applying has another remedy;
purposely avoids the service (*l*). But
l knowledge of the award and rule of
Bench granted an attachment against
the award, although he had not been

chment, the person in whose favour the
me of the serving of the copies of the
as above mentioned (*n*), *demand of*
of the award (*o*). This demand is
ward specifies the time and place of
e made on a day subsequent to that
the performance (*q*). But where an
intiff should on or before a certain day
to be prepared by the defendant, the
it, no demand of the execution of the
on or before such day (*r*). It seems
by an award made by one of several
If it is inconvenient for the party him-
ersonally, he may depute his solicitor

L. J., 63; n, 2 rd, 7 Vass, eman, wood, icard, Dowl. B. & Tower, ndon, nleaze, Chit. And 582: 7 Sc. Troup,

7 C. B. 757; 18 L. J., C. P. 29: *Hawkins* v. *Benton*, 2 D. & L. 46

(*n*) See *Lloyd* v. *Harris*, 7 D. & L. 118, C. P.

(*o*) All conditions precedent to the performance, &c. should be performed before making this demand.

(*p*) *Brandon* v. *Brandon*, 1 B. & P. 394. An award directing payment of costs "immediately after the execution of the award," must be construed to mean "within a reasonable time after notice:" *Hoggman* v. *Gordon*, 3 Q. B. 466.

(*q*) *Re Craike*, 7 Dowl. 603.

(*r*) *Doe* d. *Williams* v. *Howell*, Ex. 299.

(*s*) *Baily* v. *Curling*, 2 L. M. & P. 161; 20 L. J., Q. B. 235: *Irer* v. *Woolcock*, 24 L. J., Q. B. 22. The affidavit in support of the attachment in such a case should show that the claim of neither of the plaintiffs has been satisfied.

or any other person to do it for him, by a letter of attorney (*t*). Where *costs* were awarded, a demand by the solicitor of the party was sufficient without a power of attorney, even though the costs were by the terms of the rule made payable to the party himself (*u*). Where the debt in an action was ordered to be paid to the plaintiff *or his attorney*, a demand by the attorney was held sufficient (*x*). And in a case where the demand of the execution of a deed was made by an agent, without a power of attorney, it was held sufficient (*y*). Care must be taken to demand the exact thing awarded; if anything else is demanded and refused, an attachment will not be granted for the refusal (*z*). If two things are directed to be done by the award, one of which the arbitrator had no power to award, the demand of performance must be confined to the other (*a*). Where the award directed that the plaintiff should, on a given day, deliver up to the defendant *a warrant* for a hogshead of port wine lying in the London Docks, describing it by its number and marks; the demand required the plaintiff to deliver up, "*one hogshead of port wine*," describing it; it was held that this was not a sufficient demand to support an attachment (*b*).

Affidavit to support motion for attachment.

An affidavit must be made in support of the motion for the attachment. It should be intituled in the cause where there is one in Court (*c*). But where there is no cause depending it need not be so entitled (*d*); it may in such case be entitled "In the matter," &c. (*e*). It is as well to state in the affidavit that the submission has been made a rule of Court, and to annex such rule to the affidavit, or make it an exhibit. The affidavit must show that the award was duly executed (*f*). If there was an attesting witness to the execution of the award it is not necessary that he should swear to the execution (*g*). The original award must be annexed or exhibited to the affidavit (*h*). The affidavit must also show that copies of the award, and of the other necessary documents, have been served as above, and that their originals were at the time of service shown (*i*). If the time for the making of the award has been enlarged and the award has been made within such enlarged time, the affidavit should state that the award was made within such

(*t*) *Laugher* v. *Laugher*, 1 Dowl. 285; 1 C. & J. 398; 1 Tyrw. 352: *Jackson* v. *Clarke*, 13 Price, 208; 2 Cl. & Fl. 72: *Ex p. Fortesque*, 2 Dowl. 443: *King* v. *Packwood*, Id. 570. See *Bass* v. *Maitland*, 8 Moore, 44.

(*u*) *Inman* v. *Hill*, 4 M. & W. 7: *Mann* v. *Whitehouse*, 4 Bing. N. C. 692.

(*x*) *Hare* v. *Fleay*, 2 L. M. & P. 392; 20 L. J., C. P. 249.

(*y*) *Kenyon* v. *Grayson*, 2 Smith, 61: *Tebbutt* v. *Ambler*, 2 Dowl. 677; 12 L. J., Q. B. 220.

(*z*) *Strutt* v. *Rogers*, 7 Taunt. 213; 2 Marsh. 524.

(*a*) *Poynter* v. *Hatton*, 7 M. & W. 211; 8 Dowl. 891. See *Tattersall* v. *Stevenson*, 3 Ex. 342: *Re Earl of Donegan*, 22 L. J., Q. B. 83, where there was a demand of three specific acts, as to one of which it was doubtful whether the award was good, and an attachment was granted for non-payment of the others.

(*b*) *Hemsworth* v. *Brian*, 1 C. B. 131; 2 D. & L. 844.

(*c*) *Doe* v. *Stilwell*, 6 Dowl. 305: *Bainbrigge* v. *Houlton*, 5 East, 21 a: *Whitehead* v. *Firth*, 12 East, 166 a.

(*d*) *Anon.*, 1 Smith, 358: *Bainbrigge* v. *Houlton*, 5 East, 21 a.

(*e*) *Whitehead* v. *Firth*, 12 East, 166 a: *Re Houghton*, 2 M. & P. 452.

(*f*) See *Higgins* v. *Street*, 25 L. J., Ex. 285.

(*g*) This is so since the C. L. P. Act, 1854, s. 26, noticed ante, p. 1598, n. (*f*).

(*h*) *Davis* v. *Potter*, 21 L. J., Q. B. 134.

(*i*) See *Re Smith and Reeves*, 5 Dowl. 513, where the arbitrator's surname was misdescribed in the affidavit, and it was held sufficient.

PART XVIII.

enlarged time, and that the party to perform the awar notice of such facts (*k*). The affidavit should state that the d above mentioned to perform the award has been duly mad that it remains unperformed. If there is a letter of attor make the demand, an affidavit should be made of its execut the service of a copy thereof, and that at the time of such serv original was shown. The affidavit, that money was due un award, might have been made by the solicitor who had dem the same by letter of attorney (*l*). Where the attachment was for for non-payment of costs not fixed by the award, the af was required to state that the costs had been taxed, and the M allocatur had to be annexed to the affidavit and verified by it affidavit in support of an attachment for non-payment to the cant for the attachment of the arbitrator's costs was required t that the party applying had paid the same (*m*). The affidavit show the performance of all conditions precedent (*n*). If the is made a long time after the making of the award, there sh an affidavit explaining the delay (*o*).

The motion.

The motion must, in all cases, be made on notice of motio *LII. r.* 2, *ante*, p. 1646), or, it would appear by summons b Judge at Chambers (*see ante*, p. 948).

As to the practice when the application is made on no motion, *see ante*, p. 1384.

Title of affidavits showing cause.

As to how the affidavits in answer should be intituled, s *Vol.* 1, p. 454.

What may be shown for cause.

In showing cause against the application for an attachme party showing cause may impeach the award for any def pearing upon the face of it, although the time limited for a to set aside the award has elapsed (*p*): but not, it see matter extrinsic (*q*); as corruption in the arbitrator (*r*). mis-recital in the award will not prevent an attachment granted (*s*). Nor can it be shown as cause that the enlar

(*k*) *Re Dodington and Baldward*, 7 Sc. 733; 7 Dowl. 640. See *Halden* v. *Glascock*, 5 B. & C. 390; 8 D. & R. 151: *Davis* v. *Vass*, 15 East, 97: *Wohlenberg* v. *Lageman*, 6 Taunt. 251; 1 Marsh. 579. It was not necessary to make an affidavit that the time had been duly enlarged. See *Re Smith and Reeves*, 5 Dowl. 513; 3 M. & W. 322: *Barton* v. *Ranson*, 6 Dowl. 384: *Diekins* v. *Jarvis*, 5 B. & C. 528: *Peebles* v. *Hay*, 8 Jur. 338, B. C.

(*l*) *Reg.* v. *Paget*, 9 Dowl. 946.

(*m*) *Masters* v. *Butler*, 13 Q. B. 341; 18 L. J., Q. B. 328.

(*n*) See ante, p. 1656, n. (*o*).

(*o*) *Storey* v. *Garry*, 8 Dowl. 299: *Bailey* v. *Curling*, 2 L., M. & P. 161; 20 L. J., Q. B. 235.

(*p*) *Pedley* v. *Goddard*, 7 T. R. 73. See *Lowndes* v. *Lowndes*, 1 East, 276: *Hutchins* v. *Hutchins*, Andr. 297.

(*q*) *Holland* v. *Brooks*, 6 T. R. 161: *Paull* v. *Paull*, 2 Dowl. 340; 2 C. & M. 235: *M'Arthur* v. *Campbell*, 2 Ad. & E. 52; 4 N. & *Masters* v. *Butler*, 13 Q. 18 L. J., Q. B. 328: *Smith* 7 C. B. 757; 18 L. J., C. *Davies* v. *Pratt*, 17 C. B. 18 J., C. P. 71: *Woollen* v. *Bra* L. J., Q. B. 129, where the whose favour the award w had been committed to tak for perjury, alleged to h committed during the ar But query the correctnes principle on which these were founded, and whet matter which might be set defence to an action on a might not be set up as an attachment for the non- ance of it. See *Wright* v. 3 Ex. 131.

(*r*) *Brazier* v. *Bryant*, 3 B 10 Moore, 587: *Manley* v. Jur. 521.

(*s*) *Paull* v. *Paull*, 2 C. & 2 Dowl. 340.

was made a rule of Court without an affidavit that the time was duly enlarged: if there is no such affidavit, the proper course is to move to set aside the rule making the order of reference, &c. a rule of Court (*t*). Where, after an award directing payment of money to the plaintiff, matter arose which gave the defendant a counter-claim against the plaintiff for an equal amount, *Wightman*, J., refused to grant an attachment for non-payment of the money awarded (*u*).

On showing cause against the motion, reference could not formerly be made to the pleadings in the cause, unless they are brought before the Court by affidavit (*x*). But such reference would probably be allowed now. Where, upon showing cause, an objection is made that the affidavits upon which the motion is founded are insufficient, the objecting party has, after making such an objection, a right to enter into the merits, in order to have the motion dismissed with costs (*y*).

Making fresh application after refusal.

As a general rule, where a motion for an attachment is refused on the ground that the affidavits upon which it was made were substantially defective, another application cannot be made to the Court upon amended affidavits (*z*). In one case a second application was allowed upon amended affidavits showing the performance of a condition precedent and a demand made since the discharge of the former rule (*a*).

Making order where no cause shown.

If no cause is shown upon an affidavit of the service of the notice of motion, which is entitled the same way as the rule (*b*), the rule will be made absolute. As to service of a notice of motion for an attachment, *see ante*, p. 949.

Proceedings on attachment.

The proceedings by attachment are noticed *ante*, *Ch. LXXXIII.* A party attached for contempt in not performing an award, and sentenced to imprisonment for a definite period, is not by undergoing such imprisonment exonerated from the performance of the award (*c*). And, it seems, that an action upon the award might be maintained at the same time (*c*).

Where a verdict has been taken at the trial.

Where a Verdict has been taken at the Trial.]—If a verdict has been taken at the trial subject to the award or certificate of an arbitrator, the successful party may enter up judgment upon the verdict and sue out execution (*d*). If other matters, besides those in difference in the action, are referred, the award as to such matters can only be enforced by action, or execution, or attachment, as mentioned in this chapter, and not under the judgment in the action (*e*).

(*t*) *Barton* v. *Ranson*, 6 Dowl. 384. See ante, p. 1598.

(*u*) *Rees* v. *Rees*, 25 L. J., Q. B. 260: *Swayne* v. *White*, 31 L. J., Q. B. 260. See *Smith* v. *Johnson*, 15 East, 213: *Brearey* v. *Kemp*, 24 L. J., Q. B. 311, where there was a cross judgment, and a question arose as to the solicitor's lien for costs on the amount awarded.

(*x*) *Roe* v. *Sawyer*, 7 Dowl. 691.

(*y*) *Re Chamberlain*, 8 Dowl. 686.

(*z*) As to renewing an application to the Court on amended affidavits, see ante, p. 1400.

(*a*) *Masters* v. *Butler*, 13 Q. B. 341; 18 L. J., Q. B. 328.

(*b*) *Re Houghton*, 2 M. & P. 452.

(*c*) *R.* v. *Hemsworth*, 3 C. B. 745.

(*d*) See *Reg.* v. *Gore*, 8 Dowl. 103, per *Denman*, C. J.: *Maggs* v. *Forston*, 6 Dowl. 481.

(*e*) See *Deere* v. *Kirkhouse*, 20 L. J., Q. B. 195, noticed ante, p. 1628, as to when the costs of the reference may be taxed as costs in the cause.

PART XVIII.

Signing judgment, &c.

In order to proceed to judgment on the verdict, *obtain the aw or certificate from the arbitrator. Take the same to the officer, will give you a certificate of the verdict found and judgment (if directed at the trial. The judgment must be entered in the usual in accordance with the award or certificate* (*f*). *The successful p may enter up judgment without any motion for that purpose* (*g*). *the usual notice of the taxation of costs* (*Vol.* 1, p. 694); *sign j ment, and get the costs taxed in the usual way. Issue executio the usual way.* It is not necessary that the party against w the award or certificate is made, in this case, should be perso served with a copy of the award (*h*). Where the award was the Court, upon an affidavit stating that fact, and the substan the award, allowed the plaintiff to sign judgment (*i*). Where a dict is taken, subject to a certificate, the certificate relates ba the time when the verdict was given (*k*). As to the effect o death of the defendant after the verdict and before the maki the award, *see ante*, p. 1028 (*l*).

Before the Judicature Acts, where an order of reference cont a clause restraining the parties from taking proceedings in error, could not move in arrest of judgment, or for judgment non ob veredicto (*m*). And where, before such Acts, the order of refe contained a clause restraining either party from bringin prosecuting any action or suit in any Court concerning the pre referred, it was held that the plaintiff could not move for judg non obstante veredicto (*n*).

Execution.

After signing judgment execution may be sued out, ordinary cases (*o*).

Where award directs possession of land to be given up.

Where Award directs Possession of Land to be given up.]—I *Com. Law Proc. Act*, 1854, *s.* 16, "When any award made o such (*p*) submission, document, or order of reference as af directs that possession of any lands or tenements capable of

(*f*) *Lee* v. *Lingard*, 1 East, 401: *Grimes* v. *Naish*, 1 B. & P. 480: *Borrowdale* v. *Hitchener*, 3 Id. 244: *Hayward* v. *Ribans*, 4 East, 310: *Bonner* v. *Charlton*, 5 East, 139, 143, 144: *Prentice* v. *Reed*, 1 Taunt. 151. And see *Grundy* v. *Wilson*, 7 Id. 700.

(*g*) *Lloyd* v. *Lewis*, 2 Ex. D. 7; 46 L. J., Ex. 81.

(*h*) *Lee* v. *Lingard*, 1 East, 401: *Grimes* v. *Naish*, 1 B. & P. 480: *Borrowdale* v. *Hitchener*, 3 Id. 244.

(*i*) *Hill* v. *Townsend*, 3 Taunt. 45.

(*k*) *Cromer* v. *Churt*, 15 M. & W. 310; 3 D. & L. 672; 15 L. J., Ex. 263; et per *Pollock*, C. B.: "There is always a Judge sitting, by application to whom any injustice may be prevented." *Ross* v. *Clifton*, 2 Dowl., N. S. 983: *Little* v. *Newton*, 1 M. & Gr. 976. Where, before the Jud. Acts, a verdict was taken for the plaintiff in an action, subject to a reference of the ca all matters in difference by Nisi Prius, and an award w directing the verdict in the stand for the plaintiff for sum, and finding another su due to the defendant in re the matters in difference, plaintiff signed judgment sum awarded to him in the the expiration of fourteen d the making of the award: held that the plaintiff's pr were regular: *O'Toole* v. & B. 182; 26 L. J., Q. B. 8

(*l*) *Heathcote* v. *Wing*, ant

(*m*) *Chownes* v. *Brown*, 706: *Steeple* v. *Bonsall*, 4 950.

(*n*) *Britt* v. *Pashley*, 1 E

(*o*) See *Callard* v. *Paterso* 319.

(*p*) See *s.* 15, ante, p. 16

the subject of an action of ejectment shall be delivered to any party, either forthwith or at any future time, or that any such party is entitled to the possession of any such lands or tenements, it shall be lawful for the Court of which the document authorizing the reference is or is made a rule or order, to order any party to the reference who shall be in possession of any such lands or tenements, or any person in possession of the same claiming under or put in possession by him since the making of the document authorizing the reference, to deliver possession of the same to the party entitled thereto, pursuant to the award, and such rule or order to deliver possession shall have the effect of a judgment in ejectment against every such party or person named in it, and execution (*q*) may issue, and possession shall be delivered by the sheriff as on a judgment in ejectment" (*r*). See *ante*, p. 1651, as to enforcing an award by obtaining a Judge's order.

By *R. of S. C., Ord. XLVII. r.* 2, "Where by any judgment or order any person therein named is directed to deliver up possession of any lands to some other person, the person prosecuting such judgment or order shall, without any order for that purpose, be entitled to sue out a writ of possession, on filing an affidavit showing due service of such judgment or order, and that the same has not been obeyed." (*See ante*, p. 1227.)

By *Ord. XLII. r.* 24, "Every order of the Court or a Judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect." (*See ante*, p. 1396.)

By Action.]—Where the submission cannot be made a rule of Court, the only means of enforcing the award is by action (*s*). An action lies on an award for the payment of money made under a submission made by consent, and this is so also where the submission is by Master's order or a rule of Court (*t*). It seems that an action may be maintained against a party for non-performance of an award at the same time that he is imprisoned under an attachment for the non-performance of the same (*u*). If the submission be by bond, deed, or other agreement, the successful party may sue on the same (*x*). Where the parties, who had submitted disputes to arbitration by mutual bonds, by indorsements under seal on the bonds of submission made within the time limited for making the award, agreed that the time should be enlarged to a future day, it was decided, before the Judicature Acts, that an action of debt on the bond would lie for non-performance of an award made

By action.

(*q*) See a form of writ of execution; Chit. Forms, p. 852.

(*r*) See ante, p. 1227.

(*s*) As to enforcing the specific performance of an award, see *Blackett v. Bates*, L. R., 1 Ch. 117; 2 H. & M. 610; 34 L. J., Ch. 515.

(*t*) See 2 Saund. 62 *a*: *Liversley v. Wilmore*, L. R., 1 C. P. 570; 35 L. J., C. P. 351; *Carpenter* v. *Thornton*, 3 M. & Ald. 53; per *Holroyd*, J. As to an action lying for costs before taxation, see *Holdsworth* v. *Wilson*, 4 B. & S. 1; 32 L. J., Q. B. 239: *Lewis* v. *Rossiter*, 44 L. J., Ex. 136: *Metropolitan District R. Co.* v. *Sharpe*, 5 App. Cas. 425; 50 L. J., Q. B. 14.

(*u*) *R.* v. *Hemsworth*, 3 C. B. 745.

(*x*) *Ferrer* v. *Oven*, 7 B. & C. 427; 1 M. & R. 222: *Marsh* v. *Bulteel*, 1 D. & R. 106; 5 B. & Ald. 507. See 2 Saund. 62 *b*; 2 Ld. Raym. 1640: *Bunfil* v. *Leigh*, 8 T. R. 571: *Antram* v. *Chase*, 15 East, 209: *Hunter* v. *Rice*, Id. 100: *Sutcliffe* v. *Brooke*, 14 M. & W. 855.

PART XVIII.

after the original time had expired, but within such enlarged ti
for such indorsement operates as a defeasance or further defeasa
to the original bond (*y*). But if the indorsement had not b
under seal, no action could have been maintained on the bond
nonperformance of the award (*z*).

Defence to.

In an action on an award, if it be bad, and appear so to be on
face of the statement of claim, the defendant may raise the p
of law in his defence (*a*): or if the award be defective for reas
not appearing on the face of the statement of claim, or even on
award, such as that the arbitrator has exceeded his authority,
not awarded on all matters submitted to him, or that it is uncert
or not final, or the like, the defendant may take advantage of s
matter in his defence (*b*). The corruption, or other misconduc
the arbitrator in making his award, not appearing on the face of
award, cannot be pleaded (*c*).

Award bad only in part.

As we have seen (*d*), if an award be good in part and bad in
the performance of that part which is good may be enfor
provided it be final and good in itself and perfectly distinct f
and independent of that part which is bad.

SECT. IX.—EFFECT OF THE AWARD.

Effect of award.

The award, if a good one, is binding on the parties (*e*).
arbitrator's decision upon a question of fact is conclusive;
where the claims of the plaintiff in an action were referred, it
held, that the arbitrator's decision that a certain claim mad
the plaintiff was within the submission was conclusive (*f*). B
arbitrator's decision as to the extent (*g*) or limits (*h*) of his auth

(*y*) *Greig* v. *Talbot*, 3 D. & R. 446; 2 B. & C. 179: *Rex* v. *Bingham*, 3 Y. & J. 101—113: *Armitage* v. *Coates*, 4 Ex. 641.

(*z*) *Brown* v. *Goodman*, 3 T. R. 592, n.

(*a*) *Fisher* v. *Pimbley*, 11 East, 188: *Sim* v. *Edmonds*, 23 L. J., C. P. 229. See ante, Vol. 1, p. 324.

(*b*) *Mitchell* v. *Staveley*, 16 East, 58: *Cargey* v. *Aitcheson*, 3 D. & R. 433; 2 B. & C. 170: *Perry* v. *Mitchell*, 12 M. & W. 792: *King* v. *Bowen*, 1 Dowl., N. S. 21; 8 M. & W. 625. As to what a plea of no award put in issue, see *Dresser* v. *Stansfield*, 14 M. & W. 822: *Armitage* v. *Coates*, 4 Ex. 641: *Adcock* v. *Wood*, 6 Ex. 814; 2 L., M. & P. 501; 20 L. J., Ex. 435: *Roper* v. *Levy*, 21 L. J., Ex. 28: *Williams* v. *Wilson*, 9 Ex. 90; 23 L. J., Ex. 17: *Roberts* v. *Eberhardt*, 3 C. B., N. S. 482; 27 L. J., C. P. 70.

(*c*) See *Whitmore* v. *Smith*, 7 H. & N. 509; 31 L. J., Ex. 107, where it was held that under a plea award it could not be shown the arbitrator had improperly on the opinion of a third part that the mode of taking adv of such an objection was by eation to the Court to set the aside. See *Thorburn* v. *Barnes*, 2 C. P. 384; 36 L. J., C. P. 1

(*d*) See ante, p. 1636: *Re A and Spittle*, 18 L. J., Q. B. 151, a rule was granted for the p of the damages awarded, th was doubtful whether the aw not defective as to the costs.

(*e*) *Cleworth* v. *Pickford*, 7 W. 321: *Cummings* v. *Heard*, 4 Q. B. 669; 39 L. J., Q. B. 9 an award was pleaded by estoppel.

(*f*) *Faviell* v. *The Eastern C.*, 2 Ex. 344; 17 L. J., Ex. 5

(*g*) *Faviell* v. *The Eastern Co.*, supra.

(*h*) *Toby* v. *Lovibond*, 5 C. *Cresswell*, J.

is not in all cases conclusive. The award is binding though the arbitrator make a mistake in point of law, unless the mistake appears upon the face of the award (*i*); or upon the face of another paper delivered with it (*k*), and forming part of the award (*l*). Where an arbitrator after the making of his award, with a view to enable one of the parties to take the opinion of the Court upon his decision, stated to such party the ground upon which he had proceeded, showing that he had put an erroneous construction upon the order of reference, the Court set aside the award, though unexceptionable upon the face of it (*m*).

It has been held, that a reference "of all matters in difference between the parties" does not preclude one of the parties from afterwards suing for a cause of action subsisting at the time of the reference, if such matter were not a matter in difference between the parties, nor laid before the arbitrator (*n*). But, in a case where the reference was "of all actions and causes of actions between the parties," and, after the award made, the party thereby ordered to pay a sum of money wished to deduct from it a sum due to him by the opposite party, and which had not been under the consideration of the arbitrators, the Court held that he could not do so; for the rule of reference was large enough to include that transaction, and it should have been discussed before the arbitrator (*o*).

Award cannot pass real property.

An award cannot pass the right to real property (*p*). But a conveyance may be awarded if within the terms of the submission (*q*). As to the enforcing an award directing the possession of land to be delivered to a party, *see the Com. Law Proc. Act*, 1854, *s.* 16, *ante*, p. 1660.

When award evidence.

An award is evidence against a party on the same ground that a judgment is (*r*). But an award is not evidence of an account stated between the parties to the submission (*s*).

(*i*) *Ashton* v. *Poynter*, 3 Dowl. 201: *Japp* v. *Grayson*, Id. 192; 1 C., M. & R. 523: *Perryman* v. *Steggall*, 3 M. & Sc. 93; 2 Dowl. 726: *Chace* v. *Westmore*, 13 East, 357: *Boutillier* v. *Thick*, 1 D. & R. 366: *Cramp* v. *Symons*, 1 Bing. 104; 7 Moore, 431: *Craven* v. *Craven*, 7 Taunt. 644; 1 Moore, 403: *Delver* v. *Barnes*, 1 Taunt. 48. And see *Sharman* v. *Bell*, 5 M. & S. 504: *Richardson* v. *Nourse*, 3 B. & Ald. 237; 1 Chit. Rep. 674: *Gibsham* v. *Germaine*, 11 Moore, 1: *Mathew* v. *Davis*, 1 Dowl., N. S. 679: *Hagger* v. *Baker*, 2 D. & L. 856: *Bradhurst* v. *Darlington*, 3 Dowl. 38.

(*k*) *Kent* v. *Elstob*, 3 East, 18. See *Doe* d. *Oxenden* v. *Cropper*, 2 P. & D. 490: 10 Ad. & El. 197: *Leggo* v. *Young*, 16 C. B. 626; 24 L. J., C. P. 200, where the Court refused to take into consideration a letter written by the arbitrator to the plaintiff. And see *Holgate* v. *Killick*, 7 H. & N. 418; 31 L. J., Ex. 7: *Dunn* v. *Blake*, 44 L. J., C. P. 276.

(*l*) *Holgate* v. *Killick*, supra.

(*m*) *Jones* v. *Corry*, 7 Sc. 106.

(*n*) *Ravee* v. *Farmer*, 4 T. R. 146: *Thorpe* v. *Cooper*, 5 Bing. 129; 2 M. & P. 245: *Seddon* v. *Tutop*, 6 T. R. 607.

(*o*) *Smith* v. *Johnson*, 15 East, 213: *Dunn* v. *Murray*, 9 B. & C. 780. And see *Martin* v. *Thornton*, 4 Esp. 180: *Shelling* v. *Farmer*, 1 Str. 646.

(*p*) Ro. Abr. 242: *Marks* v. *Marriott*, 1 Ld. Raym. 115.

(*q*) 3 Bl. Com. 16. See *Re Warner*, 2 D. & L. 148.

(*r*) *Murray* v. *Gregory*, 5 Ex. 468; 19 L. J., Ex. 355. As to an award being evidence of reputation, &c., see *Evans* v. *Rees*, 10 A. & E. 151: *Wenman* v. *Mackenzie*, 5 E. & B. 447; 25 L. J., Q. B. 44.

(*s*) *Bates* v. *Townley*, 2 Ex. 152; 19 L. J., Ex. 399.

CHAPTER CXXXVII.

COMPULSORY ARBITRATION.

	PAGE
Order for, before Trial	1664
Proceedings upon Reference and Power of Arbitrator	1666
Enlarging Time for making Award	1667
The Award	1667
Costs	1667
Setting aside the Award	1
Sending back Matters referred to Arbitrator	1
Appeal	1
Enforcing Performance of the Award	1
Other Matters relating to Arbitration	

PART XVIII.

THE *Judicature Acts* have not taken away the power of compul reference given by the *Com. Law Proc. Act*, 1854, and there there may still be a reference of a cause to an arbitrator decision under this Act, and in such case he cannot be require report, but his decision is liable to be reviewed by the Cour the grounds on which an award might have been reviewed b the *Judicature Acts* (*a*), or on appeal under *Order LIX. r.* 3 p. 1669).

Order for, before trial.

Order for, before Trial.]—By the *Com. Law Proc. Act*, 1854 "If it be made appear, at any time after the issuing of the w the satisfaction of the Court or a Judge, upon the application either party, that the matter in dispute consists wholly or i of matters of more account which cannot conveniently be tr the ordinary way, it shall be lawful for such Court or Judge, such application, if they or he think fit, to decide such matte summary manner, or to order that such matter, either wholly part, be referred to an arbitrator appointed by the parties, o officer of the Court, or, in country causes, to the Judge County Court (*c*), upon such terms as to costs and otherw such Court or Judge shall think reasonable; and the deci order of such Court or Judge, or the award or certificate referee, shall be enforceable by the same process as the findi jury upon the matter referred."

What may be referred.

It will be observed that the reference can only be ordere "the matter in dispute consists wholly or in part of matters account which cannot conveniently be tried in the ordinary

(*a*) *Cruikshank* v. *The Floating Swimming Bath Co.*, 1 C. P. D. 260; 45 L. J., C. P. 684: *Lloyd* v. *Lewis*, 2 Ex. D. 7; 46 L. J., Ex. 81.

(*b*) See form of summons to refer, Chit. Forms, p. 857.

(*c*) By 21 & 22 V. c. 74, s. 5, so much of this Act as enables a superior Court of Common law minster or any Judge thereo a cause to the Judge of a Court is repealed. See *Cu Birkett*, 3 H. & N. 156; Ex. 216, decided before th V. c. 74.

R CXXXVII.

Y ARBITRATION.

GE		PAGE
64	*Setting aside the Award*	1668
	Sending back Matters referred to Arbitrator	1668
66	*Appeal*.....	1669
667	*Enforcing Performance of the Award*.....	1669
667	*Other Matters relating to Arbitration*	1669
667		

taken away the power of compulsory
. *Law Proc. Act*, 1854, and therefore
ence of a cause to an arbitrator for
in such case he cannot be required to
iable to be reviewed by the Court on
ard might have been reviewed before
n appeal under *Order LIX. r.* 3 (*post*,

By the *Com. Law Proc. Act*, 1854, s. 3,
ny time after the issuing of the writ, by
or a Judge, upon the application (*b*) of
er in dispute consists wholly or in part
which cannot conveniently be tried in
e lawful for such Court or Judge, upon
he think fit, to decide such matter in a
ler that such matter, either wholly or in
trator appointed by the parties, or to an
n country causes, to the Judge of any
ch terms as to costs and otherwise as
l think reasonable; and the decision of
dge, or the award or certificate of such
e by the same process as the finding of a
red."

the reference can only be ordered when
sists wholly or in part of matters of mere
veniently be tried in the ordinary way

loating
0. 260;
Lewis,

o refer,

s. 5, so
a supe-

rior Court of Common law at Westminster or any Judge thereof to remove a cause to the Judge of a County Court is repealed. See *Cummins v. Birkett*, 3 H. & N. 156; 27 L. J., Ex. 216, decided before the 21 & 22 V. c. 74.

To bring a case within this section it must be shown that part of the matter in dispute consists of "*mere* matter of account;" but there is considerable doubt whether the whole action can be referred when part only of the dispute consists of mere matter of account. According to the earlier cases, this could be done (*d*). But the Court of Appeal, in February, 1878, in the case of *Clow* v. *Harper* (*e*), decided that it could not, and that wherever there was a preliminary question of liability, a reference could not be ordered. This case, however, has been the subject of some discussion (*f*), and the Courts do not appear inclined to treat it as laying down any general rule (*f*). In *Martin* v. *Fyfe* (*g*), where the question was raised in the Court of Appeal, the Judges refused to decide the point, but met the difficulty, as it always may be met in practice, by ordering a reference under sect. 57 of the Judicature Act.

It has been held (*h*), in an action on bills of exchange, that the Court will not compel a reference of the action, unless it be sworn that it cannot be conveniently tried by a jury in the ordinary way. It seems that an action for dilapidations may be a matter of account and the subject of a compulsory reference within the Act (*i*). It has been doubted whether an action on a bond, where there is only a plea of payment, is a subject of compulsory reference (*k*).

When the matter is one of "mere account," it has been held that the fact that the plaintiff imputes fraud to the defendant will not prevent its being referred (*l*). And if the question of fraud in such a case arises before the arbitrator he must proceed with the inquiry into it (*m*).

It would appear that a Judge at Nisi Prius had no power to order a reference under this section (*n*), though he could indirectly compel a reference. He has power, if sitting without a jury, to order a reference under sect. 6 (*post*, p. 1666), and in any case all practical difficulty is avoided by ordering a reference under sect. 56 of the *Judicature Act*, 1873 (*see ante*, p. 1573). Order at Nisi Prius.

In the absence of any provision for that purpose in the order of reference, the arbitrator has no power over the costs of the

(*d*) *Brown* v. *Emerson*, 17 C. B. 25 L. J., C. P. 104: *Wickham* v. *Herding*, 28 L. J., Ex. 215: *Murray* v. *Sunderland Dock Co.*, 1 F. & F. 179: *Goddard* v. *Seale*, 2 Id. 7: *Adams* v. *Yeoman*, Id. 92.

(*e*) 3 Ex. D. 198; 47 L. J., Ex. 38 L. T. 269.

(*f*) *Martin* v. *Fyfe*, in Div. C., 37 L. T. 107; 31 W. R. 840: *S. C.* C. A., 50 L. T. 72: *Ward* v. 5 Q. B. D. 427; 43 L. T. 301: v. *Hale*, W. N. 1880, 69: ep. v. *Budden*, 42 L. T. 536.

(*g*) 50 L. T. 72.

(*h*) *Pellatt* v. *Markwick*, 3 C. B., 800.

(*i*) *Cummins* v. *Birkett*, 3 H. & N. 27 L. J., Ex. 216: *Angell* v. 7 H. & N. 396; 31 L. J., Ex. 41, where money was paid into Court: *Pell* v. *Addison*, 2 F. & F. 291.

(*k*) *Chapman* v. *Van Toll*, 8 El. & Bl. 396; 27 L. J., Q. B. 1.

(*l*) *Imhof* v. *Sutton*, L. R., 2 C. P. 406: *Birmingham, &c. Gas Co.* v. *Ratcliffe*, L. R., 6 Ex. 224, *Kelly*, C. B., diss.

(*m*) *Insull* v. *Moojen*, 3 C. B., N. S. 359: *Trickett* v. *Green*, 13 L. T. 405.

(*n*) *Robson* v. *Lees*, 6 H. & N. 258; 30 L. J., Exch. 235; *Morgan* v. *Ainslie*, 28 L. T. 120. See *Murray* v. *Sunderland Dock Co.*, 1 F. & F. 179; *Jones* v. *Beaumont*, Id. 336; Day, C. L. P. Acts, 4th ed. 246; 30 L. J., Ex. 234. As to appeal, see *Hoch* v. *Boor*, 49 L. J., C. P. 665; 43 L. T. 425.

PART XVIII.

reference (*o*), nor can the Court grant them (*p*). The order may b amended for the purpose of carrying out the intention of the Cou when it was made (*q*). The Court has power to amend the part culars of demand at any time before award made (*r*). A par cannot apply to set aside an order of reference made under t above section after he has acted upon it (*s*).

Special case may be stated, and question of fact tried (*t*).

By sect. 4, "If it shall appear to the Court or a Judge that t allowance or disallowance of any particular item or items such (*u*) account depends upon a question of law fit to be decid by the Court, or upon a question of fact fit to be decided by a jur or by a Judge upon the consent of both parties as hereinbefo provided, it shall be lawful for such Court or Judge to direct case to be stated, or an issue or issues to be tried; and the decisi of the Court upon such case, and the finding of the jury or Jud upon such issue or issues, shall be taken and acted upon by arbitrator as conclusive."

Order at trial.

By sect. 6, "If upon the trial of any issue of fact by a Ju under this Act it shall appear to the Judge that the questi arising thereon involve matter of account which cannot con niently be tried before him, it shall be lawful for him, at discretion, to order that such matter of account be referred to arbitrator appointed by the parties, or to an officer of the C [*or, in country causes, to a Judge of any County Court* (*x*)], u such terms, as to costs and otherwise, as such Judge shall th reasonable; and the award or certificate of such referee shall h the same effect as hereinbefore provided as to the award or tificate of a reference before trial (*y*); and it shall be competent for Judge to proceed to try an dispose of any other matters question, not referred, in like manner as if no reference had b made."

This only applies to a trial by a Judge without a jury (*z*).

Proceedings upon reference and power of arbitrator.

Proceedings upon Reference and Power of Arbitrator.]—By *Com. Law Proc. Act*, 1854, s. 7, "The proceedings upon such (*a*) arbitration as aforesaid shall, except otherwise dire hereby or by the submission or document authorizing the refere be conducted in like manner, and subject to the same rules enactments, as to the power of the arbitrator and of the Court attendance of witnesses, the production of documents, enforcin setting aside the award and otherwise, as upon a reference mad consent under a rule of Court or Judge's order" (*b*). The arbit must proceed as in an ordinary arbitration; and he has no

(*o*) *Legge* v. *Young*, 16 C. B. 626; 24 L. J., C. P. 200: *Bell* v. *Postlethwaite*, 5 E. & B. 695; 25 L. J., Q. B. 63: *West London, &c. R. Co.* v. *Fulham*, L. R., 5 Q. B. 361.

(*p*) *Wimshurst* v. *Barrow Shipbuilding Co.*, 2 Q. B. D. 335; 46 L. J., Q. B. 477.

(*q*) *Bell* v. *Postlethwaite*, supra: *Kendil* v. *Merrett*, 18 C. B. 173; 25 L. J., C. P. 251, where the order was amended after the award was made.

(*r*) *Gibbs* v. *Knightley*, 26 L. J., Ex. 294.

(*s*) *Rogers* v. *Kearns*, 29 L. J 328.

(*t*) As to the arbitrator stat special case, see ante, p. 1634.

(*u*) See sect. 3, ante, p. 1664

(*x*) See supra, n. (*c*).

(*y*) See sect. 3, ante, p. 1664

(*z*) *Jeffries* v. *Lovell*, 23 L. T 19 W. R. 408: *Robson* v. *Lee*,

(*a*) See sect. 3, ante, p. 1664

(*b*) As to the proceedings upon a reference by consen ante, pp. 1606 et seq.

to refuse to inquire into a question of fraud raised before him as to a part of the account in dispute (*b*). The 17 & 18 *V. c.* 34, is not available to compel the attendance of a person in Ireland as a witness before an arbitrator upon a compulsory reference (*c*).

Where special case or issue directed.

By the *Com. Law Proc. Act*, 1854, *s.* 4, the decision of the Court upon a special case stated under that Act, and the finding of the jury or Judge upon an issue directed under that Act, are to be taken and acted upon by the arbitrator as conclusive. *See this section, ante*, p. 1666.

In a reference on a building contract, it was held competent to the Master to employ a surveyor to view and report to him as to the amount of work done (*d*).

Bill of discovery.

Before the Judicature Acts, a bill of discovery in aid of the proceedings before the arbitrator would lie (*e*).

Fees to Master.

As to the fees payable on a reference to the Master, and as to paying the same by means of stamps, *see Orders in Appendix, post.*

Enlarging time for making award.

Enlarging Time for making Award.]—As to this, *see Com. Law Proc. Act*, 1854, *s.* 15 (*f*), *ante*, p. 1612.

The award. Arbitrator stating special case.

The Award.]—The award need not be stamped (*g*) in the absence of any provision for that purpose in the order of reference (*h*). As to the power (*i*) of the arbitrator to state a special case for the opinion of the Court, *see ante*, p. 1634. As to what the arbitrator must state in the special case, *see ante*, p. 1634 (*k*). The award must be signed by the arbitrator, *see Com. Law Proc. Act*, 1854, *s.* 15, *ante*, p. 1618. As to the time within which it must be made, *see ib.*

Costs.

Costs.]—It will be seen by the *Com. Law Proc. Act*, 1854, *s.* 3 (*ante*, p. 1664), that the matters therein mentioned may be referred on such terms as to costs as the Court or Judge making the order of reference may think reasonable. As we have seen, *ante*, p. 1628, in the absence of any provision for that purpose in the order of reference, the arbitrator has no power over the costs of the reference (*l*).

As to the *County Courts Act*, 1867, *s.* 5, applying where there is a compulsory order of reference, *see ante*, p. 1630, *and see Vol.* 1, p. 689 (*m*).

In an action of contract where the amount recovered is less than 20*l.*, and the costs of the reference are in the discretion of the Master, a mere direction that the defendant shall pay them will not entitle the plaintiff to them, under the County Courts Act (*n*).

(*b*) *Insull* v. *Moojen, Trickett* v. *Green*, supra, n. (*m*).

(*c*) *O'Flanagan* v. *Geoghegan*, 16 C. B., N. S. 636. See ante, Vol. 1, p. 570.

(*d*) *Gray* v. *Wilson*, L. R., 1 C. P. 30; 35 L. J., C. P. 123.

(*e*) *Brocas* v. *Lloyd*, 26 L. J., Ch. 759.

(*f*) See *Bennett* v. *Watson*, 5 H. & N. 831; 29 L. J., Ex. 357.

(*g*) See ante, p. 1592; and see L. P. Act, 1854, s. 30.

(*h*) *Leggo* v. *Young*, 16 C. B. 626; 24 L. J., C. P. 200.

(*i*) The arbitrator is not bound to state a case under this section if either party demands it: *Baguley* v. *Markwick*, 10 C. B., N. S. 61; 30 L. J., C. P. 342.

(*k*) See Chit. Forms.

(*l*) Ante, p. 1628.

(*m*) See *Robertson* v. *Sterne*, 13 C. B., N. S. 248; 31 L. J., C. P. 362.

(*n*) *Moore* v. *Watson*, L. R., 2 C. P. 314. See *Galatti* v. *Wakefield*, 4 Ex. D. 249.

PART XVIII. Where the order gives him all the powers of certifying and amend
ing of a Judge at Nisi Prius, the Master has power to certify und
sect. 5 of the *County Courts Act*, 1867, that there was sufficie
reason for bringing the action in a superior Court (*o*). But this ce
tificate must be given in the award itself, and the Master has
power to give it after his award has been taken up, unless the ca
is remitted to him by the Court (*p*).

Setting aside the award.

Setting aside the Award.]—By *Com. Law Proc. Act*, 1854, s. 9, "
applications (*q*) to set aside any award made on a compulsory
reference under this Act, shall and may be made within the fi
seven days of the term next following the publication (*r*) of t
award to the parties, whether made in vacation or term; and if
such application is made, or if no rule is granted thereon, or if a
rule granted thereon is afterwards discharged, such award shall
final between the parties."

It is doubtful whether this section is impliedly repealed
Ord. LXIV. r. 14 (*ante*, p. 1644), by which a different time limi
imposed. The point has not yet been decided.

It seems that the order of reference need not be made a rul
Court before moving to set aside an award under this section
Upon compulsory references there is no greater power in the C
to set aside awards than under voluntary references (*t*); and
parties are bound by the opinion of the arbitrator upon quest
both of law and fact, as in the case of a voluntary reference (*u*)

As to the Court interfering where a mistake has been mad
the arbitrator, or in case of his misconduct, *see Brown* v. *Hel*
26 L. J., Ex. 217; and *see ante*, p. 1641.

As to setting aside an award when the arbitration is by con
see ante, pp. 1640 *et seq.*

Sending back matters referred to arbitrator.

Sending back Matters referred to Arbitrator.]—As to this, *see*
p. 1648.

It seems that there is no power in the Court to remit t
arbitrator where there would not be power to set aside the awar
The Court have no greater power under a compulsory refe
to remit to the arbitrator than they have under a referen
consent (*y*).

(*o*) *Bedwell* v. *Wood*, 2 Q. B. D. 626; 36 L. T. 236.

(*p*) Id.: *Spain* v. *Cadell*, 8 M. & W. 129. See *Harland* v. *Newcastle (Mayor, &c.)*, L. R., 5 Q. B. 47. See ante, p. 1638.

(*q*) *Bennett* v. *Watson*, 5 H. & N. 831; 29 L. J., Ex. 357.

(*r*) When the award is to be considered as published, see ante, p. 1638. As to terms being abolished, and as to the present mode of computing the time for making applications under this section, see Vol. 1, p. 189, and ante, p. 1644.

(*s*) *Bennett* v. *Watson*, supra.

(*t*) *Hogg* v. *Burgess*, 3 H. & N. 293; 27 L. J., Ex. 318. See *Holgate* v. *Killick*, 7 H. & N. 418; 31 Ex. 7, where the Court refu regard a letter written by th trator. And see ante, p. 1669

(*u*) *Bagnley* v. *Markwick*, 1 N. S. 61; 30 L. J., C. P. 3 *Morris*, 25 L. J., Q. B. 26 they are not bound as to ques law, see post, p. 1669.

(*x*) *Hogg* v. *Burgess*, 27 L. 318, sed query. See *Caswell* v *cott*, 31 L. J., Ex. 361. S p. 1648.

(*y*) *Baggalay* v. *Borthwi* B., N. S. 61; 3 H. & N. 293 *way* v. *Francis*, 9 C. B., N. See *Grafham* v. *Turnbull*, Ch. 538.

CHAP. CXXXVII.

Appeal from award on compulsory reference.

Appeal from Awards, &c., on compulsory reference.]—By *R. of S. C., Ord. LIX. r.* 3, "Where a compulsory reference to arbitration has been ordered, any party to such reference may appeal from the award or certificate of the arbitrator or referee *upon any question of law*; and on the application of any party the Court may set aside the award on any ground on which the Court might set aside the verdict of a jury. Such appeal shall be to a Divisional Court who shall have power to set aside the award or certificate, or to remit all or any part of the matter in dispute to the arbitrator or referee, or to make any order with respect to the award or certificate or all or any of the matters in dispute that may be just."

The appeal must be made on notice of motion—which should state shortly the grounds on which it is founded, and a copy of any affidavit intended to be used should be served with it. Probably, it would be held that *Ord. LXIV. r.* 14 (*ante*, p. 1644) applied, and that consequently the appeal must be made before the end of the sittings next after those in which the award is published.

By the *Judicature Act*, 1884, *s.* 8, "The provisions of section forty-five of the Supreme Court of Judicature Act, 1873, as to certain appeals therein mentioned, shall extend and apply to all appeals brought after the commencement of this Act from any award or certificate of a referee or arbitrator when there has been a compulsory reference to arbitration in any cause or matter in the Queen's Bench Division of the High Court of Justice." (*See sect.* 45, *ante*, p. 1516.)

Enforcing performance of the award.

Enforcing Performance of the Award.]—The award or certificate of the referee is enforceable by the same process as the finding of a jury upon the matter referred (*z*).

Judgment must be signed before execution can be issued (*a*).

As to enforcing an award directing the possession of land to be delivered to a party, *see ante*, p. 1660.

Within period for setting it aside.

By *Com. Law Proc. Act*, 1854, *s.* 10, "Any award made on a compulsory reference under this Act may, by authority of a Judge, on such terms as to him may seem reasonable, be enforced at any time after seven days from the time of publication (*b*); notwithstanding that the time for moving to set it aside has not elapsed." As to enforcing an award within the time limited for setting it aside where the reference is by consent, *see ante*, p. 1653.

Other matters relating to arbitration.

Other Matters relating to Arbitration.]—As to this, *see Ch. CXXXVI.*

(*z*) See C. L. P. Act, 1854, *s.* 3, *ante*, p. 1664; *Talbot* v. *Fisher*, 2 B., N. S. 471.

(*a*) *Kendit* v. *Merrett*, 18 C. B. 173; 25 L. J., C. P. 251.

(*b*) As to when the award is to be considered as published, see ante, p. 1638.

CONTENTS OF APPENDIX.

PA

ORDER AS TO SUPREME COURT FEES, 1884 1

ORDER AS TO SUPREME COURT FEES, OCTOBER, 1884 . . 1

ORDER AS TO FEES AND PERCENTAGES TO BE TAKEN BY STAMPS 1

MASTERS' PRACTICE RULES 1

FEES TO BE TAKEN BY SHERIFFS, &C. 1

COUNTY COURT SCALE OF COSTS 1

OF APPENDIX.

PAGE

RT FEES, 1884 1671

RT FEES, OCTOBER, 1884 . . 1682

PERCENTAGES TO BE TAKEN BY

. 1683

. 1695

IFFS, &C. 1701

OSTS 1705

APPENDIX.

ORDER

AS TO

SUPREME COURT FEES, 1884.

The Right Honourable ROUNDELL, EARL OF SELBORNE, Lord High Chancellor of Great Britain, by and with the advice and consent of the undersigned Judges of the Supreme Court, and with the concurrence of the Lords Commissioners of Her Majesty's Treasury, doth hereby in pursuance and execution of the powers given by the Supreme Court of Judicature Act, 1875, and all other powers and authorities enabling him in this behalf, order and direct in manner following:—

I.

The fees and percentages contained in the schedule hereto are fixed and appointed to be, and shall be taken in the High Court of Justice, and in the Court of Appeal, and in any Court to be created by any commission, and in any office which is connected with any of those Courts, or in which any business connected with any of those Courts is conducted, and by any officer paid wholly or partly out of public moneys who is attached to any of those Courts, or the Supreme Court or any judge of those Courts, or any of them. And the said fees and percentages shall, until otherwise determined by the Treasury, be taken by stamps in the same manner as heretofore, except those taken in the District Registries, which shall, until otherwise determined by the Treasury, be taken as the fees and percentages are now taken.

II.

The provisions in this Order shall not apply to or affect any of the matters following (that is to say):—

The existing fees and percentages in respect of any of the jurisdictions which are not, by the Supreme Court of Judicature Acts, 1873 and 1875, transferred to the High Court of Justice or the Court of Appeal;

The existing fees and percentages in respect of any matters within the jurisdiction of the Court of Probate at the time of the passing of the Supreme Court of Judicature Act, 1875, other than probate actions, or in respect of any appeal in Bankruptcy;

The existing fees and percentages in respect of any criminal proceedings, other than such proceedings on the Crown side of the Queen's Bench Division as the scale contained in the schedule hereto may be applicable to;

The existing fees and percentages in respect of matters on the revenue side of the Queen's Bench Division, and proceedings and business in the office of the Queen's Remembrancer, other than such matters, proceedings, and business as the scale contained in the schedule hereto may be applicable to;

The existing fees and percentages authorised to be taken by any sheriff, under sheriff, deputy sheriff, bailiff, or other officer or minister of a sheriff;

The existing fees and percentages directed to be taken or paid by any
Parliament, and in respect of which no fee or percentage is hereby provi
The existing fees and percentages which shall have become due or payable
this Order comes into operation.

III.

Save as otherwise provided by this Order all existing fees and percentages
may be taken in any of the Courts whose jurisdiction is, by the Judicature
1873 and 1875, transferred to the High Court of Justice or Court of Appeal
any office which is connected with any of those Courts, or in which any b
connected with any of those Courts is conducted, or by any officer paid wh
partly out of public moneys who is attached to any of those Courts,
Supreme Court, or any judge of those Courts or any of them, shall be and are
abolished.

IV.

A folio is to comprise 72 words, every figure comprised in a column, or aul
to be used, being counted as one word.

V.

The provisions of Order LXXI. of the Rules of the Supreme Court, 188
apply to this Order.

VI.

This order shall come into operation on the 25th day of January, 1884, a
be cited as "The Order as to Supreme Court Fees, 1884."

The SCHEDULE above referred to.

An Order or Rule herein referred to by number shall mean the Order or
numbered in the Rules of the Supreme Court, 1883.

SUMMONSES, WRITS, NOTICES, COMMISSIONS, AND WARRANTS.

1. On sealing a writ of summons for commencement of an action ....
2. On sealing a concurrent, renewed or amended writ of summons for commencement of an action .....
3. On sealing a notice for service under Ord. XVI. r. 48 .....
4. On sealing a writ of mandamus.....
5. On sealing a writ of subpœna for witnesses, not exceeding three persons .....
6. On sealing a writ of execution, a subpœna pursuant to the Court of Probate Act, 1858, sect. 23, and every other writ .....
7. On sealing or issuing an originating summons under the Act 6 & 7 Vict. c. 73, for the taxation of a solicitor's bill of costs within twelve months after delivery, or delivery of a bill of costs by a solicitor, including the order to be made thereon .....
8. On sealing any other originating summons.....
9. On amending same .....
10. On sealing or issuing a summons for directions under Ord. XXX..
11. On sealing or issuing any other summons, or Taxing Master's warrant .....
12. On filing a notice to have a reference to an Admiralty Registrar placed in the list for hearing.....
13. On a notice in admiralty actions pursuant to Ord. LXVII. r. 10 ..
14. On sealing or issuing a commission to take oaths or affidavits in the Supreme Court .....
15. On every other commission .....
16. On marking a copy of a petition of right for service.....

APPEARANCES.

	£	*s.*	*d.*
17. On entering an appearance, for each person	0	2	0
18. On amending same	0	2	0

COPIES.

19. On a copy of a written deposition of a witness to enable a party to print the same, for each folio	0	0	4
20. On examining a written or printed copy, and marking or sealing same as an office copy, for each folio	0	0	2
21. On making a copy and marking same as an office copy, for each folio	0	0	6
22. On a copy in a foreign language—the actual cost.			
23. On a copy of a plan, map, section, drawing, photograph, or diagram—the actual cost.			
24. On a printed copy of an order, not being an office or certified copy, for each folio	0	0	1

ATTENDANCES.

25. On an application, with or without a subpœna, for any officer to attend as a witness, or to produce records or documents to be given in evidence [illegible] addition to the reasonable expenses of the officer) for each [illegible] part of a day he shall necessarily be absent from his office 1 0 0

The officer may require a deposit of stamps on account of any further fees, and a deposit of money on account of any further expenses which may probably become payable beyond the amount paid for fees and expenses on the application, and the officer or his clerk taking such deposit shall thereupon make a memorandum thereof on the application.

The officer may also require an undertaking in writing to pay any further fees and expenses which may become payable beyond the amounts so paid and deposited.

OATHS, &c.

26. On taking an affidavit or an affirmation or attestation upon honour in lieu of an affidavit or a declaration, except for the purpose of receipt of dividends from the Paymaster-General, for each person making the same			
27. And in addition thereto for each exhibit therein referred to and required to be marked	0	1	6
	0	1	0

FILING.

28. On filing a special case or petition of right	1	0	0
29. On filing, except in admiralty actions, and unless otherwise provided, an affidavit, deposition, or set of depositions (including any exhibits annexed to any such affidavit or deposition), statement of claim in default of appearance, official and special referees' certificates, petition, preliminary act, submission to arbitration, award, warrant of attorney, cognovit, bail, satisfaction piece, bond, writ of execution with return, and power of attorney, and every other proceeding in a probate action or in a divorce or other matrimonial cause or matter required by Act of Parliament, general order, or order in the action, cause, or matter to be filed in the Principal Probate Registry			
30. On filing a scheme pursuant to the Railway Companies Act, 1867, or the Liquidation Act, 1868	0	2	6
31. On filing scripts in a probate action or on depositing pursuant to an order in any cause or matter, any documents for safe custody or production, if the number does not exceed five	1	0	0
	0	5	0

	£
32. If exceeding five	0
33. On a receipt for any document or documents to which the two last fees apply, when delivered out, or for any other document or documents when delivered out of the Principal Probate Registry.	0
34. On filing an affidavit and notice under Ord. XLVI. r. 4	0
35. On every minute in admiralty actions pursuant to Ord. LXVI. r. 8, for every instrument or document to which the minute relates (other than an exhibit, or any instrument or document previously issued from the Registry or the Marshal's office), unless otherwise provided	0
36. On filing a bill of sale and affidavit therewith where the consideration (including further advances) does not exceed 100*l.*	0
37. Above 100*l.* and not exceeding 200*l.*	0
38. Above 200*l.*	1
39. On filing under the Bills of Sale Acts, 1878 and 1882, any other document to which the fees Nos. 36, 37, and 38 do not apply	0
40. On filing an affidavit of re-registration of a bill of sale or any such other document as in No. 39 mentioned	0
41. On filing a fiat of satisfaction	0

CERTIFICATES.

42. On a certificate of appearance, or of a pleading, affidavit or proceeding having been entered, filed, or taken, or of the negative thereof, unless otherwise provided	0
43. Or if required for use in a foreign country	0
44. Or if a certificate of proceedings pursuant to Ord. LXI. r. 24	0

SEARCHES AND INSPECTIONS.

45. On an application to search for an appearance or an affidavit, and inspecting the same	0
46. On an application to search an index, and inspect a pleading, judgment, decree, order, or other record, unless otherwise expressly provided for by any Act of Parliament or this order, and to inspect scripts filed or documents deposited pursuant to an order for safe custody or production, for each hour or part of an hour occupied	0
47. Not exceeding on one day	0

EXAMINATION OF WITNESSES.

48. On every memorandum of appointment for an examination to be taken before an Examiner of the Court	0
49. On every witness sworn and examined by an officer of the Court in his office, unless otherwise provided, including oath, for each hour or part of an hour	0
50. On an examination of witnesses by any such officer away from the office (in addition to reasonable travelling and other expenses), per day	1

51. The officer may require a deposit of stamps on account of fees and a deposit of money on account of expenses, which may probably become payable beyond any amount paid for fees and expenses upon the examination, and the officer, or his clerk, taking such deposit shall thereupon make a memorandum thereof and deliver the same to the party making the deposit.

The officer may also require an undertaking, in writing, to pay any further fees and expenses which may become payable beyond the amount so paid and deposited.

HEARING.

	£	s.	d.
52. On entering or setting down (*a*), or re-entering or re-setting down an appeal to the Court of Appeal, or a cause or matter for trial or hearing in any Court in London or Middlesex or at any assizes, including hearing on further consideration where no such fee was paid on the original hearing, whether on summons adjourned from chambers or otherwise, and including special case, a petition in a divorce or matrimonial cause or matter by which a proceeding is commenced, and petition of right, but not any other petition, nor any other summons adjourned from chambers	2	0	0
53. On entering directions of the judge at a trial pursuant to Ord. XXXVI. rr. 41 and 42, and certifying same when required	1	0	0
54. On writing for the attendance of Trinity masters or other assessors on the hearing of an admiralty action	0	10	0
55. On answering and setting down for hearing in Court a petition by which any proceeding is commenced, unless otherwise provided	1	0	0
56. Any other petition	0	10	0

JUDGMENTS, DECREES AND ORDERS.

On drawing up and entering judgments, decrees, and orders—

57. If made in Court on the original hearing or hearing on further consideration of a cause, or on the hearing of a special case or petition, or on any application to the Court of Appeal unless otherwise provided Where in a divorce or matrimonial cause or matter a decree nisi is made, and afterwards a decree absolute, no fee shall be payable on the decree absolute.	1	0	0
58. If a judgment without hearing in Court or a final order in a probate action made by a registrar, or if an order made in a probate action or in a divorce or matrimonial cause or matter on a motion, including filing the case or application on which the order is made	0	10	0
59. If made on the hearing of an originating summons, unless otherwise provided	0	10	0
60. If made at chambers in the Chancery Division on the hearing of a cause or matter on further consideration	0	10	0
61. If made under Ord. XV., Ord. XXXII. r. 6, or Ord. XXXIII. r. 2	0	10	0
62. If made on any application by Ord. LV. r. 2, directed to be disposed of in chambers comprised in sections (1), (2), (3), (5), (6), (7), or (10) of the said rule, exclusive of those comprised in section (12) of the same rule	0	10	0
63. If an order of course on a petition of right	0	10	0
64. If an order for a commission on a petition of right	0	10	0
65. If an order of course under the Act 6 & 7 Vict. c. 73, to tax a solicitor's bill of costs within 12 months after delivery, or for delivery of a bill of costs by a solicitor where fee No. 7 is not applicable	1	0	0
66. On any other order, including an agreement filed pursuant to Ord. LII. r. 23, in admiralty actions, and filing same	0	10	0
67. On signing a note or memorandum of an order pursuant to Ord. LII. r. 14, when required for production, where no order is drawn up	0	5	0
68. On a memorandum to enter an order nunc pro tunc	0	3	0
	0	5	0

ON PROCEEDINGS IN THE CHANCERY DIVISION, AT THE JUDGES' CHAMBERS, OR BEFORE A TAXING MASTER OR DISTRICT REGISTRAR.

69. On the sale or mortgage of any land or hereditaments pursuant to any order directing a sale or mortgage with the approbation of the judge made in any cause or matter for the purpose of raising money to be dealt with by the Court in such cause or matter, for every 100*l.* or fraction of 100*l.* of the amount raised	0	2	0

(*a*) This is not confined to matters not arising in an action, *Exp. Hasker*, 14 Q. B. D. 82.

70. On the approval of the purchase of any land or hereditaments, or of the title to any land or hereditaments, to be purchased pursuant to any order in any cause or matter with money under the control of the Court in such cause or matter, for every 100*l.* or fraction of 100*l.* of the amount of the purchase money ..... £ s 0

71. On proceedings pursuant to an order in any cause or matter where the amount of the outstanding or undisposed of estate of a deceased person or of the estate subject to any trust or partnership shall be ascertained for the purpose of being dealt with in such cause or matter without deducting any payment to creditors or parties interested after the commencement of the cause or matter, for every 100*l.*, or portion of 100*l.*, of the amount or value thereof 0

72. On taking an account of moneys received by an executor, administrator, trustee, agent, solicitor, mortgagee, co-tenant, partner, receiver, guardian, consignee, bailee, manager, provisional official or other liquidator, sequestrator, or execution creditor, or other person liable to account, for every 100*l.* or fraction of 100*l.* of the amount found to have been received without deducting any payment 0

73. On taking an account of the debts or ascertaining the amount of any debt due from a deceased person or from any company in any cause or matter when any creditor shall be required to prove his debt otherwise than by production of his security, for every 100*l.* or fraction of 100*l.* of the amount found to be due to such creditor, or (if more than one) of the aggregate amount found to be due to all such creditors 0

74. And in any such case, if after evidence adduced by the creditor his claim shall be disallowed, on each such claim 0

75. On taking an account of or ascertaining the amount due in respect of the debentures or bonds of a joint stock or other company, for every 100*l.* or fraction of 100*l.* of the aggregate amount found to be due..... 0

76. On an inquiry to ascertain the heir and next-of-kin, or the heir or next-of-kin of any one or more than one deceased person whose estate is being administered in any cause or matter or in respect of whose estate an application is made under Ord. LV. r. 3, and on any such inquiry at chambers upon an application under the Act 10 & 11 Vict. c. 96 (the Trustee Relief Act), or the Lands Clauses Consolidation Act, 1845, or any other Act whereby the purchase money of any property sold is directed to be paid into Court.... 1

77. On settling a list of shareholders entitled to a return, where there is any money to be returned, or a list of contributories, for every person settled on either such list not exceeding 2,000 0

78. On settling under the 13th section of the Companies Act, 1867, the list of the creditors of a limited company which proposes to reduce its capital..... 5

79. On settling a scheme pursuant to the Railway Companies Act, 1867, or the Liquidation Act, 1868..... 5

80. On settling a scheme for the management of a charity..... 2

81. On a certificate of a chief clerk, taxing master, or district registrar of the result of any proceeding or taxation of costs before him, including one or any number of matters..... 0

The amount on which the fee No. 69 is payable shall not include the a
which may be payable out of the money raised to any mortgagee or other
entitled to any charge, estate, or interest, on or in the property sold whe
mortgagee or other person is not in respect o. his mortgage, charge, es
interest a party to the cause or matter in which the order is made or bound
proceedings although he may consent to or concur in the sale.

The amount on which the fee No. 71 is payable shall not include any outs
debts believed to be bad or irrecoverable, nor any property the value of w

undefined or uncertain, nor any property to which the fee No. 69 is applicable, nor any money on which the fee No. 72 shall be payable in the same cause or matter.

The amount on which either of the fees Nos. 70 and 72 is payable shall not include any sum of money or any money arising from the sale of any property upon which either of the fees Nos. 69 and 71 shall have been previously paid.

The value of any stocks, funds, debentures, securities, shares, or other property, the price of which is quoted in the London Daily Stock and Share List, published by the authority of the Committee of the Stock Exchange, to which the fee No. 71 is applicable, shall be the closing price quoted in such published list on the day previous to the fixing the amount of such fee.

When the fee No. 72 shall be applicable to any money received which shall be invested or deposited in a bank, and again be received from such investment or deposit, or shall be paid by one person accounting to any other person accounting in the same cause or matter, or in any other similar case, the fee shall not be payable twice on the same money in the same cause or matter.

When a fee shall be payable on the money raised by the sale of property, and the same property shall be resold, in the same cause or matter, the fee payable on the first sale shall be deducted from the fee payable on the second sale.

The amounts for or in respect of which the following fees are payable shall be limited to 200,000*l.* in the following cases—(*a*) the amount raised at any time or times in the same cause or matter in the cases to which the fee No. 69 is applicable; (*b*) the amount of purchase-money to be invested pursuant to any one order in the cases to which the fee No. 70 is applicable; (*c*) the amount in the same cause or matter of the value of the outstanding or undisposed of estate whenever ascertained in the cases to which the fee No. 71 is applicable; (*d*) the amount at any time or times in the same cause or matter found to have been received by any executor, administrator, or trustee in the cases to which the fee No. 72 is applicable, except in the case of a trustee directed to account periodically, and in that case, and in all other cases to which the fee No. 72 is applicable, the amount found to be due by any one certificate or on any one account; (*e*) the amount at any time or times in the same cause or matter found to be due to a creditor or creditors in the cases to which the fee No. 73 is applicable; (*f*) the amount found to be due in respect of debentures or bonds in the cases to which the fee No. 75 is applicable.

The fees Nos. 69 to 80 inclusive shall become due and payable by the party conducting the proceedings to which they apply as part of his costs of such proceedings, and be allowed as follows or otherwise as the Court or a judge shall direct; that is to say, the fee No. 71 shall become due and payable upon making the certificate or order by which the outstanding or undisposed of estate is ascertained or as to any part thereof the value of which is at that time undefined or uncertain, and which during the further proceedings in the cause or matter shall be realised or the value of which shall be ascertained upon any order or certificate made when or after the same shall be so realised or the value thereof ascertained. The fee No 72 on taking the account of a receiver, guardian, consignee, bailee, manager, liquidator, sequestrator, or execution creditor, or a trustee directed to pass his accounts periodically shall, upon payment, be allowed in the account, unless otherwise ordered by the Court or a judge. The fee No. 72 in the other cases to which it applies, and the fees Nos. 69, 70 and 73 to 80 inclusive, shall become due and payable by the party conducting the proceeding, on making the certificate or order on the result of the sale, purchase, account, inquiry or other proceeding to which the fee is applicable; but if the Court or a judge shall be of opinion that the costs of the party liable to the payment of any such fees will become payable out of any funds or moneys in Court or to be brought into Court, the Court or judge may suspend the payment of any such fees until such funds or moneys are dealt with, or for such other time as may be thought fit, in which case the amount payable shall be stated in the certificate or order upon which the same are payable, or in some subsequent certificate or order, and where such fees have not been paid, and the costs are directed to be paid out of money in Court or out of the proceeds of securities in Court, the taxing officer shall certify the amount of fees payable in respect of such proceedings, and the paymaster shall, if so provided by the Rules under the Supreme Court of Judicature (Funds, &c.) Act, 1883, carry over the amount so certified to be payable from

the account to which such moneys or proceeds are placed to a separate accou
the books of the Pay Office for fees on proceedings or otherwise as shall be pr
by such rules, and the amount shall from time to time, as the Treasury may d
be paid to the account of her Majesty's Exchequer.

ON PROCEEDINGS IN THE QUEEN'S BENCH AND PROBATE DIVORCE AND ADMI
DIVISIONS, EXCEPT IN ADMIRALTY ACTIONS, BEFORE A MASTER REGISTR
DISTRICT REGISTRAR.

		£
82.	The fee No. 72 on taking accounts applicable to proceedings in the Chancery Division upon similar proceedings in these Divisions—	
83.	On every other reference, investigation, or inquiry, including examination of witnesses, if any, for every hour or part of an hour the officer is occupied	0

ON PROCEEDINGS IN THE PROBATE DIVORCE AND ADMIRALTY DIVISION, IN ADM
ACTIONS ON REFERENCES BEFORE A REGISTRAR OR DISTRICT REGISTRAR.

84.	On any reference to the Registrar, including examination of witnesses, if any, having regard to the nature and importance of the accounts and other matters, and to the time occupied	F 5 15
85.	If the attendance of one or more merchants is required, for each merchant the same fees as to the Registrar	F 5 15
86.	In cases of great intricacy, or very large amount, occupying more than two full days, larger fees may be taken, not exceeding five guineas additional per day to the Registrar and for each merchant, for every day beyond two full days.	
87.	In cases where the accounts to be investigated do not exceed 500*l.*, and where the time occupied is short, fees may be taken for the Registrar and each merchant of	1 1 4

PROCEEDINGS BEFORE AN OFFICIAL REFEREE.

88.	On every reference	
89.	And for every hour or part of an hour he is occupied beyond two full days	
90.	On every sitting elsewhere than in London or Middlesex a further fee for every night the official referee shall be absent from London	
91.	And for his clerk	

The fees Nos. 82 to 91 inclusive shall become due and payable by the pa
ducting the proceedings on the report of the result of the reference or other
hereinafter provided, where no such report is made.

The above-mentioned fees, Nos. 69 to 80 and 82 to 91 inclusive, shall be
payable, when no certificate, report or order is made, by the party conduc
proceedings on the completion of such proceedings, or, if not completed, a
portion shall be payable on so much of the proceedings as shall have take
the amount to be fixed by the officer.

In these cases the fees shall be paid by stamps impressed upon or affi
memorandum stating on what account such fees are paid.

A deposit of stamps on account of the fees applicable to any proceeding
required before such proceeding is commenced, or at any time during th
thereof, and in admiralty actions, when Ord. LVI. r. 4, applies, such stam
be affixed as therein provided, and in all other cases a memorandum of the
deposited shall be delivered to the party making the deposit.

In the Admiralty Marshal's Office.

	£	*s.*	*d.*
92. On the execution of a warrant	2	0	0
93. On the execution of an attachment, for every person attached	1	0	0
94. On the execution of any decree, order, commission, or other instrument under Order LXVII.	1	0	0
95. On attending, appointing, and swearing appraisers	1	0	0
96. On delivering up a ship or goods to a purchaser agreeably to the inventory	1	0	0
97. On attending the delivery of cargo, or sale or removal of a ship or goods, per day	2	0	0
98. On retaining possession of a ship with or without cargo, or of a ship's cargo without a ship, to include the cost of a ship keeper, if required, per day	0	5	0
99. On a report as to the sufficiency of sureties	0	10	0
100. If the Marshal or any of his substitutes is required to go a greater distance than five miles from his office to perform any of the above duties, he shall be entitled to his reasonable expenses for travelling, board, and maintenance, in addition to the above fees.			
101. On the sale of any vessel or goods sold pursuant to a Decree or Order of the Court, for every 50*l.* or fraction of 50*l.* realised	0	10	0

Taxation of Costs.

102. On taxing a bill of costs where the amount allowed does not exceed 4*l.*	0	2	0
103. Where the amount exceeds 4*l.*, for every 2*l.* allowed or a fraction thereof	0	1	0

These fees, unless otherwise provided, shall be taken on signing the certificate or on the allowance of the bill of costs as taxed; but the fees shall be due and payable, if no certificate or allocatur is required, on the amount of the bill as taxed, or on the amount of such part thereof as may be taxed, and the solicitor or party suing in person shall in such case cause the proper stamps (the amount thereof to be fixed by the officer) to be impressed on or affixed to the bill of costs.

The taxing officer may require a deposit of stamps on account of fees before taxation not exceeding the fees on the full amount of the costs as submitted for taxation, and the officer or his clerk on taking such deposit shall make a memorandum thereof on the bill of costs.

Ord. V. r. 58 of the Chancery Funds Consolidated Rules, 1874, shall continue to be acted upon in cases to which it is applicable.

On Proceedings in the Pay Office of the Supreme Court.

104. On a certificate of the amount and description of any money, funds, or securities, including the request therefor	0	1	0
105. On a transcript of an account for each opening, including the request therefor	0	2	0
106. On a request to the Paymaster, Bank of England, or a registrar of the Probate, Divorce and Admiralty Division (unless otherwise provided), for any of the following purposes: paying, lodging, transferring, or depositing money, funds, or securities in Court without an order, or money in addition to the amount directed by an order to be paid in; paying out of Court any money without an order or a certificate of a taxing officer; information in writing in respect of any money, funds, or securities, or any transaction in the Pay Office	0	1	0

		£
107.	On a request for information respecting any money, funds, or securities to the credit of any cause or matter contained in any list prepared by the paymaster of causes and matters to the credit of which any money, funds, or securities have not been dealt with during fifteen years	0
108.	On an affidavit for the purpose of paying, transferring, or depositing any money, funds, or securities in Court pursuant to the statute 10 & 11 Vict. c. 96	0
109.	On preparing a power of attorney	0

Register of Judgments and Lis Pendens.

110.	On registering a judgment or lis pendens, although more than one name may have to be registered	0
111.	On re-registering same	0
112.	On a search for each name	0
113.	On a certificate of entry of satisfaction	0
114.	On a request for a search and certificate pursuant to Order LII. r. 23	0
115.	If more than one name included in the same request, for each additional name	0
116.	On a duplicate certificate, if not more than three folios	0
117.	For every additional folio	0
118.	On every continuation search, if requested within fourteen days of any former search (the result to be endorsed on such certificate)	0
119.	On a certificate of a judgment for registration in Ireland or Scotland under the Judgments Extension Act, 1868, including affidavit	0
120.	On filing for registration a certificate issued out of the Courts of Dublin or Court of Session in Scotland under the last-mentioned Act, although more than one name may have to be registered under the said Act	0
121.	On every certificate of the entry of a satisfaction under the last-mentioned Act	0
122.	On a search made in one or both of the registers of Irish and Scotch judgments for each name	0

Miscellaneous.

123.	On a report of a private bill in Parliament	5
124.	On an allowance of byelaws or table of fees	1
125.	On a fiat of a judge	0
126.	On signing, settling, or approving an advertisement	0
127.	On taking the acknowledgment of a deed by a married woman	1
128.	On an appointment of a receiver in a probate action	1
129.	On taking a recognizance or bond, whether one or more than one recognisor or obligor, and whether entered into by all at one time or not	0
130.	On assignment of a bond	0
131.	On taking bail, and taking same off the file and delivering	0
132.	On a commitment	0
133.	On an application to produce judges' notes	0
134.	On appointment of commissioners under glebe exchange	1
135.	On vacating a recognizance	0
136.	On a citation	0
137.	On the admission or re-admission of a solicitor	5
138.	On filing a claim in the Admiralty Registry for repayment of the excess of wages paid to a substitute hired in the place of a volunteer into the Royal Navy, including copy sent to the Admiralty	0
139.	On the opinion of the Admiralty Registrar objecting to the claim	0

	£	*s.*	*d.*
ecting any money, funds, or use or matter contained in any of causes and matters to the s, or securities have not been			
	0	2	6
aying, transferring, or deposit-ties in Court pursuant to the			
	0	1	0
	0	3	0

RS AND LIS PENDENS.

ndens, although more than one			
	0	2	6
	0	1	0
	0	1	0
ion	0	1	0
tificate pursuant to Order LI.			
	0	5	0
in the same request, for each			
	0	2	0
re than three folios	0	1	0
	0	0	6
uested within fourteen days of e endorsed on such certificate)	0	1	0
gistration in Ireland or Scotland Act, 1868, including affidavit	0	2	0
cate issued out of the Courts of otland under the last-mentioned ame may have to be registered			
	0	7	6
f a satisfaction under the last-			
	0	1	0
the registers of Irish and Scotch			
	0	1	0

LANEOUS.

liament	5	0	0
le of fees	1	0	0
	0	5	0
an advertisement	0	10	0
a deed by a married woman	1	0	0
a probate action	1	0	0
d, whether one or more than one ner entered into by all at one time			
	0	10	0
	0	5	0
off the file and delivering	0	2	6
	0	5	0
es' notes	0	5	0
under glebe exchange	1	0	0
	0	10	0
	0	5	0
of a solicitor	5	0	0
ty Registry for repayment of the bstitute hired in the place of a vy, including copy sent to the			
	0	10	0
Registrar objecting to the claim	0	10	0

	£	*s.*	*d.*
140. On a certificate of the Admiralty Registrar ordering payment of amount due, including the copy to be sent to the Accountant-General of the Navy	0	10	0
141. On registering in the Admiralty Registry a power of attorney for a Queen's ship generally, and a copy thereof for the Accountant-General of the Navy	1	10	0
142. On registering same specially	0	10	0
143. On taking accounts by the Admiralty Registrar in Naval Prize matters	0	5	0
144. On Admiralty Registrar writing letters in regard to Naval Prize matters	0	10	0
145. On every 50*l.*, or fraction of 50*l.*, paid out of the Admiralty Registry in any action, or to the Naval Prize Account	0	5	0

No fee is payable on the transfer of money from the Admiralty Registry to the Naval Prize Account.

(Signed) SELBORNE, C.
COLERIDGE, C. J.
W. B. BRETT, M. R.
JAMES HANNEN,
Prest. P.D.A. Divn.

We concur in the above order.
(Signed) C. C. COTES,
H. J. GLADSTONE,
Lords Commissioners of Her Majesty's Treasury.

ORDER

AS TO

SUPREME COURT FEES (OCTOBER), 1884.

I, the Right Honourable Roundell, Earl of Selborne, Lord High Chan
Great Britain, by and with the advice and consent of the undersigned j
the Supreme Court, and with the concurrence of the Lords Commissioner
Majesty's Treasury, do hereby, in pursuance and execution of the powers
the Supreme Court of Judicature Act, 1875, and all other powers and a
enabling me in this behalf, order and direct in manner following:—

The fees hereunder written are fixed and appointed to be, and shall be,
appeals brought on or after the Twenty-fourth day of October, 1884, fro
Courts, notwithstanding anything in the Order as to Supreme Court Fe
contained.

	£	s.	d
On filing	0	10	0
On hearing	1	0	0
On drawing up judgment	0	10	0

The 21st day of August, 1884.

SELBORNE, C.
COLERIDGE, C
W. B. BRETT,
C. E. POLLOCK

We concur,
CHARLES C. COTES,
HERBERT J. GLADSTONE,
Lords Commissioners of Her Majesty's Treasury.

ORDER

AS TO

THE FEES AND PERCENTAGES WHICH ARE REQUIRED TO BE TAKEN IN THE SUPREME COURT OF JUDICATURE BY MEANS OF STAMPS.

WHEREAS by sect. 26 of the Supreme Court of Judicature Act, 1875, it is provided that the fees and percentages appointed to be taken in the High Court of Justice and in the Court of Appeal, and in any Court to be created by any Commission, and in any office which is connected with any of those Courts, or in which any business connected with any of those Courts is conducted, shall, except so far as may be otherwise directed, be taken by means of stamps; and further, that such stamps shall be impressed or adhesive, as the Treasury may from time to time direct; and that the Treasury, with the concurrence of the Lord Chancellor, may from time to time make such rules as may seem fit for publishing the amount of the fees and regulating the use of such stamps, and particularly for prescribing the application thereof to documents from time to time in use or required to be used for the purposes of such stamps, and for ensuring the proper cancellation of such stamps, and for keeping accounts of such stamps.

Now, we, the undersigned, being two of the Lords Commissioners of Her Majesty's Treasury, do, with the concurrence of the Lord Chancellor, hereby give notice, and order and direct:—

1. That from and after the date at which this Order shall come into operation the stamps used for denoting the said fees and percentages shall be of the character, and be applied and otherwise dealt with in the manner, prescribed in the schedule hereto.

2. That the adhesive stamps at present in use in the Supreme Court of Judicature shall continue to be used so long as they are supplied by the Commissioners of Inland Revenue.

3. That in any case in which a deposit of stamps is required, pursuant to the Order as to Supreme Court Fees, 1884, such deposit shall be made in the manner provided by such Order.

THE SCHEDULE above referred to.

The official forms, with impressed or adhesive stamps (as the case may be), required in any Court or Office of the Supreme Court, in respect of any proceedings therein referred to, may be obtained at the Inland Revenue Offices, Royal Courts of Justice.

Forms and stamps for use in the Principal Probate Registry (which except for wills are all adhesive), can be purchased from the licensed vendors at Somerset House.

Summonses, Writs, Commissions and Warrants.

	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
On sealing a writ of summons for commencement of an action	Writ of summons.	Impressed.	
On sealing a concurrent, renewed, or amended writ of summons for commencement of an action			
On sealing a notice for service under Ord. XVI. r. 48	Notice	Impressed or adhesive.	
On sealing a writ of mandamus	Præcipe left at time of issuing writ	Impressed, adhesive in Probate Registry.	
On sealing a writ of subpœna not exceeding three persons			
On sealing a writ of execution, a subpœna pursuant to the Court of Probate Act, 1858, s. 23, and every other writ			
On sealing or issuing any originating summons.	Summons	Impressed.	
On amending same	Præcipe	Adhesive.	
On sealing or issuing a summons for directions under Ord. XXX.	Summons	Impressed or adhesive.	
On sealing or issuing any other summons or taxing master's warrant.	Summons or warrant.	Impressed or adhesive.	
On filing a notice to have a reference to an Admiralty registrar placed in the list for hearing	Notice	Impressed.	
On a notice in Admiralty actions pursuant to Ord. LXVII. r. 10			
On sealing or issuing a commission to take oaths or affidavits in the Supreme Court.	Commission ..	Impressed.	The commi the copy o to be writt pressed p the docum produced Inland Royal C Justice, stamped.
On every other commission	Commission ..	Impressed, adhesive in Probate Registry	
On marking a copy of a petition of right for service.	Copy of petition	Impressed.	

Appearances.

The fee payable on entering or amending an appearance shall be denoted by an impressed stamp on the form of memorandum as prescribed by the Appendix to the Rules of the Supreme Court, 1883, and where the appearance of more than one person is entered by the same memorandum, the fees for all persons beyond the first shall be denoted by means of impressed stamps.

Forms of memorandum of appearance with the impressed stamp for one or more defendants will be sold at the Inland Revenue Office, Royal Courts of Justice.

Copies.

———	Document to be Stamped.	Character of Stamp to be used.
On a copy of a written deposition of a witness to enable a party to print the same.	Copy	Impressed or adhesive.
On examining a written or printed copy, and marking or sealing same as an office copy.	Copy	Impressed or adhesive.
On making a copy, and marking same as an office copy.	Copy	Impressed or adhesive.
On a copy in a foreign language....	Copy	Impressed or adhesive.
On a copy of a plan, map, section, drawing, photograph, or diagram.	Præcipe or copy ..	Impressed or adhesive.
On a printed copy of an order, not being an office or certified copy.	Copy	Impressed or adhesive.

Attendances.

The fees payable under this heading shall be denoted either by an impressed or adhesive stamp on the subpœna, notice or other document requiring the attendance of the officer.

Oaths, &c.

———	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
On taking an affidavit or an affirmation or attestation upon honour in lieu of an affidavit or a declaration, except for the purpose of receipt of dividends from the Paymaster-General.	Affidavit or other document answering thereto.	Impressed or adhesive.	

———	Documents to be Stamped and Character of Stamp to be used.	Regulations and Observations.
And in addition thereto, for each exhibit therein referred to and required to be marked.	Stamps to be impressed or adhesive on affidavit.	The amount of stamps should be marked on the office copy.

Filing.

———	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
On filing a special case or petition of right.	Special case, petition of right, or præcipe.	Impressed	Where practic stamp to be on cial case or pet of right, and other cases on cipe filed.
On filing, except in Admiralty actions, an affidavit, deposition, or set of depositions (including any exhibits annexed to any such affidavit or deposition), statement of claim in default of appearance, official and special referees' certificates, petition, preliminary act, submission to arbitration, award, warrant of attorney, cognovit, bail, satisfaction piece, bond, writ of execution with return, and power of attorney, and every other proceeding in a probate action or in a divorce or other matrimonial cause or matter required by Act of Parliament, general order, or order in the action, cause, or matter to be filed in the Principal Probate Registry.	Document filed	Impressed or adhesive.	
On filing a scheme pursuant to the statute 30 & 31 Vict. c. 127, or the Liquidation Act, 1868.	Scheme	Impressed.	
On filing scripts in a probate action or on depositing, pursuant to an order in any cause or matter, any documents for safe custody or production.	Affidavit or order.	Adhesive.	
On a receipt for any document or documents to which the two last fees apply, when delivered out, or for any other document or documents when delivered out of the Principal Probate Registry.	Receipt	Adhesive.	

e	Character of Stamp to be used.	Regulations and Observations.
e, of e-	Impressed	Where practicable stamp to be on special case or petition of right, and in other cases on præcipe filed.
ed	Impressed or adhesive.	
	.... Impressed.	
	or Adhesive.	
	.... Adhesive.	

—	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
On filing an affidavit and notice under Ord. XLVI. r. 4.	Affidavit	Impressed.	
On every minute in Admiralty actions pursuant to Ord. LXVI. r. 8, for every instrument or document to which the minute relates (other than an exhibit, or any instrument or document previously issued from the registry or the marshall's office).	Minute	Impressed or adhesive.	
On filing a bill of sale and affidavit therewith.	Bill of sale ..	Impressed.	
On filing under the Bills of Sale Acts, 1878 and 1882, any other document.	Document	Impressed.	
On filing an affidavit of re-registration of a bill of sale.	Affidavit	Impressed.	
On filing a fiat of satisfaction.	Fiat	Impressed.	

Certificates.

—	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
On a certificate of appearance or of a pleading, affidavit, or proceeding having been entered, filed, or taken, or of the negative thereof, including certificate for use in a foreign country, and certificate of proceedings pursuant to Ord. LXI. r. 24.	Certificate	Impressed or adhesive.	

Searches and Inspections.

The fees on searches and inspections shall be taken by means of impressed stamps on a form of application which will be issued and sold at the Inland Revenue Office, Royal Courts of Justice; or, for the Principal Probate Registry, at Somerset House.

Examination of Witnesses.

The fees under this heading may still be denoted by means of adhesive sta
which may be affixed either to the deposition or to the order or memorandu
appointment for an examination.

Hearing.

	Document to be Stamped.	Character of Stamp to be used.	Regulations an Observations.
On entering or setting down, or re-entering or resetting down, an appeal to the Court of Appeal, or a cause or matter for trial or hearing in any Court in London or Middlesex, or at any Assizes, including hearing on further consideration when no fee was paid on the original hearing, whether on summons adjourned from chambers or otherwise, and including special case, a petition in a divorce or matrimonial cause or matter by which a proceeding is commenced, and petition of right, but not any other petition, nor any other summons adjourned from chambers	In the Chancery Registrar's Office, on forms provided for the purpose	Impressed.	
	At offices of Associates on copy of pleadings..	Impressed or adhesive.	
	At all other offices of the High Court or Court of Appeal on præcipe ..	Impressed or adhesive in Probate Registry.	
On entering directions of the judge at a trial and certifying same if required.	Certificate	Impressed or adhesive.	
On writing for the attendance of Trinity Masters or other assessors on the hearing of an Admiralty action.	Præcipe	Impressed.	
On answering and setting down for hearing in Court a petition by which any proceeding is commenced on any other petition.	Petition	Impressed	

Judgments, Decrees, and Orders.

	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
On drawing up and entering a judgment, decree, or order, whether on the original hearing of a cause or on further consideration, including a cause commenced by summons at chambers, and an order on the hearing of a special case or petition, and any order by the Court of Appeal or any other order or judgment.	Judgment, decree, or order.	Stamp to be impressed on the judgment or order except at the Crown Office, where adhesive stamps may for the present be also admitted, but, as far as practicable, a præcipe, with an impressed stamp, should in all cases be used. Adhesive stamps to be used in the Principal Probate Registry.	
On signing a note or memorandum of an order, pursuant to Ord. LII. r. 14, when required for production, where no order is drawn up.	Note or memorandum.	Impressed or adhesive.	
On a memorandum to enter an order nunc pro tunc.	Memorandum .	Impressed.	
For copy of a plan, map, section, drawing, photograph, or diagram required to accompany any order.	Copy	Impressed or adhesive.	Where an adhesive stamp would damage the copy, a præcipe with the impressed stamp should be used.

Proceedings at Judge's Chambers or before a Master, Registrar, District Registrar or Official Referee.

The fees payable on these proceedings shall be paid in the manner provided by the order as to Supreme Court Fees, 1884, either by impressed or adhesive stamps, and where any such fees become due and payable upon making a certificate or order they shall be impressed or attached on the certificate or order. When any such fee is impressed or attached on an order, the officer who enters the order shall note on the entry the amount of the fee appearing on the order; and where any such fee is impressed or attached on a certificate the amount thereof shall be noted on every office copy thereof.

In the Admiralty Marshal's Office.

	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations
On the execution of a warrant.	Warrant	Impressed.	
On the execution of an attachment, for every person attached.	Attachment ..	Impressed or adhesive.	
On the execution of any decree, order, commission, or other instrument under Ord. LXVII.	Instrument ..	Impressed.	
On attending, appointing, and swearing appraisers.	Certificate of appraisement.	Impressed.	
On delivering up a ship or goods to a purchaser agreeably to the inventory.	Account sales	Impressed.	
On attending the unlivery of cargo or sale or removal of a ship or goods per day.	Certificate of execution.	Impressed.	The Marshal tificate of ex shall be att document the unlive or removal Marshal's cate of rele be attached instrument lease.
On retaining possession of a ship with or without cargo, or of a ship's cargo without a ship, to include the cost of a ship keeper, if required, per day.	Certificate of release if property released. Account sales if property sold.	Impressed.	
On a report as to the sufficiency of sureties.	Report	Impressed.	
On the sale of any vessel or goods sold pursuant to a decree or order of the Court for every 50*l.* or fraction of 50*l.* realised.	Account sales	Impressed.	

Taxation of Costs.

	Document to be Stamped.	Character of Stamp to be used.	Regulation Observa
For taxing a bill of costs..	Bill.....	Impressed or adhesive.	In any case the fees been paid on the bil and a ce used, the denoted by stamp on ficate.
For a certificate of the result	Certificate	Impressed.	

ty Marshal's Office.

o be	Character of Stamp to be used.	Regulations and Observations.
....	Impressed.	
it..	Impressed or adhesive.	
t ..	Impressed.	
e of	Impressed.	
ient.		
ales	Impressed.	
e of	Impressed.	The Marshal's cer- tificate of executio shall be attached t document orderin the unlivery s or removal. T Marshal's certi cate of release sh be attached to t instrument of s
te of se if y re- Ae- sales operty	Impressed.	lease.
.....	Impressed.	
sales	Impressed.	

ration of Costs.

nt to be ıped.	Character of Stamp to be used.	Regulations and Observations.
.....	Impressed or adhesive.	In any case in w the fees have been paid by s on the bill of c and a certific used, the fee denoted by im stamp on this ficate.
ate	Impressed.	

——	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
On a certificate of the amount and description of any money, funds, or securities, including the request therefor.	Request	Impressed.	
On a transcript of an account for each opening, including the request therefor.	Transcript....	Impressed.	
On a request to the Paymaster, Bank of England, or a Registrar of the Probate, Divorce, and Admiralty Division (unless otherwise provided), for any of the following purposes: paying, lodging, transferring, or depositing money, funds, or securities in Court without an order, or money in addition to the amount directed by an order to be paid in; paying out of Court any money without an order or a certificate of a taxing officer.	Request	Impressed.	
On a request for information in writing in respect of any money, funds, or securities, or any transaction in the Pay Office.	Request	Impressed or adhesive.	
On a request for information respecting any money, funds, or securities to the credit of any cause or matter contained in any list prepared by the Paymaster of causes and matters to the credit of which any money, funds, or securities have not been dealt with during 15 years.	Request	Impressed or adhesive.	
On an affidavit for the purpose of paying, transferring, or depositing any money, funds, or securities in Court pursuant to the Statute 10 & 11 Vict. c. 96.	Office copy of schedule.	Impressed.	
On preparing a power of attorney.	Power of attorney.	Impressed.	

Register of Judgments and Lis Pendens.

——	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
On registering a judgment or lis pendens	Memorandum of registry ..	Impressed.	
On re-registering same....			
On a search	General form of search præcipe ..		
On a certificate of entry of satisfaction.	Certificate		
On a request for search and certificate pursuant to Ord. LXI. r. 23.	Certificate	Impressed or adhesive.	
On a duplicate certificate..	Certificate	Impressed or adhesive.	
On a continuation search..	Original certificate.	Impressed or adhesive.	
On a certificate of a judgment for registration in Ireland or Scotland under the Judgments Extension Act, 1868, including affidavit	Certificate ..	Impressed or adhesive.	
On filing for registration a certificate issued out of Courts of Dublin or Court of Session in Scotland under the same Act			
On every certificate of the entry of a satisfaction under the same Act			
On a search made in one or both of the Registers of Irish or Scotch Judgments.	Præcipe	Impressed.	

Miscellaneous.

——	Document to be Stamped.	Character of Stamp to be used.	Regulations Observati
On a report of a private Bill in Parliament.	Report	Impressed.	
On an allowance of bye-laws or table of fees.	Allowance....	Impressed.	
On a fiat of a judge	Fiat	Impressed.	
On signing, settling or approving an advertisement.	Advertisement	Impressed, or adhesive in Probate Registry.	
On taking acknowledgment of a deed by a married woman.	Acknowledgment.	Impressed.	
On taking a recognizance or bond.	Recognizance .	Impressed.	

	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
On assignment of a bond ..	Assignment ..	Adhesive.	
On taking bail, and taking same off the file and delivering.	Bail piece	Impressed.	
On a commitment	Commitment..	Impressed.	
On an application to produce judge's notes.	Application ..		
On appointment of commissioners under glebe exchange.	Appointment..	Impressed.	
On vacating a recognizance	Recognizance..	Impressed.	
On a citation	Præcipe	Adhesive.	
On admission or re-admission of a solicitor.	Admission	Impressed.	
On filing a claim in the Admiralty Registry for repayment of the excess of wages paid to a substitute hired in the place of a volunteer into the Royal Navy, including copy sent to the Admiralty.	Claim	Impressed or adhesive.	
On the opinion of the Admiralty Registrar objecting to the claim.	Document	Impressed.	
On a certificate of the Admiralty Registrar ordering payment of amount due, including the copy to be sent to the Accountant-General of the Navy.	Certificate	Impressed.	
On registering in the Admiralty Registry a power of attorney for a Queen's ship generally, and a copy thereof for the Accountant-General of the Navy.	Power of attorney.	Impressed.	
On registering same specially.	Power of attorney.	Impressed.	
On taking accounts by the Admiralty Registrar in naval prize matters.	Account.....	Impressed or adhesive.	
On Admiralty Registrar writing letters in regard to naval prize matters.	Document	Impressed or adhesive.	
On every 50*l.*, or fraction of 50*l.*, paid out of the Admiralty Registry in any action, or to the Naval Prize Account.	Account.....	Impressed or adhesive.	
Any other proceeding, pleading, or document not hereinbefore specified.	Document or Præcipe.	Impressed or adhesive.	These are to be impressed, if practicable, where not filed in the office.

General Directions.

In any case in which the use of impressed stamps is prescribed, paper or p
ment on which the document requiring a stamp is to be written may be stam
the Inland Revenue Office, Royal Courts of Justice, notwithstanding that st
forms are also provided by the Commissioners of Inland Revenue.

The cancellation shall be effected in such manner as the Commissioners of I
Revenue shall from time to time direct.

It shall be obligatory on all officers of the Supreme Court charged with the
of cancelling adhesive stamps to see that all such stamps, although obliterated
written or printed cancellation, be afterwards cancelled by means of perforatio

This order shall come into operation on the 18th day of July, 1884.

Dated the 4th day of July, 1884.

CHARLES C. COTES,
R. W. DUFF,
Two of the Lords of Her Majesty's Treas

I concur in this order,
SELBORNE, C.

CENTRAL OFFICE.

OFFICE RULES SETTLED BY THE PRACTICE MASTERS, 1880, 1881, 1882.

Documents to be filed in the Writ and Appearance and Summons and Order Departments.

Originating summonses issued from Chancery chambers.
Petitions of right.
Affidavits of service.
Lower scale certificates (Chancery).
Schemes of arrangement under Railway Abandonment Act.
Pleadings left on entering judgment (Ord. XLI. r. 1).
Pleadings and other documents filed under Ord. XIX. r. 6 [now Ord. XIX. r. 10], in default of appearance.
Writs and returns to writs, orders, &c.
All documents required by rules or orders of Court to be filed, such as warrants of attorney, and cognovits on signing judgments (rule 25, of Hilary, 1853), orders for assessment of damages and masters' findings thereon (rule 171, of Hilary, 1853), also satisfaction pieces and orders to satisfy, strike out, or amend any judgment or proceeding, or directing any act to be done in the office (except Chancery Orders and Orders of Court in Queen's Bench Division). [A copy of the order marked that the original was produced may be taken at the discretion of the officer in cases in which the original is required to be retained by the parties.]
All pleadings to be entered in the cause books are to be opened and stamped on the day of filing, with the date seal at the top of the front page, and returned to the general filing department on Monday morning in each week.
Copies writs filed.
Præcipes for writs of execution.
Præcipes for subpœnas and miscellaneous writs.
Appearances.
Lower scale certificates.
Certificate of costs.
All these should be sent to the general filing department when more than a year old.
Orders of commitment and returns thereto may be filed and indexed in the writ, &c. department in the same way as (and with) writs of execution.

Cause Book, Distinctive Marks, and Indexes.

Actions and matters in the title of which a limited company is first must be indexed under the first letter of the first word or initial.
Courtesy titles of eldest sons of peers are not to govern the distinctive mark which is to follow the surname, viz., "Campbell" and not "Marquis of Lorne."
In cases such as mayor and corporation of &c., the initial letter of the city or borough should govern the distinctive mark.
Owners of ships by name of ship.
Overseers of parishes by name of parish.

Names in which "de" occurs as part of the surname, or is preceded on
christian names, should be indexed under "D."

Foreign companies should be indexed under the initial letter of the first w
their name, *e.g.*, Banco de Lima under "B," Société d'Acclimatisation, "S."

Foreign titles should be indexed under the initial letter of the proper or
name in the title, *e.g.*, Comte de Paris under "P," Duc de Montebello under

The christian and surnames of all parties to an action should be entered i
in the cause book.

Parties are not to be allowed to see the cause book unless by express
obtained from a master or an order by a judge.

All searches in the cause book for writs of summons or otherwise are to be
by the clerks in the central office, and the result communicated to the
applying.

When a certificate is given, and no inspection of a præcipe is required, onl
fee of 1*s.* is to be taken (or 4*s.* if higher scale).

A separate index is to be kept of writs in administration actions and of
nistration summonses, which index the public may search without fee.

Separate books are to be kept for entering returns to writs of execution, in
lower scale certificates in chancery matters not actions, and return books, an
attachment book.

No other books to be kept for entries except the cause books (and desk bo
facilitating reference). The judgment books may be kept in the cause book
with the cause books, or in a separate room.

Writs of Summons, Appearances, and Amendments.

Copies of writs of summons should be signed with the name of the solici
solicitor's clerk suing them out as under:—

C. D. and Co.
or A. B.
for C. D. and Co.

The stamp is to be on the copy writ filed.

In the Chancery Division an order of course to amend a writ of summons a
plaintiff may be advised will not justify an alteration that strikes out the na
any plaintiff or defendant, or makes a person out of the jurisdiction a party.

In all the divisions an amendment of a writ of summons may be made by le
a master (on payment of fee) before service. A plaintiff can be struck out on
special leave given in the order to amend; a defendant, by special leave, or o
written statement (to be filed) of the plaintiff's solicitors that a notice of di
tinuance under Ord. XXIII. [now Ord. XXVI.] has been duly given.

In Chancery actions an amendment to a writ of summons pursuant to an or
Court or judge, may be made either on an undertaking to get the order draw
or on a separate memorandum or certificate being left for filing, signed or ini
by the judge or registrar, showing the order to have been made.

In an information where there is no relator, the Attorney-General's signatu
the writ is not required; but where there is a relator (whether a person or
corporate) the original writ (not the copy filed) must be signed by the Atto
General, and if any amendment be made it must be authorized by his signatu
the original writ or draft.

In entering appearances a note should be made in the cause books "statem
claim required" or "statement of claim not required," and in cases where the a
is for recovery of land, and the defence is limited, a further note to that
should be added.

If no time is specified in an order to amend, the amendment must be
within 14 days.

No writs are to be issued in Probate Division causes, unless on a certificate
the affidavit required by Ord. V. r. 10 [now Ord. V. r. 15], has been filed.

Where appearances are entered in the Central Office in Probate and Admi
Division actions, a list or copy of the appearances entered shall each day be addr
and sent to the principal registrars of the Probate and Admiralty Divisions.

list to be made out at the close of the day by one of the junior clerks in the writ, &c., department.

If a solicitor has caused an appearance to be entered by mistake, the mistake may be rectified with the consent in writing of the solicitor for the plaintiffs, and on the fiat (on the production of such consent) of a practice master to be given on a præcipe with a 2*s.* 6*d.* (search) stamp.

A defendant in person may change his address for service (without order to change address) by leave of master, but must forthwith give notice to the other side.

In the case of infants the appearance is accepted without any authority or order; an order being obtained by the defendant's solicitor after the appearance has been entered.

In the case of a married woman, an order to defend separately must be obtained *before* appearance is entered. [*This no longer applies, see* ante, Ch. CI.]

If a writ of summons has been lost the filed copy may, for the purpose of amendment, or for any other purpose, be treated as a duplicate, but only by leave of a practice master, and on the party giving an undertaking to produce the original at the central office when found.

Writs of summons issued before the Judicature Acts came into force may be renewed without an order.

A female plaintiff must be described as "spinster," "married woman," or "widow," and if an infant, as an infant.

Where an infant or married woman is plaintiff the authority of the next friend (duly attested) must be filed before the writ of summons can be issued. [*This no longer applies in the case of a married woman, see* ante, Ch. CI.]

Substituted Service. Affidavit of Service.

Unless the order shall otherwise direct, a copy of the order and of the writ shall be deemed to have been served on the day following the day on which a prepaid letter containing such copy shall have been posted.

Subpœnas.

Subpœnas remain in force only till the end of the sitting or assize for which they were issued. A new writ must afterwards be issued or the former writ may be (at the option of the parties) altered as to date and sitting, or assize, and re-issued as a new writ.

The date of return in the writ and præcipe may, before service, be amended without the direction of a master, and without fee, provided the amended date be within the sitting or assize for which the subpœna issued.

A subpœna in an interpleader issue should be headed in the title of the original action, and in the title of the interpleader issue, and should be applied for in, and issued out of, the room in which the writ of summons in the original action was issued.

Removal by Appearance to London of Actions commenced in District Registries.

A fresh London distinctive mark to be given.

No separate district registry cause book to be kept.

No letter need be sent to the district registrar.

Writs of summons issued out of a district registry cannot be amended by order or fiat of master unless the action has been removed to London by appearance or otherwise.

No writ issued out of a district registry can be amended in the central office unless the duplicate filed in the district registry has been previously received in the central office.

If it becomes necessary to send to London (for amendment or otherwise) the copy writ filed in the district registry, authority may be given to send the copy writ to the central office by sealing a duplicate of the præcipe for appearance, which shall be transmitted to the district registrar by the solicitors concerned.

Distringas.

When the settlement comprises more than one sum, and the sums are in the
or securities of different companies, a separate affidavit and notice should be
for each company, and the affidavit should be that the funds comprise "an
others" the sum of, &c. [specifying the sum in the books of the one company
a stamp of 10*s.* will be required for each separate notice.

If there are more sums than one, but all in the books of the Bank of Engla
in the books of any one company, one affidavit and notice will be sufficient
the sums.

In actions not specifically assigned to the Chancery Division by the Judi
Act, 1873, s. 34 (*i. e.*, so called common law actions brought in the Ch
Division), no certificate of lower scale shall be given out till after appearanc
the cause books such actions shall be distinguished by the letters L.S.

When deposited documents, or documents on the file, are ordered to be del
to a solicitor, on his undertaking to return them, he must sign a receipt and
taking to return (which may be endorsed on the order), and leave the orde
endorsement at the central office to be returned to him on his bringing bac
documents. The signature of the solicitor must be witnessed by his clerk,
someone known to the officer delivering out the documents.

Pleadings and Documents filed in Default.

None of these documents will be placed in the bundles containing the w
summons and pleadings filed on entering judgment, but will be made up into tw
of separate bundles.

The first containing all statements of claim filed in default.

The second containing summonses, warrants to tax, notices, and miscell
documents.

All these documents must have the date of filing and the name of the def
against whom they were filed written on them, and be entered in the cause
under the head of pleadings, such entry to show the date of filing, nature of
ment, and name of defendant against whom they are filed.

None of these documents will (for the present) be delivered out without an
but any defendant against whom documents have been filed may, after appe
inspect the same without fee.

As to filing generally.

In the Chancery Division, judgments, orders, notices of motion for attac
and other documents requiring personal service, cannot be filed in default of a
ance without an order or leave of a master, and no pleadings or other doc
can be filed under Ord. XIX. r. 6, unless an affidavit of service under Ord.
rr. 2 and 9 [now Ord. XIX. r. 10, and Ord. XIII. rr. 2 and 12], or an offic
thereof, be first produced to the officer.

Orders and Judgments.

When parties have not drawn up their orders on the day of the hearing
summons, the solicitor shall, before having his order issued, take it to the
office, and having endorsed on the back the words "the affidavits referred to
are on the file," the seal will be affixed to certify that the affidavits are filed.
certificate will have the same effect as producing the affidavits on drawing the

As to County Court certificate of result of trial, no fee to be charged for se

Judgment may be signed on a certificate of "no affidavit filed in answer to
rogatories," or on a certificate of non-payment of money into Court
affidavit.

On entering judgments under Ord. XLI. r. 1, in actions in the Chancery Di
when drawn up by the chancery registrars, the engrossment of the ju

together with the pleadings to be filed shall be brought to the writ appearance and judgment department, and the officer receiving the same shall make a note in the margin of the engrossment that the pleadings have been filed, and shall authenticate such note with the small seal of the office, and return the engrossment to the solicitor.

The date of the judgment as shown by the engrossment of the order and the date of leaving the pleadings shall be entered in the cause book.

The solicitor on leaving the pleadings must endorse thereon and sign a certificate in the words or to the effect following:—

"I certify that these are all the pleadings required to be left for filing."

When judgment is signed under Ord. XLI. rr. 4 and 5 [now Ord. XLI. rr. 6 and 7], on any order, certificate, or other document, such document shall be filed.

Original stamped judgment to be filed and office copy to be delivered out at 6*d.* a folio. The judgment need not be signed by the solicitor entering it.

If judgment removed from Lord Mayor's Court the fixed cost of removal to be one guinea in all cases.

An allocatur for costs is to be placed on a certificate in the form settled.

Judgments are to be numbered consecutively in each alphabetical division in the right-hand corner, and the number entered in the cause book.

In cases where the plaintiff is entitled to a final judgment as to part of his claim, and to an interlocutory judgment as to the remainder, one judgment only is necessary, final as to part and interlocutory as to the rest, and one fee paid.

In the case of cross judgments in the same action where after a trial there is a direction for judgment for plaintiff against some of the defendants, and for some of the defendants against the plaintiff, and also for some of the defendants against the others, the whole direction may be embodied in one judgment, and the different parties may take office copies for use.

Date of filing of pleadings filed on entering judgment and of certificates of costs are to be entered in cause books and on the documents.

As to Costs on Judgments for Default of Appearance.

	£	*s.*	*d.*
In town cases	3	14	0
In country and agency cases and cases in which service effected beyond five miles from General Post Office, St. Martin's-le-Grand.....	4	6	0

And 6*s.* in addition for each service beyond one defendant.

The above allowances include all mileage.

As to the Costs of removing Judgments from Inferior Courts for Purposes of Execution.

The order should direct that the party removing the judgment have his costs of and relating to the removal (to be taxed).

As to Common Pleas Judgments between November, 1875, and April, 1880.

Any office copy required may be made from the copy filed in the office and issued as an office copy of the original judgment, unless there shall be some special reason against doing so, in which case the parties shall be referred to a practice master.

As to writs of attachment issued in pursuance of an order for making default in payment of a sum of money made in any case excepted by the 4th section of the Debtors Act, 1869, from the operation of that section, these should have a note stating that the writ does not authorize an imprisonment for any longer period than one year.

NOTE.—All questions of practice, sufficiency of affidavits, &c., are to be referred to a practice master, and not to any other master.

10th May,

Memorandum of Appearance.

When a memorandum of appearance by a defendant is handed in wi
previous search for judgment (for which search the proper fee should be tak
it is afterwards found that judgment has been already signed, the appearan
not be entered in the cause book, and the stamp on the memorandum of app
must be retained as a used stamp, and not treated as fit for allowance. Th
cate is not to be sealed, but the party who has handed in the memorandu
desires to know, at the time, whether judgment has been already signed, ma
informed without further payment. A note should, in such cases, be made
cause book that a memorandum of appearance was brought in after ju
signed, and the fee should be accounted for amongst the appearance fees.

A TABLE OF FEES

To be taken by the SHERIFFS, UNDER-SHERIFFS, DEPUTY-SHERIFFS, SHERIFFS' AGENTS, BAILIFFS, *and others the Officers or Ministers of Sheriffs in England and Wales, pursuant to the Statute of* 1 *Vict. c.* 55 (*a*).

For every Warrant which shall be granted by the Sheriff to his officers upon any Writ or Process :—[See *post*, p. 1704, as to the charge where there are several defendants.]

	£	*s.*	*d.*
In London and Middlesex	0	2	6
And on Crown and Outlawry process, an additional	0	2	6
In all other counties where the most distant part of the county shall not exceed 100 miles from London (*b*)			
Not exceeding 200 miles	0	5	0
Exceeding 200 miles	0	6	0
For an arrest in London	0	7	0
In Middlesex, not exceeding a mile from the General Post Office	0	10	6
Not exceeding seven miles from same place	1	1	0
In other counties, not exceeding a mile from officer's residence	0	10	6
Not exceeding seven miles	1	1	0
Exceeding seven miles	1	11	6
For conveying the defendant to gaol from the place of arrest, *per mile*	0	1	0
For an undertaking to give a bail bond	0	10	6

For a Bail Bond—Deposit in lieu of Bail (*c*).

If the debt shall not exceed £50	0	10	6
Ditto £100	1	1	0
Ditto £150	1	11	6
Ditto £300	2	2	0
Ditto £400	3	3	0
Ditto £500	4	4	0
If it shall exceed £500	5	5	0
For receiving money under the statute upon deposit for arrest, and paying the same into Court, if in London or Middlesex	0	6	8
If in any other county	0	10	0

For Filing the Bail Bond.

If the arrest be made in London or Middlesex	0	2	0
If in any other county	0	4	0

(*a*) See the statute, Vol. 1, p. 36; and as to sheriffs' fees and poundage, &c. in general, Vol. 1, p. 825. So much of the table of fees as relates to process at the suit of the Crown was annulled by R. T. 10 V. See 9 Q. B. 599.

(*b*) By a subsequent regulation of the judges, it is provided, that, where there are several defendants in a writ of capias, and warrants are issued thereon by the under-sheriff against more than one defendant, no more shall be charged in any case for each warrant after the first than 2*s.* 6*d.* See post, p. 1704.

(*c*) As to the present practice as to arrest of a defendant before judgment, and the proceedings thereon, see Vol. 2, Ch. CXXVII.

Assignment of Bail or other Bond.

If in London or Middlesex .....
If in any other county, including postage .....
For the return to any writ of Habeas Corpus, if one action .....
And for each action after the first .....
For the bailiff to conduct prisoner to gaol .....*per diem*
And travelling expenses .....*per mile*
For searching offices for detainers (*d*) .....
Bailiff's messenger for that purpose (*d*) .....

Bailiffs executing Warrants, &c.

To the bailiffs, for executing warrants on extent, capias utlagatum, levari facias, fieri facias, ca. sa., ne exeat, attachment, elegit, writ of possession, forfeited recognizance, process from pipe office, and other like matters, for each, if the distance from the sheriff's office or the bailiff's residence do not exceed five miles (*e*) .....
If beyond that distance (*f*) .....*per mile*
On Distringas in London .....
In Middlesex, not exceeding five miles from General Post Office ....
Exceeding five miles .....
In other counties, not exceeding five miles from officer's residence ..
Exceeding five miles .....
For each man left in possession, when absolutely necessary (*g*)—
If boarded .....*per diem*
If not boarded .....*per diem*
For every sale by auction (*h*), notwithstanding the defendant should become bankrupt or insolvent, where the property sold does not produce more than 300*l.*, 5 per cent.—400*l.*, 4 per cent.—500*l.*, 3 per cent.—and where it exceeds 500*l.*, 2½ per cent.
For the certificate of sale to save auction duty .....
Bond of indemnity, besides stamps .....
Certificate of execution having issued for record .....

On Writs of Trial and Inquiry.

For a deputation .....
On lodging writ for entering cause and warrant for summoning jury, which fee shall be forfeited in case of countermand of trial .....

On Trial or Inquisition.

Sheriff for presiding .....
Bailiff for summoning jury, and attendance in Court .....
And if held at the office of the under-sheriff—
For hire of room, if actually paid, not exceeding .....
For travelling expenses of under-sheriff from his office to place where trial or inquisition held .....*per mile*

(*d*) This does not apply to the case of a fi. fa.: *Masters* v. *Lowther*, 21 L. J., C. P. 130.

(*e*) On the execution of a fieri facias, the defendant requested that a man might not be put in possession, and agreed to pay the possession money; the bailiff charged three days' possession money, and 1*s.* mileage; it was held upon an application for an attachment, that the agreement of the defendant was an answer as to the possession money, but that the charge of 6*d.* per mile each way was illegal: *Gill* v. *Jose*, 2 Jur., N. S. 860, Q. B. On the execution of a ca. sa. the sheriff's not entitled to charge for an nor for conducting the party a gaol: *Cooper* v. *Hill*, 6 C. B., N 28 L. J., C. P. 311.

(*f*) See *Gill* v. *Jose*, 6 El. & where in a particular county it the custom to take 1*s.* per mile, held that only 6*d.* could be taken

(*g*) *Ex p. Sims*, 4 Ch. D. 521;

(*h*) See *Phillips* v. *Lord Cant* M. & W. 619; *Marshall* v. *Hicks* 15: *Braithwaite* v. *Marriott*, Ex. 24.

Bail or other Bond. £ s. d.

		0	5
e		0	7
rpus, if one action		0	12
		0	2
ol	per diem	0	10
	per mile	0	1
		0	1
		0	2

ing Warrants, &c.

n extent, capias utlagatum, levari			
achment, elegit, writ of possession,			
pipe office, and other like matters,			
iff's office or the bailiff's residence			
		1	1
	per mile	0	0
		0	5
iles from General Post Office		0	5
		0	10
e miles from officer's residence		0	5
		0	10
bsolutely necessary (g)—			
	per diem	0	3
	per diem	0	5
thstanding the defendant should			
the property sold does not produce			
per cent.—500*l.*, 3 per cent.—and			
uction duty		0	2
		1	10
ied for record		0	5

Trial and Inquiry.

		1	1
nd warrant for summoning jury,			
countermand of trial		0	4

or Inquisition.

		1	1
iance in Court		0	4
nder-sheriff—			
exceeding		0	10
riff from his office to place where			
	per mile	0	1

execution of a ca. sa. the sheriff's office not entitled to charge for an assist nor for conducting the party arrest gaol: *Cooper* v. *Hill*, 6 C. B., N. S. 28 L. J., C. P. 311.

(*f*) See *Gill* v. *Jose*, 6 El. & Bl. where in a particular county it had the custom to take 1*s.* per mile, and it held that only 6*d.* could be taken.

(*g*) *Ex p. Sims*, 4 Ch. D. 521; 5 Ex. D. M. & W. 619; *Marshall* v. *Hicks*, 10 15; *Braithwaite* v. *Marriott*, 32 L. Ex. 24.

	£	s.	d.
To bailiff, from his residence ..... per mile	0	0	6
In all cases in which it shall appear to the Master that a saving of expense has accrued to the parties by reason of a writ of trial having been executed by deputation, the fee for such deputation shall be allowed. [*Writs of trial are now abolished.*]			
On Writs of Extent, Elegit, Capias, Utlagatum, and others of the like nature; for summoning the jury, use of room, presiding at the inquisition, &c.	2	2	0
Jury			
For travelling expenses of under-sheriff from his office to the place of inquisition	0	12	0
For drawing and engrossing the inquisition ..... per mile	0	1	0
For a summons for the attendance of witness ..... per folio	0	1	6
	0	5	0

[*As to the apportionment of the travelling expenses of the under-sheriff and bailiff, see post*, p. 1704.]

In Replevin (i).

[*Bond, see post*, p. 1704.]

Precept to bailiff			
Notice for service on defendant	0	2	6
Broker, where the sum demanded and due shall exceed 20*l.*, and shall not exceed 50*l.*, for appraisement and affidavit of value	0	2	6
Where it shall exceed 50*l.*	0	10	6
And his travelling expenses from his residence to the place where the goods are	1	1	0
Bailiff for summoning parties and delivering goods to tenant ..... per mile	0	0	6
And his travelling expenses same as a broker.	1	1	0
For the warrant, record, and return of a re. fa. lo., accedas ad curiam, pone, or writ of false judgment			
For writ of retorno habendo	0	16	6
	0	4	6

In Scire Facias, Service of Capias, Outlawry, Error, Supersedeas, &c.—Return of Writs.

For each summons on a writ of sci. fa., or for the service of writ of capias where no arrest			
And mileage	0	5	0
For recording each demand or proclamation under writs of outlawry ..... per mile	0	1	0
For bailiff for making each demand or proclamation on writs of outlawry in London and Middlesex	0	2	0
In other counties	0	2	6
And travelling expenses, if the distance shall exceed five miles, then for every mile beyond that distance	0	5	0
For any supersedeas,] writ of error, order, liberate or [discharge to any writ or process, or for the release of any defendant in custody (unless in the prison of the county) or of goods taken in execution] (*k*)	0	0	6
For the return of any writ or process, and filing the same, exclusive of the fee paid on filing	0	4	6
	0	1	0

(*i*) The registrar of the County Court grants replevins. See ante, p. 1254.

(*k*) The parts within brackets are not applicable where the debt and costs are paid after the seizure under a fi. fa.: *Masters* v. *Lowther*, 21 L. J., C. P. 130.

Jury Process—Sheriff's attendance in Court, &c.

	£	s.
For return to common venire (*l*)	0	3
The like to special	0	5
The like on distringas or habeas corpus for common jury	0	12
The like for special jury	0	14
The like with a view	1	0
The like to traverse venire	0	14
For attendance naming special jury	2	2
Twenty-four warrants to summon special jury	1	4
For bailiff for summoning each special juror	0	2
Sheriff attending in Court (*m*)	1	1

For attending a view, the fees as allowed by rule of Court, Trinity Term, 7 Geo. 4, 1826 (*n*).

For any duty not herein provided for, such sum as one of the Masters of the Court of Queen's Bench or Exchequer, or one of the Prothonotaries of the Court of Common Pleas, may upon special application allow (*o*).

[*Signed by all the Judges.*]

Bond in Replevin.

Instead of the allowance of the fees upon the same scale as the bail bond, the fee of one pound one shilling only is allowed, whatever be the amount, if above 20*l.* 1 1

Fees on Writs of Trial and Inquisition.

The travelling expenses of the under-sheriff from his office, and of the bailiff from his residence, to the place where the trial or inquisition is held, are to be apportioned rateably to the parties, if more than one trial or inquisition to be held at the same time and place.

[*Signed by all the Judges.*]

Where there are several defendants in a writ of capias, and warrants are issued thereon by the under-sheriff against more than one defendant, no more shall be charged in any case for each warrant after the first, than two shillings and sixpence.

[*Signed by eight of the Judges.*]

By *R. T. T.*, 1864—It is ordered, that from and after the last day of this present Trinity Term, the following fees may be taken by the sheriffs, under-sheriffs, deputy-sheriffs, sheriffs' agents, bailiffs, and others the officers or ministers of the sheriffs in England and Wales, pursuant to the statute of 1st Victoria, chapter 55, intituled "An Act for regulating the Fees payable to Sheriffs upon the Execution of Civil Process."

	£	s.
By sheriff for attending in Court on the trial of every common jury cause or issue from the party who entered the same for trial, the sum of	0	10
For attending in Court on the trial of every cause or issue tried by a special jury, summoned by precept under the 10th section of the Common Law Procedure Act, 1852, from the party at whose instance the same was so tried, the sum of	1	1

(*l*) As to jury process being now abolished, see Vol. 1, p. 602. See *Bennett* v. *Thompson*, 2 Jur., N. S. 613, Q. B., as to the sheriff now charging these fees.

(*m*) See R. T. T. 1864, infra.

(*n*) See R. 49, H. T. 1853, noticed Vol. 1, p. 610.

(*o*) Ex mero motu, the Master has power to allow a charge for such d... Under this it seems that the expense of keep of cattle seized by the sheriff may be allowed: *Gaskel* v. *Sefton*, 14 M. & W. 802. See Vol. 1, p. 825, n. (*k*).

COUNTY COURT SCALE OF COSTS.

[County Court Rules, 1875.]

A Scale of Costs and Charges to be paid to Solicitors in ACTIONS under 20*l.*,

As well between Party and Party as between Solicitor and Client, on and after the 2nd of November, 1875.

I.—*In actions where the amount recovered exceeds 40s. and does not exceed 5l.*

	s.	d.
(1.) Instructions for and preparing particulars for an ordinary summons (such particulars to be signed by the solicitor), and attending and entering plaint	3	0
(2.) Attending or acting in Court (9 & 10 Vict. c. 95, s. 91)	10	0
For a default summons instead of item one.		
(3.) Preparing affidavit, swearing and filing, including notice of mode in which payment will be accepted	5	0
(4.) Copy and service of summons, if served by plaintiff's solicitor, or his clerk, within two miles of the place of business of the solicitor	5	0
If beyond that distance, additional for every mile, but not to exceed ten miles	0	6
(5.) Affidavit of service, with copy of summons annexed, attending to file, and entering up judgment by default	6	8

II.—*In actions where the amount recovered exceeds 5l. and does not exceed 10l.*

	s.	d.
(1.) Letter before action	3	4
(2.) Instructions for and preparing particulars for an ordinary summons (such particulars to be signed by the solicitor), and attending and entering plaint	6	8
(3.) Attending or acting in Court (9 & 10 Vict. c. 95, s. 91)	15	0
For a default summons instead of item two.		
(4.) Preparing affidavit, swearing and filing, including notice of mode in which payment will be accepted	6	0
(5.) Copy and service of summons, if served by plaintiff's solicitor, or his clerk, within two miles of the place of business of the solicitor	5	0
If beyond that distance, additional for every mile, but not to exceed ten miles	0	6
(6.) Affidavit of service, with copy of summons annexed, attending to file, and entering up judgment by default	6	8

III.—*In actions where the amount recovered exceeds 10l., and does not exceed 20l.*

	s.	d.
(1.) Letter before action	3	4
(2.) Instructions for and preparing particulars for an ordinary summons (such particulars to be signed by the solicitor), and attending and entering plaint	6	8
(3.) Attending or acting in Court (9 & 10 Vict. c. 95, s. 91)	15	0
(4.) Taxing costs	5	0

For a default summons instead of item two. s. d.

(5.) Preparing, swearing and filing affidavit, including notice of mode in which payment will be accepted 6

(6.) Copy and service of summons, if served by plaintiff's solicitor, or his clerk, within two miles of the place of business of the solicitor 5

If beyond that distance, additional for every mile, but not to exceed ten miles 0

(7.) Affidavit of service with copy of summons annexed, attending to file and entering up judgment by default 6

Note.—[The items of charge numbered 1 and 2, and 1, 2 and 3 the above scales may be charged in the summons in the cases which the charges respectively apply; where the amount claim is larger than the amount recovered, the judge may certify f costs on the scale applicable to the amount claimed if he sh think fit.]

Scales of Costs and Charges to be paid to Counsel and Solicitors in

ACTIONS above £20,

As well between Party and Party as between Solicitor and Clie on and after 2nd November, 1875.

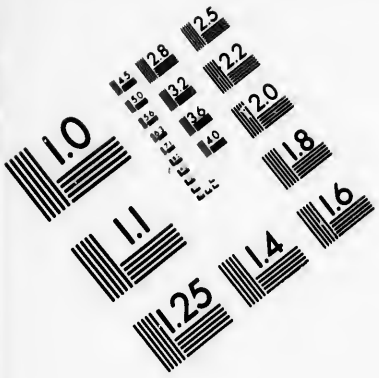
	Lower Scale.*			Higher Scale.*	
	£	*s.*	*d.*	£	*s.*
1. Letter before action	0	3	6	0	3
2. Instructions to sue or defend	0	6	8	0	13
3. Application for substituted service or service out of England ..... Service, sum allowed by judge.	0	4	0	0	6
4. Perusing deeds and documents when long, not exceeding		—		2	2
5. Attendance and entering plaint, including particulars and copies, such particulars and copies being signed by the solicitor	0	13	4	0	13
6. Where special particulars are required under Order VIII., Rule 7, then in addition to item 5	0	6	8	0	13
7. Preparing affidavit and filing, including notice of mode in which payment will be accepted..	0	6	8	0	6
8. Copy and service of summons, if served by solicitor, or his clerk, within two miles of the place of business of the solicitor	0	5	0	0	5
If beyond that distance, additional for every mile, but not to exceed ten miles.....	0	0	6	0	0
9. Affidavit of service with copy of summons annexed	0	5	0	0	5
10. Attending to file affidavit of service, including entering up judgment by default ..... N.B.—The total amount of these items where applicable to be entered on the summons.	0	3	4	0	6

* See note at end of scale.

	Lower Scale.			Higher Scale.		
	£	*s.*	*d.*	£	*s.*	*d.*
11. Attending lodging Judge's order, and preparing statement of cause of action or defence, including copies, and lodging same with registrar, if signed by attorney (sections 7 and 10 of "The County Courts Act, 1867")	0	13	4	0	13	4
12. Examining and taking minutes of evidence of each witness afterwards allowed by the Judge If more than six folios, every additional folio (whether counsel employed or not)	0	1	0	0	1	0
13. Drawing brief for counsel, per folio	0	1	0	0	1	0
14. Attending counsel therewith	0	3	4	0	6	8
15. Fee to counsel and clerk, sum paid not exceeding	3	5	6	5	10	0
16. If conference with counsel allowed, appointing it and attending counsel	0	6	8	0	13	4
17. Fee to counsel and clerk, on conference	1	6	0	1	6	0
18. Attending Court on trial, with counsel	1	1	0	1	10	0
19. Attending Court and conducting cause, where no counsel employed	2	0	0	2	0	0
20. Where judgment is deferred, attending Court to hear it	0	6	8	0	6	8
21. Plans, charts, or models where necessary for use at hearing, by special order on taxation, not exceeding	2	2	0	2	2	0
22. Witnesses' expenses, according to scale in force.	0	6	8	0	6	8
23. Attending taxing costs	0	5	0	0	5	0
24. Letters to be allowed once only in action or matter	0	3	6	0	5	0
25. Serving any notice on a party or his solicitor, including copy thereof						
26. If served beyond three miles of registrar's office, reasonable expenses for travelling and maintenance.						
Occasional Costs.						
27. Transfer, lodging order of	0	10	0	0	16	8
28. Notice to produce, notice to admit,—notice of application for a new trial, or to set aside proceedings,—including copies or duplicate originals and service,—and notice of special defence and copies, including particulars, and copies in cases of set-off, and attending registrar of the Court therewith, such notices, particulars, and copies being signed by the solicitor	0	6	8	0	13	4
29. On receipt of notice to produce or admit or to answer interrogatories perusing the same and advising thereon	0	6	8	0	13	4
30. All applications and motions, or attending Court to answer applications and motions under Order XIII.	0	6	8	0	6	8
31. Drawing interrogatories and answer thereto under last-mentioned order	0	5	0	0	5	0
If more than five folios, per folio	0	1	0	0	1	0
32. Attending examination under Order XXIV	0	6	8	0	6	8

	Lower Scale.			Higher Scale.		
	£	*s.*	*d.*	£	*s.*	*d.*
33. Attending inspecting documents	0	6	8	0	6	8 (per hour)
34. Mileage, one way, from the solicitor's place of business to place of inspection of documents, for each mile, not exceeding, unless by special order of Judge, in the whole 20 miles	0	1	0	0	1	0
35. All necessary affidavits, not exceeding five folios, including filing, each	0	5	0	0	5	0
36. For every additional folio	0	1	0	0	1	0
37. Oath; sum paid.						
38. Attending Court for an order to bring up a prisoner to give evidence	0	4	0	0	4	0
39. Attending Court to support or oppose motion for any application, or where no counsel employed	0	13	4	1	1	0
40. Attending in the last-mentioned cases with counsel	0	10	0	0	13	4
41. Fee to counsel and clerk in such cases sum paid (not exceeding)	1	3	6	2	6	8
42. All necessary applications and motions to the Court not otherwise provided for, including instructions and all attendances	0	6	8	0	13	4
43. Solicitor's travelling expenses to attend Court, one way, not exceeding 20 miles, per mile	0	1	0	0	1	0
44. Where in the opinion of the registrar the solicitor cannot return the same night, in addition to the above mileage	1	11	6	1	11	6
45. Any attendance at the office of the registrar, or any attendance upon the opposite party, which the registrar may, upon taxation, think was necessary	0	3	4	0	6	8
46. All costs for letters, and for searches for certificates of births, marriages and deaths, which the registrar may upon taxation think necessary, such sum as the registrar shall deem reasonable.						
47. Fees and copies; (sum paid).						
48. All necessary copies, per folio	0	0	4	0	0	4
49. Preparing admission by defendant	0	3	4	0	6	8
50. Drawing accounts and other documents not included in the foregoing costs, but allowed upon taxation of costs to be necessary, per folio	0	0	8	0	0	8
51. For perusing and adapting old abstracts of title, per sheet	0	3	4	0	3	4
52. Drawing abstracts of additional deeds and documents, per sheet	0	6	8	0	6	8
53. For preparing conditions and contracts of sale, and fair copy, per folio	0	0	8	0	0	8
54. Where condition and contract are not submitted to counsel, in addition to the above there shall be allowed for perusing abstracts, every three sheets	0	3	4	0	3	4
55. Where conditions and contracts are to be settled by counsel, instructions to counsel to accompany abstract, and attendance therewith, or letter	0	6	8	0	6	8

	Lower Scale.	Higher Scale.
	£ s. d.	£ s. d.
56. Fee to counsel and clerk.		
57. Attending sale	1 1 0	2 2 0
58. Where by any proceeding taken by the opposite party it becomes necessary to advise or receive instruction from a client in the progress of an action or matter, for each attendance	0 6 8	0 13 4
59. Where in the course of an action or matter a party suing or sued in a fiduciary or representative character necessarily incurs costs not allowed upon taxation between party and party, the registrar shall apply to the Judge to allow such sums as he may think fit out of any funds in Court applicable to that purpose.		
Case.		
Sections 11 *or* 12 *of the County Courts Act*, 1867.		
60. Drawing case, per folio	—	0 1 0
61. Perusing and settling case prepared by the other party in action, per folio	—	0 0 6
62. Drawing briefs for counsel to argue case	—	1 1 0
63. Attending counsel with brief	—	0 3 4
64. Fee to counsel upon brief, sum paid not exceeding	—	3 5 6
65. Attending Court when counsel employed	—	1 1 0
66. Attending Court when counsel not employed	—	0 15 0
Costs of the Day on Adjournment of Cause.		
67. Solicitor for attending Court where no counsel employed	0 15 0	0 15 0
68. Attending with counsel	0 10 0	0 13 4
69. Refresher fee to counsel and clerk	1 3 6	1 3 6
70. Witnesses' expenses, same as on trial.		
Arbitration.		
71. Attending reference, without counsel, for each sitting	1 0 0	1 0 0
72. Attending reference, with counsel, for each sitting	0 15 0	0 15 0
73. Where sitting exceeds four hours, for every additional hour	0 6 8	0 6 8
74. Fee to counsel and clerk, for each sitting, sum paid, not exceeding	2 4 6	2 4 6
75. Witnesses' expenses, same as on trial.		
Note.—Cost of counsel and solicitor, or of a solicitor on attending reference, shall not be allowed without the order of the Judge; nor shall the costs of more than one sitting be allowed without the order of the Judge.		
New Trial.		
76. Costs to be allowed on the same scale as on the original trial.		



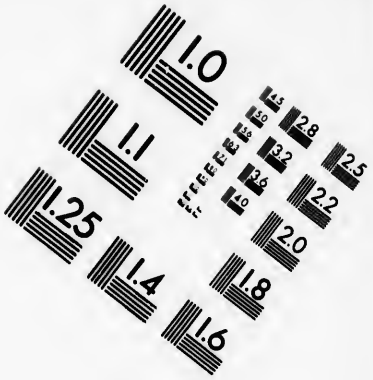
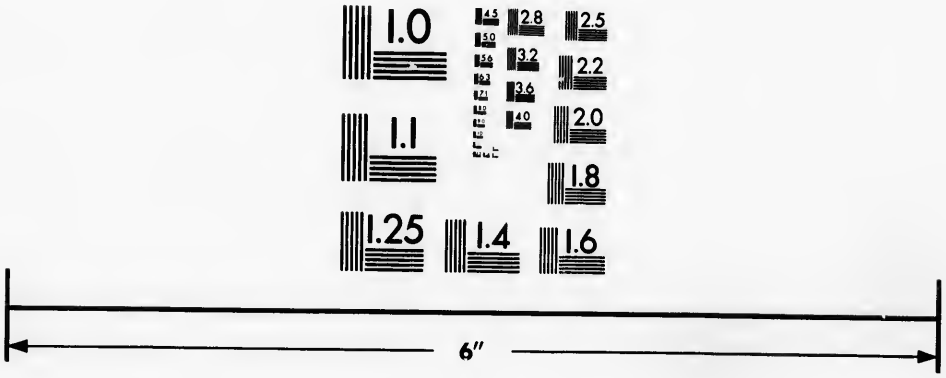
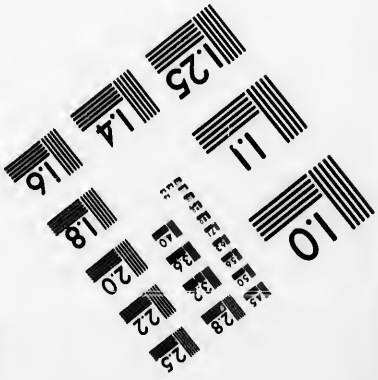


IMAGE EVALUATION TEST TARGET (MT-3)





Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

	Lower Scale.			Higher
	£	s.	d.	£ s
Costs on Appeals.				
77. Preparing notice of appeal, including copies and service	0	5	0	0 1
78. Paying money into Court as deposit on appeal, including notice and service thereof	0	3	0	0
79. Notice of nature and particulars of proposed security, including copies and service	0	5	0	0
80. Preparing case, including copies	0	10	0	1
81. Attending judge to sign, or to settle and sign	0	6	8	0
82. Transmitting and depositing copies of case to party, and with registrar	0	5	0	0
83. Transmitting case and copies to Court of Appeal, including notice thereof to successful party	0	7	0	0
84. Application to Judge for leave to proceed on the judgment	0	5	0	0
85. Depositing order of Court of Appeal, including notice and service thereof	0	3	4	0
Order X.—Counter or other Claim. Any additional costs occasioned by a counter or other claim shall be taxed, and may be allowed as if such claim had been made by a separate action, except that no item shall be allowed for any charge which has been allowed in respect of the original action or the defence thereto.				

The registrar is to tax the bills of costs of defendants upon the lowe
when the subject-matter does not exceed 100*l.* and upon the higher
exceeds 100*l.*, or the action is brought under either section 11 or 12
County Courts Act, 1867; and the bills of costs of plaintiffs upon the
scale when the sum recovered or the subject-matter does not exceed 10
upon the higher when the sum recovered or the subject-matter exceed
or the action is brought under either section 11 or 12 of the County
Act, 1867, unless in either case the Judge shall otherwise order.

Costs in actions under the County Courts Act, 1856, s. 23, shall b
according to the scale of taxation used in the High Court of Justice
as it is directly applicable; and where it is not so applicable, the p
of that scale shall be followed.

As to special allowances of costs, see Order XXXVI.

	Lower Scale.			Higher Scale.		
	£	*s.*	*d.*	£	*s.*	*d.*
ıding copies and	0	5	0	0	10	0
posit on appeal, hereof	0	3	0	0	3	0
ars of proposed service.....	0	5	0	0	5	0
s	0	10	0	1	1	0
settle and sign.. opies of case to	0	6	8	0	6	8
Court of Appeal, ıccessful party.. e to proceed on	0	5	0	0	5	0
Appeal, including	0	7	0	0	7	0
	0	5	0	0	7	0
	0	3	4	0	6	8

r Claim.

ed by a counter or , and may be al- been made by a ; no item shall be which has been original action or

of costs of defendants upon the lower scale exceed 100*l.* and upon the higher when it ught under either section 11 or 12 of the e bills of costs of plaintiffs upon the lower ıe subject-matter does not exceed 100*l.*, and overed or the subject-matter exceeds 100*l.*, ther section 11 or 12 of the County Courts e Judge shall otherwise order.

ınty Courts Act, 1856, s. 23, shall be taxed used in the High Court of Justice, so far where it is not so applicable, the principle

s, see Order XXXVI.

TABLE OF STATUTES.

	PAGE
13 Edw. 1, c. 18	874
7 Hen. 8, c. 4, s. 3	1264
21 Hen. 8, c. 19, s. 3	1264
5 Eliz. c. 9, s. 12	570
28 Eliz. c. 4	824
29 Eliz. c. 4	36
43 Eliz. c. 5	1558
21 Jac. 1, c. 13	901, 1036
7 Jac. 1, c. 5	1046
21 Jac. 1, c. 23, s. 2	1559
s. 3	1561
17 Car. 2, c. 7, s. 2	1264
29 Car. 2, c. 3, s. 10	874
s. 16	804
8 & 9 Will. 3, c. 11, s. 8	1279
9 & 10 Will. 3, c. 15, s. 1	1591, 1651
s. 2	1644
4 & 5 Anne, c. 3, s. 13	364
8 Anne, c. 14, s. 1	841
5 Geo. 1, c. 15, s. 16	829
2 Geo. 2, c. 23	132, 152 (*f*), 153
11 Geo. 2, c. 19, s. 23	1535
12 Geo. 2, c. 13	132
20 Geo. 2, c. 37, s. 2	816
13 Geo. 3, c. 63, s. 40	555
s. 44	556
19 Geo. 3, c. 70, s. 4	1569
ss. 5, 6	1557
46 Geo. 3, c. 37	640
56 Geo. 3, c. 50, s. 1	849
s. 2	850
s. 3	850
3 Geo. 4, c. 39, ss. 1—8	1314—16
6 Geo. 4, c. 50, s. 1	613
s. 22	603 (*l*)
s. 26	626
c. 87, s. 20	468
7 Geo. 4, c. 46	1080
s. 9	1081
s. 12	1085
s. 13	1085
s. 14	1085
10 Geo. 4, c. 44, s. 4	1048
11 Geo. 4 & 1 Will. 4, c. 47, s. 2	1132
c. 70, s. 4	1402
s. 6	190

	PAGE
1 Will. 4, c. 3, s. 3	190
c. 22, s. 1	556
s. 2	558
s. 3	559
s. 6	538
1 & 2 Will. 4, c. 41, s. 19	208, 1047
2 Will. 4, c. 39, s. 20	798
3 & 4 Will. 4, c. 37, s. 36	215
c. 42	25
s. 2	1027, 1113, 1118
s. 12	1465
s. 16	1282
s. 18	1283
s. 20	32
s. 28	663
s. 29	663
s. 30	992
s. 39	1603
s. 40	1610
s. 41	1609
c. 67, s. 2	800
c. 99, s. 7	33
6 & 7 Will. 4, c. 32, s. 4	1100
7 Will. 4 & 1 Vict. c. 30	30
s. 15	98 (*k*)
c. 55	825
s. 2	36
s. 3	36
s. 4	37
s. 5	37
c. 73, s. 2	1088
s. 3	1089
s. 4	1090
s. 8	1091 (*u*)
s. 21	1090
s. 22	1089
s. 24	1090
s. 25	1089
s. 26	1089
s. 27	1089
1 & 2 Vict. c. 45, s. 1	1402
c. 96	1081
c. 110, s. 1	1449, 1555
s. 3	1450
s. 11	875
s. 12	845
s. 14	919

PAGE

1 & 2 Vict.
c. 110, s. 15 920
s. 16 .....901, 921
s. 17 767
s. 22 1569

2 & 3 Vict.
c. 11, s. 5 875
s. 7 775
c. 33, s. 9 52

3 & 4 Vict.
c. 82, s. 1 920
c. 110, s. 8 1104
s. 16 1105

5 Vict. c. 5, s. 4 924

5 & 6 Vict.
c. 45, s. 16 392
c. 97, s. 1 692
s. 2 692
s. 3 .....210, 1049
s. 4 .....210, 1049
c. 98, s. 31 .....829, 898
c. 109, s. 15 1048

6 & 7 Vict.
c. 20 30
c. 73 (Solicitors Act, 1843)
s. 1 40
s. 2 .....44, 71
s. 3 48
s. 4 48
s. 5 58
s. 6 53
s. 8 50
s. 9 51
s. 10 73
s. 11 ..... 51 (*a*)
s. 12 53
s. 13 58
s. 14 73
s. 19 73
s. 21 78
s. 22 78
s. 23 79
s. 24 80
s. 26 82
s. 27 74
s. 28 .....48, 57
s. 29 .....49, 52
s. 31 98
s. 32 91
s. 33 97
s. 36 93
s. 37 ..123, 131, 140, 141, 151, 170
s. 38 .....124, 140
s. 39 .....125, 140
s. 40 125
s. 41 125
s. 42 126
s. 43 196
s. 44 57
s. 46 .....40, 47
s. 47 .....40, 47
s. 48 .....41, 134
c. 82, s. 5 551
s. 6 551

6 & 7 Vict.
c. 82, s. 7 .....
c. 96, s. 1 .....

7 & 8 Vict.
c. 61, s. 1 .....
s. 4 .....
c. 86, s. 4 .....
c. 96, s. 67 .....
c. 101, s. 68 .....
c. 113, s. 47 .....

8 & 9 Vict.
c. 16 (Companies Clauses Consolidation Act, 1845)
s. 1 .....
s. 3 .....
s. 4 .....
s. 8 .....
s. 9 .....
s. 21 .....
s. 22 .....
s. 23 .....
s. 25 .....
s. 26 .....
s. 27 .....
s. 28 .....
s. 36 .....
s. 37 .....
s. 97 .....
s. 100 .....
s. 135 .....
s. 141 .....
c. 113, s. 2 .....
c. 127, s. 8 .....

9 & 10 Vict.
c. 93 (Lord Campbell's Act)
s. 4 .....
c. 95 [illegible]nty Courts Act, 184[illegible]
8 .....
0 .....
s. 119 .....
s. 120 .....

10 & 11 Vict. c. 69 .....

11 & 12 Vict.
c. 44 (Jervis's Act)
s. 1 .....
s. 2 .....
s. 3 .....
s. 4 .....
s. 5 .....
s. 6 .....
s. 7 .....
s. 8 .....
s. 9 .....
s. 10 .....
s. 11 .....
s. 12 .....
s. 13 .....
s. 14 .....
s. 18 .....

12 & 13 Vict.
c. 67 .....
c. 78 .....

13 & 14 Vict.
c. 35, s. 17 .....
c. 61, s. 14 13

13 & 14 Vict. PAGE
c. 61, s. 15 ..... 1527, 1532
s. 16 1563
s. 22 1543
14 & 15 Vict.
c. 25, s. 2 844
c. 99 (Lord Brougham's Evidence Act),
s. 6 513
s. 16 1609
15 & 16 Vict.
c. 73, s. 11 93
c. 76 (C. L. P. Act, 1852)
s. 91 1327
s. 104 602
s. 105 603
s. 106 604
s. 107 604
s. 108 ..... 605, 626
s. 110 ..... 607, 626
s. 112 605
s. 113 605
s. 114 610
s. 115 ..... 611, 625
s. 126 895
s. 127 1194
s. 132 ..... 993, 1286
s. 209 1213
s. 210 ..... 1242, 1244, 1246
s. 211 1246
s. 212 1245
s. 213 ..... 1231, 1233
s. 214 1235
s. 215 1235
s. 216 1236
s. 218 1236
s. 219 1247
s. 220 1248
s. 226 375
c. lxxvii, s. 76 1567
s. 78 ..... 1527 (*k*)
16 Vict. c. xxi, s. 45 1521
16 & 17 Vict.
c. 30, s. 9 568
c. 83, s. 3 632
17 & 18 Vict.
c. 34 570
s. 1 571
s. 2 571
s. 3 571
s. 4 571
s. 5 572
s. 6 572
c. 104 (Merchant Shipping Act, 1854).
s. 165 486
c. 112, s. 20 1105
s. 21 1105
s. 22 1106
s. 23 1106
s. 25 1106
c. 125 (C. L. P. Act, 1854)
s. 3 1664
s. 4 1666
s. 5 1634
s. 6 1666

17 & 18 Vict.
c. 125, s. 7 ..... PAGE 1666
s. 8 1648
s. 9 1668
s. 10 1669
s. 11 1599
s. 12 1592
s. 13 1593
s. 14 1615
s. 15 ..... 1612, 1618
s. 16 1660
s. 17 1594
s. 20 ..... 458, 633
s. 21 633
s. 22 636
s. 23 639
s. 24 638
s. 25 641
s. 26 1598
s. 27 636
ss. 68—74 1274
s. 69 602
18 & 19 Vict.
c. 15, s. 7 1571
s. 11 878
c. 32, s. 9 1573
c. 42, s. 1 468
s. 2 469
s. 3 469
s. 4 470
s. 5 470
19 & 20 Vict.
c. 69, s. 6 1048
c. 97, s. 1 805
s. 2 905
s. 10 958
c. 108 (County Courts Act, 1856)
s. 26 1550
s. 38 1563
s. 39 1563
s. 40 1564
s. 41 1564
s. 42 1544
s. 43 1538
s. 44 ..... 1540, 1564
s. 47 862
s. 49 1571
ss. 63—68 ..... 1254, 1255
s. 68 1527
s. 69 1528
s. 70 1530
s. 71 1530
s. 76 1537
c. 113, ss. 1—6 ..... 1351, 1352
20 & 21 Vict.
c. 39 75
c. 43 1040
c. 77 (Probate Court Act) 131
s. 64 482
s. 65 483
s. 76 1116
s. 79 1113
c. 85 1151
s. 21 1149
s. 25 1151
s. 26 1151

PAGE

20 & 21 Vict.
c. clvii (Mayor's Court of London Procedure Act, 1857)
s. 8 1519
s. 9 1518
s. 10 1547
s. 12 1547
s. 15 1547
ss. 16—20 1568
s. 48 1571
s. 52 1568

21 & 22 Vict.
c. 74, s. 4 .....1538 (*b*)
s. 5 1665
c. 95, s. 16 .....1150 (*a*)
c. 108, s. 6 1151
s. 7 1151
s. 8 1151
s. 9 .....1150 (*g*)
s. 10..... 1152
22 Vict. c. 20, ss. 1—6 .....1352, 1353

22 & 23 Vict.
c. 35, s. 3 .....,1242 (*a*)
s. 11 881
c. 63, ss. 1—5 .....1349, 1350

23 & 24 Vict.
c. 34 (Petitions of Right Act) 1860) 1288
s. 1 1289
s. 2 1289
s. 3 1290
s. 4 .....1289, 1290
s. 5 1290
s. 6 1290
s. 7 1291
ss. 8—12 .....1291, 1292
ss. 13, 14..... 1293
s. 15 1291
s. 16.....1288 (*a*)
s. 17 .....1288 (*a*)
c. 38, s. 1 806
s. 2 806
s. 3 769
s. 4 770
s. 5 .....770, 807
c. 115, s. 2 780
c. 126 (C. L. P. Act, 1860)
s. 1 1246
s. 17 1364
c. 127 (Solicitors Act, 1860)
s. 1 41
s. 2 44
s. 3 46
s. 4 46
s. 6 .....54 (*f*)
s. 7 53
s. 10 54
s. 12 70
s. 14 75
s. 15.....47, 75
s. 18 80
s. 19.....77 (*d*)
s. 20 79
s. 21 81

23 & 24 Vict.
c. 127, s. 22 .....
s. 26 .....
s. 28 .....
s. 30 .....
s. 33 .....
s. 34 .....
s. 35 .....
s. 36 .....
24 & 25 Vict. c. 100, s. 36 .....

25 & 26 Vict.
c. 89 (Companies Act, 1862)
s. 11 .....
s. 13 .....
s. 15 .....
s. 16 .....
s. 18 .....
s. 23 .....
s. 25 10
s. 26 .....
s. 32 .....
s. 35 .....
s. 36 .....
s. 37 .....
s. 39 .....
s. 40 .....
s. 61 .....
s. 62 .....
s. 63 .....
s. 64 .....
s. 67 .....
s. 68 .....
s. 69 .....
s. 70 .....
s. 72 .....
s. 73 .....
s. 85 .....
s. 138 .....
s. 163 .....
s. 192 .....
s. 194 .....
s. 195 .....
s. 197 .....
s. 198 .....
s. 201 .....
s. 202 .....
Table A., 1st Sched.
art. 95 .....
art. 96 .....
art. 97 .....
c. 104, s. 2 .....
s. 10 .....
s. 11 .....
c. 107 .....

26 & 27 Vict.
c. 118 (Companies Clauses 1863), s. 1.....
s. 36 ....
s. 37 ....
s. 38 ....
s. 39 ....

27 & 28 Vict.
c. 32, s. 1 .....
c. 95 .....
s. 2 .....

23 & 24 Vict. PAGE
c. 127, s. 22 82
s. 26 88
s. 28 166
s. 30 25
s. 33 41
s. 34 80
s. 35 41
s. 36 41
24 & 25 Vict. c. 100, s. 36 1460
25 & 26 Vict.
c. 89 (Companies Act, 1862)
s. 11 1054
s. 13 1055
s. 15 1054
s. 16 1054
s. 18 1055
s. 23 1054
s. 25 .....1057, 1065
s. 26 1055
s. 32 1065
s. 35 1054
s. 36 1065
s. 37 1057
s. 39 1059
s. 40 1054
s. 61 1065
s. 62 1065
s. 63 1057
s. 64 1054
s. 67 1058
s. 68 1058
s. 69 1055
s. 70 1057
s. 72 1059
s. 73 1059
s. 85 1054
s. 138 1054
s. 163 1057
s. 192 1057
s. 194 1058
s. 195 1058
s. 197 1059
s. 198 1057
s. 201 1059
s. 202 1060
Table A., 1st Sched.
art. 95 1054
art. 96 1055
art. 97 1054
c. 104, s. 2 .....1185, 1186
s. 10 1
s. 11 1
c. 107 663
26 & 27 Vict.
c. 118 (Companies Clauses Act, 1863), s. 1 1054
s. 36 1065
s. 37 1057
s. 38 1057
s. 39 1057
27 & 28 Vict.
c. 32, s. 1 1054
c. 95 1
s. 2 1

27 & 28 Vict. PAGE
c. 112 (Judgments Act)
s. 1 879
s. 2 880
s. 3 880
s. 4 880
s. 5 881
s. 6 881
s. 7 880
28 & 29 Vict.
c. 99 (County Courts Equity Jurisdiction)
s. 18 1526
c. 126 (Prisons Act, 1865)
s. 3 .....567 (e), 1196 (j)
s. 4 .....568 (e), 1196 (j)
s. 49 1185
s. 50 1186
s. 57....567 (e), 1186, 1196 (j)
s. 58 1186
s. 61 ....567 (e), 1186, 1196 (j)
29 & 30 Vict. c. 109, ss. 97, 98 1460
30 & 31 Vict.
c. 47, s. 2 777
c. 127, s. 3 ..... 1071 (x)
s. 4 1071
s. 5 1071
ss. 6—9 1070
c. 142 (County Courts Act, 1867)
s. 5 681
s. 7 1548
s. 10 1552
s. 11 .....1205, 1567
s. 12 .....1205, 1567
s. 13 1528
s. 31 376
s. 32 .....1550 (m)
s. 35 .....1527 (k)
c. cxxx, ss. 89, 91 1520
31 & 32 Vict.
c. 54 (Judgments Extension Act, 1868) 771
s. 1 771
s. 2 771
s. 3 772
s. 4 773
s. 5 773
s. 6 773
s. 7 773
s. 8 775
c. 71, s. 2 688
s. 3 688
c. 119 (Regulation of Railways Act, 1868)
s. 25 1070
s. 26 530
c. 125, s. 11 ..... 7 (u)
32 & 33 Vict.
c. 19 (Stannaries Act, 1869)
s. 13 1051
c. 38 (Bails Act, 1869) 26
c. 51, s. 2 689
s. 4 .....689 (c)
c. 62 (Debtors Act, 1869)
s. 4 .....889, 941, 942
32 & 33 Vict.
c. 62, s. 5 ..... PAGE
s. 6 787
s. 24 .....1299, 1305
s. 25 1306
s. 26 1314
s. 27 1295
s. 28 1295
c. 68, s. 2 632
s. 3 632
s. 4 633
c. 83 1555
33 & 34 Vict.
c. 23, ss. 6—9 1187
ss. 10—15 1188
ss. 16—20 1189
ss. 21—24 1190
ss. 25—28 1191
ss. 29, 30 1192
ss. 32, 33 1193
c. 28 (Attorneys and Solicitors Act, 1870)
s. 3 126
s. 4 127
s. 5 127
s. 6 127
s. 7 128
s. 8 128
s. 9 128
s. 10 128
s. 11 129
s. 12 129
s. 13 129
s. 14 129
s. 15 130
s. 16 .....130, 159
s. 17 130
s. 18 130
s. 19 .....131, 1025
s. 20 131
c. 77 (Juries Act, 1870)
s. 6 614
s. 8 614
s. 9 614
s. 10 614
s. 11 614
s. 12 616
s. 16 607
s. 17 607
s. 18 607
Sched. 607
c. 97 (Stamp Act, 1870) 615
s. 2 1304
s. 3 ..... 647 (a)
s. 15 49
s. 16 .....647 (o)
s. 41 647
s. 42 50
s. 43 50
s. 59 50
s. 60 82
Sched. 82
34 Vict. c. 18, s. 1 50
34 & 35 Vict. 97
c. 31 (Trade Union Act, 1871) s. 9 1106
c. 45 (Sequestration Act, 1871) 1181

35 & 36 Vict. PAGE
c. 81, s. 1 47
c. 86 (Borough and Local Courts of Record Act, 1872)
s. 2 1514
s. 3 1515
s. 5 25
Sched. r. 9 1572
r. 12 1558

36 & 37 Vict.
c. 66 (Supreme Court of Judicature Act, 1873)
s. 3 ..... 1, 964
s. 4 ..... 2, 964
s. 5 3
s. 12 19
s. 16 3
s. 17 5
s. 18 967
s. 19 ..... 968, 989
s. 22 6
s. 23 ..... 5, 968
s. 24, sub-s. 3 ..... 804, 416
sub-s. 5 ..... 360, 1060
sub-s. 7 5
s. 25, sub-s. 5 1203
sub-s. 6 1365
sub-s. 8 426
sub-s. 11 6
s. 26 139
s. 28 ..... 193 (*n*)
s. 29 197
s. 30 191
s. 31 9
s. 32 9
s. 33 9
s. 34 ..... 9—10
s. 36 412
s. 37 ..... 623 (*a*)
s. 39 ..... 17, 1401
s. 40 15
s. 41 15
s. 45 ..... 970, 1516
s. 46 ..... 17, 1411 (*a*)
s. 47 973
s. 49 ..... 971, 1417
s. 50 1417
s. 52 969
s. 56 1576
s. 57 1576
s. 58 1580
s. 59 1575
s. 60 ..... 1421, 1424
s. 61 1424
s. 62 1424
s. 64 1424
s. 65 ..... 1428 (*q*)
s. 66 1425
s. 67 ..... 681, 1548 (*a*), 1553
s. 75 200
s. 76 202
s. 79 24
s. 82 24
s. 83 1575
s. 84 24

36 & 37 Vict.
c. 66, s. 87 .....
s. 88 .....
s. 89 .....
s. 90 1513,
s. 91 .....
s. 100 .....

37 & 38 Vict.
c. 42 (Building Societies Act, 187
s. 7 110
s. 9 .....
s. 16 .....
s. 17 .....
s. 20 .....
s. 21 .....
s. 22 .....
s. 31 .....
s. 34 .....
s. 35 .....
s. 36 .....
c. 57 (Real Property Limitation Act, 1874)
s. 1 .....
s. 2 .....
s. 3 .....
s. 4 .....
s. 5 .....
s. 6 .....
s. 7 .....
s. 8 .....
s. 9 .....
c. 68 (Attorneys and Solicitors Act, 1874)
s. 4 .....
s. 5 .....
s. 6 .....
s. 7 .....
s. 8 .....
s. 9 .....
s. 10 .....
s. 12 .....

38 & 39 Vict.
c. 50 (County Courts Act, 187
s. 6 .....
c. 55 (Public Health Act, 187
s. 7 .....
s. 259 .....
s. 264 .....
s. 265 .....
s. 311 .....
c. 60 (Friendly Societies Act, 18
s. 21, sub-s. 1 .....
sub-s. 2 .....
sub-s. 3 .....
sub-s. 4 .....
s. 24, sub-s. 2 .....
s. 30 .....
s. 31 .....
c. 77 (Supreme Court of Judicature Act, 1875)
s. 4 .....
s. 7 .....
s. 11 .....
sub-s. 2 .....

36 & 37 Vict. PAGE
c. 66, s. 87 89
s. 88 1512
s. 89 1512
s. 90 ..... 1513, 1592
s. 91 1514
s. 100 230

37 & 38 Vict.
c. 42 (Building Societies Act, 1874)
s. 7 ..... 1100 (*g*)
s. 9 1101
s. 16 1101
s. 17 1101
s. 20 1101
s. 21 1101
s. 22 1101
s. 31 1100
s. 34 1102
s. 35 1103
s. 36 1103
c. 57 (Real Property Limitation Act, 1874)
s. 1 1203
s. 2 1203
s. 3 1204
s. 4 1204
s. 5 1205
s. 6 1205
s. 7 1205
s. 8 967
s. 9 1206
c. 68 (Attorneys and Solicitors Act, 1874)
s. 4 54
s. 5 55
s. 6 56
s. 7 181
s. 8 181
s. 9 181
s. 10 181
s. 12 ..... 88, 90

38 & 39 Vict.
c. 50 (County Courts Act, 1875)
s. 6 1520
c. 55 (Public Health Act, 1875)
s. 7 1096
s. 259 1096
s. 261 1097
s. 265 1097
s. 311 1096
c. 60 (Friendly Societies Act, 1875)
s. 21, sub-s. 1 1096
sub-s. 2 1096
sub-s. 3 1096
sub-s. 4 1096
s. 24, sub-s. 2 1100
s. 30 1100
s. 31 1100
c. 77 (Supreme Court of Judicature Act, 1875)
s. 4 966
s. 7 ..... 1114 (*g*)
s. 11 5–7
sub-s. 2 41

38 & 39 Vict. PAGE
c. 77, s. 12 ..... 976, 988
s. 13 1423
s. 14 40
s. 15 1518
s. 16 200
s. 17 200
s. 20 ..... 451, 602
s. 21 ..... 201, 602
s. 22 17
s. 23 194
s. 24 200
s. 25 200
s. 26 29
s. 34 ..... 411 (*a*)
39 & 40 Vict.
c. 22, s. 11 1107
c. 45 (Industrial and Provident Societies Act, 1876)
s. 10 1104
s. 11 1103
s. 16, sub-s. 2 1104
s. 21 1104
c. 57 194
c. 59 (Appellate Jurisdiction Act, 1876)
s. 3 ..... 996, 998
s. 5 1009
s. 6 995
s. 7 996
s. 8 1009
s. 9 1009
s. 10 997
s. 11 997
s. 15 966
s. 16 989
s. 17 ..... 15, 16 (*c*), 200
s. 19 ..... 965 (*c*)
s. 20 970
s. 22 ..... 1423 (*b*)
40 Vict. c. 9 13
40 & 41 Vict.
c. 21 (Prison Act, 1877) 898
s. 26 1186
s. 27 1186
s. 28 1186
s. 41 1187
c. 25 (Solicitors Act, 1877)
s. 1 41
s. 2 41
s. 3 41
s. 4 42
s. 5 61
s. 6 61
s. 7 62
s. 8 62
s. 9 62
s. 10 63
s. 11 64
s. 12 64
s. 13 45
s. 15 55
s. 16 80
s. 17 ..... 39 (*c*)
s. 18 25

40 & 41 Vict.
c. 25, s. 19 ..... PAGE 42
s. 20 42
s. 21 42
s. 23 42
2nd Sched., Part II. 72, 76, 85
c. 26, s. 6 1058
c. 46, s. 1 ..... 194 (*a*)
c. 62 (Legal Practitioners Act, 1877)
s. 2 90
s. 3 90
s. 4 90
41 & 42 Vict.
c. 54 (Debtors Act, 1878)
s. 1 ..... 890 (*d*), 943
42 Vict.
c. 1 194
c. 11 (Bankers' Books Evidence Act, 1879)
s. 1 ..... 531 (*a*)
s. 2 ..... 531 (*a*)
s. 3 531
s. 4 532
s. 5 532
s. 6 532
s. 7 532
s. 8 532
s. 9 ..... 531 (*a*)
s. 10 ..... 531 (*a*)
s. 11 ..... 531 (*a*)
42 & 43 Vict.
c. 59 (Civil Procedure Acts Repeal Act, 1879) ..... 202, 672 (*a*)
s. 3 787
Sched., Part I. 798
c. 76, s. 4 1057
c. 78 (Judicature (Officers) Act, 1879) 23
s. 4 20
s. 5 20
s. 7 ..... 20 (*e*)
s. 8 26
s. 10 27
s. 11 27
s. 12 ..... 21 (*d*)
s. 13 21
s. 14 23
s. 22 200
s. 29, and Sched. 26
s. 78 202
43 & 44 Vict.
c. 10, s. 4 967
c. 19 (The Taxes Management Act, 1880)
s. 88 844
44 Vict. c. 2, s. 2 967
44 & 45 Vict.
c. 41 (Conveyancing and Law of Property Act, 1881)
s. 14 ..... 1237, 1239
s. 37 1117
s. 67 1238
c. 44 (Solicitors' Remuneration Act, 1881) 131

PAGE

44 & 45 Vict.
c. 58, s. 125 1468
s. 144 1461
c. 59 (Statute Law Revision, &c. Act, 1881) 202
c. 68 (Judicature Act, 1881)
s. 5 13
s. 12 ..... 14, 18
s. 16 31
s. 19 200
s. 23 29
s. 24 40
s. 25 ..... 13 (*e*)
s. 26 25

45 & 46 Vict.
c. 50, s. 170 798
s. 226 1052
c. 57, s. 4 681
c. 61 (Bills of Exchange Act, 1882)
s. 70 404
c. 72, s. 11 ..... 531 (*a*)
c. 75 (Married Women's Property Act, 1882)
s. 1 1148
sub-s. 2 1154
sub-s. 3 1154
sub-s. 4 1154
s. 2 1148
s. 12 1148
s. 13 1155
s. 14 1159
s. 15 1159
s. 17 1160
s. 18 1149
s. 19 1156
s. 22 ..... 1147 (*b*)
s. 23 1149
s. 24 ..... 1148 (*k*)

46 & 47 Vict.
c. 39 (Statute Law Revision Act, 1883) 202
c. 49 (Statute Law Revision and Civil Procedure Act, 1883) ..199, 202, 1514
c. 52 (Bankruptcy Act, 1883)
s. 9 1168
s. 10 1167

46 & 47 Vict.
c. 52, s. 11 .....
s. 30 .....
s. 41 .....
s. 45 882,
s. 46 .....
s. 57 .....
s. 63 .....
s. 83 .....
s. 103 .....
s. 113 .....
s. 114 .....
s. 132 .....
s. 134 .....
s. 137 .....
s. 138 .....
s. 139 .....
s. 140 .....
s. 145 .....
s. 146 78
s. 168 .....
c. 57 (The Patents, Designs and Trade Marks Act, 1883)
s. 26, sub-s. 7.....
s. 29 .....
sub-s. 6 .....
s. 30 .....

47 & 48 Vict.
c. 41 (Building Societies Act 1884) .....
c. 61 (Judicature Act, 1884)
s. 4 .....
s. 5 .....
s. 6 .....
s. 8 .....
s. 9 .....
s. 10 .....
s. 11 ..... 965 (*f*)
s. 12 .....
s. 14 .....
s. 16 .....
s. 17 .....
s. 18 .....
s. 21 .....
s. 22 1
s. 23 .....
s. 24 20

TABLE OF RULES OF THE SUPREME COURT, 1883.

*** *The references here given are to the pages where the rules will be found printed verbatim.* The rules are referred to in the text and notes as "R. of S. C."

PAGE

Ord. I. Form and Commencement of Action.
r. 1 201
r. 2 201

Ord. II. Writ of Summons.
r. 1 .....215, 217, 221
r. 2 216
r. 3 216
r. 4 244
r. 5 248
r. 6.....216, 1202
r. 8 .....220, 799

Ord. III. Indorsement of Claim.
r. 1 221
r. 2 221
r. 3 221
r. 4 226
r. 6.....221, 1230
r. 7 223
r. 8 225

Ord. IV. Indorsement of Address.
r. 1 226
r. 2 227
r. 3 1426
r. 4 1443

Ord. V. Issue of Writs of Summons.
I. Place of Issue.
r. 1.....228, 1426
r. 2 228
r. 3 1426
r. 4 1426
II. Assignment of Causes.
r. 5 217
r. 6 ..... 415, 1408
r. 7 ..... 415, 1409
r. 8 ..... 415, 1409
III. Generally.
r. 10 227
r. 11 228
r. 12 228
r. 13 228
r. 14 217

PAGE

Ord. VI. Concurrent Writs.
r. 1 228
r. 2 229

Ord. VII. Disclosure by Solicitors, &c.
r. 1 .....115, 250
r. 2.....116, 1092
II. Change of Solicitors.
r. 3 109

Ord. VIII. Renewal of Writ.
r. 1 229
r. 2 231
r. 3 231

Ord. IX. Service of Writ
I. Mode.
r. 1 232
r. 2 .....232, 236
II. Particular Defendants.
r. 3 ..... 234, 1159
r. 4 ..... 234, 1137
r. 5 ..... 234, 1144
III. Partners, &c.
r. 6 ..... 234, 1093
r. 7 ..... 234, 1093
r. 8 ..... 235, 1051
IV. Particular Actions.
r. 9 1212
V. Generally.
r. 15 235

Ord. X. Substituted Service 238

Ord. XI. Service out of Jurisdiction.
r. 1 244
r. 2 245
r. 4 246
r. 5 248
r. 6 248
r. 7 248

Ord. XII. Appearance.
r. 1 252
r. 2 252
r. 4 ..... 252, 1427
r. 5 ..... 252, 1427
r. 6 ..... 257, 1427
r. 7 ..... 257, 1427

46 & 47 Vict. PAGE
c. 52, s. 11 1107
s. 30 1168
s. 41 60
s. 45 .....882, 1169
s. 46 1172
s. 57 1165
s. 63 1174
s. 83 1164
s. 103 787
s. 113 1166
s. 114 1168
s. 132 1166
s. 134 1168
s. 137 1166
s. 138 1168
s. 139 1166
s. 140 1166
s. 145 859
s. 146 .....787, 871
s. 168 1168
c. 57 (The Patents, Designs and Trade Marks Act, 1883)
s. 26, sub-s. 7..... 699
s. 29..... 709
sub-s. 6 691
s. 30 858
47 & 48 Vict.
c. 41 (Building Societies Act, 1884) 1102
c. 61 (Judicature Act, 1881)
s. 4 15
s. 5 15
s. 6 18
s. 8 1060
s. 9 1057
s. 10 1078
s. 11 .....965(*f*), 1078
s. 12 1124
s. 14 1228
s. 16 970
s. 17 1060
s. 18 1311
s. 21 15
s. 22 .....1422(*f*)
s. 23 80
s. 24 .....200, 1315

PAGE

Ord. XII.—Appearance—*continued.*
r. 8 254
r. 9 256
r. 10 255
r. 11 255
r. 12 255
r. 13 254
r. 14 254
r. 15 ..... 256, 1094
r. 16 ..... 256, 1094
r. 17 255
r. 18 ..... 119, 258
r. 22 252
r. 25 1213
r. 26 1215
r. 27 1215
r. 28 1215
r. 29 1215
r. 30 ..... 241, 251

Ord. XIII. Default of Appearance.
r. 1 ..... 1137, 1144
r. 2 260
r. 3 260
r. 4 261
r. 5 261
r. 6 262
r. 7 261
r. 8 1216
r. 9 ..... 262, 1216
r. 10 264
r. 11 ..... 259, 1427
r. 12 263
r. 14 1279

Ord. XIV. Summary Judgment.
r. 1 269
r. 2 272
r. 3 273
r. 4 275
r. 5 275
r. 6 275

Ord. XV.
r. 1 ..... 263, 1341
r. 2 ..... 263, 1341

Ord. XVI. Parties.
I. Generally.
r. 1 1015
r. 2 1021
r. 3 ..... 306, 1020
r. 4 1015
r. 5 1016
r. 6 1016
r. 7 1016
r. 8 ..... 1017, 1114
r. 9 1017
r. 11 ..... 416, 1019, 1021
r. 12 1020
r. 13 1023
II. Partners.
r. 14 1092
r. 15 1092
III. Persons under Disability.
r. 16 ..... 1133, 1147
r. 17 1141
r. 18 1138
r. 19 ..... 1138 (*k*)

PAG

Ord. XVI. Parties—*continued.*
r. 20 11
r. 21 11
IV. Paupers.
r. 22 11
r. 23 11
r. 24 11
r. 25 11
r. 26 11
r. 27 11
r. 28 11
r. 29 11
r. 30 11
r. 31 11
V. Administration.
r. 32 10
r. 37 10
r. 39 10
r. 44 11
r. 46 10
VI. Third Parties.
r. 48 4
r. 49 4
r. 50 4
r. 51 4
r. 52 4
r. 53 4
r. 54 4
r. 55 4

Ord. XVII. Change of Parties by Death.
r. 1 10
r. 2 10
r. 3 10
r. 4 10
r. 5 10
r. 6 10
r. 7 10
r. 8 10
r. 9 10
r. 10 10

Ord. XVIII. Joinder of Causes of Action.
r. 1 4
r. 2 12
r. 3 4
r. 4 ..... 405, 11
r. 5 ..... 406, 11
r. 6 4
r. 7 4
r. 8 4
r. 9 4

Ord. XIX. Pleading Generally.
r. 1 2
r. 2 ..... 279, 2
r. 3 ..... 301, 3
r. 4 2
r. 5 2
r. 6 2
r. 7 2
r. 8 2
r. 9 2
r. 10 2
r. 11 2
r. 12 3

PAGE

Ord. XVI. Parties—*continued.*
r. 20 1134
r. 21 1135
IV. Paupers.
r. 22 1182
r. 23 1182
r. 24 1182
r. 25 1183
r. 26 1183
r. 27 1183
r. 28 1181
r. 29 1181
r. 30 1184
r. 31 1181
V. Administration.
r. 32 1018
r. 37 1018
r. 39 1018
r. 44 1140
r. 46 1018
VI. Third Parties.
r. 48 418
r. 49 420
r. 50 421
r. 51 421
r. 52 421
r. 53 422
r. 54 421
r. 55 421

Ord. XVII. Change of Parties by Death.
r. 1 1025
r. 2 1032
r. 3 1032
r. 4 1033
r. 5 1033
r. 6 1034
r. 7 1034
r. 8 1034
r. 9 1034
r. 10 1035

Ord. XVIII. Joinder of Causes of Action.
r. 1 405
r. 2 1207
r. 3 405
r. 4 ..... 405, 1158
r. 5 ..... 406, 1115
r. 6 405
r. 7 406
r. 8 406
r. 9 406

Ord. XIX. Pleading Generally.
r. 1 279
r. 2 ..... 279, 297
r. 3 ..... 301, 310
r. 4 281
r. 5 281
r. 6 380
r. 7 386
r. 8 384
r. 9 279
r. 10 280
r. 11 280
r. 12 300

Ord. XIX. Pleading Generally—*con.* PAGE
r. 13 284
r. 14 285
r. 15 282
r. 16 ..... 283, 312
r. 17 ..... 299, 313
r. 18 312
r. 19 283
r. 20 283
r. 21 286
r. 22 286
r. 23 286
r. 24 286
r. 25 287
r. 26 ..... 282, 319
r. 27 318
r. 28 394

Ord. XX. Statement of Claim.
r. 1 288
r. 4 293
r. 5 294
r. 6 294
r. 7 292
r. 8 293

Ord. XXI. Defence and Counter-claim.
r. 1 300
r. 2 300
r. 3 300
r. 4 300
r. 5 284
r. 6 297
r. 7 297
r. 8 297
r. 9 299
r. 10 306
r. 11 308
r. 12 308
r. 13 308
r. 14 309
r. 15 310
r. 16 307
r. 17 309
r. 19 300
r. 20 285
r. 21 1219

Ord. XXII. Payment into Court.
r. 1 ..... 342, 1279
r. 2 345
r. 3 346
r. 4 344
r. 5 347
r. 6 351
r. 7 348
r. 8 ..... 354, 410
r. 9 343
r. 11 346
r. 15 1136
r. 16 1137

Ord. XXIII. Reply.
r. 1 312
r. 2 313
r. 3 313
r. 4 313

Ord. XXIII. Reply—*continued.* PAGE
r. 5 313
r. 6 285

Ord. XXIV. Pending the Action.
r. 1 320
r. 2 321
r. 3 322

Ord. XXV. Proceedings in lieu of Demurrer.
r. 1 324
r. 2 324
r. 3 325
r. 4 325
r. 5 325

Ord. XXVI. Discontinuance.
r. 1 ..... 337, 624
r. 2 ..... 340, 600, 624
r. 3 340
r. 4 341

Ord. XXVII. Default of Pleading.
r. 1 326
r. 2 328
r. 3 331
r. 4 331
r. 5 332
r. 6 331
r. 7 1220
r. 8 1220
r. 9 332
r. 11 ..... 328, 757
r. 12 ..... 328, 757
r. 13 327
r. 14 ..... 333, 757
r. 15 333

Ord. XXVIII. Amendment.
r. 1 316
r. 2 315
r. 3 315
r. 4 316
r. 5 316
r. 6 316
r. 7 318
r. 8 315
r. 9 316
r. 10 316
r. 11 ..... 442, 768, 1399
r. 12 ..... 442, 768
r. 13 515

Ord. XXX. Summons for Directions.
r. 1 335
r. 2 336
r. 3 336

Ord. XXXI. Discovery.
r. 1 515
r. 2 516
r. 3 524
r. 4 518
r. 5 517
r. 6 520
r. 7 518
r. 8 519
r. 9 520
r. 10 523
r. 11 524
r. 12 491
r. 13 496

PAGE

Ord. XXXI. Discovery—*cont.*
r. 14 507
r. 15 505
r. 16 506
r. 17 506
r. 18 506
r. 19 511
r. 20 492
r. 21 525
r. 22 525
r. 23 526
r. 24 520
r. 25 491
r. 26 491
r. 27 495
r. 27a 495
r. 28 493

Ord. XXXII. Admissions.
r. 1 ..... 284, 477
r. 2 479
r. 3 480
r. 4 477
r. 5 478
r. 6 757
r. 7 ..... 478, 482
r. 8 487
r. 9 480

Ord. XXXIII. Issues, Inquiries, and Accounts.
r. 1 ..... 314, 1341
r. 2 1341
r. 3 1342
r. 4 1342
r. 5 1342
r. 6 1342
r. 7 1342
r. 8 1342
r. 9 1342

Ord. XXXIV. Special Case.
r. 1 1343
r. 2 1343
r. 3 1344
r. 4 1345
r. 5 1345
r. 6 1344
r. 7 1345
r. 8 1345

II. Issues of Fact.
r. 9 1347
r. 10 1347
r. 11 1347
r. 12 1348

Ord. XXXV. District Registries.
r. 1 1425
r. 2 1427
r. 3 1430
r. 4 1430
r. 5 1425
r. 6 ..... 1424, 1425
r. 7 1427
r. 8 1428
r. 9 1428
r. 10 1428
r. 11 1423
r. 13 1429
r. 14 1429

Ord. XXXV. District Registries—c
r. 15 .....
r. 16 .....
r. 17 .....
r. 18 .....
r. 19 .....
r. 20 .....
r. 22 .....
r. 23 .....
r. 24 .....

Ord. XXXVI. Trial.
I. Place.
r. 1 .....
r. 1a .....

II. Mode of Trial.
r. 2 .....
r. 4 5
r. 5 .....
r. 6 5
r. 7 .....
r. 8 .....
r. 9 .....
r. 10 .....

III. Notice and Entr
r. 11 .....
r. 12 3
r. 13 .....
r. 14 .....
r. 15 .....
r. 16 5
r. 17 .....
r. 18 .....
r. 19 .....
r. 20 .....

IV. Entry in District Registr
r. 22a .....
r. 22b .....
r. 23 .....
r. 24 .....
r. 25 .....
r. 26 .....
r. 27 .....
r. 28 .....

V. London and Middlesex
r. 29 .....

VI. Papers.
r. 30 .....

VII. Proceedings.
r. 31 .....
r. 32 .....
r. 33 .....
r. 34 .....
r. 35 .....
r. 36 .....
r. 37 .....
r. 38 .....
r. 39 .....
r. 40 .....
r. 41 .....
r. 42 .....

VIII. Assessors,
r. 43 .....
r. 44 .....
r. 45 .....

PAGE

Ord. XXXV. District Registries—*cont.*
r. 15 1429
r. 16 1429
r. 17 1430
r. 18 1430
r. 19 1431
r. 20 1431
r. 22 1431
r. 23 1424
r. 24 1426

Ord. XXXVI. Trial.
I. Place.
r. 1 .....
r. 1a .....
II. Mode of Trial.
r. 2 .....
r. 4 583,
r. 5 .....
r. 6 583,
r. 7 .....
r. 8 .....
r. 9 .....
r. 10 .....
III. Notice and Entry.
r. 11 .....
r. 12 327,
r. 13 .....
r. 14 .....
r. 15 .....
r. 16 580,
r. 17 .....
r. 18 .....
r. 19 .....
r. 20 .....
IV. Entry in District Registries.
r. 22a .....
r. 22b .....
r. 23 .....
r. 24 .....
r. 25 .....
r. 26 .....
r. 27 .....
r. 28 .....
V. London and Middlesex.
r. 29 .....
VI. Papers.
r. 30 .....
VII. Proceedings.
r. 31 .....
r. 32 .....
r. 33 .....
r. 34 594,
r. 35 .....
r. 36 .....
r. 37 .....
r. 38 .....
r. 39 .....
r. 40 .....
r. 41 .....
r. 42 .....
VIII. Assessors, &c.
r. 43 .....
r. 44 .....
r. 45 .....

Ord. XXXVI. Trial—*continued.* PAGE
r. 46 1579
r. 47 1580
r. 48 1580
r. 49 1580
r. 50 1581
r. 51 1581
r. 52 1581
r. 53 1582
r. 54 1582
r. 55 1582
IX. Writ of Inquiry.
r. 56 1331
r. 57 1327
r. 58 ..... 664, 1336

Ord. XXXVII. Evidence.
I. Generally.
r. 1 .....452, 533
r. 3 452
r. 4 ..... 452, 1443
II. Examination of Witnesses.
r. 5 533
r. 6 547
r. 6a 554
r. 7 537
r. 8 537
r. 9 537
r. 10 538
r. 11 538
r. 12 539
r. 13 537
r. 14 538
r. 15 538
r. 16 539
r. 17 539
r. 18 540
r. 19 538
r. 20 537
r. 21 542
r. 22 538
r. 23 539
r. 24 539
r. 25 452
III. Subpœna.
r. 26 561
r. 27 560
r. 28 .....561, 1412
r. 29 561
r. 30 567
r. 31 561
r. 32 562
r. 33 562
r. 34 562
r. 39 542
r. 40 543
r. 41 543
r. 42 543
r. 43 543
r. 44 543
r. 45 543
r. 46 543
r. 47 544
r. 48 544
r. 49 544
r. 50 545

Ord. XXXVIII. Affidavits.
I. Affidavits.
r. 1 453
r. 2 454
r. 3 460
r. 4 466
r. 5 463
r. 6 467
r. 7 458
r. 8 459
r. 9 462
r. 10 471
r. 11 461
r. 12 .....465, 474
r. 13 464
r. 14 473
r. 15 470
r. 16 467
r. 17 467
r. 18 471
r. 19 470
II. Chambers.
r. 24 462
r. 25 574
r. 26 574
r. 27 574
r. 28 574
r. 29 575
r. 30 575

Ord. XXXIX. Motion for New Trial.
r. 1 745
r. 2 ..... 749, 1583
r. 3 746
r. 4 746
r. 5 748
r. 6 ..... 730, 1583
r. 7 .....741, 750
r. 8 .....647, 731

Ord. XL. Motion for Judgment.
r. 1 755
r. 2 755
r. 3 756
r. 4 756
r. 5 756
r. 6 1583
r. 7 756
r. 8 756
r. 9 760
r. 10 .....749, 760

Ord. XLI. Entry of Judgment.
r. 1 765
r. 2 765
r. 3 765
r. 4 765
r. 5 766
r. 6 766
r. 7 765
r. 8 1331
r. 9 1294
r. 10 1295

Ord. XLII. Execution.
r. 1 789
r. 2 790
r. 3 788
r. 4 ..... 788, 907, 941
r. 5 ..... 788, 1227

PAGE

Ord. XLII. Execution—*cont.*
r. 6 ..... 788, 907, 941
r. 7 ..... 788, 941
r. 8 787
r. 9 963
r. 10 1094
r. 11 795
r. 12 795
r. 13 800
r. 14 799
r. 15 826
r. 16 801
r. 17 ..... 789, 836
r. 18 793
r. 19 789
r. 20 803
r. 21 804
r. 22 ..... 789, 956
r. 23 ..... 955, 1073
r. 24 ..... 788, 941, 1396, 1661
r. 26 ..... 788, 793
r. 27 ..... 790, 792
r. 28 789
r. 29 793
r. 30 ..... 1275, 1278
r. 31 ..... 908, 947, 1051

II. Discovery in Aid.
r. 32 791
r. 33 792
r. 34 792

Ord. XLIII. Writs of Fi. Fa. &c.
r. 1 836
r. 2 866
r. 3 1176
r. 4 1176
r. 5 ..... 866, 1176
r. 6 908
r. 7 908

Ord. XLIV. Attachment.
r. 1 952
r. 2 948

Ord. XLV. Attachment of Debts.
r. 1 927
r. 2 933
r. 3 934
r. 4 935
r. 5 936
r. 6 936
r. 7 936
r. 8 937
r. 9 937

Ord. XLVI. Charging Stock.
r. 1 919
r. 2 925
r. 3 925
r. 4 925
r. 5 925
r. 6 925
r. 7 925
r. 8 925
r. 9 926
r. 10 926
r. 11 926
r. 12 926
r. 13 926

Ord. XLVII. Writ of Possession.
r. 1 .....
r. 2 1227
r. 3 .....

Ord. XLVIII. Writ of Delivery.
r. 1 .....
r. 2 .....

Ord. XLIX. Transfers, &c.
r. 1 .....
r. 3 .....
r. 4 .....
r. 5 41
r. 7 .....
r. 8 .....

Ord. L. Interlocutory Orders.
r. 1 .....
r. 1a .....
r. 2 .....
r. 3 .....
r. 4 .....
r. 5 .....
r. 6 ..... 437 (*d*)
r. 7 .....
r. 8 .....
r. 11 .....
r. 12 4
r. 13 4
r. 14 .....
r. 15 .....
r. 15a .....
r. 16 .....
r. 17 .....
r. 18 .....
r. 19 .....
r. 20 .....
r. 21 .....

Ord. LII. Motions.
r. 1 .....
r. 2 ..... 949, 1
r. 3 .....
r. 4 ..... 949, 1
r. 5 .....
r. 6 .....
r. 7 .....
r. 8 .....
r. 9 .....
r. 11 .....
r. 12 .....
r. 13 .....
r. 14 .....

Ord. LIII. Mandamus.
r. 1 .....
r. 2 .....
r. 3 .....
r. 4 .....

Ord. LIV. Chambers.
I. General.
r. 1 .....
r. 2 .....
r. 3 .....
r. 4 .....
r. 5 .....
r. 6 .....
r. 7 .....
r. 8 .....

Ord. XLVII. Writ of Possession. PAGE
r. 1 1227
r. 2 ..... 1227, 1661
r. 3 1227
Ord. XLVIII. Writ of Delivery.
r. 1 994
r. 2 995
Ord. XLIX. Transfers, &c.
r. 1 ..... 412 (
r. 3 412
r. 4 18
r. 5 ..... 414, 1063
r. 7 414
r. 8 406
Ord. L. Interlocutory Orders.
r. 1 407
r. 1a 408
r. 2 407
r. 3 ..... 438, 527
r. 4 525
r. 5 526
r. 6 ..... 437 (d), 527
r. 7 407
r. 8 438
r. 11 ..... 1...
r. 12 ..... 428, 1...
r. 13 ..... 440, 1...
r. 14 ..... 1...
r. 15 ..... 1...
r. 15a ..... 1...
r. 16 ..... 1...
r. 17 ..... 1...
r. 18 ..... 1...
r. 19 ..... 1...
r. 20 ..... 1...
r. 21 ..... 1...
Ord. LII. Motions.
r. 1 ..... 1...
r. 2 ..... 949, 1379, 1...
r. 3 ..... 1...
r. 4 ..... 949, 1383, 1...
r. 5 ..... 1...
r. 6 ..... 1...
r. 7 ..... 1...
r. 8 ..... 1...
r. 9 ..... 1...
r. 11 ..... 1...
r. 12 ..... 1...
r. 13 ..... 1...
r. 14 ..... 1...
Ord. LIII. Mandamus.
r. 1 ..... 1...
r. 2 ..... 1...
r. 3 ..... 1...
r. 4 ..... 1...
Ord. LIV. Chambers.
I. General.
r. 1 ..... 1...
r. 2 ..... 1...
r. 3 ..... 1...
r. 4 ..... 1...
r. 5 ..... 1...
r. 6 ..... 1...
r. 7 ..... 1...
r. 8 ..... 1...

Ord. LIV. Chambers—*cont.* PAGE
r. 9 1405
r. 10 1405
II. Queen's Bench, and Probate, Divorce, and Admiralty.
r. 11 1405
r. 12 1403
r. 13 1407
r. 14 1408
r. 15 1408
r. 16 1408
r. 17 1408
r. 18 1408
r. 20 ..... 1404, 1411
r. 21 1416
r. 22 1417
r. 23 1418
r. 24 1419
r. 25 ..... 1409 (*p*)
r. 26 1409
r. 27 1409
r. 28 1409
r. 29 1414
Ord. LVII. Interpleader.
r. 1 ..... 1354, 1366
r. 2 1358
r. 3 1356
r. 4 1357
r. 5 1357
r. 6 1359
r. 7 1359
r. 8 1359
r. 9 1359
r. 10 1359
r. 11 1364
r. 12 1371
r. 13 1361
r. 14 1360
r. 15 1362
Ord. LVIII. Appeals.
r. 1 975
r. 2 979
r. 3 979
r. 4 989
r. 5 ..... 762, 990
r. 6 980
r. 7 981
r. 8 981
r. 9 977
r. 10 ..... 975, 977
r. 11 985
r. 12 987
r. 13 987
r. 14 990
r. 15 ..... 975, 982
r. 16 984
r. 17 994
r. 18 994
r. 19 992
Ord. LIX. Divisional Courts.
r. 1 ..... 16, 1378
r. 2 415
r. 3 1660
r. 4 ..... 18, 1516
r. 7 1517
r. 8 1517
Ord. LX. PAGE
r. 2 ..... 23, 994
r. 3 28
Ord. LXI.
r. 1 21
r. 2 22
r. 3 22
r. 5 ..... 25, 26, 466
r. 7 1443
r. 8 1446
r. 9 1446
r. 12 1446
r. 13 1446
r. 14 1446
r. 15 1446
r. 16 1446
r. 17 1446
r. 18 1447
r. 19 1447
r. 20 1447
r. 22 ..... 778, 1447
r. 23 ..... 778, 1447
r. 24 1447
r. 28 ..... 472, 565, 1447
r. 29 ..... 565, 1447
r. 31 1446
r. 32 1448
r. 33 1448
Ord. LXII.
r. 1 200
Ord. LXIII. Vacations.
r. 1 189
r. 2 191
r. 3 191
r. 4 192
r. 5 189
r. 6 191
r. 7 191
r. 8 192
r. 9 192
r. 10 192
r. 11 193
r. 12 193
r. 15 193
r. 16 1580
Ord. LXIV. Time.
r. 1 ..... 230, 1436
r. 2 1434
r. 3 1434
r. 4 ..... 193, 280, 1434
r. 5 ..... 193, 1434
r. 6 ..... 403, 1434
r. 7 1432
r. 8 1432
r. 11 ..... 1436, 1440
r. 12 1434
r. 13 1437
r. 14 1644
Ord. LXV. Costs.
I. Costs.
r. 1 672
r. 2 ..... 309, 686
r. 3 1562
r. 4 1552
r. 5 184
r. 6 401

PAGE

Ord. LXV. Costs—*cont.*
r. 7 402
r. 8 701
r. 9 701
r. 10 702
r. 11 184
r. 12 685
r. 13 1138
r. 14 166
r. 15 1639
r. 16 695
r. 17 694
r. 19 694
II. Special Regulations.
r. 27 702
sub-rr. 1—24 .... 702—706
sub-r. 13 1413
sub-r. 17 509
sub-r. 18 509
sub-r. 24 1433
sub-r. 25 696
sub-r. 26 706
sub-rr. 29—38 .... 707—708
sub-rr. 43—54 .... 708—710
sub-r. 27 696
sub-r. 28 694
sub-r. 37 693
sub-r. 39 698
sub-r. 40 698
sub-r. 41 699
sub-r. 42 699
sub-r. 43 1431
sub-r. 54 497
sub-r. 55 697
sub-r. 56 697
sub-r. 57 697
sub-r. 58 696

Ord. LXVI. Notices, &c.
r. 1 1443
r. 2 1444
r. 3 ..... 279, 1444
r. 4 ..... 466, 1444
r. 5 ..... 466, 539, 1444
r. 6 ..... 466, 539, 1444
r. 7 (*a*) to (*o*) 1444, 1445

Ord. LXVI. Notices, &c.—*cont.*
r. 7 (*c*) .....
r. 7 (*j*) .....
r. 7 (*k*) .....

Ord. LXVII. Services of Orders, &
r. 1 .....
r. 2 .....
r. 3 .....
r. 4 4
r. 5 .....
r. 6 .....
r. 7 .....
r. 8 .....
r. 9 2

Ord. LXVIII.
r. 1 .....
r. 2 .....
r. 3 .....

Ord. LXIX. Debtors Act.
r. 1 14
r. 2 .....
r. 3 .....
r. 4 .....
r. 5 .....
r. 6 .....
r. 7 .....

Ord. LXX. Non-compliance.
r. 1 .....
r. 2 .....
r. 3 .....
r. 4 .....

Ord. LXXI. Interpretation.
r. 1 .....
r. 2 .....

Ord. LXXII. General Rules.
r. 1 .....
r. 2 .....
r. 3 .....

Order as to Fees .....
Order as to Fees (October, 188
Order as to Stamps .....
Masters' Practice Rules .....
County Court Scale of Costs .

INDEX.

A.

ABANDONING pleadings, and other proceedings. *See the respective titles throughout the Index.*
Abandonment of possession of premises, what is, 1212.
Abatement,
of action by death, &c. of parties, 1007, 1025.
by company changing name, 1053, 1068.
plea in, abolished, 285.
proceedings in lieu of, for defects in parties, 1019.
in other cases, 285, 360.
Abode. *See "Residence."*
Absence,
of counsel, &c., new trial for, 737.
of witness, new trial for, 739.
Accidents,
compensation for, by railway company, 1070.
inspection of plaintiff in actions for, 530.
Account,
indorsing writ with claim for, 225.
stated, pleading in claim, 293.
when order made for, 1341.
mode of taking, 1342.
may be directed to be taken at any stage of action, 1341.
may be taken before a district registrar, 1425.
fees to be paid on taking, 1676.
Accountants, &c., fees to, 708.
Acknowledgments by married women. *See "Married Women."*
Action,
definition of, 203.
authority of a solicitor in an action, 102, 104.
where action commenced without authority, 106.
notice of, 206. *See "Notice of Action."*
distinction of year, letter and number, 216.
title of action in statement of claim, 290.
where counterclaim, 308.
pleading matters arising after commencement of action, 320.
to be commenced by writ of summons, 212.
transfer of, from one Division to another, 411.
joinder of various causes of, 405.
consolidation of actions, 407.
trial of. *See "Trial at Nisi Prius."*
abatement of, by death, &c. of parties, 1026.
compounding penal, 440.
frivolous, 624.

Acts of Parliament, application of, to High Court, 202
Adding parties to action, 1021, 1022.
Addition of parties,
in writ of summons, 220.
in affidavits, 460.
Address. *See* "*Residence.*"
for service, 226, 255.
Adjournment,
of trial, 647.
of execution of writ of inquiry by sheriff, 1336.
of summons, 1412.
Administration,
of estates assigned to the Chancery Division, 10.
staying proceedings after order for, 1119.
transfer of action after order for, 414.
Administrator of property of convict, 1187.
Administrators. *See* "*Executors.*"
Admiralty,
former jurisdiction of Court of, 8.
now part of the High Court, 4.
judge of Admiralty Division, 8.
business assigned to Admiralty Division, 11.
costs when County Court has jurisdiction, 688.
retainer fees allowed in Admiralty Division, 713.
marshal's office, fees in, 1679.
Admission,
of solicitor, 71; fee on, 74. *See* "*Solicitors.*"
in pleadings, 284.
by notice, 477.
effect of payment into court as, 352.
admitting part of adversary's case, 477.
of documents before trial, 479.
notice to give in evidence probate or office copy of will in ac
concerning real estate, 482.
of facts on notice to admit, 477.
costs of refusing, 477.
of next friend, guardian, &c. for infant, 1136; for lunatic, 114
offer to make, 516.
motion for judgment on, 757.
to sue in formâ pauperis, 1183.
Adverse claims. *See* "*Interpleader.*"
relief of persons in general against, 1354.
relief of debtors, 1365.
relief of sheriffs and other officers against, 1366.
"Adverse" witness, 636, 639.
Advertisement, service of writ by, 238.
Advowson in gross not extendible, 877.
Affidavits in general,
commissioners for taking, 24.
when evidence taken by, 452, 453.
at trial, by consent, 574.
title of the court, 453.
affidavits on Crown side, 454.
title of the cause, &c., 454.
consequence of defective title, 457.
commencement of, must be drawn up in first person, and be div
into paragraphs, 458.
deponent's abode, 459.
deponent's degree, 460.
contents of, 460.

of, to High Court, 202
022.

ıry by sheriff, 1336.

ıancery Division, 10.
ler for, 1119.
r for, 414.
vict, 1187.
."
of, 8.
Court, 4.
ı, 8.
lmiralty Division, 11.
ıs jurisdiction, 688.
ıiralty Division, 713.
9.

See "Solicitors."

as, 352.
's case, 477.
79.
probate or office copy of will in actions
2.
477.

e. for infant, 1136; for lunatic, 1142.

7.
83.
der."
against, 1354.

fficers against, 1366.

y, 238.
le, 877.

4.
2, 453.
4.

4.

le, 457.
drawn up in first person, and be divided

Affidavits in general—*continued.*
deponent's signature, 462.
exhibits, 462, 475.
affirmation instead of oath, 458 (*p*), 462.
jurat, 462.
affidavit by illiterate or blind person, 464.
by marksman, 464.
where deponent a foreigner, 464.
interlineation in jurat, 465.
effect of defective jurat, 465.
amendment of jurat, 466.
statement as to party filing, 465.
printing affidavits, 466.
before whom to be sworn, 466.
fee for oath, 470.
when to be sworn, 470.
stamping affidavits, 470, 475.
filing affidavit, 471.
opposite party may use affidavit, 471.
copy of exhibit, 471.
taking affidavit off file, 472.
search for affidavits filed, 472, 475.
office copies, 472, 475, 476.
production of affidavit filed before judge, &c., 473, 475.
inspecting original affidavits, 476.
how long in force, 473.
defects in, effect of, when aided, amended, &c., 473.
alterations, erasures, &c., in affidavits, 465, 474.
examination where party refuses to make an affidavit, 474.
cross-examination of deponent, 474.
official notice as to affidavits, 475.
allowance of costs for, 702.
Affidavit of documents, 496.
of increase, 695.
of service, 1443, 1697.
to arrest, 1464.
in particular proceedings, &c. *See the respective titles throughout the Index.*
Affidavits, ordering, to be used at the trial, 574.
filing in such cases, 574.
cross-examining, 575.
printing, 575.
Affirmation instead of oath, 458 (*p*), 462, 633.
"After," meaning of the word, 1435.
Agency correspondence, costs of, 703.
Agent,
to solicitor, 185. *See "Solicitors."*
correspondence with, costs of, 187.
Agreement,
inspection of. *See "Discovery and Inspection."*
order to produce, to get stamped, &c., 513.
between solicitor and his clients, 126—131.
Alias and pluries writs,
of *fi. fa.*, 868.
of *ca. sa.*, 900.
of attachment, 953.
of habere facias, 1228.
Alien,
arrest of, 1458.
when may be a juror, 614.
time to render principal, when an, 1510.

Alien enemy, staying proceedings in actions by, 378.

Allocatur for costs, 697.

Alteration,
of submission to arbitration, 1593.
of award, 1638.
of warrant of attorney after execution, 1312.
of sheriff's warrant, 808.

Alternative statements in claim, 292

Ambassadors and their servants,
privilege from arrest, 1457.
no security for costs in action by, 397.
privilege of, from *fi. fa.*, 858.
staying proceedings in actions against, 379.

Ambassadors and other British ministers abroad may administer oath
&c., 468.

Amendment,
of proceedings, 442, 834.
when allowed, 442, 646.
when amendment allowed, 442.
at the trial, 372.
how proceedings amended, 442.
terms of amendment and remedy for costs, 442.
allowance for costs of, 707.

Amendment of, and striking out pleadings,
by parties of their own pleadings, 315.
without leave, 315.
mode of making, 315.
application to disallow, 315.
leave to amend, 316.
the application, 316.
appeal, 318.
effect of not amending after leave, 318.
compelling opposite party to amend, &c., 318.

Amendment in particular cases. *See the respective titles throughout t*
Index.

Amendments, practice rules as to, 1696.

Amends, tender of, plea of, by justice, &c., 1042. *See* "*Tender.*"

Annuity,
action for, staying proceedings in, on payment of arrears, &c., 12
bond for, within the 8 & 9 *Will.* 3..1281.
sci. fa. on judgment on warrant of attorney for subsequent arrea
of, not necessary, 1324.

Apothecary, exempt from being a juror, 615.

Appeal to the Court of Appeal,
sittings, &c., of the Court of Appeal, 189.
Court of Appeal in chancery to include Lord Chancellor, 203.
constitution of the Court of Appeal, 964.
jurisdiction, 967.
in what cases appeal lies, and in what not, 969.
when appeal does not lie, 970.
from inferior courts to divisional courts, 970.
as to costs, 971.
criminal matters, 973.
appeals from discretion, 973.
agreement not to appeal, 974.
by party not appearing in court below, 974.

n actions by, 378.

593.

ecution, 1312.

2

by, 397.

against, 379.

inisters abroad may administer oaths,

dy for costs, 442.

eadings,
ngs, 315.

15.

ter leave, 318.
mend, &c., 318.
See the respective titles throughout the

1696.
tice, &c., 1042. *See* "*Tender.*"

s in, on payment of arrears, &c., 1280.
ll. 3..1281.
ant of attorney for subsequent arrears

juror, 615.

Appeal, 189.
to include Lord Chancellor, 203.
ppeal, 964.

in what not, 969.
970.
visional courts, 970.

073.
974.
n court below, 974.

Appeal to the Court of Appeal—*continued.*
by one of several parties, 974.
by person not a party, 975.
appeal, how brought, 975.
time within which appeal must be brought, 975.
what must be done within the time, 977.
from what point time runs, 978.
objection how raised, 978.
extension of time, 978.
notice of motion on appeal, 979.
by respondent in cross appeal, 980.
setting down appeal for hearing, 981.
security for costs of appeal, 982.
staying proceedings pending appeal, 984.
evidence on appeal, 985.
fresh or further evidence, 987.
hearing of the appeal, 988.
powers of court, 989.
practice, 990.
rehearing, 991.
judgment or order of Court of Appeal, 991.
costs of appeal, 991.
proceedings after judgment, execution, &c., 993.
applications to Court of Appeal, 994.
officers to perform duties in, 994.
infant's right to appeal, 1136.
Appeal to the House of Lords,
constitution and jurisdiction of House of Lords as a Court of Appeal, 995.
Lords of Appeal in ordinary, 995.
in what cases appeal lies, 996.
within what time appeal must be brought, 997.
procedure on appeal, 997.
standing orders and directions to agents, 997 *et seq.*
the petition of appeal, 998.
lodging appeal, 1000.
security for costs, 1000.
return of order for service with affidavit, 1003.
appearance by respondent, 1003.
the cases—time for lodging, &c., 1003.
respondent's case, 1005.
the appendix, 1005.
binding of printed cases, 1006.
lodgment of cases in Parliament Office, 1006.
setting down appeal for hearing, 1007.
abatement by death or defeat through bankruptcy, 1007.
incidental applications, 1008.
hearing of the appeal, judgment, &c., 1009.
practice on hearing, 1010.
costs, 1011.
making decree of House of Lords an order of court below, 1011.
execution, 1011.
taxation of costs, 1011.
payment or repayment of the 200*l.* paid in, 1012.
Appeal in interpleader, 1364.
Appeals to divisional courts, 1378.
Appeal from master to judge, 1416.
from judge to court, 1417.
from Divisional Court to Court of Appeal, 1429.
Appeal from district registrar to judge, 1428.

Appeal from inferior courts, 1516. *See* "*Inferior Courts.*"
Appeal from County Courts, 1253.
by motion, 1523.
in what cases, 1523.
points not taken below, 1524.
the motion, to whom, and how, made, &c., 1524.
the hearing, 1525.
costs, 1525.
appeal to Court of Appeal, 1525.
by special case,
enactments as to, when appeal lies, 1525.
in replevin, 1255, 1527.
in ejectment, 1528.
in interpleader, and when parties agree to give jurisdi
&c., 1528.
where appeal lies, 1528.
not in an interlocutory matter, 1528.
rules, &c. as to proceedings in the County Court, 1529
notice of appeal, 1529.
security for costs of appeal, 1530.
by deposit, 1530.
by bond, 1531.
the case, 1532.
setting down case for argument, 1533.
argument of appeal, costs, &c., 1533.
proceedings after appeal determined, 1535.
action on the bond for securing costs, 1535.
court may give relief, 1535.
setting aside irregular proceedings, 1536.
sureties, how far liable, 1536.
how discharged, 1537.
entering satisfaction on bond, 1537.
Appeal in cases of special indorsement under Ord. XIV., 276.
in case of leave to amend, 318.
in case of prohibition, 1543, 1544.
in case of remission of action to County Court, 1552, 1554.
when certiorari from inferior court refused, 1566.
in compulsory reference, 1584.
Appearance to writ of summons,
Entry of appearance,
necessity for, 251.
what may be done before appearance, 251.
when to be entered, 251.
where to be entered, 252.
form of, 254.
how entered, 254.
address for service, 255.
appearance by two or more defendants, 255.
unnecessary or improper appearance, 706.
fees for, 721, 1673.
notice of, 256.
conditional appearance, 256.
irregularity in, 257.
amendment of, 257.
where further proceedings to be taken, 257.
where solicitor has given an undertaking to appear, 258.
by third party, 308, 420.
in district registry, 1427.
practice rules as to, 1696.
memorandum of, 1700.

Appearance to writ of summons—*continued.*
Proceedings in default of appearance,
time for signing judgment, 259.
when issued out of registry, 259.
affidavit of service, 260.
where claim liquidated, 260.
where several defendants, 261.
where claim partly liquidated, 261.
claim for damages or detention of goods, 261.
where one of several makes default, 262.
action for mesne profits, &c., 262.
where account claimed, 263.
in other cases, 253.
costs, 263.
table of costs, 264, 1699.
execution, 264.
setting aside judgment by default, 264.
where irregular, 264.
where regular, 266.
application by stranger, 266.
after substituted service, 267.
the affidavit, 267.
in case of action of replevin, 1259.
when action in district registry, 1427.
Appearance on petition in Chancery Division after notice not to appear, 705.
Appearance in particular actions and proceedings. *See the respective titles throughout the Index.*
Applications to the Court, 1378.
at Chambers, 1401.
Appropriation of money paid into Court under Ord. XIV., 346, 356.
Arbitration by consent, 1585.
I. Preservation of former practice, 1586.
II. What may be referred, 1586.
III. The order or agreement to refer, 1587.
mode and form of submission, &c.,
where there is a cause in Court, 1587.
solicitor has power to refer, 1587.
order of reference how obtained, 1587.
order of nisi prius how obtained, 1588.
form of, &c., 1588.
where no action in Court, 1588.
by deed or agreement, 1588.
with whom to be entered into, 1588.
form of submission, 1589.
construction of, 1589.
where a cause referred, 1589.
authority to enter verdict, 1589.
submission between several parties, 1590.
partnership differences, 1590.
power to arbitrator to say what is to be done, 1590.
accruing debt, 1590.
question of title, 1591.
power of distress, 1591.
moiety to each, 1591.
directions as to lease, 1591.
action of account, 1591.
submission by an executor, 1591.
stamp on agreement of reference, 1591.
appointment of arbitrator when not named in submission, 1592.
when reference is to two arbitrators and one party fails to appoint, 1593.

Arbitration by consent—*continued.*
III. The order or agreement to refer—*continued.*
meaning of refusal to *nominate* a referee, 1593.
alteration of submission, 1593.
making submission a rule of Court, 1594.
cases within the statute, 1595.
cases not within it, 1595.
order of reference, 1595.
rule no evidence of agreement, 1596.
making enlargements rule of Court, 1596.
at what time submission should be made a ru
Court, 1596.
of what Court, 1596.
motion to Court must be made on original submission,
and on enlargements, 1598.
submission must be duly stamped, 1598.
affidavit in support of motion, 1598.
how rule obtained, 1598.
filing the submission, 1598.
office copies, 1598.
effect of agreement on right to sue, 1599.
staying proceedings after agreement to refer, 1599.
revocation of submission, &c., 1602.
former practice, 1602.
present statute, 1603.
when statute applies, 1603.
where revocation allowed, 1603.
where not, 1604.
by death, 1604.
by marriage, 1605.
bankruptcy, 1605.
costs in case of abortive reference, 1605.
IV. Proceedings upon the reference, 1606.
obtaining appointment from the arbitrator, 1606.
mode of conducting the reference, 1607.
arbitrator's discretion, 1607.
general course of proceeding, 1607.
where several arbitrators, 1607.
proceeding ex parte, 1607.
discovery, 1607.
examination of witnesses, &c., 1607.
swearing witnesses, 1608.
authority to arbitrator to administer oath, 1609.
private communications to arbitrator, 1609.
delegation of authority, 1609.
compelling attendance of witnesses, 1610.
subpœna, 1611.
witnesses from Scotland and Ireland, 1611.
privilege from arrest, 1486.
enlargement of time for making award, 1611.
by arbitrator, 1611.
by consent of parties, 1612.
by master's order, 1612.
proceeding without proper enlargement, 1614.
arbitrator's authority, how determined, 1614.
appointment of umpire and proceedings by him, 1615.
where no power of appointment in submission, 1615.
must not be appointed by lot, 1615.
where parties to appoint cannot agree, 1616.
stamp, 1616.
how far arbitrators may act after appointing an umpire

d.
o refer—*continued.*
to *nominate* a referee, 1593.
, 1593.
le of Court, 1594.
atute, 1595.
1595.
1595.
agreement, 1596.
its rule of Court, 1596.
bmission should be made a rule
6.
ust be made on original submission, 1597
ements, 1598.
e duly stamped, 1598.
t of motion, 1598.
1598.
on, 1598.

right to sue, 1599.
ter agreement to refer, 1599.
n, &c., 1602.
602.
03.
ies, 1603.
llowed, 1603.

o reference, 1605.
erence, 1606.
from the arbitrator, 1606.
e reference, 1607.
tion, 1607.
proceeding, 1607.
trators, 1607.
te, 1607.

itnesses, &c., 1607.
es, 1608.
rator to administer oath, 1609.
ations to arbitrator, 1609.
nority, 1609.
of witnesses, 1610.

otland and Ireland, 1611.
est, 1486.
or making award, 1611.
1.
ties, 1612.
, 1612.
ut proper enlargement, 1614.
, how determined, 1614.
e and proceedings by him, 1615.
of appointment in submission, 1615.
inted by lot, 1615.
appoint cannot agree, 1616.

rs may act after appointing an umpire, 1615

Arbitration by consent—*continued.*
IV. Proceedings upon the reference—*continued.*
examination of witnesses, &c. by, 1616.
enlargement of time by umpire, 1617.
umpirage must be made within limited time, 1617.
V. The award, 1617.
by whom to be made, 1617.
when to be made, 1617.
form of, 1618.
recitals, 1618.
plan may be annexed, 1619.
submission must be pursued, 1619.
award must not be uncertain or ambiguous, 1619.
award in alternative, 1620.
should state how an act to be done, 1620.
award good if it can be rendered certain, 1620.
award must finally settle all the matters referred, 1621.
awarding payment at a future day, or note or bond to be given, 1623.
need not be stated that every matter referred has been adjudicated on, 1624.
award must not be inconsistent, 1624.
award must not direct an illegal act to be done, 1624.
making award in favour of or against a stranger, 1625.
directing payment to wife, 1625.
mutual releases, 1625.
where a cause is referred, 1626.
finding on each issue, 1626.
amount of damages, 1626.
award that action be discontinued, &c., 1627.
where arbitrator has power to enter a judgment, &c., 1627.
where two certificates given, 1627.
award as to costs, 1628.
of the reference, 1628.
of action, when action referred, 1629.
costs to abide event, 1630.
effect of County Courts Act, 1630.
when defendant has a counter-claim, 1631.
costs allowed by particular statutes, 1632.
arbitrator's authority over amount of costs, 1633.
ordering taxation of same, 1634.
error as to costs, 1634.
awarding set-off of costs, 1634.
award in form of special case, 1634.
award bad in part, 1636.
stamp on award, 1637.
execution of award by arbitrators, 1637.
publication of, 1638.
alteration of, 1638.
VI. Taxation of the costs awarded, 1638.
at what time costs may be taxed, 1639.
mode of taxation, 1639.
review of taxation, 1640.
apportionment of costs, 1640.
VII. Setting aside the award: referring back matters referred to arbitrator, 1640.
in what cases, 1640.
when not, 1641.
when useless to apply to set aside award, 1642.

Arbitration by consent—*continued.*
VII. Setting aside the award, &c.—*continued.*
how objections may be waived, 1643.
waiver of objections by accepting a benefit under award,
who may apply to set aside award, 1643.
to what Court application must be made, 1643.
within what time application can be made, 1644.
where motion can be made after times stated, 1644.
where reference at the trial, 1645.
motion to set aside judgment on award not limited, 16
when proceedings stayed, 1646.
application, how made, 1646.
the notice of motion, 1646.
order should be drawn up on reading award, 1646.
affidavit in support of, 456, 1647.
arbitrators' notes, 1647.
second application, 1647.
costs of application, 1648.
referring back matters to arbitrator, 1648.
when application to be made, 1649.
course to be pursued on reference back, 1649.
amended award, 1650.
costs of reference back, 1650.
second taxation, 1650.
action against arbitrator for negligence, 1651.
evidence of arbitrator, 1651.
VIII. Enforcing performance of the award, 1651.
by order and execution, 1651.
by judgment, 1653.
by attachment, 1654.
at what time attachment to be applied for, 1655.
pending motion to set aside award, 1655.
at whose instance attachment will be granted, 1655
against whom, 1655.
submission must have been made a rule of Court, 1
service of rule, &c. on party to perform award, 165
demand of performance, 1656.
affidavit to support motion for attachment, 456, 16
the motion, 1658.
title of affidavits showing cause, 1658.
what may be shown for cause, 1658.
making fresh application after refusal, 1659.
making order where no cause shown, 1659.
proceedings on attachment, 1659.
where a verdict has been taken at the trial, 1659.
signing judgment, &c., 1660.
execution, 1660.
where award directs possession of land to be given up
by action, 1661.
defence to, 1662.
award bad only in part, 1662.
IX. Effect of the award, 1662.
cannot pass real property, 1663.
when award evidence, 1663.
Arbitration, compulsory, under *C. L. P. Act*, 1854.
order for, before trial, 1664.
what may be referred, 1664.
order at nisi prius, 1665.
special case may be stated and question of fact tried
order at trial, 1666.

...—*continued.*
...waived, 1643.
... by accepting a benefit under award, 1643.
...sido award, 1643.
...on must be made, 1643.
...cation can be made, 1644.
...be made after times stated, 1644.
... the trial, 1645.
... judgment on award not limited, 1645.
...stayed, 1646.
... 1646.
...n, 1646.
...awn up on reading award, 1646.
...t of, 456, 1647.
... 1647.
..., 1647.
...648.
...s to arbitrator, 1648.
... to be made, 1649.
...ied on reference back, 1649.
...1650.
... back, 1650.
...ion, 1650.
...ator for negligence, 1651.
...rator, 1651.
... of the award, 1651.
...on, 1651.

...tachment to be applied for, 1655.
...otion to set aside award, 1655.
...ce attachment will be granted, 1655.
...1655.
...t have been made a rule of Court, 1655.
... &c. on party to perform award, 1655.
...ormance, 1656.
...port motion for attachment, 456, 1657.
...58.
...ts showing cause, 1658.
...hown for cause, 1658.
...application after refusal, 1659.
...where no cause shown, 1659.
...attachment, 1659.
...s been taken at the trial, 1659.
...ment, &c., 1660.
...60.
...ts possession of land to be given up, 1660.

...362.
...ly in part, 1662.
..., 1662.
...property, 1663.
...ence, 1663.
...under *C. L. P. Act*, 1854.
..., 1664.
...erred, 1664.
...s, 1665.
... be stated and question of fact tried, 1666.
...66.

Arbitration, compulsory, under *C. L. P. Act*, 1854—*continued.*
proceedings upon reference, and power of arbitrator, 1666.
where special case stated, or issue tried by direction of Court, 1667.
bill of discovery, 1667.
fees to master, 1667.
enlarging time for award, 1667.
the award, 1667.
arbitrator stating special case, 1667.
stamp on, unnecessary, 1667.
costs, 1667.
within what time award to be made, 1618.
setting aside award, 1668.
sending back matters referred to arbitrator, 1668.
appeal from award on compulsory reference, 1669.
enforcing performance of award, 1669.
within period for moving to set aside, 1669.
other matters relating to, 1669.
Arbitration, references to referees. *See* "*Referee.*"
Array of jurors, challenge to, 617, 620.
Arrest of defendant before final judgment,
present enactments and rules as to, 1449.
in what actions defendant may be arrested, 1449.
the amount and nature of the cause of action, 1550.
in actions of contract, 1450.
when for interest, 1451.
where a set-off, 1451.
on bond, 1451.
on recognizance of bail, 1452.
on judgment, 1452.
on award, 1453.
on covenant, 1453.
in actions of tort, 1453.
in sci. fa., 1454.
in actions of account, 1454.
privilege from arrest, 1454.
consequences of the privilege, 1454.
who privileged,
the Royal Family, &c., 1455.
peers, 1455.
members of the House of Commons, 1456.
members of convocation, 1456.
candidates and voters at elections, not, 1457.
ambassadors and their servants, 1457.
aliens, 1458.
the judges, barristers, &c., 1458.
solicitors and officers of the Court, 1458.
coroners, 1459.
parties to a suit, witnesses, &c., 1459.
bail, 1459.
corporators and hundredors, 1459.
executors, administrators, and heirs, 1459.
infants and lunatics, 1460.
seamen, 1460.
soldiers and marines, 1461.
where the defendant has been before arrested for same cause, 1461.
the affidavit to arrest,
form of, 1464.
how intituled, 1464.
deponent's abode and addition, 1464.

Arrest of defendant before final judgment—*continued.*
the affidavit to arrest—*continued.*
form of—*continued.*
names of the parties, 1464.
statement of cause of action, 1465.
statement that defendant is about to quit England, 1474.
statement that an action is pending, 1475.
statement that defendant's absence will materially prej the plaintiff in the prosecution of the action, 1475.
jurat, 465, 1476.
mode and time of swearing, 1476.
by whom to be sworn, 1476.
before whom sworn, 1476.
when to be sworn, and duration of, 1476.
judge's order to arrest,
when and to whom applied for, 1477.
form of order, 1477.
indorsements on, 1480.
concurrent orders, 1481.
costs, 1481.
practical directions as to obtaining the order, &c., 1481.
duration of the order, 1481.
defects in, how and when taken advantage of, 1481.
amendment of, 1482.
action for maliciously obtaining, 1483.
the arrest,
duty of sheriff to execute the order, 1483.
the warrant and bailiff appointed by, 1483.
who may be arrested under the warrant; temporary from arrest, 1483.
by whom, when, where, and how arrest made, 1490.
delivery of copy of order to the defendant, 1491.
indorsement on order of the day of arrest, 1491.
detainer, 1491.
what done after the arrest, 1491.
improper arrest or detainer, 1492.
application to discharge order or for other relief, 1492.
rule on this subject, 1492.
affidavits upon applying for, 1493.
the application for, 1495.
proceedings on the arrest, the security, &c., 1496.
deposit of money in Court, 1497.
bond or security to the plaintiff, 1498.
payment of debt and costs, &c., 1503.
taking the defendant to prison, 1503.
proceedings against the sheriff,
compelling sheriff to return order, &c., 1504.
escape, 1505.
rescue, 1505.
liability and discharge of sureties, proceedings by and aga
liability and discharge of, 1506.
proceedings against sureties, 1511.
Arrest after judgment. *See* "*Execution.*"
Arrest, improper, order to discharge after, how to be directed,
Arrest for default in payment of money, 889.
Articled clerks. *See* "*Solicitors.*"
Assessment of damages, 661, 1326.
consequences of want of, 1326.
by master, 1326.

udgment—*continued.*
ued.

s, 1464.
of action, 1465.
endant is about to quit England, &c.,

action is pending, 1475.
endant's absence will materially prejudice
he prosecution of the action, 1475.

ring, 1476.
orn, 1476.
n, 1476.
, and duration of, 1476.

plied for, 1477.

.
1.

to obtaining the order, &c., 1481.
1481.
hen taken advantage of, 1481.

obtaining, 1483.

cute the order, 1483.
ff appointed by, 1483.
d under the warrant; temporary privileg

ere, and how arrest made, 1490.
rder to the defendant, 1491.
r of the day of arrest, 1491.

arrest, 1491.
ctainer, 1492.
order or for other relief, 1492.
1492.
ying for, 1493.
1495.
t, the security, &c., 1496.
Court, 1497.
the plaintiff, 1498.
d costs, &c., 1503.
nt to prison, 1503.
sheriff,
to return order, &c., 1504.

of sureties, proceedings by and against the
rge of, 1506.
st sureties, 1511.
e "*Execution.*"
lischarge after, how to be directed, 809.
ent of money, 889.
itors."
61, 1326.
of, 1326.

Assessment of damages—*continued.*
in actions on bond within 8 & 9 *W.* 3, *c.* 11..1282. *See further,* "*Damages.*"
Assessors, trial with, 585.
Assignee of debt, staying proceedings in case of action by, 373.
suing in his own name, 1365.
Assignment,
new, abolished, 285.
of breaches in debt on bond, 1279.
of debts, 1365.
pending action, effect of, 1034.
Assize, clerks of, 24.
Assizes,
when held, &c., 194.
how jury summoned for, 603.
how special jury, 605.
qualification of jurors at, 613.
considered but as one day, 1029.
Associates,
offices of, 20, 21.
office abolished, 23.
duty of, as to findings of jury at trial, 653.
not to act as solicitor, 93.
"At least," meaning of the words, 1435.
Attachment generally,
in what cases, 911.
disobedience of order, 941.
other than for non-payment of money, 944.
failure to answer interrogatories, &c., 944.
solicitor failing to enter appearance, 945.
for non-performance of award, 1654.
contemptuous expressions towards the Court or its process, 945.
for rescue, 945.
misbehaviour of solicitors or officers of Court, &c., 945.
sheriff or coroner not executing writ, or executing it oppressively, &c., 945.
against judges of inferior Courts, justices of peace, gaolers, &c., 946.
suitors perverting the course of justice, 946.
publication of pending proceedings, 946.
disobedience of process, 946.
abuse of process, 946.
contempts committed in face of Court, 947.
for not paying officer's fees, 947.
against peers or members of Parliament, 947.
against corporation, does not lie, 947.
the proceedings to obtain writ, 947.
service of order, 948.
notice of motion, 948.
service of notice of motion, 948.
affidavit in support, 457, 950.
the hearing, 950.
costs, 951.
appeal, 951.
second application when first unsuccessful, 951.
the writ and proceedings thereon, how sued out and executed, 951.
execution of writ, 952.
where prisoner is in custody of keeper of Queen's Prison, 952.
notice to return, 952.
sheriff's return, 953.

Attachment generally—*continued.*
the proceedings to obtain writ—*continued.*
alias writs, 953.
effect of writ of attachment, 952.
discharge for irregularity, &c., 953.
discharge of party attached, 954.
Attachment in particular cases,
against sheriff for not returning writs, &c., 822.
for interfering with sheriff, 815.
for disobedience of mandamus, 1275.
for disobedience of injunction, 1277.
for non-performance of award, 1654. *See* "*Arbitration.*"
for not obeying subpœna, 568.
against solicitor for not appearing, &c., 258.
Attachment of debts, 927.
power to order, 927.
in what cases available, 927.
examination of debtor, 791, 928.
what debts can be attached, 928.
effect of order, 933.
bankruptcy of debtor, 933.
proceedings when garnishee does not dispute liability, 934.
when garnishee disputes liability, 935.
on suggestion of claim by third party, 936.
upon payment garnishee discharged, 936.
attachment book, 937.
costs, 937.
practical directions as to attaching debts, 938.
Attendance,
of parties at trial, 624.
by solicitors, charges for, 704, 725.
of witnesses, compelling, 560. *See* "*Witness.*"
of officers of the Court, fees of, 1673.
Attestation of cognovit, 1299.
warrant of attorney, 1305.
Attorney, Queen's Coroner and, 26.
Attorney, warrant of. *See* "*Warrant of Attorney.*"
Attorneys. *See* "*Solicitors.*"
Attornment of tenant after ejectment, 1229.
Auction, selling goods under *fi. fa.* by, 839.
Auditâ querelâ, staying proceedings instead of relief upon, 379
now abolished, 790, 792.
Avowry in replevin, 892. *See* "*Replevin.*"
Award. *See* "*Arbitration.*"
holding to bail on, 1453.
affidavit to hold to bail on, 1469.
costs, 679.

B.

Bachelor of Arts, &c., articles of clerkship of, 49. *See* "*Solicito*
Bailable proceedings, 1449. *See* "*Arrest of Defendant before F*
ment."
Bail in ejectment by landlord, &c., 1233.
Bail on removal of cause from inferior Court, 1557, 1559. *See* "
Bail, commissioners for taking, 26.

Bailiff of sheriff,
warrant appointing, 807.
Bailiffs,
special, 32.
sheriff not liable for escape from, 898.
Banc, sittings in, 190.
Bank of England, proceedings in lieu of distringas by person claiming stock, 924.
Bank-notes seizable in execution, 846.
Bank-notes within s. 70 of Bills of Exchange Act, 404.
Banker, attaching moneys in hands of, 932.
Bankers' Books Evidence Act, 531.
Banking company, proceedings by and against, in name of Public Officer, 1080. *See* "*Companies.*"
Bankrupt, temporary privilege of, from arrest, 1490.
Bankruptcy,
Court of, consolidated with the Supreme Court, &c., 2, 4.
has jurisdiction to restrain proceedings in the High Court, 4.
solicitor's bill in case of bankruptcy, 136, 141.
effect of, on execution by creditor, 882.
effect of, on attachment, 944.
effect of, pendente lite, 1030.
in House of Lords, 1008.
obtaining leave to issue execution in case of, after judgment, 962.
pending arbitration, 1605.
of public officer of company, &c., 1084, 1089.
Bankrupts, or their trustees,
actions by, 1162.
in whose name to be brought, 1162.
what rights of action pass to trustee and what not, 1162.
trustee to sue, &c. in official name, 1164.
actions by trustees assigned to Bankruptcy Judge, 1164.
writ of summons, &c., 1165.
joinder of claims, 405.
security for costs, 398.
powers of trustee, 1165.
actions by trustee of partner, 1166.
of joint contractor, 1166.
evidence, provisions in the Bankruptcy Act as to, 1166.
actions against, 1167.
stay of proceedings after presentation of petition, 1167.
service of order staying proceedings, 1167, 1211.
expiration of order, 1168.
effect of receiving order, 1168.
secured creditor, 1168.
effect of order of discharge, 1168.
pleading order as a defence, 1169.
execution against property of bankrupts, 1169.
restriction of rights of creditor under execution or attachment, 1169.
fi. fa., 1169.
what is available act of bankruptcy, 1170.
what is notice of bankruptcy, 1170.
where two writs in sheriff's hands, 1172.
liability and duty of sheriff, 1172.
duties as to goods taken in execution, 1172.
actions against trustee of bankrupt, 1174.
no action for dividend, 1174.
costs, &c., 1174.

Bar, trial at, 586.
Baron and feme. *See* "*Husband and Wife.*"
Baronet, description of, in writ of summons, 218.
Barrister. *See* "*Counsel.*"
Belief,
when affidavit to arrest sufficient on, 1466.
affidavit of merits according to, 267.
Berwick-upon-Tweed, direction of writ to, 790.
Bill of costs, 122. *See* "*Solicitors.*"
Bill of exchange,
affidavit of debt on, 1469.
may be taken in execution, 846.
actions on lost bills, security in, 404.
action on destroyed bill, 404.
staying proceedings in actions on, 363.
Bill of sale,
and execution under fi. fa., 857.
void as against creditors, &c., unless registered, &c., 860.
Bills of exchange and promissory notes, special proceedings in
on, under stat. 18 & 19 *V. c.* 67, abolished, 1200.
Bills of Sale Department of Central Office, 21.
Bills of sale affidavits, 475.
Binding of cases for House of Lords, 1006.
Bishop,
execution of fi. fa. and sequestrari facias by, &c., 1177, 117
extending lands of a, 877.
Blank warrant, forbidden, 32.
Blind person, affidavit by, 464.
Bodmin, entry of action for trial at, 598.
Bond. *See* "*Replevin.*"
fee on taking, 1680, 1704.
holding to bail on, 1451.
affidavit to hold bail on, 1469.
staying proceedings on payment of penalty of, &c., 364.
damages in action on, 661, 665.
Bonds,
staying proceedings in actions on, 364.
in cases of security for costs, 402.
actions on, within 8 & 9 Will. 3, c. 11..1279.
plaintiff to assign breaches, 1279.
on judgment by default, 1279.
writ of inquiry, 1280.
stay on payment into Court of damages after jud
1280.
judgment to stand for further breaches, 1280.
scire facias and further proceedings, 1280.
effect of statute, 1280.
to what cases it extends, 1281.
what amount recoverable, 1281.
proceedings when defendant fails to appear, 1282.
suggestion of breaches, 1282.
before whom inquiry executed, 1282.
after judgment by default, 1282.
leave to try at sittings or assizes, 1283.
the evidence, 1283.
final judgment when signed and execution issued,
how signed and costs taxed, 1284.
subsequent proceedings on roll, 1284.
form of execution, 1284.

l and Wife."
of summons, 218.

ficient on, 1466.
g to, 267.
n of writ to, 790.
tors."

1, 846.
ity in, 404.
404.
tions on, 363.

1., 857.
&c., unless registered, &c., 860.
ssory notes, special proceedings in, actions
c. 67, abolished, 1200.
Central Office, 21.

f Lords, 1006.

sequestrari facias by, &c., 1177, 1179.
7.
2.
64.
trial at, 598.

04.
1.
1, 1469.
payment of penalty of, &c., 364.
661, 665.

actions on, 364.
costs, 402.
9 Will. 3, c. 11..1279.
breaches, 1279.
by default, 1279.
ry, 1280.
ment into Court of damages after judgment, &

stand for further breaches, 1280.
and further proceedings, 1280.
ute, 1280.
es it extends, 1281.
t recoverable, 1281.
fendant fails to appear, 1282.
eaches, 1282.
quiry executed, 1282.
by default, 1282.
ittings or assizes, 1283.
283.
when signed and execution issued, 1283.
d costs taxed, 1284.
ceedings on roll, 1284.
on, 1284.

Bonds—*continued.*
proceedings when defendant appears, 1284.
upon issue joined, 1284.
evidence, 1285.
verdict, 1285.
judgment, 1285.
form of execution, 1285.
scire facias on further breaches, 1285.
definition, 1285.
proceedings, 1286.
not within Statute of Limitations, 1286.
defects how aided, 1287.
costs, 1287.
execution, 1287.
seizable in execution, 846.
relief in action on bond given under County Courts Act, 1535.
to plaintiff, on defendant's arrest before judgment, 1498.
Books of corporation, inspection of, 511.
Breach of covenant, right of re-entry on land for, 1236.
Breaches,
particulars of, in ejectment, 1221.
in action for infringement of patent, 390.
suggestion, &c., of, in action on bond, 1279, 1282.
Breaking open doors,
to execute writs of execution generally, 812.
to execute writ of attachment, 952.
to execute writ of habere facias, 1227.
Brief, the, 601.
what costs for, allowed, 709, 713.
Building societies, actions by and against, 1101.
Business, distribution of, 9.
"By statute," general issue, 300.

C.

Calls on shares,
in limited companies, actions for, 1056.
in railway and similar companies, actions for, 1077.
Campbell's (Lord) Act,
payment into Court under, 343.
particulars in action under, 389.
Candidate at election, not privileged from arrest, 1490.
Capias ad satisfaciendum, 889. *See* "*Execution.*"
a waiver of charge or security, 921.
no attachment of debts after, 933.
Capias in withernam, 1266.
Carnarvon, entry of action for trial at, 598.
"Carrying on business," cases explanatory of, 253.
"Cause," what it includes, 203.
Cause book, actions how distinguished in, 216, 1695.
Cause lists, at Nisi Prius, 623.
Causes of action, joinder and separation of, 405.
Central Office, the, 20.
departments, 21.
when open, 191.
office hours, 192.

Central Office, the—*continued.*
production of documents from, at trial, 567.
transmission of documents, 1431.
forms for use in, 1448.
Certificate,
of solicitor, 77. *See* "*Solicitors.*"
of bankrupt, effect of. *See* "*Bankrupts.*"
of judge, as to special jury, 653.
by sheriff, to stay judgment, &c., on execution of writ of
1338.
of judge, as to costs, 653, 683. *See* "*Costs.*"
of taxation of costs, 697.
as to double and treble costs, 692.
fees on, 1674.
Certiorari,
title of affidavits in, 456.
to remove a case from inferior Court, 1555. *See* "*Removal*
from Inferior Courts."
to remove cause to have execution, 1569.
to remove plaint in replevin into superior Court, 1267.
Cestui que trust,
taxation of solicitor's bill by, 141.
staying proceedings in action by, 373.
Challenges of jurors, 616.
Chamber clerks, 24.
Chambers, documents left at, 1444.
attendance of judges at, 192, 1401. *See* "*Summons and Or*
proceedings at. *See* "*Summons and Order.*"
subpœna for attendance of witnesses at, 561.
appeal from a decision at, 970.
Chancellor, Lord,
office and position of, 13.
certain jurisdiction of, not transfered to High Court, 6.
jurisdiction of, with respect to lunatics, 6.
not liable to serve as vacation judge, 193.
vacancy in the office of, 205.
counsel's attendance at chambers, 704.
when great seal in commission, provision as to, &c., 205.
with consent of judges, may fix fees, &c., 200.
Chancery,
former jurisdiction of Court of, 6.
now part of the High Court, 1, 2.
business assigned to Chancery Division, 10, 411 (*a*).
transfer of actions in, 12, 411.
obtaining production of rolls at trial, 565.
included in what Courts, 203.
mode of trial, 583, 584.
fees on proceedings in, 1675.
Change,
of solicitor, 109.
of agent, 186.
of venue. *See* "*Venue, Change of.*"
Chapel,
service of writ on holders of, 1212.
Charges on land, raising of, assigned to Chancery Division, 10
on property recovered, &c. by solicitors, 166.
Charging order,
solicitor's, on property recovered, &c., 166.
on stocks, shares, &c., 919.
Charging prisoner, in execution, 1194.

Chattel, execution for return of, 904.
Chattels real may be taken under an elegit, 871.
Chelmsford, entry of action for trial at, 598.
Cheques seizable in execution, 846.
Chief Justice, office and position of, 13.
  when President of High Court, 13.
  when office vacant, 205.
Children as witnesses, 632.
Choses in action, assignment of, 1365.
Christmas,
  vacation, 192.
  days at, when reckoned in proceedings, 1434.
Churchwardens, office of, on sequestration, 1177.
Cinque ports,
  direction of writs to, 799.
Circuit officers, 23.
  appointment of, 197.
Circuits, 194.
  jurisdiction of judges on, 197.
Claim, statement of, 288. *See* "*Statement of Claim.*"
Claims, adverse, proceedings on, 1354. *See* "*Interpleader.*"
"Clear days," meaning of the words, 1435.
Clergymen,
  privilege of, from arrest, 1176, 1490.
  exempt from being jurors, 615.
  actions against, 1176.
  fi. fa. de bonis ecclesiasticis, 855, 1176.
  testatum, fi. fa. 1177.
  sequestrari facias, 1177.
  sequestrator may sue in his own name, 1178.
  after protection from process, 1178.
  both fi. fa. and seq. fa. continuing writs, &c., 1178.
  rule to return writs, &c., 1178.
  premature return, 1180.
  reference of accounts to master, 1180.
  setting aside sequestration, 1180.
  amendments, 1180.
  effect of sequestration under decree of suspension, 1181.
  appointing curate, 1181.
  warrant of attorney creating charge on benefice, when set aside, 1311.
Clerk, counsel's, fees to, 709.
Clerk of solicitor, 44. *See* "*Solicitors.*"
Clerks of assize, 24.
  in crown office, 26.
  to the judges, 24.
Client. *See* "*Solicitor.*"
"Client," defined, 126.
Cognizance in replevin. *See* "*Replevin.*"
Cognovit, judgment by, 1297.
  the cognovit, 1297.
  how attested, 1299.
  filing of, 1299.
  judgment, when may be signed, 1299.
  mode of signing judgment, &c., 1300.
  execution on, 1301.
  in what cases it may be set aside, &c., 1301.

Cognovit, judgment by—*continued.*
implied confession of action, 1302.
by infant, 1140.
writ of inquiry, 1302.
College, service on party in, 1442.
Colleges and charities, jurisdiction in relation to, 5.
Collision between ships,
in actions for, Preliminary Act to be filed before pleading, 3
Collusion. *See* "*Fraud.*"
Colonial Courts, solicitors of, admission in England, 75.
remitting cases for opinion of, 1349.
Colonies, mandamus for examination of witnesses in, 556.
Commencement of actions to be by writ of summons, 215.
Commission,
for examination of witnesses out of the jurisdiction, 545.
in what cases, 545.
affidavit, 546.
the order, 547.
how sued out, &c., 549.
interrogatories, 550.
proceedings after commission sued out, 550.
compelling attendance of witnesses, &c., 551.
the examination, 552.
return of commission, 552.
costs, 554.
examination on request in lieu of, 554.
fees on issuing, 1672, 1684.
Commissioner, trial by, 585.
Commissioners,
for taking affidavits, 24, 463, 466.
for examination of witnesses, 25.
for acknowledgments by married women, 25.
for taking bail, 26.
jurat in affidavit taken before, 463.
service of writ on, 1212.
Committal, order of, for nonpayment of judgment debt, 787.
sheriff's fees on, 829.
Common informer. *See* "*Penal Action.*"
corporation suing as, 1050.
Common jury. *See* "*Jury.*"
Common law,
variances in practices between common law and equity, 20
generally, when different from equity, equity to prevail,
Courts of, former jurisdiction of, 6.
Common Law Procedure Acts, repeal of parts of, 199, n. (c).
Common Pleas,
former jurisdiction of, 7.
part of the High Court of Justice, 4.
Division, business assigned to, 10.
amalgamated with the Queen's Bench Division, 11.
Common Pleas at Lancaster, jurisdiction of, transferred to Hig
Company,
(*As to incorporated joint-stock companies under the Com*
1862—1881, *and proceedings by or against them, see* "*Cor*
where a company "carries on business," 253.
order for discovery of documents against, 493.

nued.
on, 1302.

442.
ction in relation to, 5.

y Act to be filed before pleading, 394.

admission in England, 75.
n of, 1349.
ination of witnesses in, 556.
be by writ of summons, 215.

sses out of the jurisdiction, 545.

ssion sued out, 550.
f witnesses, &c., 551.

2.

in lieu of, 554.
584.

, 463, 466.
esses, 25.
y married women, 25.

before, 463.

payment of judgment debt, 787.

Penal Action."
050.
"

etween common law and equity, 201.
nt from equity, equity to prevail, 201.
diction of, 6.
cts, repeal of parts of, 199, n. (*c*).

7.
t of Justice, 4.
gned to, 10.
Queen's Bench Division, 11.
r, jurisdiction of, transferred to High Court,

int-stock companies under the Companies Ac
ceedings by or against them, see "Corporation."
rries on business," 253.
documents against, 493.

Company—*continued.*
Proceedings by and against banking and other companies entitled to sue and be sued in the name of their public officers, &c., 1080.
General observations as to, 1080.
Banking companies, statutes as to, 1081.
actions to be brought, &c., in name of public officer, 1081.
right of action by shareholder against company, &c., 1081.
Statutes obligatory, 1082.
when they apply, 1083.
delivery of return to stamp office not a condition precedent to right to sue, 1083.
Writ and other proceedings till judgment, 1084.
death, &c., of public officer, 1084, 1300.
bankruptcy of public officer, 1084.
Execution against company and shareholders, 1085.
against shareholder for time being, 1085.
against former shareholder, 1085.
public officer, &c., to be indemnified, 1085.
who liable as shareholders, 1085.
in what order shareholders liable, 1086.
mode of proceeding against, 1086.
Shareholders of some companies not personally liable, 1088.
remedy for satisfaction of judgment in such case, 1088.
Companies established by letters patent under 7 W. 4 & 1 V. c. 73., 1088.
may sue, &c. in name of public officer, 1089.
action not to abate by his death, removal or bankruptcy, 1089.
service upon and by company, 1089.
execution against company and shareholders, 1090.
proviso as to liability of shareholders, 1090.
extent of shareholders' liability, 1090.
continuance of liability, 1090.
Company, charging stock, &c., in, 919.
Compelling attendance of witnesses, 560.
Compelling discovery. *See "Discovery and Inspection."*
Compelling judge or officer of County Court to do his duty,
enactment respecting, 1538.
when judge will be compelled to hear a case, 1538.
when application should be against the clerk, 1539.
when to be applied for, 1539.
the affidavit, 1539.
the rule nisi, 1539.
showing cause, 1539.
costs of the rule, 1539.
proceeding on rule absolute, 1540.
Competency of witnesses, 632.
Compounding debts, &c.,
by trustees of bankrupt, 1165.
by executor, 1117.
Compounding penal actions, 440.
Compromise,
by client to prejudice of solicitor, 165.
authority of counsel to, 103, n. (*l*).
staying proceedings after, 374.
by trustee on bankruptcy, 1165.
by executor, 1117.
in case of an infant, 1140.
Compulsory arbitration, 1584.
Computation of time, 1434. *See "Time."*

Concurrent writs,
of summons, 228.
o execution, 793.
orders to arrest, 1481.
Condition, judgment subject to, enforcing, 963.
Condition precedent, how pleaded, 285.
Conditional appearance, 256.
Conditional rule or order as to costs, 1413.
Conduct money to witness, 537.
Conferences, fees for, 709.
Confession,
of action, 1297. *See* "*Cognovit.*"
of defence arising after action, 322.
of irregularity in proceedings, 449.
of action of ejectment, 1297.
Confession and avoidance, pleading matter in, 312.
Consent order, 1385.
Consent, judgment on order by, 1294.
Consents of next friend, &c. for infants, &c., 1136.
Consent to summons, 1409.
Consolidating actions, 407.
effect of the rule, 409.
when opened, 410.
application for leave to sign judgment in actions not tried,
costs on payment into Court, 410.
effect of payment into Court on consolidated actions, 354.
Constable, high,
proceedings by and against, ' actions against hundredors
exempt from being juror, 615.
Constables, actions against,
notice of action, 207.
Generally, 1044.
limitation of action, 1044.
demand of warrant, 1044.
notice of action, 1045.
statement of claim, &c., 1045.
venue, 1046.
costs, 1046.
Against special constables, parish constables, &c., 1047.
special constables, 1047.
parish constables, 1048.
county police, 1048.
borough constables, 1048.
metropolitan police, 1048.
other statutes, 1048.
Consul, British, may administer oaths, &c., abroad, 468.
Consuls not privileged from arrest, 1457.
Contempt of Court,
attachment for, 947.
treatment of person in prison for, 1187.
Contingency, judgment subject to, enforcing, 963.
Continuance, notice of inquiry by, 1334.
Continuance, plea of puis darrein, 320.
Contract,
mode of pleading, 286.
damages in action on, 661.
action founded on, 683.
Contractions in Christian names, 218, 1465.

to, enforcing, 963.
aded, 285.

o costs, 1413.
37.

Cognovit."
action, 322.
dings, 449.
297.
leading matter in, 312.

by, 1294.
for infants, &c., 1136.

sign judgment in actions not tried, 410.
Court, 410.
Court on consolidated actions, 354.

ainst, ' actions against hundredors, 1109.
or, 615.

n, 1044.
t, 1044.
045.
n, &c., 1045.

ables, parish constables, &c., 1047.
, 1047.
, 1048.
48.
es, 1048.
ice, 1048.
048.
inister oaths, &c., abroad, 468.
om arrest, 1457.

in prison for, 1187.
ubject to, enforcing, 963.
quiry by, 1334.
s darrein, 320.

86.
n, 661.
683.
n names, 218, 1465.

Contribution from third parties, how enforced, 416. *See* "*Third Party Procedure.*"
Contribution between co-defendants, 424.
as to costs, 728.
Conveyancers under the bar, certificate, 80.
"Convict," defined, 1187.
regulations as to property of, 1187.
Conviction,
of solicitor of a crime, consequences of, 177.
persons attainted cannot be jurors, 614.
Convocation, members of, when privileged from arrest, 1456.
Coparcener. *See* "*Joint Tenant,*" "*Partners.*"
Copies of instruments. *See* "*Discovery and Inspection.*"
notice to opposite party to admit documents, 479.
solicitor, when lien satisfied, bound to give up, 170.
charges for, 723, 1673.
charge for, when made by one party for another, &c., 705, 1444.
of special case for use of judge, 1346.
office copies, 1443.
Copy,
of writ of summons to be served, 232.
of case on appeal to House of Lords, for peers, 1006.
of case on appeal from inferior Court, for judges, 1517.
Copyhold lands, extending of, by elegit, 876.
Copyright, particulars of objections to, 392.
Cornwall, appeal from Stannary Courts of, 1521.
Coroner,
direction of writs of execution to, 797.
direction of attachment to, 951.
former award of venire to, where sheriff a party, 602.
exempt from serving on jury, 615.
privilege from arrest, 1459.
Corporate towns, former award of venire, &c., in case of, 603.
Corporation books, inspection of, 511.
Corporations, proceedings by and against,
1. In General,
must sue and defend by solicitor, 99, 1051.
retainer should be under seal, 100, 1051.
place of business of, 219, 253.
proceedings by corporations, 1050.
proceedings against corporations, 1051.
writ against, 1051.
service of, 235, 1051.
cannot be held to bail, 654.
must defend by solicitor, 1051.
statement of claim, 1051.
execution, 1052.
attachment does not lie against, 947.
interrogatories to, 517.
2. Companies within "The Companies Act, 1862—1883,"
retainer of solicitor by, 100.
1. Actions by such companies, 1053.
writ, 1053.
company a corporation, 1053.
change of name, 1053.
registered office, 1053.

Corporations, &c.—*continued.*
effect of memorandum of association, 1054.
of articles of association, 1054.
authentication of proceedings by company, 1054.
service of proceedings, 1055.
service of notices on members by company, 1055.
security for costs, 1055.
action for calls—form of claim, 1056.
effect of registration on previous rights of action, 1
evidence in actions,
certificate of incorporation, 1057.
register of members, 1057.
report of inspectors, 1058.
minutes of resolutions and proceedings, 1058.
seal of Stannaries Court, 1058.
certified copies of documents at registration of
reference to arbitration, 1058.
2. Actions by companies being wound up, 1059.
3. Actions against companies under these Acts, 1059.
writs of summons, &c., 1059.
staying proceedings after petition for winding up,
winding-up order, effect of—leave to commence
time action after, 1062.
transfer of actions after, 1063.
effect on action against contributories, 1063.
discovery, 493.
execution, 1063.
4. Rectification of register of companies under Comp
1862, s. 35..1064.
remedy for improper entry, &c., 1064.
definition of member, 1064.
register of members, 1065.
inspection of register, 1065.
notice of rectification, 1065.
3. Proceedings by and against railway and similar compa
enactments of Companies Clauses Acts, 1845 and
1065.
to what companies act applies, 1065.
interpretation clause, 1066.
how contracts to be entered into, 1066.
directors not personally liable, 1066.
mode of proceeding by and against, 1067.
security for costs, 1067.
notice of action, 1067.
tender of amends, 1068.
service of writ, 1068.
change of name, 1068.
action not to abate by reason of change of nam
saving of rights, 1069.
contracts preserved, 1070.
proceedings when company unable to meet
1070.
compensation for accidents, 1070.
execution against company, 1070.
restriction on execution, 1071.
determination of questions respecting, 1071.
execution against shareholders, 1072.
definition of shareholders, 1072.
register of shareholders, 1072.
to extent of shares in capital not paid up, 107

…ndum of association, 1054.
…f association, 1054.
…f proceedings by company, 1054.
…dings, 1055.
…s on members by company, 1055.
…ts, 1055.
…form of claim, 1056.
…ation on previous rights of action, 1056.
…ons,
…of incorporation, 1057.
… members, 1057.
…spectors, 1058.
… resolutions and proceedings, 1058.
…mmaries Court, 1058.
…pies of documents at registration office, 105…
…bitration, 1058.
…anies being wound up, 1059.
… companies under these Acts, 1059.
…ons, &c., 1059.
…dings after petition for winding up, 1059.
…rder, effect of—leave to commence or co…
…tion after, 1062.
…f actions after, 1063.
…action against contributories, 1063.
…
…3.
… register of companies under Companies Ac…
…1064.
…proper entry, &c., 1064.
…member, 1064.
…mbers, 1065.
…register, 1065.
…ification, 1065.
…l against railway and similar companies,
…mpanies Clauses Acts, 1845 and 1863, as t…
…
…es act applies, 1065.
…use, 1066.
… be entered into, 1066.
…onally liable, 1066.
…ng by and against, 1067.
…costs, 1067.
…ion, 1067.
…ends, 1068.
…rit, 1068.
…me, 1068.
…o abate by reason of change of name, 1069.
…ghts, 1069.
…reserved, 1070.
… when company unable to meet engagem…
…
…on for accidents, 1070.
…st company, 1070.
…on execution, 1071.
…ion of questions respecting, 1071.
…st shareholders, 1072.
…f shareholders, 1072.
… shareholders, 1072.
…f shares in capital not paid up, 1073.

Corporations, &c.—*continued.*
modo of procedure, 1073.
directions for obtaining leave to issue, 1074.
service of notice, 1074.
affidavit, 1075.
second application, 1076.
where Court orders execution, 1076.
reimbursement of shareholder, 1077.
4. Banking companies. *See* "*Company.*"
actions for calls, 1077.
Corporators and hundredors,
when privileged from arrest, 1459.
from arrest on ca. sa., 892.
Costs, solicitor's bills of, 122. *See* "*Solicitors.*"
agreements with solicitor as to, 126—131.
Costs,
of particular actions by and against partienlar persons, and in particular proceedings, &c. *See the respective titles throughout the Index.*
of judgment by default, 263, 264, 332.
after order for judgment under Ord. XIV., 275.
of copies of pleadings, 287.
where statement of claim unnecessary, 288.
where counterclaim, 309.
of amendments, 315.
indorsement of claim for, 224.
setting off costs against costs, 783, 784.
when security for, may be compelled to be given, 395. *See* "*Security for Costs.*"
as to solicitor's remedy for, against client, 155 *et seq.*
on trial of issue, 1362.
indorsed on writ of summons, 223.
taxation of, on payment of debt, &c., within four days, &c., 225.
entry of, in judgment, 766.
plaintiff's solicitor liable for, when plaintiff fictitious, 106.
on award, taxation of, 1640. *See* "*Arbitration.*"
of proof of will, 483.
Costs generally,
parties entitled to,
general rule, costs in discretion of Court or Judge, 671.
extent of rule, 672.
applies to all proceedings, 672.
discretion, how exercised, 673.
between co-defendants, 674.
where several defendants, 674.
third party, 675.
after trial with a jury, costs follow event, 675.
meaning of "event," 676.
ambiguity, &c., of certificate, 678.
application to deprive successful party of costs, meaning of "good cause," 679.
application to the Court on appeal, 680.
where less than 20*l.* recovered in contract and 10*l.* in tort—County Courts Act, 1867..680.
to what actions applicable, 681.
counterclaim, 682.
third party, 682.
meaning of "recovers," 682.
distinction between actions founded on contract and tort, 683.
to what costs, 683.
how obtainable, 683.

Costs generally—*continued.*
who may give certificate, 683.
sufficient reason, what is, 684.
proceedings when certificate not given or refused
judge, 685.
when plaintiff recovers sum not exceeding 50*l.* in cont
Ord. LXV. r. 12..685.
where several issues, 686.
where County Courts have admiralty jurisdiction, 688.
extent of jurisdiction, 688.
restriction on proceedings in superior Court, 690.
costs of executors, trustees, &c., 690.
costs under particular statutes, 690.
in actions against public officers, justices of the peace, &c
in actions for infringement of patents, 691.
in pauper actions, 1184.
double and treble costs, 692.
taxation of costs, 693.
former practice preserved, 693.
by whom, 693.
when to be taxed, 694.
notice of taxation, 694.
omitting to give notice, 695.
affidavit of increase, 695.
indorsements on bill, 696.
the taxation, 696.
powers of taxing officers, 696.
the certificate or allocatur, 697.
objections to taxation, 698.
by person not a party to taxation, 699.
review of taxation, 699.
fees on, 1679, 1690.
what costs allowed on taxation, 700.
taxation between party and party and solicitor and client
higher and lower scale, 701.
special allowances and general regulations, 702—710.
costs of particular proceedings, 710—719.
amounts allowable in particular cases, App. N. to R. o
719—727.
recovery of costs, 727.
payment of costs by person not a party, 728.
appeal as to, 971.
in case of appeals to House of Lords, 1011.
agreement for payment of, in special case, 1345.
when action in district registry, 1431.
County Court scale of costs, 1705.
Counsel,
solicitor getting himself struck off roll to become, 184.
admission to roll of solicitors, 46.
exemption from intermediate examination, 64.
signature of pleadings by, 281.
order in which heard, on motions, 1381.
course as to hearing, &c., at trial, 630, 642, 644.
right of speech, &c., 631.
number allowed, &c., 709.
attending summons by, 1411.
attending writ of inquiry by, 1335.
signature of, to special case, 1344.
to petition of appeal, 1000.
to case for House of Lords, 1005.

tificate, 683.
on, what is, 684.
certificate not given or refused by the
's sum not exceeding 50*l.* in contract—
85.
86.
nave admiralty jurisdiction, 688.
ion, 688.
ngs in superior Court, 690.
stees, &c., 690.
statutes, 690.
lic officers, justices of the peace, &c., 691.
nent of patents, 691.
4.
s, 692.
ved, 693.
notice, 695.
se, 695.
ill, 696.
officers, 696.
atur, 697.
, 698.
arty to taxation, 699.
9.
ition, 700.
y and party and solicitor and client, 700.
e, 701.
l general regulations, 702—710.
ceedings, 710—719.
particular cases, App. N. to R. of S. C.
a not a party, 728.
e of Lords, 1011.
, in special case, 1345.
gistry, 1431.
s, 1705.
truck off roll to become, 184.
ors, 46.
ate examination, 64.
, 281.
motions, 1381.
at trial, 630, 642, 644.
411.
by, 1335.
se, 1344.
1000.
Lords, 1005.

Counsel—*continued.*
counsel's opinion on case of pauper, &c., 1182.
new trial, for absence, &c. of, 737.
privilege of, fom arrest, 1458.
exempt from being juror, 615.
fees to, 709, 712.
for advising and settling, 704.
for attendance at chambers, 704.
to be vouched by counsel's signature, 710.
authority of, 102.
pre-audience and going through the bar, 1381.
fees to counsel's clerks, 709.
Counterclaim,
in ordinary cases, 304.
when admissible, 305.
where plaintiff misjoined, 306.
form, 306.
arising after action brought, 307.
counterclaim to counterclaim, 307.
effect of discontinuance, 307.
of death, 307.
equitable rights, 307.
reply, 312.
where third party brought in as co-defendant to counterclaim, 307.
reply by third party, 309.
judgment, 309.
costs, 309, 676, 682.
distinction between counterclaim and set-off, 310.
excluding where inconveniently joined, 310.
amendment of counterclaim, 315.
counterclaim arising after action, 322.
withdrawal of counterclaim, 340.
payment into Court to meet, 343.
damages in case of, 667.
particulars of, 381.
in inferior Courts, 1513.
setting up on application under Ord. XIV., 271.
Countermand,
of writ of execution, 811.
of notice of trial, 580.
of notice of inquiry, 1334.
County Court,
unqualified person prohibited from practising in, 93.
roll to be signed by solicitor before practising in, &c., 75.
what actions cannot be brought in, 681.
jurisdiction in ejectment, 1205, 1567.
removal of action of ejectment from, 1567.
proceedings in replevin in, 1253, 1266. *See "Replevin."*
appeal from, 1255.
when Admiralty jurisdiction, 688.
costs of action in High Court, that might have been brought in County Court, 680. *See "Costs."*
costs under acts relating to, where money paid into Court, 682.
staying proceedings in respect of claim to goods taken in execution, under process from, 376.
transfer of interpleader proceedings to, 1360.
removal of causes from, 1562, 1571. *See "Removal."*
appeal from, 1378, 1523. *See "Appeal from County Court."*

County Court—*continued.*
mandamus to, 1538. *See "Compelling Judge of County Court to his duty."*
prohibition to, 1543. *See "Prohibition."*
ordering cause to be tried in a County Court, 1548. *See "R of Actions to County Courts."*
security under County Courts Act, how to be given, &c., 153
at whose cost, and form of, 1530.
relief may be given to obligors, 1530.
deposit may be made in lieu of giving security, 1530.
County Court rules as to security, 1531.
action on bond, 1535.
Court may give relief, 1535.
setting aside irregular proceedings, 1536.
sureties how far liable, 1536.
how discharged, 1537.
entering satisfaction on bond, 1537.
other matters,
priority of execution, 862.
County Court, registrar of, liability for taking insufficient or no on replevin bond, 1273.
County Court scale of costs, schedule, 1705.
County palatine. *See "Lancaster," and "Durham."*
admission of solicitors to Courts of, 75.
writ, how directed when to be executed in, 798.
how writ executed there, 812.
return of writs in, 819.
judgments in Courts of, 807.
Court. *See "High Court of Justice," "Supreme Court of Ju "County Court."*
Court, inferior, removal of causes from. *See "Removal."*
Court-martial, privilege from arrest extends to witnesses, &c. 1486.
Courts in her Majesty's dominions, remitting cases to, for thei 1349.
Coverture. *See "Husband and Wife."*
Crier, 26.
Criminal information, title of affidavits, 456.
Criminal matters, no new trial in, 744.
when appeal lies, 973.
Criminal custody,
render in case of, 1509.
proceedings against prisoners in case of, 1195. *See Proceedings against."*
Criminal proceedings,
staying proceedings pending, 377.
excepted from the rules in Jud. Acts, 203.
action does not include, 203.
Criminating documents privileged, 501.
Criminating interrogatories, 522.
Criminating questions to witness, &c., 640.
Crops, seizure of, in execution, 844, 849.
Cross-actions, consolidation of, &c., 370.
Cross-examination of witness at trial, 637.
Crown, the. *See "Petition of Right."*
Crown debts, liability to arrest for, 891.
Crown Office of the Queen's Bench, 20, 21.

'Compelling Judge of County Court to perform

"Prohibition."
in a County Court, 1548. *See* "*Remission*
rts."
urts Act, how to be given, &c., 1530.
rm of, 1530.
o obligors, 1530.
in lieu of giving security, 1530.
s to security, 1531.

f, 1535.
r proceedings, 1536.
le, 1536.
7.
on bond, 1537.

, 862.
ability for taking insufficient or no sureties

schedule, 1705.
aster," *and* "*Durham.*"
Courts of, 75.
to be executed in, 798.
here, 812.
19.
s of, 807.
Justice," "*Supreme Court of Judicature*,"

auses from. *See* "*Removal.*"
n arrest extends to witnesses, &c. attending

inions, remitting cases to, for their opinion

nd Wife."

of affidavits, 456.
rial in, 744.

risoners in case of, 1195. *See* "*Prisoners*

nding, 377.
s in Jud. Acts, 203.
, 203.
vileged, 501.
s, 522.
itness, &c., 640.
ion, 844, 849.
n of, &c., 370.
ess at trial, 137.
of Right."
rrest for, 891.
s Bench, 20, 21.

Crown side of the Queen's Bench,
officers of the, 26.
proceedings not affected by R. of S. C., 203.
affidavits on, 454.
Curate, appointment of, where sequestration, 1181.
Curator of property of convict, 1187.
Custody of property, 437.
Customs and excise,
officers of, exempt from being jurors, 615.
actions against. *See* "*Revenue Officers.*"

D.

Damage feasant, replevin in case of. *See* "*Replevin.*"
Damages,
undertaking as to, in cases of injunction, &c., 436.
interrogatories as to, 518.
in actions on contract, 661.
where set-off pleaded, 661.
in detinue, 662.
trover, 662.
replevin. *See* "*Replevin.*"
ejectment. *See* "*Ejectment.*"
actions for mesne profits. *See* "*Ejectment.*"
actions against justices, &c., 1043.
interest, when given as, 663.
must not be for cause of action subsequent to suit, 664.
matters not pleaded not allowed in mitigation, 665.
when limited, 665.
where a penalty, 665.
cannot exceed damages in statement of claim, 665.
when increased, 665.
reduced, 666.
where several defendants, 666.
several claims, issues, &c., 666.
on a nonsuit or verdict for defendant, 667.
double and treble damages, 667.
damages where counterclaim, 667.
consequences of omission by jury to assess, 903.
proof of, on executing writ of inquiry, 1336.
reference to Master, and writ of inquiry, to ascertain amount of, 1326. *See* "*Reference to Master*," "*Inquiry, Writ of.*"
assessment of, in debt on bond, 1282.
new trial where excessive or too small, 735, 736.
Date of pleadings, writs, &c. *See the several titles throughout the Index.*
Day. *See* "*Time.*"
Day, costs of the, 625.
Death of parties,
where action does not abate by, 1026.
between verdict and judgment, 960, 1028.
leave to enter judgment nunc pro tunc in case of, 1029.
between interlocutory and final judgment, 1029.
after final judgment and before execution, 959.
of one of several plaintiffs or defendants after final judgment, 961.
in ejectment, 1226.

Death of parties—*continued.*
after execution sued out, 810.
where party dies in execution, 900.
death of defendant, how far a discharge of his bail, 1508
effect on judgment on order by consent, 1295.
how far death affects cognovit or warrant of attorney, 1300,
how far death revokes arbitrator's authority, 1604.
pending motion for new trial, 749.
in case of appeal pending in House of Lords, 1007.
Death,
of public officer of company, 1084, 1089.
of arbitrator, 1592.
of solicitor in the cause, 111.
effect of, on clerkship, 58. *See* "*Solicitors.*"
Debt,
indorsement of, on writ of summons, 223.
staying proceedings on payment of, &c., 223, 362. *See* "*Proceedings.*"
assignment of, 1365.
attachment of, 927. *See* "*Attachment.*"
Debt on bond. *See* "*Bond.*"
Debtors, relief of, from adverse claims by creditors and assignee
Debtors Act, 1869,
as to arrest for debt, 889.
committal under, 787.
Debtors Act, 1878..943.
Declaration,
a former pleading, 278.
instead of oath, 462.
Declaratory judgments, 325.
Deed, affidavit to arrest on, 1469.
Deeds, what, seizable under *fi. fa.*, 846.
Defamation, notice of intention to give evidence of apology in 393.
Default of appearance. *See* "*Appearance.*"
Default in delivering defence, 303.
Default of pleading,
by plaintiff, 326.
in delivering statement of claim, 226.
reply, 327.
by defendant, 328.
by other parties, 333.
motion for judgment in default, 757.
setting aside judgment signed in default, 333.
Default in entering action for trial, 599.
Default, pleadings, &c. filed in, 1698.
Defeazance on cognovit, 1298.
on warrant of attorney, 1364, &c. *See* "*Warrant of Att*
Defect. *See* "*Irregularity,*" *and the respective titles.*
Defence, the, 297.
time for delivering, 297.
how delivered, 297.
contents, 298.
traverses, 299.
not guilty by statute, 300.
further time to deliver, 300.
proceedings in default of defence, 303.
withdrawing, 303.
amending, 315.
confession of defence, 322.
default in delivering defence, 328.

810.
tion, 900.
far a discharge of his bail, 1508
ler by consent, 1295.
novit or warrant of attorney, 1300, 1309.
bitrator's authority, 1604.
trial, 749.
g in House of Lords, 1007.

ıny, 1084, 1089.

111.
8. *See* "*Solicitors.*"

of summons, 223.
payment of, &c., 223, 362. *See* "*Staying*

e "*Attachment.*"
"
erse claims by creditors and assignees, 1363

39.

5.
, 1469.
r. *fi. fa.*, 846.
ation to give evidence of apology in action fo

ee "*Appearance.*"
ıce, 303.

ement of claim, 226.
y, 327.

in default, 757.
nt signed in default, 333.
n for trial, 599.
led in, 1698.
1298.
ey, 1304, &c. *See* "*Warrant of Attorney.*"
ity," *and the respective titles.*

297.

tatute, 300.
ver, 300.
ult of defence, 303.

ce, 322.
g defence, 328.

Defence, the—*continued.*
withdrawal of, 340.
payment into Court before, with, or after, 343, 344, 347.
course of, at trial, 642.
arising too late to be pleaded, 320.
arising after action brought, 320.
confessing defence, 322.
Defendant, definition, 204.
Defendants,
who to be, 1015.
costs of co-defendants, 674.
claims between, 424.
Degree. *See* "*Additions.*"
Delay. *See* "*Laches.*"
where month's notice necessary after, 1437.
Delegation of authority by arbitrator, 1609.
Delivery,
of solicitor's bill. *See* "*Solicitors.*"
of pleadings and other proceedings, 280. *See the several titles.*
allowance of costs for, 703.
writ of, 904.
of property detained as lien, &c., 439.
Demand,
of possession in ejectment, 1202.
on termination of tenancy, 1232.
of rent, to work a forfeiture, 1240.
inspection of document, 505.
perusal and copy of a warrant in action against constables, &c., 1044.
Demand, particulars of, 380. *See* "*Particulars of Demand.*"
Demurrer, pleadings in lieu of, 324.
Departure in pleading, 283.
Deponent, description of, &c., 459.
Deposit,
money not to be placed on, in Q. B. D., 359.
on arrest of defendant before judgment, 1497.
in lieu of security in County Courts, 1530.
for costs in case of interrogatories, 518.
Depositions of witness,
before special examiner, 539.
use of at trial, 540.
may be read by either party, 541.
whole must be read, 541.
Depositions before examiner of the Court, 544.
Deputy-sheriff, 32.
Destroyed bill of exchange, action on, 404.
Detention of property, order for, 437.
Detinue,
damages in, 662.
staying proceedings in, 367.
effect of judgment in, 767.
execution for return of chattels detained, 904.
Devastavit, its effect upon proceedings against executors or administrators, 1124, 1126.
Devisee,
actions by and against, 1131.
admitted to defend in ejectment, 1214.
Devolution of estate, effect of, on actions, 1031, 1032.

Dies non,
writ returnable on, a nullity, 800.
Dignity, name of, in writ of summons, 217.
Direction of writs, 797.
of notice to discharge party improperly arrested, 809.
Directions, application for, as to third party, 421.
Discharge of,
party improperly arrested, 809.
defendant from custody, when he ought not to have been
before judgment, 1492.
on payment of debt and costs, 1503.
after arrest under ca. sa., 895.
sureties given, on arrest of defendant before judgment, 150
judgment, how far execution is. *See* "*Execution.*"
jury, 652.
Discontinuance, 337.
without leave, 338.
notice of, 338.
with leave, 338.
costs, 339.
effect, 339.
judgment, for costs, 340.
new action after, 340.
staying proceedings until costs of former action paid, 341.
effect of, on counterclaim, 307.
Discovery,
rules of equity prevail as regards, 6.
affidavits in, 475.
in aid of execution, 791.
interrogatories to opposite party, 515. *See* "*Interrogatorie*
of documents, 491.
time for application, 491.
postponement until trial of issue, 492.
affidavit in support of application, 492.
in what cases, 492.
against whom order will be made, 493.
security for costs by payment into Court, 494.
the affidavit of documents, 496.
what documents are privileged, 497.
not ordered in penalties and forfeiture, 502.
joint possession, 502.
jus tertii, 503.
solicitor's lien, &c., 503.
proceedings in case of failure to comply with order, 525.
inspection of documents. *See* "*Inspection.*"
inspection of public books, 511.
inspection of real and personal property, 527.
in case of petitions of right, 1291.
against third party, 422.
Discretion, appeal from, 973.
Dismissal of action for want of prosecution, 326.
"Disputes," definition of, 1102.
Dissolution, &c. of parliament, hearing appeals on occasion
Distress,
ejectment for nonpayment of rent, when not sufficient,
goods distrained cannot be taken in execution, 855.
Distributive issues, to be construed distributively, 676.
District registries, 1421.

lity, 800.
summons, 217.

ety improperly arrested, 809.
s to third party, 421.

l, 809.
, when he ought not to have been arrested
1492.
and costs, 1503.
t. sa., 895.
of defendant before judgment, 1506.
ution is. *See* "*Execution.*"

).

il costs of former action paid, 341.
m, 307.

as regards, 6.

.
site party, 515. *See* "*Interrogatories.*"

n, 491.
l trial of issue, 492.
t of application, 492.

.
er will be made, 493.
by payment into Court, 491.
cuments, 496.
re privileged, 497.
nalties and forfeiture, 502.
502.

e., 503.
failure to comply with order, 525.
ts. *See* "*Inspection.*"
ooks, 511.
personal property, 527.
right, 1291.
22.
73.
nt of prosecution, 326.
, 1102.
ment, hearing appeals on occasion of, 1009.

ment of rent, when not sufficient, 1242.
not be taken in execution, 855.
construed distributively, 676.

District Registries and proceedings therein,
formation and places where, 1421.
appointment of registrars, 1422.
powers and duties of registrars, 1423.
power to administer oaths, 1424.
same powers as Master at Chambers, 1424.
not to practise in registry, 1424.
seal to be used, 1424.
what proceedings may be taken in district registry, 1424.
reference of accounts and inquiries to registrar, 1425.
forms to be used, 1426.
writ of summons, 252, 256, 1426.
name of registry, 1426.
statement of place for appearance, 1426.
indorsement of address, 1426.
appearance, 1427.
judgment in default of appearance or pleading, 259, 1427.
interlocutory and other applications—summons, 1427.
reference to judge, 1428.
appeal to judge, 1428.
no stay unless so ordered, 1428.
removal of actions from district registries, 1428, 1697.
as of right by notice, 1429.
service and delivery of notice, 1429.
certificate that no defence delivered, 1429.
order to proceed in District Registry notwithstanding notice, 1429.
by summons, 1430.
notice of address for service on removal, 1430.
removal from London to District Registry, 1430.
payment into Court, 1430.
entry for trial, 598.
judgment, 1430.
execution and taxation of costs, 1430.
fees, allowances, costs, &c., 1431, 1675.
filing pleadings, &c., 1431.
transmission of documents to central office, 1431.
removal of documents from registry, 1431.
when district registries open, &c., 191.
Districts, direction and execution of writs in, 798.
Distringas juratores, abolished, 602.
Distringas against sheriff for not selling goods, &c., 867.
Distringas vicecomitem, 865, 867.
Distringas, proceedings in lieu of, 924, 1698.
Divisional Courts, 15.
how constituted, 15.
what business transacted in, 16, 180, 1378.
appeal to, 970.
Divisions of the High Court, 9.
assignment of action to, 217.
Divorce,
former jurisdiction of Court for, 9.
now part of High Court, 4.
business assigned to Divorce Division, 11.
proceedings for divorce, excepted from rules in J. Acts, 203.
costs in, 131.
action by married women after, 1149.
effect of judicial separation, 1151.
order to protect wife's property after desertion by her husband, 1150.
Docketing judgment, 769.

Documents,
pleading contents of, 286.
ordering production of, 507.
in order to be stamped, 513.
compelling discovery of, 491. *See* "*Discovery.*"
the affidavit of documents, 496.
inspection of, 505. *See* "*Inspection.*"
notice to admit, 479.
notice to produce at trial, 484.
when necessary, 484.
when not, 485.
possession of original, 486.
form, 487.
service, 487.
consequences of want of, 489.
proceedings at trial after, 489.
production of, before special examiner, &c., 537.
at trial, 565.
removal of, from registry, 1431.
compelling delivery up of, by solicitor, 170.
interrogatories as to, 518.
costs of copies of 723.
Doors,
breaking open of, to execute writs of execution generally,
to execute habere facias, 1227.
Double and treble costs,
repeal of statutes as to, 692.
indemnity for costs instead of, 692.
Double and treble damages, 367.
Dower, action of, how commenced, 215.
Drafts. *See* "*Copies.*"
Drawing pleadings, &c., charges for, 722.
Drawing pleadings, allowance of costs for, 702.
Durham. *See* "*County Palatine.*"
transfer of jurisdiction of Court of Pleas at, to High Cou
fees of sheriffs, &c. in, 37.
"Dwell," cases explanatory of word, 253.

E.

Easter, days at, reckoning of, 1434.
Easter sittings, 189.
Easter vacation, 192.
Ejectment,
I. *In ordinary cases*, 1201.
nature of the action, 1201.
right to enter without action, 1201.
action the proper mode for recovering possessi
equivalent to ancient entry, 1201.
when actual entry or notice necessary before a
notice to quit, 1202.
determination of tenancy at will, 1203.
disclaimer of landlord's title, 1203.

Ejectment—*continued.*
I. *In ordinary cases*—continued.
nature of the action,
by mortgagors, 1203.
Statute of Limitations, 1203.
where County Court has jurisdiction, 1205.
how action commenced, 1206.
joinder of causes of action, 1207.
service of writ, 1208.
what kinds of service allowed where personal service cannot be effected—modes in vogue before C. L. P. Act, 1852..1208.
where regular service could not be effected, 1209.
in case of lunacy, 1211.
in case of bankruptcy, 1211.
on holders of chapel, 1212.
on corporations, 235, 1050.
charitable institutions, 1212.
free school, 1212.
road commissioners, 1212.
in case of vacant possession, 1212.
vacant possession, what, 1212.
tenant to give notice of ejectment to landlord, 1213.
appearance, 1213.
by defendant, 1213.
by landlord or person not named in writ, 1213.
cases before C. L. P. Act, 1852..1214.
order to appear as landlord, 1215.
appearance as landlord, 1215.
limiting defence to part of land claimed, 1215.
judgment in default of appearance, 1216.
affidavit of service of writ, 1216.
setting aside judgment by default, 1218.
pleadings, 1219.
judgment in default of defence, 1220.
particulars, 1220.
staying proceedings, 1221.
until costs of former action paid, 1221.
where several actions brought, 1223.
where title determines, 1223.
on forfeiture, 1238.
for non-payment of rent, 1245.
on application of mortgagor, 1247.
discovery, inspection and interrogatories, 1223.
receiver, 1224.
proceedings to trial—the trial, 1224.
judgment, 1225.
costs, 1226.
effect of judgment, 1226.
after death of party, 1226.
execution, 1226.
writ of possession, 1227.
how executed, 1227.
sheriff's poundage on, 1229.
attornment in lieu of, 1229.
entry without habere facias, 1229.
on judgment of inferior Court, 1229.
appeal, 1230.
restitution, 1229.
how enforced, 1230.

Ejectment—*continued.*
II. *Recovery of possession by landlord on termination of tenancy by*
tion of term or notice to quit, 1230.
proceedings under Ord. XIV., 1230.
under *C. L. P. Act*, 1852, *s.* 213..1231.
when statute applies, 1232.
demand of possession, 1232.
writ and notice, 1233.
appearance, 1213.
bail, 1233.
judgment for not putting in bail, 1234.
trial, 1235.
when no stay of execution, 1235.
landlord's rights not prejudiced, 1236.
III. *By landlord for breach of covenant under right of re-entry or*
to which Conveyancing Act, 1881, *sect.* 14, *applies*, 1230
general observations, 1236.
statutory restrictions on right of re-entry, &c., 1237.
relief against forfeiture, 1238.
IV. *By landlord on forfeiture by non-payment of rent*, 1240.
where there is a sufficient distress upon the premises, 1
where there is not a sufficient distress upon the premise
statute as to, 1242.
search for distress, 1243.
writ and service of, 1243.
judgment by default, 1244.
appearance and subsequent proceedings, 1244.
staying proceedings before trial on payment of
costs, 1245.
relief against forfeiture under *C. L. P. Act*, 1860.
proceedings for relief, 1246.
V. *Ejectment by mortgagee*, 1247.
VI. *Action for mesne profits*, 1249.
Ejectment, appeals from County Courts in actions of, 1528.
order for trial in superior Court of action commenced i
Court, 1567.
Ejectment, consolidating actions of, 408.
new trial in, 744.
Election petitions, proceedings relating to, 16.
Election petition affidavits, 475.
Elections, candidates, &c. at, not privileged from arrest, 1457.
Elegit, 873. *See* "*Execution.*"
Elisors,
direction of writs to, 797.
direction of attachment to, 951.
former award of venire where sheriff a party, 602.
Elongata, return of, &c., in replevin, 1265.
Ely, Isle of, direction of writ to be executed in, 797.
"Embarrassing," meaning as applied to pleadings, 318.
Enlarged rules, 1389.
Enlarging time,
for taking a proceeding, 1432.
for return of writ of execution, 817.
for showing cause against rule nisi, 1389.
for making award, 1611, 1617.
Enquiry, writ of. *See* "*Inquiry, Writ of.*"
Enrolment,
of documents, 1446.
of solicitors, 76.
of articles of clerkship, 51. *See* "*Solicitors.*"

landlord on termination of tenancy by expira-
e to quit, 1230.
rd. XIV., 1230.
Act, 1852, *s.* 213..1231.
o applies, 1232.
possession, 1232.
tice, 1233.
1213.

or not putting in bail, 1234.

o stay of execution, 1235.
rights not prejudiced, 1236.
of covenant under right of re-entry or forfeiture
ing Act, 1881, *sect.* 14, *applies*, 1236.
1236.
s on right of re-entry, &c., 1237.
ure, 1238.
re by non-payment of rent, 1240.
icient distress upon the premises, 1240.
sufficient distress upon the premises, 1242.
242.
ess, 1243.
e of, 1243.
efault, 1244.
subsequent proceedings, 1244.
dings before trial on payment of rent and

orfeiture under *C. L. P. Act*, 1860..1245.
s for relief, 1246.
1247.
s, 1249.
nty Courts in actions of, 1528.
ior Court of action commenced in County

ions of, 408.

gs relating to, 16.
475.
, not privileged from arrest, 1457.
."

7.
t to, 951.
where sheriff a party, 602.
replevin, 1265.
it to be executed in, 797.
as applied to pleadings, 318.

, 1432.
ecution, 817.
ast rule nisi, 1389.
1, 1617.
quiry, Writ of."

51. *See* "*Solicitors.*"

Enrolment Office, 20, 21.

Entry of the cause for trial,
at bar, 587.
at Nisi Prius, 598.
fee to be paid on, 600.
withdrawal after entry, 340.

Entry of the judgment at trial, 653.
of satisfaction, 779. *See* "*Satisfaction.*"
of suggestions, &c. in debt or bond, 1297.
on lands. *See* "*Ejectment.*"

Equitable,
defence, &c. may be set up in any division, 360.
stay of proceedings on equitable grounds, 360.

Equity,
conflict with the common law, 201.
and law to be concurrently administered, 4.
rules of, where to prevail when in conflict with law, 5, 201.

Equity, Court of. *See* "*Chancery.*"
former jurisdiction of, 6.

Equity of redemption,
sheriff cannot sell under fi. fa., 848.
not extendible under an elegit, 878.

Erasure,
in affidavit, 465, 474.
in jurat, 465.

Error from inferior Courts. *See* "*Removal of Causes from inferior Court.*"

Escape,
from custody under writ of execution, 896.
no action against sheriff for escape from prison, 898.
from special bailiff, 898.
from custody under order to arrest, 1505.

"Event," costs to follow, meaning of, 676, 1631.

Eviction of tenant by elegit, 886.

Evidence generally, 451.
at trial given viva voce, &c., 452.
when taken by affidavit, 452.
reading of evidence in another cause, 452.
office copies, 452.
use in proceedings subsequent to trial, 452.

Evidence, means of, &c.,
obtaining admission of documents before trial, 479.
notice to produce documents, 485.
examination of witnesses before trial, 533.
of entries in bankers' books, 531.
of witnesses, &c. before special examiner, 533.
before examiner of the Court, 542.
out of the jurisdiction on commission, 545.
on request in lieu of commission, 551.
on mandamus, 555.
examination of witnesses before trial, when resident within the jurisdiction of the Court, 533.
the same under a commission, when resident out of the jurisdiction, 545.

Evidence, means of—*continued.*
the same under a writ of mandamus, when resident in India
Queen's dominions abroad, 555.
compelling attendance of witnesses within the jurisdiction, 56
compelling attendance of witnesses when in Scotland or Irela

Evidence,
effect of particulars on, 386.
when taken by affidavit by consent, 574.
examination of witnesses at trial, &c., 634. *See* "*Trial Prius.*"
production of, on hearing of motion or summons, 1380.
improper admission of, 648, 730. *See* "*New Trial.*"
new trial where fresh evidence, 741.
in an action by solicitor for his bill, 156. *See* "*Solicitors.*"
upon executing a writ of inquiry, generally, 1285, 1336.
in action on bond, 1283.
in matters pending before foreign tribunal, 1351.
summing up at trial, 644.
allowance of costs for, 703.
on appeal, how brought before the Court, &c., 985.
in actions by companies, 1057.
provisions of the Bankruptcy Act as to, 1166.
in action against sheriff for taking insufficient sureties, 1273

Examination,
of solicitors before admission, 61—71.
before renewal of certificate, after neglect to take it out
"*Solicitors.*"
of witnesses. *See* "*Witness.*"
fees on, 1674.
pro interesse suo, 912.
of debtor, 928.
of parties refusing to make an affidavit, 474.
of parties to suit for purpose of discovery, &c. *See* "*Disco*

Examiners, special. *See* "*Special Examiner.*"
official. *See* "*Examiners of the Court.*"

Examiners of the Court, 26.
examination before, 542.
appointment of examiners, &c., 543.
distribution of examinations, &c., 543.
depositions, &c., 544.
fees, 544.

Exceptions,
from R. of S. C., 203.

Excessive damages,
new trial for, 735.

Exchequer,
former jurisdiction of Court of, 7.
part of the High Court of Justice, 4.
division, business assigned to, and exclusive jurisdiction
amalgamated with the Queen's Bench Division, 11.
proceedings on revenue side of, excepted from rules, 203

Exchequer Chamber, jurisdiction of, vested in Court of Appe

Excise officers, 1048.

Execution,
order for postponing execution, 654.
when appeal stays, 984.

mandamus, when resident in India, or the
oad, 555.
witnesses within the jurisdiction, 560.
witnesses when in Scotland or Ireland, 570.

86.
by consent, 574.
s at trial, &c., 634. *See* "*Trial at Nis*

of motion or summons, 1380.
48, 730. *See* "*New Trial.*"
dence, 741.
for his bill, 156. *See* "*Solicitors.*"
inquiry, generally, 1285, 1336.

e foreign tribunal, 1351.

93.
before the Court, &c., 985.
1057.
aptcy Act as to, 1166.
for taking insufficient sureties, 1273.

ssion, 61—71.
ficate, after neglect to take it out, 85. *Se*

tness."

nake an affidavit, 474.
rpose of discovery, &c. *See* "*Discovery.*"
Special Examiner."
Examiners of the Court."

2.
iers, &c., 543.
ations, &c., 543.

Court of, 7.
Court of Justice, 4.
gned to, and exclusive jurisdiction of, 10.
e Queen's Bench Division, 11.
ne side of, excepted from rules, 203.
sdiction of, vested in Court of Appeal, 968.

execution, 654.
84.

Execution generally. *As to execution in each particular case, see the respective titles throughout the Index.*
by what writs, &c. and by and against whom judgment enforced, 787.
when to be issued, 789.
staying execution, 790.
discovery in aid of execution, examination of debtor, 791.
staying execution, 792.
execution for defendant, 792.
by and against persons not parties, 793.
by what solicitor, 793.
several writs, succession of, &c., 7[illegible].
issuing execution, production of judgment and precipe, 795.
form of the writ, 796.
direction of, 797.
teste of, 799.
return day of, 800.
indorsements on, in general, 800.
how long writ in force, renewal of same, 803.
from what time it binds defendant's property, 804.
registration of writs, 806.
delivery of writ to be executed, 807.
by whom executed, when directed to the sheriff, &c.; warrant and bailiff appointed, by, &c., 807.
when, where, and how executed when so directed, 809.
attachment for interfering with sheriff, 815.
return of writs, in what cases, and how enforced, 815.
the return itself, amendment of, &c., 818.
attachment for not returning, &c., 822.
poundage and expenses of execution, &c., 824.
how far a discharge of judgment and remedy for amount levied, 830.
irregular execution, &c., 830.
amendment of writ and indorsements, 803, 833.
restitution, 834.
fraudulent execution, 834.
By fieri facias,
what, 836.
in what cases, and when to be sued out, 836.
form, 836.
how sued out and indorsed, 837.
delivery of, to sheriff, &c., 806.
by whom, when, where, and how executed, 837.
payment of rent and taxes on seizure under, 841.
what sort of property may be taken, and how disposed of, 845.
whose property may be taken, 850.
goods of third persons, 851; husband and wife, 852; of testator, 853; of partners, 853; of bankrupts, 855; of companies being wound up, 855; of surviving defendants, 855; of ambassadors, clergymen, &c., 855.
goods distrained, 855; in possession of receiver, 855; let, &c., 856; mortgaged, 857; fraudulently assigned, 856.
several writs, priority of, &c., 860.
from what time it binds defendant's property, 804.
when and how returned, 863.
venditioni exponas and distringas vice comitem, 865.
alias or pluries writs, &c., 868.
what other kinds of execution may issue after fi. fa., 868.
how far a discharge of judgment, 869.

Execution generally—*continued.*
remedy for amount levied, 869.
irregular execution, 830.
amendment of, 833.
restitution, 834, 871.
By elegit,
what, and what property it affects, 873.
changes produced by 1 & 2 Vict. c. 10..876.
property which cannot be extended, 877.
effect of bankruptcy of debtor, 882.
form of, 882.
when to be sued out, 882.
how sued out and indorsed, 883.
registration of writs, 880.
when, where, and how executed, 883.
when and how returned, 884.
setting aside or impugning inquisition, 885.
poundage and expenses, 829.
what writs may issue after it, 885.
how the execution creditor shall obtain possession, 886.
how the debtor shall recover back his land, 887.
selling land when judgment entered up since the 29th July 888.
By levari facias, 601.
sheriffs' poundage on, &c., 830.
By capias ad satisfaciendum,
what it is, 889.
against whom and when it lies, 889.
form of, 892.
when to be sued out, 893.
how sued out and indorsed, 893.
delivery of the writ to sheriff to be executed, 807.
by whom, when, where, and how executed, 893.
discharge from custody, after arrest, 895.
escape, 896.
rescue, 899.
when and how returned, 899.
poundage and expenses, 829.
what writs may issue after it, alies and pluries writs, &c., 900
execution of the writ how far a discharge of debt, 900.
irregular ca. sa., 830.
Order of committal, 787.
By writ of delivery, for recovery of property other than land, 90
of specific goods, 905.
By writ of sequestration, 907.
By appointment of a receiver, 914.
Charging stock or shares and proceedings in lieu of distringas, 9
charging stock, &c., 919.
proceedings in lieu of distringas, 924.
Attachment of debts, 927.
In actions of mandamus and where injunction claimed. *See* *damus*" *and* "*Injunctions.*"
Leave to issue execution,
in general, when necessary, &c., 955.
when six years have elapsed since judgment, &c., 956.
on change of parties, 959.
by death, 959.
by marriage, 961.
on bankruptcy, 962.

Execution, leave to issue—*continued.*
where husband entitled or liable for wife, 1160.
where upon a judgment of assets in futuro, 955.
where against shareholders of a joint-stock company, 955.
where judgment subject to a condition or contingency, 963.
on judgment against a firm, 1094.
for or against persons not parties, 793.
After appeal, 992.
When action in district registry, 1430.
Execution, removal of judgment from inferior Court, for the purpose of having, 1569. *See "Removal."*
Execution in particular cases. *See the respective titles of Proceedings, &c.*
Executors and administrators, proceedings by and against,
proceedings by, 1112.
limitation of actions, 1112.
parties to actions, 1113.
staying proceedings until probate, 1114, 1116.
process, arrest, &c., 1001.
affidavit to hold to bail by, 1466.
writ of summons, 1114.
joinder of actions, 1115.
statement of claim and subsequent proceedings, 1115.
security for costs, 1115.
revocation of administration pending action, 1116.
costs, 690, 1116.
power to compound debts, 1117.
continuing actions commenced by testator, 1026, 1032.
proceedings against, 1118.
limitation of actions, 1118.
actions for torts, 1118.
parties to action, 1119.
writ of summons, 1119.
staying proceedings after judgment or order for administration, 1119.
transfer of action after administration order, 1121.
judgment in default of appearance, 1121.
statement of claim, 1122.
defence and subsequent proceedings, 1122.
proceedings upon plene administravit pleaded alone, 1122.
where with other pleas, 1123.
executor's right to prefer a creditor, 1123.
warrant of attorney by one, bad, 1124, 1313.
judgment, 1124.
in general, 1124.
on plea of judgments outstanding, 1124.
in actions suggesting devastavit, 1124.
against executor as assignee, 1125.
of assets quando, &c., 1125.
costs, 1125.
execution, devastavit, &c., 1126.
form of execution, 1127.
proceedings upon a judgment of assets quando, &c., 1127.
Executors and administrators, other points as to,
payment out of Court to, 359.
executing writ of execution on judgment obtained against testator, 810.
goods of testator cannot be taken in execution for personal debt of, 565.

Executors and administrators, other points as to—*continued.*
obtaining leave to issue execution against, on judgment ag
tator, &c., 960.
transferring action against, to Chancery Division, after ord
ministration of assets, 1121.
privilege from arrest before judgment, 1459.
second arrest by, 1463.
effect of submission to arbitration by, 1591.
Exhibits. *See* "*Affidavits.*"
title to, 457.
certificate on, &c., 462.
copies of, 471.
to be annexed, &c., 475.
charges for, 727.
"Existing," definition, 204.
Exoneretur to discharge bail, entry of, 1509.
Expenses of execution, 824. *See* "*Execution.*"
Extension of time, 1432.
Extent. *See* "*Execution.*"
Extortion,
by officers of Court, 30.
by sheriff, &c., 828.
Extra,
costs, 432.
expenses of execution, 824.

F.

Fact, trial of questions of, without pleadings, 1317.
False imprisonment,
excessive damages in actions for, 735.
justification under writ, in action for, 832.
False plea,
by executor, &c., 1125.
by heir, &c., 1129.
False representation. *See* "*Fraud.*"
False return, action against sheriff for, 820.
False swearing. *See* "*Perjury.*"
Fast day,
when reckoned in proceedings, 1434.
Fees,
in the Courts and offices, 29, 200, 1671.
of examinations before examiners of the Court, 544.
on entry of action for trial, 600.
of conveyancing counsel, accountants, scientific persons,
on filing satisfaction piece, 780 (*d*).
on entering appeal, &c., 982.
in district registries, 1431.
of counsel, 709.
of counsel's clerks, 709.
on filing special case, 1346.
for drawing up order, 1414.

s, other points as to—*continued.*
execution against, on judgment against te
nst, to Chancery Division, after order for ac
1121.
fore judgment, 1459.
rbitration by, 1591.
l, entry of, 1509.
See "Execution."
824.

F.

without pleadings, 1347.
ctions for, 735.
, in action for, 832.
'Fraud."
t sheriff for, 820.
ury."
eedings, 1434.
es, 29, 200, 1671.
examiners of the Court, 544.
rial, 600.
el, accountants, scientific persons, &c., 708.
iece, 780 (*d*).
., 982.
431.
).
1346.
1414.

Fees—*continued.*
of official referees, 1584.
of sheriff, 1701.
table of, 1672 *et seq.*
taken by stamps, 200, 1683; schedule of, 1672, 1682.
Feigned issue. *See "Interpleader."*
Felony,
stay in proceedings pending indictment for felony, 378.
security for costs in action by convicted felon, 400.
Feme covert. *See "Husband and Wife."*
Fieri facias, 836. *See "Execution."*
Fieri facias, in particular cases. *See the respective titles throughout the Index.*
Fieri facias de bonis ecclesiasticis, 1176. *See "Clergymen."*
Fieri feci, return of, 864.
Filing,
pleadings, 280.
statement of claim, 289.
affidavits generally, 471.
taking affidavits off file, 472.
cognovit, 1304, 1314.
warrant of attorney, 1314.
writs. *See the respective titles of Writs, &c.*
bill of sale, 860.
submission to arbitration, 1598.
fees on, 1673, 1682.
Filing documents generally, 1446, 1698.
Filing documents in district registry, 1431.
Filing and Record Department of Central Office, 21.
authority to take oaths in, 466.
Final examination of solicitors before admission, 67.
Final judgment. *See "Judgment."*
Final or interlocutory order, 976.
Finding of jury, entry of, 653.
Fixtures, sale, &c. of, under fi. fa., 848.
Folio,
meaning of, 704.
number of, to be marked on office copies, 1445.
Foreign attachment, 934.
Foreign corporations, security for costs from, 397.
Foreign country,
swearing affidavits in, 467.
arrest here, after arrest in, 1467.
Foreign Court, remitting cases for the opinion of, 1349.
Foreign government, order for discovery against, 494.
Foreign judgment, reference to compute on, 1328.
Foreign language, affidavit in, 470.
Foreign tribunal, evidence in matters pending before, 1351.
Foreigner,
bail being, 1501.
security for costs from, 397, 982.
affidavit by, 464.
service of notice of writ of summons on, when out of jurisdiction, 248.
Forfeiture,
discovery not ordered in case of, 502.
for breach of covenant, 1236.
statutory restrictions on, 1237.

Forfeiture—*continued.*
relief against, 1238.
for non-payment of rent, 1240.
relief against forfeiture, 1245. *See* "*Ejectment.*"
Forms include "rules," 203.
"Forthwith," meaning of the word, 1435.
Fraction of day, when noticed, 1436.
Franchise, or liberty, writ how directed and executed within, 798.
Fraud,
in procuring admission as solicitor, 75.
of solicitor, when Court will punish him for, 176.
must be pleaded, 286.
setting aside warrant of attorney for, 1311.
new trial on verdict obtained by, 738.
arrest got rid of by, no bar to second arrest for same cause of a 1462.
Frauds, Statute of. *See* "*Statute of Frauds.*"
Freebench, action for, how commenced, 215.
Freehold,
execution against, by elegit, 873.
when judgment binds, 879.
Friendly societies, actions by and against, 1099.
"From," meaning of the word, 1435.
Further maintenance of the action, plea to the, 320.
Further time to plead, 300.
summons for, when stay of proceedings, 301.
time given, &c., 301.

G.

Gaming, warrant of attorney for, set aside, 1311.
Gaol, execution of writ in, 812.
Gaoler, direction of writs to, 1186.
Garnishee, 927. *See* "*Attachment of Debts.*"
Garnishee order nisi, postponed to charging orders, 169.
Gazette (London), to be evidence, 1166.
General issue,
by statute, 300.
in actions against justices, 1042.
against constables, 1046.
against revenue officers, 1048.
clauses in local acts giving, repealed, 1049.
General verdict, 355.
the like, subject to a special case, 359.
Glebe land not extendible, 877.
Good faith,
staying proceedings where action against, 374.
execution against, when set aside, &c., 830.
proceedings against, not an irregularity, 445.
Good Friday,
when reckoned in proceedings, 1434.
Good jury, order for, on writ of inquiry, 333.
Goods, execution for return of goods detained, 905.
Goods, elegit not to extend to, 874.
Growing crops,
sale, &c. of, under fi. fa., 849.
liability of, to distress notwithstanding, 844.

Guarantee for costs of solicitor, must be in writing, 100.
Guardian, appointment, &c. of, for infant plaintiff or defendant. *See* "*Infants, actions by and against.*"
Gunners. *See* "*Seamen.*"

H.

Habeas corpora juratorum, abolished, 602.
Habeas corpus cum Causâ, to remove cause from inferior Court, 1555.
See "*Removal.*"
Habeas corpus ad Satisfaciendum,
to charge defendant in execution, 1194.
form of, how issued, 1196.
Habeas corpus ad Testificandum, 567.
direction of, 567.
Habere facias possessionem, 1227.
poundage on execution of, 1229.
Handwriting, comparison of disputed, at trial, 636.
Headborough. *See* "*Constable.*"
Hearing in Supreme Court, fee on, 1682.
Heir,
suing where difficult to ascertain who is, 1018.
action against, 1128.
liability of, 1128.
writ of summons, 1128.
statement of claim, 1128.
defence, 1126.
consequence of false plea, 1129.
parol demurrer abolished, 1129.
reply, 1130.
judgment in general, 1130.
when heir has aliened before action, 1130.
execution, 1132.
execution on judgment against ancestor, 1131.
admitted to defend in ejectment, 1214.
obtaining leave to issue execution against, 1131.
privileged from being held to bail, 1459.
High Court of Justice,
is a division of the Supreme Court, 2.
constitution, 3.
jurisdiction, 3.
extent, 4.
not vested, 5.
how exercised, 5.
judges of, 13.
sittings of, 189.
jurisdiction of judges of, on circuit, 197.
divisions of, 9.
distribution of business amongst divisions of, 9.
transfer from one division to another, 411.
applications to, 1378.
Hilary sittings, 189.
Hire, sale under fi. fa. of goods let to, 856.
Holidays, 29.
Holloway Prison, Queen's prison, 1185.

Hour of the day for service of proceedings, 1436.

House of Lords, appeal to, 995. *See* "*Appeal to House of Lords.*"

Housekeeper,
as to bail being, 1498.
when juror must be, 613.

Houses of Parliament. *See* "*Members of Parliament*," "*Peers.*"

Hundredors,
actions against, under stat. 7 & 8 *Geo.* 4, *c.* 31, &c., and proc
thereon, 110[illegible].
service of writ of summons in, 235.
when privileged from arrest, 1459.

Husband and wife. *See* "*Married Women.*"
retainer of solicitor by wife so as to bind husband, 101.
solicitor's authority to continue action, &c., where feme sole
pending suit, 104.
warrant of attorney by or to feme sole who marries before jud
1309.
warrant of attorney by or to feme covert, 1313.
obtaining leave to issue execution upon marriage of feme solo p
or defendant, 961, 962.
wife of party to suit a competent witness except in certain cas
how far arbitrator's authority revoked by marriage, 1605.
effect of marriage pending suit, 1025.
after judgment, 961.
execution, 961.

Actions by,
when to sue jointly, 1158.
joinder of claims, 405, 1158.
other proceedings, 1158.
Married Women's Property Act, 1882..1147.
Divorce Acts, 1149.
order for protection of wife's property, 1149.
effect of judicial separation, 1151.

Actions against jointly,
service of writ, 1159.
in respect of ante-nuptial liabilities of wife, 1159.
extent of husband's liability, 1159.
ceases on wife's death, 1160.
execution by or against husband on judgment given agains
1160.
questions between husband and wife as to property unde
ried Women's Property Act, 1160.
joinder of claims, 405.
service on, 234.
execution, 852, 877, 910.
costs, 1158.
effect of marriage pending suit, 1025.
after judgment, 961.
payment out of Court to women who marry before payme
358.
See also "*Married Women.*"

Husbandry contracts, execution in case of, 849.

proceedings, 1436.
. *See* "*Appeal to House of Lords.*"

Members of Parliament," "*Peers.*"

. 7 & 8 *Geo.* 4, *c.* 31, &c., and proceedings

nons in, 235.
st, 1459.
ried Women."
e so as to bind husband, 101.
tinue action, &c., where feme sole marries

to feme sole who marries before judgment,

to feme covert, 1313.
ecution upon marriage of feme sole plaintiff

petent witness except in certain cases, 632.
city revoked by marriage, 1605.
ding suit, 1025.
61.

158.
1158.
8.
perty Act, 1882..1147.

n of wife's property, 1149.
eparation, 1151.

tial liabilities of wife, 1159.
bility, 1159.
eath, 1160.
t husband on judgment given against wife,

band and wife as to property under Mar-
rty Act, 1160.

0.

ding suit, 1025.
61.
o women who marry before payment, &c.

."
in case of, 849.

I.

Idem sonans, sufficient in writ of capias, if name was, 1478.
Idiots or lunatics, proceedings by and against,
cannot appear by solicitor, 99.
actions by and against, 1141. *See* "*Unsound Mind.*"
service of an ejectment where tenant a lunatic, 1211.
Illegal contract,
warrant of attorney to secure, set aside, 1311.
illegality should be specially pleaded, 283.
Illiterate person, affidavit by, 457.
Illness,
excuse for not taking defendant to prison, 894.
of principal, no excuse for bail not rendering him, 1509.
of witness, excuse for not obeying a subpœna, 569.
examining before trial, where witness ill, 533.
of juryman, 653.
of solicitor, when a ground for putting off trial, 595.
"Immediately," meaning of the word, 1436.
Impartial trial,
award as to jury, to secure, 602.
change of venue in order to have, 589.
Imprisonment for debt,
before judgment, 1449.
after judgment, 899.
"Incidental expenses," meaning of in judge's order, 826.
Incompetency of witness, 632.
Incorporated Law Society,
meaning, powers, &c., 42.
regulations respecting examinations, 64.
Indemnity, proceedings by defendant claiming, 416. *See* "*Third Party.*"
Indemnity bond to sheriff, 841.
India,
examination of witnesses in, 555.
affidavits sworn in, 465.
Indorsement,
of address on proceedings, 1443.
on writ of summons. *See* "*Summons, Writ of.*"
on bill left for taxation, 696.
on order to arrest, 1480.
on writs of execution generally, 800.
on fi. fa., 837.
on ca. sa., 893.
on notice of action, 212.
on order of Court, 1396.
Industrial societies, actions by and against, 1103.
Infant,
cannot appear by solicitor, 99.
warrant of attorney by, 1312.
custody and education of, 1133.
privilege from being held to bail, 1460.
Infants, actions by,
cannot sue in person or by solicitor, 1133.
may sue by next friend, 1133.
who may act, 1133.
appointment and consent of, 1134.
substitution of, 1134.

Infants, actions by—*continued.*
removal, 1134.
security for costs, 400, 1135.
title of action, 1135.
power of next friend, 1135.
pleadings, 1135.
discovery, 493, 1135.
admissions, consents, appeal, 1136.
costs, 1136.
order for investment of money recovered, 1136.
infant coming of age, 437.

Infants, actions against,
writ of summons, 1137.
service of proceedings, 234, 1137.
default of appearance by infant defendant, 1137.
guardian ad litem, 1138.
consequences of not defending by, 1139.
statement of claim, &c., 1139.
compromise, 1140.
warrant of attorney, &c., 1140.
service of notice of judgment, 1140.
costs, 1140.
execution, 878, 1140.

Inferior Courts,
application of the Judicature Acts, &c. to, 1512.
power to confer jurisdiction on, 1512.
power of, to grant relief and give effect to defences and claims, 1512.
jurisdiction with respect to counter-claims, 1513.
rules of law applicable to inferior Courts, 1514.
power to extend enactments to borough and local Court
power to make rules as to appeals from, 1515.
power over rules of inferior Courts, 1515.
appeals from, 1516.
before whom to be heard, 1516.
costs, 1517.
to Court of Appeal, 1517.
power to draw inferences of fact, and give judgm 1517.
judge's notes, evidence of proceedings below, 1517.
power to apply statutes as to County Court appeals Courts, 1518.
power to make rules as to, 1514.
from Mayor's Court, London, 1518.
by motion, 1518.
by special case, 1518.
from Salford Hundred Court, 1520.
Liverpool Court of Passage, 1521.
Stannaries Court, 1521.
Petty Sessions, 1521.
Quarter Sessions, 1521.
Railway Commissioners, 1521.
County Palatine of Lancaster, 1522.
Common Pleas of Lancaster, 1522.
prohibition to, 1541.
removal of causes from, *certiorari*, 1555. *See* "*Removal.*"
execution of judgment in action of ejectment in, 1229.
rules, &c. of, 1398.

Informality. *See* "*Irregularity,*" "*Waiver.*"

*.

0, 1135.

, 1135.

peal, 1136.

noney recovered, 1136.
7.

34, 1137.
infant defendant, 1137.

defending by, 1139.
1139.

, 1140.
ment, 1140.

ture Acts, &c. to, 1512.
sdiction on, 1512.
elief and give effect to defences and counter-

pect to counter-claims, 1513.
ole to inferior Courts, 1514.
etments to borough and local Courts, 1514.
as to appeals from, 1515.
inferior Courts, 1515.

neard, 1516.

1517.
ferences of fact, and give judgment, &c.

nce of proceedings below, 1517.
tutes as to County Court appeals to other

as to, 1514.
, London, 1518.
8.
1518.
ed Court, 1520.
rt of Passage, 1521.
urt, 1521.
, 1521.
ns, 1521.
missioners, 1521.
ne of Lancaster, 1522.
s of Lancaster, 1522.

certiorari, 1555. *See* "*Removal.*"
n action of ejectment in, 1229.

rity," "*Waiver.*"

Initials of name,
in affidavit to arrest, 1464.
in order for arrest, 1478.
in writ of summons, 218.
in statement of claim, 291.

Injunction, 1277.
indorsement of claim for, 226.
copies of affidavits on application for, 1445.
by interlocutory order, 426, 427.
instances where granted, 429.
where refused, 431.
application how made, 434.
power to order early trial, 435.
the order, 435.
punishment for breach, 436.
enforcing undertaking as to damages, 436.
direction of writ of injunction, 799.
Court of Bankruptcy granting, 361.

Inquest. *See* "*Inquiry, Writ of.*"
under a *fi. fa.*, 851.
under an elegit, 883, 884.

Inquiries may be directed at any stage of proceedings, 1341.

Inquiry, writ of,
in general:
qualifications of jurors, 615.
in what cases necessary, &c., 1326.
form of, &c., 1331.
how sued out, &c., 1332.
before whom to be executed, 1333.
order for a good jury, 1333.
notice of inquiry, 1333.
subpœnaing witnesses, 1335.
attending by counsel, 1335.
the execution of the writ, 1335.
return of, 1338.
setting aside inquisition, &c., 1338.
amendment of, 1340.
costs, 1340.
final judgment, &c., 1340.
execution, 1340.
new trial after, 744.
witnesses, &c. privileged from arrest, 1486.
in debt on bond, 1280.
in what cases necessary, &c., 1280.
before whom executed, 1282.
proceedings after judgment by default, 1282.
proceedings upon issue joined, 1284.
scire facias after, 1285.

Inquiry, writ of, in roplevin, 1259.

Inquisition. *See* "*Inquest,*" "*Inquiry, Writ of.*"

Insanity. *See* "*Idiots.*"

Insolvent debtors,
security for costs in action by, 398.
filing of warrant of attorney or cognovit, 1314.
where lunatic, 1142.

Insolvents' estates, administration of assets of, 10.

Inspection,
of documents, 505.
notice to produce for, 505.
notice to inspect, 506.
application, &c., 506.
ordering production, 507.
sealing up parts of documents, 508.
costs, 509.
in actions on policies of marine insurance, 509.
of public books, &c., 510.
of rolls of manor, 511.
of corporation books, 511.
proceedings in case of failure to comply with order, 525.
allowance for costs of, 705.
of real or personal property, 527.
by judge, 528.
by jury, 528.
in actions for infringement of patent, 528.
of persons injured in railway accidents, 530.
Instalments, bond for payment by, within 8 & 9 *W.* 3, *c.* 11., 128
"Instanter," meaning of the word, 1436.
Instructions, charges allowed for, 702, 721.
Instruments, execution of, by order of the Court, 1275.
Insurance, consolidation of actions on one policy of, 409.
inspection of documents in actions on policies of marine, 509
ejectment for non-insurance, 1237.
Interest,
on solicitor's disbursements, 130.
on solicitor's bill, 148.
indorsement of claim for, on writ of summons, 224.
when to be given as damages, 663, 1337.
on amount taxed for costs, 728.
on judgment after verdict, 797, 802.
on judgment or appeal, 992.
Crown liable for, 1293.
arrest for, 1451.
Interlineation in affidavit, 465, 474.
in jurat, 465.
Interlocutory application, injunction, &c. on, 426.
applications to district registrar, 1427.
Interlocutory judgment,
on default in appearance, 259.
in pleading, 328.
reference to master, or writ of inquiry after, 1326.
death of parties after, 961. *See* "*Death of Parties.*"
Interlocutory proceedings,
costs of, 672, 1412.
setting off of costs of, 783.
Intermediate examination of solicitors before admission, 65.
Interpleader,
relief of persons in general against adverse claims, 1354.
in what cases granted, 1354.
when titles have not a common origin, 1356.
the application for relief, 1357.
service out of jurisdiction, 1357.
affidavit in support, 1358.
hearing of the application, 1358.
stay of proceedings, 1359.

Interpleader—*continued.*
when claimants appear, 1359.
where question one of law, 1359.
summary decision, 1359.
where claimant does not appear or does not comply with order, 1359.
power to make one order in several causes or matters, 1360.
power to transfer proceedings to County Court, 1360.
issue, 1360.
security for costs, 1360.
discovery, 1361.
trial, 1361.
adding parties, 1361.
special case, 1361.
judgment, &c., 1361.
costs, 1362.
where claimant does not appear, 1362.
of issue, &c., 1363.
new trial, 1363.
effect of judgment or decision—appeal, 1364.
taking money, &c. out of Court, 1365.
relief of debtors from adverse claims by creditors and assignees of debt, 1365.
relief of sheriffs and other officers charged with the execution of process, 1366.
when relief may be granted, 1367.
sheriff cannot be compelled to apply, 1368.
the application for relief—proceedings on hearing, &c., 1369.
taking indemnity, 1369.
application, to whom made, 1369.
must be made promptly, 1369.
affidavits on, 1369.
who entitled to appear on application, 1369.
affidavits on showing cause, 1369.
proceedings on hearing where parties appear, 1370.
order for receiver, 1371.
order for sale of goods when claimed as security, 1371.
where they do not appear, 1371.
appeal, 1364.
rescinding or amending order, 1372.
time to return writ, 1372.
compelling sheriff to re-enter, &c., 1372.
order, if made by consent, binding, 1372.
particulars, 1372.
issue, and proceedings thereon, 1372.
special case, 1361.
costs, poundage, &c., 1373.
costs between claimant and creditor, 1373.
how obtained, 1374.
sheriff's costs attending the application, 1374.
costs, when payable by sheriff, 1375.
sheriff's poundage and expenses of execution, &c., 1375.
where the parties appear, 1375.
where parties do not appear to the summons, 1376.
judgment, 1361.
new trial, 1363.
appeal, 1364, 1376.
proceedings in violation of interpleader order, 1376.
Interpleader, appeal from County Court in proceedings, 1528.

Interpretation of terms,
in Judicature Acts, &c., 203.
in the R. of S. C., 204.

Interrogatories,
in what cases may be delivered without leave, 515.
when leave necessary, &c., 515.
time for delivering, 516.
in what cases allowed, 516.
to company or corporation, 517.
to sheriff's officer, 517.
what interrogatories allowed, 517.
security for costs by deposit, 518.
form, 518.
setting aside, 518.
the affidavit in answer, 475, 519.
objecting to answer, grounds for, &c., 520.
omission to answer or insufficient answer, 523.
costs of unnecessary interrogatories, 524.
proceedings in case of failure to comply with order, 525.
for examination of witnesses, 536 *See* "*Evidence, Means o*
answers to same, 550.
reading answers in evidence at trial, 520.

Ireland,
service of writ when defendant resident in, 245.
not within rule as to security for costs, 395.
third-party notice cannot be served in, 419.
swearing affidavits in, 467.
peers of, privileged from being held to bail, 1456.
commissioners for taking affidavits in, 25.
compelling attendance at trial of witness in, 571, 1611.
registration of judgment in, 771.

Irish judgment,
affidavit to arrest on, 1469.
registration of, in England, 1457.

Irregularity,
in what cases, and herein of the distinction between an ir
and a nullity, 444.
who may take advantage of, 445.
within what time the application must be made, and whe
larity waived, 445.
the application, and proceedings on, &c., 448.
should ask for stay of proceedings and costs, 448.
costs, 449.
stay of proceedings, 449.
confessing irregularity, &c., 449.
new trial for irregularity in proceedings, &c., 741.

Irregularities in particular cases. *See the respective titles of I*
&c. throughout the Index.

Irrelevant interrogatories, 520.

Issue,
joinder of, 313.
where not sufficiently defined, proceedings on, 314.
in interpleader, 1360, 1372.
feigned, 1347. *See* "*Feigned Issue.*"

Issues, order to prepare, 1341.

Issues of fact, trial of, 1347.

"Issuing execution against any party," meaning of words, 787

., 203.

elivered without leave, 515.
&c., 515.
516.
oration, 517.
517.
lowed, 517.
posit, 518.

475, 519.
ounds for, &c., 520.
nsufficient answer, 523.
errogatories, 524.
ailure to comply with order, 525.
nesses, 536 *See* "*Evidence, Means of.*"

dence at trial, 520.

fendant resident in, 245.
curity for costs, 395.
ot be served in, 419.
467.
n being held to bail, 1456.
g affidavits in, 25.
at trial of witness in, 571, 1611.
at in, 771.

469.
and, 1457.

in of the distinction between an irregularity

go of, 445.
application must be made, and when irregu

oceedings on, &c., 448.
roceedings and costs, 448.

).
&c., 449.
y in proceedings, &c., 741.
cases. *See the respective titles of Proceedin*
ex.
20.

efined, proceedings on, 314.
372.
eigned Issue."
41.

any party," meaning of words, 787.

J.

Jeofails, statutes of, 442.
do not apply to writs of execution, 833.
Joinder of causes of action,
what causes of action may be joined, 405.
separate trials may be ordered, 405.
claims by and against husband and wife, 405.
claims by trustee in bankruptcy, 405.
in actions by or against executors, 405.
in action for recovery of land, 1207.
Joinder,
of issue, 313.
of parties, 1015. *See* "*Parties to Actions.*"
and separation of causes of action, 405.
Joint possession, production of documents in, 502.
Joint-stock companies,
proceedings by and against. *See* "*Corporations.*"
staying proceedings after petition for winding-up of, 1059.
Joint tenants, &c.,
service of writ in ejectment on, 1209.
Judges,
of the High Court of Justice, 13.
number, &c., 13.
power, 14.
jurisdiction of a single judge, 17.
power to sit for one another, &c., 18.
applications on death, &c. of judge, 19.
duties not incident to administration of justice in Court, 19.
power to make rules, 200.
of the Court of Appeal, 965.
titles of, and how to be addressed, 14.
circuits, 196.
vacation judges, 193.
jurisdiction on circuit, 197.
one judge constitutes a Court, 17.
what powers may be exercised in Court by one judge, 17.
attendance at chambers, 191.
jurisdiction of, at chambers, 1401.
transfer of causes on death, &c., 415.
inspection of property by, 528.
orders of, in general made on summons, 1404.
summing up at Nisi Prius, 645.
trial of issues, 582.
amendment of verdict from notes of, 668.
use of judge's notes on appeal, 986.
fee to be paid on application for notes of, 1680, 1693.
judicial notice taken of their signatures, 14.
cannot be arrested, 1458.
Judge's chambers,
attendance of counsel at, 704.
allowance for attendances at, 704.
See "*Summonses and Orders.*"
Judges' clerks, 24.
not to act as solicitors, 93.

Judges' marshals, 26.
Judge's order to arrest, 1477.
Judgment,
action on,
staying proceedings in, 365.
after payment of money into Court, 348.
after trial by a County Court judge, 1552.
after trial by Court without a jury, 764.
after trial by judge without a jury, 764.
after a verdict, &c., 764.
when to be signed, 764.
postponement, 764.
entering judgment nunc pro tunc, 764.
entry of, form of same, 653, 765.
place of entry, 765.
date of entry, 765.
authority to officer to enter, 765.
waiving costs, 766.
fees to be paid on entering, 1675.
practical directions as to signing after trial with a jury
memorandum endorsed on, requiring act to be done, 76
relation of judgments, 767.
effect of judgment in detinue, 767.
interest on, 767.
amendment of, 768.
where judgment roll lost, 768.
setting aside judgment, 768.
after special verdict, 685.
after trial before referee, 1583.
after trial of questions of account by referee, 1583.
after trial of issue, on motion, 756.
after trial, against third party, 422.
after writ of inquiry, 261.
against executors and administrators, 1121, 1124.
against heirs, 1130.
against third party, 422.
amendment of, 768.
declaratory, 325.
definition, &c., 204, 807.
fees on drawing up, 1675, 1682.
in default of appearance, 259.
leave unnecessary, 259.
time for signing judgment, 259.
when writ issued out of district registry, 259.
affidavit of service, 260.
where claim liquidated, 260.
where several defendants, 261.
where claim only partly liquidated, 261.
where claim for damages or detention of goods, 261.
where one of several defendants makes default, 26
in actions against infants, 1140.
persons of unsound mind, 1146.
for recovery of land, 1225.
for mesne profits, 1251.
on money bonds, 1279.
where account claimed, 263.
in cases not specially provided for by R. of S. C., 263.
costs, 263.
execution, 264.

7.

s in, 365.
into Court, 348.
Court judge, 1552.
hout a jury, 764.
hout a jury, 764.
.
764.

nunc pro tunc, 764.
me, 653, 765.
765.
765.
ficer to enter, 765.
766.
on entering, 1675.
as to signing after trial with a jury, 766.
sed on, requiring act to be done, 766.
its, 767.
in detinue, 767.
.
it roll lost, 768.
ient, 768.
5.
, 1583.
f account by referee, 1583.
notion, 756.
l party, 422.
51.
dministrators, 1121, 1124.
.
.
5, 1682.
, 259.
259.
dgment, 259.
ed out of district registry, 259.
260.
ted, 260.
dants, 261.
irtly liquidated, 261.
nages or detention of goods, 261.
veral defendants makes default, 262.
nfants, 1140.
und mind, 1146.
land, 1225.
ts, 1251.
s, 1279.
ied, 263.
y provided for by R. of S. C., 263.

Judgment—*continued.*
setting aside judgment by default, 264.
where irregular, 264.
where regular, 266.
application by stranger, 266.
on what terms, 266.
"merits" must be sworn to, 267.
when action in district registry, 1427.
in default of appearance at trial, 625.
in default of pleading, 326.
for non-delivery of reply, &c., 327.
for default by defendant, 328.
where claim liquidated, 328.
judgment how signed, &c., 329.
where defence a nullity, 329.
where a sham one, 330.
when judgment may be signed, 331.
against several defendants, 331.
where claim for damages, &c., 331.
for detention of goods, 331.
costs, 332.
where several defendants, 332.
when defence goes to part of cause of action, 332.
execution, 333.
for default by other parties, 333.
setting aside judgment by default, 333.
affidavit of merits, 334.
when action in district registry, 1427.
in ejectment, 1225.
in replevin, 1265.
memorandum to be endorsed requiring any act to be done, 766.
motion for, 755, 749. *See* "*Motion for Judgment.*"
of inferior Courts, removal of. *See* "*Removal,*" *&c.*
on allocatur on solicitor's bill, 159.
on award, 1653.
on cognovit, 1297. *See* "*Cognovit.*"
on discontinuance, for costs, 340.
on order by consent, 1294.
by one of several partners, 1295.
when stay of proceedings, 1295.
filing order, 1295.
setting aside, 1295.
revocation by death, 1295.
not by marriage, 1296.
judgment and execution, 1296.
on order to stay, 363.
on warrant of attorney, when to be signed, &c., 1316.
registrar of, office of, 20, 21.
registration of, 769.
to affect lands as regards purchasers, 769.
as against heirs, executors, &c., 769.
for purposes of execution in Scotland and Ireland, 771.
rules and scale of fees, 773 (*l*).
registering lis pendens, 775.
fee for, 776.
vacating same, 777.
practice on registration, 778.
searches, 778.
satisfaction of, entry, &c., 779.
service of, when necessary, 766.

Judgment—*continued.*
setting aside, 768.
in default of appearance, 264.
in default of pleading, 333.
in default of appearance at trial, 628.
setting off of, against judgment, 681.
solicitor's lien on, 164.
staying proceedings in action on judgment, 365.
summonses, 787.
under Ord. XIV. on specially indorsed writ, 269.
in what cases, 269.
in what cases applicable, 269.
the special indorsement, 269.
general principles as to giving or refusing leave to defe
set-off or counterclaim, 271.
other facts, 272.
the application, 272.
the plaintiff's affidavit, 272.
how defendant may show cause, 273.
defendant's affidavit, 273.
examination of defendant viva voce, &c., 274.
further affidavits, 274.
order for judgment, 274.
costs, 275.
leave to defend, 275.
several defendants, 275.
fresh application, 276.
appeal, 276.
payment into Court or giving security, 276.
further proceedings, 276.
plaintiff a secured creditor, 276.
return of money to successful defendant, 277.
where no judgment ordered at trial, 755.
various writs to enforce, 788.
Judgment summonses, 787.
Judgments, registrar of, office of, 20, 21.
Judgments, &c., solicitor's lien on, 164.
Judgments, various writs to enforce, 788.
Judgments, decrees, and orders, fees on drawing up, 1675, 1682,
Judicial separation of husband and wife, effect of, 1151.
Jurat of affidavit, 462. *See* "*Affidavits.*"
Jurisdiction,
of the Court of Appeal. *See* "*Appeal.*"
of the High Court of Justice, 3.
extent, 4.
jurisdiction not vested in, 5.
how exercised, 5.
suing persons resident out of, 244.
meaning of, in R. of S. C., 245.
of the Lord Chancellor and Lords Justices in relation to lunat
of judges on circuit, 197.
of judges at chambers, 1401.
of masters, 1403.
Juror,
consequences of being taken ill, 653.
withdrawing of, 648.
verdict founded on knowledge of, 652.
qualifications of, 613.
who exempt from being, 614, 615.
how punished for non-attendance, 616, 627.

rance, 264.
ng, 333.
rance at trial, 628.
dgment, 681.

action on judgment, 365.

cially indorsed writ, 269.

able, 269.
ent, 269.
s to giving or refusing leave to defend, 270
erclaim, 271.

vit, 272.
show cause, 273.
, 273.
ndant vivâ voce, &c., 274.
4.
274.

nts, 275.
6.

or giving security, 276.
276.
ed creditor, 76.
to successful defendant, 277.
ed at trial, 755.
788.

e of, 20, 21.
n on, 164.
nforce, 788.
's, fees on drawing up, 1675, 1682,
l and wife, effect of, 1151.
Affidavits."

See "*Appeal.*"
ice, 3.

l in, 5.

t out of, 244.
S. C., 245.
l Lords Justices in relation to lunatics, 5.

01.

en ill, 603.

dge of, 602.

14, 615.
nducc, 616, 627.

Juror—*continued.*
challenges of, 616.
species of, 617.
to the array, 617.
to the polls, 618.
when and how to be made, 620.
how tried, 620.
Jury,
inspection by, 528.
de ventre inspiciendo, 618.
in trials at bar, 582.
mode of insisting on trial by, 585.
discharging, &c., 652.
at Nisi Prius, how called and sworn, &c., 625.
on writ of inquiry, 615.
compelling attendance of, &c., 602.
jury process abolished, 602.
general power of Courts to make orders for summoning jury, 602.
how jury summoned for the assizes, 603.
how in London and Middlesex, 604.
proceedings to get special jury, 604.
under former practice, 608.
how special jury summoned at the assizes, 605.
how special jury nominated, &c., in London and Middlesex, 606.
striking jury, under old practice, 607.
view by, in what cases, and how obtained, 609.
proceedings to be had before juries as before *C. L. P. Act*, 1852, 611.
improper discharge of, new trial for, 732.
misconduct, &c. of, new trial for, 733. *See* "*New Trial.*"
how kept together after evidence closed, 650.
order for good jury on writ of inquiry, 1333.
Justices of the peace, when solicitors cannot be, 97.
actions against, 1038.
enactments of stat. 11 & 12 *V. c.* 44, as to, 1038.
when actions will lie, &c., 1039.
Queen's Bench Division may order act to be done by justice, and no action to lie, 1039.
limitation of actions, 1040.
notice of action, 206, 1041.
process, &c., 1042.
venue, 1042.
plea of general issue, 1042.
tender of amends, and payment into Court, 1042.
nonsuit or verdict for defendant in certain cases, 1043.
damages, 1043.
costs, 1043.
appeals from, 1521.

K.

Keeper of Queen's prison, who is, 26.
King. *See* "*Queen.*"
King's Bench. *See* "*Queen's Bench.*"

L.

Laches,
when solicitor liable for, 111, 180.
in setting aside proceedings for irregularity in general, 445.

Lancaster. *See* "*County Palatine.*"
jurisdiction of C. P. at, transferred to High Court, 4.
fees of sheriffs, &c. in, 37.
entry of action for trial in, 599.
county palatine and common pleas of appeal from, 1522.
different venues in, 294.
Land, actions for recovery of. *See* "*Ejectment.*"
right to begin in, 629.
judgment in, by what writ enforced, 788.
how bound by a judgment, 807. *See* "*Judgment after Ve*
registration of writ of execution to bind lands, 806, 807, 8
extending of, by elegit, 873.
enforcement of award relating to possession of, 1660.
Landlord and tenant. *See* "*Ejectment,*" "*Rent,*" *&c.*
Lapse of time, execution after, 956.
Law and equity,
when rules of equity to prevail, 201.
Law list, evidence, 81.
Law, points of, may be raised in pleadings, 324.
decision of, 325.
trial of questions of, by special case, 1343.
Lease,
sale of, under a fi. fa., 847.
extending, &c. on elegit, 874.
Leave to amend pleadings, 316.
Leave to defend in case of specially indorsed writ, 270. *See*
Indorsement of Writ of Summons."
Leave to deliver further defence, &c., 321.
Leave to deliver interrogatories, 515.
Leave to issue execution, 955. *See* "*Execution.*"
to sign judgment on warrant of attorney, 1318.
to enter special case for argument, 1345.
Legatee, taxation of solicitor's bill by, 141.
Letter to distinguish action, rules as to, 216.
Letters between solicitor and client, inspection of, 497.
Letters, costs allowed for, 710.
Letters patent,
jurisdiction in relation to, 5.
particulars in action for infringement, 390.
proceedings by and against companies established by, 1
"*Company.*"
Levari facias, writ of, 787.
Lewes, entry of action for trial in, 599.
Libel and slander, matters in mitigation of damages in actions fo
Liberty, direction and execution of writs in, 819.
Lien,
of officer of Court for fees, 30.
solicitor, 111, 159.
effect on production of documents, 503.
agent, 187.
arbitrator, 1633 (*m*).
interpleader in case of, 1356.
lost by seizure of same goods in execution, 856.
delivery up of goods on paying into Court, 439.
delivery up of property detained as, 960.
Limitations, Statute of,
when begins to run against costs of a suit, 158.
must be pleaded, 282.
in proceedings on judgments, &c., 957.

Palatine."
t, transferred to High Court, 4.
, 37.
l in, 599.
ommon pleas of appeal from, 1522.
4.
of. *See* "*Ejectment.*"

writ enforced, 788.
ment, 807. *See* "*Judgment after Verdict.*"
execution to bind lands, 806, 807, 889.
, 873.
relating to possession of, 1660.
"*Ejectment,*" "*Rent,*" *&c.*
ter, 956.

prevail, 201.

sed in pleadings, 324.

special case, 1343.

847.
it, 874.
316.
f specially indorsed writ, 270. *See* "*Sp*
mmons."
ence, &c., 321.
ries, 515.
5. *See* "*Execution.*"
warrant of attorney, 1318.
or argument, 1345.
r's bill by, 141.
rules as to, 216.
l client, inspection of, 497.
10.

o, 5.
infringement, 390.
ainst companies established by, 1088.

ial in, 599.
mitigation of damages in actions for, 39
tion of writs in, 819.

es, 30.

on of documents, 503.

356.
oods in execution, 856.
paying into Court, 439.
etained as, 869.

ist costs of a suit, 158.

ents, &c., 957.

Limitations, Statute of—*continued.*
in actions against justices of peace, 1038.
against constables, &c., 1047.
in actions against municipal corporations, 1052.
in actions by executors, 1112.
against executors, 1118.
by married women, 1152.
under local and personal acts, 1049.
as to recovering land, 1203.
does not apply in case of petition of right, 1290.
renewal of writs of summons to prevent operation of, 229.
production of writ, evidence of renewal, 231.
amendment of writ to save, 243.
Limited liability, proceedings by and against companies with, 1053. *See* "*Corporations.*"
Liquidated damages, 661. *See* "*Damages.*"
Lis pendens, registering, &c., 769, 775.
fees on registering, 776.
Lists of actions for trial, 600.
Literary Societies, actions by and against, 1105.
Liverpool, special sittings in, 600.
Court of Passage in, appeals from, 1521.
Loan Societies, actions by and against, 1104.
Local actions, trial of, &c., 580.
Local and personal Acts of Parliament. *See* "*Statute.*"
Local Boards, extending lands of, 877.
actions by and against, 1096.
London,
Court of Bankruptcy part of the Supreme Court, 2.
summoning jury in, 604, 606, 607.
qualification of jurors in, 613.
direction of writ to be executed in, 799.
prohibition to the Mayor's Court, 1546. *See* "*County Court.*"
foreign attachment in Mayor's Court, 1546.
appeal from such Court, 1518.
London Small Debts Act, 1567.
London agents of solicitors, 105, 111.
London and Middlesex, sittings at Nisi Prius in, 191.
notice of trial for, 579.
entry of action for trial, 598.
how jury summoned, 604.
special jury, 606.
Long Vacation, 192.
delivering pleadings in, &c., 192 (*m*), 280, 1434.
when time in, to be reckoned, 193, 303, 1434. *See* "*Vacation.*"
Lords Justices,
of appeal, 965.
jurisdiction of, over lunacies, 6.
Lords, House of, 995. *See* "*Appeal to House of Lords.*"
Lost bill of exchange, action on, 405.
Lots,
verdict of jury determined by casting, 651.
appointment of umpire by, 1615.
Lunatics,
jurisdiction in relation to, 5.
staying proceedings in action by, 373.
actions by and against, 1141. *See* "*Unsound Mind.*"
service of writ on, 1144.

Lunatics—*continued.*
proceedings in default of appearance by, 1144.
defence by guardian, 1145.
when party to special case, 1345.
admission in pleadings by, 284.
arrest of, before judgment, 1460.
obtaining production of, as witness at trial, 567.
competency of, as witness, 633.
not compelled to give security for costs, 400.
order for discovery against next friend, 493.
removal from Queen's prison, 1199.
warrant of attorney by, 1313.

M.

Magistrate. *See* "*Justices of the Peace—Actions against,*" 1038.
Malice, mode of pleading, 286.
Malicious arrest, action for, 1483.
Manchester district registry, closed during Whitsun week, &c., 192.
special sittings in, 600.
Mandamus, action for, 1274.
R. of S. C. affecting, 202.
indorsement on writ of summons of intention to claim manda
226, 1274.
pleadings and other proceedings, 1274, 1275.
may be granted by interlocutory order, 426, 431.
the application, 434.
the order, 435.
direction of writ of, 799.
writ of, abolished, 1275.
Mandamus, 1274.
interlocutory, 431.
Mandamus to a County Court taken away, 1538. *See* "*Compelling C*
Court Judge to perform his duty."
Mandamus to examine witness before trial, 555.
Mandamus to public company, where shareholders not liable, 1088.
Mandavi ballivo, return of, 819.
Manor, inspection of rolls of, &c., 511.
Maps, cost of preparing, &c., when not allowed, 703.
Marginal note,
in statutory plea of not guilty, 300.
Marine insurance, inspection in actions on policies of, 509.
Marines, privilege of, from arrest, 1461.
Marksman, affidavit by, 462.
Marriage of parties,
of feme plaintiff or defendant, execution after, 961, 962.
effect of, on action, 1025.
on judgment on order by consent, 1296.
on warrant of attorney, 1510.
on arbitration, 1605.
Married women. *See further* "*Husband and Wife.*"
actions by, 1147.
remedies for protection and security of separate property,
when executrix, 1149.
remedies of personal representative, 1149.

Married women—*continued.*
action after divorce or dissolution of marriage, 1149.
after protection order, 1149.
order to protect property after desertion, 1150.
after judicial separation, 1151.
when executrix, 1151.
reversal of order or decree, 1151.
proceedings in the action, 1152.
security for costs, 1152.
Statute of Limitations, 1152.
damages and costs, 1152.
action against, 1153.
liability to be sued, 1153.
joinder of husband, 1153.
of trustees, 1153.
extent of liability, 1153.
separate estate, 1154.
in respect of post-nuptial contracts made on or since 1 Jan., 1883..1154.
of ante-nuptial debts when married on or since 1 Jan., 1883..1155.
of contracts made before 1 Jan., 1883..1155.
effect of restraint on anticipation, 1156.
liability of personal representative, 1157.
writ of summons, &c., 1157.
application for judgment under Ord. XIV., 1157.
judgment, 1157.
inquiry as to estate, 1158.
appointment of receiver, 1158.
costs, 1158.
execution, 1158.
warrant of attorney by, 1313.
See further "*Husband and Wife.*"
Married women's certificates, office of the registrar, 20.
commissioners for taking, 25.
Married Women's Property Act, 1147.
Marshals to the Judges, 26.
Master and assistant master to the Crown Office, 28.
Masters of the Supreme Court, 26.
their offices, 20.
qualification, 27.
tenure, 27.
appointment, 27.
their duties, 20, 22, 27.
hours of attendance, &c., 28.
appointments before attending, 1330, 1410.
taxation of costs by, 22, 694, 696, 697.
transfer of causes, 415.
may administer oath, 466.
entry of findings, &c. by, 653.
reference to, to ascertain damages, 1327.
jurisdiction at judge's chambers, 1403.
mode of proceeding to obtain order of, at chambers, 1404. *See* "*Summons and Order.*"
attendance and rotation of, at chambers, 1407.
assignment of actions to particular masters, 1408.
practice rules, 1448.
fee on reference to, 1678.

Master of the Rolls,
a judge of the Court of Appeal only, 13.
jurisdiction of, in regard to records, 5.
"Matter," definition, 204.
Mayor's Court of London,
removal of causes from, 1568, 1571.
appeal from, 971, 1518.
prohibiton to, 1546.
Members of limited companies,
definition of, 1064.
register of, 1065.
liability of, 1063.
Members of Parliament,
proceedings against, 1036.
privileged from arrest, 1036, 1456.
process against, 1036.
attachment against, 947.
Memorandum of appearance, 1700.
Merits, affidavit of, to set aside judgment by default, 333, 334.
Mesne profits,
actions for, 262.
recovery of, on trial of ejectment, 1249. *See* "*Ejectment.*"
Messengers of the Courts, 29.
Metropolitan police magistrates, costs in actions against, 1044.
Michaelmas sittings, 189.
vacation, 192.
Middlesex,
sittings in, where held, &c., 191.
notice of trial for, 579.
direction of writ to be executed in, 799.
registry of judgment to bind lands in, 769.
office of sheriff of, 31.
qualification of jurors in, 613.
summoning jury in, 604, 606, 607.
Midland circuit, 195.
Military, privilege of, from being held to bail, 1461.
Militia, solicitor not privileged from ballot for, 93.
Misconduct of solicitor,
how punished, 177.
of agent to solicitor, 186.
of jury, new trial, &c., in case of, 733.
Misdirection of judge, &c., new trial for, 730.
Misjoinder of plaintiffs or defendants, effect of, 656, 1019.
Misnomer in summons, 219.
in appearance, 707.
in statement of claim, 991.
in order to arrest, 14
in writ of execution, 893.
new trial where a juror sworn by a wrong name, &c., 627.
Misprision of clerks, amendment in case of, 442.
Mistakes. *See* "*Irregularity*," "*Amendment.*"
of judge at trial, new trial for, 730. *See* "*New Trial.*"
Mitigation of damages,
what may be taken into consideration by jury in, 665.
on writ of inquiry, 1336.
in action for mesne profits, 1251.
Money, when seizable under fi. fa., 846.
payment of, into Court, in lieu of security on arrest, 1497.
Monmouth, entry of action for trial at, 599.

"Month," meaning of the word, &c., 1436.
Month's notice of proceeding, 1437.
Mortgage,
redemption or foreclosure of, assigned to Chancery Division, 10.
when action can be brought by mortgagor, 1203.
mortgagee's costs, 1247.
sale of equity of redemption on fi. fa., 857.
the like of goods, &c., mortgaged, 857.
where mortgagee admitted to defend in ejectment, 1214.
ejectment by mortgagee, 1217. *See* "*Ejectment.*"
Mortgagee, legal estate vested in, when not to be taken in execution, 878.
Mortgagor, action of ejectment by, 1203.
Motions and orders generally, 1378.
what applications to be made to the Court, 1378.
Divisional Courts, 1378.
application how made, 1379.
on notice, 1379.
no rules nisi in certain cases, 1379.
no rules absolute, ex parte, or orders to show cause except in certain cases, 1380.
how facts brought before the Court, 1380.
affidavits, 1380.
ex parte applications, 1381.
pre-audience and going through the bar, 1381.
what motions could not be made on last day of term under former practice, 1382.
notice of motion, 1383.
grounds of application when to be stated, 1383.
length of notice, 1383.
notice, 1383.
service of notice of motion, 1383.
on defendant who has not appeared, 1383.
on defendant before appearance by leave, 1384.
of copy affidavit, 1384.
entry of motion for hearing, 1384.
hearing of application on motion, 1384.
amendment of notice of motion, 1384.
order for service of notice on parties not before Court, 1384.
party not appearing, 1385.
adjournment, 1385.
consent order, 1385.
costs, 1385.
order absolute in first instance, 1386.
motions where rule nisi in first instance, 1386.
proceedings to obtain, 1386.
directions as to service where residence unknown, 1386.
showing cause in first instance, 1386.
form of rule, 1387.
stating grounds of rule in rule nisi, 1387.
amendment, 1387.
service of rule nisi, 1387.
irregularities in, how waived, 1388.
affidavit of service, 1388.
when a stay of proceedings, 1389.
abandoning rule nisi, 1389.
enlarging rule nisi, 1389.
showing cause against rule nisi, 1390.
office copies of rule nisi necessary, 1390.

Motions and orders generally—*continued.*
affidavits for, 1390.
sworn in another rule, 1391.
practical directions as to, 1391.
the argument, 1391.
costs, 1392.
limiting time for payment, 1393.
when payment of, conditional to doing an act, 1393.
ordering payment of, by person not a party, 1394.
when cause shown in first instance, 1386.
drawing up rule, 1394.
making rule absolute where no cause shown, 1394.
rules absolute without motion, 1394.
time for taking next step after rule disposed of, 1394.
rules granted without motion by counsel, 1395.
upon a judge's flat, 1395.
upon a præcipe, 1395.
side bar rules, 1395.
order of the Court on motion, 1395.
drawing up, 1395.
where need not be drawn up, 1395.
notice, 1395.
date, 1396.
entry nunc pro tunc, 1396.
amendment of, 1396.
service, 1396.
indorsement as to effect of disobedience, 1396.
enforcing order of Court, 1396.
further order, when necessary and how obtained, 1397.
writ of execution, 1398.
bankruptcy, 1398.
rules, &c. of inferior Courts, 1398.
rehearing, rescinding or altering order, 1398.
renewal of ex parte applications, 1400.
Motion for judgment, &c.,
in what cases,
generally, 755.
when no judgment at trial, 755.
when to set aside and enter other, 756.
after trial of issues, 756.
after trial before referee,
in default of pleading, 757.
on admissions of fact, 757.
practice on motions, 759.
time for application, 760.
powers of Court, 760.
judgment on motion, 763.
cross motions for judgment and new trial, 749.
Municipal corporations. *See* "*Corporations.*"
Mutiny Acts, regulations in, as to actions against soldiers, &c., 146

N.

Name,
change of, by solicitor, 77.
by company, 1053, 1096.
by local board, 1096.
by friendly society, 1099.
by building society, 1101.

Name—*continued.*
juror sworn by wrong, 627.
arrest by wrong name, 1478.
Names of parties. *See* "*Misnomer.*"
Navy. *See* "*Seamen.*"
Negligence,
solicitor's liability for, 111, 128, 180.
when a defence to an action for his bill, 157. *See* "*Solicitors.*"
of sheriff, in executing writs, &c. *See* "*Escape,*" "*Sheriff,*" "*Execution,*" *&c.*
Ne exeat regno, writ of,
copies of affidavits on application for, 1445.
Ne unques executor, &c., plea of, 1122.
New assignment, 285.
now abolished, 285.
New trial, generally,
applications for, where to be made, 17.
costs in case of, 676.
In what cases granted,
where person not on panel sworn on jury, 627.
when wrongly decided who to begin, 630.
mistake, &c., of judge, 730.
default, &c., of officer of Court, 732.
default or misconduct of jury, 733.
absence, &c., of counsel or solicitor, 737.
default or misconduct of opposite party, 738.
default or misconduct of witnesses, 739.
party taken by surprise at trial, 740.
fresh evidence, &c., 741.
where one of several issues wrongly decided, 741.
irregularity or error in proceedings or pleadings, 741.
where action or defence is trifling or vexatious, 742.
in penal actions, 743.
in criminal matters, 744.
in ejectment, 744.
in replevin, 744.
after inquiry before the sheriff, 744.
in interpleader, 1376.
after issue, 1348.
after a previous new trial, 744.
after cause remitted to County Court, 1551.
The application for,
to what Court, 17, 745, 1379.
how made—notice of motion, 746.
length of notice—time for making the motion, 746.
by whom applied for, 746.
form of notice of motion, &c., 747.
amendment of, 748.
affidavits on, 748.
the motion itself, and proceedings on, 749.
costs, &c., 751.
proceedings on order for new trial, 753.
The new trial, 754.
New trial in County Courts after appeal, 1535.
Next friend. *See* "*Husband and Wife,*" "*Infants.*"
Next of kin. *See* "*Parties to Action.*"

Night, writ of execution may be executed at, 810.
Nisi Prius,
sittings at, 191.
trial at, 622.
Nisi Prius record, 653.
where new trial, 754.
Nisi, rules. *See "Motions and Rules."*
Nominal defendant, where party who defends ejectment in name of, liable to costs, 399.
Nominal plaintiffs, order for discovery against, 493.
Noncompliance, 444. *See "Irregularity."*
Noncompliance with rules, effect of, 444.
Nonjoinder,
effect of, 656, 1019.
amendment of, 1019.
Non omittas clause in writs, 807.
Nonpros, judgment of,
in replevin, 1260.
Nonsuit,
after payment into Court, 354.
plaintiff may elect to be non-suited, 649.
effect of, 649.
costs on, 650, 718.
how set aside, and on what conditions, 650.
damages on a, 667.
Northern Circuit, 195.
North Eastern Circuit, 195.
Notes of judge at trial,
amendment of verdict by, 668.
conclusive on motion for new trial, 748.
fee to be paid on application for, 1680, 1693.
Not guilty by statute,
plea of, 300.
by justices, 1046.
by constables, &c., 1047.
by revenue officers, 1048.
repeal of clauses in local acts giving, 1049.
Notice of action,
when requisite, 206.
waiver of, 209.
by whom to be given, 210.
to whom, 210.
length of, 210.
form of, 210.
signature to, 211.
indorsements on, 212.
service of, 212.
discontinuing action brought after, and bringing another act 212.
costs of notice, 212.
pleading want of, 212, 286.
against companies, 1067.
justices, 1041.

Notice of action—*continued.*
against constables, &c., 1045.
revenue officers, 1048.
local authorities, 1048.
Notice,
of writ of summons where defendant out of the jurisdiction, &c., 248.
of discontinuance, &c. of action, 338.
of payment into Court, 344.
of intention to give evidence of apology in action for defamation, 393.
third party, 418.
to admit facts, 477.
to admit documents, 479.
to give in evidence probate, &c. of will, 482.
to produce documents at trial, 484.
to produce documents for inspection, 505.
of motion on appeal, 979.
of trial at Nisi Prius, 577. *See* "*Trial, Notice of.*"
of motion, when necessary, 1379.
to admit documents in evidence, 479.
to produce documents, 484, 505.
of inquiry, 1333.
of motion, generally, 1383.
month's, of proceeding, 1437.
of taxation of costs, 694.
to quit, 1202, 1230.
of appeal from County Court, 1529.
Notices. *See the different titles.*
service of, in general, 1443.
required by rules must be in writing, 1443.
scale of costs, 720.
Nulla bona, return of, to *fi. fa.*, 863.
Nullity,
distinction between nullity and irregularity, 445.
no waiver where proceeding a nullity, 447.
non-compliance does not create, 444.
Nunc pro tunc, entering of judgment, on death of parties, 1029.

O.

Oath, to include affirmation, &c., 204.
Oath. *See* "*Affidavit.*"
general power to administer, 466.
power of taxing officers to administer, 696.
power of arbitrator to administer, 1609.
charge for, 727.
fee for, 470, 1673.
commissioners to administer, form of jurat in affidavits taken by, 463.
Objections to answer interrogatories, 520.
Objections to title,
to patent, particulars of, 390.
to copyright, particulars of, 392.

Office copies,
to be evidence, 452.
of affidavits, 472.
erasures, &c. in, 472, 476.
of will, 482.
of order, service by showing, 1442.
of submissions to arbitration, 1598.
stamps on, 1673, 1685.
rules as to, 452, 1443.
Officer of sheriff, 32.
privileged from being juror, 615.
Officers of the Courts, 23.
to follow appeals, 23.
list of the immediate, 23.
their holidays, 29.
times of attendance, 29.
must perform their duties in person, &c., 29.
to perform duties in Court of Appeal, 994.
fees of, for attendances, 1673, 1685.
extortion by, 30.
privilege of, 30.
attachment against, for misbehaviour, &c., 30, 945.
fees to be taken by, 29.
new trial for misconduct of, 732.
Officers of army and navy,
when privileged from arrest, 1460, 1461.
exempt from being jurors, when, 615.
Officers of revenue, actions against, 1048.
Offices of the Supreme Court, when open, &c., 191.
Official liquidators. *See* "*Corporations, Proceedings by and against*
Official referees, 1575.
opening pleadings, 627.
references to them, 1575. *See* "*References.*"
rotation of, 1579.
times of sittings, &c., 1580.
fees, 1584, 1678.
"Order" to include "rule," 204.
Order of Court or judge, how enforced, 788.
Order of judge upon summons. *See* "*Summonses and Orders.*"
Order by consent, judgment, &c. on, 1294.
consent to same, 1294.
by partner, 1295.
stay of proceedings, 1295.
filing order, 1295.
setting aside, &c., 1295.
revocation by death, 1295.
by marriage, 1296.
judgment and execution, 1296.
fraudulent preference, 1296.
Order of judge, &c., for judgment by consent,
for judgment, 1294.
judgment by, 1296.
consents to, 1295.
setting aside, 1295.
revocation by death of defendant, 1295.
judgment and execution on, 1296.
Order of judge to arrest defendant before judgment, 1477.
Ord. XIV., proceedings to obtain summary judgment under a
indorsed writ, 269.

, 476.

ing, 1442.
ion, 1598.

or, 615.

in person, &c., 29.
t of Appeal, 994.
673, 1685.

nisbehaviour, &c., 30, 945.

of, 732.

est, 1460, 1461.
s, when, 615.
ainst, 1048.
when open, &c., 191.
rporations, Proceedings by and against."

See "*Referees.*"

30.

204.
enforced, 788.
s. *See* "*Summonses and Orders.*"
&c. on, 1294.

.

5.
296.
1296.
96.
ment by consent,

fendant, 1295.
on, 1296.
dant before judgment, 1477.
btain summary judgment under a special

Orders and judgments, rules as to, 1698.
Orders in Council affecting practice in the High Court, 200.
Ordnance, solicitor to Board of, may practise, &c. without articles of clerkship, 39.
"Originating summons," definition, 204.
Outlawry abolished, 787.
Overseer of the poor, solicitor privileged from being, 93.
Oxford circuit, 195.
Oxford, city of, direction of writ to be executed in, 798.

P.

Palace, writ of execution cannot be executed in, 811.
Palatine county. *See* "*County Palatine.*"
Paper,
  for printing, 1444.
Parliament, members of. *See* "*Members of Parliament.*"
  private bills in, bills of costs, 131.
  papers printed by order of, staying proceedings against persons for, 379.
Parliamentary agents, bills of costs of, 132.
Parol demurrer abolished, 1129.
Part,
  warrant of attorney bad as to, 1312.
  defence answering only part of cause of action, 332.
  discontinuance to part of suit, 337.
  affidavit to arrest bad in part, 1437.
  award bad in part, 1636.
Particulars,
  in ordinary cases, 380.
    indorsement on writ, 221, 380.
    in pleadings, 380.
      under former practice, 381.
    of statements in pleadings, 381.
    at what time and how obtained, 383.
    time for pleading after delivery, 384.
    staying proceedings, 384.
    form, 385.
    amending, 386.
    order for better particulars, 386.
    effect of, on pleadings and evidence, 386.
    when evidence for defendant, 389.
    how proved, 389.
  in particular cases, 389.
    in actions under Lord Campbell's Act, 389.
      for infringement of patent, 390.
      for infringement of copyright, 392.
    of matters in mitigation of damages in actions for libel, &c., 393.
    notice of intention to give evidence of apology in action for defamation, 393.
  leaving copy of, at time of entry of cause for trial, 509.
  effect of, on pleadings and evidence, 389.
  offer to deliver, 516.

Particulars—*continued.*
of premises or breaches, &c. in ejectment, 1220.
of sureties, 1498.
Parties to actions,
in statement of claim, 290.
who to be plaintiffs, 1015.
who to be defendants, 1015.
actions by and against trustees, 1017.
where numerous parties, heir-at-law, next of kin, &c., 101
effect of misjoinder or non-joinder, 1019.
proceedings in lieu of plea of abatement, 1019.
application for amendment in respect of parties, 1020.
adding or substituting plaintiff in case of mistake, 1021.
striking out or adding party under Ord. XVI. r. 11..1021.
adding plaintiff, 1022.
adding defendant, 1023.
striking out defendant, 1023.
proceedings against added defendant, service of writ, &c., 1
against third party for indemnity, 416.
against person joined as defendant to counterclaim, 10
may address jury and give evidence, 631.
when privileged from arrest, 1450, 1484.
compelling discovery by. *See "Discovery."*
Parties, change of,
by marriage, 1025.
by death, 1025, 1026.
proceedings on death, 1027.
death between verdict and judgment, 1028.
leave to enter judgment nunc pro tunc, 1029.
bankruptcy of plaintiff, 1030.
of defendant, 1031.
assignment, devolution of estate, &c., 1031.
infant attaining majority, 1137.
insanity, or vice versâ, 1143.
when person found lunatic, 1032.
service of order, appearance by party served, 1033.
application to discharge or vary order, 1034.
proceedings on death when action not continued, 1034.
certificate of abatement or change of interest, 1034.
new trial for misconduct of, 738.
Partners,
dissolution of partnerships, &c., assigned to Chancery Divisi
liability of solicitor for acts of partner, 115.
may sue and be sued in the name of their firm, 1092.
disclosing name, &c. of partners, 1092.
service of writ on, 234, 1092.
must appear in their own names, 256.
but subsequent proceedings are in name of firm, 256, 10
payment out of Court to, 359.
execution against, 853, 1094.
attaching debt due from, 930, 932.
action by trustee in bankruptcy of, 1166.
judgment on order by consent of one, 1295.
decisions of arbitrators as to partnership differences, 1590.
one of them signing a cognovit, 1297.
or warrant of attorney. 1303.
bringing action against consent of other, 373.
affidavit by, to arrest, 1467.
"Party," definition, 204.

, &c. in ejectment, 1220.

90.
15.
015.
trustees, 1017.
, heir-at-law, next of kin, &c., 1017.
ion-joinder, 1019.
of plea of abatement, 1019.
ent in respect of parties, 1020.
plaintiff in case of mistake, 1021.
arty under Ord. XVI. r. 11., 1021.

1023.
ed defendant, service of writ, &c., 1023.
for indemnity, 416.
ed as defendant to counterclaim, 1024.
ve evidence, 631.
rest, 1450, 1484.
. *See "Discovery."*

h, 1027.
ct and judgment, 1028.
idgment nunc pro tunc, 1029.
1030.
031.
f estate, &c., 1031.
, 1137.
143.
unatic, 1032.
tice by party served, 1033.
or vary order, 1034.
en action not continued, 1034.
r change of interest, 1034.
of, 738.

os, &c., assigned to Chancery Division, 1
cts of partner, 115.
he name of their firm, 1092.
of partners, 1092.
092.
names, 256.
edings are in name of firm, 256, 1094.
359.
094.
930, 932.
ruptcy of, 1166.
sent of one, 1295.
to partnership differences, 1590.
novit, 1297.
y. 1303.
nsent of other, 373.
7.

Party and party costs, 700.

Passage, Court of, Liverpool, appeal from, 1521.

Patents,
- jurisdiction in relation to, 5.
- putting off trial in causes relating to, 595.
- right to begin in actions as to, 630.
- particulars of breaches and objections to, 390.
- costs, &c. in action for infringement of, 691.
- inspection in actions for infringement of, 528.

Paupers, proceedings by and against, 1182.
- who may sue and defend in formâ pauperis, 1182.
- when admitted, 1182.
- case for counsel's opinion, 1182.
- mode of obtaining leave, 1183.
- assignment of counsel or solicitor, 1183.
- effect of admission, 1183.
- no fees payable by pauper, 1183.
- signature of notice of motion or summons, 1184.
- when dispaupered or compelled to pay costs, 1181.
- costs, 1184.
- set-off of costs, 1184.
- security for costs from, 398.
- set-off of costs in, 783.

Pawn, goods in, fi. fa. on, 856.

Pay Office of Supreme Court, fees in, 1679.

Payment,
- to be pleaded specially, 282.
- plea of, construed distributively, 345.
- solicitor's bill, when taxable after, 143.
- to solicitor, 102.
- to agent of solicitor, 186.
- to solicitor employed to serve writ, 185.
- to sheriff under an execution, 841, 895.
- to administrator, 1116.
- to sequestrator, 1179.
- of sum indorsed on writ, and costs, &c., staying proceedings on, 362.
  See "Staying Proceedings."

Payment of money into Court,
- as a condition to leave to defend, 276.
- in satisfaction of claim or counter-claim,
  - in what cases, 342.
  - under Lord Campbell's Act, 343.
  - amount, 343.
  - mode, 355.
  - before defence, 344.
  - with defence, 345.
  - plea of, 346.
  - appropriation of money paid in under Ord. XIV., 346, 357.
  - defence of tender, 346.
  - after defence, 347.
  - taking money out when liability not denied, 347.
  - acceptance of sum when claim not denied, 348.
  - proceedings when not accepted, 349.
  - costs, 350.
  - proceedings when payment pleaded, with denial of liability, 351.
  - effect of, as an admission of cause of action, 352.
  - effect on consolidated actions, 354.

Payment of money into Court—*continued.*
to abide event or otherwise than in satisfaction, 354.
regulations as to mode of paying in and taking out, 355.
payment out to particular persons, 358.
in consolidated actions—costs, 410.
to meet costs of discovery of documents, 494.
getting money out of Court, 495.
payment of costs out of money in Court, 707.
judgment for, by what writ enforced, 788.
of amends, in actions against justices, 1042.
against special constables, &c., 1047.
in case of local boards, 1097.
when action in district registry, 1430.
Payments, particulars of, 381.
Peers and peeresses,
description of, in writ of summons, 1036.
proceedings against, 1036.
privileged from arrest, 1036, 1455.
arrest of, under ca. sa., 892.
attachment against, 947.
exempt from being jurors, 615.
security for costs from, 397.
Penal actions,
consolidating, 408.
corporation suing as common informer, 1050.
staying proceedings in, 377.
staying proceedings in, where several actions, 371.
security for costs in, 399.
compounding of, 440.
new trial in, 743.
Penalty. *See "Inquiry, &c. in Debt on Bond."*
discovery not ordered in an action for, 502.
holding to bail for, 1453.
affidavit for, 1473.
damages in an action for, 665.
arrest after judgment for, 889.
defendant accountable only to extent of, in debt on bond, 665.
staying proceedings on payment of, 362.
Pensions,
liable to sequestration, 910.
attachment of, 930.
Percentages,
to be taken, 1671.
to be taken by stamps, 1683.
Perishable goods, sale of, 437.
Perjury,
in general by solicitor, 177.
staying proceedings on execution pending indictment for, 790, 377
of witness at trial, new trial for, 740.
"Person" to include corporation, 126, 1067.
Personal,
service of proceedings, 1442.
service of writ of summons, 232.
of proceedings to obtain attachment, 948.
Personal actions, main proceedings in. *See the several titles throughout the Index.*
Personating bail, 1502.
Persons, inspection of, 527, 530.

Perusals, charges for, 703, 724.
Perverse verdict, new trial after, 733.
Petition of right, 1288.
form, &c., 1289.
venue, change of, &c., 1289.
presentation at Home Office, 1289.
presentation at office of Solicitor to Treasury, 1290.
the answer, 1290.
time for answering, &c. by Crown, 1290.
service on parties other than Crown parties, 1290.
appearance, 1291.
practice and procedure generally, 1292.
rules, 1292.
discovery, 1292.
judgment by default, 1292.
form of judgment, 1292.
effect of judgment, 1292.
costs, recoverable by Crown, 1292.
by suppliant, 1292.
Crown liable for interest, 1293.
certificate of judgment for presentation to Treasury or Treasurer of the Household, 1293.
satisfaction of judgment and costs, 1293.
Petition to sue in formâ pauperis, 1183.
Petition of appeal, 998.
Petitioner, definition, 204.
Petty Bag Office, clerk of, earo of rolls, &c. of articled clerks, solicitors, 51 (n.), 76.
notices of application for admission as solicitor, 72.
Petty Sessions, appeal from, 1521.
Physicians, College of, inspection of books of, 512.
when exempt from being jurors, 615.
Pilot exempt from being juror, 615.
Place for trial, 294, 589.
Plaint in replevin, removal of, &c. *See* "*Replevin.*"
Plaintiff, definition, 204.
new trial after death of, 749.
Plaintiffs, who to be, 1015.
Plan may be annexed to an award, 1619.
Pleadings generally, 278.
printing pleadings, 279.
furnishing copies, 279.
delivery of, 280.
form, 280.
signature of, 281.
contents, 281.
rules as to, 282—287.
costs of copies, 287.
See "*Statement of Claim;*" "*Defence;*" "*Counter-claim;*" "*Reply and Subsequent Pleadings.*"
close of pleadings, 313.
amendment, &c., 315.
pleading matters arising after commencement of action, 320.
pleading matters of law, in lieu of demurrer, 324.
default of pleading, 326.
by plaintiff,
in delivering statement of claim, 326.
reply, 327.
by defendant, 328.
by other parties, 333.

Pleadings generally—*continued.*
setting aside judgment signed in default of defence, 333.
motion for judgment, 757.
particulars in or referred to, 380.
time for pleading after delivery of particulars, 384.
admissions in, 477.
documents referred to in, inspection of, 505.
allowance for costs of, 702, 710.
costs of unnecessary or improper matter in, 705.
new trial for error in, 742.
trial of issues of fact without, 1347.
"Pleading," definition, 204.
Pleadings, service of, in general, 280.
not to be amended or delivered in long vacation, 193.
Plea puis darrein continuance, 320.
Plea of payment into Court, 345.
Plea in bar, in replevin, 1261.
Plea after removal of cause from inferior Court, 1562.
Pleas in particular actions. *See the respective titles throughout the I*
Plene administravit,
plea of, proceedings upon, 1122.
costs on, 1125.
Plural and singular number, 205.
Pluries writs. *See* "*Alias and Pluries Writs.*"
Points of law, how raised, &c., 324.
Police. *See* "*Constables.*"
Police magistrate, actions against, 1038, 1044. *See* "*Justices.*"
Political communications, inspection of, not allowed, 501.
Polls (jurors), challenges to, 618, 620.
Pone, writ of, &c., 1269.
Pone per vadios, 1270.
Posse comitatûs, 814.
Possession of lands,
how obtained under an elegit, 886.
taking, 1201.
writ of execution for, in ejectment, 1227:
demand of, 1232.
Possession of original documents, what is, 486.
Post, sending proceeding by, 1442.
Postea, certificate in place of, 654.
Postponing execution, order for, 792.
Postponing trial,
at Nisi Prius, 647.
new trial for improper refusal of judge to postpone, 732.
"*Trial, Putting off.*"
Postponing the signing of judgment, 764.
Poundage to sheriff upon writs of execution, 824.
Practice and procedure,
maintenance of old, 200.
variances in old practice, 201.
repeal of statutes as to, 202.
"Practitioners, legal," or "qualified," who is, 90.
Præcipe, for subpœna, 561.
no writ of execution to issue without, 795.
Precaudience of the bar, 1381.
Preliminary act in action for collision between vessels, 394.
Preservation of property, interim order for, 437.
Printing,
generally, 1444.
pleadings, 279.

t signed in default of defence, 333.
757.
red to, 380.
r delivery of particulars, 384.

in, inspection of, 505.
702, 710.
r improper matter in, 705.
742.
vithout, 1347.

l, 280.
ered in long vacation, 193.
320.
5.

n inferior Court, 1562.
e the respective titles throughout the Index.

1122.

5.
Pluries Writs."
324.

st, 1038, 1044. *See* "*Justices.*"
ction of, not allowed, 501.
3, 620.

it, 886.

etment, 1227.

s, what is, 486.
42.
4.
792.

fusal of judge to postpone, 732. *Se*

nent, 764.
f execution, 824.

1.

lified," who is, 90.

without, 795.

ision between vessels, 394.
a order for, 437.

Printing —*continued.*
amendments of pleadings, 315.
special case, 1344.
evidence taken by affidavit, 575.
depositions, 575.
affidavits, 466.
answers to interrogatories, 520.
evidence for purposes of appeal, 987.
Priority of writs of fi. fa., 860.
Prison,
Queen's, 1185.
keeper of, 26, 28.
delivery of papers, &c., to turnkey of, 1194.
taking the defendant to, 1503.
acts relating to prisons, 1185.
where deemed to be, 1186.
where debtors to be confined, 1186.
when prisoners outside, in legal custody, 1186.
Prisoners,
enactments in Prisons Acts, 1185.
pleadings and costs in actions against, 1185.
direction of writs, &c., 1186.
appointment of administrator and curator to property of convict, 1187.
proceedings against, 1193.
attachment against, 952.
writ of summons, 1193.
statement of claim, 1193.
defence, 1194.
execution, 1194.
how hab. corp. ad sat. issued, 1196.
other proceedings, 1197.
proceedings by, 1197.
discharge of, 1198.
after death of plaintiff, 1198.
removal of, 1199.
obtaining production of, as witnesses at trial, 567, 568.
service of proceedings on, 1440.
Privilege,
from arrest, 1454.
temporary, 1483. *See* "*Arrest of Defendant before Final Judgment.*
Privilege of officers of superior Courts, 30.
Privilege of speech by counsel, 631.
Privileged communications between solicitor and client, 95, 497.
Privileged documents, &c., 496, 497, 523.
Privileges and disabilities of solicitors, 94.
Probate,
former jurisdiction of Court of, 8.
now part of High Court, 4.
division, business assigned to, and exclusive jurisdiction of, 11.
costs in Court of, 131.
of will, notice to give, in evidence, 482.
Procedendo,
after removal of cause from inferior Court, 1560.
title of affidavit, 456.
Process. *See the different titles of process throughout the Index.*
Prochein amy. *See* "*Infants,*" "*Husband and Wife.*"
Proctor now called solicitor, 39.

Production of documents, &c.,
ordering, 507.
at trial, how enforced, 484.
notice to produce, 484.
what documents privileged from production, 497.
for purpose of being stamped, 513.

Prohibition,
R. of S. C. affecting, 203.
to inferior Courts generally, 1541.
the application, 1542.
pleadings and subsequent proceedings, 1542.
costs, 1543.
restitution, 1543.
appeal to Court of Appeal, 1543.
to County Courts,
enactments as to, 1543.
no pleadings, 1544.
appeal, 1544.
when prohibition will lie, 1544.
partial prohibition, 1545.
time when application should be made, 1545.
to whom, 1545.
affidavits, 1545.
stay of proceedings, 1546.
service of rule nisi or summons, 1546.
hearing, 1546.
appealing—second application, 1546.
service of writ of prohibition when obtained ex parte, 154
to Mayor's Court, London, 1546.
to Salford Hundred Court, 1547.

Promissory note. *See* "*Bill of Exchange.*"
"Proper officer," definition, 204.
Property, inspection of, 528.
Property other than land or money, judgment for, by what writ en
788.
Prorogation of Parliament, no abatement of appeal, 1009.
Prosecution, dismissal of action for want of, 326.
Protection, writ of, for persons privileged from arrest, 1484.
Provident societies, actions by and against, 1103.
Public books and documents in general, inspection of, 511. *S*
spection."
Public companies. *See* "*Corporations,*" "*Companies.*"
mode of obtaining inspection of books, &c. of, 510.
Public officer, suing in name of, 1081. *See* "*Company.*"
Public officers, costs against, 691.
Public policy, and production of documents, &c., 501, 523.
Public Record Office, transmission of documents to, 1445.
Publication of pending proceedings, 946.
Puis darrein continuance, plea, 320.
Purchasers, relation of judgments as to, &c., 878.
Putting off trial, 594. *See* "*Trial, putting off.*"

Q.

Qualification of jurors, 613.
"Qualified practitioner," definition, 90.

Quando acciderint,
judgment of assets against executor, &c., 1125, 1127.
judgment of, against heir, 1130.
enforcing a judgment of, 1127.
Quare impedit, action of, how commenced, 215.
Quarter Sessions, appeals from, 1521.
Quashing writ of certiorari, 1560.
Queen,
servants, &c. of, privileged from arrest, 1455.
arrest cannot be made in palace, &c. of, 811.
no execution of writ in presence of, 811.
Queen's Bench,
former jurisdiction of, 6, 7.
business assigned to Q. B. Division, 10.
proceedings on the Crown side, 16.
appeals from, 1378.
officers of, 26.
on the revenue side, 16, 1379.
not affected by R. of S. C., 203.
appeals from chambers in, 1379.
Queen's birthday, 192.
Queen's coroner and attorney, 28.
Queen's prison, 1185.
keeper of, 26, 28.
Queen's Remembrancer's Office, 20, 21.
Qui tam,
indorsement on writ of summons in action of, 226.
compounding actions of, 440.
staying proceedings in, 377.
Quo warranto, R. of S. C. affecting, 203.

R.

Railway accidents, inspection of persons injured in, 530.
Railway commissioners, cases stated by, for divisional Courts, 17, 1379;
appeals from, 1521.
Railway companies, proceedings by and against, 1065. *See* "*Corporations.*"
Re-admission of a solicitor. *See* "*Solicitors.*"
Real actions abolished, 215.
Real property,
when a judgment a charge on, 875.
elegit to have execution of, 873.
inspection of, 527.
Rebutter, 279, 313.
Recalling witness after plaintiff's case is closed, 641.
Receiver, definition of, 205.
indorsement of claim for, 226.
granted on interlocutory order, 426, 432.
instances, 432.
equitable execution, 433.
who may be appointed, 433.
security, 433.
remedies against, 433.
application for, 434.
the order for, 435.
order for in interpleader, 1371.
execution by appointment of a, 914, 433, 1224.

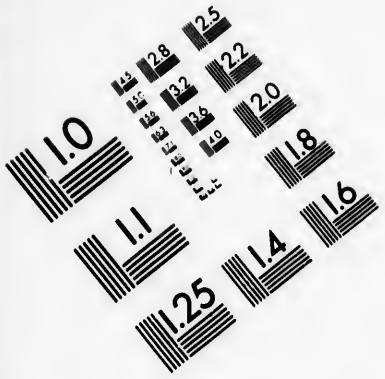
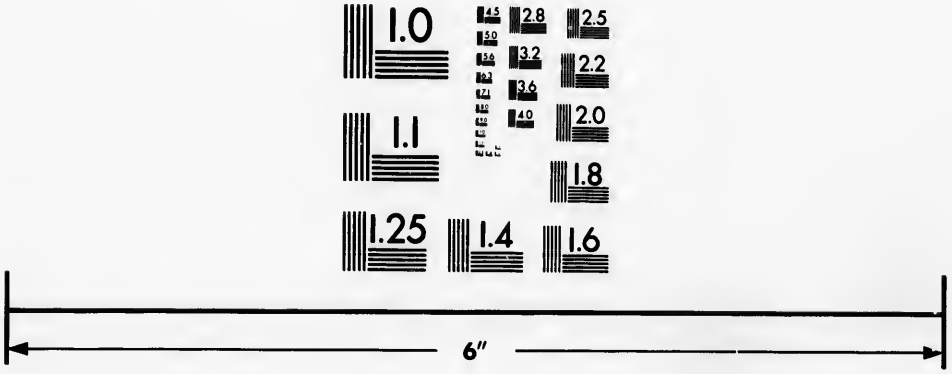
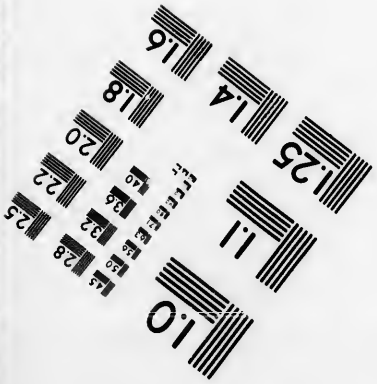
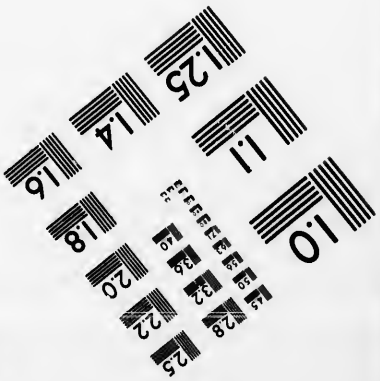


IMAGE EVALUATION TEST TARGET (MT-3)







Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

2.8
2.5
3.2
3.6
2.2
2.0
1.8
1.1
1.0

Receiving order in bankruptcy, 1168.
Recognisance,
of bail, &c., 1452
in ejectment on termination of a tenancy, 1233, 1236.
on removal of cause under 20*l.* from inferior Court, 1557.
fee on taking and vacating, 1680, 1692.
enrolment of, 1446.
Record,
withdrawing, 624.
re-entry of, 624.
Record and writ clerk's office, 20.
Recordari facias loquelam, writ of, 1270.
Records, jurisdiction as to, 5.
"Recovered or preserved," interpretation of the words, 168.
"Recovers," interpretation of, 682.
Recovery of land. *See* "*Ejectment.*"
Rectification, &c. of written instruments assigned to Chancery Division, 1
Reducing damages, 666.
Re-examination of witnesses, 641.
Referees. *See* "*References to Referees.*"
Reference to Master, in what cases necessary, 1326.
Reference to Master to ascertain amount of damages,
enactment and rules as to, 1327.
in what cases there should be a reference, 1328.
advisable to be had where practicable, 1327.
obtaining order for, *practical directions as to*, 1329.
proceedings on, *practical directions as to*, 1330.
proceedings after, 1331.
References to referees, 1575.
referees, "official," "special," 1575.
control of Court over proceedings before referees, 1575.
what may be referred, 1576.
reference by consent, 1576.
reference by consent of whole cause to official referee for tri
1577.
compulsory reference, 1577.
cases which may be referred to arbitrator may be referred
official referee, 1578.
reference to official referee by agreement between parties witho
action, 1578.
proceedings to obtain reference, 1579.
rotation of official referees, 1579.
times and sittings of official referees, 1580.
proceedings before referee, 1580.
authority of referee, 1580.
place of reference, 1580.
inspection, 1580.
to proceed de die in diem, 1580.
peremptory appointment, 1580.
conduct of trial, 1580.
attendance of witnesses, 1580.
discovery, &c., 1581.
judgment, 1581.
no power to commit or attach, 1581.
referee's report, form of, &c., 1581.
power to submit question to Court or state facts specially, 1581.
notice that report ready, 1582.
applications to adopt, vary, or remit report, 1582.
application to set aside findings on reference under sect. 57 o
Judicature Act, 1582.

tcy, 1168.

ıtion of a tenancy, 1233, 1236.
ler 20*l.* from inferior Court, 1557.
ting, 1680, 1692.

ce, 20.
writ or, 1270.
5.
interpretation of the words, 168.
of, 682.
cetment."
instruments assigned to Chancery Division, 1(

s, 641.
o Referees."
t cases necessary, 1326.
rtain amount of damages,
to, 1327.
uld be a reference, 1328.
re practicable, 1327.
tical directions as to, 1329.
l directions as to, 1330.

pecial," 1575.
pceedings before referees, 1575.
576.
t, 1576.
t of whole cause to official referee for tri
e, 1577.
e referred to arbitrator may be referred
78.
referee by agreement between parties witho
ference, 1579.
es, 1579.
cial referees, 1580.
e, 1580.
1580.
580.

diem, 1580.
nent, 1580.
0.
ses, 1580.

or attach, 1581.
&c., 1581.
to Court or state facts specially, 1581.
1582.
y, or remit report, 1582.
findings on reference under sect. 57 o

References to referees—*continued.*
motion for judgment, 1583.
motion to set aside judgment directed to be entered, 1583.
judgment, 1583.
costs, 1583.
appeal in compulsory reference, 1584.
fees, 1584, 1678.
Refresher fees, 709, 713.
Registered companies. *See* "*Corporations.*"
Registrar,
of married women's certificates, office of, 20.
of judgments, office of, 20.
of County Court, proceedings against, for taking insufficient sureties in replevin, 1271.
of solicitors, 78. *See* "*Solicitors.*"
of district registries, 1422. *See* "*District Registries.*"
Registries, district, 1421. *See* "*District Registries.*"
Registry,
of writs of execution, when necessary to bind lands, 896, 880.
of judgment to affect lands, &c., 769. *See* "*Judgment after Verdict.*"
of lis pendens, 775.
of judgment of inferior Court, 1569.
of judgments in Scotland and Ireland, 771.
of judgments, fees on, 1680.
Rejoinder, 279, 313.
Relation of judgments, 765.
Release,
plea of release puis darrein continuance, 320.
agreement of release of errors, &c. in warranty of attorney, 1323.
Relictâ verificatione, cognovit, &c. on, 1300.
Remainderman,
admitted to defend in ejectment, 1214.
Remanet,
re-sealing subpœna, 565.
entry of cause in case of, 600.
order of trial of, 623.
costs in case of, 718.
Remission of actions and issues to County Courts, 1548.
of actions of contract under 30 & 31 *V. c.* 142, *s.* 7..1548.
rules for proceedings, 1549.
of actions of contract and issues for trial only under 19 & 20 *V. c.* 108, *s.* 26..1550.
of actions of tort under 30 & 31 *V. c.* 142, *s.* 10..1552.
Remitting cases to Courts in her Majesty's dominions for their opinion on questions of law, 1349.
Removal of prisoners, 1199. *See* "*Prisoners.*"
Removal of causes from inferior Courts,
I. Removal before judgment,
1. In general, 1555.
by what writs, 1555.
when not removable, 1556.
when bail required before removal, 1557.
form, &c. of writs for, 1557.
how sued out, 1558.
within what time, 1558.
how obeyed and returned, 1559.
bail and appearance after, 1559.
quashing certiorari, &c., procedendo, 1560.
proceedings after removal, 1561.

Removal of causes from inferior Courts—*continued.*
2. Removal when defence or counterclaim beyond jurisdiction set up, 1562.
3. Removal of causes from County Courts, 1562.
by certiorari, 1562.
enactments respecting, 1563.
when certiorari will be granted, 1565.
affidavit, 1565.
the application, 1566.
what terms imposed, 1566.
service of rule or summons, 1566.
service of order, 1566.
appealing, &c., when application refused, 1566.
the writ of certiorari, 1566.
quashing it, 1566.
service of writ, 1567.
proceedings after removal, 1567.
London Small Debts Act, 1567.
action of ejectment, order for trial in Superior Court, 1567
II. Removal after judgment for the purpose of execution, 1569.
generally by 19 *G.* 3, *c.* 70..1569.
where the judge is a barrister of seven years' standing, und
the 1 & 2 *V. c.* 110..1569.
from County Courts, 1571.
from Mayor's Court of London, 1571.
from Court to which Borough and Local Courts of Record Ac
1872, applies, 1572.
from the Stannaries Courts, 1573.
Removal of actions from or to district registries, 1428, 1430. *See* "*District Registries.*"
Removal of plaint, in repl 1267.
Render of defendant by , 1509.
Renewal,
of writ of summons, 229.
of execution, 803.
Rent,
ejectment for non-payment of, 1240. *See* "*Ejectment.*"
to be paid to landlord before goods sold under execution, 841.
right to, where elegit, 887.
replevin, in case of distress for. *See* "*Replevin.*"
Rent, double, affidavit of debt for, 1473.
Rent-charge, extending of, 877.
Rent-seek not extendible, 877.
Replevin,
what, and in what cases it lies, and by whom, &c., 1253.
enactments as to, 1254.
proceedings to obtain the replevin, 1255.
security taken on granting replevin before 19 & 20 *V. c.* 108..1257.
at what time replevin to be made, 1258.
proceedings when goods moved out of county..1258.
proceedings in High Court when action commenced there, 1258.
must be prosecuted without delay, 1259.
proof of belief that title, &c. in question, 1259.
special statutes relating to action of replevin repealed, 1259.
present procedure, 1259.
writ of summons, 1259.

or Courts—*continued.*
fence or counterclaim beyond jurisdiction is
from County Courts, 1562.
32.
ecting, 1563.
vill be granted, 1565.

1566.
imposed, 1566.
summons, 1566.
1566.
when application refused, 1566.
rari, 1566.
3.
567.
r removal, 1567.
ebts Act, 1567.
nt, order for trial in Superior Court, 1567
it for the purpose of execution, 1569.
3, *c.* 70..1569.
a barrister of seven years' standing, unde
0..1569.
s, 1571.
t of London, 1571.
h Borough and Local Courts of Record Act
72.
s Courts, 1573.
district registries, 1428, 1430. *See* "*Dis*

1267.
, 1509.

it of, 1240. *See* "*Ejectment.*"
ro goods sold under execution, 841.
7.
s for. *See* "*Replevin.*"
for, 1473.
7.

t lies, and by whom, &c., 1253.

replevin, 1255.
g replevin before 19 & 20 *V. c.* 108..1257.
e made, 1258.
noved out of county..1258.
t when action commenced there, 1258.
ithout delay, 1259.
tle, &c. in question, 1259.
ng to action of replevin repealed, 1259.
59.
9.

Replevin—*continued.*
appearance, 1259.
default in appearance, 1259.
statement of claim, 1259.
default in delivering, 1260.
writ of second deliverance, 1261.
writ of inquiry after non pros. in case of distress for rent, 1261.
setting aside judgment of non pros., 1261.
defence, 1261.
default in delivering, 1262.
reply, &c., 1262.
default in delivering, 1262.
payment into Court, 1263.
discontinuing, 1263.
trial, &c., 1263.
verdict for plaintiff, 1263.
for defendant, or nonsuit, 1264.
second deliverance after nonsuit, 1264.
new trial, 1265.
costs, 1265.
judgment, 1265.
appeal, 1265.
execution, 1265.
proceedings on return of elongata, 1265.
proceedings in County Court when action commenced there, 1266.
in case of distress for rent or damage feasant, 1266.
proceedings in High Court when action commenced in County Court and removed by certiorari, 1267.
application for writ, 1267.
affidavit, 1267.
rule nisi, &c. sometimes only granted, 1267.
service of rule or summons, 1267.
service of order, 1267.
the writ of certiorari, &c., 1267.
security to be given, 1268.
appeal and second application, 1268.
proceedings after removal, 1268.
appearance, 1268.
statement of claim, &c., 1270.
proof that title, &c. came in question, 1270.
appeals from County Courts in actions of, 1528.
proceedings on the replevin bond against the sureties, 1270.
how bond forfeited before 19 & 20 *V. c.* 108..1270.
proceedings against the registrar of the County Court, for taking insufficient or no sureties, 1271.
new trial in, 744.
Reply to defence of payment into Court, 349.
Reply, 312.
where not necessary, 312.
pleadings subsequent to, 313.
default in delivering, 327.
Reply at trial, right to, 644.
Report office, 20.
Request, examination on, in lieu of commission, 555.
Rescue, 899, 1505.
Re-sealing writ, 242.
Residence,
compelling solicitor to disclose that of client, &c., 115.
of solicitor, for purpose of serving proceedings, 226.

Residence—*continued.*
of party suing or defending in person, 227.
statement of, in affidavit, 459.
indorsement of, on writ of summons, &c., 226, 1443.
on writ of execution, 800.
on order to arrest, 1480.
of defendant, in writ of summons, 217.
statement of, in appearance, 255.
service of rule nisi, where residence of party unknown, 1386, 1388.
Restitution,
after execution, 834.
after reversal on appeal, 993.
in ejectment after execution, 1229.
Retainer of solicitor, 99.
Retainers to counsel, 709, 713.
Retorno habendo, writ of, 1260, 1262.
Return of writs. *See the respective titles of writs throughout the Index.*
notice for, 817.
of writs of execution, 800, 815, 818, 863, 884.
Return of chattel, execution for, 904.
Revenue officers, &c., actions against, 1048.
Revenue side of Queen's Bench. *See* "*Queen's Bench.*"
Revenue, solicitor of, may practise, &c. without articles of clerkship, 47.
Reversionary estates, extending of, 877.
Reviewing taxation, 699.
Revising barristers, appeals from, 16, 1378.
Revivor of suit for costs, 728.
Revocation,
of warrant of attorney, 1309.
of arbitrator's authority. *See* "*Arbitration.*"
of administration pending action, 1116.
Right to begin at trial, 627.
Right, petition of. *See* "*Petition.*"
Riot, actions against hundredors in case of, 1108. *See* "*Hundredors.*"
Roll. *See* "*Entry on the Roll.*"
striking solicitor off, for misconduct, 176.
at his own request, 184. *See* "*Solicitors.*"
Rolls of manor, inspection of, 511.
Royal Courts of Justice, 20.
appointments to keep in order, 29.
Royal family, &c. cannot be arrested, 1455.
Rule, title of affidavit in answer to, 457.
Rules of the Supreme Court, 199.
orders and rules annulled, 199, n. (*a*).
to what proceedings they apply, 202.
include forms, 203.
power to make new rules, 200.
interpretation of terms in, 204.
exceptions from, 203.
mode of citing, 199.
cited. *See* "*Table.*"
Rules in particular cases. *See the respective titles throughout the Index.*
Rules and motions. *See* "*Motions and Orders.*"
rules nisi, 1379, 1380, 1386.

S.

Sailors. *See* "*Seamen.*"
Sale,
of property subject to charge, assigned to Chancery Division, 10.
under a fi. fa., 840 *et seq.*
under an elegit, 880, 888.
of stock of shares, no power to order, 924.
ordering of perishable goods, 437.
Sale, registration of bill of, 860.
Salford Hundred Court, appeal from, 1520.
prohibition to, 1547.
Salvage, jurisdiction in cases relating to, 11.
Satisfaction,
entry of, on roll, 779.
satisfaction piece, 779.
practical directions, 779.
when signature to satisfaction piece dispensed with, 780.
of registered judgment, 780.
Saturday, service of proceedings on, 1440.
"Scandalous," meaning as applied to pleadings, 318.
to interrogatories, 520.
School, service of writ in action of ejectment in case of, 1212.
Science, evidence on questions of, 630.
Scientific societies, actions by and against, 1105.
Scire facias,
action of, commenced by writ, 215.
definition of, 1285.
where it lies, 1285.
proceedings in, 1286.
on a judgment on bond, 1285.
against shareholders of companies, &c., proceedings in lieu of, 1073, 1091.
Scotland,
solicitors in, admission in England, 75.
service of writ, when defendant resident in, 245.
not within rule as to security for costs, 395.
third party notice cannot be served in, 419.
swearing affidavits in, 467.
peers of, privileged from being held to bail, 1456.
commissioners for taking affidavits in, 25.
compelling attendance at trial of witness in, 571, 1611.
registration of judgments in, 771.
Sea, damages by collision at. *See* "*Collision between Ships.*"
Seal of district registry, 1424.
Seamen or petty officers of the royal navy,
privileged from arrest, 1460.
obtaining production of, as witness at trial, 567.
Searches, fee stamp on, 200, 806, 1674.
Second action,
staying proceedings in, 368.
after discontinuance, 341.
Second arrest, when allowed, 1461.

Second deliverance, writ of, 1261, 1264.
Securities for money seizable in execution, 846.
Security for solicitor's costs, 159.
Security for costs,
by solicitor, 130, 159.
in what cases, 395.
where plaintiff resides abroad, 395.
where he resides in Scotland or Ireland, 395, 773.
temporary absence not enough, 395.
nor involuntary absence, 396.
residence at time of application for security, 396.
possession of property, where an answer to application, 397.
in actions by peers, ambassadors, and their suites, 397.
in actions by foreign potentates, 397.
in actions by foreign corporations, 397.
when defendant ordered to give security, 398.
where plaintiff a bankrupt, insolvent, or pauper, 398.
in actions by limited company, 400, 1055.
where plaintiff a lunatic or infant, 400.
where plaintiff convicted of felony, &c., 400.
next friend, when ordered to give security, 400.
in case of action by married woman, 1152.
in interpleader, 1360.
in ejectment, 395.
on appeal, 982, 1000.
on appeal from County Court, 1530.
application for, when to be made, and how, and subsequent proceedings, 400.
demand of security, 401.
application for plaintiff's residence, 401.
affidavit in support of, 401.
amount of time for giving, 401.
bond, 402.
fresh security, 402.
discharge of order for security, 402.
time for pleading after security given, &c., 403.
dismissing action pending order, 403.
day on which order for, served, not reckoned, 1434.
of discovery by payment into Court, 494.
when delivering interrogatories, 518.
Security,
by receiver, 433, 916.
delivery up of property detained as, 439.
in actions on lost bills of exchange, &c., 404.
to plaintiff, on defendant's arrest before judgment, 1498.
under County Courts Act, 1530.
in replevin, 1254, 1268. *See* "*Replevin.*"
to plaintiff on removal of replevin, 1268.
Separate trials, ordering, 406.
Separation of causes of action, 406.
Separation, judicial, effect of, 1151.
Sequestrari facias de bonis ecclesiasticis. *See* "*Clergymen.*"
when issued, 1177.
sequestrator may sue in his own name, 1178.
Sequestration, writ of, 907.
Sequestrators, duties of, 912.
Serjeant. *See* "*Counsel.*"
when privileged from being held to bail, 1458.
exempt from being a juror, 615.

61, 1264.
execution, 846.
9.

abroad, 395.
otland or Ireland, 395, 773.
enough, 395.
ce, 396.
plication for security, 396.
where an answer to application, 397.
ibassadors, and their suites, 397.
potentates, 397.
corporations, 397.
ed to give security, 398.
rupt, insolvent, or pauper, 398.
ompany, 400, 1055.
ic or infant, 400.
ed of felony, &c., 400.
ered to give security, 400.
urried woman, 1152.

y Court, 1530.
made, and how, and subsequent proceed-

1.
ff's residence, 401.
401.
ring, 401.

security, 402.
security given, &c., 403.
ling order, 403.
r, served, not reckoned, 1434.
nt into Court, 494.
ogatories, 518.

ained as, 439.
xchange, &c., 404.
arrest before judgment, 1498.
1530.
See "*Replevin.*"
eplevin, 1268.

406.
1151.
esiasticis. *See* "*Clergymen.*"

s own name, 1178.

g held to bail, 1458.
, 615.]

Servants of Royal Family,
when privileged from arrest, 1455.
from serving on jury, 615.
Servants of peers, 1456.
of ambassadors, &c., 1457.
Service of clerkship to a solicitor, 53. *See* "*Solicitors.*"
Service of proceedings, &c. generally, 1439.
hour of the day for, 1436.
charges allowed for, 720.
on third party, 308.
Service of proceedings, &c. in particular cases. *See the respective titles throughout the Index.*
Set-off and counterclaim, 304. *See* "*Counterclaim.*"
distinction between them, 310.
costs in case of, 678, 682.
particulars of, 381.
in cases of special indorsement, 271.
verdict, how taken, in case of, 661.
when allowed to prejudice of solicitor's lien, 783.
solicitor's bill need not be delivered for purpose of, 136.
of judgments, costs, &c., 781.
of costs, by taxing officer, 706.
in pauper action, 1184.
against calls in winding-up cases, 305.
Setting aside proceedings for irregularity, 444. *See* "*Irregularity.*"
Setting aside particular proceedings, &c. *See the respective titles throughout the Index.*
Several actions,
staying proceedings in, 407.
consolidating, 407.
Several claims, joinder and separation of, 405.
Several issues,
costs in case of, 686.
Several parties, proceedings by one on behalf of, 1017.
Several plaintiffs or defendants, joinder of, in action, 1015.
Several writs, priority of, 793.
Shareholders in company, proceedings against. *See* "*Company,*" "*Corporations.*"
Shares, charging of, under a judgment, 919.
Sheriffs, under-sheriffs, and sheriffs' officers,
for what counties, 31.
nomination, 31.
under-sheriffs, 31.
deputy-sheriffs, 32.
sheriff's officers, 32.
action by, against solicitor, for fees, &c., 33.
blank warrants forbidden, 32.
special bailiffs, 32.
liability for fees, 33.
direction of writs to, 797.
writs into counties palatine, how directed, &c., 798.
transfer of writs, &c. to incoming sheriff, 33, 816.
returns of writs by, 34.
relief to, by way of interpleader, 1366.
punished for misconduct by Court, 34.
liability of sheriff for misconduct of officer, 34.
evidence to prove connection between sheriff and officer, 35.
not agent of execution creditor, 36.
what fees may be taken, 36.

Sheriffs, under-sheriffs and sheriffs' officers—*continued.*
solicitor able to practise while under-sheriff, 98.
order for discovery against, 493.
interrogatories to sheriff's officer, 517.
table of fees of, 1701.
extortion by, summarily punished, &c., 36.
costs of complaint, &c., 37.
fees in Lancaster and Durham, 37.
action for, 33, 827.
Sheriff,
direction of order for arrest of defendant to, 1477.
of writ of execution, 797.
where sheriff is a party, 797.
duty of, to execute order for arrest of defendant, 1479, 1483.
liability of, for arrest of privileged persons, 1484.
proceedings on the arrest, 1496.
proceedings against sheriff after, 1504.
duty of, as to summoning jury, &c. *See* "*Jury.*"
award of venire, where a sheriff a party, &c., 602.
how to execute writs of execution generally, 807, 809. *See* "*Execution.*"
his poundage and expenses on writ of execution, 824.
how to execute, and duty, &c. on a fi. fa., 837. *See* "*Execution.*"
on an elegit, 883. *See* "*Execution.*"
on a ca. sa., 893. *See* "*Execution.*"
remedy against, for amount levied under fi. fa., 844.
property of, in goods seized under fi. fa., 838.
duty and liability of, on bankruptcy of execution debtor, 1172.
writ of inquiry executed before, 1335.
in debt on bond, 1282. *See* "*Inquiry.*"
attachment against, for not executing writs, &c., 822. *See* "*Attachment.*"
duty of, to execute writ of attachment, 952. *See* "*Attachment.*"
Sheriff, action against,
for escape, 898.
for false return, 820.
for amount levied under fi. fa., 869.
for not taking sufficient pledges in replevin before 19 & 20 *V. c.* 10, 1271.
for extortion, 36.
for arrest in wrong name, 1479.
for refusing to arrest, 1458.
Sheriff's officers. *See* "*Sheriffs,*" "*Under-sheriffs,*" *and* "*Officers.*"
Ships,
mortgaged, cannot be sold in execution, 856.
collision between, 394.
preliminary act to delivery of pleadings in action for, 394.
Short,
notice of trial, 578.
of inquiry, 1334.
of motion, 1383.
Shorthand notes,
when privileged, 504.
costs of, 712, 986.
Showing cause against rules generally, 1390. *See* "*Motions and Orders.*"
Side-bar rules, 1395.
Signature of judges, judicial notice to be taken of, 14.
Signature of pleadings, 281.
Signet, writers to the, admission as solicitors in England, 75.
Singular to include plural, 205.

nd sheriffs' officers—*continued.*
ctise while under-sheriff, 98.
gainst, 493.
eriff's officer, 517.
1.
rily punished, &c., 36.
c., 37.
d Durham, 37.

arrest of defendant to, 1477.
tion, 797.
a party, 797.
rder for arrest of defendant, 1479, 1483.
t of privileged persons, 1484.
he arrest, 1496.
inst sheriff after, 1504.
ning jury, &c. *See* "*Jury.*"
re a sheriff a party, &c., 602.
of execution generally, 807, 809. *See* "*Exec*

d expenses on writ of execution, 824.
duty, &c. on a fi. fa., 837. *See* "*Execution.*"
. *See* "*Execution.*"
. *See* "*Execution.*"
for amount levied under fi. fa., 844.
seized under fi. fa., 838.
on bankruptcy of execution debtor, 1172.
ted before, 1335.
1282. *See* "*Inquiry.*"
for not executing writs, &c., 822. *See* "

rit of attachment, 952. *See* "*Attachment.*"

ler fi. fa., 869.
nt pledges in replevin before 19 & 20 *V. c.* 10

me, 1479.
1458.
eriffs," "*Under-sheriffs,*" *and* "*Officers.*"

sold in execution, 856.

et to delivery of pleadings in action for, 394.

es generally, 1390. *See* "*Motions and Orders*

al notice to be taken of, 14.
1.
ission as solicitors in England, 75.
205.

ittings of Courts, 189. *See* "*Courts.*"
oldiers,
privilege of, from arrest, 1461.
from arrest on ca. sa., 1461.
olicitor,
meaning of the term, 39, 126.
general enactments as to, 39.
actions by and against, 1037.
I. Articled clerks,
the binding and service—examinations, 64.
who to be bound, and in what cases, time of service, &c., 44.
to whom to be bound, 48.
preliminary examination, 48.
the articles of clerkship, 48.
the term, 49.
stamp on, 49, 50.
penalty on stamping after six months, 50.
affidavit of execution and enrolment of, 50.
enrolment where articles lost or destroyed, 52.
articles to be entered by the registrar, 53.
the service, 53.
clerks not to hold other office, &c., 54.
admission notwithstanding irregular service, 55.
solicitor being struck off the roll, &c., no disqualification of clerk, 57.
fresh service in case of death, leaving off practice, bankruptcy, &c., 58.
refunding premium, 59.
stamp on fresh articles, 59.
no assignment of articles, 59.
examinations, 61.
fees, 62.
exemptions from examination, 63.
regulations of Incorporated Law Society, 64.
preliminary examination, 64.
intermediate, 65.
final, 67.
honours, 69.
the admission,
enactments requiring admission, 71.
preliminary steps to admission, notices, &c., 72.
affidavit of service, &c. for the purpose of admission, 73.
oath to be taken on admission, 73.
practical directions as to obtaining admission, 74.
admission in other Courts, 74.
admission in certain cases, 75.
improper admission, 75.
notices, &c. for re-admission, 75.
fees on admission and re-admission, 1680, 1693.
II. Solicitors,
the enrolment of, 76.
solicitor changing name, 77.
the certificate and renewal thereof, 77.
stamp duty, 77.
appointment of registrar of solicitors, 78.
registrar to deliver certificate, &c., 79.
certificate after neglect to take it out for a year, 80.
practical directions for obtaining certificate, 80.
when certificate to bear date, &c., 81.

Solicitors—*continued.*
consequences of practising without certificate, &c., 82, 83.
decisions under the old Act, 84.
effect on client, 84.
readmission and renewal of certificate, 85.
in what cases granted, 87.
time for application, &c., 87.
procedure, 88.
definition of qualified practitioner, 90.
entry of name and abode of, at Petty Bag Office, 74.
unqualified persons drawing up instruments and acting as solicitors, 83, 88.
consequences, 90, 91.
effect as regards client, 90.
solicitors not to act as agents to, 91.
cases within the Act, 91.
proceedings against, 92.
cannot act in County Court, 93.
privileges and disabilities of solicitors, 93.
privileged communications, 95, 497.
disabilities of, 97.
disabilities of solicitor prisoner, 98.
not privileged from arrest, 1458.
their employment and duties, 99.
the right to sue and defend by, 99.
how appointed, and when, 99.
by whom, 100.
using solicitor's name without authority, 101.
extent of authority, and when it ceases, 102.
acting without authority, 107.
authority to refer, 1587.
when solicitor bound to proceed, 108.
change of, 109.
death of, 111.
duties of, to clients, and when liable for negligence, 111.
consequences of breach of duty, 114.
liability for acts of partner, 115.
not entering appearance in pursuance of undertaking, 258.
stating whether writ issued by him, 115, 250.
application for disclosure of client's residence, 116.
liabilities of, to third parties, 117.
liability for tort, 118.
enforcing their undertakings by application to the Court or judge, 119—121.
title of affidavit, 457.
assignment of, to persons suing in formâ pauperis, 1183.
their bills of costs, rights, remedies and other matters as to, 122.
statutes as to, 122.
agreements as to costs, 126—131.
the delivery of the bill, 131.
form of bill, &c., 132.
delivery of, 134.
compelling delivery of bill, 136.
taxation of the bill, 122, 139—155.
what bills, 139.
by whom application to be made, 140.
time for applying, 142.
application and order for, 146.
costs of taxation, 148, 151, 154.

Solicitors—*continued.*
the taxation itself, 149.
reviewing taxation, 154.
remedy for over-payment, 155.
their remedies for their bills, 155.
defences to an action, 157.
securities and lien for bill, 159, 593, 934.
compromise of a cause to prejudice of solicitor, 165.
effect of lien or set-off of costs, 783.
delivery up of documents, moneys, &c., 170.
charging orders on property recovered, &c., 166.
solicitor neglecting to give notice to client of order to answer interrogatories, &c., 526.
solicitor and client costs, 700.
solicitor for several defendants, costs of, 703.
summary remedy against, for misconduct, &c., 176.
for crimes and misdemeanors, 177.
for gross misconduct, 177.
for negligence or unskilfulness, 180.
the application, how made and proceedings on it, 180.
appeal against, 183.
order against solicitors to pay costs of proceedings, 184.
title of affidavit, 457.
signature of pleadings by solicitor, 284.
pleading by wrong solicitor, 298.
striking off the roll at their own request, 184.
new trial for absence of, 738.
III. Agents to solicitors, 185.
liability, authority, lien, &c., 185.
Solicitor, necessity of presence, &c. of, for attestation of warrant of attorney, 1306.
mode of service of proceedings on, 1440.
South Eastern circuit, 195.
Southwark, direction of writ to be executed in, 797.
Special bail. *See* "*Bail.*"
Special bailiff, 32, 813.
sheriff not liable for escape from, 33, 898.
Special case,
on trial at Nisi Prius,
verdict subject to, 659.
allowance for costs of, 702.
in case of compulsory arbitration, 1667. *See* "*Arbitration.*"
trial of questions of law by, 1343.
by agreement, 1343.
by order, 1344.
the case, 1344.
agreement as to payment of money and costs, 1344.
amendment, 1345.
entry for argument, 1345.
leave to enter when necessary, 1345.
fee on filing, 1346.
copies for judge, 1346.
points, 1346.
proceedings to argument, 1346.
appeal, 1346.
may be heard before Divisional Court, 1379.
where infant is a party, 1136.

Special case—*continued.*
in interpleader proceedings, 1361.
statement of, by arbitrator, 1634.

Special constables, actions against, 1047.

Special examiner, examination of witnesses, &c. before, 533.
order for, 534.
affidavit in support of application, &c., 535.
when application not granted, 535.
framing interrogatories, 535.
compelling witness to attend, &c., 537.
appointment of examination, 538.
the examination, 538.
depositions, 539.
special report, 539.
filing, &c. depositions, 539.
notice of intention to use depositions, 539.
use of depositions at trial, 539.
costs, 542.
taking evidence subsequently to trial, 542.

Special execution, not warranted by general judgment, 797.

Special indorsement of writ of summons, 221.
application by plaintiff to sign judgment after, when defendant appears, 269.
general principles as to leave to defend, 270.
set-off or counterclaim, 271.
the application, 272.
plaintiff's affidavit, 272.
how defendant may show cause, 273.
defendant's affidavit, 273.
examination of defendant, 274.
order for judgment, 274.
costs, 275.
leave to defend, 275.
time for delivering defence, 297.
appeal, 276.
payment into Court, 276.
statement of claim unnecessary after, 288.

Special jury,
how summoned, 605, 606.
how called and sworn, 626.
challenges of, 626.
costs of, 717.
tales, 626.
qualifications of special jurymen, 614. *See* "*Juror.*"

Special pleas. *See* "*Pleadings in general.*"

Special referees, 1575.

Special verdict, and proceedings on, 657. *See* "*Verdict.*"

Specific goods, execution for delivery of, 904.

Specific performance assigned to Chancery Division, 10.

Speedy execution,
order for, unnecessary, 789.
waiving costs in order to obtain, 766.

Spring assizes, 194.

Stafford, entry of action for trial at, 599.

lings, 1361.
rator, 1634.
against, 1047.
tion of witnesses, &c. before, 533.

application, &c., 535.
granted, 535.
s, 535.
attend, &c., 537.
iation, 538.

539.
se depositions, 539.
ial, 539.

uently to trial, 542.
anted by general judgment, 797.
of summons, 221.
to sign judgment after, when defendant a

leave to defend, 270.
271.

w cause, 273.
73.
nt, 274.
t.

nee, 297.

6.
cessary after, 288.

6.
626.

jurymen, 614. *See* "*Juror.*"
ys in general."

ngs on, 657. *See* "*Verdict.*"
delivery of, 904.
l to Chancery Division, 10.

'89.
o obtain, 766.

rial at, 599.

Stamp,
rules as to taking fees, &c. by, 1683.
on articles of clerkship, 49, 50.
on fresh articles, 59.
on admission of solicitor, 74.
on solicitor's certificate, 77.
upon affidavits, 470, 475.
on cognovit, 1298.
on warrant of attorney, 1303.
on agreement of reference to arbitration, 1591.
unnecessary on appointment of umpire, 1616.
on award, 1637.
unnecessary in case of compulsory arbitration, 1667.
when unnecessary on copy of deed produced as secondary evidence, &c., 490, n. (*r*).
documents under *C. L. P. Act* 1854, exempt from, 1592.
compelling production of instrument to get it stamped, 513.
stamping at trial, 647.
wrong ruling of judge as to, no new trial for, 731.
Stamps, collection of fees by, 200, 1683.
Standing orders and instructions to agents, 997 *et seq.*
Stannaries,
seal of Court of, judicially noticed, 1058.
appeal from Court of, 1521.
removal of causes from, 1573.
Statement of claim,
in what cases to be delivered and in what not, 288.
where several defendants, 289.
time for delivery of, 288.
delivery of, 289.
filing, &c., 289.
rules as to contents, 290.
alternative statements, 292.
how to be intituled, &c., 292.
statement of facts, 293.
place for trial, 294.
signature, 295.
irregularity in, 295.
further time for delivery, 296.
amendment, &c., 326.
default in delivering, 326.
Statement of defence, 297. *See* "*Defence.*"
Statute,
not guilty by, 300.
what defences under, to be pleaded specially, 300.
general issue by, in actions against justices, 1038.
against constables, &c., 1044.
against persons protected by, 1048.
clauses in local and personal Acts giving double costs, general issue, &c. repealed, 1048.
uniformity of notice of action, when required by, 1049.
limitation of actions by, 1049.
Statute of Frauds,
retainer of solicitor, when within, 100.
pleading defence of, 284.
Statute of Limitations. *See* "*Limitations.*"
Statutes, particulars of, where "not guilty by statute" pleaded, 300.
Statutes, penal. *See* "*Penal Actions.*"
Staying execution, 790.

Staying proceedings,
by further time given to plead, 301.
until costs of discontinued action paid, 341.
generally, 360.
application, where to be made, 361.
how to be made, 362.
upon payment of sum indorsed on writ and costs, 362.
upon payment, &c. of debt or damages, and costs, where the amoun
is not disputed, 362.
the like, where the amount is disputed, 366.
the like, without costs, 366.
on payment of less than amount claimed, 367.
on delivery up of goods, &c. claimed, and nominal damages, 367.
in second actions for same cause, 368.
in cross actions, 370.
in several actions pending the trial of one, 371, 409.
in trifling actions, 371.
in vexatious actions, 372.
until costs of interlocutory proceedings paid, 372, 728.
in actions brought without authority, 372.
where action, &c. against good faith, &c., 374.
on compromise, 374.
after injunction, 375.
in actions in respect of a claim to goods taken in execution under proce
from County Courts, 376.
in penal actions, 377.
pending criminal proceedings, 377.
in actions on judgment, &c. pending appeal, 378.
pending a rule nisi, &c., 378.
in actions by outlaws and alien enemies, 378.
in other cases, 378.
where solicitor uncertificated, 85.
after agreement to refer, 1599.
what a breach of order staying proceedings, 379.
where order for delivery of particulars, 384.
in cases of irregularity, &c., 448, 449.
pending appeal, 984.
pending appeal to House of Lords, 985.
till probate granted, 1116.
after presentation of bankruptcy petition, 1167.
in ejectment, 1221, 1245.
in interpleader, 1359.
after a summons, 1406.
Stet processus can only be entered by consent. *See Quarrington* v. *Arthu*
11 M. & W. 491.
Sticking up proceedings in Master's office, 280, 1443.
Stock, charging of, under a judgment, &c., 919.
Striking out,
matter in pleadings, 315, 325.
parties, 1021, 1023.
Striking solicitor off roll,
for misconduct, 180.
at his own request, 184. *See* "*Solicitors.*"
Subornation of perjury by a solicitor, how punished, 177.
Subpœna, 560, 1697.
for attendance of witness at chambers, 561.
service of, 562.
before special examiner, 537.
before arbitrator, 1611.
on writ of inquiry, 1335.

Subpœna—*continued.*
punishment for not obeying, 568.
amendment of, 565.
Subpœna duces tecum, 565.
before special examiner, 537.
Substituted service of writ of summons, &c., 236, 1442, 1697.
Suggestions, delivery of suggestion of breaches in action on a bond, 1279.
Suit, definition, 203.
Summing up at trial, 644, 655. *See "Trial at Nisi Prius."*
Summons, writ of,
actions must be commenced by, 215.
1. Where the defendant is within the jurisdiction:
form of writ, 216.
year, letter, and number, 216.
assigning action to Division of High Court, 217.
direction of, and parties' names and residences, &c., 217, 1426.
character in which parties sue, &c., addition, &c., 220.
number of parties, 217.
return of, and time and place for appearance on, &c., 1427.
date and teste, 220.
indorsement of claim, 221, 380.
special indorsement under Ord. III. r. 6..221, 269.
of amount of debt and costs, 223.
proceedings on non-appearance where special indorsement, 269.
application to sign judgment when defendant appears where special indorsement, 269.
when statement of claim unnecessary after special indorsement, 288.
indorsement in cases of account, 225.
indorsement that plaintiff claims a writ of mandamus, &c., or injunction, 226.
indorsement where parties sue or are sued in a representative character, 226.
indorsement of solicitor's or plaintiff's address, 226.
preparation and issuing of writs, 227.
concurrent writs, 228.
duration and renewal of writs, 229.
when writ lost, 231.
service of writ, 232.
service on particular defendants, 234.
indorsement of service, 235.
substituted service, 235.
service by advertisement, 238.
service by notice, 238.
affidavit of service, 260.
setting aside service of writ, 241.
solicitor stating whether writ issued by him, 115, 250.
defects in writ or copy, how taken advantage of, &c., 241.
proceeding as if service effected, where it has not been abolished, 239.
altering the writ without leave, 243.
amendment of writ, 242.
allowance for costs of, 702, 710.
2. Where defendant is out of the jurisdiction, 244.
present rules as to, 244.
where defendant resident in Scotland or Ireland, 245.
the order, 247.
form of writ and notice, 248.

Summons, writ of—*continued.*
2. Where defendant is out of the jurisdiction—*continued.*
service of, 248.
proceedings to set aside the order, 249.
practice rules as to, 1696.
Summons,
for directions, 335.
of jury on trial at nisi prius, 602.
on writ of inquiry, 602, 1332.
Summons and order department of Central Office, 21.
what documents filed in, 1695.
Summons and order, 1401.
jurisdiction of a single judge at chambers, 1401.
jurisdiction of a master, 1403.
master may refer matter to judge, 1404.
mode of proceeding to obtain order, 1404.
order nisi making itself absolute, 1404.
the summons, how obtained, service of, &c., 1404.
form, 1405.
title and direction, 1405.
place and time of attendance, 1405.
contents, 1405.
several matters may be included, 1405.
alteration of, 1405.
date, 1405.
when to be served, 1405.
service of, 1406.
entry of, in list, 1406.
when summons operates as a stay of proceedings, 1406.
what proceedings stayed, 1407.
time to take next step after summons disposed of, 1407.
abandoning summons, 1407.
attendance and rotation of masters at chambers, 1407.
assignment of actions to particular masters, 1408.
transfer from master to master, 1409.
absence, &c. of master, 1409.
time for return of summonses, lists, &c., 1409.
consent to summons, 1409.
attendance on summons, 1410.
where parties agree to adjourn, 1410.
when opposite party attends, 1410.
affidavit when required, 1410.
judge directing examination of witnesses, 1410.
attendance by counsel, &c., 1411.
summons dismissed, 1411.
referring application to the Court, 1411.
reference by one judge to another, 1411.
by master to judge, 1411.
adjournment where all matters not disposed of, 1412.
proceedings where party fails to appear, 1412.
reopening proceedings, 1412.
costs, 1412.
compelling attendance of witness, 1412.
costs, 1412.
costs caused by non-attendance, neglect, &c., 1413.
the order, drawing up, service of, &c., 1413.
who may draw up the order, 1414.
form, 1414.
fee for drawing up, 1414.
effect of the order, and how enforced, 1414.

l.
ıut of the jurisdiction—*continued.*
ıside the order, 249.
6.
rius, 602.
1332.
ent of Centr l Office, 21.
, 1695.
udge at chambers, 1401.
1403.
atter to judge, 1404.
ɔtain order, 1404.
self absolute, 1404.
ned, service of, &c., 1404.
405.
tendance, 1405.
be included, 1405.
405.
3.
ıs a stay of proceedings, 1406.
yed, 1407.
ɔ after summons disposed of, 1407.
07.
f masters at chambers, 1407.
particular masters, 1408.
to master, 1409.
r, 1409.
nses, lists, &c., 1409.
).
1410.
ɔ adjourn, 1410.
ttends, 1410.
d, 1410.
ination of witnesses, 1410.
, &c., 1411.
411.
to the Court, 1411.
e to another, 1411.
ɔ judge, 1411.
l matters not disposed of, 1412.
ails to appear, 1412.
s, 1412.
vitness, 1412.
ttendance, neglect, &c., 1413.
vice of, &c., 1413.
order, 1414.
14.
v enforced, 1414.

Summons and order—*continued.*
when and how it may be abandoned, 1415.
setting aside or amending order, 1415.
appeal from master to judge, 1416.
no stay unless so ordered, 1417.
appeal from the judge to the Court, 1417.
to what Court, 1418.
how brought, 1419.
time within which it must be brought, 1419.
form of application, 1419.
setting down, 1419.
affidavits, 1419.
costs, 1420.
appeal to the Court of Appeal, 1420.
fees at judge's chambers, 1675.
Sunday,
when reckoned in proceedings, 977, 1434.
when not reckoned in County Courts, 1434.
proceedings, &c. cannot be served on, 232.
arrest cannot be made on, 810.
unless after negligent escape, 897.
writ not returnable on, 800.
writ of summons cannot be tested on, 220.
or served on, 232.
subpœna cannot be served on, 562.
writ of execution cannot be executed on, 810.
attachment cannot be executed on, 952.
affidavit sworn on, bad, 470.
warrant may be delivered to bailiff on, 809.
action by solicitor for work done on, 157.
Superannuation allowance, attachment of, 930.
Superfluous matter, &c. in pleadings, 281, 705.
Supreme Court of Judicature,
how constituted, 1.
divisions of, 2.
jurisdiction not vested in High Court, 3.
masters of. *See* "*Masters.*"
offices of, when open, &c., 191.
notices from, 1443.
rules settled by the practice master, 1695.
Supreme Court Funds Rules (1884)..355.
fees (schedule), 1672, 1682.
what to be taken by means of stamps, 1683.
Surety. *See* "*Arrest of Defendant before Judgment*," "*Bail.*"
in replevin, proceedings against, 1270.
on arrest of defendant before judgment, liability and discharge of, 1506.
proceedings against, 1511.
Surgeon exempt from being juror, 615.
Surprise, new trial in case of verdict, &c. by, 740.
Surrebutter, 279.
Surviving defendants, execution against, 855.

T.

Table,
of fees, 1671.
of sheriffs' and bailiffs' fees, &c., 1701.
Taking money out of Court, 347.

Tales, what, and how obtained, 626.
Taxation,
of costs, 693. *See* "*Costs.*"
not a condition precedent to right to recover costs, 728.
taxing officer's powers, 696 *et seq.*
taxing officer's duty, 705.
of costs on award, 1640.
of solicitor's bill, 139. *See* "*Solicitors.*"
fees to be paid on, 1675, 1679.
Taxes to be paid in case of execution, 841, 844.
Taxing department of the Central Office, 22.
Technical objections to pleadings not to be raised, 319.
Telegram, notice of injunction by, 436.
Tenant. *See* "*Ejectment,*" "*Landlord.*"
service of writ in ejectment on, 1209.
collusion by, against landlord in ejectment, 1214.
bound to give landlord notice of ejectment, 1213.
ejectment by landlord against, 1230.
Tenants in common, service of writ for recovery of land on, 1209.
Tender,
defence of, 346.
payment into Court on, 346.
of rent, &c. in ejectment, 1245.
by justices, 1042.
by special constables, &c., 1047.
in case of railway companies, &c., 1068.
of local boards, 1097.
no waiver of notice of action, 209.
Term fees, 727.
Term of years, &c.,
sale of, under fi. fa., 840, 847.
extending, &c. of, on elegit, 884.
Terms,
abolished, 189.
commencement and duration of old terms, 190.
motions on last day of term, 1382.
Terretenants, elegit against, 1201.
Test action, stay of proceedings in case of, 371, 409.
Testator, seizure of goods of, in execution, 853.
Teste of writs, 799.
Thanksgiving day,
when reckoned in proceedings, 1434.
Third party,
counter-claim, where interested, 307.
non-delivery of pleadings by, 421.
costs in case of, 675.
seizure of goods of, under writ of execution, 851.
wrongful arrest by, 1489.
Third party procedure, 416.
third party notice, leave to issue, 418.
application for leave, 419.
form of, service, &c., 420.
appearance by third party, 420.
leave to appear after time limited, 420.
default of appearance, 420.
proceedings where third party appears, 421.
application for directions, 421.

ıed, 626.
ts."
ɔedent to right to recover costs, 728.
696 *et seq.*
5.
See "*Solicitors.*"
675, 1679.
xecution, 841, 844.
ntral Office, 22.
ings not to be raised, 319.
ɔn by, 436.
"*Landlord.*"
ent on, 1209.
dlord in ejectment, 1214.
otice of ejectment, 1213.
ainst, 1230.
f writ for recovery of land on, 1209.
346.
, 1245.
, 1047.
ies, &c., 1068.
997.
ion, 209.
847.
it, 884.
ion of old terms, 190.
m, 1382.
201.
gs in case of, 371, 409.
n execution, 853.
ings, 1434.
ested, 307.
by, 421.
writ of execution, 851.
issue, 418.
419.
420.
420.
ime limited, 420.
420.
rd party appears, 421.
ections, 421.

Third party procedure—*continued.*
judgment against third party on, 422.
liberty to defend, &c., 422.
leave to third party to serve notice on fourth, 423.
discovery, 423.
subsequent proceedings, 423.
claims between co-defendants, 424.
order for discovery against, 493.
Threshing machines, actions against hundredors for damage to, 1108.
Time,
extension and computation of, &c., 1432.
extension of, by consent, 1432.
order for, 1432.
need not be drawn up, 1433.
costs of application, 1433.
computation of, 1434.
days excluded when less than six days, 1434.
Sunday, or day when offices closed, 1434.
long vacation, 1434.
day on which order for security for costs served, 1434.
when days are to be reckoned inclusive or exclusive, 1434.
meaning of "clear" days, "at least," "forthwith," &c., 1435.
fraction of a day, 1436.
month, 1436.
hour of day for service of proceedings, 1436.
month's notice of proceeding, 1437.
for service of proceedings, 1440.
costs of applications to extend, 706.
proceedings to issue execution after lapse of, 695.
discharge of bail, by giving time, 1507.
enlarging or abridging, for doing an act, 1432.
time for the several proceedings in an action, &c. *See the respective titles throughout the Index.*
Tipstaffs, 28.
Tithe Acts, consolidating issues under, 408.
Tithing-man. *See* "*Constable.*"
Title,
of action, 290.
of affidavit, 453.
of statement of claim, 290.
of defence, 298.
where counter-claim, 308.
of notice of trial, 579.
Title deeds,
not seizable under fi. fa., 846.
compelling production of, 501.
Tools not to be taken in execution, 845.
Tort,
actions of, effect of payment into Court in, 353.
action founded on, 683.
Tower, execution of writs in, 811.
Trade, Board of, appeal from, to High Court, &c., 1166.
Trade marks, injunction for imitating, 430.
Trade unions, actions by and against, 1106.
Transfer of actions from one Division to another, 411.
after order for winding-up or administration, 414.
from master to master, 415.
from judge to judge on death, &c., 415.

Traverse,
of facts in pleadings, 299, 300.
Treble costs, 692. *See* "*Double Costs.*"
Treble damages, 667.
Trespass, staying proceedings in actions for, 365.
Trial, early, power to order, on application for injunction, 435.
Trial, notice of,
in what cases must be given, 577.
when and by whom to be given, 578.
what length of, necessary, 578.
short notice, 578.
form of, 579.
for what day, sittings, &c., 579.
as to mode of trial, 580.
to whom given, 580.
how long in force, 580.
countermanding, 580.
irregularity in, 581.
Trial, mode of, 582.
by judge without a jury, 582, 583.
with a jury, 582.
mode of insisting on trial by jury, 585.
in chancery cases, 583, 584.
special order as to mode, 585.
before referee, 1580.
with assessors, 585.
by commissioner, 585.
of different questions by different modes, 586.
trial at bar, 586.
place of, 294, 589.
change of, 589.
Trial, entry of action for, 598. *See* "*Entry of Action for Trial.*"
withdrawal of cause after, 340.
Trial, use of depositions at, 540.
mode of taking evidence subsequently to, 542.
Trial, putting off,
As to countermanding notice of trial, see "*Trial, Notice of.*"
in what cases, 594.
for absence of material witness, 594.
other grounds, 595.
in a patent cause, 595.
of issue, 596.
the application for, 596.
the affidavit, 596.
terms imposed on, 597.
costs on, 597.
Trial at Nisi Prius,
proceedings at, after notice to produce documents, 489.
evidence by affidavit by consent, 574.
where and when, order of trial of causes, &c., 622.
withdrawing record, 624.
re-entry of record, 624.
attendance at trial, 624.
jury, how called and sworn, &c., 625.
opening of pleadings and right to begin, &c., in general, 627.
statement of the case by counsel, 630.
competency and swearing of witnesses, 632.

299, 300.
ouble Costs."

ngs in actions for, 365.
, on application for injunction, 435.

given, 577.
be given, 578.
ury, 578.

&c., 579.

y, 582, 583.

ng on trial by jury, 585.
584.
, 585.

different modes, 586.

8. *See* "*Entry of Action for Trial.*"
er, 340.
540.
subsequently to, 542.

of trial, see "*Trial, Notice of.*"

rial witness, 594.

05.

ice to produce documents, 489.
consent, 574.
f trial of causes, &c., 622.

24.

rn, &c., 625.
right to begin, &c., in general, 627.
counsel, 630.
of witnesses, 632.

Trial at Nisi Prius—*continued.*
ordering witnesses out of Court, 638.
examination of witnesses, &c., 634.
cross-examination, 637.
re-examination, 641.
recalling witnesses, 641.
arguments of counsel, and right to reply on objections taken during the trial, 642.
the defence, 642.
calling witnesses to disprove defence, 643.
counsel summing up evidence, the reply, 644.
the summing up by the judge, 645.
amendments at the trial, 646.
stamping documents, 647.
adjourning the trial, 647.
ordering reference of action, 648.
withdrawing a juror, 648.
improper admission of evidence, 648.
nonsuit, 649.
verdict, how given, 650.
certificate for costs, &c., 653.
judgment, 653, 755.
entry of findings, certificate, &c., 653.
note as to the time of commencement of, 654.
costs of, and of preparing for, 711.

Trial of issues of fact by a judge, 1347.

Trial,
in interpleader issue, 1361.
of questions of fact and law without pleadings, 1343, 1347. *See* "*Special Case.*"
in ejectment, 1224, 1235.
in replevin, 1263.
where issues in fact and in law—which to be tried first, 586.
new, 729. *See* "*New Trial.*"
de novo. *See* "*New Trial.*"

Triers, 620.

Trifling actions,
staying proceedings in, 371.
new trial in, 742.

Trinity sittings, 189.

Trover,
staying proceedings on restoring goods, &c., 376.
notice to produce in, 484.
damages in, 662.
affidavit to hold to bail in, 1472.
particulars in, 380.

Trustee,
staying proceedings in actions in name of, till security given, 373.
suing, &c. on behalf of persons beneficially interested, 1017.
under bankruptcy suing, 1162. *See* "*Bankruptcy.*"
security for costs from, 399.
joinder of claims by, 405.
costs of, 690.
affidavit to arrest by, 1466.

Trust estates, taking in execution, &c., 874, 877.
Trusts, execution of, assigned to the Chancery Division, 10.
Turnkey of prisons, delivery of papers, &c. to, for prisoner, 1168.

U.

Umpire, 1615. *See* "*Arbitration.*"
Undefended causes, time for trial of, 623.
Under-sheriff, 31. *See* "*Sheriffs.*"
may practise as a solicitor, 98.
Undertaking,
of a solicitor, 119. *See* "*Solicitors.*"
to appear for defendant, 232.
Universities, inspection of statutes, &c. of, 512.
Unliquidated damages. *See* "*Damages.*"
Unnecessary costs, &c., 705.
"Until," meaning of the word, 1435.
Unsound mind,
persons so found by inquisition,
actions by, 1141.
leave to bring action, 1142.
actions against, 1142.
leave to defend, 1142.
lunatic insolvent, 1142.
persons not so found by inquisition,
actions by, 1143.
when plaintiff really sane, 1143.
plaintiff recovering or being found lunatic, 1143.
actions against, 1144.
writ of summons, 1144.
service of writ, 1144.
when no appearance entered, 1144.
defence by guardian, 1145.
default in defence, 1146.
admissions in pleadings, 1146.
special case, 1146.
Ushers, &c., 29.

V.

Vacant possession, ejectment in case of, 1212.
Vacation, 192.
proceedings in, 193, 1434.
sittings of the Courts in, 193.
pleadings in, 280, 1434.

xecution, &c., 874, 877.
gned to the Chancery Division, 10.
ery of papers, &c. to, for prisoner, 1168.

U.

tration."
or trial of, 623.
Sheriffs."
itor, 98.

e "*Solicitors.*"
t, 232.
statutes, &c. of, 512.
e "*Damages.*"
.
ord, 1435.

uisition,

action, 1142.
42.
, 1142.
nt, 1142.
inquisition,

really sane, 1143.
ring or being found lunatic, 1143.
4.
s, 1144.
1144.
ance entered, 1144.
dian, 1145.
ce, 1146.
eadings, 1146.
6.

V.

a case of, 1212.

93.

Variance,
between writ of summons and statement of claim, 293.
between judgment and execution, 796.
amendment of between pleading and evidence, at Nisi Prius, 646.

Venditioni exponas,
writ of, 865, 866.

Venire de novo. *See* "*New Trial.*"

Venire facias, abolished, 602.

Venue, 589.
naming of, in statement of claim, 294, 589.
in action by or against solicitor, &c., 94.
local, 294.
in actions against justices, 1042.
against constables, 1046.
against revenue officers, 1049.
change of,
under what circumstances, 589.
application for, 591.

Verdict on trial at Nisi Prius, &c., right to, 646; how given, &c., 650.
See "*Trial at Nisi Prius.*"
founded on juror's own knowledge, 652.
against evidence, 652.

Verdict,
generally, 655.
general, 655.
special, 657.
subject to a special case, 659.
what damages in general recoverable, 661.
interest, 663.
must not be given for cause of action subsequent to suit, 664.
matters not pleaded not allowed in mitigation of, 665.
when limited, 665.
when increased, 665.
when reduced, 666.
where several defendants, 666.
where several claims, &c., 666.
on nonsuit, &c., 667.
double and treble damages, 667.
damages where counterclaim, 667.
amendment of, 667.
of special verdict, 670.

Verdict in ejectment, 1225. *See* "*Ejectment.*"

Verdict in replevin, 1263.

Verdict, staying proceedings after, 366.

Verdict taken subject to a reference, 1695.

Vexatious action,
staying proceedings in, 372.
new trial not granted in, 742.

Vicecomes non misit breve, continuances by, abolished, 33.

View,
by jury, 609.
scale of expenses, 610.
calling, &c. of jury at trial after, 626, 733.
inspection of real or personal property by parties, &c., 527.

Vivâ voce examination of party to suit, 524, 533.

Voire dire, examination on the, 632.

Voters at an election not privileged from arrest, 1490.

W.

Waiver,
of irregularity in general, 446, 1443. *See "Irregularity."*
in particular cases. *See the respective titles throughout the Index.*
a nullity cannot be waived, 447.
of costs to obtain speedy execution, 776.
of lien, by seizing goods in execution, 856.

Waiving or withdrawing pleadings, &c. *See the respective titles.*

Wales, circuits, 196.

Want of prosecution, dismissal of action for, 326.

Warrant,
demand of, where action against constable, &c., 1044.
to bring up prisoner to give evidence, 568.
allowances on taxation for, 719.

Warrant of attorney,
the warrant, by whom, and when it may be given, &c., 1303.
form of, stamp on, &c., 1303.
defeazance, 1304.
how executed, 1305.
how attested, 1305.
presence, &c. of solicitor, requirements of statute, 1306.
how far revocable, and how affected by death, marriage, &c., 1309.
in what cases it may be set aside, &c., 1311.
filing of, 1314.
judgment on, when to be signed, form of, &c., 1316.
when leave to sign necessary, 1318.
judgment, how signed, &c., 1322.
appeal, 1323.
execution, &c., 1323.

Warrant of attorney,
by infant, 1140.

Warrant,
of sheriff, 32.
on writs of execution, 808.
showing warrant, 813.

Warwick, entry of action for trial at, 599.

trial after, 626, 733.
ersonal property by parties, &c., 527.
party to suit, 524, 533.
the, 632.
rivileged from arrest, 1490.

W.

al, 446, 1443. *See "Irregularity."*
the respective titles throughout the Index.
ved, 447.
execution, 776.
in execution, 856.
adings, &c. *See the respective titles.*

sal of action for, 326.

against constable, &c., 1044.
rive evidence, 568.
or, 719.

nd when it may be given, &c., 1303.
303.

requirements of statute, 1306.
ow affected by death, marriage, &c., 1309.
&c., 1311.

signed, form of, &c., 1316.
ecessary, 1318.
d, &c., 1322.

rial at, 599.

Waste,
suing in actions to prevent, 1018.
Wearing apparel, how far exempt from execution, 845.
Wells, entry of action for trial at, 599.
Western circuit, 196.
Whitecross-street Prison, Holloway Prison substituted for, 1199.
Wife. *See "Husband and Wife." "Married Women."*
Will, notice to give in evidence probate or office copy of, 482.
costs of proof of, 483.
Winchester, entry of action for trial at, 599.
Winding-up of companies under Companies Act, 1862..1059, 1062. *See "Corporations, Proceedings by and against."*
Winding-up, transfer of action after order for, 414.
Winter assizes, 194.
Withdrawing,
a juror, 648.
staying proceedings in second action after, 375.
defence, 340.
cause after entry for trial, 340.
notice of trial, 580.
after entry of trial, 599, 600.
record, 624.
Withernam, writ of capias in, 1261.
"Within," meaning of the word, 1435.
Witness,
examination before special examiner, 533.
before examiner of the Court, 542.
out of the jurisdiction on commission, 545, 572.
on request in lieu of commission, 554.
on mandamus in India, &c., 555.
compelling attendance of:
when within jurisdiction, for examination before trial, 537.
at trial, 560.
when in Scotland or Ireland, for examination at trial, 570.
for examination on commission out of jurisdiction, 515.
for examination on commission in India, &c., 558.
for examination as to matter arising on motion or summons, 534.
for examination before referee, 1580.
for examination before arbitrator, 1610.
for examination on matters pending before a foreign tribunal, 1351.
subpœna, 560.
tendering expenses of, 537, 562.
what expenses entitled to, 563.
remedy for expenses, 563.
amounts allowed for, on taxation, 714.
punishment for not obeying subpœna, 568.
action for, 570.
subpœna duces tecum, 537, 565.
privilege from producing documents, &c. on, 566.
habeas corpus ad testificandum, where witness in custody on civil process, 567.
warrant or order to bring up prisoner, 568.

Witness—*continued.*
privilege from arrest, 1459, 1484.
examination of, before trial, 533.
fees on, 1674. *See "Evidence, Means of."*
examination of person who refuses to make affidavit, 474.
interrogatories to, 536.
swearing of, 633.
examination of, at trial, 634.
where parties defend separately, 634.
leading questions to, 635.
examination of, on hearing of motion or summons, 534.
competency of, 632.
party to suit may act as advocate and be witness, 631.
where lunatic, 683.
witness must only speak to facts within his own knowledge, &c., 63
refreshing memory by reference to papers, &c., 635.
opinion admissible on questions of science, 636.
comparison of disputed handwriting, evidence of witness as to, 636.
how far party may discredit his own witness, 636.
ordering witnesses out of Court, 633.
cross-examination of, 637.
as to previous statements in writing, 638.
proof of contradictory statements of witness, 639.
what questions witness may refuse to answer, 640.
general evidence of his bad character, 641.
proof of his conviction for an offence, 641.
re-examination of, 641.
recalling after case closed, 641.
putting off trial for absence of, 594.
new trial for absence, &c. of, 739.
for perjury of, 740.
for mistake of, 740.
costs of, on taxation of costs, 714.
allowances to professional witnesses, 716.
for maintenance, &c., 717.
to warrant of attorney, 1305.
to cognovit, 1299.

Women. *See "Husband and Wife," "Married Women."*
cannot serve on juries, except on a writ de ventre inspiciendo, 618.
seizure of goods of, when cohabiting with defendant, 565.

Wreck, actions against hundredors for robbery of, 1108.

Writ, appearance and judgment department of central office, 21.
documents to be filed in, 1695.

Writs. *See the different titles.*

Writs, summonses and warrants, scale of costs, 719.
direction of, to gaoler, 1186.
fees on issuing, 1671.
sheriff not to execute writ until delivered, 807.
notice to return, 815.
of execution, 787. *See "Execution."*
de identitate nominis, 814.
of possession, 1227.
de retorno habendo, 1265.
of second deliverance, 1261, 1264.
of summons, 214. *See "Summons, Writ of."*
of scire facias. 1285.

, 1459, 1484.
re trial, 533.
See "Evidence, Means of."
erson who refuses to make affidavit, 474.
6.

al, 634.
end separately, 634.
to, 635.
aring of motion or summons, 534.

as advocate and be witness, 631.

ak to facts within his own knowledge, &c., 63
y by reference to papers, &c., 635.
questions of science, 636.
l handwriting, evidence of witness as to, 636
credit his own witness, 636.
of Court, 633.
637.
its in writing, 638.
statements of witness, 639.
may refuse to answer, 640.
bad character, 641.
for an offence, 641.
.
ed, 641.
ence of, 594.
&c. of, 739.
.
.
costs, 714.
al witnesses, 716.
e., 717.
1305.

Wife," "*Married Women.*"
except on a writ de ventre inspiciendo, 618.
n cohabiting with defendant, 565.
redors for robbery of, 1108.
ent department of central office, 21.
1695.
.
nts, scale of costs, 719.
186.

it until delivered, 807.

Execution."
4.
.
31, 1264.
Summons, Writ of."

Writs, summons and warrants, scale of costs—*continued.*
of inquiry, 1331.
of protection, 1484.
of habeas corpus cum causâ, 1555.
of certiorari, 1556.

Writing, comparison of disputed, at trial, 636.

Writings, when seizable in execution under fi. fa., 846.

Y.

Year,
where no proceeding for a, 1437. *See "Time."*
affidavit to arrest only in force for, 1477.
other affidavits good though more than a year old, 1303.

LONDON:
PRINTED BY C. F. ROWORTH, GREAT NEW STREET, FETTER LANE, E.C.

1/2

LONDON:

GREAT NEW STREET, FETTER LANE, E.C.